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Exhibit A

Supplement to Amended Record on Appeal

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

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

Balfour Beatty Construction, LLC, Appellant,

v.

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

And

Library Associates, LLC, Third-Party Plaintiff,

v.

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

Of which Library Associates, LLC is the Respondent.

SUPPLEMENT TO AMENDED RECORD ON APPEAL

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Excerpts from Trial Transcript of September 13, 2021 to December 3, 2021, to include:

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Section 2 - Exhibits

Balfour Beatty Construction, LLC's Exhibit 300 .... R-9907
Library Associates LLC's Exhibit 42 .... R-9970
Library Associates LLC's Exhibit 43 .... R-9979

And I explained to him that we had a lot of change orders out there, and that we needed to help resolve that. We wanted to make sure that -- we wanted to get it done. He assured me at that time that, Phil, we've got to let the dust clear. We've got to get through the process, but anything and everything you do here in Charleston, I'll get you taken care of.

So I had a good sense of reassurance that your guy was -- that Mr. Bennett was a stand-up guy. Then on another unrelated project, right before y'all had the hurricane last year, the day before the hurricane, he invites us -- myself and our general counsel, Michael Durham, to his office unrelated to Marion Square to come visit about an energy project on -- at Patriots Point.

So we went out there and met with -- one hour meeting turned into a four hour meeting. Again, the conversation started, hey, how are things going? In that conversation, he even said when he came in the group, we may have caused some things, but we've got to let the dust settle. And we've got to go through this process.

Anything you're owed for your work done in Charleston, when it's settled, I'm going to get you taken care of. Then he told us the story about, why even build the building? And I think you see that.

I hadn't personally read the newspaper articles, but we talked about it at dinner the last night, about his story of why he built the building and that his dad worked here and jumped shoes or whatever it may be. He told us that. I even met his mother that day, four hours later.

So I judged him on his character, said look, they're -- we needed help. We left that meeting saying, rather than stopping doing what we're doing, we needed help getting this man's building open because I took him on his word. I was -- I felt comfortable from a business standpoint that he was an up and great guy. And yeah, we might have -- but that's who he is.

Our previous owner is a developer as well. His style is to make a bunch of changes and so forth. That is what it is. But we made a business decision to move forward. It would best for the (inaudible) of the community. Let's get the project open.

anticipated completion costs, correct?

A. Correct.

Q. Now, yesterday you said that you didn't get paid for 43 and you didn't get paid for 44, and basically some time in that area, you decided you were just going to quit sending pay applications, isn't that right, because you just weren't getting paid, right?

A. Yes, sir.

Q. All right. And yesterday, you didn't know why. You just didn't understand why 43 and 44 were not paid. Do you understand now, Mr. Simonton, why you were not paid 43 and 44 applications for payment for October and November in 2018?

A. That's what I read right here.

Q. Okay. And that's the explanation?

A. We protested this.

Q. Okay. No. You protested this, but 43 and 44 were not paid -- were not decertified because of this. 43 and 44 were held up until January the 18th, or actually the Monday following the Thursday that the bond was filed, because the lien was in place.

The failure of payment of 43 and 44 had

nothing to do with this. They were withheld because you had a lien that you hadn't bonded off, correct?

A. 43, I believe was, yes.

Q. How about 44? 44 was in November, they filed a lien on November the 1st?

A. I'm not sure about 44.

Q. Okay. You're not sure. All right. By the time it took Balfour Beatty over 65, 70 days to bond off the second-tier subcontractors lien, which prevented payment, did Library Associates do anything to prevent Balfour Beatty from bonding that lien off on November the 2nd so you could have gotten paid 43 and 44?

A. No, sir.

Q. Okay. And isn't it true that by the time you got around to bonding it off, circumstances on the job had changed from November 1, 2018?

A. Yes, sir.

Q. Okay. And the circumstances that had changed related, among other things, other than the unbonded off lien, to the refusal of Balfour Beatty to finish the -- and correct deficient work as it related to painting; isn't that true?

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

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

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

A. Correct.

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

A. Correct.

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

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

A. Correct.

Q. All right. And in your opinion and

more than that, to be honest.

Q. All right. Fair enough. Let's go to -- I would like to jump back just for a moment, if I can, about the eggshell paint and its use. Eggshell paint was specified in the original construction drawings, correct?

A. Yes, sir.

Q. And an L4 finish was specified, correct?

A. Yes, sir.

Q. When the repainting was done, was the finish changed to an L5?

A. The drywall finish?

Q. Yes, sir.

A. No, I don't believe so, no.

Q. So you don't know whether they abutted the entire wall?

A. When they skimmed the walls?

Q. Yes, sir.

A. I never saw that.

Q. Okay. Did they go back with eggshell paint?

A. No.

Q. All right. And I think you testified that eggshell -- in your view, eggshell paint is not appropriate for a hotel, correct?

A. It does not touch up well. I recommend clients that have a lot of activity, you know, like in your house with kids, you know, not to use it.

Q. Right. And hotels are -- you have a lot of activity, furniture coming in, bumping around, and if you have scuffs and scrapes, eggshell paint is not good. You can't just do a quick touch up, you have to go from wall to wall and ceiling to ceiling?

A. I mean, personally, I would not categorize a hotel room as having a lot of activity. But to your point, the touch-up process is problematic.

Q. Okay. Well, do you know why eggshell was not -- was it based on your recommendation to the owner that he not go back with eggshell paint?

A. It was my recommendation, which I petitioned from the interior designer, and they approved it.

Q. Okay. Before the project started, did you petition the interior designer and recommend that eggshell paint not be used?

A. No.

Marty and Nick at noon today in room 311. Despite the owner's position to the contrary, BB asserts they have met their contractual obligation in terms of punch list and standards of care with regard to the guest room finishes.

BBC confirmed it will continue to provide access to the room for the owner's work. As a result of this disagreement, the owner is now forced to correct workmanship and quality issues with his own forces. At Marty's request, I visited 315 with him and have attached one example of a deficiency found in the room which BBC declined to visit with us.

Q. All right. Let's us look these photographs. You took these photographs, right?

A. I did.

Q. All right. Tell me what we are looking at in the first photograph that you gained appropriate to photograph and for what purpose.

A. Well, both photographs of the same location is where a mirror had been removed from the wall. And so the screw holes on the front (inaudible) covered up still remained, and I guess the mirror is missing.

Q. All right, sir.

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

MR. HILDEBRAND: But she did the audit.

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

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

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

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

THE COURT: Y'all are going to have to answer that question for me before we resolve this case, I can tell you that. That's one issue that I've got. It's big time in my mind as to how we got to where we got to. She's the one that's putting the numbers on the table.

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

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

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

And for each of those pay applications, there -- we can certainly discuss it, but they were in effect audited because each one went through many iterations, went through a paper. There would be questions that were asked by the architect, and all the information was provided to their satisfaction.

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

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

MR. MCDONALD: Ms. DeFranco.

THE COURT: What was her name?

MR. HILDEBRAND: Sarah DeFranco.

THE COURT: Sarah DeFranco, yeah. So when I do the simple math, the claim was 360. I awarded 257. That was partial summary judgment. The difference, by my math, is 103,000. So we're close to 102.

My recollection was that was in dispute. That's why they didn't get summary judgment, so through earlier, the subtotal of balance owed to Balfour Beatty of $419,425, if you apply the liquidated damages amount, how much would Balfour Beatty owe to Library Associates?

A. $1,063,665.

Q. And then, to that, you would add the BBC contract costs incurred by Library to the extent they are awarded, and what is -- and that number is what? Would you add the $1,063,665 and the $2,256,764?

A. Yes. You would add those two together, $3,320,329.

Q. $3,320,000?

A. 329.

Q. 329, from Balfour to Library Associates?

A. Yes.

Q. And all of those numbers are to a reasonable degree of accounting and auditing certainty?

A. Yes.

MR. MCDONALD: Ms. Hadley, please answer any questions that opposing counsel may have.

MR. HILDEBRAND: Your Honor, before I begin, I would like to make a motion and an arguing on the record. This goes to an objection that I made earlier, and you kind of waved me off and you were maybe making it later or something.

THE COURT: All right.

MR. HILDEBRAND: I just wanted to make it for the record. I would first like to introduce as Defendant's Exhibit -- I'm sorry, Plaintiff's Exhibit 347.

THE COURT: 347?

MR. HILDEBRAND: Yes, sir.

THE COURT: All right.

(PLF. EXH. 347 was marked for identification and received in evidence.)

MR. HILDEBRAND: These are our interrogatory -- or the responses from the defendant to plaintiff's interrogatories, and I would refer the Court specifically to the interrogatory that asks for the witness -- expert witness identification, which is number 7.

And I will read this record. Identify all experts you may call to testify in this action and with each expert, set forth the following: A, the expert's qualifications and B, all opinions the expert may offer or otherwise testify to this action.

The answer is, Library Associates has not yet determined the identity of the expert witnesses it may call to the trial of this action. This interrogatory will be supplemented. And it was not subsequently supplemented to us as a specific response to this interrogatory. What I would like --

MR. MCDONALD: Your Honor, I don't want to interrupt, but I don't know what this is. I mean, he's marked it as an exhibit. I'm not familiar with this process. So I'm going to object to it, and I don't know. It's an interrogatory response from May of 2019.

MR. HILDEBRAND: Well, right. I'm supporting the record for these new opinions that Ms. Hadley expressed here today as to why I think that they are inappropriate and should be excluded. I'm going to ask that they be stricken from the record, and I'm trying to make my record on that.

THE COURT: All right. Go ahead. Go ahead.

MR. HILDEBRAND: So I would like to introduce that Exhibit 347.

THE COURT: That's the answer to

the first set of interrogatories?

MR. HILDEBRAND: Yes, sir. And then if you'll review this in the record with the Court, the scheduling order of the Court, which the amended scheduling order, Your Honor, was filed on September 30, 2020, and it provides that, by November 16, 2020, both Library and Balfour are to provide expert identification.

And it says, the identification must include the full name, address, and telephone number of each expert and shall provide a complete statement of all opinions the witness will express and the general basis and reasons for them, and the general facts and data considered by the witness in forming the opinions.

That was extended -- that scheduling order was extended a couple of times by Your Honor, and with the last due date under that deadline being August 16, 2021. So the next document that I would like to introduce is Plaintiff's Exhibit 348.

(PLF. EXH. 348 was marked for identification.)

MR. HILDEBRAND: Your Honor, this

is the last designation or is the expert identification or designation by Mr. Bundy. And the cover letter is dated May 17, 2021, and it's to all counsel.

And it says, enclosed for service upon you, please find a copy of defendant third-party plaintiff, Library Associates, third supplemental designation of expert witnesses for the above-referenced matter.

All right. Then if you turn to page 2 of that actual document, at the very top, it says, pursuant to the May 2021 scheduling order in the above-referenced case, Library Associates makes the following identification of expert witnesses for use at trial, and listed is Sam Hadley, Jason Boberg.

And it says, please find the following documents: A, a June 11, '19 affidavit of Jason Boberg; b, a November 27, '19 affidavit of Sam Hadley and Jason Boberg; c, a September 17, 2019, Cotton and Company report; d, 11/16/20 Cotton and Company's report previously produced.

Those reports I have attached to this proffer, Your Honor, each one of those, the four referenced documents. And I would like to introduce this as our next exhibit, Your Honor.

THE COURT: Number 348?

MR. HILDEBRAND: Yes, sir.

MR. MCDONALD: Your Honor, are these being introduced as evidence? Again, I'm very unfamiliar with this process. And is he just making -- he said he was making a proffer on his previous arguments.

MR. HILDEBRAND: Yes. I think it needs to come into evidence, Your Honor. I'd like to move to introduce them into evidence.

THE COURT: In support of your argument that she has not previously opined on some of what she had testified?

MR. HILDEBRAND: Yes, sir. Yes, sir.

THE COURT: All right. I will allow it in evidence.

(PLF. EXH. 348 was received in evidence.)

MR. HILDEBRAND: Thank you, Your Honor. So for some of these witnesses, you will see in Mr. Bundy's or Library's designation, there is a recitation, like for Mr. O'Connor, a long recitation of what he is going to testify about. The same with Jim Clements. There's a lot of narrative. For Sam Hadley, the only reference is to these four reports.

Your Honor, there is -- we can read all four of those reports. I can leave that to you later. There is nothing in her reports that reflect the opinions that she just gave here on the stand.

I deposed Ms. Hadley on May 5 and 6 of this year, based upon the file reports that at that time were due, and I would like to introduce her deposition transcript as Exhibit 349, Plaintiff's Exhibit 349.

THE COURT: All right, sir.

(PLF. EXH. 349 was marked for identification.)

MR. MCDONALD: Same objection, Your Honor.

THE COURT: All right.

MR. HILDEBRAND: Which I would like to introduce into evidence, Your Honor.

THE COURT: All right.

(PLF. EXH. 349 was received in evidence.)

MR. HILDEBRAND: And I asked her

about her opinions and said, listen, you understand that -- I'll paraphrase it, that you're required under the Court's order to have finalized your opinions and be prepared here today to render your final opinions.

And we went through her opinions, and these opinions that she espoused here today were not among those opinions that she espoused in her deposition.

THE COURT: Okay.

MR. HILDEBRAND: So then, on top of that, Your Honor, we have the South Carolina rule of evidence as -- I'm not going to read it into the record again, 26(e) regarding supplementation of responses.

So we had the Court's order. We had Mr. Bundy's designation of what she was going to testify about, and he attached only four reports, four old reports that I referenced in there. And I took her deposition.

And then today, at the end of this case, after we've called our witnesses, our witnesses have testified, we had already -- we weren't able to call rebuttal experts to her opinions here today or anything else. She simply -- no additional reports were entered or no additional opinions were entered by Library Associates.

All of a sudden here today, we get brand new opinions by Ms. Hadley, and some of those opinions are relative to cross-examination, but I do want to introduce Plaintiff's Exhibit 350.

THE COURT: All right, sir.

(PLF. EXH. 350 was marked for identification.)

MR. HILDEBRAND: The actual audit report that Ms. Hadley provided to the parties as requested by the Court, and, Your Honor, I understand that you reviewed the contract a little differently than I might have, based on litigation.

Every other case I've been involved in, once the litigation started, then whatever documents you need to provide and such are done through the litigation process. And I understand we've already argued that, but it is what it is. That's what -- where we stood.

But regardless, Ms. Hadley provided us with this report, this audit report, and this is based on your order, that she do an audit of the books. And according to this audit, which

Mr. Thompson touched on in his testimony and was introduced, he said, look, Ms. Hadley audited all the documents, and if you look on page 15, she talks about the eligible costs of the work are $65,745,000 maximum allowable.

Then she has some deductions, Your Honor, and she says, the maximum allowable cost of the work and fee -- and this is on page 15, Exhibit B, is $64,435 -- I'm sorry, $64,435,030. So she's saying, according to the audit that I did and provided to Balfour, that is the audited cost of the work that is recoverable, and I took her deposition on this.

She then says, the reason that I come to 60 -- the total allowable cost, as shown in her audit was 65,745,441, I'm taking some deductions because I think that there were some allowable costs that I'm going to take off. One of those was based on the RFP that we talked about.

And Casey Thompson said, okay, y'all did an audit. I see where -- I think some of your reports are legitimate. And we'll agree that some of those are -- probably should be taken off, and we will agree to some of the adjustments. And he said that we will agree to audit the adjustments of $613,742. And we agreed to remove that from the amount that we were claiming. He said, but we disagree with some of those audit results, $556,646.

So coming in here, at the end of the trial, this is the audit that was done, and these are the reports that came in for this. And I would like to introduce this exhibit as well, Your Honor, this last one, 350.

THE COURT: All right. That would be 350?

MR. HILDEBRAND: Yes, sir.

MR. MCDONALD: Same objection to all of this.

THE COURT: Okay. All right. I will allow it.

(PLF. EXH. 350 was received in evidence.)

MR. HILDEBRAND: All right, sir. So here's where we are, Your Honor, is that, under your scheduling order, and you can -- you were very clear in your scheduling order that, if it hadn't been produced, then it doesn't come in. We were produced her audit.

Oddly, though, it was referenced -- even referenced in the designation of Mr. Bundy gave. But none of these opinions were espoused by Ms. Hadley in her deposition. They weren't espoused in the prior reports.

So here we are on maybe the last day of the trial or next to last day, right at the very end -- or we're getting pretty close, anyway, and we are faced with brand new opinions by Ms. Hadley. If we had gotten those earlier, our witnesses could have dissected them. I could have gotten back up.

For example, yesterday, she referred to a change order that was never signed or anything else. I don't know where it came from. So she comes in and offers opinions, and we haven't had a chance -- we are highly, highly, highly prejudiced by her not giving us these opinions before. If she had, then we might have called and retained a rebuttal expert if it had been this big of a difference.

Frankly, if the -- if there's disagreed audit adjustments for the total contract of 556,646, we might disagree with those, but that sure is not the same as Ms. Hadley coming in here as she did today and saying, you're basically entitled to -- what was the amount? Yeah, $400,000.

Here in the report, the audit report that she issued, says we're the maximum allowable cost of work and fee, $64,435,030, and the amount paid to date is 59,994,38. The difference between those is about 4 and a half million dollars. And then she comes in today and says, well, yeah, I've got a new opinion. It's only -- they are only entitled to $419,000.

THE COURT: All right. So noted. I'm not going to exclude her opinions, but you've made a great argument for cross-examination, and I look forward to hearing from you on that one. Okay?

I will allow the documents to come into evidence, and certainly I think you would probably be in a position to cross-examine her as to her report, anything she testified to differently from today, just like any other witness would.

But I don't think that excludes her testimony or her opinions from coming into evidence in the trial of the case. So I'm going to deny that motion, to the extent it's a motion, but I do think it's a good position for cross-examination, where you try to get the truth of the matter that's being presented. Okay?

It's like 10 minutes to 12, and you probably need to take some time. I assume you're going to cross-examine Ms. Hadley for a while?

MR. HILDEBRAND: I do have some questions for her.

THE COURT: Yeah. Why don't we go ahead and take the break now and come back at 1:30.

(A recess transpired.)

MR. HILDEBRAND: I thought I had an extra copy of Exhibit 350 that I was going to hand the witness, but I can't seem to --

THE COURT: I've probably got the original. I've got the original stickered one.

MR. HILDEBRAND: Right. I thought I had an extra copy.

Do you have your audit report?

THE WITNESS: I do not.

MR. HILDEBRAND: You can follow along with that one, Your Honor.

THE COURT: Okay. All right.

MR. HILDEBRAND: Thank you for your

describe the typical process.

Q. Right. So you have one -- you have your audit that's done under the contract to determine the recoverability of the GMP cost, and then, if you were asked, you can do a separate analysis if there are claims that are outside of the contract GMP, correct?

A. No. I think that that would mischaracterize things. If there's a claim within a GMP contract, you can't do the first step without the second step because we have to keep reminding ourselves that the GMP contract is a cost, reimbursable contract with the GMP ceiling.

So it would be -- it wouldn't make any sense to only take a look at some of the costs now and compare those to the -- where the GMP is right now, kind of an interim basis, and then look at claims without going back through the process of incorporating the eligible cost of the work from the claims and then determining how much of those claims would actually increase the GMP.

Some of the claims don't have anything to do with the GMP because it's part of the contract balance, for example, but other things like a request for a change order that has yet to be approved by the owner would increase the GMP.

So to do that audit process first, without evaluating the claims, would be a wasteful exercise because you're going to have to pull it all together in the end.

Q. Well, you can do that. You can get -- if Balfour were not making a claim for delays and/or the RCOs and the claim amounts, you could have simply audited the amount that was due under the GMP contract at that point and made a determination under the contract of which costs were eligible or not. Agreed?

A. If there were no outstanding claims to increase the GMP and there were no assertions that additional costs were going to be incurred, then, yes, I would agree in that hypothetical situation.

Q. Right. And often that's what you do. Often there is no claim, and you're just simply asked to come in and say, the owner says, look, we want to make sure that what we're being billed under the GMP are allowable costs. We want you to take a look at that and do an audit, and then it was only in PDF. That Excel spreadsheet is Exhibit E of this report -- to explain that the amounts that I see here are not the amounts that you guys were claiming as RCOs. Can anybody help me? What's wrong with these numbers? Which ones are outdated? But I couldn't get that information.

Then I also asked them to identify what subcontractors were associated with each of the RCOs, so that I could determine whether the amounts had been paid or not, you know, in the eligible cost of the work or not. I couldn't get that information.

Q. Well, the RCOs, what Balfour is going to be entitled to recover, that's something that the Judge is going to have to decide, isn't it, Ms. Hadley?

A. Yes. But that's exactly the problem is, some of these costs that are in this RCO that are in my Exhibit E, for instance RCO 27, which is still being claimed today, is for an amount that BBC is now saying it's already incurred, and it's already an ineligible cost of the work in my audit.

But if the Judge doesn't award the

maximum price of the contract as was; is that correct?

THE WITNESS: Yes. That row called current GMP, those amounts come right out from pay app 45, which would be the latest contract values that the parties, I will say, agreed to. I appreciate pay app 45 wasn't paid, but it -- there were a couple of OCOs and a couple of change orders that were approved late in the game. So this would incorporate all of that.

THE COURT: Okay. And I'm sure your testimony is consistent in how you determined the general conditions and what you talked about primary costs. But I noted that, in your schedule B, you show a figure of $3,322,074. Your testimony earlier today said that general conditions were $3,319,212. Do you recall that?

THE WITNESS: Yes.

THE COURT: I get a difference of $2,862 over a 3.3 million dollar claim.

THE WITNESS: The difference is actually explainable.

THE COURT: Well, it's less than 1/10th of 1 percent is what I come up with. Is that significant, an accounting of what you've a part of that the owner stopped paying and in the middle of doing work. This is the -- this is the first time I had ever been here in my years of Balfour Beatty. I would say that's why it was treated differently.

Q. Show me one certified pay request that was not paid.

A. So pay application 43 was certified. There was a response from the architect stating that they disagreed with a portion of the value, but that the rest should be paid.

That payment wasn't made. I never heard of a decertification. I never say any formal -- all I can say is, based on the additional work you guys had to do, this is the amount that should be payable for pay app 43.

Q. It is true, is it not, after that pay request, that liens were filed against the job which (inaudible) because those liens were not bonded off against the job?

A. I can't recall.

MR. BUNDY: Okay. You can't recall. Thank you.

MR. HILDEBRAND: Nothing further, Your Honor.

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Plaintiff Balfour Beatty's Trial Exhibit # 300

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-10-01108

Balfour Beatty Construction, LLC,

Plaintiff,

vs.

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

Defendants.

Library Associates, LLC,

Third-Party Plaintiff,

vs.

Lithko Contracting, LLC, Guy M. Beaty, Inc., Bernard MMC, LLC, Gulf Stream Construction Company, Inc., Palmetto Automatic Sprinkler Company, Inc., Cook & Boardman, LLC, 1st Choice Glass, Inc., 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, Robert Thomas Iron Design, LLC, Warco Construction, Inc., Old North State Masonry, LLC, Tom Rochester & Associates d/b/a Southeastern Architectural Systems, Forton Company, LLC, Lowcountry Case & Millwork, Inc., Quantum Coatings, LLC, Balfour Beatty Construction Group, Inc.,

Third-Party Defendants.

PLAINTIFF'S EXCERPT DESIGNATION FOR DEPOSITION OF KIMBERLY BROWN

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Kimberly Bennett Brown
August 4, 2020

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Kimberly Bennett Brown
August 5, 2020

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Kimberly Bennett Brown
August 6, 2020

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Kimberly Bennett Brown
April 29, 2021

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VERITEXT
LEGAL SOLUTIONS

Deposition of:

Kimberly Bennett Brown

August 4, 2020

In the Matter of:

Balfour, Beatty v. Library Associates

A. William Roberts, Jr & Assoc.
800-743-3376 | calendar-awr@veritext.com | www.veritext.com

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Q. How was that resolved?
A. We mailed him a check.
Q. For the full balance?
A. Yes.
Q. Okay. So prior to April when you all -- and you all discussed nothing other than the payment?
A. There were discussions with Buck in 2019 regarding the shutters on the hotel. There were discussions with Buck regarding issues with the flooring in the pool room in 2019 or early 2020 and that's all I can recall.
Q. Okay. Have you spoken with anybody from Balfour Beatty since say February -- when is the last time you spoke to somebody with Balfour Beatty?
A. Say January of 2019.
Q. And who was that?
A. I believe that was David Simonton.
Q. And what was it about?
A. I believe it was the day that he had hand-delivered the letter regarding the claim to us.
Q. And what was the nature of that conversation?

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A. I don't recall.
Q. Okay. Have you discussed with Buck Lindsay this lawsuit since it was filed?
A. I don't specifically recall.
Q. How about Jim Clements?
A. I don't specifically recall. I'm sure we had discussions between January of 2019 and May of 2019 regarding the claim when it was delivered to us.
Q. Okay. So tell me what your role with Bennett Hospitality has been since you have been with them.
A. My role has evolved in 36 years.
Q. Okay. Tell me about that.
A. Started out as a receptionist. We really have no titles at Bennett Hospitality. Everyone does what needs to be done. But I am involved in obtaining loans for the projects, working with our attorneys to close any type of real estate transactions or loans, and I oversee the day-to-day operations.
Q. Okay. So the job responsibilities that you just articulated, how long have you been doing that? I understand you started as a receptionist, but how long have you been doing those?

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A. Gradually started into the lending and the financing and closing the real estate loans in probably '85, '86, so for the past 33 years.
Q. Okay. So at the time of -- as I understand it, at the time that this project was being developed, and I'm talking about Hotel Bennett, there were five employees of Bennett Hospitality, is that correct?
A. There's typically five to seven employees. I'm not sure exactly. Sometimes we have summer interns. So that's approximately correct.
Q. Okay. Aside from summer interns, there are typically five people on the payroll at Hospitality.
A. Five to seven.
Q. All right. So at the time this project was -- when it was really getting going say in 2015, how many employees were there with Bennett Hospitality?
A. Five or six.
Q. And who were they?
A. Myself, Peter Wright, Tracy Ray, but she may have been on maternity leave. I don't remember that exact date.

