

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

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

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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.

AMENDED RECORD ON APPEAL - VOLUME 3 OF 20

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INDEX

Page(s)

Section 1 - Orders

Volume - 1

Order Granting Balfour Beatty Construction, LLC's Motion to Amend Complaint, filed October 2, 2019.....	R-001
Order to Consolidate C.A. No. 2019-CP-10-2275 and Refer to the Charleston County Master-In Equity, filed November 18, 2019	R-003
Order to Consolidate C.A. No. 2019-CP-10-2868 and Refer to Charleston County Master-In-Equity, filed November 18, 2019.....	R-007
Form 4 Order Granting Library Associates, LLC's Motion for an Affirmative Junction, filed March 17, 2020	R-011
Order Granting Library Associates, LLC's Motion to Enforce the Court Order, filed June 17, 2020.....	R-014
Order Granting Strong Tower Construction, LLC d/b/a Koch Corporation's Motion for Partial Summary Judgment, filed September 9, 2021	R-021
Order Granting Third-Party Defendant Warco Construction, Inc.'s Motion for Partial Summary Judgment, filed September 13, 2021	R-037
Order Granting Watson Electrical Construction Co., LLC's Motion for Partial Summary Judgment, filed September 13, 2021	R-047
Order Regarding Multiple Motions, filed October 26, 2021	R-057
Form 4 Order Judgment Entered in Favor of Premier Exteriors, LLC Against Balfour Beatty Construction, LLC, filed December 22, 2021.....	R-060
Order Granting Premier Exteriors, LLC's Motion for Summary Judgment Against Balfour Beatty Construction, LLC, filed December 22, 2021	R-063
Form 4 Order Judgment in Favor of Library Associates, LLC Against Balfour Beatty Construction, LLC, filed October 6, 2023.....	R-076
Trial Order, filed October 6, 2023	R-079
Order Awarding Attorneys' Fees and Costs, filed April 12, 2024	R-126
Order Awarding Punitive Damages, filed April 12, 2024	R-132

Order Granting and Denying in Part Balfour Beatty Construction, LLC’s Motion to Alter or Amend the Order Awarding Punitive Damages and Election of Remedy, filed April 29, 2024R-144

Form 4 Judgment Order in Favor of Library Associates, LLC Against Balfour Beatty Construction, LLC, filed May 6, 2024.....R-147

Form 4 Order Denying Balfour Beatty Construction, LLC’s Motions to Alter or Amend, filed May 15, 2024R-153

Section 2 - Pleadings

Summons and Complaint, C.A. No. 2019-CP-10-01108, filed March 5, 2019R-156

Library Associates, LLC’s Answer to Plaintiff’s Complaint and Counterclaims, filed May 3, 2019R-182

Amended Answer and Counterclaims of Library Associates, LLC and Third-Party Complaint, filed May 15, 2019R-196

Amended Summons and Complaint, C.A. No. 2019-CP-10-01108, filed October 3, 2019.....R-364

Answer and Counterclaims of Library Associates, LLC to Amended Complaint of Balfour Beatty Construction, LLC and Third-Party Complaint, filed October 17, 2019.....R-385

Second Amended Summons and Complaint, C.A. No. 2019-CP-10-01108, filed October 12, 2020.....R-418

Answer and Counterclaims of Library Associates, LLC to the Second Amended Complaint of Balfour Beatty Construction, LLC and Third-Party Complaint, filed October 20, 2020R-446

Volume - 2

Answer and Counterclaims of Library Associates, LLC to the Second Amended Complaint of Balfour Beatty Construction, LLC and Third-Party Complaint, filed October 20, 2020, cont’dR-501

Section 3 - Transcripts

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

Pages: 1-3; 90-164; 204; 215-284; 385-386; 392; 675-815; 1786-1797; 1843-1892; 1916-2046; 2204-2207; 2231-2233; 2274; 2299-2331; 2553-2554; 2599; 2607-2613; 2615-2662; 2665-2705; 2714-2716; 2759-2761; 2794-2924; 2949-2950; 2968-2971; 3039-3061; 3142-3148; 3154-3155; 3166-3173; 3175-3179; 3194; 3247-3255; 3267-3272; 3817; 3819-3827; 3835-3837; 3839-3853; 3856-3860; 3890-3893; 3901-3902; 3907-3908; 3916-3941; 3955-

3957; 4110-4112; 4120-4121; 4149-4150; 4216-4234; 4248-4251; 4275-4296; 4316; 4340-4341; 4460-4487.R-523

Volume - 3

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

Pages: 1-3; 90-164; 204; 215-284; 385-386; 392; 675-815; 1786-1797; 1843-1892; 1916-2046; 2204-2207; 2231-2233; 2274; 2299-2331; 2553-2554; 2599; 2607-2613; 2615-2662; 2665-2705; 2714-2716; 2759-2761; 2794-2924; 2949-2950; 2968-2971; 3039-3061; 3142-3148; 3154-3155; 3166-3173; 3175-3179; 3194; 3247-3255; 3267-3272; 3817; 3819-3827; 3835-3837; 3839-3853; 3856-3860; 3890-3893; 3901-3902; 3907-3908; 3916-3941; 3955-3957; 4110-4112; 4120-4121; 4149-4150; 4216-4234; 4248-4251; 4275-4296; 4316; 4340-4341; 4460-4487, cont'd.R-1001

Volume - 4

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

Pages: 1-3; 90-164; 204; 215-284; 385-386; 392; 675-815; 1786-1797; 1843-1892; 1916-2046; 2204-2207; 2231-2233; 2274; 2299-2331; 2553-2554; 2599; 2607-2613; 2615-2662; 2665-2705; 2714-2716; 2759-2761; 2794-2924; 2949-2950; 2968-2971; 3039-3061; 3142-3148; 3154-3155; 3166-3173; 3175-3179; 3194; 3247-3255; 3267-3272; 3817; 3819-3827; 3835-3837; 3839-3853; 3856-3860; 3890-3893; 3901-3902; 3907-3908; 3916-3941; 3955-3957; 4110-4112; 4120-4121; 4149-4150; 4216-4234; 4248-4251; 4275-4296; 4316; 4340-4341; 4460-4487, cont'd.R-1501

Transcript of April 2, 2024 Hearing on Balfour Beatty Construction, LLC's
Motion to Alter/Amend Order granting Judgment to Library Associates, LLC,
only pages 1-4, 29-38.....R-1507

Section 4 - Exhibits

Balfour Beatty Construction, LLC's Exhibit 3R-1521
Balfour Beatty Construction, LLC's Exhibit 11R-1534
Balfour Beatty Construction, LLC's Exhibit 12R-1542

Volume - 5

Balfour Beatty Construction, LLC's Exhibit 12, cont'd.....R-2001

Volume - 6

Balfour Beatty Construction, LLC's Exhibit 12, cont'd.....R-2501
Balfour Beatty Construction, LLC's Exhibit 26R-2518
Balfour Beatty Construction, LLC's Exhibit 27, only pages 1, 3-12, 23, 47-49, 53,
55, 67.....R-2520

Balfour Beatty Construction, LLC's Exhibit 42, only pages 1-2, 8.....	R-2538
Balfour Beatty Construction, LLC's Exhibit 46, only pages 1-2, 18.....	R-2541
Balfour Beatty Construction, LLC's Exhibit 56	R-2544
Balfour Beatty Construction, LLC's Exhibit 72	R-2689
Balfour Beatty Construction, LLC's Exhibit 81	R-2691
Balfour Beatty Construction, LLC's Exhibit 83	R-2693
Balfour Beatty Construction, LLC's Exhibit 85	R-2695
Balfour Beatty Construction, LLC's Exhibit 111	R-2699
Balfour Beatty Construction, LLC's Exhibit 138, only pages 1-2	R-2702
Balfour Beatty Construction, LLC's Exhibit 141	R-2704
Balfour Beatty Construction, LLC's Exhibit 143	R-2706
Balfour Beatty Construction, LLC's Exhibit 150	R-2709
Balfour Beatty Construction, LLC's Exhibit 151	R-2715
Balfour Beatty Construction, LLC's Exhibit 154.....	R-2724
Balfour Beatty Construction, LLC's Exhibit 201	R-2735
Balfour Beatty Construction, LLC's Exhibit 202	R-2742
Balfour Beatty Construction, LLC's Exhibit 215	R-2745
Balfour Beatty Construction, LLC's Exhibit 226	R-2774

Volume - 7

Balfour Beatty Construction, LLC's Exhibit 226, cont'd	R-3001
--	--------

Volume - 8

Balfour Beatty Construction, LLC's Exhibit 226, cont'd	R-3501
--	--------

Volume - 9

Balfour Beatty Construction, LLC's Exhibit 226, cont'd	R-4001
Balfour Beatty Construction, LLC's Exhibit 231	R-4352
Balfour Beatty Construction, LLC's Exhibit 255	R-4383
Balfour Beatty Construction, LLC's Exhibit 257	R-4385
Balfour Beatty Construction, LLC's Exhibit 258	R-4389
Balfour Beatty Construction, LLC's Exhibit 261	R-4391
Balfour Beatty Construction, LLC's Exhibit 263, only pages 1-2.....	R-4396
Balfour Beatty Construction, LLC's Exhibit 292	R-4398
Balfour Beatty Construction, LLC's Exhibit 300, only pages 1-2, 9-12	R-4435
Balfour Beatty Construction, LLC's Exhibit 301	R-4441
Balfour Beatty Construction, LLC's Exhibit 303, only pages 1-4, 16-18	R-4490
Balfour Beatty Construction, LLC's Exhibit 304, only pages 1-2, 10.....	R-4497
Balfour Beatty Construction, LLC's Exhibit 305, only pages 1-2, 12-13, 42-43 45, 57-59, 90	R-4500

Volume - 10

Balfour Beatty Construction, LLC's Exhibit 305, only pages 1-2, 12-13, 42-43 45, 57-59, 90, cont'd	R-4501
Balfour Beatty Construction, LLC's Exhibit 312	R-4511
Balfour Beatty Construction, LLC's Exhibit 350	R-4715
Library Associates LLC's Exhibit 3	R-4747
Library Associates LLC's Exhibit 11	R-4966

Volume - 11

Library Associates LLC's Exhibit 11, cont'd	R-5001
---	--------

Volume - 12

Library Associates LLC's Exhibit 11, cont'd	R-5501
Library Associates LLC's Exhibit 12	R-5770

Volume - 13

Library Associates LLC's Exhibit 12, cont'd	R-6000
Library Associates LLC's Exhibit 13	R-6309

Volume - 14

Library Associates LLC's Exhibit 13, cont'd	R-6501
Library Associates LLC's Exhibit 14	R-6849
Library Associates LLC's Exhibit 28	R-6915
Library Associates LLC's Exhibit 35	R-6919

Volume - 15

Library Associates LLC's Exhibit 35, cont'd	R-7001
Library Associates LLC's Exhibit 39	R-7077
Library Associates LLC's Exhibit 44	R-7199
Library Associates LLC's Exhibit 45	R-7206
Library Associates LLC's Exhibit 50	R-7212
Library Associates LLC's Exhibit 89	R-7214
Library Associates LLC's Exhibit 90	R-7351
Library Associates LLC's Exhibit 91	R-7377

Volume - 16

Library Associates LLC's Exhibit 91, cont'd	R-7501
Library Associates LLC's Exhibit 103	R-7523
Library Associates LLC's Exhibit 104	R-7634
Library Associates LLC's Exhibit 105	R-7640
Library Associates LLC's Exhibit 114	R-7643

Library Associates LLC’s Exhibit 141	R-7700
Library Associates LLC’s Exhibit 142	R-7845

Volume - 17

Library Associates LLC’s Exhibit 142, cont’d	R-8001
Library Associates LLC’s Exhibit 143	R-8045
Library Associates LLC’s Exhibit 146B	R-8178
Library Associates LLC’s Exhibit 150	R-8242

Section 5 - Other Documents

Balfour Beatty Construction, LLC’s Notice and Certificate of Mechanic’s Lien, filed January 25, 2019	R-8255
Balfour Beatty Construction, LLC’s Notice and Certificate of Amended Mechanic’s Lien, filed July 23, 2019	R-8261
Proposed Trial Order submitted by Balfour Beatty Construction, LLC, filed May 23, 2023	R-8268
Proposed Trial Order submitted by Library Associates, LLC, filed May 23, 2023	R-8413
Balfour Beatty Construction, LLC’s Motion to Alter/Amend Order Granting Judgment to Library Associates, LLC, filed October 16, 2023	R-8461

Volume - 18

Balfour Beatty Construction, LLC’s Motion to Alter/Amend Order Granting Judgment to Library Associates, LLC, filed October 16, 2023, cont’d	R-8501
Balfour Beatty Construction, LLC’s Motion to Require Library Associates, LLC to Elect a Remedy, filed October 16, 2023	R-8631
Library Associates, LLC’s Petition for Attorneys’ Fees and Costs, filed November 6, 2023.....	R-8633
Balfour Beatty Construction, LLC’s Memorandum in Opposition to Defendant Library Associates, LLC’s Petition for Attorneys’ Fees and Costs, filed March 7, 2024.....	R-8642
Balfour Beatty Construction, LLC’s Memorandum in Support of its Motion to Require Library Associates, LLC to Elect a Remedy, filed March 7, 2024.....	R-8672

Balfour Beatty Construction, LLC’s Memorandum in Support of Motion to Alter/Amend the Order Granting Judgment to Library Associates, LLC, filed March 7, 2024	R-8675
Library Associates, LLC’s Memorandum in Support of its Petition for Attorneys’ Fees and Costs and Pursuant to the Declaratory Judgment Act, Additional Interest Payments, Past and Future, as Direct Costs Incurred and for Prejudgment Interest as Provided by Law; and in Support of Pending Rule 52(B) and 59(E) Motions to Alter or Amend and Make Additional Findings, filed March 7, 2024.....	R-8718
Balfour Beatty Construction, LLC’s Amended Motion to Require Library Associates, LLC to Elect a Remedy, filed March 8, 2024.....	R-8739
Balfour Beatty Construction, LLC Memorandum in Response to Library Associates, LLC’s Memorandum in Support of its Petition for Attorneys’ Fees and Costs and Pursuant to the Declaratory Judgment Act, Additional Interest Payments, Past and Future, as Direct Costs Incurred and for Prejudgment Interest as Provided by Law; and in Support of Pending Rule 52(B) and 59(E) Motions to Alter or Amend and Make Additional Findings, filed March 11, 2024.....	R-8741
Balfour Beatty Construction, LLC’s Motion to Strike Affidavit of Marvin D. Infinger, filed March 11, 2024	R-8754
Library Associates, LLC’s Reply to Balfour Beatty Construction, LLC’s Memorandum in Opposition to its Petition for Attorneys’ Fees and Costs, filed March 11, 2024	R-8760
Revised Affidavit of Marvin D. Infinger, filed March 11, 2024	R-8766
Affidavit of Franklin E. Worrell, filed March 28, 2024	R-8779
Balfour Beatty Construction, LLC’s Motion in Limine Regarding Hearing on Punitive Damages, filed April 1, 2024.....	R-8786
Library Associates, LLC’s Filing of March 13, 2024 Hearing Exhibits, filed April 10, 2024.....	R-8793

Volume - 19

Library Associates, LLC’s Filing of March 13, 2024 Hearing Exhibits, filed April 10, 2024, cont’d.....	R-9001
--	--------

Volume - 20

Library Associates, LLC’s Filing of March 13, 2024 Hearing Exhibits, filed April 10, 2024, cont’d.....	R-9501
--	--------

Library Associates, LLC’s Supplemental Petition for Attorneys’ Fees and Costs; and in Addition Other Relief Pursuant to Declaratory Judgment Cause of Action, filed April 10, 2024	R-9826
Supplemental Affidavit of Kimberly Bennett Brown, filed April 10, 2024	R-9828
Balfour Beatty Construction, LLC’s Motion to Alter or Amend the Order Awarding Punitive Damages and Election of Remedy Pursuant to Rule 59(E), filed April 22, 2024	R-9864
Library Associates, LLC’s Notice of Election of Remedy, filed May 2, 2024	R-9867
Balfour Beatty Construction, LLC’s Motion to Alter or Amend Pursuant to Rule 59(E), filed May 9, 2024	R-9870
Video Deposition Testimony of George Michael Baumbach, 13:5-14:10 (Timestamp 7:28-8:23); 14:24-15:11 (Timestamp 10:00-10:30); 42:12-45:23 (Timestamp 47:40-52:05); 46:22-47:15 (Timestamp 53:27-54:22) (Placeholder for video file being submitted via Court of Appeal’s OneDrive)	R-9876

1 go to the A201 and remove paragraphs 3.10.4 to
2 3.10.4.8 and substitute this language. That's
3 what this says.

4 When Balfour got this language, as
5 reflected in Exhibit 132, we said, no, this is
6 not acceptable. Delete this section and delete
7 the other section that I referenced just a minute
8 ago, which was 9.10.7.

9 So both of those were specifically
10 called by Balfour Beatty. We said, no, in these
11 supplementary conditions, we specifically direct
12 you to delete these two provisions.

13 THE COURT: Okay.

14 MR. HILDEBRAND: As the
15 negotiations continued, the supplementary
16 conditions were completely discarded and the A201
17 was revised by Mr. Bundy to incorporate what he
18 wanted in the contract.

19 So this document 293 that you are
20 looking at is an -- the original document that
21 does not reflect what the discussions were about,
22 what was to be included or not. It was just
23 stuck in some specifications again by accident.

24 So the relevance of the e-mail is
25 that -- again, we looked at that document and we

1 said, well, we specifically disagree this
2 section, and we specifically disagree with this
3 section. And then we went further, and all the
4 supplementary conditions were taken out.

5 Then for some reason, again, the
6 architect compiled the specifications, and they
7 got stuck in there. So that's what the
8 explanation is for all of this, Your Honor.

9 THE COURT: All right.

10 MR. HILDEBRAND: I know it is
11 confusing.

12 THE COURT: The architect's
13 position is, none of this is in the agreement; is
14 that right?

15 MR. HILDEBRAND: Right.

16 THE COURT: All right. Okay. All
17 right. I don't really need to go into the
18 substance of it. It's not in the agreement is
19 y'all's position?

20 MR. HILDEBRAND: Right.

21 MR. BUNDY: You would have to make
22 a decision. I mean, we have an argument. We
23 have arguments to the -- legal arguments.

24 THE COURT: And your position is
25 that it is included in there?

1 MR. BUNDY: My position is, you
2 have to read the contract, and the contract that
3 was signed is what's controlling, not
4 negotiations that went on thereafter. These are
5 big boys.

6 THE COURT: I agree with that.

7 MR. BUNDY: Okay.

8 THE COURT: But if your
9 architect -- if your architect's testimony is --
10 I hadn't gotten to the architect's testimony yet.
11 The architect's testimony is that it was not
12 intended to be in there.

13 MR. BUNDY: Well, the architect
14 didn't sign this contract. The architect is not
15 authorized as our agent to sign our contracts,
16 and the architect has -- I mean, I could -- if
17 you wanted to, I could take the position that
18 there's some stuff in here I didn't want in
19 there.

20 THE COURT: Okay. Oh, I have no
21 doubt about that.

22 MR. BUNDY: Yeah.

23 THE COURT: Okay.

24 MR. HILDEBRAND: Well, he can take
25 that position, but --

1 THE COURT: To answer my initial
2 question, it is an issue for the Court. All
3 right.

4 MR. BUNDY: Yes, it is.

5 THE COURT: I'm with you.

6 MR. BUNDY: That's why we got a
7 declaratory judgment because of that.

8 THE COURT: All right. Okay. So
9 at least I understand what the issue is.

10 MR. HILDEBRAND: Okay.

11 THE COURT: That's what I'm
12 wrestling with, is there an issue? Yes, there is
13 an issue.

14 MR. HILDEBRAND: Right.

15 THE COURT: All right.

16 MR. HILDEBRAND: And I wasn't sure
17 that there was --

18 THE COURT: I can only answer the
19 questions y'all ask me.

20 MR. HILDEBRAND: I'm with you, Your
21 Honor.

22 THE COURT: Otherwise, it's an
23 advisory opinion, and it's worth nothing. I'd
24 hate to think we spent two weeks here doing
25 nothing. All right.

1 MR. BUNDY: No, we're good.

2 MR. HILDEBRAND: All right. So
3 I've got several other documents that relate to
4 this issue that are in front of the Court.

5 THE COURT: All right.

6 BY MR. HILDEBRAND:

7 Q. This is an e-mail from Bill Bundy to Jim
8 Clements, Kim Brown, and Marion Hotel. Have you
9 seen this document before?

10 A. Yes.

11 Q. All right. What was the occasion that
12 you --

13 MR. BUNDY: Objection.

14 Q. -- came to see this document?

15 MR. BUNDY: Objection.

16 THE COURT: That doesn't make him
17 the vehicle to get it into evidence, right?

18 MR. HILDEBRAND: Well, Your Honor,
19 I'd like to -- I can make a proffer for these. I
20 think that they would come in under an admission
21 of a party opponent. I mean, the people on this
22 thing are Jim Clements, Kim Brown, and Buck
23 Lindsay, who are all of the agents of the owner,
24 explicit agents of the owner.

25 And what this document -- what this

1 document shows and the other documents that I
2 would seek to introduce is that these go to
3 explain -- not for the truth asserted, but go to
4 explain the intentions of the parties with regard
5 to these supplemental conditions.

6 This exhibit, and I've got two more, I
7 think, further clarify this issue. So I would
8 like to proffer them.

9 THE COURT: You can proffer this
10 one. This one is not coming into evidence.
11 Okay?

12 MR. HILDEBRAND: Okay.

13 THE COURT: This is -- he's not a
14 party to it. It seems to me at best you're going
15 to be able to use it for cross-examination of
16 these people. All right?

17 MR. HILDEBRAND: Okay. I
18 understand, Your Honor. So let's --

19 THE COURT: So that's -- what
20 number do we need to give something like this?
21 Are we sticking in the 300s or the 400s? Where
22 you want to be?

23 MR. HILDEBRAND: I'm not sure what
24 number we were on.

25 THE COURT: I know we had like 307.

1 Let's just -- why don't we just call it 310.

2 Okay?

3 MR. HILDEBRAND: Okay.

4 THE COURT: Just give it a number,

5 No. 310.

6 MR. BUNDY: 310 for identification?

7 THE COURT: 310 for ID only.

8 (PLF. EXH. 310 was marked for
9 identification and received as a proffer.)

10 THE COURT: It's Plaintiff Exhibit
11 52 to Jim Clements' deposition.

12 MR. HILDEBRAND: All right, sir, I
13 would like make a proffer.

14 THE COURT: Sure.

15 MR. HILDEBRAND: This is Exhibit
16 53.

17 THE COURT: All right. I'm going
18 to mark this as 311 for ID purposes.

19 MR. HILDEBRAND: All right, sir.

20 (PLF. EXH. 311 was marked for
21 identification and received as a proffer.)

22 MR. HILDEBRAND: I would make the
23 same proffer. I contend that this is a business
24 record. It's an admission by a party opponent.
25 We got it from the defendant and it relates to

1 this same issue.

2 THE COURT: All right. This is an
3 e-mail -- it looks like an e-mail chain dated May
4 6, 2014, which predates the contract. It looks
5 like it originates from Buck Lindsay to Bill
6 Bundy on May 5 of '14. And I'm assuming it's
7 talking about what's going to go into the
8 contract?

9 MR. HILDEBRAND: Right.

10 THE COURT: Okay. Okay.

11 MR. HILDEBRAND: So I would like to
12 move to admit this one into evidence, Your Honor.

13 THE COURT: All right. I'm going
14 to keep it out as negotiations and not part of
15 the contract.

16 MR. HILDEBRAND: All right. And
17 then.

18 MR. BUNDY: And that would be
19 number 311 for ID?

20 THE COURT: 311 for ID, yes, sir.

21 MR. HILDEBRAND: If you will give
22 me just a minute, Your Honor, I may be finished.

23 All right. Mr. Simonton, please answer
24 any questions that Mr. Bundy might have.

25 THE COURT: Do you want a couple

1 be here, you and Library Associates agreed to be
2 here if you had a claim. We all agreed not to
3 go get a jury trial, correct?

4 A. That's what the contract says, yes.

5 Q. And y'all agreed that you weren't going
6 to arbitrate, correct?

7 A. I believe so, yes, sir.

8 Q. So we're here because that's what the
9 parties agreed to, that's what you wanted when
10 you signed the contract?

11 A. That's what we agreed to in the
12 contract.

13 Q. Okay. Now, when did you cut off my
14 client's access to the Egnyte site that we
15 discussed yesterday? Was it about this time?

16 A. I believe it was, yes, sir.

17 Q. So what y'all did was -- is you made a
18 claim for 21 million dollars, and the first thing
19 you did after you made the claim was to deny my
20 client's access to the records of the job, which
21 were not owned by Balfour Beatty Construction; is
22 that correct?

23 A. We did cut off access, yes.

24 Q. Okay. And instead what you did, you cut
25 off the access to your records, which would have

1 been the subcontractor budgets, all the things
2 you discussed yesterday.

3 And y'all continued to use that website
4 to close out the job with subcontractors and
5 enter into change orders with subcontractors, and
6 all the rest, without the owner having any access
7 to the information and the things that were going
8 on in that Egnyte site preventing the owner from
9 knowing what was going on with regards to those
10 actions after January 25th, 2019; is that
11 correct?

12 A. If that was the date, that's correct.

13 Q. Okay. And then you were rolling into
14 your litigation support role, more and more,
15 eventually becoming a full-time litigation
16 support personnel for \$185,000 a year. And y'all
17 sent subpoenas to Library Associates so y'all
18 could determine what documents Library Associates
19 actually had, right?

20 A. Yes, sir. It was subpoenaed.

21 Q. So then what y'all could do knowing what
22 Library Associates actually had, you could make
23 sure that anything y'all did later was not going
24 to be contested unless you saw something in the
25 subpoenaed documents that might trip you up,

1 correct?

2 A. Can you restate that? I'm --

3 Q. Sure. Sure. You cut off the access to
4 the documents. You continued to perform work
5 under the contract with your subcontractor, and I
6 think you referred to it yesterday as closing out
7 the job, right? Y'all continued to close out the
8 job?

9 A. Finish the job.

10 Q. Without giving Library Associates access
11 to the documents that related to closing out
12 their job? It's not your job, is it?

13 A. It was our job, yes, sir.

14 Q. Okay. So it's your job?

15 A. It is our job.

16 Q. Right. Well, y'all built the hotel,
17 right?

18 A. Yes, sir.

19 Q. Sir?

20 A. Beautiful hotel on the corner.

21 Q. That beautiful hotel, y'all built it?

22 A. Award winning.

23 Q. But it's not your hotel?

24 A. No, sir.

25 Q. Okay. Now, y'all were the construction

1 manager by title, correct?

2 A. Yes, sir.

3 Q. But you were not the construction
4 dictator, were you?

5 A. No, sir.

6 Q. Okay. You couldn't dictate or you
7 didn't have the legal authority under this
8 contract to dictate my client's access to his own
9 documents, did you? Sir?

10 A. We denied them access to the
11 documentation, yes.

12 Q. Okay. So let's go back to where we were
13 before. After you denied access, you sent
14 subpoenas to Library Associates so you could
15 determine everything they had in their file,
16 correct?

17 MR. HILDEBRAND: Objection, Your
18 Honor. I think that is a factual misstatement.
19 I don't think there was a subpoena that was ever
20 done to Library Associates. We went into the
21 regular discovery process, and that's the whole
22 issue.

23 We went into litigation, and then they
24 were told, any documents that you want, do it
25 through litigation. And we didn't get a request

1 A. Yes, sir. That's what it says.

2 Q. Now, you weren't able to informally
3 resolve the dispute? Obviously, because we're
4 here now, right?

5 A. Yes, sir.

6 Q. Okay. So now, we need to go into the
7 dispute resolution process. That's what we're
8 getting ready to start in terms of the timeline.
9 This letter kicked off that process, right?

10 A. Yes, sir.

11 (DFT. EXH. 44 was marked for
12 identification.)

13 Q. Boom. Now we're in the dispute
14 resolution process. Okay. January 25th. All
15 right. Let's talk about what happened -- what
16 followed.

17 I hand you what's been identified as
18 Defendant's Exhibit 44 for identification.

19 A. Can I put this up, sir?

20 Q. Yeah. You can put that away. Do you
21 recognize this document?

22 A. Yes, sir, I do.

23 Q. All right. Let's turn to page 4,
24 Exhibit B. Do you see it?

25 A. Yes, sir.

1 Q. It's sworn to before somebody named
2 Kimberly S. Nagy, N-A-G-Y, right?

3 A. Yes, sir.

4 Q. Do you know who that is?

5 A. I met her that day, yes.

6 Q. You met her what?

7 A. I met her on the 25th.

8 Q. Okay. She was also a litigation support
9 staff person?

10 A. I have no idea.

11 Q. Did she work for Mr. Hildebrand?

12 A. I don't know, sir. I don't remember.

13 Q. Okay. Where did you sign this document?

14 A. In my office.

15 Q. In your office. Okay. Who drafted this
16 document?

17 A. I believe legal counsel did.

18 Q. Okay. Who came up with this number?

19 A. We came up with this number through our
20 financials, Casey and our financials and what we
21 were owed and things that come in from the
22 subcontractors up to that point.

23 Q. So Casey -- what was the name of the
24 gentleman?

25 A. Casey Thompson. He's our --

1 Q. He's the comptroller?

2 A. He's the comptroller, yes.

3 Q. Okay. Is he the one that gave you this
4 number to put in this document?

5 A. It took an operation of myself, Nick
6 Starcevic, and Casey to come up with this number.

7 Q. Okay. And y'all came up with that
8 number and delivered that number to
9 Mr. Hildebrand, your legal counsel, and you
10 created Exhibit B, and you signed it under oath
11 to be true?

12 A. Yes, sir.

13 Q. And this document is a notice and
14 certificate of mechanic's lien; is that correct?

15 A. Yes, sir.

16 Q. And it's Exhibit what?

17 A. 44.

18 MR. BUNDY: Your Honor, I move to
19 introduce Exhibit 44 into evidence.

20 MR. HILDEBRAND: No objection.

21 THE COURT: Without objection.

22 (DFT. EXH. 44 was received in
23 evidence.)

24 BY MR. BUNDY:

25 Q. Now, this document was sworn to on the

1 February 15, 2019, beyond the 60-day time frame
2 provided for production of documents under the
3 contract. See section 7.1.11. Is that what you
4 said?

5 A. That's what it says.

6 Q. And you refused to provide the documents
7 so that the audit can take place, correct?

8 A. Yes, sir.

9 Q. Now, an audit did take place ultimately,
10 didn't it?

11 A. Yes, sir.

12 Q. And it took place because His Honor
13 ordered it to take place, correct?

14 A. Yes.

15 Q. So it was only with a court order that
16 my client was able to get access to the records
17 of costs on a cost-plus job, right?

18 A. Yes, sir.

19 Q. That seems fair, doesn't it? Does that
20 seem fair to you?

21 A. I have no comment on whether it's fair
22 or not.

23 Q. Okay. That's fine. All right. Let's
24 talk about these four binders. Did these four
25 binders, as stated in previous correspondence,

1 Q. Yes, sir.

2 A. I'm there.

3 Q. All right. The punch process is defined
4 in section 9.8.2, so let's turn to that, please.

5 A. 201?

6 Q. Yes, sir. So general conditions 201.

7 A. What was the section again?

8 Q. 9.8.2, right there at the very bottom,
9 page 36.

10 A. I'm there.

11 Q. All right. The punch process starts
12 here. It says, when the contractor considers
13 that the work or a portion thereof, which the
14 owner agrees to accept separately is
15 substantially complete, the contractor shall
16 prepare and submit to the architect a
17 comprehensive list of items to be completed or
18 corrected prior to final payment, correct?

19 A. Yes, sir.

20 Q. So this provides -- when it says for a
21 portion that the -- in other words, the
22 contractor can request a punch list of various
23 items, various sections of the building as they
24 progress; is that a fair statement?

25 MR. BUNDY: Objection.

1 MR. HILDEBRAND: I will withdraw
2 it.

3 BY MR. HILDEBRAND:

4 Q. So the first -- that's step one, where
5 when the contractor is ready to have a punch, he
6 does the -- and he builds the work substantially
7 complete, he provides a punch list to the
8 architect, right?

9 MR. BUNDY: Objection.

10 THE COURT: Overruled. Go ahead.

11 MR. HILDEBRAND: All right.

12 BY MR. HILDEBRAND:

13 Q. Is that correct?

14 A. Yes, sir.

15 Q. All right. Now, let's turn to step 2,
16 9.8.3. Upon receipt of the contractor's list,
17 the architect will make an inspection to
18 determine whether the work or designated portions
19 thereof is substantially complete.

20 If the architect's inspection discloses
21 any item, whether or not included on the
22 contractor's list, which is not sufficiently
23 complete in accordance with the contract
24 documents, so that the owner can occupy or
25 utilize the work or designated portion thereof

1 for its intended use, the contractor before
2 issuance of the certificate of substantial
3 completion, shall complete or correct such items
4 upon notification by the architect. Did I read
5 that correctly?

6 A. Yes, sir.

7 Q. Okay. What provisions, if any, are
8 provided in the contract for an owner's punch
9 list?

10 A. It's -- there's none that I could find.

11 Q. How about for the hotel operator?

12 A. Not any that I could find.

13 Q. How about for Jim Clements?

14 A. Not for Jim Clements either.

15 Q. So it's the owner -- the owner is the
16 one under this contract who does the punch list?

17 A. The architect.

18 Q. Architect, I'm sorry. Is that standard?

19 A. Yes, sir.

20 Q. All right. Did the architect do a punch
21 of the guest rooms in the project?

22 A. Yes, sir.

23 MR. BUNDY: Objection.

24 BY MR. HILDEBRAND:

25 Q. Okay. Did they fulfill their -- did the

1 architect fulfill its obligation and actually do
2 a punch?

3 A. Yes, sir.

4 Q. All right. And how did they go about
5 doing that?

6 A. So we gave -- we gave Mr. Clements our
7 prepunch of items in the rooms and stuff that was
8 missing that we didn't have yet, and then the
9 architect came, and they started on level 3.

10 Q. Speak up.

11 A. The architect arrived at the project,
12 and they started on level 3. And as they -- they
13 get a level done, they would send us the punch
14 list. And then they moved to level 5. We kind
15 of built it a little out of sequence.

16 And then when they -- we got the punch
17 list, we took and we assigned the items to the
18 subcontractor to go in -- manage them and go in a
19 sequential thing, you know, get rid of the big
20 stuff and then have the painter come in last.
21 And then we would complete that punch list.

22 Q. Okay. And did the owner self-perform
23 all of the punch lists, to your knowledge, or did
24 they hire anybody to assist them?

25 A. I believe the architect had a third

1 party punch the project.

2 Q. And that was Mr. DeMatteo?

3 A. Mrs., yeah.

4 Q. Mrs. What's her first name? Barbara?

5 A. Yeah, Barbara.

6 Q. Okay. Is that unusual for an architect
7 to hire a third party to help with the project?

8 MR. BUNDY: Objection.

9 THE COURT: Overruled. Go ahead.

10 THE WITNESS: It's unusual, yes,
11 sir. I haven't seen it in a long time.

12 BY MR. HILDEBRAND:

13 Q. Okay. Had you met Mrs. Barbara DeMatteo
14 prior to this job?

15 MR. BUNDY: Objection.

16 A. Not prior to this project, no, sir.

17 Q. Okay. And what did you understand her
18 function to be?

19 MR. BUNDY: Objection.

20 THE COURT: Overruled. Go ahead.

21 THE WITNESS: To punch the guest
22 rooms, level 3 through 8.

23 BY MR. HILDEBRAND:

24 Q. Okay. I'm going to -- all right, sir.
25 I've handed you what is contained in a binder,

1 and if you will turn -- open it up, and on the
2 left page, do you see an e-mail?

3 A. Yes, sir.

4 Q. All right. And It's an e-mail from Jim
5 Clements to R. Quinlan and Paul Charette dated
6 November 27, 2018, and it shows you were copied
7 on it. Do you see that?

8 A. Yes, sir.

9 Q. And it says, guest room turnover. Do
10 you see that?

11 A. Yes, sir.

12 Q. All right. It says, per the agreement
13 with David Simonton and myself.

14 MR. BUNDY: Your Honor, at this
15 point, before we start going into questions, I
16 object to the use of this document.

17 THE COURT: All right.

18 MR. BUNDY: Because this is
19 redirect. I mean, clearly -- he has already
20 repeated testimony now that virtually mirrors
21 what he testified to in direct; so he's outside
22 the rule under that ground.

23 I don't believe it's appropriate to
24 introduce evidence in redirect, which was not new
25 material brought up in cross. So I object to the

1 introduction and use of this document, and I
2 object to this testimony. He should have done
3 this in his case-in-chief so I would have been
4 able to properly cross-examine him. What this
5 does is -- and that's why we have this rule.

6 THE COURT: I'm with you. Stop
7 right there. All right.

8 MR. HILDEBRAND: Your Honor --

9 THE COURT: The document itself,
10 what is that being offered for?

11 MR. HILDEBRAND: What you'll -- if
12 I can get to it in just a second --

13 THE COURT: Yeah, go ahead.

14 MR. HILDEBRAND: -- I think it will
15 be -- what happened was -- and Mr. Bundy went to
16 great lengths and great detail with this witness
17 about the fact that Mr. Bennett over Christmas
18 had people out there punching it, and it wasn't
19 done right, and we didn't pay for it and all that
20 sort of stuff. This explains that the
21 architect -- and I've got the -- the rest of this
22 document shows --

23 THE COURT: Okay.

24 MR. HILDEBRAND: -- that the
25 professional punch list person, who the architect

1 employed, went through iteration after iteration
2 after iteration of the punch list. He signed off
3 on every single room, to include the painting on
4 every room and said, they're all done.

5 Only after that did Mr. Bennett, for
6 whatever reason, that's fine -- whatever reason
7 he had, he decided to repaint them. So the
8 implication from the cross-examination was that
9 the rooms had not been properly punched, and that
10 the architect -- there was a change of
11 conditions.

12 That's not true, Your Honor. There was
13 no change of conditions because the architect
14 punched all the rooms and said, they're good.
15 And that's what this document will show if I can
16 ask him about it.

17 THE COURT: All right. I will
18 allow it. Go ahead.

19 MR. HILDEBRAND: Thank you, Your
20 Honor.

21 BY MR. HILDEBRAND:

22 Q. All right, sir. So do you see the
23 documents that are -- all the thick documents
24 that are attached to this?

25 A. Yes, sir.

1 Q. And what did those -- can you explain to
2 the Judge what those reflect?

3 A. So these are the rooms, starting out
4 with the third floor. These were the items that
5 were previously given to us to take care of in --
6 by room. And we had a gentleman come out and
7 walk this with the architect's representative,
8 third-party punch list.

9 The gentleman that made it, I believe,
10 and had him walk through these items, each item
11 on the page with the Balfour Beatty
12 representative and sign off that they were done,
13 they were completed.

14 Q. Okay. To save some time, there is an
15 original punch list. The items are identified,
16 and then there's a repunch, and then it keeps
17 getting narrowed down until you have a final; is
18 that a fair statement?

19 A. Yes, sir.

20 Q. All right. And so what did these --
21 there's R -- it says RTL, and it says 11/15, and
22 there's some initials under that. Do you
23 recognize those initials?

24 A. Lynn Adkins and then the RTL, I can't
25 remember the gentleman's name.

1 Q. Who is Lynn Adkins?

2 A. He was a general superintendent that
3 worked for Balfour Beatty.

4 Q. Okay. So was this the -- so this was
5 the punch list that was done by the architect's
6 representative --

7 A. Yes, sir.

8 Q. -- for the guest rooms. And at this
9 point, they were all signed off on; is that
10 right?

11 A. Yes, sir.

12 Q. All right. Now, I would like to turn to
13 tab 152.

14 MR. HILDEBRAND: And I would like
15 to introduce that last document as our next
16 exhibit, Your Honor.

17 THE COURT: Okay.

18 MR. BUNDY: In that book?

19 MR. HILDEBRAND: Yes.

20 MR. BUNDY: Objection.

21 THE COURT: Okay. And that's with
22 the e-mail cover of November 27th included?

23 MR. HILDEBRAND: Yes, sir, the
24 e-mail and the documents they've got with it.

25 THE COURT: All right. What number

1 are we up to? Do you know? All right. We will
2 call it Plaintiff's 312. I think that's the next
3 one. Okay?

4 MR. HILDEBRAND: All right.

5 (PLF. EXH. 312 was marked for
6 identification and received in evidence.)

7 THE WITNESS: And what was the tab?
8 I'm sorry.

9 MR. HILDEBRAND: The next one I
10 would like you to turn is Exhibit 152.

11 MR. BUNDY: This is 312, Your
12 Honor?

13 THE COURT: Yes, sir.

14 MR. BUNDY: Thank you.

15 BY MR. HILDEBRAND:

16 Q. All right. Do you have that document in
17 front of you?

18 A. Yes, sir, I have it in front of me.

19 Q. This is an e-mail from Buck Lindsay
20 to -- from Jennifer Faulkinberry to Buck Lindsay.
21 Do you see recognize that?

22 A. Yes, sir.

23 Q. Dated December 2, 2018, correct?

24 A. Yes, sir.

25 Q. All right. Subject is Marion Square

1 guest room status, correct?

2 A. Yes, sir.

3 Q. It says, Barbara DeMatteo's team punched
4 all guest rooms twice, and their final list is
5 attached. I thought they were thorough.
6 Operator Salamander also punched the rooms, but
7 their list is hard to understand, checks and X's,
8 no descriptions.

9 I was about to release the guest rooms
10 in partial certificate of substantial completion
11 when Mike showed up to randomly check some rooms.
12 The attached photos are from room 840, excuse
13 sloppy writing. The worst item was the bathroom
14 pocket door off its track.

15 The remaining offenses are very minor
16 and mostly easily -- and most easily addressed by
17 Salamander. Don't know anyone who can punch 179
18 rooms to Mike's standard. I suggest that he has
19 one of his team members do it.

20 BBC has refused to pick up a third round
21 of punch items, so Mike may need to bring in his
22 own crew. They're talking to CPI. Bennett still
23 has their own LVAV system installers going into
24 rooms and leaving minor damage.

25 Last one, Bennett is in arrears with

1 those five invoices totaling \$75,000. I'm
2 concerned we will never see that money, and I
3 have not even started the exterior punch.

4 So did you have any discussions with
5 Jennifer Faulkinberry after they had completed
6 their punch list and before the repainting had
7 started where she had expressed Michael Bennett's
8 standards and where they were as far as the final
9 punch list was concerned?

10 A. No, sir.

11 MR. HILDEBRAND: I would like to
12 move this as the next exhibit, Your Honor.

13 MR. BUNDY: Objection.

14 THE COURT: All right. Any
15 objection on that one?

16 MR. BUNDY: Yes.

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

19 MR. HILDEBRAND: So is this --

20 THE COURT: Yeah, I reviewed her --
21 I don't know, was he copied on this, number 1? I
22 don't think he was.

23 MR. HILDEBRAND: He was not.

24 THE COURT: Number 2, I did review
25 her deposition, and I had questions because I

1 couldn't find the basis for this, but this was
2 clearly a document created by Ms. Faulkinberry?

3 MR. HILDEBRAND: Yes, sir.

4 THE COURT: And she did testify
5 about it in her deposition, so I checked it off.
6 It's admissible.

7 MR. HILDEBRAND: Correct.

8 THE COURT: All right. I'm going
9 to allow it.

10 MR. HILDEBRAND: Thank you, Your
11 Honor.

12 THE COURT: That was 122 to her
13 deposition; 152 is our exhibit number.

14 MR. HILDEBRAND: Correct. Thank
15 you, Your Honor.

16 THE COURT: Okay. All right.

17 MR. BUNDY: So what number will it
18 be now, Judge?

19 THE COURT: 152.

20 MR. BUNDY: 152?

21 THE COURT: Yes.

22 MR. BUNDY: All right.

23 (PLF. EXH. 152 was marked for
24 identification and received in evidence.)

25 BY MR. HILDEBRAND:

1 Q. Mr. Simonton, when was the painting
2 finished? When was the guest room painting --
3 when was it completely finished on the project?
4 Before Mr. Bennett repainted the rooms?

5 A. It was -- the touchup from the punch
6 list would have been the last little bit of paint
7 in the rooms. That was right after the rooms had
8 finished, so September or October, I believe.

9 Q. Okay. So what change of circumstances,
10 if any, occurred with the painting of the rooms
11 between that day and September of 2018 and the
12 date that the owner and the architect advised you
13 that they were not going to make any further
14 payments on the project?

15 A. Nothing had changed.

16 Q. Okay. Let me clear this up. Mr. Bundy
17 had referenced a subpoena that you had done to
18 Library Associates. Are you aware of any
19 subpoenas that Balfour Beatty directed to Library
20 Associates in this matter?

21 A. Yes, sir, I read it. Yes, sir.

22 Q. A subpoena?

23 A. Oh, a subpoena? No, sir. I don't
24 recall that.

25 Q. Do you know the difference between a

1 subpoena and a request for production?

2 MR. BUNDY: Objection.

3 THE COURT: I will allow it.

4 THE WITNESS: Explain it if you
5 don't mind.

6 THE COURT: Well, the question was,
7 do you know the difference?

8 THE WITNESS: Yes, sir.

9 BY MR. HILDEBRAND:

10 Q. What is it?

11 A. The subpoena is your served document and
12 the request for production is the produced
13 documents to us in short version.

14 Q. Okay. Let's go back to the contract for
15 a moment.

16 A. It's in binder 2, isn't it?

17 Q. It's Exhibit 56. And I would like to
18 refer you to the A201 section 15.2.8, page 15.

19 A. Okay. I'm there.

20 Q. All right. It reads, if a claim relates
21 to or is the subject of a mechanic's lien, the
22 party asserting such claim may proceed in
23 accordance with applicable law to comply with the
24 lien notice for filing deadlines. And then turn
25 to section 4.4.8 if you would.

1 MR. BUNDY: Is there a question
2 involved with it?

3 MR. HILDEBRAND: There is if you
4 will bear with me, please.

5 THE COURT: 4.4.8?

6 MR. HILDEBRAND: Yes, sir.

7 THE COURT: What page is it on?

8 MR. HILDEBRAND: On 25.

9 THE COURT: Okay.

10 BY MR. HILDEBRAND:

11 Q. Are you with me?

12 A. I'm with you.

13 Q. Okay. I'm going to read that one. If a
14 claim relates to or is the subject of a
15 mechanic's lien, the party asserting such claim
16 may proceed in accordance with applicable law to
17 comply with the lien notice or filing deadlines
18 prior to resolution of the claim.

19 There were a lot of questions directed
20 to you by Mr. Bundy about the claims process and
21 the filing of the suit in relation to those
22 provisions of the contract. Do you think that
23 those have any -- what applicability, if any, do
24 those provisions have with the filing of the
25 lawsuit?

1 MR. BUNDY: Objection.

2 THE COURT: Basis?

3 MR. BUNDY: Well, he's asking the
4 witness a legal opinion. He reads him things out
5 of the contract, and there's really no -- I don't
6 know what the question is. I mean, that's
7 really -- I don't know what it is. I just
8 object. I don't understand.

9 THE COURT: Okay. Go ahead.
10 Restate your question.

11 BY MR. HILDEBRAND:

12 Q. All right, sir. But there are a lot of
13 questions about timing of filing claims and
14 following the contract. Do you remember that?

15 A. Yes, sir.

16 Q. And whether Balfour followed the
17 contract when they filed the claims. Do you
18 remember all of those from Mr. Bundy?

19 A. Yes, sir.

20 Q. My simple question is, in light of
21 those, what impact, if any, do those claim
22 provisions have with relation to Balfour's filing
23 the claim, if you have any opinion?

24 A. I don't have any opinion.

25 Q. Okay. Fair enough.

1 MR. HILDEBRAND: I would like to
2 pre-mark this. I guess the next one would be
3 313, I believe, Plaintiff's 313.

4 THE COURT: Discovery pleadings,
5 right?

6 MR. HILDEBRAND: Yes, sir.

7 MR. BUNDY: Yes, sir, and --

8 THE COURT: I think he can publish
9 it. I'm not sure he can --

10 MR. BUNDY: Well, I don't think he
11 can publish these because they are not verified.
12 The rules require that all interrogatory answers
13 be verified, and there is a reason they have to
14 be verified so you can come into Court and read
15 them.

16 THE COURT: Okay.

17 MR. BUNDY: And I have -- every
18 letter I send with discovery, every request that
19 I get for an interrogatory says, you will verify
20 these answers. And I've had lawyers -- and I'm
21 not so sure if my learned counsel in this case is
22 one of them.

23 I've had lawyers tell me, absolutely,
24 they do not, and they all have to go look at the
25 rule. And the rule specifically says that, and

1 the reason the rule says it is because you can't
2 use them in Court and publish them if they aren't
3 verified. This is hearsay, and this is
4 Mr. Hildebrand's hearsay. Okay?

5 THE COURT: Okay. All right.
6 Objection is made to the document as not being
7 verified. Do you got something else?

8 MR. HILDEBRAND: Your Honor, I
9 don't recall a specific request on this document
10 from Mr. Bundy to verify the document.

11 MR. BUNDY: It doesn't require a
12 specific request. The rule requires it. What I
13 do is simply try to help my adversaries who don't
14 the rules.

15 THE COURT: For self-authenticating
16 documents, correct?

17 MR. BUNDY: Pardon me?

18 THE COURT: Self-authenticating
19 documents if they're verified, right?

20 MR. HILDEBRAND: Okay. I will tell
21 you what.

22 THE COURT: Okay.

23 MR. BUNDY: The interrogatory
24 answers have to be verified. Self-authenticating
25 documents are documents like public record

1 documents and that sort of thing.

2 THE COURT: Right.

3 MR. HILDEBRAND: All right.

4 MR. BUNDY: That's not what this
5 is.

6 THE COURT: It becomes --

7 MR. BUNDY: It's an out-of-court
8 statement offered for truth of the matter
9 asserted.

10 THE COURT: Got it.

11 BY MR. HILDEBRAND:

12 Q. All right. So let's go through the
13 information as the Judge indicated rather than
14 introduce the document. The request was
15 identified with specificity and particularity.

16 MR. BUNDY: Objection. He can't
17 introduce the document. He can't read it.

18 MR. HILDEBRAND: Your Honor --

19 THE COURT: Is the purpose of this
20 to get into the basis for the claim, the amount
21 of the claim?

22 MR. HILDEBRAND: The purpose of
23 this is based on questions from Mr. Bundy in
24 cross-examination where he said, well, look at
25 this pay application number 43. Here you're

1 claiming -- or 44.

2 You're only claiming 2 million dollars
3 and all of a sudden you file a mechanic's lien
4 and then jumps up to 8 million and then 12
5 million dollars. Y'all must have made up this
6 money and why are you entitled to it?

7 So what I'm trying to establish, for the
8 record, and by looking at it is, what's included
9 in a pay application is one thing. That's
10 amounts that -- that his client has agreed to pay
11 us under owner change orders and under the
12 contract.

13 THE COURT: Okay.

14 MR. HILDEBRAND: On top of that, we
15 have a breach of contract claim, and we have a
16 right to a mechanic's lien for -- and that's why
17 we're here, for delays and also for requested
18 change orders.

19 So I'm just trying to clarify for the
20 record, based on Mr. Bundy's basic allegations
21 that we made up something and that what we did
22 was inappropriate, and I just want to establish
23 the basis that -- what was called for under the
24 pay application was different than what the claim
25 is.

1 THE COURT: Okay.

2 MR. BUNDY: This has nothing to do
3 with what Mr. Bundy thinks. We are in here. He
4 puts a witness on the witness stand. I asked him
5 questions, and he answers the questions.

6 And now, he gets to clarify my
7 cross-examination because he filed some discovery
8 answers? This is -- I'm not familiar with this
9 procedure. I've been doing this 44 years and I
10 cannot believe we're having this discussion, and
11 I object.

12 THE COURT: Okay. Objection noted.
13 You can ask him the basis for the claim.

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

16 BY MR. HILDEBRAND:

17 Q. Mr. Simonton, there were some
18 discussions about what was claimed under pay
19 applications and what was -- what Balfour claimed
20 under his amended lien of 12 million dollars. Do
21 you remember those questions?

22 THE COURT: Objection noted.

23 MR. BUNDY: But I object to him
24 having the document in front of him. He has got
25 recorded testimony he is reading from. That's

1 improper. And he shouldn't have that in his
2 hands.

3 He should answer questions. He can't
4 give him a script. This is a script for the
5 witness to read to you from a lawyer with an
6 unsigned answers to interrogatories. This is
7 entirely improper.

8 THE COURT: Okay. I'm not sure I
9 agree with that, but I think a better foundation
10 can be laid.

11 MR. HILDEBRAND: All right, sir.

12 MR. BUNDY: Well, could we -- does
13 he get to read the document? Does he get to read
14 their answers to interrogatories?

15 THE COURT: If it refreshes his
16 memory, he will.

17 MR. BUNDY: But he doesn't have any
18 memory of it because he didn't prepare it, Judge.

19 THE COURT: Well, I'm with you on
20 that one, but let's see if he can.

21 BY MR. HILDEBRAND:

22 Q. Well, let me ask you this, Mr. Simonton:
23 What involvement, if any, did you have in the
24 preparation of that discovery response?

25 A. Working with Parker Poe and putting it

1 together, the numbers.

2 Q. Did you have personal involvement
3 with -- with the information that is set forth
4 when Mr. Bundy asked Balfour Beatty, identify
5 with specificity and particularity, each and
6 every monetary component of your claimed
7 mechanic's lien in the amount of \$12,066,147.09.
8 Did you have personal involvement with drafting
9 any responses to that?

10 MR. BUNDY: Objection.

11 A. Yes, sir.

12 Q. All right, sir. Can you tell me what
13 the amounts that were comprised of that lien?

14 THE COURT: First, without looking
15 at the document, can you tell us what the amounts
16 are?

17 THE WITNESS: The total amount is
18 12 million dollars.

19 THE COURT: Okay.

20 BY MR. HILDEBRAND:

21 Q. And just tell me generally what that was
22 comprised of?

23 A. It was the contract balance, RCOs,
24 executed and unexecuted, overages of general
25 conditions, change orders -- I believe I said

1 that -- and OCOs, executed OCOs not funded.

2 Q. Okay. Were there any damages included
3 in that mechanic's lien for delay damages?

4 A. The overages and overhead -- profit
5 overhead insurance, interest.

6 Q. Okay.

7 MR. HILDEBRAND: I will move on,
8 Your Honor.

9 THE COURT: Okay.

10 BY MR. HILDEBRAND:

11 Q. Let's turn to the contract again, the
12 A201 9.6.2.

13 A. I'm there.

14 Q. All right. It says, the contractor
15 shall promptly pay each subcontractor upon
16 receipt of payment from the owner out of the
17 amount paid to the contractor on account of such
18 subcontractor's portion of the work, the amount
19 to which said subcontractor is entitled
20 reflecting percentages actually retained from
21 payments to the contractor on account of such
22 subcontractor's portion of work.

23 The contractor shall, by appropriate
24 agreement with each subcontractor, require each
25 subcontractor to make payments to

1 sub-subcontractors in a similar manner. Did I
2 read that correctly?

3 A. Yes, sir.

4 Q. All right.

5 MR. HILDEBRAND: I'm just about
6 wrapped up, Your Honor. Last questions.

7 BY MR. HILDEBRAND:

8 Q. All right. Do you remember a lot of
9 questions, and very specific questions from
10 Mr. Bundy, about pay applications and when they
11 were certified and decertified and all of that?

12 A. Yes, sir.

13 MR. BUNDY: Objection.

14 BY MR. HILDEBRAND:

15 Q. Do you recall that?

16 MR. HILDEBRAND: I'm just trying to
17 establish the foundation here.

18 BY MR. HILDEBRAND:

19 Q. All right. And you testified, as I
20 recall, you believe that the pay applications
21 have been decertified; is that correct?

22 A. That's what I -- that's what I
23 understood, yes, sir.

24 Q. All right. And refresh my recollection
25 on events upon our --

1 MR. BUNDY: Objection. I'm not
2 familiar with the process of the witness --

3 MR. HILDEBRAND: I'll withdraw it.

4 MR. BUNDY: -- refreshing the
5 lawyer's recollection.

6 THE COURT: All right.

7 MR. HILDEBRAND: I will withdraw
8 it. Okay.

9 BY MR. HILDEBRAND:

10 Q. Are e-mails a part of the contract
11 documents in your view?

12 MR. BUNDY: Objection. He answered
13 that on the cross. It's a leading question.

14 THE COURT: I think he did.

15 MR. HILDEBRAND: All right. I
16 believe the answer was no.

17 THE COURT: That's my recollection.

18 MR. BUNDY: Objection.

19 THE COURT: That's my recollection.
20 I agree with you.

21 BY MR. HILDEBRAND:

22 Q. All right. So let's go through this.
23 Let's turn to exhibit, Library's Exhibit 43. Can
24 you get that in front of you?

25 A. 43?

1 Q. Yes, sir, Exhibit 43.

2 THE COURT: It's a two-page
3 document. It was the one that had the bottom cut
4 off at the top of the second page, Jennifer
5 Faulkinberry e-mail.

6 THE WITNESS: I don't see any
7 e-mails. It may be in this stack.

8 MR. BUNDY: Just use mine.

9 THE WITNESS: Thank you.

10 BY MR. HILDEBRAND:

11 Q. All right. So Exhibits 43 and 44 are in
12 evidence, and I believe that those --

13 THE COURT: Mr. Bundy, let me give
14 you this. Here's the original, and you can hand
15 that to him. Give him his back. I had two of
16 them.

