

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 11 OF 51

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1 the check yet. So it's a payable. You owe it to
2 someone.

3 Q. And in this Plaintiff's Exhibit 329,
4 it's got Balfour Beatty Construction with
5 \$191,088.78 open payable; is that right?

6 A. That's what this spreadsheet says.

7 Q. Okay. Can you have an open payable to
8 yourself?

9 A. You cannot. It's just nonsensical,
10 really. What this piece of paper is saying is
11 that Balfour owes Balfour \$191,000 for bills that
12 Balfour sent itself.

13 Q. Let's talk about on this line item, BBC
14 retainage. \$612,952.17, right?

15 A. That's what the amount shows on the
16 spreadsheet.

17 Q. Have you reviewed any backup where
18 Balfour Beatty had \$612,952 in retainage on this
19 job?

20 A. I have not seen any backup that would
21 support that amount, but it can't be retainage
22 for Balfour Beatty's work.

23 Q. Why not?

24 A. Because as we've previously discussed,
25 they did not self-perform a significant part of

1 the work.

2 So if you were to go to any of the more
3 recent payment applications, anywhere from
4 payment application 42 to 45 and identify the
5 retainage related to the work that BBC would have
6 done; i.e., general conditions, maybe a couple
7 elements of general trades or staging and
8 hoisting, at best, you're going to come up with,
9 you know, \$200,000 that might have been retained
10 for expenses that BBC paid directly. But even
11 that is a significant overstatement, I believe.

12 Q. The \$200,000 would be?

13 A. The 200,000. There's a document that
14 BBC produced in its response to the set of
15 interrogatories where it identified all the
16 different subcontractors that were associated
17 with each schedule of value.

18 And rightfully so, some of them are a
19 perfect match. That's the sub that does that
20 work. In general trades and staging and
21 hoisting, there's a variety of vendors like
22 Sunbelt Rentals and that sort of thing, and
23 Wesley that did a lot of work.

24 But there will be some self-performed --
25 I just call them maybe general laborers and then

1 general conditions costs that BBC did. But the
2 amount of that work is so low, so limited, that
3 in order to get \$600,000 worth of retainage even
4 at 10 percent, that would be \$6 million worth of
5 work.

6 And, you know, they didn't do \$6 million
7 worth of work in general trades and staging and
8 hoisting. The values aren't even that high. So
9 it's impossible for that number to be related to
10 BBC's work.

11 But I think maybe more over, you can
12 tell that, again, I'm kind of brainstorming just
13 on the -- on what I know about the project and
14 what I know about BBC's costs. But I wouldn't
15 have to if this number had any support behind it
16 and came from somewhere that had been produced
17 thus far.

18 Q. All right. Let's talk about the OCOs,
19 \$82,124.79. Was there any backup? Did you see
20 any backup for those OCOs?

21 A. I don't recall seeing any backup for
22 that particular amount, but I know through
23 testimony and reviewing their original claims,
24 that that would represent work that BBC did for
25 the last four OCOs, 19 through 22.

1 The problem with that amount being
2 claimed here as an OCO is that the costs that
3 were incurred by BBC that were billed as an
4 OCO -- I think Kim testified that it was for
5 maybe Alec Dooley's time or Nick's time or
6 Mr. Spano's time. Those costs are charged to
7 general conditions.

8 So now that we've previously discussed
9 that you already have a general conditions total
10 cost claim, all of your costs incurred less the
11 GMP and you want the difference, then you're also
12 going to claim those costs that are in the OCOs
13 for the same folks. This \$82,000 is duplicative
14 of the 3.889 million that's in the green column.

15 Q. That's in the delay damages?

16 A. Correct.

17 Q. Did you review the support for the owner
18 change orders, specifically 19, 20, 21 and 22?

19 A. Yes.

20 Q. Okay. And what, if anything, did you
21 understand about the Balfour Beatty portion after
22 your review of the backup for those owner change
23 orders 19 through 21 -- through 22, excuse me.

24 A. The detailed backup that relates to CCDs
25 did not support the amount that was being claimed

1 for that activity.

2 Specifically, Kim would discuss the fact
3 that the current amount per an accounting report
4 was about \$200, but the amount that was being
5 claimed in the OCO was \$400 or that -- I believe
6 she testified that Mr. Dooley had already left
7 employment at that time even though he was still
8 identified as the scope of the work for that
9 month.

10 So, you know, I came to those
11 conclusions myself when I was reviewing the OCOs.
12 But now that I see it being presented here again
13 on the same BBC line with all of the general
14 conditions in the green section, I don't know if
15 it matters so much that it isn't supported
16 because now it's duplicative.

17 Q. Duplicative in the total cost claim?

18 A. Correct.

19 Q. Let's talk about Quantum a/k/a Merritt
20 a/k/a SBC Group. Are they on here?

21 A. Under SBC Group.

22 Q. SBC Group, LLC?

23 A. Correct.

24 Q. All right. And how much are they asking
25 for for Quantum?

1 A. In total, it's \$324,858.

2 Q. And are they ever going to incur those
3 costs, \$324,858.06?

4 A. No, they won't.

5 Q. Why not?

6 A. Quantum is no longer a party, and
7 Quantum has been paid.

8 Q. Were there any back charges associated
9 with Quantum?

10 A. It was a significant amount of back
11 charges associated with Quantum.

12 Q. And I'm going to hand you a few
13 exhibits, Ms. Hadley. I hand you what's been
14 marked for ID purposes as Defendant's Exhibit
15 152, 153, and 154. And I'm going to ask you if
16 you recognize those documents.

17 A. These are three change order requests as
18 from SBC on this project.

19 Q. SBC being Quantum, Merritt, and SBC
20 Group, all the same outfit?

21 A. Yes.

22 Q. Okay.

23 A. I believe so.

24 Q. Now, do you know the amount that Quantum
25 settled for?

1 A. I believe it was \$175,000.

2 Q. Okay. And is that amount reflected on
3 Plaintiff's Exhibit 329?

4 A. No.

5 Q. Okay. And the documents that I just
6 handed you: 152, 153, and 154, Defendant's
7 Exhibits, do those relate to back charges?

8 A. Change order 37 specifically identifies
9 the back charges and what subcontractor had to do
10 the work that was being then back charged against
11 SBC.

12 Q. Okay. And what is the exhibit number on
13 change order 37?

14 A. Exhibit 154.

15 Q. 154. And explain to the Judge, if you
16 would at this time, how back charges -- what that
17 means, how that works.

18 MR. HILDEBRAND: Objection, Your
19 Honor. I don't think he's laid a foundation for
20 that, for her to explain how back charges work;
21 and particularly, how they might work in this
22 particular situation.

23 I don't see how she can testify about
24 the underlying data for this document. It calls
25 for speculation.

1 MR. MCDONALD: Your Honor.

2 THE COURT: All right. Do you want
3 to lay some foundation for that?

4 MR. MCDONALD: I thought I laid
5 some foundation when I spent all the time going
6 through the fact that she's a construction
7 auditor.

8 THE COURT: Yeah. Ask her the
9 general question then.

10 BY MR. MCDONALD:

11 Q. Have you had the opportunity in your
12 experience to assess back charges as it relates
13 to, from one subcontractor to another
14 subcontractor?

15 A. Well, you said assess. I have never
16 assessed or applied back charges, but we
17 definitely review back charges.

18 From an audit perspective, the concept
19 is pretty simple that, if you're going to
20 increase the subcontractor's contract to do extra
21 work that was caused by another sub, you're going
22 to take the money from one sub as a negative and
23 say, that guy had to clean up your mess. That
24 guy had to repaint your wall. I'm going to
25 reduce your contract, and I'm going to give the

1 money to the contractor that had to redo the
2 work.

3 Q. Okay. So it's kind of like a water
4 balloon, squeezing the end of a water balloon?
5 It just goes -- the money goes from one sub to
6 another sub. It's a raise and a lower?

7 A. Yes, unless the back charge related to
8 something that the prime, BBC, in this instance,
9 did then, you know, it would -- then that would
10 just result in a change order that you're not
11 assessing against another sub.

12 Q. Okay.

13 A. It would just be a change order that you
14 wouldn't present to the owner because maybe it
15 was something that the primary cause to be
16 incurred.

17 Q. And my simple question is, as it relates
18 to Exhibits 152, 153, and 154, did you see where
19 any of those back charges were given credits
20 rather than an increase to Quantum's contract
21 amount?

22 A. No. And logically, given the work that
23 Quantum did, it is more logical that they're
24 having to -- they're coming in towards the very
25 end of the project and they're running into

1 little things that need to be fixed before the
2 painting can be done; so they're patching and
3 doing some things.

4 And then those will be accumulated.
5 Quantum was preparing work order tickets,
6 detailed handwritten tickets about extra things
7 that they had to do and whose fault that they
8 thought it was. And then those would get
9 submitted to BBC.

10 Those tickets then get accumulated, you
11 know, onto the chart like you see on Exhibit 152.
12 They get, you know, added up and tallied,
13 periodically batched up, and then that additional
14 money gets given to Quantum. And then in theory,
15 what BBC would do would be then to go take that
16 money --

17 MR. HILDEBRAND: Your Honor, her
18 testimony is obviously speculative. She says in
19 theory and these people do this and that. She
20 doesn't know what happened here, and she can't
21 testify about these documents.

22 THE COURT: Overruled.

23 THE WITNESS: And you can see on
24 Defendant's Exhibit 154, the second page
25 documents what I'm talking about, where BBC is

1 identifying that this particular increase to
2 Quantum is going to come as a back charge and
3 that box is blacked out against another
4 subcontractor.

5 So this document, the supporting
6 document to the change order talks about, where's
7 this money coming from? Is it coming from the
8 owner because the owner has an approved change
9 order?

10 Am I doing a budget transfer because I
11 have to move some of my contingency around, or am
12 I going to go get this money from another sub?
13 So this one would tell the accountant -- I guess
14 Shanti in this particular example -- that it's a
15 back charge.

16 So the difficulty here -- and maybe I
17 didn't say it properly in the very beginning --
18 is that these change orders are being added to
19 Quantum's contract without a negative being
20 assessed against the other subs.

21 But moreover now, Quantum is out.
22 They've been paid their money, \$175,000, not the
23 amount that's being requested here -- without
24 Library getting the benefit of going to reduce a
25 subcontractor's contract for the money that was

1 being paid to Quantum.

2 MR. MCDONALD: Your Honor, at this
3 time I would move Exhibits 152, 153, and 154 as
4 Defendant's Exhibits into evidence.

5 THE COURT: Okay.

6 MR. HILDEBRAND: Your Honor, she
7 hasn't -- she was not copied on these documents.
8 She hasn't been provided them. I note that 154,
9 looking at it, is not even signed.

10 So she's not -- we went through this
11 with -- again with my experts, where it's okay
12 if she wants to reference them, but I don't
13 believe that it's appropriate for them to come
14 into evidence because she can't authenticate
15 these documents.

16 THE COURT: Okay. Do you want to
17 lay any more foundation for that?

18 BY MR. MCDONALD:

19 Q. Did you receive and consider Exhibits
20 152, 153, and 154 in performing your audit?

21 A. Yes.

22 Q. Did you take them into consideration in
23 performing your audit?

24 A. Yes. We looked at all the subcontractor
25 files, support for the change orders and again

1 back charges. And assuring the debits equal the
2 credits is a pretty standard audit test.

3 MR. MCDONALD: Okay.

4 MR. HILDEBRAND: Your Honor, it's
5 no different than our experts when they reviewed
6 documents and tried to introduce e-mails and
7 other documents that they say underlay their
8 opinions.

9 She was not copied on these. She simply
10 looked at them, and there's no evidence that she
11 had any direct communication with these
12 subcontractors or Balfour about them. So I don't
13 think that it's appropriate for them to come into
14 evidence.

15 THE COURT: All right. Well, I
16 think her testimony as to how it relates to her
17 analysis from an accounting or an auditing
18 standpoint, not even as to the validity of the
19 document.

20 You're going to be able to ask her about
21 it on cross if you'd like. So I'm going to
22 overrule the objection. I'll allow it. All
23 right.

24 MR. MCDONALD: Your Honor, this is
25 152.

1 MR. HILDEBRAND: I'm sorry, which
2 one is 152?

3 MR. MCDONALD: 152 is the
4 12/14/2018, the big chart.

5 153, Your Honor, this is the Merritt.

6 THE COURT: Merritt?

7 MR. MCDONALD: Yes, sir. And 154,
8 Your Honor, is the last one.

9 THE COURT: All right.

10 (DFT. EXH. 152, 153 and 154 were
11 marked for identification and admitted into
12 evidence.)

13 BY MR. MCDONALD:

14 Q. All right. Now, let's talk about
15 Bernhard MCC. Are they up here?

16 A. I'm not sure.

17 Q. You've got your 329?

18 A. I lost it.

19 Q. Okay. And what is your understanding of
20 the status of the BMCC claims?

21 A. BMCC has received a settlement from
22 Library directly, and they're out.

23 MR. MCDONALD: All right. On
24 Plaintiff's Exhibit 329, Your Honor, just to
25 explain, in order for ProCopy to blow this up to

1 where you could actually see it --

2 THE COURT: Right.

3 MR. MCDONALD: -- which didn't end
4 up being big enough, we cut out the margins. So
5 on -- you will notice on your 329, there's some
6 things that appear that don't appear on this.

7 THE COURT: Yeah.

8 MR. MCDONALD: And that's the
9 reason, just for clarification.

10 THE COURT: Yeah. I have noticed
11 that.

12 BY MR. MCDONALD:

13 Q. At the bottom of that document, is there
14 a reference to Bernhard MCC on Exhibit 329,
15 Plaintiff's 329?

16 A. Yes. There's a number 625 BMCC.

17 Q. And do you know how much the
18 plaintiff -- how much Library Associates has
19 agreed to pay Bernhard MCC directly?

20 A. \$625,000 roughly.

21 Q. All right. Does that appear to be
22 taking into account on this chart for Bernhard
23 MCC?

24 A. No. It's just the opposite. There's
25 \$491,387 included in this claim for BMCC, but I

1 know, having worked with BMCC, that they've
2 received their payment and they're out. They're
3 not going to get any additional money and
4 definitely not from BMCC.

5 Q. You said you've worked with BMCC. What
6 are you talking about?

7 A. I communicated with them regarding the
8 claims that they had, what monies they felt that
9 they were owed. I provided them documentation to
10 prove to them that some of the money that they
11 were asking for, Library had already paid to BBC
12 through routine pay apps.

13 And I gathered information from them
14 just on what their claims were. I provided
15 information to Bundy McDonald, and I was in
16 direct communication with them through that
17 settlement process.

18 Q. Tell the Judge about money that was paid
19 by Library Associates to BBC for Bernhard that
20 wasn't paid to Bernhard, what you just touched
21 on.

22 A. So BMCC submitted a payment application
23 to BBC.

24 Q. Let me just stop you. I'm not trying to
25 interrupt. Let's use Bernhard and Balfour

1 because --

2 A. Okay.

3 Q. -- it's going to get crazy with all of
4 these C's and B's.

5 A. Bernhard submitted its --

6 MR. HILDEBRAND: Objection, Your
7 Honor. She's issued reports and has testified
8 about none of this in her prior reports, to my
9 knowledge, nor in her deposition, when I asked
10 her all of her opinions.

11 They've already called witnesses to
12 testify about these facts, but for her to render
13 new opinions on these, I think, is in
14 appropriate.

15 THE COURT: All right. The timing
16 of this would be just before trial?

17 MR. MCDONALD: Well, it's in the --
18 the pay application is in evidence. This chart
19 was sent on September 21st of 2021 during the
20 trial of their case.

21 THE COURT: Okay.

22 MR. MCDONALD: And I think it's
23 incredibly important for her to say, having
24 done -- tried to do an audit, as she's testified
25 to, that I've now went back, and here's BMCC

1 popping up again.

2 Wonder where the \$137,000 that's been
3 paid to Balfour is -- which they still have.
4 They still have it to this day. They haven't
5 given it out to anybody.

6 I think not only is it incredibly
7 relevant, the notion that she -- he took her
8 deposition and then updated the damages to 13
9 from 22 and now she's precluded from talking
10 about anything?

11 I think it goes to the heart of this
12 matter, not to mention, I will lay the foundation
13 that this money not only was paid to Balfour,
14 they certified that they had paid it to Bernhard,
15 which they had, which is a crime and is relevant
16 to our causes of action for civil conspiracy and
17 unfair trade practices.

18 How it happened was --

19 THE COURT: All right. Let's stop
20 right there. That's enough.

21 MR. MCDONALD: Okay. Thank you.

22 THE COURT: All right. Your
23 objection again is as to what?

24 MR. HILDEBRAND: She has not --

25 THE COURT: Not previously

1 testified to it?

2 MR. HILDEBRAND: Yes, sir. And
3 what we -- what he's talking about, yes, we have
4 had -- our damages have changed and compilations
5 have changed.

6 There have been settlements with
7 subcontractors, and the interest amounts have
8 changed. And that's what the documents have
9 reflected, and they're -- they went through
10 several iterations, certainly with the passage of
11 time, inevitably.

12 And she can certainly testify that she's
13 aware of settlements, and there's already been
14 testimony. You're aware of that because it was
15 at a hearing where Mr. Linton advised the Court
16 that there was a settlement.

17 THE COURT: Right.

18 MR. HILDEBRAND: So all of those
19 are prior facts. This change order was something
20 that was done during the project. So the facts
21 weighed very extensively preexist the reports and
22 the deposition that she gave.

23 So now she's offering new opinions that
24 have not been previously expressed, and it has
25 nothing to do with this chart because this is

1 based on data that -- all that preexisted her
2 testimony, and certainly insofar as this pay
3 application 38 is concerned.

4 THE COURT: All right. And the
5 purpose you seek to introduce it is to establish
6 that they've been paid or they should have been
7 paid? Is that what you're trying to establish?

8 MR. MCDONALD: Seeking to introduce
9 it for settlement purposes. The first is, they
10 came in here --

11 THE COURT: Now, wait, wait,
12 Mr. McDonald. Just tell me why you're doing it.
13 Don't tell me what they did. Tell me why
14 you're --

15 MR. MCDONALD: Because they asked
16 for \$400,000 for BMCC with no credit for this
17 \$137,000.

18 THE COURT: Okay.

19 MR. MCDONALD: We had to pay it.
20 We had to pay that directly to him.

21 THE COURT: Right.

22 MR. MCDONALD: So this is --
23 they're still asking for \$500,000 for BMCC
24 without regard to this credit that we, at the
25 very least, should be given. That's the first

1 purpose I'm offering it for.

2 THE COURT: Okay.

3 MR. MCDONALD: The second purpose
4 I'm offering it for is, this goes to the root of
5 the reliability of this document. I'm going to
6 spend hours going through it with the -- and show
7 this over and over and over and over again.

8 THE COURT: All right.

9 MR. MCDONALD: And it's relevant to
10 that, to their damages.

11 THE COURT: All right. And the
12 document itself appeared during the trial; is
13 that right?

14 MR. MCDONALD: And this document
15 appeared on the 21st of September.

16 THE COURT: All right. On that
17 basis, I will allow it. Okay. Go ahead.

18 BY MR. MCDONALD:

19 Q. All right. You testified that you
20 reviewed Balfour pay applications in regard to
21 Bernhard monies, correct?

22 A. Correct.

23 Q. Okay. Did Library Associates pay
24 Balfour monies that were not ultimately paid to
25 Bernhard?

1 A. Yes.

2 Q. How much money was that?

3 A. \$137,918.

4 Q. And in what pay application did the
5 owner pay to Balfour that \$137,918?

6 A. It was Balfour's pay app number 38.

7 Q. Okay. And you've qualified that as
8 Balfour's pay application. Is that because
9 Bernhard's had a different number?

10 A. Yes. Bernhard's payment application is
11 number 31 but then gets incorporated into
12 Balfour's pay app 38.

13 Q. And did the owner fund pay application
14 38?

15 A. Yes, it did.

16 Q. Did the owner fund pay application --
17 subsequent pay application 39?

18 A. Yes, it did.

19 Q. Did the owner pay Bernhard MCC directly
20 for its remaining retainage?

21 A. Yes, it did.

22 Q. And is there retainage up here on
23 Exhibit 329?

24 A. For Bernhard, there is retainage of
25 \$28,672.

1 Q. And based upon Library Associates paying
2 Bernhard directly for the costs as depicted on
3 Plaintiff's Exhibit 329 ever be costs for the
4 work?

5 A. No. The only way those could be
6 considered cost of the work is if Balfour were to
7 reimburse Library for what Library has paid to
8 the subcontractor.

9 Q. Okay. Let's talk about Lithko. Are
10 they on Plaintiff's Exhibit 329?

11 A. Lithko is a subcontractor on Exhibit 329
12 for a total claim amount of \$979,702.

13 Q. It's over here, right?

14 A. Correct. That's the total amount of
15 that row all the way across on the right.

16 Q. You just add up everything that they
17 have for Lithko including \$182,341.52 for quote,
18 "miscellaneous claims and interests." If you add
19 up everything, you get \$979,701.57 for Lithko?

20 A. That's what they have, yes.

21 Q. I'm going to hand you what's been marked
22 as Defendant's Exhibit 28 and ask if you've seen
23 that document before.

24 A. Yes, I have seen it. It is Lithko's
25 change order number 34.

1 Q. And when is that document dated?

2 A. The date on the upper left of the
3 document is April 7th, 2015 -- oh, no, sorry.
4 That says to contract dated April 7, 2015.

5 The top page where it says date of this
6 change order is not filled in, but the two
7 parties: Lithko and Balfour, signed the document
8 on March 14, 2019 and April 9, 2019,
9 respectively.

10 MR. MCDONALD: Okay. Your Honor,
11 this is already in evidence. This is Defendant's
12 Exhibit 28. I know you have -- I have an extra
13 copy if you want to follow along with this one.

14 THE COURT: Sure. Then I don't
15 have to dig it up.

16 BY MR. MCDONALD:

17 Q. And was this change order included in
18 the Lithko subcontract filed for Balfour Beatty's
19 records?

20 A. Yes.

21 Q. Okay. Let's go through this document.
22 What is the total amount of this change order?

23 A. The total amount of the change order is
24 a deduction to Lithko's contract for \$7,985.08.

25 Q. Okay. So if you start at the top, the

1 previous contract amount, this is a negative
2 change order, right?

3 A. Correct.

4 Q. And then you arrive at the new contract
5 amount?

6 A. Correct.

7 Q. Okay. And how do you get there? How do
8 you get there with this chart that they have
9 here? Can you explain to the Judge how this
10 works?

11 A. So this particular change order
12 accumulates all of the issues. Well, I can't say
13 all because I don't know for sure.

14 This change order accumulates many of
15 the issues that remained unsettled between
16 Balfour and Lithko in both Lithko's request for
17 additional contract value for doing work that it
18 believed it did outside of the scope of its
19 contract and then negative amounts that you see
20 in the amount column for things that got back
21 charged against Lithko, where BBC believe that
22 Lithko did something that it should be back
23 charged for because another contractor had to do
24 the work.

25 So there's a significant amount of back

1 charges against Lithko, and there are a
2 significant amount of change orders for all of
3 the additional costs that Lithko had been
4 accumulating on its request for change orders
5 over the life of the project.

6 Q. Okay. And the result of the back
7 charges and the positive work, does that result
8 in Balfour paying Lithko any money, any
9 additional money?

10 A. No. It would result in lowering the
11 contract value. It wouldn't necessarily be
12 receiving money. It would just allow Lithko to
13 invoice a total that's less than what it was able
14 to invoice for the day before this was signed
15 because it's lowering the contract value.

16 Q. Gotcha. All right. And the back
17 charges -- let's look at CI number 1545.

18 A. The very first one?

19 Q. Yes. And what does that say?

20 A. Marion MC cable L7 and L8 back charge,
21 and it's in the amount of \$55,500. And there's a
22 description right below it. It includes
23 replacing all of the damaged MC cable on L7 and
24 L8 after testing was performed. Does not include
25 testing.

1 Q. What is L7 and L8?

2 A. It's referring to the two levels of the
3 hotel: L7 and L8.

4 Q. And what is the next negative number
5 that we have? What is the CI number for the
6 next?

7 A. The next negative number is on the next
8 page. It would be CI number 3061.

9 Q. Okay.

10 A. The description is block mason sleeves,
11 and the amount is \$22,500.

12 Q. And what is the next one?

13 A. The next one is CI number 3062, ninth
14 floor pool deck. The negative amount is \$79,475.

15 Q. And the next one?

16 A. CI number 3063, elevator shafts, a
17 negative \$7,000.

18 Q. The next one?

19 A. CI number 3064, L4, ceiling height,
20 negative \$15,000.

21 Q. And the next one?

22 A. CI number 3065, floors out of tolerance,
23 and I give them \$10,000.

24 Q. And the next one?

25 A. CI number 3066, stucco walls out of

1 tolerance, \$13,000, negative.

2 Q. Okay. Now, let's talk about CI number
3 3059. What is that for?

4 A. CI 3059 is adding money to the contract
5 for crane breakdown for the fifth time. So it's
6 awarding Lithko \$2,671.

7 Q. Because the crane broke down for the
8 fifth time?

9 A. Yes. You can see other crane breakdowns
10 a little higher up on the page that's causing
11 delays. They'll say like crane and layout
12 delays.

13 Q. We're going to go through them.

14 A. Okay.

15 Q. That 3059 is the crane breakdown for the
16 fifth time, right?

17 A. Correct.

18 Q. And that's an add to Lithko's contract?

19 A. Correct.

20 Q. And then what is 3057, CI -- well, let
21 me back up. What is CI? What is that? Do you
22 know what that stands for?

23 A. It's the acronym that Lithko is using
24 for change requests. It's like an RCO. Every
25 sub and every contractor kind of uses a different

1 acronym. It's a tracking mechanism to, you know,
2 keep track of all the pending approved and
3 rejected changes.

4 Q. Okay. Let's go to -- what is 3057?
5 Excuse me, 3058.

6 A. 3058 is an add to the contract per
7 arched wall, \$18,027.32.

8 Q. And then 3057?

9 A. That issue is lost concrete due to down
10 crane and pump rental, \$4,966.

11 Q. Okay. And that's an add, correct?

12 A. Correct.

13 Q. All right. And then what is 3048?

14 A. Crane and layout delays (back charge)
15 adding \$67,200 to Lithko's contract.

16 Q. Okay. And then what is 3047?

17 A. Crane delays times two (back charge)
18 \$975 being added to the contract.

19 Q. And it specifically has back charge in
20 parentheticals?

21 A. Correct.

22 Q. Both 3047 and 3048 do?

23 A. Correct.

24 Q. This is an add. These are adds, right?
25 Crane breakdown for the fifth time. Crane and

1 layout delays and crane for those times two.

2 Those are adds to Lithko, correct?

3 A. Right. They're increased costs --
4 Lithko's increased costs for these crane and
5 other layout delays and other issues that's
6 impacting Lithko in a negative way.

7 Q. Who's getting back charged?

8 A. It doesn't identify the subcontractors
9 that are causing the delay or the crane breakdown
10 or the layout delays.

11 Q. And this is what we talked about
12 earlier. The way a back charge works is, if you
13 increase the subcontractor's amount, some other
14 subcontractor's contract amount should be
15 decreased?

16 A. Yes, unless it was an issue that was
17 caused by Balfour themselves. Contractors still
18 do call that a back charge on occasion, but
19 typically, when the prime uses the term back
20 charge, it's kind of like playing the parent with
21 two fighting kids. And it's just, you know,
22 administering the funds between the parties.

23 Q. Okay. And the CI numbers that we looked
24 at so far have been from 3047 with some missing
25 ones but through 3066, right? It's not

1 completely numerical, but the lowest one is 3047
2 and the highest is 3066, right?

3 A. Correct.

4 Q. And then the one on the first page is
5 called 1545?

6 A. The first back charge, the negative,
7 yes, is CI 1545.

8 Q. Okay. Now, let's go to the body of this
9 document. Can you read the first sentence to the
10 Judge?

11 A. This change order represents full
12 settlement on any known internal change orders
13 between Lithko and Balfour Beatty.

14 Q. What are internal change orders?

15 A. Those would be change orders --

16 MR. HILDEBRAND: Objection, Your
17 Honor. She doesn't know that. She can't testify
18 what other parties or what other people meant by
19 the terminology in this particular document. And
20 the plaintiffs have had an opportunity to ask
21 Balfour about it. They can ask Lithko about it.

22 Moreover, you can read this document,
23 and you can determine whether it's a settlement
24 or not. There's already been discussion on it.
25 So I think it's -- that's for the Court to decide

1 and with the rest of the information in this.

2 Lastly, my objection would be that it's
3 cumulative. There's already been questions asked
4 of Mr. Starcevic and others about this. So I
5 think for all of those reasons, she can't
6 interpret someone else. It's hearsay. It's
7 cumulative. It's irrelevant.

8 THE COURT: Noted. All right.
9 We've covered this before, have we not?

10 MR. MCDONALD: Well, this -- these
11 are the numbers. This is going to explain the
12 numbers.

13 THE COURT: We haven't talked about
14 the numbers, but --

15 MR. MCDONALD: We talked about
16 the --

17 THE COURT: -- the bottom and the
18 language we talked about.

19 MR. MCDONALD: Yes. And I'm going
20 to explain how these exact numbers relate to this
21 document. That's where I'm going. I'm just
22 laying the foundation.

23 And I'm not familiar with a plaintiff or
24 Mr. Starcevic, just because he's explained it,
25 that my witness doesn't get to give her take on

1 it, the expert in the construction field. And
2 I've heard that objection now five --

3 THE COURT: All right. I will
4 allow it on the basis you're going to coordinate
5 the numbers. Let's just go there.

6 MR. MCDONALD: Thank you.

7 BY MR. MCDONALD:

8 Q. And then the next one says that, this
9 change order -- well, publish it into the record,
10 for that sentence.

11 A. I don't know how to read into the record
12 when something is stricken through. Do I read it
13 and say it's stricken through?

14 Q. Sure. I think that would be
15 appropriate.

16 A. Okay. This change order includes -- and
17 then being stricken -- select design-related
18 change orders, quote, "BB design-related change
19 orders", specifically including CI numbers
20 3049-3056, 0734-0736, 0@738-0741, that are part
21 of a claim against the owner/design team.

22 Balfour Beatty has agreed to include
23 these change order requests upon execution of
24 this change order, and in full return, will
25 receive the first \$100,650.60 of any monies

1 recovered from aforementioned claim. Lithko
2 agrees --

3 Q. Wait. Let me just stop you there. Are
4 any of the back charges that we just went over
5 included in the numbers that you just read, the
6 CI numbers you've just read in the body of the
7 paragraph?

8 THE COURT: They're not, I can tell
9 you. I've already looked at it.

10 THE WITNESS: No. The positives
11 are in the body of that paragraph. The negatives
12 are not.

13 BY MR. MCDONALD:

14 Q. Okay. And does the owner on this
15 document, how much -- what is the total of the
16 back charge negatives? Do you know?

17 A. I did at one time. I believe it's
18 \$204,000 roughly.

19 Q. Okay. And does the owner on Plaintiff's
20 Exhibit 329 get any credit as it relates to
21 Lithko for that \$204,000 in back charges?

22 A. No. Those credits get absorbed with the
23 other additions to their contract due to other
24 delays caused by others apparently, and you don't
25 know if BBC could have possibly reduced another

1 subcontract for these because they don't identify
2 the sub.

3 Q. And what we've talked about earlier, the
4 reason that this change order 34, Plaintiff's
5 Exhibit -- or Defendant's Exhibit 28, the reason
6 that it results in a negative amount to Lithko is
7 because of these back charges, correct?

8 A. Right. The back charges against Lithko
9 are more than the back charges against other subs
10 that they're now awarding to Lithko in the
11 positive change orders.

12 Q. And then, notwithstanding that, they
13 take the positives in the CIs we just looked at
14 in the body of this, and say, they're still going
15 to pursue it against the owner?

16 A. Right. They're going to pursue it
17 against the owner, but Balfour will then get
18 \$100,650.60 of anything recovered by the owner.

19 Q. Okay. And how does that work under a
20 cost-plus contract? How do you do that?

21 A. You don't do that. From an accounting
22 standpoint, it can't be done because this is a
23 cost reimbursable contract. So as long as monies
24 are spent by Balfour and they meet the conditions
25 of the contract and then they become cost of the

1 work, then Balfour can recover and get reimbursed
2 for those actual costs.

3 If Balfour receives cash in this
4 instance \$100,650.60, then that would be a credit
5 to the cost of the work that would then have to
6 be given to Library, just as if they got a
7 discount on a volume purchase, or they, you know,
8 sold something for scrap or another issue where
9 you have a credit in a project.

10 Q. All right. Let's talk about the \$67,200
11 back charge.

12 A. Crane and layout delays, back charge.

13 Q. All right. And Lithko has a delay
14 claim -- or it has an RCO and delay claim,
15 correct?

16 A. Lithko had a delay claim. The amount on
17 this exhibit on the easel is an amount that I've
18 never recognized that's \$12,459.96. That's
19 what's in the delay column.

20 But I do believe that Lithko has an RCO
21 that relates to delay in the blue column in one
22 of -- but I'm not a hundred percent sure whether
23 it's in that amount that's listed there. But
24 they did have one. They have one.

25 Q. Do you know where the \$12,459.96 comes

1 from?

2 A. I don't.

3 Q. The \$375,000 in retainage for Lithko, do
4 you see that amount?

5 A. Yes.

6 Q. If you subcontract, how -- it was
7 \$204,000 of back charges?

8 A. I probably should add them up right now,
9 but I think it was 202,000 and some change.
10 That's what I recall.

11 Q. Okay. And then in addition, does that
12 202 include the 67,000 that's for the crane and
13 layout delays, the back charge?

14 A. No, because that's going the other way.
15 So these are apparently delays suffered by Lithko
16 due to the crane and layout delays versus the
17 202,000, which are charges against Lithko for
18 either increased costs of other subs or, you
19 know, delays to other subs -- delays suffered by
20 other subs.

21 Q. Gotcha. And we don't know who -- which
22 sub, if any, was actually back charged that
23 amount, the 67,000?

24 A. Correct, nor do we know the subs that
25 may or may not have been given the increases that

1 are assessed against Lithko as well.

2 To me, the issue is somewhat of which
3 subs are impacted because you do want to make
4 sure that the pluses equal the minuses, and that
5 essentially the owner got treated fairly and that
6 money just isn't given to one sub. It needs to
7 be taken from another sub to wipe that out;
8 otherwise, it wouldn't be an internal change
9 order. It would be an owner change order.

10 The bigger issue is that money is being
11 given to Lithko for delays. They also have a
12 delay claim. So Library already lost the benefit
13 of this money in this delay and now is being
14 asked to pay directly to BBC to apparently be
15 given to Lithko for delay claims.

16 Why wouldn't that just be this delay
17 that's in this change order that Library already
18 paid for?

19 Q. Do you know if Lithko -- in part of your
20 audit, did you review the joint prosecution
21 defense and tolling agreements?

22 A. Yes, I did.

23 Q. Okay. And were that any terms in those
24 joint prosecution defense and tolling agreements
25 that were relevant to you in performing your

1 audit?

2 A. Absolutely.

3 MR. HILDEBRAND: Objection, Your
4 Honor.

5 THE COURT: All right. Basis?

6 MR. HILDEBRAND: There has been
7 absolutely no disclosure prior to here about her
8 offering any opinions regarding the joint defense
9 agreement. We've taken her deposition. She's
10 issued reports, and for them to now try to elicit
11 testimony from her about the joint defense
12 agreement is an ambush and improper.

13 THE COURT: All right. And
14 Mr. Terry?

15 MR. TERRY: Your Honor, she been
16 identified as an expert. I didn't write it down
17 quite fast enough, but --

18 THE COURT: Forensic accounting.

19 MR. TERRY: -- construction
20 accounting.

21 THE COURT: Forensic and
22 construction accounting.

23 MR. TERRY: She's not qualified to
24 testify about the terms of any agreement, any
25 legal agreement here, nor has she been qualified

1 to do that.

2 MR. MCDONALD: I'm not sure the
3 question actually came out because of the --

4 THE COURT: Okay. Where are you
5 going?

6 MR. MCDONALD: I asked her whether
7 or not -- had she reviewed in the scope of her
8 audit, that she's been qualified to give her
9 testimony on, whether she reviewed the joint
10 defense tolling agreement, whatever the title is.

11 She said yes. And I said, were any
12 portions of that joint defense tolling agreement,
13 prosecution defense relevant to you in performing
14 your audit. That was the question.

15 THE COURT: Okay. You can ask that
16 question, and there may well be an objection
17 after that, but anyway, go ahead. You can answer
18 the question.

19 THE WITNESS: Yes. An agreement
20 like that is the same as a change order. It has
21 less numbers and more words, but it all relates
22 to contract compliance and whether a cost is
23 reasonable or allowable and basically what you're
24 buying and selling in that agreement. So it's
25 just like a change order.

1 BY MR. MCDONALD:

2 Q. Okay. And what portions of that
3 agreement were relevant to you in performing your
4 audit?

5 MR. HILDEBRAND: Your Honor, again,
6 this joint defense agreement was entered into
7 well before her report, well before her
8 deposition, and there's been no testimony,
9 whatsoever, no findings or anything else about
10 her testifying about this joint defense
11 agreement. So it's -- and the fact is that --

12 THE COURT: All right. Let me ask
13 you that. When y'all propounded her as an
14 expert, was this area upon which she was going to
15 opine, or how was that described?

16 MR. MCDONALD: That she was going
17 to perform -- she was an expert in performing an
18 audit, which she did perform. Now, I'm -- the
19 problem that keeps coming up is --

20 THE COURT: All right. Wait a
21 minute. Mr. McDonald, you like to explain
22 yourself. I'm just looking for an answer.

23 MR. MCDONALD: Sorry. That she was
24 going to perform, that she was going to give
25 expert testimony on the audit. That's why I

1 asked that question.

2 THE COURT: All right.

3 MR. MCDONALD: And if this is
4 relevant and it existed, and if she took it into
5 account, Your Honor, I think it's appropriate for
6 her to go into it.

7 THE COURT: Okay. I gotcha.
8 Mr. Terry, anything further?

9 MR. TERRY: Same objection.

10 THE COURT: Mr. Windle?

11 MR. WINDLE: Objection, Your Honor,
12 on the basis that she was qualified in
13 accounting, auditing and construction accounting.

14 She's not qualified to interpret a legal
15 document between other people. There will be
16 testimony explaining the terms of the joint
17 defense agreement, but it's ultimately your
18 decision to interpret, not hers.

19 THE COURT: All right. I agree
20 with that explanation; however, she did say that
21 she has -- that she believes it impacts her
22 decision in the audit, and so, on that basis, I'm
23 going to allow the testimony.

24 MR. MCDONALD: Thank you, Your
25 Honor.

1 BY MR. MCDONALD:

2 Q. How is it relevant to your opinions as
3 it relates to your audit of Balfour Beatty's
4 construction records, project records?

5 A. As in any contract modification, this is
6 a modification to that contractual relationship
7 between the parties. So just as a change order
8 will modify and provide for additional monies to
9 do additional work, this is something that the
10 parties are buying and selling amongst
11 themselves.

12 The agreement is very clear that they
13 have claims against each other, that they're
14 willing to ignore for now, as they now work
15 together to file claims against the owner.

16 So that will definitely impact how this
17 change order is viewed and how the reasonableness
18 of those costs are viewed because we just got
19 done talking about the fact that this change
20 order is give Lithko at least \$67,200 for delays.

21 And then there's an agreement signed
22 that says, we know we have issues against each
23 other, but we're going to ignore them for now and
24 go work against the owner, and now there's a
25 delay claim on the board. It's all assets and

1 liabilities and debits and credits from an
2 accounting standpoint.

3 THE COURT: Okay. All right.

4 MR. HILDEBRAND: Your Honor, this
5 is such a stretch. It's for you to look at the
6 joint defense agreement and where they stand and
7 who was in it and who's not. You can look at
8 those terms, and you can reach your own decisions
9 and conclusions based on it.

10 But to have this auditing expert -- and
11 I think Ms. Hadley is very comfortable trying to
12 testify about what the parties meant and how this
13 impacts and it's a change to the contract. It's
14 not. For her to try to tie this into this
15 document -- that joint defense agreement is such
16 a stretch.

17 And, again, it has not been disclosed.
18 It's beyond her testimony. If she wants to
19 testify about the audit and what she thinks were
20 for appropriate deductions, then go ahead. Let's
21 get to it. But this is way far afield.

22 MR. WINDLE: Objection, Your Honor.
23 In regard to whether or not there are any claims
24 against each other, actual -- there actually are,
25 she doesn't know if there actually are or not.

1 That is going to be testimony from Lithko, or it
2 could be Balfour Beatty.

3 THE COURT: Okay. All right. I
4 think we're getting somewhat far afield; however,
5 part of the defendant's claim is that, for
6 whatever reason, it's constantly befuddled this
7 Court as to why the plaintiff, Balfour Beatty,
8 was unable to perform the audit that the contract
9 provided for or provide the documentation for the
10 audit.

11 She's saying that this is a basis for
12 her -- to render her opinion as to the values
13 that are in here. So it's on that basis that I'm
14 going to allow the testimony. Okay? All right.

15 MR. MCDONALD: Thank you, Your
16 Honor.

17 BY MR. MCDONALD:

18 Q. All right. Let's go to Miscellaneous
19 Steel Industries, MSI. Do they appear on
20 Plaintiff's Exhibit 329?

21 A. Yes, they do.

22 Q. And who is Miscellaneous Steel
23 Industries?

24 A. They're a subcontractor.

25 Q. And do you know what the scope of their

1 work was?

2 A. I believe they did metal work similar to
3 Tate.

4 Q. And did you review Balfour's
5 subcontractor file for Miscellaneous Steel
6 Industries during the performance of your work on
7 this project?

8 A. I did.

9 Q. Okay. And what, if anything, did you
10 find in there?

11 A. Miscellaneous Steel, one of the amounts
12 that's being claimed here, in the yellow section
13 in the contract balance section -- I just can't
14 remember the change order number, 13, I
15 believe -- was included in a previous pay
16 application that Library had already paid to
17 Balfour.

18 Q. Okay. So the money had been paid to
19 Balfour for Miscellaneous Steel but not paid to
20 Miscellaneous Steel?

21 A. Correct.

22 Q. And did you review, on this document,
23 there is -- on Plaintiff's Exhibit 329, there's
24 \$130,000 for RCOs. Do you see that?

25 A. I do.

1 Q. Did you review backup documentation for
2 that \$130,476 for request for change orders on
3 behalf of Miscellaneous Steel Industries?

4 A. I did.

5 Q. Okay. And what, if anything, were you
6 able to determine upon your review of that backup
7 documentation?

8 A. That some of the same amounts that have
9 already been paid are now also included in that
10 RCO in the blue column.

11 Q. And is Miscellaneous Steel Industries
12 making a -- are they a party in this action?

13 A. No, they're not. They're out.

14 Q. Were they ever in?

15 A. I can't remember. They're one of the 22
16 that had a lien.

17 Q. Okay. I'm going to hand you what's been
18 marked for ID purposes as Defendant's Exhibit 155
19 and ask if you recognize that document?

20 A. This was in the subcontract file for
21 MSI. It's change order 12.

22 Q. And when you say, the sub, you're
23 talking about Balfour's subcontract file?

24 A. I believe so. I don't remember the --
25 what box that I saw it at first. I'm sorry. I

1 just remember seeing it.

2 Q. All right. And is this a true and
3 accurate copy of the document that you saw?

4 A. Yes, that I saw. It was a zero change
5 order with an attachment of that Excel file of
6 the different outstanding issues, similar to what
7 we just discussed with Lithko. It's kind of a
8 closeout, if you will, kind of change order that
9 identifies all of the open issues between the
10 parties.

11 Q. Okay. Is it signed?

12 A. It is not.

13 Q. Is it dated?

14 A. It's not.

15 Q. And take a look at the top right-hand
16 corner.

17 A. The top right-hand corner regarding the
18 date?

19 Q. Yes.

20 A. February 11, 2019.

21 Q. All right. And what name is on the
22 buyer on the second page?

23 A. Shanti Pieniak.

24 Q. Okay. And what is the entry there for
25 the description of the scope of work being added

1 or removed?

2 A. It's called the final settlement.

3 Q. Okay. And what is the value on this
4 change order?

5 A. Zero.

6 Q. All right. And then the third page of
7 it is an Excel spreadsheet, correct?

8 A. Correct.

9 Q. All right. Does the Excel spreadsheet
10 contain credits?

11 A. Yes. There's credits that are in red
12 font and additional amounts that are in black.

13 MR. MCDONALD: Okay. Your Honor,
14 at this time, I would move Defendant's Exhibit
15 155 into evidence.

16 MR. TERRY: Objection, Your Honor.
17 She's just testified she doesn't even know where
18 she saw the document; so she can't authenticate
19 the document to begin with, as a true and
20 accurate copy or -- and she said, she doesn't
21 even know what box she found the document in.
22 It's not signed.

23 THE COURT: It was provided to you
24 how?

25 THE WITNESS: Well, unfortunately,

1 I've had to dump out a lot of shoeboxes on this
2 job; so I don't always remember where I first saw
3 a document.

4 It could have been in the four claim
5 binders. It could have been going through the
6 payment applications. It could have just been a
7 document that Library had, or it could have
8 ultimately been in the production.

9 I don't remember when I first saw it.
10 But I do remember seeing it, especially because
11 of the date and what it's doing based on what MSI
12 did on this job.

13 THE COURT: So your opinion is
14 based upon your reliance on the data in the
15 document; is that right?

16 THE WITNESS: Oh, absolutely.
17 MSI's work was in 2015 and 2016.

18 THE COURT: Okay. All right. I'll
19 allow it. Is that 155?

20 MR. MCDONALD: Yes, Your Honor.
21 Thank you.

22 (DFT. EXH. 155, was marked for
23 identification and admitted into evidence.)

24 BY MR. MCDONALD:

25 Q. And you just -- MSI's work was in '15

1 and '16.

2 A. Right. MSI did work that was very early
3 on in the project.

4 Q. So this document is dated February 11,
5 2019, and it is a zero dollar final settlement
6 change order, correct?

7 A. Correct.

8 Q. I know I said I wasn't going to do this
9 to you, but let's look at RCO -- do you have
10 those in front of you?

11 A. Is that Exhibit 12?

12 Q. Exhibit 12, yes, ma'am.

13 A. Is it just one binder?

14 Q. It is just one binder, yes, ma'am.

15 A. What's the RCO number?

16 Q. We're going to look at 277.

17 A. Okay.

18 MR. HILDEBRAND: Your Honor, I
19 would just like to note for the record that I'm
20 making an objection on the prior exhibit for the
21 same basis. It's not signed.

22 THE COURT: All right. So noted.

23 BY MR. MCDONALD:

24 Q. Are you there?

25 A. I am.

1 Q. And what does this RCO relate to?

2 A. RCO 277 is the -- I've been calling
3 them, when I was doing the audit, kind of like
4 settlement, global RCOs. There's seven or eight
5 of them in the 270 range, one for each
6 contractor.

7 So what 277 does is it identifies all of
8 those open issues between the subcontractor and
9 the contractor, and it's basically re-requesting
10 those change orders to the owner.

11 So 277 is specifically for MSI's work,
12 and you can see that in -- not only in the letter
13 but then on the attachment. It says in bold,
14 structural steel change orders MSI, and it lists
15 13 items there that Balfour is asking the owner
16 to approve in an RCO.

17 Q. Okay. And when is that request for
18 change order 277 dated?

19 A. March 13, 2019.

20 Q. Okay. And the MSI plaintiff's -- or
21 Defendant's Exhibit 155 unsigned change order is
22 February 11th of 2019?

23 A. Correct.

24 Q. All right. Now, attached to the
25 Plaintiff's Exhibit 155 is an Excel spreadsheet,

1 correct?

2 A. Yes. It's their change order log.

3 Q. Are the amounts that are included on
4 request for change order 277 also included on
5 this Excel spreadsheet?

6 A. 277 takes the positive amounts from the
7 change order log that haven't already been
8 approved as a change order in the past and
9 incorporates those into 277.

10 So if I said that differently, MSI's
11 change order log that's attached as an Excel
12 spreadsheet, in this instance for this
13 subcontractor, identifies all the change orders,
14 whether they were previously approved or not. So
15 in the second column where it says CO amount,
16 that's an amount that was actually approved in a
17 previous change order between Balfour and MSI.

18 But any amounts that don't have
19 something in the CO amount column are still open.
20 If you take those that are in black font, the
21 majority of those, I think, stands except for
22 one, the very last one, I believe. It's then
23 recast into RCO 277.

24 Q. Okay. And you said the positives?

25 A. Correct. There are -- there's two

1 negatives, and then in this particular
2 subcontractor, instead of using RCO or CI, they
3 used XO, and so XO6 is for \$3,050 negative and 26
4 is for \$76,491 negative that were again on their
5 pending log. Those don't make it to 277, the
6 positive ones do.

7 Q. The positive make it but then the
8 negative don't quite make it into RCO 277?

9 A. Correct.

10 Q. And once again -- well, all right.
11 Let's go to Otis. Is Otis up here on Exhibit
12 329?

13 A. Yes.

14 Q. All right. And what are they -- what is
15 it saying with regard to Otis? Does it have a
16 retainage number?

17 A. Yes. The claimed amount for Otis for
18 retainage is \$161,561.90.

19 Q. Okay. And then it has OCOs. How much
20 is that?

21 A. \$1,995.

22 Q. It talks about open contract amounts.
23 This one has a negative \$57,485. Do you know
24 what that is?

25 A. No. A negative open contract balance

1 would mean that the subcontractor would have
2 invoiced for more than their contract amount. So
3 that's not typical, not usual.

4 Q. Okay. And then you've got a total over
5 here of what number?

6 A. The total amount for Otis is
7 \$132,766.08.

8 Q. Before we get there, the total in the
9 yellow?

10 A. The total in the contract balance
11 section of Balfour's claim is \$106,071.90.

12 Q. And then they've got miscellaneous
13 claims and interests in how much?

14 A. \$26,694.18.

15 Q. And then they're claiming for a total
16 for Otis, Balfour is claiming a total for Otis of
17 \$132,766.08, right?

18 A. Correct.

19 Q. And is that just adding the 106 and the
20 26? Is that how you get there?

21 A. Yes.

22 Q. Okay. All right. Now, did Otis have
23 \$161,561.90 in retainage on this job?

24 A. No.

25 Q. Why not?

1 A. Well, let me rephrase that. You know,
2 they may have, but that wasn't their ending
3 retainage given the amounts that Library had paid
4 and then what Otis later recorded as to what its
5 retainage was.

6 Q. Okay. You're going to have to explain
7 that to me.

8 A. This one gets a little complicated
9 because Otis's retainage of \$161,000 is made up
10 of the amount that you see in Balfour's pay app,
11 I believe, 42. And then Otis submits another
12 invoice subsequent to that, and if you take 10
13 percent retainage on that invoice, you will get
14 to the 161,000 that you see here to the penny.

15 In that same month, what Balfour did
16 is -- and we heard prior testimony of it -- was
17 reducing the retainage from 10 percent to 5
18 percent; so in this case, roughly \$80,700. So
19 what Balfour did in that month's pay app was then
20 request that Library make that payment as well.

21 Q. Okay. So let me stop you there just to
22 make sure that I understand. So in the same pay
23 application, Otis billed -- made a bill, and that
24 resulted in there being \$161,561.90 in retainage,
25 Otis's money retainage, right?

1 A. Right, at that time.

2 Q. At that time?

3 A. Yes.

4 Q. And in the same pay application, Balfour
5 drew or made a draw reducing the 10 percent
6 retainage to 5 percent?

7 A. For the subcontractor, yes.

8 Q. For Otis?

9 A. Yes.

10 Q. Okay. So that would have been reducing
11 it to 80,000?

12 A. Yes, approximately.

13 Q. Okay. So Balfour received the 80,000 in
14 retainage?

15 A. Yes, because that was the done prior to
16 pay app 42, which is the last pay app that
17 Library has paid.

18 Q. So Library paid -- of the \$161,561.90,
19 Library has paid \$80,000 of it to Balfour?

20 A. Correct.

21 Q. Why then is Balfour back in here
22 claiming \$161,561.90 in Otis retainage?

23 A. I don't know.

24 Q. Did Balfour pay Otis the \$80,000
25 reduction in retainage?

1 A. It did not.

2 Q. Did Balfour certify that it had paid
3 Otis the \$80,000 reduction in retainage?

4 A. Yes, in the subsequent pay application
5 that it submitted to Library.

6 Q. What do you know about Library
7 Associates -- strike that. Let's move on to
8 Pasco.

9 MR. MCDONALD: Your Honor, I have
10 no idea what time it is. When you're ready, let
11 me know.

12 THE COURT: About 4:30. Let's
13 press on for about another half hour or so.

14 MR. MCDONALD: Okay.

15 BY MR. MCDONALD:

16 Q. Let's move on to Pasco. Are they on
17 here? That's also Automatic Sprinkler.

18 A. Yes, they are here.

19 Q. On here, they're called Palmetto
20 Automatic Sprinkler C, right?

21 A. Correct.

22 Q. All right. And so Balfour has
23 \$19,554.19 in the open payables column?

24 A. Yes.

25 Q. All right. What do you know about that

1 amount?

2 A. That amount is the amount that Palmetto
3 Automatic Sprinklers invoiced BBC over five
4 different payment applications.

5 I believe payment applications 35 to 40.
6 Actually, that would be six, so payment
7 applications 36 to 40. It invoiced for that
8 amount of \$19,554.19. Balfour then incorporated
9 that into their payment application to the owner.

10 The owner paid those amounts. And they
11 are amounts that Pasco has not been paid, and you
12 can see that through both their claim, and
13 frankly, this record here showing it as an open
14 payable. Balfour obviously knows that it hasn't
15 paid it to Pasco either.

16 Q. So that money, that \$19,554.19 has
17 already been paid by the owner to Balfour Beatty
18 over five different pay applications?

19 A. Yes.

20 Q. And with each subsequent pay
21 application, did Balfour Beatty certify that they
22 had in fact paid Pasco that money?

23 A. Yes.

24 Q. Under what theories of the general --
25 GMP contract, would they be entitled to pay that

1 money again? How does that work?

2 A. Well, it doesn't work. Again, from an
3 accounting perspective, the logical debit and
4 credit answer is that whoever prepared this
5 didn't know that Library had already paid that
6 amount in those payment applications. But
7 honestly, I'm just guessing.

8 Q. Now, are you aware of any claimed back
9 charges by Balfour as it relates to Pasco?

10 A. Yes. There's about \$107,000 worth of
11 back charges that Balfour is asserting that Pasco
12 should pay.

13 Q. Okay. So you got \$19,554.19 that the
14 owner has already -- that Library has already
15 paid Balfour, right?

16 A. Yes, that Balfour is holding.

17 Q. Okay. That Balfour has got,
18 notwithstanding the fact that they're asking for
19 it again. Then you've got \$46,815.19 in
20 retainage as it relates to Pasco, right?

21 A. Correct.

22 Q. All right. And you've got \$49,355.67
23 for RCOs as it relates to Pasco?

24 A. That is also correct.

25 Q. And if you add those two numbers

1 together, is it less than or more than 107,000 in
2 back charges?

3 A. If you add those two numbers together?

4 Q. If you add 46,000 to 49,000, it's less
5 than \$107,000.

6 A. So you're leaving out the -- okay. I'm
7 sorry. So, yes, if you add the retainage amount
8 of 46,815 and the RCOs of 49,355, it is less than
9 \$100,000.

10 Q. And should I have not left out the open
11 payable that we've already paid? Was I wrong to
12 do that? You tell me.

13 A. No. I was just comparing what their
14 total -- what BBC's total claim for Pasco is,
15 but, yes, Library has already paid \$19,554 of
16 that amount. And additionally, Balfour has told
17 Pasco that they have \$107,000 worth of back
18 charges that Pasco owes Balfour for.

19 Q. And notwithstanding that, they still
20 have miscellaneous claims and interests of
21 \$27,417.21?

22 A. That is on the claim, yeah. And I
23 couldn't determine whether that, again, was just
24 interest by trying to back into it or if there's
25 claims, miscellaneous claims in there as well.

1 Q. Did you -- when you were performing your
2 work during September of 2021, when these four
3 new things came in, did you ever have any
4 conversations with Mr. Simonton about back
5 charges?

6 A. Yes, on --

7 MR. HILDEBRAND: Objection, Your
8 Honor, calls for hearsay.

9 MR. MCDONALD: Your Honor, it's
10 801(d)(2)(b). Mr. Simonton is the representative
11 of Balfour, is presented as a representative of
12 Balfour. It is absolutely not hearsay.