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Q. Okay.
A. There was a gentleman by the name of Steve Granger, but he left in the middle of 2015.
Q. Okay.
A. My grandmother, who I called my mother, as she raised me.
Q. And what's her name?
A. That was Virginia Bennett, and she's passed away.
Q. Okay.
A. And Mike would have a receptionist/assistant, but I'm not sure who that was in 2015.
Q. Okay.
A. I recall her -- that may have been Beverly Eckhurst, because I believe she started the day after the groundbreaking.
Q. Okay. So what was Peter Wright's job responsibilities?
A. Peter helped on the development side with contracts and entitlements for the development projects.
Q. What do you mean contracts?
A. Just reviewing development contracts, whether it's a loan agreement or a construction

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yourself, was there anybody else who helped you during those periods?
A. We had an outside CPA firm.
Q. And who is that?
A. Welch Roberts Amburn.
Q. All right. But primarily those controller functions you assumed during those periods, is that correct?
A. Yes.
Q. Okay. How about Tracy Ray, does she have any involvement with the controller aspects?
A. No.
Q. How about Michael Bennett?
A. No.
Q. Let's turn to this particular project. When was the concept of the -- how did this project get started, when was the property first bought, and tell me about that.
A. The property was first bought through an RFP with Charleston County in 1994.
Q. And that was purchased by Bennett Hofford Development?
A. That was purchased by Library Associates.
Q. Which was an entity of I guess Bennett

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Hofford?
A. It was a separate entity set up for the specific purpose to buy the property.
Q. Okay. As part of the dissolution in 2012, I guess Michael Bennett got the Library -- or got that piece of property?
A. Prior to 2012, Mike and Hank had begun to separate different entities. I don't recall if that was 2012 or earlier.
Q. So perhaps even before the dissolution, the Library property was owned by Michael Bennett, so to speak, or one of his particular entities?
A. It was always owned by Library Associates.
Q. Okay. And Library Associates at the dissolution went to Michael Bennett?
A. It went to Michael and to a trust that was set up for Michael's children at the time.
Q. Okay. But not to -- Mr. Hofford had no involvement with that?
A. That's correct.
Q. Okay. So when was the development of a hotel conceptualized?
A. I don't recall the exact year.
Q. Can you give me an approximation?

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A. Approximately early 2000.
Q. Let's go back and talk about some of the job responsibilities. You've talked about what your responsibilities were, which were reviewing contracts and helping with loans and during some periods acting as a controller, is that correct? Is that a fair description?
A. Fair.
Q. Okay. And you told me earlier on what Michael Bennett's involvement was with Hank Hofford, but what -- when this project was ongoing, what was Michael Bennett's job responsibilities or what were they with Bennett Hospitality?
A. Can you be more exact with the dates?
Q. Yeah. Say in 2014, what was -- Michael Bennett is the principal of Bennett Hospitality, correct?
A. Yes.
Q. And Bennett Hospitality owns Library Associates, so to speak, correct?
A. Bennett Hospitality is separate and apart from Library Associates.
Q. Does Library Associates have any employees?
A. No.

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Q. So all employees -- any work that is done in-house, so to speak, for Library Associates is done through the employees of Bennett Hospitality, correct?
A. Yes.
Q. Okay. So what was -- in 2014, what were Michael Bennett's responsibilities with Bennett Hospitality?
A. Michael's responsibilities have always been the vision, the creativity, the responsibility to obtain the financing for the project. Those were his responsibilities.
Q. Is there a distinction between his responsibilities and what he actually did?
A. He was involved in 2014 during the pre-construction phase of working with the architect and Balfour Beatty at the time for the entire 2014 with the design of the project and he was also involved in -- prior to 2014, I believe, late 2013, of deciding who the contractor was going to be selected to build Hotel Bennett.
Q. Okay. Tell me how you -- what your business interactions are with Michael Bennett and how you keep him informed of the financial aspects of the company or is that your job?

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taken over by Fairfax Sammons?
A. They worked in conjunction with each other.
Q. Okay. Even after -- so the exterior schematics, so to speak, what was ultimately approved by the City, who did that design?
A. Fairfax & Sammons.
Q. Did Goff D'Antonio have any involvement with it?
A. Not that I recall.
Q. Okay. What is the finished height of the hotel now?
A. Approximately 105 feet.
Q. Was that ever -- was a design ever done at a height different than 105 feet?
A. Not that I recall.
Q. So it's always been -- it's never been higher than -- no design to your knowledge has ever been done greater than 105 feet?
A. No.
Q. Okay. And the exterior of the hotel as it exists now is basically as was designed by Fairfax Sammons, correct?
A. Correct.
Q. Okay. Let me go back and ask you a few

more questions about some background issues.
As I understand it, Michael Bennett's interests relative to restaurants are currently at Rue De Jean, Virginia's on King and Coast, is that right?
A. Correct.
Q. At the time of his deposition he said that he was also involved with Good Food Catering, Vincent Chicco, Victor Social Club and Michael's on the Alley. Are they still active or what happened to those?
A. Yes. Good Food Catering is not a restaurant. It's an event catering company.
Q. Okay.
A. Vincent Chicco's, Victor Social Club and Michael's on the Alley are currently closed.
Q. Are they out of business?
A. We closed them -- Michael's on the Alley was closed prior to the pandemic and the other two were closed during the pandemic and we are undecided if we are going to continue those as a restaurant or just have them operate as private event spaces.
Q. All right. So Rue De Jean, Coast and Virginia's been -- were they active throughout the

pandemic?
A. They temporarily closed for approximately two, two and a half months, but they -- all three have currently reopened.
Q. Okay. Does Mr. Bennett have an interest in any apartment complexes?
A. No.
Q. Okay. And as I understand it, at the time of his deposition he had an interest in 13 motels, is that correct?
A. It's approximately 21 hotels.
Q. Okay. In looking at the Web site that was introduced as Exhibit 1 to Mr. Bennett's deposition, Bennett Hospitality listed the Embassy Suites in historic Charleston, the Hampton Inn in Charleston, Hampton Inn in Mount Pleasant, Residence Inn, Mount Pleasant; Courtyard, Mount Pleasant; Homewood Suites, North Charleston; Hampton Inn in North Charleston; Hampton Inn on Citadel Haven in Charleston; Hampton Inn Savannah; Hampton Inn Billings, Montana; Homewood Suites Bozeman; The Cottages in Mount Pleasant; Embassy Suites in Savannah; and Homewood Suites in Montana. Are there any other hotels or motels that he has an interest in?

A. I believe since that Web site there is a Homewood Suites in Billings, Montana. There is a Homewood Suites in Kalispell, Montana. There's a Hampton Inn in Bozeman, Montana. There is a Hampton Inn at Charleston Airport and there's Hotel Bennett.
Q. Okay. Would that add up to 21?
A. I didn't count the ones that you added, so if I had the list in front of me I could verify.
Q. Okay. So for the -- for all of those hotels other than Hotel Bennett, tell me how they came to be -- were any of those already constructed when Mr. Bennett got his interest or were all of them developed and constructed under him?
A. There were two. One now I recall that you just did not name, the Hampton Inn on Daniel Island.
Q. Okay.
A. And the Hampton Inn in Bozeman, Montana were previously constructed and purchased from the current franchisee.
Q. Okay. So of the approximately 21 hotels that Mr. Bennett owns, two of them were already constructed when he got them, the rest of the other approximately 19, the full development

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and construction occurred under his guidance, correct?
A. Yes.
Q. Okay. And can you tell me for those 19 hotels what the general range is that we're talking about them being constructed in?
A. Can you be more specific?
Q. Yeah. Were they -- were all of those hotels constructed after Bennett Hofford dissolved or were some of them constructed before?
A. Some were before, some were after.
Q. Okay. Which ones were constructed -- so can you give me a general timeframe from when the first hotels were constructed that Michael Bennett did?
A. The first hotel, the Hampton Inn on John Street, was constructed in 1992.
Q. Okay. Have there been any hotels that Michael Bennett constructed that he no longer owns?
A. No.
Q. And of the 19 that he constructed, who were the architects for them?
A. For the Hampton Inn on John Street, the architect was T Doggett. On the Embassy Suite --
Q. Let me ask you this before you go

through each one just to try to save some time.
Which ones -- how many of the hotels were designed by Buck Lindsay or an entity that he was associated with?
A. It would be easier for me just to give you the list.
Q. Okay. What is easier for you.
A. The Hampton Inn in Savannah, the Courtyard in Mount Pleasant --
Q. These are ones that Buck Lindsay did?
A. Yes.
Q. Okay.
A. The Courtyard in Mount Pleasant.
Q. Okay.
A. The Homewood Suites at Charleston Airport.
Q. Okay.
A. The Homewood Suites in Kalispell, Montana.
Q. Okay.
A. The Hampton Inn at Charleston Airport.
Q. Okay.
A. The Embassy Suite in Savannah. I believe that's all.
Q. So it would have been six?

A. That sounds correct.
Q. Okay. Has Buck Lindsay designed any hotels since the Hotel Bennett was finished?
A. Not for our company.
Q. Do you all have any hotels that are currently being conceived or developed that Buck Lindsay is involved with?
A. Not at this time.
Q. Okay. Would you use Buck Lindsay for another project?
A. Yes.
Q. How did the -- tell me where the -- what was the guidance for the design for the six hotels that you just articulated? Tell me how that project -- how that process worked. Was I guess whoever the franchisor was would tell what the parameters were, did they have stock plans that were then used and massaged by Buck Lindsay, or tell me what that process was.
A. The franchisor did not have stock plans. They had basic floor layouts and certain requirements for guest rooms and public areas that the architect must incorporate into the plans. But each hotel is different, each site is different, so there's no way that a stock plan would work on any

specific site. They just gave the architect parameters of what was required to be included in the building and on the site.
Q. Okay. Were any separate interior designers retained for the hotels Buck Lindsay did?
A. In some cases, yes; in some cases the interior designer that worked for Buck Lindsay's office was included in the project.
Q. Okay. And when did Buck Lindsay start working for Michael Bennett?
A. The first hotel that Buck Lindsay designed for us was the Hampton Inn in Savannah, which opened in 2006, so that would have started it at late 2004, 2005.
Q. All right. So from '05 to -- and how about the Embassy Suites in Savannah, was that the last one, do you know?
A. Yes.
Q. And when was that done?
A. It opened in 2013. That would have been designed in 2011, 2012.
Q. Going back to your last discussion with Buck Lindsay, which I think you said was in April of this year?
A. Approximately.

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Q. Okay. What was the approximate payment that was made to him at that time?
A. It was approximately 12,000 dollars.
Q. And why did it take so long for him to be -- if the hotel was finished in early 2019, why did it take so long to get him paid?
A. There's no specific reason.
Q. How about a general reason?
A. Due to the lateness of the construction of the hotel and many expenses that we had due to that, the operating cash flow for the hotel was short and he was gracious enough to allow us to pay it when the cash flow was there.
Q. So there was not sufficient cash flow to pay that final bill from the time of the completion of the hotel until approximately April of 2020, correct?
A. It may have been sooner, but we did not pay it until April of 2020.
Q. Well, did you pay it as soon as you were reasonably able to?
A. That would be a fair assessment.
Q. Okay. And is it your testimony that there were no amounts that were billed by WLA that have been unpaid?

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A. Correct.
Q. How about DCI, interior designer?
A. To my knowledge they have been paid in full.
Q. So for going back to the hotels that were -- had been constructed by Michael Bennett, and as I understand it there's about 19 of them, none of them were -- do you know what the star rating system is for hotels? Have you heard about that? Five-star hotel, four-star hotel, three-star hotel, do you have any knowledge of that?
A. Yes.
Q. Okay. What star hotels approximately were the 19 that were done?
A. In the categories of Embassy Suites and Hampton Inns and Courtyards and limited service hotels, they really are not giving -- given a star or are rated by Forbes or Triple A as a Star or a Diamond hotel.
Q. Okay. If you had to rate them just based on your 36 years of knowledge and experience in the industry, what would you rate them?
A. Three-star.
Q. Three-star. Okay. Prior to this hotel, had Bennett been involved with any four or

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five-star hotels that it developed?
A. Can you repeat the question?
Q. Other than the Hotel Bennett, were there any four or five-star hotels that had been developed by Mr. Bennett?
A. No.
Q. How about for the project administration from the owner standpoint on all of the hotels that were done prior to Hotel Bennett, who did -- who performed all of the owner's roles in whatever was expected of the owner for those hotels?
What I'm getting at, was that all done in-house or was there ever a time for any of those hotels where you all contracted out separately to have a construction manager or somebody like that perform those roles?
A. It was all done in-house.
Q. Okay. And who specifically was responsible for that?
A. Myself and Peter Wright.
Q. Okay. Anybody else?
A. No.
Q. Okay. So prior to the Hotel Bennett, you had done all of the owner's -- whatever

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obligations were required of the owner, you basically self-performed that, correct?
A. Correct.
Q. Okay. And that would involve reviewing -- making decisions that came up during construction, reviewing pay apps, whatever questions that might come up with the general contractor or the architect, agreed?
A. Yes.
Q. Okay. On the -- any of the prior projects prior to this one that had been done by Michael Bennett, were there ever any mechanic's liens that were filed to your recollection?
A. Maybe once or twice.
Q. Okay. Were they -- any significant mechanic's liens?
A. Not that I recall.
Q. Were there any delays in construction on any of the other projects?
A. On the Embassy Suites Savannah, there was approximately 60-day delay.
Q. Any others?
A. Not significant, no.
Q. And the Embassy Suites Savannah was completed in 2013, is that what you said?

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A. Yes.
Q. And did the owner assess liquidated damages against the contractor on that job?
A. Yes.
Q. For 60 days?
A. They were assessed. There was subsequently an agreement, a settlement. I don't recall what the final outcome was on the exact amount of liquidated damages.
Q. Okay. Who was the contractor?
A. Welbro.
Q. I'm sorry, what?
A. Welbro Construction out of Florida.
Q. Where in Florida?
A. Maitland, Florida.
Q. Okay. Goff D'Antonio began its design services in about 2003, is that correct?
A. Approximately.
Q. Okay. And what was the approximate total amount that was billed by Goff D'Antonio?
A. I don't recall. I do recall it being over a million dollars.
Q. Okay. Were they paid that amount?
A. I don't recall the exact amount that they were paid.

Q. Okay. Was there a lawsuit that was filed over by Goff D'Antonio?
A. Yes.
Q. And why was the -- what was the approximate amount in dispute?
A. I don't recall the approximate amount.
Q. Was it around 250,000 dollars, does that sound about right?
A. That sounds about right.
Q. And why were they not paid that?
A. Architects, like attorneys, time bill. All the billing is based on time. We didn't agree with the hours of time that they billed on the project.
Q. Okay. So they didn't have a lump sum agreement, it was purely hourly?
A. I don't recall a lump sum agreement. But due to the ongoing changes requested by trying to get the hotels approved by the BAR, they would be considered additional changes, which would be billed on a timely basis.
Q. Okay. And looking at a settlement agreement that was marked as Exhibit 4 to Michael Bennett's deposition, it says that Goff D'Antonio claimed to be owed 435,000 dollars and they settled

for 260,000 dollars. Does that sound familiar?
A. If that's what the settlement agreement says.
Q. Okay. And why were they not paid the difference?
A. Because it was a settlement amount.
Q. But why did you all dispute that they were owed that amount?
A. Again, as I just said, we believed that the amount of billing was excessive of the amount of work that they completed on the project.
Q. So you thought that they overbilled you?
A. That would be one reason, yes.
Q. Okay. So you think that when they submitted the bill for the 435,000 dollars, they had not performed that -- they had not put in the hours that they claimed that they had, is that correct?
A. That would be one of the reasons, yes.
Q. Okay. Any other reasons?
A. That the building that they did design never got approved by the City of Charleston to be built and that those plans would just have to be thrown away.

Q. How was that Goff D'Antonio's fault that the BAR rejected what they wanted -- what their design was?
A. I don't think you could call it a fault. They were just unable to fulfill a contract that they had to get the -- as part of the contract was to take it through the approval process with the City of Charleston.
Q. Okay. Have you all worked with Goff D'Antonio since then?
A. No.
Q. Had you all worked with them before then?
A. Not that I recall.
Q. Okay. So was the -- did the height of -- when Goff D'Antonio provided its services, was the height of the hotel still set at 105 feet?
A. Yes.
Q. All right. So let's turn more specifically to this particular hotel and tell me how Buck Lindsay was engaged as the architect.
A. After the exterior of the building that Fairfax & Sammons had designed was approved by the City of Charleston, Fairfax & Sammons was -- were not hotel architects and so we turned to Buck to

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contract with him to design not the interior design of the hotel but the interiors of the hotel that along with all of the mechanicals and electricals and all the other pieces and parts that go into making a hotel function.
Q. Okay. So the design that was done by Fairfax & Sammons, it did not include any interior features?
A. Correct.
Q. It was just the shell?
A. Correct.
Q. So Buck Lindsay was only given the exterior elevations and told that that's what he has to do per the City of Charleston BAR and he needs to design all the interior?
A. Correct.
Q. Okay. What other architects, if any, were vetted for this job?
A. If I recall, we did hire Chris Schmitt, who is a local Charleston architect who at one time sat on the BAR, to help get final BAR approval.
Q. Did he do any design services?
A. No.
Q. Okay. So he was just there to kind of grease the tracks or help with the processes?

A. Correct.
Q. So my question was: Were there any other architects who were interviewed or vetted other than Buck Lindsay for this job?
A. No.
Q. Had Buck Lindsay ever designed a five-star hotel prior to this?
A. I'm not familiar with all of Buck's designs.
Q. Well, did you ever ask him that?
A. I did not ask him that, no.
Q. Well, you were kind of the -- you were the -- whose decision would it have been -- it would have been basically yours and Michael Bennett's, you all are the point persons for the company, correct?
A. Yes.
Q. Okay. So it would have been your decision to hire Buck Lindsay, agreed?
A. Yes.
Q. Okay. So do you remember any discussions or questions that you asked Buck Lindsay of whether he had any or his firm had any prior experience with a five-star hotel?
A. I don't recall.

Q. Okay. You don't recall asking him that?
A. I don't recall.
Q. Okay. Did that -- so I guess you did not -- you don't recall that you did not think that that was important or do you think that was important for him to have had that?
A. My recollection at the time was that we knew that we would have to hire an interior designer that had five-star experience, and we did that. So it was not as important for the architect to have five-star experience.
Q. Okay. So you thought it was important for the interior designer, DCI, to have five-star experience, but not the primary architect. And why is that?
A. Because the primary architect is designing, for lack of a better word, the bones of the hotel. It's the interior designer who designs the items that would make it five-star.
Q. Okay. Do you know if it's important for the -- while the plans are being developed for the interior designer and the primary architect to work together?
A. Absolutely.

Q. When did -- when was -- I can tell you that the -- let me ask you this. When was Buck originally contacted about this particular project?
A. I don't recall when.
Q. Okay. Do you recall schematically or from a coordination standpoint whether he was contacted before the interior designer?
A. Yes.
Q. And approximately how long?
A. I don't recall. I do recall him making the suggestion to us that DCI would be a great interior design firm to design the interiors of the hotel.
Q. So when you were talking to Buck Lindsay, did you have any questions or did Michael Bennett have any questions of whether he had any reservations about his abilities to design this particular structure and whether he had the appropriate staffing to perform what he needed to perform?
A. I don't recall.
Q. Okay. You don't recall asking any questions about that or hearing any reservations?
A. No.
Q. As far as the obligations of the

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A. No.
Q. Was he recommended to you or did you all find him through your independent research?
A. Jim Clement is a brother of one of Michael's college roommates.
Q. Okay. And who is that roommate?
A. His name was Vinny Clements.
Q. Okay. So how did it come -- so how -- tell me what the connection was that Clements came to hit it off, like was it a reunion or something, talk to his roommate, or how did that come about?
A. I don't specifically know how Michael reconnected with Vinny, but it was through that connection that Michael was made aware of Jim's expertise and it just coincided with the timing of starting the Hotel Bennett project.
Q. Okay. Before Jim Clements was actually hired to perform the services that he did, what sort of vetting occurred with him?
A. I recall Michael having several meetings with Jim. I do not recall being involved in those meetings.
Q. Okay. Were any other construction -- or what do you term Jim Clements, construction manager or owner's representative?

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A. An owner's representative.
Q. Okay. Were any other owner's representatives vetted other than Jim Clements?
A. Not that I recall.
Q. Okay. How often did Jim Clements visit the project during construction?
A. I don't recall that either.
Q. Did he have any set -- did he have any contracted or obligatory inspections that he was supposed to make?
A. He would be responsible for being at the pay app meeting.
Q. So that would be monthly?
A. Yes. But he was there more than monthly. I don't recall the number of times.
Q. Well, when he would go onsite, would he typically let you know?
A. Typically.
Q. Okay. So was it normal for him to come onsite to your recollection once a month, then on some months there might be -- he might come another time or so?
A. And in some months he may be three or four times.
Q. Okay. But the usual time -- usual

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number of visits, the customary number of visits would be once a month, is that correct?
A. I don't specifically agree with that. It was always more than once a month. I can't recall if it was two or three times in one month, four or five times in another month. I don't recall.
Q. Okay. So did Jim Clements ever recommend to you as the owner -- when I say you, I'm talking about Library Associates or Jim -- I'm sorry, Michael Bennett or Bennett Hospitality. I'm just going to lump them together just for the purpose of my questions as the owner.
Did Jim Clements ever recommend to the owner that he as the owner's representative needed to be out on the project basically full-time?
A. No.
Q. Okay. Did he ever recommend to the owner that the architect needed to be onsite and in person on the project more than what was contracted for?
A. No.
Q. And same question for DCI.
A. No.
Q. Okay. What was the -- for decisions

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that were made on this particular job that were required of the owner, what was the chain of command for how decisions were made?
A. Can you be more specific?
Q. Yeah. Say --
A. I've got something in my eye. I'm sorry.
Q. Do you need to take --
A. I'm good.
Q. Okay. Say an issue came up with a decision needed to be made because there is some selection that was required to be made for a finish or something like that that the architect or the contractor said we need a decision on to move forward, how was that decision made? What was kind of the chain of command? Would it go to Jim Clements and then to you and then to Michael Bennett or what was it?
A. It would really depend on what the decision was.
Q. Okay. Explain that.
A. I believe typically Balfour Beatty, if they needed a decision, they would contact Jim Clement.
Q. As the point of contact?

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A. Point of contact. Depending on what the decision was, if Jim was not able to make the decision, then he would come to me and/or both Mike and I at the same time.

Q. Okay. From the documents I've seen, and we can go through those at length, but might be able to cut this short a little bit. It seems to me that during the course of the project and looking at all the e-mails and such that Jim Clements for almost every decision other than just some completely -- a very minor decision, he would not act on his own, he would seek the input and authority from yourself and then sometimes it would go up to Michael Bennett, but he almost never decided, made decisions on his own, he'd almost always pass it upstairs for your buy-in, is that a fair statement?

A. If the decision was needed and it was a monetary issue or a design issue, yes, he would not make the decision. He would come to myself and/or Michael at the same time.

Q. Right. So a design issue or a monetary issue, when those would come up, Jim Clements' obligations were to approach you and/or Michael Bennett for authority to move forward, agreed?

A. Correct.

Q. All right. And how about the architect, same thing?

A. Can you be more specific with the architect?

Q. Right. If the architect needed to make a decision related to either budget or design, then the understanding and the protocol, the requirement was that they would come to you and/or Michael Bennett to get input and to guide them on their decision, correct?

A. Not all the time.

Q. Okay. Can you explain your answer, please.

A. Well, if there was a decision requested on the design and the contractor would go to Jim as the owner's representative if it was a design issue that was related to whether it's electrical or mechanical or any other systems in the hotel, he would then go to the architect. The architect would not necessarily come to us and say we've got an issue with the electrical system or the mechanical system. That's something that the architect would decide.

Q. Okay. How often were you onsite during

construction?

A. I can't recall the exact amount of times.

Q. Right. I'm just talking approximately. In the usual month, normal month, would you go once a month, less a month?

A. It would be more than once a month.

Q. So once or twice, would that be a fair statement?

A. Two or three times a month.

Q. And how about Michael Bennett?

A. Definitely less than once a month.

Q. Okay. Did anybody else from under Bennett Hospitality or for Library Associates visit the project?

A. Not on a regular basis, no.

Q. Bear with me a second. What other projects were under development and construction at the same time as the Hotel Bennett?

A. Can you be more specific? Do you mean once construction started?

Q. No, that were either where the property had been -- why don't we limit it to this: Where the property had actually been purchased and it was going on from there. So not just some conceptual

thing that might have it in his brain that he might want to get involved with where concrete actions were taken and property had been purchased.

A. We started and finished construction on a Hampton Inn at Charleston Airport during that time period.

Q. So approximately when was that?

A. That was 2000 -- February 2016 to April of 2017.

Q. Okay. What else?

A. I believe the only other hotel that was involved during that time period is when we purchased the Hampton Inn in Bozeman in 2016.

Q. Okay. That was preconstructed?

A. That's correct.

Q. How about the Patriots Point project, some other projects that had been started prior to January of '19?

A. I believe, yes, they had the Ferry Wharf project ground breaking in December of 2018, so it was one month prior to January of 2019.

Q. Okay. Anything else?

A. And he had secured the lease for Patriots Point during that time period, but no development or construction had started and still

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A. He sat in all of the meetings. He was the ultimate decision maker, but he took information from Jim and myself on who we thought would be the best contractor for the job.

Q. And who was your recommendation of the three?

A. I believe I recommended Balfour Beatty.

Q. And how about Jim?

A. I believe I just testified that Jim recommended Balfour Beatty.

Q. Okay. I understood that he was recommended as one of the three proposals, but I didn't realize that he had actually recommended him after the presentations were made.

A. Yes.

Q. All right. Do you remember how many meetings you had with Balfour pre-construction or pre-contract?

A. There were several meetings pre-contract and then there was an agreement signed for pre-construction services, I believe. And the pre-construction services started in January, February 2013 where they were involved in every aspect with the architect and the interior designer in completing and designing the plans all the way

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grew until the plans were finished.

