

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

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

RECEIVED
Nov 17 2025
SC Court of Appeals

Balfour Beatty Construction, LLC, Appellant,

v.

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

And

Library Associates, LLC, Third-Party Plaintiff,

v.

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

Of which Library Associates, LLC is the Respondent.

RECORD ON APPEAL - VOLUME 9 OF 51

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INDEX

Page(s)

Section 1 - Orders

Volume - 1

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

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

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

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

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

Volume - 2

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

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

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

Section 3 - Transcripts

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

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

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

Volume - 3

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

September 13, 2021 (Day 1 of Trial)

Start of Trial.....R-1035

Tim Spano

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

September 14, 2021 (Day 2)

Alec Dooley R-1320

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

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

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

September 15, 2021 (Day 3) R-1498

Volume - 4

September 15, 2021 (Day 3)

Tim Spano

Direct by Hildebrand, Page 468.....R-1502

Cross by Bundy, Page 600.....R-1634

Cross by Kelly, Page 603.....R-1637

Mark Doran

Direct by Hildebrand, Page 675.....R-1709

Direct by Hildebrand, Page 690.....R-1724

Direct by Hildebrand, Page 715.....R-1749

September 16, 2021 (Day 4)

James McAuliffe

Direct by Hildebrand, Page 835.....R-1869

Direct by Hildebrand, Page 855.....R-1889

Steven Huyghe

Direct by Hildebrand, Page 960.....R-1994

Volume - 5

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

Direct by Hildebrand, Page 994.....R-2028

September 17, 2021 (Day 5)

Nick Starcevic

Direct by Hildebrand, Page 1094.....R-2128

Cross by Bundy, Page 1268.....R-2302

September 20, 2021 (Day 6)

Nick Starcevic

Cross by Bundy, Page 1288.....R-2322

Volume - 6

September 21, 2021 (Day 7)

Nick Starcevic

Cross by Bundy, Page 1619.....R-2653

David Simonton

Direct by Hildebrand, Page 1786.....R-2820

September 22, 2021 (Day 8)

David Simonton
Direct by Hildebrand, Page 1899 R-2933

Volume - 7

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

September 23, 2021 (Day 9)

David Simonton
Cross by Bundy, Page 2167 R-3201
Redirect by Hildebrand, Page 2278 R-3312
Recross by Bundy, Page 2331 R-3365

Casey Thompson
Direct by Hildebrand, Page 2364.....R-3398
Cross by Bundy, Page 2439 R-3473

Volume - 8

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

September 24, 2021 (Day 10) R-3514

October 25, 2021 (Day 11)

Mark Boe
Direct by Bundy, Page 2599 R-3633

October 26, 2021 (Day 12)

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

Grady Query
Direct by Bundy, Page 2939 R-3973

Volume - 9

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

October 27, 2021 (Day 13)

Grady Query

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

Jim Clements

Direct by Bundy, Page 3116	R-4153

October 28, 2021 (Day 14)

Jim Clements

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

Volume - 10

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

Kim Bennett Brown

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

October 29, 2021 (Day 15)

Kim Bennett Brown

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

November 1, 2021 (Day 16)

Kim Bennett Brown

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

November 2, 2021 (Day 17)

Sam Hadley

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

Volume - 11

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

November 2, 2021 (Day 18)

Sam Hadley

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

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

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

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

Tim Spano

Redirect by Hildebrand, Page 4237 R-5274

Recross by Bundy, Page 4246 R-5283

November 4, 2021 (Day 19)

David Simonton

Redirect by Hildebrand, Page 4276 R-5313

Recross by Bundy, Page 4296 R-5333

Casey Thompson

Redirect by Hildebrand, Page 4326 R-5363

Recross by Bundy, Page 4380 R-5417

November 29, 2021 (Day 20)

Mark Doran

Redirect by Hildebrand, Page 4413 R-5450

Recross by Bundy, Page 4433 R-5470

Volume - 12

November 30, 2021 (Day 21) R-5558

December 2, 2021 (Day 22)

Jim Clements

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

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

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

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

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

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

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

William Brittelli

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

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

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

December 3, 2021 (Day 23)

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

Volume - 13

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

Section 4 - Exhibits

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

Volume - 14

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

Volume - 15

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

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

Volume - 16

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

Volume - 17

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

Volume - 18

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

Volume - 19

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

Volume - 20

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

Volume - 21

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

Volume - 22

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

Volume - 23

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

Volume - 24

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

Volume - 25

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

Volume - 26

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

Volume - 27

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

Volume - 28

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

Volume - 29

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

Volume - 30

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

Volume - 31

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

Volume - 32

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

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

Volume - 33

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

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

Volume - 34

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

Volume - 35

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

Volume - 36

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

Volume - 37

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

Volume - 38

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

Volume - 39

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

Volume - 40

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

Volume - 41

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

Volume - 42

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

Volume - 43

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

Volume - 44

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

Volume - 45

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

Volume - 46

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

Volume - 47

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

Volume - 48

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

Section 5 - Other Documents

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

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

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

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

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

Volume - 49

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

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

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

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

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

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

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

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

Volume - 50

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

Volume - 51

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

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

1 then compared that to what the 4 August update
2 was showing.

3 Q. Okay.

4 A. From there --

5 Q. Then the second part of your audit does
6 what?

7 A. So the second part of the audit, we also
8 determined whether this -- it appeared to
9 specification requirements and to accept
10 scheduling practices.

11 So we actually take the schedule, the
12 actual XER digital format, and look at it in the
13 scheduling software and determined, you know, if
14 it's -- if it's adhering to acceptable scheduling
15 practices.

16 Q. All right. You have a sentence here
17 that says, the main function of the CPM schedule
18 are coordination, communication, documentation,
19 and forecasting. Are those main functions
20 consistent with the contract provisions we read?

21 A. Yes.

22 Q. Okay. And are they consistent with what
23 CPM schedule review is for --

24 A. Exactly.

25 Q. -- in your business, day in and day out?

1 A. That's what you would expect with
2 operating a CPM schedule.

3 Q. All right. The next sentence says, is
4 Balfour Beatty deleted all completed work from
5 the schedule prior to submitting their latest
6 update for review. It is not possible to
7 ascertain the accuracy of the documented actual
8 dates. What is the significance, if any, of that
9 statement?

10 A. Well, you know, what -- we were
11 basically evaluating three different, you know,
12 measurables here. One was whether it was
13 documenting accurately. I really couldn't
14 determine that because the schedule that they
15 sent had deleted everything that had actual
16 dates.

17 So there's only everything to the right
18 of the data date, so all just remaining work was
19 left in the schedule. So it was an incomplete
20 schedule, and for that reason, I really couldn't
21 speak to that -- that one aspect of what you
22 would expect from a CPM schedule.

23 Q. In your experience, is deleting the
24 completed work from the schedule, is that usual
25 or unusual in your experience?

1 A. I've never received one like that
2 before.

3 Q. And does that comply with the contract
4 requirements as it relates to the schedule?

5 A. No. You're supposed to get it in
6 digital format as it said in the contract
7 documents.

8 Q. Okay. Did that hinder you in your
9 ability to audit this schedule?

10 A. Yes.

11 Q. And how so?

12 A. Basically, you had to make a lot of
13 assumptions on -- because of that, and it didn't
14 really allow me to have a fully complete audit in
15 the September audit. It wasn't really until the
16 December audit that I could see the schedule in
17 full and truly have a complete and formed opinion
18 about the status of the CPM scheduling.

19 Q. Okay. If we were to compare a schedule,
20 let's say, to a Swiss Army knife that has a lot
21 of different blades and parts in it, was this
22 Swiss Army knife missing some blades and parts
23 since these things have been deleted?

24 A. Very much so.

25 Q. Okay. So this tool was not a complete

1 tool for its intended use?

2 A. No.

3 Q. Okay. You go on to say, however, it is
4 possible to glean the schedule's ability to
5 forecast and coordinate the remaining work. How
6 was that? How were you able to do that? What
7 made that possible?

8 A. Well, you could see everything to the
9 right of the data date. So you could see
10 everything that they were projecting, you know,
11 to be done.

12 And so, you know, that was one part of
13 our analysis, was to go out, and as I said,
14 basically compare what they were showing in their
15 4 August schedule and compare it to what was
16 occurring on the site three weeks later. So in a
17 single construction period, you would expect that
18 to be very close and not many deviations from
19 what they were showing before August to what we
20 saw on the site in 28 August.

21 Q. You go on to make the statement,
22 unfortunately, the Balfour Beatty schedule has
23 such significant fatal flaws that it is neither
24 an effective forecasting or coordination tool.
25 That was your statement, correct?

1 A. Correct.

2 Q. And that was your opinion, correct?

3 A. Absolutely.

4 Q. Is that your opinion here today to a
5 reasonable degree of certainty? And by that, I
6 mean, the opinion that the Balfour Beatty
7 schedule on -- as of September 13, 2017, had such
8 significant fatal flaws that it was neither an
9 effective forecasting or coordination tool? Is
10 that your opinion to a reasonable degree of
11 certainty?

12 A. Yes.

13 Q. Okay. And does this still remain your
14 opinion?

15 A. It does.

16 Q. Okay. All right. Will go to the next
17 paragraph and tell us what your problems were or
18 what your observations were as it relates? And
19 if you just need to read it, we can talk about
20 it, however you want to do it.

21 A. So numerous critical activities either
22 do not have successors or have been signed
23 inappropriate successors relating to schedules,
24 having no ability to -- resulting in the
25 schedules having no ability to accurately

1 ascertain affect, that finishing or not finishing
2 an activity would have upon the overall project.

3 Q. All right. Let me stop you there. It
4 says they do not have successors. What are
5 successors?

6 A. So in a CPM schedule, you only want two
7 open-ended items, which means, notice to proceed
8 would not have a predecessor. That's the initial
9 activity.

10 And then the final activity of
11 completion would not have a successor. That's
12 the final activity. Everything else needs to
13 have -- can't be open-ended or it fails to
14 function and gives false float.

15 Q. Can you turn here a second and let's see
16 if we can figure this out?

17 A. Sure.

18 Q. Notice to proceed, NTP, right?

19 A. Yes.

20 Q. It has no predecessor because nothing is
21 going on before the notice to proceed, correct?

22 A. Yeah.

23 Q. Substantial completion, it has no
24 successor because there's nothing that goes on
25 after that for purposes of determining the delay,

1 right?

2 A. Correct.

3 Q. Okay. But every activity in the middle,
4 all these activities should connect to something
5 else. This is the preceding, if A -- if B is
6 this activity, previous to that, this is A.
7 That's the predecessor's activity?

8 A. Correct.

9 Q. Over here is C, that's the successor
10 activity, correct?

11 A. Correct.

12 Q. And what you're telling the Judge, are
13 you not, is that you found that there were
14 instances of no successor activities, correct?

15 A. There is a lot them, yes, sir.

16 Q. Okay. And what's the problem with that
17 from a scheduling perspective?

18 A. It doesn't allow the schedule to
19 calculate properly, so it applies false float to
20 schedules that are open-ended.

21 So schedules when you -- you know, I can
22 give an example of how we would calculate a
23 schedule. And so -- and this is an example I use
24 to explain how a CPM schedule does a forward and
25 backward pass and how it's created. So the

1 schedule is created, you know, of activities and
2 relationships.

3 And for this illustration, we use a long
4 table with a calendar or a time scale at the top,
5 and the activities are little tiles. And the
6 length of the tile is representative of their --
7 of the duration. So one inch for one day; two
8 inches for two days, and you would --

9 Q. So this is your alternative turkey
10 dinner?

11 A. Exactly.

12 Q. This is your way of explaining how it
13 really goes, not a turkey dinner?

14 A. Yes.

15 Q. Okay.

16 A. Sort of relating to different subjects,
17 but as you --

18 Q. Well, you can't turn the turkey dinner
19 upside down and work back the other way. Like
20 you can't make a reserve pass on a turkey diner
21 because people aren't going to throw up their
22 food and go back the other way, right?

23 A. Good point.

24 Q. Okay. So let's go through the tile
25 analysis.

1 A. So you stack these tiles. You start
2 with NTP, and as you would constrain that, that's
3 a contractual start date. So you constrain that
4 or glue that to the table, so to speak, being our
5 analogy for constraint.

6 And then you would stack upon that. You
7 would have a tile that stacks upon that of
8 preparing the site, and then another tile for
9 excavating footings, and then another tile for
10 setting rebar in the footings. And you'd
11 probably have a secondary path that also leads
12 from NTP of preparing rebar shop drawings,
13 delivery of rebar, and that's also stacked and
14 the installation of the rebar is stacked on that.

15 And you go all the way through the
16 project to the end, which is substantial
17 completion, and then you glue that down because
18 that's a contractual date, and that should be --
19 that's nonmoving. And then in order to calculate
20 the schedule, you basically would do a forward
21 pass, which means you would pick up the
22 right-hand part of the table and all the tiles
23 would shift back towards NTP.

24 And then you can look at the top of the
25 table where the time scale is and you can see

1 exactly what -- this is the earliest time that
2 this activity can start. And at the same time,
3 you can identify the longest path through the
4 project, which is the critical path.

5 Then to do a backwards pass, you would
6 pick up the left-hand side of the table. And
7 then the tiles that move the most, that's -- they
8 have the most float. So how far a tile moves is
9 how much float it has. And then, when it gets to
10 the back of it, then you can look at the top of
11 the time scale, and you can see exactly when the
12 late date is, which is the last date that that
13 activity can occur, start or finish, and not
14 impact the completion date.

15 And once again, the longest path or the
16 critical path would be nonmoving because that's
17 uninterruptible and the longest path.

18 Q. And that's what the computer algorithm
19 does when you put the information in,
20 essentially, right?

21 A. Essentially.

22 Q. Okay. So the computer, in its head, is
23 raising and lowering the table, but it's not --
24 it's using math and algorithms to get there,
25 right?

1 A. Exactly.

2 Q. Okay. But does the computer sort of --
3 I don't know -- saying, junk in, junk out, apply
4 to scheduling and computer analysis?

5 MR. HILDEBRAND: Objection,
6 Your Honor.

7 MR. BUNDY: I will withdraw it.

8 THE COURT: Okay.

9 BY MR. BUNDY:

10 Q. So other than -- then you say, at first
11 we had a problem with -- to have successors.
12 Then very few of the owner furnished equipment
13 dates shown in the schedule are accurate. What
14 did you mean by that?

15 A. Well, to finish the successor --

16 Q. Sure.

17 A. I didn't really finish that analysis.

18 Q. Oh, I'm sorry.

19 A. Now, as far as open -- as it relies to
20 open-ended activities, an open-ended activity,
21 when you tilt the table, it's going to fall on
22 the floor. So you're basically -- that is going
23 to provide false float because there's nothing
24 that's tying it to anything.

25 So whether it -- if it doesn't have a

1 predecessor, it goes all the way back to NTP, or
2 if it doesn't have predecessor, it goes -- it's
3 saying, hey, this is the very last thing I can do
4 and then I can open the project and open the
5 hotel.

6 Q. Okay. But there's nothing to stop that
7 tile from falling off the table if you don't have
8 a successor?

9 A. Exactly.

10 Q. Okay. So then what are restraints,
11 Mr. Query?

12 A. So that's how Balfour Beatty got around
13 that is they constrained those opened activities
14 in order to keep them in place.

15 And they didn't just stop there because,
16 as -- you know, once you started looking at
17 subsequent schedules, where they had all of the
18 activities including them, not just the ones to
19 the right, the remaining work activities, one out
20 of ten activities -- one out of ten of the total
21 activities of the -- there's like 2,000-something
22 activities, just over 2,000. Well over 200 on
23 every schedule I reviewed, had open ends.

24 And beyond that, 30 to 33 percent, one
25 out of three activities had constraints. So

1 that's basically gluing one-third of all of those
2 activities to the table. And that's a very
3 important -- you know, two of the most important
4 aspects of the CPM schedule are elasticity and
5 being readable.

6 So readable not just in the fact that,
7 you know, you need to be able to say, okay, this
8 defines what I'm doing and where I'm doing it and
9 who's doing it, but also readable in the intent.
10 So that's the thing. You can't read intent on
11 the constraints. And, furthermore, they used the
12 wrong type of constraints. So there's --

13 Q. What was wrong with the constraints they
14 used?

15 A. Typically, when you're using constraints
16 and you really need to be very judicial about the
17 use of constraints because they absolutely alter
18 the float in the schedule.

19 So, typically, you would use a
20 constraint -- there's eight types of constraints
21 you can use in the CPM schedule or in the
22 (inaudible) software. The four that would be
23 acceptable for just -- you know, if you knew a
24 specific delivery date or something, you would
25 use start on or after, and you would -- that

1 constraints that had to just start on or after
2 that date.

3 So that is -- that would be liberally
4 used, that would be okay. What they did is use
5 start on or finish on. That is absolutely
6 inappropriate because what that does is makes
7 that activity critical. So there would be very,
8 very few times -- you would use that for the
9 empty fee and for a contractual date after you
10 finish.

11 You would not use that for, you know,
12 activities within the body of a schedule except
13 for rare occasions where say you were doing
14 school work and you're building an addition to
15 school, but you did have some renovation work and
16 for summer work. So that's critical work within
17 that time period.

18 So you would use that constraint so --
19 because you don't want -- that's not -- finishing
20 that work isn't driving the finish, it's dictated
21 by the teachers coming back. So it's sort of a
22 mini schedule within a schedule, and you would
23 assign those constraints for that, and then that
24 would have its own critical path when
25 (inaudible).

1 So what you do when you use start on,
2 finish on constraints is you're assigning zero
3 float to all these miscellaneous activities which
4 could be completely non-consequential activities.
5 They could put face plates on an electrical
6 switch or something. So it's just -- once you do
7 that, you've taken away the ability of the
8 schedule A to be elastic, but, B, it's giving --
9 not only is it not working, but it's giving false
10 information.

11 Q. Does it make it harder to review the
12 logic or understand the logic of the schedule?

13 A. You have no idea why a constraint was
14 made, and we found that consistent in our
15 reviews, that all these constraints -- it's
16 just -- and they're -- as we read, they're under
17 contractual obligation to explain that, and every
18 time they use one. So when they -- when they put
19 one in, there's absolutely no explanation of why
20 it was there or what the purpose of that
21 constraint is.

22 Q. In your opinion on a job of this size
23 and schedule for a job of this size, how many
24 constraints of the type that would be reasonable
25 would you expect to see?

1 A. If it -- in reviewing, if I -- which I
2 do, you know, a fair amount.

3 Q. Right.

4 A. If I had one start on constraint that
5 was inappropriate, I would reject that schedule.
6 If I submitted that to someone else -- in any
7 Federal project, you have to have approval for
8 use of any constraint, and which means that you
9 don't get to use them.

10 They don't approve them. So, I mean,
11 one constraint would reject -- you would have a
12 rejected pay app, and you have rejected schedule.
13 You're just -- you have to use them very
14 sparingly.

15 Q. Okay. All right. Let's keep going.
16 You say you completed the walk through.

17 A. So we were at the owner furnishing.

18 Q. Yeah. What I want to -- what I want to
19 go to is the next page. It says that, as shown
20 in the progress review section, the Balfour
21 Beatty schedule is ineffective in even
22 forecasting the very shortest terms. Now, what
23 does that mean?

24 A. So when we walked the job on 28 August,
25 there was a fair amount of deviation, much more

1 than you would expect within a progress cycle.
2 So just from 4 August to 28 August, there was --
3 it's just, they were not following the schedule,
4 which we read was a contract requirement. And
5 it's spelled out.

6 When we went through, and later on in
7 this report, it shows -- you know, we take a
8 little excerpt from the schedule, broken -- you
9 know, from the WBS, how they define this -- the
10 areas in the schedule. We show that schedule in
11 our report.

12 We list the activities that should have
13 been completed during that time, and then we list
14 basically what we observed during the time frame
15 on our 28 August walk through and then noted
16 whatever manpower we saw in the area. And we
17 just saw enough deviations that would -- you
18 would not expect to see that many deviations in
19 that short of time frame.

20 Q. The next sentence says, the lack of crew
21 to -- the crew flow logic in the schedule also
22 compounds the inaccurate forecasting by
23 unreasonably stacking (inaudible) and allowing
24 finishes to occur in the schedule much sooner
25 than is realistic. What did you mean by that?

1 A. All right. There just wasn't very much
2 crew flow logic in the schedule, which you would
3 expect to see. I mean, the schedule was set up
4 as you would -- with the assumption that you have
5 this infinite number of resources. That's
6 typically not the case in construction.

7 You have finite on resources, so you
8 would link one crew, say the electrical crew on
9 one floor to the next floor. So if they fall
10 behind there, it will drive them on the next
11 floor. Well, there just wasn't really hardly any
12 crew flow logic at all, which meant that
13 basically, if they fell behind on one -- one
14 floor, they would just start stacking up and
15 would be -- expect the schedule would show them
16 working on all nine floors at one time.

17 Q. Okay. Let me ask you this just to clean
18 things up a bit. This opinion -- there are other
19 opinions in your letter and other documents we're
20 going through. Are these opinions yours to a
21 reasonable degree of certainty?

22 A. Yes.

23 Q. Okay. So I don't need to ask you that
24 every time. All of your opinions are going to be
25 to a reasonable degree of certainty in your area

1 of expertise; is that correct?

2 A. Yes, sir.

3 Q. All right. So then you go on, and you
4 say in the second portion of the audit exercise,
5 adjustments were made to the schedule to match
6 progress observations. What are you trying to
7 get across here in this paragraph?

8 A. Well, we were asked to try to forecast a
9 completion date. That would really be difficult,
10 not having access -- well, I would say it'd be
11 impossible not having access to the planning
12 team, to their subcontractors, their suppliers.
13 So, basically, what we were trying to do was
14 basically just fix what we could in their
15 schedule and see what the variance would be.

16 So we basically went through and tried
17 to reasonably close the open-ended activities,
18 assigning them reasonable relationships to
19 successors, predecessors, basically adjusting --
20 I think we also adjusted -- one of the things we
21 looked at was whether or not they were adhering
22 to -- there was a lot of owner furnished
23 contractor installed equipment that had specific
24 delivery dates.

25 And we wanted to make sure that they

1 were matching what the owner had furnished them
2 as far as the delivery dates, and they were
3 wildly off from that. So we adjusted those
4 delivery dates to be accurate as well.

5 Q. Let me ask you this: Was it your
6 intention, when you went through this job, to
7 take over the contractor's means, methods, and
8 scheduling and tell him how to do his job?

9 A. Not at all.

10 Q. Okay. What was your -- or what did you
11 see as your purpose as it related to Balfour
12 Beatty?

13 A. Basically, we were just trying to assess
14 the schedule, but it was relayed to me that -- it
15 was told that I might be taken on as a
16 third-party scheduler for Balfour Beatty.

17 So it was really trying to spell out
18 what was wrong with the schedule and how it was
19 broken, and then hopefully, they might realize
20 that they might be out of their depth and might
21 need a little bit of help.

22 Q. Okay. So you -- if Balfour Beatty had
23 asked if you were available to go to work for
24 them and help them to figure out this mess,
25 correct?

1 A. Absolutely.

2 Q. Okay. But they never took advantage of
3 that?

4 A. No.

5 Q. Okay. And in fact, how did they respond
6 to your information and your suggestions or
7 observations?

8 A. I didn't get a response.

9 Q. Okay. Do you have an opinion to a
10 reasonable degree of certainty, based on what you
11 saw and did over the next months, whether if you
12 had been hired by Balfour Beatty, you would have
13 been able to assist them and get this job done
14 quicker?

15 A. I think I would have been of assistance,
16 and I think that -- yes, I agree with that.

17 Q. Okay. All right. The next paragraph is
18 resulting changes may result in large variants to
19 each and every major completion of milestone,
20 most notable, which is the overall hotel opening
21 activity 1050 now reflects a 29 June '18
22 completion date resulting in a loss of 57
23 calendar days from the previous completion date
24 of May 3, '18. What are you trying to tell us
25 here?

1 A. Basically, when we went and made those
2 changes just to -- of what we could, just to try
3 to bring the schedule back into, you know, some
4 form of acceptable scheduling practices, it
5 pushed out the completion date from 3 May to 29
6 June 2018.

7 Q. So you immediately were able to show
8 them that they in fact were an additional 60 days
9 later than they thought they were, approximately?

10 A. Yes.

11 Q. Okay. And did they respond to that in
12 any way that you recall?

13 A. No.

14 Q. Did they deny it or did they accept it,
15 or they just didn't respond at all as far as you
16 can recall?

17 A. I didn't personally give this report to
18 them, so I can't --

19 Q. Okay. All right. What is this project
20 milestone update block? What is this showing us?

21 A. Basically, this relates to what we just
22 talked about. It's basically their major
23 milestones that they showed on their 4 August
24 schedule and then in the next chart, it basically
25 shows what the resulting milestones move to once

1 you basically try to fix what you could in the
2 schedule.

3 Q. Okay. Let's turn over to -- you've got
4 a little drawing on the next page, but I want to
5 go to the next page under constraints. Are you
6 with me?

7 A. Yes.

8 Q. Okay. An exorbitant amount of
9 activities -- and what do you mean by that --
10 have been assigned restraints -- constraints
11 dictating logic. Can you put that in more
12 understandable terms for us?

13 A. Well, if you see above that, you see the
14 schedule overview, and there is 787 activities.
15 Now, understanding that they deleted all the
16 activities with the actual dates; so that's just
17 part of the schedule. And of those activities,
18 96 are constraints, which is exorbitant.

19 Q. What would you expect to see -- how many
20 constraints would you expect to see?

21 A. Well, once again, there is the wrong
22 type of constraints, too, which is extremely
23 important, but much less than that, and not only
24 the number, but how they're used.

25 They're used inappropriately to dictate

1 logic and to constrain things in mid-air rather
2 than -- a true CPM should always allow the logic
3 to dictate the dates, not just it go, oh, I think
4 this is going to finish here. I'm going to
5 constraint it there.

6 Because that might be applicable on 4
7 August, but then come the next update, you've got
8 to go back and change all those to where you
9 think they're going to be there. That's not what
10 a CPM is supposed to do. It's supposed to think
11 for you. It's supposed to -- you put in the
12 activities. You put in the logic. And then,
13 once you calculate it, it lets you know what has
14 float, when things are going to finish.

15 I mean, it's not rare that, when doing
16 an update, the project manager will tell me,
17 we're doing it here. But you have to backtrack
18 him and say, that's great, but, you know,
19 there's -- A, B, and C have to happen before we
20 get to D.

21 So how are -- you know, I'm not showing
22 on my schedule that we can do it on that date.
23 So you have to have that conversation and then
24 adjust the logic to get that date. You just
25 don't arbitrarily go, okay, yeah, we will set it

1 on that date. That breaks the logic and it makes
2 it a nonfunctioning CPM.

3 Q. Is it sort of reverse engineering a
4 schedule, or is it even worse than that?

5 A. Well, it's worse in the fact that it
6 gives false data.

7 Q. Okay. I gotcha. All right. Let's keep
8 going. Since Balfour Beatty sent the schedule --
9 sent the schedule with only activities in
10 progress and not completed, in the extra file
11 they submitted for this review is understandable,
12 while the large amount of constraints were
13 present. What does that mean? If you could
14 explain it.

15 A. Well, I was just trying to be as
16 reasonable as possible and sort of give them the
17 benefit of the doubt. Since they had not really
18 given me a full CPM -- maybe the reason for all
19 of those constraints was the fact that, because
20 there wasn't predecessor logic in there from
21 actuals, maybe that was the reason that the
22 constraints weren't there.

23 But as -- and I was just trying to be
24 fair in my analysis of not really trying to throw
25 the book at them on -- about that, but just to

1 point out how it could be that all these
2 constraints would be in there.

3 Now, on subsequent reviews, we -- that
4 was absolutely not the case. It was actually
5 worse than we thought, that it was -- as I said,
6 one out of three activities in a 2000-plus
7 activity schedule were constrained, and that one
8 out of ten were open-ended.

9 Q. Would that schedule, as you just
10 described, comply with the contract provisions as
11 we read?

12 A. Not at all.

13 Q. Okay. All right. Let's keep going.
14 You've got activities without predecessors. When
15 you say it's completely unacceptable, number 89.

16 A. That -- once again, I'm not really going
17 to throw the book at them on this one for that
18 because they deleted all the predecessors because
19 they deleted all the actual dates. What's more
20 concerning is the ones without successors.

21 Q. Okay. Tell me about that one. There
22 were 20 of those.

23 A. Well, there should only be one, as we
24 stated. There should be the hotel opening. And
25 then I -- because it's serious, I went ahead and

1 listed exactly what all 20 of those are below it.
2 And you could see it. I mean, some of these
3 are -- you know, the hotel opening is one of
4 them; so 19 are inappropriate.

5 Q. All right. Well, to use -- to go back
6 to your tile example, these -- other than the
7 hotel opening, would these be the tiles that
8 would fall off the table --

9 A. Exactly.

10 Q. -- when you picked up one end of it?

11 A. Yes, sir.

12 Q. Okay. All right. Then we've got
13 schedule calendars.

14 A. Basically, just to be complete, I wanted
15 to call out -- because not only this is -- this
16 analysis is also trying to give information to
17 the owner on what he's looking at in the
18 schedule. So I wanted to call out that, you
19 know, you can't discern that, and that's what
20 they were -- the owner was handed, our PDFs or
21 printouts of the schedule.

22 So you can't discern what a calendar
23 would be or assigned for each activity. So I
24 just wanted to call out that, hey, there are
25 certain calendars -- certain activities assigned

1 to a six-day calendar. I also mentioned that
2 there are no weather days, inclement weather, you
3 know, a specific calendar for that, which is
4 typical.

5 And it is an AGC standard that you would
6 assign -- say if you're -- any activity that
7 could be impacted by weather, rain, cold, you
8 would typically put in non-work days anticipating
9 how many of those days would be each month. So
10 you would sort of bake into the schedule your
11 anticipated non-work days due to that. So they
12 didn't have that in there.

13 Q. And you're not entitled to a time
14 extension for anticipated weather, are you?

15 A. No.

16 Q. Okay. So you -- the contract speaks to
17 that. You have to anticipate what the normal
18 weather is, correct?

19 A. Correct.

20 Q. And you build it in the schedule?

21 A. Because -- yeah, it has to be because
22 you don't --

23 Q. You're not going to get an extension for
24 it. Let's talk a minute about --

25 THE COURT: Let's take a break for

1 five minutes.

2 (A recess transpired.)

3 THE COURT: All right. Mr. Bundy?

4 MR. BUNDY: May it please the
5 Court.

6 THE COURT: Yes.

7 BY MR. BUNDY:

8 Q. When we broke, I was getting ready to
9 ask you about a format in which you receive
10 schedules from Balfour Beatty. Okay? Tell me
11 what you got from Balfour Beatty as you were
12 working along monthly to look at their schedules.
13 Did you get --

14 A. When you transmit a Primavera P6
15 schedule, it's exported, and it's stored in an
16 XER file. And that basically contains all of the
17 schedule data. And then you would take that and
18 then import it in your database and then use that
19 software, the P6 Primavera software to then open
20 it and examine it.

21 Q. So you would be given the underlying
22 information?

23 A. Exactly.

24 Q. Which would include the logic and the
25 restraints and all of that?

1 A. Correct.

2 Q. Is that right?

3 A. Well, except that we didn't get all of
4 that.

5 Q. No, I'm not asking you what you got.
6 I'm asking you what you would normally expect to
7 get.

8 A. Exactly.

9 Q. Okay. Would it be comparable to,
10 instead of getting a spreadsheet, let's say,
11 electronically that allows you to manipulate the
12 spreadsheet, instead they just printed a copy of
13 it and sent it to you without being able to get
14 the underlying stuff, or is that comparable?

15 A. No. I would be able to -- I just could
16 only open up half of it. So only the things to
17 the right of the data date, the remaining work
18 would --

19 Q. So tell me -- and what do you normally
20 get from a contractor when you do these kinds of
21 things? Let's do it that way.

22 A. Typically, I mean, you would get an XER
23 file, and then you would load it into your
24 database.

25 I did have to go to an additional step

1 because -- and you see this typically with
2 schedulers that are not very -- you know, people
3 that don't really work in the scheduling industry
4 don't know any better. But their database was
5 extremely corrupted, and it had what was
6 called -- it's POBS float.

7 So there's a subroutine inside the XER
8 file that basically, when Primavera was bought
9 out by Oracle, they just basically print -- made
10 this whole new software, and then forced it on
11 everyone. And it was flawed, and they never
12 fixed it because that's probably 0.001 percent of
13 their gross income, and they didn't care.

14 So immediately within the scheduling
15 industry, we found that this subroutine,
16 basically, when you used an old schedule, it
17 would sort of kick in, and then every time you
18 imported or exported and it had global data in
19 it -- so it applied to every project in your
20 database, it would double.

21 And then so it didn't just increase in
22 size, it exponentially increased its size. So
23 what they sent me was actually an 18 meg XER
24 file. But then when you -- if you input that
25 into your database, you've now corrupted your own

1 database, which means you've got -- with a
2 database of my size, it's probably two to three
3 days worth of work.

4 So I would go in, and then basically
5 extract that corrupted POBS float out of there,
6 and that reduced it down to 1.7 date. So that
7 would give you some indication of just how
8 corrupted that is, and it also gives you an
9 insight to what Joe was working with and the fact
10 once the database --

11 Q. Now, by Joe, you mean Lauricella?

12 A. Yes. If that corrupted, it is painfully
13 slow to do any calculation or work within that
14 schedule.

15 Q. Well, when you got these PDFs or
16 whatever you got, were they calculated? Had he
17 run the calculations?

18 A. Well, later on when we received some,
19 that -- and, no, we -- so we had -- that's the
20 first thing you do when you receive a schedule is
21 then you calculate it. You would expect -- and,
22 you know, 9,999 times out of 10,000, you would
23 never see one move.

24 You're basically giving someone a
25 document that should be complete. So there's

1 multiple problems with that. So when you send
2 someone an XER file that's not calculated, that
3 meant he basically made some changes. So like I
4 was saying in my illustration earlier when we
5 talked about the rebar.

6 So maybe you update the schedule, and
7 you say, hey, the rebar is not coming in. It's
8 going to take now instead of a week to do, it's
9 going to take six weeks to do, which is -- should
10 then push out setting the rebar. The problem is,
11 you don't calculate it. So that means all you
12 did was just change that duration on that, and
13 that reflected.

14 But the underlying cause and effect has
15 not been realized. So that rebar is still
16 probably sitting well before the delivery date of
17 the rebar. So it's another way of a broken
18 schedule. But the worst -- there's multiple
19 problems with that, and the fact that everyone
20 else is looking at PDFs.

21 So it's great for me. I can hit F9 and
22 calculate it. Everyone else, you know, they're
23 looking at the wrong schedule. It's not been
24 calculated; so the dates are wrong. So that's
25 distributed to everybody, and it's just wrong.

1 And the other problem is that, if you
2 were doing -- you know, if you were looking at
3 PDFs in a forensic aspect, you were -- the same
4 thing. You're not open -- you're looking at
5 that. What you do is you go back and compare
6 those dates. It doesn't calculate it when it
7 compares those dates.

8 So if I was little going back and
9 looking at a previous schedule, a PDF or even
10 assigning -- an easy way to compare dates is to
11 assign our previous schedules as baselines. So
12 now we'll run reports comparing, okay, this
13 activity is now showing finishing on this date.
14 What was it supposed to be on the original
15 baseline? What was it supposed to be on update
16 number 22?

17 And you can look at those, but when you
18 look at those, you're now looking at uncalculated
19 schedules. So the dates are wrong.

20 Q. If you have this corrupt database with
21 this glitch in it that Lauricella was using, how
22 does that affect the time it takes to calculate
23 things in that corrupt database?

24 A. It really slows it down, and I really
25 brought it up just to get insight as to why maybe

1 some of these things were being done is just time
2 saving maybe. Because it just -- it really falls
3 outside of any practical application of CPM
4 scheduling.

5 Just some of the things he was doing you
6 just do not, do and I was just trying to give
7 some benefit of the doubt, why you would do that,
8 and that's because it was just so slow and
9 tedious to work in this database.

10 Q. I'd like to be a little more specific.
11 On your software, which is not corrupt, I assume,
12 right? And it's not corrupt -- for one reason,
13 you didn't download Lauricella. If you had, your
14 whole database would have been corrupt, right?

15 A. Correct.

16 Q. How do schedulers take it as between
17 professional schedulers when you send another
18 scheduler a corrupt database?

19 A. I mean, I'm fairly certain I went to --
20 when we did meet, I pointed this out to him. And
21 you get a first pass. But after a while, you're
22 basically sending me a virus. So it's a hostile
23 act after a while.

24 Q. Fair enough. When you punch F9 to do
25 the calculations, which I assume is the key,

1 right, the function key?

2 A. Correct.

3 Q. You get your calculation in what, a
4 second?

5 A. A second.

6 Q. Okay. When Lauricella punches his F9
7 key with a corrupt database, how long does it
8 take him to get his calculation?

9 A. With a -- something like that, it would
10 probably be 20 seconds.

11 Q. 20 seconds. So for every minute that
12 you work and do calculations, you can do 60, and
13 Mr. Lauricella would do three, on average?

14 A. That would be a fair --

15 Q. Is at least -- is that at least one
16 explanation as to why he would have been
17 reluctant to be calculated?

18 MR. HILDEBRAND: Objection,
19 Your Honor. Calls for speculation.

20 THE COURT: Sustained.

21 BY MR. BUNDY:

22 Q. All right. Let's go back to the --
23 anything else we need to know about the quality
24 of the schedules you received from Balfour Beatty
25 as it relates to the formatting or software

1 aspect of it?

2 A. Well, I mean, there was other -- another
3 great error is changing -- once you have
4 established an activity ID code, you don't -- you
5 don't change the description. Everything in the
6 database is keyed off of that unique code,
7 assigned to that activity.

8 Q. Give me an example about what you're
9 talking about.

10 A. So when -- the same thing, so if I --
11 and this happened on -- this was on the item that
12 was driving the majority of the schedules that I
13 saw. The longest lead item was the Hope's doors,
14 and that the Hope's doors were basically -- we
15 had spoken to, you know, the very fancy doors out
16 front, and they were on the mockup.

17 And it was ascertained that they were
18 not going to be allowed to move these Hope's
19 doors from the mockup onto the building until --
20 so they basically were going to need two sets of
21 Hope's doors.

22 So this was what was -- it was hope that
23 this could be a workaround item and that the
24 (inaudible) would come to their senses, but
25 still, it was a situation, and it was always --

1 it was on the schedule. And basically, the
2 Hope's doors had an activity ID. They had
3 changed one, and it was previously setting the
4 trash can compactor in the alleyway.

5 So they -- it might seem innocuous, but
6 here, if you were -- when you go back and look
7 and say, hey on previous schedules, how critical
8 are these Hope's doors, you're not -- you're
9 comparing the Hope's doors to how critical the
10 trash compactor is. So it's a serious problem.

11 Q. Be like calling animals different names
12 at the zoo, huh? All right. So anything else
13 with the software? Are you looking for
14 something?

15 A. Yeah, I was. And you were just asking
16 me just basically what fallacies I had found in
17 the schedule.

18 Q. Okay. Let's go back to the letter if
19 you would.

20 A. Okay.

21 Q. Let's go back to where we were. I want
22 to look at the underneath -- we were on the
23 weather before we got sidetracked on this
24 computer virus problem. Let's go back to that
25 page, if we could, because you've got calendars

1 used in the schedule. I would like to talk to
2 you about that.

3 A. Sure.

4 Q. Okay. Now, what do you mean by
5 calendars used in the schedule?

6 A. As I said before, we -- I really wanted
7 to -- it's not only just -- I mean, it's a
8 document that the owner needs to use to sort of
9 understand the schedule.

10 In fact, he doesn't -- he can't
11 ascertain what calendar is assigned to each
12 activity, just looking at a PDF. So, A, I wanted
13 to point out, there was no inclement weather on
14 exterior work. That would be industry standard.

15 And then I went on to just list, you
16 know, most activities were on a five day work
17 week and then just wanted to, in here, list it --
18 there are some activities that are on a six day
19 calendar. And it's just wanting to call those
20 out, and basically for no other reason than just
21 to say, okay, these are the guys you should be
22 expecting to see on Saturday.

23 Q. Okay. What use to an owner is an
24 accurate schedule when the owner is thinking
25 about making a change? Why would the owner want

1 to know what the actual schedule on the job was
2 in considering a change?

3 A. Because there is a cause and effect.
4 You can -- you can input the change into the
5 schedule and see what the effect is.

6 Q. Okay. And that allows the owner to make
7 an informed decision about whether that
8 particular change may or may not be a good idea?

9 A. Correct.

10 Q. Okay. And did this schedule, as you saw
11 it when you were on this job, permit the owner to
12 make informed decisions about proposed changes?

13 A. No.

14 Q. Okay. And would that be consistent with
15 the contract requirement, a schedule that did not
16 inform the owner about the effect of proposed
17 changes?

18 A. No.

19 Q. Okay. All right. We've got a seven day
20 week, solely used on the calendar for curing the
21 stucco. What is the significance, if any, of
22 that note?

23 A. Not really. I'm just noting the
24 different calendars and that that's an
25 appropriate assignment for a curing.

1 Q. Okay.

2 A. I mean, it's -- that's just the passage
3 of time, so you would count Saturday and Sunday
4 for a curing activity.

5 Q. Okay. How about Marion Square hotel for
6 a five day work, assigned the majority of
7 activities. Holidays are included but only
8 through the end of 2017, so at least one day will
9 be lost for New Years Day. What's the
10 significance? Are you just pointing out they're
11 going to miss a day?

12 A. Just pointing out that they're planning
13 on working on New Year's Day. It is typically
14 not -- we don't typically expect that.

15 Q. Okay. What about the Marion Square --
16 is that the sixth day?

17 A. That's what I was talking about. That's
18 just calling out which activities are assigned to
19 work on Saturdays, so a six day work week. And
20 the majority of it was floor tile. So just to
21 point out that you should be expecting to see the
22 tile value on Saturday.

23 Q. All right. Let's go to the next page.
24 It says here, the longest path is driven by
25 hanging a drywall on the seventh floor wall. Is

1 that your analysis or theirs? I'm not sure.

2 A. No. This is strictly taking -- I just
3 wanted to point out what the critical path was on
4 the 4 August schedule as per Balfour Beatty's
5 schedule.

6 And it's basically -- the longest path
7 is driven by anchored drywall on the seventh
8 floor walls. This drives the ceiling and soffit
9 framing and subsequent rough-in once the overhead
10 inspection was cleared on 26 September, the
11 ceilings can be sheetrocked, taped, finished and
12 painted -- sorry, the paint dries, tile and
13 millwork installation.

14 Once millwork is complete, wall covering
15 proceeds followed by mechanical trim out, carpet
16 and final paint. Final paint dries and supplied
17 FF&E as well as crown molding and baseboard,
18 which drives the final the punch activities.

19 Q. Okay. In your opinion, if a contractor
20 schedules a job properly and has a proper
21 schedule with proper updates, should that
22 contractor be able to tell you where the critical
23 delays are all through the job as they occur?

24 A. Absolutely.

25 Q. Okay. So is there a reason that a

1 contractor would not be able to do that until
2 after the job was over, until after a claim was
3 made, until after they hired an expert, and then
4 two years after the job was over, finally come up
5 with a critical claim? Any reason for that?

6 MR. HILDEBRAND: Objection to the
7 leading question, Your Honor. He just asked
8 the -- his opinions on that.

9 MR. BUNDY: I will withdraw it.
10 All right. Let's go to owner coordination.
11 BY MR. BUNDY:

12 Q. It says here, the critical milestone
13 listed in the schedule are inaccurate. What does
14 that mean?

15 A. There are owner furnished contractor
16 installed items that were in the schedule, and
17 that was just part of our audit was to go to the
18 owner.

19 And specifically, we were assigned
20 that -- I was told that Deborah Robinson was
21 responsible for supplying that -- those items and
22 just have her confirm or deny whether that was --
23 are these dates right? And she, you know,
24 basically said, no, they're widely inaccurate.

25 Q. Is that her -- this is her redline

1 response?

2 A. Exactly. This was her comments on this.

3 Q. What effect does it have when the
4 contractor doesn't even know the actual date that
5 the owner's deliverables are going to get there?

6 A. In reality or in this schedule?

7 Q. Either way, either way.

8 A. Well, they are two different things.

9 Q. Okay.

10 A. In reality, it would be a big problem.
11 In this schedule, they had -- FF&E is -- they
12 made wild changes. It would change from one
13 update period to the next on what drove FF&E --
14 typically, FF&E is driven by a life safety
15 inspection, and once you get your GCO, you can
16 put in FF&E items.

17 And they -- it went back and forth, and
18 then they finally -- it was deleted, any
19 relationship between the safety inspection. And
20 it was just driven by just random milestone which
21 had no predecessor, and it was just hanging out
22 in the middle of the space, and we pointed that
23 out on a couple of updates.

24 Q. In your opinion, to a reasonable degree
25 of certainty, was this contractor ever, after you

1 got on this job, to accurately predict when they
2 were going to finish this job?

3 A. No.

4 Q. Okay. And what obligations did the
5 owner have to undertake prior to the completion
6 of this hotel in order to have the hotel up and
7 running that you're aware of?

8 A. Well, it's broken out in the schedule of
9 60 day prior, 30 day prior. You will see that on
10 the top of every schedule, and that sort of --
11 that list, you know, when -- when they're hiring
12 and bringing you on staff, when they're having --
13 you're doing your startup kitchen equipment,
14 making test meals, and it just sort of runs
15 through the litany of everything that drives the
16 opening of the hotel.

17 Q. And what about the general manager and
18 the sales force? Do they have to be hired in
19 advance of the completion of the hotel?

20 A. Yeah, within 60 days, not -- not too
21 soon.

22 Q. Okay. Well, what happens if you're told
23 the hotel is going to finish early and you go
24 ahead and hire those people? Is that a loss? Is
25 there any reason to do that? What's the effect

1 of that?

2 A. You're hiring them to do nothing.

3 Q. Right. You're wasting money?

4 A. Yeah.

5 Q. Okay. And with that type of schedule, a
6 schedule that was unable to accurately predict
7 when the hotel was going to be finished as the
8 job progressed, would that be inconsistent with
9 the requirements of the contract terms as it
10 relates to the scheduling?

11 A. Yes.

12 Q. Okay. All right. I'm not going to --
13 the rest of this exhibit is basically photographs
14 and what -- I mean, what is the -- I don't want
15 to go through all of this. What is the rest of
16 it?

17 A. That was just basically us going through
18 each area and then calling out, here's what the
19 schedule is showing, here's what we see, here's a
20 comparison between calling out how many people we
21 saw in an area. So I think we did cover that.

22 (DFT. EXH. 95 was marked for
23 identification.)

24 Q. All right. Now, I would like to hand
25 you what's been marked for identification as

1 Defendant's Exhibit 95 for identification. Can
2 you identify that for me, please?

3 A. That's our report that we generated on
4 December 23rd.

5 Q. All right. Now, did this report also
6 contain, in its original form, all these
7 photographs and the same thing in the previous
8 one?

9 A. It did.

10 Q. Okay. But we've omitted it for
11 purposes --

12 A. Exactly.

13 Q. -- of this to keep the paper down, if
14 nothing else.

15 MR. BUNDY: Your Honor, I move to
16 introduce this, Defendant's Exhibit 95, into
17 evidence.

18 MR. HILDEBRAND: No objection.

19 THE COURT: Without objection.

20 This is a report dated when?

21 MR. BUNDY: It's dated December the
22 23rd, 2017.

23 THE COURT: Okay.

24 MR. BUNDY: Here's your copy.

25 THE COURT: Thank you, sir.

1 (DFT. EXH. 95 was received in
2 evidence.)

3 BY MR. BUNDY:

4 Q. All right, sir. We are now 90 days
5 later, roughly?

6 A. From August to December, yes, sir.

7 Q. Okay. Tell the Judge what you
8 determined when you went to the job and then
9 issued your report on December 23, 2017, as
10 reflected in Exhibit 95.

11 A. Basically, we did the previous audit,
12 and, obviously, we weren't brought on as a third
13 party scheduler. And then later on, they had
14 asked -- I believe Library Associates asked or
15 Jim, I forget who -- asked, can you please come
16 do another audit?

17 At that time, we were given a full XER
18 file of all activities, both actual and
19 uncompleted. So we had the full file that we
20 could then evaluate.

21 Q. All right. And what were your
22 conclusions to a reasonable degree of scheduling
23 certainty as a result of this audit?

24 A. So we -- I'll just read the summary, if
25 I may. The previous audit of the 4 August

1 schedule update projected a 29 June date for the
2 hotel opening. And that was basically by just
3 using their own projection, just by fixing the
4 schedule.

5 And I will -- I want to qualify that, in
6 that, our previous report, we spelled out that --
7 I mean, we were not providing projection. I
8 mean, we said specifically that we feel that
9 maybe you could finish this on the date that
10 you're showing. We just don't -- this is not a
11 viable CPM.

12 We have no way of knowing that, and we
13 have no access to verify to your subcontractors,
14 suppliers, and the project team. So, basically,
15 that 29 June date was basically just us saying,
16 we're going to fix this as best we can, and
17 that's how we came to that date.

18 Q. You can drive your car to New York, you
19 just can't head south and get there?

20 A. Yeah.

21 Q. Okay. So what else did you determine?

22 A. So in the interim of -- between August
23 and December, we had discussions that basically,
24 there was a -- there was supposed to be -- and
25 originally, I believe, in the original schedule,

1 there was an eight week time that belonged to the
2 owner for training. And that was between the TCO
3 and basically the hotel opening.

4 And at some point, that had been reduced
5 down to seven weeks, and it was our argument that
6 that needs to be -- that time belongs to the
7 owner. You can't just arbitrarily make changes
8 to the schedule, and that it needs to be put back
9 there.

10 And then we just maybe, you know, wanted
11 to point out that our projection of 29 June
12 should actually be 9 July because of that. And
13 then we did a walk through on 13 December based
14 on -- there are 4 December update.

15 And the first thing we did was compared
16 basically the 4 December schedule with the 4
17 August schedule. And that's the next thing that
18 shows here in this chart is just how much
19 variance is between, you know, one and the other.

20 So you've got some that go up to 111
21 days of variance. But you -- I mean, you do have
22 some that are up to 27 days ahead of schedule.
23 So there's wide variance between one schedule and
24 the next schedule. And then the next part of the
25 analysis we talk about, we do it -- our side log

1 and comparing what we saw on 13 December to an
2 update that was only done nine days earlier.

3 And every single area we saw was not
4 only behind that schedule, but we saw some
5 activities on, I guess, third, fourth, fifth,
6 sixth, seventh west terrace and east lobbies that
7 actually had work that was shown to be a hundred
8 percent that was actually -- still was not
9 complete and ongoing, which, once again, is a
10 real big -- that's obviously -- then I can speak
11 to the documentation side of the fallacies of the
12 schedule.

13 You know, the third -- weather forecast
14 coordinates and documents; so if it fails in all
15 three categories now, which is a problem if
16 you're looking back at schedules and using that
17 as basically your basis of finding out when
18 things happen because that's not when they
19 happen. It's wrong.

20 Q. So if Doran was using interim schedules
21 to -- for his analysis based on input that was
22 wrong and completion dates, that would affect his
23 collusion, I assume, would it not?

24 A. If that's his only source for dates.

25 Q. All right. So the failure to accurately

1 put in the schedule what the completion is or the
2 misrepresentation in the schedule of what is
3 actually in place, does that comply with the
4 terms of the contract documents?

5 A. Not at all.

6 MR. HILDEBRAND: Objection,
7 Your Honor. The way he categorized it as a
8 misrepresentation I think is unfounded and
9 inappropriate.

10 BY MR. BUNDY:

11 Q. Was it true what they put in the as
12 built as opposed to what was really there? Is
13 that true?

14 A. The actuals were wrong.

15 Q. Okay. So an untruth could be a
16 misrepresentation, could it not?

17 A. (No audible response.)

18 Q. I hand you now Exhibit -- are you done
19 with this one? Anything else we need to talk
20 about on that one?

21 A. No.

22 (DFT. EXH. 96 was marked for
23 identification.)

24 Q. Okay. I hand you now Defendant's
25 Exhibit 96 and ask if you can identify that.

1 A. That's the report we did on March 15th.

2 MR. BUNDY: Your Honor, I move to
3 introduce Defendant's Exhibit 96 into evidence.

4 THE COURT: All right. Without
5 objection?

6 MR. HILDEBRAND: No, sir.

7 THE COURT: All right.

8 (DFT. EXH. 96 was received in
9 evidence.)

10 BY MR. BUNDY:

11 Q. All right. Mr. Query, where are we in
12 March 15 of 2018?

13 A. We were once again asked to come out and
14 audit a schedule. They had released one in 14
15 February, and then immediately before we really
16 had done the audit, they released another one in
17 7 March. So we just combined these two into the
18 one audit.

19 And at this point -- well, so the hotel
20 opening is showing as 16 January of '19
21 completion date, which is driven by the
22 fabrication of the Hope's doors. And it's -- at
23 this point, our involvement -- or we tried to
24 take a different tact to basically best
25 facilitate the project on what we were doing and

1 not just giving, hey, this CPM was broken.

2 It wasn't really giving any results, so
3 we basically wanted to drill down and say -- and
4 help the owner and me and, quite frankly, Balfour
5 Beatty understand, this is what the schedule is
6 saying. Let's drill down and understand what the
7 driving factors that are shown in the schedule.
8 So we basically took the -- what the sixth, and
9 it just turned out to be sixth.

10 The longest critical paths, which are
11 driving the project, and we kept drilling down
12 into each one until basically got to -- there are
13 so many paths that are now driving this date, but
14 there is no reason to really go any further than
15 this. It really -- you can't resolve this many
16 problems, so that's kind of what we would use
17 just drop-dead data.

18 Okay, you're probably not going to
19 better this date as a completion date. And then
20 anything that's longer than that is listed here,
21 and we basically wanted to give our understanding
22 and then also start a conversation, which we had
23 meetings and different conference calls with
24 Balfour Beatty to understand, okay, this is what
25 you're showing.

1 You know, help us understand. Let's all
2 get on the same page of what this issue is, and
3 hopefully we can start resolving these issues.
4 And that way -- I felt that was my best way to
5 serve the project at that point.

6 Q. All right. And what was Balfour
7 Beatty's response to all of that, generally?

8 A. Generally, there -- they were very
9 cooperative with that -- with that effort, and
10 they were more than happy to talk about these
11 issues.

12 Q. Did they implement any changes to
13 effectuate your suggestions?

14 A. We did -- well, stair four was one where
15 we identified, you know, going down, and we
16 identified stair four. And it was one of the
17 longer paths and had a conversation there about,
18 okay, explain to us what we're seeing here
19 because I'm -- it was confusing in the fact that
20 they had -- stair four was basically driven.

21 We then had this field measurement
22 activity for field measuring the millwork, but it
23 extended well past the fabrication and even
24 installation of the millwork.

25 Q. Let me see if I understand it. Before

1 you can do millwork, you have to field measure
2 it, right?

3 A. That would be the -- yes.

4 Q. Yeah. You want to measure something
5 before you cut it, right?

6 A. Right.

7 Q. And field measurements are required, are
8 they not?

9 A. Yes.

10 Q. At least it's good practice?

11 A. Yeah.

12 Q. Okay. So are you saying that the
13 schedule had them installing the millwork before
14 they were doing the field measurements for the
15 millwork?

16 A. It was extending past the field
17 measurements.

18 Q. Okay. All right.

19 A. And then there was a large gap, and then
20 there was a constraint that just held the glass
21 railing in place. And there was no -- nothing
22 driving it. There was some predecessors, but
23 there wasn't anything driving it because it was
24 constrained there.

25 And we just wanted to -- this is one of

1 the things we talked about just to help us
2 understand what's going on here. And their
3 explanation was, it's actually two field
4 measurements, and that's the reason it's
5 extending past it. And the second gap in time is
6 the fabrication of the glass railings.

7 So we just said, why don't we -- and I
8 think we were together and just helped Joe. It
9 was like, Joe, let's -- if there's two field
10 measurements, how -- let's put in two field
11 measurement activities, and we can clearly see
12 field measurements for millwork that drives
13 obviously fabrication, installation.

14 And then once that millwork was done,
15 you could then take the field measurements for
16 the glass railings and then install the glass
17 railings. So at that time drove, you know,
18 basically life saving inspection.

19 And actually, when we put all that logic
20 in there, it actually made the delay to the stair
21 four longer than what they were showing. And at
22 that time, basically Mr. Clements had said, we're
23 not doing the change to stair number four. We're
24 not changing the millwork there.

25 So based upon that, they -- and I don't

1 know. I can't speculate why they took it out,
2 but they took out the millwork for a change and
3 then in the next update, we understood that -- we
4 were confused into why this sequence was still
5 here as far as waiting on millwork. You know,
6 that we were still field measuring and waiting
7 for that change.