13 MR. HILDEBRAND: He testified he's
14 retired from Balfour back in I think --

15 THE COURT: I hope he's getting
16 paid because he's been sitting back there
17 patiently since he testified. I'm going to allow
18 it.

19 BY MR. MCDONALD:

20 Q. You may answer.

21 A. Yes. I had a phone call with
22 Mr. Thompson and Mr. Simonton as the Court
23 requested to have them work with me to get me the
24 last of the accounting records so they're now
25 going to support their September claims.

1 And in that conversation, the three of
2 us were discussing what accounting records needed
3 to be provided to, you know, support the latest
4 version of the project costs. And again, I know
5 that we haven't spent a lot of time with the
6 earlier versions of the September claims, the
7 September 10th, September 12th and whatever the
8 third date was.

9 But the first two didn't recognize any
10 summary judgments, partial or full. And I said
11 to Mr. Thompson and Mr. Simonton, well, why would
12 you be still claiming all of the RCOs for this
13 particular sub, for example? They've got a
14 summary judgment. They're done. Why not just
15 put in that amount for them instead of what
16 you've always, you know, had in your records?

17 And Mr. Simonton explained that the
18 amount that the summary judgment was for may not
19 be paid to that sub because they're still
20 assessing back charges against those particular
21 subs, which again comports exactly to the motions
22 that Balfour has filed contrary to all of the
23 summary judgments where Balfour states that the
24 amount may be improper because of attorney's fees
25 not being applicable and because of -- instead of

1 back charges, I think they called them setoffs in
2 that -- in all of those documents.

3 So they didn't want to put the summary
4 judgment amount in their claim. They wanted to
5 leave the claim the way it was before, but you
6 can see on this form, especially because it's
7 blown up and it's a little bit larger, some of
8 those grayed-out cells.

9 And that's what they're doing there is,
10 when you see a grayed area, you will also see off
11 to the far right, it will either say SJ full or
12 SJ partial. And not that they're doing what I
13 told to them to do, but subsequent to our phone
14 call when I said, well, why can't we just use the
15 summary judgment amounts versus all the detail,
16 then those amounts now appear in this new section
17 called summary judgment.

18 And you can see that it's grayed out.
19 Like here, I'm taking it out of here is what I --
20 what I think that Excel spreadsheet is telling
21 me, and I'm putting it over here.

22 Q. And as it relates to Palmetto Automatic
23 Sprinkler, there's no indication that those back
24 charge -- there's no indication that's
25 \$107,000 in back charges on that line item?

1 A. No. Those back charges have not yet
2 been assessed against Pasco.

3 Q. All right. Let's go to First Choice.
4 Do you have First Choice up here?

5 A. Yes, fourth from the top.

6 Q. And is First Choice a party to this
7 action anymore?

8 A. No. They are no longer a party to this
9 action.

10 Q. Were they in the action?

11 A. They were.

12 Q. And then they quit?

13 A. Yes, they did.

14 Q. Tell me about the monies -- tell me
15 about what you know about the monies being
16 claimed by Balfour on Plaintiff's Exhibit 329 as
17 it relates to First Choice.

18 A. Specifically, the amount in the open
19 payables column is \$36,694.34. It's part of a
20 \$75,000 amount that Library has paid Balfour
21 through payment applications that Balfour has not
22 passed on to First Choice.

23 Q. Let me stop you there. So the
24 36,694.34, Library has already paid that to
25 Balfour?

1 A. That's correct.

2 Q. And Balfour has not paid it to First
3 Choice?

4 A. That's correct.

5 Q. And yet they're in here claiming it
6 again?

7 A. Yes.

8 Q. Okay. What else do you know about these
9 numbers?

10 A. Well, the difference between \$75,000 and
11 the amount you see in the open payables column is
12 also an additional amount that Library has paid
13 Balfour for First Choice Glass. It also has not
14 made it to First Choice Glass.

15 It doesn't -- it unfortunately is a very
16 complicated scenario where you have to dig
17 through all the pay apps. But it would be in the
18 retainage column at this point. And the
19 \$112,093.80 is an additional amount that was
20 invoiced to Library that Library paid that didn't
21 make its way to First Choice.

22 Q. And so there's this is full amount in
23 the open payables for First Choice, and then
24 whatever the difference between \$75,000 and
25 \$36,694.34, it finds its way over into the

1 retainage column?

2 A. Correct.

3 Q. That Library has paid Balfour, and
4 Balfour hasn't paid First Choice?

5 A. Correct.

6 Q. Okay. First Choice quit. They're not
7 in the lawsuit anymore?

8 A. No, they're not.

9 Q. And Balfour is asking for it again?

10 A. They're asking for it again but in
11 addition, whatever amount is on this row for
12 them, won't ever be cost of the work because
13 First Choice won't be receiving any additional
14 funds. Or if they do, it won't be cost of the
15 work.

16 THE COURT: Let me make -- ask a
17 question just so I'm clear. You mentioned the
18 figure 75,000. That's the amount that has been
19 paid? The \$75,000 figure has been paid in --
20 which includes the \$36,000?

21 THE WITNESS: Yes, correct.

22 THE COURT: Okay.

23 THE WITNESS: It's the net amount
24 that Library has paid to Balfour, that Balfour
25 has not passed on to First Choice. It didn't

1 happen in one transaction.

2 THE COURT: Right.

3 THE WITNESS: Like BMCC's \$137,000
4 transaction, where it's one invoice, and you can
5 see it, or the five transactions that Pasco
6 didn't get paid.

7 This is a little more complicated
8 because of the release of retainage and a couple
9 of other things happening in the same payment
10 application. It just works out to be exactly
11 \$75,000 that Library has paid in excess of what
12 First Choice has received.

13 THE COURT: Okay. All right.

14 BY MR. MCDONALD:

15 Q. Was it confusing to you to try and
16 figure all of this out?

17 A. It was extremely difficult, and I am
18 very sure I haven't figured it all out.

19 Q. Did Balfour issue a negative change
20 order in October of 2020?

21 A. I don't remember the date.

22 Q. Was there a negative change order issued
23 for glass credits?

24 A. Yes, there was.

25 Q. And how much was that for?

1 A. I don't remember.

2 Q. Okay. All right. Let's go to Precision
3 Walls. Are they up there?

4 A. Precision Walls is on the board, yes.

5 Q. And is Precision Walls a party to this
6 case?

7 A. No, Precision Walls is not a party to
8 this case. They're out.

9 Q. And did they used to be a party to the
10 case?

11 A. They did.

12 Q. All right. And do you know whether or
13 not Precision Walls is pursuing any money for
14 Balfour Beatty?

15 A. Precision Walls is not seeking any funds
16 in this -- related to this contract.

17 Q. And therefore, it couldn't be cost of
18 the work?

19 MR. HILDEBRAND: Objection, Your
20 Honor. How does she know whether Precision Walls
21 is pursuing any money or not? I mean, there's
22 no -- and that's my objection. There's no
23 foundation for that.

24 They were a party. They're not a party.
25 But she doesn't -- it's just speculation on her

1 as to whether Precision Walls has a right or
2 isn't -- going to pursue a right or isn't
3 pursuing a claim.

4 MR. MCDONALD: I will lay some
5 further foundation, Your Honor.

6 THE COURT: All right. Go ahead.

7 BY MR. MCDONALD:

8 Q. Did you review the 30(b)(6) deposition
9 of Precision Walls?

10 A. I did.

11 Q. And based upon that, your review of the
12 30(b)(6) deposition of Precision Walls, what is
13 your understanding of any claims that Precision
14 Walls is pursuing against Balfour as it relates
15 to this contract?

16 A. In the 30(b)(6) deposition, the
17 representative stated that he was not aware, did
18 not believe that there were any claims that would
19 be filed. In addition, there was a motion to
20 dismiss in this action for that particular
21 subcontractor.

22 THE COURT: All right. I will
23 allow it in.

24 MR. MCDONALD: Your Honor, I have
25 four more, and then I think it would be a good

1 stopping point. Does that work for your time?

2 THE COURT: That would be perfect.

3 THE WITNESS: And just as a --
4 maybe because this has happened that many times,
5 but in fact, I was in the courtroom when
6 Mr. Floyd, I believe, made a motion to dismiss
7 himself from this action. It was a long time ago
8 when I was here giving some testimony about the
9 right to audit; so that was in 2019.

10 THE COURT: That's the day I found
11 out Sam was a female.

12 THE WITNESS: As long as you know
13 now.

14 BY MR. MCDONALD:

15 Q. All right. Let's go to Robert Thomas.
16 Are they up here?

17 A. Robert Thomas, yes, they're on the
18 board.

19 Q. And what is the total amount that they
20 want for Robert Thomas?

21 A. The total amount for the contract
22 section and the miscellaneous claims and interest
23 are \$38,285.95.

24 Q. Okay. So on this, they have a contract
25 balance, OCOs of \$20,050 for Robert Thomas,

1 right?

2 A. Correct.

3 Q. And this is on Plaintiff's Exhibit 329,
4 right?

5 A. Correct.

6 Q. And then they've got open contract
7 balance of \$10,820, right?

8 A. That is true.

9 Q. And then they totaled those at \$30,870,
10 right?

11 A. The total for the contract section, the
12 yellow section is \$30,870.

13 Q. And how do they -- how do they get to
14 that number?

15 A. Well, simplistically on this Excel
16 spreadsheet, it's just the addition of the
17 \$10,820 of open contract balance and the 20, 050
18 in OCOs.

19 Q. Okay.

20 A. And those are added together.

21 Q. Okay. And once you left staring at the
22 Excel spreadsheet, how do they -- do you have an
23 understanding of how they got to those numbers,
24 how they're able to add those two numbers
25 together?

1 A. Once you get past the Excel spreadsheet,
2 you can't add those two numbers together because
3 one is a subset of the other.

4 Q. Okay. And do you know whether or not
5 Library paid Robert Thomas directly?

6 A. Library paid \$16,000 through the regular
7 payment application process to Balfour, and
8 additionally, Library paid Robert Thomas directly
9 for the \$10,820 that you see there in the open
10 contract balance.

11 Q. So how is Balfour in here claiming that
12 amount?

13 A. It will never be a cost of the work.
14 Robert Thomas has been paid in full.

15 Q. With Library Associates' money?

16 A. In both instances, yes.

17 Q. Let's go to Trimark up there.

18 A. Trimark Foodcraft, yes, they are up
19 there.

20 Q. All right. Were they in this action?

21 A. They were in this action, yes. They had
22 a lien.

23 Q. Do they have a lien anymore?

24 A. They do not.

25 Q. Are they in the action anymore?

1 A. No. They are out.

2 Q. All right. Warco. Is Warco up here?

3 A. Yes. Warco has an OCO amount of
4 \$67,966, and then RCO amount of \$7,283. There
5 are miscellaneous claims and interests, and then
6 the summary judgment is also identified in the
7 gray section.

8 Q. Yeah. And we will get to that tomorrow.
9 I just want to focus on the yellow section for
10 right now. Okay? The 67,966 is on the line item
11 for Warco, correct?

12 A. Correct.

13 Q. Do you know whether or not Library
14 Associates has already paid BBC that amount?

15 A. Yes, that amount has already been paid.

16 Q. What rights under the contract do they
17 have to come in here and ask you for this again?

18 A. I don't think it's a valid claim, and it
19 will not be cost of the work.

20 Q. Is it included in any of the OCOs?

21 A. Well, the amount that's being claimed is
22 the OCO, yes. And then that OCO was also
23 included. It's -- the amount has already been
24 invoiced through the payment application process
25 through the OCOs, yes.

1 MR. MCDONALD: Your Honor, this is
2 a good stopping point for me.

3 THE COURT: All right.

4 MR. MCDONALD: Thank you, Your
5 Honor.

6 THE COURT: It's just about 5
7 o'clock. Let's break for the day and come back
8 tomorrow at 9:30.

9 (The hearing adjourned at 4:56 p.m.)

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1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Adams, Certified
5 Shorthand Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness whose attached in the
8 foregoing hearing was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but
10 the truth in the within-entitled cause; that said
11 hearing was taken at the time and location
12 therein stated; that the testimony of the witness
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 EIGHTEEN
) 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)

18 Third-Party Defendants.)

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 November 3, 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

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ON BEHALF OF PLAINTIFFS:

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ON BEHALF OF DEFENDANT LIBRARY ASSOCIATES:

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ON BEHALF OF DEFENDANT WATSON ELECTRICAL:

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ON BEHALF OF DEFENDANT OLD NORTH STATE & LITHKO:

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1 THE COURT: We are still on
2 Ms. Hadley, aren't we?

3 MR. MCDONALD: Yes, Your Honor.

4 THE COURT: Any other matters we
5 need to take up?

6 MR. MCDONALD: No, sir.

7 THE COURT: Ms. Hadley, come on
8 forward. You're still under oath. We'll pick up
9 where we left off yesterday.

10 All right. Mr. McDonald?

11 MR. MCDONALD: Thank you very much,
12 Your Honor. May it please the Court.

13 DIRECT EXAMINATION

14 BY MR. MCDONALD:

15 Q. Ms. Hadley, where we left off yesterday
16 is we had gone through the yellow section of
17 Plaintiff's Exhibit 329; is that correct?

18 A. Yes, for the most part.

19 Q. And what I would like to do now is move
20 over to the green section entitled delay damages.
21 Okay?

22 A. Okay.

23 Q. And I believe you touched on this
24 earlier, but is this -- do you know what is
25 included in the \$3,889,189.52 cents in delay

1 damages on the Balfour Beatty line item?

2 A. No.

3 Q. All right. Do you know whether or not
4 that item includes the \$700,000 in general trades
5 we talked about yesterday?

6 A. I don't know where that number comes
7 from. I haven't seen that number before, and it
8 hasn't been a previous number. But because the
9 general trades number doesn't appear anywhere
10 else, I think it's logical, but I would just be
11 assuming whether in that \$3,000,000 in the green
12 column.

13 Q. Okay. And have you had an opportunity
14 to look at the general trades claim that's been
15 made by Balfour Beatty?

16 A. Yes.

17 Q. Okay. And can you explain to the Judge
18 what the upshot of that inquiry was into the
19 general trades claim?

20 A. So general trades is a line on the
21 schedule of values in the pay apps. There hadn't
22 been a previous claim for general trades in the
23 January of 2019 letter or in the binders. It
24 first appeared in one of the four versions that
25 came in September.

1 The support that was provided, which is
2 the PowerPoint presentation that Mr. Casey spoke
3 from when he was testifying, accumulates -- if I
4 could look at that PowerPoint presentation?

5 Q. Sure. I believe that is Plaintiff's
6 Exhibit 332.

7 A. Yes, that's what I was thinking about.
8 The PowerPoint presentation is -- I think it's
9 roughly 15 pages. It's the very last page that
10 has the general trades information on it.

11 And how this claim amount was prepared
12 is Balfour took eight different cost codes from
13 their accounting system and compared what they
14 had internally budgeted for those eight codes to
15 what they had actually spent in those eight
16 codes, and then took the difference. So the
17 difference was \$770,134.

18 MR. HILDEBRAND: Your Honor, I've
19 got an objection that's going to take me just a
20 minute. And I would like to work you through a
21 few facts in this letter -- in this matter, if I
22 may.

23 THE COURT: All right. First of
24 all, what's the objection?

25 MR. HILDEBRAND: The objection is

1 to her rendering an opinion on this issue, and I
2 would like to go through, if I may, the basis for
3 that.

4 One, she just said that the general --
5 the general trades overages is something that we
6 never made reference to or made a claim for until
7 September, but our first interrogatory responses
8 or second interrogatory responses to the
9 defendant dated September 24, 2019. The very
10 second --

11 THE COURT: All right. Well, that
12 sounds like a cross-examination question.

13 MR. HILDEBRAND: But here's where
14 I'm going to with the -- you're right on that
15 one. The merits are, we asked the plaintiff to
16 identify their experts and to identify the
17 opinions of their experts back in May 29 of 2019.

18 I've got their responses. Their
19 responses are simply, we will -- we haven't
20 decided who our experts will be. We'll identify
21 them later in the subject matter; so we never got
22 anything else.

23 We then got a scheduling order from the
24 Court, Your Honor. There was an amended
25 scheduling order requiring all experts to provide

1 their opinions in detail and basis -- factual
2 basis for their opinions. There were several
3 extensions to that scheduling order, you may
4 recall, with the last deadline for experts to
5 render opinions running on August 16 of this
6 year, 2021.

7 And you will recall, the Court has said
8 that scheduling orders are not frivolous
9 documents, and that if it hasn't been produced,
10 then it can't be introduced and such. So as of
11 August, they could have updated any of their
12 opinions if they wanted to.

13 In September of this year, we received
14 expert designations from Mr. Bundy with a copy of
15 all of the -- I would like to mark this for
16 identification.

17 THE COURT: Well, you're getting
18 way ahead of yourself, Mr. Hildebrand. You've
19 got an objection, and I want to rule on your
20 objection. But you're -- now, you're trying to
21 put evidence in. The basis for the objection is
22 that this expert has not previously opined on
23 this? Is that the objection?

24 MR. HILDEBRAND: Absolutely, Your
25 Honor.

1 THE COURT: Okay. All right.

2 MR. HILDEBRAND: Yes, sir.

3 THE COURT: All right.

4 Mr. McDonald, where are we going?

5 MR. MCDONALD: Where we're going
6 is, she couldn't have previously opined on this
7 because it was produced, once again, as this
8 issue came up yesterday, in September of 2021.

9 All she has done -- and I tried to laid
10 the foundation for it -- is conduct this audit of
11 a moving target that continually moved into
12 September of 2021. In fact, as Your Honor will
13 recall, one of the things that she was doing at
14 the start of this trial was try to get the
15 updated numbers that she had -- didn't have.

16 And so she's doing the best that she can
17 to understand this claim and to explain to Your
18 Honor, based upon her experience, what this is
19 and what it means and how it breaks down and
20 whether it's reliable. And that's all -- that's
21 all she's doing. They knew she was going to
22 audit. They knew she has been auditing.

23 THE COURT: Okay. All right.

24 Based on that, Mr. Hildebrand, what's your
25 position?

1 MR. HILDEBRAND: Well, it's very
2 simple, Your Honor. This -- these are new
3 opinions. These general trade cost overages were
4 identified over two years ago for \$796,850.07.
5 It's in our responses to the defendant's
6 interrogatories, and they're dated September 24,
7 2019. We set forth our general trade overages.

8 Since then, Ms. Hadley has issued
9 several reports that they have said -- when I've
10 asked them, what is her opinion going to be?
11 They've said, it's going to be on these four
12 reports. They have nothing to do with these
13 general trade cost overages.

14 She's now coming into Court, after all
15 of this time, after your scheduling orders, after
16 their discovery responses, and trying to offer
17 opinions that she has not professed. Our -- I've
18 taken her deposition. She didn't testify about
19 that. It was not in the reports for her
20 designations.

21 And frankly, Your Honor, it's
22 prejudicial to me for her to come in as their
23 last witness, and now offer opinions on these
24 issues when many of our witnesses have already
25 testified. They're from out of state. So she

1 hasn't testified about it, but they could have
2 cross-examined Casey Thompson about it, had they
3 wanted to.

4 But these are opinions that have not
5 been espoused, have not been produced, and
6 according to your order, they should have been.
7 All of this -- there's no new information on our
8 general trade cost overages. Thank you.

9 THE COURT: Well, let me ask this
10 question: Does general trade costs show up on
11 this Plaintiff's Exhibit 329?

12 MR. HILDEBRAND: They do, and they
13 did in our discovery responses back in 2019.
14 It's the same ones. It's the general -- all this
15 is, Your Honor, is --

16 THE COURT: It's demonstrative, I
17 understand that.

18 MR. HILDEBRAND: It's
19 demonstrative.

20 THE COURT: It's how we calculate
21 how we got to the damages.

22 MR. HILDEBRAND: Right, right. But
23 it's the same -- the damages have changed a
24 little bit. The primary reason that they
25 vacillated in September was simply based on the

1 fact that we had summary judgments, some
2 subcontractors were in and out, and some of the
3 interest rates were -- had to be calculated.

4 But all of this underlying data, Your
5 Honor, none of this has changed since January of
6 2019, when this project was finished and all of
7 the data was done. I mean, the project was
8 overall. All the data was done; so there's no
9 new data here.

10 THE COURT: So the underlying data
11 then, is it -- it sounded like she is estimating,
12 and that's the basis for this is what it sounded
13 like to me.

14 MR. MCDONALD: May I ask her why
15 this is new information?

16 THE COURT: Sure, if it is.

17 BY MR. MCDONALD:

18 Q. Why was this new information,
19 Ms. Hadley?

20 A. General trades claim was never made in
21 their January 2019 letter. The response to
22 interrogatories that Mr. Hildebrand is talking
23 about is a question regarding what's in their
24 lien. It was never in their claim. It was only
25 in a lien.

1 On the phone call that I had with
2 Mr. Simonton and Mr. Casey last month, I asked
3 them why this new item appeared. And Mr.
4 Thompson explained, well, it had always been in
5 our lien, but now we're including it in the
6 claim.

7 So I had never had the opportunity to
8 evaluate it as far as me trying to determine
9 total project cost, which was what -- was in
10 their accounting record, plus their claim, and it
11 was a new item.

12 THE COURT: And that was as of
13 when? When was that conversation?

14 THE WITNESS: That was as of
15 September 14th, 2021, when you ordered them to
16 have a phone call with me. The number that
17 Mr. Hildebrand just read out that was in his
18 response to the interrogatories was
19 790-some-thousand. The amount that they're
20 claiming as of last month was 770,000; so even
21 that number is outdated as of three weeks ago.

22 MR. HILDEBRAND: Your Honor, if
23 it's changed a few thousand dollars, the numbers
24 are the same, and they could have cross-examined
25 our witnesses on it. The point is, Your Honor,

1 one, if she -- she can't testify based on your
2 scheduling order, but, two, if they wanted to
3 have her testify in a claim that she has new
4 opinions based upon new evidence, then they have
5 to notify us.

6 And I would refer the Court -- there's a
7 very specific provision on this in Rule 26(e)
8 supplementation of responses.

9 A party who has responded to a request
10 for discovery with a response that was complete
11 when made is under no duty to supplement his
12 response to include information acquired except
13 that request for discovery under Rule 31, 33, 34
14 and 36 shall be deemed to continue from the time
15 of service until the time of trial, so that
16 information sought, which comes to the knowledge
17 of the party or his representative or attorney,
18 after his original answers have been submitted
19 shall be properly transmitted to the other party.

20 And then it goes on to specifically talk
21 about experts, and it says, in addition, a party
22 is under a duty seasonably to supplement his
23 responses with respect to any question directly
24 addressed to number two, the identity of each
25 person expected to be called as an expert

1 witness, the subject matter of which he's
2 expected to testify, and the substance of his
3 testimony.

4 So it was barred -- the due date was
5 long ago under your scheduling order, which you
6 said. If she says that she has got new
7 opinions -- I don't think that any of this
8 evidence is new. I don't think any of this data
9 is new. It all goes -- nothing has happened
10 since January of 2019.

11 THE COURT: Well, her statement was
12 that she had a conversation with Casey Thompson
13 on September 14; is that right?

14 THE WITNESS: I don't know if it
15 was the 14th, maybe the 15th with Mr. Thompson
16 and Mr. Simonton.

17 THE COURT: But that was after
18 trial commenced?

19 THE WITNESS: Right. It was after
20 trial in response to us trying to get the new
21 numbers. And two new claims had been submitted
22 as of that time, and we didn't have the
23 accounting records to support those two numbers.

24 THE COURT: All right. Based on
25 that, I'm going to allow it. I'm going to

1 overrule the objection, and I am going to allow
2 it. The numbers are changing. We're still going
3 forward. It impacts her analysis, and I think
4 where you're going with this is certainly right
5 for cross-examination, but I'm going to allow her
6 to give her opinion. Okay?

7 MR. MCDONALD: Thank you, Your
8 Honor.

9 BY MR. MCDONALD:

10 Q. All right. Ms. Hadley, would you
11 explain the general trades as claimed by Balfour
12 Beatty?

13 A. The general trades amount that's being
14 claimed now is the difference between the amount
15 budgeted internally for those eight cost codes
16 and the amount that was actually incurred for
17 those eight cost codes.

18 There are other general trades cost
19 codes that were not included in this claim.
20 These were just the eight that were identified to
21 be used in this claim. So there's several things
22 that I have a problem with. First of all, this
23 is a total cost claim, and a total cost claim is
24 very unfavored in the courts for very good
25 reasons because you --

1 MR. HILDEBRAND: Objection, Your
2 Honor. She can't tell you -- that's a legal
3 issue for you to decide. There's -- it's not a
4 total cost claim, and if they want to decide
5 cases where the courts have addressed a total
6 cost claim, that's fine. But I think it's
7 improper for her to render a legal conclusion to
8 tell you what the courts have been doing.

9 THE COURT: Didn't we have somebody
10 opine on that already? Didn't somebody talk
11 about that already in the case, the total cost
12 claim, the different types of claims?

13 MR. HILDEBRAND: Somebody said it
14 was the total cost.

15 THE COURT: Yeah. Okay. All
16 right.

17 MR. HILDEBRAND: Not our witness.

18 THE COURT: Yeah. Okay. All
19 right. I will sustain that one. Go ahead.

20 BY MR. MCDONALD:

21 Q. You may continue, Ms. Hadley.

22 A. The claim is the difference between the
23 amount that they budgeted internally. That
24 amount hadn't been provided to Library or
25 approved. It wasn't as if a budget had been

1 submitted, and we saw those details.

2 It was an internal accounting, where
3 they had taken the contract and broken it out
4 into more detail than what you see on the
5 schedule of values. But that individual one line
6 item for general trades was apparently made up of
7 many items, and this was the budget for that many
8 item.

9 The risk, when you're requesting in a
10 claim, the difference between what you internally
11 budgeted and what you actually spent is now it
12 comes into question the reasonableness of what
13 you had internally budgeted because that becomes
14 completely relevant on a dollar for dollar
15 situation.

16 In addition, the actual cost would also
17 need to be reasonable, and then the third element
18 is that you would need to prove that every one of
19 those dollars of cost overruns was the
20 responsibility of the contractor -- or the owner,
21 and none of those overruns were the
22 responsibility of the contractor.

23 So even in this situation where you have
24 at least Mr. Doran talking about a 20 day
25 non-compensable period, by claiming the full

1 amount of costs that were purportedly delay
2 driven, you're no longer acknowledging that 20 of
3 those days were non-compensable. But moreover,
4 when you are requesting money because of a
5 delay --

6 MR. HILDEBRAND: Objection, Your
7 Honor. She is going into delay damages that --
8 or delay issues that have been testified about,
9 the scheduling issues. As to what is compensable
10 and what is not compensable on delays, that's a
11 critical path analysis that she's not qualified
12 to give.

13 THE COURT: Overruled. Go ahead.

14 THE WITNESS: When you identify
15 these costs as delay driven as BBC did on the
16 easel there, as -- from an audit perspective,
17 what we look at is we look at the costs and see
18 whether they really are increasing due to time.

19 It was a monthly cost for the
20 superintendent. Typical general condition-type
21 costs, then that make sense, and we talked -- or
22 I spoke yesterday about the difference audit
23 tests you do when it's in a claim for expanded
24 costs versus a claim for extended costs.

25 When you take a look at some of the

1 costs that are being claimed here. For instance,
2 \$127,000 of the 770,000 that's being claimed is
3 for a one time purchase for generators that was
4 done in 2015. So it wasn't as if they were
5 renting generators from Sunbelt or extending
6 their costs. That was a purchase that doesn't
7 appear to be damage due to delay. There's no
8 increased cost due to delay.

9 So what we would expect to see when
10 people are preparing -- companies are preparing
11 claims is to evaluate these costs to really
12 identify those that are time driven and due to
13 delay, and then represent that they increased due
14 to the length of time. But in this situation,
15 through some simple tests, I can see that those
16 costs all are not related to time.

17 A fixed cost like that, a one time
18 purchase at the beginning of the job, you know,
19 typical move and demove, fencing, those sort of
20 things, they don't increase due to a delay, and
21 that's what we're seeing in some of these costs.
22 BY MR. MCDONALD:

23 Q. Were the general trades that are being
24 claimed in this action, were they billed during
25 the job?

1 A. So this is another issue that gets to be
2 very confusing, but if you recall, there's a
3 general conditions line item on this -- on the
4 pay application, and then the very next line is
5 general trades.

6 While each one of them have separate
7 ceilings, on an interim basis, the general
8 conditions were just billed as a fixed monthly
9 amount for the first 28 months of the project,
10 which is pretty common when you have general
11 conditions in a GMP.

12 Because, otherwise, it would require the
13 contractor to accumulate labor and accounting
14 reports and payroll records every single month to
15 support their supervision and management costs,
16 and it is very paper intensive. So you typically
17 just bill those costs equally or at some
18 agreement between the parties until the end when
19 you do this final accounting and final
20 reconciliation.

21 So the cost here, the biggest cost here,
22 which is the temporary power cost, actual cost of
23 \$694,000 had never been billed on the schedule of
24 values that are reimbursable each month; i.e., on
25 the general trades line or on the staging and

1 hoisting line, which is the other line where BBC
2 would incur the costs internally versus
3 subcontracted or there's some self-performed
4 costs, if you will.

5 So the only way that BBC has ever been
6 reimbursed for any of these actual costs would
7 have been through the general conditions line.
8 So in my audit report, I identified these costs
9 as being general conditions costs and not general
10 trades costs for that reason.

11 Additionally, I included two attachments
12 to my audit report regarding these costs where I
13 had noted that Mr. Clements' RFP that he had
14 submitted and asked the contractors to respond to
15 told the contractors what type of costs to put as
16 general conditions and what type of costs to put
17 as general trades and what type of costs would be
18 billed via the subcontractors.

19 Then, as a separate attachment to my
20 audit report, I attached BBC's response to that
21 RFP, where they had identified that temporary
22 power would be included as general conditions
23 cost. And all of that aligned with what we saw
24 happening every single month because, once again,
25 they've never billed for these costs, so one has

1 to assume that they have been part of general
2 conditions.

3 The other issue is that the response to
4 the RFP that BBC submitted had general conditions
5 costs --

6 MR. HILDEBRAND: Objection, Your
7 Honor.

8 THE COURT: What's the objection?

9 MR. HILDEBRAND: She's referring
10 to -- part of her opinion apparently is based on
11 a request for proposal that defense counsel has
12 been arguing, look, we've got a contract. The
13 contract includes all the terms. Preexisting
14 documents doesn't matter. And you said, yeah, I
15 agree, I'm not going to allow that in.

16 This RFP is not -- inarguably, I can go
17 through the specific provisions with you. It's
18 not a part of the contract, and it's improper for
19 her to include that in her opinions or even to
20 reference it.

21 THE COURT: Yeah. An RFP, right?

22 MR. HILDEBRAND: Yes, sir.

23 THE COURT: Okay.

24 MR. MCDONALD: The RFP is in
25 evidence. It's an exhibit, and more importantly,

1 what she's using it to do is to explain how the
2 general trades were in fact applied, and she
3 started off with, throughout the project, pay
4 applications.

5 I think this is just another example
6 that she's showing how these costs were actually
7 coded by Balfour Beatty inconsistent with what
8 they are saying now.

9 THE COURT: That's what you
10 mentioned about Jim Clements saying this is how
11 it should be done; is that what you --

12 THE WITNESS: And how BBC said they
13 were going to do it and both of those documents
14 are included as attachments to my audit report to
15 support my opinion about these costs.

16 THE COURT: Okay.

17 MR. HILDEBRAND: But, Your Honor, I
18 know that she says that's what she includes as
19 part of her opinion. She says, the RFP says this
20 about general conditions, but it's not in the
21 contract.

22 So it's absolutely inappropriate for an
23 expert to come in here and say, well, I saw a
24 document. It is not a part of the contract.
25 They didn't include it in the contract, but I'm

1 going to testify here in Court and use that as
2 the basis for my opinion. It's just
3 inappropriate.

4 THE COURT: She's trying to --
5 first of all, she is trying to quantify the level
6 of damages, and at this point in time, it seems
7 to me her testimony is, in what category you put
8 those damages.

9 That's really what this Exhibit 329, I
10 think, is trying to do, at least for the
11 plaintiff. And now it's the defense's time to
12 attack that. So I'm going to allow it. I'm
13 going to overrule your objection. I'm going to
14 allow it.

15 THE WITNESS: So in BBC's response
16 to the RFP, they identified X's as to where
17 certain costs would be billed, and I'm simply
18 noting the alignment of their response to the RFP
19 to their actions over the contemporaneous life of
20 the project, which was to not bill these costs as
21 general trades, but to instead incorporate them
22 into the general conditions costs.

23 The last item that I wanted to mention
24 was that --

25 THE COURT: That being in support

1 of your opinion that it was included in the
2 general conditions, right?

3 THE WITNESS: Correct.

4 THE COURT: Okay. All right.

5 THE WITNESS: And the only reason
6 we didn't include it contemporaneously over the
7 life of the project was because of the agreement
8 between the parties that on an interim basis for
9 general conditions, they were just going to bill
10 a fixed amount and figure it out at the end.

11 The difficult part, again, is that BBC's
12 response to the RFP had identified 2.4 million
13 dollars of general conditions, and as
14 Mr. Clements testified and as you can see in the
15 award of the GMP, BBC requested an additional
16 \$760,000 roughly in order to get the job done for
17 general conditions.

18 So the amounts in the RFP as proposed
19 don't line up exactly to what they have in their
20 budget now because they did get that extra
21 \$750,000 that they felt was necessary in order
22 to, you know, break even or make money on the
23 project.

24 So now we have these accounts that
25 Library has never seen before in a billing now

1 being claimed for roughly the same amount,
2 \$770,000, that they're saying that they were over
3 budget. But their budget wasn't ever revised for
4 the extra \$750,000 that they received at the very
5 end of the negotiation for the A133 amendment.

6 So, again, with the total cost -- when
7 you're claiming the difference between your
8 budget and your actual costs, it is very
9 important to recognize any additional budget that
10 you've received through the life of project;
11 i.e., change orders, the approval to use
12 contingency.

13 As you received more money in the GMP
14 for those budgeted items, you have to recognize
15 that your budget increased and that the owner has
16 already paid for some of that budget increase.
17 And the calculations that are in the PowerPoint
18 presentation are only recognizing the original
19 initial budget that BBC put into its accounting
20 records.

21 If you take a look at the budget
22 adjustments that BBC made throughout the life of
23 the project because they received money and
24 change orders or because they got the approval to
25 use contingency or other budget transfers, the

1 budget significantly increased. And if you were
2 to compare that increased budget to their actual
3 costs that they're not showing here, this claim
4 would drop down to about \$221,000.

5 So I think it is inappropriate to
6 include in a claim now the difference between
7 what you originally wanted to spend and not
8 acknowledge the fact that you got budget
9 increases throughout the life of the project, but
10 additionally, if that original budget does not
11 acknowledge the fact that you negotiated a higher
12 amount for this issue right prior to the A133
13 amendment.

14 BY MR. MCDONALD:

15 Q. All right. And on that note, while
16 you're on the PowerPoint, is RCO 122 in general
17 conditions, is that referenced in that
18 PowerPoint?

19 A. In the general conditions portion of the
20 claim, which is the page just prior to the
21 general trades page in the PowerPoint, Balfour
22 identifies their actual costs that they have
23 incurred for general conditions, and then they
24 make three adjustments to their actual costs.

25 They subtract out legal fees. They

1 subtract out general conditions for RCO 122, and
2 they then subtract the budget to again request
3 the difference between what their actual costs
4 are and what they've budgeted to spend.

5 Q. What they had originally budgeted to
6 spend?

7 A. What they had originally.

8 Q. And what is the number that they
9 subtract out for RCO 122?

10 A. So the credit that they apply for RCO
11 122 is \$290,353, which is the amount that Balfour
12 had included in their RCO 122 when Mr. Starcevic
13 submitted the RCO to Library on November 27th.

14 But on that same day, Mr. Simonton sent
15 in another RCO 122 called 122R1, and in that
16 letter, Mr. Simonton noted that this was
17 replacing the previous RCO.

18 And the letter states that the amounts
19 now being claimed for Lithko and BBC were being
20 reduced, and here's a revision. Mr. Simonton was
21 mistaken. The amount for BBC wasn't reduced. It
22 actually increased. Lithko's claim --

23 Q. They actually what?

24 A. Increased.

25 Q. Increased.

1 A. So while Lithko's amount did go down
2 significantly, the amount now being requested for
3 BBC actually increased to \$320,000, and that's
4 the latest version of RCO 122. And that amount
5 that's being claimed for RCO 122R1 is shown in
6 their RCO claim in the blue column there at the
7 revised amount for BBC.

8 But when they applied the credit in the
9 general conditions claim here, they're using the
10 original RCO, which is a much lower amount to the
11 tune of about \$30,000.

12 So I don't know which one is the right
13 one, but I do think -- or I do know that you have
14 to use the same one when you're claiming costs as
15 when you're crediting that same cost in another
16 claim element in order to avoid duplication, and
17 that isn't what was done here.

18 THE COURT: So it's either 290 or
19 it's 320, but it's not both?

20 THE WITNESS: It is not both --

21 THE COURT: It can't be both?

22 THE WITNESS: -- to make the
23 highest claim in both situations.

24 THE COURT: All right.

25 BY MR. MCDONALD:

1 Q. When you're doing an audit and you find
2 a situation like this that we just discussed, do
3 you -- and I'm going to use the term, you know,
4 whatever it is, an inconsistency, okay -- do you
5 make an effort to look and see if there are any
6 inconsistencies that are in the favor of the
7 other party?

8 A. Well, I'm not looking for
9 inconsistencies going in either direction. I'm
10 taking just auditing, just taking the amount
11 that's being claimed now, and I'm reconciling it
12 to the supporting documentation. I'm going to
13 point out an inconsistency either way.

14 Q. Thank you. And I believe we touched on
15 this earlier. The Lithko portion of the delay,
16 the \$12,459.96, do you have any idea where that
17 comes from?

18 A. I do not. Like I said, Lithko did have
19 a revised number in RCO 122, and their amount did
20 go down. I think it's around 390,000 right now.
21 So I have no idea where \$12,000 came from.

22 Q. Okay. And let's talk about the next
23 one, which is for Old North State Masonry
24 \$1,970,717.07. Was any support provided for that
25 number?

1 A. There is no support for that number. I
2 have spent a lot of time looking at Old North's
3 claim over time. And the amount did change over
4 time. It has never been the amount that's listed
5 here.

6 Q. Okay. And take a look, if you would,
7 and they are Plaintiff's Exhibits. They're to
8 your right. I will grab them for you -- excuse
9 me, Defendant's Exhibit 36 and 32. I will ask if
10 you have seen those documents before?

11 A. Yes. These are two change orders that
12 were issued to Old North State Masonry, change
13 orders 19 and change orders 20.

14 Q. Okay. Let's start with 19, Ms. Hadley,
15 which is Exhibit 36.

16 A. 36, yes.

17 Q. And what does that show?

18 A. Change order 19 is another summary
19 settlement change order that I was speaking of
20 yesterday that basically takes all of the
21 remaining outstanding issues between Old North
22 and BBC and wraps it together into, you know,
23 one -- it takes the negatives and the positives
24 and puts them together to come up with one
25 number.

1 In this instance, which is different
2 from Lithko from yesterday, this is actually an
3 added change order, so it's adding \$68,740.20 to
4 Old North's contract, presumably for the
5 additional items that are listed in the box, in
6 the middle of the page to the top page.

7 Q. And are there any numbers listed in that
8 box?

9 A. No. There's no numbers listed on the
10 box. The box represents an excerpt from Old
11 North's change order log, which it had attached
12 at various times to its lien waiver reservations.

13 And you can see in the record at various
14 stages in time, it had included the things that
15 it was -- it believed was an outstanding change,
16 but the bottom third of that, that talks about
17 all of the back charges that should be assessed
18 against Old North State Masonry for window reload
19 and caulking hadn't appeared on the change order
20 log in the past.

21 So I do know the amounts for some of the
22 positive items, but I don't have any values for
23 the negative items because the excerpt that's on
24 this change order excludes all of the dollar
25 amounts.

1 Q. And when is this change order dated?

2 A. Well, the date of the change order says
3 July 9, 2019, but the parties signed it at
4 various dates in September of 2019.

5 Q. September of 2019?

6 A. Yes.

7 Q. And one of the things on here, albeit
8 none of them having numbers is stucco buildup due
9 to exterior masonry issues; is that right?

10 A. Yes. That's one of the items that's
11 being resolved through this change order.

12 Q. Okay. Do you know who the stucco
13 subcontractor was?

14 A. I sure did. I often refer to this item
15 that BBC produced in its response to this set of
16 interrogatories -- it's a copy of their pay
17 application, and in red, they wrote who the
18 subcontractors are. So I have to use this all
19 the time. It's Premier Exteriors.

20 Q. Premier Exteriors?

21 A. So in Premier Exteriors' change orders,
22 you can see their contract value growing for the
23 additional work that they're having to get paid
24 for due to correction of Old North's work. So
25 these are those --

1 MR. WINDLE: Objection, Your Honor.

2 There's no evidence or foundation that this
3 relates to -- that anything in Premier's pay
4 application relates to Old North's work.

5 MR. MCDONALD: Your Honor, we
6 submitted the 30(b)(6) deposition testimony of
7 Premier Exteriors where the 30(b)(6)
8 representative of Premiere Exteriors was adamant
9 on four to five occasions that the stucco buildup
10 was very clear in that deposition testimony. It
11 was a result of masonry issues.

12 THE COURT: All right. Overruled.
13 Go ahead.

14 THE WITNESS: So Premier Exteriors
15 has several change orders. Six and seven are the
16 two biggest ones that I can think of and also 10
17 and 11, where monies are being added to Premier
18 Exteriors' contract to correct where we're
19 talking about stucco and caulking issues.

20 So the debits and credits that I was
21 talking about yesterday where you're adding money
22 to one contractor, you would take from another
23 contractor in a back charge situation. But in
24 this situation, the back charges are just being
25 wiped against the additional work that BBC wants

1 to award to Old North.

2 But in the very next change order, which
3 is a zero dollar change order, the parties
4 recognize that the first \$70,000 that BBC is
5 going to get from Library in this litigation
6 would go back to Library -- would go back to BBC.
7 So in essence, BBC sold these negative back
8 charges that Library owns and --

9 MR. HILDEBRAND: Objection, Your
10 Honor.

11 THE WITNESS: -- and was getting
12 \$70,000.

13 MR. HILDEBRAND: Objection, Your
14 Honor. That's speculation. She can't make an
15 inference as to what the intentions of the
16 parties were. She can read the document.

17 THE COURT: All right. Objection
18 noted.

19 MR. WINDLE: Objection, same
20 objection. She can't opine on whether something
21 was sold to somebody else.

22 THE COURT: All right.

23 MR. MCDONALD: It's an accounting.
24 She is explaining it from an accounting
25 perspective. This is the owner's money.

1 THE COURT: All right. I'm going
2 to allow it. Overruled. Go ahead.

3 THE WITNESS: So the back charges
4 that were going to be assessed against Old North
5 State Masonry, and I can see that they were going
6 to be assessed because they're identified here as
7 negative back charges for issues that somebody
8 believes was Old North State Masonry's fault --
9 are being absolved and credited against the
10 additional scope of work that Old North received
11 for these other items relocating something or
12 frankly increased costs that Old North had due to
13 back charges from a different activity.

14 And so from an accounting perspective,
15 if you are the owner, typically back charges
16 don't affect you because, again, those two subs
17 are arguing. One money goes from one to the
18 other.

19 But in this situation, the contract
20 increased for Premier Exteriors to do the
21 additional work, but there was no equal decrease
22 to Old North's contract for the back charges that
23 it had caused that made Premier's go up. But
24 instead, in the next change order 20, now it's
25 BBC --

1 MR. WINDLE: Objection, Your Honor.
2 She has no evidence, hadn't discussed anything
3 that Old North State caused. That was her
4 testimony, "Went up for something Old North
5 caused." There's no evidence that Old North
6 State caused anything yet.

7 MR. MCDONALD: That's the same
8 objection.

9 THE COURT: I think that was the
10 same objection of the 30(b)(6). Yeah, I'm going
11 to allow it. Go ahead.

12 THE WITNESS: Premier Exterior, the
13 change orders that I identified, there are five
14 or six of them.

15 But I know number 6, 7, 10, and 11 at
16 least that identify those increased costs for
17 stucco, for example, again, are causing the
18 contract from Library's perspective to increase
19 because the subcontractor is getting more money
20 for these issues to do these things that were not
21 part of their original scope and are seemingly
22 necessary due to issues from another contractor.

23 In a back charge situation, the debits
24 equal the credits, and the owner kind of comes
25 out equal. But in this situation, again, the GMP

1 went up for the Premier Exterior increases.
2 There was no equal decrease in Old North's
3 contract, and instead, the monies that BBC may
4 recover for the positive issues are now going to
5 go to BBC.

6 Again, given that BBC is a fiscal agent
7 for the owner, then BBC would be required to give
8 that money to Library as a credit and, you know,
9 to the contractor. Otherwise, what happens is
10 Library pays for increases, doesn't get the
11 benefit of decreases, and then Balfour would end
12 up with \$70,000.

13 BY MR. MCDONALD:

14 Q. All right. Let's look at Exhibit 32,
15 which is change order 20. Is that where it's
16 memorialized, the \$70,000 that you keep
17 referencing?

18 A. Yes. Change order 20 identifies that
19 Balfour will get the first 70 percent of any
20 monies recovered through the pursuit of claims
21 that Old North had, up to \$70,000, although the
22 claim amount that you see here, Old North's claim
23 is \$1,139,509, which isn't the amount that we
24 were just referring to previously of \$1,097,000.
25 I assume the amount must have been modified at

1 some point in time, but I don't have any of that
2 documentation.

3 Q. And can you read -- publish into the
4 record the final sentence of paragraph 1?

5 A. Are you referring to the paragraph that
6 the final sentence is underlined?

7 Q. Yes, ma'am.

8 A. Notwithstanding the foregoing, both
9 parties reserved their respective rights as
10 specified in the joint defense agreement dated
11 June 19th, 2019.

12 Q. And then if you would publish the second
13 paragraph in toto, and please note when there's a
14 portion that is stricken.

15 A. The next paragraph. This change order
16 constitutes full and complete settlement of any
17 and all costs referred to and/or described herein
18 including, but not necessarily limited to all
19 applicable taxes, insurance, bond, delivery,
20 supervision, overhead and profit, labor, labor
21 impacts, materials, changes, delays, acceleration
22 and inefficiency or any claims thereof, and the
23 subcontractor hereby waives any and all claims
24 for such items associated with or related to the
25 work covered by this change order, all previous

1 change orders, and base subcontract agreement,
2 and all conditions incurred to date.

3 Then the last sentence, which is
4 stricken says, notwithstanding the foregoing,
5 both parties reserve their respective rights as
6 specified in the joint defense agreement dated
7 June 19, 2019.

8 Q. So in the second paragraph, the final
9 sentence is struck through?

10 A. Correct.

11 Q. And then initialed?

12 A. And initialed.

13 Q. All right. There's no more until the
14 green delay column, correct? We covered all of
15 them.

16 A. Let me get mine because I can't see
17 yours.

18 Q. I'm sorry.

19 A. Yes, there's only three months.

20 Q. Okay.

21 A. The amount for BBC, the \$12,000 for
22 Lithko, and the million dollars for Old North
23 State Masonry.

24 Q. Okay. All right. Move over to -- and I
25 believe you touched on this, so we don't have to

1 spend a lot of time on it, the miscellaneous
2 claims and interests. Were you given any backup
3 documentation on the calculation of the -- we'll
4 start with interest.

5 A. Well, no. There's no segregation
6 between whether the amounts shown here are a
7 miscellaneous claim or interest. I wasn't given
8 any backup documentation, and I was not able to
9 just back into it using -- you know, trying to
10 develop relationships between the numbers.

11 Q. And do you know what a miscellaneous
12 claim is?

13 A. Only generically from knowing what the
14 two words mean separately, but I don't know what
15 that means.

16 Q. You don't know how it relates to this
17 column?

18 A. No. I don't know if there were claims
19 that are outside of RCOs, and now they're
20 included in that column or what that would be.

21 I would assume that, because the numbers
22 in this column are bigger when the other claims
23 for those subs are bigger, that the majority of
24 it is probably related to interest versus
25 miscellaneous claims, but I don't know for sure.

1 Q. Okay.

2 A. But I think I pointed out yesterday the
3 illogical relationship of asking for interest on
4 claims that BBC has not paid and that Library has
5 paid portions of.

6 In addition, I think there was prior
7 testimony regarding whether interest accrues when
8 the pay application of the claim hadn't been
9 certified by the architect. But from a
10 mathematical standpoint, I can't get there.

11 Q. Okay. And you just mentioned that. If
12 you would -- do you still have Exhibit 56
13 available? I think it might be to your right.

14 A. What is it?

15 Q. It is the contract documents.

16 A. Yes.

17 Q. Okay. If you would, Ms. Hadley, could
18 you turn to 13.6 of the 201.

19 A. Okay. I'm there, 13.6 interest.

20 Q. Okay. Would you publish that section,
21 please?

22 A. Payments due and unpaid under the
23 contract documents shall bear interest from the
24 date payment is due at such rate as the parties
25 may agree upon in writing or in the absence

1 thereof, at the legal rate prevailing from
2 time-to-time at the place where the project is
3 located.

4 Q. And under this contract, when is a
5 payment due?

6 A. I believe it's either 30 or 60 days
7 after the architect certifies the payment
8 application.

9 Q. Okay. And has the owner paid all
10 certified pay applications in this action or with
11 regard to this project?

12 A. Yes, and some of those amounts are on
13 the board.

14 Q. Let's go over to the gray section here.
15 Were you provided any backup associated with the
16 summary judgment section, other than the numbers,
17 the actual numbers themselves?

18 A. No, no. There was no backup
19 documentation provided for the amounts in the
20 gray columns.

21 Q. And yesterday, you testified about your
22 conversation with Mr. Simonton and the back
23 charges that still have to shake out in the
24 future, right?

25 A. Correct.

1 Q. And was that in reference to this
2 section here? Is that the context -- I don't
3 want to take it out of context. You tell me if
4 that is the context.

5 A. When we had that phone call, this claim
6 hadn't been prepared in this manner, and I was
7 actually advocating for this change because what
8 was being claimed previously was different RCOs
9 and different amounts that those subcontractors
10 had wanted, but given that they're out of
11 litigation and amounts had been either settled,
12 like Quantum.

13 Quantum had received \$175,000 from BBC,
14 and they're out. Or other subcontractors have
15 received partial summary judgment or full summary
16 judgments, and those amounts would be the more
17 proper amount to include now as the amount that
18 BBC wants to get reimbursed because that would
19 seem to me the amount that BBC would end up
20 having to pay.

21 So I said, why don't you use summary
22 judgment amounts versus these old amounts that
23 you have, you know, in your claims.

24 MR. HILDEBRAND: Objection, Your
25 Honor. She can't -- the issue is, what is

1 Balfour's exposure. Unless -- and she's
2 testifying to a legal conclusion as to what the
3 legal rights of the parties are relative to the
4 settlement agreements that these subcontractors
5 have entered into.

6 We have to look into each one. Were
7 there assignments? Were there not assignments?
8 Did they dismiss all claims with prejudice and
9 they have no further claims, or do they still
10 have potential ones to make? I think she's going
11 beyond her realm of expertise.

12 MR. MCDONALD: He just said it, do
13 they still have potential claims to make. That's
14 all she's -- that's what she's referencing.

15 THE COURT: All right. I'm going
16 to allow it. I understand the argument.

17 MR. MCDONALD: Okay.

18 THE WITNESS: My point being that,
19 the claim wasn't prepared in this manner, and
20 apparently, BBC agreed with me because then the
21 subsequent claims that were done in the second
22 week of the trial now do include summary judgment
23 amounts versus the amounts that were previously
24 in there that I was criticizing.

25 So it appears, like I said, with the

1 grayed out areas, those amounts -- there used to
2 be amounts there, and I was talking to
3 Mr. Simonton and Mr. Casey about the fact that
4 that was inappropriate.

5 MR. HILDEBRAND: Objection, Your
6 Honor. Hearsay.

7 THE COURT: That's not hearsay, but
8 I do want to find out, was it done in lieu of or
9 in addition to, I guess, is where my inquiry
10 would be.

11 THE WITNESS: It was done in lieu
12 of. So the old amounts for those subs are now
13 grayed out. And there's no amounts being claimed
14 in the gray shaded cells, and instead, they're
15 being claimed as a base summary judgment amount.

16 THE COURT: That's been issued.

17 THE WITNESS: And I thought that
18 was an improvement because that would, in my
19 mind, more represent what BBC might have to pay.

20 Again, Mr. Simonton did explain to me
21 that that might not be the amount that they have
22 to pay because they are still assessing back
23 charges against those subs. And now I'm also
24 learning from Mr. Hildebrand that there are other
25 issues that may be happening once the -- whatever

1 the joint defense prosecuting tolling agreement
2 goes away, and those issues have to be resolved
3 with those folks.

4 But ultimately under a GMP contract,
5 what should be called cost of the work and what
6 should be reimbursed to BBC is the amount that
7 BBC actually has to pay, assuming those costs
8 meet the definition of cost of the work in
9 section 6 of the A133 contract.

10 So given that, for instance, Quantum is
11 going to receive \$175,000 as a settlement that
12 they made with BBC, not a motion for summary
13 judgment or a ruling, that, to me, would be the
14 amount that you would include in your claim as
15 now, you know, having to be paid to them.

16 THE COURT: All right.

17 THE WITNESS: Assuming it does get
18 paid, then it will become cost of the work once
19 it's paid.

20 BY MR. MCDONALD:

21 Q. And now, these summary judgments were
22 granted against Balfour Beatty, correct?

23 A. Correct.

24 Q. Okay. And was there any distinction
25 made between the monies that the subcontractor

1 was seeking against Balfour Beatty as a result of
2 the conduct of Balfour Beatty or the amounts that
3 it was seeking with allegations as a result of
4 the conduct of the owner?

5 MR. HILDEBRAND: Objection, Your
6 Honor. We would have to -- if she wants to
7 introduce each one of those documents, that's
8 been a big point from their perspective.

9 If we're going to refer to documents,
10 then let's refer to the actual documents for her
11 to speculate and try to testify about each one of
12 those documents and what they -- in terms of that
13 they convey, then I think we need to go through
14 those.

15 THE COURT: Yeah. I was confused
16 by the question as well, so.

17 MR. MCDONALD: I can clear it up.

18 THE COURT: All right.

19 BY MR. MCDONALD:

20 Q. Was any documentation provided to you to
21 backup any of these numbers in the summary
22 judgment? Just the summary judgment line item in
23 the summary judgment gray box.

24 A. No.

25 Q. Okay. All right. There is also two

1 things in here called attorney's fees and costs
2 and prejudgment interest. Do you see that?

3 A. I do.

4 Q. Could those ever been cost of the work
5 under the contract in this -- in this action
6 between the contract between Balfour and Library
7 Associates?

8 A. It's remotely possible, but unlikely
9 that attorney's fees and costs or prejudgment
10 interest would be an eligible cost of the work
11 under the contract.

12 Again, I do believe or I have read that
13 BBC has filed motions against those summary
14 judgments, and in those, they have also addressed
15 that attorney's fees are not appropriate in that
16 ruling, and I agree.

17 Q. All right. Now, Cook and Boardman, are
18 they up there for -- in the summary judgment
19 column?

20 A. Yes. Cook and Boardman has a summary
21 judgment amount in this document of \$257,651.39.

22 Q. And then, if you go over that, it says,
23 SJ full, right?

24 A. It says that, yes.

25 Q. Has Library Associates paid any money to

1 Balfour on behalf of Cook and Boardman that
2 Balfour has not been paid for?

3 A. I'm sorry, can you say that again?

4 Q. Has Library Associates paid Balfour any
5 money for Cook and Boardman's work that Balfour
6 has not been paid by Cook and Boardman?

7 A. Yes. Library Associates paid a Cook and
8 Boardman invoice of \$102,000 that BBC had
9 incorporated into pay application 40, and that
10 amount was not then -- BBC did not transfer those
11 funds to Cook and Boardman. It was their change
12 order number 12.