Q. So there would be written documents that relate to what the pre-construction obligations were and what was provided?

A. I believe so, yes.

Q. What was Balfour paid to do -- how much was it paid for its pre-construction services?

A. If I can recall, it was around 65,000 dollars.

Q. Okay. How many -- those services primarily included pricing, didn't they?

A. Pricing, estimating, reviewing the plans. Buck has a specific way as he has plans complete. He does a 33 percent set, he does a 66 percent set, he does a 99 percent set. And at each of those levels Balfour Beatty was sent those plans to review those plans to, you know, make sure that they understood everything that were in the plans, make sure that there was nothing missing in the plans that they could see.

Q. Okay. So ultimately there was a request proposal, do you remember that, an RFP?

A. Not specifically, but there probably was.

Q. Okay. And I'm sorry, you don't

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remember how many meetings there were with Balfour pre-contract?

A. I do not recall.

Q. Do you remember any of the details of any of the discussions of any of the pre-contract meetings?

A. I do not recall as I sit here today.

Q. Okay. The lawsuit that we're involved with, we got a counterclaim from Library Associates and it named Balfour Beatty Construction Corporation as a defendant. Do you know -- have any knowledge as to why it was named along with Balfour Beatty Construction, LLC?

A. I do not specifically recall. It may be in the construction contract listed as Balfour Beatty Corporation. I'm not sure as I sit here today.

Q. All right. What involvement did you have, if any, with the negotiation of the construction contract with Balfour?

A. I had some involvement in that negotiation with the contract.

Q. Okay. What was that?

A. I believe we hired Mr. Bundy to review the contract for us and I would have discussions

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with Mr. Bundy regarding the contract and any changes or requests that Balfour Beatty's attorney may have made to Mr. Bundy.

Q. Okay. Who actually presented the initial draft of the contract?

A. I do not recall.

Q. What was Jim Clements' role with negotiating the contract?

A. I believe Jim Clement was involved in the monetary portion of the contract, but not of any of the legal terms requirements of the contract.

Q. And who negotiated those?

A. Mr. Bundy with the Balfour Beatty's attorney.

Q. All right. We -- are you familiar with supplementary conditions that have been discussed or were discussed during the construction project?

A. Yes, I'm aware of supplementary conditions.

Q. Okay. I can -- do you know if those were actually attached to the copy of the contract that Library Associates signed?

A. Can you be more specific?

Q. Well, I can tell you that Balfour

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specification book for the job.
Q. Okay. Was there -- did you have a discussion with Buck Lindsay while this project was ongoing as to whether the -- these supplementary or supplemental conditions were meant to be in the contract or not?
I mean, this whole issue came up during the project because there was a -- there's a reference in the supplemental conditions that retainage is to be 5 percent and in the other contract documents it says 10 percent. Do you remember that?
A. I know that the retainage is 10 percent.
Q. In the AIA 133, in the main contract, it's 10 percent, correct?
A. That's correct.
Q. Right. And the supplemental conditions, it says -- the draft supplemental conditions, it says 5 percent, right?
A. The supplemental conditions, in this case this one was dated May the 28th, 2014.
Q. Okay. What's the relevance of that?
A. It was the lender who required the 10 percent retainage.

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Q. Okay. But regardless, A133 says 10 percent, supplemental conditions say 5 percent, and there is a disagreement during the construction as to what percentage of retention applied. Do you remember that?
A. Yes.
Q. Okay. And Balfour asked for a 5 percent retention and Library Associates took the position that it's 10 percent, correct?
A. That's correct.
Q. Right. And, in fact, you refused to reduce the retention to 5 percent saying, no, it's 10 percent, correct?
A. Because the lender required 10 percent retainage.
Q. Well, that's -- but it's still a matter of contract, isn't it, whether -- whatever the lender required is really immaterial after the contract is signed. If the contract says 10 percent or 30 percent, it's -- you still have to -- Library can't just arbitrarily say we're going to withhold 50 percent or 15 percent, you have to look at the contract, agreed?
A. The A133 says 10 percent. Also, I do recall Balfour Beatty signing a document saying

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that they would agree to the terms of the loan documents. And the loan document says 10 percent. So in that letter that they had sent to the lender during the construction loan closing said that they would adhere to the loan documents, of which also stated 10 percent.
Q. Okay. The contract says 10 percent. And when you were arguing the retainage, that's what you were arguing, is that the contract says 10 percent, correct?
A. I was arguing that the contract says 10 percent and that the lender required 10 percent.
Q. Okay. But you refused to -- and when the point was brought up that the supplement -- that the draft supplement conditions said 5 percent, you said I'm not going to do that, I'm not going to pay the 5 percent, I'm going to pay 10 percent, correct?
A. My position was that the retainage should be 10 percent. The architect is the ultimate one who signs off on the pay app where the retainage is requested.
Q. Okay. Did you have any specific involvement with drafting the supplementary conditions?

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A. No.
Q. Who did?
A. That's Buck Lindsay's document. That's in his specification book.
Q. Okay. How about Jim Clements?
A. No. That's Buck Lindsay's document. That's in his specification book.
Q. Okay. Are you aware of Buck -- of Jim Clements specifically striking out certain sections of the supplemental conditions and they were negotiated, that it was decided that they would be completely left out? Do you have any knowledge of that?
A. No.
Q. What is the factual basis for Library Associates' position that the supplemental conditions, whatever they are, or draft supplemental conditions? When it made that claim to the court saying we want the supplementary conditions declared not part of the contract because they were draft, what was the factual basis for that?
A. You'd have to ask my attorneys.
Q. So Mr. Bundy would be the one to answer that?

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A. Yes.
Q. Okay. Anybody else?
A. Or his partner, Mr. McDonald.
Q. Okay. I asked you about who you may have spoken with regarding this litigation and you told me about various people. How about Michael Bennett, did you have any -- have you had any discussions with him specifically about this litigation in the last month?
A. Can you be more specific?
Q. Just a general question. Have you had any discussions with Michael Bennett in the last month about anything specific to this litigation?
A. The only conversation I had was that my deposition was scheduled for this week.
Q. That's it?
A. That's it.
Q. Okay. Do you have any reason to believe that -- or testimony relative to whether Michael Bennett read the contract or not?
A. No, I do not believe he read the contract.
Q. Is that his habit, not to read contracts?
A. Yes.

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Q. Why is that?
A. He does not get into the minutia. Typically we rely on our counsel to review our contracts and then I deal with the contracts.
Q. Okay. Do you do any sort of written summary? Say for this particular contract, would you do an executive summary or memorandum or anything else like that to Michael --
A. No.
Q. -- Bennett to explain to him what you thought the perfect conditions were?
A. I did not, no.
Q. Did you discuss any of the particular provisions to your recollection with Michael Bennett?
A. We would have conversations. I do not specifically reflect what those conversations were being six years ago.
Q. Okay. Well, do you have any general recollection? Do you have any -- can you testify here today that any -- about any particular provision or specific provision of the contract between Library and Balfour that you discussed with Michael Bennett?
A. Not as I sit here today.

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Q. Okay. Does Michael Bennett have any -- have you observed if he has any problems with his memory?
A. No.
Q. Do you think he's sharp?
A. Yes.
Q. Does he recall details?
A. Yes.
Q. Okay. When I deposed Michael Bennett, he -- his testimony was that he had no recollection of design changes on the hotel. If that was his testimony, does that make sense to you?
A. That would make sense to me that he would say that, yes. It also depends on at what time, you know, what your specific question was.
Q. From the time that the contract was signed forward. So the contract was signed with Balfour. From that point forward I asked Mr. Bennett if he was aware of any design changes and he said no.
A. If that was his answer, I believe that would be his answer at the time.
Q. Right. Does that make sense to you?
A. Yes.
Q. Are you aware of design changes that took place in the hotel?

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A. I am.
Q. Some of those were pretty big, weren't they?
A. There was one big design change. It was done prior to even the floors being built where we converted 18 rooms to 12 rooms.
Q. That's on Floors 6, 7 and 8?
A. Correct.
Q. Right. You made single rooms into -- single rooms into suites, correct?
A. Correct.
Q. That's a major change, wasn't it?
A. That was a change, yes.
Q. Does it make sense to you that Michael Bennett does not recall that?
A. If that's what he testified.
Q. No, I'm asking if it makes sense to you.
A. Yes, that does make sense to me.
Q. Okay. Who signed the pay applications for LA?
A. The pay applications to the lender?
Q. From Balfour Beatty's, the applications, who signed those?

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A. The architect would sign the pay application.
Q. Okay. Did the owner sign them?
A. No.
Q. Did the owner approve them?
A. No. The architect approved them.
Q. How about change orders? Who signed those?
A. I signed the change orders. The architect signed them first. They would be signed by Balfour Beatty, then they would be sent to the architect for approval, and then I would sign them.
Q. Okay. Did Michael Bennett ever review any of those before they were signed?
A. No.
Q. Did you discuss change orders that were ongoing on the project before you signed them with Mike Bennett?
A. There were a few that were discussed with him, but he was not involved in the biweekly meetings that we had for Balfour Beatty or -- not on a regular basis, no.
Q. What change orders did you discuss specifically with Michael Bennett?
A. There was a -- specifically I recall

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that there was a -- we decided to put a cover on the pool. That was going to be an 85,000 dollar change order for a pool cover.
Q. Okay. What else?
A. I specifically remember I think there was some time delays given to Balfour Beatty early on for the -- there was a storm where the thousand year flood. That's what I specifically remember that he was involved in.
Q. Did you review any of the pay applications with Michael Bennett?
A. No.
Q. If he had wanted to look at them, would you have explained them to him?
A. Absolutely.
Q. Why did he have no interest in reviewing the applications?
A. He doesn't get into the details.
Q. Did Michael Bennett have any involvement with negotiating the guaranteed maximum price in the contract?
A. That was mostly Jim Clement. I'm sure -- Michael was in the pre-construction meetings that we had for Balfour Beatty. I'm sure he was somewhat involved in the numbers, trying to

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get the numbers down where they need to be and -- but once the project is under construction, he steps away.
Q. What do you mean steps away?
A. He doesn't get involved in the day-to-day details, including the pay apps.
Q. Okay. Well, on this -- on this hotel, did Michael Bennett have any interest in it at all after the contract was signed with Balfour?
A. Absolutely he had interest. However, he did not go to the site and he did not review the pay apps and he was not involved in the day-to-day operations of it, construction of the hotel.
Q. Were there any aspects of this job after the contract was signed that were important to Michael Bennett from your viewpoint?
A. Making sure it opened on time.
Q. What else, if anything?
A. Making sure that the end product was what was promised to us by Balfour Beatty.
Q. What else?
A. That's all I can recall right at this second.
Q. Okay. So it's they finished on time and that he's happy with the final product?

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A. Correct.
Q. Okay. Was Michael Bennett involved with the design selections of the hotel?
A. He was involved early on meeting with the interior designers, you know, picking out the colors and fabrics. We went to Atlanta a couple of times to meet with DCI to review their packages.
Q. Okay. Were there any other selections that Michael Bennett was involved with?
A. The Hope's windows, that I believe that they flew with Balfour Beatty to the Hope's manufacturer somewhere up north to review the Hope's windows.
Q. Okay. The primary reason that Michael Bennett was concerned with the opening was that he wanted the opening before his mother's birthday. Do you remember that?
A. No. He was concerned about the opening because we had already had a lot of money invested because we had already hired the management company. We were paying the management company and we were paying employees starting in 2017 when Balfour Beatty continued to say that we would be opening in October of 2017. We had a lot of money we had spent.

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Q. So it had nothing to do with his mother's birthday?
A. No, it had nothing to do with his mother's birthday. It wasn't until it was obvious that the opening wasn't going to happen until January of 2019, but he thought it might be nice to have it on her birthday since it was already apparent that it was going to be in January. And her birthday was January the 11th. There was no -- it wasn't the main thing that was important to him to open for her birthday. That was 2019. We were supposed to open in October of 2017.
Q. Okay. The projected opening date was July 30, 2017. Do you recall that?
A. I do recall that.
Q. And then there was a one-time extension of 20 days was given that extended the opening date to August 1917. Do you recall that?
A. No, I believe that the substantial completion date was supposed to be August. When you open a hotel, you usually have 30 to 60 days where you have your employees in to train on all the systems prior to actual opening. And so the substantial completion date was supposed to be in August, then that would automatically we would be

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open sometime in October.
Q. So the opening date you said was -- you understood was originally July 30 and then it moved to August 19 because there was one 20-day extension, correct?
A. No, I did not say the opening date was July 30. You just referenced that as the opening day. The contract originally says the substantial completion date was July 30th, and then it was extended by time until August.
Q. Right. And the hotel opened when?
A. The hotel opened in January of 2019.
Q. What specific date?
A. 27th.
Q. Okay. So it was completed and opened on January 27, correct?
A. Of 2019.
Q. Okay. And the substantial completion had to occur did you say two months before that in order to train employees?
A. Typically. Typically it's two months before that.
Q. All right. How much time was substantial completion performed in order to allow Salamander to move its people in and do that

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training?
A. And -- excuse me. I'd like to go back just a second. Certificate of occupancy. Substantial completion, sometimes referred to also as a certificate of occupancy. However, I believe in Buck's documents there's certain other things that have to be met in order to hit substantial completion. And so in this case I believe we were able to get a temporary CO in November of 2018. And because of relationships with the city, we were able to open the hotel under a TCO and we were -- we had to get -- the Salamander people I believe got in there, started working, you know, in December, in January, actually got in the hotel. We had them hired a year prior where they had been working offsite in the hotel for over a year.
Q. Okay. But the hotel operational and running and had guests was selling rooms on January 21, 2019?
A. I believe it was 26th.
Q. January 26th?
A. 26th or 27th, yeah.
Q. All right. So regardless of any -- whatever, if any, technical things had not occurred by then, by that date the owner was using the hotel

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and it was functioning and was an operable hotel, agreed?
A. It was open on that day and it was operational.
Q. Okay. What would --
A. Maybe not fully, but there might have been some floors that were not finished at that time.
Q. Okay. What floors -- when were all the floors finished?
A. I don't recall at this specific -- I don't recall a specific date.
Q. Okay. Well, if the hotel was scheduled to be completed with the one 20-day extension on August 19, 2017 and was not completed until January of 2019 according to your testimony or whatever the TCO was or CO was, what was the cause of the delay?
A. Balfour Beatty did not have enough subs on the job, enough people on the job at all times to get the work done.
Q. So it was strictly Balfour Beatty's fault?
A. Balfour Beatty and its subs.
Q. But it was strictly Balfour Beatty and its subs that caused the delay, nobody else, that's

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your position?
A. That's my position.
Q. Okay. And that's the position of Library Associates?
A. That's my position.
Q. Aren't you speaking for Library Associates?
A. You're taking my deposition, so that's my position.
Q. Right.
A. Yes.
Q. Are you making a distinction? Are you not testifying for -- you're an officer of Library Associates, aren't you?
A. No.
Q. You run the corporation basically for your brother, don't you?
A. Yes, but I'm not an officer of Library Associates.
Q. Okay. Regardless of the technical distinctions, your position is that all of the delays were solely caused and attributable to and the responsibility of Balfour Beatty, correct?
A. Yes.
Q. Okay. And it is not and never has been

your position or contention that anybody else contributed to any of the delays, correct?
A. As I sit here today.
Q. Okay. Is that correct, it is not and never has been your contention that anyone other than Balfour Beatty is the cause or responsible for the approximately 500 plus days of delay on this job, agreed?
A. Yes.
Q. Thank you. After the contract was signed, did you understand that the owner, Library Associates, was going to have to self-perform some of the work?
A. There are certain things in the contract that would be owner furnished, owner installed.
Q. Okay. And what were those?
A. Typically that's low voltage wiring. Typically that would be -- in any other contract, that would be kitchen equipment. But in this specific case, Balfour Beatty wanted the kitchen equipment after the contract was signed in their contract, so there was a change order to that effect to give them the responsibility of the kitchen equipment in their contract.

Q. I'm simply asking what did the owner of Library Associates self-perform? What was it responsible for? You said the low voltage wiring. What else, if anything?
A. Self-performed, we would hire outside contractors, but that's typically what we would do, would be we would have -- be responsible for the laundry equipment, the -- like I said, typically kitchen equipment, but in this case this is in Balfour Beatty's responsibility and low voltage wiring.
Q. Whose responsibility was it under the contract to coordinate the work that was self-performed by Library?
A. I believe that was Balfour Beatty's responsibility.
Q. Okay. So it was Balfour Beatty's responsibility to coordinate the work of Library?
A. Yes.
Q. And that's your understanding of the contract?
A. Yes.
Q. Okay. Did you ever discuss delays with Jim Clements while the project was ongoing?
A. I don't specifically recollect each

conversation, but I'm sure that there was conversations about delays, yes.
Q. Okay. And I would assume that his position mirrored yours, that it was not his contention that anybody other than Balfour was responsible for the delays of the project?
A. I cannot speak for Jim. You'd have to ask Jim that question.
Q. Well, I'm just asking about your recollection.
A. You'd have to ask Jim that question.
Q. I'm not asking what he recollects, I'm asking what you recollect.
Do you have any recollection of Jim Clements having a position that differed from yours? You said from your perspective, day one, as soon as the delays started, once the project was delayed after August 19, 2017, you thought it was -- you felt it was Balfour's obligation.
And to your knowledge, did your designated representative, owner's representative, Jim Clements, differ?
A. Not to my knowledge.
Q. How about the architects, did they differ?

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A. I can't speak -- I don't recall.
Q. Okay. Well, from your recollection, do you recall did the -- did the architects say it's Balfour Beatty's responsibility for delays and solely Balfour Beatty's? Do you remember anything to the contrary from the architects?
A. No.
Q. In fact, everybody from your testimony and recollection from day one from the time from August 19, 2017 that the first day of delay occurred until the hotel finally opened on January 26, 2019, everybody involved with the project from yourself, Jim Clements and the architect all took the position and delegated all responsibility and the sole responsibility of the delays to Balfour Beatty, correct?
A. I can only speak for myself. I can't speak for them.
Q. Right. We've already been through this. I'm just recapping your testimony. You said what you recall them saying. And I'll take their depositions and they can say whatever they want to and they can allege and cite whatever others they want to.
But from your perspective and your

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recollection based on your involvement with this project, it was Library Associates', yours, Jim Clements and the architects assertion from day one that all delays were the responsibility and solely the responsibility of Balfour Beatty, agreed?
A. I believe that they were the responsible party, yes.
Q. Right. The answer to my question is yes, correct?
A. I believe they were the responsible party.
Q. Right. And nobody else, correct?
A. That's my opinion.
Q. Okay. And that was everybody's opinion while construction was going, correct?
A. It's my opinion. I can only speak for myself.
Q. Right. But you can also speak to what you were told by others. And it was everybody's contention from day one that it was Balfour, correct?
You've already testified to that, haven't you?
A. I don't recall anything different.
Q. Okay. Were there any other

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independent -- strike that question.
I'm going to move into another area if you'd like to take a few-minutes break.
A. I'm good.
Q. We've been going a little over an hour. Okay.
I want to refer you to the contract with Balfour Beatty that as I referenced is -- let me back up. Maybe you answered this and maybe I don't recall what the answer was.
If the pleading identified under Exhibit 13 says that Library Associates seeks to add supplementary conditions declared not part of the contract because they were draft, what -- why was that request made?
A. I don't recall. You'd have to ask Mr. Bundy.
Q. Okay. Let's turn to the contract, if you would, please. Do you recognize what has been marked as Exhibit 14 to Michael Bennett's deposition?
A. Yes.
Q. And this is -- do you recognize this as the contract between Library and Balfour?
A. Yes.

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Q. Okay. We're going to work through a few provisions in this. So on the front page, the owner is Library Associates. Do you see that?
A. Yes.
Q. The construction manager is Balfour Beatty, LLC. Do you see that?
A. Yes.
Q. From your understanding on this job, was there any distinction between Balfour Beatty being called a construction manager as opposed to a general contractor?
A. They were the construction manager.
Q. Okay. What is -- is there any distinction in your mind as them being called a construction manager or a general contractor or alpha dog or whatever you want to say, the fact that it was -- they were called a construction manager as opposed to a general contractor, did that have any significance to you on this job?
A. No.
Q. Okay. And for the following project, hotel Marion Square, do you see that? First page.
A. Let me retract that question for just a second. In this contract, which is an A133, they are labeled as a construction manager. And because

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this is the contract that was used, the 133, the construction manager does have different responsibilities or additional responsibilities than if a typical job was signed within AIA 101, which would call the contractor a general contractor.
So even though that they were the general contractor, they were also the construction manager as part of this definition of this contract, which gave them additional responsibilities.
Q. Okay. The primary responsibility -- this agreement gives the construction manager more -- basically you agree on a -- you sign a deal before you have a guaranteed maximum price, correct?
I mean, what is the distinction? You tell me what your understanding of the distinction is between a construction manager and a general contractor.
A. In this particular contract they are identified as the construction manager.
Q. Okay.
A. And they are responsible for all of the accounting and managing and it's their complete

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responsibility to manage all the subcontractors --
Q. How does that differ from any other contract that a general contractor would sign?
A. Give me a second here.
Q. Let me ask you this: Without reference to the contract, tell me what your understanding -- without referencing the contract, Miss Brown, going from your understanding sitting here today in front of me, what is the distinction, if any, between a construction manager and a general contractor?
A. Again, they have -- this -- the construction manager has additional responsibilities that a general contractor would have when they would typically sign an A101 contract for a job.
Q. Okay. But if you have a -- and what other responsibilities are those?
No, based on your recollection. Tell me your understanding.
A. They're completely responsible for all the accounting on the job, they're responsible for their subs, they're responsible for the schedule of the job. They have complete responsibility.
Q. Okay. Isn't that the responsibility of a general contractor on any job, that they're

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responsible for their subcontractors, for the -- if it's a cost plus, they're responsible for the cost and supporting the costs for the project? I mean, I'm just trying to get your understanding of what the distinction is, if you have any.
A. Again, I believe this document requires them -- and without you allowing me to review the document to come up with specific items, the construction manager has more responsibilities than a typical general contractor would in signing an A101.
Q. Do you know why the decision and what reasons, if any, underlaid the decision for Balfour to be a construction manager as opposed to a general contractor to be labeled as such in this contract?
A. It was the decision -- and I'm not sure -- I don't recall why the decision was made, but the decision was to have the A133 and have it be a cost of work plus a guaranteed maximum price.
Q. Have you used this contract before, this contract form?
A. No.
Q. So you always use the A101 and 201?
A. Yes.

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Q. Have you ever had a contract that was cost plus with a guaranteed max?
A. No. This was the first one.
Q. Okay. So all of your other -- your prior contracts were just simply for a negotiated stipulated sum?
A. A lump sum contract, yes.
Q. Okay. For the other 19 hotels that Mr. Bennett's constructed, correct?
A. Yes.
Q. All right. Continuing down on Page 1. I'm sorry, Page 1 of the contract. The first page. Cover page. I'm sorry, you kept turning. Actually, I think it is enumerated as Number 1.
A. Yeah.
Q. All right. We were working down through the terms. Architect is Winford Lindsay Architect?
A. Yes.
Q. And the owner's designated representative is Jim Clements, major program management services, correct?
A. Yes.
Q. And for the architect, Winford Lindsay Architect, any responsibilities that he's to

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perform under the contract or -- that's a general question. Let me rephrase.
Where the contract references that the architect is to perform certain functions, then Winford Lindsay Architect is that entity, correct?
A. Yes.
Q. And where the owner -- where the contract says that the owner's designated representative is to be Jim Clements, then he's the person, correct?
A. Yes.
Q. Okay. Who, if anybody, was involved with the negotiation of the agreement for Jim Clements?
A. That would have been Michael.
Q. How about for the actual -- the actual wording verbiage of that agreement? Who negotiated it, in other words?
A. I don't recall. I was finishing up another hotel project at the time and I was not involved in that.
Q. So it was only Michael to your knowledge?
A. I'm sure Michael had someone review it for him. Whether it was Mr. Bundy or one of our

other attorneys, I'm not sure. I don't recall.
Q. Does Tracy Ray actually practice law? Is she a practicing lawyer?
A. I believe she keeps up with her continuing education, but she works for us. She does not practice law.
Q. So any legal work she does is strictly for Bennett Hospitality?
A. Correct.
Q. And its related entities?
A. Correct.
Q. All right. Turn to Page 7 of the agreement, if you would, please. At the very bottom under 2.3, construction phase, under Section 2.3.1.3 there is a provision for liquidated damages at a rate of and then it's spelled out 9,500 dollars and then the -- or the numeral is 9,000 dollars. Do you see that?
A. I do.
Q. Okay. Who negotiated that amount?
A. As I recall, that was Jim Clement who negotiated that amount.
Q. Okay. And you were involved in it, though, weren't you?
A. I was involved in it, yes.

Q. And, in fact, you just finished -- hadn't the Embassy Suites just finished where you all were involved in a dispute that necessitated the imposition of liquidated damages?
A. Yes.
Q. So you're very aware and very knowledgeable of what a liquidated damages provision is for, agreed?
A. I am knowledgeable about what a liquidated damages clause is, yes.
Q. And you negotiated that on -- into all of the contracts that Library -- I'm sorry, that Bennett Hospitality has negotiated with general contractors. Each one of the A101's has a liquidated damages provision, correct?
A. No.
Q. They don't?
A. No. In our contracts with CPI, we don't have liquidated damages provisions in their contracts.
Q. Anybody else?
A. As I testified earlier, they had built the last eight hotels for us. We had the liquidated damage clause in there with Welbro and we had the liquidated damage clause in there with

Balfour Beatty, but it's not in our other contracts, no.
Q. What is the intention of the -- what's the reason for having a liquidated damages provision?
A. The daily revenue that you lose from a hotel is a very large number. In a hotel like Hotel Bennett, that could be, you know, a hundred to 150,000 dollars a day in revenues. So a liquidated damage amount even what our net loss would be would be such a high number that a contractor would never agree to it, roughly 30,000 dollars a day that we lost in revenues for the hotel not being open.
Knowing that the contractor would never agree to a 30,000 -- what our true net loss was, we were able to negotiate a number that at the time we knew would not cover our losses but that we felt comfortable with and that Balfour Beatty felt comfortable with.
Q. Okay. So the liquidated damages is an agreement between Library Associates and Balfour Beatty that for every day of delay that is determined to be the fault of Balfour Beatty, that that's what Library Associates would collect as

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damages, agreed?
A. Correct.
Q. Okay. Did you have any specific involvement with negotiating that provision?
A. I recall that Jim Clement was negotiating that with Balfour Beatty. I recall that he may have come back with a number lower. I recall he -- that we probably had the conversation that our liquidated damage clause in that current contract with Welbro was 9500 dollars a day and that that's what we would be willing to accept even though that that -- the actual loss would be higher, and he was the one who was able to negotiate that with Balfour Beatty.
Q. To negotiate it higher?
A. To negotiate the 9500 dollars.
Q. What was the figure before the 9500 dollars?
A. You know, I don't recall. It was probably in the 7,000 dollar range.
Q. Okay. But the final agreement was that for each day of delay, Balfour -- the responsibility of Balfour, they would be liable for 9,00 dollars -- or 9500 dollars?
A. 9500 dollars.

