

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.

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1 parties now that are actually members of it. So
2 I would move for nonsuit on that claim.

3 THE COURT: Does the tobacco bill
4 case state specifically what you allege it does,
5 entering into that type of agreement as approved
6 or would not constitute an unlawful act?

7 MR. HILDEBRAND: No. I haven't
8 read that in a long time, Your Honor. It's cited
9 in my brief.

10 THE COURT: Neither have I.

11 MR. HILDEBRAND: I haven't, and I
12 don't want to represent anything to you.

13 THE COURT: All right. I will go
14 back and look at it.

15 MR. HILDEBRAND: I think that it
16 does refer to the common interest doctrine and
17 says that that is recognized in South Carolina.
18 And where it typically comes up is where you have
19 a joint defense agreement, and then you have a
20 sharing of ideas among counsel and such that
21 might otherwise be discoverable. But the Court
22 has, I think, said that --

23 THE COURT: Without waiving any
24 privileges really.

25 MR. HILDEBRAND: Right, right, Your

1 Honor. The next ground that I would like to move
2 for a directed verdict on a nonsuit is the breach
3 of contract accompanied by fraudulent act.

4 The case law is clear. Neither -- and
5 I'll quote, neither a simple nor an intentional
6 breach of contract can rise to the level to
7 support a claim for breach of contract
8 accompanied by fraudulent act. Here again, the
9 predicate is the entering into of the joint
10 defense agreement.

11 And for all the reasons that I just
12 articulated, I don't see that there's any
13 fraudulent intent or fraudulent act. How can
14 there -- what did we do to defraud? How did we
15 defraud the owner? The owner hasn't paid
16 anything. Kim Brown said in a letter to Balfour
17 on February 14, 2019, that the owner -- that's
18 right when the project was finished.

19 The owner was going to make no further
20 payments to Balfour. The owner was not going to
21 make any further payments to Balfour, and they --
22 it wasn't going to recognize the cap on
23 liquidated damages.

24 So at that point, the owner owed us 5
25 million dollars under the contract, and we also

1 had claims for our delay and claims for our RCOs.
2 But no payments are made as of February. After
3 that point, the joint defense agreement was
4 entered into.

5 I don't see any damages that could be
6 even hypothesized at this point, that the owner
7 has been damaged. The owner hasn't made --
8 hasn't made these payments. You'll decide
9 whether the owner has to make payments and what
10 those payments might be.

11 But there has been no damage that has
12 resulted from any -- if you could stretch somehow
13 that joint defense agreement to say that was a
14 fraudulent act -- and I don't see how you
15 could -- that there has been -- that it was a
16 fraudulent act or that there was damage. And the
17 courts have held -- I will cite Kelly vs.
18 Nationwide, 29 Southeastern 454.

19 There has to be reasonable reliance by
20 the party claiming breach of contract accompanied
21 by fraudulent act. Here, there was no reliance,
22 whatsoever. How could they have relied at all on
23 the joint defense agreement or relied to their
24 damage.

25 The next basis, Your Honor, number 3

1 that I would like to move is based on an
2 indemnity claim. Library asserts that it is
3 entitled to an indemnity, and it's really just
4 claiming a breach of contract that Balfour should
5 have bonded off Balfour's lien and the lien of
6 other subcontractors, and that we're entitled to
7 somehow indemnify or required to indemnify the --
8 Library for that.

9 I think that's simply a breach of
10 contract, and I would refer the Court to the
11 contractual provision that talks about bonding
12 off the lien and liens, and it is required only
13 so long as the owner is not in substantial breach
14 of its obligations, and particularly its
15 obligation to pay.

16 And when those liens started getting
17 filed, the owner was not making payments. The
18 last payment that was made was November 4 of
19 2018. So by that time, no payments were made,
20 and it's pretty clear that the -- that there were
21 valid liens that were filed against the project.

22 I would also note that the contract
23 provides that if the owner of Balfour does not
24 bond off the liens, then the owner has the option
25 to do that. So if the owner had bonded off the

1 liens, then potentially they could come in here
2 and claim some damages as a result of that. But
3 it has -- it decided not to do that, and has
4 suffered no damage.

5 There's been no evidence that the owner
6 was going to bond off Balfour's claim or was
7 going to pay Balfour's claim or anything else.
8 It was real clear as of -- at least by February
9 of 2019, that it was not going to make any
10 payments.

11 I would also argue that the indemnity
12 claim is barred by estoppel and unclean hands.
13 Basically, the owner is saying, we deny that we
14 are obligated to pay you anything, but --
15 anything further, but we want you to bond off
16 your own lien against the property. I just don't
17 think that that's what is required, and I think
18 it doesn't make any sense.

19 The next specific point is number 4,
20 declaratory judgment to bond off a lien. I think
21 that's included within number 3. And I'm
22 basically going through their counter-claim, Your
23 Honor, and addressing them sequentially.

24 The next one -- then the next one after
25 that is the Unfair Trade Practices Act, and

1 again, here we go back to the same argument or
2 the same predicate act for unfair trade practices
3 as alleged in the counter-claim is the joint
4 defense disagreement, that they say the joint
5 defense agreement was an Unfair Trade Practice
6 Act.

7 There's no -- I'm not going to repeat
8 all of my arguments, Your Honor. I don't see how
9 a joint defense agreement on the case law, and
10 particularly, the joint defense agreement by its
11 wording that was entered into in this matter, and
12 which now has been opted out by most of the
13 subcontractors who had entered into it, I don't
14 see how that could be a basis for an unfair trade
15 practices claim.

16 There's no unfair or deceptive act
17 related to that. Also, the case law is that
18 there has to be specific damage related to the
19 unfair -- claimed unfair trade practice. Again,
20 there's been no damage to the owner as a result
21 of the joint defense agreements that were entered
22 into.

23 Lastly, Your Honor, there's been -- I
24 don't think there's even any basis for a UTBA
25 claim, and most of it was a breach of contract

1 claim that the owner has. But certainly there's
2 been no evidence of a willful violation or act by
3 entering into that joint defense agreement. So I
4 think that that allegation should be thrown out.

5 I don't think this is -- all right. The
6 next point that I would like to make is that, as
7 to the counter-claims of Library is that, at most
8 its claims would be capped at the 1.4 million
9 dollars that is set out in the contract, and the
10 fact that there's been no evidence that would
11 allow that to be surpassed.

12 THE COURT: That is the cap on the
13 liquidated damages, correct?

14 MR. HILDEBRAND: Yes, sir, in the
15 contract. Library's claim is also inappropriate
16 because it never made a claim during the project
17 for any liquidated damages or even after the
18 project. No claim was ever made to the architect
19 or to Balfour at all.

20 It's not until this lawsuit was filed
21 that a claim was made. And I would again urge
22 Your Honor to very carefully review -- you said
23 you looked at that, and you're not -- I think
24 your thought was, the owner did not have to make
25 a claim under the contract for liquidated

1 damages. But if you look at the definition of
2 claim, which is found in --

3 THE COURT: Go to Exhibit 53.

4 MR. HILDEBRAND: It would be
5 Exhibit 56.

6 THE COURT: 56.

7 MR. HILDEBRAND: The definition, a
8 claim must be made within 30 days under the
9 contract.

10 THE COURT: Okay.

11 MR. HILDEBRAND: If you look at the
12 A201 in page 22, at the very bottom.

13 THE COURT: Claims and disputes?

14 MR. HILDEBRAND: Yes, sir.

15 THE COURT: Okay.

16 MR. HILDEBRAND: Definition, a
17 claim is a demand or assertion by one of the
18 parties seeking as a matter of right, adjustment,
19 or interpretation of contract claims, payment of
20 money, extension of time, or other relief with
21 respect to the terms of the contract. The term
22 claim also includes other disputes and matters in
23 question between the owner and contractor arising
24 out of or relating to the contract.

25 Your Honor, there's no question that,

1 just as Mr. Bundy says he has been doing this for
2 43 years, I've been doing it for a number of
3 years. In a construction place -- and I don't
4 know if you've had LD, liquidated damages claims
5 in front of you, but it's always a liquidated
6 damages claim, a claim for liquidated damages.

7 It's inarguable that it is a claim.
8 What the owner is seeking is that, from the date
9 that the original scheduled completion date in
10 the contract, which was extended to August of
11 2017, it's saying for every date that that was
12 surpassed, that they're entitled to liquidated
13 damages.

14 Damages, Your Honor, implies a claim.
15 How can you have damages without a claim? I
16 think that, by the terms of the contract, they
17 clearly -- it was a claim. The contract allows
18 for a continuing claim, and all the owner had to
19 do was say, we've got a claim against you for
20 liquidated damages.

21 It's a continuing claim until the
22 project is over or until the substantial
23 completion is raised. They never made a claim.
24 There wasn't a peep of a claim. And this is in
25 the deposition testimony that you read and the

1 testimony that you heard.

2 There was never one mention of any claim
3 for liquidated damages to Balfour Beatty until
4 the architect sent an e-mail to Balfour Beatty in
5 February of 2019, stating that the owner was
6 going to assert or had a claim for liquidated
7 damages up to the amount of debt. So I think
8 that there's -- it's clearly a claim. The
9 architect says it was a claim. I just don't see
10 how you get around that, Your Honor.

11 Also, I think that the owner is, by the
12 doctrines of waiver estoppel, prohibited from
13 making -- trying to make a claim now for
14 liquidated damages. Waiver estoppel are
15 established when, by its actions, one party
16 unreasonably induces another party to act or not
17 to act.

18 Here, the owner never made a peep again
19 to Balfour that it was going to assert these
20 damages. And you heard Mr. Simonton testify that
21 that never happened, and if it had happened, that
22 would have brought that issue to a head.
23 Certainly Balfour, if the owner was going to
24 claim that it was going to assert \$290,000 a
25 month for liquidated damages starting in August

1 of 2017, that issue would have come to a head,
2 and Balfour would have -- something would have
3 happened.

4 We certainly would not have continued
5 providing -- building the hotel up until --
6 finish it out knowing that we're not going to get
7 paid for it. And that's what's happened.

8 THE COURT: That's essentially what
9 the liquidated damages represents, does it not,
10 the profit that they would make on the deal?

11 MR. HILDEBRAND: Yes, sir. That's
12 what the agreement was, their lost profits.

13 THE COURT: Right.

14 MR. HILDEBRAND: Also, the basis
15 for our motion is there's -- any damages by
16 Library should be disallowed because of the
17 doctrine of prior breach, which is in our trial
18 brief and the case law is, the first party to
19 breach cannot later complain of a subsequent
20 breach by the other party.

21 So what were the breaches that have been
22 established by the testimony? One is that Jim
23 Clements, God bless him -- again, I like him.
24 He's a nice fellow, very well credentialed, but
25 he was not vested with the authority that he was

1 required to be by the contract. He was required
2 to be able to speak for the owner, to make the
3 decisions -- the same decisions that the owner
4 would make.

5 And if you recall his testimony in his
6 deposition that you read and the other testimony
7 at trial, he had no authority to make change
8 orders or make any decisions relative to payment
9 or design. All those had to go upstairs to other
10 people.

11 And as a result, the project was
12 delayed. There are also -- another initial
13 breach was that the owner failed to pay Balfour
14 from the sixth floor claim that was made. And
15 you'll recall that the sixth floor claim was made
16 in 2017. The architect issued a ruling stating
17 that \$72,000 was allowed, but that -- that money
18 was never paid.

19 The argument here is that we should have
20 filed -- we can't get payment unless there's a
21 pay application, but when there's a claim that is
22 made, Your Honor, just like here in front of you
23 in this litigation, when there's a claim, you
24 issue a ruling, and then you pay the ruling. You
25 don't have to do a change order. And the

1 language of the contract is that it's only if
2 there is an -- under paragraph 4.1.4 of the
3 contract in the A201.

4 THE COURT: 4?

5 MR. HILDEBRAND: 4.3.1.4.

6 THE COURT: Got it.

7 MR. HILDEBRAND: The contractor --
8 and this is all under the claim section. Claims
9 and disputes. 4.3 is the heading.

10 The contractor acknowledges its
11 obligation to complete the work. Then the last
12 sentence is one I would like to refer you to.
13 However, the owner shall have no right to
14 withhold undisputed amounts and shall pay any
15 undisputed amounts due to the contractor.

16 So the architect ruled, we think that
17 it's -- it was way short, and it was much less
18 than we wanted, but he said, okay, we're -- we
19 find -- we believe that Balfour is entitled to
20 \$72,000. The owner never paid that.

21 The argument -- and then, if you look at
22 4.3.1.5, it says, the resolution of a claim shall
23 be documented in a change order executed by the
24 parties. That claim was not resolved. The
25 architect said, pay 72,000. Balfour said, we

1 disagree with that. We want mediation.

2 THE COURT: That's the one that
3 went to mediation, did it not?

4 MR. HILDEBRAND: I'm sorry?

5 THE COURT: That's the one that did
6 go to mediation, correct?

7 MR. HILDEBRAND: No, it did.

8 THE COURT: That's what I was
9 saying. It did go to mediation?

10 MR. HILDEBRAND: Yes, sir.

11 THE COURT: But it was left
12 unresolved?

13 MR. HILDEBRAND: Right. But the
14 \$72,000, the testimony was, was never in dispute.
15 Balfour didn't accept it. We wanted more.

16 THE COURT: Right.

17 MR. HILDEBRAND: But that amount
18 was undisputed. The architect said, that that's
19 what he awarded. That amount was undisputed and
20 it was never paid by the owner.

21 THE COURT: Okay. That was part of
22 the sixth floor issue, was it not?

23 MR. HILDEBRAND: Yes, sir.

24 THE COURT: All right.

25 MR. HILDEBRAND: Which leads to a

1 waiver and estoppel as to any further claims
2 where the owner says, well, gosh, y'all didn't
3 make your claims right and dot your I's and cross
4 your T's. That was one where we dotted our I's
5 and crossed our T's and made a very specific
6 claim that included portions of the schedule, a
7 lot of documentation.

8 The architect ruled on it, and then we
9 were never paid on it. So I think that -- by
10 that, the owner waived its rights for future, to
11 say, okay, y'all need to dot your I's and cross
12 your T's for claims when we did it once and --
13 early on, and it wasn't paid.

14 The next argument I would like to argue
15 is that -- relates to waiver and estoppel. And
16 here, the basis is that -- and I would like to
17 site you to -- this is a Nebraska case. There's
18 not a South Carolina case on it. But I think
19 that the reason it makes sense, it's US Pipeline
20 vs. Northern Natural Gas Company, 930 Northwest
21 Second, 450.

22 It's a 2019 case from the Supreme Court
23 of Nebraska. And the Court -- and this is the
24 principal of construction law. I don't know if
25 you're familiar with construction law, but the

1 lawyers are -- that if an owner makes changes to
2 a contract after the scheduled completion date
3 but does not provide time extensions with those
4 changes, then it is estopped from alleging
5 liquidated damages.

6 And the rationale is, you're telling the
7 contractor to do additional work. The contract
8 completion date has been passed. So you're
9 affirmatively telling them to do work, but if
10 you're not given him time, you can't claim
11 liquidated damages. And that's what happened
12 here.

13 You will recall from the charts that
14 were introduced by Mr. Doran, the changes that
15 the owner made on this project after August of
16 2017 were eye opening. There were so many
17 changes -- and this is something I will refer to
18 you in my closing argument at the end of the
19 week.

20 There were so many changes that were
21 made by the owner that caused the delays, but
22 that certainly -- the evidence showed, if you
23 recall from Mr. Doran, that there were many
24 changes by the owner, even after the original
25 completion date finished.

1 And the case law is that, when you do
2 that, you made your claim for liquidated damages.
3 Those are slides 24 and 25 of Mark Doran's
4 PowerPoint presentation, if you want to go back
5 and look at what all of those changes were.

6 All right. Another basis for our
7 argument, Your Honor, is that there is -- the
8 owner's claims for liquidated damages must be
9 dismissed because the owner did not refute
10 Balfour's expert, who established what the
11 critical path was and what the delays were on
12 this job.

13 And let me explain that to you. So what
14 we have here was, all of the experts, from Mark
15 Boe to Grady Query to Mark Doran, all testified
16 that the critical path is what you have to look
17 at in a delay claim. Because otherwise, you have
18 the turkey dinner issue, where you have the
19 critical path going along.

20 You might have the potatoes or the corn
21 or something on the side. If it's not on the
22 critical path, it doesn't matter. And that's
23 where a layman like me or somebody else would
24 say, oh, gosh, we see that the stone mason was
25 behind. And Balfour was writing him a letter

1 saying, you're behind and you're affecting the
2 critical path.

3 Well, if he actually was not, then it's
4 simply a concurrent delay. What we had here was,
5 it was only Mr. Doran who did the homework and
6 did the analysis to say, here's the critical
7 path, and these are the delays that are
8 attributable to the owner in this case.

9 What Mr. Boe -- although Mr. Boe offered
10 testimony, and he said that a critical path is
11 necessary because scheduling is a science. A
12 layman will get mixed up. I will get mixed up
13 about what is critical and what is not. I can't
14 look at a schedule and I can't look at a
15 construction because I might think that a -- some
16 concurrent delay is on the critical path when
17 it's not.

18 You have to do a critical path analysis.
19 And Mr. Boe did not do that. Inexplicably, it
20 baffles me why he did not. All he had to do was
21 do his own critical path analysis, and then say,
22 look, I've done the homework.

23 Here's the science. This is what
24 schedulers do. We determined the critical path,
25 and in my view, the owner is not responsible for

1 these damages or is only responsible for some of
2 them. Unless and until he does that, his
3 testimony is just speculation that a
4 theoretical -- well, I see an issue here. I see
5 that the stone mason might have been delayed. I
6 see that Pasco might have done something.

7 But by all the testimony is, that
8 doesn't matter until you can show that it's on
9 the critical path, that's only a theoretical
10 issue that doesn't hold water. And since the
11 only testimony in front of the Court is
12 Mr. Doran's -- where he did say this is the
13 critical path, then I don't think that Library
14 has met its burden of proof to establish that it
15 is entitled to any liquidated damages.

16 Another issue -- I think some of these
17 are affirmative defenses, and -- that we've
18 raised, or all of them are and related to the
19 counter-claim as by Library -- is forfeiture.
20 I'm sure you're -- the Court is familiar with
21 that. The Court abhors a forfeiture. Equity
22 abhors a forfeiture.

23 What the owner would like to argue in
24 this case is that, because Balfour didn't dot --
25 perhaps it didn't dot its I's or cross its T's on

1 some of the claims, that it should not be
2 entitled to any damages for delay, for the year
3 and a half that it -- extra that was out there,
4 for all of the damages it incurred.

5 Basically, we just -- the owner is
6 saying, we just want that -- all of that time and
7 effort and work for free. We just don't want
8 Balfour to have to pay for it.

9 And the case law is that, even in issues
10 where you have a condition precedent, that those
11 can't -- if the case law were black and white, if
12 you have a condition precedent that the -- the
13 other party is just out of court, black and
14 white, then you would have ruled on summary
15 judgment, or we wouldn't be in front of you.

16 It's up to you, as the Master-in-Equity,
17 look at the case, look at the facts and make a
18 decision as to whether we are entitled to the
19 work that we performed. And even if Mr. Bundy
20 says that -- well, you didn't follow the court --
21 the contract exactly, you didn't make a claim for
22 31 days or whatever, the courts have said, we're
23 going to look at principals of equity, and we
24 abhor forfeiture.

25 There have been arguments that,

1 appropriate notice for delays was not made, but I
2 believe that it was. And, again, Your Honor, on
3 these issues, waiver and estoppel and such, the
4 courts have held that actual notice is
5 sufficient. If a party has received actual
6 notice, then exact compliance with contract
7 documents is not necessary.

8 If an owner recognized -- wants a
9 benefit and recognizes that it's got the benefit,
10 it can't then turn back to the contract and say,
11 well, you didn't follow exact the notification
12 provisions, or we're not going to pay you. So I
13 think that the -- there was actual notice, and if
14 you will recall, there was a delay notification
15 log that was issued that had 20 notifications of
16 delay. With each payment application, there was
17 a carve out of claims that were being made by
18 Balfour.

19 And you will recall from the testimony,
20 deposition testimony of Jim Clements -- I asked
21 him this very specifically, I said, in your view,
22 even if Balfour did not dot all the I's and cross
23 all the T's on making the claims, do you
24 recognize that it was making a claim and a
25 continuing claim for delays on this job, and he

1 said yes.

2 They make -- they tried to -- they might
3 not have done so perfectly, but they certainly
4 tried to. Active interference, the case law --
5 construction case law is that, if an owner
6 actively interferes and causes damage, that it
7 has to -- it's liable for the damages it caused
8 here.

9 The owner made a lot of changes and did
10 not, by omission, did a lot of active
11 interference by not making decision and such.
12 And all we're simply asking the Court to do is
13 say, okay, owner, by your changes and your
14 failure to act in the things that you did, we --
15 that constitutes active interference, and you've
16 got to pay the contractor for the work that you
17 performed.

18 The case I would like to cite, Your
19 Honor, regarding waiver of claims for extra work
20 is the -- you cited it in our pretrial brief, I
21 believe. It's Lazer, L-A-Z-E-R, Construction vs.
22 Long, 370 Southeast Second 900 Court of Appeals
23 1988, South Carolina.

24 And the quotation is, where the owner
25 has actual notice of extra work and permits it to

1 proceed without objection. The notice
2 requirements, if any, may be waived. The owner
3 hasn't shown any prejudice from having
4 received -- not having received notice. I think
5 they got actual notice that we were doing the
6 work and had claims for the work that we
7 performed, and just simply didn't pay them.

8 Another issue, Your Honor, is that
9 relating to the notice obligations or notice
10 claim is, the principle of cumulative impact.
11 And I know that the -- that Mr. Query testified
12 that that's commonly known as a death by a
13 thousand cuts. And he said that he didn't think
14 much of it. It's not one that he -- that he
15 recognizes.

16 But I will tell you that the courts do
17 recognize it, and it's where, when there are
18 changes after changes after changes that cause a
19 cascading ripple type of impact, they can be
20 considered a single change that can't be made
21 until the end of the project, and it's called a
22 cumulative impact.

23 And I think that, if you look at all the
24 changes that the owner made, you could very well
25 come to the conclusion that the change after

1 change after change that were testified by Nick
2 Starcevic, Tim Spano, David Simonton, Mr. Doran,
3 they constituted a cumulative impact. And I will
4 refer you on that provision to Santa Fe Engineers
5 vs. United States 818 F Second, 856, 1987. And
6 I've got a brief on that point as well.

7 So, Your Honor, I believe that those are
8 all the grounds that -- let me check with my
9 colleagues. All right. Thank you for your
10 attention, Your Honor. That's it.

11 THE COURT: All right. Thank you.

12 MR. BUNDY: If it pleases the
13 Court.

14 THE COURT: Yes, sir.

15 MR. BUNDY: I would like to talk
16 about something unusual in this case, which is
17 evidence and what's in the record. That's what I
18 would like to talk about. I don't want to talk
19 about what people think happened. If it's not
20 written down in this young lady's book, it didn't
21 happen.

22 THE COURT: I understand that.

23 MR. BUNDY: We can start back -- I
24 will start back with the conspiracy. Recently,
25 as my adversary pointed out, the conspiracy fraud

1 had been amended. All they did was took out the
2 requirement of special damages, otherwise, we
3 would have been up here hearing about special
4 damages.

5 So it's all pretty clear now, and
6 Justice Few, in his concurring opinion -- I think
7 it was concurring opinion. I think it was a
8 concurring opinion. I don't think it's a
9 dissent. I would commend Justice Few's this
10 concurring opinion to you because in it, he has
11 reservations about the Court's decision, Justice
12 Bay's decision on conspiracy.

13 And he has specific concerns, and that
14 specific concern is that it can be used by crafty
15 plaintiffs lawyers, such as myself, to try to
16 broaden it and make somebody responsible for what
17 they're not responsible for. Fortunately for me
18 and my client, that's not a concern in this
19 particular case because this particular case is
20 exactly why our jurisdiction needs a civil
21 conspiracy cause of action.

22 It is exactly why the Court was correct
23 in dispensing with the requirement of special
24 damages. And I would commend the decision to you
25 overall because it is a very erudite disposition

1 of how the conspiracy law in South Carolina, the
2 civil conspiracy law started out with this notion
3 of special damages. It was really a rule of
4 evidence that somehow got misinterpreted. And,
5 of course, you know how that goes. And finally,
6 Justice Beatty fixed it.

7 So where we are in this case is that, in
8 the complaint, and it -- when we alleged
9 conspiracy, we, like most people who have been
10 conspired against, were unaware of the full depth
11 and breadth of the conspiracy that had been
12 occurring. So all we knew was this agreement.
13 Okay? That's all we complete because that's all
14 we knew about.

15 Now, since that time, evidence has been
16 presented in this case, hard evidence, which has
17 in fact been admitted to as recently as today by
18 Balfour Beatty, that they committed no less than
19 six misdemeanors. And those are unlawful acts.
20 They're also acts and are a breach of contract.

21 Our contract says that you will pay
22 money to subcontractors we pay on subcontractors'
23 behalf. What makes that not only a breach of
24 contract but a fraudulent breach of contract --
25 because every single pay request in which that

1 money was asked for was sworn to under oath as
2 being true, and said that the money we're asking
3 for is owed, and we're going to pay it, if you
4 paid us.

5 And it's not like in the UCC, corn going
6 into a bin and you don't know whose corn it was,
7 was in there. We knew exactly whose money it
8 was. We know exactly whose money it was asked
9 for, whose benefit it was asked for, how much it
10 was for, and we knew where it was supposed to go.

11 Now, the next fraudulent act that
12 occurred as it related to those unlawful
13 misdemeanor transactions was the next pay
14 request, wherein the same people testified, not
15 only did we swear to God under oath that we were
16 going to pay the money when we got it, we have
17 now paid it. And they admit they did that. That
18 was an unlawful act.

19 It was also a breach of contract. It
20 was a fraudulent act accompanying the breach of
21 that contract. It was also a conspiracy. They
22 conspired with these subcontractors to inflate
23 the liens and to not disclose change -- back
24 charges, trading back charges that we should have
25 gotten the benefit, that they traded -- they

1 traded our money back and forth.

2 And they did it knowingly, and they did
3 it with the intent -- in a nutshell, this is what
4 our case is. I wrote this down the other night.
5 Balfour Beatty told the subs that Library
6 Associates was not paying their pay requests, to
7 motivate the subs to file excessive liens against
8 the owner in breach of contract, the subcontract,
9 and the law.

10 This was a lie, a fraudulent act
11 accompanying the breach, told for the expressed
12 purpose of angering the subs and causing them to
13 file excessive liens because the liens included
14 money BBC had been paid by Library Associates
15 that was required to be paid by the subs.

16 The lien that Watson filed included the
17 \$200,000 that they were paid the other day. The
18 lien that all of these people filed include all
19 of these fraudulent funds they held, and they
20 made interest on it the whole time. These are --
21 this unlawful purpose here was extortion.

22 It was founded upon BBC's lies not only
23 to the subcontractors, to Library Associates, but
24 to you. They have lied to this Court to
25 perpetrate their lies. Watson came in here and

1 got partial summary judgment.

2 Balfour Beatty did not defend it, did
3 not divulge to you they were holding \$200,000 of
4 their money, allowed them to get attorney's fees
5 under a contract they were not entitled to and
6 did not put in front of you releases of liens,
7 claims, back charges, and all of those things.

8 These -- that summary judgment was a
9 fraud on this Court, and I advised the Court of
10 it before it began, if Your Honor may remember.
11 Having the subs file excessive liens gave facial
12 confidence -- or credence to the excessive lien
13 amounts. There was \$750,000 of money they were
14 holding that was included in the millions and
15 millions of dollars worth of liens.

16 And they've admitted it. Hence, that's
17 why Judge Price refused to address that issue
18 when we in front of him and tried to get some
19 relief for \$24 million worth of liens. That's a
20 lot of money, Judge, on a \$55 million contract.
21 And it's why you, being hoodooed just like Judge
22 Price, encouraged the subcontractors to file
23 summary judgment motions and get down here and
24 get their money.

25 Remember how long it took for any of

1 them to file summary judgment? Why was that? I
2 wonder. Particular with the conspirators. They
3 didn't want to get in front of you on that all
4 that stuff. You've -- you've watched these
5 depositions. You've seen Simonton or whatever
6 the heck his name was and me trying to get some
7 information out of him.

8 This has been going on since day one,
9 that letter -- the piece of evidence I put back
10 in front of you, that was the kernel. But where
11 this started was in Charlotte, when they first
12 got sideways with Old North State Masonry. And
13 that's how you got these same three people
14 represented by the same two lawyers. I'm telling
15 you, that's what this is.

16 The unlawful and disingenuous
17 machinations when combined with shutting down the
18 Egnyte site, which we had no knowledge of, could
19 not have known about, the true purpose of it. We
20 just thought it may be whatever it was.

21 But it wasn't until Simonton got up here
22 and told you he did it on purpose, and he did it
23 for the exclusive purpose so we couldn't get into
24 these documents. That's when we found out about
25 secret change orders. That's when we found out

1 about project manager hold backs. There's no
2 such thing as a project manager hold. We were
3 never told about it.

4 And then Simonton gets paid \$500,000,
5 telling you he worked 40 to 45 hours a week for
6 two years preparing this case. And you saw what
7 they put up. It was embarrassing, embarrassing
8 the stuff that they put up in front of you.
9 There's no backup for any of it.

10 They want 2 and a half million dollars
11 for RCOs. They came in here with a black
12 notebook. This is our 2.3 million dollars, and
13 that's all they said. Did you have a lot of
14 trouble? Yeah, yeah, simple case here. We just
15 want our money.

16 I had to put up Kim Bennett Brown, my
17 partner did. Two and a half hours, went through
18 every single page. There was one legitimate
19 charge in the whole book, and we'd written them a
20 change order for it. That's where that went.

21 When you -- when we provide for you the
22 difference between what this says, what was just
23 told to you by a lawyer, as an officer of this
24 Court, that the changes made were the ones
25 described, that was not true. There are more

1 changes on here, and there are other things that
2 were done and were not disclosed to you, and will
3 provide that to you at the appropriate time in a
4 brief.

5 This is not true. There's no other
6 conclusion you could make, other than this was an
7 intentional premeditated scheme and evidence to
8 extort money from Library Associates with the
9 cooperation of their co-conspirators. They've
10 admitted as much.

11 They came to you the first day. Mike
12 Bennett doesn't have any money. We're going to
13 put a 24 million dollar lien on his hotel and
14 bring him to his knees, and he will pay us.
15 Wrong choice. Wrong choice because two years
16 later, almost to the day, we're right here. And
17 now you know what happened.

18 Damages? Oh, I've got damages. I've
19 got damages. The conspiracy damages are 24
20 million dollars in lost profits, which there's
21 been not a single shred of evidence to combat it
22 or to put any other number in front of you.
23 That's the only number you've got.

24 MR. HILDEBRAND: Your Honor --

25 MR. BUNDY: 24 million dollars.

1 MR. HILDEBRAND: -- he testified
2 about damages that you've ruled are -- what he
3 did was --

4 MR. BUNDY: Wait, I'm talking.

5 THE COURT: Go ahead and let him
6 finish. Let him finish. All right. Go ahead.

7 MR. BUNDY: 24 million dollars we
8 lost in lost profits because of this conspiracy,
9 because this breach of contract accompanied by a
10 fraudulent act. This is clearly an unfair trade
11 practice. How could this not be an unfair trade
12 practice? To file false documents to commit
13 crimes, to hide evidence?

14 The contract that we have with them --
15 and apparently, they still refuse to read the
16 contract. During this thing, of course, I told
17 Brent, I said, I've been doing this for a long
18 time. One thing you can count on, generally, the
19 construction cases, nobody reads the contract but
20 me and them. They just don't like reading it.
21 They just read over stuff they don't like.

22 The contract says, prejudice will be
23 assumed. If you don't give notice, prejudice
24 will be assumed, and you agreed that we're
25 prejudiced. Why are we talking about prejudice?

1 And then we talk about waiver and estoppel,
2 dotting I's and crossing T's. My goodness,
3 really? We're estopped from doing anything.

4 Apparently, if we did one thing wrong
5 eight years ago, everything is good after that.
6 That's the most ridiculous thing I've ever heard.
7 Prior breach. That's not the law. This contract
8 is the law of this case, and it says clearly that
9 they agreed to do everything in the best
10 financial interest and in the most efficient
11 manner in the owner's best interest.

12 Have they done that? Absolutely not, at
13 every turn. At every turn. Simonton cut down
14 the Egnyte site, and then they sent out subpoenas
15 out. Then they were in litigation, which meant
16 that they could hide all the documents because we
17 didn't know what they had. They sent the
18 subpoenas out.

19 Simonton says, two years to comparing
20 what's in the Egnyte site to what has been --
21 they get back from us. So now they know what
22 we've got. What do they disclose? What we
23 already have. So we have no way of knowing
24 what's really going on.

25 And that's how we found out, through

1 other subcontractors because they actually said,
2 well, I know we -- you had found somewhere else.
3 It's not an easier egg hunt, Judge. They're
4 supposed to tell us the truth. You've already
5 told these subcontractors, they can't put 70,000
6 pages of documents in at the last minute. We've
7 been fighting this thing for two years.

8 And finally, and then I'll quit, but I
9 don't think we're at a procedural point to
10 really -- I mean, you've already ruled, as I
11 understand it. I didn't hear anything in reply
12 today to change everything that's happened for
13 the last five weeks.

14 So at any rate, I would respectfully
15 request that we're entitled to a directed verdict
16 on the excessiveness of the mechanic's lien. I
17 don't think there's any way to get around that,
18 that they filed an excessive mechanic's lien.
19 They sworn under oath they were entitled this
20 money.

21 And if they filed an excessive
22 mechanic's lien, that in and of itself is an
23 unfair trade practice. That in and of itself is
24 a breach of contract accompanied by a fraudulent
25 act, and that in and of itself was another act of

1 conspiracy in furtherance of the conspiracy.

2 So they filed excessive liens in an
3 attempt to extort money. They hide documents.
4 They shut down -- the Egnyte site belongs to us.
5 It doesn't belong to them. We're entitled to
6 those documents. They then engage in subsequent
7 agreements with contractors changing the terms of
8 the subcontract.

9 This pass-through agreement changes the
10 terms of the subcontract. They said, we're not
11 telling the owner anything. They owe us a
12 fiduciary duty not to do any of that. What's
13 more, pass-through claims only in a lump sum
14 contract. They don't work on a cost plus job.

15 We hired them to monitor the work and
16 lookout for us, not lookout for them. And we
17 certainly didn't hire them to conspire with
18 subcontractors to try to steal money from us.
19 And this whole thing about liquidated damages is
20 just nonsense. This is nonsense.

21 The new AIA document, the language is
22 exactly the same as it is in the current
23 document. There's only an additional sentence
24 for the num-nuts that don't know how to read.
25 And it says, and liquidated damages is not a

1 claim.

2 They didn't change the language of the
3 word at -- they didn't change the language of it
4 at all. Okay? It's just a clarification for
5 people who don't do this kind of work, who think
6 they can come in here with those ridiculous
7 arguments, which flies in the face of common
8 sense.

9 He says that, if we'd have notified him,
10 they would have done something. Now, what would
11 they have done? Gone slower? Time was always of
12 the essence. This contract is a time is of the
13 essence case. It has always been. (Inaudible).
14 That's my case. We can get lost profits for
15 not -- and there was no data completion. The
16 time was of the essence, and the Court set a
17 reasonable time.

18 What were they going to do if we said,
19 we want liquidated damages even though we didn't
20 know when the job was going to -- were they going
21 to terminate the contract? I don't think so. I
22 think that would have been a breach of contract
23 in and of itself for wrongful termination.

24 They say we didn't pay them. They've
25 got absolute rights to file notices of leaving

1 the job if we don't get paid. Waiver and
2 estoppel. What? I think waiver and estoppel
3 ought to go both ways. Okay? Both ways.

4 And clean -- unclean hands. Mr. Howe
5 used to say to me, it comes with some ill grace.
6 Okay? It comes with some ill grace. For Balfour
7 Beatty Construction, anybody over there, to talk
8 about clean hands. Thank you.

9 THE COURT: All right.
10 Mr. Hildebrand, do you want to be heard on the
11 issue of the mechanic's lien? He brought up the
12 directed verdict on that.

13 MR. HILDEBRAND: Yes, sir. So what
14 happened here was that, Mr. Bundy -- mechanic's
15 liens were filed by Balfour and its
16 subcontractors for amounts that were -- Mr. Bundy
17 argued to Judge Price that the South Carolina,
18 that some of the liens were duplicative, and that
19 was the basis.

20 You can go back and look at the record.
21 The liens were duplicative. And what Judge Price
22 looked at was the law, and the South Carolina
23 legislature says that, subcontractors have liens
24 if they don't get paid, liens against the owner,
25 and Balfour has liens against the owner.

1 And there might be some duplication.

2 There's no question about that. There's no
3 question about -- we've been very candid with the
4 Court to show -- I think extremely detailed to
5 show, of our mechanic's lien, how much is owed to
6 the subcontractors and what work they did and
7 supplied that needs to be passed through to those
8 subcontractors.

9 That's what the -- that's what those
10 motions were about. And I argued with the judge,
11 and Judge Price accepted it. I said, look,
12 that's what the legislature says. Subs have
13 liens; we have liens. If the sub -- if the
14 legislature wants to change that, then they can
15 do that, but there will be some duplication.

16 So at most, what Mr. Bundy has argued is
17 that, okay, of the 59 million dollars that was --
18 was actually paid by Library Associates, that
19 after a lot of time and effort and work, it's
20 been discovered that they were some discrepancies
21 to the tune of \$552,733.44 where we were --
22 Balfour had billed for work performed by subs,
23 and apparently was paid.

24 And we said, yep, we acknowledge that.
25 We see that. That's not how we do business. We

1 acknowledge that they're entitled to that money.
2 So -- and most of it was in oversight. But that
3 is a small percentage. I'm not saying that --
4 again, we like perfection. We don't get it, but
5 that figure in comparison to the total billings
6 is not good, but it is very small by comparison.
7 I have done the math and what the percentage is.

8 So that's my response to the mechanic's
9 lien issue. Certainly we have mechanic liens.
10 The subs have the right to file their owner
11 mechanic liens.

12 Any other particular questions, Your
13 Honor?

14 THE COURT: No. That was my
15 particular one. Okay.

16 MR. HILDEBRAND: All right.

17 THE COURT: All right. Let me tell
18 you what I would like to do now, and I've debated
19 about whether or not to do this now or do this at
20 the end of the week. But let me go ahead and do
21 it now because both of those were directed
22 verdict or nonsuit motions, but similar to
23 closing arguments, and it might save us some time
24 later.

25 I'm going to give y'all some of my

1 thoughts as to what it is that I'm looking to
2 hear from y'all because I'm going to get y'all to
3 submit orders. She needs time to prepare the
4 transcript and get it finalized.

5 I will tell you this right off the bat,
6 I did this after we had finished the last
7 testimony, knowing that today was going to be
8 relatively straightforward and after I reviewed
9 all of those wonderful videos that y'all sent for
10 me to go home and watch. Let me tell you: These
11 are my thoughts, and these are my notes.

12 And one of the things I'm going to ask
13 that you do typically is you get -- this is what
14 I typically do when I don't rule from the bench,
15 what I'm not going to do in this case. But I
16 want y'all to know what I'm thinking and how I'm
17 thinking about this case, and what I really need
18 y'all to address in your proposed orders. Okay?

19 So this is how I'm going to get to my
20 answer. So I've got sort of an outline here.
21 I'm going to read it to y'all. Y'all can get a
22 copy of the transcript or you can write it down
23 as to what hits you. These are my thoughts.
24 Okay? So issue number one for the Court is a
25 breach of contract. Okay?

1 So who breached the contract first and
2 how was it breached, when was it breached? What,
3 if anything, caused or led to the breach and what
4 damages as a consequence of the breach? Because
5 I look at this principally as a breach of
6 contract case. You will hear me say that again.

7 On my findings of fact, A, I've got
8 preconstruction services. What was the purpose
9 of this and the purpose of the additional funds
10 that were paid to extend the period of
11 preconstruction services?

12 Under B, I've got status of the BIM
13 plans. You talked about BIM quite a lot. What
14 constitutes a hundred percent plus for purposes
15 of construction, when was BIM to be provided and
16 by who, how were the subcontractors to use the
17 BIM in their work, who provided the BIM and at
18 what cost?

19 And this is a question that you may or
20 may not wish to address, but it hit me and dawned
21 on me during the course of the proceedings -- and
22 why is the architect not a party? These are
23 choices y'all have to. You can address it or not
24 address it, but it was raised a number of times
25 and not answered to my -- to my way of thinking.

1 Next is a list of significant dates that
2 I would like to see y'all each address. Initial
3 BAR approval is one. Two, notice to proceed;
4 three, ground breaking; four, the concrete pours
5 on levels one through nine. Under that, when was
6 top out and when was the crane removed from the
7 site, the date? I'm looking for dates here.

8 When was significant completion date,
9 when was actual completion date, and I don't
10 expect y'all to necessarily agree on these
11 things. I just want you to address them so I can
12 issue my order.

13 How many days required to extend, how
14 many days were claimed to extend to the
15 completion date? When was the CO issued? When
16 was the turn over to the owner? When was the
17 last day worked? And those are the significant
18 dates.

19 Next is what, per the contract, was the
20 critical path? We talked about that again today.
21 Again, dates and times are going to be
22 significant to me there, especially what delays
23 were noted to the owner and the subcontractors.
24 What efforts were made to control the delays?

25 And what does the -- the next one I

1 have, what does the owner contend was the
2 critical path, its dates and times, et cetera?
3 It's the time they reply to their request for
4 information, the status of the request for change
5 orders and the effects to the critical delays,
6 and then certainly what evidence you have to
7 substantiate the basis for your claims. We've
8 got a lot of exhibits. We've got e-mails,
9 letters, pay apps and all kinds of stuff there.

10 Item number four is determination of the
11 cause of delay and the cause for expenses and how
12 to reconcile that based on the terms of the
13 contract. We spent a lot of time going through
14 that contract, and you should cite specific
15 portions of the contract to support your
16 position.

17 Damages, next section 5, as to the
18 plaintiff, contract costs, support for
19 subcontractor costs; defendant, basis for
20 contract damages, specifics, claims for damages.
21 And then I just generically talked about some of
22 the other causes of action.

23 I find this generally a contract case;
24 however, I'm bothered -- I'm just going to tell
25 you this -- I'm bothered by the plaintiff's

1 pursuant of a separate contract agreement with
2 the subcontractors as a joint defense agreement.
3 I'm also bothered by the shut down of the Egnyte
4 site.

5 And so my question -- I don't know if
6 these were -- I don't know that these were
7 raised, and if they weren't you can't raise them
8 now. Is the intentional interference of the
9 contract as to -- if the subcontractors join in,
10 is there intentional, a negligent infringement
11 with the contract?

12 Defendants say it's a conspiracy. They
13 also alleged the South Carolina Unfair Trade
14 Practices Act. That's what they're alleging
15 here. These tort and statutory damages may well
16 be difficult from the contract damages as to the
17 terms of the contract, which I find was very
18 tightly drawn and agreed to by both parties,
19 which is ultimately going to control the terms of
20 the breach of contract.

21 There were numerous times during the
22 trial when it seemed to me that BBC did not read
23 the terms and conditions of the contract they
24 were working under. This bothers me -- this is
25 part of what bothers me in the case as well.

1 As to the other causes of action, just
2 generally, we've spent time on those this
3 afternoon. What you should know is that waiver
4 equity arguments should follow the law. I
5 generally follow the law, the statutes, and then
6 the equity in my rulings. So they come last.
7 They don't come first. They come last.

8 There's an awful lot to digest here in
9 this case. I need y'all's help in preparing
10 these orders. To the extent y'all can use the
11 same format, that's really going to help me out a
12 lot. That's really what I'm doing is -- so y'all
13 have the same format, and I can start working
14 through.

15 MR. BUNDY: I'd like to make a
16 few -- are you finished? I'm sorry. I didn't
17 mean to interrupt.

18 THE COURT: Nope. I've got a
19 little bit more to go, but I'm on the last page.

20 MR. BUNDY: I'm sorry.

21 THE COURT: I'll grant y'all ample
22 time to submit proposed orders. I'm going to
23 request that you send a proposed order in Word to
24 my law clerk, Ms. Wilkerson here. Her e-mail,
25 y'all know that. Mielawclark@charleston.county.

1 I'm going to say -- I generally give 30
2 days. I'm going to give y'all 45 days after you
3 get the transcript. Okay? Y'all can't do it
4 before you get the transcript. And then my goal
5 is to give you an answer in that same time frame.
6 So 90 days after submission of the transcript --
7 we've been two or three years in the process.
8 Some have been in for a lot longer than that.

9 I will say this. I want to commend the
10 parties for an excellent presentation. Y'all
11 both have done a tremendous job. There's a lot
12 of stuff here. I'm glad I don't have a contract
13 case every five weeks in my life, let me tell
14 you. I've had one case that went on for six
15 weeks, but this one has been a lot to digest over
16 five weeks.

17 And of course, I don't have anybody to
18 award or to punish. I just try to make my
19 decision based on the facts of the law. As you
20 all know, the Appellate Courts get the final
21 decision. So I just have to give them an answer
22 for them to go work with.

23 So that's just my -- I wanted y'all to
24 know what I'm thinking and how I'm thinking so
25 y'all can address my concerns on how to get an

1 answer in a relatively reasonable time period
2 because it's just a lot of stuff here.

3 I've read a number of these arbitration
4 decisions, and it always makes my head spin
5 because it's kind of like pushing here, and it
6 comes out there. And that's why I need y'all to
7 sort of be working in the same format, so y'all
8 know what I'm thinking.

9 I try to give you some idea as we go
10 through the testimony. But this what I've put
11 some thought into so I could deliver that
12 information to y'all to help y'all as you prepare
13 proposed orders to get it done to me. So I'm not
14 going to rule on any of those issues today. I'm
15 going to take a look at some more of the case
16 law.

17 The -- you know, one of the things, as I
18 say, that bothers me is the joint defense
19 agreement. But if that's -- if that's approved
20 as a method, you know, I don't think that becomes
21 an unlawful act. Then it becomes a question of,
22 is it an unlawful means that accomplish unlawful
23 act, that kind of thing.

24 So I got to get through that on the
25 conspiracy claim. That's just one of the things

1 I've got to do. Generally, in a breach of
2 contract case, I don't find it to be an unfair
3 trade practices. I just -- y'all just need to
4 know that. It is what it is. But I'm going to
5 go from there.

6 Basically, I saw this as sort of the
7 conclusion of the principal part of this case.
8 We've got to get through the subs tomorrow or the
9 rest of this week, and that may have some impact
10 on how we end up with our damages in this case
11 anyway. But certainly they're entitled to have
12 their day in Court.

13 I had hoped to get rid of most or all of
14 them before we got to this point, but that has
15 not been successful. And I will keep the door
16 open for the subcontractors who need to come in
17 here today. Any questions that y'all may have
18 for what I have presented y'all with this
19 afternoon.

20 MR. BUNDY: The only request I
21 would make is that, when we talk, either side,
22 about what occurred at trial, that we refer to
23 page and line because there's a lot of things
24 that people think happened in this courtroom that
25 did not happen.

1 And I think it -- it doesn't help any of
2 us to use terms like plethora of evidence. I
3 don't know what that means. So I would rather --
4 if you've got a plethora of evidence, then list
5 the plethora of evidence.

6 If you had an architect come in here to
7 testify that the architect was guilty of
8 malpractice, tell me what page and line that was.
9 I missed that day of Court. But if I did, I'll
10 go ahead and get the transcript, and I will read
11 it. So that's all -- that would be all I would
12 request that you do is to require both parties to
13 give you page and line.

14 THE COURT: Well, it certainly
15 helps when you get to the next level. Not just
16 mine, but the next level.

17 Mr. Hildebrand, any questions or
18 concerns?

19 MR. HILDEBRAND: Only about closing
20 arguments, Your Honor.

21 THE COURT: Sure.

22 MR. HILDEBRAND: So will we do
23 those on Friday?

24 THE COURT: Do you still want to do
25 those?

1 MR. HILDEBRAND: I would like to,
2 Your Honor.

3 THE COURT: Depends on how we're
4 looking on Friday.

5 MR. HILDEBRAND: Sir?

6 THE COURT: It depends on how we're
7 looking on Friday. I gave you -- what did I tell
8 you the first day, five minutes and you took
9 about 45? I might give you two minutes.

10 MR. BUNDY: I'm tired of talking,
11 I'll tell you that now. And I know you're tired
12 of listening to me.

13 THE COURT: All right. My goal for
14 this week is to get through these subs and get
15 the conclusion of all the testimony in the case.
16 Once we've done that, I'm all ears, okay, just so
17 you know.

18 MR. HILDEBRAND: I would like an
19 opportunity, if I could have it.

20 THE COURT: You can start working
21 tonight on your 20 minute closing argument if you
22 would like. All right. Thank you,
23 Mr. Hildebrand.

24 All right, folks. I think we've got
25 this thing -- I know we've got tomorrow.

1 Mr. Kelly, are y'all prepared to move
2 forward in the morning?

3 MR. KELLY: We are, Your Honor. I
4 guess for planning purposes, I would like to
5 have -- this because of the posture of the
6 case -- whether Library Associates or Balfour or
7 whoever will present witnesses in response to our
8 case tomorrow or whether they're going to do all
9 at once in response to all of us at (inaudible).

10 THE COURT: I think y'all get to
11 put y'all's case up and they get to cross-examine
12 you. If they've got a witness here, I will
13 listen to it. But I think that's what they're
14 going to do. That's my understanding.

15 MR. KELLY: And that's certainly
16 fine. I just wanted to be prepared for when the
17 defendants or when, I guess, the --

18 THE COURT: Well, I'm sure you
19 prepared your direct. Now you've just got to be
20 wary of cross.

21 MR. KELLY: Sure. But there's four
22 or five witnesses that may be called in response
23 to the case.

24 THE COURT: I will let you talk
25 with these guys and see what they say. Okay?

1 MR. KELLY: Okay. Thank you.

2 THE COURT: But I'm hoping we get
3 through yours in the morning, and then --

4 Mr. Windle, I don't know if you've said
5 anything to Mr. Terry, but we did -- we did get a
6 response. He wants to start in on Thursday, so I
7 let him know that Ms. Brown, you were going to be
8 out of town.

9 So I'll probably start him Thursday
10 morning, and we'll see what we can do about
11 getting through there. And that may get you into
12 Friday, and then I will have 20 minutes to give
13 to Mr. Hildebrand. All right. Folks. Thanks.
14 Let's start back at 9:30 a.m.

15 (The hearing was concluded at
16 3:53 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 December 8, 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 A P P E A R A N C E S

2
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1 THE COURT: Good morning, folks.

2 Mr. Kelly, I saw you chatting out there. Have
3 y'all got an arrangement that you would like to
4 put on the record.

5 MR. KELLY: We do, Your Honor.

6 THE COURT: All right.

7 MR. KELLY: We'll try to lighten
8 your load a little bit for today at least.

9 THE COURT: I'm all for it.

10 MR. KELLY: Mr. Hildebrand and I
11 chatted this morning, and Balfour Beatty has
12 agreed to pay David Allen Company the sum of its
13 lien.

14 THE COURT: Okay.

15 MR. KELLY: And Mr. Hildebrand may
16 correct me if I'm wrong, but it's \$295,592.96.

17 THE COURT: 295,592?

18 MR. KELLY: And 96.

19 THE COURT: Point 96?

20 MR. KELLY: Yes, sir. And as a
21 consequence of us being able to resolve our
22 claims with Balfour Beatty, David Allen Company
23 is not going to pursue the mechanic's lien claim
24 under Rule 41 and we would move to dismiss that
25 claim.

1 THE COURT: All right.

2 MR. KELLY: And the other claim, I
3 think, for unjust enrichment that's pending.
4 It's our goal, obviously, in moving to dismiss
5 this claim is to end our involvement in the
6 lawsuit, and we're seeking an order from the
7 Court permitting us to terminate those claims.

8 THE COURT: All right.

9 MR. KELLY: We will also file a
10 cancellation of the lis pendens and we'll dismiss
11 the mechanic's lien claim.

12 THE COURT: Very good. All right.
13 Mr. Hildebrand, is that your understanding as
14 well, sir.

15 MR. HILDEBRAND: Yes, sir.

16 THE COURT: All right. Payment of
17 the 295,592.96, cancel the lis pendens and the
18 property and the terms of their payment. So
19 settlement pursuant to Rule 43(k) of South
20 Carolina Rules of Civil Procedure.

21 Mr. Bundy, anything you wish to add to
22 that, sir?

23 MR. BUNDY: Pardon me, Your Honor?

24 THE COURT: So the settlement terms
25 will take care of the lien and --

1 MR. BUNDY: Well, it's their
2 settlement. If they want to quit, they can quit.
3 That's all I've got to say.

4 THE COURT: Got it.

5 MR. BUNDY: I can't make them
6 continue to fight.

7 THE COURT: Well, I'm glad of that,
8 too.

9 MR. KELLY: Yes, sir. Just
10 procedurally, Your Honor, I guess we will file a
11 notice of dismissal or stipulation of dismissal.
12 Is that how you prefer us to handle it?

13 THE COURT: Stipulation is fine.

14 MR. KELLY: Okay.

15 THE COURT: Just make sure to put
16 that stuff, that cancellation of lis pendens on
17 the record. If you need me to sign off on it,
18 I'm happy to do it. Okay?

19 Well, that was really all we had
20 scheduled for today. So I'm glad y'all could
21 come to that agreement. That sounds like a
22 pretty good agreement on behalf of your client.
23 I'm sure client should be pleased with that,
24 coming a little bit later. I'm sure they would
25 have liked that two or three years ago. I

1 understand that, but that's kind of where we are.

2 All right. As I said, that's all I
3 really had scheduled for today. I believe we've
4 got Old North State, Lithko, and Watson Electric
5 coming -- moving forward on their claims, some of
6 which the defense is on Thursday.

7 I do have outstanding -- Mr. Hildebrand,
8 I wanted to mention to you, I've got outstanding,
9 these motions for summary judgment and motions to
10 reconsider. I plan to take those up this week
11 during the time period; so somewhere between
12 today and Thursday I will probably be addressing
13 those.

14 I don't know that I need to have a
15 hearing on it. I will review them and get you an
16 answer. I plan to do that this week as well so
17 we can sort of figure out where we are.

18 MR. HILDEBRAND: Okay. Thank you,
19 Your Honor.

20 THE COURT: Okay. All right. As
21 far I know, you can leave your stuff here. We
22 can lock it up.

23 MR. BUNDY: I just wanted to remind
24 Your Honor about Ms. Brown. She's not going to
25 be here Friday.

1 THE COURT: Right. So that's why
2 we were going to take up that Watson Electric
3 request. I think the subpoena came through
4 Watson Electric, did it not?

5 MR. BUNDY: I believe so.

6 THE COURT: I'm going to have them
7 start, and I think that was the message that we
8 sent to Mr. Terry. Let's plan to start with
9 Watson Electric on Thursday morning. Let's just
10 plan to start back at 9:30.