8 Millwork is still driving the field
9 measurements for the glass railings. And it was
10 explained that we still need -- there's still
11 even in the base bid scope, there's millwork that
12 needs to be measured in order to fabricate the
13 glass railings.

14 So then another iteration, it was
15 decided that we can just install rough carpentry,
16 and then basically take out -- you know, then you
17 can immediately take the field measurements from
18 glass railings. And that fabrication time can
19 then -- can be going on at the same time. And
20 the next schedule update showed the same thing.

21 You know, we said, you're not -- this is
22 not showing rough carpentry. This is showing you
23 waiting until the end of the millwork being
24 installed to take the field measurement of the
25 glass railing. And they -- at that point, they

1 did argue with us, that they said, no, that's
2 right. And in our report, we just put that
3 fragment in there to say, no, you're wrong.
4 That's not what it's showing.

5 And then in subsequent timelines, the
6 next update, they had increased -- not only did
7 they increase the duration time for some -- it
8 was either the millwork or the glass railing
9 from -- I think from the 7 March to the May
10 update that we evaluated. They had added seven
11 weeks of fabrication time in there.

12 So with -- and as a contract
13 requirement, there were no explanation. So
14 there's no way to know why that was added in
15 there. And they also added subsequent activities
16 of installing stair treads, all adding time to
17 this item and delay. And then on our last update
18 on -- when we looked at August 18th, it's all
19 deleted. It was all gone.

20 Q. All right. Did you get a hint of
21 stubbornness from Balfour Beatty in trying to
22 help them?

23 A. Not really, not really.

24 Q. Well, do you have any explanation for
25 why they would not change the schedule when you

1 pointed it out? I mean, I guess I'm just trying
2 to figure out why that would be if you know?

3 A. I mean --

4 Q. Okay.

5 A. I can speculate, but --

6 Q. Okay. That's fine. All right.

7 Anything else on this one you need to point out?

8 A. No.

9 Q. It looks like there's still 263
10 activities that do not have a successor or
11 predecessor, and over a third of the most recent
12 schedules have constraints. Is that -- that
13 problem still existed?

14 A. That's consistent with every schedule I
15 got. Obviously, the first one didn't have as
16 many because they deleted the schedule -- the
17 activities were deleted. But it was consistent
18 with every schedule I got since then.

19 Q. And when you brought this to
20 Lauricella's attention, was there a response of
21 any kind?

22 A. I don't recall what it -- I don't
23 recall.

24 Q. Do you have any idea, one way or the
25 other, whether he understood what you were

1 talking about? Did you feel like you at least
2 were communicating with him about what was going
3 on or do you think it was a lack of understanding
4 or ability to communicate?

5 A. I don't -- I really can't tell you what,
6 you know.

7 Q. In your experience with other
8 professional schedulers, have you been able to
9 converse with them in this language and talk
10 about constraints and successors and all of that
11 without undue problems?

12 A. With other professional schedulers, I
13 have.

14 Q. Okay. Mr. Lauricella was an in-house
15 scheduler; is that correct?

16 A. Correct.

17 Q. Okay. When did the bust -- when was
18 that discovered with the crane? When was that
19 discovered?

20 A. It was prior to my involvement, prior to
21 August of 2017.

22 Q. Okay. And do you know who discovered
23 that?

24 A. I think it would be internal.

25 Q. To Balfour Beatty?

1 A. I believe.

2 (DFT. EXH. 97 was marked for
3 identification.)

4 Q. Okay. Exhibit 97 for identification.
5 Can you tell us what that is?

6 A. That's a report we prepared on March
7 24th.

8 MR. BUNDY: Okay. Your Honor, I
9 move to introduce Exhibit 97 from March 24th,
10 another scheduling report.

11 THE COURT: All right, sir.

12 MR. HILDEBRAND: No objection,
13 Your Honor.

14 THE COURT: Without objection.

15 (DFT. EXH. 97 was received in
16 evidence.)

17 BY MR. BUNDY:

18 Q. All right. So where are we in March of
19 2018 relative to your schedule analysis?

20 A. Right now the hotel opening is showing a
21 19 December completion date, which is driven by
22 the -- once again, the fabrication of the Hope's
23 doors. And basically on all iterations of our
24 progress from that point forward. We basically
25 followed the same format with trying to drill

1 down.

2 So here are the basically -- the longest
3 path driving the project and then we try to
4 identify it, okay, here's where the line in the
5 sand is, where there's so many basically driving
6 factors that you can't really anticipate
7 finishing prior to this date.

8 Q. Okay. And then I believe if we turn to
9 the second page, under schedule structure and
10 continuity, you point out, beyond the typical
11 errors found in BBC's schedule to-date, it was
12 discovered that BBC has been changing the
13 activity description for the same activity rather
14 than adding an additional activity. This is what
15 you discussed earlier; is that correct?

16 A. Exactly.

17 Q. And then you also pointed out, as is the
18 case, there are numerous critical activities that
19 do not have successors, et cetera, et cetera.
20 That problem just continued?

21 A. Correct.

22 Q. Okay. And the virus remained in their
23 software, right? They never got rid of the
24 virus?

25 A. No.

1 Q. Okay. Do you know whether they fixed it
2 yet?

3 A. I don't.

4 (DFT. EXH. 98 was marked for
5 identification.)

6 Q. Okay. On May 20, 2018, is this your
7 report?

8 A. That is.

9 MR. BUNDY: Your Honor, I move to
10 introduce Exhibit 98 into evidence.

11 THE COURT: All right, sir.

12 Without objection?

13 MR. HILDEBRAND: No, sir.

14 THE COURT: Thank you.

15 (DFT. EXH. 98 was received in
16 evidence.)

17 BY MR. BUNDY:

18 Q. All right. Where are we in May of 2018,
19 just if you would.

20 A. The hotel is now showing a 28 Feb '19
21 completion, which is driven by the release of
22 basically the Hope's doors. And they -- so
23 this -- it's pushed out because they have now
24 increased the fabrication time.

25 Q. Okay. And the schedule structure and

1 continuity problems remained?

2 A. Yes, sir.

3 (DFT. EXH. 99 was marked for
4 identification.)

5 Q. Exhibit 99 is your June 17, 2018,
6 report?

7 A. That's it.

8 MR. BUNDY: Your Honor, I move to
9 introduce Exhibit 99.

10 THE COURT: All right, sir.
11 Again without objection?

12 MR. HILDEBRAND: No objection.

13 MR. BUNDY: Thank you.

14 (DFT. EXH. 99 was received in
15 evidence.)

16 BY MR. BUNDY:

17 Q. All right. So where are we in June of
18 2018?

19 A. They had -- Library Associates had asked
20 me to -- for the March -- for the May schedule
21 audit, we just had audited the schedule. We
22 didn't do a site walk. And they asked us, could
23 you please go and do a site walk.

24 So in June, we basically went and walked
25 the site and basically evaluated, as we had done

1 before, you know, progress and related it to what
2 is shown on the schedule. And then furthermore
3 in this, we talked about the FF&E, basically, the
4 deleted link. This speaks to that deleted link
5 between life safety and then a TCO, and then
6 installing the FF&E.

7 And then we just -- it also drills down
8 and just talking about different longest paths
9 and maybe some mitigation or workarounds that
10 could be implemented. Because that was the whole
11 basis of it was to start conversation to make
12 these longest paths go -- get up and go away.

13 So that was -- it was decided that, you
14 know, the ballroom doors are a life safety issue.
15 They're fire doors, so they needed to be
16 installed. And they were a long lead item.

17 And there was a possibility of possibly
18 putting temporary doors in there to -- to
19 basically, at the cost of \$51,000, to then use
20 those for the life safety. And then once the
21 doors arrived, you would just change them out.

22 So it's just -- it's basically just
23 trying to be informative of mitigation
24 possibilities that would allow for, you know, how
25 to mitigate impacts that are shown in the

1 schedule.

2 (DFT. EXH. 100 was marked for
3 identification.)

4 Q. Okay. And finally, Defendant's Exhibit
5 100. Can you identify that?

6 A. That is our August.

7 MR. BUNDY: Your Honor, I would
8 move to introduce Defendant's Exhibit 100.

9 THE COURT: All right, sir.

10 Without objection?

11 MR. HILDEBRAND: No objection.

12 (DFT. EXH. 100 was received in
13 evidence.)

14 BY MR. BUNDY:

15 Q. All right. The schedule that you were
16 looking at, at this time in August of '18, it
17 would have been MSH 44; is that correct?

18 A. Correct.

19 Q. Okay. And the -- and that's August of
20 '18. These schedules -- one of the schedules
21 that Mr. Doran used was MSH 49. Do you remember
22 that in his testimony? He used the baseline, and
23 he used 49, right, for his analysis?

24 A. I wasn't here for his testimony.

25 Q. Okay. The last schedule you looked at,

1 however, was MSH 44?

2 A. Yes, sir.

3 Q. Which was roughly five versions earlier?

4 A. Correct.

5 Q. Okay. What was -- were the deficiencies
6 in the MSH 44, the last one you looked at? What
7 was wrong with it?

8 A. Basically everything that we've
9 discussed so far. They've had open-ended items.
10 It had -- you know, one out of ten items were
11 open-ended. One out of three items were
12 constrained. They used the wrong type of
13 constraints that used -- you know, that projected
14 false float on the project schedule.

15 They -- and this is something we hadn't
16 discussed yet is, they had a lot of
17 out-of-sequence activities. So in an
18 out-of-sequence activity, when you update an
19 activity and it's -- so let me explain it this
20 way.

21 Q. Sure.

22 A. So say you're scheduling the mason to go
23 around the building, and he's going to work
24 counter -- he's going to work clockwise around
25 the building.

1 So he is going north, east, south, west.
2 So -- and you update the schedule, and the mason,
3 for some reason, is now working counterclockwise,
4 so he is going north, west, south, east. So you
5 update the north and now you update half of --
6 you know, he is 50 percent done on the west
7 elevation.

8 Well, the problem is, an out-of-sequence
9 error means that you've now -- it's showing you,
10 you've done it. You were supposed to go to the
11 south. You've now updated an activity out of
12 sequence.

13 So you've got predecessors that are
14 unfulfilled. They're supposed to be done, and
15 their computer is recognizing and -- all these
16 errors are generated when you do a schedule for
17 it. It tells you exactly which activity is wrong
18 and -- so you can easily fix it. So the outer
19 sheath -- that means that now the schedule is
20 showing that -- you know, it's expecting you
21 clockwise and you're going counterclockwise.

22 So, at that point, what would probably
23 be shown is that you've got -- it's going -- it's
24 going to kick out your west because it's using
25 the logic leftover in the schedule.

1 Q. But the computer won't tell you if you
2 don't calculate it?

3 A. Well, no, it won't. It will not,
4 correct.

5 Q. The computer will tell you all these
6 things if you calculate it, but if you don't
7 calculate it, you can do whatever you want,
8 right?

9 A. Correct, correct.

10 MR. BUNDY: That's all I have.
11 Thank you.

12 THE COURT: Okay. It's almost 5
13 o'clock. Do you want to go ahead and proceed
14 today?

15 MR. HILDEBRAND: Gosh, it's going
16 to be a little while.

17 Do y'all have some questions also?

18 MR. TERRY: We do.

19 THE COURT: All right. Y'all want
20 to just come back in the morning?

21 MR. HILDEBRAND: That's fine with
22 me.

23 THE COURT: All right. Let's do
24 that. Let's go ahead and break now.

25 Mr. Query, can you join us in the

1 morning?

2 THE WITNESS: I'm running out of
3 suits, Your Honor.

4 THE COURT: Don't worry about that.
5 All right. Let's come back. We will start back
6 at 9:30 in the morning.

7 (The hearing concluded at 4:52
8 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 deposition was by me duly sworn to
9 testify to the truth, the whole truth, and
10 nothing but the truth in the within-entitled
11 cause; that said deposition was taken at the time
12 and location therein stated; that the testimony
13 of the witness and all objections made at the
14 time of the examination were recorded
15 stenographically by me and were thereafter
16 transcribed by computer-aided transcription; that
17 the foregoing is a full, complete and true record
18 of the testimony of the witness and of all
19 objections made at the time of the examination;
20 and that the witness was given an opportunity to
21 read and correct said deposition and to subscribe
22 the same.

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

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

31 Witness my hand, I have hereunto
32 affixed my official seal on September 12, 2022 at
33 Charleston, Charleston County, South Carolina

34

35

36 _____
37 Jennifer M. Adams
38 Court Reporter And Notary Public
39 My commission expires: 03/15/2032

40

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1 INDEX OF WITNESSES

2	DEFENDANT'S WITNESSES	<u>PAGE</u>
	GRADY QUERY	
3	Cross-Examination by Mr. Hildebrand	3040
	Cross-Examination by Mr. Terry	3081
4	Redirect Examination by Mr. Bundy	3092
	Recross-Examination by Mr. Terry	3100
5	JIM CLEMENTS	
6	Direct Examination by Mr. Bundy	3116
7	Certificate	3300
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 THE COURT: All right, folks, hope
2 y'all had a good evening. Mr. Query, good to see
3 you again this morning, sir.

4 THE WITNESS: Thank you. Good to
5 see you, Your Honor.

6 THE COURT: Very good. We're still
7 under oath and ready to proceed.

8 MR. HILDEBRAND: Yes, sir.

9 THE COURT: All right.

10 Mr. Hildebrand?

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

13 CROSS-EXAMINATION

14 BY MR. HILDEBRAND:

15 Q. All right. Mr. Query, thank you for
16 being here this morning. We talked yesterday
17 about your initial contact and what you were
18 asked to do, and from your perspective, as I
19 understand it, your charge was to look at the
20 scheduled completion date and determine whether
21 in your view that was reasonably achievable. Is
22 that a fair statement?

23 A. They had asked -- that was definitely
24 part of what I was asked to do is to help try to
25 project a completion date.

1 Q. Right.

2 A. It was -- became evident, not having
3 access to, you know, the subcontractors, the
4 planning team, the suppliers, that I could not
5 generate that on my own. So I just merely tried
6 to do the best I could and just tried to fix what
7 I could in the schedule to help sort of show what
8 trend it would be.

9 Q. Okay. So from your perspective, what
10 you understood your charge to be and what you
11 tried to do was, you look at the schedule
12 documents that Balfour would have provided, and
13 then you assess them to try to facilitate the
14 process to move forward in an expeditious manner.
15 Is that a fair statement?

16 A. (No audible response.)

17 Q. You were trying to help the process to
18 move towards, as reasonably expediting a
19 completion date as possible?

20 A. Absolutely.

21 Q. Okay. All right. And so the way that
22 you went about that would be -- it's pretty
23 obvious that you had asked for the schedules and
24 get the information that you thought would
25 benefit you to be able to do that, correct?

1 A. Correct.

2 Q. And as part of that process, you got the
3 schedules from Balfour and from Joe Lauricella to
4 help you do that, correct?

5 A. Well, initially, I didn't get the full
6 schedule. I just got, you know, the remaining
7 activities, not -- not the actual dates. So,
8 initially, I didn't get that, but then I think as
9 they became more comfortable with my role, they
10 did give me -- in December, I got the full
11 schedule.

12 Q. Okay. Well, and I just want to make
13 sure that we're clear on that. Nothing was -- to
14 your knowledge, was withheld that you asked for?
15 Balfour was accommodating and you got the
16 schedules in whatever format you wanted them in
17 or daily reports or whatever you needed, you got
18 from Balfour, didn't you?

19 A. There was some reticence at first, but
20 eventually, yes, the information started to flow
21 very frequently.

22 Q. Okay. As a result of that, we
23 introduced yesterday -- or Mr. Bundy did, a
24 number of reports, and you call them audits that
25 you did of the schedule and of the way that

1 things were being scheduled by Balfour, correct?

2 A. Yes, sir.

3 Q. All right. And in those audits, you had
4 some criticisms of the way that you thought that
5 the schedule was being done, and you had
6 suggestions for how it should be approved; is
7 that correct?

8 A. Yes, sir.

9 Q. All right. And it was your intent, from
10 the original audits that you did that Mr. Bundy
11 introduced and the subsequent audits, that they
12 would actually be produced to Balfour so that
13 Balfour could use those and gain the expertise
14 and the constructive comments that you were
15 making so that the project could proceed and
16 perhaps the finish date could be moved up, and it
17 could be finished earlier. Is that a fair
18 statement?

19 A. It was definitely my hope that actually
20 I would be brought on as a third-party scheduler
21 and, yes, that those reports were -- I was hoping
22 would point out the fallacies in the schedule
23 that could be improved.

24 Q. Right. But those schedules, from your
25 standpoint, those were -- that was your work

1 product, and that's what it -- if Balfour wanted
2 to see what your constructive criticisms were and
3 how it could avail itself of your expertise, it
4 would need to look at those reports. That's the
5 best way to do it, to see exactly what your
6 comments are and to try to implement them,
7 agreed?

8 A. Agreed.

9 Q. All right. And it was your intent that
10 those reports would actually be provided to
11 Balfour so that it could move forward in a
12 collaborative effort with you to get the project
13 on schedule and to keep the -- and to try to move
14 the opening date up, correct?

15 A. Correct.

16 Q. Okay. Do you know if any of your audits
17 were ever actually -- let me ask you this. Did
18 you ever actually provide any of your audits to
19 Balfour?

20 A. I don't recall ever interacting directly
21 or sending -- I always interacted through either
22 the owner or Jim Clements with Balfour. The only
23 time we talked directly was either in a
24 conference call or, you know, when we met in a
25 conference room together.

1 Q. Okay. Now, so you did not provide any
2 of your audits to Balfour, correct?

3 A. No, sir.

4 Q. All right. And you don't know whether
5 any of the audits were ever actually provided to
6 Balfour while the project was ongoing, correct?

7 A. I'm sure I referenced the audits when we
8 met, but I have no idea. I would not know if
9 they were given that, no.

10 Q. Okay. If I represent to you that
11 there's no reference of your audits during the
12 construction project in any of the construction
13 files, would you have any reason to contradict
14 that?

15 A. No, sir.

16 MR. BUNDY: Objection.

17 Mr. Hildebrand is not under the oath. He's
18 making statements -- he's making evidentiary
19 statements. He's not under oath.

20 MR. HILDEBRAND: I will withdraw
21 it, Your Honor.

22 THE COURT: Okay.

23 MR. HILDEBRAND: What exhibit are
24 we on now?

25 THE COURT: 344.

1 (PLF. EXH. 344 was marked for
2 identification.)

3 BY MR. HILDEBRAND:

4 Q. All right. I want to hand you what has
5 been marked as Plaintiff's Exhibit 344 for
6 identification. All right. And that is an
7 e-mail string that the -- on the top of page 1 is
8 from Jim Clements to you dated September 8, 2017.
9 Do you recognize that document?

10 A. Yes, I do.

11 Q. All right. And this document -- turn to
12 the bottom of the second page, if you would,
13 please.

14 A. Yes, sir.

15 Q. And it's a document from Jim Clements
16 dated September 6, 2017, to yourself and to Bill
17 Bundy and copied to Kim Brown. It says, final
18 draft schedule. Do you see that?

19 A. Yes, sir.

20 Q. All right. September 6, 2017, that's
21 right at the beginning of your involvement with
22 the project, correct?

23 A. Yes, sir.

24 Q. All right. In fact, I think you've
25 testified that you had gotten involved just in

1 August. So it would have been several weeks or
2 maybe a month or so prior to this?

3 A. Yes, sir.

4 Q. All right. So let's turn to the third
5 page, and this is your e-mail again to Jim
6 Clements.

7 And it says, Mike asked that when you
8 send the final report on Friday, that it should
9 be in draft form and be sure to take whatever
10 steps necessary to title it or whatever, to be
11 sure it is not discoverable for submittal. If
12 you are unsure how to present it by copy of this
13 e-mail, I ask that Bill provide direction or you
14 with me first.

15 So it says, Mike asked. Who is Mike?

16 A. I really don't know.

17 Q. Do you think it's probably Mike Bennett?

18 A. It could be.

19 Q. Did you meet with any other Mikes when
20 you were being interviewed or during this early
21 process from the Library Associates side, to your
22 recollection?

23 A. Not that -- not that I know of.

24 Q. Okay. Would you agree that that's --
25 your reference to Mike was probably Mike Bennett?

1 A. He's been Mr. Bennett to me all my life,
2 so I don't think I would have referenced him as
3 Mike. So honestly, I -- it could be. I can't
4 believe that I would call Mr. Bennett Mike,
5 though.

6 Q. Okay. All right. So you've known
7 Mr. Bennett all your life?

8 A. I've done -- we did the Embassy Suites
9 many, many years ago. So I mean, I've -- we've
10 worked with him in the past. So it's been a
11 long, long gap between our involvement, but yes.

12 Q. All right. Okay. Well, whoever asked
13 you, whatever Mike it was, it says to be sure
14 take whatever steps necessary to title it or
15 whatever to be sure it's not discoverable or
16 submittal. Do you know why that request was made
17 of you?

18 A. I do not.

19 Q. Do you know what the concern was of you
20 sharing your audit responses to Balfour?

21 MR. BUNDY: Objection. The witness
22 already answered the question. He didn't know.

23 THE COURT: I think that was his
24 testimony. I assume that's your answer?

25 THE WITNESS: I have no idea.

1 BY MR. HILDEBRAND:

2 Q. Okay. Do you recall when Mike asked you
3 to keep the report on non-discoverable and
4 non-submittable; do you remember --

5 MR. BUNDY: Objection.

6 Misrepresents what's in the e-mail. The e-mail
7 was sent by Jim Clements. I don't know how he is
8 saying that Mr. Grady Query would know who Mike
9 was when he didn't author this e-mail. So I
10 object this line of questioning.

11 THE COURT: Sustain that objection.

12 MR. HILDEBRAND: Okay. All right.

13 BY MR. HILDEBRAND:

14 Q. Do you have any knowledge of -- from
15 having spoken with anybody from Library
16 Associates and either Jim Clements or Bill Bundy,
17 who is on this e-mail or anybody else, why it was
18 important to Library Associates to keep your
19 audits not discoverable for submittal?

20 MR. BUNDY: Objection. Asked and
21 answered. The witness says he doesn't know.

22 THE COURT: I'm going to allow that
23 one. Go ahead.

24 THE WITNESS: I do not.

25 BY MR. HILDEBRAND:

1 Q. Okay. And that would be -- that
2 directive would be contrary to what you thought
3 was in the best interest of the project in order
4 for it to go forward in a timely fashion? You
5 thought it was important for those audits to be
6 provided to Balfour, correct?

7 MR. BUNDY: I think he is
8 mischaracterizing the statements on direct.
9 Direct will speak for itself, but I object.

10 MR. HILDEBRAND: Your Honor, I --

11 THE COURT: Overruled. Overruled.
12 Go ahead.

13 THE WITNESS: I would have liked
14 for them to see it, absolutely. I was also the
15 only one at the time that knew what the audit
16 said.

17 BY MR. HILDEBRAND:

18 Q. Right. All right. And then your
19 direction, as shown at the bottom of the first
20 page from Jim Clements to yourself was, Grady,
21 mark the report as draft.

22 Included in the heading, quote,
23 attorney-client privileged information prepared
24 in anticipation of litigation. Then send the
25 report to Bill Bundy. Bill will then distribute

1 to Mike, Kim, and me. As long as it stays
2 amongst us, it is protected. Did I read that
3 correctly?

4 A. Yes, sir.

5 Q. Did you ask Jim Clements why he wanted
6 the document, why he wanted you to edit
7 attorney-client privileged information prepared
8 in anticipation of litigation?

9 A. I just asked how they wanted me to
10 prepare it, as far as the header and being --
11 having draft on it. So, no, I did not ask
12 anything beyond that.

13 Q. Okay. Well, do you have any knowledge
14 of why they wanted you to include that?

15 A. I mean, I just guessed at it, that I was
16 the only one at the time that knew what it said.
17 But, I mean, that would be my only guesstimate.

18 MR. BUNDY: Move to strike the
19 answer. The witness isn't allowed to guess.
20 Speculation by definition.

21 MR. HILDEBRAND: It's still his
22 answer, Your Honor, so I would --

23 MR. BUNDY: No, but you can't
24 guess. That's not evidence. Guesses are not
25 evidence. They're not likely to lead to anything

1 that's relevant.

2 THE COURT: I will grant that
3 objection.

4 MR. BUNDY: Thank you, Your Honor.

5 THE COURT: Motion to strike
6 granted.

7 MR. HILDEBRAND: Your Honor, I
8 would like to move this into evidence as our
9 Plaintiff's Exhibit 344.

10 THE COURT: Any objection?

11 MR. BUNDY: Objection, relevant.

12 THE COURT: Overruled. It's in.

13 (PLF. EXH. 344 was received in
14 evidence.)

15 BY MR. HILDEBRAND:

16 Q. Okay. So you provided the first audit,
17 and then subsequently, you provided a number of
18 other audits that Mr. Bundy introduced yesterday,
19 correct?

20 A. Yes, sir.

21 Q. All right. And then in early 2018, as I
22 understand it, you had a meeting with some people
23 from Balfour. In fact, you had two meetings with
24 people from Balfour, where you introduced
25 yourself and you made suggestions on how you

1 thought the schedule could be improved to go
2 forward, correct?

3 A. Well, I had introduced myself earlier
4 when I had done the site walks. I know we had at
5 least one meeting and maybe a couple of
6 conference calls. I couldn't really recall
7 exactly the date of the meeting or how many times
8 we met. But we definitely met at least on one
9 occasion.

10 Q. Okay. And that was in early 2018?

11 A. I believe so.

12 Q. Okay. Who from Library Associates was
13 in attendance in that meeting?

14 A. Well, Mr. Clements with Matrix was
15 there, but no one from Library Associates.

16 Q. Okay. And who from Balfour was there?

17 A. I believe Nick.

18 Q. Starcevic?

19 A. Yes, sorry. I don't have the board to
20 reference.

21 Q. Right.

22 A. Joe Lauricella, and then I believe that
23 the senior PM.

24 Q. Tim Spano or David Simonton?

25 THE WITNESS: I apologize, I don't

1 remember your name.

2 MR. SPANO: I'm Tim Spano.

3 THE WITNESS: Thank you. Tim Spano
4 was there.

5 BY MR. HILDEBRAND:

6 Q. All right.

7 A. I don't recall who else was there.

8 Q. All right. And as I understood from
9 your testimony yesterday, you found them to be
10 receptive to your comments and it was a good
11 dialogue and a good exchange?

12 A. That's how I recall it.

13 Q. And to be clear, after that meeting, no
14 audits, to your knowledge, were provided to
15 Balfour? None of your subsequent audits,
16 correct?

17 A. I don't know of any audits.

18 Q. Let me ask you this: Other than the
19 audits, was any other work product or reports or
20 findings or recommendations or anything like that
21 of yours in writing provided to Balfour?

22 A. Not in writing.

23 (PLF. EXH. 345 was marked for
24 identification.)

25 Q. Okay. I'm going to hand you what I've

1 marked as Exhibit 345. This is an e-mail from
2 Jim Clements to yourself dated January 30, 2018.
3 So this is pretty early in your involvement in
4 the job, correct?

5 A. Yes, sir.

6 Q. And as I understand it, your involvement
7 ended -- was it in September or October of this
8 year, of 2018?

9 A. I think it was around October of 2018.

10 Q. Okay. And that's when your last audit
11 was done?

12 A. Our last audit was done in August of
13 2018.

14 Q. Okay. All right. So this was pretty
15 early in the project. Do you recognize this
16 document?

17 A. I do.

18 Q. All right. And then in the e-mail from
19 you to Jim Clements dated that same date at 7:31
20 in the morning, it says, I think the 9 July '18
21 hotel opening reflects the best case scenario
22 based upon the guest room progress to-date.

23 Outstanding design procurement items
24 could push it past this date, but BBC's progress
25 would have to start meeting their projected dates

1 to maintain the 9 July '18 hotel opening which
2 has yet to happen. We will turnaround schedule
3 review one week at most accuracy?

4 All right. So you were looking at what
5 was anticipated -- what was scheduled to be the
6 opening of the hotel was 9 July of 2018, correct?

7 A. Yes, sir.

8 Q. All right. It says, that's the best
9 case scenario. Outstanding design procurement
10 items could push this -- the opening past this
11 date. What design and procurement items were you
12 referencing?

13 A. There were several -- I mean, we were --
14 the only tool we had to project was Balfour
15 Beatty's schedule. So we were using that and
16 there were designer procurement dates, whether
17 constrained or whatever, in the schedule which
18 were showing as having -- being low float items.
19 So those were the ones I was referring to.

20 Q. Okay. And just so that I'm clear, when
21 it says that -- just from what you're describing
22 so that I can understand in layman's terms, are
23 you telling me that looking at the schedule that
24 Balfour had provided, that it was awaiting design
25 information and procurement information from

1 other people, and that the results of obtaining
2 that information might impact the scheduled. Is
3 that a fair statement?

4 A. They had listed, you know, CCDs and
5 supplemental instructions as near critical path
6 items on the schedule, and that's what I was
7 referring to. I don't know where in the progress
8 of awaiting information or pricing information
9 those were because I don't really recall which
10 one specifically I was referring to.

11 Q. Okay. Well, the CCD, that's a
12 construction change directive?

13 A. Yes, sir.

14 Q. Okay. And that's something that the --
15 if the owner wants the contractor to do work and
16 there has not been an agreement on exactly what
17 it would, then the owner can just unilaterally
18 tell the contractor, do this work through a CCD,
19 and then contractor is obligated to do it, and
20 the price will be determined later. Is that a
21 fair statement?

22 A. Cost plus, correct.

23 Q. Okay. So when the schedule showed that
24 there were CCD items that were outstanding,
25 that's an indication to you that Balfour was

1 awaiting information from the owner or the design
2 team, correct?

3 A. I don't know what stage of the CCD. So
4 they might have had the information, and they
5 might be pricing it. I don't know what stage of
6 that --

7 Q. Gotcha. Okay. But regardless, the CCD
8 was shown on the schedule as an issue that was --
9 that could push the schedule past the anticipated
10 completion date, correct?

11 A. Correct.

12 Q. And the same thing with procurement
13 items. There were procurement items that were
14 outstanding, correct?

15 A. Correct.

16 Q. Now, when you come at the -- BBC's
17 progress would have to start meeting their
18 projected dates to maintain the 9 July '18 hotel
19 opening, which has yet to happen.

20 Now, as I understand it, you were not
21 tasked with developing any sort of delay analysis
22 on this project to determine what the causes were
23 for Balfour's delays, correct?

24 A. Correct.

25 Q. All right. And in your opinion and

1 based upon your forensic expert testimony and
2 work that you talked about with Mr. Bundy, a
3 critical path analysis is required in order for
4 you or any other competent scheduling expert to
5 come in here to the Court and render opinions on
6 what caused the delays and to whom the delays
7 would be appropriately attributable, correct?

8 A. I didn't do a forensic analysis.

9 Q. I understand. I'm just asking you, in
10 order for you to render your -- to render such an
11 opinion here today, that would have been
12 required, correct?

13 A. Granted that I'm not a forensic expert
14 as we've determined here.

15 Q. I was a little confused, and I thought
16 that that's -- Mr. Bundy did. Okay. I will
17 strike that question.

18 A. I consider myself to be one. I thought
19 you did not.

20 Q. I wasn't real clear on that. And let me
21 ask you this.

22 MR. BUNDY: You weren't, but now
23 you are.

24 BY MR. HILDEBRAND:

25 Q. From the forensic analysis that you've

1 done, the simple question is, is a critical path
2 analysis required in your professional opinion to
3 render an opinion as to delays and to whom they
4 would be attributable?

5 A. Well, delays are delays to the critical
6 path or your critical path. So you would
7 absolutely have to have a very clear knowledge of
8 what the critical path was.

9 Q. Right. And all I'm getting at with that
10 is, that that was not done and the audits that
11 you promulgated were not done from a forensic
12 scheduling standpoint, correct?

13 A. No.

14 Q. No, that is correct?

15 A. I think there was no forensic efforts in
16 my audits.

17 Q. Okay. So when you state that Balfour,
18 its progress would have start meeting their
19 projected dates, what -- the reasons for those
20 delays, you don't have an opinion here today,
21 correct?

22 A. I don't have an opinion of why they
23 didn't meet the dates from their 13 -- from the
24 three -- I was referencing in that comment,
25 there's both the variances from the 4 August to

1 the 4 December update, and also the variances on
2 their ability to match on the 4 December, we did
3 a walk on 9 December. And on all floors and all
4 areas, they were behind schedule.

5 Q. Okay. Let's turn to a few of your
6 reports, a few of your audits, if you would,
7 please. Do you still have them there?

8 A. I think I do, sure. Which one are we
9 looking at?

10 Q. Let's turn, if we could, to May 20,
11 which I think was Library's Exhibit 98,
12 Defendant's Exhibit 98.

13 A. I have it.

14 THE COURT: Now, which number are
15 we?

16 MR. HILDEBRAND: 98.

17 THE COURT: 98? Okay.

18 BY MR. HILDEBRAND:

19 Q. All right. Do you have that in front of
20 you?

21 A. Yes.

22 Q. All right. This is an audit letter --

23 MR. HILDEBRAND: Your Honor, I
24 don't believe I introduced Exhibit 345 into
25 evidence, but I would like to do that.

1 THE COURT: 345?

2 MR. HILDEBRAND: Yes, sir.

3 THE COURT: Is that this last one?

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: Okay. Plaintiff's 345.

6 MR. BUNDY: Objection on the

7 relevance.

8 THE COURT: All right. Overruled.

9 MR. BUNDY: Thank you, Your Honor.

10 (PLF. EXH. 345 was received in
11 evidence.)

12 BY MR. HILDEBRAND:

13 Q. All right, sir. So on Library's Exhibit
14 98, May 20, 2018, a letter to Walter Bundy, re:
15 Hotel Bennett, Balfour Beatty schedule review,
16 attorney-client privilege. Below that, it says,
17 project overview and critical path review.

18 So what you were reviewing here was the
19 critical path that was shown on the Balfour
20 schedules, correct?

21 A. Actually, what we did was the critical
22 path and then the near critical paths. I think
23 that -- the 6th most critical paths, yes, sir.

24 Q. Okay.

25 A. As shown on their schedule.

1 Q. Okay. So let's look at these. The
2 second paragraph, the hotel opening is showing a
3 28 February '19 completion date, which is driven
4 by the release of CCD and subsequent fabrication
5 of Hope's door. So, again, that's driven by a
6 construction change directive, correct?

7 A. Correct.

8 Q. And fabrication of Hope's door. Have
9 you been here the entire trial?

10 A. For several days. I missed some days in
11 the first week.

12 Q. Were you here for the testimony of Tim
13 Spano and Nick Starcevic where they talked about
14 the long lead times and the issues that developed
15 on the project with getting the Hope's doors and
16 the delays that that caused?

17 A. He had referenced the Hope's doors as a
18 dry-in issue. I can't imagine -- not as I'd
19 referenced it here where the problem is that it's
20 on the mockup and it needs to be moved over to
21 the actual building for the approval and opening
22 of the building. But I thought Tim Spano
23 referred to them as actually a dry-in issue.

24 Q. Okay. Do you have any opinion as to
25 whether that Hope's door -- do you understand the

1 issue was that the bar -- the Hope's door was
2 shown in the mockup and that the owner did not
3 want to buy another Hope's door -- an extra
4 Hope's door to put in the hotel? They wanted to
5 wait for the bar to approve the mockup and then
6 use -- reuse the Hope's door from that onto the
7 hotel?

8 MR. BUNDY: Your Honor, this is --
9 there's no -- I mean, I don't know. Where is the
10 testimony for all of this? I mean, there's no
11 foundation for this question. That's a purely
12 hypothetical question. This is a lawyer
13 testifying without being under oath, laying a
14 foundation. You know, I don't know whether
15 that's in evidence or not.

16 MR. HILDEBRAND: Well, Your
17 Honor --

18 MR. BUNDY: I don't recall it.

19 MR. HILDEBRAND: Your Honor, it's
20 cross-examination, and it's testimony that was
21 previously given. And I mean, my gosh,
22 hypothetical questions, it used to be that
23 experts, that you would -- that's the only way
24 that you could ask them any sort of questions.
25 But regardless of that, it's in evidence, and I

1 think it's appropriate.

2 THE COURT: All right. I'm going
3 to overrule the objection. Go ahead and restate
4 the question if you would.

5 MR. HILDEBRAND: All right, sir.

6 BY MR. HILDEBRAND:

7 Q. Do you know what the issue was with the
8 Hope's door and why that was delayed, the dry-in
9 of the building of the hotel?

10 A. It wasn't delaying -- at this point, it
11 wasn't delaying the dry-in. It was delaying the
12 opening and the bar approval of transferring
13 those doors over and not having to have two
14 Hope's doors. So, yeah, it's actually in the
15 next sentence of what I wrote.

16 Q. All right. So that was the first issue
17 on the critical path at this point, May 20, 2018,
18 was the Hope's door, correct?

19 A. As shown in Balfour Beatty's schedule.

20 Q. Okay. Well, have you heard one of the
21 criticisms is that the -- Mr. Boe testified that
22 an analysis should be used using the Balfour
23 schedule by a scheduling expert in order to
24 render their opinions, that that's what you have
25 to use the contemporaneous schedule to determine

1 what the critical path was and what impacted
2 that. That's what a time impact analysis is,
3 isn't it?

4 MR. BUNDY: Objection. He's
5 pitting one witness's testimony against another.
6 He said this -- he's already established that
7 this gentleman did not provide a forensic
8 analysis.

9 And now what he is doing is asking my
10 witness, who he says wasn't qualified and
11 shouldn't be allowed to testify as a forensic
12 scheduler, to opine on a forensic analysis made
13 by my other witness. This is pitting one witness
14 against the other.

15 MR. HILDEBRAND: It's not, Your
16 Honor, and I would, at this point, ask that we
17 reimplement or that the rule -- if he has an
18 objection, I'd rather him just say objection and
19 then --

20 THE COURT: Okay.

21 MR. HILDEBRAND: -- under the
22 rules, if you would like it further, Your Honor.

23 THE COURT: All right. So the
24 objection is pitting one witness against the
25 other?

1 MR. BUNDY: Yes, sir.

2 THE COURT: Your question has to do
3 with --

4 MR. HILDEBRAND: With simply the --
5 an analysis, a time impact analysis, if one is
6 done, is using the contemporaneous schedules of
7 Balfour. That's what I understand the criticism
8 was.

9 So I'm just asking him his reference to
10 this critical path aspect and why he put that
11 down as driving the critical path. I'm just
12 asking -- it's a pretty simple question. He's
13 using Balfour's schedule as he thinks is
14 appropriate, and as I understood that Mr. Boe
15 thought was appropriate, for doing time impact
16 analysis.

17 THE COURT: Okay.

18 MR. BUNDY: Well, one, that's not
19 the question he asked him. Okay? And that's the
20 main problem. He's asking him yet another
21 question, which I object to.

22 THE COURT: All right. Okay.
23 Restate your question.

24 MR. HILDEBRAND: All right, sir.

25 THE COURT: And then we will go

1 right through this and see if we can get it
2 straight.

3 MR. HILDEBRAND: Okay. Okay. So I
4 will tell you what, I'll strike it.

5 BY MR. HILDEBRAND:

6 Q. What you did was you looked at Balfour's
7 schedule, its contemporaneous schedule produced
8 on this job while it was under construction, and
9 you referenced that the Hope's door, what was
10 shown as the number 1 critical path item, that it
11 was driving completion, correct?

12 A. As shown on their schedule.

13 Q. Right.

14 A. That's what it was showing.

15 Q. Right. Okay. And then the next one
16 that you -- the next paragraph, once the Hope's
17 door is removed from the critical path, the
18 project is then driven by the next longest paths,
19 which is CCD8 SI57RI and SI63RI for the manager's
20 apartment and the speciality ballroom security
21 doors. Did I read that correctly?

22 A. Correct. There's two identical paths
23 there that I'm identifying.

24 Q. Okay. CCD --

25 A. Oh, it is for -- no, it's just one path,

1 I apologize.

2 Q. Okay. CCD, and that's another
3 construction change directive. That's where
4 there was a -- rather than doing a change order,
5 the owner directed Balfour to make a change in
6 the project, and that was shown on the schedule
7 as driving the completion date, correct?

8 A. No, that was shown -- it wasn't shown as
9 driving completion date. So this is basically --
10 I'm drilling down on the top six. So if I'm
11 doing sort of a but for analysis in the fact that
12 we've got the longest one.

13 Then you copy the schedule, delete that
14 path, and then you -- the next longest path, I
15 want to identify that so that everyone on the
16 project team understands what the second longest
17 path is.

18 Q. Okay. And that was CCD, the manager's
19 apartment and specialty ballroom security doors?
20 Were those the same thing?

21 A. No, those were -- that was two different
22 paths.

23 Q. All right.

24 A. So there were two different -- the
25 second longest was actually two different paths.

1 One was the manager's apartment, and the other
2 was the specialty doors.

3 Q. All right. What was the issue with the
4 manager's apartment?

5 A. I think it just hadn't -- the issue was
6 with the manager's department, but then we had
7 also had -- with the design of the manager's
8 apartment.

9 But then we had also, I think in
10 subsequent discussions, had discussed, we could
11 just block this off and it wouldn't affect the
12 critical path, which was basically the whole
13 purpose of these analysis was to basically
14 identify problems and then fix them.

15 Q. Okay. The schedule from Balfour,
16 though, was showing the manager's apartment as
17 the next -- the second critical path after the
18 Hope's doors?

19 A. Yes, sir.

20 Q. All right. And they were waiting for
21 design information from the owner, and that's
22 what was causing the delay; is that correct?

23 A. Once again, I don't know where they are
24 in that process of its procurement or waiting on
25 design information, but activities referencing

1 that, driving renovations in the manager's
2 apartment were the second longest critical path.

3 Q. All right. How about the ballroom
4 security doors? What was the issue there?

5 A. I think that the long lead time on the
6 ballroom doors, and then that was needed -- they
7 were actually fire doors, so they were needed for
8 the life safety inspection. And then we, once
9 again, identified a potential workaround at the
10 cost of \$51,000 to buy potentially temporary
11 doors to install if need be. So that was the
12 issue with that.

13 Q. Okay. Do you know why those temporary
14 doors were not ordered?

15 A. I do not.

16 Q. Did you discuss that with the owner and
17 ask the owner if they were willing to fund and
18 pay \$51,000 for temporary doors?

19 A. I discussed it with Mr. Clements, and
20 then he took that option to the owner.

21 Q. So you never know what happened after
22 that?

23 A. No, sir.

24 Q. All right. The third longest critical
25 path is driven by -- the next paragraph down, the

1 third longest critical path is driven by CCD 9
2 for the front desk bellhop post case work and
3 results of substantial completion date being
4 driven. Do you know what CCD 9 was, just that
5 and the front desk bellhop?

6 A. It just had to do with the front desk
7 bellhop.

8 Q. So that was information that Balfour was
9 waiting to get from the owner?

10 A. Once again, I don't know where they are
11 in the process of that CCD. So the CCD was --
12 that bellhop was driven by that CCD. I don't
13 know where -- if they're waiting on information
14 or pricing was going on or what.

15 Q. Okay. All right. Next page.

16 A. But that -- I'm sorry, I didn't know if
17 we were discussing each one of those, but go
18 ahead, sir.

19 Q. Let's jump to the next one or the next
20 page. The fourth longest path would drive the
21 project would be CCD, another CCD 6 for stair
22 number 4; is that correct?

23 A. Correct.

24 Q. What was the issue with CCD 6 and stair
25 number 4? Do you know?

1 A. I believe there was -- we had discussed
2 this a little bit yesterday and the fact that
3 there was a change, I think, to the millwork on
4 stair number 4.

5 And then that -- during one of the
6 meetings, you know, with -- I know the in-person
7 meeting with the one that I know we had, that was
8 definitely discussed, and I discussed it with Joe
9 Lauricella really on how to specifically show
10 that impact in the schedule.

11 And then it sort of went on to further
12 iterations, and they -- once it was totally shown
13 what the impact was, I believe the owner said, I
14 don't want to do that, and we went back to the
15 original scope.

16 Q. Okay. All right. Next paragraph. The
17 fifth longest critical path is driven by CCD 12,
18 A/C for lighting and the private dining. Do you
19 know what the issues were there?

20 A. I don't recall, no, sir.

21 Q. Let's turn to Defendant's Exhibit 99, if
22 you would, please. That's dated June 17, 2018.

23 A. Yes, sir.

24 Q. Well, let's just turn down to the third
25 paragraph. A milestone for all signage complete

1 is scheduled for 18 June 2018. This date will
2 not be achieved. Signage will be needed for the
3 fire marshal to approve FF&E stocking to begin.
4 What signage is it that you are talking about?

5 A. Well, I mean, you need, you know,
6 signage in order to open the building, so just
7 evacuation exit and those -- those would be
8 critical signages, I believe. I don't know
9 specifically what a fire marshal needs, but I
10 know those are some of the signages needed to get
11 a TCO and a life safety inspection.

12 Q. Do you know who was the -- whose
13 obligation it was or the contractor to provide
14 the signage?

15 A. I believe the owner -- the owner
16 furnished the contract -- I mean, I'm sorry, the
17 owner was responsible for providing the signage.

18 But, once again, this was -- I'm trying
19 to point out the issues but if you look up above
20 this, there is Balfour Beatty in their scheduling
21 to leading the link between signage and the life
22 safety.

23 So I'm trying to point out here also
24 fallacies in the schedule and the fact that, you
25 know, according -- I'm saying that it could be

1 critical or is critical. But it's not -- or at
2 least it's not going to meet their date, but
3 according to Balfour Beatty, it's not critical at
4 all.

5 Q. Okay. So Balfour didn't think it was
6 critical, but you did because the signage that
7 was to be provided by the owner was not yet --
8 existed, correct?

9 A. They had deleted the link between the
10 necessary signage and the life safety inspection.

11 Q. Okay. Regardless of the schedule, what
12 was shown on the schedule, to your knowledge, at
13 this point, was the signage that the owner was
14 obligated to provide wasn't available?

15 A. It would not be available on 18 June.

16 Q. All right. Let's turn to the last one,
17 Defendant's Exhibit 100 dated August 16, 2018.
18 And under project overview of the critical path
19 review, turn to the third paragraph below that,
20 if you would, please.

21 A. Yes, sir.

22 Q. There appears to be the possibility of
23 bettering the 20 November '18 substantial
24 completion date. The longest path driving
25 substantial completion is the completion of the

1 manager's apartment. Is that the same issue that
2 we were talking about earlier?

3 A. That's the one that would be blocked off
4 to order -- in order to remove that from the
5 critical path.

6 Q. Okay. Have you worked with Mark Doran
7 before?

8 A. I've never worked with Mr. Doran, no.
9 I've had projects where I overlapped with
10 Contract Solutions.

11 Q. Did you find him, in your previous
12 dealings with him, to be competent and
13 professional?

14 MR. BUNDY: Objection. The
15 character of the witness is not relevant to this
16 case. I don't think this -- he's not been called
17 as a character witness for Mr. Doran, and I
18 object.

19 THE COURT: I will sustain that.
20 Go ahead.

21 BY MR. HILDEBRAND:

22 Q. When you were dealing with Joe
23 Lauricella and you had your meeting with him, did
24 you find that he understood the software and
25 understood what needed to go into schedules and

1 such? In other words, was your opinion of him to
2 be competent?

3 A. I think he understood the software and
4 he knew construction, but he didn't know proper
5 scheduling procedures.

6 Q. And those are reflected -- your
7 criticisms are reflected in your audit reports?

8 A. It would result in what happened in the
9 schedule.

10 Q. Okay. With regard to your criticisms of
11 how the scheduling was being done, and that
12 was -- your involvement started in August of
13 2017, so that's about a year and four months or
14 so before completion was achieved, when you had
15 your scheduling criticisms, did you advocate to
16 the owner that it be -- take an aggressive stance
17 and insist to Joe Lauricella or to Balfour that
18 they implement some drastic scheduling changes or
19 some other programs to expedite the conclusion of
20 the project?

21 A. To my knowledge, the owner had no avenue
22 to change that.

23 Q. Well, whether it had a legal avenue
24 under the contract or not, it certainly had the
25 ability, if it wanted to, just to write a letter

1 to say that, look, we think we had -- we've had
2 our expert. We had Grady Query review the
3 schedule and the way that it's being done, and we
4 think that it's important or extremely important
5 or we insist -- they certainly would have that
6 opportunity, wouldn't they?

7 MR. BUNDY: Objection. Can I give
8 you the grounds for my objection?

9 THE COURT: Basis would be
10 speculation?

11 MR. BUNDY: Sir?

12 THE COURT: Basis would be
13 speculation?

14 MR. BUNDY: Well, it's even more
15 than that, Your Honor, if I may expound.

16 THE COURT: Okay.

17 MR. BUNDY: What the question
18 advocates is that this witness would have
19 advocated to my client that they breach the
20 contract by taking over the scheduling of this
21 job and affirmatively asserting, you go out and
22 get a different program. You go out and do
23 something entirely different.

24 Now, contractually, they have the sole
25 responsibility for the means, the method, and the

1 schedule. And there will be an answer later in
2 this case as to why these documents were actually
3 not produced to prevent that very defense.

4 Because if we just sent them all of
5 these things and said, this is wrong, that's
6 wrong, they would be in here today saying, you
7 took over the schedule, you told us how to build
8 the job, and you breached the contract because
9 you denied us the right to implement our means
10 and methods.

11 My client had the absolute right to see
12 what was going on on this job, hire a private
13 consultant, and become informed about what was
14 going on. They had no legal or moral obligation
15 to tell BBC anything. Thank you, Your Honor.

16 MR. HILDEBRAND: That's just a
17 speech, Your Honor. The simple question is, did
18 he -- it was certainly within the prerogative of
19 the other if they wanted to -- if he is saying,
20 look, I've got scheduling critiques.

21 Was he aware that the owner did make or
22 certainly had the option, if it wanted to, to
23 tell Balfour specifically, look, we've got
24 criticisms of how you're scheduling is being
25 done, and we are -- it's just at the point of

1 being done a different way.

2 THE COURT: You can ask him what he
3 did, and I don't think you can have him speculate
4 as to what anybody else was doing. Okay?

5 MR. HILDEBRAND: All right.

6 BY MR. HILDEBRAND:

7 Q. Did you strongly recommend, or whatever
8 terms you want to use, to the owner that they
9 confront Balfour or Joe Lauricella in strong
10 terms and have a change made to the scheduling,
11 the way the project was being scheduled?

12 MR. BUNDY: Objection.

13 THE COURT: Noted. Overruled. Go
14 ahead, if you can answer that question. Did
15 you --

16 THE WITNESS: I merely -- I stated
17 that I felt that my coming on board as a
18 third-party scheduler would help the project. I
19 didn't state anything beyond that.

20 MR. HILDEBRAND: All right. I
21 think that's all I have. Thank you very much.

22 THE COURT: And just so I follow up
23 on that, Mr. Query. Did you express that to both
24 Balfour Beatty and to Mr. Clements, or did you
25 keep that within your discussions with --

1 THE WITNESS: I think I just -- I
2 expressed that -- no, at no time did I tell Joe
3 that I was trying to take over his job.

4 THE COURT: Okay. All right.
5 Thank you.

6 All right. Mr. Terry?

7 MR. TERRY: Thank you, Your Honor.
8 I want to clarify something before I ask the
9 questions. My understanding is that you
10 certified Mr. Query as a scheduling expert and a
11 forensic scheduling expert.

12 THE COURT: I thought I had to.

13 THE WITNESS: I apologize. I
14 missed that.

15 THE COURT: I thought I had, too.

16 MR. TERRY: May it please the
17 Court?

18 THE COURT: Yes, sir.

19 CROSS-EXAMINATION

20 BY MR. TERRY:

21 Q. Mr. Query, good to see you again this
22 morning.

23 A. Good to see you doing well.

24 Q. I know we met several times. I'm Don
25 Terry. I represent Watson Electrical

1 Construction. My partner, Al Windle, may ask you
2 some questions related to Lithko and Old North
3 State. And I'm going to try not to cover some of
4 the things that has already been covered by
5 Mr. Hildebrand.

6 You talked about the audits that you
7 did, but I want to make sure that we understand.
8 You're both an expert witness here and a fact
9 witness as well because you saw what was
10 occurring on the project when you visited the
11 project, right?

12 A. On the limited basis, yes, sir.

13 Q. Right. You made several visits to the
14 project where you were evaluating the work that
15 had been completed at that time, right?

16 A. I was evaluating the status of the work,
17 yes, sir.

18 Q. Okay. And the status of the work means
19 how much of the work had been completed, correct?

20 A. Sure.

21 Q. Okay. And you talked at length about
22 how that you -- you looked at Balfour's schedule
23 and found that there were some problems with that
24 schedule, right?

25 A. Yes, sir.

1 Q. And you went into detail of how many
2 logic ties -- I guess maybe that's the right
3 word -- are missing in Balfour's schedule,
4 correct?

5 A. That's a correct statement.

6 Q. Yesterday you talked about that folks
7 would receive PDF copies of the schedule. Do you
8 remember that?

9 A. Yes, sir.

10 Q. All right. And those PDF copies don't
11 show the logic between the activities in the
12 project schedule, correct?

13 A. The PDFs that I saw did not. You can
14 produce a PDF that does show that.

15 Q. Okay. And as far as you know, the
16 subcontractors only receive PDF copies of the
17 schedule, right?

18 A. I have no knowledge of what the
19 subcontractors have.

20 Q. You have no knowledge that the
21 subcontractor receives schedules that showed the
22 logic, correct?

23 A. No. I have no knowledge of that either
24 way.

25 Q. Now, in your experience, that in order

1 to do a schedule analysis, you would have to see
2 the logic in the schedule, right?

3 A. That would be very helpful, yes.

4 Q. You can't do a schedule analysis from a
5 PDF copy of the schedule, correct?

6 A. You would have to recreate a CPM off of
7 a PDF, so that is -- sometimes if there's no CPM
8 available, you have to recreate one off of a CPM.
9 But, yes, there has to be a CPM available to --
10 you can look at PDFs and you can judge that, but
11 it's not the best way to do it.

12 Q. And so if a subcontractor has a PDF
13 printout of a schedule that is missing logic, he
14 can't do an accurate schedule analysis, right?

15 A. It could be much more accurate with the
16 actual XER and the software.

17 Q. And you agree that a good schedule makes
18 for an efficient workplace, right?

19 A. Yes.

20 Q. And a bad schedule would make for an
21 inefficient workplace, correct?

22 A. They would -- definitely a good schedule
23 helps. I can't -- I can't say that they're
24 completely hand in hand, but, yes, they
25 definitely lend each other -- lend one's self to

1 each other.

2 Q. Mr. Hildebrand covered this briefly, but
3 I want to make sure that we understand the time
4 frame here. In June of 2018, is your
5 understanding that the signage for the project,
6 which was to be provided by the owner, was
7 preventing completion of the project, right?

8 A. No. I was merely stating that the dates
9 shown on the schedule -- I made two points about
10 the signage, was that the date shown on the
11 schedule was -- of 18 June, was not achievable as
12 far as receiving the signage, and that that
13 should be tied to the life safety, and that I
14 think it -- life safety should be tied to FF&E.
15 So I was just merely stating that the date was
16 wrong.

17 Q. And it was your understanding at that
18 time, though, that the signage hadn't even
19 arrived on site, correct?

20 A. Well, I mean, I don't remember. What
21 was the date of that?

22 Q. June 18, 2018.

23 A. So, no, if June 18th can't be
24 achievable, then, no, it's not there yet, no,
25 sir.

1 Q. Okay. And you also understood that
2 design issues were going to delay completion of
3 the project until after July of 2018, right?

4 A. Balfour Beatty's schedules were showing
5 design issues, and those were the top six that
6 that broken schedule is showing on -- as critical
7 or near critical path.

8 Q. Okay. But you were trying to make sure
9 that -- you weren't just relying on this what you
10 call a broken schedule, you were actually trying
11 to figure out what was actually occurring,
12 correct?

13 A. No. We were relying on that -- on that
14 schedule. We had tried in the very first audit,
15 to make -- make changes to the schedule to just
16 sort of see what the trend was if you correct
17 some of these items.

18 Past that audit, I didn't go in and try
19 to revise the schedule. I did try to help
20 Balfour Beatty to sort of project, you know, what
21 they were trying to say better. But that was
22 really the only -- I didn't make changes. I was
23 suggesting to them, how to better represent.

24 Q. Now, when you were walking around and
25 looking at the project, you never developed any

1 criticisms of Watson Electrical's work, did you?

2 A. No.

3 Q. And you're not aware of any delays to
4 the project caused by Watson Electrical
5 Construction, correct?

6 A. No.

7 Q. In your work as a forensic scheduling
8 analyst, you've done as planned versus as built
9 critical path analysis before, right?

10 A. I don't recall doing an as planned
11 versus as built. I would use the contemporaneous
12 windows analysis whenever I could, or I would use
13 an as built but for. But, no, I would stay away
14 from that.