13 Q. Okay. And did the owner fund pay
14 application 41, Balfour pay application 41?

15 A. Yes. The owner paid pay applications 41
16 and 42.

17 Q. And that was \$102,000 that was paid to
18 Balfour, but not paid to Cook and Boardman?

19 A. Yes. It was the full amount of that
20 change order. I don't remember the smaller
21 dollar amount, but it's \$102,000, which I believe
22 is what's remaining on the lien.

23 Q. All right. So Cook and Boardman lien
24 for money that Library had paid Balfour, but
25 Balfour had not paid Cook and Boardman?

1 A. Correct. Cook and Boardman liened for
2 \$360,000. The ruling was that, that they got a
3 partial summary judgment for \$257,000, the amount
4 that you see on the board.

5 It says summary judgment full on that
6 document, but it was actually partial because I
7 read the transcript and the issue that the Cook
8 and Boardman attorney noted is that change order
9 12 had not been approved, so that amount was not
10 awarded to them.

11 Change order 12 actually was approved,
12 and it was incorporated through an OCO into the
13 contract and then billed with pay application 40
14 and Library Associates paid that amount to BBC.
15 So the issue --

16 Q. What's the -- oh, I'm sorry.

17 A. The mathematical problem here is that,
18 while I appreciate maybe that BBC took that
19 \$102,000 and didn't put it on the board, because
20 the lien is against the owner, now, the owner is
21 going to have to pay potentially that amount.

22 It already paid the 102 before, and now,
23 if they get an award on their lien, Library will
24 have to pay the 102 again to Cook and Boardman
25 directly. And then BBC will have received the

1 \$102,000, but won't have to disburse it.

2 MR. HILDEBRAND: Objection, Your
3 Honor. And I just would like to restate my
4 grounds.

5 Listen, if they -- just like with the
6 audit that she did earlier, if she has legitimate
7 questions about some of the payments, okay, bring
8 them to our attention, bring them to us in
9 advance. And there were some in the audit that
10 we said, yeah, we agree with you that those were
11 legitimate.

12 These, if she has opinions, then she
13 could give those to us -- well, she said she got
14 them at -- take best case scenario, in September.
15 Give us these opinions under the discovery rules.
16 They have to supplement them.

17 And then we have a chance to respond to
18 them. We have a chance to get the underlying
19 documents and respond to them. For her to come
20 in here now and offer opinions for the first time
21 is against the rules. Okay?

22 THE COURT: Well, let me play
23 devil's advocate for you for a second,
24 Mr. Hildebrand. Had your client done the audit
25 under the contract, her whole testimony and the

1 basis for her testimony would be totally
2 different, would it not?

3 MR. HILDEBRAND: But she did the
4 audit.

5 THE COURT: Well, I realize that,
6 but I've seen a contract that says your client
7 was supposed to do an audit. I have heard no
8 testimony from Balfour Beatty of an audit.

9 MR. HILDEBRAND: Well, if the audit
10 was --

11 THE COURT: There is a contract.
12 It's in black and white. Her job initially
13 should have been to come in and review that
14 audit. That would have been fairly simple,
15 fairly straightforward. That was not done. So
16 she had to come in with basically a blank slate
17 and go back through and do this whole thing
18 herself.

19 MR. HILDEBRAND: Well, I don't
20 believe so, Your Honor, because what happened was
21 each --

22 THE COURT: Y'all are going to have
23 to answer that question for me before we resolve
24 this case, I can tell you that. That's one issue
25 that I've got. It's big time in my mind as to

1 how we got to where we got to. She's the one
2 that's putting the numbers on the table.

3 Now, y'all put numbers up there, and I
4 understand that, but her job is go back and try
5 and reconcile those numbers is really from an
6 audit standpoint. That's all she is really
7 trying to do, explain the basis for those
8 numbers. That's what she's doing in her
9 testimony.

10 MR. MCDONALD: Right. And to that
11 point, Your Honor, there -- as you may recall,
12 during the audit process, there are two --
13 there's numbers that get audited as part of the
14 GMP, and then there's an entirely separate basket
15 of claims and delays and such that are not part
16 of the audit provision, and we went through that.

17 So that is an issue that we -- so what
18 she was auditing were the payments that were --
19 came under the GMP and the contract that was
20 agreed upon. So that's a completely separate
21 thing that these claims -- and there has been a
22 lot of intermingling in the discussion with her.

23 And for each of those pay applications,
24 there -- we can certainly discuss it, but they
25 were in effect audited because each one went

1 through many iterations, went through a paper.
2 There would be questions that were asked by the
3 architect, and all the information was provided
4 to their satisfaction.

5 So that, I think, is the simple answer.
6 We can certainly re-call our people to answer
7 that question, but I think that that's how, for
8 each of those pay applications, and that's what
9 she was audited, the pay applications that were
10 made.

11 THE COURT: Okay. All right. Just
12 for my edification, when I do the -- because I
13 recall the Cook and Boardman, and I don't recall
14 the attorney's name. It was a female attorney
15 from Charlotte, as I recall.

16 MR. MCDONALD: Ms. DeFranco.

17 THE COURT: What was her name?

18 MR. HILDEBRAND: Sarah DeFranco.

19 THE COURT: Sarah DeFranco, yeah.

20 So when I do the simple math, the claim was 360.
21 I awarded 257. That was partial summary
22 judgment. The difference, by my math, is
23 103,000. So we're close to 102.

24 My recollection was that was in dispute.
25 That's why they didn't get summary judgment, so

1 just so y'all know. So that was back in the back
2 in the recesses of my mind. Okay? So I'm glad
3 we got some agreement on some of that.

4 MR. HILDEBRAND: Right. Is this a
5 good time to take five, Your Honor?

6 MR. MCDONALD: I've got one more on
7 this board.

8 THE COURT: All right. Let's do
9 one more, and then we can be finished with this
10 one.

11 MR. MCDONALD: And it will probably
12 take 10 minutes. Is that all right,
13 Mr. Hildebrand?

14 MR. HILDEBRAND: Yeah.

15 BY MR. MCDONALD:

16 Q. All right. Is Watson up there on this
17 summary judgment?

18 A. Watson Electric does have an amount in
19 this summary judgment section, three months
20 actually. The summary judgment amount is
21 \$921,671.39.

22 Q. Okay. Take a look, if you would, it's
23 to your left, pay application 40. It is
24 Defendant's Exhibit 5. And what is the pay
25 period on Defendant's Exhibit 5, pay application

1 40?

2 A. I'm sorry. Can you say that question
3 again, please?

4 Q. Sure. What is the pay period on pay
5 application 40, which is Defendant's Exhibit 5?

6 A. The period is from July 1st, 2018 and to
7 July 31st, 2018.

8 Q. So July 2018?

9 A. Yes.

10 Q. All right. And was pay application 40
11 funded by the owner?

12 A. Yes, it was.

13 Q. And does it include funds that have a
14 Watson pay application in there?

15 A. Yes. There's an amount that BBC has
16 included for Watson, and Watson also has its own
17 payment application number 32 as part of the
18 supporting documentation.

19 Q. Okay. And as of that time, what is the
20 amount left on the contract in July of 2018 for
21 Watson?

22 A. Well, the amount left on the contract as
23 far as work to be done is negative because the
24 contract was 4,505,000, but the work completed
25 and stored to date was 4,507,000 roughly, in

1 rounding by the thousands.

2 But given that they still had not been
3 paid their retainage of \$450,685, the net amount
4 on the cover sheet of the payment application
5 notes that the balance to finish including
6 retainage would be \$449,451.

7 Q. Okay. So \$449,451 is the amount left on
8 the contract based upon Watson's accounting?

9 A. Correct.

10 Q. As of July of '18?

11 A. Their payment application is dated,
12 signed July 10th, 2018.

13 Q. Okay. And that \$449,000 would be
14 representative of just the retainage?

15 A. It is actually a couple dollars less
16 than retainage because of the fact that they had
17 billed a thousand dollars more than their actual
18 contract value.

19 Q. Okay. And is there a claim and lien
20 waiver attached to that?

21 A. There is a --

22 MR. TERRY: Your Honor, I object.
23 The Court has already issued an order related to
24 Watson's lien claim, and in that order, it says,
25 all claims between Watson and Library related to

1 or arising out of Watson mechanic's lien are
2 resolved; therefore, I object, that this is
3 irrelevant.

4 THE COURT: Okay. That one's
5 subject to the motion to reconsider as well?

6 MR. TERRY: No, Your Honor.

7 THE COURT: If y'all are out of the
8 case, why are you participating?

9 MR. TERRY: Your Honor, we're a
10 defendant and our lien payment hasn't been
11 resolved.

12 THE COURT: Got it.

13 MR. MCDONALD: And it's a lien and
14 claim waiver as it relates to Balfour, and this
15 predates that. I'm just pointing that out, as it
16 relates to summary judgment. I'll get there real
17 quick.

18 THE COURT: All right.

19 MR. MCDONALD: If I can get some
20 leeway on it.

21 THE COURT: All right. I'm going
22 to allow it. Go ahead.

23 BY MR. MCDONALD:

24 Q. Is there a lien and claim waiver
25 attached to this pay application by Watson?

1 A. Yes, there are two.

2 Q. And what date does it run through?

3 A. It runs through the 31st of July, 2018.

4 Q. Okay. And does it have any exceptions?

5 A. Watson -- I reviewed all of Watson's
6 payment applications and their lien waivers.
7 They never identified any reservations to their
8 lien waivers.

9 Q. Okay. And claim waivers, is that
10 inclusive of claims against the contractor as
11 well?

12 A. In the verbiage of the waiver, yes.

13 Q. Okay. So as of July '18, the amount in
14 Watson's pay application that was left was
15 \$449,451; is that right?

16 A. That's correct.

17 Q. Okay. And up here on Plaintiff's
18 Exhibit 329, in summary judgment, they've got
19 \$921,671.39; is that right?

20 A. That's correct.

21 Q. Okay. So some \$500,000, plus more,
22 something like that?

23 A. Not quite.

24 Q. Okay. Now, of the \$449,451, did Library
25 pay any money to BBC that BBC didn't get around

1 to paying to Watson?

2 A. Yes. I believe in my audit report, I
3 identified \$206,000 that had been paid to Library
4 Associates for Watson payment applications, but
5 BBC did not transfer that money to Watson.

6 Q. \$206,000?

7 A. It is in my report. I don't remember
8 the exact amount.

9 Q. We got 206,540. Does that sound about
10 right?

11 A. It does sound right, yes.

12 Q. Okay. Any reference to that number up
13 here on Plaintiff's Exhibit 329, the amount that
14 had been paid to Balfour, but not paid to Watson?

15 A. No. In fact, if Watson does receive the
16 full amount that's noted in gray there,
17 obviously, you wouldn't put the full amount as a
18 claim against Library because Library has already
19 paid \$206,000 of that, I believe --

20 Q. And there's a waiver --

21 A. -- in the summer of 2018.

22 Q. There's a waiver for all of \$449,000,
23 right?

24 A. Yes. There's a waiver for the full
25 contract value.

1 Q. Do you have an opinion, to a reasonable
2 degree of accounting certainty, as to whether or
3 not the claim documents submitted in September of
4 2021 by BBC are reliable?

5 MR. HILDEBRAND: Objection, Your
6 Honor, for all the reasons prior -- previously
7 stated. They have not supplemented their
8 discovery responses under rules of civil
9 procedure, nor under the scheduling order. None
10 of the information that they're relying on is
11 recent information except for the summary
12 judgments.

13 So I think she's trying to render an
14 opinion that's improper, and it's also just too
15 general an opinion to go to the whole document.
16 If there are particular items that they -- that
17 she has opinions on, that's fine, but certainly
18 not the entire thing.

19 THE COURT: Overruled. You can
20 answer.

21 THE WITNESS: Sorry. Can you
22 repeat the question?

23 BY MR. MCDONALD:

24 Q. Did you have an opinion, to a reasonable
25 degree of accounting certainty, whether or not

1 the claim documents submitted in September of
2 2021 by BBC are reliable?

3 THE COURT: Objection noted. Go
4 ahead.

5 THE WITNESS: If I might add that
6 it's to an accounting and auditing degree of
7 certainty because sampling comes in as an audit
8 concept first and then an accounting concept
9 primarily.

10 So given the magnitude of errors and the
11 fact that there's a lot of money on there that
12 Library has already paid, and there is a
13 significant amount of money on there that's
14 duplicative of other amount on there, you can't
15 rely on this document to make payments to BBC
16 because I've identified duplication errors and
17 unsupported amounts that are too significant to
18 rely on it in part or in whole.

19 MR. MCDONALD: I think it's a good
20 time to take a break.

21 THE COURT: All right. Very good.
22 Let's take a 10-minute break.

23 (A recess transpired.)

24 MR. MCDONALD: May it please the
25 Court.

1 BY MR. MCDONALD:

2 Q. Ms. Hadley, if you could get 56 in front
3 of you, Plaintiff's Exhibit 56.

4 A. Is it the contract?

5 Q. Contract, yes.

6 A. Okay. I'm there.

7 Q. Okay. And in the 201, if you would turn
8 to section 9.6.3, and when you get there, if
9 you'd publish that section.

10 MR. HILDEBRAND: I'm sorry, what?

11 MR. MCDONALD: 9.6.3.

12 MR. HILDEBRAND: Of the 133?

13 MR. MCDONALD: Of the 201.

14 THE COURT: 201? Okay.

15 THE WITNESS: 9.6.3. The architect
16 will, upon request, furnish to a subcontractor,
17 if practicable, information regarding percentages
18 of completion or amounts applied for by the
19 contractor and actions taken thereof by the
20 architect and owner on account of portions of the
21 work done by such subcontractor.

22 BY MR. MCDONALD:

23 Q. Thank you. All right. Ms. Hadley, your
24 testimony yesterday was that there were two
25 categories of costs of the work and GMPs in this

1 contract, right?

2 A. Correct. General conditions and what I
3 call primary.

4 Q. And what you call primary, okay. And
5 what I would like to do now is -- have you made a
6 determination as to reasonable degree of
7 accounting certainty -- well, let me back up.
8 What is the first -- is the starting point the
9 eligible cost of the work?

10 A. You have to do both numbers, and you can
11 do either one first. You can determine the cost
12 of the work -- eligible cost of the work or you
13 can determine the final GMPs for both sections of
14 the contract, and then ultimately, you compare
15 them.

16 Q. Okay. So let's start with the eligible
17 cost of the work. Have you made a determination,
18 to a reasonable degree of accounting and auditing
19 certainty, as to the eligible cost of the work
20 for the general conditions portion?

21 A. Yes.

22 Q. Okay. And what is that number?

23 A. Sorry, you asked me for the eligible
24 cost of the work for the general conditions
25 portion of the contract?

1 Q. For the general conditions portion, yes,
2 ma'am.

3 A. I'm sorry, I'm going to have to make it
4 a little bit more complicated. The total
5 eligible cost would be \$6,243,537.

6 So I just want to put an asterisk on
7 that amount to say that, within the AIA section
8 of the contract, it does state that any amounts
9 that exceed the GMP, actually then change their
10 identity and don't become eligible costs of the
11 work. So this is the amount before you compare
12 it to the GMP, and if there is any overages, it
13 gets re-labeled, re-classified.

14 Q. Understood. Just got to start
15 somewhere, right?

16 A. Correct.

17 Q. Okay. And do you have an opinion as to
18 a reasonable degree of accounting certainty as to
19 the eligible cost of the work under the primary
20 portion of auditing?

21 A. Yes.

22 Q. Of accounting and auditing certainty?

23 A. Yes.

24 Q. What is that opinion? What is that
25 number?

1 A. \$55,544,734.

2 Q. Okay. Now, let's talk about the GMP
3 numbers. Do you have an opinion, to a reasonable
4 degree of accounting certainty and auditing
5 certainty as to the guaranteed maximum price, the
6 GMP for the general conditions portion of the
7 contract?

8 A. Yes. For the general conditions portion
9 of the contract, the -- I took the highest value
10 I could find on pay app 45 for the GMP, which is
11 \$3,319,212.

12 Q. \$3,319,212; is that right?

13 A. Correct.

14 Q. Okay. And do you have an opinion as to
15 a reasonable degree of accounting and auditing
16 certainty as to the GMP for the primary portion?

17 A. Yes, that amount is \$59,323,601.

18 Q. Okay. All right. And have you done a
19 final reconciliation based upon eligible costs of
20 the work and the guaranteed maximum price
21 numbers?

22 A. Yes.

23 MR. HILDEBRAND: Objection, Your
24 Honor. She's -- again, we're -- she's already
25 testified. She's already been required to

1 provide her final opinions, and to the extent
2 that any of these opinions differ from the
3 opinions that she stated within the scheduling
4 order as required -- all of this part of the
5 audit that she did.

6 And she issued an audit report dated
7 December 10, 2020. Under the rules, if she's
8 changing any of those opinions into that,
9 whatsoever, then we're entitled to notice that
10 and under your scheduling order.

11 So if he wants to have her read the
12 audit report, I think that's entirely appropriate
13 because that's what she did was issue an audit.
14 But to the extent that she testifies any
15 differently than what she's previously published,
16 I object.

17 THE COURT: All right.

18 MR. MCDONALD: This is the same
19 issue as --

20 THE COURT: Yeah. Objection noted,
21 but overruled. All right.

22 BY MR. MCDONALD:

23 Q. Do you have an opinion, to a reasonable
24 degree of accounting and audit certainty, of the
25 final reconciliation of the eligible costs of the

1 work and the guaranteed maximum price for the
2 general conditions portions of the contract?

3 A. Yes. It would be the GMP as identified
4 in pay app 45, which is \$3,319,212.

5 Q. Okay. So that is the final
6 reconciliation as it relates for the general
7 conditions portion, \$3,319,212; is that right?

8 A. Correct.

9 Q. All right. And do you have an opinion
10 as to a reasonable degree of accounting and
11 auditing certainty as to the final reconciliation
12 for the primary portion of the contract?

13 A. Yes. It would be the lesser of the
14 eligible cost of the work or the GMP for that
15 primary portion which is \$55,544,734.

16 Q. Okay. All right. And within that final
17 reconciliation, would you add anything to that,
18 to the \$3,319,212 for the general conditions and
19 the \$55,544,734 for the primary portion? Are
20 there any numbers that are added to that?

21 A. Yes. Those two amounts are cost of the
22 work, and then you would add to that the agreed
23 upon fixed amount for preconstruction services,
24 which is \$66,000,779, and then you would also add
25 on the two and a half percent of the GMP that is

1 awarded as the contractor's fee.

2 So if you do that math, two and a half
3 percent of the GMP would be \$1,483,090 of fee,
4 and then you would add up all four of those
5 numbers to be the amount that BBC should receive.

6 Q. Okay. And what is that number? What is
7 the --

8 A. That amount is \$60,413,815.

9 Q. Okay. \$60,413,815?

10 A. Correct.

11 Q. And how much has Balfour been paid to
12 date?

13 A. Library has paid Balfour \$59,994,390.

14 Q. \$59,994,390?

15 A. Correct.

16 Q. And so what does that leave a balance
17 of?

18 A. That would leave a balance owed to the
19 contractor of \$419,425.

20 Q. \$419,425?

21 A. Yes.

22 Q. Okay. And have you -- are these numbers
23 to a reasonable degree of accounting and auditing
24 certainty?

25 A. Yes.

1 Q. Okay. All right. And have you had the
2 opportunity -- to the extent the Court rules on
3 awarding liquidated damages, have you had the
4 opportunity to calculate those?

5 A. Yes.

6 Q. Okay. And how did you calculate it?

7 A. Well, liquidated damages would be either
8 the \$9,000 a day or \$9,500 a day because both of
9 them appear in the contract, times 566 days, I
10 believe, is the number of days between
11 substantial completion of the contract and
12 actual.

13 But that math becomes obsolete because
14 the contract does state that the liquidating
15 damages would max out at the fee. So it simply
16 just becomes the amount of the fee, which is
17 \$1,483,090.

18 Q. \$1,483,090 being as LDs, correct?

19 A. Yes.

20 Q. Okay. And you were here for Ms. Brown's
21 testimony, were you not?

22 A. Yes, the majority.

23 Q. And did you have a hand in compiling the
24 BBC contract costs that were incurred by Library?

25 A. Yes. Those were in my lost profits

1 report.

2 Q. Okay. And how much was that amount?

3 A. Those costs were -- which costs are you
4 referring to? She had two groups of costs.

5 Q. Yes. And I'm trying to -- we're going
6 to do --

7 MR. MCDONALD: Your Honor, just for
8 your edification, I'm trying to segregate the
9 ones that came into evidence. That's the ones
10 I'm talking about now, and then I will ask your
11 permission to proffer the rest of it.

12 THE COURT: All right. Okay.

13 BY MR. MCDONALD:

14 Q. I'm referring to the BBC contract costs
15 incurred by Library.

16 A. The BBC contract costs for painting and
17 punch lists and those sort of things --

18 Q. Yes.

19 A. -- was \$2,256,764.

20 MR. MCDONALD: Okay. Your Honor,
21 at this time, I would like to proffer the other
22 number.

23 THE COURT: All right.

24 MR. MCDONALD: So the proffer will
25 begin now.

1 BY MR. MCDONALD:

2 Q. Did you have a hand in compiling the
3 unnecessary costs incurred prior to opening?

4 A. Yes. Those amounts were also in my lost
5 profits report.

6 Q. And what is that total?

7 A. That amount is \$2,353,673.

8 Q. All right. And was that number done to
9 a reasonable degree of accounting and auditing
10 certainty?

11 A. Yes.

12 Q. Okay. And did you actually vet those
13 numbers from Salamander, the operator?

14 A. Yes. I received information from both
15 Salamander and Library to compile those numbers.

16 MR. MCDONALD: And that will end my
17 proffer on that, Your Honor.

18 THE COURT: All right.

19 BY MR. MCDONALD:

20 Q. And then I neglected to ask you: As to
21 the BBC contract costs incurred by Library, is
22 that number to a reasonable degree of accounting
23 certainty -- and auditing certainty?

24 A. Yes. Those numbers were in that report
25 with the support (inaudible).

1 Q. All right. Did you also do a
2 calculation for lost profits?

3 A. I did.

4 Q. And how did you do that calculation?

5 MR. HILDEBRAND: Objection, Your
6 Honor. You've already ruled on this, but if he's
7 doing a proffer, then that's one thing.

8 THE COURT: Right. How is this to
9 distinguish from what you just were asking about?

10 MR. MCDONALD: I didn't offer this
11 through Ms. Brown, and the same arguments that I
12 made on that are -- they're different factually.
13 Because my arguments on the unnecessary costs
14 incurred preopening was also related to, that
15 they're not delay damages.

16 This issue relates solely to the
17 argument on the unfair trade practices and the
18 civil conspiracy cause of action, that these
19 damages could be awarded under that. I've
20 already made that argument to Your Honor, and I
21 don't -- I think I said my piece. I don't need
22 to rehash it.

23 But I just wanted to be clear that this
24 doesn't -- that this is the same argument that
25 was made, but it's a different element. It's a

1 different claim of damages.

2 THE COURT: On a different -- on
3 the other claims, the noncontractual claims?

4 MR. MCDONALD: Yes, Your Honor.

5 THE COURT: Is that what you're
6 asking?

7 MR. MCDONALD: Yes, Your Honor.

8 THE COURT: Objection is the same?

9 MR. HILDEBRAND: Yes, Your Honor.

10 THE COURT: We talked about arising
11 out of the contract.

12 MR. HILDEBRAND: Absolutely, Your
13 Honor. She's talking about lost profits, and
14 under the -- under the waiver of consequential, it says specifically, lost profits, and that's
15 what he wants to proffer.

17 THE COURT: I think it still needs
18 to be a proffer, but go ahead.

19 MR. MCDONALD: Thank you very much.
20 All right. Your Honor, with the Court's
21 permission, I will begin my proffer now.

22 THE COURT: Yes, sir.

23 MR. MCDONALD: Thank you.

24 MR. HILDEBRAND: So the same ruling
25 as before, he's just simply doing a proffer, Your

1 Honor?

2 THE COURT: Yes.

3 MR. HILDEBRAND: Okay. Thank you.

4 MR. MCDONALD: Well, I'm going to
5 proffer it because Your Honor ruled against me,
6 just to --

7 THE COURT: Right.

8 MR. MCDONALD: Thank you.

9 THE COURT: You're not giving it
10 up, I understand.

11 BY MR. MCDONALD:

12 Q. All right. Ms. Hadley, you also had the
13 occasion to calculate the lost profits sustained
14 by the project or the Hotel Bennett and Library
15 Associates, did you not?

16 A. I did.

17 Q. Okay. And what was the number you came
18 up with?

19 A. The amount of lost profits that I've
20 calculated is \$22,104,469.

21 Q. \$22,104,469; is that right?

22 A. Correct.

23 Q. And how did you calculate those?

24 A. That amount is calculated by taking a
25 look at what Library and Salamander negotiated as

1 what the hotel could accomplish in their
2 forecasted period. I shortened the period to
3 December 2019 and then compared it to what the
4 hotel actually did in that period. And that
5 would represent the difference.

6 THE COURT: And the start date on
7 that would be the original contract completion
8 date?

9 THE WITNESS: In my original
10 report, that is the date I used, and I did get a
11 criticism from the quick report that said I
12 should have added in the 20 days of
13 compensable -- non-compensable delay. And the
14 number that I just read you, I did adjust that
15 number by 20 days.

16 THE COURT: Okay.

17 THE WITNESS: Just in the interest
18 of being conservative. I think I could make a
19 couple arguments about why it shouldn't be that
20 way, given the lack of notice, but the number
21 that I read is 20 days short of the number that I
22 issued in the report.

23 THE COURT: Okay. And do you have
24 the figures -- you said that was the difference.
25 What was the figure you expected to earn versus

1 what the amount was earned, to get to that 22
2 million?

3 THE WITNESS: The expected to earn
4 amount was \$25,120,284. The actual earned
5 through the period ending December 31, 2019, was
6 \$3,015,815, and then the difference is the number
7 that I read.

8 THE COURT: Okay.

9 THE WITNESS: And just to again
10 qualify those amounts, when you say earned, this
11 would be the net operating income.

12 So it's not gross revenue, and it's not
13 the bottom line profit. It is the net operating
14 income, which represents the real loss. Some
15 costs are fixed, and, you know, you don't need to
16 go all the way down to ending bottom line on the
17 P&L because those costs are going to be incurred
18 regardless.

19 So what the ASEP manual tells you to do
20 is to take gross revenue for loss period and
21 subtract out avoidable costs, housekeeping, those
22 sort of things, and then that's the revenue that
23 you actually lost out on. And then those other
24 things that are fixed, you incurred regardless of
25 how well the hotel was doing or whether it was,

1 you know, at full operation or not.

2 THE COURT: Okay. All right.

3 BY MR. MCDONALD:

4 Q. And, Your Honor, while we are still on
5 proffer, Ms. Hadley, do you have an opinion, to a
6 reasonable degree of accounting and auditing
7 certainty, how much, based upon all the numbers
8 we just went over, the total amount that Balfour
9 owes to Library Associates?

10 MR. HILDEBRAND: Same objection,
11 Your Honor.

12 THE COURT: Noted. Go ahead.
13 Still on the proffer.

14 THE WITNESS: Incorporating the two
15 proffered lost profits and additional cost items
16 and then all of the other issues that we --

17 MR. MCDONALD: Yes.

18 THE WITNESS: -- previously
19 discussed? That total would be \$27,778,571.

20 MR. MCDONALD: That would end my
21 proffer on that issue, Your Honor.

22 THE COURT: All right.

23 BY MR. MCDONALD:

24 Q. And then now, let's do it this way,
25 Ms. Haldey, the subtotal -- the numbers we went

1 through earlier, the subtotal of balance owed to
2 Balfour Beatty of \$419,425, if you apply the
3 liquidated damages amount, how much would Balfour
4 Beatty owe to Library Associates?

5 A. \$1,063,665.

6 Q. And then, to that, you would add the BBC
7 contract costs incurred by Library to the extent
8 they are awarded, and what is -- and that number
9 is what? Would you add the \$1,063,665 and the
10 \$2,256,764?

11 A. Yes. You would add those two together,
12 \$3,320,329.

13 Q. \$3,320,000?

14 A. 329.

15 Q. 329, from Balfour to Library Associates?

16 A. Yes.

17 Q. And all of those numbers are to a
18 reasonable degree of accounting and auditing
19 certainty?

20 A. Yes.

21 MR. MCDONALD: Ms. Hadley, please
22 answer any questions that opposing counsel may
23 have.

24 MR. HILDEBRAND: Your Honor, before
25 I begin, I would like to make a motion and an

1 arguing on the record. This goes to an objection
2 that I made earlier, and you kind of waved me off
3 and you were maybe making it later or something.

4 THE COURT: All right.

5 MR. HILDEBRAND: I just wanted to
6 make it for the record. I would first like to
7 introduce as Defendant's Exhibit -- I'm sorry,
8 Plaintiff's Exhibit 347.

9 THE COURT: 347?

10 MR. HILDEBRAND: Yes, sir.

11 THE COURT: All right.

12 (PLF. EXH. 347 was marked for
13 identification and received in evidence.)

14 MR. HILDEBRAND: These are our
15 interrogatory -- or the responses from the
16 defendant to plaintiff's interrogatories, and I
17 would refer the Court specifically to the
18 interrogatory that asks for the witness -- expert
19 witness identification, which is number 7.

20 And I will read this record. Identify
21 all experts you may call to testify in this
22 action and with each expert, set forth the
23 following: A, the expert's qualifications and B,
24 all opinions the expert may offer or otherwise
25 testify to this action.

1 The answer is, Library Associates has
2 not yet determined the identity of the expert
3 witnesses it may call to the trial of this
4 action. This interrogatory will be supplemented.
5 And it was not subsequently supplemented to us as
6 a specific response to this interrogatory. What
7 I would like --

8 MR. MCDONALD: Your Honor, I don't
9 want to interrupt, but I don't know what this is.
10 I mean, he's marked it as an exhibit. I'm not
11 familiar with this process. So I'm going to
12 object to it, and I don't know. It's an
13 interrogatory response from May of 2019.

14 MR. HILDEBRAND: Well, right. I'm
15 supporting the record for these new opinions that
16 Ms. Hadley expressed here today as to why I think
17 that they are inappropriate and should be
18 excluded. I'm going to ask that they be stricken
19 from the record, and I'm trying to make my record
20 on that.

21 THE COURT: All right. Go ahead.
22 Go ahead.

23 MR. HILDEBRAND: So I would like to
24 introduce that Exhibit 347.

25 THE COURT: That's the answer to

1 the first set of interrogatories?

2 MR. HILDEBRAND: Yes, sir. And
3 then if you'll review this in the record with the
4 Court, the scheduling order of the Court, which
5 the amended scheduling order, Your Honor, was
6 filed on September 30, 2020, and it provides
7 that, by November 16, 2020, both Library and
8 Balfour are to provide expert identification.

9 And it says, the identification must
10 include the full name, address, and telephone
11 number of each expert and shall provide a
12 complete statement of all opinions the witness
13 will express and the general basis and reasons
14 for them, and the general facts and data
15 considered by the witness in forming the
16 opinions.

17 That was extended -- that scheduling
18 order was extended a couple of times by Your
19 Honor, and with the last due date under that
20 deadline being August 16, 2021. So the next
21 document that I would like to introduce is
22 Plaintiff's Exhibit 348.

23 (PLF. EXH. 348 was marked for
24 identification.)

25 MR. HILDEBRAND: Your Honor, this

1 is the last designation or is the expert
2 identification or designation by Mr. Bundy. And
3 the cover letter is dated May 17, 2021, and it's
4 to all counsel.

5 And it says, enclosed for service upon
6 you, please find a copy of defendant third-party
7 plaintiff, Library Associates, third supplemental
8 designation of expert witnesses for the
9 above-referenced matter.

10 All right. Then if you turn to page 2
11 of that actual document, at the very top, it
12 says, pursuant to the May 2021 scheduling order
13 in the above-referenced case, Library Associates
14 makes the following identification of expert
15 witnesses for use at trial, and listed is Sam
16 Hadley, Jason Boberg.

17 And it says, please find the following
18 documents: A, a June 11, '19 affidavit of Jason
19 Boberg; b, a November 27, '19 affidavit of Sam
20 Hadley and Jason Boberg; c, a September 17, 2019,
21 Cotton and Company report; d, 11/16/20 Cotton and
22 Company's report previously produced.

23 Those reports I have attached to this
24 proffer, Your Honor, each one of those, the four
25 referenced documents. And I would like to

1 introduce this as our next exhibit, Your Honor.

2 THE COURT: Number 348?

3 MR. HILDEBRAND: Yes, sir.

4 MR. MCDONALD: Your Honor, are
5 these being introduced as evidence? Again, I'm
6 very unfamiliar with this process. And is he
7 just making -- he said he was making a proffer on
8 his previous arguments.

9 MR. HILDEBRAND: Yes. I think it
10 needs to come into evidence, Your Honor. I'd
11 like to move to introduce them into evidence.

12 THE COURT: In support of your
13 argument that she has not previously opined on
14 some of what she had testified?

15 MR. HILDEBRAND: Yes, sir. Yes,
16 sir.

17 THE COURT: All right. I will
18 allow it in evidence.

19 (PLF. EXH. 348 was received in
20 evidence.)

21 MR. HILDEBRAND: Thank you, Your
22 Honor. So for some of these witnesses, you will
23 see in Mr. Bundy's or Library's designation,
24 there is a recitation, like for Mr. O'Connor, a
25 long recitation of what he is going to testify

1 about. The same with Jim Clements. There's a
2 lot of narrative. For Sam Hadley, the only
3 reference is to these four reports.

4 Your Honor, there is -- we can read all
5 four of those reports. I can leave that to you
6 later. There is nothing in her reports that
7 reflect the opinions that she just gave here on
8 the stand.

9 I deposed Ms. Hadley on May 5 and 6 of
10 this year, based upon the file reports that at
11 that time were due, and I would like to introduce
12 her deposition transcript as Exhibit 349,
13 Plaintiff's Exhibit 349.

14 THE COURT: All right, sir.

15 (PLF. EXH. 349 was marked for
16 identification.)

17 MR. MCDONALD: Same objection, Your
18 Honor.

19 THE COURT: All right.

20 MR. HILDEBRAND: Which I would like
21 to introduce into evidence, Your Honor.

22 THE COURT: All right.

23 (PLF. EXH. 349 was received in
24 evidence.)

25 MR. HILDEBRAND: And I asked her

1 about her opinions and said, listen, you
2 understand that -- I'll paraphrase it, that
3 you're required under the Court's order to have
4 finalized your opinions and be prepared here
5 today to render your final opinions.

6 And we went through her opinions, and
7 these opinions that she espoused here today were
8 not among those opinions that she espoused in her
9 deposition.

10 THE COURT: Okay.

11 MR. HILDEBRAND: So then, on top of
12 that, Your Honor, we have the South Carolina rule
13 of evidence as -- I'm not going to read it into
14 the record again, 26(e) regarding supplementation
15 of responses.

16 So we had the Court's order. We had
17 Mr. Bundy's designation of what she was going to
18 testify about, and he attached only four reports,
19 four old reports that I referenced in there. And
20 I took her deposition.

21 And then today, at the end of this case,
22 after we've called our witnesses, our witnesses
23 have testified, we had already -- we weren't able
24 to call rebuttal experts to her opinions here
25 today or anything else. She simply -- no

1 additional reports were entered or no additional
2 opinions were entered by Library Associates.

3 All of a sudden here today, we get brand
4 new opinions by Ms. Hadley, and some of those
5 opinions are relative to cross-examination, but I
6 do want to introduce Plaintiff's Exhibit 350.

7 THE COURT: All right, sir.

8 (PLF. EXH. 350 was marked for
9 identification.)

10 MR. HILDEBRAND: The actual audit
11 report that Ms. Hadley provided to the parties as
12 requested by the Court, and, Your Honor, I
13 understand that you reviewed the contract a
14 little differently than I might have, based on
15 litigation.

16 Every other case I've been involved in,
17 once the litigation started, then whatever
18 documents you need to provide and such are done
19 through the litigation process. And I understand
20 we've already argued that, but it is what it is.
21 That's what -- where we stood.

22 But regardless, Ms. Hadley provided us
23 with this report, this audit report, and this is
24 based on your order, that she do an audit of the
25 books. And according to this audit, which

1 Mr. Thompson touched on in his testimony and was
2 introduced, he said, look, Ms. Hadley audited all
3 the documents, and if you look on page 15, she
4 talks about the eligible costs of the work are
5 \$65,745,000 maximum allowable.

6 Then she has some deductions, Your
7 Honor, and she says, the maximum allowable cost
8 of the work and fee -- and this is on page 15,
9 Exhibit B, is \$64,435 -- I'm sorry, \$64,435,030.
10 So she's saying, according to the audit that I
11 did and provided to Balfour, that is the audited
12 cost of the work that is recoverable, and I took
13 her deposition on this.

14 She then says, the reason that I come to
15 60 -- the total allowable cost, as shown in her
16 audit was 65,745,441, I'm taking some deductions
17 because I think that there were some allowable
18 costs that I'm going to take off. One of those
19 was based on the RFP that we talked about.

20 And Casey Thompson said, okay, y'all did
21 an audit. I see where -- I think some of your
22 reports are legitimate. And we'll agree that
23 some of those are -- probably should be taken
24 off, and we will agree to some of the
25 adjustments. And he said that we will agree to

1 audit the adjustments of \$613,742. And we agreed
2 to remove that from the amount that we were
3 claiming. He said, but we disagree with some of
4 those audit results, \$556,646.

5 So coming in here, at the end of the
6 trial, this is the audit that was done, and these
7 are the reports that came in for this. And I
8 would like to introduce this exhibit as well,
9 Your Honor, this last one, 350.

10 THE COURT: All right. That would
11 be 350?

12 MR. HILDEBRAND: Yes, sir.

13 MR. MCDONALD: Same objection to
14 all of this.

15 THE COURT: Okay. All right. I
16 will allow it.

17 (PLF. EXH. 350 was received in
18 evidence.)

19 MR. HILDEBRAND: All right, sir.
20 So here's where we are, Your Honor, is that,
21 under your scheduling order, and you can -- you
22 were very clear in your scheduling order that, if
23 it hadn't been produced, then it doesn't come in.
24 We were produced her audit.

25 Oddly, though, it was referenced -- even

1 referenced in the designation of Mr. Bundy gave.
2 But none of these opinions were espoused by
3 Ms. Hadley in her deposition. They weren't
4 espoused in the prior reports.

5 So here we are on maybe the last day of
6 the trial or next to last day, right at the very
7 end -- or we're getting pretty close, anyway, and
8 we are faced with brand new opinions by
9 Ms. Hadley. If we had gotten those earlier, our
10 witnesses could have dissected them. I could
11 have gotten back up.

12 For example, yesterday, she referred to
13 a change order that was never signed or anything
14 else. I don't know where it came from. So she
15 comes in and offers opinions, and we haven't had
16 a chance -- we are highly, highly, highly
17 prejudiced by her not giving us these opinions
18 before. If she had, then we might have called
19 and retained a rebuttal expert if it had been
20 this big of a difference.

21 Frankly, if the -- if there's disagreed
22 audit adjustments for the total contract of
23 556,646, we might disagree with those, but that
24 sure is not the same as Ms. Hadley coming in here
25 as she did today and saying, you're basically

1 entitled to -- what was the amount? Yeah,
2 \$400,000.

3 Here in the report, the audit report
4 that she issued, says we're the maximum allowable
5 cost of work and fee, \$64,435,030, and the amount
6 paid to date is 59,994,38. The difference
7 between those is about 4 and a half million
8 dollars. And then she comes in today and says,
9 well, yeah, I've got a new opinion. It's only --
10 they are only entitled to \$419,000.

11 THE COURT: All right. So noted.
12 I'm not going to exclude her opinions, but you've
13 made a great argument for cross-examination, and
14 I look forward to hearing from you on that one.
15 Okay?

16 I will allow the documents to come into
17 evidence, and certainly I think you would
18 probably be in a position to cross-examine her as
19 to her report, anything she testified to
20 differently from today, just like any other
21 witness would.

22 But I don't think that excludes her
23 testimony or her opinions from coming into
24 evidence in the trial of the case. So I'm going
25 to deny that motion, to the extent it's a motion,

1 but I do think it's a good position for
2 cross-examination, where you try to get the truth
3 of the matter that's being presented. Okay?

4 It's like 10 minutes to 12, and you
5 probably need to take some time. I assume you're
6 going to cross-examine Ms. Hadley for a while?

7 MR. HILDEBRAND: I do have some
8 questions for her.

9 THE COURT: Yeah. Why don't we go
10 ahead and take the break now and come back at
11 1:30.

12 (A recess transpired.)

13 MR. HILDEBRAND: I thought I had an
14 extra copy of Exhibit 350 that I was going to
15 hand the witness, but I can't seem to --

16 THE COURT: I've probably got the
17 original. I've got the original stickered one.

18 MR. HILDEBRAND: Right. I thought
19 I had an extra copy.

20 Do you have your audit report?

21 THE WITNESS: I do not.

22 MR. HILDEBRAND: You can follow
23 along with that one, Your Honor.

24 THE COURT: Okay. All right.

25 MR. HILDEBRAND: Thank you for your

1 patience, Your Honor.

2 THE COURT: Yes, sir.

3 MR. HILDEBRAND: Your Honor, I
4 would first like to note for the record that the
5 exhibit that I marked as 348 had -- that was
6 in -- I'd like to introduce that for a limited
7 purpose, in support of my motion to exclude the
8 new testimony -- opinions of Ms. Hadley that the
9 exhibits -- when I introduced this, is to show we
10 had only gotten reports for certain opinions.

11 And I was not intending to introduce the
12 reports as substantive evidence into the case.
13 So I guess I would just like to introduce it
14 either for a limited purpose or as a proffer; so
15 it's just not -- it can't be --

16 THE COURT: I will defer to Counsel
17 McDonald, but I thought you had offered them all
18 as exhibits, and that's how I noted them. 347,
19 348, 349, 350. 348 is the discovery responses.
20 Is that what that is?

21 MR. HILDEBRAND: Right, with their
22 expert designations with the reports. The
23 reports, though, were -- I would like to offer
24 those for a limited purpose or just as a proffer.

25 I don't want them into -- to say that I

1 have waived arguments regarding their loss of
2 profits or whatever by introducing their reports
3 on that. I just simply wanted to introduce those
4 to inform the Court of what had been produced in
5 discovery.

6 So I would just like to request that it
7 be acknowledged as being introduced for limited
8 purpose for the Court's edification.

9 THE COURT: To show what the
10 opinion was at the time --

11 MR. HILDEBRAND: Yes, sir.

12 THE COURT: -- before it was
13 entered?

14 MR. HILDEBRAND: Yes, sir.

15 THE COURT: Mr. McDonald?

16 MR. MCDONALD: As I stated at the
17 time, I'm not familiar with this process of
18 entering exhibits without a witness. I'm not
19 familiar with putting in reports for the limited
20 purpose of putting in reports. So, I mean, I
21 just object.

22 THE COURT: It's in support of your
23 motion that you should not have been not allowed
24 to alter or amend your opinion today different
25 from what was issued in December of '20; is that

1 right?

2 MR. HILDEBRAND: Yes.

3 THE COURT: Is that really what
4 your position is?

5 MR. HILDEBRAND: For that limited
6 purpose.

7 THE COURT: But now you don't want
8 the opinion in?

9 MR. HILDEBRAND: Well, I just don't
10 want the document as substantive evidence. I
11 will offer it as a proffer. I just want to have
12 it in the record or to note for the record. So
13 maybe it's a Court's exhibit or it's a proffer,
14 however you'd like -- I know you might say it --
15 reference it as a proffer rather than a Court's
16 Exhibit but --

17 THE COURT: I guess you could
18 proffer it. I guess you could do that. I noted
19 it was in as evidence, but if you want to
20 withdraw that particular one, 348 --

21 MR. HILDEBRAND: Yes, sir.

22 THE COURT: -- and just say it's
23 for that limited purpose that it differs from
24 whatever that testimony is.

25 MR. HILDEBRAND: Thank you, Your

1 Honor.

2 THE COURT: I think it's going to
3 need to be in evidence in order for an Appellate
4 Court to review whether or not it is different,
5 though, is it not? Isn't that what you're asking
6 ultimately?

7 MR. HILDEBRAND: Yes, sir.

8 THE COURT: Yeah. I think you
9 probably ought to put it in substantively.
10 That's just my thought.

11 MR. HILDEBRAND: Right. All right.
12 Give me one second.

13 THE COURT: Yeah. All right.

14 MR. HILDEBRAND: I will leave it in
15 evidence but for the limited purpose in
16 information for the Court in ruling -- and for
17 the record in ruling on that motion.

18 THE COURT: Okay. All right. I
19 think that's what it was tendered for, and I
20 agree with that.

21 MR. HILDEBRAND: Okay. Thank
22 you.

23 CROSS-EXAMINATION

24 BY MR. HILDEBRAND:

25 Q. All right. Ms. Hadley, we've talked

1 before. I took your deposition, and I've got
2 some questions for you. You said that you -- you
3 went through quite a bit of testimony about your
4 background and what you do as a professional,
5 right?

6 A. Yes.

7 Q. Right. And what you do -- what you
8 primarily do is you audit jobs at the end of the
9 job to determine whether the costs are
10 appropriate or not. Is that a fair statement?

11 A. That is something that I do. It isn't
12 the substantive part of my work right now.

13 Q. Okay. But what you do and what you were
14 asked to do at this -- let me ask you this:
15 Generally, what you were frequently asked to do
16 is, after a project is completed, you were
17 approached by an owner and/or asked, look, would
18 you mind, we've got a GMP contract. We would
19 like for you to do an audit to determine whether
20 the GMP cost that the contractor is alleging are
21 appropriate or not and should be paid, correct?

22 A. That is something that I do, yes. More
23 often, I'm asked to provide an opinion on claims
24 or proposed change orders.

25 Q. Okay. Well, but let's make sure that we

1 understand. There are two clarifications here.
2 There's an audit of the GMP, which is what we
3 went through in this case at length with the
4 Judge where there is a provision in the A133 for
5 an audit that would be done during the job and
6 then at the end of the job, and that is to
7 determine the allowability or the recoverability
8 of the GMP costs, correct?

9 A. That is to identify total project costs,
10 the eligible costs of the work. Then you compare
11 that to any revisions to the GMP and take the
12 lesser of the two of those.

13 Q. Right. Right. So what you're doing is
14 you're looking at, what is the -- if it's a GMP
15 contract, and that's what we have here. You have
16 to look at the contract documents to determine
17 what is the agreed upon GMP.

18 You look at that. Then you look at the
19 costs that have been submitted by the general
20 contractor, and you make a determination of which
21 of those costs are eligible, incurred costs under
22 the -- for the GMP audit analysis. Is that a
23 fair statement?

24 A. I believe that is generally true, yeah.
25 I think that is a very general statement to

1 describe the typical process.

2 Q. Right. So you have one -- you have your
3 audit that's done under the contract to determine
4 the recoverability of the GMP cost, and then, if
5 you were asked, you can do a separate analysis if
6 there are claims that are outside of the contract
7 GMP, correct?

8 A. No. I think that that would
9 mischaracterize things. If there's a claim
10 within a GMP contract, you can't do the first
11 step without the second step because we have to
12 keep reminding ourselves that the GMP contract is
13 a cost, reimbursable contract with the GMP
14 ceiling.

15 So it would be -- it wouldn't make any
16 sense to only take a look at some of the costs
17 now and compare those to the -- where the GMP is
18 right now, kind of an interim basis, and then
19 look at claims without going back through the
20 process of incorporating the eligible cost of the
21 work from the claims and then determining how
22 much of those claims would actually increase the
23 GMP.

24 Some of the claims don't have anything
25 to do with the GMP because it's part of the

1 contract balance, for example, but other things
2 like a request for a change order that has yet to
3 be approved by the owner would increase the GMP.

4 So to do that audit process first,
5 without evaluating the claims, would be a
6 wasteful exercise because you're going to have to
7 pull it all together in the end.

8 Q. Well, you can do that. You can get --
9 if Balfour were not making a claim for delays
10 and/or the RCOs and the claim amounts, you could
11 have simply audited the amount that was due under
12 the GMP contract at that point and made a
13 determination under the contract of which costs
14 were eligible or not. Agreed?

15 A. If there were no outstanding claims to
16 increase the GMP and there were no assertions
17 that additional costs were going to be incurred,
18 then, yes, I would agree in that hypothetical
19 situation.

20 Q. Right. And often that's what you do.
21 Often there is no claim, and you're just simply
22 asked to come in and say, the owner says, look,
23 we want to make sure that what we're being billed
24 under the GMP are allowable costs. We want you
25 to take a look at that and do an audit, and then

1 report back to us, correct?

2 A. I have done that exercise, yes.

3 Q. Right. And that's not unusual to have
4 that. Even if there's no acrimony or claims or
5 lawsuits or anything else on the job, it's not
6 unusual for an owner to say at the end, look, I
7 just want to avail myself of the audit provisions
8 of the contract just to make sure that I get it
9 vetted by an accountant, such as you, to
10 determine whether the appropriate costs have been
11 billed, correct?

12 A. Yes. I think typically a contractor
13 prepares that final accounting, produces their
14 own audit or full accounting of the project at
15 close out, and then the owner would, as you
16 mentioned, avail himself to somebody like me that
17 could take a look at what that contractor put
18 forth.

19 Q. Okay. And in the usual -- let's assume
20 that Balfour had not made a claim for delay costs
21 and the RCOs. Then you would have done your
22 audit as is referenced in Plaintiff's Exhibit
23 350. You would have done your audit to determine
24 the maximum allowable cost of the work and the
25 fee, correct?

1 A. Yeah. Yes. I mean, I think that's
2 fair.

3 Q. Right. Right. And you have that
4 ability. You can look at the GMP amount, and
5 then you can look at the cost of the work that
6 have been asserted by the contractor and make
7 that determination and tell the owner, look,
8 under the GMP, here are the costs that I think
9 are allowable under -- for payment under the
10 contract. Agreed?

11 A. Yes.

12 Q. Okay. All right. And in the usual case
13 or in a case where there aren't outstanding
14 claims, that's where your inquiry would end
15 normally.

16 You would issue your audit, telling the
17 owner, okay, I've looked at the GMP. Here is my
18 audit. Here are the costs that I do not think
19 are appropriate costs of the work, and here's
20 what I think you should pay, correct?

21 A. Yes.

22 Q. Right. And then, typically in the
23 industry -- let's assume hypothetically that the
24 contractor said that it submitted costs of the
25 work for 60 million, and your audit says it's 59

1 million, so there's a million dollar delta. Then
2 usually there's some sort of negotiation that
3 takes place between the owner and the contractor,
4 and most of them get resolved, correct?

5 A. Ultimately, most of them get resolved,
6 maybe through litigation or maybe through
7 negotiation.

8 Q. Okay. Well, some of them are resolved
9 in negotiations and some of them have to -- the
10 parties can't -- you say it's 59 million; the
11 contractor, maybe his expert says it's 60 million
12 dollars, and you can't come to an agreement and
13 it proceeds to whatever the claim resolution is,
14 right?

15 A. That may happen, yes.

16 Q. Okay. So in this case, what you did as
17 referenced in Exhibit 350 is -- well, let's look
18 at -- let's just go through it sequentially. On
19 page 1, are you with me?

20 A. Yes.

21 Q. Okay. This report contains the results
22 of Cotton and Company's evaluation of the
23 guaranteed maximum price contract between Library
24 Associates, LLC, which you referred to as Library
25 or owner before, and Balfour Beatty Construction,

1 LLC, BBC, related to BBC's services as the
2 construction manager as constructor for the hotel
3 at Marion Square hotel, correct?

4 A. Yes.

5 Q. All right. And then skipping down to
6 the last sentence of the third paragraph on the
7 bottom, we performed our analysis in accordance
8 with the American Institute of Certified Public
9 Accountants' statement on standards of consulting
10 services, correct?

11 A. Standards for consulting services, yes.

12 Q. Okay. And then what you did was, on
13 page 15, if you will turn to that, schedule B.
14 Are you with me?

15 A. Yes.

16 Q. All right. It says, schedule of costs
17 of work, fee, GMP values and paid amounts. So
18 this is the portion of the audit that you
19 performed under the GMP aspect of the contract,
20 correct?

21 A. I don't think I understand that
22 question. Say that again.

23 Q. This is where you looked at the GMP
24 value of the contract, and you looked at the
25 maximum allowable cost of the work of the -- and

1 fee, and you rendered an opinion and put in this
2 chart as to, under the GMP aspect of the
3 contract, what you felt was more appropriate
4 costs, correct?

5 A. The way you say it isn't correct. What
6 exhibit -- excuse me, what schedule B does, is it
7 compares the eligible costs of the work, which is
8 on the previous schedule, and simply compares it
9 to the current GMP.

10 Q. Right.

11 A. And you had mentioned that I evaluated
12 the GMP. I didn't in that instance, but I was
13 comparing the eligible costs of the work to the
14 current GMP, and then you're basically just
15 identifying the lesser of those two.

16 Q. Right.

17 A. As long as we appreciate -- because you
18 said the term evaluate the GMP, but we read the
19 paragraph beneath the table that clearly
20 specifies yet another scope limitation of this
21 audit, which is that I didn't modify the GMP for
22 any of the entitlement issues.

23 And the reason that that's so important
24 is because there's costs in eligible costs of the
25 work on row 1 of that schedule. For instance,

1 BBC's payment to Gulf that are currently not in
2 the GMP because what BBC was saying is, look, we
3 had to keep paying Gulf even though Library
4 didn't approve the RCO or increase the GMP for
5 that work. But we are going to go ahead and keep
6 paying them.

7 So their costs are ineligible costs of
8 the work, but the contract has yet to be modified
9 for the GMP. So I had to put that scope
10 limitation in there along with the seven other
11 scope limitations that are extremely significant
12 in the beginning of this report, to make sure
13 that everybody realized that this is a very
14 interim report with very limited information.

15 Q. Well, Balfour has not been provided any
16 report by you subsequent to this report. Agreed?

17 A. Only orally through the phone calls that
18 the Judge recommended that we have in September,
19 where I identified the weaknesses, and they've
20 been making changes since then.

21 Q. So the answer is, no, you have done no
22 other -- where this is listed as the GMP contract
23 evaluation, you have done no other report or GMP
24 contract evaluation such as this. Agreed?
25 Because I haven't seen it.

1 A. I have not issued a report in the past
2 five weeks since the new plan had been prepared.

3 Q. Well, there hasn't been a report since
4 Balfour has been provided on the GMP analysis or
5 any other report from you from -- since December
6 10, 2020. Have you provided any reports, to your
7 knowledge, that we have not gotten?

8 A. So BBC did not assert a new GMP until
9 several weeks ago in September of 2021. As I put
10 in my timeline, the amount that they claimed and
11 what they stated as to the GMP was the same from
12 the January 2019 letter.

13 I know that we don't need me to rehash
14 the amount of times that I have kept articulating
15 that the claim amount was duplicative and that
16 you can't just add these things together, the
17 claim and the incurred costs because they're
18 overlapping and duplicative.

19 So once the trial started and BBC
20 acknowledged and validated that I've been right
21 for the past two and a half years, they produced
22 a claim in September of 2021 that was millions
23 and millions of dollars less than it ever had
24 been, and that is brand new information to me.

25 And to be fair, I've been sitting back

1 there auditing away trying to figure out those
2 numbers, and, no, I have not produced a report
3 based on that claim that was just recently
4 submitted.

5 Q. Well, let's look at this report right
6 here. So we agree that it's not been -- the only
7 thing we had prior to your testimony today to --
8 I will strike that.

9 So schedule B. The GMP cost that is
10 provided in your report, that GMP cost is what
11 you took as you looked at what the parties had
12 agreed the GMP was as reflected on the latest pay
13 application, correct?

14 A. Yes. If I can make just one minor
15 correction. You keep saying the term GMP costs,
16 and those two words don't go together.

17 Q. Okay.

18 A. There's eligible costs and then there's
19 the GMP, which is the maximum contract value,
20 which doesn't really have anything to do with
21 costs. It's just the maximum.

22 Q. Right.

23 A. So the current GMP that's in schedule B
24 was taken from -- was taken from, I believe, pay
25 application 42 because there was an OCO after

1 that that, you know, hadn't been approved.

2 Q. Okay.

3 A. So, yes, I was taking the GMP as it --
4 the two parties had agreed that it was at that
5 time.

6 Q. Right. There are certain documents that
7 increased the contract GMP. It's a formal
8 increase. Agreed? The GMP can be formally
9 increased, and that's typically through OCOs or
10 change orders that are agreed upon, correct?

