

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

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Appellate Case No. 2024-000788

Case No.: 2019-CP-10-01108

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**RECEIVED**

**Aug 12 2026**

**SC Court of Appeals**

Balfour Beatty Construction, LLC, Appellant,

v.

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

And

Library Associates, LLC, Third-Party Plaintiff,

v.

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

Of which Library Associates, LLC is the Respondent.

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**AMENDED RECORD ON APPEAL - VOLUME 2 OF 20**

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INC.; QUANTUM COATINGS, LLC;  
BALFOUR BEATTY CONSTRUCTION  
GROUP, INC.,

Third-Party Defendants.

COMES NOW Third-Party Defendant Old North State Masonry, LLC ("ONSM"), by and through its attorney, and pursuant to Rules 36 of the South Carolina Rules of Civil Procedure, and hereby responds to Defendant/Third-Party Plaintiff Library Associates, LLC ("Library") Requests for Admission in writing and under oath.

**GENERAL OBJECTIONS**

Plaintiff objects to the Set of Requests for Admission including the "Definitions and Instructions," to the extent the same requests information, materials or documents that are beyond the scope of discovery as permitted in Rules 36, to the extent the same requests information or materials protected by the attorney-client privilege or work product doctrines, and to the extent the same requests information or materials that are not discoverable. These responses are submitted subject to, and without waiving or intending to waive, but on the contrary intending to reserve and reserving the following:

A. All questions as to competency, relevancy, materiality, privilege and admissibility as evidence for any purpose any of the documents referred to or Responses given, or the subject matter thereof in any subsequent proceeding in, or trial of this action or any other action or proceeding;

B. The right to object to other discovery procedures involving the subject matter of these inquiries;

C. The right at any time to revise, correct, add or clarify any the Responses set forth herein or in documents referred to herein.

D. The inadvertent production of any document or information that is privileged, that was prepared in anticipation of litigation, that constitutes attorney work product, and that is otherwise immune from discovery, shall not constitute a waiver of any privilege or of any other grounds for objecting to discovery with respect to such document or any other document, or the subject matter thereof, or the information contained therein or the right of ONSM to object to the use of any such documents or the information contained therein during the subsequent proceeding.

#### **REQUESTS FOR ADMISSION**

1. Admit that You are a party to a Joint Prosecution, Defense and Tolling Agreement.

#### **ANSWER:**

**Admit. The terms of the Agreement are confidential and ONSM hereby objects to Library Associates possession of the terms of the Agreement.**

2. Admit that Plaintiff Balfour Beatty Construction, LLC or their Counsel requested that You enter into a Joint Prosecution, Defense and Tolling Agreement with Plaintiff Balfour Beatty Construction, LLC.

#### **ANSWER:**

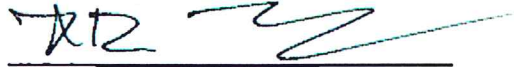
**Admit. The terms of the Agreement are confidential and ONSM hereby objects to Library Associates possession of the terms of the Agreement.**

3. Admit that you had actual knowledge of the terms of Section 2.1.6 of the A133-2009 Agreement between Plaintiff Balfour Beatty Construction, LLC and Defendant/Third-Party Plaintiff Library Associates, LLC at the time You entered into a Joint Prosecution, Defense and Tolling Agreement with Plaintiff Balfour Construction, LLC.

#### **ANSWER:**

**Denied. The terms of the Agreement are confidential and ONSM hereby objects to Library Associates possession of the terms of the Agreement.**

This the 9<sup>th</sup> day of October 2020.



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LLC*



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **OLD NORTH STATE MASONRY, LLC'S RESPONSES TO LIBRARY ASSOCIATES, LLC'S REQUEST FOR ADMISSION** has been served by electronic mail as follows:

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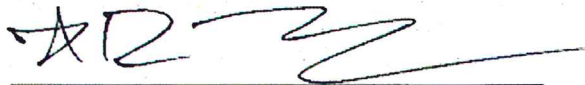
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This the 9<sup>th</sup> day of October 2020.



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STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT  
) C/A No.: 2019-CP-10-1108

Balfour Beatty Construction, LLC,

Plaintiff,

v.

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

---

Library Associates, Inc.,

Third-Party Plaintiff,

v.

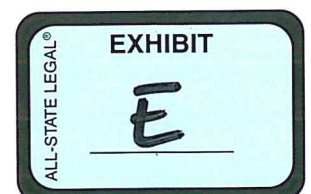
Lithko Contracting, LLC, Guy M. Beaty, Inc.,  
Bernard MMC, LLC, Gulf Stream  
Construction Company, Inc., Precision  
Walls, Inc., Palmetto Automatic Sprinkler  
Company, Inc., Cook & Boardman, LLC, 1st  
Choice Glass, Inc., Strong Tower  
Construction, LLC d/b/a Koch Corporation,  
Watson Electrical 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.

**THIRD-PARTY DEFENDANT GULF  
STREAM CONSTRUCTION  
COMPANY, INC.'S RESPONSE TO  
THIRD-PARTY PLAINTIFF  
LIBRARY ASSOCIATES, LLC'S  
REQUEST TO ADMIT**

**TO: THIRD-PARTY PLAINTIFF AND ITS COUNSEL OF RECORD:**

Third-Party Defendant Gulf Stream Construction Company, Inc. (hereinafter "Gulf





Stream”), by and through its attorneys, Walker Gressette Freeman & Linton, LLC, responds and objects to Third-Party Plaintiff Library Associates, LLC (“Library”)’s Request to Admit as follows:

### **GENERAL OBJECTIONS**

1. Gulf Stream objects to Library’s Requests to Admit on the ground that they seek information that is not relevant to the action or reasonably calculated to lead to the discovery of admissible evidence.

2. Gulf Stream objects to Library’s Requests to Admit on the ground that they seek information that is protected from disclosure by the attorney-client privilege and/or attorney’s work product doctrine.

3. Gulf Stream objects to Library’s Requests to Admit on the ground that they seek information that is protected from disclosure by the common interest doctrine and/or joint defense privilege.

4. Gulf Stream objects to Library’s Requests to Admit on the grounds that they seek confidential information.

5. Gulf Stream objects to Library’s Requests to Admit referencing documents in that the explanations of and the admissions regarding the referenced document(s) sought cannot replace or be used as a substitute for meeting the requirements of South Carolina Rule of Evidence 901.

Subject to, and without waiving the foregoing general objections, each of which Gulf Stream incorporates into each of its responses below, and further reserving the right to modify or supplement these objections and/or to provide responses, if necessary, at the appropriate time, Gulf Stream responds to Library’s Requests to Admit as follows:

**REQUEST TO ADMIT**

1. Admit that You are a party to a Joint Prosecution, Defense and Tolling Agreement with Plaintiff Balfour Beatty Construction, LLC.

**RESPONSE:** Subject to, and incorporating the objections set forth herein above, admitted.

2. Admit that Plaintiff Balfour Beatty Construction, LLC or their Counsel requested that You enter into a Joint Prosecution, Defense and Tolling Agreement with Plaintiff Balfour Beatty Construction, LLC.

**RESPONSE:** Subject to, and incorporating the objections set forth herein above, admitted.

3. Admit that you had actual knowledge of the terms of Section 2.1.6 of the A133-2009 Agreement between Plaintiff Balfour Beatty Construction, LLC and Defendant/Third Party Plaintiff Library Associates, LLC at the time YOU entered into a Joint Prosecution, Defense and Tolling Agreement with Plaintiff Balfour Beatty Construction, LLC.

**RESPONSE:** Subject to, and incorporating the objections set forth herein above, denied.

<<SIGNATURE PAGE FOLLOWS>>



---

**Ian W. Freeman (SC Bar #72736)**

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**WALKER GRESSETTE FREEMAN & LINTON, LLC**

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Telephone: 843.227.2200

**ATTORNEYS FOR THIRD-PARTY DEFENDANT  
GULF STREAM CONSTRUCTION COMPANY, INC.**

Charleston, South Carolina  
October 9, 2020

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT  
) 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.

CERTIFICATE OF SERVICE

---

Library Associates, LLC,

Third-Party Plaintiff,

vs.

Lithko Consulting, LLC f/k/a Lithko  
Contracting, Inc.; Guy M. Beatty, Inc.,  
Bernhard MCC, LLC; Gulf Stream  
Construction Company, 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; Lowcountry Case &  
Millwork, Inc.; Quantum Coatings, LLC;  
Balfour Beatty Construction Group, Inc.,

---

Third-Party Defendants.

The undersigned hereby certifies that I have served a copy of the foregoing **Third-Party Defendant Gulf Stream Construction Company, Inc.'s Response to Third-Party Plaintiff Library Associates, LLC's Request to Admit** in connection with the above-referenced matter by mailing a copy of the same by United States Mail, postage prepaid, and/or electronic transmission, as follows:

**VIA US MAIL & EMAIL**

Walter H. Bundy, Jr., Esq.  
Michael Brent McDonald, Esq.  
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**COUNSEL FOR LIBRARY ASSOCIATES, LLC**

**VIA EMAIL ONLY**

All Other Counsel of Record



---

M. Eugenia Minniti  
Paralegal

Charleston, South Carolina  
October 9, 2020

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

BALFOUR BEATTY CONSTRUCTION,  
LLC,

Plaintiff,

v.

LIBRARY ASSOCIATES, LLC; and  
METROPOLITAN LIFE INSURANCE  
COMPANY, a New York Corporation,

Defendants.

---

LIBRARY ASSOCIATES, INC.,

Defendant/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; 1<sup>ST</sup> 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,

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CASE NO.: 2019-CP-10-01108

**LITHKO CONTRACTING, LLC'S  
RESPONSES TO LIBRARY  
ASSOCIATES, LLC'S REQUEST FOR  
ADMISSION**



INC.; QUANTUM COATINGS, LLC;  
BALFOUR BEATTY CONSTRUCTION  
GROUP, INC.,

Third-Party Defendants.

COMES NOW Third-Party Defendant Lithko Contracting, LLC ("Lithko"), by and through its attorney, and pursuant to Rules 36 of the South Carolina Rules of Civil Procedure, and hereby responds to Defendant/Third-Party Plaintiff Library Associates, LLC ("Library") Requests for Admission in writing and under oath.

### **GENERAL OBJECTIONS**

Plaintiff objects to the Set of Requests for Admission including the "Definitions and Instructions," to the extent the same requests information, materials or documents that are beyond the scope of discovery as permitted in Rules 36, to the extent the same requests information or materials protected by the attorney-client privilege or work product doctrines, and to the extent the same requests information or materials that are not discoverable. These responses are submitted subject to, and without waiving or intending to waive, but on the contrary intending to reserve and reserving the following:

A. All questions as to competency, relevancy, materiality, privilege and admissibility as evidence for any purpose any of the documents referred to or Responses given, or the subject matter thereof in any subsequent proceeding in, or trial of this action or any other action or proceeding;

B. The right to object to other discovery procedures involving the subject matter of these inquiries;

C. The right at any time to revise, correct, add or clarify any the Responses set forth herein or in documents referred to herein.



D. The inadvertent production of any document or information that is privileged, that was prepared in anticipation of litigation, that constitutes attorney work product, and that is otherwise immune from discovery, shall not constitute a waiver of any privilege or of any other grounds for objecting to discovery with respect to such document or any other document, or the subject matter thereof, or the information contained therein or the right of Lithko to object to the use of any such documents or the information contained therein during the subsequent proceeding.

#### **REQUESTS FOR ADMISSION**

1. Admit that You are a party to a Joint Prosecution, Defense and Tolling Agreement.

#### **ANSWER:**

**Admit. The terms of the Agreement are confidential and Lithko hereby objects to Library Associates possession of the terms of the Agreement.**

2. Admit that Plaintiff Balfour Beatty Construction, LLC or their Counsel requested that You enter into a Joint Prosecution, Defense and Tolling Agreement with Plaintiff Balfour Beatty Construction, LLC.

#### **ANSWER:**

**Admit. The terms of the Agreement are confidential and Lithko hereby objects to Library Associates possession of the terms of the Agreement.**

3. Admit that you had actual knowledge of the terms of Section 2.1.6 of the A133-2009 Agreement between Plaintiff Balfour Beatty Construction, LLC and Defendant/Third-Party Plaintiff Library Associates, LLC at the time You entered into a Joint Prosecution, Defense and Tolling Agreement with Plaintiff Balfour Construction, LLC.

#### **ANSWER:**

**Denied. The terms of the Agreement are confidential and Lithko hereby objects to Library Associates possession of the terms of the Agreement.**

This the 9<sup>th</sup> day of October 2020.



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*Attorneys for Defendant Lithko Contracting, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **LITHKO CONTRACTING, LLC'S RESPONSES TO LIBRARY ASSOCIATES, LLC'S REQUEST FOR ADMISSION** has been served by electronic mail as follows:

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*Attorney for Lowcountry Case & Millwork,  
Inc.*

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Peter Philip, Esq.  
Kelly Law Firm, LLC  
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*Attorney for Trimark Foodcraft, LLC and  
David Allen Company, Inc.*

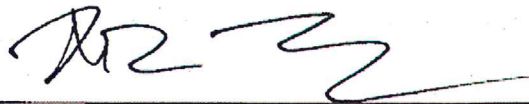
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Thurmond Kirchner & Timbes  
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*Attorney for Quantum Coatings, LLC*

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*Attorney for Precision Walls, Inc.*

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*Attorney for Cook & Boardman, LLC*

This the 9<sup>th</sup> day of October 2020.



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STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT  
) CASE NO.: 2019-CP-10-01108

Balfour Beatty Construction, LLC,  
Plaintiff,

v.

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

**BERNHARD MMC, LLC'S  
RESPONSE TO LIBRARY  
ASSOCIATES, LLC'S REQUEST  
TO ADMIT**

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Library Associates, Inc.,

Third-Party Plaintiff,

v.

Lithko Consulting, LLC, Guy M. Beaty, Inc.,  
Bernhard MMC, LLC, Gulf Stream Construction  
Company, Inc., Palmetto Automatic Sprinkler  
Company, Inc., Cook & Boardman, LLC, Strong  
Twoer Construction, LLC d/b/a Kock  
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, Lowcountry Case &  
Millwork, Inc., Quantum Coatings, LLC, Balfour  
Beatty Construction Group, Inc.,

---

Third-Party Defendants.

**TO: THIRD-PARTY PLAINTIFF AND ITS COUNSEL OF RECORD:**

Pursuant to the South Carolina Rules of Civil Procedure, Third-Party Defendant  
BERNHARD MCC, LLC (hereinafter "BMCC") hereby answers Third-Party Plaintiff's Request  
to Admit, by and through its attorneys, Walker Gressette Freeman & Linton, LLC.



1. Admit that You are a party to a Joint Prosecution, Defense and Tolling Agreement with Plaintiff Balfour Beatty Construction, LLC.

**ANSWER:**

**Admitted. To the extent Library Associates, LLC has obtained possession of a Joint Prosecution, Defense and Tolling Agreement or its terms, BMCC objects to such possession on the basis that the agreement is confidential and protected by the joint interest privilege.**

2. Admit that Plaintiff Balfour Beatty Construction, LLC or their Counsel requested that You enter into a Joint Prosecution, Defense and Tolling Agreement with Plaintiff Balfour Beatty Construction, LLC.

**ANSWER:**

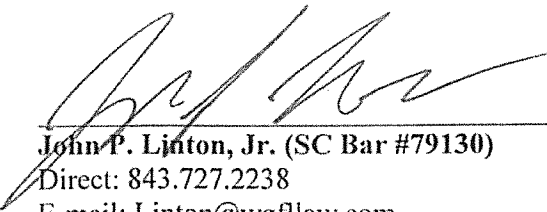
**Admitted. To the extent Library Associates, LLC has obtained possession of a Joint Prosecution, Defense and Tolling Agreement or its terms, BMCC objects to such possession on the basis that the agreement is confidential and protected by the joint interest privilege.**

3. Admit that you had actual knowledge of the terms of Section 2.1.6 of the A133-2009 Agreement between Plaintiff Balfour Beatty Construction, LLC and Defendant/Third Party Plaintiff Library Associates, LLC at the time YOU entered into a Joint Prosecution, Defense and Tolling Agreement with Plaintiff Balfour Beatty Construction, LLC.

**ANSWER:**

**In response to Request No. 3, BMCC admits that at the time it entered into a Joint Prosecution, Defense and Tolling Agreement with Plaintiff Balfour Beatty it was in possession of a copy of the A133-2009 Agreement between Library Associates and Plaintiff Balfour Beatty dated September 22, 2014. To the extent Library Associates, LLC has obtained possession of a Joint Prosecution, Defense and Tolling Agreement or its terms, BMCC objects to such possession on the basis that the agreement is confidential and protected by the joint interest privilege.**

<<SIGNATURE PAGE FOLLOWS>>



---

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E-mail: Linton@wgflaw.com

**Jennifer S. Ivey (SC Bar #102533)**

Direct: 843.727.2216

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**WALKER GRESSETTE FREEMAN & LINTON, LLC**

Mailing: P.O. Box 22167, Charleston, SC 29413

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**ATTORNEYS FOR THIRD-PARTY DEFENDANT  
BERNHARD MCC, LLC**

Charleston, South Carolina  
October 14, 2020

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT  
) CASE NO.: 2019-CP-10-01108

Balfour Beatty Construction, LLC

Plaintiff,

v.

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

Defendants.

CERTIFICATE OF SERVICE

---

Library Associates, Inc.,

Third-Party Plaintiff,

v.

Lithko Consulting, LLC, Guy M. Beaty, Inc.,  
Bernhard MMC, LLC, Gulf Stream Construction  
Company, Inc., Palmetto Automatic Sprinkler  
Company, Inc., Cook & Boardman, LLC, Strong  
Twoer Construction, LLC d/b/a Kock  
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, Lowcountry Case &  
Millwork, Inc., Quantum Coatings, LLC, Balfour  
Beatty Construction Group, Inc.,

Third-Party Defendants.

The undersigned hereby certifies that I have served a copy of the foregoing **BERNHARD  
MMC, LLC'S RESPONSE TO LIBRARY ASSOCIATES, LLC'S REQUEST TO  
ADMIT** in connection with the above-referenced matter by mailing a copy of the same by  
United States Mail, postage prepaid, and/or electronic transmission, as follows:



**VIA U.S. MAIL & EMAIL**

Bundy McDonald, LLC  
W.H. Bundy, Jr., Esq,  
M. Brent McDonald, Esq.  
1516 Old Trolley Rd, 2<sup>nd</sup> Floor  
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**ATTORNEYS FOR DEFENDANT/THIRD-PARTY  
PLAINTIFF LIBRARY ASSOCIATES**

**VIA EMAIL ONLY**

All Other Counsel of Record

A handwritten signature in black ink, appearing to read 'M. Minniti', is written over a horizontal line.

M. Eugenia Minniti  
Paralegal

Charleston, South Carolina  
October 14, 2020

1       STATE OF SOUTH CAROLINA  
                                           IN THE COURT OF COMMON PLEAS  
 2       COUNTY OF CHARLESTON  
                                           FOR THE NINTH JUDICIAL CIRCUIT

3  
 4       BALFOUR BEATTY CONSTRUCTION,       )  
       LLC,                                    ) VOLUME ONE  
                                               ) Case No.  
 5                                   Plaintiff,       ) 2019-CP-10-1108  
                                               )  
 6                       -versus-                )  
                                               )  
 7       LIBRARY ASSOCIATES, LLC; AND       )  
       METROPOLITAN LIFE INSURANCE        )  
 8       COMPANY, A NEW YORK CORPORATION    )  
                                               )  
 9                                   Defendants.)

10       LIBRARY ASSOCIATES, INC.,        )  
                                               )  
 11       Defendant/Third-Party Plaintiff,   )  
                                               )  
 12                       -versus-                )  
                                               )  
 13       LITHKO CONTRACTING, LLC; GUY M.    )  
       BEATY, INC.; BERNHARD MMC, LLC       )  
 14       GULF STREAM CONSTRUCTION CO.,     )  
       INC; PRECISION WALLS, INC.;        )  
 15       PALMETTO AUTOMATIC SPRINKLER        )  
       COMPANY, INC.; ET AL,                )  
 16                                                )  
                                   Third-Party Defendants.    )  
 17       -----

18                   Hearing before the Honorable Mikell R.  
 19       Scarborough, reported by Jennifer M. Huggins,  
 20       Court Reporter and Notary Public, at 10:00 a.m.  
 21       on September 13, 2021 at 100 Broad Street,  
 22       Courtroom 2A, Charleston, South Carolina.

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1       and said if you were going to ask him to tell me.  
2       I'd like to know who his tomorrow witness is.

3               THE COURT: By the end of the day,  
4       we're going to -- we're going to cover that one,  
5       for sure. Okay?

6               MR. BUNDY: Thank you.

7               THE COURT: Okay. All right. Are  
8       you ready to proceed?

9               MR. HILDEBRAND: Would you like me  
10       to distribute these? I can call my first  
11       witness. We've got the exhibit books, but I can  
12       go ahead and -- yes, sir. We can get started.

13              THE COURT: All right. Let's roll  
14       for about 30 minutes or so. Okay?

15              MR. HILDEBRAND: Okay.

16              THE COURT: All right.

17              MR. HILDEBRAND: Thank you. The  
18       plaintiff would call Tim Spano.

19              THE COURT: Mr. Spano, if you will  
20       come up this way, however you can get here. And  
21       this is our witness chair over here. Put your  
22       left hand on the Bible and raise your right.

23                      (TIM SPANO, having first been duly  
24       sworn, testified as follows:)

25              MR. BUNDY: Your Honor, can I ask

1       you about the mask?

2                   THE COURT:   Yeah.   Mr. Spano, if  
3       you could remove that mask, we'd appreciate it.  
4       Just, it's a lot easier to hear and to see.

5                   THE WITNESS:   No problem.   No  
6       problem.

7                   THE COURT:   So what I always ask  
8       the witness to do is to give us your full name,  
9       spell your last name, and your address for the  
10      record.   Okay?

11                  THE WITNESS:   Okay.   I'm Timothy  
12      Spano, S-P-A-N-O.   Address, 2104 Darlington Oak  
13      Drive, Seffner, Florida 33584.

14                  THE COURT:   How you spell Seffner?

15                  THE WITNESS:   S-E-F-F-N-E-R.

16                  THE COURT:   Thank you.   Very  
17      good.

18                               DIRECT EXAMINATION

19      BY MR. HILDEBRAND:

20              Q.   All right.   Mr. Spano, you just stated  
21      your full name for the record.   How old are you?

22              A.   55.

23              Q.   All right.   Where are you from  
24      originally?

25              A.   Tampa, Florida.

1           Q.    Okay.  Can you speak up just a little  
2           bit, please?

3           A.    Sure.

4           Q.    Okay.  Where are you from?

5           A.    Tampa, Florida.

6           Q.    All right.  And tell me about your  
7           educational background.  Did you go to college?

8           A.    I went to junior college, Dalton,  
9           Georgia.  No degree.  And then I started  
10          construction, making good money, and the rest is  
11          history.

12          Q.    Okay.  And when was that?

13          A.    That was, gosh, 1985, '86.  I graduated  
14          high school in '84.

15                   THE WITNESS:  Can you hear me, sir?

16                   THE COURT:  Yes, sir.

17                   THE WITNESS:  Okay.

18                   THE COURT:  I can hear you.

19          Mr. Bundy, I know you have difficulty hearing.  
20          If you need to move around, you certainly may.  
21          Okay?

22                   MR. BUNDY:  Do you mind if I sat  
23          over there next to -- closer to the witness?

24                   THE COURT:  I got no problem with  
25          that.  Just don't scare him.



1 BY MR. HILDEBRAND:

2 Q. All right. Mr. Spano, so you started  
3 work with -- in the construction business in  
4 1984, '85?

5 A. A little more to it. Dad was a  
6 contractor; so I was kind of born and raised in  
7 it. I did it for the summer, worked for my dad,  
8 things like that. So I was kind of always around  
9 it.

10 And I chose that profession even though  
11 my dad tried to talk me out of it. Yeah, so  
12 basically during college time, I was working  
13 construction also and doing drafting, designs,  
14 things like that.

15 Q. Okay. And then how long -- when did you  
16 actually start working for Balfour Beatty?

17 A. 2004. I believe it was April, the  
18 beginning of 2004. I've got about 17 years in  
19 now.

20 Q. Okay.

21 A. Formerly Centex Construction, but  
22 Balfour bought them in '07; so it's a combination  
23 of the two.

24 Q. Okay. All right. So you -- before you  
25 came with Balfour, you had been doing

1 construction work for about 19 years, if I did  
2 the math right? Does that sound right?

3 A. That's about right.

4 Q. Okay. And tell me what sort of  
5 construction, generally what sort of work you did  
6 in those 19 years?

7 A. Started off as mostly residential, some  
8 commercial, and then went into more commercial,  
9 industrial. Early on, did a lot of, you know,  
10 custom homes and kind of high-end stuff like  
11 that, and I then started doing more commercial.

12 And most of -- I should say, like the  
13 first part of my career was more -- was the  
14 superintendent field is kind of my -- how I came  
15 up through the ranks. And then pretty much the  
16 last half of my career has been, you know, in the  
17 project management side.

18 Q. All right. So the last half, so the  
19 last 20 years or so approximately?

20 A. Approximately, yeah.

21 Q. Okay. And you came to work for Balfour  
22 Beatty in 2004; is that right?

23 A. Uh-huh.

24 Q. Okay. And tell me what your job title  
25 was when you started and how that progressed.

1           A.    When I first started with them, I was a  
2           project manager with a different company before I  
3           came over.

4           Q.    Okay.

5           A.    RCS Construction out of Tampa. We did,  
6           you know, refrigerated. We did large commercial.  
7           We did industrial. Just kind of a combination of  
8           things.

9                    When I came over to Centex at the time  
10           with Balfour, I started on the Bank of America  
11           project, building new banks, and I was a  
12           superintendent for -- with them to get onboard  
13           with them for about the first year. So I built,  
14           I think, three banks, very fast-paced  
15           construction.

16          Q.    Okay.

17          A.    So that's why I said three in a little  
18           over a year.

19          Q.    Right.

20          A.    They were doing them pretty quick. At  
21           that point, I rolled into project manager.

22          Q.    And when would this take us? About what  
23           year?

24          A.    It was only 2005, '6, right in there.

25          Q.    Okay.

1           A.   And then basically was doing banks, and  
2           then BB&T came into Florida. I ended up heading  
3           up that account in Florida for building new  
4           branch banks, Bank of -- or BB&T, which is now  
5           Truist, I guess.

6           Q.   All right. So what has been your  
7           progression with Balfour since you became a  
8           project manager in about 2005, 2006?

9           A.   Basically, you know, worked -- worked my  
10          way up to senior project manager, and then was  
11          senior project manager on this project through  
12          the duration of the project.

13          Q.   Okay.

14          A.   That was my title.

15          Q.   Okay. Can you tell me what sort of -- I  
16          understand that Balfour Beatty is a large  
17          construction company; is that right?

18          A.   Yeah, very large.

19          Q.   Okay. Can you tell me about it,  
20          generally?

21          A.   Yeah. They're pretty much worldwide.  
22          The corporate is in London. We build all over  
23          the world. We build very diversified commercial,  
24          industrial, hospitals, apartments, military. So  
25          just kind of a plethora of things they do all

1 over the place.

2 Q. Okay. And are you in a particular -- is  
3 it called a division, or what sort of section?  
4 Or what would you call it where you are now --

5 A. So --

6 Q. -- during this project?

7 A. Yeah, during this project, I was  
8 basically based out of the Charlotte division. I  
9 had moved from Tampa to Charlotte, I guess, about  
10 a year before this had started, so near the  
11 beginning of 2014, right in that timeframe.

12 I moved to Charlotte and was overseeing  
13 as senior project manager. I was overseeing a  
14 mid-rise downtown Charlotte, apartment, parking  
15 deck. They're on a zero lot line. I was also  
16 over an apartment complex here on Daniel Island.  
17 So I was kind of going back and forth.

18 Q. Okay. So the Charlotte division, what  
19 geographical area does that cover?

20 A. Basically North Carolina, South  
21 Carolina, is where they cover.

22 Q. Okay.

23 A. It morphs a little bit; in other words,  
24 like our -- one time our president would be over  
25 in North Carolina, South Carolina, and Georgia.

1       So some of that geography moved a little bit as  
2       far as our upper executives.

3           Q.    Okay.

4           A.    But for the most part, it's North  
5       Carolina, South Carolina.

6           Q.    Okay. Do you have any approximation of  
7       how many projects you have worked on while you  
8       have been with Balfour prior to the Hotel  
9       Bennett?

10          A.    Oh, gosh, probably ten, somewhere in  
11       that range. 10, 12 maybe.

12          Q.    Okay. And what was the nature of those  
13       projects?

14          A.    Like I said, banks, a lot of banking for  
15       Bank of America BB&Ts, military housing; worked  
16       for a military group doing officer homes,  
17       apartment complex, community centers.

18                There's kind of a multitude of  
19       construction in the Southeast United States. So  
20       I was heading up all construction in the Gulf  
21       Coast region, which basically was from Key West,  
22       Pensacola, Gulfport, Mississippi, all the way  
23       around pretty much to Texas.

24          Q.    Okay.

25          A.    There were several bases there.

1           Q.    Okay.  Are there any sort of  
2           philosophies that are engrained in the employees  
3           of Balfour as far as work slogans or anything  
4           like that, that you could tell me about?

5                   MR. BUNDY:  Objection.  Calls for  
6           hearsay.  It's an out-of-court statement offered  
7           for proof of the matter asserted.  There's no  
8           exception to the hearsay rule for him to talk  
9           about a philosophy.  Objection.

10                   MR. HILDEBRAND:  It's not -- Your  
11          Honor, it's not hearsay.  It's not an  
12          out-of-court statement offered for his truth.  
13          It's his knowledge of the -- how the company is  
14          run.  It's not hearsay.

15                   THE COURT:  I'm going to overrule  
16          it.  I will allow it.  Go ahead.

17                   THE WITNESS:  Our motto is  
18          relentless ally.

19          BY MR. HILDEBRAND:

20           Q.    Okay.  And what does that mean?

21           A.    It basically means you put the owner  
22          first.  You go above beyond.  You, you know, do  
23          the extra that's not the norm.  It's to build an  
24          excellent job for an owner, I mean.

25           Q.    Tell me about the work that Balfour --

1       the Charlotte division does. Is it -- before I  
2       ask you that, can you describe to me what the  
3       difference is between negotiated work and bid  
4       work, and tell that the Judge, please.

5           A. Yeah. I mean, bid work is multiple  
6       bidders or contractors bid on a job. You have  
7       that a lot in public work, right, hospitals,  
8       things like that.

9           Q. Okay.

10          A. Negotiated work is basically, you've got  
11       a relationship with a client, and you work  
12       through drawings, and you negotiate prices on  
13       projects.

14          Q. Okay. Do you have any sort of  
15       approximation of -- well, since you have been  
16       with Balfour, about what percentage, just in  
17       gross numbers, would be bid work as opposed to  
18       negotiated work?

19          A. Oh, gosh. Probably 70, 80 percent  
20       negotiated.

21          Q. Does Balfour have a -- is there a  
22       preference in the construction industry as to  
23       whether it's typically preferable to do bid work  
24       or negotiated work?

25          A. We'd much rather do negotiated work.



1 Q. Why is that?

2 A. You're -- well, you're not just a  
3 number, you know, among a bunch of numbers.  
4 You're building that relationship with that  
5 client.

6 Q. All right. What is the -- Balfour's  
7 philosophy as far as its business development  
8 model is concerned and how it wants to build its  
9 business base and client base?

10 A. I mean, the ultimate goal is to have  
11 repeat clients, you know, to have repeat work.  
12 You want a client that's very satisfied, and he's  
13 going to refer you to other people he knows.

14 And he's going to -- if something else  
15 comes along or another development, you're the  
16 first call. I mean, this builds future work for  
17 you in negotiation.

18 Q. So repeat business. That's something  
19 that y'all try to develop?

20 A. Absolutely, absolutely.

21 Q. Good relationships with your clients?

22 A. Absolutely.

23 Q. Do you have a lot of repeat business?

24 A. We do. We do.

25 Q. What sort of -- have you done any

1 projects here locally? Any other projects  
2 besides Hotel Bennett?

3 A. Yes. We, of course, started with Jasper  
4 & Beach Company. We just finished up. It's over  
5 700,000 square feet, a mixed use office,  
6 apartment, parking deck, retail.

7 We just started across the street for  
8 the Beach Company, the Charles, which are very  
9 high-end townhomes. We're putting in piles right  
10 now.

11 Q. Are those negotiated jobs?

12 A. Absolutely. Just our department for  
13 Beach Company on John's Island, Stono Oaks, that  
14 was a negotiated deal. We're also doing up-fits,  
15 of course, in the office tower of Jasper for the  
16 Beach Company.

17 Q. Okay. What other -- how many projects  
18 have y'all done for the Beach Company, would you  
19 say?

20 A. I think we're -- I think Jasper was  
21 seven completed to-date, and I guess Stono would  
22 be eight, and Charles would be nine; so we have  
23 just started.

24 Q. Did those projects end well?

25 A. Yes, sir.

1           Q.    What other -- any other major projects  
2           in the Charleston area that y'all have done?

3           A.    Not completed, just starting Kiawah  
4           Senior Living, which is an assisted and senior  
5           living facility. That's been -- we've been  
6           working on the front-end of that and precon,  
7           things like that for a couple years now.

8                   Of course with COVID, it got delayed.  
9           But that was a repeat client. We had built a  
10          high-rise assisted living facility in  
11          Celebration, Florida, for them.

12          Q.    Okay.

13          A.    And when they came and bought land here,  
14          they came to us.

15          Q.    All right. Have you ever testified in  
16          court before?

17          A.    Testified one time for -- kind of as a  
18          witness on a residential project that I just went  
19          and looked at.

20                   A client asked me to come look. He was  
21          having an issue with drywall, and I was giving  
22          him my opinion of what I saw. And basically I  
23          got called just to testify what I saw. That was  
24          it.

25          Q.    Okay. Have you testified in any prior

1       lawsuits --

2           A.    No.

3           Q.    -- similar to this?

4           A.    No, sir.

5           Q.    Okay.  Have you done any prior projects  
6       for Michael Bennett or any entities related to  
7       him?

8           A.    I have not.

9           Q.    How about with his -- with the owner's  
10       representative, a fellow named Jim Clements?  To  
11       your knowledge -- or have you done any work with  
12       him?

13          A.    No prior work with him.

14          Q.    And how about with Buck Lindsay, the  
15       architect on this project?

16          A.    No prior work with him.

17          Q.    Do you know how Balfour came to get  
18       involved with the Hotel Bennett?

19          A.    I don't.  I wasn't at the precon part of  
20       the process; so, no, I don't know how it  
21       originated.

22          Q.    All right.  When did you get involved  
23       with this project?

24          A.    Beginning of 2015.  I was -- I had been  
25       living in Charlotte for about a year, away from

1 my wife. So we were in the process of loading  
2 our home in Tampa and moving to Charlotte. It  
3 was being organized, and I was asked that -- if I  
4 was willing to move to Charleston and work on  
5 this project, and I immediately said yes.

6 Q. Okay. So you said early 2015. Was that  
7 January?

8 A. I think it's around January. I know I  
9 officially moved here into the house, I think it  
10 was, the first week of March in '15 when I  
11 actually moved my stuff here. But I had -- I  
12 know once I got involved, I immediately started,  
13 that I was looking into the permit process.

14 So I started coming down and checking  
15 with the city and the county, trying to figure  
16 out what the permits were to get the permit. You  
17 know, visiting the site, but ultimately getting  
18 the permits so the job could start.

19 Q. So construction had not started when you  
20 got involved?

21 A. It had not.

22 Q. Okay. Can you tell me what you  
23 understood the -- this hotel was going to be or  
24 what the project was?

25 A. A luxury hotel. Basically, a high-rise

1 marquis hotel for Charleston.

2 Q. Okay. All right. The contract that was  
3 entered into in this matter was a construction  
4 manager as constructed. Do you understand that?

5 A. I do.

6 Q. All right. Can you describe for the  
7 Judge what the difference is between a  
8 construction manager as constructor and just a  
9 contract that involves just with a general  
10 contractor? What's the distinction?

11 A. My understanding is it's basically more  
12 of a precon side of things. Basically, you're  
13 working as a construction manager and then  
14 becoming the constructor, you know, once that's  
15 settled, is my understanding of it.

16 Q. Okay. All right. On this particular  
17 project, the -- who are the primary parties to  
18 the agreement and for the project?

19 MR. BUNDY: Your Honor, I object.  
20 The contract is the only evidence that was  
21 establishing who the primary parties are.

22 This would be an out-of-court statement  
23 or proof of matter asserting. He's already said  
24 he wasn't involved in negotiations. So now it's  
25 time to put the contract in if we're going to

1 start talking about it.

2 MR. HILDEBRAND: Your Honor, he can  
3 testify certainly based on his experience who the  
4 primary parties are in a project, generally, and  
5 certainly for this particular job.

6 THE COURT: I'll allow it.  
7 Overruled.

8 MR. HILDEBRAND: Thank you.

9 BY MR. HILDEBRAND:

10 Q. Who are the primary parties to this  
11 particular project?

12 A. So it's Library -- the contract was with  
13 Library Associates, LLC.

14 Q. Okay.

15 A. Per the contract, I believe we had Jim  
16 Clements as the owner's representation, which  
17 is -- I believe it's the company's matrix. I  
18 don't know the whole LLC unless it's in front of  
19 me.

20 Q. Okay.

21 A. The architect was Winford Lindsay --

22 Q. Okay.

23 A. -- out of Atlanta. And then -- and they  
24 also held all of the MEP, you know, structural,  
25 electrical. That was all in-house as part of

1       WLA, Winford Lindsay, is what we referred to him  
2       in Balfour Beatty.

3           Q.    Okay. Did Balfour Beatty have any  
4       design responsibilities for this project?

5                   MR. BUNDY:  Objection. That's  
6       hearsay. The contract is not in evidence.

7                   MR. HILDEBRAND:  Your Honor, he can  
8       testify about what his -- I mean, my gosh, if he  
9       can't testify about what their responsibilities  
10      were, but then -- everything we do in life is  
11      based on a contract, Your Honor.

12                  And he can testify about what he did and  
13      what his responsibilities are, and we can get to  
14      the contract. But I'd like to be able to try the  
15      case like I want to.

16                  MR. BUNDY:  Well, the problem with  
17      trying the case like he wants to is it doesn't  
18      comply with the Rules of Evidence. This is an  
19      out-of-court statement offered for the proof of  
20      the matter asserted. Okay? It's hearsay.

21                  He doesn't know any -- how would he  
22      possibly know that? There's nothing in the  
23      record for him -- because the best evidence -- we  
24      can go to the Best Evidence Rule. The best  
25      evidence of who is in the parties to this



1 contract is the contract.

2 So it's inadmissible under the Best  
3 Evidence Rule. He's required to put in the  
4 document before he can talk about it.

5 THE COURT: We are going to get  
6 there. I'm going to allow it. Go ahead.

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

9 BY MR. HILDEBRAND:

10 Q. And what responsibilities, if any, did  
11 Balfour have on this project as far as the design  
12 is concerned?

13 A. No design. No design responsibilities.

14 Q. Okay. All right. So when the -- when  
15 you got involved in this project, the contract  
16 had already been signed; is that correct?

17 A. I believe so. I believe -- I don't know  
18 the -- I can't remember the exact execution date,  
19 but it was right at that time. I knew it was  
20 awarded here verbally, or it was already  
21 assigned.

22 Q. Okay. Do you know what the original  
23 scheduled time was for this job?

24 MR. BUNDY: Objection.

25 MR. HILDEBRAND: Your Honor.

1 THE COURT: Overruled. Go ahead,  
2 go ahead.

3 THE WITNESS: The 28-month duration  
4 is -- was the duration for the -- for the  
5 project.

6 BY MR. HILDEBRAND:

7 Q. Okay. Can you tell me how a general  
8 contractor goes about scheduling a project? Do  
9 you have any involvement with that?

10 A. Yeah, at times. Sometimes we're -- we  
11 get into -- you know, we'll come in earlier. If  
12 we have time, we'll come in earlier and we'll  
13 help with the scheduling.

14 But basically you're looking at, you  
15 know, the documents and the structure and how  
16 you're putting it together. You've got to look  
17 at the logistics, the area of the site, and how  
18 you're getting materials in and out. I mean,  
19 there's a lot that comes into the conversation on  
20 a schedule.

21 Q. Okay. Is the owner part of those  
22 discussions and part of the scheduling  
23 discussions?

24 A. No.

25 MR. BUNDY: Objection. Lack of

1       personal knowledge.

2       BY MR. HILDEBRAND:

3             Q.    What was your answer?

4             A.    I don't normally know.  I don't know if  
5       they were not.

6             Q.    On this job, you don't know whether they  
7       were not?

8             A.    I don't.

9             Q.    Okay.

10            A.    They weren't -- when I got the schedule,  
11       it was -- the schedule was put together.

12            Q.    All right.  What involvement do the --  
13       does Balfour Beatty's subcontractors have with  
14       the project schedule and their work?

15            A.    So for the most part, your main -- your  
16       main subs that have to do with structure or  
17       mechanical, electrical, plumbing, they're  
18       involved in the discussion and the duration.

19                    We normally have meetings, coordination  
20       meetings, and talk through, you know, sequencing  
21       and things like that to make any kind of tweaks  
22       or adjustments to it.

23                    There are some subcontractors, I should  
24       say, that may not be included on those kind of  
25       meetings, like landscaping.  You know, we know

1       how many trees or plants are going in, and we  
2       allot the time, but then send it for review or  
3       acceptance.

4           Q.   All right.  How do subcontractors plan  
5       for their work on a job like this or how they're  
6       going to --

7                   MR. BUNDY:  Objection.  There's no  
8       foundation for that.  He hadn't testified as a  
9       subcontractor.  He hadn't testified he's a  
10      scheduler.  Now we're being asked how a third  
11      party does something.  I object.

12                   THE COURT:  Yeah.  I might sustain  
13      that one.  Tell me what the -- tell me where  
14      you're going.  I know you're trying to lay a  
15      foundation.

16                   MR. HILDEBRAND:  Yes, sir.  He's --  
17      I'm simply asking him -- he works with  
18      subcontractors every day.  He knows how -- what  
19      their knowledge is when they go about scheduling  
20      and what they do.  I'm asking him generally  
21      what --

22                   THE COURT:  You're saying  
23      generally, based on his experience?

24                   MR. HILDEBRAND:  Yes, sir.

25                   THE COURT:  Generally, based on

1       that. All right. I'll allow it on that basis.

2       Go ahead.

3                   MR. HILDEBRAND: Thank you.

4                   THE WITNESS: So repeat it, please.

5       BY MR. HILDEBRAND:

6           Q. Certainly. As a general proposition on  
7       a complicated project like this, can you tell me  
8       how a subcontractor goes about scheduling and  
9       planning for its work?

10          A. Yes. So, I mean, you look at the  
11       duration. So within a schedule, you have  
12       durations for say per floor or per area, right?

13                So you look to the flow of the building,  
14       how we're going to start at the bottom and work  
15       up, how we're going to rotate around the  
16       building. You get in a sequence because subs  
17       can't all be in the same place at one time.  
18       Certain subs go first, and then, you know, you  
19       have a path.

20                So all those things are discussed, so  
21       that they can look at durations that they have in  
22       a particular area to figure, you know, manpower  
23       or resources to make -- meet that schedule.

24          Q. Okay. Do subs sometimes -- on  
25       construction jobs, do subs prefabricate work?

1           A.    They do.

2           Q.    Tell me -- explain to the Judge what  
3           that is.

4           A.    Kind of most prefer to.  So any work  
5           that they can -- pieces of their work that they  
6           can put together kind of in a controlled  
7           environment, maybe off-site, tends to be more  
8           efficient for them.

9                   In other words, I guess probably an easy  
10          reference is, say a shower valve that's going in  
11          a shower.  If you can take that valve, solder  
12          your pipe connections for your cold water, your  
13          hot water, and have those connections already  
14          soldered in say a factory setting or a warehouse  
15          setting, then you're shipping it with all that  
16          work already completed, and you're just tying in.

17                 So it just eliminates the onsite process  
18          of the work, and, you know -- and the other  
19          things that come with it with other work going on  
20          around you.  It just enables them to get little  
21          more work done in a controlled environment before  
22          it ships to the site.  Basically, it's prefab.

23                   THE COURT:  Okay.

24          BY MR. HILDEBRAND:

25           Q.    All right.  Let me ask you about some of

1       the subcontractors on this particular job. I  
2       want to ask you -- well, let me ask you this.  
3       Generally, how does Balfour go about selecting  
4       subcontractors for a particular job?

5           A. I mean, it would be based on, of course,  
6       the type of project, and we typically try to work  
7       with subs that we worked with before that we have  
8       experience with and --

9           Q. Why is that?

10          A. Well, you know their performance. You  
11       know what they're capable of. You know their  
12       amount of employees and things like that.

13          Q. How about the -- let's go through some  
14       of the primary subs on this job and tell me  
15       whether you've had prior relationships with them.  
16       How about Baker Rubin (ph)?

17          A. Yes.

18          Q. Bernhard MCC?

19          A. Yeah, the company has. I didn't before  
20       this job, but the company has.

21          Q. I'm talking about Balfour.

22          A. Yeah, yeah.

23          Q. Okay. Cook and Boardman?

24          A. Yes.

25          Q. David Allen Company?

1 A. Yes.

2 Q. First Choice Glass?

3 A. Maybe. I'm not sure. I'm not sure.

4 This could have been the first one.

5 Q. Flooring Services?

6 A. They were a local sub; so I believe this  
7 was the first project we used them on.

8 Q. How about Gulf Stream Construction?

9 A. Yes.

10 Q. Guy Beaty?

11 A. No. They were a sub for, I think, BMCC.

12 Q. Okay. Lithko?

13 A. Yes.

14 Q. Old North State Masonry?

15 A. Yes.

16 Q. Pasco?

17 A. I believe so, yes.

18 Q. Pleasant Places?

19 A. Yes. They did some of the other Beach  
20 projects.

21 Q. Precision Walls?

22 A. Yes.

23 Q. Warco?

24 A. Yes.

25 Q. Watson Electric?



1 A. Yes.

2 Q. Okay. And those are all I listed.

3 Would you describe that -- characterize that list  
4 I gave you as many of the primary subs on this  
5 job?

6 A. That's, yeah, the majority of them.

7 Q. Okay. All right. So the job -- the  
8 ground had not yet been broken when this job  
9 began; is that correct?

10 A. Yeah. When I got here, there was  
11 basically a chain link fence around it. I guess  
12 the old building had been demoed; so there was  
13 still a little rubble, you know, things like that  
14 on the site. That was the condition on the site  
15 when I got down here, the first time I looked at  
16 it.

17 Q. Okay. All right. So tell me what the  
18 progress of construction was. What did you do?  
19 What did you start with and how did that go?

20 A. So, of course, you put your swift  
21 measures, your basically silt fence in and things  
22 like that, for erosion control stuff, having an  
23 inspection. And then it allows you, kind of  
24 releases you to do your land alteration, site  
25 work.

1                   So at first, there was a little bit of  
2                   clean up just with some of the rubbles there.  
3                   But with this job, there was -- there was an  
4                   underground parking garage with, you know, a  
5                   water table that's not that far down.

6                   So the first thing we did was we came in  
7                   and we basically had to drive sheet pile, metal  
8                   sheathing that would interlock. I'm trying to  
9                   explain it to you guys.

10                  So you basically are building a steel  
11                  wall around the perimeter of the basement that is  
12                  driven down into the ground, that then allows you  
13                  to excavate down.

14                  So, I guess, your first process would be  
15                  to drive sheet pile, and then before you start  
16                  any excavation, you would have -- you would  
17                  basically have a concrete cap that locked all  
18                  that sheet pile in it.

19                  Q.    Okay.

20                  A.    But you also had to -- well points are  
21                  basically PVC pipe that runs down in the ground  
22                  with a pumping system that extracts the water, so  
23                  you can lower the water table.

24                  So as you're digging down the inside of  
25                  the parking garage, you want to lower the water

1       table on the outside so -- just so the  
2       hydrostatic pressure is not pushing the walls in.  
3       So that's the first process. So that was the --  
4       probably the most complicated thing, you know,  
5       here was, getting that process, getting it down  
6       to grade to where you could start, you know,  
7       foundation.

8               But once we got all of that in, then you  
9       drive your piles, your concrete piles that this  
10      building has to sit on, the foundation has to sit  
11      on.

12             Q.    Okay.

13             A.    You're basically driving them and  
14      punching them down around -- and this one was  
15      around 20 feet -- 18 to 20 feet to the bottom of  
16      your parking deck, where your actual slab on  
17      grade would start down there.

18               So you punched them through. Then you  
19      start excavating the hole out to where you'd start  
20      the foundation.

21             Q.    Okay. Let me stop you there for a  
22      minute and we'll get back in just a -- for a  
23      moment, if I may. Have you heard the acronym or  
24      the term BIM?

25             A.    Yes.

1 Q. Do you know what that stands for?

2 A. Yeah, building information modeling.

3 Q. And what is BIM?

4 A. It's a software program that basically  
5 takes a set of drawings or two-dimensional  
6 drawings and puts it in a 3D model.

7 Q. All right. And can BIM be used by an  
8 architect?

9 A. Sure.

10 Q. Can it be used by a contractor?

11 A. Sure.

12 Q. To your knowledge, did the architect  
13 employ BIM on this project?

14 A. They did not.

15 Q. Do you know why they didn't?

16 MR. BUNDY: Objection. Based on  
17 hearsay. And there's no foundation how he --  
18 there's no foundation as to how he can possibly  
19 know that.

20 MR. HILDEBRAND: Your Honor, it's  
21 not hearsay. It's knows and knowledge.  
22 Certainly he can testify about whether -- and if  
23 he had a conversation with the owner's  
24 representative, who is the architect, then  
25 certainly he can testify about that. It's not

1       offered to -- as a matter of proof.

2                   MR. BUNDY:   It's an out-of-court  
3       statement on the proof of the matter asserted.  
4       He's saying -- he's asking him why somebody else  
5       did something.   Why did the architect do that?

6                   And he hadn't laid any foundation as to  
7       how he could possibly know the answer to that  
8       question.   The First Rule of Evidence says --

9                   THE COURT:   Unless he has personal  
10      knowledge, right?

11                  MR. BUNDY:   If he has got personal  
12      knowledge, sure, under the Rules of Evidence, he  
13      can, sure.

14                  THE COURT:   Sure.   Okay.

15                  MR. BUNDY:   But it can't be based  
16      on hearsay.   It's got to be personal knowledge.

17                  THE COURT:   I'm with you.   Okay.  
18      If he has got personal knowledge, you can tell  
19      me, whether or not the architect had BIM.

20      BY MR. HILDEBRAND:

21                  Q.   Did they?

22                  A.   They did not.

23                  Q.   Okay.   Was there a requirement in  
24      Balfour's contract for Balfour to provide BIM?

25                  MR. BUNDY:   Objection.   The

1 contract is not in the record, and this witness  
2 is now testifying what's in the contract. The  
3 contract is not in the record. The best evidence  
4 is the contract. Thank you, Your Honor.

5 MR. HILDEBRAND: Your Honor, he  
6 can -- his knowledge of the contract is critical  
7 to the case and everything that he has done. He  
8 can certainly testify about what his obligations  
9 were, and I don't have to go through every single  
10 time and say, did you have to do this, or what  
11 did you --

12 THE COURT: Okay. I'm going to  
13 allow it. Go ahead.

14 MR. HILDEBRAND: Thank you.

15 THE WITNESS: BIM requirement was  
16 not in the contract.

17 BY MR. HILDEBRAND:

18 Q. Okay. Did Balfour employ BIM on this  
19 project?

20 A. We did.

21 THE COURT: Was that a yes or a no?  
22 I'm sorry.

23 THE WITNESS: Yes, sir.

24 BY MR. HILDEBRAND:

25 Q. If you could speak up just a little bit.

1           A.    I'm sorry.

2           Q.    And why did Balfour use BIM if it was  
3           not contractually obligated to?

4           A.    We like to use it especially on a  
5           complicated job, as -- such as this one was.

6                   With our main mechanical, electrical,  
7           plumbing subs, basically to take what's on the  
8           drawings, get it in a 3D model, which gives you a  
9           vertical aspect of the building to fit in their  
10          mechanical, electrical, plumbing, piping, and  
11          things like that.

12                   So for instance, like the ceiling --  
13          this ceiling to the actual structure deck above  
14          it, sometimes you have larger spaces less, but  
15          you've got to fit all of those components up  
16          there. So it allows you to design the size of  
17          the duct, the size of the pipe, maybe insulation  
18          around the pipe.

19                   And it's basically coordinating the  
20          mechanical, electrical, plumbing to detect any  
21          kind of interference or clashes that are -- that  
22          are in it. So basically you can figure out if  
23          the drawings, as designed, it works.

24           Q.    So is it a fair statement that you used  
25          the BIM to determine if the work shown on the

1 drawings actually works or not in the real world?

2 MR. BUNDY: Leading. Objection.

3 THE COURT: I'm sorry, I missed the  
4 question. Objection was to leading, but --

5 MR. BUNDY: Yes, Your Honor.

6 BY MR. HILDEBRAND:

7 Q. So the purpose of BIM, from Balfour's  
8 perspective, is for -- to allow it to review the  
9 drawings to determine if there are clashes; is  
10 that a fair statement?

11 MR. BUNDY: Objection.

12 THE COURT: Objection noted.

13 Overruled. Go ahead.

14 THE WITNESS: Yes.

15 BY MR. HILDEBRAND:

16 Q. All right. Okay. So you were there on  
17 this job from the very beginning with the site  
18 preparation until completion?

19 A. Uh-huh.

20 Q. You need to answer yes or no for the  
21 record, please.

22 A. Yes.

23 Q. All right. And what was your role on  
24 this job?

25 A. Senior project manager.



1           Q.   All right.  What was your job as the  
2           senior project manager?

3           A.   To oversee the project, to oversee the  
4           field, the office, oversee the whole project  
5           basically.

6           Q.   Okay.  So you were boots on the ground?  
7           You were there every day; is that right?

8           A.   I was.

9           Q.   Okay.  Was there anybody above you who  
10          was on-site on this job?  Did you have a  
11          supervisor who was on-site?

12          A.   Yes.  So you mean full-time on-site?

13          Q.   Yes.

14          A.   No, just part-time.

15          Q.   Okay.  So who would have been there  
16          part-time?

17          A.   Originally Mike Baumbach, senior vice  
18          president.  So he was -- when we first started,  
19          he was basically above me, and he would come down  
20          to meetings and visit every couple of weeks or  
21          whatever.

22          Q.   Okay.

23          A.   And we'd go through things.

24          Q.   All right.  So were you the top dog on  
25          this project as far as the supervision, on-site,

1       daily supervision?

2           A.    On-site, yes.

3           Q.    Okay.  And then who was under you?

4           A.    I had -- of course, we had  
5       superintendents.  Bob Kauferman originally was a  
6       senior and general, I think.  I can't remember  
7       the title now, but was the original super on the  
8       ground, I believe, for the first year or so.

9           Q.    Okay.

10          A.    Dan Richie came in, superintendent.

11          Q.    Okay.

12          A.    I believe about -- I don't know -- 10  
13       months and maybe a year in, somewhere in there,  
14       around the time Bob left.

15          Q.    Okay.

16          A.    Marty Dale, senior super, was on the  
17       project.  Johnny Eldridge, superintendent; Ryan  
18       Ledford, superintendent.

19                I do want to state, when we were coming  
20       out of the ground, those guys were working on  
21       other projects, finishing them up, anywhere  
22       between 10 months in and 12 months in.  We were  
23       transitioning them on as -- as the job started --  
24       began in progress.  You know what I mean.

25          Q.    Okay.

1           A.    We also had periodically through the  
2           project, I mean, we brought in more  
3           superintendents; so going by memory here, but  
4           brought in Mike Jansen, a general superintendent,  
5           out of Atlanta. We bought him in for a little  
6           while to help.

7                    Brought in Heath Bradford,  
8           superintendent, brought him down for a while.  
9           Steve Zenowski was an assistant superintendent,  
10          brought him in.

11                   Let me think. AJ. I'm trying to  
12          remember AJ's full name. He was a project  
13          engineer. We brought him in to help. We also  
14          had Travis Farris, assistant superintendent.

15          Q.    Okay.

16                A.   We had him for a while. So we kind  
17          of -- as work got heavy, we would bring guys in  
18          to assist on different areas of the project. So  
19          that's on the superintendent side.

20                Q.   When you say, "on the superintendent  
21          side", do you mean on the -- out in the field  
22          side?

23                A.   The field side.

24                Q.   Okay. So there -- you would have  
25          typically different employees on the field side

1       and then in the office?

2           A.    Correct.

3           Q.    Okay.  And I would assume that people in  
4       the field are overseeing the actual construction  
5       and then office people have different  
6       responsibilities?

7           A.    Yeah.  They tend to -- I mean, they are  
8       doing paperwork, RFIs, submittals, pay apps, you  
9       know, depending on their title or role, and  
10      basically moving the paperwork along and the  
11      e-mails and all the office side of things.

12                They also have overlap out in the field.  
13      That's one of my preferences is to get office  
14      staff in the field as much as possible just for  
15      experience.

16           Q.    Okay.  So can you explain to the  
17      Judge -- and it's not entirely clear to me.  So  
18      at the top of the triangle on -- or top of the  
19      pyramid during construction for supervision was  
20      you, correct?

21           A.    Supervision?

22           Q.    Right.

23           A.    Overall, over the job, I'm here.  We had  
24      a set of -- we had a set of field  
25      superintendents.

1 Q. Okay.

2 A. And then we had office, right?

3 Q. Okay.

4 A. So go ahead.

5 Q. So you have field superintendents. Is  
6 there anybody underneath a field superintendent?

7 A. Say that again.

8 Q. Is there anybody underneath a field  
9 superintendent, or is that where --

10 A. You have those titles: General  
11 superintendent, senior superintendent,  
12 superintendent, assistant superintendent, field  
13 PE. So that's kind of the progression of  
14 authority on the field side.

15 Q. Okay. When you -- you said a field PE?

16 A. Uh-huh.

17 Q. What is that?

18 A. Basically a project engineer that -- you  
19 have an office project engineer, and you have a  
20 field project engineer.

21 So they're more, basically -- typically  
22 out of school, working under a superintendent,  
23 learning just the field engineering side. It's  
24 not a quote, "engineer". That's just a title  
25 term To be clear.

1           Q.   Gotcha.  Okay.  All right.  So you've  
2           already described to the Judge how you came out  
3           on the ground for this project or what the  
4           beginning stages were.  Can you just very briefly  
5           kind of work -- tell him what the sequence of  
6           construction is all the way to topping out?  How  
7           does construction proceed?

8           A.   Okay.  This particular job is a  
9           cast-in-place concrete job.  So basically you're  
10          forming and pouring your concrete columns, your  
11          floors, and working all the way up to the roof  
12          basically.

13                So once we excavated down into the  
14          basement, per se, and got the dirt out to where  
15          we could start foundations.  The foundations are  
16          a little more complicated.  You do have grade  
17          beams and pile caps and things to where you can  
18          get to the point to pour your slab.

19                Then you come up with formed columns.  
20          Then at that point, once you have columns, you  
21          come in with what we call tables, big wood  
22          tables, with basically shoring underneath that  
23          builds basically a platform or a floor base above  
24          you.

25                So you build these tables.  You put the

1       shoring under it. Once you do that, on top of  
2       those tables is where you put your sleeves. You  
3       put your PT cable, post-tension cable, and you  
4       put your rebar reinforcements. All the things  
5       that have to go in that slab, you put on this  
6       platform to where you can pour the concrete.

