

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 10 OF 51

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

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

*Attorneys for Appellant Balfour Beatty
Construction, LLC*

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

and

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

Attorneys for Library Associates, LLC

INDEX

Page(s)

Section 1 - Orders

Volume - 1

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

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

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

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

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

Volume - 2

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

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

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

Section 3 - Transcripts

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

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

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

Volume - 3

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

September 13, 2021 (Day 1 of Trial)

Start of Trial.....R-1035

Tim Spano

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

September 14, 2021 (Day 2)

Alec Dooley R-1320

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

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

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

September 15, 2021 (Day 3) R-1498

Volume - 4

September 15, 2021 (Day 3)

Tim Spano

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

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

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

Mark Doran

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

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

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

September 16, 2021 (Day 4)

James McAuliffe

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

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

Steven Huyghe

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

Volume - 5

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

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

September 17, 2021 (Day 5)

Nick Starcevic

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

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

September 20, 2021 (Day 6)

Nick Starcevic

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

Volume - 6

September 21, 2021 (Day 7)

Nick Starcevic

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

David Simonton

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

September 22, 2021 (Day 8)

David Simonton
Direct by Hildebrand, Page 1899 R-2933

Volume - 7

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

September 23, 2021 (Day 9)

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

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

Volume - 8

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

September 24, 2021 (Day 10) R-3514

October 25, 2021 (Day 11)

Mark Boe
Direct by Bundy, Page 2599 R-3633

October 26, 2021 (Day 12)

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

Grady Query
Direct by Bundy, Page 2939 R-3973

Volume - 9

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

October 27, 2021 (Day 13)

Grady Query

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

Jim Clements

Direct by Bundy, Page 3116	R-4153

October 28, 2021 (Day 14)

Jim Clements

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

Volume - 10

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

Kim Bennett Brown

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

October 29, 2021 (Day 15)

Kim Bennett Brown

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

November 1, 2021 (Day 16)

Kim Bennett Brown

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

November 2, 2021 (Day 17)

Sam Hadley

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

Volume - 11

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

November 2, 2021 (Day 18)

Sam Hadley

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

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

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

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

Tim Spano

Redirect by Hildebrand, Page 4237 R-5274

Recross by Bundy, Page 4246 R-5283

November 4, 2021 (Day 19)

David Simonton

Redirect by Hildebrand, Page 4276 R-5313

Recross by Bundy, Page 4296 R-5333

Casey Thompson

Redirect by Hildebrand, Page 4326 R-5363

Recross by Bundy, Page 4380 R-5417

November 29, 2021 (Day 20)

Mark Doran

Redirect by Hildebrand, Page 4413 R-5450

Recross by Bundy, Page 4433 R-5470

Volume - 12

November 30, 2021 (Day 21) R-5558

December 2, 2021 (Day 22)

Jim Clements

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

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

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

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

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

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

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

William Brittelli

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

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

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

December 3, 2021 (Day 23)

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

Volume - 13

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

Section 4 - Exhibits

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

Volume - 14

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

Volume - 15

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

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

Volume - 16

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

Volume - 17

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

Volume - 18

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

Volume - 19

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

Volume - 20

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

Volume - 21

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

Volume - 22

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

Volume - 23

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

Volume - 24

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

Volume - 25

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

Volume - 26

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

Volume - 27

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

Volume - 28

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

Volume - 29

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

Volume - 30

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

Volume - 31

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

Volume - 32

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

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

Volume - 33

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

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

Volume - 34

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

Volume - 35

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

Volume - 36

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

Volume - 37

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

Volume - 38

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

Volume - 39

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

Volume - 40

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

Volume - 41

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

Volume - 42

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

Volume - 43

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

Volume - 44

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

Volume - 45

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

Volume - 46

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

Volume - 47

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

Volume - 48

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

Section 5 - Other Documents

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

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

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

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

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

Volume - 49

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

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

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

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

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

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

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

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

Volume - 50

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

Volume - 51

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

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

1 Q. And did you need a flashlight?

2 A. No.

3 Q. Okay. Now, let's talk a minute about
4 these -- let's talk a minute about eggshell paint
5 versus flat paint, right?

6 A. Yes, sir.

7 Q. Did the contractor know -- or was the
8 original specification on this job for eggshell
9 paint?

10 A. Let me say that the contractor did not
11 qualify the paint finishes with regard to the
12 guest rooms. So what was in the specs was always
13 in the specs. It was never changed.

14 Q. Okay. But by qualify, you mean ask any
15 questions or --

16 A. Yes.

17 Q. -- eggshell had always been in there?

18 A. Yes, sir.

19 Q. Is it known in the industry, what you
20 testified to earlier, that eggshell paint has to
21 be corrected from corner to corner?

22 A. Yes, sir.

23 Q. Okay. So Balfour Beatty went into this
24 job with their eyes open and knew that they were
25 going to have to use eggshell paint, and that, if

1 there was a flaw, it would have be repainted from
2 corner to corner, or they should have known?

3 MR. HILDEBRAND: Your Honor,
4 objection. This is direct. It's not cross.

5 THE COURT: That's sustained.
6 That's sustained.

7 BY MR. BUNDY:

8 Q. Now, flat paint was used to repair the
9 work, right?

10 A. Yes, sir.

11 Q. Okay. What is the relative cost of flat
12 versus eggshell paint? Do you know?

13 A. The flat is less expensive, particularly
14 due to labor because of the touchup project.

15 Q. So you were the program manager --

16 A. Yes, sir.

17 Q. -- during the preconstruction period,
18 correct?

19 A. Yes, sir.

20 Q. If you had been -- if it had been
21 brought to your attention they wanted to use flat
22 and eggshell, what would you, Jim Clements, have
23 recommended to the owner?

24 A. Flat.

25 Q. Okay. And it wouldn't have cost the

1 contractor any more money. In fact, it would
2 have cost them less money and saved the owner
3 money?

4 A. In my opinion, yes.

5 Q. Okay. Thank you. Now, let's look at
6 Exhibit 100. I think you should have it in front
7 of you somewhere. Are you with me, Mr. Clements?

8 A. Yes, sir, I am.

9 Q. All right. This document is in evidence
10 as Defendant's Exhibit 100. What is the
11 architect of record -- what is the architect of
12 record's decision here on the level 6 structural
13 delay claim dated 9/26/16?

14 A. Okay. Do you want me to read it?

15 Q. No. I mean, if you could just go to the
16 bottom of it. You don't need to read the whole
17 thing. Just go to the bottom of it and tell me
18 what his conclusion was on the second page.

19 A. On the second page?

20 Q. Yeah. I believe it's the bottom of
21 second page.

22 A. Given the complexity of these factors
23 and the intermingled responsibilities
24 contributing to the claim delay, we can only
25 render a subjective determination as to

1 responsibility to pay for the related costs. We
2 approved 50 percent of the costs for a change to
3 the contract amount of \$72,454 and then changed
4 the contract time of 20 days.

5 Q. Did the contractor ever submit a change
6 order for \$72,454 in a 20 day time extension?

7 A. No.

8 Q. Okay. In fact, they disputed this
9 decision, correct?

10 A. Yes.

11 Q. Okay. So then it goes to the next
12 level?

13 A. Yes.

14 Q. Under dispute resolution process?

15 A. Yes.

16 Q. Okay. Now, let's turn to Exhibit 103,
17 the same book. Do you see that?

18 A. Yes, sir.

19 Q. And would you read that into the record,
20 please?

21 A. It's a letter dated December 28th, 2016,
22 from Tim Spano to Kim Brown.

23 Ms. Brown, based on the architect's
24 decision letter received from WLA on December 21,
25 2016, to the Lithko backup requested for the

1 sixth floor delay, 07 for article 15.2.6.1 of the
2 prime contract, Balfour Beatty Construction
3 demands mediation in this matter, and we disagree
4 with the architect's decision and retain all
5 rights to the full claim.

6 Q. All right. So that's the next step in
7 the process?

8 A. Yes, sir.

9 Q. Okay. Now, let's go to -- and that
10 relates just to the sixth floor?

11 A. That's correct.

12 Q. Okay. And now, let's go to Exhibit 120
13 in that same book. All right. This is in
14 evidence. This is Plaintiff's Exhibit 120. This
15 is a decision from WLA. It would probably be
16 better to read this -- let me ask you this. Does
17 this decision relate to L6, which is what we
18 previously looked at, right?

19 A. L6, yes.

20 Q. It relates to L6, L8 and L9?

21 A. Sorry, I see it now. Yes.

22 Q. Okay. So L6 has now been rolled into
23 this decision again?

24 A. Yes, sir.

25 Q. And there's a claim for L8?

1 A. No, 6, 7, and 9.

2 Q. This says 6 -- mine says it is 8.

3 A. There was never a claim made on 8.

4 Q. Okay. So this is a misprint? It's 7?

5 A. I'm only -- I know no claim was made on
6 8, and this is for 6, 7, and 9 is what I see.

7 Oh, I see down at the bottom, to date for L7, 8,
8 and 9 delay. I think it's a typo, to be honest.

9 Q. Okay. So up at the top, he says,
10 addressing L6, 8 and 9, but to date, he says L7,
11 8, and 9?

12 A. Yes.

13 Q. Okay. So what was the architect's
14 decision on these claims?

15 A. Shall I read them?

16 Q. Let's just read the --

17 A. The bullet points?

18 Q. Yeah. Why don't you read the second
19 page because this -- I think the -- why don't you
20 just read the whole thing. I think it makes more
21 sense just to read the whole thing.

22 A. Date, December 4th, 2017. It's a letter
23 from Buck Lindsay to David Simonton copied to
24 myself, Kim Brown, and Jennifer Faulkinberry with
25 WLA.

1 Q. And it relates to RCO 122R, which stands
2 for revised, correct?

3 A. Yes, sir.

4 Q. Okay. Would you read us that?

5 A. We're in receipt of your November 27,
6 2017, e-mail containing RCO number 122R
7 addressing L6, L8, and L9 structural delays with
8 a total value of \$1,012,042, along with related
9 backup material.

10 This RCO is a revisit of your earlier
11 letters of delay and notice as follows: One,
12 level 6 structural delay claim of 27 days and
13 \$260,135.07 in cost, to which we replied on
14 October 14th, 2016, that we approved 20 days, and
15 that sufficient backup was not presented to
16 evaluate the dollar claim. BBC did not reply to
17 the architect's final decision.

18 Q. Initial decision?

19 A. Initial decision. Thank you. Level 6,
20 structural delay claim revised of 22 days and
21 \$221,945 in costs, to which we repeated on
22 December 21, 2016, that we approved 20 days, and
23 that we approved \$72,454 in related costs for
24 reasons given.

25 BBC did not reply to the architect's

1 initial decision. Level 7, structural delay
2 claim, dated 1/16/17 for nine days and \$95,815.68
3 in related costs, which we rejected with
4 explanation in our February 8, 2017, letter. BBC
5 did not reply to the architect's initial
6 decision.

7 Level 9, structural delay claim dated
8 April 10, 2017, for 21 days and \$131,640.60. WLA
9 did not reply to this claim since BBC issued
10 notice that they received mediation to resolve
11 levels 6, 7, and 9 combined.

12 Q. Okay. Let me stop you here. Does this
13 sort of confirm your recollection that there was
14 never a claim for level 8?

15 A. No, that is true.

16 Q. Okay. Because he doesn't refer to level
17 8?

18 A. No.

19 Q. Okay. All right. So let's keep going.

20 A. Without giving a reply to the
21 architect's initial decision on these matters,
22 BBC requested mediation to resolve them, which
23 was conducted on May 30, 2017. The parties were
24 unsuccessful in resolving their disputes.

25 To date, for L7, 8, and 9, structural

1 delay claims, the architect has published an
2 initial decision recommending award of 20 days
3 and \$72,454 in related costs. The additional
4 information in RCO 122R does not provide any new
5 information to substantiate any change to that
6 recommendation.

7 Underlying reasons for the original
8 initial decisions and the affirmation of those
9 decisions herein are as follows: A, the cause of
10 delays was the inability of the BIM system
11 coordination work to keep ahead of the actual L6
12 through L9 structural work, thereby delaying the
13 construction work.

14 BBC then president, Michael Baumbach, as
15 an element of their selection for the project,
16 offered to provide BIM services. There was a
17 benefit to BBC and their team of subcontractors
18 to provide BIM services on their project. And
19 they were able to modify systems organizations to
20 better suit their processes (prefabrication of
21 the elements) and to reduce their own costs.

22 Through the periods of the project in
23 question, it was apparent that BBC BIM capacity
24 was overloaded, not adequately manned for the
25 work, and was not able to keep up with their own

1 field work. At one point in the BIM process, the
2 BCC BIM manager for the project left BBC's
3 employ, and there was no BBC BIM support.

4 In the latter stages of the delay
5 questions, the owner asked the architect to
6 combine and engage additional BIM support
7 services to supplement BBC's effort, which was
8 done. BBC was engaged and paid for
9 preconstruction services during the course of the
10 construction documentation preparation.

11 They were involved in the early pricing
12 work as the plans were being developed and were
13 expected to provide input on construction logic
14 and set up. They had adequate opportunity during
15 this period to identify systems, conflicts, and
16 to suggest alternative system organization
17 methods. They did not offer any input in this
18 regard.

19 C, the owner reserves the right to
20 invoke construction contract provision A201 and
21 A834, wherein claims for delays. They're not
22 submitted to the architect within 20 days of the
23 event, giving rise to delay, shall not be
24 recognized.

25 Q. Okay. Thank you. Now, let's look at

1 exhibits --

2 MR. BUNDY: Have I put 104 in,
3 Judge?

4 THE COURT: I believe so.

5 MR. BUNDY: Okay. Thank you.

6 BY MR. BUNDY:

7 Q. All right. Let's look at some exhibits
8 that you went over in your cross-examination.
9 Let's look at 273. That's a different book.

10 A. Okay.

11 Q. All right. You've got 273. Let's look
12 at 273, and it says, based upon orders reviewed
13 (inaudible) change order request RCO 139, right?

14 A. Yes, sir.

15 Q. And it says -- was that paid? Has that
16 RCO been paid?

17 A. Actually, in this particular case, it
18 turned out to be the contractor's --
19 misinterpretation of the contract documents.

20 Q. Okay.

21 A. And they repaired it at no cost to the
22 owner.

23 Q. Okay. They didn't -- okay. But let's
24 also go and compare 273 to 276. Turn to 276.
25 All right. Now, it relates to RCO 139 and RFI

1 0991 as well, right?

2 A. Yes, sir.

3 Q. This is just simply another copy of the
4 same document, isn't it?

5 A. It appears to be.

6 MR. BUNDY: Your Honor, at this
7 point, I would object to the introduction of
8 duplicate exhibits. I was unaware at the time,
9 and couldn't keep up, but I would have objected
10 at that time if I had known.

11 THE COURT: All right.

12 MR. BUNDY: I would ask that
13 document be removed from evidence.

14 THE COURT: So Plaintiff's 273 and
15 276 appear to be the same.

16 MR. BUNDY: Yes. I would like to
17 get one of them out of here.

18 THE COURT: Okay. All right. Let
19 me make sure he sees the same.

20 MR. HILDEBRAND: No problem, Your
21 Honor.

22 MR. BUNDY: Which one are we going
23 to get ride of?

24 THE COURT: Let's get rid of 276.
25 Let's just take the first one. I forget which

1 one we were in, but we were moving quickly then.

2 MR. HILDEBRAND: Yeah. I'm sorry.

3 So we will take out 276?

4 THE COURT: Let just remove 276.

5 (PLF. EXH. 276 was removed from
6 evidence.)

7 BY MR. BUNDY:

8 Q. Okay. All right. So let me understand
9 something. This RCO was not paid or wasn't -- it
10 ended up -- didn't have a cost to it?

11 A. I guess you could say it was rejected
12 because it was incorrect. The contractor
13 position was incorrect. I remember specifically
14 of Jennifer Faulkinberry and I going to an AGA
15 bathroom and discussing the location of the AGA
16 valves.

17 But the code requires them to be located
18 in such a manner, and there was, as I recall,
19 misinterpretation by the contractor and it did
20 not result in an owner change.

21 Q. Okay. So all you're doing here is
22 providing the architect the required contractual
23 notice that he's entitled to when a contractor
24 writes you and says, the architect has made a
25 mistake, right?

1 MR. HILDEBRAND: Objection, Your
2 Honor. Again, it is blatantly leading. Just ask
3 him -- he just needs to ask him --

4 BY MR. BUNDY:

5 Q. All right. What are the contract
6 requirements, if any, that the owner has when the
7 contractor writes the owner and says, the
8 architect has committed an error?

9 A. He's reserving his rights.

10 Q. All right. But is the owner required to
11 put the -- let the architect --

12 A. Yes, absolutely, per the agreement.

13 Q. Okay. So is the sending of notice to
14 the architect, that the contractor thinks the
15 architect made a mistake, an admission by the
16 owner that the architect did make a mistake?

17 A. No.

18 Q. Okay. And in fact, he didn't in this
19 instance?

20 A. In this instance, he didn't.

21 MR. HILDEBRAND: Objection.

22 Q. Okay. Now, let's look at 281. Are you
23 with me?

24 A. Yes, sir.

25 Q. Now, what is this about? This one says,

1 further to the notice SI 38 and 39 based upon
2 owner review service written notice. This is
3 consequent -- strike that all of that.

4 The last line in the first paragraph
5 says, consequently, CCD 25 has been issued to the
6 contractor to pipe and relocate FCU6. Was the
7 contractor paid for this?

8 A. Yes.

9 Q. All right. So let me see if I get it
10 straight. The architect made a mistake, and the
11 owner is paying for it, right?

12 A. Yes, sir.

13 Q. What harm has there been to the
14 contractor?

15 A. None.

16 Q. Okay. And then it's the contract --
17 owner's decision if he wants to go after the
18 architect or not, right?

19 A. Yes.

20 MR. BUNDY: Okay. That's all I
21 have, Your Honor. Thank you.

22 THE COURT: Okay.

23 MR. HILDEBRAND: I have some
24 follow-ups.

25 THE COURT: All right.

1 MR. BUNDY: Hold on. I'm getting a
2 note here. I'm told to put in 167.

3 THE COURT: 167?

4 MR. BUNDY: Yes. Sorry, Judge, I
5 misplaced the book.

6 BY MR. BUNDY:

7 Q. All right. Mr. Clements, tab 167, do
8 you have that in front of you? This is a
9 Plaintiff's Exhibit, I believe.

10 A. 167?

11 Q. Yeah, 167.

12 MR. BUNDY: Judge, are you with me?

13 THE COURT: Yes, sir.

14 MR. BUNDY: Thank you.

15 BY MR. BUNDY:

16 Q. All right. 167 is -- can you identify
17 it, please?

18 A. This is Buck Lindsay's e-mail, 11 of
19 February 2019, regarding a contract closeout
20 status.

21 MR. BUNDY: All right. Your Honor,
22 I move to put this into evidence.

23 THE COURT: Mr. Clements was copied
24 on it?

25 THE WITNESS: Sir?

1 THE COURT: If you can identify it?

2 THE WITNESS: Oh, sorry. I thought
3 I already did. An e-mail from Buck Lindsay to
4 David Simonton dated February 11, 2019, subject,
5 Bennett Hotel contract closeout.

6 THE COURT: All right. Very good.

7 MR. HILDEBRAND: I think it's
8 already in evidence.

9 THE COURT: That one is in?

10 MR. BUNDY: It's already in?

11 THE WITNESS: Yeah.

12 MR. BUNDY: Okay. All right.
13 We're good. That's all I have. Thank you.

14 RECROSS-EXAMINATION

15 BY MR. HILDEBRAND:

16 Q. All right, sir. In Exhibit 120, there
17 was a lot of discussion about the architect's
18 decision that Balfour, based on the claims
19 related to the sixth floor, was entitled to -- he
20 found that the damages were \$144,000 and that
21 Balfour was entitled to \$72,000 of that, correct?

22 A. Yes, sir.

23 Q. Do you remember that?

24 A. Yes, sir.

25 Q. All right. And you were the

1 representative of the owner on this project,
2 correct?

3 A. Yes, sir.

4 Q. Did you dispute that amount on the --

5 A. No, sir.

6 Q. Okay. So all things being equal, that
7 was an undisputed amount and should be paid?

8 MR. BUNDY: Objection.

9 A. No, that was just my thought.

10 Q. Well, did the owner dispute that, to
11 your knowledge?

12 MR. BUNDY: Objection.

13 A. I honestly don't recall. I don't think
14 the whole idea was that we were going to try and
15 sell it at mediation.

16 Q. Okay. Well, yeah, and I understand
17 that, that the architect said, okay, you've got a
18 claim for however much it was, \$800,000 or a
19 million dollars. We only find that \$144,000 of
20 the claim is valid, and we are only going to
21 award \$72,000?

22 A. That's what it says.

23 Q. Right. And then we looked at the e-mail
24 from David Simonton where he said, we're not
25 going to accept it. We do not accept that

1 decision, and we're going to mediation because we
2 want the whole claim, correct?

3 A. Yes, sir.

4 Q. Right. So, to your knowledge, the 72
5 was undisputed. The part that was in dispute
6 that was going to be going to the mediation was
7 the remainder?

8 MR. BUNDY: Objection.

9 A. No, that's not the case.

10 MR. BUNDY: Objection.

11 THE COURT: Just one second. What
12 is the objection?

13 MR. BUNDY: The objection is it's
14 irrelevant. There was an award or a decision
15 from the architect, and the contractor rejected
16 it. It's not undisputed. It's now -- that's as
17 if you had a settlement, a negotiation. You have
18 a trial and somebody appealed. You don't know
19 what's going happen up the road.

20 They refused to accept the architect's
21 decision, and it goes to the next process. And
22 ultimately, it's going to get to you. You could
23 find, when it gets to you, they're only entitled
24 to 10 days. I don't know what's going to happen,
25 right? We're not bound by the architect's

1 decision. If they don't accept it, we're not
2 bound by anything.

3 THE COURT: All right. Go ahead.
4 I understand your argument. Go ahead.
5 Overruled. You can ask him.

6 MR. HILDEBRAND: And my response to
7 it, Your Honor, would be, if there's a pay
8 application, and it's a million dollar pay
9 application and the owner agrees to pay \$990,000
10 and they only dispute \$10,000, that they can't
11 refuse to pay the remainder of it.

12 They can only pay the disputed amount.
13 You still have an obligation to pay the
14 undisputed amount. And that's what I'm trying to
15 get to here. So undisputed was \$72,000.

16 BY MR. HILDEBRAND:

17 Q. Balfour was saying, we dispute the rest
18 of it, we want our full amount of our claim,
19 correct?

20 A. No. First, that's the architect's
21 initial decision. The owner is not even bound by
22 the architect's decision.

23 It is not -- with regard to the
24 settlement of the claim. That's -- he the
25 additional decision maker. That's all he is.

1 The owner has the right to dispute the architect,
2 just like the contractor has the right to dispute
3 the architect.

4 Q. Well, this is a big deal and went to
5 mediation, didn't it?

6 A. It did, but there is no acknowledgement
7 that the owner agrees with this, and the balance
8 is in dispute. I mean, you don't know -- there
9 was no correspondence other than that from
10 Balfour Beatty saying that they weren't going to
11 accept any of it.

12 Q. Well, do you have any recollection of --
13 so you have no recollection of whether your
14 client disputed the \$72,000?

15 A. No, sir, I do not.

16 Q. So you didn't know?

17 A. No. Mike Bennett never came to me and
18 said, that's too much, or that's too little. We
19 just do what is on the table. You have to
20 remember, at the same time -- or very closely
21 behind it, 7 and 9 popped up. It kind of moved
22 the goal post.

23 Q. I understand.

24 A. So the consensus, as I recall was, we're
25 going to go to mediation and try and settle it.

1 Q. Okay. Do you know of any basis -- so
2 you don't recall whether the owner disputed
3 \$72,000, and therefore, you have no recollection
4 of -- or any -- you don't know any basis that
5 they would dispute it?

6 A. Honestly, I do not.

7 Q. Okay. Let's turn to Exhibit 120. I'm
8 sorry, 122.

9 A. I have a 120, a 123.

10 Q. I'm sorry, it's 120.

11 A. 120. Okay, sorry. It's what we were
12 talking about?

13 Q. Yeah.

14 A. Okay. I'm with you.

15 Q. On the second page, top, this is Buck
16 Lindsay. Are you with me?

17 A. Yes, sir.

18 Q. Okay. The cause of delays was the
19 inability of the BIM systems coordination work to
20 keep ahead of the actual L6, L9 structure work,
21 thereby delaying that construction report.

22 So in other words, what was happening
23 was that there were so many problems with the
24 design documents that Balfour was identifying
25 problems through the BIM process, and then under

1 the contract, its obligation is to send them back
2 to the architect, correct?

3 MR. BUNDY: Objection.

4 THE COURT: All right. Basis?

5 Mr. Bennett, the basis for the objection is?

6 MR. BUNDY: Oh, I'm sorry. The
7 basis is he's mischaracterizing the letter. I
8 mean, he can -- that's not what the letter says.
9 I mean, he's interpreting a letter from a party
10 of a person that's not here, is not a party, and
11 the person said what they said. But he -- I
12 don't think he can re-characterize it, narrate
13 it, write a novel about it or any of it.

14 MR. HILDEBRAND: Well, he's asked
15 him questions about it.

16 THE COURT: All right. I'm going
17 to overrule that. Go ahead. You can ask him the
18 question. I think I know where this is going.
19 Go ahead.

20 THE WITNESS: Can you restate it
21 please?

22 BY MR. HILDEBRAND:

23 Q. Right. The architect is saying -- well,
24 let's back up just a little bit. The BIM that
25 Balfour was doing, was done to identify clashes

1 with the documents?

2 A. Yes, sir.

3 Q. Do you agree?

4 A. Yes, sir.

5 Q. Right. So what Balfour was doing was
6 looking at the architect's design, employing BIM,
7 and when there were problems with the design, it
8 would raise his hand and say -- do an RFI and
9 say, we've got a problem with the drawings.
10 Architect, you need to fix them, right?

11 A. Not necessarily through an RFI, but it
12 was through conference calls.

13 Q. Conference calls or whatever --

14 A. Yes, right.

15 Q. -- means?

16 A. Right. There was --

17 Q. I'm sorry. And in fact, that's what is
18 appropriate and required, not only by the
19 contract, but by just good common sense that, if
20 the contractor finds a design bust, they need to
21 tell the designer, look, we've got a problem with
22 your drawings. You need to fix them, right?

23 A. Yes, sir.

24 Q. Right. Because contractor, under law,
25 under South Carolina law and under our statutes

1 and under the contract, does not have the ability
2 or the prerogative to make design changes itself.
3 That's something that needs to go back to the
4 architect, correct?

5 MR. BUNDY: Objection. This is the
6 exact same question he asked him the first time
7 he cross-examined him. We're now rephrasing that
8 same theme.

9 THE COURT: All right. I'm not
10 sure if we went back into this document. But if
11 I read the whole thing, he basically takes away
12 what he says in the first sentence. He says, the
13 BIM was the responsibility of Balfour Beatty is
14 what he says if you read the whole paragraph.

15 MR. HILDEBRAND: Right. That's
16 what I'm getting at.

17 THE COURT: Well, go right to it.
18 Ask him. All right.

19 MR. HILDEBRAND: Right. That's
20 what I'm getting at.

21 BY MR. HILDEBRAND:

22 Q. The BIM that Balfour did -- and I think
23 we need to clarify this probably for Your
24 Honor --

25 THE COURT: All right.

1 Q. -- to make sure that we're on the page.

2 But the BIM that Balfour did was to identify
3 design clashes?

4 A. Yes.

5 Q. Right. Then it goes back to the
6 architect to fix those clashes, correct?

7 A. In coordination with the subcontractors,
8 yes. They were (inaudible). But ultimately, the
9 architect of record has to change the drawings.

10 Q. Well, right. The architect is the only
11 one --

12 A. Yes, I agree.

13 Q. -- responsible for, and any design
14 deficiencies or defects incurred on, may have to
15 fix it, correct?

16 A. Yes.

17 Q. Right. The reason -- one of the
18 reasons, as identified by the documents that have
19 been introduced into evidence, that the design
20 documents were bad that went to Balfour was
21 because the architect did not BIM them from his
22 side to start with? Agreed?

23 MR. BUNDY: Objection.

24 THE COURT: Overruled. Go ahead.

25 If you can answer it, answer it.

1 THE WITNESS: So you're asking me,
2 is the architect at fault for not doing BIM prior
3 to the issuance of the drawings?

4 BY MR. HILDEBRAND:

5 Q. Right. That's what we -- that was the
6 e-mail that we read earlier from Buck Lindsay and
7 what his response was.

8 MR. BUNDY: That didn't go into
9 evidence. That document is not in evidence, and
10 Your Honor did not let it into evidence. I don't
11 know how he's cross-examining somebody when it's
12 not in evidence.

13 THE COURT: Okay. I'm going to
14 give him some latitude on the cross.

15 THE WITNESS: I think based on the
16 correspondence that we have read today, Buck
17 confirmed that Mike Baumbach was going to provide
18 BIM to the project.

19 And this first sentence says -- it says,
20 the inability of the BIM system coordination to
21 keep ahead of the work, and that supports my
22 position on the untimeliness of the start of the
23 BIM process, or whether it should have been BIM
24 floor by floor or in, you know, (inaudible) of
25 the building.

1 As I testified in my -- when you
2 subpoenaed me before, when I did the cancer
3 center, 50,000 square feet, they dropped the
4 whole thing into a Revit model and BIM'd the
5 whole thing at one so.

6 BY MR. HILDEBRAND:

7 Q. The architect did?

8 A. No. The contractor did, Roger's
9 Builders. We discussed this.

10 Q. The architect had the ability -- they
11 had a Revit, though.

12 A. They designed the Revit, but the BIM
13 process is separate from Revit, right? And so,
14 in this case, it would be easier if Buck designed
15 the Revit. He did not. He designed in AutoCAD.
16 But you still -- and so Balfour had to take the
17 AutoCAD. There was like a transcription software
18 that allowed it to be put into BIM.

19 So what Buck is saying here, as I
20 interpret it, is, Balfour's BIM process did not
21 keep the pace with the project. Now, I mean,
22 that's what Buck is saying. I mean, I can read
23 it again to you.

24 Q. Well, right. But we've agreed that all
25 the BIM did was identified for the architect, his

1 defects?

2 A. Yes, it did.

3 Q. Right.

4 A. It did.

5 Q. Where in the contract does it require
6 that Balfour give it a time period to say that
7 you have to identify busts in the design
8 documents at some certain point before you start
9 working?

10 A. It doesn't limit the contractor at any
11 time. There is no limitation, so it's unlimited.

12 Q. Right, right. And in fact, the contract
13 requirements are simply that, when or if the
14 contractor finds a problem with the design, then
15 it has to raise its hand and tell the architect,
16 look, there's a problem with your design, right?

17 A. Yes.

18 Q. It's not obligated to find design
19 defects. It's simply, if it finds them, to
20 notify the architect? Agreed?

21 A. That's what it says. As I recall, yes.

22 MR. HILDEBRAND: All right. That's
23 all I have. Thank you.

24 REDIRECT EXAMINATION

25 BY MR. BUNDY:

1 Q. One question. The later the contractor
2 decides to BIM the project, the harder it's going
3 to be to get it done, right?

4 A. The more chance of the process catching
5 up with the work in place.

6 Q. That's exactly what Buck said?

7 A. That's what he said.

8 MR. BUNDY: Thank you, sir.

9 RE CROSS-EXAMINATION

10 BY MR. HILDEBRAND:

11 Q. So if we had caught -- so in other
12 words, if we'd have caught -- if Balfour had
13 caught the design busts earlier, then the
14 architect could have responded to them earlier?

15 A. Well, and that's what happened
16 throughout the course of the project until we got
17 to level 6.

18 Q. Right. There were so many errors -- in
19 fact, what happened, there were so many errors in
20 the design, that Balfour couldn't keep up with
21 identifying them and getting them back to the
22 architect, correct?

23 A. Well, Buck's position, that we've read
24 earlier, was that Balfour was unable to keep up
25 with the process and had the BIM manager leave.

1 And for a time, there was no person in charge of
2 them.

3 So to say that it was solely as a result
4 of the clashes -- which there were many of,
5 there's no question about that. I think it's
6 unfair to say that Balfour Beatty does not have
7 some culpability in it coming to a head on level
8 6. I think that's just fair.

9 Q. Well, let's look at the contract. We
10 agreed that the contract does not require them.
11 There's no time period that they have to identify
12 them?

13 A. The subcontractor agreements require the
14 subs to BIM the project.

15 Q. Okay.

16 A. That's in the subcontractor agreements.

17 Q. In some of them. What subcontractors?

18 A. Watson, Balfour Beatty, Pasco, and MCC.

19 Q. How do you know that?

20 A. Because I've got copies.

21 Q. Okay.

22 A. I sent a copy to Buck.

23 Q. Okay.

24 A. I mean, long ago, I did.

25 Q. Right. There's no question here, but

1 that Balfour did provide BIM?

2 A. Yes, sir.

3 Q. Some BIM to identify the punch list?

4 A. Yes, sir, absolutely.

5 Q. And it said, subcontractors, y'all need
6 to help us. Help us, tell the owner -- tell the
7 architect, what are your design busts? There was
8 no dispute there, correct?

9 A. No.

10 Q. Right. But that doesn't -- again,
11 there's nothing in the contract, though, that
12 obligates Balfour to review the contract
13 documents to find any design busts, is there?

14 A. No, there is not.

15 Q. And there's nothing in the contract that
16 requires Balfour to do -- identify for the
17 architect, that, look, your documents are bad,
18 and we can't built them until they discover them,
19 correct?

20 A. There is no requirement in the contract
21 for Balfour. In the written word of the
22 contract, there was no reference to requirement
23 that Balfour Beatty provide BIM.

24 Q. Right. Nor to identify --

25 MR. BUNDY: Your Honor, are we

1 about through with this cross-examination? I
2 mean, we've been --

3 THE COURT: Yeah. I've pretty much
4 got this one figured out.

5 MR. BUNDY: Thank you.

6 THE COURT: I got it. I'm with
7 you.

8 MR. HILDEBRAND: All right. Thank
9 you.

10 THE WITNESS: Mr. Terry want
11 another shot?

12 MR. TERRY: No.

13 THE COURT: All right. Are you
14 through, Mr. Hildebrand?

15 MR. HILDEBRAND: Yes, sir.

16 THE COURT: All right. Thank you.
17 Mr. Terry or Mr. Windle?

18 MR. TERRY: None for me, Your
19 Honor.

20 THE COURT: All right.
21 Mr. Clements, it looks like you've come to the
22 end of your journey.

23 THE WITNESS: Thank you, Your
24 Honor. It's been a pleasure.

25 THE COURT: All right. I

1 appreciate that.

2 (A recess transpired.)

3 THE COURT: All right. So y'all
4 reviewed these. There were deposition
5 transcripts, which were provided on USB with a
6 number of exhibits. I don't remember the
7 specific numbers. They had asked that y'all look
8 into them and see whether we can come to
9 agreement on them or not.

10 MR. BYRD: And we did, Your Honor.

11 THE COURT: Okay.

12 MR. BYRD: A number of the -- the
13 issue for the Court was whether or not the
14 designation of certain lines of the deposition
15 transcript would mean that the so-called exhibits
16 that were attached to the deposition would, by
17 themselves, being admissible as well without any
18 further foundation, right?

19 THE COURT: Okay. All right.

20 MR. BYRD: And I refer to the
21 document as so-called exhibits because it's
22 really hard in many instances to even refer to
23 them as exhibits. So I think I need to back up
24 and explain how these depositions worked. Most
25 of them that I attended, Mr. McDonald --

1 THE COURT: Well, wait a minute.

2 You're going to tell me how depositions work?

3 MR. BYRD: Well, just not -- how
4 these depositions worked.

5 THE COURT: How different were
6 these depositions, I guess, would be the better
7 question?

8 MR. BYRD: Well, just no -- and
9 they ran very smoothly, and what happened is that
10 Mr. McDonald would bring, for the witness, a
11 notebook.

12 THE COURT: Okay.

13 MR. BYRD: A tabbed notebook of
14 documents. Some contracts, some e-mails, some
15 letters. Just documents that he intended to ask
16 questions about of the deponent during the
17 deposition.

18 THE COURT: Okay.

19 MR. BYRD: The witness would get a
20 copy of the notebook at the deposition.

21 THE COURT: Okay.

22 MR. MCDONALD: Before the
23 deposition.

24 MR. BYRD: Well, I didn't get a --
25 before the deposition, I did not get an actual

1 notebook at the deposition. It's fine. We
2 printed our own --

3 THE COURT: Okay.

4 MR. BYRD: -- and brought it with
5 us. And so it was, by in large, the exact same
6 thing.

7 THE COURT: Okay.

8 MR. BYRD: So although there was
9 one -- I think at least one deposition towards
10 the end that we did not get copies during the
11 deposition.

12 THE COURT: All right.

13 MR. BYRD: But that's not at
14 dispute here.

15 THE COURT: Okay.

16 MR. BYRD: So in some instances,
17 you know, the deponent would be asked about a --
18 questions about a particular document that they
19 had seen before, perhaps they had offered,
20 perhaps they were recipient or copied on the
21 e-mail or whatever.

22 THE COURT: Okay.

23 MR. BYRD: But in some instances,
24 the deponent was asked about documents, letters,
25 e-mails that they had never seen. And of course,

1 the witness, in those situations, would not be
2 the sender or the receiver of the particular
3 e-mail.

4 THE COURT: Okay.

5 MR. BYRD: And in other instances,
6 he would ask the deponent if they had ever seen
7 the document before, and they would say, no, I
8 haven't seen that before.

9 THE COURT: Okay.

10 MR. BYRD: And what I can tell the
11 Court is -- and the Court would be happy to know
12 that we've narrowed it down to, I think, three
13 documents.

14 THE COURT: Well, I appreciate that
15 right off the bat.

16 MR. MCDONALD: And before we go any
17 further, can I just give Your Honor the copies
18 that we've agreed on so this is all -- because
19 they were only arguing over, literally, three
20 exhibits.

21 MR. BYRD: Well --

22 THE COURT: All right. Hold that
23 thought. I'm not opposed to it, but just hold
24 it. So let's get to the three that we've got to
25 get on to. Then you can only make one trip up

1 here.

2 MR. MCDONALD: Fair enough.

3 THE COURT: Unless you just need
4 the exercise.

5 MR. BYRD: And I know that there's
6 been some discussion earlier in this trial about
7 whether objections were made at the deposition,
8 and that kind of thing. You know, these were
9 discovery depositions. This was not a court
10 proceeding.

11 And you can pretty much ask anything, as
12 Your Honor knows, if they're in a discovery
13 deposition. But at least since the year 2000, I
14 have been completely constrained in objecting to
15 much of anything other than to the form of the
16 question.

17 THE COURT: Okay.

18 MR. BYRD: And the rules make it
19 very clear that any objections to, you know,
20 admissibility or any other types of objections
21 are reserved until the time of trial, and here we
22 are.

23 THE COURT: Okay.

24 MR. BYRD: So the three documents,
25 specifically, the first, it comes from the

1 deposition of Mr. Dale Winovich, who was with
2 Watson Electric.

3 And we had specifically objected to what
4 was in the deposition as Exhibit 1 and 22. What
5 these are, are e-mails between Balfour Beatty's
6 in-house counsel and the lawyer for Watson
7 Electric. Mr. Winovich was not copied on the
8 correspondence. It was e-mails between the
9 lawyers.

10 And I would also point out that this
11 was -- this deposition was his individual
12 deposition. I think he had been previously
13 deposed in his past that he was a 30(b)(6)
14 representative. But that -- he was being deposed
15 most recently, in this deposition we're talking
16 about, as an individual.

17 THE COURT: Okay.

18 MR. BYRD: There's no way he could
19 have personal knowledge of these e-mails. He
20 wasn't on the e-mails between his lawyer and the
21 lawyer for Balfour Beatty.

22 THE COURT: All right. Give me
23 some -- just give me some background information,
24 the date and to and from, and subject matter.

25 MR. MCDONALD: I have a copy for

1 Your Honor if you would like to look at it.

2 THE COURT: You want me to look at
3 it?

4 MR. TERRY: I object to you looking
5 at it.

6 MR. BYRD: I don't want you to look
7 at it, Judge.

8 THE COURT: I didn't think so.

9 MR. BYRD: Your Honor, these were a
10 series of e-mails.

11 THE COURT: All right. So back to
12 my question, to -- from whom to whom, date?

13 MR. BYRD: From Mr. Heuer to Steve
14 Smith.

15 THE COURT: Steve Smith, attorney
16 for?

17 MR. BYRD: Attorney for Watson
18 Electric.

19 THE COURT: Watson Electric. And
20 anybody else copied on the e-mail?

21 MR. BYRD: No one else copied on
22 the e-mail. Well, Don Terry was copied on the
23 e-mail.

24 THE COURT: Don Terry, another
25 lawyer.

1 MR. BYRD: Yes, sir.

2 THE COURT: Okay. And the subject
3 matter, was it referencing anything?

4 MR. BYRD: The subject is re:
5 Watson Electrical Construction and Balfour
6 Beatty, Hotel Bennett. And they're talking --
7 there's some discussions regarding the joint
8 defense and tolling agreement. And there are
9 some discussions just regarding the work on the
10 project.

11 THE COURT: Okay. And your
12 objection is that he has no personal knowledge of
13 it? Is there an objection on the basis of
14 confidentiality or privilege or anything like
15 that?

16 MR. BYRD: Your Honor, we believe
17 that -- we've taken the position that, you know,
18 the communications pursuant to a joint defense
19 agreement -- I don't believe the joint defense
20 agreement had been executed at this time. But
21 certainly, you know, these are from August of
22 2018.

23 THE COURT: August of '18. All
24 right.

25 MR. BYRD: So certainly this

1 witness couldn't possibly have any personal
2 knowledge about letters between counsel. There's
3 no way he could make any sort of, you know,
4 determinations who sent what to who.

5 THE COURT: Okay.

6 MR. BYRD: And it wouldn't be
7 appropriate to do that anyway, Judge.

8 THE COURT: Okay. Let me ask
9 Mr. McDonald. Mr. McDonald, for what purpose do
10 you offer the exhibits?

11 MR. MCDONALD: Well, I have a very
12 difficult time in answering that question without
13 referring to the document. So I'm in a little
14 bit of a catch-22 here, with the Judge and jury
15 as the same individual. The purpose I'm offering
16 it is, one, it's a statement by Mr. Heuer, okay,
17 to Mr. Smith, which is the lawyer for Watson.

18 THE COURT: Sure.

19 MR. MCDONALD: And I think Your
20 Honor has worked pretty diligently to avoid
21 having to have lawyers take the stand in this
22 case. Okay? And I seek to avoid that myself.

23 THE COURT: Well, I generally do
24 that in most cases.

25 MR. MCDONALD: Well, what you have

1 is, you have an e-mail that details
2 deficiencies -- Balfour Beatty's position that
3 there are deficiencies in the work of Watson.

4 THE COURT: All right. Was
5 Mr. Winovich asked about that work?

6 MR. MCDONALD: Yes. He was asked
7 about this exact e-mail.

8 THE COURT: All right.

9 MR. MCDONALD: I'm trying to find
10 it, Your Honor, because I don't know that there
11 was an objection.

12 THE COURT: So notwithstanding
13 that, did Mr. Winovich testify to his personal
14 knowledge about the work that was done?

15 MR. MCDONALD: I believe
16 Mr. Winovich -- I'm trying to find the exact page
17 number. I believe what Mr. Winovich did is deny
18 that these things were occurring.

19 THE COURT: Okay.

20 MR. MCDONALD: And that's the whole
21 point.

22 THE COURT: Okay.

23 MR. MCDONALD: It's the dispute
24 over manpower for failure to provide adequate
25 manpower to progress their work sufficiently.

1 THE COURT: All right.

2 MR. MCDONALD: It's the allegation
3 that's made, and now it's, the subcontractors
4 didn't do anything wrong. So the reason that
5 Mr. Winovich was asked about it is, what was your
6 position? Do you agree with it? Do you not
7 agree with it?

8 Clearly, it comes in under 801(d)(2)(d).
9 It doesn't have to be a statement against the
10 interest. It just has to be a statement of a
11 party opponent made in their capacity that they
12 can make it, and this is the general counsel for
13 Balfour Beatty asserting that there were high
14 level discussions between BBC and Watson about
15 Watson's failure to provide adequate manpower to
16 progress their work sufficiently.

17 THE COURT: All right.

18 MR. MCDONALD: We have a cause of
19 action against Balfour Beatty for unfair trade
20 practices, civil conspiracy arising out of the
21 joint defense agreement.

22 But also arising out of these very
23 communications, which is, we don't just shake
24 this out amongst ourselves and then when we all
25 get on the same team -- and we're going to see

1 this again on these others here. Once we're all
2 on the same team, then we can go against the
3 owner. We think that's inappropriate, and this
4 e-mail is probative of that.

5 THE COURT: I'm with you. All
6 right.

7 Mr. Terry, let me hear from you.

8 MR. TERRY: So first, Your Honor,
9 Mr. Winovich testified that he had never seen the
10 document before.

11 THE COURT: Right.

12 MR. TERRY: He can't authenticate
13 it.

14 THE COURT: Right.

15 MR. TERRY: Second, it's hearsay,
16 and I believe the e-mail he's referring to is the
17 e-mail from Mr. Smith and not from Mr. Heuer.
18 But I'm going to go all the way back to evidence
19 class.

20 THE COURT: Okay.

21 MR. TERRY: My professor in
22 evidence class was Judge Joe Anderson, and he
23 referred to it as REO Speedwagon hearsay. I
24 heard it from a friend who. I heard it from a
25 friend who. I heard it from another you've been

1 messing around.

2 THE COURT: Okay.

3 MR. TERRY: That's what this e-mail
4 is.

5 THE COURT: Okay. That's a pretty
6 good explanation.

7 MR. MCDONALD: It is from
8 Mr. Heuer. Rule 801(d), statements which are not
9 hearsay; two, which is a subsection, admission by
10 a party opponent; D, a statement by the party's
11 agent or Mr. Heuer, as general counsel, or
12 servant concerning a matter within the scope of
13 the agency or employment made during the
14 existence of the relationship.

15 I hear it all the time. There's a lot
16 of talk about statement against interest. It
17 doesn't have to be against interest. It just has
18 to be a statement of the party opponent, and
19 that's what this is.

20 THE COURT: All right. What number
21 did y'all make this one?

22 MR. MCDONALD: And we've alleged a
23 conspiracy, which has its own exception as to
24 hearsay.

25 THE COURT: I'm familiar with that,

1 too. All right. What number exhibit is this?

2 MR. MCDONALD: This is Exhibit No.
3 81.

4 THE COURT: All right. All right.
5 My ruling is, that one stays out. Okay? You can
6 proffer it, but you're not going to put it in
7 evidence.

8 MR. MCDONALD: Proffer Defendant's
9 Exhibit 81.

10 THE COURT: Yes.

11 (DFT. EXH. 81 was marked for
12 identification and received as a proffer.)

13 THE COURT: Next one?

14 MR. BYRD: Your Honor, the next two
15 come from -- and there are only three of them,
16 Judge, and we just finished with one of them.

17 THE COURT: That's the good news.

18 MR. BYRD: It came from the
19 deposition of Pasco.

20 THE COURT: All right.

21 MR. BYRD: On August 9th, and
22 specifically, it was referenced in the deposition
23 as Exhibit 2, tab 12, which is an internal
24 Balfour Beatty e-mail, which he testified that he
25 had not seen before.

1 THE COURT: All right. So Pasco is
2 one of the subs, right?

3 MR. BYRD: Correct.

4 THE COURT: This is Mr. Pasco's
5 deposition was taken? Is that who this is?

6 MR. BYRD: This was 30(b)(6)
7 deposition.

8 THE COURT: Okay.

9 MR. BYRD: I can't remember if it
10 was (inaudible) or Mr. Jeffers speaking at the
11 time.

12 THE COURT: Okay. And it was an
13 internal memo of Balfour Beatty?

14 MR. BYRD: Yeah. It's to Balfour
15 Beatty employees.

16 THE COURT: Okay.

17 MR. BYRD: And the deponent had
18 never seen it before.

19 THE COURT: All right. No
20 knowledge of it?

21 MR. BYRD: No knowledge of it.

22 THE COURT: All right. And the
23 same question, for what purpose do you offer that
24 one?

25 MR. MCDONALD: Because this proves

1 that Balfour Beatty was withholding money from
2 their subcontractors and not telling the owner.
3 Pasco's representative was asked this question,
4 did you know that the owner was paying Balfour
5 Beatty for Pasco's work, and Balfour Beatty was
6 not paying Pasco? That's a crime in the State of
7 South Carolina.

8 THE COURT: Okay.

9 MR. BYRD: And what this proves is,
10 Balfour Beatty was withholding that money and not
11 paying Pasco, not informing Pasco that he was
12 withholding the money, and not informing the
13 owner that he was withholding the money.

14 We have a civil conspiracy claim, an
15 unfair trade practices claim, and as Your Honor
16 knows, if you do lawful things through unlawful
17 means, that's what that -- those are buttons
18 we've got to tick. This is an internal e-mail
19 between Starcevic saying, yes, all but Pasco and
20 retainage can be released.

21 She's asking -- I have a PM hold on
22 Pasco. We're going to get into all that. But
23 this is them holding money that -- they called
24 the owner -- and we're going to get into all of
25 this once we go through it, once we put in our

1 case-in-chief. And the next exhibit is going to
2 be even more telling to this.

3 They submit a pay application for
4 Pasco's work. They do not, as is required by
5 law, section 29-7-20 inform the owner that
6 they're not going to pay Pasco for that work.
7 They then withhold the money from Pasco and don't
8 pay Pasco.

9 And, Your Honor, at the risk of getting
10 ahead of myself, where we are today and what
11 we're going to talk about in a second is they're
12 now asking Your Honor for that money again.
13 They're asking you -- they're asking for the
14 money that they're currently holding on Pasco for
15 you to award it again.

16 So I think this is absolutely relevant
17 and probative of all our causes of action. And
18 it doesn't matter that he's not on it. I
19 wouldn't expect him to be on it. You couldn't
20 carry this out if you told Pasco, I'm taking your
21 money.

22 THE COURT: Okay. Go ahead.

23 MR. BYRD: Only, Your Honor,
24 that -- nobody is questioning the relevancy of
25 the -- the question is, can this witness -- can

1 it come in through this witness, whose deposition
2 was taken. It's a document he's never seen
3 before.

4 We're not saying that -- it's not
5 impossible to have gotten this in through a
6 different -- whatever he wants to get in, if it's
7 an internal e-mail between Balfour Beatty,
8 through another way, through a different witness
9 who had personal knowledge about it and who could
10 testify about, you know, what -- when it was
11 sent, why it was sent, and what it meant.

12 But this witness, this Pasco employee
13 had no knowledge of this e-mail that's trying to
14 come in this way. And it's just not an
15 appropriate way to -- to get something into
16 evidence.

17 THE COURT: All right.

18 MR. MCDONALD: And just very
19 quickly, that's what I'm offering it for, that he
20 didn't have any knowledge of it. That's the
21 purpose of the document. Were you aware that
22 this was happening? No. I mean, I guess I could
23 have articulated what was going on.

24 THE COURT: All right. All right.
25 So the problem I see with that one is

1 authentication. I think it's a closer call, but
2 I'm going to keep it out. All right. Once
3 again, you can proffer it. That was exhibit
4 number what?

5 MR. MCDONALD: 60, Your Honor.

6 THE COURT: 60?

7 MR. MCDONALD: 60.

8 THE COURT: All right.

9 (DFT. EXH. 60 was marked for
10 identification and received as a proffer.)

11 MR. BYRD: Your Honor, the last
12 one, also a Pasco document. This was tab 14 of
13 Exhibit 2, I believe. What it is is an e-mail
14 from my law partner, Tom Hildebrand, to Pasco's
15 attorney, Bobby Wylie.

16 THE COURT: Okay.

17 MR. BYRD: And this is after
18 litigation has commenced. This is marked
19 confidential attorney work product and privileged
20 settlement communication. I'm not entirely
21 certain how --

22 THE COURT: How it got discovered?

23 MR. BYRD: -- how it got
24 discovered. It doesn't have our Bates label at
25 the bottom, so I don't know.

1 THE COURT: All right.

2 MR. BYRD: And it is clearly -- it
3 would be clearly inappropriate to let something
4 like this into evidence.

5 THE COURT: Okay. Just between the
6 two lawyers?

7 MR. BYRD: Just -- yes. And the
8 only other person -- well, and copying people who
9 work in my law firm.

10 THE COURT: All right.

11 MR. MCDONALD: Your Honor, what
12 this is, it is marked confidential attorney work
13 product. There's no confidential relationship
14 between Mr. Hildebrand and Mr. Wylie, who was
15 here. But no confidential relationship.

16 And then it's also marked privileged
17 settlement communication, which I'm not -- we're
18 not on this. There was no settlement made to us.
19 Okay? This is an invitation to join the
20 conspiracy, okay, and it is in fact dated
21 November 1st, 2019, and demonstrates the
22 continuation of the conspiracy.

23 Your Honor, this is what I was going to
24 show you. This is exhibit -- may I approach Your
25 Honor?

1 THE COURT: Sure.

2 MR. MCDONALD: This is Plaintiff's
3 Exhibit 329. This is the chart -- and we're
4 going to spend a lot of time on this chart, Your
5 Honor, but just for the purposes of right now.

6 This is the chart that they put in as
7 their -- quote, their damages that they're asking
8 you for. And if Your Honor -- if you go down to
9 Palmetto Automatic Sprinklers, under open
10 payables, it has a number of \$19,554.19. Do you
11 see that?

12 THE COURT: Yeah.

13 MR. MCDONALD: They're asking you
14 to award that against the owner. What this
15 document establishes is that Balfour is holding
16 an additional \$19,554.19. Not only do they have
17 that money, that they've been paid for by the
18 owner -- and this chart is replete with this
19 instance.

20 THE COURT: Okay.

21 MR. MCDONALD: This isn't the only
22 time it happened. This is the admission that
23 they have the money. We billed the owner for
24 that money, and we have it and they're
25 withholding on you. Why are they holding it on?

1 Not to mention, they can't do it under
2 the law. They've already breached the statutory
3 law, but they're doing it, and why are they doing
4 it? They're doing it because they have \$107,000
5 in back charges, and that Pasco would owe Balfour
6 \$60,446. That's where they are. Okay?

7 And instead, they come into Court and
8 say that actually they owe Pasco \$143,000 --
9 \$143,142.26, not to mention they're claiming
10 interest on monies that have already been paid.
11 And this record is going to be replete with
12 instances of back charges that are hidden from
13 the owner, and this is another example of it.

14 It cannot be that one lawyer can write
15 to another lawyer. They didn't enter in the
16 joint defense agreement. Mr. Wylie didn't join
17 in the joint defense agreement in the face of
18 this, and he is still prosecuting his claim.

19 THE COURT: Okay.

20 MR. MCDONALD: That all of this --
21 and it goes on to talk about why the back charges
22 are, sprinkler heads having to be moved. We've
23 compiled a list of things that support these back
24 charges, and that we can agree to disagree in
25 private. It's completely in conflict with terms

1 of the contract.

2 We have a civil conspiracy claim, an
3 unfair trade practices claim, a breach of
4 contract accompanied by a fraud act claim, and
5 this is a statement by -- on Balfour Beatty's
6 behalf, by an authorized representative,
7 Mr. Hildebrand, that not only did they have the
8 money, but they're holding the money, and they're
9 not paying Pasco.

10 And in the face of that, they come in
11 here, and they ask you for it again. My client
12 has already paid it once, had no idea it didn't
13 go to Pasco. The purpose was to find out -- they
14 now know that it didn't go to them, the 19,000.
15 And then we have to sit in here three weeks ago
16 and watch them ask for it again.

17 And this is incredibly probative of how
18 Balfour approached this document, Exhibit 329,
19 and what they are asking Your Honor to do. And
20 I'm going to go through every single one of these
21 with the next two witnesses. But this is
22 incredibly important to our case.

