

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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Aug 12 2026

SC Court of Appeals

Balfour Beatty Construction, LLC, Appellant,

v.

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

And

Library Associates, LLC, Third-Party Plaintiff,

v.

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

Of which Library Associates, LLC is the Respondent.

SUPPLEMENT TO AMENDED RECORD ON APPEAL

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INDEX

Page(s)

Section 1 - Transcripts

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

Pages: 651-652; 2192-2193; 3339-3340; 3458; 4094-4096; 4121-4134; 4141-4142;
4163; 4195; 4392R-9877

Section 2 - Exhibits

Balfour Beatty Construction, LLC's Exhibit 300R-9906
Library Associates LLC's Exhibit 42R-9969
Library Associates LLC's Exhibit 43R-9978

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

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

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

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

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

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

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

1 anticipated completion costs, correct?

2 A. Correct.

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

9 A. Yes, sir.

10 Q. All right. And yesterday, you didn't
11 know why. You just didn't understand why 43 and
12 44 were not paid. Do you understand now,
13 Mr. Simonton, why you were not paid 43 and 44
14 applications for payment for October and November
15 in 2018?

16 A. That's what I read right here.

17 Q. Okay. And that's the explanation?

18 A. We protested this.

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

25 The failure of payment of 43 and 44 had

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

4 A. 43, I believe was, yes.

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

7 A. I'm not sure about 44.

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

15 A. No, sir.

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

20 A. Yes, sir.

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

1 more than that, to be honest.

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

7 A. Yes, sir.

8 Q. And an L4 finish was specified, correct?

9 A. Yes, sir.

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

12 A. The drywall finish?

13 Q. Yes, sir.

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

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

17 A. When they skimmed the walls?

18 Q. Yes, sir.

19 A. I never saw that.

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

22 A. No.

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

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

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

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

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

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

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

25 A. No.

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

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

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

16 A. I did.

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

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

25 Q. All right, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. MCDONALD: Ms. DeFranco.

17 THE COURT: What was her name?

18 MR. HILDEBRAND: Sarah DeFranco.

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

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

1 through earlier, the subtotal of balance owed to
2 Balfour Beatty of \$419,425, if you apply the
3 liquidated damages amount, how much would Balfour
4 Beatty owe to Library Associates?

5 A. \$1,063,665.

6 Q. And then, to that, you would add the BBC
7 contract costs incurred by Library to the extent
8 they are awarded, and what is -- and that number
9 is what? Would you add the \$1,063,665 and the
10 \$2,256,764?

11 A. Yes. You would add those two together,
12 \$3,320,329.

13 Q. \$3,320,000?

14 A. 329.

15 Q. 329, from Balfour to Library Associates?

16 A. Yes.

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

20 A. Yes.

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

24 MR. HILDEBRAND: Your Honor, before
25 I begin, I would like to make a motion and an

1 arguing on the record. This goes to an objection
2 that I made earlier, and you kind of waved me off
3 and you were maybe making it later or something.

4 THE COURT: All right.

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

9 THE COURT: 347?

10 MR. HILDEBRAND: Yes, sir.

11 THE COURT: All right.

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

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

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

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

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

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

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

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

25 THE COURT: That's the answer to

1 the first set of interrogatories?

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

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

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

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

25 MR. HILDEBRAND: Your Honor, this

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

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

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

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

23 Those reports I have attached to this
24 proffer, Your Honor, each one of those, the four
25 referenced documents. And I would like to

1 introduce this as our next exhibit, Your Honor.

2 THE COURT: Number 348?

3 MR. HILDEBRAND: Yes, sir.

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

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

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

15 MR. HILDEBRAND: Yes, sir. Yes,
16 sir.

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

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

21 MR. HILDEBRAND: Thank you, Your
22 Honor. So for some of these witnesses, you will
23 see in Mr. Bundy's or Library's designation,
24 there is a recitation, like for Mr. O'Connor, a
25 long recitation of what he is going to testify

1 about. The same with Jim Clements. There's a
2 lot of narrative. For Sam Hadley, the only
3 reference is to these four reports.

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

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

14 THE COURT: All right, sir.

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

17 MR. MCDONALD: Same objection, Your
18 Honor.

19 THE COURT: All right.

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

22 THE COURT: All right.

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

25 MR. HILDEBRAND: And I asked her

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

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

10 THE COURT: Okay.

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

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

21 And then today, at the end of this case,
22 after we've called our witnesses, our witnesses
23 have testified, we had already -- we weren't able
24 to call rebuttal experts to her opinions here
25 today or anything else. She simply -- no

1 additional reports were entered or no additional
2 opinions were entered by Library Associates.

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

7 THE COURT: All right, sir.

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

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

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

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

1 Mr. Thompson touched on in his testimony and was
2 introduced, he said, look, Ms. Hadley audited all
3 the documents, and if you look on page 15, she
4 talks about the eligible costs of the work are
5 \$65,745,000 maximum allowable.

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

14 She then says, the reason that I come to
15 60 -- the total allowable cost, as shown in her
16 audit was 65,745,441, I'm taking some deductions
17 because I think that there were some allowable
18 costs that I'm going to take off. One of those
19 was based on the RFP that we talked about.

20 And Casey Thompson said, okay, y'all did
21 an audit. I see where -- I think some of your
22 reports are legitimate. And we'll agree that
23 some of those are -- probably should be taken
24 off, and we will agree to some of the
25 adjustments. And he said that we will agree to

1 audit the adjustments of \$613,742. And we agreed
2 to remove that from the amount that we were
3 claiming. He said, but we disagree with some of
4 those audit results, \$556,646.

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

10 THE COURT: All right. That would
11 be 350?

12 MR. HILDEBRAND: Yes, sir.

13 MR. MCDONALD: Same objection to
14 all of this.

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

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

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

25 Oddly, though, it was referenced -- even

1 referenced in the designation of Mr. Bundy gave.
2 But none of these opinions were espoused by
3 Ms. Hadley in her deposition. They weren't
4 espoused in the prior reports.

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

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

21 Frankly, if the -- if there's disagreed
22 audit adjustments for the total contract of
23 556,646, we might disagree with those, but that
24 sure is not the same as Ms. Hadley coming in here
25 as she did today and saying, you're basically

1 entitled to -- what was the amount? Yeah,
2 \$400,000.

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

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

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

22 But I don't think that excludes her
23 testimony or her opinions from coming into
24 evidence in the trial of the case. So I'm going
25 to deny that motion, to the extent it's a motion,

1 but I do think it's a good position for
2 cross-examination, where you try to get the truth
3 of the matter that's being presented. Okay?

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

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

9 THE COURT: Yeah. Why don't we go
10 ahead and take the break now and come back at
11 1:30.

12 (A recess transpired.)

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

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

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

20 Do you have your audit report?

21 THE WITNESS: I do not.

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

24 THE COURT: Okay. All right.

25 MR. HILDEBRAND: Thank you for your

1 describe the typical process.

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

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

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

24 Some of the claims don't have anything
25 to do with the GMP because it's part of the

1 contract balance, for example, but other things
2 like a request for a change order that has yet to
3 be approved by the owner would increase the GMP.

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

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

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

20 Q. Right. And often that's what you do.
21 Often there is no claim, and you're just simply
22 asked to come in and say, the owner says, look,
23 we want to make sure that what we're being billed
24 under the GMP are allowable costs. We want you
25 to take a look at that and do an audit, and then

1 it was only in PDF. That Excel spreadsheet is
2 Exhibit E of this report -- to explain that the
3 amounts that I see here are not the amounts that
4 you guys were claiming as RCOs. Can anybody help
5 me? What's wrong with these numbers? Which ones
6 are outdated? But I couldn't get that
7 information.