7               For that next floor, the same thing.  
8       You strip the forms. You put what we call  
9       re-shores. You have to put shoring back under it  
10      to support it for a certain amount of time,  
11      typically three floors above before you can take  
12      that shoring out.

13             So you just kind of work your way in a  
14      stack system. This particular job, when we were  
15      in the basement, we ended up having to pour the  
16      slab a little differently other than the original  
17      contract, what the original schedule showed, just  
18      from the elements we ran into down there.

19             Pluff mud, which I wasn't familiar with  
20      before -- to where we would put a wellpoint in  
21      the middle to pull water out. It wouldn't  
22      pull -- it would pull the water out, about a cup.

23                     THE COURT: Right.

24                     THE WITNESS: So, basically, we  
25      kind of changed gears and started isolating into

1 smaller sections to where we could have a normal  
2 pump, as you would to know it, to pump the water  
3 out to work the foundation. So the basement part  
4 went a little different, in smaller sections,  
5 than was originally planned.

6 BY MR. HILDEBRAND:

7 Q. And describe, if you would again, what  
8 stripping forms means and doing the re-shores.

9 A. So the tables that we built, which are  
10 big wood platforms with shores that are  
11 supporting it. Basically, once you pour that  
12 concrete and it's cured to a certain point, you  
13 pull the shoring out.

14 You drop those tables. You move them.  
15 You use them in another section. But you have --  
16 you have shoring that you have to put in just  
17 under the concrete to help support it until it  
18 fully cures.

19 Q. Okay.

20 A. Not just fully cures, but because you're  
21 adding floors above it, you've got to leave --  
22 per an engineer, you've got to leave those --  
23 that shoring in for a certain amount of time or a  
24 certain --

25 Q. Typically, how long is the re-shores



1       plugged in?

2           A.   Well, it's -- typically, you want three  
3       floors of shoring.  So once we get three floors  
4       above, then we typically pull that bottom  
5       re-shore out.

6           Q.   Okay.

7           A.   And that basically opens up the floor  
8       for framing and whatnot.

9           Q.   Okay.  All right.  So you basically  
10       leapfrog your way up the building with the  
11       concrete floors?

12          A.   Yeah.  This particular job, we ended up  
13       doing basically those slab -- the slab sections  
14       in two sections.  So we were kind of moving east,  
15       west, you know, kind of jogging back and forth as  
16       we -- you would do half.  You would pour it.

17                You would move -- the columns would  
18       start over here while we're prepping slab over  
19       here.  It's just kind of -- it's basically a  
20       rotation around the job; so you kind of have a  
21       pattern that you would move up the shell.

22          Q.   Okay.  So I interrupted you earlier.  So  
23       you start the foundation.  Then you do each pour  
24       for the floor.  You do your steel structure  
25       around; is that correct, the next thing?

1 A. On the basement?

2 Q. Right.

3 A. Yes. So we did the sheet pile.

4 Q. Okay.

5 A. Which created the wall.

6 Q. The next phase, generally, is what?

7 A. Pardon?

8 Q. The next phase, generally, is what?

9 A. On that situation, you drive piles once  
10 you get the shoring in place.

11 Q. Once you've done that, going up, what's  
12 the progression?

13 A. Basically, you pour your slab, columns,  
14 tables, shoring, layout, all your elements on  
15 your slab, your penetration sleeve, your rebar  
16 and all that.

17 Q. Right.

18 A. There the inspection, pour, strip forms,  
19 shift to another area. So you're just moving  
20 tables. The columns are constantly going up,  
21 rotating around. Tables are constantly going up,  
22 rotating around. We're kind of working a spiral  
23 effect up the building.

24 Q. Okay. What's the next general phase of  
25 construction?

1           A.   Well, once you get shell up -- or I  
2           should say, once you get your floors and you're  
3           able to pull the re-shores out on the lower  
4           floor, on this one, it was -- you know, exterior  
5           walls, CMU walls would go on the exterior. That  
6           would --

7           Q.   What is CMU?

8           A.   Basically block, cement block. Cement  
9           block would form between the columns and from  
10          floor to floor. So you basically fill in that  
11          wall around the building.

12          Q.   And is that how it went all the way up  
13          the whole building?

14          A.   It did. It did.

15          Q.   Okay. So you pour the floors, you fill  
16          in the sides with cinder blocks, and you do that  
17          all the way up to the top; is that right?

18          A.   Uh-huh.

19          Q.   All right. What's next, generally?

20          A.   Your interior frame.

21          Q.   What is that?

22          A.   Basically metal stud, building your  
23          walls, your interior walls, your layout, build  
24          all your interior walls, and, of course, tie into  
25          the bottom wall or the exterior walls.

1 Q. Okay. What's next?

2 A. Then your rough-ins, so your MEPs. Your  
3 mechanical, your electrical, your plumbing.  
4 Rough-ins start in the wall systems. So where  
5 you're running outlets, which is thermostats, et  
6 cetera. Then you would basically sheetrock the  
7 walls.

8 Q. Okay.

9 A. And then you put the drywall up.

10 Q. Drywall and then you do your finishes  
11 after that?

12 A. Yeah. I mean, you've got, you know --  
13 you've got cabinets in some areas. You've got  
14 millwork or trim in some areas. Painting, of  
15 course. Countertops, crown molding, lighting.  
16 So, yeah, it's a progression of finishes.

17 MR. HILDEBRAND: Okay. I'm about  
18 to go into another area where he's going to talk  
19 about the problems that he encounters; so it's a  
20 natural stopping place if you'd like to.

21 THE COURT: Okay. All right.  
22 Let's take a break now. Let's plan to come back  
23 at 2 o'clock.

24 MR. BUNDY: Can I ask you to  
25 admonish the witness since he's under oath?

1 THE COURT: All right. So,  
2 Mr. Spano, you're under oath. You're on direct  
3 testimony. So just, I would -- when you come  
4 back, I want you to come on back in the witness  
5 stand. But you shouldn't be consulting with your  
6 attorneys during the break.

7 (A recess transpired.)

8 THE COURT: Okay. Back on the  
9 record. Mr. Spano, you're still under oath.

10 THE WITNESS: Yes, sir.

11 THE COURT: All right. Very good.  
12 Mr. Hildebrand?

13 MR. HILDEBRAND: Thank you, Your  
14 Honor.

15 BY MR. HILDEBRAND:

16 Q. All right. Mr. Spano, would you please  
17 turn to Exhibit 56 on that document.

18 A. Okay.

19 MR. BUNDY: Your Honor?

20 THE COURT: Yes, sir.

21 MR. BUNDY: This is an exhibit  
22 that's labeled 56. I wasn't aware we had any  
23 exhibits in evidence yet. I've heard no motion  
24 to introduce any evidence. And could we mark  
25 them for ID first and then move them when they're

1       in exhibits? That way if they don't get in,  
2       there's no confusion.

3                   THE COURT: They'll already -- all  
4       right. So what we'll do is, we'll consider them.  
5       They could be -- it doesn't matter what number  
6       they are, but they'll be considered to be marked  
7       for identification purposes until they're moved  
8       into evidence. If there's an objection, we'll  
9       entertain that at that time.

10                  MR. HILDEBRAND: Yes, sir.

11                  MR. BUNDY: And I'll need to be  
12       provided with a copy of the document that they've  
13       propose to identify.

14                  THE COURT: All right.

15                  MR. HILDEBRAND: Yeah. We have  
16       several copies.

17                  MR. BUNDY: And, Your Honor, we're  
18       going to need some way to keep these things  
19       separate. It seems to -- and I don't care, but I  
20       mean, from an administrative matter, you've got  
21       to -- 100-and-something exhibits in here, none of  
22       which have been produced into -- none of which  
23       are in evidence.

24                  THE COURT: Okay.

25                  MR. BUNDY: And so if he marks No.

1       36 and you let it in, I think we ought take it  
2       out of the book and set it over somewhere. And  
3       when he gets them all done, if he gets them all  
4       in, we'll put them back in the book.

5               THE COURT: We can monitor. We'll  
6       monitor them as to what they are. There's -- is  
7       there an index before each binder as to what's in  
8       the binder, or is there an overall index?

9               MR. HILDEBRAND: There is one. I  
10      will make a copy for the Court.

11              THE COURT: Okay. All right.

12              MR. HILDEBRAND: Yes, sir. What I  
13      thought -- what I normally do is -- and normally  
14      Court's like you to premark exhibits and have  
15      them well organized.

16              THE COURT: Right.

17              MR. HILDEBRAND: I've tried to make  
18      it just quick and convenient for the Court. And  
19      what I usually do is, when I do a notebook like  
20      this, if -- you could turn to the one and counsel  
21      can, and if it comes in, it stays in the  
22      notebook. And then at the end, the ones that  
23      were not admitted, then would come out.

24              THE COURT: Right.

25              MR. HILDEBRAND: So it's pretty

1       straightforward.

2                   THE COURT:   Okay.   All right.   I'm  
3       with you.

4       BY MR. HILDEBRAND:

5           Q.   All right.   Will you turn to -- we've  
6       got exhibit -- I'm sorry, tab 56 in the notebook,  
7       Plaintiff's tab 56.   And I would refer you to the  
8       document that you see in front of you.   Do you  
9       see that, Mr. Spano?

10          A.   I do, yes.

11          Q.   All right.   Are you familiar with  
12       the contract, Mr. Spano?

13          A.   Yes.

14          Q.   Have you had a chance to review that  
15       document?

16          A.   Yes.

17          Q.   All right.   And is that Balfour's  
18       contract with the owner, Library Associates?

19          A.   Yes.

20                   MR. HILDEBRAND:   Okay.   I would  
21       like to move that into evidence.

22                   MR. BUNDY:   Objection.   It's not  
23       the complete contract.   The best evidence of the  
24       contract between the parties is the complete  
25       contract.   And the contract documents themselves



1 outline what the contract documents are.

2 THE COURT: Okay.

3 MR. BUNDY: Plus, you may recall, I  
4 tried to have a meeting to go through all of this  
5 two weeks ago. I don't -- I have never seen this  
6 exhibit before.

7 I've seen, obviously, the contract. I  
8 have no way of sitting here in open court and  
9 going through every page to make sure that this  
10 is in fact an accurate copy of the contract.

11 Okay. And the witness hadn't testified  
12 to that. Whether he has or not, I'm still  
13 entitled some time to look at it. Okay. So we  
14 can do it a couple of different ways. I mean, I  
15 can certainly -- I'll certainly -- well, however  
16 you want to do it.

17 But I reserve my right -- would reserve  
18 my right to go tonight and look at these  
19 documents to -- to establish that in fact they  
20 are because if we'd have gotten together, we  
21 could have premarked them and both agreed it was  
22 all in the contract.

23 That was my hope all along, but we  
24 weren't able to accomplish that. Thank you, Your  
25 Honor.

1 THE COURT: All right. All right.  
2 I'm going to note the objection, but what's being  
3 presented is the document A133-2009?

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: All right. I'm going  
6 to allow that into evidence. All right.

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

9 BY MR. HILDEBRAND:

10 Q. And that's the document that you  
11 referred to throughout the contract when you  
12 would have questions or issues that came up with  
13 regard to it; is that correct?

14 A. Yes.

15 Q. We're going to go through some of the  
16 provisions in just a moment, but before I do, I  
17 want to return you to -- return to an area that I  
18 had touched on earlier. And I had asked you who  
19 the people in the field were and what the  
20 hierarchy was there. You went through that with  
21 a typical job.

22 A. Yes, uh-huh.

23 Q. Can you please tell Judge Scarborough  
24 who, on the other side of the house, so to speak,  
25 who the administrative people are who are back at

1       the -- in the trailer?

2           A.    Yes.    So Nick Starcevic was project  
3       manager.   Alec Dooley was assistant project  
4       manager.

5                   THE COURT:   First name of  
6       Mr. Dooley?

7                   THE WITNESS:   Alec.

8                   THE COURT:   Alec Dooley?

9                   THE WITNESS:   Alec Dooley.

10                  THE COURT:   All right.

11                  THE WITNESS:   Through, I guess,  
12       most of the project, early on, we had Brandon  
13       Denny, was a project engineer for us.   Clark --  
14       I'm drawing a blank on his last name -- is a  
15       project engineer we had working for us.

16                  We also had Shanti Pieniak.   I'll  
17       probably misspell her last name, but Shanti is  
18       probably the easiest way to -- as a project  
19       engineer in the office also.

20       BY MR. HILDEBRAND:

21           Q.    All right.   Can you describe, generally,  
22       what the dichotomy of responsibilities is on a  
23       job like this between the office people and the  
24       field people?

25           A.    Yes.    So the office people are receiving

1       submittals, things like that, from the subs.  
2       They execute -- they meet with the  
3       subcontractors. They work through scopes of  
4       work, things like that, to get them contracted,  
5       get them bought out or under contract, each  
6       subcontractor.

7             Q.    Okay.

8             A.    Then there's a submittal process where  
9       items being used on the job will be submitted,  
10      the criteria, the data, dimensions, schematics,  
11      thing like that.

12            You review them against the documents or  
13      the specifications that are supposed to be  
14      provided for the job and then submit them to the  
15      architect for review and approval. And that  
16      basically releases materials to be ordered for  
17      the field.

18            And then you've also got any change  
19      order process or request for information.  
20      Sometimes you have the field guys see something,  
21      and they'll say, hey, what's going on here? I  
22      don't see it. And usually the project manager or  
23      the assistant project engineer will submit a  
24      request for information to the architect to get  
25      clarification on something.

1 Q. Okay.

2 A. Whether it's from the office or from the  
3 field.

4 Q. Okay. Do the people in the office ever  
5 go out in the field? I think you may have  
6 alluded to that.

7 A. They do. They do.

8 Q. Okay.

9 MR. BUNDY: Tom, is this Exhibit 14  
10 or is it Exhibit 36 -- 56?

11 MR. HILDEBRAND: It's tab 56.

12 MR. BUNDY: But what exhibit number  
13 is it, though? Is this -- I just want to make  
14 sure I'm -- that we're talking about the same  
15 document. I'm really not being hard to live  
16 with.

17 MR. HILDEBRAND: Fair enough. No.

18 MR. BUNDY: I'd like to know what  
19 the document is.

20 MR. HILDEBRAND: What I would  
21 suggest is that that's tab 56, but I would just  
22 mark that as Plaintiff's 56 would be the easier  
23 way.

24 THE COURT: All right. Do you want  
25 to call it Plaintiff's 56?

1 MR. BUNDY: That's fine. As long  
2 as it's -- I'm not binding this whole book.

3 THE COURT: Okay. We can have --  
4 all right.

5 MR. BUNDY: It's Exhibit 56.

6 THE COURT: Got it.

7 MR. BUNDY: Okay. Thank you.

8 THE COURT: Okay.

9 MR. HILDEBRAND: Bear with me, Your  
10 Honor.

11 THE COURT: Okay.

12 MR. HILDEBRAND: These rings get  
13 out of whack.

14 BY MR. HILDEBRAND:

15 Q. Let me walk you through, if I can, some  
16 of the provisions in this contract and get those  
17 published in the record. All right. Let's go  
18 to -- the agreement was made as of the 22nd day  
19 of September of the year 2014; is that correct?

20 A. Yes.

21 Q. All right. And between the owner. And  
22 who is the owner?

23 A. Library Associates, LLC.

24 Q. And the construction manager is who?

25 A. Jim Clements Matrix Program Management

1 Services, LLC.

2 Q. That's at the very bottom. I think  
3 that's the owner's designated representative?

4 A. Right, right.

5 Q. All right. Go back up to where -- do  
6 you see Balfour Beatty Construction, LLC?

7 A. Yeah, Balfour Beatty Construction, LLC.

8 Q. That's the construction manager?

9 A. Yeah.

10 Q. Okay. And the architect is who?

11 A. Winford Lindsay, architect,  
12 Lawrenceville, Georgia.

13 Q. All right. At the very top, it says,  
14 standard form of agreement between owner and  
15 construction manager as constructed. Do you see  
16 that?

17 A. I do.

18 Q. All right. And as constructor, that is  
19 where y'all were acting as the general  
20 contractor; is that correct?

21 A. Correct.

22 Q. Okay. Let's turn to article 1 on page  
23 3. 1.1 of the contract documents, and the last  
24 two sentences where it starts, the contract  
25 represents.

1           The contract represents the entire and  
2           integrated agreement between the parties hereto  
3           and supercedes prior negotiations,  
4           representations for agreements, either written or  
5           oral.

6           If anything in the other contract  
7           documents, other than a modification is  
8           inconsistent with this agreement, this agreement  
9           shall govern. Did I read that correctly?

10          A. Yes.

11          Q. Now, turn to the article 2 at the  
12          bottom. Do you see that? Article 2,  
13          construction manager's responsibilities.

14          A. I do.

15          Q. Okay. And on the next page, article  
16          2.1. Do you see where it says, 2.1,  
17          preconstruction phase?

18          A. I do.

19          Q. Let's turn to -- I will tell you what.  
20          All right. Let's turn to page 5, please. Right  
21          in the middle 2.1.8, extent of responsibility,  
22          starting with the third line.

23                 The construction manager is not required  
24                 to ascertain that the drawings and specifications  
25                 are in accordance with applicable laws, statutes,



1       ordinances, codes, rules and regulations or  
2       lawful orders of public authorities.

3               But the construction manager shall  
4       promptly report to the architect and owner any  
5       nonconformity discovered by it and made known to  
6       the construction manager as a request for  
7       information in such form as the owner and  
8       architect may require. Did I read that  
9       correctly?

10           A.    Yes.

11           Q.    Can you explain to the Judge what a  
12       request for information -- that's commonly  
13       abbreviated as RFI, isn't it?

14           A.    Correct.

15           Q.    Okay. What is that?

16           A.    If we run into something where we don't  
17       understand, whether it be a design or it be a  
18       statement, a clause, anything in the contract --  
19       or I'm sorry, in the documents or the plans.

20               Sometimes there's duplicates for the  
21       same thing that says two different things for the  
22       same item. So it's just a clarification that we  
23       request further information so that we understand  
24       what the designer is wanting.

25           Q.    Okay. If there's something that appears

1 to be unworkable in the drawings, is that  
2 something that you would submit an RFI on?

3 A. Yes, absolutely.

4 Q. All right. Let's turn to page 6,  
5 please. Article paragraph 2.2.4.2, the fourth  
6 line down.

7 This construction continuously is  
8 included to provide funds for unanticipated costs  
9 resulting from, and then I would like to go down  
10 to C. Deductibles, penalties for builder's risk  
11 insurance or other insurance claims to which a  
12 deductible applies. Did I read that correctly?

13 A. Yes.

14 Q. Did that become an issue later in the  
15 case? Let me ask you this way: Do you remember  
16 an issue that came up --

17 A. I do.

18 Q. -- under builder's risk deductibles --

19 A. I do.

20 Q. -- that they would be responsible?

21 A. I do.

22 Q. Okay. We'll come back to that then with  
23 an RCO. All right. The next page, page 7,  
24 2.3.1.1 about two-thirds down. For purposes of  
25 section 8.1.2 of A201-2007, the date of

1 commencement of the work shall mean the date of  
2 commencement of the construction phase; is that  
3 correct?

4 A. Yes.

5 Q. All right. So we will need to look at a  
6 separate document to ascertain when you were  
7 given a date of commencement; is that right?

8 A. Yes.

9 Q. Okay. Now, the next paragraph, 2.3.1.3.

10 In the event construction manager does  
11 not achieve substantial completion of the work  
12 within the contract time including approved  
13 extensions, the contractor shall pay to owner as  
14 liquid damages and not as a penalty, the sum of  
15 \$9,500 or in \$9,000 per day for each calendar day  
16 that the actual time of performance to achieve  
17 substantial completion exceeds the authorized  
18 contract time, which amount shall not exceed the  
19 amount of contractor's stated fee.

20 Such liquidated damages are hereby  
21 agreed to be a reasonable estimate of damages the  
22 owner would incur as a result of a delayed  
23 completion of the work and shall be the owner's  
24 sole and exclusive remedy for the delayed  
25 completion of the work. Did I read that

1       correctly?

2           A.    Yes.

3           Q.    Do you see that there are conflicting  
4       provisions in this document?  One says that it's  
5       going to be written out that it's \$9,500 a day  
6       and then another provision that says --

7           A.    I do.

8           Q.    -- \$9,000?

9           A.    I do.

10          Q.    Okay.  Do you know, was that ever  
11       resolved among the parties during the  
12       construction or early in the construction as to  
13       what that or which one that would control?

14          A.    Not that I'm aware of.

15                   THE COURT:  I didn't hear that.

16                   THE WITNESS:  Not that I'm aware  
17       of.

18                   THE COURT:  Okay.  Thank you.

19       BY MR. HILDEBRAND:

20          Q.    Page 9, if you would please, article 3.  
21       3.1, information in services required of the  
22       owner.

23                   The owner shall provide information with  
24       reasonable promptness regarding requirements for  
25       and limitations on the project including a

1       written program which shall set forth the owner's  
2       objectives, constraints, and criteria including  
3       schedule, space requirements and relationships,  
4       flexibility, and expandability, special  
5       equipment, systems, sustainability and site  
6       requirements; is that correct?

7           A.    Yes, sir.

8           Q.    All right.  The next page, 3.1.4.4.  
9       During the construction phase, the owner shall  
10      furnish information or services required of the  
11      owner by the contract documents with reasonable  
12      promptness.

13               The owner shall also furnish any other  
14      information or services under the owner's control  
15      and relevant to the construction manager's  
16      performance of the work with reasonable  
17      promptness after receiving the construction  
18      manager's written request for such information or  
19      services; is that correct?

20           A.    Yes.

21           Q.    Were requests made to the owner on this  
22      project for information?

23           A.    Yes.

24           Q.    When request were made to the owner,  
25      were days -- were specific days provided that --

1 on occasion that the owner needed to respond by?

2 A. Yeah. Our replies are basically within  
3 seven days as far as the response.

4 Q. Okay. And is that -- were RFIs  
5 responded by the owner on a timely basis on this  
6 project?

7 A. Some, but a lot, no.

8 Q. Okay. And is there a document that  
9 discusses that on these documents?

10 A. Yes.

11 Q. All right. Down at the bottom, page 10,  
12 article 5, compensation for construction phase  
13 services. For the construction manager's  
14 performance of the work as described in section  
15 2.3, the owner shall pay the construction manager  
16 the construction sum in current funds.

17 The guaranteed maximum price, quote,  
18 "GMP" for the cost of the work plus the  
19 construction manager's fee and the guaranteed  
20 maximum price for general conditions shall be  
21 established in the A133, Exhibit 3.

22 Costs which would cause the respective  
23 guaranteed maximum price to be exceeded shall be  
24 paid by the construction manager without  
25 reimbursement by the owner and may not be billed

1 under the other GMP.

2 What does that mean, to your  
3 understanding, as the general contractor on this  
4 job?

5 A. That the construction -- let's see.  
6 That basically the guaranteed maximum price  
7 included our fees, our general conditions, and  
8 cost of work for the plans, for the documents.

9 Q. Okay. Is there a document that's  
10 attached to the contract that represents what is  
11 included in the guaranteed maximum price?

12 A. There is.

13 Q. We will get to that in just a minute.  
14 Next paragraph, 5.1.1, the construction manager's  
15 fee. Second sentence, the construction manager's  
16 fee shall be two and a half percent of the GMP,  
17 correct?

18 A. Correct.

19 Q. Right. 5.1.3, below that, limitations,  
20 if any, on a subcontractor's overhead and profit  
21 for increases in the cost of its portion of the  
22 work. The contractor's -- the subcontractor's  
23 fees for changes combined overhead and profit  
24 shall be 15 percent, correct?

25 A. Correct.

1           Q.    Okay.  5.2.1, the construction manager  
2           guarantees that the contract sum shall not exceed  
3           the guaranteed maximum prices as set forth in the  
4           guaranteed maximum price amendment unless it is  
5           amended from time to time, correct?

6           A.    Correct.

7           Q.    Okay.  Are there provisions that the  
8           guaranteed maximum price can be amended under the  
9           contract?

10          A.    Yes.

11          Q.    Okay.  5.2.2, the guaranteed maximum  
12          price is subject to additions and deductions by  
13          change order as provided in the contract  
14          documents, and the date of substantial  
15          completions shall be subject to adjustment as  
16          provided in the contract documents, correct?

17          A.    Yes.

18          Q.    Okay.  5.3, changes of the work.  5.3.1.  
19          The owner may, without invalidating the contract,  
20          order changes in the work within the general  
21          scope of the contract consisting of additions,  
22          deletions, or other revisions.

23                The owner shall issue such changes in  
24          writing.  The architect may make minor changes in  
25          the work as provided in section 7.4 of AIA



1 document A201-2007, general conditions of the  
2 contract for construction.

3 The construction manager shall be  
4 entitled to an equitable adjustment in the  
5 contract time as a result of changes in the work  
6 when such changes directly impact the critical  
7 path of the work; is that correct?

8 A. Yes.

9 Q. Do you have an understanding of what the  
10 critical path is on the job?

11 A. Yes.

12 Q. What is that?

13 A. Basically your schedule is made up of  
14 tasks, items and tasks. Basically, the critical  
15 path is the process or the main line or the main  
16 objective that takes you from the end to the  
17 completion date. So that critical path could  
18 adjust at times, depending on how those tasks  
19 within it shift around, what becomes priority.

20 Q. Okay. 5.3.2. Adjustments to the  
21 guaranteed maximum price on account of changes in  
22 the work subsequent to execution of the  
23 guaranteed maximum price amendment may be  
24 determined by any of the methods listed in  
25 section 7.3.3 of the AIA document A201-2007

1       general conditions, correct?

2           A.    Correct.

3           Q.    Article 6, cost of the work for  
4       construction phase. 6.1.1. The term cost of the  
5       work shall mean costs necessarily incurred by the  
6       construction manager in the proper performance of  
7       the work. Such costs shall be at rates not  
8       higher than the standard place of the project  
9       except with prior written consent of the owner.

10           The cost of the work shall include only  
11       the items set forth in section 6.1 through 6.7.  
12       Construction manager's labor rates as set forth  
13       in Exhibit B. All costs shall be consistent with  
14       and allocated as set forth in the project cost  
15       elements matrix attached to Exhibit C, correct?

16           A.    Correct.

17           Q.    6.3. Subcontractor costs. Payments  
18       made by the construction manager or subcontractor  
19       in accordance with the requirements of the  
20       subcontractor; is that correct?

21           A.    Yes.

22           Q.    On this project, were -- did Balfour  
23       Beatty self-perform any of the work?

24           A.    No. We had like an hourly carpenter  
25       that would put safety rails and more safety

1 features. They would keep up railing. If there  
2 was a safety issue, we'd send him over there to  
3 do that, but other than that, no.

4 Q. Okay. So, I mean, we will get into the  
5 pay applications in some of the documents a  
6 little bit later, but the -- a pay application,  
7 any -- I guess each pay application on this job  
8 included work that was done by subcontractors,  
9 work and materials; is that correct?

10 A. Correct.

11 Q. All right. Did -- and 42 of the pay  
12 applications were paid by the owner; is that  
13 correct?

14 A. Yes.

15 Q. On each of those pay applications, you  
16 told me that there were subcontractors' work and  
17 materials. Before they were paid, did the owner  
18 ever require Balfour Beatty to pay its  
19 subcontractors in advance of Balfour Beatty being  
20 paid for its payment applications?

21 A. No.

22 Q. Have you ever heard of that being done  
23 on a project?

24 A. No, not that I've known.

25 Q. All right. 11.4, assignment. The owner

1       and construction manager respectively bind  
2       themselves, their agents, successors and --

3           A.    I'm sorry, where are you at?

4           Q.    I'm sorry.  Page 21, the next page,  
5       11.4, assignment.

6           A.    Okay.

7           Q.    The owner and construction manager  
8       respectively bind themselves, their agents,  
9       successors, assigns and legal representatives to  
10      this agreement, correct?

11          A.    Correct.

12          Q.    Okay.  All right.  So then the next  
13      page, page 22, 12.2.  The following documents  
14      comprised the agreement, and I would like to  
15      turn -- go down to number 4.

16                AIA document E202-2008.  Building  
17      information modeling protocol exhibit if  
18      completed for the following.  Was a form  
19      E202-2008 completed as part of Balfour Beatty's  
20      contract?

21          A.    No.

22          Q.    Were there any other requirements in the  
23      contract, to your knowledge, that required them  
24      to --

25          A.    No.

1           Q.   All right.  Let's turn to the next  
2           document that's attached.  AIA document  
3           A133-2009, Exhibit A.  Guaranteed maximum price  
4           amendment.  Do you see that?

5           A.   I do.

6           Q.   Okay.

7                   THE COURT:  I'm sorry.  Which  
8           section again?

9                   MR. HILDEBRAND:  It's the next  
10          section of the document.  It's a couple pages  
11          past the one that I just referred to.

12                  THE COURT:  Okay.  All right.

13                  MR. HILDEBRAND:  Exhibit A.  209  
14          Exhibit A.

15          BY MR. HILDEBRAND:

16           Q.   A 1.1.1.  The contract sum is  
17           guaranteed -- the contract sum is guaranteed by  
18           the construction manager not to exceed  
19           \$59,354,747.  Subject to additions and deductions  
20           by change order as provided in the contract  
21           documents, correct?

22           A.   Correct.

23           Q.   Was that amount changed during the  
24           project?

25           A.   Yes.

1           Q.    Do you know approximately what it went  
2           up to under change orders?

3           A.    My recollection is around \$64,000.  I  
4           mean, somewhere in there.

5           Q.    Okay.  All right.  And then the -- under  
6           A 1.1.2 the second paragraph, it says, see  
7           attached, the hotel at Marion Square guaranteed  
8           maximum price dated February 18, 2015, section 2A  
9           GMP summary.  So that's the date of this GMP  
10          document; is that correct?

11          A.    Correct.

12          Q.    Okay.  Turn to, if you would, section 1,  
13          clarifications, about three pages in.  Do you see  
14          that document, Mr. Spano?

15          A.    Yes.  Certifications and assumptions?

16          Q.    Right.  All right.  Page 1 at the very  
17          top, division 01, general requirements.  So this  
18          is the very first general requirement of your GMP  
19          document?

20          A.    Uh-huh.

21          Q.    You need to answer yes or no.

22          A.    Yes.  I apologize.

23          Q.    The GMP is based on the 100 percent plus  
24          pricing documents dated November 6th, 2014,  
25          addendum 1 dated 11/14/14; addendum 2 dated

1 11/20/14; addendum 3 dated 12/1/14 and addendum 4  
2 dated 12/3/14 received from Winford Lindsay,  
3 architect and design continuum, to arrive at the  
4 designated GMP price.

5 Addendums include requests for  
6 information responses. Refer to the document  
7 list within the booklet, correct?

8 A. Correct.

9 Q. Okay. And number 13 below that. This  
10 GMP assumes a 28-month construction schedule from  
11 notice to proceed, correct?

12 A. Correct.

13 Q. All right. Let's turn to page 11 of  
14 that document. At the very top, division 9,  
15 finishes. Do you see that?

16 A. Yes.

17 Q. Okay. And I would like to refer to the  
18 very first one. Level 5 drywall finish is  
19 included at special finish SF02 and SF03 only; is  
20 that correct?

21 A. Yes.

22 Q. Is that -- can you describe for the  
23 Judge what drywall levels are, how many there  
24 are, and kind of what they mean?

25 A. Yeah. So there's five levels, of

1 course. So your typical -- your typical drywall  
2 finish is a level 3, which is basically meaning  
3 you're putting coats on joints, screw holes up to  
4 three levels of finish, and then sanding before  
5 you paint them.

6 Level 4, you would go beyond that and  
7 you would put another basically wider drywall  
8 joint over your joints so that you're basically  
9 tapering out your joints even wider. It's a  
10 little bit better finish.

11 Level 5, you're following those  
12 processes, and then you're skimming -- you're  
13 basically skimming the entire wall with drywall  
14 and then sanding it. So you're getting a  
15 complete coat of drywall on the entire surface.

16 Q. Okay. When it says that a level 5 will  
17 be only on SF02 and SF03, if we turn to the  
18 drawings, would that be -- would that relate to  
19 the guest room?

20 A. No.

21 Q. Okay. All right. Page 13, up at the  
22 top, division 10 specialties no. 1. All signage,  
23 exterior and interior is provided and installed  
24 by the owner, correct?

25 A. Yes.



1           Q.   And it shows that you were a recipient  
2           of this document?

3           A.   Yes.

4           Q.   Okay.  And it says, Mike, confirming our  
5           conversation, on behalf of Library Associates,  
6           LLC, Balfour Beatty Construction is hereby given  
7           notice to proceed with the work of the project;  
8           is that right?

9           A.   Yes.

10          Q.   Okay.  So the notice to proceed was  
11          provided on March 19, 2015?

12          A.   Yes.

13                   MR. HILDEBRAND:  I would like to  
14          move to introduce that, Your Honor.

15                   MR. BUNDY:  And that will be  
16          exhibit what?

17                   THE COURT:  We'll call that 60.

18                   MR. BUNDY:  No objection.

19                   THE COURT:  All right.  No. 60.

20                           (PLF. EXH. 60, was marked for  
21          identification and admitted into evidence.)

22          BY MR. HILDEBRAND:

23          Q.   All right.  Mr. Spano, so Balfour was to  
24          started work, as we've just read on March 19,  
25          2015, and it had a baseline schedule for the work

1        know. So it's a constant push with subs to make  
2        sure everybody is staying on schedule. There's  
3        thing that happen that are maybe out of their  
4        control, and you understand. But I'm pushing  
5        hard a lot.

6            Q.    Okay. Is it unusual on a project or on  
7        a job for a subcontractor to be behind schedule  
8        at some point but then make it up?

9            A.    Sure. They do it all the time.

10          Q.    And how do they make it up when they --  
11        after they've been behind?

12          A.    Sometimes it's working weekends. You  
13        know, you work extra days where your schedule is  
14        built on a five-day schedule. You basically have  
15        Saturday as makeup days, sometimes longer hours.

16                Sometimes you adjust other things in the  
17        project. So -- because in a schedule, there's --  
18        things are tied together, right? So one thing is  
19        tied to another. One pushes -- it could push  
20        another thing. Some of them overlap.

21                So sometimes there's a situation where  
22        this one may push, but it's not pushing the next  
23        task. You know what I mean? So you can see an  
24        opening to keep that thing back on track between  
25        the two subs.

1           Q.    Okay.  What is your -- having finished  
2           the Hotel Bennett, as far the -- how the job  
3           went, are you -- what are your feelings in  
4           general about that?

5           A.    It was a very tough job.  It took its  
6           toll on the team and me, personally.  It was a  
7           lot of extra hours.  You know, some sleepless  
8           nights as things go.  A lot of -- just a lot of  
9           moving parts, a lot of people on a job like that.

10                  And so it's -- yeah, pretty much keeping  
11           you -- just keeping you in tune and keeping your  
12           mind right and keeping everybody positive, you  
13           know, is the goal.

14           Q.    Okay.  What was the primary -- was there  
15           a primary problem that caused you angst and  
16           frustration on this job?

17           A.    I mean, there was -- there was a lot of  
18           changes.  There was a lot of design conflicts on  
19           the job.

20                  MR. BUNDY:  Your Honor, he's not an  
21           architect, and now he's testifying that the  
22           problem on the job was design problems.  He's not  
23           qualified as an architect.  He's not been listed  
24           as an architectural expert.  He's laid no  
25           foundation.

1                   And this cannot be lay testimony. It  
2                   simply can't be lay testimony. The -- that a  
3                   contractor can talk about whether an architect's  
4                   design is in conflict. Furthermore, I've not  
5                   seen any drawings yet, not one. So I would  
6                   object.

7                   THE COURT: All right. Objection  
8                   noted. Lay a little more foundation. You might  
9                   want to go into specifics, it sounds like.

10                  BY MR. HILDEBRAND:

11                  Q. All right. Do you look at drawings  
12                  every day when you're on a job?

13                  A. Usually.

14                  Q. Okay. Do you know what at -- so you  
15                  know what drawings are?

16                  A. Sure.

17                  Q. Can you recognize when you get a drawing  
18                  and what is shown on the drawing doesn't work  
19                  from a construction standpoint?

20                  A. Sometimes, sure.

21                  Q. Okay. So if you -- are you able to  
22                  determine what is an -- if you can't build it, do  
23                  you infer that that's a design issue?

24                  MR. BUNDY: That's ipse dixit.  
25                  Things that contractors can't build, by

1 definition, are not all design problems because  
2 if they were, we wouldn't need architects and  
3 engineers. It could be just as likely, the  
4 contractor doesn't know how to read the  
5 documents.

6 In order to have an expert who can  
7 testify that these architectural documents don't  
8 meet the standard of care because they're in  
9 conflict and unbuildable, it takes an architect.

10 THE COURT: Well, didn't the  
11 contract allow for the contractor to object to  
12 some problems if they saw those problems? That's  
13 in the contract, is it not?

14 MR. BUNDY: Well, sure. He could  
15 object to them, but that doesn't -- the contract  
16 doesn't change the Rules of Evidence.

17 The Rules of Evidence still require that  
18 if somebody is going to come in here and give a  
19 professional opinion that they be qualified and  
20 listed as a witness. And that's what he's doing.  
21 That's a conflation of two different things.

22 THE COURT: All right. Well, noted  
23 and overruled. Go ahead.

24 BY MR. HILDEBRAND:

25 Q. All right. You talked about the

1       thousand-year flood. What was the next problem  
2       that you encountered on this job?

3           A. When we -- so, of course, we did a  
4       modeling process with our subs, right? So that  
5       was the first thing that we did to get the  
6       mechanical, electrical, plumbing coordinated  
7       inside the building model of the structure.

8           Q. Okay.

9           A. One of the first things we ran into in  
10      the basement, in the mechanical room, fire pump  
11      room, once you get like equipment specifics,  
12      basically our then designer would put that say  
13      fire pump in that room.

14                 The first problem we had was the  
15      equipment wouldn't go in. It would fit with the  
16      pumps there. It had to be modified to move some  
17      of the pumps around.

18           Q. So you got the drawings and put them  
19      into the 34D?

20           A. I did, but, yes, we also have a BIM  
21      person.

22           Q. And it was discovered that some of the  
23      equipment didn't fit once you looked at it in  
24      34D; is that correct?

25           A. That's correct.

1           Q.    So what was the result of that? Whose  
2    fault was that, in your view?

3                   MR. BUNDY:  Objection.  That's  
4    leading.

5                   THE COURT:  I will sustain that  
6    objection.

7    BY MR. HILDEBRAND:

8           Q.    Okay.  What was the sequence of that  
9    issue?

10                   MR. BUNDY:  Objection.  The  
11   documents are the best evidence of whether or not  
12   the pump was not the right size or anything like  
13   that.  You have to put -- at least bring in front  
14   of this Court the documentation that shows the  
15   pump was wrong, so I can cross-examine him on it.

16                   There's no foundation for his testimony  
17   other than his recollection.  The documents are  
18   out-of-court statements.  He's offering us  
19   documents for approval of the Court.  The  
20   documents themselves are hearsay, and they're not  
21   even in evidence.

22                   THE COURT:  All right.  Noted.  Go  
23   ahead.

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

1 BY MR. HILDEBRAND:

2 Q. Okay. So you look at the drawings and  
3 design and figure out if it's going to -- if you  
4 can construct, correct?

5 A. Yes.

6 Q. All right. And what are your  
7 obligations when that happens?

8 A. To any conflicts or -- like that that  
9 arise, we send the information to the architect,  
10 the designer.

11 Q. Okay. Whose obligation is it to design  
12 a fix?

13 A. The architect.

14 Q. Okay.

15 A. Or engineer.

16 Q. All right. Was there an issue with some  
17 of the equipment in the basement of the building?

18 A. Yes.

19 Q. Was that brought to the attention of the  
20 architect?

21 A. Yes.

22 Q. Did they make a change?

23 A. Yes.

24 Q. What impact did that change have to you  
25 or to Balfour?



1           A.   Well, it takes time and money.

2           Q.   Okay.  Explain to the Judge if you  
3       would --

4           A.   To perform the work, if it's extra work.

5           Q.   Explain to the Judge, if you would,  
6       exactly what it was -- was the equipment too big  
7       for the space, or what was the problem that you  
8       discovered on the drawings?

9                   MR. BUNDY:  Before he proceeds, I'd  
10       like to strike his previous answer because he  
11       said it takes time and money.  How much time?  
12       How much money?  Pure speculation.  So I move to  
13       strike his previous answer.

14                   THE COURT:  Noted.  And I'll let  
15       you go into that on cross.  Go ahead.

16       BY MR. HILDEBRAND:

17           Q.   What was the equipment problem?  What  
18       was it that didn't work?

19           A.   I guess the equipment fitting in the  
20       area.  There was a little more to it.  There was  
21       an elevator equipment room that was -- had a door  
22       opening to enter it off of that pump area.

23           Q.   Right.

24           A.   Which is not allowed by code, by the  
25       State Department.  So we basically, they had --

1       that doorway had to move around, you know what I  
2       mean, to shift to another area, which we created  
3       room to shift some of the mechanical equipment.

4           Q.    Okay.  What was the next problem that  
5       arose?

6           A.    Piping.  So there's terraces up on the  
7       third floor, sixth floor, and ninth floor, which  
8       have drains -- four drains in them.  So the  
9       piping for all those drains ran down to the  
10      basement.

11                So the concept of the design was -- when  
12      it rained, the water would run down to the  
13      basement.  Then it would get pumped back up into  
14      the street storm system.

15           Q.    So there were areas, I guess, that  
16      weren't sloped roofs that water just dumped off?  
17      It collected water and had to be --

18           A.    It was about -- like balconies.

19           Q.    Okay.

20           A.    So you had periodic drains on those  
21      balconies or terraces that would catch the water  
22      and bring it down to the basement.

23                So one of the first issues was the  
24      piping was originally shown as 4 inch drains and  
25      then got changed to 6 inch drains, 6 inch piping

1       because of the volume. To capture and not cause  
2       a problem with the amount of volume of rain,  
3       whatever the calculations are, they changed the  
4       piping size.

5           Q.   How was that problem discovered? Who  
6       discovered it and how?

7           A.   It was in -- it was in part of the BIM  
8       process, but I know that BMCC, our mechanical  
9       contractor brought it up on one of the design  
10      drawings.

11           And he said, hey, I don't think the  
12      calculations are correct for this. You need to  
13      look at it. So that process went on for a few  
14      months until it finally changed by the architect  
15      or engineer.

16           Q.   Was that a big deal?

17           A.   Yeah.

18           Q.   And why was that? It sounds pretty  
19      simple. You just go from a 4-inch pipe to a 6  
20      inch.

21           A.   Well, keep in mind the pipe goes from  
22      the basement, and in some cases, all the way to  
23      the ninth floor. So it has to have a chase to  
24      carry that pipe, you know, all the way to the  
25      roof.

1           Q.    What is a chase?

2           A.    Chase is just basically a hollowed out  
3           column to allow that pipe -- it's not visible  
4           inside the building.  So if you increase the  
5           pipe, you increase the path that it has to go  
6           through.

7                    So it ended up making some adjustments  
8           for the rest of the building up through there.  
9           But the immediate concern was we were -- we were  
10          piping -- you know, trying to rough in  
11          underground, that piping under the ground that  
12          comes into our, you know, drain lines and things  
13          like that.

14          Q.    Did those have to be changed?

15          A.    They had to be upsized, yes.

16          Q.    Okay.  All right.  What was the next  
17          problem there?

18          A.    One of them was down there in the  
19          basement and some tanks had collected water that  
20          weren't in the original design.

21          Q.    Okay.  Why were those added?

22          A.    Just the amount of volume that was, I  
23          guess, coming down.  I don't know the exact  
24          details, but basically, to handle the water flow  
25          coming down off terraces to get back out of the

1 building.

2 MR. BUNDY: Move to strike. He  
3 just testified he didn't know the details.

4 THE COURT: So noted. Overruled.  
5 Go ahead.

6 BY MR. HILDEBRAND:

7 Q. All right. So you got an instruction  
8 from who? The architect to change the piping and  
9 make a change?

10 A. Uh-huh.

11 Q. You have to answer yes or no.

12 A. Yes.

13 Q. All right. What was the next problem  
14 that occurred?

15 A. I need you to clarify. At the time we  
16 were building -- at the time we're moving up the  
17 building, do you know what I mean? Because some  
18 of those areas, there were things that later came  
19 about. Do you know what I'm saying?

20 Q. You can answer however you think is  
21 appropriate. What was the next major significant  
22 issue that occurred from your perspective as the  
23 construction manager on this project?

24 A. Okay. There was electrical. There was  
25 some electrical service that had to be added to

1       the project. There was some modifications to  
2       electrical panels that -- the electrical room was  
3       down in the basement.

4           Q.    So there was a change from the original  
5       drawings?

6           A.    Yes.

7           Q.    And why was that?

8           A.    It's additional circuitry needed or  
9       additional power needed.

10          Q.    Needed for what?

11          A.    Needed for heaters and just -- it was  
12       several things that were in the -- I would have  
13       to look at the change order.

14          Q.    Okay. Was that a pretty easy change to  
15       integrate?

16                   MR. BUNDY:  Objection.

17                   THE COURT:  Overruled.  Go ahead.

18                   THE WITNESS:  Was it easy?

19       BY MR. HILDEBRAND:

20          Q.    Yes, sir.

21          A.    I wouldn't say easy.

22          Q.    What was the next problem that  
23       developed?

24          A.    I'm sorry. I'm still in the basement,  
25       running it through my head.

1 Q. Okay.

2 A. I know there was a wall that had to be  
3 deleted between two electrical rooms for  
4 mechanical equipment. There was eventually a  
5 change order approved for that, to eliminate that  
6 wall.

7 Q. Okay.

8 A. There was a -- there may have been --  
9 and I don't remember other things right now in  
10 the basement.

11 Q. Okay. What was the next problem?  
12 What's the next significant issue that arose as  
13 you --

14 A. I mean, one of the -- one of the first  
15 things that were done -- and this was early on --  
16 was columns were deleted from the ballroom.

17 So the ballroom, I guess, originally had  
18 more columns in it. Those were deleted. That  
19 was early on. It created beams. The beams being  
20 upsized, I guess, to carry, you know -- because  
21 of the weight distribution, so they upsized beams  
22 when columns were deleted.

23 So with those columns enlarging, it  
24 created some mechanical issues, fitting  
25 mechanical in and above the ceilings type of

1        thing with those beams and getting around them  
2        and things like that.

3                So I know on the first floor there  
4        was -- it went to an indirect HVAC system, which  
5        basically hides your A/C grills. It kind of  
6        hides them inconspicuous, maybe behind the crown  
7        mold or whatever. So there was a mechanical  
8        redesign on the first and second floor.

9                Q.    Okay. Why was that made?

10              A.    I think -- I don't remember that being a  
11        design issue, but -- I don't know if it was the  
12        owner or not.

13              MR. BUNDY: Move to strike. He  
14        doesn't know the answer.

15              MR. HILDEBRAND: Okay. That's just  
16        his answer, though.

17              THE COURT: He doesn't know the  
18        basis for it, just that it happened.

19              THE WITNESS: Right.

20              THE COURT: All right.

21        BY MR. HILDEBRAND:

22              Q.    Let's discuss the ballroom column issue.  
23        Was that a significant change in your view?

24              A.    Yes, structural, yes.

25              Q.    All right. And tell what the -- what



1 exactly was the change there?

2 A. Well, the original building was designed  
3 with more columns in it, right, through the  
4 ballroom. You had additional columns. When you  
5 remove those columns, to create more space,  
6 you've still got to carry all the weight of the  
7 building up above it. So it was just increased  
8 sizing of beams, things like that.

9 Q. Okay. Did that cause any delays to the  
10 project in your view?

11 A. No.

12 Q. Okay. What was the next problem that  
13 arose or issue?

14 A. So if I'm kind of running -- when you  
15 say next in sequence, there were a lot of changes  
16 that came later on the first and second floor.  
17 But at the time, moving up the structure, do you  
18 know what I mean? They didn't come about until  
19 later in the project.

20 Q. Okay.

21 A. So moving up the structure, basically as  
22 we're -- as we're designing or doing our BIM  
23 design with our MEPs, right, our mechanical,  
24 electrical, plumbing, because you're trying to  
25 locate anywhere sleeves are going to go through

1       that concrete slab.

2               So with those sleeves, basically we go  
3       through with their -- for instance, if that  
4       piping changed, it could adjust something. So we  
5       were coordinating all the drawings with changes  
6       as they were coming in also.

7               Q.   And which floor was this?

8               A.   This was basically the first and second  
9       floor.

10              Q.   Okay.

11              A.   So we moved up the building with BIM  
12       just like we're moving in construction to  
13       basically have the MEP design or MEP modeling for  
14       clashes to stay ahead of the structure that we're  
15       putting up tables and we're pouring concrete and  
16       things like that.

17              So as the changes were coming about, we  
18       would put those into the model. If there was a  
19       clash, we would send the clash to the architect.  
20       The architect would have a response to it or a  
21       change to it.

22              We would put it -- get it back. We  
23       would put it into the BIM model again to see if  
24       that worked or if it caused any other issues or  
25       conflicts within the structure.

1           Q.    Okay.  So when you say that there were  
2           changes -- so the original design was changed on  
3           the first and second floors?

4           A.    It was -- it was basically like piping,  
5           indirect HVAC, things like that, that may affect  
6           the sleeve that goes through the floor.

7           Q.    Okay.

8           A.    The sleeves in your floor is anything  
9           past (inaudible) whether it's plumbing,  
10          electrical, mechanical, things like that.  You've  
11          got to coordinate that to get your sleeve where  
12          it's going to go.

13          Q.    Okay.  And is that something that the  
14          architect tells you where to put those?

15          A.    Yes.

16          Q.    Okay.  Give me a little more detail, if  
17          you would, Mr. Spano -- I'm not sure I'm real  
18          clear on the complexities of -- I would imagine  
19          that under this floor there might be a few HVAC  
20          ducts or maybe some mechanical equipment.

21                But can you describe to the Judge how  
22          complex it is in between each floor?  What goes  
23          in there and what has to be worked around or  
24          prepared in order for a floor to take place?

25          A.    So, in other words, between a ceiling

1       and a floor above, you're going to have your HVAC  
2       ductwork.

3               You're going to have waterlines  
4       electrical lines, lighting. I mean, your  
5       lighting -- say a can light could be 8 inches.  
6       It could be 6 inches. All those are taking fire  
7       sprinkler lines, things like that.

8               They're all taken into consideration to  
9       figure out how they're going to crisscross and  
10      work together within that space. So that's one  
11      of the reasons we, with our subs, do a model to  
12      try to get ahead of any of those conflicts.

13              Q.    Okay. What was the next issue that  
14      arose?

15              A.    I know one of the kind of big ones had  
16      to do with chilled water. I believe it was at  
17      the third or fourth floor. When we were up  
18      there, there were chilled waterlines that would  
19      run basically down the corridors to carry water  
20      to the guest rooms.

21              Q.    So is this just in the ceiling area?

22              A.    This is in the ceiling area.

23              Q.    What is a chilled waterline?

24              A.    Basically it's coming from your -- we  
25      basically have large chillers outside that cooled

1 water pushes it through the building to feed all  
2 your plumbing fixtures, things like that.

3 Q. Okay.

4 A. So one of the problems, when we first  
5 went in with BIM, it had -- originally had, I  
6 believe, a 4-inch waterline. Once you insulate  
7 it, once we fit everything within that ceiling it  
8 was going to cause the ceiling to be lower, to be  
9 able to fit everything.

10 So I know that that was kind of a no-no.  
11 They didn't want to lower the ceiling; so they  
12 basically redesigned the chilled waterline to go  
13 to like 2-inch lines to minimize the distance and  
14 keep the ceilings as high as possible.

15 Q. Okay.

16 A. So that affects, you know, sleeves and  
17 everything. You know, your penetration and stuff  
18 when you change water. You know, you change one  
19 pipe to another or you change sides.

20 Q. Okay. So the BIM process that you and  
21 your subcontractors did, when y'all put them in  
22 the 3D, it showed that the chilled waterlines  
23 were two -- they wouldn't fit in the space  
24 provided; is that right?

25 A. That's correct.

1           Q.   And you submitted an RFI to the  
2 architect and said, what do we do?

3           A.   We did.

4           Q.   And then you were told --

5           A.   And they were on the -- you know, they  
6 would get on the BIM calls.

7                   And when our guys would put the  
8 information in, find the conflicts, get on the  
9 call with the architect, show it to them, then  
10 they would basically in 2D version, figure out  
11 how they're going adjust it, send it back and put  
12 it in the model and look at it again.

13          Q.   Okay. When you said there were BIM  
14 calls, what does that mean?

15          A.   Just conference calls so that all  
16 parties, the architect, whoever could see the 3D  
17 model on the screen to see the conflicts. And  
18 we'd have a 3D visual of where the conflict was.

19          Q.   Okay. So your BIM would identify --  
20 might identify the problem, and when it did, it  
21 would be a conference call with the architect so  
22 that they could get it resolved?

23          A.   Yes, so that they could understand it.

24          Q.   How often did those calls take place?

25          A.   Oh, gosh. I think for the most part

1       like biweekly, as I recall.

2           Q.    I always get it mixed up on biweekly.  
3       Is that every other week or --

4           A.    Like every two weeks because keep in  
5       mind, our guys were -- it took a little time to  
6       get everything into the model.  You know, also  
7       your MEP subs are getting their information over  
8       for their model.

9                    So there's a coordination between  
10      mechanical, electrical, plumbing models and our  
11      BIM coordinator that would fit everything  
12      together and put it in.  So sometimes it would  
13      take two weeks to have another call; sometimes it  
14      would be more.  It just depends on the amount of  
15      information they were putting in.

16          Q.    Okay.  If y'all had not used BIM, it may  
17      have taken longer to have discovered the clashes  
18      in your view?

19          A.    Sure, absolutely.

20          Q.    That's why you use it, correct?

21          A.    Yes.  It's a quicker tool.

22          Q.    Okay.  All right.  What was the next  
23      issue that arose?

24          A.    Really where we hit a wall was the fifth  
25      floor -- basically, the slab.  The fifth floor

1 ceiling slab or sixth floor slab, I should say.  
2 I know that the rooms from the sixth, seventh,  
3 and eight floor were being -- got consolidated  
4 and revised to suites.

5 Q. All right. Let me stop you just for a  
6 second so the Judge can be clear. The building  
7 has nine floors, correct?

8 A. Correct.

9 Q. The first two floors are the restaurant,  
10 the ballroom and spa and all that sort of stuff?

11 A. The patisserie, the foyer, all that  
12 stuff.

13 Q. All right. Then the third through  
14 eighth floors --

15 A. Were guest rooms.

16 Q. Okay. So you had a total of six floors  
17 with guest rooms?

18 A. Yes.

19 Q. Is that correct?

20 A. That's correct.

21 Q. And what was on the ninth floor?

22 A. That was for -- it was a meeting space.  
23 There was a pool. There was a rooftop bar, a  
24 little kitchen up there.

25 Q. Okay. So all the guest rooms were going



1 to be on rooms 3 through 8, correct?

2 A. Correct.

3 Q. And what is this change that you're  
4 telling me to place, I guess, right in the middle  
5 of the floors, right at the top, from the ceiling  
6 of the fifth to the --

7 A. Six, seventh and eighth floor went to --  
8 got modified to suites.

9 Q. Do you know why that was?

10 A. No.

11 Q. Was that after construction had started?

12 A. Yes.

13 Q. Okay. What impacts did that have with  
14 your progress on your job?

15 A. So basically getting the sleeve  
16 locations correct for the sleeve design so that  
17 we can get them in the slab and get the slab  
18 forward.

19 Q. Okay. When you said, we hit the wall at  
20 that point, what did you mean by that?

21 A. We basically got tables up, our shoring  
22 underneath it, to where we were ready to layout  
23 all the sleeves on the floor, and we did not have  
24 any information from the architect.

25 Q. So your construction -- the design

1        didn't keep up where you -- the design changes  
2        didn't keep up with where you were constructing?

3            A.    The construction wasn't, correct.

4            Q.    And was there any stoppage of work?  
5        What happened as a result of that?

6            A.    There was.

7            Q.    So y'all had to come to a stop?

8            A.    We came to a stop on the sixth floor.  
9        My concrete guy had demobilized -- had put the  
10       tables up as much as he could.

11                Some of the workers worked, you know,  
12       down below where they could; in other words,  
13       MEPs. But our work stopped up on the sixth floor  
14       building for -- to be able to pour the slab. So  
15       it basically stopped at that point.

16            Q.    Okay. So when was that resolved and how  
17       was it resolved?

18            A.    We sent a delay notice, per the  
19       contract. So we, up until that point, had been  
20       sending just kind of -- you know, sending e-mails  
21       saying, hey -- we just saw our time frame  
22       narrowing down as we were moving up the building.

23                So we were requesting the shop drawings  
24       or the information with enough time to allow us  
25       to go through the kind of normal process where

1       you -- your subs have a little more time to prep  
2       material or maybe prefab or whatever. So as we  
3       were moving up the building, that normal kind of  
4       prefab time was just going away.

5               So pretty early on we were starting to  
6       say, hey, we need this floor by this date and  
7       this floor by this date because we saw what was  
8       happening. You know what I mean? We saw it  
9       coming to a head basically. At that point, we  
10      came to a head, and we had to stop.

11             Q. And do you know why the architect was  
12      unable to give you the corrected designs in time  
13      for you to proceed with the work?

14             A. Only they didn't have the information at  
15      the time of what was changing, I guess, you know,  
16      because they didn't have the information.

17                     MR. BUNDY: Move to strike. He  
18      says he guesses.

19                     THE COURT: That would be  
20      speculation, right?

21                     MR. BUNDY: Yes, by definition.

22                     THE COURT: I will sustain that  
23      objection.

24      BY MR. HILDEBRAND:

25             Q. Okay. All right. So you made a claim,

1 a formal claim; is that right?

2 A. I did.

3 Q. Okay. And we'll go through those  
4 documents a little bit later. What was the  
5 result of that?

6 A. The original -- so the claim process  
7 goes to the -- went to the architect. They were  
8 the person to rule on it, I guess, is how it was  
9 put in the contract. So WLA came back with an  
10 answer.

11 Q. That's the architect?

12 A. That's the architect.

13 Q. Okay.

14 A. They basically granted us a certain  
15 amount of days and a certain amount of money was  
16 their ruling, not what we totally had asked for.  
17 At that point, we followed the contract process  
18 to request a mediation -- to have a mediation to  
19 try to further resolve, you know, the rest of the  
20 non-approval.

21 Q. Okay. Were you ever -- so they  
22 disputed -- they agreed with part of -- the  
23 architects agreed with part of your claim and  
24 denied part of it; is that correct?

25 A. That's correct.

1           Q.   Were you ever paid for the part that  
2           they agreed you were entitled to?

3           A.   No.

4           Q.   The undisputed claim?

5           A.   Huh-uh.

6           Q.   All right.  So how long was the delay on  
7           the sixth floor?  How long was the work stoppage?

8           A.   21 days, I believe.

9           Q.   Who was the subcontractor?  The concrete  
10          subcontractor, who was that?

11          A.   Lithko.

12          Q.   Okay.  All right.  What was the next  
13          issue that arose on the job?

14          A.   Once we got back on -- were able to  
15          continue with the sixth floor, the same process  
16          was going on.  So there was basically a continual  
17          delay that in -- that went up to seven or went up  
18          to eight.

19                So we had sent an additional delay  
20          notification, you know, explaining the seventh  
21          floor timing and where we were at and all of that  
22          stuff.

23          Q.   Okay.  Were you ever provided any  
24          compensation for those -- as a result of those  
25          delay notices?

1           A.    No.

2           Q.    Was any part of that claim, to your  
3           recollection, agreed with by the architect and  
4           part was not agreed with like on the sixth floor?

5           A.    I don't believe so.

6           Q.    All right.  What was the next -- let me  
7           ask you this:  With regard to your  
8           subcontractors, when there's a work stoppage or  
9           an issue like you described with the sixth floor,  
10          how does that impact them?