11 A. Correct.

12 Q. Right. And what you did was, you looked
13 at what the parties had agreed the GMP was on
14 this project, and you said, okay, for my audit
15 report and after conferring with your clients and
16 looking at the documents, you included that GMP
17 cost of what? Tell me what that is, Ms. Hadley.

18 A. I'm sorry?

19 Q. What was the GMP that you used in your
20 report?

21 A. I believe the GMP that I used in my
22 report was -- and I would like to actually double
23 check to say it right -- either from pay app 42
24 or from pay app 45.

25 Q. Okay. And what was that amount?

1 A. Which GMP do you want?

2 Q. The pay app, the GMP that you used for
3 schedule B.

4 A. I'm just -- I'm not quite understanding
5 you. So there's each -- the contract has two
6 GMPs, one for general conditions and one for
7 primary.

8 Q. And what is that total?

9 A. The total with or without the fee?

10 Q. With the fee.

11 A. The total amount of the GMPs and the
12 fees that I reported on schedule B in my report
13 is \$65,171,688.

14 Q. All right. The actual eligible costs of
15 the work at the time that you rendered this
16 report and this opinion was 60 -- so you went
17 back through, and you looked at all the costs
18 that had been provided to you by Balfour. And
19 you looked at the contract, and in your view, the
20 eligible costs were \$65,745,441, correct?

21 A. As long as, again, you continue to read
22 this with the seven very significant scope
23 limitations in the beginning of the report that
24 identified the documentation that BBC had yet to
25 provide.

1 Q. Well, when you issued this report,
2 Ms. Hadley, this was done after a major exchange
3 of information. You had requested all sorts of
4 information from Balfour Beatty job costs -- what
5 you wanted to do was to be -- make yourself
6 satisfied that, when you issued this report, that
7 it was accurate, correct?

8 A. Right. And I was still unsatisfied that
9 I had to issue the scope limitations, and there's
10 not seven, there's only five, that are listed on
11 page 2 and page 3 of this report. They were so
12 significant that I had to identify each one
13 individually to talk about the documentation that
14 BBC did not provide.

15 And for example, to talk about the fact
16 that the change order log did not support the
17 change orders and all of the different issues
18 that we were struggling with, as further itemized
19 and discussed between the parties in many e-mails
20 between Mr. Simonton, Mr. Thompson, and I
21 regarding the lack of information that I had.

22 Q. Well, let's talk about the costs under
23 the contract. There are certain costs that are
24 allowable under the contract and certain costs
25 that are not, correct?

1 A. Correct.

2 Q. Right. And what you did was, you
3 reviewed all of the -- you said, Balfour, what I
4 want you to do is to show me the costs that you
5 contend are -- make up the current GMP of the
6 contract so that I can take a look at them,
7 correct?

8 A. No, that is not correct at all. And
9 it's not what they did because they refused to do
10 that. So what I did was, I attempted to
11 accumulate all the project costs for the project
12 so that everybody knew what the eligible project
13 costs were, and then others, not an accountant
14 like myself, could argue about what the GMP
15 values should be, increase for change orders,
16 increase for delay plans, up or down, whatever
17 the litigation issues are.

18 And once that litigation was over, you
19 could simply take the costs that I'd already
20 taken a look at and compare it to the GMP and do
21 that simple lesser of and fee stuff at the
22 bottom.

23 But when I went to BBC and said, what
24 are the project costs? They said, look, we're
25 only going to give you this job cost report.

1 Here's all the costs that we put into this job
2 cost report. I said, well, that's not the whole
3 project. That's only what you have in this job
4 cost report.

5 And in addition, there are many, many,
6 many costs -- many costs in the job cost report
7 that don't have anything to do with this current
8 GMP, the Gulf being just one anecdote that I'm
9 talking about, at any time Library has incurred a
10 cost but hasn't increased the GMP or modified the
11 GMP up or down for that issue.

12 I was in -- I was struggling with this
13 apples and oranges comparison, and that -- I
14 attempted to properly articulate it in this
15 report, the fact that this is apples and oranges.
16 In this report, in those e-mails, and in my
17 deposition with you, I tried to explain that.

18 Q. Well, all of the costs that were
19 incurred relative to the construction were
20 finalized, were they not, by the time -- by
21 the -- say March of 2019? The job was over. All
22 the costs actually incurred by Balfour were
23 finalized by then, correct?

24 A. No, that is very incorrect.

25 Q. Okay. What costs increased? What other

1 costs of the project that were allowable costs
2 increased after that time?

3 A. Well, I would hope that BBC believes
4 that some of these costs that they're claiming
5 now that they haven't yet paid will be eligible
6 costs of the work.

7 Otherwise, they will just simply be a
8 cost that has to be paid to the sub without an
9 increase in the GMP, and they won't receive
10 reimbursement for that. But the opposite is also
11 true. We have roughly 6 million dollars in
12 general conditions. We only have a 3 million
13 dollar GMP.

14 The GMP will need to be impacted for
15 delays, or maybe it won't, depending on how the
16 litigation goes, and then we will isolate just
17 general conditions, and we will compare the
18 eligible costs to the GMP as modified.

19 But I can't stress enough that the
20 general -- the job cost report that I was given
21 already includes costs that are outside of the
22 GMP.

23 Q. Okay. And --

24 A. And it's an apples and oranges
25 comparison.

1 Q. Well, let me ask you this, Ms. Hadley:
2 What documents -- what additional documents
3 existed at the -- say in March of 2019, that came
4 into existence -- actually came into existence
5 after that time that were costs of the work that
6 were allowed?

7 A. Well, all of the change orders that BBC
8 entered into with the subs, those settlement
9 change orders, would definitely impact the
10 eligible costs of the work. There were other
11 change orders, the MSI examples. I think that
12 was dated as late as 2020.

13 For instance, just last month -- or was
14 it September -- BBC entered into a settlement
15 with Quantum. That's going to be a significant
16 impact to the cost of the work. Assuming that
17 settlement is eligible, once BBC pays it, that's
18 a cost of the work.

19 Q. Okay. Well, other than the settlements
20 with the subcontractors that are at issue, what
21 other eligible costs of the work have changed, if
22 at all, from the time that substantial completion
23 was achieved?

24 A. Okay. So other than the settlements and
25 other than change orders that happened after that

1 point.

2 Q. Right.

3 A. And -- which would eliminate all of
4 those RCOs in the 270 range-ish, what other
5 costs. It's a really tough question to come up
6 with more examples, but the best one I think I
7 could come up with would be the back charges.

8 Since we know that back charges haven't
9 been assessed against all of the subcontractors,
10 while that won't be a cost to BBC, it will be a
11 reduction potentially of a cost that was paid to
12 the subcontractor. So it's going to impact the
13 eligible costs of the work.

14 The GMP has already been potentially
15 impacted by the increase to the sub that did the
16 work. But there hasn't been that corresponding
17 decrease either to the cost of the work, the GMP
18 or both for the deduction to the -- what do you
19 call it -- the back charge fee, you know, the sub
20 that caused the cost.

21 So as BBC has explained, and as you put
22 it in your motions, and as we've seen, there is
23 back charges that need to be assessed against
24 those subs. And that's definitely going to
25 impact the amount of eligible cost of the work I

1 have there.

2 The biggest dollar impact would be to
3 note that this eligible cost of the work,
4 65,745,441, millions of dollars of that hasn't
5 been paid to the subs at this point. So now I
6 understand, again through subpoenas, through your
7 motions, and through Mr. Simonton, and through
8 other documentation, that those costs that
9 haven't been paid to the subs won't be paid to
10 the subs.

11 Q. That's a supposition on your part. You
12 don't know how much might be paid to subs and
13 what they might be entitled to, do you?

14 A. I'm asserting your statement that said
15 that there were setoffs that need to be applied
16 to the subs. I'm noting that Mr. Simonton also
17 agreed that back charges have to be assessed.

18 But moreover, this amount included the
19 full amount that was listed as the retainage and
20 unpaid contract balance to those subcontractors.
21 Anybody that's now gotten a partial summary
22 judgment, a full summary judgment or a
23 settlement, the amount that was listed here is
24 obsolete.

25 Because it wasn't paid to the subs, and

1 it's not going to be paid to the subs. So now
2 that I've learned that, this number is no longer
3 eligible cost of the work.

4 Q. Where is a compilation of the back
5 charges that -- of the potential back charges
6 that -- has that been produced, that you've
7 arrived at?

8 A. I think BBC has produced a lot of
9 information about those back charges that is hard
10 to accumulate, but the best places to go would be
11 the Premier Exterior charge orders.

12 Q. My question to you is, have you produced
13 that to Balfour Beatty?

14 A. Have I given those change orders back to
15 you? Personally, I have not.

16 Q. Right. Have you done any compilation of
17 back charges that you think went into -- should
18 have gone into your report that you provided to
19 Balfour Beatty?

20 A. Yes. I discussed them either yesterday
21 or the day before. We went through the Lithko
22 change order 34. We went through the Old North
23 change orders 19 and 20, and we talked about the
24 Premier Exterior changes 6, 7, 10 and 11. Change
25 orders for Quantum, we went through numbers 37,

1 40, and 129. But all of the since back charges
2 against others have been settled.

3 Q. Right. I understand that you've
4 testified about that. Have you produced any
5 compilation or any document or documentation of
6 that, where you've compiled that? Any sort of
7 reports to Balfour where you've compiled that
8 information?

9 A. Some of that. Only a portion of what I
10 just said is in this report. But until certain
11 subs have responded to subpoenas, and other
12 information was found out after the date of this
13 report, I have identified more since then.

14 Q. So your testimony here today is that
15 until you received -- did you understand that
16 what was referenced as Plaintiff's 345 was our
17 compilation of where the damages stood for the
18 Judge to consider?

19 A. I just don't know what 345 is.

20 Q. That's the large blow up that
21 Mr. McDonald had.

22 THE COURT: That's 329, isn't it?

23 MR. HILDEBRAND: I'm sorry, 329.

24 THE COURT: Okay. All right.

25 THE WITNESS: I'm sorry. What was

1 the question again?

2 BY MR. HILDEBRAND:

3 Q. I will withdraw that. Let's go back to
4 your report and your GMP. Your report that you
5 provided to Balfour, which is Plaintiff's 350.
6 So what you did in this report -- you said you
7 had some qualifiers.

8 What you did was, you represented in
9 this report to -- I guess it doesn't say to whom
10 it's being sent. It just says it's being
11 prepared by you -- that the eligible costs for
12 \$65,745,441, and then you deducted, based upon
13 your review of all of the documents, the costs
14 that you thought were not allowable under the
15 contract, correct?

16 A. That I could find with the limited
17 documentation provided, yes.

18 Q. What other documents, if any, existed at
19 that time that you had not been -- that you had
20 requested that you were not provided with?

21 A. I asked for an updated RCO log. I was
22 told to go into the four binders of the claim to
23 get that. I went to the four binders of the
24 claim. There was more than one version.

25 I prepared an Excel spreadsheet because

1 it was only in PDF. That Excel spreadsheet is
2 Exhibit E of this report -- to explain that the
3 amounts that I see here are not the amounts that
4 you guys were claiming as RCOs. Can anybody help
5 me? What's wrong with these numbers? Which ones
6 are outdated? But I couldn't get that
7 information.

8 Then I also asked them to identify what
9 subcontractors were associated with each of the
10 RCOs, so that I could determine whether the
11 amounts had been paid or not, you know, in the
12 eligible cost of the work or not. I couldn't get
13 that information.

14 Q. Well, the RCOs, what Balfour is going to
15 be entitled to recover, that's something that the
16 Judge is going to have to decide, isn't it,
17 Ms. Hadley?

18 A. Yes. But that's exactly the problem is,
19 some of these costs that are in this RCO that are
20 in my Exhibit E, for instance RCO 27, which is
21 still being claimed today, is for an amount that
22 BBC is now saying it's already incurred, and it's
23 already an ineligible cost of the work in my
24 audit.

25 But if the Judge doesn't award the

1 change -- RCO 27 to BBC, then those costs are
2 going to need to be removed out of the eligible
3 costs of the work because that -- whatever it
4 was, Builder's Risk claim or storm claim
5 shouldn't be recoverable.

6 Q. Right. I understand that the -- that
7 part of the costs in this case are going to be
8 decided by the Judge, the RCOs. He's heard the
9 testimony by Nick Starcevic about the RCOs and
10 Kim Brown, and he will have to make a decision on
11 that.

12 He will also have to look at the delays
13 and make a decision on those costs and the other
14 costs that Casey Thompson articulated. But there
15 were some costs that were inarguably set and did
16 not change at the time that the contract -- at
17 the time that the substantial completion was
18 done; isn't that correct?

19 A. The general conditions costs would be
20 those that would fall under that category, but
21 it's not the subcontractor costs, which is the 59
22 and a half million out of 65 million.

23 Q. So you took all of the job costs,
24 allocate the RCOs, and the delay damages and
25 others -- you took all of the costs at the end of

1 the job, and that's what this schedule B
2 reflected? You looked at those, and you
3 determined which -- the maximum allowable cost of
4 the work would be based on the documents at that
5 time, correct?

6 A. Again, yeah, with the caveat of the fact
7 that many of the costs were not adequately
8 supported, and the sentence right beneath this
9 table that says, some of these costs have -- will
10 not be eligible once the GMP entitlement issues
11 get resolved, and that adjustment is going to
12 have to be made. As long as you read the
13 sentences with the table, I agree with you.

14 Q. Well, I understand that is -- unless and
15 until -- when the Judge rules and he decides what
16 the final RCO costs are and delays, then this is
17 going to be somewhat continuous, correct?

18 A. This will need to be adjusted.

19 Q. Right. So all we have at the end of the
20 job were the costs that were incurred under the
21 contract that were provided to you as reflected
22 in the GMP, and that's what you did your analysis
23 on?

24 A. No, that is not correct. And I'm not
25 saying it right, but I'm going to try it one more

1 time. The eligible costs of the work, schedule A
2 on that top row, already include costs that the
3 Judge has not ruled upon that should increase the
4 GMP.

5 So the costs have been incurred.
6 They're already in there. If it gets ruled that
7 the RCOs should not be approved, then those costs
8 would need to come out. So I don't think it's
9 fair to characterize it to say, well, this was
10 what it was at one point in time, and then if the
11 Judge rules that these RCO should get approved,
12 then the number gets higher.

13 It's going to go both ways. The bigger
14 issue, though, besides some of the RCOs,
15 especially the delay claim RCOs, because BBC has
16 already incurred those costs because they kept
17 the lights on -- is the fact that the eligible
18 costs of the work here had millions of amounts
19 listed as an expense on the job cost report that
20 it had not yet paid to the subs.

21 And we're learning that they were
22 withheld from the subs for either good reasons or
23 bad reasons, but the subs won't see those dollars
24 anymore. So those adjustments have to be made.
25 They can be made now before the Judge rules on

1 the RCOs, but then other adjustments would have
2 to be made after that as well.

3 Q. The parties agreed through an original
4 GMP of approximately 59 million dollars, and
5 then, through contract changes, that the agreed
6 upon GMP was going to be \$65,171,688, correct?

7 A. Yes, with the little asterisk. But I
8 appreciate you reading from my bottom number of
9 my table on page 1. That excludes the
10 preconstruction, \$66,779. I took that out
11 because it was a fixed amount that the parties
12 agreed to, and I don't have to test those costs.

13 Q. Right. And then -- so what you did was
14 you looked at what the parties agreed the GMP was
15 going to be, as revised, and then you said, okay,
16 I'm going to make deductions from the amounts
17 included in that agreed upon GMP, correct?

18 A. No. I don't make deductions to a GMP.
19 I've never touched it, I promise. The GMP is
20 what the GMP is.

21 Q. I stand corrected. What you did was you
22 looked at the costs that were appropriately
23 attributable or allowable under that GMP,
24 correct?

25 A. Absolutely not. That's the point I keep

1 trying to make. If Balfour would have asserted
2 here, Ms. Hadley, these are the costs that are
3 attributable as it relates to this GMP, then you
4 would be correct.

5 But that isn't what BBC asserted. What
6 BBC gave me, they said, here's our job cost
7 report. You know, have a good time. And that
8 job cost report includes costs that have nothing
9 to do with the current GMP.

10 For instance, it includes 3 million
11 dollars more of general conditions that are --
12 that have nothing to do with the current GMP. So
13 I can make that correction just by comparing it
14 to the current GMP, but there were also costs
15 within those cost codes that I mentioned in note
16 1 to this report, that BBC said shouldn't be
17 billed.

18 And then there are other costs in the
19 primary amount, the \$59,500,733 that have nothing
20 to do with the current GMP. And that's the
21 example that I keep trying to give you. Maybe
22 RCO 122 is a good example, but RCO 127 is another
23 example.

24 So I would not have minded at all to do
25 the work the way you described it, but that's not

1 the way it was presented to me, and that's why I
2 kept writing affidavits and complaining that I
3 wasn't getting apples to apples.

4 Q. Schedule B, the eligible costs of the
5 work, you referenced that, and then you came to a
6 conclusion in the report that you provided that
7 the maximum allowable costs of the work was
8 \$64,435,030, correct?

9 A. Yes, as long as we read the sentence
10 below the table because that says, the GMP has
11 yet to be impacted, and the costs are already
12 ineligible costs of the work.

13 Q. Right. So what you did was -- in this
14 report, what you provided to the parties in this
15 Court and in this case, was the figure at 65.
16 Then you said -- you looked at the allowable
17 costs based on all the information that was
18 provided to you and all of your conversations
19 with Balfour Beatty and with Casey Thompson and
20 David Simonton.

21 And you said, look, I'm going to -- I
22 don't believe that all those costs that you are
23 claiming as part of the GMP are allowable as
24 costs under the contract, and I'm going to
25 deduct -- if we turn to schedule A on page 4,

1 Ms. Hadley, if you will turn to that.

2 Page 4, schedule A. The top half of
3 that where it says, eligible costs in job cost
4 report. Do you see that?

5 A. I do see that.

6 Q. All right. So what you did, you have
7 notes on here to the -- you have the costs
8 incurred for the job cost report, and then you
9 went through and made an assessment of which
10 costs you felt were not appropriate as costs for
11 the work, correct?

12 A. That part is correct as long as you
13 don't add on the other part of the sentence that
14 you were doing before within the current GMP.
15 The amount here represents all costs that have
16 been incurred as of that time, whether they
17 relate to the GMP or not, and we evaluated those
18 costs, and we did find these deductions.

19 Then, if you look at the last half of
20 the page, there's another \$20 million of
21 adjustments that I'm also recommending because
22 other amounts that were requested to be increased
23 to the GMP were not adequately supported.

24 Q. But those weren't in the GMP that was
25 agreed upon by the parties, though, was it?

1 A. And those were some of these. That's
2 kind of my point.

3 Q. Okay. You arrived at the GMP that
4 was -- you felt was agreed upon by the parties,
5 correct?

6 A. I did not arrive at the GMP. I took the
7 GMP as it is currently approved by both of the
8 parties.

9 Q. Right.

10 A. And I evaluated the total costs incurred
11 by BBC, which they would not assert relates to
12 that GMP, but rather related to the entire
13 project, which is not the same thing.

14 Q. And then what you did was, you made
15 deductions, like for -- you deducted for
16 adjustments between GCs and primary. What was
17 that deduction?

18 A. That \$731,000 deduction represents the
19 general trades issue that we talked about earlier
20 where the amounts had been billed as general
21 conditions, but were booked into a 400 code. But
22 because they were general conditions, I was
23 moving them from primary into GCs.

24 Q. And if we -- so where it says, note one,
25 if we turn the page, the costs that you felt were

1 not costs of the work, there's a description of
2 what that total is, the 731. There's a
3 description by you of why that is not
4 appropriate, correct?

5 A. Yes. And it also explains why the costs
6 in here don't relate solely to the current GMP,
7 you know, and I think you can see it on page 6
8 and others.

9 Q. So what you did was, you looked at all
10 of the job costs and all of the data that the --
11 that Balfour provided. Did you see all of
12 Balfour's construction files and all of its job
13 data that existed at that time when you made your
14 audit?

15 A. No, I'm sure I did not. I was given the
16 four binders, which we know to be very
17 incomplete. They didn't include all of the OCOs
18 that are being claimed. They didn't include the
19 correct amounts for the RCOs. They didn't
20 include Watson's claim. It had been not put in
21 there yet.

22 And then I also had the job cost report
23 and accounting reports from Mr. Simonton and
24 Mr. Thompson. Then, when I picked samples of
25 transactions, they provided me the receipts and

1 the backup for those items.

2 And then I had full payment applications
3 that I received from Library Associates, and as
4 we all know, those things are hundreds of pages,
5 and there's a lot of information in the payment
6 applications as well.

7 Q. Okay. You reviewed all of that data,
8 and you identified costs that you felt were not
9 appropriate to be included in the allowable costs
10 of the work, correct?

11 A. Correct.

12 Q. All right. And when you add up all of
13 those deducts that are in that -- the top page of
14 this -- the top half of this page, they add up to
15 \$1,170,389, correct?

16 A. Correct.

17 Q. Right. So based on this report, those
18 were the costs that you identified to Balfour as
19 being, in your view, costs that were not
20 recoverable under the contract, correct?

21 A. That would be some of them, but you will
22 have to then add in any of the costs that have
23 been incurred in the job cost report that relate
24 to something that's not in the current GMP, based
25 on how the litigation gets resolved.

1 But I do have to say that I did allow at
2 that time, the non-payments that BBC, you know,
3 didn't make to its subcontractors. It was
4 holding retainage or any amount that it had not
5 yet paid. I did not exclude those amounts
6 because I assumed it was just a matter of
7 retainage needs to be released.

8 Now that I realize that the
9 subcontractors are going to be receiving
10 different amounts; some lower, like Quantum; some
11 higher, potentially like Watson. The amounts
12 that were audited in here are obsolete for that
13 reason.

14 It is very clear that back charges need
15 to be assessed, as you guys have stated, BBC has
16 stated and through various venues, as well as
17 settlements are being made. This audit was done
18 just based on the amount that was in the
19 accounting report.

20 Q. Just so I understand, so what you've
21 done now is that, any costs that are reflected in
22 Plaintiff's Exhibit -- I think it was 329.

23 THE COURT: The table?

24 Q. -- that are otherwise payable to
25 subcontractors that have not been paid, you have

1 not -- when you rendered your opinion here today,
2 you deducted -- you did not include as costs of
3 the work, any payments that Balfour owed
4 subcontractors; is that correct, that had not
5 been paid?

6 A. Yes.

7 Q. Have you looked at -- do you know, from
8 a legal standpoint, as to whether the work is
9 still obligated in its subcontracts with its
10 subcontractors, to pay them for the work and
11 materials that they provided on this job?

12 MR. MCDONALD: Objection, Your
13 Honor. I believe that the beginning of that
14 question had a legal standpoint thrown in there;
15 so I object to that question.

16 THE COURT: Object to the --
17 seeking her opinion on a legal matter?

18 MR. HILDEBRAND: No, sir. I'm
19 asking her, based on her review of the contract,
20 it's simply that, is she aware of a contractual
21 provision in Balfour's contracts with its
22 subcontractors, where it still is obligated to
23 pay the subcontractors for their time and
24 materials. That's a big part of the case.

25 MR. MCDONALD: That's a different

1 question. I also object for the previous reason
2 and the existence of the pass-through agreement
3 that we've talked about, that has amended
4 Balfour's contract with its subcontractors.

5 And I would submit, Your Honor, there's
6 only one subcontract in evidence, and it's
7 Lithko's subcontract, that Lithko is a party to
8 the very agreement that said, we're going to
9 shake it all after this at the end of it. So I
10 object for all of those reasons.

11 THE COURT: All right. Objection
12 noted. You can ask the question.

13 BY MR. HILDEBRAND:

14 Q. All right. Have you looked at the
15 subcontracts to make an assessment and render an
16 opinion here today as to whether Balfour is
17 obligated -- what obligations Balfour has to pay
18 the subcontractors who provided work and
19 materials on this job and who have not been paid?
20 Do you know what Balfour's obligations are under
21 its contracts with those subcontractors?

22 A. I haven't read every subcontract, but
23 Balfour's obligations will differ based on the
24 subcontract and the change orders.

25 So Old North, Lithko, for example, where

1 the parties have agreed that they don't owe each
2 other anything but the first 100,000, or the
3 first 70,000, if anything recovered, would go to
4 Balfour. Those change orders then do articulate
5 those debits and credits of what -- what BBC has
6 to pay.

7 That change order says nothing. We
8 aren't going to pay you anything, but if we
9 recover anything, we get the first -- and unless
10 you recover more than that, then I guess you
11 would release the excess. If you take a look at
12 the financial obligation as defined in the joint
13 defense agreements, again, that's going to be a
14 change to the original subcontract.

15 And as those parties negotiate and
16 potentially litigate those issues, the amount
17 that BBC may be entitled to pay will be
18 completely dependent upon that litigation and
19 that negotiation.

20 Q. Well, how many parties are currently --
21 are still involved with the joint defense
22 agreement?

23 A. I have the list with me. I believe
24 there were somewhere between 8 to 11.

25 Q. There are 8 to 11 who are still involved

1 in it? If I told you there are only two that are
2 still involved in it, would you dispute that?

3 A. If there's only two that are still
4 involved in it, then there's been some
5 settlements with the others that I don't know the
6 finances of.

7 Q. Or maybe they just -- there is -- they
8 opted out of the joint defense agreement.

9 A. So did they also then opt out of
10 receiving any additional money from BBC?

11 Q. Well, there's a lot of hypotheticals
12 that you don't know relative to the
13 subcontractors.

14 A. But it's only hypothetical to me. You
15 know. I just don't know.

16 Q. Let's go through page 5 on the first --
17 the general conditions noted on schedule A, which
18 you said should result in \$731,259 not being
19 allocable to the cost of the work, correct?

20 A. What it actually says -- I think it's on
21 the subsequent page after this one is, I'm moving
22 it from the primary codes to general conditions.
23 And if you take a look at those accounts that are
24 on the top of page 6, you will see that those
25 are, for the most part, the new general trades

1 claim.

2 Q. And the basis that you used to make that
3 determination on this report was the response to
4 the request for production -- I'm sorry, the
5 request for information that was issued by
6 Library prior to the contract being signed?

7 A. No, that's --

8 Q. The request for proposal?

9 A. Yeah, that's -- the request for proposal
10 is quite a bit different than a request for
11 information.

12 But in addition, as I stated in the
13 report, that was just one element that led me to
14 that conclusion. The other element is that BBC
15 never billed for any of these costs throughout
16 the life of the project. They had never been
17 identified by BBC as a general trade cost.

18 The only thing that Library had ever
19 seen throughout the course of the project was the
20 fixed amount being billed for general conditions,
21 which comported to what they put in their
22 response for the proposal, where they said that
23 those costs would be part of general conditions.
24 So everything was aligning until the general
25 trades claim came about in September of 2021.

1 Q. In your report and in your deposition,
2 you stated numerous times, you have no opinion as
3 to entitlement either to Balfour or Library
4 regarding liquidated damages or the RCOs or
5 anything else. That's going to be for the Judge
6 to decide, correct?

7 A. You will have to send me to the page in
8 this report that talks about liquidated damages.
9 Is it -- is it a particular note?

10 Q. Hold on a second. I think it's on page
11 15, the current GMP has not been modified for any
12 entitlement claims by either parties.

13 A. Right. I don't know what that would
14 have to do with liquidated damages, though. The
15 GMP wouldn't get modified for the sole reason of
16 liquidating damages being assessed.

17 MR. HILDEBRAND: Can you give me a
18 few minutes, Your Honor? I need to check my
19 notes.

20 THE COURT: Sure.

21 MR. BUNDY: Your Honor, can I
22 inquire about what's going on?

23 THE COURT: I think they're just --
24 hopefully they're wrapping up, trying to figure
25 out whether or not they want to ask any more

1 questions, I think. We can take a break. Let's
2 take five minutes.

3 (A recess transpired.)

4 MR. HILDEBRAND: Nothing further.

5 MR. MCDONALD: Nothing for me, Your
6 Honor.

7 THE COURT: Mr. Windle?

8 CROSS-EXAMINATION

9 BY MR. WINDLE:

10 Q. Ms. Hadley, Al Windle on behalf of Old
11 North State Masonry. And I want to ask you these
12 questions. In regard to the testimony about
13 Premier Stucco, the additional payments to
14 Premier Stucco --

15 A. Yes.

16 Q. Do you recall your testimony on that?

17 A. I do.

18 Q. And your testimony is that, if there is
19 an added change order to Premier for additional
20 stucco work, in your opinion, there should be a
21 deductive change order to Old North State
22 Masonry; is that correct?

23 A. I don't think I said it exactly like
24 that. I think I said, if Premier's contract was
25 increased due to damages caused by Old North,

1 then an appropriate back charge credit should be
2 a part of it.

3 Q. That's said a little differently, but it
4 means the same, right?

5 A. No, I don't think it does. The way you
6 said it was just additional stucco work versus
7 additional work because of defective work by
8 another.

9 Q. Okay. The next question is this: Do
10 you know whether or not there was actually any
11 defective work by Old North State Masonry in the
12 case, in that situation?

13 A. From an audit perspective, I rely on
14 what BBC and Premier said. I didn't inspect the
15 work.

16 Q. You don't know whether or not Old North
17 State Masonry's work was actually defective or
18 not, do you?

19 A. No. From an audit perspective, I do
20 rely on the evaluations for that.

21 Q. Do you know whether or not Old North
22 State Masonry provided evidence to Balfour that
23 convinced Balfour that Old North State Masonry's
24 work was not defective?

25 A. It must not have because BBC wouldn't

1 have entered into change order 19 and 20 with Old
2 North State Masonry that identified the defective
3 work on the back charges if it believed there
4 weren't any.

5 Q. Thank you. Are you also aware of the
6 fact that Balfour -- excuse me, Old North State
7 produced evidence that convinced Balfour that the
8 actual problem that required additional stucco
9 work was defective design?

10 A. Sorry. I was paying attention, but what
11 was the first part of the question?

12 Q. Are you aware that Old North State
13 Masonry produced evidence to Balfour that
14 convinced Balfour that the actual reason that
15 Premier had to do additional stucco work was due
16 to defective design?

17 Mr. McDonald: Objection, lack of
18 foundation.

19 THE COURT: Overruled.

20 THE WITNESS: I am not aware, but
21 it would have had to have been produced after
22 change orders 19 and 20 were entered into;
23 otherwise, again, 19 and 20 wouldn't make any
24 sense. But if it was produced after in the
25 summer of 2019, that's possible.

1 BY MR. WINDLE:

2 Q. All right. Switching subjects now,
3 talking about the lien waivers that contain the
4 release language. They're attached or included
5 with every subcontractor application for payment
6 as well as every Balfour application for payment,
7 right?

8 A. They should be.

9 Q. Okay. And did you attempt to review, as
10 part of your audit, all of the Balfour
11 applications for payment, which included the
12 subcontractor application for payment?

13 A. Yes.

14 Q. Well, in doing that review, did you
15 notice that there are instances where work is
16 performed by a subcontractor in one pay period?

17 The subcontractor generates a request
18 for change order that goes to Balfour, and
19 Balfour and the owner discussed that request for
20 change order for several months, but then it gets
21 approved for payment.

22 But at the time it's paid, the
23 subcontractor has signed at least one lien waiver
24 with the release language, maybe more. Did you
25 see that in your analysis?

1 A. In that situation, there is a specific
2 place in the lien waiver to reserve for those
3 pending changes, as Old North did, by attaching
4 its change order log to every single one of the
5 lien waivers. As a reservation, it referred to
6 something called Exhibit A that identified all of
7 its outstanding issues.

8 Q. It was a poor question. I'm not asking
9 the question now just on behalf of Old North
10 State. I'm asking on behalf of Old North State
11 and all the other subs.

12 Let me ask it this way and ask it more
13 specifically: Did you notice situations, and
14 most generally change order work, like I said,
15 where a sub did change order work in one pay
16 period, signed a lien waiver including the
17 release for that pay period, submitted a RCO for
18 the change order work that had been performed.

19 That change order work gets negotiated
20 by the owner and Library for a month or more. It
21 finally gets approved and gets paid, but in the
22 meantime, the sub has signed one or more lien
23 waivers with release language it in. Did you
24 notice that?

25 MR. MCDONALD: Objection.

1 THE COURT: Overruled. You can
2 answer it, if you can.

3 THE WITNESS: Is the question
4 hypothetical to any construction project or is --
5 BY MR. WINDLE:

6 Q. This project.

7 A. -- the question relating to these --

8 Q. This project and the documents you
9 reviewed on this project.

10 A. In the documents that I reviewed on this
11 project, I did do a detailed lien waiver
12 reservation analysis for many sites. And what I
13 found, for example, Watson never had a
14 reservation identified on any of its lien
15 waivers.

16 Old North attached an exhibit that the
17 amounts would change and RCOs would come and go,
18 again, as they get approved. And if they didn't
19 get approved, they would just stay on there.

20 Every sub is a little bit different, but
21 I am not recalling a particular subcontractor
22 name where it had performed work and not put the
23 RCO on its lien waiver, nor would it make logical
24 sense for it to do so because, as you said, it
25 billed for it.

1 So if it's already in the payment
2 application and identified in the pay app, it
3 wouldn't be something that you would also put as
4 a reservation to the lien waiver.

5 Q. Okay. Let me ask the question one more
6 time, and I'll try to be very -- ask a better
7 question. In regard to lien waiver forms that
8 had no reservation language on it, the sub didn't
9 reserve any rights to anything. They just signed
10 the lien waiver form with the release language on
11 there.

12 Did you see instances where the
13 subcontractor, nevertheless, got paid for that
14 work, even though the lien waiver and release
15 form had been signed at least once, maybe more,
16 in subsequent monthly pay periods?

17 A. Okay. So the situation is, they did the
18 work. They got paid for the work, but they never
19 put it on their reservation?

20 Q. No, they didn't get paid for the work.

21 A. They never got paid for the work?

22 Q. Well, not never. They got paid several
23 months later, but in the meantime, they had to
24 sign a lien waiver and release forms with no
25 reservations, but nevertheless, they still got

1 paid.

2 A. I don't have a particular instance of
3 that.

4 Q. Do you recall that at all?

5 A. No.

6 Q. Do you recall the owner ever refusing to
7 pay Balfour or Balfour refusing to pay a sub
8 because a lien waiver form had been signed
9 without any reservation during the course of this
10 whole project?

11 A. So Library would refuse to pay Balfour
12 because Library didn't see enough reservations on
13 the subcontractor lien waivers? No, I did not
14 see that.

15 Q. Okay. Did you look for that?

16 A. I didn't look for the reasons why
17 Library Associates would refuse to pay a pay app
18 because, my understanding is they've been paid
19 all through pay app 42. So the only three that
20 didn't get paid would have been 43, 44, and 45,
21 and I think there's been a lot of testimony as to
22 why that happened. So ultimately, Library did
23 pay the pay app.

24 Q. You don't recall any instance where
25 Library refused to pay because some work that was

1 being requested was precluded by a release in a
2 lien waiver?

3 A. Oh, that's a different scenario. I
4 don't think I understood you right. So this is a
5 situation where a sub did put something, it was
6 trying to preserve its rights for something, and
7 Library was like, I don't want to pay this pay
8 app because that sub is trying to preserve its
9 rights for something?

10 Q. No, ma'am. I'm sorry.

11 A. I'm sorry. I really am trying.

12 Q. Do you recall any instance on this
13 project where any sub was refused payment, either
14 by the owner or Balfour, because they had failed
15 to make a reservation of rights on a lien waiver
16 and a release form?

17 A. No.

18 MR. WINDLE: No further questions.

19 THE COURT: Mr. Terry?

20 MR. TERRY: Your Honor, will you
21 bear with me just for one moment.

22 THE COURT: Sure. Yeah.

23 CROSS-EXAMINATION

24 BY MR. TERRY:

25 Q. Ms. Hadley, I'm Don Terry. I represent

1 Watson Electrical Construction, and I believe we
2 met virtually during your deposition. Today
3 during your testimony, you have utilized some
4 documents that you to appear to have brought with
5 you, correct?

6 A. Yes.

7 Q. Okay. I would like to take a look at
8 those documents, please. Is this all of them?

9 A. Yes.

10 Q. Thank you. What is in this notebook
11 here?

12 A. The stuff on the left-hand side is a
13 blow up of Exhibit 329 because I couldn't read
14 it. It's the timeline again because I couldn't
15 read it, and Balfour's pay app 38 that they
16 provided in their responses to (inaudible) sub
17 interrogatories where they identified the
18 subcontractors that are associated with each line
19 item on the schedule of values.

20 So that's just in the little folder part
21 on the left side. Then the tabs, I don't have
22 them all memorized, but, like, the first one is
23 my resume, and the other documents that Bundy,
24 McDonald was planning on or could have
25 potentially introduced.

1 Q. Did you prepare this notebook? Let me
2 it a different way. Did you participate in
3 preparing this notebook?

4 A. Yes.

5 MR. TERRY: And, Your Honor, I
6 would like to -- I don't know how we're going to
7 mark Watson's exhibits, but I'd like to mark
8 this, if possible as 1.

9 THE COURT: Do you want that to be
10 your exhibit?

11 MR. TERRY: I want it in the
12 record, yes, sir.

13 THE COURT: Has she properly
14 identified it all?

15 MR. TERRY: It can be her exhibit,
16 I don't care. At this point, I want to mark it
17 as an exhibit.

18 MR. MCDONALD: I don't think it can
19 be a witness's exhibit. If he wants to mark an
20 exhibit, he's going to have to mark it on behalf
21 of Watson because he wasn't --

22 THE COURT: What's the purpose of
23 putting that into evidence? These are her notes,
24 her reflections she's referred to during her
25 testimony?

1 MR. TERRY: Yes, Your Honor.

2 THE COURT: What would be the rule
3 upon which you would put that into evidence?

4 MR. TERRY: Unfortunately, Your
5 Honor, I can't cite a rule.

6 THE COURT: Well, there is one, and
7 it's past recollection recorded. And that stuff
8 doesn't come into evidence.

9 MR. TERRY: All right. Thank you,
10 Your Honor.

11 BY MR. TERRY:

12 Q. Who made this notebook, Ms. Hadley,
13 besides yourself?

14 A. It really was me. I pulled together PDF
15 change orders from subs and things and just had
16 it printed. I mean, I'm not the originator of
17 many of those because they are just old PDFs or
18 the joint prosecuting agreement or my resume.

19 Q. To your knowledge, is there any
20 handwriting in this notebook that's not yours?

21 A. If there's handwriting in the document
22 that's not mine, it would be a photocopy from
23 someone else's handwriting, maybe Nick Starcevic
24 or something like that. If it's in ink -- like,
25 I don't know how to say it. Live ink, it would

1 be me. I'm the only one that's ever had that
2 notebook.

3 MR. TERRY: That's all the
4 questions I have. Thank you.

5 MR. MCDONALD: Nothing for me, Your
6 Honor. Thank you very much.

7 THE COURT: Ms. Hadley, I have a
8 few questions for you, I hate to tell you. And
9 they are in, I think, largely three areas. I
10 just want to be clear on your testimony.

11 You said about -- to determine what the
12 guaranteed maximum price was in the contract,
13 based on the record, how far -- you've testified
14 about all the documentation you've looked at.
15 How far did you go in the pay apps to support
16 those numbers? Was it through pay application
17 42, or did you include 43, and I think there was
18 a 44 and a 45? I know there was a 42.

19 THE WITNESS: So Mr. Hildebrand
20 asked me that question, and I said I would kind
21 of like to check. The table that I have in my
22 report on page 1, and then the numbers that he
23 and I were both referring to that are also in
24 Exhibit B identify the current GMP value.

25 THE COURT: That's schedule B.

1 THE WITNESS: Schedule B, as well
2 as the table on page 1. And I just can't
3 recollect whether the change orders that I
4 recognized would have stopped at pay app 42.

5 I believe that these are the current
6 values as of pay app 45 because, for example, one
7 of the OCOs was approved after pay app 42, and I
8 know that to be the case. So if I could just
9 have a look at pay app 45, if it's around, I
10 could probably confirm that.

11 THE COURT: We could probably find
12 that.

13 MR. MCDONALD: I can get that, Your
14 Honor. I've got it right here, Your Honor. Do
15 you want me to --

16 THE COURT: Sure. Just hand it to
17 her.

18 THE WITNESS: So the numbers in my
19 schedule B and the table on page 1 are reflective
20 of pay app 45.

21 THE COURT: Okay. All right. So
22 while we're on that Exhibit 350, let's look at
23 schedule B because I noted that was on page 15 of
24 your report. And I want to -- you repeated
25 several times that you took the guaranteed

1 maximum price of the contract as was; is that
2 correct?

3 THE WITNESS: Yes. That row called
4 current GMP, those amounts come right out from
5 pay app 45, which would be the latest contract
6 values that the parties, I will say, agreed to.
7 I appreciate pay app 45 wasn't paid, but it --
8 there were a couple of OCOs and a couple of
9 change orders that were approved late in the
10 game. So this would incorporate all of that.

11 THE COURT: Okay. And I'm sure
12 your testimony is consistent in how you
13 determined the general conditions and what you
14 talked about primary costs. But I noted that, in
15 your schedule B, you show a figure of \$3,322,074.
16 Your testimony earlier today said that general
17 conditions were \$3,319,212. Do you recall that?

18 THE WITNESS: Yes.

19 THE COURT: I get a difference of
20 \$2,862 over a 3.3 million dollar claim.

21 THE WITNESS: The difference is
22 actually explainable.

23 THE COURT: Well, it's less than
24 1/10th of 1 percent is what I come up with. Is
25 that significant, an accounting of what you've

1 been doing here?

2 THE WITNESS: It is not
3 significant, and the difference is due to the
4 fact that the pay applications didn't recognize
5 two GMPs. They were kind of standard monthly pay
6 apps.

7 So that top page that brings the whole
8 thing together didn't have two columns; one for
9 the GCs and for the primary. So you had to dig
10 into the detailed pages in the back to get those
11 numbers.

12 And when you think about a particular
13 change order, the change order is most likely for
14 increased costs for a subcontractor, but then
15 there is a small amount of markup for BBC.

16 THE COURT: Right.

17 THE WITNESS: And BBC didn't move
18 that markup that was approved into the general
19 conditions line all the time, and it just got a
20 little fuzzy by a very immaterial amount, by them
21 not recognizing that additional GMP. It stayed
22 on -- let's say, the stucco or electrical
23 scheduled row for the whole change order, on
24 occasion.

25 THE COURT: All right. And

1 likewise, I noted, but I pulled this off a
2 different line, it was amount paid to-date on
3 your schedule B was 55,486,480, and you testified
4 today it was 55,549,730. That's some \$63,000
5 more.

6 Is that reflective in the updates and
7 what you've seen since or what would be the
8 difference? Again, that's .001 percent; so I
9 don't know that it's significant, but --

10 THE WITNESS: That amount should
11 not have changed.

12 THE COURT: Okay.

13 THE WITNESS: The amount paid
14 to-date -- I must have just misspoke because it's
15 always been 59,994,390.

16 THE COURT: The amount paid?

17 THE WITNESS: That's the amount
18 paid to-date.

19 THE COURT: Okay. In the total
20 column?

21 THE WITNESS: In the total column,
22 yes. The amount on schedule B as amount paid
23 to-date --

24 THE COURT: Okay.

25 THE WITNESS: -- is accurate.

1 Again, maybe the amount I quoted was a reduction
2 for that preconstruction fixed price. I don't
3 know what the other number is.

4 THE COURT: I'm sorry. Say that
5 again.

6 THE WITNESS: I was saying, it's
7 possible that the other number that you just
8 quoted was without the preconstruction services
9 fixed fee. I'm not sure where that number came
10 from, the other one that you read.

11 THE COURT: I could have written it
12 down wrong. I think that was reflective of the
13 cost of the work.

14 THE WITNESS: Oh, yeah. That is
15 potentially the addition of the general
16 conditions of the primary and the preconstruction
17 costs before the fee gets added on.

18 THE COURT: Right. Your testimony
19 then was -- the 59 that's in there is correct?

20 THE WITNESS: Yes. The 59 million,
21 as amount paid to-date in the schedule B of my
22 report is correct.

23 THE COURT: Okay. All right. And
24 you testified that, under the contract, it was
25 some 60,413,815, and it was -- led to a balance

1 due back to Library Associates of 419,425.

2 That's what my notes reflect.

3 THE WITNESS: No, I said it wrong.

4 The \$419,425 would be the amount that Library
5 would owe Balfour in that situation prior to the
6 assessment of the LDs.

7 THE COURT: Okay. All right. Now,
8 let's go back to what we had talked about all
9 through the course of getting ready for this
10 trial. What was it that you needed that you were
11 seeking from Balfour Beatty in order to properly
12 do your audit? What was it that you wanted that
13 you never got?

14 THE WITNESS: I wanted to know what
15 their final accounting was of what the project
16 cost. Some of those amounts didn't have to be
17 paid, but they would be an accrual of the costs.
18 Instead what I got was a very thick wall between
19 two different things. Here's our accounting
20 report. Here's our job cost report, and here's
21 our claim as supported by the four binders.

22 The problem is there's overlap. There
23 are things in the job cost report that is part of
24 the claim, and you can't just simply add those
25 two things together to figure out what the total

1 project costs are. There are also things in the
2 job cost report that never intended to get
3 billed.

4 You can do a lot of things as a
5 contractor that might be a very -- you know, a
6 thing to do, but it isn't necessarily an eligible
7 cost of the work. So there are things that even
8 Balfour never intended to invoice to Library.
9 And it doesn't mean you shouldn't incur them and
10 put them in the job cost report. But until it's
11 Balfour making an assertion of, here's what our
12 total project cost us and then, okay, Sam, you
13 know, go take a look. But I never did know what
14 they want to assert as the cost of the project.

15 In addition when I was, you know, trying
16 to accumulate them and add them together, the
17 problem would be that the four binders didn't
18 support the claim letter, which is the only claim
19 that we've ever had until September of six weeks
20 ago. So I couldn't get the binder to support the
21 claim, but the claim and the job cost report
22 overlapped.

23 So I met with BBC and said, you know,
24 the only way we're really going to figure this
25 out is if we take the following steps. And I

1 itemized the steps and I sent them in the e-mail,
2 and they said, that's for you to do. We're not
3 going to do that.

4 THE COURT: Right.

5 THE WITNESS: And if you find
6 anything wrong, just put it in your audit report,
7 and we'll deal with it down the road. But right
8 now, here's our accounting report, and that's all
9 we're going to do.

10 THE COURT: And have you had that
11 problem before?

12 THE WITNESS: No. Most of the time
13 the contractors want to get paid, and they're
14 willing to provide the information to support the
15 amount they want to get paid.

16 It wasn't until just September that
17 they've identified the amount that they want to
18 get paid, but even that schedule, Exhibit 329,
19 includes contract balance, things that are in the
20 GMP now, and things that have been incurred.

21 So we can't just simply write a check
22 for 13.8 million because some of that has already
23 been paid, some of it's part of the GMP. It will
24 depend on also Your Honor's decision about the
25 merits of the RCOs and the claims.

1 THE COURT: Right. Right. So the
2 final question is, do you have the ability to
3 determine exactly how much is actually owed or
4 ultimately owed without knowing how much the subs
5 are going to be paid and credits were given and
6 back charges and that type of thing?

7 THE WITNESS: In previous
8 situations like this where the -- all the checks
9 haven't cleared, the contractor does typically
10 put forth a schedule or an estimate of, here's
11 what I'm negotiating with this sub.

12 So that's what I'm going to book as the
13 expense in my accounting system, and then that's
14 what I want to get reimbursed for. If there is a
15 delta, then we sometimes do a true open
16 reconciliation between them. But, you know,
17 settlements with subs happen all the time.

18 THE COURT: Sure.

19 THE WITNESS: And as long as the
20 prime acts reasonable and, you know, isn't
21 saying, you know, I will pay you this and then I
22 want a hot tub at my house -- as long as it's a
23 reasonable settlement amount, that amount becomes
24 an eligible cost of the work.

25 THE COURT: Okay.

1 THE WITNESS: But if they had
2 estimated and accrued for a slightly different
3 amount or a significantly different amount, we do
4 make that adjustment later. One of the contract
5 provisions specifically said, subcontractors have
6 to be paid. It has to be a paid amount to be an
7 eligible cost of the work.

8 So that is one of the reasons why you
9 can't just accrue expenses or identify the
10 retainage. If you don't release the retainage to
11 the sub for a potentially very good reason, then
12 that retainage will never be cost of the work.

13 THE COURT: All right. Those are
14 my questions. Any follow-up from anybody?

15 Mr. McDonald?

16 MR. MCDONALD: No, Your Honor.

17 THE COURT: Mr. Hildebrand?

18 MR. HILDEBRAND: No, sir.

19 MR. TERRY: No, Your Honor.

20 MR. WINDLE: No, sir.

21 THE COURT: Ms. Hadley, thank you
22 very much.

23 THE WITNESS: This was the report.
24 It's not marked.

25 THE COURT: Yeah, it's in evidence

1 as 350. All right.

2 Mr. McDonald? Mr. Bundy?

3 MR. BUNDY: The defendant rests,
4 Your Honor.

5 THE COURT: Very good. All right.

6 MR. TERRY: Your Honor, I would
7 like to make a motion for directed verdict on
8 defendant -- on Library Associates, the
9 conspiracy claim against Watson.

10 As you know, on the civil conspiracy
11 claim, that Library Associates has to prove that
12 Watson entered into an agreement, made an
13 unlawful act, or a lawful act by unlawful means.
14 There's no evidence in the record of any such
15 agreement.

16 Additionally, they have to prove that
17 there's been an overact and furtherance of this
18 agreement. Additionally, there's no evidence in
19 the record, as it relates to any agreement
20 between Watson and anyone, that any overact
21 occurred.

22 Third, they have to prove that damages
23 resulted from this conspiracy. There's no
24 evidence in the record of any damages to Library
25 Associates -- there's no admissible evidence in

1 the record to any damages to Library Associates
2 as a result of any agreement made by Watson. And
3 those -- the damages that are in the record, Your
4 Honor, have to be caused by this conspiracy.

5 And, Your Honor, there's no evidence of
6 any damages caused by this alleged conspiracy
7 that Library has sought and did not even put on
8 any evidence of causation.

9 THE COURT: All right. Mr. Windle,
10 are you joining in that one or not?

11 MR. WINDLE: Yes, sir, on the same
12 ground.

13 THE COURT: All right.
14 Mr. Hildebrand, do you want to be heard?

15 MR. HILDEBRAND: I've got a number
16 of them.

17 THE COURT: You've got even more.
18 Do you want me to take this up and then come to
19 you, or how would you like to do that?

20 MR. HILDEBRAND: Some of mine are
21 duplicative; some of mine are -- we might need to
22 go through.

23 THE COURT: All right. Are you
24 including the conspiracy? Why don't you just
25 talk about the conspiracy. Right now let's talk

1 about that.

2 MR. HILDEBRAND: Okay. The grounds
3 for the conspiracy claim are articulated in the
4 cross-claim, which are -- is entering into the
5 joint defense agreement. Your Honor, that -- the
6 common interest doctrine is recognized in South
7 Carolina that you can have joint defense
8 agreements.

9 THE COURT: Help me out again with
10 the date. When was that joint defense agreement
11 first entered into? Was it September of '19?

12 MR. HILDEBRAND: No, sir. No, sir.
13 It was in -- maybe so. Maybe so. There's an
14 exhibit that we did as a chart of the
15 dates that -- I can't recall right off the bat,
16 but we have a synopsis of it. It was well after
17 the project was finished and well after the
18 litigation was started.

19 THE COURT: The lawsuit was filed
20 on March 5th, and then the joint defense
21 agreement was sometime -- sometime after June or
22 the fall?

23 MR. HILDEBRAND: Yes, sir. Well,
24 after that. One, there's no unlawful -- joint
25 defense agreements are recognized, common

1 interest doctrine.

2 If you read that joint defense
3 agreement, all it says is that, if there are
4 claims between Balfour and the subs, that we
5 will -- there's a tolling agreement. We'll
6 litigate those later. That's basically all it
7 says. There were -- and we'll agree to share
8 experts.

9 Really none of that has occurred. There
10 were several subcontractors that signed onto it,
11 but most of them then said, well, we're going to
12 back out of it. None of the -- even though it
13 subcontractors -- even though it said that the
14 subs would litigate their claims later, most of
15 them had filed claims against Balfour before the
16 joint defense agreement, and they never withdrew
17 them. So they had remained in place.

18 So what it really gets down to is, one,
19 there's no unlawful means. Two, as Mr. Terry
20 alluded to, there are no damages that flow from
21 that. All of the plaintiff's damages -- I'm
22 sorry, the defendant's damages, Library's are the
23 excess costs of having to finish the job, the
24 amounts due under the contract.

25 All of that was solidified through when

1 the job ended. When substantial completion was
2 done, all of their damages were completed by
3 then. How on earth could there have been damages
4 caused by this alleged joint defense agreement?
5 It just -- it makes no sense.

6 So there's no unlawful -- there's no
7 unlawful mechanism or a lawful means. Under that
8 Paradise case, it was recently entered, Your
9 Honor. It was issued by the Appellate Courts.
10 There has to be a -- there has to be an unlawful
11 act or a lawful act by unlawful means. And I
12 submit to you that there's no such evidence in
13 this case.

14 THE COURT: All right.

15 MR. WINDLE: Yes, Your Honor,
16 briefly. If you look at the subcontract, the
17 subcontract between Balfour and the
18 subcontractors has a provision that says, in
19 regard to damages caused by -- and one in
20 evidence, Lithko, in regard to damages caused by
21 the owner, the subcontractor is only entitled to
22 receive whatever Balfour receives from the owner
23 on the subcontractor's behalf.

24 So in order to make that happen,
25 subcontractors and general contractors have been

1 entering into pass-through claims for decades,
2 like the joint defense agreement, which explains
3 how you're going to work together to proceed in
4 regard to an alleged damage caused by the owner.

5 And that's what these subs, Lithko,
6 Watson, Old North State and the others did in
7 this case, which isn't an unlawful act. It also
8 isn't a lawful act to achieve an unlawful means.

9 THE COURT: All right.

10 MR. BUNDY: Do I get a turn?

11 THE COURT: Yes, sir.

12 MR. BUNDY: Thank you. This is
13 going to take a minute. I've got a lot to
14 remember here. If you may recall when this case
15 began, it was a, quote, unquote, simple case. It
16 was going to take a day or two to try.

17 And the main theory behind the case then
18 was that Mike Bennett didn't have any money to
19 pay the claim. Remember that? We went through
20 all of the -- that Mike Bennett's got no money,
21 right? No money, can't afford to pay, and that's
22 why he's not paying.

23 Now, since then, we have learned in
24 camera, he had plenty of money. Since then, we
25 also have in evidence a mortgage to the tune of

1 \$128 million on a \$62 million loan. So he had
2 about 60 million dollars in cash from MetLife,
3 who is not a bank, but a lender. Plenty of
4 money.

5 Why is that significant? Because that's
6 what they believed. They believed the general
7 contractor and these conspiratorial
8 subcontractors all believe that Mike Bennett had
9 no money. Now, why was that important? It was
10 important because they knew he had a loan, and
11 they knew he had to get permanent financing.

12 And they knew that if they over-liened
13 his job, that he would have to bend to their will
14 and submit to their extortion because 90 percent
15 of the developers out there cannot afford to do
16 what Mike Bennett did, and they don't have a
17 lender who will stand behind them in the face of
18 extortion.

19 So what they did was, they filed 24
20 million dollars worth of liens, and we're now
21 down here, and they come into Court three years
22 later and it's down to 13 million. We put up
23 somebody who says they don't have the 400,000.
24 They're entitled to nothing.

25 Now, the Spearin Doctrine allows for

1 pass-through claims. United States Supreme
2 Court. It's been the law for quite a long time,
3 and yes, pass-through agreements go all the time
4 in lump sum jobs. This is not a lump sum job.
5 This is a cost plus job.

6 And the contract clearly bumping up
7 against judiciary obligations says that Balfour
8 Beatty will spend my client's money judiciously,
9 or words to that effect, and with efficiency. We
10 hired him to do two things and two things only,
11 which was to schedule this job, to finish it on
12 time. They were in complete charge of the
13 schedule, and they failed miserably.

14 Two, to spend our money wisely as if it
15 was ours, not theirs. Instead what they did, in
16 violation of the contract, they amended the
17 subcontracts. We are an intended third-party
18 beneficiary of those subcontracts and our
19 contract. We're entitled to know what they're
20 doing.