11 MR. BUNDY: Thank you, sir.

12 THE COURT: Very good.

13 (The hearing was concluded at
14 9:58 A.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 December 8, 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 TWENTY TWO
) 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 December 2, 2021 at 100 Broad Street, Courtroom
 23 2A, Charleston, South Carolina.

24

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1 THE COURT: All right. Gentlemen,
2 are y'all prepared to move forward on the
3 subcontractor claims? Mr. Terry, Mr. Windle.

4 MR. TERRY: Yes, sir.

5 MR. WINDLE: Yes, Your Honor. And
6 we do have an announcement.

7 THE COURT: Yes, sir. All right.
8 Mr. Hildebrand is back in the room. I'm sorry,
9 Mr. Hildebrand. I almost started without you.

10 MR. HILDEBRAND: Thank you, Your
11 Honor. Balfour has resolved the claims for the
12 contract balance with regard to both Old North
13 State and Lithko. Balfour will pay Old North
14 State \$256,054.09 in exchange for a release of
15 its claims, and Lithko will pay -- we will pay
16 \$375,064.15.

17 In exchange -- in exchange for those
18 amounts, those parties have agreed to drop their
19 resolve and release their claims in this matter
20 and will also cancel their liens in consideration
21 of that payment or as a result of that payment.
22 So I think that's it.

23 THE COURT: What was the Lithko
24 amount again? I'm sorry.

25 MR. HILDEBRAND: \$375,064.15.

1 THE COURT: 15?

2 MR. HILDEBRAND: Yes, sir.

3 THE COURT: All right. Mr. Windle?

4 MR. WINDLE: At this time, Old
5 North State and Lithko are -- remain in the case
6 in regard to the conspiracy claim.

7 THE COURT: Right. Okay. And then
8 Mr. Terry on Watson Electric, y'all had gotten
9 summary judgment, I think, did you not?

10 MR. TERRY: We got summary
11 judgment -- we got partial summary judgment, and
12 we filed -- I believe it was yesterday -- a
13 consent dismissal without prejudice as to
14 Watson's remaining claims against Balfour.

15 THE COURT: Okay. Do you have the
16 dollar amount on the partial summary judgment
17 just so I can write it down here?

18 MR. TERRY: In a file somewhere.

19 THE COURT: Okay. All right.
20 Well, don't worry about it.

21 MR. TERRY: (Inaudible) and some
22 change.

23 THE COURT: I'm sorry. Go ahead.

24 MR. TERRY: It's 1,360,000 and some
25 change.

1 THE COURT: Got it. Okay. All
2 right. So as far as prosecuting your claims, no
3 longer necessary. Those have been resolved.
4 These would be Balfour Beatty; is that correct?

5 MR. WINDLE: That's correct.

6 THE COURT: But you still have the
7 issue about conspiracy and you want to be heard
8 on that as well?

9 MR. WINDLE: Yes, sir.

10 MR. TERRY: We want to be heard on
11 the conspiracy. We also have some affirmative
12 defenses that will be involved in the conspiracy.
13 And then Watson has made -- has a negligence
14 claim against Library Associates.

15 THE COURT: Okay. All right.

16 MR. TERRY: So we would like to be
17 heard on that, too.

18 THE COURT: Are y'all ready to
19 proceed?

20 MR. WINDLE: Yes, sir.

21 THE COURT: All right. Mr. Terry?

22 MR. TERRY: I have a couple of
23 issues I want to raise before we get started
24 here, Your Honor. One, how do you want us to
25 mark our exhibits? I have premarked some of

1 them. W for Watson 1 ID, and then we will strike
2 ID as the evidence gets in.

3 THE COURT: Okay.

4 MR. TERRY: Is that acceptable to
5 you?

6 THE COURT: Perfect. Yes, sir.

7 MR. TERRY: Watson renews its
8 motion for directed verdict on the conspiracy
9 claim from Library Associates based on two
10 reasons. One, there's no evidence of damages on
11 the conspiracy claim.

12 The damages that are in the record are
13 related solely to repairs to the project.
14 Library's damages that are in the record are
15 repairs to the project in liquidated damages.
16 That's it, Your Honor. All other damages were
17 excluded. So there's no evidence of damages.

18 Along with that, there's no causation
19 evidence in the record as it relates to this
20 conspiracy claim, that those -- that damages that
21 are in the record were in fact caused by the
22 conspiracy. The law requires that the damages
23 actually be caused by the agreement between the
24 parties and the overact and furtherance of that
25 agreement.

1 Watson again moves for a directed
2 verdict on that. Watson also renews its motion
3 under Rule 14. Rule 14 requires that -- let me
4 back up a second. Library Associates made its
5 claims against Watson as a third-party claimant.

6 Rule 14 allows third-party claims to
7 allow Library to say, Watson is responsible for
8 Balfour's claims against Library. There's no
9 evidence in the record, Your Honor, that Watson
10 is responsible for Balfour's claims, the damages
11 Balfour is seeking from Library.

12 Therefore, Watson moves for directed
13 verdict on that. My understanding is there's
14 other motions for directed verdict that are still
15 outstanding from Balfour Beatty that you may not
16 have ruled on.

17 THE COURT: Okay. Mr. Windle?

18 MR. WINDLE: In regard to motions
19 for directed verdict on behalf of Lithko and Old
20 North State, we adopt Mr. Terry's arguments, but
21 we also add this, that there is no evidence, not
22 only of no damages, but no conspiracy.

23 What Library alleges as evidence of a
24 conspiracy in regard to Lithko and Old North
25 State are the two lien waivers -- excuse me,

1 change orders that they signed that had what they
2 called allegedly kickbacks in them.

3 Now, there is no evidence, whatsoever in
4 this case, that those change orders are any kind
5 of kickback or that they're involved in any kind
6 of conspiracy, and let me tell you why. The only
7 people that have testified about those change
8 orders have been Balfour representatives. This
9 was in negotiation, the change order being
10 negotiated between Balfour and Lithko and Balfour
11 and Old North State separately.

12 But both Nick Starcevic and David
13 Simonton explained to the Court that those change
14 orders were to resolve internal change order
15 issues between Balfour and the subcontractor.
16 Meaning, if Balfour says that Lithko damaged
17 another subcontractor's work -- this is just a
18 hypothetical.

19 THE COURT: Sure. Okay.

20 MR. WINDLE: Then Balfour would
21 want to back charge Lithko for repairing that
22 work. And if Balfour wanted to back charge
23 \$5,000 and Lithko said, that's only \$1,000,
24 they're negotiating those kind of issues between
25 themselves.

1 And that was the testimony of the
2 witnesses. And their resolution was, what's in
3 change order 34 for Lithko and change order 20
4 for Old North State Masonry.

5 And what those change orders also say is
6 that, in resolution of those internal change
7 orders, one thing that Balfour might get is the
8 first \$70,000 of any recovery by its
9 subcontractor on its delay claim, and that the
10 testimony is, it was a resolution of an internal
11 change order.

12 Now, how does that affect their
13 conspiracy claim? What it means is -- and there
14 has been no witness for Library that has taken
15 the stand and said that those change orders
16 represent anything else. No evidence from
17 Library on that point. No testimony from any
18 witness from Library that says, huh-uh, that's
19 not what this was for.

20 The intent was some kind of conspiracy.
21 Like, we're going to give you this \$70,000 if you
22 pursue this delay claim. There's been no
23 evidence of that. The only evidence before the
24 Court in regard to those change orders is that it
25 was a legitimate, valid change order resolving

1 internal issues between Balfour and the
2 subcontractor.

3 And if there's no evidence that it was
4 anything other than that before the Court, then
5 there's no evidence of any conspiracy between the
6 parties -- between Balfour and the subcontractor.
7 No witness from Library took the stand and said
8 that the intent of those change orders was a
9 conspiracy, some kind of conspiracy. There's no
10 evidence before you of that at all.

11 Now, there are two things that Library
12 is relying on to -- in regard to this alleged
13 conspiracy is, those change orders and the
14 language in the change orders -- and I've just
15 explained the language in the change orders don't
16 have anything to do with the conspiracy, and
17 that's the only evidence before the Court.

18 The other thing that Library is relying
19 on is the joint defense agreement. What the
20 Court -- what I would like to show the Court is
21 that those type agreements -- well, what I would
22 like to show the Court is this, that these
23 parties didn't get together and decide they're
24 going to conspire against Library and write up an
25 agreement to do so.

1 What happened was this, they entered
2 into what's called a joint defense liquidating
3 and tolling agreement. And the important point
4 is that those type agreements are common and
5 commonly used on construction projects when the
6 general contractor and the subcontractor believe
7 that they've been damaged and incurred costs as a
8 result of something that the owner or architect
9 did.

10 And they've been in use for decades.
11 And I don't have it here right now because I
12 couldn't get it copied at our hotel, but I will
13 have it shortly. It's an excerpt from a
14 construction law treatise by a gentleman named
15 Bruner (inaudible).

16 And it's one of the main treatises used
17 by construction lawyers across the county. And
18 it just so happens that the O'Connor in this
19 Bruner and O'Connor treatise is their expert
20 witness. He didn't testify, but he was listed as
21 an expert witness for Library.

22 MR. BUNDY: If I could just correct
23 that. It's not true. It's his brother. If you
24 could get your allegations straight for these
25 other attorneys, it would be appreciated. Thank

1 you so much.

2 MR. WINDLE: I don't know if it's
3 his brother or not, but it was my understanding
4 it was Mr. O'Connor.

5 THE COURT: Okay.

6 MR. WINDLE: But regardless, what
7 this treatise says in regard to -- may I hand one
8 to the -- provide one to the Court?

9 THE COURT: Sure.

10 MR. WINDLE: What the treatise
11 says, the first paragraph, a liquidation
12 agreement, which was what this is -- is a type of
13 settlement agreement wherein the contracting
14 parties liquidated or settled disputes between
15 them -- which is exactly what Balfour and the
16 subcontractors did -- and agreed to pass through
17 some or all of the claims to a third-party, which
18 is exactly what Balfour and the subcontractors
19 did in this case.

20 Hence the name liquidation or
21 pass-through claims agreement. In the
22 construction context, these agreements are
23 generally entered into between the general
24 contractor and one or more of its subcontractors,
25 which is exactly what happened in this case.

1 These agreements arise where a
2 subcontractor asserts a claim for additional
3 compensation and believes that the party
4 ultimately responsible for paying the claim is
5 the owner or its agents.

6 A common claim that is passed through in
7 these type of agreements is where the
8 subcontractor has incurred additional expenses
9 because of design errors, which is exactly what
10 you've got in this case.

11 And the point is that these parties
12 didn't get together just to come up with some
13 secret agreement among themselves to knock Mike
14 Bennett to his knees or extort money from Mike
15 Bennett or conspire to do anything. They entered
16 into a common agreement exactly in accordance
17 with what this article says.

18 The other evidence before the Court is
19 that there is no evidence of any unlawful act by
20 any subcontractor. And that's an element of a
21 conspiracy. Again, you've got the change orders.
22 You've got the agreement and neither one are
23 unlawful. Both are common construction project
24 documents.

25 So no evidence of any intent from

1 anybody, any witness from Library. The only
2 thing you heard in regard to intent is what
3 Mr. Bundy has said, and that's not evidence. No
4 matter how many times he says it or how loud he
5 says it, it's not evidence.

6 There's also been no evidence presented
7 by Library that Lithko or Old North State did a
8 lawful act for an unlawful means. The only
9 evidence is that they filed liens, which they're
10 allowed to do by statute.

11 And as Mr. Terry stated, there's no
12 damages proven in regard to an alleged
13 conspiracy. So even if you were to find there's
14 a conspiracy, there's no damages in evidence,
15 whatsoever, in that regard.

16 THE COURT: As a consequence of the
17 conspiracy?

18 MR. WINDLE: Yes, sir, as a
19 consequence of the conspiracy.

20 THE COURT: All right.

21 MR. WINDLE: And for those reasons,
22 both Old North State and Lithko are entitled to a
23 directed verdict on the conspiracy claim. Thank
24 you.

25 THE COURT: All right. Mr. Windle,

1 I'm looking -- just looking briefly at what you
2 passed up, this treatise, Bruner and O'Connor
3 treatise, section 8-51 for liquidation claims.

4 There's a footnote in here that got my
5 first attention, and the note South Carolina case
6 is reported here. There is a North Carolina
7 case, so let me ask you about that one. It talks
8 about Metric Constructors vs. Hawker Siddeley.
9 It says it's from 1996.

10 It says it's distinguishing the
11 rejection of pass-through claims, and I guess the
12 previous case, APAC-Carolina vs. Greensboro-High
13 Point Airport Authority. Can you explain what
14 the distinction is, what they're trying to
15 distinguish there?

16 MR. WINDLE: Your Honor, I can't do
17 that.

18 THE COURT: All right. I haven't
19 read the case. I'm just trying to figure out, if
20 they're distinguishing some, they might find some
21 are and some aren't is I guess what -- that's
22 what distinguishing means maybe.

23 MR. WINDLE: Well, the
24 typical issue --

25 MR. BUNDY: I might be able to help

1 you with that when it gets to be my turn.

2 THE COURT: I'm going to get to
3 you. All right. Okay.

4 MR. WINDLE: The typical issue is
5 whether or not the general contractor remains
6 liable to the subcontractor.

7 It's a doctrine called the Severin
8 doctrine, and in this case, Balfour would have to
9 remain liable to the subs and pursuant to the
10 terms of the joint agreement they knew. Now,
11 that's generally the issue in regard to any
12 liquidation, pass-through tolling agreement.

13 THE COURT: All right. Very good.

14 MR. WINDLE: And I have other
15 authority that I can hand up in regard to South
16 Carolina, in regard to pass-through agreements.

17 THE COURT: Okay. All right. I
18 will be glad to hear from you on that.

19 Mr. Bundy, let me hear your response.

20 MR. BUNDY: I've got a few Judge.

21 THE COURT: All right.

22 MR. BUNDY: I guess what -- is this
23 more of this -- what is it called? Oh, this must
24 be more update evidence. Is that what this is?
25 I mean, I've learned a new term since I've been

1 in this courtroom. I learned it the other day.

2 There's update evidence. And update
3 evidence is any evidence that we, the lawyers,
4 want to bring in and give to you at any point in
5 time and just start telling you what's in
6 evidence.

7 These subcontractors haven't put up a
8 single witness, and they're telling you, before I
9 get started, they're entitled to a directed
10 verdict because I didn't get one of the
11 co-conspirators to rat out the other
12 co-conspirators.

13 You can't prove a conspiracy by that --
14 that way. If I would have asked anybody on the
15 witness stand, Ms. Brown, do you think that these
16 people were conspiring to cheat you? Objection.
17 How could she possibly know what was in their
18 mind? That's an impossible burden, and it's
19 ridiculous.

20 They have put no evidence in yet at all.
21 Okay. And I've got evidence to put in. I'm
22 calling (inaudible) to the stand if they don't
23 call him because we're still in this case. I'm
24 still proving my conspiracy case. The notion
25 that they think this is even the right time to

1 make this motion is a little bit absurd on its
2 face.

3 But at any rate, let's talk a minute
4 about liquidations agreements and liquid -- how
5 about liquidated damages. What liquidated means
6 is, we've resolved the number. We have
7 liquidated the claim. We decided that liquidated
8 damages was going to be \$1,000 a day. We have
9 liquidated the claim. That means we have solved
10 the claim.

11 We are now going to pay you
12 subcontractor X amount of dollars if we get it
13 from the owner. These agreements are not
14 liquidated claims. What they agreed to do was,
15 in the agreement itself, we're going to work it
16 out later how we're going to divide it up.

17 That's not liquidated, one, and two,
18 this -- the change orders themselves that they
19 refer to provide a \$70,000 kickback to Balfour
20 Beatty, which they agreed to pay. That's part of
21 the conspiracy.

22 Now, why does that matter in this case?
23 For some reason, I've been screaming for this for
24 two years, and nobody will listen to me.
25 Hopefully you will. What makes this case

1 different is this is a cost plus job.

2 On lump sum jobs, you can do this
3 liquidated pass-through agreement all you want to
4 because the owner on a cost -- on a lump sum job,
5 only cares about two things. He wants his
6 building, and he wants it built for that much
7 money. Whether you spend all that money on ice
8 cream and build a building with somebody else's
9 money, the owner doesn't care. It doesn't
10 matter.

11 So what the subcontractors and the
12 general contractors do, whatever they decide to
13 do. They can do whatever they want to do because
14 it's their money. Once the money goes to a
15 general contractor on a lump sum job, it's the
16 general contractor's money. He can do whatever
17 he wants to with it.

18 Now, these people don't even do that.
19 They commit misdemeanors and even keep the money.
20 Even on a cost -- on a lump sum job, the general
21 contractor has to pay its subcontractors. These
22 people didn't even do that. And that's a breach
23 of contract. It's a misdemeanor.

24 But more than that, back to my point, a
25 cost plus guaranteed maximum job is as close as

1 you can get a fiduciary duty without actually
2 saying fiduciary duty. The most important
3 language in this whole contract is in Article 2.

4 And it says, paraphrasing, you will do
5 the work in the most efficient manner and in the
6 best interest of the owner. It doesn't say a
7 word in there about the best interest of the
8 contractor. They are spending our money.

9 That's why they didn't want to do the
10 audit. That's why an audit is required. That's
11 where we found they stole a million dollars.
12 That's where we found out they stole \$750,000
13 from their subcontractors. And now two years
14 later, they're sashaying in here and saying, this
15 is all perfectly legal. My goodness, it couldn't
16 be legal. This can't be legal.

17 Tell them to put a witness on the
18 witness stand and testify to anything that that
19 gentleman just said. He's not under oath. None
20 of these gentlemen are under oath. We're going
21 to find out what they said. I've got letters
22 they wrote that are all part of this conspiracy
23 that I'm going to move into evidence under the --
24 what was the name of that rule again -- the
25 updated evidence rule.

1 I've got a bunch of updated evidence I'm
2 going to bring in here, and I'm going to put it
3 in under the same rubric that I was held to
4 yesterday. But sauce for the goose is sauce for
5 the gander.

6 If Balfour Beatty can manufacture
7 evidence after they close, I should certainly be
8 able to put in evidence that they created with
9 their Bates numbers on it where lawyers are
10 writing each other way back in 19 -- in 2016,
11 talking about conspire -- they didn't use the
12 word conspiracy, but they said, we're going to
13 work together.

14 We ain't energizing Bundy. We're going
15 to keep this between ourselves, and we're going
16 to divide all this money up. It's not their
17 money to divide up. That's \$70,000. There is no
18 way that could be cost of the work. No way it
19 could be cost of the work. It's actually just a
20 bribe is all it is. We're back to extortion,
21 conspiracy, and bribery.

22 Those change orders, the secret change
23 orders that were hidden in that Egnyte site,
24 which is where they were hidden. We would have
25 never gotten them if we hadn't have gotten them

1 from another subcontractor. Where they were
2 hidden was in that Egnyte site. We found them.
3 Those are deceptive acts and practices. They
4 conspire to assist Balfour Beatty in committing
5 extortion, unfair trade practices, breaching
6 these contracts.

7 The other thing I would point out to
8 you, which is very fascinating. The general
9 conditions of this contract say, the only time
10 you, the subcontractor, can talk to anybody above
11 the general contractor is one person about one
12 thing.

13 You can call the architect and ask him
14 or her if your money, as a subcontractor, that he
15 approved that we sent in on a pay request was
16 approved by the owner and paid. Oddly enough,
17 not one of them.

18 Big time construction lawyers, they've
19 got books that everybody agrees on. Books by
20 O'Connor. It's ridiculous. They've got nothing
21 to do with this. These lawyers never pointed out
22 to their client apparently or their client didn't
23 want to know.

24 All we've got to do is pick up the phone
25 and call Atlanta, area code 404. You get him

1 every time. He will be glad to tell you, no,
2 sir, I gave -- I approved that pay request. And
3 yes, sir, I've got a sworn affidavit over here,
4 it was paid to you. And I've got another one
5 that says it was paid to you. You didn't get
6 your money? And immediately, he would have told
7 us, and we would have given him a notice and
8 terminated him. We would have gotten rid of him.

9 You can conspire by omission just as
10 much as you can conspire by commission. You can
11 have a Nixon Ford agreement. Do you really
12 believe that Richard Nixon and Mr. -- and
13 President Ford had a conversation about what he
14 was going to do once he resigned? They didn't
15 need to have that conversation.

16 It's a Nixon Ford agreement. It's a
17 conspiracy. Do you think the IRS needed all
18 these extra people once Mr. Obama got to be
19 president? No, because he didn't need to know
20 all of those people to come get their money. Put
21 some witnesses up, and let's try it.

22 THE COURT: All right. Gentlemen?
23 One at a time.

24 MR. TERRY: Your Honor, as far as
25 Mr. Bundy's comments, first, he has the burden of

1 proof. He has to call his own witnesses. If he
2 wanted to call these 11 witnesses, he could have
3 done that in his case. He's rested.

4 We don't -- we wouldn't -- we don't have
5 to put up any witnesses if he doesn't meet his
6 burden of proof, and he hasn't done that. As it
7 relates to Watson, there's nothing, zero evidence
8 in the record as it relates to Watson Electrical
9 Construction. They didn't engage in any
10 conspiracy.

11 Further, his argument that you can
12 commit conspiracy by omission is simply not true.
13 It doesn't even -- it doesn't even logically make
14 sense. To commit a conspiracy, you have to have
15 an agreement. You don't admit to commit an
16 overact and furtherance of the agreement.

17 There's zero evidence in this record as
18 it relates to Watson's attempt about any
19 agreement that it entered into related to this
20 project as we sit here right now.

21 THE COURT: Watson has not --
22 transfer of the \$70,000, that was not a Watson
23 agreement? That was Old North State or Lithko?

24 MR. TERRY: That's what I meant,
25 Your Honor. While those change orders for Lithko

1 and Old North State are not related to conspiracy
2 in any way, they have nothing to do with Watson.
3 There's zero evidence Watson even knew about it.
4 None.

5 So, Your Honor, it's just -- there is no
6 evidence of any conspiracy as it relates to
7 Watson. There's not a burden shifting
8 requirement on a conspiracy claim. Again, he
9 could have called these witnesses before. He
10 didn't do it. That was his job. So Watson moves
11 for direct verdict on the conspiracy claim.

12 THE COURT: All right.

13 MR. WINDLE: Your Honor, in regard
14 to some of Mr. Bundy's comments, the first thing
15 I want to say is, Library rested. They did.
16 Now, before they rested, they never presented any
17 evidence necessary to support a conspiracy claim
18 against either Old North State or Lithko or
19 Watson.

20 Mr. Bundy gets confused between general
21 contractors and subcontractors in this case.
22 This is a subcontractor issue. He can be as mad
23 at Balfour as he wants, but -- whatever Balfour
24 did or didn't do. But we're looking at what the
25 subcontractor did or didn't do now. And one

1 argument was --

2 THE COURT: Y'all had no privity of
3 contract at all, did you?

4 MR. WINDLE: No, sir.

5 THE COURT: All right.

6 MR. WINDLE: Is that there was a
7 billing and then money was paid, but the people
8 that were supposed to get the money didn't. Old
9 North State and Lithko didn't have anything to do
10 with that. That was Balfour.

11 We billed Balfour, and we waited for
12 Balfour to get our money and pay us. That had
13 nothing to do with what Balfour billed to the
14 owner, when they billed it, how much they billed
15 it or what Balfour did with the money when they
16 got it from Library.

17 The next thing they said is, evidence of
18 conspiracy is that the Egnyte site was closed.
19 That was a Balfour site. We didn't have anything
20 to do with that. We weren't involved with that,
21 whatsoever.

22 The next thing was -- this was
23 inappropriate because this is cost plus agreement
24 versus a lump sum agreement. Well if you'd take
25 notice, Mr. Bundy has provided you no legal

1 authority in support of that.

2 All he's done is say it, and that
3 doesn't make it true, and that doesn't make it
4 law. I'm not aware that it makes any difference,
5 whatsoever. I'm not aware of any legal authority
6 that says, you can't have a pass-through
7 agreement on a cost plus project.

8 And a misdemeanor, he claimed --
9 Mr. Bundy claims that evidence of the conspiracy
10 is that somebody got money and didn't pay it and
11 kept it. Well, again, that wasn't Old North
12 State and that wasn't Lithko. We didn't get
13 money from Library. We didn't keep money that
14 was supposed to be paid to somebody else.

15 And the first thing he said was the
16 \$70,000 kickback. And I've said, and I'm sorry
17 for repeating myself, but the only evidence
18 before the Court is the testimony of Nick
19 Starcevic and Tim Spano in regard to the meaning
20 of those change orders between Lithko and Balfour
21 and Old North State and Balfour.

22 And the only evidence before the Court
23 is that was to resolve internal change orders,
24 which, by the way, is one of the things that's
25 required by the joint defense cooperation tolling

1 agreement.

2 THE COURT: Well, were those just
3 resolved today with the settlement that y'all
4 had?

5 MR. WINDLE: No, sir. They were --
6 that was resolved before the -- well, part of
7 them were resolved ultimately today, but they
8 were resolved by -- between Balfour and the sub
9 at the end of the project.

10 They were negotiating various charges
11 back and forth against each other relating to the
12 construction project. They couldn't -- well,
13 what they did was, agree on a number to pay, and
14 then Balfour agreed to accept a potential future
15 payment, if that ever occurred, to resolve back
16 charge issues between Balfour and the
17 subcontractor that the parties disagreed on.

18 THE COURT: All right.

19 MR. WINDLE: Thank you, sir.

20 MR. HILDEBRAND: Your Honor, I
21 would like to --

22 THE COURT: Do you want to jump in
23 on this, Mr. Hildebrand?

24 MR. HILDEBRAND: Just very briefly,
25 Your Honor.

1 THE COURT: All right.

2 MR. HILDEBRAND: There's been some
3 comments that I'd like to respond to just very
4 briefly.

5 THE COURT: All right.

6 MR. HILDEBRAND: I'm not sure that
7 you ruled on our motion the other day. I wasn't
8 sure if you had taken it under advisement. I
9 guess we will need to get your ruling on that.
10 But there are several things I would like to
11 bring to the Court's attention.

12 One is, are the factual allegations, the
13 ranking allegations that Mr. Bundy states as
14 evidence -- he said, let's listen to the
15 evidence. Let's stick to the evidence. We found
16 documents in Egnyte. We did this.

17 Your Honor, I have gone to great
18 lengths, in prior communications with the Court
19 and affidavits with the Court, that we've
20 produced all the documents to the best of our
21 knowledge with -- that were requested. All the
22 documents that were requested in Egnyte and
23 otherwise, we produced all of that. We did it
24 voluntarily before we even got a request for
25 production from them.

1 If they had any allegation that they
2 found something that -- in Egnyte that had not
3 been previously produced, then they could have
4 introduced the evidence of that. If they can
5 introduce evidence that we somehow manipulated or
6 anything else with documents, they could have
7 done that. They could have called in experts or
8 whatever.

9 None of that happened, Your Honor. None
10 of that happened. We turned over all the
11 documents that we had. And if they had any beef
12 with that, then introduce the evidence of it.
13 But it's not fair to us, and it's not -- and it's
14 inappropriate for the Court, for a lawyer to make
15 allegations that we did something with evidence
16 that we did not.

17 And I don't think that you believe, and
18 I certainly don't believe that David Simonton,
19 that you heard was the one who said, yeah, when
20 the litigation started, we, on advice of counsel,
21 said, look, we're now in litigation. The
22 documents need to be produced in accordance with
23 how litigation proceeds with the request for
24 production.

25 The Court ruled that -- the Court ruled

1 on some motions for accounting and such, and
2 that's fine. But all the documents were
3 produced, and it's just inappropriate to allege
4 that there was some sort of wrongful act there.

5 Second, I looked up Patrick O'Connor,
6 and he testified in his deposition that
7 he coauthored -- the same Patrick O'Connor,
8 Patrick J. O'Connor, who's shown in the book,
9 that he coauthored books that he gets royalties
10 from with Mr. Bruner. And it shows his picture
11 on there. So I think that that's the same guy,
12 but I stand to be corrected, but that's what I
13 believe.

14 There is no -- there is no distinction
15 on a cost plus contract from any other
16 contractor. What the subcontracts say is that,
17 if the subcontractor claims that it has incurred
18 damage because of what the owner has done, then
19 because it doesn't have privity to the contract,
20 the general contractor will pursue those claims
21 against the owner.

22 And the pass-through agreements, in
23 simplistic terms, memorialized that. That's what
24 the joint defense agreements, they memorialized
25 that, whether -- and you've heard the delay

1 claims that are outside of the audit that was
2 done by Sam Hadley. They're outside of that, and
3 those claims are appropriately passed on to the
4 owner.

5 Lastly, the allegation that we
6 manufactured evidence, you know, come on, Your
7 Honor. I mean, do I have to stand here and set
8 that allegation that Balfour manufactured
9 evidence, when all we've done is, during the
10 course of the trial, settled with some
11 subcontractors that the Court has prompted us
12 since the last one. So anyway, for all those
13 reasons, I would join in a --

14 MR. BUNDY: Your Honor, can I
15 respond now?

16 THE COURT: Just one second. Go
17 ahead.

18 MR. BUNDY: A couple things. Well,
19 actually quite a few things. We are now -- we've
20 now heard for the first time in this case, a
21 defense that has not pled but now apparently
22 we're going to go into it, which is advice of
23 counsel. That's fine.

24 Because now that they have stood in
25 front of you and said they did it on advice of

1 counsel, under the rules, I'm entitled to know
2 what that advice is because you can't raise the
3 affirmative defense of advice of counsel and not
4 say what that advice was. I've got that -- I've
5 been down this road with Judge Young and other
6 judges.

7 This is a little chart I made about that
8 for you, just to give you an idea. So if
9 Mr. Hildebrand wants to come take the witness
10 stand and tell us what that advice was, I would
11 like to call him.

12 Number two, none of the stuff you've
13 just heard from him is in evidence, but since
14 we're updating evidence, and that's the new rule,
15 I want to update the evidence in this case and --

16 MR. HILDEBRAND: No, no.

17 MR. BUNDY: -- put in the three
18 subcontracts.

19 MR. HILDEBRAND: No, Your Honor.

20 MR. TERRY: Objection, Your Honor.

21 MR. BUNDY: Because there are no --

22 THE COURT: Just one second.

23 MR. HILDEBRAND: Your Honor, I'm
24 responding to Mr. Bundy's comments that were not
25 in evidence, and by responding that he was

1 inappropriate, that does not open the door for
2 him to now say, oh, well, because he talked about
3 evidence, I can introduce any evidence I want to.
4 The rules of civil procedure and evidence are
5 very clear. Mr. Bundy has finished his case. He
6 can't just go up and hand you additional
7 information and continue.

8 MR. BUNDY: That's what we did
9 yesterday. That's what he did yesterday. He
10 came in here after he closed his case and handed
11 you a bunch of stuff, and I objected to it and
12 said, it's not the rule.

13 And you said, no, we're going to do it
14 that way. We've got the update evidence rule
15 here on the corner of Broad and Meeting Street
16 here in Charleston. And so I want to -- that's a
17 distinction without a difference. Putting in
18 evidence late through a lawyer, that's the rule,
19 that we do it now.

20 So it doesn't matter what the evidence
21 is, although the evidence I'm going to put in, of
22 all of these e-mails and stuff is not hearsay
23 under Rule 801(d)(2). Every single one of these
24 things meets -- is not hearsay. It's a
25 furtherance of the conspiracy.

1 THE COURT: All right.

2 MR. BUNDY: How in the world are
3 you going to rule if you don't have these
4 subcontracts?

5 THE COURT: All right. Just hold
6 on there. Just hold on.

7 All right. So is there anything -- any
8 follow-up you want to do before I rule?

9 MR. TERRY: I don't know what he's
10 talking, his advice of counsel issues as it
11 relates to Watson, Your Honor.

12 THE COURT: Right. Okay. All
13 right.

14 MR. HILDEBRAND: On that, Your
15 Honor, I think that Mr. Simonton said -- and he
16 was questioned on the stand, did you -- when you
17 were asked to reallow access to the Egnyte site,
18 he said, I didn't, and it was on -- and Mr. Bundy
19 said, was it on the advice of counsel? And he
20 said yes. I think that's what he said.

21 THE COURT: Okay. All right.

22 MR. WINDLE: The only thing is, I
23 forgot to provide the other reference materials
24 in regard to the pass-through agreement.

25 THE COURT: You can hand those up.

1 All right. Here's what I'm going to do. You can
2 pass those up, though, Mr. Windle.

3 MR. BUNDY: We're not going to mark
4 them evidence, though, are we?

5 THE COURT: No, no, no. This is
6 just -- no.

7 Thank you, sir. All right. The second
8 one is kind of heavy.

9 MR. WINDLE: Only the first part of
10 it is relevant, the first couple pages.

11 THE COURT: All right. I'm going
12 to deny the motions on this basis. I want to put
13 something in the record as to why I'm doing that.

14 All right. So the allegations or what
15 is being sought is a directed verdict. It's
16 taking place prior to the subcontractors
17 presenting their case, but the directed verdict
18 is in response to Library's presentation.

19 The Court finds that there is some
20 evidence or some allegation of a conspiracy, and
21 I'm going to allow that to continue. So I'm
22 going to deny the directed verdict as to that
23 claim.

24 The part of the basis being -- and this
25 is what gets Mr. Bundy agitated, the fact that

1 the parties are settling these cases now is of
2 interest to the Court on the issue of damages,
3 but it is not dispositive on the issue of
4 liability on the conspiracy.

5 So that's why that's, I think,
6 significant. It is the amount of damages. Y'all
7 have alleged the damages are not related to the
8 conspiracy. We've still got that issue to deal
9 with.

10 But I'm just telling you that, as to the
11 question of whether or not there's a conspiracy,
12 acts done -- lawful acts done in an unlawful
13 manner or unlawful acts as alleged in the form
14 of, I think, misdemeanors is what he's indicated
15 in the past. I think there's some evidence in
16 the record to allow that, and on that basis, I'm
17 going to deny the directed verdict motion. Okay?

18 MR. TERRY: Your Honor, my Rule 14
19 motion, what about that?

20 THE COURT: This is as to the
21 third-party claim.

22 MR. TERRY: Yes, Your Honor. The
23 conspiracy claim is the third-party claim.

24 THE COURT: And again, your basis
25 for that is what?

1 MR. TERRY: Rule 14 allows Library
2 Associates to bring a claim, if it's asserting
3 that, that a third-party is liable for Balfour's
4 claims against Library. There's no evidence of
5 that at all. There's no damages that Balfour is
6 seeking against Library, that -- Library hasn't
7 put on any evidence to say, Watson might be
8 responsible for these damages.

9 THE COURT: Okay. I'm with you.
10 Response?

11 MR. BUNDY: Well, it says,
12 (inaudible) arising out of transaction or
13 occurrence that is the subject matter of
14 plaintiff's claim against the third-party
15 plaintiff. I mean, I think -- it's all part of
16 the same case.

17 These -- the conspiracy, they -- they
18 didn't conspire without the plaintiff. They
19 conspired with the plaintiff, you know. And the
20 excessive liens. We had a declaratory -- we
21 still have a declaratory judgment for all of
22 these liens they filed that were duplicitous and
23 duplicate.

24 So clearly, I mean, they're -- it's
25 appropriate to keep them in this case until it's

1 finished. If they don't -- if I don't make out
2 my burden by the time they finish, if they ever
3 get around to putting up any evidence, and I put
4 in the rest of my evidence, we can have that --
5 we can have that motion again.

6 THE COURT: Okay.

7 MR. TERRY: Your Honor, the
8 conspiracy is his own claim. It's not Balfour.

9 THE COURT: It's his claim.

10 MR. TERRY: That's right. It's his
11 claim.

12 THE COURT: Right. In that case --
13 you become the defendant in that case, do you
14 not?

15 MR. TERRY: I would if he brought
16 it that way, but he didn't.

17 THE COURT: He brought it as a
18 third party?

19 MR. BUNDY: He brought it as a
20 third party.

21 THE COURT: A third-party plaintiff
22 against third-party defendant. Wasn't there an
23 allegation of conspiracy there?

24 MR. BUNDY: Yes. And I will also
25 move to realign the parties and amend. I mean,

1 this is to conform with the evidence, and we
2 can -- you can amend the pleadings now to conform
3 to the evidence. Because at the time we brought
4 all this, all we had was that one little nugget,
5 and now, we've got this entire ocean of facts.

6 THE COURT: All right. I will note
7 the objection. I'm going to overrule it and
8 allow them to proceed.

9 MR. WINDLE: Your Honor, Old North
10 State and Lithko would make the same motion for
11 the same reasons.

12 THE COURT: Got it. Noted.

13 MR. WINDLE: Your Honor, Mr. Bundy
14 has raised this issue of on the advice of counsel
15 as a defense. There's no pled defense of on the
16 advice of counsel. If a party testifies
17 factually that he did something on the advice of
18 counsel, that doesn't mean it's a defense. Do
19 you agree?

20 THE COURT: Yeah, I do agree with
21 that. I don't think that door has been opened.
22 Okay? I'm not aware that door having been
23 opened. Okay? So I'm hoping not to go there.

24 MR. TERRY: Thank you, Your Honor.

25 MR. BUNDY: I'm just giving a fair

1 warning, if they open the door, if --

2 THE COURT: Sure.

3 MR. BUNDY: -- they bring it up,
4 that's what they're facing.

5 MR. TERRY: That's the reason I'm
6 raising the point, Your Honor, because if a party
7 testifies, he did something on advice of counsel,
8 that doesn't mean he's defending. He just means,
9 that's a factual situation, a factual statement.

10 If on the advice of counsel is -- when a
11 client says, I did something because counsel
12 advised me to do it or I did it after receiving
13 advice from counsel, that would open up
14 everything for every attorney who ever gave
15 advice and a client then acted on it. It doesn't
16 mean they're making an affirmative defense. It
17 just happens to be what happened, what occurred.

18 MR. BUNDY: It's a fundamental
19 misunderstanding of the pleadings. It's a
20 confession and avoidance. It's an affirmative
21 defense. Advice of counsel. Like in a bad faith
22 case for an insurance company. Okay?

23 THE COURT: Right.

24 MR. BUNDY: We went through this
25 with Judge Young. They put up their insurance

1 adjustor, and they said, he said -- and they
2 said, well, why did you interpret the contract
3 this way and no coverage, right?

4 THE COURT: Right.

5 MR. BUNDY: And they said, because
6 our lawyer said it. And then we said, okay, what
7 was it? And the judge ruled, no. You know, once
8 you put that up as a defense -- because you can
9 hide behind the advice -- it might not have been
10 advice.

11 Sometimes what happens is, is you get
12 into it and what the lawyer said was, sign it,
13 with no advice at all. It still was an
14 instruction of counsel. Okay? So if you're
15 going to hide behind the advice of counsel, you
16 have to tell the Court what that advice was, and
17 I'm entitled to know it.

18 Now, if they didn't rely on advice of
19 counsel, it just doesn't come up, or the witness
20 doesn't have to say that. The witness could say,
21 why did you sign it? I signed it because I
22 wanted to sign it. I wanted to sign this
23 agreement. I read it, and I understood it, and I
24 did what I was supposed to, as opposed to what
25 they're doing in which they have done, which is,

1 one witness said he didn't even read it.

2 I think it was -- I read a deposition
3 last night. It's in evidence in this case where
4 the witness testified he didn't even read the
5 joint defense agreement. Okay? Well, if you
6 didn't read it, why did you sign it? I signed it
7 on the advice of counsel. What was that advice?
8 That's all.

9 THE COURT: All right.

10 MR. BUNDY: Thank you.

11 MR. TERRY: No, Your Honor. That
12 is not in fact what the law says here, and it
13 would be -- and, again, it's illogical to suggest
14 that if any client does something on the advice
15 of counsel, he all of a sudden is waiving his
16 right to attorney-client privilege.

17 THE COURT: I fundamentally agree
18 with that. I think it depends on the context and
19 what happened. So that's going to be the
20 testimony for the witnesses. We will have to
21 cross that bridge when we get there. It sounds
22 like we're going that way, but that's -- we've
23 got to do what we've got to do.

24 MR. TERRY: Mr. Bundy apparently
25 has more witnesses he wanted to call. Has he

1 rested?

2 MR. BUNDY: It's your turn. Put
3 somebody up.

4 MR. TERRY: Thank you, Your Honor.
5 If it pleases the Court, I have about a three
6 minute opening statement.

7 THE COURT: All right.

8 MR. TERRY: Your Honor, as you
9 know, I represent Watson Electrical Construction,
10 Incorporated. I'm Don Terry. For four and a
11 half weeks, you've heard evidence of all the
12 things that Balfour did wrong and all the things
13 that Library did wrong. You've heard very little
14 evidence about the subcontractors in this case.

15 And the general contracting world that
16 we know today is different than it was back
17 when -- even when I was a kid or you were a kid.
18 There was a day that general contractors were
19 craftsmen and they instructed the trades, but it
20 was more than just a, go here or go there, go do
21 this, go do that.

22 On this project, Balfour Beatty was just
23 coordinating, and paying at times the
24 subcontractors. The subcontractors provided all
25 the labor. The subcontractors provided all the

1 materials. The subcontractors provided all the
2 equipment and the tools necessary to build this
3 hotel. The subcontractors financed this project
4 and still are financing this project today
5 because they haven't been paid.

6 Library Associates has a beautiful
7 building its enjoying and making a profit off of.
8 Balfour Beatty has received some payment, but the
9 subs are still just sitting here waiting to stop
10 the financing that they've been doing for four
11 years almost now.

12 Watson calls -- I'm going to take
13 Mr. Clements. It's a little out of order than I
14 normally would because he'd like to get out of
15 here.

16 THE COURT: Okay.

17 MR. TERRY: Watson calls Mr. Jim
18 Clements.

19 THE COURT: Mr. Clements, come on
20 up. Good to see you again. You've previously
21 been sworn in. You are still sworn in. You've
22 not been put under anesthesia since then other
23 than the election process, right?

24 THE WITNESS: No.

25 MR. TERRY: Your Honor, as you

1 know, Library Associates called Mr. Clements, so
2 I would request the permission to treat
3 Mr. Clements as an adverse witness.

4 THE COURT: Well, I would assume he
5 was -- he was not an employee, but he was
6 employed by Library Associates in the process,
7 right?

8 MR. TERRY: He was the owner's
9 representative.

10 THE COURT: If what you're asking
11 me to do is if you can cross-examine him and have
12 him testify on cross, I'm going to allow it.

13 MR. TERRY: I'm simply trying to
14 make it go faster by asking leading questions.

15 THE COURT: Adverse witness. All
16 right. Noted.

17 (JIM CLEMENTS, having already been
18 duly sworn, testified as follows:)

19 DIRECT EXAMINATION

20 BY MR. TERRY:

21 Q. Mr. Clements, you were the owner's --
22 Library Associates representative on this Hotel
23 Bennett project, correct?

24 A. Yes, I was.

25 Q. All right. And you are familiar with

1 Watson Electrical Construction as the
2 electrical -- one of the electrical contractors
3 on the project, right?

4 A. Yes.

5 Q. All right. And there was another --
6 what we call low voltage contractor on the
7 project as well, correct?

8 A. An owner low voltage contractor, yes.

9 Q. Correct. And you've been in the
10 construction business for a long time, right?

11 A. I have.

12 Q. All right. And you've never had a
13 conversation during the course of this project
14 with Watson about the construction schedule; is
15 that correct?

16 A. Correct.

17 Q. But you agree that the project schedule
18 is an important tool in the construction
19 business, right?

20 A. Yes, sir, I would.

21 Q. And it's an important tool for
22 subcontractors, correct?

23 A. Especially.

24 Q. Right. And that's because the
25 subcontractors have to use the schedule to

1 coordinate when workers are going to be on the
2 site, right?

3 A. Yes, sir.

4 Q. And they have to use the schedule to
5 coordinate where they're going to be working on
6 the site, right?

7 A. Yes, sir.

8 Q. And subcontractors have to use that
9 schedule to decide when to have materials
10 delivered, right?

11 A. Yes, sir.

12 Q. And so the schedule is the
13 subcontractors -- is the beginning stage of the
14 subcontractor's plan of how they're going to work
15 efficiently on the job, right?

16 A. Yes, sir.

17 Q. And you agree it's reasonable that all
18 subcontractors would want to work as efficiently
19 as possible, right?

20 A. Yes, I believe so.

21 Q. Now, on this project, you learned in
22 late 2016, if not earlier, that the schedule --
23 Balfour's schedule from this project was
24 incorrect, right?

25 A. Yes.

1 Q. And you learned it was missing logic?

2 A. Yes.

3 Q. In fact, you learned that it was missing
4 logic on hundreds of scheduled activities, right?

5 A. Through the assistance of our scheduling
6 consultant, yes.

7 Q. Right. And you would agree that, when
8 there's poor scheduling, it makes the
9 subcontractors work less efficiently, right?

10 A. That seems logical, yes, sir.

11 Q. Now, because you've never spoke to
12 Watson about the project schedule, it's also
13 true, you never told Watson that the schedules
14 weren't accurate, correct?

15 A. Yes.

16 Q. And you testified that you and Mr. --
17 that you and Mr. Bundy agreed that you were not
18 going to give Mr. Query's report to Balfour,
19 right?

20 A. I don't know that we agreed to that. I
21 don't recall that discussion or that intent.

22 Q. You testified here in Court that
23 Mr. Bundy told you not to give the -- Mr. Query's
24 report to Balfour, correct?

25 A. I don't recall that. If I said that

1 before, then I guess it stands.

2 Q. You never did give Mr. Query's report to
3 Balfour, right?

4 A. No.

5 Q. And you didn't give Mr. Query's reports
6 to Watson Electrical, correct?

7 A. No, sir.

8 Q. Now, as I understand it from your
9 testimony, one of your criticisms of Balfour
10 Beatty is that, when they submitted a claim, they
11 didn't properly document that claim, right?

12 A. It's incomplete.

13 Q. Right. It was incomplete. And you said
14 that there was not a schedule analysis, right?

15 A. Well, there was one, in my opinion, bona
16 fide claim made on the project with the
17 appropriate backup and the appropriate analysis,
18 which would be the sixth floor claim, which the
19 architect responded to.

20 Q. Okay. And Watson made a claim under the
21 sixth floor claim, right?

22 A. I don't recall, but I believe so, yeah.

23 Q. Okay. And then there was also seventh
24 through ninth floor claims as well --

25 A. Yes, sir.

1 Q. -- right?

2 A. Yes, sir.

3 Q. Okay. And your position on those claims
4 is that those claims weren't properly documented
5 because they didn't include the schedule
6 analysis, right?

7 A. Yes was verified by the architect and
8 the engineer of record.

9 Q. Okay. I want to talk a little bit about
10 change orders for the project. Now, do you agree
11 that the contract in this case between Balfour
12 and Library Associates requires that, if the
13 owner wants to make a change, that they have to
14 issue a change order before the work is done?

15 A. Say that again.

16 Q. If the owner wants to make a change --

17 A. Right.

18 Q. -- they're supposed to issue a change
19 order before the work occurs, correct?

20 A. I don't see -- I don't think that is
21 entirely true. The architect can issue a
22 directive to make a change.

23 Q. Okay.

24 A. And the basis of that directive could be
25 for pricing only, to proceed with pricing to

1 follow up.

2 Q. Okay. So there's two ways to make a
3 change, a change order or a construction change
4 directive, correct?

5 A. Yes, sir.

6 Q. Okay. And throughout most of this
7 project, construction change directives weren't
8 used. That's something you used towards the end,
9 right?

10 A. Yes, sir.

11 Q. Okay. So during the early stage of this
12 process, you used -- to make changes, you used
13 change orders, right?

14 A. Yes.

15 Q. Okay. And the process that was required
16 was, it's going to give you -- Balfour Beatty
17 gives you a price for the change order, and then
18 you would you issue a change order, right?

19 A. That's the way it's supposed to work.

20 Q. And once the change order is issued,
21 then the work gets done, right?

22 A. Yes, sir.

23 Q. Okay. But that's not what happened on
24 this project, right?

25 A. Not in all cases, no.

1 Q. Right. Because in many cases, on this
2 project, the work was done before the change
3 order was issued, right?

4 A. Well, you have to -- it's a cart and a
5 horse thing. You can't approve the change order
6 when you done have a price. So Balfour's pricing
7 came much, much later than the work, and so as a
8 consequence, that is -- we played catch up most
9 of the time.

10 Q. Right. And on -- this is something that
11 occurs on a lot of construction projects. If you
12 wait on the change order, the work gets slowed
13 down, right?

14 A. Well, there's work that might affect the
15 critical path. That would be the case for that.
16 But other changes don't. I mean, we had -- we
17 had changes that were resolved prior to the work
18 going in place. So it would be a misnomer to say
19 that all the work was completed on that basis.

20 Q. Oh, no, I'm not suggesting all of the
21 work was completed on the basis. Some of the
22 work on this project occurred before the change
23 orders were issued?

24 A. Absolutely.

25 Q. Okay. That wasn't uncommon on this

1 project, was it?

2 A. No, no.

3 Q. You agree that the owner's design team
4 failed to provide a complete design for work on
5 the project, correct?

6 A. For a fully coordinated design.

7 Q. Right.

8 A. I would agree with that.

9 Q. Okay. And it's the owner's obligation
10 to provide a full coordinated design, right?

11 A. I think the owner -- the contractors --
12 yeah, I think there's an obligation to provide a
13 coordinated design, whether it's -- I don't
14 think -- I think it's appropriate to say that no
15 one believes a design is fully coordinated
16 whenever it's issued, hence the submittal process
17 and hence the BIM process. But to say a design
18 is a hundred percent, I don't think anybody would
19 ever agree with that.

20 Q. Right. On this project, it actually --
21 the architect said it was a hundred percent plus?

22 A. That was the description of a set of
23 drawings.

24 Q. Now, as I recall it, there was a joke on
25 this project that you regularly engaged in with

1 others, and it was, hurry up and get it done so
2 that the owner can't make any changes. Do you
3 remember that?

4 A. Well, that's my advice I give to all
5 contractors. Get it gone before the owner can
6 make changes.

7 Q. Right. And on this project, there was
8 many instances where the owner was coming in and
9 making changes because they wanted to improve the
10 project as it proceeded, correct?

11 MR. BUNDY: Your Honor, I don't --
12 at this point, I would object to all of his
13 testimony so far as to relevance. What claim is
14 he -- is he prosecuting a negligence claim
15 against my client? Is that what this is about,
16 or is this a -- I mean, how does this -- what is
17 the relevance of this testimony?

18 MR. TERRY: It's both a negligence
19 claim, and it's an unclean hands defense.

20 MR. BUNDY: Whose unclean hands?

21 MR. TERRY: The owner's unclean
22 hands.

23 MR. BUNDY: Okay. Well, how does
24 this relate to negligence of any kind? Where's
25 the duty involved from --

1 MR. TERRY: I will tie it together,
2 Your Honor.

3 THE COURT: All right. I'm going
4 to allow it to go forward.

5 MR. TERRY: I'm not going to tie it
6 together with this witness.

7 THE COURT: Okay. All right.

8 MR. TERRY: Your Honor, as you may
9 recall, I was -- I had COVID during the first two
10 weeks of this. So I may introduce a couple
11 exhibits that are duplicative.

12 THE COURT: Okay.

13 MR. TERRY: I just -- it was more
14 cost effective to do it that way.

15 THE COURT: Okay. All right.

16 (WATSON EXH. 1 was marked for
17 identification.)

18 BY MR. TERRY:

19 Q. Mr. Clements, I'm handing you what I've
20 marked for identification as Watson's Exhibit
21 No. 1 or W-1. Mr. Clements, have you seen this
22 document before?

23 A. Yes.

24 Q. And what is it?

25 A. It's a notice to proceed for the

1 project.

2 Q. And this is an e-mail from you to
3 Balfour Beatty giving them notice to proceed for
4 this project, correct?

5 A. Yes, it is.

6 Q. All right. And that is on March 19,
7 2015, correct?

8 A. Yes, it is.

9 MR. TERRY: All right. Watson
10 moves to enter Exhibit 1 into evidence.

11 THE COURT: All right.

12 MR. TERRY: I'm going to let you
13 guys keep those over there or let him keep them.
14 I don't care. But they're not in a notebook; so
15 I'm a little concerned about them floating
16 around.

17 THE COURT: Okay. Are you going to
18 make reference to it further?

19 MR. TERRY: I'm not, not with
20 Mr. Clements, no, and probably not with
21 another --

22 THE COURT: All right. Do you want
23 to hand that up -- give that up here to the court
24 reporter?

25 MR. BUNDY: What's the exhibit

1 number?

2 MR. TERRY: W-1.

3 MR. BUNDY: W-1. No objection.

4 THE COURT: Okay.

5 (WATSON EXH. 1 was received in
6 evidence.)

7 (WATSON EXH. 2 was marked for
8 identification.)

9 BY MR. TERRY:

10 Q. Mr. Clements, I want to hand you what
11 I've marked for identification as Exhibit W-2.
12 Have you seen this document before?

13 A. Yes.

14 Q. All right. And what is this document?

15 A. Well, it's an e-mail from -- e-mail
16 exchange with Tim Spano and myself regarding
17 notice of delay on level 6 dated July 26, 2016.

18 MR. TERRY: Okay. And Watson then
19 moves to enter Exhibit W-2 into evidence.

20 MR. BUNDY: No objection.

21 THE COURT: Without objection.

22 (WATSON EXH. 2 was received in
23 evidence.)

24 BY MR. TERRY:

25 Q. All right. Mr. Clements, I'm going to

1 look at the e-mail at the top from you to Tim
2 Spano copied to Kim Brown and others. Do you see
3 that e-mail?

4 A. Yes.

5 Q. All right. And this is July 26th, 2016,
6 correct?

7 A. Yes, sir.

8 Q. And the subject line is, reference HMS.
9 What does that mean?

10 A. Hotel Marion Square.

11 Q. Okay. That's the same as Hotel Bennett,
12 right? And it says, notice of delay, L6 design,
13 correct?

14 A. Yes, sir.

15 Q. All right. And this is the delay we
16 talked about a few minutes ago, right?

17 A. Yes.

18 Q. And it says, Jim, I need to clarify that
19 these RFIs were brought up for the BIM design
20 conflicts that were just realized. The current
21 input on fifth floor overhead information due to
22 ongoing design changes is the reason that we were
23 just realized in RFI. The 3D modeling can't
24 sufficiently stay ahead of the scheduled course
25 due to MEP redesign.

1 Do you agree that the -- MEP means
2 mechanical, electrical, and plumbing, correct?

3 A. Yes.

4 Q. Okay. Do you agree that there was
5 redesign going on on the sixth floor MEP at this
6 time?

7 A. I think the reference is to
8 consolidation of the guest rooms. That would be
9 true.

10 Q. Okay. And it says, this notice is to
11 make all aware that we are behind our contractual
12 structure completion dates and that the current
13 fifth floor overhead redesign conflicts are
14 affecting the sleeve location information that we
15 need for the level 6 floor.

16 You would agree that Balfour Beatty and
17 its subcontractors were in fact behind as a
18 result of what was stated in that e-mail,
19 correct?

20 A. Let me clarify. Because of the pace,
21 this -- it is true that changes were being made.
22 It is true that Balfour Beatty's BIM process
23 was -- at this time, was not keeping up with the
24 pace of the project.

25 I think there -- I think it would also

1 be a true statement, had the BIM process been
2 done sooner, quicker, faster, that owner changes
3 could have been accommodated in advance of
4 impacting the critical path.