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Q. Okay. How did that -- there's a discrepancy between the written part and the numeric aspect. Who drafted that actual language, do you know?
A. I believe Mr. Bundy did.
Q. Okay. So do you know how that happened, why -- what the discrepancy is?
A. I don't know how that happened.
Q. Was there a discussion -- after the contract was signed, do you remember any discussions with Balfour Beatty about which rate was the agreed upon rate?
A. I don't recall any discussions.
Q. So you don't know whether there's an agreement -- a meeting of the minds, so to speak, after the contract was signed as to which provision was going to apply?
A. I do not.
Q. What is your understanding of how the project schedule was developed or do you have any understanding of it? Do you know what a schedule is?
A. No. Balfour Beatty had the scheduling software that they scheduled the project.
Q. Okay. Do you have any training, any

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formal or informal training or CLE's or continuing education or anything else regarding scheduling?
A. No, I do not.
Q. Do you have any -- do you profess any expertise or understanding of critical path or other scheduling aspects?
A. I understand what critical path is.
Q. What is it?
A. Critical path are items in the job that have to be complete at a certain time in order for the job to move forward.
Q. Okay. Is there a science involved with that?
A. Not that I'm aware of. I'm not a scheduling expert. They have the -- they were in charge of scheduling the job.
Q. Okay. Do you do critical path analysis and do you use any of the computer programs to develop critical paths or schedules for jobs?
A. No, I do not.
Q. Does anybody with Bennett Hospitality?
A. No.
Q. Do you know whether anybody from Library Associates reviewed the schedule that was proposed by Balfour Beatty that included the

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original completion date of July 31, 2017?
A. I believe Jim Clement reviewed the schedule. I looked at the schedule.
Q. Okay. How about the architect?
A. I do not recall if the architect -- well, the schedule would have been part of the initial OAC meetings of which Balfour Beatty would have given the architect the schedule.
Q. Okay. What I'm getting at is the completion date that was set out in the contract that I think we've already discussed was -- when you do the math, it works out to July 31, 2017?
A. Yes.
Q. All right. There was a schedule that underlaid that date, agreed?
A. Yes.
Q. Okay. Did either Jim Clements or the architect review that schedule to your knowledge?
A. Yes, I believe they did.
Q. Okay. So both Jim Clements and the owner -- I'm sorry, Jim Clements and the architect were aware of and familiar with the original contract to completion date?
A. Yes.
Q. Under -- on Paragraph 9 of the

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complaint, Article 3, owner's responsibilities, it says: The owner shall provide information with reasonable promptness.
A. I'm sorry, where are you reading?
Q. On Page 9 of the agreement.
A. Okay.
Q. Okay.
A. What section?
Q. Article 3, Paragraph 3.1.1.
A. Okay.
Q. The owner shall provide information with reasonable promptness. Do you see that?
A. Yes.
Q. Did you understand that that was an obligation of the owner while this project was ongoing?
A. I see that's written here, yes.
Q. So did you understand that while construction was ongoing, the owner was going to be asked questions about selections and other things that it wanted and it was going to have to provide guidance to the design people and/or Balfour Beatty in order for the project to go forward?
A. Yes.
Q. Okay. And you understand that if the

owner does not provide that guidance that it's required to, that that piece of work cannot go forward, agreed?
A. Okay.
Q. All right. So it's just pretty commonsensical, isn't it, that if the owner -- if the owner is required to provide information and it doesn't do so within a reasonable time, then whatever information they're supposed to provide is going to cause a delay to that particular piece of work. That's pretty commonsensical, isn't it?
A. It may cause a delay to that piece of work, but it may not cause a delay to the critical path.
Q. Okay. All right. With that understanding.
A. Yes.
Q. However --
A. Yes.
Q. Right. But -- okay. What is a reasonable time in your view?
A. It depends on what the question was.
Q. Okay. Well, what if the contractor says, look here, owner, we have -- we need information from you to make a selection and make a

decision on a particular aspect of work and we need it within two weeks? Do you remember that happening sometimes on this job?
A. No.
Q. Well, if they asked you to have it within a certain time period, do you agree that it would be appropriate for the owner to provide that information within that time period?
A. If that information was readily available, yes.
Q. Well, whether it was readily available to the owner or not, if the -- if the owner just can't make the -- can't get the information for whatever reason, that's not the contractor's fault, is it?
A. No, but I'd have to have a specific --
Q. Okay. How about Jim Clements, does he have knowledge of scheduling?
A. I would think that he would, yes.
Q. Okay. Do you have any -- do you know whether he did or not based on your -- how long -- the contract time was 28 months, so it would have been in May of 2015 approximately when it got started and was completed in December, January of '19, '20.

A. Yes.
Q. So that's a pretty long time.
A. It started in March -- March of 2015.
Q. So about a four-and-a-half-year construction period?
A. Yes.
Q. Did you get to know Mr. Clements pretty well during that time?
A. I did.
Q. Did you like him?
A. I did.
Q. Do you have any complaints whatsoever of his work?
A. No.
Q. Okay. How about the architect, same answer?
A. I like Buck. I don't have any complaints about Buck's work.
Q. Okay. So the only complaints with regard to this are Balfour, correct?
A. Yes.
Q. And its subcontractors, correct?
A. Correct.
Q. All the complaints and criticisms are Balfour, correct?

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specific item, so I can't recall or specifically say that it should have been in this job. I'm not sure if Balfour Beatty may have told Jim that it would be in the subcontractors, so I cannot testify to that.
Q. All right. Let me back up for a second. Let's talk about Jim Clements and his responsibilities and your understanding of what he was to provide. You all -- Library Associates contracted with Matrix through Jim Clements -- Jim Clements is Matrix, correct?
A. Correct.
Q. All right. To act as the designated representative or owner's representative of this job, right?
A. Yes.
Q. And we'll turn to his contract shortly and I'll ask some questions about it, but it's basically the owner was asking for Jim Clements to give Library Associates before the contract was signed with Balfour Beatty his recommendations and advice as to what would be appropriate and necessary in the contract in order to make the job successful, agreed?
A. Yes.

Q. And same with the architects, agreed?
A. Yes.
Q. All right. You all are asking Jim Clements to bring in his credentialed experience to advise you on the contract terms and which forms of contract would be appropriate and otherwise in order to arrive at a successful project for the owner, correct?
A. Yes.
Q. Okay. Did Jim Clements ever advise the owner to your recollection that anything the owner was doing was causing or contributing to any of the delays on this job?
A. I don't recall any specific instance, no.
Q. Nor general instance?
A. I don't specifically recall.
Q. I'm not -- so do you have a general recollection that Jim Clements was telling the owner that its errors or omissions or acts or omissions were contributing to or causing delays?
A. I don't recall any conversation.
Q. Okay. The first person to be -- who was the first person to be hired among the architect, the general contractor and Jim Clements?

A. I don't recall the exact date that the architect was hired or the exact date that Jim Clement was hired.
Q. That's not my question. What's your recollection of who was hired first?
A. I don't recall.
Q. Okay. Well, if Jim Clements, if you're going to rely on him to -- was Jim Clements on board before the architect's contract was signed?
A. I don't have the exact date that the architect's contract was signed in front of me. I don't recall.
Q. Did Jim Clements ever make any recommendations to you about or to -- I understand that you weren't involved with any of the negotiations with Jim Clements, correct?
A. Not at the beginning, but yes, no.
Q. That went into his contract?
A. No.
Q. Okay. To your knowledge did Jim Clements make any suggestions to Library Associates about how often he felt he needed to be on the job physically?
A. No, I do not recall.
Q. Same question with regard to the

architect.
A. No, I do not recall.
Q. Same question with regard to the interior designer.
A. No, I do not recall.
Q. Okay. Turn to, if you would, Page 49 of the general conditions.
A. Of the 201?
Q. Yes, ma'am. Okay. Do you see kind of in the middle of the page 15.1.6, claims for consequential damages?
A. Yes.
Q. Do you recall any discussion about that paragraph with anyone prior to this contract being executed by Library Associates?
A. No, I don't recall.
Q. Reading that here today, claims for consequential damages. The contractor and owner waive claims against each other for consequential damages arising out of or relating to this contract. This mutual waiver includes, one, damages incurred by the owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such

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persons. Do you understand that paragraph?
A. Yes.
Q. Okay. Did you have any discussion with anybody about it when this contract was signed?
A. Not that I recall.
Q. Is that part of the contract? Do you have any dispute about that?
A. No.
MR. HILDEBRAND: Okay. I'm going to move into another area now. Why don't we take just a five-minute break.
THE WITNESS: Okay.
(A recess transpired.)
(EXHIBIT 16, AIA Document B101 - 2007, was marked for identification.)
BY MR. HILDEBRAND:
Q. I'm going to hand to you what's been marked as Exhibit 16. I don't have a whole lot of questions, but I do have some on this. Do you recognize this document?
A. I recognize this as being the architect contract, yes.
Q. Okay. And I've marked that as Exhibit 16. And I would like for you to turn to Page 8 of the agreement and the very bottom. Do you see

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where it says Article 4, additional services, and the very last one is 4.1.6?
A. Yes.
Q. And it says building information modeling not provided?
A. Yes.
Q. Do you have any recollection of any discussions you had with anybody relative to whether the architect was going to be contractually required to provide BIM for this job?
A. No.
Q. So you don't recall -- you have no recollection of the architect saying, look, this is a complicated job and the industry standard is that we need to use BIM to make it go smoothly, no memory of discussions like that?
A. No, I do not.
Q. Nor any recommendations from Jim Clements saying that it's his recommendation to the owner that really this is something we need to have, you just don't remember anything about it?
A. I do not recall, no.
Q. Okay. Well, if the -- we've now looked at the general contractor's contract, which I believe we agreed did not include them, and we

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looked at the architect's contract that did not include them. Will you agree with me from based on what we've looked at, there is no contractual obligation of either the general contractor or architect to provide BIM services for this job?
A. Not when the contracts were signed, correct.
Q. Okay. Well, were there any changes? Was there a change to the contract where it says, okay, explain that answer?
A. Not to -- not that I recollect. Again, as per earlier, the only recollection that I have is that the -- I believe it was the mechanical contractor was going to provide BIM services.
Q. All right. So would you agree with me that if the owner -- if either the architect or contractor was contractually required to provide BIM, it appears that they -- that that was not included, agreed?
A. That's correct.
Q. Okay. And would it stand to reason that if they had been asked to provide for that service that it would have been added additional cost to the owner?
A. Yes.

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Q. Turn then to -- let me ask you this: Do you know -- do you have any knowledge of any agreements with the architects to -- between Library Associates and the architect regarding them being a defendant or a potential party to this litigation or anything like that?
A. Repeat the question.
Q. Are there any agreements to your knowledge between Library Associates and the architect where the agreement is that the architect won't be made a party to this litigation but can be named later on or that the statute of limitations being -- is being tolled, T-O-L-L-E-D, or any sort of agreement -- arrangement or agreement whatsoever with the architect as to their being liable or potentially liable for any of the issues in this lawsuit?
A. No.
Q. Same question with the interior designer. Are you aware of any agreements with them relative to any exposure they might have?
A. No.
Q. How about with the -- with Jim Clements of Matrix?
A. No.

Q. Same answer? Are you -- let me expand that question just a bit beyond just if there is actually an agreement. Have there been any discussions about any such agreements?
A. No.
Q. Have there been any discussions to your knowledge between Library Associates -- discussions or communications of any sort between Library Associates and the architects about them being liable for the -- any of the damages that Balfour Beatty has claimed in this matter?
A. No.
Q. Okay. Same question for DCI?
A. No.
Q. And Jim Clements?
A. No.
Q. Do you know if the architect has put their insurance carrier on notice of a potential claim?
A. I do not know.
Q. Okay. Turn to the last page of that agreement, if you would, please. Do you recognize this document?
A. I recognize it as being a certificate of liability insurance. I don't recall seeing the

specific document, but it's seven years old.
Q. Okay. It indicates under -- are you familiar with this form?
A. Yes.
Q. It's an ACORD form?
A. Yes.
Q. And do you see under Section C professional liability?
A. Yes.
Q. Each claim is a million dollars and there is a provision under the third Section A for umbrella liability of 2 million dollars?
A. Yes.
Q. Okay. Do you know if there was -- is any agreement between Library and the architects that they provide any tail coverage or continuing coverage for some period of time relative to their work on this project?
A. Not that I'm aware of.
(EXHIBIT 17, AIA Document B152 - 2007, was marked for identification.)
BY MR. HILDEBRAND:
Q. All right. I've handed you what I have marked as Exhibit 17 and would ask if you can identify that.

A. It's the contract with DCI, the interior designer.
Q. And it is dated December 20, 2013?
A. Yes.
Q. Look on Page 13 of that, if you would, please. At the very bottom, Article 11, compensation. For the designer's services, the owner shall compensate the designer at the -- for the lump sum of 360,000 dollars. Do you remember that?
A. Yes.
(EXHIBIT 18, Invoice Register dated 5/7/19, was marked for identification.)
BY MR. HILDEBRAND:
Q. I'm handing you what's been marked as Exhibit 18. And this is an invoice register for DCI from December 2013 to May of 2019. Do you recognize this?
A. No, I do not recognize this.
Q. Okay. It's an invoice register. And right under invoice register it says Design Continuum. And on the third page, last page, bottom right, it says that the total charges for this job were $820,774.83. Do you see that?
A. No. No, I don't.

Q. I gave you the wrong page. We'll try this again. I've now handed you a document, Exhibit 18, which has been identified as invoice register. Do you see that, upper left on the first page?
A. Yes.
Q. And do you see on the third page at the bottom right it says final totals, $820,774.83?
A. I see that number, yes.
Q. Okay. Do you know if that reflects the total billings from DCI for this job?
A. Bear with me. This is the first time I've ever seen this document. Yes, those numbers look right to me.
Q. Okay. Does that sound right to you about the --
A. Yes. Because if you look at their contract -- there's two different invoices. There is Job Number 630001.01 and then there are jobs the invoices related to 630002.01. The first one where the project total fees are 419,500 dollars, that is about 59,000 dollars higher than the 360,000 dollar project cost. And that was due to the monthly services that they provided under the contract due to delays in the job with Balfour Beatty.

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This job was supposed to be finished and opened in '17, but they had to provide services going on through 2019 which we had to pay them for those services on a monthly basis. The 237,000 is for reimbursables. That's for flights to Charleston when they came, that's for hotel stays, that's for any other items that would be considered reimbursables in their contract.

And so the total for that 630.001 is 656,000 dollars. Again, a lot of that is due to the delays. If you'll look for invoices from all through January '18 through '19, all of those are due to delays in the job.

63002, is --

Q. I'm sorry, show me where you're --
A. 63002 here is a different --
Q. That's on the third page?
A. Yes, where it says additional services, where we requested additional services from them after the -- that wasn't part of the original contract, additional design that they've provided. And they base their fees on a per hourly cost and those totals were 159,000 dollars with the reimbursables on that portion being 4200. So yes, that --

Q. Okay. Regardless, my simple question was: So that does sound -- comport with your recollection of what they billed?
A. Correct.
Q. So the final billing to Library Associates was 820,774 dollars, you've got no reason to dispute that?
A. No.
Q. Okay. And so the original contracted amount was 360,000 dollars?
A. Plus reimbursables, plus additional services per the contract.
Q. Okay. So the original did not include anything -- did not include reimbursables?
A. No. It said in here that reimbursables will be in addition and any additional services would be at a per hour cost.
Q. So where do you -- so the contract administration, it was over and above the 360,000 dollars, where do you get --
A. Yeah, if you look at the time that they spent --
Q. This is the invoice register, Exhibit 18?
A. Yes. If you look --

Q. On the second page?
A. On the second page -- excuse me, on the date, yeah, you can see the additional cost and fees from '18 and '19. Those were 3500 dollars a month for additional -- just additional fees for their construction administration. Actually, that goes back to 2017. They billed one lump sum at the 14,000 that went back until -- that was four months old. You have to look at the actual invoices.
Q. Okay. So did DCI tell you -- so is it your contention that all of the 419,000 dollars is attributable to Balfour Beatty's delays?
A. No. The 419,000 is 360,000 of the original lump sum.
Q. Okay.
A. That's the original contract.
Q. Okay.
A. Okay? The addition, 419,500, was the additional time that they spent on the job. The 419 -- you'd have to subtract the 419 five from the 360.
Q. Okay.
A. But that's an additional 59,500 dollars in administration that they spent on the job.
Q. Okay.

A. Due to the additional time due to the delays in the hotel.
Q. Okay. Is there any document that says that's from DCI saying -- that to your knowledge it says that's what's caused by the delays?
A. The invoices and there was -- there was -- I'm sure that there was a letter sent or some type of correspondence since saying that, you know, we have now passed the contract time period, it was supposed to open and -- you know, this was supposed to open in 2017 and we need to charge an additional 3500 dollars a month.
Q. Okay. What would you have expected to pay but for the alleged breaches of Balfour, the 360 plus contract administration?
A. Plus -- 360 plus the reimbursables, yes.
Q. So approximately what?
A. I'd have to -- in general terms, probably about 500,000.
Q. Okay. So the difference of that 320 you claim is attributable to Balfour?
A. It was partially due to the delays. But the additional services, which are under 630002.01, some of those may have been attributable

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to Balfour and some of those just may have been attributable to additional things that we had asked them to do after the contract time.

Q. Okay. So have you talked to DCI and do you know what their contention is as to what the -- what their overages, what caused their overages?

A. I have not had that discussion with them, no. I haven't spoken to them regarding that.

Q. Okay. Is it your recollection that they specifically say on their invoices caused by Balfour's delay?

A. No, I do not believe their invoices say that. I do recall receiving notification from them due to -- due to the delays in the hotel that they will need to charge an additional 3500 dollars a month in administration.

(EXHIBIT 19, Invoice Register dated 5/7/19, was marked for identification.)

BY MR. HILDEBRAND:

Q. Okay. Now, Exhibit 19 is a document which shows in the top left cash receipts. Do you see that?

A. Yes.

Q. Both of these documents are dated the same date, May 7, 2019?

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A. Yes.

Q. Cash receipts are 785,334. So it's about 35,000 less than their total billings. Do you know what the explanation is for that?

A. It may have been what that was at that point. I believe that they have been paid in full since May of 2019.

Q. So you think they've been paid in full 820,000 dollars?

A. I believe so, yes.

(EXHIBIT 20, Project Management Agreement Between Owner And Project Manager, was marked for identification.)

BY MR. HILDEBRAND:

Q. I've handed you what I've marked as Exhibit 20 and would ask if you can identify that one.

A. This is a contract from Jim Clements not executed by Library Associates.

Q. Okay. Do you know -- do you have any reason to believe that it was not or that this is not the actual contract that was in place?

A. I -- I do not recall.

Q. Okay. Let's look under Article 1, project management services, project start-up

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phase, 1.1.2. Prepare master project schedule, delineating tasks, milestones and deadline dates to ensure project is completed on schedule. Do you know if Mr. Clements did that?

A. I don't recall.

Q. If that was one of his contractual requirements, do you have any explanation for why he would not have done that?

A. No.

Q. Under the next section at the top of Page 2, predesign and design phase, the third paragraph down, 1.2.3, update the master schedule with new and revised information when appropriate. Do you know if that was done?

A. Not that I'm aware of. I don't recall.

Q. Under 1.2.8 on that page, manage the design team and the owner's consultants to ensure necessary design information is incorporated into the design and construction documents. Did he do that?

A. He was involved in the preconstruction design meetings with Balfour Beatty, with Buck Lindsay and with the design team from DCI in meetings to incorporate into the design of the construction documents, yes.

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Q. Well, it says necessary design information -- to ensure necessary design information is incorporated into the design and construction documents.

A. Yes. He was in those meetings to ensure that the design and the construction -- that information was incorporated into the design and construction documents. It was -- the meetings consisted of Balfour Beatty, it consisted of DCI, it consisted of Buck Lindsay and it -- those meetings were held on a monthly basis during the design -- the predesign and design phase.

Q. And that's what Jim Clements' responsibility was on this project?

A. Yes.

Q. Agreed?

A. Yes.

Q. Okay. 1.2.10, manage key team members to ensure all necessary decisions are made by the appropriate persons at the appropriate time.

That was his responsibility?

A. In the predesign and design phase, yes.

Q. Review and comment on all pay applications, purchase orders and invoicing from all consultants?

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A. In the predesign and design phase, yes.
Q. All right. How about pre-construction, next page, 1.3, pre-construction and construction phase, 1.3.4. Provide the day-to-day management of the project, including coordination of the design and construction teams as well as owner's FF&E suppliers and statutory authorities. Was that his responsibility?
A. Yes.
Q. Did he perform it?
A. Yes.
Q. 1.3.6, manage contractor's schedule preparation and follow through, monitor schedule progress and report on schedule delays.
Same question, that was his responsibility and what he did?
A. Yes.
Q. All right. On Page 4, third item down. Let's back up under the bottom of Page 3, deliverables, 1.6 at the bottom.
With the design phase, his obligations to you were to provide a strategic development schedule incorporating milestone design, statutory, procurement, construction and occupancy activities.
Then it talks about his obligations for

the bidding and negotiation phase and then the construction phase. Under the construction phase, it says he will provide weekly meeting minutes, including action items list, monthly cost reports and variance analysis, including the estimated cost to complete the project and owner contingency reserves, monthly schedule updates and some other things. Those were his obligations of what he provided?
A. That's what this contract says, yes.
Q. Okay. That's what you all -- this contract embodies what you all expected to close, correct?
A. Right.
Q. And it says just below that his compensation would be 12,000 dollars per month, is that correct?
A. Yes.
Q. Jim Clement's charge was to meet -- he's the owner's representative and his charge was to meet with the owner and determine what your goals were and what you wanted the project to come out to in broad strokes, agreed?
A. Yes.
Q. And then it was his job based on his

experience and the fees were going to be paid to him to make sure that the owner's vision was transferred to the design team and the construction team so that they were contractually obligated to build what it was that the owner wanted, agreed?
A. Yes.
Q. So if there was a -- if Jim Clements did not convey to Balfour Beatty what some of the owners's requirements and expectations were such that they were included in Balfour Beatty's contract, then that would fall on Clements, agreed?
A. Yes.
Q. And we went through the contracts just a few moments ago that talk about the BIM. And the BIM was not included in either Balfour's contract or the architect's contract, therefore that omission would be Jim Clements' responsibility, correct?
A. It was not included in the contract. I don't think that I testified that it was the owner's request to have BIM, so how could it be in an omission?
Q. Okay. Well, if Balfour or the architect -- would you agree with me -- based on your knowledge of Jim Clements, are you pretty

impressed with him and his knowledge of construction management by being an owner's representative?
A. Yes, he's knowledgeable about construction.
Q. It would have been pretty easy for him if he had wanted to add it to the contracts of Balfour and the architect BIM provisions. If that had been important to him, he could -- it would have been very easy for him to have that, agreed?
A. Yes.
Q. And because they worked on the contracts, he knew and Library Associates knew the BIM obligations were not included within the responsibilities of Balfour or the architects, agreed?
A. At the signing of the con -- yes.
Q. Okay. Unless that changed somewhere?
A. Correct.
Q. Unless there was an addendum or revision of the contract?
A. Yes.
Q. Okay. The next document that I'd like to ask you about I want to mark as Exhibit 21.
(EXHIBIT 21, E-mail chain dated 11/9/15

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to Kim Brown from Marty Wall, with attachments, was marked for identification.)

BY MR. HILDEBRAND:

Q. And it looks to me from what I can -- let's see here. This is a -- 21 is a letter to M. Wall at Bennett Hospitality. Who is M. Wall?

A. That's Marty Wall.

Q. Is he still with the company?

A. He is.

Q. What is his responsibility?

A. He currently is the general manager of the hotel.

Q. Okay. Who was it who brought Salamander into the picture?

A. We interviewed two management companies prior to selecting Salamander. It may have been Marty that suggested Salamander. I don't recall.

Q. Okay. Who was the other company that you all --

A. Charlestowne Management.

Q. For Exhibit 21, that's a document where Salamander from what I can see, it looks like Salamander was initially contacted about a month before. On October 1 there's an e-mail from Marty Wall to Karen Jenkins saying I'm introducing you to

Prem Devadas. Is that how you pronounce his name?

A. I don't see that e-mail.

Q. I'm just referencing some facts. It looks like --

A. Karen Jenkins is with DCI. There would be no reason for Marty to contact Salamander with Karen, I believe. I don't know.

Q. Okay. Well, the point is, from what I could see it looks like Salamander was brought on board about a month before this Exhibit 21 is --

A. No, I believe we were in talks with Salamander in 2015 and through '16, but I think the actual management contract was signed in December of 2016 with Salamander --

Q. Right.

A. -- in anticipation because you typically hire your managers six months to nine months prior to opening and at that point we thought that we would be opening in October of '17 so we brought them on in December of 2016.

Q. Okay. So is that -- based on your experience with I guess the 21 hotels that you all own or the number of hotels you all had over the years, that's what you all have found is the appropriate time to bring a manager on board?