15 Q. And in your experience as a scheduling
16 expert, you are familiar with cumulative impact
17 claims, right?

18 A. I'm familiar with them, correct.

19 Q. And I believe during your deposition,
20 you referred to those as death by a thousand
21 cuts, right?

22 A. Yes.

23 Q. Okay. And to understand the damages
24 you're going to incur from cumulative impact
25 claims, all the cuts have to actually occur,

1 right?

2 A. Sure.

3 Q. So you can't understand the damages that
4 you're going to incur until the project is
5 complete for a cumulative impact claim, right?

6 A. Repeat that question. I apologize.

7 Q. For a cumulative impact claim related to
8 schedule, you can't understand all the damages
9 you'll incur until the project is over, right?

10 A. For one, I would never use -- I know
11 that we've referenced use in my deposition of a
12 cumulative claim. There was -- the two times
13 that I referenced, I did the impact analysis. I
14 was working for a claims consultant. He used
15 that. It was not part of my -- my analysis, but
16 it was part of what we presented.

17 And then the second time was, we were
18 arguing for a dispute resolution board, and as
19 the defendant, we had no burden of proof. And I
20 had used that as -- as in there, but it's not
21 anything -- and I said this my deposition -- you
22 would never hang your hat on a cumulative impact
23 analysis. They're -- it's just junk.

24 Q. So you've never testified before related
25 to a cumulative impact claim?

1 A. I have testified -- like I said, I
2 didn't testify in the original, which is the
3 Sahara West -- I know in my deposition, I'd
4 referenced two, where I know they were used. The
5 Sahara West Library, we did an impact analysis
6 for the contractor.

7 I did the impact analysis, but the
8 actual -- the claim was written and argued by the
9 consultant that I was working for, which was Tom
10 Fressilli. I knew that would get some laughs.
11 You obviously don't know Tom.

12 And then the second one, we were arguing
13 before a dispute resolution board where we had no
14 burden to show impact. We were merely -- the
15 owner had alleged that all delays were basically
16 on -- were caused by the general contractor, and
17 we basically had a week to argue this.

18 And I had included in that argument that
19 there were cumulative delays that affected how we
20 moved around that project. But it was a little
21 more complicated in that because it was a phased
22 project, and it was -- it was unclear, through
23 not having direction from the owner, how we would
24 get life safety inspections and open up certain
25 areas of that.

1 So it was, A, there was no burden of
2 proof and, B, it was very specific to what was
3 going on in that project. So, yes, I did use
4 that in my report then, but I would not -- like I
5 said, I don't hang much -- put much credence on
6 that type of analysis.

7 Q. When there's multiple delays at the same
8 time during the project, it makes it much harder
9 for the contractor to coordinate the work on that
10 project, right?

11 A. Sure. Delays, yeah, call for more
12 coordination.

13 Q. Okay. And you talked about yesterday
14 that the schedule began to show activities
15 stacked from floor to floor rather than what you
16 called, I believe, crew logic. Logic might have
17 been the right word you used. I'm not exactly
18 sure.

19 But when those activities are all
20 stacked up at the same time, you discussed that,
21 but that's not realistic because we don't have
22 unlimited resources, right?

23 A. In my initial audit, I pointed out that
24 there was very few crew flow preferential logic
25 ties, that they basically, you know, recognize

1 that there are finite resources available to the
2 project.

3 And that those crew flow ties -- you
4 would typically want -- you would typically see
5 more in this type of project where you're working
6 from floor to floor to where, if someone was held
7 up on one floor, it would affect wherever the
8 next floor or the -- or if they're leapfrogging
9 or whatever, you know, the floor above that. You
10 would see that tie, and it would, one -- there
11 would be consequence.

12 Q. Sure. And when you have the
13 subcontractors that are trying to work on
14 multiple floors at a time, that's going to cause
15 that subcontractor, if the resources aren't
16 available, to be less efficient, right?

17 A. Well, I don't know. I don't know. Like
18 I said, I didn't have access to the
19 subcontractors. So I didn't know what their
20 commitments were to Balfour Beatty and -- or how
21 they did it. I was just merely pointing out that
22 it -- I would typically see more crew flow logic
23 in the schedule, and there's really not a lot in
24 here.

25 Q. Right. And that crew flow logic is what

1 creates sufficient work by subcontractors, right?

2 A. It just --

3 Q. I will strike the question. Crew flow
4 logic, if done properly, allows the subcontractor
5 to work efficiently on the project, right?

6 A. It shows consequence of -- actually, the
7 opposite. It shows consequence of inefficiency.
8 It shows consequence of delay, but I wouldn't say
9 that having crew flow logic in there would help
10 with efficiency.

11 MR. TERRY: Okay. That's all the
12 questions I have. Thank you.

13 THE COURT: Mr. Windle, any
14 questions?

15 MR. WINDLE: No questions.

16 MR. BUNDY: I just have a few, Your
17 Honor.

18 REDIRECT EXAMINATION

19 BY MR. BUNDY:

20 Q. Let's start with Mr. Fressilli. How
21 long ago did you work for Tom?

22 A. I started working in 19 -- that was when
23 I started scheduling in 1994. We were initially
24 working on -- Tom was working with Eric Unger,
25 and I came to work with Eric.

1 Q. Gotcha.

2 A. And then I think Eric and Tom split up,
3 and I went with Tom to start doing consulting
4 work, which I believe the first claim I did was
5 with Tom, I believe against you on Spann
6 Elementary.

7 Q. So Fressilli was your first scheduling
8 mentor, so to speak?

9 A. Well, yeah.

10 Q. And I guess you've gotten over that,
11 right, see, because you're still in business,
12 right?

13 A. He liked to refer to himself as a guru.

14 Q. Yeah, yeah. So regardless of what you
15 may have done while you were unfortunately under
16 the tutelage of Mr. Fressilli, you now firmly
17 believe and opine that the cumulative impact
18 claims are essentially ridiculous, right?

19 A. Right.

20 Q. Is that a fair statement?

21 A. Yes.

22 Q. Okay. What about total time claims
23 since we're talking about ridiculous --

24 MR. HILDEBRAND: I object, Your
25 Honor. There's no testimony, no questions about

1 total time. It's inappropriate for redirect.

2 MR. BUNDY: I believe they opened
3 the door to all of this when they started asking
4 my witness about scheduling techniques and
5 analysis. They decided to pick one out. They
6 opened the door to all of that now, not just the
7 one. They've made this witness, based on those
8 questions, they asked him questions.

9 They affirmed he was a scheduling
10 expert, a scheduling analyst, forensic analyst.
11 That's the first thing they did. And then they
12 started asking him about one or two different
13 types of methodologies. They asked him whether
14 or not he'd ever used the as planned, as built,
15 which is what they used here. And they were
16 advised, no, he doesn't do that. Okay?

17 He used an as planned but for if he has
18 to, but he doesn't even like to do that. He
19 likes to use the windows analysis. All I'm
20 trying to do, since they opened the door, I would
21 like to walk in the door.

22 THE COURT: Okay.

23 MR. HILDEBRAND: Your Honor, all he
24 was asked about was cumulative impact. If you
25 accept Mr. Bundy's logic, okay, you've asked him

1 about cumulative impact. That opens the door to
2 him testifying about any other aspects of
3 schedule. It opens the door for everything.

4 MR. BUNDY: Yeah, that's correct.

5 MR. HILDEBRAND: That's
6 inappropriate.

7 THE COURT: All right.

8 MR. HILDEBRAND: It was a specific
9 topic on cumulative impact. If he wants to ask
10 him questions about that, I think it's
11 appropriate. But then to open the door for
12 whatever -- like he says, whatever he wants to
13 ask him about anything, I don't think that's
14 appropriate.

15 THE COURT: All right. So what's
16 the purpose that you seek to ask these questions?
17 You're trying to dispel some of these other
18 theories?

19 MR. BUNDY: Yes.

20 THE COURT: All right. We're not
21 going into those theories?

22 MR. BUNDY: No, I'm not going into
23 those theories. They just asked him his opinion
24 about some theories, and I thought I would just
25 bring up a few more while we're opening that

1 door.

2 THE COURT: All right. I'm going
3 to allow you to just touch on them. I don't want
4 to go into any detail.

5 BY MR. BUNDY:

6 Q. Well, let's go back to cumulative
7 impact. Why do you think it is ridiculous?
8 What's wrong with it?

9 A. I mean, you're just throwing a bunch of
10 stuff in a bucket and saying, here's -- this was
11 what delayed the project. There's no cause and
12 effect.

13 Q. Lack of causation is the basic problem,
14 right?

15 A. Exactly.

16 Q. Okay. And what's the problem with the
17 total time method of delay analysis?

18 A. I mean, it's not really a method. It's
19 more a result. I mean, it's kind of ridiculous
20 to imagine that a project of this scope could
21 be -- one party is the only party responsible for
22 delays.

23 Q. Are there any similarities between the
24 flaws in the total time analysis and the flaws in
25 the total cost analysis?

1 A. Again, they're both somewhat ridiculous.

2 Q. Okay. Now, you simply, in this -- in
3 these letters, you were simply pointing out what
4 the schedule provided by Balfour Beatty said,
5 right?

6 A. Correct.

7 Q. You weren't adopting the rationale of
8 that schedule, were you?

9 A. No.

10 Q. Okay. In fact, quite the contrary if
11 you read the whole letter. You were quite
12 critical of all of these schedules, correct?

13 A. Correct.

14 Q. Okay. Now, let's talk about that. In
15 these meetings that you had or conversations that
16 you had with Balfour Beatty, its representative,
17 and particularly Mr. Lauricella, the scheduler on
18 this job, did you essentially tell him the same
19 thing over the phone that was in these letters,
20 that you don't have proper restraints, that you
21 don't -- you've got open-ended problems and on
22 and on and on?

23 A. I'm not sure if I touched on every
24 single one, but I definitely said, these are
25 serious issues, and we need to resolve them.

1 Q. And he needs to -- they're a problem
2 with his schedule, not yours?

3 A. Correct.

4 Q. Okay. And did you ever -- did you
5 understand, while you were on this job, as we
6 read into the contract yesterday, that the total
7 responsibility for means and methods in the
8 schedule lies on the contractor?

9 A. Yeah, it is the fact.

10 Q. Is there any prohibition in these
11 contracts for the owner to go out and hire
12 another consultant to check on what's been done
13 on the job to see if it's being done properly?

14 A. I believe, yeah, that they can hire a
15 consultant to come out and inspect it.

16 Q. They can hire their own QC people, can't
17 they?

18 A. Uh-huh.

19 Q. They can hire their own testing
20 engineers if they to want --

21 A. Yes, sir.

22 Q. -- correct?

23 A. Correct.

24 Q. Were you available in these
25 conversations with Balfour Beatty, to assist them

1 in any manner that they requested and all they
2 had to do is ask; is that fair?

3 A. That's fair.

4 Q. And you were being paid by the owner to
5 do this, right?

6 A. Correct.

7 Q. And the owner had no contractual
8 obligation to provide them with any help, did he?

9 A. Correct.

10 Q. Okay. And if they had had wanted to, as
11 you essentially offered to them, they could have
12 allowed you to come on board at Mr. Bennett's
13 expense, to assist them in fixing this broken
14 schedule; is that correct?

15 MR. HILDEBRAND: Objection,
16 leading, and it calls for speculation.

17 THE COURT: I'm going to sustain
18 that.

19 MR. BUNDY: Thank you, Your Honor.
20 That's all I have.

21 THE COURT: Okay. Anything
22 further? I'm sorry.

23 MR. TERRY: If you'll give me just
24 a minute, Your Honor.

25 THE COURT: All right, Mr. Terry.

1 RECROSS-EXAMINATION

2 BY MR. TERRY:

3 Q. Mr. Query, do you remember giving your
4 deposition in this case?

5 A. I do.

6 MR. BUNDY: Your, Honor this is
7 inappropriate re-cross. I mean, I'm not sure
8 what we're --

9 THE COURT: I agree with you.
10 You've got to ask him the question first. The
11 first thing you've got to do is ask him a
12 question.

13 BY MR. TERRY:

14 Q. Mr. Query, you just testified about that
15 you believe that -- you just testified that you
16 discount cumulative impact claims, right?

17 MR. BUNDY: Your Honor, he just
18 crossed this witness. He brought up cumulative
19 impact claims, and he got his answer, right? So
20 now, he's continuing his original
21 cross-examination. This is completely improper.

22 THE COURT: All right. I'm going
23 to allow it. Go ahead and ask the question.

24 BY MR. TERRY:

25 Q. You just testified to Mr. Bundy on

1 redirect that you discount cumulative impact
2 claims, right?

3 A. Correct.

4 Q. And then, in cases in the past, you've
5 testified that the level of disruptions on the
6 project resulted in cumulative impacts and
7 impacted the general contractor, correct?

8 MR. BUNDY: Objection. Improper
9 scope of second cross-examination. He went
10 through all of this before, and Grady explained
11 all of that before in his first
12 cross-examination. He only gets one bite, Judge.

13 THE COURT: I tend to agree with
14 that. I will sustain that.

15 MR. TERRY: I will withdraw the
16 question. Thank you, Your Honor.

17 THE COURT: Okay. All right. Very
18 good. Anything further for Mr. Query before we
19 take our morning break?

20 MR. HILDEBRAND: No, sir.

21 THE COURT: All right. Thank you
22 very much, Mr. Query. Thank you for coming in,
23 sir.

24 THE WITNESS: Thank you.

25 THE COURT: Okay. All right. He

1 can be excused as well?

2 MR. BUNDY: Yes, Your Honor.

3 THE COURT: All right. Thank you,
4 Mr. Query.

5 MR. TERRY: Your Honor?

6 THE COURT: Yes, sir.

7 MR. TERRY: We have Mr. Query under
8 subpoena for our case.

9 THE COURT: Oh, you do? Okay. All
10 right.

11 MR. TERRY: So we're happy to
12 coordinate with him for coming back.

13 THE COURT: Sure. Okay.

14 MR. TERRY: But I would prefer that
15 you not release him.

16 THE COURT: Okay. All right.
17 Apparently you're under subpoena by Mr. Terry, so
18 you may be back. I hate to tell you that, but
19 anyway.

20 THE WITNESS: Fantastic.

21 THE COURT: All right. And just so
22 you know, right now we are scheduled for work
23 this week and next, and then come back. I was
24 planning on doing the subcontractors some time --
25 I can't remember what week it is.

1 MR. TERRY: After Thanksgiving.

2 THE COURT: The week after
3 Thanksgiving? Okay. And so it may not be until
4 then, but I just want you to be aware of that.

5 THE WITNESS: So it may be before
6 then?

7 THE COURT: It would either be this
8 week, more than likely next week, or possibly --
9 what week is that?

10 MR. TERRY: The 29th.

11 THE COURT: November 29th week, the
12 week following Thanksgiving.

13 THE WITNESS: And I'm sorry, Your
14 Honor, do I need to just show up or will someone
15 tell me?

16 THE COURT: They will let you know.
17 We will put you on notice.

18 (A recess transpired.)

19 THE COURT: All right. Mr. Bundy?

20 MR. BUNDY: Thank you, Your Honor.

21 Before we start on the next witness, maybe a
22 little housekeeping on these depositions.

23 THE COURT: All right.

24 MR. BUNDY: We now have
25 Mr. Hildebrand's counter designations.

1 THE COURT: Okay.

2 MR. BUNDY: And so what we have
3 here is, this is the videos -- Tom, here are your
4 videos of all of the witnesses. (Inaudible) were
5 cut so that they match up with your designations
6 and ours.

7 MR. HILDEBRAND: Okay.

8 (DFT. EXH. 101 was marked for
9 identification.)

10 MR. BUNDY: All right. And, Your
11 Honor, Defendant's Exhibit 101 is your deposition
12 stuff, and it contains 4 USB drives containing
13 the video deposition experts.

14 It contains a copy of Library
15 Associates, LLC's designations and excerpts from
16 depositions, and a copy of Balfour Beatty
17 Construction's counter designations to the
18 depositions, and the deposition exhibit excerpts
19 exhibits, which are Defendant's Exhibit 52
20 through 88, which were introduced in these
21 depositions.

22 So I would move to introduce Defendant's
23 Exhibit 101 at this time, and then we have
24 Exhibit 102.

25 (DFT. EXH. 102 was marked for

1 identification.)

2 THE COURT: Okay. One second.

3 Let's go through it. Yeah, let's go ahead and go
4 through it. Okay. Go ahead.

5 MR. BUNDY: We have Exhibit 102,
6 which is the deposition of Patrick O'Connor. It
7 was not videoed. It's the only one that we're
8 presenting that was not, and it has designations
9 and counter designations in it. And we've marked
10 it as Exhibit 102, and I move to put that in
11 evidence as well.

12 THE COURT: Defendant's 101 and
13 Defendant's 102. And 101 is actually four
14 separate video depositions; is that correct?

15 MR. BUNDY: No, sir. It's about 30
16 depositions.

17 THE COURT: Okay. Okay.

18 MR. BUNDY: It's all of them, but
19 we put -- we've managed to squeeze them in to
20 four USB drives.

21 THE COURT: Four USB drives. Okay.
22 Okay. So experts, those are depos, and then
23 Exhibits 52 through 88?

24 MR. BUNDY: Yes, sir, which were
25 introduced in these depositions.

1 THE COURT: They're referenced
2 within the depositions?

3 MR. BUNDY: Yes, sir.

4 THE COURT: Okay. All right.
5 Mr. Hildebrand?

6 MR. HILDEBRAND: I'm not sure that
7 I heard Mr. Bundy correctly -- or maybe I just
8 didn't hear him well, but I understood that he
9 gave you his deposition transcripts, and I
10 understand that, and our counter designations.

11 But I think I also may have heard him
12 say that he was providing you with all of the
13 exhibits to all of those depositions and that
14 those will be introduced as an exhibit through
15 what he just handed to you. But I think we need
16 to go through the same process that we did before
17 like we did with mine to see if he actually --

18 THE COURT: Admissibility of the
19 exhibits, right?

20 MR. HILDEBRAND: Right, right. Did
21 he admit them properly? Were they referenced in
22 the deposition? Just the exact same process that
23 you went with -- through ours. I just didn't
24 want to make -- make sure I didn't slip through
25 the cracks.

1 THE COURT: Right.

2 MR. BUNDY: Well, I thought that's
3 what his -- I thought that's what he was supposed
4 to do when I designated the -- I expected him to
5 designate. When I designated my deposition --
6 and I'm not trying to put in every exhibit
7 referred to.

8 THE COURT: I asked about that.

9 MR. BUNDY: I've simply designated
10 portions of the depositions in which some of
11 those portions introduce evidence, and if those
12 were designated, I don't see how you can conclude
13 that I wasn't trying to introduce the exhibit
14 referred to.

15 So what I expected was, is that if he
16 exhibit -- if objected to that exhibit, he would
17 have said so, and we could come in here and argue
18 about the ones he disputed. So it seems like
19 we're doing it backwards, but we can do whatever
20 he wants to do.

21 THE COURT: Okay.

22 MR. BUNDY: But it puts me at a
23 disadvantage in the sense that, since I've never
24 gotten an objection to any of these exhibits,
25 okay?

1 THE COURT: Okay.

2 MR. BUNDY: You might determine
3 that an exhibit I thought he didn't object to, if
4 he now objects to it, you now say, no, it's not
5 going in.

6 So now what I've got to go do is find
7 the witness or a different witness to come get
8 that exhibit in, which I thought was going to be
9 in because I never got any counter designation or
10 objection to the exhibit.

11 THE COURT: Okay. Okay. All
12 right.

13 MR. BUNDY: So I don't know. If we
14 get there, I would request that Your Honor allow
15 me to figure out, I may have to recall a witness.

16 THE COURT: Okay.

17 MR. BUNDY: Or I may have to
18 actually call one of these witnesses in person in
19 order to get it in, depending on what the basis
20 of the objection is.

21 THE COURT: All right. All right.
22 Well, rather than spending time on that, you've
23 designated exhibits as being 52 through 88.
24 We've got those listed and marked so we know what
25 they are talking about there. Is that what

1 you --

2 MR. HILDEBRAND: I haven't seen
3 them. I think where this came from --

4 THE COURT: Right.

5 MR. HILDEBRAND: -- is that, with
6 my exhibits, I had a bunch of notebooks and so
7 they were readily, fairly accessible by Your
8 Honor, and we could go through them.

9 THE COURT: Sure.

10 MR. HILDEBRAND: I just didn't -- I
11 had understood that Bill was going to
12 introduce -- or designate testimony, not
13 exhibits. So if he wants to do exhibits like I
14 did, then that's fine. But I just would like an
15 opportunity to see what they are and have an
16 objection to it or not because I didn't realize
17 that that's what he was doing.

18 MR. BUNDY: Your Honor, may
19 Mr. McDonald speak? He is the one who handled
20 this.

21 THE COURT: Sure.

22 MR. MCDONALD: At the end of the
23 conclusion of the trial, I was given ten days to
24 do two things: Make directed verdict motion and
25 get Mr. Hildebrand the deposition exhibit and

1 designations. I did both things.

2 The designations that we submitted to
3 Mr. Hildebrand on October 4th, which he had until
4 October 11th to give us counter designations,
5 specifically listed the deposition exhibits in
6 those depositions that we intended to offer into
7 evidence.

8 We got counter designations. We got no
9 objections. We had a day to respond to his
10 designations and exhibits, which I did. Your
11 Honor may recall that I went through it and
12 objected to the ones that I objected to.

13 THE COURT: Sure.

14 MR. MCDONALD: He's known about
15 this for three weeks, not he didn't realize it
16 was designated in the counter designation, those
17 very exhibits from the deposition.

18 THE COURT: All right.

19 MR. HILDEBRAND: Well, it's one
20 thing to have --

21 THE COURT: Hold on. I just want
22 to jump to the issue here. So the objection that
23 you would have is not as to the deposition
24 excerpts, it may be as to the exhibits?

25 MR. HILDEBRAND: Precisely, Your

1 Honor.

2 THE COURT: And you would like to
3 be able to review those exhibits and then make
4 your -- assuming that there's a contemporaneous
5 objection at the time of the deposition, you
6 would like to argue the admissibility of those
7 exhibits? Is that fair to say?

8 MR. HILDEBRAND: It's exactly what
9 happened at the -- the exhibits that we tried to
10 introduce through our depositions. And you
11 looked at those. You looked at the transcripts,
12 and then you made a ruling as to whether they
13 were in or out.

14 THE COURT: All right.

15 MR. HILDEBRAND: And it was a
16 misunderstanding on my part. I mean, people
17 refer to it -- it's one thing to reference an
18 exhibit in a deposition. It's an entirely
19 different thing to introduce it as an exhibit in
20 trial, and that's where it was mixed up on my
21 part, perhaps.

22 THE COURT: Okay. Okay.

23 MR. HILDEBRAND: So I would just
24 simply like to look to see what they are, what
25 their exhibits are, and then tell you which ones

1 that we -- and then you can go through the same
2 process.

3 THE COURT: Gotcha. Y'all have got
4 hard copies of these exhibits, I'm sure?

5 MR. MCDONALD: We do indeed, Your
6 Honor.

7 THE COURT: Okay.

8 MR. BUNDY: And just note my
9 objection to that interpretation of the rule.

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

11 MR. BUNDY: There's no such thing
12 as a de bene esse deposition anymore. I don't
13 know why people still keep going back. It's just
14 not -- it was a statutory situation that no
15 longer exists. Okay?

16 And a deposition, once they're
17 unavailable, everything that happens in a
18 deposition happens in court. So when you move to
19 introduce a deposition, unless you object, I
20 think you've waived it.

21 THE COURT: All right.

22 MR. BUNDY: Thank you, Your Honor.

23 THE COURT: Well, here's what I'm
24 going to have y'all do as it relates to the
25 exhibits, and that is to provide Mr. Hildebrand

1 with those 26, 27 Exhibits 52 through 88. You
2 can review those this evening and see how they
3 look, and let's go through that list. We will do
4 that sometime tomorrow. Okay?

5 MR. BUNDY: Okay.

6 THE COURT: All right.

7 MR. HILDEBRAND: Can I have one
8 more day, Your Honor? It might be a tall order
9 to review them all.

10 THE COURT: I realize that, but
11 Mr. Bundy promised me we're going to finish --
12 he's going to finish tomorrow.

13 MR. HILDEBRAND: Is that --

14 MR. BUNDY: I hope to.

15 MR. HILDEBRAND: I mean, seriously?

16 MR. BUNDY: I don't -- when I come
17 in here, I'm serious about everything, yes.

18 MR. HILDEBRAND: Well, you say
19 you're going to spend a couple days
20 cross-examining Tim Spano.

21 MR. BUNDY: Well, that was so you
22 wouldn't be ready for the next witness. It ain't
23 got nothing to do with that. Okay? Tom, this
24 ain't marbles. I'm down here trying to win.

25 THE COURT: We all know that. We

1 all know that. See if you can't take that, and I
2 will take a look at it.

3 They ought to -- easily they ought to
4 refresh your memory when you see them, and then
5 we go from there. We should be able to get
6 through that relatively quickly. I had planned
7 to do that tomorrow around lunch time. Let's
8 just do that tomorrow around lunch time.

9 MR. BUNDY: Okay. With the caveat
10 that you still were working on these exhibits.
11 Are Exhibits 101 and 102 in evidence?

12 THE COURT: All right. I'll allow
13 those in evidence subject to the documentation on
14 the exhibits. We will cover that tomorrow.

15 MR. BUNDY: Great. Thank you, Your
16 Honor.

17 (DFT. EXH. 101 and 102 were
18 received in evidence.)

19 THE COURT: Okay. All right.

20 MR. HILDEBRAND: So 101 and 102 are
21 the deposition excerpts?

22 THE COURT: Excerpts with the
23 counter designations.

24 MR. MCDONALD: Except, Your Honor,
25 just to be clear, they just e-mailed us their

1 counter designation for O'Connor. I thought,
2 because of the rule, that they should e-mail it
3 to you at the same time. So your clerk, I
4 believe, will be getting an e-mail from them with
5 their counter designations. That is Patrick
6 O'Connor's entire deposition.

7 THE COURT: Okay. That's what
8 y'all submitted is his entire deposition?

9 MR. MCDONALD: Yes, that's 102.

10 THE COURT: And then I assume if
11 they've got counters, it will be in there, right?
12 Thank you for that reading material and video.

13 MR. HILDEBRAND: So we will need to
14 get our counter designations and just throw them
15 in that.

16 THE COURT: It will be in there,
17 but if what y'all want to do is say, this is what
18 we really want you to take note of, I'm happy to
19 do that. Okay?

20 MR. HILDEBRAND: Right. Thank you.

21 THE COURT: Okay. A little
22 housekeeping then. Are you ready to proceed?

23 MR. BUNDY: May it please the
24 Court?

25 THE COURT: Yes, sir.

1 MR. BUNDY: Thank you, sir.

2 Library Associates would call Jim Clements to the
3 stand.

4 THE COURT: All right.

5 Mr. Clements?

6 (JIM CLEMENTS, having first been
7 duly sworn, testified as follows:)

8 THE COURT: Please have a seat.
9 Watch the back of that chair.

10 THE WITNESS: Yep.

11 THE COURT: And if you would give
12 us your full name and address for the record,
13 please.

14 THE WITNESS: James Michael
15 Clements, 322 Prince Street, Georgetown, South
16 Carolina.

17 DIRECT EXAMINATION

18 BY MR. BUNDY:

19 Q. Jim, where were you born?

20 A. Washington, DC.

21 Q. Okay. And what is your educational
22 background?

23 A. Graduated from the University of South
24 Carolina, a BS in biology and chemistry.

25 Q. What year?

1 A. '76.

2 Q. Okay. And any subsequent formal
3 education?

4 A. No.

5 Q. Okay. And from '76, that's 1976 onward,
6 what was your employment history up until today's
7 date?

8 A. Graduated from college. I was going to
9 apply to medical school, fell in love with a
10 woman, and went to work for a mortgage banking
11 company. And I've been in construction and
12 development the last 46 years.

13 Q. Did you play sports at Carolina?

14 A. I did, basketball.

15 Q. What did you play?

16 A. What position?

17 Q. Yeah.

18 A. Swing forward.

19 Q. Who did you play with? What team were
20 you on?

21 A. South Carolina Gamecocks.

22 Q. Okay. Who were some of your teammates?

23 A. English, Dunleavy, Gause, Winters. We
24 had a good crowd.

25 Q. Back when we had a real coach?

1 A. Yes, sir.

2 Q. All right, sir. During the last 30
3 years of your -- 30, 40 years of your employment
4 in the construction industry --

5 A. Yes, sir.

6 Q. -- how about give the Judge the benefit
7 of your actual work experience, maybe the company
8 you were with, some of the projects you worked
9 on, some of the companies you worked for.

10 A. Okay.

11 Q. So what got you here?

12 A. So I started out working for a mortgage
13 banking company that did its own development. I
14 grew up -- I became a superintendent with them.
15 I then went to work as a general superintendent
16 for a heavy construction company putting lifts,
17 stands -- force mains, lift stations and such.

18 From there, I started my own commercial
19 firm, but I was living in Kansas at the time and
20 wanted to get back to DC. So I went to work for
21 Clark Construction Group out of Bethesda,
22 Maryland, very, very large.

23 Q. What do you think they do on an annual
24 basis, or did they?

25 A. Now, probably close to 4 billion.

1 Q. Okay.

2 A. At the time I joined them, they were
3 about 750 million. So I was hired to wrap up a
4 hotel called National Place on Pennsylvania
5 Avenue.

6 We primarily did some work in the public
7 areas, and there was a few -- it was a big,
8 big -- back in the '70s, it was probably 120
9 million dollar project. It was a big office
10 component right on Pennsylvania Avenue, just down
11 from the capital.

12 Q. What was your role on that project?

13 A. Project manager. And then from there,
14 let's see. I went to build the Bulk and General
15 Mill Facility for Washington, DC, the one that
16 got anthrax. So I built that ground up.

17 Q. What was your position on that project?

18 A. Project manager.

19 Q. Okay.

20 A. That was about 50 million dollars back
21 in those days. From there, I went into
22 procurement. They had me as a buyer. During
23 that time, I bought out the Grand Hyatt Hotel in
24 Washington, DC, very large five-star hotel.
25 After that project, during that time, they took

1 me and sent me to the McClain Hilton, and I built
2 a five-star hotel there, McClain Hotel.

3 Q. And you were the project manager?

4 A. Yes, sir. Actually, I got promoted to
5 senior project manager at the time.

6 Q. Okay. Well, it seems to be about time.
7 And who was your boss again during that period?

8 A. Dick Duffy, the senior vice president of
9 Clark Construction.

10 Q. Okay. And you're still with the same
11 construction company?

12 A. Yes, sir, no changes.

13 Q. Okay.

14 A. From there, they sent me to Manhattan as
15 a -- I became a project exec there, and I was in
16 charge of the expansion of the Lincoln Center,
17 the Juilliard School of Music.

18 Q. How big a job was that dollar wise?

19 A. So that was in early '80s. Well, there
20 was a large condominium component of it. The
21 Juilliard School was five basements deep in
22 Manhattan, five stories above was a giant podium.
23 And on top of that, we have a 46 story luxury
24 condominium tower, and on the other corner, we
25 had a 13-story dormitory for the school.

1 Q. If you would, just give the Judge some
2 of the -- I think the word they use now, the
3 challenges that you would have been facing in the
4 city of New York, building this type of structure
5 with regard to staging, lay down, bribes,
6 whatever it took to get it built.

7 A. It's a postage stamp. You know, like
8 all those type of projects, you don't have any
9 place to lay things down. Everything came in on
10 trucks. So you got the union issues related to
11 that, the teamster issues, of course.

12 But digging a basement five stories down
13 in Manhattan, in shifts is challenging in itself.
14 We had a hundred-year-old Edison gas main -- 30
15 inch gas main alongside the site, pretty
16 precarious. We're up tight against the Lincoln
17 Center, so foundation systems were underpinning.
18 Very, very challenging project.

19 But it went well. It went well.
20 Working in New York is not applicable to any
21 other place, maybe Philadelphia or someplace.
22 But the challenges of the unions was burdensome,
23 but, you know, I pride myself in being a good
24 communicator and a consensus builder and worked
25 very, very well. Towards the end of that

1 project, I was recruited by Bovis International,
2 based in London.

3 THE COURT: Bogus?

4 MR. BUNDY: Bovis, yes.

5 THE COURT: B-O-G?

6 MR. BUNDY: B-O-V-I-S, Bovis.

7 BY MR. BUNDY:

8 Q. They're one of the largest contractor's
9 in the world, aren't they?

10 A. Correct.

11 Q. Bovis Lend Lease. Were they Lend Lease
12 at that time?

13 A. No. Sorry, let me say that -- Lend
14 Lease had bought them, but they hadn't changed
15 the name to Bovis Lend Lease.

16 Q. And they also bought McDevitt Street,
17 right?

18 A. They had bought McDevitt Street.
19 Actually, McDevitt Street was the program
20 manager -- what I do for a living now -- on my
21 project for the Lincoln Center.

22 And they had -- Bovis had bought them,
23 and that really made the (inaudible) guys annoyed
24 when I left. But I got recruited there, and I
25 went to London with my family, and I spent four

1 years there. Primarily -- they used me primarily
2 for preconstruction development and auditing some
3 projects.

4 Q. What do you mean by audit?

5 A. Well, if there's a problem project --
6 there was a large Ritz-Carlton being built in
7 Barcelona in time for the Olympics at the time.
8 I think it was '86 maybe or something like that,
9 and there was a lot of problems there. And I
10 went down there on a regular basis for a while to
11 try and help cure some of the problems.

12 Q. Now, in your -- what was your title
13 again with Bovis?

14 A. You know, I don't -- well, I became
15 director of preconstruction services. I became
16 director of preconstruction services. The
17 only --

18 Q. You have been referred -- you weren't in
19 the -- I don't know. You probably weren't in the
20 courtroom, but you were seen by Mr. Starcevic as
21 merely a messenger.

22 A. Oh, really?

23 Q. Yes, yes.

24 MR. HILDEBRAND: Objection, Your
25 Honor. It's leading, and it's -- to Mr. Bundy's

1 point, pitting one witness against another. So I
2 don't think it's a fair statement.

3 THE COURT: I will sustain that.
4 See if you can rephrase that.

5 BY MR. BUNDY:

6 Q. Let me rephrase. When you worked for
7 Bovis Lend Lease and went to Barcelona to solve a
8 problem at the Olympics, were you acting as a
9 messenger?

10 A. No.

11 Q. Okay. In your last 35 years, have you
12 ever been employed as a messenger?

13 A. No.

14 Q. You don't deliver papers and you don't
15 deliver letters or coffee, do you, sir?

16 A. No, I don't.

17 Q. Okay. And Mr. Bennett didn't hire you
18 on this job to be a messenger, did he?

19 A. No, sir.

20 Q. Okay. Thank you. Now, let's proceed
21 with your history, not sustaining your --

22 A. Well, while I was in London, Bovis was
23 building Euro Disney. And the chairman of Bovis
24 International came to me and said there was a
25 problem on Main Street. He sent me over to take

1 a look at it because the project was opening up
2 in six months. I got to Main Street, and there
3 was nothing there. I came back and explained
4 that to him, and he said, you've got six months
5 to fix it. And I did. No messenger involved in
6 that process.

7 Q. Just a little bit more on Bovis Lend
8 Lease. Do you have any idea of how much business
9 they're doing now or they were doing at the time
10 you worked for them?

11 A. No, no. I mean, they were all over the
12 world. I mean, I worked on projects throughout
13 continental Europe, a lot of time in Germany.

14 In Germany, I headed up the
15 preconstruction on a big mixed-use development
16 called Centro. Back in that day, it was over a
17 billion dollars. I particularly was focused on
18 the large retail development section. At that
19 time, it was 200 million dollars.

20 THE COURT: And that's where?

21 THE WITNESS: Centro Oberhausen.
22 That's outside of Dusseldorf.

23 THE COURT: Dusseldorf, okay.

24 BY MR. BUNDY:

25 Q. Let me try it this way.

1 A. Yeah.

2 Q. Is Bovis Lend Lease in the top ten
3 contractors in the world?

4 A. I would hope so. I would think so.

5 Q. Okay. All right. So after -- so you
6 stayed in your four years working for Bovis Lend
7 Lease?

8 A. Yes, sir.

9 Q. And that brings us up to when,
10 Mr. Clements?

11 A. I came back from Europe in late '86,
12 just about -- I was offered a green card. They
13 asked me to stay, but I really wanted to come
14 back. And I joined a friend of mine who had just
15 been a project manager for McDevitt Street and
16 built a NationsBank Tower in Charlotte. It's a
17 big building.

18 And so we started a construction
19 company. Because of my experience in Europe with
20 program management, which I feel that they were
21 the leaders and different from construction
22 management, which I can explain if you would like
23 me to.

24 I marked that business into a program
25 management business. We did do general

1 construction. One of the things we did as
2 general contractors is we upfitted all the suites
3 in the Panthers Stadium, for instance.

4 Q. Let me stop you there, and I want ask
5 you to expand on the distinction between the
6 construction manager and the program manager for
7 the Judge's edification.

8 A. You know, they're often confused, and
9 sometimes I'm not sure I even have the right
10 story. But a construction manager is licensed to
11 direct subcontractors. You talk about
12 (inaudible).

13 In the State of South Carolina, where I
14 reside, to be a project manager, which is what
15 was my primary business or program manager, my
16 role is to support the client in developing its
17 product.

18 And by that, I mean, because I have a
19 general contractor's license in North and South
20 Carolina, I'm also the broker-in-charge for my
21 company in North and South Carolina. Because of
22 that experience, I helped them with land
23 selection for farm and development, finalizing
24 budgets.

25 And then I competitively bid the work,

1 the general contractor, the design, all the
2 interior components, FF&E, security systems,
3 furniture. I do a lot in the healthcare
4 marketplace, particularly. But that is my role
5 is to reinforce.

6 By that, I mean, I work with clients
7 that have project managers, so Mr. Bennett is a
8 good example of that, to be honest with you. But
9 when they come upon a project that is out of
10 their wheelhouse, they want some depth. They
11 hired me.

12 And so the idea there is that I bring my
13 experience to them on a fee basis to supplement
14 them and to provide guidance and support. And
15 that's why Mike hired me because I had -- I knew
16 Mike in college. He and my younger brother
17 were -- still are very close friends.

18 But Mike asked me to take a look at
19 this. In fact, I chased Mike for some work for a
20 while, but he said he didn't need any help
21 because he was cranking out the limited service
22 hotels like they were nobody's business.

23 But along came this project, and Mike
24 made no bones about it being something out of his
25 wheelhouse with regard to it being, you know, a

1 five-star type of opportunity and a much larger
2 project. And so we got together, and then Mike
3 hired me to support he and Kim in the
4 construction process.

5 Q. Okay. Given your experience at or about
6 the time Mike hired you, did you feel comfortable
7 taking on this project? Did you feel like you
8 were capable or qualified to handle this hotel?

9 A. Absolutely.

10 Q. Okay. Because in terms of just
11 percentages, a 50 or 60 million dollar hotel is
12 not a particularly large project in your history,
13 is it?

14 A. No, but it was the prestige of it, to be
15 honest with you. It wasn't about the money,
16 although money is nice. But I really -- I'm at
17 the twilight of my career, and it was a
18 significant project that I would like to have on
19 my resume.

20 And I was anxious to do the work, and I
21 had just relocated to Georgetown. So, you know,
22 it's 70 miles away, and it's something everything
23 that I really wanted to do, plus Mike, you know,
24 I know him, and we got along pretty good.

25 Q. Tell the Judge a little bit about Mike

1 Bennett's management or lack of management style
2 when he starts to do something like this. Is
3 he -- I mean, you tell me. What was your
4 experience with the way he handles these types of
5 things, and once he decides to turn something
6 over to somebody, what his involvement is and
7 that sort of thing, based on your actual
8 experience?

9 MR. HILDEBRAND: Well, Your Honor,
10 I think that calls for speculation. If he wants
11 to say what Mike would benefit on this project,
12 fine. But he said, tell him about what his --
13 what Michael Bennett does for the projects when
14 he develops projects. I think if he directs it
15 to this project, then --

16 THE COURT: All right. I would
17 imagine that's all he knows, but he can expand on
18 that. I'll overrule the objection.

19 THE WITNESS: So I only know Mike
20 from this project, from a working relationship;
21 so we'll clarify that. So Mike was very, very,
22 very involved in the preconstruction process. We
23 engaged Balfour Beatty -- well, we went
24 through an RFP -- excuse me, let me back up.

25 I'm not sure that Mike ever went through

1 an RFP process in terms of the project. And also
2 most of Mike's work was lump sum, and so I
3 brought to the -- the opportunity to CM at risk,
4 which I have extensive experience in, and this my
5 preferred format for construction.

6 THE COURT: What type of risk was
7 that?

8 THE WITNESS: CM, Construction
9 manager at risk, the A133 contract agreement.

10 THE COURT: All right.

11 THE WITNESS: So in fact, that's
12 how I met Mr. Bundy. We met up close to where he
13 lived, and we discussed the contract format. And
14 my preference to use the AIA document and -- as
15 opposed to the --

16 MR. BUNDY: Consensus.

17 THE WITNESS: -- consensus
18 document. We chose that format. And then from
19 there, we initiated an RFP process, and give
20 the --

21 BY MR. BUNDY:

22 Q. And RFP stands for what?

23 A. Request for proposal process. And given
24 the complexities of the project, you need a good
25 firm to take a look at it. And my number one

1 priority is to get the best people on the team.
2 Number one, it makes my life easier, but my
3 management philosophy is, let the people do what
4 they're good at and go from there.

5 And if there's problems, you solve the
6 problems. So I had finished a hotel project with
7 Balfour Beatty at the end. It went okay. The
8 client was very, very happy. It was about a 30
9 million dollar project in Charlotte.

10 Q. What project was that?

11 A. Sorry, I said hotel, I apologize. It
12 was a law school. There was a law school in
13 Charlotte. And Mike Baumbach, who is a very
14 close friend of mine, had come on board with
15 Balfour Beatty, and he actually helped finish up
16 that project. And, you know, I thought a lot of
17 him.

18 And so this opportunity came up, and
19 Mike had built hotels as well as -- not just in
20 -- well, he had built hotels in Charleston, and
21 he was familiar with the foundations. And I
22 thought that Balfour Beatty would be a good
23 candidate. I knew Mike primarily from healthcare
24 work because a bunch of my work is -- at that
25 time was healthcare.

1 Q. And by Mike, you mean Mike Baumbach?

2 A. Yes, sir, Mike Baumbach, Mike Baumbach.

3 I had also worked a lot with WM Jordan, a very
4 large company, and invited them to the table.
5 And then the Bennetts had just finished up a
6 project with a company called Welbro in Savannah,
7 and they wanted them included.

8 And so we initiated a very, very formal
9 RFP process, request for proposal process.
10 It probably initiated in September of 2015, and
11 by -- I believe it was around December 2015, we
12 had signed up Balfour Beatty. And that was
13 for -- let me explain that.

14 In the 133 format, it's a two-stage
15 agreement. So for first stage is a nonbinding
16 preconstruction agreement, and then the second
17 stage, you execute amendment to do construction.
18 So we executed the initial -- we signed the
19 contract and went forward based on that.

20 (DFT. EXH. 103 was marked for
21 identification.)

22 Q. Let me stop you for one second. Can you
23 identify Exhibit 103, please?

24 A. Yes, sir. That's my RFP along with
25 exhibits from the architect.

1 MR. BUNDY: Your Honor, I move to
2 introduce this as Exhibit 103 in defendant's
3 case.

4 THE COURT: Okay.

5 THE WITNESS: That includes the
6 contract, which is of paramount importance
7 because I never issue an RFP without a contract,
8 specifically because I wasn't trying to hire
9 somebody unless I know what the exceptions are.
10 BY MR. BUNDY:

11 Q. All right. But without the contract,
12 you wouldn't be able to know what risk you were
13 taking on, right?

14 A. Right, absolutely.

15 Q. And that's -- in order to bid a job,
16 part of it is to allocate risk, right? What risk
17 am I willing to take and what is it going to cost
18 you if I take that risk, right?

19 A. Particularly in CM, and that's very
20 important because it's a shared risk.

21 Q. In its simplest form, isn't the contract
22 nothing other than a device to allocate risk
23 between parties for a price?

24 A. I would agree with that, yes, sir.

25 MR. BUNDY: Okay. Is it in

1 evidence or not?

2 THE COURT: Just one second. Any
3 objection?

4 MR. HILDEBRAND: So this is a copy
5 of the original RFP and the --

6 THE WITNESS: And the exhibits, the
7 exhibits meaning the WLE design documents.

8 MR. HILDEBRAND: Is it a complete
9 copy?

10 MR. BUNDY: Yes, it's a complete
11 copy. He has testified to it under oath.

12 MR. HILDEBRAND: Okay. With that
13 representation, I have no objection.

14 THE COURT: All right. Without
15 objection.

16 (DFT. EXH. 103 received in
17 evidence.)

18 BY MR. BUNDY:

19 Q. Let me have your copy back, and I'm
20 going to give you this one.

21 A. So in this case, we executed the 133 and
22 started the stage one which was preconstruction.

23 Q. All right. Let's back up a minute.
24 Slow down a little bit.

25 A. Okay.

1 Q. The process of your work as a program
2 manager early on begins with the -- deciding who
3 you're going to recommend -- who you're going to
4 send these to, right?

5 A. Yes, sir.

6 Q. Because this is not government work.
7 You're not required to take the lowest
8 responsible and responsive bid, correct?

9 A. Correct.

10 Q. Okay. Which causes problems with
11 government work because you've got to take the
12 lowest bid, and then you get change ordered to
13 death, right?

14 A. That happens.

15 Q. Yes, it does. So once you've delineated
16 the three or four people you want to interview,
17 okay, then you prepare the documents, correct?
18 Prepare the RFP?

19 A. Concurrently that's done.

20 Q. You prepare your request for proposal?

21 A. Yes, sir.

22 Q. It's like an invitation to make an offer
23 basically. Here's what we want built. We would
24 like you to look at it and tell us what you
25 think, right?

1 A. Yes, sir.

2 Q. Okay. And that's done in conjunction
3 with the architect, consultants, yourself, the
4 owner, and everybody else because everybody has
5 got to decide what they want, right?

6 A. Yes, sir.

7 Q. And you also have to make sure the City
8 of Charleston is going to let you build it. You
9 can't built it 32 stories high, right?

10 A. Yes, sir.

11 Q. You've got to comply with apparently
12 some rule that BMCC knows about churches that I'm
13 not aware of, but that's another issue, too. So
14 when you -- whose involved -- give me all the
15 people involved in that process. You've got
16 lawyers involved?

17 A. Well, we have lawyers, the design team.
18 Buck Lindsay was on board at the time. We needed
19 an interior designer. So Design Continuum.

20 I recommended another firm out of
21 Atlanta. Buck recommended Design Continuum. We
22 issued a -- Buck and I issued a request for
23 proposal from them. Mike interviewed both of
24 them and the decision was taken to use Design
25 Continuum.

1 MR. BUNDY: Okay. This is Exhibit
2 103, right? Is that what we said?

3 THE COURT: Yes.

4 BY MR. BUNDY:

5 Q. How much time and effort do you think
6 was involved in creating Exhibit 103?

7 A. A lot. I mean, it takes a couple OF
8 weeks for me to do.

9 Q. Okay. But the totality -- do you think
10 this thing costs 50 grand to produce?

11 A. Well, I had used it before.

12 Q. Okay.

13 A. So I had templates to drawn upon.

14 Q. Not your work, but all the work of
15 everyone else.

16 A. Oh.

17 Q. I'm talking about all the work --

18 A. Oh, no. That's -- yeah, there's lessons
19 learned here from decades.

20 Q. Pardon me?

21 A. There are decades of lessons learned
22 here, represented in this document.

23 Q. Okay. And is one purpose of RFP to try
24 to explain to the potential bidders as clearly as
25 possible, with as few ambiguities possible, as to

1 what you're looking for? Is that one of the
2 goals?

3 MR. HILDEBRAND: Objection, Your
4 Honor. He's just flagrantly leading the witness.

5 MR. BUNDY: I will withdraw the
6 question.

7 BY MR. BUNDY:

8 Q. What are the goals of the RFP?

9 A. Well, the goal of the RFP is really
10 transparency. This is the project we want to
11 build. It lists out our expectations of the
12 contractor.

13 There was no expectation included with
14 regard to how long it would take or how much it
15 would cost, and with that regard, it was a blank
16 sheet of paper. I have done projects before
17 where I included the owner's budget because they
18 had to stay within the budget.

19 Or particularly in healthcare, when we
20 have CON issues, there is a hard stop or a
21 constraint or, you know, the CON applications and
22 such like that.

23 THE COURT: Certificate of need,
24 right?

25 THE WITNESS: Yes, sir.

1 THE COURT: All right.

2 THE WITNESS: So this document
3 includes chapter and verse of restrictions of the
4 preconstruction process with what is expected,
5 with regard to as design is developed.

6 The contractor is required to update his
7 pricing, provide schedule updates, go through the
8 terms of construction analysis, give us feedback
9 on that. You know, generally anything you see is
10 wrong, we're looking for help.

11 The contractor in this format is
12 inadequate, and we were working together
13 synergistically to try and create an open
14 platform to build a project. And it's very
15 explicit, to build it as economically and as
16 quickly as possible. I mean, that's the burden
17 that's just sitting there.

18 So the contract documents at the time --
19 we don't put a -- although you could put out a CM
20 RFP with full documents, it's preferable to put
21 out a document where you're at the beginning of
22 the design because you want the support of a
23 construction manager to influence the design, not
24 in terms of means and methods, but in terms of
25 constructability, but also in terms of costs,

1 schedule, those types of matters.

2 So this was issued based on schematic
3 design drawings. Schematic design was probably
4 11 or 12 percent of total design, and the idea is
5 that, for a fixed fee -- in this case, I think
6 Balfour's fee was about \$30,000, they bolt on to
7 the design team with me, with the client, any
8 other specialty consultants that we need to bring
9 on board.

10 And we worked together to refine the
11 design, inform the client, inform the architect,
12 track costs, look at contractibility issues, and
13 at the end of the day, once we're through all the
14 design phases, the contractor is afforded the
15 opportunity to propose a GMP, a guaranteed
16 maximum price.

17 That's not owed to him. But I've only
18 had one exception in 46 years where the
19 contractor failed to get the project.

20 Q. All right. So --

21 A. That's how we ended up. That's where we
22 were.

23 Q. Sure. So of all the things that the
24 contractor is given for parameters of what you
25 want, what you would like to see, the two things

1 he's not dictated are price and time of
2 construction?

3 A. Not in this contract.

4 Q. Okay. And that's up to the contractor
5 to offer; is that correct?

6 A. Yes, sir.

7 Q. Okay.

8 A. Now, obviously we have guidance of where
9 he thinks the cost is from the RFP process.

10 Q. Sure.

11 A. Right.

12 Q. Okay. So let's back up a minute. I
13 want to go through the process in a little bit
14 more detail. So you prepare the RFP, you consult
15 with your owner, and you decide who you're going
16 to invite, who you're going to send it to?

17 A. Yes, sir.

18 Q. You make a decision, and you send it
19 out, correct?

20 A. Yes, sir.

21 Q. If they haven't call you, you're getting
22 to -- you're going to them, correct?

23 A. Yes, sir.

24 Q. Sort of like an invitational golf event
25 or something?

1 A. Yeah. I called them ahead of time and
2 say, I've got this project, are you interested?
3 You know, because you don't want to send it out
4 and have them it back.

5 Q. Sure, sure.

6 A. Right.

7 Q. And if Balfour Beatty said they're not
8 interested, you wouldn't have sent it to them?

9 A. Agreed.

10 Q. Because you can't make people respond to
11 a request for proposal?

12 A. No.

13 Q. Okay. So how long was it between the
14 time you sent the request for proposals out, to
15 the best of your recollection, and when there was
16 any interaction, so to speak, or a response from
17 the reported or proposed construction managers?

18 A. Well, I always give them three weeks.
19 If they need a time extension, we're open to
20 that. Because obviously we want as complete a
21 price as possible.

22 During the -- I will call it the bid
23 process, there are opportunities defined in the
24 format of the RFP to submit questions, and those
25 questions are received by myself and the

1 architect of record.

2 And we answered those questions, and
3 regardless of who sent the questions in, the
4 questions and all the answers are sent back out
5 to all the bidders again to maintain an open
6 playing field.

7 Q. Which is much like it's done in the
8 public setting. If somebody is asking a
9 question, then everybody is entitled to the
10 benefit of it, so everybody is on level ground
11 when they make their competitive bid, correct?

12 A. Yes, sir.

13 Q. Okay. But unlike a public situation,
14 Mr. Bennett was not required to accept the lowest
15 price or the shortest time, was he?

16 A. No, sir.

17 Q. Okay. And did he accept the lowest
18 price or the shortest time?

19 A. Actually, honestly, I don't recall what
20 the numbers were. I did the reconciliation of
21 them. I believe Welbro, who had worked before,
22 was the lowest bid, and I believe that WM Jordan
23 was the highest bid, and Balfour Beatty was right
24 there in the mix.

25 And you're not just looking at total

1 price because you have to remember that this is
2 about fee and general conditions, this type of
3 format. In this contract, particularly, we
4 generally fixed the general conditions as a mini
5 GMP.

6 So you have the project guaranteed
7 maximum price, but then, within the total
8 project, there's a GMP on general conditions, and
9 sometimes contractors will ask to do a lump sum,
10 but in this particular case, it was -- we called
11 it a mini GMP.

12 Q. When the contractor is included with the
13 request for proposal, was it acceptable for any
14 of the prospective bidders to ask questions about
15 the contract or provide information, they weren't
16 going to agree to those terms? Was that
17 available to them?

18 A. It is required by the terms of the RFP.
19 The RFP is very explicit. You have one bite at
20 the apple. When you respond, you have to have
21 all of your exceptions. You're not allowed to
22 change your exceptions, but the owner is allowed
23 to change the contract in response to your
24 exceptions.

25 Q. Now, let's go to the next step. Three

1 weeks have passed by and the three -- I see three
2 contractors.

3 A. Yes, sir.

4 Q. Looking at it, there's three general
5 constructions managers that looked at it. Is
6 there any type of meeting or presentation that's
7 made?

8 A. Yes, sir. Well, we go through an
9 interview process. So the first stage is they
10 respond. There may be some questions and answers
11 to further verify their response. In the RFP,
12 the actual interview dates are published,
13 anticipated interview dates.

14 And in fact, we had interviews with all
15 three contractors, including myself, the
16 architect of record. I think you were there,
17 Mike Bennett. I don't remember if Kim was there,
18 but I think she was. But basically, it's an open
19 forum where the contractor is allowed to present,
20 and then we asked our questions.

21 Q. So is it similar to when somebody is
22 looking for a lawyer, they sort of have a beauty
23 contest, and they let two or three different
24 lawyers come in and, of course, they don't hire
25 me because I'm too rude, but they might hire the

1 next guy, right?

2 A. Yes, sir.

3 Q. Okay. So that's what went on?

4 A. Yes, sir.

5 Q. They had a beauty contest?

6 A. I've got to get some of this stuff out
7 of the way. I can't -- it's too tight for me.

8 MR. BUNDY: Your Honor, it's noon.
9 It might be a good time to sort of regroup if
10 that suits you.

11 THE COURT: I was going to run
12 until about 1 today.

13 MR. BUNDY: All right, sir.

14 BY MR. BUNDY:

15 Q. I want to know, how long do these
16 interviews -- where did the interviews take
17 place?

18 A. Actually, they took place at the Hampton
19 Inn, Mike's hotel.

20 Q. Okay. And --

21 A. In one of the meeting rooms.

22 Q. And Defendant's Exhibit -- did the
23 prospective construction managers bring
24 documentation or a response to the RFP?

25 A. They were required to provide hard

1 copies and electronic versions.

2 Q. I hand you what's been previously
3 introduced in evidence as Defendant's Exhibit 39.
4 Can you identify this as the response to the RFP
5 provided by Balfour Beatty Construction,
6 plaintiff, in this case?

7 A. It certainly looks like that. You know,
8 I recognize the project team proposed --

9 Q. It's previously been identified, and
10 it's in evidence.

11 A. Yes, sir.

12 Q. All right. So who was it again that was
13 your contact at Balfour Beatty that led you to
14 believe that Balfour Beatty would be a good
15 choice to receive a request for proposal?

16 A. Mike Baumbach.

17 Q. Okay. And what do you know about
18 Mr. Baumbach's construction history or
19 credentials and why was it that you thought it
20 was a good idea that Baumbach and Balfour Beatty
21 be invited?

22 A. Well, I had done a lot of work around
23 Mike Baumbach in healthcare. Healthcare is very
24 difficult. It is very intensive, a lot of
25 technology, kitchens, rooms. But more

1 importantly, they had built the Ritz-Carlton
2 Hotel in Charlotte, and that was a great hook to
3 me to bring them to the table.

4 Q. And how important was it to you that
5 Baumbach be on this job during construction?

6 A. Well, I like to say I can work with
7 anybody, but I trusted Mike. And he always told
8 me like it is. And we didn't agree on
9 everything, but we could always settle it.