5 Q. But if the drawings had been properly
6 coordinated, these changes wouldn't have needed
7 to be made, correct?

8 A. If they had been a hundred percent
9 coordinated, no.

10 MR. TERRY: Your Honor, I don't
11 know that you necessarily admitted this into
12 evidence. I can't recall.

13 THE COURT: No. 2?

14 MR. TERRY: Yes, sir.

15 THE COURT: It's in evidence.

16 MR. BUNDY: I'm going to object on
17 the grounds of relevance.

18 THE COURT: I'm going to allow it,
19 Watson No. 2.

20 (WATSON EXH. 4 was marked for
21 identification.)

22 BY MR. TERRY:

23 Q. Mr. Clements, I'm handing you what I've
24 marked for identification as Exhibit W-4. Have
25 you seen Exhibit W-4 before?

1 A. I mean, I read what it says. I don't
2 agree with what it says.

3 Q. Let's start with, have you seen it
4 before?

5 A. I must have, but I don't recall it
6 because my name is on it. So I will take it for
7 granted that I did.

8 Q. And Exhibit W-4 is an exhibit -- is a
9 letter to you dated --

10 MR. BUNDY: Wait a second. Before
11 we get into all of that, I object to Exhibit -- I
12 object to this piece of paper. It's irrelevant.
13 Watson's name is not even on here. This is a
14 claim in negligence, and this is a letter from
15 Jim Clements to Balfour Beatty in October of
16 2018. It's completely irrelevant.

17 MR. TERRY: Your Honor, Watson's
18 name is not on it, but it certainly relates to
19 Watson. It discusses light fixtures and life
20 safety signage on the project, which were both
21 installed by Watson.

22 MR. BUNDY: How is that relevant to
23 negligence? How does this letter make it more
24 likely than not that Library Associates was not
25 in contract with Watson, whose very contract

1 said, the owner was not supposed to talk to the
2 subcontractors, and the subcontractors weren't
3 supposed to talk to the owner, except as it
4 related to -- if it -- where you're getting paid.

5 There's no way that this makes it more
6 likely than not or less likely than not that
7 whatever this negligence in the air claim is,
8 any -- it doesn't establish duty, proximate cause
9 or damages. Thank you, Your Honor.

10 THE COURT: Well, the purpose of
11 introducing the document is?

12 MR. TERRY: The purpose of
13 introducing the document is to show that Watson
14 is damaged by the events that occurred on the
15 project, and that Watson had the right to make
16 claims, part of which are hindered perhaps
17 intentionally by Library Associates' failure to
18 give Watson notice that the schedule is
19 incorrect.

20 Now, he can sit back and say, I don't
21 have a contractual obligation to do that, but he
22 is a third-party beneficiary to the contract,
23 according to him. And so someone who's a
24 third-party beneficiary can't sit back in a
25 construction project and say, this whole thing is

1 going downhill. I know why, but not tell the
2 participants in the project what's going on.

3 MR. BUNDY: Well, read the letter.
4 I mean, it --

5 THE COURT: Well, it's got to come
6 in for me to read it.

7 MR. BUNDY: It's ridiculous.

8 THE COURT: So I'm going to allow
9 it. Go ahead.

10 MR. BUNDY: Okay. All right. I
11 object.

12 MR. TERRY: So is it in evidence?

13 THE COURT: Yes.

14 MR. TERRY: Watson moves for it to
15 be in evidence.

16 THE COURT: Identify it for me.
17 From whom to whom?

18 MR. TERRY: Watson's Exhibit No. 4,
19 Your Honor.

20 THE COURT: No. 4. Dated?

21 MR. TERRY: October 31st, 2018, and
22 it's says, updated November 2, 2018.

23 MR. BUNDY: This is No. 3?

24 THE COURT: No. 4.

25 MR. TERRY: No. 4. I skipped No.

1 3.

2 MR. BUNDY: What's 3?

3 MR. TERRY: Watson is not --

4 MR. BUNDY: I only got 1 and 2.

5 MR. TERRY: I understand. I marked
6 them in advance, and I'm skipping 3.

7 MR. BUNDY: Okay. Well, can we
8 change it to 3 because if we don't --

9 THE COURT: No, no.

10 MR. BUNDY: -- there's going to be
11 a gap in it.

12 THE COURT: No. We're just going
13 to leave it the way it is. It doesn't matter
14 what order they come in.

15 MR. BUNDY: All right.

16 THE COURT: They just need to have
17 numbers on them.

18 MR. BUNDY: Thank you.

19 THE COURT: All right. And it's a
20 letter from Clements to --

21 MR. TERRY: It's a letter from
22 Balfour to Mr. Clements.

23 THE COURT: Oh, from Balfour to
24 Clements.

25 MR. TERRY: Yeah, Your Honor, I

1 apologize.

2 THE COURT: Okay. All right.

3 (WATSON EXH. 4 was received in
4 evidence.)

5 BY MR. TERRY:

6 Q. All right. Mr. Clements, so the initial
7 letter here is a letter from Balfour Beatty to
8 you dated October 31st, 2018, from David
9 Simonton, correct?

10 A. Yes.

11 Q. And if you look on the second page, Kim
12 Brown is copied on that as well, right?

13 A. Yes, sir.

14 Q. Okay. Now, we're going to start with
15 the first paragraph, and it says, we are writing
16 to -- we are writing this notice of construction
17 delay to advise you of time and cost impact to
18 the project that will ultimately affect the
19 construction team's ability to deliver the
20 project to Library Associates.

21 I'm going to skip down a little bit just
22 to save some time. It says, the current -- the
23 last sentence of the first paragraph, the current
24 impacts as of the date of this letter are, and
25 then it lists some items, correct?

1 A. It does.

2 Q. All right. So look at the fourth item.
3 It says, owner delay giving direction on tub
4 light fixture and its failure to execute CCD 37
5 to cut Balfour Beatty loose, right?

6 A. It does say that.

7 Q. All right. These tub light fixtures --
8 and I apologize, Your Honor, if you've already
9 heard this evidence. I wasn't here -- are lights
10 that physically go over the restroom tubs in the
11 guest rooms, right?

12 A. Yes, sir.

13 Q. All right. And those light fixtures
14 were ordered by the owner, Library Associates?

15 A. Yes, sir, they were.

16 Q. Okay. And they were ordered with the
17 incorrect UL labeling, right?

18 A. Missing.

19 Q. Missing. So there was no UL labeling,
20 right?

21 A. As I recall.

22 Q. All right. And so those lights couldn't
23 be installed under code over the tubs without the
24 UL labeling, right?

25 A. Correct.

1 Q. All right. And so then these light
2 fixtures were -- had already been installed on
3 two floors, right?

4 A. There were some that were installed,
5 that's correct.

6 Q. And Watson had to go take them back
7 down, right?

8 A. Yep.

9 Q. And then the light fixtures had to be
10 sent off somewhere, right?

11 A. Yes.

12 Q. And then they had to be labeled
13 correctly?

14 A. Yes.

15 Q. And then they had to be brought back?

16 A. Yes.

17 Q. And then Watson had to reinstall them,
18 correct?

19 A. Yes.

20 Q. Okay. And so here, Balfour Beatty is
21 giving notice of delay for that issue, correct?

22 A. That wasn't a delay.

23 Q. That's not my question. My question is,
24 Balfour Beatty was giving notice of delay?

25 A. Well, yeah, but I would like to clarify

1 that this just is a list of what they're calling
2 delays, but none of them are bona fide delays. I
3 got a lot of correspondence like this over the
4 course of the project that amounted to nothing,
5 and this is another piece of that.

6 Q. And you didn't do a schedule analysis on
7 the project, right?

8 A. No.

9 Q. If you look down at the sixth item, it
10 says, owner's failure to furnish and install
11 required safety signage. Okay. What is that
12 about?

13 A. That's the owner's signage in the hotel.
14 Room assigned -- room assigned is back of house
15 signs, you know, statutory signs.

16 Q. Okay. And these are things that were
17 required by code to be installed for the project
18 to be finished on time?

19 A. To be open, yes.

20 Q. To get a certificate of occupancy?

21 A. TCO, yeah.

22 Q. And it was the owner's responsibility to
23 provide those, correct?

24 A. Yes.

25 Q. And as of October 18th -- I'm sorry,

1 October 31, 2018, they weren't installed,
2 correct?

3 A. According to this, no.

4 Q. You don't have any reason to believe
5 this is wrong?

6 A. No, I don't.

7 Q. Okay. Turn to the second page. The
8 very first item, owner's failure to make a
9 decision on alternate light fixture for elevator
10 five. Now, that's about changing out a light
11 fixture in the elevator, right?

12 A. That's what it says, yes.

13 Q. And that's related to Watson's work,
14 right?

15 A. Yes.

16 Q. And if you read on, in the red portion,
17 it says WLA. That's the architect, right?

18 A. Yes, sir.

19 Q. And DCI. That's the interior designer,
20 right?

21 A. Yes.

22 Q. Approved fixture. BBC to submit RCO for
23 cost. That's a change order price, right?

24 A. Request for change, yes.

25 Q. DCI and WLA will be provided design

1 drawings including fixture locations. So
2 according to this, at the time that -- of October
3 31, 2018, DCI still provided the location of the
4 lights in these elevators -- provided the design
5 for the lights in the elevators, correct?

6 A. Apparently so.

7 MR. TERRY: That's all the
8 questions I have for Mr. Clements.

9 THE COURT: All right, sir.

10 CROSS-EXAMINATION

11 BY MR. BUNDY:

12 Q. So just to be clear, Watson 4, like many
13 other letters you received notification of delay,
14 this letter is just simply not accurate or true
15 as it relates to the fact from the ground, is it?

16 A. Well, it's accurate in the fact that
17 these are open matters, but the fact -- to say
18 that they were impacting the critical path and
19 the inability to open up the hotel due to the
20 current status of the project, it was not. It's
21 a falsehood.

22 Q. Right. Exactly. And this wasn't usual
23 for Mr. Simonton, once he got on this job, to
24 come in and clean it up and start writing a bunch
25 of these letters, right?

1 A. No.

2 Q. In fact, the number of trees that got
3 killed on this job greatly -- were greatly
4 magnified once Simonton arrived, right?

5 A. Only exceeded by the attorneys.

6 Q. Thank you. Now, you, I believe -- you,
7 of course, are familiar with the subcontracts,
8 right?

9 MR. TERRY: Objection, Your Honor.
10 Mr. Clements has no personal knowledge about the
11 contract between Watson --

12 MR. BUNDY: How does he know that?
13 He didn't answer the question yet. Does he get
14 to answer the question before --

15 MR. TERRY: Furthermore, this is
16 not -- this was not the basis of any direct
17 testimony. It's just not an allowable cross.

18 MR. BUNDY: All right. No, it's
19 not because it doesn't have to be. In the South
20 Carolina code, it's an open cross-examination
21 unlike over there, which is closed cross. Once
22 you put him on the stand, I can ask him anything.
23 If you need to look at the book, here it is.

24 THE COURT: He can ask him. Wait
25 until he makes an objectionable comment.

1 BY MR. BUNDY:

2 Q. You're familiar with the subcontract,
3 right, and all subcontracts?

4 A. Not all of them, but some of them.

5 Q. You're familiar with this one? Are you
6 familiar with Watson's?

7 A. Yes, sir.

8 MR. BUNDY: Okay. Let's mark this,
9 Your Honor, as an exhibit, and I move to put it
10 in evidence, please. It would be our next
11 exhibit.

12 MR. TERRY: Objection, Your Honor.
13 Just because he saw it at some point in the past
14 doesn't mean he has knowledge about the document.
15 He didn't testify that he signed. He hasn't
16 testified that ever read it. He didn't testify
17 that he's a party to it.

18 MR. BUNDY: Are we --

19 MR. TERRY: He has the --

20 THE COURT: The basis for the
21 objection is what?

22 MR. TERRY: He has no personal
23 knowledge. He's not competent to testify about
24 the document. He can't authenticate it.

25 MR. BUNDY: He says he read it.

1 MR. TERRY: He can't authenticate
2 it by saying he saw it at some point in time.

3 MR. BUNDY: That's what testimony
4 is. Are you telling me that if you don't agree
5 with this lawyer, you can't testify? What are we
6 doing?

7 MR. TERRY: He can't -- he could
8 have seen it in discovery. It doesn't make him
9 familiar with it during the (inaudible) --

10 MR. BUNDY: He was the --

11 THE COURT: Lay more foundation for
12 it.

13 BY MR. BUNDY:

14 Q. You are the owner's representative,
15 correct?

16 A. Yes, sir.

17 Q. Okay. And part of what you did as the
18 owner's representative was to prepare, review,
19 and read and sort of enforce contracts to the
20 extent of your job as the owner's representative,
21 correct?

22 A. With Balfour Beatty.

23 Q. Yeah, exactly. And its subcontracts, in
24 fact, incorporate the general conditions by
25 reference, don't they?

1 A. Yes.

2 Q. And say in the subcontracts that all
3 these obligations run back and forth, right?

4 A. Yes.

5 MR. BUNDY: So, Your Honor, I mean,
6 are we really going to be in a case where the
7 electrician is objecting to the introduction of
8 his own subcontract into evidence?

9 MR. TERRY: I'm objecting to
10 Mr. Clements testifying about it.

11 MR. BUNDY: Well, let's put it in
12 evidence and read it.

13 MR. TERRY: And furthermore, he's
14 just -- all he's testified to is he coordinated
15 the contract between Library and Balfour Beatty.
16 And he testified that he didn't even talk to
17 Watson.

18 BY MR. BUNDY:

19 Q. Mr. Clements, how long have you been
20 doing this construction stuff?

21 A. 46 years.

22 Q. Okay. Do you know how to read?

23 A. I do.

24 Q. Do you know how to read construction
25 contracts? Have you ever read subcontracts

1 before?

2 A. Only occasionally, to be honest with
3 you.

4 Q. But you've read this one, right?

5 A. I read this one specifically with regard
6 to BIM coordination.

7 Q. And can you identify it as the
8 subcontract between Watson and Balfour Beatty
9 Construction? That's all I'm asking --

10 A. Yes, it appears to be.

11 Q. -- that you can identify it as the
12 document.

13 MR. TERRY: He can identify it
14 appears to be. That's all he can do.

15 THE COURT: Purports to be what it
16 is; is that right?

17 THE WITNESS: (No audible
18 response.)

19 THE COURT: And do you know when
20 you first reviewed this?

21 THE WITNESS: No, I don't, to be
22 honest with you.

23 THE COURT: Okay. Was it during
24 the course of construction?

25 THE WITNESS: Yes.

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

3 MR. BUNDY: Thank you.

4 MR. TERRY: What exhibit number is
5 it?

6 MR. BUNDY: This will be Exhibit
7 156. This is 156, Judge.

8 THE COURT: Got it.

9 (DFT. EXH. 156 was marked for
10 identification and received in evidence.)

11 MR. TERRY: Well, I don't have the
12 contract copy. I don't know what you've got.

13 MR. BUNDY: Gotcha. I shouldn't
14 take too long on it, Your Honor.

15 BY MR. BUNDY:

16 Q. If you would, turn to page 4 of 16, and
17 it's back in the document.

18 A. 4 of 16?

19 Q. Yes. Down at the bottom, you will see
20 page 4 of 16 on Exhibit C, subcontract special
21 provisions.

22 MR. BUNDY: Judge, it says, subject
23 of special provisions here, and at the bottom, it
24 says page 4 of 16. I'm going be referencing
25 paragraph 14.

1 THE WITNESS: I see it.

2 BY MR. BUNDY:

3 Q. Do you see it?

4 A. Yes, sir.

5 Q. I'm going to ask you if I'm reading this
6 correctly. This is in the middle of this
7 paragraph 14. It is further understood and
8 agreed the contractors entered into a guaranteed
9 maximum price contract with owner --

10 COURT REPORTER: Could you slow
11 down?

12 MR. BUNDY: Sorry. It is further
13 understood --

14 THE WITNESS: Bill, stop for a
15 second. Are you on 4 of 16?

16 THE COURT: Page 4 of 16.

17 THE WITNESS: I don't know where
18 you're reading.

19 MR. BUNDY: Page 4 of 16, number
20 14.

21 THE COURT: You're in paragraph 14?

22 MR. BUNDY: Paragraph 14. It's
23 entitled, quote "no change", end quote,
24 agreement.

25 THE WITNESS: Now I'm with you.

1 BY MR. BUNDY:

2 Q. You got it?

3 A. Yes, sir.

4 Q. And in the middle of it, it says, it is
5 further understood and agreed that contractors
6 enter into a guaranteed maximum price, GMP
7 contract with owner to complete this project
8 based on the contract documents identified and
9 described in Exhibit A.

10 Accordingly, claims for additional costs
11 for inconsistencies in the contract documents
12 will not be recognized. Accordingly -- well,
13 subcontractor shall bear all costs of such claims
14 that may arise as they relate to this scope of
15 work. Did I read that correctly, Mr. Clements?

16 A. You did.

17 Q. Okay. Let's go to the next page, 5 of
18 16, number 22. It says here, document order of
19 precedence, read as follows.

20 In addition to the standard form
21 agreement, in the event of any conflict or
22 discrepancies in the terms of the contract
23 documents, this agreement, attached exhibits,
24 manual code or laws, the document order of
25 precedence shall be interpreted as the most

1 stringent requirement within the above as solely
2 determined by the contractor. Did I read that
3 correctly?

4 A. You did, sir.

5 Q. All right. And let's go to page,
6 Exhibit F-1, conditional waiver and release upon
7 progress payment.

8 THE COURT: Is that a separate
9 exhibit, Exhibit F-1?

10 MR. BUNDY: Yes, sir. It's F-1,
11 page 1 of 2.

12 THE COURT: All right.

13 MR. BUNDY: Do you got it?

14 THE COURT: Not yet.

15 MR. BUNDY: It says updated 8/30.
16 What it is, it's just a form.

17 THE COURT: Yeah.

18 BY MR. BUNDY:

19 Q. Exhibit F-1, Mr. Clements, is the form
20 that was required in this subcontract in order to
21 get payment, right?

22 A. Yes, sir.

23 Q. Okay. Let me read this footnote to you.
24 There's a blank line above it. Tell me if I'm
25 reading this correctly.

1 Describe here or set out in an
2 attachment, which must be identified here and
3 attached, all extras not included in the release.
4 Failure to describe any extras included shall be
5 a waiver and a release of any right to payment
6 for such work. Did I read that correctly?

7 A. You did.

8 Q. Okay. Let's go to page 14 of 16. Okay.
9 Do you see 66, which says, building information
10 modeling, BIM digital documentation?

11 A. Yes, I do.

12 Q. Do you see -- let me see if I'm reading
13 this correctly. All subcontractors listed above
14 shall be required to attend BIM kickoff meeting
15 led by Balfour Beatty; is that correct?

16 A. Yes.

17 Q. And who in this subcontract was to
18 provide the BIM work for the electrical?

19 A. The electricians.

20 Q. So the electrician was supposed to BIM
21 his own work, correct?

22 A. Yes.

23 Q. And the same thing is true for the HVAC
24 contractor and the plumber, correct?

25 A. And the fire protection.

1 Q. And the fire protection. They were --
2 the subcontractors all agreed to do the BIM,
3 right?

4 A. Yes.

5 MR. BUNDY: Okay. That's all I
6 have.

7 THE COURT: What was the last
8 clause? Where were we in this contract,
9 Mr. Bundy?

10 MR. BUNDY: On page 14 of 16 of
11 the --

12 THE COURT: Subcontract?

13 MR. BUNDY: Of the special
14 provisions, yes, Your Honor.

15 THE COURT: Got it.

16 REDIRECT EXAMINATION

17 BY MR. TERRY:

18 Q. Now, Mr. Clements, you just testified
19 about some attachments. I believe it was
20 specifically Exhibit F. Do you recall that?

21 A. Yes.

22 Q. All right. Now, you don't -- you don't
23 know whether Exhibit F was actually attached to
24 the contract Watson signed, do you?

25 A. Do I know if --

1 Q. Do you know if Exhibit F was attached to
2 the copy of the contract Watson signed? You
3 don't know, do you?

4 A. Not technically, no.

5 Q. Okay. And then, if you will also look
6 just behind Exhibit G, there's an application for
7 payment, and then beyond that, there appears to
8 be a schedule. Do you see that?

9 A. You want Exhibit G? Is that what you're
10 looking at?

11 Q. Beyond Exhibit G. Right at the G,
12 you'll see the -- G is the application for
13 payment.

14 A. I see it.

15 Q. And then right behind that, there's what
16 appears to be a schedule of some sort. Do you
17 see that?

18 A. Yes, I see it.

19 Q. Okay. Now, it's hard to read, but if
20 you'll look down at the bottom there, in the
21 right-hand corner, what's the date on that
22 schedule?

23 A. 3/25/15.

24 Q. Okay. Now, if you will turn to the
25 front page.

1 A. Of?

2 Q. Of the contract. What's the date of the
3 contract?

4 A. 3/20/15.

5 Q. Watson did the BIM for the project,
6 right?

7 A. Sir?

8 Q. Watson did the electrical BIM for the
9 project, right?

10 A. They did.

11 Q. And you don't have any complaints about
12 Watson's BIM on the project, do you?

13 A. No. Well, to be honest with you, Watson
14 did not participate early on in the process. It
15 wasn't until later in the process that they did
16 become involved in it, and that became a little
17 bit of a challenge because of clearances,
18 particularly as it related to recessed lighting
19 and such.

20 Q. You don't know why Watson didn't
21 participate?

22 A. No, I don't.

23 Q. You reviewed the change orders on the
24 project, right?

25 A. Yes.

1 Q. And --

2 MR. BUNDY: Your Honor, I object.
3 This is not an appropriate reply.

4 MR. TERRY: Mr. Bundy raised the
5 issue of what he called a -- if I can get to
6 paragraph here -- no change agreement. He asked
7 him about the portion of the paragraph of the
8 contract on page 4 of 16 called no change
9 agreement. So I think I'm entitled to ask him --

10 MR. BUNDY: I will withdraw the
11 objection.

12 THE COURT: Yeah, you may.

13 BY MR. TERRY:

14 Q. And so when you reviewed -- you reviewed
15 change orders before they were sent up to the
16 architect for approval, right?

17 A. Briefly.

18 Q. Okay.

19 A. They went to the architect and engineer
20 of record for entitlement purposes, otherwise I
21 wouldn't waste my time on them.

22 Q. Okay. And so there were in fact
23 electrical changes to this project that changed
24 the electrical work on the project, right?

25 A. Yes.

1 Q. Okay. So it wasn't the fact that there
2 was not really a no change agreement. There were
3 changes made, right?

4 MR. BUNDY: Objection. He's asking
5 the question to testify in contrary to a written
6 document, about a document he wasn't a party to.
7 All he's done is identify it.

8 THE COURT: Well, he's asking him a
9 factual question. Overruled. You can answer
10 that.

11 THE WITNESS: Yes.

12 MR. TERRY: That's all I have.

13 MR. BUNDY: Nothing else from me,
14 Judge.

15 MR. WINDLE: Three quick questions.

16 THE COURT: All right, sir.

17 CROSS-EXAMINATION

18 BY MR. WINDLE:

19 Q. Isn't it true that neither Old North
20 State or Lithko had BIM obligations on the
21 project?

22 A. I don't know that.

23 Q. Okay. You previously testified that the
24 project was generally on time when you reached
25 the sixth floor of the structure going up; is

1 that accurate?

2 A. No. It was five months late.

3 Q. By the time you reached the sixth
4 floor --

5 A. Oh, sorry, the top out was --

6 Q. Not top out. When you reached -- were
7 ready to begin work on the sixth floor, you
8 previously testified that the project was
9 generally on time; is that correct?

10 A. Well, if I did, then the record stands,
11 but when I think about it, that's not the case.
12 It was three months late out of the ground.

13 MR. WINDLE: Okay. We will let the
14 record stand. No further questions.

15 THE COURT: Okay. Mr. Hildebrand?

16 MR. HILDEBRAND: Yes, sir, just
17 very briefly.

18 MR. BUNDY: Your Honor, what are we
19 doing now?

20 THE COURT: I'm going to allow him
21 to ask questions.

22 MR. BUNDY: You're going to allow
23 him to ask questions?

24 THE COURT: Yes. Go ahead.

25 MR. HILDEBRAND: Just a few, very

1 few.

2 CROSS-EXAMINATION

3 BY MR. HILDEBRAND:

4 Q. Just a few, Mr. Bundy asked you about
5 the BIM that was provided in the Watson contract.
6 Do you remember that?

7 A. Yes.

8 Q. Okay. So just to clarify -- I think
9 we've been through this before, but just so we're
10 on the same page, a general contractor and its
11 subcontractor can have an agreement that the
12 subcontractor is going to BIM the design
13 documents to find clashes, correct?

14 A. They can.

15 Q. Right. They can do that regardless of
16 whether there is any obligation to do so or not
17 in the general contractor's contract with the
18 owner, correct?

19 A. Seems logical, yes, of course.

20 Q. Right. And I think we went through
21 this. In Balfour's contract with the owner,
22 there was no requirement for BIM, correct?

23 A. No written requirement.

24 Q. Right. And likewise, in the architect's
25 contract with the owner, there was no obligation

1 for BIM, correct?

2 A. Not that I recall.

3 Q. All right. So the BIM services that
4 Balfour provided on this job identified the
5 clashes, which was appropriate, and then the
6 clashes were identified to the designer, the
7 architect, through RFIs, correct?

8 A. Well, the -- I just want to make sure I
9 understand your question.

10 Q. Yeah.

11 A. So the architect and its subcontractors
12 worked in real time in the BIM process. So as a
13 consequence of those meetings, the impacts were
14 discovered, and the architect took action to
15 that.

16 Q. Right. But the point is that, what was
17 discovered were --

18 A. Clashes.

19 Q. -- the aspects of the drawings that were
20 uncoordinated and contained busts, correct?

21 A. Correct.

22 Q. And then the architect, which was
23 appropriate, it would issue a clarification or a
24 revision to its design documents to tell the
25 contractor, here's what I want you to do to move

1 forward, correct?

2 A. Yes.

3 MR. HILDEBRAND: Okay. Thank you.

4 MR. BUNDY: One question, Your
5 Honor, brought up by Mr. Hildebrand.

6 RECROSS-EXAMINATION

7 BY MR. BUNDY:

8 Q. You said there was no written agreement
9 for BIM. Am I to understand an implication,
10 there was an oral agreement for BIM or an oral
11 understanding?

12 MR. HILDEBRAND: Your Honor, we've
13 already been through this.

14 MR. BUNDY: Well, we have, and he
15 brought it back up. He opened the door.

16 MR. HILDEBRAND: I didn't ask him
17 about --

18 MR. BUNDY: He asked him --

19 THE COURT: Wait a minute. Go
20 ahead.

21 MR. HILDEBRAND: I asked the
22 witness if there was a written provision in the
23 contract between Balfour and his client for BIM.
24 I also asked him if there was a written provision
25 in the architect's contract for BIM.

1 Mr. Bundy has gone on and on that the
2 contract is the contract and we have to enforce
3 the provisions. And the provisions are that oral
4 agreements are not included in the contract and
5 what might have been discussed before or
6 whatever. And in fact, you've already ruled on
7 this because --

8 THE COURT: All right. So the
9 objection is as to, was there something outside
10 of the contract; is that correct?

11 MR. HILDEBRAND: That's one
12 objection. The second objection is, I asked
13 Mr. Clements no questions about oral revisions to
14 contracts. He might have said there --

15 MR. BUNDY: Ain't no might.

16 MR. HILDEBRAND: He might have said
17 that there were no oral revisions, but that
18 doesn't open the door for Mr. Bundy to go into
19 what he thinks there might have been oral
20 revisions or prior discussions or anything else.

21 MR. BUNDY: All I'm asking him to
22 do, the witness --

23 THE COURT: State your question
24 again for me.

25 MR. BUNDY: Okay.

1 BY MR. BUNDY:

2 Q. In your cross-examination, you said that
3 there was no written agreement for BIM, right?
4 The implication that I took from that answer was
5 that there was an oral understanding of some sort
6 or that BIM was at least discussed; is that
7 correct?

8 MR. HILDEBRAND: Again, I --

9 MR. BUNDY: And my question is -- I
10 just wanted to explain the rest of his answer.
11 That's all I'm trying to do because he asked a
12 question.

13 He got an answer, which was not a
14 complete answer, and I want the witness to
15 answer -- give the entire answer, which is --
16 whatever it is. He may say, there is no
17 understanding. I don't know what he is going to
18 say.

19 THE COURT: Okay.

20 MR. BUNDY: But I think you need to
21 know it since he brought it up.

22 THE COURT: All right.

23 MR. HILDEBRAND: I didn't bring it
24 up, Your Honor.

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

1 going to allow him to -- if he can expand or
2 explain his answer, I'll allow it. So go ahead.
3 Objection overruled.

4 THE WITNESS: There was always an
5 understanding that the project would be BIM'd and
6 through Mike Baumbach and even at the
7 presentation that was done to the owner. It's
8 standard operating procedure in projects that are
9 complicated like this.

10 BY MR. BUNDY:

11 Q. And the BIM was going to be done by
12 Balfour Beatty and its subcontractors, correct?

13 A. And to be honest with you, I've never
14 had an agreement that had a formal amendment
15 noting BIM. We just always have done it. It's
16 always been -- in those appropriate projects,
17 it's been done.

18 MR. BUNDY: Thank you.

19 RE CROSS-EXAMINATION

20 BY MR. HILDEBRAND:

21 Q. Well, let's go through this then, if you
22 want to get down to it. The BIM is -- there are
23 two ways that BIM can be used, assuming
24 hypothetically if -- just assume hypothetically
25 that we wanted -- somebody wanted to use BIM on

1 this project. We've agreed that it was not
2 required by the written contract, correct?

3 A. Correct.

4 Q. All right. And in fact, you've
5 testified that the only thing that governs in
6 this case is what's in the written contract.
7 It's not oral agreements, it's the written
8 contract, correct?

9 A. I'm not an attorney.

10 Q. That's your understanding?

11 A. That's my understanding.

12 Q. Right. That's how you work as a --

13 A. Right.

14 Q. -- construction manager?

15 A. Yes.

16 Q. You've got to look at the contract,
17 what's in the contract, if it's in there. Oral
18 thing don't matter, correct?

19 A. Correct.

20 Q. All right. So the way that BIM can work
21 and should work is that, both the contractor puts
22 the documents into an electronic 3D form and the
23 architect puts the documents into an electronic
24 3D form, correct?

25 A. Are you talking about the precedent and

1 how this was done?

2 Q. In order for BIM to work most
3 efficiently, both the architect and the
4 contractor should have BIM capabilities, correct?

5 A. Yes.

6 Q. Right. And in this case, have you read
7 the deposition of the architect, where he said
8 that they didn't --

9 MR. BUNDY: Your Honor, now, that's
10 got to be objectionable. Have you read the
11 deposition of the architect in this case? I
12 mean, how can that possibly be evidence?

13 MR. HILDEBRAND: He opened the
14 door, Your Honor, about oral communications and
15 what it --

16 THE COURT: Just ask him the
17 question.

18 MR. HILDEBRAND: All right.

19 THE WITNESS: I haven't read the
20 architect's deposition, no.

21 BY MR. HILDEBRAND:

22 Q. Do you know whether the architect even
23 had any capability to even use BIM from its side?

24 A. I know that he did not have the
25 capability.

1 Q. Okay. So in order for him to have -- to
2 even use BIM, he needed to have the capability?

3 A. Well, we're confusing terms because the
4 contractor has the BIM. The architect has the 3D
5 modeling, the Revit model that the contractor
6 takes and incorporates into BIM. So architects
7 don't have BIM generally.

8 Q. They have to do -- an architect, if he
9 has Revit and BIM capabilities, then the way that
10 it should be done is he designs his project --

11 MR. BUNDY: Objection. Is this a
12 question?

13 MR. HILDEBRAND: Yes.

14 MR. BUNDY: He's now lecturing my
15 witness on construction. Ask him a question.

16 MR. HILDEBRAND: I'm about to get
17 to it, Your Honor, if he'll quit interrupting me.

18 THE COURT: All right.

19 BY MR. HILDEBRAND:

20 Q. All right. An architect can utilize BIM
21 in its design, correct?

22 A. I guess.

23 Q. Right. And in order to do that, they
24 have to have Revit, correct?

25 A. They would have to have Revit or

1 something.

2 Well, no not true, because in the case
3 of this project, the architect designed in CAD.
4 CAD files were provided to Balfour Beatty.
5 Balfour Beatty used another step in the software
6 translation to provide the modeling that it
7 needed to upload into BIM to determine conflicts.
8 So you don't have to have Revit.

9 Q. The architect, in order to design -- to
10 utilize BIM in his design, he has to have the
11 capability to use it, before it even gets to the
12 contracts, to the --

13 A. Yes. I understand. I'm just clarifying
14 your point.

15 Q. I understand. Okay.

16 A. You can have CAD and still get the BIM.
17 You don't have to design in Revit in order to use
18 BIM. That would be a falsehood.

19 Q. Well, in order for the architect to use
20 BIM, he would have to design it in BIM?

21 A. The architect can do it the same way --

22 MR. BUNDY: Objection.

23 A. -- the contractor would do it, I guess.
24 Because what happened on the project, the
25 architect designed --

1 Q. My simple question, Mr. Clements, in
2 order -- before the documents ever get to the
3 contractor, the architect can and should utilize
4 BIM because that's the state of the art, to
5 ensure that his documents are coordinated. Do
6 you agree with that?

7 A. No. The architect -- there's no reason
8 why somebody that designs in CAD can't have a
9 fully coordinated drawing. Now, is it
10 facilitated by a 3D modeling? Yeah, absolutely,
11 it is. And if you're saying, is the architect --
12 can the architect coordinate his drawings better
13 if he had employed a 3D modeling software, like
14 Revit, yes.

15 Q. And the reason that that is appropriate
16 is that, if the architect does that, then when
17 the documents are transferred to the contractor,
18 the coordination has already been done through
19 the 3D analysis and the BIM analysis?

20 A. Substantially that is the -- yeah.

21 MR. HILDEBRAND: Right. Thank you.

22 THE COURT: So I'm trying to
23 interpret what that was.

24 THE WITNESS: Sure.

25 THE COURT: So the architect

1 prepared the drawings, the hard copies, and then
2 there were CAD drawings; is that right?

3 THE WITNESS: Well, the architect
4 designs electronically in CAD.

5 THE COURT: Right.

6 THE WITNESS: But CAD is a 2
7 dimensional software.

8 THE COURT: 2 dimensional.

9 THE WITNESS: So, now, particularly
10 now, most of the -- in fact, I'm doing a large
11 manufacturing project right now, \$55 million.
12 The architect is designing in CAD.

13 I asked him from the very beginning, are
14 you going to design in Revit? Because I didn't
15 want to put out the RFP. I was going to ask him.
16 And he said, no, we're going to design in CAD.
17 So everybody knew what the design basis was.

18 Now, on this project, those files were
19 provided to the contractor to do -- to put in the
20 BIM. And there was a second stage that those
21 drawings had to go through in order for them to
22 be modeled in BIM.

23 And Balfour Beatty did that. That
24 was -- they took it upon themselves to do that.
25 And the subcontractors worked in that medium to

1 identify conflicts. And that's the way the
2 process generally works.

3 In newer projects now, the architect
4 designs in BIM, hands the model to the
5 contractor, and then the contractor comes back
6 and says, I found these conflicts. And then the
7 architect responds and fixes it. They do the
8 whole building at once.

9 THE COURT: Okay. All right. That
10 was just not how this one was done?

11 THE WITNESS: No.

12 THE COURT: And there was an
13 interim step that -- your understanding is that
14 Balfour Beatty did?

15 THE WITNESS: There was -- called
16 it a translation that went from 2D into a 3D
17 model so that Balfour could use their BIM. And
18 Balfour -- that was part of Balfour process in
19 terms of BIM'ing the project.

20 THE COURT: And that translation is
21 what allowed it to go into the 3D?

22 THE WITNESS: From 2D to 3D.

23 THE COURT: 3D.

24 THE WITNESS: Because it wasn't
25 designed in 3D; so it was an extra step that had

1 to take place.

2 THE COURT: And then BIM is the
3 ultimate project that they used --

4 THE WITNESS: Yes.

5 THE COURT: -- to find the clashes
6 and --

7 THE WITNESS: Exactly. That
8 actually determines the clash.

9 THE COURT: All right. Okay. I
10 gotcha. Thank you, Mr. Clements.

11 Anything further for Mr. Clements?

12 MR. TERRY: No, Your Honor.

13 THE WITNESS: Thank you, Judge.

14 MR. TERRY: Your Honor, can we take
15 a short break?

16 THE COURT: Sure. Let's take five
17 minutes.

18 (A recess transpired.)

19 MR. TERRY: Your Honor, Watson
20 calls Mr. William Brittelli.

21 THE COURT: All right.

22 (WILLIAM BRITTELLI, having first
23 been duly sworn, testified as follows:)

24 THE COURT: Please have a seat.

25

1 DIRECT EXAMINATION

2 BY MR. TERRY:

3 Q. Mr. Brittelli, would you please state
4 your full name for the record.

5 A. William J. Brittelli, Jr.

6 Q. And where do you work, Mr. Brittelli?

7 A. Watson Electrical Construction.

8 Q. What is your role at Watson Electrical
9 Construction?

10 A. I'm the vice president of construction
11 operations.

12 Q. For any particular area or for the whole
13 company?

14 A. Currently, the whole company.

15 Q. Okay. And were you at -- how long have
16 you been with Watson Electrical Construction?

17 A. 13 years.

18 Q. If you would briefly give me a history
19 of your experience working in an electrical
20 construction business.

21 A. Well, I have a two year degree in
22 construction management, four year apprenticeship
23 program. I worked at a family business in New
24 York for 20 years, and then currently, 13 years
25 at Watson.

1 Q. And what roles have you held while you
2 were at Watson?

3 A. I was a project manager initially,
4 Charleston division manager. Then I was the
5 regional South Carolina vice president, and
6 currently, the vice president for all three
7 states that we're operating in.

8 Q. And what states are those?

9 A. North Carolina, South Carolina, and
10 Virginia.

11 Q. As it relates to the Hotel Bennett
12 project, what was your role?

13 A. I was the division manager here in
14 Charleston.

15 Q. And did you ever visit the Hotel Bennett
16 project during construction?

17 A. Yes.

18 Q. Did you participate in any meetings
19 during construction of the project, about the
20 project?

21 A. Yes.

22 Q. And how often did you visit the project
23 site?

24 A. Probably initially, I would be there
25 monthly and then as the project got fully

1 underway, at least monthly, and then it became
2 probably every other week.

3 (WATSON EXH. 5 was marked for
4 identification.)

5 Q. I'm going to hand you what I've marked
6 for identification as Exhibit W-5. Tell me, have
7 you seen this document before?

8 A. Yes.

9 Q. What is the --

10 MR. BUNDY: One minute, Your Honor.
11 I was just handed this document. I would like an
12 opportunity to look at it.

13 It appears as though the second -- this
14 document dated May 14 does contain a subcontract,
15 and it says executed. The cover letter has never
16 been provided to us in discovery, and I don't --
17 as far as I know, we've never seen it before.

18 MR. TERRY: I will take the cover
19 letter off.

20 MR. BUNDY: Okay.

21 MR. TERRY: I will have to re-mark
22 that, Your Honor. Your Honor, I disagree that
23 this cover letter was not produced in discovery.
24 It absolutely was produced in discovery.

25 MR. BUNDY: If he represents it

1 was, then I accept that.

2 THE COURT: Okay.

3 MR. BUNDY: I just don't have any
4 independent recollection of ever seeing it.

5 THE COURT: Okay.

6 MR. BUNDY: If he represents he
7 did, he did it.

8 THE COURT: All right.

9 MR. TERRY: Then, Your Honor, I
10 would like to leave it as a part of the exhibit.

11 THE COURT: Okay.

12 MR. BUNDY: So he's going to put in
13 through your --

14 MR. TERRY: I'm going to leave it
15 in together.

16 MR. BUNDY: Huh?

17 MR. TERRY: I'm going to put it in
18 together just like this.

19 THE COURT: Altogether, okay. All
20 right.

21 BY MR. TERRY:

22 Q. Mr. Brittelli, what is the first page of
23 Exhibit W-5?

24 A. It's a letter that would accompany our
25 executed contract to Balfour Beatty from our CFO.

1 Q. Okay. And is this a document kept in
2 Watson's regular course of business?

3 A. Yes.

4 Q. All right. What's the date of it?

5 A. May 14, 2015.

6 Q. Okay. And have you seen this letter
7 before?

8 A. Yes.

9 Q. All right. If you look behind the
10 letter, what's the document beginning at the
11 third page of the --

12 A. That's the subcontract agreement between
13 Watson Electrical and Balfour Beatty.

14 Q. Have you seen it before?

15 A. Yes.

16 Q. And did you review Watson's subcontract
17 with Balfour Beatty for the Hotel Bennett
18 project?

19 A. Did I review it with Balfour Beatty?

20 Q. No. Have you reviewed it before?

21 A. Yes.

22 MR. TERRY: Okay. Watson would
23 move to enter into evidence Exhibit W-5?

24 MR. BUNDY: No objection.

25 THE COURT: No objection. Very

1 good.

2 (WATSON EXH. 5 was received in
3 evidence.)

4 BY MR. TERRY:

5 Q. All right. Let's look at the first
6 page, Mr. Brittelli. Again, it's dated May 14,
7 2015, and it says, Balfour Beatty Construction,
8 attention Mike Baumbach, senior vice president,
9 correct?

10 A. Yes.

11 Q. And it says, Dear Mr. Baumbach,
12 attached, please find the signed subcontracts,
13 Exhibits B, electrical work and C, subcontract
14 special provisions, insurance certificates and
15 our W-9 in support of the referenced project.

16 And then after that, it identifies that
17 Watson is making clarifications and exceptions to
18 the contract, correct?

19 A. Yes.

20 Q. Now, if you will take a look through
21 Exhibit No. W-5 and tell me if there's any lien
22 waiver forms attached.

23 A. What exhibit was that?

24 Q. It was the exhibit in your hand. Are
25 there any lien waiver forms attached to this?

1 A. I'm trying to find it. No.

2 Q. Is there a construction schedule
3 attached to Exhibit W-5?

4 A. No.

5 Q. Is Exhibit W-5 the contract that Watson
6 signed with Balfour Beatty?

7 A. Yes.

8 MR. BUNDY: Your Honor, I don't
9 have any objection, and I would -- to keep this
10 record a little cleaner, if we can, since he's
11 now testified as to the actual subcontract with
12 the appropriate amendments, I'm willing to
13 withdraw my exhibit so that you won't have but
14 one contract to look at because I'm in no
15 position to argue with this gentleman about what
16 the terms of his contract were.

17 THE COURT: Okay. So withdraw 156?

18 MR. BUNDY: Yes.

19 THE COURT: Okay.

20 (DFT. EXH. 156 was removed.)

21 MR. TERRY: Do you want to withdraw
22 the testimony about 156 as well?

23 MR. BUNDY: No, not the testimony.
24 Because I think Your Honor can look at the
25 testimony and see what he testified to is in this

1 agreement as well.

2 BY MR. TERRY:

3 Q. Mr. Brittelli, did Watson submit claims
4 to Balfour Beatty during the course of this
5 project?

6 A. Yes.

7 Q. And did you participate in the
8 preparation of this claim?

9 A. Yes.

10 Q. And did Balfour pay Watson for all the
11 claims it submitted?

12 A. We just received one payment for
13 208,000.

14 Q. Okay. And do you see why you received
15 that payment?

16 A. No.

17 Q. When did you receive that payment?

18 A. I believe it was Thursday last week.

19 Q. Has Balfour ever asserted a claim
20 against Watson related to the Hotel Bennett
21 project?

22 A. No.

23 Q. And has Balfour Beatty ever sent a back
24 charge to Watson related to the Hotel Bennett
25 project?

1 A. No.

2 Q. Were you ever aware, during the course
3 of the project, that Balfour Beatty had been paid
4 money for Watson's work that had not paid to
5 Watson?

6 MR. BUNDY: Objection. Leading.

7 MR. TERRY: I asked him if he was
8 aware.

9 THE COURT: Overruled. He can
10 answer.

11 THE WITNESS: Yes.

12 BY MR. TERRY:

13 Q. Were you ever aware, during the course
14 of the project, that Balfour Beatty had been paid
15 money by Library Associates for Watson's work
16 that Balfour Beatty did not pay to Watson?

17 A. No.

18 Q. And if you had been here, you would have
19 heard the evidence, but did Watson enter into a
20 joint defense prosecution and tolling agreement
21 with Balfour Beatty and other subcontractors
22 related to the disputes in this litigation?

23 A. Yes.

24 Q. And has Watson entered into any other
25 agreements that you're -- that -- with Balfour or

1 a subcontractor related to the disputes in this
2 litigation?

3 A. No.

4 Q. Has Watson entered into any other
5 agreements with any other person related to
6 disputes in this litigation?

7 A. No.

8 Q. What was the reason that Watson entered
9 into the joint prosecution tolling and defense
10 agreement -- or joint defense prosecution and
11 tolling agreement?

12 A. We were going to utilize the expert
13 witnesses that -- with Balfour Beatty.

14 Q. Was there any other reason?

15 A. No.

16 Q. Was that because you could save costs by
17 not hiring your own witnesses?

18 MR. BUNDY: Objection.

19 THE COURT: Why don't you rephrase
20 that.

21 BY MR. TERRY:

22 Q. Why would you want to share witnesses --
23 why would you want to share expert witnesses with
24 Balfour Beatty?

25 A. To save costs.

1 Q. Is there any other -- I may have asked
2 this, and I apologize if I did. Is there any
3 other reason Watson entered into the joint
4 prosecution defense and tolling agreement?

5 A. No.

6 Q. When Watson entered into this -- I'm
7 going to call it the joint defense agreement so I
8 can quit saying such long words. When Watson
9 entered into the agreement, did it do so with the
10 intent of causing any injury to Library
11 Associates?

12 MR. BUNDY: Objection.

13 THE COURT: Overruled.

14 THE WITNESS: No.

15 BY MR. TERRY:

16 Q. Did Watson enter into the agreement for
17 the intent of causing any damage to Library
18 Associates?

19 MR. BUNDY: Objection.

20 THE COURT: Overruled.

21 THE WITNESS: No.

22 BY MR. TERRY:

23 Q. Was Watson's intent entering into the
24 joint prosecution and defense tolling
25 agreement -- strike that. Was it Watson's intent

1 to inflate or to have duplicative liens on the
2 project when it entered into the joint
3 prosecution defense and tolling agreement?

4 A. No.

5 Q. Did you know that Balfour Beatty had
6 filed a lien on the -- strike that. Did Watson
7 file a lien on the project?

8 A. Yes.

9 Q. Okay. And at the time that you filed
10 the lien or had it filed on your behalf, did you
11 know that Balfour Beatty had filed a lien?

12 A. Yes.

13 Q. Okay. And how did you know that?

14 A. I believe it was on a file with Dave
15 Simonton.

16 Q. Did you know the amount of Balfour
17 Beatty's lien?

18 A. No.

19 Q. Do you know the amount of Balfour
20 Beatty's lien today?

21 A. No.

22 Q. Has Watson ever entered into any
23 agreement related to this litigation or the
24 project, the Hotel Bennett project, where it
25 intended to commit an unlawful act?

1 A. No.

2 Q. Has it ever entered into an agreement
3 related to this project where it intended to do
4 any wrongful conduct as it relates to Library
5 Associates?

6 A. No.

7 Q. To your knowledge, does anyone at
8 Watson, including yourself, have knowledge of any
9 negotiations between Balfour Beatty and Old North
10 State Masonry?

11 MR. BUNDY: Objection. He's asking
12 him now about other people's knowledge.

13 MR. TERRY: I will withdraw the
14 question and restate it.

15 BY MR. TERRY:

16 Q. Do you have any knowledge of -- strike
17 that. As the vice president of Watson Electrical
18 Construction, do you have any knowledge of
19 negotiations between Old North State Masonry and
20 Balfour Beatty?

21 A. No.

22 Q. As the vice president of Watson
23 Electrical, do you have any knowledge of
24 negotiations between Balfour Beatty and Lithko
25 Contracting?

1 A. No.

2 (WATSON EXH. 6 was marked for
3 identification.)

4 MR. TERRY: That would be W-6.
5 Your Honor, this exhibit is already, as I
6 understand it from the testimony -- I haven't
7 looked at the documents because they're too
8 voluminous in evidence -- in some of Library's
9 pay applications from Balfour Beatty to Library
10 Associates.

11 So I'm marking it as Exhibit W-6, but
12 if -- unfortunately, I don't have all the
13 documents. I can't go through them, and I don't
14 want to spend the time and money to do that.

15 THE COURT: Pay app number 26, is
16 that what this is?

17 MR. TERRY: Yes, Your Honor.

18 MR. BUNDY: You know, I don't know
19 about all of that. I want to look at the
20 document in front of you, which is unsigned, and
21 it doesn't even have this witness's name on it,
22 at least the first one. I don't know what this
23 is. So can I have about five minutes to look at
24 it or three minutes?

25 THE COURT: Take a look. It does

1 look like it's got an electronic signature on it,
2 the one I've got.

3 MR. MCDONALD: What number is it?

4 MR. TERRY: 26.

5 THE COURT: Pay app 26.

6 MR. MCDONALD: Pay app 28 is in
7 evidence as Defendant's 83.

8 MR. TERRY: Well, what I'm saying
9 is in Balfour's pay applications --

10 MR. MCDONALD: Just give me one
11 second, and I will tell you what's in evidence.

12 THE COURT: All right.

13 MR. TERRY: Your Honor, what I'm
14 saying is that, in Balfour's pay applications,
15 which have different numbers, each of the
16 subcontractor pay applications is already
17 attached and in evidence. That's all I'm
18 pointing out.

19 THE COURT: Okay. Is it part of a
20 different -- is that what you're trying to do?

21 MR. TERRY: I'm going to mark it.

22 THE COURT: Yeah.

23 MR. TERRY: But what I'm telling
24 you is, I -- I try not to do duplicative
25 exhibits.

1 THE COURT: Sure.

2 MR. TERRY: But the expense of
3 going through and looking to find where -- which
4 pay app is associated with pay app 26 for Watson
5 far exceeds the cost of entering this in
6 separately.

7 THE COURT: I'm with you. You
8 don't have any idea what pay app it would have
9 been attached to?

10 MR. TERRY: Well, so the problem
11 is, is that if you -- some of them came with a
12 cover letter, it would tell you what pay app was
13 in it. But then they kept leaving the same pay
14 app number on it.

15 THE COURT: Okay. All right.

16 MR. TERRY: But, no, I don't,
17 unfortunately. We don't have a date to figure
18 that out.

19 MR. BUNDY: Well, may I --

20 THE COURT: Sure.

21 MR. BUNDY: You know, some lawyers
22 represent some of these clients phenomenally and
23 were here every day, all day, representing people
24 who were -- you know, I was wondering, and
25 apparently, you know --

1 THE COURT: Well, the man got
2 COVID.

3 MR. BUNDY: Watson Electric is not
4 able to send somebody down here to keep up with
5 the exhibits. So that's a little bit, you know,
6 worrisome, I guess.

7 And I don't -- and he may not be
8 duplicating anything. I don't know what he's
9 doing. But I object to the exhibit. If it's
10 already in, it's already in. But -- and maybe I
11 want it in for some reason, but I'm not real wild
12 about this.

13 THE COURT: Okay.

14 MR. WINDLE: I'd just like to state
15 that it would have been very easy to keep up with
16 the exhibits if Mr. Bundy had provided us with
17 copies during the proceedings, but he didn't.

18 MR. BUNDY: No because it's not my
19 job to do your job.

20 MR. WINDLE: It's not my job to get
21 your exhibit.

22 THE COURT: You're tendering the
23 document?

24 MR. TERRY: Yes, Your Honor.

25 THE COURT: Pay app 26 from Watson

1 Electric, right?

2 MR. TERRY: Yes, Your Honor.

3 THE COURT: It's in evidence.

4 MR. TERRY: It's in evidence?

5 THE COURT: Yes.

6 MR. TERRY: Thank you.

7 (WATSON EXH. 6 was received in
8 evidence.)

9 BY MR. BRITTELLI:

10 Q. All right. Mr. Brittelli, what's the
11 date on pay application number -- is this pay
12 application number 26 from Watson Electrical to
13 Balfour Beatty related to the project?

14 A. Yes.

15 Q. What's the date of it?

16 A. 12/31/17.

17 Q. And if you will turn back to the -- the
18 second page begins the -- what we call the
19 schedule of values. Do you see that?

20 A. Yes.

21 Q. If you will turn back to the last page
22 of the schedule of values. And we're going to
23 look at line 201. Do you see that?

24 A. Yes.

25 Q. Okay. And what change order did Watson

1 bill for on line 201? Strike that. Did Watson
2 bill for change order 23 on line 201 of this
3 application for payment?

4 A. Yes.

5 Q. Now, if you will turn back to the next
6 page -- sorry, about four pages later, you will
7 see a document that says, change order log at the
8 top. Do you see that?

9 A. Yes.

10 Q. All right. What is that document?

11 MR. BUNDY: Your Honor, I object on
12 the grounds of relevance. What we're in now is a
13 negligence case against my client. That's the
14 only case that's pending. They've dropped their
15 liens. They've dropped the contract claims. I
16 don't -- and they're defending a conspiracy case.
17 I don't know what this has to do with any of
18 that.

19 MR. TERRY: We're defending a
20 conspiracy case, Your Honor.

21 THE COURT: I'm going to allow it.
22 Go ahead.

23 MR. BUNDY: Okay.

24 BY MR. TERRY:

25 Q. Okay. What is this portion of the pay

1 application that says, change order log at the
2 top? What is that?

3 A. That's a change order log out of our
4 change order software.

5 Q. Okay. And were you provided pay
6 applications -- on this pay application, was this
7 change order log included?

8 A. Yes.

9 Q. Okay. And what was the purpose of
10 providing this change order log?

11 A. Just to show what was approved, which
12 was -- what was still outstanding and the change
13 orders that were still owed to us.

14 Q. Okay. And so when you submitted this
15 pay application to Balfour Beatty, were you
16 notifying Balfour Beatty of the remaining change
17 order requests that were still outstanding?

18 A. Yes.

19 Q. And were you waiving your right to be
20 paid for these outstanding change orders?

21 A. No.

22 (WATSON EXH. 7 was marked for
23 identification.)

24 Q. Mr. Brittelli, I've handed you what I've
25 marked for identification as Exhibit W-7. What

1 is Exhibit W-7?

2 A. It looks like it's an application for
3 payment number 27 for January of 2018.

4 Q. Okay. And so is this Watson's
5 application for payment number 27 to Balfour
6 Beatty for the Hotel Bennett project?

7 A. Yes.

8 MR. TERRY: All right. Your Honor,
9 I move to --

10 MR. BUNDY: Same objection.

11 MR. TERRY: -- admit Exhibit No.
12 W-7 into evidence.

13 THE COURT: Allowed in evidence.

14 (WATSON EXH. 7 was received in
15 evidence.)