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

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

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

25 But if the Judge doesn't award the

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

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

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

18 THE WITNESS: Yes.

19 THE COURT: I get a difference of
20 \$2,862 over a 3.3 million dollar claim.

21 THE WITNESS: The difference is
22 actually explainable.

23 THE COURT: Well, it's less than
24 1/10th of 1 percent is what I come up with. Is
25 that significant, an accounting of what you've

1 a part of that the owner stopped paying and in
2 the middle of doing work. This is the -- this is
3 the first time I had ever been here in my years
4 of Balfour Beatty. I would say that's why it was
5 treated differently.

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

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

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

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

21 A. I can't recall.

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

24 MR. HILDEBRAND: Nothing further,
25 Your Honor.

Plaintiff Balfour Beatty's Trial Exhibit # 300

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-10-01108

Balfour Beatty Construction, LLC,
Plaintiff,

vs.

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

Defendants.

Library Associates, LLC,
Third-Party Plaintiff,

vs.

Lithko Contracting, LLC, Guy M. Beaty,
Inc., Bernard MMC, LLC, Gulf Stream
Construction Company, Inc., Palmetto
Automatic Sprinkler Company, Inc., Cook
& Boardman, LLC, 1st Choice Glass, Inc.,
Strong Tower Construction, LLC d/b/a
Koch Corporation, Watson Electrical
Construction Co., LLC, Trimark Foodcraft,
LLC, Pleasant Places, Inc., David Allen
Company, Inc., Premier Exteriors, LLC,
Robert Thomas Iron Design, LLC, Warco
Construction, Inc., Old North State
Masonry, LLC, Tom Rochester &
Associates d/b/a Southeastern
Architectural Systems, Forton Company,
LLC, Lowcountry Case & Millwork, Inc.,
Quantum Coatings, LLC, Balfour Beatty
Construction Group, Inc.,

Third-Party Defendants.

PLAINTIFF'S EXCERPT DESIGNATION
FOR DEPOSITION OF KIMBERLY
BROWN

Kimberly Bennett Brown
August 4, 2020

Page 19, lines 10-21
Page 28, lines 23-25
Page 36, lines 8-11
Page 37, lines 22 – Page 38, line 3
Page 39, lines 7-24
Page 41, lines 22 – Page 42, line 7
Page 44, lines 3-6
Page 47, lines 22 – Page 50, line 16 – EXHIBIT Bennett 4
Page 51, lines 6-25
Page 52, lines 4-12
Page 60, lines 18-24
Page 62, lines 22 – Page 63, line 1
Page 63, lines 25 – Page 64, line 10
Page 65, lines 16-21
Page 75, lines 6 – Page 76, line 7
Page 89, lines 15- Page 90, line 1
Page 91, lines 5-12
Page 93, lines 21- Page 94, line 6
Page 94, lines 13-15
Page 95, lines 10 – Page 96, line 6
Page 100, lines 17 – Page 101 ,line 4
Page 102, lines 12 – Page 103, line 9
Page 104, lines 12-16
Page 108, lines 5-17 – EXHIBIT Bennett 13
Page 109, lines 13-20 – EXHIBIT Bennett 14
Page 113, lines 1- Page 114, line 21 – EXHIBIT Bennett 5
Page 121, lines 9-24
Page 125, lines 7 – Page 126, line 1
Page 133, lines 6 – Page 134, line 8
Page 134, lines 17 – Page 136, line 25 – EXHIBIT 16
Page 140, lines 5-11 – EXHIBIT 17
Page 143, lines 5-8 – EXHIBIT 18
Page 147, lines 24 – Page 148, line 15 – EXHIBIT 20
Page 152, lines 23 – Page 153, line 22
Page 155, lines 8-15 – EXHIBIT 21

Kimberly Bennett Brown
August 5, 2020

Page 192, lines 21 – Page 194, line 1
Page 200, lines 24 – Page 201, line 24 – EXHIBIT 25
Page 202, lines 21 – Page 203, line 10

Page 204, lines 3 – Page 205, line 18
Page 216, lines 21 – Page 223, line 24
Page 226, lines 3 – Page 227, line 2
Page 230, lines 2 – Page 231, line 17
Page 232, lines 6 – Page 233, line 20
Page 236, lines 23 – Page 237, line 10
Page 238, lines 10 – Page 240, line 8
Page 262, lines 1-22
Page 298, lines 13 – Page 299, line 16 – EXHIBIT 31
Page 324, lines 15 – Page 325, line 2 – EXHIBIT Bennett 5
Page 336, lines 15 – Page 337, line 24

Kimberly Bennett Brown
August 6, 2020

Page 566, lines 2 – Page 568, line 14

Kimberly Bennett Brown
April 29, 2021

Page 195, lines 23 – 25 – EXHIBIT 22
Page 198, lines 3 – Page 200, line 24
Page 202, lines 18-24
Page 205, lines 20 – Page 206 line 15 – EXHIBIT 25
Page 207, lines 21 – Page 208, line 15
Page 215, lines 10-20
Page 220, lines 18-23
Page 221, lines 8-19
Page 231, lines 24 – Page 232, line 24 – EXHIBIT 29
Page 235, lines 15-23
Page 370, lines 3-9
Page 373, lines 1 – Page 375, line 12
Page 383, lines 8-14



Deposition of:
Kimberly Bennett Brown

August 4, 2020

In the Matter of:
Balfour, Beatty v. Library Associates

[A. William Roberts, Jr & Assoc.](#)

800-743-3376 | calendar-awr@veritext.com | www.veritext.com

Page 18 1 Q. How was that resolved? 2 A. We mailed him a check. 3 Q. For the full balance? 4 A. Yes. 5 Q. Okay. So prior to April when you 6 all -- and you all discussed nothing other than the 7 payment? 8 A. There were discussions with Buck in 9 2019 regarding the shutters on the hotel. There 10 were discussions with Buck regarding issues with 11 the flooring in the pool room in 2019 or early 2020 12 and that's all I can recall. 13 Q. Okay. Have you spoken with anybody 14 from Balfour Beatty since say February -- when is 15 the last time you spoke to somebody with Balfour 16 Beatty? 17 A. Say January of 2019. 18 Q. And who was that? 19 A. I believe that was David Simonton. 20 Q. And what was it about? 21 A. I believe it was the day that he had 22 hand-delivered the letter regarding the claim to 23 us. 24 Q. And what was the nature of that 25 conversation?	Page 20 1 A. Gradually started into the lending and 2 the financing and closing the real estate loans in 3 probably '85, '86, so for the past 33 years. 4 Q. Okay. So at the time of -- as I 5 understand it, at the time that this project was 6 being developed, and I'm talking about Hotel 7 Bennett, there were five employees of Bennett 8 Hospitality, is that correct? 9 A. There's typically five to seven 10 employees. I'm not sure exactly. Sometimes we 11 have summer interns. So that's approximately 12 correct. 13 Q. Okay. Aside from summer interns, there 14 are typically five people on the payroll at 15 Hospitality. 16 A. Five to seven. 17 Q. All right. So at the time this project 18 was -- when it was really getting going say in 19 2015, how many employees were there with Bennett 20 Hospitality? 21 A. Five or six. 22 Q. And who were they? 23 A. Myself, Peter Wright, Tracy Ray, but 24 she may have been on maternity leave. I don't 25 remember that exact date.
Page 19 1 A. I don't recall. 2 Q. Okay. Have you discussed with Buck 3 Lindsay this lawsuit since it was filed? 4 A. I don't specifically recall. 5 Q. How about Jim Clements? 6 A. I don't specifically recall. I'm sure 7 we had discussions between January of 2019 and May 8 of 2019 regarding the claim when it was delivered 9 to us. 10 Q. Okay. So tell me what your role with 11 Bennett Hospitality has been since you have been 12 with them. 13 A. My role has evolved in 36 years. 14 Q. Okay. Tell me about that. 15 A. Started out as a receptionist. We 16 really have no titles at Bennett Hospitality. 17 Everyone does what needs to be done. But I am 18 involved in obtaining loans for the projects, 19 working with our attorneys to close any type of 20 real estate transactions or loans, and I oversee 21 the day-to-day operations. 22 Q. Okay. So the job responsibilities that 23 you just articulated, how long have you been doing 24 that? I understand you started as a receptionist, 25 but how long have you been doing those?	Page 21 1 Q. Okay. 2 A. There was a gentleman by the name of 3 Steve Granger, but he left in the middle of 2015. 4 Q. Okay. 5 A. My grandmother, who I called my mother, 6 as she raised me. 7 Q. And what's her name? 8 A. That was Virginia Bennett, and she's 9 passed away. 10 Q. Okay. 11 A. And Mike would have a 12 receptionist/assistant, but I'm not sure who that 13 was in 2015. 14 Q. Okay. 15 A. I recall her -- that may have been 16 Beverly Eckhurst, because I believe she started the 17 day after the groundbreaking. 18 Q. Okay. So what was Peter Wright's job 19 responsibilities? 20 A. Peter helped on the development side 21 with contracts and entitlements for the development 22 projects. 23 Q. What do you mean contracts? 24 A. Just reviewing development contracts, 25 whether it's a loan agreement or a construction