10 And so I was hopeful that he would get
11 the work. I would work with anybody, but at the
12 end of the day, you know, my preference certainly
13 would have been to work with Balfour Beatty and
14 Mike.

15 Q. And eventually it was awarded to -- and
16 was Baumbach mentioned -- is he the one that made
17 the presentation, Baumbach?

18 A. He was certainly in the interview. Bill
19 Lorenzo was there. Pat Ricci's brother was there
20 as the superintendent. He became sick and his
21 son -- I think his younger brother became the
22 superintendent. There was another older
23 gentleman -- I can tell you.

24 Q. Yeah, let's look at that. What was
25 Lorenzo -- who was he?

1 A. Head of preconstruction.

2 Q. Okay.

3 A. Bret Estridge, he was the project
4 manager for the Ritz-Carlton project and Knox
5 Tate, who probably has the biggest resume with --
6 in regards to high quality work at a company
7 called RT Dooley, which Balfour Beatty acquired,
8 and Knox was there, too.

9 MR. BUNDY: So, Your Honor, let me
10 give you a copy of this.

11 THE COURT: Is that 39?

12 MR. BUNDY: 39, yes. I just think
13 you need a copy.

14 THE COURT: Yeah. All right.

15 BY MR. BUNDY:

16 Q. All right. So let's look at -- and
17 this, what we're looking at is Exhibit 39, which
18 was presented at the meeting, at the interview
19 for consideration of Balfour Beatty, correct?

20 A. Yes, sir.

21 Q. All right. And there is, on page 7,
22 section A, a proposed team, correct?

23 A. Yes, sir.

24 Q. All right. And would you read what it
25 says at the top and tell me whether or not what

1 was in this paragraph at the top was a
2 representation that was actually made in this
3 meeting? Were the representations in the meeting
4 consistent of what's in the written document?

5 A. Do you want me to read it?

6 MR. HILDEBRAND: Objection, Your
7 Honor. It's leading -- again, a flagrant leading
8 question. Representations made. It's just
9 simply the team that was on the RFP. This is a
10 leading question. That's my objection.

11 THE COURT: All right. The
12 objection is leading. Restate the question.

13 BY MR. BUNDY:

14 Q. Okay. Well, would you read the first
15 paragraph at the top of Exhibit 39 into the
16 record, please, under our team.

17 A. All right. Our proposed team has been
18 hand selected for the hotel at Marion Square
19 project. Each member has experience working on
20 complex hospitality projects and has delivered
21 best in class, high-end facilities, luxury
22 amenities, and sustainable environments.

23 Our relationship with Lindsay, Pope,
24 Brayfield, Clifford & Associates will allow our
25 team to hit the ground running without the

1 learning curve. Our team has what it takes to
2 deliver the project and exceed your expectations.
3 A complete look at our team skills and experience
4 as outlined on the following pages.

5 Q. Okay. And if you would, read into the
6 record who they proposed as the team, and start
7 first -- well, Mr. Baumbach was going to be the
8 project executive. We talked about him, right?

9 A. Right.

10 Q. That was the gentleman you knew. Who
11 did they say was going to be the project team for
12 Project Solutions?

13 A. Bill Lorenzo, who was head of
14 preconstruction; Keith Rossi. I believe he
15 was -- he worked for Bill. John Katschkowsky, it
16 says here, he's MEP. I don't recall him from the
17 presentation. And Ryan Lawrence, then manager.

18 Q. Okay. So let's -- we've got some
19 initials here I would like to clear up for the
20 record. Mr. Katschkowsky, he was MEP
21 preconstruction. What does MEP stand for?

22 A. Mechanical, electrical and plumbing.

23 Q. Okay. And then we've got the BIM
24 manager. What does BIM stand for?

25 A. Building image modeling.

1 Q. Okay. Now, the Project Solutions team,
2 what -- you told the Judge earlier that all that
3 was provided when the thing began was schematic
4 drawings, right? You gave these proposed or
5 potential builders or construction managers
6 schematic drawings, not complete drawings, right?

7 A. Yes.

8 Q. Was there any misunderstanding as far as
9 you knew, in your conversations with any of the
10 people who submitted a proposal, that they were
11 confused and thought these were a complete set of
12 construction documents?

13 A. No.

14 Q. Okay. If they had have been a complete
15 set of construction documents, would it have been
16 necessary to have a Project Solutions team?

17 A. No.

18 Q. Okay. So is it true that this work was
19 really going to be done in two phases? First,
20 you have to get a set of construction documents,
21 and that's what this Project Solutions team is
22 going to do, right?

23 A. Yes, sir.

24 MR. HILDEBRAND: Objection, Your
25 Honor.

1 THE COURT: Just one second.

2 MR. HILDEBRAND: I think he needs
3 to ask what these people were going to do
4 relative to the project documents. But, again,
5 he is just leading this witness.

6 Every question, it's a -- it is just a
7 flagrantly leading question. If he would just
8 ask him what he did and what they were going to
9 do next and what their responsibilities were,
10 I've got no problem with that.

11 THE COURT: Okay.

12 MR. HILDEBRAND: Every question
13 is -- basically is a leading question.

14 THE COURT: All right. See if you
15 can bring that down a little bit. What were they
16 hired to do and what did they do.

17 MR. BUNDY: All right.

18 BY MR. BUNDY:

19 Q. What was the work of the Project
20 Solutions team as outlined in this request for
21 proposal -- as requested in the request for
22 proposal?

23 A. Well, keep in mind, it's a two-stage
24 proposal. The first stage is preconstruction to
25 develop a guaranteed maximum price. So the

1 Project Solutions, by virtue of their titles and
2 what I know of some of these individuals, they
3 were the preconstruction team.

4 Q. Okay. And what deliverable, if any, was
5 the project construction team supposed to provide
6 at the end of their work?

7 A. The guaranteed maximum price proposal, a
8 schedule, and any qualifications to that price.
9 I think that's about it.

10 Q. And other than the in-house people that
11 the Project Solutions team worked with, who else
12 did they work with who worked on this job during
13 that project team work product?

14 A. Well, Mike Baumbach was very, very
15 involved. Bret Estridge, who was the -- as I
16 recall, the project manager on Ritz-Carlton was
17 involved as well. In fact, I think, as I recall,
18 Bret and I finalized the GMP contract. You and
19 Mike started out with it, and then Bret and I
20 actually finished it up.

21 Q. And my question was -- I guess I didn't
22 ask a very good question. Outside of the Balfour
23 Beatty Project Solutions team, who did they work
24 with outside of their team in order to accomplish
25 their delivery?

1 A. Well, they worked with me. They worked
2 with Mike. They worked with WLA, the architect,
3 and Design Continuum, the interior designer. I
4 don't recall anybody else.

5 Q. Okay. What would have been the nature
6 of their interaction with the architect during
7 that process? We'll call it stage one.

8 A. Well, certainly requesting
9 clarifications, RFIs. Because you have to
10 understand, you don't have the representative
11 documentation, right? So enough information to
12 price it because each design phase, the
13 contractor's provided updated budget, and for us
14 to assess.

15 The whole idea is that, you don't go
16 ahead and design the project, only to find out
17 you can't afford it. So you design the phases
18 and then you adjust the design and the scope to
19 mitigate, you know, budget exposure to control
20 costs or to control schedule, those type of
21 things.

22 Q. Do some people refer to that as value
23 engineering, or is that value engineering?

24 A. I mean, value engineering is a common
25 term. Value engineering, yes. I think value

1 engineering is fine.

2 Q. And during this process, what is the
3 development of the plans? How does the architect
4 develop his plans during that period in
5 interaction with the owner and the other team
6 members, specifically Balfour Beatty's team?

7 A. Well, we started out the schematic
8 designs as a baseline. Those were priced
9 basically on -- as part of the RFP. Those
10 responses from the RFP help influence the next
11 phase, design development.

12 And so Buck and his team, along with the
13 interior designer, developed the site development
14 documents, and that creates the second milestone
15 and that is --

16 Q. Explain to the Judge, if you will, the
17 difference between schematic -- how many stages
18 are there of development of a plan in the typical
19 AIA documents?

20 A. In the AIA document, three. Schematic,
21 design development, and structure documents.

22 Q. Okay. And let's talk about, since you
23 provided the schematics in the RFP, tell the
24 Judge what is generally understood in the
25 industry, what should be, and what is in a

1 schematic set of drawings?

2 A. Well, schematic set of drawings is just
3 basically the vertical and horizontal
4 reconciliation of the building. It sections
5 through buildings. It might give you some facade
6 studies. It will not typically but can provide
7 single line drawings for HVAC. You know, with a
8 duct running here, it might -- it would provide
9 you with the electrical load of the building.
10 But more often than not, because the MEP design
11 follows the architectural design, the MEP is
12 represented in narrative form. This is what
13 we're going to use, and this is what you should
14 allow. You know, this is the HVAC system, and
15 that's the way to inform the bidders, you know,
16 how you're going to proceed. So most often, the
17 MEP design is not even included in the schematics
18 on the documents. In fact, if I recall
19 correctly, it wasn't.

20 Q. Okay. And would that area, the MEP area
21 during this preconstruction solution be something
22 that Mr. Katschkowsky would have been doing?

23 A. In terms of evaluating the design as it
24 progressed, yes.

25 Q. Okay.

1 A. That would be the intent.

2 Q. Okay. That would be the intent. In the
3 schematic drawings, is there any reference to how
4 high the building is going to be, or is that left
5 to be determined later?

6 A. No. The height of the building was
7 locked in from day one, 105 feet.

8 Q. Okay. And do you know what that --
9 whether that was the result of any litigation or
10 contentions between Mr. Bennett and the City of
11 Charleston over a period of 12 years?

12 A. I know that Mr. Bennett tried for 12
13 years to get it approved, and I know I got a
14 building that's 105 feet for a reason. In fact,
15 Mike and I worried about putting the lighting
16 protection rod on top of the building.

17 Q. Okay. So is it true or is not that the
18 building shrunk by 120 feet after the building
19 permit was issued?

20 A. No. That's ridiculous.

21 Q. So at 105 feet reduced by 120, we'd have
22 a 15 foot hole then, right?

23 A. Yes.

24 Q. And I assume you can do that a lot
25 quicker and a lot cheaper than what we actually

1 built?

2 A. Yes, sir.

3 Q. Okay. So the next part or the next
4 level of an AIA plan for design is a design
5 development, correct?

6 A. Yes, sir.

7 Q. And that's the first phase you start at
8 once you start with it. So tell the Judge what
9 the design development phase entails, what the
10 deliverables are, and what input Balfour Beatty
11 had in those deliverables, please.

12 A. So the design development phase is not a
13 complete document. It's somewhere between 60 to
14 80 percent a complete document. But basically
15 what it does is its namesake. It has the design,
16 so it has the design concept.

17 So it may show a cornice piece, but
18 it -- they may not show the cornice everywhere on
19 the project, but it says, this is the cornice
20 that we're going to use. This is the mechanical
21 system that we're going to use. The HVAC system
22 would be much further developed at that time.
23 Interior design would be on -- would start
24 appearing on the documents at that time, but it's
25 not a complete design.

1 Q. Okay. And at the completion of the
2 design development, are you aware of -- are there
3 any requirements that the architect or the
4 contractor or anybody sign off on them before the
5 architect moves on to the next step? How does
6 that -- how do you know when you are going to go
7 to the next step?

8 A. I mean, typically, I require the client
9 to sign off at the end to make sure that we are
10 not violating the basic program and the project.
11 I don't recall doing that.

12 Q. Because the project starts out with the
13 owner telling the architect what his program is,
14 right?

15 A. Right.

16 Q. This is what I want. I want a hotel.
17 You know, I don't want a hospital. I want a
18 hotel.

19 A. Right.

20 Q. Okay. So when the design development is
21 concluded and the owner signs off with it, do you
22 know whether Balfour Beatty, in this matter,
23 during this phase when they were on the job, what
24 input they would have had in the completion or
25 signoff on the design development? Were they

1 involved in that?

2 A. Well, in terms of signoff, no. But they
3 would have provided their best estimate at the
4 time of cost and time.

5 Q. Okay. So they would have provided some
6 cost at that time?

7 A. Yeah, absolutely.

8 Q. And they would have been aware of what
9 those design development documents looked like?

10 A. Absolutely.

11 Q. And in fact, do you know whether they
12 had any input into those design development
13 documents through suggestions or value
14 engineering or anything else like that?

15 A. Yes, absolutely, absolutely.

16 Q. Do you recall any specifics?

17 A. Well, for instance, you know, the guest
18 rooms -- if I'm trying to recall correctly, at
19 one time, had a louvered opening or like a window
20 between the bathroom and the bedroom.

21 And, you know, it was something that was
22 worth of X amount of dollars and decided to take
23 it out. It reappeared later, but that was an
24 example of it. Hardware. I don't -- you know,
25 it's been a long time. We had a lot of value

1 engineering meetings where we went through cost.
2 Balfour Beatty was very good about its
3 itemization of cost and scope creep, I will call
4 it.

5 And we worked in a very open and
6 consensus basis in reviewing factors that had
7 added costs and what we might do. And at all
8 times, Mike got the option, in or out.

9 In fact, the way Balfour Beatty's
10 spreadsheet was set up was the client said, yes,
11 that it went in the project and, no, that it went
12 out of the project. I mean, literally, Manny
13 Teodoro was the estimator that I worked with and
14 who was very conscientious about managing that
15 process.

16 Q. What is your recollection of the owner's
17 openness to suggestions for Balfour Beatty
18 regarding his involvement in this process?

19 A. He was very open.

20 Q. All right. And was there a contract
21 involved in this process? Were there contract
22 requirements and what their duties were in this
23 process?

24 A. Yes, as spelled out in the A133.

25 Q. So and did -- were these types of -- was

1 this type of input what was expected based on
2 what they had agreed to do?

3 A. Yes, yes.

4 Q. And with regard to this team of Lorenzo,
5 Baumbach, Rossi, Katschkowsky, and Lawrence, were
6 those the people that were on the team during
7 this period?

8 A. No.

9 Q. Okay. Tell me who the people who ended
10 up actually on that team were.

11 A. Well, Mike certainly took the lead.
12 Bret was involved. I didn't see anybody else
13 from the execution side. Bill might have been
14 involved very little.

15 But there was a young African-American
16 woman that worked with him. I can't remember her
17 name. She was involved in the preconstruction
18 process. And then Manny Teodoro, who was an
19 estimator, he really provided the bulk of the
20 sweat equity, I guess, in the construction
21 process.

22 Q. Who was the scheduler on this job for
23 Balfour Beatty? Do you recall?

24 A. Well, I knew Joe Lauricella from the law
25 school. I don't remember him coming for those

1 preconstruction meetings.

2 Q. Okay. So your recollection is
3 Lauricella wasn't involved in the --

4 A. Not that I --

5 Q. -- resolutions?

6 A. Not that I recall.

7 Q. Okay. In your experience, is that
8 something that would or would not be typical in
9 this process to have the scheduler at least
10 tangentially involved or not?

11 A. I think the scheduler would be -- he was
12 certainly involved because at the end of the
13 design phases, we're trying to update progress.
14 And in fact, during the course of
15 preconstruction, Balfour Beatty added three
16 months to the actual project schedule.

17 So obviously somebody was doing some
18 critical path analysis or whatever to complete
19 the project. Whether it was Bill or not, I don't
20 know.

21 Q. When you say add, what would they add?
22 What was the number -- where did the number come
23 from that they were adding to, the duration that
24 they were -- they came from? Do you understand
25 my question?

1 A. Yeah. I mean, incrementally, amongst
2 the activities, I don't recall where it was, but
3 as I recall correctly, the RFP was 24 months and
4 we ended up in 27 months.

5 Q. Okay. All right. So now, we're in the
6 next phase in the construction or the
7 architectural duties of the architect as it
8 relates to his document, is the construction
9 documents phase; is that correct?

10 A. Yes, sir.

11 Q. Okay. And at this point, where is the
12 GMP in the process before the construction
13 documents begin?

14 A. Well, it's a moving target through the
15 process.

16 Q. Okay.

17 A. In September -- let me get my numbers
18 right -- of 2014, Balfour Beatty proposed a GMP,
19 and -- well, let me say this differently. They
20 proposed a GMP, and they felt the documents
21 weren't complete enough to go forward.

22 And they put it on the table for Mike to
23 make a decision, meaning that -- because the
24 market was so good. Take advantage of the
25 market. We were, you know, nine months into

1 preconstruction, or we could continue to find --
2 refine the drawings and, you know, really tweak
3 them and then go out later.

4 So they gave us the option of an
5 additional extension. I believe it was \$36,000.
6 I think the total price for preconstruction ended
7 up being \$66,000. But Mike wanted to go ahead
8 and have higher cost security and paid the
9 additional \$36,000.

10 So that took preconstruction from, you
11 know, September into the following year, and then
12 as you know, when we issued the -- signed the
13 contract for the GMP.

14 Q. All right. Let me see if I understand
15 this. The initial preconstruction agreement was
16 for 30-some-odd thousand dollars for their
17 services?

18 A. Yes, sir.

19 Q. Okay. And there came a point in time in
20 September of 2014 --

21 A. '14, yes, sir.

22 Q. -- where the -- where BBC offered an
23 alternative?

24 A. They proposed going to contract at that
25 time with the documents, or they suggested that

1 we could refine them more for greater cost
2 security for -- by extending the general
3 conditions and giving WLA an opportunity to
4 further refine their documents, and then go to --
5 and then finalize the GMP at that time and start
6 working for that.

7 Q. Okay. And that was a choice that was
8 made by Mr. Bennett based on those two options?

9 A. Yeah. Mike came to the office. Sandeen
10 was there. I think Bill Lorenzo was there
11 actually, too. And we sat around this conference
12 table and had a discussion.

13 Q. Okay. So what was Balfour Beatty going
14 to provide for this additional 30-some-odd
15 thousand dollars, and what was Mr. Bennett paying
16 for, for this additional 30-some-odd thousand
17 dollars?

18 A. Well, their expertise in terms of
19 analysis of means and methods and pricing, cost
20 security, just a further refinement of their
21 analysis of the probable costs and durations of
22 the project.

23 Q. Okay. And how did -- and that time
24 period for the 30-some-odd thousand dollars
25 lasted how long?

1 A. The proposal, as I recall, was September
2 2014, and, you know, we had issued those
3 (inaudible) in March of the following year.

4 Q. So was it nine --

5 A. Six months.

6 Q. Six months?

7 A. I mean, five to six months.

8 Q. Okay. So during that six months, what
9 was going on with the construction documents?
10 Were we now into the construction document phase?

11 A. Oh, yes. We were well into that, and we
12 were just further refining them.

13 Q. Okay.

14 A. Balfour Beatty would give us feedback on
15 certain items, and Buck went to work to refine
16 them, I think. We ultimately ended up with
17 documents that Buck called 101 percent.

18 Q. Okay. So is it a fair statement that
19 during that six months from the additional
20 30-some-odd thousand dollars, both Balfour Beatty
21 and the architect were refining their respective
22 deliverables or worked product?

23 A. Yes.

24 Q. And do you know whether or not they
25 worked in conjunction with each other and

1 communicated with each other during that period?

2 A. Absolutely.

3 Q. Do you know whether or not the
4 deliverables that were produced by Balfour Beatty
5 in the terms of price and deliverables that were
6 produced by the architect in terms of the
7 documents, were affected by the communications
8 and interactions between those two entities?

9 A. Absolutely.

10 Q. Okay. And is that what was expected?

11 A. Absolutely.

12 Q. Okay.

13 A. The whole intent.

14 Q. All right. And did the team that was
15 working on that -- I'm getting ready -- we're
16 getting close to the end of the first portion of
17 their delivery. Was the team pretty much the
18 same during that period up until the --

19 A. Never wavered.

20 Q. Huh?

21 A. Never wavered.

22 Q. There were?

23 A. It Never wavered.

24 Q. Never wavered. I'm sorry. I didn't
25 hear it. Okay. So then, at some point, Balfour

1 Beatty produces what in order to move to the next
2 step?

3 A. Well, Balfour Beatty produced their
4 formal GMP proposal.

5 Q. And that's guaranteed maximum price?

6 A. Guaranteed maximum price.

7 Q. Okay. And explain that a little bit
8 just for -- just to elucidate that a little bit
9 more. What does that mean in terms of the --

10 A. Well, a lump sum price is just that.
11 Here's five bucks. Go build me this building for
12 five bucks. Lump sum says that, we guarantee
13 that this project will not exceed this based on
14 the documents that you have provided.

15 These were our qualifications to that
16 proposal, which might include allowances or
17 exclusions or things like that. We are going to
18 run this project based on an open book business,
19 meaning that, we will see actual cost, and at the
20 end of the day, there will be a reconciliation of
21 cost.

22 And depending on the respondent's
23 proposal, those savings may be shared between the
24 contractor and the owner.

25 Q. And that was done?

1 A. That was done.

2 Q. And who arrived at the GMP price? Whose
3 work product was that?

4 A. Balfour Beatty.

5 Q. Okay. Now, what, if anything, was the
6 importance to the owner, Library Associates, of
7 the time the project was going to be delivered?
8 Did time matter? Was that an issue or something
9 that was important?

10 A. Well, I'm sure Mike wanted it as fast as
11 possible, but at no time did Mike ask me to
12 negotiate time or cost.

13 Q. Okay. So who selected the contract
14 duration?

15 A. Balfour Beatty.

16 Q. All right. Once the contract duration
17 was established, what was the importance of that
18 date?

19 A. It was very important. I mean, are you
20 talking about the duration?

21 Q. Well, the completion date, the duration,
22 either one.

23 A. I guess everything.

24 Q. Okay.

25 A. I mean, to Balfour Beatty's position, it

1 was important because, if I recall correctly,
2 there were liquidated damages on the order. I
3 think it was \$9,000 or \$7,000. I can't remember.
4 So that as -- obviously that was very, very
5 important.

6 Q. Well, let's stop there then and talk
7 about that. What are liquidated damages?

8 A. Liquidated damages are a way for a
9 contractor to limit its exposure to damages.

10 Q. For delay?

11 A. For delay. And it's a perk inspired
12 contract as opposed to actual damages. And in
13 this case, Mike was open to that. And I remember
14 the discussions about the liquidated damage and
15 what liquidated damages.

16 Now, what liquidated damages mean is
17 they don't mean -- they mean specifically with
18 regard to your profitability, the profit. It has
19 nothing to do with, if Mike's hotel was making
20 300,000 gross a month or just say \$300,000
21 dollars gross, you wouldn't divide that by 30
22 days and come up with, you know, liquidated
23 damages.

24 It's actually the profit, the loss. And
25 I don't like doing it because owners get taken

1 advantage of. Because liquidated damages never
2 sufficiently cover the exposure.

3 MR. HILDEBRAND: Objection, Your
4 Honor. This is not responsive to a question, and
5 it's just speculation. We have liquidated
6 damages, and he can testify that that's what they
7 are in the contract. But for him to --

8 THE WITNESS: No, I'm just --

9 MR. BUNDY: He's explaining a
10 contract term in a contract case.

11 THE COURT: I'm going to allow it.
12 Overruled. Go ahead.

13 BY MR. BUNDY:

14 Q. Where we were? I think we were talking
15 about the calculation of the --

16 A. Liquidated damages.

17 Q. Okay. If you would continue.

18 A. Well, I will just wrap it up. Mike
19 Baumbach and Mike Bennett agreed to that
20 liquidated damages number. It's in -- well, I
21 won't go further.

22 Q. No, you can. I mean, he doesn't get to
23 say. Okay. You answer your question.

24 A. Well, it's a very important number
25 because if the number is too high, you can't get

1 bidders to bid the project. So dialing it in is
2 important. So while an owner may have a loss
3 profitability of 10 or \$20,000 a day, you would
4 never get anybody to bid the job.

5 Q. And do you know whether or not Library
6 Associates actually made a calculation prior to
7 entering into the liquidated damage cost to
8 determine what that number would be?

9 A. I remember Mike saying the number. It
10 was in the tens of thousands of dollars.

11 Q. And do you know whether or not that was
12 a negotiated, a hotly negotiated issue in this
13 contract, about what that amount was going to be?

14 A. You know, I would say, no, and I would
15 tell you why because Mike trusted Mike.

16 Q. Baumbach trusted Bennett and Bennett
17 trusted Baumbach or both?

18 A. Yeah. They had a very good working
19 relationship. There was a strong bond there, and
20 it was no protracted negotiations. It was just
21 resolved.

22 Q. Okay. So, now, we're at the point where
23 you have a -- y'all signed the contract at that
24 point, right?

25 A. No.

1 Q. No? Tell me what happened.

2 A. Well, we came down to the wire. And
3 there was a number on the table, and I don't
4 remember what it was at the time. And Mike
5 Baumbach asked me to come to Charlotte for a
6 meeting, to their offices. And I did that, and I
7 sat down in the conference room and he and
8 Sandeen were --

9 MR. HILDEBRAND: Objection, Your
10 Honor, hearsay.

11 MR. BUNDY: It's Mike Baumbach. He
12 was the vice president of Balfour Beatty.

13 MR. HILDEBRAND: It's still an
14 out-of-court statement offered as burden of
15 proof. It's hearsay.

16 THE WITNESS: Well, I will cut to
17 the chase.

18 BY MR. BUNDY:

19 Q. Okay. You went to Charlotte, and you
20 had a conversation with Mr. Baumbach, correct?

21 A. Correct.

22 Q. And as a result of that conversation,
23 what happened?

24 A. Balfour Beatty added \$870,000 to their
25 general conditions number.

1 Q. And did Bennett agree to it?

2 A. Ultimately, but he was not happy.

3 Q. Why not?

4 A. Well, because it was out of the blue.

5 Jeff Sandeen told Mike Baumbach -- I was there.

6 I need this money to -- in the general conditions
7 to build the project.

8 And so Mike looked at me. I called Mike
9 Bennett, listened to him scream for a few
10 minutes, and then I drove right back to
11 Charleston to sit down with Mike to talk about
12 it.

13 Q. Okay. Where would Bennett have been if
14 he had not have -- he didn't have to take it,
15 right? He could have said no?

16 A. Correct.

17 Q. Okay. And where would that have put the
18 hotel project if he would have said no, assuming
19 that Balfour Beatty was not going to move? Where
20 would Bennett have been? What would have been
21 his next move from your standpoint as his program
22 manager?

23 MR. HILDEBRAND: Calls for
24 speculation, Your Honor.

25 THE WITNESS: The contract

1 allowance -- I'm sorry.

2 MR. BUNDY: It's not speculation.
3 I'm asking him what he would have -- what would
4 have happened if they didn't do this, where that
5 would have put him.

6 THE COURT: I think it's self
7 management again, is it not?

8 MR BUNDY: Yes.

9 THE COURT: All right.

10 THE WITNESS: I can tell you what
11 the contract provides.

12 THE COURT: Does the contract
13 provide for this?

14 THE WITNESS: It does.

15 THE COURT: All right. Go ahead.

16 THE WITNESS: The contract clearly
17 says that the owner doesn't owe you this project,
18 and it's absolutely spelled out.

19 THE COURT: Sure.

20 THE WITNESS: So at that point, you
21 simply close out stage one. We have a complete
22 set of documents that have been worked on,
23 embedded for the better part of 15 months, I
24 guess. And we've offered lump sum proposals, or
25 we could go out for CM risk proposals, just

1 without the two stage format.

2 THE COURT: Okay. This is still
3 preconstruction phase, correct?

4 THE WITNESS: Well, we would be
5 transcending to the construction phase --

6 THE COURT: Transitioning?

7 THE WITNESS: Transitioning, thank
8 you.

9 THE COURT: Okay.

10 BY MR. BUNDY:

11 Q. So there was no obligation to proceed to
12 the next step?

13 A. No. There was -- not from the -- never
14 during the process was there an obligation to
15 proceed to the next step.

16 Q. All right. So Bennett agreed to the
17 extra 800,000 bucks?

18 A. Yes.

19 Q. All right. And when did you -- and then
20 you entered into a contract, this negotiated
21 contract, correct?

22 A. Yes.

23 Q. Okay. What happened then? Give the
24 Judge just the steps of what happens then.

25 A. Well, it was -- once we had the final

1 GMP, Mike had been working with this lender, and
2 they closed. And we issued Balfour Beatty a
3 notice to proceed. That was mid March, as we all
4 know, and we went to work.

5 Q. Mid March of what year?

6 A. '15.

7 Q. '15. All right. So, now, let's go back
8 to the request -- the response to the request for
9 proposal. Do you have that in front of you?

10 A. Yes, sir.

11 Q. Okay. Now, this project execution team,
12 how much time had transpired between the time
13 that this proposal was made listing the people
14 that were going to be on the project execution
15 team and when the job started -- when this
16 noticed to proceed started?

17 A. Well, the proposal was received in the
18 fourth quarter of '13.

19 Q. Okay.

20 A. And we started work March 2015, so 12 to
21 18 months.

22 Q. Okay. So 18 months have transpired
23 between the first and second portion of this
24 response, correct?

25 A. Yes, sir.

1 Q. Okay. And if Bennett had said no, I'm
2 not paying the \$800,000, this project execution
3 team wouldn't have had anything to do?

4 A. Yes.

5 Q. Correct?

6 A. Yes.

7 Q. Okay. But he did pay \$800,000. So now,
8 let's look at the project execution team that was
9 proposed from the response that was originally
10 given and the project execution team that
11 actually showed up on the job some 18 months
12 later. Okay. Let's start with Baumbach. Was he
13 there?

14 A. I will save you time. Mike Baumbach is
15 the only guy.

16 Q. Pardon me?

17 A. Mike Baumbach is the only person.

18 Q. Bret Estridge didn't show up?

19 A. No.

20 Q. Knox Tate didn't show up?

21 A. No.

22 Q. Hunt Werner didn't show up?

23 A. No.

24 Q. Katie Worth?

25 A. No.

1 Q. Pat Ricci?

2 A. No.

3 Q. Dave Nugent?

4 A. No.

5 Q. Sean Prendergast?

6 A. No, I don't recognize him.

7 Q. And Andrew Cook?

8 A. I don't recognize that at all.

9 Q. So out of the nine, we got one?

10 A. There might have been a very brief time
11 that Bret was there, but he was pulled off and
12 put on another project. But when we started the
13 project in March, Tim Spano was the project
14 manager, and Pat Ricci's brother, Dan -- I'm
15 sorry, I take it back. That's not true. Another
16 superintendent -- Bob Cotherman was the
17 superintendent. So it was Tim Spano and Bob
18 Cotherman and then Mike Bennett.

19 Q. Mike Baumbach?

20 A. I'm sorry, Mike Baumbach. And I believe
21 Nick Starcevic was on the team at that time, too.

22 Q. Let me ask you this: We know now that
23 there was 18 months between the time they started
24 the first phase until they went to the second
25 phase, correct?

1 A. Yes, sir.

2 Q. Did the request for proposal advise that
3 there was going to be some time between the first
4 and second? Did everybody know there was going
5 to be some time period between the Project
6 Solutions team working before the project
7 execution team began their work?

8 A. By virtue of the preconstruction period,
9 yes.

10 Q. Okay. And what was the original
11 prospective duration of that period? Was there
12 an --

13 A. Of preconstruction?

14 Q. Yep.

15 A. I honestly don't remember.

16 Q. Okay. Well, it was actually 18 months.
17 Did that -- I'm trying to figure out, how much
18 did that -- did that time actually extend, and if
19 it did extend, approximately how much did it
20 extend?

21 A. Well, the preconstruction period would
22 have lasted as long as Buck Lindsay would have
23 taken to complete its final construction
24 documents.

25 Q. All right.

1 A. And I want to say that that was
2 probably -- I would be guessing, but I would --
3 Buck had a very fast design schedule, and my
4 thought, that was somewhere on the order of 120
5 to maybe, you know, 180 days.

6 Q. So six months?

7 A. Six months.

8 Q. Okay. So it roughly lasted about a year
9 longer than you would have thought?

10 A. Yes.

11 Q. Okay. But was that a function of the
12 altered proposal that was given to Bennett to
13 either pay us the extra 37,000 bucks in some more
14 time or let us do it now?

15 A. Well, certainly six more months was
16 added to it by the option to extend the
17 preconstruction period.

18 Q. At the time the extension was given or
19 at any time before work began, were you -- did
20 Balfour Beatty ever advise you, as the program
21 manager, that you're not going to get any of
22 these team members?

23 A. No.

24 Q. All right. And would that have made any
25 difference to you one way or the other? If you

1 known when they came to you with the RFP, when
2 you signed it and agreed to it -- if they told
3 you look, 18 months has passed, we don't have any
4 of those people, we're not sending them, okay?
5 All you get is Baumbach. What would your advice
6 have been to Mr. Bennett?

7 MR. HILDEBRAND: Objection. Calls
8 for speculation, Your Honor.

9 THE COURT: I will sustain that.

10 MR. BUNDY: Thank you, Your Honor.

11 BY MR. BUNDY:

12 Q. All right. So let's go to what -- who
13 showed up and what they were going to do and how
14 long they were there.

15 A. Well, I mentioned Jeff Sandeen. Mike
16 Baumbach actually hired him. He had just come
17 off -- I had thought it was a big Marriott or
18 some very nice five-star hotel, and the intent
19 was for Jeff to build the project.

20 Q. Okay.

21 A. To be the project manager.

22 Q. Did you interview Sandeen?

23 A. Did I interview him?

24 Q. Uh-huh.

25 A. No. But I met them, and he was involved

1 towards the tail end of the preconstruction
2 because he brought -- was brought on board then.
3 And I remember going to meet certain -- like a
4 millwork provider to interview them with him. He
5 obviously had a lot of experience, a very
6 qualified guy.

7 Q. Do you know whether or not the contract
8 has any provisions related to substitution of
9 project managers and superintendents, et cetera,
10 personnel in the field, that allow the owner to
11 object to changes or requires the general
12 contractor to notify the owner in advance of any
13 change to give him an opportunity to object? Do
14 you know whether that's in the contract or not?

15 A. No, I don't. I've used it before, but I
16 don't recall whether it's in it.

17 Q. Okay. All right. So who else showed up
18 in March?

19 A. Well, as I said, it was -- Baumbach was
20 boots on the ground. Baumbach headed up all the
21 procurement. He was doing all the buying. I'm
22 sure Tim Spano was helping him, but at the end of
23 the day, Mike Baumbach had the relationships.
24 And he was buying out the project firsthand. I
25 know that for a fact.

1 Q. Okay. What do you mean by buying out?
2 Tell the Judge, if any, what is the importance of
3 a buy out?

4 A. Well, because it's -- well, simply
5 stating is that Balfour Beatty now has the work.

6 They've been working with a group of
7 subcontractors from the preconstruction process.
8 Now it's time for the rubber to meet the road and
9 finalize contracts with these people
10 competitively, which is the premise of the stated
11 agreement, and get them on board.

12 And there is a formal process of
13 notification in the contract where they would
14 recommend somebody -- recommended a subcontractor
15 and show the -- well, I may be confusing
16 projects. There would be a notice of award, and
17 that was carried out. And during the process,
18 Mike also developed a buyout log.

19 Q. Mike Baumbach?

20 A. Mike Baumbach, sorry.

21 Q. Okay.

22 A. I will start saying Bennett for Mike
23 Bennett.

24 Q. Yeah. There you go.

25 THE COURT: A buyout award?

1 THE WITNESS: Right. So as you
2 award a contract, Balfour Beatty had a schedule
3 of value in mind of what that was worth. And
4 when they made the award, if it was less than
5 that was their money because it -- but because
6 it's an open book, they declared it.

7 And they had a procurement log, and it
8 showed all the subcontractors as they bought them
9 out, and it actually showed the buyout, whether
10 they were ahead or behind. And the buyout was
11 about -- I recall this because it was about 2
12 percent, because they argued with me during
13 preconstruction about whether they would buy that
14 much out.

15 BY MR. BUNDY:

16 Q. What do you mean -- 2 percent of what?

17 A. Total contract value.

18 Q. When you say the buyout was 2 percent, I
19 don't know what that means. What do you mean by
20 that?

21 A. Well, you have the contract of 60
22 million dollars. The buyout was 1 million 2.

23 Q. Who are you buying out for 1 million 2?

24 A. Well, during preconstruction, the
25 subcontractor might have given you price of 8

1 million dollars for HVAC and plumbing, but you
2 bought for 7 million or 7,500,000. Well, that's
3 savings.

4 Q. Okay. So you're -- so buyout and
5 savings are equated? They're the same thing in
6 this?

7 A. Yes, yes. At the end of the day, when
8 there's a final reconciliation, they are the same
9 thing.

10 Q. Okay. So as an example, contractor
11 says, we got a GMP of 6 million bucks, and 59
12 million of it is subcontractors. You sign the
13 contract, and they go to the subs and beat them
14 up, and they get it for 58. So the delta of 1
15 million dollars is the buyout?

16 A. Right.

17 Q. That's the savings. Now, who gets the
18 use of that money?

19 A. The contractor.

20 Q. The contractor gets the use of that
21 money because it's a cost plus job?

22 A. Well, it's his money, yes.

23 Q. It's the owner's money, but the
24 contractor has to -- gets to spend it?

25 A. Yeah. This is not to be confused with

1 contingency.

2 Q. Right. Exactly. That's what I'm trying
3 to understand. Okay. So this buyout process --
4 I forgot to ask you earlier. What role or what
5 involvement, if any, did the subcontractors have
6 in the deliverables or the information that was
7 provided to you or anyone on the team during the
8 Project Solutions phase or preconstruction phase?

9 A. You know, they were very involved. I
10 remember specifically meeting in Buck's office in
11 Atlanta with Balfour Batty. Jeff Sandeen was
12 there. Proposed electrical, a subcontractor, was
13 there, and there was --

14 Q. Do you know which subcontractor it was?

15 A. It wasn't the awarded one, I know that.

16 Q. Okay.

17 A. MCC was at the table, and we were
18 reviewing mechanical design, and, you know, just
19 in a very cooperative, open book analytical type
20 of process, means and methods, that type of
21 thing.

22 And that's a very important component of
23 the preconstruction process because you need
24 pricing that is on the street versus something
25 that you dream up in your head, right? You want

1 to have boots on the ground. So when you go --
2 as a contractor, when I go to work the project, I
3 want to have some cost of liability of what I'm
4 putting out there.

5 Q. All right. Did BBC make the commitment
6 on the guaranteed maximum price before they went
7 out to buy out the job?

8 A. Yes.

9 Q. Okay. So they're already --

10 A. As far as I know, yes.

11 Q. Okay. So they're already stuck with
12 that number, so now --

13 A. Yes.

14 Q. -- they just can't go out in the world
15 having no idea what they're going to end up with
16 because they have already committed to a price, a
17 total price?

18 A. Yes.

19 Q. Okay. So you say that Bernhard MCC,
20 which I guess was MCC at the time, was involved
21 in this preconstruction process, right?

22 A. Very.

23 Q. And they were the mechanical,
24 electrical, and plumbing contractor?

25 A. Very.

1 Q. Well, they were the mechanical and
2 plumbing contractor?

3 A. Yes, sir.

4 Q. And I noticed that there was a gentleman
5 named John Katschkowsky, who was going to be the
6 MEP, the preconstruction manager, right?

7 A. Yes, sir.

8 Q. Did you ever see him working on this
9 job?

10 A. No, but there was another person
11 involved.

12 Q. Okay.

13 A. I'd have to look at -- if I saw a
14 project name listed. I'd have to think about it.

15 Q. Were you surprised that the MEP
16 contractor, the electrical contractors were
17 involved in the preconstruction process?

18 A. No, not entirely.

19 Q. Okay.

20 A. Not entirely.

21 Q. Okay. All right, sir. So let's go back
22 to who showed up on the job and how long they
23 were there. We talked about Baumbach did the
24 buyout and the procurement, right?

25 A. Yes.

1 Q. Okay. So who else showed up to build
2 this building initially?

3 A. Bob Cotherman.

4 Q. Okay. And what was his job, as you
5 recall?

6 A. Well, he introduced himself as the
7 general superintendent.

8 Q. Okay.

9 A. And what that means is the
10 superintendent of superintendents. He's like,
11 you know, the guy.

12 Q. Right.

13 A. And that's the way he was introduced to
14 me. And so Bob started the project as
15 superintendent, and Tim Spano was the project
16 manager. As I said, Nick Starcevic was there.
17 And they had another young man. He's what we
18 call an engineer or assistant project manager.

19 Q. A field engineer maybe?

20 A. Yeah, a field engineer. Well, he was in
21 the office more.

22 Q. Okay.

23 A. So I'm trying to remember now. Tim
24 Spano was the project manager, so Nick Starcevic,
25 I think, was the APM, assistant project manager

1 for Tim. And then Bob Cotherman was the
2 superintendent. And early on, I don't recall --
3 eventually, Dan Ricci transitioned onto the
4 project.

5 I think it was during the foundation
6 period because Dan's background was structures,
7 concrete, heavy concrete. And so he was perfect
8 in terms of taking the building through top value
9 of the structure.

10 Q. What role, if anything, did you play in
11 the scheduling of this job or creating the
12 schedule?

13 A. I didn't play any role.

14 Q. What role did Library Associates play in
15 creating the schedule on this job?

16 A. None.

17 Q. Who created the schedule on this job?

18 A. Balfour Beatty.

19 Q. Okay. Do you know who at Balfour
20 Beatty?

21 A. No.

22 Q. If you would -- when the job started,
23 were there any particular challenges or events
24 that you recall, let's say for the first -- I
25 don't know. Let's start with the first six

1 months. Anything that stands out in your mind
2 that you think the Judge --

3 A. Well, piling started on time.

4 Q. Okay.

5 A. Piling finished on time. The original
6 Balfour schedule called for the BAR mockup to be
7 installed no later than September, I think.
8 Well, let me digress a little bit.

9 So we got started in March. Then
10 Hurricane Matthew hit in May. So that was an
11 unforeseen condition, and Balfour Beatty was
12 granted a 20 day extension to the contract. That
13 was the only contract extension given at the
14 time.

15 Q. Okay. Do you know how much they asked
16 for?

17 A. They got 20 days, but they asked for a
18 month.

19 Q. Okay. So they asked for 30 days and
20 they got 20 days?

21 A. Yes.

22 Q. Did they ask for any money?

23 A. They did ask for money.

24 Q. Did they get it?

25 A. No.

1 Q. Okay. And why not?

2 A. Well, at the time, two reasons. One is,
3 I felt it was builder's risk claim that had to be
4 pursued, but the other side of it is that I felt
5 they had some culpability in terms of the cost
6 setting.

7 Q. Why is that?

8 A. Well, the foundation design was it --
9 I'm sorry. Basically, we filled a big bathtub
10 with sheet piling, and we used dirt wedges up
11 against the sheet piling to brace them, and that
12 helped get the basement open.

13 When Hurricane Matthew came, there was
14 no protection made to safeguard those wedges.
15 And we had a dewatering system in place, but it
16 was pretty minor, to be honest with you.

17 Q. And whose responsibility was the
18 dewatering system?

19 A. Balfour Beatty.

20 Q. And when you say "minor", you mean not
21 big enough?

22 A. Well, the building was not designed to
23 have a permanent well point system. As I said,
24 we were designing the bathtub basically.

25 Q. Okay.

1 A. And we got this huge rain, and it washed
2 out the wedges and filled up the bathtub. And
3 that was the good news because the water pressure
4 helped keep the sheet piling in place.

5 But in the back of my mind -- and
6 Balfour Beatty, to their credit, responded
7 immediately with extra pumps and pumped it out,
8 but by then, we had lost a lot of work. And
9 that's not to say that protective measures could
10 have mitigated, but I still felt that there was
11 some responsibility at some level.

12 Certainly, it wasn't the owner's job
13 site. The owner wasn't in control of the means
14 and methods. But at the end of the day, I did
15 not -- I rejected the cost. Balfour Beatty
16 rewrote the change order for time, and we
17 executed it for time.

18 Q. And they signed it?

19 A. Yes, sir.

20 Q. Okay. Did the architect rule on it?
21 Was it taken to the architect?

22 A. It didn't go that far.

23 Q. All right. And was there any
24 reservation of rights or claims for additional
25 money?

1 A. No.

2 Q. Okay. So it was just a modification
3 signature to the contract?

4 A. Yes.

5 Q. Okay. So let's go on. And what --
6 after that, what do you recall? What's going on
7 with the job?

8 THE COURT: Do you want to take a
9 break now?

10 THE WITNESS: Sure.

11 THE COURT: Let's go ahead and
12 break before you get into all of that. And let's
13 come back. It's almost 1. Let's plan to come
14 back at 2, 2:30.

15 MR. BUNDY: 2:30? Thank you,
16 Judge.

17 THE COURT: Mr. Clements, you're
18 admonished. You're not to speak to anyone about
19 your testimony.

20 THE WITNESS: I was going to ask
21 you. I wasn't sure.

22 THE COURT: Yeah. Okay? Either
23 side.

24 MR. HILDEBRAND: Nor review any
25 information or anything else.

1 THE COURT: Right. Right.

2 (A recess transpired.)

3 THE COURT: All right. Mr. Bundy?

4 MR. BUNDY: May it please the
5 Court.

6 BY MR. BUNDY:

7 Q. Mr. Clements, what is a constructability
8 review?

9 A. The constructability review, in my mind,
10 is the analysis of best practices. It's just the
11 best way we can build. For instance, given the
12 floor-to-floor heights of the Bennett Hotel, you
13 wouldn't necessarily use an 8-inch floor slab
14 because you've got some different dimensions, so
15 you would introduce post-tensioning, for
16 instance.

17 Constructability review would have a lot
18 to do with how the precast is implemented. You
19 know, the means and methods of the constructing;
20 hoisting it, mobile crane, tower crane, derricks
21 off of floors, you know, items like that.

22 So it's really what we rely on the
23 contractor to -- you know, we want to build as
24 economical a building as possible. And to the
25 extent that he can influence that design through

1 economies of the construction process, we want to
2 take advantage of that. I mean, that's what we
3 relied on.

4 Q. And is there a distinction between value
5 engineering and a constructability review, those
6 two different things?

7 A. They are two different things, but one
8 can lead to another. I mean, obviously you have
9 economies by taking certain steps and turns up
10 your means and methods that were related to cost
11 savings or time savings. And time is money.

12 Q. But is it -- if you had a product, you
13 specified product A and the contractor knew of
14 product B, would it serve the same purpose?

15 A. Yeah.

16 Q. That would be more in line of a value
17 engineering; is that correct?

18 A. Yes.

19 Q. Okay. And the constructability review,
20 as I understand what you're saying, is the
21 contractor looking at the building and saying,
22 this is the preferred way to assemble this
23 project; is that correct?

24 A. Yes.

25 Q. Which may result in economies?

1 A. Yes, to his benefit.

2 Q. Did Balfour Beatty do a constructability
3 review on this job?

4 A. I don't recall such, no. Nothing
5 formal.

6 Q. Okay. Would you expect the contractor
7 to do that in this situation? In other words, if
8 they were going to -- if they were involved in
9 the precon process, as part of that process with
10 developing drawings, would you expect them to do
11 a constructability review if they were going to
12 give you a price?

13 A. I don't know that they didn't do it, but
14 I presume that the economies of the construction
15 were already built into the design, and there was
16 nothing to proffer.

17 Q. Okay. All right. So where we were
18 before was, I think, toward the -- we were
19 roughly 90 to 120 days into this project, was I
20 think where we had left before we had lunch.

21 A. Yes, sir.

22 Q. If you can just start again and tell us
23 what -- in your mind, what you recall of how the
24 project progressed from that point forward.

25 A. Well, you know, we talked a lot about

1 critical path, right? And when you first start a
2 project, there's not a bunch of critical paths,
3 right? There's only one.

4 And that's to get to -- particularly in
5 what I will call this -- euphemistically, it's a
6 high-rise building. I mean, it is in Charleston.
7 And that's basically to get the building topped
8 out as quickly as possible, to get permanent
9 power as quickly as possible, to get vertical
10 transportation as quickly as possible.

11 I mean, there's not a lot else going on.
12 I mean, you had some other work going on, but in
13 terms of getting the building to a point where
14 it's on schedule, tracking well, those are
15 critical items.

16 Another critical item, of course, as a
17 side bar, was the BAR approval, and that's in
18 Charleston, which I had never done before. It
19 requires a full scale mockup of the site, and
20 that's inspected. But let me digress a little
21 bit.

22 So as I recall correctly, the GMP
23 schedule called for the building to top out 17
24 months after we broke ground. It actually topped
25 out at 22 months. In fact, I think the early

1 2016 schedules actually would be HMS 13 -- HMS
2 11, I believe, showed permanent power on 1/25.
3 And, in fact, we reached permanent power, I
4 think, on 1/24.

5 But getting those elevators started --
6 getting the building topped out is critical, and
7 getting elevators going is critical.

8 And schedule -- I mean, one schedule
9 that comes to mind is the data date August 2016,
10 HMS 13. They actually showed the permanent power
11 coming on after the installation of -- about
12 concurrent with the completion of the elevators.
13 But that schedule and the one prior in May and
14 then the -- prior to that in February, all showed
15 elevators 1 through 4 being completed in four
16 months.

17 You're talking about a nine story
18 building, but I'm not a \$4 billion contractor,
19 and honestly, I'm not doing the schedule that's
20 in question. I state that only because that was
21 information that I was given.

22 The reality is that that elevator
23 started in May 2017, so long after we had
24 permanent power. Permanent power is a critical
25 predecessor for starting your elevators. Those

1 elevators were completed -- actually, the LLR
2 initial inspection was completed in November of
3 2018.

4 So it's just my opinion, it took a long
5 time to get those elevators, and that is one of
6 the most critical activities that are in the
7 schedule. It was clearly late, and I will state
8 right now, the owner had no impact on the
9 delivery of that elevator. None, whatsoever.

10 We did have some influences on it, some
11 aesthetic issues, but at the end of the day, that
12 elevator was woefully late, and the timing of its
13 completion was actually consistent with the other
14 statutory inspections that were required for
15 substantial completion. Excuse me. For TCO.

16 Q. Temporary certificate?

17 A. Temporary certificate of occupancy. May
18 I opine on that a little?

19 Q. Yeah.

20 A. So there's a difference between TCO and
21 substantial completion. This is -- I mean, it's
22 a very important criteria and one that I argue
23 with contractors on a regular basis. You can get
24 a TCO from the city to say that this building is
25 safe to occupy. That does not mean that the

1 building is ready for the owner's beneficial
2 occupancy, which is, by definition, substantial
3 completion.

4 So I just want to make that clear
5 because in November of 2018, we got a TCO. At
6 the time we did not have substantial completion.
7 And, in fact, we didn't have a certificate of
8 substantial completion until some time in
9 February. That's a whole argument upon itself.

10 But let me go back. So that critical
11 path -- we did well on the temporary power date.
12 But the primary elevators didn't start until May,
13 and a lot of that, I believe, was driven by the
14 completion of the crate elevator. That crew went
15 from there to the main stacks of elevators, and
16 the schedule was -- as I understood the schedule,
17 predicated on having two crews working on those
18 elevators.

19 That eventually did happen, but still,
20 the elevators were very late. And for months,
21 somebody was in the elevators jacket is all I can
22 tell you. That's -- I think that's a very
23 important point. With regard to --

24 Q. Let me ask you this -- it may be
25 self-evident -- why the elevators were important,

1 but if you would just expand on why the elevators
2 are so important once you get permanent power to
3 the completion and construction of a building, of
4 a multi eight or nine story building?

5 A. Well, substantial completion is a
6 benefit for occupancy of the building. You have
7 to have vertical transportation. Vertical
8 transportation are for -- is state regulated,
9 right? And it's not just a matter of LLR coming
10 out and inspecting it. The fire marshal is
11 heavily involved with it.

12 So it is, I think, second only to the
13 fire alarm system, probably one of the most
14 critical, if not the most critical activity in a
15 high rise building.

16 Q. Okay. And to the best of your
17 information and belief, what was the cause of the
18 delay of the elevators?

19 A. I have no idea.

20 MR. HILDEBRAND: Objection, Your
21 Honor. This witness has not been qualified as a
22 scheduling delay expert. I took his deposition,
23 and I asked him -- gosh, it's real clear.

24 Do you consider yourself to be a
25 critical path method scheduling expert? No. I

1 will review bar charts and I will look at
2 schedules, but I don't consider myself to be a
3 CPM expert.

4 He's never testified as an expert. He
5 doesn't do schedules. He's never done a
6 schedule. I also asked him if he's done any sort
7 of CPM analysis in this matter or delay analysis
8 from start to finish, and he said, no.

9 So I don't think it's appropriate. He
10 can certainly testify about the start dates and
11 finish dates, and that's fine for him to testify
12 as a fact witness but not as a scheduling expert.
13 I object to that.

14 THE COURT: All right. Objection
15 is noted but overruled. I'm not sure it's
16 relevant at this point in time. The objection, I
17 don't think, is relevant at this point in time.
18 He has opined as to what happened in this
19 project. He was the owner's representative on
20 the project, was he not.

21 MR. BUNDY: And Rule 701, if the
22 witness is not testifying as an expert, the
23 witness's testimony in the form of opinions or
24 inferences limited to the opinions which are
25 rationally based on the perception of the

1 witness, are helpful to a clear understanding of
2 the witness's testimony, or the determination of
3 the issue in fact. It does not require special
4 skill, knowledge, or training. In other words --

5 THE COURT: Lay opinion.

6 MR. BUNDY: I didn't ask him about
7 CPM. I said nothing about CPM. I just asked
8 him, since he was the project program manager on
9 the job, did he know why the elevator was late,
10 and his answer was?

11 THE WITNESS: I have no idea.

12 BY MR. BUNDY:

13 Q. Thank you. But it was late?

14 A. Yes.

15 Q. Thank you.

16 A. Yes.

17 Q. Were there ever any claims made for
18 delay or additional compensation that you're
19 aware of related to the inability to put the
20 elevator in?

21 A. No.

22 Q. Okay. And would the contract documents
23 have required such a claim if a claim, in fact,
24 existed?

25 A. Absolutely, as executed per --

1 Q. Is the owner obligated to go out and
2 look for claims to help the contractor make
3 claims back against the contractor?

4 MR. HILDEBRAND: We're back into
5 the leading questions, Your Honor.

6 MR. BUNDY: I will withdraw it.

7 THE COURT: Okay.

8 BY MR. BUNDY:

9 Q. All right. So we were on the elevators.
10 So now what -- let's say we're in the summer of
11 the first -- started in March. Let's say that
12 summer. Now, where are we in terms of the
13 representatives of Balfour Beatty on this job?
14 Is Baumbach still around? Are all the same --
15 Cotherman and all those people still there?

16 A. No.

17 Q. All right. Tell us what happened to
18 Mr. Baumbach.

19 A. I found that out after the fact. Mike
20 Bennett got a call from Pat Dean to tell him that
21 Mike Baumbach had been let go as well as Bob
22 Cotherman.

23 Q. When was that?

24 A. It was just right at Christmastime, '15.

25 Q. And that would be roughly six months

1 into the job?

2 A. Closer to nine.

3 Q. Closer to nine?

4 A. Yeah.

5 Q. Okay. And was the job owner or -- was
6 the job on time at that time or generally on
7 time, or what was the status of the job?

8 A. I would characterize it as generally on
9 time.

10 Q. Okay. All right. And what was the
11 effect of -- in your observations -- from your
12 observations on the job -- let me back up. You
13 were on the job the whole time, right?

14 A. Yes, sir.

15 Q. And how often were you on the job?

16 A. You know, at least once a week. You
17 know, when we got closer to the end, I would be
18 there for days at a time.

19 Q. And what kind of meetings did you go to
20 during the progress of this job?

21 A. Well, I chaired a weekly OAC meeting.

22 Q. That's on site?

23 A. On site. Owner, architect, contractor
24 meeting. And then during the BIM process, we had
25 weekly BIM calls, which I participated in and

1 then just general correspondence.

2 Q. Tell me about these weekly OAC meetings.
3 Were they a contract requirement?

4 A. They were an RFP requirement. I don't
5 recall them being a contract requirement.

6 Q. Did they occur every week?

7 A. Yes, they did with few exceptions.

8 Q. Sir?

9 A. With few exceptions.

10 Q. And up to -- was it usually the same day
11 every week?

12 A. Yes, sir.

13 Q. What day was that?

14 A. I want to say Wednesday for some reason.

15 Q. Okay. And where were these meetings
16 held?

17 A. In Balfour Beatty's office.

18 Q. In Charleston?

19 A. Yes, sir.

20 Q. And how long would they last until?

21 A. I mean, they could last an hour; they
22 could last three hours.

23 Q. And in preparation for the meeting,
24 what, if anything, would be distributed or
25 discussed in order to make sure the meeting was

1 efficient?

2 A. Well, I always did the agenda. I did
3 meeting minutes. Balfour Beatty would provide a
4 two week look ahead schedule, and then monthly,
5 they would have kind of a monthly report, maybe
6 some photos and summaries.

7 Q. Okay. And who else was -- who attended
8 the meetings initially on behalf of Balfour
9 Beatty, the initial OAC meetings, if you recall?