16 BY MR. TERRY:

17 Q. All right. Mr. Brittelli, what is the
18 date of Exhibit W-7?

19 A. The date it was signed was 1/15/2018.

20 Q. And if you will again turn to the last
21 page of the schedule of values, what's the last
22 change order that Watson billed to Balfour Beatty
23 on this application for payment?

24 A. The last one on this is change order 29.

25 Q. Does Exhibit W-7 also included Watson

1 change order log?

2 A. Yes.

3 (WATSON EXH. 8 was marked for
4 identification.)

5 Q. Mr. Brittelli, I hand you what I've
6 marked for identification as Exhibit W-8. What
7 is Exhibit W-8?

8 A. It appears to be an application for
9 payment number 30.

10 Q. From Watson to Balfour Beatty?

11 A. Yes.

12 Q. And is this an application for payment
13 related to the Hotel Bennett project?

14 A. Yes.

15 Q. What is the date of it?

16 A. It was signed on April 13, 2018.

17 MR. TERRY: Watson moves to admit
18 Exhibit W-8 into evidence -- moves to introduce
19 Exhibit W-8 into evidence.

20 THE COURT: Okay. Pay application
21 number 30?

22 MR. TERRY: Yes, Your Honor.

23 THE COURT: All right. In
24 evidence.

25 (WATSON EXH. 8 was received in

1 evidence.)

2 BY MR. TERRY:

3 Q. All right. Mr. Brittelli, if you will
4 look at the last page of the schedule of values
5 again. And we're going to look at Exhibit -- or
6 I'm sorry, line 207. Did Watson bill for
7 additional work on line 207?

8 A. Yes.

9 Q. And what did they bill for?

10 A. Well, the description is by retail. It
11 looks like \$306.92.

12 (WATSON EXH. 9 was marked for
13 identification.)

14 Q. Mr. Brittelli, I'm handing you what I've
15 marked as W-9 for identification. What is
16 Exhibit W-9?

17 A. I'm not familiar with this front page.

18 MR. TERRY: Okay.

19 MR. BUNDY: Pardon me?

20 MR. TERRY: He's not familiar --

21 THE WITNESS: I'm not familiar --

22 MR. TERRY: -- with the front page.

23 THE WITNESS: -- with this front

24 page.

25 MR. TERRY: Your Honor, I would

1 like to remove the front page, and I'm just going
2 to remark it if that's okay with you.

3 THE COURT: All right.

4 MR. TERRY: I'm going to remark the
5 second page.

6 BY MR. TERRY:

7 Q. All right. Mr. Brittelli, what is
8 Exhibit W-9?

9 A. It looks to be our application number
10 31.

11 Q. All right. And is this Watson
12 Electric's application for payment to Balfour
13 Beatty for the Hotel Bennett project?

14 A. Yes.

15 MR. TERRY: Your Honor, I move
16 Exhibit W-9 into evidence.

17 MR. BUNDY: Have you got it in
18 front of you, Judge?

19 THE COURT: I do.

20 MR. BUNDY: Okay. Well, it's
21 unsigned. It's got scratch throughs. It's got
22 apparently typing on top of computer writing.
23 You know, I'm not familiar with any of this, and
24 it's still irrelevant to a negligence case.

25 THE COURT: Okay.

1 MR. TERRY: It's a defense to a
2 conspiracy claim, Your Honor, related to their --
3 I guess they're claiming there's this -- some
4 lien issues that -- part of their conspiracy
5 related to the lien.

6 THE COURT: The filing of the lien?

7 MR. TERRY: That's what I
8 understand.

9 MR. BUNDY: Yeah. They filed an
10 excessive lien, there's no doubt about that.

11 THE COURT: Okay. All right.

12 MR. BUNDY: But that's how -- I
13 don't know what that's got to do with an unsigned
14 blank document that they just manufactured and
15 produced in the last day of a five week trial.

16 MR. TERRY: Hold on, excuse me.
17 It's not been manufactured and produced. Your
18 Honor, Mr. Bundy continues to insist on making up
19 whatever he wants and spewing allegations of
20 attorney misconduct. It's time for that to stop.

21 THE COURT: All right.

22 MR. BUNDY: Well, if you stop, I'll
23 stop. Look at this. I mean, they've got changes
24 on the inside of the document. What's the
25 number?

1 THE COURT: He can explain that, I
2 assume?

3 MR. TERRY: Your Honor, these were
4 produced to us by Balfour Beatty.

5 THE COURT: Okay.

6 MR. TERRY: This is how they were
7 produced to us.

8 MR. BUNDY: Wait a minute now.

9 MR. TERRY: I'm sorry.

10 THE COURT: I thought these were
11 y'all's documents?

12 MR. TERRY: I said that wrong.
13 These were our documents, but they were sent back
14 to us by Balfour Beatty with corrections. So we
15 would send in a pay application. Balfour Beatty
16 would make corrections. They would send it back.
17 This is what we got.

18 MR. BUNDY: Sure. Once it got
19 washed at the Egynte site. Once they closed that
20 laundry down and could take these -- take these
21 documents down there wash them and turn them into
22 something else, then they returned them back to
23 Watson. It's all part of the same scheme.

24 MR. HILDEBRAND: Your Honor, there
25 is no -- as you said at the very beginning,

1 you're the Judge and the jury. Mr. Bundy
2 continues to make unfounded allegations that are
3 not supported by any evidence of misconduct, and
4 it's inappropriate. And I would ask you -- the
5 Court to admonish him to stop. It's
6 inappropriate.

7 THE COURT: All right. Let's just
8 stick with the documents in evidence. I'm going
9 to allow it. He needs to be able to explain
10 something there.

11 MR. TERRY: Thank you.

12 THE COURT: So this is number what?
13 9 or 10?

14 MR. TERRY: 9, W-9.

15 THE COURT: Okay. W-9.

16 (WATSON EXH. 9 was received in
17 evidence.)

18 BY MR. TERRY:

19 Q. All right. Mr. Brittelli, if you will
20 again look at the last item on the schedule of
21 values. Line item 213, what change order -- did
22 Watson bill for change order -- I'm sorry, CCD
23 008, manager department on this application for
24 payment?

25 A. Yes, we did.

1 Q. Now, if you flip further back in the
2 document, you will see some -- maybe we can count
3 from the very back. You can see some documents
4 that say, daily time and material work report.

5 A. Yes.

6 Q. Do you see that?

7 A. Yes.

8 Q. All right. What is this document here?

9 A. If we were directed to do work on a T
10 and M basis, we would keep track of it on this
11 form, the hours and material.

12 Q. Unfortunately, these are hard to read,
13 but if you would look at the first one. What's
14 the date at the top left side?

15 I'll do it this way. On the very first
16 one, where it says date, it says, April 12, 2018.
17 Did I read that correctly?

18 A. Yes.

19 Q. Okay. And on the far right-hand side at
20 the top, it says CCN 174. Now, what is a CCN?

21 A. I'm not familiar with the -- it's
22 probably a directive that we receive.

23 MR. BUNDY: Objection. Move to
24 strike. Probably does not prove anything.

25 MR. TERRY: I will withdraw the

1 question.

2 THE COURT: All right.

3 BY MR. TERRY:

4 Q. Turn to the previous page. What is this
5 document?

6 A. It's a proposed change order.

7 Q. All right. And is this Watson's
8 proposed change order to Balfour Beatty
9 Construction?

10 A. Yes.

11 Q. Okay. And is it related to the Hotel
12 Bennett project?

13 A. Yes.

14 Q. All right. Up in the right-hand side,
15 there's a date. What's the date of it?

16 A. 8/12/2018.

17 Q. Okay. Maybe my eyes are bad or maybe
18 your eyes are bad, I don't know, but it looks
19 like 6/12/2018 to me.

20 THE COURT: It looks like 6/12.

21 THE WITNESS: 6/12, sorry.

22 BY MR. TERRY:

23 Q. And so right above that, what does it
24 say? CCN numbered what?

25 A. 174.

1 Q. All right. Turn to the next page again.
2 We showed -- talked about the date on it. Let's
3 go to the next page. This one is even harder to
4 read, but if you look at the date, it says,
5 6/12/2018. Did I read that correctly?

6 A. Yes.

7 Q. All right. Turn to the next page. It
8 says, the date, 5/31/2017. Did I read that
9 correctly?

10 A. Yes.

11 Q. Do these daily time and material work
12 reports, do they identify -- these dates that
13 we're going through, are those the dates that the
14 work was done?

15 A. Yes.

16 (WATSON EXH. 10 was marked for
17 identification.)

18 Q. Okay. Mr. Brittelli, I'm handing you
19 what I've marked for identification as Exhibit
20 W-10. What is Exhibit W-10?

21 A. Pay application 32.

22 Q. Is this Watson's pay application to
23 Balfour Beatty for this Hotel Bennett project?

24 A. Yes.

25 Q. And what is the date on the application

1 for payment?

2 A. July 10, 2018.

3 Q. Which application for payment number is
4 this?

5 A. Number 32.

6 Q. Now, if you look at the first page, and
7 it's kind of the right column at the top, where
8 it says, period to 7/31/2018. What does that
9 mean?

10 A. We generally get our bills into the --
11 our general contractors and they're forecast
12 through the end of the month.

13 Q. And so this is where you're billing
14 through the end of July 2018; is that correct?

15 A. Yes.

16 Q. Okay. All right. We're also going to
17 turn to the last page of the schedule of values
18 for this one. It should be about five pages in
19 or six pages in. Now, on Exhibit W-9, we saw
20 through line 217. Do you remember that, Spa
21 Retail?

22 A. Yes.

23 Q. What additional items has Watson billed
24 for on pay application number 32 below Spa
25 Retail?

1 A. Make up their changes, (inaudible) their
2 relocation and PFC out of (inaudible) relocation.

3 MR. TERRY: Your Honor, we move to
4 put Exhibit W-10 into evidence.

5 MR. BUNDY: Same objection.

6 THE COURT: All right. In
7 evidence.

8 (WATSON EXH. 10 was received in
9 evidence.)

10 (WATSON EXH. 11 was marked for
11 identification.)

12 BY MR. TERRY:

13 Q. Mr. Brittelli, I've handed you what I've
14 marked as Exhibit W-11 for identification. What
15 is it?

16 A. This is pay application 33.

17 Q. For what?

18 A. This is Watson's pay application 33 to
19 Balfour Beatty for -- well, it's marked the hotel
20 at Marion Square.

21 MR. TERRY: Your Honor, Watson
22 moves to enter Exhibit W-11 into evidence.

23 THE COURT: All right. In
24 evidence.

25 (WATSON EXH. 11 was received in

1 evidence.)

2 BY MR. TERRY:

3 Q. Mr. Brittelli, what period through -- to
4 is this application for payment?

5 A. October 11, 2018.

6 Q. Okay. And on the left-hand side of the
7 first page, do you see where it says retainage?

8 A. Yes.

9 Q. How much retainage is shown?

10 A. \$457,422.80.

11 Q. Okay. And then do you see where it says
12 current payment due?

13 A. Yes.

14 Q. How much is shown there?

15 A. \$60,636.13.

16 Q. Now, if you will also turn to the last
17 page of the schedule of values again and start at
18 line 218. Did Watson bill for CCD 22 on this
19 application for payment?

20 A. Yes.

21 Q. Did Watson bill for CCD 24 on this
22 application for payment?

23 A. Yes.

24 Q. And did Watson bill for CCD 30 on this
25 application for payment?

1 A. Yes.

2 Q. And did Watson bill for supplemental
3 instruction no. 67 on this application for
4 payment?

5 A. Yes.

6 (WATSON EXH. 12 was marked for
7 identification.)

8 Q. Mr. Brittelli, I've handed you what I've
9 marked for identification as Exhibit W-12. What
10 is Exhibit W-12?

11 A. It's a change order from Balfour Beatty.

12 Q. Okay. And is it to Watson for the Hotel
13 Bennett project?

14 A. Yes.

15 Q. Okay. And what change order number is
16 it?

17 A. Number 21.

18 MR. TERRY: Watson moves to enter
19 into evidence Exhibit W-12.

20 MR. BUNDY: Same objection.

21 THE COURT: I didn't get that one.
22 Did you put that one over here?

23 MR. TERRY: I haven't yet.

24 THE COURT: Okay.

25 MR. TERRY: I'm sorry. I thought I

1 handed one to you, but maybe not.

2 THE COURT: It's dated December of
3 '17?

4 MR. TERRY: It's dated December 5,
5 2017.

6 THE COURT: Got it. All right. I
7 will allow it.

8 (WATSON EXH. 12 was received in
9 evidence.)

10 BY MR. TERRY:

11 Q. Mr. Brittelli, His Honor just discussed
12 this, but what is the date of change order number
13 21?

14 A. December 5, 2017.

15 Q. And is this a change order from Balfour
16 Beatty to Watson for this project?

17 A. Yes.

18 Q. And if you look down at the bottom, it
19 has a signature of Dale Winovich. Who was he?

20 A. Dale was the project manager for Marion
21 Square.

22 Q. For who?

23 A. Watson Electrical.

24 Q. And what date does it identify that he
25 signed it electronically?

1 A. 12/11/17.

2 Q. Okay. And if you'll look to the right
3 of that, it says, Balfour Beatty Construction,
4 Nick Starcevic. What date does it show he signed
5 it?

6 A. March 8, 2018.

7 Q. Now, if you will turn over until we get
8 to Watson's proposed change order, and it would
9 be seven pages. The document says, proposed
10 change order. What is it?

11 A. This is the proposed change order sent
12 to Balfour Beatty.

13 Q. Okay. And what is the date on it?

14 A. June 19, 2017.

15 Q. So that's -- is that -- how many months
16 is that from the date that you submitted the
17 change order request until you got a signed
18 change order from Balfour Beatty?

19 A. Nine months.

20 Q. Now, if you go back to the third page,
21 there's a letter included in this change order.
22 And up at the top, it says that it's to Ms. Kim
23 Brown. What is the date of that letter?

24 A. June 20, 2017.

25 Q. And it says, Dear Ms. Brown, we are

1 submitting herewith our request for change order
2 number 107 in the amount of \$142,662, correct?

3 A. Yes.

4 Q. How many months before you -- before
5 Watson received a signed change order does this
6 letter indicate that it was sent to Library
7 Associates?

8 A. Sorry, say that again.

9 Q. Isn't it about nine months from the date
10 that the change request was sent to Library
11 Associates that Watson received a signed change
12 order?

13 A. Yes.

14 (WATSON EXH. 13 was marked for
15 identification.)

16 Q. This is 13. Mr. Brittelli, I've handed
17 you what I've marked for identification as
18 Exhibit W-13. What is it?

19 A. It's a change order from Balfour Beatty
20 to Watson Electrical.

21 Q. And is it related to the Hotel Bennett
22 project?

23 A. Yes.

24 Q. Okay. What change order number is it?

25 A. 24.

1 Q. And what's the date on it?

2 A. December 5, 2017.

3 MR. TERRY: Watson moves Exhibit
4 W-13 into evidence.

5 THE COURT: All right. In
6 evidence.

7 (WATSON EXH. 13 was received in
8 evidence.)

9 BY MR. TERRY:

10 Q. Mr. Brittelli, what is the date that
11 Balfour Beatty signed this change order?

12 A. March 9th, 2018.

13 Q. And what is the date that Watson
14 Electrical signed it?

15 A. December 11, 2017.

16 Q. Now, if you turn over to the fourth
17 page, we see Watson's change order request again,
18 correct?

19 A. Yes.

20 Q. What is the date of Watson's change
21 order request?

22 A. June 13, 2017.

23 Q. Okay. And that, again, is about nine
24 months from the time that Watson received the
25 executed change order?

1 A. Yes.

2 Q. Now, if you'll turn to the next page, we
3 have one of these daily time and material work
4 reports, right?

5 A. Yes.

6 Q. And what's the date of -- that this work
7 was performed?

8 A. February 23rd, 2017.

9 Q. So was there more than a year between
10 the time Watson did the work and the time it
11 received a change order for the work?

12 A. Yes.

13 (WATSON EXH. 14 was marked for
14 identification.)

15 Q. Mr. Brittelli, I've handed you what I've
16 marked as Exhibit W-14. What is Exhibit W-14?

17 A. It's a change order from Balfour Beatty
18 to Watson Electrical for the hotel at Marion
19 Square.

20 Q. Okay. And what is the date of it?

21 A. January 15, 2018.

22 MR. TERRY: Okay. Watson moves
23 Exhibit W-14 into evidence.

24 THE COURT: All right. In
25 evidence.

1 (WATSON EXH. 14 was received in
2 evidence.)

3 BY MR. TERRY:

4 Q. What date was change order -- is this
5 change order 27?

6 A. Yes.

7 Q. What date was change order 27 signed by
8 Watson Electrical?

9 A. March 16, 2018.

10 Q. And what date was it signed by Balfour
11 Beatty?

12 A. March 16, 2018.

13 Q. Okay. If you will go to the next page.
14 Let's look at this. It says, May 8, 2017,
15 Ms. Kim Brown. Let me go to the substance of the
16 letter.

17 Dear Ms. Brown, we are submitting
18 herewith our request for change order number 112
19 in the amount of \$14,292.44 to provide additional
20 work in accordance with the following
21 qualifications, correct?

22 A. Yes.

23 Q. All right. Now, if you will turn to the
24 next -- two more pages over. Do you see a
25 document that says, proposed change order again?

1 A. Yes.

2 Q. Is this Watson's change order request
3 related -- or change order request related to
4 this change order?

5 A. Yes.

6 Q. Okay. And what is the date of Watson's
7 change order request?

8 A. November 7, 2016.

9 Q. So that was well over a year before
10 Watson got the change order -- an approved change
11 order, right?

12 A. Yes.

13 Q. From the change order request, turn over
14 three more pages. I'm sorry. I'll strike that
15 question.

16 (WATSON EXH. 15 was marked for
17 identification.)

18 Q. Mr. Brittelli, I hand you what I've
19 marked for identification as Exhibit W-15. What
20 is that?

21 A. It's a change order from Balfour Beatty
22 to Watson Electrical for the hotel at Marion
23 Square.

24 Q. And what is the date on it?

25 A. March 13, 2018.

1 Q. And what change order number is it?

2 A. Number 30.

3 MR. TERRY: Watson moves to put
4 Exhibit W-15 into evidence.

5 THE COURT: I will allow it. In
6 evidence.

7 (WATSON EXH. 15 was received in
8 evidence.)

9 BY MR. TERRY:

10 Q. Turn to the -- well, let's do it this
11 way. Look at the first page. What's the amount
12 of this change order?

13 A. \$3,996.08.

14 Q. Okay. And what is it for?

15 A. Added low voltage sleeves on floors one
16 and two.

17 Q. Now, if you turn to the second page, you
18 have a similar letter to what was in the other
19 pages. It says, June 29, 2017.

20 It's to Ms. Kim Brown, and it says, Dear
21 Ms. Brown, we are submitting herewith our request
22 for change order 144 in the amount of \$14,190 to
23 provide additional work in accordance with the
24 following qualifications. Did I read that
25 correctly?

1 A. Yes.

2 Q. Okay. And if you will turn over two
3 pages from there, what is that -- what are those
4 pages?

5 A. It's our proposed change order.

6 Q. All right. And what is the date of
7 that?

8 A. February 10th, 2017.

9 Q. And is that a change request over a year
10 before the change order was issued?

11 A. Yes.

12 Q. If you go back to the page that says,
13 proposed change order at the top. About halfway
14 down on the page, there's some smaller font. Do
15 you see that? It starts with this quote.

16 A. Yes.

17 Q. Would you read that for us?

18 A. This quote covers trade costs only. We
19 reserve the right to claim for impact and
20 consequential costs.

21 (WATSON EXH. 16 was marked for
22 identification.)

23 Q. Mr. Brittelli, I've handed you what I've
24 marked for identification as Exhibit W-16. What
25 is this document?

1 A. It's a change order from Balfour Beatty
2 to Watson Electrical for the hotel at Marion
3 Square.

4 Q. What change order number is it?

5 A. Number 22.

6 Q. And what is the date of it?

7 A. December 5, 2017.

8 MR. TERRY: Watson moves to
9 exhibit -- offers Exhibit W-16 into evidence.

10 THE COURT: In evidence.

11 (WATSON EXH. 16 was received in
12 evidence.)

13 BY MR. TERRY:

14 Q. Okay. Mr. Brittelli, what date was this
15 change order signed by Balfour Beatty?

16 A. March 8, 2018.

17 Q. All right. Let's look in the middle of
18 the first page. What is the amount for this
19 change order?

20 A. \$15,985.

21 Q. And what is it for?

22 A. Supplemental instruction 32.

23 Q. If you will turn over to the second to
24 the last page. What is that?

25 A. That's our proposed change order.

1 Q. Okay. And what is the date of that?

2 A. June 22nd, 2017.

3 Q. Okay. So that's nine months before you
4 received the change order; is that right?

5 A. Yes.

6 Q. Now, if you will look at the third page
7 of Exhibit W-16. There's a letter there dated
8 September 16, 2017 to Ms. Kim Brown; is that
9 correct?

10 A. Yes.

11 Q. It says, Dear Ms. Brown, we are
12 submitting herewith our request for change order
13 number 138 R2 in the amount of \$74,896. Did I
14 read that correctly?

15 A. Yes.

16 Q. I hand you Exhibit W-15 again. And if
17 you would look at Watson's proposed change orders
18 that are attached to the change order. What
19 dates were they submitted? Were they -- let's do
20 it this way. Were they submitted on the same
21 date?

22 A. No.

23 Q. What's the difference in the dates?

24 A. Our CCM 30 was submitted on June 22,
25 2017, and our CCM 15 was on 2/10/2017.

1 Q. Okay. And so was the change order
2 request associated with change order 30 for work
3 that -- for change order -- strike that. Was the
4 date of the change order request for change order
5 number 30 prior to the change order request for
6 change order number 22?

7 A. Yes.

8 (WATSON EXH. 17 was marked for
9 identification.)

10 Q. All right. Mr. Brittelli, I just handed
11 you what I've marked for identification as
12 Exhibit W-17. What is it?

13 A. It's a change order from Balfour Beatty
14 to Watson Electrical for the hotel at Marion
15 Square.

16 Q. Okay. And what change order number is
17 it?

18 A. 31.

19 MR. TERRY: Okay. Watson moves to
20 enter Exhibit W-17 into evidence.

21 THE COURT: Change order 31 in
22 evidence.

23 (WATSON EXH. 17 was received in
24 evidence.)

25 BY MR. TERRY:

1 Q. All right. Mr. Brittelli, what is the
2 date of change order 31, at the top?

3 A. April 13, 2018.

4 Q. Okay. And down at the bottom, when did
5 Dale Winovich sign it for Watson, according to
6 this document?

7 A. April 17, 2018.

8 Q. Okay. And when did Balfour Beatty sign
9 it?

10 A. June 19, 2018.

11 Q. Okay. And right in the middle of that
12 first page, what was this change order for?

13 A. Supplemental instruction 36 R1, L3
14 through 8, corridor (inaudible) revisions and
15 supplemental instruction 36 R1, guest room
16 revisions.

17 Q. Okay. And how much is the change order?
18 What are the two amounts included in the change
19 order?

20 A. \$72,368.19.

21 Q. Okay. Turn over to the third page. We,
22 again, have a letter from Balfour Beatty to
23 Ms. Brown again. This one is dated June 19,
24 2018, correct?

25 A. The letter to -- from Balfour Beatty to

1 Library Associates?

2 Q. Yes.

3 A. January 19, 2018.

4 Q. And this says, we are here -- we are
5 submitting herewith our request for change order
6 number 193 in the amount of \$99,761. Did I read
7 that correctly?

8 A. Yes.

9 Q. Turn over two pages. Down at the bottom
10 of that page -- at the top, it says, Balfour
11 Beatty Construction, hotel at Marion Square. And
12 then at the bottom, do you see where it says,
13 authorization granted by? Do you see that?

14 A. Yes.

15 Q. All right. What is the date that that
16 signature appears?

17 A. It looks like April 12, 2018.

18 Q. Okay. So that's the date before the
19 date shown at the top of the change order on the
20 first page of the document, right?

21 A. It's signing a pay app here.

22 Q. The first page of change order number 31
23 at the top says, April 13, 2018, correct?

24 A. Yes.

25 Q. The signature on the fourth page says,

1 April 12, 2018, correct?

2 A. Yes.

3 Q. If you go over to the next page, what's
4 the date of this change request from Watson?

5 A. February 10, 2017.

6 Q. So that's over a year before you
7 received the change order, right?

8 A. Yes.

9 Q. And if you keep turning, you get to a
10 second change request from Watson. What is the
11 date of it?

12 A. May 30th, 2017.

13 Q. Between February 10, 2017 and April 13,
14 2018, did Watson submit applications for payment
15 on this project?

16 A. Yes.

17 Q. When Watson submitted those applications
18 for payment in the associated documents, did it
19 waive the change orders that were -- or the
20 change requests that were issued in these change
21 orders?

22 MR. BUNDY: Objection. Calls for
23 legal conclusion. He's leading his witness, and
24 there's been no testimony this guy actually even
25 prepared any of these documents, which we can get

1 into on cross. But I mean, it's just -- that's
2 not even close.

3 THE COURT: Restate the question,
4 please.

5 MR. TERRY: Sure.

6 BY MR. TERRY:

7 Q. When Watson issued change -- or sorry,
8 pay applications between February of 2017 and
9 April of 2018, was it Watson's intent to waive
10 claims for the change orders that were issued in
11 these change order documents?

12 A. No.

13 MR. BUNDY: Objection.

14 THE COURT: Overruled.

15 How many more have you got, Mr. Terry?

16 MR. TERRY: I'm almost done.

17 THE COURT: All right.

18 (WATSON EXH. 18 was marked for
19 identification.)

20 BY MR. TERRY:

21 Q. Mr. Brittelli, I've handed you what I've
22 marked for identification as Exhibit W-18. What
23 is that?

24 A. This is a change order from Balfour
25 Beatty to Watson Electrical for the hotel at

1 Marion Square.

2 Q. And what is the date of it?

3 A. August 16, 2017.

4 Q. Okay. And did Balfour Beatty issue this
5 change order request to Watson? Oh, sorry,
6 strike that. Did Balfour Beatty issue this
7 change order to Watson?

8 A. Yes.

9 MR. TERRY: Now, Watson moves to
10 enter into evidence Exhibit W-18.

11 THE COURT: All right. In
12 evidence. Go ahead.

13 (WATSON EXH. 18 was received in
14 evidence.)

15 BY MR. TERRY:

16 Q. What's the amount of this change order,
17 Mr. Brittelli?

18 A. \$43,244.66.

19 Q. And what is the date of the -- what's
20 the change order number?

21 A. Change order number is 15.

22 Q. And what is the date of the change order
23 at the top of the first page?

24 A. August 16, 2017.

25 Q. If you will flip all the way to the

1 back. We will just work from the back forward.
2 There's a work order there. Now, what's the date
3 of that work order?

4 A. March 22nd, 2017.

5 Q. Okay. And is that -- was the work that
6 is shown on this work order performed on that
7 day?

8 A. Yes.

9 Q. Okay. And is that related to this
10 change order?

11 A. Yes.

12 Q. Okay. And if you will come forward a
13 page. What is the date on it?

14 A. March 24, 2017.

15 Q. And is that -- for each of the work
16 orders included in this change order, was the
17 work performed on the date identified on the work
18 order page?

19 A. Yes.

20 Q. All right. If you will turn to the --
21 it looks like the sixth page, you will see an
22 e-mail. It says, Starcevic, Nicholas at the top.
23 Tell me when you get there.

24 A. Okay.

25 Q. There's an e-mail here from James

1 Clements to Nick Starcevic and Jennifer
2 Faulkinberry dated February 6, 2017, correct?

3 A. Yes.

4 Q. What does it say? Let's actually look
5 at the e-mail below that, I apologize. In the
6 e-mail below that, there's an e-mail from Nick
7 Starcevic to Jim Clements and Jennifer
8 Faulkinberry on February 6, 2017. What does this
9 say?

10 A. Okay. We will need to start on L3 and
11 L4 since we will be hanging out on Monday. We're
12 assuming any necessary revisions should be
13 (inaudible). Please confirm. I will get with
14 our field staff to ask any necessary questions
15 prior to making revisions.

16 Q. All right. And then above that, we have
17 an e-mail that started talking about -- this is
18 from Jim Clements to Nick Starcevic on February
19 6, 2017. It says, that is correct. Marty Dale
20 took the daily tickets from Watson. What are
21 daily tickets?

22 A. The tickets that are on the back of this
23 change order.

24 MR. TERRY: I don't know what time
25 it is, Your Honor.

1 THE COURT: It's about ten after 1.

2 MR. TERRY: I assume there's going
3 to be a cross, so do you want to break now?

4 THE COURT: I would think so. Do
5 you want to break now and come back? I've got
6 one issue, which is I've got a hearing I've got
7 to get to at 2 o'clock over here. I'm hoping it
8 will be 30 minutes, but let's just plan to come
9 back at 2:45. All right? It's a little bit
10 longer than I'd like, but I've got to get this
11 other hearing done today.

12 MR. TERRY: Okay. You need to
13 admonish the witness.

14 THE COURT: I do. Mr. Brittelli,
15 you're not allowed -- we're going to take a
16 break. It's going to be a little longer than I
17 would anticipate, but we'll come back at 2:45, if
18 you would. You're not to speak with the lawyers
19 on the break. You're subject to
20 cross-examination and more questioning. All
21 right, sir?

22 THE WITNESS: Okay.

23 THE COURT: All right. Thank you
24 very much. Very good. See you then.

25 (A recess transpired.)

1 THE COURT: All right.

2 Mr. Brittelli, come on up. You're still under
3 oath. I hope you had a chance to get some lunch.
4 You're still under oath, and you're good to go.

5 All right. Mr. Terry?

6 DIRECT EXAMINATION

7 BY MR. TERRY:

8 Q. Mr. Brittelli, did Watson ever receive
9 additional compensation for signing any waivers
10 related to this project?

11 A. No.

12 MR. TERRY: That's all the
13 questions I have, Your Honor.

14 THE COURT: Okay. All right. Very
15 good. Anything?

16 CROSS-EXAMINATION

17 BY MR. BUNDY:

18 Q. So you are William Brittelli; is that
19 correct?

20 A. William J. Brittelli, Jr.

21 Q. And you are an officer of Watson?

22 A. Yes.

23 Q. And what office do you hold?

24 A. I'm sorry?

25 Q. What office do you hold?

1 A. I'm the vice president.

2 Q. Who is Dale Winovich?

3 A. At the beginning of this project, he was
4 a project manager.

5 Q. He was what?

6 A. A project manager.

7 Q. Is he here in the courtroom today?

8 A. No.

9 Q. Was he here earlier?

10 A. Yes.

11 Q. Okay. Why did he leave?

12 A. I don't know.

13 Q. And how long was he a project manager?

14 A. For Watson?

15 Q. Yes, on this job.

16 A. The entire time.

17 Q. Sir?

18 A. The entire time.

19 Q. The entire time. And did he live in
20 Charleston while -- during the job?

21 A. Yes.

22 Q. On the job every day?

23 A. I wouldn't think every day, no.

24 Q. Monday through Friday?

25 A. I wouldn't think, no.

1 Q. All right. So what were his other
2 duties other than this job in Charleston while he
3 was down here as project manager of this project
4 for Watson?

5 A. This was his project.

6 Q. So he only had one job to do in
7 Charleston, and that was it?

8 A. He may have had a small project here and
9 there, but that job was of size, so.

10 Q. Was he the highest ranking person with
11 Watson Electric on the job here in Charleston?

12 A. No.

13 Q. Who was?

14 A. That would be me.

15 Q. Pardon me?

16 A. That would be me.

17 Q. Okay. And how often were you on the
18 job?

19 A. Like I said earlier, at the beginning of
20 the job, probably not so frequent, but once the
21 build, the construction was (inaudible), I was
22 there at least monthly. And then, during the
23 job, as the work started getting more -- the
24 floor started getting done, we would have
25 meetings every other week.

1 Q. All right. So you didn't move down here
2 for this job?

3 A. No.

4 Q. And you drove down from Charlotte?

5 A. I live in Charleston.

6 Q. You live in Charleston. What other jobs
7 did you have -- and you lived in Charleston
8 during this job?

9 A. Yes.

10 Q. Okay. And what other projects did you
11 have in Charleston other than this one while you
12 were living here?

13 A. We would have several projects going on.

14 Q. Okay. Can you give me the names of the
15 projects, please?

16 A. Not off the top of my head.

17 Q. Well, how big were they?

18 A. This was the biggest job that we had.

19 Q. So you were here full-time in
20 Charleston, and Mr. Winovich was here full-time,
21 but you didn't work on the job full-time?

22 A. No.

23 Q. And you went once every other --
24 initially, how often? Once a month did you go?

25 A. I don't recall that far back.

1 Q. Huh?

2 A. I don't recall that far back.

3 Q. You don't recall that far back. Okay.

4 Did you take any records or keep any records?

5 A. No.

6 Q. And when you visited the job, what did
7 you do?

8 A. Well, I would attend a meeting and then
9 walk the job and see the progress of the job.

10 Q. And who did you report to?

11 A. Report what?

12 Q. Sir?

13 A. Report what?

14 Q. Report what was happening on the job.

15 Who did you report to, if anyone, about the work
16 going on this job?

17 A. That would be the president of the
18 company.

19 Q. Okay. And who is that?

20 A. Tom Headlee.

21 Q. Okay. Where is he?

22 A. He's not here.

23 Q. He's not here. And how often was he on
24 the job?

25 A. I couldn't tell you.

1 Q. All right. So did you ever talk to
2 Mr. Winovich? How often did you talk to
3 Mr. Winovich on the job, about this job, during
4 the job? Did you talk to him every day about the
5 job?

6 A. No.

7 Q. Every other day? What I'm trying to
8 understand is, if you were in Charleston you had
9 the job, the project manager was this other
10 gentleman, Winovich and you didn't work but, you
11 know, every other week or whatever it was and you
12 had other jobs and you can't remember what those
13 jobs were that you were doing the rest of the
14 time?

15 A. You're asking me questions about close
16 to six years ago.

17 Q. Correct, I am. And you can't remember?

18 A. No.

19 Q. Okay. Now, Exhibit --

20 MR. BUNDY: Judge, give me a second
21 to find them. I thought I had them straight.
22 I'm trying to get these exhibits straight here.

23 THE COURT: Okay.

24 BY MR. BUNDY:

25 Q. Dale Winovich, that's his name, right?

1 A. Yes.

2 Q. Did you have access to the Watson file?
3 Were you allowed to look at it?

4 A. Our own files, yes.

5 Q. Sir?

6 A. Our own files.

7 Q. Right. You had access to your own
8 files?

9 A. Yes.

10 Q. Were you ever denied any access to your
11 files by anyone?

12 A. No.

13 Q. Okay. And did you frequently review
14 letters that had been written to Mr. Winovich
15 about this case? Problems, delays, whatever it
16 might be? You were aware of what Winovich was
17 doing, right?

18 A. Yes.

19 Q. Okay. Because you were there at
20 least -- sometimes once a month, sometimes every
21 other week, but you went to meetings, right?

22 A. Yes.

23 Q. And you knew how to get in touch with
24 Mr. Winovich if you needed to?

25 A. Sure.

1 (DFT. EXH. 157 was marked for
2 identification.)

3 Q. I want to show you what's been marked
4 for identification as Exhibit 157 and ask you,
5 one, is this a letter written to Dale Winovich?

6 A. Yes.

7 Q. This is a letter, and it's addressed to
8 Watson Electrical in North Charleston, correct?

9 A. Yes.

10 Q. All right. And it's signed -- and it's
11 signed by Mr. Stanton, or at least his name is on
12 the back of it. It's not signed, like a lot of
13 these letters. But it has a BBC e-mail number,
14 Bates number, does it not? 01739514, 15, 16 and
15 17; is that correct?

16 A. Yes.

17 Q. And those are part of the books and
18 records of Watson Electrical kept in the ordinary
19 course of business, correct?

20 A. Yes.

21 MR. BUNDY: Your Honor, at this
22 point, I move to introduce it into evidence.

23 MR. TERRY: No objection.

24 THE COURT: This is No. 357,
25 correct?

1 MR. BUNDY: Yes.

2 THE COURT: Or 157, I'm sorry.

3 MR. BUNDY: 157.

4 (DFT. EXH. 157 was received in
5 evidence.)

6 BY MR. BUNDY:

7 Q. All right, sir. Now, let me get you a
8 copy because we're going to look at this
9 together. If you need a chance, since your
10 memory is not that good, if you need to read
11 through the letter and refresh your recollection,
12 I will be perfectly happy to give you some time.
13 Done?

14 A. Uh-huh.

15 Q. All right. I have a few questions.
16 Apparently, this refers to additional costs due
17 to schedule impacts, claims that were made by
18 Watson on August 4, 2017 and October 3, 2017; is
19 that correct?

20 A. Yes.

21 Q. All right. And when was this claim for
22 additional costs due to schedule impacts for the
23 claims dated August 4, 2017 and October 3, 2017,
24 transmitted to the owner?

25 A. I don't know.

1 Q. All right. You did not have a contract
2 with Library Associates, did you?

3 A. No.

4 Q. And what duties does Library Associates
5 owe Watson?

6 MR. TERRY: Objection, Your Honor.
7 Calls for a legal conclusion.

8 MR. BUNDY: He's suing us for
9 negligence, and I would like to know what duties
10 he contends we owe them.

11 THE COURT: All right. I will
12 allow it. Go ahead. You can answer it.

13 BY MR. BUNDY:

14 Q. What duties did Library Associates owe
15 Watson Electric, that you contend we negligibly
16 breached proximately resulting in damages?

17 A. I'm not aware.

18 Q. Of course you're not. And what are the
19 damages proximately caused by the negligence
20 you're not aware of?

21 A. The damages to who?

22 Q. To Watson Electric, the company you work
23 for and for whom you're sitting in that chair and
24 have taken the oath, that company.

25 A. I can't answer that.

1 Q. Okay. Now, it says -- now, this is from
2 David Stanton. Do you know David Stanton?

3 A. Yes.

4 Q. How do you know David Stanton?

5 A. He was on the project.

6 Q. Okay. Do you know if he testified in
7 this case or not?

8 A. I don't know.

9 Q. Okay. How often have you been here
10 during the trial of this case for the last five
11 weeks?

12 A. Today.

13 Q. Today. All right. It says here, to
14 summarize, both of the claims are requesting
15 additional compensation. As previously discussed
16 on more than one occasion, both of these claims
17 have been submitted without any backup that
18 substantiates any of these costs or provides any
19 explanation to how the costs were derived. Is
20 that a true statement or not?

21 A. No.

22 Q. Okay. Tell me what substantiation was
23 provided as of October 3, 2017?

24 A. There was always calculations submitted
25 with our potential claims.

1 Q. In August of '17 and October 3 of '17?

2 A. Well, I was a part of that so, yes.

3 Q. Okay. So this statement from
4 Mr. Stanton in writing to you, where he says
5 that, as previously discussed, both of these
6 claims have been submitted without any backup.
7 That's not true? He's lying. That's a
8 misstatement of fact?

9 A. He is asking for more backup. We
10 submitted backup, and he wanted further details.

11 Q. Okay. But we both -- I'd like to both
12 of us to speak English. This doesn't say more.
13 It says any. Do you understand the distinction
14 in this language between more and any?

15 A. Yes, I do.

16 MR. TERRY: Objection, Your Honor.

17 BY MR. BUNDY:

18 Q. Sir?

19 MR. TERRY: Objection, Your Honor.

20 THE COURT: Overruled. Go ahead.

21 You can answer that one.

22 Stand back for me. Don't get in his
23 face.

24 BY MR. BUNDY:

25 Q. Do you understand the difference in the

1 English language between the word more and the
2 word any?

3 A. I do, but I didn't write this letter.

4 Q. Okay. Well, the letter was written to
5 Watson Electric, and all I'm asking you sir, is,
6 the letter says that the claims were submitted
7 without any backup. That means none.

8 That's what the letter -- that's what
9 the author of the letter says. You're saying
10 he's lying. That's not true. You did submit
11 backup. He's lying in this letter? Is that what
12 you're saying?

13 A. No. I was saying that, we submitted
14 backup.

15 Q. As of October 3, 2017, when the letter
16 was written?

17 A. We submitted backup with both of our
18 claims.

19 Q. As of October 3, 2017, or do you know
20 when that backup was submitted?

21 A. It would have been submitted with the
22 claim.

23 Q. And when was the claim submitted?

24 A. We just -- the dates are in evidence.

25 Q. Okay. This letter is making false

1 statement of fact. Okay.

2 The next thing says -- if you read on,
3 it says, without any explanation to how the costs
4 were derived. Is that a true statement or not?
5 Was there information provided as to how those
6 costs were derived?

7 A. No.

8 Q. Okay. So that's at least a true
9 statement?

10 A. Yes.

11 Q. And then, let's look at the
12 inefficiencies. In both of these claims, you're
13 claiming \$467,069 in August and 53,461 in
14 October; is that correct?

15 A. Yes.

16 Q. Did you prepare this claim, Watson's
17 claim?

18 A. Not solely.

19 Q. Sir?

20 A. Not solely.

21 Q. Okay. And who else helped you?

22 A. There was Dale Winovich, and at the
23 time, our operations, David Farmer, who is no
24 longer with Watson.

25 Q. Where is he now?

1 A. I don't know.

2 Q. So the three of you put this together?

3 A. Yeah.

4 Q. Okay. You didn't have any experts
5 helping you, just the three of you did it?

6 A. Yes.

7 Q. All right. He asks this question. In
8 both of these claims, it appears you are buying a
9 35 percent factor for the total hours that Watson
10 has worked on this project to date. How did
11 Watson come up with a 35 percent factor? Can you
12 tell me how you came up with the 35 percent?

13 A. We follow production so we know exactly
14 how much we get per labor hour versus what we
15 should be getting. And this job was running 35
16 percent below production at that point.

17 Q. Is there a letter in response to this
18 from Watson back to Mr. Stanton saying, no, we
19 provided you with the backup, and yes, here's the
20 basis for the 35 percent? Or did this letter
21 just lay there unanswered?

22 A. No. Most of it would have been handled
23 on the job site. This was a formal, probably
24 after our meeting.

25 Q. But was there a written answer to this

1 letter from Watson Electrical?

2 A. I don't know.

3 Q. And secondly, are you assuming there was
4 an inefficiency throughout the entire project?
5 Was that the assumption of your claim, that there
6 was inefficiency throughout the entire project?

7 A. Yes.

8 Q. Balfour Beatty recognized this project
9 incurred numerous changes, but I believe Watson
10 requested additional time and compensation for
11 these changes, and the requested time was
12 provided to Watson to perform the additional
13 work. Any cost impacts as a result of the
14 additional changes should have been included in
15 the change order request. Is that true or not?

16 A. No.

17 Q. Balfour Beatty has requested additional
18 backup and explanation of these costs, but as of
19 today, we have not received any additional
20 information supporting these costs or how the
21 inefficiency were derived. Is that a true
22 statement?

23 A. Can you say that again?

24 Q. Sure. The last sentence, first
25 paragraph, number one, inefficiencies on the

1 first page. There's a statement of fact in here
2 from the general contractor's project manager,
3 our construction manager to Watson.

4 Balfour Beatty has requested additional
5 backup and explanation to these costs, but as of
6 today -- and it's dated October 3, 2017 -- we
7 have not received any additional information or
8 supporting -- any additional information
9 supporting these costs or how the inefficiencies
10 were derived. Is that a true statement or not?

11 A. Yes.

12 Q. Okay. It is true. All right. Let's go
13 to number 2. Effective delays on remaining work.
14 Watson is requesting 198,220 in August and
15 118,920 in October for lost production and
16 sequencing. I am confused and not clear as to
17 what this claim is actually for. Is the claim
18 for inefficiencies for work that has yet to take
19 place? What's the answer to that question?

20 A. No.

21 Q. How were the hours of labor factor
22 calculated? What's the answer to that question?

23 A. I think they just explained that to you.

24 Q. Is there a specific change order that is
25 impacting Watson from completing your work?

1 What's the answer to that question?

2 A. I couldn't be specific at this point.

3 Q. Okay. And he says again, we have
4 reviewed -- but once again, we have requested
5 additional backup and explanation supporting
6 these costs, but as of today, we have not
7 received any additional information. Is that
8 true or not?

9 A. I don't know.

10 Q. All right. Let's go to number 3. You
11 have submitted a claim for 231,655 in August and
12 another 110,791 for the October claim. I have
13 several questions about this claim.

14 First, from what I've been able to
15 interpret in the claim, Watson is assuming that
16 they will incur 1,408 man hours of overtime to
17 complete the project. Question, why would a
18 claim be made for overtime hours that have not
19 been incurred. Can you answer that question for
20 the Judge?

21 A. Yes. The building wasn't done.

22 Q. Sir?

23 A. The building wasn't done, and we were
24 being asked to work overtime.

25 Q. So you projected that in the future, you

1 would incur that overtime?

2 A. They told us when we were going to be
3 done with the building, and that's --

4 Q. Where's the evidence in this case of the
5 overtime that you've worked? The job is over
6 now. You're not planning on spending any more
7 overtime in the future on this job, are you?

8 A. No.

9 Q. Okay. So where's the records in this
10 case of the overtime?

11 A. We have them.

12 Q. Where are they? They're not in
13 evidence.

14 A. I mean, we've turned over everything
15 that we were supposed to turn over.

16 Q. Okay. Gotcha. Secondly, in your labor
17 rate, you've included project manager and
18 supervision in the blended rate.

19 Question, isn't this a double up with
20 the requested general condition's claim as well
21 as those positions, salaried positions that are
22 not subject to overtime pay. What's the answer
23 to that question?

24 A. I mean, this letter was written to Dale.
25 I don't know what he answered on this.

1 Q. Well, you don't have an answer to show
2 us either, do you? You don't have a letter in
3 response to show us what his answer was, do you?

4 A. We may.

5 Q. Well, if they put Mr. Winovich on the
6 stand, he can explain it all to us, right?

7 MR. TERRY: Objection. Calls for
8 speculation.

9 MR. BUNDY: But he's not here. Oh,
10 okay. I guess it would be speculation that
11 Winovich would know the answer to those
12 questions. Absolutely. I will agree with that.
13 BY MR. BUNDY:

14 Q. All right. Extended general conditions.
15 A claim has been submitted for 225,939 in August
16 and an additional 102,883 in October. First, if
17 I add both claims together, you're requesting an
18 additional 163 days of general conditions costs.
19 It appears you're using August 29 as your
20 starting point.

21 Balfour Beatty issued a claim to the
22 owner for Watson Electric for the structural
23 delays, which would take the contract completion
24 to October 23 of 2017. This claim has been
25 formally submitted.

1 And he goes again, once again, at the
2 end of that, Balfour has requested additional
3 backup supporting this claim but has not received
4 this information. This is the fifth or sixth
5 he's told that same lie, isn't it?

6 A. At the time this letter was written, the
7 building was nowhere close to being done. So a
8 lot of these -- this is basically putting in new
9 dates based upon what we were told, and that's
10 why there's several submissions on this. There
11 were many conversations. This seems to be
12 recapping things in October when we didn't finish
13 the building until two years later.

14 Q. This is a prediction of the future two
15 years hence, is it not?

16 A. This is based on what we were given from
17 Balfour as a finish date for the building.

18 Q. This is a prediction in the future of
19 things that are going to happen two years into
20 the future, is it not?

21 A. No, it's not accurate two years in the
22 future.

23 Q. Okay. So your testimony under oath here
24 today is you had already incurred all of these
25 costs? Even the overtime costs, you said, had

1 not been incurred yet. Which is it?

2 A. No. It was a prediction.

3 Q. All right. So it is a prediction of
4 what's going to happen in the future. This whole
5 claim is a prediction of what might happen in the
6 future?

7 A. Based upon the information that
8 was given --

9 Q. Exactly. But the best evidence of what
10 is going to happen in the future, once the future
11 is past, is to look and see exactly what
12 happened, right? Then you don't have to
13 speculate about what's going to happen in the
14 future, right?

15 A. (No audible response.)

16 Q. You don't know. Okay. That's fine.
17 All right. Now, Exhibit W-5, this is your
18 subcontract, correct? I also want to look at
19 W-1.

20 All right. So W-1 says -- it's dated
21 March 19, 2015. It's a go. Contract amendment
22 number 1, GMP is signed. They closed the loan
23 today and the permit is in hand. Here's the
24 notice to proceed, right?

25 Now the owner and Balfour Beatty are

1 obligated each to the other, one of them
2 instructing the other to pay for a hotel, right?
3 Is that correct?

4 A. Yes.

5 Q. Okay. All right. Now, let's look at
6 your subcontract. The subcontract, if you look
7 at it in the top right corner. Go to the third
8 page, sir.

9 A. The third?

10 Q. Well, it's the first page of the
11 contract. It's the third page of the exhibit,
12 the first page of the contract. You're right
13 there.

14 A. Okay.

15 Q. Now, it says subcontract, it says, dated
16 March 20, 2015, correct?

17 A. Yes.

18 Q. All right. And that would be the day
19 after the contract was signed with Balfour
20 Beatty, right?

21 MR. TERRY: Objection.

22 Q. Correct?

23 A. Yes.

24 Q. But let's look at the signature blocks.
25 Who signed on behalf of Watson Electric?

1 A. Carroll Lipscombe.

2 Q. And when did Carroll -- and what is
3 her -- she's the chief CFO?

4 A. He's the CFO.

5 Q. Okay. He's the CFO. Is he the one that
6 helped prepare this claim, too, or did he have
7 anything to do with this claim?

8 A. No.

9 Q. Okay. So your chief financial officer
10 had nothing to do with the claim?

11 A. No.

12 Q. Okay. So the subcontract was actually
13 first signed by Watson on the 13th of May, right,
14 which is roughly 60 days after the contract had
15 been signed with Balfour Beatty, correct?

16 A. Correct.

17 Q. And Balfour Beatty didn't sign it until
18 May 28, 2015, correct?

19 A. Correct.

20 Q. All right. So y'all were still
21 negotiating the subcontract because you had to --
22 it took you another 60 days to sign the
23 subcontract?

24 A. No. We weren't negotiating.

25 Q. Pardon me?

1 A. We were not negotiating it.

2 Q. Okay. But it still took you 60 days to
3 get around to signing it?

4 A. Yes.

5 Q. Do you recall why that took so long?

6 A. There's an internal process at Watson,
7 and it goes through many people before it gets to
8 the corporate office.

9 Q. Let's look at your letter, your
10 transmittal letter of May 14, 2015, and it's
11 actually Carroll Lipscombe's transmittal letter.
12 The third paragraph, Mr. Lipscombe wanted --
13 please provide a copy of the prime contract for
14 our use. Was that done?

15 A. I don't know.

16 Q. Who should know the answer to that
17 question?

18 A. Carroll Lipscombe.

19 Q. Should it have been done?

20 A. I'm sorry?

21 Q. Should the prime contract have been
22 provided to y'all by Balfour Beatty in order for
23 you to proceed with work?

24 A. Yes.

25 Q. Okay. Because the prime contract is

1 incorporated by reference in the subcontract,
2 correct?

3 A. It's mentioned in the contract.

4 Q. Okay. And it's incorporated by
5 reference, right? It's part of the contract?

6 A. I don't recall.

7 Q. Okay. Why would y'all even want to see
8 the prime contract? Why would Watson want to see
9 the prime contract?

10 A. Because of the language that was
11 prepared in this subcontract.

12 Q. And it has an effect on the subcontract,
13 correct?

14 A. I don't know that.

15 Q. You don't know that. Okay. Now, it is
16 true, is it not, that you personally have never
17 read or reviewed Exhibit W-5, which is the
18 subcontract, save and accepting the scope of
19 work. You never looked at the provisions of this
20 contract? It's true, isn't it?

21 A. No.

22 MR. BUNDY: Okay. Your Honor, I'm
23 going to open the original with your permission.

24 THE COURT: Yes.

25 BY MR. BUNDY:

1 Q. I will ask you one more time. Did you
2 read the subcontract between Balfour Beatty and
3 Watson? What's your answer?

4 A. Yes.

5 Q. Okay. And you read the entire contract?

6 A. I would say probably the things that I
7 normally would pay attention to.

8 Q. Okay. So you didn't read the entire
9 contract? Either you did or you didn't?

10 A. No, I didn't read the entire contract.

11 Q. You didn't. In fact, it's true that the
12 only thing you read was the scope of work.

13 That's true, isn't it?

14 A. No.

15 MR. BUNDY: Okay. Your Honor, if
16 you would turn to page 120 of his deposition,
17 please. Well, first, let's turn to page 93, just
18 to give you some background.

19 THE COURT: All right.

20 MR. BUNDY: Page 93.

21 THE COURT: I'm there.

22 MR. BUNDY: Are you with me? You
23 got it?

24 THE COURT: Should be his
25 introduction, correct?

1 MR. BUNDY: Right. 93, lines 1
2 through 9. And just so you'll know, the title of
3 this deposition is videotaped 30(b)(6) deposition
4 of Watson Electrical Construction Co., LLC,
5 through its designated representative, Dale
6 Winovich, William Brittelli, and Wendell Vinson.
7 Okay? On page 93 is the swearing in of
8 Mr. Brittelli.

9 THE COURT: Got it.

10 MR. BUNDY: And so he's testifying
11 for Balfour Beatty.

12 THE COURT: Okay.

13 MR. TERRY: Objection. It should
14 be for Watson.

15 THE COURT: It should be for
16 Watson.

17 MR. BUNDY: I mean, Watson. I'm
18 sorry.

19 BY MR. BUNDY:

20 Q. So I'm going to read these questions to
21 you and show you what you said under oath back
22 then. You do remember this, don't you, back in
23 October of 2019, or have you forgotten that as
24 well?

25 A. I remember I was there.

1 Q. You remember you were there, but you
2 don't remember what you said?

3 A. I don't know.

4 Q. Well, I'm going to read you the
5 question. Did you read the subcontract between
6 Balfour Beatty and Watson? What was your answer,
7 two, three years ago?

8 A. For scope of work.

9 Q. What it says is, I would have read it
10 for scope. You have it every -- you have to read
11 it accurately. This is a serious business.
12 We're talking about people under oath. So what
13 was your sworn answer back then?

14 A. I would have read it for scope.

15 Q. Question, for scope of work? Uh-huh,
16 right? That's what you said?

17 A. Yep.

18 Q. The next question was, but not for the
19 provisions of the contract. And what was your
20 answer when I asked you that under oath?

21 A. No, sir.

22 Q. What did that mean? It means you didn't
23 read it, correct?

24 A. No, it doesn't mean that.

25 Q. What does it mean?

1 A. It means that we read certain parts of
2 the contract. We have a job order form, so there
3 are certain parts of the contract that our local
4 divisions read before our folks start working on
5 this. So it's more than scope of work, and
6 that's what it means.

7 Q. But in your deposition, you said, when I
8 asked you, but not for provision of the contract,
9 and you said, no, sir. So you didn't -- at least
10 at that time, you didn't read the provisions.
11 You read the scope.

12 A. I read more than the scope.

13 Q. Okay. All right. Any reason why you
14 didn't disclose that to me at the time I asked
15 you under oath? No particular reason?

16 A. No.

17 Q. In your mechanic's lien, have you made
18 any claim for accelerations?

19 MR. TERRY: Objection, Your Honor.
20 Your Honor has already ruled on Watson mechanic's
21 lien, and your order says that any and all claims
22 related to Watson's mechanic's lien are resolved.