A. You bring the general manager on board six months. This was a bigger hotel with more employees. We brought him on nine months before, yes.

Q. Okay.

A. Or you hire the management company.

Q. Did you confer with anybody to -- did you vet that time period with anybody else as to this particular hotel and for a luxury five-star hotel whether six to nine months would be the appropriate time for Salamander to come on board? Six to nine months before completion.

A. We did not vet that out. That's just our experience in industry standards.

Q. Okay. I guess if you all hadn't done a five-star hotel, how would you know that that is the appropriate time, just a guesstimation?

A. That's just industry standards out there. Marty, who is the general manager, was the general manager at Palmetto Bluff, which is a five-star hotel as well, and he may even have been part of that conversation of when to bring the management company on.

Q. So tell me again what Marty Wall's general responsibility is.

A. He is the general manager of the hotel.

Q. When was he hired?

A. I don't recall when he first came from Palmetto Bluff to us. He was working on a part-time basis, so I don't recall when he became a full-time employee.

Q. Do you have an approximation?

A. I -- I don't -- I don't. I don't recall.

Q. All right. So what is the distinction between Marty Wall and Salamander?

A. Salamander's the management company. Marty is the general manager of the hotel. It is quite unusual that the general manager does not work for the management company, but in this case this is the agreement that we've had with the management company, that the general manager's an employee of Bennett Hospitality but manages the hotel, is the general manager of the hotel. All other employees in the hotel are Salamander employees.

Q. Okay. Why would that -- why did that come about?

A. We just thought that that would be a better situation for us there and they had no

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Deposition of:

Kimberly Bennett Brown

August 5, 2020

In the Matter of:

Balfour, Beatty v. Library Associates

A. William Roberts, Jr & Assoc.
800-743-3376 | calendar-awr@veritext.com | www.veritext.com

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would it go back to Balfour to finalize?
A. The -- there were copies of pencil copies given to everybody, just only the three or four summary pages of the pay app, and that was all of the backup information.
Q. Okay.
A. I think once the pencil copy was done and the architect took it, they then -- if they had any questions with Balfour Beatty or if there was any changes to be made, they would be the ones who corresponded with Balfour Beatty on any of the changes to the pay app. Balfour Beatty would then send the pay app with the backup again to the architect for their final review.
I do not recall -- the pencil copy typically didn't to my knowledge be sent back to Balfour Beatty. I'm not sure. I -- you know, I shredded my copies of the pencil copies because they weren't finalized. It was just something to use during the OAC meetings.
Q. Okay. So when the -- so the architect would review and approve the pay app and then forward it to you with the backup documentation?
A. That's correct.
Q. Okay. And would you get that by

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e-mail?
A. I would, yes.
Q. And the backup documentation was pretty extensive because this was a cost per a guaranteed maximum price, correct?
A. That's correct. In some cases it may be 500 pages.
Q. Okay. And the architect -- the architects and you had the opportunity during the pay app process to if you saw something that you'd like additional explanation on or you didn't think the backup was appropriate, then you could request that information from Balfour and often did, agreed?
A. I typically reviewed on the architect's review of the pay app. I did not go through all of the backup invoices. That is what we were paying the architect to do.
Q. Okay. So it's the architect's responsibility to review all the backup and satisfy itself that what Balfour was presenting to the owner for payment was appropriate and the -- and it had satisfied its obligations to document that the value of the work in place was, in fact, there, agreed?

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A. Correct.
Q. Okay. And you -- when you would get the pay applications from the architect, would you just -- would you review them at all or would you just sign them?
A. I don't believe I signed the pay apps.
Q. Signed off on them.
A. I would review -- I would take the information from that pay app, then it was compiled into the pay app with other invoices that the owner had to send to the lender.
Q. Okay. So your approval was your forwarding of those documents to the lender for funding?
A. Correct.
Q. If there was anything -- during the pencil copy when it was discussed, did you ever request additional information on any of the line items from Balfour?
A. I don't recall.
Q. After any of the pay apps had been signed by the architect, did any of them go back to Balfour Beatty for revision -- further revision for one reason or another to have them redone?
A. I don't recall.

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Q. Okay. If the owner disagreed with -- were there times when the owner would get a pay application from Balfour Beatty and disagree that some of the work called for was appropriate or not and ask them on the pencil copy to delete it?
A. I don't recall personally ever doing that. That was also Jim Clements' responsibility as the owner's representative. He may or may have not in certain instances.
Q. Okay. So would the -- for the review of each of the pay apps, that would have been done by both Jim Clements and the architect?
A. Jim Clement was always in the OAC meeting when the pencil copy was delivered to everyone. If he saw something in that pencil copy, it was his responsibility to point that out to Balfour Beatty, which he may or may have not done.
Q. Were there any instances where the architect certified a particular amount for payment that you actually -- when payment was made to Balfour, it was less than the amount certified in the pay app?
A. I recollect there may have been one instance when after the architect had certified the pay app and the bank was going to fund the pay app,

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reviewed?
A. I review them typically throughout the day. I don't review every e-mail.
Q. You don't -- would you have reviewed every e-mail for this job that you got?
A. I don't recall.
Q. Would you have a reason to believe that you didn't?
A. I receive hundreds of e-mails per day. There's some that I miss. In my e-mail box currently, I have over 100,000 e-mails and there's probably showing about 30,000 unread e-mails. I possibly could have missed e-mails from this job that I did not read.
Q. Okay. It's possible, but you endeavored to review all of the e-mails that came to you from Balfour Beatty or Jim Clements or the architects on this job, can we agree to that?
A. Yes.
Q. Okay. And this e-mail -- do you recall this e-mail?
A. I don't recall this specific e-mail, no.
Q. Okay. Well, I can -- I just want to refer to a particular portion. On Paragraph 3 D

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with liquidated damages, do you see that?
A. Yes.
Q. Okay. I've reviewed all of the documents in this case and the -- this is the first notice of an assertion of a claim for liquidated damages to Balfour Beatty in this matter. Would you disagree with that?
A. I have not reviewed all of the documents in this case, so I cannot state that I agree or disagree to that.
Q. Okay. Let me ask you this then, Miss Brown. Are you aware that prior to this point any claim being made by the owner to Balfour Beatty for liquidated damages?
A. I do not recall.
Q. Okay. So you're -- the answer is you don't -- you're not aware of any?
A. I do not recall.
Q. Right. Since you don't recall, you can't testify that you're aware of any notice to Balfour Beatty of liquidated -- of a claim for liquidated damages prior to this letter, agreed?
A. I don't recall if there was or there was not.
Q. All right. The documents will speak to

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that.
Have you looked for that in this litigation?
A. No, I have not.
Q. Okay. And I haven't -- is there -- I've reviewed the OAC meeting minutes and other correspondence and I again haven't found any notice of a claim by the owner for liquidated damages going back through the OAC meetings.
Do you recall any oral assertions or claims by the owner to Balfour Beatty for liquidated damages prior to this?
A. I do not recall.
Q. Okay. Have you talked to anybody else to whether a claim for liquidated damages had been made orally or in writing to Balfour Beatty prior to this --
A. I have not.
Q. -- e-mail of February 11, 2019?
A. I have not.
Q. Okay. And from your testimony yesterday, the liquidated damages in your view began to run on a per-day basis starting on the contract extension time of August 19, 2017 because all of the delays were solely attributable to

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Balfour Beatty, agreed?
A. Correct.
Q. All right. So from day one, every single day, approximately 10,000 dollars per day of liquidated damages the owner felt it was entitled to from Balfour Beatty starting August 19, 2017, agreed?
A. There was a cap on the liquidated damages that was based on the total amount of the actual general contract fee.
Q. Okay. Have you been involved in a project before where -- what is the longest period of time that a project has been delayed from final completion that you've been involved with?
A. Approximately 60 days.
Q. And that was Embassy Suites that we talked about yesterday?
A. Correct.
Q. So there the delay claim didn't arise until the very end because it's only 60 days, correct?
A. Correct.
Q. Here, though, the delay claim arose 516 days before final completion, so your claim -- your claim in your mind against Balfour arose about a

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year and a half before final completion, agreed?
A. Repeat the question.
Q. Okay. In this project I think it's pretty clear that your claim against Balfour Beatty for liquidated damages arose in your view from day one of the -- that the project was not completed as contracted for, which is August 19, 2017, agreed? You told me that several times.
A. Yes. That says per the contract requires that, yes.
Q. Okay. And you had the right at that point to assert specifically to Balfour Beatty on the -- each pay application that you were going to deduct liquidated damages against them right then, agreed?
A. I'd have to read the term of the contract to see when liquidated damages would be assessed in the pay applications.
Q. Okay. Well, let's look at the damages provision then. Because I think the contract is under Tab 14, exhibits for Michael Bennett's deposition. Do you see that under 2.3.1.3 in 133?
A. Yes.
Q. Okay. So my question is: From day one under the contract, the liquidated damages apply

for every day that the contractor is at fault or responsible for that delay, agreed?
A. Yes.
Q. Right. And the owner has that right to collect those liquidated damages as of day one, agreed?
A. Yes.
Q. Okay. And has the right to assert them as of day one, agreed?
A. Yes.
Q. And it has the right to notify the contractor and to notify on pay applications or otherwise, look, contractor, we think you're delayed right now and we are not going to pay you this pay application and we're going to reduce it by the liquidated damages because that's a right that you have right then, agreed?
A. A right, yes.
Q. Right. And for the 10,000 dollars -- approximately 10,000 dollars a day that was asserted, how would the -- unless the owner tells the contractor, look, we are -- we think that you are late and we think that this delay is your fault and we intend to assert liquidated damages, unless the owner or somebody else tells the contractor

that that is a claim that the owner has and intends to make, how would the contractor know that the owner's going to make it or not?
A. I don't think it's the obligation of the owner to notify the contractor that it's going to make the claim of liquidated damages. Liquidated damages are in the contract as a right that the owner has. It doesn't -- I do not believe it is stated the time period in which the owner has to make the claim for liquidated damages.
Q. Okay. So it's a right -- it's a claim that you had but that you did not make against Balfour, and Balfour continued its work without knowing that you intended to assert that claim?
MR. BUNDY: Object to the form of the question.
BY MR. HILDEBRAND:
Q. Agreed?
MR. BUNDY: You can answer it. I'm just objecting to the way he asked it.
THE WITNESS: Repeat the question, please.
BY MR. HILDEBRAND:
Q. The liquidated damages claim that the owner had was not made known to Balfour until

February of 2019 even though it arose according to your testimony in August of 2017, and therefore Balfour to your knowledge continued its work without having received a liquidated damages claim by the owner?
MR. BUNDY: Object to the form of the question.
BY MR. HILDEBRAND:
Q. Agreed?
A. I do not recall. There may have been conversation regarding liquidated damages, but I do not recall that this specific notice by the architect was the first time that liquidated damages were mentioned to the contractor.
Q. Okay. Let's assume that your testimony -- let's assume that there's no prior writing. And if there is going to be a claim, is there a notice provision in the contract that if a -- one of the parties to the contract has a claim that they need to notify the other party about it?
A. I'd have to review the contract.
Q. So you can't answer that without reviewing the contract?
A. Not from recollection, no.
Q. Okay. So every -- the owner -- you

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telling me that you had no intention -- it wasn't until February of 2019 that you intended to -- even though you knew that in your view liquidated damages were accruing against Balfour in August of -- began to accrue in August of 2017, is it your testimony that you had -- you weren't intending to assert those liquidated damages until the end of the contract?

A. No, that is not my testimony. My testimony is that it's a right that we have under the contract.

Q. Right. And you didn't think that you needed to make it until the very end of the contract, agreed? Obviously, because you didn't make it.

A. Being the second job that had liquidated damages in it and, as we testified earlier, the other job was at the end of the job. In our mind that is when liquidated damages are assessed, at the end of the job.

Q. I'm not asking you that. You didn't feel -- you knew that they arose 500 -- that liquidated damages in your view should have been assessed and arose in favor of the owner in August of 2017, but you didn't think that -- you intended

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to assert them against Balfour beginning in 2017, but you didn't think that it was your obligation to inform Balfour until the end of the job, correct?

A. Yes.

Q. And when the liquidated damages were asserted in 20 -- I'm sorry, in February of 2019, then the owner said we are not going to pay this last pay app because we're going to deduct the liquidated damages, correct?

A. That was one of the items --

Q. Okay. Whether it was one of the items or many, the owner said in 2013, okay, Balfour, we're going to deduct liquidated damages from this pay application, correct?

A. In 2019.

Q. 2019.

A. Yes.

Q. Okay. You all could have done that any time, couldn't you?

A. As per the terms of the contract, we could have, yes.

Q. Right.

A. But we're not obligated to.

Q. Okay. I've done just a little bit of math on this issue. And if we assume a liquidated

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damages per daily limit of 9500 dollars, let's assume that that was correct -- I know that the architect said it was 9,000, and I'm going to come back to this in just a minute.

So after 30 days from August 19, 2017 at 9500 dollars a day, after 30 days the owner you felt, if you had simply done the math, that Balfour was obligated to pay the owner 285,000 dollars, agreed? It's simple math, right?

MR. BUNDY: Object to the form of the question.

THE WITNESS: Yes.

BY MR. HILDEBRAND:

Q. Okay. And after -- I could tell you after 30 days it's 285,000 dollars. After 60 days, it goes to 570,000 dollars. After 90 days, it goes to 855,000 dollars. What -- do you think that if the owner had made a -- had given Balfour notice of a claim for liquidated damages in September of 2017 that it was going to deduct 285,000 dollars from their contract, do you think that would have gotten Balfour's attention?

A. I cannot tell you what would get Balfour's attention.

Q. Based on your knowledge of Balfour, do

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you think that would have provoked a response?

A. Possibly.

Q. You know dang well it would, wouldn't it? If you're going to tell Balfour we're going to deduct 285,000 dollars from your paycheck or from your pay application, you know dang well that Balfour Beatty would have had a pretty aggressive response to that, wouldn't they?

A. That's an assumption.

Q. So you're not -- we're going to just say that you're confident that Balfour Beatty, if you had -- the owner had asserted liquidated damages back in August of -- or September of 2017 for 285,000 dollars and say we're going to deduct this from your pay application and only pay you the undisputed amount, you don't think that would have provoked a response from Balfour?

A. I cannot tell you what Balfour Beatty would do.

Q. Okay. How about after 60 days when the amount goes to 570,000 dollars, do you think that that would have provoked a response from Balfour?

A. Again, I cannot speak for Balfour Beatty.

Q. How about at 90 days when it's 855,000

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dollars, would that have provoked a response?
A. I cannot speak for Balfour Beatty.
Q. How about after 120 days when it's 1,140,000 dollars, what do you think Balfour would have done?
MR. BUNDY: Object to the form of the question. You're badgering the witness.
THE WITNESS: I cannot speak for Balfour Beatty.
BY MR. HILDEBRAND:
Q. I'm sorry?
A. I cannot speak for Balfour Beatty.
Q. What do you think that after 150 days of liquidated damages accrued that you were intending to assert against Balfour Beatty, if you had made that 150 days after August of 2017 and that total is 1,425,000 dollars, what do you think Balfour Beatty would have done if you'd have made that claim?
MR. BUNDY: Object to the form of the question.
THE WITNESS: I cannot speak for Balfour Beatty.
BY MR. HILDEBRAND:
Q. Okay. If a -- is it a right under the

contract for a contractor to -- if you all had asserted liquidated damages in each of those months and deducted them from each pay application, then you would not be paying Balfour the amount that it asserts that it is owed under the contract? Pretty simple, agreed?
A. Repeat the question.
Q. All right. If you -- if Balfour submits a pay application and you say -- let's assume it's the first pay application that was submitted after August of 2017 and you say we're going to deduct 285,000 dollars in liquidated damages, then that is obviously a deduction from the -- from the pay application and Balfour would not be paid the full amount of what it claims it's due, agreed?
A. That would be a deduction from the pay app by the architect.
Q. Okay. Right. By the architect, agreed?
A. Yes.
Q. Okay. And after 60 days, it would be 570,000 dollars by the architect, agreed?
A. Accumulative.
Q. Right. Under the contract if you had

made those claims against Balfour when they arose, would Balfour Beatty have had the right -- if you didn't pay what it claimed it was owed under the contract, would it have a right to stop work?
A. I'd have to read the section of the contract. I'm not -- I don't recall the exact language.
Q. Okay. Would a reasonable response if the -- if the owner wanted to assert liquidated damages against Balfour, don't you think that's just fundamentally fair that that be done when the -- when that claim arose to give Balfour a time -- appropriate time to respond to the claim and to -- if they needed to change something or do something different, that now they know that the owner is asserting liquidated damages so they're on notice of it and if they need to change their actions they can do so?
MR. BUNDY: Object to the form of the question.
THE WITNESS: Repeat the question.
BY MR. HILDEBRAND:
Q. The question is simply do you think that it is fundamentally fair if you've got a claim against Balfour that you're going to assert

liquidated damages, don't you think that it's fundamentally fair for the owner to just tell them on day one, look, we're going to assert liquidated damages against you to give them an opportunity to respond to the liquidated damages and if they think that they're responsible, then how they can change it and change their behavior so to bring that problem to a head and to try to avoid future liquidated damages?
MR. BUNDY: Object to the form of the question.
THE WITNESS: I think you have to be bound by the contract. I don't think that the contract says you have to be, in your words, fundamentally fair. It's what the contract says.
BY MR. HILDEBRAND:
Q. Okay. So even if you thought it was fair, fundamental fairness is -- didn't come into the equation as far as you're concerned, you just didn't think you were required to assert liquidated damages until the end of the job because that's what you thought was required under the contract, agreed?
A. Yes.
Q. Okay. And when the liquidated damages

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were assessed by the architect at the end of the job, he used a sum of 9,000 dollars in that letter that I've handed you, agreed?
A. Yes.
Q. Okay. Yesterday when we were talking about the actual liquidated damages provision, we know that there was a discrepancy where the amount that was written out said 9500 dollars and the amount in the parenthetical numerals was 9,000 dollars, remember that?
A. Yes.
Q. Do you know how that got in the contract?
A. I do not.
Q. Okay. Who would -- who is going to -- who would testify about how -- which of those -- which one do you think is applicable?
A. In my opinion, typically in contracts the written word is what's applicable and not in what's in parentheses.
Q. Okay. All right. But how about the -- whoever -- who negotiated that for the owner?
A. As we discussed yesterday, Jim Clement was involved in negotiating the liquidated damages for the owner, for the contractor.

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Q. So what was intended, whether it was 9500 dollars or 9,000 dollars, that's something for Jim Clements to answer?
A. Yes.
Q. And you're willing to go by what he says?
A. Yes.
MR. BUNDY: Object to the form of the question.
BY MR. HILDEBRAND:
Q. And your testimony today is that you don't recall any discussions internally at Library Associates about whether liquidated damages should be assessed against Balfour Beatty as soon as they arose and continuously as they arose, is that your testimony?
A. I do not recall any internal conversations about assessing liquidated damages as soon as they occurred.
Q. Okay. Well, when did that -- did it ever come up? Were they ever discussed prior to February of 2019?
A. Yes.
Q. Internally?
A. Yes.

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Q. Okay. When?
A. I don't recall exactly when.
Q. Was it right at the end of the job or right when they first started? The opening day was very critical to Michael Bennett he testified, correct?
A. Yes.
Q. Right. For a lot of different reasons, right?
A. Yes.
Q. And he knew that there was liquidated damages in the contract, didn't he?
A. Yes.
Q. Right. And he knew they were about 10,000 dollars a day, didn't he?
A. Yes.
Q. Right. So Michael Bennett never -- you never said to him, he never said to you, wow, the project is -- it's after the agreed-upon completion date, we've got liquidated damages -- a liquidated damages claim against Balfour Beatty, that never came up?
MR. BUNDY: Object to the form of the question.
THE WITNESS: We knew he had the right to claim liquidated damages under the right of the contract.
BY MR. HILDEBRAND:
Q. Did you ever discuss it with Mike Bennett?
A. We had that conversation that the liquidated damages was a right of ours under the contract.
Q. Right. And you all had that discussion shortly after, or did you, prior to February -- prior to 2019, did you ever have that discussion with Michael Bennett?
A. Yes. I can't exactly tell you when, but, yes, prior to February' 19, yes.
Q. Okay. Did you have any discussion about whether you should assert and make that claim against Balfour Beatty right away or wait until the end of the job?
A. I don't recall having a conversation saying that we need to make the claim right away.
Q. So there's no discussion about whether you need to -- you should make it now or later?
A. Correct.
Q. Okay. Now, were you ever advised by the architect that he felt that liquidated damages

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had begun to accrue against Balfour Beatty prior to February of 2019?
A. I don't specifically recall.
Q. Okay. Well, is Buck Lindsay a pretty smart guy?
A. Yes.
Q. Is he a good architect?
A. Yes.
Q. Is he experienced in the field?
A. Yes.
Q. Would you expect him to know what liquidated damages are?
A. Yes.
Q. Would you expect him to know that if he felt that it was Balfour Beatty's responsibility to pay liquidated damages that he should -- would or should have known that as of August of 2017?
MR. BUNDY: Object to the form of the question.
BY MR. HILDEBRAND:
Q. What I'm getting at is wouldn't you expect that if the architect, either Buck Lindsay or Jennifer Faulkinberry, felt that liquidated damages should be assessed against Balfour Beatty, that they would have told you and should have told

you shortly after August of 2017 when those damages began to accrue?
MR. BUNDY: Object to the form of the question.
THE WITNESS: I cannot speak for what they should or shouldn't.
BY MR. HILDEBRAND:
Q. Well, wouldn't your -- your expectations, if you're paying an owner -- I'm sorry, if you're paying an architect to review pay applications and oversee the job and oversee the schedule and they know that it is beyond the contracted completion date, wouldn't you expect them if they felt Balfour was responsible to tell you, look, we think Balfour's responsible and you have a claim against them for liquidated damages, wouldn't that be an appropriate expectation by you?
MR. BUNDY: Object to the form of the question.
THE WITNESS: I mean, we knew we had liquidated damages in the contract. Do I expect Buck to tell me I have liquidated damages in the contract?
BY MR. HILDEBRAND:
Q. No.

A. Not necessarily.
Q. That's not my question. They should be -- as of August 19, the contract is supposed to be completed. So on August 20, 2017, that wouldn't -- did you -- wouldn't you expect that if the architect felt that Balfour was at fault that it would tell you, look, we think that Balfour is at fault and this is a claim that you have?
MR. BUNDY: Object to the form of the question.
THE WITNESS: Not necessarily.
BY MR. HILDEBRAND:
Q. Well, how about Jim Clements? Would you have expected Jim Clements -- let me ask you this before I ask that question.
I think you've already told me that you have no recollection of Jim Clements -- I know that you said you have no recollection of anybody giving Balfour Beatty notice of liquidated damages before February of 2019. Prior to that date did Jim Clements ever tell you that he felt that Balfour Beatty was incurring liquidated damages and that's a claim that you have?
A. Yes.
Q. When did he start making that -- when

did he start advising you of that?
A. I don't recall.
Q. Would it have been shortly after the August 19, 2017 date?
A. I don't recall.
Q. Okay. But it was during the project, it was well before February of 2019?
A. Yes.
Q. Did he tell you or advise you that that claim should be made? Whenever that conversation was, did he tell you that that claim should be made?
A. Not that I can recall.
Q. Did you have any discussion with him as to whether the claim should be asserted then or not?
A. Not that I recall.
Q. If the claim had been asserted back in 2017 against Balfour, do you think that it's a reasonable likely -- let's say four months after August of 2017, so December of 2017. If that claim had been made for 1,140,000 dollars against Balfour, do you think it -- what is your conclusion as to whether Balfour would have stopped working on it?

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MR. BUNDY: Object to the form of the question.

THE WITNESS: I can't speak for Balfour.

BY MR. HILDEBRAND:

Q. You discussed yesterday that -- I think you said that Michael Bennett never reviewed pay applications, is that right?

A. Yes.

Q. Okay. Did Michael Bennett have any involvement whatsoever with reviewing the budget on this project and what the original construction contract was -- let me start over.

Was Michael Bennett involved with negotiating the guaranteed maximum price that was in the contract as the date that was originally signed by Balfour Beatty?

A. He was involved in the negotiations with Balfour Beatty, yes.

Q. Okay. So he knew that the original contract amount was 59,000 dollars -- 59 million -- approximately 60 million dollars, agreed?

A. Yes.

Q. Okay. And then it went up -- the agreed upon contract amount went up by about 5

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million dollars, correct?

A. Yes.

Q. All right. Was Michael Bennett aware of the incremental increases to the contract amount as they occurred?

A. As I testified yesterday, he was aware of a few of those items when we elected to add the pool cover, but other than that, no.

Q. Okay. So the answer is he knew about the original contract amount, but did not -- was not informed that the contract had gone up by about 5 million dollars, agreed?

A. He knew we had change orders, but he was not involved in the -- in those discussions.

Q. Right. The answer to my question is he negotiated -- negotiated the original price of the contract, but then changes and change orders and the costs and all of that, that's something he was not involved with nor aware of, agreed?

A. He was not involved with, yes.

Q. Right. Who actually negotiated the -- when change orders were made, who negotiated the prices in those?

A. The request for change orders were submitted by Balfour Beatty to Jim Clement. We

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would then have a meeting with Balfour Beatty, Jim Clement, myself, and typically the architect would be on the phone. We would review each request for change order. If we felt that the request for change order was not appropriate or we had questions, we would then have Balfour Beatty go back to the subcontractor requesting the request for change order. If we thought the request for change order was appropriate, then Jim Clement and the architect would advise me that their position was the request was appropriate and then we would sign the request for change order.

MR. HILDEBRAND: Why don't we take a five-minute break.

THE WITNESS: Okay.

(A recess transpired.)

BY MR. HILDEBRAND:

Q. I think I've established this, but I just want to be crystal clear that -- the question is prior to 2019, did you ever have a discussion with anyone about whether liquidated damages should be assessed against Balfour Beatty sooner as opposed to later?