Page 26	Page 28
1 yourself, was there anybody else who helped you 2 during those periods? 3 A. We had an outside CPA firm. 4 Q. And who is that? 5 A. Welch Roberts Amburn. 6 Q. All right. But primarily those 7 controller functions you assumed during those 8 periods, is that correct? 9 A. Yes. 10 Q. Okay. How about Tracy Ray, does she 11 have any involvement with the controller aspects? 12 A. No. 13 Q. How about Michael Bennett? 14 A. No. 15 Q. Let's turn to this particular project. 16 When was the concept of the -- how did this project 17 get started, when was the property first bought, 18 and tell me about that. 19 A. The property was first bought through 20 an RFP with Charleston County in 1994. 21 Q. And that was purchased by Bennett 22 Hofford Development? 23 A. That was purchased by Library 24 Associates. 25 Q. Which was an entity of I guess Bennett	1 A. Approximately early 2000. 2 Q. Let's go back and talk about some of 3 the job responsibilities. You've talked about what 4 your responsibilities were, which were reviewing 5 contracts and helping with loans and during some 6 periods acting as a controller, is that correct? 7 Is that a fair description? 8 A. Fair. 9 Q. Okay. And you told me earlier on what 10 Michael Bennett's involvement was with Hank 11 Hofford, but what -- when this project was ongoing, 12 what was Michael Bennett's job responsibilities or 13 what were they with Bennett Hospitality? 14 A. Can you be more exact with the dates? 15 Q. Yeah. Say in 2014, what was -- Michael 16 Bennett is the principal of Bennett Hospitality, 17 correct? 18 A. Yes. 19 Q. And Bennett Hospitality owns Library 20 Associates, so to speak, correct? 21 A. Bennett Hospitality is separate and 22 apart from Library Associates. 23 Q. Does Library Associates have any 24 employees? 25 A. No.
Page 27	Page 29
1 Hofford? 2 A. It was a separate entity set up for the 3 specific purpose to buy the property. 4 Q. Okay. As part of the dissolution in 5 2012, I guess Michael Bennett got the Library -- or 6 got that piece of property? 7 A. Prior to 2012, Mike and Hank had begun 8 to separate different entities. I don't recall if 9 that was 2012 or earlier. 10 Q. So perhaps even before the dissolution, 11 the Library property was owned by Michael Bennett, 12 so to speak, or one of his particular entities? 13 A. It was always owned by Library 14 Associates. 15 Q. Okay. And Library Associates at the 16 dissolution went to Michael Bennett? 17 A. It went to Michael and to a trust that 18 was set up for Michael's children at the time. 19 Q. Okay. But not to -- Mr. Hofford had no 20 involvement with that? 21 A. That's correct. 22 Q. Okay. So when was the development of a 23 hotel conceptualized? 24 A. I don't recall the exact year. 25 Q. Can you give me an approximation?	1 Q. So all employees -- any work that is 2 done in-house, so to speak, for Library Associates 3 is done through the employees of Bennett 4 Hospitality, correct? 5 A. Yes. 6 Q. Okay. So what was -- in 2014, what 7 were Michael Bennett's responsibilities with 8 Bennett Hospitality? 9 A. Michael's responsibilities have always 10 been the vision, the creativity, the responsibility 11 to obtain the financing for the project. Those 12 were his responsibilities. 13 Q. Is there a distinction between his 14 responsibilities and what he actually did? 15 A. He was involved in 2014 during the 16 pre-construction phase of working with the 17 architect and Balfour Beatty at the time for the 18 entire 2014 with the design of the project and he 19 was also involved in -- prior to 2014, I believe, 20 late 2013, of deciding who the contractor was going 21 to be selected to build Hotel Bennett. 22 Q. Okay. Tell me how you -- what your 23 business interactions are with Michael Bennett and 24 how you keep him informed of the financial aspects 25 of the company or is that your job?

Page 34	Page 36
1 taken over by Fairfax Sammons? 2 A. They worked in conjunction with each 3 other. 4 Q. Okay. Even after -- so the exterior 5 schematics, so to speak, what was ultimately 6 approved by the City, who did that design? 7 A. Fairfax & Sammons. 8 Q. Did Goff D'Antonio have any involvement 9 with it? 10 A. Not that I recall. 11 Q. Okay. What is the finished height of 12 the hotel now? 13 A. Approximately 105 feet. 14 Q. Was that ever -- was a design ever done 15 at a height different than 105 feet? 16 A. Not that I recall. 17 Q. So it's always been -- it's never been 18 higher than -- no design to your knowledge has ever 19 been done greater than 105 feet? 20 A. No. 21 Q. Okay. And the exterior of the hotel as 22 it exists now is basically as was designed by 23 Fairfax Sammons, correct? 24 A. Correct. 25 Q. Okay. Let me go back and ask you a few	1 pandemic? 2 A. They temporarily closed for 3 approximately two, two and a half months, but 4 they -- all three have currently reopened. 5 Q. Okay. Does Mr. Bennett have an 6 interest in any apartment complexes? 7 A. No. 8 Q. Okay. And as I understand it, at the 9 time of his deposition he had an interest in 13 10 motels, is that correct? 11 A. It's approximately 21 hotels. 12 Q. Okay. In looking at the Web site that 13 was introduced as Exhibit 1 to Mr. Bennett's 14 deposition, Bennett Hospitality listed the Embassy 15 Suites in historic Charleston, the Hampton Inn in 16 Charleston, Hampton Inn in Mount Pleasant, 17 Residence Inn, Mount Pleasant; Courtyard, Mount 18 Pleasant; Homewood Suites, North Charleston; 19 Hampton Inn in North Charleston; Hampton Inn on 20 Citadel Haven in Charleston; Hampton Inn Savannah; 21 Hampton Inn Billings, Montana; Homewood Suites 22 Bozeman; The Cottages in Mount Pleasant; Embassy 23 Suites in Savannah; and Homewood Suites in Montana. 24 Are there any other hotels or motels that he has an 25 interest in?
Page 35	Page 37
1 more questions about some background issues. 2 As I understand it, Michael Bennett's 3 interests relative to restaurants are currently at 4 Rue De Jean, Virginia's on King and Coast, is that 5 right? 6 A. Correct. 7 Q. At the time of his deposition he said 8 that he was also involved with Good Food Catering, 9 Vincent Chicco, Victor Social Club and Michael's on 10 the Alley. Are they still active or what happened 11 to those? 12 A. Yes. Good Food Catering is not a 13 restaurant. It's an event catering company. 14 Q. Okay. 15 A. Vincent Chicco's, Victor Social Club 16 and Michael's on the Alley are currently closed. 17 Q. Are they out of business? 18 A. We closed them -- Michael's on the 19 Alley was closed prior to the pandemic and the 20 other two were closed during the pandemic and we 21 are undecided if we are going to continue those as 22 a restaurant or just have them operate as private 23 event spaces. 24 Q. All right. So Rue De Jean, Coast and 25 Virginia's been -- were they active throughout the	1 A. I believe since that Web site there is 2 a Homewood Suites in Billings, Montana. There is a 3 Homewood Suites in Kalispell, Montana. There's a 4 Hampton Inn in Bozeman, Montana. There is a 5 Hampton Inn at Charleston Airport and there's Hotel 6 Bennett. 7 Q. Okay. Would that add up to 21? 8 A. I didn't count the ones that you added, 9 so if I had the list in front of me I could verify. 10 Q. Okay. So for the -- for all of those 11 hotels other than Hotel Bennett, tell me how they 12 came to be -- were any of those already constructed 13 when Mr. Bennett got his interest or were all of 14 them developed and constructed under him? 15 A. There were two. One now I recall that 16 you just did not name, the Hampton Inn on Daniel 17 Island. 18 Q. Okay. 19 A. And the Hampton Inn in Bozeman, Montana 20 were previously constructed and purchased from the 21 current franchisee. 22 Q. Okay. So of the approximately 21 23 hotels that Mr. Bennett owns, two of them were 24 already constructed when he got them, the rest of 25 the other approximately 19, the full development