23 THE COURT: All right. I'm with
24 you. I'm going to allow it. Go ahead. He's on
25 cross.

1 BY MR. BUNDY:

2 Q. Have you made any claim for acceleration
3 in your mechanic's lien?

4 A. Acceleration?

5 Q. Yes.

6 A. I don't understand that.

7 Q. Well, when I asked you that question on
8 your deposition on behalf of Balfour Beatty, your
9 30(b)(6), have you made any claim for
10 acceleration, your answer was, no, correct? Is
11 that still your answer?

12 A. Yes.

13 Q. Okay. Have you made any claim for
14 delay?

15 A. Yes.

16 Q. What was your answer when I took the
17 30(b)(6) deposition? What did you say?

18 A. No.

19 Q. All right. Have you made any claim for
20 lack of coordination?

21 A. No.

22 Q. Okay. Have you made any claim for loss
23 of efficiency?

24 A. No.

25 Q. Have you made any claim for rescheduling

1 or resequencing?

2 A. No.

3 Q. Now, is that going to change? You're
4 getting ready to send us another bill next week,
5 or are we done with Watson's claims? Do you plan
6 to send us any more bills next week?

7 A. No.

8 Q. Now, you now know, sir, that Balfour
9 Beatty was paid money that they collected on
10 behalf of Watson, and Watson never got paid,
11 correct?

12 MR. TERRY: Objection, Your Honor.
13 How would he know that? He hadn't -- he's
14 testified he hasn't been here in court. So
15 absent someone telling him, it's hearsay.

16 MR. BUNDY: Your Honor, that's part
17 of the conspiracy claim. I mean, it's all part
18 of this conspiracy.

19 THE COURT: I'll allow it. Go
20 ahead. If you know, you can answer it. If you
21 don't know, you don't know.

22 BY MR. BUNDY:

23 Q. When did you find out, if ever -- well,
24 first let me ask you this: Do you know how much
25 money that belonged to Watson, Balfour Beatty

1 held in violation of the subcontract of the
2 general conditions of the contract?

3 MR. TERRY: Objection, Your Honor.
4 To the extent that he's asking him what I might
5 have told him, that's privileged, and I mean, he
6 can't answer the question.

7 THE COURT: All right. Don't tell
8 me what your lawyer told you or what y'all
9 discussed. But you can tell me what you know of
10 your own knowledge. Okay?

11 THE WITNESS: I know that we
12 recently have gotten a payment.

13 BY MR. BUNDY:

14 Q. And that payment was for money that was
15 paid on Watson's behalf by Library Associates to
16 Balfour Beatty, which Balfour Beatty never paid
17 to Watson, correct?

18 A. I don't know.

19 Q. You don't know. Okay. All right. Now,
20 it's true, is it not, that at any time Balfour --
21 Watson or any other subcontractor wanted to find
22 out whether or not the owner had paid Balfour
23 Beatty on account of money owed to subs, all you
24 had to do was call the architect, and he would
25 have told you, correct?

1 A. I don't know that.

2 Q. Okay. You don't know that. So you
3 don't know whether it's in the contract or not,
4 right? You just don't know. Let me ask it to
5 you this way: Did you ever call the architect
6 and ask the architect, have you paid -- have you
7 certified pay requests to Balfour Beatty for our
8 money, and in an effort to determine whether or
9 not your money was being held by Balfour Beatty?
10 Did y'all ever do that?

11 A. I did not.

12 Q. Okay. How much work do y'all do with
13 Balfour Beatty? Do y'all do a lot of work with
14 Balfour Beatty?

15 A. What is a lot?

16 Q. I don't know. \$10 million?

17 A. I don't know the answer to that
18 question.

19 Q. How much was your subcontract? What was
20 the amount of your subcontract?

21 A. \$3,963,792.

22 Q. All right. Let's look at -- I'm handing
23 you now, sir, W-8. It's in evidence, and it's
24 the application number -- pay application number
25 30 to Balfour Beatty from Watson Electric,

1 correct?

2 A. Correct.

3 Q. Is that correct?

4 A. Yes.

5 Q. And this is as of what time? April of
6 2018?

7 A. Yes.

8 Q. Signed by Dale Winovich?

9 A. Yes.

10 Q. And as of -- and the current payment due
11 on this pay request was \$2,969.40; is that right?

12 A. Yes.

13 Q. Was it paid?

14 A. I don't know.

15 Q. Sir?

16 A. I don't know.

17 Q. Okay. The original contract sum here is
18 roughly, let's say, 4 million bucks. Can we use
19 4 million bucks? It's 3 million now. Okay?

20 A. Okay.

21 Q. And as of this date, there have been
22 over a half a million dollars in improved change
23 orders, correct?

24 A. Yes.

25 Q. All right. And y'all agreed to those

1 and signed those change orders and got whatever
2 relief you got out of them, right?

3 A. We had signed them if they're on the
4 application.

5 Q. Did you have anything to do with filling
6 these out?

7 A. No.

8 Q. Let's turn to -- go back to where it
9 says, subcontractor and other (inaudible) partial
10 (inaudible) release of the lien. Are you with
11 me?

12 A. Uh-huh.

13 Q. All right. Let's read it together.
14 First off, let me ask you: Is this document,
15 Exhibit 8, a complete copy of this pay request?
16 Y'all didn't put in a partial document, did you?

17 A. It looks to be complete.

18 Q. Sir?

19 A. It looks to be complete.

20 Q. Okay. Because y'all wouldn't put in a
21 document that didn't include all the proper
22 parts, would you?

23 A. No.

24 Q. Okay. Fair enough. Well, let's look at
25 what you signed. It's entitled subcontractor of

1 (inaudible) partial payment. Watson Electrical
2 forwarding consideration, \$2,969.40.

3 It goes on to say, the second paragraph,
4 second line, that this is a waiver of all lien
5 rights and other claims which lienor has against
6 the property, the contractor and the owner for
7 all labors and materials, services performed
8 thereon including all extras and change orders
9 and all labors retained or employed (inaudible)
10 of improvements on the property.

11 All suppliers, subcontractors of
12 lienholders have furnished labors and materials,
13 services for the owner signed for the (inaudible)
14 improvements on the property for all able
15 services, et cetera.

16 And in bold print, it says, the
17 undersigned acknowledges that the contractor and
18 owner and other parties have a right to reply
19 upon this waiver and release and that making any
20 false statement shall constitute perjury and
21 punishment can be made in accordance with the
22 laws of the State of South Carolina, right?

23 Now, it talks in here about your other
24 claims, but there's nothing that this relates to
25 of any outstanding claims as of that date, is it?

1 This is a complete waiver, right?

2 A. No.

3 Q. It's not?

4 A. No.

5 Q. Okay. Show me how that works, sir.

6 A. We fill out these documents all the
7 time, our pay applications, and we routinely on
8 many jobs, all jobs, submit our pay applications
9 and then our paid for change orders and whatever
10 other items outstanding after these are executed
11 and signed.

12 Q. You testified on your direct examination
13 that you -- well, let me ask another question.
14 Mr. Watson's attorney, okay, is also the attorney
15 for Old North State and Lithko, correct? Your
16 lawyer sitting right here is also the attorney
17 for Lithko and Old North State, right?

18 A. Not that I know of.

19 Q. Not that you know of?

20 A. No, he's not.

21 Q. You weren't aware that Don Terry was
22 representing Old North State Masonry and Lithko
23 in this case?

24 A. He's not.

25 Q. He's not. Okay. So then since you

1 didn't know he was representing those
2 subcontractors, who also have claims and back
3 charges against you, then you wouldn't know what
4 he knows about the agreements between Old North
5 State and Lithko and Watson? Only these two
6 lawyers at the table know all about that, right?

7 A. I don't know what he knows.

8 Q. Okay. Do you think anybody else at
9 Watson -- I mean, you're an officer in this
10 company, right?

11 A. Yes, sir.

12 Q. And you are unaware that your lawyer is
13 also representing subcontractors who are also in
14 this case. Who else in your organization, to
15 your knowledge, is also unaware that Mr. Terry
16 also represents Lithko and Old North State
17 Masonry in this very same case? Who else is
18 unaware of that as far as you know at Watson?

19 MR. TERRY: Objection. Your Honor,
20 how would he know what other people know?

21 MR. BUNDY: Okay. Well, I can do
22 it the other way.

23 BY MR. BUNDY:

24 Q. Do you know whether or not Mr. Winovich
25 knows that Don Terry is y'all's lawyer and also

1 Lithko's lawyer and also Old North State's
2 lawyer?

3 A. I can't testify on what Dale knows.

4 Q. Okay. Would you have expected him to
5 tell you that?

6 A. How could I expect him to tell me if I
7 don't know what he knows?

8 Q. So you wouldn't expect somebody in your
9 firm to tell you that the lawyer that's
10 representing us in this case is also representing
11 other subcontractors in the same case, right?

12 A. I didn't know that.

13 Q. Okay. I got it. But you're surprised
14 to find it out, aren't you?

15 A. I still don't know that he is.

16 Q. All right. Now, you said that you
17 signed the joint defense agreement -- joint
18 defense and tolling agreement to save on expert
19 witness costs, right?

20 A. Right.

21 Q. Who told you to say that?

22 MR. TERRY: Objection.

23 Q. Who told you to say that?

24 MR. TERRY: Objection. I mean, if
25 he is asking what I told him to say, then he's

1 not going to answer the question.

2 THE COURT: Right. Okay. If you
3 talked to your lawyer, then you don't want to go
4 into that. But if that's what your testimony is
5 and that's your testimony is, then I'm happy to
6 hear from you.

7 THE WITNESS: My attorney.

8 BY MR. BUNDY:

9 Q. Okay. And when he told you to sign,
10 obviously, and you -- are you the one that signed
11 it?

12 A. He didn't tell me to sign it.

13 Q. Oh, he didn't?

14 A. No.

15 Q. All right. Let's go back to saving
16 money on experts. Y'all don't have an expert in
17 this case; so what money did you save expert --
18 save money on?

19 A. At the time the joint defense agreement
20 was talked about, it was for saving expert
21 witnesses with Balfour Beatty, what we withdrew
22 from the agreement before anything was ever done.
23 That's all I know, I mean.

24 Q. That's what you were told the purpose
25 was, correct?

1 MR. TERRY: Objection.

2 Q. But you weren't told that it also was to
3 allow the other subcontractors -- the manager to
4 conspire to get additional money out of this
5 case, were you? You weren't told that, were you?

6 MR. TERRY: Objection. He's asking
7 what I told him.

8 THE COURT: I will sustain it as to
9 any attorney-client confidentiality.

10 BY MR. BUNDY:

11 Q. All right. Sir, the agreement, the
12 tolling agreement, which I had and now I can't
13 find.

14 MR. BUNDY: Sorry, Judge.

15 THE COURT: That's all right.

16 BY MR. BUNDY:

17 Q. All right. If you would, sir -- do you
18 have the tolling agreement in front of you?

19 A. Yes.

20 Q. Have you ever read this document before?

21 A. Yes.

22 Q. Okay. Who signed it and when?

23 A. Tom Headlee signed it. I don't know.
24 June 19, 2019.

25 Q. And who signed it?

1 A. Tom Headlee.

2 Q. And the reason you signed it was to save
3 money on expert witness fees?

4 A. Yes.

5 Q. Okay. If you would, turn to page 6,
6 paragraph 7. I'm going to read this to you, and
7 I'm going to ask you a question. No disclosure
8 to third parties.

9 No information obtained as a result of
10 this agreement by a party or its counsel shall be
11 disclosed to any third-party, except
12 representatives as defined below of the party.
13 The party's attorney and other attorneys within
14 the same law firm, as party's counsel and the
15 party's litigation or claims consultants or
16 experts without expressed consent of the party
17 who first made the information available?

18 Each party agrees that common interest
19 materials that proceed pursuant of this agreement
20 shall not be provided to any person not involved
21 in making decisions regarding a matter of
22 subsequent or related proceedings.

23 If the purpose of the agreement was to
24 save money on expert witnesses, why wouldn't you
25 simply tell the owner you had such an agreement?

1 Why was there an agreement not to disclose the
2 existence of an agreement whose only purpose,
3 according to you, was to save money on expert
4 witness fees? Why would you do that?

5 MR. TERRY: Objection, Your Honor.
6 That's not what Mr. Brittelli has testified to.
7 He testified that Watson signed it for that
8 purpose.

9 BY MR. BUNDY:

10 Q. All right. Let's go to page 3. Let's
11 back up a page, I'm sorry. I apologize to you.
12 Let's just start with number 2, prosecution of
13 the subcontractor claims.

14 Subcontractors agree that the contractor
15 may, the contractor's sole and complete
16 discretion, pursue the subcontractor claims
17 against the owner through contractor in a
18 contractor's name as appropriate. Did I read
19 that correctly?

20 A. Uh-huh, yes.

21 Q. Now, let's turn over a page and look at
22 the last sentence. Now, the agreement was signed
23 on June 19, 2019, correct?

24 A. Yes.

25 Q. Okay. The last sentence says, if the

1 contractor elects not pursue any of the
2 subcontractor claims, contractors will notify
3 subcontractor in writing within 30 days of the
4 execution of this agreement.

5 Now, did you -- or did you receive any
6 writing or notice from Balfour Beatty on or
7 before July the 18th, 2019, in writing that
8 Balfour Beatty was not going to pursue your
9 claims in its case? Did you ever get such a
10 letter?

11 A. No.

12 Q. Okay. Then we go to B. This is what
13 happens if you don't get the notice. Well, I'm
14 asking you. Isn't this what happens if you don't
15 get the notice?

16 If the contractor elects not to pursue
17 any of the subcontractor's claims as provided in
18 paragraph 2A, contractor agrees, affected the
19 sub, may pursue such subcontractor claims.
20 That's what it says, right?

21 A. That's what it says.

22 Q. So when did y'all determine for the
23 first time that Balfour Beatty was not going to
24 be pursuing -- well, let me ask it to you this
25 way. I will withdraw that question. Did Balfour

1 Beatty or did they not pursue Watson's claims in
2 their claim against my client, Library
3 Associates?

4 A. I don't know what they did.

5 Q. Okay. Let's look down to D. Contractor
6 and subcontractors. Now, this agreement has more
7 than one subcontractor, correct? This agreement
8 has got more than one subcontractor to it, right?
9 There are other signatories?

10 A. This one only has Watson.

11 Q. Okay. Well, I will assert to you -- I
12 can show you every one of them, but the other
13 people that signed it were -- for our purposes
14 right now, were Old North State and Lithko. They
15 also signed it. Were you aware of that, that
16 they were also part of this joint defense and
17 tolling agreement?

18 A. No. I wouldn't have known that.

19 Q. So today was the first time you
20 determined that Lithko and Old North State was
21 also a signatory to this agreement?

22 A. All I -- we knew about what Watson did
23 with Balfour.

24 Q. You didn't know anything about these
25 other ones? Okay. Well, let's keep reading.

1 Contractor and subcontractors -- and that would
2 included Lithko and Old North State -- agree to
3 promptly meet. Did you meet with Lithko and Old
4 North State?

5 A. No.

6 Q. But you met with their lawyer, though,
7 didn't you because he was also your lawyer?

8 MR. TERRY: Objection. I
9 apologize. I don't know the dates of all of
10 these off the top of my head, but I'm not sure
11 that I was not with Lithko. I'm pretty sure I
12 was not Lithko and Old North State's lawyer at
13 the time this was signed.

14 MR. BUNDY: I don't think
15 Mr. Windle would be able to be here if Watson --
16 if this gentleman wasn't his lawyer because he's
17 here pro hac vice.

18 MR. TERRY: No, Your Honor.

19 MR. BUNDY: He has to have local
20 counsel.

21 MR. TERRY: At the time the
22 document was signed, I was not attorney of record
23 for Lithko and Old North State.

24 THE COURT: Okay. All right.

25 MR. TERRY: And I'm happy to

1 explain. Mr. Windle was in another firm and had
2 just joined our firm. There's another attorney.

3 THE COURT: Okay. All right.

4 BY MR. BUNDY:

5 Q. Promptly meet, negotiate. Did you do
6 any negotiations with Balfour Beatty about
7 this -- under the auspices of this pass-through
8 agreement?

9 A. No.

10 Q. And resolve all claims between
11 contractor and subcontractors, if at all
12 possible. Y'all didn't do that until yesterday,
13 right? Y'all finally resolved all of your claims
14 yesterday, right, or did you?

15 A. No.

16 Q. You didn't. Okay. Well, let's look at
17 that order. Until resolution of owner related
18 claims, subcontractors agree that it will assert
19 no claim against contractor except as necessary
20 to perfect lien rights. And contractor agrees it
21 will assert no claim against any of the
22 subcontractors. How does that relate to saving
23 money on expert fees?

24 A. Well, like I said, we entered into this
25 agreement. Nothing happened and we withdrew. We

1 didn't do anything.

2 Q. Subsequently, subcontractors and the
3 contractor respectively have the right to assert
4 claims against one another for any amounts not
5 recovered from the owner or others. What does
6 that mean to you? What did you understand you
7 were agreeing to?

8 A. I'm not a lawyer. I don't -- and like I
9 said, we never -- we entered the agreement.
10 Nothing happened, and we withdrew from the
11 agreement.

12 Q. And how long was the agreement in place
13 before you withdrew?

14 A. I don't know the date.

15 Q. A couple years?

16 A. I don't know the date.

17 Q. You just don't know. Okay. Tell me
18 about the agreement that y'all have entered into
19 with Balfour Beatty that resulted in a dismissal
20 of claims and the lien -- or not the lien but the
21 claims that you had with Balfour Beatty. What is
22 the agreement?

23 MR. TERRY: Objection. To the
24 extent he's asking what I told him, it's
25 attorney-client privilege.

1 THE COURT: You're getting ready to
2 go into what your lawyer told you. Tell me what
3 you understand the agreement was. You can tell
4 me that, what you understand the agreement was.

5 THE WITNESS: All I know is what my
6 attorney has told me.

7 THE COURT: Okay.

8 BY MR. BUNDY:

9 Q. Do you plan on getting any more money in
10 the future out of this case, out of Balfour
11 Beatty? Do y'all have some side deal to get some
12 more money down the line?

13 A. No.

14 Q. So y'all are done?

15 A. We don't have any plans.

16 Q. I'm going to read you what your lawyer
17 has put before the Judge, and it says -- this may
18 help you.

19 This is you and Balfour Beatty -- Watson
20 and Balfour Beatty are stipulating to dismissal
21 without prejudice, remaining claims -- without
22 prejudice -- stipulate dismissal without
23 prejudice, Watson's remaining -- without
24 prejudice, so Watson's remaining claims against
25 Balfour. What are Watson's remaining claims

1 against Balfour as you sit here today?

2 A. All I know is what we've collected or
3 we've won based on -- based on what my attorney
4 has told me.

5 Q. So you don't know what the remaining
6 claims are?

7 A. I don't, no.

8 Q. And it goes on to say, stipulation of --
9 who is Steven L. Smith?

10 A. He's the initial person in the law firm
11 that we talked to.

12 Q. Right. He was with Smith, Terry, and
13 Johnson, right?

14 A. I believe that's what it was.

15 Q. And that's -- but he's in Charlotte,
16 right?

17 A. He was.

18 Q. He was. Was Mr. Terry your lawyer then?
19 Was Mr. Terry your lawyer in August of 2018, or
20 was it Steven Smith?

21 A. We met with Steve Smith probably in
22 Charlotte, probably back in 2018.

23 Q. And then you went on to Mr. Terry? Is
24 that how you found Mr. Terry?

25 A. I didn't find Mr. Terry. He was part of

1 the law firm.

2 Q. Okay. All right. But Smith was your
3 lawyer in August of 2018, authorized to speak for
4 you?

5 A. To my knowledge, we met with Steve Smith
6 in Charlotte.

7 MR. TERRY: Objection, Your Honor.
8 I'm not sure if this is the same document you've
9 already excluded, but this is -- matter of fact,
10 I don't think it's even appropriate for you to
11 read it at this point.

12 This is communication between two
13 lawyers. It's the same type of document that
14 you've already excluded in this case and probably
15 the very same document. But communication
16 between my partner and the lawyer for Balfour
17 Beatty are -- they are not facts. They're not
18 relevant, and they're not admissible, for that
19 matter.

20 MR. BUNDY: There can be no
21 privilege because he's sending it to another
22 lawyer with another firm, one, and, two, it hits
23 all of the evidentiary requirements, and it
24 proves up conspiracy. It proves they've been
25 talking about this agreement well before the

1 agreement was signed.

2 You asked me the other day when -- you
3 know, this agreement, was that the first you
4 found of it? And I said, no, it started much
5 earlier. These lawyers got together to figure
6 this out and how they were going to hide these
7 things and how they weren't going to fight each
8 other, as Hildebrand pointed out in his letter.
9 We don't want to energize Bundy.

10 The thing they were trying to do was to
11 not allow or let my client know that there were
12 problems between these parties. And they hid
13 that evidence, and they came up with this scheme.

14 MR. TERRY: Objection.

15 MR. BUNDY: 801, South Carolina
16 Rule of Evidence 801(d)(2), admission by a party
17 opponent.

18 A statement offered against a party and
19 is, A, the party's own statement either an
20 individual or representative capacity, or a
21 statement for which the party has manifested an
22 adoption or belief it is true. A statement by a
23 person authorized by the party to make a
24 statement concerning the subject. Well, the
25 lawyer is a speaking agent.

1 Any statement by the party's agent or
2 servant. The lawyer is a speaking agent, not
3 just an agent but a speaking agent. Concerning a
4 matter within the scope of the employment or
5 agency. That's exactly why this lawyer was
6 hired. Made during the existence of the
7 relationship. We hit every one of them.

8 And then you get to E. Not only is it
9 not hearsay, a statement by a co-conspirator of a
10 party during the course and in furtherance of the
11 conspiracy. This was the initial seed that was
12 planted by Lawyer Smith that resulted in this
13 conspiracy.

14 MR. TERRY: Objection, Your Honor.
15 There's no evidence that --

16 THE COURT: Let him finish.

17 MR. BUNDY: That's all I was going
18 to say.

19 THE COURT: All right.

20 MR. TERRY: Your Honor, so this is
21 the very same document you have already excluded
22 when Mr. Bundy tried to have it admitted as --
23 through the deposition testimony. There was a
24 list of exhibits included, and this is the very
25 document that you excluded.

1 Furthermore, it goes to attorney work
2 product. It's simply not admissible. And
3 Mr. Bundy continues to make statements as though
4 these facts that he's saying are actually true
5 when he doesn't know what he is talking about.

6 MR. WINDLE: Your Honor, objection.

7 THE COURT: Well, let me tell you
8 what jumps out at me because I've been doing --
9 I've been doing some research on this common
10 defensive doctrine. And one of the things would
11 be that if the agreement -- and clearly, the
12 agreement was entered into post-litigation.

13 But this document tells me it was
14 prepared long before litigation was commenced.
15 This is August of '18. That sheds a new light on
16 it for me, I can tell you that right now.

17 MR. BUNDY: And that's why I --
18 that's why I've waited until now to get it in
19 front of you because I had to get the right
20 witness up here to get it in front of you.

21 MR. TERRY: Your Honor, this
22 gentleman can't even authenticate the --

23 THE COURT: You know, it may or may
24 not come into evidence through him, but let's
25 talk about that a little bit. But I'm telling

1 you, the date is what jumps out at me. I could
2 care less about the substance of the document
3 right now. But clearly there was some planning
4 going on long before the project was done. That
5 is of concern.

6 MR. TERRY: Your Honor, I'm going
7 to have to look at the dates, but I believe this
8 is after --

9 THE COURT: This is August 22,
10 2018.

11 MR. TERRY: I'm sorry, I'm going to
12 have to look back at the lien. But I believe
13 this is after liens were filed.

14 THE COURT: Well, you might want to
15 find that out for me. August 22 of '18, I think
16 that building was under construction, if I'm not
17 mistaken.

18 MR. WINDLE: Your Honor, I have an
19 objection.

20 THE COURT: It was not quite a year
21 old at that point in time.

22 MR. WINDLE: Objection. This
23 doesn't hide anything. If you look at the joint
24 agreement, page 3, paragraph -- subparagraph B,
25 it specifically says that the parties have the

1 right to pursue each other for claims one
2 another -- for amounts not recovered from the
3 owner. That's in the document.

4 THE COURT: Okay.

5 MR. WINDLE: The agreement. It's
6 not hidden from anybody.

7 THE COURT: All right.

8 MR. BUNDY: It doesn't make it
9 inadmissible or admissible. This is a ruling on
10 evidence. This is a document that's admissible
11 in evidence under the rule. And it proves --
12 it's proof of conspiracy. It's predates the
13 conspiracy agreement. And I've got more. I
14 mean, I'm not done yet.

15 THE COURT: All right. So the
16 objection is?

17 MR. TERRY: Well, first of all,
18 it's privileged common interest doctrine
19 throughout their communication. It indicates
20 attorney work product between parties, and
21 there's no one here to authenticate the document.

22 MR. BUNDY: Your Honor, the
23 document --

24 THE COURT: Well, Mr. Heuer is
25 sitting over there.

1 MR. TERRY: Well, he's not the
2 witness, Your Honor.

3 THE COURT: No, he's not. I don't
4 want to get him called in here either.

5 MR. BUNDY: But this has got a BCC
6 e-mail stamp on it. These documents have been
7 Bates stamped and produced in discovery.

8 THE COURT: All right.

9 MR. TERRY: Your Honor, every
10 document produced in discovery is not admissible.

11 THE COURT: I agree with that.
12 Just one second.

13 MR. BUNDY: If authenticity is the
14 problem, that takes care of it is all I'm saying.
15 But I'm glad to call Howard because I would like
16 to ask him a few questions, too. If they were
17 privileged, they would have taken the privileged
18 and put it on a privileged log, and we would have
19 talked about it. These were all produced.

20 MR. TERRY: Your Honor, they were
21 produced inadvertently.

22 MR. HILDEBRAND: Your Honor, I
23 think that this is one -- it's one of the
24 documents that was marked as privileged. I think
25 that it was. It's the same one, I think, that

1 you've ruled on.

2 More over, Your Honor, this document
3 says, attached, please find a defense and tolling
4 agreement. There's no evidence that what was
5 attached is what was entered into or it might
6 have been a one --

7 THE COURT: Well, according to
8 them, the conspiracy has begun, right? I'm
9 telling you, the law I'm reading is, if you
10 entered in a joint defense agreement once the
11 litigation has started, I think you're good to
12 go. I think that's been the presentation that
13 y'all have had throughout this.

14 What presents this in a new light to me
15 is the litigation had not yet commenced, but
16 there's a joint and defense and tolling agreement
17 going on. I don't know where we are with -- I
18 don't know where we are date-wise with the
19 mechanic's liens, but clearly --

20 MR. TERRY: There's a discussion.

21 THE COURT: This is in anticipation
22 of litigation. Your argument is, it's work
23 product, from that standpoint. But the question
24 is, the timing of the document and whether or not
25 that's considered. Okay? That's my concern.

1 All right?

2 MR. TERRY: Whether it mentions --
3 it mentions a potential agreement. It doesn't
4 even say there is an agreement.

5 THE COURT: Yeah. Well, here's a
6 draft of something.

7 MR. HILDEBRAND: It's a letter from
8 Steve Smith, who's not here, to John Heuer. And
9 the comment is from Steve Smith saying, maybe we
10 will have a joint defense agreement in this
11 matter at some point.

12 I mean, it was clear that there were
13 problems on this job. I mean, Balfour, earlier
14 in the job -- I mean, from very early, was
15 sending notices of delay, subcontractors had
16 delay claims. This was known by this point,
17 there is no question but that there were claims
18 from Balfour that were coming. That was very
19 clear.

20 We had sent notices of delay, and
21 there's a good chance that none of them had been
22 paid. The sixth floor claim had not been paid.
23 I mean, it wasn't like all of a sudden, the claim
24 popped up the first time. It had been building
25 up for a long time. We had sent by this time, I

1 think, 15 or 20 notices of delays.

2 It was included in our pay apps, where
3 we were saying we are reserving these rights for
4 claims. We hadn't been paid for those. So it
5 was understood that there may be -- may come a
6 time when there was going to be litigation, if
7 the parties couldn't resolve it.

8 So all this attorney was saying, maybe
9 at some point, we'll enter into a joint defense
10 agreement. That's it. It was not entered into,
11 very clearly, until after the lawsuit had been
12 filed.

13 I can refer you to the summary sheet
14 that we executed, Your Honor, which shows the
15 date that it was signed -- was not signed -- none
16 of them were signed until, gosh -- none of them
17 were fully excused until at least June of 2019.

18 THE COURT: After commencement of
19 the litigation, right?

20 MR. HILDEBRAND: Yes, sir.

21 THE COURT: Was this document in
22 y'all's privilege log, your original privilege
23 log that you submitted?

24 MR. HILDEBRAND: I will have to
25 look that up.

1 MR. TERRY: Your Honor,
2 additionally, there was -- mediation had already
3 occurred between some of the parties in this case
4 at the time of this. There was testimony that a
5 mediation occurred before the project was even
6 over.

7 THE COURT: Yeah. That was on the
8 level 6 claim, right?

9 MR. TERRY: It was.

10 THE COURT: I'm with you on that
11 one.

12 MR. WINDLE: Your Honor, may I make
13 one short, brief statement?

14 THE COURT: Sure.

15 MR. WINDLE: I would shed some
16 light on it by looking at it from this
17 perspective. This is part a pass-through
18 agreement. At this point in time, subcontractors
19 I know Lithko and Old North State had already
20 given notice of a claim. They know that's
21 coming. They're aware of it.

22 So now they're talking about how they're
23 going to handle it. That's it. They're going to
24 structure a pass-through agreement, just like the
25 ones I gave you earlier today. They've been

1 through it before. They know what's coming. Now
2 they're beginning to talk about it.

3 THE COURT: All right.

4 MR. HILDEBRAND: I think that's
5 right, Your Honor. I think that Lithko was filed
6 well before the lawsuit on that.

7 THE COURT: All right. Here's what
8 I'm allowed to do. Mark it for ID purposes for
9 now, whatever number you're up to. And I'm not
10 going to admit it in evidence as yet, but I want
11 it marked. For me, as I say, the significance of
12 it is the date.

13 MR. BUNDY: So it would be 158.

14 (DFT. EXH. 158 was marked for
15 identification.)

16 MR. HILDEBRAND: Excuse me, Your
17 Honor. I don't mean to interrupt you, but we're
18 looking to find right now the Lithko claim.

19 MR. BUNDY: This is all an
20 argument. All I'm trying to do is put in
21 evidence -- a piece of evidence in.

22 MR. HILDEBRAND: This was filed in
23 early 2018; so that communication apparently from
24 Lithko's attorney -- is it Lithko?

25 THE COURT: Well, this is Watson's

1 attorney. Mr. Smith was the original attorney as
2 he had testified.

3 MR. HILDEBRAND: By May of 2018,
4 Library had already asserted cross claims against
5 Balfour in the original Lithko lawsuit. So there
6 was pending litigation at that time by Library
7 against Balfour.

8 THE COURT: All right.

9 MR. HILDEBRAND: There's no
10 question about it.

11 THE COURT: All right.

12 MR. BUNDY: Can I proceed?

13 THE COURT: You may.

14 BY MR. BUNDY:

15 Q. All right. Now, we've already
16 established that Mr. Smith, Steve Smith was your
17 lawyer. And have you ever seen this e-mail?

18 A. No.

19 Q. What performance issues were being
20 sorted out in September of 2018, by and between
21 Watson Electric and Balfour Beatty?

22 A. Is it in this e-mail?

23 Q. Sir?

24 A. Is it in this e-mail?

25 Q. No, I'm just asking you. I mean, the

1 e-mail speaks to performance issues in 2018,
2 September 10, 2018. I'm asking you what
3 performance issues were being discussed in
4 September 10, 2018?

5 A. I couldn't answer that.

6 MR. BUNDY: Your Honor, I move to
7 introduce this document into evidence under the
8 same rubric, the same rule. Speaking agent,
9 conspiracy.

10 MR. TERRY: Same objection. He
11 hasn't authenticated the document.

12 THE COURT: Attorney
13 correspondence?

14 MR. TERRY: It's absolutely
15 attorney correspondence. And he first has to
16 authenticate the document, and he said he's never
17 seen it before.

18 THE COURT: This puts you in the --
19 some time in the September, October time frame.
20 Is that about the time you started taking over
21 for Mr. Smith?

22 MR. TERRY: I don't recall, Your
23 Honor.

24 THE COURT: All right. This is
25 what I'm going to -- I'm not going to allow you

1 to put that one in. You can ID it. I'm not
2 going to allow it in. All right?

3 MR. BUNDY: Okay. That would be --

4 THE COURT: 159.

5 MR. BUNDY: -- 159 for ID. So you
6 already wrote it down, I guess?

7 THE COURT: Yes, sir.

8 MR. TERRY: Your Honor, is it 158
9 you're not letting in?

10 THE COURT: 159, I think, was the
11 one we just marked. 158 I hadn't ruled on. It's
12 still ID only, though.

13 MR. TERRY: I didn't get any 159.

14 THE COURT: Just hand him that one.
15 Just hand him the original and let him look at
16 it.

17 MR. BUNDY: Yeah. I've got to find
18 it. Are you ready to go?

19 MR. TERRY: Same objection, Your
20 Honor.

21 THE COURT: That one is staying
22 out.

23 MR. TERRY: That one is staying
24 out?

25 THE COURT: Is that the one with

1 October 10th on the top of it?

2 MR. TERRY: Yes, Your Honor.

3 THE COURT: Yeah. That one is
4 staying out.

5 MR. TERRY: Thank you.

6 THE COURT: I have not ruled
7 finally on the other one, 158.

8 BY MR. BUNDY:

9 Q. All right. Exhibit W-13. You testified
10 about this earlier, \$350 change order, right?

11 A. Yes.

12 Q. Is that right?

13 A. Yes.

14 Q. Okay. Now, the change order, how
15 much did y'all -- what is this change order for,
16 the \$350. What is it for?

17 A. Lower soffits and concierge outgoing.

18 Q. Okay. How much labor is involved in
19 that \$350 change order?

20 A. Five and a half hours.

21 Q. How much?

22 A. Five and a half hours.

23 Q. Five and a half dollars?

24 A. Hours.

25 Q. Five and a half hours. Okay. And was

1 the -- what did y'all request in the change order
2 request? How much money did y'all request?

3 A. It's \$348.34.

4 Q. All right. So you got another buck and
5 a half more than you asked for, right?

6 A. Yes.

7 Q. All right. Did that buck and a half
8 cover the interest you lost, having to wait for
9 three months to get to 350 bucks?

10 A. I can't answer that.

11 Q. Did y'all appeal this change order?
12 Have you contested the change order?

13 A. Not to my knowledge.

14 Q. Well, what is the complaint? Y'all got
15 paid the money. You asked for a change order.
16 You got paid the money. What is the complaint?
17 What are you complaining about?

18 A. I don't understand what you mean by
19 that.

20 Q. Well, you sent a change order in and
21 asked for \$348. We send you -- we agree to \$350,
22 and you come into the courtroom, and you go over
23 it and are complaining about it. I want to know,
24 what is the complaint? What damages have you
25 suffered? Who has offended your sensibilities?

1 What has happened in this case that makes that
2 relevant to this case?

3 MR. TERRY: Objection, Your Honor.
4 He's mischaracterizing the testimony. He's not
5 complained at all about it. I put it into
6 evidence. He testified about the information on
7 it.

8 THE COURT: All right.

9 BY MR. BUNDY:

10 Q. Let's look at W-16, and this is for
11 \$8,000. And attached to it is a letter dated
12 September 16, 2017. Do you see that?

13 A. Yes.

14 Q. And is that letter signed?

15 A. Yes.

16 Q. Okay. Who signed it?

17 A. Alec Dooley.

18 Q. Okay. When was it mailed?

19 A. Sir?

20 Q. Pardon me?

21 A. I didn't hear the question.

22 Q. When was that letter mailed? Can you
23 testify under oath today that that letter was in
24 fact mailed on that day or that that letter was
25 ever actually received by Kim Bennett Brown?

1 A. I didn't send this letter.

2 Q. All you know is, it was sent to you by
3 Balfour Beatty with the representation that the
4 letter was sent on that day, but you can't
5 testify under oath it was actually sent or it was
6 actually ever received, can you?

7 A. I didn't prepare the letter.

8 Q. Okay. Because you didn't write it, and
9 Watson didn't write it, correct?

10 A. Correct.

11 Q. And every single one of the change
12 orders y'all put evidence, as it relates to
13 Balfour Beatty's letters, the answers would all
14 be the same, if I went through every one of them
15 with you, which is, one, you have no proof and
16 you can't testify under oath that any of those
17 letters were actually mailed, can you?

18 A. I can't.

19 Q. Okay. And you can't testify under oath
20 that they were ever actually received by Kim
21 Bennett Brown, correct?

22 A. Correct.

23 Q. And you weren't here in this courtroom
24 when Ms. Brown testified on that issue, were you?

25 A. No.

1 MR. BUNDY: Your Honor, can I have
2 five minutes maybe to sort of regroup? I'm about
3 finished.

4 THE COURT: Sure.

5 (A recess transpired.)

6 MR. BUNDY: Judge, I'm done. Thank
7 you.

8 THE COURT: All right. Anything
9 further for Mr. Brittelli?

10 MR. TERRY: I have one more
11 question.

12 THE COURT: Yeah. Go ahead.

13 REDIRECT EXAMINATION

14 BY MR. TERRY:

15 Q. Mr. Brittelli, is it true that Watson
16 signed the joint defense agreement to save costs
17 on expert witnesses?

18 MR. BUNDY: Objection. Leading.

19 MR. TERRY: I asked him if it was
20 true.

21 THE COURT: Go ahead.

22 THE WITNESS: Yes.

23 MR. TERRY: That's all I have.

24 THE COURT: All right. Hand him
25 this document 158 back.

1 MR. BUNDY: Sir?

2 THE COURT: Hand him that document.

3 Mr. Brittelli, were you aware -- take a
4 look at that document. It just talks about this
5 joint defense agreement.

6 Best I can tell, it's being presented,
7 at least in the first e-mail, which is on that
8 second page, being presented by Mr. Smith. Is
9 that -- just read that -- the two lines. Is that
10 your understanding, that he was presenting it?

11 THE WITNESS: Yeah. He presented
12 on -- that's what I would read.

13 THE COURT: All right. That was
14 your understanding, and that was during the
15 course and scope of his representation of you at
16 that time, and I think that's in August of 2018?

17 THE WITNESS: That would be, yes.

18 THE COURT: All right. I'm going
19 to allow that into evidence. That comes in.

20 MR. BUNDY: Thank you.

21 (DFT. EXH. 158 was received in
22 evidence.)

23 MR. TERRY: Your Honor --

24 THE COURT: It's not privileged.
25 There's absolutely no privilege there. You've

1 got two lawyers talking about stuff. There's no
2 client confidence.

3 MR. TERRY: Your Honor, I want to
4 make sure you understood his testimony is all I'm
5 asking.

6 THE COURT: Yeah.

7 MR. TERRY: I mean, I think he's
8 saying, I read what you read.

9 THE COURT: Right.

10 MR. TERRY: Bu I want to make sure
11 you understand that he's saying, I didn't do
12 anything with Balfour.

13 THE COURT: Well, that was my
14 understanding.

15 THE WITNESS: No, I've never seen
16 this before today.

17 THE COURT: No, I know you hadn't
18 seen the document, but you knew about the joint
19 defense agreement. Did you know -- I guess the
20 question is, when did you know about it?

21 THE WITNESS: We didn't know this
22 early on in the project. It was at the end of
23 the project.

24 MR. BUNDY: Your Honor, he just
25 coached his witness to change an answer.

1 THE COURT: Yeah. It comes in.

2 All right. 158 is in. I'm going to keep 159.

3 Mr. Terry, I want to keep you from getting on the
4 stand, and I really want to keep Mr. Heuer from
5 getting on the stand, to be honest with you, but
6 that's just me. Okay. Thank you very much.

7 It's significant to this Court for the
8 date. That's what I want y'all to understand.
9 Okay? But there's no privilege in that document
10 that I can see. All right?

11 MR. TERRY: Watson rests.

12 THE COURT: Very good. Thank you,
13 sir.

14 MR. TERRY: Watson renews its
15 motion for a directed verdict as well on the same
16 basis.

17 THE COURT: All right. Very good.

18 MR. BUNDY: I'm moving -- if he's
19 done against me, I'm moving for directed verdict
20 on his negligence claim. He hasn't proven
21 negligence at all. There's no duty, no experts,
22 no witnesses, no testimony, nothing.

23 THE COURT: All right. What do you
24 got on negligence? I didn't --

25 MR. TERRY: Those damages --

1 THE COURT: It looks like
2 contractual matters to me, but go ahead.

3 MR. TERRY: Well, there's no
4 contract between --

5 THE COURT: Right.

6 MR. TERRY: -- Watson and Library
7 Associates, Your Honor.

8 THE COURT: So you're getting
9 subsumed in the economic loss rule?

10 MR. TERRY: I don't -- we are not
11 subsumed in the economic loss rule, Your Honor.

12 THE COURT: Okay.

13 MR. TERRY: And the -- but let me
14 talk -- I discussed this earlier.

15 THE COURT: Yeah.

16 MR. TERRY: And I will tell you,
17 there's no South Carolina law on this particular
18 issue.

19 THE COURT: Okay.

20 MR. TERRY: Or I've searched --

21 THE COURT: Well, I'm not sure I
22 agree with you, but go ahead.

23 MR. TERRY: Well, on the issue I'm
24 about to discuss.

25 THE COURT: Okay. All right.

1 MR. TERRY: All right. As I
2 discussed earlier, Library Associates claimed to
3 be a third-party beneficiary of the agreement
4 between Watson and Balfour Beatty.

5 THE COURT: Okay.

6 MR. TERRY: Library Associates has
7 come in here and said, they've got no duty to do
8 anything. They can know of a breach of the
9 contract and things that are damaging Watson.

10 As a third-party beneficiary, they can't
11 escape their liability. They have superior
12 knowledge. Superior knowledge doctrine says
13 that, if you have knowledge of some fact, a
14 material fact that you fail to tell someone, you
15 can be held liable for that.

16 Now, it's normally discussed under
17 formation of contracts, but that's not always the
18 case. And in this case, Library Associates knows
19 that Watson is on the job site, running around,
20 working pursuant to a schedule that Library
21 Associates knows and claims is wrong.

22 There's no question that's harming
23 Watson and every other sub on this project.
24 Library Associates can't sit idly back and watch
25 that occur. Furthermore, Library Associates

1 didn't hire a general contractor. Library
2 Associates hired a construction manager.

3 In this state, those are two different
4 things. We have a licensing requirement for
5 general contractors. We have a separate
6 licensing requirement for construction managers,
7 and construction managers were acting on behalf
8 of the owner.

9 So this is -- they want to sit idly by
10 with this knowledge and say, oh, well, the
11 project is falling apart. It's getting delayed
12 500 days, but let's not tell the people who are
13 paying the bills for the project.

14 As I said in the beginning, the
15 subcontractors are still fighting for this
16 project. They haven't been paid, yet Library
17 Associates wants to sit back and say, we knew
18 this, but we're not going tell them. Maybe it
19 was intentional. Maybe it was by mistake. Maybe
20 they weren't smart enough to think through the
21 fact that this is hurting the subs.

22 Nonetheless, they had the duty to tell
23 them, and they've testified they did not tell the
24 subs. And they want to hide behind, we're not
25 allowed to talk to the subs. They want to be a

1 third-party beneficiary. They want all the
2 benefits, but they don't want any of the risks.

3 And now, I think of contracts as, you
4 have contractual obligations. This helps me to
5 separate them. And I think with torts, you have
6 a duty. Well, there's no contract here. There's
7 no privity. They can't have a contractual
8 obligation. They can only have a duty.

9 THE COURT: What's the basis for
10 the duty? That's what I need to understand,
11 where you're going.

12 MR. TERRY: The basis of the duty
13 is, they are a third-party beneficiary who know
14 that these subs are being damaged and --

15 THE COURT: That --

16 MR. TERRY: -- if it's under a
17 third-party beneficiary, they have a duty.

18 THE COURT: Doesn't the mechanic's
19 lien statute take care of that for you?

20 MR. TERRY: Well, it depends on who
21 you ask. Mr. Bundy has gotten before this Court
22 before and argued that all of these costs, such
23 as delay claims, aren't even -- aren't even
24 allowed under the mechanic's lien statute.

25 So, no, I don't know. You're going to

1 have to decide that issue, Your Honor. My
2 position is, we certainly can bring a mechanic's
3 lien.

4 THE COURT: Sure.

5 MR. TERRY: But that doesn't mean
6 that we can't also bring other claims.

7 THE COURT: But I think -- I'm
8 still wrestling with your theory. Your theory is
9 that, as a third-party beneficiary of the
10 contract between the sub and the general, they
11 have -- some duty springs from that agreement for
12 them to say, hey, y'all are running behind.
13 You're running late, we're not going to pay you.

14 MR. TERRY: No, not that they're
15 not -- that is my theory of why they have the
16 duty, but that's not what I'm saying they didn't
17 tell us. They knew Balfour Beatty's schedules
18 were wrong. They've testified to that. And
19 they've testified, they didn't go tell the subs.

20 And Mr. Clements testified that this
21 schedule is critical. It's how subcontractors
22 operate within that schedule to perform efficient
23 work. And when you have a schedule that's wrong,
24 you're telling me to go work over there when I
25 need to be working over here.

1 THE COURT: All right.

2 MR. TERRY: And you're telling me
3 I'm behind, when in fact, you don't know if I'm
4 behind because the schedule is wrong.

5 THE COURT: All right. And your
6 argument is the economic loss rule doesn't apply
7 to you?

8 MR. TERRY: I don't believe it does
9 apply in this case, Your Honor. The economic
10 loss rule normally falls under the -- if it's
11 privity to the contract.

12 THE COURT: When you have privity,
13 right?

14 MR. TERRY: When you have privity,
15 yes, Your Honor. But it normally is a defense
16 under privity of the contract.

17 THE COURT: And it's the negligence
18 claim in addition to your mechanic's lien?

19 MR. TERRY: Your Honor, the
20 mechanic's lien is no longer. We resolved that.

21 THE COURT: Y'all resolved that
22 one?

23 MR. TERRY: Watson has no
24 mechanic's lien. They offered us 100 bucks under
25 whatever -- the statute.

1 THE COURT: Okay.

2 MR. BUNDY: Which is going to be
3 reviewed in Columbia. I ain't paying him \$100.
4 He'll never get it. All right. Your Honor, may
5 I be heard?

6 THE COURT: Sure.

7 MR. BUNDY: The first is the
8 quantum meruit claim. Do they have the quantum
9 meruit claim?

10 MR. MCDONALD: Not anymore.

11 MR. BUNDY: Okay. Not anymore. So
12 they're done with that. Economic loss rule
13 applies if you've got an action in court that
14 (inaudible) solely by contract. We don't know
15 these people from Adam's house cat. In South
16 Carolina, there's no special relationship between
17 an owner and a subcontractor.

18 I mean, this whole -- clearly there's no
19 duty. But there's no -- there's been no evidence
20 in front of you. If this was a car wreck and
21 they put this evidence in, you'd give a directed
22 verdict on that. Because they didn't put in any
23 evidence of breach of the duty. They haven't
24 shown any damages proximately caused thereby.

25 You're going to be -- what number would

1 you pick out after what you heard today, okay, to
2 award them in negligence? What would that number
3 be? All he did was put in a bunch of signed
4 change orders that they've been paid for and
5 their 30(b)(6) representative testified under
6 oath and his deposition, they had no damages for
7 this, no damages for that, no damages for the
8 rest of it.

9 I mean, they hadn't hit a single element
10 other than naming us properly, I guess. They got
11 that right. I mean, at some point in time,
12 directed verdicts need to be granted just to get
13 it to stop.

14 THE COURT: Well, I think this
15 might be the one. All right? I can't -- I don't
16 find a duty here, Mr. Terry. I just don't see
17 it. I hear your argument. I just think it's a
18 stretch, and I just don't think it's there. I'm
19 going to grant their directed verdict on the
20 negligence claim.

21 I don't think -- I don't think you've
22 adequately established damages. You've presented
23 damages in the form of delay and late payments
24 and that type of thing, but I just don't -- I
25 just don't see the duty here. You've got to

1 have -- on a contract, all you've got to have is
2 a contract and a breach and you get damages.

3 On a negligence claim, you've got to
4 have a duty. There's got to be a duty owed. I
5 think the duty is encompassed. In this instance,
6 it's allowed by the statute. The statute is a
7 mechanic's lien statute. I don't think there's
8 any other duty that arises out of the common law
9 under this -- under this theory. I just don't --
10 I can't follow that one. Okay?

11 MR. TERRY: I understand, Your
12 Honor.

13 THE COURT: Very good. All right.
14 Does that end your case?

15 MR. TERRY: Yes, Your Honor.

16 THE COURT: All right. Very good.
17 Mr. Windle, it's late, but are you ready to
18 proceed?

19 MR. WINDLE: Yes, sir. Can I ask
20 for a five minute bathroom break --

21 THE COURT: Absolutely.

22 MR. WINDLE: -- before we start?

23 THE COURT: Absolutely. Let's take
24 five minutes.

25 MR. BUNDY: Can we get an idea of

1 how many witnesses he has and whether or not I'm
2 going to be here next week or not?

3 THE COURT: Yeah. Mr. Windle?

4 MR. WINDLE: Two.

5 MR. BUNDY: Do you mind giving me
6 their names?

7 MR. WINDLE: No. Joe Anastasi and
8 Michael Rohrer.

9 MR. BUNDY: Okay. Thank you. Joe
10 is going to be first?

11 MR. WINDLE: Yes.

12 MR. BUNDY: Okay.

13 THE COURT: We'll press on until
14 about 5:30 today. We'll go for about an hour.

15 (A recess transpired.)

16 THE COURT: Mr. Windle, you may
17 call your witness.

18 MR. WINDLE: It's Mr. Joe Anastasi.

19 (JOE ANASTASI, having first been
20 duly sworn, testified as follows:)

21 THE COURT: Mr. Anastasi, give me
22 your full name and address for the record,
23 please, sir.

24 THE WITNESS: Joseph S. Anastasi,
25 A-N-A-S-T-A-S-I, 327 Sardis, S-A-R-D-I-S, Pointe,

1 with an E at the end, Road, Matthews, North
2 Carolina 28105.

3 THE COURT: Thank you, sir.

4 DIRECT EXAMINATION

5 BY MR. WINDLE:

6 Q. Mr. Anastasi, where are you employed?

7 A. Old North State Masonry.

8 Q. And what is Old North State Masonry?
9 What does it do?

10 A. We are a commercial masonry
11 subcontracting firm.

12 Q. Performing work in what geographic area?

13 A. Currently in north Carolina and South
14 Carolina, but in the past, we've been as southern
15 as Fort Benning, Georgia, and up in Blacksburg,
16 Virginia, at the northern most point.

17 Q. Do you ever do any projects in
18 Charleston other than the Bennett Hotel?

19 A. We have done one other project at the
20 Naval nuclear training facility.

21 Q. Mr. Anastasi, what is your position with
22 Old North State Masonry?

23 A. I'm the president of the company and a
24 partner.

25 Q. Who are the other -- your partners?

1 A. Tony Griffin and Scott Griffin.

2 Q. How long have you been -- or how long
3 has Old North State Masonry been in existence?

4 A. August 2003, we were formed, so 18 plus
5 years.

6 Q. And how long have you been president of
7 Old North State Masonry?

8 A. 18 plus years.

9 Q. Mr. Anastasi, were you personally
10 involved in the Bennett Hotel project?

11 A. I was.

12 Q. And in what ways? Did you visit the
13 site? Did you attend meetings? What did you do?

14 A. From a site standpoint, it was almost on
15 an as-needed basis. There would be times when I
16 wouldn't be down there for a month or so at
17 times, and then there would be times I would be
18 down there for two weeks or two times in a week.
19 It just depended on the circumstance.

20 Q. All right. During that time, did you
21 have an opportunity to review the subcontract
22 between Old North State Masonry and Balfour?

23 A. At times, yes.

24 Q. Are you familiar with that document?

25 A. I can recognize that document, yes.

1 Q. All right. Before we get to that,
2 though, I want to ask one of the questions since
3 the Judge was brought up earlier. Why did Old
4 North State Masonry dismiss or cancel -- decide
5 to settle with Balfour and cancel their lien
6 claim?

7 A. It was a business decision. Based on
8 the fact that we have lost probably close to 7 to
9 \$800,000 out of pocket on this job. We're owed
10 in excess of \$250,000 retainage on this job.

11 We've spent well over a couple hundred
12 thousand dollars in attorney's fees to this
13 point, and according to Mr. Bundy, he's not going
14 to stop until -- even if he loses, he's going to
15 appeal it. And we're basically a subcontractor.
16 I can make money laying brick and block. I can't
17 make money sitting in here talking to you nice
18 folks.

19 Q. Any other reasons?

20 A. No, sir.

21 Q. Okay. What type of project was the
22 Bennett Hotel project from a performance
23 standpoint? How did Old North State look at it?

24 A. It was basically two elements of work
25 for our trade. We had the structural exterior

1 block walls, and there was some interior walls
2 also in the garage in the first level. But
3 mainly, as we got up into the typical floors, it
4 was exterior block walls, and then we had precast
5 in there.

6 The precast was mainly on the lower
7 levels of the building up through the second
8 floor, and then there was some accent details
9 going up in the corners of the building. And
10 there were some damages at various levels.

11 Q. Was there anything on this project that
12 Old North State Masonry hadn't done before?

13 A. No.

14 Q. Was there anything on this project that
15 Old North State Masonry didn't know how to do?

16 A. No.

17 Q. Had Old North State done hotel projects
18 before?

19 A. We had.

20 Q. Structural concrete hotels, multi-story
21 hotels?

22 A. We've done wall bearing hotels, yes.

23 Q. All right. Was this, from a structural
24 point of view, a concrete structure, and had you
25 done nine story hotels before?

1 A. I would say our wall bearing, probably
2 seven or eight stories is our highest wall. But
3 we've done buildings as high as 15 floors.

4 Q. On these type of projects, a concrete
5 structure hotel, how does Old North State Masonry
6 plan to perform the work, typically?

7 MR. BUNDY: Your Honor, this is
8 an -- as I understand it, this is a defense to a
9 civil conspiracy claim. I don't -- I take the
10 position all of this -- this is irrelevant, I
11 mean, you know. I don't know whether he -- I
12 don't know what it's got to do with anything.

13 MR. WINDLE: Your Honor, it is
14 relevant because we're being accused of a
15 conspiracy. We're being accused of filing an
16 inflated lien. I need to show you what happened
17 to these folks on the job that caused them to
18 incur damages and file a lien and why they filed
19 the lien in the amount they did. And I'm just
20 laying the foundation for that.

21 THE COURT: All right. You can
22 proceed.

23 BY MR. WINDLE:

24 Q. How do you typically plan to perform
25 work on this type of project?

1 A. It's a sequential. You start on a lower
2 level. You complete a lower level. You move up
3 to the next level.

4 Typically with the vertical
5 reenforcements designed to run through the floor
6 slab system, you have to finish the floor below,
7 route that reinforced out, and then move up to
8 the next level of block work. So it's complete a
9 floor, move to the next.