A. There was never a discussion on the timing of when to impose the liquidated damages.

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Q. Okay. And nobody told you that liquidated damages in their view should be assessed or were assessable against Balfour Beatty prior to 2019, correct?

A. Repeat the question, please.

Q. And nobody told you that liquidated damages were -- should be assessed and were assessable against Balfour Beatty prior to 2019, agreed?

A. We knew they were assessable. No one told us that they should be assessed prior to 20 -- actual assessed prior.

Q. And I'm not talking about that the claim should be made, the notice that claim should be made, but did you -- I understand that -- you understood that you believed that the owner had liquidated damages claims against Balfour Beatty.

Did anybody else, in fact, ever tell you that, look, we think that there are delays and we think that they are the responsibility and were caused -- of Balfour and were caused by Balfour and the fact that you got them, they started to accrue, did that conversation ever take place?

A. Yes.

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Q. With whom?
A. Jim Clement.
Q. When?
A. I don't recall exactly when.
Q. Approximately.
A. I can't recall approximately.
Q. So you have no time reference whatsoever?
A. No, not in the over a year and a half from the August '17 date to the January '20 or February 2019 date. I don't recall the time period.
Q. Okay. I asked you yesterday what the -- what your basis -- what the basis for your statement that you felt that all delays were completely and solely the responsibility of Balfour, and you said -- listed off some things. I think you said that they weren't -- they improperly -- they didn't have enough people on the job or something else. What were those -- tell me again what those reasons were.
A. Repeat the question.
Q. Okay. It's very simple. You said that you think that Balfour Beatty is responsible for the delays. Do you have any opinion or knowledge

as to what actually -- if Balfour is responsible, what it did wrong, what its errors or omissions were that actually caused it to be delayed?
A. There was not enough people on the job at any given time. They did not provide the construction management required under their contract of all the subs, contractors on the job. They did not have individuals that were experienced in the jobs that they were -- Balfour Beatty was having these individuals oversee.
So the supervision in the job by Balfour Beatty was not to the level that they had contracted for and it was not to the level that they had told us that they would have on the job during the contract negotiations.
Q. Okay. So the -- you said that there were not enough -- in your view, the delays that are -- the responsibility of Balfour were caused because they didn't have enough people, they did not manage their subs, and because they did not have -- their supervisors were not properly -- were not competent, is that correct?
A. That is some of the reasons, yes.
Q. What else?
A. I don't believe that they -- this goes

back to the subcontractors. Don't believe that they scheduled the subcontractors appropriately.
Q. Okay. Anything else?
A. Not that I can recall.
Q. Do you understand that Balfour Beatty did not actually self-perform the work on this job, that it hired subcontractors to actually provide materials and install them?
A. Yes.
Q. Okay. So all of the actual -- what you see there, all the physical properties of the building were installed by subcontractors, agreed?
A. Yes.
Q. Okay. Going back to -- would you expect that if -- if the -- if the lay claims were made against Balfour that it would -- that some of those delay claims, some or all, may be -- may involve subcontractors and their work?
A. That would be a part of the delay claim.
Q. Okay. What I'm getting at is if -- if subcontractors are performing all of the work, don't you think it would be -- and if the owner has the position that Balfour is delaying the project and the owner intends to assert liquidated damages,

don't you think it would be appropriate to advise Balfour of that as soon as those damages began to accrue and as they continued to accrue so that Balfour in turn would be able to work with its subcontractors and tell the subcontractors whose work is implicated that this claim is being made and we need to discuss what are your thoughts or what we need to do to correct it? Do you think that would be something that would be appropriate?
A. I do not think that was our obligation.
Q. Okay. Do you perceive any fundamental unfairness to the subcontractors if their work is being criticized by the owner and the owner is not making that known to the subcontractors that it would be unfair to assert liquidated damages against Balfour that may impact the subcontractors?
A. Our contract is with Balfour and not the subcontractors. In fact, in some cases Balfour told us that we weren't allowed to talk to the subcontractors.
Q. That's not my question. My question is: Do you see any fundamental unfairness to the subs if they might ultimately be impacted by liquidated damages claims against Balfour, that if they didn't know that they were -- those claims

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were going to be made until the very end of the job when it's too late to do anything about them, do you think that there's anything fundamentally unfair to the subs with saying that they were in the wrong when they were not notified of it during the job?

A. I do not believe that's our responsibility.

Q. Okay. The pay application process that we talked about a little bit earlier, is the -- an appropriate time for the owner to -- through the architect and through the owner's representative, Jim Clements, to determine to request whatever backup documentation it deems is appropriate in order to establish the cost of the work that Balfour is requesting payment for under a particular pay application, correct?

A. At the pay app meeting, again a pencil copy was provided. After that copy was provided, the architect reviewed the application. The architect went back to Atlanta. Balfour Beatty sent them all the backup invoices that were attributed to each line item on the pay app.

Q. Okay. What I'm getting at is the owner has the opportunity, every pay application, to

request -- to review all the documentation that's provided by Balfour and determine whether it thinks it's appropriate and adequate; and if it doesn't think it's appropriate and adequate, then it can request additional information from Balfour, correct?

A. The architect is the one who reviewed all of the backup invoices to certify the pay app.

Q. Right. I understand that. And if the architect has any questions or doesn't think that what is being provided is necessary, then it has the ability and the obligation to request Balfour for additional information, doesn't it, on each pay app?

A. That's correct.

Q. Okay. Are you familiar with the audit provisions of the contract?

A. I am.

Q. Okay. And there are two audit -- there's a provision in the contract for two audits, one midway through the project and then one at the end, correct?

A. I'd have to read that specific section of the contract. Can I review that?

Q. Sure. Absolutely.

A. As I read Section 7.1.11 of the contract, the owner has the right and its sole discretion to perform periodic examinations, audits and verification of construction manager's cost accounting records and the project documentations.

What you may be referring to is 7.1.11.3 where it says the cost, just the cost of two audits shall be included in the price of the contracts. It doesn't specifically say that we are limited to audits. And, in fact, in Section 6.11, it states that the construction manager shall keep full and detailed records of accounts related to the work and the cost and exercise such control as may be necessary for proper financial management under the contract and to substantiate all costs incurred.

Q. Okay. I stand corrected. So, in fact, the owner had the option if it wanted to to request an audit anytime throughout the project and as many times as it wanted to, correct?

A. Correct.

Q. All right. But only two of those would be included within the GMP and anything -- so the inference is that if additional audits were requested, then they would be an add to the

contract as an added cost, correct?

A. Correct.

Q. Okay. So do you know what the industry practice is for GMP contracts and audits are typically done?

A. I do not.

Q. Okay. My question is: If the owner had any reservations or questions or problems with any of Balfour Beatty's submissions each month with the pay apps that it provided, despite the fact that it requested whatever information was satisfactory in order to make payment, why were no requests for audits made during the project?

A. I do not believe that there was any -- let me think about this for a second.

Q. In other words, why didn't the owner -- there were no requests for audits during the job or were there?

A. No, there was not.

Q. Not until the Cotton & Company letter dated in the spring of 2019, correct?

A. That's correct. And that was due to the letter that we received from Mr. Simonton claiming 21 million dollars was owed on the contract when the pay apps only showed less than

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Q. Okay. So regardless of what her credentials might or may not have been, what -- do you have any specific criticisms of her work?
A. I don't believe she was experienced enough to run subcontractor crews.
Q. Well, you had only -- you were only on the job about once a month, correct?
A. No. Typically I would say two or three times a month. Towards the end of the job, it was probably a little more frequent.
Q. Okay. Any other people who you had a criticism of their professional competence at Balfour?
A. Early on, I believe his name was Bob, he was the early construction manager doing the site work. I believe he was even let go by Balfour Beatty due to not performing on the job.
Let's see. I believe one of the project managers, Tim, I believe maybe his style was a little different than what we would have expected and it appearing that he did not have control of the subcontractors on the job.
Q. In what regard? Tell me exactly what you're talking about.
A. Kind of hard to quantify. It was just

the appearance that the subcontractors ran that job and not the project managers.
Q. And that's the appearance -- how often -- when you actually went inside the hotel, how long were you there?
A. You know, sometimes 20 minutes, sometimes a few hours.
Q. All right. That observation would be based on what could be a 20-minute visit to the hotel or a couple of hours?
A. It would also be based on how they presented themselves in job meetings, phone conversations, e-mail. So just not eyewitness at the hotel itself, but it encompasses all of the items I just recalled.
Q. You just didn't like Tim's style?
A. I don't believe his style was conducive to managing the subcontractors on the job.
Q. In your lay opinion?
A. In my opinion of working with other contractors as well in other hotel projects.
Q. All right. Anybody else in particular you've got a criticism of?
A. That's all I can recall off the top of my head.

Q. Any Balfour employees who you commend, you're very happy with?
A. There was one gentleman during the course of the job, his name was Marty Dale. Unfortunately, he had some knee injuries and he was not on the job for that long. There was a young African American who was just a laborer, I believe, his name was Stacey, he was very good on the job.
Q. Okay. Anybody else?
A. You know, in the beginning with Mike Baumbach, who was the original project manager. Unfortunately, Balfour Beatty let him go within a few months of commencing the job. And that's all I can recall off the top of my head.
Q. Okay.
A. I take that back. There's another gentleman whose name was Alec Dooley. He was -- he worked in the office. He left approximately sometime in the summer or fall of I think right before the hotel opened, so that would have been 2018. He left to go back home to work for his father's company as I recall.
Q. The lender on the project is Met Life?
A. Correct.
Q. And the -- when I deposed Michael

Bennett, he said that he was still in negotiations with them and still attempting to bond off the mechanic's liens on this job. Are you familiar with that?
A. Yes.
Q. Where do things stand with Met Life now?
A. They haven't required us to bond off the mechanic's lien at this point.
Q. Are you -- is there a date by which the liens have to be bonded off?
A. Not that I recall.
Q. So are you -- so is there no requirement at all for bonding of liens?
A. Not that I recall at this point in time.
Q. Okay. Is there a written agreement with them on that?
A. Yes.
Q. And who would have that?
A. I would have a copy in my office.
Q. So what other terms are there? Are they -- is foreclosure imminent or anything like that?
A. No.

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Jim, as I reported to Mike yesterday -- it says dad, but I think it meant to say had -- a good meeting with Ann and her associate, Gary.
Do you know who those persons would be?
A. I don't know.
Q. I'm just curious --
A. I don't know.
Q. -- if you knew who those two persons were.
A. No.
Q. Okay. So the e-mail is dated November 6, 2013 that came from Buck Lindsay to Jim Clements. What I want to ask you about is the next to last paragraph at the bottom.
It says: Lastly, I owe you an updated owner/architect agreement, which I will address in the morning. Among a few items that it needs to address is the addition of BIM modeling services. I've solicited two proposals for that work, one for 46,331 dollars and the other 51,500 dollars. To either of these numbers I'll need to add time for my team to build in the vertical attribute character to all their work. After problems on the Embassy with the above-ceiling clashes, Kim was very anxious to find a solution to avoid this for

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Marion. BIM is the answer, but it carries a cost.
Do you recall any discussion or -- with Jim Clements or the architect about requesting the architect's request for BIM -- additional BIM compensation?
A. No, I do not recall.
Q. But regardless, it was not included in their contract as we reviewed yesterday, correct?
A. It was not included in the architect's contract, that's correct.
Q. Right. Nor in Balfour's, correct? Did we go through that?
A. Again, as I testified yesterday, it was not listed in Balfour's contract. I recall that it was part of the subcontract with I believe the mechanical contractor for them to provide BIM.
Q. Okay. So you don't know why this was not followed up and why this was not included in the architect's contract?
A. This is the first time I've seen this e-mail. I have no idea.
Q. Okay. It says after problems on Embassy with the above-ceiling clashes. Do you know what he's talking about here?
A. I do not recall.

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Q. Do you remember problems in the ceilings at the Embassy Suites?
A. I do not recall.
Q. All right. Do you remember any -- receiving any information from Jim Clements regarding a proposal on the first and second floors for -- from Balfour for assistance with pre-construction BIM services?
A. No.
Q. At a cost of a little over 8,000 dollars?
A. No.
(EXHIBIT 31, E-mail chain dated 5/16/15 to Kim Brown from James Clements, was marked for identification.)
BY MR. HILDEBRAND:
Q. Okay. I'm handing you Exhibit 31. And do you see at the top of that it's to you from Jim Clements?
A. Yes.
Q. Okay. And the first line says: Kim, thanks. I am fully aware of how important this issue is to Mike. We were both in the room when he -- Mike went off like a rocket when this first -- when I first brought this to his attention

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that we had guest room ceilings under nine feet.
So I want to ask you about that. Were the -- tell me about the ceiling heights and how important that it was to Mike as far as guest rooms are concerned.
A. In most of our hotels, we -- guest room ceilings are nine feet.
Q. So was that a huge issue to Mike, the ceiling heights in the guest rooms?
A. Yes, it was an important issue to Mike to have the ceiling heights at nine feet.
Q. It was a huge issue for him, wasn't it?
A. It was an important issue for him, yes.
Q. Do you disagree with my characterization as huge?
A. It was very important to him.
Q. Okay. This is from Jim Clements to yourself. I want to ask you about the next e-mail below that. This is in response to -- it's from you to Jim Clements.
And the first line says: You may not be aware of how important the ceiling height issue is to Mike. There are a few hot buttons and this is one at the top.
And then below that, this is kind of a

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A. No. It was -- it was not included in the contract documents, but it -- the contract documents did not specifically state that Balfour Beatty would not provide the BIM.

Q. So are you arguing that even though the contract said -- let's take a look at the contract document. I want you to take a look at Exhibit 12 from the exhibits from yesterday. Page 22 of 133. Number 4, 12.2. The following documents comprise the agreement, AIA document E202, building information modeling protocol if completed or the following. The E202 was never completed to your knowledge, agreed?

A. Agreed.

Q. And there's nothing set out in this contract that said something else is going to require Balfour to provide BIM, agreed?

A. Agreed.

Q. Okay. So there were some pre-contract discussions about what Balfour could provide, but that was not included in the contract, agreed?

A. That was not in the contract.

Q. Right. And anything that -- any comments or agreements that were orally made at a meeting that were not included in the contract are

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not part of the contract, are they, Miss Brown?

A. They're not part of the contract.

Q. Right. It would be -- it would have been very simple if Jim Clements or Balfour -- or Library Associates wanted to include BIM by putting that in Balfour's contract, agreed?

A. As I testified earlier, I do believe that Balfour did require their sub to perform the BIM.

Q. And, in fact, the architect it appears made a proposal to Library Associates to provide BIM as part of its work. And we saw from the contract yesterday that BIM was not required, agreed?

A. It was not included in the contract.

Q. So that's on the owner and that's on BBC, isn't it? If you all wanted it, you should have required it; if you didn't want it, then don't require it, correct?

A. I want to go back to the last page on Exhibit 32 where Tim Spano wrote BBC has gone above contracted requirement of BIM coordinating. So maybe it wasn't in that first contract, but at some point in time there was a contract requirement of BBC as outlined in this e-mail for BIM

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coordinating.

Q. There's no requirement -- is it -- do you have any knowledge about whether it's appropriate or inappropriate for Balfour, if it wants to, to engage in BIM exercises with its subcontractors outside of anything that the architect is doing? Do you have any knowledge about that?

A. Repeat the question.

MR. HILDEBRAND: Can you repeat the question, Terri?

(The record was read back by the court reporter.)

THE WITNESS: As I stated earlier, I did not participate in the BIM calls, but there were biweekly or monthly BIM calls that Balfour, the architect, the subcontractors and Jim Clement participated in.

(EXHIBIT 36, E-mail dated 11/2/16 to Brian Rinehart from James Clements, with attachment, was marked for identification.)

BY MR. HILDEBRAND:

Q. I just handed you an e-mail from Jim Clements, who's your man, right?

A. Yes.

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Q. To Brian Rinehart with the interior designer, correct?

A. Yes.

Q. And Karen Jenkins with the interior designer, correct?

A. Yes.

Q. And yourself?

A. Yes.

Q. And it's dated -- the subject is sixth floor delay, November 2, 2016. And Jim Clements says: Brian, thanks for taking my call this morning. Per our discussion when you have time, please review the attached spreadsheet from BBC identifying RFI issues resulting in the sixth floor delay. I've added a column, who is responsible. Based upon my review of BBC RFI's, it is my current submission that most are pure building coordination issues and the owner-related changes were not fully coordinated by WLA or as a result of existing coordination issues in the building resulted in RFI's and coordination issues.

And he has attached to this a listing from Jim Clements. On the left-hand side -- do you see on the next page at the top, who is responsible? Do you see that line, Miss Brown?

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next question, if it was not, do you know why not?
A. I believe that Balfour Beatty did not agree with the result from the architect and they demanded mediation. And we went to the mediation and could not come to any terms, so I'm not sure that once they demanded the mediation if the architects -- it's my opinion that if Balfour Beatty would have accepted the architect's review of the claim of the 20 days and the additional amount of 72,454, they would have requested a change order for that amount. And I see no reason why the owner would not have given them the change order or the contract time because that's what the architects had reviewed and awarded in that case.
Q. Okay. Well, if a change order is done, that's a mutual agreement that Balfour Beatty agrees -- would have agreed with the 72,000 dollars, right?
A. Correct.
Q. Once you have a change order, then you can't come back and say later, well, you know, I -- I want to renegotiate what was in that change order, it's over and done with, that issue's settled, right?
A. Correct.

Q. Okay. My question to you, though, is if the architect said, look, we think that Balfour should be paid 72,000, Balfour said that's not acceptable, we think we're owed more, then the 72,000 dollars is undisputed, isn't it?
A. I don't believe Balfour Beatty would think that the 72,000 was undisputed. They're the ones who would not accept the 72,000 for the 20 days.
Q. Right, in full settlement of the claim, but the architect says we think it's only 72,000 dollars, Balfour says, no, we think it's more, but why would the owner pay the part that was undisputed, the 72,000, and say, okay --
A. Balfour --
Q. -- we're going to pay -- let me finish. We're going to pay the 72,000 dollars and, Balfour, if you think it's more, then you can pursue that later.
A. No, I believe the only way we would have paid the 72,000 and given them the additional time was to say that that was a final settlement, as that was the architect's award to them on that claim.
Q. Okay. Well, nothing prohibits or would

have prohibited the owner from paying Balfour what it felt was appropriate, the 72,000, and given the extension without requiring a release, it can still pay the amount that's not in dispute and leave the unresolved part to be addressed later, can't it?
A. It was Balfour Beatty who was disputing the amount of the architect's award, so we would have given them 20 days and we would have paid the 72,000 dollars and we would have called that full settlement. In my opinion, Balfour Beatty probably wouldn't accept that as a full settlement, but that's their decision.
Q. Okay. Well, you understand, though, that the owner has the right to only pay -- if there's a claim for -- just like with the retainage, if Balfour Beatty says we want 5 percent and you say we're only going to pay 10, then you pay the pay app that you feel is not disputed and then the 5 percent remains to be determined at a future date?
MR. BUNDY: Object to the form of the question.
THE WITNESS: No, I believe that's -- contractually it says 10 percent for the retainage in that instance. This is Balfour Beatty

specifically not accepting what the architect award was on that claim. They disputed that. They wanted to go to mediation. We went to mediation. It was not settled.
BY MR. HILDEBRAND:
Q. Okay. The architect said we think that Balfour Beatty is owed 72,000 dollars. Balfour Beatty says we think we're owed more. But that part is undisputed, the 72,000 dollars, isn't it?
A. From the architect's point of view, but not from Balfour Beatty's point of view.
Q. Right. Miss Brown, who is -- have you ever heard of Grady Query?
A. Yes.
Q. Who is he?
A. He works for one of the scheduling consultants.
Q. All right. So how did he get involved with this project?
A. After many attempts of requesting schedules from Balfour Beatty and not receiving those schedules in any type of timely manner, we were very concerned on the schedule. Jim Clement went out and found I believe Mr. Query to -- so that Library Associates would have a third-party

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VERITEXT LEGAL SOLUTIONS

Deposition of:

Kimberly Bennett Brown

August 6, 2020

In the Matter of:

Balfour, Beatty v. Library Associates

A. William Roberts, Jr & Assoc.
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approximation of what those sums are sitting here today? I know you said it was over 2 million. You don't remember if it's 2.3 or 2.5? It's less than 3 but more than 2?

A. I don't know what remains in that account. This is Met Life's account. I'd be more than happy, as Brent said, to call Met Life up and get the exact balance in the account.

Q. Okay. Well, so whatever that account balance was, if the final -- if the contract balance with retainage to Balfour as of Pay Application 45 was approximately 6 million dollars, let's say, if the balance in the construction loan was say 2 million dollars, where would the remainder come from?

A. Well, as we spoke about earlier, Pay Apps 44 and 45 were not approved by the architect. I believe when we looked at one of the pay apps yesterday, there were certain change orders in 44. And I don't recall seeing 45, so I don't recall the change orders that Balfour Beatty submitted for 45.

Now, as also we talked earlier that I would put in the funds if there was an approved pay app by the architect that included change orders that were over and above the contract with Balfour

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Beatty, then I would put those funds in first and then Met Life would disburse those funds.

So if there is any change order funds included in 44 and 45, I would have not put those funds in the hotel because the architect -- or in the lender's account because the architect has not certified to the bank that those have been approved.

Q. My simple question is: Let's assume that there's 2 million dollars remaining in the construction loan account that Met Life has and let's assume for the sake of argument that the contract amount had increased from approximately 60 million dollars to approximately 65 million dollars. There's a approximately 5 and a half million dollar increase. In my hypothetical there would be a 3 and a half million dollar deficit. Where would that money come from?

A. If those pay apps were approved by the architect, then we would be required as we did with the other pay apps to put the cash into the Met Life account for those change orders and then there would be sufficient funds in that account to cover the payment that's due.

Q. Okay. My question, though, is: Was

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the -- assuming that the final contract amount is 65 million dollars -- and I can take some time to prove this point since it's in a filing from your attorney.

A. Sure. Or if you have Pay App Number 44 and 45, I can go through that.

Q. Exhibit 27 is Pay App 45.

A. Exhibit 27?

Q. I think a quicker way to do this probably --

A. It would be -- here we go. As we talked about yesterday, those two figures, the 256,000 in Pay App 45, I would not have been required to fund the lending account at that point in time because that pay app had not been approved. I'm not sure what Pay App 44 was as far as change orders.

Q. Let's assume that the Figure 3 contract sum today, $65,238,466.99, let's assume that's the contract amount.

A. Yes. And the net change by the change orders was 5,893,719. That included these change orders and previous change orders on 44 that I don't have here in front of me.

Q. Okay. That's fine.

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A. Okay.

Q. My simple question is: Let's assume that there's 2 million dollars remaining in the Met Life account. Under these figures, approximately 3 and a half million dollars would remain to be paid to fully pay the contract amount, agreed?

A. Agreed. But as I said, that I had put in those change orders as required by the lender every time that they incurred in the contract, yes.

Q. Okay. But regardless of what you've put in, the only amount that would remain in the Met Life account in my hypothetical would be 2 million dollars, so there would still be a deficit, right, that Library Associates would have to fund to make the final payment, agreed?

A. That's correct.

Q. Okay. My question is -- and in my hypothetical it would be 3 and a half million dollars?

A. Approximately.

Q. Okay. Did Library Associates have those funds in its account in December of 2018?

A. I don't think it really matters where Library Associates get those funds at, it's just required by the bank to have those funds in the

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bank when the pay app is approved.
Q. Okay. My question, though, is: Did the Library Associates account have that 3 and a half million dollars in its account in December of 2018?
A. Again, it's Met Life's account we're talking about, correct?
Q. Well -- the only payments -- so even if you had to pay your equity, you would pay it to Met Life first and then redistribute?
A. That's correct.
Q. Okay. Did Library Associates have a bank account?
A. Library Associates has a bank account, yes.
Q. Right. What was the balance of that bank account as of December 2018?
A. I don't recall.
Q. Approximately. Give me an approximation.
A. I don't recall.
Q. Was it less than a million dollars?
A. I don't recall.
Q. Was it 3 and a half million dollars?
A. I don't recall.

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Q. You have no recollection?
A. I don't recall.
Q. Do you think it was sufficient to pay -- if Library Associates agreed that it was going to pay the full contract amount, was there sufficient funds in the Library Associates account to pay the full contract amount along with what was in the Met Life account?
A. I don't recall.
Q. If there weren't funds in the Library Associates account, where would they have come from?
A. Other accounts that Michael Bennett may have.
Q. Okay. Was there liquidity -- sufficient liquidity to have funded 3 and a half million dollars?
A. Yes.
Q. Okay. Have you ever been deposed before?
A. Yes.
Q. How many times?
A. I believe this is my fourth time.
Q. What were the other matters?
A. The first was back in the '90s. It was

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a trip and fall. I represented the landlord.
Q. All right. What's the next one?
A. The next one is -- was a personal injury where I was hit by a drunk driver on a Saturday afternoon.
Q. What's the next one?
A. And I sustained injuries. And then the third one was the litigation with the Welbro contractor on the Embassy Suites in Savannah that we have spoken about.
Q. Who was the architect on that project?
A. Buck Lindsay.
Q. Who was your attorney?
A. Hunter Maclean in Savannah.
Q. Who specifically?
A. Chris Phillips.
Q. And who represented Welbro?
A. They are out of Orlando. I don't recall their law firm in Orlando.
Q. And that was filed in Georgia?
A. Yes.
Q. And was it -- so it would have been in whatever -- it was in State Court?
A. No. We actually settled it through mediation.

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Q. No, the case was filed -- when you were deposed, the case was in State Court, not Federal Court?
A. Correct.
Q. So it would have been filed in the county where Savannah is?
A. Correct.
Q. Okay. Let's turn, please, to Exhibit 28.
A. 28?
Q. Yes, ma'am. We got about halfway yesterday and then stopped, so I can ask you a general question or we can go through these individually. And my simple question is -- one general question is: Do you have any dispute -- do you know of any dispute sitting here today as to whether any of the work and materials that are reflected in these RCO's were, in fact, used for the construction of the project?
A. I cannot confirm or deny. We can go through each one. But where the description is supplemental instruction, I'm not -- don't have that supplemental instruction in front of me. When it says it's a modification change, I can't specifically say that that change is in the hotel.