Page 38

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

Page 39

1 through each one just to try to save some time.
2 Which ones -- how many of the hotels
3 were designed by Buck Lindsay or an entity that he
4 was associated with?
5 A. It would be easier for me just to give
6 you the list.
7 Q. Okay. What is easier for you.
8 A. The Hampton Inn in Savannah, the
9 Courtyard in Mount Pleasant --
10 Q. These are ones that Buck Lindsay did?
11 A. Yes.
12 Q. Okay.
13 A. The Courtyard in Mount Pleasant.
14 Q. Okay.
15 A. The Homewood Suites at Charleston
16 Airport.
17 Q. Okay.
18 A. The Homewood Suites in Kalispell,
19 Montana.
20 Q. Okay.
21 A. The Hampton Inn at Charleston Airport.
22 Q. Okay.
23 A. The Embassy Suite in Savannah. I
24 believe that's all.
25 Q. So it would have been six?

Page 40

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

Page 41

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

Page 42

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

Page 43

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

Page 44

1 five-star hotels that it developed?
2 A. Can you repeat the question?
3 Q. Other than the Hotel Bennett, were
4 there any four or five-star hotels that had been
5 developed by Mr. Bennett?
6 A. No.
7 Q. How about for the project
8 administration from the owner standpoint on all of
9 the hotels that were done prior to Hotel Bennett,
10 who did -- who performed all of the owner's roles
11 in whatever was expected of the owner for those
12 hotels?
13 What I'm getting at, was that all done
14 in-house or was there ever a time for any of those
15 hotels where you all contracted out separately to
16 have a construction manager or somebody like that
17 perform those roles?
18 A. It was all done in-house.
19 Q. Okay. And who specifically was
20 responsible for that?
21 A. Myself and Peter Wright.
22 Q. Okay. Anybody else?
23 A. No.
24 Q. Okay. So prior to the Hotel Bennett,
25 you had done all of the owner's -- whatever

Page 45

1 obligations were required of the owner, you
2 basically self-performed that, correct?
3 A. Correct.
4 Q. Okay. And that would involve
5 reviewing -- making decisions that came up during
6 construction, reviewing pay apps, whatever
7 questions that might come up with the general
8 contractor or the architect, agreed?
9 A. Yes.
10 Q. Okay. On the -- any of the prior
11 projects prior to this one that had been done by
12 Michael Bennett, were there ever any mechanic's
13 liens that were filed to your recollection?
14 A. Maybe once or twice.
15 Q. Okay. Were they -- any significant
16 mechanic's liens?
17 A. Not that I recall.
18 Q. Were there any delays in construction
19 on any of the other projects?
20 A. On the Embassy Suites Savannah, there
21 was approximately 60-day delay.
22 Q. Any others?
23 A. Not significant, no.
24 Q. And the Embassy Suites Savannah was
25 completed in 2013, is that what you said?

Page 46	Page 48
1 A. Yes. 2 Q. And did the owner assess liquidated 3 damages against the contractor on that job? 4 A. Yes. 5 Q. For 60 days? 6 A. They were assessed. There was 7 subsequently an agreement, a settlement. I don't 8 recall what the final outcome was on the exact 9 amount of liquidated damages. 10 Q. Okay. Who was the contractor? 11 A. Welbro. 12 Q. I'm sorry, what? 13 A. Welbro Construction out of Florida. 14 Q. Where in Florida? 15 A. Maitland, Florida. 16 Q. Okay. Goff D'Antonio began its design 17 services in about 2003, is that correct? 18 A. Approximately. 19 Q. Okay. And what was the approximate 20 total amount that was billed by Goff D'Antonio? 21 A. I don't recall. I do recall it being 22 over a million dollars. 23 Q. Okay. Were they paid that amount? 24 A. I don't recall the exact amount that 25 they were paid.	1 for 260,000 dollars. Does that sound familiar? 2 A. If that's what the settlement agreement 3 says. 4 Q. Okay. And why were they not paid the 5 difference? 6 A. Because it was a settlement amount. 7 Q. But why did you all dispute that they 8 were owed that amount? 9 A. Again, as I just said, we believed that 10 the amount of billing was excessive of the amount 11 of work that they completed on the project. 12 Q. So you thought that they overbilled 13 you? 14 A. That would be one reason, yes. 15 Q. Okay. So you think that when they 16 submitted the bill for the 435,000 dollars, they 17 had not performed that -- they had not put in the 18 hours that they claimed that they had, is that 19 correct? 20 A. That would be one of the reasons, yes. 21 Q. Okay. Any other reasons? 22 A. That the building that they did design 23 never got approved by the City of Charleston to be 24 built and that those plans would just have to be 25 thrown away.
Page 47	Page 49
1 Q. Okay. Was there a lawsuit that was 2 filed over by Goff D'Antonio? 3 A. Yes. 4 Q. And why was the -- what was the 5 approximate amount in dispute? 6 A. I don't recall the approximate amount. 7 Q. Was it around 250,000 dollars, does 8 that sound about right? 9 A. That sounds about right. 10 Q. And why were they not paid that? 11 A. Architects, like attorneys, time bill. 12 All the billing is based on time. We didn't agree 13 with the hours of time that they billed on the 14 project. 15 Q. Okay. So they didn't have a lump sum 16 agreement, it was purely hourly? 17 A. I don't recall a lump sum agreement. 18 But due to the ongoing changes requested by trying 19 to get the hotels approved by the BAR, they would 20 be considered additional changes, which would be 21 billed on a timely basis. 22 Q. Okay. And looking at a settlement 23 agreement that was marked as Exhibit 4 to Michael 24 Bennett's deposition, it says that Goff D'Antonio 25 claimed to be owed 435,000 dollars and they settled	1 Q. How was that Goff D'Antonio's fault 2 that the BAR rejected what they wanted -- what 3 their design was? 4 A. I don't think you could call it a 5 fault. They were just unable to fulfill a contract 6 that they had to get the -- as part of the contract 7 was to take it through the approval process with 8 the City of Charleston. 9 Q. Okay. Have you all worked with Goff 10 D'Antonio since then? 11 A. No. 12 Q. Had you all worked with them before 13 then? 14 A. Not that I recall. 15 Q. Okay. So was the -- did the height 16 of -- when Goff D'Antonio provided its services, 17 was the height of the hotel still set at 105 feet? 18 A. Yes. 19 Q. All right. So let's turn more 20 specifically to this particular hotel and tell me 21 how Buck Lindsay was engaged as the architect. 22 A. After the exterior of the building that 23 Fairfax & Sammons had designed was approved by the 24 City of Charleston, Fairfax & Sammons was -- were 25 not hotel architects and so we turned to Buck to