21 Secretly, they entered into an agreement
22 in which whereby they said in this cost plus
23 contract, we -- until resolution of owner-related
24 claims, subcontractors have agreed that it will
25 assert no claims against contractor as

1 necessary -- except as necessary to lien rights,
2 and contractor agrees it shall assert no claims
3 against any subcontractors.

4 Subsequently, contractors and the
5 contractor, respectively, have the right to
6 assert claims against one another for any amounts
7 not recovered from the owner or others.

8 In the 30(b)(6) deposition that you may
9 or may not have had a chance to look at, I was
10 told repeatedly by the 30(b)(6) representative,
11 we have no responsibility to look at
12 subcontractor claims. I submit they did. We
13 hired them for that very purpose. Indeed, in
14 this very agreement.

15 Subcontractors each warrant and
16 represent their respective claims compromised to
17 the subcontractor who claims and each of them
18 will factually and legally support them. They
19 were not. They did not look at them.

20 The unlawful acts are numerous,
21 numerous. They committed multiple misdemeanors,
22 multiple misdemeanors in this Courtroom under
23 oath. They have taken money from my client, said
24 thereby, we will pay this money to the
25 subcontractor. They did not pay the money to the

1 subcontractor, and subsequently, verified under
2 oath again, we did pay them.

3 We have 12 separate instances of that.
4 Why did BMCC settle? Because once they realized
5 that Balfour Beatty had held their money,
6 unbeknownst to them, they walked.

7 MR. HILDEBRAND: Objection, Your
8 Honor.

9 MR. BUNDY: These unlawful acts
10 have caused damages to my client. The testimony
11 today is 20-some-odd million dollars in profits,
12 and I know Your Honor doesn't agree with our
13 position, but I respectfully request that the
14 unfair trade practices, breach of contract
15 accompanied by fraudulent act, and this
16 conspiracy support a loss of profits claim.

17 But for this conspiracy -- and there was
18 a conspiracy to hide documents. They cut off the
19 ignite site. They entered into -- they entered
20 into secret agreements with the subcontractors,
21 trading back and forth credits and debits and
22 back charges. They conspired together to cheat
23 my client as a team.

24 And you can't go into a conspiracy and
25 get out of it and say, I wasn't involved in it.

1 If you're part of a bank robbery, you don't get
2 to go home and say, well, I've got my money, I'm
3 out. Either you're in it or you're out.

4 Clearly, Your Honor, with the burden of
5 any evidence, I'm entitled to proceed with my
6 conspiracy claim, with all due respect. Thank
7 you, Your Honor.

8 THE COURT: All right. Very good.
9 Do you want to come back?

10 MR. TERRY: Yes, Your Honor.
11 Mr. Bundy's argument is very impassioned, and I
12 appreciate the passion with which he practices
13 law. But that doesn't mean that there's any
14 agreement entered into by Watson. And there's no
15 evidence in the record as to what Watson believed
16 at any point during this case. There's no
17 evidence in the record as to what Watson's intent
18 was in entering into the agreement. Simply what
19 the joint defense agreement said.

20 Furthermore, the joint defense agreement
21 entered suit after the claims are made, Your
22 Honor, after the liens are filed and after the
23 damages have been admitted here, have already
24 been incurred. There's no other damages that
25 have been entered into evidence here, Your Honor,

1 that could have been caused by the joint defense
2 agreement. Thank you.

3 THE COURT: All right. On the
4 issue of the conspiracy, because we are at the --
5 basically we're at the directed verdict stage,
6 I'm going to allow it to proceed under
7 conspiracy. I know you're going to argue about
8 some other ones, but we're at the any evidence
9 stage of the case. I am going to allow it for
10 now.

11 I think clearly you've touched on these,
12 and Mr. Hildebrand, I'm going to go ahead and let
13 you make your other motions. But I do think
14 there's sufficient evidence to go forward on the
15 breach of contract, the breach of contract
16 accompanied by fraudulent act.

17 And while I think of this as a contract
18 case, I think there's enough evidence under the
19 unfair trade practices act to move forward as
20 well. I'm happy to hear from you on any of those
21 motions, but I think we have that.

22 MR. HILDEBRAND: Well, Your
23 Honor --

24 THE COURT: You can make your
25 record.

1 MR. HILDEBRAND: All right. Thank
2 you. We would also move towards -- I think it's
3 nonsuit under 41 is what the (inaudible) instead
4 of directed verdict --

5 THE COURT: It is.

6 MR. HILDEBRAND: -- for a bench
7 trial. There's no -- their claim for liquidated
8 damages falls because they -- there has been no
9 testimony from their experts to establish that
10 there were any critical path delays caused by
11 Balfour Beatty Construction Company.

12 The only critical path delays that have
13 been identified were by Mr. Doren, who said he
14 did a critical path analysis, and they were all
15 attributable to the owner, to Library Associates.
16 So any claims relative to liquidated damages are
17 because of the critical path, and then not
18 putting on evidence of that.

19 I understand that they are not claiming
20 damages beyond the 1.4 million dollars, and I --
21 any liquidated damages are limited to that. So I
22 would move for directed verdict for any damages
23 in excess of that. There -- I would also move
24 for directed verdict on liquidated damages
25 because no claim was made until the project was

1 completed.

2 If you look at the claim language in the
3 contract, it's pretty clear that a claim is any
4 assertion that you owe money, that you're
5 entitled to time, or you have any sort of damages
6 against the other party. It's liquidated
7 damages. Damages connotes a claim.

8 I mean, there's no way to get -- no way
9 to get around it. It is a claim, and there's no
10 question but that, once the contract completion
11 date, which was originally July, and then was
12 changed to August, I believe --

13 THE COURT: That was in '17.

14 MR. HILDEBRAND: August 19 of 2017.

15 THE COURT: '17, right?

16 MR. HILDEBRAND: Yes, sir. Once
17 that was passed, then certainly the owner knew or
18 knew that if they wanted to assert liquidated
19 damages, they could have. So they did not do
20 that under the contract. Also --

21 THE COURT: Well, I don't agree
22 with you on that one either. Mr. Bundy wore old
23 Mr. Cotherman out on that question over and over
24 and over, and finally, Mr. Cotherman agreed, you
25 can't have liquidated damages until you know --

1 until the project is over and you know what the
2 claim is for. So I'm going to deny that one.

3 My other point was, didn't Jim Clements
4 talk about the critical path for some length of
5 time, as I recall? So there is some effort about
6 that. I seem to recall him talking about the
7 critical path a fair amount.

8 MR. HILDEBRAND: I know that we
9 introduced his deposition excerpt where he
10 emphatically, and in fact, I cross-examined him
11 on it. I asked him about that, and I don't think
12 he testified anything about the critical path.
13 He said that he's not a critical path expert and
14 has no opinions regarding the critical path is my
15 recollection.

16 THE COURT: All right.

17 MR. HILDEBRAND: I also move for
18 nonsuit that no claims were made by the owner or
19 any of the claims that they're asserting in this
20 matter.

21 Mr. Bundy has said, look, y'all never
22 made a claim for your delay damages and these
23 other damages until you made your claim, the
24 three volume claim in early 2019. And he said
25 that it went to the architect, and then we

1 introduced evidence from -- the e-mail from the
2 architect saying, I ruled on it. I've already
3 issued the substantial completion, and I think my
4 obligations are over.

5 There's been no evidence, whatsoever,
6 that the -- that Library Associates has asserted
7 any of these claims at all during the contract
8 period or otherwise until this lawsuit was filed.
9 There's been no evidence that the architect
10 addressed any of their claims.

11 So they argued at that point against us,
12 but then they're charred by their own brush
13 because they -- and Kim Brown admitted that. I
14 said, did y'all make any claims? Did y'all
15 assert any claims at all to the architect or
16 otherwise during construction? And she admitted
17 that they did not. There were no formal claims
18 that were made, like we did. And certainly not
19 within the time period of the -- that is
20 referenced in the contract.

21 I would also move for nonsuit on their
22 claimed repair costs for the claim's unfinished
23 work. By the time that all of that was done,
24 they had refused to pay us the amount due under
25 the contract, and you'll recall, Your Honor, that

1 the architect wrote a letter in January of 2019
2 saying, look, the contract amount is 65 million
3 dollars. I'm -- there are a few setoffs. I'm
4 going to impose a setoff for painting.

5 I'm going to impose a setoff for
6 liquidated damages, but there's still a million
7 five left under the contract that he said was
8 owed to Balfour. That was never -- that was not
9 paid. So all of these damages, it's
10 inappropriate for an owner who says we're not
11 going to pay you.

12 And in fact, what happened was that we
13 asserted our claim under the contract. And it
14 was undisputed that we were owed that amount.
15 The owner said, here's the GMP that we -- and the
16 architect said -- acknowledging that.

17 And then for the first time, the owner
18 goes back and says, well, we want the -- we're
19 going to assert liquidated damages of 1.4 -- oh,
20 by the way, we're not even going to recognize the
21 cap on liquidated damages because of first to
22 breach or something like that.

23 So they asserted some extra contractual
24 defense or claim to try to defeat our claim for
25 payment. And so I think that all of their repair

1 costs were inappropriate because they didn't pay
2 us.

3 There are -- i also submit that there
4 are plaintiff's -- I'm sorry, defendant's
5 counter-claims barred by the doctrine of prior
6 breach. There's been so much evidence of that,
7 Your Honor. The plans that were supposed to be a
8 hundred percent plus just flat out were not.

9 All of the testimony has been, they were
10 deficient from the get go. When we started --
11 when we tried to construct, we found deficiencies
12 then. We notified the architect. The architect
13 had to make changes, and they -- there's no
14 question about that. In fact, Mr. Clements said
15 that, when he looked at all the reasons for the
16 sixth floor delays, he asserted all the blame to
17 primarily the architect. Some of them fell on
18 the plaintiff. That's one of them.

19 Mr. Jim Clements, he's a nice guy. I
20 like him. He's got a place out in the country
21 close to mine. I mean, he's just a nice fellow,
22 gregarious. I'm not -- nobody said that he's
23 incompetent, and he didn't know how to do
24 construction management services.

25 The simple claim was that he did not

1 have any authority to approve changes or to
2 approve the expenditure (inaudible), and when you
3 read the deposition excerpts of Jim Clements and
4 of Michael Bennett and of Kim Brown, it's --
5 along with the testimony that you heard here,
6 again it's not derogatory. It's just the simple
7 fact.

8 The owner was required under the
9 contract to appoint somebody with the actual
10 authority -- their owner's representative as
11 shown on the contract was Jim Clements. He just
12 didn't have that authority.

13 THE COURT: I don't know. He kind
14 of bristled when you -- they said he was a
15 messenger boy. He didn't like that at all.

16 MR. HILDEBRAND: Well, Mr. Bundy
17 made a big point of that, but he wasn't even here
18 when they said that. I don't think it was meant
19 derogatorily on that point, but I don't think
20 that was the actual target. There is no evidence
21 for the UTPA, Your Honor.

22 THE COURT: Unfair trade practice?

23 MR. HILDEBRAND: Pardon me?

24 THE COURT: It's a contract case,
25 but I tell you, some of this -- some of this

1 stuff your client has done after the fact, I --
2 like I said, you're not going to get -- I'm not
3 going to grant you a directed verdict on that
4 one.

5 You're going to have to be able to
6 explain to me what happened with the final
7 accounting that Ms. Hadley kept asking for, and I
8 just can't, quite frankly, figure that one out.

9 MR. HILDEBRAND: You will hear from
10 our people, you know, in what they provided, and
11 we certainly do plan to fully explain that to
12 you.

13 THE COURT: All right.

14 MR. HILDEBRAND: But for the
15 record, we -- okay. I understand. Breach of
16 contract accompanied by fraudulent act. Again,
17 it's just -- the fraudulent act was the
18 conspiracy is what they claimed.

19 There was no fraudulent act. We
20 finished the job. The conspiracy and entering
21 into the joint defense agreement has nothing do
22 with -- there has to be some misrepresentation,
23 and, you know, there was none. There was simply
24 a joint defense agreement that was entered into.
25 And there's no evidence of any fraudulent act.

1 (Inaudible) that we were trying to injure them
2 and plan for them -- intend for them to rely on
3 it.

4 Basically what you have here, Your
5 Honor, as I'm sure you're well aware -- and I
6 think that Jim Clements testified to that this --
7 the project was supposed to have finished in July
8 of 2017, but holy moly, there was change after
9 change after change after change.

10 You heard from Mr. Doran, even after the
11 completion date, there was all sorts of change
12 orders and all issued by the owner that caused
13 the project to become -- to get off track and to
14 take a lot longer than required.

15 And then right at the end, we submitted
16 our final pay apps, several pay applications, and
17 they weren't paid. And a bunch of liens were
18 filed, and it was a very difficult time to try to
19 get the project closed out and the hotel
20 finished, much to Balfour's credit.

21 You've heard some vitriolic statements
22 against Balfour and how God awful we were, but to
23 our credit, we provided -- we didn't walk off the
24 job when we weren't paid. We never walked off of
25 it, and we stayed there until the bitter end,

1 even with our notices of delay, and without
2 getting paid on the sixth floor, we continued to
3 work and finished and built Mr. Bennett a first
4 class, world class hotel.

5 THE COURT: When's the last date
6 y'all did work out there? Was it April?

7 MR. HILDEBRAND: Yes, sir.

8 THE COURT: April of '19?

9 MR. HILDEBRAND: Yes, sir.

10 THE COURT: Okay. All right.

11 MR. HILDEBRAND: There's also a
12 claim for indemnification.

13 There's one other claim that they're --
14 their claim is that we did not bond off liens,
15 but the -- there's a caveat to that in the
16 contract that, so long as the owner is not the
17 fault of uncontested amounts, and we -- our
18 contention is that there were amounts owed to us
19 that were uncontested, as referenced in the sixth
20 floor claim and as referenced in the architect's
21 e-mail of January 2019, right at end of the
22 project where he said, okay, y'all are owed 5
23 million bucks, I want to deduct some for the
24 painting. I'm going to deduct some for LDs.
25 You're still owed a million five.

1 So I don't think we are obligated to
2 bond off our own lien, nor those of
3 subcontractors that were -- subcontractors had to
4 file affidavits saying that they -- affidavits
5 saying that they were owed money, and that's what
6 the South Carolina statutes provide for, as I'm
7 sure you're well aware.

8 There have been some allegations that we
9 aren't entitled retainment because we've not paid
10 subcontractors yet, but our -- you saw in the
11 contract that the subcontractors -- in our
12 contract with Library, it says that we're not
13 required to pay the sub. We will pay the subs
14 out of money that we receive from the owner.

15 And in addition, every pay application
16 that we submitted. And the evidence shown
17 through David Simonton and Tim Spano was that,
18 with every pay application, we didn't prepay
19 subs, and they never paid us. There was never
20 any conditions. So all the way up until the end
21 of the job, the owner paid us knowing that we had
22 not paid subs because we would pay subs from
23 their -- from pay applications. But there's no
24 condition of prepayment.

25 So I think for -- that that application

1 is barred by waiver estoppel and forfeiture.
2 Allegations regarding conditions precedent for
3 the claims that we'd followed some -- dot some of
4 the I's and crossed some of the T's. We briefed
5 that in our -- in our pretrial brief, Your Honor.

6 Waiver, estoppel and forfeiture
7 provisions apply in every case, but certainly by
8 you as well, that what the -- what the owner --
9 we absolutely provided notices of delay to the
10 owner. And Mr. -- if you read the testimony of
11 Mr. Clements, he said, yeah, Balfour is trying to
12 make a claim.

13 I understand that they were trying to
14 make a claim. Maybe they didn't do so perfectly,
15 but -- maybe they didn't do so exactly according
16 to the contract, but they were trying to do that.
17 So the law provides that, if the owner has actual
18 notice of the claim and that there can be a
19 waiver and estoppel.

20 And basically, we spent a whole lot of
21 time and money relating to these delays to get
22 this -- to get the hotel finished, and it's just
23 as an equitable principle, you can say, you know,
24 that maybe he didn't dot the I's exactly and
25 cross the T's exactly, but I still think the

1 owner got the benefit of all of that work, and I
2 think that they should pay for it.

3 Also, this goes to -- I just want to
4 make the grounds because I think you've already
5 ruled on it. On the notice of claims for
6 liquidated damages, there's the implied warranty
7 of good faith and fair dealing. The testimony in
8 the depositions that you read, you will recall
9 where I asked, what do you think would have
10 happened if the owner had asserted -- or at least
11 told Balfour, look, we think y'all are, you know,
12 violating the contract, and we intend to assert
13 liquidated damages at some point.

14 If they had done that, then those were
15 accumulating at \$270,000 a month, and it would
16 have brought the issue to a head, and then
17 Balfour could have made the decision of whether
18 we wanted to continue with the construction or
19 not.

20 But what happened was, we were never
21 told about that; so we continued gladly along
22 until the very end, got the hotel finished, and
23 then were blind-sided on that issue. Lastly -- I
24 think that's all. Hold on a second. Can I have
25 a minute?

1 THE COURT: Sure.

2 MR. HILDEBRAND: And then lastly,
3 Your Honor, is that there -- there was a claim,
4 you recall, against two Balfour entities. One
5 was Balfour Beatty Construction Company, LLC.
6 That is the entity that's shown in the contract,
7 and that's who the contract was with.

8 There was also a claim in the
9 counter-claim against Balfour Beatty Construction
10 Company, Inc. Balfour Construction Company,
11 Inc., there's been no testimony, whatsoever, it
12 had any involvement with this project,
13 whatsoever. They just -- this came before you on
14 summary judgment, and you said, well, I will
15 decide to look at it later.

16 And the evidence was that -- I don't
17 believe there was any evidence either on the
18 summary judgment, but that's really irrelevant
19 because the question before you is, is there any
20 evidence that Balfour Construction Company, Inc.,
21 had anything to do with this project. What the
22 counter-claim alleges is that it had agreed to be
23 the guarantor.

24 You've heard nothing, no testimony,
25 whatsoever, that the -- that Balfour Construction

1 Company, Inc., was a guarantor or otherwise. So
2 I think that that needs to be -- they definitely
3 need to be out.

4 THE COURT: Okay. Who wants to
5 talk about that one?

6 MR. BUNDY: Unfortunately, I guess
7 opposing counsel doesn't realize that evidence
8 comes in many forms. There's a documenting
9 evidence, which is a response to the request for
10 proposal, signed by Balfour Beatty, and Balfour
11 Beatty Construction, whatever the name is. So
12 they were going to guarantee the performance. So
13 that's my evidence. I don't have to bring in a
14 witness to read to you. It's in evidence. Okay?
15 Now, if you believe the narrative you just heard,
16 Balfour Beatty would be entitled to a certificate
17 of merit and a country ham for finishing this job
18 two years later and trying to steal 13 million
19 dollars from my client. That's where we would
20 be.

21 What I would like to do, instead of
22 focus on what somebody may have imagined that
23 occurred what they wish what would have occurred
24 in this Courtroom or somebody imagined what they
25 wish would have occurred in this Courtroom or

1 imagine evidence they wish they had put in, or
2 imaginary things that happened in a deposition
3 taken two or three years ago.

4 I'd like to bring ourselves back to the
5 Courtroom and what was in evidence because I had
6 mentioned to you earlier, I'm not a litigator. I
7 find that to be a despicable term. I am a trial
8 lawyer. You litigate out here. You try cases in
9 here, and this is what matters, what's in here.
10 Now, I don't where to even want to even begin.
11 We can start with this --

12 THE COURT: Well, let me tell you,
13 I plan on denying all the motions.

14 MR. BUNDY: Right.

15 THE COURT: But I'm interested in
16 hearing on the issue of the inc. Tell me about
17 the inc., if it's in the contract.

18 MR. BUNDY: No, sir. It's in the
19 request for proposal.

20 THE COURT: All right. Request for
21 proposal.

22 MR. BUNDY: In lieu of a bond,
23 okay, you can -- the way it is, you can -- when
24 you send a request for proposal, they can give a
25 payment performance bond, right? The request for

1 proposal wants to know, what is your financial
2 ability. Okay?

3 THE COURT: Okay.

4 MR. BUNDY: And will you guarantee,
5 okay, the performance of this. Who will
6 guarantee the performance of this contract.

7 That's the financial statement that they
8 used in their response to request for proposal to
9 convince my client -- because it's a corporation.
10 They gave us their financials to not entertain a
11 performance bond. And the reason you have to pay
12 a performance bond is so you know somebody is
13 going to guarantee the work.

14 So they're the ones that put it in
15 there. Mike Baumbach signed that document under
16 oath, and we verified they were -- that that's
17 who these people are behind us. That's who our
18 major company is. That's not enough. It's not
19 enough.

20 I didn't see any reason to go any
21 further with it. Okay? I could have had
22 somebody to read it to you, but it wouldn't have
23 changed the -- changed the truth of it. So
24 that's just where we are. Okay. So that's my
25 argument on that.

1 THE COURT: Your argument is the
2 inc., the parent company, was the guarantor?

3 MR. BUNDY: Yes, sir.

4 THE COURT: All right.

5 MR. BUNDY: And -- well, do you
6 mind?

7 MR. HILDEBRAND: Sorry.

8 MR. BUNDY: I submit it Your Honor,
9 instead of somebody telling you what it says or
10 me telling you what it says, why not read it
11 without any narrative from me or opposing counsel
12 and make your own decision. I'm good with that.
13 Okay?

14 THE COURT: All right. Okay.

15 MR. BUNDY: You can determine
16 whether or not it was -- whether or not by
17 putting that in that proposal, my client decided
18 to do business with these people as opposed to
19 somebody else. The rest of it -- I mean, I think
20 the rest of it -- just read the contract.

21 I mean, some of these arguments are just
22 so out of the realm of reality and so simplistic.
23 There's no nuance at all. It's as if they read
24 one -- it's as if one shoe fits all. I can give
25 you 50 examples, but I'm not going to. We will

1 do it later. Thank you, Your Honor.

2 THE COURT: All right.

3 MR. HILDEBRAND: Your Honor, on the
4 inc., I would encourage you to read our motion
5 for summary judgment and the attachments that
6 were -- that accompanied that. It's black and
7 white. Even under the RFP, Balfour Construction
8 Company, Inc., did not guarantee this agreement.

9 But on top of that, inarguably, under
10 the contract, any prior agreements are not part
11 of the final agreement, and there's -- if they
12 had wanted to include something in the RFP, then
13 they could have done that.

14 There's no guarantee. There's nothing
15 in the contract with Balfour Construction
16 Company, Inc. It's nowhere to be found in the
17 contract documents. There's no evidence,
18 whatsoever, Your Honor. But I would encourage
19 you if you want to --

20 THE COURT: I will go back and
21 review it. I will hold that one under
22 advisement.

23 MR. TERRY: Your Honor, Watson has
24 one more motion.

25 THE COURT: Yes, sir.

1 MR. TERRY: Your Honor, Watson also
2 makes a motion for directed verdict on the suit,
3 whichever one you want to call it here, Your
4 Honor. Under Rule 14, the rules of civil
5 procedure third-party practice, Watson is a
6 third-party defendant brought in by defendant,
7 Library Associates.

8 And Rule 14 allows a defendant to bring
9 in a third-party at any time after commencement
10 of the action to show that that third-party might
11 be liable for any damages sought from him, from
12 the plaintiff.

13 There's no been no evidence in this
14 case, Your Honor, that Library Associates asserts
15 that Watson is in -- is liable to Library
16 Associates for any damages caused by it, caused
17 by Balfour Beatty or by Watson, Your Honor.

18 THE COURT: Do you want to be heard
19 on that one?

20 MR. WINDLE: Yes, sir, the same
21 motion. There been no evidence presented in this
22 trial by either Library or Balfour Beatty that
23 either Old North State or Lithko are responsible
24 for any defective work or any incomplete work or
25 any delays. There just are no damages that have

1 been established in this trial proceeding.

2 THE COURT: Mr. Bundy?

3 MR. BUNDY: You know, Judge, civil
4 conspiracy has various elements. I take the
5 position we've proved it to the extent -- for the
6 purposes of this motion. Okay. They conspired
7 to over-lien my client's job and cause him
8 significant damages. The cause of action for
9 civil conspiracy exists.

10 THE COURT: All right. On that
11 basis, I will deny it.

12 MR. BUNDY: Thank you, Your Honor.

13 THE COURT: Okay. Mr. Hildebrand,
14 do y'all plan to put forth any reply testimony?

15 MR. HILDEBRAND: Yes, sir. We have
16 just a couple of witnesses. If you will bear
17 with me.

18 THE COURT: Do you want to start on
19 it today, or do you want to come back tomorrow?
20 I'm happy to come back tomorrow.

21 MR. HILDEBRAND: Can we take just a
22 couple minutes?

23 (A recess transpired.)

24 MR. HILDEBRAND: We will go
25 forward, Your Honor. We would call Mr. Spano.

1 (TIM SPANO, having already been
2 duly sworn, testified as follows:)

3 REDIRECT EXAMINATION

4 BY MR. HILDEBRAND:

5 Q. All right. Mr. Spano, there were --
6 you've been -- we're not going to go through much
7 background with you, but you've been -- what's
8 your current position with Balfour?

9 A. Currently, project manager.

10 Q. During this project?

11 A. During this project, still project
12 manager.

13 Q. All right. And how long have you been
14 with Balfour in a supervisory capacity when this
15 project was going on?

16 A. Gosh, probably at the time, I -- through
17 my career, I've been superintendent and project
18 manager. So from a project manager standpoint,
19 probably 15 years, somewhere in there, somewhere
20 in that ballpark. 12, 15 prior to this project.

21 Q. Okay. And is it unusual for -- when
22 Balfour is working on a project, to have issues
23 that come up that are not anticipated?

24 MR. BUNDY: Objection.

25 THE COURT: Basis?

1 MR. BUNDY: Leading.

2 THE COURT: Overruled. Go ahead.

3 THE WITNESS: It's not unusual.

4 BY MR. HILDEBRAND:

5 Q. Okay. And what do you do when the
6 unexpected happens?

7 A. Figure out a way around the unexpected,
8 try to figure out a way to expedite, fix the
9 issue, whatever it may be.

10 Q. On a project, how often is it that
11 you -- that something unusual happens or you have
12 to do some sort around it like that?

13 MR. BUNDY: Objection.

14 A. More than I would like, but quite a bit.

15 Q. All right. You were here during the
16 testimony of Mark Boe?

17 A. I was.

18 Q. All right. And do you recall his
19 testimony regarding the original schedule and the
20 frame that was used to place the pool on top of
21 the hotel?

22 A. I do.

23 Q. Okay. Was there an issue with the
24 original schedule with the crane not being shown
25 to be removed by a certain date?

1 A. The original plan schedule?

2 Q. Yes, sir.

3 A. Not in my opinion because it's basically
4 some --

5 MR. BUNDY: Objection. He's not
6 been qualified as a scheduling expert. He's not
7 been listed as an expert witness, and I object.

8 THE COURT: All right. He's the
9 project manager. I'm going to allow it.

10 THE WITNESS: Not in my opinion.
11 The crane removal is something, you know, that
12 has to happen, of course. The typical crane
13 removal process, I should say, is about a three
14 day process. It's normally done in a weekend; so
15 it's something that you know is going to happen.
16 You've got to pull the crane out.

17 And then basically we knew the crane had
18 to stay in until we got the larger elements to
19 the roof, the concrete pours, the pool set,
20 things like that before we could take the crane
21 out.

22 MR. BUNDY: Objection. Move to
23 strike, nonresponsive.

24 THE COURT: Overruled. Go ahead.

25 BY MR. HILDEBRAND:

1 Q. All right. How big of a -- how big was
2 the opening that the crane went through the
3 building?

4 A. Approximately 20 foot by 20 foot.

5 Q. Okay. And would the -- okay. So what
6 would the work around have been, if any, that you
7 would have done to keep -- try to keep the
8 project on schedule with the crane scheduling
9 issue that you've identified?

10 MR. BUNDY: Objection. He is
11 asking the witness to speculate.

12 THE COURT: I will sustain that.
13 It's speculative.

14 BY MR. HILDEBRAND:

15 Q. Okay. Let's turn to the mockup. Do you
16 remember a discussion about the mockup on the
17 project?

18 A. I remember, I believe, Mr. Clements had
19 a comment about it, and I believe Kim Brown had a
20 comment about it, that I recall.

21 Q. Okay. Was there a mockup that was
22 required under the original GMP?

23 A. There was.

24 Q. And when was that mockup completed by
25 Balfour?

1 A. I need to elaborate a little bit because
2 there's a little more to that mockup in the GMP.

3 Q. Okay.

4 A. So the original mockup in the GMP is
5 approximately 12 foot by 26 foot high. It had
6 cast stone elements on it, bands had Arriscraft
7 on it. It had a small window, and the first
8 story of it, which had actually door cast stone
9 surrounds around it.

10 The upper part had a window with a
11 Juliet balcony rail on it; had some of the
12 cornice work, some of the copper roof. That was
13 the main structure mockup. And then there were a
14 couple of 6 foot by 6 foot panels that were
15 shown.

16 One panel was to show a piece of the
17 canopy roof up on the sixth floor balcony, and
18 the other panel was showing a piece of the grand
19 marquis where you entered the main, the grand
20 entrance of the hotel. It was just a small
21 section of that that was in it.

22 So through the process of erecting that,
23 in the BAR, there was an addition to that
24 original mockup and a couple of changes is where
25 I'm elaborating to.

1 Q. Okay.

2 A. So basically, there was another window
3 added. Basically, we added a side wall to it, a
4 CMU wall to that additional mock -- to that
5 original mockup, and then we ended up, instead of
6 6 by 6 panels, we fastened the marquis and the
7 sixth floor came to be onto that wall with the
8 addition of another window that was added in.

9 In part of that review of that original
10 mockup, the marquis was original bronze. The
11 BAR --

12 Q. What is the marquis?

13 A. The marquis is basically the canopy over
14 the main entrance of the hotel.

15 Q. Okay.

16 A. It's kind of a major feature hangover
17 roof over the brick main entrance to the hotel.

18 Q. Okay.

19 A. So it was changed from bronze to copper.
20 So there was an element there that had to be
21 ordered. And of course, the additional windows.
22 There was some modifications to it. With those
23 modifications, that mockup was approved
24 unanimously by the BAR December of 2016.

25 Q. Okay. Did that end the story on the

1 mockup?

2 A. Absolutely not.

3 Q. What happened after that?

4 A. There were -- there was an additional
5 mockup that the BAR had requested that was a
6 pretty large CMU concrete wall that added some
7 additional features, some dental molding.
8 Precast dental molding was basically at the top
9 of the second floor band that ran around the
10 building.

11 That is the -- that is the other mockup
12 where they wanted to see one of the Hope's doors
13 in that mockup, which was the door that was
14 referred to that wasn't in the building that was
15 used in that mockup.

16 Q. Okay.

17 A. There was a -- they're what we call
18 doughnuts, basically some round precast openings
19 above the marquis at the main entrance of the
20 hotel. That was a feature they wanted to see
21 with some of the rod iron elements in it also.

22 Q. Okay. You testified that the original
23 GMP mockup was completed in December of 2016?

24 A. '16, yes.

25 Q. Okay. What time frame are we talking

1 about now with this new mockup or the additional
2 mockup?

3 A. It was a progression, but that was in
4 2017 that we were building this thing and waiting
5 for the Hope's doors that were long lead items to
6 put in there and making sure we ordered some of
7 the elements.

8 There were some original features shown
9 in the details on the original GMP mockup, which
10 had the wood trellis. It had -- it had GFRG
11 column surrounds on it, and then the BAR had
12 asked that we do an obelisk, which is basically a
13 large precast element that went up on the sixth
14 floor terrace because they wanted to see one of
15 those live in the mockup.

16 So it was kind of a gradual -- little
17 bit of progression, and then, of course, you
18 would have the BAR out. They would look at it.
19 They would make comments. You would address the
20 comments. There were some things that they
21 adjusted.

22 Like, the GFRG columns are made in two
23 pieces. It's basically a fiberglass column. So
24 you basically have a structural column that may
25 be say a 4 by 4 or something, and these are

1 decorative fiberglass column that wrap around it
2 in two pieces to make it the illusion of a big
3 precast column.

4 The way the manufacturer's specs are on
5 those, they basically -- they butt together, have
6 a screw element to basically to secure them. So
7 there's a gap that's shown to be caulked. The
8 BAR did not like the caulk, and we ended up
9 basically bonding those joints to make it look
10 like they were all one piece.

11 Q. So you said product specifications
12 required that the place be caulked?

13 A. Yes, it did.

14 Q. All right. So what happened next?

15 A. So I know that we -- it went back and
16 forth with the BAR over shutters on that
17 additional mockup. There was a lot of back and
18 forth because they wanted basically to cross
19 members on the shutters to line up with the
20 windows and the muntins in the top and the
21 bottom. So they wanted everything really
22 symmetrical. So I know there was a couple of
23 iterations on that.

24 But at the end, there was -- I believe
25 it was the third floor shutters that we were

1 doing on that mockup that basically they ended up
2 approving it with the shutters that we had on
3 there some time in 2018, which is what I think
4 Mr. Clements was referring to, that final mockup
5 approval.

6 Q. Do you have any recollection when in
7 2018 that happened?

8 A. I want to say July, somewhere in that
9 time frame.

10 MR. HILDEBRAND: Okay. All right.
11 Thank you very much. That's all I have.

12 MR. BUNDY: That's it?

13 MR. HILDEBRAND: Yep.

14 RE CROSS-EXAMINATION

15 BY MR. BUNDY:

16 Q. Mr. Spano, I believe we've established,
17 through your testimony, that y'all -- by y'all I
18 mean Balfour Beatty. Y'all were aware that the
19 crane was going to have to come down at some
20 point, correct?

21 A. Yes.

22 Q. Y'all weren't under any illusion that
23 the crane was going to be part of the hotel, were
24 you?

25 A. No.

1 Q. Okay. And you were planning on putting
2 that swimming pool up with a helicopter? Is that
3 how y'all were going to do that?

4 A. No.

5 Q. You were going to use the crane?

6 A. Yes.

7 Q. Okay. Now, you were -- however, you
8 were going to close in the second floor ceiling
9 while the crane was still there, correct?

10 A. No.

11 Q. Oh, you weren't?

12 A. No.

13 Q. Okay. Well, if the schedule showed the
14 closing in of the second floor ceiling months
15 before the pool was going to be installed, can
16 you give me that sequence of construction?

17 A. If it was shown to be out -- say that
18 one more time.

19 Q. Yeah. If the pool was going to be
20 installed in, let's say, April, okay?

21 A. Uh-huh.

22 Q. And the schedule showed the second floor
23 ceiling was going to be closed in four months
24 earlier, how were y'all going to do that?

25 A. You couldn't completely close it in

1 without getting the tower crane out.

2 Q. All right. So that schedule, if it
3 existed, would be a bust in the schedule if you
4 were showing a closing of a floor, which could
5 not be closed before the pool was put in place by
6 the crane that was in the hole? That's not
7 physically possible, is it?

8 A. No.

9 Q. Okay. So that schedule, if there was
10 such a schedule -- I believe there's been some
11 testimony that there was -- would have a bust in
12 it, correct? That would be an incorrect
13 schedule?

14 A. Correct.

15 Q. Okay. And if that was the first
16 schedule, and the testimony was that bust was
17 about a three or four month delay. Were you in
18 the Courtroom when that was testified to?

19 A. I believe so.

20 Q. So the initial schedule was required by
21 the contract documents, if followed, to put you
22 in a completion date as agreed upon, right?
23 Y'all were supposed to provide schedule that, if
24 followed, would put you on substantial
25 completion?

1 A. Correct.

2 Q. And it was not possible with the
3 schedule that y'all provided because it was a
4 four month bust in it, correct?

5 A. There were a lot of -- the planned
6 schedule was based off of the original GMP
7 drawings.

8 Q. That wasn't my question. My question
9 was pretty simple. If you presented your
10 schedule to the architect and the owner, and it
11 had a completion date that was impossible to
12 achieve because of a bust in the schedule, that
13 schedule would be an improper schedule, would it
14 not?

15 A. If there was a bust in the schedule that
16 did not work.

17 Q. Because the contract requires that the
18 contractor produce a schedule that, if followed,
19 will get you to the end on time, correct?

20 A. Correct.

21 Q. And if the schedule that you provide is
22 impossible to do it, that would be a breach of
23 that obligation, would it not?

24 A. The schedule is constantly adjusting
25 based on what's going on site, and it's --

1 Q. That's not my question.

2 MR. HILDEBRAND: Your Honor, he has
3 to give him a chance to answer, of course.

4 MR. BUNDY: Well, he's answering a
5 different -- I didn't ask that question.

6 THE COURT: The answer is a yes or
7 no, and then you can explain your answer.

8 THE WITNESS: All right.

9 BY MR. BUNDY:

10 Q. Do you understand that the very first
11 schedule on a job is a planned schedule?

12 A. I do.

13 Q. Nothing has happened yet?

14 A. That's correct.

15 Q. The contract required, did it not, that
16 the as-planned first schedule, if followed, would
17 result in a building that was completed on time?
18 That was required, was it not by --

19 A. It was.

20 Q. -- by the contract?

21 A. It was.

22 Q. And the schedule that was provided did
23 not do that, did it, because of the bust with the
24 crane; is that true?

25 A. I disagree because the schedule didn't

1 show when the crane was coming in, correct?

2 Q. The schedule showed the second floor
3 being closed up before the pool was put in. The
4 second floor couldn't be closed up until the pool
5 was put in, correct?

6 A. Correct.

7 Q. And the pool was four months later on
8 the schedule than closing up the second floor.
9 Those things are not physically possible, are
10 they?

11 A. No.

12 Q. Okay. So a schedule that shows that is
13 a schedule which does not meet the contract
14 requirements, is it?

15 A. It's a bust in the schedule.

16 Q. Okay. Thank you. And that breach of
17 contract occurred within 14 days of the notice to
18 proceed because the schedule was required within
19 14 days, was it not?

20 A. I'm not sure.

21 Q. Okay. Mr. Spano, did you read this
22 contract?

23 A. I did.

24 Q. Sir?

25 A. I did years ago.

1 Q. How many times did you read it,
2 Mr. Spano?

3 A. I don't know. All the way through,
4 probably once; bits and pieces, when -- here and
5 there.

6 Q. And had you ever read an AIA A201 or 133
7 contract before in your career?

8 A. I had.

9 Q. Okay. Had you ever read this particular
10 contract since it was different from, in many
11 respects, the standard form agreement?

12 A. Had I ever what? Say it again.

13 Q. You're familiar with the standard form?

14 A. I am.

15 Q. Are you familiar with the absolute fact
16 that this contract was different from -- because
17 there were agreed upon amendments to the AIA 201.
18 Were you aware of that?

19 A. I'm aware there was an amendment, sir.

20 Q. Okay. And did you compare at any point
21 in time, the standard agreement with what was
22 actually agreed to by your employer?

23 A. Did I compare it? No.

24 Q. Sir?

25 A. Did I compare?

1 Q. Yes.

2 A. I took the signed contract, and that's
3 what I read.

4 Q. Okay. So your prior knowledge of A201
5 didn't come into play when you went to determine
6 what your obligations were? You went straight to
7 this agreement to determine that, correct?

8 A. Sure.

9 Q. Okay. And you said earlier, you were
10 asked, do you still work for Balfour Beatty as
11 you sit here today?

12 A. I do.

13 Q. Sir?

14 A. I do.

15 Q. Okay. And what is your job now?

16 A. Project manager, but I'm with Balfour
17 Beatty Investments now.

18 Q. Were you aware that there were change
19 order procedures in this contract?

20 A. Yes.

21 Q. Sir?

22 A. Yes.

23 Q. Okay. And did you follow them? Did you
24 follow the change order procedures?

25 A. I believe so.

1 Q. Okay. Now, there's a lot of discussion
2 about the mockup. Is it your position -- you
3 didn't say it, but I'm just trying to understand
4 it. Is it your position that those changes or
5 the discussion we just had or you just had about
6 the mockup was a change work?

7 A. There was absolutely a change order
8 mockup.

9 Q. Was there a change order request made by
10 the contractor?

11 A. Yes.

12 Q. Okay. And the architect ruled on it?

13 A. Rule or signed, yes.

14 Q. Yeah. Did you submit a change order to
15 the architect?

16 A. We submitted a change order, yes.

17 Q. Were you paid for it?

18 A. Yes.

19 Q. Okay. So what do you want for it now?
20 You've already been paid for it one time. How
21 many times do you want to be paid for the mockup?

22 A. One time.

23 Q. Have you been paid for the mockup?

24 A. Yes.

25 Q. Why are we talking about it?

1 A. We're talking about a date of when the
2 original mockup was completed or approved back in
3 December of 2016, to clarify that the mockup
4 wasn't approved in '18. It was a second or third
5 mockup that was approved in '18.

6 Q. Did you request a time extension?

7 A. No.

8 Q. Why are we talking about it?

9 A. To clarify the approval of the original
10 mockup date.

11 Q. Does the contractor have any obligation,
12 under this contract when it makes a delay claim,
13 to provide a critical path analysis?

14 A. I don't know.

15 Q. Okay. What role did you play,
16 Mr. Spano, in this pass-through agreement? Were
17 you involved in that?

18 A. I was not.

19 Q. Were you even aware of it?

20 A. I had heard of it.

21 Q. When did you hear of it, Mr. Spano?

22 A. I don't recall.

23 Q. Is this a usual -- is the usual course
24 of business for Balfour Beatty to enter into
25 these agreements?

1 A. I don't know.

2 Q. You don't know. Okay. Did you see any
3 detriment to the owner in a cost plus job of not
4 knowing that the contractor and the
5 subcontractors after the job, after the case has
6 been tried, are going to sit around and decide
7 they're going to divide up the money? Does that
8 seem fair to you?

9 A. I'm not familiar with claims.

10 Q. All right. Tell me about the mechanic's
11 lien. What did you have to do with the
12 mechanic's lien? Did you decide how much it was
13 going to be?

14 A. No.

15 Q. Who made that decision?

16 A. I don't recall. Our senior management.

17 Q. Anybody ask you about it?

18 A. I don't recall. They may have asked me
19 little details.

20 Q. Can you verify today, under oath, that
21 y'all had a legitimate 12 million dollar lien?
22 Are you comfortable with that?

23 A. I can't.

24 Q. Sir?

25 A. I didn't put it together. I can't --

1 Q. And your job was what? You were the
2 project manager?

3 A. Uh-huh.

4 Q. I want to show you this document -- this
5 poster here. This is Exhibit 329. Have you ever
6 seen this?

7 A. In Court today.

8 Q. In Court. Okay. Let me ask you this:
9 You were the project manager on this job for how
10 long?

11 A. The duration.

12 Q. The duration. Look at 329, and tell me
13 which numbers you calculated.

14 A. Those numbers were made up of contract
15 balances, change orders, et cetera.

16 Q. Okay. And what role did you play in the
17 preparation of this document?

18 A. None that I'm aware of. That's the
19 accountant's.

20 Q. Right. There you go. So the
21 construction -- what was your job again?

22 A. Project manager.

23 Q. Project manager?

24 A. Yep.

25 Q. For the whole job?

1 A. Yep.

2 Q. And you weren't consulted at all about a
3 claim for \$11,896,000? Is that your testimony?

4 A. Maybe questioned, but that was it. I
5 didn't put it together.

6 Q. Well, what would have been the
7 questions? Give me an example.

8 A. If they had particular questions about
9 maybe a change order or --

10 Q. Who is they?

11 A. Our accountants, our project managers,
12 our vice presidents, our legal, our team.

13 Q. And do you have any specific
14 recollection of any particular questions you were
15 asked?

16 A. I don't, I mean.

17 Q. Have you had any meetings with these
18 subcontractors to determine how y'all would
19 divide this up, the money later if you get any?

20 A. No.

21 MR. BUNDY: Okay. That's all I
22 have. Thank you.

23 MR. HILDEBRAND: Nothing further,
24 Your Honor.

25 THE COURT: Thank you, Mr. Spano,

1 no questions.

2 MR. HILDEBRAND: We have one more
3 witness, and I think he'll take just a few.

4 THE COURT: Take a little longer?

5 MR. HILDEBRAND: I believe so.

6 THE COURT: All right. It's
7 quarter to 5, so why don't we knock off today
8 until 9:30. Do you think you have one more in
9 reply?

10 MR. HILDEBRAND: Yes, sir,
11 Mr. Doran.

12 THE COURT: All right. What's the
13 status of Mr. Doran?

14 MR. HILDEBRAND: I got a text from
15 him.

16 MR. BUNDY: Is Doran the next
17 witness? Is that who we're talking about?

18 MR. HILDEBRAND: Right. Yeah.
19 There are two more live witnesses before
20 Mr. Doran.

21 THE COURT: Okay.

22 MR. HILDEBRAND: So Mr. Doran is --
23 I've got his -- a text from him yesterday that he
24 was not -- had not been released from the
25 hospital and put in a feeding tube, and he -- he

1 just got malnourished. But he thinks that he
2 will be discharged within the next couple of
3 days.

4 So if we can just put him off until the
5 week after Thanksgiving, I would appreciate that.

6 THE COURT: Okay. All right.

7 MR. BUNDY: Can I find out who the
8 next witnesses are?

9 MR. HILDEBRAND: Next one would be
10 David Simonton.

11 MR. BUNDY: And who else?

12 THE COURT: I'm just trying to
13 schedule for tomorrow.

14 MR. HILDEBRAND: Yeah, it won't be
15 even a day. And Casey Thompson.

16 THE COURT: So Mr. Simonton and
17 Mr. Thompson in reply? It should take up most of
18 tomorrow?

19 MR. HILDEBRAND: I don't know that
20 it will. I would guess maybe half a day or so.

21 THE COURT: Half a day. We got
22 these guys over here, maybe some others. I have
23 already told a bunch of these subs that they
24 didn't need to plan to go forward because it was
25 taking longer than we thought it would take this

1 week. So if you want to -- what is your status
2 with your client? How soon could you go forward?

3 MR. TERRY: Based on our
4 conversation, I thought I'd be ready, Your Honor,
5 but that's going to be after Thanksgiving.

6 THE COURT: Okay. Well, now it
7 might even be later than that.

8 MR. TERRY: That will not surprise
9 me, Your Honor.

10 THE COURT: Okay. You had turned
11 them lose. We might take off Friday. Let's see
12 if we can't get through those tomorrow and go
13 from there. Okay.

14 (The hearing concluded at 4:46
15 p.m.)

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1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Adams, Certified
5 Shorthand Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness whose attached in the
8 foregoing hearing was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but
10 the truth in the within-entitled cause; that said
11 hearing was taken at the time and location
12 therein stated; that the testimony of the witness
13 and all objections made at the time of the
14 examination were recorded stenographically by me
15 and were thereafter transcribed by computer-aided
16 transcription; that the foregoing is a full,
17 complete and true record of the testimony of the
18 witness and of all objections made at the time of
19 the examination; and that the witness was given
20 an opportunity to read and correct said hearing
21 and to subscribe the same.

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

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

30 Witness my hand, I have hereunto
31 affixed my official seal on December 2, 2022 at
32 Charleston, Charleston County, South Carolina

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

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1 THE COURT: Good morning, folks.

2 Sorry I'm running late. I did want to touch on a
3 couple items before we start. I stated two days
4 ago that Mr. Bundy was wearing out Bob Cotherman
5 in his deposition, but I was wrong. That was
6 Jeff Sandeen that he was wearing out, that was
7 the 30(b)(6) guy.

8 That's one, and the other item is, as
9 requested yesterday on the issue of summary
10 judgment, to go back -- excuse me, on directed
11 verdict nonsuit on the issue of guarantor, I did
12 go back and review the summary judgment last
13 night.

14 And based upon that record and my review
15 of the contract, I am going to grant that motion
16 so that will put Balfour Beatty, Inc., out of the
17 case. Okay?

18 MR. BUNDY: Your Honor, may I? I'm
19 not arguing with your ruling, but I was -- I
20 forgot to mention something yesterday, and I
21 would like to please supplement it.

22 THE COURT: Sure.

23 MR. BUNDY: The document -- the
24 construction document says that -- this
25 construction document is a merger of all other

1 agreements between these parties. And the
2 parties to this agreement are Balfour Beatty and
3 Library Associates. The parties to the guarantee
4 agreement are not those parties. The parties to
5 the guarantee agreement are the guarantor in the
6 response to the requested proposal, which is a
7 different entity.

8 And so much like the payment of the
9 performance bond, if that were the case, then if
10 there was a payment of a performance bond, which
11 is an obligation from the bonding company to the
12 owner, then the bond would merge into the
13 contract, which, of course, is not the law and is
14 not the case. They're two separate agreements.

15 So basically, what you have to do is,
16 look at the guarantee that was offered in the
17 request for proposal. What the guarantee
18 basically says is, is if this contract is awarded
19 this entity, the -- whatever you want to call
20 them, Balfour Beatty Construction International,
21 whatever that name is, will guarantee the
22 performance.

23 Now, the statute of frauds doesn't apply
24 because that was signed under oath. It was a
25 contract under seal. It was another 20-year

1 statute of limitations. It's under seal, signed
2 by the vice president of Balfour Beatty. So
3 Balfour Beatty's vice president signed the
4 document, which says essentially that, if the
5 contract is awarded to Balfour Beatty, the entity
6 we ultimately contracted with, we -- this other
7 entity will guarantee that performance.

8 And so one, there could be no merger
9 because they're not the same parties. Two, it's
10 enforceable because of the -- they signed it.
11 The statute of frauds only requires a signature
12 by the first party against whom it's trying to be
13 enforced.

14 And so on that basis, Your Honor, it's
15 my fault because I didn't make my full argument
16 yesterday, and I apologize. But that's the
17 theory, the legal theory. Thank you, Your Honor.

18 MR. BYRD: Your Honor, I was
19 actually planning to ask the Court for some time
20 today to make further argument on that anyway; SO
21 I'm glad Mr. Bundy has brought that up.

22 A couple of issues. One is that the
23 statute of frauds does apply, and it applies
24 because the statute of frauds requires not only a
25 writing, it requires a signature. It requires

1 the signature of the person to be charged.

2 The document he's referring to was
3 signed by Mr. Baumbach, who was not an officer or
4 director of the parent company. All he was, was
5 a senior vice president of the general
6 contractor, the party in this case -- the
7 contractor and construction manager in this case.

8 So what he is trying to do is, he is
9 trying to impose guaranteed liability on someone
10 who never signed the contract; in other words,
11 the parent company. There's been no evidence to
12 show that they did and why we should disregard
13 the separate corporate structures of two entirely
14 separate legal entities.

15 THE COURT: All right. I will
16 acknowledge both of those arguments, but my
17 ruling was really based upon my review of the
18 contract, Article 12, pursuant to the agreement,
19 particularly 12.1 was my basis for that ruling.
20 Okay? Noted for the record.

21 MR. BYRD: Thank you, Your Honor.

22 THE COURT: Mr. Hildebrand, I think
23 we're still in reply.

24 MR. BUNDY: We're still in his
25 case, but if you don't mind, I'd like to bring up

1 a little --

2 THE COURT: All right.

3 MR. BUNDY: I know that it's
4 unfortunate that Mr. Doran is not well. But I
5 would oppose any procedure which would allow the
6 subcontractors to begin their case at all, until
7 such time that Mr. Hildebrand has rested his
8 case.

9 One, his case would not be over and
10 would be offering evidence in the next case.
11 Two, as you know, Your Honor, now our conspiracy
12 plan, in fact, has been held to be viable to be
13 (inaudible). And two of the subcontractors --
14 all three subcontractors who remain signed that
15 agreement. One of them has, you know, tried to
16 get out of it, whether that's legally successful,
17 I don't know. It doesn't really matter for
18 purposes of my argument.

19 But at least two subcontractors remain
20 who are engaged, we believe, in a conspiracy with
21 the general contractor. And so it would be
22 prejudicial to us to allow that subcontractor to
23 continue to engage in this conspiracy and put in
24 witnesses before Balfour Beatty completes their
25 case.

1 And so, from our position, Library
2 Associates' position is, if we need to wait until
3 Mr. Doran gets well -- it may be six months; it
4 might be a year. We're asking, if that's what
5 Your Honor deems to be appropriate, then so be
6 it.

7 But we are not going to agree with
8 depositions. We're not going to agree to any
9 affidavits. We're not going to agree to
10 anything, other than, let's run this case
11 pursuant to the civil procedure which would
12 require him to finish his case before the next
13 case can commence. Thank you, Your Honor.

14 THE COURT: All right.
15 Mr. Hildebrand?

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

18 THE COURT: We don't have any new
19 updates on his health, do we?

20 MR. HILDEBRAND: I haven't talked
21 to him this morning. I will be happy to call
22 him.

23 THE COURT: Well, if he's getting
24 tube fed, I don't expect him to come down here
25 because I don't want him to go through that.

1 MR. HILDEBRAND: No, sir. I'm sure
2 that he can't testify here.

3 THE COURT: Right.

4 MR. HILDEBRAND: But I do
5 anticipate that he will be recovered by the week
6 after Thanksgiving, and he thinks that, unless
7 there is some turn for the worse, which he
8 doesn't anticipate.

9 But there's a quirk with his neck
10 surgery, that led to pneumonia, but that should
11 resolve, and that was the biggest issue that kind
12 of threw him down. But I think he will be fine,
13 and we will just have to cross that bridge. But
14 I don't anticipate any problems that week after
15 Thanksgiving.

16 THE COURT: He's the one that lives
17 on Pawleys Island, right?

18 MR. HILDEBRAND: Yes, sir.

19 THE COURT: Okay. So he's an hour
20 and a half up the road, whatever it is. Do you
21 have any objection to taking his deposition or
22 even a hearing via Zoom, live with the Court if
23 we can manage that?

24 MR. HILDEBRAND: Yes, I do, Your
25 Honor.

1 THE COURT: All right. Okay. All
2 right. Let's see if we can get him in here on --
3 I think it's the 29th, Monday the 29th, and if
4 you'll just let us know what his status is that
5 Monday or Tuesday of Thanksgiving week, that
6 should be sufficient for us to be able to move
7 forward.

8 MR. BUNDY: And again, my hearing's
9 not the best. I don't really -- I can't recall
10 whether Your Honor -- what your decision was
11 regarding my request to have some idea about what
12 he is going to say so that I will be able to --
13 if I got a list of what he is going to say, then
14 I will be able to come and say, that's not a
15 proper reply or -- I don't know. I just don't
16 remember, Your Honor, where we landed on that
17 issue, so I'm just wondering.

18 MR. HILDEBRAND: Your Honor,
19 Mr. Bundy says he's not going to agree to
20 anything if the basis is -- if he gets some
21 notion of what Mr. Doran might say, that he might
22 agree to it or something. I just don't think
23 that that's genuine, and I --

24 THE COURT: Well, he's your -- what
25 do you call it -- not a structural expert, but

1 he's the flow expert. He's the guy that cooks
2 the turkey. So it would be perfect for him to
3 bring him in right after Thanksgiving. We'll see
4 how his bird went. So let's just see how it
5 goes. I think that's got to be what it's in
6 reply to. Okay? And I'm going to limit it to
7 that.

8 MR. BUNDY: And I just want to be
9 clear in my own --

10 THE COURT: It's reply testimony
11 and not new direct, for sure,

12 MR. HILDEBRAND: Right. Okay.
13 With that little housekeeping then, are you ready
14 to proceed?

15 MR. HILDEBRAND: Yes, sir.

16 THE COURT: All right.

17 MR. HILDEBRAND: We would David
18 Simonton.

19 THE COURT: All right.

20 Mr. Simonton, come on around. All right.

21 Mr. Simonton, you've been hanging around for a
22 little while. I think you probably have a good
23 snuff for what we're doing. Have a seat and
24 watch yourself back there. Don't go too far
25 back.

1 (DAVID SIMONTON, having already
2 been duly sworn, testified as follows:)

3 REDIRECT EXAMINATION

4 BY MR. HILDEBRAND:

5 Q. All right. Mr. Simonton, I would like
6 to first just walk through a couple of contract
7 provisions with you. So let's get -- if you
8 would get Plaintiff's Exhibit 56 in front of you.

9 A. Sure. Plaintiff's Exhibit 56?

10 Q. Yes, sir.

11 A. Okay.

12 Q. If you'll turn to the A201.

13 A. Okay.

14 Q. And page 13 at the bottom.

15 A. Okay.

16 Q. All right. 3.2.1.

17 A. Do you want me to read that?

18 Q. I will read it.

19 A. Okay.

20 Q. It says, the contract documents are
21 complementary. Before starting each portion of
22 the work, the contractor shall carefully study
23 and compare the various drawings and other
24 contract documents relative to that portion of
25 the work as well as the information furnished by

1 the owner pursuant to section 2.2.3, shall take
2 field measurements of any existing conditions
3 related to that portion of the work and shall
4 observe any conditions at the site affecting it.