23 And you can't -- just because it was
24 between two lawyers doesn't mean it wasn't in
25 furtherance of the conspiracy, without airing

1 dirty laundry and allegations like an Energizer
2 bunny, and potentially harm one or both of our
3 clients.

4 THE COURT: But y'all are trying to
5 get this is through somebody at Pasco?

6 MR. BYRD: Correct.

7 MR. MCDONALD: That's exactly
8 right.

9 THE COURT: All right.

10 MR. MCDONALD: And so the -- it
11 comes to Pasco's lawyer. It comes to Bobby Wylie
12 and is sent to Pasco. And we can -- we can call
13 the guy.

14 It just seems -- I've already taken his
15 30(b)(6) deposition. I've already asked him
16 about it, as to what it was. We went through it.
17 We can do it another way, I guess. But this is
18 the -- or we're going to end up calling the
19 lawyers, which we're trying to avoid.

20 THE COURT: I gotcha. I gotcha on
21 that. Well, Mr. Hildebrand is here. I'm not
22 sure I want him to testify, but anyway, he's
23 here. But that will screw us all up, won't it?

24 MR. BYRD: Yes, sir.

25 THE COURT: All right. I'm still

1 going to keep it out. I will let you proffer it
2 for now. You may well need that document at the
3 time we start talking about damages, and I'll let
4 you revisit the issue at that point in time is
5 what I'm going to let you do. Okay?

6 MR. BYRD: Thank you.

7 THE COURT: If y'all paid for
8 something and you're not getting credit for it, I
9 want to know about that. Okay?

10 That's substance to your claim for a
11 conspiracy or a breach of contract or whatever it
12 is. Yeah, I want to know about that. Okay?
13 Yes, I will want to know about that. But for --
14 but the way it's being introduced for now, I
15 don't see it coming in just on that basis. Okay?

16 MR. MCDONALD: That's fair enough,
17 Your Honor.

18 THE COURT: And I'll still let you
19 proffer it. And that's number what?

20 MR. MCDONALD: Plaintiff's Exhibit
21 62.

22 THE COURT: 62?

23 MR. MCDONALD: Yes, sir.

24 (DFT. EXH. 62 was marked for
25 identification and received as a proffer.)

1 MR. MCDONALD: All right. Your
2 Honor, given that, where we --

3 Is that it, Bobby?

4 MR. BYRD: I believe that was it.

5 THE COURT: Those were the three
6 y'all had? I appreciate that.

7 Mr. Terry, are you just standing or do
8 you have something you need to tell me?

9 MR. TERRY: I've got something,
10 Your Honor.

11 THE COURT: All right. Go ahead.

12 MR. TERRY: A couple things.

13 THE COURT: Yes, sir.

14 MR. TERRY: Just housekeeping. You
15 mentioned before lunch that you're belief is that
16 we will start next Wednesday, and I want to make
17 sure I understand procedurally how we're going to
18 move forward here.

19 MR. MCDONALD: Your Honor, I'm not
20 trying to -- can I enter these exhibits before --

21 MR. TERRY: I'm sorry. Go ahead.

22 MR. MCDONALD: -- we leave the --

23 THE COURT: Let's finish what we
24 were doing.

25 MR. MCDONALD: Thank you.

1

2 THE COURT: Do you want to read
3 them off again?

4 MR. MCDONALD: Yes. So it's -- I'm
5 going to read through them because some of them
6 in the middle have been taken out. So rather
7 than giving you the -- I guess I can give you the
8 chunk and tell you the ones that have been
9 proffered. Let's do that one.

10 THE COURT: All right.

11 MR. MCDONALD: So it's Defendant's
12 Exhibit 52 through 88.

13 THE COURT: Okay.

14 MR. MCDONALD: Defendant's Exhibit
15 61 has been withdrawn and Defendant Exhibits 60,
16 62 and 81 have been proffered into evidence but
17 are not in evidence based upon Your Honor's
18 rulings. The remainder of the exhibits,
19 Defendant's Exhibits 52 through 88, except for
20 the exceptions I just noted are in without
21 objection.

22 THE COURT: Got it. Okay.

23 (DFT. EXH. 52 through 59, 63
24 through 80 and 82 through 88 were marked for
25 identification and received in evidence.)

1 MR. MCDONALD: And I would like to
2 do this, Your Honor, if I may. I would like to
3 give you this set as well as the -- this was set
4 over there. This has already been marked as
5 Defendant's Exhibit 101. These are your thumb
6 drives. May I approach, Your Honor?

7 THE COURT: Okay. Sure.

8 MR. MCDONALD: These are your thumb
9 drives that have the actual video depositions on
10 them, and then here are the exhibits themselves,
11 your copies.

12 THE COURT: And those have been
13 referenced in those exhibits?

14 MR. MCDONALD: And those are
15 referenced in those, that's exactly right. And
16 that folder that I just handed you, 101 has the
17 designations and the counter designations, your
18 copies for that, too.

19 THE COURT: Okay.

20 MR. MCDONALD: And then the last
21 thing, this is Mr. O'Connor's deposition.

22 THE COURT: All right.

23 MR. MCDONALD: This is 102. This
24 is your copy. It was not videotaped, and I
25 understand that Balfour Beatty had sent their

1 counter designations out and which you now have,
2 I believe. I think they sent them yesterday.

3 THE COURT: Okay. I think we got
4 those by e-mail.

5 MR. MCDONALD: And this -- so this
6 is a complete copy of Mr. O'Connor's deposition.

7 THE COURT: All right. Very good.

8 MR. MCDONALD: Okay. Your Honor, I
9 just thought it would be -- but now that they're
10 in, they're in our case-in-chief.

11 THE COURT: Yes.

12 MR. MCDONALD: So I know you're
13 busy, but if you could start looking at them, it
14 might help us. I mean, before we -- I don't know
15 if you've got time before we'll see them.

16 THE COURT: Well, it's probably a
17 good thing we're going to continue on into next
18 week. It will give me something other than
19 football to watch over the weekend.

20 MR. MCDONALD: It may as well be --
21 if you'd like, we could tell you which
22 depositions we think you ought to read first, if
23 you're going to try to do it over the weekend,
24 and that way it might help you understand the
25 witnesses that are going to be live. I don't

1 know if you want us to do that or not. I will be
2 glad to try to do it.

3 THE COURT: Any order you can get
4 it in, not necessarily chronological?

5 MR. MCDONALD: No.

6 THE COURT: Okay. All right.

7 MR. MCDONALD: Just, if a certain
8 witness we think you need to hear or see before
9 you hear some witness after, just like this --
10 you know, whatever, this might be helpful for
11 you. That's all.

12 THE COURT: I'm happy to do that.
13 In other words, you'd be calling them, and this
14 is how you would call them in your case, right?

15 MR. MCDONALD: Right.

16 THE COURT: And that's what you're
17 asking.

18 MR. HILDEBRAND: Well, we didn't
19 have that opportunity, Your Honor, and I
20 definitely would have availed myself of that same
21 condition if it had been brought up. So I think
22 that you should just do them randomly, like we
23 did.

24 THE COURT: Well, I'm going to
25 allow it. I'll allow him to do it. If he wants

1 to do that, I'll have him do it. And if you've
2 got a preferred way to present it, I will be glad
3 to hear from you as well.

4 All right. So let's do a little bit of
5 housekeeping. I don't want to take up too much
6 time because it is approaching 4 o'clock, and I
7 know I want to press on. I think y'all want to
8 press on today, don't you? I know you've got one
9 more witness at least.

10 MR. TERRY: I've got two issues.

11 THE COURT: Okay.

12 MR. TERRY: One, in the
13 presentation, at least with Watson, Lithko, Old
14 North State's evidence, do you care -- we're
15 offering rebuttal evidence and both evidence in
16 support of our direct claim.

17 THE COURT: Okay.

18 MR. TERRY: Do you care how we do
19 that? Do you want us to do the rebuttal first,
20 then to the extent they have any rebuttal
21 witnesses they want to call, they can, or do
22 we -- do you want us go straight into our
23 case-in-chief?

24 THE COURT: I want to get the
25 defendants through their case. I'm going to

1 allow for reply testimony from the plaintiffs and
2 then we're going to get into the subcontractors'
3 cases. Is that helpful?

4 MR. TERRY: Well, we were going
5 to -- some of the defendant's claims are against
6 the subs.

7 THE COURT: Yeah.

8 MR. TERRY: And so I just want to
9 make sure that, once we start our case, they're
10 not going to be offering rebuttal to our case
11 or --

12 THE COURT: All right. Well, you
13 can cross-examine as you've done, but I'm not
14 going to -- y'all will just start next week is
15 what I'm saying. Okay?

16 MR. TERRY: I understand.

17 THE COURT: Are we clear on that?

18 MR. BUNDY: The only thing I -- you
19 know, it just occurred to me that we have -- the
20 only direct claim we have against the subs are
21 conspiracy.

22 THE COURT: Right. Okay.

23 MR. BUNDY: So I'm not quite
24 sure -- I mean, we're going to put our
25 conspiracy -- we're going to try to put our

1 conspiracy claim in.

2 THE COURT: Yeah.

3 MR. BUNDY: But, you know, we might
4 want to use some of their witnesses. I would --
5 I don't know. Maybe the best thing to do is let
6 the conspiracy case continue as they put theirs
7 so we don't have to come back and forth and back
8 and forth.

9 So I just would throw that out to you to
10 figure out the best way and the most efficient
11 way to do that. I'll do it any way you want me
12 to do it, but I think it's something that you
13 need to think about.

14 THE COURT: Yeah. Well, you'll
15 need to go into your conspiracy case and your
16 case-in-chief so that it survives any type of
17 directed verdict motion.

18 MR. TERRY: Thank you.

19 THE COURT: Okay.

20 MR. TERRY: The second issue, Your
21 Honor, is, Library Associates is now getting
22 into -- maybe they've covered some of their
23 conspiracy claims, but that's where they're
24 headed now.

25 THE COURT: Okay.

1 MR. TERRY: We've not been provided
2 any exhibits along the way here. They're handing
3 them to Mr. Hildebrand, to yourself, but we don't
4 see them.

5 THE COURT: Okay.

6 MR. TERRY: We don't -- we need
7 copies of these exhibits as we go forward. So we
8 request to get them.

9 MR. BUNDY: Come on up. Glad to
10 have you.

11 THE COURT: All right. Let's work
12 for another hour or so, and let's work today
13 because I think, if I understood correctly, y'all
14 have got Ms. Brown up next.

15 Mr. McDonald?

16 MR. MCDONALD: Thank you very much,
17 Your Honor. May it please the Court. Library
18 Associates would call Kim Bennett Brown.

19 (KIM BENNETT BROWN, having first
20 been duly sworn, testified as follows:)

21 THE COURT: Please have a seat, and
22 if you would, when you're comfortable, give us
23 your full name and address, please.

24 THE WITNESS: My full name is
25 Kimberly Bennett Brown. I reside at 1046

1 Dominion Drive in Hanahan, South Carolina 29410.

2 THE COURT: Thank you, ma'am.

3 DIRECT EXAMINATION

4 BY MR. MCDONALD:

5 Q. Ms. Brown, how are you doing this
6 afternoon?

7 A. Doing fine, thanks.

8 Q. Good. Would you tell the Court a little
9 bit about yourself, where you're from. You just
10 said you live in Hanahan. Have you lived there
11 your whole life?

12 A. No. I was born in Charleston, raised in
13 West Ashley. Went to Bishop England High School,
14 graduated in 1980. Went to the College of
15 Charleston for a couple of years, and then went
16 to Trident Tech for a little over a year.

17 And in 1983, Mike came to me, he and his
18 good friend Hank Hofford had just started a
19 business, and wanted to know if I wanted to come
20 work for them. And so I started on January 2nd,
21 1984. And I've been there --

22 Q. Well, before you get there, what kind of
23 business was it in 1984 for Mr. Bennett and
24 Mr. Hofford?

25 A. It was Bennett Hofford Construction at

1 that time.

2 Q. Okay.

3 A. And we were doing downtown renovations.

4 Q. Okay. And what was going to be your
5 role in 1984 at Bennett Hofford Construction?

6 A. Secretary, accountant.

7 Q. Okay. Did you have any experience in
8 construction prior to that?

9 A. No.

10 Q. Okay. All right. And how many
11 employees did Bennett Hofford Construction have
12 in 1984?

13 A. I was the only office employee. They
14 had one superintendent and two or three laborers.

15 Q. Okay. So if you included Mr. Hofford
16 and Mr. Bennett, about five of y'all or six of
17 y'all, something like that?

18 A. Correct.

19 Q. Okay. All right. And how long did you
20 work there at Bennett Hofford Construction?

21 A. I have been there since, so it's been 38
22 years.

23 Q. Through various iterations?

24 A. Correct.

25 Q. Okay. So let's talk about, instead of

1 the various iterations at Bennett Hofford
2 Construction, let's talk about your role
3 specifically.

4 A. Okay.

5 Q. You started off there in 1984 as doing
6 administrative work. How has that role evolved
7 over the years?

8 A. Yeah, we don't have really any titles at
9 Bennett Hofford and Bennett Hospitality. So
10 we -- all the employees do whatever needs to be
11 done.

12 So I have -- you know, at that time, we
13 were doing payroll and accounting and then this
14 involved -- and being involved with land
15 purchases, closing real estate loans, closing
16 construction loans, negotiating contracts,
17 negotiating all the bank documents, overseeing
18 the construction of hotels.

19 Q. In 1984 -- I didn't mean to cut you off.

20 A. That's okay.

21 Q. So just the general categories of your
22 role, as broad as it is, is within the field of
23 real estate loans, closing construction loans,
24 overseeing construction, and all of the -- all
25 the ins and outs of that.

1 A. And really kind of acting as a chief
2 operating officer of the company.

3 Q. All right. So in 1984, you all were
4 doing mostly residential? Is that what it was?

5 A. Correct. Renovating all old, restored
6 homes into apartments.

7 Q. Okay. And if you would, for the benefit
8 of His Honor, would you just generally go over
9 how that developed into the hotel business and
10 where you all are today?

11 A. So in the '80s, after doing the
12 renovations downtown, we started doing some strip
13 centers. We built Northcutt Plaza in
14 Mt. Pleasant and a couple of strip centers and --
15 off of Savannah Highway.

16 At that point, we -- Mike had the vision
17 to develop these seaside communities and resorts
18 such as Wild Dunes and Kiawah, DeBordieu in
19 Georgetown and Daufuskie Island. And so we
20 started doing single family homes, building
21 single family homes in the resort development.

22 Hurricane Hugo came in 1989 and kind of
23 wiped away the resort development. The old Chico
24 Apartments on Meeting Street, which was kind of
25 on the wrong side of the track at the time, on

1 the other side of Calhoun Street, was available.

2 And Mike had the vision to turn that
3 into a Hampton Inn, and contacted the owners of
4 the Hampton Franchise. They kind of took him
5 under their wing, and I believe it was the first
6 urban developed Hampton Inn in the country.

7 Q. What is an urban developed Hampton Inn?

8 A. In the -- located in the city versus on
9 interstates where most of them were developed at
10 the time.

11 Q. On an interstate exit?

12 A. Correct.

13 Q. Gotcha. Okay. And so the first venture
14 into the hotel business was a Hampton Inn but
15 located in town?

16 A. Correct.

17 Q. Okay. And where was that located?

18 A. It's located at the corner of Meeting
19 and John Street.

20 Q. Downtown Charleston?

21 A. Yes. I think the address is 345 Meeting
22 Street.

23 Q. All right. And where do you go from
24 there? The first hotel y'all developed -- well,
25 what was your role in that process?

1 A. At that time, I was just working with
2 the lenders in the -- and closing the real estate
3 loans. Mike and Hank were still partners at that
4 time, and Hank was running the construction
5 company. And so he had other employees at the
6 time that worked -- were helping with that
7 construction.

8 Q. And that would be like the construction
9 draws, pay applications, and things like that?

10 A. That's correct.

11 Q. Okay. All right. And tell me briefly
12 where it went next. What was the next stage?

13 A. Then after that, the County had put out
14 an RFP for the old Citadel building and the
15 County library at the time, and that was in 1994.

16 Q. Okay.

17 A. Mike had the vision that it looked like
18 an Embassy Suites with the quadrangle, and so we
19 applied for the Embassy Suites franchise.
20 Actually, before that, we put out the RFP -- or
21 we replied to the RFP with the County and won the
22 RFP, and then developed the old Citadel building
23 into the Embassy Suites.

24 Q. Okay. All right. And at that time, did
25 you purchase the library property, too?

1 A. Yes. It was all one purchase.

2 Q. Okay. And that was 1994?

3 A. '94, yes.

4 Q. Okay. All right. So that was
5 your-all's second hotel was the old Citadel
6 building that's the Embassy Suites now?

7 A. Correct.

8 Q. Okay. And then you owned the library,
9 which is still standing?

10 A. Yep, it was still standing. And the
11 County was developing their new library building
12 on Calhoun Street, but it was not ready yet. So
13 they leased it back from us for a little over a
14 year while they completed the building on Calhoun
15 Street.

16 Q. Okay. And moving along, did your
17 role -- when did your role change into being
18 involved in the construction process at the
19 hotel?

20 A. That kind of really involved a little
21 after we did the Embassy Suites in 1998. In
22 fact, let me make one point. It was actually, to
23 this day, in 1996, that we opened the Embassy
24 Suites.

25 Q. Okay. Meaning today's date?

1 A. Yeah, October 28th.

2 Q. Okay.

3 A. In 1998, we had purchased some land in
4 Mt. Pleasant off the Isle of Palms Connector. At
5 that point, there was no Towne Centre. There was
6 no development up that way. Everything was still
7 down at the bridge.

8 Mike had the vision to -- he saw that
9 the -- that it would be a viable area for the
10 future development in Mt. Pleasant, and we bought
11 a site on the -- right on the Isle of Palms
12 Connector near the corner of 17, and the Isle of
13 Palms Connector for a Hampton Inn and Suites.

14 And that's really kind of when I got
15 involved mostly with the construction and doing
16 the pay apps, et cetera.

17 Q. Okay. So you've basically been involved
18 in the construction on behalf of an entity that's
19 not known as Bennett Hospitality? Is that the
20 entity you were --

21 A. That's correct. We had Bennett Hofford
22 Construction and Bennett Hofford Development.
23 Mike and Hank split up because Hank decided he
24 wanted to keep on with the residential
25 development and the resorts.

1 Mike was going through the hotel
2 business. They split up in 2011. Bennett
3 Hofford Development turned and just had a name
4 change to Bennett Hospitality, Inc.

5 Q. Okay.

6 A. And Hank still runs in Bennett Hofford
7 Construction --

8 Q. And --

9 A. -- and owns that.

10 Q. I'm sorry, I didn't meant to cut you
11 off. And so your role with being involved on the
12 construction side -- and I want to go into that
13 just a little bit -- has been ongoing since 1998?

14 A. Yes.

15 Q. Okay. So 23 years or something like
16 that?

17 A. Correct.

18 Q. Okay. All right. And tell me a little
19 bit about that. What's -- obviously, at Bennett
20 Hospitality and your role at Bennett Hospitality,
21 you all aren't constructing anything, right?
22 You're contracting with general contractors or
23 construction managers to construct the actual
24 hotels, correct?

25 A. Correct.

1 Q. Okay. So tell me -- given that, tell me
2 what your role at Bennett Hospitality, as it
3 relates to that -- I know being a small business,
4 you have many hats.

5 But I just want to focus on that portion
6 of your job, how -- what role you have in
7 interacting with the contractors as far as
8 approvals, communications, anything?

9 A. I'm more or less the liaison with -- for
10 the company with the general contractors. I am
11 involved in negotiating the construction
12 contracts. I attend all of the weekly or monthly
13 OAC meetings.

14 If there are any change orders, I'm the
15 one who reviews them and signs up on the change
16 orders. I prepare all the pay apps that go to
17 the bank. We usually get pay apps submitted from
18 the contractor, which would be, you know, signed
19 off by the architect.

20 Those then come to me, and then I
21 include them in the rest of the other invoices
22 that go into the owner's pay app that go to the
23 lender and have the lender fund.

24 Q. At the risk of getting ahead of
25 ourselves, because I think it's important --

1 we're going to talk about the pay applications in
2 a little bit. You talked about the contractor
3 pay application. You talked about the owner pay
4 application. Would you briefly explain to Your
5 Honor those two different iterations?

6 A. Sure. So with our bank loans, not only
7 do we have the funding for the construction, but
8 there's funding for the FF&E, the furniture,
9 fixture, and equipment.

10 There's the line item for the architect
11 fees. There's line items for the engineer's
12 fees. You've got land financing fees, different
13 type of soft costs that are all included in the
14 owner's pay app that goes to the bank. The
15 construction pay app is just one line item of the
16 owner's pay app.

17 Q. Okay. And so that construction -- what
18 we'll call the construction pay application for
19 now or the pay application for the contractor, is
20 actually included in the pay application that
21 goes to the bank?

22 A. Yes.

23 Q. Okay. So what you -- what you're saying
24 is, you review the pay application as it comes in
25 from the contractor, and when you use the word

1 prepare, you then prepare the bank's pay
2 application that includes the contractor's pay
3 application?

4 A. That's correct.

5 Q. Okay. I just want to be clear about
6 that. So when you say you review pay
7 applications, what you're talking about is, you
8 review the pay application from the contractor
9 when it comes in the door at your office?

10 A. That's correct, once it's signed also by
11 the architect.

12 Q. Yes. And once again, you've been
13 involved in this process since about 1998?

14 A. Correct.

15 Q. Okay. All right. Let's talk about
16 Hotel Bennett. What was your involvement -- and
17 with the understanding that this is -- the
18 development of this project has been going on for
19 many, many years, so I don't want to belabor the
20 points that don't have anything to do with what
21 brings us here today.

22 But would you just explain briefly for
23 the Judge, as you can, your involvement in the
24 development of this project, and then we'll get
25 more detailed as we get into the construction

1 contract setting in or about 2013, somewhere in
2 there. But, just generally, give the Judge the
3 lead up prior to that.

4 A. Prior to 2013?

5 Q. Yes, please.

6 A. Okay. So involved with Mike with
7 working with his vision, working with the
8 architects, going through the approval processes
9 with the DRV and then BAR for the approval of the
10 hotel.

11 Worked prior to 2013, you know, working
12 to try to obtain financing, putting together
13 performative to submit to the lender and the
14 lender packages to try to obtain the financing.

15 Q. Okay. And that was obviously extended
16 out over a long period of time. I think you said
17 the acquisition was 1994 or somewhere in there?

18 A. That's correct.

19 Q. And so all the way up to 2013, a lot
20 going on. Okay. In or about 2013, were you
21 involved with Mr. Clements, who testified that he
22 created the request for proposal be sent out to
23 contractors?

24 A. I was not involved with his RFP.

25 Q. Okay. And how did it come to be that

1 Mr. Clements was hired by Library Associates?

2 A. As Mr. Clement testified, his brother
3 was a roommate of Mike's at South Carolina. I
4 think Mike had run into Mr. Clements' brother and
5 knew what Mr. Clements was doing at the time and
6 being project manager.

7 And his brother suggested that he would
8 be a good fit for Mike's needs at Hotel Bennett.
9 So we had Mr. Clements come to the office,
10 interviewed him. We agreed and decided to hire
11 him.

12 Q. And had you all used the program
13 manager -- had Library Associates used a program
14 manager, had Bennett Hospitality used a program
15 manager in the past?

16 A. No.

17 Q. Okay. So this was your first occasion
18 to use one?

19 A. Correct.

20 Q. Do you know why the decision was made to
21 use one now for this project when you hadn't
22 utilized one in the past?

23 A. The hotels in the past that we had built
24 were limited service hotels. We had the
25 experience and didn't require a project -- or

1 program manager. This being a five-star and also
2 this being non-flagged, we thought it would be
3 very beneficial to have a program manager.

4 Q. And at the risk of insulting Your Honor,
5 but I didn't know, can you explain to him what it
6 means to be flagged or non-flagged?

7 A. A flag is having a franchise as Hilton
8 or Marriott.

9 Q. Okay. And so one of the reasons that
10 this hotel was going to be non-flagged played
11 into your or your-all's decision to have Jim come
12 on board as a program manager?

13 A. Correct.

14 Q. Okay.

15 A. In fact, I think Mike said, Jim is going
16 to make your job a whole lot easier, Kim.

17 Q. So you were all for it?

18 A. I was all for it.

19 Q. Okay. Perfect. All right. And so you
20 weren't involved in Jim's creation of the request
21 for proposal to the various contractors. Were
22 you involved with the interview process?

23 A. I was involved in the interview process.
24 I sat in the interviews with all of the
25 contractors.

1 Q. Okay. And how many contractors did
2 y'all interview?

3 A. It was three.

4 Q. Okay. And who were they?

5 A. It was Balfour Beatty, (inaudible), and
6 I can't remember the name of the third. I know
7 Mr. Clements had stated it in his deposition or
8 in his testimony.

9 Q. All right. And did you have any role in
10 selecting those three contractors to come and
11 interview?

12 A. I had input into the process. We all
13 had discussion in who we thought would be the
14 best contractor, and we selected Balfour Beatty.

15 Q. Okay. And you went to the interview
16 with Balfour Beatty?

17 A. Yes.

18 Q. And do you recall who was in attendance
19 there on behalf of Balfour Beatty?

20 A. I know Mike Baumbach was.

21 Q. Let me ask you this: Do you know who
22 gave the presentation on their behalf?

23 A. I don't remember at the time.

24 Q. Okay. But you know Mike Baumbach was
25 there?

1 A. Yes.

2 Q. Anybody else?

3 A. Bill Lorenzo may have been there.

4 Q. Okay.

5 A. Bret Estridge may have been there, but I
6 can't recall.

7 Q. Okay. And did y'all make a decision as
8 to which three contractors to hire after the
9 three interviews -- after the completion of the
10 three interviews?

11 A. Yes.

12 Q. Okay. And were you involved in that --
13 those discussions and that decision making
14 process?

15 A. Yes.

16 Q. Was Balfour Beatty the low number when
17 they put their numbers on a proposed GMP?

18 A. No.

19 Q. Okay. Where were they?

20 A. They were either the highest or second
21 highest. I know they were not the lowest.

22 Q. So they were -- since there was only
23 three, they were either in the middle or on the
24 top?

25 A. Correct.

1 Q. Okay. And were you involved in
2 discussions as to why Balfour Beatty was chosen
3 over the other two contractors?

4 A. As Jim testified, he felt very strongly
5 and was very comfortable with Balfour Beatty, and
6 because he had worked with Mike Baumbach before,
7 we kind of took his advice and all agreed that
8 Balfour Beatty would be the best one for the job.

9 Q. Okay. Were you involved on behalf of
10 Library Associates or Bennett Hospitality in the
11 back and forth of the preconstruction process for
12 Balfour Beatty?

13 A. Yes. We had many preconstruction
14 meetings that were held at our offices at the
15 Rice Mill building on the first floor, and I was
16 involved in those meetings.

17 Q. Okay. And explain to Your Honor how
18 that works, the preconstruction. Did it occur
19 prior to signing the contract in September of
20 2014?

21 A. Yes.

22 Q. Okay. So if we're going to explain to
23 Your Honor the first phase as preconstruction,
24 that's what I want to talk about now, and we'll
25 talk about two phases after that. Okay?

1 You're involvement -- or what was your
2 involvement in the preconstruction phase, and by
3 that, I mean, post-selection of Balfour to be the
4 contractor, to move forward with Balfour as the
5 contractor, but pre-September of 2014. Okay?

6 A. Okay.

7 Q. All right. What was your role during
8 that period?

9 A. Like I said, I attended the
10 preconstruction meetings. There were usually
11 four or five people from Balfour Beatty. Buck
12 Lindsay was at those meetings. Mike Bennett
13 attended those meetings.

14 Q. What was the purpose of the
15 preconstruction meetings? Why were you having
16 them?

17 A. It was to have the contractors review
18 the plans, as to the state that they were in.

19 They would then also take the plans back
20 with them, review them some more. We would have
21 these meetings at least once a month, and they
22 would come back during the course of the design
23 to give their input and make suggestions, see
24 where there were issues.

25 Like I said, this went on from -- for

1 about a year. So there was at least 12 meetings.
2 And, you know, there was input from -- in some of
3 the meetings, to be interior designers were there
4 also.

5 Q. That's DCI?

6 A. That's DCI.

7 Q. Okay.

8 A. Right. And so it was a collaborative
9 effort to review the plans and to make
10 suggestions on how things could work better. We
11 talked about costs. It was just a collaborative
12 effort to get to the point where the contract was
13 designed.

14 Q. During this time, was the purpose of the
15 project going to be a five-star hotel?

16 A. Always.

17 Q. Always. All right. So DCI was involved
18 during preconstruction. That's the interior
19 designer?

20 A. Yes.

21 Q. The architect, that's Mr. Lindsay,
22 right, or Buck?

23 A. Correct.

24 Q. Okay. Who was involved during the
25 preconstruction meetings on behalf of Balfour?

1 A. Jeff Sandeen was there.

2 Q. Okay.

3 A. Mike Baumbach was there. Bill Lorenzo
4 had attended a few. Bret Estridge was there.
5 And Manny Teodoro, who was the estimator, was
6 there. And like Jim mentioned, there was an
7 African-American woman, who was also an
8 estimator, and I can't recall her name.

9 Q. And during this period, which would have
10 been late 2013 to September of 2014, how many of
11 these preconstruction meetings where y'all went
12 over the plans and you discussed the
13 collaborative effort? How many would you say
14 occurred?

15 A. You know, probably around 12. I know
16 they're usually once a month. There could have
17 been a few months that we didn't have them, but
18 once the plans were at a certain design point,
19 and they would be sent to Balfour Beatty to
20 review. And then we would all come together for
21 these meetings --

22 Q. Okay.

23 A. -- to discuss any issues.

24 Q. And so then, on September 22nd of 2014,
25 the contract between Balfour and Library

1 Associates was actually signed, correct?

2 A. Correct.

3 Q. Did you have any involvement in the
4 negotiation in the terms of that contract?

5 A. I did have some involvement in the
6 negotiation of the terms of that contract.

7 Q. And is that based on the fact that that
8 had been your role at Bennett Hospitality since
9 1998?

10 A. That's correct.

11 Q. All right. Now, so the next phase I
12 want to talk about, Ms. Brown, is the phase from
13 September of 2014 and the signing of the contract
14 in February of 2015, which is the GMP. Okay?

15 A. Okay.

16 Q. All right. First of all, do you recall
17 any discussion or proposal by Balfour to extend
18 the preconstruction period?

19 A. Yes. We paid an additional 30-plus
20 thousand dollars to extend that preconstruction
21 period.

22 Q. And what was the purpose of extending
23 the preconstruction period?

24 A. Is to even -- to get the plans
25 themselves as tight as they can possibly be.

1 Q. Okay. And who came up with that idea?

2 I mean, tell me a little bit more about that.

3 A. I'm not sure. I know that Jim had
4 testified that that was Balfour Beatty's idea.

5 Q. Okay. So you know because of what
6 Jim --

7 A. That's correct.

8 Q. Okay. All right. What was your role
9 during that period that -- what we'll call the
10 second period of preconstruction, from September
11 of 2014 to February of 2015?

12 A. Well, I know that one of the items in
13 July of 2014, as it was stated, but had given
14 them 100 percent plans. It was in November of
15 2014, after the VE items were negotiated.

16 And then there was some items that were
17 listed as possible VE items that we could take.
18 There was like -- if I remember correctly, there
19 were three different sections. Your VE items
20 that you're going to take, here's some tentative
21 ones, possible ones.

22 And we could kind of pick and choose.
23 And so going through that process during that
24 time period, from September through March of that
25 time, we were trying to figure out, you know,

1 what VE items we wanted to include in the plans
2 and which ones we decided that -- you know, we
3 wanted to stick with what Buck had originally
4 drawn.

5 Q. Okay. So were the plans still being
6 developed over this period, this second period of
7 preconstruction, from September of '14 to
8 February of '15?

9 A. Yes.

10 Q. Okay. And was the same individuals
11 involved: Balfour Beatty, architect, and
12 interior designer?

13 A. Yes.

14 Q. All right. And then in February of '15,
15 there is the Exhibit AOR the GMP amendment,
16 correct?

17 A. Correct.

18 Q. All right. And what was your
19 understanding about that document? What occurred
20 then?

21 A. That document actually specified the
22 actual price of the GMP.

23 Q. Okay. And prior to the signing of that
24 document in February of '15, could Balfour Beatty
25 have walked away except they would have been

1 entitled to their preconstruction fee?

2 A. That's correct.

3 Q. Okay. So even though you -- even though
4 the contract was signed in September of '14,
5 until you arrive at a GMP, the contractor was
6 able to walk away?

7 They're entitled to a preconstruction
8 fee, and they come back with some crazy number
9 and the owner can say, I've had about all the fun
10 I've had here, and the owner could walk away,
11 correct?

12 A. Correct.

13 Q. Okay. Who came up with the actual
14 number of the GMP in February of '15?

15 A. Balfour Beatty.

16 Q. Okay. And the GMP in February '15 also
17 establishes the duration of the project, correct?

18 A. Correct.

19 Q. All right. Who came up with the
20 duration of the project?

21 A. Balfour Beatty.

22 Q. So the next period I want to talk about,
23 Kim, is your involvement during the construction
24 itself. And what I would like to focus on is,
25 first, what your -- what types of things you did,

1 what your role was with construction.

2 And so earlier you testified that
3 typically you were involved in negotiating the
4 contract. We've already come into that, right?

5 A. Correct.

6 Q. All right. And during the construction
7 of the Hotel Bennett, did you attend weekly and
8 monthly OAC meetings?

9 A. I attended the monthly OAC meetings, and
10 sometimes I -- you could conference call on the
11 weekly meetings, and occasionally I would do
12 that. But I was typically at the monthly
13 meetings.

14 Q. Okay. And what was your role or purpose
15 for being at the meetings?

16 A. Just to understand where the project was
17 going. Jim would give me updates on a regular
18 basis, but just to -- you know, because the bank
19 also had the inspector at those meetings, and so
20 just to attend to inspect through the
21 walk-through with the building, and also to, you
22 know, review the pay apps with the contractor.

23 Q. Okay. So let's back that a little bit.
24 Was there any discussion in those meetings, in
25 those monthly meetings to review proposed change

1 orders from the contractor?

2 A. Early on maybe, but starting in really
3 2016, I believe, or late 2015, we would actually
4 have RCO meetings that would take place at our
5 office that would occur probably every two weeks
6 that were outside of the OAC meetings.

7 Q. Okay. I'm sorry, go ahead.

8 A. Early on, if there was an RCO, they
9 would send it to Jim, and then Jim would review
10 it, as he stated, and send it to the architect
11 for entitlement, and then he would bring it to
12 me.

13 Q. To review?

14 A. To review and then to sign off or agree
15 or disagree with it.

16 Q. Okay. So we've got two things. We've
17 got you attending monthly OAC meetings with the
18 purposes of being there, understanding what's
19 going on, and being the liaison with the bank; is
20 that fair?

21 A. Correct.

22 Q. Okay. And then there were also meetings
23 that you had at your office that were dedicated
24 solely to the review of RCOs and those occurred
25 every couple of weeks?

1 A. Yes, starting like I said, in 2016
2 sometime.

3 Q. 2016. Okay. And I assume, since you
4 brought it up, that you were in attendance in
5 those RCO meetings?

6 A. Yes.

7 Q. Okay. All right. And we will come back
8 to that, but I just want to get your role, a
9 flavor for your role.

10 All right. So there's review of change
11 orders, then attend the OAC meetings. Did you
12 review the contractor pay applications as they
13 came in?

14 A. Yes. During those meetings, the
15 contractor would provide a pencil copy, which is
16 just the first three pages of the pay app with no
17 backup, and we would go through those pay apps as
18 a group, line item by line item.

19 Q. Okay. And then the first three pages of
20 the pay application -- and we'll go through in
21 some time. It's just the cover page that says a
22 bunch of information and then drops down to how
23 much we want, and then two spreadsheets, correct?

24 A. That's correct.

25 Q. And those spreadsheets were referred to

1 as the schedule of values, correct?

2 A. Correct.

3 Q. Okay. So the pencil copy that you would
4 get to first review, didn't have any backup
5 documentation? It just had essentially the cover
6 sheet and the updates to the schedule of values?

7 A. Correct.

8 Q. All right. And so you would review
9 those, and what was the next step in the pay
10 application review process that you undertook?

11 A. At that point, if there were any
12 questions in the pay app from the architect, she
13 would ask those questions. Then Balfour would
14 send the pay app with all the backup to the
15 architect.

16 Once the architect signed off, then she
17 would send it to me, and then that's the -- kind
18 of the next step. That's when I included the
19 contractor's pay app, that the architect had
20 signed off into the owner's pay app to the bank.

21 Q. Okay. So let me stop you there. When
22 you said that -- so then the pay application
23 would come in with the backup in kind of a final
24 form, right?

25 A. Correct.

1 Q. Signed by the contractor?

2 A. Correct.

3 Q. Okay. There's a space for the
4 contractor to sign it, correct?

5 A. Correct.

6 Q. All right. Then it would go to the
7 architect?

8 A. Correct.

9 Q. Right. And then, when you said the
10 architect signs off on it, is that the same thing
11 as certifying a pay application as required by
12 the contractor?

13 A. Yes.

14 Q. Okay. Did the owner pay pay
15 applications that were not certified by the
16 architect?

17 A. No.

18 Q. Was the owner required to pay pay
19 applications that they were not certified by the
20 architect?

21 A. No.

22 Q. So you would get the architect's
23 certification, and then let's just walk through
24 so we don't have to do this --

25 A. Okay.

1 Q. -- with 30 of them. So just generally,
2 so you would get the contractor -- you would get
3 the certified pay application from the architect
4 saying, we've looked at it, we're certifying it
5 based upon the terms of the contract documents,
6 and then what would you do?

7 A. Like I stated, I would then include that
8 in the owner's pay app that would go to the
9 lender, and I would submit that to the lender.

10 Q. Okay. And you would submit that to the
11 lender via e-mail, hard copy? How would that
12 work?

13 A. E-mail.

14 Q. E-mail. Okay. So you would
15 electronically send the owner's pay application
16 to the bank?

17 A. That's correct.

18 Q. Was Balfour Beatty aware, during this
19 process, that you were drawing funds from a
20 federally insured bank?

21 MR. HILDEBRAND: Objection, Your
22 Honor. She hasn't testified about that, and I
23 don't think there was a federally insured bank.
24 It was a lender, Metropolitan Life Insurance
25 Company; so I think it's a --

1 BY MR. MCDONALD:

2 Q. You can answer the question.

3 A. Balfour Beatty was aware that MetLife
4 was the lender on the project.

5 Q. And that MetLife was funding the draws?

6 A. That's correct.

7 Q. Okay. That you all were coming off the
8 hip for this money, meaning Library Associates?

9 A. So we had to put in initial equity
10 required by our loan. That initial equity was 10
11 million dollars.

12 So before the first pay app was ever
13 funded, we submitted 10 million dollars to
14 MetLife. They held that in one of their
15 accounts. So for the first few pay apps, they
16 would use the money that we had supplied for our
17 equity first before they got into their loan.

18 Q. And then thereafter, the pay
19 applications were funded from Met Life's loan?

20 A. That's correct.

21 Q. Okay. All right. After you e-mailed
22 the pay application to the bank or MetLife, what
23 happened next?

24 A. There was a third-party reviewer at
25 MetLife. I believe it was T&C Loan Services at

1 the time. They would review the entire pay app.
2 If they had any questions, they would go back to
3 the architect or the bank inspector to ask
4 questions.

5 And then, once she was satisfied, they
6 would then order the title update from Foster
7 Gaillard's office, who was the real estate lawyer
8 that handled all of the title work, and the title
9 policy. They would, again, order that title
10 update.

11 Once the bank received the title update
12 showing the clear title, the bank would fund the
13 money into our development account, and then we
14 would cut checks to everyone who was on the pay
15 app.

16 Q. Okay. Did the bank have any retainage
17 requirements?

18 A. The bank had -- for construction, they
19 had 10 percent retainage requirement.

20 Q. So on the construction draw, the bank
21 required that there be 10 percent retainage?

22 A. That's correct.

23 MR. HILDEBRAND: Your Honor,
24 objection. I'd just like to get it straight so
25 the record is straight.

1 There's not a bank involved. It's a
2 lender. He keeps referring to it as a bank.
3 It's simply Metropolitan Life Insurance Company
4 as a lender. So I just wanted to make the record
5 clear.

6 THE COURT: All right. Duly noted,
7 but --

8 MR. MCDONALD: They are what they
9 are, but I will refer to them as MetLife from
10 here on; so it will be whatever they are.

11 BY MR. MCDONALD:

12 Q. Okay. All right. So did MetLife
13 require a certain amount of retainage?

14 A. Yes. MetLife required 10 percent
15 retainage on the construction line item of the
16 schedule of values for the owner's pay app.

17 Q. Okay. All right. So once MetLife
18 approved the owner draw, how would they get you
19 all -- would they send the money directly to
20 Balfour, or would they send you all the money?
21 What would they do?

22 A. No. They would wire the funds to our
23 account, and then I would cut the check to
24 Balfour and any of the other companies that we
25 had requested the payment for on the pay app.

1 Q. How did Balfour submit its pay
2 applications to you all? Did they hand deliver
3 them?

4 A. No. They were usually sent by e-mail on
5 a Dropbox because they were so large because of
6 all of the invoices in the backup.

7 Q. Okay. So you would get the Balfour pay
8 application via e-mail. You would then e-mail
9 the owner pay application with the Balfour pay
10 application to the bank, and the bank would wire
11 you the funds if they approved it?

12 A. That's correct. And let me go back. In
13 the first year, probably when the pay apps were
14 not so large, they did provide hard copies of the
15 pay apps to us.

16 Q. Okay.

17 A. Yes.

18 Q. And then after they got bigger, they
19 were electronically?

20 A. In the Dropbox, yes.

21 Q. All right. And then you, meaning
22 Library Associates, would physically cut checks?

23 A. Yes.

24 Q. Okay. And that would include the check
25 that would go to Balfour Beatty?

1 A. That's correct.

2 Q. Okay. And how would they get that
3 check?

4 A. We would FedEx it to their corporate
5 office in Charlotte.

6 MR. MCDONALD: All right. Your
7 Honor, at this time, there are certain pay
8 applications that are not in evidence, and they
9 are voluminous. I don't know what opposing
10 counsel wants to do.

11 I mean, we've got them all here. If he
12 wants me to authenticate every single one of
13 them, I can. I'm game to do it the easy way, or
14 if I've got to do it the hard way. I just want
15 to inquire before I start it the hard way.

16 THE COURT: Okay.

17 MR. HILDEBRAND: I'm smiling
18 because it's just funny to me. It's so ironic
19 that they would like for me to do it the easy
20 way. I mean, good Lord, Your Honor.

21 THE COURT: Well, they put you to
22 the test, didn't they?

23 MR. HILDEBRAND: Right. Yeah.

24 THE COURT: Let me ask you this
25 question. Have you had a chance to see or review

1 any of these?

2 MR. HILDEBRAND: No, sir. They've
3 been sitting there all week. I don't know --
4 didn't know what they were going to do with
5 them --

6 THE COURT: Yeah.

7 MR. HILDEBRAND: -- or anything.
8 They hadn't given any notice what they were going
9 to do, and I don't know what pay apps there are.

10 MR. BUNDY: I printed out every
11 single page of every single one and we'll go
12 through every single piece of paper. We'll do it
13 that way.

14 THE COURT: Well, I'd rather not do
15 it that way, but what can we do to expedite this
16 process?

17 MR. HILDEBRAND: Your Honor, I'm
18 not an obstructionist, and I'm not here to waste
19 the Court's time.

20 THE COURT: Sure.

21 MR. HILDEBRAND: If they want to --
22 I don't even know -- gosh, I'm just trying to
23 figure out like a wise way or in an economical
24 way to do this. I mean, we produced most of
25 these pay apps, so I'm just -- if you're not

1 going to tolerate it, then I sure don't want to go
2 through them page by page. That's ridiculous.

3 THE COURT: Right.

4 MR. HILDEBRAND: And so if he will
5 represent to me, as an officer of the Court, that
6 these are copies of the full apps, then maybe
7 that's all we need. Maybe I need to talk to my
8 counsel. We need to figure out what it is that
9 we're talking about.

10 So we're talking about -- you want to
11 introduce into evidence full pay apps for number
12 1 to number 45?

13 MR. MCDONALD: Well, some of them
14 are already in evidence. So this is only going
15 to be 1 through 34, then 37, and then 43, 44, 45,
16 which I understand the first few pages you put
17 into evidence.

18 MR. HILDEBRAND: And what you are
19 representing that you've got there, the ones that
20 you do want to do, which are 1 through 37 and
21 then 43, 44, 45, you want to introduce the full
22 copies and all the backup?

23 MR. MCDONALD: Yes. And I can lay
24 a little foundation for this, if you want, Your
25 Honor. It might make this very quick.

1 THE COURT: I don't want to be the
2 person that has to upload all that stuff, but
3 anyway, let me ask this question: Is there any
4 question, but that the pay apps were submitted,
5 the pay apps were documented, the pay apps were
6 paid up until we got to 43, 44, and 45? Is there
7 any issues on those?

8 MR. TERRY: Yes. So the short
9 answer is yes.

10 THE COURT: Okay. All right.
11 Well, those will have to -- go ahead, if you want
12 to have a second with Mr. Hildebrand.

13 MR. MCDONALD: Sure, sure.

14 THE COURT: Y'all can do that.

15 (A recess transpired.)

16 THE COURT: All right.

17 Mr. McDonald, let's go back on the record.

18 MR. HILDEBRAND: So what I would
19 propose is, again, if Mr. McDonald has
20 identified -- it sounds like he's introducing
21 full copies of 1 through 37, and then full copies
22 of 43 through 45.

23 Brent, is that right, or are you just
24 going to allow what we have done for those?

25 MR. MCDONALD: No, 1 through 34.

1 MR. HILDEBRAND: 1 through 34 are
2 full copies.

3 MR. MCDONALD: 37.

4 MR. HILDEBRAND: 37. Okay.

5 MR. MCDONALD: And then 43, 44, and
6 45.

7 MR. HILDEBRAND: And then they're
8 full -- those are full copies of all of those?

9 MR. MCDONALD: Yes.

10 MR. HILDEBRAND: Okay. All right.
11 Well, if he will represent that those are copies
12 of the full pay applications that we provided,
13 I'll have to take him on his word on that at this
14 point, subject -- I'm not saying that we are
15 going to review all of them, page by page.

16 But if we discover some issue, that we
17 can inform the Court -- and I'm sure it would be
18 accidental or whatever -- that we would be able
19 to -- if there is some issue with one of them
20 that is discovered, that we can bring that up to
21 the Court?

22 THE COURT: Sure. I'm glad to do
23 that. Are you agreeable to that?

24 MR. MCDONALD: Yes, just two quick
25 things, I think, that may put this to bed.

1 THE COURT: Okay.

2 BY MR. MCDONALD:

3 Q. Ms. Brown, did you make notebooks of
4 your -- the pay applications as they were
5 submitted from Balfour Beatty to you?

6 A. Yes.

7 Q. Okay. Are these copies of the notebooks
8 you made from the pay applications as they were
9 submitted from Balfour Beatty to you?

10 A. Yes.

11 MR. MCDONALD: Okay. That's the
12 first one.

13 THE COURT: All right.

14 MR. MCDONALD: The second one is,
15 as it relates -- as I go in and out of these pay
16 applications, what I've tried to do, Your Honor,
17 with some of these other exhibits, is to take the
18 relevant subcontractor and the cover page and
19 shrink it.

20 What I don't want to be is 20 minutes
21 into a back and forth and then say, well, this
22 isn't -- how do we even know this is the right
23 pay application, and I don't have it in evidence.
24 So to maybe dissuade Your Honor's concerns, they
25 will be in evidence, but what we're going through

1 will be a lot skinner, if that helps.

2 THE COURT: That sounds like a
3 great idea to me. Are you okay with that one,
4 subject to your chance to review it, certainly.

5 MR. HILDEBRAND: Right. And just
6 for clarity, these are the pay apps just as they
7 were received --

8 MR. MCDONALD: Yes.

9 MR. HILDEBRAND: -- from Balfour?

10 MR. MCDONALD: Yes, the ones I just
11 put in.

12 MR. HILDEBRAND: So nothing has
13 been added from her side? She got them, and then
14 added this document or changed some of her
15 notes or --

16 MR. MCDONALD: No.

17 MR. HILDEBRAND: Fair enough.

18 MR. MCDONALD: No. And they would
19 be Defendant's Exhibits 106 through 143.

20 (DFT. EXH. 106 through 143 were
21 marked for identification and received in
22 evidence.)

23 MR. HILDEBRAND: All right. Well,
24 let's get that straight. So 1 through 34 -- I'm
25 sorry. 1 through 34, 37 and 43 and 45. So they

1 would be defendant's, I'm sorry, again what?

2 MR. MCDONALD: 106 through 143.

3 MR. HILDEBRAND: So 106 to 139

4 would be 1 through 34?

5 MR. MCDONALD: Yes.

6 MR. HILDEBRAND: Okay. And then 40

7 would be 37?

8 MR. MCDONALD: Yes.

9 MR. HILDEBRAND: And then 141

10 through 143 would be 43, 44 and 45?

11 MR. MCDONALD: Yes.

12 THE COURT: All right. Mr. Terry

13 you had a question?

14 MR. TERRY: Maybe Mr. McDonald can
15 explain this, but the shrinking down, I didn't
16 follow that, so I just want to make sure I don't
17 have some objection here based on Watson as the
18 subcontractor.

19 MR. MCDONALD: All I meant was, as
20 we go through it, it's not going to be as bulky
21 as handing them out. There's already exhibits
22 that are in evidence that are cover pages of pay
23 applications that I can probably use to make my
24 point.

25 But if I can't, then I have the folder I

1 can make my point with, or if I draw an
2 objection, I have the folder I can make my point
3 with. That's all.

4 THE COURT: If the objection is not
5 complete?

6 MR. MCDONALD: That's exactly
7 right.

8 THE COURT: Okay. All right.

9 MR. MCDONALD: Okay.

10 THE COURT: You wouldn't want to
11 cut through a couple of these? Do you want to
12 look through them and we will take a break?

13 MR. MCDONALD: Yes. I wasn't going
14 to go into the pay applications at this point,
15 but --

16 THE COURT: Even better.

17 MR. TERRY: I was just going to
18 finish her role, and then we're going to get into
19 the RCOs, which I can start tomorrow because
20 they -- as we go through them, it's going to
21 be --

22 THE COURT: Okay. All right.

23 MR. MCDONALD: So in addition to
24 this, probably 10 minutes.

25 THE COURT: Okay. That's fine.

1 BY MR. MCDONALD:

2 Q. All right. So we talked about the
3 review of pay applications. We talked about the
4 review of change orders. We talked about your
5 role at the monthly OAC meetings and your role at
6 the -- what we'll call the RCO meetings, right?

7 A. Yes.

8 Q. What other duties did you have during
9 the construction of Hotel Bennett?

10 A. That's probably about it.

11 Q. Okay. And did you interface with
12 Mr. Clements?

13 A. Yes, all the time.

14 Q. Okay. And tell me about how that
15 process worked. He said he was on site once a
16 week. Did you go with him?

17 A. Not typically. He would go to the site,
18 usually get there really early in the morning
19 since he came in from Georgetown, and then either
20 would give us a call afterwards, or he would come
21 to the office and see us and kind of report what
22 he found afterwards.

23 Q. Okay. And were you his kind of main
24 contact at Bennett Hospitality or Library
25 Associates?

1 A. Yes.

2 Q. Okay. And did you have a main contact
3 at Balfour?

4 A. We kind of interfaced with both Tim
5 Spano, Dave Stanton at the time. But there was
6 no main contact with Balfour.

7 Q. Well, let me ask it this way. If you
8 had a Balfour question, a question that Balfour
9 needed to answer, was it more typical that you
10 would pick up the phone and call Mr. Clements and
11 say, Jim, I don't understand this, this, and
12 this, can you go figure it out, or would you
13 contact Balfour directly?

14 A. I would typically go through Jim.

15 Q. Okay. So Jim undoubtedly had the most
16 interfacing with Balfour?

17 A. Yes.

18 Q. Okay. And in those atypical times where
19 you didn't go through Jim, do you recall what
20 those were?

21 A. Not off the top of my head.

22 Q. And you said it was usually Mr. Spano or
23 Mr. Stanton?

24 A. Stanton at the time, but there was --
25 you know, if we were walking through the site,

1 and, you know, we might have some questions.

2 Mr. Dooley might have been there and
3 maybe Mr. Starcevic. But he was usually -- Mr.
4 Starcevic was usually in the office. I didn't
5 communicate with him as much as Mr. Spano or
6 Stanton on the site.

7 Q. Okay. Did you have any role in the
8 review of aesthetics; meaning, this doesn't look
9 right, wanted to change, or whatever it may be?

10 A. Yes.

11 Q. Okay. What was that role?

12 A. You know, just -- I've worked with Mike
13 over the years building 20 hotels, you know, and
14 knew what we expected as far as the aesthetics of
15 the design. And if I saw something that I didn't
16 think was up to those standards, then, you know,
17 we would let Jim know, and then Jim would give
18 that information to Balfour Beatty.

19 Q. But during construction of the project,
20 did you have any other responsibilities that we
21 haven't yet talked about?

22 A. Well, it was during the construction,
23 the process, but I was -- you know, in the
24 beginning of 2016, we started interviewing
25 management companies for operators. We

1 interviewed Salamander, and we interviewed
2 Charles Towne Management. Maybe that was
3 actually in -- started in 2015.

4 We selected Salamander in the beginning
5 of 2016, and then I worked with the Salamander
6 folks in the legal department and Foster Gaillard
7 to negotiate the management contract.

8 Q. Okay. And briefly, if you would, I'm
9 sure His Honor knows generally, can you describe
10 what the role of the management company would be,
11 Salamander?

12 A. Salamander operates the hotel one
13 hundred percent.

14 Q. Soup to nuts?

15 A. Soup to nuts.

16 Q. Okay. So they staff it?

17 A. They staff it.

18 Q. Do they provide marketing?

19 A. Yes.

20 Q. Do they book the events?

21 A. Yes.

22 Q. And when I say events, because this --
23 spend just a short period of time, if you would,
24 on the fact that this is a full service hotel and
25 events. And I'm using events in a broad sense.

1 A. Yes. And so, typically, in a limited
2 service hotel, you don't have large events. You
3 don't have large meeting space. With the Hotel
4 Bennett, we had a beautiful jewel box ballroom,
5 as Mike would call it, and additional conference
6 space that we would book -- that we could hold
7 conferences up to 500 people or weddings up to 3
8 to 4 or 5, if you will.

9 Q. How did y'all come to select Salamander?

10 A. We knew the president of Salamander, as
11 he had once been the operating partner for the
12 Sanctuary, and we knew of his five-star
13 experience.

14 Q. And who was that?

15 A. His name was Prem Devadas.

16 Q. And he is down in Seattle now, right?

17 A. No. Prem is still the president of
18 Salamander, and he's out of Middleburg, Virginia.
19 Salamander is owned by Sheila Johnson, and he's
20 the president her company. BJ Singh was the
21 general manager of the Sanctuary, and then worked
22 for Prem at the time at the Sanctuary.

23 Q. Okay.

24 A. And he was brought on initially as the
25 general manager of the hotel. He had still

1 retained a house here in Charleston.

2 But he had been the vice president of
3 operations for Salamander and was living in
4 Middleburg and kind of wanted to get back to
5 Charleston and decided to almost kind of --
6 almost take a demotion a little bit from his
7 duties at Salamander to be the general manager of
8 Hotel Bennett.

9 Q. So in addition to the construction side,
10 your role that we talked about, one aspect of it
11 was your involvement in hiring the manager?

12 A. Correct.

13 Q. In this case, Salamander?

14 A. Correct.

15 Q. Okay. And any other role during the
16 construction side?

17 A. I would work with the designers and
18 their FF&E packages and work with the purchasing
19 agent, ADM, to purchase all of the FF&E for the
20 hotel.