11          A.    I mean, they will -- if they're in a  
12          delay, they will send us a delay notice.

13          Q.    Okay.  Does that -- what impact, if any,  
14          does that have on the job efficiencies for the  
15          subcontractors?

16          A.    Delay?

17          Q.    Yeah.

18          A.    Well, it stops the progression and the  
19          normal flow of the work as planned.

20          Q.    Okay.  All right.  What was the next  
21          issue that arose?

22          A.    I know that there -- there was some  
23          design that continued for a while up in the bar  
24          area, ninth floor.  There was the bar design that  
25          flagged quite a bit.

1                   Once we got back on six, we basically  
2           were -- it was kind of a continual -- a continual  
3           delay up the thing to get us to the ninth floor.  
4           So the ninth floor is where we basically top out  
5           our structure, right? So that's a key milestone  
6           on the project, right, to get your final pour in.

7                   So there was -- on the ninth floor,  
8           there was changes going on up there that  
9           affected, you know, some of the, I guess, more --  
10          not as much the structural part of it but more  
11          finishes and things that were coming with the bar  
12          and things like that.

13                  Q.    Okay. At what point did -- when the  
14          sixth floor issue came up, was the project on  
15          schedule or behind?

16                  A.    We were, I believe, within one day of  
17          schedule.

18                  Q.    Is that right? Okay. So all the 16  
19          months that we've referred to earlier that the  
20          project was delayed, all that happened after the  
21          sixth floor?

22                  A.    Yes.

23                  Q.    Okay. And the issues that you  
24          identified earlier in the structure had been  
25          overcome; is that right?

1           A.    That's correct.

2           Q.    What were the issues that -- what other  
3           issues happen after that?  What other significant  
4           issues?

5           A.    With the interiors basically, there were  
6           door selections, hardware selections, things that  
7           were -- took a lot of time to get selections on  
8           that affect your procurement of say doors.  You  
9           need to know what hardware are going in the doors  
10          and vice versa.  There were changes to egress  
11          stairwells, changing finishes, changing  
12          handrails.

13                There were, of course, lighting changes,  
14          selecting entrance doors like in the Camilla  
15          lounge.  There were restaurant equipment changes  
16          in your Camilla lounge or in your lobby bar or in  
17          your kitchens, things like that.  So there was  
18          some equipment changes also that happened.

19          Q.    Okay.

20          A.    There were some guest rooms; so there  
21          were like barn doors added in the guest rooms  
22          which are basically sliding doors over an opening  
23          between the bedroom and the tub.

24          Q.    Okay.

25          A.    With that, the barn door add, it



1       required basically a header or a bulkhead to be  
2       built to make the track for that door basically  
3       to be recessed and somewhat hidden.

4               So at the time we -- and most of the  
5       job, it depends -- I can't tell how many floors  
6       we were on at the time when we first started it.  
7       I think two or three that we -- were drywall; so  
8       we went back in, and we framed out the headers.  
9       We had to drywall those. We also had to -- at  
10      the time, we had sprinkler heads and HVAC grills  
11      in that wall.

12             Q.    Okay.

13             A.    So when you bring that header out, those  
14      things have to be extended out to the base of the  
15      new wall, right. So there was going back,  
16      framing, MEP subs, going back extending their  
17      rough-ins out to be able to drywall it.

18             Q.    Does the changing of the barn -- adding  
19      the barn doors cause all that impact?

20             A.    Yes.

21             Q.    Well, why couldn't you -- why couldn't  
22      you just proceed with the rest of the guest rooms  
23      if you were -- or could you? Were you able to  
24      proceed with finishing the guest rooms except for  
25      the barn doors?

1           A.    You could work in the bathrooms, yeah.  
2           There were other areas you could be working in,  
3           but you couldn't completely finish the room.  
4           There was also trim added on all the exterior  
5           windows in the guest rooms.

6                    So it was originally drywall and then  
7           they went with wood trim, you know, so that was  
8           sort of millwork adds throughout. On the barn  
9           door header, there was millwork that was added  
10          there. There was a piece of trim across it.

11                   So those were areas where the barn doors  
12          were a very long lead time; so you couldn't  
13          complete the room until those barn doors came in  
14          and painted them and put them in place and  
15          finished the trim over the top.

16          Q.    When you say there was a "long lead",  
17          can you describe to the Judge what that means?

18          A.    Just once we receive the change order  
19          for a product -- when I say long lead, I believe  
20          the barn doors were somewhere around 14 months,  
21          once released, to get them in stock.

22          Q.    When you said, "once released", what  
23          does that mean?

24          A.    Once the change order is approved for  
25          the cost of it.

1           Q.    So release is a term of art in the  
2           construction industry?

3           A.    Yes.

4           Q.    And that means what it implies, that the  
5           contractor is released to start the work?

6           A.    Yes.

7           Q.    Okay.  So the release of the barn door  
8           issue, that means that y'all were able to order  
9           them or able to install them?

10          A.    Order them.

11          Q.    And how long did it take for them to  
12          come in?

13          A.    Around 14 weeks.

14          Q.    Okay.  Do you know why it took so long?

15          A.    I don't.  Just that it was the supply  
16          chain.

17          Q.    Was there something in particular about  
18          the barn door that was -- was there a particular  
19          barn door that was required?

20          A.    It was a particular one.  It had a  
21          mirror or glass in it.

22          Q.    Okay.  All right.  And who directed you  
23          on the specific barn door and the specific  
24          supplier for it to be ordered?

25          A.    The architect.

1           Q.    Okay.  All right.  What other issues did  
2    you encounter?

3           A.    Hardware selection.  It took a long  
4    time.

5           Q.    What do you mean by hardware?

6           A.    Door hardware, doorknobs, locks.  
7    There's finishes, there's types, which affect the  
8    door and preparing the door for the actual lock  
9    that's being selected, that kind of stuff.  So  
10   when hardware delays, it will delay your door  
11   work also.

12          Q.    Why is that?

13          A.    So they go into -- because of the prep  
14   work on the door.  The door is pre-prepped for  
15   the lock, you know, for mortise or whatever  
16   hinges, things like that.  So the hardwood  
17   selection affects the door prep.

18          Q.    So if there's a hardware delay, so the  
19   door latches and such, you can't even order the  
20   door yet?

21          A.    If you know what your ordering for the  
22   locks, yes, you can order the door.

23          Q.    Okay.  But if you don't know what  
24   hardware is going to be used, then you can't  
25   order the door typically; is that correct?

1           A.   Typically, right.

2           Q.   Okay.  What other delays were there on  
3   the job?

4           A.   I know there was the guest room baths  
5   over the tubs.  There was a lighting issue there.  
6   There was basically what we call a doughnut  
7   recessed area in the ceiling above the soaker  
8   tubs.  Those lights were owner furnished, and  
9   when they came in, they weren't UL rated.

10                So our electrical contractor said, I  
11   can't put these up unless they're UL rated.  So I  
12   know I personally got a light, took it down to  
13   the city to the electrical inspector to take a  
14   look at it because he agreed to take a look at  
15   it.  He responded and said, I need a UL approved  
16   sticker on these lights, et cetera.

17                So I know the owner went back to whoever  
18   to get them through the UL process and all that.  
19   So that was -- I don't remember the gap of time  
20   before we got them, but I know they went up  
21   right -- very close to TCO time.  I want to say  
22   maybe November of '18, somewhere in there, toward  
23   the end of '18, I think, when we actually got the  
24   lights and got them all up.

25           Q.   Do you have any approximate recollection

1 of how long the delay was caused because the  
2 lights were -- because you upgraded them?

3 MR. BUNDY: Objection. The delays  
4 have to be critical delays.

5 THE COURT: Noted. Overruled. Go  
6 ahead.

7 THE WITNESS: I don't exactly.

8 BY MR. HILDEBRAND:

9 Q. Okay. What other issues did you  
10 encounter, to your recollection?

11 A. I know up on the ninth floor, the full  
12 equipment room, we had a design change there that  
13 had to do with the exhaust fans in the equipment  
14 room and, you know, the chemical room. And that  
15 was DHEC, the Department of Health.

16 Q. Did that delay the job in your view?

17 A. No, I don't think so. It was very close  
18 at the end, but I believe we got in there just in  
19 time.

20 Q. Okay. What other issues did you  
21 encounter?

22 A. Down in the first and second floor, we  
23 had a late flooring change in the restaurant  
24 area, kind of the lobby/restaurant area that went  
25 from carpet to wood flooring. So the wood

1        flooring had to be ordered.

2                Stair four, which basically takes you  
3        from the ground floor of the restaurant up to  
4        the -- you can access the ballroom and you can  
5        also access a private dining room up there.

6                Q.    When the change came through to change  
7        from carpet to wood flooring, do you know how  
8        long it took for the wood flooring to be selected  
9        and to be ordered to get on-site?

10              A.    I think it was a month probably to make  
11        the selection, and I believe it was around ten  
12        weeks to get the materials.    Eight to ten weeks,  
13        something like that.

14              Q.    Okay.

15              A.    I know the stair four that went from the  
16        first floor to the second floor, a few changes  
17        there.    A change to basically wood treads risers  
18        instead of carpet.    There was millwork on the  
19        walls basically going up that stair.

20              The handrails had changed to a glass  
21        handrail, which were also a long lead time.    And  
22        when you're dealing with stairs -- and I know  
23        that one was critical because it has to do with  
24        egress, fire inspections, exiting the building,  
25        that kind of stuff.

1           Q.   All right.  What other changes or issues  
2           that were involved?

3           A.   There was a wine bar added -- I mean, a  
4           wine cooler added.

5           Q.   That doesn't sound big.

6           A.   Well, it was basically in a -- kind of a  
7           pathway between the dining room and basically the  
8           lobby off of stair four and adjacent to stair  
9           four.  It kind of tucked up under stair four.

10                 So there was some modification framing  
11           that had to happen there.  There was cedar  
12           paneling that came in that had to create this  
13           wine cooler.  There's also basically a  
14           refrigerant system that goes in.  It's underneath  
15           stair four.

16                 We had to core a hole to get the  
17           equipment -- to get power to the refrigeration  
18           equipment, to get drainage and water to the  
19           refrigeration equipment.  So that was right  
20           towards the end also.

21           Q.   Okay.  What other issues did you  
22           encounter on the job?

23           A.   I guess some of the others were like  
24           elevations from interior design that are  
25           basically showing how the millwork is to be



1        installed in different areas. And this is  
2        primarily on the first and second floor amenity  
3        areas.

4                So getting some of those drawings or  
5        elevations later in the project -- because when  
6        you go in at the beginning and you frame and you  
7        rough-in say your electrical, your switches, your  
8        fire alarm strobes, things like that, you're  
9        roughing all that into the framing. You're  
10       drywalling.

11               When a millwork elevation comes later,  
12       there's coordination that has to happen there  
13       because you may have a receptacle that doesn't  
14       line up in that -- in that wood panel or it hits  
15       a piece of chair rail or hits a piece of base.

16               So there was -- when those would come  
17       out, we would look at it, and we were shifting  
18       the -- you know, shifting electrical outlets and  
19       shifting switches and trying to get them centered  
20       in the panels and things like that, so it caused  
21       a disruption.

22               Q.    So that was after the finishes had been  
23       installed, like after the sheetrock and/or the  
24       wood paneling had been installed?

25               A.    In many cases, yes.

1           Q.   All right.  What other changes were  
2           there?

3           A.   I think one of the -- one of the ones  
4           that happened a little bit later was the  
5           stairwells -- there were windows in the  
6           stairwells, and they originally had like interior  
7           shutters that were deleted.

8                    So one of the problems was, when you  
9           stood on the outside of the building and looked  
10          through the window, you could see, say a stair  
11          landing or a stair stringer, you know, through  
12          the window.

13                   So we went back and forth for a while,  
14          what are we going to do to fix that?  And I know  
15          the designers had to go back, you know, with the  
16          BAR because anything on the exterior, Board of  
17          Architectural Review, they've got a say-so,  
18          right.

19          Q.   Okay.

20          A.   So we eventually went in after  
21          stairwells were drywalled and painted.  They had  
22          us go in and basically put metal panels, dark  
23          metal panels over the inside of the window to  
24          basically blank off the inside and then drywall  
25          over then and then go back and paint.  So that

1       was one of the, I guess, bigger change orders on  
2       the job.

3           Q.    Okay.  Were there any issues with the  
4       Hope's doors?

5           A.    No.  The Hope's doors originally had a  
6       VE that took them to a Jamestown series, I  
7       believe it was.

8           Q.    What is a VE?

9           A.    Value engineering, a reduction of cost,  
10      trying to find something that's equivalent but  
11      less expensive.

12                So there was -- there was a VE to the  
13      doors that basically changed some of the beams  
14      and headers around it -- you know, around those  
15      as far as on the inserts.  So there was a little  
16      bit of change there as far as the structure, the  
17      framing, the sealing around it.

18           Q.    Okay.  Any other issues?

19           A.    I know the general windows, which I  
20      believe were peerless originally in the original  
21      docs that were on for the most part floors three  
22      through eight in your guest rooms and all.  It  
23      basically got upgraded to a Graham window.  That  
24      was one of the requests.  I know peerless had  
25      been used with WLA in previous hotels, like

1 Hampton Inns and things like that.

2 Q. Okay.

3 A. And I knew the owner wanted better  
4 windows. So we talked to First Choice. We  
5 talked to Graham, brought Graham in, got some  
6 samples and took them to Mike and Kim at their  
7 office to let them look at them.

8 He would look at the muntins or the  
9 profile and make adjustments until he got the  
10 windows the way he liked. And then we were able  
11 to get the change order resolved and get them  
12 ordered.

13 Q. Okay. Was there a delay associated with  
14 that?

15 A. No.

16 Q. Any other significant changes or issues  
17 that developed?

18 A. Stucco change early on, a stucco finish  
19 change early on, on the exterior. I know there  
20 was an address given to me of a building  
21 downtown. I can't remember the address that Mike  
22 had liked the finish on.

23 So I grabbed our stucco subcontractor.  
24 We went and looked at it to see the finish. It  
25 wasn't an engineered system. It was just a

1       direct applied, but we understood the finish. So  
2       we got some samples, showed them. Then we ended  
3       up making some larger sample boards.

4               I think I recall four of them with  
5       different textures or different colors,  
6       antiquing, things like that. And we had Mike and  
7       Kim come out to look at it and decide, and so we  
8       ended up having a change order to the type of  
9       stucco on the project.

10       Q.    Okay. Any other issues that you can  
11       recall?

12       A.    Some smaller ones, changes to -- some of  
13       the balconies had knee walls on them. There was  
14       a minor change to modify a couple of the balcony  
15       walls on the third floor. There was -- over the  
16       ballroom up on the third floor, third floor  
17       terraces.

18               They're basically like a third story  
19       there with walls and a roof. That was originally  
20       CMU. That changed the framing to DensGlass, and  
21       that was part of the column removal, structural  
22       change.

23       Q.    Okay. When you say, "CMU", that's  
24       concrete --

25       A.    Block. It was originally block walls up

1       there with BAR choice copper roof and that went  
2       to framing DensGlass stucco; so that was a  
3       change. That was part of the structural change.

4               Then up on that third floor terrace,  
5       there were owner furnished lighting that we ended  
6       up getting it changed to kind of relocate them.  
7       This was after the balcony was tiled. And  
8       basically that required -- you had stub-ups for  
9       your power.

10              So we had to do some shifting, some more  
11       cord drilling, which required going in the  
12       ballroom, opening up the ceilings, moving  
13       electrical, things like that. The ballroom  
14       chandeliers originally came in. They were owner  
15       furnished. The contractor installed. We put  
16       those up.

17              And then Mike came in one day and said,  
18       those aren't right. That's too small. So they  
19       looked at it and then reordered larger  
20       chandeliers. Reordered the larger chandelier.  
21       It required additional weight, additional  
22       anchoring from the schematic we had with the  
23       other lights. So there was some opened up  
24       ceilings adding additional anchors for the  
25       additional weight for those lights.

1                   There was some can lights deleted in the  
2           ballroom. Of course, I had spoke to it earlier.  
3           There was a lot of the HVAC that had to be  
4           rerouted to try to fit within the ceiling  
5           confinements.

6                   There was one in particular where we had  
7           to go take ductwork outside of the ballroom into  
8           the adjacent room, come around and come back in  
9           because we were trying to keep the interior  
10          design elements intact as much as possible. So  
11          we made -- there was some HVAC ductwork changes  
12          to work with that.

13                Q.    Okay. How often would you see Michael  
14          Bennett on-site?

15                A.    I'd see him. I mean, sometimes he would  
16          stop by for lunch, you know, come by around  
17          lunchtime periodically. But I would say on  
18          average maybe once a month, something like that.

19                Q.    Okay.

20                A.    Sometimes twice a month. It just  
21          depended.

22                Q.    How about Kim Brown?

23                A.    Kim would come probably about the same,  
24          a little bit more. Probably twice a month,  
25          something like that.

1           Q.    What is Kim Brown's relation to Mike  
2    Bennett?

3           A.    She works for Mike in -- I would say  
4    Mike's right hand.

5           Q.    Okay. All right. How about Jim  
6    Clements, the owner's representative, that you  
7    talked about earlier. How often did he come  
8    on-site?

9           A.    Jim would be on-site weekly. He would  
10   come on-site and do walks. He would be in our  
11   OAC meetings, of course. So he was frequently  
12   there.

13          Q.    Okay. So when you say weekly, was that  
14   typically once a week, one day a week or --

15          A.    Sometimes two days a week. One to two  
16   days a week but consistently there every week.

17                   MR. HILDEBRAND: I'm going to go  
18   back into the document, if that's okay.

19                   THE COURT: Okay. Before we get  
20   there, let me just ask. It's almost 5 o'clock.  
21   You've still got a little more to go. How much?  
22   Do you have any idea?

23                   MR. HILDEBRAND: It's --

24                   THE COURT: I was going to go -- I  
25   typically go anywhere from 5:00 to 6:00. So



1       that's why I was just trying to figure out if we  
2       were at a stopping point now.

3               I think I put word out to y'all last  
4       week, I've got -- my morning is covered up  
5       tomorrow. So we're not going to start back until  
6       after lunch. So I was just kind of trying to  
7       figure out where we are on a stopping point.

8               MR. HILDEBRAND: This is probably a  
9       good stopping point before I get into the  
10      drawings.

11              THE COURT: For now?

12              MR. HILDEBRAND: Yes, sir.

13              THE COURT: Okay. All right. Then  
14      let's go ahead and let's stop here for today.  
15      I've got Court. I've got my usual foreclosure  
16      roster I've got to get through. And I'm  
17      scheduled to run until 12:30. So why don't we  
18      pick up back here at 1:30 tomorrow.

19              Let's just pick back up at 1:30. We'll  
20      have Mr. Spano back on the stand at that time,  
21      and then you wanted to get some idea -- I don't  
22      know how long you anticipate cross being, but  
23      he's got -- do you got any idea? Maybe another  
24      hour or so?

25              MR. HILDEBRAND: I would guess

1       probably maybe two hours or so.

2                   THE COURT:   A couple more hours?

3       Okay.

4                   MR. HILDEBRAND:   Yes, sir.

5                   MR. BUNDY:   Couple days.

6                   THE COURT:   Couple days?   All  
7       right.   We'll be here a while.

8                   MR. HILDEBRAND:   Well, can we --  
9       I've got one -- and this kind of segues into  
10      Mr. Bundy's request for witness identification.

11                   THE COURT:   Sure.

12                   MR. HILDEBRAND:   I've got a witness  
13      who is -- has flown in to testify.   He's a  
14      factual witness.   It's a fellow named Alec  
15      Dooley.   He lives in Ohio.

16                   THE COURT:   Okay.

17                   MR. HILDEBRAND:   And I'm told that  
18      he would likely -- and this is before we had  
19      gotten your word that you wouldn't be able to  
20      start until a little bit late.

21                   THE COURT:   Right.

22                   MR. HILDEBRAND:   And so he is  
23      actually here.

24                   THE COURT:   Okay.

25                   MR. HILDEBRAND:   I'd like -- I

1 think he'll take about two hours or so. If I  
2 could just call him out of order tomorrow so we  
3 can get him up and down, particularly if he's  
4 going to take a couple day. I'd like to do that  
5 and then send him on his way.

6 MR. BUNDY: I have no objection to  
7 that at all. I would be more than happy to  
8 accommodate him. Two days may have been an  
9 exaggeration. Probably a day. Okay?

10 THE COURT: Right.

11 MR. BUNDY: So as I understand it,  
12 we're going to start tomorrow at 1:30?

13 THE COURT: Yeah.

14 MR. BUNDY: He's going to put  
15 Mr. Dooley up. And I assume he'll stay until I  
16 can cross-examine him?

17 MR. HILDEBRAND: Yeah.

18 MR. BUNDY: He's not that busy?

19 MR. HILDEBRAND: That's fine.

20 MR. BUNDY: I'll cross-examine him,  
21 and then we'll more likely than not, start back  
22 with this gentleman on Wednesday.

23 THE COURT: Probably. That's what  
24 it sounds like.

25 MR. BUNDY: Can we just admonish

1 the witness again not to talk to anybody because  
2 these overnight direct examinations --

3 THE COURT: Yeah.

4 MR. BUNDY: -- don't sit -- I mean,  
5 they scare me. Okay?

6 MR. HILDEBRAND: I'm not going to  
7 talk to him.

8 MR. BUNDY: So there's that.

9 MR. HILDEBRAND: That's no problem.

10 MR. BUNDY: The other thing is, I  
11 think we've admitted -- do we have the subpoena?

12 THE COURT: Oh, yeah. Okay.

13 So, Mr. Spano, you can step down if  
14 you'd like. You can stay right there if you're  
15 comfortable.

16 MR. BUNDY: Your Honor, earlier  
17 today, we discussed the subpoena that I had  
18 issued and I, unfortunately, didn't have a copy  
19 at the time. I do now.

20 THE COURT: Sure.

21 MR. BUNDY: The subpoena was served  
22 right after the meeting that my law partner had  
23 with Mr. Hildebrand.

24 THE COURT: Okay.

25 MR. BUNDY: And we got the letter

1 back saying he was not going to provide what we  
2 requested. So we attached documents to be  
3 produced at trial, Exhibit A.

4 All of these descriptions came from --  
5 to me from Ms. Hadley, and they were a direct  
6 approximate result of my representation to you.  
7 The last time we were together, she was going to  
8 attempt to finish the audit and update the audit.

9 THE COURT: Right. Okay.

10 MR. BUNDY: Nothing to do with  
11 discovery; nothing to do with exhibits; nothing.

12 THE COURT: Okay.

13 MR. BUNDY: It's just a subpoena.

14 THE COURT: So, generally speaking,  
15 we're talking about updated job cost report,  
16 updated subcontractor status report, updated  
17 projected final cost report, and the  
18 identification of expenses incurred as cost of  
19 the work; is that right?

20 MR. BUNDY: And she attempts to  
21 explain it. It's not like these are just words  
22 that she made up.

23 THE COURT: Right.

24 MR. BUNDY: She really has gone --  
25 I really feel like she's tried to do her job to

1 explain what it is she wanted. And she dealt  
2 with these people when she did the original  
3 audit. So they should be familiar with all of  
4 these terminologies and that sort of thing.

5 THE COURT: Okay.

6 MR. BUNDY: And she's here from  
7 Maryland, and we're paying her to sit here all  
8 week. So I'd like to give her something to do  
9 other than listen to me complain.

10 THE COURT: Mr. Hildebrand?

11 MR. HILDEBRAND: Your Honor, that  
12 subpoena is inappropriate to serve an attorney  
13 for a client. There's no place in the rules that  
14 would provide for a subpoena to be served on an  
15 attorney.

16 If you want documents or if you need to  
17 subpoena somebody, you serve the subpoena on the  
18 person or on the client. I don't think -- more  
19 over, I don't think a subpoena is appropriate for  
20 a discovery request, which this is. It's after  
21 the discovery period.

22 So I think that the subpoena is  
23 inappropriate, but like I told you earlier, Your  
24 Honor, I tried to accommodate Mr. Bundy. His  
25 auditor spent an inordinate amount of time

1       going -- asked our witnesses as many questions as  
2       they wanted to, got all sorts of documents and  
3       issued their report.

4               So when I got this request for  
5       additional information that Mr. Bundy sent and  
6       noted for the first time last week at that  
7       hearing, I said, well, let's see what it is and  
8       if we just need to update the figures again. I  
9       understood it, based on subcontractors who had  
10      settled and such.

11             Let's see if we can get to the same  
12      figure. And he said okay. And then I got this  
13      document request, and I said, well, let me see  
14      what I can do. I then just voluntarily provided  
15      him -- I sent this to my clients, and they said,  
16      well, okay, we'll provide that.

17             And my understanding was, we've answered  
18      all four of these. And I sent an e-mail to  
19      Mr. Bundy directly from my client saying, here  
20      are the documents. So first off, I think that  
21      the subpoena is inappropriate.

22             THE COURT: All right.

23             MR. HILDEBRAND: But I think I've  
24      produced the documents. I think that they're  
25      outside of discovery, but I said that -- told you

1 I would try to work with them to see if we could  
2 come to some sort of agreement on what the  
3 actual -- that the owners are.

4 THE COURT: Okay.

5 MR. HILDEBRAND: So that's kind of  
6 where we are. I think I had provided this. I  
7 gave it to my client and I just told him, these  
8 are the answers to it. So I'm not really sure  
9 where we are.

10 THE COURT: Okay. All right.

11 MR. BUNDY: I just want the  
12 document. I don't want -- I don't need a lot of  
13 talk about who agreed to what or anything else.  
14 I sent him a letter. I told him, this is the  
15 documents I wanted. He refused to produce them,  
16 and I issued a trial subpoena.

17 And now he's telling me he's produced  
18 them, but I don't see any documents. Just bring  
19 me what it is that he contends comply with this  
20 subpoena so I can see if that is in fact true.

21 THE COURT: Okay.

22 MR. BUNDY: Because I'm going to  
23 ask these witnesses when he finally puts up  
24 somebody to talk about numbers, whether these  
25 documents actually exist or not. And if they do,



1       they're going to be in violation of the subpoena.  
2       If they don't exist, then we've got other  
3       problems with the cost of the work.

4                   THE COURT:   Okay.   All right.

5                   MR. HILDEBRAND:   Your Honor, I sent  
6       him an e-mail with the documents.   Every other  
7       document production in this case has been done by  
8       e-mail, and that's what was required under the  
9       actual contract, the original contract.  
10      Everything was to be done electronically.

11                  THE COURT:   Okay.

12                  MR. HILDEBRAND:   So I provided  
13      them.   I had sent them by e-mail.

14                  THE COURT:   Do we have hard copies  
15      or what do you have?   You've submitted them  
16      electronically --

17                  MR. HILDEBRAND:   Yes, sir.

18                  THE COURT:   -- what you've got?

19                  MR. HILDEBRAND:   Yeah.   That's what  
20      we did.

21                  THE COURT:   And updated through  
22      what?   Friday, Saturday, Sunday?

23                  MR. HILDEBRAND:   That's my  
24      understanding, Your Honor.   I haven't reviewed  
25      them, but I've been told by my client that

1       they -- these are the documents in response to  
2       Mr. Bundy's request.

3                   THE COURT: All right. Here's what  
4       I want y'all to do. I've got things to do in the  
5       morning. Y'all have got things to do in the  
6       morning. I want y'all to put your heads together  
7       in the morning, come on in here at 8:30, 9,  
8       whatever time y'all want to get started, and  
9       let's make sure we work out what it is we've got  
10      to get to. Okay?

11                  She's trying to get the documentation  
12      that she needs to do her report. She was shaking  
13      her head back there just like Mr. Bundy was. So  
14      I need to get her whatever it is that she's  
15      looking for so we can get this done.

16                  MR. BUNDY: Well, I don't know what  
17      I want to come down here and talk about. Either  
18      he's going to produce the documents that are  
19      listed here because he doesn't have them or  
20      because he refuses the -- I don't want to talk  
21      about it anymore because there's nothing to talk  
22      about.

23                  THE COURT: I'm assuming that they  
24      exist somewhere, right?

25                  MR. BUNDY: Or if they don't, all

1       they have to do is say no. I can't make him  
2       produce something that doesn't exist. But he  
3       doesn't even personally know himself whether they  
4       do exist. Somebody else has told him. This is a  
5       subpoena. This is serious stuff. He's supposed  
6       to go get it.

7                       MR. HILDEBRAND: Your Honor, I'm  
8       going to respond to that. I got his letter, and  
9       I volunteered -- I think the discovery period is  
10      over.

11                     THE COURT: Right.

12                     MR. HILDEBRAND: And it's -- his  
13      client who's supposed to have done the audit many  
14      months ago produced a report, and we're going to  
15      talk about that. Now, she's saying she wants  
16      additional documents. I've done that  
17      voluntarily, but I don't think I'm under an  
18      obligation to.

19                     But I've done it voluntarily with -- I  
20      will tell you what, Your Honor -- in good faith,  
21      to try to work with the Court to give you  
22      accurate numbers. Again, I thought that it was  
23      related to the number of subs who had settled out  
24      on those issues. That's where the context of  
25      where it came in.

1 THE COURT: Okay.

2 MR. HILDEBRAND: What Mr. Bundy is  
3 now trying to do is to engage in additional  
4 discovery after the discovery period, and saying,  
5 okay, well, I didn't do a request for production  
6 a while back. Now, I'm going to try to do a  
7 trial subpoena and have you come in and produce  
8 additional documents.

9 So I don't think I'm under an obligation  
10 to, but I have, as an accommodation, provided  
11 responsive documents. And I think it just needs  
12 to end at that. His witness can testify about  
13 what her opinions and whether they've changed or  
14 not, but I don't think it's an issue for the  
15 Court, frankly.

16 MR. BUNDY: I don't want anybody to  
17 accommodate me at all. I'm not asking for  
18 accommodation. I just want you to make a  
19 decision that, in all due respect, you quash the  
20 subpoena or enforce the subpoena. And it's very  
21 simple. If you've got a legal ground to quash  
22 it, quash it, and I'll just live with it. If you  
23 don't, make him do it, right?

24 I mean, those are the only two choices,  
25 Judge. I mean, we can talk about who's

1       accommodating who and who said what.    The  
2       subpoena is very clear.   If I had subpoenaed a  
3       witness, we'd be looking at people's IDs and --

4                   THE COURT:   Making sure they are  
5       what they are.

6                   MR. BUNDY:   -- and driver's  
7       licenses.

8                   MR. HILDEBRAND:   That's entirely  
9       different.

10                  THE COURT:   Well, let me ask this  
11       question.   Ms. Hadley, you're on the back row  
12       back there.   The first thing requested is an  
13       updated job cost report.   What do you -- have you  
14       gotten anything since March of 2020?

15                  (Ms. Hadley:)   Yes.   We got a job  
16       cost report on Friday.

17                  THE COURT:   On Friday.   Was that  
18       sufficient to answer this -- to put into your  
19       report?

20                  (Ms. Hadley:)   It's not in the same  
21       format, and it's -- the PDF is not useable but --

22                  THE COURT:   If it were provided in  
23       a different format, would that become useable for  
24       you?

25                  (Ms. Hadley:)   It would.   If it's

1 in Excel would be great.

2 THE COURT: Is that something that  
3 could be done?

4 MR. HILDEBRAND: I don't know, Your  
5 Honor. I would assume so. I don't know where  
6 the documents came from.

7 (Ms. Hadley:) It's been produced  
8 in a PDF.

9 MR. HILDEBRAND: Why can she not  
10 use it? I don't understand.

11 THE COURT: Well, with the PDF, she  
12 can't manipulate it.

13 MR. HILDEBRAND: I'm sorry?

14 THE COURT: I said, with the PDF,  
15 she can't manipulate it. She's got to be able to  
16 use it.

17 (Ms. Hadley:) It's been given to  
18 me in Excel before.

19 MR. BUNDY: Your Honor, the  
20 witness, could you look at the subpoena, please?

21 THE COURT: Yeah. I've got it in  
22 front of me.

23 MR. BUNDY: She's the one that  
24 prepared the narrative.

25 THE COURT: I've just got to get to

1       this. Y'all can work on it overnight and in the  
2       morning. Updated job cost report. You said you  
3       got something Friday, but it was in PDF. If what  
4       you got Friday is put together in an Excel  
5       spreadsheet, you could use that --

6                       (Ms. Hadley:) Yes.

7                       THE COURT: -- to give your report?  
8       All right. I'm going to ask that y'all produce  
9       that in an Excel format.

10                      All right. Item number 2, an updated  
11       subcontractor status report. I would assume that  
12       includes the -- what we just talked about, that  
13       these subs, some of them are in and some of them  
14       are out now.

15                      (Ms. Hadley:) Yes. That was also  
16       produced on Friday night.

17                      THE COURT: Okay. Do you have the  
18       data you need for that?

19                      (Ms. Hadley:) Yes.

20                      THE COURT: Okay. Sufficient in  
21       format?

22                      (Ms. Hadley:) It's also in PDF.  
23       That is very hard to manipulate. I would love it  
24       in Excel, but it isn't my highest priority.

25                      THE COURT: All right. Let's put

1       that in Excel, if we can do that. It's got to be  
2       done in that fashion, one way or the other.

3       Number 3, updated project final cost report.

4       Anything since March of '19?

5                       (Ms. Hadley:) No.

6                       THE COURT: All right. Is there  
7       any additions, corrections to that updated  
8       project final cost report?

9                       MR. HILDEBRAND: I don't know, Your  
10      Honor. I would have to check.

11                      THE COURT: All right. If you've  
12      got it --

13                      MR. HILDEBRAND: Yeah, if it has  
14      been updated, I'll --

15                      THE COURT: If you've got it,  
16      produce it in Excel if you could. And then  
17      finally, expenses submitted as cost of the work,  
18      and there's a number down here, approximately  
19      \$108,000 or so. I want to make sure we're  
20      talking about apples and apples.

21                      (Ms. Hadley:) Not exactly. We are  
22      looking for BBC's cost of the work. We've never  
23      received that. It's not that we need an update.  
24      We've never gotten one.

25                      THE COURT: That's a line item cost



1 of the work?

2 (Ms. Hadley:) We would like to  
3 know what BBC is saying their cost of the work  
4 was.

5 THE COURT: Okay.

6 MR. HILDEBRAND: Your Honor, it  
7 sounds like this is what she should have done  
8 when she did her audit many months ago. And I  
9 have no idea -- and I don't think it's fair to --  
10 I can't represent what she's talking about, how  
11 difficult it would be to get.

12 But I do know that the audit was  
13 finished, and it was represented by Mr. Bundy and  
14 Library Associates that the audit was finished,  
15 and it was provided. So they did the audit, and  
16 they said that they had gotten everything, and it  
17 was done. So we got it.

18 And nobody -- if we hadn't done it  
19 right, they would -- I can guarantee you, they  
20 would have come back to you and said, Hildebrand  
21 didn't cooperate because they've already done  
22 that before.

23 So she did an audit, and she published  
24 an audit. And I don't know what it is that she's  
25 asking for or saying that she did not have

1       because it should have all been produced long  
2       ago.

3                       (Ms. Hadley:) I can explain it.

4                       THE COURT: Okay.

5                       MR. BUNDY: It wasn't produced, and  
6       this lady can explain it.

7                       THE COURT: All right. Tell me  
8       what you're looking for.

9                       (Ms. Hadley:) That report is 15  
10       pages long. Two of the 15 pages of that report  
11       are itemizing that I didn't get the cost of the  
12       work documents, and all of the laborious work  
13       that I had to do that Mr. Hildebrand referenced  
14       earlier, we did spend hours with them because  
15       they wouldn't give us cost of the work. I've  
16       never gotten it, and that report clearly shows  
17       that.

18                      MR. HILDEBRAND: I can respond to  
19       that, Your Honor.

20                      THE COURT: Yeah. I'm not -- I  
21       think I'm lost now. I'm not sure what we're  
22       looking for. Is this any expense that Balfour  
23       Beatty has expended out of pocket? Is that what  
24       we're looking for?

25                      (Ms. Hadley:) Yes. Well, I will

1       say, it's slightly different. It is what -- what  
2       Balfour is saying represents cost of the work as  
3       defined in the contract.

4                   THE COURT: Right.

5                   (Ms. Hadley:) Section 6.

6                   THE COURT: Okay.

7                   (Ms. Hadley:) I received their  
8       accounting report, but they don't claim all of  
9       those costs as cost of the work because maybe  
10      they're legal fees or maybe they're  
11      reconstruction or whatever they might be. I need  
12      them to identify what they believe is cost of the  
13      work because then we compare it to the GMPs.

14                  THE COURT: Okay. Got it. I'm  
15      with you.

16                  MR. HILDEBRAND: Your Honor, again,  
17      this audit was done, and I don't have -- I think  
18      we have a copy of the audit. I think it's one of  
19      our exhibits. I'm almost sure that it is. Let's  
20      look at it, and we can show you, that's what they  
21      provided as the audit of our work.

22                  THE COURT: Okay.

23                  MR. HILDEBRAND: And I know we  
24      spent a whole lot of time and effort responding  
25      to it for them to come in now and say, we didn't

1       cooperate, and we haven't provided all the  
2       documents. We did. But what they're hitting me  
3       with now is -- I don't know what she's talking  
4       about.

5               These are accounting issues, and I don't  
6       think it's appropriate or fair to me to ask me to  
7       respond to her allegations without the fellow who  
8       did those for Balfour Beatty. He's an inhouse  
9       fellow named Casey Thompson. So I would like for  
10      him to understand --

11             THE COURT: And that's probably  
12      what needs to happen here would be to have him  
13      communicate with her and see if he's got  
14      something, whether it's buried in something else  
15      or it's a line item that's the cost of the work.  
16      I don't know how that is.

17             But the only way I know to get that  
18      stuff together, you've got to get lawyers talking  
19      to lawyers and engineers talking to engineers and  
20      accounting people talking to accounting people.  
21      That's the only way you get -- to my way of  
22      thinking, that you get something like that  
23      resolved.

24             I'm not a hundred percent either or  
25      whether or not it's buried in some other

1 document, you know, some other category of  
2 expense somewhere else. I don't know the answer  
3 to that question. But I do recall the language  
4 in the contract, something about cost of the work  
5 that involved the language of the contract.

6 MR. HILDEBRAND: Your Honor, they  
7 provided the audit, and I can show it to you  
8 because I know that we have it here and have it  
9 marked.

10 They produced -- and that's what we went  
11 through so much trouble with. They said, yes,  
12 we've gotten -- in fact, there was an affidavit  
13 from Ms. Hadley, and I had taken her deposition,  
14 that she did her full her audit, and she  
15 published her audit.

16 And that was all done. And for her --  
17 for them to now come in and say, wait a second,  
18 we didn't do it, and y'all didn't provide  
19 something way back when. I'm saying, what on  
20 earth are you talking about? Because we went  
21 through that about a year ago.

22 MR. BUNDY: Here it is right here.

23 THE COURT: Okay.

24 MR. BUNDY: When she wrote her  
25 report, she wrote down all the things that were

1       necessary to do her audit that they did not  
2       produce. They still haven't produced it. They  
3       need to read the audit before they -- no wonder  
4       they don't understand it. They probably haven't  
5       read it.

6                   THE COURT: This was correspondence  
7       she was having with Casey Thompson. Is that the  
8       fellow?

9                   MR. HILDEBRAND: Yes, sir.

10                  THE COURT: Yeah. Okay. So if you  
11       read further, they're trying to distinguish  
12       between expenses which are claimed reimbursable  
13       versus those which are not. Is that something  
14       that y'all have done or that you are aware of  
15       having done? Reimbursable versus  
16       non-reimbursable expenses?

17                  MR. HILDEBRAND: Your Honor, Casey  
18       Thompson, I would --

19                  THE COURT: All right. What I'd  
20       ask you to do is to make him and her available to  
21       talk, and let's get a report tomorrow before we  
22       start. Okay?

23                  MR. BUNDY: Thank you, Your Honor.

24                  THE COURT: All right. So I plan  
25       to see y'all tomorrow, whoever wants to come back

1 at 1:30.

2 (The hearing was concluded at

3 5:13 P.M.)

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1       the actual completeness of the project.

2           Q.    Okay.  So he's an in-house guy, right?  
3       He's an employee of Balfour Beatty?

4           A.    He was, yes.

5           Q.    Okay.  Well, at the time of this project  
6       he was?

7           A.    Yes, sir.

8           Q.    And he was -- and just like you, you  
9       used to be an employee of Balfour Beatty,  
10      correct?

11          A.    Correct.

12          Q.    You're not an employee anymore, right?

13          A.    I am not.

14          Q.    Do you know when Mr. Lauricella left?

15          A.    I don't.

16          Q.    Okay.  But his sole job, as far as you  
17      know, is he was the scheduling guy, right?

18          A.    He was our scheduling manager, yes.  He  
19      managed the schedule.

20          Q.    For the Hotel Bennett project, correct?

21          A.    Yes.

22          Q.    All right.  Other than Mr. Lauricella,  
23      was there anybody else?  Is it Lauricella or  
24      Lauricello?

25          A.    I've always pronounced it Lauricella.



1           Q.    But I could be right; you could be  
2           right.  We don't know.

3           A.    Yeah.

4           Q.    It doesn't matter.  Who else was the --  
5           who else was out there?

6           A.    Well, the -- from an executive level  
7           standpoint, we had a combination during the  
8           course of the project being Jeff Sandeen, David  
9           Stanton and Dave Simonton working with us on the  
10          project.  Do you want to go through that, too?

11          Q.    How often were they on-site?

12          A.    Well, Dave Simonton was on-site every --  
13          he was in the office every day.  I don't know if  
14          he went onto the jobsite every day, but he was on  
15          the jobsite at multiple days during the course of  
16          every week.

17          Q.    In the office that you described that  
18          was on King Street?

19          A.    Yes.

20          Q.    And he was there the whole time that you  
21          were there, Mr. Simonton?

22          A.    No.  He came in the fall of '17.

23          Q.    Fall of '17?

24          A.    Uh-huh.

25          Q.    Okay.  So when he got there --

1           A.    I can only assume so.

2           Q.    So as of April 25th, 2018, you had  
3           uploaded -- and we'll get there in a second --  
4           all the Multivista photos onto a shareable link?

5           A.    I don't know which photos that I had,  
6           but the Multivista photos that was given to me by  
7           somebody else, I put them onto Balfour Beatty's  
8           Egnyte site.

9           Q.    And that's what I'm going to ask about  
10          next. What is the Egnyte site?

11          A.    It's like a Dropbox or a shared file.  
12          It's a shared folder service. It's a file  
13          computing shared folder service.

14          Q.    Okay. And what kind of things do y'all  
15          put on the Egnyte site?

16          A.    Everything. I mean, we would put -- we  
17          would put plans, specifications, RFI responses,  
18          submittals, progress photos.

19          Q.    What about change orders?

20          A.    So I don't recall if we put them on  
21          there. I know that we used a different program  
22          called Constructware for change orders.

23          Q.    Okay.

24          A.    I don't know if we would actually copy  
25          those into Egnyte. I don't remember.

1 All right.

2 MR. HILDEBRAND: Thank you, Your  
3 Honor. The plaintiff would call Mark Doran.

4 THE COURT: All right. So come  
5 right around here if you would. Watch your step.  
6 And, sir, I missed your name.

7 THE WITNESS: Mark Doran.

8 THE COURT: Doran. All right.  
9 Mr. Doran, if you would, sir.

10 (MARK DORAN, having first been duly  
11 sworn, testified as follows:)

12 THE COURT: And if you'll give us  
13 your full name and address for the record,  
14 please, sir.

15 THE WITNESS: Yes, Your Honor.  
16 It's Mark Joseph Doran, D-O-R-A-N. My address is  
17 915 Preservation Circle, Pawleys Island, South  
18 Carolina 29585.

19 THE COURT: All right, Mr. Doran.  
20 Thank you, sir.

21 Mr. Hildebrand?

22 MR. HILDEBRAND: Thank you, Your  
23 Honor.

24 DIRECT EXAMINATION

25 BY MR. HILDEBRAND:

1           Q.   All right.  Mr. Doran, you've stated  
2           your name and address, and let's go through a  
3           little more of your background.  And I think that  
4           you have prepared a PowerPoint that has some  
5           slides that -- let me ask you this:  Have you  
6           prepared a PowerPoint relative to your  
7           presentation here today?

8           A.   I have.

9           Q.   And have you -- the PowerPoint, is it  
10          based upon the information that you've received  
11          from various parties in this matter?

12          A.   It is.  It's based on my report, which  
13          was based on all the information I received from  
14          the parties in this matter.  It's basically a  
15          summary of opinions and findings I had in my  
16          report.

17          Q.   Okay.  And is the information that you  
18          have provided with the charts and summaries that  
19          are included within your PowerPoint, are those of  
20          a type that are typically included and reasonably  
21          relied upon by experts in your field of  
22          scheduling?

23          A.   Sure, yes.

24          Q.   I would like to, and do you -- what was  
25          the reason for preparing the PowerPoint?

1           A.    The reason for preparing the PowerPoint  
2           was to summarize my findings and opinions in a  
3           simpler format to present to the Court.

4           Q.    Do you feel like the PowerPoint would be  
5           hopeful to Judge Scarborough in following your --  
6           what your opinions are and helping him to  
7           understand what it is that you're trying to  
8           convey?

9           A.    I think it's a lot more helpful than my  
10          report. My report is full of all kinds of  
11          narratives and discussions and some charts. It  
12          just basically boils that down to allow pictures,  
13          which I think are a lot more understandable and  
14          easy to follow.

15          Q.    Okay. And are the diagrams and  
16          photographs that are included in your PowerPoint,  
17          do you believe that those would be more helpful  
18          for the Judge to understand your opinions than  
19          simply you trying to testify orally?

20          A.    Of course.

21                   MR. HILDEBRAND: Okay. Your Honor,  
22          he's got some preliminary slides I can --

23                   MR. BUNDY: I object. I filed a  
24          motion. I think Your Honor has it, on 1006.

25                   THE COURT: 1006? Yeah. Okay.

1                   MR. BUNDY: May I do some voir dire  
2                   on this to maybe save us some time?

3                   THE COURT: Okay. All right. I  
4                   assume you're going to put him in as an expert  
5                   scheduling --

6                   MR. HILDEBRAND: Yes.

7                   THE COURT: A scheduling expert?

8                   MR. HILDEBRAND: That's right.

9                   THE COURT: Okay. That's what he's  
10                  being offered for, correct?

11                  MR. BUNDY: This voir dire is not  
12                  going towards his expertise. I'm going to go  
13                  into that in another area when he offered -- he  
14                  hasn't offered him up as an expert yet.

15                  THE COURT: Right.

16                  MR. BUNDY: What he's offering is  
17                  a -- what he alleges to be a 1006 exhibit. Okay?  
18                  And I can tell you all of the things that are  
19                  wrong with it, and he is going to go back and  
20                  forth. It would probably be easier for me just  
21                  to see if he can establish the elements that are  
22                  necessary. Do you know what I'm saying?

23                  THE COURT: Yeah.

24                  MR. BUNDY: Okay.

25                  THE COURT: A preliminary? I'll

1       allow it.   Go ahead.

2                   MR. BUNDY:   Thank you.

3                   MR. HILDEBRAND:   Your Honor, I

4       can --

5                   THE COURT:   Do you want to take the  
6       first stab at it and we'll go from there?

7                   MR. HILDEBRAND:   Yeah, Your Honor.

8                   THE COURT:   Sure.   Okay.

9                   MR. HILDEBRAND:   And I've prepared  
10      a brief on this.

11                   THE COURT:   Okay.

12                   MR. HILDEBRAND:   Mr. Bundy is  
13      correct that Rule 1006 provides, in part, the  
14      contents of voluminous writings, recordings, or  
15      photographs which cannot conveniently be examined  
16      in Court and may be presented in the form of a  
17      chart, summary, or calculation, provided the  
18      underlying data are admissible into evidence.

19                   And then for experts, there is a  
20      provision that, basis of opinions -- bases of  
21      opinion testimony by experts, that's Rule 703,  
22      which states, the facts or data in the particular  
23      case upon which an expert bases an opinion or  
24      inference may be those perceived by or made known  
25      to the expert at or before the hearing.

1                   If of a type reasonably relied by  
2           experts in a particular field in forming opinions  
3           or inferences upon the subject, the facts or data  
4           need not to be admissible in evidence. And then,  
5           as I cite the case that -- in the brief, State  
6           vs. Warner. The parties seeking to admit a  
7           summary must demonstrate that the contents of the  
8           documents upon which the summary is based are so  
9           voluminous, they would be inconvenient to examine  
10          in the Court.

11                  The underlying documents are admissible  
12          in evidence, and the summary is a faithful  
13          rendering of the underlying data and any  
14          inferences it contains are supported by the  
15          contents and are neutral and non-argumentative,  
16          and the originals or duplicates of the underlying  
17          documents have been made reasonably available to  
18          the parties.

19                  So we've got two rules here. One is a  
20          rule that allows summaries of data, and that's  
21          what you've allowed me to introduce as Exhibit  
22          26. Instead of introducing all the schedules, we  
23          introduced the dates that they were entered into.

24                  And this rule -- it's basically a rule,  
25          Your Honor, to -- gosh, sometimes instead of



1       having just -- introducing a massive amount of  
2       data, it allows the party to economically produce  
3       it to the trier of fact in a concise form just to  
4       make the proceedings.

5               What we're -- what this is about, Your  
6       Honor, is an attempt to make -- for the Court to  
7       be able to understand, in a reasonable manner,  
8       without unduly complicating the record, make it  
9       commonsensical on the data.

10              And sometimes it just makes no sense to  
11       introduce -- try to introduce a huge base pile of  
12       data without having it summarized, and that's  
13       what this rule allows and says, if you can  
14       introduce summaries, if the party can, so long as  
15       the underlying data has been produced. And all  
16       of the data in this matter has been produced by  
17       these experts, and they've submitted affidavits  
18       about what they have produced.

19              All the underlying data, by the way, is  
20       data that has been generated and received by the  
21       parties in discovery. It's discovery responses  
22       from Library Associates, and its expert and  
23       subpoenas that were done to the architect. So  
24       you can do summaries.

25              And then the Court, as noted in this

1       brief, Clark vs. Cantrell has said, one,  
2       summaries are admissible; but then, two, experts  
3       can certainly testify about, even if documents  
4       are not admissible into evidence, they can  
5       certainly offer their opinions based on the  
6       information that might not be admissible.

7               In reading that, Clark vs. Cantrell  
8       talks about demonstrative evidence, and it says,  
9       demonstrative evidence often is admitted only for  
10      use of the courtroom to explain and illustrate a  
11      witness's testimony, but may also be admissible  
12      as an exhibit for the jury to examine and  
13      consider during deliberations.

14             So what Mr. Doran has drafted as -- and  
15      I can ask him some more questions about it to  
16      further the -- further the base for it is, he  
17      simply -- he did a report that -- you've probably  
18      seen reports, typically reports by experts not  
19      admissible into evidence.

20             But it's kind of long-winded and boring  
21      in my view, and it's difficult to understand.  
22      But what he's done is try to do -- present this,  
23      get this PowerPoint, which is a series of  
24      diagrams and such, distillations of the data to  
25      try to understand -- help the Court understand,

1 as a layman, some of these scheduling issues.

2 I don't know if you've had them before  
3 you or not, but they can be just a little bit  
4 complicated. So that's what he has done, and  
5 I've got an -- certainly, it's appropriate. I've  
6 got a copy of the actual exhibits. Some of these  
7 are very --

8 THE COURT: Just one second. This  
9 would be a picture of the PowerPoint? These are  
10 the slides of the PowerPoint?

11 MR. HILDEBRAND: Yes, sir.

12 THE COURT: All right. Let me ask  
13 you this question, and that has to do with this  
14 underlying report. There is an underlying report  
15 of Mr. Doran?

16 MR. HILDEBRAND: Yes, sir.

17 THE COURT: That's been prepared,  
18 and that's been produced?

19 MR. HILDEBRAND: Yes, sir.

20 THE COURT: All right. And so --

21 MR. BUNDY: But it's not  
22 admissible.

23 THE COURT: The report itself is  
24 not admissible?

25 MR. BUNDY: No, it's not.

1                   THE COURT: Right. But he is here  
2           to testify as to his findings or his opinions as  
3           an expert?

4                   MR. HILDEBRAND: Yes, sir.

5                   THE COURT: That would be  
6           admissible, would it not, provided he's an  
7           expert?

8                   MR. BUNDY: Well, sure. His  
9           testimony certainly is admissible provided he is  
10          qualified for everything else. It's amazing --  
11          it's interesting. In order to make this  
12          argument, counsel for Balfour Beatty has to  
13          conflate two rules.

14                   THE COURT: Right.

15                   MR. BUNDY: These aren't two --  
16          these aren't one rule. These are two rules.  
17          They're two rules for a reason. So let's try to  
18          be analytical about this because I think that's  
19          what the rules require.

20                   THE COURT: All right.

21                   MR. BUNDY: The first thing I  
22          object to is the 1006 or based on 1006. This  
23          PowerPoint is not admissible in evidence under  
24          Rule 1006 because it -- it's not -- the  
25          evidence -- it's not in the evidence. The facts

1       in this report are not in evidence.

2                   THE COURT:   Okay.

3                   MR. BUNDY:   I've focused my whole  
4       attention on that PowerPoint.

5                   THE COURT:   Okay.

6                   MR. BUNDY:   That's all I am talking  
7       about.

8                   THE COURT:   All right.

9                   MR. BUNDY:   It is not admissible in  
10      evidence.   The fact that under Rule 703, an  
11      expert can testify on the witness stand under  
12      oath and give his opinions has nothing at all to  
13      do with the admissibility of a 1006 report.   I  
14      mean, it's apple and oranges.

15                   These are two different things because  
16      the real issue here is, under the -- you know,  
17      State vs. Warner sets it out about as clear as  
18      you can set it out.   And it says, the Courts are  
19      better attuned to the (inaudible) has wide  
20      discretion of whether a summary should be  
21      admitted, excluded, or allowed only as a  
22      demonstrative aid.

23                   And they go on the previous page and  
24      say, the more -- the first it says, the more  
25      inference a summary chart contains, the less

1       likely it will be admissible under Rule 6 and the  
2       more likely it will draw objection based on other  
3       grounds.

4               And the more likely the Trial Court  
5       decided not to admit the summary as an exhibit  
6       but restricted it to being a demonstrative aid.  
7       But even as a demonstrative aid, it can't be  
8       misleading. It can't have opinions in it. It  
9       can't draw unnecessary inferences, and all the  
10      rest of it.

11             And it's highly -- and I know Judge and  
12      jury, you're the Judge and the jury and all of  
13      that. And it's true. But I don't think if you  
14      were sitting -- let me ask you, let me put it to  
15      you this way: If you were sitting as a Trial  
16      Judge in a jury trial, would you allow this to be  
17      used to show to a jury because that's who's  
18      really sitting there. You're going to have to  
19      judge your own ability.

20             THE COURT: Right. That's the  
21      admissibility aspect, right?

22             MR. BUNDY: He said, this is the  
23      admissibility aspect.

24             THE COURT: All right.

25             MR. BUNDY: Okay. So could I ask

1       him one or two questions?

2                   THE COURT: All right. Let me make  
3       sure he's said his background, and I'm going to  
4       give you that opportunity.

5                   MR. HILDEBRAND: What I might  
6       suggest, Your Honor, is, let him go through the  
7       PowerPoint, and then, when he is finished, then  
8       you determine whether you want to admit it as --

9                   MR. BUNDY: No.

10                  THE COURT: I think that's just the  
11       opposite of what Mr. Bundy is wanting to do.

12                  MR. BUNDY: That's exactly right.

13                  THE COURT: I think he first has to  
14       establish his bases, what is his opinion and what  
15       is it based upon; and if that's been admissible,  
16       then we can get to the admissibility of the  
17       PowerPoint. I think we've got to talk somewhat  
18       about his credentials.

19                  We've got to talk about his opinions,  
20       what he relied upon in those opinions before we  
21       get to the -- and this is more of an -- I see it  
22       more as a demonstrative evidence, sort of a wrap  
23       up more so than an introductory exhibit is the  
24       way I would see that.

25                  MR. HILDEBRAND: And some of them,

1       though, Your Honor -- some of the slides are very  
2       basic to try to help the Court understand. For  
3       example --

4                   THE COURT: Well, I'm okay with  
5       that. But I think you've got -- right now, you  
6       want to show me a video through this witness. I  
7       know nothing about it.

8                   MR. HILDEBRAND: It's not a video.

9                   THE COURT: Okay.

10                  MR. HILDEBRAND: They're just  
11       slides, Your Honor.

12                  THE COURT: Just slides?

13                  MR. HILDEBRAND: Yes, sir.

14                  THE COURT: Same difference. I  
15       know nothing about his testimony, his background.  
16       I don't know anything about him.

17                  MR. HILDEBRAND: Okay.

18                  THE COURT: So first, I don't know  
19       if he is a fact witness or an expert witness, but  
20       I'm assuming he is being presented as an expert.

21                  MR. HILDEBRAND: He is.

22                  THE COURT: So give me some  
23       background.

24                  MR. HILDEBRAND: All right.

25                  THE COURT: And then let's voir



1       dire. We can voir dire him on that basis.

2                   MR. HILDEBRAND: All right.

3                   THE COURT: I don't know that  
4       there's an objection there. He clearly has an  
5       objection as to the presentation of the format.

6                   MR. HILDEBRAND: Fair enough, Your  
7       Honor.

8                   MR. BUNDY: Can I just ask him one  
9       question? Just one question?

10                  THE COURT: All right. Go ahead.

11                  VOIR DIRE EXAMINATION

12       BY MR. BUNDY:

13               Q. Mr. Doran, is that it?

14               A. Yes, sir.

15               Q. Your PowerPoint is essentially a  
16       teaching aid, right? You're trying to teach the  
17       Judge what your opinion is, right?

18               A. To explain to the Judge.

19               Q. Yes, to teach the Judge.

20               A. So he can understand it.

21               Q. To teach the Judge what your opinion is?

22               A. To explain it so he can understand it.

23               Q. Pardon me?

24               A. To explain it, so he can understand it.

25               Q. So like a teacher? Like, you're

1 explaining it to him, like if you were taught --  
2 if you were teaching scheduling, and you were  
3 teaching kind of as scheduling people, this would  
4 be a device that you would use to teach them how  
5 to do this kind of thing, right?

6 A. No. This is an explanation.

7 Q. Uh-huh. Okay.

8 THE COURT: Okay. All right.

9 MR. HILDEBRAND: Thank you.

10 THE COURT: Go ahead and lay some  
11 foundation.

12 DIRECT EXAMINATION

13 BY MR. HILDEBRAND:

14 Q. Tell me about your background. Where  
15 did you go to school, Mr. Doran?

16 A. I went to Purdue University. I majored  
17 in construction management, but it's what it's  
18 called now. I graduated in 1985. After  
19 graduation from Purdue, I went to work for Turner  
20 Construction Company in --

21 Q. I'm sorry, when did you -- '85 was when  
22 you graduated?

23 A. 1985.

24 Q. Okay.

25 A. And at Turner Construction, I was at

1       Turner for seven years.

2               Q.    Tell me about Turner.   What is that?

3               A.    Turner Construction was -- at that time  
4       was the largest general contractor in the world.  
5       We had offices all over the country and all over  
6       the world.   I was assigned to the Washington, DC,  
7       office and assigned as a field engineer.

8                   As a field engineer, you layout a  
9       project.   You like layout the walls and things.  
10      A field engineer might supervise two or three  
11      subcontractors, coordinate the work between two  
12      or three subcontractors, get the contractor's  
13      information, subcontractors the information they  
14      need if their information missing.

15              Q.    Okay.   How long were you at Turner?

16              A.    I was at Turner for seven years, and I  
17      progressed from field engineer to project  
18      engineer, which administers the paperwork for a  
19      project, submitting change orders to the owner,  
20      and then also to the concept contractors, getting  
21      the submittals approved.