Page 50

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

Page 51

1 A. Correct.
2 Q. So my question was: Were there any
3 other architects who were interviewed or vetted
4 other than Buck Lindsay for this job?
5 A. No.
6 Q. Had Buck Lindsay ever designed a
7 five-star hotel prior to this?
8 A. I'm not familiar with all of Buck's
9 designs.
10 Q. Well, did you ever ask him that?
11 A. I did not ask him that, no.
12 Q. Well, you were kind of the -- you were
13 the -- whose decision would it have been -- it
14 would have been basically yours and Michael
15 Bennett's, you all are the point persons for the
16 company, correct?
17 A. Yes.
18 Q. Okay. So it would have been your
19 decision to hire Buck Lindsay, agreed?
20 A. Yes.
21 Q. Okay. So do you remember any
22 discussions or questions that you asked Buck
23 Lindsay of whether he had any or his firm had any
24 prior experience with a five-star hotel?
25 A. I don't recall.

Page 52

1 Q. Okay. You don't recall asking him
2 that?
3 A. I don't recall.
4 Q. Okay. Did that -- so I guess you did
5 not -- you don't recall that you did not think that
6 that was important or do you think that was
7 important for him to have had that?
8 A. My recollection at the time was that we
9 knew that we would have to hire an interior
10 designer that had five-star experience, and we did
11 that. So it was not as important for the architect
12 to have five-star experience.
13 Q. Okay. So you thought it was important
14 for the interior designer, DCI, to have five-star
15 experience, but not the primary architect. And why
16 is that?
17 A. Because the primary architect is
18 designing, for lack of a better word, the bones of
19 the hotel. It's the interior designer who designs
20 the items that would make it five-star.
21 Q. Okay. Do you know if it's important
22 for the -- while the plans are being developed for
23 the interior designer and the primary architect to
24 work together?
25 A. Absolutely.

Page 53

1 Q. When did -- when was -- I can tell you
2 that the -- let me ask you this. When was Buck
3 originally contacted about this particular project?
4 A. I don't recall when.
5 Q. Okay. Do you recall schematically or
6 from a coordination standpoint whether he was
7 contacted before the interior designer?
8 A. Yes.
9 Q. And approximately how long?
10 A. I don't recall. I do recall him making
11 the suggestion to us that DCI would be a great
12 interior design firm to design the interiors of the
13 hotel.
14 Q. So when you were talking to Buck
15 Lindsay, did you have any questions or did Michael
16 Bennett have any questions of whether he had any
17 reservations about his abilities to design this
18 particular structure and whether he had the
19 appropriate staffing to perform what he needed to
20 perform?
21 A. I don't recall.
22 Q. Okay. You don't recall asking any
23 questions about that or hearing any reservations?
24 A. No.
25 Q. As far as the obligations of the

Page 58	Page 60
1 A. No. 2 Q. Was he recommended to you or did you 3 all find him through your independent research? 4 A. Jim Clement is a brother of one of 5 Michael's college roommates. 6 Q. Okay. And who is that roommate? 7 A. His name was Vinny Clements. 8 Q. Okay. So how did it come -- so how -- 9 tell me what the connection was that Clements came 10 to hit it off, like was it a reunion or something, 11 talk to his roommate, or how did that come about? 12 A. I don't specifically know how Michael 13 reconnected with Vinny, but it was through that 14 connection that Michael was made aware of Jim's 15 expertise and it just coincided with the timing of 16 starting the Hotel Bennett project. 17 Q. Okay. Before Jim Clements was actually 18 hired to perform the services that he did, what 19 sort of vetting occurred with him? 20 A. I recall Michael having several 21 meetings with Jim. I do not recall being involved 22 in those meetings. 23 Q. Okay. Were any other construction -- 24 or what do you term Jim Clements, construction 25 manager or owner's representative?	1 number of visits, the customary number of visits 2 would be once a month, is that correct? 3 A. I don't specifically agree with that. 4 It was always more than once a month. I can't 5 recall if it was two or three times in one month, 6 four or five times in another month. I don't 7 recall. 8 Q. Okay. So did Jim Clements ever 9 recommend to you as the owner -- when I say you, 10 I'm talking about Library Associates or Jim -- I'm 11 sorry, Michael Bennett or Bennett Hospitality. I'm 12 just going to lump them together just for the 13 purpose of my questions as the owner. 14 Did Jim Clements ever recommend to the 15 owner that he as the owner's representative needed 16 to be out on the project basically full-time? 17 A. No. 18 Q. Okay. Did he ever recommend to the 19 owner that the architect needed to be onsite and in 20 person on the project more than what was contracted 21 for? 22 A. No. 23 Q. And same question for DCI. 24 A. No. 25 Q. Okay. What was the -- for decisions
Page 59	Page 61
1 A. An owner's representative. 2 Q. Okay. Were any other owner's 3 representatives vetted other than Jim Clements? 4 A. Not that I recall. 5 Q. Okay. How often did Jim Clements visit 6 the project during construction? 7 A. I don't recall that either. 8 Q. Did he have any set -- did he have any 9 contracted or obligatory inspections that he was 10 supposed to make? 11 A. He would be responsible for being at 12 the pay app meeting. 13 Q. So that would be monthly? 14 A. Yes. But he was there more than 15 monthly. I don't recall the number of times. 16 Q. Well, when he would go onsite, would he 17 typically let you know? 18 A. Typically. 19 Q. Okay. So was it normal for him to come 20 onsite to your recollection once a month, then on 21 some months there might be -- he might come another 22 time or so? 23 A. And in some months he may be three or 24 four times. 25 Q. Okay. But the usual time -- usual	1 that were made on this particular job that were 2 required of the owner, what was the chain of 3 command for how decisions were made? 4 A. Can you be more specific? 5 Q. Yeah. Say -- 6 A. I've got something in my eye. I'm 7 sorry. 8 Q. Do you need to take -- 9 A. I'm good. 10 Q. Okay. Say an issue came up with a 11 decision needed to be made because there is some 12 selection that was required to be made for a finish 13 or something like that that the architect or the 14 contractor said we need a decision on to move 15 forward, how was that decision made? What was kind 16 of the chain of command? Would it go to Jim 17 Clements and then to you and then to Michael 18 Bennett or what was it? 19 A. It would really depend on what the 20 decision was. 21 Q. Okay. Explain that. 22 A. I believe typically Balfour Beatty, if 23 they needed a decision, they would contact Jim 24 Clement. 25 Q. As the point of contact?