17 THE WITNESS: I've got it right
18 here.

19 THE COURT: You do have it? All
20 right.

21 MR. BUNDY: Let me get mine back if
22 I could.

23 THE WITNESS: I believe I have it.

24 BY MR. HILDEBRAND:

25 Q. All right. So Exhibit 43. I believe

1 that this -- when Mr. Bundy was asking you about
2 change circumstances and decertification, it was
3 in reference specifically to this document. Is
4 that your recollection?

5 MR. BUNDY: Objection.

6 THE COURT: Go ahead.

7 THE WITNESS: Yes, sir.

8 BY MR. HILDEBRAND:

9 Q. All right. Now, I believe you read this
10 whole document into evidence or most of it, but
11 it's a document from Jennifer Faulkinberry to
12 Nick Starcevic and you, and it was pointed out
13 that you were a direct recipient of this; do you
14 remember?

15 A. Yes, sir.

16 Q. And the architect, Jennifer
17 Faulkinberry, in the third paragraph down says,
18 as a consequence of this deficient work and BBC's
19 unwillingness to correct it, the owner has
20 received its first invoice from Robins and Morton
21 of \$518,830 for repairs to pay.

22 Now, we've talked about whether y'all
23 believe the work was deficient or not, correct --

24 A. Yes, sir.

25 Q. -- based on the punch list? But

1 regardless, it says at the very next to last
2 paragraph, in view of the progress of this owner
3 furnished work to-date, invoices in hand and
4 remaining work to complete, it is our estimate
5 that the remedial repairs could reach in excess
6 of a million dollars.

7 Per article 9.5, decisions to withhold
8 payment, we recommend withholding funds from
9 applications for payment 43 October and 44
10 November, and future contract payment request to
11 offset these costs incurred to-date as well as
12 anticipated completion costs.

13 My question to you is, what specific
14 amount is being referenced in this document from
15 your reading of it other than the \$518,830?

16 A. 518,830 was the only thing that they
17 basically provided backup for.

18 Q. Okay. And pay application 43 that
19 hadn't been -- hadn't paid and certified was for
20 \$556,408. So the amount of pay at that point was
21 less than the amount of that pay application,
22 correct?

23 A. Yes, sir.

24 Q. And then the subsequent pay application
25 of 44 was \$1,994,855. Those total \$2,551,263.

1 Did Balfour ever receive payments from the owner
2 for any undisputed amounts after you withdrew --
3 after any of this painting -- this disputed
4 painting was withdrawn?

5 MR. BUNDY: Objection. He just
6 said he doesn't work for Balfour anymore, so I
7 don't know how he can testify now about Balfour
8 Beatty did. He can't have it both ways.

9 BY MR. HILDEBRAND:

10 Q. While you were there. I understand you
11 can't testify about what you've done since then.

12 THE COURT: All right. Limit it,
13 that's okay. Go ahead.

14 BY MR. HILDEBRAND:

15 Q. While you were there, did you have
16 knowledge of Balfour having received payment of
17 undisputed amounts that I just described?

18 A. No, sir, we didn't. We had not received
19 any.

20 Q. All right. We just read this document,
21 Mr. Bundy did, and he characterized -- or there
22 was a characterization of decertification of an
23 e-mail. Do you remember that?

24 A. Yes, sir.

25 Q. All right. I don't see that word on

1 this document. Do you?

2 MR. BUNDY: Objection.

3 BY MR. HILDEBRAND:

4 Q. Tell me where, if anywhere on this
5 document, you see the word decertification from
6 the architect.

7 A. I don't see decertification on this
8 document.

9 Q. To your recollection, was there ever --
10 was pay application 43, did the -- do you recall
11 ever having received it back from the architect
12 where it was written on there or otherwise, it
13 was decertified?

14 A. No, sir.

15 Q. Can you point me here today or can you
16 tell me your recollection of ever having received
17 a specific document from an owner -- I'm sorry,
18 from the architect in relation to pay application
19 43 or 44 where they decertified a document?

20 A. Not using the word decertified, no, sir.

21 MR. HILDEBRAND: Thank you. That's
22 all I have.

23 RE CROSS-EXAMINATION

24 BY MR. BUNDY:

25 Q. All right. Look at the contract, page

1 It is not like summary judgment or you
2 just do it on briefs or anything else like that.
3 So I've asked Mr. Bundy several times, just tell
4 me, you want just -- and I think the Court has
5 asked him that same thing, why are we even -- is
6 this in controversy? The witnesses agree that
7 these aren't in, so -- but I don't agree to a
8 kind of interlocking --

9 THE COURT: A preliminary ruling on
10 the DJ action?

11 MR. HILDEBRAND: Right. Yes, sir.

12 THE COURT: I got you on that. Let
13 me ask this question: If you were to limit that
14 issue to whether or not those supplemental
15 conditions are in the record, does that really
16 answer the question? It may not answer the
17 ultimate question, but it is an answer to a
18 question that we need to get --

19 MR. BUNDY: And I can solve his
20 problem.

21 THE COURT: Yeah.

22 MR. BUNDY: If I withdraw my dec
23 action, so the only dec action before you is his.
24 He has finished his case, and he wants to know
25 whether the supplemental conditions are in or

1 out.

2 THE COURT: Okay.

3 MR. BUNDY: I don't need to put in
4 any evidence, so I withdraw my dec action. But I
5 would like a ruling on the pending dec action
6 brought by Mr. Hildebrand. Thank you, Your
7 Honor.

8 THE COURT: Okay. All right. I
9 will tell you what I would be willing to do, and
10 that would be to hear from each of you on the
11 limited question of whether or not those
12 supplementary conditions are or are not in the
13 contract.

14 On that one issue alone, that's been
15 burning up some time and effort in here. The
16 evidence that I've seen so far would indicate to
17 me that it was in there by mistake. Okay? And
18 that's what it seems to me, but I would like
19 y'all to -- if y'all want to brief that and do it
20 in that short timeframe, I would be happy to hear
21 from you on that question. Okay?

22 MR. BUNDY: Okay. That's fair
23 enough.

24 THE COURT: Because that would -- I
25 think that would clear up one just sort of -- and

1 Mr. Boe, come right on around.

2 (MARK BOE, having first been duly
3 sworn, testified as follows:)

4 THE COURT: Please have a seat.

5 Mr. Boe, when you get comfortable, if you will
6 give us your full name and address for the
7 record.

8 THE WITNESS: My name is Mark Boe.
9 That's spelled B-O-E.

10 THE COURT: B-O-E?

11 THE WITNESS: B-O-E.

12 THE COURT: All right, sir.

13 THE WITNESS: And my address has
14 changed since my deposition. It's 20 Calibougue,
15 C-A-L-I-B-O-G-U-E, Cay Road, number 2610, in
16 Hilton Head, South Carolina 29928.

17 THE COURT: All right, sir. Thank
18 you very much.

19 Mr. Bundy?

20 DIRECT EXAMINATION

21 BY MR. BUNDY:

22 Q. Mr. Boe, before you moved, where did you
23 live?

24 A. In Blue Bell, Pennsylvania.

25 Q. All right. Where did you grow up?

1 expert?

2 A. I have. I'm actually just finishing up
3 an assignment for a court in Israel that has to
4 do with the Ben Gurion Airport.

5 Q. Okay. And how did it come to be that
6 you were assigned that task?

7 A. I taught a seminar at some point, and
8 one of the attendees was representing the
9 Israel -- the IAA Airport Authority, and they
10 recommended me after that seminar. And I was
11 selected over four or five other people.

12 MR. BUNDY: And, Your Honor, at
13 this point, I would move to qualify mr. Boe as an
14 expert in contract dispute resolutions, CPM
15 schedule delay analysis, labor productivity
16 analysis, damages resulting from delay and
17 disruption, CPM scheduling and scheduling,
18 forensic scheduling analysis as well.

19 THE COURT: All right.

20 MR. HILDEBRAND: That seems pretty
21 broad. The only documents that we've gotten
22 relative to his testimony are delayed -- was his
23 testimony regarding delay. That was a long
24 litany of what he's qualifying him.

25 As I heard him testify that he's

1 primarily a delay expert, and that's what I heard
2 him testifying about. All those others things, I
3 just -- I don't know that he is qualified on all
4 of those. But I certainly would stipulate to his
5 credentials as a scheduling delay expert.

6 THE COURT: Okay.

7 MR. BUNDY: I can lay more
8 foundation, if you would like.

9 THE COURT: Is that generally the
10 area that you are seeking to have him opine?

11 MR. BUNDY: Well, I'm seeking to
12 have him qualified in all the areas he's
13 qualified to testify to, and to the point we get
14 into -- and to the extent we get outside of what
15 he's thinks is fair, then he can object at that
16 point in time. But that doesn't make him not an
17 expert. I mean, he might be an heart surgeon. I
18 may not ask him about it, but I don't know.

19 THE COURT: Well, it all looks to
20 be -- and other than the contract dispute
21 resolution area, which I don't think we're going
22 to get into with him --

23 MR. BUNDY: Right, right.

24 THE COURT: -- everything else
25 seemed to have to do with construction project

1 management schedule and delay analysis. And I
2 will allow him to -- I will certify him as an
3 expert in that area, okay --

4 MR. BUNDY: Thank you, Your Honor.

5 THE COURT: -- based on that.

6 BY MR. BUNDY:

7 Q. Mr. Boe, when did you first become
8 involved on this project?

9 A. I believe it was February or March of
10 2019.

11 Q. 2019. And do you know how -- who
12 contacted you?

13 A. I would say that you contacted us.

14 Q. Okay. And do you have any knowledge
15 about how it happened to pass that I called you?

16 A. I think you were asking for
17 recommendations from another counsel in South
18 Carolina and got a recommendation for our firm.

19 Q. Okay. And I assume we had a phone call?

20 A. I'm sure we did.

21 Q. And as a result of that conversation,
22 were you hired?

23 A. Yes.

24 Q. Okay. And you've been working on this
25 case for about how long now?

1 A. Two and a half years.

2 Q. Okay. And what do your -- how much is
3 Library Associates paid you to-date for your
4 work?

5 A. It's between 400 and \$450,000.

6 Q. Okay. So Library Associates has paid
7 your firm between 400 and \$450,000 to analyze
8 this case; is that correct?

9 A. Yes, sir.

10 Q. And how many man hours does that
11 represent, just generally, do you think?

12 A. Well, my part of it was a half or
13 quarter of -- half a million. No, quarter of a
14 million. So 500, 600 hours. So I would say five
15 times that.

16 Q. Okay. So 2500 hours?

17 A. Yeah.

18 Q. Okay, sir. And the other people who
19 work with you on this job, what are their names
20 and what are their qualifications?

21 A. Kevin Eckert is one. He has 12 years of
22 experience doing construction work, working for
23 first a general contractor and then -- well, two
24 different general contractors and has been
25 working for CPMI for about four years or about

1 three years -- three years.

2 Q. And CPMI is the company you work for,
3 correct?

4 A. Exactly, yeah. I'm a founding
5 shareholder.

6 Q. All right. And the other person who
7 worked on this job?

8 A. Supriya Panwar, who has six -- six years
9 of construction experience working in the field
10 for the most part. And for the last two years,
11 she's been working for CPMI. Before that, she
12 worked for a couple years as a scheduler on
13 projects while she was getting her master's
14 degree.

15 Q. Okay. And who supervises these people?

16 A. I do.

17 Q. And you're familiar with their work and
18 you understand what they do?

19 A. We basically don't go a day without
20 talking about what they're working on, on my
21 cases. So we go back and forth on the specifics
22 of what they're doing.

23 Q. All right. What were you asked to do,
24 mr. Boe?

25 A. Well, basically, our tasking was to look

1 at the claim that existed. So by that time,
2 there were four binders that were -- that were in
3 existence from Balfour Beatty, and those four
4 binders made up their initial claim from January
5 of 2019.

6 So we were asked to look at that and
7 then to look over some of the owner's documents
8 just to get a basis of the project and to
9 determine whether or not there was something that
10 we could move forward with and analyze and come
11 up with a solution, to come up with a
12 recommendation.

13 Q. Were you hired to do a delay analysis on
14 this job to determine where the delays were?

15 A. No.

16 Q. Okay. So you were hired to review the
17 delay claims made by the contractor to determine
18 their validity in your opinion, correct?

19 A. Right.

20 Q. And the opinions you're going to give
21 today, are they to a reasonable degree of
22 certainty within your area of expertise?

23 A. Yes.

24 Q. Okay. So I won't need to ask you every
25 time to a reasonable degree of certainty because

1 you're not going to give an opinion in this
2 courtroom that is not to a reasonable degree of
3 certainty, are you?

4 A. That's right.

5 Q. Okay. Thank you. So let's begin with
6 Exhibit 252. I believe you have that in front of
7 you.

8 A. Okay.

9 MR. BUNDY: Your Honor, would you
10 like to get that in front of you?

11 THE COURT: Yes.

12 MR. BUNDY: Do you have it? Your
13 Honor, I have another copy. That way we can move
14 ahead. It's not marked, but that is 252.

15 BY MR. BUNDY:

16 Q. All right. Mark, do you have 252 in
17 front of you?

18 A. I do.

19 Q. And what do you understand Exhibit 252
20 to be?

21 A. This is the initial claim that was
22 presented to Library Associates.

23 Q. And how much -- and this is a four page
24 letter?

25 A. Yeah.

1 analysis. And then there's subcontractor claims
2 for 11 million dollars out of this number, and
3 they're not included here. I know they were
4 included in the four binders that came later.

5 Q. Okay. So is it fair to say that this is
6 just simply a litany of allegations with no
7 factual backup?

8 A. Right.

9 Q. Now, let's look at Exhibit 11. For the
10 record, would you tell us what the Exhibit 11 is?

11 A. This is the four binders that I was
12 referencing.

13 Q. Exhibit 11 is one of four?

14 A. One of four.

15 Q. Okay. What is Exhibit 12?

16 A. It's two of four.

17 Q. And Exhibit 13?

18 A. This is three of four.

19 Q. And Exhibit 14?

20 A. It's four of four.

21 Q. Okay.

22 A. So those are the four binders that I was
23 discussing earlier.

24 Q. Is this the claim that was prepared by
25 Balfour Beatty, which followed the letter, which

1 has been marked and introduced as Exhibit 252?

2 A. Yes.

3 Q. Okay. Now, did you review this -- these
4 documents, this claim -- let's call it the binder
5 claim, I guess?

6 A. Yes.

7 Q. Okay. And approximately how much did
8 Library Associates pay you to review this claim?

9 A. Between 40 and \$50,000.

10 Q. Okay. So you spent -- and roughly how
11 much time is that if you extrapolate it in time?

12 A. Sorry. I used to be able to do that
13 math in my head, and I'm afraid I can't. If I
14 average \$200 an hour, that's probably 200 hours.

15 Q. Okay. So you spent 200 hours -- 150,
16 200 hours and sent my client a bill for \$40,000
17 to review it, and at the conclusion of that
18 review, what was your opinion to a reasonable
19 degree of certainty about the validity of this
20 claim?

21 A. It was essentially that I didn't have
22 the information that I needed in order to do a
23 reasonable analysis to figure out what was going
24 on, what was the cause of the delay.

25 They didn't make specific allegations

1 concerning delay. It's more, here's the number.
2 You know, the number is what it is. And then
3 there's backup to -- there's a single schedule
4 that's provided that's -- that's the last
5 schedule on the project.

6 And there's several subcontractor claims
7 that, quite frankly, have more meat on them than
8 the actual Balfour Beatty part of the claim.
9 They actually had a summary of the cost and a
10 reasoning, at least, for what the damages were.

11 Q. Okay. You reviewed this claim in 20 --
12 roughly 2019, correct?

13 A. Yes.

14 Q. And at that time in your career, how
15 many claims do you think you had reviewed prior
16 to this one?

17 A. Over 500, I would say.

18 Q. Okay. So on a scale of one to ten, ten
19 being the very best organized claim you have ever
20 seen, right, in your career, and zero being the
21 worst claim you've ever seen, where would you put
22 this four volume set along that scale for
23 purposes of educating someone about what the
24 basis of the claim was and the justification for
25 the number?

1 A. I mean, I have seen some pretty bad
2 claims that are worse than these -- than this,
3 but I still would put it in the two or three
4 range.

5 It's just -- it's very difficult to be
6 able to analyze -- to tell that something is
7 owed. And that's what my task, from my
8 perspective, is. I want to know if I can
9 recommend payment, and I really couldn't in this
10 case.

11 Q. In your career, receiving claims, have
12 you ever recommended to your client, you know,
13 I've looked at it, and we ought to pay them some
14 money?

15 A. I do it all the time.

16 Q. Okay. Did you make that recommendation
17 to Library Associates once you looked at this
18 document?

19 A. No.

20 Q. Did you make a recommendation regarding
21 payment?

22 A. I recommended that they get more
23 information, that they needed a delay analysis,
24 that they needed more information.

25 Q. All right. Well, let's talk about the

1 information that you actually looked at in these
2 claims. I would like to sort of drill down a
3 little bit into these.

4 MR. BUNDY: Your Honor, we're going
5 to begin with Defendant's Exhibit 11 in evidence.
6 It's volume one of four.

7 THE COURT: Got it.

8 MR. BUNDY: Are you ready?

9 THE COURT: Yes, sir.

10 BY MR. BUNDY:

11 Q. All right. Mr. Boe, let's start with
12 Exhibit, Defendant's Exhibit 11. Now, what was
13 the purpose, as you understand it, of Balfour
14 Beatty in making -- in providing this
15 documentation? What is it you understand that
16 they were trying to accomplish?

17 A. From my perspective, they were -- they
18 were putting meat on the bones of that previous
19 letter, the previous letter that requested 22
20 million dollars. This was supposed to be backup
21 that caused the owner to look at it and say,
22 okay, we can pay that or we can pay some portion
23 of it.

24 Q. Do you know whether this -- have you
25 read the contract between these parties?

1 A. I have.

2 Q. Okay. And do you know whether that
3 contract has any provisions related to disputes,
4 claims, and how you make them and what needs to
5 be in them?

6 A. I know it does.

7 Q. Okay. And in general, in the
8 construction industry, is it generally understood
9 how claims are generally presented, what needs to
10 be in a claim in order to justify payment?

11 A. I think it's well understood, and by
12 most contractors, I'm sure that they --

13 Q. Tell the Judge, if you would, what that
14 understanding is, as you understand it to be, as
15 it relates to claims. The contractor is making a
16 the claim. What is he trying to do?

17 A. I think generally he is trying to put
18 forward his best foot and his best effort to say,
19 you owe me money and here's why -- here's
20 specifically why, step by step, issue by issue.

21 Q. And does causation between an event and
22 damages play any role in the validity of a claim
23 in your mind?

24 A. Of course. Cause and effect is key to
25 any of this claim. Is it a requirement of the

1 contract? Did that requirement change? Did that
2 specific event cause delay or cause additional
3 costs? You know, you've got to show each of
4 those steps, entitlement and the -- and the
5 impact.

6 Q. In your opinion, is it sufficient for a
7 contractor to simply say, there were changes,
8 there were delays, and so therefore, I'm entitled
9 to be paid?

10 A. No.

11 Q. Why not?

12 A. I mean, as an outside person coming into
13 a claim, I can't look at -- I mean, I want to
14 look at a claim and be able to say, step by step,
15 okay, that sounds -- that's a story that is
16 logical. Now, I just have to verify that that's
17 what really happened.

18 And so having those allegations right up
19 front and being able to say, okay, I've seen the
20 allegation, and I can dig into the details of it.
21 And it -- the best way to do that is to have that
22 information right here, so the schedules, and the
23 daily reports and the weekly meetings that show
24 those things.

25 And I truly -- I expect to see that when

1 I'm reviewing a claim. It doesn't have to be the
2 first step. It doesn't have to be that first
3 letter, but if you're going to put together four
4 binders, there ought to be a sequence or a logic
5 to it that makes sense.

6 Q. Do you know whether or not the contract
7 speaks to who has the burden of proof when a
8 claim is being made?

9 A. I haven't seen very many contracts that
10 say it's other than contractor, the person making
11 the claim.

12 Q. So whoever is making the claim has the
13 burden, whether it's the owner or the contractor?

14 A. Yes.

15 Q. Okay. So have you ever been in a
16 situation where the contractor made a claim and
17 it was the owner's responsibility to disprove the
18 claim, not the contractor's responsibility to
19 prove his claim?

20 A. No.

21 Q. Okay. So let's look at volume one.
22 Let's start out with the letter that's dated
23 March 6th, 2019. It's directed to, I think, a
24 Mr. Buck Lindsay. Who is Buck Lindsay?

25 A. He's the architect on the project.

1 Q. Okay. And do you know why the
2 contractor was sending this claim to Buck
3 Lindsay?

4 A. That's the initial step of the dispute
5 process in the contract.

6 Q. Okay. And the dispute process is found
7 where?

8 A. Well, in the contract. I don't -- I
9 can't really recollect the --

10 Q. I'm just -- but this is something the
11 parties agreed to do, that they would do it this
12 way --

13 A. Yes.

14 Q. -- correct?

15 A. Yes.

16 Q. And as I understand it, the process was,
17 you send it to the architect first and he makes a
18 decision, correct?

19 A. Yes.

20 Q. Okay. And does the first paragraph
21 inform us that this was additional information
22 that was being provided at the architect's
23 request?

24 A. Yes.

25 Q. And do you know whether or not that was

1 because the architect, much like you, didn't
2 think that a four page letter justified a 22
3 million dollar payment?

4 A. I see that this is in response to a
5 letter from the architect; so I assume that's the
6 case.

7 Q. So let's look down at -- further down on
8 this letter. It says, tab one. What was tab one
9 supposed to do? What was it supposed to tell us?

10 A. It's supposed to be support for the
11 additional general conditions costs incurred
12 through the contractor during the contract
13 period. So it's additional general conditions
14 that were incurred during the contract period.

15 Q. And that's not an item that you would
16 have been investigating, correct, the cost
17 itself?

18 A. Oh, not -- we didn't know at that
19 initial stage at that point, but yes, I wouldn't
20 be looking at the cost necessarily, just what the
21 justification would be for that.

22 Q. And the cost in this number would have
23 been a consequence of the delay or ties to the
24 delay, if no delay in the cost, right?

25 A. No, not really in this case. This is

1 during the contract period. So the idea was that
2 this is over and above what they had originally
3 estimated.

4 Q. I got ahead of myself. All right. What
5 is tab 2 then?

6 A. Tab 2 is support for the extended
7 general conditions.

8 Q. Okay. And the extended general
9 conditions, are they premised on the notion that
10 the contractor was entitled to additional time?

11 A. Additional time meaning compensation; so
12 it has to be compensable time.

13 Q. Right. But you can't get additional
14 compensation if you don't get additional time,
15 right?

16 A. Right.

17 Q. Okay. And time is what you were
18 investigating, correct?

19 A. Yes.

20 Q. Okay. And then tab 3 is subcontractor
21 claims, pass-through claims?

22 A. Yes.

23 Q. Tab 4, support for change orders, and it
24 goes on down. Tab 7, what was tab 7?

25 A. Tab 7 is the -- it says, entitlement --

1 support for entitlement to schedule delays and
2 impacts.

3 Q. Okay. And it says, which consists of
4 Balfour Beatty Construction's most recent updated
5 schedule and -- so did you understand tab 7 to be
6 the support for entitlement to delay?

7 A. Yes.

8 Q. That was what they were sending the
9 architect? This is why we're entitled to delay?

10 A. Yes.

11 Q. Okay. Now, let's look at Exhibit 14.
12 Okay. You have it. Was it your interpretation
13 of this March 6th letter, 2019, containing
14 Exhibit 11, that tab 7 refers to Defendant's
15 Exhibit 14?

16 A. Yes.

17 Q. Okay. And tell us, if you will, how
18 that would inform someone that Balfour Beatty was
19 entitled to delays?

20 A. Well, frankly, it doesn't. All it
21 demonstrates is that delay occurred, that there
22 wasn't -- there was more time required or more
23 time was taken on the project. So all this shows
24 is, for the most part, that it took longer than
25 it was planned.

1 Q. So at this time, when you looked at this
2 the first time, this is simply telling you there
3 was a delay, and this is how much it was -- how
4 much the delay was?

5 A. And even that is not necessarily
6 accurate because it's -- it's the last schedule
7 update. But it did not -- when did they actually
8 complete what was the --

9 Q. I guess that was my point. Let's look
10 at the first page of this document, and it says,
11 detailed project schedule, right? Do you see
12 that?

13 A. Yes.

14 Q. And it says here, data date in the
15 bottom left-hand corner. What does that mean?
16 Data date, January 4, 2019.

17 A. So the data date on any of these
18 printouts that we get essentially says, what's
19 the status as of.

20 And you know, from a scheduling
21 standpoint, everything to the left of that data
22 date is as built information. At least you can
23 assume that it's as built. And everything to the
24 right of that is still planned and not completed
25 yet.

1 Q. As of January '19, that data date, where
2 was the project? Do you know? What was the
3 status of completion of the project?

4 A. It was essentially complete.

5 Q. Okay. Now, there's another notation
6 above that. It's got a hole, but I think it says
7 version 06 March '19; is that correct?

8 A. Yes.

9 Q. All right. What does that mean?

10 A. It just means that's when it was
11 printed.

12 Q. Means what?

13 A. That's when it was printed.

14 Q. That's when it was printed?

15 A. Yes.

16 Q. Is there any way to tell what the logic
17 was in this schedule by looking at this document?

18 A. No.

19 Q. Is there any way to tell what the plan
20 schedule was according to this document?

21 A. No.

22 Q. Can you tell any -- is this just
23 basically a list of to do items and the days they
24 occurred on?

25 A. Well --

1 MR. HILDEBRAND: Objection, Your
2 Honor. Mr. Bundy is really testifying more than
3 the witness here. I'm trying not to interrupt
4 him, but if he'd just ask him what his opinions
5 are and what his observations are on that
6 document, I think that would be fine. But I
7 don't think it's appropriate for Mr. Bundy to
8 testify.

9 THE COURT: Okay. I will sustain
10 that. Rephrase that question, if you would.

11 MR. BUNDY: Thank you, Your Honor.

12 BY MR. BUNDY:

13 Q. What use, if any, were you able to make
14 of this exhibit, Defendant's 14, in determining
15 in March of 2019, whether there were any delays
16 on this job and who caused them?

17 A. It was really of no value by itself. We
18 really needed somebody to say, based on this,
19 here's where the delays occurred, here's what
20 caused those delays, and explain to us what --
21 why did you even give us this? So it isn't -- by
22 itself, it's of no value.

23 Q. All right. Let's go to tab -- let's go
24 back to your Exhibit 11, please. We're looking
25 at the letter. Let me ask you this: I think you

1 said 500 hours, you spent on this or somebody
2 spent on this?

3 A. Yes.

4 Q. Of the 500 hours that were spent, how
5 much time did you need --

6 A. I think this was 200 hours.

7 Q. 200 hours. Of the 200 hours that you
8 spent, how much time did it take you to determine
9 that Exhibit 14 was completely useless to you?

10 A. Not very long. A few hours looking
11 through to try to see if there was something that
12 explain what the delay was.

13 Q. All right. Let's go back to tab 8.
14 Now, what is tab 8 supposed to -- what is it
15 represented to be?

16 A. It's additional. It's supposed to be
17 support for entitlement related to circumstances,
18 so related to delay. So it includes an RFI log,
19 a drawing log, and some other information.

20 Q. How do those documents support
21 entitlement? It says they support entitlement,
22 but how do those documents that were in tab 8
23 support entitlement?

24 A. An RFI log, by itself, the fact that
25 there were RFIs or weren't RFIs or if there were

1 thousands of RFIs or tens of RFIs doesn't get us
2 there.

3 In a delay analysis, there has to be
4 cause and effect. You have to be able to say,
5 there was -- here's the cause of the delay and
6 there's an effect that actually delayed something
7 that was on the critical path. So you have to
8 identify the critical path, and you have to say
9 the specifics that delay it.

10 So we do see it a lot where there's
11 1,000 RFIs or 2,000 or 10,000 RFIs, and
12 therefore, we see it all the time, and that
13 doesn't cut it. It just -- under no
14 circumstances, does the number of the RFIs
15 reflect -- you know, get you to a proof of delay.
16 It just doesn't get a cause and effect.

17 Q. Well, where in the contract does it say,
18 there's a magic number here, and if you ask for
19 more than X number of RFIs, you're in -- you've
20 been delayed automatically. Is that in the
21 contract anywhere?

22 A. No.

23 Q. Have you ever seen that in the contract
24 in your 40 years of -- in this industry?

25 A. No.

1 Q. Okay. All right. Let's go through and
2 look at exhibit -- I'm going to go through these
3 very quickly, if we could. Let's go to section
4 1. What do we get out of section 1 here?

5 A. This looks to be a printout of a cost
6 report or a portion of a cost report, just kind
7 of identifying an overrun. So a budget number
8 and an actual number to that date, I suppose, and
9 saying, during the project, we overran the amount
10 of general conditions.

11 Q. Who prepared the budget?

12 A. Balfour Beatty.

13 Q. So this document proved that they had a
14 budget and they went over budget?

15 A. Yes.

16 Q. Okay. What else did it prove?

17 A. I'm -- I guess I'm -- maybe it's saying
18 too much to say it proved it. This is the start
19 of the proof that they went over budget in that
20 area. So you would have to look at more detail,
21 and that's what I get out of it.

22 Q. What is tab 2?

23 A. Tab 2 measures the same kind of costs,
24 but it's for extended -- for the extended time,
25 for the time after the original contract

1 completion date, and it measures what the costs
2 were for that period afterwards.

3 Q. What are they looking for on this one?

4 A. I should remember, but I don't. 3
5 million, 3.1 million.

6 Q. Okay. And is it typical for you to
7 recommend that your clients pay 3 million dollars
8 based on a three page summary?

9 A. No.

10 Q. No?

11 A. Again, entitlement, we need a delay
12 analysis. We need something that says, it's
13 clear that these additional costs or this
14 additional time is owed, and there's not
15 concurrent delay.

16 Q. And, again, who has the burden of
17 proving these damages?

18 A. The contractor.

19 Q. All right. Let's look at tab 3. Tab 3
20 was described -- if you would read tab 3 to the
21 Judge so he can understand what tab 3 was
22 supposed to represent.

23 A. It's support for the subcontractor
24 claims. So it includes some initial kind of
25 narrative based on e-mails, and then it gets into

1 the subcontractor claims from Old North and from
2 BMCC, Bernard.

3 Q. All right. So these are the
4 subcontractor claims, and it appears to be about,
5 what, 4 and a half to 5 inches of paper?

6 A. Yeah.

7 Q. Okay. And do you know what
8 responsibility, if any, Balfour Beatty had to
9 review subcontractor claims before submitting
10 them to the owner for payment?

11 A. I can't say that I know exactly what
12 clause requires that, but there's always a
13 requirement. There's always a need to verify
14 that those things are -- things that should be
15 paid by the owner as opposed to being internal to
16 Balfour Beatty.

17 Q. Well, what is your understanding
18 generally in the industry of a construction
19 manager's obligation as it relates to claims of
20 its subcontractors?

21 MR. HILDEBRAND: Objection, Your
22 Honor. Mr. Bundy has made a real point in this
23 case of saying, what were the obligations under
24 the contract and just asked for general
25 obligations of what it might be. I just don't

1 think it's relevant. I think he should direct
2 the questions to the particular facts in this
3 case.

4 THE COURT: Overruled. Go ahead.

5 MR. BUNDY: I will withdraw the
6 question.

7 BY MR. BUNDY:

8 Q. Let's look at what's under tab 3,
9 Exhibit A, page 7 of 7. What is it that you were
10 able to determine, if anything, about the
11 validity of this claim you reviewed for \$50,000
12 based upon what's contained in attachment A,
13 seven pages? What did that inform you of?

14 A. I've got to tell you that I'd have to
15 look at it again because it's been too long, but
16 just looking at it and seeing it's got some
17 actual allegations in here or some discussions of
18 actual facts, it just doesn't sum up to anything.
19 It doesn't give me an idea of what's the big
20 picture, why are you telling me these things.

21 Q. All right. And then let's go to the
22 next -- let's keep going. There's a change order
23 4, and there's some -- what is the next
24 attachment? Well, the rest of Exhibit A, the
25 attachment B. What does attachment B tell you

1 regarding this claim?

2 I want you to just look at it briefly to
3 try to refresh your recollection. I want to go
4 through these to determine why it is that you
5 told my client not to pay 22 million dollars. We
6 paid you \$50,000 to look at this thing and tell
7 us to pay it or not pay it, and I want to know
8 why you told us not to pay it.

9 A. I mean, in this case, this is a change
10 order written to Old North State; so it's a
11 mason. And it discusses masonry edge of slab
12 changes. Without knowing more, my immediate
13 thought was, you know, that could be an owner
14 problem. It could be a contractor problem. It
15 could have been a predecessor contractor problem.

16 Knowing a little bit more about it now,
17 I know that it was -- this masonry edge of slab
18 changes was at least an allegation that said,
19 this is a Balfour problem because their
20 predecessor subcontractor didn't work within the
21 tolerance it was supposed to be worked to.

22 Q. All right. Let's look at attachment C.
23 What is this? And this is entitled, for
24 settlement purposes only. And this is from ONSM,
25 and who is ONSM?

1 A. Old North State Masonry.

2 Q. And what was their scope of work?

3 A. They did the CMU block work that was the
4 exterior skin of the building -- not the skin
5 ultimately, but the exterior and then precast
6 work, setting precast after that.

7 So this document, though, is -- it
8 starts to layout their allegations, their
9 specific allegations. And it's -- you know, it's
10 got some specific items, coordinations,
11 scheduling, planning, sequencing of trades in its
12 logical sequence.

13 And they had block working pacts. And
14 one of the block working pacts was hoisting.
15 Well, hoisting doesn't sound like an owner
16 problem. It sounds like a contractor worked it
17 out type problem.

18 Completion of preceding activities in a
19 logical manner. It's possible the owner could
20 have influenced that, but it doesn't sound like
21 it on its face. Conflicts with other trades.
22 Again, it doesn't like an owner problem. It
23 could be something there. It's possible, but it
24 doesn't sound like it.

25 Water proofing and (inaudible), hoisting

1 of the precast on the fifth floor. Length of
2 time to resolve additional scope. Okay. That
3 could be an owner problem, but again, they're not
4 specific.

5 I don't have anything that tells me what
6 it specifically is. So, I mean, we can kind of
7 go through it, but that's where we get at, is
8 that there's -- this doesn't say, we have a claim
9 against the owner, and here's the pieces that are
10 against the owner, and maybe here's the pieces
11 that are against Balfour Beatty.

12 Q. Well, was this claim for settlement
13 purposes only a claim against Balfour Beatty, or
14 was it a claim against the owner?

15 A. No idea. I have no idea.

16 Q. Attachment D, what did attachment D tell
17 you, if anything?

18 A. I mean, I can see that it's supposed to
19 be saying something about the timing, but it
20 doesn't tell me what it is. I don't -- I can't
21 tell anything.

22 It's like that as built schedule for a
23 house. This is how we ended up. This is what we
24 had to do or this is how we worked on the
25 project, but it doesn't give me any conclusion.

1 It doesn't tell me that there's delay or why
2 there's delay. It's just information.

3 Q. Where on this document does it even
4 inform you this relates to this hotel?

5 A. It doesn't.

6 Q. I mean, there's nothing in there. Okay.
7 That's all I need to know. So let's go to
8 attachment E. What are you able to glean from
9 attachment E?

10 A. From a start of it is, it's the
11 notifications. It's the times when ONSM, Old
12 North State said, we're being delayed and told
13 Balfour Beatty.

14 Q. Now, at the time you -- and attachment E
15 goes how far? Does it go until we get to
16 Shumaker and Loop, for settlement purposes only?
17 Okay. That's Old North State Masonry, too.

18 A. Right. It's not defined.

19 Q. Okay. Well, let's just -- so we've got
20 to -- I'm trying to understand what you were
21 looking at. What did these letters from Old
22 North State through -- there's a white sheet of
23 paper, and then there's a letter, January 9,
24 2019, from Shumaker, Loop and Kendrick.

25 Those pages -- these pages right here,

1 what did that tell you about the claim that
2 assisted you in arriving at any conclusions?

3 A. It's actually counter to what we would
4 want to be finding that we -- you would want. If
5 this is going to be a claim that we're going to
6 be able to say, yes, we recommend paying for this
7 part of the claim, we want it to say, it's very
8 specific. There's design changes, here's the
9 specific design changes and here's what happened
10 that caused us to be delayed.

11 Instead in this case, it talks to
12 impacts that don't appear to have anything to do
13 with the owner, and this is July of 2016. So
14 it's fairly early in the process. But it talks
15 very specifically about some beams to ensure the
16 these are required at all vertical joints. Pour
17 grout holes are missing and all the slabs cannot
18 be poured.

19 So the predecessor trade did something
20 wrong. Now, was that because of the design
21 change? Standing here, I don't think so, but I
22 don't know. I can't imagine that it would.

23 Q. All right. So then you proceeded to the
24 next letter, which is a January 9, 2019 letter,
25 for settlement purposes -- for settlement only

1 signed by Mr. Steele B. Windle, III. Do you see
2 that on page 4?

3 A. Yes.

4 Q. Okay. And what did this letter -- or
5 how did this letter assist you, if at all, in
6 making a determination -- making your
7 determination as to whether or not Library
8 Associates should pay 22 million dollars?

9 A. Well, this is a claim document that has
10 some backup to it, and it looks like maybe the
11 documents that we were just talking about A, B,
12 et cetera, are supposed to be attached to this
13 letter.

14 Because they're -- for example, the
15 documents we just referenced are in that last
16 paragraph or second to last paragraph. But this
17 is trying to make allegations that there is a
18 claim, but it's still not apparent that this
19 claim is against the owner. It looks like most
20 of the blame is to predecessor trades or to
21 scheduling.

22 Q. Do you have an opinion as to whether or
23 not the contents of this letter helps or hurts
24 Balfour Beatty's cause in trying to get money out
25 of the owner?

1 A. It hurts it. These claims seem to be
2 more related to Balfour Beatty.

3 Q. Okay. And do you know whether
4 Mr. Steele B. Windle, III, is going to be a fact
5 witness in this case?

6 A. It looks like he's an attorney.

7 Q. It's a lawyer letter, right?

8 A. Yeah.

9 Q. Okay. All right. And behind that
10 letter is what, and what use -- well, actually,
11 we go from there to -- turn some pages. Do you
12 know what these charts relate to?

13 A. It's a claim from Lithko, the
14 structure -- the structure contractor, and it
15 looks like -- it talks to some of the level 6, 22
16 day delay, 188,000, about seven, eight days. So
17 it's a delay claim, and it's trying to identify
18 the --

19 Q. Let me ask you this: Let's back up a
20 minute. The letter written by Mr. Steele B.
21 Windle, III, says it has enclosures, but the
22 letter is written on behalf Old North State
23 Masonry; is that correct?

24 A. Yes.

25 Q. But the attachment appears to be a

1 Lithko claim; is that correct?

2 A. I think I said -- I think the
3 attachments are before the letter, the actual
4 attachments to that, and this is completely
5 separate. This is a different claim.

6 Q. A different claim. Okay. And so what
7 is this claim for?

8 A. This is for delay to the structure, to
9 the concrete contractor, Lithko. And it could --

10 Q. And how do you know that by looking at
11 this?

12 A. I just -- I see level 6, 22 days in the
13 middle of the top -- the top column, the top row.
14 It says, level L6, 22 days, and then it says,
15 base bid \$188,000. I don't know what that has to
16 do with anything. But then it goes through and
17 talks to costs. So I'm guessing.

18 Q. Well, I don't want you to guess.

19 A. It would be an estimated guess.

20 Q. And what, if anything, did you know more
21 about this claim than you did after you looked at
22 these five or six sheets of paper?

23 A. There's a couple of specific delay
24 request days, but there's no backup to it.
25 There's nothing that I could --

1 Q. Where does it say who caused the delay?

2 A. It doesn't.

3 Q. Where does it say whether it was on the
4 critical path?

5 A. It doesn't provide any analysis of
6 critical path.

7 Q. Where's the information that would allow
8 you to give an opinion that my client owes money
9 on that?

10 A. I couldn't do it.

11 Q. All right. Let's go to the next one.
12 David Allen Company. Do you see that?

13 A. Yes.

14 Q. All right. Who is David Allen?

15 A. Just offhand right now, I don't know.

16 Q. Okay. And they want \$222,000, correct?

17 A. Yes.

18 Q. And that's -- and that's based on how
19 many pages of information?

20 A. Three.

21 Q. Huh?

22 A. Three.

23 Q. Three.

24 A. Two or three. Sorry, two.

25 Q. Two. We go from David Allen \$222,000,

1 and there's a sheet behind it, right, cost
2 impact? Is that what you're talking about? Are
3 we looking at the same thing?

4 A. Yes.

5 Q. All right. You've got a \$22,000 claim
6 based on two pieces of paper. What would inform
7 you, from these two pieces of paper, about paying
8 David Allen \$222,000?

9 A. Nothing.

10 Q. Okay. All right. Let's go to the next
11 one, Pasco. Who is Pasco?

12 A. Pasco is the sprinkler contractor.

13 Q. Okay. And what is Pasco looking for
14 here?

15 A. This is a change order proposal, and
16 they're requesting general conditions for
17 schedule push on level 7, 21 days.

18 Q. Where does it say they're requesting
19 anything?

20 A. It says, change order proposal at the
21 top.

22 Q. Who is the change order to?

23 A. Balfour Beatty.

24 Q. Okay. So how do you relate this --
25 these pages, which relate to Pasco's claim

1 against Balfour Beatty to the owner? How would
2 you get from one point to the other based on
3 these pages?

4 A. I can't.

5 Q. Okay. And how much time in your \$50,000
6 of looking through this document did you have to
7 spend on these fours pages to come to the
8 conclusion, I can't make -- there's nothing here?
9 How long did that take?

10 A. Again, it didn't take long.

11 Q. In terms of claims that you get, is this
12 typical of what you see? When you see a 22
13 million dollar claim, is this the kind of
14 paperwork you see typically from a multinational
15 contractor?

16 A. No.

17 Q. Okay. Let's go to the next one,
18 Bernhard MCC. Do you see that?

19 A. Yes.

20 Q. Now, this letter is 13 pages long,
21 correct?

22 A. Yes, it is.

23 Q. And do you know who prepared the letter?
24 Is it signed by anybody?

25 A. I don't think so.

1 Q. Okay. The --

2 A. No, it's not signed.

3 Q. And it's 13 pages, and they only wanted
4 6 and a half million dollars, correct?

5 A. Yes.

6 Q. How many times in your career have you
7 recommended to your client to pay a 6 million
8 dollar -- 6 and a half million dollar claim based
9 on a 13 page letter with no backup?

10 A. Never.

11 Q. All right. In your profession, would
12 that consider to be malpractice, to recommend to
13 somebody to pay a 6 and a half million dollar
14 claim on a 13 page letter such as this, this
15 letter?

16 A. As an engineer, we don't talk about
17 malpractice a lot, but it's really bad.

18 Q. In this letter -- let's turn to page 3
19 of 13. I would like to read the last paragraph
20 to you. Another issue that greatly impacted the
21 project design was that after the construction of
22 the hotel began, the City of Charleston notified
23 the owner and the City had made a mistake of
24 approving the plans for the project.

25 Now, are you aware of how many times the

1 plans for this project went to the State Supreme
2 Court?

3 A. I don't know the number.

4 Q. Do you have any idea how many meetings
5 Mike Bennett went to to get this hotel approved,
6 over what period of time?

7 A. I've known at some point in the past.

8 Q. But we do know that after all of that,
9 according to Bernhard MCC, the City made a
10 mistake on the building plans, correct, according
11 to this?

12 A. That's what it says.

13 Q. Okay. Buildings in Charleston cannot be
14 taller than the tallest church steeple, which
15 St. Matthews Lutheran church; however, the
16 original plans for the project called for the
17 building to be taller than St. Matthews.

18 As such, the architect was required to
19 shrink the building by approximately 120 feet
20 after the building was already under
21 construction. Now, are you aware of that
22 happening on this job?

23 A. It didn't happen.

24 Q. Okay. How tall is this building? Nine
25 stories?

1 A. Nine stories.

2 Q. If you shrunk it 120 feet, how tall
3 would it be?

4 A. It would be on the ground.

5 Q. Okay. Do you think the contractor would
6 have made a change order request saying that you
7 know what, I've been deprived of nine stories
8 over here, right? You would expect that change
9 order request, right?

10 A. Yes.

11 Q. Are you aware of such a request?

12 A. It didn't happen.

13 Q. All right. Now, having looked at a
14 letter that asks for 6 and a half million
15 dollars, which contained an allegation that the
16 building had been shrunk by 120 feet, which was a
17 lie, did that influence you in determining
18 whether or not that was a legitimate claim?

19 A. It pretty clearly -- that part of it was
20 clearly not a legitimate allegation.

21 Q. All right. Now, let's go to BMCC claim,
22 Exhibit 5, Marion Square project. This -- if you
23 look at Exhibit 5 -- is a series of scheduled
24 observations, I guess, for lack of a better word,
25 from a gentleman named Randy P. Lynn. Do you see

1 that?

2 A. Yes.

3 Q. All right. And it's schedule review and
4 compare, and it starts in February of '18 and
5 goes back to '17.

6 What, if anything, did these documents
7 inform you of to allow you to make a decision or
8 give my client a recommendation to a reasonable
9 degree of certainty as to whether or not BMCC had
10 been delayed and/or whether the owner had caused
11 it?

12 A. This is at least good schedule
13 information that talks through what was going on
14 on the project and talks to some of the delays on
15 the project. So at least it was something that
16 was readable and could be understood.

17 But it still doesn't demonstrate or
18 didn't demonstrate that the owner was the cause.
19 It doesn't talk to the owner being the cause of
20 the delay. It really talks to schedule, you
21 know, details and how the schedules that were
22 contemporaneous on the project weren't
23 necessarily -- they weren't great. They weren't
24 accurate necessarily.

25 Q. In reviewing Mr. Lynn's schedule

1 analysis, did you see where he made a schedule
2 change when they reduced the building by 120
3 feet?

4 A. No. First, I would hesitate to call
5 this a schedule analysis. This is really a
6 review of the schedules. But, no, there's no
7 change orders.

8 Q. Let me ask it to you this way: Would
9 you have expected Mr. Lynn in your review of the
10 schedule, to have noted that the building had
11 shrunk by 120 feet after he started construction?

12 A. If he was involved at that time, he
13 certainly would have noticed it, but we know that
14 that didn't happen.

15 Q. All right. Let's go to claim Exhibit 7.
16 Now, what are we being -- what are you learning
17 from what's in Exhibit 7? What is that telling
18 you about BMCC's claim?

19 A. Well, the start of it is just change
20 orders. I mean, it's not a change order. It's a
21 payment from May of 2018.

22 Q. And then we've got Exhibit 8, which is a
23 list of proposed change orders, correct?

24 A. Yes.

25 Q. All right. Now, let's go to the next

1 one, which is for settlement purposes only. Are
2 you with me? This is 12/7/17.

3 A. Yes.

4 Q. All right. And this is a claim for Old
5 North State Masonry?

6 A. So we're back to Old North State.

7 Q. Okay. We are back to Old North State.
8 Is this typically how you see these claims
9 organized in your experience, to go from one
10 contractor to another and back to another one?

11 A. No.

12 Q. Okay. What was your opinion of the
13 organization of this claim? Was it organized
14 well in your opinion?

15 A. No.

16 Q. Okay. Did the lack of organization
17 cause you any additional time in trying to figure
18 what they were trying to say?

19 A. We expect to see an outline and damages,
20 you know, kind of identified and then what --
21 what are the allegations and that kind of thing.
22 We didn't see that here.

23 You know, eventually you can dig out
24 these proposed change orders, for example, just
25 from looking at it. You can dig that out and

1 say, okay, there's some things that we can look
2 at and determine or we can leave that and at
3 least identify it and say, that's something that
4 the owner needs to look at. But the organization
5 just isn't good.

6 Q. And let me ask you something about this
7 document, for settlement purposes only from Old
8 State Masonry, claim calculations. It's dated
9 12/7/2017. That predated the submission of this
10 claim in March of 2019 by how much?

11 A. Two years and three months.

12 Q. Okay. Do you know if the contract
13 speaks to any time restraints on the filing of
14 claims?

15 A. I seem to recall that it says 20 days.

16 Q. 20 days. Do you have an opinion as to
17 whether or not this claim exceeds those 20 days?

18 A. I would say that three years is more
19 than two years.

20 Q. What, if any, problems are caused to an
21 owner by a contractor or subcontractor submitting
22 a claim for -- how much? How much did they want?
23 \$1,127,871.

24 Does it cause an owner any problems when
25 they try to analyze -- well, what problems is

1 caused by a subcontractor waiting two and a half
2 years before they submit a 1.27 million dollar
3 claim? What problems does that cause?

4 A. Well, I don't want to -- I'm not sure
5 that that was the problem.

6 This says that they generated this
7 document for settlement purposes. The
8 subcontractor did make the claim, it looks like.
9 It's that Balfour didn't forward it to the owner
10 at that point, that we know of. I mean, from
11 this, I can't tell, but we know that this -- this
12 happened two years before.

13 Q. Do you know whether or not the general
14 construction manager has any obligation to
15 forward the claims of subcontractors onto the
16 owner if they think the owner is responsible?

17 A. I'm sure they do. And it looks like I'm
18 off by a year on that, so December to January.

19 Q. All right. After you looked at this
20 claim, what were you able to determine as it
21 relates to its validity, as it relates to
22 entitlement and quantity?

23 A. I didn't have the information that I
24 needed. I needed specific allegations, and what
25 I really needed was a delay analysis that told me

1 what happened on the project, what critical paths
2 were taken, what are the allegations that brought
3 delay to the project specifically, you know,
4 period by period.

5 Q. Now, the Old North State Masonry has
6 behind it how many -- when do we get -- how far
7 do we go to get through the Old North State
8 Masonry?

9 A. Almost through the end of this section.

10 Q. So basically all the rest of this?

11 A. Well, no. It goes to Precision Walls is
12 the next yellow sheet; so it's a couple issues of
13 Old North. They included the date in their daily
14 reports, which is good information that I like to
15 see in a claim. But, again, this is just one
16 sub.

17 Q. All right. Show me where Old North
18 State Masonry starts back.

19 A. It starts --

20 Q. Where does it end? Where does Old North
21 State end? Back here?

22 A. Where you see the yellow sheet.

23 MR. BUNDY: Judge, I don't know if
24 you have a yellow sheet. There should be a white
25 sheet, I guess, somewhere in there. It might be

1 a tab.

2 THE COURT: Do you know where it
3 ends?

4 THE WITNESS: Yes.

5 MR. BUNDY: It must be the tab,
6 Judge, tab 4.

7 THE WITNESS: There's some fold out
8 sheets that are soon after that one.

9 BY MR. BUNDY:

10 Q. All right. Well, as it relates to the
11 Old North State Masonry, it appears as though
12 there are a series of daily logs and production
13 reports, correct?

14 A. Yes.

15 Q. All right. Now, what use were those to
16 you in trying to analyze the validity of Old
17 North State's Masonry claim?

18 A. Well, it's the kind of information that
19 I want to see. It's the kind of information
20 that, as a delay analyst, you want to see the
21 schedules and you want to see the daily reports
22 and perhaps the meeting minutes so you know what
23 the issues were at the time.

24 So it was useful information. It's just
25 that without an analysis behind it that says,

1 what were the delays, what was going on, there
2 wasn't much we could do with it.

3 Q. So it was left to you to make the
4 analysis from their own reports, right?

5 A. Right.

6 Q. Okay. Is that typically the way it's
7 done, that the contractor just dumps their daily
8 reports, and then you do the analysis to
9 determine what their claim is?

10 A. No.

11 Q. Because you don't send your bill to
12 Balfour Beatty, do you? You send it to Library
13 Associates, correct?

14 A. Yes.

15 Q. And if you took their documents and made
16 their claim, you would be working for them, and
17 that's who you would send your bill to, right?

18 A. You're right.

19 Q. All right. Let's go to the next tab,
20 which is what? What is this -- what is the next
21 tab telling us?

22 A. It says Exhibit B, and it's Precision
23 Walls' claim.

24 Q. Okay. All right. Anything else in this
25 first volume that informs you of sufficient

1 information for you to be able to make any
2 realistic determination about the validity of
3 this claim?

4 A. No. I'll just get back this last
5 section. There's some information about the
6 thousand year storm that -- where a change order
7 was granted for 20 days. That's probably helpful
8 at least to know that that time was granted. But
9 other than that, it wasn't much.

10 Q. Okay. All right. So let's look at the
11 next volume then.

12 MR. BUNDY: Your Honor, the next
13 one is Exhibit 12.

14 BY MR. BUNDY:

15 Q. Can you give me a -- just sort of look
16 through it quickly if you need to. Just give me
17 a general description of what it is that was
18 provided in this Exhibit 12 to you in order to
19 arrive at some sort of conclusion?

20 A. Sure. This is a delay notification log.
21 So it seems like something that would really make
22 a lot of sense, that there might be something
23 behind it that would tell us that, here's the
24 causes of delay, and here's the ones that are
25 important. Except that it doesn't get there.

1 It just gives us the notifications and
2 doesn't give us the critical path, which
3 ones matter. So there's a lot of information,
4 and going through this took a lot of time. But
5 it doesn't -- it turns out it doesn't give the
6 information that we're looking for, which is what
7 was the critical path delays, what happened on
8 this project that caused the delays.

9 Q. So you spent -- I don't know what -- how
10 many hours do you think going through this
11 particular document?

12 A. I would guess that this is the bulk --
13 this and the subcontractor claims are the bulk of
14 what we spent time on. So out of 200 hours, we
15 probably spent 150 or something on this part.

16 Q. And at the conclusion of that time
17 expenditure, what, if anything, more did you know
18 about it than before you started?

19 A. We knew that up to that point, there
20 wasn't enough information for us to recommend
21 any -- and we also had some information at least
22 that the allegations were not going to end up
23 being completely the owner's problem.

24 Q. Okay. All right. And then let's look
25 at Exhibit 13 next. All right. Pretty much the

1 same question. How much time do you think you
2 spent looking at Exhibit 13?

3 A. This is, I believe, the same -- just a
4 continuation of the previous section. So this is
5 kind of what I was talking about before for the
6 hours.

7 But, again, it doesn't give us the
8 critical path. It doesn't tell us what's
9 important from here. It just identifies that
10 there were some issues that might have caused
11 delay. Notification was granted for sure when it
12 was given, that there was -- that there were
13 delays that occurred.

14 Q. Okay. Was responsibility assigned for
15 those delays? Was there any causation provided?

16 A. There probably is for some of these
17 items. I mean, some of them are just change
18 orders. So in the case of the owner change
19 orders, it certainly would be maybe assumed that
20 the owner was responsible.

21 Q. Was there any way to determine, or were
22 you able to determine how many days the
23 contractor was entitled to the time extension
24 based upon the information provided in this
25 claim?

1 A. No.

2 Q. And why not?

3 A. Well, first, it -- that wasn't my
4 initial task. It wasn't to figure out what the
5 number of days was that should be granted.

6 But at least -- it was at least to look
7 at and see if there was justification that said,
8 here's what the delays are. And that information
9 just isn't there. So there's no way that we
10 could make a recommendation for even a small
11 amount of the delay.

12 Q. Okay. Let me ask it to you a different
13 way. How many days were you able to justify,
14 based upon your analysis of the -- how many days
15 time extension were you able to justify giving
16 the general contractor and recommend to Library
17 Associates based upon the information provided in
18 these four volumes?

19 A. I think the 20 days for the hurricane
20 was justified, but it was already granted. So
21 other than that, none.

22 Q. So the 20 days the architect had already
23 granted?

24 A. Right.

25 Q. But no additional days?

1 A. No.

2 Q. Okay. All right. But what was the --
3 once you got through this report or this claim,
4 what was the next stage of your work or your work
5 product?

6 A. We issued a one page thing just saying
7 what we -- what we just talked about, that there
8 wasn't enough information here to analyze. And
9 we had already spent X dollars and we -- we
10 really thought it was important that we stop at
11 that point.

12 And the next phase for us was when -- I
13 think a year later-ish, we were asked some
14 questions at different points, but it -- but when
15 a schedule was set for reports, that's when we
16 really started (inaudible) back again.

17 Q. Now, in terms of the work you did --
18 this is the March '19, April '19 timeframe,
19 correct?

20 A. Yes.

21 Q. Between March of '19 and November of
22 '19, what work did you engage in as it related to
23 your employment on this particular job?

24 A. On this job? We had a task that had to
25 do with the leads. And I think I wrote up an

1 matter.

2 And it's important to make sure that you
3 recognize where float exists and where float
4 doesn't exists, what impacts the end date, what
5 impacts the last of the items on a project.

6 Q. Okay. Have you -- and I'm going to go
7 through your findings, and then I want to go back
8 and put some meat on the bone, so to speak. What
9 are your basic four or five opinions in this case
10 based upon the work you've done to-date for
11 roughly \$450,000? What are your opinions?

12 A. I'll go quickly through the four or
13 five. The first one is that I believe Mr. Doran
14 selected the wrong methodology. He used an as
15 plan, as built methodology with an as built
16 critical path, and I think that methodology is
17 susceptible to a whole bunch of problems.

18 And I will go through kind of in a
19 little bit more detail what those problems are,
20 why using that methodology is just not a good
21 idea, especially on a project this big.