22                   And then also into the superintendents,  
23      where I was superintendent of a project or  
24      projects.   As a superintendent, you are in charge  
25      of the all the field work on the project.

1           Q.   All right.  So you were at Turner for  
2           about seven years; is that right?

3           A.   Yeah.  Yes.  I started with Turner in  
4           March of '86 and left in March of '93, seven  
5           years.

6           Q.   All right.  And what did you do after  
7           that?

8           A.   After I left Turner, I went to work for  
9           a national consulting firm specializing in  
10          schedule delay analysis.  I was hired as a  
11          schedule delay analyst, and I was there for seven  
12          years.

13          Q.   Okay.  So that was -- so from '93 to  
14          2000?

15          A.   I left in '99, late '99.

16          Q.   What was the firm that you worked with  
17          during that time?

18          A.   I'm sorry?

19          Q.   What was the name of the firm that you  
20          worked with during those said years?

21          A.   It was -- the name of the firm back then  
22          was Barrington Consulting Group.

23                   THE COURT:  Barrington?

24                   THE WITNESS:  B-A-R-R, Barrington  
25          Consulting Group.  We had seven or eight offices

1        nationwide. I was in the Washington, DC, office.  
2                Right after I left, they were bought out  
3        by Navigant, which is one of the largest  
4        international consulting companies that's  
5        specializing in -- part of it specialized in  
6        schedule delay analysis and dispute resolutions.  
7        BY MR. HILDEBRAND:

8                Q.    Okay. So while you were at Turner  
9        Construction Company, that was more of -- you  
10       were a field engineer? That was kind of boots on  
11       the grounds, sort of experience?

12              A.    It was. One thing I forgot to say was,  
13       I was very involved in scheduling each of the  
14       projects at Turner. I had scheduling courses and  
15       project management courses at Purdue, which gave  
16       me the background to input the data and help with  
17       the scheduling services at Turner.

18              Q.    Okay. All right. And then, while you  
19       were with what is now called Navigant -- I think  
20       that was Barrington you said -- what sort of  
21       scheduling experience did you have during that  
22       time?

23              A.    Mostly scheduling was forensic  
24       scheduling, schedule delay analysis after a  
25       project is complete or nearly complete to

1       determine why a project went awry or why a  
2       project -- actually why a project incurred  
3       delays, the quantity of delays, causation of the  
4       delays, and the responsible party for the delays.

5           Q.    Okay.

6           A.    I did not get personally involved in the  
7       cost of the delays.

8           Q.    Okay. All right. And since you left  
9       Barrington or Navigant in 2000, approximately,  
10      what have you done since then?

11          A.    I formed Contract Solutions, which is a  
12      company I still own, and shortly after I formed  
13      it, three of the senior managers from then  
14      becoming Navigant joined me, and we brought some  
15      other people with us. Most of what we did was  
16      the same schedule delay analysis forensically.

17                I also was preparing schedules for  
18      contractors and provided schedule oversight for  
19      owners to help the owner determine if the  
20      projects from -- I'm sorry, the schedules from  
21      the contractors were acceptable, reasonable, and  
22      help with the owner understanding information in  
23      the schedule, helping to determine when their  
24      contract was due. I was also helping the  
25      contractors.

1           Q.    Okay.  So you assisted both the owners  
2           and contractors; is that right?

3           A.    Yes.  Mostly owners at that time.

4           Q.    And it sounds like during your career,  
5           you worked not only on the forensic side to  
6           determine what the cause of delays was and the  
7           length of delays, but you might be responsible --  
8           but you've also helped out and assessed schedules  
9           while a project was ongoing and even before a  
10          project gets started to see whether, in your  
11          view, the project is reasonable.  Is that a fair  
12          statement?

13          A.    Yes.  It's very accurate.

14          Q.    Okay.  And so on the -- tell us about  
15          forensic scheduling and what that entails and  
16          really what you spent a lot of your career doing?  
17          What is forensic scheduling?

18          A.    So forensic scheduling is, after the  
19          fact, analysis of a project to determine why --  
20          how much delay was incurred on a project, why did  
21          that happen, and who is responsible.

22          Q.    Okay.  And what did -- I'm sorry?

23          A.    I'm sorry.  And you asked what goes into  
24          that.

25          Q.    Yeah, yeah.  So tell me how you go about

1       doing a scheduling analysis, and I will guess  
2       where forensic work comes in is when you have a  
3       case just like this, where you get to the end of  
4       the job and then it's late and then there's a  
5       dispute over who causes; is that right?

6                   MR. BUNDY:  Objection, leading.

7           A.  Yes, that's correct.

8           Q.  Okay.  All right.  So what do you do in  
9       order to do a forensic analysis?  What's your  
10      protocol?

11          A.  So, generally, the protocol is depending  
12      on which party hires me.  Like, if I'm hired,  
13      which either -- I meet with them first, whichever  
14      party hires me.  I meet with them to determine  
15      what is it they think happened, what is it they  
16      want me to do.  It's always generally saying they  
17      want me to, you know, review the project records  
18      and provide an independent assessment of my  
19      findings.

20          Q.  When you say that your protocol -- and  
21      maybe I'm misunderstood you and I don't think we  
22      were clear.  Did you say your protocol changes  
23      depending on whether you're doing a forensic  
24      analysis for owners as opposed to a contractor?

25          A.  No, just the initial meeting is



1 different usually.

2 Q. Okay. How is that different?

3 A. Usually with the contractor, you sit in  
4 a room with multiple people involved, from the  
5 field engineer to the owner of the company maybe.  
6 And they give you a flavor for what happened on  
7 the project.

8 They go through lots of detail maybe,  
9 and give you some -- a lot of good -- a lot of  
10 information that would give an analyst like me  
11 information to where I could look further to form  
12 an analysis.

13 Q. Okay.

14 A. Usually when I meet with an owner, it's  
15 usually one or two people, and they say, we've  
16 got a claim from the contractor. We'd like for  
17 you to take a look at it, write a report, give us  
18 your opinions.

19 Q. Okay.

20 A. So it's a little bit different from the  
21 amount of 20 people involved and the amount of  
22 detailed information.

23 Q. Okay.

24 A. By the time I get involved with the  
25 owner, there's already a claim, a written claim

1 usually by the contractor, sometimes an expert  
2 report. It is, you know, by the contractor. And  
3 that gets me off running because I already know a  
4 lot about the project.

5 Q. Okay.

6 A. When I work for the contractors, it's a  
7 lot of detail work to do to get all of that  
8 information and start from the ground up.

9 Q. Okay. All right. And I would imagine  
10 that the amount of time that you spent doing --  
11 assessing the background work and such would  
12 depend on -- largely on the size of the project.  
13 Is that a fair statement?

14 A. The size of the project, the complexity  
15 of the project, and mostly -- what I tell people,  
16 it's quantity of documents I have to review.

17 You could have a short project that has  
18 a lot of documentation that I have to review than  
19 maybe a middle size or a larger contract that has  
20 a lot less correspondence or documentation for me  
21 to maintain proficiency. The quantity of  
22 documents usually is what determines the cost of  
23 my services and how long it takes me to do that.

24 For instance, on this project, 43  
25 schedule updates. That's a pretty long project.

1       Pretty long, pretty big. One of my work products  
2       from those schedules was I exported the data. I  
3       have a database. It's in Excel. 93,000 --

4           Q. You said it's in Excel?

5           A. It's in Excel.

6           Q. Okay.

7           A. And I supported the data from the  
8       scheduling software into an Excel database. It  
9       has 93,000 lines of data all in one place. So I  
10      could go to that tool to get information rather  
11      than trying to open up 43 different schedules and  
12      then trying to get information.

13                 That has a lot of data, a lot of  
14      information on this project. And I always  
15      asked -- not just for this one, but I always ask  
16      for owner and architect meeting minutes,  
17      schedules that were submitted, schedules that  
18      were accepted, correspondence, requests for  
19      information, change orders that were issued,  
20      change orders requested, requested change orders  
21      that maybe did not become change orders but they  
22      may still be in dispute.

23                 So it goes on. It's just a lot of  
24      information that I request that -- so I could go  
25      through the data and information to make

1        hopefully an accurate and -- an accurate  
2        assessment --

3            Q.    Right.

4            A.    -- of what happened on the project and  
5        then present it in as simple a format as I  
6        possibly can.

7            Q.    Okay. All right. So you're the -- the  
8        time that would go say into a delay analysis on a  
9        single family residence obviously would be a lot  
10       shorter than it would be for someone in North  
11       Charleston Coliseum, so to speak?

12          A.    I didn't hear those examples, I'm sorry.

13          Q.    Okay. Your time that would be devoted  
14       say for -- there is a scheduling delay on a  
15       single family residence would be different and  
16       much shorter than it would be if there were some  
17       delays at North Charleston Coliseum or somewhere?

18          A.    Sure.

19          Q.    Okay. All right. So you assessed the  
20       delay. And then what sort of assessment -- you  
21       used critical path, and one of your slides is  
22       something to where you try to explain critical  
23       path, but is critical path a CPM methodology,  
24       something that you use?

25          A.    Of course. And that's what most

1 consultants would use these days. The critical  
2 path method is generally the path of activities  
3 that determines the duration of the project,  
4 whether that's planned or as-built.

5 And so in the forensic analysis, such as  
6 the one I performed, I looked at all kinds of  
7 data outside of just the project schedule to  
8 be -- to create an as-built critical path, the  
9 path to determine the length of the project and  
10 duration of the project.

11 Whereas, if you're working a critical  
12 path method during the project, it's basically  
13 limited to just what's in the scheduled software  
14 and still -- you're still quantifying the  
15 duration of the project. It's an estimate. It's  
16 a guess, but when I do it after the fact, it's  
17 actual. I determine what actually happened on  
18 the project.

19 Q. Okay. Let me stop you there. So do you  
20 sometimes get involved in a project as a  
21 scheduling expert while it's ongoing, while the  
22 construction is still ongoing?

23 A. Sometimes.

24 Q. Okay. And you said that the analysis  
25 changes depending on whether -- maybe I

1       misunderstood you.

2           A.    And maybe I didn't present it correctly.  
3       If I'm working for a contractor or if any  
4       contractor, during the course of the project -- I  
5       was just try to explain the CPM scheduling.

6           CPM scheduling, you have perspective.  
7       You have forensic perspective.  It's limited to  
8       what's put into the scheduled software, and it's  
9       an estimate of when the project will complete.  
10      It's a guess.

11          Q.    Okay.

12          A.    Forensic scheduling is what actually  
13      happened.

14          Q.    Okay.  All right.

15                THE COURT:  One is looking forward  
16      in time to project what's going to happen, and  
17      the other is looking back in time to see what did  
18      happen, correct?

19                THE WITNESS:  Exactly, Your Honor.

20                THE COURT:  All right.

21      BY MR. HILDEBRAND:

22          Q.    All right.  So you've been doing  
23      scheduling work almost exclusively now since '93;  
24      is that right?

25          A.    I'm sorry, what's the question?

1           Q.    You've been doing scheduling analysis  
2           and work -- this has been your career since 1993;  
3           is that correct?

4           A.    Yes, that's correct.

5           Q.    Okay.  And have you been qualified as an  
6           expert in courts?

7           A.    I've testified 36 times prior to today.

8           Q.    Okay.

9           A.    Various courts and jurisdictions  
10          including arbitrations, a few arbitrations by  
11          several boards and for the federal -- at the  
12          government level as well as a couple of state  
13          courts such as this.

14          Q.    Okay.  And what has your -- what have  
15          you been qualified as an expert in?

16          A.    Generally, a schedule delay expert, CPM  
17          expert.  I've been qualified in a few other  
18          things, too, but that's primarily it.

19          Q.    Okay.  Do you serve on any advisory  
20          boards, or do you have any experience advising  
21          regarding scheduling and how forensics should be  
22          done?

23          A.    Not anymore.  I mean, actually, I am on  
24          a committee that we're redrafting a recommended  
25          practice to -- that would be published to the

1 industry as a guideline for how to perform and  
2 the different methodologies to perform forensic  
3 schedule delay and analysis.

4 Q. Okay. All right.

5 A. That won't be out for another year or  
6 so.

7 MR. HILDEBRAND: Okay. Your Honor,  
8 I would like to proffer Mr. Doran as an expert in  
9 scheduling analysis.

10 THE COURT: All right. Mr. Bundy?

11 MR. BUNDY: May I voir dire, Your  
12 Honor?

13 THE COURT: Certainly. Okay.

14 VOIR DIRE EXAMINATION

15 BY MR. BUNDY:

16 Q. How do you get compensated for your  
17 work?

18 A. I'm sorry?

19 Q. How do you get compensated for your  
20 work?

21 A. How do I? And can you repeat your  
22 question, sir?

23 Q. Okay. How do you get compensated for  
24 your work?

25 A. And I'm sorry to make you jump through



1       hoops, sir. I'm hard of hearing, sir.

2           Q.   That's all right. We're going to be  
3       sitting together. I can't hear and neither can  
4       you.

5           A.   By the hour.

6           Q.   How was it?

7           A.   By the hour.

8           Q.   All right. And what is that for you?

9           A.   For this project, it's been going on for  
10       a few years now. It's 385 an hour.

11          Q.   385, okay. Have you ever had any  
12       experience in like billing one number and getting  
13       paid a different one? In other words, not  
14       getting the whole bill paid? Have you ever  
15       had -- have you ever been stuck for a bill?

16          A.   I'm thinking.

17          Q.   If you've got to think, you probably  
18       didn't. Okay? So I will give you -- I'll let  
19       that one pass.

20          A.   Okay.

21          Q.   Because I remember all the ones I got  
22       stiffed on. And how many hours have you spent  
23       prior to today on this job?

24          A.   I would have to look at my invoices.  
25       I'm not sure.

1 Q. A thousand hours?

2 A. Several hundred probably.

3 Q. Several hundred?

4 A. Several hundred, yeah.

5 Q. Okay. So you think you've probably  
6 billed, what, a couple hundred thousand bucks?

7 A. Yes, sir, probably a couple hundred  
8 thousand.

9 Q. Is that about average for you on a job  
10 like this?

11 A. Yes.

12 Q. Okay. Let me ask you this: You went  
13 through some documents that you relied on, that  
14 you typically would rely on in coming to a  
15 conclusion, right, in order to be able to give an  
16 opinion?

17 A. Yes.

18 Q. And is it -- has it ever happened to you  
19 that you never have gotten sufficient  
20 documentation or information to allow you to give  
21 your opinion to a reasonable degree of certainty?

22 A. I don't think so. I think I would  
23 always give an opinion to a reasonable degree of  
24 certainty based on documents I've reviewed.

25 Q. So you've never had a situation where

1       the documents you received, in and of themselves,  
2       were not adequate for you to give an opinion on  
3       behalf of your client to a reasonable degree of  
4       certainty?

5           A.    I don't think so.

6           Q.    Okay.

7           A.    I would be able to give an opinion based  
8       on that document.

9           Q.    All right. And how long have you been  
10       doing this?

11          A.    30 years.

12          Q.    Okay. All right. So then you've always  
13       got an opinion when somebody is coming to you?  
14       No matter what, you're always going to be able to  
15       give them some opinion to a reasonable degree of  
16       certainty regardless of what they bring?

17          A.    Yes, sir. It would be based on the  
18       documents that I'd reviewed.

19          Q.    Right. The quality of your opinion  
20       directly reflects the quality of what you were  
21       told?

22          A.    No, I wouldn't say the quality of my  
23       opinion. My opinion is based on the documents I  
24       reviewed. Sometimes it could be to the detail  
25       and the level in the documents that I've

1 reviewed.

2 Q. All right. Let me put it to you this  
3 way: Is it fair that the more documents you  
4 receive, the more confident you are in your  
5 opinion?

6 A. No, not necessarily.

7 Q. Not necessarily. Okay.

8 A. It's just a lot of the documents are  
9 irrelevant to the issues that I'm looking at.

10 Q. I understand that. But I just want to  
11 go back and make sure that I understand that you,  
12 regardless of the documents you receive, are  
13 always able to give an opinion to a reasonable  
14 degree of certainty when you are asked for one?

15 A. Yes.

16 Q. Okay. And I presume Balfour Beatty knew  
17 that the day they hired you?

18 A. I don't know what they knew.

19 Q. Okay. Now, let's talk a minute. You  
20 said something about, when you worked for a  
21 contractor, you actually sit down with people  
22 that built the job. They bring records, and  
23 they've got schedules, and they know a lot about  
24 the job because they built it, right?

25 A. The general contractor?

1 Q. Yes, sir.

2 A. Yes.

3 Q. Okay. And that's an entirely different  
4 client than the owner on that very same job. If  
5 the owner had come to you on that very same  
6 hypothetical job where the contractor had all the  
7 project managers, all the documents, the plans  
8 and all of his internal reports and all that,  
9 that's a different situation than when the owner  
10 comes to you and says, I've got a letter here,  
11 and they say I owe 20 million bucks.

12 You then have to go hunt those  
13 documents, right? You've got to go on a search  
14 to get the contractor's documents?

15 A. I ask for them.

16 Q. Right.

17 A. I also ask for them from the contractor.

18 Q. I understand that.

19 A. If we don't have the same documents.

20 Q. Well, we will see about that. But if we  
21 had just had a time -- if you were a scheduler,  
22 timeline kind of guy, which I think you are,  
23 right? Given your experience, okay?

24 If the owner and contractor come to you  
25 on the same day, hypothetically, okay? You're

1       going to be much further along arriving at your  
2       opinion the day you meet the contractor than you  
3       will be with the owner because you've got to go  
4       assemble a lot of documents that the contractor  
5       already has. It takes longer, doesn't it?

6           A. It's exactly the opposite.

7           Q. It's exactly the opposite?

8           A. It's exactly the opposite. When I work  
9       for the owner, they have already received --  
10       generally, they have already received the claim  
11       from the contractor. The contractor has already  
12       done all of that work and presented it to the  
13       owner, and that puts me a lot further ahead.

14          Q. But your assumption there is, is that  
15       claim from the contractor was legible, complete,  
16       honest, straightforward, and properly presented,  
17       does it not?

18          A. I don't have -- I don't have a comment  
19       for that.

20          Q. Well, you said you just -- you said you  
21       had a -- what you liked about the owner was, you  
22       already had all the contractor's documents.  
23       You're assuming that you are going to get those,  
24       right?

25          A. When I work for an owner, I get all

1 kinds of levels of documents from the -- from  
2 contractors that could be from a little bit of  
3 nothing sometimes to very voluminous, detailed  
4 documentation.

5 Q. In your experience, is the owner behind  
6 the eight ball from starting the claims case  
7 because the contractor has already got his  
8 documents all together, he has already got his  
9 claim prepared, and he is ready to go when he  
10 meets you as opposed to the owner? Or is that  
11 not your opinion?

12 A. That's not my opinion.

13 Q. Okay. Your opinion is that -- is just  
14 the opposite. It is between the two parties to a  
15 contract, the owner is in the best position to  
16 know what the contractor's claim is and the best  
17 position to have all the documents and the best  
18 position to defend the claim, and all they do is  
19 lay it in front of you and you've got less work  
20 to do for an owner than you do for a contractor?  
21 Is that what you are saying?

22 MR. HILDEBRAND: Your Honor, may I  
23 interrupt? This is not questioning him on voir  
24 dire about his expertise as an expert. It's  
25 cross-examination after he's proffered his

1       opinions.

2                   MR. BUNDY:   I will withdraw the  
3       question.

4                   THE COURT:   Okay.

5       BY MR. BUNDY:

6           Q.    When you looked at these -- let's talk  
7       about the documents because you did look at  
8       documents and you did talk to people.   Okay?   You  
9       listed some documents.   I didn't hear you list  
10      the daily reports.   Did you look at the daily  
11      reports on this job?

12          A.    A few.

13          Q.    A few.   Now --

14                  MR. HILDEBRAND:   Your Honor, this  
15      still is going to --

16                  THE COURT:   Yeah.

17                  MR. HILDEBRAND:   --

18      cross-examination, Your Honor.   This is not --

19                  THE COURT:   Let me -- I understand  
20      the objection.   So the objection has to do with  
21      the qualifications; is that right?

22                  MR. BUNDY:   Right.   And my position  
23      is that an expert who doesn't read the daily  
24      reports in a construction scheduling case is --  
25      he's not an expert.



1 THE COURT: Well, isn't that for  
2 cross and not for qualification?

3 MR. BUNDY: Pardon me?

4 THE COURT: Isn't that for  
5 cross-examination and not for qualification?

6 MR. BUNDY: I think it's for  
7 qualification.

8 THE COURT: The question is whether  
9 or not he's qualified.

10 MR. BUNDY: All right. Okay.

11 THE COURT: They're not necessarily  
12 in this case, but then he's testified he's been  
13 an expert in 36 other cases. What about his  
14 qualifications is suspect, not what he did in  
15 this case.

16 MR. BUNDY: What suspect is --

17 THE COURT: Yeah.

18 MR. BUNDY: -- is if a medical  
19 malpractice expert came in front of you and  
20 testified in voir dire that he had not reviewed  
21 any medical records. Okay?

22 THE COURT: Okay.

23 MR. BUNDY: And so he has got a  
24 medical opinion and then doesn't -- hadn't looked  
25 at any records. My point that I'm simply trying

1       to make is, is that, my opinion and my position  
2       is going to be --

3                   THE COURT:   All right.

4                   MR. BUNDY:   -- that an expert who  
5       does -- a scheduling expert who does not look at  
6       the daily reports is incompetent and unqualified  
7       and incapable of giving an opinion to a  
8       reasonable degree of certainty.   That's all.

9                   THE COURT:   Okay.   All right.   Your  
10      objection is noted.   I find he's qualified.

11                  MR. BUNDY:   Okay.   We're done with  
12      that?

13                  THE COURT:   Yeah.

14                  MR. BUNDY:   I will take care of the  
15      rest of it on --

16                  THE COURT:   Okay.   All right.  
17      Qualified as an expert in scheduling, correct?

18                  MR. HILDEBRAND:   Yes, sir.

19                  THE COURT:   Under what?   Critical  
20      path management?   Is that what we are talking  
21      about?

22                  MR. HILDEBRAND:   Well, yeah, as a  
23      scheduler and critical path as to the methodology  
24      he used, yes, sir.

25                  THE COURT:   All right.

1 MR. HILDEBRAND: Absolutely.

2 THE COURT: So qualified.

3 DIRECT EXAMINATION

4 BY MR. HILDEBRAND:

5 Q. All right, sir. I would like to talk to  
6 you about some of the projects that you worked  
7 on, and actually, I will try to move this thing  
8 along here.

9 THE COURT: Why don't we talk about  
10 this one?

11 MR. HILDEBRAND: Right, absolutely.  
12 I think so. You read my mind, Your Honor. I  
13 would like to -- all right.

14 BY MR. HILDEBRAND:

15 Q. Let's talk about a critical path  
16 analysis, and this is in the first couple of  
17 pages where he's provided some explanation that I  
18 think would be beneficial.

19 THE COURT: Just ask him. Just ask  
20 him.

21 BY MR. HILDEBRAND:

22 Q. What is a critical path analysis,  
23 Mr. Doran?

24 A. Critical path analysis is -- we've been  
25 discussing it here for the last 15 minutes, I

1 think. But it's an analysis that determines --  
2 it determines what activities determine the  
3 duration of the project.

4 Q. Okay. And what activities determine the  
5 duration of the project?

6 A. What work, what events occurred that  
7 determined the overall duration of the project.

8 Q. Okay. And I'll assume that there is  
9 a -- in a project such as this, you have the  
10 as-planned critical path; is that right?

11 A. Yes. There's an as-planned critical  
12 path and baseline schedule, and there's an  
13 estimated critical path on each of the monthly  
14 updates.

15 Q. Okay. And can you explain to the Judge  
16 that the critical path in the context of  
17 Thanksgiving dinner?

18 MR. HILDEBRAND: And, Your Honor,  
19 would it be okay if he shows this one slide on --

20 MR. BUNDY: I don't object to the  
21 chicken dinner. I haven't seen it before.

22 MR. HILDEBRAND: All right.

23 THE COURT: It's a turkey dinner,  
24 but go ahead.

25 MR. HILDEBRAND: Turkey dinner, all

1 right.

2 MR. BUNDY: It's all Thanksgiving.

3 THE COURT: There you go.

4 THE WITNESS: All right. So this  
5 slide is a representative, a representation -- a  
6 very simple, simplistic representation of a plan  
7 schedule, a baseline schedule for a project.

8 THE COURT: Okay.

9 THE WITNESS: This project is to  
10 make Thanksgiving dinner.

11 THE COURT: All right.

12 THE WITNESS: And in creating  
13 the -- in trying to figure out how to make the  
14 Thanksgiving dinner, you have to determine the  
15 different steps involved to get to the end, which  
16 is serving the Thanksgiving dinner.

17 So in this one, we identified the  
18 various activities. Prep the turkey, cook the  
19 turkey, cool the turkey. You have to prep the  
20 potatoes, cook the potatoes, prep the veggies,  
21 prep the cranberries or whatever you're having.  
22 And then you serve the dinner.

23 THE COURT: You left off the  
24 stuffing, but I gotcha. I'm with you.

25 THE WITNESS: So on this one, it's

1       very easy to see what determines the duration of  
2       this project, how long it's going to take before  
3       we get to serve the dinner is prepping and  
4       cooking and cooling the turkey.

5               And the other activities that you have  
6       to eat alongside of the right (inaudible), like  
7       the potatoes, the green beans, cranberries, they  
8       take a much shorter amount of time. And those  
9       are in this. Those are shown in green. Those  
10      are not the critical path. The critical path is  
11      the turkey.

12               THE COURT: Okay. All right.

13               THE WITNESS: The green ones would  
14      be the float now. I will get into it later.

15      BY MR. HILDEBRAND:

16              Q. Well, just explain however.

17              A. So the green ones, between when they end  
18      and that vertical black line at the end, it can  
19      float anywhere in that time frame, be delayed, be  
20      impacted, maybe have to cook the green beans  
21      twice because you burned them or something.

22               But there is a float in there,  
23      contingency that, as long as they don't get  
24      delayed beyond 2:30, just as an example, past  
25      whenever the turkey is done, they are not a

1 critical path delay, the project.

2 Sure they may have been delayed but not  
3 a critical path delay, which leads us into the  
4 next slide, which is the as-built. Now, this is  
5 what I would do on a big project in which I --  
6 now, I can see what's actually happened here.

7 Q. In your hypothetical turkey there?

8 A. Because we didn't serve this until 4:30,  
9 not 3:30. 4 is not up there, but we didn't serve  
10 it until about 4:30. What the heck happened?  
11 Doran, get in there and go find out. How much  
12 was this project delayed? Who is responsible for  
13 it, and why did that happen?

14 So I would look at this data in a  
15 nutshell. And on this one, about 1:30, the  
16 mother-in-law shows up, and the mother-in-law  
17 says, I don't want to eat these potatoes. I  
18 don't like them. I want rice. And I don't want  
19 green beans. I don't like them either. I like  
20 collard greens. I want those. That's an impact.

21 We're almost done with the turkey, not  
22 quite, but we're an hour away. Now that throws a  
23 very inappropriate time (inaudible). But it's  
24 not a good time. If she would have come in at 9  
25 o'clock, they had no problem. But she comes in

1 at 1:30. So that's what it -- now, in a forensic  
2 sense, I can see how that really impacted this  
3 dinner, this project.

4 So you had to go shopping and go get  
5 that food and get the rice and get the collard  
6 greens and bring it back, prep it and cook it,  
7 but by the time they do that, now, dinner is not  
8 served for another hour. But the critical path  
9 is no longer finishing and cooking the turkey,  
10 cooling it.

11 Now, the critical path is going to the  
12 store, getting the collard greens, getting the  
13 rice, cooking them properly, letting them cool  
14 and then serving them. So that's the as-built  
15 critical path, and that's how I would do an  
16 analysis generally, high level, very high level.  
17 And that's the difference between a planned CPM  
18 and an as-built CPM analysis.

19 MR. BUNDY: And I'm only not  
20 objecting to those two charts, right? I'm not  
21 agreeing on this whole PowerPoint.

22 THE COURT: Okay.

23 BY MR. HILDEBRAND:

24 Q. All right. Have you -- do you have a  
25 chart that shows very simplistically what the



1       as-planned critical path was on this project and  
2       what the as-built critical path was on this  
3       project?

4           A.    It's probably more simpler than that,  
5       but, yes, I've broken down about five lines, five  
6       parts each.  It's very simple to show.

7                   MR. BUNDY:  Do you mind if I look  
8       at it first?

9                   MR. HILDEBRAND:  You've gotten  
10      them.

11                  THE COURT:  It's in this document  
12      here.

13                  MR. BUNDY:  I might not object, but  
14      I would like to look at it.

15                  MR. HILDEBRAND:  Here we go.  So  
16      that's the next -- if you go past the turkey  
17      dinner, Your Honor, the Thanksgiving meal, that  
18      would be the next slide.

19                  MR. BUNDY:  All right.  Let me look  
20      through this here.  I think that makes this  
21      easier on everybody.  I presume he prepared all  
22      of; is that correct?

23                  THE WITNESS:  Yes, sir.

24                  MR. BUNDY:  And prepared any  
25      contract documents and all that stuff?  Okay.

1       Here's what I would agree to, without objection:  
2       He can show this document as a demonstrative aid.  
3       It's not going to be introduced in evidence.  
4       You're not going to keep a copy of it.

5               It's not going to be in the record, and  
6       his report doesn't go in the record as evidence.  
7       But he can testify and use this to help you  
8       understand his testimony. That's all I can agree  
9       to without objection.

10              THE COURT: Okay. As demonstrative  
11       evidence?

12              MR. BUNDY: As demonstrative  
13       evidence.

14              THE COURT: Mr. Hildebrand, does  
15       that work for you?

16              MR. HILDEBRAND: I'm not going to  
17       agree that it will not be in evidence. That's  
18       something that you will have to determine at the  
19       end of the presentation.

20              THE COURT: Okay. All right.

21              MR. HILDEBRAND: But I will proceed  
22       on it.

23              THE COURT: I will take it under  
24       advisement with that caveat. Okay?

25              MR. HILDEBRAND: Thank you, Your

1 Honor.

2 MR. BUNDY: But the problem with  
3 it --

4 THE COURT: No, I'm with you. I'm  
5 with you.

6 MR. BUNDY: The problem is, you've  
7 already seen it now.

8 THE COURT: I've seen it. I'm  
9 going to allow him to testify from his report,  
10 and then I'm going to let you cross-examine him  
11 at great length or short length, whichever you  
12 prefer.

13 MR. BUNDY: I may not have any  
14 questions at all. You never know.

15 BY MR. HILDEBRAND:

16 Q. All right. Explain to the Judge, if you  
17 would, please, Mr. Doran, what we have here on  
18 the screen, and let me see if I can maybe move  
19 this back a little bit. Okay. So do you want to  
20 use this and just point at it?

21 A. This is a summary of the as-planned  
22 schedule on top in blue, which is what that says  
23 right there, as-planned and the as-built critical  
24 path -- I'm sorry, as-planned critical path and  
25 the as-built critical path in red. The

1 as-planned critical path, I -- obviously there  
2 was maybe a hundred activities that created that  
3 in the schedule.

4 I summarized it down to these four and  
5 kind of combined them to make it much more  
6 simpler. And the project was supposed to be  
7 completed by July 30th, 2017. In the as-built  
8 sense, these tasks or summarization of work  
9 doesn't match all of these. It became different,  
10 kind of like the turkey example.

11 It became a new, a different critical  
12 path. And in doing so, the project didn't become  
13 substantially complete, in my analysis, until  
14 December 28th, 2018, and the difference between  
15 what was planned and contracted for and what  
16 actually occurred was 516 days, roughly 17  
17 months.

18 THE COURT: Okay. All right.

19 BY MR. HILDEBRAND:

20 Q. So the as-planned is on top; the  
21 as-built is on the bottom and then you've got --

22 A. And then what I did, if you're going  
23 to -- if we're going to continue with these  
24 slides is, I broke this project. I then  
25 discussed how I arrived at 516 days. I broke it

1 up into five periods to present it to you or to  
2 whoever I'm speaking to.

3 And the five periods basically go --  
4 that would be period one. It goes halfway  
5 between bars one and two. Period two ends at the  
6 end of that bar; period three is that bar; period  
7 four is that bar; period five is that bar. And I  
8 compare the time between what actually occurred  
9 in those bars to what was planned to quantify the  
10 delay.

11 Q. Okay. Let's talk about that first  
12 period of delay on the as-built path. It says,  
13 excavate footings, slab on grade. Can you --

14 A. Correct.

15 Q. -- tell us what that is?

16 A. So there's another chart after this that  
17 identifies -- there it is -- and you asked about  
18 the first bar. The first bar goes out to slab on  
19 grade, and on that slab on grade, it completed on  
20 April 1st, 2017, and it was supposed to complete  
21 on March 11th. The difference between those two  
22 days -- two dates is 21 days.

23 Now, what happened to delay the project  
24 by 21 days on that first bar, well, if 20 days --  
25 up until on or about October 19th or 20th of

1       2015, for 20 days, there was a flood, 1,000-year  
2       flood -- you might remember it -- that hit  
3       Charleston.

4               And they were doing site work at that  
5       point in time, building foundations and doing  
6       site excavation. So obviously it's going to  
7       delay the project. It delayed it by 20 days.  
8       They ended up getting a change order for that 20  
9       days eventually.

10              Then there was another day somewhere in  
11       there where the contractor lost a day on top of  
12       this one. So at the time -- as of April 1st, the  
13       project was 21 days behind schedule, 20 of which  
14       was due to flood. Another day, because of lack  
15       of progress, which would be to Balfour Beatty's  
16       account.

17              And then the second part of that bar is,  
18       it goes up to level 5 of the structure. It's a  
19       nine-story structure with a little -- the norm  
20       building on top of it. It's basically a  
21       nine-story structure, nine levels above grade,  
22       above ground level.

23              And up until the -- through the fifth  
24       floor, the fifth slab up, up until that point,  
25       the contractor was on schedule, accounting for

1       this other 20 days. They're on schedule. And  
2       then on June 26, there's equipment breakdown.  
3       The crane broke down. They lost a day.

4               Well, as of July 23 of 2016, the fifth  
5       floor gets poured. It's 22 days behind schedule.  
6       22 days. So it's your 20 days that they lost  
7       there, another day there, and that date for the  
8       equipment breakdown.

9               So that takes you out to July 23rd, and  
10       they start forming the sixth floor slab. They  
11       did the four days of work -- of progress. All of  
12       a sudden, they have to stop work, can't go any  
13       further. They don't have the information to  
14       layout on the slab or on the floor where the  
15       penetrations will be in the slab.

16               Penetrations to the slab -- for the  
17       penetration to the slab, that had to be  
18       coordinated by the architect to tell Balfour  
19       Beatty where to put these holes in the slabs.  
20       They have plumbing that goes where it's supposed  
21       to go and mechanical to where it's supposed to  
22       go, ductwork maybe and things like that.

23               So for 15 days, Balfour Beatty sat,  
24       couldn't make a dent either until they got the  
25       coordinated drawings to show how the

1 post-tensioning, the rebar, and the slab  
2 penetrations all could be laid out and installed  
3 in the slab, ready for it to pour. And that  
4 finish date was August of -- that's where I cut  
5 off my period one.

6 THE COURT: Okay.

7 MR. BUNDY: All right. I have an  
8 objection and move to strike. He just gave an  
9 opinion that the drawings were not coordinated or  
10 were not adequate. He's not an architect. That  
11 is an opinion that can only be given by an  
12 architect. He's only been qualified as a  
13 scheduler. Okay?

14 He is not qualified to say or put in an  
15 opinion, okay, that the drawings were not  
16 adequate. He's just not qualified to do that,  
17 and it's -- you know, as of yet, they hadn't put  
18 an architect up here yet. So I strongly object  
19 to that and move that it be stricken from the  
20 record.

21 THE COURT: All right. Do you want  
22 to cover that?

23 MR. HILDEBRAND: Yes, sir.

24 BY MR. HILDEBRAND:

25 Q. When you were doing scheduling delays,



1       do you look at all the facts, the underlying  
2       facts and the underlying data to see what the  
3       data show the cause of delays was?

4           A.    I did.  And on this particular issue,  
5       there was correspondence between Balfour Beatty  
6       and the architect or owner, whoever the -- I  
7       think it was Mr. Clements and maybe the Library  
8       Associates and the architect, that they needed  
9       this information.

10               It delayed the job.  It was delaying the  
11       job, and that they couldn't pour the slab without  
12       this.  And not only that, but even coming up  
13       closer to that, there was a hint, if you will.  I  
14       mean, not a hint, but a notice there of, hey, if  
15       we don't get these, then the project is going to  
16       be delayed.

17               MR. BUNDY:  I don't have a problem  
18       if he says the alleged cause of this was  
19       architectural error.  Okay?  He can certainly say  
20       that he bases an opinion on an allegation.

21               THE COURT:  Right.

22               MR. BUNDY:  But he can't give an  
23       opinion --

24               THE COURT:  Okay.

25               MR. BUNDY:  -- to a reasonable

1 degree of architectural certainty that that in  
2 fact is true. He can simply say that's what he  
3 knows to be an allegation, and that it's  
4 reasonable for experts to rely on allegations.

5 Some of them rely on allegations that  
6 are ridiculous. But at least you're entitled to  
7 know that it's just an allegation, that there is  
8 no proof in this case so far of that.

9 THE COURT: All right.

10 MR. HILDEBRAND: Well, Your Honor,  
11 he can -- this is not -- we need to be real clear  
12 is that, I have been involved in a lot of cases  
13 where there are allegations that an architect is  
14 negligent and he is under the gun.

15 And when that happens, you have to call  
16 in an architect and say, what is the standard of  
17 care for this area and can you state to a  
18 reasonable architectural certainty. That's not  
19 the case. For some reason, the Library  
20 Associates did not bring the architect into this  
21 case, and you will hear about that later on.

22 But we're not here to establish the  
23 ultimate liability of the architect. What he is  
24 doing is -- and this is what he does day in and  
25 day out. He has been doing it for 30 years is,

1 look at the facts and determine what the causes  
2 were of the delay.

3 Now, if Mr. Bundy, disagrees, he can  
4 certainly cross-examine him. If he wants to call  
5 his own expert to say that he didn't think that  
6 these were design issues or whatever, then that's  
7 fine. But Mr. Doran has looked at the documents,  
8 and in his opinion, the documents established  
9 that there were design issues that caused these  
10 delays. And that's all he's testified about; so  
11 I think it's appropriate.

12 THE COURT: All right. I think his  
13 testimony is based upon his review of the records  
14 that he's reviewed.

15 MR. HILDEBRAND: Right.

16 MR. BUNDY: But it's not a legal,  
17 professional opinion.

18 THE COURT: I understand that.

19 MR. BUNDY: (Inaudible) of the  
20 architect falling below the standard of care.  
21 And to answer the question about why we didn't  
22 sue the architect, because he didn't do anything  
23 wrong. Okay? And I don't sue people that don't  
24 do things wrong.

25 THE COURT: Okay. All right. And

1 I understand that as the basis for the opinion.  
2 Okay.

3 MR. HILDEBRAND: Thank you, Your  
4 Honor.

5 THE COURT: All right.

6 BY MR. HILDEBRAND:

7 Q. So if we're looking at -- if I'm looking  
8 at this chart right, it looks like that's the  
9 original schedule date and the --

10 A. Well, that original schedule date was  
11 July 23 -- was July 1st to get the fifth floor  
12 slab.

13 Q. Okay.

14 A. July 1st. I said July 23rd. And they  
15 made a few days more of progress, and then they  
16 were stopped then and for 15 days were waiting on  
17 information to locate the sleeves on the sixth  
18 floor slab.

19 Q. Okay. All right.

20 A. That's why I cut it off there. I could  
21 have easily cut it off at July 23rd and made it  
22 clear, hey, this the fifth floor slab.

23 And then my period starts up 15 days of  
24 delay right away. I felt it was better to  
25 present this in the way someone can understand

1       it, by ending it where the delay ended, and the  
2       delay ended on August 11th.

3           Q.    All right.  So what was the next period  
4       if we -- I'm not going to ask you how the sleeves  
5       delayed the job.  I think there's been a lot of  
6       testimony about that, and we'll try to move  
7       forward.  So tell me -- go ahead.

8           A.    I just wanted to point out how these  
9       slides are designed, so Your Honor can follow  
10      them as we move forward.

11          Q.    Okay.

12          A.    So on the bottom you see in yellow, 37.  
13      My period one totaled 37 days of delay.  When you  
14      get to period two or period three and so on,  
15      you're going to see the total, the culmination  
16      and the total each time down here which may be  
17      different than that number.  The number up top is  
18      that period.

19                   THE COURT:  Okay.

20                   THE WITNESS:  We will see that on  
21      the next slide, Your Honor.

22                   THE COURT:  All right.

23      BY MR. HILDEBRAND:

24          Q.    Okay.

25          A.    So on period two --

1 Q. Let's back up. Do you want to back up?

2 A. Okay.

3 Q. All right. So what was your clue  
4 that -- you divided the project up into five  
5 periods, based on your analysis, right? That  
6 made logical sense, correct?

7 A. Correct.

8 Q. And the critical path, in your view, is  
9 appropriate to break up into five periods?

10 A. Yes.

11 Q. All right. So on the first period,  
12 you've got -- if you could just tell the Judge or  
13 you can refer to the exhibit. If you can tell  
14 what your opinion is as to the period one delay.

15 A. Well, I've already done that, but --

16 Q. Okay. Let's move on then. All right.

17 THE WITNESS: Now are you clear,  
18 sir?

19 THE COURT: Yes, yes.

20 THE WITNESS: So this is period  
21 two. On period two, I quantify that 167 more  
22 delays that's in the middle of the page to total,  
23 to date, 204 days that you see down on the  
24 bottom. That's the relationship.

25 And as of March 3rd, 2017, the project

1       had incurred 204 delays -- days of delay, 167 of  
2       which occurred between August of 2016 and March  
3       of 2017. And what I measured to was the start of  
4       ballroom framing for this period two, which is  
5       this bar.

6       BY MR. HILDEBRAND:

7             Q.    Okay. So --

8                   MR. BUNDY: Well, I'm going to  
9       object to this chart, but very quickly. This  
10      witness is here to establish and has been  
11      qualified to establish critical delays on the  
12      job, where they occurred and how many days.

13                  He has not been qualified to assign  
14      liability or responsibility for those delays.  
15      That's a separate line of testimony entirely  
16      because this is his opinion that the AE delay, ME  
17      sleeve locations. That's just his opinion.  
18      There is no facts on that, and he has not been  
19      qualified to give an opinion on that.

20                  N and S arch window design revisions.  
21      Well, I don't -- you know, I don't know  
22      whether -- if he is not ascribing that design to  
23      any one person or he is just simply saying that  
24      there was that many days of delay because the  
25      revision occurred. I don't think that's a

1       legitimate objection. I think that's okay.

2               But he can't go to the next level, which  
3       is and it was so-and-so's fault, the architect's  
4       fault, because I'm not an architect, and I don't  
5       get to do that. Do you see what I'm saying?

6               THE COURT: I think the objection  
7       is noted. The assignment of blame is where you  
8       have the problem, right?

9               MR. BUNDY: Exactly right.

10              THE COURT: All right. Okay. All  
11       right.

12              MR. HILDEBRAND: Well, Your  
13       Honor --

14              THE COURT: He is basing his  
15       opinion upon what he is seeing in the record.

16              MR. HILDEBRAND: Right.

17              THE COURT: That I get. Okay?

18              MR. HILDEBRAND: Yes, sir.

19              THE COURT: I get that. Okay. All  
20       right.

21              MR. HILDEBRAND: And that's what he  
22       does.

23       BY MR. HILDEBRAND:

24              Q. In all of these projects, you've --  
25       that's what you were asked to do?



1           A.   That's my job, usually. That's my job  
2   to quantify the delay, to find out why the --  
3   what happened and who is responsible.

4           Q.   All right. So explain to the Judge what  
5   is involved in this second period of critical  
6   path and what the period two delays were. Tell  
7   him about those.

8           A.   Period two is a continuation of period  
9   one. Period one went up through level five. The  
10  building goes up for four more levels to the  
11  ninth floor, and then they had a big tower crane  
12  that they used to load the materials on the roof.

13                   And then while that building is going  
14  up, the higher it gets, they're -- in the  
15  structure, the work below there, the interior  
16  work, they can start, and it usually doesn't  
17  (inaudible) on this project.

18                   So let's say, when you are through level  
19  7, pouring the concrete slab, you may have  
20  subcontractors down on level 1 or 2, you know,  
21  running conduit for electric and mechanical work  
22  and ductwork and things like that. That's  
23  understandable. That's usually what happens.

24                   Usually, what the plan was, was by the  
25  time they got to level 3 in the structure and the

1 critical path would jump down to interior work.  
2 That didn't happen in reality. What really  
3 happened was, the structure -- the delays in the  
4 structure continued and outpaced the work that  
5 was going on down on the lower levels. So the  
6 structure remained on the critical path until  
7 that crane got removed.

8 And to start then to transition to the  
9 interior work, for this framing of the ceilings  
10 in the ballrooms, what is the critical path? And  
11 so that's what period two is. So at the end of  
12 period two, to start the ballroom ceiling framing  
13 on March 3rd, 2017, the project had lost 167 days  
14 in period two, 204 overall. The same  
15 continuation of what was happening on level 6  
16 continued on levels 7, 8 and 9.

17 Q. All right. Can you explain what the AE  
18 in the yellow box there, specifically what the AE  
19 delay, MEP sleeve locations in the NS arch window  
20 design revisions are?

21 A. Yes. The AE delay, the MEP sleeve  
22 location is the same thing I just discussed on  
23 level 6. They didn't have the locations.

24 The contractor was waiting on  
25 information to locate the sleeves in the slab,

1       the penetrations so they could continue forming  
2       and pouring those slabs. That just continued,  
3       but they got longer. The information came later  
4       and later on the seventh, eighth and ninth  
5       floors.

6                   THE COURT: Okay.

7                   THE WITNESS: So then there was  
8       another 90 days of delay before they got to the  
9       top of the building. So then the north, N and S  
10      arched windows is north and south arch window  
11      design revision.

12                  So within the ballroom itself, that  
13      ballroom one, it's a very extravagant ballroom,  
14      very detailed. The main ballroom, ballroom one  
15      has a big barrel or arched ceiling. And then at  
16      either end of that, there are arched windows that  
17      are below the ceiling but higher than -- and this  
18      area is basically a 2-story structure at this  
19      point, so it's up higher.

20                  So these north and south arches are in  
21      that ballroom that can -- that work was revised  
22      by the architect -- by the owner. And the  
23      affected two parts of that were -- one part was  
24      the structural part, and the next part was the  
25      hanging of the drywall and the plywood to close

1       it in. And they took two portions of that  
2       change.

3       BY MR. HILDEBRAND:

4             Q.    So this ballroom, it's -- you say it's a  
5       vaulted ceiling?

6             A.    I mean, I thought -- well, they called  
7       it a barrel ceiling.

8             Q.    Okay. And it's two stories, that barrel  
9       ceiling?

10            A.    Yes, like 20-some feet high.

11            Q.    All right. And what was the problem  
12       here?

13            A.    So at either end of that, below the  
14       ceiling level, there's big half circle window,  
15       and they call the arched window.

16            Q.    Okay.

17            A.    And so at the north -- and so that both  
18       of those windows, they couldn't get to that until  
19       the crane got removed because the crane is  
20       sitting right there in the middle of the  
21       footprint for that ballroom.

22                    So they can't get to do this change work  
23       until that. So they remove the crane. Once they  
24       removed the crane, they were able to get to this  
25       north and south arch windows, perform the change

1       work and then start on the meaningful framing of  
2       the ballroom ceiling.

3           Q.    Okay.  Why were they not able to remove  
4       the crane?

5           A.    Because the structure was delayed, and  
6       it continued to be delay.

7           Q.    Okay.  Explain why the crane is crucial  
8       to the structure.

9           A.    The crane is crucial because that's  
10      what's used to pour each slab all the way up to  
11      level 9, and this area of the building where the  
12      ballroom is, is really, like, about three stories  
13      tall, two floors with a high second floor.

14               And so the crane was set in that area,  
15      so they could access the entire -- I call it a  
16      horseshoe, if you will -- of the remaining three  
17      sides of the building from nine floors up.  So  
18      they frame it, pour it, stock it with materials  
19      to do follow-along work.  And that's what they  
20      needed to continue that structure all the way up.

21           Q.    Okay.  So the delays with the concrete  
22      and the sleeves that you have -- that have been  
23      talked about a lot already, those delayed the  
24      concrete pours and the concrete pours were  
25      delayed because -- the crane was critical to

1 making the concrete pours? So the crane could  
2 not be removed until those were done; is that  
3 right?

4 A. That's correct.

5 Q. Okay. Was there anything else that the  
6 crane was necessary for that affected the  
7 critical path?

8 A. The crane was necessary to put some  
9 things on the roof that the -- they had to set  
10 the swimming pool, the big huge stainless steel  
11 swimming pool. That had to be set on the roof  
12 before they could remove the crane.

13 The last bit of work performed on  
14 February 3rd, 2017, was their second or third.  
15 It was to set that swimming pool and then remove  
16 the crane.

17 Q. All right. Let me ask you this. I hate  
18 to interrupt you, but that swimming pool, is  
19 that -- is there any life safety issue or  
20 fireproofing issue in relation to that swimming  
21 pool?

22 A. Yeah. I mean, I was going to discuss  
23 that later in period four, but I can do it right  
24 now.

25 Q. All right. Go ahead.

1           A.    The swimming pool is integral to the --  
2           over the whole building and integral to getting  
3           substantial completion on the project because it  
4           served two -- it served at least two purposes.  
5           Those two purposes are recreation and use for  
6           swimming.

7                    The other was, it was a secondary source  
8           of water for fire protection for the building  
9           because the water pressure in Charleston is low,  
10          and it may not provide enough -- enough power  
11          pressure to provide enough sprinkler coverage to  
12          put out a fire.

13                   So this pool was a secondary source.  
14          They had big pipe sections, I think, that were  
15          piped to the pool; so if there was a fire, to  
16          supplement the city's water system, they would  
17          pump the water out of the pool to fight the fire.

18          Q.    Okay.  So you could basically have a  
19          water tower in effect?

20          A.    Yeah.  It is basically a water tower, an  
21          open water tower.

22          Q.    Okay.  And was that the last major thing  
23          that the crane was used for was --

24          A.    Yes.

25          Q.    -- to place that?

1           A.    That was it.  As soon as they -- I mean,  
2           it's so big and heavy.  It's 14,000 pounds, the  
3           swimming pool, empty.  They had to -- they had to  
4           set it before they could -- they had to have a  
5           crane set it there.

6           Q.    Okay.  All right.

7           A.    So that takes us through period two.

8           Q.    So let's go to the next line.  So you've  
9           got -- maybe you've talked about it.

10          A.    This just a summary of my opinions,  
11          findings and opinions.  I qualified 167  
12          additional days of delay in period two caused by  
13          the ceiling -- well, the framing for the ceiling  
14          in the ballroom ceiling, the bars were delayed.

15                Why were they delayed?  Because of the  
16          continued structure not getting poured on time  
17          and because they're waiting on information.  
18          That's what I called the AE delay, and then the  
19          arch window design revisions.

20          Q.    All right.  All right.  So now, we've  
21          got five periods and now we are in period three,  
22          right?

23          A.    Correct.  This period three, it takes us  
24          out to, after the ceilings are framed in the  
25          ballroom, there was some mechanical and



1       electrical work that goes in the ceilings and  
2       then hanging the drywall.

3               And so there was just a multitude of  
4       design revisions and changed information that  
5       affected the ability to hang drywall on the  
6       ceiling. It should have happened within a couple  
7       of months at starting the framing. It didn't  
8       really get started until October 7th of 2017.

9               There was a delay in period three of 95  
10       days for a total of 299 days of delay through  
11       October 7th of 2017, and up here in that yellow  
12       box, I determined the causation of that was owner  
13       design revisions I have a couple of slides to  
14       show some multitude of issues, the design  
15       revisions that went into that ballroom.

16              Q.    Okay. Great. Go to the next one,  
17       please.

18               THE WITNESS: So I have three  
19       slides similar to this, Judge. This is -- and  
20       the reason I made three is, I'm a visual person  
21       myself, and people I talk to -- well, most people  
22       are visual.

23               But whether I put it in this format or a  
24       second format or a third format, one may work for  
25       me and one may work for you. I put in three

1       formats and one may work for counsel.

2       BY MR. HILDEBRAND:

3           Q.    Let's skip ahead.  Let's jump to the  
4       next two just to kind of give the Judge --

5           A.    Yeah.

6           Q.    Tell him the three different types you  
7       used.

8           A.    All right.

9           Q.    That's the same thing as the --

10          A.    Same exact information, but now it's on  
11       call outs across the timeline.

12                   THE COURT:  Okay.  All right.

13          Q.    And then the third one?

14          A.    And now this in is a narrative format.  
15       I call it narrative.  Tabular, if you will.  So  
16       they're all color-coded.  They all work together.  
17       It's all the same information on all three  
18       slides.  So when I --

19                   MR. HILDEBRAND:  So do you have any  
20       preference, Judge, on which of the three that he  
21       explains?

22                   THE COURT:  Do I have a preference?  
23       No.  I can follow it.

24                   MR. HILDEBRAND:  All right.  Let's  
25       go to the second one.

1                   MR. BUNDY: Well, just for the  
2                   record to make it clear, none of this is in  
3                   evidence.

4                   THE COURT: Right.

5                   MR. BUNDY: None of the individual  
6                   notations or anything that is referred, none of  
7                   that is in evidence.

8                   THE COURT: All right. This is for  
9                   demonstrative purposes for now. Yes, sir.

10                  MR. BUNDY: All right. Thank you,  
11                  Your Honor.

12                  THE WITNESS: This is my favorite  
13                  to me.

14                  THE COURT: Okay.

15                  THE WITNESS: It helps me  
16                  understand that throughout this time line -- the  
17                  only reason you have some above and some below is  
18                  because it didn't all fit above.

19                  THE COURT: Okay.

20                  THE WITNESS: There's just a ton of  
21                  design revisions and information, clarification  
22                  that was required to change the work to get it  
23                  installed.

24                  THE COURT: Okay. And the time  
25                  line is still going left to right, right?

1 THE WITNESS: Correct, sir, yeah.

2 Up above it goes, yeah, 2015, '16, '17.

3 THE COURT: And the levels and  
4 colors are demonstrative of what?

5 THE WITNESS: The issue.

6 THE COURT: Okay.

7 THE WITNESS: So all of the purple  
8 items are significant dates that happened for RFI  
9 0799. In fact, that's one that I was -- I picked  
10 out three or four to discuss. That was actually  
11 one of them.

12 THE COURT: Okay.

13 THE WITNESS: So the timeline,  
14 looking at it all at once here, here's an issue  
15 that a question was generated in the RFI, request  
16 for information, to locate dimensions on what --  
17 where are these ceiling lights going to go?

18 Well, they ended up going through some  
19 different discussions and all, different designs  
20 that may not work. But that came up on December  
21 3rd. May 15th of 2017, the information was  
22 finally provided in a format that actually worked  
23 in the field.

24 BY MR. HILDEBRAND:

25 Q. Explain it to us.

1           A.    To locate --

2           Q.    Slow down a bit on that one.  So tell us  
3    what the problem was and just tell me in a little  
4    more detail on that one.  What was the problem  
5    and what was the delay?

6           A.    I'm not sure if this is the one for  
7    the -- the barrel ceiling that we talked about  
8    earlier.

9                   MR. BUNDY:  Objection.

10                  THE WITNESS:  There are a lot of  
11   different notations required for that.

12                  THE COURT:  Okay.

13                  THE WITNESS:  But this is a request  
14   for information that Balfour Beatty required  
15   dimensions to locate the layout, to locate the  
16   lights in the ceiling area.

17                  And they got an answer a couple of weeks  
18   later, six weeks later, got an answer for that.  
19   And then the design team -- Balfour Beatty  
20   notified that the locations given would not work  
21   through to the ceiling height.

22   BY MR. HILDEBRAND:

23           Q.    Do you know why that was, why they  
24   wouldn't work?

25           A.    It wouldn't fit in the depth of the

1 ceiling, for the ceiling up above. For the  
2 framing to up above, it is not very deep there.

3 Q. So there were canned lights and --

4 A. These were canned lights in the  
5 building, yes.

6 Q. So the recessed lights that were shown  
7 by the interior designer or whoever, didn't work?

8 A. Didn't fit in the space provided.

9 Q. And how long were --

10 A. There were -- so I think it was the  
11 framing that hit it, but it wouldn't -- the  
12 locations for it were in conflict with the  
13 structure above it.

14 Q. Okay.

15 A. That's one issue. There's another -- I  
16 think the black one, which actually started  
17 before this. So it was just -- I think it's that  
18 one. Yeah, so even the -- remember they started  
19 framing on March 3rd.

20 On March 10th, there's an RFI that, hey,  
21 the ductwork doesn't fit in the soffit, and  
22 again, this went through some iterations of  
23 rerouting, and eventually, on May 11th, a revised  
24 sketch was sent and confirmed. And so, by May  
25 11th, they were able to continue in that area.

1 Q. All right. So how long is the delay?

2 A. Overall? Well, there is a ton of  
3 things. These are -- this has happened for the  
4 next seven months. These issues keep popping up.  
5 That's two of them. There's several more. By  
6 the time you get to the last one, the information  
7 was provided in the red, I think.

8 The bright red, I think. That might be  
9 it. Yeah, if you go back to the other chart.  
10 No. Go back to the chart that has all of the  
11 call-outs. So that's RCO 170, I think, 157. So  
12 in August, a lot of these conflicts that  
13 weren't -- that were occurring by -- most of  
14 those had been resolved by the time you get to  
15 March.

16 So they started -- they made progress in  
17 March. And on March 7th, Balfour Beatty  
18 identified that the lower soffit tract that --  
19 now, this ballroom is comprised of four  
20 ballrooms. Basically, it's four.

21 Q. Comprised of what?

22 A. Four ballrooms.

23 Q. Four ballrooms.

24 A. There are four ballrooms on the second  
25 floor, and three of them, maybe four, but

1 definitely three are separated by a movable  
2 partition. This is a soffit underneath the  
3 movable partition. So until you know where the  
4 soffit is that holds the structure to hold the --  
5 I forget the term.

6 Q. The sliding doors?

7 A. Sliding partition. You know, when you  
8 go into a ballroom sometimes, you can make it  
9 smaller maybe by moving the walls. That's what  
10 these are.

11 THE COURT: Sure. Okay.

12 THE WITNESS: And so that  
13 identified the soffit height that would work to  
14 accommodate the movable partition.

15 BY MR. HILDEBRAND:

16 Q. Okay.

17 A. And there was conflicts in that. It  
18 wasn't working as designed. It got that -- they  
19 finally got the answer on that on -- they finally  
20 got direction to proceed after getting the  
21 information on October 7th. And that was the  
22 last issue or conflict on October 7th here.

23 So they got a response. Balfour Beatty  
24 priced it up, submitted to the owner. The owner  
25 didn't like it, but said go ahead anyway. So



1       they went ahead and directed the contractor to  
2       perform, and that's where I stopped. I said,  
3       okay, now, they have information. They have been  
4       given direction. That delay has ended. Sorry,  
5       that's where I stopped the delay on October 7th,  
6       2017.

7               They ended up getting an RCO, a request  
8       for change order, got it signed, and 10 days  
9       later, it was eventually included in the change  
10      order. But I stopped, you know, on October 7th.  
11      That's when the delay ended.

12             Q. All right. So each one of these blowups  
13      or clouds or whatever we have here represent  
14      different design issues or changes that occurred  
15      during this period; is that correct?

16             A. Right, yes.

17             Q. All right. And the underlying data for  
18      this is readily available, the RFIs and the other  
19      data that's in the project files?