21 Q. And that is furniture?

22 A. Fixtures and equipment.

23 Q. All right. Anything else on a broad
24 sense?

25 A. Not that I can think of.

1 MR. MCDONALD: All right. Your
2 Honor, this is probably the time before I go
3 through this, if you want to take a break for the
4 evening.

5 THE COURT: We will just stop there
6 and let's come back -- we'll start back at 9:30
7 in the morning. Any other matters to take up
8 before we break for the day?

9 MR. MCDONALD: No, Your Honor.

10 (The hearing was concluded at
11 4:53 P.M.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Adams, Certified
5 Shorthand Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness whose attached in the
8 foregoing hearing was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but
10 the truth in the within-entitled cause; that said
11 hearing was taken at the time and location
12 therein stated; that the testimony of the witness
and all objections made at the time of the
examination were recorded stenographically by me
and were thereafter transcribed by computer-aided
transcription; that the foregoing is a full,
complete and true record of the testimony of the
witness and of all objections made at the time of
the examination; and that the witness was given
an opportunity to read and correct said hearing
and to subscribe the same.

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

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

Witness my hand, I have hereunto
affixed my official seal on October 15, 2022 at
Charleston, Charleston County, South Carolina

20 _____
21 Jennifer M. Adams
22 Court Reporter And Notary Public
23 My commission expires: 03/15/2032
24
25

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

3 BALFOUR BEATTY CONSTRUCTION,)
 4 LLC,) VOLUME FIFTEEN
) Case No.
 5 Plaintiff,) 2019-CP-10-1108
)
 6 -versus-)
)
 7 LIBRARY ASSOCIATES, LLC; AND)
 METROPOLITAN LIFE INSURANCE)
 8 COMPANY, A NEW YORK CORPORATION)
)
 9)
 Defendants.)

10 -----
 LIBRARY ASSOCIATES, INC.,)
 11)
 Defendant/Third-Party Plaintiff,)
 12)
 -versus-)
 13)
 LITHKO CONTRACTING, LLC; GUY M.)
 14 BEATY, INC.; BERNHARD MMC, LLC)
 GULF STREAM CONSTRUCTION CO.,)
 15 INC; Precision Walls, INC.;)
 PALMETTO AUTOMATIC SPRINKLER)
 16 COMPANY, INC.; ET AL,)
)
 17 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 29, 2021 at 100 Broad Street, Courtroom
 23 2A, Charleston, South Carolina.

24

25

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

2
3 ON BEHALF OF PLAINTIFFS:

4 PARKER POE ADAMS & BERNSTEIN, LLP
5 BY: THOMAS HILDEBRAND, JR., ESQ.
6 BY: ROBERT C. BYRD, ESQ.
7 200 Meeting Street
8 Suite 301
9 Charleston, SC 29401
10 (843) 727-6315
11 Tomhildebrand@parkerpoe.com
12 Bobbybyrd@parkerpoe.com

13 ON BEHALF OF DEFENDANT LIBRARY ASSOCIATES:

14 BUNDY MCDONALD, LLC
15 BY: WALTER H. BUNDY, JR., ESQ.
16 BY: M. BRENT MCDONALD, ESQ.
17 1516 Old Trolley Road
18 Second Floor
19 Summerville, SC 29485
20 (843) 492-0221
21 Walter@bundymcdonald.com
22 Brent@bundymcdonald.com

23 ON BEHALF OF DEFENDANT WATSON ELECTRICAL:

24 SMITH TERRY JOHNSON & WINDLE
25 BY: DON R. TERRY, ESQ.
26 150 Milestone Way
27 Suite C
28 Greenville, SC 29615
29 Dterry@smithterrylaw.com

30 ON BEHALF OF DEFENDANT OLD NORTH STATE & LITHKO:

31 SMITH TERRY JOHNSON & WINDLE
32 BY: STEELE B. WINDLE, III, ESQ.
33 150 Milestone Way
34 Suite C
35 Greenville, SC 29615
36 Awindle@smithterrylaw.com

37

1 ON BEHALF OF DEFENDANT DAVID ALLEN COMPANY:

2 KELLY LAW FIRM, LLC
3 BY: RUSSELL BRITTON KELLY, ESQ.
4 689 King Street
 Charleston, SC 29403
 Britt@kellylawsc.com

5
6 ON BEHALF OF DEFENDANT METROPOLITAN LIFE:

7 BUIST BYARS & TAYLOR, LLC
8 BY: G. HAMLIN O'KELLEY, ESQ.
 652 Coleman Boulevard
 Suite 200
 Mt. Pleasant, SC 29464
9 Hamlin.okelley@buistbyars.com

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 INDEX OF WITNESSES

2 DEFENDANT'S WITNESSES

PAGE

KIM BENNETT BROWN

3 Direct Examination by Mr. McDonald

3587

4
Certificate

3687

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: All right, sir. Good
2 morning. Mr. Bundy?

3 MR. BUNDY: Yesterday I mentioned
4 to you we had an order of preference.

5 THE COURT: Yes.

6 MR. BUNDY: We would ask that you
7 read the 30(b)(6) deposition of Balfour Beatty
8 first.

9 THE COURT: Okay.

10 MR. BUNDY: And then follow that
11 with the subcontractors. We divided the
12 witnesses up into groups, BBC witnesses,
13 subcontractors, et cetera. So if you would just
14 move from the 30(b)(6) of BBC to the
15 subcontractors. And the order they're in is
16 fine.

17 THE COURT: All right. Thank you.
18 Very good. Mr. McDonald?

19 MR. MCDONALD: Thank you very much,
20 Your Honor. May it please the Court.

21 THE COURT: Yes, sir.

22 DIRECT EXAMINATION

23 BY MR. MCDONALD:

24 Q. Ms. Brown, yesterday we left off going
25 over what your role was during the construction

1 of the Hotel Bennett, correct?

2 A. Correct.

3 Q. And we touched on the broad categories
4 and what your duties were and responsibilities,
5 correct?

6 A. Correct.

7 Q. Okay. So where I would like to start
8 today is -- I did a little bit of this with
9 Mr. Dooley, but I want to put application 39 in
10 front of you, which has been -- already in
11 evidence as Defendant's Exhibit 4.

12 And what I would like to do, Ms. Brown,
13 is walk through the organization of the pay
14 application so we can understand how we go
15 through these RCOs. Okay?

16 A. Okay.

17 Q. And it's Defendant's Exhibit 4, and it's
18 in volume one of two of the defendants exhibits.
19 Are you there, Ms. Brown?

20 A. I am.

21 Q. Okay. The first page, can you explain
22 to the Judge the various sections of the AIA
23 document G702? And I'd like to -- you can see
24 where the application number is, correct?

25 A. That's correct.

1 Q. On the top right-hand corner?

2 A. Correct.

3 Q. And then the period for that pay
4 application, in this instance, it's June 1st,
5 2018 to June 30th, 2018, correct?

6 A. Correct.

7 Q. Would you explain to the Judge, just in
8 general terms, given that, how these were
9 submitted to y'all?

10 A. So there was typically an OAC meeting
11 toward the end of each month, and they would
12 account for all of the costs for that month. So
13 this one was probably -- the pay app meeting was
14 probably the very end of June, for all the costs
15 of June 1 through June 30, 2018.

16 Q. Okay. So is it fair to say that this
17 was a monthly process?

18 A. Correct.

19 Q. Okay. All right. And as it comes in,
20 there's some signature blocks here. The first is
21 the signature block of Balfour Beatty, correct?

22 A. That's correct.

23 Q. Okay. And do you know who signs this
24 first -- there's two signatures blocks. There
25 was actually three. There's the Balfour Beatty

1 signature, there's the notary, and then there's
2 the architect's signature?

3 A. Yes. So the representative from Balfour
4 Beatty would sign it, and his signature would be
5 notarized. And then it would be sent to the
6 architect, and the architect would sign it.

7 Q. Okay. And in this case, it was
8 submitted by -- it was signed by Mr. Dooley on
9 July 10, 2018, and it was certified by the
10 architect on July 18 of -- it says 2019, but I
11 guess it would have been '18?

12 A. That's correct.

13 Q. All right. Okay. And can you explain
14 to the Judge what was above Mr. Dooley's
15 signature, what the certification is?

16 A. He certified, to the best of his
17 knowledge, that all the information believed in
18 the work covered by the application has been
19 completed in accordance with the contract
20 documents, and that all amounts have been paid by
21 the contractor for the work for which previous
22 certificate for payment were issued, and payments
23 received from the owner, and that current payment
24 shown here is now due.

25 Q. Okay. All right. Let's flip to the

1 next page. Ms. Brown, what I would like to do is
2 just generally discuss what the various columns
3 are. The first is the original amount. Can you
4 explain to the Judge what that was?

5 A. Yes. That's the original schedule of
6 values amounts that also appeared in the GMP
7 contract.

8 Q. Okay. And then you have change orders.
9 Do you see that?

10 A. Yes.

11 Q. Okay. And how did a request for change
12 order or an RCO --

13 MR. MCDONALD: I'm going to try,
14 Your Honor, not to use acronyms because there's a
15 million acronyms in this.

16 THE COURT: Sure.

17 BY MR. MCDONALD:

18 Q. How does a request for change order turn
19 into an owner change order?

20 A. The request for change orders would be
21 presented to us. We would then sign the request
22 for change order, if we agreed with it, and then
23 Balfour Beatty would take all the signed approved
24 requests for change orders and consolidate them
25 into an owner change order.

1 Q. Okay. So if you look in the column
2 called work description, just as an example, if
3 you go to line 54, that says OCO, owner change
4 order 4, and it included RCO, request for change
5 order, 17R1 and RCO40, correct?

6 A. Correct.

7 Q. Okay. So just because it lines up as an
8 owner change order doesn't necessarily mean that
9 it was -- the owner is the one that originally
10 proposed it, correct?

11 A. That's correct.

12 Q. Okay. And RCOs were eventually -- or
13 request for change orders were eventually rolled
14 into an owner change order, correct?

15 A. Correct.

16 Q. And you can look at this instance, there
17 is owner change order 1 through 14 on this pay
18 application, correct?

19 A. That's correct.

20 Q. Okay. So how it works, just to go over
21 it, is, it would start as a request for change
22 order. If it was approved, it would be included
23 in an owner change order, and then it would
24 ultimately be included in a pay application
25 request?

1 A. Correct.

2 Q. And if approved and certified by the
3 architect, it was then paid?

4 A. That's correct. The requests for change
5 orders weren't certified by the architect even
6 though we had a conversation and she -- or Buck
7 Lindsay had agreed to their entitlement before I
8 would sign it. But the architect did sign and
9 certify the OCO, the owner change order.

10 Q. Okay. So the request for change order,
11 if it was approved by you, you would go ahead and
12 sign it?

13 A. Correct.

14 Q. And then it would go to the owner change
15 order that would be signed by owner, contractor,
16 and architect?

17 A. Correct.

18 Q. Okay. And then it would be included in
19 a pay application?

20 A. Correct.

21 Q. And for that pay application to be
22 funded, it would have to be certified by the
23 architect?

24 A. Correct.

25 Q. Okay. All right. Let's go to the next

1 column entitled budget transfers. What are
2 budget transfers?

3 A. That is where the contractor transferred
4 dollar amounts from the original schedule of
5 values or the change orders up into the schedule
6 of values.

7 Q. Okay. And did the owner have anything
8 to do with budget transfers, or did the
9 contractor come up with that?

10 A. That was the contractor. The owner had
11 nothing to do with that.

12 Q. Okay. And then you have three columns
13 that I'd like to talk about together. The
14 current amount from the previous application in
15 this period, do you see those?

16 A. Yes.

17 Q. Okay. So you have the original amount.
18 The current amount is the new number with the
19 budget transfers and the change orders, correct?

20 A. That's correct.

21 Q. All right. And then you have from
22 previous pay applications, that's money that's
23 already been paid, correct?

24 A. Correct.

25 Q. And then if you're wanting to look, in

1 this instance, it's pay application 39, at what
2 the money they're trying to draw for a given pay
3 application, you would look at this period,
4 correct?

5 A. That's correct.

6 Q. All right. Okay. Now, this is
7 important, so I want to go slow through this.
8 This period --

9 MR. HILDEBRAND: Objection, Your
10 Honor. It's your determination what's important,
11 so I think that's --

12 MR. MCDONALD: I will withdraw it.

13 BY MR. MCDONALD:

14 Q. This period, the funds that are listed
15 in this, are they inclusive of retainage?

16 A. Under the total completed and stored to
17 date?

18 Q. No. Just the this period column?

19 A. Yes.

20 Q. Okay. So the retainage doesn't get
21 taken out of that number until you get all the
22 way to the right-hand side of retainage, correct?

23 A. Correct.

24 Q. Okay. And then let's go back to the
25 first page briefly, and if you look, the way to

1 determine how much the contractor is asking for
2 is line 8, current payment due, and then the
3 amount certified, correct?

4 A. Correct.

5 Q. That's the check that's going to be cut
6 to them?

7 A. That's correct.

8 Q. Okay. Before we get into the request
9 for change order notebook, as submitted by
10 Balfour Beatty, can you explain to the Judge how
11 the request for change orders were submitted to
12 you throughout the project by the contractor?
13 We're done with that.

14 A. As I stated yesterday, in the beginning
15 they would give them to Jim, and then Jim would
16 bring them to me to review. During about 2016, I
17 believe, we decided to have usually bimonthly RCO
18 meetings.

19 At those meetings, Mr. Dooley would be
20 there, Mr. Starcevic. In the beginning,
21 Mr. Stanton, and when Mr. Stanton left the
22 company, Mr. Simonton would attend, and Tim Spano
23 would attend. Jim Clements would be there. We
24 would typically have the architect on a
25 conference call along with the interior designer

1 on a conference call.

2 Balfour Beatty would present to us
3 during the weekly meeting what RCOs they wanted
4 to get approved at the time. They were never in
5 sequential order, never in date order. It was
6 just the ones that they determined that they
7 wanted to get us to approve during that week.

8 Q. Okay. Not to cut you off, but -- so the
9 RCOs each had -- or the request for change orders
10 each had a number associated with it?

11 A. That's correct.

12 Q. And when you say they weren't presented
13 in sequential order, what do you mean?

14 A. I mean, we might get RCO 100 one week,
15 and the next week, we might get RCO number 49.
16 So they were never -- so it was not given to us,
17 RCO 1, 2, 3, 4. It was always whatever they
18 determined that they wanted to present to us that
19 week.

20 Q. Okay. And did the request for change
21 orders include backup or supporting materials?

22 A. Typically, they would have some backup
23 from the subcontractors, yes.

24 Q. Okay. And did you all ever have
25 occasion, if there wasn't sufficient backup, to

1 request additional backup?

2 A. Absolutely.

3 Q. Okay. And explain to the Judge, when a
4 request for change order has an R and then a
5 number, what that means?

6 A. That means that the -- there was a
7 revision from the previous change order. It was
8 change RCO number 1, for example, and then you
9 might have RCO 1R or RCO 1R1. That was revision
10 one. Some of them had -- you know, R2 might have
11 been the second revision of that change order.

12 Q. Okay. Did the request for change
13 orders -- how is that broken down as it related
14 to money and time?

15 A. Typically, there would be a cover letter
16 or cover sheet requesting money, and if there was
17 any time, that it would be in that cover sheet.
18 And then there was the -- some of the
19 subcontractor backup as well.

20 Q. All right. And you were personally
21 involved in reviewing these requests for change
22 orders as they were submitted by the contractor?

23 A. Yes.

24 Q. Okay. All right. If you would,
25 Ms. Brown, to your -- I can grab it for you.

1 Right here is Plaintiff's Exhibit 12. Do you
2 recognize that notebook?

3 A. I do.

4 Q. Okay. And what do you recognize it to
5 be?

6 A. These are the RCOs, or the potential
7 RCOs that were noted on Balfour Beatty's claim.

8 Q. Okay. And this folder is already in
9 evidence, correct?

10 A. Correct.

11 Q. And were you present when Mr. Starcevic
12 testified about these various RCOs?

13 A. Yes, I was.

14 MR. MCDONALD: Okay. Your Honor, I
15 also have Plaintiff's Exhibit 329. It's been
16 blown up. You may recognize it. We discussed it
17 yesterday. I will refer to it.

18 MR. HILDEBRAND: I'm sorry, it's
19 number 329?

20 MR. MCDONALD: 329.

21 THE COURT: I'm trying to remember.
22 That's Defendant's Exhibit?

23 MR. MCDONALD: Plaintiff's Exhibit
24 329.

25 THE COURT: Plaintiff's 329. Okay.

1 BY MR. MCDONALD:

2 Q. Ms. Brown, do you see a column on
3 Plaintiff's Exhibit 329 for request for change
4 orders?

5 A. There is a column there, yes, but it's a
6 little too far away.

7 Q. It's a little too far. All right. Does
8 the Plaintiff's Exhibit 329 have an RCO column?

9 A. Yes. It's the one in blue.

10 Q. Blue. Okay. Now, have you spent any
11 time going through Plaintiff's Exhibit 12?

12 A. I have, yes.

13 Q. Do the numbers in Plaintiff's Exhibit 12
14 correlate to the numbers in this column?

15 A. No.

16 Q. Okay. So if you add up all these
17 numbers, it doesn't match this number?

18 A. Correct.

19 Q. And when I say this number, I mean the
20 total RCO of the column, \$2,306,397?

21 A. Correct.

22 Q. That number on Plaintiff's Exhibit 329
23 does not add up to what's in Plaintiff's
24 Exhibit 12?

25 A. Correct.

1 Q. Okay. Let's go through Plaintiff's
2 Exhibit 12, if you don't mind. The first is, in
3 Plaintiff's Exhibit 12, is there a request for
4 change order from Balfour Beatty wherein Balfour
5 Beatty requests for themselves, \$1,019,127.49?

6 A. No.

7 Q. It's not in there?

8 A. Not at all.

9 Q. Did Library Associates ever receive a
10 request for change order from Balfour Beatty for
11 itself in the amount of \$1,019,127.49?

12 A. No.

13 Q. And it appears to be almost half of the
14 total, correct?

15 A. Correct.

16 Q. And did Balfour Beatty actually
17 personally, or as an institution, physically
18 perform any work out there?

19 A. No.

20 Q. They were the construction manager?

21 A. Correct.

22 Q. On Plaintiff's Exhibit 329, they want
23 virtually half of the request for change orders;
24 is that right?

25 A. Correct.

1 Q. And once again, y'all never received a
2 request for change order in the amount of
3 \$1,019,127.49, correct?

4 A. Correct.

5 Q. And having never received it, it's also
6 not in Plaintiff's Exhibit 12?

7 A. Correct.

8 Q. Okay. Let's look at the first one in
9 Plaintiff's Exhibit 12, RCO 27. Are you there?

10 A. Yes.

11 Q. All right. And what is the date of that
12 request for change order?

13 A. January 13th, 2016.

14 Q. And what is it for?

15 A. It's a request for time and cost from
16 the thousand-year storm delay. I know that there
17 was previous testimony calling it a hurricane,
18 but this was not a hurricane. This was the
19 thousand-year storm.

20 Q. And on the one that's included in
21 Plaintiff's Exhibit 12 and brought before this
22 Court, is there money requested?

23 A. Yes.

24 Q. How much?

25 A. A total of \$124,089.19.

1 Q. All right. And what is the backup for
2 that?

3 A. There is no backup invoices for that.
4 They say it's 115,969.21 for the thousand-year
5 storm and 2,383.15 for the 6-inch diesel pump,
6 but there is no other backup.

7 Q. Okay. And do you know whether Balfour
8 Beatty self-performed this work?

9 A. They did not self-perform any work.

10 Q. And once again, this is dated January
11 13th, 2016?

12 A. That's correct.

13 (DFT. EXH. 144 was marked for
14 identification.)

15 MR. MCDONALD: Your Honor, I'm
16 going to hand to the witness for ID purposes,
17 Defendant's Exhibit 144.

18 BY MR. MCDONALD:

19 Q. Do you recognize that document?

20 A. Yes.

21 Q. And what do you recognize it to be?

22 A. This is the actual change order that was
23 approved for RCO number 27.

24 Q. Is it a true and accurate copy of that
25 change order?

1 A. Yes.

2 MR. MCDONALD: Your Honor, at this
3 time, I would move Defendant's Exhibit 144 into
4 evidence.

5 MR. HILDEBRAND: No objection, Your
6 Honor.

7 THE COURT: Without objection. All
8 right.

9 (DFT. EXH. 144 was received in
10 evidence.)

11 BY MR. MCDONALD:

12 Q. All right. And when is this change
13 order dated?

14 A. This change order is dated January 26,
15 2016.

16 Q. So some 13 days after the one that was
17 actually included in the notebook, Plaintiff's
18 Exhibit 12?

19 A. Correct.

20 Q. And does this change order include any
21 money?

22 A. No.

23 Q. So zero dollars, correct?

24 A. Correct.

25 Q. And who is it signed by?

1 A. It is signed by myself and by Jim
2 Clements.

3 Q. And who was it signed by on behalf of
4 Balfour Beatty?

5 A. Tim Spano.

6 Q. And who -- the change order 27 dated
7 January 13th, 2016 that was included in
8 Plaintiff's Exhibit 12, who signed that on behalf
9 of Balfour Beatty?

10 A. Tim Spano.

11 Q. Okay. Did this include -- did the
12 change order that is Defendant's Exhibit 144
13 dated January 26, 2016, is -- does it include any
14 days?

15 A. Yes. It includes 20 days.

16 Q. Okay. So the change order that was
17 actually executed includes 20 days but no money?

18 A. Correct.

19 Q. All right. And you mentioned that
20 Balfour didn't do any of the work that was
21 originally included in the unexecuted change
22 order. Do you know if a subcontractor did that
23 work?

24 A. The site work contractor was Gulf
25 Stream.

1 Q. Gulf Stream?

2 A. Gulf Stream.

3 Q. Okay. Let me see if I can find Gulf
4 Stream up there. Do you still have your copy of
5 Plaintiff's Exhibit 329?

6 A. Correct.

7 Q. Is Gulf Stream getting any RCO money?

8 A. Gulf Stream is not receiving any RCO
9 money.

10 Q. Let me ask you this: If you turn to the
11 change order -- the unexecuted change order,
12 request for change order that was included in
13 Plaintiff's Exhibit 12, it has a thousand-year
14 storm that has a total of 115,969.21, correct?

15 A. Correct.

16 Q. Do you know whether or not y'all paid
17 that money?

18 A. That was agreed to by the parties to
19 come out of the contingency because that was an
20 unforeseen condition, and all the parties agreed
21 to take that money out of the contingency line
22 item.

23 Q. Okay. So the \$115,969.21, that money
24 has actually been paid?

25 A. I believe it's been paid, yes.

1 Q. And has it been paid to Gulf Stream?

2 A. I'm not sure if it's been paid to Gulf
3 Stream or not.

4 Q. Okay. But it's been paid to Balfour
5 Beatty?

6 A. Yes.

7 Q. And they're asking for it again?

8 A. Correct.

9 Q. And this was in 2016?

10 A. Correct.

11 Q. All right. Let's go to the next one.
12 Request for change order 75. Are you there?

13 A. Yes.

14 Q. On the request for change order 75 on
15 Plaintiff's Exhibit 12, what is the date of that
16 request?

17 A. There is no date.

18 Q. Is it signed by Mr. Starcevic?

19 A. It is not signed by Mr. Starcevic.

20 Q. Is there any backup to it?

21 A. There is no backup.

22 Q. Is there any way to determine, by
23 looking at these two pages, that this is a
24 change?

25 A. No.

1 Q. Okay. Let's go to request for change
2 order 88. Are you there?

3 A. I am.

4 Q. Okay. When is this request dated?

5 A. March 7th, 2019.

6 Q. When was the claim submitted to the
7 architect?

8 A. March 6th of 2019.

9 Q. Okay. Do you know when this lawsuit was
10 filed?

11 A. March 5th of 2019.

12 Q. So this request for change order is
13 purportedly dated after the claim that was
14 submitted to the architect and after the lawsuit
15 was filed, correct?

16 A. Correct.

17 Q. Okay. I would like to go through this
18 document in some detail. It's actually signed by
19 Mr. Starcevic; is that right?

20 A. Yes.

21 Q. What I would like to do is turn -- this
22 is request for change order 88R1, correct?

23 A. Correct.

24 Q. And if you turn to the second page of
25 the document --

1 MR. MCDONALD: Your Honor, my copy
2 is printed on both sides. Is your copy printed
3 on both sides, two-sided?

4 THE COURT: It looks like it is.

5 MR. MCDONALD: All right.

6 By MR. MCDONALD:

7 Q. So if you turn to the second page of the
8 document, you see concrete change orders for
9 Lithko; is that right?

10 A. Correct.

11 Q. Okay. And let's look up on Plaintiff's
12 Exhibit 329 and see if Lithko is getting any RCO
13 money. Do you know whether they are?

14 A. Is it the 436,941?

15 Q. So Lithko is in the RCO column at the
16 436,941?

17 A. Correct.

18 Q. Okay. So Balfour Beatty is claiming
19 RCOs for Lithko, correct?

20 A. Correct.

21 MR. MCDONALD: All right. If you
22 would, Your Honor --

23 BY MR. MCDONALD:

24 Q. Ms. Brown, if you would pull out -- it's
25 already in evidence. It's Defendant's Exhibit

1 28.

2 MR. MCDONALD: And I think what
3 we're going to have to do, Your Honor, is to keep
4 these next to each other, 28 and this --

5 THE COURT: 27?

6 MR. MCDONALD: And our request for
7 change order 88 in Plaintiff's Exhibit 12.

8 THE COURT: Okay.

9 BY MR. MCDONALD:

10 Q. It's right here, Ms. Brown. So do you
11 recognize Defendant's Exhibit 28?

12 A. Yes, I do.

13 Q. Okay. And what do you recognize it to
14 be?

15 A. This is a change order to Lithko from
16 Balfour Beatty. Yeah, change order number 34.

17 Q. Okay. And let's get some basics down
18 first. When is this change order dated?

19 A. There's no date on the front page, but
20 it's accepted by Lithko on March 14th, 2019 and
21 signed by Balfour Beatty on April 9, 2019.

22 Q. Okay. So it was accepted by Lithko
23 some -- one week after Mr. Starcevic submitted a
24 request for change order 88R1, which is included
25 in Plaintiff's 12; is that right?

1 A. Correct.

2 Q. Okay. And then it's signed by Balfour
3 Beatty, Mr. Starcevic, on April 9th of 2019,
4 correct?

5 A. Correct.

6 Q. All right. And the first thing I would
7 like to do, Ms. Brown, is go through -- if we're
8 on the third page of request for change order 88
9 and Plaintiff's Exhibit 12, what I would like to
10 do is see if the amounts that are included in
11 this change order or request for change order are
12 also included in Exhibit 28. Okay?

13 A. Okay.

14 Q. All right. So \$407.39, is that on --
15 for RFI 466. Is that on Defendant's Exhibit 28?

16 A. Yes, it is.

17 Q. Okay. \$3,902.24, is that on the
18 Plaintiff's Exhibit?

19 A. Yes, it is.

20 Q. Okay. And this says L and M for last
21 minute changes on L2, correct?

22 A. Correct.

23 Q. Okay. All right. \$3,203.61, is that
24 also on Defendant's Exhibit 28?

25 A. Yes, it is.

1 Q. Okay. For three PTB for steel changes?

2 A. Correct.

3 Q. Okay. \$2,708.25, is that also on

4 Defendant's Exhibit 28?

5 A. Yes, it is.

6 Q. \$3,810?

7 A. Yes, it is.

8 Q. \$7,127.43?

9 A. Yes.

10 Q. \$1,552.50?

11 A. Yes.

12 Q. \$1,620.19?

13 A. Yes. It's back on the front page.

14 Q. \$1,456.99?

15 A. Yes.

16 Q. \$783.04?

17 A. Yes.

18 Q. \$1,854.91?

19 A. Yes.

20 Q. \$17,383.83?

21 A. Yes.

22 Q. \$7,410.66?

23 A. Yes.

24 Q. Okay. And then they're claiming here in

25 Plaintiff's Exhibit 12, \$53,221.04, correct? And

1 there's a markup for a total \$56,414.30, right?

2 A. Correct.

3 Q. Okay. Now, let's go back to Defendant's
4 Exhibit 28. Do you see the amounts that are in
5 the parentheses?

6 A. On Exhibit 28, I see those, yes.

7 Q. Okay. Do you know what those are for?

8 A. Those appear to be credits or back
9 charges that Balfour is back charging Lithko for.

10 Q. Okay. Do you see any of those back
11 charges on request for change order 88 as it's
12 included in Plaintiff's Exhibit 12?

13 A. No.

14 Q. And what's the total of change order 34,
15 Defendant's Exhibit 28?

16 A. It's a negative 7,985.08.

17 Q. Let's go to the verbiage on Plaintiff's
18 Exhibit 28 under the chart that we just looked
19 at. The first asterisks, will you read that to
20 the Judge, please?

21 A. This change order represents full
22 settlement on any known internal change orders
23 between Lithko and Balfour Beatty.

24 Q. Okay. So as it relates to Lithko and
25 Balfour Beatty, they're done?

1 A. Correct.

2 MR. HILDEBRAND: Objection, Your
3 Honor. She can't -- she can read this document,
4 but Mr. Starcevic --

5 THE COURT: I'll sustain that,
6 yeah, okay.

7 BY MR. MCDONALD:

8 Q. All right. Let's go on. Read the
9 second asterisk, if you would, please.

10 A. This change order includes DD design
11 related change orders, specifically including
12 CI's number 3049 through 3056, 0734 through 0736,
13 0738 through 0741 that are part of the claim
14 against the owner design team.

15 Balfour Beatty has agreed to include
16 these change order requests upon execution of
17 this change order, and in return, will receive
18 the first \$100,650.60 of any monies recovered
19 from the aforementioned claim.

20 Q. Let me stop you there. Was Library
21 Associates aware of this --

22 A. No.

23 Q. -- exhibit, Defendant's Exhibit 28 --

24 A. No.

25 Q. -- at the time that it was executed?

1 A. No.

2 Q. So what this says is, Balfour Beatty is
3 going to submit the change orders we just went
4 over, right?

5 MR. HILDEBRAND: Objection, Your
6 Honor. He's -- the document speaks for itself.
7 He can have her read it and -- but otherwise, the
8 leading questions and his asking for an
9 interpretation of this witness, who wasn't a part
10 of the conversations. And, again, Mr. Starcevic
11 testified about this at length. It's cumulative.
12 It's leading, and I --

13 THE COURT: All right. I will
14 sustain the objection as to leading. You can
15 maybe rephrase it.

16 MR. MCDONALD: I will rephrase.
17 BY MR. MCDONALD:

18 Q. Are the amounts that we just looked at
19 and went through that are in change order 88, in
20 Plaintiff's Exhibit 12, included in CI numbers
21 3049 through 3056, 734 through 736, and 738
22 through 748?

23 A. Can you repeat that for me?

24 Q. Yeah. The numbers we just went through,
25 that we -- the amounts we just went through that

1 are included in both request for change order 88
2 and request for -- and you take all the time you
3 need. Request for change order -- or excuse me,
4 Defendant's Exhibit 28, are those amounts also
5 identified as CI numbers 3049 through 3056, 734
6 through 736, and 738 through 741?

7 A. Yes.

8 Q. Okay. So Balfour Beatty agreed to
9 include these change order requests in the claim
10 against the owner; is that right?

11 A. Yes.

12 Q. Okay. At the same time stating, this
13 change order represents full settlement of any
14 known internal change orders between Lithko and
15 Balfour Beatty?

16 A. Correct.

17 Q. Okay. And what Balfour Beatty, in
18 return will receive, is the first \$100,650.60?

19 A. Correct.

20 Q. Where is that depicted on Plaintiff's
21 Exhibit 329?

22 A. It is not.

23 Q. Do you know whether the contract that
24 Library Associates entered into allows for
25 Balfour Beatty to get portions of the

1 subcontractor's claims?

2 A. No.

3 Q. No, you don't know, or, no, it does not?

4 A. No, it does not.

5 Q. How that can be a cost of the work, if
6 Balfour Beatty is getting the money and not
7 paying the subcontractors?

8 MR. HILDEBRAND: Objection, Your
9 Honor, that calls for speculation.

10 MR. MCDONALD: Your Honor --

11 THE COURT: I think that's more --

12 MR. HILDEBRAND: And legal
13 conclusion, Your Honor.

14 THE COURT: I think that's the
15 argument. I will sustain the objection.

16 BY MR. MCDONALD:

17 Q. All right. So Balfour Beatty -- on this
18 document, Balfour Beatty received the benefit of
19 the back charges, correct?

20 A. Correct.

21 Q. And those were not passed along to the
22 owner?

23 A. Correct.

24 Q. Okay. Do you know whether that's
25 allowed under the terms of the contract?

1 MR. HILDEBRAND: Same objection,
2 Your Honor.

3 THE COURT: I'm going to overrule
4 that one. I think she can -- if she knows, she
5 can answer that one.

6 THE WITNESS: No, it was not.

7 BY MR. MCDONALD:

8 Q. Let's go through the backup of this
9 change order 88. All right. About six pages in,
10 there's a CMC change order 28. Do you see that?

11 THE COURT: I'm sorry. Which
12 document are we on now?

13 MR. MCDONALD: We're still on 88,
14 and we're about six pages in. There's a change
15 order from CMC Commercial Metals.

16 BY MR. MCDONALD:

17 Q. Before we leave that, Ms. Brown, do you
18 know what the total of the back charges that
19 Balfour received the benefit of but Library did
20 not was? You relied on Sam to do those numbers?

21 A. Yeah. It's about 200 grand.

22 Q. Okay. Are you there on the CMC change
23 order 28?

24 A. Yes.

25 Q. Okay. And how many times does that

1 change order appear on the backup?

2 A. This particular change order appears
3 three times in this backup.

4 Q. Okay. Now, there's a change order from
5 a Tendon Systems in this backup, the 88?

6 A. Yes.

7 Q. And how many times has that appear?

8 A. That appears twice.

9 Q. Does the amount of back charges that
10 Library did not receive the benefit of, exceed
11 the amount of change order 88?

12 MR. HILDEBRAND: Objection, Your
13 Honor. He's flagrantly leading the witness. He
14 just -- if she knows the answer to a question,
15 you can ask her what the -- what the total is or
16 whatever, but for him to make those legal
17 conclusions and have that leading question, it's
18 improper.

19 MR. MCDONALD: It's just math, Your
20 Honor, and it's not a leading question. There's
21 no other way to ask whether a number exceeds
22 another number. Does the amount of the back
23 charges that we just spent a bunch of times going
24 through exceed the amount of the change order?

25 THE COURT: Okay.

1 MR. WINDLE: Objection, Your Honor.

2 There's no correlation between the amount of the
3 back charge or the owner getting the benefit of
4 the back charge. That may be internal just
5 between the general contractor and the
6 subcontractor. The only benefit the owner gets
7 is that they get the work done at no charge.

8 MR. MCDONALD: Well, if he's going
9 to say that, I would like to respond, Your Honor.
10 This change order is dated March and April of
11 2019. There wasn't a pay application submitted
12 after that. Okay?

13 So they don't actually -- they've been
14 paid the money that they've been paid. They're
15 asking for their full amount of retainage over
16 here, the full amount of retainage. They've been
17 paid their contract amount. Okay?

18 Because this was executed after the pay
19 application, since they're back charging Lithko,
20 the other subcontractor that incurred that cost
21 to make the back charge is still chasing that
22 money as it relates to us. It's twice. The only
23 way we can get to the benefit of the back charge,
24 okay, is if it looked exactly like this, and
25 there wouldn't be any money left over to go to

1 Lithko.

2 What they're doing is saying, all right,
3 we're done vis-à-vis each other, okay, but we're
4 still -- even though we're done because we don't
5 owe you any money because we have these back
6 charges we're asserting against you, we're going
7 to ignore those back charges for the purposes of
8 the claim against the owner.

9 And what we're going to do is, we're
10 going to act like, in Court, that you're going to
11 get that money, that RCO money. We're not going
12 to bring up the back charges. You're not
13 actually going to get it because we're going to
14 get the first \$100,000 of it.

15 But if Your Honor looks at this exhibit,
16 it looks like Lithko is getting that money when
17 they're not. That's all I'm pointing out.

18 THE COURT: Okay.

19 MR. WINDLE: That's a nice legal
20 argument, and that will be contradicted clearly
21 when Lithko testifies.

22 THE COURT: All right. Well, they
23 will be entitled to put that testimony up. I'm
24 going to allow it for now. Go ahead. Overrule
25 the objection.

1 BY MR. MCDONALD:

2 Q. Do you know whether or not the amount of
3 back charges in Defendant's Exhibit 28 exceed the
4 amount of charge order 88?

5 A. Yes, it is.

6 Q. Thank you. Let's go to the next one,
7 request for change order 103. And what is the
8 date of this document?

9 A. December 16th, 2017.

10 Q. Okay. And who is the subcontractor for
11 which the change order is for?

12 A. This states, mechanical revision.

13 Q. Okay.

14 A. And that would Bernhard MCC.

15 Q. Are you able to look at the backup
16 documentation to make that determination?

17 A. Yes, I am.

18 Q. Okay. Has Library Associates agreed to
19 pay Bernhard MCC in settlement of their claims
20 against Library?

21 A. Yes.

22 Q. Okay. And do you know how much Library
23 Associates is paying BMCC?

24 A. Approximately \$650,000.

25 Q. Okay. Now, at the time this was

1 submitted as Plaintiff's Exhibit 12, had Library
2 Associates agreed to make that payment?

3 A. Yes.

4 Q. Next to you is Defendant's Exhibit 34.
5 Could you briefly go to that, Ms. Brown? Do you
6 see it? Can you get it?

7 A. Yes, I got it.

8 Q. Are you there?

9 A. Yes.

10 Q. All right. Now, on Plaintiff's Exhibit
11 329, do they have money up there for Bernhard MCC
12 in the RCO column?

13 A. Yes.

14 Q. And they also have money up there for
15 BMCC in the retainage column, correct?

16 A. Correct.

17 Q. And then they've got interest for it,
18 correct?

19 A. Correct.

20 Q. Do you know whether or not Library
21 Associates has agreed to pay Bernhard its
22 retainage?

23 A. We agreed to pay them \$650,000, yes.

24 Q. All right. I want you to keep
25 Plaintiff's Exhibit 34 open in front of you, and

1 I'm going to hand you Defendant's Exhibit 11. Do
2 you recognize that?

3 A. Yes, I do.

4 Q. All right. And do you understand --
5 what do you recognize it to be?

6 A. This is volume one of the four binder
7 claim presented by Balfour Beatty.

8 Q. Okay. And if you would, go to the
9 section, I believe it's tab 3, and see if you can
10 determine whether or not Bernhard has a claim
11 that's included in that claim notebook? It looks
12 likes it's about half an inch in.

13 MR. HILDEBRAND: Hold up. I think
14 I've got this mixed up. She might be looking at
15 my copy.

16 THE WITNESS: No. This is Exhibit
17 11. It doesn't have your copy on it.

18 MR. HILDEBRAND: Okay.

19 THE COURT: Were you looking for
20 11?

21 MR. MCDONALD: That's exactly
22 right. Defendant's Exhibit 11. It's tab 3 in
23 there and about a half an inch in.

24 THE COURT: December 15th letter?

25 MR. MCDONALD: January 23rd, 2019

1 letter. Defendant's Exhibit 11, volume one of
2 the claim.

3 THE COURT: I found January 9.

4 MR. MCDONALD: January 23rd. It's
5 about that far into tab 3.

6 THE COURT: All right. I think I
7 got it.

8 BY MR. MCDONALD:

9 Q. All right. What I would like to see is,
10 there is a line item -- and this is a claim
11 submitted by Balfour on March 6th of 2019, right?

12 A. Correct.

13 Q. And there's a line item in here for BMCC
14 contract balance.

15 A. Correct.

16 Q. All right. \$137,917.73?

17 A. Correct.

18 Q. Okay. And if you go to the fourth page
19 of that document, page 413?

20 A. Yes.

21 Q. All right. There's a description of the
22 contract balance amount, correct?

23 A. Correct.

24 Q. Okay. And would you read the first
25 paragraph into the record, please.

1 A. On May 24th, 2018, BMCC submitted
2 application for payment number 31 in the amount
3 of \$137,917.73 for work performed on the project.
4 BMCC has not received payment.

5 Q. Okay. All right. BMCC has not received
6 payment?

7 A. Correct.

8 Q. All right. Now, let's go to Exhibit 34
9 that we were just looking at, which is pay
10 application 38. Was pay application 38 funded?

11 A. Yes, it was.

12 Q. It was certified by the architect,
13 correct?

14 A. Correct.

15 Q. And the owner paid it?

16 A. Correct.

17 Q. All right. Let's look at -- go, if you
18 would, in pay application 38, which is
19 Plaintiff's Exhibit 34, and turn to the portion
20 of the pay application that deals with Bernhard
21 MCC.

22 MR. MCDONALD: Your Honor,
23 unfortunately, it's almost smack dab in the
24 middle.

25 THE COURT: Okay. Just found it.

1 MR. MCDONALD: Perfect.

2 THE COURT: Okay.

3 BY MR. MCDONALD:

4 Q. All right. Are you there, Ms. Brown?

5 A. Yes, I am.

6 Q. All right. And what is the pay
7 application for Bernhard MCC?

8 A. Application number 31.

9 Q. And is that the same number 31 that was
10 referenced in the claim that Balfour submitted
11 that BMCC said had not been -- they had not been
12 paid?

13 A. Correct.

14 Q. And what is the amount of that pay
15 application for BMCC?

16 A. Current payment due on line 8 was
17 \$137,917.73.

18 Q. All right. And what was the amount in
19 the claim that Balfour submitted on March 6th,
20 2019 for Bernhard MCC?

21 A. \$137,917.73.

22 Q. Okay. And this is from May of 2018?

23 A. Correct.

24 Q. And Library Associates paid Balfour that
25 \$137,917.73, correct?

1 A. Correct.

2 Q. And why did Library Associates pay
3 Balfour Beatty the \$137,917.73?

4 A. Because we pay certified pay apps that
5 are certified by the architect.

6 Q. Is there anywhere on Plaintiff's Exhibit
7 329 that you-all get a credit for \$137,917.73?

8 A. No.

9 Q. Okay. Do you know whether or not
10 Library Associates has now had to pay that twice
11 to Bernhard?

12 A. Yes.

13 Q. Okay. So Library Associates paid
14 Bernhard in settlement of its claims against it,
15 correct?

16 A. Correct.

17 Q. And Balfour is still in here asking for
18 \$491,386.90?

19 A. Correct.

20 Q. Do you know whether or not that interest
21 calculation takes into account that they've had
22 \$137,917.73 of the owner's money since May of
23 2017?

24 A. It appears that it does not, or it does.

25 Q. All right. Let's go to 118, RCO --

1 request for change order 118, in Plaintiff's
2 Exhibit 12. But before we leave that -- before
3 we go to that, Ms. Brown, in what we looked at
4 earlier was pay application -- we were just
5 looking at pay application 38. What we looked at
6 earlier was pay application 39, correct?

7 A. Correct.

8 Q. If you would just grab that briefly.
9 And this, of course, follows pay application 38,
10 correct?

11 A. That's correct.

12 Q. On the first page of that, is there a
13 certification that all amounts in the previous
14 pay application have been paid?

15 A. Yes, it is.

16 Q. Did Library Associates ever get notice
17 that Balfour Beatty was not going to pay Bernhard
18 MCC that \$137,000?

19 A. No.

20 Q. In fact, they certified on pay
21 application 39 that they had paid?

22 A. Correct.

23 Q. All right. Now, we've got RCO 118.
24 We're done with that. Are you there?

25 A. Yes.

1 Q. Okay. And do you know which
2 subcontractor this request for change order was
3 for?

4 A. This would also be Bernhard MCC.

5 Q. Okay. And once again, Library
6 Associates has agreed to pay Bernhard MCC
7 directly, correct?

8 A. Correct.

9 Q. Okay. All right. Let's go to RCO 122.
10 Are you there?

11 A. I am.

12 Q. All right. And when is this dated?

13 A. November 27, 2017.

14 Q. And can you give the Judge a little
15 background as to what this particular RCO relates
16 to?

17 A. It's for the structural delay claim for
18 level 6, level -- it says level 8 and level 9.

19 Q. Okay. And there was some discussion
20 yesterday and throughout this case about that
21 particular claim, correct?

22 A. Yes.

23 Q. Okay. So is this the request for change
24 order that ultimately was submitted for that
25 issue, the structural issue? I think it's been

1 called a number of different things, but it's
2 level 6, level 7, level 9?

3 A. Correct.

4 Q. All right. And this particular one is
5 November 27th, 2017?

6 A. Correct.

7 Q. Okay. Do you know when the first one
8 was submitted; meaning, our request for change
9 order 122, the original?

10 A. I believe that was in 2016.

11 Q. Okay. And is this the issue that went
12 to -- there was discussion about going to
13 mediation?

14 A. Yes, it is.

15 Q. Okay. And it's signed -- this
16 particular request for change order 122 is signed
17 by Mr. David Stanton. Who is he?

18 A. He was the -- they've got so many
19 titles, I'm not -- the project supervisor. He
20 is -- was in the same role that Mr. Simonton is
21 in at the end of the job, the project exec. I'm
22 not sure.

23 Q. Okay. All right. And on the second
24 page of the document -- actually, it's on the
25 first page, but it's the back side of the first

1 page, there is a breakout of numbers, correct?

2 A. Correct.

3 Q. All right. And it's got BBC general
4 conditions, \$321,255, correct?

5 A. Correct.

6 Q. All right. Is there any backup for that
7 number?

8 A. No.

9 Q. So it's just a number?

10 A. Correct.

11 Q. And then it's got hoisting, staging and
12 logistics for \$119,227?

13 A. Yes.

14 Q. Is there backup associated with that?

15 A. There's some backup, but not the total
16 for that number.

17 Q. Is that the Sunbelt documents?

18 A. Yes, it is.

19 Q. Okay. We'll go through those in a bit.
20 All right. Then it has Lithko at \$383,720; is
21 that right?

22 A. Yes.

23 Q. Okay. Then it has Pasco at \$6,262?

24 A. Correct.

25 Q. All right. Let's talk about Pasco for a

1 second. Who is Pasco?

2 A. Pasco was the sprinkler sub, the fire
3 protection sub.

4 Q. Okay. So we've got Lithko with
5 Defendant's Exhibit 28 that we went through,
6 right?

7 A. Yes.

8 Q. They're first. And we've got Pasco
9 next, correct?

10 A. Correct.

11 Q. All right. I'm going to hand you what's
12 been marked as Defendant's 63. It's already in
13 evidence.

14 MR. MCDONALD: And, Your Honor,
15 this came -- this was in the deposition
16 transcript exhibits; so they're in that stack.

17 THE COURT: Okay. This is tab 15?

18 MR. MCDONALD: Tab 15, yes, Your
19 Honor.

20 BY MR. MCDONALD:

21 Q. Are you there, Kim -- Ms. Brown?

22 A. I am.

23 Q. All right. If you would, go to the
24 final page of that document. Are you there?

25 A. I am.

1 Q. All right. This has a line here. This
2 is Balfour Beatty Construction, and it has a line
3 here, extended general conditions claim. Do you
4 see that?

5 A. On the back page?

6 Q. Yes, ma'am, about halfway down.

7 A. Yes, I do.

8 Q. Okay. And which subcontractor is this
9 for?

10 A. Pasco.

11 Q. Okay. And it has a number of \$113,376,
12 right?

13 A. Yes.

14 Q. All right. And will you read what the
15 comments are?

16 A. It says, added to claim. No backup or
17 explanation provided.

18 Q. And this also has a number of
19 parenthetical numbers on it, too, correct?

20 A. Correct.

21 Q. And what is the total of those? It's
22 right after remove rejected painted heads, at the
23 very bottom.

24 A. Yeah. I --

25 THE COURT: It will add it for you.

1 THE WITNESS: The total of the ones
2 in the parenthetical?

3 BY MR. MCDONALD:

4 Q. Yes.

5 A. Well, the 14 weeks, the negative 14
6 needs to be added to the negative 1233, negative
7 15, negative --

8 Q. Look at the total at the bottom.

9 A. Oh, the very total at the bottom is a
10 negative 107,261.19.

11 Q. Okay. Also on this document, there's
12 a -- on the second and third -- the first page,
13 it says, tab 14. It's the second, third and
14 fourth page is a Balfour Beatty subcontractor
15 status report, right?

16 A. Correct.

17 Q. And it shows an open amount of
18 \$19,554.19, correct?

19 A. Correct.

20 Q. Next, going back to 122, the next is
21 BMCC?

22 A. Yes.

23 Q. For \$35,782?

24 A. Yes.

25 Q. And the owner has agreed to pay BMCC,

1 correct, Library?

2 A. Correct.

3 Q. And the next is Watson Electrical in
4 \$99,008?

5 A. Correct.

6 Q. All right. And is Watson Electrical
7 getting any RCO money up here on Plaintiff's
8 Exhibit 329?

9 A. No.

10 Q. All right. Let's turn to the next page,
11 which is the Balfour Beatty Construction page,
12 correct?

13 A. Yes.

14 Q. And this is -- this again identifies
15 what we just looked at on the previous page and
16 then breaks out what the markup is, correct?

17 A. Correct.

18 Q. Okay. And then, if we go to the next
19 page, which is the back side of the Balfour
20 Beatty page, what is that?

21 A. That is the -- it's just a subcontractor
22 scope fee for Lithko.

23 Q. Is there any dates on that document?

24 A. The only dates is the one at the very
25 top, November 27, 2017.

1 Q. Okay. So this is a delay claim that
2 doesn't actually identify any dates? Is that
3 what this is?

4 A. It has no dates, correct.

5 Q. Ms. Brown, I'm going to hand you what is
6 Defendant's Exhibit 69. Do you have that?

7 A. Yes.

8 MR. MCDONALD: It's in the
9 deposition.

10 THE COURT: Okay. Thank you.

11 BY MR. MCDONALD:

12 Q. And do you recognize the first page of
13 this document?

14 A. Yes.

15 Q. What do you recognize it to be?

16 A. This is the Balfour Beatty pay app
17 number 18 for period, September 1st, 2016 to
18 September 30th, 2016 to Library Associates.

19 Q. Okay. And was this pay application
20 funded?

21 A. Yes, it was.

22 Q. Okay. Funded by the owner?

23 A. Yes.

24 Q. Okay. And if you turn to the third page
25 of Exhibit 69, there's a Lithko pay application.

1 A. Yes.

2 Q. And that's for the same period,
3 September of 2016, correct?

4 A. Correct.

5 Q. All right. And if you turn to the final
6 page of this document, do you recognize that?

7 MR. MCDONALD: It's Defendant's
8 Exhibit 69, Your Honor.

9 THE WITNESS: Yes.

10 BY MR. MCDONALD:

11 Q. What do you recognize it to be?

12 A. This is the subcontractor lien waiver.

13 Q. Okay. And would you read -- and the
14 line where it starts, see Exhibit A, would you
15 read that into the record, the first paragraph?

16 A. Yes. See Exhibit A attached hereto,
17 parentheses, the property, end parentheses.

18 On account of labor and services
19 performed and/or material furnished for the
20 construction of any improvements thereon, except
21 for retention and open change order requests,
22 claims, or disputes identified as follows, none.

23 Q. Okay. None is entered in after any open
24 change order requests, claims, or disputes?

25 A. That's correct.

1 Q. Okay. And go to the second paragraph,
2 second sentence.

3 A. That this is a waiver of all lien rights
4 and other claims which lienor has against the
5 property, the contractor and the owner for all
6 labor, material, and services performed
7 therein -- thereon, including all extras and
8 change orders, that all labor is retained or
9 employed by the lienor, construction or
10 improvements on the property.

11 All suppliers and subcontractors of
12 lienor who have furnished labor, material, and
13 services for the undersigned for the construction
14 of the improvements on the property, and all
15 labor, services, and materials used by the
16 undersigned in construction of said improvements
17 will be paid in full for the work performed and
18 materials supplied up to and including the 30th
19 day of September of 2016, including the items
20 identified --

21 Q. Excluding. Excluding.

22 A. Excluding the items identified
23 hereinabove, if any.

24 Q. Were any items identified hereinabove?

25 A. No.

1 Q. Okay. So through the 30th day of
2 September 2016?

3 A. Correct.

4 Q. All right. And if we go back to request
5 for change order 122 on Plaintiff's Exhibit 12
6 for Lithko, it doesn't have any dates as to when
7 these claims days are for, correct?

8 A. Correct.

9 Q. Okay. So we go through the undated
10 Lithko backup, and we wind up at some Sunbelt
11 quotes; is that right?

12 A. That's correct.

13 Q. And have you had an opportunity to
14 review these Sunbelt quotes?

15 A. I have.

16 Q. All right. The first one is dated May
17 3rd, 2016.

18 A. Correct.

19 Q. And is that prior to September 30th,
20 2016?

21 A. Yes, it is.

22 Q. And what is this one for?

23 A. This is for scaffolding of Sunbelt. And
24 under scope, it says, Sunbelt Rentals to provide
25 labor and material for two system stair units

1 that will be erected in one each, stair 3 and
2 stair 6.

3 Q. Okay. And then under scope at the
4 beginning of phase one, what does it say it's
5 for? It's the second or third sentence.

6 A. Phase one will be to install the units
7 up to 26 inches high with one landing to the
8 first floor.

9 Phase two will be to continue up with
10 the units after the building is self-sufficient
11 enough to allow the securing of the stair units
12 to the building and provide access to the second
13 floor.

14 Phase three is to complete the units up
15 to 45 feet in height and provide access to the
16 third floor.

17 Q. Okay. So this is a Sunbelt quote from
18 May 3rd, 2016, related to scaffolding on the
19 first, second, and third floor, correct?

20 A. Correct.

21 Q. And it is attached to a request for
22 change order that on its face says it's for the
23 sixth, seventh and ninth floor?

24 A. Correct.

25 Q. And how much is it for?

1 A. \$13,947.98.

2 Q. Right. 13,947.98. Okay. And is this
3 signed?

4 A. No.

5 Q. What is the next Sunbelt quote as backup
6 for this request for change order 122?

7 A. It's dated April 14th, 2016.

8 Q. Is that prior to September 30th, 2016?

9 A. Yes.

10 Q. Okay. And who is it submitted to?

11 A. It is submitted to Balfour Beatty to Bob
12 Cotherman.

13 Q. Okay. And what is it for, under scope?

14 A. Under scope, Sunbelt Rentals to provide
15 labor and materials for 154 linear feet times 10
16 foot high of overhead protection. System
17 scaffolding with aluminum beams and three-quarter
18 inch pressure treated plywood will be used.

19 Q. And where -- what was that? Where was
20 that?

21 A. I believe that was the overhead
22 protection on the King Street side.

23 Q. What is the overhead protection?

24 A. On the sidewalk, covering the sidewalk
25 so people can walk through without being injured.

1 Q. And how much is that for?

2 A. 13,511.54.

3 Q. And is that signed?

4 A. No.

5 Q. What is the next Sunbelt quote that has
6 been attached to the request for change order 122
7 on Plaintiff's Exhibit 12?

8 A. Dated July 21st, 2016.

9 Q. July 21st, 2016. All right. Is that
10 prior to September 30th, 2016?

11 A. Yes.

12 Q. Okay. And what is this for?

13 A. It is also for the overhead protection.

14 Q. And where is it going to be located?

15 A. Under specifications, it says that, this
16 is for overhead protection systems, scaffolding,
17 and layering, single layer of each aluminum
18 beams, OSHA wood planking, and three-quarter inch
19 plywood secured on top directly in front of the
20 garage opening.

21 Q. Where is the garage opening located?

22 A. On Hutson Street.

23 Q. On the ground floor?

24 A. Correct.

25 Q. All right. And how much is this for?

1 A. 3,698.82.

2 Q. Okay. And is this signed?

3 A. No, it's not.

4 Q. All right. The next document is a
5 Sunbelt Rentals -- what is this? What is this?
6 It says reservation. What is this, Kim? The
7 previous ones were entitled quotes.

8 A. Correct. It appears that they've
9 already called to actually reserve this equipment
10 to be delivered to the site.