5 Any errors, inconsistencies, or
6 omissions discovered by the contractor shall be
7 reported promptly to the architect as a request
8 for information in such form as the architect may
9 require.

10 Then, the next sentence, 3.2.2. Any
11 design errors or omissions noted by the
12 contractor during this review shall be reported
13 promptly to the architect, but it is recognized
14 that the contractor's review is made in the
15 contractor's capacity as a contractor and not as
16 a licensed design professional unless otherwise
17 specifically provided in the contract documents.
18 Did I read that correctly?

19 A. Yes, sir.

20 Q. Okay. What obligations did the -- did
21 Balfour have to inform the architect of design
22 errors or omissions --

23 MR. BUNDY: Objection.

24 Q. -- under the contract, to your
25 knowledge?

1 MR. BUNDY: Objection.

2 THE COURT: Basis? Basis for the
3 objection?

4 MR. BUNDY: Well, it's not a proper
5 reply for one thing. I don't know what this has
6 got to do with anything that was brought up by
7 us. And two, he just read what the obligations
8 were. So I don't know how he's going to do
9 anything other than read this very same thing
10 back to him.

11 THE COURT: All right. Purpose of
12 the question?

13 MR. HILDEBRAND: Well, it's --
14 Mr. Bundy made a point that this is not a
15 malpractice design -- malpractice case, and that
16 design errors and omissions are not required to
17 have been pointed out and hadn't been pointed
18 out.

19 And I think that they were, and this
20 confirms that we had an obligation under the
21 contract that Mr. Bundy drafted. It's black and
22 white. Any design errors or omissions noted by
23 the contractors, and that's what we identified.
24 And that's a breach of the contract.

25 If there are errors and omissions, then

1 we have an obligation to advise the owner of it,
2 and that's what we did. So that's just
3 responding to his questioning of our witnesses
4 regarding design errors and omissions.

5 THE COURT: All right. I'm going
6 to overrule the objection; however, I'm going to
7 limit that. You need to go into specific
8 instances of conduct, not just generalized
9 questions.

10 MR. HILDEBRAND: Okay. All right.
11 BY MR. HILDEBRAND:

12 Q. What did Balfour Beatty do in this
13 matter when it discovered design errors and
14 omissions that it -- that were in the drawings?

15 MR. BUNDY: Lack of foundation,
16 objection.

17 THE COURT: Go back to, if you
18 would, specific instances of conduct. What
19 particular items are we talking about?

20 MR. HILDEBRAND: I will move on,
21 Your Honor.

22 BY MR. HILDEBRAND:

23 Q. All right. Also in A201, if you will
24 turn to section 4.3.

25 A. I'm there.

1 Q. And 4.3.1.4. The contract acknowledges
2 that its obligations to complete the work in
3 accordance with the contract documents shall not
4 be affected or amended as a result of any
5 unresolved, outstanding, or rejected claims
6 submitted to the owner.

7 The contractor shall proceed with all
8 work required under the contract documents, or
9 directed to be performed by the owner, regardless
10 of any unresolved claims or proceedings to assert
11 a claim. However, the owner has no right to
12 withhold undisputed amounts and shall pay any
13 undisputed amounts due to the contract.

14 Then the next section 4.3.1.5. The
15 resolution of a claim shall be documented in a
16 change order executed by the parties. Did I read
17 that correctly?

18 A. Yes, sir.

19 Q. All right. Let's turn to, if you would,
20 Defendant's Exhibit 146. Can you get that for
21 me?

22 A. Book two?

23 Q. Yeah. It's the same as, I think, what
24 you've got in your hands here.

25 A. Okay.

1 Q. If you can just -- it's the same as what
2 you've got in front of you. All right.
3 Defendant's Exhibit 146 is a document that was
4 offered by -- part of this proffered, the top
5 part, and then the second, the bottom part was
6 offered as repair costs or damages. Do you
7 recognize that document?

8 A. Yes, sir.

9 Q. Okay. I would like to refer you to a
10 couple of them and ask you questions about just a
11 few of them. Under the BBC contract costs
12 incurred by Library, where it says flood damage
13 repair, \$13,327. Do you see that?

14 A. Yes, sir.

15 Q. All right. Do you -- are your
16 familiar -- do you have any personal knowledge of
17 that issue?

18 A. I do remember when they had a flood up
19 on the eighth that trickled down to the fourth
20 floor.

21 Q. And what was -- did you -- what was the
22 cause of that?

23 A. What I was told by the owner, that the
24 owner's painters were up there, and they tied a
25 big plastic sheet around it.

1 MR. BUNDY: Your Honor, the owner's
2 painters, objection.

3 THE COURT: I think that was
4 hearsay, but let's come back to it.

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

7 THE COURT: It sounded like hearsay
8 to me. He's told such and such and so and so.
9 Does he know what happened?

10 BY MR. HILDEBRAND:

11 Q. Did you do any investigation? Do you
12 have any personal knowledge of that incident?

13 A. We did. We went up and saw where the
14 rooms had gotten flooded, yes.

15 Q. All right. Did you see what the cause
16 of that was?

17 A. The plastic sheet on the tub that had
18 been tied to the water, the -- the faucet that --
19 or the hardware that puts the water in, and as it
20 had pulled open -- pulled it open, and then the
21 plastic sheathing was -- had water on it.

22 And as it got water on it, it weighted
23 it down, and the water came off faster and caused
24 it to go over the tub and then flood the rooms
25 below.

1 Q. Did Balfour install that plastic
2 sheathing?

3 A. No, sir.

4 Q. Do you know who did?

5 A. The owner's direct painter, I guess.

6 Q. Okay. Let's turn down to about halfway
7 down that list where it says, outsourced laundry
8 services under \$140,193. Do you see that?

9 A. Yes, sir.

10 Q. All right. Do you have any personal
11 knowledge of that incident or that claim?

12 A. The dryer itself, we had -- they had it
13 supplied by the owner. We just hooked the gas
14 straight up to it, according to the P400 and the
15 plumbing drawings is where the gases showed.

16 Q. All right. Let's stop for just a
17 second. What is the issue here? What was the
18 problem?

19 A. The dryer would not work correctly.

20 Q. What do you mean by that?

21 A. It wouldn't stay on. It wouldn't heat
22 up.

23 Q. Okay. And when was that discovered?

24 A. When they started using it. When we
25 tested, it worked because we had to change the

1 fire sprinkler out because the heads were not --
2 the heat rating needed to be raised because it's
3 going to set them off and then also the heat
4 detector.

5 So they brought in the owner's person
6 that furnished the equipment, fired it up.
7 Everything worked fine, and then the next thing I
8 heard, that it wasn't working.

9 Q. Okay. Approximately what time was this?

10 A. It was in the early part of the
11 openings, a couple months in, I believe.

12 Q. So it would be early 2019?

13 A. Yes, sir.

14 Q. Okay. All right. So the -- you were
15 informed that the dryer wasn't working?

16 A. Yes, sir. I happened to bump into the
17 people down in the garage when I was doing
18 some --

19 Q. And who supplied the dryer?

20 A. The owner supplied the dryer.

21 Q. Did Balfour have any involvement with
22 that?

23 A. Just to hook it up.

24 Q. All right. And what was -- and was any
25 determination made as to why the dryer was not

1 working?

2 A. It needed a straight piece of pipe to go
3 into the dryer. It needed some running room for
4 the gas because it was a high gas consumption
5 dryer.

6 Q. Okay. Was the gas line -- was there a
7 design of the gas line that led to that drawing?

8 MR. BUNDY: Objection.

9 Q. Was there?

10 THE COURT: Basis? Go ahead.
11 Basis?

12 MR. BUNDY: The basis of it is the
13 best evidence of what the design was on the gas
14 line are the gas line drawings and designs
15 themselves. This is hearsay. He's -- he's
16 telling you about a document that's not in
17 evidence. He hasn't been qualified as a plumbing
18 or mechanical engineer.

19 It was their job -- it was their
20 responsibility to install it. So basically, I
21 guess what he is trying to say is -- I don't know
22 what he is trying to say, but if he's trying to
23 say the design was defective, then we need to
24 have some evidence of that.

25 But he can't even tell you what page,

1 what drawing, what detail, nothing. So there's
2 no foundation for any of this. Thank you, Your
3 Honor.

4 MR. HILDEBRAND: Your Honor, that's
5 cross-examination. He can -- he has personal
6 knowledge of what the issue was. They said,
7 we're responsible for this because the dryer
8 didn't work.

9 He has personal knowledge of why it
10 didn't work, and he can certainly testify, based
11 on his personal knowledge, what was required
12 under the design documents and what was installed
13 and what the problem was. He can cross-examine
14 him.

15 THE COURT: Yeah, I'm going to
16 allow it. Go ahead.

17 MR. BUNDY: Sure, that's fine.

18 THE WITNESS: I did look at the
19 installed gas line at that time, and it's an inch
20 and a half gas line, turned down the wall on the
21 P503 drawing, and it tied straight into the
22 dryer.

23 BY MR. HILDEBRAND:

24 Q. So in other words, it had a sharp turn
25 where --

1 A. Yes, sir.

2 Q. -- it went into --

3 A. Yes, sir.

4 Q. And that restricted the gas flow?

5 A. Yes, sir.

6 Q. And what was the -- how did that have to
7 be corrected?

8 A. They had to run an extra long pipe out
9 down and then back in. And it had to have 20 to
10 25 foot of straight run of inch and a half pipe
11 into the dryer.

12 Q. Okay. Was the gas line, where it was
13 originally installed, was that in accordance with
14 the design that was provided?

15 A. Yes, sir.

16 Q. Okay. Let's go down to -- about five or
17 six down, removal of the bar sample wall for
18 \$7,216. Do you see that?

19 A. Yes, sir.

20 Q. All right. Do you have any personal
21 knowledge of that claim?

22 A. Yes, sir. I was there when the mockup
23 was taken down. I'd assume that's the mockup.
24 It says the bar sample wall. The only bar sample
25 wall in the mockup we had was outside.

1 Q. All right. Did you hear Ms. Brown --
2 were you here when Ms. Brown testified?

3 A. Yes, I was.

4 Q. All right. And she testified the CPI
5 did a demolition and removal of the mockup. Do
6 you remember that?

7 A. Yes, sir.

8 Q. All right. What is your personal
9 knowledge of what CPI did relative to the
10 demolition of the mockup walls on the project?

11 A. Can I start at the first of the series?

12 Q. Sure.

13 A. Jim notified us that Mr. Bennett would
14 like to have that mockup hauled down to his ranch
15 farm.

16 Q. Jim Clements said that --

17 A. Yes, sir. He sent us a note and said,
18 well, the issue is, it's huge, big block cinder
19 walls, stone. But a lot of those features in
20 there had to go back on the building. The doors,
21 windows, (inaudible).

22 And he said, well, can we come and take
23 parts off of it? You know, go ahead and take it
24 off. And we said, sure, if you can't -- these
25 things had huge footings, I mean.

1 Q. Can you speak up little bit, please?

2 A. These things had huge footings on them
3 and, you know, big concrete and CMU block walls,
4 filled full of concrete. So they said, okay, so
5 they came, and they took off the canopy. They
6 took out some windows. They took off some of the
7 stone, the -- part of the wood that was out
8 there.

9 I mean, they took parts and pieces off
10 of all the mockups to haul them, put it on the
11 trailer and haul it off. And then we asked, and
12 they said, yes, we're done. So then we -- then
13 we hired Gulf Stream, and they brought in deco
14 because we had a contract with Gulf Stream. We
15 could write them a change order.

16 Then brought in deco with all the big,
17 huge hoe-rams. I mean, these things are huge,
18 and they knocked it all down. First, we took
19 pictures of the area to make sure because we were
20 really close to the other hotel, and if they
21 damage it, we wanted to have proof that it had
22 gotten damaged.

23 So they pulled everything down with
24 backhoes, track hoes, and then they had to get a
25 hoe-ram and knock these big huge footings out

1 because they were full of rebar to keep them from
2 tipping over in the wind. And then they loaded
3 it up, hauled it off, put the area back to what
4 it was, and then we came in and finished the
5 landscaping.

6 Q. Okay.

7 A. So it was a lot of material there that
8 was left.

9 Q. So the \$7,216, based on your
10 recollection, was where Mr. Bennett wanted
11 portions of the mockup taken out and then
12 transported to his farm?

13 A. Yes.

14 Q. Okay. The rest of the demolition --
15 what remained there on site, y'all took care of
16 that through a change order with Gulf Stream; is
17 that correct?

18 A. Yes, sir.

19 Q. Okay. All right. Let's go down to the
20 replacement, the last items two and three from
21 the bottom. Replacement of ballroom chandelier
22 crystals \$47,802 and installation of ballroom
23 chandelier crystals, \$6,260.

24 A. Yes, sir.

25 Q. Who supplied the chandelier?

1 A. Those were furnished by the owner
2 through a company called ADM, I believe.

3 Q. Okay. And describe for the Judge, if
4 you would, what the issue was with the chandelier
5 crystals and they're -- not being there.

6 A. So with these big huge ballroom fixtures
7 that you hang these crystals on, we couldn't
8 locate them.

9 Q. Couldn't locate the crystals?

10 A. Yeah. We couldn't find the crystals.
11 The light fixtures were there, but the crystals
12 were not. So we notified them, and then they
13 sent us a shipping ticket; so we couldn't ever
14 find them on the shipping --

15 Q. You notified who?

16 A. Notified by the owner, Jim, that the
17 crystals weren't there; so we got all the
18 receiving tickets and we couldn't find where that
19 crate of crystals were on that shipping ticket
20 for those particular type fixtures.

21 So I went down -- I personally went down
22 to the room. By then we had everything up that
23 was supposed to be installed, and I found two
24 crates of crystals. I went through those,
25 inventoried those; sent those back to Jim, to the

1 supplier. And he said, well, those crystals
2 don't go to this project, those two big crates of
3 crystals, just miscellaneous crystals.

4 I thought maybe they'd work, and he said
5 they wouldn't work. So we never could locate
6 those crystals. We went back to check at the
7 warehouse. But we couldn't ever find a delivery.
8 And they sent a picture, but the picture was in
9 their warehouse where they shipped it. So we're
10 not sure where it went. They told me the
11 crystals that we had went to another job, and
12 they had been there for a while.

13 Q. Okay. Have you had occasion to -- there
14 are eight floors of guest rooms in the -- in this
15 project; is that correct?

16 A. Yes, sir.

17 Q. All right.

18 A. Well, three through eight.

19 Q. Okay. Have you had occasion to go back
20 to the drawings and look at the number of walls
21 that are in the guest rooms and on those floors?

22 A. Yes, sir, I have.

23 Q. All right. How many walls are there
24 total in all of the guest rooms in this hotel?

25 A. 1,913 walls.

1 Q. Okay. And how did you come up with
2 that? How did you calculate that number?

3 A. The walls in the suite, the entry hall
4 walls, and the bathroom walls.

5 Q. For each room?

6 A. For each room.

7 Q. Okay. Let's talk about the project
8 closeout. The -- did you have any involvement
9 with providing the closeout manuals and the
10 product data and specifications to the owner when
11 job was completed?

12 A. Yes, sir.

13 Q. Tell me what you provided and when.

14 A. So at the closeout, the last few months
15 of the project, we scheduled the owner training
16 for the building engineers to take their owner
17 training on all the mechanical, electrical
18 equipment, plumbing, all those things required in
19 the specs to do the -- to do that owner training,
20 you know, how to change filters.

21 Q. When was this?

22 A. Gosh. Late '18. Late '18.

23 Q. All right.

24 A. And so they came in. We scheduled
25 those, got all those signed off, and then we

1 assembled -- from the subcontractors, we
2 assembled all the O and M manuals from the
3 mechanical, electrical, plumbing, start up
4 reports, all the shop drawings, contract
5 drawings, the latest set of contract drawings,
6 and all of the attic stock, you know, paint,
7 wood, stone, sprinkler heads, things like that.

8 Got all those transmitted up to the
9 building for the building engineer to use to run
10 the building.

11 Q. Okay.

12 A. And built his library, and that was
13 furnished in paper format. And then we gave them
14 a thumb drive of drawings so they could look at
15 them on a computer. It was a lot of items that
16 they -- that they required to be sent to them.

17 Q. Okay. So to your knowledge, were all
18 the required maintenance operation data and all
19 that provided to the --

20 A. Yes, sir.

21 Q. -- hotel operator?

22 A. Yes, sir.

23 Q. All right. Were you here when
24 Defendant's Exhibit 145 was discussed, which was
25 a change order that Ms. Hadley referred to with

1 MCI that was dated February 11, 2019?

2 A. MSI.

3 Q. Yes, sir.

4 A. Yes, I was here.

5 Q. All right. Do you recall if that
6 document, that change order was not signed?

7 A. Yes, sir. They said it was not
8 executed.

9 Q. Right. Based on your involvement with
10 this project, is it unusual to have documents
11 like that in the files that -- where there are
12 change orders, but not signed?

13 A. Yes. We have unsigned change orders.

14 Q. Okay. Is there -- does Balfour
15 recognize a change order with the subcontractor
16 if it's not signed?

17 A. We don't recognize unsigned change
18 orders.

19 Q. Did you -- were you able to locate a
20 signed copy of what was introduced as Defendant's
21 Exhibit 155?

22 A. No, sir.

23 Q. Did you look for one?

24 A. Yes.

25 Q. Okay.

1 MR. HILDEBRAND: All right. Please
2 answer any questions that Mr. Bundy might have.

3 THE WITNESS: Sure.

4 RE CROSS-EXAMINATION

5 BY MR. BUNDY:

6 Q. Mr. Simonton, are you still working for
7 Balfour Beatty, as you sit here today?

8 A. No, sir.

9 Q. Since you're not currently employed by
10 Balfour Beatty, are you speaking about Balfour
11 Beatty, or are you just speaking for
12 Mr. Simonton?

13 A. I'm speaking for Balfour Beatty.

14 Q. As a prior employee?

15 A. I'm sitting up here as a witness for
16 Balfour Beatty.

17 Q. But you're speaking as a prior employee,
18 correct?

19 A. Prior employee, yes, sir.

20 Q. And are you represented by
21 Mr. Hildebrand, personally?

22 A. No, sir.

23 Q. What did you do to prepare for your
24 testimony? Did you talk to Mr. Hildebrand?

25 A. Yes, sir.

1 Q. How much time did you spend with him?

2 A. I can't -- don't remember how long. 15,
3 30 minutes.

4 Q. Well, as it relates to your testimony
5 today --

6 A. Yes, sir.

7 Q. -- you spent about 30 minutes?

8 A. Yes, sir.

9 Q. Who decided what y'all are going to talk
10 about, he or you?

11 A. He did.

12 Q. Since we dove into the contract
13 document, could you get it in front of you? I
14 would like to discuss a few --

15 A. Sure. Which exhibit is that again, I'm
16 sorry?

17 Q. Sir?

18 A. Exhibit 56?

19 Q. Yes, sir.

20 A. Okay.

21 Q. Before we get in, did you have any
22 understanding, with regard to this project, that
23 a Mr. Jim Clements was the program manager?

24 A. Yes, sir. He is listed in the contract.

25 Q. And you understood that was his job?

1 A. Yes, sir.

2 Q. Okay. Regardless of what he may have
3 been referred to, that was his formal title,
4 program manager, correct?

5 A. He's the owner's designated
6 representative, yes.

7 Q. Program manager?

8 A. All right. Yes.

9 Q. You heard his testimony, right?

10 A. Yes, sir, I was here.

11 Q. Do you have any dispute that he was the
12 owner's program manager?

13 A. No, sir.

14 Q. Okay. He wasn't his messenger, he was
15 his program manager?

16 A. He was his program manager.

17 Q. Now, would the best place to find out
18 what his duties and obligations and expressed
19 authority were, would that be the contract
20 documents?

21 MR. HILDEBRAND: Objection, Your
22 Honor. Mr. Bundy has questioned this witness at
23 length earlier in the trial. I've raised just a
24 couple of discrete points, and I think it's
25 inappropriate to rehash and just go into new

1 areas, like you said, with this witness.

2 We responded to particular items that
3 Mr. Bundy had made, and I think he needs to
4 restrict his questioning to those items. For him
5 to go to the general -- other items, well, it's
6 just a rehash of what he's already done.

7 MR. BUNDY: I have no doubt that
8 that's what he believes. I have no doubt he
9 believes that. The problem is, that's not
10 consistent with the rules. What the rules say
11 is, he can bring in somebody and talk about
12 anything new, right?

13 But they also say that, once you put up
14 a witness in South Carolina, he is subject to
15 open cross-examination. He is now back on the
16 witness stand, and there's no -- there's no
17 restriction, if you look at the rules, about what
18 I can ask him. The only restriction relates to
19 what he can ask him.

20 Once he brings it in here, he opens the
21 door for everything that this witness may or may
22 not know. He didn't have to put him on the
23 witness stand. He didn't have to do any of this.
24 In addition to that, he's the one that started
25 talking about the contract. And so I figured,

1 well, let's -- if we're going to talk about the
2 contract, we might as well talk about it a little
3 more.

4 THE COURT: All right. I will give
5 you some latitude. Go ahead.

6 MR. HILDEBRAND: Thank you, Your
7 Honor.

8 BY MR. BUNDY:

9 Q. I will repeat my question. If you
10 wanted to find out what the authority of the
11 program manager was, the place you would go would
12 be the contract, correct?

13 A. Yes, sir.

14 Q. Okay. Let's look at paragraph 2.1.3,
15 page 12 of the AIA 201.

16 A. 201.

17 Q. Yes, sir. Are you with me?

18 A. Yes, sir.

19 Q. All right. In deference to this young
20 lady who is over here trying to take everything
21 down everybody says, you don't speak very loud.
22 I'm a loud talker, but I'm going to try to slow
23 down.

24 So what I would like to do is, instead
25 of you reading it, I'm going to read it to you,

1 and if I mistake, you tell me. Okay? Clear
2 enough?

3 A. That's fair, yes.

4 Q. 2.1.3.

5 A. Okay.

6 Q. If the owner elects the contract with
7 the program manager to assist and advise the
8 owner performing its responsibility relating to
9 the project, the following applies. Program
10 manager will be privy to information on the
11 project and will assist the owner in transmitting
12 and receiving information from and to the
13 contractor, architect, and owner.

14 The contractor understands and
15 acknowledges that the program manager has no
16 authority, contractual or otherwise, to bind the
17 owner. The program manager will not
18 independently issue, direct, either to execute or
19 approve changes in the work. Or approve services
20 of the contractor or other project participants.

21 The owner's retention of the project
22 manager does not change the owner's or other
23 contractor's responsibilities or obligations set
24 forth in the contract documents, and does not
25 subject the owner to a higher standard of care

1 that it would otherwise have in regards to its
2 duties and responsibilities to the contractor and
3 others. Did I read that correctly?

4 A. Yes, you did read that correctly.

5 Q. So did you ever read that provision
6 while you were working on this job?

7 A. I did, but Jim is the owner who
8 designated the representative.

9 Q. Okay. So now he's -- previously, when I
10 asked you this question, he was the program
11 manager, but then when I asked you to read the
12 contract now, he is not the program manager. Is
13 that what you're saying? Which is it,
14 Mr. Simonton?

15 A. It doesn't say he's the program manager.
16 It says --

17 Q. Well, you just said earlier he was, and
18 so I'm a little confused, but we'll move on. All
19 right. Let's go to page 14, paragraph 3.2.5.
20 Well, let's go to 3.2.4 first. Do you see 3.2.4?

21 A. 201.

22 Q. Yes, sir, the same -- we're in the same
23 document.

24 A. Yes, sir.

25 Q. All right. 3.2.4.

1 A. Yes, sir.

2 Q. 3.2.4. Any failure on the part of the
3 owner, architect, or other consultant of the
4 owner to specifically identify deficiencies in
5 the work shall not relieve the contractor of its
6 obligation to complete the work in accordance
7 with the contract documents.

8 The contractor shall not claim authority
9 or deviate from the contract documents unless the
10 basis for such deviation is in writing, signed by
11 the owner or the architect, paren, for those
12 matters of which architect has authority to bind
13 the owner, end paren.

14 The architect's authority to bind the
15 owner includes directives including
16 interpretations of the contract documents in 4.2.
17 The architect does not have the authority,
18 without the owner's written approval, to
19 authorize additional compensation to be paid to
20 the contractor.

21 As to matters beyond the scope of the
22 architect's authority including decisions
23 involving additional compensation to be paid by
24 the contractor, the owner's consent must be in
25 writing. If the work is delayed by the owner's

1 failure to timely provide written direction,
2 proposed deviations from the contract documents,
3 the contractor is entitled to a time extension
4 that will be determined by section 8.3.

5 If the contractor is required to rework
6 portions of the work due to owner's timely
7 failure to provide written direction on proposed
8 deviations from the contract documents, the
9 contractor shall submit a claim for additional
10 compensation, which will be processed in
11 accordance with 4.3.

12 For matters requiring the consent of the
13 owner and architect, the deviations of the
14 contract documents, both the writing
15 requirements, sections 3.2.5, shall be deemed
16 sufficiently satisfied by electronic or written
17 communication from the owner.

18 Identifying the deviation, indicating
19 consent for the same, regardless of whether such
20 communication bares a handwritten signature from
21 the architect or owner. Did I read that
22 correctly?

23 A. Yes, sir.

24 Q. 3.2.5. The contractor acknowledges its
25 obligation to complete the work and enforcement

1 of the contract shall not be affected or amended
2 as a result of any act or failure to act by the
3 architect, or any of the owner's other
4 consultants, or as a consequence of field
5 inspections or observations, or approved pay
6 requests, or in regard to any other duty
7 performed by the architect or other owner's
8 consultants for the benefit of the owner unless
9 the owner shall expressly approve the
10 contractor's actions in writing, specifically
11 identifying the action approved.

12 Furthermore, the contractor shall not be
13 relieved of any responsibility to complete the
14 work in conformity with the contract documents as
15 a consequence of any knowledge of nonconformity
16 obtained by any owner's representative including
17 the architect.

18 COURT REPORTER: Can you slow down
19 just a bit?

20 MR. BUNDY: -- whether or not such
21 a representative acts or fails to act on such
22 knowledge. The contractor acknowledges and
23 agrees that any representative retained by the
24 owner to act for the owner's benefit, including
25 the architect or program manager, shall have no

1 duty or responsibility to the contractor, except
2 where specifically stated herein.

3 And no failure to act by such owner's
4 representative shall relieve the contractor of
5 his obligations to perform all requirements under
6 this contract except the specifically approved in
7 writing otherwise. Did I read that correctly?

8 A. Yes, sir.

9 Q. 4.3.2.6. The contractor's obligation to
10 perform the work according to the requirements of
11 the contract documents may be amended only in
12 writing, correct?

13 A. Yes, sir.

14 Q. 3.3.1. The contractor shall supervise
15 and direct the work using the contractor's best
16 skill and attention. The contractor shall be
17 solely responsible for and have control over
18 construction means, methods, techniques,
19 sequences and procedures, and for coordinating
20 all portions of the work under the contract
21 documents.

22 And I'm not going to read the rest of
23 it. We can read it later. Turn the page,
24 please. 3.3.2.

25 THE COURT: 3.3.2.

1 MR. BUNDY: 3.3.2, Your Honor.

2 BY MR. BUNDY:

3 Q. 3.3.2. The contractor shall be
4 responsible to the owner for acts and omissions
5 of the contractor, the contractor's employees,
6 subcontractors and their agents and employees,
7 and other persons who are introduced performing
8 portions of the work for, or on behalf of, the
9 contractor and any of its subcontractors. Did I
10 read that correctly?

11 A. Yes, sir.

12 Q. 3.4.1. Unless otherwise provided in the
13 contract documents, the contractor shall provide
14 and pay for labor, materials, equipment tools,
15 construction equipment, machinery, water, heat,
16 utilities, transportation, other facilities and
17 services necessary for the proper execution or
18 completion of the work, whether temporary or
19 permanent, and whether or not incorporated or to
20 be incorporated in the work. Did I read that
21 correctly?

22 A. Yes, sir.

23 Q. Okay. Let's go to 3.5.4. Let's skip
24 over that one. I don't need to read over that.
25 A few more to go, and I will be done.

1 A. Okay.

2 Q. Let's go to page 18. 3.10.4.7.

3 A. Okay. I'm there.

4 Q. Let's read the first sentence. The
5 contractor is solely responsible for its
6 obligations regarding the construction schedule.
7 Did I read that correctly?

8 A. Yes, sir.

9 Q. Let's look at 3.10.4.8. Contractor
10 represents to the owner that the initial schedule
11 and all subsequent construction schedules
12 including updates and amendments shall be
13 prepared in good faith and accurate to the best
14 of the contractor's knowledge.

15 The contractor acknowledges that the
16 owner and architect will rely on the construction
17 schedule in regards to any and all decisions or
18 actions by either, in regard to the project. Did
19 I read that correctly?

20 A. Yes, sir.

21 Q. Let's look at 4.2, page 21.

22 A. Okay.

23 Q. All right. Let's go to 4.2.2. The
24 architect, as a representative of the owner, will
25 visit the site. One, to become generally

1 familiar with and keep the owner informed about
2 the progress and quality of the portion of work
3 completed. To the best of your information and
4 belief, did the architect do that?

5 A. And he issued reports.

6 Q. Sir?

7 A. He issued reports.

8 Q. Did he comply with that provision? A
9 fair representative, as far as you know?

10 A. Yes, sir.

11 Q. Okay. Two, to endeavor to guard the
12 owner against defects and deficiencies in the
13 work. To the best of your information and
14 belief, did he do that as well?

15 A. Yes, sir.

16 Q. Okay. Number 3, to determine in general
17 if the work is being performed in a manner
18 indicating that the work, when fully completed,
19 will be in accordance with the contract
20 documents. Did he do that?

21 A. Yes, sir.

22 Q. Okay. So those are three things that
23 the architect was required to do, and in your
24 opinion, he did all three of them?

25 A. Yes, sir.

1 Q. Okay. And let's read on. However, the
2 architect will not be required to make exhausted
3 or continuous on-site inspections to check the
4 quality or quantity of work. Architect services
5 are solely for the benefit of the owner.

6 The architect will neither have control
7 over, or charge of, nor be responsible for, the
8 construction means, methods, techniques,
9 sequences or procedures or for safety
10 precautions, and programs in connection with the
11 work.

12 Since these are solely the contractor's
13 rights and responsibilities under the contract
14 documents except as provided in section 3.3.1.
15 Did I read that correctly?

16 A. Yes, sir.

17 Q. Let's go down to 4.2.5. Based on the
18 architect's evaluation of the contractor's
19 application for payment, the architect will
20 review and certify the amount due to the
21 contractor and will issue certificates of payment
22 in such amount; is that correct? Did I read that
23 correctly?

24 A. Yes, sir.

25 Q. And isn't it true that the owner on this

1 job paid every certified pay request?

2 A. Yes, sir.

3 Q. Okay. Let me ask you something about
4 this painting. If you paint something for
5 aesthetic purposes, correct; in other words, a
6 painting is an aesthetic -- what color?

7 A. Yeah, You could call it that.

8 Q. Can we agree to that?

9 A. Yeah.

10 Q. Okay. Let's go to paragraph 4.2.1.3.
11 Are you there?

12 A. Not yet.

13 THE COURT: Which numbers are you
14 on? I'm sorry.

15 MR. BUNDY: 4.2.13. I'm sorry, I
16 misspoke.

17 BY MR. BUNDY:

18 Q. Are you there?

19 A. Yeah.

20 Q. I'd like to read that to you. It says,
21 the architect's decision on matters relating to
22 aesthetic effect will be final, if consistent
23 with the intent expressed in the contract
24 documents; is that correct?

25 A. That's what it says.

1 Q. That what it says, right?

2 A. Yes, sir.

3 Q. Okay. And the architect in this case
4 made an aesthetic decision that the contractor
5 was responsible for the cost of repainting this
6 hotel in December and January; is that correct?

7 A. He did send that correspondence.

8 Q. Okay. Let's look at 4.3.1.2. Well,
9 let's go back. Before we get there, under 4.3.1,
10 claims and disputes. Do you see that?

11 A. Yes, sir.

12 Q. Let's read this one. This is a
13 definition. A claim is a demand or assertion of
14 one party seeking, as a matter of right,
15 adjustment or interpretation of the contract,
16 payment of money, extension of time, or other
17 relief with respect to terms of the contract.

18 The term claim also includes other
19 disputes and matters in question between the
20 owner and the contractor, arising out of or
21 relating to the contract. Claims must be
22 initiated by written notice. The responsibility
23 to substantiate claims shall rest with the party
24 making the claim. Did I read that correctly?

25 A. Yes, sir.

1 Q. Who in this case had made a claim for
2 time extension?

3 A. I don't know the answer to that.

4 Q. You don't know the answer?

5 A. No, sir.

6 Q. Well, it's either going to be the
7 contractor or the owner, right? It's got to be
8 one or the other because those are the only two
9 parties to this contract, correct?

10 A. Right. We included a schedule in our
11 claim, yes.

12 Q. I guess let's do this way. The owner
13 hasn't made a claim for a time extension, has he?

14 A. I haven't seen one, no, sir.

15 Q. Okay. The contractors made a claim,
16 right?

17 A. Yes, sir.

18 Q. Okay. And according to this, the
19 responsibility to substantiate that claim rests
20 with the party making the claim. So the
21 contractor has the responsibility to substantiate
22 its delay claim, correct?

23 A. That's what it says.

24 Q. Okay. And that has to be done pursuant
25 to the CPM, the critical path -- the CPM

1 schedule, correct?

2 A. I don't see where it says that.

3 Q. Well, we will get to that in a second.

4 A. Okay.

5 Q. Let's look at 4.3.1.2. The contractor
6 shall attach these applications of payment, a
7 schedule of outstanding and unresolved claims and
8 request for change orders, which shall include
9 change orders dealing with change in scope,
10 request an extension of time for asserting a
11 claim.

12 This attachment shall certify that the
13 only outstanding request for change orders either
14 for a scope change, extension of time, or a claim
15 shall be those identified in the schedule
16 attached to the application for payment.

17 A schedule of outstanding change orders
18 and claims shall be required of each
19 subcontractor submitting an application for
20 payments to the contractor, that is to be
21 included in the contractor's application for
22 payment to the owner.

23 For purposes of contract administration,
24 the owner and architect shall each rely upon the
25 attached schedule as inclusive of the claims of

1 which contractor has been on notice and for which
2 the contractor intends to seek compensation. Did
3 I read that correctly?

4 A. Yes, sir.

5 Q. 4.3.1.3. The contractor's acceptance of
6 payment, in response to an application of
7 payment, shall constitute a release and waiver of
8 any known claim or request for change orders then
9 accrued and able to asserted by the contractor,
10 not identified in the schedule accompanying such
11 application for payment.

12 Contractor shall require each
13 subcontractor release and waive all claims for
14 any scope change or claims identified herein by
15 acceptance of payments from the contractor. Did
16 I read that correctly?

17 A. Yes, sir.

18 Q. 4.3.1.4. The contractor acknowledges
19 that its obligation to complete the work in
20 accordance with the contract documents shall not
21 be effective or amended as a result of any
22 unresolved, outstanding, or rejected claims
23 submitted to the owner.

24 The contractor shall proceed with all
25 work required under the contract documents or

1 directed to be performed by the owner, regardless
2 of any unresolved claims or proceedings to assert
3 a claim; however, the owner shall have no right
4 to withhold undisputed amounts and shall pay any
5 undisputed amounts to the contractor. Now, the
6 contractor -- the owner is only required to pay
7 certified pay requests; is that correct?

8 A. Yes, sir.

9 Q. And we have already determined in your
10 testimony that all certified pay requests were
11 paid?

12 A. Yes, sir.

13 Q. Okay. So this last sentence, the owner
14 shall have no right to withhold undisputed
15 amounts and shall pay any undisputed amounts to
16 the contractor would not apply here because there
17 were no unpaid certified pay requests, correct?

18 A. The last pay app 43 or 44, whichever one
19 it was, they took that money back.

20 Q. They decertified it, right?

21 A. Yes.

22 Q. Okay. And they were entitled to do
23 that. The architect is entitled to withdraw a
24 previous certification based on after discovered
25 information, correct?

1 MR. HILDEBRAND: Objection, Your
2 Honor. Mr. Bundy has been referencing the
3 contract and says, the contract speaks for
4 itself. He can't ask him to --

5 MR. BUNDY: I'll withdraw it. I'll
6 withdraw the question. That's fine.

7 BY MR. BUNDY:

8 Q. 4.3.3. This is entitled continuing
9 contract performance, is it not?

10 A. Which paragraph? I'm sorry.

11 Q. 4.3.3. Continuing contract performance.
12 Do you see it?

13 A. Yes, sir.

14 Q. Okay. It reads, pending final
15 resolution of a claim, except as otherwise agreed
16 in writing or as provided in section 9.7 and
17 Article 14. The contractor shall proceed
18 diligently with performance of the contract, and
19 the owner shall continue to make payments in
20 accordance with contract documents. Did I read
21 that correctly?

22 A. Yes, sir.

23 Q. And that -- was that your understanding
24 of the contract and your obligations on this
25 project?

1 A. That's what it says, yes, sir.

2 Q. Let's go to page 25, 5.3.

3 Subcontractual relations. By appropriate
4 agreement, written where legally required for
5 validity, the contractor shall require each
6 subcontractor, to the extent of work to be
7 performed by the subcontractor to be bound to the
8 contractor by the terms of the contract
9 documents, and assume toward the contractor, all
10 obligations and responsibilities, including the
11 responsibility for safety of the subcontractor's
12 work, which the contractor, by these documents,
13 assumes toward the owner and architect.

14 Each subcontractor shall preserve and
15 protect the rights of the owner and the architect
16 under the contract documents with respect to the
17 work to be performed by the subcontractor so that
18 subcontracting thereof will not prejudice such
19 rights.

20 Where appropriate, the contractor shall
21 require the subcontractor into similar agreements
22 with sub-subcontractors. The contractor shall
23 make available to each supposed subcontractor
24 prior to the execution of the subcontract
25 agreement, copies of the contract documents to

1 which the subcontractor will be bound.

2 Subcontractor will make copies available to their
3 respective proposed subcontractors. Did I read
4 that correctly?

5 A. Yes, sir.

6 Q. Okay. I'm just about done. Okay.

7 Let's go to page 30, paragraph 7.3.8. Are you
8 there?

9 A. I'm there.

10 Q. Okay. 7.3.8. Pending final
11 determination of the total costs of construction
12 change directive to the owner, amounts not in
13 dispute for such changes in the work shall be
14 included in the applications for payment,
15 accompanied by a change order indicating the
16 parties agreement with all -- with part or all of
17 such costs.

18 For any such -- for any portion of such
19 costs that remains in dispute, the architect will
20 make (inaudible) the determination for purposes
21 of monthly certification for the payment above
22 for those costs.

23 That determination shall adjust the
24 contract on the same basis as the change order,
25 subject to the rights of either party to disagree

1 and assert a claim in accordance with Article 4;
2 is that correct? Did I read that correctly?

3 A. Yes, sir.

4 Q. Let's go to page 33, paragraph 9.3.1.
5 Well, let's start with 9.3.1. It's entitled,
6 application for payment.

7 A. I'm there.

8 Q. Prior to the 30th day of each month, the
9 contractor shall submit to the owner and
10 architect for their review, an itemized
11 application for payment for operations completed
12 in accordance with the schedule of values in a
13 form acceptable to owner, architect, and lender.

14 Such application shall be similar to AIA
15 form G702, 703 shall accurately reflect retainage
16 held from contractor to current percentage of
17 completion on a line by line basis, and shall be
18 notarized.

19 Each application for payment shall be
20 accompanied by, one, a conditional waiver or
21 release upon the progress of payments -- upon
22 progress payment documents for the entire amount
23 covered by the subject application for full
24 payment in a form acceptable to the owner
25 executed by contractor and all subcontractors,

1 sub-subcontractors and materially serving a
2 notice to owner?

3 Unconditional waiver and release upon
4 project payment documents in a form acceptable to
5 the owner executed by contractor and all of the
6 above specified subcontractors,
7 sub-subcontractors, and materially served in
8 notice to owner, with respect to all the work for
9 which payment was made for previous application
10 for payment. Did I read that correctly?

11 A. Yes, sir.

12 Q. 9.3.1.1. Such applications may not
13 include requests for payment for portions of the
14 work for which contractor does not intend to pay
15 a subcontractor for materials supplied unless
16 such work has been performed by others whom the
17 contractor intends to pay. Did I read that
18 correctly?

19 A. Yes, sir.

20 Q. All right. Let's go to the next one,
21 page 34. It says paragraph 9.3.3. Do you see
22 that?

23 A. Page 34?

24 Q. 9.3.3. Do you see that on page 34? Are
25 you with me, Mr. Simonton?

1 A. 9.3.3, yes.

2 Q. Yes. Okay. Do you notice here that
3 this paragraph, like every other paragraph in
4 this contract, is all in bold?

5 A. Yes, sir.

6 Q. Okay. Does that signify anything to you
7 in any way, whatsoever?

8 A. It's important, I would assume.

9 Q. Sure. Well, here's what it says, 9.3.3.
10 The contractor warrants that title to all work
11 covered by an application for payment will pass
12 to the owner no later than the time of payment.

13 The contractor further warrants that,
14 upon submittal of an application for payment, all
15 work for which certificates for payment had been
16 previously issued and payments received from the
17 owner shall, to the best of the contractor's
18 knowledge, information, and belief be free and
19 clear of all liens, claims, security interests or
20 incumbrances in favor of contractor,
21 subcontractors, material suppliers, or other
22 persons or entities making a claim by reason of
23 having provided labor, materials, and equipment
24 relating to the work. Section 9.4, certificates
25 for payment. Did I read that correctly?

1 A. Yes, sir.

2 Q. Okay. Let's go to the next page. Let's
3 go to 9.6.7.

4 A. Okay.

5 Q. Unless the contractor provides the owner
6 with a payment bond in the full penal sum -- in
7 full penal sum of the contract sum. Now, let me
8 stop here and ask you: Did the contractor
9 provide a payment bond in the full penal sum of
10 the contract sum?

11 A. Not that I'm aware of.

12 Q. Okay. So where it says unless, that
13 doesn't apply because you didn't provide such a
14 payment bond; is that right?

15 A. Right.

16 Q. Okay. So now we read what the
17 requirement would be. Payments received by the
18 contractor for work properly performed by
19 subcontractors and suppliers shall be held by the
20 contractor for those subcontractors or suppliers
21 who perform work or furnish materials or both
22 under contract with the contractor for which
23 payment was made by the owner. Did I read that
24 correctly?

25 A. Yes, sir.

1 Q. Okay. Let's go to -- this is the last
2 one, and I will leave you alone, which I think
3 it's 8.2.1.

4 A. What's the number?

5 Q. The number is 8.2.1. Are you with me?

6 A. I'm with you.

7 Q. Why don't you read 8.2.1. It's only two
8 sentences.

9 A. Time limit stated in the contract
10 documents are of the essence of the contract.

11 Q. Let me stop you there. What is your
12 understanding of the meaning in construction
13 contracts of time is of the essence, if you know?

14 A. To get it done in that time period.

15 Q. It matters, time matters, right?

16 A. Right, essence.

17 Q. What does essence mean? What is the
18 essence of something?

19 A. The heart of it.

20 Q. Like the essence of a smell is where it
21 comes from. It's the very heart of the
22 agreement. It's the essence of it. And time was
23 at the heart of this agreement, correct?

24 A. Yes, sir.

25 Q. Okay. By executing the contract -- by

1 executing the agreement, the contract confirms
2 that the contract time is a reasonable period for
3 performing the work; is that correct?

4 A. That's what it says.

5 Q. And who selected the time that this job
6 was supposed take based on the testimony we've
7 heard?

8 A. I believe Balfour Beatty.

9 MR. BUNDY: Thank you very much.

10 THE COURT: All right. Anyone in
11 the back have any questions?

12 MR. WINDLE: No, sir.

13 MR. TERRY: No, Your Honor.

14 THE COURT: All right. Very good.
15 Thank you, Mr. Simonton, you can step down.

16 THE WITNESS: Thank you, Your
17 Honor.

18 THE COURT: All right.
19 Mr. Hildebrand, anything further?

20 MR. HILDEBRAND: Nothing for him,
21 Your Honor. We've got one more witness.

22 THE COURT: All right. So we
23 talked about Mr. Doran, correct? Do you have one
24 more witness today? I'm sorry.

25 MR. HILDEBRAND: Yes, sir.

1 THE COURT: Okay, okay.

2 MR. HILDEBRAND: Casey Thompson.

3 Can we just take five minutes break?

4 THE COURT: Yeah, yeah. Let's take
5 10 minutes.

6 (A recess transpired.)

7 THE COURT: All right.

8 Mr. Hildebrand?

9 MR. HILDEBRAND: Thank you, Your
10 Honor. I would call Casey Thompson.

11 THE COURT: All right.

12 Mr. Thompson, come on forward. You've been
13 previously sworn. You're still under oath. Come
14 on.

15 (CASEY THOMPSON, having already
16 been duly sworn, testified as follows:)

17 REDIRECT EXAMINATION

18 BY MR. HILDEBRAND:

19 Q. All right. Mr. Thompson, you were here
20 for the -- when Sam Hadley testified earlier this
21 week; is that correct?

22 A. Yes, sir, the first day.

23 Q. All right. Do you remember that she
24 went through and identified a number of instances
25 where she's noted on pay applications that

1 Balfour had been paid for that -- where amounts
2 had not been paid --

3 A. I do.

4 Q. -- subsequent to the subcontractors?

5 A. Yes, sir.

6 Q. Have you had a chance to -- since the
7 beginning of that information from her on the
8 stand, have you had a chance to go back and look
9 at those pay applications?

10 A. Yes, sir, I have.

11 Q. And the amounts that were claimed by
12 subcontractors and that were not paid as she
13 reflected?

14 A. Yes, sir.

15 Q. Okay. And as a result of your
16 investigation, have you determined why those
17 amounts that were shown to some of the
18 subcontractors were not paid?

19 A. Yes, sir. So the majority of them have
20 been placed on a project manager hold. I can't
21 speak to the reason why those were placed on hold
22 back in 2018.

23 There's not enough information for me to
24 delve into it and figure it out. Certainly
25 our -- going through those and addressing those

1 issues and making sure that those subcontractors
2 were funded or the dollars have been paid by
3 Library.

4 Q. Okay. So have you identified which
5 individual -- which particular subs that there
6 are and what the amounts are for them?

7 MR. BUNDY: Objection.

8 THE COURT: Basis?

9 MR. BUNDY: There is no provision
10 in this contract for what has been referred to as
11 a project manager's hold. In fact, that's
12 another name for a misdemeanor because there's no
13 such thing as a project manager's hold in his
14 contract.

15 There's no exception to the criminal
16 statute in South Carolina for a, quote, project
17 manager's hold. And in fact, the contract itself
18 specifically requires to have the contractor pay
19 the amounts that were certified for payment to
20 the subs.

21 And in fact, it's verified twice. It's
22 verified when the payment application is put in,
23 and it's verified again in the next pay
24 application. So this may be an explanation, but
25 it's not a legal excuse. Okay?

1 And so we're not here for explanations.
2 We're here for legal excuses, I would believe.
3 So I take the position this is all irrelevant,
4 immaterial, and in fact, probably this very
5 explanation entitle us to a directed verdict.
6 Thank you, Your Honor.

7 THE COURT: He said he didn't know
8 the basis for the project manager's hold. How
9 can he testify about that?

10 MR. HILDEBRAND: Right. I asked
11 him if he has done an investigation, and he said
12 yes. I saw back in 2018 that the reason that
13 they weren't paid, that there were project
14 manager holds.

15 What the basis for the holds were, he
16 didn't know, but he said he did investigate them
17 and that there were project manager holds. So he
18 might not be able to go to the root cause of what
19 they were, but he has testified. And I think
20 it's appropriate for him to say why he -- based
21 on his investigation, why they were not paid.

22 MR BUNDY: He might as well have
23 said, we didn't get a Christmas card from him,
24 and that's why we didn't pay it. It is
25 completely irrelevant.

1 MR. HILDEBRAND: Your Honor, I
2 certainly want to hear why they --

3 THE COURT: All right. What I'm
4 going to do is I'm going to sustain the
5 objection. I'm going to let you proffer it if
6 you proffer it and put it in the record. Okay?
7 But I'm going to sustain the objection.

8 MR. HILDEBRAND: Okay. I think
9 he's already testified about it.

10 BY MR. HILDEBRAND:

11 Q. All right. Should be for -- and
12 actually, the question was, have you -- the
13 actual question that I asked you was, have you
14 determined what the amounts are that were
15 identified by Ms. Hadley for the subcontractors
16 that she said were not paid? Do you have those
17 and can list them for us?

18 A. Yes, I do. I have a list, if I can
19 reference that.

20 Q. Yeah.

21 A. I tried to take notes on this.

22 Q. That's fine.

23 A. So I believe I've captured them all.
24 Okay. So starting from the top and items that
25 were addressed in Sam Hadley's --

1 MR. BUNDY: Objection. This is
2 nothing but a recap of Ms. Hadley's testimony.
3 We've got a record, and Your Honor was here and
4 heard the testimony. So I don't know what -- how
5 this could be relevant?

6 THE COURT: All right. Well, I
7 rule it not admissible evidence, but I'm going to
8 allow it.

9 MR. BUNDY: I'm sorry, Your Honor.

10 THE COURT: Okay. You can have a
11 continuing line of objection on this. I'm going
12 to note the objection, but go ahead and just run
13 him through it because I'm hoping to finish at
14 1:00 today. Okay?

15 MR. HILDEBRAND: Right. I
16 understand. Well, Your Honor, I think that
17 the -- and I don't mean to try your patience, and
18 I apologize if I am. You ruled that, he could
19 not testify about things that were outside of his
20 knowledge, and that was the PM, the project
21 manager's holds on things.

22 I'm not asking him about that. I'm
23 simply asking him to identify on the record the
24 amounts that -- that were not paid by the
25 subcontractors, and then I'm going to ask him if

1 they should be.

2 THE COURT: Okay. So to testify to
3 the numbers and who they belong to, correct?

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: Okay. All right.

6 BY MR. HILDEBRAND:

7 Q. All right. So do you have the itemized
8 report for the subcontractors who --

9 A. Yep. So there were --

10 Q. -- who got paid for and who were not
11 paid from those?

12 A. Yep. So Bernhard MCC in the amount of
13 \$157,000, which includes retainage. There was --
14 MSI was mentioned for \$135,850, their contract
15 balance.

16 MR. BUNDY: I'm sorry, who was
17 that?

18 THE WITNESS: Miscellaneous steel.

19 MR. BUNDY: Miscellaneous, thank
20 you, sorry.

21 BY MR. HILDEBRAND:

22 Q. Okay.

23 A. There was Otis, a retainage of \$80,000;
24 Pasco contract balance of \$19,554.19; Pasco
25 retainage, \$46,815.19; Robert Thomas, \$30,870;

1 Warco, \$67,966; Watson, \$206,540. All those I'm
2 in agreement.

3 Cook and Boardman, \$102,000. It was
4 stated that this was funded in pay application
5 40. I went back and reviewed payment application
6 40, and that \$102,000 mentioned was not the
7 correct amount that was billed. I believe that
8 the amount that was billed for Cook and Boardman
9 in pay app number 40 off the top of my head was
10 roughly \$56,000, but it was billed -- funded by
11 Library but also paid to Cook and Boardman. So I
12 don't see the \$102,000. I'm not saying that it's
13 not out there. Just in my review, I couldn't
14 find it. So if there's any support for that,
15 that we didn't pay that 102,000 that was
16 mentioned to Cook and Boardman, I would like to
17 see that.

18 Q. Okay. So of the amounts that you were
19 able to determine --

20 A. Yeah.

21 Q. -- we have received payment for, but
22 it's not been passed on to subcontractors. What
23 is that total?

24 A. \$757,055.34.

25 Q. 757?

1 A. \$55.34.

2 THE COURT: Does that include any
3 of that Cook and Boardman or it totally excludes
4 that?

5 THE WITNESS: It doesn't include
6 the Cook and Boardman.

7 BY MR. HILDEBRAND:

8 Q. All right. So Plaintiff's Exhibit 329,
9 which is the damages summary, that \$757,055.34,
10 you would agree should be deducted from that,
11 right?

12 A. Along with any interest that's
13 associated with those damages.

14 Q. Okay. Have you made calculation of the
15 interest?

16 A. I haven't gone through the interest yet,
17 but -- because it would have to -- it would have
18 to be dated back to the previous years, depending
19 on when those applications were submitted.

20 Q. Okay. All right. Let's talk about the
21 audit provisions of the -- of this job that
22 occurred back in -- I guess it was in 2019.
23 Would you -- were you personally involved with
24 those discussions and the audit that Ms. Hadley
25 did?

1 A. Yes.

2 Q. Okay. And what was your involvement?

3 A. I was to provide accounting records
4 related to this project, any support that Cotton
5 and Company requested. I provided all support to
6 substantiate the cost that was submitted for
7 review and for audit for Cotton and Company.

8 Q. Okay. All right. Let's turn to -- and
9 you were providing an audit as required under the
10 contract documents; is that correct?

11 A. That's correct.

12 Q. All right. Do you have Plaintiff's
13 Exhibit 56, which, I think, is in binder 2 there?

14 A. This one?

15 Q. Actually, before we get there, let me
16 ask you a few more questions. So do you remember
17 the -- some dispute and discussion about the
18 documents that were to be provided to Sam Hadley
19 as a result of the audit that she wanted to
20 perform?

21 A. I do. To the best of my knowledge,
22 there were initial requests for documents and an
23 accounting of the project costs, the cost of the
24 work. We provided or met that request with the
25 documents that we provided. We provided

1 everything that we had, that we had the ability
2 to provide to Cotton and Company.

3 You know, throughout the process, it did
4 seem that Cotton and Company was, you know,
5 asking additional questions, requesting
6 additional support. As those requests arose, we
7 did the best that we could to meet those requests
8 with the additional documentation by answering
9 any questions that they may have had. So to the
10 best of my knowledge, yeah, we provided
11 everything that we could to support that audit.

12 Q. Was there anything that you had that she
13 requested that was not provided to your
14 knowledge?

15 A. Not that I'm aware of.

16 Q. Okay. How many -- what was the sequence
17 of meetings and discussions that led up to her --
18 to Sam Hadley's publishing her GMP audit in this
19 case that we've talked about?

20 A. From what I recall, we had a few
21 discussions after all of our documentation and
22 support had been provided, leading up to the site
23 visit audit, which was held via Microsoft Team.
24 I believe it was virtual due to COVID
25 restrictions.

1 So all of that was provided and we went
2 back and forth through e-mails, just some
3 questions, general questions that they had
4 regarding our records. Then, we had a two-day
5 meeting with Cotton and Company where we went
6 through multiple sort of questions and requests
7 for maybe some additional support or explanation
8 regarding some of the samples that they selected
9 throughout the audit process.

10 We had a few -- I would say multiple
11 items or instances of correspondence throughout
12 that whole process. There was a lot of back and
13 forth between us and the auditors, making sure
14 that they had everything that they needed. There
15 were a few follow-up items once the audit was
16 completed, and then nothing until the audit
17 report was published by Cotton and Company back
18 in December of 2020.

19 Q. Okay. Do you have any general
20 approximation of how much time that you spent
21 personally working to respond to the requests for
22 information and to provide what was requested by
23 Sam Hadley in that audit process?

24 A. Yeah. I would say roughly I probably
25 spent a week in compiling all of the reports and

1 the support to substantiate the costs that were
2 reflected in those reports in a format that was
3 sort of organized for the auditors to review.

4 So in preparation for the audit, about a
5 week during the audit was the site visit that
6 week of, leading up to and afterwards. And then
7 probably another week in my estimation beyond
8 that of just general correspondence back and
9 forth and answering questions, things of that
10 matter.

11 Q. Okay. Did you try to be cooperative
12 during that process?

13 MR. BUNDY: Objection.

14 A. Absolutely.

15 THE COURT: Overruled. That's
16 fine.

17 BY MR. HILDEBRAND:

18 Q. And then recently, there was a subpoena
19 that was served on me relative to this case. Are
20 you familiar with that subpoena?

21 A. From September 4th, I believe.

22 Q. Yes, sir.

23 A. Yes.

24 Q. And the Judge required that certain
25 documents be produced as a result of that

1 subpoena; is that correct?