20             A. Right.

21             Q. All right. And if you could go -- you  
22      could, with your testimony, explain to the Judge  
23      each one of these and why you feel that  
24      particular item delayed the job?

25             A. Well, first of all, you do the timing.

1       You know, you look at the time. It's like, why  
2       wasn't the ceiling making progress? Well, they  
3       didn't have the information or Balfour Beatty  
4       didn't have the information.

5               When did they get that information?  
6       They finally got that on October 7, and then I  
7       can work backwards. Okay. That's RFI, you know,  
8       RCO 157, which is RFI whatever it is. So, yes  
9       all of that information. I mean, I couldn't sit  
10      here right now and just cite every single one of  
11      those timelines to the Judge. But at one point,  
12      I probably could.

13             Q.    Okay. But the data is there if we  
14      wanted to go back and --

15             A.    Yes.

16             Q.    Somebody wanted to go back and look at  
17      it? Okay. All right. I doubt the Judge wants  
18      you to go through all of those.

19             A.    No. I think we're -- I mean, that was  
20      the last one. I had four. We went through some  
21      of them. I think that's sufficient.

22                   THE COURT: Let me ask you this  
23      question while it's on my mind, and that is, I  
24      saw -- so I counted a 60-day delay, August 7th to  
25      October 7th from the RFI to the RCO, correct?

1 Change orders executed by the --

2 THE WITNESS: On that one?

3 THE COURT: On that particular one?

4 THE WITNESS: On that one, yes.

5 THE COURT: So that's a 60-day  
6 delay. Now, is that cumulative to everything, or  
7 is that just that one project and there may be  
8 other delays going on at the same time?

9 THE WITNESS: Just that one  
10 activity.

11 THE COURT: Okay. All right.

12 THE WITNESS: I mean, there are  
13 2,000 activities in this case.

14 THE COURT: Sure, sure. Yeah.  
15 Okay. All right.

16 THE WITNESS: But I also  
17 identified, this is the critical path.

18 THE COURT: Yeah, yeah. I'm with  
19 you. We're cooking the turkey, right?

20 THE WITNESS: Pardon me?

21 THE COURT: We're cooking the  
22 turkey.

23 THE WITNESS: We're cooking the  
24 turkey.

25 THE COURT: All right.

1 THE WITNESS: Exactly.

2 THE COURT: Can't have Thanksgiving  
3 dinner without the turkey.

4 THE WITNESS: So this is my  
5 conclusion on period three. There are 95 days of  
6 additional delay due to numerous changes. I  
7 picked out four to discuss with you, but that  
8 ended with that -- you know, that RCO 157.

9 BY MR. HILDEBRAND:

10 Q. All right. On the previous period,  
11 period two, to whom did you allocate those  
12 delays?

13 A. To the owner because of the lack of  
14 information to locate a sleeve to the slabs.

15 Q. Okay. And how about on this period  
16 three? To whom do you allocate the delay?

17 A. To the owner.

18 Q. Why is that?

19 A. Because they're design changes and  
20 revisions that delayed the work.

21 Q. Okay. All right. Period four, can you  
22 describe to the Judge what this is?

23 A. So period four, using the same method we  
24 did before, I identified 141 days between October  
25 7th, 2017, and June 18th of 2018. 141 days in

1       that period. So by June 18th, 2018, the project  
2       is now 440 days behind schedule.

3           Q.    440 days?

4           A.    440 days.

5           Q.    Over a year?

6           A.    Over a year.

7           Q.    Okay. All right. Tell us about this  
8       period delay.

9           A.    So I called this the barn doors there  
10       and up there. This is what I called the barn  
11       door issue. The barn doors were sliding doors in  
12       most of the guest rooms that slid in front of a  
13       tub, separating the tub from the bedroom, if you  
14       will, the bathroom from the bedroom.

15          Q.    Okay.

16          A.    Initially, they were in the GMP. They  
17       were in the contract initially. They value  
18       engineered out of the contract.

19          Q.    The barn doors were in the original  
20       contract and then taken out?

21          A.    Right.

22          Q.    Okay.

23          A.    Value engineered out. So by the time we  
24       got -- by the time we got the -- I looked at the  
25       GMP. By the time you got to the GMP and

1       (inaudible), they were out of the contract.

2           Q.    Okay.

3           A.    Okay.  So they're not -- they're no  
4   longer in.  Balfour Beatty submitted the hardware  
5   schedule a couple of times.  They submitted a  
6   hardware schedule.

7                   THE WITNESS:  A hardware schedule,  
8   Your Honor, if you don't know is a schedule,  
9   which a listing, not a time schedule.  The  
10   listing of all the doorknobs and hinges and  
11   things like that, and all the doors that are  
12   required on the project.

13                  So Balfour Beatty submitted the hardware  
14   schedule, and it was returned with additional  
15   scope of work now.  Now, the architect wants the  
16   barn doors back in.  And they had a certain  
17   design that took -- well, through -- between  
18   those in 2017, June or so of 2017 -- or '16, I'm  
19   sorry.  It was in 2016.

20                  It took a year of submittals and pricing  
21   and revisions, continued revising of those barn  
22   doors until they ended up having mirrors, I  
23   think, on both sides of the barn doors, which  
24   it's a very common -- and it didn't match up from  
25   one side to the other.  They had a window or

1 mirror on one side and the barn door was a  
2 different size or location that was on the other  
3 side. So it was very complex.

4 Well, they finally -- Balfour Beatty  
5 finally got that request for change order  
6 approved on October 19th, 2017, just a week or so  
7 after we stopped, period. We ended, period. So  
8 about 10 days later -- 12 days later on October  
9 19th, the new revised barn doors are added back  
10 into the contract with the approved pricing and a  
11 direction basically to proceed, October 19th.

12 Well, Balfour Beatty submitted the shop  
13 drawings for it, got rejected; resubmitted them  
14 in December of that year. The pricing was not  
15 acceptable to the owner. On January 3rd it was  
16 rejected, of '18. The shop drawings finally got  
17 approved later in January.

18 But when they got approved, they were  
19 approved as noted. And one of the notes was,  
20 contractor to determine the height of the doors.  
21 And Balfour Beatty was like, we're not the -- you  
22 tell us the height of the doors. Well, it took a  
23 couple of days.

24 But they went out in the field and  
25 measured, gave the information and confirmed what

1 the height of the door should be. Then on  
2 February 1st of 2018, they confirmed that --  
3 Balfour Beatty confirmed that with the architect,  
4 released the doors for fabrication.

5 As I explained earlier, these aren't a  
6 normal barn door. You can't go to Home Depot and  
7 get them. It took four months to get these  
8 doors, 16 weeks. So those are shipped --  
9 released on February 1st. They don't get  
10 delivered, Your Honor, until May 29th, 2018.

11 After they get delivered, they're not  
12 primed and they're not painted. These are wooden  
13 doors, and the reason they're not is we have all  
14 of mirrors and windows. So they come to the  
15 project site and there's a paint shop that was  
16 built on site to paint these doors. And so from  
17 May 29th until the middle of June, they're  
18 painting the doors.

19 The first set of barn doors were  
20 installed on level 3 on June 18th. That's where  
21 I saw that delay ends because now the barn door  
22 issue is complete on June 18. The follow-on work  
23 can now continue.

24 Well, the only work now to be done is  
25 basically owner fixture, furniture, fixtures, and



1 equipment, what they call FFE and punch list.  
2 Because Balfour Beatty, by February of 2018, had  
3 two coats of paint on the entire project, four  
4 months earlier.

5 So there's a lot of time that the  
6 project was substantially complete on a given  
7 floor, and they couldn't do anything else before  
8 they got these barn doors. It's pretty easy to  
9 say that's a critical path delay. It's kind of  
10 like the mother-in-law coming and right before  
11 the dinner is over and saying, wait, we want  
12 something else. That's kind of the same thing  
13 you have here.

14 So there's a slide. I believe it's the  
15 next one, and if not, then we'll get to it. But  
16 it shows that -- there it is -- waiting on the  
17 barn doors.

18 Q. Can you explain that just a little bit.

19 A. Level 3 was painted, punched out, final  
20 cleaned, ready for the owner's punch list and  
21 then to start installing that furniture,  
22 fixtures, and equipment. That was at the end of  
23 March of 2018, level 4, 5, 6, 7, 8 here. Now,  
24 level 6, that really was substantially complete  
25 back here.

1                   There was one activity that wasn't  
2           complete. That was putting on the cover plates  
3           with switches, but -- so even though that shows a  
4           solid bar, slight gap in time. So you have a gap  
5           of time ranging from about, you know, two and a  
6           half months or so to -- down to a little over a  
7           month. But, you know, as you work up the  
8           building.

9                   So the building has -- aside from all of  
10          the other changes that were occurring in 2018 --  
11          and we will get to that later -- there's no other  
12          work, contract work going on at that time, just  
13          waiting on these barn doors.

14                  And basically, in my opinion, all the  
15          delays -- and it's just very clear that, once the  
16          owner started issuing contract change directives  
17          in 2018, at that point, in February 2018, all  
18          delays -- and it's not even up to discussion  
19          really. They're just -- they're adding and  
20          changing, modifying the scope of work.

21                  The building's painted in February with  
22          two coats of paint. It's very clear that any  
23          delay after that is going to -- in my assessment  
24          to the owner. I jumped way ahead. But that's  
25          where I'm going to get to. So period four.

1           We're in period four. Did we skip a slide?

2           Q. Is this it?

3           A. Yeah.

4           Q. Okay. Can you explain this one to the  
5 Judge, please?

6           A. There were other critical paths also.  
7 Go back to slide one. Go back one. Yeah. So I  
8 identified -- there wasn't just one critical  
9 path, there were multiple critical as-built  
10 critical paths during period four.

11           The barn doors we discussed. There were  
12 three other issues that came up, additional work  
13 that was required. One was stair four; one was  
14 the front desk; one was the elevator interiors.  
15 And I will discuss those in a little more detail.  
16 Stair four --

17           Q. What was the issue with stair four?

18           A. Stair four was -- what had been revised  
19 earlier in the project -- or actually, they were  
20 late in the project -- in 2017, to add additional  
21 millwork in the stairwell.

22           Now, stair four goes from the first  
23 floor to the ninth floor, and between levels 1  
24 and 2 -- level 2 is pretty -- they're both pretty  
25 important floors. And, you know, there are lots

1 of high-level finishes. On level 2 is where --  
2 there's another dining room up on level 2. This  
3 is the stairwell, grand stairwell that gets you  
4 up to that dining area.

5 And then it continues up to level 9.  
6 But between level 1 and 2, the architect had  
7 added plywood and -- I'm sorry, millwork and  
8 things that changed the scope. And then there  
9 was discussion about the pricing and all and how  
10 long it was going to take it.

11 So the owner said, well, just forget it.  
12 We're going to back to GMP, the design that was  
13 agreed upon, that Balfour Beatty based their  
14 proposal on, their bid on.

15 Q. Okay. So wait a second. So there was  
16 a -- the grand stairway you're talking about on  
17 this --

18 A. Yes. It's on level 2.

19 Q. -- stair number 4? All right. There  
20 was an original design on how it was supposed to  
21 be finished, and then there was a discussion  
22 about changing it; is that right?

23 A. Yes.

24 Q. All right. And then it went back to the  
25 original?

1           A.    Yeah.  It went back to the original.  
2           After that -- yeah, after shop drawings were  
3           submitted, it then went back to the original one.

4           Q.    All right.  Now, how long a delay  
5           occurred because of that issue?

6           A.    I didn't assess any delay because of  
7           that initial issue.

8           Q.    Gotcha.  That was just another delay  
9           that occurred during the --

10                   MR. BUNDY:  I object and move to  
11           strike the testimony.  He signed no delay to that  
12           issue.  He is supposed to be a delay expert.  
13           He's been qualified to talk about delays, and he  
14           just said he didn't design any delay.

15                   THE COURT:  All right.

16                   MR. BUNDY:  So it's irrelevant.

17                   THE COURT:  No delay was assigned  
18           to that.

19                   THE WITNESS:  All right.  To answer  
20           his question, to the revisions on the millwork  
21           shop drawings, the revision was not done anyway.

22                   THE COURT:  Right.

23                   THE WITNESS:  I found no delays in  
24           that.

25                   THE COURT:  Okay.  Okay.  Noted.

1       Okay. I'm with you.

2                   MR. BUNDY: That's why I'm having  
3       to pay attention over here, right?

4                   THE COURT: Yeah.

5                   THE WITNESS: So what happened, we  
6       went back to the GMP design. The architect still  
7       kept it into millwork. And so this stairwell  
8       has -- instead of spindles, like what's below  
9       here, it was glass. It was glass and not  
10      spindles.

11                  THE COURT: Okay.

12                  THE WITNESS: And so that glass has  
13      to be supported by something, and then the  
14      original, I think design --

15                  MR. BUNDY: What's the question?  
16      He's just talking now. There is no question on  
17      the table, and he already said that it's not  
18      admissible, I think.

19                  THE COURT: No, I hadn't said that,  
20      but the objection is noted and overruled. Go  
21      ahead.

22                  THE WITNESS: Thank you, sir.

23                   The architect left in wood that goes  
24      underneath and supports this glass. So now that  
25      that's finally determined at the end of January

1       by that time. Then they were able to release the  
2       glass. They'd not released it yet.

3               They had to then start framing in the  
4       stair, but they couldn't -- the glass is a 16  
5       week lead item, and it's going to take four  
6       months to get the glass. So they don't know  
7       where that -- how they're going to locate that  
8       glass until they put what supports it underneath  
9       it. They have to field measure it. It's very  
10      custom.

11             They have to field measure and then  
12      order the glass accordingly. So that ended up  
13      getting -- I had a time like this. (Inaudible).  
14      But that -- they got far enough of the framing of  
15      that work in the stairwell. They could field  
16      measure where the wood, where the millwork was  
17      going to go, and then order the glass. That was  
18      on -- I forget the date -- February, March. It  
19      was in March.

20             So anyway, but it's a -- clearly, now,  
21      that stairwell is life safety exit for the  
22      building. So you need that stairwell to get to  
23      substantial completion.

24                     THE COURT: All right.

25                     THE WITNESS: So now that's going

1 to delay the stairwell past June, so now it's  
2 another delay, a delay in the path project past  
3 June 18.

4 THE COURT: Awaiting the glass; is  
5 that right?

6 THE WITNESS: Yes.

7 THE COURT: Okay. All right.

8 THE WITNESS: Awaiting the glass.  
9 After the glass got there, they finished quickly.  
10 Another issue was --

11 BY MR. HILDEBRAND:

12 Q. Mr. Doran, you've been going for a  
13 while. Are you okay?

14 A. What's that?

15 Q. You've been going pretty hard for a  
16 while. Are you okay to be --

17 A. I'm fine. I'm fine. All right.

18 THE COURT: He is an expert. He's  
19 tough.

20 BY MR. HILDEBRAND:

21 Q. All right. Good. Go ahead.

22 A. Another one was the elevator. There's a  
23 front desk.

24 Q. Tell us, what was the issue with the  
25 front desk?



1           A.    There was no front desk.  The contract  
2           was issued without a front desk.  And so Balfour  
3           Beatty --

4           Q.    A reception desk?

5           A.    Where you check in, the front desk to  
6           check in.

7           Q.    Okay.

8           A.    So Balfour Beatty inquired, thinking  
9           this is -- inquired, how are you going to check  
10          in your guests?  And the owner -- and he brought  
11          it up to the architect's attention that, hey, we  
12          don't have a front desk here.  I mean, when I  
13          discussed this with Balfour Beatty, they said --  
14          they told me, it's like --

15                   MR. BUNDY:  Wait.  That's hearsay.

16                   THE COURT:  Yeah.

17                   MR. BUNDY:  I mean, come on.

18                   THE COURT:  I know you're giving me  
19          a basis for it, but anyway, there was no front  
20          desk in the original design?

21                   THE WITNESS:  There's none.

22                   THE COURT:  Okay.

23                   THE WITNESS:  And Balfour Beatty  
24          wasn't concerned with that.

25                   THE COURT:  Okay.

1                   THE WITNESS: They had a reason not  
2           to be concerned. They were not concerned. So,  
3           boom, you know, there's a big light bulb, hey,  
4           where in the heck is the front desk? We've got  
5           to design the front desk. And that's the  
6           mother-in-law showing up.

7                   THE COURT: Okay. All right.

8                   MR. BUNDY: Could we get rid of the  
9           light bulb? I mean, really, you know.

10                  MR. HILDEBRAND: It's not on the  
11          actual copy of the --

12                  THE WITNESS: And so when that  
13          finally gets added to the contract in March of  
14          '18, it doesn't actually get the final install  
15          until November 20th with the whole -- and because  
16          it's a front desk, that's electric through it.  
17          It wasn't just a piece of wood you stick. It's  
18          got electric and other things going into it.

19                  THE COURT: Right.

20                  THE WITNESS: And then the last  
21          item was the elevator interior finishes, and it's  
22          almost another light bulb here because the owner  
23          didn't provide any finishes for the interior of  
24          the elevators until June 12th, 2018. Now, it's  
25          in supplemental instruction, SI 67.

1                   So at the conclusion of period 4, I  
2                   concluded that 141 days of critical path delay  
3                   during this period due primarily to the barn  
4                   doors, but also due to the stairs, lack of a  
5                   front desk, and no selections of interiors for  
6                   the four main passenger elevators.

7                   BY MR. HILDEBRAND:

8                   Q.   And you'd attribute those to the owner;  
9                   is that correct?

10                  A.   Yeah. I assigned all of those to the  
11                  owner.

12                  Q.   Okay.

13                  A.   They're all design delays.

14                  Q.   All right.

15                         THE WITNESS: That leads us to the  
16                   last period, Your Honor, level -- I'm sorry,  
17                   period five. I had quantified 76 days, which is  
18                   in the lower right-hand corner, for a total 516  
19                   days for the entire contract. I concluded that  
20                   the delays were due to added scope and design  
21                   changes, and I assigned those to the owner as  
22                   such.

23                   The multiple critical paths that were in  
24                   existence at the end of period four continued  
25                   into period 5. Some dropped off, but another one

1 or two took their place. So at the -- throughout  
2 period five, the -- and the next slide will show  
3 critical paths that will show the other issues.

4 So you had the elevators continue until  
5 the end of the project, and I'll discuss that in  
6 a minute. Stair four was delayed due to those  
7 revised finishes I just discussed. That doesn't  
8 get complete until October 4th. The front desk  
9 was delayed due to no design. That got delayed  
10 until November 20th, as I said a minute ago.

11 The pool -- now this kind of jumps up  
12 and takes over late in the project. But the pool  
13 became another as-built critical path. It ended  
14 on the same day as the elevators. The elevator  
15 and the pool both passed final inspection the  
16 same day. Both were needed for substantial  
17 completion.

18 THE COURT: Okay.

19 THE WITNESS: And that's why I  
20 found that they were critical path delays. This  
21 is just a chart showing a summary of the  
22 selective changes that I selected throughout  
23 2018, in addition to those others.

24 They include those, but there's an  
25 addition of others. You can see the pervasive

1 nature, I guess, not just on level 1 and 2. 2 is  
2 more like critical path (inaudible) but  
3 throughout the building. And these are --

4 BY MR. HILDEBRAND:

5 Q. Wait a second. What is this?

6 A. It's a --

7 Q. Slow down a little bit on this, please.

8 Can you explain to the Judge what this slide  
9 shows and what these delays are?

10 A. This slide shows owner revisions of  
11 changes and added scope of work throughout  
12 periods four and five.

13 MR. BUNDY: Objection.

14 THE COURT: Okay.

15 MR. BUNDY: He is not tying them to  
16 any delays. These are just owner changes of  
17 work. That's irrelevant to a delay analyses.

18 THE WITNESS: So if I can continue.

19 MR. BUNDY: And I object.

20 THE COURT: All right. Overruled.

21 Go ahead.

22 THE WITNESS: Thank you. So if  
23 you -- if I didn't find the elevators or the pool  
24 or the front desk or stair four as the critical  
25 path, one of these others would pop up and take

1 over and be the as-built critical path.

2 THE COURT: Okay. In other words,  
3 these are not critical as-builts?

4 THE WITNESS: No.

5 THE COURT: But they would be  
6 incorporated in there if they were?

7 THE WITNESS: Yeah. If those other  
8 delays had not occurred, some of these would then  
9 have been become critical.

10 THE COURT: Okay. Okay. All  
11 right.

12 BY MR. HILDEBRAND:

13 Q. And what are these delays?

14 A. These are mostly CCDs, which are  
15 contract change directives.

16 Q. Construction change directives?

17 A. Construction change directives, which  
18 just by its title, you know, it's a change to the  
19 contract. So those are easy to identify, it's an  
20 owner responsibility.

21 MR. BUNDY: Your Honor, I object.

22 THE WITNESS: And that's the CCDs.

23 THE COURT: All right. Hold one  
24 second.

25 MR. BUNDY: I object to the

1 reference to these things as delays. I think the  
2 appropriate definition would be noncritical  
3 delays. He just testifies that unless those  
4 other delays went away, these were not critical.

5 THE COURT: Okay.

6 MR. BUNDY: He is supposed to  
7 present a critical path delay analysis. Okay?

8 THE COURT: Okay.

9 MR. BUNDY: This is not a mud ball.  
10 He's got to have an analysis. Okay?

11 THE COURT: Okay.

12 MR. BUNDY: So can we at least  
13 agree that the proper terminology is a  
14 noncritical path delay in this summary?

15 MR. HILDEBRAND: Well, I think the  
16 point, Your Honor, is that, okay, somebody wants  
17 to come in and say, oh, gosh, well, the barn  
18 doors weren't our problem. They weren't our  
19 fault. Or this wasn't our problem. Then  
20 Mr. Doran says, okay, then we drop down to this  
21 next one, and this next one is on the critical  
22 path and is the owner's fault.

23 MR. BUNDY: I realize he has got an  
24 answer to every question.

25 THE COURT: Right.

1                   MR. BUNDY: I'm not concerned about  
2 his lack of -- able to come in here and make up  
3 more stuff, right? He just keeps dealing out of  
4 the same deck. What I'm talking about is, these  
5 are noncritical path items, right?

6                   And if my guy comes in here and says,  
7 no, one of them is not, that's his reply  
8 testimony because that's new evidence in reply to  
9 what he said. But it's not evidence now proper  
10 for this witness because he is only supposed to  
11 testify to critical path delays.

12                  THE COURT: All right. Let me make  
13 sure I summarize this properly because I'm going  
14 to allow it, but it's a but-for test. But for  
15 these other items which you found to be critical  
16 path delays, these items would constitute  
17 critical path delays; is that correct?

18                  THE WITNESS: Yes, sir. But as I  
19 said, as I brought this slide up, this -- it  
20 might include them. It does include some that  
21 actually were on the critical path, like the  
22 elevators at the bottom. So this slide includes  
23 both --

24                  THE COURT: Okay.

25                  THE WITNESS: -- as-built with a



1 path like for the elevators, stair four on the  
2 bottom, but then all of these -- some of these  
3 are showing that, if this didn't occur, these  
4 others would pop up.

5 THE COURT: All right.

6 THE WITNESS: So it includes both.

7 THE COURT: So my question then  
8 becomes, is it cumulative or is it -- and how is  
9 it in addition to? That's my question. In other  
10 words, you've got stair four and elevators again  
11 and this list. But we've already covered those,  
12 right?

13 THE WITNESS: Yes.

14 THE COURT: Okay. All right.

15 THE WITNESS: Yeah.

16 BY MR. HILDEBRAND:

17 Q. So just run through these real quick.  
18 What are the other critical path delays that were  
19 for --

20 A. Well, I already had, you know, stair  
21 four millwork up here.

22 Q. Just walk from there and just put them  
23 in the record real quickly for me, please.

24 A. Well, like I said, most of these were  
25 CCDs. So you have CCD3, which is color sprinkler

1 at stair four millwork, which led then to the  
2 stair four design refinishes.

3 Q. All right. I don't know if this is  
4 going to be admitted into evidence or not. So if  
5 it's not, then I need for you to just probably  
6 tell the Judge what all of these are. So let's  
7 back up just a second. So what under -- you've  
8 got the floors. Explain what that is and then  
9 what the -- what is AS?

10 A. AS is actual start. AF is actual  
11 finish.

12 THE COURT: Okay.

13 THE WITNESS: The description is  
14 my -- it's probably my description that came off  
15 the document as to what -- the summary of what  
16 the change was. All of these are changes --  
17 added scope and changes to the contract, and  
18 that's why I added it here then. These were all  
19 changes added seven months after the original  
20 contract completion date.

21 BY MR. HILDEBRAND:

22 Q. Okay. That's what I was trying to get  
23 at, and I don't think I did it very well. So all  
24 of these are after the originally scheduled date  
25 of July of 2017; is that correct?

1           A.    Yes.

2           Q.    Okay.  Let's go through them  
3 individually just very quickly and explain to  
4 Judge -- it's near the end of the day, but can  
5 you go through each one of these and describe  
6 what the issue is and what the delays are for  
7 each of these after the original date?  What's  
8 the first one?

9           A.    Here in purple?

10          Q.    No, the very top one.

11          A.    This one, CCD?

12          Q.    Right, yeah.  Just go through each one,  
13 please.

14          A.    I don't know if I can recite every  
15 single one without my report, without all of my  
16 other work product I have.  I mean, at one point  
17 in time, I probably knew every one of these.  I  
18 didn't review every one for this presentation.

19          Q.    Just read them into the record and then  
20 we'll --

21          A.    Yes.

22                   MR. BUNDY:  Wait, wait, wait.  I  
23 object.  If he says he can't remember, he says  
24 it's in another box and he could have done it,  
25 but he can't do it now.  I don't know how -- why

1       would we put that in the record? That's just a  
2       list that he made. It's irrelevant. It's  
3       immaterial.

4               It doesn't go to the issue which he has  
5       been qualified for, which is to give a critical  
6       path delay analysis. A list of documents on the  
7       screen is not a critical path delay analysis,  
8       particularly when it is made up of things he  
9       cannot remember. He doesn't -- he can't even  
10      describe them. All he can do is read them to  
11      you. It's not proper.

12              MR. HILDEBRAND: Your Honor, maybe  
13      Mr. Bundy has a lot better memory than I do, but  
14      I will tell you what, if I were to look at all of  
15      these -- you put them in your report as a  
16      summary, and I think that he can qualify that he  
17      does have the underlying data.

18              And he's come to a conclusion as to when  
19      the actual start and actual finish work and what  
20      the periods are. I mean, if we want to take the  
21      time, I can have him bring the relevant data  
22      behind each one.

23      BY MR. HILDEBRAND:

24              Q. Let me ask you the question. On each  
25      one of these, have you taken the time and do you

1       have the data to support your opinion for each  
2       one of these delays?

3           A.    Each one of these came directly from the  
4       project schedule.

5           Q.    Okay.

6                   MR. BUNDY:   We're talking about two  
7       different things.   If he wants to -- I would  
8       agree -- I don't have any way of arguing that he  
9       went to the documents and found this activity,  
10      CCO number 1 on floor 1 was as -- was that as  
11      scheduled?

12                   THE WITNESS:   Actual start.

13                   MR. BUNDY:   Actual start and actual  
14      finish.

15                   THE COURT:    Okay.

16                   MR. BUNDY:   That's okay.   I have no  
17      problem with that.   I mean, but what he can't do  
18      is come in here and give an opinion about  
19      something he says he cannot remember, right?   Do  
20      you see what I'm saying?

21                   THE COURT:    Okay.   All right.

22                   MR. BUNDY:   He doesn't even have a  
23      copy of shift kitchen 17 AC for lighting, drain  
24      panel R.   I will agree, I guess, that he can say  
25      CCD was 11.   It was drain power and alarm was

1       on -- it was on the first floor, and these are  
2       the two dates associated with it.

3               THE COURT:   Okay.

4               MR. BUNDY:   That's it.   That's all  
5       he's qualified to testify to.

6               THE COURT:   All right.   Do you want  
7       to run down the list?

8               THE WITNESS:   We can try.

9               THE COURT:   Yeah.   Go ahead.

10       BY MR. HILDEBRAND:

11              Q.   Just start at the first one, please.

12              A.   So the first one, custom color sprinkler  
13       heads, and this was a change directive from the  
14       architect in early 2018, and the work was  
15       performed in -- from April 10, 2018 to July 6,  
16       2018, which certainly could never have been  
17       completed before the original contract conclusion  
18       date.

19              Q.   Okay.

20              A.   And that's the actual start to finish.  
21       So this was obvious owner change to the contract.

22              THE WITNESS:   And remember, Your  
23       Honor, by February of 2018, the building has two  
24       coats of paint.   By March of 2018, level 3 is  
25       punched, and, I mean, is final and cleaned.

1       That's why I'm showing these things.

2                   THE COURT:   Okay.

3                   THE WITNESS:   These are all  
4       occurring at -- you know, that late in the game.

5                   THE COURT:   Okay.

6                   THE WITNESS:   Stair four millwork.  
7       That was the millwork revision changes I was  
8       talking about.

9       BY MR. HILDEBRAND:

10           Q.    What is the actual start and -- tell us  
11       the actual start and the actual --

12           A.    The actual start on this issue was  
13       December 11th, 2017, finished on March 8th, 2018.  
14       Those were revisions in the millwork shop  
15       drawings by the architect.

16           Q.    That was a change?

17           A.    Part of that ended up in the change for  
18       stair four.

19           Q.    Okay.

20           A.    CCD 7.

21           Q.    What floor gives the --

22           A.    So that the floor -- that's why I had  
23       these broken up. All of these occurred on the  
24       first floor lobby level and main entrance to the  
25       building.

1 THE COURT: Okay. All right.

2 THE WITNESS: CCD 7, construction  
3 change directive 7, supplemental instruction  
4 number 62R1, private dining. I had this one from  
5 floor 1. Actual start May 14th, 2018; actual  
6 finish, January 23rd, 2019.

7 This is where the owner requested a  
8 different wall covering. In fact, the wall  
9 covering, as it was finally installed was  
10 installed after substantial completion. They  
11 didn't need it for substantial completion.

12 CCD 9, supplemental instruction 66R1,  
13 front desk/bellhop/host. We already discussed  
14 part of that. It was just the front desk that  
15 CCD was issued on April -- and I think that was  
16 first floor front -- April 2nd, 2018.

17 Finally, it was completed and accepted  
18 by the owner, front desk only. By November 20th,  
19 2018, the bellhop and the host stations were  
20 provided later by the owner in January. CCD 11,  
21 drain pan and alarm. I think this was up in  
22 level 9, if I'm not mistaken.

23 This was a drain pan for an air handler  
24 unit. It didn't have an alarm on it, so they --  
25 oh, it's on level 1, I'm sorry. When it came



1 out, it was issued CCD 11 on 4/27/18.

2 BY MR. HILDEBRAND:

3 Q. This is AF --

4 A. Actual finish. Actual start on April 27  
5 at 2018. Actual finish, June 27, 2018. I  
6 believe this is up in the ceiling area.

7 Q. Is that a code issue, that drain pan  
8 alarm, to your knowledge?

9 A. Yeah. I mean, that was part of the -- I  
10 forget which inspection it was. It was closed-in  
11 ceilings. I can't remember which one.

12 Q. So the building inspector caught up an  
13 issue and said, this has to be --

14 A. And then the architect designed it and  
15 issued it as a construction change directive.

16 Q. Okay.

17 A. Construction change directive on 12, AC  
18 for lighting on level 1. Actual start of April  
19 27, 2018; actual finish of October 5th, 2018.

20 Q. What was that issue?

21 A. I forget that one. I know the lighting  
22 and they were concerned with the lighting making  
23 the room too hot or the area too hot. I just  
24 don't remember this one.

25 Q. All right. Fair enough.

1           A.    Shift kitchen.  On some level, they had  
2           two kitchens, one on the first floor and one on  
3           the second.  CCD 13, level 1.  Actual start, May  
4           3rd, 2018 and actual finish, May 23rd, 2018, so  
5           only 20 days.

6                    This shifted some -- I think it was some  
7           lighting or it shifted something in the kitchen  
8           which required (inaudible) shifting it over and  
9           reinstalling it.

10                   MR. BUNDY:  Objection.

11           BY MR. HILDEBRAND:

12           Q.    What's the next one?

13           A.    CCD 21, added chiller to waterline,  
14           level 1 and 9.  I had it on level 1 here.  Actual  
15           start, June 25th, 2018; actual finish, July 19th,  
16           2018 on level 1.  My understanding, my  
17           recollection on this was that the chiller line  
18           was too small.  It had to be added in, a second  
19           chiller line, to make it work properly.  The  
20           design didn't work, the original design.

21                    CCD 22, patisserie, floor 1.  Actual  
22           start, June 8th, 2018; actual finish, November  
23           19th, 2018.  That was in -- the patisserie is on  
24           the -- it's close to the -- it's a bakery.

25                   THE COURT:  Right.

1                   THE WITNESS: They bake breads and  
2           stuff down on the first floor. And there was  
3           some revisions on the layout of that area. That  
4           may be when they changed some of the finishes and  
5           added some marble.

6                   And this the owner wall covering that  
7           they ordered, this level 2. It began back in  
8           July 27th, 2018 when they replaced it, and  
9           finally came and was delivered on May 18th, 2018  
10          for those three floors.

11       BY MR. HILDEBRAND:

12           Q.    What was the actual start on that?

13           A.    Actual start was July 6th, 2017.

14           Q.    Okay.

15           A.    CCD 4, supplemental instructions 61R,  
16          boardroom TV relocation.

17           Q.    That's the second floor?

18           A.    Yes, the second floor.

19           Q.    What's the actual start on that one?

20           A.    Actual start, May 30th, 2018, the  
21          actual -- I'm sorry. Actual start, April 16th,  
22          2018; actual finish August 15th, 2018.

23           Q.    Describe to the Judge what the issue was  
24          there, what the change was.

25           A.    I don't remember why, but it was

1       relocated as a change from the --

2                   MR. BUNDY:  Objection.

3                   THE WITNESS:  -- to in the wall,  
4       and this is the plug-in for the TV relocation and  
5       finishes.  So they had to relocate it to fit the  
6       size of the television.

7       BY MR. HILDEBRAND:

8           Q.    Sure.  Is that a paneled room, a wood  
9       paneled room?

10          A.    Pardon me?

11          Q.    Was that a wood paneled room?

12          A.    The boardroom, yes.  The boardroom is.  
13       That's on the second floor.  There was something  
14       else besides the -- there's a spa in that area  
15       before -- on the side of it.

16                I think there's something else right  
17       beside that room, but anyway, yes.  This is your  
18       boardroom that has high level finishes throughout  
19       the room.  I think it's floor to ceiling, if I'm  
20       not mistaken, millwork, wood work.

21          Q.    When that change was made, had the  
22       paneling already been installed?

23          A.    By April 16th, 2018, everything is done  
24       by then.  I mean, substantially complete in these  
25       rooms.  And so it's ready to be final cleaned and

1       punched out. So to make a change like this, you  
2       have to go in and cut through the millwork and  
3       replace the millwork. That's a big deal.

4             Q. All right.

5             A. CCD 17, PIU two and three. Access level  
6       2, May 30, 2018 to June 13th, 2018.

7             Q. Where it says, actual start is May 30,  
8       2018?

9             A. Actual start is May 30, 2018; actual  
10       finish, June 13th, 2018. These are units by the  
11       ceiling on the second floor that the access  
12       panels were supposed to be a certain size to  
13       access, to maintain the area that's above the  
14       ceiling.

15                   THE COURT: Okay.

16                   THE WITNESS: And the owner and  
17       architect directed the -- the inspector said it  
18       need to be bigger. The architect and owner  
19       directed the contractor. We want them small.  
20       They made them small. And then, eventually, they  
21       had to --

22                   MR. BUNDY: Your Honor, I object.  
23       It's hearsay.

24                   THE WITNESS: The inspector made  
25       them change that, and this is that -- they had to

1 cut the ceiling and put in a bigger access panel,  
2 two of them, and refinish the ceiling around it.

3 THE COURT: Okay. All right.

4 BY MR. HILDEBRAND:

5 Q. All right. What is the next one?

6 A. CCD 19, 200 volt shift fire alarm, level  
7 2. Actual start, June 25th, '18, to actual  
8 finish August 16, 2018.

9 Q. So that's almost two months. What's the  
10 delay there? What was the issue?

11 A. This is where they had to move -- or  
12 shift to relocate. They were talking about some  
13 shift room or shift changes. This is where they  
14 had to relocate the fire alarm pool in a finished  
15 room in the corridor, guest.

16 And by then, again, like I said, all the  
17 finishes were done, and they had to shift it -- I  
18 forget in which direction. They had to shift it  
19 to get the material, order it, like the example  
20 used for Thanksgiving dinner. Get the material  
21 there, and then they performed the work.

22 RCO, which means request for change  
23 order, 228 stone top. It's by retail. This is  
24 on level 2. Actual start, March 2nd, 2018;  
25 actual finish, June 18, 2018. This was changing

1       the -- they now required a stone top, and that's  
2       in the spa area, change it to marble. They got  
3       confused with the patisserie. This was the area  
4       this happened.

5           Q. All right. What's the next one?

6           A. Hold on one second.

7           Q. I think we're starting to end up -- let  
8       me ask you this: You were about to start in the  
9       white section, but why do you have some in orange  
10      and some in blue and some in white?

11          A. Down on the bottom where you see the  
12      orange?

13          Q. No. If you look at the picture on the  
14      chart.

15          A. Right. So the chart is separate in  
16      three areas.

17                   THE COURT: First floor, second  
18      floor, and other floors, right?

19                   THE WITNESS: And the rest of the  
20      building.

21                   THE COURT: And what's the  
22      significance of the numbers in front of the bar  
23      graphs?

24                   THE WITNESS: Those were the actual  
25      start date or actual finish date that correspond

1 to these actual start date and actual finish  
2 date. You're asking about these?

3 THE COURT: The 9th or the 11th.  
4 Okay, okay. All right. Coincides with the date?

5 THE WITNESS: Yes. So if I read  
6 this later, where there's a blue bar, there is a  
7 number to the left of it that corresponds to the  
8 actual start date I have listed. The number to  
9 the right corresponds to the actual finish date  
10 that I have in the column.

11 THE COURT: Okay. All right.  
12 Gotcha.

13 THE WITNESS: The first one up here  
14 is RCO 176, concierge lounge millwork. This is  
15 the sixth floor, which is the manager's apartment  
16 level. This is where the -- the owner's room,  
17 basically.

18 This actual start, October 9th, 2017;  
19 actual finish, July 11th, 2018. The concierge  
20 room is in the back northwest corner of the  
21 floor -- the owner's apartment in the southeast  
22 corner of the room. This is the concierge  
23 lounge.

24 And so this added millwork to that  
25 lounge and which had to be -- you know, designs



1       submitted, procured, shipped, delivered, and  
2       installed. So it takes a long time.

3                   THE COURT: All right.

4       BY MR. HILDEBRAND:

5           Q. Let me interrupt you just for a second,  
6       if I may. So all of these -- we can figure out,  
7       we have the actual start and actual finish. Each  
8       period of that is a delay and would be a delay to  
9       the critical path if other delays had not taken  
10      place; is that correct?

11          A. Yes, yes.

12          Q. Okay. And we can figure out the number  
13      of days between -- just figure out the time  
14      between the actual start and actual finish of  
15      each period?

16          A. Right.

17          Q. All right. I'm sorry to interrupt you.  
18      Go ahead.

19          A. It's okay.

20          Q. CCD 8, I think we're on.

21          A. CCD 8 is supplemental instruction 571R1  
22      and supplemental instruction 63R1, manager's  
23      apartment. This happens -- the manager's  
24      apartment or room goes -- it's a two-level room.  
25              There's a stair that goes from one level

1       the other one so the manager doesn't have to  
2       go and -- doesn't have to go out into the common  
3       area, if you will. He can access it within his  
4       own room. So it's two stories.

5           Q.    Actual start and actual finish?

6           A.    So the actual start is April 2nd, 2018;  
7       the actual finish is April 8, 2019. So these  
8       were -- this was a lot of changes. I can't tell  
9       you what. There was a lot of changes made in the  
10      manager's apartment that continued even after  
11      substantial completion.

12                AE is architect engineer. BAR is an  
13      Architect Review Board for Charleston. Delay.  
14      This has to do with the shutters that's exterior  
15      of the building. The actual start, December 20,  
16      2017; actual finish, May 31, 2019.

17                THE COURT: That's about right, 18  
18      months. Sounds about right.

19                THE WITNESS: Yes. So this did not  
20      delay the project. This one did not delay  
21      substantial completion unless it required a  
22      substantial completion. But it was required in  
23      the final completion.

24      BY MR. HILDEBRAND:

25           Q.    So you get the CO?

1           A.    I'm sorry?

2           Q.    To get the CO, would you have to have  
3           that done on the shutters?

4           A.    The certificate of occupancy was issued  
5           in May 2019. I had in my mind May 24th, but it  
6           must have been -- I must have been mistaken. It  
7           must have been May 31st.

8                   Generally, the certificate of  
9           completion, which is different than the  
10          certificate of occupancy. The certificate of  
11          completion means that everything has to be  
12          completed as it was on the permit drawings, a  
13          hundred percent.

14                   MR. BUNDY: Objection. Certificate  
15          of completion is a defined contract term.

16                   THE COURT: Okay.

17                   MR. BUNDY: So I object to him  
18          paraphrasing what the contract said.

19                   THE COURT: All right. Got it.

20                   THE WITNESS: Now, CCD 2, blackout  
21          stair with the drywall stairs. Actual start,  
22          March 30, 2018; actual finish, September 20th,  
23          '18.

24                   Several of the windows were blacked out.  
25          It was a change directive. Some of those were

1 stair four; some of those were stair three, and  
2 some of them would have been another stair. They  
3 were stairs three and four, but some were in  
4 stair four.

5 So that's just another revision in stair  
6 four that was different than the millwork  
7 revision. Did I get the actual start and actual  
8 finish date on that? I think I did. The actual  
9 start date, March 30, 2018; actual finish date,  
10 September 20 of '18.

11 BY MR. HILDEBRAND:

12 Q. Okay. What's the next one?

13 A. CCD 6, supplemental instruction 60R1,  
14 stair four. Stair four, actual start, April 16,  
15 2018; actual finish, October 4, 2018. This is  
16 that same stair four issue we discussed.

17 CCD 16, car equipment at level 9.  
18 Actual start, May 14, 2018; actual finish, June  
19 27, 2018. This is where the owner added the  
20 equipment at the bar level like refrigerator and  
21 stuff like that.

22 CCD 10, supplemental instruction 58R1,  
23 ninth floor air changes, level 9. April 18 --  
24 the actual start, April 18, 2018; actual finish,  
25 September 4, 2018.

1 Q. And what the issue there?

2 A. There? I'm trying to remember which one  
3 it was. There were two -- I think there were two  
4 issues with floor change with CCD 10.

5 Okay. So this is over on the east side  
6 of the building, I believe, where they had  
7 revised the airflow and air change. I forget  
8 what they did exactly, but they revised the air  
9 handlers that the air -- flow of air fans that  
10 were servicing the east part of the ninth floor.

11 The last -- second to last is the  
12 elevator. That -- actually, I don't have the  
13 actual start and actual finish on that. You  
14 know, this bar, this blue bar was just from  
15 whenever the elevator or the contractor first  
16 started. They were substantially complete by  
17 June 1st, 2018. The owner -- and right below  
18 that in the orange, owner custom cab trim  
19 beginning on June, and that must be May.

20 Q. What was that?

21 A. And I don't know that date, but this is  
22 the -- what was on my critical path for the  
23 elevators, that interior, the finishes had not  
24 been designed. That's what that issue is. Stair  
25 four we discussed, and I don't have dates on

1       there either. You got me through it.

2           Q. All right. Yes, sir. Thank you. All  
3       right. What is this next one?

4           A. This is just a summary of -- beginning  
5       in February of 2018, Balfour Beatty was requiring  
6       that any changes or added scope to be issued as a  
7       construction change directive, the owner -- the  
8       architect issued about, you know, 35 to 40 of  
9       those throughout the year between February and  
10      December of 2018.

11                This is just a listing of all of those  
12      contract construction change directives, the date  
13      it was issued and a description of that work.  
14      Now, a lot of these CCDs we just went through on  
15      the previous one.

16           Q. Okay. So this just shows changes --  
17      these are changes by the owner to the contractor,  
18      just saying, you've got to make this. We haven't  
19      agreed on the price or anything else, but make  
20      it -- and these were done from February 27th,  
21      2018? That's well after the original  
22      construction.

23           A. That's seven months after the original  
24      contract completion date. But what I said  
25      earlier was important was, by February -- by this

1       date, there's two coats of paint on the whole  
2       building. And then there's 35 or 40 changes,  
3       just in construction change directives issued  
4       after that.

5               And then the relevance of that is  
6       something that, without being one hundred percent  
7       painted is, to shift a light switch or relocate  
8       or make a revision to a television in the  
9       ballroom, why would it take two months to do  
10      something like that or four months for something  
11      else? Because the fixtures weren't there.

12             And so most of these changes require  
13      ripping something out, ordering maybe, getting  
14      submittals, ordering -- getting stuff delivered,  
15      reinstalling it and repatching up the finishes  
16      around them. That's what -- that's why I felt  
17      this was relevant to this presentation.

18             Q.   Okay. All right. What's the next  
19      slide, next chart?

20             A.   Supplemental instructions. These are  
21      only the ones issued in 2018. Again, as I  
22      discussed earlier, any changes in 2018, I felt,  
23      you know, but for that as-built critical path, it  
24      would have been -- and eventually getting back to  
25      it anyway would have probably been a critical

1 path delay.

2 Q. So the previous ones were construction  
3 change directives and then these are supplemental  
4 instructions?

5 A. Yes. Every one of these is a change.

6 Q. I'm sorry?

7 A. Every one of these is a change to the  
8 contract -- I mean, is a change to the work,  
9 change to the contract. Every one of these is a  
10 revision.

11 Q. All right. Would you be able to  
12 describe what each one of these is?

13 A. No. I mean, if it was not on the  
14 critical path, I didn't waste my time. I can  
15 only go back so far, knowing all the information  
16 on the project. I stick to what's critical or  
17 near critical. So a lot of these --

18 MR. BUNDY: Move to strike,  
19 irrelevant.

20 THE WITNESS: -- you know, they're  
21 off my radar to analyzing them. I mean, at one  
22 time I knew these three years ago or two and a  
23 half years ago when I started with this work.  
24 But, you know, sitting here today, I didn't  
25 review all of that.



1 BY MR. HILDEBRAND:

2 Q. All right. So what is your conclusion  
3 on the period five delays?

4 A. On period five, I concluded 76 days of  
5 as-built critical path delay, and the causation  
6 was added scope of work through supplemental  
7 instructions, construction change directives and  
8 change orders and design changes to address  
9 inspections, which we didn't address yet.

10 Q. All right. Tell us about that.

11 A. Pardon me?

12 Q. Can you tell us about that?

13 A. Yes, sir. The elevator and the pool  
14 that I started to talk about earlier, they both  
15 finished on December 28th, 2018. When the  
16 inspector came to inspect the elevator in  
17 October, I think, 2018, the inspector found that  
18 it did not meet the code requirements, and he  
19 wanted additional work done.

20 To kind of summarize this, the  
21 information went back to architect. The  
22 architect designed it, reissued it, the work as a  
23 change directive, construction change directive,  
24 and the elevator work was performed. Some of  
25 that even had to do with -- you know, the lights

1           were not an emergency light circuit.

2                       And so then the lighting for the  
3           elevators had to be put on the emergency light  
4           circuit in December of 2018, the last three weeks  
5           of the project, to meet the code requirements of  
6           the inspector.

7                       The other one was the pool. The pool  
8           has a life safety issue, and the equipment for  
9           the pool was in an equipment room. And it had  
10          ductwork and it had equipment that ran on  
11          national gas or propane. Either way, it was gas.

12                      And the inspector had an issue with how  
13          that was -- how that gas and the ductwork were  
14          located. It wasn't venting outside, either  
15          completely outside or not high enough above the  
16          roof.

17                      And so that required additional design  
18          by the architect or issues of construction change  
19          directive. The pool inspected -- that work was  
20          performed, inspected in December of 2018, and the  
21          same day, the inspector for the DHEC -- it's not  
22          the building inspector. It's South Carolina  
23          Department of Environmental.

24                      THE COURT: Health and  
25          Environmental Control.

1                   THE WITNESS: Control, thank you,  
2           sir. That's when they did their final inspection  
3           and approved it, the pool. And that was -- the  
4           reason that was so important was that was a  
5           secondary source of fighting fires.

6                   THE COURT: Okay.

7           BY MR. HILDEBRAND:

8           Q. Okay. All right, sir. What does the  
9           next chart show us?

10           A. One of my other opinions was that, when  
11           unimpacted, Balfour Beatty performed as good as  
12           planned or better. I printed out a copy of a  
13           listing of the as-planned critical path for the  
14           project.

15                   If you performed the as-planned critical  
16           path, the project should finish on time.  
17           Everything in orange, each one of those  
18           activities was either -- was performed either on  
19           time or better, faster than what was planned by  
20           Balfour Beatty.

21                   So any time you get all the way down  
22           to -- I can't really read it. It's a 16 here.  
23           So you get down to this level. These are all  
24           structural delays up until this time is when  
25           we're getting through the structure of the

1 building. Like I said, the structure on the  
2 as-planned critical path only went up through  
3 level 3.

4 But all of the work prior to that  
5 structural work, civil work -- not all, but most  
6 of it was performed on time or better. Then,  
7 when you got into the ballroom, which takes over  
8 on the aspect critical path, most of that work  
9 was also performed on time or better than  
10 planned.

11 Q. All right.

12 A. Now, you have the insulated, the  
13 ductwork. They installed the ceiling framing in  
14 28 days. It was planned for seven weeks.

15 THE WITNESS: That 35, Your Honor,  
16 is 35 work days. That's seven weeks, almost two  
17 months. Balfour Beatty did it in 28 days, once  
18 they got started. They started several months  
19 later. Once they got started, they were able to  
20 do it far faster.

21 Ceiling, electrical, a pre-function.  
22 This gets performed after ceiling is framed,  
23 during it, and before the drywall gets hung.  
24 That was performed as-planned or better. As you  
25 know, we have all kinds of delays and impacts

1 with the above ceiling work that affected hanging  
2 the drywall ceiling.

3 So the important part here is Balfour  
4 Beatty is performing better than planned. And  
5 they have all these design changes affecting the  
6 ceiling, and then, of course, they didn't perform  
7 those timely.

8 Painted it timely. Painted it,  
9 installed light fixtures timely. Paint and  
10 carpet timely. They created their own punch list  
11 timely. They performed their punch list timely.  
12 The engineer's punch list repairs to interiors  
13 was dropped out. That doesn't have an actual  
14 finish date. It was not in the schedule.

15 The prefunction -- the last schedule  
16 that we had, I think, was November of 2018, so  
17 some of these are architect punch list repairs  
18 that continued on beyond that. Oh, wait, wait.  
19 I think that the last schedule was in May of '19,  
20 April or May of '19. But for some reason, I  
21 don't have the actual finish date for the  
22 architect's punch list.

23 Q. All right. Let's go back up for a  
24 second on that chart, and let's go to the very  
25 top. I want you to explain that very top line so

1       that the Judge can understand what these columns  
2       are, if he decides to look at them later on.

3           A.    So this spreadsheet has broken into --  
4       it looks like about 11 columns.  Moving left to  
5       right, the first column is activity ID number  
6       that was in the project schedules.

7                   The activity name is a description for  
8       the work that was given to it by Balfour Beatty  
9       that's in the construction schedules.  The  
10      original duration is of work days assigned to  
11      perform that work.  Usually it's a five-day  
12      calendar.  So 10, that first line would be two  
13      weeks.

14                   THE COURT:  Okay.

15                   THE WITNESS:  Start date is the  
16      as-planned start date.  The finish date is the  
17      as-planned finish date for that work.  Total flow  
18      is -- we have -- is that flow that you have in  
19      the turkey scenario for the cooking of the  
20      potatoes and any such activities as far as could  
21      have floated.  These are critical path activities  
22      because they have zero float.

23                   Actual start is the actual start date  
24      for these activities.  The actual finish date --  
25      VAR start means variance to the start date, just

1       actual start on this start. VAR finish is the  
2       variance finish date, which is the actual finish  
3       minus finish. And then better means whether they  
4       perform better than planned or not, they being  
5       Balfour Beatty.

6       BY MR. HILDEBRAND:

7           Q.    So are all of these ones that Balfour  
8       performed better or just the ones that are in  
9       orange?

10          A.    Just the ones in orange. This entire  
11       listing is the entire as-planned critical path.

12          Q.    All right. So what is your conclusion  
13       from -- so what is your opinion relative to this  
14       chart, or why is this important?

15          A.    One more thing I should point out for  
16       Your Honor, going back to that. Some of these  
17       activities have blank and actual, and that may be  
18       why it's down there.

19                Those activities were deleted from the  
20       schedule. Sometime before the baseline schedule  
21       and the final schedule, those activities were  
22       deleted. That's why there's -- no dates were  
23       actual.

24                   THE COURT:   Okay. All right.

25       BY MR. HILDEBRAND:

1           Q.   All right.  So what is your conclusion  
2           on this chart?  What's the inference?

3           A.   It's right -- Balfour Beatty performed  
4           as-planned or better when unimpacted.

5           Q.   Now we're done, thanks.  All right.  
6           Mr. Doran, let me ask you this:  The opinions  
7           that you have expressed thus far, have they --  
8           those been expressed to a reasonable scheduling  
9           certainty in your view?

10          A.   In my opinion, yes.

11          Q.   And the reason -- the opinions that  
12          you're going to articulate here in just a moment  
13          for your conclusions for this project, are you  
14          prepared to state those to a reasonable  
15          scheduling and delay certainty?

16          A.   Yes, I am.

17          Q.   All right.  What are your conclusions  
18          on -- after having analyzed the schedule?

19          A.   After spending lots of time on this, my  
20          final conclusions were that -- and throughout the  
21          schedule delay analysis, that the owner is --  
22          that there were 516 days of delay to the project.  
23          Of those, the owner's responsible for 494 days  
24          of delay for which -- that are identified as  
25          being compensable to Balfour Beatty.  21 days --



1 MR. BUNDY: Objection, Your Honor.

2 Just to protect the record. He's not here and  
3 has not been qualified to give opinions about the  
4 compensable delays. Compensable delays are  
5 defined in the contract, okay, and that's not a  
6 term -- that's not a term of art. Okay?

7 It's specific to each contract. Some  
8 contracts are -- I think we've already had it  
9 pointed out to you. You've got class A and class  
10 B delays, right? Some of them are -- have  
11 certain -- so I'm objecting to that. I know I'm  
12 going to get overruled, but I object.

13 THE COURT: All right. But clearly  
14 he's entitled to render his opinion, maybe not as  
15 to delay, but as to schedule delays, correct?

16 MR. BUNDY: Right. I mean, he's  
17 here -- as I understood what he was going to tell  
18 us was, he was going to tell us where the  
19 critical path delays were. Okay?

20 THE COURT: Right.

21 MR. BUNDY: And he wasn't -- he  
22 can't assign liability because some of those are  
23 legal conclusions if they're governed by the  
24 contract.

25 THE COURT: Okay.

1                   MR. BUNDY: But he's clearly  
2           entitled to say, this is a critical delay or it's  
3           not. And that's why some of this stuff is  
4           irrelevant because it's not a critical delay.  
5           That's my position. Thank you, Your Honor.

6                   THE COURT: Very good.

7                   THE WITNESS: To clarify, Your  
8           Honor, prior to today, I've testified 36 times in  
9           all kinds of jurisdictions. Every single time,  
10          part of that testimony --

11                  MR. BUNDY: Your Honor, I object to  
12          all of this. He is not a lawyer. He is not  
13          supposed to be arguing his position and case, and  
14          I really object to this.

15                  THE COURT: Okay. I agree with  
16          that. I'm going to give him the -- you've got  
17          the right to give your opinion. All right? I'm  
18          going to let you do that, no question about that.  
19          BY MR. HILDEBRAND:

20                  Q. Mr. Doran, have you been -- what is a  
21          compensable delay under this contract?

22                  A. Under this contract, it's --

23                  MR. BUNDY: Objection. Out of  
24          court statement offered for truth of matter  
25          asserted. The best evidence of what the contract

1       says about compensable delays is in the contract.

2       Read the contract.

3       BY MR. HILDEBRAND:

4             Q.    Have you reviewed the contract?

5             A.    I have.

6             Q.    All right.  And do you have an opinion  
7       here today as to what the compensable delays are  
8       under that contract?

9                   MR. BUNDY:  Objection.  It's a  
10       legal opinion.

11                  MR. HILDEBRAND:  Well, I think the  
12       rules of evidence allow him to -- it's the  
13       ultimate opinion.  Mr. Bundy just objected to him  
14       not tying his opinion to the contract, and  
15       Mr. Doran said that he has reviewed the contract  
16       and is able to -- is here to testify in his  
17       opinion what the compensable delays are.  That's  
18       the root issue.

19                  MR. BUNDY:  I was objecting to him  
20       giving his opinion, and now because he -- I was  
21       objecting because he wasn't tying it in, and now  
22       he's tied it in and improper the way he's tying  
23       it in.  He's not a lawyer.

24                  THE COURT:  All right.  All right.  
25       So I think it would be proper to say that these

1       were critical path delays as opposed to  
2       compensable delays. I think that's the ultimate  
3       issue for the Court.

4                   MR. HILDEBRAND: Okay.

5                   THE COURT: Who's at fault, who  
6       breached first, who's at fault, and what is the  
7       compensability of that. I think those are the  
8       ultimate questions for the Court to decide.

9                   He's entitled to render his opinion as  
10      to what were schedule delays and whether or not  
11      they were authorized under the contract or  
12      outside the terms of the contract. That, I  
13      think, he's entitled to.

14                  MR. HILDEBRAND: All right.

15                  THE COURT: And which we've defined  
16      as critical path delays. Okay?

17      BY MR. HILDEBRAND:

18                  Q. All right. So let me understand your  
19      opinion. Is it your opinion that 494 days of  
20      delay, you would attribute to being owner caused  
21      that were not concurrently caused by Balfour?

22                  A. Yes.

23                  Q. All right. Thank you.

24                  A. I found in addition to that, 21 days  
25      were excusable, meaning not attributable to

1       either the owner or Balfour Beatty. Found one  
2       day that I assigned that was attributable to  
3       Balfour Beatty. It's an equipment breakdown day.

4               Balfour Beatty has already received 20  
5       days in the time extension in change order three,  
6       which is OCO, owner change order number 3, for  
7       the 1,000-year flood. And then in the box below  
8       that, it's just a summary of everything we have  
9       gone through for -- from periods one through  
10      five. Now, I apportion -- quantified them and  
11      apportioned the delays.

12             One thing I did not mention earlier that  
13      I'd like to bring it up, that change order three  
14      included 20 days of time extension for Balfour  
15      Beatty. When the structural delay started at  
16      level 6, Balfour Beatty submitted a claim for  
17      additional time in those delay -- I don't think  
18      it got to the claim. The architect agreed for 20  
19      days for level 6, and they didn't get a change  
20      order for that.

21             But usually the -- you know, the  
22      architect agreed to give them 20 days just for  
23      level 6. I came up with maybe more than that,  
24      but that's what the architect came up with. And  
25      that is not in the quantification of time

1 extensions issued.

2 THE COURT: Okay. All right.

3 Thank you. Yep, got it.

4 BY MR. HILDEBRAND:

5 Q. All right. What is the next chart?

6 Well, let me ask you this way. What did you use  
7 as the date of substantial completion in your  
8 analysis?

9 A. I used December 28, 2018.

10 Q. And why did you use that?

11 A. Because that was the final two  
12 inspections required for the building to be used  
13 for its intended use.

14 Q. Okay. All right. So are we down to the  
15 last chart -- the last two charts?

16 A. This chart slide 29 is just a summary of  
17 the previous charts where the -- each of those  
18 charts had a yellow bar on the bottom and it  
19 added up to 516.