22 Q. And that's an opinion to a reasonable
23 degree of certainty?

24 A. Yes.

25 Q. Okay. And your next opinion?

1 A. The second one is that there was a
2 significant error made by Mr. Doran on the -- on
3 the -- what the as built critical path was, what
4 was -- you know, how did those -- how did he
5 determine what the as built critical path was and
6 why those things did not jive with what was
7 happening on the project, with what the
8 contractor said was critical on the project
9 itself.

10 And the best example is at the end of
11 the second and third periods. Okay. So that's
12 after the structure is built, after the pool is
13 set down and you go drop down to the second floor
14 to the ballroom. You fill that in so you can
15 start the ceilings in the ballroom.

16 The contemporaneous schedules that --
17 the schedules that Balfour was using to manage
18 their people on the site and what they pushed and
19 what they didn't push said that there was 10
20 weeks of float on that schedule, 10 weeks of
21 float on that activity.

22 Q. And what does that mean?

23 A. That means that the people on the site
24 at the time believed that there was 10 weeks they
25 could have delayed that activity and had it not

1 impact the end date.

2 Q. And that's the definition of float?

3 A. That's the definition of float. Ten
4 weeks. At the end of that period, Mr. Doran
5 still has the same as built critical path, the
6 same spot as on the second floor in the ballroom
7 doing drywall.

8 And at the end of that period, there's
9 13 weeks involved in the contemporaneous
10 schedule. So I have trouble concluding -- I have
11 trouble looking at the analysis that he did of
12 the as built critical path and giving it credence
13 because it doesn't agree.

14 Either he's wrong or the people on the
15 project site were wrong. You know, they're off
16 by that much, and it's just not -- it's just
17 never that far off. It just pretty much can't
18 be. I've never seen it that far off.

19 Q. Well, let me ask -- let's explore that a
20 little bit. You've been jousting with other
21 schedulers all your life, right?

22 A. Yes.

23 Q. And typically, they come in with a
24 delay, and you come in and have some criticism,
25 right?

1 A. Oh, yes.

2 Q. Typically, what are the deltas you're
3 talking about in your experience? I mean, how
4 many days do y'all typically argue over?

5 A. It's variable completely, but when we
6 find -- you know, when we're looking at critical
7 path, it's usually based on evidence in the
8 project records, something in the record that
9 says, this is critical at the time. This is what
10 the people on the project site thought was
11 critical.

12 And if it's -- if it turns out that it's
13 not, if there's some other overriding thing, the
14 people on the project site still have to know.
15 They have to know that that's close. And I've
16 never seen it be that there's ten weeks of float
17 shown contemporaneously, ten weeks of float on
18 the project, that they thought at the time, and
19 that somebody comes in and says, no, no, that was
20 the critical path.

21 Now, if that is the critical path, and
22 there's changes involved in that second floor,
23 there's a real problem here because the -- now
24 the owner doesn't know that that's the critical
25 path. What he's told is, here's -- the critical

1 path is elsewhere. It's in the structure, or
2 it's in -- in this case, the masonry. Anyway,
3 I'm getting too far into the details.

4 Q. Well, all I wanted to know was, as
5 between experts.

6 A. Right.

7 Q. Typically, what are y'all arguing about
8 in terms of durations?

9 A. Usually, you think in terms of a couple
10 weeks of float as being the thing that you might
11 argue about. And I think Mr. Doran says that he
12 thinks 10 to 15 days of float might be
13 concurrently critical.

14 But in this case, there's 10 weeks, not
15 two weeks, not three weeks, 10 weeks, and then 13
16 weeks. It's just -- it's hard to believe that
17 that could really -- you know, that one or the
18 other of those parties is wrong. Either
19 Mr. Doran is wrong or the other side.

20 Q. All right. What other -- some of the
21 other opinions do you have?

22 A. So the third item is that Mr. Doran
23 recognized, and he saw it in there, and he spent
24 a lot of time justifying the idea that the
25 critical path -- the as built critical path was,

1 build the structure, set the pool on top, remove
2 the tower crane, and now you can do the in-fill
3 work, and now you can work on the ceilings in the
4 ballroom.

5 And he is right. That sequence was
6 necessary, no question about it. But that
7 sequence wasn't in the baseline schedule. It
8 wasn't in that as built schedule. He's using an
9 as plan versus an as built analysis, and it
10 wasn't -- that logic wasn't in the as planned
11 schedule.

12 Q. All right. Let's drill down a little
13 bit on that. What did the as plan -- first of
14 all, who created the as plan schedule?

15 A. Balfour Beatty.

16 Q. Okay. And is it correct, the contractor
17 can prepare his schedule any way he wants to?

18 A. Well, I mean, within physical limits, et
19 cetera, yeah. That's the main point of doing
20 this as plan schedule is, this is how they intend
21 to work on the project. And they get to choose
22 certain options.

23 They can -- they can work off the
24 structure, and then they can work the finishes
25 going down the structure. They can follow

1 directly going up the structure. There's lots of
2 different options, and they get to choose.
3 That's the means and methods.

4 Q. Okay. But some logics defy the ability
5 to do them, right? I mean, some things you just
6 can't do. You can't build a roof first and work
7 down, right?

8 A. Right.

9 Q. Okay. So let's talk about the as
10 planned original baseline schedule prepared by
11 Balfour Beatty. Was there a logic bust or a
12 mistake in the as planned schedule?

13 A. Yes.

14 Q. All right. And what was it?

15 A. The main point is the way the -- you
16 know, just exactly that logic that we were
17 talking before, build the structure, set the
18 pool, drop the tower crane. The tower crane
19 wasn't in there. The removal of the tower crane
20 wasn't in the schedule at all. There was no
21 logic tied between building the structure and
22 then starting that second floor. There was no
23 tie there.

24 So in that baseline schedule, the second
25 floor ceilings were able to start on August 11,

1 2016, according to that schedule, but the pool
2 wasn't going to be set until November 22nd, three
3 months later.

4 Q. And how was the pool going to get set?

5 A. Right. You can't actually do those
6 ceilings until you set the pool and drop the
7 tower crane. So that three months, three and a
8 half months of time is still a delay, but it's
9 not because of the structure being delayed.

10 And ultimately, the way to measure how
11 the structure was delayed is just saying, when
12 was the pool supposed to be set? When did it
13 actually get set? It's 74 days. It's not 204,
14 which is what Mr. --

15 Q. Is it correct that it was impossible --
16 impossible to close up the second floor in
17 August, the ceiling of the second floor in
18 August, because the tower crane had to be there
19 until November to set the pool; is that correct?

20 A. Yes.

21 Q. And is it correct that this schedule did
22 not have a single activity on it for the erection
23 or the removal of the tower crane?

24 A. I think it had something for the
25 erection, but not for the removal.

1 Q. Not for the removal?

2 A. Right. So there was none of that
3 sequence.

4 Q. So if the ceiling completion on the
5 second floor was delayed past August, it was
6 because the tower crane was in the way?

7 A. It couldn't have started in August.

8 Q. Because the tower crane was in the way?

9 A. And it couldn't have started until the
10 tower crane was removed, and that would have been
11 in December some time. It's three and a half
12 months.

13 Q. And is that what is referred to in the
14 industry as a bust in the schedule?

15 A. Sure.

16 Q. Okay. So how much delay then, since we
17 were restrained by reality -- that's the real
18 restraint here is reality here, right? You can't
19 do it?

20 A. It's a physical constraint.

21 Q. Okay. How much delay was built into the
22 original schedule built by Balfour Beatty from
23 day one? How much delay was there if they did it
24 the way they wanted to do it?

25 A. It was about 137 days.

1 Q. Okay. So when they got the building
2 permit, if they would have followed their own
3 schedule, they were at least what?

4 A. Three and a half months.

5 Q. Behind to start with?

6 A. Yes.

7 Q. Do you have any idea whether they ever
8 discovered that until today when you told them?

9 A. Well, it's in my report, and it's -- it
10 was also something that was inserted into the
11 schedule eventually, but it took them 19 months
12 before they got to the point of actually
13 inserting that into the schedule.

14 Q. All right. What was your next finding
15 or conclusion?

16 A. The next point being that there was no
17 cause and effect, that the analysis done by
18 Mr. Doran, again, he shows the time and then says
19 there were a bunch of changes and kind of
20 concludes that, because there were a bunch of
21 changes, therefore -- therefore, the changes
22 caused the delay.

23 Instead of trying to get down to the
24 nitty gritty detail of what was the critical
25 path, how did those changes -- what specific

1 changes caused that delay. And that's the hard
2 part of the delay analysis. It's, you know,
3 doing the conclusion, the big conclusion that,
4 hey, we had a bunch of changes; therefore, it
5 must -- and they're big changes.

6 And frankly, you know, I think I said it
7 in my report, I don't doubt that there's some
8 time here. But you can't just jump to
9 compensable delay. You can't just jump to delay.
10 You have to do the work to get the schedule -- to
11 get the critical path to identify it and make
12 sure that that's what caused the delay.

13 Q. And do you have an opinion to a
14 reasonable degree of certainty whether or not
15 Doran did the necessary work to determine that?

16 A. I don't believe he did.

17 Q. Okay. Could he have done it?

18 A. Yes. And the last item of the five is
19 that there were subcontractors -- subcontractors
20 had their own problems. They had manpower
21 problems, and these are all basically
22 demonstrated by Balfour Beatty documents to the
23 subcontractors for procure notices, et cetera,
24 saying, you're the cause of delay. You're on the
25 critical path, and you're causing delay.

1 And to some extent, it's -- Mr. Doran
2 dismissed those. He essentially said, well,
3 that's not critical without any -- again, no
4 justification as to why except that there was
5 some work that moved inside.

6 But the contemporaneous schedules say
7 that, for example, masonry is critical. And
8 there's major problems. There's three cure
9 notices to the mason that say that they're on the
10 critical path, and that's just dismissed by
11 Mr. Doran.

12 Q. Those are your basic findings?

13 A. Yes.

14 MR. BUNDY: Your Honor, this would
15 be a good time to take lunch because I'm going to
16 circle back around like that Jen Psaki woman
17 says, and we're going to start back all over
18 again.

19 THE COURT: All right. It's 1
20 o'clock. Let's just plan to come back at 2:30.

21 (A recess transpired.)

22 THE COURT: Okay. Mr. Bundy?

23 MR. BUNDY: If it pleases the
24 Court.

25 (DFT. EXH. 89 and 90 were marked

1 for identification.)

2 BY MR. BUNDY:

3 Q. Mr. Boe, I hand you what's been marked
4 as Exhibit 89 for identification and Exhibit 90.

5 THE COURT: 89 and 90?

6 MR. BUNDY: Yes, sir.

7 THE COURT: All right.

8 BY MR. BUNDY:

9 Q. Mr. Boe, if you would please identify
10 Defendant's Exhibit 89 for identification,
11 please.

12 A. All right. Exhibit 89 is AACE
13 International recommended practice number 29,
14 revision 03 -- R03.

15 Q. And AACE stands for the Association for
16 the Advancement of Cost Engineering
17 International; is that correct?

18 A. Yes.

19 Q. All right. Tell me little about that
20 organization, please.

21 A. The organization is kind of an
22 organization where scheduling falls under. They
23 call it cost engineering for the bigger pictures,
24 so it includes estimators and other people, too.
25 But it's been around for 50 years or so, and it

1 basically has developed into an organization that
2 writes these standards, writes these recommended
3 practices.

4 And it's put out by a lot of industry
5 practitioners, a lot of -- there's a bunch names
6 on the front of this that talk to who
7 specifically reviewed and who provided initial
8 input, et cetera. There are a lot of names from
9 the industry including attorneys.

10 Q. As an expert, who's been qualified in
11 this field, do you consider this document to be a
12 reliable authority?

13 A. It is.

14 MR. BUNDY: And, Your Honor, at
15 this point, I would move to introduce this as a
16 learned treatise under Rule 803(18) of the South
17 Carolina Rules of Evidence.

18 MR. HILDEBRAND: All right. No
19 objection.

20 THE COURT: Without objection.

21 (DFT. EXH. 89 was received in
22 evidence.)

23 BY MR. BUNDY:

24 Q. And the next exhibit is Exhibit 90, I
25 believe; is that correct?

1 A. Okay. Exhibit 90.

2 Q. And this is a document from the American
3 Society of Civil Engineering; is that correct?

4 A. That's right.

5 Q. Can you identify it, please?

6 A. It's ASCE standard 67-17 schedule delay
7 analysis, and it was built under the ANSI, so the
8 American National Standards Institute also. So
9 it's an actual standard from that perspective.

10 Q. As an expert, who's been qualified in
11 this Court, in this field, do you consider it to
12 be a reliable authority --

13 A. Yes.

14 Q. -- in this area?

15 A. Yes.

16 MR. BUNDY: Your Honor, I would
17 move to introduce this as a learned treatise
18 under Rule 803, rules of evidence, paren 18,
19 learned treatise.

20 THE COURT: All right. Any
21 objection?

22 MR. HILDEBRAND: No, sir.

23 THE COURT: Without objection.

24 Okay.

25 (DFT. EXH. 90 was received in

1 evidence.)

2 BY MR. BUNDY:

3 Q. Now, one of your -- we're going to now
4 go through your findings. We talked earlier
5 before lunch about your conclusions to a
6 reasonable degree of certainty; is that correct?

7 A. Yes.

8 Q. And one of your conclusions to a
9 reasonable degree of certainty was that
10 Mr. Doran's method didn't meet the contract
11 burden to use BBC updates as the basis for time
12 extension and that Doran chose the wrong method,
13 correct?

14 A. I actually excluded the first part of
15 that based on the Judge's determination that that
16 wasn't part of the contract, but the second part
17 of the item, that this doesn't -- it doesn't meet
18 industry standard.

19 Q. Okay. All right. If you would, using
20 whichever learning treatise you wish to use
21 first, if you would walk through the treatise,
22 please, and explain to his Honor why it is in
23 your opinion that Ms. Doran used the wrong
24 methodology to analyze -- to make a forensic
25 analysis of the delay on this job?

1 A. So first of all, this documents doesn't
2 really exclude any method. It goes through and
3 identifies and it looks through and tells the
4 advantages and disadvantages as how to select,
5 what method you're going to use.

6 And then it has a bunch of warnings that
7 warn the practitioner to make sure that, if
8 you're going to use that method, you have to look
9 at it in detail. And you've got to solve some of
10 these questions, these caveats they call them.

11 The document itself -- like I say,
12 there's nine different methods, and the bottom
13 line on it is, the -- it goes from -- it doesn't
14 take into account court cases. So there's a
15 method in here called the impacted as planned
16 method that is always rejected by courts. It
17 just always is, and yet it's in here.

18 And it gives you warnings about how to
19 deal with that kind of thing. In this case, what
20 they've identified, what Mr. Doran has identified
21 is an as planned, as built using an impact,
22 using -- I'm sorry, using an as built critical
23 path. And that is identified --

24 Q. Let me stop you here just to make sure
25 that I understand and the Judge is following.

1 The learned treatise provides for nine different
2 ways to analyze the schedule?

3 A. Yes.

4 Q. And the ninth method, what's the name of
5 that again?

6 A. Well, one of the methods is the impacted
7 as plan.

8 Q. Okay. And that method is not approved
9 in the court system?

10 A. Right. Every -- there are tons of court
11 cases out there that say, don't use this, it's
12 not useful.

13 Q. Okay. So that leaves us with eight?

14 A. Right.

15 Q. Of the eight that are left, in terms of
16 viability, priority, or however you want to look
17 at it, where -- which one is number 8?

18 A. From my perspective, I look at these and
19 say that two that are the bottom of that barrel
20 are as planned, as built and something called
21 collapsed as built.

22 Q. Okay.

23 A. So they take an as built schedule and
24 pull things out of it.

25 Q. And which one did Mr. Doran use?

1 A. He used the as planned, as built.

2 Q. Okay. Now, what does this learned
3 treatise tell us about the use or viability of
4 the as planned, as built methodology as used by
5 or attempted to be used by Mr. Doran?

6 A. The place where I'm pointing as the
7 primary source of what I pull out of this
8 document is on page 44 of 134, and it's at the
9 top of that. And it talks about --

10 MR. BUNDY: Let me stop you. Your
11 Honor, you might want to follow along because
12 it's a little bit --

13 THE COURT: We're in 89, right?

14 MR. BUNDY: Yes, sir. We're going
15 to start with 89, and we're going to go to 90.
16 But it's probably helpful to read it as he goes
17 along. It's not that --

18 THE WITNESS: Page 44.

19 THE COURT: Page 44.

20 BY MR. BUNDY:

21 Q. So where are you again, please?

22 A. Page 44. It has to do with -- they call
23 it 3.1, which is exactly the item that we're
24 talking about, as planned, as built. And this
25 list of caveats, it says, caveats in using

1 minimum protocol conditions.

2 And the first one is, it's not suitable
3 for project durations extending into multiple
4 dozens of updates. Well, we know an update
5 period is a month. The multiple dozens means 24
6 months. This was about a four-year project. So,
7 you know, it's not -- this project lasted much
8 longer, and there's good reason for that.

9 You know, when you start with an as
10 planned schedule, things change over time, and
11 things don't go according to plan. And there's
12 likely to be adjustments. For example, if a
13 contractor gets delayed themselves, they're
14 likely to pull back and work around some problem,
15 and that will get reflected. And it won't be
16 reflected if you use just the beginning and the
17 end.

18 So this says it's not suitable for
19 projects extending, and Mr. Doran, of course,
20 used it. I'm not going to go through every one
21 of these. The fifth item is it's susceptible to
22 unintentional or intentional manipulation by
23 choice of the as built data that is incorporated
24 into the schedule.

25 So when we get to an as built -- so we

1 got an as planned schedule, and it has got the
2 logic all built into it. Its scheduled moving
3 forward and moving back and forward and backward
4 (inaudible) talked about.

5 When you get to the as built, all you've
6 got is a recording of dates. It's a big bar
7 chart with no relationships in there, and so what
8 happens is, somebody has to draw in, what is the
9 as built. Now, it can be prepared in several
10 different ways. I don't want to get into that.

11 Q. Okay.

12 A. The point is that it can be manipulated
13 by looking at the wrong things as the critical
14 path.

15 Q. In your review of Mr. Doran's analysis,
16 did you see any indication that Mr. Doran had
17 manipulated the as built schedule in order to
18 achieve a specific result?

19 A. I think that's what I talked about this
20 morning with respect to the -- his as built
21 critical path not having any relationship at all
22 to the evidence of the schedules that were issued
23 at the time during the construction.

24 So that leads me to believe -- I can't
25 see why he would select those items when they

1 were -- when they indicate 10 to 13 weeks of
2 float. So that looks -- that appears to be
3 manipulation.

4 Q. Okay. Anything else?

5 A. Yes.

6 Q. Okay.

7 A. The primary point here, I think, for me
8 is that, it does not consider that changes to the
9 original baseline schedule may have been the
10 actual cause of delay instead of the identified
11 delay issues. And that's exactly what I feel
12 like happened in this first two periods of this
13 project.

14 And we will get into detail a little bit
15 more, but that idea that the logic that was
16 needed, absolutely needed in the -- you know,
17 order to build this thing, the physical logic of,
18 you build the structure, load the pool, remove
19 the tower crane. Then you can work on the --
20 that second floor. That wasn't in that baseline.
21 If it had been, it would have been a longer
22 schedule.

23 Q. Let me stop you here. Can you identify
24 this document, please?

25 A. Yes. I think it's Exhibit 15 to my

1 report, which is the detailed baseline schedule
2 with a date of November 13, 2015.

3 Q. This is Balfour Beatty's schedule,
4 correct?

5 A. Balfour Beatty's schedule.

6 Q. You just simply copied their as planned
7 schedule?

8 A. Yeah. We actually printed it out from
9 the perimeter of the house from the files, the
10 electronic files.

11 Q. And the as planned schedule is just
12 that, it is a plan in the future -- none of these
13 things have happened yet, correct?

14 A. Right.

15 Q. This is the process by which they intend
16 to build this building?

17 A. Yes.

18 Q. The sequence they intend to use -- the
19 activities, the durations, et cetera?

20 A. And the sequencing.

21 Q. And the sequencing. And the logic?

22 A. Yes.

23 Q. And who or what entity decides what goes
24 in this document?

25 A. Balfour Beatty.

1 MR. BUNDY: Okay. Your Honor, I've
2 move to mark this as exhibit -- the next exhibit,
3 please.

4 MR. MCDONALD: 93.

5 COURT REPORTER: 93? Okay.

6 MR. HILDEBRAND: No objection.

7 (DFT. EXH. 93 was marked for
8 identification.)

9 MR. BUNDY: Move to introduce
10 without objection, Your Honor --

11 THE COURT: Yes.

12 MR. BUNDY: -- Defendant's Exhibit
13 93.

14 (DFT. EXH. 93 was received in
15 evidence.)

16 MR. BUNDY: For the record, it is
17 what's referred to as MSH, which I think stands
18 for Marian Square Hotel 000111315. For Your
19 Honor's edification, subsequent interim schedules
20 will be the next one. They will be 0001, 0002.

21 THE COURT: Okay.

22 MR. BUNDY: They start at zero, and
23 every time they do an interim, they add another
24 number.

25 THE COURT: Gotcha. Okay. Thank

1 you.

2 BY MR. BUNDY:

3 Q. Now, we spoke earlier from -- I believe
4 you said that one of the problems or one of the
5 things pointed out in this treatise, is it --
6 there may be something wrong with the original
7 schedule?

8 A. Right. The changes -- any changes to
9 that original schedule might have been the cause
10 of delay.

11 Q. Can you show me on this schedule the
12 line item for putting up and taking down the
13 tower crane?

14 A. No.

15 Q. Why not?

16 A. I can't because it's not here.

17 Q. Should it be there in your opinion to a
18 reasonable degree of certainty?

19 A. Oh, absolutely.

20 Q. Would you consider the erection and
21 demolition of a tower crane on a nine story
22 building a pretty significant event?

23 A. Absolutely. I mean, it's on Mr. Doran's
24 as built critical path. He says that it's a key
25 item that is required to happen before they can

1 get to that second floor, and he's right about
2 getting it to the second floor.

3 Q. In your 35 years of experience, have you
4 handled any multi-story buildings that use tower
5 cranes to erect the building?

6 A. Yes.

7 Q. Okay. And how many instances in your
8 last 30 years or 35 years has a contractor failed
9 to enter into his schedule the erection and
10 demolition of the tower crane with which to erect
11 that building?

12 A. I can't think of any.

13 Q. Would you consider that to be a major
14 fall in the schedule?

15 A. It is.

16 Q. Okay. And is that an example of what
17 this treatise is actually talking about, why you
18 don't do this?

19 A. It's exactly what they're talking about.

20 Q. Okay. So what else is in this treatise
21 that would indicate the impropriety of
22 Mr. Doran's forensic methodology?

23 A. Well, the other piece here is a warning
24 that the -- that may not properly treat
25 concurrence.

1 Because it's only looking at the
2 beginning and the end, it can't really see what
3 is close to being critical or what is co-critical
4 at any one point. So a lot of assumptions had to
5 be made to try to think of what could be
6 concurrent and a lot of things had to be
7 discarded.

8 Q. Did Mr. Doran make any assumptions in
9 his analysis?

10 A. Of course. He made tons of assumptions.

11 Q. And were his assumptions based on the
12 actual daily reports and records of what happened
13 on the job, or were they assumptions that came
14 out of his head?

15 MR. HILDEBRAND: Objection, Your
16 Honor. He's leading him now.

17 A. I mean, I can't know the bottom line.

18 Q. Were you in --

19 A. I don't think there's any proof in the
20 record as to how he developed or what he did
21 other than looking at a lot of documents to
22 develop that as built critical path. I just
23 don't know.

24 Q. Okay. All right. So anything else that
25 you -- that this treatise provides you with

1 regard to the inappropriateness of using an as
2 built, as planned?

3 A. Well, the one other thing is that, in
4 here -- and I've got to say, I don't know exactly
5 where it is. But I know that in here is a
6 discussion of how you develop and what you do to
7 get an as built critical path. And they quibble
8 over the idea of what we call an as built
9 critical path and an as built controlling path.

10 But that's really not the important
11 point. The point is that it makes a strong
12 recommendation that the way you get to an as
13 built critical path is by going to the
14 contemporaneous schedules and looking at them one
15 by one and trying to figure out what was critical
16 at the time.

17 Q. All right. And how many interim
18 schedules were there between the baseline and the
19 last one?

20 A. I don't know if it's 46 or 47. It's
21 something in that range.

22 Q. Okay. Of those 46 or 47 interim
23 schedules, how many did Mr. Doran refer to in his
24 analysis?

25 A. I know he referred to the baseline and

1 the last schedule and then maybe two others,
2 maybe three.

3 Q. In your opinion, to a reasonable degree
4 of certainty, is that an appropriate methodology,
5 not to look at the individual interim schedules?

6 MR. HILDEBRAND: Objection, Your
7 Honor. His follow-up question did not comply
8 with his predecessor point. He asked him a
9 question, how many times did the report state
10 that Mr. Doran had looked at the schedule.

11 And then he said, well, is it
12 inappropriate for him not to look at any of the
13 other schedules. There's no testimony that he
14 didn't, and I think that he said that he did look
15 at the schedules when he gave his opinion. So I
16 think that's an improper question.

17 THE COURT: Do you want to rephrase
18 that question?

19 MR. BUNDY: Sure, Your Honor. I
20 will just withdraw it.

21 BY MR. BUNDY:

22 Q. All right, sir. Anything else in this
23 treatise that relates to the impropriety or
24 the -- any failures in Mr. Doran's analysis?

25 A. Not that's inferred at this point.

1 Q. All right, sir. Now, let's look at
2 Exhibit 90, and I believe that's -- now, this
3 treatise is prepared by what?

4 A. It's prepared by the ASCE, so the
5 association, American Society of Civil
6 Engineering.

7 Q. And you're an engineer, right?

8 A. I'm an engineer, and I'm a civil
9 engineer, but I'm not a member of the ASCE. I've
10 been involved with reviewing this document when
11 it was first issued. I think actually probably
12 Mr. Doran was, too.

13 And it was created by a group of people
14 that's a very diverse group, and their point,
15 their real goal was to meet all the ANSI
16 requirements, the standards requirements, to
17 develop a standard that is a recommended
18 standard. And they worked hard to do that, to
19 try to get this to be across the industry,
20 whether the major truths that go into delay
21 analysis.

22 So in this case, the main points that I
23 looked at and that I believe that Mr. Doran
24 didn't follow, one of the major ones is item 5.1.

25 Q. What page is that on?

1 A. Well, let me start with chapter 4. So
2 page 7, 4.1 says, because the critical path is
3 dynamic, delays should be evaluated based on the
4 critical path during each delay. So that maybe
5 doesn't say specifically that you should be
6 looking at, what is critical during that time
7 based on what was happening at that time.

8 The next item, 4.4, you should generally
9 be measured -- they should generally be measured
10 by the change to the completion date caused by
11 the delay, and I don't think that really can be
12 done without using those contemporaneous project
13 schedules.

14 Q. And in your review of Mr. Doran's
15 report, were contemporaneous schedules used?

16 A. For the most part, they were -- they
17 were not used. Not only were they -- if they
18 were reviewed -- and I kind of assumed the same
19 thing. Mr. Doran did review those schedules. He
20 had to ignore them. He had to say, my judgment
21 is better than the people at the time.

22 Because putting in an activity that has
23 10 weeks of float in the contemporaneous
24 schedule, that's, from my perspective, the best
25 evidence that you have of what is critical. And

1 he went a completely different way and chose
2 something else. And I can't understand it.

3 Q. Okay. Anything else in here?

4 A. Yes. 5.1 is very specific. Activities
5 with float are not critical, and those -- that
6 second floor room, the ballroom, the ceiling
7 activity specifically had a ton of float in the
8 contemporaneous schedule.

9 Q. 5.2 says float is owned by the project.
10 What does that mean?

11 A. Generally speaking, unless there's a
12 contract clause that says something different,
13 it -- whoever gets to that delay first, whoever
14 gets to that float first, whoever causes the
15 project to be delayed within the float, nobody
16 owns it.

17 So if the contractor of sorts float
18 during that -- a delay, or if the owner absorbs
19 what causes a delay, that only absorbs float, and
20 it doesn't impact the end date, they don't get
21 charged for that. There's no damages. There's
22 no delay there because it doesn't impact the end
23 date.

24 Q. So as an example, if you, the
25 contractor, were delayed by two weeks by the

1 owner, but there was five weeks of float, there
2 would be no delay? You couldn't say, I want my
3 float back because the float doesn't belong to
4 you to get it back?

5 A. Right.

6 Q. It belongs to project; is that correct?

7 A. That's correct.

8 Q. Okay. All right. Anything else?

9 A. Let me see. 10.4. So that's on page --
10 into 20, page 20. I'm going to start with 19.
11 So changes -- changing the schedules after the
12 fact is the name of this chapter, and what it's
13 recommended here is that -- and 10.4 is specific
14 to it.

15 It's recommended that you use the
16 contemporaneous schedules, and the follow on
17 piece of this is, whenever possible, the
18 preference for dealing with inaccurate
19 schedules -- so, if there are inaccuracies in the
20 scheduling, and there are many times inaccuracies
21 in the schedules -- after the fact, the
22 preference for dealing with inaccurate scheduling
23 after the fact is to make corrections rather than
24 to abandon the schedules. And it's subject to
25 the nature and scope of the corrections.

1 But the idea is, you're not supposed to
2 just say, I'm not going to use that schedule. I
3 don't make a conscious decision not to use that
4 schedule. Instead, I look at it and say, can I
5 make a change that will allow me to use that
6 schedule?

7 Q. And how would this statement in this
8 learned treatise apply to the mistake in the
9 baseline schedule related to the crane?

10 A. Well, the first thing you would do is
11 make that correction because it's a clear
12 problem.

13 Q. In order to comply with this?

14 A. Right.

15 Q. And did Doran do that?

16 A. No.

17 Q. Okay. And what is the result of that in
18 terms of how it affected the viability or
19 reasonableness of his conclusion?

20 A. Well -- and I don't want to jump too far
21 ahead, but in his period 2, he uses a measure
22 that says, if the baseline schedule says that
23 you're going to be able to start this ceiling
24 work on the second floor in the ballroom on
25 August 11th, and it didn't actually start until

1 March 3rd of the following year, and that's 203
2 days.

3 So there's 203 days between the time
4 that it was critically supposed to start, as that
5 was critical in the baseline schedule, and the
6 time when it actually was able to start. That
7 sounds like 203 days of delay. And frankly, but
8 for some float out here, it is 203 days. The
9 calculation is right.

10 But the problem is that the structure
11 wasn't delayed by that much time. If you are
12 looking at how much time the structure was
13 delayed, it was only delayed 74 days. The rest
14 of that entire time is because of this change --
15 because of this change to the baseline.

16 So that's -- and the 74 that I come up
17 with compared to 204 is really -- it's what --
18 the difference is, the baseline schedule and what
19 has to happen and what correction has to be made
20 to that baseline schedule. So there's a couple
21 ways to look at that. We can look at that 74 as
22 when did the -- like I said, when did the -- when
23 could you put the -- drop the pool in and when
24 did you drop the pool in? That's 74 days.

25 And the problem that came with that is,

1 first, there's float in that part of the
2 schedule, and, second, that 74 has to account for
3 also the hurricane. So subtract 20 from that 54
4 days is where there's the delay in the structure.

5 Q. How did Doran account for the bust in
6 the schedule related to the crane in his
7 analysis?

8 A. He didn't. He charged all that time as
9 if it was a structure delay, as if it was an
10 owner delay caused by the structure.

11 Q. And in your opinion to a reasonable
12 degree of certainty, that's not the appropriate
13 methodology to forensically analyze the delay on
14 this job?

15 A. It's clearly wrong.

16 Q. All right. Anything else in this
17 treatise?

18 A. I don't believe so.

19 Q. That's it?

20 A. That's it.

21 Q. All right, sir. Do you know whether or
22 not the interim schedules were available to
23 Mr. Doran to use in his analysis if he chose to
24 do so?

25 A. I have to assume they were available to

1 him.

2 Q. And what evidence do you have that he
3 did use those schedules and/or to what extent he
4 used those schedules?

5 A. Like I said, he referenced it in his
6 analysis.

7 Q. All right. Do you have an opinion, one
8 way or the other, whether he should have walked
9 through the job change by change by change to
10 figure out what the critical path was at any
11 point in time?

12 A. So that's the method that I would
13 choose. That method of going through period by
14 period by period, from my perspective, is my
15 chosen method if I can. If it's possible to do
16 it, that's what I'd want to use.

17 And so, yes, I believe that that's how
18 he should have looked at it, and that that would
19 have come up with a documentable analysis that
20 would give -- hopefully give some level of cause
21 and effect.

22 Q. That can be done, right? I mean, it's
23 not impossible?

24 A. It can be done.

25 Q. Okay. And if you would have been

1 charged to do it, that's the method you would
2 have used?

3 A. That's the method I would have used.

4 Q. And do you have an opinion one way or
5 the other whether that's the more -- whether or
6 not that's a more accurate way of determining
7 where the schedules are delayed and who's
8 responsibility?

9 A. Yes, it definitely is.

10 Q. And then, do you have an opinion to
11 reasonable degree of certainty whether or not
12 that is also a more accurate way to determine and
13 differentiate concurrent delays from non-current
14 delays?

15 A. Yes. It's a lot better -- because you
16 can look at it in a lot finer slicers, basically,
17 you can see what else might be concurrent, what
18 else might be happening at the same time.

19 Q. Okay. What is the difference in this
20 contract? Let me strike that question. In this
21 contract, in these documents, did the contract
22 documents make distinction between types of
23 delay?

24 A. Yes.

25 Q. All right. Can you tell the Judge what

1 the different types of delays are as were agreed
2 by and between these parties when they signed
3 this contract?

4 A. I would probably have to refer back. I
5 know that essentially there's -- there are
6 directed changes, and then there are type two
7 changes, which are essentially force majeure,
8 weather, that kind of thing.

9 Q. Non-compensable?

10 A. Non-compensable type delays.

11 Q. Do you know whether or not -- or have
12 you seen any evidence that Doran made any attempt
13 to characterize his delays or categorize his
14 delays between compensable or non-compensable or
15 type one and type two as set forth in the
16 contract?

17 A. Well, he didn't identify them as
18 compensable, and with respect to the weather
19 delay, he said that was non-compensable. So he
20 didn't look at the requirements of the contract,
21 I think. Apparently, he didn't refer to them as
22 type one or type two. But he did say, all of the
23 delay other than the 20 days was compensable
24 delay. He -- that was his opinion.

25 Q. So he agreed that the architect, they

1 got 20 days, and that was non-compensable, but
2 everything -- all the rest of the delay on this
3 entire job except for one day, he contended it
4 was compensable; is that correct?

5 A. Yes.

6 Q. Now, what was the length of the delay on
7 this job, according to Doran?

8 A. 516 days, I believe.

9 Q. How many?

10 A. 516.

11 Q. In your experience, in a 516 delay on a
12 60 million dollar contract, how many times have
13 you run across a delay of that magnitude, where
14 every single day of delay, except one, was a
15 compensable delay chargeable to the owner?

16 A. I'm afraid it happens too often.

17 Q. All right, sir. Now --

18 A. I assume that there -- how many days
19 have -- has it been claimed, or how many days has
20 it actually been that it was determined that all
21 the delays -- the days were --

22 Q. Okay. So you're making a distinction
23 between the claim and what it was actually to
24 become?

25 A. I'm saying that it's way too many times

1 that it's claimed that way. It's -- I've never
2 seen it actually found that way.

3 Q. Well, I guess, what's the success -- or
4 let me ask it this way. What is the success rate
5 in your experience?

6 MR. HILDEBRAND: Objection, Your
7 Honor. That calls for speculation. It's not in
8 his report, and I think it's inappropriate for
9 him to ambush us on this. I haven't seen any
10 sort of analysis captioning this underlying data.
11 Getting him to give this opinion, I think it
12 would be speculative.

13 THE COURT: Mr. Bundy?

14 MR. BUNDY: I will withdraw the
15 question, Your Honor.

16 THE COURT: All right. Withdrawn.

17 BY MR. BUNDY:

18 Q. All right. Now, Mr. Doran, I think,
19 divided up his analysis into periods; is that
20 correct?

21 A. Yes.

22 Q. Let's talk about period one. What was
23 period one?

24 A. Period one was intended to run for the
25 time from the notice to proceed to that August

1 right. That's about what they ended up being
2 because the tower crane broke down in February.
3 But they had lost three weeks of time. Now, that
4 includes those other two times. We're not trying
5 to add those on.

6 Q. If you would, just tell the Judge what
7 use was made of this tower crane? It was doing
8 more than just lifting swimming pools. What else
9 was it doing?

10 A. Right. It was helping with concrete
11 floors and forms and that kind of thing, and then
12 it also was assisting with the precast, at least
13 in the early stage.

14 Q. In your opinion, at that point in the
15 job, if the tower crane was out of service for
16 seven days, would that have been on the critical
17 path, or would it have affected the critical path
18 in any way?

19 A. Right.

20 MR. HILDEBRAND: I'm sorry?

21 THE WITNESS: I think it had to
22 be --

23 MR. HILDEBRAND: Your Honor --

24 THE WITNESS: -- if that was the
25 critical path.

1 MR. HILDEBRAND: If it were. Your
2 Honor, this is an issue I would like to discuss.
3 I did take Mr. Boe's deposition, and I do have
4 copies of his reports. And he has already said
5 he has not done a critical path analysis. And
6 I've asked -- got him in his deposition where he
7 says, there are subcontractor issues, but he
8 doesn't know whether they were concurrent or not.

9 So if he is now going to say that these
10 were on the critical path, that is contrary to
11 his deposition, and those are new opinions that
12 he has not expressed before. His testimony is
13 real clear. He did not do a delay analysis.

14 And when I deposed him before, he said
15 he can't tell me how many days of delay they were
16 attributable to the owner, to design issues, to
17 any other issues. All he's done is assessed
18 Mr. Doran's -- like Mr. Bundy said, critique
19 Mr. Doran. So I would very much object to him
20 now changing those opinions and testify that
21 things are on the critical path.

22 THE COURT: Do you want to be heard
23 on that?

24 MR. BUNDY: Well, one, he is
25 certainly going to get to cross-examine him.

1 Two, he didn't do a critical path analysis, and
2 we don't have one.

3 But it seems beyond the (inaudible) that
4 this gentleman wouldn't be able to testify in
5 open court, that a tower crane on a construction
6 job that was out of work for seven days, wasn't
7 on the critical path. I mean, I just -- that's
8 so fundamental to construction, but, you know,
9 that's fine. It is what it is, right.

10 THE COURT: I'm going to allow it,
11 and he is subject to cross. I will let you go
12 into cross on that. Okay?

13 BY MR. BUNDY:

14 Q. Let's continue on the tower crane
15 problems. What about July -- in July of '16, was
16 there any -- did you see any records of problems
17 with the tower crane?

18 A. Yes. They were shut down again for
19 repairs.

20 Q. All right. What about in December? Did
21 you see any problems with the tower crane?

22 A. In December, there was a crane
23 malfunction and an accident and --

24 Q. And was there a notation with regard to
25 this malfunction?

1 would say, yes, I know that you can.

2 Q. So it would have been possible if BBC
3 had wanted to, to have looked at the work that
4 was going on when the first one went in to
5 determine they were improper?

6 A. Yes.

7 Q. Okay. Let's go to the next one. This
8 was in October of 2017. This is roughly close to
9 the next day, I guess. First, that last one was
10 October 9. Now, we're on October 10, right?

11 A. Yes.

12 Q. And tell us what this reveals.

13 A. This is an e-mail from Mr. Spano to Alec
14 Dooley. It's both internally to Balfour Beatty
15 and to Pasco.

16 Gentlemen, this is a major issue, as you
17 will now need to open up ceilings. You need to
18 immediately address the seventh floor to stay
19 ahead of the drywall hangers. Then proceed to
20 the eighth floor after tomorrow's inspection, and
21 then get to the third floor, which has already
22 been -- which already has painted ceilings and
23 fixtures just going in. This cannot delay the
24 ninth floor completion that is holding up the
25 ceiling inspection now.

1 So it's not a simple problem. It's
2 through many floors, and it requires a lot of
3 leeway.

4 Q. Do you have an opinion as to whether
5 this would cause congestion of various people
6 working in the room?

7 A. It certainly would in an area where they
8 are actually doing real work, where they have
9 other work to do.

10 Q. And do you have an opinion as to whether
11 that could result in loss of productivity?

12 A. Yeah. Yes, it could.

13 Q. And could it result in increased costs?

14 A. It almost certainly would.

15 Q. Have you seen any evidence that BBC has
16 made any attempted to conduct any of these
17 increased costs from their claim?

18 A. That's not my scope.

19 Q. Let's go to December 14, 2017, with
20 regard to sprinklers, from Starcevic to various
21 people.

22 A. Right.

23 Q. Entitled, concealed sprinkler heads in
24 the guest rooms.

25 A. And this one says, we have an issue with

1 sprinkler heads in the guest rooms, and all need
2 to be replaced. Please price a small patch for
3 each pending, assuming completing a floor at a
4 time in every guest room.

5 There is between 350 to 400 in total.
6 There should really be one trip to each room. We
7 will need to execute this work as swiftly and
8 cleanly as possible since we are not stopping
9 with other activities.

10 Q. And are not is in all caps, right?

11 A. Yes, sir.

12 Q. Okay. All right. What you got next on
13 this issue?

14 A. Well, with regard to this, on December
15 26th, 2017, Precision Walls came out with an
16 estimate for change order. And it basically
17 says, there was an initial list of 150 patches.
18 It's going to be difficult to make the patch
19 disappear in the level 4 ceiling.

20 If you have any questions, let me know.
21 So they're working on how much it would cost
22 because these are supposed to be a level 4
23 finish. How much would it cost to repair these
24 things once the correction is made.

25 Q. Well, let's look at the numbers. It

1 A. Good morning.

2 MR. BUNDY: Your Honor, at this
3 point, I would move to introduce the Hotel
4 Bennett manpower issues chart, which is Exhibit
5 91.

6 THE COURT: 91. Okay. In
7 evidence.

8 (DFT. EXH. 91 was received in
9 evidence.)

10 MR. BUNDY: It's in evidence?

11 THE COURT: Yes.

12 MR. BUNDY: Okay.

13 BY MR. BUNDY:

14 Q. All right. Mr. Boe, do you have the
15 exhibit in front of you?

16 A. I do.

17 Q. What you have in front of you is now
18 Exhibit 91.

19 A. I understand.

20 Q. Who created Exhibit 91, Mr. Boe?

21 A. I did.

22 Q. Okay. And why did you create it?

23 A. Just to get -- just to show that over
24 time, there were a lot of manpower issues
25 throughout the project time frame. So rather

1 than pull each and every one of those into the
2 report, we put a time line.

3 Q. And that would be the type of task that
4 somebody who was forensically analyzing the
5 schedule would typically engage in, right? Check
6 manpower?

7 A. Yes.

8 Q. That's not unusual?

9 A. No.

10 Q. In fact, it's what you would expect,
11 correct?

12 A. Yes.

13 Q. Okay. Approximately how much time -- or
14 you can quantify it in money. What did
15 Mr. Bennett pay for this? If you had to put a
16 price on it, what did he pay for it?

17 MR. HILDEBRAND: Objection,
18 Your Honor.

19 Q. How much time did you spend preparing
20 this document?

21 MR. HILDEBRAND: Objection.
22 Relevancy, Your Honor.

23 THE COURT: I'm going to allow it.
24 Go ahead.

25 THE WITNESS: So the biggest part

1 of the task is going through all of those
2 business records, all of those e-mails to try to
3 find specifics either to manpower -- we go
4 through all of those documents. So that part of
5 the task is one of the biggest things that we do.

6 BY MR. BUNDY:

7 Q. And how much time did -- how many
8 documents did you look through in order to find
9 the documents that found their way in this chart?

10 A. It's certainly tens of thousands. It
11 could be 100,000. I'm just not sure about the
12 total number. There's a lot of e-mails on this.

13 Q. How many people worked on it?

14 A. Three people.

15 Q. Okay. So tens of thousands, maybe up to
16 \$100,000 was spent to create this?

17 A. No, no. That was how many documents.

18 Q. Oh, how many documents.

19 A. That part of the task is probably
20 \$150,000. I mean, that part of the task is a
21 huge effort to go through and find what the
22 issues were that were identified in the meeting
23 minutes and that kind of things and the e-mails.

24 Q. And tell me where these documents were.
25 I mean, what categories were they? How were they

1 produced to you? What had to be done in your
2 offices in order to come up with this?

3 A. Well, part of the documents were in a
4 concordance database. Part of the documents were
5 from subcontractors. We got those at different
6 times during the process.

7 We got a lot of information early. Once
8 we got the notice that -- the deadline for the
9 reports, we went to work in earnest to identify
10 that, find out what problems were on both sides,
11 if you could identify in the e-mails. This is
12 what resulted as part of the rebuttable report.

13 So this was mostly produced between
14 the -- this item itself was mostly produced
15 between the November 15th receipt of Mr. Doran's
16 first report and the December 15th time frame
17 when this was issued with our rebuttal report.
18 But the vast part of the issue analysis, the
19 issue identification was done before that.

20 Q. Do you know whether or not the documents
21 you looked at in order to arrive at Exhibit 91
22 were those same documents available to Balfour
23 Beatty?

24 A. Yes.

25 Q. Okay. How do you know that?

1 A. Well, they're -- the vast majority of
2 these are e-mails to or from Balfour Beatty.
3 There's some that came from -- directly from
4 them.

5 Q. And were those documents available to
6 Doran, to the best of your information and
7 belief?

8 A. As far as I know, they should have been.

9 Q. And would they have been available to
10 the best of your information and belief to all
11 the experts hired by Balfour Beatty in this case?

12 A. Yes.

13 Q. Okay. Do you have an opinion as to
14 whether or not Mr. Doran, based on his testimony,
15 was mentally capable of preparing a document like
16 this from the same documents you had? Could he
17 have done this as far as you know?

18 MR. HILDEBRAND: Objection,
19 Your Honor.

20 THE COURT: I will sustain that.

21 MR. BUNDY: Okay. Thank you.

22 BY MR. BUNDY:

23 Q. All right. Let's start with the chart,
24 please, on the far left-hand corner on the top.
25 1/14/16. Do you see that?

1 A. Yes.

2 Q. And that document or that notation in
3 your chart here -- and this is just a time line,
4 right?

5 A. Yes.

6 Q. For the record, I guess if somebody was
7 trying to describe -- how would you describe this
8 document if you wanted to describe it to somebody
9 who didn't have it in front of you, to look at?
10 How would you describe it?

11 A. It's a time base or time scale list of
12 documents, chronology of items that occurred.

13 Q. Okay. And your intent in preparing the
14 document was to show what?

15 A. Just that from the very early stages to
16 the very latest stages, there were manpower
17 problems identified by Balfour Beatty or by
18 subcontractors.

19 Q. Before you began your inquiry into this
20 particular issue, did you know the result?

21 A. Not really. I mean, we knew that there
22 were some allegations.

23 I think I probably in the initial
24 meeting you had with us, you might have mentioned
25 that -- I'm sure you mentioned that there were

1 manpower problems on the project. But, no, we
2 didn't know that it would go across. We didn't
3 know the extent.

4 Q. Okay. So this chart was not reverse
5 engineering? You didn't start out by saying, I'm
6 going to prove lack of manpower and then
7 manufacture things to prove that result?

8 A. No. I couldn't have done that.

9 Q. Okay. Let's look at what I guess we
10 could refer to as -- for identification, as
11 Exhibit 91-1. Do you have that in front of you?

12 A. Yes.

13 Q. Would you describe it, please?

14 A. The top e-mail is an e-mail from Daniel
15 Ritchie of Balfour Beatty dated January 14, 2016
16 to Tim Spano of Balfour Beatty, Robert Cotherman
17 and Jeff Sandeen, all of Balfour Beatty. And the
18 subject is Marion Square notice of delay for lack
19 of manpower and materials.

20 Q. And is that subject matter why this
21 document found its way in this exhibit book and
22 the notation on this chart?

23 A. Yes. And it's -- it's in response to a
24 WSI e-mail that say that this minute, every
25 single crew is really busy. It means, if you do

1 not have nothing for us, to continue today or
2 tomorrow.

3 It seems like the best we can go back is
4 going to be Monday. And the response from Daniel
5 Ritchie was, how much more do I need to take from
6 them if they keep pushing us.

7 Q. What is the context of this last
8 statement, I thought I was back in commercial and
9 done with this expletive excuses?

10 A. I don't know.

11 MR. HILDEBRAND: Objection,
12 Your Honor. Calls for speculation.

13 MR. BUNDY: Your Honor, I would
14 move to introduce Exhibit 91-1 into evidence.

15 MR. TERRY: Objection, Your Honor.

16 THE COURT: All right.

17 MR. TERRY: Do you want me to go
18 first?

19 THE COURT: Let me hear from
20 Mr. Hildebrand first.

21 MR. HILDEBRAND: Your Honor, this
22 is exactly what we went through before, and I
23 said that these were not subject to the hearsay
24 rules because they were in admissions. They're
25 statements against interest. I made all these

1 same objections, and you ruled it.

2 You said, he can testify about his
3 opinions and do the summaries but the underlying
4 data do not come in. And I don't see any
5 difference, and I don't see an exception that --
6 for the exact same reasons that you ruled before
7 for these documents. I don't think that they
8 come into evidence.

9 THE COURT: All right. Very good.
10 Mr. Terry?

11 MR. TERRY: Your Honor, before we
12 get to the hearsay rule, we first have to deal
13 with the authentication of the document.

14 THE COURT: Right.

15 MR. TERRY: Mr. Boe can't
16 authenticate the document. It's not his
17 document. It's not his business record.

18 It doesn't matter whether there's an
19 exception to the hearsay rule such as the
20 business record or such as an admission against
21 interest. It's simply inadmissible because he
22 can't authenticate the document; therefore, we
23 object.

24 THE COURT: Okay.

25 MR. BUNDY: The document itself

1 authenticated. It came out of their files,
2 right? The notion that the documents they
3 produced to us in discovery were in -- are they
4 now saying that their own documents are
5 unauthentic and not real and not accurate and not
6 their documents?

7 The authentication rule relates to
8 documents that have no basis and fact, that came
9 from nowhere. These documents came from them in
10 discovery. They were kept in the normal course
11 of their business. They're statements against
12 interest.

13 The notion that these documents --
14 they're not the original. If that was the rule,
15 I would have to find the -- and there's no such
16 thing as an original e-mail. I can't bring in
17 bits and bites and put them in here. This is a
18 document they produced. It's self-authenticated.

19 MR. HILDEBRAND: Your Honor, if I
20 May.

21 THE COURT: Sure.

22 MR. HILDEBRAND: That's exactly
23 what I've argued previously. I said, look, these
24 are their documents. And many of the documents
25 that our experts tried to introduce were e-mails

1 by, among, and between that we got from
2 Mr. Bundy. They all came from his files. It's
3 the exact same thing.

4 And I argued, look, they're -- and I
5 said, Your Honor, it's really just an issue of --
6 is there any real question about where these
7 documents came from? I argued that. You said,
8 no, I want to stick to -- they are not
9 self-authenticated, and you ruled against me on
10 that.

11 And I don't think that it's fair, and I
12 think it would be highly prejudicial for my
13 experts not to, while they were here and who've
14 now left, to be able to introduce all the
15 documents under the same grounds that I argued,
16 which are the same ones that Mr. Bundy is now
17 trying to argue -- to allow these documents in.

18 I just think it's -- it would be
19 prejudicial and it would be inappropriate quid
20 pro quo. Thank you.

21 MR. TERRY: Your Honor, May I?

22 THE COURT: Go ahead.

23 MR. TERRY: Your Honor, these
24 documents are not self-authenticated simply
25 because they come from someone's record. Just

1 last night, Mr. Bundy's office produced documents
2 from Otis Elevator. It doesn't make them
3 self-authenticated because they were produced by
4 him or by anyone else.

5 The way you authenticate a document is
6 to have someone who actually can testify as to
7 the truth and accuracy of the document, and that
8 was -- is the same today as it was the day it was
9 created. Mr. Bundy first has to jump through the
10 hoop of authenticating the document. Then we can
11 decide whether it's a hearsay objection.

12 THE COURT: All right. Rule 901
13 address authentication. 901(a). The requirement
14 of authentication or identification as a
15 condition precedent to admissibility is satisfied
16 by evidence sufficient to support a finding that
17 the matter in question is what its proponent
18 claims.

19 I think on that basis, I think it can
20 come in. I don't know that I've heard this man's
21 name before or not, Daniel Ritchie. But clearly
22 he's a Balfour Beatty employee speaking to people
23 who I do know who are Balfour Beatty employees.
24 I'm going to allow it.

25 MR. BUNDY: Thank you, Your Honor.

1 All right.

2 (DFT. EXH. 91-1, was marked for
3 identification and admitted into evidence.)

4 BY MR. BUNDY:

5 Q. All right. Let's go to number -- you've
6 got a number here. There's a little circle on
7 each one; is that correct?

8 A. Yes.

9 Q. And that circle simply relates back to
10 the tab number, correct?

11 A. That's right.

12 Q. Okay. So if we just go in chronological
13 order or numeric order, the next one would be
14 1/18/16. And the note is -- well, you tell me
15 what the note is. What is the significance?

16 A. WSI, lack of materials and manpower.

17 Q. All right. Let's go to tab 2 which
18 would be Exhibit 91-2. Do you have it in front
19 of you?

20 A. I do.

21 Q. All right. And it's from Joe
22 Lauricella. Do you know who he is?

23 A. Yes.

24 Q. He was with Balfour Beatty. What was
25 his job?

1 A. Balfour Beatty scheduler.

2 Q. He was the scheduler?

3 A. Yes.

4 Q. Okay. And it was sent to Tim Spano,
5 Cotherman. Cotherman was with Balfour Beatty,
6 correct?

7 A. Yes.

8 Q. And what was his job?

9 A. I don't know.

10 Q. And what is the subject?

11 A. The subject is MSH004 updated schedule
12 and reports.

13 Q. All right. What does MSH stand for?

14 A. Marion Square Hotel.

15 Q. And 004 relates to what?

16 A. Update number 4 of the project.

17 Q. Schedule update number 4, right?

18 A. Yes.

19 Q. Correct?

20 A. Yes, sir.

21 MR. BUNDY: That's what we
22 discussed yesterday, Your Honor.

23 BY MR. BUNDY:

24 Q. All right. Tell me what the
25 significance of this document is in your search

1 for manpower issues.

2 A. Well, it shows a couple of things. The
3 thing that we identified on the time line was a
4 note from Mr. Lauricella saying that the
5 waterproofing subcontractor -- well, it says,
6 team attaches the update.

7 Below I have listed a few of the issues
8 that have or are still impacting the job for the
9 past month. Waterproofing subcontractor, both
10 lack of materials and manpower. The next line
11 says, tower crane down for approximately seven
12 days. That's not what I noted on this.

13 Q. But there are at least four bullet
14 points related to -- and described as impacting
15 the job?

16 A. Yes.

17 Q. And this is from the scheduler of the
18 job?

19 A. Yes.

20 Q. Okay.

21 MR. BUNDY: Your Honor, I move to
22 introduce Exhibit No. 91-2 into evidence.

23 MR. TERRY: Same objection,
24 Your Honor. And in this case, Mr. Boe doesn't
25 even know who Mr. Cotherman is.

1 MR. BUNDY: Mr. Cotherman is one of
2 five.

3 THE COURT: He's one of five.
4 Mr. Spano is on there. He's testified; so I know
5 who he is. All right. Admitted over objection.

6 MR. HILDEBRAND: Same objection.

7 THE COURT: Same objection. All
8 right.

9 (DFT. EXH. 91-2, was marked for
10 identification and admitted into evidence.)

11 BY MR. BUNDY:

12 Q. All right. Let's go to number 3. It's
13 dated -- notation number 3 -- 2/29/16. Will you
14 tell us -- read your note, please, and then refer
15 to the exhibit and tell us why you put this on
16 your chart.

17 A. In brackets it says, WSI, and then it
18 says, will not be here until lunchtime. Once
19 again, they are running the job.

20 Q. Okay. And if you would, let's refer to
21 Exhibit No. 3. Would you go to it and tell me
22 what in that exhibit you deem relevant to your
23 issue of manpower?

24 A. So this is from Mr. Ritchie to Mr. Spano
25 and copied to Mr. Cotherman. Basically it says,

1 everything Lithko and I said we were going to do,
2 we accomplished. I called Ronnell yesterday at 6
3 p.m. He said they would be here. If they cannot
4 do their work during that -- I skipped. The job
5 site hours are 7 a.m. to 6 p.m. If they cannot
6 do their work during that time, then we should be
7 able to slap a notice on them.

8 Q. Slap a cure notice? Is that what he's
9 referring to?

10 A. Could be or some other kind of notice.

11 Q. What does he mean when he says, I'm
12 tired of staying late for these ass clowns
13 because they do and work when they want to?

14 MR. HILDEBRAND: Objection,
15 Your Honor.

16 MR. TERRY: Objection, Your Honor.

17 MR. BUNDY: Pardon me?

18 MR. TERRY: Objection. It calls
19 for speculation.

20 MR. HILDEBRAND: Objection. It
21 calls for speculation. He isn't the writer of
22 the e-mail. He can't testify about that.