11 Q. Okay. So this might -- this says page 1
12 of 2, 2 of 2, and then terms and conditions,
13 right?

14 A. Correct.

15 Q. Okay. All right. What is this for?

16 A. This appears to be for an electric man
17 lift, but the job location right under the
18 reservation says, 200 Pier View Drive, Simmons
19 Park.

20 Q. We will get to that in a second. This
21 is for an electric man lift, right?

22 A. Yes.

23 Q. And what is the date out?

24 A. Date out is July 13th, 2016.

25 Q. And what is the estimated return?

1 A. July 18th, 2016.

2 Q. And what is the job number?

3 A. 1 Simmons Park.

4 Q. Okay. And what is the total of this?

5 A. You have to go on page 2 of 2. It is
6 \$1,180.10.

7 Q. Okay. And where did they -- what is
8 this little note here? Were you here when
9 Mr. Starcevic testified?

10 A. I was.

11 Q. Okay. And what is this little note here
12 on page 2 of 2 next to the subtotal?

13 A. Call when driver leaves yard, deliver to
14 Pier View Street side.

15 Q. So they were going to deliver this thing
16 to Pier View Street side?

17 A. Correct.

18 Q. And is Hotel Bennett located on Pier
19 View Street?

20 A. No.

21 Q. All right. The next thing we have is
22 what?

23 A. The next one is gutter systems scaffold
24 quote.

25 Q. From Sunbelt?

1 A. Yes.

2 Q. Okay. All right. And this is dated
3 November 4th, 2016, correct?

4 A. Correct.

5 Q. And what is it for?

6 A. This is to provide top and side
7 protection for two transformers.

8 Q. And where are the transformers located?

9 A. They're on the Hutson -- well, the
10 transformers are actually located between the
11 Hotel Bennett and the Embassy Suites, on the
12 alleyway between the two, going from Marion
13 Square to Hutson Street.

14 Q. On the ground?

15 A. Yes, they're on the ground.

16 Q. Okay. And is this signed or dated on
17 the third page?

18 A. No.

19 Q. All right. And how much is it for?

20 A. 6,187.12.

21 Q. And then the next and final Sunbelt
22 entry is what?

23 A. This one says, quote, dated, June 8th,
24 2016 for a shooting boom forklift and a 2-ton
25 electrical chain hoist and a forklift.

1 Q. And when is the date out for these
2 pieces of equipment?

3 A. June 13th, 2016.

4 Q. And what is the estimated date of
5 return?

6 A. July 11th, 2016.

7 Q. And what is the total of this document?

8 A. 3,173.60.

9 Q. And if we go back to the first page of
10 this document, RCO, request for change order 22,
11 what is the amount -- or it's the first page, but
12 it's the back side of it. It's printed on two
13 sides. What is the amount for the hoisting,
14 staging logistics?

15 A. 119,227.

16 Q. Do you know if these Sunbelt Rental
17 things add up to anywhere close to that?

18 A. No, it doesn't appear to be.

19 Q. All right. The next entry in this pay
20 application or request for change order 22
21 relates to which subcontractor?

22 A. After the hoisting or --

23 Q. After the Sunbelt.

24 A. Oh, sorry. That's Pasco.

25 Q. Pasco. And the total for Pasco is? You

1 will have to look on the front page. It's pretty
2 small, Pasco's.

3 A. \$6,262.

4 Q. Okay. And for their backup, Pasco says
5 they're able to go to 21 days on level 7. Are
6 there any dates associated with that or just
7 days?

8 A. It's just days.

9 Q. Okay. And then it's got -- for those 21
10 days, they can do it in \$3,225.75, right?

11 A. That's correct. Page 4 of 5 says, a
12 project manager for 17 hours and a superintendent
13 for 17 hours.

14 Q. And then they've got 20 days on level 9,
15 right?

16 A. Correct.

17 Q. Okay. Are there any dates on that?

18 A. No.

19 Q. All right. And so for those 40 days,
20 they're looking for \$6,262?

21 A. Correct.

22 Q. The next one is which subcontractor?

23 A. BMCC.

24 Q. Okay. And BMCC -- the owners paid BMCC,
25 correct, directly?

1 A. Correct.

2 Q. Okay. And what is the next
3 subcontractor?

4 A. Watson Electrical.

5 Q. Okay. Let's look at that. Is Watson
6 getting any RCO money?

7 A. No.

8 Q. Okay. It has L6, 20 days and L7 and 9,
9 32 days, right?

10 A. Correct.

11 Q. Now, are there any -- are there any
12 dates on this?

13 A. No, there's not.

14 Q. Just a calculation of man hours, it
15 looks like?

16 A. Correct.

17 Q. Okay. And you would be unable to
18 determine, from the backup documentation, when
19 these dates -- these days were claimed on a
20 calendar year?

21 A. Correct. And there's not even a date on
22 the top of the page.

23 MR. MCDONALD: Okay. I have no
24 idea what time it is. I'm about to switch gears.

25 THE COURT: Do you want take a

1 five-minute break?

2 MR. MCDONALD: Five minutes would
3 be perfect, Your Honor.

4 (A recess transpired.)

5 THE COURT: Okay. All right.

6 Mr. McDonald?

7 MR. MCDONALD: Thank you very much,
8 Your Honor.

9 BY MR. MCDONALD:

10 Q. Ms. Brown, before we broke, we were
11 looking at the Watson backup to RCO, request for
12 change order 122 that's included in Plaintiff's
13 Exhibit 12, and I asked you whether or not in --
14 rather than just saying days, 20 days or 32 days,
15 does it have any actual dates?

16 A. No, it does not.

17 Q. Okay. I hand you what's been marked as
18 Defendant's Exhibit 83.

19 MR. MCDONALD: It is in the stack
20 from the depositions.

21 THE COURT: Deposition stack.

22 BY MR. MCDONALD:

23 Q. Ms. Brown, do you recognize that
24 document?

25 A. This is a pay app from Watson to Balfour

1 Beatty.

2 Q. All right. And it is pay application
3 28?

4 A. That's correct.

5 Q. And it is dated when?

6 A. February 28th, 2018.

7 Q. Okay. And if you could turn to the
8 second of the last page. Do you recognize that
9 document?

10 A. Yes.

11 Q. And this is the same claim lien waiver
12 document that we looked at earlier, just from a
13 different subcontractor, correct?

14 A. That's correct.

15 Q. And what is the date that this one runs
16 through?

17 A. Runs through the 28th day of February
18 2018.

19 Q. And are any items identified on the line
20 for open change order request claims or disputes?

21 A. No, it's blank.

22 Q. All right. Let's go to request for
23 change order 159, the next one in Plaintiff's
24 Exhibit 12. Are you there?

25 A. Yes.

1 Q. Okay. And when is this dated?

2 A. August 21st, 2017.

3 Q. And it proposes to be for FF&E changes;
4 is that right?

5 A. Expanded scope for the FF&E installer,
6 yes.

7 Q. Okay. And the FF&E installer is who?

8 A. Wesley Contracting.

9 Q. Okay. And on Plaintiff's Exhibit 329,
10 do you see Wesley?

11 A. Yes.

12 Q. And are they getting any RCO money?

13 A. No.

14 Q. Okay. Now, on the first page of the
15 August 21st, 2017 document, it says, Wesley's
16 expanded scope, right?

17 A. Yes.

18 Q. And it has 19 entries?

19 A. Correct.

20 Q. Was the work proposed in entries 3
21 through 18 actually done?

22 A. No.

23 Q. Attached to -- it also says, extended
24 storage. Do you see that?

25 A. Yes.

1 Q. Okay. Includes current storage and
2 transportation fees, includes demurrage fees paid
3 by the contractor. It includes a \$40,000
4 allowance. Do you see that?

5 A. Yes.

6 Q. For projected continued storage; is that
7 right?

8 A. Correct.

9 Q. Did you receive anything in addition to
10 this on that allowance?

11 A. No.

12 Q. But we know that allowance of projected
13 continued storage is included in 242,632.32,
14 right?

15 A. Yes.

16 Q. All right. Let's go to the next page.
17 This says -- the first page says, Wesley's
18 expanded scope, right? It's the header for the 1
19 through 19.

20 A. Yes.

21 Q. And you didn't do 3 through 18, right?

22 A. Correct.

23 Q. Is there an attachment to this letter --
24 is there an attachment identified on this letter
25 entitled Wesley's expanded scope of work PDF?

1 A. No.

2 Q. Well, let's look at the second page.

3 What is identified as Exhibit B?

4 A. Oh, I'm sorry. Down at the bottom,
5 under the signature, it says, Exhibit B, Wesley's
6 expanded scope of work.

7 Q. Okay. And was that in Plaintiff's
8 Exhibit 13? Is that actually attached?

9 A. No.

10 Q. Okay. So this is a request for change
11 order in the amount of \$242,000 that includes 16
12 items that weren't done, correct?

13 A. Correct.

14 Q. At one time, purportedly included a
15 document entitled Wesley's expanded scope of
16 work, correct?

17 A. Correct.

18 Q. And they just didn't bother to attach it
19 or can you find it attached to the document that
20 they submitted into evidence?

21 A. No.

22 Q. Okay. Now, there's also an Exhibit D,
23 BBC demurrage invoice. Do you see that?

24 A. Yes.

25 Q. And that's what we looked at earlier.

1 It includes demurrage fees?

2 A. Yes.

3 Q. Is that attached?

4 A. No.

5 Q. Well, let's do it again. Exhibit D, it
6 says it's attached, right?

7 A. It says it's attached, yes.

8 Q. And is it actually attached?

9 A. No.

10 Q. All right. And once again, on Exhibit
11 329, there's no RCO money going to Wesley,
12 correct?

13 A. Correct.

14 Q. Let's go to request for change order
15 161, the next one on there. When was this dated?

16 A. August 26th, 2017.

17 Q. And this is actually signed by
18 Mr. Dooley?

19 A. Correct.

20 Q. And which subcontractors are involved in
21 this change order?

22 A. Precision Walls and BMCC.

23 Q. And is Precision Walls a party to this
24 action?

25 A. No, I don't believe so.

1 Q. Were they at one time a party to this
2 action?

3 A. Yes.

4 Q. Did you pay -- did Library Associates
5 pay Precision Walls?

6 A. Yes.

7 Q. How much did y'all pay them?

8 A. \$75,000.

9 Q. Okay. And they quit after that,
10 correct?

11 A. Correct.

12 Q. And then the other subcontractor is
13 BMCC, correct?

14 A. Correct.

15 Q. And y'all paid -- Library Associates
16 paid BMCC directly, correct?

17 A. Correct.

18 Q. And let's talk about some of this
19 backup. The RCO is dated -- the request for
20 change order is dated August 26th, 2017?

21 A. Correct.

22 Q. All right. The first piece of backup
23 for Precision Walls is dated when?

24 A. September 27th, 2016.

25 Q. So 11 months prior?

1 A. Correct.

2 Q. And what about the next extra work
3 order? When is it dated?

4 A. December 7th, 2015.

5 Q. Okay. So now we're 20 months, something
6 like that?

7 A. Yes.

8 Q. And when's the next attachment?

9 A. 12/14/2015.

10 Q. Okay. When's the next one dated?

11 A. It looks like 1/4/2016.

12 Q. Okay. So 18 or 19 months. All right.
13 Then we've got what?

14 A. 1/25/2016.

15 Q. Okay. And the last one is what?

16 A. July 21st, 2016.

17 Q. Okay. So between 20 months and 11
18 months, prior to the request for change order 161
19 being transmitted to the owner?

20 A. Correct.

21 Q. And the BMCC documents are dated when?

22 A. June 3rd, 2016.

23 Q. Okay. So that's 14 months prior to
24 getting around to you, right?

25 A. Correct.

1 Q. And attached to BMCC is Ferguson
2 documents. Who is Ferguson?

3 A. Ferguson is a plumbing material
4 supplier.

5 Q. Okay. And when is the Ferguson document
6 dated?

7 A. May of 2016.

8 Q. May of 2016?

9 A. Yes.

10 Q. So that's 15 months, something like
11 that?

12 A. Correct.

13 Q. All right. Let's go to request for
14 change order 178 in Balfour's Exhibit 12. When
15 is this change order dated?

16 A. October 10th, 2017.

17 Q. Okay. And which subcontractor is this
18 for?

19 A. It appears to be Wesley.

20 Q. Okay. All right. Is Wesley getting any
21 RCO money?

22 A. No.

23 Q. And it's for \$2,142, right?

24 A. Correct.

25 Q. All right. Let's go to request for

1 change order 184, the next request in Plaintiff's
2 Exhibit 12. Do you recognize this document?

3 A. Yes.

4 Q. And which is dated November 9th, 2017?

5 A. Correct.

6 Q. And which -- what is this for?

7 A. This is for Hurricane Irma prep and
8 recovery.

9 Q. Okay. And did that take place at or
10 about -- did Hurricane Irma come through here in
11 October or November of '17?

12 A. It was September of '17.

13 Q. September of '17. Okay. And we've
14 got -- which subcontractors were in this one?

15 A. Premier Exteriors and First Choice
16 Glass.

17 Q. Okay. Let's see. Is Premier Exteriors
18 getting any RCO money on Plaintiff's Exhibit 329?

19 A. No.

20 Q. And is First Choice Glass a party to
21 this lawsuit?

22 A. No.

23 Q. Do you know if at one time they were?

24 A. Yes.

25 Q. Did they quit?

1 A. Yes.

2 Q. How long ago did they quit?

3 A. I believe it was right at the beginning
4 of 2019.

5 Q. All right. Let's go to Exhibit 212 --
6 or excuse me, request for change order 212 in
7 Plaintiff's Exhibit 12. When is this dated?

8 A. October 19th, 2018.

9 Q. Okay. And what is this for?

10 A. This is for the decorative brackets by
11 Robert Thomas.

12 Q. This comes up a number of times in
13 Balfour's claim, does it not?

14 A. Yes, it does.

15 Q. Can you give the Judge a little history
16 as to what happened as far as Library Associates
17 is concerned related to this issue?

18 A. So the BAR wanted to see the decorative
19 brackets on the mockup wall. The original
20 brackets were fabricated by, I believe it was,
21 Tate Ornamental, which was one of Balfour
22 Beatty's subs.

23 The BAR disapproved those brackets. We
24 asked the BAR if Robert Thomas, a local iron man,
25 could perform the brackets, and so we put Balfour

1 Beatty in touch with Robert Thomas, and they had
2 Robert Thomas do a mockup. The BAR finally
3 approved Robert Thomas' mockup, and so Balfour
4 Beatty then contracted with Robert Thomas to make
5 and install the brackets.

6 Q. Okay. And did Robert Thomas end up
7 filing a lien on the job?

8 A. Yes, he did.

9 Q. Okay. And who paid Robert Thomas to get
10 rid of that lien?

11 A. Library Associates.

12 Q. Paid him directly?

13 A. Yes.

14 Q. And this request for change order 212 in
15 Plaintiff's Exhibit 12 has Robert Thomas for
16 \$20,050, correct?

17 A. Correct.

18 Q. Okay. And then a BBC markup of \$1,203,
19 correct?

20 A. Correct.

21 Q. And if you look at the third page, you
22 can see how those numbers were arrived at,
23 correct?

24 A. Correct.

25 Q. And you actually signed this?

1 A. I did.

2 Q. It's a signed request for change order?

3 A. It is.

4 Q. And you approved it?

5 A. I did.

6 Q. Okay. Now -- and y'all paid Robert
7 Thomas directly?

8 A. We did.

9 Q. But you didn't pay him the full \$20,050,
10 did you?

11 A. No. It was approximately 10,000.

12 Q. Okay. That's how much he liened the job
13 for?

14 A. Correct.

15 Q. You paid him the full amount of his
16 lien?

17 A. Correct.

18 Q. Okay. And this is in Exhibit 212 as an
19 RCO?

20 A. Correct.

21 Q. Excuse me, Plaintiff's Exhibit 12, RCO
22 212, correct?

23 A. Correct.

24 Q. So it's in Plaintiff's Exhibit 12?

25 A. Correct.

1 Q. Does Plaintiff's Exhibit 329 show Robert
2 Thomas getting any RCO money?

3 A. No.

4 Q. Okay. Do you see the \$20,050 anywhere
5 else on this?

6 A. I do. That is in -- under the OCO
7 column, which is in the yellow highlighted area.

8 Q. So the 20,050 is also in the OCO
9 portion?

10 A. Yes, it is.

11 Q. Okay. And then in the open contract
12 balance, they've got \$10,820. Do you see that,
13 for Robert Thomas?

14 A. That's correct.

15 Q. Is that the amount you paid Robert
16 Thomas?

17 A. Approximately, yes.

18 Q. So are they asking for it three times?
19 How many times are they asking for it?

20 A. It looks to be that they were asking for
21 it originally in the RCO. That got signed and
22 put into the OCO, and now also in the open
23 contract balance.

24 Q. Okay. Even though you've already paid
25 the \$10,820?

1 A. Correct.

2 Q. All right. Let's go to request for
3 change order 215 in Exhibit 12. When is this
4 dated?

5 A. August 14th, 2018.

6 Q. August 14, 2018. Okay. And it's signed
7 by Alec Dooley, and which is for Lutron Lighting
8 Control revision, correct?

9 A. Correct.

10 Q. And which subcontractor is involved in
11 this one, RCO 215?

12 A. Watson Electrical.

13 Q. Okay. Is Watson Electrical getting any
14 RCO money up there?

15 A. No.

16 Q. And this request for change order is
17 dated August 14, 2018. When is the Watson
18 Electrical backup dated?

19 A. January 8th, 2018.

20 Q. And does it have backup to itself from
21 Shealy?

22 A. Yes, it does.

23 Q. And when is that dated?

24 A. July 20th, 2017.

25 Q. So Watson's is dated eight months before

1 August 14, 2018, and then Watson's backup is
2 dated 13 months before RCO 215?

3 A. Correct.

4 Q. Let's go to RCO, request for change
5 order 221, Plaintiff's Exhibit 12. Do you
6 recognize that?

7 A. Yes.

8 Q. And what is it?

9 A. It is a change order for some additional
10 tinting on Hope's Window dated February 6th,
11 2018.

12 Q. Is it unsigned?

13 A. Yes.

14 Q. It is not signed by Mr. Starcevic?

15 A. It's signed by Mr. Starcevic.

16 Q. Okay. Is it signed by you?

17 A. No.

18 Q. And who is the subcontractor associated
19 with it?

20 A. Koch also known as Strong Tower.

21 Q. Okay. Is Strong Tower or Koch getting
22 any RCO money?

23 A. No.

24 Q. Are you sure? Take a look at
25 Plaintiff's Exhibit 329.

1 A. I'm sorry. These lines are little. It
2 appears 18,401.65.

3 Q. Do you know whether or not Strong Tower,
4 a/k/a Koch, has asked this Court to be dismissed
5 from the case?

6 A. Yes.

7 Q. Do you know whether they're pursuing the
8 \$18,194.70?

9 A. I know they --

10 MR. HILDEBRAND: That's
11 speculation, Your Honor.

12 A. -- have requested summary judgment. I
13 don't know the exact amount.

14 Q. Okay. Let's go to request for change
15 order 223 in Plaintiff's Exhibit 12. Are you
16 there?

17 A. Yes.

18 Q. Okay. What is the date of this change
19 order?

20 A. There is no date.

21 Q. Is there any backup documentation
22 associated with it?

23 A. There is no backup, and there is no
24 signature.

25 Q. And do you know what subcontractor is

1 involved?

2 A. No.

3 Q. Let's go to request for change order 227
4 of Plaintiff's Exhibit 12. Do you recognize this
5 document?

6 A. Yes.

7 Q. Okay. And when is this dated?

8 A. February 6th, 2018.

9 Q. Are you on 227, Ms. Brown?

10 A. No, I'm sorry. I think what's happened
11 here is they have copied 221 and put it in the
12 tab of 227, but on the back of the page 2, there
13 is actually 227.

14 Q. 221?

15 A. In my copy.

16 Q. May I approach?

17 A. Sure. You have tab number 227. Then
18 you have again 221, the backup for 221, and then
19 you have -- and then on the second page, the back
20 of that, you've got the request for change order
21 227.

22 Q. Well, let's talk about 227.

23 A. Okay.

24 Q. How much is 221 for?

25 A. It was the --

1 Q. Oh, okay. The one we just went through?

2 A. The one we just went through, yes. It
3 looks like it was copied twice somehow.

4 Q. Gotcha. Okay. So now, you're at 227,
5 right?

6 A. Yes.

7 Q. Okay. And you recognize -- this is
8 dated when?

9 A. April 9th, 2018.

10 Q. And do you recognize this request for
11 change order 223?

12 A. Yes.

13 Q. Do you recall it?

14 A. Yes.

15 Q. Okay. Is there any backup associated
16 with it?

17 A. No.

18 Q. Just an e-mail from Mr. Mahoney to
19 Mr. Starcevic?

20 A. Correct.

21 Q. Okay. And what is this request for
22 change order related to?

23 A. For additional storage of -- and
24 handling of the guest bathroom mirrors.

25 Q. Okay. And why are they contending --

1 why is Balfour contending they're entitled to a
2 change order in the amount of \$9,169.01 for
3 additional storage for bathroom mirrors?

4 A. I'm not sure why they feel like they are
5 entitled to that. They were responsible for
6 storing and the installation of the bathroom
7 mirrors.

8 Q. Okay. And were the mirrors used on the
9 project?

10 A. Some of the mirrors were used on the
11 project; some of the mirrors were broken.

12 They were -- Balfour Beatty was also
13 responsible for receiving all goods and checking
14 all goods as they came in to determine if there
15 was any damage to the goods or not. And so it
16 was their responsibility if anything was broken
17 to notify us as soon as they -- quickly so that
18 we could go back to the supplier.

19 In this case, we weren't notified until
20 late 2018 after they had sat in the warehouse
21 for, you know, over -- almost a year, that there
22 were some broken mirrors. And now they're
23 charging us for the storage of the broken mirrors
24 that they didn't tell us that were broken.

25 Q. Okay. Let's go to request for change

1 order 244. Are you there?

2 A. Yes.

3 Q. Okay. And what is this for?

4 A. This is a credit change order for the
5 installation of the light fixtures over the
6 bathroom tubs.

7 Q. Okay. So when you say a credit, so this
8 is money that should go back to Library
9 Associates?

10 A. Correct.

11 Q. All right. And do you see where you get
12 that on Plaintiff's 329?

13 A. No.

14 Q. Do you see where you get your \$1,000 on
15 Plaintiff's 329?

16 A. No.

17 Q. Let's go to request for change order
18 246. Request for change order 246 on Plaintiff's
19 Exhibit 12. When is it dated?

20 A. September 4th, 2018.

21 Q. Do you recall the submission of this
22 request for change order?

23 A. No, I do not.

24 Q. Okay. And do you know what its related
25 to?

1 A. It's related to the millwork in the
2 elevator cabs.

3 Q. Okay. And do you recall what that issue
4 was?

5 A. So Balfour Beatty is responsible for
6 supplying the shop drawings to the -- from the
7 elevator company to the interior designer so they
8 can design the millwork for the elevator cabs.
9 Mr. Starcevic supplied the shop drawing to the
10 designer.

11 They designed the interiors; however,
12 when the elevator cabs were installed, the
13 elevator cabs were not as were -- that were not
14 as described in the shop drawings causing some
15 additional millwork to have to be fabricated and
16 installed.

17 Q. And who was responsible for the shop
18 drawings?

19 A. Balfour Beatty.

20 Q. Let's go to request for change order 249
21 on Plaintiff's Exhibit 12. When is this dated?

22 A. August 10th, 2018.

23 Q. And what is this for?

24 A. Changes to the ballroom walls from block
25 to studs.

1 Q. And who is the subcontractor?

2 A. Premier Exteriors.

3 Q. Is Premier Exteriors getting any RCO
4 money on Plaintiff's Exhibit 329?

5 A. No.

6 Q. Do you even know if this work was done?

7 A. I do not.

8 Q. Request for change order 250, 2-5-0.
9 Are you there?

10 A. Yes.

11 Q. Okay. And when is this dated?

12 A. August 13th, 2018.

13 Q. Okay. And it's signed by Mr. Dooley,
14 correct?

15 A. Correct.

16 Q. All right. And the subcontractor is
17 who?

18 A. First Choice Glass.

19 Q. And is First Choice Glass still in this
20 lawsuit?

21 A. No.

22 Q. Did they quit?

23 A. Yes.

24 Q. The e-mails that are attached to this
25 request for change order 250, when are those

1 dated?

2 A. August 31st and September 1st of 2016.

3 Q. Okay. And when is the request for
4 change order dated?

5 A. August 13th, 2018.

6 Q. Okay. So some two years later?

7 A. Yes.

8 Q. Okay. Let's go to request for change
9 order number 251. Are you there?

10 A. Yes.

11 Q. Okay. And it's dated August 31st, 2018?

12 A. Correct.

13 Q. Okay. And what was the subcontractor
14 associated with this?

15 A. Low Country Case and Millwork.

16 Q. Was this work done?

17 A. Maybe not all of it.

18 Q. But some of it was done?

19 A. Yes.

20 Q. And some of it that was completed would
21 have been a change?

22 A. Yes.

23 Q. Do you know whether or not this RCO 251
24 was ever presented to you?

25 A. No, I don't believe so.

1 Q. All right. And when you said -- you
2 don't believe it was presented to you by Balfour?

3 A. That's correct. And this is not signed
4 by Mr. Dooley either.

5 Q. It's not signed by Mr. Dooley, and it's
6 not signed by you?

7 A. Correct.

8 Q. Okay. Let's go to RCO 253 in
9 Plaintiff's Exhibit 12. 253, request for change
10 order 253 in Plaintiff's Exhibit 12.

11 A. Yes.

12 Q. When is that dated?

13 A. August 14th, 2018.

14 Q. And this is actually signed by
15 Mr. Dooley, correct?

16 A. Correct.

17 Q. And do you recall receiving this?

18 A. I do.

19 Q. Okay. And give us -- tell the Judge a
20 little background as to this request for change
21 order 253.

22 A. The subcontractor, Low County Case and
23 Millwork, their position is this crown work was
24 not in the original drawings, and the interior
25 designers design continuum contend that it was in

1 the original drawings, and it should have been in
2 their original scope.

3 Q. And so it was rejected?

4 A. That's correct.

5 Q. And do you know whether or not -- after
6 it was rejected in or about August 14 of 2018,
7 when was the next time you heard about it?

8 A. After the lawsuit was filed.

9 Q. All right. Let's go to request for
10 change order -- and who is the -- before we leave
11 the request for change order 253, who was the
12 subcontractor?

13 A. Low Country Case and Millwork.

14 Q. Let's go to RCO, request for change
15 order 254 in Plaintiff's Exhibit 12. Now, do you
16 know whether or not Balfour withdrew this request
17 for change order from its claim?

18 A. Yes.

19 Q. Okay. But let's take a look at it. Is
20 there an allowance in request for change order
21 254?

22 A. Yes, there is.

23 Q. And how much is that allowance?

24 A. 50,000.

25 Q. 50,000?

1 A. Yes.

2 Q. Do you see your 50,000 up on Plaintiff's
3 Exhibit 329?

4 A. No.

5 Q. Let's go to request for change order 255
6 in Plaintiff's Exhibit 12. All right. And when
7 is it dated?

8 A. August 31st, 2018.

9 Q. August 31st, 2018?

10 A. Yes.

11 Q. And signed by Mr. Dooley?

12 A. Yes.

13 Q. It's not signed by you, correct?

14 A. Correct.

15 Q. All right. And when is the backup
16 dated?

17 A. December 8th, 2017.

18 Q. December 8th, '17?

19 A. Yes.

20 Q. Some nine months prior?

21 A. Yes.

22 Q. And it says it's to add trim to conceal
23 pocket door header.

24 A. Correct.

25 Q. Do you recall receiving this change

1 order?

2 A. I do not.

3 Q. Is there a picture attached?

4 A. Yes.

5 Q. And can you describe for the Judge what
6 that picture is showing? Well, let me ask you
7 this: Are you familiar with this location?

8 A. I'm not exactly sure what particular
9 room this was taken in, but I'm familiar with
10 what this picture shows.

11 Q. Okay. Explain to the Judge, what does
12 it show?

13 A. It's the pocket doors leading from
14 the -- in the guest room from the hallway into
15 the bathroom. The pocket doors split open, and
16 when they're split open, you can look and see raw
17 wood when you look above.

18 Q. And that's what that picture is
19 depicting?

20 A. Yes. It's showing the raw wood when
21 looking up.

22 Q. Okay. And so what was this change order
23 for?

24 A. It was to conceal that issue.

25 Q. In the original design intent, were you

1 supposed to see the raw wood in that cavity?

2 MR. HILDEBRAND: Objection, Your
3 Honor. She can't comment on design intent. If
4 she wants to look at the drawings, then we can
5 look at the drawings if she's qualified to do
6 that and see whether that was shown on those
7 drawings or not.

8 MR. MCDONALD: I will withdraw it.

9 BY MR. MCDONALD:

10 Q. All right. RCO, request for change
11 order 258, Plaintiff's Exhibit 12.

12 A. Yes.

13 Q. Okay. When is this dated?

14 A. March 28th, 2019.

15 Q. Was that after the claim was submitted
16 to the architect?

17 A. Yes.

18 Q. Is that after the lawsuit was filed?

19 A. Yes.

20 Q. Who were the subcontractors purportedly
21 involved in this?

22 A. It looks likes Merit also known as
23 Quantum Coatings.

24 Q. Okay.

25 A. Remove and reinstall the Hope's door,

1 which would be Strong Tower and Warco.

2 Q. Okay. Let's take a look at some of
3 the -- this request for change order 258 is dated
4 March 28th, 2019?

5 A. '19, yes.

6 Q. And the first piece of backup, when is
7 it dated?

8 A. July 24th, 2017.

9 Q. Okay. So some 20 months, something like
10 that?

11 A. Correct.

12 Q. And Merit Professional Coatings is the
13 same as Quantum?

14 A. Correct.

15 Q. And they've settled?

16 A. Correct.

17 Q. And the next one is Gulf Stream?

18 A. Correct.

19 Q. When is that dated?

20 A. August 17th, 2018. This was for the
21 demo mockup.

22 Q. Okay. So that's seven months prior to
23 getting over to you?

24 A. Correct.

25 Q. Okay. And after the lawsuit was filed?

1 A. Correct.

2 Q. Do you know whether or not Gulf Stream
3 did this work?

4 A. I don't believe they did this work.

5 Q. Who did this work?

6 A. We had to hire CBI to do this work.

7 Q. We've got Deco in here. It's the next
8 piece of backup. Who is Deco?

9 A. I have no idea.

10 Q. So you've got Gulf Stream purportedly
11 demoing the mockups in August of 2018, right?

12 A. Correct.

13 Q. Then you've got Deco showing up on March
14 28th, 2019?

15 A. Correct.

16 Q. And they're demoing the mockups, too,
17 right?

18 A. Correct.

19 Q. But the people that actually demoed the
20 mockups were CPI?

21 A. Yes. We had CPI demo the mockups.

22 Q. Then we've got Quantum?

23 A. Yes.

24 Q. And when is Quantum's invoice dated?

25 A. July 2nd, 2018.

1 Q. Okay. So eight months prior to getting
2 over to you?

3 A. Yes.

4 Q. And Quantum has settled?

5 A. Yes.

6 Q. All right. Then we've got Koch. When
7 is Koch's invoice dated?

8 A. August 6th, 2018.

9 Q. And this is to remove -- furnish labor
10 and materials to remove mockup door from mockup
11 area and install in the building?

12 A. Correct.

13 Q. Is that the Hope's door?

14 A. Yes, that's the Hope's door.

15 Q. Okay. That was done. We know that was
16 done, right?

17 A. That's correct.

18 Q. All right. Then we've got Warco. When
19 is its invoice dated?

20 A. February 7th, 2018.

21 Q. Okay. So that 13 months prior to
22 getting over to you?

23 A. Correct.

24 Q. All right. Let's go to request for
25 change order 259. Do you see that?

1 A. Yes.

2 Q. When is it dated?

3 A. August 30th, 2018.

4 Q. And who is the subcontractor that's
5 claiming this money?

6 A. Gulf Stream.

7 Q. Is Gulf Stream getting any request for
8 change order money?

9 A. No.

10 Q. Do you know whether this was ever paid
11 to Gulf Stream?

12 A. I don't believe it was.

13 Q. Okay. And Gulf Stream has settled,
14 correct?

15 A. Correct.

16 Q. RCO 260, when is this dated?

17 A. March 1, 2019.

18 Q. All right.

19 A. And it's unsigned.

20 Q. It's not signed by Mr. Starcevic, and
21 it's not signed by you, correct?

22 A. Correct.

23 Q. All right. Do you know whether or not
24 this work was done?

25 A. The 88 guest rooms part was -- may have

1 been done. I don't recall as I sit here today.

2 Q. Okay. And Quantum, a/k/a Merit, has
3 settled in this action, correct?

4 A. That's correct.

5 Q. And part of that was direct payment from
6 Library Associates, correct?

7 A. Correct.

8 Q. Okay. 261 has been withdrawn. RCO 261
9 in Plaintiff's Exhibit 12 has been withdrawn.
10 That's the accordion doors. Is that your
11 understanding?

12 A. Correct.

13 Q. And that work was done, correct?

14 A. Correct.

15 Q. They were originally, on day one of this
16 trial, looking for \$71,723.42, right?

17 A. Correct.

18 Q. And then they withdrew it?

19 A. Correct.

20 Q. RCO 262 in Plaintiff's Exhibit 12,
21 request for change order 262. Do you see that?

22 A. Yes.

23 Q. Okay. And when is it dated?

24 A. August 31st, 2018.

25 Q. Okay. And it is for which

1 subcontractors?

2 A. Precision Wall.

3 Q. Is Precision Wall still in this action?

4 A. No.

5 Q. Okay. And did you pay them directly?

6 A. Yes.

7 Q. And they quit, right?

8 A. Yes.

9 Q. And who is the other?

10 A. Watson.

11 Q. All right. Is Watson getting any
12 request for change order money?

13 A. No.

14 Q. All right. And so this is dated -- RCO
15 262, request for change order 262 is dated August
16 31st, 2018, right?

17 A. Correct.

18 Q. All right. And when is the Precision
19 Walls backup dated?

20 A. August 31st, 2017.

21 Q. So that's --

22 A. Exactly one year.

23 Q. Exactly one year. Okay. And then when
24 is Watson's backup dated?

25 A. January 30th, 2018.

1 Q. Okay. So that's about eight months
2 prior?

3 A. Correct.

4 Q. Seven months, something like that.
5 Well, there's two Watson backups, right?

6 A. Yes.

7 Q. Okay. So one is dated January 30th,
8 2018, and when is the other one dated?

9 A. January 29th, 2018.

10 Q. And Watson says their quotes are only
11 good for 30 days, right?

12 A. Correct.

13 MR. MCDONALD: All right. I can
14 stop at this point, Your Honor.

15 THE COURT: Okay. All right. So
16 we're done through 262. It looks like 264 is
17 your next one.

18 Let's go ahead -- it's right at noon.
19 Why don't we go ahead and break for the week. I
20 know y'all have got some logistics you've got to
21 deal with. Those rooms are going to be open
22 downstairs. I would suggest to pick one.

23 MR. BUNDY: I did want to -- just
24 before we break -- we are in -- Grady Query left.
25 He's off the stand. I can talk to him. The same

1 thing is true with Jim Clements, right? He's off
2 the stand. He's done.

3 THE COURT: Yeah. If y'all are
4 done with whatever you've got for them.

5 MR. BUNDY: It means that I can
6 talk to him?

7 THE COURT: Sure. Yeah.

8 MR. BUNDY: He's my witness. Okay.
9 Thank you.

10 THE COURT: And then, Ms. Brown,
11 have a nice weekend.

12 All right. So we will conclude for
13 the week, and we'll start back Monday. We'll
14 come back with Ms. Brown. Of course, that's by
15 way of admonishing, and you're not to speak to
16 anybody, and you're well aware of that.

17 THE WITNESS: Absolutely.

18 MR. BUNDY: All right. Thank you.

19 (The hearing was concluded at
20 12:03 P.M.)

21

22

23

24

25

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Adams, Certified
5 Shorthand Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness whose attached in the
8 foregoing hearing was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but
10 the truth in the within-entitled cause; that said
11 hearing was taken at the time and location
12 therein stated; that the testimony of the witness
and all objections made at the time of the
examination were recorded stenographically by me
and were thereafter transcribed by computer-aided
transcription; that the foregoing is a full,
complete and true record of the testimony of the
witness and of all objections made at the time of
the examination; and that the witness was given
an opportunity to read and correct said hearing
and to subscribe the same.

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

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

Witness my hand, I have hereunto
affixed my official seal on October 19, 2022 at
Charleston, Charleston County, South Carolina

20 _____
21 Jennifer M. Adams
22 Court Reporter And Notary Public
23 My commission expires: 03/15/2032
24
25

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

5 BALFOUR BEATTY CONSTRUCTION,)
 6 LLC,) VOLUME SIXTEEN
 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 10:00 a.m.
 22 on November 1, 2021 at 100 Broad Street,
 23 Courtroom 2A, Charleston, South Carolina.

24

25

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

2
3 ON BEHALF OF PLAINTIFFS:

4 PARKER POE ADAMS & BERNSTEIN, LLP
5 BY: THOMAS HILDEBRAND, JR., ESQ.
6 BY: ROBERT C. BYRD, ESQ.
7 200 Meeting Street
8 Suite 301
9 Charleston, SC 29401
10 (843) 727-6315
11 Tomhildebrand@parkerpoe.com
12 Bobbybyrd@parkerpoe.com

13 ON BEHALF OF DEFENDANT LIBRARY ASSOCIATES:

14 BUNDY MCDONALD, LLC
15 BY: WALTER H. BUNDY, JR., ESQ.
16 BY: M. BRENT MCDONALD, ESQ.
17 1516 Old Trolley Road
18 Second Floor
19 Summerville, SC 29485
20 (843) 492-0221
21 Walter@bundymcdonald.com
22 Brent@bundymcdonald.com

23 ON BEHALF OF DEFENDANT WATSON ELECTRICAL:

24 SMITH TERRY JOHNSON & WINDLE
25 BY: DON R. TERRY, ESQ.
26 150 Milestone Way
27 Suite C
28 Greenville, SC 29615
29 Dterry@smithterrylaw.com

30 ON BEHALF OF DEFENDANT OLD NORTH STATE & LITHKO:

31 SMITH TERRY JOHNSON & WINDLE
32 BY: STEELE B. WINDLE, III, ESQ.
33 150 Milestone Way
34 Suite C
35 Greenville, SC 29615
36 Awindle@smithterrylaw.com

37

1 ON BEHALF OF DEFENDANT DAVID ALLEN COMPANY:

2 KELLY LAW FIRM, LLC
3 BY: RUSSELL BRITTON KELLY, ESQ.
4 689 King Street
 Charleston, SC 29403
 Britt@kellylawsc.com

5
6 ON BEHALF OF DEFENDANT METROPOLITAN LIFE:

7 BUIST BYARS & TAYLOR, LLC
8 BY: G. HAMLIN O'KELLEY, ESQ.
 652 Coleman Boulevard
 Suite 200
 Mt. Pleasant, SC 29464
9 Hamlin.okelley@buistbyars.com

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 INDEX OF WITNESSES

2	DEFENDANT'S WITNESSES	<u>PAGE</u>
	KIMBERLY BROWN	
3	Direct Examination by Mr. McDonald	3693
	Cross-Examination by Mr. Hildebrand	3835
4	Cross-Examination by Mr. Windle	3861
	Cross-Examination by Mr. Terry	3868
5	Cross-Examination by Mr. O'Kelley	3870
	Redirect Examination by Mr. McDonald	3875
6	Recross-Examination by Mr. Hildebrand	3880
7	Certificate	3882

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: We were still on direct
2 examination of Ms. Brown, correct?

3 MR. MCDONALD: Yes, Your Honor.

4 THE COURT: All right.

5 MR. MCDONALD: Your Honor, I have a
6 very brief housekeeping that I would ask to bring
7 to your attention. Mr. Bennett has pretty much
8 an unavoidable conflict on Wednesday afternoon.

9 THE COURT: Okay.

10 MR. MCDONALD: I don't know where
11 we're going to be in the case. I believe he's
12 under subpoena.

13 I just want to bring that up to you now
14 so we can kind of plan, given that, if there was
15 any way that we could accommodate that. Not that
16 we couldn't move forward, but just accommodate
17 that portion of it. I just wanted to bring that
18 up as early as I could, Your Honor.

19 THE COURT: All right. Wednesday
20 afternoon?

21 MR. MCDONALD: Wednesday afternoon,
22 yes, sir.

23 THE COURT: Well, with a miracle,
24 we'll be done.

25 MR. MCDONALD: I hope so.

1 May it please the Court?

2 THE COURT: Certainly.

3 DIRECT EXAMINATION

4 BY MR. MCDONALD:

5 Q. Good morning, Ms. Brown.

6 A. Good morning.

7 Q. When we left off, we were going through
8 Plaintiff's Exhibit 12, which is the request for
9 change order backup documentation, correct?

10 A. Correct.

11 Q. All right. And where were we left off,
12 Ms. Brown, was request for change order number
13 264 in Plaintiff's Exhibit 12.

14 A. I had had the sheet of that exhibit kind
15 of tucked in here. I don't know what happened to
16 my sheet.

17 Q. I think rather than searching for it, I
18 have another copy for you.

19 A. Thank you.

20 Q. And the sheet you're referring to is
21 Plaintiff's Exhibit 329?

22 A. That's correct.

23 Q. All right. Ma'am, do you recognize
24 request for change order 264 in Plaintiff's
25 Exhibit 12?

1 A. Yes, I do.

2 Q. And when is it dated?

3 A. September 4th, 2018.

4 Q. Okay. And it is not signed on the
5 second page by Mr. Dooley, correct?

6 A. That's correct.

7 Q. Do you know when Mr. Dooley left the
8 employee of Balfour Beatty?

9 A. I believe Mr. Dooley testified that he
10 left right at Labor Day in 2018.

11 Q. Okay. So right at about the time of
12 this request for change order?

13 A. That's correct.

14 Q. All right. And do you know which subs
15 or subcontractors are involved with this change
16 order?

17 A. Pasco.

18 Q. Okay. And that's Palmetto Automatic
19 Sprinkler?

20 A. That's correct.

21 Q. Okay. Do you have a memory of receiving
22 this request for change order?

23 A. I don't recall receiving the request for
24 change order, no, but I do recall this work had
25 to be done.

1 Q. Okay. And do you know why this work had
2 to be done?

3 A. Because the location of the sprinkler
4 heads were in the walls where the TVs were going,
5 and they were too close to the TVs.

6 Q. Okay. And who selected the location to
7 the sprinkler head?

8 A. Pasco.

9 Q. So the subcontractor selected the
10 original locations of the sprinkler head?

11 A. Yes. The fire protection subcontractor
12 self designs the fire protection location for the
13 sprinkler heads, et cetera, in the plan.

14 Q. And for that reason, is that why this
15 change order would be rejected?

16 A. Correct.

17 Q. And did the interior designer, in fact,
18 reject this change order?

19 A. I believe he did, yes.

20 Q. Let's go to request for change order 266
21 in Plaintiff's Exhibit 12. Are you there?

22 A. Yes.

23 Q. And this is -- when is this request for
24 change order dated?

25 A. September 7, 2018.

1 Q. Okay. And are you able to make a
2 determination as to which subcontractors were
3 involved with this request for change order?

4 A. The Precision Walls. Yes, Precision
5 Walls.

6 Q. All right. And Precision Walls was
7 originally in this action, correct?

8 A. Correct.

9 Q. And they quit?

10 A. That's correct.

11 Q. And did you all pay Precision Walls
12 money?

13 A. Yes, we did.

14 Q. And this change order is purportedly
15 dated September 7th, 2018, correct?

16 A. That's correct.

17 Q. Are you able to make a determination as
18 to the date of the backup documentation?

19 A. The date of the backup documentation
20 from Precision Walls was April the 12th, 2017 and
21 March the 28th, 2017.

22 Q. So some 17 months prior?

23 A. Correct.

24 Q. All right. Let's go to request for
25 change order 267 in Plaintiff's Exhibit 12. Are

1 you there?

2 A. Yes.

3 Q. Okay. And when is this change order
4 dated?

5 A. September 7th, 2018.

6 Q. And it is not signed by Mr. Dooley,
7 correct?

8 A. That's correct.

9 Q. Okay. And are you able to make a
10 determination as to which subcontractors are
11 involved?

12 A. Low Country Case and Millwork.

13 Q. Any other subcontractors?

14 A. No.

15 Q. And what is the date that Low Country
16 Case and Millwork's backup documentation is
17 attached to request for change order 267?

18 A. June 14th, 2017.

19 Q. So approximately 15 months prior to
20 submission?

21 A. Correct.

22 (DFT. EXH. 145 was marked for
23 identification.)

24 Q. Okay. Ms. Brown, I'm going to hand you
25 what's been marked for ID purposes as Defendant's

1 Exhibit 145 and ask if you recognize that
2 document?

3 A. Yes, I do.

4 Q. Okay. What do you recognize it to be?

5 A. It's an e-mail from Jim Clements to Nick
6 Starcevic requesting the breakdown from Balfour
7 Beatty on roof mod one through eight, millwork
8 change order.

9 Q. Okay. And let's start at the bottom.
10 Are you copied on the first e-mail from
11 Mr. Dooley?

12 A. Yes, I am. That one was actually sent
13 to me, yes.

14 Q. Okay. And are you on the next e-mail?

15 A. Yes, I am.

16 Q. And are you on the final e-mail?

17 A. Correct.

18 Q. And is this a true and accurate copy of
19 this e-mail exchange?

20 A. Yes.

21 MR. MCDONALD: Your Honor, at this
22 time, I move Defendant's 145 into evidence.

23 MR. HILDEBRAND: No objection.

24 THE COURT: Without objection.

25 (DFT. EXH. 145 was received in

1 evidence.)

2 BY MR. MCDONALD:

3 Q. Now, on the e-mail on the bottom, are
4 you able to determine what request for change
5 order this relates to?

6 A. Yes. It says RCO 267.

7 Q. And is that the request for change order
8 we're looking at in Plaintiff's Exhibit 12?

9 A. Yes.

10 Q. Okay. And Mr. Dooley transmits it on,
11 it looks like, Friday September 7, 2018?

12 A. Correct.

13 Q. And what response does he get from
14 Mr. Clements?

15 A. Mr. Clements actually returns the e-mail
16 to Nick Starcevic because I believe --

17 Q. Do you -- go ahead.

18 A. I believe Mr. Dooley had left as of
19 September the 13th and requesting additional
20 information and a credit for RCO 149.

21 Q. Okay. And then the final e-mail is from
22 Mr. Clements to Mr. Starcevic, and then the
23 second e-mail is dated September 13, 2018,
24 correct?

25 A. That's correct.

1 Q. And then the final e-mail is from
2 Mr. Clements to Mr. Starcevic, correct?

3 A. That's correct.

4 Q. And when is it dated?

5 A. February 6th, 2019.

6 Q. Okay. And what does it say to
7 Mr. Starcevic?

8 A. Nick, following up on a response to the
9 trailing e-mail.

10 Q. Okay. And do you know whether or not
11 Mr. Clements or anybody at Library Associates
12 ever got a response from Mr. Starcevic as to the
13 inquiry related to request for change order 267?

14 MR. HILDEBRAND: Objection, Your
15 Honor, calls for speculation. She can testify
16 about what she got -- what information she got,
17 but not anything else.

18 THE COURT: Sustained.

19 BY MR. MCDONALD:

20 Q. Do you know whether or not anybody at
21 Library Associates received any additional
22 information related to RCO 267?

23 MR. HILDEBRAND: Same objection,
24 Your Honor.

25 THE COURT: It's overruled.

1 THE WITNESS: Not to my knowledge.

2 BY MR. MCDONALD:

3 Q. Okay. All right. Let's move on to
4 request for change order 268 -- 268 in
5 Plaintiff's 12. When is that change order dated?

6 A. September 24th, 2018.

7 Q. Okay. And are you able to make a
8 determination as to which subcontractors are
9 involved?

10 A. Yes.

11 Q. Okay. And who is that?

12 A. The Low Country Case and Millwork, SEAS,
13 which is Southeastern Architectural System, and
14 First Choice Glass.

15 Q. All right. So let's go over first --
16 was First Choice Glass in this action?

17 A. Yes, they were.

18 Q. And they quit, right?

19 A. Correct.

20 Q. All right. And what about SEAS? Were
21 they in this action?

22 A. Yes.

23 Q. Okay. And did Library Associates pay
24 SEAS money directly?

25 A. I believe we did, yes.

1 Q. Okay. And they're no longer in this
2 action, correct?

3 A. Correct.

4 Q. Do you know what -- the final Low
5 Country Case and Millwork, do you know what that
6 backup documentation is for?

7 A. It is for wire mesh -- decorative wire
8 mesh that was to be installed in the Camellia's
9 bar cabinets.

10 Q. Okay. And do you know whether or not
11 that was in fact installed?

12 A. We did. We did install this alternate
13 decorative wire mesh from Low Country.

14 Q. Okay. And if that was in fact
15 installed, was it a change?

16 A. There was always wire mesh shown in the
17 documents, in the plans for that area --

18 Q. Okay.

19 A. -- or metal inserts.

20 Q. Let's go to request for change order 270
21 in Plaintiff's Exhibit 12. All right. And when
22 is this change order dated?

23 A. March 12th, 2019.

24 Q. Was that after the claim was submitted
25 to the architect by Balfour Beatty?

1 A. Yes, it was.

2 Q. Was that after the lawsuit was filed?

3 A. Yes, it was.

4 Q. And are you able to make a determination
5 as to which subcontractor is involved in request
6 for change order 270?

7 A. Precision Walls.

8 Q. And Precision Walls is no longer a party
9 to this action?

10 A. Correct.

11 Q. And y'all paid Precision Walls money
12 directly?

13 A. Correct.

14 Q. All right. Let's look at some of these
15 tickets from Precision Walls. The first ticket,
16 are you able to make a determination as to the
17 date of that ticket?

18 A. It is dated March 13th, 2017.

19 Q. Okay. So some two years prior to the
20 request for change order 270?

21 A. Correct.

22 Q. And just generally, if you would, inform
23 the Judge of the various dates of the purported
24 backup documentation in the request for change
25 order 270.

1 A. It appears it starts at the -- March 13,
2 2017 and continues on until about June 18th,
3 2018, which is the last backup.

4 Q. So it's two years to nine months old,
5 something like that?

6 A. Correct.

7 Q. Okay. If you would, Ms. Brown, this
8 request for change order is in the amount of
9 \$49,885.72; is that right?

10 A. Correct.

11 Q. And it's for Precision Walls?

12 A. Correct.

13 Q. If you would -- are you able to find the
14 Precision Walls backup documentation? It is
15 about 10 pages from the end, dated November 17th,
16 2017?

17 A. Yes.

18 Q. And do you see the note section of that
19 document?

20 A. I do.

21 Q. All right. And can you read the first
22 sentence of the note section?

23 A. All the mobilization costs for framing,
24 painting and finishing openings that could not be
25 completed during the construction of the

1 respected areas due to the outer sequenced
2 installation of exterior windows and doors shown
3 on the attached take off.

4 Q. Okay. Do you know who was responsible
5 for the sequencing of the work?

6 A. Balfour Beatty.

7 Q. And so that one from November 17th of
8 2017 is \$19,590 of the total change order,
9 correct?

10 A. Correct.

11 Q. All right. Let's go to request for
12 change order 271 -- 271, Plaintiff's Exhibit 12.
13 When is that request for change order dated?

14 A. March 12th, 2019.

15 Q. Okay. And is that after the claim was
16 submitted to the architect?

17 A. Yes, it was.

18 Q. And was that after the lawsuit was
19 filed?

20 A. Yes, it was.

21 Q. Okay. And are you able to make a
22 determination as to what subcontractor is
23 involved in this request for change order 271?

24 A. Quantum Coatings.

25 Q. And Quantum Coatings has since settled

1 in this case?

2 A. That's correct.

3 Q. Take a look, if you would, at the
4 tickets, Quantum Coatings' tickets that are
5 attached. And if you'd go to the first -- to the
6 second one, that's dated June 5th, 2018.

7 A. Yes.

8 Q. Are you there?

9 A. Yes.

10 Q. All right. And so this would have been
11 some nine months prior to submission to you all,
12 correct?

13 A. Correct.

14 Q. Do you know why these PWI, Pasco, Watson
15 and LLI are listed on these statements?

16 A. Because they were being back charged.

17 MR. HILDEBRAND: Objection, Your
18 Honor. She doesn't know anything about this
19 document. She can read what's on it, but she
20 didn't author it. She wasn't -- she didn't have
21 any involvement with its generation. I think it
22 just calls for speculation.

23 MR. MCDONALD: Your Honor, may I
24 respond?

25 THE COURT: Yeah.

1 MR. MCDONALD: Balfour Beatty sent
2 this document after the law ordered it, March
3 12th, 2019, after the lawsuit was filed to
4 Ms. Brown. Okay?

5 And now, they're going to stand up in
6 Court in front of you and say, Ms. Brown isn't
7 qualified to know anything about this document.
8 If that's the case, what was she supposed to do
9 with it? Why would they send it to her?

10 MR. HILDEBRAND: Your Honor, his
11 question was, does she know why Balfour listed
12 those people, and she can't testify about that.
13 That would be speculation. She can testify about
14 facts and her knowledge, but she sure can't
15 testify about what our intents were or what
16 our --

17 MR. MCDONALD: I'll rephrase the
18 question.

19 THE COURT: Restate the question.

20 BY MR. MCDONALD:

21 Q. What was your understanding of why this
22 ticket included other subcontractors, if any?

23 A. Because they were going to be back
24 charged for the work.

25 MR. HILDEBRAND: Your Honor,

1 that -- I would move to strike that testimony.
2 She didn't -- she can't testify what was in
3 Balfour's knowledge. If they want to
4 introduce --

5 THE COURT: I agree with that. It
6 was -- the question was, what was her
7 understanding, and that was her understanding.
8 So she's entitled to give that opinion. All
9 right. I will overrule it.

10 BY MR. MCDONALD:

11 Q. Okay. And let's move on to the next
12 one, June 4th, 2018. It's on the same page.

13 A. Yes.

14 Q. And what is the description of work for
15 that?

16 A. Description of work is shrinkage and
17 splitting, caulk and sand at adjoining surfaces,
18 trim base crown, columns, ceilings, soffits, and
19 operable wall tracks, crown and soffit finish
20 coat, column finish coat, ceiling upper trade cut
21 in.

22 Q. Okay. And does that June 4, 2018
23 document also list varying subcontractors?

24 A. That's correct.

25 Q. Okay. Let's go to the next one, June 7,

1 2018. What does that say?

2 A. Prime and finish coat, sprinkler repairs
3 in the sixth floor guest room ceilings, Pasco BC.

4 Q. And did you have an understanding what
5 Pasco BC meant?

6 A. Yes. That's a back charge.

7 Q. Okay. And let's go to the next one,
8 June 6th, 2018. What is that for?

9 A. Shrinkage, splitting in upper tray
10 ceiling, gypsum wall boards and crown, box soffit
11 off of the wall track, prime and finish coat
12 flat.

13 Q. And does that list various
14 subcontractors, including Low Country, Precision
15 Walls, Watson, Pasco and Low Country Millwork?

16 A. Yes.

17 Q. All right. Let's go to the next one,
18 June 8, 2018. What is that one for?

19 A. Pasco sprinkler head ceiling repair,
20 prime, sand and finish two coats.

21 Q. And then the next one, June 7, 2018.
22 What is that one for?

23 A. Upper ceiling tray and crown, sand and
24 prime applied, finish coat, shrinkage, splitting.

25 Q. And does it list various subcontractors?

1 A. It does.

2 Q. All right. Let's go to request for
3 change order 272. 272. And when is that
4 change -- Plaintiff's Exhibit 12, when is that
5 order dated -- or request for change order dated?