20 This shows it in the middle of delay.  
21 Period one had 37 days. Period two -- that  
22 should be 167, not 168. That should be 167. 95  
23 for period three. 141 critical path delays in  
24 period four, and 76 days of critical path for  
25 period five.

1 Q. And the last chart?

2 A. This is the -- this shows a summary of  
3 the original substantial completion date, July  
4 30, 2017 and the date of substantial completion,  
5 December 20, 2018, which is significant because  
6 that's when liquidated damages stopped, that the  
7 owner can charge the contractor.

8 April 26, 2019, is that the -- when  
9 Balfour Beatty, that was their last day on the  
10 project, and so the damages that they claim that  
11 they're entitled to, I think, or at least in my  
12 opinion, would end on April 26, 2019, for  
13 indirect costs at the period level.

14 MR. BUNDY: I object. That's a  
15 legal conclusion as to when their damage has  
16 stopped, and he wasn't hired to give us his  
17 opinion on that and he is not qualified to do.

18 THE COURT: I will sustain that.  
19 Yeah, that's fine.

20 BY MR. HILDEBRAND:

21 Q. All right. Was your deposition taken in  
22 this matter, Mr. Doran?

23 A. No.

24 MR. HILDEBRAND: Give me just one  
25 minute, Your Honor. That's all, Your Honor.

1        anything from them.

2                    THE COURT: All right. That I will  
3        do. I will take the exhibits, and the objections  
4        into consideration. I'll give you a ruling on  
5        that as I go. I'll keep track of it as I go.

6                    All right. It's 3:15. Do you want to  
7        start on somebody today?

8                    MR. HILDEBRAND: It's up to you,  
9        Your Honor. I have two more live witnesses and  
10       then I'll be done. It's up to you.

11                   MR. BUNDY: Defendant would like to  
12       proceed, Your Honor.

13                   THE COURT: Yeah. Okay.

14                   MR. HILDEBRAND: We're ready to go  
15       there. If we can take just a quick break.

16                   THE COURT: Yeah. Let's take five  
17       minutes and come right back. Okay? We will run  
18       for a couple hours today.

19                   (A recess transpired.)

20                   MR. HILDEBRAND: The plaintiff  
21       would call David Simonton.

22                   (DAVID SIMONTON, having first been  
23       duly sworn, testified as follows:)

24                   THE COURT: Thank you, sir. Please  
25       sit. Be careful over there. You're wrapped in



1       there pretty tight. And I'm sure they have a  
2       few -- all right. Mr. Simonton, give us your  
3       full name and address for the record, please,  
4       sir.

5                       THE WITNESS: It's David Merritt  
6       Simonton, S-I M-O-N-T-O-N, 2973 Black Hills  
7       Boulevard, Heath, Texas 75123.

8                       THE COURT: That was Beef?

9                       THE WITNESS: Heath, H-E-A-T-H.

10                      DIRECT EXAMINATION

11       BY MR. HILDEBRAND:

12               Q. Can you speak up a little bit,  
13       Mr. Simonton?

14               A. Yes.

15               Q. Try to speak loud and clear.

16               A. I will do that.

17               Q. Thank you. Where are you from  
18       originally?

19               A. Dallas, Texas.

20               Q. All right. And just tell me, tell the  
21       Judge briefly, if you would, Mr. Simonton about  
22       your experience in the construction industry  
23       prior to starting work with Balfour Beatty?

24               A. Prior to starting with Balfour Beatty, I  
25       was in the mechanical industry. My father was in

1       the mechanical business. And up until the '70s,  
2       the mid '80s, I was working mechanical,  
3       electrical and plumbing industry.

4           Q.    MEP?

5           A.    MEP.

6           Q.    All right. And so that -- when did you  
7       actually join Balfour Beatty?

8           A.    I joined in 1986 with a company that was  
9       called JW Basin (ph) out of Dallas, Texas and was  
10      owed by Syntech. We were a commercial side.  
11      Then over the years, it transferred -- change in  
12      that Syntech Construction and basically started  
13      in '86 working in the Dallas, Fort Worth area on  
14      museum art, (inaudible) as like an assistant  
15      superintendent at the time in the field and in  
16      the office managing different trades.

17          Q.    Can you speak up a little bit, please?

18          A.    Managing different mechanical,  
19      electrical plumbing trades on large projects and  
20      then moved over and started a large Navy hospital  
21      in Dallas.

22          Q.    Okay. What was your job title when you  
23      started with Balfour?

24          A.    Mechanical, electrical, plumbing  
25      coordinator. So basically a subcontractors,

1       which there were about 60, 70 percent of the job  
2       for the total manage of the job, I was managing  
3       those subcontractors.

4               And then I went over to build prisons  
5       and jails in the Dallas, Fort Worth area, and  
6       then moved out to -- moved out to the next  
7       project. I did move me 12, 13 times with  
8       Syntech. We changed to Syntech in the '90s, we  
9       were building hotels, office buildings. I worked  
10      in the '90s, I worked on the Gaylord Texan.

11             Q.   Worked on what?

12             A.   Gaylord Texan. It's a 2,000 room hotel,  
13      convention center in Grapevine, Texas, five star  
14      alliance, very large hotel.

15               And then basically in '07, '06, I was  
16      out in California working for our development  
17      branch and construction building high end condos  
18      in San Diego and San Jose and San Antonio,  
19      starting some. They asked me to come out to  
20      Charlotte, and they had a large project, which  
21      was the superblock.

22             Q.   I'm sorry, the superblock?

23             A.   Superblock in Charlotte because it was a  
24      high end. I built a lot of hotel and office  
25      building and downtown areas. The CEO called me

1       and asked me if I would go to Charlotte and help  
2       build -- the lead team to build the Charlotte  
3       (inaudible) down and Ritz Carlton Hotel of  
4       Charlotte.

5           Q.   Was that a five-star hotel?

6           A.   Yes.

7           Q.   Have you had other five-star hotels that  
8       you have worked on?

9           A.   I worked on the Omni in Hilton Head,  
10       later on, a few years back. That's basically the  
11       best one, the largest value hotel that I worked  
12       on.

13          Q.   Okay.

14          A.   Well, the Gaylord, it was 500 million,  
15       but the Ritz was 200.

16          Q.   Okay. So the risk -- and that was just  
17       before this project; is that right?

18          A.   No, sir. This was before this project,  
19       the Bennett Hotel.

20          Q.   Right, the Ritz?

21          A.   No. So we built the Ritz. I was  
22       operations director. We had a team of about 50  
23       people on that project.

24          Q.   Balfour?

25          A.   Yeah. We had about 50 people working on

1 the upfit side, working on the upfit of the  
2 tower, working on finishing up of the Ritz, and  
3 moved in on time in 2009, opened them up and did  
4 a Winter Garden and then Founders Hall.

5 And so from that point, Bank of America  
6 was one of my clients so they asked me if I could  
7 go up to Richmond, Virginia, and lead a team and  
8 build a data center for them. They needed a data  
9 center up there and I went up and led that team.

10 Q. What was your job description? What was  
11 your job title at this point?

12 A. At that time, I was operations director,  
13 but I worked out in the field and in the office,  
14 to lead the team on the buy out, and  
15 pre-construction, of course, at first, and then  
16 the buy out. Those are all GMP contract. And  
17 then get the job rolling and then make sure that,  
18 you know, we have the keys to finish the job.

19 Q. Okay.

20 A. From that point, I went down to build a  
21 data center in Winston Salem for Lowe's.

22 Q. And when was this approximately?

23 A. 2012. And then Microsoft was one of our  
24 clients. They approached us about building a  
25 confidential data center -- I should have said

1       Microsoft, major software developer in Redmond,  
2       Washington.

3           Q.   All right.

4           A.   We built a confidential data center in  
5       San Antonio, Texas. So we precon that with the  
6       architect down in Austin. The architect was in  
7       Austin; so they moved me to San Antonio from  
8       Charlotte.

9           Q.   Okay.

10          A.   And kicked that off onsite, building  
11       that, that was about a couple hundred million and  
12       build that confidential data center, cranked it  
13       up running.

14               And then at that time, I went to -- I  
15       believe we acquired a contractor in Austin. They  
16       wanted to open up a large project division. So I  
17       went up there and ended up acquiring 30-story,  
18       514 multiple family projects in downtown Austin.  
19       We got that built, I was lead over that. Again,  
20       I had a team.

21          Q.   You're working at the tip of the spear  
22       on those?

23          A.   Yeah. So I worked for Trammell Crow,  
24       the developer out of Texas, and then while we  
25       were building that, we started a 60-story condo

1 project in downtown Austin. (Inaudible). I  
2 believe there's 300 condominiums in it.

3 Q. Try to speak just a little more  
4 distinctly if you could, please.

5 A. Sorry, it's the Texas accent.

6 Q. All right.

7 A. Anyway, went from there to then 2016, I  
8 decided I wanted to retire.

9 Q. So you retired in 2016?

10 A. Late 2016.

11 Q. All right. Let me stop you there just  
12 for a second.

13 A. Okay.

14 Q. So what was your job title in 2016 when  
15 you retired?

16 A. Vice president of operations.

17 Q. Okay. And can you tell me what the  
18 spread in dollar value is of projects that you  
19 had been the tip of the spear, so to speak,  
20 during the last 15 years of your career from  
21 about what to about what?

22 A. Probably about 3 billion, two and half  
23 to 3 billion.

24 Q. Billion dollars?

25 A. Yes.

1           Q.   What about individual projects?  What  
2           were some of the bigger dollar amounts?

3           A.   The Bank of America or the superblock,  
4           it sold a little over 7 hundred million.  The  
5           hotel in Grapevine, that was 500 million.  The  
6           data center 250, data center down in San Antonio,  
7           it was north of 200.

8           Q.   Okay.

9           A.   And then the 60-story condo was 175  
10          million, I think.

11          Q.   All right.  So you were -- again, your  
12          official title was, again, the vice president  
13          of --

14          A.   Operations.

15          Q.   Vice president of operations.  Okay.  
16          And was that primarily an office position or a  
17          field position or did you ever see both or  
18          describe that for me?

19          A.   Both.  Oversee the office and then to  
20          work with the superintendents, working with the  
21          project manager, senior project managers, working  
22          with precon, making sure everybody is turning  
23          over a project.

24          Q.   Okay.  All right.  So you retired in  
25          Texas and obviously you came out of retirement,



1       what happened?

2           A.    So I was up helping a friend of mine in  
3       Oklahoma City, a small general contractor and Pat  
4       Dean called me.

5           Q.    Who is Pat Dean?

6           A.    Pat Dean, at that time, was president of  
7       Charlotte or Carolina's Division, Atlanta,  
8       Carolina, Raleigh, Charlotte and Charleston, all  
9       the Carolina's plus Georgia. So he called me and  
10      said, hey, what you are you doing --

11                   MR. BUNDY:  Objection.

12                   THE COURT:  Overruled.  Go ahead.

13                   THE WITNESS:  So when he did -- he  
14      said I have an opportunity for you.  I'd like to  
15      think about going back to Balfour Beatty, come to  
16      Charleston, and help us on an existing project  
17      and anything else we have.

18                   And so after a period of time, I came to  
19      an agreement and literally within a day I was in  
20      Charleston.  I believe he had contacted me in  
21      October of '17 and I was in Charleston the first  
22      couple weeks of December.

23      BY MR. HILDEBRAND:

24           Q.    Okay.

25           A.    And my wife and I, we relocated down

1       here.

2           Q.    So you came to the Hotel Bennett in  
3       October of '17?

4           A.    No.

5           Q.    When?

6           A.    December.

7           Q.    December of '17; is that correct?

8           A.    Yes, sir.

9           Q.    All right. And did you -- was there --  
10       did you replace another vice president of  
11       operations? How did that work?

12          A.    David Stanton, who I worked with out of  
13       our Charlotte office, he was down here taking  
14       care of Hotel Bennett.

15          Q.    Right.

16          A.    And eventually as things started  
17       rolling, I started getting familiar with the  
18       project and the team, he slowly backed out where  
19       I could, you know, get a grip on dealing with the  
20       subs, dealing with the team, and things like  
21       that. So he backed out I believe by February he  
22       had pulled out, February of '18, sorry.

23          Q.    Okay. What was the status of the  
24       project when you came on board?

25          A.    The status was ongoing. And they were

1       working on finishes, trying to work on finishes  
2       on the first floor. I walked the outside, you  
3       know, some of the wall between the two hotels  
4       wasn't finished, making an assessment of what  
5       wasn't done, and seeing what we needed to finish.

6               But walked the first floor, second floor  
7       with different team members just trying to get an  
8       assessment of where the project was as far as  
9       finishes.

10            Q.    Okay. All right. We have a couple sets  
11       of -- so we've got two stacks of drawings here;  
12       is that right?

13            A.    Yes, sir.

14            Q.    All right. Can you describe for the  
15       Judge --

16                   MR. HILDEBRAND: Your Honor, would  
17       you mind coming down so he could show you what  
18       he's got? Can you come down here -- and will you  
19       come around here, please?

20                   THE WITNESS: Do you want me to  
21       come around there?

22                   MR. HILDEBRAND: Yes, please.

23                   THE WITNESS: So this is the GMP  
24       set that they invoked the number from on the  
25       right side. Basically the architectural,

1           A.    Which volume?

2           Q.    That would be in volume 3.

3                   MR. MCDONALD:  Your Honor, while  
4   everybody is shuffling around, this exhibit is  
5   also not in evidence, this is also subject to  
6   objection not actually being rendered --

7                   MR. HILDEBRAND:  Your Honor, this  
8   is just not fair.  I don't have -- it's just not  
9   fair.  I don't have -- I've never been in a trial  
10  where --

11                  THE COURT:  Where other people  
12  have --

13                  MR. HILDEBRAND:  Yes, sir.

14                  THE COURT:  I think the proper  
15  objection is, whoever is cross-examining the  
16  witness to make the objection.  So I would ask  
17  that you stick with that.  We're in binder number  
18  3 and tab number what?

19                  MR. HILDEBRAND:  Tab 133, Your  
20  Honor.

21  BY MR. HILDEBRAND:

22           Q.    All right.  Are you with me?

23           A.    133, yes, sir.

24           Q.    Yes, sir.  All right.  Do you see that  
25  this is an e-mail from Nick Starcevic to Jennifer

1 Faulkinberry and you were copied on it?

2 A. Yes.

3 Q. And it's Marion Suare GR, I guess that's  
4 guest room?

5 A. Yes.

6 Q. Guest room, punch direction to proceed.  
7 Are you with me?

8 A. Yes.

9 Q. All right. And there's an e-mail right  
10 below that as well from Jennifer Faulkinberry and  
11 you were copied dated May 9, 2018?

12 A. Yes.

13 Q. All right. Are you familiar with these  
14 documents?

15 A. Yes, I am.

16 Q. All right. Okay. And do you have  
17 personal knowledge of them?

18 A. Yes.

19 MR. HILDEBRAND: All right. I  
20 would like to move these into evidence, Your  
21 Honor.

22 MR. BUNDY: Objection. These  
23 documents can only come in through Mr. Clements.  
24 The fact that he just read e-mails does not make  
25 them admissible into evidence.

1                   MR. HILDEBRAND: Your Honor, he was  
2           a recipient. He can identify them. This is an  
3           authentication issue. Is it -- and again, Your  
4           Honor, I would refer you to the rule on  
5           authentication is very clear and very simple and  
6           very common sensible. It's very common sensible.

7                   THE COURT: I'm -- okay. I think  
8           he can authenticate it and the objection was --  
9           but the objection was as to what?

10                  MR. BUNDY: The objection is to  
11           hearsay. This is -- these are out of court  
12           statements are being offered for proof of the  
13           matter asserted, and the statements are being  
14           made by Nick Starcevic and/or -- to Jennifer  
15           Faulkinberry.

16                  These people that received copies aren't  
17           involved. They're just simply receiving  
18           information, but the document itself is an out of  
19           court statement offered for the proof of the  
20           matter asserted, and he's bringing somebody  
21           before you that either wrote the letter or who  
22           was supposed to respond to the letter.

23                  THE COURT: So for what purpose do  
24           you introduce the exhibit?

25                  MR. HILDEBRAND: Your Honor -- Your

1 Honor, this is not hearsay.

2 THE COURT: And so for what purpose  
3 is there to introduce the exhibit?

4 MR. HILDEBRAND: For -- you will  
5 see in just a minute, there is an issue relating  
6 to how the punch lists is to be performed. So it  
7 goes to show what the agreements of the parties,  
8 and Mr. Simonton was a part of that, and he can  
9 testify personally about him being involved with  
10 meetings with people, how was the punch -- what  
11 was the agreement on how the punch list was to be  
12 done.

13 THE COURT: All right. Lay a  
14 little more foundation for that and then we'll  
15 get into it.

16 MR. HILDEBRAND: All right, sir.

17 MR. HILDEBRAND:

18 Q. Were you involved with meetings relative  
19 to punch list items and how punch lists would be  
20 -- how punch list inspections were to be  
21 performed?

22 A. Yes, I was in that meeting.

23 Q. You were in this very meetings?

24 A. At the Marion Square jobsite.

25 Q. Okay. And is this a written note of

1       what transpired at the meeting, is that a fair  
2       statement?

3                   MR. BUNDY:  Objection, leading.  
4       That's not what this document says.

5                   THE COURT:  Overruled.  Go ahead.

6                   MR. HILDEBRAND:  All right, sir.

7                   THE COURT:  Have him just lay the  
8       foundation for it -- basis for it.  He says he  
9       was in the meetings?

10                  MR. HILDEBRAND:  Yes, sir.

11                  THE COURT:  And is this a  
12       compilation of what happened at the meetings?

13                  THE WITNESS:  Yes, sir.

14                  THE COURT:  All right.  Have you  
15       reviewed this document before?

16                  THE WITNESS:  Yes, sir.

17                  THE COURT:  And I think you were  
18       copied on the letter --

19                  THE WITNESS:  I was copied.

20                  THE COURT:  -- and were you  
21       somebody that they would have asked to make an  
22       objection or interact if they had requested that?

23                  THE WITNESS:  Right.  I can agree  
24       or not agree.

25                  THE COURT:  All right.  On that



1       basis, I think there's a foundation laid. He can  
2       testify to it.

3                   MR. HILDEBRAND: I would like to  
4       introduce this, Your Honor.

5                   THE COURT: All right. I'm going  
6       to to allow it into evidence.

7                   MR. HILDEBRAND: All right. Thank  
8       you, Your Honor.

9       MR. HILDEBRAND:

10       Q. So on the prior page at the very bottom,  
11       there's an e-mail from Nick Starcevic, again, and  
12       you're copied, referencing GR punch list; do you  
13       see that?

14       A. Yes.

15       Q. And there are notes about -- it says,  
16       see our attached mark up punch list. We have  
17       highlighted items that are not in our scope.  
18       Some general notes below, DOT, DOT, DOT. It  
19       says, a flashlight cannot be used for punch.  
20       What does that mean?

21       A. Use a flashlight on a wall and show  
22       holidays, and it doesn't give a representation on  
23       a flashing on the wall. It gives a flash. In  
24       the industry, you don't punch with a flashlight.

25       Q. It's highlights imperfections?

1           A.    Yeah.  You use natural light or you just  
2           artificial light to punch a room.

3           Q.    Okay.  Where it says JF, okay, whose  
4           initials are those?

5           A.    Jennifer Faulkinberry.

6           Q.    And what does okay mean?

7           A.    Okay.  To that sense.

8           Q.    Okay.  Below that it says, the standard  
9           distance to punch is 5 feet off the finished  
10          surface.  This goes for tile, drywall, wall  
11          coverings, caulk, etcetera, closer than 5 feet in  
12          bathroom areas; is that correct?

13          A.    Yes, that's correct.

14          Q.    Okay.  So there's a -- it's allowable to  
15          observe or identify a deficiency less than 5 feet  
16          in bathrooms; is that right?

17          A.    Yes, sir.

18          Q.    And why was that?

19          A.    Because the bathroom is a lot smaller.  
20          You can't back up 5 feet from the shower.

21          Q.    Down below that number 6, sheetrock at  
22          the ceiling is an L4 finish and installed on hat  
23          channel.  The mock up rooms exceed this standard  
24          and so we are not addressing the flashing that is  
25          typical of an L4 finish without an approached

1 change order. First off, what is an L4 finish?

2 A. An L4 finish is the five different  
3 standards of finish L1, 2, 3, 4. 04 is basically  
4 four coatings on the seams and on the nails and  
5 you spread it out on each one and you sand it.

6 Q. Okay. What is the next higher level?

7 A. Level five is one step above level four.  
8 It's 5 and you can coat the whole sheet of  
9 sheetrock and tape them.

10 Q. Okay. All right. What was the  
11 understanding that was reached at this meeting  
12 that you attended relative to what the finishes  
13 were -- what standard that they were to meet in  
14 the guest room?

15 MR. BUNDY: Objection. Even  
16 though it's in evidence, he can't deviate from  
17 what the document says. He understood -- the  
18 best evidence was with the understanding is  
19 understood, don't think it will be a problem once  
20 window treatments are installed. That's the  
21 understanding in the document.

22 MR. HILDEBRAND: That's not we're  
23 back to. I think 43 --

24 THE COURT: Speaking objection.

25 MR. HILDEBRAND: Long speaking

1 objections.

2 THE COURT: So restate the  
3 question. I'm sorry.

4 THE COURT: What was your  
5 understanding that was reached.

6 MR. HILDEBRAND:

7 Q. What was your understanding as to what  
8 the level of finishes was to be in the guest  
9 rooms?

10 A. Level 4 finish.

11 Q. Okay. All right. Let's turn to Exhibit  
12 138, please. Are you with me?

13 A. Yes, sir.

14 Q. All right. Can you -- this is an owner  
15 architect notification log August 2018. Were you  
16 on the job at this time?

17 A. Yes, sir.

18 Q. Were you -- are you familiar with  
19 this --

20 A. Yes, sir.

21 Q. -- delay notification log?

22 A. Yes, sir.

23 Q. How was this generated?

24 A. We would generate this and it would go  
25 in the owner's monthly report.

1           Q.   All right.  Okay.  So was this list  
2           discussed at OA/C meetings?

3           A.   I don't recall ever going through it in  
4           OA/C meeting that I attended.

5           Q.   I'm sorry?

6           A.   We did not go through it in the OA/C  
7           meetings that I was at.

8           Q.   Okay.  Who was provided this list?

9           A.   Jim Clements, the owner, the architect.  
10          We get the monthly report, the bank would get the  
11          the monthly report.

12          Q.   Okay.  You need to speak up a little  
13          bit.

14          A.   The owner, the bank, Metlife, or the  
15          bank's representative.

16          Q.   Okay.

17          A.   Steve, Jim Clements, and Jennifer  
18          Faulkinberry.

19                   MR. HILDEBRAND:  Okay.  I'd like to  
20          move this into evidence, Your Honor, as --

21                   MR. BUNDY:  Objection.  The witness  
22          testified --

23                   MR. HILDEBRAND:  -- 138.

24                   MR. BUNDY:  The witness testified  
25          that this document was included in a monthly

1 report. This is one page out of a monthly  
2 report. I object to the introduction of one page  
3 out of total exhibit. There's no -- it's not --  
4 it's one page -- it's a monthly reports. It's  
5 got pictures in it. It's got conversations. I  
6 just don't --

7 THE COURT: I'm with you.

8 MR. BUNDY: I don't don't  
9 understand. I object.

10 THE COURT: Do you got any further  
11 foundation? I think he said he was working  
12 there, but did he produce, did he create this,  
13 who would have done that?

14 MR. HILDEBRAND:

15 Q. Are you personally familiar with this  
16 document?

17 A. Yes.

18 Q. Are you personally familiar how it's  
19 generated?

20 A. Yes.

21 Q. Are you personally familiar with  
22 providing this to Jim Clements and the bank  
23 representative like you've --

24 A. Yes.

25 Q. -- indicated?

1           A.    Yes.

2           Q.    And are you familiar with the items that  
3           are noted in the delay notification log?

4           A.    Yes.

5                   MR. HILDEBRAND:   All right.

6                   THE COURT:   And then you testified,  
7           it's included in what would be a monthly log of  
8           whatever is going on?

9                   THE WITNESS:   Yes, Your Honor, it's  
10          a monthly report.

11                  THE COURT:   Okay.   All right.   And  
12          when you met and had these monthly meetings, you  
13          had go through some of the things in the report  
14          but not everything; is that right?

15                  THE WITNESS:   I don't recall going  
16          through it, no, sir, Your Honor.   They were  
17          provided the report.

18                  THE COURT:   Okay.   And the report  
19          went to the owner's rep and the architect's rep?

20                  THE WITNESS:   Owner.

21                  THE COURT:   And y'all generated it?

22                  THE WITNESS:   Yes.

23                  THE COURT:   I will allow it.

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

1 MR. HILDEBRAND:

2 Q. What was the purpose for providing this  
3 delay notification log to the owner?

4 A. Subcontractor requirement to notify the  
5 delays.

6 (PLF. EXH. 138 was marked for  
7 identification and received in evidence.)

8 MR. HILDEBRAND: So that has been  
9 marked as -- admitted as Plaintiff's Exhibit 138?

10 THE COURT: Yes.

11 MR. HILDEBRAND: All right.

12 (PLF. EXH. 141 was marked for  
13 identification.)

14 MR. HILDEBRAND:

15 Q. All right. Let's turn to tab 141,  
16 please. All right. This document is dated a  
17 month later, October 2018. So this is right at  
18 the very end of the project, correct?

19 A. Yes, sir.

20 Q. This one is sideways. The other one was  
21 top to bottom. Can you tell the Judge why that  
22 happened?

23 A. So I noticed from the previous month and  
24 I went into this month and thought it would print  
25 it out, and it had cut off some of the -- Of the



1 words on the right-hand column. So I wanted to  
2 make sure that the whole thing printed out, Your  
3 Honor.

4 Q. All right. Did you actually generate  
5 this document?

6 A. This one I did, yes, sir.

7 MR. HILDEBRAND: I would like to  
8 move this in evidence, Your Honor?

9 MR. BUNDY: He's testified he  
10 generated the first page. I object to it based  
11 on my previous objections, but this tab  
12 contains -- I don't know another hundred pages  
13 that's he's not testified to that I don't know  
14 anything about. So I object to putting in  
15 documents that have no foundation at all, no  
16 testimony from the witness.

17 MR. HILDEBRAND: My apologies. I  
18 thought these could be easily admitted based on  
19 the prior testimony. Let's go do that.

20 BY MR. HILDEBRAND:

21 Q. Okay. So with this delay modification  
22 log, there are other documents that are attached  
23 to that. Do you see that?

24 A. Yes.

25 Q. Were those, to your knowledge, provided

1 with attached to the delay notification log?

2 A. I don't recall.

3 Q. Okay. Are are -- okay. Fair enough.

4 MR. HILDEBRAND: I will just move  
5 at this point, Your Honor, to introduce the first  
6 page of this document?

7 MR. BUNDY: And I would move at  
8 this point to remove every single sheet of paper  
9 behind the first page under tab, whatever the tab  
10 number is, tab number 141, so to avoid any  
11 confusion in the record.

12 MR. HILDEBRAND: Your Honor, this  
13 is another of Jim Clements that he identified in  
14 his deposition. So I think if you will read his  
15 deposition.

16 THE COURT: For the record, I'm  
17 going to allow tab 141 into evidence, but for  
18 now, only take one page of that document comes  
19 in.

20 (PLF. EXH. 141 was received in  
21 evidence.)

22 MR. BUNDY: For the record,  
23 contrary to what you just heard, it is not  
24 identified in Clements -- all these documents are  
25 not identified as an exhibit in Jim Clements'

1 deposition.

2 THE COURT: No. Mr. Simonton  
3 identified this one.

4 MR. BUNDY: This one page?

5 THE COURT: Yeah.

6 MR. BUNDY: He said he could not --

7 THE COURT: And I didn't let  
8 anything but the first page in.

9 MR. BUNDY: Well, okay. So I made  
10 a motion these need to come out of his tab.

11 THE COURT: And I'm going to do  
12 that.

13 MR. BUNDY: Well, how are we going  
14 to keep up with the exhibits?

15 THE COURT: Because the record just  
16 says what exactly I just said. Page 1 came in.  
17 The rest of it did not.

18 MR. BUNDY: All right. Thank you,  
19 Your Honor.

20 THE COURT: All right.

21 MR. BUNDY: Sometimes I  
22 misunderstand you.

23 THE COURT: Sometimes we have  
24 communications problems.

25 BY MR. HILDEBRAND:

1           Q.    Let me ask you this, are the actual  
2           delay notices, can you correlate the documents  
3           behind the first page, each one of these delay  
4           notices, are the documents that are behind it do  
5           they correlate to the delay notifications on the  
6           front page?

7                   MR. BUNDY:  Objection, leading.

8                   THE COURT:  He is leading, but I'm  
9           going to allow it.  Go ahead.

10                  MR. BUNDY:  But he also just said  
11           he couldn't -- he also said he couldn't testify.

12                  THE COURT:  He said he couldn't  
13           identify.  It sort of blew my mind too.

14                  THE WITNESS:  The first document is  
15           set, sheet pile, delay, time, extension, which is  
16           number 1 on the list.

17           MR. HILDEBRAND:

18           Q.    Okay.  So if we -- each one of these  
19           documents that followed the cover sheet  
20           correlate, are the actual delay notice of letters  
21           that are reflected on that top page; is that  
22           correct?

23           A.    Yes.  Yes.

24           Q.    All right.

25                   MR. BUNDY:  Was the answer yes?

1 THE WITNESS: Yes.

2 MR. BUNDY: My objection, lack of  
3 foundation.

4 (PLF. EXH. 143 was marked for  
5 identification.)

6 MR. HILDEBRAND:

7 Q. Let's turn to tab 143, please. Are you  
8 with me?

9 A. Yes.

10 Q. All right. This is a letter to Jim  
11 Clements, notification of delays, and on the  
12 second page, you signed it, correct?

13 A. Yes, sir.

14 Q. All right.

15 A. Let me make sure, yes.

16 Q. So you drafted this letter?

17 A. Yes.

18 Q. And sent it to Jim Clements?

19 A. Yes, sir.

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

22 MR. BUNDY: No objection.

23 THE COURT: In evidence.

24 (PLF. EXH. 143 was received in  
25 evidence.)

1 MR. HILDEBRAND:

2 Q. And it's dated October 30, 2018, we are  
3 writing this notice of construction delay to  
4 advise you of time and cost impact to the project  
5 that will ultimately affect the construction  
6 teams ability to deliver the project to Library  
7 Associates. Did I read that correctly?

8 A. Yes, sir.

9 Q. All right. And then below you listed  
10 items that your identifying to the owner that are  
11 causing delays, right?

12 A. Yes, sir.

13 Q. All right. Let's turn to Exhibit 146.

14 MR. BUNDY: 146?

15 THE COURT: 146.

16 (PLF. EXH. 146 was marked for  
17 identification.)

18 MR. HILDEBRAND:

19 Q. All right. This is a letter to Jim  
20 Clements from yourself, correct?

21 A. Yes.

22 Q. Dated November 2, 2018. And the ray is  
23 MSH owner direct contractor damage to building?

24 A. Yes.

25 Q. And you've wrote this letter?

1           A.    Yes.

2                       MR. HILDEBRAND:   I would like to  
3   admit this, Your Honor.

4                       THE COURT:   All right.   In  
5   evidence, 146.

6                       (PLF. EXH. 146 was received in  
7   evidence.)

8                       MR. HILDEBRAND:   Thank you, Your  
9   Honor.

10          MR. HILDEBRAND:

11               Q.    Without reading the letter, can you tell  
12   me what the problem was here, what you were  
13   advising the owner of?

14               A.    The owner had a separate subcontractor  
15   in there installing the TV, the phone systems,  
16   and we were getting damage to the building.  We  
17   had punched it out and completed.

18                       And they were going in without -- nobody  
19   was supervising them from the owner's side, they  
20   were owner directed contractors.  So the subs  
21   were calling us out, so I went and investigated  
22   and found all this material scattered everywhere  
23   and the TV pulled off.

24               Q.    Okay.  You said, how often was Jim  
25   Clements on site?

1           A.   Towards the end, I believe once a week.

2           Q.   Okay.  When -- how often would the owner  
3   have its own personnel on site performing work in  
4   the last year on average?

5           A.   Every day.

6           Q.   Okay.  So when Jim Clements wasn't  
7   there, who was overseeing the owner's forest --  
8   retract that -- for fire benefit, if anybody?

9           A.   Nobody.

10          Q.   Was somebody supposed to be doing that  
11   for the owner?

12          A.   Normally they do, yes, sir.

13          Q.   Do you know if that's required in the  
14   contract?

15          A.   They have to manage their own  
16   subcontractor?

17          Q.   Yes, sir.

18          A.   Yes.

19                       (PLF. EXH. 150 was marked for  
20   identification.)

21          Q.   All right.  Let's turn to 151.  I'm  
22   sorry.  I misspoke.  Actually 150, if you would  
23   please.

24          A.   Okay.

25          Q.   All right.  So this is a letter -- an



1 e-mail that where -- that you had sent to Jim  
2 Clements and Kim Brown and others regarding  
3 substantial completion second request 11/17 of  
4 2018; is that correct?

5 A. Yes.

6 Q. All right. So you have personal  
7 knowledge of this e-mail?

8 A. Yes.

9 Q. Attached to the e-mail three pages back  
10 is a letter from you to Jim Clements dated  
11 November 12, 2018. Do you see that?

12 A. Yes, sir.

13 Q. And in red, it says -- and November 17,  
14 2018; is that correct?

15 A. Yes.

16 Q. All right. So you -- is it true that  
17 you wrote the e-mail and the letter that's  
18 attached to it?

19 A. Yes.

20 Q. All right, sir.

21 MR. HILDEBRAND: I would to move  
22 that, Your Honor.

23 MR. BUNDY: No objection.

24 THE COURT: In evidence.

25 (PLF. EXH. 150 was received in

1 evidence.)

2 BY MR. HILDEBRAND:

3 Q. All right. So explain to the Judge what  
4 the issue was here and what you are requesting  
5 from the owner.

6 A. Your Honor, we were requesting  
7 substantial completion, which is a major  
8 milestone in this project, substantial complete,  
9 then start kicking in and the owner can start  
10 using for its purposes.

11 THE COURT: Pardon me, what did you  
12 just say? I didn't hear you.

13 THE WITNESS: The owner can start  
14 using it for its purpose. Going through contract  
15 documents, there are certain steps in the  
16 contract that we have to achieve in order to get  
17 that substantial completion. So we were sending  
18 over our request for that substantial completion.

19 BY MR. HILDEBRAND:

20 Q. Do you know why it was not granted at  
21 that time?

22 A. No.

23 Q. Okay. All right.

24 MR. HILDEBRAND: I'd like to move  
25 that --

1 THE COURT: 150.

2 (PLF. EXH. 151 was marked for  
3 identification.)

4 BY MR. HILDEBRAND:

5 Q. All right. Let's turn to 151. This is  
6 an e-mail to Jim Clements from yourself dated  
7 November 27, 2018. Do you see that?

8 A. Yes.

9 Q. All right.

10 MR. HILDEBRAND: I would like to  
11 introduce this as Plaintiff's No. 151, Your  
12 Honor.

13 THE COURT: 151.

14 BY MR. HILDEBRAND:

15 Q. All right. Under -- below that, there's  
16 an e-mail November 27, 2018 from Jim Clements  
17 where it says Jennifer and Dave. And Dave is  
18 yourself?

19 A. Yes. He called me Dave.

20 Q. Okay. Confirming our discussion,  
21 Jennifer will issue a certificate of substantial  
22 completion for guest rooms only in attached rays  
23 of punch list. This includes FFE items such as  
24 drapes and LMI light switches, and as well as a  
25 few BBC items. Jennifer will do her -- what she

1       can to grant the certificate today, if not in the  
2       morning.

3               What was the -- what was the issue  
4       there? What were you confirming? What was being  
5       confirmed?

6               A. I'm confirming that in order to -- so  
7       they -- the architect did a punch list, signed it  
8       off, we sent it in, the architect signed it off,  
9       and they were going to issue a substantial  
10      completion for the guest rooms where the owner  
11      could take them over and finish whatever they  
12      needed to do inside, lock them down.

13              I do a substantial completion, basically  
14      it becomes the owner of the hotels rooms. We  
15      don't have keys or access to them. So at G704  
16      list those rooms that were sent.

17              Q. Okay. So let me understanding this.  
18      Can you have substantial completion of a part of  
19      the building and not the entire building?

20              A. Yes, sir.

21              Q. All right. And here what Balfour was  
22      trying to do was get substantial completion of  
23      the guest rooms, correct?

24              A. Yes.

25              Q. And were you present when the architect

1       said that she was going to issue a certificate of  
2       substantial --

3           A.    Yes.

4           Q.    -- substantial completion for all the  
5       guest rooms?

6           A.    Yes.

7           Q.    All right.  And do you know -- so that  
8       would indicate that the guest rooms were ready  
9       for occupancy or used by the owner, correct?

10          A.    Yes.

11          Q.    And then y'all would be locked out of  
12       them?

13          A.    Yes.  We would have to go to the hotel  
14       to get into them.

15          Q.    Okay.  Was that substantial -- was that  
16       substantial completion for the guest rooms ever  
17       issued?

18          A.    In February.

19          Q.    Do you know why it was not issued in  
20       November?

21          A.    No, sir.

22                   MR. HILDEBRAND:  Did I introduce  
23       this one?

24                   THE COURT:  I'm not sure you did.  
25       No, not yet.

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

3 THE COURT: 151, in evidence.

4 (PLF. EXH. 151 was received in  
5 evidence.)

6 (PLF. EXH. 154 was marked for  
7 identification.)

8 MR. HILDEBRAND:

9 Q. All right. The next document, let's  
10 turn to 154, please, tab 154.

11 A. Okay. I'm there.

12 Q. All right. This is a letter from  
13 yourself to Jim Clements?

14 A. Yes.

15 Q. All right. MSH, BBC response to  
16 additional third party hotel room inspection  
17 slash punch. All right. You wrote this letter?

18 A. Yes.

19 MR. HILDEBRAND: I would like to  
20 introduce this, Your Honor?

21 MR. BUNDY: No objection to the  
22 letter. There's a bunch of stuff behind it. I  
23 presume it is not being offered into evidence at  
24 this time?

25 THE COURT: No objection to the

1 letter.

2 MR. BUNDY: No objection to the  
3 letter. Object to everything behind it.

4 MR. HILDEBRAND: All right.

5 BY MR. HILDEBRAND:

6 Q. All right. So give me a synopsis of the  
7 reason that you drafted this letter. Let me do  
8 this, let's turn to the third paragraph. The  
9 rooms have been punched no less than four times  
10 by the subcontractors BBC, Salamander, and the  
11 architect of record.

12 Per the contract, the architect of  
13 record has issued a completion list in which BBC  
14 has executed and had our eight architect of  
15 record sign off all items as complete, meeting  
16 the intent of the contract documents, as well as  
17 meeting the intended use of the building.

18 Punch list expectations and requirements  
19 were established by all parties via meeting  
20 attended by yourself, owner, operator, and BBC on  
21 January 24, 2018. At that time all parties  
22 walked the agreed upon model units, 309 and 311,  
23 and set the levels of quality expectations that  
24 all parties agreed to and the architect created a  
25 punch list for these rooms that was completed.

1                   It was also agreed that the owner's  
2           consultant architect operator would work together  
3           to create one punch list. An e-mail on March 21,  
4           2018 agreed on what was acceptable and how the  
5           punch process would proceed going forward, see  
6           attached correspondence on meeting, as well as as  
7           original punch list.

8                   Can you describe to us what the problem  
9           here and what was the reason for created this  
10          punch?

11                  A. The owner after walking in a few rooms  
12           wanted to bring in a third party to do another  
13           inspection of the rooms, a contractor --

14                  Q. Speak up, please.

15                  A. The owner wanted to bring in a third  
16           party, which was another contractor, to inspect  
17           the rooms.

18                  Q. All right. And what understanding, if  
19           any, did you have as to whether the rooms were  
20           acceptable to the architect of record?

21                  A. They were acceptable because we did our  
22           punch list. We signed off on the punch list. We  
23           did our remaining punch list and we finished that  
24           punch list and then we're done with the rooms.

25                  Q. And the architect signed off on your



1       punch list?

2           A.    Yes.

3           Q.    Do you know what's required per the  
4       contract document?

5           A.    The architect punch the rooms and  
6       provide a punch list. We provide a punch list  
7       first, and then they provide a punch list, they  
8       can after.

9                   After an agreement with the owner, they  
10       would sign off it on that punch list, and the  
11       Salamander provided another punch list. So the  
12       same architect signed off on Salamander punch  
13       list.

14                   So we've got two punch lists. So we had  
15       done two written punch lists by the architect and  
16       by the operator. And they were done. Now, they  
17       were going to bring in a third punch, and we were  
18       completed with those rooms. We completed them  
19       and ready to turn them over.

20           Q.    All right, sir. When it says there were  
21       agreed upon model rooms 309 and 311. What does  
22       that mean? Can you describe for the Judge what  
23       that --

24           A.    There were two rooms that were built,  
25       that were inspected early on, the letter of the

1 criteria that I described earlier. There were  
2 two rooms we built, king and queen, next door to  
3 each other, had everything set up in them, then  
4 we put in furniture, and those were punched.

5 We worked out those punch lists and then  
6 made agreements on what was going to go in the  
7 rooms. Everybody agreed that's the way we were  
8 going to build them and we built 177 more rooms  
9 just like them. Basically we finished it, the  
10 paint and caulk and everything else.

11 And then once we had them ready by  
12 floor, they came and they punched floor three,  
13 four -- five, then four, then six, seven and  
14 eight. They provided us a punch list and we  
15 immediately started working them off, and the  
16 operator went out with their people and started  
17 punching the orders.

18 Q. In the last paragraph I read, it says,  
19 see attached correspondence on meeting as well as  
20 original punch list. Were the e-mails that are  
21 attached to this attached to your original  
22 letter?

23 A. Yes. The criteria of the punching  
24 order, I would attach it to.

25 MR. HILDEBRAND: So I would like to

1       move this in its entirety, Your Honor.

2                   MR. BUNDY: I object to the  
3       attachments, hearsay.

4                   THE COURT: All right. I will  
5       allow it, 154.

6                   (PLF. EXH. 154 was received in  
7       evidence.)

8       BY MR. HILDEBRAND:

9           Q. All right. 155. The e-mail, second  
10       e-mail down, said it's from Jim Clements to  
11       yourself, subject door issues. Do you see that?

12          A. Yes.

13          Q. December 13, 2018?

14          A. Yes.

15          Q. All right. And so obviously this was to  
16       you from Jim Clements?

17          A. Yes.

18          Q. And do you have personal knowledge of  
19       it?

20          A. Yes.

21                   MR. HILDEBRAND: And I would like  
22       to introduce this as Plaintiff's 155, Your Honor.

23                   THE COURT: Okay. Without  
24       objection. In evidence. All right.

25                   MR. HILDEBRAND: Thank you.

1 MR. HILDEBRAND:

2 Q. It says from Jim Clements. Dave, thanks  
3 for your follow-up. Buck will be here Tuesday,  
4 walk it off with him. He is the authority you  
5 need to convince. Neither of us have a role in  
6 his objective and final decision. Buck is here  
7 to assess BBC overall completion status as well.

8 Do you know what he was referring to  
9 when he says, he is the one you need to convince?

10 A. He is the architect of record that's  
11 what WLA -- he is Jennifer's boss.

12 Q. Okay. Were the doors -- were there  
13 doors that were the subject of a punch list  
14 dispute or what was the nature of the issue here?

15 A. Doors and walls that after we had  
16 punched it, the client said he didn't like the  
17 finish.

18 Q. Okay. So this is a confirmation of your  
19 understanding from the owner's representative  
20 that the architect of the record has the final  
21 say on the punch list?

22 A. Yes, sir.

23 MR. BUNDY: Did you already put 155  
24 in?

25 THE COURT: Yeah.

1 MR. HILDEBRAND: Yeah, we did.

2 MR. BUNDY: No objection.

3 (PLF. EXH. 159 was marked for  
4 identification.)

5 BY MR. HILDEBRAND:

6 Q. All right. Let's turn to exhibit or tab  
7 159, please.

8 A. I'm there, sir.

9 Q. All right. Are you with me?

10 A. Yes, sir.

11 Q. What is this document? It's dated  
12 January 2, 2019 table summary; what is this?

13 A. This is a table summary of the CCD,  
14 which is construction change directive. The  
15 contract allows the owner to issue a construction  
16 change directive, architect issues this and the  
17 owner signs it, and we go do the work. And it's  
18 basically time and material basis.

19 And I believe there was 45, 46 issued on  
20 this project while I was there. So we track it,  
21 and then each month we were bill it in an owner  
22 change order, tracking the values. So we're  
23 tracking the values and we're also separating out  
24 BBC's cost, and all that back up and signed  
25 tickets are provided in the plan, or in the owner

1 change order, I'm sorry.

2 Q. Do you have personal knowledge of this  
3 document?

4 A. Yes.

5 Q. Is this part of the business records of  
6 Balfour Beatty?

7 A. Yes.

8 Q. And it's created contemporaneous with  
9 the data that is reflected in it?

10 A. Yes.

11 MR. HILDEBRAND: All right. I  
12 would like to admit this, Your Honor, as 159.

13 MR. BUNDY: Objection. We're on  
14 106, South Carolina Rules of Evidence require  
15 that the underlying data be in evidence. Note,  
16 that evidence that underlies this data, it's not  
17 in evidence.

18 THE COURT: All right. It's a  
19 compilation of what's been done?

20 MR. HILDEBRAND: Right.

21 THE COURT: Do we have the  
22 underlying data?

23 MR. HILDEBRAND: Yes, sir. It's  
24 been provided. They've got all this.

25 THE COURT: Okay.

1 MR. HILDEBRAND: And that's the  
2 whole reason they have a compilation so that you  
3 don't have to bring in everything, just like the  
4 other summaries that he already admitted that  
5 he's had the same objection about. As long as  
6 the underlying data is available and they have  
7 all these construction -- they issued them to us.

8 THE COURT: Okay.

9 MR. HILDEBRAND: It's a --

10 MR. BUNDY: I don't know what the  
11 purpose of the rule is, I just know what the rule  
12 says. The rule says, it has to be admitted into  
13 evidence.

14 MR. HILDEBRAND: It does not.

15 THE COURT: Let me look and go look  
16 at the rule. Underlying data are admissible into  
17 evidence. We've covered this before.

18 (Inaudible) shall be made available for  
19 examination. The court may order them to be  
20 produced.

21 I would allow the exhibit as it is with  
22 the assumption that it has been provided, and if  
23 it's not, I'm sure I will be hearing about it on  
24 cross.

25 MR. HILDEBRAND: Thank you, Your

1 Honor.

2 (PLF. EXH. 159 was received in  
3 evidence.)

4 (PLF. EXH. 201 was marked for  
5 identification.)

6 BY MR. HILDEBRAND:

7 Q. All right. Let's turn to -- never mind.  
8 Let's turn to Exhibit 201.

9 MR. HILDEBRAND: Your Honor, I've  
10 still got a little ways to go. I'm happy to go  
11 as long as you want to.

12 THE COURT: It's 5:30. I was going  
13 to go it until 6, if you'd like.

14 MR. HILDEBRAND: Sure. I'm fine  
15 with that.

16 THE COURT: We started late. I'm  
17 just trying to press on.

18 BY MR. HILDEBRAND:

19 Q. All right. We will move on. So turn to  
20 Exhibit 201.

21 A. I'm there.

22 Q. You've got 201? This is a notice and  
23 certificate of amended mechanic's lien at the  
24 bottom for the amount of \$12,066,147.09. Are you  
25 familiar with this document?



1           A.    Yes.

2           Q.    All right.  Did you review it before it  
3   was filed?

4           A.    Yes.

5           Q.    And I think that Exhibit B statement of  
6   accounts is -- contains your signature the fifth  
7   page in?

8           A.    Yes.

9           Q.    All right.

10                   MR. HILDEBRAND:  I would like to  
11   introduce this as our next exhibit, Your Honor.

12                   MR. BUNDY:  No objection.

13                   THE COURT:  Without objection.  
14   Into evidence.

15                   (PLF. EXH. 201 was received in  
16   evidence.)

17                   MR. HILDEBRAND:  Your Honor, the  
18   next document I wanted to introduce though this  
19   individual, it's filed with the Court --  
20   electrically filed August 17th, affidavit of  
21   service of the mechanic lien on Kim Brown.  So I  
22   would like to mark this as our next exhibit.

23                   MR. BUNDY:  Which number is it  
24   again?

25                   MR. HILDEBRAND:  202.

1 THE COURT: It's affidavit of  
2 service?

3 MR. HILDEBRAND: Yes, sir.

4 MR. BUNDY: I don't have any  
5 objection.

6 THE COURT: All right. In  
7 evidence.

8 MR. HILDEBRAND: All right.

9 (PLF. EXH. 202 was marked for  
10 identification and received in evidence.)

11 (PLF. EXH. 204 was marked for  
12 identification.)

13 BY MR. HILDEBRAND:

14 Q. Turn to exhibit attachment tab 204,  
15 please. Are you with me?

16 A. I'm with you.

17 Q. All right. What is this document?

18 A. This is a total account of the documents  
19 for the project, the RFIs and OCOs.

20 Q. So it shows 1,224 RFIs. Did you count  
21 the number of RFIs?

22 A. Yes. In the previous log we reviewed,  
23 yes, 1,224 RFIs.

24 Q. Okay. 22 owner change orders; is that  
25 correct?

1 A. Yes.

2 Q. 279 RCOs; is that correct?

3 A. Request for -- yes.

4 Q. Request for change orders?

5 A. Yes.

6 Q. 46 construction change directives; is  
7 that number correct?

8 A. Yes.

9 Q. 81 SI's?

10 A. Yes.

11 Q. 8 mocks; is that number correct?

12 A. Yes.

13 Q. 8 revisions to the model room plan; is  
14 that correct?

15 A. Yes.

16 Q. Total drawings impacted 2,023; is that  
17 correct?

18 A. Yes.

19 Q. Okay. So is this a summary of the data  
20 that it reflects?

21 A. Yes.

22 Q. Did you prepare this document?

23 A. Yes.

24 MR. HILDEBRAND: I would like to  
25 introduce this, Your Honor.

1 MR. BUNDY: Objection, relevance.

2 THE COURT: I will allow it. 204?

3 MR. HILDEBRAND: Yes, sir.

4 (PLF. EXH. 204 was received in  
5 evidence.)

6 (PLF. EXH. 209 was marked for  
7 identification.)

8 MR. HILDEBRAND:

9 Q. All right. Let's turn to Exhibit 209.  
10 Are you with me?

11 A. Yes, I'm with you.

12 Q. All right. This document is a -- who --  
13 are you familiar with this document?

14 A. Yes.

15 Q. All right. And what does this show?

16 A. This is a joint defense agreement, the  
17 party -- basically is a matrix of subcontractors,  
18 when it was signed, when Balfour signed it, and  
19 then the date the sub withdrew, and their  
20 attorney's names.

21 Q. Okay. And have you reviewed the tabs  
22 behind this one through 10?

23 A. Yes.

24 Q. So it's 209, and then you have 209.1  
25 through 209.10. And do those documents

1       accurately --

2           A.    Yes.

3           Q.    -- reflect, to your knowledge, the data  
4       in the summary chart?

5           A.    Yes.

6           Q.    Okay. Did you -- what involvement, if  
7       any, did you have with the joint defense  
8       agreement?

9           A.    I hosted the joint defense agreement by  
10       our inhouse counsel, and then I distributed to  
11       the subcontractors.

12          Q.    Okay. And what was your understanding  
13       of what the joint defense agreement did?

14                   MR. BUNDY:  Objection.

15                   THE COURT:  Do you need him to  
16       testify to that?

17                   MR. HILDEBRAND:  I'm sorry?

18                   THE COURT:  Do you need him to  
19       testify to that?

20                   MR. HILDEBRAND:  No.

21                   THE COURT:  He wasn't involved with  
22       the preparation of it, I wouldn't think.

23                   MR. HILDEBRAND:  All right. I  
24       would like to move the compilation and the tabs 1  
25       through 10 into evidence.

1 MR. BUNDY: No objection.

2 THE COURT: Without objection. All  
3 right. Very good.

4 (PLF. EXH. 209 was received in  
5 evidence.)

6 MR. HILDEBRAND:

7 Q. Do you have a binder five of five up  
8 there, Mr. Simonton? Do you have that?

9 A. I have it.

10 Q. Okay. All right. This is binder five  
11 of five, is a compilation of 22 owner change  
12 orders?

13 A. Yes.

14 Q. All right. It start with one and goes  
15 through 22?

16 MR. BUNDY: Your Honor, it might be  
17 helpful if we could take five minutes to look  
18 this book. It's a thick book. It won't take  
19 five minutes. I don't want to end today,  
20 probably could save us 10 minutes.

21 THE COURT: Okay. Just to review  
22 it. All right. We will take a little break.

23 (A recess transpired.)

24 MR. BUNDY: Here are my objections.  
25 Number one, presumably, Mr. Hildebrand's

1 objective is to move the entire book into  
2 evidence.

3 THE COURT: Is that true?

4 MR. HILDEBRAND: Yeah, Your Honor.

5 MR. BUNDY: Okay. Here are my  
6 objections. Number one, it was not signed and  
7 was not in the form of a change order.

8 Number 3 is not signed. Number 4 is not  
9 signed. Number 14 not signed and no back up.  
10 Number 15 there's no back up. Number 17 there's  
11 no back. And number 18 through 22, not signed.

12 Any change orders in this book that I  
13 did not reference by number are without  
14 objection. So it's 1, 3, 4, 14, 15, 17, 18  
15 through 22 for the reasons stated. Thank you,  
16 Your Honor.

17 THE COURT: Lack of signatures on  
18 1, the backups were only 14, 15 and 17 is what  
19 I'm seeing; is that right?

20 MR. BUNDY: No back up for 15,  
21 number 17 and --

22 THE COURT: 14?

23 MR. BUNDY: The not signed ones  
24 are --

25 THE COURT: Was 14 have back up?

1 MR. BUNDY: 14 was not signed and  
2 no back up.

3 THE COURT: And no back up?

4 MR. BUNDY: Right. Let me just  
5 give this to you. That way we won't have any --

6 MR. HILDEBRAND: What is that?

7 THE COURT: This is just his list.  
8 And if you didn't get a chance to write it down,  
9 I did.

10 MR. HILDEBRAND: Okay.

11 THE COURT: You have to make the  
12 foundation on those.

13 MR. HILDEBRAND: I will come back  
14 to that one.

15 BY MR. HILDEBRAND:

16 Q. Okay. So let's turn to 283 to 293.

17 MR. BUNDY: 283 to 293?

18 THE COURT: Is that --

19 MR. HILDEBRAND: It's 283 to 293.

20 BY MR. HILDEBRAND:

21 Q. All right. Mr. Simonton, I would like  
22 to refer you to Exhibit 288, please.

23 A. I am there.

24 (PLF. EXH. 289 was marked for  
25 identification.)



1 Q. Actually let's go to 289, if you would.

2 A. I'm there.

3 Q. All right. This is pay app 42?

4 A. Yes.

5 Q. Are you familiar with this document?

6 A. Yes.

7 Q. Do you have personal familiarity with  
8 it?

9 A. Yes.

10 Q. Did you have input into its preparation?

11 A. Yes.

12 Q. Is it part of business records of  
13 Balfour Beatty Company?

14 A. Yes.

15 MR. HILDEBRAND: I would like to  
16 move this in, Your Honor.

17 THE COURT: 289?

18 MR. HILDEBRAND: Yeah. I think  
19 there's the cover sheet that was previously  
20 marked.

21 THE COURT: 278. I'll check to see  
22 if it's already in.

23 MR. BUNDY: It's represented to be  
24 the complete tab?

25 MR. HILDEBRAND: Right.

1 MR. BUNDY: No objection.

2 THE COURT: Without objection.

3 (PLF. EXH. 289 was received in  
4 evidence.)

5 (PLF. EXH. 290 was marked for  
6 identification and received in evidence.)

7 MR. HILDEBRAND: If we could do the  
8 same for 290, it's pay app 43.

9 MR. BUNDY: Same representation, no  
10 objection.

11 THE COURT: Okay.

12 MR. HILDEBRAND: And 291 is 44, and  
13 I will state that there's not a signed one. We  
14 don't have a signed copy of that.

15 MR. BUNDY: So you're submitting an  
16 unsigned tab?

17 MR. HILDEBRAND: Right.

18 MR. BUNDY: It's not signed by  
19 anybody?

20 MR. HILDEBRAND: Right. We cannot  
21 locate the signed tab.

22 MR. BUNDY: I'm going to have to  
23 object to that one.

24 THE COURT: Was that 291 was the  
25 one you were just offering?

1 MR. HILDEBRAND: Yes, sir.

2 THE COURT: Objection was made  
3 because it was unsigned?

4 MR. BUNDY: Yes, sir. It was not  
5 signed by anybody.

6 (PLF. EXH. 291 was marked for  
7 identification and received as a proffer.)

8 BY MR. HILDEBRAND:

9 Q. How about Exhibit 291, Mr. Simonton.

10 A. Yes. I've seen this pay paper.

11 Q. All right. Do you know why it was not  
12 signed?

13 A. They have turned pay app 43. No, sir.  
14 I don't know. I do not know why it's not signed.

15 (PLF. EXH. 292 was marked for  
16 identification.)

17 Q. All right. How about Exhibit 292? Can  
18 you identify that? It's a pay app 45 and it is  
19 signed, right?

20 A. Yes, it is signed.

21 MR. HILDEBRAND: All right.

22 MR. BUNDY: No objection.

23 MR. HILDEBRAND: So that one's in.

24 THE COURT: 292?

25 MR. HILDEBRAND: Yes, sir.

1 (PLF. EXH. 292 was received in  
2 evidence.)

3 MR. HILDEBRAND: All right. So I'm  
4 about to move into the last area, but I think  
5 it's probably going to take maybe an hour.

6 THE COURT: Okay. All right.

7 MR. HILDEBRAND: It would be a good  
8 time to break.

9 THE COURT: Yeah, I would say so.  
10 Let's break for today. We can shoot for 9 a.m.  
11 again. I don't know. It started to clear and  
12 there's supposed to be rain tomorrow because  
13 there's a cool front coming through. If we're  
14 lucky, that will happen tonight. Let's just say  
15 9:30 tomorrow just to be safe.

16 MR. BUNDY: Could I ask that you  
17 admonish the witness and also admonish whoever at  
18 Balfour Beatty needs to call, the gentleman who  
19 calls people, who have been admonished who  
20 doesn't know they've been admonished, and let him  
21 know that he's not supposed to call this witness?

22 THE COURT: All right. So  
23 Mr. Simonton, you'll be under oath overnight.  
24 And I would just ask that you not consult with  
25 anybody and don't let anybody consult with you.

1       Come back in the morning. Come on right back  
2       here at 9:30 in the morning, if you would, sir.

3                   THE WITNESS: Yes, sir. I will be  
4       here.

5                   THE COURT: All right. Very good.  
6       Y'all have a good night.

7                   (The deposition was concluded at  
8       5:56 P.M.)

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1           A.    I'm there.

2           Q.    All right.  Were you familiar -- were  
3   you involved with the payment application process  
4   on this job?

5           A.    Yes, sir.

6           Q.    All right.  And are you familiar -- have  
7   you reviewed the pay applications in this matter  
8   as part of your job responsibilities?

9           A.    Yes.

10          Q.    All right, sir.  We have -- and are you  
11   familiar with the documents that are attached,  
12   the contractor's conditional partial payment  
13   waiver and release of lien upon progress payment,  
14   that the ones that are attached to this exhibit?