23 MR. BUNDY: So he's not qualified
24 to tell us what an ass clown is?

25 THE COURT: I will sustain that.

1 MR. BUNDY: Thank you. Your Honor,
2 I move to introduce Exhibit 91-3.

3 MR. HILDEBRAND: Same objection,
4 Your Honor.

5 MR. TERRY: Same objection,
6 Your Honor. And just for the record, I'm Don
7 Terry on behalf of Watson Electrical and Lithko
8 Contracting and Old North State Masonry.

9 THE COURT: Just so I'm clear, WSI,
10 is that Watson? That's not Watson, is it?

11 MR. TERRY: No, Your Honor.

12 THE COURT: Okay. All right. Just
13 so I'm clear. All right. Objections noted and
14 overruled.

15 MR. BUNDY: Thank you, Your Honor.

16 (DFT. EXH. 91-3, was marked for
17 identification and admitted into evidence.)

18 BY MR. BUNDY:

19 Q. All right. Mr. Boe, the second -- it
20 looks like there's -- is there another e-mail
21 behind this one?

22 A. This is the initial e-mail of the group,
23 I believe.

24 Q. Is there a second page to that one?
25 I've got a 229 on mine.

1 A. They're out of sequence from Bates
2 numbers; so I can't tell if it's related.

3 Q. All right. Let's go to number -- well,
4 there's two numbers 3's, I guess is what I'm
5 getting at. There are two number 3's, right?

6 A. Yes.

7 Q. Okay. Let's look at the top number 3
8 dated 2/29. That's the second page. Are you
9 with me?

10 A. Yes.

11 Q. All right. What is the rationale for
12 putting this is in there?

13 MR. BUNDY: And, Your Honor, this
14 is the second page behind.

15 THE COURT: Okay.

16 THE WITNESS: So this is another
17 e-mail from Daniel Ritchie to Ronnell Murray and
18 the waterproofer, to Robert Cotherman and
19 Mr. Spano. The subject is WSI. And it says, we
20 need more manpower. You don't currently have
21 enough men to meet the three weeks scheduled.

22 Q. All right. And he goes on to explain
23 that, at least according to this, they start at
24 11, take lunch, et cetera, et cetera, right?

25 A. Yes.

1 Q. And it has more derogatory expletives in
2 this e-mail, correct?

3 A. Yes.

4 MR. BUNDY: I think Your Honor has
5 already -- I wanted to make sure that you saw
6 that. Is this in evidence as well?

7 THE COURT: Yes.

8 MR. BUNDY: Okay. Thank you,
9 Your Honor.

10 BY MR. BUNDY:

11 Q. All right. Let's move on to number 4.
12 This is a 3/1/16 notation you make. Will you
13 tell us why you put this note in and explain the
14 document that backs it up, please?

15 A. Again, this is a Mr. Ritchie e-mail to
16 the waterproofer and to the -- and to Mr. Robert
17 Greer at WSI with a copy to Mr. Spano and
18 Mr. Cotherman.

19 And he says, do you have more manpower
20 coming? We just spoke with your guy, and he said
21 it will be end of the day tomorrow before half of
22 section 6 is ready. And it won't be until
23 Saturday until the remainder is finished. This
24 is unacceptable. Get me another crew in
25 Charleston today. We cannot let the schedule

1 push a week.

2 Q. Okay. And what is underneath that?

3 A. This will push vertical. At this rate,
4 we will have the elevator deck poured before
5 section 7. I need an answer in the next 30
6 minutes on what the plan is.

7 Q. All right. And what is underneath
8 there?

9 A. It looks like several photos were
10 provided, and it asks -- again, this is the day
11 before. What about all these areas that are
12 ready and have -- what about all these areas that
13 are and have been since 7 a.m.?

14 I can take pictures, too, but it will
15 not speed up the job. If you had a competent
16 person, we might be able to get something done.
17 Send more men and a competent person.

18 Q. Thank you.

19 MR. BUNDY: All right. Your Honor,
20 I move to introduce 91-4.

21 MR. TERRY: Objection, Your Honor.

22 MR. HILDEBRAND: Objection.

23 THE COURT: Admitted over
24 objection.

25 MR. BUNDY: Sir?

1 THE COURT: Admitted over
2 objection.

3 MR. BUNDY: Okay. Thank you.

4 (DFT. EXH. 91-4, was marked for
5 identification and admitted into evidence.)

6 THE COURT: Y'all have a continuing
7 objection. If you want to add something along
8 the lines, you can. Okay. I'll acknowledge that
9 for you for the record.

10 MR. HILDEBRAND: Thank you.

11 MR. BUNDY: Thank you, Your Honor.

12 BY MR. BUNDY:

13 Q. All right. Mr. Boe, the next one is --
14 because now we're below the line, it looks like?

15 A. Yes.

16 Q. Okay. It's number 5. It's dated
17 May 19, '16. If you would, tell us what your
18 note was and why it's here and the significance
19 of the document that backs it up in your opinion.

20 A. It says, to date, this has not been
21 going well. Lithko continues to lose days at
22 each update and completing valuable flow from the
23 schedule, Lauricella. And this -- and the date
24 here -- it's a Lauricella e-mail, May 19th.

25 I guess I kind of noted that each of

1 these has a BBC Bates number at the bottom, which
2 is -- sometimes there are documents with Bates
3 numbers and sometimes there aren't. This is a
4 May 19th e-mail to Mr. Spano and Mr. Starcevic
5 and several other people, including Daniel
6 Ritchie.

7 And the subject is MSH-11; so that's the
8 schedule update number 11. Team, attached is the
9 updated schedule. Based on our meeting with
10 leadership, we've gone through the schedule and
11 completed the following tasks.

12 I'm trying to find that. Review the
13 schedule, the structure. Lithko to improve on
14 cycle time. To date, this has not been going
15 well. Lithko continues to lose days with each
16 update and completing valuable float from the
17 schedule.

18 Q. If you would, would you refresh the
19 Judge's recollection about what float is and what
20 the significance of completing float would mean
21 to a contractor and his scheduler, if anything?

22 A. Sure. And in this case, this would
23 indicate that that activity wasn't critical, that
24 there was some amount of float, some amount of
25 leeway for that contractor, if he delays a few

1 days here and there, maybe he won't become
2 critical.

3 But the completion of float by itself, I
4 mean, it does indicate that that activity right
5 there is not critical right then. But it's --
6 the mention of it is likely to mean that it's
7 getting close.

8 Q. Well, when you lose float, can you get
9 it back? Once you've lost that float on that
10 activity, can you get it back?

11 A. Well, yes. Theoretically, you can get
12 it back, if you accelerate and overcome either
13 that activity or the following activity. So you
14 can get it back, but you've -- you've lost it for
15 now with this schedule update.

16 MR. BUNDY: Your Honor, I move to
17 introduce 91-5 into evidence.

18 THE COURT: All right. Over
19 objection, into evidence.

20 MR. BUNDY: Thank you, Your Honor.

21 (DFT. EXH. 91-5, was marked for
22 identification and admitted into evidence.)

23 BY MR. BUNDY:

24 Q. All right. Let's move on to 6, and the
25 note here is on June 6, 2016. Would you answer

1 the same question again, please?

2 A. Sure, the statement says, manpower is
3 tough in Charleston, referencing a Lithko
4 schedule slip from Mr. Spano.

5 Q. All right.

6 A. So this has several e-mails at the top,
7 and getting them to the -- like, at the bottom of
8 the page, from Mr. Spano, Marty, per our
9 discussion, look hard at getting the first two
10 floors driving ASAP.

11 So this is June of 2016, and I think --
12 think outside the box, trying to look at ways we
13 can get all the equipment into the basement.
14 Dan, let's be prepared to respond to the schedule
15 slip and plan for recovery. Tony will not be
16 happy that there's no recovery plan with Lithko
17 after asking for six to eight weeks last visit.

18 So this would indicate that there has
19 been a schedule slip of some kind as of June 6th.
20 But it frankly doesn't say that it's critical or
21 not critical.

22 MR. BUNDY: All right. Your Honor,
23 I move to introduce exhibit 91-6.

24 THE COURT: In evidence over
25 objection.

1 MR. BUNDY: Thank you, Your Honor.

2 (DFT. EXH. 91-6, was marked for
3 identification and admitted into evidence.)

4 BY MR. BUNDY:

5 Q. All right. Let's move on to notation 7,
6 which I believe there's two entries. If you
7 would explain those two entries and the
8 documentation that you found to justify these
9 entries in your manpower analysis.

10 A. Okay. The first is from Mr. Spano. It
11 says, Lithko has been averaging about 25 men on
12 site. It's half the crew size that should be on
13 this project.

14 And again, the top e-mail is from
15 Mr. Starcevic on June 7th talking about attaching
16 the notice of delay and demand for cure. The
17 quote that I've got there is in the second part,
18 which is from Mr. Spano to Anthony Hazen at
19 Lithko and copied to Mr. Starcevic, Mr. Ritchie,
20 and several other people.

21 And the subject is, schedule delay and
22 manpower issues, quality control issues, QC
23 issues, and recovery schedule. So the first part
24 of this: Anthony, after our last schedule
25 discussion with you, Mike and Josh, you guys

1 brought in a 10K -- some kind of a crane -- to
2 help with the front entrance which definitely
3 helped, but the L3, level 3 last pour still
4 slipped.

5 As you see below, we're tracking 11 days
6 behind the 4/11 structure schedule and were to be
7 making up time. So you're slipping and you were
8 supposed to be making up time. It goes -- the
9 table crew was pushing to get one-quarter of the
10 deck, then drops back to do drop down beams and
11 fill in while more tables are being set.

12 Getting a quarter deck only allows MCC,
13 the mechanical contractor to start the layout.
14 Even if it's a half deck to get our controls, and
15 the same goes for Watson Electrical. This
16 shortened layout time has only benefited Lithko
17 not to slip further behind, when in reality, it
18 should have gained BBC with days on schedule.

19 And ultimately, it gets to, Lithko has
20 been averaging about 25 men on site, which as we
21 both know is half the crew size that should be on
22 this job. It goes on. We currently have no
23 (inaudible) in the sequence and there should be a
24 table that -- with drop beam and fill crew, et
25 cetera.

1 It also shows a QC concern down below
2 it, talking about problems with the level 3 west
3 slab. The bottom line says, please address the
4 manpower QC issues immediately and give us a plan
5 tomorrow by noon.

6 Q. All right. And then I think there were
7 two on this one, were there not? Yes. There
8 were two. There's one 6/7. There's two 6/7
9 letters, correct?

10 A. Let's see.

11 Q. Two references?

12 A. So the other is Mr. Starcevic, and the
13 note says, the project schedule is currently 11
14 day of calendar days behind schedule, in large
15 part due to Lithko, and that's in the top e-mail
16 of the previous page. June 7 from Mr. Starcevic
17 to Michael Rohrer at Lithko with a copy to
18 Ritchie, et cetera.

19 Q. And attached was a delay and demand for
20 cure, right?

21 A. Right. And a note that the project was
22 currently 11 calendar days behind schedule, in
23 large part due to Lithko Contracting, with no
24 indication for recovery.

25 MR. BUNDY: Your Honor, what I'd

1 rather do is instead of him reading to you, is to
2 just give you a minute or two to read it yourself
3 if that's satisfactory. You let me know when
4 you're ready to move on, and I'll move on. Is
5 that workable?

6 THE COURT: This is working well;
7 so I'm just looking through here.

8 MR. BUNDY: Okay.

9 THE COURT: All right. That was as
10 of the 7th for the date?

11 MR. BUNDY: Yes. Your Honor, I
12 would move to introduce 91-7.

13 THE COURT: It's moved in evidence
14 over objection.

15 MR. BUNDY: Thank you, Your Honor.

16 (DFT. EXH. 91-7, was marked for
17 identification and admitted into evidence.)

18 BY MR. BUNDY:

19 Q. All right. Mr. Boe, let's move on to --
20 I think we're back above the line now. Number 8.
21 It's a notation of 7/8/16. Are you with me?

22 A. Yes.

23 Q. All right. If you would, just the same
24 question. I don't want to ask you the same
25 question over and over again, but you know what I

1 want; so if you would just proceed. Thank you.

2 A. Sure. July 8th, 2016. Tim is teeing
3 ONSM -- I have it in brackets -- up already
4 because they suck, and we need to take any
5 excuses away. That's from Mr. Ritchie. And
6 that's essentially what it says in the top line
7 of this -- of this e-mail from Mr. Ritchie to
8 Anthony Hazen of Lithko.

9 And below that are several places where
10 it talks to CMU before; so Mr. Spano writing to
11 Mr. Holloway of Old North State talking about
12 specific -- looking at details of manning and
13 scaffolding and CMU and where they are.

14 Q. Okay.

15 A. The rest of this is a sequence of
16 e-mails where Mr. Spano is asking for how many
17 people are going to be here, when are they going
18 to be here, exactly how many trials are we
19 talking about, and he's not seeming to get an
20 answer. And so it's this frustration getting to
21 the end.

22 MR. BUNDY: Your Honor, I move to
23 introduce Exhibit 91-8 into evidence.

24 THE COURT: All right. In evidence
25 over objection.

1 (DFT. EXH. 91-8, was marked for
2 identification and admitted into evidence.)

3 BY MR. BUNDY:

4 Q. All right, sir. Let's go to number 9.
5 This is a notation you made in your chart of
6 August 16, 2016, the same question.

7 A. And the notation says, we need to
8 discuss several items controlled by ONS that
9 affect the BBC schedule.

10 So this is at a time when -- well, I
11 guess, just to give some context, during this
12 time, this is -- Mr. Doran's period 2 when the
13 critical path was up the structure, you know,
14 driving out to get that pool set.

15 And the contemporaneous critical path on
16 those schedules, I can't begin to remember all
17 the details. But I know that the masonry has
18 indicated it as critical during this time. But I
19 don't know if it was this work.

20 So this is an e-mail that starts out
21 from Tim Spano, August 16, and to Tim Holloway,
22 Joe Anastasi from Old North State, Chip Venable
23 and Mr. Starcevic, Mr. Ritchie and Mr. Dale.
24 Down -- maybe half the page down, on August 16 at
25 3:02, Mr. Spano wrote, I hear you, but we need to

1 discuss several items controlled by ONS that
2 affect the BBC schedule on the call today.

3 MR. BUNDY: Your Honor, I move to
4 introduce Exhibit 91-9.

5 THE COURT: All right. In evidence
6 over objection.

7 MR. BUNDY: Thank you, Your Honor.

8 (DFT. EXH. 91-9, was marked for
9 identification and admitted into evidence.)

10 BY MR. BUNDY:

11 Q. All right. Let's move to item number 10
12 on your chart, please, the same question. And I
13 believe there are two entries on this one.

14 A. Okay. That's two entries. One for
15 Mr. -- both for Mr. Dean, it looks like, both on
16 August 26th. The first one says, these projects
17 have clearly been impacted by ONSM, and the
18 second one says, ONSM are about to screw
19 themselves.

20 So this is several pages. And usually,
21 I like to start at the back. The bulk of this
22 string of e-mails is about a different project,
23 and there's only -- there's only a small area
24 where it talks to the -- this project,
25 specifically, and it's Mr. Dean. So at the top

1 of what amounts to the third page.

2 Q. Is there a BBC Bates number on these
3 documents?

4 A. Yes.

5 Q. Could you give us the BBC Bates number
6 of the documents you're speaking of, please?

7 A. BBC underscore e-mails underscore
8 00004592. And at the top of that, it says, let's
9 make sure we have properly notified ONSM on, it
10 looks like, four different projects.

11 But one of those is Hotel Marion Square,
12 if they have not already been notified. These
13 projects have clearly been impacted by ONSM, and
14 I don't want there to be any misunderstandings as
15 suggested below.

16 MR. BUNDY: Your Honor, I would
17 move to introduce 91-10.

18 THE COURT: All right. In evidence
19 over objection.

20 MR. BUNDY: Thank you, Your Honor.

21 (DFT. EXH. 91-10, was marked for
22 identification and admitted into evidence.)

23 BY MR. BUNDY:

24 Q. All right. Mr. Boe, let's move onto
25 number 11, same question.

1 A. Sure. The note says, October 14, 2016.

2 A mason who was already struggling with masons
3 and manpower. So that's a pretty shortened
4 statement, but anyway, that's from Mr. Ritchie.

5 So this is a sequence of e-mails. The
6 third on the first page is from Mr. Ritchie to
7 Tim Quinn, Timothy Quinn at Lithko, Mr. Beach at
8 Lithko and Mr. Starcevic and Spano and Alec
9 Dooley are copied. And it concerns reshores on
10 level 5.

11 Tim Josh, did you ever hear back from
12 the Doca engineer on whether we need to leave the
13 reshores in place in order to pour level 9. I
14 cannot find information. The question is whether
15 the mason can get started on the -- on its work.

16 Ultimately, please advise as it would
17 help us stocking ahead of time to hit production
18 work on 11/1 and have the entire floor cleared of
19 reshores to not stop the mason, who is already
20 struggling with masons and manpower.

21 Q. For the Court's edification, will you
22 explain what reshoring is and how -- put this
23 e-mail in context for him, please?

24 A. Sure. This is trying to explain that
25 you have to have -- you have to have bracing for

1 floors below when you're going to pour concrete
2 above. So you have bracing for a certain number
3 of floors.

4 In this case, there were going to --
5 this bracing of these reshores had to stay in
6 place for three floors under normal circumstances
7 and on the ninth floor, there was an engineer
8 that thought that they need to stay in place for
9 four floors.

10 And if that was the case, that wasn't
11 something that was planned for in the schedule,
12 and that would cause the mason not to be able to
13 get started. They wouldn't be able to -- it's a
14 lot less efficient for the mason, even though
15 they're working around the outside, to get their
16 stuff stocked in there and to get it working.

17 MR. BUNDY: Your Honor, I move to
18 introduce 91-11 into evidence.

19 THE COURT: Number 11?

20 MR. BUNDY: That's the one we're on
21 now, I believe.

22 THE COURT: All right. Yeah. In
23 evidence over objection.

24 MR. BUNDY: Thank you.

25 (DFT. EXH. 91-11, was marked for

1 identification and admitted into evidence.)

2 BY MR. BUNDY:

3 Q. Let's move on to number 12, please, your
4 notation of 12/16/16.

5 A. 12/16 says -- it's a note from
6 Mr. Starcevic -- have concerns that ONSM has the
7 proper manpower and supervision on site. And
8 this is an e-mail from Mr. Starcevic to Joe
9 Anastasi at Old North Masonry, copied to several
10 other people at Old North.

11 And Mr. Spano and Mr. Ritchie, Jeff
12 Sandeen and Marty Dale. And the subject is a
13 sequence of numbers. That's probably a contract
14 number, a notice of delay and a demand for cure,
15 hotel at Marion Square. And it looks like
16 there's an attachment for that notice of delay.

17 So this is a notice of delay from
18 Mr. Starcevic to Old North, details below. We
19 have concerns that Old North has the proper
20 manpower and supervision on site to meet the
21 schedule and quality necessary to complete this
22 project.

23 We continue to get excuses on why work
24 cannot be done instead of solutions to make this
25 project a success. Jumping ahead a little bit,

1 it says, ONSM needs to submit a plan to address
2 all areas that are behind the schedule with the
3 appropriate manpower.

4 Now, this is December of 2016. So this
5 is essentially very soon after the ninth floor
6 was topped out before the -- the tower crane gets
7 taken out in February.

8 MR. BUNDY: Your Honor, I move to
9 introduce 91-12 in evidence.

10 THE COURT: All right. In evidence
11 over objection.

12 MR. BUNDY: Thank you, Your Honor.

13 (DFT. EXH. 91-12, was marked for
14 identification and admitted into evidence.)

15 BY MR. BUNDY:

16 Q. Let's move on to 13.

17 A. Item 13 is January 11th of 2017.

18 Mr. Starcevic says, we feel strongly that ONSM
19 needs more manpower and a plan. Well, I don't
20 see that quote.

21 Q. You don't see it?

22 A. I don't.

23 Q. Okay. We will take that one out. Let's
24 move on to 14. 1/23/17.

25 THE COURT: Let me stop you before

1 you move on to there. I do have a question.

2 MR. BUNDY: Sir?

3 THE COURT: I do have a question on
4 that one.

5 MR. BUNDY: Okay.

6 THE COURT: There's a discussion in
7 the headline, schedule update, 1/10/17. We
8 talked yesterday about the schedules having a
9 series of numbers. Each time a schedule is
10 changed, does it get its own number?

11 THE WITNESS: Generally speaking, I
12 think it's usually the official schedule that
13 gets forwarded to the owner or to the -- you
14 know, that's circulated to the subs or whatever.
15 Those get an official number. And sometimes
16 there's an interim schedule.

17 When we received all the Primavera
18 files, all of the schedule files from the -- in
19 discovery, we got 150 schedules. And really,
20 they're -- you know there's only 48 updates. So
21 there are some interim schedules that are issued.
22 We haven't paid much attention, frankly, to
23 those.

24 THE COURT: Okay. All right.

25 BY MR. BUNDY:

1 Q. If you would, let's go to -- I wanted to
2 bring one thing to your attention. On BBC e-mail
3 68, 5627 on the first page, it says, we're
4 pulling the tower crane the first week in
5 February. The schedule is wrong. Do you know
6 what the context of that is?

7 A. Yeah. There's an earlier e-mail in this
8 string that says that they were going to move
9 the -- the tower crane is scheduled to move March
10 10th.

11 And there was a time when we talked
12 about it. It wasn't in the schedule originally.
13 I know it got put into -- that removal got put
14 into the schedule update number 19 with a string
15 of activities that went to the ceiling in the
16 second floor.

17 But it -- that date, the date of moving
18 the crane jumped around some. It moved out as
19 far as March 10th. And then they wanted to do it
20 earlier. They managed -- and they did get it
21 done February 2nd.

22 MR. BUNDY: Your Honor, I'm going
23 to move -- I would move to put this into evidence
24 and strike the note, the corrected chart because
25 he said, this doesn't reflect it. So what I'd

1 like to do is one, move to put this into evidence
2 as 91-13, and then I'm going to strike out -- and
3 I would ask Your Honor to do the same thing on
4 the chart, strike that notation.

5 THE COURT: Strike 13 notation.

6 Okay. All right. So noted.

7 MR. BUNDY: Thank you, Your Honor.

8 (DFT. EXH. 91-13, was marked for
9 identification and admitted into evidence.)

10 BY MR. BUNDY:

11 Q. All right. Let's move on to 14,
12 Mr. Boe.

13 A. January 23, 2017, and it's Mr. Starcevic
14 saying, I have requested additional manpower to
15 maintain the schedule but have seen no
16 substantial increase.

17 And the initial e-mail here is an e-mail
18 from Mr. Starcevic to Joe Anastasi from Old North
19 State and several other people at Old North
20 State, Mr. Spano, Gino Cassetto, Jeff Sandeen,
21 Shelly Goodwin. And it has to do with MSH019
22 detail schedule of 12/13/16.

23 So this is -- this is the schedule that
24 I was talking about with putting that logic into
25 the update.

1 THE COURT: Right.

2 THE WITNESS: And it goes through
3 again and it's -- it says, this schedule needs to
4 write a plan for all deficient areas listed below
5 to complete by January 28th, 2017, and level 7
6 complete by 2/3/17.

7 And the quote that we had before was --
8 had requested additional manpower. So we feel we
9 have been more than lenient with Old North State
10 and given ample opportunity for ONSM to cure
11 their deficiencies.

12 We have requested additional manpower to
13 maintain the schedule. We have seen no
14 substantial completion of current production. So
15 it's directing Old North State to provide a
16 recovery schedule of adequate manpower addressed
17 to each activity by close of business, January
18 24th.

19 BY MR. BUNDY:

20 Q. I would like you to look at something on
21 this Bates stamp document BBC e-mail 0094116. Do
22 you have that in front of you?

23 A. Yes.

24 Q. Down in the -- right above
25 Mr. Starcevic's name, it says, see link for

1 1/23/17 masonry progress photos, and it has an
2 https site. Is that the -- and it says, BBC U.S.
3 Egnyte. Is that the Egnyte site where all of
4 these documents were kept in the cloud, so to
5 speak?

6 A. That's what I understand.

7 Q. And that the same Egnyte site that was
8 cutoff by BBC?

9 MR. HILDEBRAND: Objection. Calls
10 for speculation. He doesn't know that.

11 THE COURT: I will sustain that.

12 BY MR. BUNDY:

13 Q. How many -- were you able to count how
14 many notices to cure or notices of cure were sent
15 by BBC to its various subcontractors during this
16 job?

17 A. I didn't count them.

18 Q. Do you have any idea? Is it more than
19 10, less than 10?

20 A. I'm sure it's more than 10, but there
21 were -- I know three in period 2 to Old North.

22 Q. Okay.

23 A. There are were a lot on March 15th of
24 2017, maybe five or six.

25 MR. BUNDY: Okay. All right. I

1 would move to introduce Exhibit 91-14 into
2 evidence, Your Honor.

3 THE COURT: All right. In evidence
4 over objection.

5 MR. BUNDY: Thank you, Your Honor.

6 (DFT. EXH. 91-14, was marked for
7 identification and admitted into evidence.)

8 BY MR. BUNDY:

9 Q. All right. Let's move on to 16,
10 February 11, 2017. Tell us why you put the
11 notation in, same question.

12 A. So this is ONSM, 20-plus people and no
13 competent person. No one on site currently is
14 capable of the work, nor is their leadership to
15 direct it, says Mr. Starcevic.

16 So this is an e-mail from Mr. Starcevic
17 to Chip Venable at Old North State, several --
18 copied to several other people at Old North State
19 and then a copy to Mr. Spano, Jeff Sandeen, and
20 Alec Dooley and some others at Balfour Beatty.
21 And it's a notice of delay and demand to cure, 72
22 hours to Old North State. It sounds like this is
23 a response to -- or it's a response
24 correspondence.

25 So there are a few clarifications to

1 your letter that need to be made. And it goes
2 through the process and the progress of each of
3 the areas that were listed in that -- in that
4 curing list. Let's see. What did I pick out?

5 The last paragraph on the first page, a
6 January 24th response, shows no commitment by Old
7 North State Masonry to cure the schedule. We're
8 now plus or minus 50 days behind schedule, mostly
9 in part to masonry.

10 After we acknowledge and pay for the
11 added time on level 1, level 3 and level 4.
12 We've tried routine players on this project and
13 understood the difficulty of the logistics;
14 however, ONSM bid a job that had tight logistics,
15 no lay down, aggressive schedule, interior
16 coordination.

17 Old North State needs to provide in
18 writing a commitment to finishing CMU on this
19 project by 2/24. That includes all punch due
20 work, topping out miscellaneous walls, stairs, et
21 cetera, et cetera.

22 Q. If you would, let's turn -- now, all of
23 the pages in this Exhibit 15 are Bates stamped as
24 BBC documents, correct?

25 A. Correct.

1 Q. Produced by Balfour Beatty, correct?

2 A. Yes.

3 Q. Okay. Let's go to the back document,
4 which is 00107147 in the middle of the page. Are
5 you with me?

6 A. Yes.

7 Q. Is this another notice to cure from
8 Starcevic to Old North State Masonry?

9 A. I think it's the same one we looked at
10 just a minute ago.

11 MR. BUNDY: All right. I would
12 move to introduce 91-15 into evidence,
13 Your Honor.

14 THE COURT: All right. In evidence
15 over objection.

16 MR. BUNDY: Thank you, Your Honor.

17 (DFT. EXH. 91-15, was marked for
18 identification and admitted into evidence.)

19 BY MR. BUNDY:

20 Q. Let's move on to 16, Mr. Boe. What is
21 this about?

22 A. 16, the note says, 20-plus people and no
23 competent person. No one on site currently is
24 capable of the work, nor is there leadership to
25 direct it.

1 That's -- it's an e-mail from
2 Mr. Starcevic to Joe Anastasi from Old North
3 State and several other people from Old North
4 State, Mr. Sandeen, Mr. Spano, Marty Dale. And
5 it says, Toby slash Joe. I'm very disappointed
6 that you have 20-plus people on site and no
7 competent person.

8 We are dismantling the scaffold, laying
9 block on multiple floors, working on perimeters
10 and heights, et cetera. And Jamaica is the most
11 qualified person on site. While he works hard,
12 he's not a competent person for ONSM.

13 It also goes to all three cast-in window
14 openings that need to be cleaned. So there were
15 some problems with precast where the window
16 openings were. And then it discusses some
17 quality issues with the cleaning discussed, et
18 cetera. That is all.

19 MR. BUNDY: Your Honor, I move to
20 introduce 91-16 into evidence.

21 THE COURT: All right. In evidence
22 over objection.

23 MR. BUNDY: Thank you, Your Honor.

24 (DFT. EXH. 91-16, was marked for
25 identification and admitted into evidence.)

1 BY MR. BUNDY:

2 Q. All right. Let's move on to 17,
3 notation 17 on your chart, Exhibit 91, please.

4 A. The note is February 14th, 2017. And it
5 says, Pasco is falling behind schedule, from
6 Mr. Starcevic. It's an e-mail dated February
7 14th, Mr. Starcevic to (inaudible) Badal from
8 Pasco and with a copy to Marty Dale from Balfour
9 Beatty.

10 And it says, manpower and scope add HMS.
11 The e-mail says, Pasco is falling behind schedule
12 and needs a few things addressed. The intent was
13 to hang drywall ceilings on level 1 yesterday,
14 but we still do not have fire protection fire
15 walls. What is going on?

16 Q. What did Pasco do? What was their job?

17 A. They're the sprinkler installer.

18 Q. Those are the ones -- those are the
19 people that put in the wrong sprinkler heads 350
20 times?

21 A. Yes.

22 MR. BUNDY: Okay. I move to
23 introduce Exhibit 17 (sic).

24 THE COURT: All right. In
25 evidence.

1 MR. BUNDY: Thank you, Your Honor.

2 (DFT. EXH. 91-17, was marked for
3 identification and admitted into evidence.)

4 BY MR. BUNDY:

5 Q. All right. Let's move on to 18,
6 Mr. Boe.

7 A. There it is. March 2nd, 2017. Ninth
8 floor behind schedule; stopped on first due to
9 other trades not yet on schedule. And this is
10 from Morgan at Precision Walls.

11 So this is an e-mail from Troy Morgan at
12 Precision Walls to Jeff Sandeen on March 7, 2017,
13 with the subject of Marion. And it says, Jeff
14 gathered intel from our troops today, and here's
15 our position. Ninth floor, we are behind
16 schedule. Tidying up loose ends on the first and
17 second. Some we own; the majority we don't.

18 We have stopped hanging some ceilings on
19 first due to other trades. Hanging on third full
20 tilt but still leaving lose ends behind out of
21 our control such as pocket doors. Framed up to
22 the seventh floor for the most part except for
23 areas. So this is just laying out what their
24 status is on the project and whether they're
25 late.

1 Our plan is to have nine, one, and two
2 complete with what is available by the end of
3 next week, starting on the 8th. Next week, we
4 will up our manpower a bit. By the end of next
5 week, all mechanics on the first, second, and
6 ninth can concentrate on three through eight.

7 Q. What does he say about the electrician?

8 A. He says, the electrician seems to be
9 blaming us for holding him up; but from what I
10 gather, that's not case.

11 Q. And what is the next sentence? When
12 eight is framed, he will be exposed?

13 A. When eight is framed, he will be
14 exposed.

15 MR. BUNDY: Your Honor, I move to
16 introduce --

17 THE WITNESS: And it also says,
18 anything you can do to let us hang ceilings on
19 one and two would be appreciated; so then this is
20 March 2nd.

21 MR. BUNDY: I move to introduce
22 91-18 into evidence.

23 THE COURT: All right. Over
24 objection in evidence.

25 (DFT. EXH. 91-18, was marked for

1 identification and admitted into evidence.)

2 BY MR. BUNDY:

3 Q. Notation 19 on your chart, please.

4 A. Number 19 says, ONSM, defects in stair
5 3, need to address the lack of manpower. So this
6 is again a several-paged e-mail.

7 And if you go to the last page, which is
8 BBC e-mails and the rest of Bates number
9 00326120, it says, this is from Gino Cassetto,
10 general superintendent to Toby Holloway with a
11 copy to Tim Spano. As discussed yesterday, we
12 surveyed stair number 3 today. Out of plumb
13 block and concrete.

14 The survey is attached. Note the
15 dimensions shown are estimated. We would ask
16 that ONSM provide a lift and operator, and we can
17 put a tape measure to each level to confirm this.
18 But it's obvious that the block facing that
19 (inaudible). So they had to replace that area of
20 block slash concrete.

21 Q. All right. If you would, go two pages
22 up. 00326118. And if you would start with the
23 notation to Toby at the bottom.

24 A. Per the below e-mail and attached survey
25 from Gino, see attached notice of -- notice to

1 cure the masonry defects in stair 3. The walls
2 out of plumb are to be demoed, rebuilt, and
3 cleaned up by 3/17/17, March 17, 2017.

4 We also need to address the lack of
5 manpower and efficiency in stone setting, and it
6 goes through some details about how late they are
7 and some apparent reasons why. Essentially, it's
8 saying they're way slower than what was planned.

9 MR. BUNDY: Do you want to take a
10 break, Judge?

11 THE COURT: I'm good.

12 MR. BUNDY: Okay. I move to
13 introduce 91-19.

14 THE COURT: All right. In evidence
15 over objection.

16 (DFT. EXH. 91-19, was marked for
17 identification and admitted into evidence.)

18 BY MR. BUNDY:

19 Q. All right. Let's move on to 20, please.

20 A. Number 20 is March 6th of 2017. Pasco
21 is behind on level 4 and up the building from
22 Mr. Starcevic. And this is from Mr. Starcevic.
23 I think at the bottom of the first page, March
24 6th of 2017, subject to Mr. Badal from Pasco with
25 copies to Johnny Eldridge from Balfour Beatty,

1 Tim Spano, Alec Dooley, and Marty Dale.

2 Manpower and scope, and we're back in
3 the same position being behind on level 4, left
4 the building. You need to man up and get through
5 level 7 by 3/20. So this is March 6th. In my
6 opinion, you need three crews out here working on
7 all three floors to meet those dates. Please
8 respond with your plan to get back on schedule.

9 MR. BUNDY: Your Honor, I move to
10 introduce 91-20.

11 THE COURT: All right. In
12 evidence.

13 (DFT. EXH. 91-20, was marked for
14 identification and admitted into evidence.)

15 BY MR. BUNDY:

16 Q. All right. Mr. Boe, 21.

17 A. March 7th, 2017. The note says, BBC
18 removed the tower crane a month ago, not taking
19 advantage of it. Behind schedules on floor 1
20 through 5.

21 From Mr. Starcevic, we went through this
22 yesterday, talking about the -- basically,
23 there's an e-mail from Mr. Spano that goes
24 through and says essentially what this talked
25 about, removed the tower crane a month ago, and

1 they're not talking advantage of it.

2 And then there's a response from
3 Precision, but that quote is next on the second
4 page. That would be the bottom paragraph. We
5 also have a lot of areas on floor 2 for ceiling
6 framing, ISO rod and install, A/C framing barrel,
7 ceiling, et cetera. BBC removed tower crane a
8 month ago so P Walls could get these areas, and
9 they're not taking advantage of it with a few
10 guys working on the ceiling.

11 So this is where Mr. Doran has said the
12 critical path is on the second floor, you know,
13 in this area. And they're -- this is
14 communication Mr. Spano thought was important.
15 He also covers a whole bunch of other areas in
16 this e-mail with -- you know, in this sequence of
17 e-mails with other information, and it can be
18 seen by Mr. Zinna's response that he is
19 responding to not just that but lots of other
20 areas.

21 But in his response, he says, level 2
22 has a vast list of loose ends and unanswered
23 issues that were not created by Precision Walls.
24 We did not agree. One of them was that there's
25 missing punch steel numbers delaying, and I think

1 there's something in here about numerous pipes
2 are out of claim for the fire walls.

3 But it does say that the design was
4 changed from the gable and framing of the third
5 floor terraces. But I don't think that has
6 anything to do with the second floor ballroom.
7 And it does say that the second floor overhead
8 inspection failed again today, what we talked
9 about before. There was no evidence of any
10 issues related to Precision Walls.

11 THE COURT: The boxed quotes -- the
12 quote that's attributed to Starcevic on 21, but
13 I'm not seeing Mr. Starcevic speaking here. I'm
14 just not finding that in this document.

15 THE WITNESS: Well, I agree.

16 THE COURT: Maybe that is --

17 THE WITNESS: That's Spano. So let
18 me just find that specific --

19 THE COURT: Would that be
20 Mr. Spano's e-mail then?

21 THE WITNESS: It should be Spano.

22 THE COURT: Yeah.

23 THE WITNESS: Yeah, sorry.

24 THE COURT: Gotcha. Okay. That's
25 at the bottom on 496.

1 MR. BUNDY: Thank you, Your Honor.

2 91-21, move to put it into evidence.

3 THE COURT: Yes.

4 (DFT. EXH. 91-21, was marked for
5 identification and admitted into evidence.)

6 BY MR. BUNDY:

7 Q. Let's go to 22, please.

8 A. 22 says about Pasco, level 6 is two
9 weeks behind with no available manpower. It was
10 agreed with your superintendent that Pasco needs
11 two additional crews.

12 And that's from Mr. Starcevic. And
13 that's with -- right at the top of that e-mail
14 string. It says, from Mr. Starcevic to Mr. Badal
15 and somebody else from Pasco with copies to
16 Mr. Spano and several people from Balfour Beatty.
17 Level 6 is two weeks behind with no available
18 manpower, and we also need guys in the basement
19 on level 5.

20 It was agreed with your superintendent
21 that you need two additional crews on site to get
22 caught up and stay up to speed through your
23 testing -- through your testing through eight.
24 Consider this a notice to cure and get additional
25 manpower on site within 48 hours.

1 Q. So now this is a notice to cure with
2 Pasco?

3 A. Yes.

4 MR. BUNDY: I'd move to put 91-22
5 into evidence, Your Honor.

6 THE COURT: Yes.

7 MR. BUNDY: Thank you.

8 (DFT. EXH. 91-22, was marked for
9 identification and admitted into evidence.)

10 BY MR. BUNDY:

11 Q. All right. Let's move on to 23,
12 Mr. Boe.

13 A. March 15, 2017, Pasco needs additional
14 manpower on site, Mr. Starcevic. So this is an
15 e-mail from Mr. Starcevic to Mr. Badal of Pasco
16 with copies to Mr. Spano and Mr. Dooley and
17 Mr. Dale and Mr. Sandeen.

18 And attached is the -- the subject is
19 Pasco demand for cure, and there's some attached
20 date of construction logistics and a letter,
21 demand for cure. And it says, see attached
22 demands for cure -- demand for cure at Hotel
23 Marion Square. Previous review on site are a
24 handful of issues.

25 Number 2A under schedule, it says, it is

1 evident that Pasco needs additional manpower on
2 site. Please provide a manpower account and
3 recovery schedule to show your plan to get back
4 on schedule.

5 MR. BUNDY: Move to introduce 91-23
6 into evidence.

7 THE COURT: All right. In evidence
8 over objection.

9 MR. BUNDY: Thank you, Your Honor.

10 (DFT. EXH. 91-23, was marked for
11 identification and admitted into evidence.)

12 (DFT. EXH. 91-24 was marked for
13 identification.)

14 BY MR. BUNDY:

15 Q. Your note 24, Mr. Boe.

16 A. 24. March 15, 2017, the exterior skin
17 continues to slip. ONSM necessary manpower is
18 not on site. Mr. Starcevic.

19 This is an e-mail from Mr. Starcevic to
20 Old North State, Mr. Venable, with copies to
21 several people from Old North State and to
22 Balfour Beatty, and it's a notice of cure --
23 notice of demand for cure having to do with a
24 long litany of items.

25 Under schedule it says, the exterior

1 skin continues to slip. It is evident that we
2 are not achieving the agreed-to rate of
3 installation due to a multitude of issues. BBC
4 acknowledges not all issues are a hundred percent
5 ONSM. BBC has gone above and beyond to
6 coordinate with ONSM precast site to provide
7 hooks necessary for installation.

8 It is clear that the necessary manpower
9 is not on site as Toby Holloway promised an
10 expert crew on site March 13th, 2017, to speed up
11 installation, and that crew is not on site as of
12 3/15.

13 MR. BUNDY: I move to introduce
14 91-24.

15 THE COURT: In evidence.

16 (DFT. EXH. 91-24 was received in
17 evidence.)

18 MR. BUNDY: Thank you, Your Honor.

19 (DFT. EXH. 91-25 was marked for
20 identification.)

21 BY MR. BUNDY:

22 Q. Number 25. It's a March 15 letter or
23 e-mail. Watson was to complete level 5 guest
24 rooms by March 10, 2017, and start level 6 guest
25 rooms on March 13, 2017. Neither of these dates

1 were accomplished. From Mr. Starcevic.

2 The e-mail itself is a -- is from
3 Mr. Starcevic to Mr. Winovich at Watson and
4 several other -- Watson and Balfour Beatty people
5 are copied, and the subject is Watson demand for
6 cure.

7 The e-mail says, see attached notice of
8 demand for cure for Hotel Bennett. There are
9 currently (inaudible) -- at yesterday's meeting
10 on site there are a number of issues needed to be
11 addressed. See below.

12 And under schedule, it says, per our
13 meeting last week, Watson was to complete level 5
14 guest rooms by 3/10 and start level 6 guest rooms
15 on 3/13/2017. Neither of these dates were
16 accomplished.

17 We also failed multiple overhead
18 inspections on level 2 and level 3 partly due to
19 level -- to Watson deficiencies. Provided
20 manpower and recovery schedule to show you the
21 plan to get back on schedule.

22 So this is a notice to cure Watson now?

23 A. Yes.

24 MR. BUNDY: Would move to introduce
25 Exhibit 25 in evidence.

1 MR. TERRY: Your Honor, I object
2 again. In this particular case, the -- you know,
3 you spoke in this item which requires that the
4 deponent provide some evidence that the document
5 is what it says it is. Then the evidence would
6 be to get examples of what those -- that evidence
7 might be.

8 The very first one is -- the most often
9 used is by a witness with knowledge. Mr. Boe has
10 no knowledge.

11 The other things in Rule 901 and 902,
12 signature or handwriting authentication and
13 things of that nature. Frankly, Mr. Boe just
14 doesn't have the knowledge to authenticate any of
15 these documents.

16 THE COURT: I understand that, but
17 it also reads, by way of illustration only and
18 not by way of limitation, so I think they are
19 purported to be what they're purported to be.
20 They're BBC e-mails. I'm going to allow them
21 into evidence. We'll take a break right now.

22 MR. BUNDY: Thank you, Your Honor,
23 and I would move it, so it's in evidence?

24 THE COURT: It's in evidence.

25 (DFT. EXH. 91-25 was received in

1 evidence.)

2 (DFT. EXH. 91-26 was marked for
3 identification.)

4 MR. BUNDY: We will start with 26.

5 THE COURT: Yes.

6 (A recess transpired.)

7 BY MR. BUNDY:

8 Q. All right. Mr. Boe, I believe we were
9 on 26; is that correct?

10 A. Correct.

11 Q. If you would then explain your note 26,
12 which is a -- I think April 5, '17 notation.

13 A. Sorry. The way these jump around --

14 THE COURT: You have to find them
15 sometimes.

16 BY MR. BUNDY:

17 Q. 26.

18 A. April 5th of 2017, BMCC will not be
19 ready on level 5, 15-plus delay to framing
20 inspection. Mr. Starcevic.

21 That's basically the e-mail at the
22 bottom of the first page of item 17 from
23 Mr. Starcevic to Erik Stor and then to several
24 other people including Mr. Stanton, Mr. Dooley,
25 so several different folks.

1 And the title of it is level 5,
2 completion to cure notice. It was brought to our
3 attention that BMCC will not be ready for framing
4 inspection on level 5 until next Wednesday, April
5 12th. This is a 15 plus day delay for the
6 framing inspection on level 5 and must be cured
7 immediately. We need a plan from BMCC by close
8 of business April 7th for completion of level 5
9 and how you intend to make up for lost time on
10 level 6, level 7, level 8.

11 Q. Is this the first notice to cure to
12 BMCC?

13 A. I think so.

14 Q. What was BMCC's response to this cure
15 notice?

16 A. Essentially that they're committed to
17 bring the schedule back, and he's going to bring
18 his general superintendent, Rusty Williams, on
19 site for several weeks to assist the project team
20 and provide additional supervision and six
21 additional plumbers. So he is going to increase
22 manpower.

23 Q. In the response, do you see any denial
24 of the statements made in the cure notice e-mail?

25 A. Not that I remember. I don't think

1 there was anything for that.

2 Q. So he is not denying there's a 15-plus
3 day delay. He just says, this is how we're going
4 to fix it?

5 A. Yes.

6 MR. BUNDY: I move to introduce 26.

7 THE COURT: In evidence.

8 (DFT. EXH. 91-26 was received in
9 evidence.)

10 (DFT. EXH. 91-27 was marked for
11 identification.)

12 BY MR. BUNDY:

13 Q. 27.

14 A. 27 is May 1st, 2017, and it discusses --
15 the quote here -- or the -- on the chart. It's
16 David's executive meeting needs to increase
17 manpower for Precision, and it's from Tony
18 Stoneking. The e-mail is from Mr. Stoneking to
19 Mr. Sandeen at BBC.

20 Well, that's the -- sorry. He says he
21 added number 10, but the original e-mail is from
22 Mr. Stoneking to Mr. Sandeen and it walks through
23 several items for an executive meeting that
24 they're planning on.

25 And item 2 of that is David's executive

1 meeting needs to increase manpower for Precision
2 and Watson.

3 MR. BUNDY: Move to introduce 27.

4 THE COURT: All right. In
5 evidence.

6 (DFT. EXH. 91-27 was received in
7 evidence.)

8 (DFT. EXH. 91-28 was marked for
9 identification.)

10 Q. Let's move on to 28.

11 A. Item 28 is dated 9/19, September 19,
12 2017, and the quote on the chart is, It is
13 obvious that Watson and other trades are
14 overwhelmed by the amount of work to complete.
15 They simply don't have enough manpower to handle
16 the activities at hand. And that's from Ryan
17 Ledford.

18 This e-mail string is really a string of
19 e-mails that -- where Mr. Winovich from Watson
20 Electric says where he is and what -- some
21 problems that he has had. And seems to be
22 appealing to Mr. Stanton that it's not their
23 fault.

24 And the response ultimately from
25 Mr. Ledford, who is project engineer for Balfour

1 Beatty on the site, was, At first the status was
2 accurate, but there might be a couple items that
3 were -- that had been wrapped up. There is a
4 long list. While Kevin does attempt to stay on
5 top of issues, it's obvious that Watson and other
6 trades are overwhelmed by the amount of work to
7 complete. They simply don't have enough manpower
8 to handle the activities at hand.

9 And he follows that up with, As you
10 know, it's a red herring to see that the design
11 issues are holding up work. The design issues
12 are probably less than 10 percent of the list.

13 So there was a list that was attached to
14 this that showed a bunch of items that were
15 deficient, that were behind schedule, et cetera.

16 The bulk of the list contains issues
17 like fire caulking, moving outlets or lights that
18 were not installed per the dimensions of the
19 contract drawings. Missing or covered up
20 devices. There are over 66 issues that we have
21 caught so far just on level 7. Just allow us to
22 get to an overhead inspection.

23 And he adds that, Due to poor quality
24 control, we're in a position where multiple
25 trades must be involved to fix these issues,

1 which disrupts the flow of work.

2 MR. BUNDY: All right. Move to
3 introduce 28.

4 THE COURT: In evidence over
5 objection.

6 (DFT. EXH. 91-28 was received in
7 evidence.)

8 (DFT. EXH. 91-29 was marked for
9 identification.)

10 BY MR. BUNDY:

11 Q. Thank you. 29.

12 A. 29 is October 3rd of 2017, and it says,
13 we currently lack framing completion on every
14 floor of the hotel and need multiple framers.
15 That's Mr. Spano.

16 It's really the first of the e-mails
17 that's on the last page of this document from
18 Mr. Spano. On October 3rd it says, guys, we
19 provided P Walls a contact to Gray Framing that
20 the Marion owner provided us, and we heard they
21 were contacted by P Walls about working on
22 another job, not Marion. We don't know if this
23 is the case, so can you comment on it.

24 We currently lack framing completion on
25 every floor of the hotel and need multiple

1 things, thanks.

2 MR. BUNDY: Move to introduce 29.

3 THE COURT: All right. In
4 evidence.

5 (DFT. EXH. 91-29 was received in
6 evidence.)

7 (DFT. EXH. 91-30 was marked for
8 identification.)

9 BY MR. BUNDY:

10 Q. Mr. Boe, 30?

11 A. 30 says, October 18, 2017, Precision
12 added additional folks at MSH but not enough and
13 have actually lost some of their framers which
14 they need desperately. It's from Mr. Sandeen.
15 It's the first e-mail of that document,
16 Mr. Sandeen to Mr. Pat Dean, and the subject is
17 Marion Square. They have added additional folks,
18 approximately 45, total count approximately 45 at
19 MSH, but not enough and have actually lost some
20 of the framers which they need desperately.

21 Dean is telling me to walk the areas
22 with P Walls and their management so they know
23 what they need. I would be able to give
24 additional specifics later.

25 MR. BUNDY: Move to introduce 30.

1 THE COURT: All right. In
2 evidence.

3 (DFT. EXH. 91-30 was received in
4 evidence.)

5 (DFT. EXH. 91-31 was marked for
6 identification.)

7 BY MR. BUNDY:

8 Q. 31, Mr. Boe.

9 A. 31 says December 15, 2017. It's very
10 clear that Precision Walls needs more framers,
11 hangers and finishers. Mr. Starcevic.

12 This is I think in the first section.
13 Yes. Mr. Starcevic e-mailed 12/15/2017 to
14 Mr. Zinna at Precision Walls with copy to several
15 BMCC -- I'm sorry, Balfour Beatty people.

16 Precision Walls, area of concern. Mike
17 Troy, it's very clear that Precision Walls needs
18 more framers, hangers, and finishers on the
19 project. We have walked this list twice now, and
20 they mostly remain status quo. And now we've
21 already lost two days on hanging paper. If we
22 don't see the appropriate actions taken within
23 the next 48 hours, we will bring in the necessary
24 manpower to get this job finished.

25 MR. BUNDY: Move to introduce 31.

1 THE COURT: All right. In
2 evidence.

3 (DFT. EXH. 91-31 was received in
4 evidence.)

5 (DFT. EXH. 91-32 was marked for
6 identification.)

7 Q. All right. Mr. Boe, 32.

8 A. 32 says January 8th of 2018. Precision,
9 lack of manpower and quality control on site.
10 The schedule continues to slip. Mr. Starcevic.

11 This e-mail string starts with the
12 discussion of the 350 -- between 350 and 400
13 areas where sprinkler heads had to be changed and
14 they had to be replaced. And I think ultimately
15 it leads to, that somebody else is doing that
16 work.

17 Yeah, on the first page of this e-mail
18 -- this is the second page. So it's BBC e-mails
19 01244806. At the bottom it says -- Mr. Zinna
20 says, I'm told that level 5 is doing sprinkler
21 head patching. So they don't -- this isn't --
22 that isn't the work Precision had to do. It was
23 another contractor brought in to do it.

24 And Mr. Starcevic right above that says,
25 between the amount of work that you're struggling

1 to staff already and the exorbitant pricing, we
2 are not asking anyone else to perform this work
3 currently. If you can reasonably price the scope
4 and catch up your contracted work, we can
5 reevaluate.

6 Q. Mr. Boe, do you know whether or not P
7 Walls fixed this work or somebody else fixed it?

8 A. I believe it was level 5, another
9 subcontractor.

10 Q. Okay. All right. And then the last --
11 on page 124485 from Starcevic to Zinna, what is
12 that -- what is he saying here?

13 A. Well, Mr. Zinna responded that they're
14 not having problems with manpower. It was just
15 that the holiday weekends and holiday weeks were
16 immediately predecess -- with predecessors, and
17 so that's why the manpower was down and that they
18 would have a full staff back Monday, January 8,
19 to continue our work.

20 Q. Let me ask you this. In the contract,
21 is there a holiday exception to having to work?

22 A. I don't think so.

23 Q. Go ahead.

24 A. But bottom line usually it's planned,
25 and so in either case, if it's not work, it's not

1 a time extension. So this is just a response
2 that says you don't get extra time for working on
3 and not working on the holidays.

4 Q. That's just up at the top?

5 A. Yes.

6 MR. BUNDY: Move to introduce 32,
7 Your Honor.

8 THE COURT: All right. In
9 evidence.

10 (DFT. EXH. 91-32 was received in
11 evidence.)

12 MR. BUNDY: Thank you, Your Honor.

13 (DFT. EXH. 91-33 was marked for
14 identification.)

15 BY MR. BUNDY:

16 Q. 33, Mr. Boe?

17 A. 33 is January 16, 2018, and it says, it
18 is clear to us that BMCC needs quite a few more
19 people, and that's from Mr. Dale. At the bottom
20 of that first -- there's only one page in this
21 exhibit -- from Mr. Dale, January 16th, to
22 Mr. Robert Weyer from BMCC, copy to several
23 Balfour Beatty people.

24 Just a follow-up that the mixing valve
25 installation is scheduled for this weekend and

1 will be done on Saturday to minimize disruption
2 of activities to other trades. Please take a
3 look -- a minute to look at the areas we need you
4 working in and try to get more manpower.

5 We will be -- I skipped a couple
6 sentences, but we will be continuing at this pace
7 so it's clear to us you need quite a few more
8 people for the next little while.

9 MR. BUNDY: All right. Move to
10 introduce 91-33, Your Honor.

11 THE COURT: All right. In
12 evidence.

13 (DFT. EXH. 91-33 was received in
14 evidence.)

15 (DFT. EXH. 91-34 was marked for
16 identification.)

17 Q. 34, Mr. Boe?

18 A. 34 is January 23rd, 2018. It's about
19 Pasco. Current manpower on site cannot keep up.
20 You continue to hold up the critical path.
21 Mr. Starcevic. On January 23rd. It's at the top
22 of the e-mail string. Mr. Starcevic to Mr. Spano
23 and Michael McGregor from Pasco and several other
24 people from Pasco and Balfour Beatty.

25 And the subject is Pasco needing more

1 manpower. Pasco team, it is apparent that the
2 current manpower on site cannot keep up with the
3 work available. You continue to hold up the
4 critical path so maintaining a four-man crew for
5 40 hours a week is not cutting it.

6 Unfortunately, we're at the point of
7 putting Pasco on default notice. We need to know
8 what you're doing to cure this issue. So this is
9 January of 2018.

10 Q. And in January 2018, what period -- what
11 Doran period are we in?

12 A. This is period 4 of 5.

13 Q. Okay. This is period 4 of 5. And the
14 project manager is saying that the critical path
15 is where?

16 A. He doesn't say what the area is, but he
17 is only saying to -- he's saying to Pasco that
18 their work is on the critical path.

19 Q. So at least that's what the project
20 manager thinks?

21 A. Right.

22 Q. At that time?

23 A. Right.

24 Q. And what was Mr. Doran's opinion in
25 period 4 in his analysis?

1 A. That during this period, the barn doors
2 were on the critical path.

3 Q. The barn doors?

4 A. The doors into the bathroom, the barn
5 doors.

6 Q. Do you see any reference here to barn
7 doors?

8 A. No.

9 MR. BUNDY: Move to introduce 34,
10 Your Honor.

11 THE COURT: All right. In
12 evidence.

13 (DFT. EXH. 91-34 was received in
14 evidence.)

15 (DFT. EXH. 91-35 was marked for
16 identification.)

17 BY MR. BUNDY:

18 Q. 35, Mr. Boe?

19 A. January 24, 2018, BMCC, need more
20 manpower on site. Mr. Starcevic. And it's in
21 the second part of this -- the lower part of this
22 page from Mr. Starcevic to Robert Weyer and to
23 several people from BMCC and Balfour Beatty.

24 Robert, it's unacceptable that we don't
25 have water on level 3. The cleaner now has

1 (inaudible), and you guys are still messing
2 around with water on level 3. I know you
3 discussed this yesterday, but you need more
4 manpower on site.

5 MR. BUNDY: Move to introduce 35,
6 Your Honor.

7 THE COURT: All right. In
8 evidence.

9 (DFT. EXH. 91-35 was received in
10 evidence.)

11 (DFT. EXH. 91-36 was marked for
12 identification.)

13 BY MR. BUNDY:

14 Q. 36, Mr. Boe?

15 A. 36. January 27, 2018, BMCC have limited
16 manpower from Pieniak. So the e-mail is from
17 Shanti Pieniak to Robert Weyer at BMCC.
18 Mr. Pieniak is a Balfour Beatty employee, and
19 it's copied to several other Balfour Beatty
20 employees.

21 It says in the second paragraph,
22 obviously I know you're super busy with all the
23 (inaudible) stuff and have limited manpower.
24 Just trying to give you a heads up. So this was
25 RFI pricing.

1 Get back to the first one. Watson
2 ripped up that wall a decent amount. I don't
3 know where this RFI is with the pricing, but
4 Watson ripped up that wall a decent amount, and
5 the painter hasn't gotten up there yet. So it
6 would be a good time to get GA up there to move
7 this stuff and get this finished.

8 But this really refers to a change.

9 MR. BUNDY: Move to introduce 36,
10 Your Honor.

11 THE COURT: All right. In
12 evidence.

13 (DFT. EXH. 91-36 was received in
14 evidence.)

15 (DFT. EXH. 91-37 was marked for
16 identification.)

17 BY MR. BUNDY:

18 Q. 37, Mr. Boe?

19 A. 37. February 17, 2018, Pasco refuses to
20 work overtime. You continue to hold up other
21 trades, says Mr. Starcevic.