10 A. The initial ones, I don't recall
11 specifically. I mean, Mike Baumbach had to be
12 there.

13 Q. And who would attend on behalf of the
14 architect?

15 A. Jennifer Faulkinberry, who was their
16 project manager.

17 Q. And who attended on behalf of the owner?

18 A. I would.

19 Q. Did Kim Bennett Brown go to those
20 meeting?

21 A. Occasionally.

22 Q. Did Mike go to those meetings --
23 Bennett?

24 A. No.

25 Q. So tell me about the format of the

1 meeting. I mean, I'm sort of imagining we're
2 walking into the meeting. How did it go? What
3 was done, and how was it handled?

4 A. Well, the agenda was fairly traditional.
5 I mean, we started off with the design topics.
6 We would go through contract status. We would go
7 through change order status and, you know --
8 sorry. Contractor status. And then owner
9 issues, owner questions. The owner was the last
10 part.

11 Q. And was there a prepared agenda before
12 the meeting?

13 A. Every meeting.

14 Q. And you prepared it?

15 A. And sent it out in advance.

16 Q. And was there a record made of what
17 occurred at the meeting?

18 A. Yes, my minutes.

19 Q. And then what would happen with those
20 documents that were created as a result of the
21 meeting? The meeting minutes, what would happen
22 to them?

23 A. Well, they would be distributed to
24 everybody.

25 Q. After the meeting and before the next

1 meeting?

2 A. Yes, usually within a couple of days.

3 Q. And were people given the opportunity to
4 amend or otherwise correct meeting minutes if
5 they thought something had been mistranscribed or
6 misunderstood?

7 A. Absolutely.

8 Q. And was that done?

9 A. A few times, yes. Toward the end of the
10 project, Nick Starcevic took exception to things,
11 maybe a half dozen or dozen times. And I can't
12 think of one time that I didn't accommodate the
13 clarification.

14 Q. But up until, I guess, toward the end of
15 the job, there wasn't that much dispute about
16 what had happened at a particular meeting in
17 terms of the record keeping?

18 A. No, not in terms of record keeping.

19 Q. And once those records were distributed
20 and people made whatever comments they were going
21 to make, were items that were still outstanding
22 moved to the next meeting?

23 A. Yes, action items. And the
24 responsibility was assigned.

25 Q. And that happened every week?

1 A. Every week.

2 Q. And, generally, how did those meetings
3 go in your opinion?

4 A. I thought -- they were very productive.
5 I mean, Balfour Beatty and WLA and Design
6 Continuum and myself, we worked through issues.

7 I mean, it's no secret that it was a
8 challenging project, a lot going on, a lot of
9 challenges for us. And, you know, my basic
10 management approach was to manage the project and
11 the schedule weekly through those action items to
12 see what's coming up and to keep the design team
13 ahead of -- or as current as possible with
14 challenges.

15 And then even Balfour Beatty would have
16 a challenge that would come up and ask for some
17 help with the architect, and we would work
18 through those things, and then try to stay on top
19 of change orders as well.

20 Q. Were these meetings adversarial in the
21 sense of a lot of contention?

22 A. You know, I lost my temper one time,
23 which I regret, which was right around
24 Thanksgiving when Balfour Beatty was trying to
25 hand me the keys to the building, which I took

1 exception to, and I regret that.

2 But to say that they were adversarial, I
3 don't remember any throw-down fights or anything
4 like that. They were formal at times and, you
5 know, strong discussions, but they were working
6 meetings.

7 Q. Okay. Fair enough. Overall, were they
8 productive?

9 A. Very.

10 Q. Do you think they moved the job along
11 and were productive?

12 A. Well, I say yes simply because if you
13 think about what transpired, the challenges that
14 we had, at the end of the day, we had one claim
15 for the sixth floor delay.

16 And despite all these other occurrences
17 of notices, of e-mails with notices of delay or
18 challenges that we had with getting design
19 completed, at the end of the day, there was only
20 one delay -- well, I take it back. One formal
21 delay properly executed in the entire project
22 over the course of the project.

23 So I take pride in that. I mean, we
24 worked very, very hard to mitigate issues
25 throughout the course of the project.

1 Q. So in your mind, as of, let's say, the
2 first of 2019, there was only one outstanding
3 claim?

4 A. There was only one outstanding formal
5 claim made.

6 Q. And what was the approximate amount of
7 that claim, if you recall?

8 A. \$140,000 in, I think, 20 days.

9 Q. And so in January -- and that was right
10 toward the end of the job?

11 A. No, no. This was in July of 2016 prior
12 to top out.

13 Q. Okay. So that was the claim? That was
14 the only outstanding claim?

15 A. Formal claim, yes, formal claim made.

16 Q. As of the date of substantial completion
17 or thereabouts?

18 A. That's correct.

19 Q. Okay. So how did that claim of 100 and
20 something thousand dollars in 20 days, the formal
21 claim that you -- that was still outstanding from
22 2016, compare with the \$22 million claim that was
23 received in January?

24 A. I was flabbergasted.

25 Q. So you hadn't anticipated that?

1 A. No.

2 Q. All right. So let's talk then -- let's
3 go back. Baumbach is out. And that was roughly
4 December of 2015?

5 A. '15.

6 Q. So nine months into the job. Cotherman,
7 what happened to him?

8 A. He's out, same time.

9 Q. And do you know why he was out?

10 A. Mike Baumbach told me later why.

11 Q. Okay. And as a result of that
12 conversations, what do you --

13 MR. HILDEBRAND: Objection, Your
14 Honor. It's clearly hearsay. It's based on
15 his --

16 THE WITNESS: That's why I didn't
17 say anything.

18 BY MR. BUNDY:

19 Q. As a result of the conversation you had
20 with Baumbach --

21 A. Yes, sir.

22 Q. -- as a result of that conversation --

23 A. Yes, sir.

24 Q. -- did you determine why he was let go?

25 MR. HILDEBRAND: It's the same

1 thing.

2 MR. BUNDY: I'm not asking him what
3 the -- I'm not asking him what he said. I'm
4 asking him, did you, as a result of the
5 conversation, learn why Cotherman was fired.

6 MR. HILDEBRAND: Your Honor, it's
7 an answer based on hearsay. It's just like it's
8 one -- the same thing he's testified about
9 hearsay. It's just a roundabout circle way to do
10 it.

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

13 MR. BUNDY: I respectfully just --

14 THE COURT: I think he's already
15 touched on this. I'm going to allow it.

16 MR. BUNDY: Okay. Thank you.

17 THE COURT: Don't tell me what he
18 said. Tell me what you learned and how you
19 learned it.

20 BY MR. BUNDY:

21 Q. As a result of that, did you learn why
22 he was fired?

23 A. Mike felt he was incompetent, and he was
24 demanding to get him replaced with Pat Dean from
25 the very beginning. He couldn't stand him.

1 Q. All right. Now, after Baumbach leaves
2 and Cotherman leaves, and he was the general
3 superintendent, did anybody else leave during
4 that period that you can recall?

5 A. No. We did have Dan Ricci overlap Bob,
6 which was tremendous.

7 Q. And how long was Dan Ricci on the job?

8 A. So just after we topped out.

9 Q. Okay. So after you topped out when?

10 A. January 7th, 2017, I think.

11 Q. And he left, and who replaced him?

12 A. Nobody. Well, I take that back, sorry.
13 He left, and Tim Spano was promoted to
14 superintendent. And then Nick Starcevic was
15 promoted in Tim's spot to project manager.

16 Q. Okay. Do you recall any other changes
17 in personnel after Cotherman and Baumbach left
18 the job, on the job for the remainder of the job?
19 Were there other personnel changes?

20 A. Well, there were people added. You
21 know, as the project became larger and more
22 complex, Balfour Beatty added superintendents on
23 the project. The initial project engineer was
24 fired shortly after, I think, the first quarter
25 of '16. Another person took that spot. That

1 person did well.

2 There were some interns that came
3 through, and then in -- later in 2016, I believe,
4 Alec Dooley came on board who was -- what we
5 thought was just really a fabulous assistant
6 project manager.

7 Q. Okay. Based on your observations of the
8 site, did this change in personnel affect the
9 progress of the job?

10 A. It wasn't self-evident to me.

11 Q. Do you know whether it affected the
12 quality of the work?

13 A. Nothing that I could testify to.

14 Q. Fair enough. Okay. What were your --
15 in your mind, if you would, what were your --
16 well, let me ask you this. Were there any
17 problems on this job insofar as the work product
18 that Balfour Beatty was concerned with in your
19 mind?

20 A. The quality?

21 Q. Yeah.

22 A. Yes.

23 Q. And what were those problems?

24 A. It was at the level of finishes. We had
25 a relatively young project team, and we were

1 building a five-star hotel. We had an interior
2 superintendent -- like Ryan Ledford, I think, is
3 his name. Very nice guy. Very nice guy. But I
4 don't think he ever stayed in a Ritz-Carlton. I
5 don't think the expectation was made clear to
6 him.

7 And as a consequence, the level of
8 quality, I don't think, was -- expectation was
9 met, to be honest with you. And at the end of
10 the day, it came down to the architect of record
11 ruling on it. You know, I'm not just -- I
12 understood what the expectation was.

13 But, you know, in December, Buck Lindsay
14 had visited the site. David Simonton had
15 requested substantial completion twice in early
16 November prior to even getting a TCO. And Buck
17 visited -- I asked Buck to come visit the site,
18 and he did. And he -- I'm sure that one of you
19 have the correspondence in the file that it was
20 not complete.

21 Q. Okay.

22 A. And he took exception to the quality in
23 the guest rooms as well, and the punch list
24 process, you know, goes on ad nauseam.

25 Q. We will come back to that. With regard

1 to the scheduling of this project -- and I think
2 we've established Balfour Beatty was responsible
3 for the scheduling. Were there any problems with
4 the scheduling on this job?

5 A. In terms that I saw --

6 Q. Yes.

7 A. -- where things were out of sequence, I
8 did not see those matters. I knew of challenges
9 in the field with getting work complete just by
10 my working relationship, but I didn't see them
11 put something in too early or too late that I
12 recall right now in terms of treating their own
13 conflicts.

14 Q. Okay. What was your experience with the
15 change order process as handled by Balfour Beatty
16 on this job? How did that go? When there was a
17 change or a CCD or RFI, whatever it was, how did
18 they handle those? And how did that compare to
19 the requirements of the contract documents?

20 A. Well, let's CCDs aside for just a
21 minute.

22 Q. Okay.

23 A. So there were a lot of change orders.
24 Anytime I got a change from Balfour Beatty, the
25 first thing I did was submit it to the architect

1 for a ruling. Is this a valid change?

2 And to be honest with you, I don't
3 remember an occasion where, if there was a
4 conflict in the drawings that -- well, I take
5 that back. I always went to the architect first.
6 I mean, I would look at it, but it's not up to me
7 to say whether it's a valid change or not.
8 That's not the way I run a job site.

9 Q. Okay. And the change orders were
10 initiated by Balfour Beatty?

11 A. Yes. And some were initiated by the
12 client as well. You know, if the client
13 originated changes, they're straightforward. But
14 with Balfour Beatty changes, they all went to the
15 architect because it's his design, and he's
16 telling me that it's a change.

17 Q. Okay. So how would that process go?
18 You would turn it over to the architect.

19 A. First thing I did -- I wouldn't even
20 look at the price or anything. I'd just sent it
21 to the architect. Is this a change? Yes. Okay.
22 Then we would delve in, and I would work with
23 Balfour Beatty with the architect's support, with
24 the engineer of record's support to evaluate the
25 changes in terms of costs.

1 The biggest challenge that -- well, one
2 of the challenges -- we had a lot of change
3 orders. Well, I've been on projects with more
4 change orders, but the challenges in the change
5 order process were that, if there was a bulletin
6 issued, that would be -- like for a change order,
7 it would cover several trades, right?

8 One comes to mind. When we put in the
9 barn doors in the bathrooms, right? So these are
10 doors. They have to be painted. So we might
11 just have the door material costs as a change
12 order as opposed to the door and the painting
13 cost.

14 And this is particularly the case with
15 larger changes that affected MEP, like RCO 103,
16 which was a modified change. It was a mechanical
17 change, but it affected drywall and power and
18 everything else.

19 But we received the changes for the most
20 part -- and I will say, in fairness, probably
21 about at least 50 percent of the time, trade by
22 trade. So in fairness to the client, never
23 really knew what the total cost was until we got
24 to the last subcontractor.

25 Owner-initiated changes, we had a better

1 idea of those because we tabled them. And I
2 would try and get an order of magnitude from
3 Balfour Beatty, and they were cooperative in that
4 because then I would go back to Mike and Kim and
5 say, you know, this is going to cost X amount of
6 dollars because I didn't want to waste Balfour's
7 time pricing it up for the subs' time.

8 I just wanted to get a -- we call it a
9 high early number, and then I would go back to
10 Mike or Kim, and they would tell me whether to
11 push forward. Then I would authorize the
12 architect to break the -- to issue a supplemental
13 service, a bulletin, ASI, whatever you want to
14 call it and -- to Balfour Beatty for pricing.

15 And sometimes it was not just for
16 pricing, but it was to proceed with pricing to
17 follow. That's a good segue to a CCD discussion.
18 So the construction change directive, that use
19 was initiated by David Simonton in January 2017,
20 I believe it was.

21 Q. So you hadn't used any prior to that?

22 A. No.

23 Q. Okay.

24 A. And the reason being is that there was
25 scope that was not GMP scope, and David wanted to

1 use CCDs for that.

2 Q. Construction change directive?

3 A. Construction change directives. And
4 with the exception of two that I recall, the CCDs
5 were paid on a cost plus basis. So they would do
6 the work.

7 There were -- I don't know -- 40 CCDs
8 probably, maybe a couple more. And we would pay
9 progress payments on the CCDs with every pay
10 application, and that covered not only their
11 direct costs but their indirect costs, meaning
12 staff costs and fees.

13 So let me think. It might have been
14 January 2018. I don't know. I'd have to go back
15 and look and see -- the first CCD was CCD 2. We
16 didn't use CCD 1. But basically we covered their
17 costs, without question, on those CCDs.

18 And those -- and we used them for
19 additional work, and I guess basically to
20 expedite things so we didn't have to go through
21 the change order process because things were
22 moving fast. We didn't want to delay anything.

23 And I think David was right because it
24 was very beneficial in mitigating, you know,
25 potential delays because we've got to arm wrestle

1 over what something costs. We just knocked it
2 out. We just did it.

3 Q. Okay. Did you ever use CCDs in the
4 instance where the owner thought that work was
5 included in the contract and the contractor said,
6 no, we didn't agree to do this, and so in order
7 to move it along, y'all issued a CCD in order to
8 get the work done and figure out who's going to
9 pay for it later?

10 A. Yes.

11 Q. Okay. And that was the only way they
12 would do the work, right, if you -- disputed
13 work?

14 A. I only recall one particularly disputed
15 work. That was the shutters, and we did use a
16 CCD on that.

17 Q. Now, what about time -- what about
18 claims related to change order work either
19 generated by the contractor or the owner? Any
20 time extensions that were requested? How were
21 those handled during the project?

22 And well, first, what was required, from
23 your standpoint, if they were going to get time
24 and what did they do and how were they resolved,
25 if they were?

1 A. Well, I mean, just like any change
2 order, you're supposed to provide evidence of the
3 cost and the time. I don't recall receiving
4 change orders with a specific request for a time
5 extension.

6 I do recall receiving change orders,
7 Balfour Beatty qualifying that they would assess
8 time impact at a later date, and that was a big
9 thing with Kim, as she -- as an owner, they
10 wanted to see, if we're going to sign a change
11 order, let's sign a change order. You know,
12 there's time, put it on the table.

13 But, you know, certainly the bulk of
14 2018, there were change orders received that were
15 qualified, and the good news -- I mean,
16 conversely, the CCDs addressed that.

17 Q. How?

18 A. Well, I take that back. As I think
19 about it now, Balfour Beatty actually put
20 qualifiers on the back of the CCDs as well. So I
21 rescind that position -- that point.

22 Q. Are you aware of any -- what reasons
23 would there have been or impediments would there
24 have been to Balfour Beatty at the time the
25 change work was to be performed, to provide a

1 fragment to show where this work was, that it was
2 on the critical path, and they wanted a time
3 extension?

4 A. I mean, there's nothing to prevent a
5 contract from doing that. In fact, at one point
6 before Simonton came on board, David Stanton was
7 there, who I knew very, very well from our past
8 history, and we were talking about the amount of
9 changes.

10 And I said, if you need more staff, ask
11 for it. And I don't mean necessarily Balfour
12 Beatty, but I told him I would go to Mike Bennett
13 and say, hey, we've got a lot of change orders.
14 We've got to add another FTE. I mean, what's it
15 going to cost? \$100,000 a year? In the scope of
16 things, it's insignificant, right?

17 But Balfour did not jump on that offer.
18 I mean, David didn't. I don't know what he did
19 with it or not, but nothing became of that.

20 Q. Do you know whether or not the contract
21 requires a critical path analysis in order to get
22 a time extension?

23 A. It absolutely should, I mean, yes, yes.

24 Q. And were you ever provided with any
25 change order request notwithstanding there was

1 reservation and rights with a change order
2 requesting time with the critical path analysis
3 at any time during this job?

4 A. Well, the sixth floor change order was
5 the closest thing, you know, because we were up
6 to our necks in the BIM process. And Balfour
7 Beatty put together a change order, a claim, with
8 the change order. And it showed where we should
9 have been and the impact of our inability to BIM
10 sixth floor west. And that was the closest thing
11 that I saw to a critical path analysis.

12 And to Buck's credit, when he analyzed
13 it, he recognized it. In his -- in his initial
14 ruling, I will call it, he offered time as well
15 as money.

16 Q. All right. And in response to that
17 initial ruling, did Balfour Beatty issue an
18 amended change order incorporating what Buck had
19 agreed to?

20 A. No.

21 Q. Well, how were you -- how was the owner
22 going to pay this -- or give this time without
23 the proper documentation from the contractor that
24 they wanted that?

25 MR. HILDEBRAND: Objection, Your

1 Honor.

2 Q. How does the contract work when that's
3 the case?

4 MR. HILDEBRAND: Objection, Your
5 Honor. It's a leading question, and it's a
6 loaded question because he said without the
7 proper documentation. There's no requirement of
8 a documentation after a claim has been made in
9 the contract for the owner to pay.

10 If there's an undisputed amount, then
11 it's undisputed. But there's no requirement --
12 if Mr. Bundy wants to go through the contract
13 later on or whatever, but he can't preface his
14 questions that -- one, they're leading; two,
15 they're improperly prefaced.

16 MR. BUNDY: I'll be glad to argue
17 it right now.

18 BY MR. BUNDY:

19 Q. The only way to get paid on this job is
20 through a pay request, right?

21 A. Yes, sir.

22 Q. The owner doesn't pay change orders, do
23 they?

24 A. No, sir.

25 Q. Okay. You pay pay requests, which may

1 include change orders, approved change orders?

2 A. Approved change orders.

3 Q. Okay. So there's no provision in this
4 contract for payment other than a pay request
5 signed by the contractor, the architect, and the
6 owner -- or at least signed by the architect?
7 The owner is required to pay pay requests signed
8 by the architect and the contractor, correct?

9 A. Yes, sir.

10 Q. Okay. And nowhere on this job is there
11 a piece of paper signed by the architect and the
12 contractor that includes that work, is there?

13 A. Which work?

14 Q. The work we were just discussing, the
15 work --

16 A. No.

17 Q. Thank you very much. All right, sir.
18 So we were talking about the meetings and the
19 monthly meetings. Tell me a little bit about
20 these monthly meetings. What occurred on those
21 meetings?

22 A. Just additional handouts for Balfour
23 Beatty, kind of like photos. They would include
24 my same meeting agenda. They would identify
25 challenges, you know, information needed, much

1 the same. And we would go through them.

2 Q. Okay. Let's talk a minute --

3 A. Sorry, let me back up. They would
4 also -- initially, in the job, they would include
5 the buyout, you know, tracking that, you know,
6 subs to be awarded, those types of general
7 information.

8 Q. Right. Okay. Were RFPs and these
9 change requests discussed at these weekly
10 meetings or monthly meetings?

11 A. I don't understand RFPs.

12 Q. I mean, well, not RFPs, the request for
13 change orders.

14 A. Yes.

15 Q. RCOs and those things.

16 A. Yes. I tried very hard to stay on top
17 of them.

18 Q. Okay.

19 A. Alec Dooley was particularly good in
20 terms of supporting those efforts.

21 Q. And were you able to resolve those
22 during the project?

23 A. Well, I remember -- I think we paid
24 about 4 and a half million dollars in change
25 orders, so it wasn't like, you know, we weren't

1 paying change orders, right?

2 Q. All right. Let's talk a minute about
3 the -- I want to talk about the Hope's doors a
4 minute and that process. You talked about the
5 BAR. BAR stands for Board of Architectural
6 Review?

7 A. Yes.

8 MR. BUNDY: I think Judge will take
9 judicial notice they're not an easy crowd to deal
10 with.

11 THE COURT: I'm well familiar with
12 them.

13 BY MR. BUNDY:

14 Q. So the mockup. Tell me what the mockup
15 was that BAR required and when they required it
16 to be complete, and what was the predecessor
17 event, and how it affected the job. Do you
18 understand my question?

19 A. Yes. You may have to remind me of a
20 couple points.

21 Q. Sure.

22 A. So the actual mockup is included in the
23 contract documents. I personally took the
24 proposed mockup drawings to the BAR's office to
25 get them stamped and certified because you had to

1 have that to get the building.

2 So it was a full-scale mockup. I don't
3 recall what -- it included -- I have to think
4 about it now. Certainly the precast -- the big
5 pieces of precast Arriscraft doors, handrails up
6 on the pool. It was kind of the -- the obelisks
7 that are on the balcony. It was quite a little
8 pallet of things.

9 Q. Is it -- just for the record, is it
10 similar to like almost a Hollywood set where you
11 see in front of these construction projects what
12 looks to be like a part of the building, but you
13 go around behind and there's nothing there, much
14 like a cowboy set in a cowboy movie, right?

15 A. Yes, sir.

16 Q. Okay. And that's the purpose, and so
17 when -- is the purpose so that there will be an
18 actual sample because the mockup is just
19 basically a sample.

20 This is what we're telling the Board of
21 Architectural Review we'll do. We're going to
22 put a golden egg every 4 inches because it's
23 historic. And they go and count the golden eggs
24 when you go to build it, right?

25 A. Yes, sir.

1 Q. Okay. So one of the golden eggs that
2 had to be in this mockup was a Hope's door,
3 correct, or was it?

4 A. It was. It wasn't in the original
5 mockup design.

6 Q. Right.

7 A. But the BAR has the liberty to come out
8 there, assess it, look at the building, and say,
9 I want one of those and one of these.

10 Q. Okay.

11 A. And we had to accommodate them. The
12 Hope's door was one of those items.

13 Q. Okay. So that's the golden egg they
14 wanted?

15 A. Yes.

16 Q. Because I assume they're not
17 contributing to the hotel's --

18 A. No.

19 Q. -- budget, right?

20 A. No.

21 Q. They're just picking how nice they want
22 somebody else's stuff to be. So they pick out
23 this golden egg, this Hope's door, right? And
24 when was this mockup supposed to have been
25 completed by the contractor, and what was the

1 significance of that date?

2 A. Well, the -- I believe the GMP
3 drawing -- the GMP schedule called for it to be
4 complete September of 2015, if I recall.

5 Q. When?

6 A. September 2015, within six months of the
7 project because you want to get it out there as
8 fast as possible. The reason why is that, as it
9 was explained to me by the BAR, you're not
10 allowed to put any of that on the building until
11 it is approved.

12 Q. So you can't go put stuff up and then
13 come back later and ask for forgiveness as
14 opposed to approval? I assume they've been down
15 that road, right?

16 A. Yes, sir.

17 Q. Okay. And much like they just did to
18 The Dewberry over here, they don't have a bar
19 anymore, right?

20 MR. BUNDY: Do you know that,
21 Judge?

22 THE COURT: I heard that.

23 BY MR. BUNDY:

24 Q. So it was supposed to have been done or
25 completed in December of --

1 A. September, as I recall, of 2015.

2 Q. September of 2015.

3 A. Yes, sir.

4 Q. And until it's approved and erected, the
5 contractor is not supposed to go do any of that
6 work?

7 A. That's per the BAR.

8 Q. Per the BAR. And they got the right to
9 stop you, right?

10 A. I would presume so, yes, sir.

11 Q. They do. I think they do. When was it
12 actually -- when was this mockup actually done?

13 A. April 2016, we got a notice from Tim
14 Spano that it would be ready for owner inspection
15 first.

16 Q. How many months late was that?

17 A. Do the math for three -- seven months.

18 Q. So we're in April now and Spano says,
19 it's ready?

20 A. He said it would be ready by a certain
21 date. I don't remember the date, but it was
22 around April. Then I got an e-mail shortly
23 thereafter that said that, no, we're not ready.
24 And I think you will find correspondence that at
25 the time Old North State was put on notice by

1 Balfour Beatty for quality issues pertaining to
2 the mockup.

3 Q. What notice were they put on? What were
4 they told?

5 A. Balfour Beatty took exception to the
6 work that Old North State had done on the mockup.

7 Q. So how did this proceed? How did this
8 problem go forward?

9 A. Mike Bennett and I -- I believe we saw
10 the mockup shortly before the BAR's first visit,
11 which was in September. At that time Mike and I
12 came out there and took a look at it, and we took
13 exception to quality issues.

14 Q. If you -- to the best of your
15 recollection, what quality issues did you take
16 exception to?

17 A. The caulking, cleanliness of the stone,
18 inconsistent joint gaps, you know, between
19 precast and the Arriscraft. You know, very, very
20 discernable items. In fact, Tim Spano was there
21 with Mike and I and Jeff Sandeen.

22 Q. And did they dispute your observations
23 regarding the quality of the work?

24 A. They did not, but Jeff Sandeen turned to
25 Tim Spano and said, don't change a thing. Let's

1 see if we can get by with this.

2 Q. And who was he going to try to get by,
3 the BAR?

4 A. The BAR.

5 Q. Good luck with that. All right. So
6 what happened after that?

7 A. Well, the BAR -- I think their first
8 inspection was in September, and they took
9 exception to it for quality control issues.

10 Q. Same exceptions you had taken?

11 A. Yes. And I'm not certain, but I believe
12 they added -- at that time, added a few more
13 things they wanted us to take a look at. I don't
14 remember the sequence exactly.

15 Q. Okay. So what -- move us on down the
16 road with this mockup.

17 A. Well, let's back up to the Hope's door.

18 Q. Okay.

19 A. So we didn't order a Hope's door for the
20 mockup. We didn't have one on the job at the
21 time.

22 Q. Right.

23 A. So what we did is we took a Hope's door
24 from the hotel and stuck it in the mockup.

25 Q. And how much is a Hope's door? Are they

1 expensive?

2 A. About 60 to \$70,000, as I recall.

3 Q. And if you had ordered one for the
4 mockup, what would you have done with this 60,
5 \$70,000 door after the job was finished?

6 A. Mike Bennett would have it on his farm,
7 I think, but that's about it.

8 Q. Expensive door to nowhere.

9 A. It was.

10 Q. So what happened next?

11 A. Well, we went back and forth between the
12 BAR -- the BAR came out several times looking at
13 the mockup. But then they became focused on the
14 building because it's one thing to -- well, let
15 me back up.

16 Because of the schedule and because we
17 did not have BAR approval, Dave Stanton directed
18 the Old North State, or whomever, to go ahead
19 and, you know -- let's get the CMU running, get
20 the Arriscraft up there, get the precast up
21 there. I can't blame them. I probably would
22 have done the same thing.

23 But he wasn't going to wait for the BAR.
24 BAR didn't appreciate it, but I think based on --
25 I don't know why they didn't stop us, but they

1 didn't stop us.

2 Q. Okay. Do you know what experience these
3 out-of-town people have with the BAR, the Balfour
4 Beatty people, what experience they have with the
5 Board of Architectural Review in Charleston,
6 South Carolina?

7 MR. HILDEBRAND: That's
8 speculative. Objection, Your Honor.

9 A. I don't know.

10 Q. All right. So you took the Hope's door
11 out of the hotel and put it in the mockup, right?
12 That's what -- was that Balfour Beatty's idea or
13 y'all's idea?

14 A. I think it was a joint idea. We had to
15 get the mockup done.

16 Q. Whatever it took?

17 A. Yeah.

18 Q. And the idea was to put it back in once
19 the mockup got approved?

20 A. Yes.

21 Q. But until the mockup got approved, you
22 couldn't put it back in?

23 A. Right. The mockup didn't get approved
24 until end of June 2018.

25 Q. Okay. And what effect did the inability

1 to get the mockup approved by the BAR have on the
2 progress of the work?

3 A. Well, it didn't have much because
4 Balfour Beatty just went ahead and ran the facade
5 up. At the end of the day, no claims could be
6 made on the delay in that regard. They just went
7 ahead and ran with it.

8 Q. All right. And were there any problems
9 with the facade or the quality of work at the
10 facade?

11 A. Yeah. The BAR took exception to the
12 jointing. Now, in fairness, there was a couple
13 of locations where by design, the jointing wasn't
14 absolutely symmetrical over some door headers.

15 But once we showed them that information
16 on the contract drawings, you know, they kind of
17 looked away. But it had more to do with chips
18 and repairs on the precast -- cleanliness of the
19 Arriscraft. Arriscraft is a very -- I think, a
20 soft and absorbent stone, and it's very difficult
21 to keep clean, but it was dirty. The precast was
22 dirty.

23 Jointing particularly on the precast was
24 inconsistent. You might have 2 inches here or an
25 up tight here, you know, almost a butt joint, and

1 then there might be a half inch over here. I
2 think the requirements were something like
3 three-quarters to an inch or something like that.

4 And the BAR really took exception to
5 that, and ultimately, they approved the mockup.
6 And the final review was going to be based on the
7 quality of the building at the end of the day.

8 Q. Okay. What effect did the Hope's doors
9 have on completion from your standpoint?

10 A. None.

11 Q. Okay. And the issues related to the
12 mockup were quality of workmanship issues as
13 opposed to design issues; is that fair?

14 A. There were -- the trellis over the third
15 floor, for instance, the design was for a
16 transparent state. The BAR didn't like seeing
17 the grain of the wood. It was too transparent,
18 so they -- we ended up painting it with a solid
19 stain. You know, that's not a Balfour Beatty
20 issue. That's a BAR requirement.

21 Q. Right.

22 A. The obelisks that are on the third-floor
23 balcony are segmented. And if I recall
24 correctly, BAR took exception to some of that
25 segmentation, and so we ended up using like a

1 Bondo or something to cover it up.

2 So it's fair to say that there were
3 changes made by the BAR. It was not just quality
4 control, but at the end of the day, the
5 overriding issue was quality control. And the
6 reason for that is that, in order to get a TCO in
7 Charleston, you need the BAR to sign off.

8 And at the time -- at the end of
9 November when we were getting the sign offs for
10 elevators and fire marshals and things like that,
11 we still hadn't completed the facade work, and we
12 didn't even have a punch list.

13 And it was only because of Jennifer
14 Faulkinberry having developed a relationship with
15 this one architect, the BAR said, all right, I
16 will let you open, but I want that punch list.
17 And Jennifer got that punch list in late January
18 2019.

19 Q. How, if any -- how, if at all, in your
20 opinion, did Balfour Beatty's proceeding with
21 work before mockup approval affect the BAR's
22 approach and relationship with this job?

23 A. They were not happy with us.

24 Q. And did that cause any problems?

25 A. I can't say specifically that it did,

1 but we worked -- myself, particularly, and Foster
2 Gaillard, who is Mike's real estate attorney, who
3 has a very personal relationship with the head of
4 the BAR, he and I had several meetings with them,
5 you know, beating our hearts, asking for
6 leniency. And that was of tremendous value.
7 That's how we were able to do what we did.

8 Ultimately, that's how we were able to
9 transfer that Hope's door into the building.

10 Q. So you were able to amend the BAR's hurt
11 feelings?

12 A. Suck up big time.

13 Q. There you go. All right. So let's talk
14 a minute about a punch list. What is a punch
15 list?

16 A. Well, the intent of the contract
17 documents and included in that is the
18 specifications, the expectations. Punch lists
19 are -- is a record of non-compliant items.
20 Typically, it could be anything, finishes,
21 interior, exterior, parking lots, drippy faucets.
22 It's just something doesn't meet the intent of
23 the contract documents.

24 Q. And in order to obtain -- what is the
25 relationship between satisfactorily completing

1 the punch list and substantial completion, if
2 anything?

3 A. It is not a requirement. A punch list
4 is a requirement of substantial completion, and
5 the extent of that punch list, as discerned by
6 the architect, meaning that you can't have a --
7 you can have a punch list that prohibits the
8 owner from occupying a building.

9 That would be unacceptable, but you can
10 have a punch list, and that punch list is to be
11 attached to the certificate of substantial
12 completion because the expectation then is for
13 the contractor to get done, knock out the punch
14 list.

15 The case in point of the exterior of the
16 building, that final punch list was provided to
17 the architect of record in May 2019. The hotel
18 opened up in January 25th or 27th of 2019.

19 Q. So the contractor didn't provide -- who
20 is supposed to provide the first punch list?

21 A. The contractor.

22 Q. Okay. So --

23 A. Let me clarify. The main submittal was
24 the completion of the punch list.

25 Q. Right. But, I mean, just in terms of --

1 A. The process is thus; the contractor
2 provides the subcontractor's punch list. He runs
3 through the punch list, gets it done, signs it
4 off, and gives it to the architect of record and
5 says, hey, I'm done. And, you know, this is the
6 whole scope of the work, MEP, everything.

7 The architect then comes out to the job
8 site to investigate. Typical contract terms
9 are -- meaning general contractor terms and
10 architect's agreement terms is that the architect
11 will come out, inspect, and provide its punch
12 list, and then will come back again to see if
13 that punch list is done.

14 If the architect comes back a third
15 time, they're usually looking for money. But
16 that's generally how it is done. It starts with
17 the contractor, though.

18 Q. Okay. But when you say, "they're
19 looking for money," you mean the architect?

20 A. Architect, yes.

21 Q. The architect is making an additional
22 field trip he hadn't -- he hadn't been paid -- it
23 wasn't included in his original --

24 A. A lot of them will only do one. Buck
25 had -- as I recall, had two.

1 Q. Okay. I just wanted to -- there's some
2 confusion, I think, with some people that the
3 owner is supposed to prepare the punch list.
4 That's the responsibility of the contractor, to
5 prepare -- to punch list his own job?

6 A. The initial punch list, yes, sir.

7 Q. So, now, you said there are punch list
8 items that can be -- you can obtain substantial
9 completion, but attached to it, a punch list
10 which must be completed before your final
11 completion, I guess, would be the next stage?

12 A. Yes, sir.

13 Q. But there are some things that would
14 be -- I guess you could call them punch list
15 items that can't be on -- that won't allow you to
16 get a substantial completion. In other words, I
17 haven't quite put in the sprinklers yet, but I'm
18 going to get to that, right?

19 A. Yeah.

20 Q. That doesn't work that way, right?

21 A. Well, sprinklers wouldn't -- you would
22 never get there. So I will give you a case in
23 point.

24 Mixed use development apartments, for
25 instance, you can get a TCO without any kitchen

1 cabinets as long as you have a range and a sink
2 stand, right? You don't have to have anything
3 else in there, in terms of the kitchen. But the
4 owner certainly can't use that, right.

5 Q. Right.

6 A. So you've got a TCO, but you don't have
7 substantial completion.

8 Q. Beneficial occupancy?

9 A. Beneficial occupancy.

10 Q. And then what are warranty items? I
11 mean, let's go through the whole thing. When
12 does the warranty begin, expressed warranty?

13 A. The warranty begins at certificate of
14 substantial completion.

15 Q. All right. And typically, it's -- let's
16 say it's a year, right?

17 A. Typically.

18 Q. Okay. And it's an expressed promise
19 that, within this one year, if something is
20 wrong, we'll fix it, and you don't have to tell
21 us why it's wrong. It's just wrong, and we'll
22 fix it.

23 A. It has to comply. If it does not comply
24 with the intent of the contract documents for the
25 life cycle or whatever the impact is, it's got to

1 be repaired.

2 Q. Right. And the owner doesn't have to
3 prove it was negligently installed or anything.
4 It just doesn't work?

5 A. Yes.

6 Q. Okay. All right. So tell me how -- and
7 did the punch list on this job go the way it
8 typically goes on your jobs?

9 A. No.

10 Q. Okay. If you would, tell the Judge what
11 you -- in your 30-something years of doing this,
12 how a punch list goes and how it works out at the
13 end of the job and how you finally get down to
14 the end. What normally happens?

15 A. Well, as we just discussed, the
16 contractor provided his punch list. He's
17 attached his certificate of substantial
18 completion.

19 And generally, within about 60 days,
20 they complete the punch list, and then the
21 contractor actually issues something called a
22 certificate of completion that he has done --
23 everybody is satisfied, and the project is
24 complete.

25 Q. Okay. So what happened in comparison to

1 that? That's not what happened on this job?

2 A. Well, no. We received substantial
3 completion -- sorry, TCO at the end of November.
4 Buck visited the job site in December '13 or '14.

5 Somewhere around there he issued a memo,
6 and he took exception to BBC's position on the
7 completion status on BBC's position that they had
8 completed the punch list in the guest rooms
9 because, if subsequent deficiencies were
10 uncovered, despite them having gone through a
11 punch list and signed it off, it's still
12 inconsistent, and it's at least in the warranty
13 period.

14 And Buck took exception to that. Buck
15 also noted -- and there was about -- probably a
16 dozen punch lists that he was asking for having
17 to do with the public spaces as well. I mean,
18 it's not like we've got a TCO for just the tower
19 or the first floor or something like that. It's
20 for the building.

21 So that was the architect of record's
22 interpretation of where we were from substantial
23 completion and such.

24 Now, that was in December. Right around
25 December, I actually took Mike and Kim, and

1 Balfour Beatty was ready to sign off the guest
2 rooms, which is what really started the issue.
3 So let me back up a little bit.

4 Early in December, Balfour was ready to
5 turn over the guest rooms. Not the whole
6 building, just the guest rooms. And Jennifer
7 Faulkinberry -- it was actually her idea. Let's
8 get the guest rooms turned over, and then we
9 we'll worry about, you know, the rest of the
10 building.

11 So I met on the eighth floor with Kim,
12 with Mike, David, Nick, and I think Shanti -- I
13 can't remember her last name was there. And we
14 were going to inspect rooms on the eighth floor,
15 and I think they had four identified or something
16 like that.

17 So we went into the first room, and we
18 started looking around, and I believe it was Mike
19 went to open the bathroom door, and the pocket
20 door was off of -- the trolley was off the runner
21 and hanging sideways or something like that. So
22 it didn't go well.

23 And then we started looking around, and
24 Mike particularly took exception to the level of
25 quality of the paint and the caulking. The

1 caulking had -- we would call it snots. You
2 know, imperfections in the caulking where you
3 come along and then you stop and you start
4 caulking some more. You've got a little bump
5 there. They were painted.

6 And the quality of the painting, Mike
7 felt was unacceptable, and I agreed with him
8 because these rooms had an eggshell finish, and
9 eggshell is a paint that you can't touch up. If
10 you have a spot in the wall that has to be
11 touched up, you have to paint from corner to
12 corner. And that was not the case. It was just
13 unacceptable. And I think that's proven by
14 Buck's inspection later that month.

15 Q. Who was the final arbiter of the quality
16 of the work and whether it meets the intent of
17 the contract documents?

18 A. The architect of record.

19 Q. So continue with this meeting. So you
20 went through the first one. The door falls off.
21 What's next?

22 A. Well, we look at one other room, and
23 then Mike was done, and I don't blame him. It
24 was unacceptable.

25 Q. Now, at this time, the building was how

1 late in its delivery?

2 A. Well, this was December. I mean, you
3 want to go back and look at August 2017.

4 Q. Well, based on the number of time
5 extensions that had been given --

6 A. Only one, 20 days.

7 Q. 20 days. Okay. So how late was the
8 building, assuming the 20 days?

9 A. Well, I believe the adjusted contract
10 time was -- I think it was August 2017; so you're
11 talking 18 months or something like that.

12 Q. And if Balfour Beatty, based on what
13 Buck told them about their other and only proper
14 claim, they could get 20 days. If they had asked
15 for it, they would have gotten another 20 if they
16 had sent in the request, right?

17 A. Yeah.

18 MR. HILDEBRAND: Objection. He's
19 leading, Your Honor.

20 BY MR. BUNDY:

21 Q. So there's a meeting -- there's a
22 meeting, and the owner of the hotel is looking at
23 his building, which is 18 months late, give or
24 take?

25 A. I think that's true, yes.

1 Q. With 20 days of time extension given?

2 A. Granted, right.

3 Q. Okay. And was he -- what was his
4 demeanor? What was going on as far as you could
5 tell with the owner of a \$60 million hotel that
6 was 18 months late and looking at doors falling
7 off and paint that was not properly done?

8 MR. HILDEBRAND: Objection, Your
9 Honor. There's -- it's just a factual
10 inaccuracy. There was one door that was off the
11 track, not doors falling off.

12 THE COURT: All right. I will
13 sustain it. What was his demeanor is what you
14 asked him.

15 MR. BUNDY: Yes.

16 BY MR. BUNDY:

17 Q. What was his reaction to that visit,
18 given the lateness and the condition of the room?

19 A. It wasn't yelling or screaming or
20 anything like that, but I think at that point, he
21 knew he had a problem, to be honest with you.

22 Q. And let's back up a second. Had there
23 been an attempt, up until that point or at any
24 time before that point, for Mr. Bennett or you to
25 try to get out of the contractor, when are you

1 going to finish the job? Earlier, before that,
2 did you -- had you requested the --

3 A. Well, sure. I mean, that's one of the
4 reasons we brought Grady on board. You have to
5 think about that. I was managing critical items
6 to make sure that they did not impact the
7 completion schedule of the project.

8 Balfour's schedules, I would get those,
9 and my focus really wasn't on their means and
10 methods. I was looking at the owner's countdown
11 when they would -- you know, when Salamander was
12 going to get involved and start --

13 Q. Who is Salamander?

14 A. Salamander is the operator.

15 Q. Okay.

16 A. I don't know if they're still the
17 operator, but they were the operator. And I
18 didn't spend time looking at a lot of activity
19 relationships that had nothing to do with me.

20 Q. Right.

21 A. You know, the things that Balfour had to
22 do with getting the job done, that was all on
23 them, you know, their schedule. I was concerned
24 with the end date being pushed out, and they
25 would show schedules and show impacts like the

1 Hope's door, stair 4, or the ballroom doors
2 pushing these dates out.

3 And that was one of the big advantages
4 of having Grady on the project. I mean, because
5 if something came up and I wasn't particularly
6 focused on the detail of what the impact is,
7 Grady was. So he was my backup.

8 And we he had a couple meetings in the
9 Balfour Beatty office on Meeting Street to
10 discuss those impacts. And as a consequence of
11 that, I got the Hope's door approved to get
12 pulled out of the mockup. I went to Mike
13 Bennett, and I said, how much do you like this
14 stair 4? He was like -- I said, well, you might
15 have to just -- the wall covering like the GMP.
16 And he goes, no. Stair 4 goes away.

17 I mean, those never impacted the ability
18 of the project to open. I mean, you can say that
19 they were aggravations, but at the end of the
20 day, nobody was standing around twiddling their
21 thumbs saying, gee, I wish stair 4 was done
22 because we could open up this hotel. It didn't
23 happen.

24 Q. At or about the time Grady got on board,
25 what was your confidence level in the

1 contractor's ability to tell the owner when this
2 hotel was going to be finished?

3 A. It was weak, and Mike was particularly
4 uncomfortable with it.

5 Q. All right. And you used the term
6 earlier -- I can't quite -- was it ramp up, or I
7 think it had to do with having to hire people in
8 preparation for --

9 A. Yes.

10 Q. -- the substantial completion date?

11 A. Well, that's what predicated all of
12 this.

13 Q. Okay. Well, that's what I really --
14 what's so important about -- why would Mike care
15 because of when they finished it as it related to
16 other people that might be running the hotel?

17 A. Well, what Mike explained to me is, I
18 have to hire 150 people. I don't want to do it
19 twice. I don't want to pay these people to hang
20 around if I can't put them to work. Simple, at
21 the end of the day.

22 Q. And what about trying to hit the ground
23 with the hotel and booking people when the hotel
24 opens? Is there any work you have to do in
25 advance or advertise or any of those things to

1 start booking weddings and all of that?

2 A. Well, I know for a fact that they had to
3 cancel events because the hotel wasn't ready.

4 Q. Okay. So let's go -- we're going to go
5 back and forth a little bit, and maybe we can
6 stick with Grady a while. What was the purpose
7 of hiring Grady? Why did you hire Grady?

8 A. Mike came to me and said, I'm not
9 convinced they're going to be done. What should
10 we do? And I said, we need to hire a third-party
11 scheduler.

12 Q. Okay. And Balfour Beatty had a
13 scheduler. Why not just go to him and ask him,
14 what's going on?

15 A. Well, because they were scheduling and
16 saying that they were going to get it done.

17 Q. And it wasn't happening?

18 A. It wasn't apparent, no. There was
19 concern, and at least we wanted to validate them,
20 not to -- you know, potentially they were right.
21 And they knew, being a \$4 billion company, they
22 knew a hell of a lot more about completion than
23 we did.

24 So Mike said, I need a scheduler. So I
25 called Brian Black with Cummings in Columbia.

1 He's a friend. He actually tried to buy my
2 company at one time. I'm supporting him with my
3 healthcare relationships. And I tried to hire
4 Cummings to come in and take a look at the hotel.

5 And initially, he said yes, but then he
6 had to contact the other offices, and we found
7 out that they had a relationship with Balfour
8 Beatty in California. And he had to recuse
9 himself, or whatever the right term is. I said,
10 well, who do I call? And he gave me Grady's
11 number.

12 Q. Okay. So you didn't know Grady before
13 this?

14 A. No.

15 Q. And I think we've heard -- you were in
16 the courtroom when Grady testified. Is his
17 recollection of why he was hired and what he was
18 told, was that --

19 A. Well, he was hired to validate the
20 schedule. I mean, that's where it started, and
21 then once we were suspicious of the completion
22 status of the schedule, we retained him to
23 continue to do what he calls audits.

24 And he was like a safety blanket for me
25 to keep an eye on the Balfour Beatty schedules in

1 terms of the completion status.

2 Q. All right. And how was Grady's
3 relationship with this job handled in terms of
4 who he reported to and who he -- how it worked?
5 How was that set up?

6 A. If I recall correctly, we hired Grady,
7 but he worked for you.

8 Q. And there was discussion this morning
9 that you did not provide his reports to --

10 A. No.

11 Q. -- Balfour Beatty, correct?

12 A. No, no, no.

13 Q. And that was done on the advice of
14 counsel; is that correct?

15 A. Well, yes, and just commonsense. In one
16 aspect, because we're not the scheduler on the
17 project. I used -- we used those schedules to
18 ask questions and to validate.

19 Q. What was your concern, if you actually
20 provided all this stuff to Balfour Beatty and
21 tell them, this is how you need to schedule a job
22 and all of that, where would that have ended up?

23 A. Well --

24 Q. What was your concern about where --
25 what was your concern about where that would have

1 ended up?

2 A. I never interfere with the contractor's
3 means and methods because I want no
4 responsibility with that, end of story.

5 Q. Okay. But notwithstanding the reports
6 themselves, based on my advice, it was not sent,
7 based on legal advice to my client. It was not
8 sent to Balfour Beatty. Was the information
9 gleaned from Mr. Query, provided orally to
10 Balfour Beatty to assist them?

11 A. Well, we sat -- I know of at least two
12 times we sat in Balfour Beatty's office with
13 David and Nick. I don't -- I think Lauricella
14 might have been at one of the meetings because we
15 were looking at the end dates and trying to pull
16 items forward.

17 And they were working meetings. You
18 know, what is driving this? What can we do?
19 Just as he explained in his testimony, Query
20 explained in his testimony.

21 Q. Did the information provided by Grady
22 provide you, as the program manager, with the
23 ability to assess or otherwise better understand
24 what the contractor was presenting to you as its
25 schedule and what was going to happen down the

1 line?

2 A. Yes, that's what I needed.

3 Q. And once you received this information
4 from Mr. Query, what effect did it have on your
5 confidence about the viability and accuracy of
6 the schedules and the dates being provided by the
7 general contractor to Library Associates?

8 A. Once I -- let me -- towards the end of
9 the project, the dates that Balfour Beatty were
10 offering were based on worst case scenarios.

11 You know, if we had to go order a Hope's
12 door, if we could even get them to make one, that
13 would take six months to do. The hotel would
14 open up in, you know, July of 2019. Well, I
15 wasn't going to stand for that. I mean, that's
16 not a reality. Surely we could do something
17 better than that.

18 Same thing with stair 4. You know, all
19 I need is a handrail, and I need, you know,
20 non-skid steps and whatever the lumen lighting
21 requirement is, and I got a stair. It doesn't
22 have to have marble on it or wallpaper on it or
23 anything.

24 So I was using Grady to help me identify
25 the activities that were driving the end date up.

1 And to Balfour's credit, they were showing them
2 to me as well.

3 But collectively, we worked together to
4 fix that. It's like the ballroom doors. I mean,
5 the ballroom doors were a big deal, but they were
6 never anything to stop the project because we
7 resolved it. The same thing with stair 4. Same
8 thing with the Hope's door.

9 Q. How did Balfour's or the lack -- your
10 loss of trust or whatever you want to use in
11 Balfour's ability to schedule this job, how did
12 that affect your ability to determine what
13 effects change orders and other things might have
14 on this job?

15 MR. HILDEBRAND: Your Honor, I
16 think that's a misstatement of his prior
17 testimony.

18 MR. BUNDY: I will withdraw the
19 question.

20 THE COURT: All right.

21 BY MR. BUNDY:

22 Q. So let's go back to -- well, let me ask
23 you this: Was Grady's work product beneficial to
24 you?

25 A. Yes.

1 Q. Okay. Do you feel like it's necessary?

2 A. Absolutely.

3 Q. Do you think you got the hotel open
4 quicker because of it?

5 A. Unquestionably.

6 Q. Do you think there were fewer problems
7 because of it?

8 A. Yes.

9 Q. All right. So let's go back to where we
10 were, which we were talking about, I think, the
11 punch lists. Let's go back now towards the
12 painting problem. That's what I want to segue
13 into now.

14 You had a punch list problem, and if you
15 need to talk about it more, we can, but now what
16 I would like to do is talk about the painting
17 issue. There's seems to be some confusion about
18 the painting.

19 So if you could talk to us first about
20 the original painting specification and your
21 understanding of it and how that was handled.

22 A. I don't remember the intimacies of the
23 painting specifications.

24 Q. Okay.

25 A. The painting was -- in the hotel tower

1 was specified by the interior designer. Buck had
2 the public areas. Buck is Winford, Lindsay &
3 Associates.

4 Prior to that '12/'13 inspection with
5 Mike, we had gone through and Balfour had gone
6 through the rooms on several occasions based on
7 inspections done by a consultant that was in
8 Balfour Beatty's contract.

9 And then Salamander inspected them and
10 found other deficiencies, and by the time that we
11 got to that inspection that I described with
12 Mike, Balfour Beatty was done in the rooms, and
13 they --

14 Q. What do you mean they were done in the
15 rooms?

16 A. They felt that they did not owe anything
17 further in terms of fixing punch lists.

18 Q. All right. And what was the condition
19 of the rooms when they basically said they're
20 done?

21 A. Well, they were furnished. Technology
22 was installed for the most part. Drapes were
23 installed.

24 Q. Did they meet the contract requirements
25 for fit and finish?

1 A. Not according to the architect of
2 record.

3 Q. And he's the arbiter of that?

4 A. He is the arbiter.

5 Q. So the architect said, doesn't meet fit
6 and finish. Contractor says, I'm not doing
7 anything else. What did you do then?

8 A. Mike called Robins & Morton.

9 Q. And who is Robins & Morton?

10 A. It's a very large contractor. I believe
11 it's privately held, but it's a big -- you know,
12 it's a billion dollar contractor.

13 And I forget the name of the gentleman
14 who's the -- had visited the site. He was the
15 president or something, but Mike had had him come
16 over and take a look at things and give advice.

17 And when Balfour said that they weren't
18 going to do any more and -- Mike felt he had
19 nothing other to do than to do it himself. And
20 so he got Robins & Morton and CPG (sic), another
21 contractor that he used on his limited services.

22 Q. CPI?

23 A. CPI. CPI to come in, and we started on
24 the -- CPI started on the fourth floor and went
25 in and did inspections, noted the deficiencies.

1 Long story short, we started repainting the
2 rooms. And it wasn't just paint, fixing doors.
3 There were instances of grout left in showers.
4 We found unpainted ceilings.

5 You know, there was -- it was a
6 hodgepodge. It was certainly not a five-star
7 hotel. And, of course, we had the caulking
8 issues, and so that was the -- I think we started
9 right after Christmas or right at Christmastime.

10 Q. Okay. So how many -- so we're now in
11 the Christmas holidays, and how many painters was
12 Mike able to get on the job to try to open his
13 hotel?

14 A. It was amazing. It was amazing how many
15 painters we had, and CPI had their own group of
16 painters. Robins & Morton had its own group of
17 painters.

18 And then Mike, with his relationships, I
19 mean, he must -- Mike must have brought in a half
20 dozen of them himself. We had an army of
21 painters. But it wasn't just painters that were
22 required because we had all this technology in
23 place that we had to take down. We had furniture
24 to move and wrap up and protect. Draperies were
25 removed. It was a monumental effort. It was

1 significant.

2 In fact, the third floor didn't open up
3 at the hotel because we just couldn't get there
4 at the end of the day. But we got the upper
5 floors opened, which particularly the fourth one
6 because I think Volvo -- I think that's who it
7 was -- had rented the entire hotel.

8 Q. And do you know how much all that work
9 cost?

10 A. A million and a half dollars, as I
11 recall.

12 Q. And do you think that was a fair price
13 to pay for the work that was done over that
14 period of time during that period of time?

15 A. Mike and I never thought it would cost
16 that much, but once you understood what it took
17 and what we received were not bids to do the
18 work, the actual cost to manifest building --
19 manifest the building.

20 And in the case of Robins & Morton, it
21 was cost plus 5 percent or something like that.
22 I don't know what CPI's agreement was. I never
23 got involved in that.

24 Q. And when that work was completed, did
25 Bennett now have the five-star hotel he bargained

1 for to start out with?

2 A. Mike Bennett was satisfied.

3 Q. Did he have more than he bargained for?
4 Did he get more than he bargained for when the
5 hotel was finally finished by these workers?

6 A. No. I need to clarify. I think it was
7 more than a million and a half dollars. That was
8 just the Robins & Morton number, I think. I
9 think CPI might have had their own invoices.

10 Q. But whatever the number was, that's what
11 it took for Bennett to spend in order to get what
12 he bargained for initially with Balfour Beatty?

13 MR. HILDEBRAND: Objection, Your
14 Honor. It's a leading question.

15 THE COURT: All right. Sustained.
16 Let's take a break for a minute, a short break.

17 (A recess transpired.)

18 BY MR. BUNDY:

19 Q. Okay. Ready to go, Mr. Clements? Are
20 you ready?

21 A. Yes, sir.

22 Q. Mr. Clements, I've put before you what's
23 in evidence as Exhibit 56, the contract
24 documents, and I direct your attention to article
25 3.11 on page 18 of the AIA 201 2007 edition as

1 amended. If you would, read into the record 3.11
2 entitled documents and samples at the site.

3 A. The contractor shall maintain at the
4 site for the owner one copy of the drawing
5 specifications, addendum, change orders, and
6 other modifications that had been ordered and
7 marked currently to indicate field changes and
8 selections made during construction. And then
9 one copy of approved shop drawings, product data,
10 samples, and similar required submittals.

11 These shall be available to the
12 architect and shall be delivered to the architect
13 for submittal to the owner upon completion of the
14 work as a record of the work as constructed.

15 Q. All right. I just wanted to bring that
16 to the Court's attention. Now, what I would like
17 to do, Mr. Clements, is talk a minute about
18 the -- what's referred to as the Egnyte site.

19 Tell the Court, if you will, what the
20 document handling protocol that was used on this
21 job; in other words, when you had these meetings
22 and you had CCDs and all these documents, I mean,
23 a good bit of paper was generated, right?

24 A. Tremendous.

25 Q. Okay. And in this 21st Century, all

1 that gets digitized in one fashion, form, or
2 another, correct?

3 A. Yes, sir.

4 Q. And what services or software, Cloud
5 services did Balfour Beatty provide for use by
6 the project team in order to keep up with all of
7 these documents?

8 A. Well, Balfour Beatty had a system called
9 Egnyte.

10 Q. Can you spell that for me?

11 A. E-G-N-Y-T-E, I think it was.

12 Q. Okay. And is that a software thing?

13 A. Cloud-based software.

14 Q. Cloud-based software?

15 A. Yeah. It's like -- I think it functions
16 similar to Procore, which is probably what you
17 hear more often with contractors. So in the very
18 beginning of the project, you have to decide who
19 is going to hold the contract documents, meaning
20 change orders.