15          A.    Yes, sir.

16          Q.    All right, sir.

17                   MR. HILDEBRAND:  I would like to  
18   admit those, Your Honor.

19                   MR. BUNDY:  No objection.

20                   THE COURT:  Without objection.  And  
21   that's all under tab 215?

22                   MR. HILDEBRAND:  Yes, sir.

23                   THE COURT:  Okay.

24   BY MR. HILDEBRAND:

25          Q.    All right, sir.  So if we turn to the

1 first page of that?

2 A. Yes, sir.

3 Q. It says, there is a release of lien at  
4 the very top upon progress payment. Do you see  
5 that?

6 A. Yes.

7 Q. Was that the standard procedure while  
8 you were there that the -- let me ask you this,  
9 what requirement, if any, was there from the  
10 owner that Balfour paid its subcontractors in  
11 advance of receiving payments from the owner?

12 MR. BUNDY: Objection. Best  
13 evidence of those requirements would be found in  
14 the contract documents.

15 THE COURT: I'm going to overrule  
16 it. Go ahead. What was the standard procedure  
17 for payments?

18 MR. HILDEBRAND: Right.

19 THE COURT: He can testify to that  
20 based on his personal knowledge, if he knows.

21 THE WITNESS: There was no  
22 requirement for us to prepay our subcontractors.  
23 BY MR. HILDEBRAND:

24 Q. And the actual lien release says upon  
25 progress payment, does that language reflect that

1       understanding from your standpoint?

2           A.    Yes.

3           Q.    Okay.  Now, under this first one it says  
4       that there are releases of lien upon progress  
5       payments, except for the very last line of that  
6       first paragraph, retention, open change orders,  
7       claims or disputes identifies as follows, pending  
8       RCOs, correct?

9           A.    Yes, sir.

10          Q.    Now, let's turn to the next page.  That  
11       one says RCOs number 14, 20, 22, 27; is that  
12       right?

13          A.    Yes, sir.

14          Q.    And then we turn to the very last page,  
15       there's a whole list of pending RCOs from 18 to  
16       it looks like 268, correct?

17          A.    Yes, sir.

18          Q.    All right.  Let's turn to the next  
19       volume, please.

20                   MR. HILDEBRAND:  We're going to  
21       volume 4.

22                   (PLF. EXH. 228 was marked for  
23       identification.)

24       BY MR. HILDEBRAND:

25          Q.    All right.  Let's turn to Exhibit 228



1       please, right at the very back.

2           A.    I'm there.

3           Q.    All right.  Are you with me?

4           A.    Yes, sir.

5           Q.    Can you describe what this document is?

6           A.    This is a plan versus actual supervision  
7       with the blue lines at the top being the planned  
8       staffing of the project.  First of the project,  
9       and then the bottom with the red lines and the  
10      green lines, that is the actual supervision that  
11      was on the project.

12          Q.    All right.  And what involvement did you  
13      have with the preparation of this document?

14          A.    I created this document.

15          Q.    You did it yourself?

16          A.    (No audible response.)

17                   MR. HILDEBRAND:  I would like to  
18      move this -- enter this as our next exhibit, Your  
19      Honor.

20                   MR. BUNDY:  Objection.

21                   THE COURT:  Basis?

22                   MR. BUNDY:  It's an improper 1006  
23      document.

24                   THE COURT:  All right.  Lay a  
25      little more foundation for this.

1 BY MR. HILDEBRAND:

2 Q. All right. So as part of the audit  
3 process and the discovery process, were all the  
4 pay records provided to Ms. Hadley and to  
5 Mr. Bundy for them to review who was involved on  
6 the job and what they got paid and daily reports  
7 and everything else like that?

8 A. Yes, sir.

9 Q. All right, sir. So the records that we  
10 have here, are -- how did you compile them? Let  
11 me ask you this very simple question, how did you  
12 compile the data that reflects when the folks  
13 were on the job?

14 A. The folks that were on the job, there  
15 was an accounting -- there was a process where  
16 the salaries and the laborer's time was coded to  
17 a certain color in the project record and the  
18 project accounting records.

19 They printed that out and sent it to me,  
20 as well as to Ms. Hadley and Mr. Bundy. And so I  
21 took that and derived after the time that people  
22 were actually charged and what was done on the  
23 project.

24 Q. Okay. So this is simply a summary of  
25 the data that we could go back, if we wanted to,

1       if we wanted to take the time now, we could get  
2       the employment records and the daily reports and  
3       such for all of these individuals and show  
4       exactly when each one was planned to start and  
5       planned to finish and when they actually did  
6       that. Is that a fair statement?

7             A. Yes, sir.

8             THE COURT: So the basis for this  
9       is time spent on the job by these individuals?

10            THE WITNESS: Yes, sir.

11            THE COURT: Is the basis for the  
12       record? Okay. All right. I find that  
13       sufficient. I will allow it.

14            MR. HILDEBRAND: Thank you. So  
15       that would be introduced as Plaintiff's 228.

16            THE COURT: 228.

17            MR. HILDEBRAND: Thank you.

18                    (PLF. EXH. 228 was received in  
19       evidence.)

20       BY MR. HILDEBRAND:

21            Q. All right. The next documents that I  
22       would like to go through is a separate notebook,  
23       smaller one, that has exhibits, I believe 228  
24       to -- I'm sorry, 250 to 264.

25            A. You said a smaller one, Mr. Hildebrand?

1 Q. Yes, sir.

2 THE COURT: Is that the one we had  
3 yesterday?

4 MR. HILDEBRAND: Yes, sir.

5 (PLF. EXH. 251 was marked for  
6 identification.)

7 BY MR. HILDEBRAND:

8 Q. All right, sir. Let's turn to tab 251,  
9 if you would, please. Are you with me?

10 A. Yes, sir.

11 Q. All right. This is a letter dated  
12 January 22, 2018, and it's from -- is that your  
13 signature on the second page?

14 A. Yes, sir.

15 Q. And it says MSA Bennett Hotel architects  
16 withholding of project funds, response R1; is  
17 that correct?

18 A. Yes, sir.

19 Q. Did you draft this letter?

20 A. Yes, sir.

21 Q. All right. And is this part of the  
22 business records of Balfour Beatty and was this  
23 document prepared contemporaneously with the  
24 content therein?

25 A. Yes, sir.

1           Q.   All right, sir.  Generally what was the  
2           nature -- what was the reason that you wrote this  
3           letter?

4           A.   The architect is withholding funds for  
5           our September pay application and any more funds  
6           due to the owner performing its own work in the  
7           rooms.

8           Q.   What was that work that the owner was  
9           performing?

10          A.   The owner did not like the finishes in  
11          the room that were specified and decided to go  
12          back with a separate contractor and change those  
13          finishes in the rooms.

14          Q.   Okay.  So when you say finishes, what  
15          was being changed?  What did the owner do?

16          A.   The painting was changed -- the paint  
17          from a specified eggshell to a flat paint.

18          Q.   All right, sir.  And we've been through  
19          this before.  That seems to be inconsequential.  
20          As a layman, can you tell me why that would make  
21          any difference to like a contractor or somebody  
22          in the business?

23          A.   The eggshell paint on a low floor finish  
24          seems to flash more when he put one coat on it.  
25          We had probably no less than three coats of paint

1       in those rooms, and we had a base paint that you  
2       paint everything a base color and off white. And  
3       then you come back and you paint it with an  
4       eggshell, another coat.

5               And the last coat we put on was after  
6       the furniture was in. Just touch up things and  
7       put that last coat on. In certain light, when  
8       the curtains are open, and then by that time all  
9       the lamps were in the room, and it shows up  
10      flashes, almost like a flashing on the wall.

11             Q.   A flash of what? I'm not sure the  
12      Judge --

13             A.   It's just like the sun hitting that wall  
14      right there. It's like you see that part, and it  
15      flashes.

16             Q.   It flashes. What is being flashed, some  
17      irregularity?

18             A.   Yes, sir. It shows on the wall.

19                     THE COURT: Where the third coat  
20      came on, right?

21                     THE WITNESS: Well, it's just the  
22      series of coats, Your Honor. It probably  
23      wouldn't show, with the first coat I don't  
24      remember seeing it, and then by the time we got  
25      to the last coat, you could see some flashes with

1 the wall where it may have touched, see some  
2 eggshell paint. It doesn't dull the wall. It  
3 seems to bring out the --

4 THE COURT: Imperfections?

5 THE WITNESS: The spots in it, yes,  
6 sir.

7 BY MR. HILDEBRAND:

8 Q. All right. What knowledge, if any, do  
9 you have as to whether an eggshell paint is  
10 recommended in the industry for a level 4  
11 sheetrock finish?

12 MR. BUNDY: Objection.

13 THE COURT: What's his basis for  
14 that? Lay a little more foundation.

15 BY MR. HILDEBRAND:

16 Q. Okay. How long have you been in the  
17 construction industry?

18 A. 48 years.

19 Q. All right, sir. Are you familiar with  
20 sheetrock finishes and paints that are compatible  
21 with particular sheetrock finishes?

22 A. Yes, sir.

23 Q. All right, sir. Do you have any  
24 experience with eggshell paint and more glossy  
25 finish on level 4 sheetrock?

1           A.    Yes, sir.

2           Q.    All right.  And what is -- is there any  
3   issue related to using a -- from based on your  
4   knowledge and experience with using a glossy  
5   paint, like an eggshell, on a level 4 sheetrock?

6                   MR. BUNDY:  Objection.

7                   THE COURT:  All right.

8                   MR. BUNDY:  This gentleman is  
9   getting ready to give you an expert opinion, and  
10   he's not been listed as an expert witness.  I  
11   will be prejudice if he now can bring people in  
12   here and testify beyond your knowledge and my  
13   knowledge about paint finishes.

14                   He hasn't been qualified as a painter.  
15   He hasn't been qualified as a chemist.  He hasn't  
16   been listed as an expert witness.  This is highly  
17   prejudicial to my client.

18                   THE COURT:  Overruled.  I find he's  
19   qualified.  Go ahead.

20                   THE WITNESS:  Can you repeat that  
21   question?

22           BY MR. HILDEBRAND:

23           Q.    Yes, sir.  The question is, is it  
24   appropriate, based on your experience, to use an  
25   eggshell finish with level 4 sheetrock finishes?



1           A.    No, sir.

2                   MR. BUNDY:  Objection.

3                   THE COURT:  Overruled.

4                   MR. BUNDY:  Appropriate to whom,  
5   however?  Objection to the question.  It's  
6   leading.

7                   THE WITNESS:  Hospitals, you put a  
8   level 5 finish on, and you put eggshell,  
9   semi-gloss paint due to surfaces, touching the  
10   surfaces, more durable surface.  Eggshell is the  
11   more durable surface.  And in the symphony hall,  
12   we had level 5 finishes.  That was the last  
13   eggshell actually that we put on the walls.

14           BY MR. HILDEBRAND:

15           Q.    So eggshell is appropriate for a level  
16   5, but not level 4?

17           A.    Yes, sir.

18           Q.    Why is that?

19           A.    Because you cover the whole sheetrock  
20   wall with a type of bed mud, the white mud, where  
21   a level 4 finish, even though you put in base  
22   coats, you still can see some of the stripes  
23   where you tape the bed into the screws and then  
24   where the joints come together.  And any patch  
25   you may have on the wall, remove electrical

1 outlets, thermostat, or sprinkler head.

2 Q. Okay. Based on your experience, what is  
3 the appropriate paint to use for a level 4  
4 sheetrock finish?

5 MR. BUNDY: Objection.

6 THE COURT: Overruled. Go ahead.

7 THE WITNESS: Flat wall paint.

8 BY MR. HILDEBRAND:

9 Q. And why is that?

10 A. It doesn't show the distortions in the  
11 sheetrock or the bleeding through of that  
12 sheetrock between those joints. Flat paint on  
13 the level 4 finish is the normal of what we put  
14 on projects.

15 Q. Okay. And to be clear, flat paint was  
16 specified for the guest room -- I'm sorry -- an  
17 eggshell glossy paint was specified on this  
18 project for use in the guest rooms, correct?

19 A. Yes, sir. There was on the plan  
20 schedule.

21 Q. But the guest rooms were not a level 5;  
22 is that correct?

23 A. No, sir.

24 Q. When this issue came up with the  
25 painting right at the end of the job -- well, let

1 me ask you, when did the issue come up with this  
2 repainting?

3 A. At the end of the project, and I believe  
4 it was in November or December.

5 Q. Okay. And the owner made a decision to  
6 repaint all the rooms?

7 A. Yes, sir.

8 Q. And what would they -- what were the  
9 rooms repainted with? Was it an eggshell or flat  
10 wall?

11 A. Flat wall paint.

12 Q. Okay. Was it the same color, to your  
13 knowledge, as what was original?

14 A. It was the same color, same brand,  
15 Sherwin Williams. It was a flat FL paint.

16 Q. Okay. All right.

17 A. For the walls.

18 Q. Okay. Give me just a little bit more  
19 background on that one. So the -- you explained  
20 to the Judge, and I think Mr. Doran -- were you  
21 here during Mr. Doran's testimony?

22 A. Yes, I was.

23 Q. All right. He said that as of --

24 MR. BUNDY: Objection.

25 MR. HILDEBRAND: I will rephrase.

1 BY MR. HILDEBRAND:

2 Q. Let me ask you this: When were the  
3 guest -- when were the model rooms completed on  
4 this job, approximately?

5 A. February.

6 Q. Of what year?

7 A. 2018.

8 Q. Okay. And as I understand it, those  
9 were kind of the templates that would be used  
10 to -- that would be replicated for the remainder  
11 of the rooms; is that correct?

12 A. Yes, sir.

13 Q. All right, sir. The -- and then when  
14 were all of the rooms -- when -- by what date had  
15 all of the guest rooms received the several coats  
16 of paint or final coats of paint on this job?

17 A. August, September. I mean, as we  
18 stacked up the building. If I remember right,  
19 it's August, September.

20 Q. All right. So prior to December, was  
21 there any or -- when the model rooms, the two  
22 model rooms, were done, was there any notes from  
23 the owner or the architect or anybody else, to  
24 your knowledge, that the paint that was being  
25 used, the eggshell paint, was not appropriate and

1       it was not to be used?

2           A.   No, sir.

3           Q.   Okay.  So when was the first time that  
4       you received notice that the owner did not like  
5       the eggshell paint?

6           A.   We received notice they were going to  
7       repaint the rooms, I believe it was late  
8       November, early December.

9           Q.   Okay.  And was Balfour asked to fund the  
10      cost or to perform that work?

11          A.   We were asked to perform that work, and  
12      I asked the owner's representative, Jim Clements,  
13      if he wanted to issue a change order for that  
14      work -- to change that order to repaint the  
15      rooms.

16          Q.   Why did you feel it was a change order?

17          A.   Because we had painted, we had built the  
18      rooms per plans and specs, for the inspections,  
19      and had them signed off the architect of record,  
20      and they were ready to be turned over for the  
21      owner do whatever he needed to get them ready for  
22      fit and finish.

23          Q.   Okay.  All right.

24          A.   And the subcontractors were demobilizing  
25      the project.

1           Q.    Okay.  So was a change order issued by  
2           the owner for y'all to repaint the rooms in the  
3           flat finish?

4           A.    No, sir.

5           Q.    All right.  And then in this letter --

6                   MR. HILDEBRAND:  I would like to  
7           admit 251.

8                   MR. BUNDY:  No objection.

9                   THE COURT:  Without objection.

10                   (PLF. EXH. 251 was received in  
11           evidence.)

12                   THE COURT:  And let me ask this  
13           question right off the bat.  You stated January  
14           22, 2018 was a response to a January 19 e-mail.  
15           Can I presume that the actual date on this letter  
16           would be January 19?

17                   THE WITNESS:  No -- yes, sir, it  
18           would be 2019.

19                   THE COURT:  All right.  I think I  
20           saw that once before.

21                   THE WITNESS:  It's inherit with  
22           word, I guess.

23                   MR. HILDEBRAND:  I think it's about  
24           the same date, about the same that your --

25                   THE WITNESS:  Yeah.

1 THE COURT: All right. 251 is in  
2 evidence.

3 MR. HILDEBRAND: Thank you.

4 (PLF. EXH. 252 was marked for  
5 identification.)

6 BY MR. HILDEBRAND:

7 Q. All right. Let's turn to Exhibit 252.

8 A. I'm there.

9 Q. All right. This is a letter dated  
10 January 25, 2019, and the fourth page is signed  
11 by yourself, David Simonton as vice president,  
12 correct?

13 A. Yes, sir.

14 Q. All right, sir. And it's consolidate  
15 claim preliminary. Do you see that?

16 A. Yes, sir.

17 Q. All right. You wrote this letter?

18 A. Yes, sir.

19 Q. And what was the purpose for writing it?

20 A. To notify the owner that we intended to  
21 file a claim. We had gotten with the  
22 subcontractors, trying to close them out, and  
23 then talking to them to see if they had any  
24 claims to make sure they passed those claims so  
25 we could review them. And we pulled all of that

1       together and came up with a number.

2               And then we wanted to go through our  
3       entitlement process for that claim. We listed  
4       out the letters and wanted to give them a  
5       preliminary actual dollar value.

6           Q.    Okay. Is this document part of business  
7       records, normal business records of Balfour  
8       Beatty Construction?

9           A.    Yes, sir.

10               MR. HILDEBRAND: I would like to  
11       move this in to evidence, Your Honor.

12               MR. BUNDY: No objection.

13               THE COURT: Without objection.

14               (PLF. EXH. 252 was received in  
15       evidence.)

16       BY MR. HILDEBRAND:

17           Q.    All right, sir. This is a long letter.  
18       I'd like to introduce and read some of this into  
19       the record. So the first paragraph is generally  
20       saying that Balfour and subcontractors are  
21       submitting their claim. Is that a fair  
22       statement?

23           A.    Yes, sir.

24           Q.    And then there's a second paragraph that  
25       reads, the project is to be a signature luxury



1 hotel in the vision of Michael Bennett,  
2 principals of the project's owner, Library  
3 Associates, and when completed, it will be just  
4 as described.

5           Unfortunately, however, the process of  
6 constructing the hotel was made excessively more  
7 difficult because of a design that was  
8 inconsistent with the owner's vision, an owner  
9 vision that changed and morphed many times over  
10 the course of the project.

11           An operator that was brought to the  
12 table long after construction had commenced and  
13 more events, all of which resulted in material  
14 changes in the scope of work that greatly drove  
15 up the cost of construction and extended the time  
16 in which to complete the project by more than a  
17 year.

18           Exacerbating these the problems, the  
19 owner often acted in a manner that was  
20 accusatory, confrontational, and uncooperative by  
21 and among other things, refusing to pay for  
22 changes and delays, failing to make decisions and  
23 provide information in a reasonable and prompt  
24 manner, abandoning provisions of the contract  
25 when they were unfavorable to the owner's

1 position and generally creating an unproductive  
2 atmosphere on the project.

3 Were those the -- did I just -- does  
4 that aspect of the letter correctly reflect  
5 Balfour's position as to the reasons for the  
6 claim?

7 MR. BUNDY: I object, Your Honor.  
8 This letter contains opinions that are not --  
9 that are outside the expertise of this witness.  
10 Specifically, he's not been qualified, nor has he  
11 been offered as an expert opinion in  
12 architecture.

13 Okay. So to the extent that I admitted  
14 this or agreed to the admission of this document,  
15 I was not agreeing to the admission of his  
16 opinions.

17 I agreed to this letter as admissible  
18 for the limited purpose of notice. That's it.  
19 That's all this letter is, is a notice letter.  
20 All the rest of it is hearsay.

21 It's opinions that aren't substantiated,  
22 given by somebody who is not qualified to give  
23 the opinions, particularly those opinions that  
24 relate to the plans and specifications. This  
25 witness has not been qualified. He's not been

1 listed as expert witness in architecture. Thank  
2 you.

3 THE COURT: All right. Objection  
4 noted. Overruled. This is your document, is it  
5 not?

6 THE WITNESS: Yes, sir. I wrote  
7 this document.

8 MR. HILDEBRAND: All right, sir.  
9 And, Your Honor, may I ask that we go back to  
10 rule 43(i) because we could just be here for a  
11 long time. If you need an explanation --

12 THE COURT: No speaking objection,  
13 okay.

14 MR. HILDEBRAND: Thank you, Your  
15 Honor.

16 BY MR. HILDEBRAND:

17 Q. So does the paragraph that I just read,  
18 is that a fair summary from your perspective of  
19 what the claim -- underlying reasons for the  
20 claims were?

21 A. Yes, sir.

22 Q. Next paragraph, in spite of repeated  
23 representations by Mr. Bennett, that he intended  
24 to pay everyone for all the work that was done to  
25 complete the project, in actuality, the actions

1 of Mr. Bennett and those who work for him were  
2 wholly inconsistent with those representations.

3 As a result, the claimants had incurred  
4 substantial damages and unreimbursed costs for  
5 which a consolidated claim in the amount of  
6 \$22,452,282.51, the claim amount is being  
7 submitted.

8 The claim amount is comprised of the  
9 components described below and is based on a  
10 preliminary accounting of the cost that have been  
11 incurred through the noted dates; however,  
12 because work on the project continues, a final  
13 accounting of costs presentable to the owner  
14 cannot be done.

15 Once the work by Balfour Beatty and its  
16 subcontractors is completed, a full accounting of  
17 those additional costs will be provided by  
18 supplement or an amendment.

19 Now, when you say that the letter  
20 includes claims by subcontractors, can you tell  
21 me how you went about asking subcontractors to --  
22 what claims they have and what support they had  
23 for those claims?

24 A. We reached out to the subcontractors,  
25 calling them, and seeing if they had any claims

1       because we didn't want any surprises, you know,  
2       after we were trying to close the job out, with  
3       not being paid by the owner for several months.

4               They kind of went in their corners and  
5       went through their books, obviously as we did,  
6       and pulled together their claims, mechanical,  
7       electrical, plumbing and electrical and drywall.  
8       Those major subcontractors that were impacted by  
9       all the changes and the sprinkler person -- the  
10      sprinkler guy that was trying to remember the  
11      list. I believe that's a pretty close list of  
12      who sent in the claims.

13             Q.    Okay. Were you here when we reviewed  
14      the salient provisions of the Lithko contracts  
15      and the -- specifically the provision that  
16      provides that if a subcontractor has a claim  
17      attributable to the owner that that could be  
18      passed through Balfour?

19                     MR. BUNDY:  Objection.

20             BY MR. HILDEBRAND:

21             Q.    Were you here?

22                     THE COURT:  And the basis?

23                     THE WITNESS:  Yes, I was here.

24                     THE COURT:  Just one second.

25                     THE WITNESS:  Sorry.

1                   MR. BUNDY: The basis is the fact  
2           that he was in the courtroom is irrelevant. The  
3           basis of it is that whatever contract rights they  
4           had with the subcontractors, the best evidence is  
5           contained in the contract.

6                   THE COURT: Right.

7                   MR. BUNDY: And I would like to  
8           refer to the contract. So I object. Thank you,  
9           Your Honor.

10                  THE COURT: Okay. All right. Just  
11           lay a little more foundation.

12           BY MR. HILDEBRAND:

13           Q. Okay. Are you familiar with the  
14           subcontracts in this matter? I probably should  
15           have said that.

16           A. Yes, sir.

17           Q. Is there a pass-through provision in the  
18           subcontracts that states that if a subcontractor  
19           has a claim attributable to the owner that that  
20           claim can be passed through Balfour because the  
21           subcontractor does not have privity of the  
22           contract with the owner?

23                  MR. BUNDY: Objection.

24                  THE COURT: All right. Overruled.

25           Go ahead.

1 THE WITNESS: Yes, sir. There is a  
2 clause in our subcontract.

3 BY MR. HILDEBRAND:

4 Q. Okay. Is that a pretty standard clause  
5 from -- based on your experience?

6 MR. BUNDY: Objection.

7 THE COURT: Overruled.

8 THE WITNESS: Yes, sir.

9 BY MR. HILDEBRAND:

10 Q. All right, sir. So in this letter  
11 you're passing along to the owner -- you  
12 requested from the subs what claims they had  
13 related to the owner and you're passing them  
14 along to the owner along with the claim of  
15 Balfour; is that a fair statement?

16 A. Yes, sir.

17 Q. All right. And the basis for the letter  
18 or for the claim are itemized in numbers 1  
19 through 20?

20 A. Yes, sir.

21 Q. All right. And how did you come up with  
22 those 20 items? How was that list compiled?

23 A. Just going from the early parts of the  
24 job with the team and with some of the  
25 subcontractors and reviewing the documents that

1       we had, all the change orders that were issued  
2       throughout the project, and actions of the team,  
3       actions of the owner's side, of the architects,  
4       came together and pulled together 20 items we  
5       felt were the high topics of why the project went  
6       over budget.

7           Q.    Okay. Number 1, the owner's failure to  
8       provide information of services required of the  
9       owner with reasonable promptness. What was the  
10      basis for that?

11          A.    RFIs. I mean, we had that document  
12      earlier, the 125 days, 60 days, 30 days to answer  
13      RFI's.

14          Q.    Okay. Number 2, the failure of the  
15      owner to provide an owner's representative who  
16      could make decisions promptly by the owner and  
17      who could furnish information expeditiously to  
18      subs to avoids delays and impacts to the project,  
19      Balfour Beatty and the subcontractors. What is  
20      that? What was the basis for that?

21          A.    The owner's representative, Jim  
22      Clements, had no authority on the project. He  
23      was given no authority. And when you ask  
24      questions about things, and he was the most  
25      acceptable person on the owner's side of the



1 project, he couldn't answer those design  
2 decisions, change order decisions, any decisions  
3 on the project.

4 Q. So when you would ask him a question,  
5 what would his response be?

6 A. He would get with Mike or Kim or get the  
7 architect involved.

8 Q. Did that cause delays?

9 A. Yes, sir.

10 Q. Would the responses have been quicker if  
11 he had had actual authority?

12 MR. BUNDY: Objection.

13 THE COURT: Overruled.

14 A. Normally when you have an owner's rep on  
15 the project, you get instantaneous decisions.

16 Q. Is that how most of your projects run?

17 A. The projects that I've had an owner's  
18 representative on, yes, sir.

19 Q. Is it a fair statement that all of the  
20 delays that we went through yesterday on the RFI  
21 log showed those delays, most of those do not  
22 take place on a typical job?

23 A. No, sir.

24 MR. BUNDY: Objection.

25 BY MR. HILDEBRAND:

1 Q. Nowhere close?

2 A. No, sir.

3 Q. All right, sir. Number 3, failure to  
4 timely and promptly pay undisputed amounts to  
5 Balfour Beatty. What was the basis for that?

6 A. Most of that is, there was a disputed  
7 amount during the initial \$71,000 that the  
8 architect had authorized to be paid to Balfour  
9 Beatty, and due to a previous delay, and then at  
10 the end of the project, the monies that they were  
11 withholding, there was no accountability of  
12 whether there was disputed amounts or undisputed  
13 amounts.

14 So we weren't paid anything. There was  
15 no math provided on the rest of the 8 or 9  
16 million dollars worth of the funds that were in  
17 the project, why we weren't paid any undisputed  
18 amounts. We had subcontractors that needed to be  
19 paid.

20 Q. Okay. Number 4, the owner's decisions  
21 to make significant changes to the character of  
22 the building while the project was underway  
23 resulting in major changes to the layout of the  
24 building and systems of the building, all without  
25 adequate compensation to Balfour Beatty and

1 subcontractors.

2 Two examples are, decisions by the owner  
3 well after construction had commenced to upscale  
4 the hotel to a higher luxury rating leading to  
5 changes in room layouts, which drove major system  
6 changes and the owner's decision to wait to  
7 select a hotel operator, which then led to  
8 changes in the levels of finishes in guest rooms  
9 and public spaces to adjust to the operator's  
10 branding -- to the operators branding of  
11 requirement.

12 Was that -- did you address that? Was  
13 that addressed yesterday when we talked about the  
14 salamander punch list? Let me ask you this.  
15 What was the basis for that statement?

16 A. This project had countless changes all  
17 the way up to the end of the project, which you  
18 normally don't see.

19 You normally see there was a cutoff  
20 point. You try to curtail the changes to where  
21 you can get the project finished, and then  
22 anything you want to do after the project is  
23 completed, then do those changes. The salamander  
24 came in and changed the lines in the room and  
25 changed (inaudible) in the room they wanted.

1 Q. Speak up, please.

2 A. The salamander came in and had ideas how  
3 they wanted the hotel to look and those changes  
4 were implemented through the big stack of  
5 drawings over there.

6 Q. Okay. Additionally, there were -- I'm  
7 continuing reading -- additionally, there were  
8 continual design changes during construction that  
9 were seemingly made or proposed simply to address  
10 the owner's consistently changing and shifting  
11 visions of what was wanted for the project.

12 Many changes were mandated by the owner  
13 and persons for whom the owner was responsible  
14 that resulted in significant cascading effects on  
15 other work that resulted in higher costs and  
16 delays. All these design changes and more caused  
17 delay and additional costs for which Balfour  
18 Beatty and its subcontractors have not been  
19 compensated.

20 Have we already talked about that one?

21 A. Yes, sir.

22 Q. All right, sir. We will move on. The  
23 owner's interference and disruption with the  
24 project as a result of countless instances where  
25 he communicated possible changes to the building,

1       and therefore, failed to promptly make decisions  
2       as to such proposed changes, many times  
3       abandoning the proposed changes after months of  
4       indecision leading to, among other things,  
5       delays, disruptions, impacts, accelerations, and  
6       interference of Balfour Beatty and its  
7       subcontractors.

8                   What was the basis for that statement?

9           A.     Just a couple of examples, when I  
10       arrived there in December, there was a screen  
11       wall that was held down between the hotel next  
12       door and the Hotel Bennett, and we didn't get  
13       that change until the very end of the job.

14                  I mean, there was probably almost 10 or  
15       11 months before that decision was made to raise  
16       that wall up so you couldn't see all the doors  
17       for the Hotel Bennett from the hotel next door.  
18       The accordion door or the door into Camilla's, I  
19       mean, that was a late decision on what they  
20       wanted to do. Ballroom doors.

21           Q.     What other -- during the project, were  
22       there any instances where the owner advised  
23       Balfour Beatty that it was thinking about  
24       changing its mind on some of the aspects of the  
25       hotel, then changed back to what was originally

1 scheduled?

2 MR. BUNDY: Objection, leading.

3 BY MR. HILDEBRAND:

4 Q. All right. Well, explain to me what the  
5 sentence, the owner's countless instances where  
6 he communicated possible changes to the building  
7 and failed to make prompt decisions.

8 A. One instance I remember is that we would  
9 get an electrical change, lighting change, like  
10 for level 1, and they would change the lights  
11 over to small retail, in the lobby, and this was  
12 well after the fact.

13 And we would sit down and try to go  
14 through it and they said, no, I don't want this.  
15 They would cherry pick the change for the value  
16 of -- for whatever reason. I don't know. Say  
17 the change was 100,000, they would pick 70,000 of  
18 the change order and say we want to do this and  
19 not revise the drawings to show that lighting had  
20 been deleted in that change.

21 That's just one example. And then when  
22 the lighting designer came in to do the punch  
23 list, all those lights that weren't put in showed  
24 up on the punch list. And that was inherent with  
25 the lighting punch list and the electrical punch

1 list. So it was a lot of confusion of what was  
2 in the job and what was out.

3 Q. All right. Number 6, failure to procure  
4 builders risk insurance in accordance with the  
5 requirements of the contract documents and the  
6 owner's failure and refusal to compensate Balfour  
7 Beatty for losses incurred, which were covered by  
8 the builders risk policy, or what should have  
9 been covered by -- which should have been covered  
10 had the owner procured a policy pursuant to the  
11 contract requirements. What was the issue there?

12 MR. BUNDY: Objection. He is not  
13 qualified as a lawyer.

14 THE COURT: I'm going to overrule.  
15 Go ahead.

16 THE WITNESS: So in the contract,  
17 the insurance documents that the owner carried  
18 builders risk on the project, hail, rain, things  
19 like that.

20 The first instance, they didn't have the  
21 1,000 year flood, they didn't have insurance on  
22 the project. And the contract -- and then once  
23 they did procure insurance, the adjuster was so  
24 high. It was a percentage of the value of the  
25 project, a million bucks deductible.

1                   And the contractor calls for the owner  
2           to recover any deductibles not covered in the  
3           insurance, but we had to cover 10,000 if it was  
4           our fault. And we never received reimbursement  
5           for the builders risk claims that we had turned  
6           in.

7           BY MR. HILDEBRAND:

8           Q.    Were y'all paid? So the issue is y'all  
9           paid -- were charged with the amount over \$10,000  
10          deductible that was your responsibility?

11          A.    We never received any reimbursement for  
12          the funds we spent for hurricane preparedness and  
13          the flood and things like that.

14          Q.    How about number 7, failure to underrate  
15          its consultants to provide contract documents  
16          that include all the necessary -- all the items  
17          necessary for the proper execution and completion  
18          of the work by Balfour Beatty and the  
19          subcontractors?

20                         MR. BUNDY:  Objection.

21                         THE COURT:  Overruled.  Go ahead.

22                         THE WITNESS:  There were a lot  
23          of --

24          BY MR. HILDEBRAND:

25          Q.    I'm sorry. I think we've talked about



1       this so why don't we move on. I'm sorry.

2           A.    Yeah, that's fine with me.

3           Q.    I think number 8, failure of the owner  
4       and its consultants to provide contract documents  
5       that were properly coordinated. Has that been  
6       discussed?

7           A.    Yes, sir.

8           Q.    And number 9, failure of the owner to  
9       either authorize or direct its design consultants  
10      to provide adequate timely and sufficient  
11      additional services, including additional  
12      modeling BIM, for the pre-construction and  
13      construction phases. We've already talked about  
14      that?

15          A.    Yes, sir.

16          Q.    All right. 10, failure of the owner and  
17      its consultants to furnish information and  
18      services required and the subcontractors to  
19      officially construct the project. We've already  
20      talked about that one?

21          A.    Yes, sir.

22          Q.    Okay. Number 11, failure of the owner  
23      to provide prompt approvals. We've already  
24      talked about that?

25          A.    Yes, sir.

1           Q.   Repeated failures on the part of the  
2           owner and the owner's representative, among  
3           others, to refrain from directly communicating  
4           with Balfour Beatty employees and subcontractors.  
5           Very briefly, what was that?

6           A.   The owner and owner's rep would go  
7           straight to the subcontractors and flooring  
8           people, the LCCM, LowCountry Millwork that was  
9           putting in the wood, they had relationships with  
10          them, I guess, in the past and working through  
11          direction on proper seams and what wood goes  
12          where and things like that.

13          Q.   Does that cause problems -- okay. Does  
14          that cause problems on the job when the owner has  
15          direct contact with your subcontractors?

16          A.   The chain of command is broken. You  
17          know, our subcontractors were necessarily working  
18          with them trying to get them through the project,  
19          or attempting to get them through the project,  
20          work through all the changes, making sure we're  
21          getting the right product into the room through  
22          all the changes that we've gotten. Communication  
23          should always come through your contractor.

24          Q.   Okay. Thirteen, delays, disruptions and  
25          damage caused to the project by the owner's

1       separate contractors resulting in Balfour Beatty  
2       and its subcontractors incurring  
3       additional costs and delays, including costs to  
4       repair resulting damages. What was that?

5           A. We talked about that earlier where they  
6       were going into the rooms, basically laying TVs  
7       on the beds and tools all over the cabinets. We  
8       talked about that earlier yesterday.

9           Q. Okay. All right. Fourteen, failure to  
10      design and perform with applicable laws, codes,  
11      rules and regulations. I think the experts  
12      addressed that one.

13           Fifteen, failure of the owner and its  
14      consultants and representatives to reasonably  
15      interpret and administer allowances set forth in  
16      the contract documents, including the refusal to  
17      execute change orders for costs exceeding  
18      allowance amounts and refusing to act reasonably  
19      and promptly in selecting materials and equipment  
20      covered by allowances.

21           Can you very briefly tell me what --

22           A. The allowances were -- a couple of them  
23      was the door going into Camilla's lounge, there  
24      was some screens that went into the bar -- lobby  
25      bar that was supposed to go up and screen that

1 bar from the rest of it.

2 And then there was an allowance on the  
3 ballroom doors, and those selections came very  
4 late in the project and over a long lead for  
5 materials.

6 Q. Okay. Abandonment by the owner of much,  
7 if not all, of the administrative provisions of  
8 the contract, as well as change order provisions  
9 which was drafted by the owner and set forth in  
10 the contract documents. What was that?

11 A. That's timely negotiating and paying for  
12 the change order on the project. Some of the  
13 change orders went 8 or 9 months before they were  
14 settled, and therefore, the subcontractors were  
15 having to basically build the project on their  
16 own nickel, their own dime.

17 Q. Okay. Seventeen, requiring Balfour  
18 Beatty and its subcontractors to provide work  
19 that went beyond what was depicted in the  
20 drawings or provided in the specifications for  
21 reasonably inferring -- inferable from those  
22 documents, all without the provision of  
23 additional compensation and extensions of time.  
24 Have we talked about that?

25 A. Yeah.

1           Q.   All right.  Eighteen, the owner's  
2           abandonment of the contract provisions by  
3           selectively enforcing provision only when the  
4           circumstances may have favorable to the owner.  
5           What was that?

6           A.   That was the insurance, basically, not  
7           providing funds to Balfour Beatty to reimburse  
8           the subcontractors from the insurance claims.  
9           That's one that comes to mind right now.

10          Q.   Okay.  That was early in the project  
11          when those issues arose?

12          A.   Early, and in '18, there was a hurricane  
13          or tropical storm.

14          Q.   Okay.  All right.  Next one, failure on  
15          the part of the owner and its design consultants  
16          to reasonably, with impartiality, on the part of  
17          the architect to interpret and administer the  
18          contract documents.  What was that about?

19          A.   The failure would go towards the owner.  
20          Like when we submitted the claim, basically he  
21          didn't give us anything to look at and then  
22          denied our claim.

23          Q.   Okay.  Twenty, failure to extend the  
24          contract completion dates and compensate Balfour,  
25          the claimants, for delay costs of damages.  What

1       does that mean?

2           A.   Failure to give us our time and our  
3       change orders that we asked for.

4           Q.   Okay. All right. Subsection C,  
5       damages. As a result of the above-described  
6       errors, admissions, failures and breaches of the  
7       owner, were those for which the owner was  
8       responsible, Balfour Beatty and its  
9       subcontractors have incurred additional costs far  
10      in excess of what has been paid due to delays,  
11      disruptions, accelerations, impacts, inference  
12      and extra work in the aggregate of  
13      \$22,452,282.51.

14           The claim amount is comprised of the  
15      following elements. And then we set forth the  
16      damages that speak for themselves, and Mr. Casey  
17      Thompson is going to address the damages in  
18      detail; is that right?

19           A.   Yes, sir.

20           Q.   All right, sir. As far as the damages  
21      that came from the subcontractors, where they are  
22      listed below here, so how did those come to you  
23      again?

24           A.   By e-mail and by mail and dropped off.

25           Q.   Did you -- what communications, if any,

1        did you have with the subcontractors when you  
2        would get their proposed claims before you  
3        included them in this claim?

4            A.    We would go through them and ask them  
5        questions about it, like Watson, and then  
6        Bernhard MCC, BMCC, asked them questions, you  
7        know, if these changes were already funded. They  
8        had to print out a list of the change orders and  
9        if they've been funded. They basically came back  
10      and said the claims are the claims.

11           Q.    Okay. All right. D, reservation. This  
12      claim by Balfour Beatty and the subcontractors is  
13      not intended to be the final claim for it to  
14      include all elements and damages submitted as by  
15      a preliminary claim while the work on the project  
16      is still ongoing.

17                   Claimants reserve any and all rights and  
18      remedies to which they're entitled under the  
19      contract for applicable law and reserve the right  
20      to supplement, amend, and/or revise any aspect of  
21      the claim in the future based upon further  
22      analysis and evaluation.

23            E, closing. Balfour Beatty and its  
24      subcontractors wish to resolve this matter and  
25      these claims with the owner, whether it be

1       informally or through the dispute resolution  
2       process prescribed by the contract documents that  
3       were principally drafted by the owner.

4               Collectively, we are prepared to present  
5       the owner materials and information that  
6       substantiate the intentions described above and  
7       the costs that have been claimed.

8               The owner has received a hotel that far  
9       exceeds what was shown on the drawings and  
10      described in the specifications, and the owner  
11      should pay for the direct and indirect costs  
12      incurred to upgrade the hotel to a heightened  
13      vision all to deliver this project to the owner  
14      for its use and enjoyment of its guests. Did I  
15      read that correctly?

16             A.   Yes, sir.

17             Q.   All right. So this was provided -- this  
18      claim letter was sent to Jim Clements, correct?

19             A.   Yes, sir.

20             Q.   All right, sir. And it was -- I show  
21      it's being copy to Kim Brown, correct?

22             A.   Yes, sir.

23             Q.   Tom Ryan, life insurance company, who is  
24      that?

25             A.   They were the owner's lender, Lender and



1 Associates.

2 Q. Jennifer Faulkinberry and Buck Lindsay  
3 is the architect?

4 A. Yes, sir.

5 Q. All right. So let's turn -- we already  
6 introduced that.

7 THE COURT: It's in, yeah.

8 (PLF. EXH. 253 was marked for  
9 identification.)

10 MR. HILDEBRAND:

11 Q. 253, if you can turn to that.

12 A. Yes, sir.

13 Q. It's a letter to you from the project  
14 architect, Buck Lindsay, correct?

15 A. Yes, sir.

16 Q. All right. So this is his response to  
17 your claim letter, correct?

18 A. Yes, sir.

19 MR. HILDEBRAND: I would like to  
20 introduce this, Your Honor.

21 MR. BUNDY: What, tab 253?

22 MR. HILDEBRAND: Yes.

23 MR. BUNDY: Absolutely. No  
24 objection.

25 THE COURT: All right. In

1 evidence. All right.

2 (PLF. EXH. 253 was received in  
3 evidence.)

4 BY MR. HILDEBRAND:

5 Q. All right. His response, we have  
6 received and reviewed the above-referenced  
7 letter, your consolidated claim letter, claiming  
8 extra cost of BBC above contract amount in the  
9 pursuit of the work for this project. Note that  
10 certain items of your claim are covered in the  
11 contract and are not in debate.

12 Let me ask you this: When he said,  
13 certain items are not in debate, have you been --  
14 after you presented the claim letter to the  
15 owner, have you received any money -- to your  
16 knowledge, has Balfour received any money  
17 whatsoever in response to the claim?

18 A. No, sir.

19 Q. Not a penny?

20 A. No, sir.

21 Q. We have thoroughly analyzed the contents  
22 of the letter. In the absence of any details  
23 according to this claim, we can draw no  
24 conclusion as to the legitimacy of the claim  
25 except to say that it appears to be grossly

1       overstated.

2                   The owner disputes the claim. We have a  
3       decision to render an initial decision on this  
4       disputed claim within 10 days of receipt. To  
5       exercise that duty, we request additional  
6       supporting data on the claim. And he asked to do  
7       so before -- within 30 days?

8           A.    Yes, sir.

9           Q.    And that additional data is what has  
10       been -- we've talked about already, these volumes  
11       have been introduced; is that correct?

12          A.    Yes, sir.

13          Q.    All right, sir.

14                   MR. BUNDY: Do you mind if we  
15       identify for the record what those are so we have  
16       a clean record?

17                   THE WITNESS: Is this your Exhibit  
18       11?

19                   MR. HILDEBRAND: Yeah, let's go  
20       back.

21                   THE COURT: It would be Defendant's  
22       11, 12, 13 and 14; is that correct?

23                   THE WITNESS: Yes.

24                   THE COURT: And it's volumes 1, 2,  
25       3 and 4?

1 THE WITNESS: Yeah.

2 MR. BUNDY: Thank you, Your Honor.

3 THE COURT: Yep.

4 BY MR. HILDEBRAND:

5 Q. All right. So you provided the  
6 documents that I will call a stack of documents  
7 11 through 14 that have been marked; is that  
8 correct?

9 A. Yes, sir.

10 Q. All right. And how did you go about  
11 compiling those documents?

12 A. The team got together along with the --  
13 when I say the team, it was Nick, myself, Tim,  
14 Shanti, and pulling together out of the documents  
15 and then got with accounting on how much funding  
16 was going out, how much money we were owed, and  
17 going through all the changes and getting all the  
18 last pricing -- trying to get the last pricing  
19 from the subcontractors, and then the  
20 documentation supporting those 20 items that were  
21 in that listed letter, 1 through 20.

22 (PLF. EXH. 254 was marked for  
23 identification.)

24 Q. Okay. All right, sir. Let's turn to  
25 tab 254, please.

1 A. Okay. I'm there.

2 Q. All right. And this is an e-mail --  
3 okay. So the letter requesting additional  
4 information is February 4th for Buck Lindsay, the  
5 prior exhibit, correct?

6 A. Yes. February 4, 2019.

7 Q. All right. And then it looks like one  
8 week later, on Monday, February 11, he sends you  
9 another e-mail, and that's this e-mail, correct?

10 A. Yes, sir. Contract -- subject line,  
11 contract close out, Bennett Hotel contract close  
12 out.

13 Q. Okay. All right, sir. So he had asked  
14 you for additional documentation and he had given  
15 you 30 days to do that. How long was it before  
16 you provided that additional documentation?

17 A. It took us about 28 days, I believe, 25  
18 days, to pull it together and get it printed.

19 Q. About a month?

20 A. About a month. He had given us 30 days  
21 and we were ticking along and getting it  
22 completed and getting it printed.

23 Q. Okay. All right. And you received this  
24 e-mail from Mr. Lindsay?

25 A. Yes, sir.

1 Q. And it shows, Jim Clements, Jennifer  
2 Faulkinberry and Kim Brown being copied?

3 A. Yes, sir.

4 MR. HILDEBRAND: All right. I  
5 would like to introduce this.

6 MR. BUNDY: Unsigned, Your Honor.  
7 I object.

8 THE COURT: It's an e-mail.  
9 Overruled.

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

12 (PLF. EXH. 254 was received in  
13 evidence.)

14 BY MR. HILDEBRAND:

15 Q. All right. Now, this is contract close  
16 out. What does that mean?

17 A. Pulling together the final calculation  
18 of the cost of the project.

19 Q. Is this something that happens on every  
20 project?

21 A. Yes, sir. You have to come to a number,  
22 total cost of the project.

23 Q. All right. David, regrets for not  
24 responding sooner on the status of applications  
25 for payments 43, 44 and 45. We have been working

1 to assemble all of the relevant information  
2 needed to complete this evaluation.

3 The following is what we have as I see  
4 it condensed into an actual format. If you  
5 disagree with any of the numbers -- with any of  
6 the below numbers in paragraphs 1 and 2, please  
7 advise. One, a NTP, that's notice to proceed?

8 A. Yes, sir.

9 Q. March 30, 2015, construction period, 852  
10 days, 28 months. So that was the original plan,  
11 correct?

12 A. Yes, sir.

13 Q. Contract completion as planned was July  
14 30, 2017?

15 A. Yes, sir.

16 Q. Days added by CEO, 20 days by owner  
17 change order number 3?

18 A. Yes, sir.

19 Q. Okay. Adjusted contract completion, so  
20 with the 20 days, it went to August 19, 2017,  
21 correct?

22 A. Yes, sir.

23 Q. All right. Days delayed, 531 as of  
24 2/1/19?

25 A. Yes, sir.

1           Q.   All right. Substantial completion to be  
2           determined. All right. So he's acknowledging  
3           what the number of delays were to that day,  
4           correct?

5           A.   Up to February 1, 2019.

6           Q.   All right. And then the next document  
7           is -- next aspect of this amount, contract amount  
8           \$59,344,747, change order amount through AFP --  
9           and that's application for payment --

10          A.   Yes, sir.

11          Q.   -- 44, \$5,637,169.15. So this is the  
12          amount of the changes that had been added to the  
13          original contract amount?

14          A.   Yes, sir.

15          Q.   Okay. Adjusted contract amount,  
16          \$64,981,916.14. So you add the changes, and  
17          those were agreed upon changes by the owner,  
18          correct?

19          A.   Yes, sir.

20          Q.   So there's no dispute on that as far as  
21          you're concerned?

22          A.   None that I'm aware of.

23          Q.   Okay. So the architect is saying,  
24          here's the agreed upon contract amount  
25          \$64,981,000. Amount paid through AFP, 42,



1       \$59,999,390.36, correct?

2           A.    Yes, sir.

3           Q.    The amount remaining, according to this  
4   e-mail to you from the architect, \$4,982,525.78;  
5   is that correct?

6           A.    Yes, sir.

7           Q.    So that was remaining under the agreed  
8   upon contract?

9           A.    Yes, sir.

10          Q.    And so do you know why that had not been  
11   paid up until that point?

12          A.    They were withholding payment.

13          Q.    Okay. Number 3, the owner has specific  
14   claims to be asserted related to time and amount  
15   as the work completes, as follows: A, for owner  
16   furnished painting and tech work in response to  
17   BBC's refusal to address painting punch work  
18   supported by invoices, 2 million dollars to be  
19   finalized. What was that? That was the  
20   repainting of the rooms?

21          A.    That was the owner repainting of the  
22   rooms.

23          Q.    List of credits due for work not  
24   performed, and it says, see attached. So if we  
25   turn to the last page of this document, there

1 is -- it looks like a total of \$272,469.75 that  
2 the owner was saying that y'all had not  
3 performed; is that right?

4 A. Yes, sir.

5 Q. Okay. Art work installation credit,  
6 what was that?

7 A. There was some art work that the FFE  
8 subcontractors, there was some art work that  
9 wasn't there to be installed. So they're asking  
10 for a credit for that.

11 Q. Fireman phone credit?

12 A. There was an issue with the fireman  
13 phone, and there was three phones that were  
14 called forward that we did not install because  
15 they put in a notifier system. It's basically a  
16 system that goes straight to the fire department  
17 and that would be a credit from the electrician.

18 Q. Let's jump down to number 9, mason --  
19 that's a larger one. Masonry testing over  
20 \$64,969.65. What was that one?

21 A. That was Matrix testing. They felt that  
22 they went over and above for the Mason. I assume  
23 they had a budget for the Mason, a budget for the  
24 testing, and it went over.

25 Q. Did y'all agree to that?

1           A.   No, sir. The subcontractor did.

2           Q.   All right. Uninstalled armoires,  
3   25,000?

4           A.   Yeah. Actually Tim and I -- there was  
5   three armoires that wouldn't fit in the room,  
6   they had to take apart. So they pulled them  
7   apart and Tim and I carried two of them in there,  
8   and they were heavy. And the third one, I  
9   believe the owner carried in.

10          Q.   Okay. RCO 220 walkway credit, \$24,000.  
11   What was that?

12          A.   That was the walkway up in the  
13   mechanical room. It was a big iron walkway for  
14   them to get over to the ductwork. There was a  
15   lot of ductwork on the roof and come out of the  
16   door and get over to the service areas, getting  
17   over to the make up area units and air handler  
18   units that we'd be -- steel walkway.

19                They had put in as much they could. And  
20   they had already built it, and they wanted the  
21   credit back. So I gave them a credit back on a  
22   previous change order. I went through and  
23   calculated it myself.

24          Q.   Okay. So the owners or the architect is  
25   saying in this document that the owner is --

1       wants to deduct \$272,469.75. Did you agree with  
2       that amount?

3           A.   No, sir.

4           Q.   All right. So then the next one.

5           A.   Are you back on page --

6           Q.   The first page, yes, sir.

7           A.   Okay. Thank you.

8           Q.   3C, architect, engineering fees  
9       incurred, moved four days past -- 60 days past  
10      completion date based on invoicing \$187,000,  
11      \$123. What was that for?

12          A.   I assume that's for the architect. I  
13      don't know which completion date it's  
14      referencing, the first completion or second  
15      completion, but I'm not sure what that was for.  
16      I was not given a breakdown or anything of what  
17      it was for or days or hours.

18          Q.   Okay. And then D, liquidated damages,  
19      530 days by \$9,000 a day equals \$4,779,000,  
20      paren, based on cap of GC's fee, \$1,400,000. So  
21      they were saying that they were liquidated  
22      damages, but they were capped at 1,400,000?

23          A.   The fee.

24          Q.   Okay. All right. Let me go down and  
25      I'm going to ask you some questions about that in

1       just a minute. Other claims the owner may assert  
2       based on ongoing total, and then it says, the  
3       owner is claiming \$3,672,657 for contract amount  
4       remaining based on owner's right to retain  
5       payment related to disputed amounts,  
6       \$1,309,866.78. Did Balfour ever receive that  
7       amount?

8           A. No, sir.

9           Q. Okay. The contract amount remaining,  
10       there is none noted?

11          A. Yes, sir.

12          Q. So the owner unilaterally told you that  
13       there were deductions from the final amount owed,  
14       but this was remaining; is that correct?

15          A. That's basically what he was saying,  
16       yes, sir.

17          Q. All right. So here's the big question.  
18       The -- prior to this letter, what notice -- so it  
19       says that the change completion date up above  
20       that, adjusted contract completion date, August,  
21       19, 2017?

22          A. Yes, sir.

23          Q. From that date until you received this  
24       e-mail from the architect, what notification, if  
25       any, did Balfour receive from the owner or the

1 architect or anybody on their behalf that there  
2 was any intention by the owner to assess  
3 liquidated damages?

4 MR. BUNDY: Objection.

5 THE COURT: Overruled. Go ahead.

6 THE WITNESS: We received no notice  
7 from the owner that they were going to assess  
8 liquidated damages up to this point of this  
9 letter. This is the first notice we've seen that  
10 they were going to assess liquidated damages.

11 BY MR. HILDEBRAND:

12 Q. Okay. So in none of the OCO meetings  
13 was there any assessment of -- or notice of a  
14 claim or assessment of liquidated damages or  
15 delay damages by the owner?

16 A. No, sir.

17 Q. Have you reviewed the contract  
18 correspondence, the millions of documents,  
19 letters, and such, and have you been able to find  
20 any notice of a claim of the owner to Balfour for  
21 delays and liquidated damages?

22 MR. BUNDY: Objection.

23 THE COURT: Overruled.

24 A. No, sir. I didn't find any document.

25 Q. How about when the dispute arose with

1 the delays to the project and related to the  
2 sixth floor and the -- were there -- was there  
3 any notice of any issues with Balfour and any  
4 delay claims or other claims from the owner at  
5 that point?

6 MR. BUNDY: Objection.

7 THE COURT: Overruled.

8 A. Well, I didn't find anything in the  
9 document that we were notified of liquidated  
10 damages.

11 Q. Did this come as a surprise to you?

12 MR. BUNDY: Objection.

13 THE COURT: Overruled. Go ahead.

14 A. It came as a big surprise.

15 Q. Okay. You started the project in -- you  
16 came to the project -- I am sorry -- in late  
17 December of 2017?

18 A. December.

19 Q. Okay. And you've been with Balfour  
20 for -- at that point, you had been with them for  
21 about 30 years or so?

22 A. Yes, sir.

23 Q. All right. If I do the math, at about  
24 \$9,000 a day for 30 -- or a month, that comes up  
25 to roughly about \$300,000 a month. So if you

1       have liquidated damages of \$9,000 a day for a  
2       month, it's around \$300,000. Okay? Actually, I  
3       can figure it up right now.

4                   THE COURT: 9 times 30 is 270,  
5       right?

6                   MR. HILDEBRAND: Right.

7                   THE COURT: Lawyers are not good  
8       with math. I'm well aware of that.

9                   MR. HILDEBRAND: All right.

10       BY MR. HILDEBRAND:

11               Q. \$270,000. If the owner had said as of  
12       August 19, 2017, with the next pay application  
13       that came along, that it was going to deduct  
14       \$9,000 a day starting then until the project was  
15       completed for liquidated damages, what would have  
16       been the reaction of Balfour?

17                   MR. BUNDY: Objection. Pure  
18       speculation.

19                   THE COURT: I think that calls for  
20       speculation, does it not? I would sustain that.

21                   MR. HILDEBRAND: Your Honor, one of  
22       our claims is that we were inappropriately and  
23       unfairly, as part of our breach of contract  
24       covered by fraudulent act, that we were  
25       inappropriately led to believe that we were going



1       to be paid for all this work, and right at the  
2       end, with no forewarning, the owner out of the  
3       blue -- here's the situation.

4               We finished the job. We get substantial  
5       completion. The owner gets the hotel. And then  
6       all of a sudden for the first time, the owner  
7       says, oh, well, guess what? We're going to  
8       assert liquidated damages going all the way back  
9       to 2017.

10              And you will hear in just a little  
11       while, oh, by the way, we're not going to  
12       recognize the cap that our architect says is in  
13       the contract, and by the way, we are not going to  
14       recognize the waiver of consequential damages.  
15       So all of a sudden, we're owed the contract  
16       balance. We've got delay claims, and the owner  
17       says for the first time, we're going to assert  
18       all these claims going way back then.

19              He's been with -- I can lay more  
20       foundation if you would like about what  
21       involvement he has had in his position with the  
22       company. Because as a vice president of BBC, I  
23       think it would be an appropriate opinion for him  
24       to say when he got on the project -- and I will  
25       limit it to that.

1                   If he -- when he got there in November  
2                   of 2017, if three months or four months of  
3                   liquidated damages had been assessed, what would  
4                   have happened?

5                   MR. BUNDY:   Objection.

6                   THE COURT:   Is it the position of  
7                   the plaintiffs that this is the first breach and  
8                   this is when the bad act accompanied the breach,  
9                   is that what their position is?

10                  MR. HILDEBRAND:   No, sir.

11                  THE COURT:   I didn't think so.

12                  MR. HILDEBRAND:   No, sir, it's not.

13                  THE COURT:   Well, the fraudulent  
14                  act has to accompany the breach, does it not?

15                  MR. HILDEBRAND:   Yes, sir.

16                  THE COURT:   That breach --

17                  MR. HILDEBRAND:   This is one of the  
18                  breaches, yes, very much so.   And it goes back to  
19                  when the owner did not make claims against us  
20                  when the original completion dates were finished.  
21                  But there were a number of first breaches that  
22                  predeceased -- preexist before the -- precede.  
23                  One was --

24                  THE COURT:   All right.   If you will  
25                  limit it to his involvement, I'm going to allow

1       it.

2       BY MR. HILDEBRAND:

3           Q.   All right.  So you got the project in  
4       November of 2017?

5           A.   Yes.

6           Q.   Okay.  So that would have been three  
7       months.  So I will have to pull up my calculator.  
8       The Judge will probably set it on his schedule.

9                   If three months of liquidated damages  
10       were deducted from your pay application as of the  
11       time that you got to the project by the owner  
12       saying that three months of \$870,000, that they  
13       were going to deduct those liquidated damages.  
14       What would have been the reaction of Balfour  
15       Beatty?

16                   MR. BUNDY:  Objection.

17                   THE COURT:  Objection as to  
18       speculation?

19                   MR. BUNDY:  Well, not only is it  
20       speculation.  It's an improper interpretation of  
21       the contract.  He's not been listed as an expert  
22       witness in the law.  He's not been listed as an  
23       expert witness on the AIA documents.

24                   We, in fact, have listed an expert on  
25       the AIA documents who was on the panel that wrote

1 the documents who's coming from Minnesota to  
2 explain all this to us. I've met with Patrick  
3 O'Connor. He's been practicing law for 40 years.

4 THE COURT: Okay.

5 MR. BUNDY: He's a chairman of the  
6 committee on the AIA that wrote these documents,  
7 and I think that he's a little bit better  
8 qualified than this elderly gentleman telling us  
9 what these documents say. Thank you, Your Honor.

10 THE COURT: Objection noted.  
11 Overruled. Go ahead.

12 THE WITNESS: There had been a lot  
13 more people than me showing up on this project  
14 for Balfour Beatty to sit down and try to work  
15 through what happened up to that point to get the  
16 liquidated damages removed.