6 A. March 7th, 2019.

7 Q. And is that after the lawsuit was filed?

8 A. Yes, it was.

9 Q. Was that after the claim was submitted
10 to the architect?

11 A. Yes.

12 Q. Who is the subcontractor that is
13 involved in this claim?

14 A. It appears to be Tate Ornamental.

15 Q. And when is the backup documentation for
16 Tate Ornamental dated?

17 A. February 1st, 2018.

18 Q. Okay. So a year before the request for
19 change order 272 is dated?

20 A. That's correct.

21 Q. Do you know whether or not this work was
22 done?

23 A. I don't recall.

24 Q. All right. Are any of these change
25 order request authorizations signed by anybody?

1 A. No.

2 Q. Is Tate Ornamental a party to this
3 action, or have they ever been a party to this
4 action?

5 A. Not that I can recall.

6 Q. Okay. Let's go to request for change
7 order 273 in Plaintiff's Exhibit 12. When is
8 this document dated?

9 A. There's no date.

10 Q. Who is it to?

11 A. It's addressed to Mr. Nick Starcevic.

12 Q. And who is it from?

13 A. Mr. Nick Starcevic.

14 Q. Is it signed by Nick Starcevic?

15 A. No, it is not.

16 Q. And if you look at the fourth page of
17 the cover letter to the request for change order
18 or the fourth page of the request for change
19 order, do you see who was meant to grant
20 authorization for the change order?

21 A. Yes.

22 Q. Who is that?

23 A. Mr. Nick Starcevic.

24 Q. Okay. So he sent it to himself in order
25 to get authorization from himself?

1 A. That's what it appears to be.

2 Q. All right. The backup associated with
3 it, Ms. Brown, if you would turn to that. Do you
4 know anything about this backup documentation?

5 A. It appears to be a change order request
6 log with David Allen Company.

7 Q. Okay. And what are the dates included
8 on the change order request log?

9 A. On the columns below or up on the box up
10 at the top?

11 Q. Well, let's talk about both. On the box
12 at the top, what's the date?

13 A. It says 12/31/19, or it just says, from
14 date, which is blank, to 12/31/19.

15 Q. Okay. Which is after -- well, this
16 document is not dated, right?

17 A. Correct.

18 Q. Okay. And then let's talk about the
19 other dates.

20 A. In the columns, there's a column for
21 origination date, and then there's a quote
22 submitted date and a date approved column.

23 Q. Okay. And those dates run from, it
24 looks like, April of '16 through January of '19,
25 right?

1 A. Correct.

2 Q. I see one for January 25th, 2019.

3 A. Correct.

4 Q. How much is that for?

5 A. The one for January 25th or the total?

6 Q. Yes, the one for January 25th.

7 A. \$150.

8 Q. And that's the date this document was
9 printed?

10 A. That's correct.

11 Q. Are you able to make a determination,
12 based upon this backup provided, as to what, if
13 any, changes were being requested?

14 A. No. It appears in the description,
15 that's repair work and floor prep.

16 Q. Let's go to request for change order 274
17 in Plaintiff's Exhibit 12. When is that dated?

18 A. There is no date.

19 Q. No date. Okay. Is it signed?

20 A. No, it is not.

21 Q. And is this -- who is it addressed to?

22 A. Mr. Nick Starcevic.

23 Q. And who is it from?

24 A. Mr. Nick Starcevic.

25 Q. And who's meant to grant authorization?

1 A. Mr. Nick Starcevic.

2 Q. And what does it say it's for?

3 A. Salamander punch list, guest room, all
4 floors.

5 Q. Okay. And are you able to make a
6 determination as to which subcontractor?

7 A. Quantum Coatings.

8 Q. Okay. And Quantum Coatings has settled
9 out of this action?

10 A. Correct.

11 Q. Let's go to our request for change order
12 275, Plaintiff's Exhibit 12. Are you there?

13 A. Yes.

14 Q. All right. And when is that dated?

15 A. April 12th, 2019.

16 Q. And is that after the claim was
17 submitted to the architect?

18 A. Yes.

19 Q. And was that after the lawsuit was
20 filed?

21 A. Yes.

22 Q. And this one was addressed to you,
23 correct?

24 A. Correct.

25 Q. All right. And it's not signed, but who

1 is sending it to you?

2 A. Mr. Nick Starcevic.

3 Q. And are you able to make a determination
4 as to which subcontractors are involved in this
5 request for change order 275?

6 A. It appears to be David Allen Tile,
7 Quantum Coatings, Precision Walls, MCC
8 Mechanical.

9 Q. Okay. And do you know what this request
10 for change order relates to?

11 A. It relates to the installation of the
12 guest room bathroom vanities and the plumbing
13 work.

14 Q. Okay. Turn if you would, Ms. Brown, to
15 the -- about 10 pages in, there's an e-mail from
16 Marty Dale to Michael Zinna, and Troy Williams.
17 Are you there?

18 A. Yes.

19 MR. HILDEBRAND: I'm sorry. Where
20 is it?

21 MR. MCDONALD: It's about 10 pages
22 in, maybe 12 pages in.

23 MR. HILDEBRAND: In 275?

24 MR. MCDONALD: Yes, sir.

25 THE COURT: I think you just passed

1 it.

2 MR. HILDEBRAND: I'm just having
3 trouble finding it. I'm sorry. I've got it.

4 MR. MCDONALD: Are you there?

5 MR. HILDEBRAND: Yeah.

6 BY MR. MCDONALD:

7 Q. All right. And this e-mail is dated
8 when, Ms. Brown?

9 A. September 19, 2017.

10 Q. Okay. And this request for change order
11 is dated April 12, 2019?

12 A. That's correct.

13 Q. Would you read the last two sentences of
14 the first paragraph?

15 A. Multiple crews working on multiple
16 floors would be preferred.

17 Q. The first paragraph.

18 A. Oh, I'm sorry. The first paragraph.

19 We realize that previously, BBC did
20 direct you to frame the opening 52 and a half
21 inches to 52 and five-eighth inch maximum width.
22 So any and all openings less than the maximum
23 dimensions we gave, the cost for repairs will be
24 on BBC. The cost for repairs for all other
25 openings exceeding the 52 and five-eighth inch or

1 less than 52 inch will be the responsibility of P
2 Walls.

3 Q. Okay. And then on the next page,
4 there's a spreadsheet, right?

5 A. Correct.

6 Q. And what does it say on the bottom?

7 A. We owe highlighted rooms 24.

8 Q. And is your copy in color?

9 A. No, it is -- I can see the blue. I
10 don't see any highlights.

11 Q. Okay. Let me go through some of these
12 other ones, if we could. Turn just by way of
13 example, to four pages in. It's an extra work
14 order after October 4, 2017.

15 A. Four pages from there or the beginning?

16 Q. Yeah. Four pages from the e-mail we
17 were looking at -- or three pages, the back page
18 of the third page.

19 MR. MCDONALD: May I approach, Your
20 Honor?

21 THE COURT: This is from the front
22 or from the back? I'm sorry, Mr. McDonald, from
23 the front?

24 MR. MCDONALD: No, no, no. If you
25 go to that e-mail we were just at, Your Honor.

1 THE COURT: Right.

2 MR. MCDONALD: And just go --

3 THE COURT: About three pages
4 further?

5 MR. MCDONALD: -- two pages to the
6 back side of the second page.

7 THE COURT: Okay.

8 BY MR. MCDONALD:

9 Q. Are you able to read that document?

10 A. No.

11 Q. Are there any documents in here that are
12 of the same legibility?

13 A. Yes. There's several, but they appear
14 to be on a yellow page.

15 Q. About how many of them are there?

16 A. 31.

17 Q. Pages that you can't read?

18 A. Correct.

19 Q. All right. And all the Precision Walls
20 stuff that you can read is dated fall of 2017?

21 A. Correct.

22 Q. Once you get through the Precision Walls
23 stuff, which subcontractor do you come to next?

24 A. Bernhard MCC.

25 Q. And when is that dated?

1 A. July 18th, 2018.

2 Q. So some 13 months prior to submission of
3 RCO, request for change order 275?

4 A. Yes.

5 Q. Turn if you would to the second page of
6 the BMCC stuff. Before I get to that question,
7 Precision Walls is no longer a party to this
8 action, correct?

9 A. Correct.

10 Q. And the owner paid Precision Walls money
11 directly?

12 A. Correct.

13 Q. This letter -- when is this dated, this
14 letter here, in the Bernhard MCC section?

15 A. There's a letter from Balfour Beatty to
16 Mr. Phillip Garcia with Bernhard MCC. It's dated
17 November 9th, 2017.

18 Q. And who sent it?

19 A. Mr. Nick Starcevic.

20 Q. Okay. And is that the same person that
21 sent request for change order 275?

22 A. Yes.

23 Q. If you would, read to the Judge the last
24 sentence of that letter from Mr. Starcevic dated
25 November 9th, 2017.

1 A. BBC will compile all the available
2 information and associated costs to determine
3 fair and equitable payment upon completion of
4 which BMCC agrees they're responsible for
5 one-third of the total costs.

6 Q. All right. And the owner has paid BMCC
7 directly, correct?

8 A. Correct.

9 Q. And they're no longer a party to this
10 action?

11 A. Correct.

12 Q. All right. Let's go to -- flip one full
13 page from the letter -- November 9th, 2017
14 letter. It looks like there's a timesheet dated
15 January 12th, 2018.

16 A. Yes.

17 Q. Okay. And do you see where it says job
18 description?

19 A. Yes.

20 Q. Would you read that for the Judge?

21 A. Relocating Lav valves for the second
22 time on the fifth floor due to walls being out of
23 square. Work was performed 1/11/2018.

24 Q. Okay. Turn to the next page. This is
25 labor, equipment, material ticket from Bernhard

1 MCC, right?

2 A. Correct.

3 Q. All right. It's included as backup
4 documentation for request for change order 275,
5 correct?

6 A. Correct.

7 Q. Do you know if Bernhard MCC framed the
8 building?

9 A. No.

10 Q. Who did that?

11 A. Precision Walls.

12 Q. Okay. And Precision Walls was in this
13 request for change order, too, right?

14 A. That's correct.

15 Q. Okay. Would you read to the Judge what
16 this work is for?

17 A. Relocating Lav valve for second time on
18 level 5 due to walls not being squared. Work was
19 performed 1/10/2018.

20 Q. Okay. Let's go to the next one. When
21 is it dated?

22 A. 12/22/2017.

23 Q. And what work was that for?

24 A. Relocating Lav values on level 3 due to
25 framing not being squared, second time this has

1 been moved. Work performed 12/22/2017.

2 Q. Okay. Let's go to the next one. When
3 is that dated?

4 A. 12/22/2017.

5 Q. Now, is that the same one as before?

6 A. It has the same description, but it
7 looks like it appears to be 12/21/2017.

8 Q. Okay. All right. And what is it for?

9 A. Relocating Lav valves on the third floor
10 due to framing not being squared, second time
11 relocating.

12 Q. Okay. Let's go to the next one. What
13 work is that for?

14 A. Same work, relocating Lav valves on
15 level 3 due to walls not being squared. Work was
16 performed 12/20/2017. This is the second time.

17 Q. All right. The next one.

18 A. Relocating Lav valves on level 3 on
19 second time due to walls not being squared. Work
20 was performed 12/19/2017.

21 Q. All right. And the next one.

22 A. Relocated Lav valves due to framing
23 being wrong. Rooms listed below. Work was
24 performed 11/29/2019. And the rooms listed below
25 are -- appears to be fifth floor rooms.

1 Q. Okay. And the next one.

2 A. Relocating Lav valves due to framing
3 being wrong. Rooms listed below. Work was
4 performed 11/28/2017.

5 Q. And the next one.

6 A. Relocating Lav valves due to framing
7 being wrong. Rooms listed below. Work was
8 performed 11/27/2017.

9 Q. And the next one.

10 A. Relocating Lav values due to framing
11 being wrong. Rooms listed below. Work was
12 performed 11/22/2017.

13 Q. And the next one.

14 A. Relocating Lav valves due to framing
15 being wrong. Rooms listed below. Work was
16 performed 11/21/2017.

17 Q. And the remaining of the MCC backup
18 documentation, does it have similar language that
19 it's for framing being wrong?

20 A. Yes, it does.

21 Q. And then the last subcontractor is who?

22 A. Low Country Case and Millwork.

23 Q. Okay. And the backup documentation,
24 what does it say it's for?

25 A. Can you repeat the question? I'm sorry.

1 Q. The Low Country Framing and Millwork,
2 when is the backup documentation dated for it?

3 A. November 21st, 2017.

4 Q. Okay. And request for change order 275
5 again is dated April of '19?

6 A. That's correct.

7 Q. All right. And are you able to look at
8 this and see what work Low Country Case and
9 Millwork is submitting a change order for?

10 A. They were modifying four guest room
11 vanities.

12 Q. All right. Let's go to request for
13 change order 276 in Plaintiff's Exhibit 12. Are
14 you there?

15 A. Yes, I am.

16 Q. When is that change order dated?

17 A. March 13th, 2019.

18 Q. All right. And is that after the
19 lawsuit was filed?

20 A. Yes, it was.

21 Q. Is that after the claim was submitted to
22 the architect?

23 A. Yes, it was.

24 Q. All right. And are you able to make a
25 determination as to which subcontractor was

1 involved in this?

2 A. Low Country Case and Millwork.

3 Q. And I will have you pull out -- and I
4 will grab it for you and make it easier -- pay
5 application 36.

6 MR. MCDONALD: And that is Exhibit
7 3, Your Honor.

8 BY MR. MCDONALD:

9 Q. All right. If you would, turn on
10 request for change order 276 to the second page.
11 It's still the first page because it's two-sided.
12 Are you there?

13 A. Yes.

14 Q. Okay. It has a line item there that
15 says added back band at windows for an amount.
16 Do you see that?

17 A. Yes.

18 Q. Do you recall that work?

19 A. We're talking about the list here or the
20 backup?

21 Q. I'm just referring to the list right
22 now. We will get to the backup in a second. Do
23 you recall any work that would be described as
24 added back band at windows?

25 A. Yes.

1 Q. And if you go to the backup
2 documentation in this document, are you able to
3 find the backup documentation for that work?

4 A. Yes.

5 Q. Okay. And when is that dated?

6 A. 11/1/2017. That's the last page of the
7 backup.

8 Q. And how much is that for?

9 A. That's for 39,725.

10 Q. I hand you what's been marked as
11 Defendant's Exhibit 3 and ask if you recognize
12 that document in toto, the whole document.

13 A. This is the -- the entire document is
14 the pay application number 36 from Balfour Beatty
15 to Library dated for the period March 1st, 2018
16 to March 31st, 2018.

17 Q. And was pay application 36 funded in
18 full?

19 A. Yes, it was.

20 Q. Okay. Can you see if Low Country Case
21 and Millwork got any money in that pay
22 application?

23 A. Yes. They're included in the pay
24 application.

25 Q. And did they get paid the \$39,725?

1 A. Yes, they did.

2 Q. Okay. And the owner has already paid
3 that?

4 A. Yes, it has been paid.

5 Q. And that's been true since March of
6 2018?

7 A. That's correct.

8 Q. And on a change order that on its face
9 is dated November 1st, 2017?

10 A. That's correct.

11 Q. Do you know whether or not they paid --
12 that Balfour paid Low Country for that work?

13 A. That I don't know.

14 Q. Did Balfour submit a pay application 37?

15 A. Yes, they did.

16 Q. And did they certify pay application 37,
17 that all the monies that they received in pay
18 application 36 had in fact been paid?

19 A. Yes.

20 MR. HILDEBRAND: Objection, Your
21 Honor. He's leading the witness. If he wants to
22 have her read the certification, but Nick
23 Starcevic explained this. So I think it's
24 improper.

25 Again, it's quite leading and it's an

1 improper recitation of the facts, and certainly
2 what Nick Starcevic testified about, what was the
3 custom in the industry for each of these pay
4 application that were submitted.

5 MR. MCDONALD: May I respond, Your
6 Honor?

7 THE COURT: Yeah.

8 MR. MCDONALD: I don't recall
9 Mr. Starcevic saying from the stand that we
10 accepted \$39,725 from the owner, okay, and are
11 now asking for it again. I don't recall that
12 testimony. If he's saying that that occurred, I
13 don't recall it.

14 So what I'm getting into -- whatever
15 Nick Starcevic testified, that's his -- that's
16 his witness. The notion that she can't respond
17 to this, especially the egregious nature of this
18 nonsense, I --

19 MR. HILDEBRAND: Well, this all
20 started --

21 THE COURT: The objection is as to
22 what Nick Starcevic did; is that right?

23 MR. HILDEBRAND: Well, it's really
24 the leading question, and she's already testified
25 that she doesn't know what happened with Balfour

1 having paid this subcontractor or not. So it's
2 all based on speculation.

3 THE COURT: All right.

4 MR. MCDONALD: I will rephrase,
5 Your Honor.

6 THE COURT: All right. Let's get
7 back to this pay app, and then if you want to go
8 to the next pay app, we will turn the page and go
9 there.

10 BY MR. MCDONALD:

11 Q. On Defendant's Exhibit 3, pay
12 application 36, this amount of 39,725 is included
13 in there for Low Country Case and Millwork,
14 correct?

15 A. Correct.

16 Q. And the owner funded that pay
17 application, correct?

18 A. Correct.

19 Q. Okay. Now, let's look at pay
20 application 37. Ms. Brown, let me ask you this:
21 Was pay application 37 funded by the owner?

22 A. Yes, it was.

23 Q. All right. And that was after pay
24 application 36?

25 A. Yes.

1 Q. Okay. All right. Let's take a look at
2 additional backup in this request for change
3 order 276. If you would, go back to the first
4 page. On it's back, it has an amount for \$9,486.
5 Do you see that?

6 A. Yes, I do.

7 Q. And do you recall what that was for?

8 A. It says rotunda mod 1 through 8
9 millwork.

10 Q. And what work was that? Do you recall?

11 A. That was millwork done in the rotunda
12 that the -- but it was rejected by the designer
13 because the designer said it was already in the
14 plans.

15 Q. Okay. If you would, would you turn back
16 to request for change order 253 in the notebook.
17 Are you there?

18 A. Yes.

19 Q. And when is that change order dated or
20 request for change order dated?

21 A. August 14, 2018.

22 Q. And it's your testimony that that was
23 rejected?

24 A. That's correct.

25 Q. Okay. And was it rejected on or

1 about -- or some time after August 14, 2018?

2 A. Correct.

3 Q. And what is the amount of that change
4 order?

5 A. \$9,486.

6 Q. And what is it for?

7 A. Add crown and dome at rotunda layer.

8 Q. Is that the same amount that's in
9 request for change order 253, that's in request
10 for change order 276?

11 A. Yes, it is.

12 Q. All right. Let's go to request for
13 change order 277. Are you there, Ms. Brown?

14 A. I am.

15 Q. This is request for change order 277 in
16 Plaintiff's Exhibit 12. When is this dated?

17 A. March 13th, 2019.

18 Q. And is that after the lawsuit was filed?

19 A. Yes, it is.

20 Q. And is that after the claim was
21 submitted to the architect?

22 A. Yes.

23 Q. Okay. And are you able to make a
24 determination as to which subcontractor is
25 involved in this change order?

1 A. Miscellaneous Steel Industries.

2 Q. Okay. And what do they do?

3 A. They provided the steel for the project.

4 Q. And are you able to look at this --
5 let's look at the backup documentation. Are you
6 able to make a determination as to when this
7 stuff was dated?

8 A. If you go through about four or five
9 pages, there's a submittal summary and an MSI
10 transmittal, and that's dated -- that's just like
11 shop drawings there. But that's dated 2015.

12 Q. What is the exact date of it?

13 A. August 5th, 2015.

14 Q. So some almost four years prior to
15 request for change order 277?

16 A. Correct.

17 Q. Is Miscellaneous Steel Industries a
18 party to this lawsuit?

19 A. No.

20 Q. Have they ever been a party to this
21 lawsuit?

22 A. No.

23 Q. All right. Then we go through here, the
24 backup documentation behind that August 5, 2015.
25 Well, what is the August 5th, 2015 correspondence

1 from Miscellaneous Steel? What are they doing?

2 A. We are sending you enclosed the
3 following design drawings, erection drawings to
4 be returned by August 19, 2015. This material is
5 being transmitted for the purpose listed below,
6 for approval (inaudible).

7 Q. And after that, you've got shop
8 drawings, right?

9 A. Correct.

10 Q. And then you get to some subcontractor
11 estimate pricing. Do you see that?

12 A. Yes.

13 Q. And is that accepted by or signed by
14 anybody?

15 A. No.

16 Q. Then after you get through the MSI
17 stuff, then we get Acero Construction Services.
18 Do you see that? It's towards the -- it's after
19 all the shop drawings. It's for -- it's a time
20 and materials sheet.

21 A. Yes.

22 Q. Do you know who they are?

23 A. I do not.

24 Q. And when are -- when is this work dated?

25 A. March 8, 2017.

1 Q. So you've got shop drawings being
2 submitted in August of 2015, and then you've got
3 a time and materials sheet. Is it signed by the
4 contractor?

5 A. From Acero?

6 Q. Yeah, from Acero.

7 A. It's signed by Acero but not --

8 Q. The spot for contractor is blank?

9 A. That's correct.

10 Q. Okay. And that's from March of '17?

11 A. Yes.

12 Q. And do you know -- and then we've got --
13 at the end, you've got two pictures, right?

14 A. Correct.

15 Q. All right. Let's go to request for
16 change order 278. And when is that dated?

17 A. March 29, 2019.

18 Q. Okay. And that's after the lawsuit was
19 filed, correct?

20 A. Correct.

21 Q. All right. And after, the claim was
22 submitted to the architect, correct?

23 A. Correct.

24 Q. And are you able to make a determination
25 as to which subcontractor is involved in this?

1 A. It would be Koch Corporation and also
2 Strong Tower doing business as Koch Corporation.

3 Q. All right. And what is the date of that
4 backup documentation?

5 A. June 25, 2018.

6 Q. So nine months prior?

7 A. Correct.

8 Q. All right. Then we've got finally
9 request for change order 279. Are you there?

10 A. Yes.

11 Q. And when is it dated?

12 A. There's no date.

13 Q. Is there a person that signed it?

14 A. No.

15 Q. Have you had an opportunity to review
16 this Plaintiff's Exhibit 12 specifically request
17 for change order 279?

18 A. Yes.

19 Q. And were you in the courtroom when
20 Mr. Starcevic gave his testimony about this
21 particular request for change order?

22 A. I was.

23 Q. And did you understand any better after
24 his testimony -- any better or any worse after
25 his testimony?

1 MR. HILDEBRAND: Objection, Your
2 Honor. It's leading. It's speculative. It's
3 pitting one witness against another.

4 THE COURT: All right. Why don't
5 you rephrase that.

6 BY MR. MCDONALD:

7 Q. All right. Let's look at the second
8 page of the letter, the undated letter --
9 undated, unsigned letter. It says it's for --
10 well, the first page says it's for constructive
11 change directives, January and March draw, right?

12 A. Correct.

13 Q. Okay. And then it has 43 entries,
14 right?

15 A. Correct.

16 Q. All right. And then it has tabs A
17 through X?

18 A. Correct.

19 Q. Okay. Let's go to tab A. Do you
20 recognize that document?

21 A. Yes.

22 Q. Okay. What do you recognize it to be?

23 A. It's a Balfour Beatty projected final
24 cost report, and it says -- has a job number, and
25 it says, CCD -- Marion Square CCD 46.

1 Q. Marion Square CCD 46?

2 A. Correct.

3 Q. So that would relate to number 20 on the
4 RCO log, right?

5 A. It looks like 11 and 20, yes.

6 Q. Okay. And if you look at tab A, where
7 it says, costs for this period, what number is on
8 that?

9 A. Zero.

10 Q. Okay. Go to Exhibit H -- or tab H of
11 request for change order 279 on Plaintiff's
12 Exhibit 12. What is in tab H?

13 A. SEAS.

14 Q. Okay. And is SEAS out of this action?

15 A. Yes.

16 Q. And did y'all pay them directly?

17 A. Yes.

18 Q. And look at tab J. Who is that for?

19 A. Old North State Masonry.

20 Q. And on Exhibit 329, does Old North State
21 Masonry owe any OCO money?

22 A. No.

23 Q. And other than tabs H, J and C, are all
24 the rest of the backup documentation in this
25 Balfour Beatty cost reports?

1 A. There's nothing in F.

2 Q. F doesn't have anything?

3 A. F doesn't have anything.

4 Q. Okay. What about, does your S have
5 anything?

6 A. M has a Lowe's receipt.

7 Q. Okay.

8 A. My S does have a backup sheet.

9 Q. Okay. That's the job cost sheet?

10 A. Yes.

11 Q. Okay.

12 A. And that's all.

13 Q. Were you ever -- was this ever submitted
14 to you, this undated RCO, request for change
15 order 279?

16 A. No.

17 Q. And that's everything? We've been
18 through every single one of them, correct?

19 A. That's correct.

20 Q. In Plaintiff's Exhibit 12?

21 A. Correct.

22 MR. MCDONALD: I don't know what
23 time it is. It might be a good time for a break.

24 THE COURT: All right. Let's take
25 about five minutes.

1 (A recess transpired.)

2 THE COURT: All right.

3 Mr. McDonald?

4 MR. MCDONALD: May it please the
5 Court?

6 THE COURT: Yes, sir.

7 BY MR. MCDONALD:

8 Q. Ms. Brown, we were looking at request
9 for change orders, correct?

10 A. Correct.

11 Q. And one of those request for change
12 orders, the final one we looked at included the
13 request for change order 279, correct?

14 A. Correct.

15 Q. And also as a part of Balfour's claim is
16 an OCO column, correct?

17 A. Correct.

18 Q. And what is an OCO?

19 A. An OCO is the owner change order that
20 the request for change orders get compiled and
21 then put into an OCO, which then gets submitted
22 to the owner and the architect to sign off on.

23 Q. And included as Plaintiff's Exhibit
24 226 -- I'll hand it to you -- are various OCOs
25 that Balfour Beatty is asking for, right?

1 A. Yes. This is binder 2 of 2 starting
2 with change order 10 through 22.

3 Q. Okay. And so in that binder,
4 Plaintiff's Exhibit 226, some of those OCOs have
5 in fact been funded, correct?

6 A. That's correct.

7 Q. Okay. So just because it's in there
8 doesn't mean it's part of the claim --

9 A. Correct.

10 Q. -- as far as you know?

11 A. Correct.

12 Q. And if you would, turn to owner change
13 order 19 in that notebook.

14 A. Okay.

15 Q. And this is an owner change order for
16 29,260.04, right?

17 A. Correct.

18 Q. All right. And this is executed by you
19 on November 23, 2018?

20 A. Correct.

21 Q. Has this owner change order been paid?

22 A. No.

23 Q. And was there a certified pay
24 application by the architect that included change
25 order 19?

1 A. No.

2 Q. Does the owner pay owner change orders?

3 A. No.

4 Q. What does the owner pay?

5 A. Certified pay requests.

6 Q. And let's go through this owner change
7 order number 19. On the first page, it has
8 various construction change directives; is that
9 right?

10 A. Correct.

11 Q. Can you explain to the Judge -- I know
12 Mr. Clements touched on it. Can you explain to
13 the Judge what -- how the construction change
14 directives were used on this job?

15 A. The construction change directives were
16 issued to the contractor for two different
17 reasons. One reason, if there was work in the
18 contract -- that we felt was in the contract, and
19 they decided -- they refused to do, we issued
20 them a construction change directive to get them
21 to do the work.

22 There was also times instead of -- at
23 the end of the job where change -- request for
24 change orders or different changes that needed to
25 be done, we would issue a construction change

1 directive to eliminate the time required to, you
2 know, price out certain changes.

3 Q. And so this particular -- and I
4 apologize for the acronyms. I will try not to
5 use them. This particular owner change order
6 includes construction change directives?

7 A. Correct.

8 Q. Okay. And if you look at the first one,
9 just so we can understand it, the first chart
10 after the signature page is a spreadsheet. Do
11 you see that?

12 A. Yes.

13 Q. Okay. And when is the -- this period
14 for?

15 A. October 2018.

16 Q. October of 2018?

17 A. Correct.

18 Q. Okay.

19 A. It would be the last column on this
20 spreadsheet.

21 Q. Gotcha. And is there any backup
22 documentation to any of this? Well, let's just
23 go through it.

24 A. Okay.

25 Q. All right. The first one is a CCD 002

1 tracking matrix, correct?

2 A. Correct.

3 Q. All right. And is there an October
4 column?

5 A. Yes.

6 Q. And what is in that column for this
7 one -- for this month, October of '18?

8 A. BBC \$163.01, markup 9.78. Total 172.79.

9 Q. Okay. And there's description of
10 services, right?

11 A. Yes.

12 Q. And it's got Ms. Pieniak, Mr. Starcevic,
13 and Mr. Spano?

14 A. Correct.

15 Q. All right. And in this month, are there
16 any charges for -- in this month, October of
17 2018, are there any charges for any
18 subcontractors?

19 A. Not for this particular CCD, no.

20 Q. Okay. Do you know what Shanti Pieniak
21 was doing in October of 2018 for administration
22 of change orders and billings?

23 A. Shanti was an intern on the -- that they
24 had hired. I'm not sure what she was doing
25 there.

1 Q. Do you know what change orders she was
2 reviewing?

3 A. I do not.

4 Q. Do you know what billing she was
5 reviewing?

6 A. I do not.

7 Q. Then you've got Mr. Starcevic doing
8 field coordination and review administration of
9 change orders and billings, right?

10 A. Correct.

11 Q. Okay. Do you know who he was
12 coordinating out in the field?

13 A. I do not.

14 Q. Do you know what change orders he was
15 administering?

16 A. Nope.

17 Q. Do you know what billings he was
18 reviewing?

19 A. No.

20 Q. Then you've got Mr. Spano. He is doing
21 some -- October of 2018, he is doing some field
22 coordination and some T&M review, right?

23 A. Correct.

24 Q. Do you know who he was coordinating in
25 the field?

1 A. No, I do not.

2 Q. Do you know what T&M materials he was
3 reviewing?

4 A. No.

5 Q. All right. Let's go to the next one,
6 CCD 003. And that one doesn't have any entries
7 for October, right?

8 A. Correct.

9 Q. And the next one that has entries for
10 October is CCD 6, correct?

11 A. Correct.

12 Q. And this has a subcontractor involved;
13 is that right?

14 A. Yes, Low Country Case and Millwork.

15 Q. Okay. And you've got the same three
16 people working out there: Ms. Pieniak,
17 Mr. Starcevic, and Mr. Spano, correct?

18 A. Correct.

19 Q. And they're all doing the same thing?

20 A. Correct.

21 Q. And the next one is CCD 7, right?

22 A. Also on CCD 6, just looking at the
23 backup, this -- it has a charge of BBC of \$488,
24 but on this backup page, which is the final cost
25 report, the cost for this period is only \$244.

1 Q. Okay. All right. CCD 7, does it have a
2 billing for October?

3 A. Yes.

4 Q. Of '18?

5 A. Yes.

6 Q. And it's got a description of service,
7 right?

8 A. Yes.

9 Q. And it's got Mr. Dooley. He's doing
10 administration of change orders and billings?

11 A. That's what this description says, yes.

12 Q. Now, do you know when Mr. Dooley left
13 the job?

14 A. I believe Mr. Dooley testified that he
15 left at Labor Day.

16 Q. Of?

17 A. 2018.

18 Q. Okay. And this billing is for October
19 of 2018?

20 A. Yes. It's dated October 26, 2018.

21 Q. Okay. And this doesn't involve any
22 subcontractors, right?

23 A. Correct.

24 Q. And you've got Mr. Spano and
25 Mr. Starcevic doing their field coordination,

1 administrative change orders and billings,
2 correct?

3 A. Correct.

4 Q. Do you know what they were doing, what
5 they were administering, what change orders they
6 were administering and what billings they were
7 reviewing?

8 A. I do not.

9 Q. The next one is CCD 8. Does that have
10 an entry for October?

11 A. Yes.

12 Q. Does that have Mr. Dooley working out
13 there still?

14 A. It does.

15 Q. Does it have any entry for any
16 subcontractors?

17 A. No.

18 Q. What about CCD 9?

19 A. There's one entry for Watson Electric.

20 Q. Okay. Is Watson Electric getting any
21 OCO money on Plaintiff's Exhibit 329?

22 A. No.

23 Q. And this is -- what we're looking at is
24 owner change order 19, right?

25 A. That's correct.

1 Q. But when we get to the backup, we're
2 referring to the construction change directives?

3 A. That's correct.

4 Q. All right. And is Mr. Dooley still
5 working out there in October of '18?

6 A. No.

7 Q. All right. And is he listed on this CCD
8 9?

9 A. Yes. And again, looking at this backup
10 on the final cost report, it appears BBC is
11 billing 570, but it says cost this period \$244.

12 Q. Okay. And go to CCD 10, which is
13 behind owner change order 19 in Plaintiff's 226.
14 Is there any subcontractors being billed that
15 month in October?

16 A. No.

17 Q. Is Mr. Dooley being charged for it?

18 A. Yes.

19 Q. And what about -- and then we've got
20 Mr. Starcevic. He is doing submittals, field
21 coordination and administration change orders,
22 correct?

23 A. Correct.

24 Q. Okay. Do you know, once again, what
25 he -- who he's coordinating or what change orders

1 he is administering?

2 A. No.

3 Q. 11, 12, 13 don't have any entries and
4 then we go to 14. Are you there?

5 A. Yes.

6 Q. Okay. And does it have any
7 subcontractors?

8 A. No.

9 Q. And it just has Mr. Starcevic under
10 description of service, right?

11 A. Correct.

12 Q. Field review and contract
13 administration?

14 A. Correct.

15 Q. Do you know what he was reviewing in the
16 field?

17 A. I do not.

18 Q. Do you know what contracts he was
19 administering?

20 A. I do not.

21 Q. I don't know if I asked you, but there
22 were no subcontractors for CCD 14 in October of
23 '18, correct?

24 A. Correct.

25 Q. All right. 15 doesn't have an entry.

1 16 doesn't have an entry. 17 doesn't have an
2 entry. All right. Let's go to change order, CCD
3 19 in -- owner change order 19 in Plaintiff's
4 226.

5 A. CCD 19?

6 Q. Yes.

7 A. Okay.

8 Q. Is there an entry for October?

9 A. No.

10 Q. Is there an entry for November?

11 A. Yes.

12 Q. And when is this document formally
13 dated?

14 A. October 26, 2018.

15 Q. Okay. All right. Nothing for 21. And
16 we've got 22, right?

17 A. Yes.

18 Q. Does that have a subcontractor involved?

19 A. Yes. It has Watson and Merit also known
20 as Quantum Coatings.

21 Q. Okay. That's the painter?

22 A. That's correct.

23 Q. The painter settled?

24 A. That's correct.

25 Q. Number 23 doesn't have any entries.

1 Let's go to 24. Does that have a subcontractor?

2 A. Watson.

3 Q. All right. Is Watson getting any OCO
4 money?

5 A. No.

6 Q. 25. Does it have an entry for October?

7 A. Yes.

8 Q. And who is it for?

9 A. BBC.

10 Q. Do they tell you who is doing what on
11 this one?

12 A. No.

13 Q. What about 26?

14 A. Just BBC.

15 Q. Excuse me. The next one is 25, and then
16 it goes to 27, it looks like?

17 A. That's correct.

18 Q. Okay. Is there any subcontractors
19 involved in that?

20 A. No.

21 Q. All right. And once again, is there a
22 description of services like there was
23 previously?

24 A. Correct.

25 Q. No, is there a description of services?

1 A. No, there's not. I'm sorry. I couldn't
2 hear you. A truck was passing.

3 Q. That's okay. Then we go to -- and
4 that's in the amount of 430 bucks?

5 A. Correct.

6 Q. And then we go to CCD 28. Any
7 subcontractors involved in that one?

8 A. No.

9 Q. All right. And is there any entry as to
10 description of services?

11 A. No.

12 Q. Go to CCD 30. Is there a subcontractor
13 involved in that?

14 A. Watson Electric.

15 Q. Is Watson getting any OCO money?

16 A. No.

17 Q. Is there a description of services for
18 Balfour on CCD 30?

19 A. No.

20 Q. And this is all still in owner change
21 order 19 in Plaintiff's Exhibit 226?

22 A. Correct.

23 Q. All right. Then you go to CCD 33,
24 right?

25 A. Correct.

1 Q. Is there a subcontractor involved there?

2 A. Low Country Case and Millwork.

3 Q. Okay. And this one has a subcontractor,
4 but it doesn't have any direct BBC money, right?

5 A. That's correct.

6 Q. It's just a markup?

7 A. Correct.

8 Q. Then you've got CCD 36. Does that have
9 any subcontractors involved?

10 A. No.

11 Q. And does it have the description of
12 services?

13 A. No.

14 Q. Now, let's go to owner change order 20.

15 A. Okay.

16 Q. All right. And this contains
17 construction change directives, correct?

18 A. Correct.

19 Q. And it is in the total amount of
20 \$57,274.27?

21 A. Correct.

22 Q. Did you sign this particular owner
23 change order?

24 A. No.

25 Q. All right. Was this change order

1 ever -- this owner change order ever included in
2 a certified pay application?

3 A. No.

4 Q. What date did Ms. Faulkinberry sign
5 owner change order?

6 A. January 28, 2019.

7 Q. Okay. And that would be owner change
8 order 20, correct?

9 A. Correct.

10 Q. Okay. And do you know whether or not
11 Balfour Beatty had already filed a 9 million
12 dollar lien at that time? 8 or 9 million dollar
13 lien?

14 A. I believe it was in the 8 range, yes.

15 Q. Okay. And this owner change order 20 is
16 for the -- let's look at that third page. This
17 appears to be for what month and year?

18 A. Can you repeat the question?

19 Q. This owner change order 20 is for what
20 months and year?

21 A. November 2018.

22 Q. And let's go through some of these. Two
23 doesn't have an entry. Three has an entry,
24 correct?

25 A. Yes.

1 Q. Is there any subs involved?

2 A. No.

3 Q. All right. It's got AJ -- it's got the
4 description of services, correct?

5 A. Correct.

6 Q. It's got AJ Wachsberger?

7 A. Correct.

8 Q. It says he's doing field review and
9 contract administration?

10 A. Correct.

11 Q. Do you know what he is reviewing in the
12 field?

13 A. I do not.

14 Q. Do you know what contracts he's
15 administering?

16 A. I do not.

17 Q. Okay. Is this time supposed to be
18 related to this specific construction change
19 directive?

20 A. Yes.

21 Q. And is that what's going on here? Is
22 that why there's so many of them because they're
23 saying that Wachsberger was working on CCD 3?

24 A. I can't tell from this.

25 Q. All right. Four doesn't have an entry.

1 Five doesn't have an entry. Then we've got CCD

2 6. Do you see that?

3 A. Yes.

4 Q. Does that have a subcontractor?

5 A. Yes.

6 Q. And how --

7 A. Low Country Case and Millwork.

8 Q. How much is Low Country Case and
9 Millwork billing on CCD 6 in November of 2018?

10 A. \$143.

11 Q. All right. And how much is BBC billing
12 to administer Low Country's 143 worth of work?

13 A. \$650.

14 Q. Okay. They've got three people working
15 on that \$143, right?

16 A. Correct.

17 Q. Pieniak, Starcevic and Spano?

18 A. Correct.

19 Q. And they're administering change orders
20 and billings, doing submittals, field
21 coordination and field review and coordination,
22 right?

23 A. Correct.

24 Q. All right. Let's go to the next one.

25 7, CCD 7. Does it have an entry?

1 A. No -- excuse me, for Balfour Beatty,
2 yes.

3 Q. Okay. And so there's no subs?

4 A. Correct.

5 Q. All right. And this is November of '18?

6 A. Correct.

7 Q. And is Mr. Dooley listed under
8 description of services?

9 A. Yes, he is.

10 Q. And then we've got Starcevic and Spano,
11 too, right?

12 A. Correct.

13 Q. CCD 8. Is there a sub involved in that?

14 A. Yes, David Allen.

15 Q. Okay. And is there any backup to
16 support that?

17 A. No.

18 Q. And is Mr. Dooley being charged for it?

19 A. Yes.

20 Q. And then we've got Mr. Starcevic,
21 Mr. Spano, and Mr. Wachsberger, correct?

22 A. Correct.

23 Q. And even though there's no backup, how
24 much work do they say David Allen is doing out
25 there?

1 A. \$13,477.

2 Q. And the four: Dooley, Starcevic, Spano
3 and Wachsberger, how much work in order to do all
4 of this administration and change orders and
5 field coordination, field review of that \$13,477,
6 how much are they -- how much is it costing them?

7 A. \$325.

8 Q. So it cost \$650 to look after \$143 worth
9 of work, and it cost them \$325 to look after
10 \$13,477 worth of work?

11 A. Correct.

12 Q. All right. The next one is CCD 9. Any
13 subcontractors on that one?

14 A. No.

15 Q. They got Mr. Dooley still working out
16 there?

17 A. Correct.

18 Q. Mr. Starcevic, Mr. Spano?

19 A. Correct.

20 Q. CCD 10. Any subcontractors?

21 A. No.

22 Q. They got Mr. Dooley and Mr. Starcevic,
23 right?

24 A. Correct.

25 Q. Nothing on CCD 11. Nothing on CCD 12.

1 Nothing on 13. And we've got 14. Any
2 subcontractors included on that?

3 A. No.

4 Q. Just BBC time?

5 A. Yes.

6 Q. Nothing on 15. Then we've got 16. Any
7 subcontractors on CCD 16 in owner change order 20
8 in Plaintiff's Exhibit 226?

9 A. Yes.

10 Q. All right. And which subcontractor is
11 that?

12 A. TriMark.

13 Q. And was TriMark in this action?

14 A. No.

15 Q. Were they previously in the action?

16 A. I believe so, yes.

17 Q. All right. And they've got -- we've got
18 Balfour on change order 16 charging for Dooley,
19 Starcevic and AJ Wachsberger, right?

20 A. That's what the description said. There
21 is no BBC amount under number 18.

22 Q. Okay. Just a markup?

23 A. Correct, just a markup.

24 Q. All right. CCD 19. Any subcontractors
25 on that one?

1 A. No.

2 Q. And we're still in owner change order
3 20, correct?

4 A. Correct.

5 Q. And then we've got BBC billing \$305,
6 right?

7 A. Correct.

8 Q. And the next one is CCD 22. Any
9 subcontractors in November of '18 on CCD 22?

10 A. No.

11 Q. All right. Any money BBC is charging?

12 A. \$615.

13 Q. And do they have the description of
14 services boxed on that one?

15 A. No.

16 Q. All right. Nothing on 23. Nothing on
17 24 or 25. And then we've got 26. Any
18 subcontractors involved in 26?

19 A. No.

20 Q. All right. We've got a BBC direct
21 billing?

22 A. Correct.

23 Q. All right. And any description of
24 services charged?

25 A. No.

1 Q. Then we go to CCD 27. Are there any
2 subcontractors being billed there?

3 A. Yes.

4 Q. All right. And who is that for?

5 A. Precision Walls and Merit also known as
6 Quantum Coatings.

7 Q. All right. And Precision Walls isn't in
8 the action anymore, right?

9 A. Correct.

10 Q. Is there any backup with this?

11 A. No.

12 Q. And BBC has a direct charge of \$3,200?

13 A. Correct.

14 Q. Was there any description of services or
15 backup for that?

16 A. No.

17 Q. Next one is CCD 28. Does that have any
18 subcontractor entries?

19 A. No.

20 Q. Was that BBC entries?

21 A. Yes.

22 Q. Was there any description of services or
23 otherwise backed up?

24 A. No.

25 Q. CCD 30. Does that have any

1 subcontractors?

2 A. No.

3 Q. CCD 30. There's no entry for November?

4 A. Correct.

5 Q. CCD 31, in November, for owner change
6 order 20.

7 A. Yes.

8 Q. Does that have any subcontractors?

9 A. Yes, SEAS.

10 Q. All right. And is SEAS in this action
11 anymore?

12 A. No.

13 Q. And did the owner pay them directly?

14 A. Yes.

15 Q. And is there any backup associated with
16 it in any way?

17 A. No.

18 Q. CCD 33. Does that have any
19 subcontractors?

20 A. Low Country Case and Millwork.

21 Q. All right. Was there any backup
22 associated with it?

23 A. No.

24 Q. Was there any description of services
25 for Balfour?

1 A. No.

2 Q. Shutters, CCD 36. Is there a
3 subcontractors involved?

4 A. No.

5 Q. Is there any backup?

6 A. No.

7 Q. Is there any description of services?

8 A. No.

9 Q. CCD 39. Is there any subcontractors
10 involved?

11 A. No.

12 Q. Is there any backup?

13 A. No.

14 Q. Is there any description of services?

15 A. No.

16 Q. Then we've got CCD -- excuse me, owner
17 change order 21?

18 A. Yes.

19 Q. And that is in Plaintiff's Exhibit 226,
20 correct?

21 A. Correct.

22 Q. And this is not signed by the architect.
23 What date is it signed by Mr. Starcevic?

24 A. 1/21/19.

25 Q. And was owner change order 21 ever

1 included in a certified pay application?

2 A. No.

3 Q. All right. Do you see in Plaintiff's
4 Exhibit -- excuse me, owner change order 21 and
5 Plaintiff's Exhibit 226, do you see any of the
6 similar charts that we have been going through
7 that had the overview and the -- Balfour's
8 description of services?

9 A. No.

10 Q. So those aren't in this one?

11 A. No.

12 Q. So the first two pages are cost reports
13 from Balfour, right?

14 A. Correct.

15 Q. And you've got a Quantum Coatings change
16 order request with tickets, right?

17 A. Correct.

18 Q. Has Quantum Coatings settled out of this
19 action?

20 A. Yes.

21 Q. And then you've got another cost report
22 and another Quantum Coatings, right? Are you
23 there?

24 A. Yes. This Quantum Coatings is dated
25 August 7, 2018.

1 Q. I was going to ask you that. I thought
2 this was for CCDs in -- well, what's the time
3 period of CCDs for this owner change order? Can
4 you tell?

5 A. No. This doesn't specifically say.

6 Q. The previous two were from -- 19 was for
7 October of '18, right?

8 A. Correct.

9 Q. And 20 was for November of '18?

10 A. Correct.

11 Q. And this one doesn't say when it's for?

12 A. Correct.

13 Q. All right. And when I say this one, I
14 mean, owner change order 21.

15 A. Correct.

16 Q. We just know it was signed by
17 Mr. Starcevic on January 21, 2019?

18 A. Correct.

19 Q. And this particular Quantum change order
20 request is for -- is dated August 7th of 2018?

21 A. Correct.

22 MR. MCDONALD: I apologize, Your
23 Honor. Just one second.

24 BY MR. MCDONALD:

25 Q. Okay. The next document is a Napa tile

1 document?

2 A. Correct.

3 Q. What is that?

4 A. That was kind of a padded tile for the
5 private dining area.

6 Q. Okay. Then we've got another Balfour
7 Beatty cost report, and this one says for the
8 period ending December 31st, 2018. Do you see
9 that?

10 A. Yes.

11 Q. And that would follow the October and
12 November time periods we looked at earlier?

13 A. Correct.

14 Q. We've got a Low Country pay application
15 here next, right?

16 A. Correct.

17 Q. Got more Quantum Coatings. Quantum
18 Coatings, Low Country. More Quantum Coatings.
19 This is Low Country and Quantum Coatings and a
20 bunch of cost reports. Quantum Coatings. All
21 right. Then we get to a document entitled
22 attachment F. Do you see that?

23 A. Yes.

24 Q. And that is the last bit of backup
25 documentation other than Balfour job cost

1 reports, right?

2 A. Correct.

3 Q. All right. And does this identify the
4 subcontractor?

5 A. This attachment F does not.

6 Q. So Marion Hotel, and then it has a block
7 for subcontractor. Do you see that?

8 A. Oh, I'm sorry. It says Warco
9 Construction.

10 Q. Okay. And what is the amount of those?

11 A. \$67,966.15.

12 Q. And when is it dated?

13 A. 2/26/2018.

14 Q. And are you able to look on your
15 Plaintiff's Exhibit 329 and see if Balfour is
16 claiming \$67,966.15 on behalf of Warco?

17 A. It says \$67,966.

18 Q. Even?

19 A. Even.

20 Q. Okay. And this has .15?

21 A. Correct.

22 Q. And do you know whether or not the owner
23 has paid that amount?

24 A. The owner has paid Warco.

25 Q. For the \$67,966?

1 A. I believe that's the amount, yes.

2 Q. Okay. And the owner has paid Balfour
3 for that? Do you know?

4 A. Yes.

5 Q. And do you know whether or not Balfour
6 has in fact paid Warco for that?

7 A. I'm not sure if they've paid Warco or
8 not.

9 Q. Okay. All right. Then we've got owner
10 change order 22, right?

11 A. Yes.

12 Q. And we've got -- and this is dated when?

13 A. January 9th, 2019.

14 Q. Okay. And when is this signed by
15 Mr. Starcevic?

16 A. 1/21/19.

17 Q. Is that the same day as owner change
18 order 21?

19 A. Yes.

20 Q. All right. And was owner change order
21 22 ever included in a certified pay application?

22 A. No.

23 Q. And this particular owner change order
24 does not relate to construction change
25 directives, correct?

1 A. That's correct because we would -- in
2 order to make it easier for everyone to
3 understand, an OCO either had all construction
4 change directives.

5 There was no mixing of RCOs and
6 construction change directives in an OCO. So
7 those were -- anything that had construction
8 change directives in an OCO, it was all
9 construction change directives. This is all
10 RCOs.

11 Q. Okay. And that's what I was going to
12 ask you. The numbers on the left-hand side, does
13 that correlate to the request for change order
14 numbers?

15 A. Yes.

16 Q. Okay. Let's look at Robert Thomas
17 decorative brackets 212R1. Do you know whether
18 that's also in the request for change order
19 notebook we looked at earlier?

20 A. Yes, it is.

21 Q. Do you know where that number \$21,253
22 comes from?

23 A. We can look at the RCO, but it was --
24 the total amount and then the architect, I
25 believe, had deducted some monies from the total

1 amount, and they came up with the 21,253.

2 Q. All right. And is this the exact one we
3 looked at in the request for change order?

4 A. Yes.

5 Q. Okay. If you'd look at the backup for
6 this in owner change order 22 and Plaintiff's
7 226.

8 A. Yes.

9 Q. Okay. So it's got \$20,050?

10 A. Correct.

11 Q. And a markup of \$1,203, correct?

12 A. Correct.

13 Q. Okay. And Library has paid \$10,820?

14 A. Correct.

15 Q. Let's take a look at Hutson Street storm
16 drain repair, 259. RCO 259 as listed on the
17 owner change order 22.

18 A. Okay.

19 Q. What is that for? Well, let's just go
20 through this so we can organize it. The first
21 pack of documentation is dated October 19th,
22 2018, and it relates to the Robert Thomas issue,
23 right?

24 A. So we're going to go through each one?

25 Q. Yeah.

1 A. Oh, yes.

2 Q. Just to touch on them. There's not many
3 of them. And that relates to the Robert Thomas
4 issue that we went over, correct?

5 A. Correct.

6 Q. And it's also included in the RCO
7 notebook?

8 A. Correct.

9 Q. Okay. And then you've got a July 26th,
10 2018 letter for a request for change order 141R2?

11 A. Correct.

12 Q. Okay. And that is not included in the
13 request for change order notebook?

14 A. Correct.

15 Q. Okay. What is this for? Is it signed
16 by Mr. Dooley?

17 A. No.

18 Q. Is it signed by you?

19 A. No.

20 Q. Do you know what this relates to?

21 A. This is in regards to some -- it says
22 paint grade sculptor panels at lobby bar. This
23 says 141R2. That's not signed, and it says, to
24 correct value but R41, R1 was signed by me for a
25 lower value of 2,338.36.

1 Q. And that was all the way back in 2017?

2 A. That's correct.

3 Q. And do you know whether --

4 A. I signed it in -- the letter is dated
5 September 13, 2017.

6 Q. Signed it September of '18?

7 A. That's correct.

8 Q. Okay. After the first -- the first one
9 that relates to it as backup is July 26th, 2018,
10 R2?

11 A. That's correct.

12 Q. And they just have them both in here for
13 some reason?

14 A. Correct.

15 Q. And do you know whether or not the
16 \$2,338 was paid?

17 A. I would have to look at the pay app.

18 Q. Well, if it wasn't paid, is it due? I
19 mean, is this an actual change?

20 A. The 2,338.36, yes.

21 Q. Because you signed that one, right?

22 A. Yes.

23 Q. All right. And then we're back to
24 Robert Thomas and the backup, right?

25 A. Correct.

1 Q. We originally had an October 19, 2018
2 backup. Now, we're back to Robert Thomas, and
3 we're at January 11th, 2018?

4 A. Correct.

5 Q. It's just a letter from Starcevic to
6 you, right?

7 A. Correct.

8 Q. Then we're back to Robert Thomas again?

9 A. Correct.

10 Q. Okay. Then we go to September 4, 2018.
11 What is this?

12 A. This is for changes for the elevator
13 cabs.

14 Q. Okay. So this is 246?

15 A. That's correct.

16 Q. All right. And was that included in the
17 RCO notebook? If you need to look, please do.

18 A. Yes.

19 Q. It was?

20 A. Yes.

21 Q. Then we've got an August 14, 2018 letter
22 here. It's signed by you, right?

23 A. That's for RCO 252?

24 Q. Yes.

25 A. Yes.

1 Q. And once again, this -- all these
2 documents are backing up owner change order 22,
3 correct?

4 A. Correct.

5 Q. And there was never a certified pay
6 application from the architect with the included
7 order change order 22, right?

8 A. Correct.

9 Q. But you did sign this particular RCO 252
10 on November 16th, 2018?

11 A. Yes.

12 Q. Okay. And is this a change? Is this
13 otherwise a legit change order?

14 A. Yes.

15 Q. Okay. All right. The next one is
16 August 21, 2018.

17 A. Yes.

18 Q. And you signed that one, too, right?

19 A. I did.

20 Q. And is this -- I mean, was this included
21 in a certified pay application and signed by the
22 architect?

23 A. No.

24 Q. Is this a legit change?

25 A. Yes.

1 Q. And is that why you signed it?

2 A. Yes.

3 Q. The next one is dated August 21st, 2018?

4 A. Yes, for RCO 257.

5 Q. Okay. And is that a legit change? Is
6 that why you signed it?

7 A. Yes.

8 Q. And was this RCO 257 ever included in
9 the pay application signed by the architect,
10 certified by the architect?

11 A. No.

12 Q. Then we've got an August 30, 2018. What
13 is this?

14 A. This is for storm repairs to Hutson
15 Street.

16 Q. Okay. And so is there any backup for
17 it?

18 A. No.

19 Q. But you've signed it on September 6th,
20 2018, right?

21 A. I did.

22 Q. Okay. And do you know what
23 subcontractor would have been involved in this?

24 A. Gulf Stream.

25 Q. Do you know whether Gulf Stream is still

1 claiming this money?

2 A. No, I don't believe so.

3 Q. Has Gulf Stream settled?

4 A. Yes.

5 Q. We've got two more. We've got October

6 15, 2018. That's signed by you, right?

7 A. Yes.

8 Q. What is this for?

9 A. To paint and prep the barn doors.

10 Q. Okay. And is this a legitimate change?

11 A. Yes.

12 Q. And was it ever included in a certified

13 pay application?

14 A. No.

15 Q. But you signed it on -- but you signed

16 it?

17 A. I did.

18 Q. Okay. And then September 4th, 2018?

19 A. Yes.

20 Q. All right. And this is -- what is this

21 for?

22 A. Trim rings around the ballroom can

23 lights.

24 Q. Okay. And it's a request for change

25 order 265?

1 A. Correct.

2 Q. You signed this one, right?

3 A. Correct.

4 Q. Okay. And was this otherwise a legit
5 change?

6 A. Yes.

7 Q. But was this ever included in the
8 certified pay application?

9 A. No.

10 Q. We went through all owner change orders,
11 19 through 22?

12 A. Yes.

13 Q. And 1 through 18 have been funded by the
14 owner, correct?

15 A. That's correct.

16 Q. Pursuant to certified pay application?

17 A. Correct.

18 Q. Ms. Brown, turn, if you would, to
19 Plaintiff's 209. Are you there, Ms. Brown?

20 A. I am.

21 Q. Okay. And have you had an opportunity
22 to look through Plaintiff's 209, which is already
23 in evidence?

24 A. Yes.

25 Q. Okay. And did Balfour ever advise you

1 that it was going to enter into joint prosecution
2 defense and tolling agreements with
3 subcontractors on this job?