22 MR. BUNDY: Move to introduce 37.

23 THE COURT: In evidence.

24 (DFT. EXH. 91-37 was received in
25 evidence.)

1 (DFT. EXH. 91-38 was marked for
2 identification.)

3 BY MR. BUNDY:

4 Q. 38, Mr. Boe?

5 A. Sorry. 3/16/18. Stop holding up BBC
6 and its subcontractors says Mr. Simonton. So
7 this is -- this is the second e-mail on this page
8 from Mr. David Simonton to Mr. Michael McGregor
9 from Pasco and copied to several Pasco and
10 Balfour Beatty people.

11 Michael, two months and still waiting on
12 PASCO's response to working adequate hours, days,
13 crews, and to stay focused on this project and to
14 stop holding up BBC and subcontractors in
15 completing this project and ultimate turnover to
16 the owner. I would like to know your off-and-on
17 approach to managing and manning this project
18 with all of your QA/QC issues and incomplete work
19 in place. Please enlighten myself and my team.

20 MR. BUNDY: Move to introduce 38,
21 Your Honor.

22 THE COURT: In evidence.

23 MR. BUNDY: Thank you.

24 (DFT. EXH. 91-38 was received in
25 evidence.)

1 (DFT. EXH. 91-39 was marked for
2 identification.)

3 BY MR. BUNDY:

4 Q. 39, Mr. Boe?

5 A. 39 is April 6th of 2018. When is Pasco
6 going to step up and put forth the necessary
7 manpower to maintain the schedule? This is
8 Mr. Starcevic.

9 At the bottom of that first page,
10 Mr. Starcevic e-mailed to Mr. McGregor from
11 Pasco, a copy of this to Mr. Spano and Mr. Dale.
12 Pasco is once again not working on Friday and
13 Saturday.

14 This continues to be a problem and major
15 concern and a commitment you made to have
16 pressure on the building this week. When is
17 Pasco going to step up and put forward the
18 necessary manpower to maintain the schedule?

19 MR. BUNDY: Move to introduce 39.

20 THE COURT: All right, it is.

21 (DFT. EXH. 91-39 was received in
22 evidence.)

23 MR. BUNDY: Mr. Boe, answer any
24 questions these gentlemen may have for you.

25 THE COURT: All right.

1 CROSS-EXAMINATION

2 BY MR. HILDEBRAND:

3 Q. Hello, Mr. Boe. We met virtually. I
4 took your deposition. I'm Tom Hildebrand. Of
5 course, I represent Balfour Beatty in this
6 matter, and I've got some questions for you in
7 follow-up.

8 Now, the first question I have is that
9 you did not do -- I think it was one of the first
10 questions that Mr. Bundy asked you in your direct
11 examination. You were not hired to do a delay
12 analysis in this matter, correct?

13 A. That's true.

14 Q. Right. And you did not do a critical
15 path analysis in this matter, correct?

16 A. I didn't do an independent critical path
17 analysis, that's true.

18 Q. Right, right. And this really gets down
19 to the nub of scheduling and delay claims and is
20 that -- when you have a job that might go on for
21 a long period of time, there might be a lot of
22 delays that occur, but unless they are on the
23 critical path and unless they affect the critical
24 path, then they are really irrelevant as far as
25 the final delay analysis is concerned, correct?

1 A. You're pretty -- that's pretty much an
2 accurate statement. It's on or near, very near
3 the critical path but yes.

4 Q. Right. And, in fact, the judge was
5 explaining this at some length to Mr. Doran with
6 the Thanksgiving dinner example. Have you ever
7 heard that one?

8 A. I read his testimony.

9 Q. Have you ever heard that one before?

10 A. Yes.

11 Q. Steve Huyghe claims to be the author --
12 the inventor of that. Do you know Mr. Huyghe?

13 A. Yes.

14 Q. And do you know if that's correct or
15 not?

16 A. I have no idea. One of my partners used
17 it at some point to a bad effect.

18 Q. All right. I'm with you. Did
19 Mr. Doran's explanation to the Judge and his use
20 of that, did that make sense to you? I know it's
21 simplistic but trying to explain, did that really
22 kind of hit the nub of what CPM analysis is in a
23 very basic way?

24 A. I don't like it as an example, but it
25 hits a good part of some of the points, but it

1 doesn't do it all and it doesn't look at like the
2 complexity of it. It doesn't look at what's the
3 real cause of how you figure it out.

4 Q. No. I'm talking about the Thanksgiving
5 turkey example.

6 A. No. I understand. It doesn't get for
7 me to the level -- It's just -- I guess it's
8 oversimplistic for me.

9 Q. Right. But what it really boils down to
10 is that I, as a layman, can look at letters in
11 the file and say, oh, gosh, well, I see that
12 that's a delay if somebody is -- my clients
13 putting down more notice of delay of a
14 subcontractor and, therefore, it's my opinion
15 that that delays the job and I can come in here
16 and try to say, okay, there's the delay and try
17 to convince the Judge that proves there was a
18 delay and the critical path was delayed.

19 But that's really irrelevant. That's
20 what you as an expert -- and you've spent 30
21 years now doing this -- is you try to look
22 through -- look, it might be a lot of smoking
23 guns. What this client says, what that client
24 says really doesn't matter.

25 Let's look at the documents, and then

1 I've got to go through all of these facts and
2 distill them to a critical path analysis so that
3 I can then tell the Judge, okay, is this on a
4 critical path or not? That's what it really
5 boils down to, isn't it?

6 A. No.

7 Q. What it --

8 A. It does not boil down to that for the
9 person that has the -- that has the burden. You
10 know, Mr. Doran has -- BBC has the burden to do
11 that analysis and to show it.

12 But they have to also take into account
13 all of the things that happened on the project,
14 not just pick out, you know, a long path that
15 looks good but doesn't really reflect what
16 happened on the project.

17 Q. Well, I understand that you disagree
18 with Mr. Doran's testimony. But as far as
19 individual examples -- okay. There might have
20 been a delay here or a delay here -- because you
21 did not do a critical path delay analysis, at
22 best we can say those are things that you suspect
23 might have affected the critical path?

24 MR. BUNDY: Objection. Your Honor,
25 I realize this is cross-examination. I believe

1 the rules require one question at a time, and I'm
2 hearing five to six questions at a time here, so
3 would you just -- my objection is one question at
4 a time, please.

5 THE COURT: So noted.

6 BY MR. HILDEBRAND:

7 Q. Well, the issue here is whether the
8 particular examples that you have brought up,
9 whether they actually impacted the critical path,
10 correct?

11 A. Well, ultimately, the question would be
12 what was the critical path?

13 Q. Right. And these examples would be --
14 might have some relevance if you had done a
15 critical path analysis as to what he thought was
16 on the critical path and whether the -- these
17 examples delayed it, correct?

18 A. But my look at these issues -- and I
19 won't say that all of those issues on that list
20 were critical or were critical according to the
21 contemporaneous schedules, but that would be my
22 comparison. Compared to the contemporaneous
23 schedules, how close to critical might they be?

24 Q. Right.

25 A. That's how I would do it, and that's how

1 I have done it. So when I know that masonry was
2 on the critical path of the contemporaneous
3 schedule, you're right, I haven't done a detailed
4 critical path analysis from beginning to end to
5 figure out what was critical at one point in
6 time.

7 But I can look at the contemporaneous
8 schedule and look at the documents that are
9 occurring in the time period.

10 Q. Okay. Fair enough.

11 A. They're at least close to what they
12 thought was critical path.

13 Q. They're close, and they're things that
14 you suspect. Again, if you had done a critical
15 path analysis and a delay analysis in this case,
16 then the items that you articulated may have
17 impacted the critical path. But we don't know
18 that because at this point they're things simply
19 that you suspect might or might not have, but you
20 can't testify that any of them actually did,
21 correct?

22 A. Or things that Mr. Doran didn't take
23 into account and --

24 Q. Well, you --

25 MR. BUNDY: Objection. He's not

1 letting the witness answer the question.

2 THE COURT: Go ahead, and let him
3 answer.

4 BY MR. HILDEBRAND:

5 Q. I'm sorry. Go ahead, Mr. Boe.

6 A. I don't know what my answer was.

7 Q. Yeah -- and I was about to follow up
8 with you. You said you don't know that some of
9 the things that you brought up were things that
10 Mr. Doran did not take into account ever. Did
11 you ever -- do you know if Mr. Doran was deposed
12 in this case?

13 A. I don't. I don't think he was.

14 Q. Do you know why he wasn't?

15 MR. BUNDY: Objection, relevance.
16 How can that possibly be relevant in this case?

17 THE COURT: I will sustain that.

18 BY MR. HILDEBRAND:

19 Q. Well, did you ask --

20 MR. HILDEBRAND: I think it might
21 be, Your Honor. I'm just asking if he had --

22 THE COURT: You're on cross. Go
23 ahead. Go forward.

24 BY MR. HILDEBRAND:

25 Q. Just very simply, if there were

1 questions that you had of Mr. Doran, then they
2 could have been propounded to him in a deposition
3 or otherwise, but that wasn't done, was it?

4 A. No. That's not really part of my job.

5 Q. Okay. Were you here during Mr. Doran's
6 testimony?

7 A. No.

8 Q. Were you here during any of the
9 testimony of the other Balfour witnesses?

10 A. No.

11 Q. And now, as far as the -- I understand
12 that you believe that a time-impact analysis,
13 which is what you would have done had you been --
14 I would assume, is that correct, you would have
15 done a time-impact analysis if you had been asked
16 to do a delay analysis on this project?

17 A. Time-impact analysis is kind of a
18 confusing term because there's a forensic use of
19 it and then there's a -- during the project type
20 use, so I don't use that term anymore.

21 Q. What do you use?

22 A. I use contemporaneous period analysis or
23 windows approach, and I try not to label it too
24 hard. I go according to what amounts to a
25 contemporaneous period analysis where you're

1 looking at the schedule.

2 So looking at the schedule as time goes
3 on and observing, figuring out if you have to
4 make changes and then observing what caused
5 delay, what was delayed in each of these little
6 slices month to month.

7 Q. Okay. Well, I understand that you
8 believe that a contemporaneous analysis or --
9 would you mind if I use time-impact analysis?

10 A. That's what we used to call it. I can't
11 argue too much.

12 Q. I will probably use your terminology,
13 but I understand that that's what you prefer.
14 That's what you do and that's how you like to
15 give your testimony.

16 And you told the Judge that under some
17 of the standards that have been published, that
18 that is -- that time-impact analysis is one of
19 the nine recognized -- eight which you think --
20 one of the nine you said was just -- is now
21 pretty well --

22 MR. BUNDY: Your Honor, where is
23 the question? Pardon me. Where is the question
24 here? I mean, this is a little speech. Can we
25 just get questions?

1 THE COURT: Overruled. Go ahead.

2 BY MR. HILDEBRAND:

3 Q. My simple question is, you like a
4 time-impact analysis. You testified that
5 Mr. Doran uses an as planned, as built analysis,
6 and that is one of the eight recognized methods,
7 as I understood your testimony -- the way that
8 Mr. Doran did his analysis is one of the eight
9 that is recognized, correct?

10 A. It's -- I don't know about the term
11 "recognized". It's one of the eight that's in
12 that standard, so it's not rejected by that
13 standard by any means because nothing is
14 rejected. So I guess "recognize" is okay.

15 Q. Well, when I reviewed the document that
16 you introduced yesterday, I didn't see a listing
17 anywhere in there where it says this is a ranking
18 of the committee that drafted this document, that
19 this is the one that is best and the most
20 accurate, and this is the most used.

21 That was simply your opinion as to what
22 you thought was the -- when you gave that ranking
23 yesterday, that was simply your opinion. It's
24 not in the document, is it?

25 A. It's not in the document. There's been

1 a lot of things written about it and a lot of
2 papers, a lot of books, et cetera, that talk to
3 that subject. There's always been a few
4 practitioners or some practitioners that want to
5 espouse as planned, as built, or even impact the
6 as planned.

7 So there's always been a few people out
8 there that go after some of the other items. But
9 I think it's pretty much recognized in the
10 industry. The more detailed it looks, are of
11 more value.

12 Q. Okay. I'm handing you a document that's
13 called capital project management. Do you
14 recognize that?

15 A. Well, that's just the header from our
16 website, yes.

17 Q. Well, I'm sorry. It identifies
18 concurrent delay.

19 A. Yes.

20 Q. And in fact, I think this was noted on
21 your CV as one of the publications that you've
22 done; is that correct?

23 A. Yep.

24 MR. HILDEBRAND: I would like to
25 introduce this into evidence, Your Honor.

1 THE COURT: All right. I'm trying
2 to give you a number. We had -- we were working
3 in the 400s, but we had gotten to 332 previously.

4 MR. HILDEBRAND: 342 was our last
5 number.

6 THE COURT: 342?

7 MR. HILDEBRAND: Was our last
8 number.

9 THE COURT: So this should be 343
10 perhaps.

11 MR. HILDEBRAND: Yeah.

12 MR. BUNDY: Objection. It's
13 hearsay in all the matters of -- he can certainly
14 ask the witness questions about the document, but
15 it's hearsay.

16 THE COURT: You can mark it for ID
17 purposes.

18 MR. HILDEBRAND: Yes, sir, but I --
19 okay. I will ask him more background.

20 (PLF. EXH. 343 was marked for
21 identification.)

22 BY MR. HILDEBRAND:

23 Q. You actually drafted this document,
24 didn't you?

25 A. I wrote it.

1 Q. Right. Okay.

2 MR. HILDEBRAND: So I would like to
3 introduce this into evidence, Your Honor.

4 THE COURT: He is the author?

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: I will allow it. It
7 will come in.

8 (PLF. EXH. 343 was received in
9 evidence.)

10 BY MR. HILDEBRAND:

11 Q. So this is a document that you authored
12 identifying concurrent delay. Let's work through
13 this because I have a couple questions.

14 What makes delay concurrent? In the
15 second paragraph. Simply stated, concurrent
16 delay occurs when a contractor and an owner have
17 both caused independent critical path delays,
18 delays that affect the completion date of a
19 project during the same approximate time period.

20 So current delay is when you have an
21 owner-caused delay and a contractor-caused delay
22 and they're both on a critical path; is that
23 right?

24 A. Right. They both impact end date.
25 There's more to it than that, but yes.

1 Q. I'm going to work through it step by
2 step. And then this next paragraph is really
3 important I think to this case.

4 The most important question to ask in
5 determining whether delays are concurrent is
6 this: Are the individual impacts critical to
7 completion? Often hundreds of delays -- hundreds
8 of delays occur on a project that absorb float
9 within the schedule but do not ultimately
10 postpone the completion date.

11 Is that your writing?

12 A. Yeah.

13 Q. And based on your experience on a
14 complicated project like this, it's not unusual
15 to have hundreds of delays that occur that are
16 not on the critical path, agreed?

17 A. Of course.

18 Q. Only delays that extend completion can
19 be considered concurrent; is that correct?

20 A. Essentially, yes. It's fleshed out
21 further as we go along.

22 Q. So in our Thanksgiving dinner example,
23 if you have a start date -- a start time, finish
24 time with the turkey, when you do the -- cook the
25 green beans, if you're 10 minutes late doing the

1 green beans, as long as it doesn't run past the
2 end time of the turkey, then that really doesn't
3 matter, correct?

4 A. If there's float available to the
5 activities. If there's float available to
6 activities and they're just absorbing float and
7 not impacting the end date, then that's true.

8 Q. All right. Let's turn to page 3 of your
9 article. All right. So on page 3 -- I'm going
10 to try to cut this a little bit short so we can
11 kind of cut to the nub of it. There is a heading
12 called independent impacts. Do you see that,
13 third paragraph down?

14 A. Yes.

15 Q. Okay. So before this, you had gone
16 through an example to show where a design impact
17 affected the critical path, and you talked about
18 that a little bit ago. I'm going to try to cut
19 this a little bit short.

20 So your statement is -- well, right
21 before it says impact -- independent impacts,
22 there is the sentence, thus, the demolition
23 impact did not cause critical path delays to the
24 completion of the project. It merely observed
25 the float.

1 That's what you told us a minute ago,
2 correct?

3 A. Absorbed, yes.

4 Q. Here's the important part. Independent
5 impacts. For delay to be concurrent, the impacts
6 must also be independent; that is, the impacts
7 created by one party cannot be caused directly or
8 indirectly by the other party.

9 So that's where we really get to with a
10 root cause analysis in delay claims, is it might
11 look at first blush like one party might be
12 delaying the project. And if you look at what
13 they're doing, you might say, gosh, they're
14 behind schedule.

15 But what you're getting to here is a
16 root cause analysis. Just because you can't look
17 at something just in a minute snapshot, you have
18 to look at the whole project and do a full
19 project CPM analysis like you told me about to
20 determine whether this isolated delay was
21 actually independent or whether it might have
22 been caused by something else. Is that a fair
23 statement?

24 A. No. You're assuming that I have some
25 kind of responsibility to do a delay analysis.

1 Q. No, no, no.

2 A. I don't have a responsibility.

3 Q. I understand that.

4 A. The whole discussion about root cause is
5 something that talks to cause and effect. What
6 was the cause of the specific delay? And, you
7 know, my -- it wasn't my burden on this job to
8 determine that.

9 Q. I understand what you did and didn't do,
10 and I'm just asking you questions about your
11 paper and your opinions of what you published.

12 So what you recognize is that because
13 you might have an isolated delay -- and it may
14 even be on the critical path -- that delay may
15 have been caused -- the root cause of that delay
16 may have been some previous design error or some
17 other issue that would cause that delay. Is that
18 a fair statement?

19 A. I think that's a fair statement. Let me
20 just give you a quick example.

21 Q. I don't need an example. If you can
22 just answer the question.

23 MR. BUNDY: He's entitled to
24 explain his answer.

25 THE COURT: I'm going to allow him

1 to explain his answer. If you want to, go ahead.

2 THE WITNESS: I just try to think
3 in terms of, there could be two sequential
4 problems. So if you have one problem that leads
5 to another problem -- my example is the elevator
6 problems on this project. So there's elevator
7 problems that occur that were Otis Elevator being
8 late, being delayed, being whatever, so the work
9 didn't get done.

10 When the owner made a change later, that
11 doesn't make the whole delay -- just what you
12 said, it doesn't make the whole delay the owner's
13 fault. It makes that piece of the delay -- if
14 there is a delay, it makes that piece of the
15 delay.

16 So, yeah, it doesn't say the owner's
17 delay caused all of this. It says the owner's
18 delay caused part of it. So it wasn't
19 independent.

20 BY MR. HILDEBRAND:

21 Q. I gotcha. Okay. And fair enough. I
22 mean, it works both ways.

23 There could be -- regardless of whether
24 the delay is a construction delay or a design
25 problem for us, what you have to look at is what

1 is the root cause, what actually caused this
2 independent delay, and it may be it was caused by
3 some predecessor act that is not readily apparent
4 by just looking at the independent delay; is that
5 a fair statement?

6 A. I'm still having some trouble with it,
7 and part of it is my reaction to the root cause
8 language because it's not really used in -- you
9 know, generally speaking, I don't think it's used
10 in our part of the industry. I think in terms of
11 a forensic structure analysis, what's the root
12 cause of this structural failure? So I just try
13 to -- I try to --

14 Q. That's what you would do in a delay
15 analysis?

16 A. Right. I will try to get past that. So
17 if I had the duty -- if I had the responsibility
18 to figure out what exactly were the concurrent
19 delays, I would have to figure out what was
20 critical first. So what's critical?

21 And then, yes, you have to say how was
22 that impacted, was it impacted, and is it
23 independent? So how was it impacted and was it
24 independent? And that's really my chief
25 complaint with Mr. Doran's analysis.

1 Q. Let's turn to the next paragraph in the
2 second sentence where it says, in actuality.

3 A. Where is this? I'm sorry.

4 Q. The next paragraph down, the second
5 sentence where it says, in actuality.

6 A. It's inside that second sentence -- it's
7 in the same paragraph, under that --

8 Q. Yes, sir. All the way down to the
9 bottom. Okay.

10 A. Sorry. There it is. I'm a little slow.

11 Q. Yes, sir. It's a bottom paragraph where
12 it says, in actuality, all the way at the bottom.

13 A. Do you want me to read it?

14 Q. No. In actuality, the apparent delay to
15 the demolition work was the result of the
16 redesign of the mechanical system. The delay
17 would not have occurred if there were no
18 redesign.

19 When the contractor became aware of the
20 redesign delay, it was not required to strictly
21 adhere to the schedule when it knew that delay
22 had occurred. A contractor is not required to
23 hurry up and wait but can reallocate its
24 resources to take advantage of other delays; is
25 that true?

1 A. Well, that's my paper. It was actually
2 a case that I worked on with the Department of
3 Justice where the contracting officer or the
4 contract personnel for the owner essentially said
5 because a contractor didn't do -- didn't perform
6 their work in the ceiling, that they were
7 supposed to do previous -- and before the
8 mechanical system could be installed -- the
9 government rep wanted to say that that delay was
10 concurrent, and I said that's not concurrent.
11 You made a change six months ago so that
12 contractor doesn't have to do that.

13 So in that case I just told my client,
14 We have to figure out how to pay.

15 Q. Okay. Fair enough.

16 The manpower analysis -- or not
17 analysis. You did not do a manpower analysis in
18 this matter to determine what impacts, if any, to
19 the critical path that a -- that manpower issues
20 created; is that a fair statement?

21 A. I didn't do a delay analysis concerning
22 manpower. It's a hard thing to do.

23 Q. Right. So what you noted again in some
24 of your examples was there were some manpower
25 shortages, but -- or there were some manpower

1 criticisms from the general contractor to the
2 subcontractors, but whether this affected the
3 critical path, you don't know, correct?

4 A. Except that they said on a fairly
5 regular basis that -- the Balfour Beatty
6 personnel said or they thought that this was a
7 critical or I --

8 Q. Well --

9 MR. BUNDY: Let him finish.

10 A. Or I noted that it was -- it was near
11 the critical -- on or near the critical path of
12 the contemporaneous schedule.

13 Q. Well, when you do -- when you are called
14 in on a project to do a critical path analysis,
15 do you -- you do your own analysis. You don't
16 just ask the client, you tell me what the
17 critical path is and take their word for it. You
18 do your own analysis, don't you?

19 A. Absolutely.

20 Q. And that's required, you think, and
21 appropriate for a professional to do, correct?

22 A. Yeah, but that doesn't mean I ignore
23 contemporaneous documents.

24 Q. I understand.

25 A. I look at all the evidence that I can

1 find as to what's critical, and that might be
2 included in what's critical. And I might end up
3 saying, you know what? That isn't what was
4 critical. The schedule shows there was something
5 else that was critical, but I don't ignore it in
6 any case.

7 Q. Let's turn to -- you did a report in
8 this matter. And this was a rebuttal to Mark
9 Doran's report. And on -- you can pull that up.
10 It's Exhibit B, and I would like to turn to page
11 5, please. And at the very last paragraph at the
12 bottom there, the first sentence of that last
13 paragraph. This is in your rebuttal report?

14 A. It is.

15 Q. Okay. There can be no argument that the
16 owner made significant changes to the project or
17 that some of those changes would impact the
18 contract completion date. Is that your writing?

19 A. Yes.

20 Q. Okay. But you did not do the delay
21 analysis to determine how much of the delays on
22 this project were caused by owner redesigns,
23 correct?

24 A. No, I didn't. Again, this is a duty
25 question. It's a question --

1 MR. BUNDY: I believe the rule
2 requires that if the lawyer is going to ask him
3 to read part of the document, the witness can
4 read the rest of it. Now, if I object -- I would
5 suggest that the client be -- the witness be
6 entitled to read the rest of his statement there
7 because he stopped.

8 MR. HILDEBRAND: Your Honor, he can
9 certainly -- if wants to do redirect and have him
10 read that out, I'll -- I don't know how much he
11 wants to read or whatever, but he certainly can
12 do it on redirect.

13 THE COURT: I will allow that or if
14 he has any explanation he wants to give, he's
15 entitled to do that.

16 THE WITNESS: It just says what I
17 just said, I think. I didn't believe that I had
18 the duty or was required -- it was required of
19 BBC to create that delay analysis.

20 BY MR. HILDEBRAND:

21 Q. Right. And I understand you're critical
22 of Mr. Doran's report, and you have a lot of
23 negativity in there, but I'm just reading one
24 point, this one point, that you did acknowledge
25 that there were owner delays that -- significant

1 owner design delays that impacted the job.

2 A. That isn't what I said. I said
3 significant changes to the project, and some of
4 those changes would have impacted the contract.

5 Q. I'm sorry. I didn't mean to misstate.
6 Significant changes. All right. At the -- are
7 you ever called in on a project to do an analysis
8 after the project has been completed?

9 A. Often.

10 Q. It's not unusual?

11 A. Not unusual.

12 Q. Okay. And are you sometimes called in
13 to do -- to be a consultant or an expert right
14 when the claim is -- the project is finished, but
15 it's right when the claim is beginning?

16 A. Yes.

17 Q. Okay. So when Mr. Bundy went through
18 the claim documents yesterday and asked you your
19 opinions on those, did you understand that to
20 be -- an assertion by the contract that he was
21 making a claim?

22 But did you understand, based on your
23 experience and what normally happens in a delay
24 claim, that that would be the starting point and
25 then experts would come in like yourself,

1 Mr. Doran, and witnesses would be deposed and
2 that the claim would be developed through
3 litigation and that ultimately somebody like
4 Judge Scarborough would decide the issues as
5 they're developed during the litigation?

6 A. But that's the thing. It doesn't have
7 to be that way. It could be a developer claim
8 that makes sense and -- like the claim that I was
9 talking about with the mechanical contractor
10 where they made the claim.

11 They did have one person that held them
12 up to get into a litigation, but they didn't even
13 have to have a report before -- I could read that
14 claim and say, the government is wrong and the
15 contractor is right and we should settle this.

16 But there wasn't enough information
17 there for us to do that. And that would have
18 been the right path. That would have been a
19 great path to work on. It just wasn't ready. It
20 wasn't done.

21 Q. Okay. Maybe that's the best -- the
22 ideal situation, but it's not unusual in your
23 experience, is it, Mr. Boe, that when the project
24 has ended that the claim needs to be developed at
25 this point through expert witnesses and discovery

1 in order to come to some resolution?

2 MR. BUNDY: Objection, relevance.

3 The contract provides what's required in the

4 claim -- what should be in the claim, and the

5 claim should be provided -- what should the --

6 whether this condition preceded or not. What

7 Mr. Boe's experience is completely irrelevant.

8 Thank you, Your Honor.

9 MR. HILDEBRAND: Well, Your Honor,

10 Mr. Bundy was asking about custom and experience,

11 and he asked Mr. Boe the same questions.

12 THE COURT: Objection noted.

13 Overruled. Go ahead. Do you want to restate the

14 question?

15 MR. HILDEBRAND: Yes.

16 BY MR. HILDEBRAND:

17 Q. So it's not unusual -- it might be ideal

18 that at the end of the project if the person

19 making the claim has everything perfect, every I

20 dotted and every T crossed and everything is

21 right there and both parties can come to an

22 agreement on a resolution, that might be the

23 perfect resolution.

24 But it's not unusual in the industry and

25 based on your experience that further discovery

1 and further analysis by experts is necessary
2 before a resolution can be attained; is that a
3 fair statement?

4 A. I mean, of course that's true. Of
5 course it's true that they -- that these cases do
6 come that way. But there are not very many
7 projects or claims that I see, you know, usually
8 on either side where there isn't a delay
9 analyses. There isn't something that says here's
10 what was critical on the project at least.

11 Q. Let's talk about the original schedule.
12 Now, the original schedule was based on a project
13 that was referenced in the GMP documents. Do you
14 understand that?

15 A. Yes.

16 Q. All right. So do you have an opinion
17 here today as to whether -- if those GMP
18 documents had not changed and assuming that there
19 were no errors or omissions in the drawings,
20 whether that original schedule would have worked?

21 A. Well, the original schedule wasn't going
22 to work.

23 Q. The project could not be completed in
24 the 28 months. That's your opinion?

25 A. No. No, no, no. That schedule couldn't

1 work.

2 Q. Okay.

3 A. I'm not saying the project couldn't be
4 completed in 28 months. I don't know. That
5 would be speculation. The way the schedule was
6 put together had a built-in delay that Balfour
7 didn't know about at the time. They missed
8 that -- taking out the tower crane, et cetera.

9 Q. Okay. Good point. So is it all that
10 unusual to have a schedule that is not -- that
11 has errors or omissions when it's done and that
12 subsequent changes have to be made by a
13 contractor in order to finish the project on
14 time?

15 A. No schedule is perfect, but to have a
16 four-month bust in the schedule is pretty
17 unusual. I don't see that very often.

18 Q. Well, it's only -- to say that it's four
19 months -- I probably said that the schedule
20 showed the second floor work being started in
21 August and that -- the crane being removed in
22 November.

23 A. Right. But there's a month worth of
24 work between -- not the crane being removed, but
25 the pool being set. The pool was set, but then

1 there's a month.

2 There's 28 days worth of work that was
3 being put into day 19, and so it's not a month
4 before. A month worth of work that had to take
5 place between then and when you could actually
6 start the work again on the second floor.

7 Q. A month worth of work on the second
8 floor?

9 A. No, no. A month's worth of work taking
10 out crane, doing the infill work, making sure
11 that it was watertight so that you could start
12 that ceiling work on the site.

13 Q. Okay. What we don't know and what would
14 be speculation on your part at this point is we
15 don't know, one -- recognizing or assuming for
16 argument that your assessment of the schedule is
17 correct and it did not -- the original schedule
18 by Balfour was correct -- that was a terrible
19 question. I will start over.

20 Let's assume that what you said was
21 correct, that the original schedule by Balfour
22 did not show having the crane removed and that
23 would have -- without any changes, that was going
24 to cause a delay to the schedule and the job.
25 Okay?

1 A. Yes, sir.

2 Q. All right. You don't know when Balfour
3 would have recognized that issue, correct?

4 A. I only know when we included it in the
5 schedule. So I know when they added that string
6 of activities to the schedule, and that's 19
7 months in the project.

8 Q. Right, but --

9 A. I'm sure they recognized it sometime
10 before and had to develop what that logic was.

11 Q. What I'm getting at -- and maybe I'm
12 going about this wrong, being a little too
13 verbose when I can simply -- sometimes issues in
14 the schedule are -- there is a problem. The
15 contractor recognizes it, and then the contractor
16 comes up with a work-around so that he could
17 still finish the job on time, correct?

18 A. Fixes it by accelerating something
19 downstream or making some kind of change.

20 Q. Right.

21 A. And so if it was brought up right at the
22 baseline, that would be one thing, but what we've
23 got here is blaming the delay. And including
24 that piece of the delay is just not right. You
25 just can't -- that part of it is clearly not the

1 owner's fault. It doesn't have anything to do
2 with the -- any delay to the structure that
3 occurred.

4 Q. But what impacts, if any, that the --
5 how Balfour might have done a work-around for the
6 crane issue or the pool issue, you just don't
7 know in this case and -- correct?

8 MR. BUNDY: Your Honor, he is
9 asking the witness to speculate. I don't --

10 MR. HILDEBRAND: I'm just asking
11 him to admit that it would be speculation.

12 BY MR. HILDEBRAND:

13 Q. You just don't know what Balfour might
14 have done when they noticed that issue to try to
15 mitigate, correct?

16 A. All I know is that the schedule didn't
17 reflect a four-month collapse of anything out in
18 the future work when they did recognize it. What
19 they did see is that this work has to be done,
20 and we have to connect the dots.

21 And now Mr. Doran says that's the
22 critical path and all of it is the owner's fault.
23 That's not right.

24 Q. Right. Well, the original schedule in
25 this case contemplated a hotel -- again, it was

1 reflected in the GMP.

2 A. Yes.

3 Q. So what was actually built after all of
4 the changes, there's no way that that original
5 schedule could have been followed to have
6 constructed the hotel as it was ultimately
7 constructed because there were a lot of changes,
8 agreed?

9 A. I don't agree. I mean, I know there was
10 a lot of changes, but the way you do delay
11 analysis is you look at what those schedule
12 changes are. You can't just say, well, there
13 wasn't any way -- the baseline, that goes away
14 because we have changes.

15 Q. I'm not saying that goes away. I'm just
16 saying that that baseline schedule, you couldn't
17 have -- it's an impossibility for it to have been
18 implemented as it was drafted because there was
19 so many changes.

20 A. How about this? Changes perhaps almost
21 certainly impacted the schedule, and so because
22 of the changes, you wouldn't have been exactly
23 that way. You know, that baseline schedule
24 wouldn't have been exactly that way.

25 Certainly changes were made later in the

1 completion date of that schedule, but there's
2 always -- there's always an argument that changes
3 are made later because the project is late.

4 You know, you don't make changes to the
5 kitchen -- and this is not an example from this
6 project. You don't make changes to the kitchen
7 for an electrical outlet until you know where
8 exactly -- what piece of equipment is going in
9 and where exactly the plug needs to be.

10 So if the kitchen is built a year late
11 because of delays for some other reason -- you
12 made a change out here past the completion date,
13 then it's not necessarily something that gets you
14 delayed beyond the completion date, and that's
15 just an example.

16 Q. Okay. Fair enough. And did you do an
17 analysis on the second-floor ceiling and all
18 ballroom ceiling changes and the fact that
19 columns were removed? Did you do any analysis to
20 determine what the delays to the critical path
21 were because of those design changes?

22 A. My review of the contemporaneous
23 schedule tells me that that wasn't critical path.
24 So I mean, just looking at the contemporaneous
25 schedules, there were 10 weeks of float at the

1 beginning of that path and 13 weeks at the end,
2 which means that during that entire time, there
3 was a bunch of float.

4 So any really detailed look at that
5 would have been -- would have told me that was
6 absorbing float during that entire time. There
7 was delay during that time, but I don't see that
8 that was -- could be the cause.

9 Q. Have you had --

10 A. The answer to your question is, no, I
11 haven't done that analysis.

12 Q. Okay. Thank you.

13 MR. HILDEBRAND: If you will give
14 me just a second, Your Honor.

15 THE COURT: Okay.

16 MR. HILDEBRAND: May I have just a
17 couple minutes, Your Honor?

18 THE COURT: Sure.

19 MR. BUNDY: Do you want to take a
20 break, Judge?

21 THE COURT: Yeah. Do you want to
22 take five minutes?

23 MR. BUNDY: That would be great for
24 five, yes, sir.

25 THE COURT: It's almost 12:30. Go

1 ahead and y'all figure out where we can finish it
2 up or let me know.

3 (A recess transpired.)

4 MR. HILDEBRAND: I do have some
5 additional questions that might take just a
6 little bit so it might be a good time to break
7 for lunch.

8 THE COURT: Okay. Let's go ahead
9 and break. It's about 12:30. Let's plan to come
10 back at 2 o'clock. Thank you.

11 (A recess transpired.)

12 THE COURT: All right.

13 Hi, Mr. Hildebrand.

14 MR. HILDEBRAND: Hi, sir.

15 THE COURT: Still on your case.

16 CROSS-EXAMINATION

17 BY MR. HILDEBRAND:

18 Q. All right. Mr. Boe, I don't have a
19 whole lot of questions, but I do have some. You
20 talked about there were a number of questions by
21 Mr. Bundy regarding the claim that was made at
22 the end of the project. Do you remember that?

23 A. Yes.

24 Q. Did you review the claim that was made
25 by Balfour regarding the sixth floor delays?

1 A. I did.

2 Q. Was that properly documented in your
3 view?

4 A. I would say that that was much closer to
5 properly documented, but there were schedules
6 involved, and there were more in terms of --
7 well, because it was a very tight window, it was
8 a time frame that they were recognizing between a
9 short period, they could see perhaps better than
10 looking at a huge, broad area.

11 Q. Okay. Did the architect consider
12 that -- to your knowledge, that claim to have
13 been appropriately documented for them to reach a
14 decision?

15 A. I think they recommended a number.

16 Q. Do you know if that was paid?

17 A. I don't think it was. I don't think
18 there was agreement for the change order.

19 Q. Okay. Now, for you to have done a full
20 start to finish detail delay analysis on those,
21 which you told us you haven't done, can you tell
22 the Judge approximately how many hours or what
23 sort of effort that would have encompassed?

24 A. I think I discussed it in my deposition
25 as being an effort of about \$200,000 to \$250,000.

1 Q. All right.

2 A. And that's really a rough number because
3 you never know what -- you know, things -- what
4 wild goose chases you go on when you're trying to
5 do that.

6 Q. Okay. And to do that, you would have
7 to -- if you were to have done that report, you
8 wouldn't have just dropped every other case and
9 every other matters you had and devoted
10 exclusively your time to do it, it would have
11 taken some period of time, I would guess, to
12 accomplish that; is that correct?

13 A. Yes.

14 Q. About how long would you anticipate that
15 would have taken?

16 A. I mean, because this is a very busy
17 time, I don't know that I could -- I wouldn't
18 have committed to anything shorter than four to
19 six to eight months.

20 Q. Okay. How about in early 2019? Were
21 you busy then?

22 A. Yes, not to the same extent, but for
23 some reason, once COVID hit, we got really busy.

24 Q. Okay. Well, good for you.

25 A. Not good for everybody else.

1 Q. It's an ill wind that blows no man any
2 good. All right, sir. So back in 2019, so would
3 you approximate it would have taken four to six
4 months?

5 A. At least. But I didn't have the
6 information to do that.

7 Q. Okay. So for Balfour to have done a
8 full report with a full CPM analysis, it would
9 have been difficult, would you agree, if not
10 possible, for them to have provided that to the
11 owner in January of 2019, when the claim letter
12 was drafted?

13 A. It would have been difficult, but I
14 think the real point was that that should have
15 been kind of developed as it went for the earlier
16 periods.

17 Q. Well, and you would agree, wouldn't you,
18 that the -- preparing a report and a claim for
19 Judge Scarborough to try to get his arms around
20 and understand is a lot of different because he's
21 starting at ground zero as far as the facts go,
22 and he has to educate himself.

23 But on a project like this, your
24 audience, the owner and the architect, should
25 have an extremely high degree of knowledge of the

1 facts and what delays occurred and what issues
2 occurred and such; would you agree?

3 A. I think that they have an idea of what
4 occurred on the project, but they don't have an
5 idea of what your position is on what's critical,
6 what critically delayed the project, and the
7 specific allegations, the cause and effect
8 pieces.

9 They can either say, yes, we agree with
10 that, that's what the critical path was during
11 that time, and we agree with that. Maybe that 20
12 days and the -- on the sixth floor, and the
13 disagreement was 20 versus 25. I don't know what
14 that was, but if you took those pieces, I think
15 that possibly those -- those things could have
16 been resolved. But to just wait, I think it was
17 problematic. It's a problem.

18 Q. Okay. And you may have answered this,
19 and I apologize if I'm repeating myself. But
20 you -- there was a lot of testimony in your
21 direct about things that Mr. Doran may have
22 considered or perhaps should have considered or
23 that perhaps you would have considered if you
24 were doing a report. But what he actually
25 considered, you don't know; is that correct?

1 A. I certainly don't know -- I can't say
2 that he didn't look at something and disregard
3 it. I can say that there's evidence of what the
4 critical path is. That's contemporaneous
5 evidence that he clearly either didn't look at
6 it, or he disregarded it. And I think he was
7 wrong to disregard it.

8 Q. Okay. Is it unusual, when you testify
9 as an expert in a matter either before an
10 arbitration board or litigation, that your
11 opinions are pretty drastically different than
12 the opinions of the opposing experts?

13 A. It happens both ways, actually, and it's
14 kind of -- well, actually, I should preface that
15 with, yes, once you get to actual trial. You
16 don't get to trial if the positions aren't
17 different, if there aren't, you know, large
18 differences.

19 But a lot of my cases end up settling
20 earlier because we have some agreement on the
21 delays, and sometimes I have even stipulated with
22 the opposing expert as to what the delays were
23 and what the amounts were and neither of us had
24 to testify at trial.

25 Q. Okay. And in this case, you don't know

1 how many days of compensable delay you would have
2 arrived at had you done a full delay analysis
3 because you didn't do one, right?

4 A. That's right.

5 Q. We went through -- you went through in
6 detail with Judge Scarborough, letters and
7 e-mails from Balfour to its subcontractors, where
8 Balfour sometimes in fairly innocuous tones and
9 sometimes in very colorful tones and sometimes in
10 extremely strident tones will say, get off your
11 behind; you're behind schedule, and you need to
12 move forward. Do you remember doing that?

13 A. Yes.

14 Q. All right. And those are in Exhibits 90
15 or 91?

16 A. 91, I believe.

17 Q. Okay. And you would agree with me that,
18 even on a project that is experiencing no delays,
19 it is appropriate for a general contractor to
20 push its subs and to crack the whip and to prod
21 and push and poke constantly to keep them moving,
22 correct?

23 A. I agree. What I try to look at is the
24 context as to -- it's not normal, I don't
25 believe, to do a cure notice, to give notice of

1 delay. It's not.

2 And then to say that something is
3 critical in that contemporaneous document, to
4 that -- and I know that sometimes the field folks
5 have a different idea of what critical means, but
6 when they use that term, they're ascribing
7 something real, delay.

8 Q. Well, but that really depends on what
9 Balfour's -- what its habits and customs -- what
10 the habits and customs are of its foreman and
11 superintendents, how they normally -- what they
12 meant and what was in their minds, you really
13 don't know? All you know is that those were
14 sometimes strident letters to the subcontractors,
15 agreed?

16 A. I don't know what's in their mind,
17 that's true.

18 Q. All right. And even if the project is
19 on schedule and even if an activity has float, so
20 it can start earlier or start later, so there's
21 float on it, it would be appropriate for a
22 general contractor to -- if it looks like that
23 float might start to get erased and the
24 subcontractor might be just a little bit behind
25 schedule, it's perfectly appropriate for him to

1 write letters and put them on notice, you need to
2 get going and get this thing up to speed,
3 correct?

4 A. And we saw that in at least one of the
5 letters where I noted that they said that they
6 said that they were absorbing float rather than
7 just -- rather than saying it's critical, they
8 said, you are -- this is absorbing float faster
9 than it should be.

10 Q. All right. You've reviewed the Mark
11 Doran's report, correct?

12 A. Yes.

13 Q. And he says that, as of July 23, 2016,
14 which is when the sixth floor issue hit, there
15 had been a number of challenges and delays and
16 setbacks on the project, but that they had been
17 addressed and that the project was on schedule as
18 of that point, but about a day behind. Do you
19 generally agree with that statement?

20 A. I think what he said was that it was one
21 day behind and then somehow 15 more days got
22 added to that. So it was 20 days for the
23 hurricane, one additional day. I know there was
24 another day in there someplace, but I don't know
25 the -- I'm not going to quibble about one day --

1 and then 15 days of delay to the structure. So
2 15 days where they were not able to do anything.

3 Q. Okay. Well, maybe it wasn't exactly on
4 schedule, but in terms of the ultimate delay
5 opening from the original schedule date, which
6 was around 500 days, that was a pretty very minor
7 in time, agreed?

8 A. Yes.

9 Q. Okay. And do you generally agree with
10 his conclusion there?

11 A. Yes.

12 Q. All right.

13 A. With the exception that, by that time,
14 the schedule bust having to do with the tower
15 crane hadn't been inserted in the schedule.

16 Q. Right. I understand. And, again, we
17 don't know how that would have developed because
18 we don't know what Balfour would have done to
19 address that, correct?

20 A. (No audible response.)

21 Q. Never mind. Let me just move on. So
22 the fact that the project was on schedule as of
23 the sixth floor delays, is -- and that there were
24 prior delays and challenges, does that --

25 MR. BUNDY: Objection. He has

1 misstated what the witness said as a predicate to
2 his question.

3 MR. HILDEBRAND: Well, I will
4 restate it.

5 THE COURT: All right.

6 BY MR. HILDEBRAND:

7 Q. Do you agree that there were documented
8 delays and challenges that had occurred on the
9 project prior to the sixth floor issue going?
10 Have you reviewed the file enough to offer an
11 opinion on that?

12 A. Yes, there were delays. Again, I didn't
13 do the critical path analysis. I'm pretty sure
14 there were delays during that period.

15 Q. All right. And the fact that Balfour
16 had brought the schedule current, does that
17 indicate to you that it had the ability to get
18 back on track with the schedule?

19 A. I guess I have trouble answering it.
20 The schedule showed that the projection at that
21 time would complete 21 plus 15 days after the
22 contract completion date, something like that.
23 And so it showed that they had scheduled around
24 whatever critical delays, if any, had occurred
25 during that previous time.

1 So there certainly were -- we know that
2 there were bumps. There were complaints about
3 waterproofing and some other problems with the
4 structure before that day. But I don't know that
5 there were critical path delays that kicked out
6 the schedule or if things were going from a
7 critical path standpoint as well.

8 Q. Now, you had in the -- when you went
9 through the notices in Exhibit 91, the letters
10 that range from -- just various letters and
11 e-mails that were written to subcontractors,
12 those, you identified, as notices from Balfour to
13 subcontractor X, that subcontractor X, you are
14 behind and you need to get moving. You need --
15 your manpower is short, and you need to
16 supplement reenforces, correct?

17 A. For the most part, that was the purpose
18 of that exhibit.

19 Q. Right. But what we don't know and what
20 you don't know, because you haven't done a delay
21 analysis is, okay, what happened as a result of
22 Balfour giving those subcontractors notice,
23 correct?

24 A. Well, except that a lot of these kind of
25 have the details after the facts, and we say, we

1 told you on such and such date, you need to have
2 more people or double your crews or whatever, and
3 it's clear that you didn't do that, and so you've
4 had this much time.

5 Now, I don't know if that's critical
6 path time or not critical path time. But in some
7 cases, they told them, it's an after-the-fact
8 notice.

9 Q. Right. But even if it's after the fact,
10 we don't know what happened as a result of
11 that -- of those notices on whether the
12 subcontractors, for aspects of their work that
13 were done after that, whether they were able to
14 accelerate or if they were able to make up time
15 or what their responses were.

16 In other words, what the responses of
17 the subs were to those notices, we don't know and
18 you don't know, correct?

19 MR. BUNDY: Your Honor, I have to
20 object. That's about three or four different
21 questions. I'm not sure which question this
22 witness is expected to answer. There were at
23 least three questions in that litany of
24 questions.

25 BY MR. HILDEBRAND:

1 Q. Did you understand the question?

2 A. I think so.

3 Q. Okay. Can you answer?

4 A. Except that, as I said before, some of
5 those responses are listed in the e-mail; so it's
6 a string of e-mails that says at the beginning,
7 you're short of manpower, and then it walks
8 through and says, you're still short of manpower.

9 So in that case, you've seen what that
10 resulted, you know, but in some cases, yes,
11 you're right. In some cases, I don't see the
12 next step except to see if there's a cure notice
13 or notice of delay in addition to that.

14 Q. Right. If Balfour's witnesses were to
15 look at those and say -- and testify that, when
16 subcontractor X got the notice and by gosh, the
17 fear got in them and they jumped and brought in
18 additional men, you wouldn't be able to -- you
19 have no evidence from the record to dispute that.
20 Is that a fair statement?

21 MR. BUNDY: Objection, Your Honor.
22 He is asking the witness to speculate, pitting
23 one witness against the other, and I've not heard
24 any testimony like that. So he's asking this
25 witness to speculate about testimony that has not

1 been put before this Court.

2 THE COURT: Mr. Hildebrand, do you
3 want to respond to that?

4 MR. HILDEBRAND: Your Honor --

5 THE WITNESS: I'm sorry?

6 MR. HILDEBRAND: Never mind. I
7 will withdraw the question.

8 THE COURT: All right. Very good.

9 BY MR. HILDEBRAND:

10 Q. Let's turn to, if you would, please,
11 Exhibit 30 -- or tab 30 and Exhibit 91-30.

12 A. All right.

13 Q. Are you with me?

14 A. Yes.

15 Q. All right. And can you turn to the
16 second page which is the start of that e-mail?

17 A. Yes.

18 Q. And this is an e-mail from Precision
19 Walls, Allen -- I'm sorry, Brian Allen, rather,
20 to Pat Dean. It says, Pat, and then the third
21 paragraph, we are losing money on this job
22 already, based on all the other delays and
23 jumping around the job to try to keep our
24 manpower productive. We cannot afford to flood
25 job with workers anymore without productive work

1 out ahead of us.

2 If there are -- do you know what delays
3 occurred on this job and what impacts those
4 delays may have had on subcontractors as far as
5 their scheduling their manpower?

6 A. So this goes beyond critical path
7 scheduling is what you're trying to say, that
8 the -- sometimes it doesn't matter if that's on
9 the critical path or not. And it can be
10 inefficient, and it can cause delay to a
11 subcontractor.

12 Do I know all of the details of the
13 small delays or the -- each change to the subs?
14 No, I can't know that, but that --

15 Q. Well, do you know that that was a small
16 delay or a small change?

17 A. This here?

18 Q. Yes, sir.

19 A. No, no. I'm not assuming it's a small
20 change.

21 Q. Okay.

22 A. He said he's jumping around, and it's
23 based on -- he says, it's based on other delays.

24 Q. Okay. You testified that you reviewed
25 48 schedules that were promulgated by Balfour in

1 this matter, correct?

2 A. I don't know if it was 48 or 46 or 52,
3 but I know there's 48 number of days.

4 Q. Okay. And there were 150 schedules that
5 were published?

6 A. Yes.

7 Q. So you didn't review 102 of them for
8 whatever reason, agreed?

9 A. No, no, no. We definitely -- we have an
10 index of all of those. We had to open them to
11 find out -- because some of them are early
12 versions. For example, I think number 13, update
13 13 says, draft on it, or one of the other ones
14 says draft.

15 And so we wanted to open those to see
16 what -- see if that was the final version or if
17 it wasn't. In some cases, we had to open up
18 things just to see what the last one that was
19 delivered was. So there was multiple numbers.

20 Q. Well, yeah, and maybe I should clarify
21 the question. Not that you didn't have eyes on
22 there, but enter the other 102 scheduled -- but
23 you didn't take them into account? You didn't
24 review them into any detail with regard to
25 including them in your reports for your opinions,

1 correct?

2 A. That's true. If I thought there was
3 some reason to include, then I would have, but I
4 didn't.

5 MR. HILDEBRAND: All right. That's
6 all, I have. Thank you.

7 THE COURT: All right. Mr. Bundy?

8 MR. TERRY: Your Honor, we have
9 some questions.

10 THE COURT: You would like some,
11 Mr. Terry?

12 MR. TERRY: Yes, sir.

13 THE COURT: Okay.

14 MR. TERRY: And to be clear,
15 Your Honor, and as you allow, I will ask
16 questions on behalf of Watson and Mr. Windle will
17 ask question on behalf of Old North State and
18 Lithko.

19 THE COURT: All right. Okay.

20 CROSS-EXAMINATION

21 BY MR. TERRY:

22 Q. Good afternoon, Mr. Boe, I'm Don Terry.
23 I believe we met during your deposition. I
24 represent Watson Electric Construction. I only
25 have a few questions just to try to clarify what

1 works on construction projects. He works with
2 contractors. That's what he does. That does not
3 make him a contractor. That does not make him an
4 architect.

5 That does not make him an expert to
6 offer opinions about construction schedules and
7 everything else -- I'm sorry, construction
8 contracts and everything else. He is simply a
9 scheduler.

10 And for Mr. Bundy to say, yeah, you work
11 on it; your scheduling relates to construction
12 projects, therefore it's -- he's so intuitive
13 that he can testify as a contractor and offer
14 construction things and everything else.

15 I don't know why he is trying to
16 schedule him -- trying to get him qualified on
17 all these other issues. He has been identified
18 as a scheduling expert. That's what I took his
19 deposition on, and I think that's what he should
20 be qualified to, simply on that.

21 THE COURT: All right. I will
22 qualify him as a scheduling expert, and to the
23 extent that that involves construction, I'm going
24 to give him some leeway on that.

25 MR. HILDEBRAND: All right. Thank

1 you, Your Honor.

2 BY MR. BUNDY:

3 Q. All right. Let's talk a minute about
4 how you got involved on this project. When did
5 you get hired, by whom, and for what purpose?

6 A. I was approached in August of 2017. I
7 received a call from Mr. Clements with Matrix,
8 and he expressed an interest in having me come
9 onboard to basically -- we really hadn't defined
10 my role at that point, just that there was a
11 troubled project and that they had sort of lost
12 faith in the schedule's ability to forecast a
13 completion date.

14 Q. Okay. And who was the scheduler that
15 scheduled this job for Balfour Beatty?

16 A. Joe Lauricella.

17 Q. Joe Lauricella?

18 A. Thank you.

19 Q. Okay. Did you ever meet with him?

20 A. I know I met with him in person on one
21 occasion.

22 Q. Okay. But you understood it was his
23 schedule?

24 A. Yes, sir.

25 Q. Okay. And how were you paid -- how were

1 A. That's what you would expect with
2 operating a CPM schedule.

3 Q. All right. The next sentence says, is
4 Balfour Beatty deleted all completed work from
5 the schedule prior to submitting their latest
6 update for review. It is not possible to
7 ascertain the accuracy of the documented actual
8 dates. What is the significance, if any, of that
9 statement?

10 A. Well, you know, what -- we were
11 basically evaluating three different, you know,
12 measurables here. One was whether it was
13 documenting accurately. I really couldn't
14 determine that because the schedule that they
15 sent had deleted everything that had actual
16 dates.

17 So there's only everything to the right
18 of the data date, so all just remaining work was
19 left in the schedule. So it was an incomplete
20 schedule, and for that reason, I really couldn't
21 speak to that -- that one aspect of what you
22 would expect from a CPM schedule.

23 Q. In your experience, is deleting the
24 completed work from the schedule, is that usual
25 or unusual in your experience?

1 A. I've never received one like that
2 before.

3 Q. And does that comply with the contract
4 requirements as it relates to the schedule?

5 A. No. You're supposed to get it in
6 digital format as it said in the contract
7 documents.

8 Q. Okay. Did that hinder you in your
9 ability to audit this schedule?

10 A. Yes.

11 Q. And how so?

12 A. Basically, you had to make a lot of
13 assumptions on -- because of that, and it didn't
14 really allow me to have a fully complete audit in
15 the September audit. It wasn't really until the
16 December audit that I could see the schedule in
17 full and truly have a complete and formed opinion
18 about the status of the CPM scheduling.

19 Q. Okay. If we were to compare a schedule,
20 let's say, to a Swiss Army knife that has a lot
21 of different blades and parts in it, was this
22 Swiss Army knife missing some blades and parts
23 since these things have been deleted?

24 A. Very much so.

25 Q. Okay. So this tool was not a complete

1 tool for its intended use?

2 A. No.

3 Q. Okay. You go on to say, however, it is
4 possible to glean the schedule's ability to
5 forecast and coordinate the remaining work. How
6 was that? How were you able to do that? What
7 made that possible?

8 A. Well, you could see everything to the
9 right of the data date. So you could see
10 everything that they were projecting, you know,
11 to be done.

12 And so, you know, that was one part of
13 our analysis, was to go out, and as I said,
14 basically compare what they were showing in their
15 4 August schedule and compare it to what was
16 occurring on the site three weeks later. So in a
17 single construction period, you would expect that
18 to be very close and not many deviations from
19 what they were showing before August to what we
20 saw on the site in 28 August.

21 Q. You go on to make the statement,
22 unfortunately, the Balfour Beatty schedule has
23 such significant fatal flaws that it is neither
24 an effective forecasting or coordination tool.
25 That was your statement, correct?

1 A. Correct.

2 Q. And that was your opinion, correct?

3 A. Absolutely.

4 Q. Is that your opinion here today to a
5 reasonable degree of certainty? And by that, I
6 mean, the opinion that the Balfour Beatty
7 schedule on -- as of September 13, 2017, had such
8 significant fatal flaws that it was neither an
9 effective forecasting or coordination tool? Is
10 that your opinion to a reasonable degree of
11 certainty?

12 A. Yes.

13 Q. Okay. And does this still remain your
14 opinion?

15 A. It does.

16 Q. Okay. All right. Will go to the next
17 paragraph and tell us what your problems were or
18 what your observations were as it relates? And
19 if you just need to read it, we can talk about
20 it, however you want to do it.

21 A. So numerous critical activities either
22 do not have successors or have been signed
23 inappropriate successors relating to schedules,
24 having no ability to -- resulting in the
25 schedules having no ability to accurately

1 INDEX OF WITNESSES

2	DEFENDANT'S WITNESSES	<u>PAGE</u>
	GRADY QUERY	
3	Cross-Examination by Mr. Hildebrand	3040
	Cross-Examination by Mr. Terry	3081
4	Redirect Examination by Mr. Bundy	3092
	Recross-Examination by Mr. Terry	3100
5	JIM CLEMENTS	
6	Direct Examination by Mr. Bundy	3116
7	Certificate	3300
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 THE COURT: All right, folks, hope
2 y'all had a good evening. Mr. Query, good to see
3 you again this morning, sir.

4 THE WITNESS: Thank you. Good to
5 see you, Your Honor.

6 THE COURT: Very good. We're still
7 under oath and ready to proceed.

8 MR. HILDEBRAND: Yes, sir.

9 THE COURT: All right.

10 Mr. Hildebrand?

11 MR. HILDEBRAND: Thank you, Your
12 Honor.

13 CROSS-EXAMINATION

14 BY MR. HILDEBRAND:

15 Q. All right. Mr. Query, thank you for
16 being here this morning. We talked yesterday
17 about your initial contact and what you were
18 asked to do, and from your perspective, as I
19 understand it, your charge was to look at the
20 scheduled completion date and determine whether
21 in your view that was reasonably achievable. Is
22 that a fair statement?

23 A. They had asked -- that was definitely
24 part of what I was asked to do is to help try to
25 project a completion date.