Page 62	Page 64
1 A. Point of contact. Depending on what 2 the decision was, if Jim was not able to make the 3 decision, then he would come to me and/or both Mike 4 and I at the same time. 5 Q. Okay. From the documents I've seen, 6 and we can go through those at length, but might be 7 able to cut this short a little bit. It seems to 8 me that during the course of the project and 9 looking at all the e-mails and such that Jim 10 Clements for almost every decision other than just 11 some completely -- a very minor decision, he would 12 not act on his own, he would seek the input and 13 authority from yourself and then sometimes it would 14 go up to Michael Bennett, but he almost never 15 decided, made decisions on his own, he'd almost 16 always pass it upstairs for your buy-in, is that a 17 fair statement? 18 A. If the decision was needed and it was a 19 monetary issue or a design issue, yes, he would not 20 make the decision. He would come to myself and/or 21 Michael at the same time. 22 Q. Right. So a design issue or a monetary 23 issue, when those would come up, Jim Clements' 24 obligations were to approach you and/or Michael 25 Bennett for authority to move forward, agreed?	1 construction? 2 A. I can't recall the exact amount of 3 times. 4 Q. Right. I'm just talking approximately. 5 In the usual month, normal month, would you go once 6 a month, less a month? 7 A. It would be more than once a month. 8 Q. So once or twice, would that be a fair 9 statement? 10 A. Two or three times a month. 11 Q. And how about Michael Bennett? 12 A. Definitely less than once a month. 13 Q. Okay. Did anybody else from under 14 Bennett Hospitality or for Library Associates visit 15 the project? 16 A. Not on a regular basis, no. 17 Q. Bear with me a second. What other 18 projects were under development and construction at 19 the same time as the Hotel Bennett? 20 A. Can you be more specific? Do you 21 mean once construction started? 22 Q. No, that were either where the property 23 had been -- why don't we limit it to this: Where 24 the property had actually been purchased and it was 25 going on from there. So not just some conceptual
Page 63	Page 65
1 A. Correct. 2 Q. All right. And how about the 3 architect, same thing? 4 A. Can you be more specific with the 5 architect? 6 Q. Right. If the architect needed to make 7 a decision related to either budget or design, then 8 the understanding and the protocol, the requirement 9 was that they would come to you and/or Michael 10 Bennett to get input and to guide them on their 11 decision, correct? 12 A. Not all the time. 13 Q. Okay. Can you explain your answer, 14 please. 15 A. Well, if there was a decision requested 16 on the design and the contractor would go to Jim as 17 the owner's representative if it was a design issue 18 that was related to whether it's electrical or 19 mechanical or any other systems in the hotel, he 20 would then go to the architect. The architect 21 would not necessarily come to us and say we've got 22 an issue with the electrical system or the 23 mechanical system. That's something that the 24 architect would decide. 25 Q. Okay. How often were you onsite during	1 thing that might have it in his brain that he might 2 want to get involved with where concrete actions 3 were taken and property had been purchased. 4 A. We started and finished construction on 5 a Hampton Inn at Charleston Airport during that 6 time period. 7 Q. So approximately when was that? 8 A. That was 2000 -- February 2016 to April 9 of 2017. 10 Q. Okay. What else? 11 A. I believe the only other hotel that was 12 involved during that time period is when we 13 purchased the Hampton Inn in Bozeman in 2016. 14 Q. Okay. That was preconstructed? 15 A. That's correct. 16 Q. How about the Patriots Point project, 17 some other projects that had been started prior to 18 January of '19? 19 A. I believe, yes, they had the Ferry 20 Wharf project ground breaking in December of 2018, 21 so it was one month prior to January of 2019. 22 Q. Okay. Anything else? 23 A. And he had secured the lease for 24 Patriots Point during that time period, but no 25 development or construction had started and still

Page 74	Page 76
1 A. He sat in all of the meetings. He was 2 the ultimate decision maker, but he took 3 information from Jim and myself on who we thought 4 would be the best contractor for the job. 5 Q. And who was your recommendation of the 6 three? 7 A. I believe I recommended Balfour Beatty. 8 Q. And how about Jim? 9 A. I believe I just testified that Jim 10 recommended Balfour Beatty. 11 Q. Okay. I understood that he was 12 recommended as one of the three proposals, but I 13 didn't realize that he had actually recommended him 14 after the presentations were made. 15 A. Yes. 16 Q. All right. Do you remember how many 17 meetings you had with Balfour pre-construction or 18 pre-contract? 19 A. There were several meetings 20 pre-contract and then there was an agreement signed 21 for pre-construction services, I believe. And the 22 pre-construction services started in January, 23 February 2013 where they were involved in every 24 aspect with the architect and the interior designer 25 in completing and designing the plans all the way	1 remember how many meetings there were with Balfour 2 pre-contract? 3 A. I do not recall. 4 Q. Do you remember any of the details of 5 any of the discussions of any of the pre-contract 6 meetings? 7 A. I do not recall as I sit here today. 8 Q. Okay. The lawsuit that we're involved 9 with, we got a counterclaim from Library Associates 10 and it named Balfour Beatty Construction 11 Corporation as a defendant. Do you know -- have 12 any knowledge as to why it was named along with 13 Balfour Beatty Construction, LLC? 14 A. I do not specifically recall. It may 15 be in the construction contract listed as Balfour 16 Beatty Corporation. I'm not sure as I sit here 17 today. 18 Q. All right. What involvement did you 19 have, if any, with the negotiation of the 20 construction contract with Balfour? 21 A. I had some involvement in that 22 negotiation with the contract. 23 Q. Okay. What was that? 24 A. I believe we hired Mr. Bundy to review 25 the contract for us and I would have discussions
Page 75	Page 77
1 grew until the plans were finished. 2 Q. So there would be written documents 3 that relate to what the pre-construction 4 obligations were and what was provided? 5 A. I believe so, yes. 6 Q. What was Balfour paid to do -- how much 7 was it paid for its pre-construction services? 8 A. If I can recall, it was around 65,000 9 dollars. 10 Q. Okay. How many -- those services 11 primarily included pricing, didn't they? 12 A. Pricing, estimating, reviewing the 13 plans. Buck has a specific way as he has plans 14 complete. He does a 33 percent set, he does a 66 15 percent set, he does a 99 percent set. And at each 16 of those levels Balfour Beatty was sent those plans 17 to review those plans to, you know, make sure that 18 they understood everything that were in the plans, 19 make sure that there was nothing missing in the 20 plans that they could see. 21 Q. Okay. So ultimately there was a 22 request proposal, do you remember that, an RFP? 23 A. Not specifically, but there probably 24 was. 25 Q. Okay. And I'm sorry, you don't	1 with Mr. Bundy regarding the contract and any 2 changes or requests that Balfour Beatty's attorney 3 may have made to Mr. Bundy. 4 Q. Okay. Who actually presented the 5 initial draft of the contract? 6 A. I do not recall. 7 Q. What was Jim Clements' role with 8 negotiating the contract? 9 A. I believe Jim Clement was involved in 10 the monetary portion of the contract, but not of 11 any of the legal terms requirements of the 12 contract. 13 Q. And who negotiated those? 14 A. Mr. Bundy with the Balfour Beatty's 15 attorney. 16 Q. All right. We -- are you familiar with 17 supplementary conditions that have been discussed 18 or were discussed during the construction project? 19 A. Yes, I'm aware of supplementary 20 conditions. 21 Q. Okay. I can -- do you know if those 22 were actually attached to the copy of the contract 23 that Library Associates signed? 24 A. Can you be more specific? 25 Q. Well, I can tell you that Balfour