4 A. No.

5 Q. Did you ever receive any notice from
6 Balfour that it was going to take funds from
7 Library but not -- take funds from Library for
8 its subcontractors but not pay its
9 subcontractors?

10 A. No.

11 MR. HILDEBRAND: Object to the
12 leading questions, Your Honor.

13 MR. MCDONALD: Your Honor, I have
14 to have -- this is not a leading question. I
15 asked, did they ever receive notice, and describe
16 what type of notice, I'm asking, that they
17 received.

18 THE COURT: All right. Well, she
19 answered the notice question. I will allow that
20 one. The next one, you will have to restate that
21 one.

22 BY MR. MCDONALD:

23 Q. The answer is, no, you didn't receive
24 any notice from Balfour?

25 A. Correct.

1 Q. Now, we talked earlier about your role
2 with regard to the construction process on behalf
3 of Bennett Hospitality and Library Associates.
4 Do you remember that?

5 A. Yes.

6 Q. I guess it was more than three days ago
7 now because we had the weekend.

8 A. Thursday, yes.

9 Q. Okay. What role do you have with regard
10 to the accounting records of -- reviewing the
11 accounting records, compiling the accounting
12 records of Library Associates?

13 A. We have two bookkeepers that work under
14 me, and I review all the accounting records for
15 Library Associates.

16 Q. Okay. So the two bookkeepers report to
17 you?

18 A. That's correct.

19 Q. Okay. And you review all the accounting
20 records?

21 A. Correct.

22 Q. Okay. And does Library Associates keep
23 its accounting records within the ordinary course
24 of its business?

25 A. Yes.

1 Q. Did Balfour Beatty provide Library
2 Associates information throughout the
3 construction process regarding the opening date
4 or the proposed opening date of the hotel?

5 A. Yes.

6 Q. Okay. And did Library Associates rely
7 on that information?

8 A. We did.

9 Q. And why is it important to know the
10 opening date of a five-star hotel with some
11 accuracy?

12 A. Because you need to know that date in
13 order to hire the employees, to start your
14 advertising, doing your web designs, your
15 e-commerce, and to -- groups book about a year in
16 advance, weddings book about a year in advance,
17 and so we needed to have that group business and
18 that wedding business already booked a year prior
19 to opening.

20 Q. Okay. And let's --

21 A. Because otherwise you wouldn't get that
22 business for another year.

23 Q. Okay. So you have that lag?

24 A. Correct.

25 Q. And let's talk about the advertising.

1 Can you tell the Judge a little bit about that,
2 why it's important to note an accurate opening
3 date as it relates to advertising?

4 A. Well, for many reasons. You need to
5 start your web design and your web page, and that
6 takes a long time to do. And you've got to start
7 taking reservations. So you need to know when to
8 open that reservation.

9 Q. And how important is advertising to a
10 hotel that doesn't have a -- we talked about it
11 earlier -- a flagged hotel and a not flagged
12 hotel?

13 A. Correct.

14 Q. How important is advertising to a new
15 hotel that's not flagged?

16 A. I mean, it's the most important thing to
17 getting your name and your product out there.

18 Q. And based upon the representations as to
19 the projected opening date of Balfour Beatty, did
20 Library Associates make decisions on advertising
21 and timing of advertising?

22 A. Absolutely.

23 Q. Okay. And based upon the
24 representations made by Balfour Beatty related to
25 the projected opening of the hotel, did Library

1 Associates make decisions on the booking of
2 groups, weddings and things we talked about
3 before?

4 A. Absolutely.

5 Q. Okay. Now, let's revisit staffing.
6 Tell me about staffing. Why is it important to
7 know an accurate date on a hotel opening as it
8 relates to staffing?

9 A. Well, the first staff member, you always
10 hire your director of sales. Most people would
11 think it might be your general manager, but it's
12 your director of sales because they need to hit
13 the ground running and to -- and to market the
14 hotel. And that's usually done at least a year
15 out, and then the general managers typically hire
16 around 12 to 9 months out as well.

17 Q. Okay. And is all that -- that would be
18 the, I guess, executive level staffing?

19 A. That's correct. You hire the director
20 of sales, the general manager, and then from
21 there, you would hire all of your salespeople
22 again because they have to sell the hotel. And
23 then you'd start bringing in your executive chef
24 to start compiling the menus for the F&B outlets,
25 et cetera. So you would always hire your -- kind

1 of your executive team first.

2 Q. And it all relates to the projected
3 opening date of the hotel?

4 A. Correct.

5 Q. Whenever that projected opening date is,
6 you just -- it needs to be accurate so you can do
7 the build up, I guess?

8 A. That's correct.

9 Q. Did Library Associates in fact incur
10 additional actual expenses as a result of the
11 projected dates -- projected opening dates that
12 Balfour Beatty gave Library Associates?

13 A. Absolutely.

14 MR. HILDEBRAND: Objection to the
15 leading question, Your Honor.

16 THE COURT: All right. I will
17 sustain it.

18 BY MR. MCDONALD:

19 Q. Did Balfour Beatty provide Library
20 Associates projected opening dates?

21 A. Yes.

22 Q. Did those projected opening dates at
23 Library Associates provide a change over time?

24 A. Yes.

25 Q. Did Library Associates make decisions on

1 this build up that we went through based upon the
2 projected opening dates that Balfour gave it?

3 A. Correct, yes.

4 Q. Were there costs incurred, actual costs
5 incurred by Library Associates based upon those
6 projected opening dates?

7 A. Yes.

8 Q. Had the projected opening dates provided
9 by Balfour Beatty been accurate, would you have
10 incurred those costs?

11 MR. HILDEBRAND: Objection, Your
12 Honor. It's calls for speculation, and again,
13 it's just blatantly leading. He can ask her
14 about the openings and what they did in
15 anticipation of the opening, but --

16 THE COURT: I'm going to sustain
17 that. Why don't you ask her directly what it is
18 you're going at.

19 MR. MCDONALD: I was just laying
20 the foundation. If I wouldn't have done that, I
21 would have had a foundation objection.

22 (DFT. EXH. 146A and B were marked
23 for identification.)

24 BY MR. MCDONALD:

25 Q. All right. Ms. Brown, I'm going to hand

1 you what's marked for ID purposes as Defendant's
2 Exhibit 146. I ask if you have seen this
3 document before. Have you seen that document
4 before?

5 A. Yes.

6 Q. And did you have an actual involvement
7 in its creation?

8 A. Yes.

9 Q. Okay. All right. And the first page
10 is?

11 MR. HILDEBRAND: Objection, Your
12 Honor.

13 Q. -- numerical line items, correct?

14 THE COURT: Just one second. You
15 had an objection, I'm sorry.

16 MR. HILDEBRAND: Yes, sir. I've
17 got a strong objection to this entire document.
18 What this purports to be --

19 THE COURT: All right. Well, let
20 me stop you because he hadn't done anything yet,
21 so let's get --

22 MR. HILDEBRAND: I know. Before he
23 even gets into it -- he's about to ask her
24 questions about it, and I think it's --

25 THE COURT: Well, when he asks her

1 a question, I'm going to let you object. All
2 right?

3 MR. HILDEBRAND: Okay. Thank you.

4 BY MR. MCDONALD:

5 Q. Did you have direct involvement in
6 compiling these numbers?

7 A. Yes.

8 Q. Okay. And there are two sets of numbers
9 in this document, correct?

10 A. Correct.

11 Q. All right. So my questions right now
12 relate to the first set.

13 A. Okay.

14 Q. The first spreadsheet, what are those
15 numbers?

16 A. Those numbers are the --

17 MR. HILDEBRAND: Objection, Your
18 Honor. I object to -- and here's the basis of
19 the objection. There are two provisions
20 regarding damages in the contract.

21 One is for liquidated damages, and
22 that's clear that, if there are delays, then the
23 plaintiff -- and they can prove that they are
24 entitled to those liquidated damages, then that's
25 what they get in lieu of whatever damages that

1 they might suffer or claim to suffer because of
2 delays.

3 The second aspect of my objection
4 relates to the plaintiff -- I'm sorry, Library
5 Associates has clearly agreed to waive any claims
6 for consequential damages, and I want to turn to
7 that. 15.1.6. The contractor and owner waive
8 claims against each other for consequential
9 damages arising out of or relating to this
10 contract.

11 The mutual waiver includes, one -- and
12 this is where it talks about the owner -- damages
13 incurred by the owner for rental expenses, for
14 losses of use, income, profit, financing,
15 business and reputation, and for loss of
16 management or employee productivity for the
17 services of such persons.

18 Your Honor, that is a broad -- and this
19 is a contract again that Mr. Bundy says that he
20 drafted. And he included this provision in here,
21 and it was signed by Library Associates. It's a
22 broad waiver of consequential damages. All of
23 these damages that Mr. McDonald has listed on
24 this potential exhibit aren't consequential
25 damages, and they're clearly within the purview

1 and very broad purview of this waiver.

2 So my objection is threefold. One, all
3 of these are consequential damages that have been
4 waived. Two, the only provision for delays in
5 the contract is liquidated damages, and three,
6 even applying the liquidated damages, there's a
7 cap of 1.4 million dollars based on the
8 contractor's fees.

9 So for all of those reasons, I object to
10 this testimony and this evidence.

11 MR. MCDONALD: May I be heard, Your
12 Honor?

13 THE COURT: Sure.

14 MR. MCDONALD: Perhaps had I been
15 able to ask questions on it, Mr. Hildebrand would
16 understand that these aren't delay damages that
17 are being requested.

18 The contractor, Balfour Beatty, under
19 the contract is solely responsible for the
20 construction schedule. Had Balfour Beatty told
21 us, hey, we're going to open late January of
22 '19 -- that's why I asked the foundation
23 questions -- these costs wouldn't have been
24 incurred. These aren't delay costs.

25 These are the costs of a direct breach

1 of contract failing to adequately schedule the
2 project, which is the testimony we've already put
3 in through Mr. Boe and through Mr. Clements and
4 then saying, based upon their failure to actually
5 schedule the project, here's where we're going to
6 open the hotel. The reliance by Library
7 Associates in order to staff it up.

8 That's a direct breach of contract and a
9 direct damage. It's not a consequential damage,
10 a direct damage. If you tell us you're going to
11 open the hotel and then you don't and you didn't
12 have a basis for that statement, which they did
13 not, okay, or we put in testimony that they did
14 not, then you've directly breached the contract,
15 and you caused direct damages.

16 That's the first section of this
17 document. And in response to his LDs for delay.
18 It just doesn't apply in this scenario. That's
19 not what we're asking for.

20 The second is, they're not consequential
21 damages, they're direct damages. They're guest
22 relocation and resolution. They told us we were
23 ready to go. We started booking them. I really
24 was trying to lay the foundation to avoid all of
25 this.

1 THE COURT: Okay.

2 MR. MCDONALD: That's why we had
3 this -- they call it walking them, which you've
4 got to send them to another hotel when they show
5 up. And now you've got to worry about that.
6 We've got the excess committed sales and
7 marketing expenses, which I laid the foundation
8 for.

9 Once again, direct damages, and then the
10 costs related to the action -- the unavoidable
11 operating and variable costs that go to
12 everything that she just testified to. Had we
13 been provided an accurate opening date, even if
14 it was late, we could have done this build up at
15 the appropriate time.

16 I mean, you run an ad for an unflagged
17 hotel and people say, that's real interesting.
18 And they call up, and you say, well, we ain't
19 open. Okay. They're going to go stay somewhere
20 else, and you don't get the benefit of that
21 advertising.

22 So in response, these aren't delay
23 damages at all. These are direct damages due and
24 owing to a direct breach that they failed to
25 adequately schedule the job, which they were

1 solely responsible for doing under the terms of
2 the contract. Solely. That's a quote,
3 responsible for scheduling the job.

4 And they breached the contract in that
5 regard, and we incurred those damages because of
6 that breach, not because of some delay analysis,
7 which is another damage category that we're going
8 to get into. But that's not this.

9 The second aspect of this -- I didn't
10 hear any objection to, is the cost to actually
11 complete the contract amount -- or the work in
12 the contract. There's a number of items here
13 that I'm going to go through with her on what
14 they had to do in order to finish the work that
15 Balfour didn't finish.

16 So that's why I was restricting my
17 questions on the first category. I haven't
18 gotten to the questions on the second category.
19 So that's my position on it. It's not delay
20 damages. It's direct damages because they failed
21 to schedule the job. And they're not
22 consequential damages, they're direct damages
23 arising out of that specific breach.

24 And we also have cause of action for
25 unfair trade practices, cause of action for civil

1 conspiracy, and I'm required to put in the
2 damages associated with those as well. So while
3 I believe that I can recover them in a contract
4 setting, they were not waived by this contract,
5 and that their direct damages related to their
6 brief.

7 Certainly entitled to put it in on the
8 unfair trade practices and civil conspiracy
9 causes of action that I had because I'm -- those
10 would be extra contractual causes of action, and
11 I would be entitled to put in, once again, direct
12 and actual damages associated with those.

13 THE COURT: All right. Mr. Terry,
14 do you want to chime in?

15 MR. TERRY: Yes, Your Honor.
16 Watson objects as well. As you might recall at
17 the beginning, prior to the trial, Watson filed a
18 motion in limine to exclude evidence of damages
19 by Library Associates.

20 Watson objects based on the same
21 reasoning for that motion in limine.
22 Specifically, this witness testified during her
23 deposition and her 30(b)(6) deposition of Library
24 Associates that she didn't know what damages
25 that -- and on multiple categories included in

1 here, that she -- that Library Associates was
2 claiming against Watson.

3 So Watson objects based on the fact that
4 she has no personal knowledge as well.

5 MR. MCDONALD: She hasn't mentioned
6 Watson yet.

7 THE COURT: Okay. All right.
8 Reply?

9 MR. HILDEBRAND: Your Honor, these
10 are delay damages. What he's saying is, you
11 scheduled the project. The scheduling -- and
12 what he's been working towards is the opening
13 day. That's what all of this preparatory
14 questions were, why is the opening day important,
15 why is it critical. So many questions about
16 that.

17 So the damages that he's asking for, and
18 he is talking about are delay damages. A rose is
19 a rose by any other name. These are delay
20 damages. Clearly that's what he's trying to
21 prove.

22 So they go under liquidated damages, and
23 any damages -- if you look at paragraph 2.3.1.3,
24 any damages related to delay go under liquidated
25 damages. But then -- and that's all you get.

1 These damages are again just so -- this waiver --

2 THE COURT: All right. Let me tell
3 you. I tend to agree with you on the contract
4 claim. I understand his argument is these are
5 direct and not consequential. But I would tend
6 to agree with you on that. Let me hear from you
7 on the tort claims that they've got.

8 MR. HILDEBRAND: Your Honor, the
9 waiver of consequential damages is broad. If you
10 look at it, it's as -- for consequential damages,
11 damages arising out of or relating to this
12 contract. Arising out of -- it could not be any
13 broader. Arising out of or relating to this
14 contract.

15 And there hasn't been any proof of any
16 conspiracy at all, whatsoever, and I take great
17 exception that there has been. All that
18 they're -- look at the evidence in front of you,
19 Your Honor. The only evidence is that there was
20 a joint defense agreement.

21 Early in the discovery, when Mr. Bundy
22 or Mr. McDonald was taking depositions, he asked
23 a BMCC representative about some information, and
24 BMCC said, well, I think that that might be
25 covered by the joint defense agreement. They

1 went off the record, and nothing else was
2 described with that.

3 We were asked to provide that. We
4 provided the joint defense agreement. And since
5 then, the chart that we very clearly and
6 straightforwardly entered into evidence, showed
7 that there were several parties in the joint
8 defense agreement. Most of them have now dropped
9 out of it.

10 And it showed that even though the joint
11 defense agreement says that any disputes between
12 Balfour and the joint defense participants won't
13 be decided until later, the fact is, most of
14 those participants had already filed claims
15 against Balfour, and they never withdrew them.

16 And you already ruled on summary
17 judgments for a lot of joint defense
18 participants. And right before you ruled, they
19 said, we're voluntarily dropping out of it. So
20 that's a long-winded response, but what it is, is
21 that there are no tort claims that are outside of
22 this consequential damages waiver. Arising out
23 of or related to.

24 And second, there's been no evidence,
25 with all due respect, to show any conspiracy or

1 unfair trade practices acts and all that would
2 allow this to come in. And I don't think that
3 they would anyway. Thank you.

4 MR. MCDONALD: Your Honor, that
5 sounds like a directed verdict motion. Okay?
6 I'm not done putting up my case yet, one.

7 THE COURT: I'm with you.

8 MR. MCDONALD: So I still have
9 those two -- there are two causes of action for
10 unfair trade practices and civil conspiracy. So
11 I don't want to get baited into arguing
12 everything that I've put and explain it because I
13 think it's inappropriate.

14 THE COURT: Well, let me hear your
15 argument about the arising out of language of the
16 contract because clearly you wouldn't be here --
17 we wouldn't be here if you didn't have a contract
18 with Balfour Beatty.

19 So that's what we've been trying this
20 case. Basically it's a contract case. I know
21 that there are tort claims out there. Let me
22 hear from you, and how you get around arising out
23 of the contract.

24 MR. MCDONALD: Yes. Well, first of
25 all, I want to step back from my direct damages,

1 direct breach argument.

2 THE COURT: Okay.

3 MR. MCDONALD: And I understand
4 we're not talking about it right now, but I just
5 wanted to make sure --

6 THE COURT: Yeah, yeah.

7 MR. MCDONALD: -- that I'm just
8 talking about --

9 THE COURT: You're not giving it
10 up. I understand.

11 MR. MCDONALD: That's exactly
12 right.

13 THE COURT: All right.

14 MR. MCDONALD: The arising out of,
15 the language that he refers to in this claim for
16 consequential damages -- consequential damages
17 arising out of or relating to this contract.
18 Okay. There's no question that that's a broad
19 statement.

20 Having said that, for the purposes of
21 entering the evidence, okay, not the application
22 of the breach of contract -- we're just talking
23 about entering the evidence for the unfair trade
24 practices and civil conspiracy.

25 I think it's absolutely appropriate

1 that -- Your Honor could find they engaged in
2 deceptive acts, which are having the tendency to
3 deceive, that could be capable of repetition.
4 You can find that separate from any contract
5 cause of action.

6 And if you can do that, if you can draft
7 an order that says, what they did, okay, by
8 internal change orders and all the things I'm
9 going to spend time putting in, has the tendency
10 to see that it's capable of repetition. In fact,
11 it was repeated in this. You can find that cause
12 of action unrelated to the contract. You have
13 the right to do that.

14 And as a result of that, this comes in
15 just on that and the civil conspiracy. The civil
16 conspiracy cause of action is somewhat even more
17 unique in that it can have accomplishing a lawful
18 act, the contract, by an unlawful means. And I'm
19 going to put in significant evidence that they
20 broke the law. They took money. They didn't pay
21 their subcontractors.

22 They still haven't to this day -- they
23 still have that money to this day. And so they
24 may be able to do these things pursuant to the
25 terms of the contract, but they can't do it under

1 the statute. Okay? I'm not suggesting they can
2 do it. I'm just saying, you could still find
3 that.

4 And if you can find that, then it
5 wouldn't apply to this, especially at this stage,
6 which is just to enter the evidence. I mean, I'm
7 hearing objections that sound like directed
8 verdicts, not whether or not the evidence comes
9 in. So that would be my response.

10 THE COURT: All right. Mr. Terry?

11 MR. TERRY: Your Honor,
12 Mr. McDonald mentioned the civil conspiracy
13 claim. Watson is a party to that or a defendant
14 in that civil conspiracy claim and to the basis
15 for Watson objection, Mr. Windle, I believe,
16 has --

17 THE COURT: Mr. Windle, do you
18 have something?

19 MR. WINDLE: The liquidated damages
20 clause allows for the recovery of delay damages,
21 and that's the sole recovery for delay damages
22 under the terms of the contract.

23 THE COURT: The liquidated damages,
24 right?

25 MR. WINDLE: Yes.

1 THE COURT: Yeah.

2 MR. WINDLE: The waiver of
3 consequential damages is wrong. Arising out of
4 or related to the contract, just like
5 Mr. Hildebrand said. And the purpose of that
6 clause is to prevent these type of claims in a
7 breach of contract lawsuit. That waiver of
8 consequential damages is intended to limit the
9 parties to direct damages.

10 THE COURT: Okay. All right.

11 MR. MCDONALD: And just so I can be
12 clear, assertion of these damages are not delay
13 damages because they're based upon a
14 representation of which the contractor had to
15 schedule the job. Had they told us, not that
16 it's going to -- we're going to be done in '18,
17 to go ahead and ramp up, okay, but we're going to
18 be done in '19, those costs wouldn't have been
19 wasted, wouldn't have been double incurred.
20 That's my point on it.

21 THE COURT: I'm with you. All
22 right. Here's what I'm going to allow you to do.
23 I'm actually -- I'm going to sustain the
24 objection as to the admissibility under the
25 contract, and because the language arising out of

1 the contract is in there.

2 I've read this contract, I think I've
3 told y'all that. I can't say I've read it
4 multiple times, but with y'all's help, I've
5 probably read the relevant stuff multiple times.
6 I do think that you contractually limited your
7 damages to liquidated damages for delay, and I
8 understand where you're going with this.

9 What I'm going to allow you to do is to
10 do, as I've done for the plaintiff in the case,
11 and that's to proffer the evidence. I will let
12 you do that however you wish to do it. But as
13 far as the breach of contract is concerned, it's
14 not going to be admissible evidence. That's my
15 ruling. All right?

16 As of if it relates to the other two, at
17 this point, I'm going to find that it's not
18 admissible again arising out of the contract. I
19 reserve my ruling to somewhat later if I change
20 my mind about that.

21 I'm going to allow you to put forth the
22 evidence you wish to. You can put directly
23 through Ms. Brown or you can do it by submittal
24 of the documents. I don't really care how you do
25 that. All right. Let's take a little break, and

1 we can come back in after lunch.

2 MR. MCDONALD: I just want to be
3 clear. The two aspects, the cost associated with
4 completing the hotel, which would be direct
5 evidence --

6 THE COURT: Yeah, I would tend to
7 think the cost to complete would probably be
8 admissible. We just talked about that. In other
9 words, we're talking about the third parties like
10 the painters and that.

11 MR. MCDONALD: Yes, those costs
12 associated with the hotel including the painting
13 costs.

14 THE COURT: Yeah.

15 MR. MCDONALD: I would like to go
16 ahead and proffer and ask her a few questions and
17 go through the second part of the exhibit.

18 THE COURT: That's fine. Let's
19 make a distinction as to how we do -- I don't
20 know whether the top part --

21 MR. MCDONALD: The distinction is
22 the top part is the costs that we contend were
23 incurred as a result of the failure of Balfour to
24 giving an accurate opening date. Okay?

25 THE COURT: Okay.

1 MR. MCDONALD: That's what we've
2 been arguing about this whole time. The second
3 portion of this exhibit were costs to complete
4 the hotel.

5 THE COURT: All right. Just so the
6 record is clear, the first part is what I just
7 ruled to be proffered and not admitted. The
8 second part, I'm going to allow you to admit
9 that.

10 MR. HILDEBRAND: That's fine. I
11 think he can making them both in one and split it
12 out and make it two exhibits. One, if he wants
13 to proffer, and then you said the other you're
14 going to allow him to introduce?

15 THE COURT: Why don't we take a
16 break and have them figure that out. I'm happy
17 to have her testify and take the breakdown. Then
18 you can determine how you wishing to present
19 that. I have no problem with that. Let's come
20 back about 2:15.

21 (A recess transpired.)

22 THE COURT: All right. Back on the
23 record.

24 Mr. McDonald?

25 MR. MCDONALD: Thank you, Your

1 Honor. Before we broke, we were looking at
2 Defendant's Exhibit 146, and for Your Honor's
3 information, Defendant's Exhibit 146 is broken
4 into two charts. The first relates to a title
5 called unnecessary costs incurred prior to
6 opening.

7 My understanding is, based upon Your
8 Honor's ruling, is that that portion -- I would
9 like to proffer through the witness that portion.
10 And then I have not yet been able to get into the
11 second portion. So since this has been marked
12 for ID purposes as Defendant's Exhibit 146 -- I
13 didn't want to do this without discussing this
14 with Your Honor first.

15 What I would like to do is on the
16 exact -- actual exhibit, bracket the chart, and
17 we'll -- I will show you how the tabs correlate
18 to that chart as A on the exhibit and then
19 bracket the second chart as B, so you'll know
20 what's being proffered based upon the arguments
21 and the rulings of Your Honor and what portion is
22 still in play.

23 THE COURT: So just to be clear,
24 bracket A would be the proffered information.

25 MR. MCDONALD: Bracket A would be

1 the proffered information, and bracket B would be
2 the BBC contract costs incurred by Library.

3 THE COURT: All right. Are you
4 clear on that?

5 MR. HILDEBRAND: Yes, sir. But
6 wouldn't it be so much clearer for the record
7 if -- it's fine if they want to do it tomorrow so
8 they could go back and just break the exhibit --
9 the two exhibits. One would be proffered, and
10 then the second one is actually in evidence so
11 the record is clearer.

12 THE COURT: Well, if we had a jury
13 here, I would agree with that. But you -- I can
14 distinguish between the two. Let's just moving
15 forward. Okay?

16 MR. HILDEBRAND: All right. No
17 problem.

18 MR. MCDONALD: May I make that
19 correction on the exhibit, Your Honor?

20 THE COURT: Certainly.

21 MR. MCDONALD: Thank you very much.

22 THE COURT: And this is Exhibit --
23 Defendant's Exhibit 146?

24 MR. MCDONALD: 146.

25 THE COURT: All right.

1 BY MR. MCDONALD:

2 Q. All right. Ms. Brown, before we broke,
3 we were discussing this chart, and I would like
4 to talk about, on your copy is the chart that is
5 bracketed as Exhibit A. All right. Were you
6 involved in the compilation and review of those
7 costs?

8 A. Yes.

9 Q. Okay. And what do those relate to?

10 A. Those relate to the costs that we
11 incurred during preopening.

12 Q. Okay. And why did you incur those costs
13 during preopening?

14 A. Because we were not given the correct
15 schedules by Balfour Beatty, showing what the
16 opening date would be.

17 Q. Okay. And there are various tabs
18 associated with spreadsheet A, correct?

19 A. Correct.

20 Q. And what are the numbers associated with
21 spreadsheet A?

22 A. Tab 1, tab 2, tab 3, tab 4, tab 5, and
23 tab 6, 6.1.

24 Q. And we'll get to that in a second. What
25 is tab 1? Well, let me ask you this: As a

1 result of what you just testified to, how much
2 money did Library Associates spend? What was the
3 total for spreadsheet A?

4 A. \$2,353,673.

5 Q. Okay. And that was as a direct result
6 of what you just testified to related to the
7 scheduling by Balfour Beatty?

8 A. Correct.

9 Q. What is tab 1?

10 A. Tab 1 is the itemized list of the
11 preopening management fee that we paid on a
12 monthly basis to Salamander for the management of
13 the hotel.

14 Q. And why is -- why are those costs in
15 spreadsheet A?

16 A. Because we incurred additional
17 preopening fees, management fees that were
18 anticipated due to the opening date not being
19 given to us correctly.

20 Q. And explain that to the Judge. What do
21 you mean, the opening date not being given to
22 y'all correctly?

23 A. We were told different dates on numerous
24 occasions. We were told it was going to be per
25 the contract in August of '17, and then there

1 were updates that said it was going to be October
2 of '17. And then it was going to be in June of
3 '18 and then October of '18. And it just -- the
4 date kept on sliding.

5 Q. Okay. And how does that relate to these
6 additional costs that are identified on
7 spreadsheet A, Defendant's Exhibit 146?

8 A. On spreadsheet A?

9 Q. Yes.

10 MR. HILDEBRAND: Your Honor, is
11 this still just part of the proffer?

12 THE COURT: Yeah. I'm going to
13 allow it. There's an objection to the entire
14 line preserved for the record. Go ahead and just
15 make your record so it's clear.

16 MR. TERRY: I'd like to add an
17 objection to -- on the basis of the best evidence
18 rule, Your Honor. All we have here is a summary,
19 and there's no documentation for that.

20 THE COURT: All right. So noted.

21 MR. MCDONALD: Your Honor, I
22 intend -- when I get done with my proffer, I will
23 let the Court know that I completed my proffer.

24 THE COURT: Okay. Thank you.

25 THE WITNESS: Can you ask the

1 question again, please?

2 BY MR. MCDONALD:

3 Q. Yes, ma'am. As it relates to the costs
4 that are depicted on spreadsheet A on Defendant's
5 Exhibit 146, you testified that those were
6 related to the opening date based upon Balfour's
7 schedule being consistently moved?

8 A. Correct.

9 Q. I'm just asking how -- as it relates to
10 tab 1, why did you-all incur those costs because
11 the opening date was consistently moved?

12 A. Our management agreement with Salamander
13 calls for a monthly management fee. And the
14 first 12 months -- excuse me, in the first -- in
15 the 12 months prior to opening, we were to pay --
16 excuse me. In the first 12 months prior to
17 opening, we would pay \$20,000 a month.

18 The management agreement was assigned in
19 October of 2016, and so we had already reached
20 that date. And so the management agreement calls
21 for the next six months to be at \$22,500 a month.
22 And then anything after those six months, it's
23 \$25,000 a month.

24 Q. Did you-all sign the management
25 agreement in reliance upon the Balfour opening

1 dates as represented to you?

2 MR. HILDEBRAND: Objection to the
3 leading question.

4 THE COURT: Go ahead.

5 A. Yes, we did. We started negotiating
6 with Salamander at the beginning. Well, we
7 started interviewing management companies in '15,
8 selected Salamander in the being of '16 and
9 negotiated those contracts for about nine to ten
10 months.

11 And we knew we were -- at that point,
12 the opening date was going to be around October
13 of '17. And so we signed this agreement one year
14 prior to the opening date, so then we could begin
15 hiring the directors of sales and general
16 manager, as I had testified earlier.

17 Q. Okay. And was the hotel open in October
18 of '17?

19 A. No.

20 Q. So Balfour's position is Salamander was
21 there too late, and your position is that
22 Salamander was there too early?

23 A. Correct.

24 Q. Okay. And let's talk about tab 2. What
25 is that?

1 A. Tab 2 is the preopening budget.

2 Q. And what does it represent?

3 A. It's partial preopening budget. The
4 preopening is kind of separated into two
5 different areas, one being kind of the general
6 and administrative areas, and the other being the
7 sales and marketing specific preopening budget.
8 This is just the general preopening budget. It
9 does not have the sales and marketing included.

10 Q. What were costs incurred, based upon
11 your previous testimony, by Library with regard
12 to tab 2?

13 MR. TERRY: Objection, Your Honor,
14 best evidence rule.

15 THE COURT: All right. Go ahead.

16 A. The costs incurred were \$2,222,145.28.

17 Q. And then you would subtract out the
18 budgeted preopening expenses, right?

19 A. That's correct.

20 Q. And what's your subtotal, just for tab
21 2?

22 A. Tab 2? \$1,105,441.

23 Q. All right. Let's go to tab 3. What is
24 that?

25 A. Tab 3 is the preopening specifically for

1 the sales and marketing.

2 Q. And what is the total for tab 3, the
3 subtotal for tab 3?

4 A. Just the subtotal or the total?

5 Q. Yes, ma'am, the subtotal.

6 A. The subtotal is \$721,557.

7 Q. Okay. And are these the sales and
8 marketing expenses that we discussed earlier?

9 A. Yes.

10 Q. Okay. And so this -- explain that, if
11 you would, just briefly. How would the sales and
12 marketing expenses be related to the moving open
13 date?

14 A. You had the additional salary and wages
15 and the benefits and everything that comes along
16 with the payroll. You had additional advertising
17 time and e-commerce time, additional fees that we
18 would have to pay the advertising agency, whose
19 name was Hurrah. We had to be -- had them on
20 retainer. We had to pay marketing fees every
21 month.

22 And then the salespeople go out to
23 travel shows to promote the hotels and
24 conferences. And we thought we would only
25 anticipate having them go out for one year, but

1 they ended up having to go out for the second
2 year as well because we were two years from
3 opening.

4 And in addition, there's dues and
5 subscriptions that we pay to different services,
6 whether it's the preferred hotels or different
7 marketing companies, American Express, et cetera.
8 We had to pay those additional dues and
9 subscriptions as well.

10 Q. Okay. And during these times where the
11 hotel opening date was being represented to
12 Library Associates by Balfour Beatty, were
13 you-all incurring these costs?

14 A. Yes.

15 Q. All right. Let's go to tab 4. That's
16 under guest relocation and resolution. What is
17 that?

18 THE COURT: What were the totals on
19 that? What did you come up with? I just wanted
20 to write it down?

21 BY MR. MCDONALD:

22 Q. What was the subtotal for His Honor on
23 the excess opening costs?

24 A. \$721,557.

25 Q. All right. And then the guest

1 relocation and resolution has three items,
2 correct?

3 A. Correct.

4 Q. And those are tabs 4, 5 and 6.1?

5 A. Correct.

6 Q. Okay. What is the total of tab 4,
7 entitled relocated --

8 A. Tab 4 is \$92,460.34.

9 Q. Okay. And what is that -- what is tab
10 4? Why were those costs incurred?

11 A. The first sheet on tab 4.1 is 7,756.56.
12 That cost was incurred because we did not have
13 all of the rooms available on the opening date
14 for the reservations that we had. Because they
15 were still -- I think there was two floors at
16 that time that were not rentable.

17 Q. What about the next thing in tab 4?

18 A. The next item on tab 4 is -- we had had
19 a complete buyout of the hotel in February
20 that -- for a Volvo group. And we did not have
21 all the rooms available for the Volvo group, and
22 we had to -- in the industry, we can them walk
23 part of the group to Charleston Place. And we
24 had to do it at Charleston Place because that was
25 the only other five-star hotel in town. Or a

1 hotel that's comparable to what they had reserved
2 for our group. And that was the cost of putting
3 those guests or part of that group into the
4 Charleston Place Hotel.

5 Q. And what is tab 4.2? Are those the
6 checks associated with that?

7 A. That's correct.

8 Q. All right. And what is tab 5? What is
9 the total of tab 5, for guest relocation?

10 A. Guest relocation is \$11,862.

11 Q. And what is tab 5 showing?

12 A. Again, those were just individual guests
13 that had to move because the rooms were not
14 available.

15 Q. Okay. And then finally tab 6.1 is
16 escort guests during construction. What is the
17 total of that?

18 A. That's highlighted in the red box. That
19 total is \$1,385.18. We had to walk some guests
20 to the Dewberry Hotel across the street.

21 Q. And so the total of the unnecessary
22 costs incurred prior to opening, what was the --
23 what is the grand total?

24 A. \$2,353,672.

25 Q. And those are costs associated with the

1 representation by Balfour as to when the hotel
2 was going to open?

3 A. Correct.

4 THE COURT: And let me make sure
5 I'm clear on that claim. That's as to all of
6 those other tabs together; is that correct, the 2
7 million or is that --

8 THE WITNESS: That's one through --

9 THE COURT: 1 through 6.1?

10 THE WITNESS: 1 through 6.1, yes.

11 THE COURT: Okay. And then refresh
12 my memory on the date the hotel opened.

13 THE WITNESS: January the 26th,
14 2017.

15 THE COURT: 2019?

16 THE WITNESS: Excuse me, '19, yes.

17 THE COURT: Thank you.

18 MR. MCDONALD: All right. Your
19 Honor, that will be the end of my proffer on that
20 section.

21 THE COURT: All right. Very good.
22 Thank you.

23 (DFT. EXH. 146A was admitted as a
24 proffer.)

25 BY MR. MCDONALD:

1 Q. All right. Ms. Brown, did Library
2 Associates incur costs performing work or
3 self-performing work that Balfour had agreed to
4 perform?

5 A. Yes.

6 Q. And what was the total of those costs?

7 A. 2,256,764.

8 Q. And those costs are found at tab 6.2
9 through the remainder of the exhibit, correct?

10 A. Correct.

11 Q. And let's go through some of them. And
12 did you -- were you involved in the compilation
13 of these costs and backup documents?

14 A. Yes.

15 MR. MCDONALD: Your Honor, at this
16 time, I would move this portion of Defendant's
17 Exhibit 146 into evidence, and that would be what
18 is identified as spreadsheet B.

19 THE COURT: Which is 6.2 through 14
20 is what I come up with, correct?

21 MR. MCDONALD: Yes, yes.

22 THE COURT: All right.

23 Mr. Hildebrand?

24 MR. HILDEBRAND: Yes, sir. I would
25 object on several grounds. First, it's

1 irrelevant because the -- Library Associates had
2 failed to pay Balfour by the time these claimed
3 costs were incurred.

4 And not having paid Balfour, it's
5 inappropriate for them to -- they don't pay us
6 our contract balance. They don't pay us our --
7 particularly our contract balance, and then say,
8 we've got to come and do additional work when
9 they haven't even paid what we were owed at that
10 point.

11 Also, from just an evidentiary
12 standpoint, this is a synopsis with background
13 data that is not the actual data. It's
14 additional synopses of the data that's in here.
15 So these tabs are not actually any sort of backup
16 or anything else, other than a computer printout
17 saying that that's what they relate to. So for
18 those reasons, I'll object.

19 THE COURT: All right. And
20 Mr. Terry?

21 MR. TERRY: Watson objects based on
22 the best evidence rule. The best evidence is the
23 documentation which supports these summaries.

24 THE COURT: All right. I will note
25 the objections. I'm going to overrule them for

1 now. You can go forward.

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

4 (DFT. EXH. 146B was received in
5 evidence.)

6 BY MR. MCDONALD:

7 Q. All right. What is tab 6.2, Ms. Brown?

8 A. Tab 6.2 is work that had to be done due
9 to Balfour Beatty not honoring their warranty for
10 the contract.

11 Q. Okay. What is tab 7?

12 A. Tab 7 is a list of laundry costs that
13 were incurred because we had to send out the
14 laundry due to the ironer, the laundry ironer,
15 which is a huge piece of equipment that irons the
16 linens and sheets.

17 Those had to be sent out because the
18 ironer kept on breaking down, and the laundry
19 companies couldn't figure out why it kept on
20 breaking down. And they finally had determined
21 that the gas regulator that goes to the laundry,
22 to the iron equipment was located in the wrong
23 place by the mechanical subcontractor that was
24 under Balfour Beatty.

25 And so we would wash and dry all of the

1 laundry but had to send them out to this company
2 to have the sheets ironed.

3 Q. What about tab 8?

4 A. Tab 8 shows inhouse labor and cleaners
5 that had to be brought in to clean the hotel
6 prior to opening.

7 Q. Okay. And why is that? Why was that a
8 performance of Balfour Beatty work?

9 A. Because Balfour Beatty refused to go in
10 and clean the rooms after the repainting.

11 Q. What about tab 9?

12 A. Tab 9 is a list of labor hours by
13 Salamander where they had to go into certain
14 rooms to do repair work.

15 Q. And how is that Balfour Beatty's fault?

16 A. Well, at the first roughly 20, 25 items
17 that's repairing the bathroom lighting circuit,
18 it was determined that the wiring in the bathroom
19 circuits, the neutrals were connected together,
20 and that was causing some malfunction with the
21 lighting system in the rooms.

22 Q. What about tab 10?

23 A. Tab 10 is what we paid Robins & Morton
24 to repaint the rooms. That's just a check
25 written from Library Associates for the payment

1 number one for \$518,823.21.

2 Q. Okay. And how much --

3 A. That's a part of our check stub.

4 Q. And how much was payment number two to
5 Robins & Morton? This was a repaint to the guest
6 rooms?

7 A. That's correct.

8 Q. And that's what Jim Clements testified
9 about?

10 A. That's correct.

11 Q. Okay. And how much was the second check
12 to Robins & Morton?

13 A. The second check was \$373,805.42.

14 Q. Okay. The first check, when was it
15 dated?

16 A. The first check was dated February 4,
17 2019. We received an invoice on January 21,
18 2019.

19 Q. Okay. So you got the invoice on January
20 21st, 2019, and you paid the first one on
21 February 4, 2019?

22 A. Correct.

23 Q. All right. And then the second check,
24 how much was it for?

25 A. It was for \$373,805.42. We received the

1 invoice on January 25, 2019. It was paid on
2 February 14, 2019.

3 Q. Okay. And then how much was the third
4 check for?

5 A. The third check was \$768,515.10.

6 Q. And you were invoiced by Robins & Morton
7 on what date?

8 A. February 21st.

9 Q. And then what date did you pay it?

10 A. April 2nd.

11 Q. And what was the total of the Robins &
12 Morton repaint costs?

13 A. \$1,661,143.73.

14 Q. All right. And if you look in red on
15 tab 10, you can see that total, correct?

16 A. That's correct.

17 Q. What is tab 11? It looks like there's
18 three entries to tab 11.

19 A. Tab 11 is work that we paid to
20 Construction Professional, Inc., CPI.

21 Q. Okay. And how was that work that
22 Balfour was supposed to do but didn't do, how --

23 A. There was punch list repair work that
24 they performed and painting that they performed
25 in the rooms of 127,580.

1 Q. Okay.

2 A. They removed the BAR sample wall that
3 Balfour Beatty was supposed to remove.

4 Q. Well, before we do that, so was CPI also
5 performing guest room repaint?

6 A. Yes.

7 Q. Okay. And then you also said punch list
8 repair. What was that related to?

9 A. Just general punch list items that had
10 not been complete. One invoice said stucco
11 column extension. They had to add some blocking,
12 just some stucco work on the columns.

13 Q. Okay. Turn if you would to the third
14 page of tab 11. Are you there?

15 A. Yes.

16 Q. What is that?

17 A. That is for painting.

18 Q. And when is it dated?

19 A. January 17, 2019.

20 Q. Okay. And then turn to CPI, the second
21 pay application. It's a few more invoices. It's
22 four pages past where we were.

23 A. Yes.

24 Q. When is that dated?

25 A. February 28th, 2019.

1 Q. And how much is that one for?

2 A. 70,211.

3 Q. And what was that for?

4 A. Painting.

5 Q. Painting the guest rooms?

6 A. Yes.

7 Q. All right. And then let's go to the
8 next CPI invoice. Are you there?

9 A. Yes.

10 Q. When is that dated?

11 A. September 11, 2018.

12 Q. What was that for?

13 A. That was for taking down the sample
14 walls.

15 Q. Is the sample wall the same as the
16 mockup?

17 A. Yes.

18 Q. Is this the same work that we looked at
19 earlier that Balfour was asking for a request for
20 change order for?

21 A. Yes.

22 Q. And you-all paid CPI how much?

23 A. \$7,215.53.

24 Q. And let's go to tab 12. What is tab 12?

25 A. Tab 12 is an -- it's an e-mail from

1 Jason Boberg of Cotton & Company wanting me to
2 confirm that the items listed below were correct,
3 the two items, to repair the (inaudible) in the
4 guest room doors and replace the broken walls in
5 the board room.

6 Q. All right. Let's look at tab 13. What
7 is that for?

8 A. There are several different chandeliers
9 in the ballroom that have thousands of crystals
10 on them.

11 And during the installation, Balfour
12 Beatty claims that the crystals were not in the
13 box, even though they were required to accept all
14 goods and to make sure everything was packed in
15 the boxes that were to be delivered and make sure
16 they weren't broken. And they say that those
17 crystals were never in the box. So we had to buy
18 new crystals.

19 Q. Who is they? Who says the crystals were
20 never in the box?

21 A. Balfour Beatty.

22 Q. So I'm sorry, I didn't mean to cut you
23 off. So you had to buy new crystals?

24 A. So we had to purchase new crystals, and
25 they took a very long time to get here. They

1 actually just arrived this summer. And we were
2 waiting on the company to send the installers to
3 install the crystals in the ballroom.

4 Q. Okay. And that's tab 13 and 14?

5 A. That's correct.

6 Q. All right. And then the chart under tab
7 15 -- this doesn't have a tab 15. What is the
8 insurance deductible for pool repairs? Do you
9 know what that relates to, \$50,000?

10 A. So the pool has overflowed down into the
11 building twice. The pool company has told us --
12 Chester Pools told us it's because floors in the
13 pool equipment room were not properly prepared
14 for the pool.

15 Q. Who prepared the floors in the pool
16 equipment room?

17 A. Balfour Beatty is my understanding, was
18 responsible for that.

19 Q. Okay.

20 A. And what happened was, when the water
21 overflowed, the coating on the flooring peeled
22 up, stopped up the drains and caused water to
23 flow down into the guest rooms and the ballroom
24 in some cases.

25 And that was just deductibles. Those

1 were insurance claims, so we did make insurance
2 claims. But those were the deductibles that we
3 had to pay for each insurance claim.

4 Q. And what was is the total amount of the
5 BBC contract costs that were incurred by Library,
6 the grand total?

7 A. \$2,256,764.

8 Q. And we looked at those Robins & Morton
9 repainting, CPI invoices. Those were January --
10 end of January, early February of 2019, correct,
11 the invoices?

12 A. Correct.

13 Q. Okay. Do you know when Balfour Beatty
14 filed its 8 million dollar lien on the hotel?

15 A. It was late January 2019.

16 (DFT. EXH. 147 was marked for
17 identification.)

18 Q. All right. I'm going to hand you what's
19 been marked for ID purposes as Defendant's
20 Exhibit 147. I ask if you recognize that
21 document?

22 A. Yes.

23 Q. What do you recognize it to be?

24 A. It's a letter to me -- excuse me, to Pat
25 Dean from me.

1 Q. And what is it related to?

2 A. It states that I'm in receipt of the
3 mechanic's lien, and I'm asking him, per the
4 contract, to bond off the lien.

5 Q. Okay. Did you actually send this
6 letter?

7 A. I did.

8 Q. Is it a true and accurate copy of the
9 letter?

10 A. Yes, it is.

11 MR. MCDONALD: At this time, I
12 would like to move Defendant's Exhibit 147 into
13 evidence, Your Honor.

14 THE COURT: Any objection?

15 MR. TERRY: No objection.

16 THE COURT: Without objection.

17 (DFT. EXH. 147 was received in
18 evidence.)

19 BY MR. MCDONALD:

20 Q. All right. And when is this letter
21 dated?

22 A. February 10, 2019.

23 Q. And what lien does it reference?

24 A. The Gulf Stream Construction Company
25 versus Library Associates, et al.

1 Q. And how much is that lien?

2 A. 119,152.17.

3 Q. All right. And what are you asking

4 Balfour Beatty to do?

5 A. Per the contract, to bond off the lien.

6 Q. And did they in fact bond off the lien?

7 A. No, they did not.

8 Q. What was that amount again?

9 A. 119,152.17.

10 Q. And that's for Gulf Stream?

11 A. Yes.

12 (DFT. EXH. 148 was marked for
13 identification.)

14 Q. I'm going to hand you what's been marked
15 for ID purposes as Defendant's Exhibit 148 and
16 ask if you have seen that document before?

17 A. Yes, I have.

18 Q. What do you recognize it to be?

19 A. It's a similar letter that I wrote on
20 the same day to Mr. Dean regarding a mechanic's
21 lien for Precision Walls.

22 Q. And it's dated February 10th, 2019?

23 A. Correct.

24 Q. And how much is the Precision Walls
25 lien?

1 A. \$1,236,284.65.

2 Q. And is this a true and accurate copy of
3 your February 10th, 2019 letter?

4 A. Yes, it is.

5 MR. MCDONALD: Your Honor, at this
6 time, I would move to put Defendant's Exhibit 148
7 in evidence.

8 THE COURT: All right. In evidence
9 as 148.

10 (DFT. EXH. 148 was received in
11 evidence.)

12 BY MR. MCDONALD:

13 Q. And what were you asking Balfour Beatty
14 to do in Defendant's Exhibit 148?

15 A. To honor the contract and bond off the
16 lien.

17 Q. And did they in fact bond off the lien?

18 A. No.

19 Q. And the lien was for 1.2 million?

20 A. And some change.

21 Q. And some change. And when was the lien
22 filed?

23 A. This lien was filed on January 31st,
24 2019.

25 Q. When was the lien, the Gulf Stream lien

1 we looked at before that, which was Defendant's
2 Exhibit 147, when was that filed?

3 A. February 4, 2019.

4 (DFT. EXH. 149 was marked for
5 identification.)

6 Q. Okay. I'm going to hand you what's been
7 marked as -- for ID purposes, as Defendant's
8 Exhibit 149 and ask if you have ever seen that
9 document before?

10 A. Yes, I have.

11 Q. Okay. What do you recognize it to be?

12 A. It's the similar letter that I wrote to
13 Mr. Dean in regard to a lien for Bernhard MCC.

14 Q. And what is Exhibit 149? What is the
15 date of that letter?

16 A. The date of the letter is February 10,
17 2019.

18 Q. And is that a true and accurate copy of
19 your February 10, 2019 letter?

20 A. Yes.

21 MR. MCDONALD: Your Honor, at this
22 time, I would move to put Defendant's Exhibit 149
23 into evidence.

24 THE COURT: All right. In
25 evidence.

1 (DFT. EXH. 149 was received in
2 evidence.)

3 BY MR. MCDONALD:

4 Q. What are you asking Balfour Beatty to do
5 in Defendant's Exhibit 149?

6 A. To honor the terms of the contract and
7 bond off the lien that was filed by Bernhard MCC.

8 Q. And did they in fact bond off the lien
9 that was filed by Bernhard MCC?

10 A. No, they did not.

11 Q. Okay. And what was the date of the
12 Bernhard MCC lien?

13 A. February 5th, 2019.

14 Q. And how much was that lien for?

15 A. 6,539,992.14.

16 Q. So in rough numbers, as of February 4th,
17 2019, there was 15 plus million dollars in liens
18 on the property?

19 A. Correct.

20 Q. Were other liens filed?

21 A. Yes, there were.

22 Q. Did you request Balfour to bond those
23 off?

24 A. I did.

25 Q. Did they?

1 A. No.

2 Q. If you would, Ms. Brown, Plaintiff's
3 Exhibit 56 is in evidence. I believe that's the
4 contract, going from memory. Let me see if I can
5 get it for you. It might be in volume 3. Are
6 you there?

7 A. Yes.

8 Q. Okay. Specifically, section 9.3.1.1.
9 Just let me know when you're ready.

10 A. I'm here.

11 Q. All right. Would you read that section
12 into the record, please?

13 A. 9.3.1.1. Such applications may not
14 include requests for payment for portions of the
15 work for which the contractor does not intend to
16 pay a subcontractor or material supplier unless
17 such work has been performed by others whom the
18 contractor intends to pay.

19 Q. Okay. Did Balfour Beatty ever submit a
20 final pay application with a final accounting?

21 A. No.

22 Q. Did Library Associates call the employee
23 and accountant to do an audit of the work?

24 A. Yes.

25 Q. Who was that?

1 A. Cotton and Company.

2 Q. And who specifically at Cotton and
3 Company?

4 A. Sam Hadley and Jason Boberg.

5 Q. And when did you-all hire Ms. Hadley and
6 Mr. Boberg?

7 A. In March of 2019.

8 Q. So a month after all of these liens were
9 filed?

10 A. Correct.

11 MR. MCDONALD: Thank you very much,
12 Ms. Brown. Please answer any questions other
13 counsel may have for you.

14 MR. HILDEBRAND: Can I have just a
15 couple minutes to get organized, Your Honor?

16 THE COURT: Yeah. Do you want to
17 take five minutes?

18 MR. HILDEBRAND: Yes, sir.

19 THE COURT: Let's do that. Let's
20 take a little break.

21 (A recess transpired.)

22 THE COURT: All right.

23 Mr. Hildebrand?

24

25

1 CROSS-EXAMINATION

2 BY MR. HILDEBRAND:

3 Q. Hello, Ms. Brown.

4 A. Hello.

5 Q. I've got several questions for you.

6 Hopefully it won't take too long.

7 A. Okay.

8 Q. All right. Prior to February 2019,
9 right, in the project, did Library Associates
10 ever make any claim for liquidated damages
11 against Balfour?

12 A. No.

13 Q. And in your view, you didn't think that
14 that was necessary, correct, or do you?

15 A. I know that we have the liquidated
16 damage clause in the contract. I don't believe
17 it's defined in the claim in the contract, and I
18 don't think that we were even able to assess
19 liquidated damages to the -- until the end of the
20 contract.

21 Q. So it's Library Associates' position in
22 this case now, though, that Balfour is subject to
23 liquidated damages from the time that the
24 original contract date has extended -- was
25 reached, so that would be August of 2017,

1 correct?

2 A. That is what the architect has ruled on
3 in this contract, that liquidated damages should
4 be assessed from the end date of the contract
5 with the 20 days extension, and that the
6 liquidated damages should be assessed from that
7 date.

8 Q. Right. And that's what you're seeking
9 this Court to rule in favor of Library Associates
10 in this case, correct?

11 A. Correct.

12 Q. And you would agree that those
13 liquidated damages in the contract are limited to
14 \$1,400,000, right?

15 A. They are limited to the -- amount of the
16 contractor's fee.

17 Q. Which is approximately \$1,400,000,
18 agreed?

19 A. It's whatever the contractor's fees is.
20 It's approximately 1,450,000. And if the
21 contractor's fee was increased during the time of
22 the contract, then that would include those costs
23 as well.

24 Q. Was it increased during the time of the
25 contract?

1 A. In the change orders, in the markup of
2 the change orders, I believe that -- that part of
3 the markup is fee.

4 Q. Okay. Well, if it was increased, do you
5 have any approximation of what it was increased?

6 A. I don't right off the top of my head,
7 no.

8 Q. All right. So it's Library Associates'
9 contention that the liquidated damages started --
10 let's see -- in 2017, you talked about, and I
11 think that the completion date with the 20 day
12 extension that was in the contract was August 19
13 of 2017.

14 So from that day forward, subject to the
15 cap, that is what Library Associates is asking
16 the Judge to award in this matter, correct?

17 A. Correct.

18 Q. All right. And you didn't feel like you
19 were contractually obligated to assess liquidated
20 damages until the very end of the project; is
21 that correct?

22 A. Correct.

23 Q. All right. What do you think --

24 A. And I did not assess the liquidated
25 damages, the architect did.

1 Q. Okay. What do you think would have
2 happened if Library Associates, right from the
3 get-go, in August of 2017, if it had told Balfour
4 with the first pay application, that past that
5 date, look, we're going to assess liquidated
6 damages against you and withhold those from your
7 pay application. What do you think that Library
8 Associates -- I'm sorry, that Balfour would have
9 done?

10 MR. MCDONALD: Objection, Your
11 Honor. Calls for speculation as to what Balfour
12 would have done. It misrepresents the terms of
13 the contract.

14 THE COURT: I could say that it
15 probably does. I will sustain that. You're on
16 cross. I'll give you some leeway, but you're
17 asking her what Balfour would do. I don't think
18 she could testify to that.

19 MR. HILDEBRAND: Okay. I
20 understand, Your Honor. What I would have asked
21 her, just as a proffer is, after one month -- and
22 we talked about this earlier -- it would have
23 been \$270,000, and then after two months, it
24 would have been \$540,000. And I would have gone
25 each one of those with her.

1 THE COURT: Okay. All right.

2 Thank you for not doing that.

3 BY MR. HILDEBRAND:

4 Q. All right. Do you think that it would
5 have been just fundamentally fair for Library
6 Associates, back when it felt that it was
7 entitled to liquidated damages back in August of
8 2017, do you think that it would have been just
9 as a matter of fundamental fairness, to tell
10 Balfour Beatty, look, we believe that y'all are
11 delaying this project, and we intend to assert
12 liquidated damages against you?

13 MR. MCDONALD: Objection, Your
14 Honor. The contract says what it says. I'm not
15 familiar with the basis of fundamental fairness.
16 It's two sophisticated parties, and they enter
17 into a contract and agreed to do what they were
18 going to do on this job. It's irrelevant.