21 Q. Yeah. Where is the repository going to
22 be?

23 A. And the reason you do this is that, you
24 don't want two or -- two or three different
25 captions of documents out there. You want to

1 have one that is absolutely current as is stated
2 in this document.

3 Q. And do you want to make sure everyone
4 involved has access to those documents?

5 A. Certainly on the project team, yes.

6 Q. And why would you want to make sure that
7 the owner and the contractor and the architect
8 all had access to the same group of documents?

9 A. Well, for instance, if there was a
10 change order that we were looking at, we wanted
11 to make sure we had the most recent change
12 because the change orders get revisioned.

13 Or certainly if there was a -- you could
14 have a modification, which was a major issue on
15 the drawing that is impacted subsequently by a
16 bulletin. You want to make sure that you have
17 the latest information.

18 Even for Balfour Beatty's own
19 protection, if they submit a change order, they
20 would qualify it based on, you know, mod 5 dated
21 such and such. And if we would review the change
22 order with the architect initially, as I would
23 do, he'd say, well, this was subsequently
24 modified by bulletin X.

25 Q. So as the construction manager, was one

1 of the duties of the construction manager, in
2 addition to scheduling the job and carefully
3 spending the owner's money, to manage the
4 documents created?

5 A. Yes.

6 Q. All right. And is document management
7 important on a \$60 million hotel job?

8 A. On any job.

9 Q. And what entity determined how those
10 documents would be identified for purposes of
11 revisions or anything else as it related to this
12 project in this repository referred to as the
13 Egnyte site?

14 A. I'm not sure I understand the question,
15 but Balfour Beatty would record and upload all
16 the documentation including documentation that
17 was superceded. I mean, it was really a very,
18 very comprehensive repository of information.

19 Q. And does the Egnyte site contain the
20 historical record of the job?

21 A. Absolutely.

22 Q. So that if it's necessary to check the
23 history of a particular change order event, you
24 can go back to day one and presumably track it
25 all the way through, if properly kept?

1 A. Yeah. They did a very good job with
2 that.

3 Q. Okay. And the Egnyte site was available
4 during the project, was it not, to you?

5 A. Oh, yes, yes. We had logins.

6 Q. Did you make use of it? Did y'all use
7 the Egnyte site?

8 A. Regularly. Well, because -- as a
9 consequence of that, I didn't even keep paper
10 copies of things, and I kept very little physical
11 copies of things because I had this Bible that we
12 worked on.

13 Q. And did it also allow you in this modern
14 age, to work from home and work on a computer or
15 a handheld computer anywhere you wanted to
16 because you could get those documents from
17 anywhere?

18 A. Correct.

19 Q. And you could come to Charleston, and
20 you wouldn't have to put three pieces of paper in
21 a briefcase, and you can talk about 1,000
22 documents?

23 A. Yes.

24 Q. And everyone made regular use of this
25 tool, right?

1 A. Yes.

2 Q. And much like the schedule, it was an
3 important tool?

4 A. Very.

5 Q. Okay. Now, when did the Egnyte site
6 first become available for your use?

7 A. As far as I recall, the very beginning
8 of the project. The first thing you upload is
9 the GMP documents.

10 Q. And would y'all, in these meetings, put
11 the Egnyte site up on the computer and look at it
12 together, or are all of you on the same computer,
13 looking at the same document? Did you send each
14 other documents off the Egnyte site? How did
15 y'all go about actually using it?

16 A. It was for reference.

17 Q. Reference.

18 A. I mean, we would pull documents from it
19 or an e-mail may reference a document in the
20 Egnyte site.

21 Q. So if somebody couldn't remember what
22 happened eight months ago, you could go back and
23 at least see what the records say?

24 A. I mean, something as simple as what day
25 did Kim Brown sign this change order. There

1 would be a copy of the executed change order --

2 Q. Or as simple --

3 A. -- or a CCD.

4 Q. Or as simple as what color drapes did we
5 decide to put in room 302?

6 A. Yeah, that should be there, yes, sir.

7 Q. Okay. And the other use of it, of
8 course, is once you start to use the hotel, going
9 forward, you've got a way to run the hotel.
10 You've got an operator's manual basically, right?
11 Because wouldn't the operator's manuals be in
12 there as well?

13 A. Submittals would be included in that.
14 So to the extent closed out documents were
15 submittals, they would be reflected there. But
16 obviously the owner would take those in hand,
17 either in hard copy or digital form for its own
18 repository.

19 Q. But let's just go to the submittals.
20 When somebody sends a submittal, it has the
21 manufacturer's information, right?

22 A. Yes, sir.

23 Q. With part numbers and all the rest of
24 it, right?

25 A. Yes.

1 Q. So here we are four years later. If the
2 building engineer wants to know what the part
3 number is for something that's broken, he can go
4 back to these records and he can find it
5 presumably?

6 A. If it was still up.

7 Q. If it was still up?

8 A. Right.

9 Q. Okay. So during what period of time was
10 the owner of this building -- well, let me stop
11 you there. Whose documents are these?

12 A. The owner's.

13 Q. So the owner's documents are being --
14 just like the owner -- the contractor is spending
15 the owner's money, and he's also holding the
16 owner's documents? The contractor doesn't own
17 these documents, does he?

18 A. Not in my opinion.

19 Q. The owner is the one paying for these
20 documents. So during what period of time did the
21 owner have access to his documents which were
22 controlled by Balfour Beatty?

23 A. Throughout the project until towards the
24 end of the project.

25 Q. All right.

1 A. Post-occupancy, I think, is right around
2 the first of the year.

3 Q. Is it your testimony that Balfour Beatty
4 denied access to the owner of the owner's
5 documents existing on the Egnyte site?

6 A. Well, they shut it down, so we did not
7 have access.

8 Q. And when was that?

9 A. I believe it was the first of the year,
10 to be honest with you.

11 Q. And did you complain about that to the
12 architect?

13 A. No. I complained to Balfour Beatty.

14 Q. Oh, you complained to Balfour Beatty.
15 And to who -- who at Balfour Beatty did you
16 complain to?

17 A. I know specifically with David Simonton,
18 but I presume also with Nick Starcevic because I
19 thought perhaps it might a computer glitch or
20 something.

21 Q. Computer glitch?

22 A. Right.

23 Q. And what were you told when you -- did
24 you ask for access to your client's documents?

25 A. Yes.

1 MR. HILDEBRAND: Objection, Your
2 Honor.

3 Q. And what were you told?

4 A. I didn't get an answer.

5 MR. HILDEBRAND: Objection, Your
6 Honor. I don't see the relevancy of any of this.

7 MR. BUNDY: Pardon me?

8 THE COURT: I do. Overruled. It's
9 relevant.

10 BY MR. BUNDY:

11 Q. What were you told by Balfour Beatty's
12 project manager or whatever Mr. Simonton's title
13 was at the time, when you asked him for access to
14 your client's, the owner's, documents on his
15 hotel?

16 A. Well, I didn't receive a response
17 initially, but eventually, I did get a response
18 from David that said, tell me which ones you
19 want.

20 Q. Tell me which ones you want. So you
21 were given limited access maybe?

22 A. At best.

23 Q. Had you ever agreed to limited access?

24 A. No.

25 Q. Are there some documents in there that

1 are owned by Balfour -- that are owned Mike
2 Bennett and others that aren't?

3 A. Say that again.

4 Q. Are there some documents in Egnyte that
5 are owned by Balfour Beatty but not owned by
6 Michael Bennett as part of his project, or is he
7 entitled to all of it?

8 A. I don't know because there could be, you
9 know, levels within Egnyte that I wouldn't have
10 access to.

11 Q. All right. Did the lack of access to
12 the Egnyte site hinder you in any way in trying
13 to determine the viability of change orders,
14 claims, and particularly the claim that was made
15 in this four volume set of books?

16 A. Yes.

17 Q. Okay.

18 A. Once we got the hotel open, I had
19 anticipated trying to reconcile change orders,
20 and that was the primary reason I was trying to
21 access the Egnyte site. At the time I was trying
22 to do just a consolidated claim draft or whatever
23 it was. It wasn't even on the table.

24 Q. This is before it went from 20 days and
25 a couple hundred thousand dollars to 24 million

1 dollars?

2 A. Yes, sir.

3 Q. During that period of time?

4 A. Yes, sir.

5 Q. So during -- so prior to this 24 million
6 dollar claim, you were not allowed access to the
7 Egnyte site?

8 A. Just prior, yes, sir.

9 Q. And were you ever given access
10 afterwards?

11 A. No. I was offered documents on a
12 limited basis, but I did not pursue that because
13 I wanted all of them.

14 Q. Okay. Could you have used those
15 documents --

16 A. Absolutely.

17 Q. -- had you been able to --

18 A. Absolutely.

19 Q. -- look at them?

20 A. Well, I had every intention of at least
21 going through every outstanding change order with
22 the design team, certifying them for entitlement,
23 at least getting them to a point where we knew
24 what the exposure was, for lack of a better word,
25 the total cost -- the cost.

1 Q. And since you had not kept hard
2 copies -- why hadn't you kept hard copies all
3 along?

4 A. Well, I had some, but, you know, it just
5 takes up too much space. You know, I don't carry
6 hard copies of anything.

7 Q. Were you ever advised by Balfour Beatty,
8 when this job is over, we're cutting off all
9 these documents. You're not getting to them, so
10 you better keep hard copies?

11 A. No.

12 Q. Did you anticipate they would do that?

13 A. I've never had it happen in my career.

14 Q. All right. So it's never happened in
15 your career?

16 A. No.

17 Q. Okay. And you believe you were hindered
18 by your -- the unavailability of your client's
19 documents in order to adequately respond to their
20 claims and to look at change orders?

21 A. Correct.

22 Q. And as we sit here today, you still
23 haven't had access?

24 A. No.

25 Q. Okay. All right. I'm just about done.

1 The four binders -- while he is looking for that,
2 let me ask you this: The claim that you thought
3 you were going to get before you got the 22 or 24
4 billion dollar claim was the claim on the sixth
5 floor?

6 A. Yes, sir.

7 Q. And what was your understanding about
8 the nature and amount of that claim that you were
9 going to receive, if any?

10 A. That I was going to receive?

11 Q. Yeah, or the owner was going to -- you
12 expected a claim from the contractor on the sixth
13 floor; is that correct?

14 A. We received a claim.

15 Q. Okay. Tell me about that claim.

16 A. Well, the -- it was delivered to the
17 architect with the qualifier that he was supposed
18 to respond in 20 days. He did. I don't recall
19 him even asking for additional information, but
20 he did respond.

21 And to paraphrase Buck, he felt that the
22 owner was liable as well as the contractor, who
23 split the (inaudible). And subsequent to that,
24 we actually scheduled -- I will call it a
25 mediation or something at your office to go ahead

1 and settle it.

2 Q. Right.

3 A. You know, it was your -- your rule to me
4 was, we settle every claim as soon as we get it.
5 Don't let them add up. And so --

6 Q. And I think I told you that the day we
7 started talking to each other, right?

8 A. Yes.

9 Q. A few years earlier?

10 A. Yes, that was the rule. And so we met
11 at your office, and the night before, I think, or
12 if not that day, Balfour Beatty added the seventh
13 and ninth floor to try to bundle it all up. But
14 those claims were not properly documented as
15 evidence of Buck's response, that he needed
16 additional information and --

17 Q. So that mediation was unsuccessful?

18 A. It was a total waste of time.

19 Q. And then the next claim that came was
20 this 22 million dollar claim?

21 A. Yeah. In fact, in January of 2018,
22 David Simonton sent Kim a letter revising the
23 sixth, seventh, and ninth floor claims to
24 \$1,023,000, and as I recall, attached some
25 Sunbelt Rental receipts or something to them.

1 Q. So in January, the claim was a million
2 or so?

3 A. 1 million 23, I think.

4 Q. And that was the only claim you were
5 aware of?

6 A. That was the only one I was ever aware
7 of.

8 Q. Only one -- was that one submitted to
9 the architect?

10 A. No. That went to Kim.

11 Q. Okay. And who were claims supposed to
12 go to first?

13 A. The architect.

14 Q. Okay. So the only claim that was
15 actually filed in this case, ruled over by the
16 architect, and paid was the one about the
17 hurricane, right?

18 A. No, about the sixth floor.

19 Q. Okay. All right. So --

20 A. To my memory. I don't remember any
21 other.

22 Q. So let's look at -- do you remember
23 receiving or seeing Exhibit 252, which for the
24 record is a January 25, 2019 letter? And I
25 believe it's sent to you.

1 A. Uh-huh, yes, I remember seeing this.

2 What's the date? January, yes. That's January
3 25th.

4 Q. 2019?

5 A. Yeah. I remember this because I think
6 Balfour Beatty filed an 8 million dollar lien the
7 next day.

8 MR. BUNDY: Okay. Do you want to
9 wait to get that letter, Judge?

10 THE COURT: I got it.

11 BY MR. BUNDY:

12 Q. So this is a claim, right, or it's a
13 letter --

14 A. It's a letter.

15 Q. -- demanding money?

16 A. It's a letter.

17 Q. Okay. And it demands.

18 A. Well, it's an offer -- I interpreted it
19 as an offer of negotiation.

20 Q. Okay. And basically, what does Balfour
21 Beatty want you to -- what check do they want you
22 to stroke based on a four-page letter?

23 A. \$22,452,282.51.

24 Q. Which exceeded the claim that you were
25 aware of by some 21 million dollars?

1 A. Yes, sir.

2 Q. Okay. And how many days did they want?
3 Did they take -- did they take any responsibility
4 for a single day of the 18 months of delay?

5 A. I never saw any record or offer of that.

6 Q. Okay. All right. Now, under the
7 contract documents, are they supposed to send
8 claims to you, or are they supposed to send them
9 to the architect?

10 A. To the architect.

11 Q. All right. Do you see -- was the
12 architect copied?

13 A. Yes.

14 Q. Okay. Was the architect asked to
15 respond?

16 A. The architect responded on his own, as I
17 recall.

18 Q. Okay. Now, the subs -- refresh your
19 recollection, if you need to, about the contents
20 of the letter, and tell if you would have been
21 able, in good faith, to recommend to Mike Bennett
22 he stroke these people a check for 22 million
23 dollars?

24 A. No, I would not have.

25 Q. How does this claim letter compare to

1 what you're typically used to in your field when
2 contractors make claims?

3 A. Well, again, I don't think it's a claim.
4 It's some kind of a statement.

5 Q. Okay.

6 A. I'd call it almost a demand letter. I
7 want 22 million dollars.

8 Q. Okay.

9 A. And you want -- and I would like to, I
10 guess, negotiate.

11 Q. Sort of like, give me all your money,
12 right?

13 A. Yeah.

14 MR. HILDEBRAND: Objection, Your
15 Honor.

16 BY MR. BUNDY:

17 Q. Empty the cash drawer. All right. So
18 then the architect gets this, and what does he
19 do?

20 A. He asks for time and for backup.

21 Q. Do you think that was a reasonable
22 request on a 22 million dollar claim based on a
23 four-page letter?

24 A. And for the owner, too.

25 Q. Sure.

1 A. I think we asked for a month with the
2 digital backup, if I recall.

3 Q. Okay. So eventually, you received --
4 somebody received -- Buck received, I guess, a
5 four-volume treatise, right? What we got is this
6 four-volume treatise, Defendants 11, 12, 13, and
7 14.

8 And the first two pages is the cover
9 letter to Mr. Lindsay. Do you see that?

10 A. Yes, sir.

11 Q. And what's the date of that?

12 A. March 6th, 2019?

13 Q. So roughly 60 days have transpired since
14 the letter demanding 22 million bucks?

15 A. Less than that.

16 Q. All right. And did you look at these
17 claims? Did you look at this -- these documents?

18 A. I did when it was -- when I received a
19 copy of it, I did.

20 Q. When did you receive a copy?

21 A. About the same time that it was issued.

22 Q. Okay.

23 A. I did not go through all 2,000 pages or
24 whatever it is.

25 Q. Did Lindsay go through it?

1 A. I can't answer that question.

2 Q. Did he issue any rulings on or any
3 opinions on the validity or viability of the
4 claim?

5 A. I don't recall.

6 Q. Okay. Was that a requirement to proceed
7 to the next step? The first thing you've got to
8 do is ask the architect and see what he says,
9 right?

10 A. Yes, sir.

11 Q. And do you understand that, before you
12 file a lawsuit, you've got to get a decision from
13 the architect?

14 MR. HILDEBRAND: Objection, Your
15 Honor.

16 A. I didn't know that.

17 Q. Fair enough. He don't know.

18 A. I don't know that.

19 Q. So, you know, your review of this
20 claim -- what is your opinion of the viability of
21 this claim as presented in this document? What
22 could this document inform you of that would give
23 you any reasonable grounds to pay Balfour Beatty
24 a single dime or give them one single day of time
25 extension?

1 MR. HILDEBRAND: It's a leading
2 question, Your Honor. If he can just ask him
3 his -- have you read it? And what his responses
4 were, what his takes were. Obviously, it's a
5 very leading question. He can ask what he did to
6 resolve and what his recommendations were.

7 THE BUNDY: I believe that
8 question --

9 (Attorneys talking over each
10 other.)

11 MR. HILDEBRAND: -- without
12 Mr. Bundy testifying.

13 MR. BUNDY: I believe I prefaced my
14 question with what, which I believe makes it, by
15 definition, a non-leading question.

16 THE COURT: Okay. I'm going to
17 overrule that. Go ahead.

18 MR. BUNDY: Thank you, Your Honor.

19 BY MR. BUNDY:

20 Q. What in this claim -- what information
21 in this claim, based upon your recollection and
22 review of it, would lead you to believe that the
23 contractor was entitled to one dime or one day of
24 time extension based on the information contained
25 in this claim?

1 A. Well, I mean, just taking the letter
2 itself and tab 5 and volume 1, there's support
3 for contract balance and retention, which
4 consists of pay applications 43, 44, and 45.

5 The contractor liened the project before
6 he completed work to start it all and the
7 subcontractors named in this liened the project
8 before they completed the work. And maybe that's
9 their right to do. I don't know, but the owner,
10 and certainly the lender, is not going to make
11 payments when there are outstanding liens.

12 And this was the case for pay apps 43
13 and 44. And 44 was further encumbered because
14 upon receipt -- I think it was mid December. By
15 the end of December, Jennifer had written to Nick
16 Starcevic and said, these numbers don't work.
17 You know, I need some help.

18 Subsequent to that, in January, of
19 course, is when we found out we're spending a
20 million and a half dollars to complete the guest
21 rooms. And I had petitioned the architect, based
22 on our exposure, that we had a right to protect
23 the owner's interest with offset.

24 And so Jennifer told Nick Starcevic that
25 she could not reduce retention, and that was in

1 January. And then we got this, I think, on the
2 25th. We got one. This is the first thing on
3 the 25th, and we got the Balfour Beatty 8 million
4 dollar lien, I think, the next day. And
5 sprinkled in there are liens from P Walls and
6 MCC, Old North State. I mean, it was a cluster.

7 And to top that off, after all that
8 happened, Balfour Beatty submitted pay
9 application 45 with all of that still sitting on
10 the table.

11 Q. And what was -- and Balfour Beatty's 45
12 only asked for, what, 2 million bucks?

13 A. I don't recall what it was. I mean,
14 given the circumstances that were on the table,
15 it just didn't --

16 Q. Well, that letter talks about 43, 44,
17 and 45 as the pay application. We don't pay
18 applications if they haven't been signed by the
19 architect, do we? We're not obligated, right?

20 A. No, but Jennifer signed 43.

21 Q. But she rescinded it thereafter?

22 A. Subsequently rescinded it, yes. I asked
23 her to certify -- to renew and certify 44,
24 thinking that Balfour Beatty was -- at the time
25 there was only one lien by Guy M. Beaty, and this

1 was in -- that occurred December 1st. And I
2 figured, well, shoot, they'll have this bonded
3 off in two weeks.

4 Q. And how big was that lien?

5 A. I don't know. I don't recall. I think
6 it was a million bucks in round numbers.

7 Q. Okay.

8 A. But that lien was not released until the
9 second week in January. I don't know why it took
10 from --

11 Q. And whose obligation is it to bond off
12 liens to subcontractors?

13 A. The contractor.

14 Q. Okay. So after the -- it's obvious we
15 didn't pay the demand in the claim in front of
16 you and around you. What happens after that in
17 terms of your work on this job?

18 A. Well, I think my work stopped between
19 the shut down of Egnyte and not being able to at
20 least go through and validate change orders that
21 I had on hand, which I wanted -- I didn't want to
22 be -- I wanted to try and reconcile things as
23 best I could.

24 And then this occurred, and this is
25 nothing that I could do anything with, given the

1 enormity of it and the subsequent liens and then
2 lawsuit in February, I think. It was a legal
3 matter. And I was available to -- for support.
4 And that basically ended my involvement in the
5 project until further discovery requests and I
6 became involved in this.

7 Q. All right. So were you or were you not
8 involved in Library Associates' attempt to try to
9 audit the books and try to get to the cost -- the
10 actual cost on this job? Were you involved in
11 that process?

12 A. No.

13 MR. BUNDY: I believe that's enough
14 for me, Judge. Thank you.

15 THE COURT: Okay. It is 4:37, and
16 I suspect you're going to take a little longer
17 than 20 minutes to cross-examine Mr. Clements.

18 MR. HILDEBRAND: I will, and I
19 think I can probably make it a little more
20 efficient if I just have a little time with my
21 documents, based on what he says. I think if we
22 start in the morning, it will be quicker
23 actually.

24 THE COURT: Very good. Sure.
25 Gentlemen, do y'all want to cross-examine as

1 well.

2 MR. BUNDY: I only have one more
3 question.

4 THE COURT: Sure.

5 BY MR. BUNDY:

6 Q. When was permanent power achieved?

7 A. January 27th, 2017.

8 THE COURT: Permanent power was
9 January 17th.

10 THE WITNESS: 27th, I believe.

11 THE COURT: 27th. All right. So
12 why don't we go ahead and break for the day. We
13 will start back at 9:30. Mr. Clements, I will
14 look to see you then. All right.

15 THE WITNESS: Yes, sir.

16 THE COURT: Meanwhile, you still
17 don't get to talk to anybody about --

18 THE WITNESS: I won't.

19 (The hearing was adjourned at 4:38
20 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 deposition was by me duly sworn to
9 testify to the truth, the whole truth, and
10 nothing but the truth in the within-entitled
11 cause; that said deposition was taken at the time
12 and location therein stated; that the testimony
13 of the witness and all objections made at the
14 time of the examination were recorded
15 stenographically by me and were thereafter
16 transcribed by computer-aided transcription; that
17 the foregoing is a full, complete and true record
18 of the testimony of the witness and of all
19 objections made at the time of the examination;
20 and that the witness was given an opportunity to
21 read and correct said deposition and to subscribe
22 the same.

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

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

Witness my hand, I have hereunto
affixed my official seal on September 25, 2022 at
Charleston, Charleston County, South Carolina

19

20

21 _____
22 Jennifer M. Adams
23 Court Reporter And Notary Public
24 My commission expires: 03/15/2032
25

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

5 BALFOUR BEATTY CONSTRUCTION,)
 6 LLC,) VOLUME FOURTEEN
 7) Case No.
 8 Plaintiff,) 2019-CP-10-1108
 9)
 10 -versus-)
 11)
 12 LIBRARY ASSOCIATES, LLC; AND)
 13 METROPOLITAN LIFE INSURANCE)
 14 COMPANY, A NEW YORK CORPORATION)
 15)
 16 Defendants.)

17 -----
 18 LIBRARY ASSOCIATES, INC.,)
 19)
 20 Defendant/Third-Party Plaintiff,)
 21)
 22 -versus-)
 23)
 24 LITHKO CONTRACTING, LLC; GUY M.)
 25 BEATY, INC.; BERNHARD MMC, LLC)
 GULF STREAM CONSTRUCTION CO.,)
 INC; Precision Walls, INC.;)
 PALMETTO AUTOMATIC SPRINKLER)
 COMPANY, INC.; ET AL,)
)
 Third-Party Defendants.)

18 -----
 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 28, 2021 at 100 Broad Street, Courtroom
 23 2A, Charleston, South Carolina.
 24
 25

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1 INDEX OF WITNESSES

2	DEFENDANT'S WITNESSES	<u>PAGE</u>
	JIM CLEMENTS	
3	Cross-Examination by Mr. Hildebrand	3305
	Cross-Examination by Mr. Terry	3425
4	Redirect Examination by Mr. Bundy	3439
	Recross-Examination by Mr. Hildebrand	3480
5	Redirect Examination by Mr. Bundy	3493
	Recross-Examination by Mr. Hildebrand	3493
6		
	KIM BENNETT BROWN	
7	Direct Examination by Mr. McDonald	3531
8		
	Certificate	3582

9

10

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1 THE COURT: All right. Back on
2 Mr. Clements, and Mr. Hildebrand was beginning on
3 cross-examination.

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: All right. Very good.

6 MR. HILDEBRAND: I got a text from
7 Mr. Heuer a few minutes ago that he's stuck on
8 526. But he'll be -- should be here in a few
9 minutes. He sends his apologies.

10 THE COURT: All right. Well,
11 welcome to Charleston.

12 MR. HILDEBRAND: May it please the
13 Court?

14 THE COURT: Yes, sir. You may
15 proceed.

16 CROSS-EXAMINATION

17 BY MR. HILDEBRAND:

18 Q. Mr. Clements, we met before. Of course,
19 I'm Tom Hildebrand, and I represent Balfour
20 Beatty in this claim that has been filed, this
21 lawsuit that is now proceeding. We spent a lot
22 of time together, did some depositions, and I
23 think I know a lot of your background and such.

24 Yesterday when Mr. Bundy was deposing
25 you, I was impressed, and I think probably the

1 Judge was as well, that you certainly have a lot
2 of experience as a -- construction manager is the
3 term that you would prefer?

4 A. Sure.

5 Q. Okay. And you went through a lot of the
6 history where you've been involved in billion
7 dollar projects and a lot of different
8 construction jobs that housed -- that were, I
9 would assume, very complex and had a lot of
10 issues that developed and such, but you've worked
11 through them; is that right?

12 A. Yes, sir.

13 Q. All right. And I've got a copy of your
14 website that's in evidence, but I don't think I'm
15 going to refer to it. But basically, as a
16 program manager for an owner, what you're able to
17 provide is, when an owner comes to you, you can
18 say, look, this is what I specialize in is
19 representing you in a construction project.

20 And I have the experience and the skills
21 available to give you, I think, good advice to --
22 according to your website, keep the project on
23 track, try to keep it on budget, try to keep the
24 schedule generally on track. And you have the
25 experience to be able to provide that for others,

1 correct?

2 A. Yes, sir.

3 Q. All right. And then for -- as far as
4 owners are concerned, when you contract with an
5 owner, you can say, here's the portfolio of
6 skills that I have, and here are the things that
7 I can offer to you. You tell me which ones you
8 would like for me to perform, and I will be happy
9 to do that. And then you enter in an agreement
10 and get started. Fair enough?

11 A. That's the gist of it, yes.

12 Q. All right. And on this job -- we will
13 briefly allude to your contract for a few
14 minutes, but really what I want to get to is, you
15 acted on this job as the owner's representative
16 to, again, try to keep the job on track and try
17 to get it moving to where we are now, with a
18 hotel that is usable and that is acceptable to
19 the owner, correct?

20 A. Yes, sir.

21 Q. All right. And during this job, you
22 used your best skills to try to do what you could
23 to keep the job on budget to the extent possible
24 and on track towards completion and to try to use
25 your best skills to try to do that, correct?

1 A. Yes, sir.

2 Q. And I appreciate that. And I think you
3 testified yesterday that it's inarguable that, on
4 this particular job, there were a lot of
5 challenges and issues that came up that took
6 extreme efforts, perhaps -- I don't know if those
7 were your exact words, but extreme efforts to try
8 to get the hotel finished to where we are today.
9 Agreed?

10 A. Yes. It was considerable effort of
11 everybody --

12 Q. Right.

13 A. -- not just me.

14 Q. Right. You spent long -- probably had
15 some sleepless nights, spent a lot of long hours
16 and a lot of anguish and a lot of time and effort
17 to try to keep this thing on track, correct?

18 A. Yes, sir.

19 Q. And Balfour did as well, you would
20 agree?

21 A. I would agree.

22 Q. And the subcontractors have to -- there
23 were a lot of changes and a lot of issues that
24 they had to address to try to keep this job
25 moving forward?

1 A. That's a true statement, yes.

2 Q. And the designers -- I mean, there might
3 have been some issues with the design, but by
4 gosh, they tried their best once the thing got
5 going, I would assume, to keep it on track?

6 A. Yes, sir.

7 Q. All right. Now, one of the benefits --
8 we've talked about this project a lot. You
9 wanted to get involved in this job in particular
10 because it was kind of -- I mean, gosh, it's
11 maybe the preeminent hotel in Charleston,
12 utilizing what it was going to be and your --
13 maybe in the autumn of your career, and you
14 wanted to work on kind of an exemplary project;
15 is that right?

16 A. Yeah. I considered it a monumental
17 project.

18 Q. Okay. Great. And you, I think,
19 testified that you had some meetings with the
20 owner, Michael Bennett, about his vision and what
21 he wanted, what he envisioned this hotel to be.
22 So you kind of knew what it was that you were
23 working towards. Is that a fair statement?

24 A. Yes. He provided me examples of hotels
25 that, I guess, were his inspiration.

1 Q. Okay. And I think you noted in response
2 to questions from Mr. Bundy that his forte before
3 the Hotel Bennett had been kind of -- I don't
4 mean any sort of derogatory term by this, but
5 kind of chain hotels, Hampton Inns and franchise
6 hotels and such, but not a five-star, luxury,
7 one-off poster hotel like the Hotel Bennett,
8 correct?

9 A. Yes. He referred to it as -- I think
10 the term is limited service.

11 Q. The --

12 A. The hotels --

13 Q. Those prior hotels that he had done were
14 limited service?

15 A. Yeah.

16 Q. All right. And I think that you told us
17 yesterday that -- and I know that you talked
18 about this in your deposition when I was talking
19 to you, that one of the big points from your
20 perspective, when you were dealing with Michael
21 Bennett, was that he did not give you a budget
22 and did not give you, nor Balfour, a rigid time
23 frame to get this finished.

24 He said, I've got my vision, and it's
25 going to take what it takes monetarily to get it

1 finished, and it's going to take time-wise what
2 it takes to get it finished. Is that a fair
3 statement?

4 A. No.

5 Q. Okay. Tell me what your testimony was.

6 A. During pre-construction, that was the
7 case.

8 Q. I understand.

9 A. But once we got to the GMP, that was the
10 budget. So there was no presumption that we were
11 going to spend more than -- whatever it was. 56
12 million dollars. I forget what the number is
13 now.

14 Q. Okay. Well, let's talk about your
15 experience and what you can provide to an owner
16 based on your experience with regard to the
17 development of a project like this.

18 If you were, as a construction manager,
19 approached by an owner and were told, look, here
20 is my vision of what I want a hotel to be, and I
21 want it to be the best. I want it to be an icon
22 for the City of Charleston. Here's what my
23 vision is.

24 You could start with the owner from that
25 nascent vision and take it all the way to

1 completion and advise him -- give him the benefit
2 of your experience on how to best do that
3 project. Agreed?

4 A. Yes, sir.

5 Q. All right. And if the owner were to
6 tell you -- if they were to ask you your advice
7 on how to best proceed, you would say, okay, if
8 you did not know this sort of thing before, I've
9 got a lot of experience as a program manager, and
10 I can provide you guidance and advice on how to
11 keep the project on track, and I can give you the
12 best practices so that this thing will be done on
13 budget and on schedule. Is that a fair
14 statement?

15 A. Yes, sir.

16 MR. BUNDY: Objection.

17 BY MR. HILDEBRAND:

18 Q. And if Mr. Bennett had asked you, okay,
19 here's my vision, here's what I want to
20 construct, but I want this thing to be finished
21 at a particular time and that time is important
22 and at a particular budget, and I don't want to
23 go over budget.

24 Then based on your experience, you would
25 be able to tell him, here's how I think you need

1 to approach this project to get that
2 accomplished; is that right?

3 A. Yes, sir.

4 Q. And if Mr. Bennett had come to you and
5 asked that that's what he wanted, then you would
6 have told him, okay, if you want to keep a
7 project on time and on budget, then there are a
8 couple of cardinal things that you need to keep
9 in mind.

10 One, when we sign the deal with the --
11 when the agreement is signed with the contractor
12 to get this thing built, we want all the design
13 completely finished, and we don't want any
14 changes. You don't want to change the budget,
15 and you don't want to go over budget. You want
16 to make sure all of your changes are done ahead
17 of time, correct?

18 MR. BUNDY: Objection.

19 THE COURT: All right. Just one
20 second. Basis?

21 MR. BUNDY: Well, I'm not so sure
22 where there is a question in there, one, and I
23 don't see where the relevance of it is; and, two,
24 it's complete speculation about what -- I mean,
25 the whole thing is misleading. I don't know

1 where it goes.

2 THE COURT: Well, he's on cross, so
3 I'm going to give him some latitude. Go ahead.
4 Overruled.

5 MR. HILDEBRAND: All right.

6 BY MR. HILDEBRAND:

7 Q. So I think every witness I've talked to,
8 from the architect to everybody else has agreed,
9 if you want to keep a project on time and on
10 budget, then you want the design finished, and
11 you don't want changes during construction. Is
12 that a fair statement?

13 MR. BUNDY: Objection.

14 THE COURT: I will sustain the
15 objection as to what others have said. You can
16 ask him --

17 MR. HILDEBRAND: I will rephrase
18 it. Good point, Your Honor. I will rephrase.

19 BY MR. HILDEBRAND:

20 Q. In order to keep -- if Mr. Bennett had
21 wanted to keep this project on time and on
22 budget, would you agree with me that the best way
23 to have done that would not -- would have been
24 not to have implemented all the changes that took
25 place after the GMP contract was signed with

1 Balfour?

2 A. I would say, no, and I will tell you
3 why. Whenever I budget a project, I budget
4 contingency. And I always make sure,
5 particularly in the case with Mr. Bennett, that
6 there will be no regrets. So clients have the
7 latitude, and the contract provides the protocol
8 for changes.

9 Now, in a very simplistic mode, yeah.
10 But no design is ever perfect. No contractor is
11 ever perfect, and no client knows exactly what he
12 wants. So change is part of the course of doing
13 business.

14 Q. I understand that, yeah, and there's --
15 I've got no problem with that. The issue is if
16 you -- the simple fact of this case is that
17 Mr. Bennett, after he signed the GMP with
18 Balfour, can make whatever changes he wants to.
19 He has that right under his contract to make
20 changes. Agreed?

21 A. Yes, sir.

22 Q. And if those changes impact the budget
23 and they cause increases, then he's responsible
24 for paying those increases, correct?

25 A. Yes.

1 Q. And if those changes impact the schedule
2 and they increase the schedule, then those
3 changes are his responsibility. Agreed?

4 A. Yes.

5 Q. Right. So it's not an issue of whether
6 he can make changes. That's what this case is
7 about. An owner certainly has the right to make
8 changes, but he just needs to understand that if
9 he is going to make those, he needs to be
10 prepared for the consequences, which are often
11 changes in the schedule and changes in the price,
12 correct?

13 MR. BUNDY: Objection. That's not
14 a question. It's a statement by the lawyer that
15 the owner needs to understand something.

16 MR. HILDEBRAND: I think the Judge
17 asked you for your --

18 I'm sorry, Your Honor.

19 THE COURT: Yeah. I'm going to
20 overrule the objection. You can answer that
21 question.

22 THE WITNESS: Restate that.

23 MR. HILDEBRAND: Mission
24 accomplished, I guess, Mr. Bundy.

25 BY MR. HILDEBRAND:

1 Q. The question was simply --

2 A. I can't remember it. I'm not messing
3 with you.

4 Q. Right. The simple issue -- the simple
5 fact that I was trying to over -- get across was
6 that the issue was not that Mr. Bennett could not
7 make changes because he certainly can.

8 A. Right.

9 Q. But if he wants to make changes, he
10 needs to be prepared to recognize the
11 consequences that those changes are -- when they
12 impact the cost and time. Agreed?

13 A. Yeah. It's not universal because not
14 all changes impact cost and time, but some may.

15 Q. Right. Would you agree with me that the
16 best -- would you agree with me that it's
17 certainly inarguable that there were -- after the
18 GMP was signed on this project, that a lot of
19 changes were made by Mr. Bennett? His vision
20 continued to develop as this project was ongoing?

21 A. I would say, no, and I will tell you
22 why. Because if you go back and go through the
23 history of the change order log, you will find
24 very few changes are directed by Mr. Bennett.
25 The bulk of the changes are driven by design

1 conflicts from -- that we discovered through the
2 BIM process.

3 That's one thing I have a lot of empathy
4 for Mr. Bennett on in this project is he didn't
5 sit there and just start changing things, you
6 know? It was the design that was the most
7 challenging aspect of the project, given the
8 limitations of the height and the strengths of
9 the floor-to-floor. And that's the bottom line.

10 But to say Mr. Bennett made a bunch
11 changes would be a falsehood.

12 Q. Okay. Well, I appreciate that. So the
13 design issues were the biggest issue, but it's
14 inarguable that Mr. Bennett did make -- for
15 example, after the GMP was signed, he decided to
16 change the rooms from -- half the rooms from just
17 regular rooms to suites. That was one major
18 change, wasn't it?

19 A. No, that's not true. The top three
20 floors -- we took two rooms out of each floor and
21 combined them. So, say, half the rooms, you
22 would be talking about 90 rooms. In this case,
23 we're talking about taking 18 or maybe 12 out of
24 them.

25 Q. How about removing the columns in the

1 ballroom? Do you think that was --

2 A. That was a non-event. It imposed no
3 constraint, no conflict of Balfour Beatty. They
4 submitted a change order. They didn't want any
5 time. There's less work for them at the end of
6 the day. There was no claims made, no calls for
7 time. It turned out that it was absolutely a
8 fabulous thing for the project.

9 Q. Well, I understand that the --

10 A. But there was no impact to the project
11 at the time, no.

12 Q. Okay. Well, in a nutshell, can you --
13 what would be the reason that the contract went
14 up? The GMP went up from -- the project was 60
15 million to 65 million dollars?

16 A. Well, I think we just talked about that.
17 I think it was -- predominantly there were design
18 conflicts in the design that were found out
19 during the BIM process.

20 And there were some changes by
21 Mr. Bennett. You know, for instance, the
22 consolidation of the rooms on the upper floors.
23 But there were -- I'm talking from memory. There
24 were not abundant structural changes. They were
25 primarily aesthetic changes, if I recall

1 correctly.

2 Q. Okay. Let's talk about the RFP and the
3 responses that were addressed yesterday. Do you
4 have Defendant's Exhibit 103 in front of you?

5 A. Oh, the RFP? My RFP?

6 Q. Yes, sir.

7 A. Yes, sir.

8 Q. Okay. So this is the -- when this job
9 was -- when the RFP went out to Balfour and
10 others, and when they were having their
11 discussions with the owner, this is the basis for
12 what their -- what they were to provide bids for
13 or to provide their presentations for; is that
14 correct?

15 A. Collectively, yes.

16 Q. Okay. And on the -- can you turn to the
17 third page of this with me, please, sir? All
18 right. Under number C, the anticipated start
19 date for the new construction is 1 March, 2014,
20 correct?

21 A. I'm sorry, under C?

22 Q. Yeah, on the third page.

23 A. Yes, thank you.

24 Q. All right. So the anticipated start
25 date is 1 March, 2014, and below that, the --

1 under key dates are as follows: The interview --
2 the last one there is, interview and award is
3 November 22, 2013, right?

4 A. Uh-huh. Yes, sir.

5 Q. So the start date, the anticipated start
6 date, according to the RFP, and that's what
7 the -- the anticipated start date was March 2014,
8 but the actual start, when the notice to proceed,
9 was March 2015, correct?

10 A. Yes, sir.

11 Q. So it was a year later than what was
12 shown on here?

13 A. Yes, sir.

14 Q. There was a lot of discussion yesterday,
15 Mr. Clements, about the project team that was
16 proposed by Balfour and -- are you familiar with
17 a mechanism whereby if an owner wants to -- if a
18 particular person is really important to an owner
19 and a particular team is important to an owner,
20 then an owner can say, look, I want to include in
21 my contract these particular team members, and
22 I'm willing to pay whatever price is necessary to
23 make sure that they work on the project.

24 Are you familiar with that?

25 A. No. What I'm familiar with is writing

1 into the contract certain individual's names, not
2 to be replaced without owner's permission, not to
3 be unreasonably withheld. I never had a client
4 pay a premium for it.

5 Q. Okay. Well, are you familiar with a --
6 if the start date of a project is unknown and
7 it's anticipated that it could be some indefinite
8 point in the future, that -- what's called a
9 bench agreement, where those persons, if they're
10 going to be sitting around waiting for the
11 project to start, that an owner would need to pay
12 some amount to have them available because they
13 wouldn't be available to work on other projects?

14 MR. BUNDY: Objection.

15 A. No, not that I'm aware of.

16 MR. BUNDY: I will withdraw the
17 objection.

18 BY MR. HILDEBRAND:

19 Q. There was some discussion about that
20 Balfour had done the Ritz-Carlton in Charlotte,
21 and there was some discussion about that during
22 our review process. Do you remember that
23 yesterday?

24 A. Yes, sir.

25 Q. Was Mike Baumbach involved with the

1 Ritz-Carlton? Do you know?

2 A. Mike Baumbach -- I don't know for sure.
3 I can't answer that, honestly. I don't think he
4 was working for Balfour Beatty at the time,
5 but I'm not -- sorry. Let me back up.

6 I thought the Ritz-Carlton might have
7 been -- was a joint venture between Balfour
8 Beatty and RT Dooley, and I think -- I thought
9 that relationship blossomed under that.
10 Actually, I withdraw that. I can't answer that
11 question.

12 Q. Fair enough. So the start date of the
13 project, as referenced in the RFP, was March of
14 2014, but the actual start date was about a year
15 later. And is it true that the primary driver of
16 that delayed start was the continued development
17 of the design?

18 A. No. The design went quite quickly, to
19 be honest with you. It was going back and forth
20 in terms of the value engineering analysis, of
21 options in terms of trying to not just -- well, I
22 take it back.

23 The value engineering process drove a
24 lot of the design. For instance, yesterday in my
25 testimony, I referenced the louvered doors

1 between the bathroom and the bedroom. For
2 instance, that was a topic of a conversation, and
3 Balfour Beatty provided the cost of that. And
4 Mike had the option to leave it in or take it
5 out.

6 So there was a lot of massaging going on
7 to refine the design to meet Mr. Bennett's
8 expectations, as well as to drive to the final
9 costs.

10 Q. Okay. All right. Well, there was some
11 discussion yesterday about the project meeting
12 minutes that you had developed -- there was a
13 good bit of talk about that and how they were
14 developed, and they were -- I think he said,
15 maybe weekly or so, and there was an agenda.

16 And then that was a time, you would
17 agree, that if anybody had a complaint or a
18 comment or anything, any issue that they wanted
19 to get out on the table, that was probably the
20 best time to do it?

21 A. Yes, sir.

22 Q. Is that a fair statement?

23 A. Yes, sir.

24 Q. All right. Are you aware of any
25 comments in any of the meeting minutes or

1 anywhere else in the file where the owner -- once
2 the project started and the project team was
3 shown to -- as the people who were going to be
4 actually working on it, where there were
5 complaints that the -- that those team members
6 were inappropriate or not acceptable?

7 A. Not in the minutes. Mr. Bennett handled
8 that directly with Mr. Dean with regard to Mike
9 Bennett -- Mike Baumbach.

10 Q. Okay. So are you aware of any written
11 documents that --

12 A. I am not.

13 Q. Okay. Let's turn to the exhibit -- the
14 first of these documents that are behind you.
15 All right. If you would, please turn to Exhibit
16 133. That's the first exhibit.

17 All right. This is a document,
18 Mr. Clements, that is already in evidence, and it
19 starts at the top with an e-mail from Nick
20 Starcevic to Jennifer Faulkinberry. And that was
21 the architect's representative, correct?

22 A. Yes, sir.

23 Q. And it shows that you're copied and Kim
24 Brown is copied, correct?

25 A. Yes, sir.

1 Q. And then I would like for you to go down
2 below that to the predecessor e-mail, which is
3 from Jennifer Faulkinberry, and that's dated May
4 9, 2018. Do you see that one?

5 A. Yes, sir.

6 Q. And you're copied on that, and Kim Brown
7 is copied, right?

8 A. Yes, sir.

9 Q. Okay. And it says -- it's an e-mail
10 from the architect, Jennifer Faulkinberry, see
11 attached final direction. And her comments are
12 in bold. That's from the architect.

13 By the owner -- so this is written on
14 behalf of the owner -- and WLA on each punch
15 scope item in question, and please proceed thus.
16 Do you see that?

17 A. Yes, sir.

18 Q. Right. So that is a representation to
19 the contractor that what we are -- the standard
20 by which we're going to punch these rooms is what
21 is set out on my -- in bold on the earlier
22 e-mail. Agreed?

23 A. I don't know if that's true or not.

24 Q. All right.

25 A. It just says, see attached final

1 direction.

2 Q. Well, let's look down then. So let's go
3 to the second page, and do you see from Nick
4 Starcevic to yourself?

5 A. Yes, sir.

6 Q. And he says, all, see our attached
7 marked-up punch list. We highlighted items that
8 are not in our scope. Some general notes below.

9 And the second one is, a flashlight
10 cannot be used for punch. The standard -- the
11 standard distance to punch is 5 feet off the
12 finished surface. This goes for tile, drywall,
13 wall covering, caulk, et cetera. Closer than 5
14 feet in bathroom areas.

15 And do you see in bold print where the
16 initials are JF, Jennifer Faulkinberry?

17 A. Yes, sir.

18 Q. All right. So it was -- that was an
19 agreement, referring to the later e-mail, where
20 Jennifer Faulkinberry is saying, on behalf of the
21 owner and the architect, this is the standard by
22 which the -- to which the rooms must comply.
23 Agreed?

24 A. Will be inspected. The standard by
25 which they will be inspected.

1 Q. Right. And the inspection is inferred
2 from that --

3 A. Standard.

4 Q. -- is that that's -- that they would
5 have to be?

6 A. That's right.

7 Q. All right. And then below that, number
8 6. Let's talk about that.

9 Sheet rock at the ceiling is an L4
10 finish and installed in the channel. The mockup
11 rooms exceed this standard, and so we are not
12 addressing the, quote, flashing that is typical
13 of an L4 finish without an approved change order.

14 So basically, this document says, okay,
15 here's what the standard is going to be for
16 punching out the guest rooms as far as their
17 quality is concerned, correct?

18 A. Yes.

19 Q. All right. And in fact, the guest rooms
20 were punched out by a number of different people.
21 They were punched out by Salamander, and they
22 were punched out by the architect and -- let me
23 ask you this. Do you know who Barbara DeMatteo
24 is?

25 MR. BUNDY: Objection.

1 THE COURT: Overruled. Go ahead.

2 THE WITNESS: She was the owner of
3 the company that did the inspections on behalf of
4 WLA.

5 BY MR. HILDEBRAND:

6 Q. And do you know who Ray Mendoza is?
7 Does that name ring --

8 A. Say that again.

9 Q. Ray Mendoza?

10 A. He was an employee of Barbara's, I
11 believe.

12 Q. So what we did on this job is that the
13 architect decided that we are going to hire a
14 consultant, our own independent professional. Do
15 you know Barbara DeMatteo or what she did? Do
16 you know anything about her background?

17 A. No, not prior to the project.

18 Q. Okay. In any event, what the architect
19 said was, we're going to hire this independent
20 consultant to come in, Barbara DeMatteo and her
21 employee, Ray Mendoza, and punch all of these
22 rooms to determine if they meet the standards
23 that are encompassed within the agreement; is
24 that right?

25 A. That would be the inference, yes.

1 Q. Right. And in fact, Ray Mendoza did
2 punch all of the rooms, and Barbara DeMatteo did
3 and said that they were satisfactory. Do you
4 remember that?

5 A. I think Buck Lindsay took exception to
6 that in his mid-December letter to
7 David Simonton.

8 Q. I understand. But before we get to
9 that, let's turn, if you would, to --

10 Okay. Mr. Clements, this is another
11 exhibit that's already in evidence. It's
12 Plaintiff's Exhibit 312, and it was actually
13 introduced initially, I believe, in your
14 deposition.

15 In any event, on the left, there's an
16 e-mail that goes with the punch list that is part
17 of this. Do you -- on the left?

18 A. Yes, sir.

19 Q. Right. Do you see that? Okay. And
20 this is an e-mail from you to Kim Brown.

21 A. No, to Ryan Quinlan.

22 Q. I'm sorry, to Ryan Quinlan. Copied were
23 Kim Brown, Prem Devadas -- and he is with
24 Salamander?

25 A. Yes, sir.

1 Q. Dave Simonton and the architect,
2 Jennifer Faulkinberry. And the importance, you
3 noted on this was hot; is that correct?

4 A. Yes.

5 Q. And it is dated November 27, 2018. It
6 says, Ryan and Paul, per agreement with Dave
7 Simonton and myself, in advance of the project's
8 formal acceptance for substantial completion, the
9 guest rooms are complete and available for
10 turnover to Library Associates and Salamander
11 now.

12 This will allow Library Associates and
13 Salamander sole possession of the rooms and its
14 vendors, such as Guest Tech, access to complete
15 their work. The only exception, in the remaining
16 rooms, where the tub fixtures are currently being
17 installed. BBC still has access to these, but
18 they have been punched.

19 And then the next line is, the following
20 link will take you to the punch list signed off
21 by the AOR. That's the architect of record,
22 correct?

23 A. Yes, sir.

24 Q. Scope includes the Salamander punch
25 list.

1 So at this point, this e-mail that you
2 sent, you're saying that the guest rooms -- at
3 this point, the guest rooms have been punched
4 off, have been agreed on by the architect of
5 record. And, in fact, just after this, you
6 recommended and agreed that the architect of
7 record should issue a certificate of partial
8 completion for the guest rooms; is that correct?

9 A. That's what we were trying to do. That
10 was Jennifer's suggestion.

11 Q. I understand.

12 A. That was the intent of this.

13 Q. All right. Is there -- okay. Can you
14 point to -- point the Judge or me to any document
15 or -- I understand now that there is a dispute
16 regarding the painting that was done in an
17 eggshell finish, correct?

18 MR. BUNDY: Objection.

19 BY MR. HILDEBRAND:

20 Q. Let me ask you this. Is there anything
21 that you -- do you have any photographs or any
22 other documents that you can provide to me to
23 show to the Judge, here today, that would show
24 him from a distance of 5 feet -- as was agreed
25 upon -- the deficiencies in the painting that the

1 owner is saying was not done appropriately, so
2 the Judge can look at those and say, yeah, I can
3 see where that's not appropriate?

4 A. I don't have anything with me, no.

5 Q. Do any such documents exist, to your
6 knowledge?

7 A. There were photographs taken --
8 considerable photographs taken by CPI, as well as
9 Robins & Morton. But it should be discoverable
10 somewhere around here.

11 Q. So would you agree with me that the
12 standard for the rooms was that they were not
13 going to be punched or that there would not be
14 deficiencies that were -- there was only
15 deficiencies that were observable from a 5 foot
16 distance or greater was the standard to which the
17 rooms were to be punched, correct?

18 A. Except in the bathrooms.

19 Q. Right. And that's because the bathrooms
20 are so small that sometimes you can't even get 5
21 feet away?

22 A. And the lighting is so bright.

23 Q. Gotcha. So no flashlights, nothing
24 within 5 feet. If that standard was not
25 acceptable to the owner, in your view, should the

1 owner and the architect have approved it?

2 MR. BUNDY: Objection.

3 THE COURT: Overruled. Go ahead.

4 THE WITNESS: Ask the question
5 again.

6 BY MR. HILDEBRAND:

7 Q. If that punch standard, not less than 5
8 feet and no flashlights used, if that was not
9 acceptable and if that level of quality was not
10 acceptable to the owner and the architect, they
11 shouldn't have approved it, should they?

12 A. I agree.

13 Q. And if the level of the painting -- if
14 the owner wants to get up within a foot or if
15 they want a higher level of quality than is shown
16 in the agreement, not less than 5 feet and no
17 flashlights -- if they decide that they want
18 something higher, then that would be a change
19 that the owner would be responsible for. Agreed?

20 A. Yes.

21 Q. Do you know when the painting was
22 finished on these rooms?

23 A. No, not specifically.

24 Q. If --

25 A. From what I understand --

1 Q. Do you know, generally, if it would have
2 been maybe January or February of 2018? Does
3 that ring a bell with you?

4 A. Well, it was finished prior to the
5 opening, with the exception of the third floor,
6 and I believe the hotel opened up at the end of
7 January.

8 Am I allowed to offer further statements
9 with regard to this punch list?

10 Q. No. Mr. Bundy can clear it up. I've
11 got another question for you on -- as far as the
12 pre-construction was concerned. You told -- you
13 went into some length yesterday about who was
14 present, involved with the preconstruction. Do
15 you remember that in the original meetings?

16 A. Yes, sir.

17 Q. There wasn't any mention of the hotel
18 operator. And why was that?

19 A. He was not on board at the time, or it
20 was not on board at the time.

21 Q. Based on your experience and your
22 intellect and such, do you think that it would
23 have been important for the operator to have
24 participated in those meetings?

25 A. I typically tell clients that they need

1 to be on board prior to opening, some period
2 prior to that. Now, your -- specifically with
3 regard to a hotel operator, I really can't offer
4 an opinion on that. This was the first hotel I
5 had ever managed as a program manager.

6 Office buildings, hospital work, you
7 know, things like that, it's advantageous to have
8 the building manager on board. For instance,
9 Ryan Quinlan, to have him involved towards the
10 end of the project, the last six months of the
11 project or year, it's very advantageous.

12 Q. All right. Prior to this job, what was
13 the highest dollar job that -- project that you
14 had worked on where you were working not for
15 another company in terms of a million dollar
16 project earlier in your career, but as matrix
17 management? What was the highest dollar project
18 that you've worked on prior to this one? Do you
19 recall?

20 A. St. Francis Cancer Center was 50 million
21 dollars. I have a 55 million dollar project
22 right now.

23 Q. Prior to this one?

24 A. Oh, prior to this?

25 Q. Yes.

1 A. It was the St. Francis Cancer Center,
2 that actually went forward.

3 Q. There was some discussion about the
4 damage that occurred --

5 A. I take that back. That's not true. I
6 managed some healthcare work for St. Francis in
7 Richmond. I did a 60 million dollar vertical
8 expansion of a med-surg tower in Richmond.

9 Q. Prior to this?

10 A. Yes.

11 Q. All right. So there were a couple of
12 projects from around 50 to maybe 60 million. Two
13 that were, prior to this project --

14 A. Yes, sir.

15 Q. -- that were comparable to this?

16 A. Yes, sir.

17 Q. Okay. There was some discussion about
18 the major rains that occurred during a hurricane
19 when the project had yet to come out of the hole.
20 Do you remember that?

21 A. Yes, sir.

22 Q. And you said that the site had become
23 flooded and had damaged some of the earth wedges?

24 A. Yes, sir.

25 Q. All right. Do you know who -- do you

1 know whether insurance was in place to cover the
2 damages that resulted to the project as a result
3 of that hurricane and the flooding of the site?

4 A. I know that builder's risk insurance was
5 in place because Balfour Beatty reviewed it as
6 part of the requirement, and also, the lender
7 required it. Specifically, those risks ended up
8 not covering that loss, because I actually --
9 later on, I followed up with the insurance
10 company.

11 Q. Okay. Well, was there any -- my
12 question is, was there any insurance in place
13 that covered that loss?

14 A. Apparently not.

15 Q. Should there have been? Do you know,
16 under the contract, whether there should have
17 been insurance?

18 A. No, that's -- I'm not an insurance
19 expert.

20 Q. No, not whether you're an insurance
21 expert, but do you know whether, under the
22 contract, there should have been insurance to
23 cover it?

24 A. The contract required builder's risk
25 insurance, I know that. But I don't know any

1 more than that, to be honest.

2 Q. All right. Fair enough. Let's go to --
3 I would like to jump back just for a moment, if I
4 can, about the eggshell paint and its use.
5 Eggshell paint was specified in the original
6 construction drawings, correct?

7 A. Yes, sir.

8 Q. And an L4 finish was specified, correct?

9 A. Yes, sir.

10 Q. When the repainting was done, was the
11 finish changed to an L5?

12 A. The drywall finish?

13 Q. Yes, sir.

14 A. No, I don't believe so, no.

15 Q. So you don't know whether they abutted
16 the entire wall?

17 A. When they skimmed the walls?

18 Q. Yes, sir.

19 A. I never saw that.

20 Q. Okay. Did they go back with eggshell
21 paint?

22 A. No.

23 Q. All right. And I think you testified
24 that eggshell -- in your view, eggshell paint is
25 not appropriate for a hotel, correct?