10 Q. All the way through the top of it?

11 A. All the way through the top.

12 Q. Is that how you planned to perform the
13 masonry work on this project?

14 A. It is. It was.

15 Q. Is that indicated in the masonry portion
16 of the construction schedule that's a part of
17 your contract?

18 A. It was. The schedule for change order
19 one showed a sequential move from one floor to
20 the next floor to the next floor from the ground
21 floor.

22 Q. That was your plan?

23 A. Yes.

24 Q. Were you able to perform your work in
25 accordance with your plan on this project?

1 A. No.

2 Q. If you would, tell the Court what
3 happened and what prevented you from performing
4 your work as planned and as indicated in the
5 construction schedule? And then we will talk
6 about what impact it had on Old North State
7 Masonry.

8 A. Well, virtually, right from the get go,
9 when we were mobilizing the job, there were
10 issues with work areas being ready for us.

11 As we started on the first, second,
12 third and fourth level, we encountered a
13 situation that there was a variance of the
14 documents as far as our fleet and being able to
15 lay a complete floor from that floor level and
16 then go into the floor above and grout it
17 through, grout being the concrete that is encased
18 in the vertical rebar, and being able to grout
19 from the floor above.

20 So literally, from the first floor all
21 the way up to the fourth floor, we encountered
22 that issue. We had issues with waterproofing the
23 third floor. We had issues, particularly on the
24 fifth and eighth floor with the precast
25 (inaudible) being in the backup wall system, the

1 reinforced wall system that impacted us.

2 And then at that point, the upper floors
3 were all -- because the job was delayed and
4 stopped around the sixth floor, when they
5 remobilized and got going, the upper floors all
6 opened up at the same time, and we were asked to
7 accelerate. And we brought additional people in
8 to accelerate.

9 Q. And when you say you accelerate, what
10 does that mean?

11 A. Well, we had to put more -- we were
12 trying to work the floors concurrently, and we
13 had to supplement our workforce with another
14 subcontractor, mason subcontractor that we
15 brought on the site at a premium to execute the
16 work with us.

17 Q. At that point in time, approximately how
18 many -- you had planned to perform work on one
19 floor at a time. At that point in time, how many
20 floors was Old North State working on at one
21 time?

22 A. Virtually we were working on every
23 single floor at the end. If we didn't complete
24 one floor, then we were hopscotching around, just
25 jumping all over, trying to pick up work that we

1 could get completed.

2 And with our industry, we're dealing
3 with block, and block is very heavy. And you
4 have prestock out block. And then when you're
5 dealing with mortar that you're laying the block
6 in, you're cutting it, and it's falling onto the
7 slab. It's very messy. So in order to go back
8 to each floor level, it was pretty extensive for
9 us remobilize on a floor with the cleaning up and
10 set up time and very difficult.

11 Q. Was it as easy and picking up a hammer
12 and some other tools and walking to another
13 floor?

14 A. No.

15 Q. If you would, tell the Judge, what was
16 involved in that process of moving from floor to
17 floor?

18 A. Well, typically, we have to prestock out
19 our --

20 Q. What does that mean?

21 A. That we would get the block, hoist it to
22 the floor level. We would move it to the wall
23 line, which is the exterior wall.

24 Q. About how much block are we talking
25 about?

1 A. On the whole job, I think there was
2 somewhere around 85,000 blocks.

3 Q. I'm talking about your stock out for one
4 floor.

5 A. Stock, you go up 4 feet. You stock out
6 enough for 4 feet, around half the building. And
7 so you would start, and you'd lay up half the
8 building and then you'd move to the other half
9 and start laying that out where you would be
10 grouting the first 4 feet.

11 The first 4 feet were grouted from the
12 same floor. The last 4 feet, 4 foot 8, was from
13 the floor above. So you would jump with grouting
14 operations on the first half while you're laying
15 up the second half, and then you're jumping to
16 the second half and continuing up.

17 Q. And the plan was to do that one floor at
18 a time, right?

19 A. Yes.

20 Q. The next question is, when you're
21 working on virtually all of the floors or you're
22 hopscotching, I think you said, what's involved
23 in the hopscotching, how difficult is it to
24 hopscotch, and does it -- how much time does it
25 take? Does it cost additional money?

1 MR. BUNDY: Objection. Eight
2 questions, all leading.

3 THE COURT: Give them to him one at
4 a time.

5 BY MR. WINDLE:

6 Q. All right. What impact did hopscotching
7 have on you in terms of time?

8 A. It took us longer to lay the units. We
9 had a much lower average production. We had --
10 for example, we had estimated 125 block per man
11 on the job.

12 We had the situation with a design
13 change that was identified to be another
14 subcontractor -- excuse me. There was a
15 variation -- variance from the documents on the
16 sleeves on the second and fourth floor, and so we
17 were --

18 Q. Let me stop you right there and just
19 interrupt. When you say there was a variance on
20 the document, tell me what that means, please.

21 A. Okay. The sleeve to grout through this
22 post-tension slab, and because it's a
23 post-tension slab, you can't cut it. So you have
24 to have that sleeve in the right spot. So they
25 go with the 3-inch diameter sleeve, which is

1 plenty wide for us to drop a rebar in from the
2 floor above and to grout from the floor above.
3 And that's how you grout it. What they did is
4 they --

5 Q. When you say they, who are you talking
6 about?

7 A. Lithko.

8 Q. Okay.

9 A. Lithko put a 1-inch sleeve, and because
10 of that, we could not drop and pour. There was
11 not enough clearance to pour around the rebar so
12 that you have it encased correctly for
13 structurally.

14 Q. Do you know whether the sleeve Lithko
15 installed was the sleeve shown on the design
16 drawings?

17 A. It was not.

18 Q. Okay.

19 A. It was not up through the fourth floor.

20 Q. All right. What was the impact on Old
21 North State Masonry in regard to money?

22 A. In regards to what?

23 Q. Money. The hopscotching in regards to
24 money.

25 A. Yeah. Well, we were able to show on

1 the -- we were able to do a time study, and a
2 change order was issued, change order number 4 to
3 our --

4 MR. BUNDY: Your Honor, objection.
5 I mean, this is all hearsay. Time studies. He
6 hasn't been listed as an expert. It's not
7 related to the conspiracy defense. I mean, we're
8 going to be trying this whole case over, and he's
9 not asking for any damages.

10 MR. WINDLE: This is just what
11 happened to them on this job.

12 MR. BUNDY: Who cares.

13 MR. WINDLE: Well, we do with a
14 conspiracy claim (inaudible).

15 THE COURT: I'm going to give you
16 some latitude. Go ahead.

17 BY MR. WINDLE:

18 Q. Go ahead, Mr. Anastasi.

19 A. Can you repeat it again, please?

20 Q. In short, what was the impact on Old
21 North State Masonry by this hopscotch in terms of
22 cost?

23 A. It was significant. It was probably in
24 excess of 3 or \$400,000 on the -- on the block
25 labor.

1 Q. And what was the impact in terms of
2 costs for the acceleration you testified about?

3 MR. BUNDY: Objection.

4 THE WITNESS: It was -- do I
5 answer?

6 THE COURT: Go ahead.

7 THE WITNESS: It was also
8 significant. It was to that level, but it was
9 somewhere in the 50 to \$60,000 dollar range for
10 the added costs to bring in that supplemental
11 crew on the upper levels.

12 BY MR. WINDLE:

13 Q. And did -- what does your contract
14 require you to -- or Old North State to do in
15 regard to asking for additional money or time?

16 A. To give notice to the general
17 contractor.

18 Q. And then after that, are you required to
19 submit a change request?

20 A. To the extent that we knew some of the
21 costs, we did submit some and followed up with
22 some documentation of costs. And then we also
23 had some projections that we were anticipating
24 that we were reserving our rights for. And along
25 throughout the project, we did have adjustments

1 to that as those projections became actual hard
2 figures.

3 Q. All right. During the course of the
4 project, did you submit a claim for delay damages
5 and acceleration costs in the form of a change
6 order?

7 MR. BUNDY: Objection.

8 THE COURT: Overruled. Go ahead.

9 THE WITNESS: We submitted several
10 variations of a claim. Starting early in, I
11 would think, September of 2016, there was an
12 initial order of magnitude for a set period of
13 time.

14 I think it was two and a half months
15 that we did submit for indirects at that point.
16 And we qualified that it was not inclusive of any
17 inefficiencies. And then as the cost developed,
18 our claims also developed along the way.

19 BY MR. WINDLE:

20 Q. Okay. We're talking big picture here at
21 the beginning of your testimony. Was Old North
22 State ever paid for that delay and acceleration
23 cost?

24 A. Other than change order 4, no.

25 Q. How much of that delay and acceleration

1 cost was Old North State not paid?

2 A. Somewhere toward a million dollars. A
3 little bit over a million dollars.

4 Q. Okay. And when Old North State wasn't
5 paid that million dollars for delay and
6 acceleration, what did Old North State do?

7 A. Eventually filed a lien.

8 Q. And what was the intent of Old North
9 State Masonry when it filed a lien for the delay
10 cost and acceleration cost it incurred as a
11 result of the hopscotching around the project?

12 A. It was to protect our rights so that we
13 would -- we had to have --

14 Q. Was there any other attempt?

15 A. No.

16 Q. What were the considerations that Old
17 North State Masonry had when it filed the lien
18 for the delay cost and acceleration cost and
19 incurred as a result of hopscotch?

20 A. What were the considerations?

21 Q. Yeah. What were you thinking? What
22 were your thoughts?

23 A. We were trying to protect ourselves.

24 Q. Trying to get paid?

25 A. Trying to get paid.

1 Q. Were there any considerations or any
2 follow-ups or anything about Library Associates
3 at that time?

4 A. No.

5 Q. Was there any communication with anyone
6 about Library Associates at that time?

7 A. No.

8 Q. Did Old North State Masonry ever meet
9 with any other subcontractor at any time during
10 this project to discuss Library or anything in
11 regard to Library?

12 A. No.

13 Q. Did you or anyone at Old North State, as
14 far as you know, ever pick up the phone and call
15 and talk to anyone in regard to this project and
16 Library Associates?

17 A. No.

18 Q. Did Old North State conspire with any
19 party, any entity to do any harm to Library
20 Associates?

21 A. No.

22 Q. Did Old North State do anything unlawful
23 as far -- in your opinion?

24 MR. BUNDY: Objection.

25 THE COURT: Overruled. Go ahead.

1 You can answer it.

2 THE WITNESS: In my unprofessional,
3 legal opinion, no, of course not.

4 BY MR. WINDLE:

5 Q. Did Old North State do anything with the
6 intent of obtaining anything from Library by
7 unlawful -- in an unlawful manner?

8 A. No.

9 Q. In actuality, what did Old North State
10 do? I think you just testified, they filed a
11 lien?

12 A. They filed a lien.

13 Q. In accordance with the statutes of South
14 Carolina, as far as you know?

15 A. As far as I know.

16 (OLD NORTH STATE EXH. 2 was marked
17 for identification.)

18 Q. Now, Old North State has -- if you would
19 now, we're going to look at some of the
20 documents. We talked about the big picture, more
21 or less. We're going to go through some of the
22 documents and talk about them. Please turn in
23 your exhibit notebook to Exhibit tab number 2,
24 Lithko Exhibit No. 2.

25 A. You mean Old North State?

1 Q. Yes, I'm sorry. Thank you.

2 A. I'm there.

3 Q. All right. Have you seen this document
4 before?

5 A. I have seen it before.

6 Q. Do you recognize it?

7 A. I do.

8 Q. And can you identify it?

9 A. It is the standard subcontract agreement
10 with Balfour Beatty for this project.

11 Q. Is it the complete copy of the contract?

12 A. I believe it is.

13 Q. Was it -- is it a business record of Old
14 North State Masonry?

15 A. It is.

16 Q. Was it maintained as a business record
17 in Old North State Masonry's normal course of
18 business?

19 A. Yes.

20 Q. Now, it's signed by Joseph J. Canitano.
21 Who is that?

22 A. That's our vice president of sales.

23 MR. WINDLE: All right. Your
24 Honor, I would move to admit Old North State
25 Exhibit No. 2, the subcontract.

1 MR. BUNDY: No objection.

2 THE COURT: Without objection.

3 (OLD NORTH STATE EXH. 2 was
4 received in evidence.)

5 BY MR. WINDLE:

6 Q. All right. Looking at the subcontract,
7 what is the original dollar amount of the Old
8 North State Masonry subcontract for the hotel at
9 Marion Square project?

10 A. \$2,340,000 even.

11 Q. And if you turn to page 34, the number
12 at the bottom of the page, page 34.

13 A. Yes.

14 Q. The question is, what was the scope of
15 work for Old North State on this project?

16 A. It was for bid package 04A, masonry
17 package.

18 Q. Was that all the masonry on the project?

19 A. Yes.

20 Q. Does that include just more than CMU
21 block or brick? What all does that include?
22 Looking at page 34, does it include Castone
23 veneer masonry at the bottom of the page? Did it
24 include that as well?

25 A. It does say, Castone veneer masonry

1 complete, yes.

2 Q. Concrete masonry units and masonry
3 veneer, et cetera?

4 A. Yep.

5 Q. All right. If you would, please turn to
6 page 16.

7 A. 60?

8 Q. 16. And I direct your attention to
9 paragraph B, and this is under the heading of
10 article 10, contract interpretation and disputes.
11 And what I would like to -- for you to look at is
12 in paragraph B, go down to line 10, please.

13 A. Okay.

14 Q. And in the middle of that line 10, do
15 you see the sentence beginning contractor will?

16 A. Yes, contractor will at its option.

17 Q. Yeah. It says, contractor will, at its
18 option, present to the owner in contractor's name
19 or authorize subcontractor to present to the
20 owner in contractor's name, all of the
21 subcontractor's claims and answer the owner's
22 claims involving subcontractor's work whenever
23 contractor is permitted to do so by the terms of
24 the contract documents. Did I read that
25 accurately?

1 A. Yes.

2 Q. And what is your understanding of that
3 provision?

4 A. It's just saying that we can pass
5 through our claim to the owner, if it's the
6 owner's responsibility to the general contractor.

7 Q. Is that the first time you've ever seen
8 such a provision like that in a construction
9 subcontract?

10 A. No.

11 Q. Is it a typical provision in a
12 construction subcontract?

13 A. Yes.

14 Q. Have you been involved in dealing with
15 pass-through agreements before on other projects?

16 A. I have.

17 Q. At any time did you get together with
18 anyone, Balfour, other subcontractors and decide
19 you were going to come up with some kind of
20 agreement on your own as a plan to commit a
21 conspiracy?

22 A. No.

23 Q. The document that you came -- that
24 you -- that was signed by Old North State
25 Masonry, was it a typical pass-through agreement

1 that you -- with terms like you'd used or seen
2 before?

3 MR. BUNDY: Objection.

4 A. Can you clarify what agreement you're
5 talking about?

6 Q. Pass-through agreement.

7 A. Pass-through agreement?

8 Q. Yes, sir.

9 A. Yes.

10 Q. Okay. So when you entered into the
11 pass-through agreement, at that time, did you
12 believe -- who did you believe was responsible
13 for the delay costs, acceleration costs?

14 A. At the time of entering into the
15 pass-through agreement?

16 Q. Uh-huh.

17 A. Well, it evolved over time.

18 Q. Okay.

19 A. Originally, we thought a lot of issues
20 were Balfour Beatty's issues, and that we were
21 told. And as time went by, it became apparent
22 that there was some issues with the information
23 that we started to experience, particularly on
24 the veneer of the job, the precast, with water
25 proofing details and information.

1 So to be honest, we really don't know
2 the extent of owner GC issues. We just know that
3 we were impacted, and we notified, through the
4 general contractor, that we were notified, and
5 you know we -- if it's a portion that would be
6 the owner's, we felt it would be the owner's, and
7 Balfour Beatty would be the balance, if there was
8 such a thing. Or it might have been all to one
9 party.

10 Q. If you would, explain to the Court why
11 Old North State Masonry, as a subcontractor,
12 didn't know for sure early on in the project what
13 the issues were that were causing the problems.

14 A. We weren't told. You know, we were just
15 experiencing issues where we couldn't finish a
16 floor, and at the same time, we're being told
17 that we were holding up the floor. And it was
18 very -- it's a frustrating situation.

19 It only became -- there were certain
20 things that kind of pointed out, that we knew
21 that they were waiting on information. And it
22 was -- one would be -- one good example would be
23 the flashing or another one would be the precast
24 on the fifth and eighth floor, where the precast,
25 it's very uncommon to be bearing into a

1 structural stud -- a structural masonry wall.

2 And an RFI was written that said, hey,
3 this is what your documents show, do you really
4 want that? RFI answer came back. No, we really
5 don't want that. We want to design it this way.
6 Submitted a price for that, and the price was
7 never resolved, approved or we're just in a
8 limbo.

9 We couldn't get the information. So
10 when it came time to go forward, when we hit
11 those floor levels, we had to go with what was on
12 the details, on the drawings.

13 Q. Did you have the authority, under the
14 subcontract terms, to pick up the phone and call
15 the architect or the owner and ask about these
16 problems?

17 A. No.

18 Q. All right. When was Old North State
19 Masonry enabled to -- or when did Old North State
20 Masonry become more informed as -- in regard to
21 the source or cause of the majority of the
22 problems that you encountered?

23 A. At the end of the job, through our
24 discussions with Balfour Beatty.

25 Q. All right. And at that time, do you

1 recall whether or not Balfour Beatty had engaged
2 a scheduling expert and performed a scheduling
3 analysis?

4 A. No. We did not know that at that time.
5 That was more or less of the extent of the number
6 of RFIs that had to be processed through the job
7 that we started to realize that.

8 Q. All right. So your subcontract requires
9 a pass through of issues regarding the owner,
10 correct?

11 MR. BUNDY: Objection.

12 Q. Is that your understanding of the
13 sentence that I read into the record?

14 A. That's my understanding.

15 Q. Okay. And when you entered into the --
16 Old North State entered into the pass-through
17 agreement, is that what Old North State was doing
18 or intended to do?

19 MR. BUNDY: Objection, leading.

20 THE COURT: You can restate that.

21 BY MR. WINDLE:

22 Q. What was Old North State's intention
23 when they entered into this joint prosecution
24 defense and tolling agreement?

25 A. We felt it was a business decision that

1 was economical for us to share resources, such as
2 scheduling, and that it was a requirement by our
3 general -- by our contract, if we had a pass
4 through that something -- there was an issue that
5 the owner was ultimately responsible for, it had
6 to be processed through the general contractor in
7 a pass through scenario.

8 Q. Is it your testimony that you were
9 following the terms -- Old North State was
10 following the terms of its subcontract? That was
11 the intent?

12 A. We believe so.

13 Q. And if you would, turn to tab 58.

14 THE COURT: Is that the last one in
15 the book?

16 MR. WINDLE: Yes, sir.

17 THE COURT: All right.

18 BY MR. WINDLE:

19 Q. Can you identify this document?

20 A. This is the joint prosecution defense
21 and tolling agreement.

22 Q. Have you reviewed it -- or did you
23 review it at or about the time it was drafted or
24 signed?

25 A. I don't believe I did at that time.

1 Q. Okay. Have you seen it before?

2 A. I have seen it -- I have seen it before,
3 but when we executed it, I don't believe I -- I
4 reviewed this. I think what we did is, we
5 actually had discussions with counsel and got
6 advice on this document.

7 Q. Let's look at -- well, was this a
8 document that was prepared in the normal course
9 of business for Old North State Masonry on this
10 project?

11 A. No, it's not a normal -- a document
12 under the normal --

13 Q. Well, on this project I'm talking about,
14 in accordance with your subcontractor
15 requirements?

16 A. In order to proceed with our claim, this
17 is -- my understanding is that this is the
18 document that was --

19 MR. BUNDY: I'm not objecting to
20 the exhibit. You can go ahead and put it in.

21 THE WITNESS: What is that?

22 MR. WINDLE: I appreciate that. I
23 move that Old North State Masonry's Exhibit No.
24 58 be moved into evidence, please.

25 THE COURT: Without objection.

1 (OLD NORTH STATE EXH. 58 was marked
2 for identification and received in evidence.)

3 BY MR. WINDLE:

4 Q. And what was your understanding of what
5 the purpose of this document is or was?

6 MR. BUNDY: Objection. He said he
7 didn't read it.

8 MR. WINDLE: Well, he said he read
9 it later.

10 MR. BUNDY: Okay.

11 THE COURT: All right. You can
12 answer that.

13 THE WITNESS: My understanding is
14 that this document allows us to do a pass through
15 that's required from our subcontract agreement.

16 BY MR. WINDLE:

17 Q. Anything else?

18 A. It did allow us to share resources as
19 far as scheduling experts. It did actually cut
20 down our costs.

21 Normally, if we had a claim such as --
22 to this extent, we would have had a claims expert
23 involved and probably a scheduling expert
24 involved. We didn't have to do that or go
25 through that expense. So that was an advantage

1 for us.

2 Q. What was -- look at page 709,
3 subparagraph B, the last sentence of that
4 paragraph. Subsequently subcontractors 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. Did I
8 read that accurately?

9 A. That was D?

10 Q. D, the last sentence.

11 A. Yes, you did read that accurately.

12 Q. All right. What was your understanding
13 of that, the meaning of that sentence that?

14 A. That meant that we retained our rights
15 for anything that was not deemed the
16 responsibility of the owner, that we could
17 then -- that was not covered from the owner, that
18 we could then look to Balfour for that portion.

19 Q. Were you -- at any time in your opinion,
20 did Old North State Masonry waive all of its
21 rights to recover its acceleration costs or delay
22 costs on this project?

23 A. No.

24 Q. All right. If you would, please turn to
25 tab 20.

1 A. Okay. I'm there.

2 Q. Could you identify this document?

3 A. This is change order number 19. That's
4 dated on the top of the first page, July 9th,
5 2019.

6 Q. And who is it signed by on behalf of Old
7 North State Masonry?

8 A. It's signed by me.

9 Q. And what is the date of your signature?

10 A. September 4, 2019.

11 MR. WINDLE: I move that this
12 document be admitted into evidence, Exhibit No.
13 20.

14 MR. BUNDY: No objection.

15 THE COURT: Without objection. All
16 right.

17 (OLD NORTH STATE EXH. 20 was marked
18 for identification and admitted into evidence.)

19 BY MR. WINDLE:

20 Q. All right. Mr. Anastasi, what was
21 purpose -- well, first of all, what was the
22 purpose of this change order 19? What was Old
23 North State Masonry attempting to accomplish?

24 A. Well, at the time, we were at an impasse
25 with Balfour Beatty, trying to close out our

1 outstanding change requests.

2 Q. All right. What time did this change
3 order -- was it being dealt with in regard to the
4 status of the project? Had the project been --

5 A. The status of the project at this point
6 for Old North State Masonry is done.

7 Q. Okay. So when you say close out, what
8 do you mean?

9 A. Just trying to clean up all the loose
10 ends from an accounting standpoint to try to just
11 close out the job.

12 Q. And if you would, for the benefit of the
13 Court, can you explain what the loose ends were?

14 A. Yeah.

15 Q. What were you dealing with?

16 A. Well, we would have a number of
17 outstanding change requests throughout --
18 throughout the job, and periodically, we would --
19 actually, through every one of our invoices, we
20 would give an outstanding change request log when
21 we did our monthly pay requests.

22 And periodically, we would ask to have a
23 meeting to sit down, and, you know, be able to
24 resolve some of those outstanding change orders,
25 change requests into change orders so we could

1 then process, you know, the pay app to get paid.

2 Well, now, we're at well past the job as
3 complete, not making any headway. This change
4 order was a result of a meeting that I requested
5 our attorney to help us set up with Balfour
6 Beatty so that we could bring all issues to a
7 head and try to clean them up.

8 Q. How long had you been trying to close
9 out and clean up these times before you asked
10 your attorney to get them off?

11 A. Eight months to a year.

12 Q. Okay. So you finally sit down. You
13 meet with Old North State Masonry, and if you
14 would, give me a couple of examples of what was
15 being cleaned up and resolved.

16 A. Well, there was -- there was probably
17 eight, nine, ten outstanding change requests, as
18 simple as a credit for some flashing that had not
19 been accepted.

20 Some extra work order work that we had
21 done, some patching and cutting of precast, which
22 was as a result of some deviating conditions
23 on-site, and removing and actually adding
24 (inaudible) which were decorative precast items
25 on the pool deck area on level three.

1 Q. And what was holding up resolution on
2 these items? Was it a disagreement on the price
3 or --

4 A. It was a disagreement on some back
5 charges that Balfour Beatty was trying to process
6 through Old North State. There was also some
7 back charges that Old North State had to Balfour
8 Beatty on some hoisting requirements that they
9 owed us.

10 And quite frankly, we were at a point on
11 the job where we were just trying to clean up
12 some of these issues so we could get some money
13 coming in the door on the job.

14 Q. I'm going to ask you to keep your finger
15 where you are.

16 A. Okay.

17 Q. But if you would, please turn back to
18 tab 58, page -- it's in that same paragraph 2D
19 that we were looking at just a minute ago. Page
20 709.

21 A. Okay.

22 Q. Are you there?

23 A. Uh-huh, yes, sir.

24 Q. The first sentence in that paragraph D
25 says, contractor and subcontractors agree to

1 promptly meet, negotiate, and resolve all claims
2 between contractor and subcontractors, if at all
3 possible. Did I read that accurately?

4 A. Yes.

5 Q. Did you, Old North State Masonry, ever
6 meet with any other subcontractors in regard --

7 A. No.

8 Q. -- to resolving these change orders
9 in change order number 19?

10 A. No.

11 Q. Who did you meet with?

12 A. Balfour Beatty.

13 Q. Only Balfour?

14 A. Only Balfour Beatty.

15 Q. And were you able to ultimately reach an
16 agreement in regard to the cost or price for each
17 of these change orders in the box, in the middle
18 of the page on change order 19?

19 A. Not on a individual level, but on a
20 global level, yes.

21 Q. Okay. And what was that?

22 A. \$68,740.20.

23 Q. And were you doing that in accordance
24 with provision 2D of the joint agreement?

25 MR. BUNDY: Objection, leading.

1 Q. Or then, why were you doing it?

2 A. We were doing it because those were all
3 the outstanding items that we had to resolve with
4 Balfour.

5 Q. Okay. Was there any reason associated
6 with the joint agreement that you had?

7 A. Specifically, I can't tell you that was
8 my mind at that point. I just knew that we had
9 outstanding items that we needed to resolve.

10 Q. All right. And the \$68,740.20
11 resolution is an add to -- or it's a payment to
12 Old North State Masonry?

13 A. It's an add to contract. It's not a
14 payment.

15 Q. And if you would, please turn to tab 22.
16 This is Old North State Masonry Exhibit No. 22.
17 It's a letter dated June 18, 2019, from me to
18 Mr. John Heuer and with a copy to Mr. Anastasi.
19 Did you receive a copy of this document on or
20 about June 18, 2019?

21 A. I did.

22 Q. And if you could, tell me how the
23 \$68,740.20 add to your contract in Exhibit
24 No. 19, change order 19, was calculated and
25 whether any part of that calculation had anything

1 to do with Library Associates?

2 A. No -- yes, I will tell you that. I
3 mean, it had our change requests that we had
4 outstanding, 14 through 41, and that's not
5 (inaudible) claims. There's 14, 15, 17, 30, 33,
6 36, 37, 38, 39 and 41. And they amounted to,
7 pluses or minuses, that was \$25,411.07.

8 There was hoisting up for the precast
9 bands on the fifth floor that was a requirement
10 from Balfour Beatty under our contract to
11 provide, and we identified that to be \$43,271,
12 which amounted to 68,685.07.

13 Then there was some outstanding change
14 orders that Balfour had issued that we were
15 disputing. We didn't think we were going accept
16 them, but through this discussion, we closed out
17 these items, And we also then accepted some
18 deductive change orders that had previously been
19 written that come to that figure or close to that
20 figure.

21 Q. All right. And if you will look at page
22 155, the first sentence underneath the
23 calculations or the second sentence says -- well,
24 the first sentence says, all back charges
25 asserted by Balfour on June 14, 2019 are resolved

1 for zero dollars. What does that mean?

2 A. That we have closed out the job.

3 Q. And what does that mean when the back
4 charge is resolved for zero dollars?

5 A. That there's no payment either way.
6 It's -- they're just resolved, closed down.

7 Q. Back charge may have been raised, but no
8 dollars were ever charged to Old North State
9 Masonry?

10 A. But the resolve.

11 Q. Okay. The next paragraph says, the
12 potential back charge by Balfour against Old
13 North State Masonry for straightening out the
14 exterior for stucco in the amount of \$75,000 is
15 resolved for zero dollars. Did I read that
16 accurately?

17 A. Yes, you did.

18 Q. What does straightening out of the
19 exterior stucco refer to?

20 A. That was in relation to an additional
21 charge from the stucco subcontractor that had --

22 Q. To who?

23 A. To Balfour Beatty, I believe.

24 Q. Okay. Go ahead.

25 A. That they -- their tolerance on their

1 stucco which was a direct applied stucco to our
2 block work and our concrete framing.

3 Q. Can I interrupt you for just a second.
4 What did the stucco subcontractor contend
5 initially in regard to the -- having to do work
6 on the --

7 A. Vertical --

8 MR. BUNDY: Objection. Answer
9 calls for hearsay.

10 THE COURT: If he knows, I will
11 allow it.

12 THE WITNESS: I know that the
13 stucco subcontractor was looking for no more than
14 a quarter inch variation from the exterior of the
15 building for his stucco unless he was going have
16 added costs for build up.

17 BY MR. WINDLE:

18 Q. Was that provided to the stucco
19 subcontractor, what they wanted?

20 A. No.

21 Q. And did Balfour initially say that that
22 was Old North State Masonry's fault?

23 A. Initially, they said it was Old North
24 State Masonry's fault.

25 Q. They were trying to back charge you for

1 it?

2 A. Yes.

3 Q. All right. And what was Old North State
4 Masonry's response?

5 A. That that was not appropriate.

6 Q. And what did Old North State Masonry do
7 together with Balfour to show Balfour that it
8 wasn't your responsibility?

9 A. We jointly did a vertical survey on the
10 north elevation of the building. It was the last
11 elevation for stucco, that the stucco needed to
12 be completed on.

13 And we showed that our block work was
14 substantially in compliance, plus or minus a
15 quarter of an inch, which exceeds the quarter of
16 an inch flatness that the stucco guy said he
17 needed. So what he needed exceeded our material
18 tolerances for masonry, for block work.

19 And in addition to that, it exceeded the
20 tolerances of a concrete structure on elevated
21 deck. They're plus or minus an inch from floor
22 to floor. So they're allowed this much movement.
23 I'm allowed this much movement, and the stucco
24 guy is allowed that much movement.

25 And so because of that and that he had

1 to apply it to our block work and the concrete
2 frame, he had to built it out, and they said that
3 there was a substantial amount of cost involved
4 in that.

5 Q. Did Old North State Masonry eventually
6 convince Balfour that this stucco issue was not a
7 Old North State issue?

8 A. Yes.

9 Q. And did Balfour agree with that?

10 A. By this document, yes.

11 Q. By this document, by agreeing that it's
12 a zero --

13 A. Yep.

14 Q. -- charge?

15 A. Yep.

16 Q. And if you would, keep your hand at the
17 tab 22, page 154, and just turn over to -- also
18 turn over to tab 53, page 632.

19 A. 632.

20 Q. Okay. Have you ever seen this document
21 before?

22 A. I have.

23 Q. Did you receive a copy of it on or about
24 September 6, 2017?

25 A. I did.

1 Q. Is it a document that was prepared and
2 maintained in the normal course of business for
3 Old North State Masonry?

4 A. It is.

5 MR. WINDLE: Your Honor, I move
6 that this document, Exhibit 53, be admitted.

7 THE COURT: Okay.

8 BY MR. WINDLE:

9 Q. This is from Toby Holloway to Tim Spano,
10 September 6, 2017, and you received a copy. And
11 what is -- who is Mr. Holloway?

12 A. He was our vice president of operations.

13 Q. And what is he telling Tim Spano and
14 Balfour in this e-mail?

15 A. He is telling them that they have
16 completed the inspection, that both parties
17 participated in, and that he identifies one, two,
18 three, four areas on the north evaluation that
19 had some minor variations beyond our allowance,
20 customized a quarter inch for masonry work, that
21 amounts to 131 square feet.

22 Q. That's 131 square feet out of total of
23 how many square feet?

24 A. That north elevation is somewhere around
25 25,000 square feet.

1 Q. So you're talking about the size of a 10
2 by 13 room?

3 A. Yes.

4 Q. Versus 25,000 square feet?

5 A. Yes.

6 Q. All right. And attached to that e-mail
7 are handwritten documents. What are they?

8 A. On page 634, that's actually the work
9 product signed off by the Balfour Beatty rep and
10 our representative on the survey.

11 Q. And behind that, there's an elevation
12 of -- that was surveyed?

13 A. Yes.

14 Q. And behind that, beginning on page 639
15 through 649, what are those documents?

16 A. These are the actual column lines along
17 that north elevation, and they literally went
18 column line to column line to column line, all
19 the way up the building and verified it.

20 Q. And when presented with that
21 information, what did Balfour Beatty do in regard
22 to the attempted back charge against Old North
23 State Masonry in regard to the stucco tolerance
24 issue?

25 A. At the time that they received that,

1 they stopped talking about back charges. When we
2 went to close out the job, at the very end of the
3 job, there was a line item that was listed for
4 the stucco back charges. We had several
5 discussions back and forth with -- I believe it
6 was Jeff Sandeen, that we were able to convince
7 him that that should be zero.

8 Q. And did you participate in these
9 discussions personally?

10 A. Yes, I did. Personally, yes, I did.

11 Q. And did they -- Balfour and Mr. Sandeen
12 agree that that would be the resolution, no back
13 charge for the stucco issue?

14 A. No back charge for the stucco issue.

15 Q. Was that no back charge for the stucco
16 issue, any kind of inducement to do anything
17 illegal or unlawful?

18 A. No.

19 Q. Was there any consideration of anything
20 in relation to Library Associates when that back
21 charge was being negotiated?

22 A. No.

23 Q. All right. If you look at the next
24 paragraph, it says, Balfour and Old North State
25 Masonry agree that the first \$100,000 recovered

1 from the owner in relation to Old North State
2 Masonry's pass-through claim will be split 70
3 percent to Balfour and 30 percent to Old North
4 State Masonry.

5 This revenue sharing is intended to
6 cover the recent back charges by Balfour dated
7 June 14, 2019, the potential back charge for
8 Balfour straightening out the exterior stucco and
9 any Balfour back charge for relocating Old North
10 State Masonry material. Did I read that
11 accurately?

12 A. Yes, you did.

13 Q. Okay. Was this potential payment to
14 Balfour related to the resolution of those back
15 charge issues that were stated in this letter?

16 A. That was the final -- that was the final
17 caveat to our -- I was just making a business
18 decision. I just decided that I was done. I
19 needed to collect some money, and I agreed to
20 that.

21 Q. Was there any consideration or any
22 thought relating to Library Associates when you
23 agreed to that?

24 A. No.

25 Q. Was there any discussion about anything

1 in relation to Library Associates when you agreed
2 to that?

3 A. No.

4 Q. Was there any intent on your part to
5 damage Library Associates in any way? Was that
6 even a consideration?

7 A. No.

8 Q. Did you have any intent to knock Mike
9 Bennett to his knees and extort money from him at
10 that time or at any time?

11 A. No.

12 Q. Does the fact that the -- is there any
13 relation between the fact that the dollar amount
14 in change order 19, \$68,740 -- is there any
15 relation between that number and the \$70,000
16 potential payment?

17 A. No.

18 MR. WINDLE: That's a good place to
19 stop for the day.

20 THE COURT: Okay. All right.

21 MR. WINDLE: I would like to admit
22 Exhibit No. 22.

23 THE COURT: Right.

24 MR. BUNDY: 22, I do not object to.

25 (OLD NORTH STATE EXH. 22 was marked

1 for identification and admitted into evidence.)

2 THE COURT: And you want 53 in
3 there as well?

4 MR. WINDLE: Yes, sir, Exhibit No.
5 53.

6 MR. BUNDY: What's the other one?

7 THE COURT: It's 53.

8 MR. WINDLE: Yes, sir. Thank you.

9 MR. BUNDY: I don't object to that
10 either.

11 (OLD NORTH STATE EXH. 53 was marked
12 for identification and admitted into evidence.)

13 THE COURT: 58 was in. How about
14 20? I think we did 20 as well. That was the
15 change order.

16 MR. WINDLE: Yes, sir.

17 THE COURT: That one has come in.
18 And then we started at 2, and I think that was
19 in. So we've covered 2, 20, 22, 53 and 58, all
20 in evidence. Very good. Let's go ahead and
21 break for the day. It's right at 5:30. Come
22 back in the morning at 9:30 and we'll continue
23 with Mr. Anastasi?

24 MR. WINDLE: Yes, sir.

25 THE COURT: All right.

1 Mr. Anastasi, I instruct you that you're not to
2 consult with the lawyers overnight.

3 THE WITNESS: Yes, sir.

4 THE COURT: All right. Anything
5 further?

6 MR. TERRY: Procedurally, I have a
7 couple. I understand that on Monday, you laid
8 out a plan for your making a decision and --

9 THE COURT: Yeah.

10 MR. TERRY: -- Balfour submitting
11 proposed findings of fact and the conclusions of
12 law, Library doing the same. Are subs permitting
13 to do the same?

14 THE COURT: They certainly can, if
15 you'd like. Glad to hear from you. All right.
16 I'm not sure what you've got left, but you don't
17 want to be part of the conspiracy on that, I'm
18 well aware.

19 MR. TERRY: Yes, Your Honor.

20 THE COURT: All right.

21 MR. TERRY: And closing arguments.
22 Do you want to hear closing arguments?

23 THE COURT: I really -- I'd prefer
24 not to. I'll be frank about it. I don't see how
25 y'all are going to change my mind one way or the

1 other at this point in time. If you write a good
2 order, proposed order, I would much prefer that.

3 MR. TERRY: Okay. So potentially
4 you're saying, put our closing argument in our
5 memorandum?

6 THE COURT: Sure.

7 MR. TERRY: Thank you, Your Honor.

8 THE COURT: That'd be what I'd
9 prefer.

10 (The hearing was concluded at
11 5:30 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 December 20, 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

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1 THE COURT: All right. Good
2 morning. Mr. Anastasi, how are you doing this
3 morning, sir.

4 THE WITNESS: Good. How are you
5 doing?

6 THE COURT: Very good. Anything
7 further?

8 MR. WINDLE: Yes, sir. We're ready
9 to continue.

10 THE COURT: Sure. Okay.

11 MR. WINDLE: If I may approach the
12 bench, the first thing I would like to do is just
13 hand up some documents, pleadings from the case.

14 THE COURT: Okay.

15 MR. WINDLE: This pertains to the
16 date of the e-mail, the Steve Smith e-mail that
17 we were talking about yesterday.

18 THE COURT: Yesterday, sure.

19 MR. WINDLE: Yes, sir. The first
20 document is the second notice and certificate of
21 mechanic's lien filed by Lithko in this case.

22 THE COURT: All right.

23 MR. WINDLE: And if you will note,
24 it is dated February 20, 2017.

25 THE COURT: Is that February 21,

1 2018?

2 MR. WINDLE: You're right. There
3 was a first lien filed. For whatever reason, I
4 don't have a copy of that at the moment.

5 MR. BUNDY: I've got one copy for
6 you.

7 MR. WINDLE: Thanks. That was
8 the -- the date of the first lien, the Lithko
9 lien was February 20, 2017.

10 THE COURT: Okay. The one we've
11 got is February of '18.

12 MR. WINDLE: Yes, sir. That's the
13 second lien.

14 THE COURT: Okay.

15 MR. WINDLE: And then the next
16 document is the Lithko lawsuit against Library
17 Associates.

18 THE COURT: Okay.

19 MR. WINDLE: And if you will note,
20 it was filed February 21, 2018.

21 THE COURT: All right. They got
22 handed to me in the -- not in the right order.
23 One second.

24 MR. WINDLE: Sure.

25 MR. BUNDY: I thought we were in

1 Old North State Masonry's case.

2 THE COURT: Right.

3 MR. BUNDY: Why are we introducing
4 Lithko documents in this --

5 THE COURT: This is to respond to
6 the issue I had about August. I think I just
7 found it. Is this the one?

8 MR. WINDLE: This is the first
9 lien.

10 THE COURT: Is that it?

11 MR. WINDLE: Yes, sir, I believe
12 so.

13 THE COURT: This says, second lien.

14 MR. WINDLE: Well, okay, that would
15 be the second lien then.

16 THE COURT: Well, it's dated '17,
17 but it says it's the second lien. I don't know
18 when it was recorded. Hold on one second.

19 MR. WINDLE: It's dated February
20 20, 2017, that's correct.

21 THE COURT: That's the signature
22 date.

23 MR. WINDLE: And I can -- we will
24 review in the presentation of evidence when it
25 was recorded, but the important document is the

1 lawsuit.

2 THE COURT: Okay.

3 MR. WINDLE: And the date -- the
4 file stamp date on the lawsuit is February 21,
5 2018.

6 THE COURT: Got it.

7 MR. WINDLE: So litigation is
8 initiated at that point in time.

9 THE COURT: Okay.

10 MR. WINDLE: And this e-mail, this
11 Steve Smith e-mail that we went through
12 yesterday, Library Associates 158 for ID purposes
13 is dated August 28, 2018.

14 THE COURT: Right. Got it. Okay.
15 Litigation commenced by then.

16 MR. WINDLE: Yes, sir.

17 THE COURT: Got it. Okay. You
18 don't need these in evidence, you're just
19 pointing that out for timing?

20 MR. WINDLE: That's all.

21 THE COURT: I got it. Okay. Thank
22 you very much.

23 MR. WINDLE: They're pleadings, and
24 I wasn't going to put them into evidence.

25 THE COURT: Okay. Thank you, sir.

1 All right. Mr. Anastasi, you're still under
2 oath.

3 THE WITNESS: Yes, sir.

4 THE COURT: Ready to roll.

5 THE WITNESS: Yes, sir.

6 DIRECT EXAMINATION

7 BY MR. WINDLE:

8 Q. How are you doing this morning,
9 Mr. Anastasi?

10 A. Good.

11 Q. It's not much fun coming to Charleston
12 and getting put in isolation, is it?

13 A. No.

14 (LITHKO EXH. NOTEBOOK was marked
15 for identification.)

16 Q. All right. We're going to resume your
17 testimony this morning. We're going to look back
18 into the notebook in front of you, but before we
19 do that, I do want to ask you this question.

20 During the course of construction on
21 this project, who did Old North State Masonry
22 believe for the most part was responsible for the
23 delays, acceleration, hopscotch effect that Old
24 North State was encountering?

25 A. Initially, we thought it was the

1 construction team.

2 Q. And by the construction team, who do you
3 mean?

4 A. Balfour Beatty and all the subs
5 underneath.

6 Q. Okay. And at any point in time, did
7 that thought change?

8 A. Towards the end of the job.

9 Q. And if you would, why did it change?

10 A. Well, we were -- we were starting to
11 experience issues with information that we
12 couldn't get that was impacting us on the precast
13 mainly.

14 Q. What did you mean with information you
15 couldn't get?

16 A. Well, we would have RFIs that were
17 outstanding. We would have RFIs that were
18 answered, and then --

19 Q. For the purpose of the Court, who was
20 supposed to respond to an RFI?

21 A. It's to be submitted from the
22 subcontractor through the general contractor,
23 ultimately to the architect to respond.

24 Q. And when you say you couldn't get
25 responses to RFIs, you mean, you weren't getting

1 responses from the architect or the architect was
2 providing responses to Balfour and you weren't
3 getting a response from Balfour?

4 A. We don't really know that. We just
5 weren't getting responses.

6 Q. Do you know of any reason why Balfour
7 would withhold a response?

8 MR. BUNDY: Objection. He doesn't
9 know. And now he's asking him to speculate about
10 something he knows nothing about. I object.

11 THE COURT: I will sustain that.
12 BY MR. WINDLE:

13 Q. All right. If you would, please turn to
14 tab 39 in your notebook. This is page 531.

15 A. I'm there.

16 Q. This is a letter dated December 15,
17 2016, from you to Tim Spano with Balfour. And
18 the reference is the Marion Square Hotel
19 follow-up conference call. Do you recognize this
20 document?

21 A. I do.

22 Q. Did you prepare this document?

23 A. I did.

24 Q. Was it prepared on or about December 15,
25 2016 and forwarded to Balfour at that time?

1 A. It was.

2 MR. WINDLE: Your Honor, I would
3 like to move this Old North State Exhibit 39 into
4 evidence.

5 MR. BUNDY: No objection.

6 THE COURT: Without objection. In
7 evidence.

8 (OLD NORTH STATE EXH. 39 was marked
9 for identification and admitted into evidence.)

10 BY MR. WINDLE:

11 Q. And the first paragraph says, this
12 letter is a follow-up to our conference call,
13 today's date, regarding the above-referenced
14 conference, correct?

15 A. Correct.

16 Q. And the second sentence says -- the
17 second paragraph, excuse me, says, we started the
18 project on July 6, 2016. Throughout this period,
19 we have not had one level without obstructions in
20 our way or an opportunity to complete on time.
21 Did I read that accurately?

22 A. You did.

23 Q. And is that the stop, start move,
24 hopscotch effect that you were referring to?

25 A. Yes, it is.

1 Q. The next sentence says, the sleeve
2 issues on the first and third floor and a portion
3 of the fifth, probably the sixth, seventh and
4 eight has not only been extremely costly but also
5 very time consuming as well.

6 To date, you have provided a partial
7 change for the first floor and complete for third
8 and fourth. Please process a change order as you
9 have agreed for the balance of the first floor.
10 Did I read that accurately?

11 A. Yes.

12 Q. It says, the sleeves on the upper
13 remaining floors will not allow acceleration or
14 working multiple levels concurrently now that the
15 shoring has been removed. What do you mean by
16 that? If you would, please explain what you mean
17 by that.

18 A. Well, what we're meaning by that is --
19 what I meant by that was, these sleeves you had
20 to do the grouting from the floor above.

21 So if you wanted to start the seventh
22 and eighth floor and you did the first of the
23 block, you couldn't possibly grout the first lift
24 of block on the eighth floor and had it run
25 through because the last lift, the seventh floor

1 wasn't complete. So you could not have had a
2 continuous grout pour for structural reasons on
3 the block pour.

4 Q. Okay. Where you talk about grouting
5 block, what are you referring to?

6 A. Grout is simply wet concrete. You know,
7 you can have -- if you think about form, our
8 block work actually represents the form for the
9 reinforcement and it's not a bunch of wet
10 concrete.

11 And the reason why it's wet, it has a
12 constricted side in the cell of the block that it
13 has to be able to flow through and to be able to
14 consolidate around the rebar, so it meets its
15 structural intent.

16 THE COURT: Grout holds it all
17 together, right?

18 THE WITNESS: What's that?

19 THE COURT: Holds it all together?

20 THE WITNESS: From a structural
21 standpoint, yes.

22 BY MR. WINDLE:

23 Q. Together with the rebar?

24 A. Yes.

25 Q. With the rebar and the grout, you have a

1 continuous -- continuous from floor to floor
2 throughout the building?

3 A. It is continuous, actually even through
4 the deck of the post-tension slab.

5 Q. All right. The next paragraph says,
6 there has been a question on the placement of the
7 exterior walls. We have confirmed through the
8 fourth floor that our walls are placed correctly
9 from the controls provided and the walls are
10 within tolerances. Is that a portion of the
11 stucco issue that we talked about yesterday?

12 A. It is.

13 Q. It says -- the last sentence says,
14 supposedly there was an error, an exterior survey
15 performed approximately a month ago, but we have
16 not yet been furnished any results. But we
17 reviewed the results yesterday as part of your
18 testimony?

19 A. No. Well, we looked at our results that
20 Old North State and Balfour Beatty did. At this
21 point in the job, we were told that there was a
22 third party survey done of the block work and the
23 frame. We never received that survey. What we
24 did is, we literally went out there with a
25 representative from Balfour Beatty, and I

1 personally walked on the second, third and fourth
2 floor and put a level up on the walls and checked
3 from the inside and found them to be in
4 compliance.

5 Q. If you would please turn to tab 40, page
6 532. This document is entitled, notice of delay
7 and demand for cure and is dated December 16,
8 2016. Do you recognize this document?

9 A. I do.

10 Q. Have you seen this before?

11 A. I have.

12 Q. Did you see it on or about December 16,
13 2016?

14 A. I did.

15 MR. WINDLE: I'd like to move this
16 document into evidence.

17 MR. BUNDY: No objection.

18 MR. WINDLE: Old North State
19 Masonry Exhibit No. 40.

20 THE COURT: Number 40 in evidence.

21 (OLD NORTH STATE EXH. 40 was marked
22 for identification and admitted into evidence.)

23 BY MR. WINDLE:

24 Q. And in this Exhibit 40, Balfour was
25 telling -- or has indicated, by putting X's in

1 boxes, that Old North State has failed to fully
2 perform and timely complete its work, provide
3 written assurances and complete timely
4 performance, coordinate its work with that of
5 Balfour, furnish sufficient labor of goods and
6 materials, correct defects, clean up daily,
7 protect its work and correct deficiencies on the
8 work. Is that accurate?

9 A. That's accurate.

10 Q. And when you received that and read it,
11 did you agree with it?

12 A. No, I did not.

13 Q. If you'd turn to Old North State Exhibit
14 41, page 533. This is a letter by Old North
15 State Masonry dated December 20, 2016, from -- or
16 to Nick Starcevic at Balfour Beatty, and it
17 indicates that it was signed by you. Did you
18 prepare this letter --

19 A. I did.

20 Q. -- on or about December 20, 2016?

21 A. I did.

22 Q. And forward it to Mr. Starcevic --

23 A. Yes.

24 Q. -- on or about December 20, 2016?

25 A. Yes.

1 MR. WINDLE: Your Honor, I would
2 like to move that Old North State Masonry Exhibit
3 41 be in evidence.

4 MR. BUNDY: No objection.

5 THE COURT: All right. Without
6 objection.

7 (OLD NORTH STATE EXH. 41 was marked
8 for identification and admitted into evidence.)

9 BY MR. WINDLE:

10 Q. And it indicates in the second
11 paragraph, it is apparent from our walk, that
12 your notice is not appropriate and that the
13 issues experienced on this project are clearly a
14 result of impacts caused by others in areas of
15 work not accessible, to complete at the time we
16 were mobilized on the floors. Did I read that
17 accurately?

18 A. Yes, you did.

19 Q. Was there a walk with Balfour throughout
20 the project?

21 A. There was on the 19th, December 19.

22 Q. The next sentence says, the two main
23 issues that have impacted the sequence are, the
24 redesign of the upper floors that delayed the
25 upper floors being poured, which prevented the

1 shoring from being removed. And who is
2 responsible for the shoring? Is that Old North
3 State Masonry or someone else?

4 A. Someone else.

5 Q. Who is that?

6 A. Lithko.

7 Q. Which prevented the shoring from being
8 removed sequentially and the missing/displaced
9 grout sleeves in the post-tension slabs, which we
10 have addressed numerous times and appears will
11 continue to impact the upper levels of the block
12 work. Did I read that accurately?

13 A. You did.

14 Q. And on the next page, last paragraph,
15 second sentence, you say -- or this letter
16 states, furthermore, the above are some of the
17 reasons why we have taken exception to and cannot
18 agree to the revised schedules, correct?

19 A. Correct.

20 THE COURT: Let me interject for a
21 second. The first letter you sent on the 15th,
22 Exhibit 39, was that in response to a telephone
23 call, or was that a face-to-face meeting.

24 THE WITNESS: That was a telephone
25 call, conference call.

1 THE COURT: All right. So y'all
2 spoke on the phone. You sent the letter. Their
3 response was a notice of delay. Y'all went to
4 the site and walked through on the 19th, and this
5 is in response to that?

6 THE WITNESS: Yes, sir.

7 THE COURT: Got it. Okay. That
8 was 41? It's already in evidence. All right.

9 BY MR. WINDLE:

10 Q. In general, what happened when
11 Balfour -- excuse me, when Old North State
12 Masonry started working on the sixth floor and in
13 the seventh floor and in the ninth floor?

14 A. We accelerated and brought in
15 supplemental forces.

16 Q. And then, when you accelerate, does that
17 involve any additional costs?

18 A. It did.

19 Q. And what type of costs are you talking
20 about?

21 A. Well, first, we're inefficient with our
22 labor. Second, we paid more per hour from a
23 supplemental workforce, that we used another
24 subcontractor. And I think that would be -- that
25 would be that plus the added costs for more

1 people on-site and then we had to put them up in
2 hotels and indirect costs, that sort of thing.

3 Q. And have you been paid for those costs?

4 A. No.

5 Q. And when you say inefficient labor, what
6 was the impact on your labor costs?

7 A. Our labor costs per unit of block was
8 almost three times. Instead of it being 125
9 block per day per mason, throughout this whole
10 job, when we tried to look at and measure
11 (inaudible), it's just the areas where block was
12 substantially laid, which we were able to capture
13 it around 77,000 block. Our average production
14 was about 55 block per eight hour day.

15 THE COURT: How much? 55?

16 THE WITNESS: 55.

17 BY MR. WINDLE:

18 Q. If you'd turn to tab 51, please. Can
19 you identify the document tab 51?

20 A. This is a report. It's called an
21 invoices report by job, and it would be all the
22 invoices.

23 MR. BUNDY: Your Honor, I would
24 like to pose an objection.

25 THE COURT: Sure.

1 MR. BUNDY: As I understand it,
2 there's no claim being made against my client for
3 any money right now by Old North State. I mean,
4 they dropped their lien. They dropped all their
5 claims, and they've been dismissed.

6 I don't see how it is relevant to a
7 defense of a conspiracy that they incurred costs,
8 extra costs. I just don't see how that makes the
9 existence of a conspiracy any more or less
10 likely.

11 THE COURT: Relevance?

12 MR. BUNDY: Yes, sir.

13 MR. WINDLE: Your Honor, as part of
14 the conspiracy, the allegation is that Old North
15 State Masonry and others allegedly filed inflated
16 liens. This goes directly to the amount of the
17 lien, the costs incurred. We're not trying to
18 prove damages.

19 THE COURT: Okay.

20 MR. WINDLE: We're trying to prove
21 why we put the dollar amount we put in the lien.

22 THE COURT: All right. I will
23 allow it. Go ahead. It goes to damages?

24 MR. WINDLE: Yes, sir.

25 THE COURT: Got it.

1 BY MR. WINDLE:

2 Q. All right. Does this -- what's the name
3 of this -- the title of this document?

4 A. Invoices by job.

5 Q. And what's reflected in this document?

6 A. It reflects all the invoices that we
7 received on this particular job through the date
8 of October 24, 2019.

9 Q. Does it include the cost of hotel rooms
10 for an extended period of time?

11 A. It does.

12 Q. Does it show, among other things, the
13 amount paid to the additional contractor Old
14 North State hired in regard to the acceleration
15 you testified about?

16 A. It does.

17 Q. And what was the name of that
18 subcontractor?

19 A. Norkett Masonry.

20 Q. And does it also include additional
21 costs paid to reimburse Old North State Masonry
22 employees?

23 A. Yes.

24 Q. If you'd turn to --

25 A. Can I clarify the -- it's not Norkett

1 and Sons.