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In the Matter Of:

South Carolina v Library Associates

Kimberly Brown

April 29, 2021

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KIMBERLY BENNETT BROWN
being first duly sworn, testified as follows:
EXAMINATION
BY MR. HILDEBRAND:
Q Ms. Brown, we met before. I'm Tom Hildebrand. I represent Balfour Beatty Construction, LLC, in this matter.
The same instructions that I had given you before and just some general guidelines to try to make the deposition go more smoothly, if you want to take a break, just let me know, and I'll be glad to do that.
If you'd like for me to repeat my questions or rephrase them, please just let me know, and I'll be happy to do that.
Please let me finish my question before you start your answer, and I'll likewise reciprocate, okay.
A Okay.
Q Are you feeling well today?
A Feeling fine.
Q Are you under the influence of any medications or any other substances that might affect either your ability to understand my questions or to respond to them?

A No.
Q You were deposed in this matter several months ago. Do you recall that?
A I do.
Q Was the testimony that you gave in your prior deposition truthful and accurate?
A Truthful and accurate at the time that I gave my deposition as I can recall, yes.
Q Well, is there anything inaccurate, sitting here today, or untruthful that you want to retract from your prior deposition?
A I did not read my prior deposition prior to this deposition, but not to my knowledge.
Q So to your recollection sitting here today, there is nothing in your prior deposition that you believe needs to be changed, correct?
A Not that I can recall, correct.
Q Is there anything in your prior deposition -- you're testifying as -- I'm sorry. I can't remember. What is your position with the company?
A With Library Associates?
Q Okay, Library Associates.
A I'm an authorized agent, and I'm the secretary of Library Associates Management, Inc.,

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LLC, which is the managing member for Library Associates.

Q You were noticed previously just as Kim Brown, not as a 30(b)(6) representative of Library Associates. Does that make any distinction to you? In other words, would your testimony previously have been any different if you had been told, okay, you're not testifying based on your -- simply as what you recall, but as the representative of Library Associates?

A I don't believe so. I did not prepare for my deposition, for my personal deposition. I have spent time preparing for this deposition. So maybe some items that I didn't recall at the time of my personal deposition I may have more information on now that I have prepared as the 30(b)(6) for Library Associates.

(Exhibit 21, Balfour's Cross-Notice of the 30(b)(6) Deposition of Library Associates, was marked for identification.)

BY MR. HILDEBRAND:

Q We have premarked as Exhibit 21 Balfour's 30(b)(6) deposition notice, and that's just a clean copy of it, and then let's mark as 22 your working

copy that has my cover letter on it.

(Exhibit 22, Ms. Brown's Working Copy of Balfour's Cross-Notice of the 30(b)(6) Deposition of Library Associates with Cover Letter, was marked for identification.)

BY MR. HILDEBRAND:

Q And can you tell me what -- there are pink tabs beside a number of the topics on Exhibit 22. Can you tell me what those are, please?

A Yes. Those are just the pink tabs with my handwritten notice for the items in the 30(b)(6) notice.

Q So those are just kind of your reminders or some of your observations about what appropriate responses would be for Library Associates to those topics?

A Correct.

MR. HILDEBRAND: Court Reporter, we've marked that as an exhibit, but probably the best way to make a copy -- I don't know if the whole page can be copied, but maybe what you would need to do is to put the pink exhibits on a separate piece of paper at the end and then make

several copies that way.

BY MR. HILDEBRAND:

Q I think this may go a little more quickly than you might have anticipated because I think a lot of the substance was covered in the thorough questioning yesterday, but let's work if we can through some of these topics.

On Topic Number 4, delays claimed by Library to have been caused by Library -- I'm sorry, to have been caused by Balfour to the project, including each specific schedule activity that Library asserts Balfour delayed, the length of the delay, and what impact the delay had on the project's critical path, what is your testimony relative to that?

A My testimony is that Balfour Beatty, as the construction manager, was responsible for the scheduling and the critical path analysis, and they would be the ones who would answer that question. And I believe that in the contract under -- bear with me just one second.

Q Take your time.

A And that is evident in the A201 Section 10 point -- excuse me, 3.10.4.7.

Q And that's a full and complete response

to Item Number 4, correct?

A Yes.

Q How about what testimony or opinions do you have as the 30(b)(6) representative on Item Number 5, which are delays and impacts and critical path impacts that are attributable to the owner? Would it be the same response?

A Yes, that would be the same response.

Q How about Item Number 6, any delays, including specific project schedule activities, length of delays, and/or impacts to the critical path, any response relative to that would be the same response that you gave me to Number 4, that that's Balfour's responsibility. Is that correct?

A That's correct, with the addition of I believe it was marked in Exhibit 7 yesterday, the daily reports from Balfour. There were certain innumerous items showing delays by certain subcontractors that Balfour had labeled in their daily reports.

Q Well, we can go through those, but do those -- do you have an opinion -- those are some issues on the project and some delays that might -- you can have a delay that could only last an hour, or you could have a delay that might last a month.

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Do you have -- going through those items on that report, do you have testimony on behalf of Library Associates as to what the length of the delays were that are itemized on that exhibit?
A No, I do not.
Q And do you have any testimony that any of those delays actually impacted the critical path?
A Because we have not received the critical path analysis from Balfour Beatty to allow us to review that to determine if any of those delays would have impacted the critical path, I have no information at this time on that.
Q Actually, Number 5 was delays caused by any of the owner's direct contractors, agents, consultants, representatives, design and engineering professionals. So, again, same response?
A Yes.
Q And then six actually is any delays caused by Library itself. Same response?
A I believe six is --
Q I'm sorry. Subcontractor -- seven is Library. So same response as to Number 7?
A Yes.
Q Number 8 is increases to the project

duration claimed by Library to have been caused by Balfour. Same response?
A Yes.
Q Number 9, increases to the project duration alleged to have been caused by Library's direct contractors, agents, consultants, design and engineering professionals. Same answer?
A Yes.
Q Number 10, increases to the project duration alleged to have been caused by each subcontractor of Balfour, including each specific project schedule activity, the length of the duration, and its impact on the critical path. Same response?
A Yes.
Q And then Number 11, same question, any increases to the project duration caused by Library directly. Same response?
A Yes.
Q So jumping down to Number 13, the critical path of the project schedule, same response?
A Yes. And in addition, the responsibility of Balfour as the construction manager under Section 3.10.4.2 where the schedule shall be a

critical path method and that they were the ones who were responsible for that.
Q And that's in the 201?
A That's in the 201.
Q Number 17, the reasons Library has not made payment on the Applications for Payment 43, 44, and 45, I think that was covered yesterday. Is that correct?
A That's correct.
Q Is there anything else you need to tell me or we need to discuss on that?
A No, I don't believe so.
Q Defective or incomplete work relating to the project, is there anything that was not discussed yesterday or any items that were not articulated?
A No.
Q Number 22, any written notifications given to Balfour identifying alleged defects or deficiencies in the work, is there anything that has not been previously identified?
A They were notices I believe from Buck Lindsay. I'm not sure if we reviewed that yesterday. I believe it was a notice on 12/18.
Q 12/18 of what?

A 12/18/18. That was a note from Buck Lindsay to Dave Simonton, and it had copied myself, Jim Clements, and Jen Faulkinberry where Mr. Lindsay had visited the building and gave notice to Mr. Simonton of Balfour Beatty of the deficiencies that he had found at the time of his walk-through.
Q The punch list deficiencies?
A In addition some -- the punch list deficiencies and the fact that the contractor had not provided a punch list at that point. It says: It also has been reported in the last few days that the fire marshal provided a list of 13 items that had not been addressed. The owner and architect have requested a copy of the list from the contractor; however, it has not yet been provided.
Q Are there any notifications that preexist that one?
A There was a notice that Mr. Lindsay had sent prior to his visit on 12/18. It was on 12/11/18.
Q Any prior to that?
A There was notices from Mr. Clements to Pat Dean in October 3rd, 2018. There was a letter from Mr. Clements, October the 26th of 2018 to

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Mr. Simonton. There was another notice of November 4th of 2018 from Mr. Clements to Mr. Simonton.
Q Is that it?
A That's all that I can recall.
Q Is that -- what is that notebook?
A This was the book that was labeled Exhibit 8 yesterday.
MR. HILDEBRAND: I'd like to get a copy of this in kind of a notebook form like this. Is that something that you would do, or would I need to make arrangements with Ms. Brown?
BY MR. HILDEBRAND:
Q So Exhibit Number 8 is the compilation of documents that you did that were in response to the topics that Balfour had wanted to question you about for the 30(b)(6) deposition, correct?
A Correct.
Q Let's go to -- so we've answered Number 22, correct?
A Yes.
Q 23, the first written notice given to Balfour where Library made or stated it specifically intended to make a claim against Balfour for damages related to a delay in

completion.
A The liquidated damage clause is -- as Mr. O'Connor testified, is self-executing, and there was no need to make a written claim.
Q We're going to talk about that in just a moment, though.
A Okay.
Q I think we addressed this in the prior deposition, and I believe that the first notice of a written claim to Balfour was Buck Lindsay's letter to Balfour in January of 2019 where he said, "We're looking at your latest pay application, and we're going to note that there are deductions for liquidated damages." Do you recall that?
A Yes.
Q Is there -- I think we talked about that last time. Do you have -- is there any testimony contrary that there was a prior notice?
A No.
Q So the answer to Number 23 -- do you know what exhibit that is? I think I can probably pull it. That was marked as Exhibit 25 to your deposition. It was an email from Buck Lindsay to David Simonton dated February 11, 2019, that sets out the deducts. Is there any prior notice from

Balfour prior to that date of Library's intention to assert liquidated damages or delay damages to Balfour?
A There was no prior notice from Balfour. As I think you just asked your question, there was no prior notice to Balfour from Buck Lindsay.
Q Or from Library?
A Or from Library.
Q And I think we answered this one previously as well, Number 24, the first oral notice. There were no oral notices given prior to the written notice that we just talked about dated February 11, 2019, from Buck Lindsay to Balfour, correct?
A Correct.
Q On Number 25, the legal basis for Library's claimed entitlement to liquidated damages. And I think LDs, liquidated damages, are set forth in Paragraph 2.3.1.3 of the AIA 133. Is that correct?
A That's correct.
Q Now, you've alluded to -- so let's look at that provision.
Before we look at that provision specifically, let me ask you this. And again, I

believe we discussed this at some length at your prior deposition. Library Associates was aware and has been aware of the liquidated damages provision in the contract since the time it was executed, correct?
A Correct.
Q And that was negotiated between Library and Balfour, correct?
A Correct.
Q And reading that term in the liquidated damages provision, it's clear that it is invoked or potentially invoked as of the time that the original contract date, as extended by any scheduling orders -- I'm sorry, by any change orders -- that that establishes the date of substantial completion under the contract, and if that date is extended or passed, then the liquidated damages provision potentially comes into play, correct?
A Correct.
Q So from my review of the documents, it looks like the -- when you look at the notice to proceed, that the planned schedule date of 28 months, the substantial completion was to have been done by July 30, 2017, there was one official

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20-day extension that was given, which would extend that date to August 19, 2017, so as of that date, you were aware that Library Associates had the right under the contract, if it wished to, to assert liquidated damages against Balfour, correct?
A Correct.
Q And it's your testimony that Library Associates intentionally did not assert liquidated damages against Balfour because it did not think that it was contractually required to, correct?
A We weren't contractually required to notice them that we were going to assess liquidated damages.
Q Right.
A Yes.
Q So let's look at the language of the contract in A133 2.3.1.3. In the event that the manager does not achieve substantial completion of the work within the contract time, including approved extensions -- and here's the part that I want to ask you about -- the contractor shall pay to owner as liquidated damages, and not as a penalty, the sum of $9,500, and then it says, paren, $9,000 per day, for each day of actual time of performance to achieve substantial completion

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exceeds the authorized contract time.
So it says the contractor shall pay to owner, so is it your position that as of Day 1 of the contract completion date, that Balfour should have come to Library Associates and said, okay, Library Associates, we're past the date, we're going to pay you $9,000 or $9,500, whichever one you want to use, as of today, and for every day after that, Library Associates should have paid -- been paid by Balfour for each day of delay?
A It doesn't state that the contractor had to start making payments on the first date that they were delayed, it just states that they shall pay to the owners liquidated damages. It doesn't give a time period on when those payments are to be made.
Q Well, did you understand that Balfour -- did you expect Balfour to make payments to Library Associates for each day that the substantial completion exceeded the contract date voluntarily and just say, okay, Library Associates, we're just going to pay you this $9,000 for every day, we're going to start doing it, or did you expect that Library Associates was going to have to say to Balfour, look, Balfour, you did not complete this

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project within the contract completion date, and therefore, you owe us X number of dollars as liquidated damages? Which one did you expect to happen?
A I believe in typical projects that the contractor is not going to come to the owner and say here's a check for $9,000 every day. I guess it's probably industry standard that those liquidated damages are typically assessed at the end of the job when the substantial completion date is met.
Q Right. It's just -- in fact, you've been through this before. You had a liquidated damages claim against a contractor on a project before this one, just before it, correct?
A Correct.
Q Right. And what happened on that was that the contractor said here's my payment application, pay me this, and the owner, which was a subsidiary of Bennett Hospitality, said we're not going to pay you that because you exceeded the completion date, and we're going to assess liquidated damages and withhold that amount, correct?
A Actually, that was assessed by the

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architect in the final payment application for that project.
Q Well, the architect discussed it with you, though, didn't they?
A I don't recall specific discussions, but in general, yes.
Q Right. The architect is the owner's agent in that respect to make a determination of whether they thought liquidated damages should be applied or not?
A I believe the architect in the contract is the one who makes that final determination, but I'm sure there was discussions, yes.
Q So the simple point is that Library Associates knew that Balfour wasn't going to voluntarily pay liquidated damages. Balfour was going to have to be -- a claim was going to have to be made against Balfour by Library where Library says, look, Balfour, we are going to assess, and we want you to pay liquidated damages, right?
MR. MCDONALD: Object to the form.
THE WITNESS: Yes. I don't believe we're going to make a claim. The liquidated damages is not a claim, it's an assessment, and the architect is -- assessed those in the February 11th

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letter prior to --
BY MR. HILDEBRAND:
Q Well, is the architect the one who determines whether it's a claim or not and whether they should be assessed?
A Again, I don't believe liquidated damages are a claim. I believe the architect needs to review the contract and assess any damages to the contractor per the terms of the contract, and I believe that's what the architect did in the -- when he determined the date of the substantial completion in his letter on February the 11th.
Q Did you ever discuss with the architect, prior to the first written notice that we've identified in February of 2019, look, architect, liquidated damages have begun to accrue as of August 19, 2017, and can you tell us whether you think that that's a claim or not and whether we need to assess those and make a claim for liquidated damages? Did you have any such discussions with the architect?
A No.
Q It says under 2.3.1.3 of the AIA 133 the contractor shall pay to owner those liquidated damages.

Let's turn to A201, if we can, Ms. Brown.
A Okay.
Q And I'd like for you to turn to Section 4.3, please. Do you see that?
A Yes.
Q And that's captioned Claims and Disputes, correct?
A Yes.
Q And 4.3.1 definition, a claim is a demand or assertion by one of the parties. And Library Associates would be one of the parties, correct?
A Library Associates is a party to the contract, yes.
Q Right. So a claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment, or interpretation of the contract terms, payment of money.
So if you look at the liquidated damages provision that we just talked about, it says in the event that substantial completion is exceeded, the contractor shall pay to the owner money, and we've talked about that Library Associates knew that it was going to have to make a -- whatever you want to call it if you don't want to call it a claim, it's going to have to make a demand to Balfour to pay

liquidated damages for the payment of money, correct?
A I believe this sentence and definition says: A claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of contract terms. The interpretation of contract terms, payment of money, extension, or time or other relief with respect to the terms of the contract.
The terms of the contract in the A133 and the section that we were just referring to, I believe it was the 2.3.1.3 -- and I believe Mr. O'Connor testified as our expert that says that, again, the 2.3.1.3 is not a claim, and so that's with respect to the terms of the contract. So this contract does not state that you have to make a claim for liquidated damages.
Q Let's break this down. The AIA 133 liquidated damages says the contractor shall pay to owner as liquidated damages, and we've agreed that the owner needs to make a demand of the contractor for liquidated damages. We've already talked about that, correct?
A No. I believe it's the architect who is the arbiter of the contract, and the architect

assessed those damages. I don't believe that the owner has to make a demand for the -- the architect assessed the LDs.
Q You're not -- certainly, you're not claiming that -- okay. So is Library Associates asserting a claim against Balfour in this litigation for liquidated damages?
MR. MCDONALD: Object to the form.
BY MR. HILDEBRAND:
Q Yes or no? Is it asserting a claim in this lawsuit for liquidated damages against Balfour?
MR. MCDONALD: Same objection.
THE WITNESS: It's a claim in the lawsuit, but it is not a claim as -- that we had to make per the terms of the contract. We're having to make that claim because -- we were having to -- the architect assessed the liquidated damages, and if there wasn't a lien that was put on this project, then --
BY MR. HILDEBRAND:
Q We're not talking about the liens, we're talking about this claim for liquidated damages.
MR. MCDONALD: She's entitled to finish her answer. Please don't interrupt her.

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about it or what Mr. McDonald may think about it, the simple point is that he was responding to the consolidated claim from Balfour, correct?

A I don't believe that that's what it says. He was just getting his information -- he was responding to the status of Applications 43, 44, and 45. He just noted at the very last sentence that he has confirmed that he had received the letter from January 25th, but I don't believe he was writing this email in response to the letter of January 25th, he was writing this email and responding regarding Payment 43, 44, and 45.

Q Well, what does the architect -- do you see -- in Paragraph 3 of Exhibit 25 to your deposition, do you see, on the first page, Paragraph 3?

A Yes.

Q Where it says: The owner has specific claims to be asserted related to time and amount as the work completes as follows, and then Number D, liquidated damages, 530 days.

The term that the architect used, as your agent, was "claims," correct?

MR. MCDONALD: Object to the form.

THE WITNESS: Yes, but that -- if we

want to get specific, that claim is a little C, and it's not a capital C, which the claim -- so I don't -- I believe that might just be a word that he used. If he was going to assert a claim under the contract, then the claim would have been capitalized.

BY MR. HILDEBRAND:

Q So this letter, in your view, is not asserting a claim? This letter from the -- this email communication to Balfour you're now stating was not a claim?

A It's a claim, but it's not a claim as it -- as the definition in the contract with a capital C. So liquidated damages, even though he's got that under his claims that, yes, these are claims, but the liquidated damages doesn't necessarily mean that he's stating that it is a claim as defined under the contract, it is just part of the contract under 2.3.1.3.

Q So you're making a claim in this litigation you talked about, correct?

A Correct.

Q Your architect uses the term "claim" in its letter to Balfour, correct?

A He used that word, yes.

Q Right. And then let's turn to the definition of claims and disputes under A201 4.3.1. A claim is a demand or assertion by one of the parties seeking payment of money.

In this lawsuit, Ms. Brown, are you asking Balfour to pay Library Associates money for liquidated damages?

MR. MCDONALD: Object to the form.

THE WITNESS: The architect has assessed the liquidated damages, again, and as I went on to say earlier, with respect to the terms of the contract.

BY MR. HILDEBRAND:

Q My simple question, Ms. Brown, is in this case, are you -- is Library Associates asking Judge Scarborough to award Library Associates against Balfour payment of money for liquidated damages?

MR. MCDONALD: Object to the form.

BY MR. HILDEBRAND:

Q Are you or not?

A We are asking Judge Scarborough to award us liquidated damages.

Q And you want Balfour to pay liquidated damages as a result of the claim that has been made before Judge Scarborough, correct?

MR. MCDONALD: Object to the form.

THE WITNESS: We are asking Judge Scarborough to award us liquidated damages.

BY MR. HILDEBRAND:

Q And you want Balfour to pay them, correct?

MR. MCDONALD: Object to the form.

THE WITNESS: We're asking him to award us liquidated damages.

BY MR. HILDEBRAND:

Q Right. And you expect -- and as a result of that award, you want Balfour to pay you those liquidated damages in the form of money, correct?

MR. MCDONALD: Same objection.

BY MR. HILDEBRAND:

Q It's a simple question.

A Or a deduction from their contract on this case.

Q But you expect to be -- what you want at the end of this thing is to be paid that amount. Whether it's as a deduction or an affirmative or Balfour's stroking you a check, you want to be paid for the liquidated damages, correct?

A We want to be compensated for the liquidated damages.

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that the judge had determined was not admissible.

Q I don't think that he addressed the Paycheck Protection Program, and I think it's relevant to your damages, so you're not going to -- you refuse to testify about that point?

A Yes.

MR. HILDEBRAND: And are you going to -- what is your instruction, Brent, as to whether she -- what is your instruction to your client whether she should testify and answer that question or not?

MR. MCDONALD: I don't have any instruction. She said that that's the basis of financial information, and you know as well as I do, I wasn't even at the hearing. So if you've got to file a motion, you've got to file a motion.

MR. HILDEBRAND: Well, I think it's your obligation to file a motion or not. If your witness --

MR. MCDONALD: And I'm not instructing her not to answer. She's saying she's not going to answer it. I'm not instructing her not to answer. And this is the basis of a hearing that I wasn't in attendance at, it was in camera, and so that's where we are.

BY MR. HILDEBRAND:

Q How about Number 36, the amount of money that was available for payment to Balfour in Library's banking account or other similar account as of the date that Library contends substantial completion was obtained, are you going to answer that?

A Again, I believe that the judge determined in that hearing that the financial information was not admissible.

Q Let's turn to Number 43, Ms. Brown.

MR. MCDONALD: I'm sorry. What number was that?

MR. HILDEBRAND: 43.

BY MR. HILDEBRAND:

Q This topic relates to Balfour's RCOs that have been identified in a volume with I think about 35 of them, and I think it was Exhibit -- seems like it's Exhibit 33. I'm sorry. It was 38. Introduced in your deposition was a list of a compilation of all the requested change orders, and there was some discussion of those yesterday. Do you remember that?

A If you have Exhibit 38 that you'd like to show me.

Q I don't have it. My question, that was a listing of all of the requested change orders from Balfour Beatty in this case?

A I don't believe I saw a listing of requested change orders yesterday.

Q Let me ask you this: Of the list of requested change orders that Balfour has that were identified in Exhibit 33, have you made a determination of which ones of those are properly owed and payable to Balfour?

A You need to show me Exhibit Number 33.

Q 38.

A Or 38.

Q Okay. I'll get that and come back to it.

MR. HILDEBRAND: Do y'all have that here, Brent?

MR. MCDONALD: 38?

MR. HILDEBRAND: I think I made a copy for you. I know that I did.

MR. MCDONALD: You made a copy for me?

MR. HILDEBRAND: Yeah. We got a request. I retained the original. It was not made an exhibit because it was so lengthy. But then Kathy had contacted me and said can y'all have an

exact copy made and send it over.

MR. MCDONALD: Yeah. I can check it.

MR. HILDEBRAND: We'll come back to that, then.

MR. MCDONALD: How about when you get done with whatever else you're going to ask, just let me know, and we'll take a break, and I can see if I can pull it.

MR. HILDEBRAND: We've been going for about an hour. Why don't we just take five now.

(A recess transpired.)

BY MR. HILDEBRAND:

Q If you would turn to my exhibit and Number 29, please, Ms. Brown. The legal, factual and contractual basis for the reasons that Library has not made a claim against its primary architect in this matter, Winford Lindsay Architects, what is Library's answer to that?

A I have no knowledge on any reason that I would need to make a claim against Winford Lindsay at this time.

Q So is it your position that Winford Lindsay has done nothing wrong that has caused or

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contributed to any of the delays or damages that have been incurred by either Library or Balfour or any of the subcontractors? Is that your position?

A I don't have any knowledge from Balfour, as the construction manager, to notice that any claims would need to be made against Winford Lindsay Architects.

Q Well, hadn't Balfour since -- during this entire project, didn't it write pretty strident letters that the design issues were the cause of delays?

A But I still don't have any knowledge on why I would need to or be required to make a claim against Mr. Lindsay.

Q Same question regarding Jim Clements. Why has no claim been made against Jim Clements and Matrix?

A I have no knowledge from Balfour Beatty, the construction manager, on why I would need to make a claim or why Library Associates would need to make a claim against Jim Clements.

Q How about Design Continuum, the interior designer?

A Same response.

Q You testified yesterday that in your

view, that Balfour was required to provide the current schedule with each payment application. Is that correct?

A Correct.

Q Were Balfour's schedules always available to the owner throughout this project?

A I don't believe so. In fact, we, again, asked for critical path schedules that they were required to supply and did not get critical path schedules.

Q Well, isn't that what Mr. -- when you asked Grady Query, with Palmetto Scheduling, to look at this project, what he did was looked at Balfour's schedules and then made a determination whether he felt, based on them, whether the completion date was correct or not. Isn't that what he did?

A No. I believe he reviewed the schedules, and I believe that he had stated that the schedules did not make sense to him because the certain items in the schedules and the timing of certain items in the schedules did not add up to other items in the schedule or milestones in the schedule.

Q Do you dispute that Balfour's schedules, as originally published and as revised during this

project, were readily available upon request or otherwise to the owner?

A Not the critical path analysis schedules that we had requested, and the schedules that were provided when given to Mr. Grady Query or even to Mr. Mark Boe, our scheduling expert, again, states that the schedules were inadequate to determine certain milestones in the job.

Q This is a very straightforward and simple question, Ms. Brown. Do you dispute that the schedules that Balfour kept on this job, from the first one to the last one, were readily available to Library and its consultants or anybody else upon request or otherwise? I'm not asking for an opinion as to whether you think the schedules were adequate or were critical path, I'm just saying were the schedules available if you had wanted to look at them?

A I remember requesting the schedules of the critical path and not receiving the schedules, so no, I cannot confirm that current schedules were provided to us and they were readily available to us on this job.

Q So there was a reference to them yesterday by Mr. Terry in his questioning to you

that the schedules that had been used by Balfour were Primavera schedules. Do you remember that?