1 A. It does not touch up well. I recommend
2 clients that have a lot of activity, you know,
3 like in your house with kids, you know, not to
4 use it.

5 Q. Right. And hotels are -- you have a lot
6 of activity, furniture coming in, bumping around,
7 and if you have scuffs and scrapes, eggshell
8 paint is not good. You can't just do a quick
9 touch up, you have to go from wall to wall and
10 ceiling to ceiling?

11 A. I mean, personally, I would not
12 categorize a hotel room as having a lot of
13 activity. But to your point, the touch-up
14 process is problematic.

15 Q. Okay. Well, do you know why eggshell
16 was not -- was it based on your recommendation to
17 the owner that he not go back with eggshell
18 paint?

19 A. It was my recommendation, which I
20 petitioned from the interior designer, and they
21 approved it.

22 Q. Okay. Before the project started, did
23 you petition the interior designer and recommend
24 that eggshell paint not be used?

25 A. No.

1 Q. Mr. Clements, in preparation for your
2 testimony here today, did you have an opportunity
3 to go back and review your -- what did you do?
4 Did you review your deposition testimony prior to
5 this?

6 MR. BUNDY: Objection.

7 THE COURT: Basis?

8 MR. BUNDY: Well, these lawyers now
9 think that depositions are something magic.
10 We're in court now, and what he did in his
11 deposition is completely irrelevant. It doesn't
12 make anything that you have to decide any more or
13 less certain.

14 He may not remember what he had for
15 breakfast yesterday, but that doesn't make it
16 relevant. So I think it's completely improper to
17 use a deposition or even to bring up depositions
18 until they ask him a question, he says -- he
19 gives an answer that's inconsistent, and then
20 present the deposition to him. This is a waste
21 of time.

22 THE COURT: Where are we going?

23 MR. HILDEBRAND: I was simply
24 asking what he did in preparation for his
25 testimony, what he reviewed. And part of that

1 was, did he review his deposition.

2 THE COURT: All right.

3 THE WITNESS: I did not review my
4 deposition.

5 BY MR. HILDEBRAND:

6 Q. Let me ask you this: Do you recall
7 getting delay notices from Balfour Beatty
8 throughout this project?

9 A. I got e-mails titled, delay or notice of
10 delay. Yes, I do remember those.

11 Q. All right. And there's no question in
12 your mind that Balfour -- maybe you didn't
13 consider that they made an appropriate claim or
14 whatever, but there's no question in your mind
15 that Balfour was putting the owner on notice that
16 it was being delayed on this project on many
17 occasions and for many different things. Do you
18 understand?

19 A. I interpreted that as an opportunity for
20 the owner to mitigate the issue of the e-mail.
21 For instance, if something was going to be late
22 and Nick Starcevic sent me an e-mail that said,
23 notice of delay, it was a heads up that this is
24 going to be a problem, and then we would work on
25 it and knock it out. None of those ever

1 developed into full claims.

2 Q. Well, would you agree with me that, even
3 if Balfour was not following the contract to the
4 T, that they were intending, from your
5 perspective, to provide delay notifications?

6 MR. BUNDY: Objection.

7 THE COURT: I will sustain that.

8 BY MR. HILDEBRAND:

9 Q. All right. Let's talk about the -- from
10 your -- prior to a notice from the architect in
11 February of 2019, where the architect was saying
12 that the owner had a claim for liquidated
13 damages, are you aware of any notice prior to
14 that from the owner that it was going to or
15 intended to assert liquidated damages against
16 Balfour or --

17 MR. BUNDY: Objection.

18 THE COURT: Speculation?

19 MR. BUNDY: The best evidence of
20 what that e-mail says is the e-mail. The e-mail
21 does not say the architect -- from the architect
22 that we were asserting a claim. A liquidated
23 damage is not a claim, so we didn't assert it as
24 a claim. It is a reality.

25 THE COURT: Okay.

1 MR. BUNDY: We don't make claims
2 for liquidated damages, and the architect didn't
3 say that.

4 THE COURT: All right. Do you want
5 to restate the question?

6 MR. HILDEBRAND: Well, let's turn
7 to that document.

8 THE COURT: Okay.

9 MR. BUNDY: And just let me finish
10 my thing. And the contract does not refer to
11 liquidated damages.

12 BY MR. HILDEBRAND:

13 Q. This is 254.

14 THE COURT: What numbers? I'm
15 sorry.

16 MR. HILDEBRAND: This is 254.

17 BY MR. HILDEBRAND:

18 Q. All right. Exhibit 254. Do you
19 recognize -- this an e-mail from Buck Lindsay to
20 David Simonton, February 11, 2019. You're
21 copied, Kim Brown is copied, and it's titled,
22 contract closeout. Do you see that?

23 A. Yes, sir.

24 Q. Do you recognize this document?

25 A. Yes, I do.

1 Q. All right. And do you see down at
2 paragraph three where it says, the owner has
3 specific claims to be asserted related to time
4 amount and amount as the work completes as
5 follows. Did I read that correctly?

6 A. Yes, sir.

7 Q. And under D, liquidated damages. 530
8 days at \$9,000 a day, and with the cap, it is
9 \$1,400,000. Do you see that?

10 A. Yes, sir, I do.

11 Q. Okay. Prior to this e-mail, do you have
12 any knowledge of any claim being made by the
13 owner to Balfour for liquidated damages or for
14 delays?

15 A. No.

16 Q. Okay. In your view, would it have been
17 appropriate for the owner -- if it had a claim
18 for -- against Balfour from the time that the
19 original contract date was not met, do you think
20 it would have been appropriate for the owner to
21 have advised and alerted Balfour that it had a
22 claim?

23 MR. BUNDY: Objection.

24 THE COURT: Overruled. You can
25 answer that.

1 THE WITNESS: Answer it?

2 THE COURT: You can, yeah.

3 THE WITNESS: Only at the end of
4 the project, just like a contractor's lien
5 wouldn't be submitted until the end of the
6 project.

7 MR. BUNDY: Objection withdrawn.

8 THE COURT: All right.

9 BY MR. HILDEBRAND:

10 Q. I would like to reference your
11 deposition, page --

12 MR. BUNDY: No, no, no. Objection.

13 THE COURT: I'm with you. So the
14 proper method for that, of course, is to ask him
15 a question. If he testified materially
16 different, you get to try and impeach him.

17 MR. HILDEBRAND: I understand, Your
18 Honor.

19 THE COURT: Just ask him a
20 question. It's a lot easier.

21 MR. HILDEBRAND: I understand.
22 Thank you.

23 BY MR. HILDEBRAND:

24 Q. Don't you agree that -- well, your prior
25 testimony --

1 MR. BUNDY: Oh, no, no, no.

2 MR. HILDEBRAND: Well, I have to
3 ask him the question. I asked whether he thought
4 it was appropriate --

5 MR. BUNDY: No --

6 THE COURT: Hold on. Let him get
7 it out. Go ahead.

8 MR. HILDEBRAND: All right.

9 BY MR. HILDEBRAND:

10 Q. The question is, do you think it was
11 fundamentally fair and appropriate for the owner
12 to have given Balfour notice that it was
13 intending to assert liquidated damages at the
14 time that the original contract completion date
15 in August of 2017 was not met?

16 MR. BUNDY: Objection.

17 THE COURT: Overruled. You can
18 answer that.

19 THE WITNESS: I don't think the
20 owner had any intent at that time to level
21 liquidated damages. In fact, I know I never had
22 a conversation in that regard.

23 BY MR. HILDEBRAND:

24 Q. If the owner intended -- let's assume
25 that hypothetical. If the owner did intend

1 because they knew, by gosh, the contract
2 completion date is X, we had surpassed that, so
3 we're entitled to liquidated damages.

4 If it intended at that point or at any
5 point after that to assert liquidated damages, it
6 would have been fundamentally fair, and in your
7 view appropriate, for the owner to have asserted
8 it right then and there?

9 MR. BUNDY: Objection.

10 THE COURT: Overruled.

11 THE WITNESS: Another owner that
12 had the intent to do that? Yes. Mike Bennett
13 did not have the intent to do that.

14 BY MR. HILDEBRAND:

15 Q. Well, you can't -- you don't know what
16 his intent was.

17 A. Well, you're asking me to think about
18 what he was thinking at the time. You've got to
19 be fair. He never came to me and said, these
20 SOBs are late. I'm going to charge them \$9,000 a
21 day to get my \$1.4 million. That conversation
22 never happened.

23 Q. And you never advised him that the
24 contract is now completed and has been surpassed,
25 and you have a right to assert liquidated

1 damages, correct?

2 MR. BUNDY: Objection.

3 THE COURT: You asked him if he
4 advised him of that?

5 MR. HILDEBRAND: Yes, sir.

6 THE COURT: All right. He can
7 answer that. Overruled. He can answer that.

8 THE WITNESS: No.

9 MR. BUNDY: Well, may I at least
10 state my basis?

11 THE COURT: No. He's already
12 answered the question.

13 MR. BUNDY: Well, he is talking
14 about a right. I mean, the rights come from the
15 contract.

16 THE COURT: I understand. He said
17 he didn't do it, and they didn't have that
18 conversation, so.

19 BY MR. HILDEBRAND:

20 Q. And if the owner had intended to assert
21 liquidated damages against Balfour, the reason
22 that it would be fundamentally fair, in your
23 view, to do it right from the get go is to
24 provide Balfour with an opportunity to make any
25 adjustments or get that on the table and come to

1 a resolution of that issue then. Agreed?

2 A. If you're talking about this owner, I
3 disagree. Mike's focus was getting the hotel
4 done. That was his only focus. He wasn't
5 focused on liquidated damages.

6 Q. But you don't know what was in --

7 A. Well, you're asking me to -- but that's
8 what you're asking me, and I can't answer that
9 honestly, other than the -- I never had a
10 conversation with Mike Bennett with -- about any
11 liquidated damages.

12 All we had conversations about was just
13 getting it done. And I'm not trying to be
14 disrespectful. I'm trying to answer these as
15 honestly as I can.

16 Q. How about from your perspective as a
17 project manager? Do you think that it's -- if
18 under this contract, there's \$9,000 a day --
19 let's assume a 30-day month. That's \$270,000 a
20 month.

21 If for every month from that August 27th
22 day, if there's a claim that liquidated damages
23 are applicable, do you think it's fundamentally
24 fair for the owner to assess the liquidated
25 damages right then, when that occurred?

1 MR. BUNDY: Objection.

2 THE COURT: The basis for the
3 objection is?

4 MR. BUNDY: The basis of the
5 objection is, what this witness thinks is
6 fundamentally fair is completely irrelevant.

7 THE COURT: Okay. I'm going to
8 overrule the objection. Go ahead. You can
9 answer it.

10 THE WITNESS: Would you ask that
11 again, please?

12 MR. HILDEBRAND: As a project
13 manager --

14 THE WITNESS: It's too distracting
15 for me when y'all start arguing, and I get lost.
16 BY MR. HILDEBRAND:

17 Q. Right. As a project manager in this
18 case --

19 A. This project.

20 Q. -- in this project, which is about
21 \$270,000 a month in liquidated damages, do you
22 think that, if the owner intended to assert
23 liquidated damages under the contract, that it is
24 fundamentally fair and appropriate for him to do
25 so right then and there when the contract date is

1 surpassed?

2 MR. BUNDY: Objection.

3 A. So you're asking me if the contractor
4 deserves notice of the owner's intent to levy
5 liquidated damages?

6 Q. Right. Yes, sir.

7 A. I've never had that instance in my
8 career. Honestly, I don't have an opinion of it,
9 only because I don't know that how the project
10 ends up has a lot to do with whether an owner
11 actually leveled liquidated damages.

12 Q. Okay. Do you remember giving your
13 deposition in this matter?

14 MR. BUNDY: Objection.

15 THE COURT: I'm going to let him
16 present it. Go ahead.

17 BY MR. HILDEBRAND:

18 Q. Do you remember giving your deposition?

19 MR. BUNDY: Your Honor, what are we
20 doing here?

21 THE COURT: He's trying to impeach
22 him of a prior statement. I'm going to make him
23 lay a little more foundation.

24 MR. BUNDY: But I don't know what
25 the statement was he's trying to impeach.

1 THE COURT: I don't know either.

2 MR. HILDEBRAND: It's not your
3 prerogative.

4 THE COURT: Just y'all keep talking
5 to the witnesses, not each other.

6 BY MR. HILDEBRAND:

7 Q. My simple question is, do you remember
8 giving your deposition, and would you please
9 refer to page 291 of the deposition that I just
10 handed you?

11 THE COURT: Do you have a copy of
12 that for me?

13 THE WITNESS: I see it.

14 THE COURT: Okay. How about for
15 Mr. Bundy?

16 MR. HILDEBRAND: I can pull it up.
17 Can you need it pulled up? Can you pull up that
18 deposition?

19 THE COURT: It's Jim Clements
20 volume 2, August 26, 2020, page 291?

21 MR. HILDEBRAND: Yes, sir.

22 BY MR. HILDEBRAND:

23 Q. I would refer you to page 291, if you
24 would, sir.

25 A. Yes, sir, I'm there.

1 Q. All right. Beginning on line 10 of 291.

2 Okay. But it's pretty clear from this
3 letter that the owner is saying, we're contending
4 that Balfour caused delays all the way back to
5 August of 2017.

6 Answer, that appears to be what it
7 purports.

8 MR. BUNDY: Objection. He hasn't
9 asked this witness that question. If you would
10 like, I can tell him how to do this.

11 THE COURT: No, no, you don't need
12 to do that.

13 MR. HILDEBRAND: Your Honor --

14 THE COURT: You have to pin him
15 down on one question. What he ended up saying,
16 that I understood, was that he didn't really have
17 an opinion about that. I think where you're
18 going is that he did have an opinion about that
19 in his deposition. Is that where you're going?

20 MR. HILDEBRAND: Yes, sir.

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

23 MR. BUNDY: But the way these
24 depositions are taken is they ask 20 questions in
25 advance, and this is completely out of context.

1 The way it's done is he reads the
2 question from the deposition without telling the
3 witness anything. And if he gets a different
4 answer, then he can say, well, I asked you the
5 same question two months ago, and you gave -- you
6 said the red light was green, and now you're
7 saying it's red. It's not that complicated.

8 THE COURT: I understand. I
9 understand.

10 MR. HILDEBRAND: Your Honor --

11 THE COURT: All right. Here's how
12 we're going to do this. You're going to read the
13 question and Mr. Clements is going to read his
14 answer. Okay?

15 MR. HILDEBRAND: Fair enough.

16 THE COURT: And then he's going to
17 get a chance to explain it, if that's what he
18 wishes to do.

19 BY MR. HILDEBRAND:

20 Q. All right. So let me read you that
21 question so we're all on the same page.

22 Question, Okay. But it's pretty clear
23 from this letter that the owner is saying, we're
24 contending that Balfour caused delays all the way
25 back to August of 2017.

1 And your answer?

2 THE COURT: Your answer,

3 Mr. Clements?

4 THE WITNESS: That appears what it
5 reports.

6 BY MR. HILDEBRAND:

7 Q. Question, wouldn't you agree that, if
8 the owner contended that Balfour was late and
9 that back on August of 2017, that Balfour's
10 delays were causing liquidated damages, that it
11 would be appropriate for the owner to advise
12 Balfour right then that it had a claim and
13 intended to assert liquidated damages?

14 And your answer?

15 MR. BUNDY: I object to the
16 question.

17 MR. HILDEBRAND: Your Honor --

18 MR. BUNDY: No. We reserved all
19 objections to every question except to the form.
20 I'm not objecting to the form of that question.
21 I'm now objecting to the relevance of that
22 question.

23 THE COURT: All right. That
24 objection is overruled. You may answer by
25 reading the answer, Mr. Clements.

1 THE WITNESS: The answer is, I
2 mean, just speaking in theory, I certainly would
3 have reserved my rights, I think. I don't think
4 Mike, not knowing when the final project
5 completion date was back on August 1 --

6 THE COURT: Back on August --

7 THE WITNESS: Where does it go?

8 THE COURT: Back on -- it should go
9 straight down.

10 THE WITNESS: I don't think it was
11 a hot -- I don't think it was as hot a topic,
12 probably.

13 BY MR. HILDEBRAND:

14 Q. Question, but regardless, it's just he.
15 And your answer?

16 A. As a matter of contract administration.

17 Q. Question, right?

18 A. Right. Yeah, should probably put him on
19 notice.

20 Q. Question, right. And the reason is
21 that?

22 A. It's fair.

23 Q. Question, pardon me?

24 Answer?

25 A. Yeah, it's --

1 Q. It's just fair, right?

2 A. Fair comment.

3 Q. Question, right?

4 And your answer?

5 A. Give them the opportunity to accelerate.

6 Q. Question, exactly, exactly.

7 Your answer?

8 A. Yeah.

9 Q. Question, it's just not -- unless and
10 until you tell a contractor, look, we think that
11 these delays are your fault, then the contractor
12 obviously doesn't know that the claim is going to
13 be made and can't take actions accordingly,
14 correct?

15 And your answer?

16 A. I agree with the logic.

17 Q. Question, right. And just fundamental
18 fairness, you need to give the contractor -- it's
19 just a matter of fairness. The opportunity -- if
20 you're going to claim that he's delayed and
21 intend to assert liquidated damages, give him a
22 chance to make corrections or do what he needs to
23 do to get on top of it.

24 Answer?

25 A. I think that's reasonable.

1 Q. Question, right.

2 And fair?

3 A. Fair.

4 MR. HILDEBRAND: If you would bear
5 with me just a minute, Your Honor.

6 THE COURT: Sure, sure.

7 MR. HILDEBRAND: I may skip over
8 some of these.

9 BY MR. HILDEBRAND:

10 Q. Mr. Clements, have you ever been
11 involved in a project where liquidated damages
12 were asserted by the owner?

13 A. No.

14 Q. Okay. The total amount of your fees, as
15 of the time that your deposition was taken, which
16 was -- which was back in August of 2020, was
17 about \$700,000; is that right?

18 A. I remember you saying that, yes.

19 Q. Okay. And that was correct?

20 A. I have no idea.

21 Q. All right. There was a prior job that
22 you said that you had worked on with Balfour and
23 that was the Charlotte School of Law; is that
24 right?

25 A. Yes, sir.

1 Q. All right. And there was no delays and
2 no delay damages for assessment on that, right?

3 MR. BUNDY: Objection.

4 THE COURT: Overruled. You can
5 answer.

6 THE WITNESS: There was no
7 assessment, that I recall, of any delay damages
8 on that.

9 BY MR. HILDEBRAND:

10 Q. And from your --

11 A. The school opened up on time, I
12 remembered that.

13 Q. On time and on budget?

14 A. I don't remember specifically.

15 MR. HILDEBRAND: All right, sir.
16 This is probably a good -- I've got a few
17 documents. This might be a good time to --

18 THE COURT: Do you want to take a
19 little break? All right. Let's take about 10
20 minutes.

21 (A recess transpired.)

22 MR. HILDEBRAND: All right, sir. I
23 will try to move this along. I'm going to try to
24 introduce some exhibits that I need marked into
25 Evidence, and I'll try to go through that.

1 THE COURT: All right.

2 BY MR. HILDEBRAND:

3 Q. All right, sir. So if you can get
4 Defendant's volume 2 or binder 2, rather. I'm
5 sorry, binder 3 of 11.

6 THE COURT: Is this a new binder,
7 or is this something we already have?

8 MR. HILDEBRAND: I think that
9 you've already got it. It's Exhibit 36.

10 THE COURT: 36?

11 MR. HILDEBRAND: Yes, sir.

12 THE COURT: This is Plaintiff's 36?

13 MR. HILDEBRAND: Yeah.

14 THE COURT: Okay. 2 of 5? Binder
15 2 of 5, does that sound right?

16 MR. MCDONALD: I think we have it
17 as 2 of 5, yes, sir.

18 BY MR. HILDEBRAND:

19 Q. Exhibit 36. Are you with me?

20 A. Yes, sir.

21 Q. All right. Do you see in the middle of
22 the page --

23 A. Hold on, sorry. What tab are you on?
24 I'm looking at the contract.

25 Q. That should be Exhibit 36.

1 A. The last reference I have was 30.

2 Q. Oh, Exhibit 36.

3 A. Okay. Right here? Oh, here it is.

4 Q. All right. In the middle, on November
5 6th, 2013 at 4:16 p.m., Buck Lindsay wrote to you
6 and Jim, and that's to you, Jim Clements?

7 A. Oh, Jim, as I reported to Mike?

8 Q. Yes.

9 A. Okay. Go ahead.

10 Q. Are y'all with me?

11 THE COURT: Something is awry here.
12 It might be downstairs. Go ahead.

13 BY MR. HILDEBRAND:

14 Q. All right. This is an e-mail from Buck
15 Lindsay to yourself, November 6th, 2013, correct?

16 A. Yes, sir.

17 Q. All right. Do you recognize this? Do
18 you remember receiving it?

19 A. No. I mean, not off the top of my head.

20 Q. Right. Do you dispute that it was an
21 e-mail that was sent to you during this project?

22 A. Yes, I do see that. Yes, sir.

23 MR. HILDEBRAND: Right. I would
24 like to introduce that as our next exhibit, Your
25 Honor.

1 THE COURT: All right. And that
2 would be No. 36?

3 MR. HILDEBRAND: Yes, sir.

4 THE WITNESS: It's confusing
5 because it doesn't say -- it doesn't have e-mail
6 as the typical header. It just starts, Jim as I
7 reported, but I'll take your word for it.

8 BY MR. HILDEBRAND:

9 Q. That above my pay grade on how these
10 things print out.

11 A. Sure. Okay.

12 MR. BUNDY: I object to the
13 relevance. I don't know what the relevance to
14 this document is.

15 THE COURT: Do you have a question
16 about it?

17 MR. HILDEBRAND: Well, I can
18 introduce part of it.

19 BY MR. HILDEBRAND:

20 Q. Let's go down to the -- the next to the
21 last paragraph. Lastly, I owe you an updated
22 owner/architect agreement, which I will address
23 in the morning. Among a few items that it needs
24 to address is the addition of BIM modeling
25 services.

1 I've solicited two proposals for that
2 work: One at \$46,331, and the other one at
3 \$51,500. Do either of these numbers, I need to
4 add time for my team to build in the vertical --
5 to build in the vertical attribute characters,
6 all of their work.

7 After problems on the Embassy Suites
8 with above ceiling clashes, Kim was very anxious
9 to find a solution to avoid this for Marion. BIM
10 is the answer, but it carries a cost.

11 MR. BUNDY: I object. That's
12 irrelevant. It's a precontract correspondence.
13 All of these -- this BIM stuff, all was merged
14 into the contract. I don't know what
15 precontract -- how they could possibly be
16 relevant.

17 MR. HILDEBRAND: Your Honor, that's
18 been an issue in the case that was discussed at
19 length in our case was the architect's failure to
20 provide design documents that actually worked,
21 was a huge issue. And Mr. Clements has talked
22 about that here today.

23 You've got documents that I want to
24 introduce where he is talking about what needs to
25 be provided to give design documents that will

1 work on this job, and that's what he says. We
2 had ceiling issues on a prior hotel.

3 And the way to prevent them from having
4 ceiling issues on the Hotel Bennett is to use
5 BIM. So he's saying that he should have used it.
6 There has been correspondence that he didn't, but
7 this substantiates that he says that it -- so
8 it's clearly relevant.

9 THE COURT: Okay. And the date on
10 this is when?

11 MR. HILDEBRAND: It's November 6th,
12 2013.

13 THE COURT: All right. So this
14 would be all preconstruction or --

15 MR. HILDEBRAND: Yes, sir. Yes,
16 sir.

17 THE COURT:: -- RFP type stuff?

18 MR. HILDEBRAND: Not RFP, but
19 it's --

20 THE WITNESS: PreRFP.

21 MR. HILDEBRAND: I don't think
22 it's -- it's not prearchitect's contract, I don't
23 believe. But it's -- for the architect saying
24 what needs to be done in the design, and he
25 didn't do it.

1 THE COURT: Okay. All right. And
2 your objection is?

3 MR. BUNDY: This may be an issue he
4 has, but it's not a legitimate material issue in
5 this case, right?

6 What he's trying to do is not put up --
7 and he has not put up in his case-in-chief, an
8 architect, to testify to a reasonable degree of
9 certainty that there's anything wrong with this
10 these drawings. Okay? He has not done that.
11 He's failed in that attempt. Okay?

12 THE COURT: Okay.

13 MR. BUNDY: This is not an
14 architectural malpractice case. He's not made
15 that allegation, nor has he submitted any proof.
16 These documents -- they're talking about a
17 contract provision in a contract yet to be
18 signed, the BIM requirements.

19 And he's now trying to say that, because
20 there was negotiations before a contract was
21 signed and there were problems on other jobs
22 completely different from this job, a different
23 hotel, a different place in other areas, that
24 somehow that's relevant to conduct which either
25 took place or didn't take place at a later date

1 by a design professional, whose conduct has not
2 been reviewed by a design professional.

3 It's imply irrelevant and immaterial.

4 Thank you, Your Honor.

5 THE COURT: All right. I tend to
6 agree on that aspect of it. So what I'm going to
7 allow you to do is to proffer it. It will be
8 proffered as to whatever exhibit you want it to
9 be. So it's not -- these are not items that went
10 into the contract, correct?

11 MR. HILDEBRAND: But they -- right,
12 but, Your Honor, the point is --

13 THE COURT: Well, it's a notice
14 issue, is it not? Isn't that where we're going?

15 MR. HILDEBRAND: Well, it's a
16 notice, but here's the issue, Your Honor, is,
17 there's no question you've heard infinite
18 testimony, even from this witness, that there
19 were design busts. You heard that. There's been
20 inarguable evidence on that.

21 And Mr. Bennett is right, this is not a
22 malpractice case. But that's not the issue.
23 This issue is, were there design busts and
24 problems. There's a lot of testimony about that.
25 The issue is, could those and should those have

1 been foreseen and prevented by the architect.

2 And the question -- and the response is,
3 according to these documents, the architect
4 recognized early on, this is what I should have
5 done. This is what I should incorporate in my
6 design, but for reasons unknown, he didn't. So
7 he's saying -- he's recognizing in advance that
8 these are going to be problems. I need to use
9 BIM to give a good design, but he never did.

10 So it certainly goes to show you that
11 the architect recognized -- it's additional
12 support that there in fact were issues because
13 the architect recognized that there were going to
14 be -- here's what I need to do to fix them, but
15 he never incorporated BIM.

16 THE COURT: I understand that, but
17 didn't your client contractually agree to do
18 that? Didn't they provide the BIM services?

19 MR. HILDEBRAND: No, sir. And that
20 goes back to what our experts -- what our
21 witnesses testified is that, BIM is a two-part
22 process.

23 Building information modeling is simply
24 a computer program that allows things to be done
25 in 3D. It allows the architect to design in 3D,

1 and then allows the contractor, once he gets the
2 design, to say, I see a problem here. There's a
3 clash. This is not going to work.

4 THE COURT: Right.

5 MR. HILDEBRAND: It then has to go
6 back to the architect to fix.

7 THE COURT: Okay.

8 MR. HILDEBRAND: But what the --
9 what it doesn't do -- we cannot design a project,
10 so all we can use BIM is for part of it, to say,
11 architect, what -- these designs do not work, you
12 need to fix them.

13 The whole point of the prior testimony
14 is that the architect should have used BIM, and
15 they say that -- this is exactly the point. BIM
16 is the tool that I need to use to give you good
17 documents. We cannot design a building. We
18 cannot do drawings. That's on the part of the
19 architect.

20 And the whole point of our presentation
21 was, the architect knew that they should have
22 used the state of the art BIM. They say in this
23 letter right here, we know that that's what we
24 should do to give a good design to the
25 contractor. But inexplicably, they didn't do

1 that.

2 So all we did was we agreed gratuitously
3 just to use BIM on our side. But, again, then it
4 has to go back to the architect to actually make
5 the changes because we can't -- under South
6 Carolina law, we can't design the project. We're
7 not the project architect. We didn't stamp them.
8 We're prohibited from doing that.

9 So what these -- what e-mail shows again
10 is the architect saying, here's what I need to do
11 to give good drawings, and I'm not going to do
12 it. And for whatever reason, he didn't do it.

13 THE COURT: And how does that make
14 Mr. Clements the vehicle to get that document in
15 evidence? How does that -- if the issue has to
16 do with the architect --

17 MR. HILDEBRAND: Well --

18 MR. BUNDY: May I say something?

19 THE COURT: Just one second.

20 MR. BUNDY: He keeps saying the
21 same thing over and over again.

22 MR. HILDEBRAND: Your Honor, gosh,
23 I'm just really getting tired of all of the
24 personal comments. Your Honor, the -- I've got
25 some questions for him.

1 Certainly the architect did not use BIM.
2 But as far as an authentication issue -- and this
3 is what we talked about yesterday when you ruled,
4 are those documents authentic and is it a
5 statement against interest of the architect, who
6 is the owner's agent on this case. He is the
7 one -- he's providing design documents for use by
8 my client.

9 So authentication, yesterday when -- or
10 the day before when Mr. Bennett wanted to
11 introduce documents, he said, we can't argue that
12 these are -- these are the final documents of the
13 project documents. So the authentication issue
14 is taken care of.

15 So then it's just, is it a statement
16 against interest by the owner's agent? I believe
17 that it is, and I think that it's appropriate for
18 that reason.

19 MR. BUNDY: Can I speak now?

20 THE COURT: Yes.

21 MR. BUNDY: This is not an
22 authentication issue. And, one, as an absolute
23 certainty, the architect was not our agent for
24 the design of this project.

25 This contract document is very complete.

1 He's not our agent when he designs this project.
2 He's the architect. That's not believable. The
3 architect is not a party. He's not our agent for
4 these purposes, and this is a letter.

5 This would be as if a doctor was in
6 medical school, and one of the students wrote the
7 other and said, when you take somebody's heart
8 out, you probably ought to put them under
9 anesthesia. And then later, 10 years later, the
10 doctor operates and the guy dies. And you say,
11 well, you wrote a letter 10 years ago.

12 This is -- he keeps going back to what
13 the architect did wrong. None of the witnesses
14 in this case are qualified, nor have they been
15 qualified as an expert to talk about
16 architectural malpractice. There's not a single
17 shred of evidence in this case that the BIM
18 process that was used fell below the average
19 standard of care.

20 There's not a shred of evidence that it
21 caused any problems from an architectural
22 standpoint, and the fact that a letter was
23 written by the architect that something needs to
24 be done in the future proves absolutely nothing.

25 THE COURT: Relevance is the

1 objection?

2 MR. BUNDY: Absolutely irrelevant,
3 and it's immaterial. It doesn't make your
4 decision any more or less likely to hit a certain
5 point because of this information.

6 THE COURT: Okay.

7 MR. HILDEBRAND: Your Honor, Jim
8 McAuliffe did testify that BIM should have been
9 used. It was available and is appropriate for an
10 architect, and had the architect used it, he
11 would have published document -- more than likely
12 documents that would have been useful.

13 THE COURT: Right.

14 MR. HILDEBRAND: There's been no
15 argument in here that the documents we got were
16 bad. They caused all sorts of problems from
17 start to finish.

18 THE COURT: But that's -- isn't
19 that an issue with the architect?

20 MR. HILDEBRAND: It is, and he
21 is --

22 THE COURT: Who is not a party to
23 the case, right?

24 MR. HILDEBRAND: He's not a party
25 but he is an agent of the owner. And we can go

1 through the contract and --

2 THE COURT:: Well, you're not
3 trying to make him liable for anything, though.
4 You're trying to make Library Associates liable.

5 MR. BUNDY: Right. He also didn't
6 testify to it to a reasonable degree of
7 certainty.

8 THE COURT: Okay. All right.

9 MR. HILDEBRAND: The issue is, we
10 certainly aren't liable for defective drawings.
11 That is on the owner. The owner has an implied
12 warranty and a specific obligation.

13 I can -- we can go through the
14 contract -- to give us drawings that were his
15 drawings that he gave us that are the contractual
16 basis that were a hundred percent plus drawings,
17 were drawings that work. He did not do that.
18 This explains why the drawings that we got were
19 bad.

20 And I think that it's going to be --
21 it's relevant to show, from this witness that,
22 yeah, he got the document. This is a recognition
23 by the architect early on that we should have
24 used BIM, but we didn't.

25 MR. BUNDY: I don't know what else

1 to say.

2 THE COURT: All right. I'm with
3 you. I still think -- I think you can proffer
4 it, but I don't think it comes into evidence.
5 You can ask this witness about what he knew about
6 it, anything that goes along that line. But I
7 just don't think that it's relevant to the
8 question at hand that the Court has to decide.
9 Okay? All right.

10 MR. HILDEBRAND: All right. Well,
11 we will make this a proffered Court's Exhibit.
12 I'm not sure what number.

13 THE COURT: It's a proffer of a
14 Plaintiff's Exhibit No., whatever you've got it
15 marked as. Is it marked already or no?

16 MR. BUNDY: It's marked for ID.

17 MR. HILDEBRAND: I would like to
18 make this a Court's Exhibit just to cover the
19 record.

20 THE COURT: Well, I don't call them
21 a Court's Exhibit. I call them your exhibit. It
22 isn't coming into evidence.

23 MR. BUNDY: It's an ID.

24 THE COURT: It's an ID.

25 MR. BUNDY: It was an ID exhibit

1 that was not entered into evidence, and it's
2 being proffered.

3 MR. HILDEBRAND: Right. It's not
4 into evidence, but it's in the record?

5 THE COURT: Absolutely, yes, sir.
6 It's the record.

7 MR. HILDEBRAND: For purposes of
8 appeal or --

9 THE COURT: Yes, sir, absolutely,
10 because I don't want to have to try it again.
11 Got it as Plaintiff's 36, right?

12 MR. HILDEBRAND: Yes, sir.

13 (PLF. EXH. 36 was marked for
14 identification and offered as a proffer.)

15 (PLF. EXH. 42 was marked for
16 identification.)

17 BY MR. HILDEBRAND:

18 Q. All right. Turn to Exhibit 42, if you
19 would, please. All right. Are you there,
20 Mr. Clements?

21 A. Yes, sir.

22 Q. Do you recognize this document?

23 A. Yes.

24 Q. And it's the agreement between you and
25 the owner for your services on this job, correct?

1 A. Yes, sir.

2 Q. And this is what you agreed to do and
3 what you felt was appropriate for you to perform
4 on this job, correct?

5 A. Yes.

6 Q. All right. I would like to introduce
7 this as Exhibit 42, Your Honor.

8 MR. BUNDY: No objection.

9 THE COURT: Without objection.
10 Very good.

11 (PLF. EXH. 42 was received in
12 evidence.)

13 BY MR. HILDEBRAND:

14 Q. All right. The next one is Exhibit 54,
15 please.

16 MR. BUNDY: Which one, Tom?

17 MR. HILDEBRAND: 54.

18 BY MR. HILDEBRAND:

19 Q. This is an e-mail dated July 5, 2014,
20 from Buck Lindsay to Jim Lord, and you are
21 copied, and Kim Brown is copied. Do you see
22 that?

23 A. At the top of the page?

24 Q. Yes, sir.

25 A. Yes, sir.

1 Q. All right. And the subject, a hundred
2 percent plans published today. Do you see that?

3 A. Yes, sir.

4 Q. And it says, Jim, a hundred percent
5 plans now published, correct?

6 A. Yes, that's what it says.

7 THE COURT: I'm sorry, which number
8 was that?

9 MR. HILDEBRAND: It's Exhibit 54.
10 I would like to introduce this one as Plaintiff's
11 54, Your Honor.

12 MR. BUNDY: One minute, Your Honor.
13 Let me check something. Your Honor, I object.
14 The contract was dated September 22nd, 2014.

15 This predates the contract, and any
16 information would have been merged into the
17 contract and would have been the final documents
18 agreed to at or about the time the contract was
19 signed. It's a merger clause of the contract.
20 It's completely irrelevant.

21 MR. HILDEBRAND: He's talking about
22 the plans that, when they are published, it is
23 relevant to the case. And it also, if I read
24 this last sentence, it says --

25 THE COURT: Who is Jim Lord, by the

1 way? Who is he?

2 MR. HILDEBRAND: He's with the
3 architect.

4 THE COURT: Okay.

5 MR. HILDEBRAND: It's a hundred
6 percent plans are being published.

7 What this shows is that actually not
8 only were the -- was the design bad, but that the
9 owner was aware of deficiencies with the design
10 because in the very last sentence of it says --
11 the first sentence says, a hundred percent plans
12 now published.

13 Then the last sentence says, when we
14 know what all the VE -- when we know what all VE
15 is viable and what all DCI may accumulate in the
16 next two months, then we will return to the
17 project for whatever repair work is needed.

18 So he's saying that we're publishing to
19 Balfour. Balfour is involved in the project at
20 this time. We're giving them a hundred percent
21 plans, but we understand that what we're giving
22 is inappropriate. We won't have to do repair
23 work when the interior design comes in later on.

24 THE COURT: All right. So the
25 issue -- where you offer this for is to say that

1 the plans are done, but they may need some
2 change. DCI, again, that was the interior
3 design?

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: Okay. What is VE?

6 MR. HILDEBRAND: VE is value
7 engineering.

8 THE COURT: Value engineering.
9 Okay. The objection is?

10 MR. BUNDY: The objection is it's
11 irrelevant, and he's trying to prove
12 architectural malpractice through the back door.
13 I don't know how documents that predate a
14 contract are relevant to a set of construction
15 documents, regardless of what they say.

16 If you don't have an architect to
17 testify to a reasonable degree of certainty that
18 these plans were defective and those defective
19 plans proximately caused damage. That's what
20 they're alleging, that the plans were the
21 defective. Okay? The fact that before they were
22 issued, there were conversations back and forth,
23 proves nothing.

24 THE COURT: All right. I'm with
25 you.

1 MR. BUNDY: Okay. Thank you, Your
2 Honor.

3 THE COURT: All right. Your
4 question to Mr. Clements about this was what?

5 MR. HILDEBRAND: I simply asked him
6 to authenticate it and -- which he has done, and
7 as part of the business records. And I move to
8 introduce it based on, again, what -- the
9 arguments I've just made.

10 Supposedly these are -- this predates
11 the signed contract by just a couple of days.
12 These -- this is dated July 5, 2014. The signed
13 contract -- I'm sorry, not a couple days, a
14 couple months -- was September 22, 2014.

15 So these are -- Balfour was involved in
16 the project at this time, from working up to a
17 contract. And these are a hundred percent
18 drawings that were provided, and the architect is
19 saying that, we recognize that they're not
20 complete. They contain errors so we're going to
21 have to do repairs to them later.

22 MR. BUNDY: But the architect is
23 not a party.

24 THE COURT: Yeah.

25 MR. BUNDY: And the architect

1 didn't --

2 THE COURT: I've still got a
3 problem. I'm going to do it for ID purposes.
4 Okay? Once again, for ID only.

5 (PLF. EXH. 82 was marked for
6 identification.)

7 MR. HILDEBRAND:

8 Q. All right. The next one is Exhibit 82.
9 And the e-mail at the top is from Kim Brown to
10 yourself, dated August 8, 2016. Do you recognize
11 this?

12 A. Top of the page?

13 Q. Yes, sir.

14 A. Yes, sir.

15 Q. All right. And then below that, there
16 is an e-mail to you from Buck Lindsay dated July
17 26, 2016. Do you see that?

18 A. Yes, sir.

19 Q. All right. And it's talking about the
20 Balfour Beatty delay claim.

21 Jim, got a good update on issues
22 surrounding the BBC delay claim. One, building
23 height. The compressed ceiling heights on this
24 job combined with the intense systems traveling
25 up and down and sideways along with structural

1 demands, have made this job a one of a kind
2 challenge. Even if all else was tranquil, which
3 it is not, it would be tough.

4 Two, changes. Changes in the last month
5 with the concierge's suite and the manager's
6 suite have compounded our ability to run an
7 organized job. Chaos has ruled. DCI has no
8 regard for changes and their impact of the work,
9 and although they trigger a lot of the change,
10 which are still going on, much work has yet to be
11 finished.

12 When the crap hits the fan, they're no
13 longer at the scene. The owner and the job would
14 benefit to enact a design freeze, but I don't
15 expect that to happen. Did I read that
16 correctly?

17 A. Yes, sir.

18 MR. HILDEBRAND: All right. I
19 would like to introduce this, Your Honor.

20 MR. BUNDY: No objection.

21 THE COURT: All right. In
22 evidence. And that's 82?

23 MR. HILDEBRAND: Yes, sir.

24 (PLF. EXH. 82 was received in
25 evidence.)

1 (PLF. EXH. 83 was marked for
2 identification.)

3 BY MR. HILDEBRAND:

4 Q. All right. 83, please. All right.
5 This is an e-mail from you to Kim Brown,
6 regarding the notification of delay to the
7 structure from Balfour Beatty, correct?

8 A. Yes. It's in the subject header, yes.

9 Q. All right. Kim, we have been working on
10 these issues since they were first brought to our
11 attention.

12 As of today, I believe we were close to
13 having the last current issue resolved. The crux
14 of the matter is when the sixth floor stepped
15 back, the concrete beams supporting the structure
16 above, as well as the offsetting risers from the
17 fifth and sixth floor and above, caused a myriad
18 of challenges and conflicts?

19 Regrettably, the challenges on the lower
20 floors precluded the opportunity to get ahead of
21 the scheduled pour -- of the concrete pour
22 schedule, and even now we are faced with an
23 unknown coordination risks with seven and above;
24 is that correct?

25 A. That is what it says.

1 MR. HILDEBRAND: All right. I
2 would like to introduce that as our next one,
3 Your Honor.

4 MR. BUNDY: No objection.

5 THE COURT: Without objection.

6 (PLF. EXH. 83 was received in
7 evidence.)

8 (PLF. EXH. 89 was marked for
9 identification.)

10 BY MR. HILDEBRAND:

11 Q. All right. The next one is 89. These
12 are -- it's entitled, meeting notes 230 delay
13 call from DCI, and it says, participants Jim,
14 Kim, Buck dated August 17, 2016. Do you
15 recognize this document?

16 A. Yes.

17 Q. Okay. Number one, need to shut the job
18 down for another week. Construction has gotten
19 ahead of BIM, which was identified at last week's
20 meeting. Number six, Buck, DCI needs to come to
21 a design freeze and stop designing, as every
22 change carries with it a huge backlog of changes
23 to other disciplines. Did I read that correctly?

24 A. Yes, sir.

25 MR. HILDEBRAND: All right. I

1 would like to do introduce this into evidence.

2 MR. BUNDY: No objection.

3 THE COURT: All right. In
4 evidence.

5 (PLF. EXH. 89 was received in
6 evidence.)

7 (PLF. EXH. 91 was marked for
8 identification.)

9 BY MR. HILDEBRAND:

10 Q. The next one is 91. An e-mail from Buck
11 Lindsay to yourself and to Kim Brown dated
12 September 8th, 2016, correct?

13 A. Yes.

14 Q. All right. And Balfour Beatty is not
15 copied on that e-mail, correct?

16 A. No.

17 Q. It's dated September 8, 2016. And it
18 says in the second paragraph -- actually, let's
19 start with the first one.

20 Jim, this has been a frustrating
21 exercise. That is WLA trying to fill in for BBC
22 and BIM'ing the eighth floor ceiling to try to
23 keep the BIM clash resolution ahead of the actual
24 field work. Gene is definitely a component -- a
25 competent BIM designer. It is his full-time job

1 normally working for an electrical company.

2 He worked for me years ago as a hotel
3 production architect, but like with AutoCAD and
4 Revit and any other pair of CAD production
5 systems, compatible system used among players is
6 a must. And if not present, is a challenge.
7 We're facing that here.

8 And then he talks about what the BIM --
9 the usual BIM protocols are, and then I would
10 like to move down to the very -- the next to last
11 paragraph.

12 The above being said -- and this is
13 again from Buck Lindsay, the project architect.
14 The above being said, I, this morning, opened my
15 desk drawings to see if I can, quote, muscle,
16 closed quote, this task into motion the old
17 fashioned way.

18 Two realities occur. The human brain,
19 mine included, is not capable of modeling
20 multiple systems in 3D to explore and find all
21 clashes. As I've emphasized many times with no
22 one hearing, I did this process as well as could
23 be done -- it says cold -- cold be done in the CD
24 process.

25 This is clear evidence in the current

1 plans all disciplines that systems were
2 manipulated by me to avoid detectible clashes.
3 But given that the bottom of the ninth floor in
4 10 foot 4 inch AFF with many structural drops
5 below that and the ceiling are desired to be 9
6 feet minimum leaving only 1 foot 2 inches to work
7 with in the good locations.

8 The challenge is of the highest order,
9 and the human brain becomes even less effective
10 and more likely to fail and not find all clashes.
11 Did I read that correctly?

12 A. Yes.

13 MR. HILDEBRAND: All right. I
14 would like to move this as the next one, Your
15 Honor.

16 MR. BUNDY: No objection.

17 THE COURT: Without objection.

18 (PLF. EXH. 91 was received in
19 evidence.)

20 (PLF. EXH. 96 was marked for
21 identification.)

22 BY MR. HILDEBRAND:

23 Q. Okay. Next is 96. This is an e-mail
24 from you to Brian Rinehart with DCI. That's the
25 interior designer, correct?

1 A. Yes.

2 Q. And copied Kim Brown and Karen Jenkins,
3 but Balfour Beatty is not copied, correct?

4 A. Yes.

5 Q. And the subject is the sixth floor
6 delay?

7 A. Yes.

8 Q. Okay. Brian, thanks for taking my call
9 this morning. Per our discussion, when you have
10 time, please review the attached spreadsheet from
11 BBC identifying RFI issues resulting in the sixth
12 floor delay. I've added column, quote, who's
13 responsible, closed quote.

14 Based upon my review of the BBC RFIs, it
15 is my current submission that most are pure
16 building coordination issues, and the
17 owner-related changes were not fully coordinated
18 by WLA or as a result of existing coordination
19 issues in the building resulted in RFIs
20 incoordination issues. Did I read that
21 correctly?

22 A. Yes.

23 Q. All right. So if we turn the page,
24 working from left to right, under the very first
25 column, where it says, who is responsible, that

1 is what you added to that document, correct?

2 A. I believe so.

3 Q. Right. The rest of the document was --
4 were issues that Balfour was complaining about
5 caused the sixth floor delay issue, correct?

6 A. Yes, sir.

7 Q. All right. And under who is
8 responsible, you filled in who you felt was
9 responsible for all that, and all of the ones on
10 the first page are WLA. That's Winford Lindsay
11 Architects, correct?

12 A. Yes.

13 Q. And on the next page, the first two are
14 Winford -- WLA, and then the next two are Library
15 Associates, and then the rest of them. Did I
16 read that correctly?

17 A. Yes.

18 MR. HILDEBRAND: All right. I
19 would like to move that in evidence, Your Honor.

20 MR. BUNDY: No objection.

21 THE COURT: 96 in evidence.

22 (PLF. EXH. 96 was received in
23 evidence.)

24 (PLF. EXH. 114 was marked for
25 identification.)

1 BY MR. HILDEBRAND:

2 Q. Let's go to 114, please. This is a
3 hotel -- Bennett Hotel budget variance recap.
4 This is a document that you drafted, isn't it?

5 A. Yes.

6 Q. Okay. And this is talking about, that
7 the budget has exceeded from the time that the
8 project started, correct?

9 A. It's a recap of exposures.

10 Q. Okay.

11 A. It summarizes a budget overage, yes.

12 Q. Right.

13 A. It's an estimated budget overage.

14 Q. Okay. In the description -- and this is
15 the description number 2, submitted and
16 unapproved is \$2,553,922, which includes a
17 \$1,057,057 structure delay claim from BBC; is
18 that correct?

19 A. That's what it says.

20 Q. All right. And then below that, number
21 7, it talks about recapture opportunity. So you
22 talk about the budget being over, which was
23 \$5,645,664, which includes claims for delay by
24 Balfour, correct?

25 A. Yes.

1 Q. And then you talk about, okay, where can
2 money come from to try to help us recapture this
3 budget overage? And it says, BBC contingent
4 liability. That's just a contingency in the
5 contract, correct? It's just money in the
6 contract that might be used?

7 A. Right.

8 Q. Financing costs. What is -- what are
9 the financing costs? How would that be money
10 coming to the owner?

11 A. The faster a project goes, the more work
12 in place and the more financing is required to
13 pay for that work. So if the project is
14 extended, the work in place is much slower, and
15 there's less borrowing.

16 Q. And then the last one, number 10 is WLA
17 errors and omissions. So that's a -- you're
18 saying that an avenue or a resource to recover
19 money from the owner that you're listing is WLA
20 insurance, a claim against WLA's E and O policy,
21 correct?

22 A. Yeah. This whole lower section is just
23 spit balling.

24 MR. HILDEBRAND: Okay. I would
25 like to introduce this.

1 THE COURT: All right. In
2 evidence, 114.

3 (PLF. EXH. 114 was received in
4 evidence.)

5 (PLF. EXH. 129 was marked for
6 identification.)

7 BY MR. HILDEBRAND:

8 Q. Okay. Actually, the next one is number
9 129, at the very end of that.

10 A. Okay.

11 MR. BUNDY: Still in the same book,
12 Tom?

13 MR. HILDEBRAND: Yes.

14 BY MR. HILDEBRAND:

15 Q. Are you with me?

16 A. Yes, sir.

17 Q. This is e-mail from Kim Brown to Woody
18 Faust and yourself dated 2/27/2018. And it's WC
19 33 at Marion Square. What is WC 33?

20 A. I think it's a wall covering.

21 Q. Okay. And her question to you and to
22 Woody is -- or to Woody, rather, is, Woody, why
23 hasn't this been done already? Now we're trying
24 to give them a reason to charge us delays in
25 there. This should have been ordered three years

1 ago. Did I read that correctly?

2 A. Almost, but you got most of it.

3 MR. HILDEBRAND: Okay. I would
4 like to introduce this as the next exhibit, Your
5 Honor.

6 MR. BUNDY: Which one was this,
7 Tom?

8 MR. HILDEBRAND: 129.

9 THE WITNESS: 129.

10 MR. BUNDY: Sure. No objection.

11 (PLF. EXH. 129 was received in
12 evidence.)

13 BY MR. HILDEBRAND:

14 Q. All right. Now, we're turning to the
15 next notebook.

16 A. The next book.

17 THE COURT: Are we in binder 3?

18 MR. HILDEBRAND: Yes, sir. My next
19 exhibit will be 141. Actually, let's go to 156.
20 I will skip one to try to move it along.

21 THE COURT: All right.

22 (PLF. EXH. 156 was marked for
23 identification.)

24 BY MR. HILDEBRAND:

25 Q. 156 is an e-mail from you to Jennifer

1 Faulkinberry. Kim Brown is copied. It's dated
2 12/18/2018.

3 All right. This is an e-mail as of that
4 date. Jennifer and Buck, attached is a copy of
5 credits owed Library Associates for items in
6 dispute between Library and BBC, and the
7 attachment is a listing of issues that totals
8 \$277,469.75, correct?

9 A. Yes, sir.

10 MR. HILDEBRAND: All right. I
11 would like to move to introduce that, Your Honor.

12 MR. BUNDY: No objection.

13 THE COURT: All right, sir. In
14 evidence.

15 (PLF. EXH. 156 was received in
16 evidence.)

17 (PLF. EXH. 158 was marked for
18 identification.)

19 BY MR. HILDEBRAND:

20 Q. And then Exhibit 158 will be next. It's
21 an e-mail to the project architect from you dated
22 December 20, 2018. Bennett Hotel contractor and
23 owner disputed matters, right to withhold
24 payment.

25 And then there again, you attach the --

1 going into the third page, the same document that
2 we just referred to, the \$277,000 and suggest
3 that that be withheld to protect the owner's
4 interest. Is that a fair summary?

5 A. Yes, sir.

6 MR. HILDEBRAND: All right. I
7 would like to introduce that as the next exhibit,
8 Your Honor.

9 MR. BUNDY: No objection.

10 THE COURT: All right. In
11 evidence.

12 (PLF. EXH. 158 was received in
13 evidence.)

14 MR. MCDONALD: What exhibit number
15 was that, Tom?

16 THE COURT: 158.

17 MR. HILDEBRAND: 158.

18 MR. MCDONALD: All right.

19 (PLF. EXH. 169 was marked for
20 identification.)

21 BY MR. HILDEBRAND:

22 Q. All right. 169 is the next one. It's a
23 string of e-mails. The middle one is from you to
24 Mike. How do you pronounce the name?

25 (Inaudible).

1 A. Yes.

2 Q. This is an e-mail dated February 17,
3 2019. Mike, good speaking with you on Friday,
4 and, yes, lunch was great. I am one and done
5 with Bennett Hospitality, but I agree that there
6 is merit in your proposal and having a
7 discussion, which I would be happy to attend; is
8 that correct?

9 A. Yes, sir.

10 MR. HILDEBRAND: All right. I
11 would like to introduce that as the next one,
12 Your Honor.

13 THE COURT: All right. It's in
14 evidence.

15 MR. BUNDY: Sure. No objection.

16 (PLF. EXH. 169 was received in
17 evidence.)

18 MR. HILDEBRAND: The next is 173.
19 I'm sorry, that's -- I will skip over that one
20 for now. Just a few more, Your Honor.

21 THE COURT: All right.

22 MR. HILDEBRAND: There's a light at
23 the end of the tunnel.

24 THE COURT: If we could get it done
25 before the rain, that would be good.

1 (PLF. EXH. 262 was marked for
2 identification.)

3 MR. HILDEBRAND: 262 is the next
4 one, so you need to go to another book.

5 THE WITNESS: 262?

6 MR. HILDEBRAND: Yes, sir.

7 BY MR. HILDEBRAND:

8 Q. Are you with me?

9 A. Yes, sir.

10 Q. All right. This is in a letter by -- to
11 Winford Lindsay Architect from John Heuer dated
12 April 24, 2019. It shows a number of recipients.
13 You are not shown, but do you remember getting a
14 copy?

15 MR. BUNDY: Objection. This is an
16 out of court statement offered for proof of the
17 matter asserted. If he wants to put this letter
18 in, he needs to put Mr. Heuer on the witness
19 stand.

20 MR. HILDEBRAND: Your Honor, I can
21 lay a foundation. If he received it and he
22 recognizes it as part of the project file, and
23 it's clearly authenticated. And there's no --
24 Mr. Bennett has no --

25 MR. BUNDY: I'm not objecting to

1 the --

2 MR. HILDEBRAND: -- reasonable
3 argument that it's not authentic.

4 MR. BUNDY: I'm not objecting to
5 the authentication of it.

6 THE COURT: Okay. Well --

7 MR. HILDEBRAND: Then the only
8 other issue is there any relevance, it is
9 relevant. And it is relevant because it --

10 THE COURT: Go ahead and lay a
11 foundation.

12 MR. BUNDY: But it's hearsay. It
13 doesn't fall under any exception.

14 THE COURT: I'm with you.

15 MR. BUNDY: If he wants to put him
16 on the stand, I will be glad to cross-examine
17 him.

18 THE COURT: Go ahead and lay a
19 foundation.

20 THE WITNESS: I don't have any
21 recollection at this time.

22 (PLF. EXH. 266 was marked for
23 identification.)

24 BY MR. HILDEBRAND:

25 Q. Okay. Fair enough. All right. 265.

1 I'm sorry, 266.

2 A. Okay.

3 Q. At the bottom, from Jim Clements to
4 Brian Rinehart with Design Continuum subject to
5 sixth floor delay.

6 Brian, pursuant to the voicemail I left
7 earlier, would you have the time to run through
8 the attached sixth floor delay RFI log and
9 identify which RFIs were driven by owner design
10 changes versus coordinations. And the last of
11 next paragraph, the nuance in all of this is
12 while --

13 A. Hold on. I've lost you. Are we on 266?

14 Q. Yes, sir.

15 THE COURT: It starts at the
16 bottom, right?

17 MR. HILDEBRAND: Yes, sir.

18 THE WITNESS: Starting at the
19 bottom?

20 BY MR. HILDEBRAND:

21 Q. Yes, sir.

22 A. Oh, okay. I'm with you.

23 Q. The middle paragraph. The nuance in all
24 of this is, while there were owner design
25 changes, some of the BIM work was driven by the

1 rooms above and HVAC coordination of plumbing
2 issues, such as exposed P traps.

3 So it is fair to say we are coordinating
4 an issue -- we are coordinating an owner change,
5 but that coordination was driven by basic shell
6 building design coordination or lack of it. Did
7 I read that correctly?

8 A. Yes, sir.

9 MR. HILDEBRAND: All right. That
10 would be my next exhibit, Your Honor.

11 MR. BUNDY: No objection.

12 THE COURT: All right. In
13 evidence.

14 (PLF. EXH. 266 was received in
15 evidence.)

16 (PLF. EXH. 267 was marked for
17 identification.)