Page 86 1 specification book for the job. 2 Q. Okay. Was there -- did you have a 3 discussion with Buck Lindsay while this project was 4 ongoing as to whether the -- these supplementary or 5 supplemental conditions were meant to be in the 6 contract or not? 7 I mean, this whole issue came up during 8 the project because there was a -- there's a 9 reference in the supplemental conditions that 10 retainage is to be 5 percent and in the other 11 contract documents it says 10 percent. Do you 12 remember that? 13 A. I know that the retainage is 10 14 percent. 15 Q. In the AIA 133, in the main contract, 16 it's 10 percent, correct? 17 A. That's correct. 18 Q. Right. And the supplemental 19 conditions, it says -- the draft supplemental 20 conditions, it says 5 percent, right? 21 A. The supplemental conditions, in this 22 case this one was dated May the 28th, 2014. 23 Q. Okay. What's the relevance of that? 24 A. It was the lender who required the 10 25 percent retainage.	Page 88 1 that they would agree to the terms of the loan 2 documents. And the loan document says 10 percent. 3 So in that letter that they had sent to the lender 4 during the construction loan closing said that they 5 would adhere to the loan documents, of which also 6 stated 10 percent. 7 Q. Okay. The contract says 10 percent. 8 And when you were arguing the retainage, that's 9 what you were arguing, is that the contract says 10 10 percent, correct? 11 A. I was arguing that the contract says 10 12 percent and that the lender required 10 percent. 13 Q. Okay. But you refused to -- and when 14 the point was brought up that the supplement -- 15 that the draft supplement conditions said 5 16 percent, you said I'm not going to do that, I'm not 17 going to pay the 5 percent, I'm going to pay 10 18 percent, correct? 19 A. My position was that the retainage 20 should be 10 percent. The architect is the 21 ultimate one who signs off on the pay app where the 22 retainage is requested. 23 Q. Okay. Did you have any specific 24 involvement with drafting the supplementary 25 conditions?
Page 87 1 Q. Okay. But regardless, A133 says 10 2 percent, supplemental conditions say 5 percent, and 3 there is a disagreement during the construction as 4 to what percentage of retention applied. Do you 5 remember that? 6 A. Yes. 7 Q. Okay. And Balfour asked for a 5 8 percent retention and Library Associates took the 9 position that it's 10 percent, correct? 10 A. That's correct. 11 Q. Right. And, in fact, you refused to 12 reduce the retention to 5 percent saying, no, it's 13 10 percent, correct? 14 A. Because the lender required 10 percent 15 retainage. 16 Q. Well, that's -- but it's still a matter 17 of contract, isn't it, whether -- whatever the 18 lender required is really immaterial after the 19 contract is signed. If the contract says 10 20 percent or 30 percent, it's -- you still have to -- 21 Library can't just arbitrarily say we're going to 22 withhold 50 percent or 15 percent, you have to look 23 at the contract, agreed? 24 A. The A133 says 10 percent. Also, I do 25 recall Balfour Beatty signing a document saying	Page 89 1 A. No. 2 Q. Who did? 3 A. That's Buck Lindsay's document. That's 4 in his specification book. 5 Q. Okay. How about Jim Clements? 6 A. No. That's Buck Lindsay's document. 7 That's in his specification book. 8 Q. Okay. Are you aware of Buck -- of Jim 9 Clements specifically striking out certain sections 10 of the supplemental conditions and they were 11 negotiated, that it was decided that they would be 12 completely left out? Do you have any knowledge of 13 that? 14 A. No. 15 Q. What is the factual basis for Library 16 Associates' position that the supplemental 17 conditions, whatever they are, or draft 18 supplemental conditions? When it made that claim 19 to the court saying we want the supplementary 20 conditions declared not part of the contract 21 because they were draft, what was the factual basis 22 for that? 23 A. You'd have to ask my attorneys. 24 Q. So Mr. Bundy would be the one to answer 25 that?

Page 90	Page 92
1 A. Yes. 2 Q. Okay. Anybody else? 3 A. Or his partner, Mr. McDonald. 4 Q. Okay. I asked you about who you may 5 have spoken with regarding this litigation and you 6 told me about various people. How about Michael 7 Bennett, did you have any -- have you had any 8 discussions with him specifically about this 9 litigation in the last month? 10 A. Can you be more specific? 11 Q. Just a general question. Have you had 12 any discussions with Michael Bennett in the last 13 month about anything specific to this litigation? 14 A. The only conversation I had was that my 15 deposition was scheduled for this week. 16 Q. That's it? 17 A. That's it. 18 Q. Okay. Do you have any reason to 19 believe that -- or testimony relative to whether 20 Michael Bennett read the contract or not? 21 A. No, I do not believe he read the 22 contract. 23 Q. Is that his habit, not to read 24 contracts? 25 A. Yes.	1 Q. Okay. Does Michael Bennett have any -- 2 have you observed if he has any problems with his 3 memory? 4 A. No. 5 Q. Do you think he's sharp? 6 A. Yes. 7 Q. Does he recall details? 8 A. Yes. 9 Q. Okay. When I deposed Michael Bennett, 10 he -- his testimony was that he had no recollection 11 of design changes on the hotel. If that was his 12 testimony, does that make sense to you? 13 A. That would make sense to me that he 14 would say that, yes. It also depends on at what 15 time, you know, what your specific question was. 16 Q. From the time that the contract was 17 signed forward. So the contract was signed with 18 Balfour. From that point forward I asked 19 Mr. Bennett if he was aware of any design changes 20 and he said no. 21 A. If that was his answer, I believe that 22 would be his answer at the time. 23 Q. Right. Does that make sense to you? 24 A. Yes. 25 Q. Are you aware of design changes that
Page 91	Page 93
1 Q. Why is that? 2 A. He does not get into the minutia. 3 Typically we rely on our counsel to review our 4 contracts and then I deal with the contracts. 5 Q. Okay. Do you do any sort of written 6 summary? Say for this particular contract, would 7 you do an executive summary or memorandum or 8 anything else like that to Michael -- 9 A. No. 10 Q. -- Bennett to explain to him what you 11 thought the perfect conditions were? 12 A. I did not, no. 13 Q. Did you discuss any of the particular 14 provisions to your recollection with Michael 15 Bennett? 16 A. We would have conversations. I do not 17 specifically reflect what those conversations were 18 being six years ago. 19 Q. Okay. Well, do you have any general 20 recollection? Do you have any -- can you testify 21 here today that any -- about any particular 22 provision or specific provision of the contract 23 between Library and Balfour that you discussed with 24 Michael Bennett? 25 A. Not as I sit here today.	1 took place in the hotel? 2 A. I am. 3 Q. Some of those were pretty big, weren't 4 they? 5 A. There was one big design change. It 6 was done prior to even the floors being built where 7 we converted 18 rooms to 12 rooms. 8 Q. That's on Floors 6, 7 and 8? 9 A. Correct. 10 Q. Right. You made single rooms into -- 11 single rooms into suites, correct? 12 A. Correct. 13 Q. That's a major change, wasn't it? 14 A. That was a change, yes. 15 Q. Does it make sense to you that Michael 16 Bennett does not recall that? 17 A. If that's what he testified. 18 Q. No, I'm asking if it makes sense to 19 you. 20 A. Yes, that does make sense to me. 21 Q. Okay. Who signed the pay applications 22 for LA? 23 A. The pay applications to the lender? 24 Q. From Balfour Beatty's, the 25 applications, who signed those?

Page 94

1 A. The architect would sign the pay
2 application.
3 Q. Okay. Did the owner sign them?
4 A. No.
5 Q. Did the owner approve them?
6 A. No. The architect approved them.
7 Q. How about change orders? Who signed
8 those?
9 A. I signed the change orders. The
10 architect signed them first. They would be signed
11 by Balfour Beatty, then they would be sent to the
12 architect for approval, and then I would sign them.
13 Q. Okay. Did Michael Bennett ever review
14 any of those before they were signed?
15 A. No.
16 Q. Did you discuss change orders that were
17 ongoing on the project before you signed them with
18 Mike Bennett?
19 A. There were a few that were discussed
20 with him, but he was not involved in the biweekly
21 meetings that we had for Balfour Beatty or -- not
22 on a regular basis, no.
23 Q. What change orders did you discuss
24 specifically with Michael Bennett?
25 A. There was a -- specifically I recall

Page 95

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

Page 96

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

Page 97

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

Page 98

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

Page 99

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

Page 100

1 training?
2 A. And -- excuse me. I'd like to go back
3 just a second. Certificate of occupancy.
4 Substantial completion, sometimes referred to also
5 as a certificate of occupancy. However, I believe
6 in Buck's documents there's certain other things
7 that have to be met in order to hit substantial
8 completion. And so in this case I believe we were
9 able to get a temporary CO in November of 2018.
10 And because of relationships with the city, we were
11 able to open the hotel under a TCO and we were --
12 we had to get -- the Salamander people I believe
13 got in there, started working, you know, in
14 December, in January, actually got in the hotel.
15 We had them hired a year prior where they had been
16 working offsite in the hotel for over a year.
17 Q. Okay. But the hotel operational and
18 running and had guests was selling rooms on January
19 21, 2019?
20 A. I believe it was 26th.
21 Q. January 26th?
22 A. 26th or 27th, yeah.
23 Q. All right. So regardless of any --
24 whatever, if any, technical things had not occurred
25 by then, by that date the owner was using the hotel

Page 101

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

Page 102

1 your position?