1 Q. Right.

2 A. It was -- became evident, not having
3 access to, you know, the subcontractors, the
4 planning team, the suppliers, that I could not
5 generate that on my own. So I just merely tried
6 to do the best I could and just tried to fix what
7 I could in the schedule to help sort of show what
8 trend it would be.

9 Q. Okay. So from your perspective, what
10 you understood your charge to be and what you
11 tried to do was, you look at the schedule
12 documents that Balfour would have provided, and
13 then you assess them to try to facilitate the
14 process to move forward in an expeditious manner.
15 Is that a fair statement?

16 A. (No audible response.)

17 Q. You were trying to help the process to
18 move towards, as reasonably expediting a
19 completion date as possible?

20 A. Absolutely.

21 Q. Okay. All right. And so the way that
22 you went about that would be -- it's pretty
23 obvious that you had asked for the schedules and
24 get the information that you thought would
25 benefit you to be able to do that, correct?

1 A. Correct.

2 Q. And as part of that process, you got the
3 schedules from Balfour and from Joe Lauricella to
4 help you do that, correct?

5 A. Well, initially, I didn't get the full
6 schedule. I just got, you know, the remaining
7 activities, not -- not the actual dates. So,
8 initially, I didn't get that, but then I think as
9 they became more comfortable with my role, they
10 did give me -- in December, I got the full
11 schedule.

12 Q. Okay. Well, and I just want to make
13 sure that we're clear on that. Nothing was -- to
14 your knowledge, was withheld that you asked for?
15 Balfour was accommodating and you got the
16 schedules in whatever format you wanted them in
17 or daily reports or whatever you needed, you got
18 from Balfour, didn't you?

19 A. There was some reticence at first, but
20 eventually, yes, the information started to flow
21 very frequently.

22 Q. Okay. As a result of that, we
23 introduced yesterday -- or Mr. Bundy did, a
24 number of reports, and you call them audits that
25 you did of the schedule and of the way that

1 things were being scheduled by Balfour, correct?

2 A. Yes, sir.

3 Q. All right. And in those audits, you had
4 some criticisms of the way that you thought that
5 the schedule was being done, and you had
6 suggestions for how it should be approved; is
7 that correct?

8 A. Yes, sir.

9 Q. All right. And it was your intent, from
10 the original audits that you did that Mr. Bundy
11 introduced and the subsequent audits, that they
12 would actually be produced to Balfour so that
13 Balfour could use those and gain the expertise
14 and the constructive comments that you were
15 making so that the project could proceed and
16 perhaps the finish date could be moved up, and it
17 could be finished earlier. Is that a fair
18 statement?

19 A. It was definitely my hope that actually
20 I would be brought on as a third-party scheduler
21 and, yes, that those reports were -- I was hoping
22 would point out the fallacies in the schedule
23 that could be improved.

24 Q. Right. But those schedules, from your
25 standpoint, those were -- that was your work

1 product, and that's what it -- if Balfour wanted
2 to see what your constructive criticisms were and
3 how it could avail itself of your expertise, it
4 would need to look at those reports. That's the
5 best way to do it, to see exactly what your
6 comments are and to try to implement them,
7 agreed?

8 A. Agreed.

9 Q. All right. And it was your intent that
10 those reports would actually be provided to
11 Balfour so that it could move forward in a
12 collaborative effort with you to get the project
13 on schedule and to keep the -- and to try to move
14 the opening date up, correct?

15 A. Correct.

16 Q. Okay. Do you know if any of your audits
17 were ever actually -- let me ask you this. Did
18 you ever actually provide any of your audits to
19 Balfour?

20 A. I don't recall ever interacting directly
21 or sending -- I always interacted through either
22 the owner or Jim Clements with Balfour. The only
23 time we talked directly was either in a
24 conference call or, you know, when we met in a
25 conference room together.

1 Q. Okay. Now, so you did not provide any
2 of your audits to Balfour, correct?

3 A. No, sir.

4 Q. All right. And you don't know whether
5 any of the audits were ever actually provided to
6 Balfour while the project was ongoing, correct?

7 A. I'm sure I referenced the audits when we
8 met, but I have no idea. I would not know if
9 they were given that, no.

10 Q. Okay. If I represent to you that
11 there's no reference of your audits during the
12 construction project in any of the construction
13 files, would you have any reason to contradict
14 that?

15 A. No, sir.

16 MR. BUNDY: Objection.

17 Mr. Hildebrand is not under the oath. He's
18 making statements -- he's making evidentiary
19 statements. He's not under oath.

20 MR. HILDEBRAND: I will withdraw
21 it, Your Honor.

22 THE COURT: Okay.

23 MR. HILDEBRAND: What exhibit are
24 we on now?

25 THE COURT: 344.

1 (PLF. EXH. 344 was marked for
2 identification.)

3 BY MR. HILDEBRAND:

4 Q. All right. I want to hand you what has
5 been marked as Plaintiff's Exhibit 344 for
6 identification. All right. And that is an
7 e-mail string that the -- on the top of page 1 is
8 from Jim Clements to you dated September 8, 2017.
9 Do you recognize that document?

10 A. Yes, I do.

11 Q. All right. And this document -- turn to
12 the bottom of the second page, if you would,
13 please.

14 A. Yes, sir.

15 Q. And it's a document from Jim Clements
16 dated September 6, 2017, to yourself and to Bill
17 Bundy and copied to Kim Brown. It says, final
18 draft schedule. Do you see that?

19 A. Yes, sir.

20 Q. All right. September 6, 2017, that's
21 right at the beginning of your involvement with
22 the project, correct?

23 A. Yes, sir.

24 Q. All right. In fact, I think you've
25 testified that you had gotten involved just in

1 August. So it would have been several weeks or
2 maybe a month or so prior to this?

3 A. Yes, sir.

4 Q. All right. So let's turn to the third
5 page, and this is your e-mail again to Jim
6 Clements.

7 And it says, Mike asked that when you
8 send the final report on Friday, that it should
9 be in draft form and be sure to take whatever
10 steps necessary to title it or whatever, to be
11 sure it is not discoverable for submittal. If
12 you are unsure how to present it by copy of this
13 e-mail, I ask that Bill provide direction or you
14 with me first.

15 So it says, Mike asked. Who is Mike?

16 A. I really don't know.

17 Q. Do you think it's probably Mike Bennett?

18 A. It could be.

19 Q. Did you meet with any other Mikes when
20 you were being interviewed or during this early
21 process from the Library Associates side, to your
22 recollection?

23 A. Not that -- not that I know of.

24 Q. Okay. Would you agree that that's --
25 your reference to Mike was probably Mike Bennett?

1 A. He's been Mr. Bennett to me all my life,
2 so I don't think I would have referenced him as
3 Mike. So honestly, I -- it could be. I can't
4 believe that I would call Mr. Bennett Mike,
5 though.

6 Q. Okay. All right. So you've known
7 Mr. Bennett all your life?

8 A. I've done -- we did the Embassy Suites
9 many, many years ago. So I mean, I've -- we've
10 worked with him in the past. So it's been a
11 long, long gap between our involvement, but yes.

12 Q. All right. Okay. Well, whoever asked
13 you, whatever Mike it was, it says to be sure
14 take whatever steps necessary to title it or
15 whatever to be sure it's not discoverable or
16 submittal. Do you know why that request was made
17 of you?

18 A. I do not.

19 Q. Do you know what the concern was of you
20 sharing your audit responses to Balfour?

21 MR. BUNDY: Objection. The witness
22 already answered the question. He didn't know.

23 THE COURT: I think that was his
24 testimony. I assume that's your answer?

25 THE WITNESS: I have no idea.

1 BY MR. HILDEBRAND:

2 Q. Okay. Do you recall when Mike asked you
3 to keep the report on non-discoverable and
4 non-submittable; do you remember --

5 MR. BUNDY: Objection.

6 Misrepresents what's in the e-mail. The e-mail
7 was sent by Jim Clements. I don't know how he is
8 saying that Mr. Grady Query would know who Mike
9 was when he didn't author this e-mail. So I
10 object this line of questioning.

11 THE COURT: Sustain that objection.

12 MR. HILDEBRAND: Okay. All right.

13 BY MR. HILDEBRAND:

14 Q. Do you have any knowledge of -- from
15 having spoken with anybody from Library
16 Associates and either Jim Clements or Bill Bundy,
17 who is on this e-mail or anybody else, why it was
18 important to Library Associates to keep your
19 audits not discoverable for submittal?

20 MR. BUNDY: Objection. Asked and
21 answered. The witness says he doesn't know.

22 THE COURT: I'm going to allow that
23 one. Go ahead.

24 THE WITNESS: I do not.

25 BY MR. HILDEBRAND:

1 Q. Okay. And that would be -- that
2 directive would be contrary to what you thought
3 was in the best interest of the project in order
4 for it to go forward in a timely fashion? You
5 thought it was important for those audits to be
6 provided to Balfour, correct?

7 MR. BUNDY: I think he is
8 mischaracterizing the statements on direct.
9 Direct will speak for itself, but I object.

10 MR. HILDEBRAND: Your Honor, I --

11 THE COURT: Overruled. Overruled.
12 Go ahead.

13 THE WITNESS: I would have liked
14 for them to see it, absolutely. I was also the
15 only one at the time that knew what the audit
16 said.

17 BY MR. HILDEBRAND:

18 Q. Right. All right. And then your
19 direction, as shown at the bottom of the first
20 page from Jim Clements to yourself was, Grady,
21 mark the report as draft.

22 Included in the heading, quote,
23 attorney-client privileged information prepared
24 in anticipation of litigation. Then send the
25 report to Bill Bundy. Bill will then distribute

1 to Mike, Kim, and me. As long as it stays
2 amongst us, it is protected. Did I read that
3 correctly?

4 A. Yes, sir.

5 Q. Did you ask Jim Clements why he wanted
6 the document, why he wanted you to edit
7 attorney-client privileged information prepared
8 in anticipation of litigation?

9 A. I just asked how they wanted me to
10 prepare it, as far as the header and being --
11 having draft on it. So, no, I did not ask
12 anything beyond that.

13 Q. Okay. Well, do you have any knowledge
14 of why they wanted you to include that?

15 A. I mean, I just guessed at it, that I was
16 the only one at the time that knew what it said.
17 But, I mean, that would be my only guesstimate.

18 MR. BUNDY: Move to strike the
19 answer. The witness isn't allowed to guess.
20 Speculation by definition.

21 MR. HILDEBRAND: It's still his
22 answer, Your Honor, so I would --

23 MR. BUNDY: No, but you can't
24 guess. That's not evidence. Guesses are not
25 evidence. They're not likely to lead to anything

1 that's relevant.

2 THE COURT: I will grant that
3 objection.

4 MR. BUNDY: Thank you, Your Honor.

5 THE COURT: Motion to strike
6 granted.

7 MR. HILDEBRAND: Your Honor, I
8 would like to move this into evidence as our
9 Plaintiff's Exhibit 344.

10 THE COURT: Any objection?

11 MR. BUNDY: Objection, relevant.

12 THE COURT: Overruled. It's in.

13 (PLF. EXH. 344 was received in
14 evidence.)

15 BY MR. HILDEBRAND:

16 Q. Okay. So you provided the first audit,
17 and then subsequently, you provided a number of
18 other audits that Mr. Bundy introduced yesterday,
19 correct?

20 A. Yes, sir.

21 Q. All right. And then in early 2018, as I
22 understand it, you had a meeting with some people
23 from Balfour. In fact, you had two meetings with
24 people from Balfour, where you introduced
25 yourself and you made suggestions on how you

1 thought the schedule could be improved to go
2 forward, correct?

3 A. Well, I had introduced myself earlier
4 when I had done the site walks. I know we had at
5 least one meeting and maybe a couple of
6 conference calls. I couldn't really recall
7 exactly the date of the meeting or how many times
8 we met. But we definitely met at least on one
9 occasion.

10 Q. Okay. And that was in early 2018?

11 A. I believe so.

12 Q. Okay. Who from Library Associates was
13 in attendance in that meeting?

14 A. Well, Mr. Clements with Matrix was
15 there, but no one from Library Associates.

16 Q. Okay. And who from Balfour was there?

17 A. I believe Nick.

18 Q. Starcevic?

19 A. Yes, sorry. I don't have the board to
20 reference.

21 Q. Right.

22 A. Joe Lauricella, and then I believe that
23 the senior PM.

24 Q. Tim Spano or David Simonton?

25 THE WITNESS: I apologize, I don't

1 remember your name.

2 MR. SPANO: I'm Tim Spano.

3 THE WITNESS: Thank you. Tim Spano
4 was there.

5 BY MR. HILDEBRAND:

6 Q. All right.

7 A. I don't recall who else was there.

8 Q. All right. And as I understood from
9 your testimony yesterday, you found them to be
10 receptive to your comments and it was a good
11 dialogue and a good exchange?

12 A. That's how I recall it.

13 Q. And to be clear, after that meeting, no
14 audits, to your knowledge, were provided to
15 Balfour? None of your subsequent audits,
16 correct?

17 A. I don't know of any audits.

18 Q. Let me ask you this: Other than the
19 audits, was any other work product or reports or
20 findings or recommendations or anything like that
21 of yours in writing provided to Balfour?

22 A. Not in writing.

23 (PLF. EXH. 345 was marked for
24 identification.)

25 Q. Okay. I'm going to hand you what I've

1 marked as Exhibit 345. This is an e-mail from
2 Jim Clements to yourself dated January 30, 2018.
3 So this is pretty early in your involvement in
4 the job, correct?

5 A. Yes, sir.

6 Q. And as I understand it, your involvement
7 ended -- was it in September or October of this
8 year, of 2018?

9 A. I think it was around October of 2018.

10 Q. Okay. And that's when your last audit
11 was done?

12 A. Our last audit was done in August of
13 2018.

14 Q. Okay. All right. So this was pretty
15 early in the project. Do you recognize this
16 document?

17 A. I do.

18 Q. All right. And then in the e-mail from
19 you to Jim Clements dated that same date at 7:31
20 in the morning, it says, I think the 9 July '18
21 hotel opening reflects the best case scenario
22 based upon the guest room progress to-date.

23 Outstanding design procurement items
24 could push it past this date, but BBC's progress
25 would have to start meeting their projected dates

1 to maintain the 9 July '18 hotel opening which
2 has yet to happen. We will turnaround schedule
3 review one week at most accuracy?

4 All right. So you were looking at what
5 was anticipated -- what was scheduled to be the
6 opening of the hotel was 9 July of 2018, correct?

7 A. Yes, sir.

8 Q. All right. It says, that's the best
9 case scenario. Outstanding design procurement
10 items could push this -- the opening past this
11 date. What design and procurement items were you
12 referencing?

13 A. There were several -- I mean, we were --
14 the only tool we had to project was Balfour
15 Beatty's schedule. So we were using that and
16 there were designer procurement dates, whether
17 constrained or whatever, in the schedule which
18 were showing as having -- being low float items.
19 So those were the ones I was referring to.

20 Q. Okay. And just so that I'm clear, when
21 it says that -- just from what you're describing
22 so that I can understand in layman's terms, are
23 you telling me that looking at the schedule that
24 Balfour had provided, that it was awaiting design
25 information and procurement information from

1 other people, and that the results of obtaining
2 that information might impact the scheduled. Is
3 that a fair statement?

4 A. They had listed, you know, CCDs and
5 supplemental instructions as near critical path
6 items on the schedule, and that's what I was
7 referring to. I don't know where in the progress
8 of awaiting information or pricing information
9 those were because I don't really recall which
10 one specifically I was referring to.

11 Q. Okay. Well, the CCD, that's a
12 construction change directive?

13 A. Yes, sir.

14 Q. Okay. And that's something that the --
15 if the owner wants the contractor to do work and
16 there has not been an agreement on exactly what
17 it would, then the owner can just unilaterally
18 tell the contractor, do this work through a CCD,
19 and then contractor is obligated to do it, and
20 the price will be determined later. Is that a
21 fair statement?

22 A. Cost plus, correct.

23 Q. Okay. So when the schedule showed that
24 there were CCD items that were outstanding,
25 that's an indication to you that Balfour was

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

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

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

11 A. Correct.

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

15 A. Correct.

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

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

24 A. Correct.

25 Q. All right. And in your opinion and

1 based upon your forensic expert testimony and
2 work that you talked about with Mr. Bundy, a
3 critical path analysis is required in order for
4 you or any other competent scheduling expert to
5 come in here to the Court and render opinions on
6 what caused the delays and to whom the delays
7 would be appropriately attributable, correct?

8 A. I didn't do a forensic analysis.

9 Q. I understand. I'm just asking you, in
10 order for you to render your -- to render such an
11 opinion here today, that would have been
12 required, correct?

13 A. Granted that I'm not a forensic expert
14 as we've determined here.

15 Q. I was a little confused, and I thought
16 that that's -- Mr. Bundy did. Okay. I will
17 strike that question.

18 A. I consider myself to be one. I thought
19 you did not.

20 Q. I wasn't real clear on that. And let me
21 ask you this.

22 MR. BUNDY: You weren't, but now
23 you are.

24 BY MR. HILDEBRAND:

25 Q. From the forensic analysis that you've

1 done, the simple question is, is a critical path
2 analysis required in your professional opinion to
3 render an opinion as to delays and to whom they
4 would be attributable?

5 A. Well, delays are delays to the critical
6 path or your critical path. So you would
7 absolutely have to have a very clear knowledge of
8 what the critical path was.

9 Q. Right. And all I'm getting at with that
10 is, that that was not done and the audits that
11 you promulgated were not done from a forensic
12 scheduling standpoint, correct?

13 A. No.

14 Q. No, that is correct?

15 A. I think there was no forensic efforts in
16 my audits.

17 Q. Okay. So when you state that Balfour,
18 its progress would have start meeting their
19 projected dates, what -- the reasons for those
20 delays, you don't have an opinion here today,
21 correct?

22 A. I don't have an opinion of why they
23 didn't meet the dates from their 13 -- from the
24 three -- I was referencing in that comment,
25 there's both the variances from the 4 August to

1 the 4 December update, and also the variances on
2 their ability to match on the 4 December, we did
3 a walk on 9 December. And on all floors and all
4 areas, they were behind schedule.

5 Q. Okay. Let's turn to a few of your
6 reports, a few of your audits, if you would,
7 please. Do you still have them there?

8 A. I think I do, sure. Which one are we
9 looking at?

10 Q. Let's turn, if we could, to May 20,
11 which I think was Library's Exhibit 98,
12 Defendant's Exhibit 98.

13 A. I have it.

14 THE COURT: Now, which number are
15 we?

16 MR. HILDEBRAND: 98.

17 THE COURT: 98? Okay.

18 BY MR. HILDEBRAND:

19 Q. All right. Do you have that in front of
20 you?

21 A. Yes.

22 Q. All right. This is an audit letter --

23 MR. HILDEBRAND: Your Honor, I
24 don't believe I introduced Exhibit 345 into
25 evidence, but I would like to do that.

1 he's not dictated are price and time of
2 construction?

3 A. Not in this contract.

4 Q. Okay. And that's up to the contractor
5 to offer; is that correct?

6 A. Yes, sir.

7 Q. Okay.

8 A. Now, obviously we have guidance of where
9 he thinks the cost is from the RFP process.

10 Q. Sure.

11 A. Right.

12 Q. Okay. So let's back up a minute. I
13 want to go through the process in a little bit
14 more detail. So you prepare the RFP, you consult
15 with your owner, and you decide who you're going
16 to invite, who you're going to send it to?

17 A. Yes, sir.

18 Q. You make a decision, and you send it
19 out, correct?

20 A. Yes, sir.

21 Q. If they haven't call you, you're getting
22 to -- you're going to them, correct?

23 A. Yes, sir.

24 Q. Sort of like an invitational golf event
25 or something?

1 A. Yeah. I called them ahead of time and
2 say, I've got this project, are you interested?
3 You know, because you don't want to send it out
4 and have them it back.

5 Q. Sure, sure.

6 A. Right.

7 Q. And if Balfour Beatty said they're not
8 interested, you wouldn't have sent it to them?

9 A. Agreed.

10 Q. Because you can't make people respond to
11 a request for proposal?

12 A. No.

13 Q. Okay. So how long was it between the
14 time you sent the request for proposals out, to
15 the best of your recollection, and when there was
16 any interaction, so to speak, or a response from
17 the reported or proposed construction managers?

18 A. Well, I always give them three weeks.
19 If they need a time extension, we're open to
20 that. Because obviously we want as complete a
21 price as possible.

22 During the -- I will call it the bid
23 process, there are opportunities defined in the
24 format of the RFP to submit questions, and those
25 questions are received by myself and the

1 architect of record.

2 And we answered those questions, and
3 regardless of who sent the questions in, the
4 questions and all the answers are sent back out
5 to all the bidders again to maintain an open
6 playing field.

7 Q. Which is much like it's done in the
8 public setting. If somebody is asking a
9 question, then everybody is entitled to the
10 benefit of it, so everybody is on level ground
11 when they make their competitive bid, correct?

12 A. Yes, sir.

13 Q. Okay. But unlike a public situation,
14 Mr. Bennett was not required to accept the lowest
15 price or the shortest time, was he?

16 A. No, sir.

17 Q. Okay. And did he accept the lowest
18 price or the shortest time?

19 A. Actually, honestly, I don't recall what
20 the numbers were. I did the reconciliation of
21 them. I believe Welbro, who had worked before,
22 was the lowest bid, and I believe that WM Jordan
23 was the highest bid, and Balfour Beatty was right
24 there in the mix.

25 And you're not just looking at total

1 price because you have to remember that this is
2 about fee and general conditions, this type of
3 format. In this contract, particularly, we
4 generally fixed the general conditions as a mini
5 GMP.

6 So you have the project guaranteed
7 maximum price, but then, within the total
8 project, there's a GMP on general conditions, and
9 sometimes contractors will ask to do a lump sum,
10 but in this particular case, it was -- we called
11 it a mini GMP.

12 Q. When the contractor is included with the
13 request for proposal, was it acceptable for any
14 of the prospective bidders to ask questions about
15 the contract or provide information, they weren't
16 going to agree to those terms? Was that
17 available to them?

18 A. It is required by the terms of the RFP.
19 The RFP is very explicit. You have one bite at
20 the apple. When you respond, you have to have
21 all of your exceptions. You're not allowed to
22 change your exceptions, but the owner is allowed
23 to change the contract in response to your
24 exceptions.

25 Q. Now, let's go to the next step. Three

1 weeks have passed by and the three -- I see three
2 contractors.

3 A. Yes, sir.

4 Q. Looking at it, there's three general
5 constructions managers that looked at it. Is
6 there any type of meeting or presentation that's
7 made?

8 A. Yes, sir. Well, we go through an
9 interview process. So the first stage is they
10 respond. There may be some questions and answers
11 to further verify their response. In the RFP,
12 the actual interview dates are published,
13 anticipated interview dates.

14 And in fact, we had interviews with all
15 three contractors, including myself, the
16 architect of record. I think you were there,
17 Mike Bennett. I don't remember if Kim was there,
18 but I think she was. But basically, it's an open
19 forum where the contractor is allowed to present,
20 and then we asked our questions.

21 Q. So is it similar to when somebody is
22 looking for a lawyer, they sort of have a beauty
23 contest, and they let two or three different
24 lawyers come in and, of course, they don't hire
25 me because I'm too rude, but they might hire the

1 next guy, right?

2 A. Yes, sir.

3 Q. Okay. So that's what went on?

4 A. Yes, sir.

5 Q. They had a beauty contest?

6 A. I've got to get some of this stuff out
7 of the way. I can't -- it's too tight for me.

8 MR. BUNDY: Your Honor, it's noon.
9 It might be a good time to sort of regroup if
10 that suits you.

11 THE COURT: I was going to run
12 until about 1 today.

13 MR. BUNDY: All right, sir.

14 BY MR. BUNDY:

15 Q. I want to know, how long do these
16 interviews -- where did the interviews take
17 place?

18 A. Actually, they took place at the Hampton
19 Inn, Mike's hotel.

20 Q. Okay. And --

21 A. In one of the meeting rooms.

22 Q. And Defendant's Exhibit -- did the
23 prospective construction managers bring
24 documentation or a response to the RFP?

25 A. They were required to provide hard

1 copies and electronic versions.

2 Q. I hand you what's been previously
3 introduced in evidence as Defendant's Exhibit 39.
4 Can you identify this as the response to the RFP
5 provided by Balfour Beatty Construction,
6 plaintiff, in this case?

7 A. It certainly looks like that. You know,
8 I recognize the project team proposed --

9 Q. It's previously been identified, and
10 it's in evidence.

11 A. Yes, sir.

12 Q. All right. So who was it again that was
13 your contact at Balfour Beatty that led you to
14 believe that Balfour Beatty would be a good
15 choice to receive a request for proposal?

16 A. Mike Baumbach.

17 Q. Okay. And what do you know about
18 Mr. Baumbach's construction history or
19 credentials and why was it that you thought it
20 was a good idea that Baumbach and Balfour Beatty
21 be invited?

22 A. Well, I had done a lot of work around
23 Mike Baumbach in healthcare. Healthcare is very
24 difficult. It is very intensive, a lot of
25 technology, kitchens, rooms. But more

1 THE COURT: Just one second.

2 MR. HILDEBRAND: I think he needs
3 to ask what these people were going to do
4 relative to the project documents. But, again,
5 he is just leading this witness.

6 Every question, it's a -- it is just a
7 flagrantly leading question. If he would just
8 ask him what he did and what they were going to
9 do next and what their responsibilities were,
10 I've got no problem with that.

11 THE COURT: Okay.

12 MR. HILDEBRAND: Every question
13 is -- basically is a leading question.

14 THE COURT: All right. See if you
15 can bring that down a little bit. What were they
16 hired to do and what did they do.

17 MR. BUNDY: All right.

18 BY MR. BUNDY:

19 Q. What was the work of the Project
20 Solutions team as outlined in this request for
21 proposal -- as requested in the request for
22 proposal?

23 A. Well, keep in mind, it's a two-stage
24 proposal. The first stage is preconstruction to
25 develop a guaranteed maximum price. So the

1 Project Solutions, by virtue of their titles and
2 what I know of some of these individuals, they
3 were the preconstruction team.

4 Q. Okay. And what deliverable, if any, was
5 the project construction team supposed to provide
6 at the end of their work?

7 A. The guaranteed maximum price proposal, a
8 schedule, and any qualifications to that price.
9 I think that's about it.

10 Q. And other than the in-house people that
11 the Project Solutions team worked with, who else
12 did they work with who worked on this job during
13 that project team work product?

14 A. Well, Mike Baumbach was very, very
15 involved. Bret Estridge, who was the -- as I
16 recall, the project manager on Ritz-Carlton was
17 involved as well. In fact, I think, as I recall,
18 Bret and I finalized the GMP contract. You and
19 Mike started out with it, and then Bret and I
20 actually finished it up.

21 Q. And my question was -- I guess I didn't
22 ask a very good question. Outside of the Balfour
23 Beatty Project Solutions team, who did they work
24 with outside of their team in order to accomplish
25 their delivery?

1 A. Yeah. I mean, incrementally, amongst
2 the activities, I don't recall where it was, but
3 as I recall correctly, the RFP was 24 months and
4 we ended up in 27 months.

5 Q. Okay. All right. So now, we're in the
6 next phase in the construction or the
7 architectural duties of the architect as it
8 relates to his document, is the construction
9 documents phase; is that correct?

10 A. Yes, sir.

11 Q. Okay. And at this point, where is the
12 GMP in the process before the construction
13 documents begin?

14 A. Well, it's a moving target through the
15 process.

16 Q. Okay.

17 A. In September -- let me get my numbers
18 right -- of 2014, Balfour Beatty proposed a GMP,
19 and -- well, let me say this differently. They
20 proposed a GMP, and they felt the documents
21 weren't complete enough to go forward.

22 And they put it on the table for Mike to
23 make a decision, meaning that -- because the
24 market was so good. Take advantage of the
25 market. We were, you know, nine months into

1 preconstruction, or we could continue to find --
2 refine the drawings and, you know, really tweak
3 them and then go out later.

4 So they gave us the option of an
5 additional extension. I believe it was \$36,000.
6 I think the total price for preconstruction ended
7 up being \$66,000. But Mike wanted to go ahead
8 and have higher cost security and paid the
9 additional \$36,000.

10 So that took preconstruction from, you
11 know, September into the following year, and then
12 as you know, when we issued the -- signed the
13 contract for the GMP.

14 Q. All right. Let me see if I understand
15 this. The initial preconstruction agreement was
16 for 30-some-odd thousand dollars for their
17 services?

18 A. Yes, sir.

19 Q. Okay. And there came a point in time in
20 September of 2014 --

21 A. '14, yes, sir.

22 Q. -- where the -- where BBC offered an
23 alternative?

24 A. They proposed going to contract at that
25 time with the documents, or they suggested that

1 we could refine them more for greater cost
2 security for -- by extending the general
3 conditions and giving WLA an opportunity to
4 further refine their documents, and then go to --
5 and then finalize the GMP at that time and start
6 working for that.

7 Q. Okay. And that was a choice that was
8 made by Mr. Bennett based on those two options?

9 A. Yeah. Mike came to the office. Sandeen
10 was there. I think Bill Lorenzo was there
11 actually, too. And we sat around this conference
12 table and had a discussion.

13 Q. Okay. So what was Balfour Beatty going
14 to provide for this additional 30-some-odd
15 thousand dollars, and what was Mr. Bennett paying
16 for, for this additional 30-some-odd thousand
17 dollars?

18 A. Well, their expertise in terms of
19 analysis of means and methods and pricing, cost
20 security, just a further refinement of their
21 analysis of the probable costs and durations of
22 the project.

23 Q. Okay. And how did -- and that time
24 period for the 30-some-odd thousand dollars
25 lasted how long?

1 A. The proposal, as I recall, was September
2 2014, and, you know, we had issued those
3 (inaudible) in March of the following year.

4 Q. So was it nine --

5 A. Six months.

6 Q. Six months?

7 A. I mean, five to six months.

8 Q. Okay. So during that six months, what
9 was going on with the construction documents?
10 Were we now into the construction document phase?

11 A. Oh, yes. We were well into that, and we
12 were just further refining them.

13 Q. Okay.

14 A. Balfour Beatty would give us feedback on
15 certain items, and Buck went to work to refine
16 them, I think. We ultimately ended up with
17 documents that Buck called 101 percent.

18 Q. Okay. So is it a fair statement that
19 during that six months from the additional
20 30-some-odd thousand dollars, both Balfour Beatty
21 and the architect were refining their respective
22 deliverables or worked product?

23 A. Yes.

24 Q. And do you know whether or not they
25 worked in conjunction with each other and

1 communicated with each other during that period?

2 A. Absolutely.

3 Q. Do you know whether or not the
4 deliverables that were produced by Balfour Beatty
5 in the terms of price and deliverables that were
6 produced by the architect in terms of the
7 documents, were affected by the communications
8 and interactions between those two entities?

9 A. Absolutely.

10 Q. Okay. And is that what was expected?

11 A. Absolutely.

12 Q. Okay.

13 A. The whole intent.

14 Q. All right. And did the team that was
15 working on that -- I'm getting ready -- we're
16 getting close to the end of the first portion of
17 their delivery. Was the team pretty much the
18 same during that period up until the --

19 A. Never wavered.

20 Q. Huh?

21 A. Never wavered.

22 Q. There were?

23 A. It Never wavered.

24 Q. Never wavered. I'm sorry. I didn't
25 hear it. Okay. So then, at some point, Balfour

1 Beatty produces what in order to move to the next
2 step?

3 A. Well, Balfour Beatty produced their
4 formal GMP proposal.

5 Q. And that's guaranteed maximum price?

6 A. Guaranteed maximum price.

7 Q. Okay. And explain that a little bit
8 just for -- just to elucidate that a little bit
9 more. What does that mean in terms of the --

10 A. Well, a lump sum price is just that.
11 Here's five bucks. Go build me this building for
12 five bucks. Lump sum says that, we guarantee
13 that this project will not exceed this based on
14 the documents that you have provided.

15 These were our qualifications to that
16 proposal, which might include allowances or
17 exclusions or things like that. We are going to
18 run this project based on an open book business,
19 meaning that, we will see actual cost, and at the
20 end of the day, there will be a reconciliation of
21 cost.

22 And depending on the respondent's
23 proposal, those savings may be shared between the
24 contractor and the owner.

25 Q. And that was done?

1 A. That was done.

2 Q. And who arrived at the GMP price? Whose
3 work product was that?

4 A. Balfour Beatty.

5 Q. Okay. Now, what, if anything, was the
6 importance to the owner, Library Associates, of
7 the time the project was going to be delivered?
8 Did time matter? Was that an issue or something
9 that was important?

10 A. Well, I'm sure Mike wanted it as fast as
11 possible, but at no time did Mike ask me to
12 negotiate time or cost.

13 Q. Okay. So who selected the contract
14 duration?

15 A. Balfour Beatty.

16 Q. All right. Once the contract duration
17 was established, what was the importance of that
18 date?

19 A. It was very important. I mean, are you
20 talking about the duration?

21 Q. Well, the completion date, the duration,
22 either one.

23 A. I guess everything.

24 Q. Okay.

25 A. I mean, to Balfour Beatty's position, it

1 was important because, if I recall correctly,
2 there were liquidated damages on the order. I
3 think it was \$9,000 or \$7,000. I can't remember.
4 So that as -- obviously that was very, very
5 important.

6 Q. Well, let's stop there then and talk
7 about that. What are liquidated damages?

8 A. Liquidated damages are a way for a
9 contractor to limit its exposure to damages.

10 Q. For delay?

11 A. For delay. And it's a perk inspired
12 contract as opposed to actual damages. And in
13 this case, Mike was open to that. And I remember
14 the discussions about the liquidated damage and
15 what liquidated damages.

16 Now, what liquidated damages mean is
17 they don't mean -- they mean specifically with
18 regard to your profitability, the profit. It has
19 nothing to do with, if Mike's hotel was making
20 300,000 gross a month or just say \$300,000
21 dollars gross, you wouldn't divide that by 30
22 days and come up with, you know, liquidated
23 damages.

24 It's actually the profit, the loss. And
25 I don't like doing it because owners get taken

1 bidders to bid the project. So dialing it in is
2 important. So while an owner may have a loss
3 profitability of 10 or \$20,000 a day, you would
4 never get anybody to bid the job.

5 Q. And do you know whether or not Library
6 Associates actually made a calculation prior to
7 entering into the liquidated damage cost to
8 determine what that number would be?

9 A. I remember Mike saying the number. It
10 was in the tens of thousands of dollars.

11 Q. And do you know whether or not that was
12 a negotiated, a hotly negotiated issue in this
13 contract, about what that amount was going to be?

14 A. You know, I would say, no, and I would
15 tell you why because Mike trusted Mike.

16 Q. Baumbach trusted Bennett and Bennett
17 trusted Baumbach or both?

18 A. Yeah. They had a very good working
19 relationship. There was a strong bond there, and
20 it was no protracted negotiations. It was just
21 resolved.

22 Q. Okay. So, now, we're at the point where
23 you have a -- y'all signed the contract at that
24 point, right?

25 A. No.

1 Q. No? Tell me what happened.

2 A. Well, we came down to the wire. And
3 there was a number on the table, and I don't
4 remember what it was at the time. And Mike
5 Baumbach asked me to come to Charlotte for a
6 meeting, to their offices. And I did that, and I
7 sat down in the conference room and he and
8 Sandeen were --

9 MR. HILDEBRAND: Objection, Your
10 Honor, hearsay.

11 MR. BUNDY: It's Mike Baumbach. He
12 was the vice president of Balfour Beatty.

13 MR. HILDEBRAND: It's still an
14 out-of-court statement offered as burden of
15 proof. It's hearsay.

16 THE WITNESS: Well, I will cut to
17 the chase.

18 BY MR. BUNDY:

19 Q. Okay. You went to Charlotte, and you
20 had a conversation with Mr. Baumbach, correct?

21 A. Correct.

22 Q. And as a result of that conversation,
23 what happened?

24 A. Balfour Beatty added \$870,000 to their
25 general conditions number.

1 Q. And did Bennett agree to it?

2 A. Ultimately, but he was not happy.

3 Q. Why not?

4 A. Well, because it was out of the blue.

5 Jeff Sandeen told Mike Baumbach -- I was there.

6 I need this money to -- in the general conditions
7 to build the project.

8 And so Mike looked at me. I called Mike
9 Bennett, listened to him scream for a few
10 minutes, and then I drove right back to
11 Charleston to sit down with Mike to talk about
12 it.

13 Q. Okay. Where would Bennett have been if
14 he had not have -- he didn't have to take it,
15 right? He could have said no?

16 A. Correct.

17 Q. Okay. And where would that have put the
18 hotel project if he would have said no, assuming
19 that Balfour Beatty was not going to move? Where
20 would Bennett have been? What would have been
21 his next move from your standpoint as his program
22 manager?

23 MR. HILDEBRAND: Calls for
24 speculation, Your Honor.

25 THE WITNESS: The contract

1 allowance -- I'm sorry.

2 MR. BUNDY: It's not speculation.

3 I'm asking him what he would have -- what would
4 have happened if they didn't do this, where that
5 would have put him.

6 THE COURT: I think it's self
7 management again, is it not?

8 MR BUNDY: Yes.

9 THE COURT: All right.

10 THE WITNESS: I can tell you what
11 the contract provides.

12 THE COURT: Does the contract
13 provide for this?

14 THE WITNESS: It does.

15 THE COURT: All right. Go ahead.

16 THE WITNESS: The contract clearly
17 says that the owner doesn't owe you this project,
18 and it's absolutely spelled out.

19 THE COURT: Sure.

20 THE WITNESS: So at that point, you
21 simply close out stage one. We have a complete
22 set of documents that have been worked on,
23 embedded for the better part of 15 months, I
24 guess. And we've offered lump sum proposals, or
25 we could go out for CM risk proposals, just

1 without the two stage format.

2 THE COURT: Okay. This is still
3 preconstruction phase, correct?

4 THE WITNESS: Well, we would be
5 transcending to the construction phase --

6 THE COURT: Transitioning?

7 THE WITNESS: Transitioning, thank
8 you.

9 THE COURT: Okay.

10 BY MR. BUNDY:

11 Q. So there was no obligation to proceed to
12 the next step?

13 A. No. There was -- not from the -- never
14 during the process was there an obligation to
15 proceed to the next step.

16 Q. All right. So Bennett agreed to the
17 extra 800,000 bucks?

18 A. Yes.

19 Q. All right. And when did you -- and then
20 you entered into a contract, this negotiated
21 contract, correct?

22 A. Yes.

23 Q. Okay. What happened then? Give the
24 Judge just the steps of what happens then.

25 A. Well, it was -- once we had the final

1 for Tim. And then Bob Cotherman was the
2 superintendent. And early on, I don't recall --
3 eventually, Dan Ricci transitioned onto the
4 project.

5 I think it was during the foundation
6 period because Dan's background was structures,
7 concrete, heavy concrete. And so he was perfect
8 in terms of taking the building through top value
9 of the structure.

10 Q. What role, if anything, did you play in
11 the scheduling of this job or creating the
12 schedule?

13 A. I didn't play any role.

14 Q. What role did Library Associates play in
15 creating the schedule on this job?

16 A. None.

17 Q. Who created the schedule on this job?

18 A. Balfour Beatty.

19 Q. Okay. Do you know who at Balfour
20 Beatty?

21 A. No.

22 Q. If you would -- when the job started,
23 were there any particular challenges or events
24 that you recall, let's say for the first -- I
25 don't know. Let's start with the first six

1 but we worked -- myself, particularly, and Foster
2 Gaillard, who is Mike's real estate attorney, who
3 has a very personal relationship with the head of
4 the BAR, he and I had several meetings with them,
5 you know, beating our hearts, asking for
6 leniency. And that was of tremendous value.
7 That's how we were able to do what we did.

8 Ultimately, that's how we were able to
9 transfer that Hope's door into the building.

10 Q. So you were able to amend the BAR's hurt
11 feelings?

12 A. Suck up big time.

13 Q. There you go. All right. So let's talk
14 a minute about a punch list. What is a punch
15 list?

16 A. Well, the intent of the contract
17 documents and included in that is the
18 specifications, the expectations. Punch lists
19 are -- is a record of non-compliant items.
20 Typically, it could be anything, finishes,
21 interior, exterior, parking lots, drippy faucets.
22 It's just something doesn't meet the intent of
23 the contract documents.

24 Q. And in order to obtain -- what is the
25 relationship between satisfactorily completing

1 the punch list and substantial completion, if
2 anything?

3 A. It is not a requirement. A punch list
4 is a requirement of substantial completion, and
5 the extent of that punch list, as discerned by
6 the architect, meaning that you can't have a --
7 you can have a punch list that prohibits the
8 owner from occupying a building.

9 That would be unacceptable, but you can
10 have a punch list, and that punch list is to be
11 attached to the certificate of substantial
12 completion because the expectation then is for
13 the contractor to get done, knock out the punch
14 list.

15 The case in point of the exterior of the
16 building, that final punch list was provided to
17 the architect of record in May 2019. The hotel
18 opened up in January 25th or 27th of 2019.

19 Q. So the contractor didn't provide -- who
20 is supposed to provide the first punch list?

21 A. The contractor.

22 Q. Okay. So --

23 A. Let me clarify. The main submittal was
24 the completion of the punch list.

25 Q. Right. But, I mean, just in terms of --

1 A. The process is thus; the contractor
2 provides the subcontractor's punch list. He runs
3 through the punch list, gets it done, signs it
4 off, and gives it to the architect of record and
5 says, hey, I'm done. And, you know, this is the
6 whole scope of the work, MEP, everything.

7 The architect then comes out to the job
8 site to investigate. Typical contract terms
9 are -- meaning general contractor terms and
10 architect's agreement terms is that the architect
11 will come out, inspect, and provide its punch
12 list, and then will come back again to see if
13 that punch list is done.

14 If the architect comes back a third
15 time, they're usually looking for money. But
16 that's generally how it is done. It starts with
17 the contractor, though.

18 Q. Okay. But when you say, "they're
19 looking for money," you mean the architect?

20 A. Architect, yes.

21 Q. The architect is making an additional
22 field trip he hadn't -- he hadn't been paid -- it
23 wasn't included in his original --

24 A. A lot of them will only do one. Buck
25 had -- as I recall, had two.

1 Q. Okay. I just wanted to -- there's some
2 confusion, I think, with some people that the
3 owner is supposed to prepare the punch list.
4 That's the responsibility of the contractor, to
5 prepare -- to punch list his own job?

6 A. The initial punch list, yes, sir.

7 Q. So, now, you said there are punch list
8 items that can be -- you can obtain substantial
9 completion, but attached to it, a punch list
10 which must be completed before your final
11 completion, I guess, would be the next stage?

12 A. Yes, sir.

13 Q. But there are some things that would
14 be -- I guess you could call them punch list
15 items that can't be on -- that won't allow you to
16 get a substantial completion. In other words, I
17 haven't quite put in the sprinklers yet, but I'm
18 going to get to that, right?

19 A. Yeah.

20 Q. That doesn't work that way, right?

21 A. Well, sprinklers wouldn't -- you would
22 never get there. So I will give you a case in
23 point.

24 Mixed use development apartments, for
25 instance, you can get a TCO without any kitchen

1 cabinets as long as you have a range and a sink
2 stand, right? You don't have to have anything
3 else in there, in terms of the kitchen. But the
4 owner certainly can't use that, right.

5 Q. Right.

6 A. So you've got a TCO, but you don't have
7 substantial completion.

8 Q. Beneficial occupancy?

9 A. Beneficial occupancy.

10 Q. And then what are warranty items? I
11 mean, let's go through the whole thing. When
12 does the warranty begin, expressed warranty?

13 A. The warranty begins at certificate of
14 substantial completion.

15 Q. All right. And typically, it's -- let's
16 say it's a year, right?

17 A. Typically.

18 Q. Okay. And it's an expressed promise
19 that, within this one year, if something is
20 wrong, we'll fix it, and you don't have to tell
21 us why it's wrong. It's just wrong, and we'll
22 fix it.

23 A. It has to comply. If it does not comply
24 with the intent of the contract documents for the
25 life cycle or whatever the impact is, it's got to

1 be repaired.

2 Q. Right. And the owner doesn't have to
3 prove it was negligently installed or anything.
4 It just doesn't work?

5 A. Yes.

6 Q. Okay. All right. So tell me how -- and
7 did the punch list on this job go the way it
8 typically goes on your jobs?

9 A. No.

10 Q. Okay. If you would, tell the Judge what
11 you -- in your 30-something years of doing this,
12 how a punch list goes and how it works out at the
13 end of the job and how you finally get down to
14 the end. What normally happens?

15 A. Well, as we just discussed, the
16 contractor provided his punch list. He's
17 attached his certificate of substantial
18 completion.

19 And generally, within about 60 days,
20 they complete the punch list, and then the
21 contractor actually issues something called a
22 certificate of completion that he has done --
23 everybody is satisfied, and the project is
24 complete.

25 Q. Okay. So what happened in comparison to

1 that? That's not what happened on this job?

2 A. Well, no. We received substantial
3 completion -- sorry, TCO at the end of November.
4 Buck visited the job site in December '13 or '14.

5 Somewhere around there he issued a memo,
6 and he took exception to BBC's position on the
7 completion status on BBC's position that they had
8 completed the punch list in the guest rooms
9 because, if subsequent deficiencies were
10 uncovered, despite them having gone through a
11 punch list and signed it off, it's still
12 inconsistent, and it's at least in the warranty
13 period.

14 And Buck took exception to that. Buck
15 also noted -- and there was about -- probably a
16 dozen punch lists that he was asking for having
17 to do with the public spaces as well. I mean,
18 it's not like we've got a TCO for just the tower
19 or the first floor or something like that. It's
20 for the building.

21 So that was the architect of record's
22 interpretation of where we were from substantial
23 completion and such.

24 Now, that was in December. Right around
25 December, I actually took Mike and Kim, and

1 Balfour Beatty was ready to sign off the guest
2 rooms, which is what really started the issue.
3 So let me back up a little bit.

4 Early in December, Balfour was ready to
5 turn over the guest rooms. Not the whole
6 building, just the guest rooms. And Jennifer
7 Faulkinberry -- it was actually her idea. Let's
8 get the guest rooms turned over, and then we
9 we'll worry about, you know, the rest of the
10 building.

11 So I met on the eighth floor with Kim,
12 with Mike, David, Nick, and I think Shanti -- I
13 can't remember her last name was there. And we
14 were going to inspect rooms on the eighth floor,
15 and I think they had four identified or something
16 like that.

17 So we went into the first room, and we
18 started looking around, and I believe it was Mike
19 went to open the bathroom door, and the pocket
20 door was off of -- the trolley was off the runner
21 and hanging sideways or something like that. So
22 it didn't go well.

23 And then we started looking around, and
24 Mike particularly took exception to the level of
25 quality of the paint and the caulking. The

1 caulking had -- we would call it snots. You
2 know, imperfections in the caulking where you
3 come along and then you stop and you start
4 caulking some more. You've got a little bump
5 there. They were painted.

6 And the quality of the painting, Mike
7 felt was unacceptable, and I agreed with him
8 because these rooms had an eggshell finish, and
9 eggshell is a paint that you can't touch up. If
10 you have a spot in the wall that has to be
11 touched up, you have to paint from corner to
12 corner. And that was not the case. It was just
13 unacceptable. And I think that's proven by
14 Buck's inspection later that month.

15 Q. Who was the final arbiter of the quality
16 of the work and whether it meets the intent of
17 the contract documents?

18 A. The architect of record.

19 Q. So continue with this meeting. So you
20 went through the first one. The door falls off.
21 What's next?

22 A. Well, we look at one other room, and
23 then Mike was done, and I don't blame him. It
24 was unacceptable.

25 Q. Now, at this time, the building was how

1 Q. Okay. Do you feel like it's necessary?

2 A. Absolutely.

3 Q. Do you think you got the hotel open
4 quicker because of it?

5 A. Unquestionably.

6 Q. Do you think there were fewer problems
7 because of it?

8 A. Yes.

9 Q. All right. So let's go back to where we
10 were, which we were talking about, I think, the
11 punch lists. Let's go back now towards the
12 painting problem. That's what I want to segue
13 into now.

14 You had a punch list problem, and if you
15 need to talk about it more, we can, but now what
16 I would like to do is talk about the painting
17 issue. There's seems to be some confusion about
18 the painting.

19 So if you could talk to us first about
20 the original painting specification and your
21 understanding of it and how that was handled.

22 A. I don't remember the intimacies of the
23 painting specifications.

24 Q. Okay.

25 A. The painting was -- in the hotel tower

1 was specified by the interior designer. Buck had
2 the public areas. Buck is Winford, Lindsay &
3 Associates.

4 Prior to that '12/'13 inspection with
5 Mike, we had gone through and Balfour had gone
6 through the rooms on several occasions based on
7 inspections done by a consultant that was in
8 Balfour Beatty's contract.

9 And then Salamander inspected them and
10 found other deficiencies, and by the time that we
11 got to that inspection that I described with
12 Mike, Balfour Beatty was done in the rooms, and
13 they --

14 Q. What do you mean they were done in the
15 rooms?

16 A. They felt that they did not owe anything
17 further in terms of fixing punch lists.

18 Q. All right. And what was the condition
19 of the rooms when they basically said they're
20 done?

21 A. Well, they were furnished. Technology
22 was installed for the most part. Drapes were
23 installed.

24 Q. Did they meet the contract requirements
25 for fit and finish?

1 A. Not according to the architect of
2 record.

3 Q. And he's the arbiter of that?

4 A. He is the arbiter.

5 Q. So the architect said, doesn't meet fit
6 and finish. Contractor says, I'm not doing
7 anything else. What did you do then?

8 A. Mike called Robins & Morton.

9 Q. And who is Robins & Morton?

10 A. It's a very large contractor. I believe
11 it's privately held, but it's a big -- you know,
12 it's a billion dollar contractor.

13 And I forget the name of the gentleman
14 who's the -- had visited the site. He was the
15 president or something, but Mike had had him come
16 over and take a look at things and give advice.

17 And when Balfour said that they weren't
18 going to do any more and -- Mike felt he had
19 nothing other to do than to do it himself. And
20 so he got Robins & Morton and CPG (sic), another
21 contractor that he used on his limited services.

22 Q. CPI?

23 A. CPI. CPI to come in, and we started on
24 the -- CPI started on the fourth floor and went
25 in and did inspections, noted the deficiencies.

1 Long story short, we started repainting the
2 rooms. And it wasn't just paint, fixing doors.
3 There were instances of grout left in showers.
4 We found unpainted ceilings.

5 You know, there was -- it was a
6 hodgepodge. It was certainly not a five-star
7 hotel. And, of course, we had the caulking
8 issues, and so that was the -- I think we started
9 right after Christmas or right at Christmastime.

10 Q. Okay. So how many -- so we're now in
11 the Christmas holidays, and how many painters was
12 Mike able to get on the job to try to open his
13 hotel?

14 A. It was amazing. It was amazing how many
15 painters we had, and CPI had their own group of
16 painters. Robins & Morton had its own group of
17 painters.

18 And then Mike, with his relationships, I
19 mean, he must -- Mike must have brought in a half
20 dozen of them himself. We had an army of
21 painters. But it wasn't just painters that were
22 required because we had all this technology in
23 place that we had to take down. We had furniture
24 to move and wrap up and protect. Draperies were
25 removed. It was a monumental effort. It was

1 significant.

2 In fact, the third floor didn't open up
3 at the hotel because we just couldn't get there
4 at the end of the day. But we got the upper
5 floors opened, which particularly the fourth one
6 because I think Volvo -- I think that's who it
7 was -- had rented the entire hotel.

8 Q. And do you know how much all that work
9 cost?

10 A. A million and a half dollars, as I
11 recall.

12 Q. And do you think that was a fair price
13 to pay for the work that was done over that
14 period of time during that period of time?

15 A. Mike and I never thought it would cost
16 that much, but once you understood what it took
17 and what we received were not bids to do the
18 work, the actual cost to manifest building --
19 manifest the building.

20 And in the case of Robins & Morton, it
21 was cost plus 5 percent or something like that.
22 I don't know what CPI's agreement was. I never
23 got involved in that.

24 Q. And when that work was completed, did
25 Bennett now have the five-star hotel he bargained

1 for to start out with?

2 A. Mike Bennett was satisfied.

3 Q. Did he have more than he bargained for?
4 Did he get more than he bargained for when the
5 hotel was finally finished by these workers?

6 A. No. I need to clarify. I think it was
7 more than a million and a half dollars. That was
8 just the Robins & Morton number, I think. I
9 think CPI might have had their own invoices.

10 Q. But whatever the number was, that's what
11 it took for Bennett to spend in order to get what
12 he bargained for initially with Balfour Beatty?

13 MR. HILDEBRAND: Objection, Your
14 Honor. It's a leading question.

15 THE COURT: All right. Sustained.
16 Let's take a break for a minute, a short break.

17 (A recess transpired.)

18 BY MR. BUNDY:

19 Q. Okay. Ready to go, Mr. Clements? Are
20 you ready?

21 A. Yes, sir.

22 Q. Mr. Clements, I've put before you what's
23 in evidence as Exhibit 56, the contract
24 documents, and I direct your attention to article
25 3.11 on page 18 of the AIA 201 2007 edition as

1 Q. All right. Ms. Brown, did Library
2 Associates incur costs performing work or
3 self-performing work that Balfour had agreed to
4 perform?

5 A. Yes.

6 Q. And what was the total of those costs?

7 A. 2,256,764.

8 Q. And those costs are found at tab 6.2
9 through the remainder of the exhibit, correct?

10 A. Correct.

11 Q. And let's go through some of them. And
12 did you -- were you involved in the compilation
13 of these costs and backup documents?

14 A. Yes.

15 MR. MCDONALD: Your Honor, at this
16 time, I would move this portion of Defendant's
17 Exhibit 146 into evidence, and that would be what
18 is identified as spreadsheet B.

19 THE COURT: Which is 6.2 through 14
20 is what I come up with, correct?

21 MR. MCDONALD: Yes, yes.

22 THE COURT: All right.

23 Mr. Hildebrand?

24 MR. HILDEBRAND: Yes, sir. I would
25 object on several grounds. First, it's

1 now. You can go forward.

2 MR. MCDONALD: Thank you, Your
3 Honor.

4 (DFT. EXH. 146B was received in
5 evidence.)

6 BY MR. MCDONALD:

7 Q. All right. What is tab 6.2, Ms. Brown?

8 A. Tab 6.2 is work that had to be done due
9 to Balfour Beatty not honoring their warranty for
10 the contract.

11 Q. Okay. What is tab 7?

12 A. Tab 7 is a list of laundry costs that
13 were incurred because we had to send out the
14 laundry due to the ironer, the laundry ironer,
15 which is a huge piece of equipment that irons the
16 linens and sheets.

17 Those had to be sent out because the
18 ironer kept on breaking down, and the laundry
19 companies couldn't figure out why it kept on
20 breaking down. And they finally had determined
21 that the gas regulator that goes to the laundry,
22 to the iron equipment was located in the wrong
23 place by the mechanical subcontractor that was
24 under Balfour Beatty.

25 And so we would wash and dry all of the

1 laundry but had to send them out to this company
2 to have the sheets ironed.

3 Q. What about tab 8?

4 A. Tab 8 shows inhouse labor and cleaners
5 that had to be brought in to clean the hotel
6 prior to opening.

7 Q. Okay. And why is that? Why was that a
8 performance of Balfour Beatty work?

9 A. Because Balfour Beatty refused to go in
10 and clean the rooms after the repainting.

11 Q. What about tab 9?

12 A. Tab 9 is a list of labor hours by
13 Salamander where they had to go into certain
14 rooms to do repair work.

15 Q. And how is that Balfour Beatty's fault?

16 A. Well, at the first roughly 20, 25 items
17 that's repairing the bathroom lighting circuit,
18 it was determined that the wiring in the bathroom
19 circuits, the neutrals were connected together,
20 and that was causing some malfunction with the
21 lighting system in the rooms.

22 Q. What about tab 10?

23 A. Tab 10 is what we paid Robins & Morton
24 to repaint the rooms. That's just a check
25 written from Library Associates for the payment

1 number one for \$518,823.21.

2 Q. Okay. And how much --

3 A. That's a part of our check stub.

4 Q. And how much was payment number two to
5 Robins & Morton? This was a repaint to the guest
6 rooms?

7 A. That's correct.

8 Q. And that's what Jim Clements testified
9 about?

10 A. That's correct.

11 Q. Okay. And how much was the second check
12 to Robins & Morton?

13 A. The second check was \$373,805.42.

14 Q. Okay. The first check, when was it
15 dated?

16 A. The first check was dated February 4,
17 2019. We received an invoice on January 21,
18 2019.

19 Q. Okay. So you got the invoice on January
20 21st, 2019, and you paid the first one on
21 February 4, 2019?

22 A. Correct.

23 Q. All right. And then the second check,
24 how much was it for?

25 A. It was for \$373,805.42. We received the

1 invoice on January 25, 2019. It was paid on
2 February 14, 2019.

3 Q. Okay. And then how much was the third
4 check for?

5 A. The third check was \$768,515.10.

6 Q. And you were invoiced by Robins & Morton
7 on what date?

8 A. February 21st.

9 Q. And then what date did you pay it?

10 A. April 2nd.

11 Q. And what was the total of the Robins &
12 Morton repaint costs?

13 A. \$1,661,143.73.

14 Q. All right. And if you look in red on
15 tab 10, you can see that total, correct?

16 A. That's correct.

17 Q. What is tab 11? It looks like there's
18 three entries to tab 11.

19 A. Tab 11 is work that we paid to
20 Construction Professional, Inc., CPI.

21 Q. Okay. And how was that work that
22 Balfour was supposed to do but didn't do, how --

23 A. There was punch list repair work that
24 they performed and painting that they performed
25 in the rooms of 127,580.