19 MR. HILDEBRAND: Well, Your Honor,
20 it is cross-examination.

21 THE COURT: I'm going to overrule
22 that one. Go ahead. If she can answer that, she
23 can.

24 BY MR. HILDEBRAND:

25 Q. Yes, ma'am?

1 A. We did not think about liquidated
2 damages in August of 2017. We just wanted to do
3 whatever we could do to get our hotel open. So I
4 don't think the thought crossed our mind in
5 August of 2017, that we were going to start
6 charging for liquidated damages at that point.

7 Q. Okay. Well, when did it cross Library
8 Associates' mind that it was going to be
9 assessing liquidated -- or that it was going to
10 assert liquidated damages against Balfour?

11 A. We knew that that was the terms of the
12 contract. We just wanted to get our hotel opened
13 on time or get our hotel opened.

14 Q. Okay.

15 A. We were willing to spend additional
16 monies to get manpower on the job to get the
17 hotel opened. So it wasn't until 2018 that we
18 said, hey, we're going to charge liquidated
19 damages. We just wanted to get our hotel open.

20 Q. Okay. My question, though, was when
21 did -- you said that in August of 2017, when the
22 original completion date was passed, you didn't
23 consider assessing liquidated damages. So when
24 did you make that decision that you were going to
25 assess liquidated damages against Balfour?

1 A. We had discussed the liquidated damage
2 clause in December of 2018, and again, it was the
3 architect who assessed the liquidated damages.
4 Library Associates didn't assess when the
5 architect -- assess the liquidated damages when
6 he was reviewing the claim that was provided by
7 Balfour Beatty.

8 Q. Okay. So it's your testimony here today
9 that nobody from Library Associates, to your
10 knowledge, gave any thought or considered
11 assessing liquidated damages against Balfour
12 until the project was virtually complete, that
13 being in December of 2018?

14 A. I would say late 2018 sometime.

15 Q. You said December just a moment ago.

16 A. Well, it might have been November. Late
17 2018.

18 Q. Okay. Did Michael Bennett review pay
19 applications before that are signed?

20 A. Never.

21 Q. Did he review the contract before it was
22 signed?

23 A. No. He typically does not review the
24 contracts.

25 Q. Okay. Does Library Associates have any

1 employees?

2 A. No.

3 Q. The designer's contract provides for a
4 lump sum payment that has -- originally drafted
5 of \$360,000. Does that ring a bell?

6 A. There were -- there's a lump sum amount
7 plus reimbursables.

8 Q. Right. It eventually ballooned up to
9 \$820,000. Does that sound about --

10 A. I believe we went over this in one of my
11 depositions, that if you take a look at their
12 invoices, they have their lump sum amount as
13 number -- job number one, and the reimbursables
14 is job number two.

15 And it was the reimbursables that had
16 increased the most and that was due to them
17 having to make site visits, et cetera, that were
18 more than was originally anticipated when we
19 signed the contract.

20 Q. Okay. Why did they have to make so many
21 more site visits?

22 A. Because the job turned longer, and they
23 had to review different items on the job during
24 the length of time of the job.

25 Q. Was the interior -- all of the interior

1 design work finished at the time that the GMP
2 contract was signed with Balfour?

3 A. I would say a majority of that work had
4 already been done. It wasn't that they were
5 redesigning or anything else, but there might
6 have been some -- some work that had to be
7 finished or detailed a little bit more at the
8 time of the GMP signing.

9 Q. Okay. So as I understand the pay
10 application process and how Balfour gets paid, a
11 pay application is reviewed. It goes back and
12 forth a couple of times, and then the architect
13 certifies it for payment, and then it gets paid.
14 Is that a fair statement?

15 A. So the process was that we would have
16 the job meeting. Balfour Beatty would present a
17 pencil copy, which is just the three pages of the
18 pay app, to everyone at the job cost -- at the
19 job meeting. That was attended by the architect
20 and the bank inspector.

21 They would review the line items. The
22 architect and the bank inspector would then walk
23 the job. If they had any questions on any of the
24 line items during their inspection, they would
25 tell Balfour Beatty, and Balfour Beatty would

1 make any adjustment that needed to be made,
2 whether it was stored materials or something that
3 the architect or the bank inspector didn't feel
4 that was progressed as much as should be, and
5 that they were trying to draw.

6 Then Balfour Beatty would complete the
7 pay app, along with all the invoices, and send
8 that to the architect for approval. Once the
9 architect approved it, then the architect would
10 forward that to me.

11 Q. And then you would do a requisition to
12 MetLife, correct?

13 A. I would include that in the rest of the
14 other invoices, soft cost invoices for the job,
15 and I would send in a pay app to MetLife, yes.

16 Q. Okay. And MetLife was the lender,
17 correct?

18 A. MetLife was the lender.

19 Q. Right. But MetLife is not a bank, is
20 it?

21 A. No, it's an insurance company.

22 MR. HILDEBRAND: What number
23 exhibit are we on?

24 THE COURT: This is on the
25 plaintiff's side?

1 MR. HILDEBRAND: Yes, sir.

2 THE COURT: All right. The last
3 one I'm showing was 345 on Friday the 29th. Does
4 that sound right?

5 MR. HILDEBRAND: Yes, sir. So this
6 would be 346.

7 (PLF. EXH. 346 was marked for
8 identification.)

9 BY MR. HILDEBRAND:

10 Q. Ms. Brown, I'm going to hand you what I
11 have marked as Plaintiff's Exhibit 346 for
12 identification. Do you recognize this document?

13 A. I do.

14 Q. Okay. And this is called a requisition
15 letter, and it says request number 43. Do you
16 see that?

17 A. Yes.

18 Q. And so this is number 43, so you would
19 have filled out an identical form for each pay
20 application that you would have given to MetLife
21 for release of funds, correct?

22 A. Correct.

23 Q. All right. So there would have been 42
24 prior to this one, identical to this --

25 A. Correct.

1 Q. -- except for the amount that you're
2 requesting, correct?

3 A. Correct.

4 Q. All right. And on this particular one,
5 it's dated December 15, 2018, so that's right at
6 the end of the project, correct?

7 A. That's correct.

8 Q. All right. And the amount being
9 requested is \$2,167,185.99, correct?

10 A. Correct.

11 Q. And so that I understand, the way that
12 the loan worked -- and I think there might have
13 been some testimony about this maybe from
14 Mr. Clements -- was that there was a loan for
15 approximately 65 million dollars, and then
16 anything above and beyond that would have to be
17 paid by Library Associates, correct?

18 A. That's correct.

19 Q. Okay. And to draw down and some of the
20 money that -- actually, when were all of the loan
21 proceeds exhausted as far as the project was
22 concerned?

23 A. The loan proceeds have not been
24 exhausted yet.

25 Q. Well, is that the loan or amounts --

1 money that Library Associates had put in to
2 the -- pay into the bank to have money available
3 to -- for draws at a future date?

4 A. So the way this worked was the original
5 schedule of values was 100 million dollars. We
6 had to come up with our portion, whether it would
7 be already in equity that we got credit for
8 during the term of the loan or funds that were
9 still due.

10 And we came up with all of our funding
11 prior to the loan. So we had gotten credit for
12 approximately 25 million dollars of costs that we
13 had already put in during the 12 plus years that
14 we had been designing and developing the project.
15 We had to come up with a little over 10 million
16 dollars before the loan closed. We put our
17 funding in at that time.

18 The bank disbursed those funds first,
19 and then there was left the 66 and a half million
20 dollars, which would have been the contract
21 balance left to fund the rest of the loan. If
22 there was any change orders during the course of
23 the loan, I would have to, on a monthly basis,
24 put those additional funds into the -- send those
25 to the bank, no matter whether they were drawn or

1 not.

2 And you could see on the front of this
3 page, at this particular time, there was \$563,869
4 in approved change orders from the previous pay
5 application.

6 Q. All right.

7 A. And so I had to submit those funds to
8 the bank prior to the bank funding this draw, so
9 the bank always had funds in there to cover all
10 of the costs that would remain on the draw.

11 Q. Gotcha. My simple question is that, at
12 this time in December 2018, had all of the loan
13 proceeds been exhausted and the money that
14 remained was money that Library Associates had
15 put in?

16 A. No. I would still think that there were
17 loan proceeds available in the draw.

18 MR. HILDEBRAND: Your Honor, you
19 already ruled. There were a lot of questions in
20 discovery about payment issues and the bank
21 accounts. And I just want to make -- for the
22 record, you've asked me not to go into those. I
23 think those have been the rulings as far as I'm
24 not into them.

25 THE COURT: I will be consistent

1 with that.

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

4 THE COURT: If you get a 22 million
5 dollar judgment and you want to collect it if
6 they don't pay, we will cross that bridge then.

7 MR. HILDEBRAND: I understand, Your
8 Honor. All right. So what we have marked as
9 Defendant's Exhibit 346 --

10 THE COURT: Plaintiff's Exhibit
11 346.

12 MR. HILDEBRAND: Sorry, Plaintiff's
13 Exhibit 346.

14 BY MR. HILDEBRAND:

15 Q. This is a certification that you would
16 do and provide to MetLife with each loan funding
17 or funding for payments to Balfour Beatty,
18 correct?

19 A. Correct.

20 Q. All right. And it says that, in
21 accordance with the agreement, you were making
22 certain certifications.

23 And the first -- second full paragraph
24 says, the owner hereby certifies that. And it
25 says, the labor services and/or materials covered

1 hereby have been performed upon or furnished in
2 connection with the project. That's a correct
3 certification?

4 A. Yes.

5 Q. All right. All construction of the
6 project to date has been performed in accordance
7 with the plans and specifications and there have
8 been no changes in the plans and specifications
9 except as have been approved by you in writing.
10 Is that certification correct?

11 A. Correct.

12 Q. Okay. Number 3, no default or event or
13 condition, which with the passage of time or the
14 giving of notice or both, would constitute a
15 default under the general contractor's agreement
16 has occurred or exists as of the date hereof.
17 Correct statement, agreed?

18 A. True.

19 Q. Okay. The next one, there have been no
20 changes in the scope or time of performance of
21 the work of construction, nor any extra work,
22 labor, or materials ordered or contracted for
23 except as have been approved by you in writing,
24 correct?

25 A. Correct.

1 Q. All right. And then on the next page,
2 the -- it looks like Roman numeral XV, Kimberly
3 B. Brown is the authorized agent of the borrower
4 and the signature set forth on the signature line
5 above, such officer's name below and such
6 officers (inaudible). And that's your signature
7 on the third page, correct?

8 A. Correct.

9 Q. Now, I don't -- I've reviewed the
10 contract document, and I don't see that there's a
11 definition of default in the agreement. Are you
12 aware of one?

13 A. In the A133 or 201?

14 Q. Yes, ma'am.

15 A. Not that I can recall at this time.

16 Q. Okay. What are the current room rates
17 for Hotel Bennett?

18 MR. MCDONALD: Objection, Your
19 Honor. It's irrelevant.

20 THE COURT: How is that relevant?

21 MR. HILDEBRAND: I will withdraw
22 the question.

23 BY MR. HILDEBRAND:

24 Q. All right. I have just a couple of
25 documents I wanted to ask you about. Can you

1 find our notebook that has 173 in it?

2 MR. MCDONALD: What was that
3 number, Tom?

4 MR. HILDEBRAND: 173. It should be
5 in number 4.

6 THE COURT: It says binder 3
7 apparently.

8 MR. MCDONALD: This is not in
9 evidence, Tom?

10 MR. HILDEBRAND: Correct.

11 (PLF. EXH. 173 was marked for
12 identification.)

13 BY MR. HILDEBRAND:

14 Q. All right. It's Exhibit 173. Are you
15 with me?

16 A. Yes.

17 Q. All right. This is an e-mail dated
18 March 15, 2019, from Paul Cherrett with Hotel
19 Bennett to yourself. Do you see that?

20 A. Yes.

21 Q. All right. And who is Paul Cherrett?

22 A. He was the general manager of the hotel
23 at the time.

24 Q. Okay. Let me ask you this before I go
25 on. Was Balfour still performing work on the

1 hotel at this time?

2 A. Yes. I actually believe they may have,
3 as we went through the CCDs, that had costs for
4 March of work of 2019.

5 Q. Would you agree with me that they were
6 working -- they were still on the job through
7 April of 2019?

8 A. Yes.

9 Q. Okay. Let's turn back to this document.
10 So this is a document from Paul Cherrett to you,
11 and it's subject, Hotel Bennett leisure transient
12 sales strategies. And Paul is saying in the
13 first paragraph --

14 MR. MCDONALD: Your Honor, before
15 he reads it -- or I mean, he needs to lay some
16 foundation and move it into evidence. That would
17 be my -- or try to move it into evidence. That
18 would be my objection.

19 MR. HILDEBRAND: Well, I would like
20 to move it into evidence then.

21 MR. MCDONALD: Lack of foundation.

22 THE COURT: All right. Cherrett
23 was an employee of Hotel Bennett; is that
24 correct?

25 THE WITNESS: Yes.

1 THE COURT: All right. And this is
2 an e-mail that he sent to you?

3 THE WITNESS: Correct.

4 THE COURT: And do you recall this
5 e-mail? Does it ring a bell?

6 THE WITNESS: Yes.

7 THE COURT: All right. Foundation
8 laid.

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

11 (PLF. EXH. 173 was received in
12 evidence.)

13 BY MR. HILDEBRAND:

14 Q. First paragraph, the rooms were out of
15 order for multiple reasons. We maintained the
16 list almost every day, but the number of 000
17 rooms fluctuated depending on how many we
18 repaired or those we found with new issues.

19 I would estimate that 90 percent of the
20 lost revenue and additional expense from not
21 having rooms available was due to the delay from
22 the painters and the damage they created in the
23 rooms. What he is talking about are the painters
24 that were doing the repainting, correct?

25 A. That's what it appears to be.

1 MR. HILDEBRAND: Your Honor, I
2 don't think that I introduced Exhibit 346 into
3 evidence, but I would like to do so. That was
4 the requisition letter.

5 THE COURT: Yeah, in evidence.
6 That's fine.

7 (PLF. EXH. 346 was received in
8 evidence.)

9 THE COURT: Ms. Brown, what are the
10 triple zero rooms? What does that mean?

11 THE WITNESS: Out of order.

12 THE COURT: Out of order.

13 THE WITNESS: It's 000 for out of
14 order.

15 THE COURT: It's new technology or
16 terminology.

17 BY MR. HILDEBRAND:

18 Q. Okay. So let me understand that the --
19 understand the claims that are being made by
20 Library Associates in this matter. You're making
21 a claim for liquidated damages, correct?

22 A. Correct.

23 Q. You're making a claim for repair costs
24 for work that you say that Balfour did not do
25 that y'all feel that it should have under the

1 contract, correct?

2 A. Correct.

3 Q. Okay. What other claims, if any, are
4 you making?

5 A. There's claims for -- there will be
6 claims for lost profits, if we're entitled to
7 those.

8 Q. Okay. Anything else?

9 A. That's all that I can think of.

10 Q. All right. Now, can you show me or tell
11 the Judge where -- prior to this time right now,
12 where we're sitting here today, where Library
13 Associates made a claim under the contract to
14 Balfour, and that was passed on through the
15 architect, that the architect ruled on and
16 adjudicated that issue prior to today?

17 A. Well, I believe that the architect ruled
18 on the Balfour Beatty claim.

19 Q. Right. So I'm asking about Library
20 Associates' claim. Did Library Associates assert
21 a claim that was ruled upon by the architect for
22 the liquidated damages?

23 A. I believe the architect ruled that
24 Library Associates was entitled to liquidated
25 damages when they ruled on the Balfour Beatty

1 claim.

2 Q. So there was a formal claim that was
3 made for liquidated damages that was ruled upon
4 by the architect in a formal decision? Is that
5 your testimony?

6 A. No. Balfour Beatty submitted a claim,
7 and the architect ruled that the liquidated
8 damage clause should be considered in their
9 claim.

10 Library -- because we don't feel that
11 the liquidated damage clause is a claim. It's
12 just they -- it's a paragraph in the contract,
13 where it said that they could be assessed. But
14 we don't feel that there is a claim or that we
15 would have to make a claim for liquidated
16 damages.

17 Q. Right. Yeah, I understand. But I had
18 asked you earlier, what do you -- what Library
19 Associates' claims were in this matter, and I
20 said several times now, that you are -- Library
21 Associates is asserting a claim for liquidated
22 damages. Agreed?

23 A. Library Associates is asserting that
24 they should be entitled to liquidated damages.
25 Again, we don't feel like we should have made a

1 claim for liquidated damages because we don't
2 feel that liquidated damages is defined in the
3 contract as something that would be a claim.

4 Q. So are you telling the Judge here today
5 that Library Associates is not asserting a claim
6 for liquidated claims in this matter?

7 MR. MCDONALD: Objection, Your
8 Honor. This is asked and answered.

9 THE COURT: I will sustain that. I
10 got it.

11 BY MR. HILDEBRAND:

12 Q. All right. Was any -- can you point me
13 to a document where a formal claim was made by
14 Library Associates to Balfour Beatty that was
15 ruled upon by the architect for liquidated
16 damages?

17 MR. MCDONALD: Same objection, Your
18 Honor. Asked and answered. And she's explained
19 it three times, exactly what her position is.

20 THE COURT: The answer to that
21 would be no, correct?

22 THE WITNESS: Correct.

23 BY MR. HILDEBRAND:

24 Q. All right. How about with regard to the
25 repair costs that you talked about earlier that

1 you felt like Balfour had not performed under the
2 contract? Was a formal claim made to Balfour
3 that was ruled upon by the architect on that
4 issue?

5 A. So we sent that information to Jennifer
6 Faulkinberry in January, and when they
7 received -- we had sent her the initial invoice
8 that we received from Robins & Morton for the
9 painting.

10 When she was reviewing one of the pay
11 apps -- and she decertified pay app number 43
12 because of the information that she received that
13 we had incurred these additional painting costs,
14 and that there was more additional painting costs
15 that were also incurring at the time.

16 And so Jennifer then had sent a letter
17 stating that, because of the additional painting
18 costs, because of the liquidated damage clause,
19 that that was the reason she was decertifying pay
20 app 43.

21 Q. My simple question, Ms. Brown, is, has
22 Library Associates asserted a formal claim, prior
23 to this litigation beginning, to Balfour that was
24 ruled upon by the architect, a formal claim that
25 was ruled upon by the architect as provided in

1 the contract documents?

2 MR. MCDONALD: Objection. Asked
3 and answered.

4 THE COURT: Go ahead. Overrule
5 that one. Go ahead.

6 THE WITNESS: We submitted the
7 information to the architect. Balfour Beatty
8 knew at the time that the rooms were being
9 repainted. I don't believe we sent a formal
10 claim to Balfour Beatty. But we had sent the
11 information to the architect, and the architect
12 had ruled at that time.

13 MR. HILDEBRAND: Okay. Give me
14 just a second. Nothing further, Your Honor.

15 THE COURT: All right, sir.
16 Mr. Terry or Mr. Windle?

17 MR. WINDLE: May it please the
18 Court?

19 THE COURT: Yes, sir.

20 MR. WINDLE: I'm going to be
21 referring to Plaintiff's Exhibit No. 12 and
22 Plaintiff's Exhibit No. 100. You can jot that
23 down in your notes, but I don't think -- I'm not
24 going to ask anybody to pull those out. I think
25 you'll remember them when we get into the

1 examination.

2 MR. MCDONALD: Can I just ask for
3 Mr. Windle to say who he's asking questions on
4 behalf of?

5 THE COURT: Yeah, just for the
6 record.

7 MR. WINDLE: These questions are
8 being asked on behalf of Lithko.

9 THE COURT: Lithko?

10 MR. WINDLE: Lithko.

11 THE COURT: All right. Very good.

12 THE WITNESS: I would like to refer
13 to the exhibit or the item while you're asking
14 questions.

15 CROSS-EXAMINATION

16 BY MR. WINDLE:

17 Q. Okay. 12 and 100.

18 A. This is Exhibit 226. This is 13 through
19 132.

20 Q. Okay. And then 12.

21 A. This one.

22 Q. Okay. If you look at Plaintiff's
23 Exhibit 12, that should be the change order
24 request by Balfour in closing all of the RCOs for
25 various subcontractors that you went through

1 yesterday afternoon.

2 A. Those are the RCOs that Balfour Beatty
3 showed in their Exhibit 329 as being pending.

4 Q. Okay. Yesterday afternoon, you
5 testified in regard to some Lithko invoices that
6 were included as backup to the Balfour delay
7 claim. Do you recall that?

8 A. Can you point me to the exact RCO?

9 Q. It's RCO 88R1.

10 A. Yes.

11 Q. Okay. And your testimony, in relation
12 to Lithko, was that Lithko had -- or Balfour
13 Beatty had enclosed an invoice from Sunbelt
14 Rentals that pertained to scaffolding for floors
15 one through three, correct?

16 MR. MCDONALD: Objection, Your
17 Honor. Misstates the evidence.

18 THE COURT: Well, let me ask this
19 question because we weren't here yesterday
20 afternoon, this being Monday. Would this have
21 been on Friday?

22 MR. WINDLE: Oh, that would have
23 been Friday afternoon.

24 THE COURT: Well, we weren't here
25 Friday afternoon; so it had to be Friday morning.

1 MR. WINDLE: Friday morning.

2 THE COURT: All right. So Friday
3 morning was when she was testifying.

4 MR. WINDLE: Yes.

5 THE COURT: All right. Thank you.

6 BY MR. WINDLE:

7 Q. Do you have an RCO that involves the
8 Sunbelt --

9 A. RCO number 88 has no Sunbelt Rental
10 information.

11 Q. 88R1?

12 A. 88R1 has no Sunbelt Rentals numbers,
13 backup.

14 Q. Well, I need to look at the documents
15 and find that exhibit. Do you remember the
16 testimony about the scaffolding --

17 A. I do.

18 Q. -- on floors one through three?

19 A. I do.

20 Q. And your testimony was that that
21 scaffolding did not pertain to the sixth floor
22 delay, it pertained to scaffolding on floors one
23 through three, right?

24 MR. MCDONALD: Objection, Your
25 Honor. Misstates the testimony.

1 BY MR. WINDLE:

2 Q. What was your testimony then in regards
3 to that scaffolding?

4 A. I was reading what the Sunbelt quotes
5 and invoices stated that it was referring to
6 floors one through three.

7 Q. And your testimony was that floors one
8 through three had nothing to do with the delay on
9 the sixth floor, correct?

10 MR. MCDONALD: Objection, Your
11 Honor. Misstates the testimony.

12 A. I don't believe I said that they don't
13 have anything to do with the sixth floor. I was
14 just reading what the quotes in the Sunbelt
15 description of work was, and it was for work
16 floors one through three and also at the garage
17 opening, which would have been on the street --
18 on the Hutson Street side.

19 Q. And you also had testimony about the
20 overhead protection of the sidewalk?

21 A. Correct. I was just reading with what
22 the Sunbelt book said in the -- in the backup.

23 Q. And your testimony was that the overhead
24 protection on the sidewalk didn't have anything
25 to do with the sixth floor delays?

1 A. What I said was that it was overhead
2 protection on the sidewalk. It had nothing -- it
3 didn't state anywhere that it was scaffolding for
4 the sixth, seventh, or ninth floor.

5 Q. Okay. Thank you. If you look at
6 Plaintiff's Exhibit 100, that is the letter from
7 Buck Lindsay in response to the claim by Balfour.
8 Do you recall that?

9 A. I've got 100 here. Yes, I do.

10 MR. WINDLE: Do you have Exhibit
11 100, Plaintiff's Exhibit 100?

12 THE COURT: I found some Sunbelt
13 stuff in Exhibit 122. I didn't find anything in
14 Exhibit 88 except one.

15 MR. WINDLE: We weren't given
16 copies of those; so I'm going off of memory.

17 THE COURT: Okay. You're going off
18 memory?

19 MR. WINDLE: Yes, sir.

20 THE COURT: Hard to rely on that.

21 MR. WINDLE: At my age, yes.

22 THE COURT: All right. Go ahead.

23 BY MR. WINDLE:

24 Q. Ms. Brown, in Plaintiff's Exhibit 100,
25 Buck Lindsay is rendering an opinion on the claim

1 from Balfour Beatty for delays and additional
2 compensation for the sixth floor structural
3 delay, correct?

4 A. Correct.

5 Q. And his final determination is that
6 Balfour is entitled to a 20-day time extension as
7 well as approximately \$72,000, right?

8 A. Correct.

9 Q. If -- because the scaffolding for the
10 first and third floor and the scaffolding over
11 the sidewalk had to remain for an additional 20
12 days, Lithko is entitled to reimbursement for
13 those additional wall costs; isn't that correct?

14 MR. MCDONALD: Objection, Your
15 Honor. Assumes facts not in evidence.

16 THE COURT: Overruled.

17 THE WITNESS: The Sunbelt Rental
18 portion of the RCO is not added to the Lithko
19 line item. It's just under hoisting, staging and
20 logistics, which is a BBC line item. And it's
21 also a BBC line item in the schedule of values to
22 BBC. So the hoisting, staging and logistics is
23 not being requested for by Lithko. It's being
24 requested for by Balfour Beatty.

25 BY MR. WINDLE:

1 Q. That's not my question. My question is,
2 if Lithko had to maintain that scaffolding and
3 that fall protection for an additional 20 days
4 due to a delay that wasn't the fault of Balfour
5 or Lithko, Lithko should be reimbursed for those
6 additional rentals; isn't that right?

7 A. I don't believe Lithko was being charged
8 for those rentals. Sunbelt was being invoiced to
9 Balfour Beatty, not to Lithko. Those weren't
10 Lithko scaffolding bills. They were Balfour
11 Beatty scaffolding bills.

12 Q. Okay. Balfour Beatty should be
13 reimbursed for those additional rental costs
14 then, correct?

15 A. No. I believe the architect has ruled
16 on this claim, and if Balfour Beatty would have
17 submitted an RCO for the 20 day time extension
18 and the \$72,000. We would have signed that RCO.
19 And in addition, I don't have a contract with
20 Lithko. I have a contract with Balfour Beatty.

21 Q. Okay. Thank you. The architect did
22 render a decision, and the architect's decision
23 was that the contractor was entitled to a 20 day
24 time extension and \$72,000, correct?

25 A. They did, but I don't pay claims, and I

1 don't pay letters from the architect. I pay
2 certified pay apps, and if they would have
3 submitted an RCO, which would have been signed,
4 which would have been turned into a change order
5 and then they would have been paid the \$72,000.
6 And they would have received the 20 days of
7 extension.

8 Q. Do you know whether or not Balfour or
9 Lithko incurred additional rental costs for that
10 scaffolding or fall protection?

11 A. I do not. I only know what's in the RCO
12 requested by Balfour Beatty for that additional
13 scaffolding.

14 MR. WINDLE: Okay. Thank you. No
15 further questions.

16 THE COURT: All right. Mr. Terry?

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

19 CROSS-EXAMINATION

20 BY MR. TERRY:

21 Q. Good afternoon, Ms. Brown.

22 A. Good afternoon.

23 Q. I'm Don Terry. I represent Watson
24 Electrical Construction. I don't think you're
25 going to need to turn to Plaintiff's Exhibit 56

1 for this, but you might. Exhibit 56 was the --
2 if I remember correctly, it was the contract
3 between Library Associates and Balfour Beatty,
4 right?

5 A. Correct.

6 Q. All right. And Library Associates hired
7 a construction manager, not a general contractor,
8 right?

9 A. Correct.

10 Q. You testified earlier about some
11 chandelier crystals. Do you remember that?

12 A. Yes.

13 Q. You don't know -- assuming those
14 crystals were lost by someone, you don't know who
15 lost them, right?

16 A. We went back to the provider. Well, the
17 purchasing agent went back to the provider. The
18 provider had submitted pictures showing that the
19 crystals were in a box of X, and that that box
20 was in the crate, included in the packing slips.
21 So they are stating that the crystals were
22 shipped with the rest of the light fixtures.

23 MR. TERRY: Your Honor, I move to
24 strike her answer as nonresponsive to my
25 question.

1 THE COURT: I'm going to allow the
2 answer. Why don't you ask her again.

3 BY MR. TERRY:

4 Q. You don't know who lost the crystals,
5 right?

6 A. I do not.

7 MR. TERRY: Okay. That's all the
8 questions I have.

9 THE COURT: Okay. Mr. O'Kelley?

10 MR. O'KELLEY: Thank you, Your
11 Honor.

12 THE COURT: All right. You've been
13 awfully quiet.

14 MR. O'KELLEY: Your Honor, we
15 thought we could be quiet until more people
16 started talking about -- Your Honor, may I
17 approach the witness?

18 THE COURT: You certainly may.

19 CROSS-EXAMINATION

20 BY MR. O'KELLEY:

21 Q. Ms. Brown, Hamlin O'Kelley from
22 Metropolitan Life Insurance Company. Much has
23 been made to my client being an insurance
24 company. How did the folks at Library Associates
25 view my client through the building of this

1 hotel?

2 A. As a lender.

3 Q. And the document that's in front of you
4 is a document that's a filed record in Charleston
5 County, is it not?

6 A. Yes, it is.

7 Q. And tell -- read into the record the
8 title of that document, please, ma'am.

9 A. Mortgage fee and leasehold security
10 agreement and fixture filing. Collateral
11 includes fixtures by Library Associates, LLC, a
12 South Carolina limited liability company as
13 borrower and mortgager to Metropolitan Life
14 Insurance Company, a New York corporation as
15 lender and mortgagee.

16 Q. And MetLife described itself as lender
17 and mortgagee, correct?

18 A. Correct.

19 Q. And that document has been filed of
20 record in book 0463 at page 656 as of March 19,
21 2015, has it not?

22 A. That's correct.

23 Q. And if you'll go to the last page of
24 that document, there's recording information. Do
25 you see that?

1 A. Yes.

2 Q. And down at the bottom, there's a seal
3 and some blue ink certifying this as a copy from
4 the Register of Deeds Office. Do you see that?

5 A. Yes, I do.

6 Q. And do you know the amount that you were
7 authorized -- and when I say you, I don't mean
8 you, Ms. Brown. I'm talking about Library
9 Associates -- the amount Library Associates was
10 authorized to borrow in that document?

11 And it's in the recitals, which is about
12 the third or fourth page, item A. And
13 unfortunately, Mr. Gailliard's office or whoever
14 prepared this document did not put page numbers
15 on there.

16 A. Yes. Under recitals A, up to a total
17 amount of 133 million dollars.

18 Q. And your testimony earlier was that you
19 think you borrowed -- you, being Library
20 Associates, a sum of around 66 million or 66 and
21 a half?

22 A. 66 and a half million dollars.

23 Q. If I said to you the sum of
24 \$66,620,539.10, does that sound about right?

25 A. That sounds about right.

1 Q. And that mortgage that's in front of you
2 was filed how many years before any liens in this
3 case, ma'am? Because the first liens in this
4 case were filed in 2019, correct?

5 A. The first lien from Balfour Beatty was
6 filed in 2019, yes. There were subcontractor
7 liens through the job that were filed earlier,
8 but the first lien from Balfour Beatty was in
9 2019.

10 Q. Well, my question to you, ma'am, is that
11 mortgage has been the record as of about three
12 and a half years at a minimum before any liens
13 were filed, correct?

14 A. Correct.

15 MR. O'KELLEY: Your Honor, at this
16 time, I'd like to move that mortgage into the
17 record. It is a matter of public record as well,
18 and I think Your Honor can take judicial notice,
19 if you would. But we would like to have that in
20 as MetLife's 1, and probably only, Your Honor.

21 THE COURT: All right. Very good.
22 In evidence.

23 (METLIFE EXH. 1 was marked for
24 identification and received in evidence.)

25 BY MR. O'KELLEY:

1 Q. And you've testified Friday and today
2 about the pay application process. My client
3 would fund you the money, and then you would sent
4 it to Balfour Beatty to distributor to the subs,
5 correct?

6 A. Correct.

7 Q. And you've talked about that until
8 you're blue in the face, the process, correct?

9 A. Correct.

10 Q. All right. And there were some
11 questions Mr. Hildebrand was asking you on his
12 cross about the equity situation and how things
13 were funded.

14 A. Correct.

15 Q. It's my understanding, from your
16 testimony, you-all funded a certain amount as
17 required by my client. That was paid down, and
18 then you drew down on the loan, correct?

19 A. That's correct.

20 MR. O'KELLEY: Thank you,
21 Ms. Brown. That's all I have.

22 THE COURT: Okay. Redirect?

23 MR. MCDONALD: Very briefly, Your
24 Honor.

25 THE COURT: All right.

1 REDIRECT EXAMINATION

2 BY MR. MCDONALD:

3 Q. Ms. Brown, you were handed Plaintiff's
4 Exhibit 346. Do you still have that in front of
5 you?

6 A. Yes.

7 Q. And do you recall you were asked some
8 questions about the certifications that were made
9 on that?

10 A. Yes.

11 Q. You weren't asked about certifications
12 little v, little i. Can you read that into the
13 record, please?

14 A. What number?

15 Q. Little v, little i, 6.

16 THE COURT: Roman numeral VI.

17 MR. MCDONALD: Roman numeral VI.

18 THE WITNESS: All amounts
19 previously disbursed by you for direct
20 construction costs for labor, services and/or
21 materials pursuant to previous requests for
22 disbursement have been paid to the parties
23 entitled thereto with the proper designation of
24 contract and account for which payment was made.

25 BY MR. MCDONALD:

1 Q. Okay. And if you would turn to the page
2 of this document. It's got a little Bates stamp
3 here, LA box 3791. It's the G702. Are you
4 there?

5 A. 003561?

6 Q. 3791. It's the front page of the pay
7 application.

8 A. Oh, I'm sorry.

9 Q. No, that's all right.

10 A. Yes, 791.

11 Q. And is the contractor making a
12 certification to you-all on that page, above the
13 signature, contractor Balfour Beatty
14 Construction, LLC?

15 A. Yes.

16 Q. And what does that certification say?

17 A. The undersigned contractor certifies, to
18 the best of the contractor's knowledge,
19 information and belief the work covered by this
20 application for payment has been completed in
21 accordance with the contract documents, that all
22 amounts have been paid by the contractor for work
23 for which previous certificate for payments were
24 issued and payment received from the owner, and
25 that the current payment shown herein is now due.

1 Q. Okay. Now, turn, if you would, the
2 final question on this document, it's the third
3 page of the document. It's got little boxes. Do
4 you see that right above your signature?

5 A. Right above my signature? Yes.

6 Q. And it says bank name, NBSC, a Synovus
7 Bank. Who is that?

8 A. That is our depository account. So we
9 were asking MetLife to fund that amount of money
10 into our account.

11 Q. And would they wire that fund into your
12 account at NBSC?

13 A. Yes.

14 Q. Now, turn if you would -- you might not
15 have it in front of you anymore -- to Exhibit 56,
16 the contract. Do you have that? I think it's in
17 that notebook right there on the top.

18 A. Yes.

19 Q. Are you there?

20 A. Yes.

21 Q. If you would, turn to the 201 in that
22 document, specifically to section 9.5.1.6. Are
23 you there?

24 A. 9.5.1.6, yes.

25 Q. Okay. Will you read that into the

1 record for the Judge?

2 MR. HILDEBRAND: Your Honor, I
3 don't see how this is appropriate on redirect. I
4 don't remember anything about this portion of the
5 contract being read into the record or otherwise.

6 THE COURT: Where are we going on
7 this one?

8 MR. MCDONALD: Relating to the
9 liquidated damages, Your Honor. He just asked
10 tons of questions about liquidated damages.

11 THE COURT: All right.

12 BY MR. MCDONALD:

13 Q. Would you read that into the record,
14 please.

15 A. 9.5.1.6. Reasonable evidence that the
16 work will not be completed within the contract
17 time and that the unpaid balance would not be
18 adequate to cover actual or liquidated damages
19 for the anticipated delay.

20 Q. Thank you. And what is the title of
21 that section as a whole?

22 A. Decisions to withhold certification.

23 Q. Thank you. All right. Turn to 2.4 of
24 the 201, please, ma'am. Would you read the title
25 of that section?

1 A. 2.4, owner's right to carry out the
2 work.

3 Q. Okay. And does that section contain the
4 provisions as to when the owner can self-perform
5 the work?

6 A. Yes.

7 MR. HILDEBRAND: Your Honor, again,
8 there was nothing about this in the -- on
9 cross-examination. He's going far into the field
10 for the appropriate redirect.

11 THE COURT: I think you did ask
12 about that, did you not?

13 MR. MCDONALD: He specifically
14 asked her about the painting and the owner's work
15 and all of that stuff. We're just simply
16 pointing out that that's the provision. And,
17 Your Honor, I would request a little bit of
18 leeway.

19 If I recall, when the case started, I
20 think you specifically asked that if we had a
21 contract section, that we would like Your Honor
22 to be aware of, that we point it out. I don't
23 have any more questions on this. That's all I
24 was trying to do.

25 THE COURT: Okay. All right.

1 MR. MCDONALD: Thank you very much.

2 THE COURT: All right. Anything at
3 all in follow-up?

4 MR. HILDEBRAND: Just a couple.
5 Very briefly.

6 THE COURT: Sure.

7 RECROSS-EXAMINATION

8 BY MR. HILDEBRAND:

9 Q. With regard to the sixth floor delay
10 issue that Mr. Windle asked you about, the
11 \$72,000, 20 day extension, do you remember the
12 discussion about that?

13 A. Yes.

14 Q. As I understand it, Balfour Beatty was
15 not satisfied with the architect's decision on
16 that and said we demand mediation. Do you
17 remember that?

18 A. Yes.

19 Q. All right. So there was not a
20 resolution of that claim, correct?

21 A. Not at the mediation, no.

22 Q. Nor ever still not today, is there?

23 A. Well, the architect ruled on that claim.
24 Balfour Beatty didn't accept his ruling.

25 Q. Right. The parties didn't agree on what

1 his ruling was, correct? They went to mediation?

2 A. Balfour Beatty didn't agree on what the
3 ruling was. The owner was fine with the
4 architect. We would have given them the \$72,000
5 and 20 day time extension if they would have
6 submitted an RCO or time extension.

7 MR. HILDEBRAND: I don't have any
8 more questions, Your Honor.

9 THE COURT: Mr. Windle anything on
10 follow up on that?

11 MR. WINDLE: No, Your Honor.

12 THE COURT: Okay. Ms. Brown, it
13 looks like your time has come to an end. Thank
14 you.

15 All right. It's almost 4:30. Let's
16 take a break, and let's start back -- I think
17 I've let y'all know I've got a piece of property
18 I've got to sell tomorrow at 11 a.m. So I'm
19 going to be busy in the morning getting ready for
20 that, so let's plan to start at 1 tomorrow. We
21 should be able to work through the day. Thank
22 you.

23 (The hearing concluded at 4:32
24 p.m.)

25

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Adams, Certified
5 Shorthand Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness whose attached in the
8 foregoing hearing was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but
10 the truth in the within-entitled cause; that said
11 hearing was taken at the time and location
12 therein stated; that the testimony of the witness
and all objections made at the time of the
examination were recorded stenographically by me
and were thereafter transcribed by computer-aided
transcription; that the foregoing is a full,
complete and true record of the testimony of the
witness and of all objections made at the time of
the examination; and that the witness was given
an opportunity to read and correct said hearing
and to subscribe the same.

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

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

Witness my hand, I have hereunto
affixed my official seal on November 9, 2022 at
Charleston, Charleston County, South Carolina

20 _____
21 Jennifer M. Adams
22 Court Reporter And Notary Public
23 My commission expires: 03/15/2032
24
25

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

3 BALFOUR BEATTY CONSTRUCTION,)
 4 LLC,) VOLUME SEVENTEEN
) Case No.
 5 Plaintiff,) 2019-CP-10-1108

6 -versus-)

7 LIBRARY ASSOCIATES, LLC;)
 METROPOLITAN LIFE INSURANCE)
 8 COMPANY, A NEW YORK)
 CORPORATION,)

9)
 10) Defendants.)

11 LIBRARY ASSOCIATES, INC.,)
)
 12 Defendant/Third-Party Plaintiff,)

13 -versus-)

14 LITHKO CONTRACTING, LLC; GUY M.)
 BEATY, INC.; BERNHARD MMC, LLC)
 15 GULF STREAM CONSTRUCTION CO.,)
 INC; Precision Walls, INC.;)
 16 PALMETTO AUTOMATIC SPRINKLER)
 COMPANY, INC.; ET AL,)

17)
) 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 1:00 p.m. on
 22 November 2, 2021 at 100 Broad Street, Courtroom
 23 2A, Charleston, South Carolina.

24

25

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

2
3 ON BEHALF OF PLAINTIFFS:

4 PARKER POE ADAMS & BERNSTEIN, LLP
5 BY: THOMAS HILDEBRAND, JR., ESQ.
6 BY: ROBERT C. BYRD, ESQ.
7 200 Meeting Street
8 Suite 301
9 Charleston, SC 29401
10 (843) 727-6315
11 Tomhildebrand@parkerpoe.com
12 Bobbybyrd@parkerpoe.com

13 ON BEHALF OF DEFENDANT LIBRARY ASSOCIATES:

14 BUNDY MCDONALD, LLC
15 BY: WALTER H. BUNDY, JR., ESQ.
16 BY: M. BRENT MCDONALD, ESQ.
17 1516 Old Trolley Road
18 Second Floor
19 Summerville, SC 29485
20 (843) 492-0221
21 Walter@bundymcdonald.com
22 Brent@bundymcdonald.com

23 ON BEHALF OF DEFENDANT WATSON ELECTRICAL:

24 SMITH TERRY JOHNSON & WINDLE
25 BY: DON R. TERRY, ESQ.
26 150 Milestone Way
27 Suite C
28 Greenville, SC 29615
29 Dterry@smithterrylaw.com

30 ON BEHALF OF DEFENDANT OLD NORTH STATE & LITHKO:

31 SMITH TERRY JOHNSON & WINDLE
32 BY: STEELE B. WINDLE, III, ESQ.
33 150 Milestone Way
34 Suite C
35 Greenville, SC 29615
36 Awindle@smithterrylaw.com

37

1 ON BEHALF OF DEFENDANT DAVID ALLEN COMPANY:

2 KELLY LAW FIRM, LLC
3 BY: RUSSELL BRITTON KELLY, ESQ.
4 689 King Street
 Charleston, SC 29403
 Britt@kellylawsc.com

5
6 ON BEHALF OF DEFENDANT METROPOLITAN LIFE:

7 BUIST BYARS & TAYLOR, LLC
8 BY: G. HAMLIN O'KELLEY, ESQ.
 652 Coleman Boulevard
 Suite 200
 Mt. Pleasant, SC 29464
9 Hamlin.okelley@buistbyars.com

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 INDEX OF WITNESSES

2 DEFENDANT'S WITNESSES

PAGE

SAM HADLEY

3 Direct Examination by Mr. McDonald

3885

4

5 Certificate

4037

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: All right, folks, back
2 on the defendant's case and Mr. Bundy and
3 Mr. McDonald.

4 MR. MCDONALD: Thank you, Your
5 Honor. May it please the Court.

6 THE COURT: Yes, sir.

7 MR. MCDONALD: Library Associates
8 would call Sam Hadley.

9 THE COURT: All right. Ms. Hadley,
10 come on forward.

11 (SAM HADLEY, having first been duly
12 sworn, testified as follows:)

13 THE COURT: And please give us your
14 full name and address, please.

15 THE WITNESS: Sandra Hadley, 12317
16 Snug Harbor Road, Berlin, Maryland 21811.

17 DIRECT EXAMINATION

18 BY MR. MCDONALD:

19 Q. Ms. Hadley, how are you doing this
20 afternoon?

21 A. Good.

22 Q. Good. Why don't you just start off by
23 telling the Court a little bit about yourself.
24 Where are you from?

25 A. I live in the DC area right now. I grew

1 up in Wisconsin. I went to college in Wisconsin,
2 got an accounting degree and moved to the DC area
3 when I was 21.

4 Q. When you were 21?

5 A. Uh-huh.

6 Q. And for what purpose did you move to the
7 DC area?

8 A. I got a job at Cotton and Company, which
9 was an accounting firm in that area.

10 Q. And we're going to go through some of
11 your experience, but I'd like to start off -- can
12 you explain to the Judge what you do? What is
13 your job right now, and then we'll get into how
14 we got there. Okay?

15 A. My job at Cotton and Company, which was
16 the majority of my career, was to evaluate
17 contract or project costs. It's not a typical
18 accounting firm. We don't do typical audits. We
19 don't do taxes and debits and credits. We're not
20 an accounting service firm for the contractor.

21 We're hired typically to evaluate costs
22 incurred on a project to ensure that they
23 complied with the contract terms or the grant or
24 the program that the federal government might be
25 funding to ensure that those costs were spent in

1 accordance with those terms and conditions.

2 Q. Okay. And does that involve an actual
3 construction contract?

4 A. Many of them initially were
5 construction. Courthouses, VA Hospitals, roads,
6 any transportation, you know, bridge projects.

7 In the early years, when I was in my
8 20's, most of the work that Cotton and Company
9 did was evaluating contractor costs on behalf of
10 the public projects. So that's where we got our
11 start in the construction area.

12 Q. And you said the construction area. Are
13 there any other areas of business -- I guess if
14 you use the generic term -- that you-all perform
15 accounting work for?

16 A. Well, this is like -- we don't do
17 accounting work, but we -- on behalf of the
18 federal government in the early days, we would
19 take a look at any program.

20 We did a lot of FEMA disaster
21 assistance, corporation for National Community
22 Service, AmeriCorps-type programs, a lot of EPA
23 projects. So we used to do a lot of audits of
24 companies that provide badging and credentialing
25 for the government.

1 So it could be a professional services
2 contract or it could have been construction where
3 we would write an audit report. Again, the total
4 costs incurred by the entity and then of those
5 costs, which one of them complied with all of the
6 terms and conditions of the program as well as
7 the contract.

8 Q. I'm going to hand you, Ms. Hadley,
9 what's been marked as Defendant's Exhibit 50 for
10 ID purposes. Do you recognize that document?

11 A. I do. It is my CV with my new employer,
12 Capital Project Management, Inc.

13 Q. Okay. Let's go through it a little bit.
14 So you were at Cotton and Company, correct?

15 A. I was, yes.

16 Q. And now you're at Capital Project
17 Management, Inc.?

18 A. Correct.

19 Q. And when did that move take place?

20 A. June 1st of this year.

21 Q. Okay. And are you doing the same type
22 of work at Capital Project Management, Inc., that
23 you did at Cotton and Company?

24 A. Yes.

25 Q. Okay. And are you a certified public

1 accountant?

2 A. I am.

3 Q. And are you a certified government
4 financial manager?

5 A. I am.

6 Q. And what is that? What is a certified
7 government financial manager?

8 A. A GCFM is a certification issued by the
9 Association of Governmental Accountants. It
10 primarily rates to understanding of federal and
11 government state funding and how that is
12 different than typical accounting.

13 So we would again evaluate costs.
14 Certain federal funding, for example, is called,
15 Know Your Money and To Your Money and when those
16 funds can be spent and when they have to be
17 obligated in accordance with what we call the
18 Federal Red Book and the presidential budget.

19 Q. Okay. Are you a certified fraud
20 examiner?

21 A. Yes.

22 Q. What is a certified fraud examiner?

23 A. A certified fraud examiner is a
24 certification issued by the Association of
25 Certified Fraud Examiners. And like the CPA

1 exam, it comes with an exam, an annual
2 certification, and it discusses issues
3 surrounding identifying fraud risk indicators,
4 doing litigation-type work and establishing
5 internal controls to prevent internal fraud in
6 corporations and, you know, left and fraud,
7 waste, and abuse.

8 Q. You used the term fraud risk indicators.
9 What is that?

10 A. A certified fraud examiner can't assert
11 that something was fraud because that is
12 something for the trier of fact. So what we do
13 is, we issue reports that identify for fraud risk
14 indicators.

15 So this much money was taken from the
16 account, and that same amount of money was
17 deposited into Mr. Johnson's bank account.
18 That's a fraud risk indicator, but I can't say
19 that he stole it. So it's just proper
20 terminology to address what I can affirmatively
21 say.

22 Q. Okay. So that's basically just your
23 professional stopping point as a fraud risk
24 indicator? You don't go beyond there?

25 A. That's true.

1 Q. And then it says -- are you certified in
2 financial forensics?

3 A. Yes.

4 Q. All right. And what is that?

5 A. The CFF is an additional sub-designation
6 of the CPA. So if you are a CPA, there are, I
7 believe, three sub-certifications that again come
8 with an additional exam and annual education
9 requirements that specialize.

10 This particular one that I have a CFF is
11 specializing in analytics and forensic analysis
12 in a wide variety of areas including this one.

13 Q. And I believe that you already stated
14 that you've got a bachelor's degree in accounting
15 from the University of Wisconsin?

16 A. That's correct.

17 Q. All right. And tell the Judge a little
18 bit about your general experience and types of
19 things you've done as indicated on Defendant's
20 Exhibit 150.

21 A. Okay. Like I said, when I graduated, I
22 did go to Cotton and Company right out of
23 college, auditing and evaluating mostly public
24 projects and issuing audit opinions regarding
25 whether those funds were adequately spent and how

1 much have been adequately spent.

2 Some of those things, as you can
3 imagine, turns litigious when contractors were
4 being asked to return funds or when they were
5 being disbarred. That naturally led into kind of
6 a litigation stance to support our audit reports.

7 Some of those things, you know, became
8 litigious, and that's, I think, where some of the
9 litigation came from. Cotton and Company wasn't
10 in the litigation support business when I started
11 in 1987. It was something that grew later on.

12 Q. Have you done claims preparation?

13 A. Yes. Again, kind of organically from
14 the testifying that we did, eventually
15 contractors would call on us to help prepare
16 their claims for the -- whether, you know, it's a
17 change order or whether it's a full-blown claim
18 to ensure that it did comply with the
19 requirements of the owner.

20 And because of, I hope, the good
21 reputation that Cotton and Company had with the
22 Department of Justice, I think that, you know,
23 the contractors wanted to use somebody like us
24 that typically worked for the government and then
25 started to, you know, prepare the claims that

1 would comply with the Federal Acquisition
2 Regulation and the myriad of regulations that
3 come with public spending.

4 Q. Have you had any involvement in claims
5 preparation related to the damages and lost
6 profits?

7 A. Yes, more subsequent. Maybe in the past
8 10 or 15 years, there's been a lot of lost profit
9 calculations. I've done many hotels but also
10 hospitals, companies that just haven't opened,
11 even like car dealerships where construction
12 delays caused a delayed opening.

13 I did a couple of fires of some energy
14 facilities that caused them to lose profits due
15 to, you know, unsafe conditions and those sort of
16 things.

17 Q. Okay. And have you done a construction
18 project evaluation involving change order
19 reviews, GMP project reconciliation and contract
20 compliance issues?

21 A. Yes. Cotton and Company has several
22 contracts where we are part of the
23 contemporaneous construction project.

24 We are evaluating change orders,
25 ensuring that the mark ups are adequate, make

1 sure that it wasn't part of the base scope work,
2 making sure that prime is properly evaluated, the
3 sub-subcontractor's portion of that change order,
4 and providing our advice to the owner on the
5 amount of that change order.

6 We also have a couple of contracts with
7 contractors where we assist them in just
8 preparing change orders, especially the larger
9 ones, you know, maybe for a large change in scope
10 or that sort of thing. But primarily, that's on
11 the owner's side.

12 We have a large contract right now with
13 NASA, where we're helping them make modifications
14 to the space station and some of their launch
15 pads. So we're constantly evaluating contractor
16 change orders to ensure that those projects can
17 stay on time.

18 Q. Okay. What is difference between
19 project accounting and auditing, if any?

20 A. Well, project accounting would be done
21 more contemporaneous. You're actually booking
22 entries. You know, you're paying bills.
23 Auditors, we come in after the fact and find
24 fault with what the accountants did. We identify
25 the lack of internal controls that may have

1 caused that to happen.

2 We typically issue reports where
3 accountants are more contemporaneous maybe, just
4 mainly preparing monthly financial statements or
5 payment applications, where we're preparing
6 actual audit reports of what's wrong with those
7 numbers that were originally prepared by the
8 accountant.

9 Q. Okay. And are you involved in any
10 professional affiliations?

11 A. I am involved in the Associations that
12 issues my certifications. So that would be the
13 American Institute of Certified Public
14 Accountants, the Association of Certified Fraud
15 Examiners, and like I mentioned, the Association
16 of Government Accountants.

17 And then I'm also a member of the ABA
18 and the construction forum, where I do some
19 public speaking and attend those events.

20 Q. Okay. ABA being the American Bar
21 Association?

22 A. Yes.

23 Q. Do you have any publications?

24 A. I haven't published books or
25 publications as such. I have done speaking

1 engagements where papers were required.

2 And I have -- I've listed those because
3 they are available publicly either on the ABA
4 website or other websites. I have issued a
5 couple of newsletters, if you will, to clients.
6 I have listed those as well.

7 Q. All right. And you have project
8 experience with the Department of Justice. Tell
9 the Judge a little bit about that.

10 A. So, yeah, as I mentioned, at Cotton and
11 Company, our first litigation client, if you
12 will, is the Department of Justice, who
13 represents all the government agencies.

14 If those contractors are issuing a claim
15 against the government in Claims Court, if
16 they're going through the Board of Contract
17 Appeals, then the agencies do represent
18 themselves.

19 But if it's in Federal Court, the
20 Department of Justice does represent each of
21 those agencies. So we developed a good
22 relationship with the Department of Justice where
23 we would then be supporting and being on that
24 team of providing litigation support regarding
25 that contractor claim.

1 Typically, it's an unpaid change order
2 or a claim for delays for different site
3 conditions, where the Department of Justice would
4 ask us to come in and evaluate that claim, issue
5 a report on it, and then testify about that.

6 Q. And do you have any other experience
7 with any other government agencies other than the
8 Department of Justice?

9 A. Yeah. Like I mentioned, if the -- if a
10 contractor is suing the government in a Board of
11 Contract Appeals or another venue besides because
12 the Federal Courts, then those agencies do
13 represent themselves.

14 So we do a lot of work for the Defense
15 Contract Management Agency and the Defense
16 Contract Audit Agency, but then other agencies as
17 well that have to support their own litigation.
18 And then I also do support some state agencies as
19 well. Mostly Departments of Transportation
20 because again they're spending a lot of, you
21 know, public funding.

22 Q. And do you also do -- do you have any
23 experience helping out private entities?

24 A. Yes.

25 Q. Okay.

1 A. In the latter years of my career, I
2 think my work is probably 50/50 now, where I'm
3 supporting contractors as much as the owners,
4 either helping them prepare claims or just
5 support their claims either through mediation,
6 arbitration, or litigation process.

7 But we do non-litigation work, too. I
8 prepare indirect cost rates or markup rates for
9 contractors. I help improve their internal
10 controls by just talking about a different maybe
11 payment process where you can see the -- you
12 know, the things that happened in the past and
13 you improve the forms and you improve the process
14 to tighten up internal controls.

15 We do other performance-type reviews to
16 ensure that a contractor has controls in place to
17 comply with the contract terms. It's not always
18 just about the money that you spend, but you do
19 have to comply.

20 Maybe you need certain signatures for
21 youngsters under 16 to work in the program. And,
22 you know, do they have a procedure in place to
23 gather and maintain all those signatures and keep
24 their document management system appropriate to
25 document their compliance with the program.

1 Q. Okay. Do you hold any government
2 clearances?

3 A. Yes. I had a top secret clearance with
4 the federal government. I believe it is still
5 active, but as you do change from one job to
6 another, sometimes it falls down in the new
7 employer must reenact it. But I do think that
8 that has been done.

9 I have a position of public trust, it's
10 called, with the Department of Homeland Security.
11 For some reason, the Department of Homeland
12 Security has a different badging and
13 certification process than the rest of the
14 federal government. So they like to have their
15 own certifications.

16 I also have a security position with the
17 Virginia Department of Transportation which again
18 they don't recognize the federal certifications.
19 So they do require their own background check and
20 that sort of thing.

21 MR. MCDONALD: Your Honor, at this
22 time, I'd offer Ms. Hadley as an expert in
23 accounting and auditing, construction accounting
24 and auditing and damage compilation in
25 construction projects.