2 Q. All right. If you would, look at page
3 585. That's probably where you are.

4 A. Yes.

5 Q. And on this invoices by job document, it
6 indicates that Norkett and Sons was paid
7 \$129,184; is that accurate?

8 A. That's accurate.

9 Q. And has Old North State Masonry been
10 reimbursed for those costs?

11 A. No.

12 Q. Is that part of the lien claim amount?

13 A. It is.

14 MR. WINDLE: Your Honor, I would
15 move that this document, Old North State Masonry
16 Exhibit 51, be admitted into evidence.

17 MR. BUNDY: Same objection, Your
18 Honor, relevance.

19 THE COURT: Okay. I will allow it.

20 (OLD NORTH STATE EXH. 51 was marked
21 for identification and admitted into evidence.)

22 BY MR. WINDLE:

23 Q. Now, this indicates invoices by job.
24 What is not indicated in this invoices by job?
25 What costs are not included in there?

1 A. Our payroll. Anything that we didn't
2 get an invoice for. So our actual payroll, our
3 burden on our payroll.

4 Q. What is burden on payroll?

5 A. That would be workers' comp insurance,
6 state and federal employment insurance. There
7 might be one or two other items that we call
8 burden that would be included in that category.

9 Q. All right. If you would turn to tab 48,
10 page 557.

11 A. I'm there.

12 Q. Can you identify this document?

13 A. This is our standard summary job cost
14 report.

15 Q. Dated?

16 A. This one is dated October 19, 2019.

17 Q. And how does that date fit into the
18 status of the job at the time? What is the
19 status of the job?

20 A. That it's complete at that point.

21 Q. All right. I forgot to ask you this
22 question about Exhibit No. 51. It's dated
23 10/24/19. Did Old North State Masonry receive
24 invoices in relation to this job after that date,
25 10/24/19?

1 A. There could be some miscellaneous ones.

2 Q. Okay. If you look at Exhibit 48, the
3 job cost report?

4 A. Yes, sir.

5 Q. And you look at the labor category, what
6 is the total labor under the column, job to date
7 cost, as of that date? What is the total labor
8 amount?

9 A. It's the fourth column. That's JTD
10 costs, job to date costs, and it's \$1,071,727.60.

11 Q. And if you look at the next column, it
12 says, remaining budget negative \$350,557.06.
13 what is that?

14 A. That represents that we spent \$350,000
15 in additional labor than we anticipated.

16 Q. Does some of that additional labor
17 costs, the costs incurred for hopscotching and
18 delays that you haven't been reimbursed for?

19 A. Yes.

20 Q. Or all of it, I don't know. Or do you
21 know?

22 A. I don't know. I think so. I don't
23 know.

24 Q. All right. If you would turn to tab 52.

25 MR. WINDLE: Your Honor, did I ask

1 that that Exhibit 48 be moved into evidence?

2 THE COURT: Not yet.

3 MR. BUNDY: Same objection,
4 relevance.

5 MR. WINDLE: I request that it be
6 moved into evidence.

7 THE COURT: I will allow it.

8 (OLD NORTH STATE EXH. 48 was marked
9 for identification and admitted into evidence.)

10 BY MR. WINDLE:

11 Q. Exhibit 52 is a letter written by me to
12 an attorney for Balfour dated January 9, 2018,
13 and if you look on page 592, it indicates that
14 you received a copy?

15 A. I did.

16 Q. Did you actually receive a copy --

17 A. I did.

18 Q. -- on or about January 9, 2019?

19 A. On or about that.

20 MR. WINDLE: All right. Your
21 Honor, I would like to move Old North State
22 Masonry Exhibit No. 52 into evidence.

23 MR. BUNDY: Sure. No objection.

24 THE COURT: All right. In
25 evidence, 52.

1 (OLD NORTH STATE EXH. 52 was marked
2 for identification and admitted into evidence.)

3 BY MR. WINDLE:

4 Q. In the first sentence, this says, as
5 requested, enclosed is the preliminary claim by
6 Old North State Masonry. Is that what this
7 document is?

8 A. It is.

9 Q. Does it include the preliminary claim?
10 For example, the --

11 A. It's not a finalized claim.

12 Q. If you look at page 605, attachment C.

13 A. Yeah.

14 Q. What is this document?

15 A. This is our claim calculations of --
16 that we submitted through -- that we calculated
17 through December 5th, 2018, for settlement
18 purposes.

19 Q. And who prepared this document?

20 A. I did.

21 Q. Okay. And we're going to walk through
22 this in just a minute and let you explain to the
23 Court how you got -- what you did and how you
24 calculated the amounts set forth in the claim.
25 okay?

1 But first, looking at the letter,
2 beginning on page 589. The first thing I would
3 like to ask you is to turn to page 590, the
4 second page of the letter. Third paragraph.

5 It begins, it should be noted that Old
6 North State Masonry acknowledges that at this
7 time, Old North State Masonry lacks sufficient
8 information to determine with absolute certainty
9 which entities are responsible for the problems
10 and issues described herein. Did I read that
11 accurately?

12 A. You did.

13 Q. Is that an accurate statement?

14 A. That is.

15 Q. Is the claim that you prepared based
16 upon the information available to you or Old
17 North State Masonry at this time?

18 A. It is.

19 Q. Did you receive additional information
20 subsequently?

21 A. We had because we had revised our claim
22 calculations.

23 Q. All right. Back on page 589,
24 subparagraph A. Third sentence, beginning with
25 because of.

1 Because of numerous issues not
2 responsive to Old North State Masonry, Old North
3 State Masonry cannot complete its work on any
4 floor and was required to make many unplanned,
5 inefficient moves from floor to floor trying to
6 finish work wherever possible. Did I read that
7 accurately?

8 A. You did.

9 Q. Is that an accurate statement?

10 A. It is.

11 Q. The last sentence of that paragraph.

12 However, due to numerous reasons, none of the
13 following are responsive to Old North State
14 Masonry. That plan was impossible.

15 As it turned out, Old North State could
16 not complete work on any floor due to, among
17 other things, lack of access, other tradesmen or
18 materials in the way, incomplete or incorrect
19 preceding work by other subcontractors, stacking
20 of trades, design errors, design changes, et
21 cetera. Did I read that accurately?

22 A. Yes, you did.

23 Q. Is that an accurate statement?

24 A. It is.

25 Q. At the top of the next page, the first

1 paragraph, pursuant to the baseline schedule, Old
2 North State Masonry, for the most part, planned
3 on proceeding with the work from one floor to
4 another in an efficient manner; however, as
5 previously stated, the plan for the efficient
6 performance of the masonry work became
7 impossible. Did I read that accurately?

8 A. You did.

9 Q. And was that an accurate statement?

10 A. It is.

11 Q. The next sentence says, as the chart
12 attached, it shows the actual progress of the
13 work on the project.

14 As shown, owner's state was forced to
15 perform work on five or six different floor at
16 the same time without ever being able to complete
17 any floor as a result of having to double back
18 many times to complete the work on prior floors,
19 resulting in additional inefficient and time
20 consuming mobilizations and demobilization
21 activity. Did I read that accurately?

22 A. You did.

23 Q. And was that an accurate statement?

24 A. It is.

25 Q. Next paragraph, for example, Old North

1 State Masonry was performing work on the sixth
2 floor. Old North State Masonry was having to go
3 back -- also having to go back and complete work
4 on floors one through five. Did I read that
5 accurately?

6 A. You did.

7 Q. And was that an accurate statement?

8 A. It is.

9 Q. The next to the last paragraph on the
10 page, for reasons unknown to Old North State
11 Masonry -- are you with me?

12 A. I am.

13 Q. The work on the project was stopped for
14 a substantial amount of time while the owner was
15 redesigning the seventh, eighth and ninth floors
16 on the project. Regardless of the reason, the
17 effect was a substantial delay to Old North State
18 Masonry. Did I read that accurately?

19 A. Yes.

20 Q. And was that an accurate statement?

21 A. It is.

22 Q. On page 591, acceleration, paragraph B.
23 According to the construction schedule for the
24 project, masonry work on the seventh floor was
25 scheduled to begin on October 3, 2016, and be

1 completed by October 14, 2016.

2 The masonry work on the eighth floor was
3 scheduled to begin on October 17, 2016, and be
4 completed by October 28, 2016. And the masonry
5 work on the ninth floor was scheduled to start on
6 October 31, 2016 and be completed by November 7,
7 2016.

8 However, that work was not performed in
9 accordance with the construction schedule. To
10 the contrary, Old North State Masonry was
11 directed to accelerate its work efforts by
12 completing all three floors at the same time.
13 Did I read that accurately?

14 A. You did.

15 Q. And is that a correct -- are those
16 correct statements?

17 A. We were working on all three of those
18 floors at the same time, yes.

19 Q. And were you directed to accelerate, to
20 work on all three floors at one time?

21 A. We were told we needed to, yes.

22 Q. And the next sentence, Old North State
23 Masonry complied with a directive and did
24 accelerate its work efforts; however, in doing
25 so, Old North State Masonry occurred substantial

1 acceleration costs.

2 Specifically, Old North State Masonry
3 retained the services of another masonry
4 contractor, Norkett and Sons and obtained
5 additional men and equipment for Norkett and Sons
6 in order to be able to accelerate performance of
7 the masonry on the seventh, eighth and ninth
8 floors.

9 Old North State Masonry paid Norkett and
10 Sons \$129,184 in order to obtain the additional
11 men and equipment needed to comply with the
12 directive to accelerate. Did I read that
13 accurately?

14 A. You did.

15 Q. And is that a correct statement?

16 A. It is.

17 Q. Under paragraph C, it says, the plan
18 duration of work on the project from start to
19 finish was 29 weeks. This is the masonry
20 portion, correct?

21 A. It is.

22 Q. The actual duration of the masonry,
23 despite the acceleration was 76 weeks and overrun
24 of 47 weeks. Did I read that accurately?

25 A. You did.

1 Q. And is that an accurate statement?

2 A. It is.

3 Q. And during those 47 weeks, what -- of
4 overrun, what are some of the costs that Old
5 North State Masonry was having to continue to pay
6 during that overrun period?

7 A. Would have been equipment rental costs.
8 It would have been hotels, our general conditions
9 costs to be there on-site.

10 Q. What about additional labor costs for
11 people to be on the job, that job at an
12 additional 47 weeks?

13 A. Absolutely. There would be absolutely a
14 labor factor with the inefficiencies of going
15 almost three times the original duration.

16 Q. The next to the last paragraph.

17 Based upon the agreed upon inefficiency
18 and general conditions costs established in
19 change order number 4, Old North State Masonry
20 has incurred and is entitled to be reimbursed
21 \$1,139,509.06 for inefficiency, disruption and
22 delay costs incurred in attempting to complete
23 its obligations under extremely difficult
24 conditions that were not the fault or
25 responsibility of Old North State Masonry. Did I

1 read that accurately?

2 A. You did.

3 Q. And was that an accurate statement?

4 A. At the time that we did our
5 calculations, it was.

6 Q. It says, attached hereto is attachment
7 of C, Old North State Masonry's calculations of
8 the additional costs incurred. The cost of Old
9 North State Masonry's analysis is ongoing. Old
10 North State Masonry reserves the right to change
11 the analysis and computation of costs as the work
12 and analysis proceed. Did I read that
13 accurately?

14 A. You did.

15 Q. And if you'd look at Exhibit C on page
16 606. Are you with me?

17 A. I am.

18 Q. What is the date of this document?

19 A. December 5th, 2018.

20 Q. And who prepared it?

21 A. I did.

22 Q. And if you would, let's just walk
23 through on this page --

24 A. Okay.

25 Q. -- what you did and explain to the Court

1 what you did, why you did it, how you did it,
2 please. 606.

3 A. Well, the first page is really -- we
4 started off by trying to identify the area of
5 impact and change in scope, and we broke that
6 down between the block work and the obstacles
7 impacted that we experienced on the veneer.

8 And we -- this claims analysis is in no
9 way trying to segregate responsibility for those
10 impacts. We're just telling you that Old North
11 State has been impacted in those areas on the
12 job. So do you want me to go into further detail
13 or --

14 Q. All right. Item number 1A, block work
15 impacts. For example, length of time to progress
16 the project. Number 7 acceleration, number 8
17 access. You testified about all of this,
18 correct?

19 A. Yes.

20 Q. Then you've got, veneer work impacts on
21 all obstacles. Item B-2 or item 2, work not
22 presented in the manner and time indicated in the
23 contract. What do you mean by that?

24 A. Just that's work that should have been
25 available or complete in front of us, to allow us

1 to start and complete activities was not done.

2 Q. Per the construction schedule?

3 A. Per the construction schedule.

4 Q. Item 3, stop work in the vertical
5 structure design changes caused by owner.

6 A. Yep.

7 Q. Item 4, design changes from the
8 waterproofing consultant. What do you mean by
9 that?

10 A. Well, on the -- there were items that --
11 the architect, I assume, brought in a third-party
12 consultant.

13 MR. BUNDY: Objection. He's making
14 assumptions about things which is not firsthand
15 knowledge. There's not -- he can't testify
16 unless he knows, under the rule.

17 MR. WINDLE: I will withdraw the
18 question.

19 BY MR. WINDLE:

20 Q. Let me ask you this way. Were there
21 changes with the waterproofing design on the
22 project?

23 A. There were.

24 Q. And did that have any effect or an
25 effect on Old North State Masonry?

1 A. It did.

2 Q. What effect did it have on Old North
3 State Masonry?

4 A. There were changes that we could not get
5 answers to, to proceed, so certain areas could
6 not move forward.

7 Q. You were stopped in certain areas
8 waiting on answers on -- to RFIs, resolving
9 waterproofing design; is that accurate?

10 A. Correct.

11 Q. Page 607, item 5, acceleration.

12 A. That's item 6.

13 Q. Six, excuse me. Item 9, multiple design
14 changes. Flashings and waterproofing details.
15 What is flashings?

16 A. Well, flashing is just -- in our
17 industry, there's two types. There's the
18 through-wall flashing that is for veneers. And
19 you have that at the base of the wall where they
20 had these big precast panels. And then there was
21 flashing underneath precast caps, that there were
22 changes to those flashings.

23 And we could not put the stone in place
24 until the flashing was there. And there were
25 changes to that flashing, and they were not

1 available when the precast was ready to go and we
2 were directed to go, so we couldn't complete it.

3 Q. What's the purpose of flashing?

4 A. It's to divert water outside of the
5 building.

6 Q. And was the design or type of flashing
7 being changed?

8 A. In certain areas, it was.

9 Q. And did that affect -- have an impact on
10 Old North State Masonry?

11 A. It prevented us from installing the
12 stone, yes.

13 Q. Under your -- the sublien, Old North
14 State Masonry started block work on the project
15 on approximately 7/16/16, and immediately
16 encountered issues and pulled off the site and
17 provided notice of delay to Balfour Beatty a
18 number of times.

19 And the next to the last sentence, the
20 upper floors encountered numerous issues with
21 direction and coordination of other trades and
22 presented a significant change in scope of work,
23 with all the reshoring being removed due to the
24 stopped work of the structure by the owner.

25 The next paragraph, block work was

1 started approximately July 6, 2016. It was
2 substantially completed as of June 14, 2017,
3 representing a 49 week duration. Did I read that
4 accurately?

5 A. You did.

6 Q. Coming down to the third to the last
7 sentence from the bottom, overall masonry
8 as-built duration on the project was
9 approximately 76 weeks in total duration. The
10 contract masonry duration, as directed in the
11 approved change order number one, was the
12 baseline schedule, correct?

13 A. It was the change order number one
14 baseline schedule.

15 Q. Okay. And that change order one became
16 a part of your subcontract?

17 A. It did, early on.

18 Q. And that showed a 29 week duration?

19 A. It did.

20 Q. Just based on the change and scope
21 duration of the masonry, is 47 weeks. Did I read
22 that accurately?

23 A. You did.

24 Q. If you turn to page 608, it says,
25 therefore, the added costs associated with this

1 change order and scope is as follows: Number 1,
2 additional variable costs, indirect costs based
3 on actual costs to date 10/25/18, attachment inc.
4 what are indirect costs?

5 A. Well, they're listed here, but they're
6 literally the fuel, the construction equipment,
7 auto and truck expense. All of the time
8 sensitive costs that we tracked on our job cost
9 report.

10 Q. And is that included as a line item in
11 the schedule of values on your contract?

12 A. No.

13 Q. Okay. This version of your claim under
14 1-A-9 includes legal fees. Is that a proper
15 inclusion in any claim against Balfour or the
16 owner?

17 A. It is not, and with the updated claims
18 submissions, we actually removed that from the
19 calculations.

20 Q. So what were the additional -- or
21 according to this, your claim document, the
22 additional variable or indirect costs, so the
23 \$401,828.44?

24 A. Correct.

25 Q. And then you say, less additional

1 indirect costs included in specific change
2 orders. well, what do you mean by that? why did
3 you do it?

4 A. In order to have this be as accurate as
5 possible, and with input from counsel, we knew
6 that if we hadn't covered costs in a change
7 order, they needed to be backed off this
8 calculation. So we were just trying to square up
9 the numbers to make sure that where we were
10 represented, that this would be additional
11 variable costs that we felt were caused by the
12 impacts on the job.

13 Q. That you had not been reimbursed?

14 A. That we had not been reimbursed for
15 through change orders previously issued and
16 executed on the job.

17 Q. So your net additional indirect costs
18 were \$335,230.78 for this version of your --

19 A. Correct.

20 Q. All right. If you'd turn to page 608.
21 The next item, item 2, additional labor costs.
22 What does this show?

23 A. 609 or 608?

24 Q. 609, I'm sorry.

25 A. This is the additional costs of labor,

1 and we broke it down into two categories. We
2 broke it down for the additional supervision
3 costs for the 47 weeks on the job site, the
4 extended duration.

5 And then at this point in time, we were
6 capturing the additional time that our vice
7 president of operations actually were
8 accelerated. He ended up spending his time
9 on-site, and that was his costs for an eight week
10 period.

11 Q. Did your vice president of operations
12 typically spend that amount of time on any
13 project?

14 A. No.

15 Q. Why was he on this project?

16 A. There were just problems. We were
17 accelerating. We were just trying to get the job
18 done.

19 Q. All right. Go ahead.

20 A. So that additional supervision cost was
21 \$101,300.

22 Q. The next item is labor impacts and
23 inefficiencies, plus supplemental forces to
24 accelerate again. Can you explain that?

25 A. Yes. What we did here is, we took our

1 labor inefficiencies, which was the overbudget
2 costs of our labor and our additional costs for
3 supplemental subcontractors, and again, you know,
4 to be fair, if there were any dollars that were
5 not spent within our budget of subcontractor
6 costs, we added that back in so that we would
7 square it up.

8 Q. You weren't trying to -- you were making
9 sure you weren't double dipping?

10 A. Correct.

11 Q. All right. Next item 3, change order
12 dollars that should be approved for work already
13 completed, \$26,078. would you explain that,
14 please?

15 A. At the time of this admission, we had
16 change requests outstanding, the \$26,000, that we
17 thought should have been -- that we should
18 ultimately get change orders for.

19 Q. All right. Item 4, total additional
20 costs without overhead.

21 A. It's just the sum of the items that we
22 went through, item 1 and item 2 and 3.

23 Q. And that's \$984,692.78, correct?

24 A. Correct.

25 Q. And then the overhead and profit, is

1 that allowed by contract, subcontract?

2 A. I believe it is, yes.

3 Q. And is what is that amount, \$143,792.22?

4 A. Correct.

5 Q. And then the bottom costs, it is
6 included in this version of the claim for
7 \$11,024.70, but what have you learned about
8 bottom costs?

9 A. We had not posted bond on the jobs, so
10 that needed to be removed.

11 Q. Okay. And ultimately, was it removed?

12 A. It was.

13 Q. The total costs then in this
14 calculation, your calculation of this claim was
15 \$1,139,509.06?

16 A. Correct.

17 Q. If you would, please turn to tab 46,
18 page 547. Page 547 is a recorder's receipt.
19 It's dated February 12, 2019, and the description
20 is for a mechanic's lien.

21 A. Yes.

22 Q. If you turn to the next page, page 548,
23 can you identify this document?

24 A. This is Old North State's lien on the
25 job.

1 Q. It's notice and certificate of
2 mechanic's lien. It says, received 2/12/19, and
3 in the third paragraph, it indicates it's in the
4 amount of \$1,400,731.94, correct?

5 A. Correct.

6 Q. And what is the difference between that
7 lien amount of \$1,400,000 and the claim amount of
8 \$1,139,000?

9 A. It would be the inclusion of our
10 outstanding mechanic's still owed and there would
11 be adjustments between the -- if we made any
12 adjustments to our claim calculations based on
13 information that we found out that shouldn't be
14 in the claim, that would also be refunded in that
15 amount.

16 Q. Had you been paid your retainage at that
17 time?

18 A. No.

19 Q. What was the amount of retainage that
20 you were owed?

21 A. \$256,000 and some change.

22 Q. And was this mechanic's lien inflated in
23 any way?

24 A. No.

25 Q. And what was the purpose of filing this

1 mechanic's lien?

2 A. It was done for our protection. We were
3 going to take the protection.

4 Q. Filed in order to protect payment for
5 work, labor and materials provided and work
6 performed?

7 A. On the job, yes.

8 Q. Was it filed for any other reason?

9 A. No.

10 MR. WINDLE: Your Honor. No
11 further questions at this time.

12 THE COURT: Do you want those last
13 two documents in evidence as well?

14 MR. WINDLE: Yes, sir.

15 (OLD NORTH STATE EXH. 46 was marked
16 for identification and admitted into evidence.)

17 MR. BUNDY: All right. There's a
18 lot of stuff in this book that's not in evidence.

19 THE COURT: Right.

20 MR. BUNDY: So we need to clean
21 that up.

22 THE COURT: Right. He didn't go
23 over everything, but the ones we went over were
24 the ones that you wanted in, right.

25 MR. WINDLE: Yes, sir.

1 MR. BUNDY: Your Honor, I need a
2 few minutes to go over my paperwork and get all
3 my papers set up.

4 THE COURT: Okay. Do you want to
5 take five?

6 MR. BUNDY: Sure, if you don't
7 mind.

8 THE COURT: Sure. Let's do that.
9 Let's take a break.

10 (A recess transpired.)

11 THE COURT: Are you ready?

12 MR. BUNDY: I am.

13 CROSS-EXAMINATION

14 BY MR. BUNDY:

15 Q. All right, sir. I would like to
16 understand just a little bit better why it is
17 that you have decided to drop -- on the eve of
18 the beginning of your trial, why you've decided
19 to drop your foreclosure action against Library
20 Associates?

21 A. It was a business decision I made.

22 Q. Pardon me?

23 A. It was a business decision that I made
24 based on a number of factors.

25 Q. And what were the factors?

1 A. A, I lost a lot of money on the job. B,
2 I was owed a lot of money in retainage still. I
3 spent hundreds of thousands of dollars in
4 attorney's fees.

5 Q. How much in attorney's fees?

6 A. Hundred of thousands. I don't know.

7 Q. You said yesterday 500, I think.

8 A. No, no, that's not what I said.

9 Q. Oh, you didn't? What did you say?

10 A. I think I said -- I referred to \$500 as
11 out of pocket on the job.

12 Q. 500 out of pocket?

13 A. Out of pocket, meaning that, contributed
14 zero dollars to my overhead -- it cost me
15 \$500,000 to build that job.

16 Q. Okay. So the difference between what
17 you have been paid and what you spent is
18 \$500,000?

19 A. No, that's not what I'm saying. It cost
20 me \$500,000 to build that job.

21 Q. Okay.

22 A. My contract was \$500,000 below my costs,
23 not including overhead or any sort of profit.

24 Q. So you spent \$500,000 more than you
25 planned to spend?

1 A. Yes.

2 Q. Plus overhead?

3 A. No, no, no because I would have
4 anticipated making money to pay for my overhead;
5 so it would have been more than what -- it's not
6 \$500,000 plus overhead.

7 Q. What's the difference between --

8 MR. WINDLE: Excuse me, let him
9 finish his answer, please.

10 BY MR. BUNDY:

11 Q. I'm sorry, go ahead.

12 A. The way it -- what I was saying is that
13 our costs, our direct costs on the job. Mason's
14 labor is put -- not including any of my company
15 overhead. It's about -- over \$500,000 below my
16 contract value. That's what I said.

17 Q. Okay. So the contract amount had how
18 much profit in it?

19 A. It would have been roughly 15 percent.

20 Q. 15 percent, which would be what,
21 \$75,000?

22 A. No. It would have been close to 300 and
23 some thousand.

24 Q. So you lost your profit for \$300,000?

25 A. Correct.

1 Q. And you spent an extra \$500,000 --

2 A. Yes, sir.

3 Q. -- in the field?

4 A. Yes, sir.

5 Q. For overhead, field overhead?

6 A. Field costs.

7 Q. Field costs or overhead, whatever you
8 want to call it. And then you had home office
9 overhead that you do, that you expend?

10 A. Yes.

11 Q. How much is that? What is that number?

12 A. It depends on our revenue for the year.
13 I mean, it gets divided up to our revenue for the
14 year for the entire company.

15 Q. But you don't have any idea?

16 A. No, I don't.

17 Q. Okay. So all you can testify here
18 today, to any degree of any certainty, is that
19 the difference between what you budgeted and what
20 you got paid -- or what you budgeted minus what
21 you spent is \$500,000 in the field and \$300,000
22 in lost profit?

23 A. I would say that's fair.

24 Q. Okay. So your loss is \$800,000. Now,
25 in order -- and you dropped your case because you

1 lost a lot of money. Isn't that why you brought
2 the case, to get the money you lost?

3 A. Initially, that's why we brought the
4 case. After all of these four years of losing
5 money on the job, not collecting on our
6 retainage, spending all of this money on
7 attorney's fees, I made a business decision.

8 And weighing heavily on me is the fact
9 that, if we were to prevail, you were very clear
10 that you were not going to rest with that, and
11 that this was going to continue on. And I had
12 just had enough of it, and I would rather just
13 try to make some money laying brick and block.

14 Q. Now, you were aware, were you not, that
15 if you prevailed in a claim you have now
16 dismissed, that you would be entitled to
17 attorney's fees? You would be entitled to get
18 all of those attorney's fees back. Did you know
19 that?

20 A. Yes.

21 Q. And so you walked away from the
22 potential of getting your attorney's fees paid,
23 and you walked away from \$800,000. And the
24 \$800,000 you had already lost, you lost that on
25 the day you left, right?

1 A. Yeah. At least that, yeah.

2 Q. So you had already incurred \$800,000,
3 whatever -- what was the date that you worked?

4 A. I would have to look at the records. I
5 don't know.

6 Q. And so you didn't incur any more losses
7 on the job because you had already sustained
8 those. Your business took the hit, and you kept
9 on moving. You kept laying block. And all you
10 had additional costs to pay is paying your
11 lawyers, right?

12 A. And the fact that there was no end in
13 sight.

14 Q. Okay. Well, were you ever -- did
15 anybody ever guarantee you that, when you brought
16 this litigation with the -- that Library
17 Associates wouldn't hire a lawyer like me who
18 goes, no, we're not going to pay you. We're not
19 going to succumb. We're not going to buckle
20 under. We're going to fight this case. Did that
21 ever occur to you?

22 MR. WINDLE: Objection.

23 A. No, sir.

24 Q. So you figured by just filing a lien,
25 sooner or later, somebody is going to pony up a

1 bunch of money?

2 A. That's not a fair statement, sir.

3 Q. All right. Okay. So when was it -- so
4 other than -- when was it you determined, in your
5 own mind, that I, Bundy, the lawyer for Library
6 Associates, was the individual who was going to
7 prevent you from getting your money? When did
8 you make that determination? When did that
9 become part of your business decisions?

10 A. Right after you presented on mediation.
11 That was a concern for us.

12 Q. And how long ago was that?

13 A. I don't know.

14 Q. It's been years and years, hadn't it?

15 A. Not years and years.

16 Q. Well, that was before you even filed a
17 lawsuit, or was it? Was it after you filed a
18 lawsuit or before?

19 A. I don't recall.

20 Q. You don't recall. Okay. So you knew at
21 the mediation, as you left -- the mediation was
22 in my office, wasn't it?

23 A. No, sir.

24 Q. Where was it?

25 A. It wasn't a mediation. It was a Zoom

1 mediation.

2 Q. A Zoom mediation. And was I involved in
3 that?

4 A. You were, sir.

5 Q. And that was the first time you met me?

6 A. I didn't meet you. I saw you on the
7 screen.

8 Q. All right. And that was at least, what,
9 a year or two ago?

10 A. I'm not sure.

11 Q. And what were we mediating? What was
12 the -- what were we mediating? Refresh my
13 recollection.

14 A. This case.

15 Q. Your million dollar lien?

16 A. No, the case in general.

17 Q. The case in general.

18 A. All parties.

19 Q. Okay. Gotcha. I remember what you're
20 talking about. So at that mediation, you
21 realized that Mr. Bennett had hired an
22 unreasonable lawyer and was going to take it all
23 the way to Columbia, and you decided at that
24 point, that you wanted to get out, right?

25 A. That's what you said.

1 Q. Sir?

2 A. That's what you said at that mediation.

3 Q. That's what I say in every mediation.
4 You're not unusual. I take this position with
5 everybody who sues my client in every single
6 mediation. You're not being -- you're not being
7 singled out. You're being treated just like --

8 A. No, I didn't say we were getting singled
9 out. I'm telling you that, that was part of our
10 business equation on how we determined that we
11 were settling.

12 Q. All right. And that decision -- and
13 that piece of information that you relied on to
14 decide to drop this case was gotten by you over a
15 year ago. You knew this over a year ago, that
16 you were going to have to deal with me?

17 A. And the fact that I, personally, have
18 spent a lot of time preparing for this day. I
19 can't remove myself from my operations and
20 dedicate this much time to this situation.
21 That's part of my business equation. That's what
22 my partners and I sat down, on the way -- the
23 night before I came down here, and that's when I
24 made the decision.

25 Q. Okay. Well, what I don't understand is,

1 is that you in fact had to do the work because
2 you got just through testifying, and your lawyer
3 went through every single thing that you thought
4 you were entitled to, and so you haven't saved
5 any time and you haven't saved any legal fees by
6 quitting, have you?

7 A. Sir, if this continues on, I'm going to
8 spend my time. That's what I'm preserving, my
9 future time.

10 Q. Okay. Are you aware that there's a
11 potential now that you're going to have to pay
12 the legal fees of my client because you dropped
13 this lien? Did anybody tell you that?

14 MR. WINDLE: Objection.

15 A. Yes.

16 Q. And you say your lawyers have charged
17 you a couple hundred thousand dollars?

18 A. Yes, sir.

19 Q. Would it surprise you that, my firm has
20 probably spent a couple hundred thousand dollars
21 of Mr. Bennett's money defending the claim you've
22 dropped? Would that surprise you?

23 A. That would surprise me.

24 Q. Sir?

25 A. That would surprise me.

1 Q. It would surprise you?

2 A. It would.

3 Q. Okay. So it would surprise you if your
4 lawyers spent more money than me?

5 A. I don't understand how the legal costs
6 will be distributed. That's beyond my scope of
7 understanding. Okay? I'm not going to even tell
8 you what -- I did not think that your costs had
9 to do with our lien and would amount to hundreds
10 of thousand of dollars, no, sir.

11 Q. Okay. All right. Now, you say that you
12 were ordered to accelerate, correct?

13 A. Correct.

14 Q. And we can agree that the only entity
15 that had the authority to order you to accelerate
16 was Balfour Beatty Construction?

17 A. Correct.

18 Q. My client didn't have a contract?

19 A. With us, no.

20 Q. Okay. And you've also said that you
21 don't know, in large part, what the cause of
22 these problems were, what the origins of these
23 problems were? You just know you were faced with
24 them?

25 A. Correct.

1 Q. But you do know, as between Balfour
2 Beatty and Library Associates, that the only
3 party that you had a contract with that you could
4 sue for breach of contract for acceleration,
5 delay, whatever it was with Balfour Beatty? You
6 knew that all along. You always had the right to
7 sue them, right?

8 MR. WINDLE: Objection, Your Honor.
9 There are other provisions in the contract.

10 THE COURT: He's on cross. I'm
11 going to allow him to ask the question.

12 THE WITNESS: Can you repeat it,
13 please?

14 BY MR. BUNDY:

15 Q. Sure. You've known since day one, that
16 you had the right to sue Balfour Beatty for the
17 damages you've incurred?

18 A. And I had the right to recover from the
19 owner, through my pass-through clause with my
20 contract.

21 Q. Have you sued Balfour Beatty?

22 A. I don't know that.

23 Q. You don't know?

24 A. I don't know that.

25 Q. Have you agreed in the joint prosecution

1 defense and tolling agreement in fact, not to sue
2 Balfour Beatty?

3 A. I think it might be that we agreed not
4 to sue them until after these proceedings. If
5 they are found -- my understanding is that, if
6 Balfour Beatty were responsible for our costs, we
7 had a right to move against Balfour Beatty.
8 Likewise, they had a right to move against Old
9 North State if we (inaudible).

10 Q. And as you sit here today, does Balfour
11 Beatty owe y'all any money? Are they responsible
12 for any of the costs you've incurred?

13 A. I don't know that. It's beyond
14 my ability -- I'm not a claims expert. I am not
15 a scheduling expert. I don't know how ripple
16 effects flow through a schedule that the
17 causation of one thing to another and then to
18 another, I -- that's beyond me. I cannot do
19 that. I cannot tell you that.

20 Q. But you did it in this claim?

21 A. I did not.

22 Q. Oh, you didn't?

23 A. I did a total cost of my claim. I am
24 not assigning responsibility because I don't
25 know. I'm very clear on that.

1 Q. And that's what I was getting to. Your
2 claim is a total cost claim? What you did was --

3 A. No, sir.

4 Q. You just said total cost?

5 A. Total as in, I did not segregate the
6 amount of my claim to any individual party
7 because I don't know proportionate shares.

8 Q. But your claim itself is a total cost
9 claim. You took -- you compared what you spent
10 to what you budgeted and what -- and the
11 difference is what you're asking for?

12 A. That in conjunction with an -- we
13 analyzed that based off of information that we
14 had from change order 4 to make sure that --
15 there's no measured mile on this job. The job
16 was screwed up from the get go. Okay? There's
17 no measured mile that we could look at, okay,
18 here's an area that works and try to work it that
19 way.

20 what we did do, to make sure that we
21 were not off base in how we calculated it was, we
22 utilized change order 4 that identified
23 production and inefficiencies. And it identified
24 indirect variable costs. For that time period,
25 we did an analysis of that to make sure that we

1 were in relatively the same ballpark of dollars,
2 and that's what we did.

3 Q. And then you ended up coming up with a
4 number that was greater than the difference
5 between your budget and what you spent, plus
6 profit and overhead. The number you came up with
7 of a million and some-odd dollars is greater than
8 the total loss on this job plus profit and
9 overhead, correct?

10 A. It includes inefficiency losses.

11 Q. But you didn't spend it. You've got a
12 list of all the money you've spent. Whatever
13 you've spent, whatever was efficient or
14 inefficient, you have paid for it. Okay? You're
15 asking, in a lien, for more money than you lost
16 if you'd just simply compare the cost of what you
17 spent to what you budgeted, correct?

18 A. I don't --

19 Q. That's what you've done.

20 A. I don't think so.

21 Q. All right. Now, have you had anybody
22 look at your budget to see if in fact, it
23 contained any errors? Because in order for you
24 to have a total cost claim, you have to have a
25 perfect budget. Did you have a perfect budget?

1 MR. WINDLE: Objection, Your Honor.
2 He testified it wasn't a total cost claim.

3 MR. BUNDY: My question was, did
4 you have a perfect budget?

5 MR. WINDLE: This is like the third
6 time he's asked the same question.

7 THE COURT: All right.

8 MR. WINDLE: And the last answer
9 was, he thought it wasn't a total cost claim.

10 THE COURT: All right. Noted. Go
11 ahead.

12 BY MR. BUNDY:

13 Q. My question was, have you had anybody to
14 look at the budget to see if it was perfect?

15 A. No.

16 Q. Okay. And did Old North State Masonry
17 run a perfect job?

18 A. No.

19 Q. Okay. So y'all made mistakes?

20 A. We made mistakes.

21 Q. Okay. What mistakes did you make, and
22 how much did they cost you?

23 A. We had some field cell issues that we
24 had to take care of.

25 Q. You had some what?

1 A. Field cells, that the grout did not --

2 Q. Oh, okay. You mean, when you put grout
3 in the cells and closed them up before the
4 building inspector approved you to be able to put
5 grout in? That's what you're talking about?

6 A. No, sir.

7 Q. How much did you lose? How much money
8 did you spend on that mistake?

9 A. I don't know.

10 Q. You don't know. Is the money you spent
11 on that mistake in these cost records of costs
12 incurred, labor incurred?

13 A. The costs are in there, yes.

14 Q. Okay. So in your claim and in your
15 lien, there's costs in there for costs you admit
16 were your fault and is your problem?

17 A. Understand, there's never a perfect job.
18 The way we set up our estimate in our budget,
19 there's going to be some inefficiencies that
20 everyone experiences on every single job. It
21 takes that into account. We feel that we did not
22 have any significant issues overall.

23 Q. Okay. When did you settle with Balfour
24 Beatty?

25 A. As I told you, we made the decision when

1 I was driving down.

2 Q. Sir?

3 A. As I told you, I made the decision with
4 my partner when I was driving down.

5 Q. Yeah, okay. But when -- and so driving
6 down here. And so you settled with Balfour
7 Beatty yesterday or the day before yesterday?

8 A. I made a decision to settle with them
9 the day before yesterday.

10 Q. And so once you made the decision to
11 settle, how did you implement that? What was the
12 next step in getting it settled?

13 A. I informed my attorney.

14 Q. And what was the -- and were you
15 involved in the negotiations?

16 A. No.

17 Q. Okay. And what number did you get?

18 A. We got our retainage.

19 Q. How much?

20 A. \$256,000. We don't have that yet. We
21 don't -- I mean, I would have to talk to my
22 attorney of when we're going to get that, but I
23 think that there's some triggers of what -- when
24 we're going to get that money. So we're just
25 getting our money.

1 Q. What are the triggers?

2 A. I don't know.

3 Q. Well, are you absolutely sure you're
4 going to get the \$256,000, or are there
5 contingencies involved?

6 A. I think we're getting our -- my
7 understanding is, we're getting our \$256,000.

8 Q. But you don't -- but you think there are
9 some conditions that you don't know of?

10 A. I'm just telling you, I'm pretty
11 confident that we're getting our \$256,000.

12 Q. And this is retainage that the
13 contractor has been holding on you for how long?

14 A. Well, it's sequential to the job, but it
15 started in 2016, and we were done with our work
16 in -- I don't know -- '17 or '18, so through that
17 whole period.

18 Q. Okay. So they've been holding your
19 retainage -- I mean, certainly since you left the
20 job, right?

21 A. Yes, sir.

22 Q. Have you ever made a request for final
23 payment?

24 A. We have.

25 Q. Yeah. And didn't you make that request

1 for final payment the day after we took your
2 deposition and asked you if you made a request
3 for final payment, and y'all went out and made a
4 request the next day?

5 A. You're right.

6 Q. All right. And that was back in August
7 of this year, that you'd just got around to
8 asking for your retainage?

9 A. Because we were told that there was --
10 the owner was releasing the retainage. So we did
11 not submit our change order request -- or our pay
12 request for our retainage.

13 Q. Balfour Beatty told you the owner was
14 not releasing retainage?

15 A. Yes.

16 Q. Do you know whether that was true or
17 not?

18 A. No.

19 Q. Did you ever check with the architect to
20 see if any of your money -- that if the money
21 paid on your behalf ever got to you on this job?

22 A. No.

23 Q. You just trusted Balfour Beatty, right?

24 A. We did.

25 Q. Okay. What other mistakes did you make

1 other than the -- filling the grout on this
2 perfect job? what other mistakes did you make?

3 A. I don't know. You tell me.

4 THE COURT: It doesn't work that
5 way, Mr. Anastasi.

6 THE WITNESS: Okay. well, we had a
7 section of wall on the -- one of the stairwells
8 we had to take down about 350 square feet of
9 block. I don't know if it was stairwell number
10 three or number six, from the third floor through
11 the fifth floor.

12 BY MR. BUNDY:

13 Q. And are those costs in your roll up for
14 your mechanic's lien? were those costs in the
15 mechanic's lien, that labor?

16 A. The labor is in our costs.

17 Q. Was it in the mechanic's lien?

18 A. It was not a significant amount of
19 money, but it was in our costs.

20 Q. Was it in the mechanic's lien?

21 A. I believe so.

22 Q. Okay. And now, it might not have been a
23 significant amount of money to you, but you
24 weren't entitled to it, were you? You weren't
25 entitled to be paid for labor to repair your own

1 defective work, were you?

2 A. No. Our -- our defective work on this
3 job was no greater than on any typical job, which
4 is built in to our estimated systems.

5 Q. Well, the lien says, does it not, and
6 you swear -- whoever signed it swears under oath
7 that all that money is due under penalty of
8 perjury. You're aware of that, right?

9 A. Yes, sir.

10 Q. So at least whatever that number was
11 fixing those stairwells was improper, that would
12 be a lie because that money was not due?

13 A. Sir, we calculated our costs. We've
14 always represented our costs were through a
15 certain date. There were adjustments to those --
16 those claims that we had done. Had we started
17 this in September or October of '16, every single
18 month, we would identify the claim on our pay
19 app.

20 We kept it going, and it was revised
21 numerous times throughout the whole process. We
22 found information that -- that was not correct.
23 We adjusted it so it would be as correct as
24 possible. So to the best of my knowledge, when
25 we submitting that, that was correct.

1 Q. But as you sit here today under oath, we
2 know it wasn't correct. Is that true?

3 A. I'm not sure if it's true or not.

4 Q. I want to show you what's been
5 previously marked and is in evidence as Exhibit
6 67. We made it a little larger for the purposes
7 of looking at it. This is an inspection prewalk
8 document by Premier Exteriors. Who is Premier
9 Exteriors?

10 A. The stucco subcontractor.

11 Q. Sir?

12 A. The stucco subcontractor.

13 Q. And have you ever worked with them
14 before?

15 A. I have.

16 Q. And how many times?

17 A. I know of one other than this one.

18 Q. And they also signed the joint defense
19 agreement as well, didn't they?

20 A. I don't know that.

21 Q. You don't know that. Now, Lithko, have
22 you ever worked with Lithko before?

23 A. Numerous times.

24 Q. Numerous times. Okay. And they also
25 signed a joint defense agreement, correct?

1 A. Yes.

2 Q. Where is Lithko out of? What town do
3 they work out of?

4 A. They're a huge company. I don't know.

5 Q. And your company is out of where?
6 Charlotte?

7 A. Matthews, North Carolina.

8 Q. That's outside of Charlotte, right?

9 A. Yes.

10 Q. Does Lithko got a Charlotte office?

11 A. Yes.

12 Q. So you socialize with people at Lithko?

13 A. No.

14 Q. Any buddies over there?

15 A. No.

16 Q. But y'all do share lawyers, though,
17 right? Y'all all -- both you and Lithko hired
18 Mr. Steele and Mr. Terry to represent both of
19 you, right?

20 A. We did.

21 Q. Okay. As did apparently unbeknownst to
22 Watson as well, right?

23 MR. WINDLE: Objection.

24 MR. TERRY: Objection. His
25 testimony was that Mr. Brittelli testified he

1 didn't know. He didn't say Watson didn't know.

2 THE COURT: Okay.

3 MR. BUNDY: The testimony was what
4 it was.

5 BY MR. BUNDY:

6 Q. All right. So let's look at Premier
7 Exteriors inspection prewalk.

8 A. Uh-huh.

9 Q. What are we looking at in these
10 pictures? What is -- well, let me ask you this:
11 Premier Exterior is going to do what, as it
12 relates to your block work?

13 A. They're putting stucco on the building.
14 They're putting it on top of the waterproofing.

15 Q. So they're putting stucco on your block
16 work?

17 A. And on the concrete framing.

18 Q. All right. And on the concrete framing.
19 And what is the -- are you aware of the principle
20 in construction, that you accept the substrate as
21 a subsequent contractor? Do you know what I'm
22 talking about?

23 A. Yes.

24 Q. Okay. And what this is, is the stucco
25 guy's attempt to go look at your work to

1 determine whether or not it's suitable for his
2 work, the next job that goes on, right?

3 A. Well, I think he's looking for overall
4 conditions. It would not just be my work.

5 Q. Okay.

6 A. It would be the concrete work as well.

7 Q. Would it be Lithko's work?

8 A. It would be windows as well and whatever
9 else.

10 Q. Okay. It would be Lithko's work, your
11 work, and the window guy's work, true?

12 A. Could be. It could be more.

13 MR. WINDLE: Objection, Your Honor.
14 He's asking about a document that he doesn't know
15 anything about.

16 MR. BUNDY: It's in evidence.

17 THE WITNESS: It could be --

18 MR. BUNDY: It's not hearsay if --

19 THE COURT: All right. One a time.

20 Deny your objection. He can ask him about the
21 document. He may or may not have seen it before,
22 but he can talk about the document.

23 MR. BUNDY: Thank you.

24 BY MR. BUNDY:

25 Q. Other than Lithko's work, your work, and

1 the window man's work, what other work would
2 be -- the stucco guy that you'd worked with
3 before?

4 A. The waterproofer.

5 Q. Sir?

6 A. Waterproofer.

7 Q. Now, in looking through these
8 photographs, have you ever seen this document
9 before?

10 A. No.

11 Q. You've never seen this inspection
12 prewalk?

13 A. I don't believe so, no.

14 Q. And you've never discussed these issues
15 with Balfour Beatty as part of a back charge?

16 A. We have had discussions on this, yes.

17 Q. Do any of these pictures reflect
18 defective work by Old North State Masonry?

19 A. Defective work?

20 Q. Yes. Work that does not meet the plans
21 and specifications or work that --

22 A. That hasn't -- not that -- I don't see
23 any pictures here of work that has to come down.

24 Q. Okay. Did Lithko do any defective work
25 on this project?

1 A. Not to my knowledge.

2 Q. Okay. who put the sleeves in?

3 A. Lithko.

4 Q. Okay. And did they put the sleeves in
5 that were required by the specifications?

6 A. No.

7 Q. And do you know why?

8 A. I know there was an RFI that addressed
9 it, and they were -- they had some variance on
10 their sleeves.

11 Q. But you don't know whether -- who caused
12 that problem? Lithko is the one that put in the
13 wrong sleeve. We know that, right?

14 A. Lithko put in the wrong sleeve.

15 Q. Okay. And that wrong sleeve caused you
16 to hopscotch, whatever term you want to use?

17 A. Initially in the --

18 Q. Okay. And how much of your claim --

19 MR. WINDLE: Objection, Your Honor.

20 THE WITNESS: I was trying to
21 finish.

22 THE COURT: Yeah, let him finish.

23 MR. BUNDY: I'm sorry.

24 THE COURT: Go ahead, Mr. Anastasi.

25 THE WITNESS: Initially, it did,

1 and then they reverted back to the proper size of
2 the sleeves.

3 It was more than just the sleeves. It
4 was the location of the sleeves and the vertical
5 rebar, which there was a big issue on that with
6 the inspectors and where the vertical needed to
7 be. And there was corrective work done, so yeah.

8 BY MR. BUNDY:

9 Q. How much of your lien costs or the costs
10 of labor on your job was incurred as a result of
11 the improper sleeve placement and sizing?

12 A. We removed the indirect costs for the
13 time. That was part of change order 4. So we
14 did remove that. The labor is in there.

15 Q. The labor what?

16 A. The labor -- the overall labor for the
17 job is in our claim.

18 Q. So any labor that was spent correcting
19 or slowing down or accelerating or anything
20 related to the sleeves, would be someone else's
21 fault?

22 A. Yes, sir.

23 Q. Correct, right?

24 A. Yes, sir.

25 Q. Okay. And it might be Lithko's fault?

1 A. I don't believe it is.

2 Q. Well, you hadn't sued them, have you?

3 A. No, sir.

4 Q. Because y'all were in the joint defense
5 agreement?

6 MR. WINDLE: Objection. If he
7 knows.

8 Q. You don't know whether you sued Lithko
9 or not, or do you?

10 A. Well, I know we haven't sued Lithko.

11 Q. Have you had any conversations with
12 people at Lithko about this joint defense
13 agreement?

14 A. Very little.

15 Q. When was the first time you talked to
16 them about it?

17 A. I would say it would be probably in the
18 last 12 months.

19 Q. The last 12 months.

20 MR. BUNDY: Your Honor, this is 161
21 for ID.

22 (DFT. EXH. 161 was marked for
23 identification.)

24 BY MR. BUNDY:

25 Q. All right. So your lawyer is windle

1 Steele or Steele windle?

2 A. Correct.

3 Q. And John Heuer is Balfour Beatty's
4 lawyer, correct?

5 A. Correct.

6 Q. Who is Tonya Stabenaw?

7 MR. WINDLE: Your Honor, she is a
8 paralegal in our office. She's also my wife.
9 She's sitting right back there.

10 THE COURT: All right, Mr. Windle.

11 BY MR. BUNDY:

12 Q. In February of 2018, Mr. Heuer sent a
13 letter to your lawyer. Al, thanks for the heads
14 up. I would like to discuss with you before it
15 gets filed, as there were performance issues with
16 ONSM on the project.

17 Underneath it, Mr. Steele had written
18 you earlier. John, just a heads up, we've been
19 asked to file a lien on behalf of Old North State
20 Masonry on the Marion Square Hotel project in
21 Charleston. I don't know the exact amount of the
22 lien, but I will let you know as soon as I can
23 talk with ONSM and confirm the amount.

24 Did you have any discussions or were you
25 in any meetings where these performance issues,

1 as referred to by Mr. Heuer, were discussed with
2 you or your lawyers?

3 MR. WINDLE: Without the lawyers,
4 Your Honor. In regard to the lawyers, objection.
5 If it was outside the presence of the lawyers and
6 no attorney-client communication, it's okay.

7 THE WITNESS: Repeat the question
8 again, please.

9 BY MR. BUNDY:

10 Q. Sure. In response to Mr. Steele giving
11 a heads up to Mr. Heuer, you're knew that there
12 was going to be a lien?

13 A. Right.

14 Q. Mr. Heuer writes him and says, thanks
15 for the heads up. I would like to discuss with
16 you, before it gets filed, their work performance
17 issues with ONSM on the project. Thanks, John.
18 Do you know what those performance issues were?

19 A. We had been going back and forth over
20 the job from the very beginning with Balfour
21 Beatty. They always were asking us to put more
22 people on, and we couldn't complete the areas of
23 work.

24 And so from that standpoint, absolutely.
25 That was from the very beginning of the job

1 through the very end. Now, our understanding of
2 why those obstacles were incurred and which
3 prevented us from performing, that might have
4 changed as we got more information. But that
5 discussion was ongoing throughout the whole job.

6 Q. So Balfour Beatty, who you were in
7 contract with, complained from the very beginning
8 about the lack of man power and production by Old
9 North State Masonry and demanded you accelerate;
10 is that correct?

11 A. No, sir. We complained to Balfour
12 Beatty that there were issues with us starting
13 the job and getting -- complete the area so we
14 could move up the building and complete the work
15 per the schedule.

16 Q. And in response to that, instead of
17 answering those questions, they ordered you to
18 accelerate?

19 A. At times, they did. They had a job that
20 they needed to get built, and they were pushing
21 us to get the job done.

22 Q. And they took no responsibility for that
23 and told you it was all the owner's fault, that
24 you were being accelerated because the owner had
25 told them to tell you to accelerate? Is that

1 what they told you?

2 A. No, sir. I'm not saying that. I didn't
3 say that.

4 Q. Okay. Well, did they tell you it was
5 the owner's fault? Did they ever tell you why
6 they were ordering you to accelerate?

7 A. They would tell us that we had to
8 accelerate. We would meet them on-site, look at
9 the errors of work, point out the obstacles, and
10 then it would be a calm situation for whatever, a
11 couple weeks. And then we get another notice,
12 hey, you're delaying the job. We'd meet with
13 them and talk about it. So this was an ongoing
14 situation.

15 MR. BUNDY: Your Honor, I move to
16 introduce this into evidence.

17 MR. WINDLE: What's the number?

18 MR. BUNDY: 161.

19 THE COURT: 161. All right.

20 MR. HILDEBRAND: I haven't seen
21 161. May I see it?

22 THE COURT: Yeah.

23 MR. BUNDY: Your Honor, I'm marking
24 162 for identification.

25 (DFT. EXH. 162 was marked for

1 identification.)

2 MR. HILDEBRAND: Your Honor, I
3 would like to note for the record, the same
4 objection to 161, as Mr. Windle. I believe this
5 is just an e-mail between the attorneys, John
6 Heuer and Al Windle.

7 THE COURT: Right. It is. Putting
8 them on notice, that they're going to file a lien
9 is what I see.

10 MR. HILDEBRAND: Okay.

11 THE COURT: Was there an objection
12 then to this?

13 MR. WINDLE: I did not object to
14 it, Your Honor. There's nothing in there that
15 bothers me.

16 THE COURT: Right. Okay. I didn't
17 think so. It's in evidence, 161.

18 (DFT. EXH. 161 was received in
19 evidence.)

20 BY MR. BUNDY:

21 Q. Now, I want to show you another e-mail
22 that starts with an e-mail from -- it looks like
23 from Mr. Windle, and this is on March 7, 2018,
24 correct?

25 A. Yes.

1 Q. Tell me if I'm reading this correct.
2 After talking to ONSM, I have been asked to
3 request a meeting in the near future between the
4 ONSM project team and the Balfour project team,
5 and you and me to discuss alleged performance
6 issues on the Marion Square project.

7 Are these the same performance issues
8 that we just got through talking about, or are
9 there new ones now?

10 A. It's throughout the whole job.

11 MR. WINDLE: Your Honor, I would
12 ask that Mr. Bundy not stand in the witness's
13 face.

14 MR. BUNDY: I'm sorry. I have a
15 hard time hearing so I have to get closer.

16 THE COURT: Just give him a little
17 space.

18 BY MR. BUNDY:

19 Q. The goal would be to discuss each issue
20 in detail with the assistance of counsel to
21 resolve as many issues as possible or at a
22 minimum, develop a path to resolution.

23 Other goals of ONSM would be to obtain
24 payment of the balance of the contract sum,
25 payment of approved but unpaid change orders, all

1 the change orders that have been satisfactorily
2 completed by ONSM. That would narrow the payment
3 issued substantially to basically only the claim
4 by ONSM for delays and extra work and the
5 retainage.

6 So were any of those issues outside of
7 what he leaves off, which he says he's going
8 to -- he wanted to narrow it down to payment
9 issues, claims by -- for delays, extra work. So
10 I guess what I'm asking you, are these other
11 issues, were those -- did you have a meeting and
12 resolve those claims and did Balfour Beatty pay
13 you those numbers?

14 A. I can't recall the time, but there was a
15 request, that I asked our attorney to contact
16 them, to set up a meeting, try to resolve as many
17 issues as we could to get the job cleaned up.