1 Q. Okay.

2 A. They removed the BAR sample wall that
3 Balfour Beatty was supposed to remove.

4 Q. Well, before we do that, so was CPI also
5 performing guest room repaint?

6 A. Yes.

7 Q. Okay. And then you also said punch list
8 repair. What was that related to?

9 A. Just general punch list items that had
10 not been complete. One invoice said stucco
11 column extension. They had to add some blocking,
12 just some stucco work on the columns.

13 Q. Okay. Turn if you would to the third
14 page of tab 11. Are you there?

15 A. Yes.

16 Q. What is that?

17 A. That is for painting.

18 Q. And when is it dated?

19 A. January 17, 2019.

20 Q. Okay. And then turn to CPI, the second
21 pay application. It's a few more invoices. It's
22 four pages past where we were.

23 A. Yes.

24 Q. When is that dated?

25 A. February 28th, 2019.

1 Q. And how much is that one for?

2 A. 70,211.

3 Q. And what was that for?

4 A. Painting.

5 Q. Painting the guest rooms?

6 A. Yes.

7 Q. All right. And then let's go to the
8 next CPI invoice. Are you there?

9 A. Yes.

10 Q. When is that dated?

11 A. September 11, 2018.

12 Q. What was that for?

13 A. That was for taking down the sample
14 walls.

15 Q. Is the sample wall the same as the
16 mockup?

17 A. Yes.

18 Q. Is this the same work that we looked at
19 earlier that Balfour was asking for a request for
20 change order for?

21 A. Yes.

22 Q. And you-all paid CPI how much?

23 A. \$7,215.53.

24 Q. And let's go to tab 12. What is tab 12?

25 A. Tab 12 is an -- it's an e-mail from

1 Jason Boberg of Cotton & Company wanting me to
2 confirm that the items listed below were correct,
3 the two items, to repair the (inaudible) in the
4 guest room doors and replace the broken walls in
5 the board room.

6 Q. All right. Let's look at tab 13. What
7 is that for?

8 A. There are several different chandeliers
9 in the ballroom that have thousands of crystals
10 on them.

11 And during the installation, Balfour
12 Beatty claims that the crystals were not in the
13 box, even though they were required to accept all
14 goods and to make sure everything was packed in
15 the boxes that were to be delivered and make sure
16 they weren't broken. And they say that those
17 crystals were never in the box. So we had to buy
18 new crystals.

19 Q. Who is they? Who says the crystals were
20 never in the box?

21 A. Balfour Beatty.

22 Q. So I'm sorry, I didn't mean to cut you
23 off. So you had to buy new crystals?

24 A. So we had to purchase new crystals, and
25 they took a very long time to get here. They

1 actually just arrived this summer. And we were
2 waiting on the company to send the installers to
3 install the crystals in the ballroom.

4 Q. Okay. And that's tab 13 and 14?

5 A. That's correct.

6 Q. All right. And then the chart under tab
7 15 -- this doesn't have a tab 15. What is the
8 insurance deductible for pool repairs? Do you
9 know what that relates to, \$50,000?

10 A. So the pool has overflowed down into the
11 building twice. The pool company has told us --
12 Chester Pools told us it's because floors in the
13 pool equipment room were not properly prepared
14 for the pool.

15 Q. Who prepared the floors in the pool
16 equipment room?

17 A. Balfour Beatty is my understanding, was
18 responsible for that.

19 Q. Okay.

20 A. And what happened was, when the water
21 overflowed, the coating on the flooring peeled
22 up, stopped up the drains and caused water to
23 flow down into the guest rooms and the ballroom
24 in some cases.

25 And that was just deductibles. Those

1 were insurance claims, so we did make insurance
2 claims. But those were the deductibles that we
3 had to pay for each insurance claim.

4 Q. And what was is the total amount of the
5 BBC contract costs that were incurred by Library,
6 the grand total?

7 A. \$2,256,764.

8 Q. And we looked at those Robins & Morton
9 repainting, CPI invoices. Those were January --
10 end of January, early February of 2019, correct,
11 the invoices?

12 A. Correct.

13 Q. Okay. Do you know when Balfour Beatty
14 filed its 8 million dollar lien on the hotel?

15 A. It was late January 2019.

16 (DFT. EXH. 147 was marked for
17 identification.)

18 Q. All right. I'm going to hand you what's
19 been marked for ID purposes as Defendant's
20 Exhibit 147. I ask if you recognize that
21 document?

22 A. Yes.

23 Q. What do you recognize it to be?

24 A. It's a letter to me -- excuse me, to Pat
25 Dean from me.

1 CROSS-EXAMINATION

2 BY MR. HILDEBRAND:

3 Q. Hello, Ms. Brown.

4 A. Hello.

5 Q. I've got several questions for you.

6 Hopefully it won't take too long.

7 A. Okay.

8 Q. All right. Prior to February 2019,
9 right, in the project, did Library Associates
10 ever make any claim for liquidated damages
11 against Balfour?

12 A. No.

13 Q. And in your view, you didn't think that
14 that was necessary, correct, or do you?

15 A. I know that we have the liquidated
16 damage clause in the contract. I don't believe
17 it's defined in the claim in the contract, and I
18 don't think that we were even able to assess
19 liquidated damages to the -- until the end of the
20 contract.

21 Q. So it's Library Associates' position in
22 this case now, though, that Balfour is subject to
23 liquidated damages from the time that the
24 original contract date has extended -- was
25 reached, so that would be August of 2017,

1 correct?

2 A. That is what the architect has ruled on
3 in this contract, that liquidated damages should
4 be assessed from the end date of the contract
5 with the 20 days extension, and that the
6 liquidated damages should be assessed from that
7 date.

8 Q. Right. And that's what you're seeking
9 this Court to rule in favor of Library Associates
10 in this case, correct?

11 A. Correct.

12 Q. And you would agree that those
13 liquidated damages in the contract are limited to
14 \$1,400,000, right?

15 A. They are limited to the -- amount of the
16 contractor's fee.

17 Q. Which is approximately \$1,400,000,
18 agreed?

19 A. It's whatever the contractor's fees is.
20 It's approximately 1,450,000. And if the
21 contractor's fee was increased during the time of
22 the contract, then that would include those costs
23 as well.

24 Q. Was it increased during the time of the
25 contract?

1 A. In the change orders, in the markup of
2 the change orders, I believe that -- that part of
3 the markup is fee.

4 Q. Okay. Well, if it was increased, do you
5 have any approximation of what it was increased?

6 A. I don't right off the top of my head,
7 no.

8 Q. All right. So it's Library Associates'
9 contention that the liquidated damages started --
10 let's see -- in 2017, you talked about, and I
11 think that the completion date with the 20 day
12 extension that was in the contract was August 19
13 of 2017.

14 So from that day forward, subject to the
15 cap, that is what Library Associates is asking
16 the Judge to award in this matter, correct?

17 A. Correct.

18 Q. All right. And you didn't feel like you
19 were contractually obligated to assess liquidated
20 damages until the very end of the project; is
21 that correct?

22 A. Correct.

23 Q. All right. What do you think --

24 A. And I did not assess the liquidated
25 damages, the architect did.

R-1366

INTENTIONALLY OMITTED

1 THE COURT: Okay. All right.

2 Thank you for not doing that.

3 BY MR. HILDEBRAND:

4 Q. All right. Do you think that it would
5 have been just fundamentally fair for Library
6 Associates, back when it felt that it was
7 entitled to liquidated damages back in August of
8 2017, do you think that it would have been just
9 as a matter of fundamental fairness, to tell
10 Balfour Beatty, look, we believe that y'all are
11 delaying this project, and we intend to assert
12 liquidated damages against you?

13 MR. MCDONALD: Objection, Your
14 Honor. The contract says what it says. I'm not
15 familiar with the basis of fundamental fairness.
16 It's two sophisticated parties, and they enter
17 into a contract and agreed to do what they were
18 going to do on this job. It's irrelevant.

19 MR. HILDEBRAND: Well, Your Honor,
20 it is cross-examination.

21 THE COURT: I'm going to overrule
22 that one. Go ahead. If she can answer that, she
23 can.

24 BY MR. HILDEBRAND:

25 Q. Yes, ma'am?

1 A. We did not think about liquidated
2 damages in August of 2017. We just wanted to do
3 whatever we could do to get our hotel open. So I
4 don't think the thought crossed our mind in
5 August of 2017, that we were going to start
6 charging for liquidated damages at that point.

7 Q. Okay. Well, when did it cross Library
8 Associates' mind that it was going to be
9 assessing liquidated -- or that it was going to
10 assert liquidated damages against Balfour?

11 A. We knew that that was the terms of the
12 contract. We just wanted to get our hotel opened
13 on time or get our hotel opened.

14 Q. Okay.

15 A. We were willing to spend additional
16 monies to get manpower on the job to get the
17 hotel opened. So it wasn't until 2018 that we
18 said, hey, we're going to charge liquidated
19 damages. We just wanted to get our hotel open.

20 Q. Okay. My question, though, was when
21 did -- you said that in August of 2017, when the
22 original completion date was passed, you didn't
23 consider assessing liquidated damages. So when
24 did you make that decision that you were going to
25 assess liquidated damages against Balfour?

1 A. We had discussed the liquidated damage
2 clause in December of 2018, and again, it was the
3 architect who assessed the liquidated damages.
4 Library Associates didn't assess when the
5 architect -- assess the liquidated damages when
6 he was reviewing the claim that was provided by
7 Balfour Beatty.

8 Q. Okay. So it's your testimony here today
9 that nobody from Library Associates, to your
10 knowledge, gave any thought or considered
11 assessing liquidated damages against Balfour
12 until the project was virtually complete, that
13 being in December of 2018?

14 A. I would say late 2018 sometime.

15 Q. You said December just a moment ago.

16 A. Well, it might have been November. Late
17 2018.

18 Q. Okay. Did Michael Bennett review pay
19 applications before that are signed?

20 A. Never.

21 Q. Did he review the contract before it was
22 signed?

23 A. No. He typically does not review the
24 contracts.

25 Q. Okay. Does Library Associates have any

1 employees?

2 A. No.

3 Q. The designer's contract provides for a
4 lump sum payment that has -- originally drafted
5 of \$360,000. Does that ring a bell?

6 A. There were -- there's a lump sum amount
7 plus reimbursables.

8 Q. Right. It eventually ballooned up to
9 \$820,000. Does that sound about --

10 A. I believe we went over this in one of my
11 depositions, that if you take a look at their
12 invoices, they have their lump sum amount as
13 number -- job number one, and the reimbursables
14 is job number two.

15 And it was the reimbursables that had
16 increased the most and that was due to them
17 having to make site visits, et cetera, that were
18 more than was originally anticipated when we
19 signed the contract.

20 Q. Okay. Why did they have to make so many
21 more site visits?

22 A. Because the job turned longer, and they
23 had to review different items on the job during
24 the length of time of the job.

25 Q. Was the interior -- all of the interior

1 design work finished at the time that the GMP
2 contract was signed with Balfour?

3 A. I would say a majority of that work had
4 already been done. It wasn't that they were
5 redesigning or anything else, but there might
6 have been some -- some work that had to be
7 finished or detailed a little bit more at the
8 time of the GMP signing.

9 Q. Okay. So as I understand the pay
10 application process and how Balfour gets paid, a
11 pay application is reviewed. It goes back and
12 forth a couple of times, and then the architect
13 certifies it for payment, and then it gets paid.
14 Is that a fair statement?

15 A. So the process was that we would have
16 the job meeting. Balfour Beatty would present a
17 pencil copy, which is just the three pages of the
18 pay app, to everyone at the job cost -- at the
19 job meeting. That was attended by the architect
20 and the bank inspector.

21 They would review the line items. The
22 architect and the bank inspector would then walk
23 the job. If they had any questions on any of the
24 line items during their inspection, they would
25 tell Balfour Beatty, and Balfour Beatty would

1 make any adjustment that needed to be made,
2 whether it was stored materials or something that
3 the architect or the bank inspector didn't feel
4 that was progressed as much as should be, and
5 that they were trying to draw.

6 Then Balfour Beatty would complete the
7 pay app, along with all the invoices, and send
8 that to the architect for approval. Once the
9 architect approved it, then the architect would
10 forward that to me.

11 Q. And then you would do a requisition to
12 MetLife, correct?

13 A. I would include that in the rest of the
14 other invoices, soft cost invoices for the job,
15 and I would send in a pay app to MetLife, yes.

16 Q. Okay. And MetLife was the lender,
17 correct?

18 A. MetLife was the lender.

19 Q. Right. But MetLife is not a bank, is
20 it?

21 A. No, it's an insurance company.

22 MR. HILDEBRAND: What number
23 exhibit are we on?

24 THE COURT: This is on the
25 plaintiff's side?

1 MR. HILDEBRAND: Yes, sir.

2 THE COURT: All right. The last
3 one I'm showing was 345 on Friday the 29th. Does
4 that sound right?

5 MR. HILDEBRAND: Yes, sir. So this
6 would be 346.

7 (PLF. EXH. 346 was marked for
8 identification.)

9 BY MR. HILDEBRAND:

10 Q. Ms. Brown, I'm going to hand you what I
11 have marked as Plaintiff's Exhibit 346 for
12 identification. Do you recognize this document?

13 A. I do.

14 Q. Okay. And this is called a requisition
15 letter, and it says request number 43. Do you
16 see that?

17 A. Yes.

18 Q. And so this is number 43, so you would
19 have filled out an identical form for each pay
20 application that you would have given to MetLife
21 for release of funds, correct?

22 A. Correct.

23 Q. All right. So there would have been 42
24 prior to this one, identical to this --

25 A. Correct.

1 Q. -- except for the amount that you're
2 requesting, correct?

3 A. Correct.

4 Q. All right. And on this particular one,
5 it's dated December 15, 2018, so that's right at
6 the end of the project, correct?

7 A. That's correct.

8 Q. All right. And the amount being
9 requested is \$2,167,185.99, correct?

10 A. Correct.

11 Q. And so that I understand, the way that
12 the loan worked -- and I think there might have
13 been some testimony about this maybe from
14 Mr. Clements -- was that there was a loan for
15 approximately 65 million dollars, and then
16 anything above and beyond that would have to be
17 paid by Library Associates, correct?

18 A. That's correct.

19 Q. Okay. And to draw down and some of the
20 money that -- actually, when were all of the loan
21 proceeds exhausted as far as the project was
22 concerned?

23 A. The loan proceeds have not been
24 exhausted yet.

25 Q. Well, is that the loan or amounts --

1 money that Library Associates had put in to
2 the -- pay into the bank to have money available
3 to -- for draws at a future date?

4 A. So the way this worked was the original
5 schedule of values was 100 million dollars. We
6 had to come up with our portion, whether it would
7 be already in equity that we got credit for
8 during the term of the loan or funds that were
9 still due.

10 And we came up with all of our funding
11 prior to the loan. So we had gotten credit for
12 approximately 25 million dollars of costs that we
13 had already put in during the 12 plus years that
14 we had been designing and developing the project.
15 We had to come up with a little over 10 million
16 dollars before the loan closed. We put our
17 funding in at that time.

18 The bank disbursed those funds first,
19 and then there was left the 66 and a half million
20 dollars, which would have been the contract
21 balance left to fund the rest of the loan. If
22 there was any change orders during the course of
23 the loan, I would have to, on a monthly basis,
24 put those additional funds into the -- send those
25 to the bank, no matter whether they were drawn or

1 not.

2 And you could see on the front of this
3 page, at this particular time, there was \$563,869
4 in approved change orders from the previous pay
5 application.

6 Q. All right.

7 A. And so I had to submit those funds to
8 the bank prior to the bank funding this draw, so
9 the bank always had funds in there to cover all
10 of the costs that would remain on the draw.

11 Q. Gotcha. My simple question is that, at
12 this time in December 2018, had all of the loan
13 proceeds been exhausted and the money that
14 remained was money that Library Associates had
15 put in?

16 A. No. I would still think that there were
17 loan proceeds available in the draw.

18 MR. HILDEBRAND: Your Honor, you
19 already ruled. There were a lot of questions in
20 discovery about payment issues and the bank
21 accounts. And I just want to make -- for the
22 record, you've asked me not to go into those. I
23 think those have been the rulings as far as I'm
24 not into them.

25 THE COURT: I will be consistent

1 with that.

2 MR. HILDEBRAND: All right. Thank
3 you, Your Honor.

4 THE COURT: If you get a 22 million
5 dollar judgment and you want to collect it if
6 they don't pay, we will cross that bridge then.

7 MR. HILDEBRAND: I understand, Your
8 Honor. All right. So what we have marked as
9 Defendant's Exhibit 346 --

10 THE COURT: Plaintiff's Exhibit
11 346.

12 MR. HILDEBRAND: Sorry, Plaintiff's
13 Exhibit 346.

14 BY MR. HILDEBRAND:

15 Q. This is a certification that you would
16 do and provide to MetLife with each loan funding
17 or funding for payments to Balfour Beatty,
18 correct?

19 A. Correct.

20 Q. All right. And it says that, in
21 accordance with the agreement, you were making
22 certain certifications.

23 And the first -- second full paragraph
24 says, the owner hereby certifies that. And it
25 says, the labor services and/or materials covered

1 hereby have been performed upon or furnished in
2 connection with the project. That's a correct
3 certification?

4 A. Yes.

5 Q. All right. All construction of the
6 project to date has been performed in accordance
7 with the plans and specifications and there have
8 been no changes in the plans and specifications
9 except as have been approved by you in writing.
10 Is that certification correct?

11 A. Correct.

12 Q. Okay. Number 3, no default or event or
13 condition, which with the passage of time or the
14 giving of notice or both, would constitute a
15 default under the general contractor's agreement
16 has occurred or exists as of the date hereof.
17 Correct statement, agreed?

18 A. True.

19 Q. Okay. The next one, there have been no
20 changes in the scope or time of performance of
21 the work of construction, nor any extra work,
22 labor, or materials ordered or contracted for
23 except as have been approved by you in writing,
24 correct?

25 A. Correct.

1 Q. All right. And then on the next page,
2 the -- it looks likes Roman numeral XV, Kimberly
3 B. Brown is the authorized agent of the borrower
4 and the signature set forth on the signature line
5 above, such officer's name below and such
6 officers (inaudible). And that's your signature
7 on the third page, correct?

8 A. Correct.

9 Q. Now, I don't -- I've reviewed the
10 contract document, and I don't see that there's a
11 definition of default in the agreement. Are you
12 aware of one?

13 A. In the A133 or 201?

14 Q. Yes, ma'am.

15 A. Not that I can recall at this time.

16 Q. Okay. What are the current room rates
17 for Hotel Bennett?

18 MR. MCDONALD: Objection, Your
19 Honor. It's irrelevant.

20 THE COURT: How is that relevant?

21 MR. HILDEBRAND: I will withdraw
22 the question.

23 BY MR. HILDEBRAND:

24 Q. All right. I have just a couple of
25 documents I wanted to ask you about. Can you

1 find our notebook that has 173 in it?

2 MR. MCDONALD: What was that
3 number, Tom?

4 MR. HILDEBRAND: 173. It should be
5 in number 4.

6 THE COURT: It says binder 3
7 apparently.

8 MR. MCDONALD: This is not in
9 evidence, Tom?

10 MR. HILDEBRAND: Correct.

11 (PLF. EXH. 173 was marked for
12 identification.)

13 BY MR. HILDEBRAND:

14 Q. All right. It's Exhibit 173. Are you
15 with me?

16 A. Yes.

17 Q. All right. This is an e-mail dated
18 March 15, 2019, from Paul Cherrett with Hotel
19 Bennett to yourself. Do you see that?

20 A. Yes.

21 Q. All right. And who is Paul Cherrett?

22 A. He was the general manager of the hotel
23 at the time.

24 Q. Okay. Let me ask you this before I go
25 on. Was Balfour still performing work on the

1 hotel at this time?

2 A. Yes. I actually believe they may have,
3 as we went through the CCDs, that had costs for
4 March of work of 2019.

5 Q. Would you agree with me that they were
6 working -- they were still on the job through
7 April of 2019?

8 A. Yes.

9 Q. Okay. Let's turn back to this document.
10 So this is a document from Paul Cherrett to you,
11 and it's subject, Hotel Bennett leisure transient
12 sales strategies. And Paul is saying in the
13 first paragraph --

14 MR. MCDONALD: Your Honor, before
15 he reads it -- or I mean, he needs to lay some
16 foundation and move it into evidence. That would
17 be my -- or try to move it into evidence. That
18 would be my objection.

19 MR. HILDEBRAND: Well, I would like
20 to move it into evidence then.

21 MR. MCDONALD: Lack of foundation.

22 THE COURT: All right. Cherrett
23 was an employee of Hotel Bennett; is that
24 correct?

25 THE WITNESS: Yes.

1 contract, correct?

2 A. Correct.

3 Q. Okay. What other claims, if any, are
4 you making?

5 A. There's claims for -- there will be
6 claims for lost profits, if we're entitled to
7 those.

8 Q. Okay. Anything else?

9 A. That's all that I can think of.

10 Q. All right. Now, can you show me or tell
11 the Judge where -- prior to this time right now,
12 where we're sitting here today, where Library
13 Associates made a claim under the contract to
14 Balfour, and that was passed on through the
15 architect, that the architect ruled on and
16 adjudicated that issue prior to today?

17 A. Well, I believe that the architect ruled
18 on the Balfour Beatty claim.

19 Q. Right. So I'm asking about Library
20 Associates' claim. Did Library Associates assert
21 a claim that was ruled upon by the architect for
22 the liquidated damages?

23 A. I believe the architect ruled that
24 Library Associates was entitled to liquidated
25 damages when they ruled on the Balfour Beatty

1 claim.

2 Q. So there was a formal claim that was
3 made for liquidated damages that was ruled upon
4 by the architect in a formal decision? Is that
5 your testimony?

6 A. No. Balfour Beatty submitted a claim,
7 and the architect ruled that the liquidated
8 damage clause should be considered in their
9 claim.

10 Library -- because we don't feel that
11 the liquidated damage clause is a claim. It's
12 just they -- it's a paragraph in the contract,
13 where it said that they could be assessed. But
14 we don't feel that there is a claim or that we
15 would have to make a claim for liquidated
16 damages.

17 Q. Right. Yeah, I understand. But I had
18 asked you earlier, what do you -- what Library
19 Associates' claims were in this matter, and I
20 said several times now, that you are -- Library
21 Associates is asserting a claim for liquidated
22 damages. Agreed?

23 A. Library Associates is asserting that
24 they should be entitled to liquidated damages.
25 Again, we don't feel like we should have made a

1 claim for liquidated damages because we don't
2 feel that liquidated damages is defined in the
3 contract as something that would be a claim.

4 Q. So are you telling the Judge here today
5 that Library Associates is not asserting a claim
6 for liquidated claims in this matter?

7 MR. MCDONALD: Objection, Your
8 Honor. This is asked and answered.

9 THE COURT: I will sustain that. I
10 got it.

11 BY MR. HILDEBRAND:

12 Q. All right. Was any -- can you point me
13 to a document where a formal claim was made by
14 Library Associates to Balfour Beatty that was
15 ruled upon by the architect for liquidated
16 damages?

17 MR. MCDONALD: Same objection, Your
18 Honor. Asked and answered. And she's explained
19 it three times, exactly what her position is.

20 THE COURT: The answer to that
21 would be no, correct?

22 THE WITNESS: Correct.

23 BY MR. HILDEBRAND:

24 Q. All right. How about with regard to the
25 repair costs that you talked about earlier that

1 you felt like Balfour had not performed under the
2 contract? Was a formal claim made to Balfour
3 that was ruled upon by the architect on that
4 issue?

5 A. So we sent that information to Jennifer
6 Faulkinberry in January, and when they
7 received -- we had sent her the initial invoice
8 that we received from Robins & Morton for the
9 painting.

10 When she was reviewing one of the pay
11 apps -- and she decertified pay app number 43
12 because of the information that she received that
13 we had incurred these additional painting costs,
14 and that there was more additional painting costs
15 that were also incurring at the time.

16 And so Jennifer then had sent a letter
17 stating that, because of the additional painting
18 costs, because of the liquidated damage clause,
19 that that was the reason she was decertifying pay
20 app 43.

21 Q. My simple question, Ms. Brown, is, has
22 Library Associates asserted a formal claim, prior
23 to this litigation beginning, to Balfour that was
24 ruled upon by the architect, a formal claim that
25 was ruled upon by the architect as provided in

1 the contract documents?

2 MR. MCDONALD: Objection. Asked
3 and answered.

4 THE COURT: Go ahead. Overrule
5 that one. Go ahead.

6 THE WITNESS: We submitted the
7 information to the architect. Balfour Beatty
8 knew at the time that the rooms were being
9 repainted. I don't believe we sent a formal
10 claim to Balfour Beatty. But we had sent the
11 information to the architect, and the architect
12 had ruled at that time.

13 MR. HILDEBRAND: Okay. Give me
14 just a second. Nothing further, Your Honor.

15 THE COURT: All right, sir.
16 Mr. Terry or Mr. Windle?

17 MR. WINDLE: May it please the
18 Court?

19 THE COURT: Yes, sir.

20 MR. WINDLE: I'm going to be
21 referring to Plaintiff's Exhibit No. 12 and
22 Plaintiff's Exhibit No. 100. You can jot that
23 down in your notes, but I don't think -- I'm not
24 going to ask anybody to pull those out. I think
25 you'll remember them when we get into the

1 So it could be a professional services
2 contract or it could have been construction where
3 we would write an audit report. Again, the total
4 costs incurred by the entity and then of those
5 costs, which one of them complied with all of the
6 terms and conditions of the program as well as
7 the contract.

8 Q. I'm going to hand you, Ms. Hadley,
9 what's been marked as Defendant's Exhibit 50 for
10 ID purposes. Do you recognize that document?

11 A. I do. It is my CV with my new employer,
12 Capital Project Management, Inc.

13 Q. Okay. Let's go through it a little bit.
14 So you were at Cotton and Company, correct?

15 A. I was, yes.

16 Q. And now you're at Capital Project
17 Management, Inc.?

18 A. Correct.

19 Q. And when did that move take place?

20 A. June 1st of this year.

21 Q. Okay. And are you doing the same type
22 of work at Capital Project Management, Inc., that
23 you did at Cotton and Company?

24 A. Yes.

25 Q. Okay. And are you a certified public

1 accountant?

2 A. I am.

3 Q. And are you a certified government
4 financial manager?

5 A. I am.

6 Q. And what is that? What is a certified
7 government financial manager?

8 A. A GCFM is a certification issued by the
9 Association of Governmental Accountants. It
10 primarily rates to understanding of federal and
11 government state funding and how that is
12 different than typical accounting.

13 So we would again evaluate costs.
14 Certain federal funding, for example, is called,
15 Know Your Money and To Your Money and when those
16 funds can be spent and when they have to be
17 obligated in accordance with what we call the
18 Federal Red Book and the presidential budget.

19 Q. Okay. Are you a certified fraud
20 examiner?

21 A. Yes.

22 Q. What is a certified fraud examiner?

23 A. A certified fraud examiner is a
24 certification issued by the Association of
25 Certified Fraud Examiners. And like the CPA

1 exam, it comes with an exam, an annual
2 certification, and it discusses issues
3 surrounding identifying fraud risk indicators,
4 doing litigation-type work and establishing
5 internal controls to prevent internal fraud in
6 corporations and, you know, left and fraud,
7 waste, and abuse.

8 Q. You used the term fraud risk indicators.
9 What is that?

10 A. A certified fraud examiner can't assert
11 that something was fraud because that is
12 something for the trier of fact. So what we do
13 is, we issue reports that identify for fraud risk
14 indicators.

15 So this much money was taken from the
16 account, and that same amount of money was
17 deposited into Mr. Johnson's bank account.
18 That's a fraud risk indicator, but I can't say
19 that he stole it. So it's just proper
20 terminology to address what I can affirmatively
21 say.

22 Q. Okay. So that's basically just your
23 professional stopping point as a fraud risk
24 indicator? You don't go beyond there?

25 A. That's true.

1 Q. And then it says -- are you certified in
2 financial forensics?

3 A. Yes.

4 Q. All right. And what is that?

5 A. The CFF is an additional sub-designation
6 of the CPA. So if you are a CPA, there are, I
7 believe, three sub-certifications that again come
8 with an additional exam and annual education
9 requirements that specialize.

10 This particular one that I have a CFF is
11 specializing in analytics and forensic analysis
12 in a wide variety of areas including this one.

13 Q. And I believe that you already stated
14 that you've got a bachelor's degree in accounting
15 from the University of Wisconsin?

16 A. That's correct.

17 Q. All right. And tell the Judge a little
18 bit about your general experience and types of
19 things you've done as indicated on Defendant's
20 Exhibit 150.

21 A. Okay. Like I said, when I graduated, I
22 did go to Cotton and Company right out of
23 college, auditing and evaluating mostly public
24 projects and issuing audit opinions regarding
25 whether those funds were adequately spent and how

1 Q. Okay. Do you hold any government
2 clearances?

3 A. Yes. I had a top secret clearance with
4 the federal government. I believe it is still
5 active, but as you do change from one job to
6 another, sometimes it falls down in the new
7 employer must reenact it. But I do think that
8 that has been done.

9 I have a position of public trust, it's
10 called, with the Department of Homeland Security.
11 For some reason, the Department of Homeland
12 Security has a different badging and
13 certification process than the rest of the
14 federal government. So they like to have their
15 own certifications.

16 I also have a security position with the
17 Virginia Department of Transportation which again
18 they don't recognize the federal certifications.
19 So they do require their own background check and
20 that sort of thing.

21 MR. MCDONALD: Your Honor, at this
22 time, I'd offer Ms. Hadley as an expert in
23 accounting and auditing, construction accounting
24 and auditing and damage compilation in
25 construction projects.

1 THE COURT: Any voir dire?

2 MR. HILDEBRAND: No objections,
3 Your Honor, and no voir dire.

4 THE COURT: All right. Very good.
5 So qualified.

6 MR. MCDONALD: Your Honor, I'd also
7 move into evidence Defendant's Exhibit 150 which
8 is Ms. Hadley's CV.

9 THE COURT: 150. Okay. Thank you.

10 MR. HILDEBRAND: No objection, Your
11 Honor.

12 THE COURT: Without objection.

13 (DFT. EXH. 150, was marked for
14 identification and admitted into evidence.)

15 BY MR. MCDONALD:

16 Q. All right. Ms. Hadley, where I'd like
17 to start with you, if you would, I believe it's
18 the notebook that's in front of you to your
19 right. And in that notebook is tab 56. It's the
20 contract that brings us here today.

21 A. Okay.

22 Q. Are you there?

23 A. I'm here, yes.

24 Q. All right, ma'am, I'd like you to turn,
25 if you would, in the A 133. Is that what you

1 And .4, a final certificate for payment
2 has been issued by the architect.

3 Q. Okay. Did you know --

4 A. I haven't -- do you want the rest of it?

5 Q. Oh, you're still publishing?

6 A. Yeah.

7 Q. Go ahead.

8 A. The owner's final payment to the
9 construction manager shall be made no later than
10 30 days after the issuance of the architect's
11 final certificate for payment or as follows.

12 The construction manager's final
13 accounting is a complete and full accounting of
14 costs incurred by the construction manager in
15 performance of the work organized according to
16 the construction manager's schedule of values and
17 cost codes and correlated to the costs to be
18 reimbursed under article 6 of this agreement.

19 Q. Okay. Has a final payment request been
20 submitted by Balfour Beatty in this action?

21 A. No.

22 Q. Has Balfour Beatty performed a final
23 accounting for the cost of the work?

24 A. No.

25 Q. Let's go to section 7.2.2. I would like

1 you to publish that, please.

2 A. 7.2.2.

3 The owner's auditor's will review and
4 report in writing on the construction manager's
5 final accounting within 60 days after delivery of
6 the final accounting to the architect by the
7 construction manager.

8 Q. Let me stop you there. And that has not
9 been done, correct?

10 A. That has not been done.

11 Q. The construction manager has not issued
12 a final accounting?

13 A. No, it has not.

14 Q. Okay. Go ahead.

15 A. The construction manager's final
16 accounting is a complete and full accounting of
17 costs incurred by the construction manager in
18 performance of the work organized according to
19 the construction manager's schedule of values and
20 cost codes and correlated to the cost to be
21 reimbursed under article 6 of this agreement.

22 Based upon such costs of the work as the
23 owner's auditor report to be substantiated by the
24 construction manager's final accounting and
25 provided the other conditions of section 7.2.1

1 you want to call it, on a job, but unless it
2 meets the definition of cost of the work, they're
3 not entitled to be reimbursed for that?

4 A. Correct.

5 Q. Okay. Then you just referred to the
6 concept of reasonableness. Then you drop into a
7 section of costs that meet the definition of
8 costs of the work, but they're still subject to a
9 reasonableness standard?

10 A. Correct.

11 Q. Okay. And when you talk about
12 performing a construction audit, what is it that
13 you are auditing?

14 A. The scope of my audit is the amount of
15 costs that the contractor is asking to be
16 reimbursed. So that's my population, if you
17 will. That's what I start from.

18 And then a typical auditor is going to
19 pick samples of the transactions and read the
20 contract. And, you know, it will say, well, this
21 is for materials. What does the contract say
22 about materials? Does this meet the definition
23 of cost of the work for materials? Yes or no.

24 Q. And when you're performing that audit,
25 are you simply auditing costs or amounts they're

1 seeking to be paid for in the future, or are you
2 auditing basically the entire project?

3 A. In a typical GMP construction project
4 audit, you would be evaluating the costs after
5 they had been incurred and as the contractor is
6 asking for them to be reimbursed.

7 You can do what's called pre-award, you
8 know, audits and evaluate, for instance, a
9 proposed change order and whether those costs are
10 reasonable. But that isn't any part of the scope
11 of the work I did on this project.

12 Q. Okay. And we'll talk about this project
13 in just one second. But the -- so how it
14 typically works is, you-all would get that final
15 accounting from the contractor if you were
16 working for an owner of the government, and then
17 you would audit that final accounting?

18 A. Correct.

19 Q. Okay. The costs they've already
20 incurred?

21 A. Correct.

22 Q. Okay. All right. Now, given that that
23 is the general organization of a GMP contract
24 with the cost of the work, how was this
25 particular contract broken down as it relates to

1 GMP?

2 A. So this particular contract has two
3 GMPs. So there are basically two ceilings that
4 general conditions couldn't exceed one guaranteed
5 maximum price and the remaining portion of the
6 contract that I've just been generically
7 referring to as the primary portion of the
8 contract can't exceed the other guaranteed
9 maximum price.

10 Q. And when you use the term GCs, what are
11 you referring to?

12 A. General conditions.

13 Q. Okay. So in this contract, it had a
14 ceiling on the general condition amount and it
15 had a ceiling on the primary and the remainder of
16 the contract amount?

17 A. Correct.

18 Q. The remainder of the contract amount
19 would be those amounts not included in the
20 general conditions?

21 A. Yes. It would be all things except in
22 the general conditions.

23 Q. All right. Ms. Hadley, when did you get
24 involved in this particular project?

25 A. The spring of 2019, I think it was March

1 or April.

2 Q. And how did you get involved?

3 A. Bundy McDonald reached out to me.

4 Q. Okay. Do you know how we found out
5 about you?

6 A. I believe you found out about either
7 Cotton and Company or myself from CPMI, Mark Boe
8 and Mike D'Onofrio.

9 Q. That's D'Onofrio and Boe?

10 A. Yes.

11 Q. And Mark Boe is the gentleman who
12 testified earlier?

13 A. Yes.

14 Q. Okay. All right. And you said that was
15 in the spring of when?

16 A. 2019.

17 Q. Okay. And were you actually retained by
18 Library Associates?

19 A. Yes, I was.

20 Q. Okay. And what was your understanding
21 at that time of what your role was going to be as
22 it relates to Hotel Bennett?

23 A. I believe my -- my recollection of my
24 role was to -- twofold: Evaluate the cost of the
25 work and the GMP and issue a report on the

1 construction of the project as well as a
2 calculation of lost promise and direct damages
3 due to the unknown hotel opening date.

4 Q. Okay. Ms. Hadley, I'm going to hand you
5 what's been marked for ID purposes as Defendant's
6 Exhibit 151 and ask if you recognize that
7 document?

8 A. Yes, I recognize it. I prepared it.

9 Q. So you prepared this document?

10 A. I did.

11 Q. And what is it?

12 A. This document is a time line of the
13 different activities that I took over the course
14 of the last two and a half -- or in excess of two
15 and a half years to perform the reconciliation of
16 the GMP to the cost of the work as compared with
17 BBC, Balfour's claims that they prepared.

18 And then the middle section of the time
19 line is the Court's actions in response to my
20 attempts to do that work.

21 Q. Okay.

22 MR. HILDEBRAND: Excuse me, have we
23 seen this before?

24 MR. MCDONALD: I don't know. This
25 is a demonstrative exhibit. It was prepared for

1 her testimony.

2 MR. HILDEBRAND: Well, Your Honor,
3 we took pains to -- we did some PowerPoints and
4 some presentations that we wanted to provide to
5 the Court. And we made sure that we gave it to
6 them.

7 MR. MCDONALD: During trial.

8 MR. HILDEBRAND: No. It was -- no,
9 all of them, and I can look at the e-mails --

10 THE COURT: Go ahead and -- the
11 objection is what?

12 MR. HILDEBRAND: Just, I haven't
13 seen it. I don't know what this is.

14 THE COURT: Not previously
15 produced?

16 MR. HILDEBRAND: No, sir. No, sir.

17 THE COURT: Okay.

18 MR. MCDONALD: The PowerPoints that
19 were submitted for the -- this is merely just
20 dates of things that occurred.

21 THE COURT: All right. So the
22 purpose of it is just to show a time line?

23 MR. MCDONALD: Just to show a time
24 line of how -- her involvement in the audit.

25 THE COURT: Okay. All right. And

1 you plan to introduce it, and you've marked it
2 for identification?

3 MR. MCDONALD: It's marked for
4 identification solely as a demonstrative exhibit.

5 THE COURT: Okay. All right. Just
6 take her through it, and then we'll get to the
7 point where -- when you go to finish, we'll go
8 there. Okay?

9 MR. MCDONALD: Thank you, Your
10 Honor.

11 BY MR. MCDONALD:

12 Q. So this is a time line that you created,
13 correct?

14 A. Yes.

15 Q. All right. And it's got three different
16 colors. It's got yellow, green, and blue, right?

17 A. Yes.

18 Q. What does the yellow represent?

19 A. The yellow represents the actions by BBC
20 as far as filing a claim or the other action was
21 denying my request to do the audit.

22 Q. Okay. So the yellow was BBC. What is
23 the green?

24 A. The green was actions by the Court based
25 on different affidavits and testimony at hearings

1 that I was providing in attempts to gather
2 information that the Court would rule and take
3 some actions.

4 Q. Okay. And then what is the blue at the
5 bottom?

6 A. The blue are the official actions that I
7 took. I do use Cotton and Company there, which
8 is where I worked up until June -- to just
9 document the first audit request that I made,
10 which was April 22, 2019, which was rejected
11 eight days later. And then the different --

12 Q. Well, hold on. We're going to go
13 through it. So the blue is your actions?

14 A. Yes, it is.

15 Q. Okay. So what is the first entry on
16 this document?

17 A. The first entry would be the January
18 2019 claim letter that BBC submitted.

19 Q. Okay. And what was the -- and the
20 amount of that claim letter was what?

21 A. The amount in that claim letter was
22 \$22,452,282.

23 Q. And is that the four-page letter we've
24 looked at throughout this trial?

25 A. Yes, sir.

1 Q. Have you been in attendance throughout
2 this trial?

3 A. Yes.

4 Q. Okay. And what is the next date-wise
5 entry in blue?

6 A. The next date entry is April 22nd when I
7 issued the letter to BBC, notifying them of doing
8 the audit and requesting the supporting
9 documentation for the project costs.

10 Q. Okay. And that was on April 22nd of
11 2019?

12 A. Correct.

13 Q. All right. And is -- what did that
14 letter request?

15 A. It was a notification of the fact that I
16 was going to perform that audit of the project
17 and then it itemized some things at the bottom of
18 the page of the initial documents that a typical
19 auditor needs to get started, subcontract files,
20 an accounting report, and those sort of things.

21 Q. Okay. And was it anything out of the
22 typical that you would request on any project
23 you're involved in?

24 A. No. It's very typical. It's pretty
25 much got the same five or six things that we

1 always ask for, for a construction project.

2 Q. Okay. All right. And did you -- did
3 Cotton and Company in fact send that letter to
4 Balfour Beatty?

5 A. We did.

6 Q. Okay. And did you get a response?

7 A. Yes. We got a response on April --
8 dated April 30th.

9 Q. And what was the response?

10 A. The response was no, and there were
11 two --

12 Q. No what?

13 A. No, you cannot have these documents, and
14 you cannot perform that audit.

15 MR. HILDEBRAND: Your Honor, I just
16 want to object on relevancy grounds. We've spent
17 a lot of time and effort on this auditing issue.
18 The Court got involved, and there was a decision
19 that certain things were required by the audit
20 and then claims information was not.

21 And we've been through all of this.
22 We've gotten her opinions, and I've taken her
23 deposition. She's issued reports. There's not a
24 time line like this. I haven't seen this before,
25 and it just seems to me it's irrelevant and we

1 should move on to her opinions.

2 THE COURT: All right. Well, I
3 find it relevant, and I guess the better response
4 would be that, you must have lived it. So this
5 is -- this is her calculation. This is something
6 you've prepared, I assume, isn't it?

7 THE WITNESS: Yes.

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

10 MR. MCDONALD: Thank you very much.

11 BY MR. MCDONALD:

12 Q. All right. And the response was no.
13 What do you mean by no?

14 A. I can't remember the exact wording of
15 the response, but it was, because we're in
16 litigation, you can't do this audit and any
17 documents that you're asking for now, you'll get
18 in -- through discovery process only.

19 Q. Did you receive any documents in
20 response to your April 22nd, 2019 letter?

21 A. No, just that response letter.

22 Q. What is the next entry?

23 A. The next entry is June 11, 2019, where
24 Cotton and Company issued an affidavit regarding
25 the amount of duplication between BBC's liens and

1 the subcontractor liens to the best of our
2 ability to identify that duplication with the
3 limited information we had.

4 Q. Okay. And what was the amount of the
5 duplication as identified by you at that time?

6 A. Again, it was very hard to come to a
7 detailed dollar amount. We could only give
8 anecdotal information. But it was roughly \$7.7
9 million.

10 And again, just generally, very
11 logically, it's -- the BBC company, for what it
12 believed was the entire project and the subs
13 filed liens either before and after that for
14 amounts that the subcontractors believed that
15 they were due, and they're both asking for the
16 same thing.

17 Q. Okay. And at the time of your -- of
18 June 11, 2019, what was the total amount of liens
19 that had been filed on this -- on this property?

20 A. The total amount of liens -- there were
21 22 liens, I believe. 22 liens, 26,341,655.

22 Q. 26 million?

23 A. 341,655.

24 Q. And mechanic's liens filed on the Hotel
25 Bennett project?

1 A. Yes, between BBC and the subs combined.

2 Q. Okay. And as of June 11th, 2019, you
3 said, based upon anecdotal. Why did you use
4 anecdotal information to come up with
5 duplication?

6 A. When a company files a lien, they may
7 just file a lien with a letter that said, you
8 know, the amount of our lien is \$11 million or \$7
9 million.

10 Sometimes subcontractors will also
11 attach supporting schedules, or it will identify
12 the change orders that it felt should have been
13 approved or the amount of the contract balance
14 that had never been paid.

15 But if all you have is the name of a
16 subcontractor and a dollar amount and then BBC
17 and a dollar amount, I can't tell how much of
18 that is duplicative because it's just a dollar
19 amount on a piece of paper. So there were some
20 subcontractors, Pasco, for example, provided some
21 details, and then I could see the amounts were
22 duplicative.

23 Q. Okay. And this is, of course, after
24 Balfour denied to produce any documents in
25 response to your audit request?

1 A. Correct. This was just using the
2 information that had either been produced in
3 discovery to date.

4 Maybe it was available by Library
5 Associates in the payment applications or again,
6 if a subcontractor happens to have an attachment
7 to their lien, then I could use that information
8 as well.

9 Q. Would the information that you were
10 seeking, would that information have been
11 available had Balfour done a final accounting
12 itself on the job?

13 A. It's a tough question because a final
14 accounting would typically mean that
15 subcontractors have been paid and then
16 subcontractors wouldn't be filing liens had they
17 been paid; so it -- it wouldn't have been
18 necessary.

19 Q. Okay. What's the next entry?

20 A. The next entry is September 17, 2019,
21 and on that date, I issued another letter that
22 identified additional potentially excessive lien
23 amounts.

24 Q. And what was the amount of the
25 potentially excessive lien amounts, as of

1 September 27, 2019?

2 A. It was \$13.8 million.

3 Q. And at this time, you-all -- you had not
4 yet been able to perform your audit of Balfour's
5 books, correct?

6 A. No. That didn't happen until the
7 subsequent year.

8 Q. Okay. And then what's the next entry in
9 green?

10 A. The next entry is October 2nd, 2019,
11 when the Court ruled that BBC and subcontractors
12 would produce information in order for us to
13 identify duplicative liens.

14 Q. And did you in fact receive information
15 from BBC and specific subcontractors?

16 A. I think we received responses. I don't
17 know that it could all be classified as
18 information.

19 Q. Okay. What does that mean?

20 A. If a subcontractor produced something
21 that was just an amount or -- yeah, it just
22 depends on what the information was, and I can't
23 remember at this time.

24 Q. Okay. And so the Court ruled on October
25 2nd, 2019, right?

1 A. Correct.

2 Q. And what is the next entry?

3 A. I issued another affidavit in November
4 27, 2019 identifying uncorrelated lien amounts of
5 \$17.4 million for particular subcontractors.

6 Q. And once again, the total amount of
7 liens was \$26,345,655?

8 A. Yes.

9 Q. Okay. And then what's the next entry on
10 March 17th, 2020?

11 A. The March 17th, 2020, the Court issued a
12 ruling that BBC should support the audit process.

13 Q. Okay. And then the next entry is April
14 3rd, 2020?

15 A. The next entry is April 3rd, when
16 Library filed a motion to enforce that rule.

17 Q. Okay. And then what is next entry? It
18 looks like it's June 17th, 2020?

19 A. Right. I think the Court agreed -- or I
20 don't get my words right -- with the motion to
21 enforce.

22 Q. And that the audit would proceed?

23 A. Correct.

24 Q. Okay. Then the next entry is July 1 of
25 2020. What happens then?

1 A. I submitted a document request list to
2 BBC to identify those documents. We call them --
3 I'm sorry, did someone object?

4 THE COURT: No. Go ahead.

5 THE WITNESS: I'm sorry. I issued
6 a letter requesting accounting reports and
7 information to get the audit started.

8 BY MR. MCDONALD:

9 Q. And was the request that you issued
10 typical of the audit process that you undertake
11 in your business?

12 A. Yes.

13 Q. It didn't contain anything that was out
14 of the norm?

15 A. No. It would identify accounting
16 numbers and documents in order to accumulate what
17 the project costs were.

18 Q. All right. And then the next entry is
19 some 30 days later on July 30, 2020. What
20 happened then?

21 A. In the month of July of 2020 is when the
22 majority of that audit -- I call it field work --
23 took place. It was COVID time, so it was done
24 remotely. But we spent some time with BBC
25 representatives receiving documentation, asking

1 questions, taking that sample that I talked about
2 earlier, testing individual transactions.

3 And throughout that process, it became
4 apparent -- or maybe I should just say easier to
5 identify the amount of duplication that was in
6 their claimed amounts versus their accounting
7 records and the fact that the claims, especially
8 when you come with the sub claims -- with BBC's
9 claim were completely duplicative. So in order
10 to scrape away that duplication, I had
11 conversations with BBC on how that could be done.

12 So if a subcontractor is asking for an
13 unapproved change order that it felt it should
14 have been paid for and did the work, but BBC is
15 also issuing a claim for all unapproved change
16 orders, it's completely duplicative, barring
17 maybe some BBC mark up that is properly applied
18 to the change.

19 So in order to determine the amount of
20 duplication in all the claims, what you would
21 need to do is pretty logical, how many -- what
22 change orders are you trying to get paid for,
23 what change orders are you trying to get paid
24 for. We wipe out those that are the same.

25 If the subcontractor had another type of

1 claim, a delay claim, then you would have to go
2 into BBC's records and see what their delay
3 claims might be, and you would eliminate that
4 same duplication, as BBC was just a pass-through
5 to the subs.

6 I documented before, well over 95
7 percent of the work was done by subcontractors.
8 Very little of the work was -- there wasn't
9 really self-performed work. There was costs
10 incurred, especially for general conditions. But
11 the work was all being done at the subcontractor
12 level.

13 So I would need BBC to provide an actual
14 list of the change orders, what we -- as Kim was
15 explaining, RCOs, requested change orders, that
16 they were claiming and then identify what change
17 orders related to which subcontractors so that I
18 could kind of just play concentration and match
19 them up and eliminate the duplication.

20 The problem is, the RCOs -- BBC didn't
21 have a list of the RCOs that they were claiming.
22 There was an amount for RCOs in the claim letter.
23 There's the found binders that we've heard a lot
24 of people talking about. But four of the binders
25 had a couple RCO lists in them, but none of them

1 tied to the amount of the letter.

2 And if you have a change order or RCO
3 log and you have a number with a dollar amount
4 for that change, it didn't foot to the amount of
5 anything else. So I had lot of information, but
6 none of it reconciled to each other.

7 So I wasn't going to be able to identify
8 exactly how much was duplicative of subcontractor
9 claims because I didn't even know what bucket was
10 the right bucket to start with. Do I try and
11 foot to the bucket that's in the claim letter?
12 Do I try and foot to the bucket where I actually
13 have a list of changes in the four binders?

14 Or during the audit process, I was also
15 provided with different change order logs that
16 had different amounts, a different quantity of
17 change orders and different dollar amounts of
18 change orders. And then that same process has to
19 be done with the subcontractor claims.

20 In the January 2019 letter that BBC
21 wrote, it identified \$11 million. It says,
22 subcontractor claims, \$11,110,000 and some
23 change. But it didn't tell you which
24 subcontractors had claims or how much for each
25 one. If you opened the four binders, you would

1 find various claims for subcontractors.

2 I dumped out that shoebox, and I
3 evaluated those four binders. I believe there
4 were five subcontractors that had claims in
5 there, and when you added up the amount for each
6 sub, it was eight and a half million dollars. I
7 knew I was a couple million dollars short.

8 I provided the spreadsheet to BBC, and I
9 said, okay, I've looked through binders that you
10 told me to look through. Here's all the amounts
11 I could find for all the subs. I'm a couple
12 million dollars short. Not only that, you did
13 mention that Watson had a claim, but you don't
14 have any Watson claims in this binder. So could
15 that be the difference.

16 And we went through this kind of brain
17 storming, hunt-and-peck kind of exercise to try
18 and figure it out. And during that process, I
19 submitted various updated spreadsheets to BBC,
20 where if they gave me some new information, I
21 would change that amount. And then I'd say,
22 okay, well, now I'm only \$1.2 million off.

23 And then we'd get some more updated
24 information, and at one point, Watson submitted a
25 claim letter during my audit process and the

1 amount changed again. Unfortunately, it made the
2 delta get bigger. So I guess in a nice way to
3 say that, I was honing in on it, but I couldn't
4 get there.

5 Q. At the time you were performing this
6 audit in July of 2020, who at Balfour were you
7 dealing with? What actual individual were you
8 dealing with?

9 A. Casey Thompson and Dave Simonton.

10 Q. And who did you understand those two
11 gentlemen to be?

12 A. Well, Mr. Thompson was the controller or
13 the CFO, definitely, of the project where
14 Mr. Simonton was more on-site project management.

15 Q. Okay. And at the time you were
16 performing your audit in July of 2020, did you
17 have any discussions with those two
18 representatives of Balfour about the
19 duplications?

20 A. Many conversations and e-mails back and
21 forth.

22 Q. And what, if anything, did Balfour
23 Beatty do about the duplication in response to
24 your conversations that you were having with
25 them?

1 A. Balfour's position in the e-mails was,
2 you're only to look at the costs that we've
3 actually incurred that in our accounting records.
4 Here, go for it. You're not evaluating the
5 claims at this time.

6 And I think that changed a little bit in
7 either late July or August to say, well, yes, you
8 can audit the claims. There's the four binders,
9 and if you find duplication, let us know or put
10 it in your audit report.

11 Q. Did Balfour Beatty, at any time during
12 the July of 2020 audit, make any effort to
13 identify duplication for you?

14 A. No.

15 Q. Did Balfour Beatty at any time during
16 the 2020 audit, July 2020 audit, acknowledge to
17 you that there was in fact duplication?

18 A. I have to say yes. In those
19 videoconference calls, we talked about the
20 process of how you -- what process you'd need to
21 go through to eliminate the duplication.

22 I had to learn from them as far as how
23 things were accounted for and what records would
24 be available to support this. And we did -- like
25 I say, brainstorm about that process.

1 But I will caveat that by saying,
2 Mr. Thompson did write an e-mail around that time
3 frame noting that -- I don't know if it
4 officially said, I don't know of any duplication,
5 or if it just said, when you find it, you can put
6 it in your audit report.

7 So I'm just trying to be fair. I don't
8 know that they would say that they admitted it.
9 But we went through the process of how it was to
10 be eliminated.

11 And it would be completely illogical
12 for -- anyone in this room knows that there was
13 millions of dollars in duplication because --
14 well, we're going to find out later -- the claim
15 went down by millions because that duplication
16 was finally eliminated. We all knew it was
17 there.

18 Q. Did Balfour Beatty eliminate any
19 duplication in July of 2020?

20 A. No.

21 Q. Okay. And the next entry is August 3rd
22 of 2020, and what happened there?

23 A. I had written an affidavit as requested
24 to note that BBC was not allowing me to audit the
25 claim. It was requesting that I only look at the

1 costs incurred that were in the job cost report.

2 And because of my understanding of my
3 task that the Court told me to do was to evaluate
4 the project costs, not just costs recorded in a
5 particular accounting report.

6 At that time, I issued an affidavit
7 regarding the fact that I understood BBC to be
8 saying, you can have the four binders if you want
9 to look at the claim, but right now, the only
10 thing that we're going to help you support is
11 what's in our accounting record.

12 Q. And the next entries are from August 12,
13 2020 through August 17, 2020. What happened
14 during those five days?

15 A. Mr. Thompson and I, maybe Mr. Simonton
16 too, e-mailed each other back and forth regarding
17 our understanding of what that audit is and the
18 support that I was getting or not getting and
19 what the scope of my work was.

20 Basically, the field work part, this
21 remote field work part of our work was completed,
22 and understandably, Mr. Thompson wanted some sort
23 of confirmation that I was done and that I was
24 out of his hair for a while. Unfortunately, I
25 wasn't done, and we had a disagreement about what

1 done meant.

2 Q. And then the next entry is November 16th
3 of 2020. What happened then?

4 A. That's the date of the report that I
5 issued on the project.

6 Q. And what was your conclusion at the
7 time?

8 A. I was able to provide some -- what I'd
9 call typical audit opinions regarding certain
10 costs that were not incurred in accordance with
11 the contract.

12 But as far as the claimed amount, the 22
13 million that was being asked for as a claim,
14 those amounts were still replete with duplication
15 and otherwise unsupported. And I couldn't issue
16 any audit opinions on the claim.

17 Q. So the audit in November 16, 2020, was
18 that your final audit, or did it have
19 qualifications?

20 A. Well, it had a page and a half of scope
21 limitations about the fact that I couldn't finish
22 the work, but it is the last report that I had
23 issued.

24 Q. All right. And then the next entry is
25 December 16th of 2020. What happened then?

1 A. I think Cotton and Company's invoices
2 through September were, I believe, \$530,000.

3 Q. And then you've -- you also have costs
4 associated with being here at the trial, right?

5 A. That would include anything through the
6 end of September, I believe.

7 Q. Okay. And were you physically in
8 Charleston when these September 2021 claim
9 iterations came through?

10 A. Maybe not the first one since it was the
11 Friday before. I didn't arrive until that
12 weekend.

13 Q. And during that time you were here, were
14 you working on these various iterations of these
15 claims?

16 A. Yes. I'm expecting somebody is going to
17 charge me rent for the space I've been taking up
18 in the back.

19 Q. How, if at all, did this -- you've been
20 involved in this since March of 2019; is that
21 what you said? 2019?

22 A. I don't know if it was March, but it was
23 definitely April.

24 Q. Okay. April of 2019. How, if at all,
25 did this audit differ from your typical audits

1 of, when you're working for an owner and you're
2 trying to audit the contractor and the GMP, the
3 cost of the work?

4 A. Well, typically -- I mean, I wouldn't
5 say always except for this job -- the contractor
6 puts forth what it wants to get paid, and I audit
7 that. You tell me how much you want and then
8 support it with accounting records.

9 I'm going to take samples. I'm going to
10 test it, and I'm going to provide my opinion as
11 to whether it should be reimbursed. And if not,
12 why I took, let's say, deductions or I increased
13 costs if something was done wrong. You know, I
14 will correct errors in either direction.

15 That's obviously a lot of different than
16 this project where I've been really struggling to
17 just identify what it is the contractor wants.