2 A. Yes.

3 Q. Have those documents been produced?

4 A. Yes.

5 Q. All right. To your knowledge, has all
6 of the information that was requested in that
7 subpoena been -- by Ms. Hadley been produced that
8 you have?

9 A. Yes. To my knowledge, yes.

10 Q. All right. Let's turn to -- let me ask
11 you some general questions. So your official
12 title with Balfour is what?

13 A. Controller.

14 Q. Okay. And you are involved with final
15 accountings on projects that Balfour works on?

16 A. Yes.

17 Q. All right. Tell me how those -- what
18 those and how these final accountings are
19 performed and what the normal course of business
20 is for Balfour.

21 MR. BUNDY: Objection. Your Honor,
22 I think this was all handled in the -- this is
23 just -- we've already plowed this field.

24 THE COURT: All right. I'm going
25 to allow it because I certainly have a question

1 about it myself.

2 MR. HILDEBRAND: Okay. All right.

3 BY MR. HILDEBRAND:

4 Q. What is the normal course, and what I'm
5 referring in -- actually, why don't we turn to
6 this. If you will look at Exhibit 56, which is
7 in binder two. It's a copy of the contract. All
8 right. Turn to section in the A133, 7.2.1.2,
9 which is final payment. Are you with me?

10 A. Yes.

11 Q. All right. And it says, the entire
12 unpaid balance of the contract sum shall be paid
13 by the owner to the construction manager when,
14 and number two, the construction manager has
15 submitted a final accounting for the cost of the
16 work and a final application for payment. Why
17 was a final application for payment not made?

18 A. Well, we had multiple payment
19 applications submitted to the architect and owner
20 that had not been certified. And it would have
21 been inappropriate for us to continue on without
22 certification that the values submitted were
23 agreed to in previous applications.

24 Funding had stopped at that point in
25 time. We had multiple payment applications

1 already submitted, that there were no -- no
2 response, to my knowledge, in regards to what
3 needed to be revised on those payment
4 applications in order for them to be certified.
5 Again, to my knowledge. So that was the reason
6 that nothing else was submitted.

7 Q. Okay. And let's talk about the final
8 accounting that's referenced there, and I think
9 in section 7.2.2 as well. You were involved in
10 final accountings, I think you said, for other
11 projects for Balfour as the controller?

12 A. Yes.

13 Q. And kind of tell the Judge what those
14 final accountings are for.

15 MR. BUNDY: Objection.

16 THE COURT: Go ahead. What's the
17 objection?

18 MR. BUNDY: Well, the objection is
19 there's been a lot of testimony in this case
20 about this contract was not a boilerplate
21 contract that was just picked off the shelf.

22 This is a specific contract related to
23 this specific job, and anything he did needs to
24 be referenced to this specific contractor and
25 this specific job. What he does on other jobs is

1 completely irrelevant, completely irrelevant.

2 THE COURT: Okay.

3 MR. HILDEBRAND: Well, I would like
4 to respond back, Your Honor. One, this provision
5 has not been changed. If you look at the
6 contract, there's not a bold line, a line beside
7 it. So this has not been changed.

8 THE COURT: Let me stop you right
9 there because I must not be where you are. What
10 number are you?

11 MR. HILDEBRAND: 7.2.1.2.

12 THE COURT: Okay. All right.
13 Yeah, what we just covered.

14 MR. HILDEBRAND: Right. So that's
15 not a changed provision.

16 And certainly, the custom and
17 industry -- custom and usage in the industry is
18 appropriate, and that's what he is going to
19 testify about, what he's done or prior
20 accountings and what his practice is, so that he
21 can explain to you why he did -- what he did and
22 why he did -- provided the accounting that he did
23 to the owner on this job.

24 MR. BUNDY: That's irrelevant, the
25 fact that one provision in this contract does not

1 change. The whole contract was changed. You
2 can't pick out one thing and say, well, because
3 there's one provision that wasn't changed out of
4 40-something pages, then we just go to custom and
5 usage. I agreed --

6 THE COURT: I'm going to allow it.
7 I'm going to overrule it.

8 MR. BUNDY: Okay. Thank you, Your
9 Honor.

10 BY MR. HILDEBRAND:

11 Q. All right. So what is the normal --
12 what is the usual process that you go through
13 with this provision when you are doing a final
14 accounting?

15 A. We provide what's called a detailed job
16 cost ledger along with the support as to
17 substantiate the costs incurred that's listed in
18 the detailed job cost ledger. So what the
19 detailed job cost ledger is, it's an accounting
20 of, out of all of our expenses, that we feel are
21 costs of the work or general conditions.

22 So we've got those coded by project
23 number and cost code so that we can differentiate
24 between general conditions, allowances,
25 insurances, cost of the work, preconstruction,

1 the -- so on and so forth, right? So that way
2 it's clear to whoever is auditing the project,
3 what those costs relate to. So we provide that.
4 We provide --

5 Q. And that's called the cost code report?

6 A. It's a detailed job cost ledger.

7 Q. Okay.

8 A. That's what we consider our accounting
9 for that project, and then we provide all the
10 documentation to support it.

11 So the contract, of course, all of the
12 subcontract, payment applications, change orders,
13 anything and everything related to the
14 subcontractors, miscellaneous invoices, all of
15 the papers or the -- you know, the report that we
16 provide.

17 So what an auditor typically does in
18 that case is, they take the contract, they take
19 our cost report, and they come up with their
20 findings of what they feel the eligible cost is
21 and how that relates to the GMP in that case,
22 right?

23 So we go through that -- those findings
24 with the auditor, and once those findings are
25 revealed to us, we have a discussion around those

1 findings, and we come to an agreement basically
2 on this findings of what's agreed to and what's
3 disagreed.

4 MR. BUNDY: I'm just preserving my
5 objection.

6 THE COURT: Objection noted.

7 MR. BUNDY: I move to strike.

8 BY MR. HILDEBRAND:

9 Q. All right, sir. So the detailed job
10 cost ledger in the documents that are typically
11 provided, is that what was provided to the owner
12 in this matter through Sam Hadley?

13 A. Yes. It's a listing of all of our
14 incurred costs on the project.

15 Q. Okay. So what you've provided here is
16 what you have done for every other final
17 accounting that you've done; is that correct?

18 MR. BUNDY: Objection.

19 A. That's correct.

20 Q. All right. Has that -- on the prior
21 accountings that you've done, have you -- has
22 that ever been -- has it ever been claimed to be
23 unacceptable or inappropriate by owners?

24 MR. BUNDY: Objection.

25 THE COURT: Sustained. Go ahead.

1 BY MR. HILDEBRAND:

2 Q. All right, sir. How many other final
3 accountings have you been involved with in your
4 career, would you --

5 MR. BUNDY: Objection.

6 Q. -- approximate?

7 THE COURT: I will allow it. Go
8 ahead.

9 THE WITNESS: Probably roughly 25
10 to 30 GMPs.

11 BY MR. HILDEBRAND:

12 Q. Okay. So let's turn now, if you would,
13 to Exhibit 350 -- Plaintiff's Exhibit 350, which
14 is the GMP contract evaluation.

15 THE COURT: All right. Just one
16 second before you leave that subject.

17 MR. HILDEBRAND: Yes, sir.

18 THE COURT: Mr. Thompson, my
19 question to you is, did you provide the full
20 accounting records to Ms. Hadley?

21 THE WITNESS: Yes, Your Honor.

22 THE COURT: All right. And did
23 those include those cost codes that she could
24 track on that.

25 THE WITNESS: Yes, Your Honor.

1 THE COURT: All right. Go ahead.

2 MR. HILDEBRAND: All right, sir.

3 BY MR. HILDEBRAND:

4 Q. Can you refer --

5 A. Yeah.

6 Q. Just pull up the --

7 A. This report here?

8 Q. Yes, sir. Actually, before you get
9 there, let's turn, if you can real quick to --
10 sorry to jump around on you just a little bit.

11 A. That's okay.

12 Q. -- to Plaintiff's Exhibit 56. I want to
13 just ask you a question about the contractual
14 audit. If you will go to A133, section 7.2. I'm
15 sorry. All right. So let's -- if you will turn
16 to page 15 of the A133 6.11, accounting records.

17 A. I'm here.

18 Q. All right. 6.11.1. 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 Does the cost of the work relative to
25 the audit provisions include claims,

1 Mr. Thompson?

2 A. No.

3 Q. All right. Do you recall a request by
4 Ms. Hadley for information related to claims that
5 were being -- the separate claims that were being
6 made by Balfour against subcontractors?

7 A. Yes.

8 Q. Was all the information that you
9 possessed at the time that those requests came to
10 you from Ms. Hadley, provided to her?

11 A. Everything that I -- yes, everything, to
12 my knowledge, that I was aware of that we could
13 send to Cotton and Company, we sent along. Once
14 reviewed -- and I know there were some back and
15 forth on this.

16 With Cotton and Company and how we
17 interpreted the audit, what all should be
18 included. Ultimately, we wanted to give Cotton
19 and Company everything that we had in our
20 possession, and that's -- that's where we left
21 it.

22 Q. Okay. So there's an audit for the cost
23 of the work, and that was inarguably provided as
24 part of the accounting and otherwise; is that
25 correct?

1 MR. BUNDY: Objection.

2 THE COURT: Overruled. Go ahead.

3 THE WITNESS: Yes.

4 BY MR. HILDEBRAND:

5 Q. And then there was some disagreement
6 about the claims issues with subs and otherwise,
7 but that was resolved, and you provided
8 everything that was -- that you could that was in
9 response to Ms. Hadley's request; is that
10 correct?

11 MR. BUNDY: Objection.

12 THE COURT: Overruled. Go ahead.

13 THE WITNESS: Yes.

14 BY MR. HILDEBRAND:

15 Q. All right, sir. Can you -- so let's
16 turn then, if we can, to Plaintiff's Exhibit 350.
17 Have you --

18 A. One second. Okay. I'm with you.

19 Q. All right, sir. Have you seen this
20 document before?

21 A. Yes.

22 Q. It's dated September 10, 2020, and
23 signed by Sam Hadley. Do you see that?

24 A. Yes.

25 Q. Did you receive this document at or

1 about the time that that date is?

2 A. Yes.

3 Q. All right, sir. And in fact, you
4 provided a lot of the information and had a lot
5 of the back and forth with Ms. Hadley for her to
6 publish this report, correct?

7 A. Yes.

8 Q. Okay. And what was your understanding
9 of the reason for her publishing this report?

10 MR. BUNDY: Objection.

11 THE COURT: Overruled. Go ahead.

12 THE WITNESS: My understanding of
13 this audit report and all our reports is to
14 provide opinions -- opinions and conclusions on
15 the construction manager or general contractor's
16 detailed final accounting in the project, in
17 terms of what the eligible costs of the work are
18 and what the maximum allowable costs of the work
19 is to be billed in relation to the GMP.

20 BY MR. HILDEBRAND:

21 Q. Okay. And does this document contain a
22 statement by Ms. Hadley as to the -- does it have
23 a conclusion and express opinions regarding the
24 eligible costs of the work under the GMP?

25 A. Yes.

1 Q. All right. And does it also include
2 some discussion about claims issues?

3 A. Yes.

4 Q. All right. And as I understand it, in
5 the usual process, when you get the audit on the
6 eligible cost of the work, there's a delta. In
7 that, Balfour negotiates with the owner to
8 hopefully come to a resolution; is that right?

9 MR. BUNDY: Objection.

10 THE COURT: Overruled. Go ahead.

11 THE WITNESS: Yes.

12 BY MR. HILDEBRAND:

13 Q. All right. And if you can't come to a
14 resolution, then it might go to dispute
15 resolution procedures, formal dispute resolution
16 procedures, correct?

17 A. That's correct. I mean, if I can expand
18 on that?

19 Q. Okay. Sure.

20 A. So typically, it's -- it's up to the
21 contractor and the circumstance to provide
22 support for the reasonableness of the cost,
23 right?

24 So if there's something that the auditor
25 disagrees with and has a finding, it's up to us

1 to prove that, whether it be the contract or what
2 have you. If that can't be provided and you
3 can't substantiate that then, yes, that's
4 typically in the form of a credit.

5 Q. Right. And you want to cooperate
6 because you want to get paid, correct?

7 A. That's correct.

8 Q. All right, sir. So this document was in
9 response to the audit provisions in the contract
10 and what Judge Scarborough ordered the parties to
11 get together and provide and for Ms. Hadley to
12 provide, correct?

13 A. That was my understanding, yes.

14 Q. All right. Let's turn to page 15 in
15 schedule B of this report.

16 A. Okay.

17 Q. All right. So if a -- it's labeled
18 schedule of costs of work -- schedule of costs of
19 work fee GMP values and paid amounts. And the
20 top line, eligible costs of work, schedule A,
21 \$65,745,441, correct?

22 A. Yes.

23 Q. All right. All right. What is the
24 figure below that? Where does that come from,
25 the \$65,171,688?

1 A. That is Cotton and Company's
2 interpretation of what the current GMP is or was
3 at the time that the report was published.

4 Q. Okay. Did you agree with that finding?

5 A. Yes.

6 Q. All right. What is the figure below
7 that, where it says, maximum allowable cost of
8 the work, MP, \$64,435,030?

9 A. So that takes into consideration all of
10 the findings related to the incurred costs of the
11 project. So there's multiple supporting
12 schedules and documents behind this to accumulate
13 this value.

14 Essentially what's done here is a credit
15 is taken to the primary costs and the general
16 conditions, if need be, to establish the maximum
17 allowable costs based on the audit findings.

18 Q. Okay.

19 A. And what happens here is, if there's
20 eligible costs in excess of the GMP, you take the
21 lesser of the two, right?

22 So for example, general conditions,
23 we've got a total eligible cost of 6.2 million
24 dollars, but our GMP at the time was 3.3 million
25 dollars. So you carry that value. Her findings

1 in our primary cost was less than the GMP, so we
2 take her finding of what the primary cost is at
3 \$59,500,000.

4 Q. Okay. So I'm going to come back to that
5 in just a minute, but the -- I'm going to ask you
6 this: The eligible costs of the work at the very
7 top line, the \$65,745,441, do you agree with that
8 figure?

9 A. Yes.

10 Q. Did you agree with it when this was
11 published?

12 A. Yes.

13 Q. All right. And then the amount paid to
14 date on this, \$59,994,390, was that figure
15 accurate?

16 A. Yes.

17 Q. All right. So as far as the audit is
18 concerned that the Judge ordered and is required
19 at the end of the project and the contract, this
20 is -- these are the findings that relate to that;
21 is a fair statement?

22 A. Yes. And this is -- if I can expand on
23 that. This is typical of what I would usually
24 see on any other audit report that's provided.
25 We touch on a lot of same things here, and that

1 was pretty plain, and it's clean that way, right?

2 When you take the incurred costs and you
3 audit data in accordance with the contract. When
4 you try to intermingle claim values, along with
5 the incurred costs, there's -- it just gets
6 messy, right? And so I think that it was
7 identified here, and it's very plain to see where
8 we audited the incurred costs, the costs of the
9 work.

10 Q. Okay.

11 A. And then we also had the discussions
12 around the claims.

13 Q. Okay. So to determine if you agree with
14 the \$65,745,441 at the top line, and then the
15 third line is what Ms. Hadley represents to be
16 the maximum allowable cost of the work to be
17 \$64,435,031, there's a delta there. The delta is
18 not shown on this chart. The delta between those
19 two figures is \$1,310,411; is that correct?

20 A. I don't think that's right. It should
21 be in schedule A, which is page 4.

22 Q. Okay.

23 A. The job cost report adjustments based on
24 Cotton's findings was \$1,170,389.

25 Q. Okay. So that is -- reading this

1 report, the audit required under the contract,
2 that's the amount in dispute?

3 A. Yes.

4 Q. All right. And of that -- so Ms. Hadley
5 said, I looked at -- I'm looking at your eligible
6 job costs, and of that total amount, it's my
7 opinion that \$1,170,389 is not appropriate, not
8 eligible, correct?

9 A. Correct.

10 Q. All right. And did you then review her
11 audit to determine whether you agreed with the
12 deducts that -- or the items that she claimed as
13 being inappropriate?

14 A. Yes.

15 Q. All right. And did you -- what is
16 the -- in your prior report, I think you had
17 indicated that there was a certain amount of
18 deducts that you had agreed to. Do you know what
19 that is?

20 A. Yes. Off the top of my head, it was
21 roughly \$613,000. It's in that PowerPoint that
22 was provided, the previous exhibit.

23 Q. Do you have it with you?

24 A. Yeah. That value was \$613,742.

25 Q. Okay. So of the \$1,170,385, you agreed,

1 after reviewing her report, that \$613,742 were
2 appropriate?

3 A. Correct.

4 Q. So you would be willing to, on behalf of
5 Balfour Beatty, say, okay, we'll exceed those
6 amounts, correct?

7 A. That's correct.

8 Q. And then some of them, you disagreed
9 with, and that was -- can we reference that? I
10 think it was the prior slide on your prior
11 presentation. You disagreed on adjustments,
12 \$556,646, correct?

13 A. Correct.

14 Q. Can you --

15 MR. BUNDY: Objection. Your Honor,
16 this is a complete rehash of his direct
17 examination. I mean, I don't -- we're going
18 through this whole thing again. I mean, he is
19 going back to the same PowerPoint.

20 THE COURT: All right. I'm going
21 to allow it. Tell me where this is going.

22 MR. HILDEBRAND: Some of it he
23 was --

24 THE COURT: Is this a new
25 calculation here that I'm looking at, or is this

1 another report?

2 THE WITNESS: No.

3 MR. HILDEBRAND: It was in his
4 prior report, but it's not in evidence.

5 THE COURT: All right. Go ahead.

6 BY MR. HILDEBRAND:

7 Q. All right, sir. And the reason was,
8 because you asked him not to respond until after
9 the --

10 THE COURT: I'm going to allow it.
11 Go ahead.

12 BY MR. HILDEBRAND:

13 Q. Okay. So there are -- some of the items
14 in her report you disagreed with. Can you
15 briefly explain to the Judge why you disagreed
16 with these deducts and why, in your view, they
17 were inappropriate?

18 A. Sure. So the first item, Your Honor, is
19 non-billed amounts. This is a partial
20 disagreement from the total value as stated in
21 the report. The total value as stated in the
22 report, it's schedule A --

23 MR. HILDEBRAND: I think we should
24 back up just for a second, Your Honor.

25 BY MR. HILDEBRAND:

1 Q. So schedule A, where we -- you
2 referenced 1,170,389, all of these deducts are
3 referenced in her report as notes 1 through 11,
4 correct?

5 A. That's right.

6 Q. All right. So if the Judge wants to see
7 what those -- what her specific reasons are, you
8 just turn the page, and there is a discussion of
9 note number 1 deduct and then number 2 deduct,
10 correct?

11 A. Correct.

12 Q. All right. So this first one,
13 non-billed amounts, partial, 68,875. Can you
14 tell the Judge, explain to the Judge how you came
15 up with that figure?

16 A. So this was a value that was billed to
17 Library and paid by Library for a
18 preconstruction, and it's my understanding that
19 that was a billable amount. And obviously it was
20 funded. So I don't have any -- I don't have any
21 understanding as to why that would be deducted
22 from the job cost report.

23 Q. Okay. So you would argue with
24 Ms. Hadley over that one?

25 MR. BUNDY: Objection. He didn't

1 have any understanding. I mean, he doesn't have
2 an answer.

3 THE COURT: I think she testified
4 about that. I'm going to allow it.

5 MR. BUNDY: All right. But he says
6 he doesn't have an answer. So I don't know how
7 he can testify.

8 MR. HILDEBRAND: No, no. He said
9 that he thinks that it's his -- we're entitled to
10 it. I'll move on.

11 BY MR. HILDEBRAND:

12 Q. So the next one, unapproved labor costs
13 \$173,753.

14 A. We missed the line above, the adjustment
15 between GCs and primary.

16 Q. Okay.

17 A. So, Your Honor, this is just a matter of
18 interpretation of how this cost is to be treated
19 and which GMP, whether it falls within general
20 conditions or the cost of the work.

21 It's my understanding that these costs,
22 the \$731,259 in schedule A should be treated as
23 primary costs of the work. It's referenced in a
24 report that they're relying on the RFP, and it
25 was stated in the RFP that these items were to be

1 general conditions.

2 And if we're relying on the contract,
3 that RFP is not listed anywhere within the
4 contract documents as something to reference.
5 But this was for temporary power, trash, water,
6 things that were necessary to the construction of
7 the project and should be viewed as a cost of the
8 work.

9 Q. And you think they are appropriately
10 costs of the work under the contract?

11 A. Yes.

12 Q. Okay. And were they necessary for the
13 construction of the hotel?

14 A. Yes.

15 Q. Okay. All right. How about the next
16 column or next line item, unapproved labor costs
17 of \$173,750?

18 A. So the unapproved labor costs, that just
19 needs support to substantiate who that is for and
20 why it's unapproved.

21 I couldn't really gather anything used
22 from the report as to why those were being
23 deducted. So I'd just like to know the portion
24 just to verify that it's indeed not an eligible
25 cost. So for that reason, I left it in there as

1 a disagreed amount.

2 Q. Okay. And have you been provided that
3 information by Ms. Hadley?

4 A. No. But I haven't had the chance to
5 request it from Ms. Hadley either; so it's an
6 open matter.

7 Q. So that one might still be available?

8 A. Yeah.

9 THE COURT: Did you look to note 3,
10 following it to find out what her position was?
11 Did you look at note 3 that she talks about?

12 THE WITNESS: Yes, I did.

13 BY MR. HILDEBRAND:

14 Q. Can you explain to the Judge why you --

15 A. Sure. So in note 3, the note 3
16 specifically states that labor charges is
17 referring to employees that are identified as
18 working off-site. I don't recall identifying
19 those employees working off-site.

20 I can't find the -- I can't find the
21 support for that. So that's all I'm asking for
22 is just, where was this provided? Who were these
23 individuals? If they were indeed working
24 off-site, I'm happy to agree to it. I just -- I
25 need to check that. That's all.

1 Q. Okay. All right. How about the next
2 one?

3 MR. BUNDY: Your Honor, I hate to
4 interrupt. They're getting ready to --

5 MR. HILDEBRAND: Well, let me --

6 MR. BUNDY: May I finish?

7 MR. HILDEBRAND: Because of the
8 rule, if there's an objection --

9 MR. BUNDY: I object.

10 THE COURT: All right. And the
11 basis is?

12 MR. HILDEBRAND: There wasn't any
13 question.

14 MR. BUNDY: I'm objecting to his
15 answer. He says he hasn't looked into that yet.
16 We submitted an audit report. He read the note.
17 This is their last witness after three and a half
18 years. Okay?

19 And they bring a man in here who says,
20 well, I don't know. I can't say yes or no, but
21 I'm going to look into that. Well, when is he
22 going to look into it, and is this case ever
23 going to end?

24 THE WITNESS: Your Honor, that's
25 incorrect. I have looked into it, and I can't

1 find it.

2 THE COURT: Can't find it. That
3 was the testimony. I understood that. Okay. I
4 got it.

5 MR. HILDEBRAND: Thank you.

6 BY MR. HILDEBRAND:

7 Q. The next item, moving expenses \$246,257.
8 Why did you disagree with Ms. Hadley's deduct on
9 that?

10 A. Moving expenses were necessary to the
11 project. It wasn't allowable costs if owner
12 approval was provided, and it's my understanding
13 that owner approval was provided to the project
14 team.

15 The contract states that owner approval
16 is required, but it does not state that written
17 owner approval is required, and that's the reason
18 it was included in Ms. Hadley's report was
19 because there was no written approval.

20 MR. BUNDY: Move to strike the
21 answer. The contract says, all changes shall be
22 in writing. We read that this morning. This is
23 all hearsay. It's a lack of foundation. He has
24 no proof, whatsoever, of a written approval.

25 In fact, his whole basis is something

1 that was not in writing, and so therefore, it
2 doesn't exist, and it's all hearsay. I move to
3 strike the answer as nonresponsive and irrelevant
4 and immaterial.

5 THE COURT: All right. Noted and
6 overruled. Go ahead. The contract is going to
7 speak for that.

8 MR. HILDEBRAND: All right, sir.
9 BY MR. HILDEBRAND:

10 Q. And then the contingency incurred before
11 start of the construction, 67,761. What was
12 your --

13 A. So in schedule A, this is stated as
14 contingency cost without prior approval. So
15 we've got, again, documentation that states that
16 this was requested. We had 1,035,000, which you
17 see in the contingency, requested for approval.
18 The documentation states that it was discussed in
19 the OAC meeting.

20 MR. BUNDY: Objection, hearsay.
21 It's not in evidence. Best evidence of any
22 documents he has will be documents themselves.
23 They're not in evidence in this case.

24 THE WITNESS: They were provided in
25 the interrogatories.

1 MR. BUNDY: And once again, the
2 witness, like his lawyer, doesn't understand how
3 it works. It has to be produced in this Court.
4 The fact that it was in the deposition is not
5 evidence in this case. I object.

6 THE COURT: All right. Go back. I
7 got lost.

8 MR. HILDEBRAND: I can tell you,
9 Your Honor.

10 THE COURT: All right.

11 MR. HILDEBRAND: I'm sorry. We
12 were talking about the deduct or contingency
13 incurred before the start of construction,
14 67,761.

15 THE WITNESS: Yeah. So schedule A
16 of the report, contingency costs without prior
17 approval. There's a typo in the report here. So
18 all I'm saying is that we did have approval to
19 use the contingency dollars. That's all I'm
20 saying.

21 MR. BUNDY: And I'm objecting to
22 the answer.

23 THE COURT: All right. Overruled.

24 BY MR. HILDEBRAND:

25 Q. All right, sir. So we talked about the

1 audit provided under the contract and which is
2 typical in a project where there aren't claims
3 for delays and such; is that correct?

4 MR. BUNDY: Objection.

5 THE COURT: You're talking about
6 this contract, right?

7 MR. HILDEBRAND: Yes, sir.

8 THE COURT: All right. I will
9 allow that.

10 THE WITNESS: Correct.

11 BY MR. HILDEBRAND:

12 Q. All right. And so let's turn back to
13 schedule A, and there are -- in the middle of the
14 page, there is a space that has nothing in it.
15 And above that is -- it says, eligible, in all
16 bold print. Eligible costs in job cost report,
17 65,745,441, correct?

18 A. Correct.

19 Q. And then down below that is another
20 section, and the bold at the bottom of that
21 section says, subtotal of claim adjustments,
22 23,854,870. What does that relate to?

23 A. That relates to the claim.

24 Q. Okay. All right. In reviewing this
25 report, was it clear to you that Ms. Hadley -- in

1 addition to this schedule A being segregated into
2 the eligible job costs and then claims, was it
3 clear to you, from the attachments to it, that
4 she looked at those two items as separate items?

5 MR. BUNDY: Objection.

6 THE COURT: Overruled. Go ahead.

7 THE WITNESS: Yes. And we
8 discussed this during the site visit. I think
9 this was the cleanest way to look at it. I think
10 you've got to look at it first from a stance of
11 the cost that's incurred on the project, the cost
12 of the work.

13 I think once you cross that bridge and
14 move into claims, right? Because as she stated
15 in her -- in her report, you know, she mentions
16 some of the hurdles that come along with doing
17 so, right, and having claims involved in the
18 audit process.

19 So for that matter, I think it's very
20 clear what the eligible cost of the work is in
21 the job cost report.

22 BY MR. HILDEBRAND:

23 Q. Okay.

24 A. So then we move along to the claims
25 aspect of it, and it is like, okay, well, a lot

1 of this is to be determined as findings come
2 about during that process.

3 Q. During the process that we're here
4 about --

5 A. Correct.

6 Q. -- now that Judge Scarborough is going
7 to have to decide?

8 A. Correct.

9 Q. Okay. Looking at the attachments and
10 schedules that Ms. Hadley did in her report, was
11 it -- did any of that shed any light to you that
12 she looked at the eligible job costs separately
13 from the claims issues?

14 A. Yes. I think it's clear in schedule B,
15 as well as schedule A, of how the two
16 were differentiated, right?

17 And so schedule A, we clearly see what
18 the total ultimate project costs are as well as
19 the claims; and schedule B, right, is strictly
20 held to the cost of the work and what was audited
21 and the incurred costs that Cotton and Company
22 was able to audit, too.

23 So it's clearly defined throughout the
24 report what matters are discussed in the job cost
25 report, what is discussed around the claims, and

1 how there may be some, you know, discrepancies or
2 confusion between the two, right, as you have
3 costs that you've incurred that are also included
4 in the claims.

5 And so it gets a little confusing and
6 messy that way. So breaking it up as she did was
7 a little bit easier to understand.

8 Q. Okay. All right. Let's turn if we can.
9 This is my last area, and I will try to go
10 through it as quickly as I can -- to Plaintiff's
11 Exhibit 329, which is Plaintiff's damage summary.

12 A. Yep.

13 Q. Okay. Do you have that?

14 A. Yes, sir.

15 Q. All right, sir. Okay. What is this
16 document?

17 A. So this is a damages -- it's a damages
18 summary. It's a snapshot in time based on the
19 information that I had in hand to provide the
20 summary of our damages.

21 And this is to try to make it clear
22 where the dollars are going in terms of whether
23 it's Balfour Beatty or whether it is to the
24 subcontractors, and what those amounts are, and
25 what they relate to. That's what this document

1 is.

2 Q. All right, sir. And I think you
3 explained earlier that the final figure in the
4 far bottom right of 13,896,741.79 would be
5 reduced by payments that were made by Library
6 Associates for that total, which was \$757,055.34?

7 A. Correct.

8 Q. Okay. Do you have any gross
9 approximation of what the interest, if you were
10 to deduct the interest, that would be
11 attributable to that?

12 MR. BUNDY: Objection. Gross
13 approximation is improper. That's not a measure
14 of damages under our law.

15 MR. HILDEBRAND: Damages don't have
16 to be approved to a scientific certainty or to an
17 absolute specificity, Your Honor. I think it can
18 be -- if you want to hear it, he can give you an
19 approximation, if he has one. I don't even know
20 if he does.

21 THE WITNESS: No.

22 MR. HILDEBRAND: He doesn't. Okay.
23 All right. Well, I will withdraw that.

24 THE COURT: Takes care of that one.

25 BY MR. HILDEBRAND:

1 Q. All right, sir. Well, let's work
2 through this chart then, and some of the
3 criticisms that Ms. Hadley had of this chart and
4 some of her observations. Can we do that?

5 A. Sure.

6 Q. All right. Let's start with the open
7 payables. So if you look at the upper left-hand
8 corner, in bold, it says, open payables. Do you
9 see that?

10 A. Yes.

11 Q. Can you tell me what this is, please?

12 A. Yes. The open payables are open
13 invoices that have yet to be paid to
14 subcontractors. So those going to the
15 subcontractors, I've got listed down below. The
16 value going to Balfour Beatty Construction, there
17 was some confusion around this. So this value is
18 there because we have --

19 Q. And what is that amount?

20 A. \$191,088.78.

21 Q. Okay.

22 THE WITNESS: So Balfour Beatty,
23 Your Honor, has paid a few subcontractors in
24 advance of owner funding. So it wouldn't be
25 appropriate to show you that those values are

1 going to the subcontractor when we're looking to
2 recover those dollars that we've already paid,
3 right?

4 So I'm showing those payables as
5 something that we've covered in regards to the
6 subs, that we're looking to recover from the
7 owner.

8 THE COURT: Okay.

9 BY MR. HILDEBRAND:

10 Q. Okay. So basically, you advance that
11 money without having received payment?

12 A. That's right. There were just a few
13 subcontractors that we closed out or paid to pay
14 the remainder of their contract balance.

15 MR. BUNDY: Objection, Your Honor.
16 There's no underlying evidence that's been
17 presented in this case to back any of that up,
18 which is the whole problem I had when we were
19 putting this document in the first time.

20 THE COURT: I'm with you.

21 MR. BUNDY: Thank you, Your Honor.

22 BY MR. HILDEBRAND:

23 Q. Where is the underlying documents? Has
24 that been produced?

25 A. In the PowerPoint, there is a listing of

1 the subcontractors that were paid. Those amounts
2 can also be found in the detail job cost ledger
3 and the payment history report that was a
4 document that was provided to Cotton and Company
5 as well. So there's multiple places where those
6 values can be found.

7 Q. And those documents have been produced?

8 A. Yes.

9 Q. All right.

10 A. They've been produced to Cotton and
11 Company.

12 Q. Okay. Where would those values be? You
13 said it's in the PowerPoint. Can you tell us
14 where that is, please?

15 A. Those are on page, contract balance and
16 retainage, where it shows amount to Balfour
17 Beatty. There's Pleasant Places, Gulf Stream,
18 Tom Rochester, David Allen, which is an amount
19 that has yet to be paid to Balfour.

20 Q. Okay. All right. Is there any other
21 explanation that needs -- further explanation you
22 need to make on that column?

23 A. I don't believe so, unless there are any
24 questions.

25 Q. Okay. What is the next item that you

1 deem appropriate for further explanation?

2 MR. BUNDY: Objection. I don't
3 know what the question is?

4 THE COURT: Overruled. Go ahead.

5 THE WITNESS: Retainage.

6 BY MR. HILDEBRAND:

7 Q. All right.

8 A. So retainage, there's a value of
9 \$612,952.17.

10 Q. Where does that represent?

11 A. So that represents open retainage due to
12 Balfour Beatty as well as retainage that Balfour
13 Beatty has paid to subs that we've not been paid
14 by Library for that retainage that we paid to the
15 subs.

16 Q. Okay. Has the underlying data for that
17 figure been produced?

18 A. It would also be in the detail job cost
19 ledger, the subcontractor status reports that
20 have been provided, the payment history report
21 that has been provided.

22 Q. All right, sir. How about -- what would
23 be the next issue for item B that you would need
24 to make a further explanation on?

25 A. The RCOs.

1 Q. Okay. Tell us about that.

2 A. So a couple of things on the RCOs. The
3 Balfour Beatty Construction amount includes a
4 couple of things. It includes markup on the
5 RCOs, and it includes costs that Balfour Beatty
6 has -- has incurred on behalf of the subs related
7 to those RCOs, where we paid vendors, where we've
8 paid suppliers, where we've paid subcontractors
9 and haven't been reimbursed. There is just an
10 explanation of what makes up that value is all
11 I'm doing there.

12 Q. All right. So the \$1,019,127.49, what
13 does that represent?

14 A. That represents markups, and it also
15 represents the dollars that we paid to
16 subcontractors in advance of owner funding.

17 Q. Okay. All right. What is the next item
18 that needs to be -- needs further explanation?

19 A. Probably the miscellaneous claims and
20 interest, the verbiage there. This is only
21 interest. There's no miscellaneous claim values
22 that -- just to avoid any confusion there. This
23 is only interest.

24 Q. Okay. All right. All right. Now, how
25 about -- explain to the Judge what summary

1 judgment is and why you have (inaudible) damages
2 chart as an explanation.

3 A. So I took the information that I
4 received at that point in time, what summary
5 judgments had been reached for those particular
6 subcontractors, and also included any attorney's
7 fees and costs and prejudgment interests that
8 were included there.

9 I did the best as I could here to
10 back -- if anybody reached summary judgment, I
11 backed out open contract balance, OCOs, RCOs,
12 retainage unless the value exceeded the summary
13 judgment value. Or if there was a settlement
14 made with a subcontractor, and that settlement
15 was less than the value that we carried.

16 Until I see a settlement agreement or I
17 know the terms of that, I can't necessarily write
18 off the exposure until I know that nobody else
19 can turn around and pursue those claims. Like
20 for BMCC, for example, right, that came up
21 yesterday with a settlement of, I believe,
22 \$625,000.

23 Q. Right.

24 A. So backing that out of their retainage,
25 it was appropriate. But there's still RCOs out

1 there that we're pursuing, and I don't -- I
2 haven't seen a settlement agreement between
3 Library and Bernard MCC. So I don't know what
4 Balfour Beatty's exposure is to those RCOs and
5 those values that are still outstanding.

6 Q. Okay. All right. Any other
7 explanations that you deem -- or further
8 explanations that you deem appropriate regarding
9 Plaintiff's Exhibit 329?

10 A. There was another item in question,
11 Lithko Contracting delay damages, \$12,459.96.

12 Q. Yes, sir.

13 A. That was simply the variance in the
14 delay claim that we received from Lithko versus
15 the value that we were carrying in the RCOs.
16 Their value that they carried in the claim was
17 \$12,459.96 in excess of what we were carrying in
18 the RCO.

19 So I included it into the exhibit, but I
20 did not receive any detailed support from Lithko
21 around that, what that \$12,459.96 variance was.

22 Q. Okay. Very well. Thank you. Any other
23 explanations?

24 A. I would say the same explanation for Old
25 North State Masonry. It's not a variance, but it

1 was a claim that we received from Old North State
2 Masonry, and so I passed it along into this
3 exhibit.

4 Q. Okay. Anything else?

5 A. That's it.

6 Q. Have you had an opportunity to go back
7 through your records and compile the total number
8 of checks that were written to subcontractors and
9 suppliers in this case?

10 A. I believe I've looked at --

11 MR. BUNDY: Your Honor, I object.
12 This is not in response to anything and now
13 we're --

14 THE COURT: What is the purpose of
15 that?

16 MR. HILDEBRAND: Well, the answer
17 is very high, Your Honor.

18 THE COURT: I'm sure of that.

19 MR. HILDEBRAND: It's simply to
20 show that there were some pick ups, that we
21 acknowledged that, and there's some -- and it
22 would show that there sure were tons of payments
23 that were made.

24 I'm not -- certainly, we strive for
25 perfection. We don't always meet the mark, but

1 each and every subcontractor material has been --
2 is actually paid by a separate check. We don't
3 do things electronically. So I just wanted to
4 introduce the number of checks that were made
5 to -- the subcontractor's checks.

6 MR. BUNDY: I will agree that they
7 may strive for perfection, but I think they have
8 missed the mark quite a bit. He's coming here to
9 admit that he's trying to get about a million and
10 something dollars more than they are entitled to.
11 This whole thing is fraudulent, so -- and I don't
12 believe that's relevant to anything, how many
13 checks they wrote?

14 THE COURT: Yeah. I don't think
15 it's relevant. I'm going to sustain that.

16 MR. HILDEBRAND: All right, sir.
17 Please answer any questions Mr. Bundy might
18 have.

19 RE CROSS-EXAMINATION

20 BY MR. BUNDY:

21 Q. All right. Would you get the contract
22 out, please?

23 A. Yes, sir. 133?

24 Q. Yes, sir. You've read this contract?

25 A. Yes, sir.

1 Q. Sir?

2 A. Yes, sir.

3 Q. You used the term -- you've used a
4 couple of terms. I've read this contract as
5 well. I would like you to tell the Judge where
6 in this contract exposure is a cost of the work.

7 A. Exposure is not a cost of the work.

8 Q. And how many entries in your claim there
9 are based on exposure?

10 A. (No audible response.)

11 Q. Add them up. Take your time.

12 A. Roughly 5 million dollars.

13 Q. And which number -- and which ones are
14 those?

15 A. So that would be the RCOs, the
16 subcontractor delay damages, and the OCOs.

17 Q. What about partial summary judgment?
18 What about the summary judgment?

19 A. Summary judgment -- summary judgment is
20 a cost of the work. That's value that we've got
21 to pay related to project costs.

22 Q. Show me where summary judgments are cost
23 of the work on the contract.

24 A. I don't know where that would be, sir.

25 Q. It's true, is it not, that Balfour

1 Beatty is appealing this -- those summary
2 judgment, correct?

3 A. I don't know if they are or not -- if we
4 are not.

5 Q. If Balfour Beatty contest those summary
6 judgments, they would be an exposure and not
7 anything else, correct?

8 A. My understanding is that you would have
9 to recognize that cost -- we would have to incur
10 that cost at the time that we receive it, right?
11 So if we receive summary judgment, so a value
12 related to a subcontractor that we are due to --
13 we have to pay, then we would have to incur that
14 cost until that matter is handled, until --

15 Q. We established earlier, you're not a
16 lawyer, are you?

17 A. No.

18 Q. Okay. So you don't understand then that
19 you only pay final judgments, you don't pay
20 summary judgments, correct?

21 MR. HILDEBRAND: Objection, Your
22 Honor.

23 Q. Or do you know?

24 MR. HILDEBRAND: Objection, Your
25 Honor.

1 THE COURT: I will allow it. Go
2 ahead.

3 THE WITNESS: Payment is one thing;
4 incurring is another. It obviously includes
5 payment, but not limited to.

6 BY MR. BUNDY:

7 Q. Show me in the cost of the work where
8 cost of the work is defined as anything other
9 than having -- debts having been paid.

10 A. It mentions incurred costs, does it not?

11 Q. Oh, really?

12 A. That's how --

13 Q. Would you read that to us?

14 A. Let's see. The term cost of the work
15 shall mean costs necessarily incurred by the
16 construction manager and the proper performance
17 of the work. It is in Article 6.1.1.

18 Q. Read Article 6.3, subcontract costs.

19 A. Payments made by the construction
20 manager to subcontractors in accordance with the
21 requirements of the subcontracts.

22 Q. I don't see anything in here about
23 incurred, summary judgments or anything. You
24 understand what the word paid means, don't you?

25 A. I do.

1 Q. Okay. So these costs have not been
2 paid?

3 A. They have not been paid, but you asked
4 if they were costs of the work, sir.

5 Q. Okay. I just want to talk about the
6 contract.

7 A. Okay.

8 Q. Now, you are the comptroller, right?

9 A. Controller.

10 Q. Controller?

11 A. Yes, sir.

12 Q. Are you aware of how much money Balfour
13 Beatty has in the bank, what their assets are,
14 cash reserves, ability to borrow?

15 MR. HILDEBRAND: Objection, Your
16 Honor. Objection, Your Honor,
17 that's completely --

18 MR. BUNDY: I think it's
19 entirely -- but I will be glad to explain.

20 THE COURT: Go ahead.

21 MR. BUNDY: I want to establish
22 that they had the money and have always had the
23 money available to pay these subcontractors if
24 they wanted to, and if they always -- and if they
25 owed the money, they acknowledge they owe the

1 money and they have the money, there is no excuse
2 for not paying these subcontractors.

3 And that's why the contract reads like
4 it does, so they can't do what they were trying
5 to do in the conspiratorial agreement, to come in
6 here and ask you for one number and then they go
7 and negotiate another number later. That's the
8 only protection my client has is actual payments.

9 THE WITNESS: Your Honor --

10 MR. BUNDY: I would like to ask the
11 question.

12 MR. HILDEBRAND: Your Honor, I
13 would like to respond that.

14 THE COURT: Yeah, state your basis.

15 MR. HILDEBRAND: Well, basically
16 he's arguing the same thing that you've already
17 ruled on, that if there's -- the financial
18 information might be appropriate at the end of
19 the case.

20 But what we have here, the issue is, why
21 were these subcontractors not paid, and we went
22 through this in our case, is that, if the
23 payments owed -- were owed to them were
24 undisputed, then, yes, they should be paid.

25 What we had here, though, was Mr. Bundy

1 and Library Associates had made large
2 counter-claims for defective work and for delays.
3 And we asked them, through request for
4 admissions, to tell us exactly -- so that we're
5 not doing exactly what we're doing here, where
6 he's saying, we should have paid subcontractors,
7 and y'all never paid them.

8 If they had simply -- so we have this
9 huge exposure. We had it, and we have an
10 exposure for whatever claims you might have, that
11 we appropriately, under our contract with the
12 subcontractors, can pass on to them.

13 Because he -- his client would not say,
14 yeah, we don't have any claims against the sub,
15 we don't -- for defective work, improper work or
16 delays or anything else like that because they
17 would not respond and admit that the request for
18 admissions that we gave to them.

19 We're put in this position where we had
20 to come here to the Court for you to hear the
21 evidence and make that determination. And once
22 that is made, then obviously, whatever
23 obligations we have to the subcontractors, we
24 will acknowledge, and we'll -- they will be paid.

25 But to -- for him to ask what --

1 regardless, Your Honor, he can ask him if we have
2 sufficient assets to pay the subcontractors, and
3 certainly we will acknowledge that.

4 THE COURT: No objection to that.
5 All right.

6 MR. BUNDY: If they will stipulate
7 that they have assets to pay the subcontractors,
8 I will move on.

9 THE COURT: Okay.

10 BY MR. BUNDY:

11 Q. Now, you had admitted under oath today
12 that, as an employee of Balfour Beatty, that they
13 held over 3 quarter of a million dollars that
14 y'all had been paid by the owner to pay the
15 subcontractors and you did not do it; is that
16 correct?

17 A. When did I testify to that?

18 Q. When did you testify to it? You
19 testified that you had received some 700 hundred
20 thousand from the owner, did you not?

21 A. Yes.

22 Q. And that your company had been paid
23 that. They said under oath two times as to each
24 one, if we get it, we're going to pay it to the
25 sub. When the next one came along, they said, we

1 didn't pay it. Do you understand that is a
2 misdemeanor in the State of South Carolina?

3 MR. HILDEBRAND: Objection, Your
4 Honor. He is now -- he is referring to legal
5 issues and statutes that are not in evidence and
6 it's inappropriate to ask this.

7 THE COURT: I'm going to sustain
8 the objection as to the last comment.

9 BY MR. BUNDY:

10 Q. The contract requires that you pay
11 subcontractors when you are paid, does it not?

12 A. It does.

13 Q. And y'all breached that contract, at
14 least to the tune of over 3 quarters of a
15 million, that was to be paid to different
16 subcontractors. True?

17 MR. HILDEBRAND: Mr. Bundy, would
18 you please back up? He is harassing the witness.

19 THE COURT: Give him some space. I
20 will have him move back.

21 BY MR. BUNDY:

22 Q. Is it true?

23 A. It is -- that was not the intention.

24 Q. And there's nothing in this document
25 that referred to a project manager hold, is

1 there?

2 A. No, sir.

3 Q. And you never disclosed to my client --
4 and by you, I mean, Balfour Beatty, that we are
5 taking money from -- that you're taking the money
6 from the subcontractors that you got from the
7 owner to pay them, and you're not going to pay
8 them. That's true? You never told them that?

9 A. Not to my knowledge.

10 Q. And is it also true, a portion of the
11 liens filed by these subcontractors against my
12 client was a result of the nonpayment by Balfour
13 Beatty of money paid to Balfour Beatty to pay
14 those subcontractors. That's true, isn't it?

15 A. Can you please repeat that?

16 Q. Is it true that a portion of the
17 subcontractor liens filed -- whatever portion of
18 their amount, a portion of that amount that was
19 liened on my client's job was because that
20 subcontractor was not paid money, paid to Balfour
21 Beatty, to pay that subcontractor. That's true,
22 isn't it?

23 A. I'm not sure.

24 Q. How about Watson, the \$200,000 in
25 retainage. Wasn't that part of their lien?

1 A. I haven't seen Watson's lien.

2 Q. Okay. If a subcontractor included money
3 that he had paid to Balfour Beatty to pay that
4 subcontractor, would that be the responsibility
5 of Balfour Beatty, the failure to pay the
6 resulting lien?

7 MR. HILDEBRAND: Objection, Your
8 Honor.

9 THE COURT: Overruled. He can
10 answer that.

11 A. I'm not sure.

12 Q. You're not sure. Okay. When did you
13 first become aware that approximately 3 quarters
14 of a million dollars of a claim that you prepared
15 was wrong?

16 A. The first day of Sam Hadley's testimony.

17 Q. And if we hadn't gotten somebody as
18 skilled as Sam Hadley to look through fraudulent
19 claims, you would have picked up an extra three
20 quarters of a million dollars, wouldn't you?

21 MR. HILDEBRAND: Objection, Your
22 Honor.

23 THE COURT: Overruled. He can
24 answer that.

25 THE WITNESS: It's possible, but

1 we -- if that was the case, that's our
2 obligation. That's not -- we would have found
3 that out through the process of closing the subs
4 out, and we would do the right thing.

5 Q. Well, you didn't do the right thing the
6 first time, did you?

7 A. Correct.

8 Q. And you didn't do the right thing to
9 find out 1 million?

10 A. That's correct.

11 Q. And that's in addition to the \$700,000
12 you concede should be in the audit?

13 A. That's correct.

14 Q. And y'all started out with 13, and you
15 go down a couple hundred -- how many times did
16 you change your claim between the time you
17 started the claim until you took the oath
18 and told us what you claimed. How many times did
19 you change it?

20 A. I'm not sure. Every time I got new
21 information.

22 Q. This is exactly how y'all do business?

23 A. No, sir.

24 Q. Well, why did you treat us differently?

25 A. This is the first project that I've been

1 a part of that the owner stopped paying and in
2 the middle of doing work. This is the -- this is
3 the first time I had ever been here in my years
4 of Balfour Beatty. I would say that's why it was
5 treated differently.

6 Q. Show me one certified pay request that
7 was not paid.

8 A. So pay application 43 was certified.
9 There was a response from the architect stating
10 that they disagreed with a portion of the value,
11 but that the rest should be paid.

12 That payment wasn't made. I never heard
13 of a decertification. I never say any formal --
14 all I can say is, based on the additional work
15 you guys had to do, this is the amount that
16 should be payable for pay app 43.

17 Q. It is true, is it not, after that pay
18 request, that liens were filed against the job
19 which (inaudible) because those liens were not
20 bonded off against the job?

21 A. I can't recall.

22 MR. BUNDY: Okay. You can't
23 recall. Thank you.

24 MR. HILDEBRAND: Nothing further,
25 Your Honor.

1 THE COURT: All right. I don't
2 think I have any questions. I think I asked them
3 while we were going forward.

4 THE WITNESS: Okay.

5 THE COURT: Mr. Thompson, you may
6 step down.

7 All right. Anything further for today,
8 Mr. Hildebrand?

9 MR. HILDEBRAND: No, Your Honor.

10 THE COURT: All right. It's 12:30.
11 We're still in reply, and we do have another term
12 of court scheduled for the week of November 29.
13 Today is the 4th. That's 25 days out. So as we
14 go forward, your intention is to bring Mr. Doran
15 in?

16 MR. HILDEBRAND: Yes, sir, very
17 briefly.

18 THE COURT: All right. Any other
19 matters we need to take up before then?

20 MR. BUNDY: No, Your Honor.

21 THE COURT: Very good. See y'all
22 then. Thank you very much.

23 (The hearing was concluded at
24 12:34 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 December 3, 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 TWENTY
 7) Case No.
 8 Plaintiff,) 2019-CP-10-1108

9 -versus-)

10 LIBRARY ASSOCIATES, LLC;)
 11 METROPOLITAN LIFE INSURANCE)
 12 COMPANY, A NEW YORK)
 13 CORPORATION,)

14 Defendants.)

15 LIBRARY ASSOCIATES, INC.,)
 16)
 17 Defendant/Third-Party Plaintiff,)

18 -versus-)

19 LITHKO CONTRACTING, LLC; GUY M.)
 20 BEATY, INC.; BERNHARD MMC, LLC)
 21 GULF STREAM CONSTRUCTION CO.,)
 22 INC; Precision Walls, INC.;)
 23 PALMETTO AUTOMATIC SPRINKLER)
 24 COMPANY, INC.; ET AL,)

25 Third-Party Defendants.)

 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 29, 2021 at 100 Broad Street, Courtroom
 23 2A, Charleston, South Carolina.

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1 THE COURT: All right. We're back
2 in action, week five, Balfour Beatty vs. Library
3 Associates.

4 And I know we were in the plaintiff's
5 reply case, and I know that y'all wanted to bring
6 Mr. Doran in. I knew he had some health issues.
7 Bob was having health issues. The last time
8 y'all saw me, I was getting sick. I'm over that
9 now. Any other matters we need to take up before
10 we start.

11 MR. BUNDY: Yes, Your Honor, a
12 couple things. Kim Bennett Brown has
13 longstanding plans for this coming Friday. She's
14 got reservations, going to Chicago, and I know
15 she's been subpoenaed by I think somebody, Watson
16 maybe, Watson Electric. And she needs protection
17 for Friday if we could arrange that and call her
18 out of turn, whatever they need to do.

19 THE COURT: Okay. All right.
20 Yeah. I was trying to set the schedule. I don't
21 know if y'all had it. I got something from
22 Mr. Terry, had sort of set the schedule. And
23 then I think Watson wanted to go forward Friday.
24 But let's see if we can't work around that. I
25 don't see Mr. Terry. I do see Mr. Windle.

1 MR. WINDLE: Mr. Terry is not here
2 today.

3 THE COURT: Yeah. Do you expect
4 him to show up on Friday based on that calendar?

5 MR. WINDLE: Yes, sir. I think
6 he's going to be here tomorrow, too.

7 THE COURT: All right. Does he
8 need Ms. Brown for his case?

9 MR. WINDLE: I don't know, but
10 I'll --

11 THE COURT: All right. Would you
12 ask him that because she's going to be here until
13 Friday. I'm out all day Wednesday, I think I've
14 let y'all know that. But today, tomorrow. We
15 don't have as many subs going forward at this
16 point in time as I thought. So we might be able
17 to work around that schedule. I just want to
18 make sure that we can do that.

19 MR. BUNDY: Well, that's what I was
20 thinking. I mean, under the old schedule, I
21 mean, we won't have -- we have nothing to do
22 tomorrow --

23 THE COURT: Right.

24 MR. BUNDY: -- if these people
25 can't move ahead and get going.

1 THE COURT: Well, I think we do
2 have one person that definitely wants to move
3 forward tomorrow; is that right?

4 MR. KELLY: Yes, sir. David Allen
5 Company plans to proceed tomorrow.

6 THE COURT: David Allen wants to
7 move forward tomorrow. How long do you
8 anticipate that taking?

9 MR. KELLY: Not very long, Your
10 Honor.

11 THE COURT: Okay. All right.

12 MR. KELLY: It depends on
13 cross-examination, but I would expect our part of
14 it to be less than an hour and a half.

15 THE COURT: Okay. Probably could
16 knock it out in the morning.

17 Mr. Windle, do you expect to take most
18 of the day on Thursday? You've got Old North
19 State and Lithko, correct?

20 MR. WINDLE: Yes, sir.

21 THE COURT: All right. You might
22 want to send -- if you're able to send Mr. Terry
23 a note, he might be -- if he can go forward
24 tomorrow, we could probably knock her out and get
25 his case done tomorrow. And that's just a change

1 because Ms. DiFranco says Cook and Boardman is
2 out of the case, so.

3 MR. WINDLE: Okay.

4 THE COURT: Okay?

5 MR. WINDLE: Yes, sir.

6 THE COURT: All right. If we could
7 get that done tomorrow, that would be great.

8 MR. BUNDY: Your Honor, there's
9 another issue I need to bring to your attention.
10 In anticipation of what occurred five minutes
11 ago, I have prepared this brief. It's very
12 short, and, you know, there's only one issue.
13 And that is, what is the appropriate issue for a
14 reply testimony.

15 THE COURT: All right.

16 MR. BUNDY: The law in this state
17 is manifestly clear. Reply testimony should be
18 limited to rebuttal of matters raised by the
19 defense rather than to complete the plaintiff's
20 case-in-chief.

21 The admission of reply testimony is
22 within your sound discretion. Testimony that is
23 arguably contradictory and in reply to that
24 offered by the defense is admissible. But it has
25 to be contradictory, and it has to be in reply.

1 However, reply testimony should be
2 limited to that which refutes or rebuts testimony
3 presented by the defendant. Finding reply
4 testimony proper noting the reply testimony did
5 not go beyond a refutation of that which the
6 defendant's witness had asserted. I hate to read
7 it out loud to you, but I think this is
8 important.

9 THE COURT: Okay.

10 MR. BUNDY: Affirming admissibility
11 of reply testimony that rebutted the defendant's
12 claim that he did not own a pistol or fire one.

13 Finding admission of rebuttal testimony
14 appropriate when the commission properly limited
15 the rebuttal evidence to a strictly -- reply
16 evidence demonstrates clearly that rebuttal is
17 offered only to the specific issue. Since reply
18 testimony is limited to issues raised by the
19 defense -- this is important -- the element of
20 surprise is eliminated when reply is properly
21 restricted.

22 Now, I was just handed five minutes
23 ago -- which I don't want to hand up because I
24 don't think it's appropriate for you to see
25 this --

1 THE COURT: All right.

2 MR. BUNDY: -- a completion of
3 their case. They are amending their damage
4 claim. This is evidence -- these -- the
5 documents attached to this evidence, six of them,
6 is evidence that was created.

7 This evidence did not exist -- did not
8 exist when we left this courtroom after they said
9 they were through. They have manufactured
10 evidence and are now before you trying to put in
11 manufactured evidence. This is not
12 after-discovered evidence. This is
13 after-manufactured evidence.