1 THE COURT: Any voir dire?

2 MR. HILDEBRAND: No objections,
3 Your Honor, and no voir dire.

4 THE COURT: All right. Very good.
5 So qualified.

6 MR. MCDONALD: Your Honor, I'd also
7 move into evidence Defendant's Exhibit 150 which
8 is Ms. Hadley's CV.

9 THE COURT: 150. Okay. Thank you.

10 MR. HILDEBRAND: No objection, Your
11 Honor.

12 THE COURT: Without objection.

13 (DFT. EXH. 150, was marked for
14 identification and admitted into evidence.)

15 BY MR. MCDONALD:

16 Q. All right. Ms. Hadley, where I'd like
17 to start with you, if you would, I believe it's
18 the notebook that's in front of you to your
19 right. And in that notebook is tab 56. It's the
20 contract that brings us here today.

21 A. Okay.

22 Q. Are you there?

23 A. I'm here, yes.

24 Q. All right, ma'am, I'd like you to turn,
25 if you would, in the A 133. Is that what you

1 have?

2 A. Yes.

3 Q. To section 6.11.1.

4 A. I'm there.

5 Q. Are you there?

6 A. Yes.

7 Q. What I'd like to do, Ms. Hadley, is, I'd
8 like to publish that section with the
9 understanding that Madam Court Reporter has to
10 type it at the rate in which you speak. Thank
11 you.

12 A. I've learned my lesson, yes, through
13 others.

14 MR. HILDEBRAND: I'm sorry, which
15 one? Where are we?

16 MR. MCDONALD: 6.11.1 of the 133,
17 Tom.

18 THE WITNESS: The construction
19 manager shall keep full and detailed records and
20 accounts related to the cost of the work and
21 exercise such controls as may be necessary for
22 proper financial management under this contract
23 and to substantiate all costs incurred.

24 The accounting and control systems shall
25 be satisfactory to the owner. The owner and the

1 owner's auditors shall, during regular business
2 hours and upon reasonable notice, be afforded
3 access to and shall be permitted to audit and
4 copy the construction manager's records and
5 accounts including complete documentation
6 supporting accounting entries, books,
7 correspondence, instructions, drawings, receipts,
8 subcontracts, subcontractor's proposals, purchase
9 orderers, vouchers memoranda and other data
10 relating to this contract.

11 The construction manager shall preserve
12 these records for a period of (four) years after
13 final payment or for such longer period as may be
14 required by law.

15 Q. Okay. Turn next, Ms. Hadley, if you
16 would, to section 7.1.11 of the A133, which is
17 Plaintiff's Exhibit 56.

18 A. I'm there.

19 Q. Okay. Would you publish that, please?

20 A. The owner has the right, at his sole
21 discretion, to perform periodic examinations,
22 audits, and verifications of the construction
23 manager's costs, accounting records, and other
24 project documentation.

25 The contractor shall make all its

1 records available to the owner upon reasonable
2 advanced notice and shall provide the owner with
3 copies of specific records from time to time upon
4 reasonable request.

5 Q. Okay. And there is a provision before
6 that, 7.1.10. I'd like you to publish that.

7 A. In taking action on the construction
8 manager's application for payment, the architect
9 shall be entitled to rely on the accuracy and
10 completeness of the information furnished by the
11 construction manager and shall not be deemed to
12 represent that the architect has made a detailed
13 examination, audit, or arithmetic verification of
14 the documentation submitted in accordance with
15 section 7.1.4 or other supporting data.

16 That the architect has made exhaustive
17 or continuous on-site inspection or that the
18 architect has made examinations to ascertain how
19 or for what purposes the construction manager has
20 used amounts previously paid on account of the
21 contract.

22 Such examinations, audits, and
23 verifications, if required by the owner, will be
24 performed at the owner's and auditors acting in
25 the sole interest of the owner.

1 Q. Now, let's go down to section 7.2 again
2 in the A133, Plaintiff's Exhibit 56. What is the
3 heading of that section?

4 A. Final payment.

5 Q. And would you go down and publish 7.2.1?
6 Are you there?

7 A. Yes. 7.2.1.

8 Final payment, constitute of the entire
9 unpaid balance of the contract sum, shall be made
10 by the owner to the construction manager when .1,
11 the construction manager has fully performed the
12 contract except for construction manager's
13 responsibility to correct work as provided in
14 section 12.2.2 of the AIA document, A201-2007,
15 and to satisfy other requirements, if any, which
16 extend beyond final payment.

17 .2, the construction manager has
18 submitted a final accounting for the cost of the
19 work and a final application for payment.

20 And .3, all closeout documents, as
21 required by the contract documents, including but
22 not limited to, as-built drawings in paper and
23 electronic format, instructions to the owner's
24 representative on all building systems, and
25 completion of all punch list items outstanding.

1 And .4, a final certificate for payment
2 has been issued by the architect.

3 Q. Okay. Did you know --

4 A. I haven't -- do you want the rest of it?

5 Q. Oh, you're still publishing?

6 A. Yeah.

7 Q. Go ahead.

8 A. The owner's final payment to the
9 construction manager shall be made no later than
10 30 days after the issuance of the architect's
11 final certificate for payment or as follows.

12 The construction manager's final
13 accounting is a complete and full accounting of
14 costs incurred by the construction manager in
15 performance of the work organized according to
16 the construction manager's schedule of values and
17 cost codes and correlated to the costs to be
18 reimbursed under article 6 of this agreement.

19 Q. Okay. Has a final payment request been
20 submitted by Balfour Beatty in this action?

21 A. No.

22 Q. Has Balfour Beatty performed a final
23 accounting for the cost of the work?

24 A. No.

25 Q. Let's go to section 7.2.2. I would like

1 you to publish that, please.

2 A. 7.2.2.

3 The owner's auditor's will review and
4 report in writing on the construction manager's
5 final accounting within 60 days after delivery of
6 the final accounting to the architect by the
7 construction manager.

8 Q. Let me stop you there. And that has not
9 been done, correct?

10 A. That has not been done.

11 Q. The construction manager has not issued
12 a final accounting?

13 A. No, it has not.

14 Q. Okay. Go ahead.

15 A. The construction manager's final
16 accounting is a complete and full accounting of
17 costs incurred by the construction manager in
18 performance of the work organized according to
19 the construction manager's schedule of values and
20 cost codes and correlated to the cost to be
21 reimbursed under article 6 of this agreement.

22 Based upon such costs of the work as the
23 owner's auditor report to be substantiated by the
24 construction manager's final accounting and
25 provided the other conditions of section 7.2.1

1 have been met, the architect will, within seven
2 days after receipt of the written report of the
3 owner's auditor either issue to the owner a final
4 certificate of payment with a copy to the
5 construction manager or notify the construction
6 manager and owner in writing of the architect's
7 reasons in plural for withholding a certificate
8 as provided in section 9.5.1 of the AIA document,
9 A201-2007.

10 The time period stated in this section
11 supercede those stated in the section 9.4.1 of
12 the AIA document A201-2007. The architect is not
13 responsible for verifying the accuracy of the
14 construction manager's final accounting.

15 Q. And finally, for our purposes now, if
16 you would turn to A201, and specifically section
17 9. It's going to be a lot of numbers, so --
18 section 9.10.1.2.3. So I would like you read the
19 lead in and then into .3.

20 THE COURT: Bear with me a second.

21 MR. MCDONALD: Yes. It is page 38
22 of the A201, Your Honor.

23 THE WITNESS: Are we good?

24 THE COURT: Okay. Yes.

25 THE WITNESS: 9.10.1.2.

1 The final payment of retained amount due
2 to contractor on account of the contract shall
3 not become due until the contractor has furnished
4 to the owner through the architect, completion
5 documents as enumerated below and as elsewhere
6 noted in the contract documents.

7 .3, release and waiver of the claims by
8 the general contractor, including representations
9 that all subcontractors of any tier and material
10 supplies have been paid, that there are no past
11 due amounts, and that all amounts due and owing
12 shall be paid immediately.

13 BY MR. MCDONALD:

14 Q. And is any portion of that in bold?

15 A. The last phrase, that all amounts due
16 and owing shall be paid immediately is bolded.

17 Q. And this section relates to final
18 completion and final payment, correct?

19 A. Yes.

20 Q. Okay. And as we just talked about,
21 Balfour Beatty has never submitted the final
22 payment, correct?

23 A. It has not submitted that, yes.

24 Q. Okay. All right. Now, Ms. Hadley, what
25 I would like to do next is generally and then

1 we'll go through it specifically, and at the risk
2 of insulting Your Honor, I have to make a record.

3 I know you've heard about this for many
4 years now, but would you explain to the Court
5 what a GMP contract is, and then we're going to
6 talk about the costs of the work. Okay? Or if
7 you want to explain that in the reverse order,
8 whatever is easier for you.

9 A. I think the easiest way is to talk about
10 the GMP first.

11 Q. Okay.

12 A. The GMP contract, the guaranteed maximum
13 price contract is a cost reimbursable contract
14 that allows a contractor to get reimbursed for
15 its costs subject to that guaranteed maximum
16 price.

17 In this particular situation
18 specifically, there are two guaranteed maximum
19 prices: One for the general conditions portion
20 of the work and one for what we call the primary
21 portion of the work which is the bulk of the
22 costs paid to the subs.

23 Q. And we're going to come back to that,
24 but let's try and talk it in small bites. Just
25 generally, the GMP construct with the cost of the

1 work. Let's stay there from a general view, and
2 then we'll break it down as it relates to this
3 case.

4 A. So I don't think that there's much more
5 that's generic to all GMP contracts. You know,
6 the contract is an AIA template, as we can see
7 that we were reading from, that does get modified
8 and altered as needed for the individual
9 circumstance.

10 So things like the fee is established
11 either as a dollar amount or a percentage, and
12 those sort of things can be tailored within the
13 contract terms. But the basic component is
14 really that it is a cost reimbursable contract
15 with a stated maximum that can't be exceeded.

16 Q. So when you say GMP, that's the
17 guaranteed maximum price? That's the ceiling for
18 the contractor as far as dollars unless there's
19 approved change orders that changes the GMP?

20 A. Right. And then it's a circular
21 reference because the GMP is now larger.

22 Q. Okay.

23 A. So you can't exceed the guaranteed
24 maximum price.

25 Q. Okay. And what happens if there are --

1 well, explain this first. Explain to the Judge
2 what costs of the work are.

3 A. So costs of the work is a term of the
4 contract, and it's defined in the contract as
5 those costs that are incurred by the contractor
6 that comply with the terms of the contract.

7 Q. And where is that -- if the Judge wanted
8 to look at this contract and find out what would
9 constitute a cost of the work, what section would
10 his Honor look to?

11 A. The primary definitions of cost of the
12 work are article 6 of the A133 portion of the
13 contract.

14 There are other areas, even article 5,
15 and frankly, even things within the A201 portion
16 of the contract that will define whether
17 something can be considered reasonable and
18 allowable which is the sub-element of the
19 definition of cost of the work.

20 Q. Explain that in a little more detail.

21 A. So the section -- article, excuse me,
22 not section. Actually, I will look to see it.

23 Q. Sure.

24 A. So article 6 of the A133 is the
25 descriptions of what type of costs are allowable.

1 So it goes through each cost element like labor
2 or materials or equipment, and it provides for
3 what would make those costs eligible to be deemed
4 cost of the work.

5 So there are certain compliance
6 requirements that have to be met in order for
7 that cost to be deemed cost of the work. But
8 what I was referring to is that, the first
9 sentence of article, the first sentence of
10 article 6 talks about the costs have to be
11 necessarily incurred.

12 And there are other sections throughout
13 the A133 and the 201 that talk about the fact
14 that the costs have to be reasonable. So, for
15 instance, labor costs are allowable, but if you
16 paid a superintendent \$5 million a year, that
17 wouldn't be necessary or reasonable.

18 So I just wanted to point out that
19 article 6 is the primary place that us auditors
20 go to see if something can be considered cost of
21 the work. But it otherwise still has to be
22 reasonable and necessary to perform the work.

23 Q. So you start out with a generic term of
24 costs, and those wouldn't necessary be
25 reimbursable unless they meet the definition of

1 costs of the work?

2 A. Correct. And there are other articles
3 in the contract that clearly itemize that other
4 costs will be incurred, but they're not
5 considered costs of the work, and that those
6 costs must be performed by the contractor.

7 Q. Okay. So in that instance, the
8 contractor could spend something that they
9 could -- related to the contract and incur a
10 cost, but if it doesn't meet the definition of
11 cost of the work, it wouldn't be reimbursable?

12 A. Sorry. It's putting a flashlight in my
13 face.

14 THE COURT: Mr. Windle, be glad I'm
15 not Judge Dennis. You'd be gone. But don't pour
16 it in the witness' face, please. I know that was
17 by accident. I'll give you that one. All right.
18 Why don't you ask that question again for
19 Ms. Hadley.

20 MR. MCDONALD: I will do, Your
21 Honor.

22 THE WITNESS: Why.

23 BY MR. MCDONALD:

24 Q. So a contractor or a construction
25 manager can incur a cost, write a check, whatever

1 you want to call it, on a job, but unless it
2 meets the definition of cost of the work, they're
3 not entitled to be reimbursed for that?

4 A. Correct.

5 Q. Okay. Then you just referred to the
6 concept of reasonableness. Then you drop into a
7 section of costs that meet the definition of
8 costs of the work, but they're still subject to a
9 reasonableness standard?

10 A. Correct.

11 Q. Okay. And when you talk about
12 performing a construction audit, what is it that
13 you are auditing?

14 A. The scope of my audit is the amount of
15 costs that the contractor is asking to be
16 reimbursed. So that's my population, if you
17 will. That's what I start from.

18 And then a typical auditor is going to
19 pick samples of the transactions and read the
20 contract. And, you know, it will say, well, this
21 is for materials. What does the contract say
22 about materials? Does this meet the definition
23 of cost of the work for materials? Yes or no.

24 Q. And when you're performing that audit,
25 are you simply auditing costs or amounts they're

1 seeking to be paid for in the future, or are you
2 auditing basically the entire project?

3 A. In a typical GMP construction project
4 audit, you would be evaluating the costs after
5 they had been incurred and as the contractor is
6 asking for them to be reimbursed.

7 You can do what's called pre-award, you
8 know, audits and evaluate, for instance, a
9 proposed change order and whether those costs are
10 reasonable. But that isn't any part of the scope
11 of the work I did on this project.

12 Q. Okay. And we'll talk about this project
13 in just one second. But the -- so how it
14 typically works is, you-all would get that final
15 accounting from the contractor if you were
16 working for an owner of the government, and then
17 you would audit that final accounting?

18 A. Correct.

19 Q. Okay. The costs they've already
20 incurred?

21 A. Correct.

22 Q. Okay. All right. Now, given that that
23 is the general organization of a GMP contract
24 with the cost of the work, how was this
25 particular contract broken down as it relates to

1 GMP?

2 A. So this particular contract has two
3 GMPs. So there are basically two ceilings that
4 general conditions couldn't exceed one guaranteed
5 maximum price and the remaining portion of the
6 contract that I've just been generically
7 referring to as the primary portion of the
8 contract can't exceed the other guaranteed
9 maximum price.

10 Q. And when you use the term GCs, what are
11 you referring to?

12 A. General conditions.

13 Q. Okay. So in this contract, it had a
14 ceiling on the general condition amount and it
15 had a ceiling on the primary and the remainder of
16 the contract amount?

17 A. Correct.

18 Q. The remainder of the contract amount
19 would be those amounts not included in the
20 general conditions?

21 A. Yes. It would be all things except in
22 the general conditions.

23 Q. All right. Ms. Hadley, when did you get
24 involved in this particular project?

25 A. The spring of 2019, I think it was March

1 or April.

2 Q. And how did you get involved?

3 A. Bundy McDonald reached out to me.

4 Q. Okay. Do you know how we found out
5 about you?

6 A. I believe you found out about either
7 Cotton and Company or myself from CPMI, Mark Boe
8 and Mike D'Onofrio.

9 Q. That's D'Onofrio and Boe?

10 A. Yes.

11 Q. And Mark Boe is the gentleman who
12 testified earlier?

13 A. Yes.

14 Q. Okay. All right. And you said that was
15 in the spring of when?

16 A. 2019.

17 Q. Okay. And were you actually retained by
18 Library Associates?

19 A. Yes, I was.

20 Q. Okay. And what was your understanding
21 at that time of what your role was going to be as
22 it relates to Hotel Bennett?

23 A. I believe my -- my recollection of my
24 role was to -- twofold: Evaluate the cost of the
25 work and the GMP and issue a report on the

1 construction of the project as well as a
2 calculation of lost promise and direct damages
3 due to the unknown hotel opening date.

4 Q. Okay. Ms. Hadley, I'm going to hand you
5 what's been marked for ID purposes as Defendant's
6 Exhibit 151 and ask if you recognize that
7 document?

8 A. Yes, I recognize it. I prepared it.

9 Q. So you prepared this document?

10 A. I did.

11 Q. And what is it?

12 A. This document is a time line of the
13 different activities that I took over the course
14 of the last two and a half -- or in excess of two
15 and a half years to perform the reconciliation of
16 the GMP to the cost of the work as compared with
17 BBC, Balfour's claims that they prepared.

18 And then the middle section of the time
19 line is the Court's actions in response to my
20 attempts to do that work.

21 Q. Okay.

22 MR. HILDEBRAND: Excuse me, have we
23 seen this before?

24 MR. MCDONALD: I don't know. This
25 is a demonstrative exhibit. It was prepared for

1 her testimony.

2 MR. HILDEBRAND: Well, Your Honor,
3 we took pains to -- we did some PowerPoints and
4 some presentations that we wanted to provide to
5 the Court. And we made sure that we gave it to
6 them.

7 MR. MCDONALD: During trial.

8 MR. HILDEBRAND: No. It was -- no,
9 all of them, and I can look at the e-mails --

10 THE COURT: Go ahead and -- the
11 objection is what?

12 MR. HILDEBRAND: Just, I haven't
13 seen it. I don't know what this is.

14 THE COURT: Not previously
15 produced?

16 MR. HILDEBRAND: No, sir. No, sir.

17 THE COURT: Okay.

18 MR. MCDONALD: The PowerPoints that
19 were submitted for the -- this is merely just
20 dates of things that occurred.

21 THE COURT: All right. So the
22 purpose of it is just to show a time line?

23 MR. MCDONALD: Just to show a time
24 line of how -- her involvement in the audit.

25 THE COURT: Okay. All right. And

1 you plan to introduce it, and you've marked it
2 for identification?

3 MR. MCDONALD: It's marked for
4 identification solely as a demonstrative exhibit.

5 THE COURT: Okay. All right. Just
6 take her through it, and then we'll get to the
7 point where -- when you go to finish, we'll go
8 there. Okay?

9 MR. MCDONALD: Thank you, Your
10 Honor.

11 BY MR. MCDONALD:

12 Q. So this is a time line that you created,
13 correct?

14 A. Yes.

15 Q. All right. And it's got three different
16 colors. It's got yellow, green, and blue, right?

17 A. Yes.

18 Q. What does the yellow represent?

19 A. The yellow represents the actions by BBC
20 as far as filing a claim or the other action was
21 denying my request to do the audit.

22 Q. Okay. So the yellow was BBC. What is
23 the green?

24 A. The green was actions by the Court based
25 on different affidavits and testimony at hearings

1 that I was providing in attempts to gather
2 information that the Court would rule and take
3 some actions.

4 Q. Okay. And then what is the blue at the
5 bottom?

6 A. The blue are the official actions that I
7 took. I do use Cotton and Company there, which
8 is where I worked up until June -- to just
9 document the first audit request that I made,
10 which was April 22, 2019, which was rejected
11 eight days later. And then the different --

12 Q. Well, hold on. We're going to go
13 through it. So the blue is your actions?

14 A. Yes, it is.

15 Q. Okay. So what is the first entry on
16 this document?

17 A. The first entry would be the January
18 2019 claim letter that BBC submitted.

19 Q. Okay. And what was the -- and the
20 amount of that claim letter was what?

21 A. The amount in that claim letter was
22 \$22,452,282.

23 Q. And is that the four-page letter we've
24 looked at throughout this trial?

25 A. Yes, sir.

1 Q. Have you been in attendance throughout
2 this trial?

3 A. Yes.

4 Q. Okay. And what is the next date-wise
5 entry in blue?

6 A. The next date entry is April 22nd when I
7 issued the letter to BBC, notifying them of doing
8 the audit and requesting the supporting
9 documentation for the project costs.

10 Q. Okay. And that was on April 22nd of
11 2019?

12 A. Correct.

13 Q. All right. And is -- what did that
14 letter request?

15 A. It was a notification of the fact that I
16 was going to perform that audit of the project
17 and then it itemized some things at the bottom of
18 the page of the initial documents that a typical
19 auditor needs to get started, subcontract files,
20 an accounting report, and those sort of things.

21 Q. Okay. And was it anything out of the
22 typical that you would request on any project
23 you're involved in?

24 A. No. It's very typical. It's pretty
25 much got the same five or six things that we

1 always ask for, for a construction project.

2 Q. Okay. All right. And did you -- did
3 Cotton and Company in fact send that letter to
4 Balfour Beatty?

5 A. We did.

6 Q. Okay. And did you get a response?

7 A. Yes. We got a response on April --
8 dated April 30th.

9 Q. And what was the response?

10 A. The response was no, and there were
11 two --

12 Q. No what?

13 A. No, you cannot have these documents, and
14 you cannot perform that audit.

15 MR. HILDEBRAND: Your Honor, I just
16 want to object on relevancy grounds. We've spent
17 a lot of time and effort on this auditing issue.
18 The Court got involved, and there was a decision
19 that certain things were required by the audit
20 and then claims information was not.

21 And we've been through all of this.
22 We've gotten her opinions, and I've taken her
23 deposition. She's issued reports. There's not a
24 time line like this. I haven't seen this before,
25 and it just seems to me it's irrelevant and we

1 should move on to her opinions.

2 THE COURT: All right. Well, I
3 find it relevant, and I guess the better response
4 would be that, you must have lived it. So this
5 is -- this is her calculation. This is something
6 you've prepared, I assume, isn't it?

7 THE WITNESS: Yes.

8 THE COURT: All right. I'm going
9 to allow it. Go ahead.

10 MR. MCDONALD: Thank you very much.

11 BY MR. MCDONALD:

12 Q. All right. And the response was no.
13 What do you mean by no?

14 A. I can't remember the exact wording of
15 the response, but it was, because we're in
16 litigation, you can't do this audit and any
17 documents that you're asking for now, you'll get
18 in -- through discovery process only.

19 Q. Did you receive any documents in
20 response to your April 22nd, 2019 letter?

21 A. No, just that response letter.

22 Q. What is the next entry?

23 A. The next entry is June 11, 2019, where
24 Cotton and Company issued an affidavit regarding
25 the amount of duplication between BBC's liens and

1 the subcontractor liens to the best of our
2 ability to identify that duplication with the
3 limited information we had.

4 Q. Okay. And what was the amount of the
5 duplication as identified by you at that time?

6 A. Again, it was very hard to come to a
7 detailed dollar amount. We could only give
8 anecdotal information. But it was roughly \$7.7
9 million.

10 And again, just generally, very
11 logically, it's -- the BBC company, for what it
12 believed was the entire project and the subs
13 filed liens either before and after that for
14 amounts that the subcontractors believed that
15 they were due, and they're both asking for the
16 same thing.

17 Q. Okay. And at the time of your -- of
18 June 11, 2019, what was the total amount of liens
19 that had been filed on this -- on this property?

20 A. The total amount of liens -- there were
21 22 liens, I believe. 22 liens, 26,341,655.

22 Q. 26 million?

23 A. 341,655.

24 Q. And mechanic's liens filed on the Hotel
25 Bennett project?

1 A. Yes, between BBC and the subs combined.

2 Q. Okay. And as of June 11th, 2019, you
3 said, based upon anecdotal. Why did you use
4 anecdotal information to come up with
5 duplication?

6 A. When a company files a lien, they may
7 just file a lien with a letter that said, you
8 know, the amount of our lien is \$11 million or \$7
9 million.

10 Sometimes subcontractors will also
11 attach supporting schedules, or it will identify
12 the change orders that it felt should have been
13 approved or the amount of the contract balance
14 that had never been paid.

15 But if all you have is the name of a
16 subcontractor and a dollar amount and then BBC
17 and a dollar amount, I can't tell how much of
18 that is duplicative because it's just a dollar
19 amount on a piece of paper. So there were some
20 subcontractors, Pasco, for example, provided some
21 details, and then I could see the amounts were
22 duplicative.

23 Q. Okay. And this is, of course, after
24 Balfour denied to produce any documents in
25 response to your audit request?

1 A. Correct. This was just using the
2 information that had either been produced in
3 discovery to date.

4 Maybe it was available by Library
5 Associates in the payment applications or again,
6 if a subcontractor happens to have an attachment
7 to their lien, then I could use that information
8 as well.

9 Q. Would the information that you were
10 seeking, would that information have been
11 available had Balfour done a final accounting
12 itself on the job?

13 A. It's a tough question because a final
14 accounting would typically mean that
15 subcontractors have been paid and then
16 subcontractors wouldn't be filing liens had they
17 been paid; so it -- it wouldn't have been
18 necessary.

19 Q. Okay. What's the next entry?

20 A. The next entry is September 17, 2019,
21 and on that date, I issued another letter that
22 identified additional potentially excessive lien
23 amounts.

24 Q. And what was the amount of the
25 potentially excessive lien amounts, as of

1 September 27, 2019?

2 A. It was \$13.8 million.

3 Q. And at this time, you-all -- you had not
4 yet been able to perform your audit of Balfour's
5 books, correct?

6 A. No. That didn't happen until the
7 subsequent year.

8 Q. Okay. And then what's the next entry in
9 green?

10 A. The next entry is October 2nd, 2019,
11 when the Court ruled that BBC and subcontractors
12 would produce information in order for us to
13 identify duplicative liens.

14 Q. And did you in fact receive information
15 from BBC and specific subcontractors?

16 A. I think we received responses. I don't
17 know that it could all be classified as
18 information.

19 Q. Okay. What does that mean?

20 A. If a subcontractor produced something
21 that was just an amount or -- yeah, it just
22 depends on what the information was, and I can't
23 remember at this time.

24 Q. Okay. And so the Court ruled on October
25 2nd, 2019, right?

1 A. Correct.

2 Q. And what is the next entry?

3 A. I issued another affidavit in November
4 27, 2019 identifying uncorrelated lien amounts of
5 \$17.4 million for particular subcontractors.

6 Q. And once again, the total amount of
7 liens was \$26,345,655?

8 A. Yes.

9 Q. Okay. And then what's the next entry on
10 March 17th, 2020?

11 A. The March 17th, 2020, the Court issued a
12 ruling that BBC should support the audit process.

13 Q. Okay. And then the next entry is April
14 3rd, 2020?

15 A. The next entry is April 3rd, when
16 Library filed a motion to enforce that rule.

17 Q. Okay. And then what is next entry? It
18 looks like it's June 17th, 2020?

19 A. Right. I think the Court agreed -- or I
20 don't get my words right -- with the motion to
21 enforce.

22 Q. And that the audit would proceed?

23 A. Correct.

24 Q. Okay. Then the next entry is July 1 of
25 2020. What happens then?

1 A. I submitted a document request list to
2 BBC to identify those documents. We call them --
3 I'm sorry, did someone object?

4 THE COURT: No. Go ahead.

5 THE WITNESS: I'm sorry. I issued
6 a letter requesting accounting reports and
7 information to get the audit started.

8 BY MR. MCDONALD:

9 Q. And was the request that you issued
10 typical of the audit process that you undertake
11 in your business?

12 A. Yes.

13 Q. It didn't contain anything that was out
14 of the norm?

15 A. No. It would identify accounting
16 numbers and documents in order to accumulate what
17 the project costs were.

18 Q. All right. And then the next entry is
19 some 30 days later on July 30, 2020. What
20 happened then?

21 A. In the month of July of 2020 is when the
22 majority of that audit -- I call it field work --
23 took place. It was COVID time, so it was done
24 remotely. But we spent some time with BBC
25 representatives receiving documentation, asking

1 questions, taking that sample that I talked about
2 earlier, testing individual transactions.

3 And throughout that process, it became
4 apparent -- or maybe I should just say easier to
5 identify the amount of duplication that was in
6 their claimed amounts versus their accounting
7 records and the fact that the claims, especially
8 when you come with the sub claims -- with BBC's
9 claim were completely duplicative. So in order
10 to scrape away that duplication, I had
11 conversations with BBC on how that could be done.

12 So if a subcontractor is asking for an
13 unapproved change order that it felt it should
14 have been paid for and did the work, but BBC is
15 also issuing a claim for all unapproved change
16 orders, it's completely duplicative, barring
17 maybe some BBC mark up that is properly applied
18 to the change.

19 So in order to determine the amount of
20 duplication in all the claims, what you would
21 need to do is pretty logical, how many -- what
22 change orders are you trying to get paid for,
23 what change orders are you trying to get paid
24 for. We wipe out those that are the same.

25 If the subcontractor had another type of

1 claim, a delay claim, then you would have to go
2 into BBC's records and see what their delay
3 claims might be, and you would eliminate that
4 same duplication, as BBC was just a pass-through
5 to the subs.

6 I documented before, well over 95
7 percent of the work was done by subcontractors.
8 Very little of the work was -- there wasn't
9 really self-performed work. There was costs
10 incurred, especially for general conditions. But
11 the work was all being done at the subcontractor
12 level.

13 So I would need BBC to provide an actual
14 list of the change orders, what we -- as Kim was
15 explaining, RCOs, requested change orders, that
16 they were claiming and then identify what change
17 orders related to which subcontractors so that I
18 could kind of just play concentration and match
19 them up and eliminate the duplication.

20 The problem is, the RCOs -- BBC didn't
21 have a list of the RCOs that they were claiming.
22 There was an amount for RCOs in the claim letter.
23 There's the found binders that we've heard a lot
24 of people talking about. But four of the binders
25 had a couple RCO lists in them, but none of them

1 tied to the amount of the letter.

2 And if you have a change order or RCO
3 log and you have a number with a dollar amount
4 for that change, it didn't foot to the amount of
5 anything else. So I had lot of information, but
6 none of it reconciled to each other.

7 So I wasn't going to be able to identify
8 exactly how much was duplicative of subcontractor
9 claims because I didn't even know what bucket was
10 the right bucket to start with. Do I try and
11 foot to the bucket that's in the claim letter?
12 Do I try and foot to the bucket where I actually
13 have a list of changes in the four binders?

14 Or during the audit process, I was also
15 provided with different change order logs that
16 had different amounts, a different quantity of
17 change orders and different dollar amounts of
18 change orders. And then that same process has to
19 be done with the subcontractor claims.

20 In the January 2019 letter that BBC
21 wrote, it identified \$11 million. It says,
22 subcontractor claims, \$11,110,000 and some
23 change. But it didn't tell you which
24 subcontractors had claims or how much for each
25 one. If you opened the four binders, you would

1 find various claims for subcontractors.

2 I dumped out that shoebox, and I
3 evaluated those four binders. I believe there
4 were five subcontractors that had claims in
5 there, and when you added up the amount for each
6 sub, it was eight and a half million dollars. I
7 knew I was a couple million dollars short.

8 I provided the spreadsheet to BBC, and I
9 said, okay, I've looked through binders that you
10 told me to look through. Here's all the amounts
11 I could find for all the subs. I'm a couple
12 million dollars short. Not only that, you did
13 mention that Watson had a claim, but you don't
14 have any Watson claims in this binder. So could
15 that be the difference.

16 And we went through this kind of brain
17 storming, hunt-and-peck kind of exercise to try
18 and figure it out. And during that process, I
19 submitted various updated spreadsheets to BBC,
20 where if they gave me some new information, I
21 would change that amount. And then I'd say,
22 okay, well, now I'm only \$1.2 million off.

23 And then we'd get some more updated
24 information, and at one point, Watson submitted a
25 claim letter during my audit process and the

1 amount changed again. Unfortunately, it made the
2 delta get bigger. So I guess in a nice way to
3 say that, I was honing in on it, but I couldn't
4 get there.

5 Q. At the time you were performing this
6 audit in July of 2020, who at Balfour were you
7 dealing with? What actual individual were you
8 dealing with?

9 A. Casey Thompson and Dave Simonton.

10 Q. And who did you understand those two
11 gentlemen to be?

12 A. Well, Mr. Thompson was the controller or
13 the CFO, definitely, of the project where
14 Mr. Simonton was more on-site project management.

15 Q. Okay. And at the time you were
16 performing your audit in July of 2020, did you
17 have any discussions with those two
18 representatives of Balfour about the
19 duplications?

20 A. Many conversations and e-mails back and
21 forth.

22 Q. And what, if anything, did Balfour
23 Beatty do about the duplication in response to
24 your conversations that you were having with
25 them?

1 A. Balfour's position in the e-mails was,
2 you're only to look at the costs that we've
3 actually incurred that in our accounting records.
4 Here, go for it. You're not evaluating the
5 claims at this time.

6 And I think that changed a little bit in
7 either late July or August to say, well, yes, you
8 can audit the claims. There's the four binders,
9 and if you find duplication, let us know or put
10 it in your audit report.

11 Q. Did Balfour Beatty, at any time during
12 the July of 2020 audit, make any effort to
13 identify duplication for you?

14 A. No.

15 Q. Did Balfour Beatty at any time during
16 the 2020 audit, July 2020 audit, acknowledge to
17 you that there was in fact duplication?

18 A. I have to say yes. In those
19 videoconference calls, we talked about the
20 process of how you -- what process you'd need to
21 go through to eliminate the duplication.

22 I had to learn from them as far as how
23 things were accounted for and what records would
24 be available to support this. And we did -- like
25 I say, brainstorm about that process.

1 But I will caveat that by saying,
2 Mr. Thompson did write an e-mail around that time
3 frame noting that -- I don't know if it
4 officially said, I don't know of any duplication,
5 or if it just said, when you find it, you can put
6 it in your audit report.

7 So I'm just trying to be fair. I don't
8 know that they would say that they admitted it.
9 But we went through the process of how it was to
10 be eliminated.

11 And it would be completely illogical
12 for -- anyone in this room knows that there was
13 millions of dollars in duplication because --
14 well, we're going to find out later -- the claim
15 went down by millions because that duplication
16 was finally eliminated. We all knew it was
17 there.

18 Q. Did Balfour Beatty eliminate any
19 duplication in July of 2020?

20 A. No.

21 Q. Okay. And the next entry is August 3rd
22 of 2020, and what happened there?

23 A. I had written an affidavit as requested
24 to note that BBC was not allowing me to audit the
25 claim. It was requesting that I only look at the

1 costs incurred that were in the job cost report.

2 And because of my understanding of my
3 task that the Court told me to do was to evaluate
4 the project costs, not just costs recorded in a
5 particular accounting report.

6 At that time, I issued an affidavit
7 regarding the fact that I understood BBC to be
8 saying, you can have the four binders if you want
9 to look at the claim, but right now, the only
10 thing that we're going to help you support is
11 what's in our accounting record.

12 Q. And the next entries are from August 12,
13 2020 through August 17, 2020. What happened
14 during those five days?

15 A. Mr. Thompson and I, maybe Mr. Simonton
16 too, e-mailed each other back and forth regarding
17 our understanding of what that audit is and the
18 support that I was getting or not getting and
19 what the scope of my work was.

20 Basically, the field work part, this
21 remote field work part of our work was completed,
22 and understandably, Mr. Thompson wanted some sort
23 of confirmation that I was done and that I was
24 out of his hair for a while. Unfortunately, I
25 wasn't done, and we had a disagreement about what

1 done meant.

2 Q. And then the next entry is November 16th
3 of 2020. What happened then?

4 A. That's the date of the report that I
5 issued on the project.

6 Q. And what was your conclusion at the
7 time?

8 A. I was able to provide some -- what I'd
9 call typical audit opinions regarding certain
10 costs that were not incurred in accordance with
11 the contract.

12 But as far as the claimed amount, the 22
13 million that was being asked for as a claim,
14 those amounts were still replete with duplication
15 and otherwise unsupported. And I couldn't issue
16 any audit opinions on the claim.

17 Q. So the audit in November 16, 2020, was
18 that your final audit, or did it have
19 qualifications?

20 A. Well, it had a page and a half of scope
21 limitations about the fact that I couldn't finish
22 the work, but it is the last report that I had
23 issued.

24 Q. All right. And then the next entry is
25 December 16th of 2020. What happened then?

1 A. I believe that was a fourth affidavit
2 that I wrote at that time.

3 Q. What, was it related to duplication?

4 A. Yeah, saying really nothing more than
5 what had been said in the past about duplication.

6 Q. Okay. And was there any excess of \$11
7 million at that time of duplication that you
8 identified?

9 A. Yes, which again, logically is
10 approximately the amount of BBC's claim because
11 it is an accumulation of subcontractor claims for
12 the most part.

13 Q. All right. And the next entry is
14 September 10th, 2021. Well, let me ask you this:
15 As of December 16th, 2020, how much was your
16 understanding was Balfour's claim?

17 A. 22,452,282, which was the amount of that
18 January 2019 letter, although I will say, I had
19 sent spreadsheets to BBC with updated claim
20 amounts, as we were learning about Watson's
21 revised claim, for example, and some other things
22 that were -- that came up during field work.

23 I would change the total and say, well,
24 this is where I am like right now. But since
25 they never officially adopted a new claim amount,

1 I think it would only be fair to say that, you
2 know, the only amount that they've ever asserted
3 was the 22 million that was issued in the January
4 2019 letter.

5 Q. So you would send Balfour updates
6 basically giving overviews of your findings as
7 that audit was progressing?

8 A. No. I think the characterization would
9 be, I was attempting to accumulate what the
10 project costs were.

11 I was also attempting to accumulate what
12 their claim would be, and if I said, well, look,
13 if I use this RCO log, then your claim would
14 change to this amount because your letter has
15 this and this log has this, so it's different.
16 Or if I use this new letter from Watson Electric
17 as their claim amount, then your \$11 million that
18 you put in your January letter would be \$9.2
19 million.

20 So therefore, the new total -- you know,
21 it was basically a simple Excel spreadsheet of
22 their claim from the letter and then anything
23 that I knew subsequent to that that would make
24 that number wrong, and it would give me a new
25 total.

1 So I just want to make sure I'm clear
2 that it's something that I was preparing and
3 providing to them, not that they were preparing.
4 So they weren't asserting that it was their
5 claim. I was -- I don't want to say guessing. I
6 was trying to calculate their claim, and it would
7 change.

8 Q. And I'm sorry, I probably asked it a
9 poor way. That's what I was trying to ask. It
10 sounds like you were trying to come up with the
11 numbers and then submitting them to Balfour and
12 saying, here's what I've got, what are y'all
13 thinking?

14 A. Correct.

15 Q. And did you ever get a response from
16 them adopting any of your numbers that you had
17 submitted or conceding that that was in fact a
18 change that needed to occur?

19 A. No. On a couple of occasions they might
20 have -- like Mr. Simonton replied at one point
21 with, I don't know why the amounts are different.
22 You know, here's a new number for Watson.

23 But there would have never been a
24 process where they would have said, oh, yeah,
25 Sam, we're going to go with this one, or this is

1 our new number. Nothing official like that.

2 Q. All right. So as of December 16, 2020,
3 the only recognized claim amount you had from
4 Balfour was 22,452,287 as referenced in that
5 January 2019 four-page letter, right?

6 A. Yes.

7 Q. All right. And the next entry is
8 September 10, 2021. And what is that entry for?

9 A. That was a claim that was submitted -- I
10 believe that was the Sunday before trial started,
11 where BBC updated their claim to \$11,872,194.

12 Q. Well, it looks likes trial starts on
13 September 13, 2021, so maybe that was -- the
14 September 10th would have been the Friday before
15 trial?

16 A. Yes.

17 Q. Okay. So the Friday before trial, you
18 get a claim. What was it? What did you get?

19 MR. HILDEBRAND: Objection, Your
20 Honor. If he can just ask her -- all these
21 questions are just very leading. I'd ask him to
22 rephrase it, please.

23 THE COURT: Okay. What did you
24 get?

25 MR. MCDONALD: Thank you, Your

1 Honor.

2 THE WITNESS: A new claim. I can't
3 remember if the format was PowerPoint or a PDF of
4 Excel at this point, but it just had new amounts
5 and were footing to 11.8 million or 11.9,
6 rounding.

7 BY MR. MCDONALD:

8 Q. And when you say "footing", are you --
9 does that mean totaling?

10 A. Totaling, yes.

11 Q. Okay. And that's probably a common
12 phrase. I just wanted to be clear. All right.
13 And that's September 10th of 2021, right?

14 A. Correct.

15 Q. Okay. So that is 31 months after the
16 January '19 letter?

17 A. Yes.

18 Q. Is that fair? Okay. Three days before
19 the trial starts?

20 A. Yes.

21 Q. All right. And then what's the next
22 entry?

23 A. Then Sunday before the trial started,
24 another claim came in, an updated amount of
25 \$13,064,917.

1 Q. Okay. That's September 12, 2021?

2 A. Yes.

3 Q. And was that claim in the same format as
4 the previous one had been submitted two days
5 prior?

6 A. Yes.

7 Q. All right. And it's for \$13,064,917?

8 A. Correct.

9 Q. And the next entry is a green one. What
10 is that for?

11 A. The trial started on the 13th of
12 September, 2021.

13 Q. All right. And then we've got two more
14 entries. It looks like there's one on September
15 20, 2021. What is that for?

16 A. So during that first week of trial, the
17 week that started on the 13th, there was some
18 discussion about the fact that Library still did
19 not have BBC's updated claim information, and we
20 didn't have the information to support these
21 amounts.

22 I think Judge recommended that I work
23 with BBC. And we had a phone call and an e-mail
24 or two, and we discussed some things. And as a
25 result of that, BBC updated the amounts the

1 subsequent week on the 20th to 13,569,659, and
2 then the following day --

3 Q. Well, hold on. We'll get there in a
4 second. So it went from 22,452,000 to 11.8
5 million, and it took 31 months to do that, right?

6 A. Correct.

7 Q. Then it went to 13 million and only took
8 two days to do that, right? 13,064,000?

9 A. Correct.

10 Q. Then eight days later, it went to
11 \$13,569,659?

12 A. It did.

13 Q. And what is the final entry on this
14 document?

15 A. On September 21, 2021, BBC submitted its
16 last update, that I know of, for its claim of
17 13,896,742.

18 Q. Okay. So the next day it went up
19 300,000 bucks, something like that?

20 A. Approximately, yes.

21 Q. And that's the last one you're familiar
22 with?

23 A. Correct.

24 Q. All right. Now, in these -- from
25 September 10th to September 21st; so in these

1 four updates over 11 days, clearly there must
2 have been something taken out because they don't
3 add up to 22 million anymore, right?

4 A. Yes. The majority of the duplication
5 between BBC and its subcontractors was
6 eliminated.

7 Q. And was there anything added?

8 A. Yes. It depends on which one of the
9 four you're talking about, but there was -- one
10 of them added in interest. There was also a new
11 claim element for general trades that wasn't in
12 the claim letter or in the previous claims. I
13 think that's \$700-and-some thousand. The
14 identification of the claims also changed.

15 Q. What does that mean?

16 A. For instance, in the January 2019 claim
17 letter, the additional monies that BBC wanted for
18 general conditions were split into two groups.

19 Expanded general conditions, which means
20 we incurred more general conditions during the
21 contract period and then extended general
22 conditions; meaning, we want general conditions
23 because we felt we were on the project longer,
24 and it was the owner's fault.

25 Q. Okay. So let me just stop you to make

1 sure I understand. So there were two -- in the
2 January '19 claim letter, there were two separate
3 types of general conditions claims?

4 A. Yeah. I think that's fair. When you
5 say types, I would say causations.

6 Q. Okay.

7 A. It's all their general conditions, but
8 it was basically identified from their accounting
9 system as, these were incurred over the 28 months
10 that we had only hoped to be there, and we spent
11 more than we had in that GMP.

12 Q. During the original 28 months of the
13 project?

14 A. Correct.

15 Q. Okay.

16 A. And then they had identified other
17 costs, and I want to use the right term; so I'm
18 looking for their January claim letter.

19 The first group was called additional
20 general condition costs incurred during the
21 contract period, and then the next group was
22 called general condition costs incurred during
23 the extended period through January 21st, 2019.
24 So they're all general conditions, but they were
25 just identifying a different cause of why they

1 wanted that amount.

2 Q. Okay. Or when they were actually
3 incurred?

4 A. Based on when they were actually
5 incurred.

6 Q. Okay.

7 A. And then subsequent to this letter,
8 through the interrogatory process, BBC identified
9 that all of the costs for general conditions were
10 incurred within the contract period, within the
11 28 months.

12 So the nature of what caused those costs
13 to be included in the claim now took on a
14 different -- a different meaning because it was
15 specifically identified that, when you added
16 these two amounts in -- and we're roughly talking
17 about 3.1 or 3.2 million.

18 They were all incurred during the
19 project, which then makes them all expanded
20 general conditions, which again, it's the same
21 general conditions but it's saying something
22 completely different.

23 Now you're not saying, you may be on the
24 project longer, and it's all your fault. You're
25 saying, during the original contract period, we

1 spent twice as much and it's all your fault. So
2 there's just a different cause and effect through
3 the interrogatory process.

4 Q. Okay.

5 A. And then in the subsequent claims that
6 were submitted --

7 Q. These are the four in September of 2021?

8 A. In September of 2021.

9 Q. Okay.

10 A. There no longer is a distinction between
11 expanded and extended. I have struggled without
12 looking at all four side by side. I had a
13 spreadsheet at one point, but now I believe
14 they're all considered extended general
15 conditions.

16 Q. Which would be essentially delay general
17 conditions?

18 A. Which would be delay; so, you know, how
19 you test the reasonableness of those costs as far
20 as a claims perspective is quite different.

21 If you had to spend more money during
22 the original period, you would take a look at
23 those costs and say, well, is this a reasonable
24 salary to pay, or did you really need seven
25 security officers.

1 But if you're looking at costs because
2 it's an extended period, you're going to say, oh,
3 it looks like you were spending about 8 grand a
4 day before. You're spending about 8 grand later.
5 It's an extra how many days. You rely on
6 somebody like Mr. Boe or Mr. Durand to talk about
7 how many days the project -- whose fault the days
8 were, and I kind of just do the math.

9 Sometimes we graph out, you know, the
10 costs to show that they were really time-driven
11 costs and that they weren't -- the damages were
12 all time-related.

13 But again the nature of what BBC is
14 saying caused these additional costs to be
15 incurred has been changing over time, and now the
16 latest that was submitted in September, they're
17 all identified as just under that green column as
18 delay. So there's no more expanded. It's just
19 all extended.

20 Q. Even though previously they took the
21 position, they actually incurred those costs
22 during the initial 28 months?

23 MR. HILDEBRAND: Objection to the
24 leading question again, Your Honor.

25 THE COURT: He is trying to

1 characterize that testimony.

2 MR. HILDEBRAND: All right.

3 THE COURT: All right. I'm going
4 to allow it. Go ahead.

5 THE WITNESS: I'm sorry, I forgot
6 whether it was -- which way to answer the
7 question. Can you say it again?

8 BY MR. MCDONALD:

9 Q. Yes. I'll reask the question. The
10 expanded general conditions, during the original
11 28 months, in final submission, became extended
12 general conditions? They switched it?

13 A. They switched it. In January of 2019,
14 it was a little of both. Then it was all
15 expanded, and now it's all extended.

16 Q. Is the general conditions that we're
17 talking about, regardless of what you call them,
18 is it -- are they trying to get all their general
19 conditions of the total cost claim?

20 A. Yes. It's a total cost claim. It's
21 taking the costs from their accounting system and
22 subtracting what the GMP was and asking for all
23 of the rest of them as a total cost claim.

24 Q. How much have you been paid to do what
25 you have done on this project?

1 A. I think Cotton and Company's invoices
2 through September were, I believe, \$530,000.

3 Q. And then you've -- you also have costs
4 associated with being here at the trial, right?

5 A. That would include anything through the
6 end of September, I believe.

7 Q. Okay. And were you physically in
8 Charleston when these September 2021 claim
9 iterations came through?

10 A. Maybe not the first one since it was the
11 Friday before. I didn't arrive until that
12 weekend.

13 Q. And during that time you were here, were
14 you working on these various iterations of these
15 claims?

16 A. Yes. I'm expecting somebody is going to
17 charge me rent for the space I've been taking up
18 in the back.

19 Q. How, if at all, did this -- you've been
20 involved in this since March of 2019; is that
21 what you said? 2019?

22 A. I don't know if it was March, but it was
23 definitely April.

24 Q. Okay. April of 2019. How, if at all,
25 did this audit differ from your typical audits

1 of, when you're working for an owner and you're
2 trying to audit the contractor and the GMP, the
3 cost of the work?

4 A. Well, typically -- I mean, I wouldn't
5 say always except for this job -- the contractor
6 puts forth what it wants to get paid, and I audit
7 that. You tell me how much you want and then
8 support it with accounting records.

9 I'm going to take samples. I'm going to
10 test it, and I'm going to provide my opinion as
11 to whether it should be reimbursed. And if not,
12 why I took, let's say, deductions or I increased
13 costs if something was done wrong. You know, I
14 will correct errors in either direction.

15 That's obviously a lot of different than
16 this project where I've been really struggling to
17 just identify what it is the contractor wants.

18 Q. And you've been sitting in this
19 courtroom for the past three weeks, whatever it's
20 been?

21 A. Yes. The past week and a half and then
22 the two weeks prior to that and then various
23 hearings.

24 Q. And are you still struggling to
25 understand what it is the contractor is asking

1 for?

2 A. As far as the dollar amount, I know what
3 is at the bottom of that chart. But I'm
4 definitely still struggling to try and figure out
5 what they want and why they want it and what
6 support there could be for some of these amounts.

7 Q. And the opinions you've given thus far,
8 have you given them to a reasonable degree of
9 certainty?

10 A. Yes, I have.

11 Q. Okay. And you don't intend to offer any
12 opinions in this courtroom before this Judge that
13 are not to a reasonable degree of certainty; is
14 that right?

15 A. I do not intend to do that.

16 Q. If you're going to offer an opinion,
17 it's going to be to a reasonable degree of
18 certainty?

19 A. Yes.

20 MR. MCDONALD: Okay. Once again, I
21 apologize, Your Honor, I don't know what time it
22 is, but this is a good stopping point if you want
23 to take a break.

24 THE COURT: All right. Very good.
25 Let's go ahead and take a break. I've got 2:47.

1 Let's just come back at 3 o'clock.

2 (A recess transpired.)

3 THE COURT: Mr. McDonald?

4 MR. MCDONALD: Thank you, Your
5 Honor. May it please the Court?

6 THE COURT: Yes, sir.

7 BY MR. MCDONALD:

8 Q. Ms. Hadley, when we left off, we were
9 talking about the various iterations of the
10 claims and the Balfour Beatty claims. In the
11 final one on the chart that we were looking at,
12 dated September 21st, 2021, what was the total of
13 that claim amount?

14 A. \$13,896,742.

15 Q. Okay. And is that the same amount as
16 listed on Plaintiff's Exhibit 329? Do you have a
17 copy of that with you?

18 A. Yes.

19 Q. But for some rounding.

20 A. Yes, 20 cents of rounding, but I just
21 didn't report the pennies.

22 Q. And you were in the courtroom, were you
23 not, for Ms. Brown's testimony, correct, where we
24 went through each and every single request for
25 change order of Plaintiff's Exhibit 12?

1 A. Yes, most of it.

2 Q. All right. Did you in fact assist
3 Ms. Brown in her review of Plaintiff's Exhibit
4 12? Did you participate with her in that?

5 A. Yes.

6 Q. All right. In your review of
7 Plaintiff's Exhibit 12, did you see any request
8 for change order for Balfour Beatty in the amount
9 of \$1,019,127.49?

10 A. No.

11 Q. And mercifully, I'm not going to go back
12 through that document with you again. If
13 something comes up and you need to refer to it,
14 just let me know. Okay?

15 A. Okay.

16 Q. Okay. So what I would like to do is
17 start over here with the yellow section. Okay?

18 A. Okay.

19 Q. And that is entitled, contract balance,
20 correct?

21 A. Yes.

22 Q. All right. And when was the first time
23 you saw this particular document, Plaintiff's
24 Exhibit 329?

25 A. I believe it was September 21st, 2021.

1 Q. Okay. All right. What is an open
2 contract balance as it relates to a GMP contract?

3 A. In this instance, the open contract
4 balance relates to the portion of the
5 subcontractor's contract that the subcontractor
6 has not submitted invoices for and may not need.

7 Q. And is under the -- how does an open
8 contract balance relate to a cost of the work?

9 A. I don't think there is a relationship
10 between an open contract balance and cost of the
11 work.

12 Specifically, on the contractor's
13 payment applications each month, this would be
14 that very -- I believe it's the very last
15 right-hand column that is work still to be
16 completed or unused contract balance, or, you
17 know, something to that effect. At the end of
18 the project, it would just be the portion that
19 wasn't needed.

20 Q. Okay. So an open contract balance would
21 never be a cost of the work, if they didn't spend
22 it?

23 A. It cannot be cost of the work. It can't
24 be because it's not a cost. It's not a payment,
25 and it doesn't represent an expenditure.

1 Q. It cannot be cost of the work. So in
2 order to recover costs under a GMP contract, does
3 it have -- does the cost have to be a cost of the
4 work?

5 A. Yes. And in fact, it would at least
6 have to be a cost and then it would have to be
7 cost of the work.

8 Q. So are you saying that an open contract
9 balance is not even a cost -- wouldn't be a cost
10 or a cost of the work?

11 A. Correct. It's, again, an unused portion
12 of the contract. You know, every subcontractor
13 has a story, but for example, in this particular
14 project, the subcontractors are listed
15 alphabetically on the left-hand side. If you go
16 to Elite Awnings, you see a 12,000 --

17 Q. Wait, hold on. Let's get there. Elite
18 Awnings over here?

19 A. Yes. You see a \$12,000 open contract
20 balance.

21 MR. MCDONALD: Your Honor, do you
22 still have your copy?

23 THE COURT: I've got it right here.

24 THE WITNESS: So in the beginning,
25 Balfour contracted with Elite Awnings for a

1 \$12,000 contract to do awnings. I can't
2 remember -- I think they were fabric. I don't
3 remember the exact material. But ultimately
4 through the construction process, someone decided
5 to go with copper awnings instead, and these
6 awnings were never purchased or never needed.

7 So I understand why it's an open
8 contract balance because that contractor wasn't
9 used, but it is not a cost, and I don't believe
10 it would be justifiably something that Library
11 should have to pay BBC for as far as a claim or a
12 cost. It's a contractor that was never needed on
13 the project.

14 BY MR. MCDONALD:

15 Q. So this \$12,000 all the way across, they
16 also want, what, \$3,024,000.02 in interest for
17 that?

18 A. No. I think it would be \$3,024.

19 Q. \$3,024.02 on that one for Elite Awnings?

20 A. Yes.

21 Q. Money that was never spent; contractor
22 that never did the work?

23 A. Right. And I'm not sure that that's
24 interest because the title says, miscellaneous
25 claims and interest. It's very hard for an

1 auditor like myself to audit because I don't know
2 if that amount was a miscellaneous claim or an
3 interest amount or a little bit of both.

4 But given that BBC didn't spend \$12,000
5 to Elite, will never pay Elite \$12,000. If it is
6 interest, it certainly doesn't represent a
7 damage. I don't think BBC is out the money at
8 this point.

9 THE COURT: If it wasn't incurred,
10 it's not a cost is what you're testifying to?

11 THE WITNESS: Right. And so I'm
12 just parlaying that into, why would there be
13 interest penalties on something that didn't
14 happen.

15 BY MR. MCDONALD:

16 Q. Why would it even be in the claim? Why
17 would it even be on this document?

18 A. I can take an educated accounting guess,
19 but it shouldn't be there. I can maybe guess as
20 to how it got there, but it would be a guess.

21 Q. All right. What is in your business, an
22 open payable?

23 A. So an open payable is when you receive a
24 bill from someone, and you book it as an expense
25 in your accounting system, but you haven't cut