18 Q. And was that done? Did you resolve any
19 of the issues? Did they pay you any money?

20 A. We did resolve issues, but I don't know
21 if it's in regards to this e-mail.

22 Q. What issues did you resolve? Is that
23 the change orders y'all entered into?

24 A. Yes.

25 Q. The internal change orders?

1 A. The change order resolved in our issues,
2 yes.

3 Q. The 19 and 20?

4 A. Yes, sir.

5 Q. Wherein Balfour Beatty was going to get
6 \$100,000 of the money that came in on -- if they
7 passed the claim through?

8 MR. WINDLE: Objection. The
9 language of the change order speaks for itself,
10 and his testimony was, it didn't have anything to
11 do --

12 THE COURT: With that. I gotcha.

13 MR. BUNDY: Your Honor, I move to
14 introduce this into evidence.

15 THE COURT: Number 162. Any
16 objection there?

17 MR. WINDLE: No, sir.

18 THE COURT: All right.

19 (DFT. EXH. 162 was received in
20 evidence.)

21 MR. BUNDY: All right. Your Honor,
22 163 for identification.

23 (DFT. EXH. 163 was marked for
24 identification.)

25 BY MR. BUNDY:

1 Q. I'm handing you now what's Defendant's
2 Exhibit 163 for identification. You got it?

3 A. Yes, sir.

4 Q. All right. Here's another e-mail dated
5 July 5, 2018, from Mr. Steele. John, are you
6 available to talk tomorrow or Monday about the
7 status of the Marion Square project, which is
8 going on between Balfour and the owner.

9 Payment of the contract balance to ONSM,
10 resolution of outstanding change orders with
11 ONSM, the claim by ONSM and whether Balfour still
12 intends to submit a consolidated claim to the
13 owner. Now, what are we -- as of this time, were
14 you still trying to get paid from Balfour Beatty?

15 A. July of '18?

16 Q. Yes.

17 A. We had not resolved. Yeah, no, you're
18 right. We had not resolved our change --

19 Q. Let me see if I -- I'm just trying to
20 understand something. How much did you or have
21 you contended -- what's the maximum amount of
22 money y'all have contended that Balfour Beatty
23 owed Old North State Masonry that remains unpaid?

24 A. At what time?

25 Q. Well, you haven't got -- all you've --

1 to resolve these claims -- and you tell me if I'm
2 wrong. It sounds like to me, to resolve the
3 claims of Balfour Beatty, two things happen or
4 three things happen. You sign change orders 19
5 and 20, and you got paid your retainage, right?

6 A. No.

7 Q. Okay. What else have they paid you?

8 A. We got paid an outstanding -- when we
9 got change order 19, there was an outstanding
10 contract balance, not inclusive of retainage.

11 Q. What was that?

12 A. \$68,000.

13 Q. And have you been paid that?

14 A. We have.

15 Q. When did you get that?

16 A. Sometime in '19.

17 Q. Okay. But you've prosecuted or made no
18 claims against Balfour Beatty for acceleration,
19 delay, loss of inefficiency or any of that, have
20 you?

21 A. I don't agree with that. I have a claim
22 in -- or I had a claim in, and it could have been
23 zero to a hundred percent of Balfour Beatty's
24 responsibility.

25 Q. So you did make a claim against Balfour

1 Beatty?

2 A. I have to submit my claim through
3 Balfour Beatty in order for anything to be passed
4 through the owner, if the owner is ultimately
5 responsible. That's what this whole proceeding
6 is about.

7 Q. Right. But if you have -- do you
8 recognize that Balfour Beatty could do something
9 that could cost you money that was not the
10 owner's fault, or is everything Balfour Beatty
11 did, the owner was responsible for?

12 A. Absolutely. We acknowledge that they
13 could have because they reserved their rights
14 against them.

15 Q. And are those rights still reserved?
16 Are you still going to sue Balfour Beatty for
17 that now that you've dropped your lien?

18 A. I think we've dropped our lien. I can't
19 answer that.

20 Q. Okay. So you -- do you realize that a
21 lien is not a claim against Balfour Beatty? Did
22 you know that?

23 A. Yes, sir.

24 Q. And do you realize that in order to make
25 a claim, you have to file a lawsuit against

1 Balfour Beatty to get money out of Balfour
2 Beatty, right?

3 A. Yes, sir.

4 Q. And you haven't done that, have you?

5 MR. WINDLE: Objection, Your Honor.

6 We have. You can look at the pleadings. Why
7 would counsel even --

8 BY MR. BUNDY:

9 Q. Have you settled that case? Have you
10 settled that case with them? Have you settled
11 your case with Balfour Beatty?

12 A. I believe we settled our case with
13 Balfour Beatty.

14 Q. Okay. So all of that money that you
15 lost is gone? You're not going to get it from
16 anybody? You're not going to get it --

17 A. Correct.

18 Q. -- from us because you dropped your
19 lien.

20 A. Yeah.

21 Q. You're not going to get it from Balfour
22 Beatty because you dropped your claims against
23 them.

24 A. This is what I told you.

25 (Attorney and witness talking over

1 each other.)

2 Q. Okay. And that's a little different
3 from what was agreed to in the joint defense
4 agreement, isn't it? Because in the joint
5 defense agreement, weren't you going to wait
6 until the owner paid and then divide up the money
7 between the two of you and resolve your problems
8 later? Isn't that what it says to --

9 MR. WINDLE: Objection, Your Honor.
10 The pass-through agreement, liquidating
11 agreement, tolling agreement, joint defense
12 agreement speaks for itself. He can testify his
13 understanding if he has one.

14 BY MR. BUNDY:

15 Q. Okay. Well, let's go look at your
16 understanding.

17 THE COURT: I think we plowed that
18 ground, didn't we?

19 THE WITNESS: Do you want me to
20 hold onto this exhibit?

21 MR. WINDLE: You can just set it
22 right down here.

23 THE COURT: That was number 162?

24 THE WITNESS: 163.

25 THE COURT: 163, I'm sorry.

1 MR. TERRY: Your Honor, 163 has not
2 been admitted, to my knowledge.

3 THE COURT: All right.

4 MR. BUNDY: Your Honor, I need to
5 move 163 into evidence. I'm sorry.

6 THE COURT: Okay. Any objection to
7 that one?

8 MR. WINDLE: No, sir.

9 THE COURT: Without objection.

10 (DFT. EXH. 163 was received in
11 evidence.)

12 MR. BUNDY:

13 Q. I'm going to hand you now exhibit --
14 it's in evidence. It's Exhibit 209. It's
15 entitled, joint prosecution defense and tolling
16 agreement. And do you recognize the signature on
17 behalf of Old North State Masonry?

18 A. I do.

19 Q. All right. Whose signature is that?

20 A. Scott Griffin.

21 Q. Okay. And was he authorized to enter
22 into that agreement?

23 A. He is a part of it, yes.

24 Q. And what was the date he signed it?

25 A. June 19, 2019.

1 Q. When was the first time you read this
2 agreement?

3 A. I can't tell you I've read the whole
4 agreement.

5 Q. Have you ever discussed its terms with
6 the gentleman that signed it on behalf of old
7 North State Masonry?

8 A. I can't tell you that.

9 Q. Do you know whether he read it or not?

10 A. I can't speak for him.

11 Q. So you don't know. And you signed it
12 why? Why did you enter into this agreement?

13 A. Because we felt that there was a
14 possibility that our claim would be the owner's
15 responsibility, and we felt that, if that were
16 the case, we needed to go through a pass through
17 and this enabled us to do it, by our subcontract
18 agreement and then this agreement.

19 Q. Why would you want the agreement in here
20 to contain language to the effect that --

21 MR. WINDLE: Excuse me, Your Honor.

22 Q. -- not on paragraph 7 --

23 MR. WINDLE: If you turn to the
24 last exhibit in your notebook, you've got a copy
25 of that agreement in 58, and Mr. Bundy doesn't

1 have to stand over here in your face while he's
2 asking you questions.

3 THE WITNESS: Page what?

4 BY MR. BUNDY:

5 Q. It's page 6 of Exhibit 209.

6 A. Page 6, I'm there.

7 Q. Do you see number 7, where it says, no
8 disclosure to third parties?

9 A. That's not page 6. I'm sorry. I'm
10 looking at page 6, and it's --

11 Q. I think you're on the wrong -- that's
12 not the right document.

13 A. Oh, I'm sorry.

14 THE COURT: It should be the very
15 last document.

16 THE WITNESS: Yeah, the very last.
17 Yes, sir. Page 6, I'm there.

18 BY MR. BUNDY:

19 Q. This document is -- paragraph 7 says, no
20 disclosure to third parties, right? That's what
21 it says, right?

22 A. Yes.

23 Q. And one of those third parties would be
24 the owner, correct? The owner is not a party to
25 this agreement, right?

1 A. It's --

2 Q. Sir?

3 A. It's any third party.

4 Q. Right, any third party.

5 A. I don't want to be sharing my
6 information with Balfour Beatty and then they
7 share it with one of my competitors. Or I'm not
8 going to go Rodgers Builders and say, this is
9 what I know of Balfour Beatty.

10 Q. All right. Well, why would you want to
11 not disclose it to the owner? Why would you want
12 to keep it?

13 A. I don't know that we're saying that
14 we're not disclosing it to the owner.

15 Q. Well, your lawyers in depositions
16 refused to give it to us. We had to get a court
17 order to get it.

18 A. You'll have to talk to my lawyers about
19 that.

20 Q. Okay. But you don't know why you would
21 not want to provide an owner in a cost plus job
22 with the agreement between the construction
23 manager and the subcontractor?

24 A. There might be a legal reason why.

25 MR. HILDEBRAND: Your Honor, that's

1 another example of Mr. Bundy just making a
2 misstatement. There's no court order requiring
3 we voluntarily produce the joint defense
4 agreement.

5 THE COURT: All right. Thank you.
6 Objection noted. You were about to answer
7 something.

8 THE WITNESS: I got confused, and
9 then I forgot. So if we can revisit that, and I
10 can do my best.

11 THE COURT: Okay.

12 BY MR. BUNDY:

13 Q. All right. Let's look at the agreement.
14 Look on page 3. Are you on page 3?

15 A. I am, sir.

16 Q. Do you see 3D? Do you see that?

17 A. Yes, sir.

18 Q. Read that to yourself since you haven't
19 read the agreement. Is this one of the
20 paragraphs you think you may have read, or is
21 this one you --

22 A. No. I think I may have read this one.

23 Q. Okay. Well, read it again, and then
24 we'll talk about it.

25 A. Okay. I read it, sir.

1 Q. What was your understanding of what you
2 were agreeing to there?

3 A. That we were to get with Balfour Beatty
4 and resolve and negotiate all of our claims
5 between the contractor and Balfour Beatty -- the
6 subcontractor, Old North State, and contractor.
7 And that we also agreed that we would not assert
8 a claim against one another until it was deemed
9 that those amounts were going to be recovered
10 from the owner.

11 Q. Okay. And what was going to happen with
12 the money if you did recover any money from the
13 owner? How were y'all going to divide that money
14 up?

15 A. I would assume that my claim would have
16 stood on its own, and I -- if my claim was found
17 to be good, and for a hundred percent of the
18 claim, that was a hundred percent of my money.

19 Q. Okay. And what about any counter-claims
20 that Balfour Beatty had because they're not suing
21 you either? What about claims they may have had
22 against you at that time that were not being
23 presented?

24 A. Well, that's what we're doing. We're
25 resolving. By this agreement, we're saying we're

1 going to get together to resolve our issues.

2 Q. Before or after you get the money from
3 the owner?

4 MR. WINDLE: Your Honor, there were
5 no counter-claims in this. I'm not sure why
6 we're going through this exercise. By Balfour
7 Beatty against Old North State.

8 THE COURT: Right. Noted.

9 BY MR. BUNDY:

10 Q. You agree that Balfour Beatty -- to
11 resolve the claims between Balfour Beatty and Old
12 North State, and you also agree that you were not
13 going to make any claims against each other, and
14 you were going go against the owner, and you were
15 going to resolve your difficulties.

16 What I wanted to know is, when were
17 y'all going to resolve your difficulties? Were
18 you going to wait until after you got the money
19 from the owner, or were you going to do it before
20 you got the money from the owner?

21 A. We were going to -- what was known to be
22 Balfour Beatty or Old North State issues, we were
23 going to get together and resolve those at the --
24 as promptly as we could with the -- after this
25 agreement was executed or in this time frame.

1 Beyond that, all I think I -- my
2 understanding of this is, is that, if there is a
3 portion of our claim that is -- that is deemed --
4 our delay claim that is deemed the responsibility
5 of Balfour Beatty, this allows us to move against
6 Balfour Beatty if that is the case.

7 Q. So you thought -- your understanding is,
8 you'd have to then sue Balfour Beatty to get that
9 money?

10 A. No, sir.

11 Q. All right. So was it your understanding
12 that there would be no dispute between you and
13 Balfour Beatty once money was recovered from the
14 owner and that you'd just get it all, or was
15 there going to be some subsequent negotiation if
16 they had claims back against you that you had not
17 resolved, such as anything that y'all may have
18 done wrong, the delays they had allege you'd
19 done? Do you see what I'm saying?

20 MR. WINDLE: Your Honor, he's
21 already testified that he believed he was going
22 to get a hundred percent of his claim.

23 MR. BUNDY: He's testified what?

24 THE COURT: His testimony was he
25 thought he was going to get a hundred percent of

1 the claim.

2 MR. BUNDY: But I'm asking him a
3 hypothetical now based on a different set of
4 facts.

5 THE COURT: Okay.

6 THE WITNESS: Okay. Give me the
7 hypothetical.

8 BY MR. BUNDY:

9 Q. Okay. Hypothetical: Y'all agree not to
10 pay -- not to go against each other and you've
11 agreed to try to resolve your difficulties, and
12 then you're going to go against the owner and
13 whatever money is left, then you're going to come
14 back and figure out how y'all are going to divide
15 it up between the two of you because there may be
16 claims in that first negotiation between --
17 claims between you and Balfour Beatty that were
18 not resolved.

19 And so y'all were going to wait and to
20 the extent those claims weren't resolved, you
21 were going to resolve it once the money came in
22 from the owner, right?

23 A. Just so I can answer your question.

24 Q. Sure.

25 A. So I understand.

1 Q. Sure.

2 A. Hypothetically, we get 50 percent of our
3 claim.

4 Q. Right.

5 A. And if it's determined that 50 percent
6 of our claim was the responsibility of the owner
7 in this case.

8 Q. Right.

9 A. There's a 50 percent balance.

10 Q. Right.

11 A. My understanding is, we could then look
12 to Balfour Beatty. If it was determined that
13 Balfour Beatty was responsible for that 50
14 percent, we could then look to them, just like
15 they could look to Old North State for that
16 money, if we so choose.

17 Q. And y'all could decide, instead of
18 having to bring another lawsuit -- let's just use
19 your example. Let's suppose you got 50 percent
20 of the claim.

21 MR. WINDLE: Your Honor, objection.
22 There was a breach of contract action against --
23 by Old North State against Balfour. There wasn't
24 going to need to be any other lawsuit. There was
25 one. Mr. Bundy needs to get that accurate.

1 MR. BUNDY: Okay. Fine. I'm just
2 asking you -- when you said, we're in the same
3 hypothetical, right? You try the case against
4 the owner and half of your damages for delay,
5 acceleration, whatever it was, are awarded to
6 Balfour Beatty, right? Because they're going to
7 go to Balfour Beatty, right?

8 A. Uh-huh.

9 Q. Because they brought the claim for
10 y'all, right?

11 A. Uh-huh.

12 Q. Now, that 50 percent -- you still have
13 got a 50 percent loss that you contend would be
14 Balfour Beatty's responsibility, correct?

15 A. Could be.

16 Q. Could be. And y'all would then sit down
17 and try to negotiate that other 50 percent,
18 correct?

19 A. I don't think it means negotiate. I
20 think we have a right to, to try to resolve them.
21 But is that just simply negotiating? I don't
22 know.

23 Q. Well, would you have the right to sue
24 them for it?

25 MR. WINDLE: Your Honor, we've

1 already sued them at that point in time.

2 THE WITNESS: I don't know if I
3 really understand.

4 THE COURT: Okay. All right.

5 BY MR. BUNDY:

6 Q. I just want to make -- see if I can
7 understand it. If under the hypothetical, if you
8 had gotten half of the money, how would you have
9 gotten and where would you have gotten the other
10 half of the money from, from your claim that was
11 not fully recovered?

12 A. We would have the right to assert
13 against Balfour Beatty.

14 Q. Okay. And they, likewise, would have
15 the ability to assert claims back against you?

16 A. Yes, sir.

17 Q. Okay. And so that there would --
18 potentially there would be a negotiation, right?

19 A. Potentially, yes.

20 Q. All right, sir. Let's look at -- I
21 think you have it in front of you, your book. I
22 think it's tab 52. Are you at tab 52?

23 A. I'm there, yeah.

24 Q. And I think you went through this on
25 direct. Turn to page 607, please, which would be

1 under your claim calculations.

2 A. 607, I'm there.

3 Q. Page 607. Do you see that?

4 A. Well, I don't see calculations. I
5 see --

6 Q. Yeah. I'm on page 607. What I would
7 like you to do is to read -- well, this thing
8 starts as, areas of impact, changes in scope,
9 right? And you go through all the problems you
10 had, right?

11 A. I'm on 607. I don't see that.

12 THE COURT: It starts on 606.

13 MR. BUNDY: 606.

14 BY MR. BUNDY:

15 Q. I was going to start at -- let's just go
16 ahead and go through it.

17 A. Okay.

18 Q. This was the -- this was the second
19 version of this claim, right?

20 A. I don't know. I think it could have
21 been multiple versions.

22 (DFT. EXH. 160 was marked for
23 identification.)

24 Q. I'm going to hand you what's been marked
25 as 160. Do you recognize 160?

1 A. It looks to be an earlier version.

2 Q. Okay. And who prepared this?

3 A. I did.

4 Q. Okay. And what's the date of it?

5 A. June 14, 2017.

6 Q. Okay. And who did you provide this to?

7 A. Provided it to Balfour Beatty, I

8 believe.

9 Q. And do you know if they ever gave it to
10 the owner in June of 2017?

11 A. I don't know.

12 Q. Did you expect them to pass it on to the
13 owner?

14 A. Well, in the sense that it was
15 represented on our pay apps, I think the owner
16 would have seen it.

17 Q. This \$1,023,000 was on the pay apps in
18 June of 2017?

19 A. We conditioned our pay app for
20 outstanding items, that the claim would be
21 outstanding, so, yes, they would know that.

22 Q. So all the outstanding items that are on
23 Exhibit 160, the owner had notice of, and they
24 were on the pay apps?

25 A. I don't know that. I'm telling you that

1 this -- yes. This was on our pay app as a
2 reservation of our rights for this claim. The
3 amount would have been on it at that time.

4 And that -- that amount would have
5 changed over time as we went through different
6 versions of the calculations and as the delays
7 and extended it, it would have changed. I mean,
8 we would have represented that and reserved the
9 right to that.

10 MR. BUNDY: All right. So, Your
11 Honor, I move to introduce 160.

12 MR. WINDLE: No objection.

13 THE COURT: All right.

14 (DFT. EXH. 160 was received in
15 evidence.)

16 MR. BUNDY: All right. So what I
17 would like to do -- Your Honor, I probably need
18 to give you my copy of 160.

19 BY MR. BUNDY:

20 Q. All right. So what I'd like you to do
21 is, let's take Exhibit 160, and then turn to page
22 606.

23 A. Okay.

24 Q. Okay?

25 A. Yeah.

1 Q. Now, what we're doing here is comparing
2 the earlier claim -- because you talked about
3 updating, right?

4 A. Yes.

5 Q. Okay. So in June of 2017, you found all
6 these things wrong, had all these problems, and
7 you've contended you had a \$1,023,000 and change
8 claim, right?

9 A. Correct.

10 Q. And then in December of 2018, which is
11 18 months later?

12 A. Thereabouts, yeah.

13 Q. Okay. In 18 months later, you now had a
14 claim that was how much?

15 A. \$1,139,500.

16 Q. Okay. So your claim went up about 100
17 and something thousand bucks, right?

18 A. Yes, sir.

19 Q. But in addition to the claim changing,
20 you also were much more knowledgeable at that
21 point about what was wrong and what had caused
22 you problems, right?

23 A. We were much more knowledgeable about
24 the impacts. I don't know what caused the
25 impacts.

1 Q. well, if we just look at the size of
2 the -- the number of items under area of impact
3 change in the scope, there were a lot more in the
4 exhibit on page 606, the only one that you did
5 initially, correct?

6 A. Correct.

7 Q. Okay. And let's go through some of
8 these things that you came up with in December.
9 Hoisting. Who was responsible for the hoisting
10 problems?

11 A. I don't know.

12 Q. Okay. Well, was the owner supposed to
13 provide the hoisting on this job?

14 A. I don't believe he was supposed to be
15 providing hoisting, but it could have been a
16 situation that we had hoisting issues because the
17 building has stopped and proper jumps weren't
18 done to avoid it. So, yes, there could have been
19 a possibility of that.

20 Q. Okay. It could have been a possibility?

21 A. Could have been.

22 Q. But you can't testify to it to any
23 reasonable degree of certainty, can you?

24 A. I cannot.

25 Q. It's just one of the things that may

1 have caused it, but you don't know what actually
2 caused it?

3 A. Correct, we don't.

4 Q. But you do know that the contractor is
5 the one you contracted with to provide hoisting
6 to you?

7 A. Correct.

8 Q. Okay. You don't know why they didn't do
9 it?

10 A. No. We're giving them notice that
11 that's part of the impact.

12 Q. I understand that. But this document
13 later turns into a lien, right? And this money
14 is used for lien purposes against my client.

15 What I'm trying to determine is, out of
16 that money, how much of this is really either not
17 the owner's fault or just as likely the
18 contractor's fault. That's all I'm trying to do.
19 Okay? So just walk through it with me. Let's
20 just get through it?

21 A. No problem.

22 Q. Completion of preceding activities in a
23 logical manner to avoid conflict of access and
24 installation. That's what this says. My
25 question to you is, who was responsible for the

1 scheduling on this job?

2 A. Balfour Beatty, I believe.

3 Q. Okay. And Balfour Beatty, in fact,
4 directed your means and methods, didn't they?

5 A. They didn't direct the design, but they
6 directed how we were to execute it.

7 Q. They directed your means and methods.
8 They told you where to put block, when to put
9 block in and what order to put it in and all the
10 rest of it, right?

11 MR. WINDLE: Objection, Your Honor.
12 That information is specified in the contract
13 documents and the design drawings. That tells
14 the contractor exactly what they've got to do,
15 whether they've got to put the block, whether
16 they've got to put the precast, and how they're
17 supposed to do it, and with the schedule of when
18 they're supposed to do it.

19 MR. BUNDY: Well, that's what makes
20 a breach of the contract action. Sometimes
21 people don't follow these contracts. But if it
22 was that easy, you wouldn't need me or you.
23 Okay? I'm asking you what happened on the job.

24 MR. WINDLE: No. You're asking him
25 if -- when the owner is supposed to tell him how

1 to do it step by step, and the contract documents
2 specify exactly how the mason is supposed to
3 perform.

4 MR. BUNDY: Does he know?

5 BY MR. BUNDY:

6 Q. Do you know who was supposed to provide
7 the hoisting on this job?

8 A. I do know.

9 Q. Who?

10 A. Balfour Beatty.

11 Q. Okay. Thank you. Who was in charge --
12 we've established that Balfour Beatty was in
13 charge of the schedule, correct?

14 A. They were in charge of the schedule, but
15 if there was design issues that would affect the
16 schedule, I don't know that.

17 MR. BUNDY: Your Honor, that's not
18 my question.

19 BY MR. BUNDY:

20 Q. And you're not an architect, and you
21 don't know whether or not there were design
22 issues or not do you?

23 A. I do know that. I do know that. I know
24 that on the fifth and eighth floor, that you had
25 a precast band that bared on the exterior block

1 wall. That precast band could not be set for 28
2 days after the block was -- the mortar and the
3 block was secure, two quarts of the block.

4 You lay two quarts of the block. You
5 have to let that mortar cure out for 28 days
6 before the waterproofing can be applied, before
7 your -- you can put the precast on it. That is a
8 drastic change of a two week turnaround per
9 floor.

10 Q. Well, who dictated a two week turnaround
11 per floor?

12 A. That was in the original schedule.

13 Q. Balfour Beatty's original schedule?

14 A. I don't know whose schedule it was. I
15 don't know if the schedule was put -- I don't
16 know where the schedule came from.

17 Q. Okay. In your contract with Balfour
18 Beatty, are they entitled to dictate your means
19 and methods? Are they entitled -- do they get to
20 say, you work here when I tell you to, you work
21 here when I tell you to, you pull off here and go
22 here and you go there? Are they entitled to do
23 that under the contract, as you understand it?

24 MR. WINDLE: Objection, Your Honor.
25 That's multiple questions, number one. And

1 number two, there's means and -- it's a means and
2 methods question and a schedule question. Which
3 one do you want him to answer?

4 MR. HILDEBRAND: I will join in
5 that, Your Honor. Coordination and means and
6 methods are two entirely different things. The
7 general contractor coordinates the schedules.
8 The individual subcontractors are the ones who do
9 the means and methods. I think it's
10 inappropriate for Mr. Bundy to --

11 MR. BUNDY: Well, what happened to
12 the invitation about needing an explain for an
13 objection, and now we're getting this, from a guy
14 who's not even in court?

15 THE COURT: All right. Restate
16 your question --

17 MR. BUNDY: Thank you.

18 THE COURT: -- breaking it out into
19 the two. Okay?

20 BY MR. BUNDY:

21 Q. In your subcontract, is it your
22 understanding that Balfour Beatty is entitled to
23 dictate your means and methods?

24 A. No.

25 Q. Okay. And in your contract, is Balfour

1 Beatty entitled to demand you accelerate without
2 paying for it?

3 A. Without paying for it?

4 Q. Without paying for it.

5 MR. WINDLE: Objection, Your Honor.
6 That's -- that's a legal question based upon the
7 terms of the contract or the law.

8 THE COURT: Well, he either knows
9 or he doesn't know.

10 THE WITNESS: I don't know. I
11 would have to refer to counsel on that.

12 THE COURT: All right.

13 MR. BUNDY: Well, in that case, I
14 move to strike all the evidence as it relates to
15 acceleration because now the witness has said
16 that all of his previous testimony, according to
17 his lawyers, is not reliable because he didn't go
18 through the contract either.

19 THE COURT: Okay.

20 MR. WINDLE: Objection, Your Honor.
21 The testimony was, he did review the contract.
22 The evidence says that he didn't review all of
23 the pass-through agreement.

24 BY MR. BUNDY:

25 Q. All right. Let's go to number 3.

1 Conflicts with other trades. Plumber stubbing up
2 conduit from the floor below impacting access to
3 the work, fourth and fifth floors. whose
4 responsibility was that?

5 A. Balfour Beatty?

6 Q. Pardon me?

7 A. I believe Balfour Beatty.

8 Q. Balfour Beatty's?

9 A. I believe.

10 Q. Okay. So that's not the owner's
11 problem? It's not the architect's problem?

12 A. I'm not -- the whole purpose of this is,
13 I'm identifying the impacts of Old North State.
14 I'm not -- at this point in the process, I'm not
15 trying to assign responsibility to anyone. I'm
16 just letting the contractor know who I'm in
17 contract with, that we're being impacted. And
18 I'm trying to give them an itemized area so they
19 can understand what the problem is.

20 Q. And you were trying to do your job,
21 right?

22 A. Yes, sir.

23 Q. I'm trying to do my job. Okay? My job
24 is to ask you questions about documents you
25 create, and that's what I'm doing. Okay?

1 A. Uh-huh.

2 Q. I want to know from you, who was
3 responsible for the plumber stubbing up conduit
4 from the floor below impacting access to the work
5 on the fourth and fifth floors, based upon this
6 document. Who is responsible for this?

7 A. I personally don't know who was
8 responsible, who caused that to happen. I'm just
9 telling you it happened.

10 Q. B, stud walls erect in disregard to the
11 block walls. Whose responsibility is that?

12 A. I'm just telling you that that impacted
13 us from prosecuting our work.

14 Q. So anything that impacted you on a job
15 or a piece of property Mr. Bennett owns, he has
16 to pay for, all of it?

17 A. I'm not saying that.

18 Q. Okay. But you filed a lien for it,
19 right?

20 A. I filed a lien based on advice that I
21 got from counsel.

22 Q. What was that advice?

23 MR. WINDLE: Objection, Your Honor.

24 MR. BUNDY: He's raised a defense
25 of advice of counselor. If he's going to use

1 that as a defense, I'm entitled to know what the
2 advice was. The law is clear.

3 MR. WINDLE: No, sir, otherwise
4 there would be no attorney-client privilege.
5 whatever we discussed, he would have the right to
6 access. And it's not a defense.

7 THE COURT: We discussed that
8 yesterday. I'm going to sustain that objection.
9 Okay?

10 MR. BUNDY: Okay.

11 BY MR. BUNDY:

12 Q. Waterproofing in MARKrete on the third
13 floor courtyard. whose responsibility was that?

14 A. I don't know.

15 Q. You know these things happened, but you
16 don't have any idea who's responsible for them?

17 A. I don't know how it flowed through the
18 whole process, no. Ultimately, I don't know who
19 was responsible for it.

20 Q. Well, did Balfour Beatty tell you the
21 owner was responsible for all of them when you
22 sent it to them?

23 A. There were certain items that Balfour
24 Beatty would say, that's an owner issue.

25 Q. And were there other items they admitted

1 responsibility for?

2 A. No.

3 Q. They wouldn't admit responsibility to
4 anything, would they?

5 A. No, I mean.

6 Q. Okay. And neither would the other
7 subcontractors that damaged your work. They
8 wouldn't admit responsibility either, would they?

9 A. Not at this point in the process, no.

10 Q. Did any other subcontractors damage your
11 work?

12 A. Yes.

13 Q. Is the cost to repair that work in these
14 calculations for cost of labor?

15 A. Yes.

16 Q. Okay. Now, let me ask you something.
17 Just, let's say -- what's it cost to lay 10 foot
18 of block, 8 foot high? Just give me a number,
19 something just reasonable in your mind.

20 A. Yeah, yeah.

21 Q. If I were to hire you --

22 A. Just give me a second. Okay?

23 Q. Okay. Sure.

24 A. 10 foot by 8 foot high?

25 Q. Yeah.

1 A. Let's say that's \$1,000.

2 Q. Okay. Let's say \$1,000. I'm trying to
3 get somewhere.

4 It really doesn't -- and let's say you
5 wanted to figure out who you wanted to build this
6 wall for you, and you put it out for bids. ONSM
7 said, I'll do it for 1,000 bucks. You know, Ace
8 Masonry wants 1,100 bucks. But Joe Brown Masonry
9 wants \$10,000 to build that same wall. Okay?
10 Are you with me?

11 A. Uh-huh.

12 Q. Okay. Now, if Mr. Brown uses brain
13 surgeons, okay, at \$800 an hour to lay his block,
14 he's probably going spend \$10,000 on that wall,
15 right?

16 A. Yes.

17 Q. Okay. But you don't use brain surgeons
18 because you don't need to use brain surgeons to
19 lay the block. That's why you can do it for
20 \$1,000, right?

21 A. Right.

22 Q. When the wall is finished, the one wall
23 for \$1,000, right?

24 A. Yes.

25 Q. It has no greater value than the wall

1 for 10,000. You just pay a lot more money for
2 it. But the wall is the same wall. Same steel,
3 same concrete, same grout, same block, right?

4 A. Build under different conditions,
5 though. So that is the value of \$10,000.

6 Q. The value is \$10,000?

7 A. Different conditions, yes, sir.

8 Q. What do you mean, different conditions?

9 A. You had brain surgeons doing it.

10 Q. And so you can look at a wall and tell
11 whether or not it was built by brain surgeons as
12 opposed to masons? So you pay \$10,000 for this
13 one and one for the other one?

14 A. I can tell you that, if you have a brick
15 wall that you have to use specialized hydraulic
16 scaffolding, that brick wall is going to cost
17 more than another brick wall.

18 Q. No. I --

19 A. So if there's obstacles in your way and
20 it costs you added costs, that's the value of
21 that work.

22 Q. That wasn't my hypothetical. The walls
23 I'm describing or I'm asking you about are
24 exactly the same walls. Okay? Exactly the same.

25 A. Different conditions being built,

1 though.

2 Q. No. The hypothetical is -- in my
3 hypothetical, the conditions are exactly the
4 same. The walls are exactly the same.

5 A. They're not. You have brain surgeons
6 doing it.

7 Q. Okay. All right. That's fine. So this
8 loss of efficiency made these brick -- the
9 masonry walls you put up more valuable and worth
10 more because you had a loss of efficiency in
11 building them?

12 A. Those walls, because of loss of
13 efficiencies had cost more money to do.

14 Q. I understand they cost more money. But
15 at the end of the day, is the value of the wall
16 any greater because you were inefficient in
17 building the wall because of something someone
18 else did?

19 A. I believe it is.

20 Q. Okay. And what is the basis of that
21 belief?

22 A. Just my general knowledge.

23 Q. Okay. Well, in your general knowledge,
24 do you have any opinion as to why in the code --
25 in the South Carolina lien statute for

1 contractors, it refers to costs, but for
2 subcontractors, it refers to value? Do you know
3 why they made that distinction?

4 MR. WINDLE: Your Honor, objection.
5 This lien statute is for labor and materials, and
6 that's what he provided.

7 THE COURT: Okay. All right.

8 MR. BUNDY: The statute says what
9 it says.

10 THE COURT: I'm with you on that
11 one.

12 MR. WINDLE: It's the value of
13 labor and materials.

14 THE COURT: All right. Gotcha.

15 MR. BUNDY: That's right. And the
16 general contractor, who says, it's the cost of
17 labor and materials.

18 THE COURT: Okay.

19 MR. BUNDY: The legislator makes --
20 uses different words for different reasons.

21 BY MR. BUNDY:

22 Q. All right. Let's go back. Hoisting.
23 All right. Five, hoisting of the precast on the
24 fifth floor resulting in out of sequence,
25 illogical work sequence and access to work

1 issues. whose fault was that? who created that
2 problem?

3 A. A hundred percent Balfour Beatty.

4 Q. Pardon me?

5 A. A hundred percent Balfour Beatty.

6 Q. Okay. And how much money is related to
7 that?

8 A. About \$43,000.

9 Q. Okay.

10 A. That was resolved.

11 Q. It was resolved?

12 A. And it's been pulled up.

13 Q. And that was taken out of the lien?

14 A. I don't know that.

15 Q. You don't know?

16 A. I don't know that.

17 Q. Should it have been taken out of the
18 lien?

19 A. From my understanding, it should have
20 been taken out of the lien.

21 Q. Okay. Because you would be asking
22 for -- if it was still in the lien before you
23 dismissed it the other day, you would be asking
24 for money you clearly would not be entitled to
25 because you had already been paid that, and it

1 was somebody else's fault, right?

2 A. Correct.

3 Q. The next one is length of time to
4 resolve added scope, change orders so not to
5 impact the progress of the project. Whose
6 responsibility was that?

7 A. That could have been the owner,
8 architect, or Balfour Beatty.

9 Q. Could have been Balfour Beatty waiting
10 too long to give the owner notice, right?
11 Balfour Beatty could be just as much of a problem
12 with getting things resolved as anybody else,
13 right?

14 A. Could have.

15 Q. All right. And again, you don't know?

16 A. I don't know.

17 Q. Seven, acceleration and stacking of
18 trades -- stacking of activities on the last
19 three floors. Whose responsibility was that?

20 A. I believe that was a combination, the
21 owner. It might have been a hundred percent the
22 owner.

23 Q. Okay. But it was ordered by Balfour
24 Beatty?

25 A. It was ordered by Balfour Beatty.

1 Q. Yeah. The owner didn't order you to
2 accelerate or anything?

3 A. No.

4 Q. We've been through all of that. Number
5 8 is access. What is -- whose responsibility --
6 what are you talking about when you talk about
7 access?

8 A. Just access to the work.

9 Q. Okay. And whose responsibility was it
10 to give you access to the work?

11 A. Generally, it's the general contractor.
12 If we have issues where we have lack of space
13 because our precast is being sequenced based off
14 of the schedule and we can't install it because
15 there's design changes with waterproofing at the
16 base of the building, then that precast is
17 stacked all around the site and in the garage.
18 It could be a design issue.

19 Q. Okay. Could be a design issue?

20 A. Could be.

21 Q. But you don't know what it is?

22 A. I have never tried to identify who it
23 is. I've always identified the impact to Old
24 North State.

25 Q. But you identified it enough to file a

1 1.3 million dollar lien. You identified it when
2 you put a lien on my client's property.

3 A. I had to protect myself.

4 Q. Do you think you overprotected
5 yourself --

6 A. No, sir.

7 Q. -- that you filed a lien greater than
8 you --

9 A. No, sir. I don't believe I
10 overprotected, and I don't believe my attorney
11 would allow me to do that.

12 Q. All right. Veneer work impacts optical.
13 Hoisting, whose responsibility?

14 A. I contracted -- it's Balfour Beatty's,
15 but again, if we're having issues with sequence
16 and because of proceeding activities, not having
17 information, it could be a combination.

18 Q. Concrete work. Whose responsibility was
19 that?

20 A. Lithko.

21 Q. And was that -- was Lithko an impact or
22 an obstacle to you?

23 A. Well, the concrete work was at times
24 with the precasting issue because we had to
25 modify the precast. I don't think it was because

1 Lithko erroneously put concrete in the wrong
2 spot. I think there was an issue that -- there
3 were some issues with the drawings of where
4 concrete should be.

5 Q. Okay. You think that, but you don't
6 know that?

7 A. No, I do not know that.

8 Q. Okay. And there are no drawings or
9 specifications in this case that have been put in
10 evidence for you to be able to show me in a set
11 of drawings any of this, is there?

12 A. I can tell you exactly where we had to
13 hollow out the precast because it doesn't sit
14 onto the frame of the structure.

15 Q. But is it your position, Lithko's work
16 and the work of his tradesmen, its tradesmen
17 didn't cause you any problems on this job?

18 A. But for the sleeves, I think that from
19 the information that I personally saw, their work
20 was in tolerance of where they -- the structure
21 needed to be.

22 Q. Well, since Lithko is a company you've
23 done a lot of business with on the same job, it's
24 a lot easier to blame somebody else other than
25 somebody you've worked with on jobs when --

1 A. Sir, if they were wrong, I would say
2 that they were wrong.

3 Q. If you knew?

4 A. If I knew.

5 Q. If you knew?

6 A. Yeah.

7 Q. Right. Precast in Arriscraft. Whose
8 responsibility was that?

9 A. We're just saying that that's our
10 precast.

11 Q. Right. Well, it's under the heading of
12 impacts and obstacles. Were you impacting and
13 obstructing your own job?

14 A. The -- no. The precast -- because the
15 structure, dimensions on the structure changed,
16 the precast had to be modified because of the
17 structure.

18 Q. Okay. Lintels installation. Who
19 installed the Lintels?

20 A. I'm not certain on that.

21 Q. Okay. Well, Mike Bennett didn't install
22 them, did he?

23 A. I didn't see him out there.

24 Q. Okay. Did you install them?

25 A. No, not me.

1 Q. whose responsibility was to install
2 them?

3 MR. WINDLE: Objection. He said he
4 didn't know.

5 BY MR. BUNDY:

6 Q. Okay. What was the problem with the
7 installation of the lintels and why did they
8 cause an impact or an obstacle?

9 A. The problem was, they were going to
10 stick it outside of the building, and you would
11 see a lintel, steel, sticking outside of the
12 stone work. So it had to be modified and
13 changed.

14 Q. Is that what you're talking about?
15 That's the lintel problem?

16 A. Yes, sir.

17 Q. Okay. Waterproofing. Whose
18 responsibility was the waterproofing?

19 A. The waterproofer.

20 Q. Okay. He didn't cause any problems to
21 this job at all, did he?

22 A. We had problems with the waterproofer.

23 Q. Pardon me?

24 A. We had problems with the waterproofer.

25 Q. Yeah. Everybody had problems with the

1 waterproofer on this job, didn't they?

2 A. I don't know about everyone. I'm
3 telling you what --

4 Q. You had?

5 A. -- I had, yes.

6 Q. Did they cause you delay or impacts?

7 A. The waterproofing caused delays and
8 impacts to us.

9 Q. How much did it cost you?

10 A. I don't know.

11 Q. Okay. Are the costs incurred because of
12 those delays and impacts in your mechanic's lien?

13 A. They are.

14 Q. Have you taken them out?

15 A. No. I don't believe it's appropriate --

16 Q. Did you know about that when you filed
17 this lien?

18 A. If that is because the waterproofing
19 details were deficient, then, no, they shouldn't
20 be taking that out.

21 Q. Okay. So the waterproofer -- so now
22 that that doesn't work, you're going to blame the
23 architect? Is that where you are?

24 A. It's not that I'm going to blame anyone,
25 sir. I told you, this is the impacts that old

1 North State experienced. It's beyond our ability
2 to identify how the logjam flows downstream.

3 Q. wood block. whose responsibility was
4 that?

5 A. I don't know what subcontractor that
6 was.

7 Q. what impact did it have on you?

8 A. It affected us being able to install
9 veneer.

10 Q. Did it cost you any extra money?

11 A. It did.

12 Q. Is it in the lien?

13 A. It is.

14 Q. And whose responsibility was it? You
15 don't know.

16 A. I don't know.

17 Q. Okay. Can you point to me anywhere in
18 these documents where it says, the owner is
19 supposed to put wood blocking in?

20 A. I can't specifically point to that, but
21 if there's design changes that affect the wood
22 blocking, then it might.

23 Q. Okay. It might. Sequencing of the
24 work. whose responsibility was it to sequence
25 the work?

1 A. Balfour Beatty's.

2 Q. And how much did that cost you out of
3 your lien?

4 A. I don't --

5 Q. How much of the lien was placed on --

6 A. I don't know of the exact figures.

7 Q. Well, the sequencing is the hopscotching
8 and all of that, right?

9 A. But the sequencing and then the
10 hopscotching could be caused by design issues,
11 lack of information, you name it.

12 Q. Exactly. It's a you name it thing. It
13 could be anything. You just know you incurred
14 it? You don't know where it came from or whose
15 responsibility it was?

16 MR. WINDLE: Your Honor, asked and
17 repeated and repeated and repeated.

18 THE COURT: Got it.

19 BY MR. BUNDY:

20 Q. Sequencing of the work. All right.
21 Length of time to resolve added scope, change
22 order not so much to impact the progress of the
23 project. What does that mean?

24 A. We just couldn't get change orders
25 approved.

1 Q. Was the owner entitled to issue change
2 orders?

3 A. He's entitled to issue change orders,
4 but he's also -- he has a responsibility to
5 process change orders.

6 Q. And do you know whether or not those
7 change orders that you sent to BBC were moved --
8 were passed along in a timely fashion to the
9 owner?

10 A. I don't know the timing of it.

11 Q. Do you know whether or not in fact some
12 change orders were as long as a year, year and a
13 half between the time the subcontractor gave the
14 information to Balfour Beatty and before it found
15 its way to the owner? Do you have any
16 information on that?

17 A. No.

18 Q. Okay. would you expect that to be the
19 normal course of business, or would you expect
20 the contractor to pass those things on?

21 A. During the normal course of business,
22 they should be passed along, but there might have
23 been extenuating circumstances. I don't know.

24 Q. And those extenuating circumstances
25 would be the fault of the owner, right?

1 A. I don't know.

2 Q. Well, then they would be the fault of
3 the architect, right?

4 A. I don't know.

5 Q. But we know it's not your fault. We
6 know it's not Lithko's fault. We know it's not
7 the waterproofer's fault. We know it's not
8 anybody's fault except maybe the owner or the
9 architect and you're not sure which, and it might
10 be neither?

11 MR. WINDLE: Objection, Your Honor.
12 He said it could be the contractor as well, many
13 times.

14 THE COURT: Okay. Got it.

15 BY MR. BUNDY:

16 Q. Number 9, scaffolding availability.
17 whose responsibility was that?

18 A. Premier probability.

19 Q. And did that cause any extra cost to
20 you?

21 A. It did.

22 Q. How much?

23 A. I don't know.

24 Q. Is it in your lien?

25 A. It's in our lien.

1 Q. Should it be there?

2 A. I believe so.

3 Q. Access. We talked about access before.
4 I would like to just get you to read one thing
5 that we -- it sort of got missed in your direct
6 examination. It's number 10 on the next page.
7 Tell me if I'm reading this right.

8 On-site management and lack of control
9 and knowledge, gross negligence of what was the
10 root cause of the project's issues and how to
11 correctly sequence and build this project. Was
12 that true when you made that statement?

13 A. As of the date of this lien, yes -- or
14 this claim calculation, yes.

15 Q. Okay. Well, did they get -- after you
16 wrote this letter, did this gross negligence
17 cease, or did it continue?

18 A. No. After this, we felt that some of
19 the issues were the cause of the lack of
20 information that they were getting from the owner
21 and the amount of time, and that had to do with
22 the -- as we progressed into the precast.

23 Q. I'm interested in this word, lack of
24 knowledge. Are you talking about Nick
25 Starcevic's lack of knowledge of construction?

1 A. I don't know at this point. There was a
2 lot of people on-site.

3 Q. Well, are you talking about Mike
4 Bennett's lack of knowledge about how to build a
5 hotel?

6 A. I don't know Mr. Bennett.

7 Q. Okay. So it's not his lack of
8 knowledge?

9 A. No, sir.

10 Q. Okay. Do you think Jim Clements lacks
11 knowledge of the construction industry? Were you
12 talking about Jim?

13 A. No, sir.

14 Q. Okay. Were you talking about the
15 architect? Do you think Mr. Lindsay has a lack
16 of knowledge of construction?

17 A. At the time that this was written, we
18 were very frustrated with Balfour Beatty and the
19 job in general.

20 Now, as they got developed and we got
21 more information, we learned more things that we
22 were not privy to at the time of this
23 information -- at the time of this writing. So
24 at the time of this writing, yes, that's how I
25 felt.

1 Q. But now you've seen the light?

2 A. I have more information.

3 Q. All right. Did Balfour Beatty -- what
4 was the excuse Balfour Beatty gave you for not
5 paying retainage until they -- until agreeing to
6 pay it, although they haven't paid it yet -- a
7 couple days ago? What had they been telling you
8 up until then was the reason for not paying your
9 retainage?

10 A. That the owner would not approve a
11 reduction.

12 Q. And what did you understand that to
13 mean? That the owner hadn't gotten a certified
14 pay request from the architect?

15 A. No.

16 Q. What did you understand that to mean?

17 A. I understood it to mean that they had
18 requested 10 subs through a reduction retainage,
19 and they were told, no. That's -- that was my
20 understanding.

21 Q. Okay. But then when you finished the
22 job, what was the explanation for not paying the
23 retainage?

24 A. Same.

25 Q. The same thing?

1 A. The same thing.

2 Q. That they wouldn't reduce retainage
3 after the job was finished?

4 A. Correct. Because at that point, there
5 were issues between the two parties, and they
6 weren't getting paid.

7 Q. Did they tell you that the owner had
8 failed to pay a certified pay request, and that's
9 why you weren't paid?

10 A. No.

11 Q. Basically, they just simply didn't have
12 the money to pay you from the owner, so they
13 weren't going to pay you?

14 A. They told us that the owner would not
15 fund the retainage at that point in time.

16 MR. BUNDY: Your Honor, could I ask
17 a favor?

18 THE COURT: Yes, sir.

19 MR. BUNDY: Could we go to lunch
20 now and give me about -- that way I can probably
21 wrap this up in another 15 or 20 minutes.
22 Otherwise, I'm going to be floundering.

23 THE COURT: Okay. All right.
24 Let's go ahead and break. It's 12:15. Let's
25 come back and be ready to go at 1:45.

1 (A recess transpired.)

2 THE COURT: All right. We're back.
3 Where were we?

4 MR. BUNDY: Nothing further.

5 THE COURT: All right. Any
6 redirect?

7 MR. BUNDY: Your Honor, before we
8 move on, can we get straight on this book?

9 THE COURT: Sure, sure.

10 MR. BUNDY: I want to take all the
11 exhibits out of your book that you didn't put in
12 evidence.

13 MR. WINDLE: Okay. That's fine.

14 MR. BUNDY: Okay. Can we do it
15 now?

16 THE COURT: Do you want to go ahead
17 and finish? You may have some or not?

18 MR. WINDLE: I do. I have two
19 questions.

20 THE COURT: Okay. Let's do that.

21 MR. WINDLE: And I would rather
22 proceed with Mr. -- the Lithko witness and make
23 sure we get that done and take care of the
24 notebook at the end.

25 THE COURT: Sure, yeah. We can do

1 that.

2 REDIRECT EXAMINATION

3 BY MR. WINDLE:

4 Q. Mr. Anastasi, let me remind you that
5 you're still under oath. Just a couple
6 questions. I know you're not a lawyer, but do
7 you know whether or not a subcontractor is
8 required to know precisely, who owes him money
9 and how much money is owed at the time the
10 subcontractor files a lien?

11 MR. BUNDY: Objection.

12 A. No.

13 Q. Your answer was no?

14 A. No.

15 Q. And do you know -- I know you're not a
16 lawyer.

17 MR. WINDLE: No further questions,
18 Your Honor.

19 THE COURT: Okay. Anything further
20 for Mr. Anastasi?

21 Joe, nice to spend the day with you.
22 Can he be free to take off and go back to do what
23 he likes to do for a living?

24 MR. WINDLE: Yes, sir.

25 THE COURT: All right. Very good.

1 MR. HILDEBRAND: Your Honor, as a
2 housekeeping measure, if we do go until a bit
3 late this afternoon, I'm wondering if the parties
4 will be able to get our -- if we can't get all of
5 our stuff out today or have trouble, can we leave
6 it over the weekend until Monday?

7 THE COURT: I think that will be
8 fine. I'm not aware -- if they were going to
9 have something in here -- about the only time
10 they use this courtroom is Friday afternoons, it
11 seems like. So nobody has told me we've got to
12 get out of here today. So I don't think that's
13 going to be a problem at all, Mr. Hildebrand.

14 MR. HILDEBRAND: Thank you very
15 much.

16 THE COURT: Okay. Yes, sir.

17 MR. WINDLE: Your Honor, Lithko
18 will call Mr. Mike Rohrer, R-O-H-R-E-R.

19 THE COURT: Okay. Mr. Rohrer, come
20 on forward if you would, sir.

21 (MIKE ROHRER, having first been
22 duly sworn, testified as follows:)

23 THE COURT: Please give us your
24 full name and address or the record, too.

25 THE WITNESS: Michael Scott Rohrer,

1 and my address is 65 Union Street North, Concord,
2 North Carolina.

3 THE COURT: Concord. Very good.
4 Thank you, sir.

5 DIRECT EXAMINATION

6 BY MR. WINDLE:

7 Q. Mr. Rohrer, where are you employed?

8 A. Lithko.

9 Q. And what is your position with Lithko?

10 A. Area lead.

11 Q. And what does Lithko do?

12 A. We're a specialty concrete contractor.

13 Q. How long have you been with Lithko?

14 A. Since 2009, 11 and a half years.

15 Q. And what are your responsibilities as
16 area lead? What are you responsible for?

17 A. For the success of the business in my
18 area. For the success of the concrete business
19 in my area.

20 Q. Are you over all Lithko projects in your
21 area?

22 A. Currently, I'm only over the Charlotte
23 area.

24 Q. Okay. And tell me again what Lithko
25 does.

1 A. We're a specialty concrete contractor.

2 Q. Were you personally involved in the
3 Marion Square Hotel project?

4 A. Yes, I was.

5 Q. What type of project was that?

6 A. It was a cast in place post-tension
7 structure.

8 Q. All right. And would you briefly
9 describe your -- when I say you, I mean Lithko.
10 If I -- I mean you, personally, I will say
11 Mr. Rohrer. How would Lithko typically perform a
12 concrete structure project? Just the process,
13 please.

14 A. Yeah. We would price it in precon. We
15 would get awarded the project. We would have a
16 planning session prior to the start of it, and
17 then we would go out and execute that plan.

18 Q. And is there a typical plan or a
19 standard plan for a concrete -- a multi-story
20 concrete structure?

21 A. No, there's not a typical plan. I think
22 every project is a little bit different. The
23 type of form work we're going to use, obviously
24 the schedule, the hoisting that was going to be
25 provided. So many different circumstances.

1 Q. If you would, tell us what the plan was,
2 Lithko's plan?

3 MR. BUNDY: Your Honor, if I may
4 impose an objection on relevance. Lithko is in a
5 different position than the other subcontractors
6 because they -- that lien was bonded off by
7 Appleby, and the bond was provided by Travelers.

8 THE COURT: Okay.

9 MR. BUNDY: So it matters not to me
10 how big that lien was. I don't think I've got
11 standing to complain about a lien that was bonded
12 off.

13 So if the purpose of this next hour or
14 two, relates to the reasonableness of their lien,
15 it would be irrelevant because there's not a
16 claim. The only thing that we have left in this
17 case is a defense to a conspiracy claim. And I
18 don't see how this building was constructed has
19 anything to do with the conspiracy claim.

20 THE COURT: Okay.

21 MR. WINDLE: That's my objection.

22 THE COURT: Okay. All right.

23 MR. WINDLE: Your Honor, up until
24 this moment in time, it was my understanding that
25 there was a claim against Lithko as well as Old

1 North State Masonry for filing an inflated lien
2 as part of an alleged conspiracy. If Library
3 will stipulate that the lien filed by Lithko was
4 not an inflated lien, then there's no issue, and
5 we don't have to go through this.

6 THE COURT: Okay.

7 MR. BUNDY: I don't voluntarily
8 stipulate to anything, ever. Okay? I'm telling
9 the Court, I don't have standing to make that
10 claim. I don't know what else I need to do.

11 THE COURT: All right. The amount
12 of the lien -- I would find that the amount of
13 the lien is not in dispute, not a point in
14 controversy. So you can probably move right on
15 through that one.

16 MR. WINDLE: Okay. Your Honor, it
17 has also been alleged that Lithko was part of a
18 conspiracy in part based on the allegation of
19 duplicative matters. I want to make sure there's
20 no issue in regard to duplicative liens and the
21 lien filed by Lithko at this point in time. If
22 there isn't, it will shorten up the testimony.

23 THE COURT: Okay.

24 MR. BUNDY: Again, I'm not going to
25 stipulate to anything. I'm just not going to do

1 it.

2 THE COURT: Gotcha.

3 MR. BUNDY: The lien was bonded
4 off. That's between Travelers and Balfour Beatty
5 and all those people. I got nothing to do with
6 all of that. I've got a conspiracy claim against
7 them for whatever is left in the agreement. And
8 I've got some evidence I need to put in with
9 regard to the lawyers, more lawyer communications
10 like the other lawyer communications we have
11 here, and then I'm done.

12 THE COURT: Okay. All right.

13 MR. WINDLE: I'm not done with
14 mine. I need to cover these points. I can do
15 them briefly and shorten it up, but I need to
16 make sure that --

17 THE COURT: All right. I will give
18 you some leeway on that.

19 MR. WINDLE: All right. Thank you.

20 BY MR. WINDLE:

21 Q. If you would, describe briefly how
22 Lithko planned to perform this project.

23 A. We -- very complicated basement
24 structure. We had plans to get through the great
25 beams and waterproofing in the basement, come up