18 BY MR. HILDEBRAND:

19 Q. All right. The next one, 267?

20 A. I'm there.

21 Q. From you to Buck Lindsay dated February
22 28, 2017, Marion Square, second service. Buck, I
23 appreciate the report, but am tired of you
24 blaming interiors. Goodness knows there are
25 no -- there are no perfect, but by my

1 calculations, we have more than 1 million dollars
2 in design errors that are not related to DCI.

3 Did I read that correctly?

4 A. Yes, sir.

5 Q. And that is in response to an e-mail
6 below that from Buck Lindsay to yourself.

7 First paragraph, Jim, as you might have
8 detected in our meeting last week, this is an
9 issue that Jen had reviewed with me and I have
10 also vetted with my design team, as to show why
11 we got here. It has to do with the stuttered
12 delay of final CDs.

13 A. Deliveries, not delay.

14 Q. Stuttered delivery of the final CDs, 99,
15 100, 100 percent plus mostly caused by interiors
16 being behind us in delivery. Where the
17 electrical service demand escalated from below
18 3,000 amps to just under 4,000 amps.

19 Our electrical team did not raise the
20 flag on that condition. Then the escalation of
21 electrical load continued to rise with owner
22 driven changes and later discovery that the two
23 MUA air units on the roof had large duct heaters
24 that had not been included in the panel counts.
25 We're still looking at a pub to be defined which

1 could further add to the electrical load. Did I
2 read all of that correctly?

3 A. Yes, sir.

4 Q. So basically, this is -- what happened
5 on the job was that the original electrical
6 design that was provided was not -- after all the
7 various changes were made, it wasn't sufficient
8 to carry the electrical load and had to be
9 completely redone, didn't it?

10 A. Yeah, that's what did.

11 MR. HILDEBRAND: I would like to
12 introduce this as the next one, Your Honor.

13 MR. BUNDY: No objection.

14 THE COURT: 267 in evidence.

15 (PLF. EXH. 267 was received in
16 evidence.)

17 (PLF. EXH. 268 was marked for
18 identification.)

19 BY MR. HILDEBRAND:

20 Q. All right. The next one, 268, from you
21 to Kim Brown, 2/28/17, follow-up to the previous
22 e-mail, I believe. And your -- it's addressed to
23 Kim and not to Balfour.

24 Kim, Buck's recap below is accurate, but
25 he fails to mention that, had we known the duct

1 heaters were not circuited, we could have
2 addressed that service shortage at the time that
3 we discovered the kitchen upgrades, had used up
4 our spare electrical capacity, when operations
5 change some kitchen equipment.

6 We still would have incurred the cost of
7 the added service but timing would have been
8 better and our potential delay exposure would
9 have been less. Did I read that correctly?

10 A. Yes, sir.

11 MR. HILDEBRAND: That would be my
12 next exhibit, Your Honor.

13 MR. BUNDY: No objection.

14 THE COURT: Without objection.

15 (PLF. EXH. 268 received in
16 evidence.)

17 (PLF. EXH. 269 was marked for
18 identification.)

19 MR. HILDEBRAND: 269.

20 MR. MCDONALD: What was the last
21 one, Tom?

22 MR. HILDEBRAND: 268. These are
23 all sequential.

24 BY MR. HILDEBRAND:

25 Q. 269. This is an e-mail from you, Jim,

1 to Buck Lindsay, sixth floor delay. And the
2 subject, sixth floor delay, hotel at Marion
3 Square, notification of delays. Structure copy
4 of BIM's constraint log levels 6 through 9.

5 Buck, based upon the owner's review of
6 the attached notifications and delay and the
7 contractor's position stated therein, please
8 allow this letter to serve as written notice
9 pursuant to section 5.9 of AIA B101-2007. The
10 owner is aware that the contractor is alleging
11 that there exists fault, defect, error, omission,
12 or inconsistencies in the architect's instruments
13 of service for professional services.

14 The contractor alleges the specifics as
15 follows: One, due to ongoing MEP coordination of
16 level 5 overhead, Balfour Beatty Construction did
17 not have final sleeve in seismic anchor locations
18 to start MEP layout in the level 6 west slab as
19 scheduled on 7/12/16. The delay is a result from
20 conflicts in the contract documents. See
21 attached Balfour Beatty Construction BIM
22 constraint log.

23 Three, Balfour Beatty advised that the
24 delays not only impacted the sixth floor but had
25 consequently impacted the project's critical

1 path, thus delaying other trades in the project's
2 scheduled completion, correct?

3 A. Yes.

4 Q. So you were putting the architect on
5 notice as required under the architect's contract
6 of deficiencies in the --

7 MR. BUNDY: Objection.

8 A. Alleged.

9 Q. -- alleged deficiencies with its work,
10 correct?

11 A. Sorry to interrupt. Yes.

12 MR. HILDEBRAND: All right. I
13 would like to introduce that as the next exhibit,
14 Your Honor.

15 THE COURT: Okay. 269 in evidence.

16 (PLF. EXH. 269 received in
17 evidence.)

18 (PLF. EXH. 270 was marked for
19 identification.)

20 BY MR. HILDEBRAND:

21 Q. Okay. 270. This is 4/21/2017 from Jim
22 Clements to Buck Lindsay, and this relates to SI
23 number 38. Do you know what that related to?

24 A. Not off the top of my head.

25 Q. The last half of that paragraph, the

1 owner is aware that the contractor is alleging
2 that there exists fault, defect, error, omission
3 or inconsistencies in the architect's
4 instruments.

5 The next sentence, the contractor
6 alleges the omission of circuiting for various
7 omitted load requirements has now caused the
8 rating of the main switchboard capacity to be
9 exceeded and in violation of the code. So you're
10 putting the architect on notice again; is that
11 correct?

12 A. Yes.

13 MR. HILDEBRAND: Okay. I would
14 like to introduce that.

15 THE WITNESS: I would not interpret
16 that as a formal notice. It's more a
17 correspondence as opposed to the previous
18 exhibit, which was -- but that's certainly
19 raising the question, right?

20 BY MR. HILDEBRAND:

21 Q. Okay. Well, it says, please --

22 A. Oh, it does say that, I take it back.

23 Q. -- allow this letter to serve as written
24 notice.

25 A. Yeah, you're right. I didn't see that.

1 MR. HILDEBRAND: Okay. So this is
2 270.

3 THE COURT: 270?

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: All right. In
6 evidence.

7 (PLF. EXH. 270 received in
8 evidence.)

9 (PLF. EXH. 272 was marked for
10 identification.)

11 BY MR. HILDEBRAND:

12 Q. Let's skip to 272. From Jim Clements to
13 Buck Lindsay dated June 2, 2017. The subject is,
14 notification of delay 7 structure, Lithko ninth
15 floor claim backup. This is another notice
16 letter, correct?

17 A. Yes, sir.

18 Q. And it is alleging that there are
19 problems with the design documents that have
20 delayed the critical path relative to the seventh
21 floor?

22 MR. BUNDY: Objection.

23 MR. HILDEBRAND: Is that a fair
24 summary?

25 MR. BUNDY: Objection.

1 THE COURT: What is the basis of
2 the objection?

3 MR. BUNDY: His question was -- his
4 letter alleges these claims. That's not what
5 this is. This is a notification the contractor
6 is making the allegations. These aren't
7 allegations made by Mr. Clements. He's simply
8 pointing the allegations. He's putting the
9 architect on notice. The contractor is making
10 the allegation.

11 THE COURT: Right.

12 MR. BUNDY: He's not ratifying,
13 adopting or anything. He's just passing on
14 information.

15 THE COURT: All right. So noted.
16 In evidence. 272?

17 MR. HILDEBRAND: Yes, sir.

18 (PLF. EXH. 272 received in
19 evidence.)

20 (PLF. EXH. 273 was marked for
21 identification.)

22 BY MR. HILDEBRAND:

23 Q. All right. 273. E-mail from you to
24 Buck Lindsay dated July 22, 2017. 88 control
25 value location, bathroom control valve location,

1 tub walls, 88 control valve locations. This is
2 another notification to the architect of claim
3 deficiencies with its work, correct?

4 A. Yes, sir.

5 MR. HILDEBRAND: I would like to
6 move that as the next exhibit, Your Honor.

7 THE COURT: All right. In
8 evidence.

9 MR. BUNDY: No objection.

10 (PLF. EXH. 273 received in
11 evidence.)

12 (PLF. EXH. 274 was marked for
13 identification.)

14 BY MR. HILDEBRAND:

15 Q. 274. An e-mail from you to Buck Lindsay
16 dated August 7, 2017, and this is, update Marion
17 current DCI redraw, redesign.

18 Number one, the contractor alleges that
19 contract documents incorrectly accounted to the
20 height of the entry to stair number 4, requiring
21 the existing header to the stair opening to be
22 reframed to provide code compliant access.

23 A. Yes, sir.

24 Q. So a similar letter to the prior ones.

25 A. Yes.

1 MR. HILDEBRAND: All right. I
2 would like to move that as the next one, Your
3 Honor.

4 THE COURT: All right. In
5 evidence.

6 (PLF. EXH. 274 received in
7 evidence.)

8 (PLF. EXH. 275 was marked for
9 identification.)

10 BY MR. HILDEBRAND:

11 Q. All right. 275.

12 A. This says the same thing.

13 Q. Mod 5, mechanical revisions from you to
14 Jim Clements (sic) dated 11/4/2017.

15 Number one, the contractor alleges the
16 piping conflicts associated with chilled water
17 and domestic plumbing as revised on M104A and
18 P103 -- were a result of the adjustment of floor
19 heights without coordination of the mechanical
20 and plumbing distribution systems. Another
21 notice to the architect?

22 A. Yes.

23 MR. HILDEBRAND: I would like to
24 move that -- introduce that, Your Honor.

25 THE COURT: All right. 275.

1 MR. BUNDY: No objection. It's
2 just giving notice.

3 THE COURT: All right. In
4 evidence.

5 (PLF. EXH. 275 received in
6 evidence.)

7 (PLF. EXH. 276 was marked for
8 identification.)

9 MR. HILDEBRAND:

10 Q. All right. The next one, 276. This is
11 notice dated July 22, 2017, from you to Buck
12 Lindsay.

13 Number one, the contractor alleges the
14 contract documents incorrectly accounted to the
15 placement of plumbing fixtures in the ADA guest
16 rooms, necessitating the relocation of completed
17 work including plumbing and sheetrock. Another
18 notice?

19 A. Yes, sir.

20 MR. HILDEBRAND: All right. I
21 would like to introduce that as the next one,
22 Your Honor.

23 MR. BUNDY: No objection to notice.

24 THE COURT: Okay.

25 (PLF. EXH. 276 received in

1 evidence.)

2 (PLF. EXH. 277 was marked for
3 identification.)

4 BY MR. HILDEBRAND:

5 Q. 277. Lighting control panel locations.
6 Based on the owner's review of the attached RFIs,
7 no provision was made in the hotel's design to
8 locate the primary lighting controls. In
9 response, WLA selected a BOH storage closet.
10 What's BOH?

11 A. Back of house.

12 Q. Back of house storage closet. During
13 installation, it was discovered the selected
14 location did not have sufficient cooling to --
15 cooling capacity to meet the lighting, control
16 equipment -- requirements. RFI 1171 was issued
17 to address the cooling question, which will now
18 result in a future change order to the owner.

19 A. Yes, sir.

20 MR. HILDEBRAND: All right. I
21 would like to move that as the next one, Your
22 Honor.

23 MR. BUNDY: No objection.

24 THE COURT: All right. 277.

25 (PLF. EXH. 277 received in

1 evidence.)

2 (PLF. EXH. 278 was marked for
3 identification.)

4 BY MR. HILDEBRAND:

5 Q. 278. E-mail from you to Buck Lindsay,
6 4/20/18. Again, written notice.

7 Number one, an adequate airflow back to
8 the AH use was provided in the contract documents
9 requiring the contractor to cut openings and
10 walls above ceilings in locations and size as
11 called for on the attached CCD number five. Some
12 required cutting and patching of sheetrock
13 sealants. Some doors were required to be
14 undercut. Another notice?

15 A. Yes, sir.

16 MR. HILDEBRAND: I would like to
17 introduce that, Your Honor.

18 MR. BUNDY: No objection.

19 THE COURT: In evidence.

20 (PLF. EXH. 278 received in
21 evidence.)

22 (PLF. EXH. 279 was marked for
23 identification.)

24 BY MR. HILDEBRAND:

25 Q. 279, banquet MEP coordination with PT

1 slab.

2 Number one, due to a lack of
3 coordination during the BIM process, the banquet
4 kitchen tables were not located to sit above
5 floor --

6 A. Over floor.

7 Q. I'm sorry?

8 A. Over floor sinks.

9 MR. BUNDY: Excuse me, which one
10 are we on?

11 THE WITNESS: We're on 279.

12 MR. HILDEBRAND: 279. Let me start
13 over.

14 BY MR. HILDEBRAND:

15 Q. Number one, due to a lack of
16 coordination during the BIM process, the banquet
17 kitchen tables were not located to sit over floor
18 sinks located to clear a structural beam leaving
19 them exposed. Consequently, the tables will have
20 to be relocated and plumbing extended.

21 A. That's correct.

22 Q. Another notice?

23 A. Yes, sir.

24 MR. HILDEBRAND: I would like to
25 introduce that, Your Honor.

1 MR. BUNDY: No objection.

2 THE COURT: In evidence.

3 (PLF. EXH. 279 received in
4 evidence.)

5 (PLF. EXH. 280 was marked for
6 identification.)

7 BY MR. HILDEBRAND:

8 Q. 280. Dated April 20, 2018, from you to
9 Buck Lindsay. Number one, SC DHEC does not allow
10 emergency drip lines to drain to the kitchen
11 floor, and there's a change that resulted from
12 that, correct?

13 A. Correct, yes, sir.

14 Q. Another notice?

15 A. Sir?

16 Q. Another notice?

17 A. Yes, sir.

18 MR. HILDEBRAND: All right. I
19 would like to introduce that, Your Honor.

20 MR. BUNDY: No objection.

21 THE COURT: All right. In
22 evidence.

23 (PLF. EXH. 280 received in
24 evidence.)

25 (PLF. EXH. 281 was marked for

1 identification.)

2 BY MR. HILDEBRAND:

3 Q. 281. FCU 6 in electrical room. CCD
4 number 25. The contractor alleges the scope of
5 work outlined in the aforementioned SIs to
6 correct the exceeded rating in the main
7 switchboard capacity, did not adequately provide
8 for the relocation of FCU 6 in the main
9 electrical room. What is FCU 6?

10 A. I don't recall.

11 Q. Do you know what FCU is? Fan coil unit?

12 A. Fan coil unit. Thank you. I was
13 drawing a blank.

14 Q. Consequently, CCD 25 had been issued to
15 the contractor to pipe and relocate FCU 6.
16 Another notice?

17 A. Yes.

18 MR. HILDEBRAND: Okay. I would
19 like to introduce that, Your Honor.

20 MR. BUNDY: No objection.

21 THE COURT: In evidence.

22 (PLF. EXH. 281 received in
23 evidence.)

24 BY MR. HILDEBRAND:

25 Q. 281.

1 THE COURT: That was 281 there.

2 MR. HILDEBRAND: I thought that was
3 280.

4 MR. BUNDY: That was 280. You read
5 281.

6 THE COURT: 280 was the drip lines
7 in the kitchen, and 281 was the FCU 6. 280 and
8 281 are both in.

9 MR. HILDEBRAND: Okay. So I think
10 I need to go back to 280.

11 MR. BUNDY: I thought we had 280
12 in?

13 THE COURT: You do. You've got 280
14 and 281 in.

15 MR. HILDEBRAND: All right.

16 THE COURT: The next is 282.

17 (PLF. EXH. 282 was marked for
18 identification.)

19 THE COURT: You're moving so fast,
20 you don't even know it.

21 MR. HILDEBRAND: I'm trying to
22 streamline it, Your Honor.

23 BY MR. HILDEBRAND:

24 Q. All right. 282. The contractor alleges
25 the architect's kitchen lighting design failed to

1 provide a minimum of 50 foot candles of lighting
2 on the cook line prep area, rooftop kitchen, prep
3 area, and weight station and bakery triple sink.
4 Another notice?

5 A. Yes, sir.

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

8 MR. BUNDY: No objection.

9 THE COURT: All right.

10 (PLF. EXH. 282 received in
11 evidence.)

12 MR. HILDEBRAND: I think I might be
13 about done, if we want to take just a couple
14 minutes.

15 THE COURT: We can take a little
16 break.

17 MR. HILDEBRAND: If we come back
18 after lunch, I think I'll just have maybe a
19 couple of questions.

20 THE COURT: All right. Let me ask
21 these fellows in the back. Do y'all have any
22 questions for Mr. Clements? I think you do,
23 don't you?

24 MR. TERRY: Yes, Your Honor.

25 MR. WINDLE: I do not.

1 THE COURT: You do not? Okay.

2 Thank you, Mr. Windle.

3 Do you have a little redirect you'll do?

4 MR. BUNDY: Pardon me, Your Honor?

5 THE COURT: Do you have a little
6 redirect?

7 MR. BUNDY: Yeah. Yes, sir.

8 MR. HILDEBRAND: He brought up
9 quite a few new items.

10 THE COURT: Let's go ahead and take
11 our lunch break now. Let's come back. It's
12 12:20. Let's come back about quarter to 2.

13 MR. MCDONALD: Your Honor, while
14 we're on the record, it came up yesterday about
15 the exhibits, the depositions.

16 THE COURT: Yes.

17 MR. MCDONALD: For whatever reason,
18 they weren't collected last night, but they now
19 have copies of them. I would like to address
20 that. It doesn't have anything to do with this
21 witness.

22 But since we're taking a lunch break,
23 I'd like to address that at some point prior to
24 my next witness because it might -- because it's
25 going to make my next witness go a lot smoother

1 as it relates to those exhibits that are already
2 in evidence.

3 THE COURT: Okay.

4 MR. MCDONALD: So I don't know how
5 much time that --

6 THE COURT: Do y'all want to work
7 on that over lunch and come back maybe about 1:30
8 or something and talk about that?

9 MR. MCDONALD: If they'll just tell
10 me. I'm ready to go with all of them. So if
11 they disagree with all of them, I'll argue all of
12 them. Just tell me which ones they disagree
13 with. I'm prepared to argue on those.

14 MR. HILDEBRAND: We're not
15 objecting to all of them. We've got several, but
16 it's not all that many.

17 THE COURT: Okay. All right.

18 MR. MCDONALD: And I'm not
19 suggesting that we do that before this witness
20 has concluded. I just wanted to bring it that to
21 Your Honor's attention.

22 MR. BUNDY: And we really need to
23 do that before we put up another witness.

24 THE COURT: We put up the next
25 witness. I'm with you.

1 All right. I will admonish Mr. Clements
2 not to speak to any of these folks sitting in
3 here. And I'd ask y'all to come back about 1:30
4 and let me know which ones you've got. And we
5 will start back at 1:45.

6 (A recess transpired.)

7 THE COURT: Back on the record.
8 Hope y'all had a relatively dry lunch. Not as
9 bad as they said it was going to be, but I don't
10 know if we've took it all yet.

11 All right. Still on your case,
12 Mr. Hildebrand?

13 MR. HILDEBRAND: Yes, sir. I'm
14 just about finished.

15 THE COURT: Very good.

16 BY MR. HILDEBRAND:

17 Q. Mr. Clements, following -- or at the
18 time that the owner had decided at the end of the
19 project, after all the rooms had been painted,
20 that he wanted to repaint them, was any punch
21 list ever provided, to your knowledge, by the
22 architect to Balfour specifying room by room or
23 with any specificity as to what needed to be
24 done?

25 A. Prior to?

1 Q. Right.

2 A. Yes.

3 Q. No, no, no, not prior to, after. After
4 Mr. Bennett -- so the punch list was signed off.
5 You said everything was fine, and that's
6 exhibited by the e-mail we talked about earlier.
7 Then Mr. Bennett said, these are not acceptable
8 to me, and you said that the architect signed off
9 on that.

10 My question is, when that decision was
11 made by Mr. Bennett, that he wanted to repaint
12 the rooms, was any punch list ever provided to
13 Balfour specifying room by room exactly what
14 needed to be done?

15 A. Not for all the rooms. There was other
16 documentation. There's correspondence
17 specifically with regard to me, to Ryan Ledford
18 about one room in particular, about deficiencies.
19 But with regard to all the rooms in question,
20 there wasn't a room by room detailed punch list.

21 Q. Well, was there actually any punch
22 lists, or was it just a notification?

23 A. Well, I guess a notification because
24 there were photographs and e-mails, but there was
25 not a punch list, per se. Nothing disparate of

1 what the architect provided.

2 Q. Right. And that's what -- wouldn't you
3 agree with me, that's what is supposed to be
4 provided? If the architect is dissatisfied with
5 the work, that it has an obligation to provide
6 the contractor a punch list room by room saying,
7 okay, here's what we -- specifically, we want you
8 to do in these rooms to bring them to acceptable
9 standard?

10 A. My opinion is that Mr. Lindsay's
11 response in mid December to the existing punch
12 list and absence thereof covered that. One
13 was -- an additional punch list was not necessary
14 if you deem it unsatisfactory.

15 Q. One last question. You said that you
16 are aware of contracts where key people on the
17 contractor's side are identified in the contract
18 that are specified to be specifically working on
19 the project?

20 A. Yes, sir.

21 Q. To your knowledge, did that happen in
22 the contract for this job?

23 A. No, I don't believe it did, sir.

24 MR. HILDEBRAND: All right. Thank
25 you very much. I think these other gentlemen

1 might have some questions.

2 THE COURT: Okay. Do you want
3 to -- Mr. Bennett, I think Mr. Terry has got a
4 few questions.

5 MR. BUNDY: Oh, I'm sorry.

6 MR. TERRY: May it please the
7 Court?

8 THE COURT: Yes, sir.

9 CROSS-EXAMINATION

10 BY MR. TERRY:

11 Q. All right. Mr. Clements, good
12 afternoon, I hope you're doing well.

13 A. I am well, Mr. Terry. Thank you.

14 Q. All right. I have just a short number
15 of questions here. You talked in detail about
16 your experience in the construction industry
17 yesterday morning and again in your testimony.
18 Do you remember that?

19 A. Yes, sir.

20 Q. And you would agree that building a
21 project like the Hotel Bennett project is a
22 challenging undertaking, correct?

23 A. Yes, sir.

24 Q. Okay. And that, when you build a
25 project like the Hotel Bennett project, the

1 coordination of the efforts is critical, right?

2 A. Absolutely.

3 Q. And that is the -- those efforts would
4 -- the coordination of those efforts is the --
5 involves the design of the project, right?

6 A. Yes, sir.

7 Q. And the owner decisions for the project,
8 right?

9 A. Yes, sir.

10 Q. And the contractor's coordination of the
11 trades on the project as well, right?

12 A. Very much so.

13 Q. And then the trades coordination of its
14 labor and material for the project, right?

15 A. That would be involved, yes.

16 Q. And by trades, those are subcontractors,
17 right?

18 A. Yes.

19 Q. All right. And the trades coordination
20 with labor and materials, let's talk about labor
21 first. Part of that coordination is deciding
22 where to put its labor resources for the project
23 at particular times, right?

24 A. Yes.

25 Q. Okay. And part of that coordination is

1 when to have specific materials delivered as
2 well, right?

3 A. Yes, sir.

4 Q. All right. And on this project,
5 material deliveries were more critical than it
6 might be on another project. There's not a lot
7 of lay down area to store those materials, right?

8 A. Yes, sir.

9 Q. Okay. And because of those
10 challenges -- or strike that. When coordinating
11 the work on the project, due to all the
12 challenges, the work would have been easier to
13 coordinate if everybody on the team got along,
14 right?

15 A. In a working relationship, yes,
16 that's -- those adversarial relationships,
17 absolutely.

18 Q. It's kind of like your experience
19 playing basketball?

20 A. Right.

21 Q. If the team is working together, we're
22 going to have a better chance of having a
23 positive outcome than if the team doesn't get
24 along, right?

25 A. Absolutely.

1 Q. All right. And on this project, the
2 team didn't always get along, right?

3 A. No.

4 Q. No, they didn't get along, correct?

5 A. No, from top to bottom.

6 Q. Okay. And so you --

7 A. Well, yes, sir. That's fine. Go ahead.

8 Q. Yeah. From top to bottom, they didn't
9 get along; so there was times that the owner and
10 Balfour Beatty were not getting along, right?

11 A. Yes.

12 Q. And there was times when the interior
13 designer and the architect were butting heads,
14 right?

15 A. Yes, sir.

16 Q. And so that made -- this relationship
17 problem that was occurring made this project more
18 challenging to build, right?

19 A. Well, you kind of stopped short because
20 there were relationship issues between Balfour
21 Beatty and the subcontractors as well.

22 Q. All relationships --

23 A. I'm just claiming top to bottom. It was
24 all across the board.

25 Q. Sure.

1 A. At times, very tenuous.

2 Q. And one of the struggles you had was,
3 you weren't just trying to manage the
4 construction of the building, you're trying to
5 manage the relationships as well, too, right?

6 A. Yes, sir.

7 Q. All right. Another struggle that you
8 had was that, because the hotel operator came in
9 later in the project, then the decisions that
10 that hotel operator wanted to make, would have
11 been better made earlier in the project, right?

12 A. Yes, sir.

13 Q. Okay. And that brought up more changes
14 that would not have -- or would have occurred
15 much earlier had the hotel operator been brought
16 in earlier, right?

17 A. Yes, sir.

18 Q. And when you add changes towards the end
19 of the project -- strike that. When you get to
20 the end of the project, there's a big push as
21 compared to later in the project, and that's
22 because there's more trades working, right?

23 A. Yes, sir.

24 Q. Like, for example, early in the project,
25 when you're building the structure, your primary

1 trade is, in this project, the concrete
2 contractor, right?

3 A. Yes, sir.

4 Q. But when you start getting towards the
5 end of the project, you're going to have the
6 electrician on-site, right?

7 A. Yes, sir.

8 Q. The fire sprinkler guy on-site?

9 A. Yes, sir.

10 Q. The mechanical HVAC guy on-site?

11 A. Yes, sir.

12 Q. The plumber on-site?

13 A. Yes, sir.

14 Q. The fire alarm contractor on-site?

15 A. Yes, sir.

16 Q. The molding and millwork guys are going
17 to be on-site?

18 A. Yes, sir.

19 Q. The ceiling contractor is going to be
20 on-site?

21 A. Yes, sir.

22 Q. The drywall contractor is going to be
23 on-site?

24 A. Yes, sir.

25 Q. And all of those contractors being

1 on-site compounds the issue or makes it much
2 harder to manage the project than just having the
3 concrete guy there building the structure, right?

4 A. I would disagree in that, when you're
5 doing the concrete structure, you have one
6 superintendent, wherein in your finishing stage,
7 where you would have multiple floors, Balfour
8 Beatty had half a dozen superintendents.

9 And so if you look at it on a one-to-one
10 basis with regard to coverage by the general
11 contractor, I would not say that it was more
12 difficult that one superintendent managing the
13 structure.

14 But your point, there's a lot more
15 people on the job. There's a lot more moving
16 parts. But I would say that the supervision
17 wasn't in place, or it should have been in place.

18 Q. All right. And now, you've got to
19 manage all those supervisors as well?

20 A. Yes, sir, absolutely.

21 Q. You've added to the effort. And so when
22 you make late changes in the project, you've got
23 a lot more moving parts going at the same time
24 that those changes effect, right?

25 A. Well, you have to define late.

1 Q. Okay.

2 A. Because the operator came on about a
3 year before. Well, just right after -- right at
4 top out. So I would not categorize that as late,
5 and most of their input was relatively early and
6 had to do primarily with technology, point of
7 sales, in room where the coffee maker went, those
8 types of things. But they didn't make any
9 cardinal changes to the program of the project
10 that I recall.

11 Q. All right. Earlier you talked about one
12 of the things that you -- I think you used the
13 word empathize or if that had -- a better way to
14 say this is, one of the things you could have
15 added for Mr. Bennett about on this project is
16 that, there were a lot of design coordination
17 problems that led to changes that really
18 shouldn't have happened, right?

19 A. Yes, sir.

20 Q. And from your perspective, as the
21 owner -- well, let's do it this way. As the
22 owner's representative on this project, would you
23 agree that for the owner's side of the team here,
24 you're the person who has the most knowledge
25 about what actually occurred on the project site?

1 A. Yes, sir.

2 Q. Okay. And as the owner's
3 representative, from your perspective, there were
4 a few things that delayed this project, right?
5 And we'll check them off here in just a minute.
6 Would you agree with me that there's just a
7 handful of things that were the major delays to
8 this project?

9 A. In terms of schedule delays?

10 Q. The things that caused the project to be
11 completed late.

12 A. Yes.

13 Q. Okay. And those were the design itself
14 because of all of the conflicts, right?

15 A. I don't think that's true, and I will
16 tell you why. The design created the conflict at
17 the sixth floor, and there was a claim for seven
18 and eight. There was no claim -- seven and nine.
19 There was no claim for eight.

20 And then, starting in January of 2018,
21 we went forward with the CCD format for changes,
22 and those were primarily driven by non-GMP scope.
23 And they proceeded, in my mind, concurrently,
24 with the balance of the GMP scope of work to
25 complete the project.

1 Q. All right.

2 A. So to say that they were -- particularly
3 exacerbated the completion date, I don't think I
4 can agree with that.

5 Q. Okay. Another thing that you claim or
6 that, from your perspective, caused delays to the
7 project was starting the BIM process later than
8 you would have thought it should have started,
9 correct?

10 A. Yeah.

11 MR. BUNDY: Object to the form of
12 the question or objection. It assumes facts not
13 in evidence. The question said, another thing
14 you agreed to and he just didn't agree to it.

15 MR. TERRY: I will rephrase the
16 question.

17 THE COURT: All right.

18 BY MR. TERRY:

19 Q. Mr. Clements, it's your opinion that the
20 project should -- the BIM project for the portion
21 of the project should have started earlier,
22 right?

23 A. Yes.

24 Q. Okay. And you also -- from your
25 perspective, the owner making changes to improve

1 the project might have delayed completion of the
2 project?

3 A. Yes, sir.

4 MR. BUNDY: Objection.

5 MR. TERRY: What was the basis for
6 your objection?

7 THE COURT: I'm sorry, I missed it.
8 Your question was whether or not it delayed the
9 completion of the project?

10 MR. TERRY: Whether it might have
11 delayed it is what I said.

12 THE COURT: Might have delayed it.

13 MR. BUNDY: Whether it might have,
14 that is my problem.

15 THE COURT: Is that speculative?

16 MR. TERRY: I will ask him a
17 different way.

18 THE COURT: All right.

19 BY MR. TERRY:

20 Q. From your perspective as the owner's
21 manager on the -- the owner's project manager,
22 the owner making changes to improve the project
23 delayed completion of the project?

24 A. No, I don't agree with that.

25 Q. Okay. Do you agree that Library

1 Associates issued changes to the project after
2 the contractually required completion date,
3 right?

4 A. Post August 2017, yes, sir.

5 Q. Okay. And you agree that there were
6 delays caused by Library Associates that were
7 concurrent with delays that might have been
8 caused -- or that were caused by Balfour Beatty,
9 correct?

10 A. I don't think those are called delays if
11 the project is already in delay. The client is
12 just taking advantage of the status of the
13 project without any -- making changes.

14 Q. Okay.

15 A. I don't categorize that as delays.

16 Q. Do you agree that the contract sets up a
17 process for -- sets up a change order process,
18 right?

19 A. A change order process?

20 Q. Yes.

21 A. Yes, sir.

22 Q. Okay. And the way the change order
23 process is, is that a change -- either the owner
24 would request the change or the contractor would
25 request the change, right? That's how we would

1 initiate it, correct?

2 A. Yes, sir.

3 Q. Okay. And then the contractor would
4 submit a price for the change, correct?

5 A. Yes, sir.

6 Q. Okay. And then either the owner or the
7 architect would approve that change order, right?

8 A. The owner would, yes.

9 Q. Ultimately, the owner would sign the
10 change order, right?

11 A. Yes. The architect would approve it
12 from entitlement standpoint, but ultimately, the
13 owner would sign it.

14 Q. Okay. And on this project, there were
15 times that that process wasn't followed for
16 change orders, right?

17 A. I think any change order -- I have to
18 breakdown your question. Are you saying that
19 changes received without authorization?

20 Q. I will ask it a different way. On this
21 project, did changes proceed without
22 authorization per the -- per the process for
23 changes orders that was laid out in the contract?

24 A. I would think that is the case
25 without -- because the change orders were so slow

1 in coming. Like, for instance, the MOD 5 for the
2 RCO 103, the mechanical change, that pricing
3 wasn't received until after the work was well in
4 advance, if that's what you mean.

5 Q. Now, you talked a little bit about the
6 schedule of the work. Let's talk about that for
7 a just little bit. The construction schedule is
8 a tool that's used to help coordinate the work on
9 the project, right?

10 A. Yes, sir.

11 Q. All right. And like we talked about
12 earlier, a subcontractor would use that schedule
13 as a tool to coordinate his labor and material on
14 the project, right?

15 A. Absolutely.

16 Q. Okay. And at some point during the
17 project, it came to your attention that, at least
18 your belief was, through Grady Query, that the
19 Balfour Beatty schedule was wrong, right?

20 A. It had some fallacies in it, yes, sir.

21 Q. Okay. And you never told any of the
22 subcontractors that Balfour Beatty's schedule was
23 wrong, did you?

24 A. No.

25 MR. TERRY: That's all the

1 questions I have.

2 REDIRECT EXAMINATION

3 BY MR. BUNDY:

4 Q. The contract specifically prohibits the
5 owner from talking to the subcontractor, correct?

6 A. I don't know if it's true, but that's
7 just a golden rule, you don't talk to the subs.

8 Q. Well, isn't it the case, the owner --
9 the contractor complained to the owner and the
10 architect about the owner talking to the
11 subcontractors? Do you remember that?

12 A. When you say -- talking to them in
13 conversation?

14 Q. Yeah.

15 A. I mean, we talked, but in terms of
16 directly giving them authorization outside of the
17 general contractor, that didn't happen.

18 Q. Okay. Let's talk about Mr. Baumbach and
19 whatever this paying people in advance to hang
20 around for a job. I think you said you weren't
21 familiar with that process?

22 A. The bench?

23 Q. Yeah, the bench.

24 A. No, I never heard of it before.

25 Q. Even if you had benched Mr. Baumbach, he

1 was still fired, right? So when -- and he
2 started the job, he was just fired?

3 A. Yes, sir.

4 Q. Okay. So there was no -- is there any
5 way for an owner to prevent a contractor from
6 firing his employees?

7 A. Not that I'm aware of.

8 Q. Okay. So the decision not to have
9 Baumbach was purely Balfour Beatty's?

10 A. Yes, sir.

11 Q. Okay. Let me ask you this: If a
12 contractor did not think that the liquidated
13 damage clause was going to be enforced, then why
14 would they make a delay claim?

15 MR. HILDEBRAND: Objection, Your
16 Honor. It calls for speculation.

17 MR. BUNDY: I'll withdraw it.

18 BY MR. BUNDY:

19 Q. What would be the contracture -- in your
20 experience, as a program manager, if the
21 contractor didn't think the liquidated damage
22 clause was going to be enforced by the owner,
23 what would be the reason or rationale for even
24 making a delay claim?

25 MR. HILDEBRAND: Same objection,

1 Your Honor. It's speculation and Mr. Bennett --

2 THE COURT: I'm going to sustain
3 the objection unless you want to lay a little
4 more foundation. Go ahead.

5 BY MR. BUNDY:

6 Q. This contract has very specific
7 requirements related to change orders, does it
8 not, and time extensions, correct?

9 A. Yes, sir.

10 Q. Okay. And in fact -- if I can find the
11 contract. Give me one second here. Paragraph
12 8.3.4 of the general conditions, AIA 201-2007
13 edition, page 32, documents in evidence. If you
14 would, read for the record, 8.3.4.

15 A. All requests for time extensions to the
16 contract shall be --

17 Q. Hang on one second. Let's let the Judge
18 get there.

19 THE COURT: Page 30?

20 MR. BUNDY: Page 32.

21 THE WITNESS: 32. It's 8.3.4.

22 MR. HILDEBRAND: Your Honor, there
23 were no questions, to my recollection, to this
24 witness about time extensions for Balfour's
25 claims. The questions were related to the

1 owner's claims for liquidated damages.

2 MR. BUNDY: Yes. And if time
3 extensions aren't directly related to liquidated
4 damages, I don't know what we're talking about.
5 He brought up liquidated damages. It says, we
6 waived them.

7 The contract specifically requires time
8 extensions in order to avoid liquidated damages.
9 You can't -- you avoid liquidated damages by
10 asking for time extensions. It's completely
11 irrational and illogical to take the position
12 that we waived the liquidated damages, and at the
13 same time, they're requesting time extensions.

14 If you didn't have damages for delay of
15 any kind, there would be no reason to do
16 anything. Time wouldn't be of the essence, and
17 there wouldn't even be any reason to have an end
18 date to the contract. You can't have it both
19 ways.

20 THE COURT: Okay.

21 MR. HILDEBRAND: Your Honor, the
22 law is, if he -- if the owner is on notice -- and
23 we believe this -- of delays, then that's
24 sufficient for you, as the fact finder, to
25 determine that they were on notice, that the

1 contractor was experiencing delays, and that we
2 were seeking damages for delays.

3 The claim provisions are something you
4 will have to determine under South Carolina Law,
5 but the question -- that's not the question. The
6 question is, would this witness -- did I -- the
7 simple question is, did I ask him anything about
8 Balfour's claims and the provisions that relate
9 to claims.

10 And Mr. Bennett has cross-examined our
11 witnesses already on that. There's no questions
12 about that. The only questions to him were, on
13 the liquidated damages, did the owner give any
14 notice until January of 2019. That was it. So
15 his -- I think his questions need to be directed
16 to that, not to these other issues.

17 THE COURT: All right. He's going
18 to go into the contract. I'm going allow him to
19 do that. Objection overruled.

20 MR. BUNDY: Thank you.

21 BY MR. BUNDY:

22 Q. Slowly, would you please read what's in
23 this contract related to that paragraph.

24 A. All requests for time extensions to the
25 contract shall be issued in writing by the

1 contractor to the architect within 20 days --
2 within 20 calendar days, other than which caused
3 the delay.

4 This requirement shall be strictly
5 enforced. Written notice is a condition
6 precedent to entitlement to any time extension,
7 and all parties agree to that the owner will be
8 prejudiced by the lack of a timely written notice
9 of a request for time extensions.

10 All requests for time extensions to the
11 contract received by the architect from the
12 contractor after 20 calendar days of any event
13 which caused a delay shall not be recognized.
14 The contract time shall include due allowance for
15 days expected to be lost due to precipitation.

16 All days lost due to precipitation shall
17 be documented and verified by the contractor at
18 the project progress meetings. Acceptable
19 sources for documentation of days lost due to
20 precipitation shall include the National Oceanic
21 Atmospheric Administration, the National Weather
22 Service, the US Army Corps of Engineers, the
23 National Climate Data Center, and any other
24 source chosen to be recognized by the architect
25 for the purpose of this contractor.

1 If the contractor agrees that it may
2 expect to lose working days due to precipitation
3 in accordance to the following table.

4 Q. Okay. Now, if you would read 8.3.5.

5 A. Are you there?

6 Q. 8.3.5.

7 A. Neither the owner, nor the architect
8 will be obligated or liable to contractor for,
9 and contractor hereby expressly waives claims
10 against the owner and architect on account of
11 damages, costs, expenses, or related impacts that
12 the contractor, its subcontractors,
13 sub-subcontractors, suppliers, or other persons
14 may incur as a result of a class 2 cause
15 enumerated in section 8.3.2.

16 The contractor, likewise, weighs claims
17 for damages, costs, or expenses incurred by the
18 contractor, its subcontractors,
19 sub-subcontractors, and suppliers due to delay
20 resulting from a class one cost, except and
21 solely to the extent of those costs allowed under
22 section 7.3.6, plus any necessary site specific,
23 general conditions incurred by the contractor as
24 a result of the delay.

25 Q. Just go ahead finish reading. Read that

1 sentence on the delay.

2 A. Oh, I'm sorry.

3 MR. BUNDY: Do you want to read it,
4 Judge and just leave it out? I mean, I'm glad
5 to -- the whole section applies.

6 THE COURT: The 8.3 section?

7 MR. BUNDY: Yes, sir. The whole
8 section applies. I would like to read it, if
9 it's okay with you.

10 THE COURT: Go ahead. Go ahead.

11 THE WITNESS: 8.3.6.

12 The contractor further waives any claim
13 relating to time that is not made in accordance
14 with applicable provisions of section 4.3
15 provided; however, extensions of time associated
16 with the change order that adjusts the scope of
17 work or cost of the work shall be noticed and
18 resolved as a part of an -- contemporaneously
19 with the procedures of article 7.

20 A change order issued pursuant to a
21 claim under article 4 or change -- or change in
22 the work under article 7 shall be a final
23 adjudication of all time and impact, costs
24 associated with such change order, and shall
25 release and waive any and all claims, costs, or

1 damages resulting from such change orders,
2 whether or not accounted for in the change order
3 as executed.

4 8.3.7. The contractor also waived and
5 releases any claim for additional costs of any
6 nature premised upon owner's failure to give an
7 extension of time unless the contractor has given
8 to owner and architect within the applicable time
9 limits set forth in the contract documents.

10 A written request for an extension of
11 time identifying their causes for delay and the
12 days requested in accordance with the provisions
13 of section 8.3.3, and includes such requests as
14 an outstanding change order as required by
15 section 4.3.1.1.

16 8.3.8. The contractor is not entitled
17 to a separate extension of the contract time from
18 each one of the causes of delay that may have
19 current or interrelated effects on the progress
20 of the work. Concurrent causes of delay shall be
21 considered a single delay.

22 Furthermore, the contractor is not
23 entitled to an extension of the time for
24 concurrent delays that include delays due to the
25 fault of the contractor that, regardless of the

1 delay caused by the owner, increased the duration
2 of the work.

3 8.3.9. The contractor shall not be
4 entitled to any additional compensation for its
5 inability to complete the work early (or prior to
6 the date of substantial completion set forth in
7 this, in the agreement) due to a class one or
8 class two cause as enumerated above.

9 BY MR. BUNDY:

10 Q. Thank you. Now, after the original --
11 the contract was extended by 20 days, right?

12 A. By change order.

13 Q. And that was the only extension of the
14 contract?

15 A. By change order, yes, sir. On
16 extension, yes, sir.

17 Q. Right. Given that -- once that 20 days
18 was given, do you know whether or not BBC and the
19 people that worked there were aware of the date
20 of substantial completion of this job? Were they
21 aware that there was a completion date?

22 A. Yes.

23 Q. Did you actually discuss it with them?

24 A. I think we looked at it in OAC meeting
25 minutes and such, yes.

1 Q. And after the original substantial
2 completion date passed and the 20 days was added,
3 do you believe that Balfour Beatty was aware they
4 were late and past the substantial completion
5 date?

6 MR. HILDEBRAND: Objection, Your
7 Honor, that calls for speculation. And he's not
8 qualified to answer that, that Balfour was aware
9 that they were late. Because it assumes that we
10 were at fault in causing the delays and that we
11 are the ones who allowed that. And I don't agree
12 with that. That's for you to decide, not by this
13 witness.

14 THE COURT: All right.

15 MR. BUNDY: Your Honor, I --

16 THE COURT: Restate the question,
17 if you would, because you did ask what Balfour
18 Beatty thought.

19 BY MR. BUNDY:

20 Q. Well, based on your personal knowledge
21 of discussing this case with Balfour Beatty
22 employees at meetings held every week from the
23 time the original substantial completion date
24 until the substantial -- the end of the job, did
25 any of them ever acknowledge to you that the time

1 had passed to finish the job based on the
2 original completion date plus 20 days, or were
3 they unaware they were late?

4 A. Everybody was aware of it, yes.

5 Q. Okay. So you don't believe that Balfour
6 Beatty was unaware they were late?

7 MR. HILDEBRAND: Objection, Your
8 Honor. He keeps changing it. He's throwing in
9 little comments on the record that are
10 inappropriate. Were they aware that they were
11 late?

12 MR. BUNDY: You know, Your Honor,
13 if they want to stipulate that they were not
14 aware that the completion date had passed, that
15 they continued to do work, I'm perfectly okay
16 with that, if anybody -- if anybody believes
17 that.

18 THE COURT: I don't think you'll
19 get that one.

20 MR. HILDEBRAND: No. Certainly the
21 contract completion date was -- passed.
22 Everybody knows that. I mean, if he wants to ask
23 him --

24 MR. BUNDY: Well, right. That's
25 all I'm trying to prove.

1 THE COURT: Okay. All right.

2 MR. BUNDY: But what -- but who is
3 at fault in him trying to say that Balfour's --

4 THE COURT: All right. That's the
5 issue I've got to resolve.

6 MR. BUNDY: I'm not suggesting --

7 THE COURT: All right.

8 MR. BUNDY: All I'm doing is trying
9 to clear up that these people were at least aware
10 that the time to complete the job was passed.

11 THE COURT: Okay. All right.

12 MR. BUNDY: And they were aware
13 they had to make a request for a change, a
14 delay -- an extension of time in order to extend
15 that date. Let me ask it to him that way.

16 BY MR. BUNDY:

17 Q. Do you know whether or not Balfour
18 Beatty had any -- did you ever get any
19 indication, talking to Balfour Beatty, anybody
20 that worked there, the whole time you were there,
21 that not one of them read this contract?

22 MR. HILDEBRAND: Your Honor, this
23 is calling for speculation. He needs to testify
24 to what he knows, not about what he thinks
25 Balfour Beatty has done. We could be here for

1 weeks while he's --

2 THE COURT: He asked him for his
3 personal opinion, but he can answer that. That
4 would be a lay opinion.

5 THE WITNESS: I'm not aware.

6 BY MR. BUNDY:

7 Q. Based on your conversations with them,
8 meeting in week after week, did you ever come to
9 a conclusion they had looked at the plans and
10 specifications?

11 A. Of course, yes, sir.

12 Q. Okay. Did you ever come to the
13 conclusion they had actually looked at the
14 contract they just signed?

15 A. I know they have.

16 Q. Did they refer to it in conversations?

17 A. Absolutely.

18 Q. Did they have a copy of it?

19 A. I never saw their copy.

20 Q. Okay. Was it at the Egnyte site? Was
21 it in the Egnyte site?

22 A. I never looked for it there because I
23 had my own copy of that.

24 Q. All right. I'd asked you now to look at
25 paragraph 9.8.2 and read the last -- you can read

1 the whole paragraph slowly, 9.8.2.

2 A. When the contractor considers that the
3 work or a portion thereof, which the owner agrees
4 to accept separately, to substantially complete,
5 the contractor shall prepare and submit to the
6 architect, a comprehensive list of items to be
7 completed or corrected prior to final payment.

8 The failure to include an item on such
9 list does not alter the responsibility of the
10 contractor to complete all work in accordance
11 with the contract documents.

12 Q. Okay. And would you read paragraph
13 9.8.3.1?

14 A. If the architect fails to grant
15 substantial completion on such reinspection and
16 determines that additional inspections are
17 necessary, contractor shall reimburse owner for
18 all reasonable architect fees charged to owner
19 for such reinspections provided -- that the need
20 for such reinspections was due to the
21 contractor's fault.

22 (DFT. EXH. 104 was marked for
23 identification.)

24 Q. All right. I hand you now what's been
25 marked as Defendant's Exhibit 104, let me put --

1 it's for ID right now. It's not been admitted
2 yet. All right. What I've handed you has been
3 marked as 104 for ID, and let me give you this
4 one, and I will give the Judge the other one.

5 THE COURT: Defendant's 104?

6 MR. BUNDY: 104 for ID.

7 BY MR. BUNDY:

8 Q. All right. Mr. Clements, can you
9 identify this document for me, please?

10 A. The bottom portion of it?

11 Q. Yeah. Just look at all of the pages and
12 tell me if you can identify this as e-mails back
13 and forth --

14 A. Oh, yes.

15 Q. -- that you were involved in?

16 A. Yes, I recognize this.

17 Q. You recognize this stuff?

18 A. Yes.

19 Q. It's created -- from Buck Lindsay to
20 Brown, Spano, and others, and you're cc'd. This
21 is an e-mail chain.

22 MR. BUNDY: Your Honor, I move to
23 introduce this into evidence.

24 THE COURT: Okay.

25 MR. HILDEBRAND: No objection.

1 THE COURT: Without objection.

2 (DFT. EXH. 104 was received in
3 evidence.)

4 BY MR. BUNDY:

5 Q. In the middle of the -- well, at the
6 very top -- we're going to go sort of backwards a
7 little bit. Buck makes a statement to Kim Brown
8 and others including Starcevic, Simonton, et
9 cetera. What does he say at the top related to
10 the topics below?

11 A. Also salient to the below dialogue is
12 the attached general condition excerpt, paragraph
13 9.8.2, confirming that just because a punch list
14 doesn't contain an item needing attention, that
15 does not relieve the GC of the duty to address
16 that new item.

17 Q. And that was the paragraph you just read
18 earlier, right?

19 A. Yes, sir.

20 Q. Okay. Now, there's -- now, we go down a
21 little bit, and it's from Buck Lindsay to -- it
22 says David. That would be David Simonton?

23 A. Yes, sir.

24 Q. What is Buck telling Mr. Simonton on
25 December 12, 2018. If you could read that into

1 the record, please.

2 A. David, regarding the attached letter and
3 e-mail below, I have spoken with Barbara DeMatteo
4 and Ray Mendoza of construction's commitment, who
5 as a consultant to us, punched the guest rooms
6 for the Bennett Hotel.

7 There were originally punches done for
8 the two mockup rooms, which should have served as
9 a comparative standard for finish acceptability.
10 Then there were two complete punch runs through
11 every room, the second of which included some
12 tradesmen, who fix defects, as they were pointed
13 out, and some items that were to be addressed
14 thereafter.

15 Then, on subsequent reviews, Ray noted
16 that items had been listed on the second round
17 were not done, and that new issues have shown --
18 moved sprinkler heads, mirror screw holes over
19 desks stained from workmen leaning on tables, for
20 example. A few other items have also been noted
21 in the correspondence over the last few days.

22 Should I continue?

23 Q. Yeah.

24 A. We understand that DFF maintains the
25 room punch work has been signed off on. Barbara

1 and Ray reported to me just now that they don't
2 sign off rooms. They prepare punch lists
3 addressing a room at a point in time.

4 It is possible that all items on
5 particular room lists are complete, but then
6 subsequent items are noted, which remains valid
7 punch work. In any case, construction
8 commitment. The first sentence is --

9 Q. Well, the first sentence at the top is
10 the same as the bottom sentence.

11 A. Oh, sorry. In either case, construction
12 commitment has not signed off punch work. There
13 are necessary punch duties that remain with DCC.
14 Since the status of the punch work remains, in
15 the next few days, I intend to review rooms
16 myself to make a determination. Thanks, Buck
17 Lindsay, architect.

18 Q. All right. Now, this e-mail chain
19 started, I believe, with your e-mail to Simonton,
20 right?

21 A. Yes, sir.

22 Q. Would you read that to us, please?

23 A. Down at the bottom?

24 Q. Yes, sir. Yeah.

25 A. They confirmed our conversation with

1 Marty and Nick at noon today in room 311.

2 Despite the owner's position to the contrary, BB
3 asserts they have met their contractual
4 obligation in terms of punch list and standards
5 of care with regard to the guest room finishes.

6 BBC confirmed it will continue to
7 provide access to the room for the owner's work.
8 As a result of this disagreement, the owner is
9 now forced to correct workmanship and quality
10 issues with his own forces. At Marty's request,
11 I visited 315 with him and have attached one
12 example of a deficiency found in the room which
13 BBC declined to visit with us.

14 Q. All right. Let's us look these
15 photographs. You took these photographs, right?

16 A. I did.

17 Q. All right. Tell me what we are looking
18 at in the first photograph that you gained
19 appropriate to photograph and for what purpose.

20 A. Well, both photographs of the same
21 location is where a mirror had been removed from
22 the wall. And so the screw holes on the front
23 (inaudible) covered up still remained, and I
24 guess the mirror is missing.

25 Q. All right, sir.

1 (DFT. EXH. 105 was marked for
2 identification.)

3 MR. BUNDY: Your Honor, this has
4 been marked 105 for identification.

5 THE COURT: All right. Did you
6 move 104 in?

7 MR. BUNDY: Well, I move to
8 introduce that, and I got the previous exhibit
9 in, I believe.

10 THE COURT: Yes, it is. I'm sorry.

11 (DFT. EXH. 105 was received in
12 evidence.)

13 BY MR. BUNDY:

14 Q. All right, sir. I hand you what's been
15 marked 105 for identification and ask you if you
16 can identify that document?

17 A. It's a memo from Buck Lindsay to David
18 Simonton dated 12/18/18.

19 Q. And are you copied?

20 A. I am.

21 Q. Do you remember this document?

22 A. I do.

23 Q. All right. Would you read it in before
24 I move to introduce it into evidence.

25 A. Visited the ref hotel on 12/18/18. The

1 subject header is referenced Bennett Hotel,
2 Charleston, South Carolina. So visited the ref
3 hotel on 12/18/18 to verify the status of the
4 contractor's approach towards substantial
5 completion.

6 See general conditions paragraph 9.8 and
7 supplementary condition paragraph 1T for a
8 complete definition of substantial completion.

9 Prior to the visit, review the following
10 listed previously punched published punch list.
11 Walk the building from top to bottom, viewing all
12 public and back of house areas and random viewing
13 of guest rooms on each floor. The project is
14 approaching substantial completion, but it is not
15 there as of this date.

16 Then he lists these items. Guest rooms
17 punch list, first round DeMatteo team, guest room
18 punch list. Second round, DeMatteo team,
19 11/20/18. Guest room punch list, Salamander.
20 First/second floor punch list, WLA 11/01/18,
21 12/06/18.

22 Ninth floor punch list, WLA 11/26/18.
23 Stairwells, WLA 11/26/18. BOH, meaning back of
24 house, WLA 8/24/18. Basement, WLA. Lighting,
25 LEB, 11/09/18. Electrical, WLA 9/08/18.

1 Mechanical, WLA 11/08/18. Tab (inaudible)
2 1/13/18.

3 Note that the preparation of punch list
4 is a duty of the contractor, GC paragraph 9.8.2,
5 which to our knowledge, they have not provided.
6 To date, the contractor has not responded as to
7 the status of any of the above reports.

8 Today, Tim Spano handed Lindsay a copy
9 of the first and second floor punch mentioned
10 above stating that, in the last few days, he had
11 personally verified completion of (most of those
12 items).

13 It has also been reported in the last
14 few days that the fire marshal provided a list of
15 13 items that had to be addressed before he would
16 return for another review. The owner and the
17 architect have requested a copy of this list from
18 the contractor, however, it has not been
19 provided.

20 The contractor verbally mentioned one
21 item on the list. The fire extinguisher cabinet
22 on the southeast corner on the first floor dining
23 cannot be blocked by the main cabinet. NFPA 10
24 required that FEs, being fire extinguishers, be
25 provided for each floor, 7,000 square feet of

1 floor area, and within 75 feet travel distance
2 from anywhere on the floor.

3 Because of the number of FE cabinets on
4 this floor (10 each, see notes N1 on A101) and
5 their distribution, the FE in question is not
6 required. The FE, the FM may -- FM meaning fire
7 marshal may allow it to stay (as it is not
8 required) or required to be abandoned.

9 The contractor has claimed being done
10 with guest room punch lists and stated repeatedly
11 that they should not be exposed to continuing new
12 punch lists. Architect replied that the
13 contractor has a continuing duty to deliver
14 contract compliant work which succeeds any
15 sequence of punch list.

16 Owner reported that given the
17 contractor's refusal to address guest room punch
18 work and owner first consultant was presently
19 assisting in guest room punch list deficiency
20 correction. Blue tape tags have been placed
21 around many rooms indicating finish flaws in the
22 work that require further attention.

23 Owner is mobilizing forces himself to
24 utilize these conditions, which may in some or
25 most cases, require complete re-prepping and

1 re-painting of rooms. In walk-through, Lindsay
2 took many notes and photos of incomplete work and
3 unacceptable finishes.

4 Findings are not enumerated here since
5 most are self-apparent (missing electrical cover
6 plates, et cetera) or have been listed on the
7 above-mentioned plus punch list. End of report.

8 Q. Now, there was a discussion in your
9 cross-examination about the flashlight 5 foot
10 rule. Okay? Applying the 5 foot no flashlight
11 rule, were these rooms acceptable under that
12 rule?

13 MR. HILDEBRAND: Object to the
14 leading question, Your Honor. He needs to ask
15 him what --

16 BY MR. BUNDY:

17 Q. Okay. How, if at all, were those rooms
18 acceptable under the 5 foot no flashlight rule?

19 A. You didn't have to be with less than 5
20 feet to see the deficiencies.

21 Q. Okay. And did you see multiple
22 deficiencies --

23 A. Yes.

24 Q. -- outside of 5 feet?

25 A. Yes.