18 Q. And you've been sitting in this
19 courtroom for the past three weeks, whatever it's
20 been?

21 A. Yes. The past week and a half and then
22 the two weeks prior to that and then various
23 hearings.

24 Q. And are you still struggling to
25 understand what it is the contractor is asking

1 for?

2 A. As far as the dollar amount, I know what
3 is at the bottom of that chart. But I'm
4 definitely still struggling to try and figure out
5 what they want and why they want it and what
6 support there could be for some of these amounts.

7 Q. And the opinions you've given thus far,
8 have you given them to a reasonable degree of
9 certainty?

10 A. Yes, I have.

11 Q. Okay. And you don't intend to offer any
12 opinions in this courtroom before this Judge that
13 are not to a reasonable degree of certainty; is
14 that right?

15 A. I do not intend to do that.

16 Q. If you're going to offer an opinion,
17 it's going to be to a reasonable degree of
18 certainty?

19 A. Yes.

20 MR. MCDONALD: Okay. Once again, I
21 apologize, Your Honor, I don't know what time it
22 is, but this is a good stopping point if you want
23 to take a break.

24 THE COURT: All right. Very good.
25 Let's go ahead and take a break. I've got 2:47.

1 work and the guaranteed maximum price for the
2 general conditions portions of the contract?

3 A. Yes. It would be the GMP as identified
4 in pay app 45, which is \$3,319,212.

5 Q. Okay. So that is the final
6 reconciliation as it relates for the general
7 conditions portion, \$3,319,212; is that right?

8 A. Correct.

9 Q. All right. And do you have an opinion
10 as to a reasonable degree of accounting and
11 auditing certainty as to the final reconciliation
12 for the primary portion of the contract?

13 A. Yes. It would be the lesser of the
14 eligible cost of the work or the GMP for that
15 primary portion which is \$55,544,734.

16 Q. Okay. All right. And within that final
17 reconciliation, would you add anything to that,
18 to the \$3,319,212 for the general conditions and
19 the \$55,544,734 for the primary portion? Are
20 there any numbers that are added to that?

21 A. Yes. Those two amounts are cost of the
22 work, and then you would add to that the agreed
23 upon fixed amount for preconstruction services,
24 which is \$66,000,779, and then you would also add
25 on the two and a half percent of the GMP that is

1 awarded as the contractor's fee.

2 So if you do that math, two and a half
3 percent of the GMP would be \$1,483,090 of fee,
4 and then you would add up all four of those
5 numbers to be the amount that BBC should receive.

6 Q. Okay. And what is that number? What is
7 the --

8 A. That amount is \$60,413,815.

9 Q. Okay. \$60,413,815?

10 A. Correct.

11 Q. And how much has Balfour been paid to
12 date?

13 A. Library has paid Balfour \$59,994,390.

14 Q. \$59,994,390?

15 A. Correct.

16 Q. And so what does that leave a balance
17 of?

18 A. That would leave a balance owed to the
19 contractor of \$419,425.

20 Q. \$419,425?

21 A. Yes.

22 Q. Okay. And have you -- are these numbers
23 to a reasonable degree of accounting and auditing
24 certainty?

25 A. Yes.

1 Q. Okay. All right. And have you had the
2 opportunity -- to the extent the Court rules on
3 awarding liquidated damages, have you had the
4 opportunity to calculate those?

5 A. Yes.

6 Q. Okay. And how did you calculate it?

7 A. Well, liquidated damages would be either
8 the \$9,000 a day or \$9,500 a day because both of
9 them appear in the contract, times 566 days, I
10 believe, is the number of days between
11 substantial completion of the contract and
12 actual.

13 But that math becomes obsolete because
14 the contract does state that the liquidating
15 damages would max out at the fee. So it simply
16 just becomes the amount of the fee, which is
17 \$1,483,090.

18 Q. \$1,483,090 being as LDs, correct?

19 A. Yes.

20 Q. Okay. And you were here for Ms. Brown's
21 testimony, were you not?

22 A. Yes, the majority.

23 Q. And did you have a hand in compiling the
24 BBC contract costs that were incurred by Library?

25 A. Yes. Those were in my lost profits

1 you know, at full operation or not.

2 THE COURT: Okay. All right.

3 BY MR. MCDONALD:

4 Q. And, Your Honor, while we are still on
5 proffer, Ms. Hadley, do you have an opinion, to a
6 reasonable degree of accounting and auditing
7 certainty, how much, based upon all the numbers
8 we just went over, the total amount that Balfour
9 owes to Library Associates?

10 MR. HILDEBRAND: Same objection,
11 Your Honor.

12 THE COURT: Noted. Go ahead.
13 Still on the proffer.

14 THE WITNESS: Incorporating the two
15 proffered lost profits and additional cost items
16 and then all of the other issues that we --

17 MR. MCDONALD: Yes.

18 THE WITNESS: -- previously
19 discussed? That total would be \$27,778,571.

20 MR. MCDONALD: That would end my
21 proffer on that issue, Your Honor.

22 THE COURT: All right.

23 BY MR. MCDONALD:

24 Q. And then now, let's do it this way,
25 Ms. Haldey, the subtotal -- the numbers we went

1 through earlier, the subtotal of balance owed to
2 Balfour Beatty of \$419,425, if you apply the
3 liquidated damages amount, how much would Balfour
4 Beatty owe to Library Associates?

5 A. \$1,063,665.

6 Q. And then, to that, you would add the BBC
7 contract costs incurred by Library to the extent
8 they are awarded, and what is -- and that number
9 is what? Would you add the \$1,063,665 and the
10 \$2,256,764?

11 A. Yes. You would add those two together,
12 \$3,320,329.

13 Q. \$3,320,000?

14 A. 329.

15 Q. 329, from Balfour to Library Associates?

16 A. Yes.

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

20 A. Yes.

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

24 MR. HILDEBRAND: Your Honor, before
25 I begin, I would like to make a motion and an

1 A. I have not issued a report in the past
2 five weeks since the new plan had been prepared.

3 Q. Well, there hasn't been a report since
4 Balfour has been provided on the GMP analysis or
5 any other report from you from -- since December
6 10, 2020. Have you provided any reports, to your
7 knowledge, that we have not gotten?

8 A. So BBC did not assert a new GMP until
9 several weeks ago in September of 2021. As I put
10 in my timeline, the amount that they claimed and
11 what they stated as to the GMP was the same from
12 the January 2019 letter.

13 I know that we don't need me to rehash
14 the amount of times that I have kept articulating
15 that the claim amount was duplicative and that
16 you can't just add these things together, the
17 claim and the incurred costs because they're
18 overlapping and duplicative.

19 So once the trial started and BBC
20 acknowledged and validated that I've been right
21 for the past two and a half years, they produced
22 a claim in September of 2021 that was millions
23 and millions of dollars less than it ever had
24 been, and that is brand new information to me.

25 And to be fair, I've been sitting back

1 there auditing away trying to figure out those
2 numbers, and, no, I have not produced a report
3 based on that claim that was just recently
4 submitted.

5 Q. Well, let's look at this report right
6 here. So we agree that it's not been -- the only
7 thing we had prior to your testimony today to --
8 I will strike that.

9 So schedule B. The GMP cost that is
10 provided in your report, that GMP cost is what
11 you took as you looked at what the parties had
12 agreed the GMP was as reflected on the latest pay
13 application, correct?

14 A. Yes. If I can make just one minor
15 correction. You keep saying the term GMP costs,
16 and those two words don't go together.

17 Q. Okay.

18 A. There's eligible costs and then there's
19 the GMP, which is the maximum contract value,
20 which doesn't really have anything to do with
21 costs. It's just the maximum.

22 Q. Right.

23 A. So the current GMP that's in schedule B
24 was taken from -- was taken from, I believe, pay
25 application 42 because there was an OCO after

1 MR. HILDEBRAND: All right. Thank
2 you. We would also move towards -- I think it's
3 nonsuit under 41 is what the (inaudible) instead
4 of directed verdict --

5 THE COURT: It is.

6 MR. HILDEBRAND: -- for a bench
7 trial. There's no -- their claim for liquidated
8 damages falls because they -- there has been no
9 testimony from their experts to establish that
10 there were any critical path delays caused by
11 Balfour Beatty Construction Company.

12 The only critical path delays that have
13 been identified were by Mr. Doren, who said he
14 did a critical path analysis, and they were all
15 attributable to the owner, to Library Associates.
16 So any claims relative to liquidated damages are
17 because of the critical path, and then not
18 putting on evidence of that.

19 I understand that they are not claiming
20 damages beyond the 1.4 million dollars, and I --
21 any liquidated damages are limited to that. So I
22 would move for directed verdict for any damages
23 in excess of that. There -- I would also move
24 for directed verdict on liquidated damages
25 because no claim was made until the project was

1 completed.

2 If you look at the claim language in the
3 contract, it's pretty clear that a claim is any
4 assertion that you owe money, that you're
5 entitled to time, or you have any sort of damages
6 against the other party. It's liquidated
7 damages. Damages connotes a claim.

8 I mean, there's no way to get -- no way
9 to get around it. It is a claim, and there's no
10 question but that, once the contract completion
11 date, which was originally July, and then was
12 changed to August, I believe --

13 THE COURT: That was in '17.

14 MR. HILDEBRAND: August 19 of 2017.

15 THE COURT: '17, right?

16 MR. HILDEBRAND: Yes, sir. Once
17 that was passed, then certainly the owner knew or
18 knew that if they wanted to assert liquidated
19 damages, they could have. So they did not do
20 that under the contract. Also --

21 THE COURT: Well, I don't agree
22 with you on that one either. Mr. Bundy wore old
23 Mr. Cotherman out on that question over and over
24 and over, and finally, Mr. Cotherman agreed, you
25 can't have liquidated damages until you know --

1 until the project is over and you know what the
2 claim is for. So I'm going to deny that one.

3 My other point was, didn't Jim Clements
4 talk about the critical path for some length of
5 time, as I recall? So there is some effort about
6 that. I seem to recall him talking about the
7 critical path a fair amount.

8 MR. HILDEBRAND: I know that we
9 introduced his deposition excerpt where he
10 emphatically, and in fact, I cross-examined him
11 on it. I asked him about that, and I don't think
12 he testified anything about the critical path.
13 He said that he's not a critical path expert and
14 has no opinions regarding the critical path is my
15 recollection.

16 THE COURT: All right.

17 MR. HILDEBRAND: I also move for
18 nonsuit that no claims were made by the owner or
19 any of the claims that they're asserting in this
20 matter.

21 Mr. Bundy has said, look, y'all never
22 made a claim for your delay damages and these
23 other damages until you made your claim, the
24 three volume claim in early 2019. And he said
25 that it went to the architect, and then we

1 introduced evidence from -- the e-mail from the
2 architect saying, I ruled on it. I've already
3 issued the substantial completion, and I think my
4 obligations are over.

5 There's been no evidence, whatsoever,
6 that the -- that Library Associates has asserted
7 any of these claims at all during the contract
8 period or otherwise until this lawsuit was filed.
9 There's been no evidence that the architect
10 addressed any of their claims.

11 So they argued at that point against us,
12 but then they're charred by their own brush
13 because they -- and Kim Brown admitted that. I
14 said, did y'all make any claims? Did y'all
15 assert any claims at all to the architect or
16 otherwise during construction? And she admitted
17 that they did not. There were no formal claims
18 that were made, like we did. And certainly not
19 within the time period of the -- that is
20 referenced in the contract.

21 I would also move for nonsuit on their
22 claimed repair costs for the claim's unfinished
23 work. By the time that all of that was done,
24 they had refused to pay us the amount due under
25 the contract, and you'll recall, Your Honor, that

1 the architect wrote a letter in January of 2019
2 saying, look, the contract amount is 65 million
3 dollars. I'm -- there are a few setoffs. I'm
4 going to impose a setoff for painting.

5 I'm going to impose a setoff for
6 liquidated damages, but there's still a million
7 five left under the contract that he said was
8 owed to Balfour. That was never -- that was not
9 paid. So all of these damages, it's
10 inappropriate for an owner who says we're not
11 going to pay you.

12 And in fact, what happened was that we
13 asserted our claim under the contract. And it
14 was undisputed that we were owed that amount.
15 The owner said, here's the GMP that we -- and the
16 architect said -- acknowledging that.

17 And then for the first time, the owner
18 goes back and says, well, we want the -- we're
19 going to assert liquidated damages of 1.4 -- oh,
20 by the way, we're not even going to recognize the
21 cap on liquidated damages because of first to
22 breach or something like that.

23 So they asserted some extra contractual
24 defense or claim to try to defeat our claim for
25 payment. And so I think that all of their repair

1 costs were inappropriate because they didn't pay
2 us.

3 There are -- i also submit that there
4 are plaintiff's -- I'm sorry, defendant's
5 counter-claims barred by the doctrine of prior
6 breach. There's been so much evidence of that,
7 Your Honor. The plans that were supposed to be a
8 hundred percent plus just flat out were not.

9 All of the testimony has been, they were
10 deficient from the get go. When we started --
11 when we tried to construct, we found deficiencies
12 then. We notified the architect. The architect
13 had to make changes, and they -- there's no
14 question about that. In fact, Mr. Clements said
15 that, when he looked at all the reasons for the
16 sixth floor delays, he asserted all the blame to
17 primarily the architect. Some of them fell on
18 the plaintiff. That's one of them.

19 Mr. Jim Clements, he's a nice guy. I
20 like him. He's got a place out in the country
21 close to mine. I mean, he's just a nice fellow,
22 gregarious. I'm not -- nobody said that he's
23 incompetent, and he didn't know how to do
24 construction management services.

25 The simple claim was that he did not

1 have any authority to approve changes or to
2 approve the expenditure (inaudible), and when you
3 read the deposition excerpts of Jim Clements and
4 of Michael Bennett and of Kim Brown, it's --
5 along with the testimony that you heard here,
6 again it's not derogatory. It's just the simple
7 fact.

8 The owner was required under the
9 contract to appoint somebody with the actual
10 authority -- their owner's representative as
11 shown on the contract was Jim Clements. He just
12 didn't have that authority.

13 THE COURT: I don't know. He kind
14 of bristled when you -- they said he was a
15 messenger boy. He didn't like that at all.

16 MR. HILDEBRAND: Well, Mr. Bundy
17 made a big point of that, but he wasn't even here
18 when they said that. I don't think it was meant
19 derogatorily on that point, but I don't think
20 that was the actual target. There is no evidence
21 for the UTPA, Your Honor.

22 THE COURT: Unfair trade practice?

23 MR. HILDEBRAND: Pardon me?

24 THE COURT: It's a contract case,
25 but I tell you, some of this -- some of this

1 stuff your client has done after the fact, I --
2 like I said, you're not going to get -- I'm not
3 going to grant you a directed verdict on that
4 one.

5 You're going to have to be able to
6 explain to me what happened with the final
7 accounting that Ms. Hadley kept asking for, and I
8 just can't, quite frankly, figure that one out.

9 MR. HILDEBRAND: You will hear from
10 our people, you know, in what they provided, and
11 we certainly do plan to fully explain that to
12 you.

13 THE COURT: All right.

14 MR. HILDEBRAND: But for the
15 record, we -- okay. I understand. Breach of
16 contract accompanied by fraudulent act. Again,
17 it's just -- the fraudulent act was the
18 conspiracy is what they claimed.

19 There was no fraudulent act. We
20 finished the job. The conspiracy and entering
21 into the joint defense agreement has nothing do
22 with -- there has to be some misrepresentation,
23 and, you know, there was none. There was simply
24 a joint defense agreement that was entered into.
25 And there's no evidence of any fraudulent act.

1 (Inaudible) that we were trying to injure them
2 and plan for them -- intend for them to rely on
3 it.

4 Basically what you have here, Your
5 Honor, as I'm sure you're well aware -- and I
6 think that Jim Clements testified to that this --
7 the project was supposed to have finished in July
8 of 2017, but holy moly, there was change after
9 change after change after change.

10 You heard from Mr. Doran, even after the
11 completion date, there was all sorts of change
12 orders and all issued by the owner that caused
13 the project to become -- to get off track and to
14 take a lot longer than required.

15 And then right at the end, we submitted
16 our final pay apps, several pay applications, and
17 they weren't paid. And a bunch of liens were
18 filed, and it was a very difficult time to try to
19 get the project closed out and the hotel
20 finished, much to Balfour's credit.

21 You've heard some vitriolic statements
22 against Balfour and how God awful we were, but to
23 our credit, we provided -- we didn't walk off the
24 job when we weren't paid. We never walked off of
25 it, and we stayed there until the bitter end,

1 even with our notices of delay, and without
2 getting paid on the sixth floor, we continued to
3 work and finished and built Mr. Bennett a first
4 class, world class hotel.

5 THE COURT: When's the last date
6 y'all did work out there? Was it April?

7 MR. HILDEBRAND: Yes, sir.

8 THE COURT: April of '19?

9 MR. HILDEBRAND: Yes, sir.

10 THE COURT: Okay. All right.

11 MR. HILDEBRAND: There's also a
12 claim for indemnification.

13 There's one other claim that they're --
14 their claim is that we did not bond off liens,
15 but the -- there's a caveat to that in the
16 contract that, so long as the owner is not the
17 fault of uncontested amounts, and we -- our
18 contention is that there were amounts owed to us
19 that were uncontested, as referenced in the sixth
20 floor claim and as referenced in the architect's
21 e-mail of January 2019, right at end of the
22 project where he said, okay, y'all are owed 5
23 million bucks, I want to deduct some for the
24 painting. I'm going to deduct some for LDs.
25 You're still owed a million five.

1 So I don't think we are obligated to
2 bond off our own lien, nor those of
3 subcontractors that were -- subcontractors had to
4 file affidavits saying that they -- affidavits
5 saying that they were owed money, and that's what
6 the South Carolina statutes provide for, as I'm
7 sure you're well aware.

8 There have been some allegations that we
9 aren't entitled retainment because we've not paid
10 subcontractors yet, but our -- you saw in the
11 contract that the subcontractors -- in our
12 contract with Library, it says that we're not
13 required to pay the sub. We will pay the subs
14 out of money that we receive from the owner.

15 And in addition, every pay application
16 that we submitted. And the evidence shown
17 through David Simonton and Tim Spano was that,
18 with every pay application, we didn't prepay
19 subs, and they never paid us. There was never
20 any conditions. So all the way up until the end
21 of the job, the owner paid us knowing that we had
22 not paid subs because we would pay subs from
23 their -- from pay applications. But there's no
24 condition of prepayment.

25 So I think for -- that that application

1 is barred by waiver estoppel and forfeiture.
2 Allegations regarding conditions precedent for
3 the claims that we'd followed some -- dot some of
4 the I's and crossed some of the T's. We briefed
5 that in our -- in our pretrial brief, Your Honor.

6 Waiver, estoppel and forfeiture
7 provisions apply in every case, but certainly by
8 you as well, that what the -- what the owner --
9 we absolutely provided notices of delay to the
10 owner. And Mr. -- if you read the testimony of
11 Mr. Clements, he said, yeah, Balfour is trying to
12 make a claim.

13 I understand that they were trying to
14 make a claim. Maybe they didn't do so perfectly,
15 but -- maybe they didn't do so exactly according
16 to the contract, but they were trying to do that.
17 So the law provides that, if the owner has actual
18 notice of the claim and that there can be a
19 waiver and estoppel.

20 And basically, we spent a whole lot of
21 time and money relating to these delays to get
22 this -- to get the hotel finished, and it's just
23 as an equitable principle, you can say, you know,
24 that maybe he didn't dot the I's exactly and
25 cross the T's exactly, but I still think the

1 owner got the benefit of all of that work, and I
2 think that they should pay for it.

3 Also, this goes to -- I just want to
4 make the grounds because I think you've already
5 ruled on it. On the notice of claims for
6 liquidated damages, there's the implied warranty
7 of good faith and fair dealing. The testimony in
8 the depositions that you read, you will recall
9 where I asked, what do you think would have
10 happened if the owner had asserted -- or at least
11 told Balfour, look, we think y'all are, you know,
12 violating the contract, and we intend to assert
13 liquidated damages at some point.

14 If they had done that, then those were
15 accumulating at \$270,000 a month, and it would
16 have brought the issue to a head, and then
17 Balfour could have made the decision of whether
18 we wanted to continue with the construction or
19 not.

20 But what happened was, we were never
21 told about that; so we continued gladly along
22 until the very end, got the hotel finished, and
23 then were blind-sided on that issue. Lastly -- I
24 think that's all. Hold on a second. Can I have
25 a minute?

1 THE COURT: Sure.

2 MR. HILDEBRAND: And then lastly,
3 Your Honor, is that there -- there was a claim,
4 you recall, against two Balfour entities. One
5 was Balfour Beatty Construction Company, LLC.
6 That is the entity that's shown in the contract,
7 and that's who the contract was with.

8 There was also a claim in the
9 counter-claim against Balfour Beatty Construction
10 Company, Inc. Balfour Construction Company,
11 Inc., there's been no testimony, whatsoever, it
12 had any involvement with this project,
13 whatsoever. They just -- this came before you on
14 summary judgment, and you said, well, I will
15 decide to look at it later.

16 And the evidence was that -- I don't
17 believe there was any evidence either on the
18 summary judgment, but that's really irrelevant
19 because the question before you is, is there any
20 evidence that Balfour Construction Company, Inc.,
21 had anything to do with this project. What the
22 counter-claim alleges is that it had agreed to be
23 the guarantor.

24 You've heard nothing, no testimony,
25 whatsoever, that the -- that Balfour Construction

1 Company, Inc., was a guarantor or otherwise. So
2 I think that that needs to be -- they definitely
3 need to be out.

4 THE COURT: Okay. Who wants to
5 talk about that one?

6 MR. BUNDY: Unfortunately, I guess
7 opposing counsel doesn't realize that evidence
8 comes in many forms. There's a documenting
9 evidence, which is a response to the request for
10 proposal, signed by Balfour Beatty, and Balfour
11 Beatty Construction, whatever the name is. So
12 they were going to guarantee the performance. So
13 that's my evidence. I don't have to bring in a
14 witness to read to you. It's in evidence. Okay?
15 Now, if you believe the narrative you just heard,
16 Balfour Beatty would be entitled to a certificate
17 of merit and a country ham for finishing this job
18 two years later and trying to steal 13 million
19 dollars from my client. That's where we would
20 be.

21 What I would like to do, instead of
22 focus on what somebody may have imagined that
23 occurred what they wish what would have occurred
24 in this Courtroom or somebody imagined what they
25 wish would have occurred in this Courtroom or

1 imagine evidence they wish they had put in, or
2 imaginary things that happened in a deposition
3 taken two or three years ago.

4 I'd like to bring ourselves back to the
5 Courtroom and what was in evidence because I had
6 mentioned to you earlier, I'm not a litigator. I
7 find that to be a despicable term. I am a trial
8 lawyer. You litigate out here. You try cases in
9 here, and this is what matters, what's in here.
10 Now, I don't where to even want to even begin.
11 We can start with this --

12 THE COURT: Well, let me tell you,
13 I plan on denying all the motions.

14 MR. BUNDY: Right.

15 THE COURT: But I'm interested in
16 hearing on the issue of the inc. Tell me about
17 the inc., if it's in the contract.

18 MR. BUNDY: No, sir. It's in the
19 request for proposal.

20 THE COURT: All right. Request for
21 proposal.

22 MR. BUNDY: In lieu of a bond,
23 okay, you can -- the way it is, you can -- when
24 you send a request for proposal, they can give a
25 payment performance bond, right? The request for

1 proposal wants to know, what is your financial
2 ability. Okay?

3 THE COURT: Okay.

4 MR. BUNDY: And will you guarantee,
5 okay, the performance of this. Who will
6 guarantee the performance of this contract.

7 That's the financial statement that they
8 used in their response to request for proposal to
9 convince my client -- because it's a corporation.
10 They gave us their financials to not entertain a
11 performance bond. And the reason you have to pay
12 a performance bond is so you know somebody is
13 going to guarantee the work.

14 So they're the ones that put it in
15 there. Mike Baumbach signed that document under
16 oath, and we verified they were -- that that's
17 who these people are behind us. That's who our
18 major company is. That's not enough. It's not
19 enough.

20 I didn't see any reason to go any
21 further with it. Okay? I could have had
22 somebody to read it to you, but it wouldn't have
23 changed the -- changed the truth of it. So
24 that's just where we are. Okay. So that's my
25 argument on that.

1 THE COURT: Your argument is the
2 inc., the parent company, was the guarantor?

3 MR. BUNDY: Yes, sir.

4 THE COURT: All right.

5 MR. BUNDY: And -- well, do you
6 mind?

7 MR. HILDEBRAND: Sorry.

8 MR. BUNDY: I submit it Your Honor,
9 instead of somebody telling you what it says or
10 me telling you what it says, why not read it
11 without any narrative from me or opposing counsel
12 and make your own decision. I'm good with that.
13 Okay?

14 THE COURT: All right. Okay.

15 MR. BUNDY: You can determine
16 whether or not it was -- whether or not by
17 putting that in that proposal, my client decided
18 to do business with these people as opposed to
19 somebody else. The rest of it -- I mean, I think
20 the rest of it -- just read the contract.

21 I mean, some of these arguments are just
22 so out of the realm of reality and so simplistic.
23 There's no nuance at all. It's as if they read
24 one -- it's as if one shoe fits all. I can give
25 you 50 examples, but I'm not going to. We will

1 do it later. Thank you, Your Honor.

2 THE COURT: All right.

3 MR. HILDEBRAND: Your Honor, on the
4 inc., I would encourage you to read our motion
5 for summary judgment and the attachments that
6 were -- that accompanied that. It's black and
7 white. Even under the RFP, Balfour Construction
8 Company, Inc., did not guarantee this agreement.

9 But on top of that, inarguably, under
10 the contract, any prior agreements are not part
11 of the final agreement, and there's -- if they
12 had wanted to include something in the RFP, then
13 they could have done that.

14 There's no guarantee. There's nothing
15 in the contract with Balfour Construction
16 Company, Inc. It's nowhere to be found in the
17 contract documents. There's no evidence,
18 whatsoever, Your Honor. But I would encourage
19 you if you want to --

20 THE COURT: I will go back and
21 review it. I will hold that one under
22 advisement.

23 MR. TERRY: Your Honor, Watson has
24 one more motion.

25 THE COURT: Yes, sir.

1 without getting the tower crane out.

2 Q. All right. So that schedule, if it
3 existed, would be a bust in the schedule if you
4 were showing a closing of a floor, which could
5 not be closed before the pool was put in place by
6 the crane that was in the hole? That's not
7 physically possible, is it?

8 A. No.

9 Q. Okay. So that schedule, if there was
10 such a schedule -- I believe there's been some
11 testimony that there was -- would have a bust in
12 it, correct? That would be an incorrect
13 schedule?

14 A. Correct.

15 Q. Okay. And if that was the first
16 schedule, and the testimony was that bust was
17 about a three or four month delay. Were you in
18 the Courtroom when that was testified to?

19 A. I believe so.

20 Q. So the initial schedule was required by
21 the contract documents, if followed, to put you
22 in a completion date as agreed upon, right?
23 Y'all were supposed to provide schedule that, if
24 followed, would put you on substantial
25 completion?

1 A. Correct.

2 Q. And it was not possible with the
3 schedule that y'all provided because it was a
4 four month bust in it, correct?

5 A. There were a lot of -- the planned
6 schedule was based off of the original GMP
7 drawings.

8 Q. That wasn't my question. My question
9 was pretty simple. If you presented your
10 schedule to the architect and the owner, and it
11 had a completion date that was impossible to
12 achieve because of a bust in the schedule, that
13 schedule would be an improper schedule, would it
14 not?

15 A. If there was a bust in the schedule that
16 did not work.

17 Q. Because the contract requires that the
18 contractor produce a schedule that, if followed,
19 will get you to the end on time, correct?

20 A. Correct.

21 Q. And if the schedule that you provide is
22 impossible to do it, that would be a breach of
23 that obligation, would it not?

24 A. The schedule is constantly adjusting
25 based on what's going on site, and it's --

1 Q. That's not my question.

2 MR. HILDEBRAND: Your Honor, he has
3 to give him a chance to answer, of course.

4 MR. BUNDY: Well, he's answering a
5 different -- I didn't ask that question.

6 THE COURT: The answer is a yes or
7 no, and then you can explain your answer.

8 THE WITNESS: All right.

9 BY MR. BUNDY:

10 Q. Do you understand that the very first
11 schedule on a job is a planned schedule?

12 A. I do.

13 Q. Nothing has happened yet?

14 A. That's correct.

15 Q. The contract required, did it not, that
16 the as-planned first schedule, if followed, would
17 result in a building that was completed on time?
18 That was required, was it not by --

19 A. It was.

20 Q. -- by the contract?

21 A. It was.

22 Q. And the schedule that was provided did
23 not do that, did it, because of the bust with the
24 crane; is that true?

25 A. I disagree because the schedule didn't

1 show when the crane was coming in, correct?

2 Q. The schedule showed the second floor
3 being closed up before the pool was put in. The
4 second floor couldn't be closed up until the pool
5 was put in, correct?

6 A. Correct.

7 Q. And the pool was four months later on
8 the schedule than closing up the second floor.
9 Those things are not physically possible, are
10 they?

11 A. No.

12 Q. Okay. So a schedule that shows that is
13 a schedule which does not meet the contract
14 requirements, is it?

15 A. It's a bust in the schedule.

16 Q. Okay. Thank you. And that breach of
17 contract occurred within 14 days of the notice to
18 proceed because the schedule was required within
19 14 days, was it not?

20 A. I'm not sure.

21 Q. Okay. Mr. Spano, did you read this
22 contract?

23 A. I did.

24 Q. Sir?

25 A. I did years ago.

1 he's the flow expert. He's the guy that cooks
2 the turkey. So it would be perfect for him to
3 bring him in right after Thanksgiving. We'll see
4 how his bird went. So let's just see how it
5 goes. I think that's got to be what it's in
6 reply to. Okay? And I'm going to limit it to
7 that.

8 MR. BUNDY: And I just want to be
9 clear in my own --

10 THE COURT: It's reply testimony
11 and not new direct, for sure,

12 MR. HILDEBRAND: Right. Okay.
13 With that little housekeeping then, are you ready
14 to proceed?

15 MR. HILDEBRAND: Yes, sir.

16 THE COURT: All right.

17 MR. HILDEBRAND: We would David
18 Simonton.

19 THE COURT: All right.

20 Mr. Simonton, come on around. All right.

21 Mr. Simonton, you've been hanging around for a
22 little while. I think you probably have a good
23 snuff for what we're doing. Have a seat and
24 watch yourself back there. Don't go too far
25 back.

1 (DAVID SIMONTON, having already
2 been duly sworn, testified as follows:)

3 REDIRECT EXAMINATION

4 BY MR. HILDEBRAND:

5 Q. All right. Mr. Simonton, I would like
6 to first just walk through a couple of contract
7 provisions with you. So let's get -- if you
8 would get Plaintiff's Exhibit 56 in front of you.

9 A. Sure. Plaintiff's Exhibit 56?

10 Q. Yes, sir.

11 A. Okay.

12 Q. If you'll turn to the A201.

13 A. Okay.

14 Q. And page 13 at the bottom.

15 A. Okay.

16 Q. All right. 3.2.1.

17 A. Do you want me to read that?

18 Q. I will read it.

19 A. Okay.

20 Q. It says, the contract documents are
21 complementary. Before starting each portion of
22 the work, the contractor shall carefully study
23 and compare the various drawings and other
24 contract documents relative to that portion of
25 the work as well as the information furnished by

1 the owner pursuant to section 2.2.3, shall take
2 field measurements of any existing conditions
3 related to that portion of the work and shall
4 observe any conditions at the site affecting it.

5 Any errors, inconsistencies, or
6 omissions discovered by the contractor shall be
7 reported promptly to the architect as a request
8 for information in such form as the architect may
9 require.

10 Then, the next sentence, 3.2.2. Any
11 design errors or omissions noted by the
12 contractor during this review shall be reported
13 promptly to the architect, but it is recognized
14 that the contractor's review is made in the
15 contractor's capacity as a contractor and not as
16 a licensed design professional unless otherwise
17 specifically provided in the contract documents.
18 Did I read that correctly?

19 A. Yes, sir.

20 Q. Okay. What obligations did the -- did
21 Balfour have to inform the architect of design
22 errors or omissions --

23 MR. BUNDY: Objection.

24 Q. -- under the contract, to your
25 knowledge?

1 MR. BUNDY: Objection.

2 THE COURT: Basis? Basis for the
3 objection?

4 MR. BUNDY: Well, it's not a proper
5 reply for one thing. I don't know what this has
6 got to do with anything that was brought up by
7 us. And two, he just read what the obligations
8 were. So I don't know how he's going to do
9 anything other than read this very same thing
10 back to him.

11 THE COURT: All right. Purpose of
12 the question?

13 MR. HILDEBRAND: Well, it's --
14 Mr. Bundy made a point that this is not a
15 malpractice design -- malpractice case, and that
16 design errors and omissions are not required to
17 have been pointed out and hadn't been pointed
18 out.

19 And I think that they were, and this
20 confirms that we had an obligation under the
21 contract that Mr. Bundy drafted. It's black and
22 white. Any design errors or omissions noted by
23 the contractors, and that's what we identified.
24 And that's a breach of the contract.

25 If there are errors and omissions, then

1 we have an obligation to advise the owner of it,
2 and that's what we did. So that's just
3 responding to his questioning of our witnesses
4 regarding design errors and omissions.

5 THE COURT: All right. I'm going
6 to overrule the objection; however, I'm going to
7 limit that. You need to go into specific
8 instances of conduct, not just generalized
9 questions.

10 MR. HILDEBRAND: Okay. All right.
11 BY MR. HILDEBRAND:

12 Q. What did Balfour Beatty do in this
13 matter when it discovered design errors and
14 omissions that it -- that were in the drawings?

15 MR. BUNDY: Lack of foundation,
16 objection.

17 THE COURT: Go back to, if you
18 would, specific instances of conduct. What
19 particular items are we talking about?

20 MR. HILDEBRAND: I will move on,
21 Your Honor.

22 BY MR. HILDEBRAND:

23 Q. All right. Also in A201, if you will
24 turn to section 4.3.

25 A. I'm there.

1 Q. And 4.3.1.4. The contract acknowledges
2 that its obligations to complete the work in
3 accordance with the contract documents shall not
4 be affected or amended as a result of any
5 unresolved, outstanding, or rejected claims
6 submitted to the owner.

7 The contractor shall proceed with all
8 work required under the contract documents, or
9 directed to be performed by the owner, regardless
10 of any unresolved claims or proceedings to assert
11 a claim. However, the owner has no right to
12 withhold undisputed amounts and shall pay any
13 undisputed amounts due to the contract.

14 Then the next section 4.3.1.5. The
15 resolution of a claim shall be documented in a
16 change order executed by the parties. Did I read
17 that correctly?

18 A. Yes, sir.

19 Q. All right. Let's turn to, if you would,
20 Defendant's Exhibit 146. Can you get that for
21 me?

22 A. Book two?

23 Q. Yeah. It's the same as, I think, what
24 you've got in your hands here.

25 A. Okay.

1 Q. If you can just -- it's the same as what
2 you've got in front of you. All right.
3 Defendant's Exhibit 146 is a document that was
4 offered by -- part of this proffered, the top
5 part, and then the second, the bottom part was
6 offered as repair costs or damages. Do you
7 recognize that document?

8 A. Yes, sir.

9 Q. Okay. I would like to refer you to a
10 couple of them and ask you questions about just a
11 few of them. Under the BBC contract costs
12 incurred by Library, where it says flood damage
13 repair, \$13,327. Do you see that?

14 A. Yes, sir.

15 Q. All right. Do you -- are your
16 familiar -- do you have any personal knowledge of
17 that issue?

18 A. I do remember when they had a flood up
19 on the eighth that trickled down to the fourth
20 floor.

21 Q. And what was -- did you -- what was the
22 cause of that?

23 A. What I was told by the owner, that the
24 owner's painters were up there, and they tied a
25 big plastic sheet around it.

1 MR. BUNDY: Your Honor, the owner's
2 painters, objection.

3 THE COURT: I think that was
4 hearsay, but let's come back to it.

5 MR. HILDEBRAND: I'm sorry, Your
6 Honor?

7 THE COURT: It sounded like hearsay
8 to me. He's told such and such and so and so.
9 Does he know what happened?

10 BY MR. HILDEBRAND:

11 Q. Did you do any investigation? Do you
12 have any personal knowledge of that incident?

13 A. We did. We went up and saw where the
14 rooms had gotten flooded, yes.

15 Q. All right. Did you see what the cause
16 of that was?

17 A. The plastic sheet on the tub that had
18 been tied to the water, the -- the faucet that --
19 or the hardware that puts the water in, and as it
20 had pulled open -- pulled it open, and then the
21 plastic sheathing was -- had water on it.

22 And as it got water on it, it weighted
23 it down, and the water came off faster and caused
24 it to go over the tub and then flood the rooms
25 below.

1 Q. Did Balfour install that plastic
2 sheathing?

3 A. No, sir.

4 Q. Do you know who did?

5 A. The owner's direct painter, I guess.

6 Q. Okay. Let's turn down to about halfway
7 down that list where it says, outsourced laundry
8 services under \$140,193. Do you see that?

9 A. Yes, sir.

10 Q. All right. Do you have any personal
11 knowledge of that incident or that claim?

12 A. The dryer itself, we had -- they had it
13 supplied by the owner. We just hooked the gas
14 straight up to it, according to the P400 and the
15 plumbing drawings is where the gases showed.

16 Q. All right. Let's stop for just a
17 second. What is the issue here? What was the
18 problem?

19 A. The dryer would not work correctly.

20 Q. What do you mean by that?

21 A. It wouldn't stay on. It wouldn't heat
22 up.

23 Q. Okay. And when was that discovered?

24 A. When they started using it. When we
25 tested, it worked because we had to change the

1 fire sprinkler out because the heads were not --
2 the heat rating needed to be raised because it's
3 going to set them off and then also the heat
4 detector.

5 So they brought in the owner's person
6 that furnished the equipment, fired it up.
7 Everything worked fine, and then the next thing I
8 heard, that it wasn't working.

9 Q. Okay. Approximately what time was this?

10 A. It was in the early part of the
11 openings, a couple months in, I believe.

12 Q. So it would be early 2019?

13 A. Yes, sir.

14 Q. Okay. All right. So the -- you were
15 informed that the dryer wasn't working?

16 A. Yes, sir. I happened to bump into the
17 people down in the garage when I was doing
18 some --

19 Q. And who supplied the dryer?

20 A. The owner supplied the dryer.

21 Q. Did Balfour have any involvement with
22 that?

23 A. Just to hook it up.

24 Q. All right. And what was -- and was any
25 determination made as to why the dryer was not

1 working?

2 A. It needed a straight piece of pipe to go
3 into the dryer. It needed some running room for
4 the gas because it was a high gas consumption
5 dryer.

6 Q. Okay. Was the gas line -- was there a
7 design of the gas line that led to that drawing?

8 MR. BUNDY: Objection.

9 Q. Was there?

10 THE COURT: Basis? Go ahead.

11 Basis?

12 MR. BUNDY: The basis of it is the
13 best evidence of what the design was on the gas
14 line are the gas line drawings and designs
15 themselves. This is hearsay. He's -- he's
16 telling you about a document that's not in
17 evidence. He hasn't been qualified as a plumbing
18 or mechanical engineer.

19 It was their job -- it was their
20 responsibility to install it. So basically, I
21 guess what he is trying to say is -- I don't know
22 what he is trying to say, but if he's trying to
23 say the design was defective, then we need to
24 have some evidence of that.

25 But he can't even tell you what page,

1 what drawing, what detail, nothing. So there's
2 no foundation for any of this. Thank you, Your
3 Honor.

4 MR. HILDEBRAND: Your Honor, that's
5 cross-examination. He can -- he has personal
6 knowledge of what the issue was. They said,
7 we're responsible for this because the dryer
8 didn't work.

9 He has personal knowledge of why it
10 didn't work, and he can certainly testify, based
11 on his personal knowledge, what was required
12 under the design documents and what was installed
13 and what the problem was. He can cross-examine
14 him.

15 THE COURT: Yeah, I'm going to
16 allow it. Go ahead.

17 MR. BUNDY: Sure, that's fine.

18 THE WITNESS: I did look at the
19 installed gas line at that time, and it's an inch
20 and a half gas line, turned down the wall on the
21 P503 drawing, and it tied straight into the
22 dryer.

23 BY MR. HILDEBRAND:

24 Q. So in other words, it had a sharp turn
25 where --

1 A. Yes, sir.

2 Q. -- it went into --

3 A. Yes, sir.

4 Q. And that restricted the gas flow?

5 A. Yes, sir.

6 Q. And what was the -- how did that have to
7 be corrected?

8 A. They had to run an extra long pipe out
9 down and then back in. And it had to have 20 to
10 25 foot of straight run of inch and a half pipe
11 into the dryer.

12 Q. Okay. Was the gas line, where it was
13 originally installed, was that in accordance with
14 the design that was provided?

15 A. Yes, sir.

16 Q. Okay. Let's go down to -- about five or
17 six down, removal of the bar sample wall for
18 \$7,216. Do you see that?

19 A. Yes, sir.

20 Q. All right. Do you have any personal
21 knowledge of that claim?

22 A. Yes, sir. I was there when the mockup
23 was taken down. I'd assume that's the mockup.
24 It says the bar sample wall. The only bar sample
25 wall in the mockup we had was outside.

1 Q. All right. Did you hear Ms. Brown --
2 were you here when Ms. Brown testified?

3 A. Yes, I was.

4 Q. All right. And she testified the CPI
5 did a demolition and removal of the mockup. Do
6 you remember that?

7 A. Yes, sir.

8 Q. All right. What is your personal
9 knowledge of what CPI did relative to the
10 demolition of the mockup walls on the project?

11 A. Can I start at the first of the series?

12 Q. Sure.

13 A. Jim notified us that Mr. Bennett would
14 like to have that mockup hauled down to his ranch
15 farm.

16 Q. Jim Clements said that --

17 A. Yes, sir. He sent us a note and said,
18 well, the issue is, it's huge, big block cinder
19 walls, stone. But a lot of those features in
20 there had to go back on the building. The doors,
21 windows, (inaudible).

22 And he said, well, can we come and take
23 parts off of it? You know, go ahead and take it
24 off. And we said, sure, if you can't -- these
25 things had huge footings, I mean.

1 Q. Can you speak up little bit, please?

2 A. These things had huge footings on them
3 and, you know, big concrete and CMU block walls,
4 filled full of concrete. So they said, okay, so
5 they came, and they took off the canopy. They
6 took out some windows. They took off some of the
7 stone, the -- part of the wood that was out
8 there.

9 I mean, they took parts and pieces off
10 of all the mockups to haul them, put it on the
11 trailer and haul it off. And then we asked, and
12 they said, yes, we're done. So then we -- then
13 we hired Gulf Stream, and they brought in deco
14 because we had a contract with Gulf Stream. We
15 could write them a change order.

16 Then brought in deco with all the big,
17 huge hoe-rams. I mean, these things are huge,
18 and they knocked it all down. First, we took
19 pictures of the area to make sure because we were
20 really close to the other hotel, and if they
21 damage it, we wanted to have proof that it had
22 gotten damaged.

23 So they pulled everything down with
24 backhoes, track hoes, and then they had to get a
25 hoe-ram and knock these big huge footings out

1 because they were full of rebar to keep them from
2 tipping over in the wind. And then they loaded
3 it up, hauled it off, put the area back to what
4 it was, and then we came in and finished the
5 landscaping.

6 Q. Okay.

7 A. So it was a lot of material there that
8 was left.

9 Q. So the \$7,216, based on your
10 recollection, was where Mr. Bennett wanted
11 portions of the mockup taken out and then
12 transported to his farm?

13 A. Yes.

14 Q. Okay. The rest of the demolition --
15 what remained there on site, y'all took care of
16 that through a change order with Gulf Stream; is
17 that correct?

18 A. Yes, sir.

19 Q. Okay. All right. Let's go down to the
20 replacement, the last items two and three from
21 the bottom. Replacement of ballroom chandelier
22 crystals \$47,802 and installation of ballroom
23 chandelier crystals, \$6,260.

24 A. Yes, sir.

25 Q. Who supplied the chandelier?

1 A. Those were furnished by the owner
2 through a company called ADM, I believe.

3 Q. Okay. And describe for the Judge, if
4 you would, what the issue was with the chandelier
5 crystals and they're -- not being there.

6 A. So with these big huge ballroom fixtures
7 that you hang these crystals on, we couldn't
8 locate them.

9 Q. Couldn't locate the crystals?

10 A. Yeah. We couldn't find the crystals.
11 The light fixtures were there, but the crystals
12 were not. So we notified them, and then they
13 sent us a shipping ticket; so we couldn't ever
14 find them on the shipping --

15 Q. You notified who?

16 A. Notified by the owner, Jim, that the
17 crystals weren't there; so we got all the
18 receiving tickets and we couldn't find where that
19 crate of crystals were on that shipping ticket
20 for those particular type fixtures.

21 So I went down -- I personally went down
22 to the room. By then we had everything up that
23 was supposed to be installed, and I found two
24 crates of crystals. I went through those,
25 inventoried those; sent those back to Jim, to the

1 supplier. And he said, well, those crystals
2 don't go to this project, those two big crates of
3 crystals, just miscellaneous crystals.

4 I thought maybe they'd work, and he said
5 they wouldn't work. So we never could locate
6 those crystals. We went back to check at the
7 warehouse. But we couldn't ever find a delivery.
8 And they sent a picture, but the picture was in
9 their warehouse where they shipped it. So we're
10 not sure where it went. They told me the
11 crystals that we had went to another job, and
12 they had been there for a while.

13 Q. Okay. Have you had occasion to -- there
14 are eight floors of guest rooms in the -- in this
15 project; is that correct?

16 A. Yes, sir.

17 Q. All right.

18 A. Well, three through eight.

19 Q. Okay. Have you had occasion to go back
20 to the drawings and look at the number of walls
21 that are in the guest rooms and on those floors?

22 A. Yes, sir, I have.

23 Q. All right. How many walls are there
24 total in all of the guest rooms in this hotel?

25 A. 1,913 walls.

1 Q. Okay. And how did you come up with
2 that? How did you calculate that number?

3 A. The walls in the suite, the entry hall
4 walls, and the bathroom walls.

5 Q. For each room?

6 A. For each room.

7 Q. Okay. Let's talk about the project
8 closeout. The -- did you have any involvement
9 with providing the closeout manuals and the
10 product data and specifications to the owner when
11 job was completed?

12 A. Yes, sir.

13 Q. Tell me what you provided and when.

14 A. So at the closeout, the last few months
15 of the project, we scheduled the owner training
16 for the building engineers to take their owner
17 training on all the mechanical, electrical
18 equipment, plumbing, all those things required in
19 the specs to do the -- to do that owner training,
20 you know, how to change filters.

21 Q. When was this?

22 A. Gosh. Late '18. Late '18.

23 Q. All right.

24 A. And so they came in. We scheduled
25 those, got all those signed off, and then we

1 assembled -- from the subcontractors, we
2 assembled all the O and M manuals from the
3 mechanical, electrical, plumbing, start up
4 reports, all the shop drawings, contract
5 drawings, the latest set of contract drawings,
6 and all of the attic stock, you know, paint,
7 wood, stone, sprinkler heads, things like that.

8 Got all those transmitted up to the
9 building for the building engineer to use to run
10 the building.

11 Q. Okay.

12 A. And built his library, and that was
13 furnished in paper format. And then we gave them
14 a thumb drive of drawings so they could look at
15 them on a computer. It was a lot of items that
16 they -- that they required to be sent to them.

17 Q. Okay. So to your knowledge, were all
18 the required maintenance operation data and all
19 that provided to the --

20 A. Yes, sir.

21 Q. -- hotel operator?

22 A. Yes, sir.

23 Q. All right. Were you here when
24 Defendant's Exhibit 145 was discussed, which was
25 a change order that Ms. Hadley referred to with

1 MCI that was dated February 11, 2019?

2 A. MSI.

3 Q. Yes, sir.

4 A. Yes, I was here.

5 Q. All right. Do you recall if that
6 document, that change order was not signed?

7 A. Yes, sir. They said it was not
8 executed.

9 Q. Right. Based on your involvement with
10 this project, is it unusual to have documents
11 like that in the files that -- where there are
12 change orders, but not signed?

13 A. Yes. We have unsigned change orders.

14 Q. Okay. Is there -- does Balfour
15 recognize a change order with the subcontractor
16 if it's not signed?

17 A. We don't recognize unsigned change
18 orders.

19 Q. Did you -- were you able to locate a
20 signed copy of what was introduced as Defendant's
21 Exhibit 155?

22 A. No, sir.

23 Q. Did you look for one?

24 A. Yes.

25 Q. Okay.

1 MR. HILDEBRAND: All right. Please
2 answer any questions that Mr. Bundy might have.

3 THE WITNESS: Sure.

4 RECROSS-EXAMINATION

5 BY MR. BUNDY:

6 Q. Mr. Simonton, are you still working for
7 Balfour Beatty, as you sit here today?

8 A. No, sir.

9 Q. Since you're not currently employed by
10 Balfour Beatty, are you speaking about Balfour
11 Beatty, or are you just speaking for
12 Mr. Simonton?

13 A. I'm speaking for Balfour Beatty.

14 Q. As a prior employee?

15 A. I'm sitting up here as a witness for
16 Balfour Beatty.

17 Q. But you're speaking as a prior employee,
18 correct?

19 A. Prior employee, yes, sir.

20 Q. And are you represented by
21 Mr. Hildebrand, personally?

22 A. No, sir.

23 Q. What did you do to prepare for your
24 testimony? Did you talk to Mr. Hildebrand?

25 A. Yes, sir.

1 directed to be performed by the owner, regardless
2 of any unresolved claims or proceedings to assert
3 a claim; however, the owner shall have no right
4 to withhold undisputed amounts and shall pay any
5 undisputed amounts to the contractor. Now, the
6 contractor -- the owner is only required to pay
7 certified pay requests; is that correct?

8 A. Yes, sir.

9 Q. And we have already determined in your
10 testimony that all certified pay requests were
11 paid?

12 A. Yes, sir.

13 Q. Okay. So this last sentence, the owner
14 shall have no right to withhold undisputed
15 amounts and shall pay any undisputed amounts to
16 the contractor would not apply here because there
17 were no unpaid certified pay requests, correct?

18 A. The last pay app 43 or 44, whichever one
19 it was, they took that money back.

20 Q. They decertified it, right?

21 A. Yes.

22 Q. Okay. And they were entitled to do
23 that. The architect is entitled to withdraw a
24 previous certification based on after discovered
25 information, correct?

1 about it myself.

2 MR. HILDEBRAND: Okay. All right.

3 BY MR. HILDEBRAND:

4 Q. What is the normal course, and what I'm
5 referring in -- actually, why don't we turn to
6 this. If you will look at Exhibit 56, which is
7 in binder two. It's a copy of the contract. All
8 right. Turn to section in the A133, 7.2.1.2,
9 which is final payment. Are you with me?

10 A. Yes.

11 Q. All right. And it says, the entire
12 unpaid balance of the contract sum shall be paid
13 by the owner to the construction manager when,
14 and number two, the construction manager has
15 submitted a final accounting for the cost of the
16 work and a final application for payment. Why
17 was a final application for payment not made?

18 A. Well, we had multiple payment
19 applications submitted to the architect and owner
20 that had not been certified. And it would have
21 been inappropriate for us to continue on without
22 certification that the values submitted were
23 agreed to in previous applications.

24 Funding had stopped at that point in
25 time. We had multiple payment applications

1 already submitted, that there were no -- no
2 response, to my knowledge, in regards to what
3 needed to be revised on those payment
4 applications in order for them to be certified.
5 Again, to my knowledge. So that was the reason
6 that nothing else was submitted.

7 Q. Okay. And let's talk about the final
8 accounting that's referenced there, and I think
9 in section 7.2.2 as well. You were involved in
10 final accountings, I think you said, for other
11 projects for Balfour as the controller?

12 A. Yes.

13 Q. And kind of tell the Judge what those
14 final accountings are for.

15 MR. BUNDY: Objection.

16 THE COURT: Go ahead. What's the
17 objection?

18 MR. BUNDY: Well, the objection is
19 there's been a lot of testimony in this case
20 about this contract was not a boilerplate
21 contract that was just picked off the shelf.

22 This is a specific contract related to
23 this specific job, and anything he did needs to
24 be referenced to this specific contractor and
25 this specific job. What he does on other jobs is

1 has presented their case in full at this time; is
2 that right, Mr. Hildebrand?

3 MR. HILDEBRAND: Yes, sir.

4 THE COURT: Very good.

5 MR. BUNDY: Thank you. I have
6 nothing further.

7 THE COURT: All right. Happy to
8 hear any motions.

9 MR. HILDEBRAND: All right, sir.

10 MR. BUNDY: Your Honor, I will just
11 renew all my same motions.

12 THE COURT: Very good. Renewed by
13 the defense. Got it. We are at 2:15. Do I need
14 to take a break now, or should I take --

15 MR. HILDEBRAND: It might be a good
16 idea.

17 THE COURT: All right. Let's come
18 back in ten minutes.

19 (A recess transpired.)

20 THE COURT: Okay. Mr. Hildebrand?

21 MR. HILDEBRAND: Thank you, Your
22 Honor. The plaintiff would move for directed
23 verdict, or I think it's more appropriate,
24 nonsuit as to the counter-claims Library
25 Associates -- and I would like to go through the

1 grounds for that.

2 THE COURT: All right, sir.

3 MR. HILDEBRAND: First is their
4 claim for conspiracy. There was a recent case
5 that was decided by the Supreme Court called
6 Paradise DIS case, where it said that in order to
7 have a conspiracy, there has to be either an
8 unlawful act or a lawful act by unlawful means.

9 If you review the counter-claim by
10 Library Associates, Your Honor, you will see that
11 the -- what they claim as the basis for the
12 conspiracy is that Balfour entered into a joint
13 defense agreement with some subcontractors. The
14 joint defense agreements were entered into after
15 the project was finished and after this lawsuit
16 had been filed.

17 Those joint defense agreements, you will
18 recall, Your Honor, their terms are very clear.
19 We introduced them. I was real candid with the
20 Court. I actually introduced those in our case,
21 and they're found in Exhibit 209, each of those
22 joint defense agreements.

23 Basically, it just -- they're
24 pass-through agreements or tolling agreements,
25 which say that the statute of limitations between

1 Balfour and the subcontractors will be told, and
2 that any claims that the subcontractors might
3 have for -- as related to the owner will be
4 passed onto the owner.

5 That's a provision that is found in the
6 subcontracts of each subcontractor. They don't
7 have privity of contract with Balfour, so there's
8 a provision for a pass-through. Your Honor, I
9 would highly encourage you -- I'm sure that you
10 already have, but to read through -- to read the
11 joint defense agreements. They are very vanilla.

12 There's no conspirator -- there's
13 nothing that could be, in my view, twisted to
14 even allege a scintilla of evidence to show that
15 those joint defense agreements amount to an
16 unlawful act or a lawful act by unlawful means.
17 In fact, Your Honor, South Carolina recognizes
18 the common interest doctrine in joint defense
19 agreements.

20 And I would cite the case Maseng,
21 M-A-S-E-N-G, vs. Tuesday Morning. It's a
22 District Court of South Carolina case citing a
23 South Carolina case, Tobacco Bill vs. McAlister.
24 692 Southeastern Second 526, a 2010 case, where
25 the common interest doctrine allows for joint

1 defense agreements, just like we have here.

2 So, Your Honor, I would submit to you
3 that there's no unlawful act or lawful act by
4 unlawful means. More over, there's been no
5 damages suffered by Library Associates. The --
6 again, this claimed act postdated the completion
7 of the project.

8 The damages suffered or claim to have
9 been suffered by Library Associates are delay
10 damages, that it was delayed on the project by so
11 many days, what damages have resulted from the
12 entering into the joint defense agreement. There
13 has been none.

14 All we have agreed to is to tolling the
15 statute of limitations and to pass through any
16 claims onto the owner. There's been no damage
17 emanated from that. So, Your Honor, I -- on
18 those bases, I would submit to you that the
19 conspiracy claim has to be -- has to be
20 dismissed.

21 More over, even as far as the evidence
22 is concerned, the fact of it is, virtually all of
23 the people who were minutes of that were -- have
24 now dropped out of it and has been introduced
25 into evidence. I think there are only two

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

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

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

10 THE COURT: Neither have I.

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

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

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

23 THE COURT: Without waiving any
24 privileges really.

25 MR. HILDEBRAND: Right, right, Your

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

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

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

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

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

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

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

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

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

25 The next basis, Your Honor, number 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 THE COURT: Go to Exhibit 53.

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

6 THE COURT: 56.

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

10 THE COURT: Okay.

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

13 THE COURT: Claims and disputes?

14 MR. HILDEBRAND: Yes, sir.

15 THE COURT: Okay.

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

25 Your Honor, there's no question that,

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

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

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

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

1 testimony that you heard.

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

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

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

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

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

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

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

13 THE COURT: Right.

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

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

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

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

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

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

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

4 THE COURT: 4?

5 MR. HILDEBRAND: 4.3.1.4.

6 THE COURT: Got it.

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

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

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

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

1 disagree with that. We want mediation.

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

4 MR. HILDEBRAND: I'm sorry?

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

7 MR. HILDEBRAND: No, it did.

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

10 MR. HILDEBRAND: Yes, sir.

11 THE COURT: But it was left
12 unresolved?

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

16 THE COURT: Right.

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

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

23 MR. HILDEBRAND: Yes, sir.

24 THE COURT: All right.

25 MR. HILDEBRAND: Which leads to a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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