14 It's entirely improper, and so I wanted
15 to make clear my position before we started,
16 because apparently, opposing counsel is just
17 going to -- through his own statements, start
18 introducing evidence. So thank you, Your Honor.

19 THE COURT: All right. Very good.
20 Mr. Hildebrand?

21 MR. HILDEBRAND: Yes, sir. Your
22 Honor, what I've prepared -- this is an unusual
23 case. As you well know, we've got a lot of
24 subcontractors. And typically, the Court's
25 encourage parties to settle matters. Matters

1 have been settled.

2 While the trial has been ongoing, we've
3 been -- the Court has encouraged Balfour to pay
4 its subcontractors. And so from the time that we
5 adjourned last time until today, we've settled
6 with a couple of subcontractors.

7 In response to testimony from
8 Ms. Hadley, where she said that it appeared to
9 her that Balfour had been -- had submitted pay
10 applications, which included pay applications for
11 subs, and then some monies had not been passed
12 through to the subs. Balfour, in response to
13 that, went back and looked at a couple of those
14 and said, yeah, we think you're right.

15 So what we have simply done, Your
16 Honor -- I'm not manufacturing anything. But we
17 think that it is appropriate for the Court to
18 have just an accurate picture of where we stand.
19 And these damages have actually been reduced.

20 And all I've done is asked -- I've
21 prepared a simple update to a couple of the
22 exhibits that have already been done to reflect
23 the settlement and a few of the payments that we
24 acknowledged were not passed down that we've now
25 paid. We've actually paid with checks, the subs

1 that have been paid. So I just want to update
2 that, and it certainly is to -- in your
3 discretion, Your Honor.

4 THE COURT: Sure.

5 MR. HILDEBRAND: But I would think
6 that you would want to have an accurate and
7 updated picture before you.

8 THE COURT: All right. Well, we
9 can get to that, but that's not in reply to
10 anything, right? That's just updating where we
11 are with the -- with where the claim of damages
12 lies, is it not?

13 MR. HILDEBRAND: It's primarily an
14 update, Your Honor, but it also is in reply to
15 Ms. Hadley's testimony about some of the
16 payments. So it's in response -- it was prompted
17 as a --

18 MR. BUNDY: It cannot be --

19 THE COURT: Hold on. Let him
20 finish. In response to that, Ms. Hadley has
21 said?

22 MR. HILDEBRAND: Right.

23 THE COURT: Is that what you're
24 telling me?

25 MR. HILDEBRAND: Yes, sir. But

1 it's really an update to the damages.

2 THE COURT: That's what it's being
3 offered for. And how do you intend to produce
4 this?

5 MR. HILDEBRAND: Well, it's simply
6 an update on our damages so that the Court has --
7 so that you have, when you're looking at the
8 final -- making your decision, you will know
9 exactly what has been settled and what has not
10 been settled and what has been paid. That's what
11 it's intended for. You're right, as an update
12 primarily.

13 THE COURT: Okay. All right.

14 MR. BUNDY: I've only been doing
15 this 43 years. I have never heard of an update
16 in trial. There's no such thing as an update.
17 What -- suppose you issue an order. Is he going
18 to send you an update on your order? Is he going
19 to send an update to a case I lost eight years
20 ago in the Court of Appeals?

21 THE COURT: I don't think so. But
22 I hadn't gotten there yet. I hadn't found
23 damages yet.

24 MR. BUNDY: This cannot be in
25 contradiction to Ms. Hadley. She said it hadn't

1 been paid. This is a confession. This is not --
2 this evidence that they put in is going to be
3 very helpful to them in the sentencing phase of
4 the criminal trial which is going to be brought
5 against them because they're going to be
6 mitigating their damages.

7 THE COURT: Okay. All right.

8 MR. BUNDY: She said they didn't
9 pay it. It was not paid, and now they're
10 producing evidence that they didn't pay it by
11 paying it. That doesn't make it reply testimony.

12 THE COURT: All right. I'm with
13 you.

14 MR. BUNDY: In addition to that,
15 don't you remember when he's finished, I said,
16 are we now through? Is he through? Because he
17 changed his numbers five times already. I don't
18 care whether they've gone down to zero. It
19 doesn't matter.

20 THE COURT: All right. I'm with
21 you.

22 MR. HILDEBRAND: Your Honor, in
23 every case I've been in, you have settlements
24 that occur during a case, and you have some
25 developments that occur during the case. And

1 that's all -- with all due respect, what this
2 reflects is a couple of settlements that have
3 been reached and some monies that have been paid
4 to subcontractors.

5 So I think it's -- I think it's entirely
6 appropriate, and it's up to you if you want to
7 hear this evidence, to have an accurate number on
8 what the damages are. It's certainly in your own
9 discretion.

10 THE COURT: All right. Well --

11 MR. HILDEBRAND: Thank you.

12 THE COURT: Okay. So the motion is
13 to limit testimony -- as I understand it limited
14 evidence. We were here to take testimony on
15 reply, was what I understood. But what they've
16 asked to do is to update their damages figure
17 based upon where we are today. Okay?

18 MR. BUNDY: Yeah, Your Honor.

19 THE COURT: Do you plan to present
20 that just as a fact? I mean, most of the people
21 have put their settlements on the record, this is
22 what we did, this is what we did.

23 MR. HILDEBRAND: Yes, sir. And I
24 would like to re-call Casey Thompson just on that
25 limited point to have him --

1 THE COURT: I don't know that I
2 need any testimony on that. Either it is or it
3 is not, right?

4 MR. HILDEBRAND: It is, Your Honor,
5 and I can just hand it to you, or I can --

6 THE COURT: What I'm going to do
7 is, because I think it's going to be beneficial
8 to the trier of fact, I'm going to allow them to
9 present evidence as to what has been paid to-date
10 through the course of this trial. I don't need
11 any evidence on that.

12 If y'all object to the admission of
13 that -- which is what I'm hearing you say -- I'm
14 going to allow you to state your objection on the
15 record. But they -- we've had -- I can't
16 remember how many subs we had in this case, but
17 we're down to about three or four at this point
18 in time. We had a lot more previously. But go
19 ahead.

20 MR. BUNDY: The only thing I would
21 say is, that may be evidence in those cases.

22 THE COURT: Right.

23 MR. BUNDY: That may be evidence in
24 the subcontract he's got with them. It's not
25 evidence in my case.

1 THE COURT: In your case. I'm with
2 you.

3 MR. BUNDY: I mean, you know.

4 THE COURT: I'm with you.

5 MR. BUNDY: A lot of settlements
6 going on across the country. I'm not involved in
7 those either.

8 THE COURT: They addressed it
9 except for one witness as to presentation of the
10 case, and this is in reply. I got you.

11 MR. BUNDY: Thank you, Your Honor.

12 THE COURT: Let's talk about that.
13 Before we get into the numbers, let's talk about
14 where we are. As far as moving forward reply, do
15 you have Mr. Doran here?

16 MR. HILDEBRAND: Yes, sir.

17 THE COURT: All right. Do you plan
18 to put -- is there any other issue I need to take
19 up before he comes forward?

20 MR. HILDEBRAND: I don't think so.

21 THE COURT: All right. Well, I
22 want to see how his turkey was over Thanksgiving.
23 I'm looking forward to that aspect of this case.

24 MR. HILDEBRAND: Your Honor, what
25 we do -- I will have a motion for directed

1 verdict or it's actually a nonsuit, I believe,
2 that I would make when we call -- I guess if they
3 have any additional witnesses after we call our
4 last one.

5 Would you like those motions heard?
6 Then we can be -- but we still have the subs
7 going on, so that would be at the very end of the
8 case. So I'm happy to do it both times, or I can
9 make a full motion right after they call their
10 last witness because I don't think the subs will
11 be impacted by any of those. But I just wanted
12 to kind of get some direction from you on that.

13 THE COURT: My understanding was,
14 y'all have rested. That's my understanding. And
15 we're here on reply. So you're entitled to put
16 forth your reply at this point in time. At the
17 end of all that testimony, if you've got a motion
18 you'd like to made, I'll take it.

19 MR. HILDEBRAND: Okay. All right.
20 Thank you.

21 THE COURT: I'll take it at that
22 point in time.

23 MR. HILDEBRAND: All right. We
24 would call Mark Doran.

25 (MARK DORAN, having already been

1 duly sworn, testified as follows:)

2 THE COURT: All right. Mr. Doran,
3 come on around. Good to see you again, sir.
4 You've already been sworn in, but I will swear
5 you in again since you've been under general
6 anesthesia. Usually I don't do that, but I knew
7 you had some sort of procedure; so I'm glad to
8 see you up and about.

9 THE WITNESS: Thank you, sir.

10 (MARK DORAN, having first been duly
11 sworn, testified as follows:)

12 THE COURT: And just restate your
13 name and address for the record for us.

14 THE WITNESS: Mark Doran. My
15 address is 915 Preservation Circle, Pawleys
16 Island, South Carolina.

17 THE COURT: Thank you. All right.
18 Mr. Doran, good to see you again.

19 All right. Mr. Hildebrand?

20 MR. HILDEBRAND: All right. Thank
21 you, Your Honor.

22 REDIRECT EXAMINATION

23 BY MR. HILDEBRAND:

24 Q. All right. Mr. Doran, thank you for
25 coming here today, and I appreciate you coming.

1 You've been a little bit ill, as I understand it.
2 What was the nature of the -- your illness?

3 MR. BUNDY: Objection.

4 THE COURT: It's not relevant, but
5 I am concerned about you. Are you okay today and
6 you know where you are and you know -- I have to
7 make a determination that you're competent, so.

8 THE WITNESS: I'm okay. Everything
9 is okay. I had pneumonia, aspirated pneumonia.

10 THE COURT: Okay.

11 THE WITNESS: I was in the hospital
12 for a week. They released me. It's been a
13 couple weeks now.

14 THE COURT: COVID related or not?

15 THE WITNESS: No. I had cancer six
16 years ago; so it's a continuation of the
17 treatment I had.

18 THE COURT: I gotcha. All right.
19 Are you feeling well enough to testify today,
20 though?

21 THE WITNESS: Yes, Your Honor.

22 THE COURT: I appreciate your
23 presence.

24 Okay. Mr. Hildebrand?

25 MR. HILDEBRAND: Thank you, Your

1 Honor.

2 BY MR. HILDEBRAND:

3 Q. All right. Have you had an attorney to
4 review the rebuttal report from Mark Boe and also
5 review his testimony offered by Library
6 Associates in response to your testimony?

7 A. Yes, I have.

8 Q. All right. And do you have some
9 opinions here related to what his opinions were
10 and what his testimony was?

11 MR. BUNDY: Objection. He's
12 leading the witness. He's going to pit one
13 witness against the other with that kind of
14 question. This is not a review of the prior
15 witness's testimony. It has to be matters,
16 rebuttal matters raised by the defense.

17 MR. HILDEBRAND: That's exactly
18 what it is, Your Honor. He's got -- just like
19 Mr. Boe specifically commented about Mark Doran's
20 testimony and his report, and your scheduling
21 order allowed for reply reports. All he can do
22 is respond in our case to what their expert says.

23 So I'm just -- I'm not going to -- it's
24 not going to take long. I'm not going to have
25 him rehash all of his testimony. I'm only going

1 to have him respond to very specific points that
2 Mr. Boe had made.

3 THE COURT: All right. Lay some
4 foundation for him as to methodology and
5 analysis, how we got to where he is, and then
6 certainly he can giving his response, his
7 opinion.

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

10 BY MR. HILDEBRAND:

11 Q. What have you done since your prior
12 testimony, Mr. Doran?

13 A. Since my prior testimony, I have
14 reviewed Mr. Boe's transcript. It wasn't
15 finalized yet, but it was a rough transcript.

16 I reviewed his -- it was -- I think it
17 was labeled an exhibit, but it was more an
18 outline to what his testimony was going to be. I
19 reviewed his prior reports a little bit, but
20 mostly stuck to his testimony during the trial.

21 Q. Okay. What is your -- do you have any
22 primary criticisms or comments regarding, as a
23 general matter, the testimony of Mr. Boe to be
24 offered against?

25 A. I do.

1 Q. And what is that?

2 A. Well, I have several. I have 10 or 12.
3 But first of all, his comments are only
4 theoretical comments. They're not based on any
5 type of schedule delay analysis because he didn't
6 perform schedule delay analysis. Right now, the
7 only schedule delay analysis before the Court is
8 mine.

9 And with his comments throughout his
10 testimony and in his report, they're not based on
11 any type of schedule delay analysis. So
12 they're -- they're comments about things that
13 were non-critical, according to my analysis.

14 Q. Okay.

15 A. So if you think about the turkey dinner,
16 they're the green beans and potatoes. It's not
17 the turkey that goes to the rice. He's -- his
18 comments are about manpower and other issues that
19 he said could have delayed the project, but he --
20 he doesn't have any support for that statement.

21 My analysis showed that they -- those
22 issues did not delay the project, did not become
23 critical path delays to the project.

24 Q. Okay. Of what importance is it in -- to
25 do a critical path analysis, rather than just

1 offering commentary on separate issues?

2 A. Well, he has no support for his comments
3 about delays.

4 MR. BUNDY: Objection, Your Honor.
5 He went through this on his direct testimony. He
6 talked in his direct testimony about the fact
7 that this gentleman didn't do -- because he'd
8 already had the report from Doran, okay -- I
9 mean, from Boe.

10 THE COURT: Boe.

11 MR. BUNDY: So he talked about the
12 fact that he didn't do a critical path analysis.
13 He's been through all of this before. His whole
14 position was, in his first testimony was, nobody
15 did a critical path but me.

16 Well, that was their burden of proof to
17 do one. We weren't required to do one. This
18 is -- all he is doing is regurgitating all the
19 same stuff that he said before. That's why they
20 had the reply report.

21 THE COURT: Noted. Overruled, go
22 ahead.

23 MR. HILDEBRAND: All right, sir.

24 BY MR. HILDEBRAND:

25 Q. Do you recall any testimony by Mr. Boe

1 relative to the baseline schedule and the crane
2 removal from this project?

3 A. Yes, I do. Mr. Boe said that the crane
4 removal activity was not in the baseline
5 schedule, and then later on in his testimony,
6 he -- he (inaudible) and sort of assigns delays
7 to Balfour Beatty for not including in the
8 baseline schedule.

9 But he didn't do any analysis of that.
10 I did. I did that analysis. And he has -- he
11 says that. He espoused it off, but he doesn't
12 follow it up with any type of an analysis. And
13 there's nothing in his report for that. I looked
14 at it. It was not in the baseline schedule.

15 But Balfour Beatty -- and, you know, add
16 that activity to the schedule very early in the
17 project before the slab on-grade was even
18 complete, they added that activity in. And it
19 was in for the rest of the entire -- of the
20 entire project.

21 When I did my analysis, I did go back
22 and say, look, if it had been linked in from
23 structure complete to then tie -- tie that to
24 determine how much -- if it was tied in,
25 structure complete and to the ballroom ceilings,

1 there would have been 30 days of float in the
2 baseline schedule from the time that the building
3 was topped off on the ninth floor until the crane
4 would have to be removed and the ceilings in
5 the -- I think in the bottom would have been able
6 to proceed.

7 So even in the baseline schedule, there
8 was 30 days that that float -- I call it float,
9 but that could have been allotted or was
10 allotted -- could have been allotted for that
11 other work on level nine to set -- to prep and
12 set the pool.

13 In fact, there was only eight or 10 days
14 that were in the schedule eventually for that
15 work. And there are 30 days between topping out
16 and framing of the ceilings in the ballroom.

17 Q. Okay. So the crane issue is something
18 that you saw before you received any testimony or
19 reports from Mr. Boe --

20 MR. BUNDY: Objection. He's
21 leading.

22 Q. Is that a fair statement?

23 A. Yes.

24 MR. BUNDY: Objection.

25 THE COURT: That's sustained. You

1 made that point about the crane.

2 MR. HILDEBRAND: Okay. All right.

3 BY MR. HILDEBRAND:

4 Q. So of what relevance, in your opinion,
5 is it that the -- in this case and as to the
6 actual delays that you've testified about, of
7 what relevance is it that the crane was not --
8 the crane removal was not shown in the original
9 baseline schedule?

10 A. Well, I didn't need it to do my
11 analysis; so from that point, it's not relevant.
12 I didn't need that. I worked -- I worked off
13 the -- in the as-built schedule. It's there.
14 It's easy to see.

15 Q. Okay. All right. Do you recall
16 reviewing testimony of Mr. Boe, where he said
17 that the barn doors were never any of -- any of
18 the schedule update to critical paths?

19 MR. BUNDY: Objection, leading.

20 THE COURT: Restate that.

21 MR. HILDEBRAND: All right.

22 BY MR. HILDEBRAND:

23 Q. What testimony do you recall, if any,
24 from Mr. Boe as to whether the barn doors were
25 shown on any of the schedule update to critical

1 paths?

2 MR. BUNDY: Objection. This isn't
3 a test of his memory. That's -- it's completely
4 irrelevant what he remembers. If he's got an
5 opinion, give it.

6 MR. HILDEBRAND: That's what I'm
7 trying to get to, Your Honor. He objects to the
8 leading question, and when I try not to lead, he
9 objects.

10 THE COURT: All right. Go ahead.
11 Tell us about the barn doors.

12 THE WITNESS: Mr. Boe testified
13 that the barn doors were never on any of the
14 critical paths of the schedule updates.

15 And it was. It was in the April of 2017
16 schedule update, and it's been -- in my as-built
17 analysis, it became critical in October of 2017.
18 So it was. It was in there four months before it
19 actually became critical.

20 BY MR. HILDEBRAND:

21 Q. All right. Mr. Boe testified that you
22 did not look at the schedule updates. What is
23 your response to that?

24 A. Well, I said, it's very frustrating to
25 me because my report specifically identifies

1 several updates, 10 or 11 of them. We had -- we
2 spent a lot of time -- my staff and I spent a lot
3 of time going through these monthly updates.

4 We created a schedule log that showed
5 all four to six schedule updates, various
6 information about those various milestones we
7 were monitoring and tracking and the critical
8 path as represented in each and every update.

9 And not only that, we even did some what
10 if scenarios. We had a column for what if
11 something happened. So we looked at every --
12 every one of those, and so did I. We also
13 created a database.

14 MR. BUNDY: Your Honor, now he's
15 off -- that's not the question that was asked of
16 him. He now pontificating. Objection. Move to
17 strike.

18 MR. HILDEBRAND: Mr. Boe was very
19 specific in his criticism, that he already
20 theorized that perhaps Mr. Doran didn't look at
21 schedule updates. So he's explained to the Court
22 that he did, and what the depth of that was. So
23 I think it's important.

24 THE COURT: I will allow it. Go
25 ahead.

1 THE WITNESS: And in addition to
2 looking at them and the schedule log, we created
3 another tool that I used a lot, which as I call a
4 database.

5 But we escorted all of the activities
6 and (inaudible) information from the Primavera
7 software into Excel, so that, at my fingertips, I
8 could type in an activity and see what happened
9 in the activity across all 46 updates, instead of
10 having to physically go open up all 46 updates.
11 So we did a lot of work in reference to those
12 updates. I was frustrated when I saw that
13 comment.

14 BY MR. HILDEBRAND:

15 Q. The database that you did in Excel, how
16 many rows of information did that recall?

17 MR. BUNDY: Objection. How is that
18 relevant? How many rows of information? Now
19 we're back into how many checks they wrote.

20 THE COURT: All right. I'm with
21 you. Go ahead. I'll allow it. Go ahead.

22 MR. HILDEBRAND: Thank you.

23 THE WITNESS: There were over
24 93,000 rows.

25 THE COURT: That's on your Excel

1 spreadsheet, right?

2 THE WITNESS: Yes, sir.

3 THE COURT: All right.

4 BY MR. HILDEBRAND:

5 Q. And that's data that you input from
6 independent sources based upon your review of the
7 project documents; is that fair?

8 A. No. This 93,000 rows of information is
9 information that we copied and pasted right out
10 of Primavera software into Excel.

11 THE COURT: And the Primavera was
12 the contractor's software? Is that where the
13 source of that was?

14 THE WITNESS: Yes, Your Honor. And
15 the part of the software that's so powerful is
16 that its interchangeable with Excel. I can copy
17 and paste out of that into Excel, and you can
18 copy and paste from Excel back into those
19 schedules. If you're a scheduler during the
20 month, you can choose to do that.

21 THE COURT: Okay. All right.

22 BY MR. HILDEBRAND:

23 Q. All right. Mr. Boe testified that you
24 erred in the quantification of structural delays.
25 Do you have any opinions or response to that?

1 A. Well, again, he also came up with an
2 opinion and then quantification of delays. He
3 came up with 53 days of structural delays, and he
4 did no analysis. He has no delay analysis. He
5 testified in his deposition that he was not going
6 to provide any --

7 MR. BUNDY: Your Honor, now we're
8 talking about a witness who's talking about a
9 deposition testimony. There's got to be some
10 limit to this.

11 THE COURT: I'm with you.

12 MR. BUNDY: Clearly that was not
13 testified to in Court if it was in his
14 deposition.

15 THE COURT: All right. I'm with
16 you. I'll limit it to what he wanted to
17 quantify. Structural delays was the question.
18 How would you do that?

19 BY MR. HILDEBRAND:

20 Q. All right. Mr. Doran (sic) testified
21 that you erred in the quantification of
22 structural delays. Tell me what opinions, if
23 any, you had in response to that.

24 A. First, I did not err. Secondly, Mr. Boe
25 did. He either intentionally or mistakenly

1 combined structure in my analysis with the crane
2 and with change order and with crane removal,
3 change order work to with the arched windows.

4 And he called all of that structural,
5 which at the end of my period 2, I had to assign
6 168 or 167 days of delay. And he likens that to
7 be structural, and it's not. It's much more than
8 structural. The structural delay was, when the
9 ninth floor got topped out, the project was 90
10 days behind schedule. That's the bottom line.
11 He came up with 53.

12 Now, as of 90 days behind schedule, 20
13 of those, plus or minus a day or two -- 20 of
14 those were weather related. So structural delays
15 were 70 days, not 53. And at the time that it
16 topped out, Balfour Beatty topped out the project
17 was 90 days behind schedule.

18 Q. Okay. Mr. Boe criticized your testimony
19 with regard to the ballroom ceilings and said
20 that they were not critical because they had 10
21 to 13 weeks of float in the schedule updates in
22 period 3. Do you have any response to that?

23 A. Well, yeah. He's looking at two
24 different types of looking at the project. One
25 is the prospective or prediction of the future

1 way, which is what they do every month.

2 In the schedule update, you try to plan
3 and predict what's going to happen over the --
4 not only the next month but until the project
5 completion. The as-built analysis looks at the
6 project after it's all done, after it's all
7 completed, which is the type of analysis I did.

8 In those schedule updates that Mr. Boe
9 is referring to -- he's right, in those monthly
10 updates, the ballroom ceiling work, framing and
11 hanging, and he references 10 weeks in one and 13
12 in another. And those schedules had 10 or 13
13 weeks of floated in that neighborhood.

14 But what Balfour Beatty didn't know was
15 that they weren't going to frame and hang the
16 ceiling in six weeks. That's just what was in
17 those schedules. It took them nine months
18 because of changes that were initiated.

19 And they had to wait for information and
20 then perform the work. It took nine months
21 that -- if nine months was set into those
22 schedules instead of six weeks, they would have
23 been critical.

24 Q. Okay. Mr. Boe testified that the APAB
25 methodology is not appropriate and not accepted

1 by some people in the industry. Do you have any
2 response to that?

3 A. Well, my response to that, I think you
4 just said it's not accepted by the industry, not
5 some people in the industry. And there are --
6 and it is accepted by the industry. There's
7 recommended practices that he identified that
8 discusses it.

9 The AACEI document recommended practice
10 29R-3. The one that he references that he thinks
11 I did was an MIP 3.1, which is a very high level.
12 We just compare the contractual completion date
13 with the as built completion date.

14 In this case, it would be 516 days, and
15 then pull out a bunch of information and say
16 that, because of all these things that have
17 happened, it's the owner's fault, with really no
18 analysis.

19 Q. Right.

20 A. I did it in MIP P3.2. MIP3.2 is where
21 you do --

22 MR. BUNDY: Your Honor, this is --
23 objection, please, sir.

24 MR. HILDEBRAND: Let him finish his
25 answer, Your Honor.

1 MR. BUNDY: No, but the answer is
2 not to the question. He's now rolling on into
3 what he did. All -- the question was pretty
4 simple. Is this accepted or not, and now we're
5 into he's regurgitating his report all over
6 again. And this is the -- he's buttressing his
7 previous testimony going back through what he
8 originally did.

9 MR. HILDEBRAND: He's not --

10 MR. BUNDY: You can't do this but
11 one time, Judge.

12 THE COURT: I'm with you. But I'm
13 going to allow it. Go ahead.

14 MR. HILDEBRAND: Thank you.

15 THE COURT: State how you got to
16 where you got to.

17 BY MR. HILDEBRAND:

18 Q. Please tell the Court why you disagree
19 with Mr. Boe's testimony that your analysis was
20 inappropriate with regard to the APAB
21 methodology?

22 A. Because first of all, they -- you mean
23 if the recommended practice?

24 Q. Right.

25 A. Because the recommended practice that

1 he's referring to was merely a document that was
2 just to explain the different types of analyses.
3 It wasn't -- it wasn't written to say that one
4 method is better than another or that one should
5 be used in a certain situation and another
6 shouldn't.

7 It was to -- it was a document to pull
8 all the different methodologies that different
9 consultants used under different names and pull
10 them together under a nomenclature system to
11 describe the type of analysis being performed.

12 Within that document, they explain
13 generally how -- how that analysis is performed
14 and then they have caveats with perceived
15 criticisms and strengths and weaknesses. And
16 that's what Mr. Boe was trying to paint out was
17 some of the perceived weaknesses. And he was
18 pointing out 3.1. I performed basically 3.2.

19 So that's one issue. And then it is an
20 appropriate -- it is an appropriate analysis for
21 another reason because the contract
22 specifications on this project say to measure
23 delays based on the dates in the baseline
24 schedule. So you have to use something to
25 compare to the baseline.

1 The only way I know to do that is to use
2 as built compared to as planned. If you use a
3 month to month periodic -- or a month to month
4 update like he was insinuating or alleging,
5 you're not measuring delays based on the dates
6 and based on schedule, you're measuring delays
7 based on the previous months. So therefore, it
8 was very appropriate for me to use that
9 methodology.

10 Q. Have your opinions based upon the as
11 planned, as built analysis that you used, been
12 accepted by other courts in the industry?

13 A. As far as I know, they've been accepted
14 in all of them. I've testified in numerous
15 courts, especially in the government side of it.
16 And every one of those has accepted my analysis,
17 and there's boatloads of case law where they've
18 accepted the as planned, as built analysis from
19 other consultants.

20 Q. All right.

21 MR. HILDEBRAND: That's all I have.
22 Thank you very much. Please answer any questions
23 Mr. Bundy might have.

24

25

1 RECROSS-EXAMINATION

2 BY MR. BUNDY:

3 Q. Still one day of delay for your
4 analysis. That's all my client's -- that's the
5 only delay that Balfour Beatty caused is one day?
6 Is that still your testimony?

7 A. I haven't changed my testimony.

8 Q. You haven't changed your testimony.
9 Okay. You wouldn't do that, would you?

10 A. No.

11 Q. All right. Now, you said earlier that
12 every court you've ever appeared in front of has
13 accepted your analysis; is that correct? That's
14 what you just testified to under oath; is that
15 correct?

16 A. Yes.

17 Q. All right. Are you familiar with WECC,
18 Inc.? Have you ever heard of that company?

19 A. Yes.

20 Q. Okay. And you, I believe, represented
21 them as a scheduling expert in front of the Armed
22 Services Board of Contract Appeals, ASBCA number
23 60949; is that correct?

24 A. That's correct.

25 Q. And I believe they issued a decision

1 just in October of 2021, right? Roughly less
2 than a month ago, right?

3 A. Around that.

4 Q. All right. Page 9, footnote number 9,
5 Mr. Doran's opinion jumped from stating that the
6 additional 31 days for WECC's responsibility, to
7 their being nobody's responsibility, to finally
8 contending they were excusable. His lack of
9 certainty leaves us unconvinced that we should
10 find for WCC upon the latter. Do you remember
11 that footnote?

12 A. I do.

13 Q. So at least that's one court that
14 doesn't agree with your delay analysis, the Armed
15 Services Board of Contract Appeals, less than 30
16 days ago, correct?

17 A. That's not true. There's a lot more in
18 there than that decision, that they did agree
19 with my analysis.

20 Q. I read that correctly, did I not?

21 MR. HILDEBRAND: Your Honor, if
22 he's going to ask him a question, he's got to
23 give him a chance to respond. And I think
24 Mr. Doran was about to explain -- was trying to
25 explain his answer, so please let him.

1 THE COURT: Go ahead. You can
2 explain.

3 THE WITNESS: Throughout most of
4 that report or that decision, the Judge, the
5 Court agreed with my analysis and said that I
6 was -- that I was -- I don't want to put words
7 out there.

8 But they agreed with my analysis. The
9 board made a mistake at one point and didn't
10 award delays for delaying that certain period.
11 Now -- and it had to do with like 40-some days.
12 And in that decision, he says, they found
13 because -- just because the contract works on
14 weekends does not make it a delay.

15 The reason that was wrong in that
16 decision was, the delay analysis was based -- and
17 that contract and that project was based on a
18 seven day work calendar. It's not that they
19 didn't work on those days. It's that they
20 couldn't work on those days. So they got that
21 wrong. But my client didn't go back to ask for
22 another bite of the apple, so to speak. They
23 just accepted it and went on.

24 BY MR. BUNDY:

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

1 The Court got it wrong or you got it wrong?

2 A. The Court got that issue wrong.

3 Q. The Court got it. Okay. So if this
4 Judge disagrees with you, he's wrong, right?

5 A. No. Because in the beginning of that
6 decision that the Court specifically says and
7 acknowledges that the schedule was based on a
8 seven day work week.

9 MR. BUNDY: Judge, I hope you get a
10 good grade. No further questions.

11 THE COURT: Anything at all?

12 MR. HILDEBRAND: No, sir.

13 THE COURT: All right. Mr. Doran,
14 thank you very much for coming. Good to see you,
15 sir.

16 THE WITNESS: Thank you, Your
17 Honor.

18 MR. HILDEBRAND: All right. Your
19 Honor, I would like to -- based upon your prior
20 admonition -- okay.

21 THE COURT: Sure.

22 MR. HILDEBRAND: I have got some
23 documents I would like to hand to the Court as a
24 proffer. I can testify about them as well.

25 THE COURT: Is this on the damages

1 question then?

2 MR. HILDEBRAND: Yes, sir.

3 THE COURT: Okay. Does he have a
4 copy as well?

5 MR. HILDEBRAND: Yes, sir.

6 THE COURT: All right. Very good.

7 MR. BUNDY: Are we going to mark
8 them so we can have some way to look at them?

9 MR. HILDEBRAND: Yes.

10 THE COURT: Yeah, let's do that.

11 MR. BUNDY: Since we have so many
12 damage claims, it would probably be a good idea
13 to number them.

14 THE COURT: I would agree. I've
15 got --

16 MR. HILDEBRAND: 351; is that --

17 MR. BUNDY: For identification,
18 please.

19 THE COURT: Sure. 351 sounds
20 right.

21 (PLF. EXH. 351 was marked for
22 identification.)

23 MR. HILDEBRAND: All right, sir.

24 I'm handing you three exhibits, which we've
25 marked for identification as 351.

1 MR. BUNDY: Wait a minute. Could I
2 see the numbers?

3 MR. HILDEBRAND: 351 is the -- is
4 that what you've got?

5 MR. BUNDY: Well, can we -- this is
6 one, two, three, four, five, six different
7 exhibits with a cover. I'd like a different
8 exhibit number on every one of them so we can
9 identify these for the record --

10 THE COURT: All right.

11 MR. BUNDY: -- because I've got
12 different things to say about different ones of
13 them.

14 THE COURT: All right. Got your
15 cover sheet?

16 MR. HILDEBRAND: Yes, sir. That's
17 a compilation of those -- of the data that
18 underlies it. So it's not only -- a summary is
19 provided for by the rules, but it actually
20 attaches the backup documents to it.

21 THE COURT: Okay. All right. Just
22 one second.

23 MR. BUNDY: But do you see my
24 point?

25 THE COURT: Yeah. Just one second.

1 Let's do this. I think what I see going on here,
2 we could call it -- we could give it letters.

3 MR. BUNDY: That's fine.

4 THE COURT: 351, it looks like A
5 would be Watson Electric; B would be Warco. Does
6 that sound right?

7 MR. BUNDY: That's fine.

8 MR. HILDEBRAND: Yes, sir.

9 MR. BUNDY: Okay. So the first
10 bullet is going to be A. The second bullet is
11 going to be B. The third bullet is C; fourth
12 bullet D; fifth bullet E and sixth bullet F.

13 THE COURT: And F.

14 MR. BUNDY: I hate to be so
15 particular, Judge.

16 THE COURT: I think that looks --
17 these checks are supporting -- it's just
18 supporting documentation?

19 MR. HILDEBRAND: Those are actually
20 checks that were written, yes, sir.

21 THE COURT: Okay. All right.

22 MR. BUNDY: So for the record, if
23 we were going to refer to Exhibit 351F for ID, it
24 would be the Palmetto Sprinkler Company? No, F
25 would be Otis Elevator.

1 THE COURT: Otis Elevator.

2 MR. BUNDY: Now, are these in for
3 ID or are they in evidence?

4 THE COURT: Yeah. These are in for
5 ID for now.

6 MR. HILDEBRAND: All right. And
7 then --

8 (PLF. EXH. 352 was marked for
9 identification.)

10 THE COURT: And 352 is your updated
11 spreadsheet is where we have that?

12 MR. HILDEBRAND: Yes, sir.

13 MR. BUNDY: For ID?

14 THE COURT: Yes, sir.

15 (PLF. EXH. 353 was marked for
16 identification.)

17 MR. BUNDY: And then the blue one
18 is 353?

19 THE COURT: I assume. I didn't get
20 that one.

21 MR. BUNDY: For ID.

22 THE COURT: All right. Got it.
23 Okay.

24 MR. HILDEBRAND: All right. Your
25 Honor, so 351 represents -- Ms. Hadley said that,

1 in her testimony, that she had identified -- it
2 was new testimony because she had not said this
3 previously.

4 But she said that, in reviewing some of
5 the documents, it appeared to her that Balfour
6 had submitted some pay applications, which
7 included amounts that were owed to
8 subcontractors, and Balfour was paid for those
9 and had not passed those payments down to the
10 subs.

11 THE COURT: Okay.

12 MR. HILDEBRAND: And Casey Thompson
13 testified about that at the end of the project.

14 So Balfour has paid -- has sent checks,
15 and that's what the underlying documents are
16 for -- to each one of those subcontractors that
17 did identify it after reviewing the documents, as
18 having -- where it had gotten payment from the
19 owner and had not passed it on. So that's what
20 is shown as back up A through F, and it totals
21 \$552,733.44.

22 MR. BUNDY: My turn?

23 THE COURT: Yes.

24 MR. BUNDY: All right. First off,
25 this is not in reply to anything because having

1 testified they hadn't been paid, they put up
2 Thompson. He testified that they hadn't been
3 paid. And then they come in here and say, well,
4 after -- this isn't to contradict anything. This
5 is a confession that they didn't get paid.

6 But more than that and what's now really
7 important and what's really fascinating is that
8 they take the position it was inadvertent. They
9 just -- you know, just got -- somehow slipped
10 through the cracks. I would now ask Your Honor
11 to revisit our Exhibit 62 for identification,
12 that you did not allow in. You almost did, but
13 you said you were going to think about it.

14 And what this is, is a letter from
15 Hildebrand to Riley dated November 1, 2019
16 roughly two years ago. And it relates to Pasco.
17 My understanding of the facts is Pasco is owed
18 46; Balfour is holding 19. Balfour has a total
19 claim of back charge against Pasco for
20 \$107,261.19; does not include any back charges.
21 I believe it would be (inaudible) of both of
22 our --

23 MR. HILDEBRAND: Wait a second,
24 Your Honor.

25 MR. BUNDY: -- because Pasco's

1 work --

2 MR. HILDEBRAND: Your Honor --

3 (Attorneys talking over each
4 other.)

5 MR. BUNDY: -- agree to disagree in
6 private without airing our dirty laundry in
7 allegations --

8 MR. HILDEBRAND: Your Honor --

9 (Attorneys talking over each
10 other.)

11 THE COURT: All right. Hold on.

12 MR. BUNDY: This is the proof of
13 conspiracy. This gentleman right here, along
14 with his client and the other lawyers have
15 conspired to fraud you, and they're now coming in
16 here and saying these things. \$200,000 of this
17 is in the partial summary judgment you've granted
18 for Watson.

19 THE COURT: Okay. All right.
20 Gotcha. All right.

21 MR. HILDEBRAND: Your Honor, what
22 Mr. Bundy's -- this has already been argued and
23 ruled by you. Mr. Byrd told you that it was one
24 lawyer to another and labeled as a settlement
25 document, as I recall. And there were

1 discussions about that, and then you ruled that
2 it was not admissible.

3 So I think it's inappropriate for
4 Mr. Bundy to come in and now try to say -- and
5 read that document into the record and to you
6 based upon your ruling.

7 What we've simply done is respond to the
8 comments from Ms. Hadley the last time she
9 testified. And again, that was new evidence that
10 had come in. So in response that, Balfour
11 said -- has said, we have now had a chance to
12 look at these, and we -- were issuing payments.
13 That's all there is to it. And that's all
14 these -- this document shows.

15 THE COURT: All right. Let me make
16 sure I've got everybody's position here correctly
17 enunciated.

18 So from the plaintiff's perspective,
19 your purpose in presenting this information is to
20 establish that y'all have gone back, you've
21 reviewed the record, based upon Ms. Hadley's
22 testimony, this is in response to that, and y'all
23 have decided that these people should be paid
24 these amounts of money, correct?

25 MR. HILDEBRAND: Yes, sir.

1 THE COURT: All right. Y'all's
2 position is, this is evidence that this is
3 some -- this has been a conspiracy and it
4 continues to this day; is that right?

5 MR. BUNDY: Right. And the reason
6 I brought it up now is because he opened the
7 door. You've already ruled on the previous basis
8 to let this document into evidence, which was
9 previous to identification. Okay? And you
10 voiced a little bit of concern that I had let
11 some other documents in.

12 Now, where we are is they're taking the
13 position it was a mistake. And I can prove it
14 was not a mistake. I've got a letter from
15 Balfour Beatty's lawyer telling the other lawyer,
16 we're going to keep this private. We're going to
17 agree to disagree.

18 I've got a written document which says,
19 they're going to do all of these things, Judge.
20 It's not hearsay because the rules of evidence
21 clearly say, under Rule 801.2(e). What is not
22 hearsay. Admission by a party opponent. A
23 statement by a co-conspirator of a party during
24 the course and in furtherance of the conspiracy.

25 That's what these documents are. This

1 was a conspiracy. What they did was, they --
2 here's what they did. They told their
3 subcontractors that they were not being paid by
4 the owner to the tune of at least \$750,000. And
5 it was probably more than that. And we know that
6 was a lie because they didn't pay it.

7 Now they've come and paid it. They
8 energized those subcontractors by telling them
9 the owner had not been paid, even though they
10 were holding three-quarters of a million dollars
11 and made them angry.

12 And they all got together and three or
13 four of them signed a conspiracy agreement.
14 (Inaudible) had the good sense to get out, right?
15 He got out. He's offered a 6 and a half million
16 dollar lien for 700,000 and 500,000, and now
17 they're sending checks, which come to us.

18 So what happened was, they then
19 conspired, and they filed 24 million dollars
20 worth of liens against Mike Bennett, under the
21 theory that they could extort to pay something
22 because they knew he couldn't close if there was
23 a lien on his hotel.

24 MR. HILDEBRAND: Your Honor, this
25 is entirely inappropriate.

1 MR. BUNDY: And they continued with
2 that.

3 THE COURT: Okay.

4 MR. BUNDY: We went down in front
5 of Judge Price. He wouldn't do it. And even
6 you, Your Honor, when you saw all of these liens,
7 you even said, you know, we need to get these
8 subcontractors paid because they needed to be
9 paid.

10 They used that as a deceit and an
11 artifice to give credibility to these ridiculous
12 liens. Now, remember, they cut off the Egnyte
13 site in addition to all of that. So in addition
14 to extorting money out of -- they're biggest
15 mistake was -- and they've said it since day one.

16 Mike Bennett didn't have any money, and
17 that's the theory under which they thought they
18 could extort him because they knew if he didn't
19 have the money, he couldn't pay the lien. He
20 couldn't close this hotel, and he was going to
21 lose everything if he didn't pay their
22 extortionate demands.

23 They come in here two years later, and
24 it's only 13. It's down to 11 million dollars,
25 and now they're down to wherever they are. This

1 is ridiculous. This is outrageous. They
2 committed crimes. Those are evidence of six
3 individual misdemeanors, all of them.

4 THE COURT: All right.

5 Mr. Hildebrand?

6 MR. HILDEBRAND: Your Honor, you
7 heard Mr. Thompson testify last week that he was
8 unaware that there -- that those -- at the end of
9 this job, the normal closeout didn't occur, and
10 this would have been found and worked out.

11 This was a highly unusual job for all
12 sorts of reasons. And at the end, litigation was
13 filed, and it went into litigation. There are
14 millions of documents and paid documents and
15 such. It's been very complicated. Ms. Hadley,
16 you heard her testify about the time she spent
17 working on this. Mr. Thompson has testified
18 about the time he spent working on this.

19 And Mr. Thompson said, yes, all of the
20 checks that were written of all of the pay
21 applications, Ms. Hadley just testified that she
22 has found -- and I don't know if it was just last
23 week or a couple weeks ago, or if she'd done it
24 sometime in the past, but she just identified
25 them at trial a couple weeks ago that, look, I

1 found some instances where y'all had been paid
2 and didn't pass on payments to subcontractors.

3 So Balfour simply said, okay, gotcha.
4 Thank you for educating us on that. We had not
5 seen that, and that's what Mr. Thompson said. He
6 said, that's not how we do business, and he said,
7 they should be paid.

8 And that's what we have simply done so
9 that when you're making your analysis, you have
10 the correct number in front of you and don't
11 award monies twice or whatever. It's not
12 evidence of a conspiracy, and I think it's
13 inappropriate.

14 The whole -- it wasn't an objection. It
15 was a speech by Mr. Bundy and his closing
16 argument about what his thoughts are. And he can
17 do that in his closing arguments. But you've
18 ruled on the prior letter, and you clearly heard
19 what Ms. Hadley testified about these specific
20 documents. And they were paid in response to her
21 specific testimony.

22 MR. BUNDY: I will only remind you
23 of one thing.

24 THE COURT: That's how those
25 payments came to be; is that your --

1 MR. HILDEBRAND: Yes, sir,
2 absolutely.

3 MR. BUNDY: That's not true. But I
4 would remind of one thing. When we started this
5 case, the first hearing you ever had in front of
6 you, Balfour Beatty's lawyer said, this is a
7 simple case. That's what he said. It's a simple
8 case. It's just they owe us the money.

9 And now here we are two years later.
10 When they're called a conspiracy, it's a very
11 complicated case with a lot of checks. And we're
12 now going to do normal closeout. This is the
13 most disingenuous argument I've ever heard.
14 Thank you.

15 THE COURT: The document you were
16 looking at, let me take a look at that. And you
17 said that was 62?

18 MR. MCDONALD: Yes, Your Honor.

19 THE COURT: Who was the presenter
20 in that? I assume y'all are, but I'm trying to
21 remember what witness and how they --

22 MR. MCDONALD: Yes. It came in
23 through Pasco's 30(b)(6) representative, Your
24 Honor, in his deposition that you --

25 THE COURT: Gotcha. Yeah. I saw

1 Pasco's. Remind me who the Pasco witness was.

2 MR. HILDEBRAND: Your Honor, Pasco
3 was --

4 THE COURT: They were the sprinkler
5 contractor, right?

6 MR. HILDEBRAND: Right.

7 THE COURT: Who was their witness?
8 What was his name? Do you recall?

9 MR. HILDEBRAND: They didn't --
10 they haven't put on their case yet.

11 THE COURT: That's right. They
12 were the ones that were coming up Friday. That
13 was Bobby Wylie's client, right?

14 MR. HILDEBRAND: Bobby Wylie,
15 right.

16 THE COURT: Okay. Gotcha.

17 MR. HILDEBRAND: That's a very
18 unique sub because there were specific -- very
19 specific back charges for that particular sub.
20 They were supposed to install a certain sprinkler
21 head.

22 THE COURT: They didn't install it?

23 MR. HILDEBRAND: They didn't do it.

24 THE COURT: Right.

25 MR. HILDEBRAND: All of the

1 ceilings had to be redone, and it was a big back
2 charge that was leveled that we had as to them.
3 It was a -- from the most messy subcontractor
4 that there was with back charges and such. And
5 that's one that we've now settled that I hadn't
6 gotten to yet.

7 THE COURT: Okay.

8 MR. HILDEBRAND: So I don't think
9 that they're planning to come, and I'm not going
10 to cross-examine them about what they did and
11 such.

12 THE COURT: All right. And this
13 was -- was this pre or post entry into the
14 agreement?

15 MR. HILDEBRAND: They never entered
16 the agreement.

17 THE COURT: They did not enter the
18 agreement?

19 MR. HILDEBRAND: No, sir.

20 THE COURT: All right. The
21 agreement is the source of your conspiracy
22 argument, is it not?

23 MR. BUNDY: That's -- well, that's
24 just one evidence of the conspiracy. It doesn't
25 have to be in writing to be a conspiracy.

1 Most bank robbers don't sit down and
2 write out a contract. These people -- this was
3 the nugget. This was the beginning. We've got
4 other evidence of conspiracy as well. This
5 started with these lawyers from Charlotte, who
6 conspired with all of this stuff. So that's
7 where this all started.

8 THE COURT: Okay. All right. 321
9 (sic) you want in evidence, do you not?

10 MR. HILDEBRAND: Yes, sir.

11 MR. BUNDY: I object.

12 THE COURT: All right. I'm going
13 to allow it.

14 (PLF. EXH. 351 was received in
15 evidence.)

16 MR. HILDEBRAND: Thank you, Your
17 Honor. The next document is simply -- I would
18 like to put on the record that, as I sent out in
19 an e-mail to Your Honor, that we have now settled
20 with two subcontractors. One is Pasco for a
21 payment of \$88,000. The other is Cook and
22 Boardman for a payment of \$359,709.39. So we've
23 settled with those two subcontractors.

24 THE COURT: Okay.

25 MR. HILDEBRAND: Balfour has.

1 THE COURT: What was the Pasco
2 figure, I'm sorry?

3 MR. HILDEBRAND: \$88,000.

4 THE COURT: 88?

5 MR. HILDEBRAND: Yes, sir. Your
6 Honor the last exhibit was 351, I think. I think
7 you referred on the record to it as 321.

8 THE COURT: 351?

9 MR. HILDEBRAND: 351.

10 THE COURT: I might have said 21,
11 but I wrote down 351.

12 MR. HILDEBRAND: Okay. Gotcha.
13 All right. So exhibit -- so we have the payments
14 that were made to the subcontractors that you've
15 already talked about and admitted, and then we've
16 got the settlement with Pasco, 88; Cook and
17 Boardman, 359,709.39.

18 What Exhibits 352 and 353 show is that
19 they simply add in those documents -- I'm sorry,
20 those figures into the actual damages that have
21 been sustained, and they actually decrease the
22 amount of damages from what Your Honor was
23 provided with earlier.

24 And so what we did -- Mr. Thompson could
25 explain his chart just a little bit easier, a

1 little bit better for you, but what we did was,
2 based on the Pasco settlements and the other
3 payments that were made, the numbers changed in
4 these charts. And the way that they changed --
5 let's see here.

6 THE COURT: Well, I can see the
7 entry for Cook and Boardman. Didn't Pasco have a
8 different name on this sheet?

9 MR. HILDEBRAND: Palmetto Automatic
10 Sprinkler.

11 THE COURT: Okay. Yeah.

12 MR. BUNDY: Your Honor, I hate to
13 interrupt, but Mr. Hildebrand has not been sworn
14 as a witness, and he's now explaining a piece of
15 evidence to you that he wants to put in evidence.
16 The case of McGaha v. Mosley.

17 Since reply testimony is limited to
18 issues raised by the defense, the element of
19 surprise is eliminated when the reply is properly
20 restricted. Now, how could I know -- how could I
21 not be surprised that the general contractor, who
22 had been withholding 320 -- \$750,000 for over two
23 years decided between the time he stopped his
24 case and the time he came to reply.

25 And he was going to write those checks

1 and amend his damage report. Do we now have to
2 start all over again? Why wouldn't I be -- why
3 doesn't Mr. Thompson have to go up on the witness
4 stand and be cross-examined all over again?
5 These people have known, Judge, that in order
6 to --

7 THE COURT: Would you like to do
8 that?

9 MR. BUNDY: No, I don't want to do
10 that. I do not want to do that, no. No, sir. I
11 want to go by the rules.

12 THE COURT: Neither do I. Okay.
13 I'm fully with you. I understand what you are
14 telling me. Okay? Y'all challenged a lot of
15 these numbers on this sheet, so clearly --

16 MR. BUNDY: Oh, sure. They've
17 known about this. The notion, the very -- it's
18 the very notion that a company we hired to keep
19 the books and records of our money, and they've
20 got pay requests, and they've had them for two
21 years.

22 And we had an audit and the contract
23 says -- I've been amazed that these people have
24 never paid these bills because the definition of
25 a reimbursable is costs that have been paid.

1 THE COURT: Right.

2 MR. BUNDY: And they haven't paid
3 them. I thought -- I told my law partner a year
4 ago, I said, sooner or later, these people are
5 going to wake up and realize they're going to
6 have to pay these bills before somebody -- before
7 they're entitled to it. Well, they finally woke
8 up, but it's too late. That horse is out of the
9 pen. They're done.

10 THE COURT: Okay. All right. I'm
11 with you on that. Okay. I understand the
12 argument. So you've reflected that in 352?

13 MR. HILDEBRAND: Yes, sir, in 352.
14 353 simply changed the numbers?

15 THE COURT: That's to
16 recapitulate -- 353 is to recapitulate the --

17 MR. HILDEBRAND: It reconciles
18 those payments.

19 THE COURT: These payments?

20 MR. HILDEBRAND: Yes, sir. So I'd
21 like to introduce 352 and 353 as well.

22 THE COURT: All right. So just for
23 my edification, just so I recall, the figures
24 from 352 had come over onto 353? This is your
25 total damage claim figure --

1 MR. HILDEBRAND: Yes, sir.

2 THE COURT: -- ultimately?

3 MR. HILDEBRAND: Right. Those
4 numbers are the same.

5 THE COURT: And those numbers in
6 the right-hand column are basically reflected on
7 353, are they not?

8 MR. HILDEBRAND: Yes, sir.

9 THE COURT: Okay. Put in a
10 different format, but they come up with the same
11 number at the bottom, right?

12 MR. HILDEBRAND: Right. This 353
13 was part -- was introduced in evidence earlier.
14 It was introduced as Exhibit -- bear with me. It
15 was Mr. Thompson's PowerPoint, and I know that it
16 was page 8 to his PowerPoint. So it's 332, and
17 that summary sheet, which is now 353 was page 8.

18 THE COURT: Page 8?

19 MR. HILDEBRAND: Yes, sir.

20 THE COURT: 332.

21 MR. HILDEBRAND: Yes, sir.

22 THE COURT: All right. Are those
23 your updated damages?

24 MR. HILDEBRAND: Yes, sir. I would
25 like to admit those.

1 THE COURT: I'm going to allow it
2 over objection. I'll allow it into evidence. I
3 understand what your argument is.

4 (PLF. EXH. 352 and 353 were
5 received in evidence.)

6 THE COURT: Now, anything further
7 in reply?

8 MR. HILDEBRAND: No, sir.

9 THE COURT: Got it. Any additional
10 motions to be made at this time?

11 MR. HILDEBRAND: Yes, sir. We have
12 a motion for -- unless they have -- if they have
13 any reply testimony, they would need to introduce
14 do that, and then we would do our motions for
15 directed verdict or nonsuit.

16 THE COURT: You don't have anything
17 in reply to what they presented at this time, do
18 you?

19 MR. BUNDY: I will agree not to
20 reply if he agrees he's done, and if you will
21 agree with me he's done, that you are not going
22 to let him continue to put evidence in next week
23 or the week after or next year, and we're done
24 with this.

25 THE COURT: I think the plaintiff

1 has presented their case in full at this time; is
2 that right, Mr. Hildebrand?

3 MR. HILDEBRAND: Yes, sir.

4 THE COURT: Very good.

5 MR. BUNDY: Thank you. I have
6 nothing further.

7 THE COURT: All right. Happy to
8 hear any motions.

9 MR. HILDEBRAND: All right, sir.

10 MR. BUNDY: Your Honor, I will just
11 renew all my same motions.

12 THE COURT: Very good. Renewed by
13 the defense. Got it. We are at 2:15. Do I need
14 to take a break now, or should I take --

15 MR. HILDEBRAND: It might be a good
16 idea.

17 THE COURT: All right. Let's come
18 back in ten minutes.

19 (A recess transpired.)

20 THE COURT: Okay. Mr. Hildebrand?

21 MR. HILDEBRAND: Thank you, Your
22 Honor. The plaintiff would move for directed
23 verdict, or I think it's more appropriate,
24 nonsuit as to the counter-claims Library
25 Associates -- and I would like to go through the

1 grounds for that.

2 THE COURT: All right, sir.

3 MR. HILDEBRAND: First is their
4 claim for conspiracy. There was a recent case
5 that was decided by the Supreme Court called
6 Paradise DIS case, where it said that in order to
7 have a conspiracy, there has to be either an
8 unlawful act or a lawful act by unlawful means.

9 If you review the counter-claim by
10 Library Associates, Your Honor, you will see that
11 the -- what they claim as the basis for the
12 conspiracy is that Balfour entered into a joint
13 defense agreement with some subcontractors. The
14 joint defense agreements were entered into after
15 the project was finished and after this lawsuit
16 had been filed.

17 Those joint defense agreements, you will
18 recall, Your Honor, their terms are very clear.
19 We introduced them. I was real candid with the
20 Court. I actually introduced those in our case,
21 and they're found in Exhibit 209, each of those
22 joint defense agreements.

23 Basically, it just -- they're
24 pass-through agreements or tolling agreements,
25 which say that the statute of limitations between

1 Balfour and the subcontractors will be told, and
2 that any claims that the subcontractors might
3 have for -- as related to the owner will be
4 passed onto the owner.

5 That's a provision that is found in the
6 subcontracts of each subcontractor. They don't
7 have privity of contract with Balfour, so there's
8 a provision for a pass-through. Your Honor, I
9 would highly encourage you -- I'm sure that you
10 already have, but to read through -- to read the
11 joint defense agreements. They are very vanilla.

12 There's no conspirator -- there's
13 nothing that could be, in my view, twisted to
14 even allege a scintilla of evidence to show that
15 those joint defense agreements amount to an
16 unlawful act or a lawful act by unlawful means.
17 In fact, Your Honor, South Carolina recognizes
18 the common interest doctrine in joint defense
19 agreements.

20 And I would cite the case Maseng,
21 M-A-S-E-N-G, vs. Tuesday Morning. It's a
22 District Court of South Carolina case citing a
23 South Carolina case, Tobacco Bill vs. McAlister.
24 692 Southeastern Second 526, a 2010 case, where
25 the common interest doctrine allows for joint

1 defense agreements, just like we have here.

2 So, Your Honor, I would submit to you
3 that there's no unlawful act or lawful act by
4 unlawful means. More over, there's been no
5 damages suffered by Library Associates. The --
6 again, this claimed act postdated the completion
7 of the project.

8 The damages suffered or claim to have
9 been suffered by Library Associates are delay
10 damages, that it was delayed on the project by so
11 many days, what damages have resulted from the
12 entering into the joint defense agreement. There
13 has been none.

14 All we have agreed to is to tolling the
15 statute of limitations and to pass through any
16 claims onto the owner. There's been no damage
17 emanated from that. So, Your Honor, I -- on
18 those bases, I would submit to you that the
19 conspiracy claim has to be -- has to be
20 dismissed.

21 More over, even as far as the evidence
22 is concerned, the fact of it is, virtually all of
23 the people who were minutes of that were -- have
24 now dropped out of it and has been introduced
25 into evidence. I think there are only two