17 BY MR. HILDEBRAND:

18 Q. If you'd not reached a resolution,  
19 what -- was it your position -- was it Balfour's  
20 position that it owed any liquidated damages at  
21 that point?

22 MR. BUNDY: Objection.

23 THE WITNESS: No, sir.

24 THE COURT: Overruled.

25 BY MR. HILDEBRAND:

1           Q.    So what would happened if the owner  
2           would not have agreed -- or if he hadn't been  
3           able to resolve that --

4                   MR. BUNDY:  Objection.

5           Q.    -- or that claim by the owner at that  
6           time?

7                   MR. BUNDY:  Objection.

8           BY MR. HILDEBRAND:

9           Q.    Would you have continued working?

10                   MR. BUNDY:  Objection.

11                   THE COURT:  Overruled.

12                   THE WITNESS:  That hotel would  
13           probably be sitting there unfinished today.

14           BY MR. HILDEBRAND:

15           Q.    So the answer is, you would not have  
16           continued the work; is that correct?

17           A.    Unless we could come to a resolution.

18                   (A recess transpired.)

19                   MR. HILDEBRAND:  Your Honor, it's  
20           momentous.  I think Mr. Bundy and I agreed on  
21           something.

22                   MR. BUNDY:  And we better get there  
23           quick.

24                   THE COURT:  I saw y'all talking.  
25           I'm very impressed.

1 MR. BUNDY: Smiling and talking.

2 It don't happen often.

3 THE COURT: I put the word out. I  
4 said, the first thing I got y'all to agree to was  
5 here.

6 MR. BUNDY: Right. And the last.

7 MR. HILDEBRAND: Your Honor, I  
8 would like the record to reflect that I  
9 approached Mr. Bundy to start the process.

10 THE COURT: All right. Very good.  
11 Do y'all want to press forward?

12 MR. HILDEBRAND: Yes, sir.

13 (PLF. EXH. 255 was marked for  
14 identification.)

15 BY MR. HILDEBRAND:

16 Q. So the next document, 255, letter to  
17 Buck Lindsay from you and a CC to Balfour Beatty  
18 Corporation. Do you see that?

19 A. From Library Associates?

20 Q. Yeah. I'm sorry. This is tab 255,  
21 Library Associates.

22 A. 255, yeah, Library Associates letter.

23 Q. Right. Are you with me?

24 A. Yes, sir.

25 Q. All right, sir. This is a letter from

1       Kimberly Brown, authorized agent, Library  
2       Associates, LLC, February 14, and it's copied  
3       Balfour Beatty. Did you receive a copy of this  
4       letter?

5           A.    Yes, sir.

6           Q.    All right, sir.

7                   MR. HILDEBRAND: I would like to  
8       introduce this as our next exhibit, Exhibit 255,  
9       Your Honor.

10                  MR. BUNDY: No objection.

11                  THE COURT: Without objection.

12                         (PLF. EXH. 255 was received in  
13       evidence.)

14       BY MR. HILDEBRAND:

15           Q.    Dear Buck, the owner of Library  
16       Associates is in receipt of your e-mail of  
17       February 11, 2019. In the e-mail you reference,  
18       among other things, that the project is 531 days  
19       delayed as of 2/1/2019.

20                   You also note that the date of  
21       substantial completion has not been determined.  
22       With regard to the delay of 531 days, you  
23       referenced a cap on the liquidated damages to be  
24       paid by the contractor.

25                   I write now to formally inform the

1 architect and the contractor that the owner  
2 claims that any cap on liquidated damages does  
3 not apply, duly noting, to the prior breach of  
4 the contract documents by the contractor relative  
5 to the project completion.

6 So my question to you is, prior to this  
7 time, what notice, if any, had Balfour received  
8 by Library Associates that it did not intend  
9 to -- if any disputes arose to recognize that the  
10 cap in the contract of \$1,400,000 was due to a  
11 prior breach?

12 A. This was the first notice that we  
13 received in regard to that.

14 Q. Right. To your -- were you ever  
15 informed, to your knowledge, what -- what Library  
16 Associates contended the prior breach was that  
17 Ms. Brown had referred to in this letter?

18 A. No, sir.

19 (PLF. EXH. 256 was marked for  
20 identification.)

21 Q. All right. Let's turn to the next  
22 document, 256. March 16, 2019 letter from John  
23 Heuer, senior legal officer to Mr. Buck Lindsay.  
24 Are you familiar with this letter?

25 A. Yes, sir.



1           Q.   Did you receive -- I don't see that  
2           you're copied, but did you receive a copy of  
3           this?

4           A.   Yes, sir.

5           Q.   Are you familiar with the contents of  
6           it?

7           A.   Yes, sir.

8           Q.   And was this produced in the ordinary  
9           course of Balfour Beatty business?

10          A.   Yes, sir.

11                   MR. HILDEBRAND:  I would like to  
12           introduce this as our next exhibit.

13                   THE COURT:  Any objection?

14                   MR. BUNDY:  Yes, Your Honor, I  
15           object.

16                   THE COURT:  All right.  And the  
17           basis for the objection?

18                   MR. BUNDY:  Well, it's hearsay.  
19           It's not signed.

20                   THE COURT:  All right.

21                   MR. BUNDY:  It's an out of court  
22           statement, offered for proof of facts asserted.

23                   THE COURT:  This is a letter  
24           between Mr. Heuer and Mr. Lindsay.  There's no  
25           apparent copies on here.

1                   MR. HILDEBRAND: No, sir. But the  
2           witness did testify that he did receive a copy.

3           BY MR. HILDEBRAND:

4           Q. Did you receive a copy of this?

5           A. By e-mail.

6           Q. Virtually immediately when it went out?

7           A. Yes, sir.

8                   THE COURT: So I am going to  
9           sustain the objection on that.

10                  MR. BUNDY: Thank you, Your Honor.

11                   (PLF. EXH. 257 was marked for  
12           identification.)

13           BY MR. HILDEBRAND:

14           Q. All right. Let's turn to 257. So I  
15           would like to --

16                  MR. HILDEBRAND: I'd like to  
17           proffer 256, Your Honor, to leave that in the  
18           record. I know it's not in evidence, but to  
19           leave in the record as a Court's exhibit.

20                  THE COURT: I will allow that. 256  
21           is proffered but not in evidence.

22                  MR. HILDEBRAND: Thank you, Your  
23           Honor.

24                   (PLF. EXH. 256 was received as a  
25           proffer.)

1                   MR. BUNDY: Your Honor, I don't  
2                   know technically if it would be a Court's  
3                   exhibit. It would just be identified.

4                   THE COURT: That's right. It's  
5                   basically just for identification purposes.

6                   MR. BUNDY: Right. It would be  
7                   Plaintiff for identification number 256, right?

8                   THE COURT: Right.

9                   MR. BUNDY: All right. Thank you.

10                  MR. HILDEBRAND: I stepped in the  
11                  gauntlet one time for not calling it a Court's  
12                  exhibit and for not --

13                  THE COURT: Well, I try not to put  
14                  stuff in evidence, but we may have to get there  
15                  one day. We will see.

16                  BY MR. HILDEBRAND:

17                  Q. All right, sir. So March 6, 2019. This  
18                  is a letter from you to Buck Lindsay saying  
19                  people are copied, Thomas Ryan with MetLife, Kim  
20                  Brown, Jennifer Faulkinberry, and that's your  
21                  signature on the second page?

22                  A. Yes, sir.

23                  Q. All right, sir. So and --

24                  MR. HILDEBRAND: I would like to  
25                  introduce this as our next one, Your Honor.

1 THE COURT: Okay.

2 MR. BUNDY: Your Honor, I don't  
3 have any problem with it, but what I would like  
4 to do if I'm correct is establish that the  
5 documents referred to are, in fact, already --  
6 are these the documents -- I guess this is a  
7 question.

8 MR. HILDEBRAND: I haven't gotten  
9 there.

10 MR. BUNDY: Okay.

11 THE COURT: But the letter itself  
12 is in evidence and you're trying to find out  
13 what's in it.

14 MR. BUNDY: I don't object to the  
15 letter once it's clear what the attachments are,  
16 and they're already in evidence, and he says he's  
17 going to clean that up.

18 THE COURT: Okay. All right. 257.

19 BY MR. HILDEBRAND:

20 Q. So this letter is basically your  
21 transmittal letter of the claim, the four volume,  
22 one foot tall claim documentation, which was  
23 marked as Defendant's Exhibit --

24 THE COURT: 11, 12, 13, and 14.

25 MR. HILDEBRAND: Yes, sir.

1 BY MR. HILDEBRAND:

2 Q. Is that correct?

3 A. Yes, sir.

4 MR. BUNDY: No objection.

5 (PLF. EXH. 257 was received in  
6 evidence.)

7 (PLF. EXH. 258 was marked for  
8 identification.)

9 BY MR. HILDEBRAND:

10 Q. All right. The next document is 258.  
11 It's a letter from Buck Lindsay to Jim Clements  
12 and you were copied; is that correct?

13 A. It's from Jim Clements to Buck Lindsay  
14 dated March 14th, 2019.

15 Q. Right. I'm sorry. Did I misstate that?  
16 From Jim Clements to Buck Lindsay, March 14,  
17 2019, and you were copied on that, right?

18 A. Yes, sir.

19 Q. All right. And this relates to the  
20 consolidated claim letter that we've already  
21 discussed, correct?

22 A. Yes, sir, the backup that we sent over.

23 Q. Okay. Are you -- did you receive a copy  
24 of this letter?

25 A. Yes, sir.

1           Q.   All right.  In the ordinary course of  
2   business for Balfour?

3           A.   Yes, sir.

4           Q.   All right.

5                   MR. HILDEBRAND:  I would like to  
6   introduce this, Your Honor.

7                   MR. BUNDY:  No objection.

8                   THE COURT:  Without objection.  258  
9   in evidence.

10                   (PLF. EXH. 258 was received in  
11   evidence.)

12                   (PLF. EXH. 260 was marked for  
13   identification.)

14   BY MR. HILDEBRAND:

15           Q.   All right.  Let's go to Exhibit 260,  
16   please.

17           A.   Okay.  I'm there.

18           Q.   Okay.  This is the architect's  
19   certificate of substantial completion; is that  
20   correct?

21           A.   Yes, sir, G704 2017.

22           Q.   Okay.  What was the date -- what does  
23   substantial completion mean?

24           A.   The project reports are designated by  
25   (inaudible) member required.  Basically the work

1 is completed.

2 Q. What date did Balfour or does Balfour  
3 Beatty contend that substantial completion took  
4 place on this job?

5 A. December 28th.

6 Q. Okay. Why the disconnect? Why do you  
7 think it occurred earlier than what the architect  
8 said?

9 A. They were repainting the rooms.

10 Q. Okay. All right. And this certificate  
11 of substantial completion, did you obtain a copy  
12 of this?

13 A. Yes, sir, I did.

14 MR. HILDEBRAND: I would like to  
15 move to introduce this one, Your Honor.

16 MR. BUNDY: No objection.

17 THE COURT: In evidence.

18 (PLF. EXH. 260 was received in  
19 evidence.)

20 (PLF. EXH. 261 was marked for  
21 identification.)

22 BY MR. HILDEBRAND:

23 Q. All right. The next document I would  
24 like you to refer to is 261. Are you with me?

25 A. I'm there.

1           Q.   All right.  This is a letter to Buck  
2   Lindsay from Bill Bundy and various people are  
3   copied on it.  Did you receive a copy of this  
4   letter?

5                   MR. BUNDY:  Wait, wait, wait.  
6   Objection.  I don't see -- I don't see where Buck  
7   Lindsay was sent this.  This is a letter from my  
8   expert to me -- an e-mail from my expert to me.

9                   MR. HILDEBRAND:  Is this 261?

10                  MR. BUNDY:  That's what I've got in  
11   mine.

12                  THE COURT:  261, and then there's  
13   an e-mail attachment to it.  It's a two-page  
14   letter.

15                  MR. BUNDY:  261 is a letter in  
16   April '19.  I guess I missed the first page.  So  
17   it's my letter to Lindsay, right?

18                  THE COURT:  Correct.

19                  MR. BUNDY:  I will withdraw that  
20   then, but continue.  I apologize.

21                  MR. HILDEBRAND:  Okay.  Do you  
22   object to the admission of this?

23                  THE COURT:  And then attached to it  
24   is the e-mail?  Is that a part of 261?

25                  MR. HILDEBRAND:  Yes.  It says,



1 attachment to Mr. Bundy.

2 THE COURT: The e-mail is attached  
3 to it.

4 MR. BUNDY: I have no objection to  
5 this, I apologize.

6 THE COURT: In evidence, 261.

7 (PLF. EXH. 261 was received in  
8 evidence.)

9 BY MR. HILDEBRAND:

10 Q. All right. I just want to ask you one  
11 question on this. It's the --

12 MR. BUNDY: The only -- let me just  
13 say one thing. The only objection I would have  
14 to this is if it's used to try to make me a  
15 witness in this case. If it is, I object.

16 THE COURT: Okay. All right.

17 MR. BUNDY: And I'd like to have  
18 a -- can I get a ruling on whether he's allowed  
19 to call me as a witness in this case? He's  
20 already taken my deposition.

21 THE COURT: I know. I know. I  
22 would have stopped that if I could have, but I  
23 didn't know about it so.

24 MR. BUNDY: Well, I couldn't do  
25 anything until it occurred because I had no basis

1       upon which to bring it to your attention.

2                   THE COURT: All right. I'm with  
3       you. You don't intend to call him or use his  
4       deposition, I hope?

5                   MR. HILDEBRAND: I don't think that  
6       I'm going to need to, Your Honor. He is the --  
7       he is on some of the e-mails, but I'm not trying  
8       to play games here. I'm not trying to cause  
9       problems.

10                  MR. BUNDY: Okay. So he's not  
11       going to call me?

12                  MR. HILDEBRAND: I don't -- we  
13       don't know what's going to happen yet.

14                  THE COURT: But I'm not likely to  
15       allow it. You'll have to -- he's in here as  
16       counsel. He's not a witness.

17                  MR. HILDEBRAND: I understand, Your  
18       Honor. I'm just not going to foreclose if --  
19       something unforeseeable could happen. I'm not --  
20       so I'm not going to perspective say that. But  
21       I can tell you that, as of right now, I have no  
22       intention of calling him.

23                  THE COURT: Well, there's about a  
24       99.9999 percent chance he ain't getting called as  
25       a witness in this case.

1                   MR. BUNDY: And I would say there's  
2           a hundred percent chance if he does put me on the  
3           witness stand, things unforeseeable will happen.

4                   THE COURT: Okay. I can understand  
5           that.

6           BY MR. HILDEBRAND:

7                 Q. All right. So the section I would like  
8           to refer you to is the very last clause of the  
9           last sentence.

10                  THE COURT: Where are we? Are we  
11           in the letter or the e-mail?

12                  MR. HILDEBRAND: In the letter.

13                  THE COURT: In the letter.

14                  MR. HILDEBRAND: The second page of  
15           the last sentence.

16                  THE COURT: Okay.

17           BY MR. HILDEBRAND:

18                 Q. Unless and until Library Associates  
19           received a properly presented and documented  
20           claim that abides by the terms of contract,  
21           regrettably, it has no choice but to deny the  
22           claim in its entirety. Did I read that  
23           correctly?

24                 A. Yes, sir.

25                 Q. All right. Who is responsible? Do you

1       know -- so Library is telling -- did you  
2       understand this to mean that the claim was being  
3       denied by the owner?

4                   MR. BUNDY:  Objection.  He's asking  
5       this witness to interpret my letter, and that's  
6       not what it meant.  That's not what I said.  And  
7       I object strongly to this.

8                   THE COURT:  I'm going to sustain  
9       that.  It says what it says.

10                  MR. HILDEBRAND:  All right, sir.

11       BY MR. HILDEBRAND:

12                  Q.  All right.  The next document is a  
13       letter from Buck Lindsay to Tom Hildebrand,  
14       copied John Heuer and a litany of other people  
15       including Walter Bundy and Brent McDonald and  
16       others.

17                  A.  Which document is that, Tom?

18                  THE COURT:  Are you on 262?

19                  MR. HILDEBRAND:  263.

20                  THE COURT:  263.

21                         (PLF. EXH. 263 was marked for  
22       identification.)

23       BY MR. HILDEBRAND:

24                  Q.  Are you familiar with this document?

25                  A.  Yes, sir.

1 Q. Were you provided a copy of this --

2 A. Yes, sir.

3 Q. -- basically contemporaneously when it  
4 came in?

5 A. Yes, sir.

6 MR. HILDEBRAND: I'd like to  
7 introduce this, Your Honor.

8 MR. BUNDY: Well, I don't object to  
9 the top of it where Buck Lindsay is talking. All  
10 right. I don't object to what Buck Lindsay --  
11 that portion from the middle of it up.

12 I don't know what the relevance is to  
13 Mr. Hildebrand resending Mr. Heuer's letter to  
14 all persons that was copied and sent letters that  
15 are not in evidence. So I would -- and I'm not  
16 so sure what the purpose of it is. I object to  
17 the bottom of the e-mail.

18 THE COURT: All right.

19 MR. BUNDY: If he can just redact  
20 that, I'll -- I'll --

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

23 THE COURT: And apparently that was  
24 Exhibit 262; is that what's --

25 MR. BUNDY: Which he skipped over.

1 THE COURT: Right. So we're not  
2 trying to introduce 262?

3 MR. HILDEBRAND: No. No, sir.

4 THE COURT: All right. I'm going  
5 to allow it just for that purpose. 262 is not  
6 coming into evidence?

7 MR. HILDEBRAND: Right.

8 MR. BUNDY: And we've agreed -- we  
9 have both now agreed that the bottom part is not  
10 in evidence, just the top part. I agree to the  
11 top part of this e-mail.

12 THE COURT: Well, I'm --

13 MR. BUNDY: Okay.

14 THE COURT: I'm going to allow the  
15 e-mail as it is.

16 MR. BUNDY: Okay.

17 THE COURT: The way I see it,  
18 that's just the notice -- that's notice. It  
19 provides notice.

20 MR. HILDEBRAND: That's what it is.

21 MR. BUNDY: Right.

22 THE COURT: The substance is in the  
23 top.

24 MR. HILDEBRAND: That's exactly  
25 right, Your Honor. That's what I'm trying to

1       introduce.

2                   THE COURT:   All right.

3                   (PLF. EXH. 263 was received in  
4       evidence.)

5       BY MR. HILDEBRAND:

6           Q.   And the subject, Bennett Hotel.

7       Mr. Hildebrand, I refer to your letter of April  
8       24 to me and to Bundy and McDonald's letter of  
9       April 19 to me, both on the subject of delays in  
10      reference to this project.

11               I have already responded to that subject  
12      in my letter of February 4, 2019, attached, in  
13      which I stated to David Simonton that BBC -- at  
14      BBC, that I had not been provided with accurate  
15      information from BBC to make a determination on  
16      BBC's delay claim.

17               I requested that additional information  
18      on the delay subject to a few subsequent  
19      communications to Simonton, but to-date have not  
20      received any useful reply.

21               Let me ask you this:   He had received  
22      the Defendant's Exhibits 11 through 14 on this  
23      date; is that correct?

24           A.   Yes, sir.

25                   MR. BUNDY:   Objection.

1 BY MR. HILDEBRAND:

2 Q. All right. The second attachment is my  
3 March 15, 2019 publications of the certificate of  
4 substantial completion with February 15, 2019 as  
5 the date of substantial completion, which in  
6 effect discharges our initial decision maker duty  
7 on the subject of the delays. So did I read that  
8 correctly?

9 A. Yes, sir.

10 (PLF. EXH. 264 was marked for  
11 identification.)

12 Q. All right. And then Exhibit 264. Are  
13 you with me?

14 A. Yes, sir.

15 Q. All right. And that's a letter from you  
16 to Buck Lindsay?

17 A. Yes, sir.

18 MR. HILDEBRAND: Okay. I would  
19 like to move to introduce this, Your Honor.

20 MR. BUNDY: No problem. No  
21 objection.

22 THE COURT: 264. Okay.

23 MR. BUNDY: 264, right?

24 MR. HILDEBRAND: Correct.

25 MR. BUNDY: Okay. No objection.



1 (PLF. EXH. 264 was received in  
2 evidence.)

3 BY MR. HILDEBRAND:

4 Q. Dear Mr. Lindsay, I'm responding to your  
5 e-mail dated April 24, 2019 to our counsel, Tom  
6 Hildebrand, referring -- regarding Balfour  
7 Beatty's consolidated claim.

8 Before receiving e-mail, I'm not aware  
9 of Balfour Beatty having received a formal  
10 acceptance or objection of the claim, and we  
11 certainly didn't take a request for further  
12 information via rejection.

13 After furnishing four volumes of  
14 information in response to your request, no  
15 initial decision was provided; however, we are  
16 considering your e-mail dated April 24, 2019 to  
17 be your initial decision in writing, rejecting  
18 the claim.

19 Pursuant to 12 -- to article 15.2.6.1 of  
20 the contract Balfour Beatty requested that the  
21 matter of the consolidated claim be referred to  
22 mediation; is that correct?

23 A. Yes, sir.

24 MR. HILDEBRAND: All right, sir.  
25 I've got the book of RCOs that we introduced.

1       Some of them were not signed, and some of them  
2       were objected to by Mr. Bundy.

3               Bill, I've got some -- we dug deeper,  
4       and I think we've got signed copies of those and  
5       such. Do you want to review those and see?

6               MR. BUNDY: Sure.

7               MR. HILDEBRAND: I should have  
8       given them to you earlier. I didn't think about  
9       it. I apologize.

10              MR. BUNDY: Sure. So what you have  
11      done is, you've added signed ones, but you  
12      haven't added any additional backup, right, or  
13      have you?

14              MR. HILDEBRAND: No.

15              MR. BUNDY: Okay. So my objection  
16      then, as it relates to the backup, would still be  
17      in place, right?

18              MR. HILDEBRAND: Was there any  
19      backup?

20              MR. LAND: There was something he  
21      said that we didn't have backup for and we added  
22      that backup.

23              MR. BUNDY: Has there been backup  
24      added?

25              THE COURT: I'm going to probably

1 break for lunch and let y'all work through that.

2 MR. BUNDY: Yeah. Why don't we  
3 look at this over lunch?

4 MR. HILDEBRAND: Okay. Good.

5 MR. BUNDY: Let's look over this at  
6 lunch, and I will write you a little note like I  
7 did last time.

8 THE COURT: That will be fine.

9 MR. HILDEBRAND: I've got some  
10 questions regarding these documents.

11 THE COURT: Sure. That would be  
12 fine. Do you want to break now or later?

13 MR. HILDEBRAND: Yeah, that would  
14 be good, Your Honor.

15 THE COURT: Okay. It's easier to  
16 go ahead and break and let y'all work through  
17 that?

18 MR. HILDEBRAND: It probably would  
19 be, yes, sir.

20 THE COURT: Okay. It's like 10  
21 'til 12. Let's just come back at 1:45. Okay?  
22 I'll give y'all a couple hours to work on that.  
23 Okay. See what you can do.

24 THE WITNESS: Your Honor, 1:45 is  
25 that what you said?

1 THE COURT: Yes, 1:45.

2 (A recess transpired.)

3 THE COURT: All right. Folks,  
4 sorry for that delay, but I got something done so  
5 that's good.

6 Mr. Hildebrand?

7 MR. HILDEBRAND: Yes, sir, thank  
8 you.

9 MR. BUNDY: Your Honor, before the  
10 break, you wanted me to look at these documents.  
11 And as I understand it, what the request is, is  
12 that Mr. Hildebrand has gone through the original  
13 notebook and gone through those ones that I have  
14 exceptions to.

15 Now, there's another notebook. We're  
16 going to look at those, and as you decide, we  
17 will take them out of -- we'll take what was  
18 objectionable out of the original notebook and  
19 put the appropriate tab in; is that correct?

20 THE COURT: Okay.

21 MR. HILDEBRAND: That will work.

22 THE COURT: That works for me. And  
23 we're -- I want to make sure which book we're in.  
24 We're in Exhibits 250 to 282, Exhibit book.

25 MR. HILDEBRAND: This would be

1 under change orders.

2 THE COURT: Oh, change orders?

3 Okay.

4 MR. BUNDY: Which is binder five of  
5 five.

6 THE COURT: Binder five? All  
7 right. I'm sorry. Okay.

8 MR. HILDEBRAND: And then the -- we  
9 went back and did a deeper dive for some  
10 produced, some signed copies and such.

11 THE COURT: Okay. Additional  
12 documents?

13 MR. HILDEBRAND: Yes, sir. And do  
14 you have this?

15 THE COURT: All right. Well,  
16 that's what she just handed me was this binder  
17 five, so is that --

18 MR. HILDEBRAND: Right. And then  
19 there's -- that's the deeper dive.

20 THE COURT: Okay.

21 MR. HILDEBRAND: The ones that they  
22 had an objection on.

23 THE COURT: Okay. These are ones  
24 to which there were objections only?

25 MR. HILDEBRAND: Yes, sir.

1 THE COURT: Okay.

2 MR. BUNDY: As I understand it. I  
3 think we probably ought to do it as we go along.  
4 In other words, as I say something and you say  
5 it's okay, let's take that one out and put the  
6 new one in.

7 THE COURT: Okay.

8 MR. BUNDY: And that way we have  
9 one less notebook in this case.

10 THE COURT: I'm all for that one.

11 MR. BUNDY: All right.

12 THE COURT: And I'm assuming you  
13 know which ones you objected to at this point in  
14 time --

15 MR. BUNDY: Yes, sir.

16 THE COURT: -- without me having to  
17 flip back and forth.

18 MR. BUNDY: Right, right, I do.

19 THE COURT: Perfect.

20 MR. BUNDY: I mean, my normal  
21 tendency, of course, is to object to everything,  
22 but I'm going to be specific.

23 THE COURT: Yeah.

24 MR. BUNDY: Number 3, didn't have  
25 complete backup before, but we paid it. So I

1       don't care anymore about that one.

2                   THE COURT:   Okay.

3                   MR. BUNDY:   So you can replace 3.  
4       Number 4 was not signed by the owner, but we also  
5       paid that one; so I don't care on that one  
6       either.

7                   THE COURT:   All right.   Just one  
8       sec. 3 and 4?

9                   MR. BUNDY:   3 and 4, yes, Your  
10      Honor.

11                  THE COURT:   All right.   So let's go  
12      through there.   So that's tabs 3 and 4?

13                  MR. BUNDY:   Yes, Your Honor.

14                  THE COURT:   Acceptable.   All right.

15                  MR. BUNDY:   All right.   The next  
16      one is, I object to number 20 --

17                  THE COURT:   Okay.

18                  MR. BUNDY:   I still object to it  
19      because it's not signed by the owner.

20                  THE COURT:   All right.

21                  MR. BUNDY:   Number 22 -- excuse me,  
22      number 21, I still object to because it's not  
23      signed by the architect or the owner.

24                  THE COURT:   Okay.

25                  MR. BUNDY:   Number 22, I still

1 object to because it's not signed by the  
2 architect or the owner, and those are my  
3 objections to where we are now.

4 THE COURT: Okay.

5 MR. BUNDY: Thank you.

6 THE COURT: So the only objections  
7 are not signed, 20 by the owner; 21 and 22 by  
8 neither the owner nor the architect?

9 MR. BUNDY: That's correct.

10 THE COURT: Correct?

11 MR. BUNDY: And I'm withdrawing my  
12 exception to 3 and 4 because they -- we paid  
13 them. It doesn't matter anymore whether they're  
14 signed or not.

15 THE COURT: Okay. All right.

16 MR. HILDEBRAND: Okay. So as I  
17 understand it, we will swap out the earlier  
18 objections. Weren't they to 1 -- I have in this  
19 notebook 1, 3, 4, 14, 15, 17, 18, 19, 20, 21, and  
20 22.

21 THE COURT: I was with you up to  
22 19.

23 MR. BUNDY: All right. You get up  
24 to 19, but I'm objecting to 20, 21, and 22.

25 THE COURT: Okay.



1                   MR. HILDEBRAND: Those were the  
2           ones -- okay. So we can swap out what are --  
3           what is in this book for 1, 3, 4, 14, 15, 17, 18  
4           and 19?

5                   MR. BUNDY: Correct.

6                   THE COURT: Okay.

7                   MR. HILDEBRAND: All right. So  
8           let's proceed?

9                   THE COURT: Yes, sir.

10                   (PLF. EXH. 226 was marked for  
11           identification and received in evidence.)

12           BY MR. HILDEBRAND:

13           Q. Okay. Mr. Simonton, you've got a  
14           notebook in front of you with some owner change  
15           orders that were just agreed upon by Mr. Bundy,  
16           three of which were not -- 20, 21 and 22 were  
17           not. Let's turn to the very last one that was  
18           agreed upon which is number 19.

19           A. I'm there.

20           Q. All right. So on the second page, we've  
21           got signatures by the architects and Jennifer  
22           Faulkinberry. Do you see that?

23           A. Yes.

24           Q. This is on 11/8/2018. Then we've got  
25           a -- is that your signature?

1 A. Yes, sir.

2 Q. Okay. Then that's 10/26/2018, and then  
3 we've got another signature, Kim Brown,  
4 11/23/2018; is that right?

5 A. Yes, sir.

6 Q. All right. This is pretty much -- this  
7 is right near the end of the job, right?

8 A. Yes, sir.

9 Q. In fact, this was just before -- gosh,  
10 maybe two months before Balfour contends that  
11 substantial completion was reached, correct?

12 A. Yes, sir.

13 Q. All right. And what is an owner change  
14 order? We had an earlier -- there's been a lot  
15 of discussion about RCOs, which are requested  
16 change orders. What is an owner change order?  
17 Can you tell the Judge what that is.

18 A. An owner change order is a change order  
19 between the contractor and the owner with the  
20 architect signing off on it, raising or lowering  
21 the contract value, just between the contractor  
22 and the owner.

23 Q. Okay. And who prepares these?

24 A. We did -- Balfour Beatty did, excuse me.

25 Q. Okay. And then you provided to both the

1 owner and the architect?

2 A. Yes, sir.

3 Q. Okay. On the first page, so this is  
4 change order date 10/19/2018, correct?

5 A. Yes, sir.

6 Q. All right. And then we've got a bunch  
7 of things underneath, work performed on  
8 construction change directives to be built at OCO  
9 on 019?

10 A. Yes, sir.

11 Q. So y'all had gotten construction change  
12 directives from the other? That's saying, just  
13 do this work, and we will work out the price  
14 later. But then that was changed to an owner  
15 change order where y'all came to an agreement on  
16 those issues? Is that a fair statement?

17 A. As the work progressed by the contract,  
18 we billed these monthly, whether completed or --  
19 if they're completing, which we wouldn't have the  
20 billing unless we worked -- had some more work on  
21 it. We billed these monthly, and then they would  
22 sign off on it and we would include this in that  
23 pay application.

24 Q. Okay. Try to speak up just a little  
25 bit.

1 A. I'm sorry, sir.

2 Q. You speak a little softly. So this  
3 changes the contract sum. So let's look at that  
4 section at the very last square on the bottom of  
5 that, where it says the original contract sum  
6 was.

7 A. I'm there.

8 Q. Okay. So as of this date, 10/19/2018,  
9 the original contract sum -- we've been through  
10 that several times, \$59,344,747, correct?

11 A. Correct.

12 Q. Net change by previous authorized change  
13 orders, \$5,550,634.83; is that right?

14 A. Yes, sir.

15 Q. So prior to this change order, there was  
16 an agreement between the owner and Balfour that  
17 there was an add to the contract with that  
18 \$5,550,000, correct?

19 A. Yes, sir.

20 Q. Okay. So the contract sum prior to this  
21 change order was 64 million, agreed upon; is that  
22 right?

23 A. Yes, sir.

24 Q. This one is for \$29,260.04, which raised  
25 the agreed upon contract amount to

1       \$64,924,641.87, correct?

2           A.    Yes, sir.

3           Q.    Okay. All right. Look below that where  
4       it says note. Do you see that right below that?

5           A.    Yes, sir.

6           Q.    It says, this change order addresses  
7       those requests for cost and/or time associated  
8       with the construction change directive and  
9       request for change order referenced above which  
10      are undisputed; however, this change order does  
11      not resolve related requests for cost and/or time  
12      which remain in dispute, and those requests are  
13      strictly reserved. Did I read that correctly?

14          A.    Yes, sir.

15          Q.    And this was signed again by all  
16      parties?

17          A.    Yes, sir.

18                   MR. BUNDY: For the record, the  
19      copy I have is not signed by the owner. Since I  
20      had already withdrawn my objection, I can't  
21      complain about it now, I guess?

22                   MR. HILDEBRAND: It is signed by  
23      the owner.

24                   THE WITNESS: Number 19?

25                   MR. BUNDY: I'm looking at the old

1       one.

2                   THE COURT:   Okay.   The Exhibit 19 I  
3       got is signed by all three.

4                   MR. BUNDY:   Okay.   I just didn't  
5       replace it in my book, I apologize.

6                   THE COURT:   Okay.   All right.

7       BY MR. HILDEBRAND:

8           Q.    Okay.   So let's turn very quickly.   Turn  
9       to the notebook that has Exhibits 250 to 282.  
10      Are you with me?

11           A.   Yes, sir.

12           Q.    There was an unsigned copy of this  
13      letter I've now got a signed copy.   Okay.

14           A.    What tab was it?

15           Q.    I'm sorry.   It's tab 256.

16           A.    Put this one out?

17           Q.    Yeah.   I'm going to refer you to what  
18      I've now handed you is a letter dated March 7,  
19      2019, to Winfred Lindsay from John Heuer  
20      regarding the Hotel Bennett.   Do you have that?

21           A.    Yes, sir.

22           Q.    Yes, sir.   And is that signed?

23           A.    Yes, sir, by John Heuer.

24           Q.    Okay.   And did you receive a copy of  
25      that?

1           A.    Yes, sir.

2           Q.    Okay.  And are you familiar with the  
3           information that's contained in that letter?

4           A.    Yes, sir.

5           Q.    And did you receive that about the time  
6           it was published?

7           A.    Yes, sir.

8           Q.    And was this part of the business  
9           records of Balfour Beatty?

10          A.    Yes, sir.

11                   MR. HILDEBRAND:  All right.  I  
12           would like to introduce this, Your Honor.

13                   MR. BUNDY:  Objection.  It's still  
14           hearsay.  It's an out of court statement offered  
15           for the proof of the matter asserted.  Mr. Heuer  
16           was not listed as a witness in this case.

17                   THE COURT:  Right.

18                   MR. BUNDY:  So it's objectionable.

19                   THE COURT:  Okay.  All right.  On  
20           the basis that it's hearsay.  What's the purpose  
21           of the letter?

22                   MR. HILDEBRAND:  It's a response to  
23           the claim from the -- we made a claim.  Then  
24           there was a response from the architect and  
25           owner.

1                   And then Mr. Heuer responded with his  
2           comments regarding the claim on behalf of Balfour  
3           Beatty, and this relates to some of the  
4           documents. It touches on documents that come  
5           after this about what the claim, what the owner's  
6           response is or what their beef is with Balfour  
7           Beatty. For example, he says --

8                   THE COURT: So what you seek is the  
9           substance of the letter, not just fact that he's  
10          disagreeing? You want to put in there that what  
11          you contend is what's in it as to be the truth?

12                  MR. HILDEBRAND: Well, it's -- no,  
13          sir. I think it's on -- it certainly puts the  
14          owner on notice for what his claims are and  
15          whether they ever responded to them. So I think  
16          that that's appropriate.

17                  THE COURT: So is it for a notice  
18          of, we object to what you have said?

19                  MR. HILDEBRAND: Yes, sir. Yes,  
20          sir.

21                  THE COURT: All right.

22                  MR. BUNDY: Your Honor, may I?

23                  THE COURT: Yeah.

24                  MR. BUNDY: Rule 803 hearsay  
25          exceptions availability of declarant immaterial.



1 THE COURT: Right.

2 MR. BUNDY: Six, records of  
3 regularly conducted activity. Memorandum,  
4 report, record or data compilation in any form of  
5 acts, events, conditions or diagnoses made at or  
6 near the time by or from information transmitted  
7 by a person with knowledge kept in the regularly  
8 conducted business activity, and if it was the  
9 regular practice of that business activity to  
10 make the memorandum, record, report, or data  
11 compilation.

12 All as shown by the testimony of the  
13 custodian or other qualified witness unless  
14 source of information or the method or  
15 circumstances of preparation indicate lack of  
16 trust worthiness; however, provided that  
17 subjective opinions and judgments found in  
18 business records are not admissible.

19 The term business as used in this  
20 subject shall mean businesses, institution,  
21 association, profession, occupation, and calling  
22 of every kind, whether or not conducted for  
23 profit.

24 Balfour Beatty is not in the legal  
25 business, and this is not -- this is not a record

1 of their -- their regularly conducted activities.  
2 And it's clearly subjective opinions and  
3 judgments of the offer. It's an out of court  
4 statement offered for the proof of the matter  
5 asserted. It's hearsay and does not meet any  
6 exception to the rule. Thank you, Your Honor.

7 THE COURT: What is your position  
8 on the letter itself?

9 MR. HILDEBRAND: I think that it  
10 is --

11 THE COURT: I'm addressing  
12 Mr. Hildebrand. I'm sorry.

13 MR. HILDEBRAND: Yes, Your Honor.  
14 I think that it is in this -- it's part of the  
15 chronology of the claim that we made and our  
16 responses to the architect and the owner's  
17 notices to us, and it puts them on notice of what  
18 our responses are.

19 And I think it is important that they  
20 did not respond to that. So that's -- I think it  
21 puts them on notice, and their lack of response  
22 is something for the Court to take into  
23 consideration in assessing the claim.

24 MR. BUNDY: Well, first off, the  
25 letter wasn't sent to Library Associates, so

1       there was nothing for us to respond to.

2               Number 2, if this letter is admissible,  
3       which obviously is your call, then I'm going to  
4       call Mr. Heuer probably as a witness in our case  
5       because he wasn't listed as a witness in this  
6       case and now, based on this letter, he will  
7       become a witness in this case. So if they want  
8       to make him a witness, I will be more happy to do  
9       bring him to trial.

10               THE COURT: I don't want him to be  
11       a witness any more than I want you to be one.  
12       Okay?

13               MR. BUNDY: All right.

14               THE COURT: I do think that it's  
15       hearsay. The document there, it's an opinion  
16       letter. It is -- again, I think I've already  
17       allowed it as a proffer.

18               But to the extent it goes into the  
19       substance of the letter, I do not believe it's  
20       admissible. I think it's admissible on the basis  
21       of notice and notice only that Balfour Beatty  
22       disagrees with the position that Library  
23       Associates, at least the architect in this  
24       instance has taken. But on the substance of the  
25       letter, I do not believe it's admissible. Okay?

1 MR. HILDEBRAND: I understand, Your  
2 Honor.

3 THE COURT: It's a legal opinion.

4 MR. HILDEBRAND: Right.

5 MR. BUNDY: I think we put him on  
6 notice in his counterclaim to deny the paper. I  
7 think they're on notice because we're. Okay? I  
8 don't -- I don't think --

9 THE COURT: Well, the timing is --

10 MR. BUNDY: I gotcha.

11 THE COURT: The timing is somewhat  
12 substantial from that standpoint.

13 MR. BUNDY: Well, I think at this  
14 point they had already sued us.

15 THE COURT: Yeah. On March the --

16 MR. HILDEBRAND: So we'll  
17 substitute this signed letter, March 7, for what  
18 was the --

19 THE COURT: I will stick it in the  
20 book with it.

21 MR. BUNDY: I hate to do this to  
22 you, but I take the position that while it's in  
23 for notice, it's only proof of notice to the  
24 architect.

25 THE COURT: Correct.

1 MR. BUNDY: Because there was no --

2 THE COURT: Right.

3 MR. HILDEBRAND: Your Honor, now, I  
4 obviously don't -- we've been through this ad  
5 nauseam.

6 THE COURT: Architects and agent or  
7 the owner?

8 MR. HILDEBRAND: Right.

9 THE COURT: Okay. All right.

10 BY MR. HILDEBRAND:

11 Q. All right. So let's turn to Exhibit 56.

12 A. Tab 56? Is that what you said?

13 Q. Yes, sir.

14 A. I'm there.

15 Q. All right. Let's turn to the GMP  
16 document which is right after the signed  
17 contract. I think the next document is AIA 133  
18 209 Exhibit A, guaranteed maximum price  
19 amendment.

20 A. Okay. I'm there.

21 Q. All right. So this document, if you  
22 will read -- and I would like to refer you to  
23 section on the second page, A1.1.6. Do you see  
24 that?

25 A. Yes, sir.

1           Q.   All right.  And the GMP has  
2           clarifications and conditions and such and the  
3           design documents that were incorporated as part  
4           of the final documents, correct?

5           A.   Yes, sir.

6           Q.   All right, sir.  And this is a change to  
7           the contract, the GMP amendment?

8           A.   Yes, sir.

9           Q.   All right, sir.  And turn to the third  
10          page.  It's signed by Michael Bennett, member and  
11          by -- do you recognize the signature of Pat Dean?

12          A.   Patrick Dean, yes, sir.

13          Q.   All right.  On the second page, A1.1.6,  
14          the guaranteed maximum price is based upon the  
15          following supplementary and other conditions of  
16          the contract.  And is there anything listed  
17          there?

18          A.   No, sir, it's blank.

19          Q.   Okay.  We're on the contract, Exhibit  
20          56?

21          A.   Yes, sir.

22          Q.   The A201 is -- and that's a copy of the  
23          original that he identified.  The A201 is  
24          attached to that document, isn't it?

25          A.   Yes.

1 Q. Okay.

2 A. It's in this 59 tab.

3 Q. Okay. The --

4 MR. BUNDY: For the record, we're  
5 on tab 56.

6 THE WITNESS: I'm sorry, 56.

7 BY MR. HILDEBRAND:

8 Q. All right. My question is simply, were  
9 any supplementary conditions attached to that  
10 original that I signed, original copy of the  
11 contract? Can you review that and let me know if  
12 the supplementary conditions of the contract  
13 yesterday were actually attached to that?

14 A. They're not attached to this contract.

15 MR. HILDEBRAND: Okay. And I would  
16 like to mark this for identification as our next  
17 document. This is not in the binders. Do you  
18 know what number we would be on?

19 MR. BUNDY: Objection. Pleadings  
20 are not evidence.

21 THE COURT: All right. Are these  
22 strictly pleadings?

23 MR. HILDEBRAND: Yes, sir.

24 THE COURT: Okay.

25 MR. HILDEBRAND: Yes, sir.

1                   THE COURT: I don't know that they  
2                   need to be marked as an exhibit, but tell me what  
3                   they are.

4                   MR. HILDEBRAND: Yeah. What this  
5                   is, is there was a -- one of the subcontractors  
6                   filed a mechanic's lien before we filed our  
7                   claim, and then it filed a suit to foreclose that  
8                   mechanic's lien.

9                   THE COURT: Okay.

10                  MR. HILDEBRAND: And as a  
11                  counterclaim by Library Associates, they said, we  
12                  want a -- you know, we are asking for a  
13                  declaratory judgment by the Court to declare that  
14                  certain supplementary conditions are not a part  
15                  of the contract.

16                  THE COURT: Okay.

17                  MR. HILDEBRAND: So that's where  
18                  the -- Mr. Bundy, may I finish, please?

19                  For a 16th defense by way of third  
20                  cross-claims. During the course of the project,  
21                  which is the subject of this action, an actual  
22                  and justiciable controversy has arisen between  
23                  answering defendant and Defendant BBC, as to the  
24                  documents which are properly included in and make  
25                  up the contract documents by and between



1       answering defendant and Defendant BBC.

2               Specifically -- and this paragraph 56 --  
3       certain documents constituting draft supplemental  
4       conditions are not included in the contract by  
5       and between answering defendant and BBC, and they  
6       attached a copy of the signed contract.

7               So, there again, I've addressed this  
8       before. The Defendant Library is asking the  
9       Court to declare that the supplementary  
10      conditions, which were concluded, we maintained  
11      by mistake are not part of the contract. So I  
12      think that these are not filed in our claim  
13      because they were in another one.

14              So I need to make the record clear  
15      when -- if a subsequent court looks at this or  
16      just having it clear for the record that this is  
17      the pleading that I'm referring to.

18              I don't know that a court -- if they  
19      want to look at the record and say, oh, gosh,  
20      well, we want to look at -- try to look this up  
21      and find out where it is and whether they feel it  
22      might have -- the system might be down, I just  
23      don't know. But I simply want to preserve the  
24      record by marking this and including it in my  
25      case as an exhibit.

1 THE COURT: All right. But what  
2 you're doing is, you're referencing a pleading  
3 that should already be in the record, correct?

4 MR. HILDEBRAND: I don't -- no,  
5 sir. I don't think that it's in the record  
6 because -- a record in this case because it was  
7 in another case.

8 THE COURT: This is strictly in the  
9 2018-936 case between Lithko and Library?

10 MR. HILDEBRAND: Yes, sir.

11 THE COURT: Okay. All right. And  
12 to the extent -- I think all those cases were  
13 consolidated in this case, if I'm not mistaken?

14 MR. BUNDY: They were.

15 THE COURT: At least it should have  
16 been.

17 MR. BUNDY: But this is a request  
18 of a court to make a declaratory judgment about a  
19 matter in dispute and is an affirmative claim  
20 that I have in my case coming up. I don't know  
21 that -- he hasn't asked for a declaratory  
22 judgment in this case.

23 MR. HILDEBRAND: Yes, I have.

24 MR. BUNDY: All right. Well, where  
25 is that? Well, why don't we deal with that?

1 THE COURT: Yeah, from a pleading  
2 standpoint. I don't know that this needs to be  
3 in here. My recollection is that everybody, at  
4 least between the two of y'all, did ask for  
5 declaratory relief, did you not?

6 MR. HILDEBRAND: Yes, sir.

7 MR. BUNDY: We're trying it. Let's  
8 try it.

9 THE COURT: Yeah.

10 MR. HILDEBRAND: Right. But this  
11 is evidence, Your Honor, that --

12 THE COURT: It's not evidence --  
13 it's not evidence if it's pleadings.

14 MR. HILDEBRAND: But it's an  
15 admission and the -- I think the case law is  
16 clear that a party, their pleadings and what  
17 they -- their allegations in their complaint is  
18 an admission.

19 So here -- and I think it's a judicial  
20 estoppel for -- and I don't know what their -- I  
21 don't know what position they're going to take.  
22 I've asked Mr. Bundy, and I got a pretty abrupt  
23 answer yesterday that I've got the burden of  
24 proof. So you asked the question, is this even  
25 in dispute? I don't know that it is.

1 THE COURT: Okay.

2 MR. HILDEBRAND: But to the extent  
3 that they take the position that the  
4 supplementary conditions aren't a part of the  
5 contract, then I'm certainly entitled to having  
6 the record -- their admission that -- where they  
7 say, look, they are not, and we're asking the  
8 Court to declare that they are not.

9 THE COURT: Okay. I think that  
10 established that fact.

11 MR. HILDEBRAND: Thank you.

12 THE COURT: Okay. You made  
13 reference to it. This is a -- this particular  
14 pleading is one from case caption Lithko  
15 Contracting, LLC, v. Library Associates.

16 It also names Balfour Beatty  
17 2018-CP-10-0936, and it's contained in the answer  
18 and cross-claim of Library Associates, LLC, filed  
19 May 29, 2018, in its 16th defense and by way of  
20 third counterclaim with declaratory judgment as  
21 to Defendant Balfour Beatty Construction, right?

22 MR. BUNDY: Right. And I would  
23 point out to the Court that Mr. Hildebrand's firm  
24 represents Travelers Casualty Insurance Company  
25 in that case because they bonded it off.

1 THE COURT: Okay. All right. Very  
2 good.

3 MR. BUNDY: All right.

4 THE COURT: Noted for the record.  
5 I don't think it needs to come in. Just noted.

6 MR. HILDEBRAND: Okay.

7 THE COURT: Just make a reference,  
8 and if you need it in the -- when y'all go up on  
9 appeal, make sure you included it. All right?

10 MR. HILDEBRAND: All right, sir.  
11 All right, sir. I've got several documents that  
12 I would like to identify and put in.

13 One of these would relate to -- whether  
14 we need to go through this or not -- would relate  
15 to what your decision is on which exhibits come  
16 in through the depositions and particularly the  
17 deposition of Mr. Clements'.

18 THE COURT: Yeah. Okay.

19 MR. HILDEBRAND: It would be what  
20 was marked as Exhibit 56 and Clements' deposition  
21 and is tab 132 in our notebook.

22 THE COURT: In the notebook?

23 MR. HILDEBRAND: Yes, sir.

24 THE COURT: Which exhibit book was  
25 that in?

1 MR. HILDEBRAND: That would be in  
2 the third one -- I'm sorry, the second one.

3 THE COURT: Second one?

4 MR. HILDEBRAND: The very last one.

5 THE COURT: All right. So the tab  
6 is 132?

7 MR. HILDEBRAND: Yes, sir.

8 THE COURT: It's Exhibit 56 to  
9 Mr. Clements' deposition.

10 MR. HILDEBRAND: Right.

11 THE COURT: All right. Which was  
12 page 141 of the transcript?

13 MR. HILDEBRAND: Yes, sir.

14 THE COURT: Okay. All right. You  
15 want to get that e-mail into evidence?

16 MR. HILDEBRAND: Yes, sir.

17 THE COURT: And it says an e-mail  
18 from Kim Brown to Jim Clements; is that right?

19 MR. HILDEBRAND: Yes, sir. That  
20 was the start of it.

21 THE COURT: All right. So all of  
22 this is discussions on what's going into the  
23 contract, is it not? The objection is parole  
24 evidence rule?

25 MR. BUNDY: Well, it's even more

1       than that.  It's -- if you look at the AIA  
2       document, A133, which is Exhibit 56, 2009, it  
3       says, see attached, the hotel at Marion Square  
4       guaranteed maximum price dated February the 18th,  
5       2015, right?

6                       THE COURT:  Okay.

7                       MR. BUNDY:  The document itself,  
8       while it is signed, is undated.  So I assume that  
9       that -- I mean, that's the date of what we're  
10      talking about.  That's the date this contract was  
11      entered into, which -- or this amendment that's  
12      entered -- this Exhibit A, guaranteed maximum  
13      price amendment was entered into.  February 18th,  
14      2015.

15                      THE COURT:  Okay.

16                      MR. BUNDY:  Now, what he wants to  
17      do is to introduce a letter or an e-mail that was  
18      written to me on June 6, 2014.

19                      THE COURT:  Okay.

20                      MR. BUNDY:  Eight months earlier,  
21      about things that they talked about that may or  
22      may not otherwise end up in the contract.  I  
23      mean, I assume he's writing the owner's lawyer to  
24      bring the lawyer up to speed on what kind of  
25      negotiations are going on and what they're

1       talking about now.

2                   But whether that ended up in the  
3       contract is all merged into the contract, and  
4       whatever is in the contract is in the contract.  
5       But the contract clearly says that all prior  
6       negotiations are merged into the document.

7                   It's not even parole evidence because it  
8       predates the contract. It's just simply evidence  
9       that there were negotiations, and they talked  
10      about these things. There are lots of  
11      negotiations that went on.

12                   THE COURT: Yeah. I definitely  
13      don't want to go there. And for what purpose do  
14      you offer this?

15                   MR. HILDEBRAND: Well, what I said,  
16      Your Honor, just as Mr. Bundy has asked for a  
17      declaration, that these supplementary conditions  
18      are not part of the contract, and just as  
19      Mr. Simonton has said that they were not  
20      attached, and as he testified yesterday, the  
21      architect, Jennifer Faulkinberry, said that they  
22      were concluded by mistake. He testified about  
23      that yesterday and these various supplemental  
24      conditions.

25                   THE COURT: Okay.



1                   MR. HILDEBRAND: This e-mail from  
2           Mr. Clements -- what happened was, there was a  
3           discussion about these supplementary conditions  
4           as is discussed in this e-mail.

5                   THE COURT: Right.

6                   MR. HILDEBRAND: And it was agreed  
7           that they would not be a part of contract, and  
8           Mr. Bundy said, okay, these prior negotiations --  
9           things that were in the supplemental -- here's  
10          what happened.

11                  THE COURT: Keep going. I'm  
12          following you so far.

13                  MR. HILDEBRAND: Okay.

14                  THE COURT: My simple question is,  
15          are they in the contract or not?

16                  MR. HILDEBRAND: Well, they are  
17          referenced, but they are in there by mistake.  
18          And that's what this explains. This e-mail says,  
19          look, we had some discussions about it.

20                  THE COURT: Okay.

21                  MR. HILDEBRAND: And we agreed that  
22          they weren't going to be in there.

23                  THE COURT: Okay. All right. So  
24          they were included in the contract; is that  
25          right?

1 MR. HILDEBRAND: Yes, sir.

2 THE COURT: I've not pulled it, but  
3 I have looked for it. But what you're telling me  
4 is, y'all's position is they were included by  
5 mistake, they should not have been included.

6 MR. HILDEBRAND: Right. Yes, sir.

7 THE COURT: All right. On that  
8 basis, Mr. Bundy, do you still object? I would  
9 only allow it for that limited purpose. Okay?

10 MR. BUNDY: I don't know that I  
11 followed all of that.

12 THE COURT: Not to -- it would  
13 not -- I'm not going to allow it to alter or  
14 amend the contract, but to explain whether or not  
15 this particular provision is included in the  
16 contract.

17 MR. HILDEBRAND: Right.

18 THE COURT: That I can allow. All  
19 right.

20 MR. HILDEBRAND: Yes, sir.

21 MR. BUNDY: I don't know what  
22 supplemental conditions we're talking about.

23 MR. HILDEBRAND: Well, I can  
24 identify it.

25 THE COURT: Okay. Speak up a

1       little bit so we can hear you.  You're not sure  
2       what supplemental conditions --

3                   MR. BUNDY:  I don't know what  
4       supplemental conditions they're talking about.

5                   THE COURT:  Right.

6                   MR. BUNDY:  They're not identified.

7                   MR. HILDEBRAND:  We went through  
8       that yesterday, Your Honor.  Again, they're in  
9       this big stack of --

10                  THE COURT:  That big stack of  
11       documents over there?

12                  MR. HILDEBRAND:  Right.  The  
13       specifications -- that the architect issued  
14       specifications for this, and according to the  
15       architect, he accidentally put in some  
16       supplementary conditions from another project,  
17       which was actually out of Montana.  We got  
18       earlier e-mails on that.

19                  THE COURT:  All right.

20                  MR. HILDEBRAND:  So they got stuck  
21       in their by accident, and this document explains  
22       why they got -- that they were not intended to be  
23       in the contract.

24                  THE COURT:  All right.  I'm going  
25       to allow it on that limited basis alone.  Okay?

1 MR. BUNDY: Thank you, Your Honor.

2 THE COURT: All right. Just for  
3 that -- just to clarify the contract.

4 MR. HILDEBRAND: All right, sir.

5 THE COURT: Okay.

6 BY MR. HILDEBRAND:

7 Q. And I would like to back up to three  
8 pages back.

9 A. Which tab are you on? I'm sorry.

10 Q. 132.

11 A. I'm there.

12 Q. This is an e-mail from Bret Estridge,  
13 and he's with Balfour Beatty. I think -- did you  
14 talk about him yesterday?

15 A. Yes, sir.

16 Q. Okay. And Marion Square supplementary  
17 conditions review 5/27/14 and subparagraph number  
18 9 below that, 3.1018, delete these paragraphs,  
19 correct?

20 A. Yes.

21 Q. And on the next page, number 26, 9.10.7,  
22 delete this paragraph A133 to .1.3 takes  
23 precedence. Original paragraph to stay intact.

24 MR. BUNDY: Your Honor.

25 MR. HILDEBRAND: Mr. Bundy, can

1 I --

2 MR. BUNDY: Well, this witness  
3 doesn't know anything about any of this. He  
4 wasn't even on the job during this thing. He's  
5 just reading an e-mail that occurred years before  
6 the contract was signed, and I don't know what  
7 this has to do with this case.

8 THE COURT: All right.

9 MR. HILDEBRAND: I'm publishing the  
10 part of this --

11 THE COURT: Yeah, just the three  
12 areas that you want to get into, I assume, were  
13 what got highlighted on this exhibit that I have  
14 got?

15 MR. HILDEBRAND: Right. Yes, sir.

16 THE COURT: So that's number 9,  
17 number 23, and number 26.

18 MR. HILDEBRAND: Yes, sir. But it  
19 goes further because there's a -- the documents  
20 up above that talk about, and all the -- BBC are  
21 not billed. BBC and I met and incorporated the  
22 bulk of Buck's supplemental conditions that were  
23 not done with existing language in 133 and 201.

24 What happened was, this document was --  
25 negotiated parts of it that were agreed to go

1       into the contract were another supplemental --  
2       just the separate document was not included.  
3       Just some of the terms that Mr. Bundy liked, he  
4       included in the contract that he drafted. So  
5       that's what this shows.

6               I've got a couple of other documents,  
7       Your Honor, that I would like to introduce, and  
8       then I know I will get an objection, but --

9               MR. BUNDY: Whatever just happened,  
10       I object to.

11              THE COURT: Okay. All right.  
12       These in the -- let me stop you because I'm  
13       looking at the -- what just got admitted, and it  
14       talks about 3.10.4 through 3.10.8. Now, that's  
15       not in the contract itself. That's in the 0800,  
16       correct?

17              MR. HILDEBRAND: Right.

18              THE COURT: All right. Let's go to  
19       the 0800. Does it include that language?

20              MR. HILDEBRAND: In the A201?

21              THE COURT: Yes.

22              MR. HILDEBRAND: No, sir. No, sir.

23              THE COURT: It's serves no purpose  
24       other than to make things -- set the contractor  
25       construction schedules.

1 MR. HILDEBRAND: Right.

2 THE COURT: Is that where you are,  
3 page 17 of the 201? Is that where we are?

4 MR. HILDEBRAND: So we're looking  
5 at Exhibit 56, Your Honor?

6 THE COURT: Yes, sir.

7 MR. HILDEBRAND: All right. The  
8 two relevant provisions are --

9 THE COURT: If I'm in the right  
10 part of this contract, it has a black line on the  
11 left side under contractor's construction  
12 schedules, and 3.10.4 includes subsections 1  
13 through 8, Exhibit --

14 MR. HILDEBRAND: Those are the ones  
15 that control. It's the A201, that was what was  
16 agreed upon. A201, I've got --

17 THE COURT: A201 is in, so I'm not  
18 in the right documents. It's 0800. We looked at  
19 that yesterday for some time, right?

20 MR. HILDEBRAND: Right.

21 THE COURT: All right. Take me to  
22 it. Let's go to it.

23 MR. HILDEBRAND: Okay. It is in, I  
24 think, one of the very last documents we  
25 introduced yesterday, so it should be -- okay.

1       The copy that we -- the plaintiff maintains  
2       accidentally included in the specifications is at  
3       the very last exhibit there.

4               MR. BUNDY:   In what book?

5               MR. HILDEBRAND:   Exhibits 283 to  
6       293.

7               THE COURT:   283 to 293?

8               MR. HILDEBRAND:   Right.

9               THE COURT:   This is Exhibit 293?

10              MR. HILDEBRAND:   Yes, sir.

11              THE COURT:   All right.   Got it.

12       Section 00800, supplemental conditions.

13              MR. HILDEBRAND:   Right.

14              THE COURT:   And what -- that  
15       language contained a section 3.10.4 --

16              MR. HILDEBRAND:   Yes, sir.

17              THE COURT:   -- through 3.10.8.   And  
18       then this reads, tab 293 reads, at 3.10.4, delete  
19       paragraph 3.10.4 through 3.10.4.8 and add the  
20       following new paragraphs.

21              Mr. Hildebrand:   Right, so --

22              THE COURT:   -- to general  
23       conditions.

24              Mr. Hildebrand:   Right.   So what  
25       happened was the supplementary conditions state,