A Yes.

Q Has someone told you that the schedules that Balfour published did not use critical path analysis?

A I believe that the information from Mark Boe stated that the schedules that he reviewed did not show correct critical path analysis on the job. The items that were put into the schedule, it's my understanding that someone is actually physically putting in the time and the elements of the schedule and the dates of the schedule, that what was entered into the schedule did not make sense.

Q That's not my question. My question is very simply, and listen to it carefully, please, has someone told you that the schedules that Balfour used for the Hotel Bennett did not use critical path methodology? Has anyone told you that?

A Mr. Clements I believe told -- has told me that the schedules that we received from Balfour did not show critical path.

Q And Mr. Boe didn't start to work with Library until just recently, correct, within the

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reviewed the other items in the claim.

Q Have you asked him to review the other items in your claim?

A I do not believe so.

Q Has Cotton & Company asked you for more information so that they can figure out your loss of use damages?

A Not that I can recall.

Q That's all the questions I have. Thank you.

A Thank you.

EXAMINATION

BY MR. HILDEBRAND:

Q I'll go ahead, Ms. Brown. Tom Hildebrand again.

Have you had any communications with anybody with the architect's office since your last deposition?

A Yes.

Q With whom?

A With Buck Lindsay and Jennifer Faulkinberry.

Q And what have you talked to them about and why?

A I believe we touched on this yesterday.

I may have had a conversation with Jennifer for a couple of hours -- or excuse me, a couple of times last week to confirm -- I can't remember. It's been a long two days. As I sit here today, I don't recall the exact conversation with Jennifer Faulkinberry as I sit here right now. I'm sure I discussed that yesterday morning.

And then with Buck Lindsay, but I don't specifically remember that conversation, just -- I believe I just called them up and said, hey, we've got a couple of questions for Jennifer. I know that her health hasn't been great lately, and if she would be available.

Q Do you know if Jennifer's planning to testify live at trial one way or the other?

A I do not know.

Q Have you talked to her about that?

A No, I have not.

Q How about Buck Lindsay?

A I have not talked with him about that.

Q How about Woody Faust, the interior designer?

A I have talked with them. They just finished up a project with us in Mount Pleasant, so I've had numerous conversations with them, but not

regarding this case, so I don't know what their situation is on this case.

Q So we talked about this at some length in your first deposition, but with regard to who negotiated the contract, as I understand it, that was all done by Bill Bundy for Library Associates. Is that correct?

A Yes. We hired Bill Bundy to represent us in the contract negotiations with Balfour Beatty.

Q Before the contract was executed, did you have any discussions with anybody regarding the liquidated damages provision and whether -- if the contractor term was not reached whether Library needed to make a claim or not against Balfour?

A Repeat the question, please.

Q You testified earlier that your reading of the contract now is that when you look at the liquidated damages provision, that there's no requirement for Library to file a formal claim against Balfour, there was no such requirement while the project was ongoing, and that, therefore, the liquidated damages are not a claim, and that, therefore, Library did not have to comply with time limits and other conditions precedent referenced in the contract. Isn't that correct?

A Yes.

Q My question is before the contract was signed, did you have any discussions with anybody about that -- or did you even look at that provision before the contract was signed and give it any thought as to whether a formal claim was going to have to be filed or not?

A I remember discussing the amount per day of liquidated damages, but never had any discussion on if a claim had to be made or if even notice had to be given of a claim.

Q All right. So when did you come to the interpretation that you are now espousing that no notice of claim was required under the contract? When did you read the contract and say, "Oh, gosh, I don't have to give notice"?

MR. MCDONALD: Object to the form.

THE WITNESS: I don't believe that I ever thought that I would have to give notice.

BY MR. HILDEBRAND:

Q Okay. Well, that would imply a review of that particular provision to determine one way or the other whether notice would have to be given or not. Did that even -- did you even consider that issue before the contract was signed?

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A No, because when we signed this contract, Balfour Beatty said that they would deliver this hotel in 28 months. We had no reason to believe anything different. We had no reason to think that the liquidated damages provision would ever come into play into this contract.

Q Okay. So my question -- okay. How about -- so you had no specific involvement -- so I want to understand. When the contract was negotiated and whether the provision related to liquidated damages in the A133, which is Section 2.3.1.3, I just want to understand that you had no negotiations or involvement with anyone as to what the intention of that paragraph was insofar as whether notice needed to be given or not, correct?

A Correct.

Q How about the -- there's been some discussion in Mr. O'Connor's testimony, and I think it's been mentioned here the last couple of days, that the contract, in some of the claims provisions, references that there are particular conditions precedent to making a claim. Do you remember that?

A Yes.

Q The same question regarding the conditions precedent. Did you take any notice of that provision prior to the contract being signed?

A No. That was -- Mr. Bundy negotiated that into the contract, I believe, with Balfour Beatty. No.

Q So as far as any of the contract terms are concerned, all of those were -- and what the intentions were, those were negotiated with Mr. Bundy and Balfour, correct?

A And Balfour's legal counsel, yes.

Q Okay. And that would be John Hoyer?

A Yes.

Q So any questions that someone might have about what the intent of the contract documents is or was at the time that it was drafted and what the parties meant to be included and didn't and how it should be interpreted, that would have to be answered on Balfour's side by John Hoyer and Balfour representatives, correct?

MR. MCDONALD: Object to the form.

THE WITNESS: You'd have to ask Mr. Hoyer and Balfour that question.

BY MR. HILDEBRAND:

Q Right. And on Library's side, the person

that question would have to be directed to would be Bill Bundy, correct?

MR. MCDONALD: Object to the form.

THE WITNESS: Repeat the question, please.

BY MR. HILDEBRAND:

Q If I want to ask somebody about what the intentions were of the contractual provisions and why this one was put in or what was meant by this one or that one or anything else like that, if I were to ask somebody to tell me that from Library's side, it would be Bill Bundy, because you've said that he is the one who negotiated all of them, correct?

MR. MCDONALD: Object to the form.

THE WITNESS: Mr. Bundy represented Library Associates in this contract, yes.

BY MR. HILDEBRAND:

Q Right. So if I have questions about what his intent -- or what the intent of Library was or questions about the contract, he's the one I would need to ask. Agreed?

MR. MCDONALD: Object to the form.

THE WITNESS: Mr. Bundy represented us in the contract, yes.

BY MR. HILDEBRAND:

Q The question is a very simple question. You're not answering the question. If I need to ask somebody about what the intentions were and why particular provisions were included or not included, like conditions precedent or anything else, the only person I can ask and the appropriate person to ask from Library's perspective is Bill Bundy, because he's the one who negotiated and drafted it. Agreed?

MR. MCDONALD: Object to the form.

THE WITNESS: Yes.

BY MR. HILDEBRAND:

Q What involvement, if any, did Brent McDonald have with the drafting of the contract?

MR. MCDONALD: Object to the form.

THE WITNESS: None to my knowledge.

BY MR. HILDEBRAND:

Q Insofar as the -- this litigation has been ongoing for about two years now. Many documents have been produced probably a year ago referencing the audit request and voluntary productions by Balfour Beatty and document productions from the subcontractors.

Do you have any testimony here today that

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owner the duty to review those to the owner's -- to the owner's benefit and to act in the best interest of the owner as they are reviewing the amounts that the subcontractors are requesting.

BY MR. HILDEBRAND:

Q When you're reviewing pay applications and Balfour submitted information from subcontractors and said, "We believe this is accurate, pay the pay application," are you saying that you didn't look beyond -- behind Balfour's review, and you just accepted everything that Balfour said?

A The architect reviewed all of the pay apps, and I only pay certified pay applications that are certified by the architect.

Q You reviewed the pay applications after the architect reviewed them, and a lot of them you had questions and said, "I want more information on this, and I want more data, and I'm not going to pay it until I get it," and a lot of times, the pay applications got further revised after your review, didn't they?

A Can you give me a specific pay application that that happened on?

Q No. Can you -- isn't that correct, that

you reviewed pay applications carefully once you got a copy and that based on your review, in fact, a lot of them were revised?

A No, I do not believe that is the case. The architect is the one who reviewed the pay applications and all of the backup submitted by the subcontractors, and in some instances, those were 500 pages worth. I would review the summary copy. I would ask questions, but not every pay app I asked questions and not every pay app I advised. There weren't many that I had actually asked questions. I accepted what the architect had certified.

Q Well, let me ask you this, Ms. Brown. Let's cut to the heart of it. If Balfour tells you now that it had, in fact, reviewed the liens and the claims of the subcontractors and found them to be valid, would you pay those liens and claims?

MR. MCDONALD: Object to the form.

THE WITNESS: No, because Balfour has also liened for -- they have the $8 million lien, or is it the twenty -- yeah, about an $8 million lien. So no, because Balfour has now also liened the project. But it was the responsibility of Balfour, per the terms of the

contract, to bond off all subcontractor liens, as per the information that Mr. McDonald and I just went through, and Balfour refused to, per the terms of the contract, bond off those liens.

BY MR. HILDEBRAND:

Q That's not my question. My question is if Balfour had reviewed the mechanic's liens and the claims of the subcontractors that were included in the $22 million joint claim that was made, if it had reviewed those and told you -- and had told Library Associates that it felt that the subcontractors' claims of liens were valid, would you have paid them?

MR. MCDONALD: Object to the form.

THE WITNESS: I pay certified pay requests from the architect. I do not pay liens. I do not pay subcontractor claims. I do not pay liens. I pay certified pay requests from the architect.

BY MR. HILDEBRAND:

Q So whether Balfour had reviewed the claims and liens of the subcontractors that are included in the joint $22 million claim, whether it reviewed them and said pay these or not, you wouldn't have paid them, would you?

A Well, again, like you said, we're talking about two different things. I think Balfour owes the -- is responsible for reviewing those claims and pay requests from the subcontractors to suggest that they're legitimate or not, but I don't pay liens, I don't pay claims, I pay certified pay requests from the architect.

Q So you never would have paid a -- if you're saying you don't pay liens or claims, you never would have paid the subcontractors or agreed to their liens or claims, correct?

A Correct. I pay certified pay requests from the sub -- from the -- certified pay requests from the architect.

Q Okay. Thank you. All of the tabs that you've referenced, is that the black notebook that we looked at this morning that you read out of some of the tabs on?

A Yes, it is.

Q So let me get this clear. So when liens were filed against the project after the architect in the February email to Balfour saying that Balfour was not going to receive any further payments from the owner and y'all had not paid the pay apps -- all the pay apps to that point, is it

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TRIAL EXHIBIT #42

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From: Starcevic, Nicholas NStarcevic@Balfourbeattyus.com
Subject: RE: MCC Lien
Date: January 14, 2019 at 12:51 PM
To: Simonton, David dsimonton@balfourbeattyus.com, James Clements jclements@matrixse.com, Kim Brown kbrown@bennetthospitality.com
Cc: Jennifer Faulkinberry jfaulkinberry@lpbatlanta.com, Steve Eifert seifert@shepconsult.com

Filed copy attached.

Whats the status of November's pay application?

Nick Starcevic
Project Mgr I Balfour Beatty
O: (843) 974-4590 I C: (704) 361-3265
E: nstarcevic@balfourbeattyus.com I www.balfourbeattyus.com
306 Meeting Street, Suite 300, Charleston, SC 29401

DEFENDANT'S EXHIBIT 42

-----Original Message-----
From: Simonton, David
Sent: Thursday, January 10, 2019 12:35 PM
To: James Clements <jclements@matrixse.com>; Kim Brown <kbrown@bennetthospitality.com>
Cc: Jennifer Faulkinberry <jfaulkinberry@lpbatlanta.com>; Starcevic, Nicholas <NStarcevic@Balfourbeattyus.com>; Steve Eifert <seifert@shepconsult.com>
Subject: RE: MCC Lien

10-4 Jim.
Here is a copy of what we are filing.
Will let you know if any issues at the County.

David Simonton
VP/Operations I Balfour Beatty
O: 512-391-9273 I C: 512-391-9273
E: dsimonton@balfourbeattyus.com I www.balfourbeattyus.com
306 Meeting Street, Suite 300, Charleston, SC 29401

-----Original Message-----
From: James Clements [mailto:jclements@matrixse.com]
Sent: Thursday, January 10, 2019 12:06 PM
To: Kim Brown <kbrown@bennetthospitality.com>
Cc: Simonton, David <dsimonton@balfourbeattyus.com>; Jennifer Faulkinberry <jfaulkinberry@lpbatlanta.com>; Starcevic, Nicholas <NStarcevic@Balfourbeattyus.com>; Steve Eifert <seifert@shepconsult.com>
Subject: MCC Lien

Kim

Dave is going to submit the bond today. He asked that you request the bank do their title search on Monday morning.

Nick has sent Jennifer corrections and back up to Pay Ap #44. If all is in order, I'd assume Jennifer will forward that to you probably this weekend or early next week.

Jim Clements
Matrix Program Management, LLC
C. 704.905.1165
jclements@matrixse.com
https://urldefense.proofpoint.com/v2/url?u=http-3A__www.matrixse.com&d=DwIGaQ&c=eapt7ST1afUS6LykE1MB9bfkdYfSLNUVF7M5AC_OmtM&r=JLQdYEaoUG2oNvVrtQ23J3X2DvQdT3eNVRcgSOoXI5U&m=z3HKQbleQTeA-ry0cexk4lw7lBmqZR4cy7lrwwOLTKk&s=EZV3dOfdI5-GhWCCqle1fWIIY_g6ch0dxyloaL2KPf4&e=

Sent from my iPhone. Please excuse any typos.

PDF

DOC011419-011420191_13.pdf

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RECORDER'S PAGE

NOTE: This page MUST remain
with the original document

Filed By:
COUNTER CUSTOMER
BALFOUR BEATTY CONSTRUCTION LLC
306 MEETING ST, SUITE 300
CHARLESTON SC 29401

RECORDED

Date: January 11, 2019
Time: 12:54:23 PM

Book	Page	DocType
0771	966	Bond/Rel

Michael Miller, Register
Charleston County, SC

MAKER:
LIBRARY ASSOCS AL

RECIPIENT:
GUY M BEATY INC

Original Book: 0758

Original Page: 160

# of Sats:

Note:

# of Pages: 7
# of References:

Recording Fee	$	10.00
Extra Reference Cost	$	-
Extra Pages	$	2.00
Postage	$	1.00
Chattel	$	-
TOTAL	$	13.00

DRAWER: Drawer 4
CLERK: SLW

0771
Book

966
Page

01/11/2019
Recorded Date

7
Pgs

0758
Original Book

160
Original Page

D
Doc Type

12:54:23
Recorded Time

R - 9972

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE CHARLESTON COUNTY REGISTER OF DEEDS OFFICE

GUY M. BEATY, INC.,

Petitioner,

vs.

LIBRARY ASSOCIATES, LLC; BALOUR BEATTY CONSTRUCTION, LLC; BERNHARD MCC, LLC,

Respondents,

SURETY BOND FOR RELEASE OF MECHANIC'S LIEN

Mechanic's Lien Filed on November 5, 2018 and recorded at Book 0758, Page 160

Bond No. 106943603

KNOW ALL MEN BY THESE PRESENTS: That the undersigned Balfour Beatty Construction, LLC ("Principal"), an entity having an interest in the property referenced herein, as Principal, and Travelers Casualty and Surety Company of America, surety company duly licensed to transact suretyship business in the State of South Carolina, as Surety, are held and firmly bound unto Guy M. Beatty, Inc. in the sum of One Hundred Forty Six Thousand Five Hundred Sixty and 48/100 Dollars ($146,560.48), the same being one and one-third the amount claimed in the lien hereinafter referred to, for the payment of which the Undersigned bind themselves, their successors and assigns, jointly and severally, as herein set forth.

THE CONDITION OF THIS OBLIGATION IS AS FOLLOWS: Guy M. Beaty, Inc., the Obligee herein, has filed a Mechanic's Lien for labor and/or materials furnished and actually used in the erection, alteration or repair of improvements situated on the real property described therein and more particularly in the mechanic's lien, attached as Exhibit "A" (the "Property"), which mechanic's lien was filed with the Charleston County Register of Deeds Office on November 5, 2018 and recorded at Book 0758, Page 160.

{01301154.}

Now, should the Principal or Surety pay or cause to be paid to Guy M. Beaty, Inc. holder and claimant of said lien, that sum that may be found to be due said lien claimant upon the trial of any action that may be filed by the lien claimant to recover the amount of the lien claimed, or if there is a determination that no amount is due the lien claimant, then this bond shall be void, otherwise it shall be in full force and effect.

This bond is filed in accordance with the provisions of S.C. Code §29-5-110 so as to discharge the real estate and premises described above from the above-referenced lien.

IN WITNESS WHEREOF, this bond is effective as of January 7, 2019 and Principal and Surety herein named have hereunto affixed their hands and seals on the date undersigned.

-signature and notary blocks on next page-

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Balfour Beatty Construction, LLC

PRINCIPAL

By: x [signature]
Title: President
Address: 1930 Camden Rd
Charlotte NC 28203

x [signature] Cabrera
Witness #1
[signature] Kiernan
Witness #2

STATE OF North Carolina)
)
COUNTY OF Mecklenburg)

PERSONALLY APPEARED BEFORE ME the undersigned witness and made oath that (s)he saw the within-named Balfour Beatty Construction, LLC by Pat Dean __________ sign, seal, and as his/her act and deed, deliver the within Surety Bond for Release of Mechanic's Lien and that (s)he with the other witness subscribed above, witnessed the execution thereof.

x [signature] Cabrera
(Witness #1)

Sworn to before me on this 8th
day of Jan, 2019
Susan L Misiak (notary)

My Commission Expires: 9/5/2020

Susan L Misiak
NOTARY
My Comm. Exp.
September 5, 2020
PUBLIC
MECKLENBURG COUNTY, NC

{01301154.}

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Travelers Casualty and Surety Company of America

SURETY

By: Jennifer B. Gullett

Title: Jennifer B. Gullett, Attorney-in-Fact

Address: One Tower Square
Hartford, CT 06183

Witness #1 Amy R. Waugh

Witness #2 Noah Pierce

STATE OF NORTH CAROLINA)
COUNTY OF MECKLENBURG)

PERSONALLY APPEARED BEFORE ME the undersigned witness and made oath that (s)he saw the within-named Travelers Casualty and Surety Company of America, by Jennifer B. Gullett sign, seal, and as his/her act and deed, deliver the within Surety Bond for Release of Mechanic's Lien and that (s)he with the other witness subscribed above, witnessed the execution thereof.

(Witness #1)

Sworn to before me on this 7th
day of January, 2019

Catherine Thompson (notary)

My Commission Expires: 4/9/2020

CATHERINE THOMPSON
NOTARY
PUBLIC
MECKLENBURG COUNTY, NC

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Exhibit A
Description of Property

ALL that certain piece, parcel or tract of land situate, lying and being on the south side of Hutson Street, in the City of Charleston, State of South Carolina, shown and designated as "2,190 Square Feet 0.050 Acres from Lot 2 Being Added to Lot 1" as shown on a plat thereof entitled "PLAT Of THE ADJUSTMENT OF PROPERTY LINES BETWEEN LOT 1, 404 MEETING STREET & LOT 2, 337 MEETING STREET, CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA, PREPARED FOR OLD CITADEL ASSOCIATES, LLC" prepared by F. Elliotte Quinn III, South Carolina Professional Land Surveyor, License No. 10292, dated June 14, 2011, and recorded in the RMC Office for Charleston County, South Carolina in Plat Book L11, at Page 0185; said 0.050 acres (2,190 square feet) having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear, said plat being incorporated herein and made a part hereof by this reference.

BEING a portion of the property conveyed to Old Citadel Associates, LLC by deed of The County of Charleston recorded March 15, 1997 in Book L-253, Page 629 in the RMC Office for Charleston County, South Carolina.

Formerly Portion of TMS No. 460-16-02-006, now a portion of TMS No. 460-16-04-009

TRAVELERS

Travelers Casualty and Surety Company of America
Travelers Casualty and Surety Company
St. Paul Fire and Marine Insurance Company

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That Travelers Casualty and Surety Company of America, Travelers Casualty and Surety Company, and St. Paul Fire and Marine Insurance Company are corporations duly organized under the laws of the State of Connecticut (herein collectively called the "Companies"), and that the Companies do hereby make, constitute and appoint Jennifer B Gullett of Charlotte, North Carolina, their true and lawful Attorney-in-Fact to sign, execute, seal and acknowledge any and all bonds, recognizances, conditional undertakings and other writings obligatory in the nature thereof on behalf of the Companies in their business of guaranteeing the fidelity of persons, guaranteeing the performance of contracts and executing or guaranteeing bonds and undertakings required or permitted in any actions or proceedings allowed by law.

IN WITNESS WHEREOF, the Companies have caused this instrument to be signed, and their corporate seals to be hereto affixed, this **3rd** day of **February, 2017.**

State of Connecticut

City of Hartford ss.

By: Robert L. Raney, Senior Vice President

On this the **3rd** day of **February, 2017**, before me personally appeared **Robert L. Raney**, who acknowledged himself to be the Senior Vice President of Travelers Casualty and Surety Company of America, Travelers Casualty and Surety Company, and St. Paul Fire and Marine Insurance Company, and that he, as such, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing on behalf of the corporations by himself as a duly authorized officer.

In Witness Whereof, I hereunto set my hand and official seal.

My Commission expires the **30th** day of **June, 2021**

Marie C Tetreault

Marie C. Tetreault, Notary Public

This Power of Attorney is granted under and by the authority of the following resolutions adopted by the Boards of Directors of Travelers Casualty and Surety Company of America, Travelers Casualty and Surety Company, and St. Paul Fire and Marine Insurance Company, which resolutions are now in full force and effect, reading as follows:

RESOLVED, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President, any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary may appoint Attorneys-in-Fact and Agents to act for and on behalf of the Company and may give such appointee such authority as his or her certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors at any time may remove any such appointee and revoke the power given him or her; and it is

FURTHER RESOLVED, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President may delegate all or any part of the foregoing authority to one or more officers or employees of this Company, provided that each such delegation is in writing and a copy thereof is filed in the office of the Secretary; and it is

FURTHER RESOLVED, that any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact and Agents pursuant to the power prescribed in his or her certificate or their certificates of authority or by one or more Company officers pursuant to a written delegation of authority; and it is

FURTHER RESOLVED, that the signature of each of the following officers: President, any Executive Vice President, any Senior Vice President, any Vice President, any Assistant Vice President, any Secretary, any Assistant Secretary, and the seal of the Company may be affixed by facsimile to any Power of Attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such Power of Attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding on the Company in the future with respect to any bond or understanding to which it is attached.

I, **Kevin E. Hughes**, the undersigned, Assistant Secretary of Travelers Casualty and Surety Company of America, Travelers Casualty and Surety Company, and St. Paul Fire and Marine Insurance Company, do hereby certify that the above and foregoing is a true and correct copy of the Power of Attorney executed by said Companies, which remains in full force and effect.

Dated this 10th day of January, 2019

Kevin E. Hughes, Assistant Secretary

To verify the authenticity of this Power of Attorney, please call us at 1-800-421-3880.
Please refer to the above-named Attorney-in-Fact and the details of the bond to which the power is attached.

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DEFENDANT LIBRARY ASSOCIATES, LLC'S

TRIAL EXHIBIT #43

Gmail

FW: Marion Sq - Pay App's 43 & 44

DEFENDANT'S EXHIBIT 43

ELECTRONICALLY FILED - 2023 May 16 9:41 AM - CHARLESTON - COMMON PLEAS - CASE#2019CP1001108

From: Jennifer Faulkinberry [mailto:JFaulkinberry@lpbatlanta.com]
Sent: Monday, January 21, 2019 3:45 PM
To: Nick Starcevic (NStarcevic@Balfourbeattyus.com) <NStarcevic@Balfourbeattyus.com>; Simonton, David (dsimonton@balfourbeattyus.com) <dsimonton@balfourbeattyus.com>
Cc: James Clements <jclements@matrixse.com>; Kim Brown (kbrown@bennetthospitality.com) <kbrown@bennetthospitality.com>; 'seifert@ShepConsult.com' <seifert@ShepConsult.com>; timspano@balfourbeattyus.com; Buck Lindsay <BLindsay@lpbatlanta.com>; Marty Wall <mwall@bennetthospitality.com>; rquinlan@hotelbennett.com
Subject: Marion Sq - Pay App's 43 & 44

Nick,

As noted in Buck's Substantial Completion survey and comments (12/18/18), the level of finishes in the guestrooms were unacceptable. BBC has taken the position that punch work was complete and that BBC would not work further to improve the guestroom finishes.

Consequently, the Owner has undertaken the improvement of the guest room finishes with significant re-painting. To achieve this work, the Owner mobilized approximately 80 painters a day to repaint the guest rooms. This work is also critical to meeting the Hotel opening date. As of this writing, the work continues and it is the Owner's hope to be complete this remedial work by early February.

As a consequence of this deficient work and BBC's unwillingness to correct it, the Owner has received its first invoice from Robins & Morten of $518, 830 for the repairs to date. The invoice and back up are accessible by the following link:

https://www.dropbox.com/s/vgxomysj8mtewxy/Invoice%20%231%20%20%26%20Backup%20Bennett%20Hotel.pdf?dl=0

Pls note the attached does not include invoices for CPI Construction who the Owner has also engaged to assist with painting the guestrooms.

In view of the progress of this owner-furnished work to date, invoices in hand and remaining work to complete, it is the our estimate the remedial repairs could reach in excess of $1,000,000. Per Article 9.5 - Decisions to Withhold Payment , we recommend withholding funds from Applications For Payment #43(October), #44 (November) and future contractor payment requests to offset these costs incurred to date, as well as anticipated completion costs.

We also consider current open punch list items, including but not limited to the exterior façade of the building, as cause to recommend against further reduction of the contractor's retention until WLA can verify all punch work has been satisfactorily completed.

Jennifer

Jennifer G. Faulkinberry

Winford Lindsay Architect

344 West Pike Street direct 770.407.5786

Lawrenceville, GA 30046 fax 770.407.5817

jfaulkinberry@lpbatlanta.com cell 770.241.2473

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