2 A. That's my position.

3 Q. Okay. And that's the position of

4 Library Associates?

5 A. That's my position.

6 Q. Aren't you speaking for Library

7 Associates?

8 A. You're taking my deposition, so that's

9 my position.

10 Q. Right.

11 A. Yes.

12 Q. Are you making a distinction? Are you

13 not testifying for -- you're an officer of Library

14 Associates, aren't you?

15 A. No.

16 Q. You run the corporation basically for

17 your brother, don't you?

18 A. Yes, but I'm not an officer of Library

19 Associates.

20 Q. Okay. Regardless of the technical

21 distinctions, your position is that all of the

22 delays were solely caused and attributable to and

23 the responsibility of Balfour Beatty, correct?

24 A. Yes.

25 Q. Okay. And it is not and never has been

Page 103

1 your position or contention that anybody else

2 contributed to any of the delays, correct?

3 A. As I sit here today,

4 Q. Okay. Is that correct, it is not and

5 never has been your contention that anyone other

6 than Balfour Beatty is the cause or responsible for

7 the approximately 500 plus days of delay on this

8 job, agreed?

9 A. Yes.

10 Q. Thank you. After the contract was

11 signed, did you understand that the owner, Library

12 Associates, was going to have to self-perform some

13 of the work?

14 A. There are certain things in the

15 contract that would be owner furnished, owner

16 installed.

17 Q. Okay. And what were those?

18 A. Typically that's low voltage wiring.

19 Typically that would be -- in any other contract,

20 that would be kitchen equipment. But in this

21 specific case, Balfour Beatty wanted the kitchen

22 equipment after the contract was signed in their

23 contract, so there was a change order to that

24 effect to give them the responsibility of the

25 kitchen equipment in their contract.

Page 104

1 Q. I'm simply asking what did the owner of

2 Library Associates self-perform? What was it

3 responsible for? You said the low voltage wiring.

4 What else, if anything?

5 A. Self-performed, we would hire outside

6 contractors, but that's typically what we would do,

7 would be we would have -- be responsible for the

8 laundry equipment, the -- like I said, typically

9 kitchen equipment, but in this case this is in

10 Balfour Beatty's responsibility and low voltage

11 wiring.

12 Q. Whose responsibility was it under the

13 contract to coordinate the work that was

14 self-performed by Library?

15 A. I believe that was Balfour Beatty's

16 responsibility.

17 Q. Okay. So it was Balfour Beatty's

18 responsibility to coordinate the work of Library?

19 A. Yes.

20 Q. And that's your understanding of the

21 contract?

22 A. Yes.

23 Q. Okay. Did you ever discuss delays with

24 Jim Clements while the project was ongoing?

25 A. I don't specifically recollect each

Page 105

1 conversation, but I'm sure that there was

2 conversations about delays, yes.

3 Q. Okay. And I would assume that his

4 position mirrored yours, that it was not his

5 contention that anybody other than Balfour was

6 responsible for the delays of the project?

7 A. I cannot speak for Jim. You'd have to

8 ask Jim that question.

9 Q. Well, I'm just asking about your

10 recollection.

11 A. You'd have to ask Jim that question.

12 Q. I'm not asking what he recollects, I'm

13 asking what you recollect.

14 Do you have any recollection of Jim

15 Clements having a position that differed from

16 yours? You said from your perspective, day one, as

17 soon as the delays started, once the project was

18 delayed after August 19, 2017, you thought it

19 was -- you felt it was Balfour's obligation.

20 And to your knowledge, did your

21 designated representative, owner's representative,

22 Jim Clements, differ?

23 A. Not to my knowledge.

24 Q. How about the architects, did they

25 differ?

Page 106	Page 108
1 A. I can't speak -- I don't recall. 2 Q. Okay. Well, from your recollection, do 3 you recall did the -- did the architects say it's 4 Balfour Beatty's responsibility for delays and 5 solely Balfour Beatty's? Do you remember anything 6 to the contrary from the architects? 7 A. No. 8 Q. In fact, everybody from your testimony 9 and recollection from day one from the time from 10 August 19, 2017 that the first day of delay 11 occurred until the hotel finally opened on January 12 26, 2019, everybody involved with the project from 13 yourself, Jim Clements and the architect all took 14 the position and delegated all responsibility and 15 the sole responsibility of the delays to Balfour 16 Beatty, correct? 17 A. I can only speak for myself. I can't 18 speak for them. 19 Q. Right. We've already been through 20 this. I'm just recapping your testimony. You said 21 what you recall them saying. And I'll take their 22 depositions and they can say whatever they want to 23 and they can allege and cite whatever others they 24 want to. 25 But from your perspective and your	1 independent -- strike that question. 2 I'm going to move into another area if 3 you'd like to take a few-minutes break. 4 A. I'm good. 5 Q. We've been going a little over an hour. 6 Okay. 7 I want to refer you to the contract 8 with Balfour Beatty that as I referenced is -- let 9 me back up. Maybe you answered this and maybe I 10 don't recall what the answer was. 11 If the pleading identified under 12 Exhibit 13 says that Library Associates seeks to 13 add supplementary conditions declared not part of 14 the contract because they were draft, what -- why 15 was that request made? 16 A. I don't recall. You'd have to ask 17 Mr. Bundy. 18 Q. Okay. Let's turn to the contract, if 19 you would, please. Do you recognize what has been 20 marked as Exhibit 14 to Michael Bennett's 21 deposition? 22 A. Yes. 23 Q. And this is -- do you recognize this as 24 the contract between Library and Balfour? 25 A. Yes.
Page 107	Page 109
1 recollection based on your involvement with this 2 project, it was Library Associates', yours, Jim 3 Clements and the architects assertion from day one 4 that all delays were the responsibility and solely 5 the responsibility of Balfour Beatty, agreed? 6 A. I believe that they were the 7 responsible party, yes. 8 Q. Right. The answer to my question is 9 yes, correct? 10 A. I believe they were the responsible 11 party. 12 Q. Right. And nobody else, correct? 13 A. That's my opinion. 14 Q. Okay. And that was everybody's opinion 15 while construction was going, correct? 16 A. It's my opinion. I can only speak for 17 myself. 18 Q. Right. But you can also speak to what 19 you were told by others. And it was everybody's 20 contention from day one that it was Balfour, 21 correct? 22 You've already testified to that, 23 haven't you? 24 A. I don't recall anything different. 25 Q. Okay. Were there any other	1 Q. Okay. We're going to work through a 2 few provisions in this. So on the front page, the 3 owner is Library Associates. Do you see that? 4 A. Yes. 5 Q. The construction manager is Balfour 6 Beatty, LLC. Do you see that? 7 A. Yes. 8 Q. From your understanding on this job, 9 was there any distinction between Balfour Beatty 10 being called a construction manager as opposed to a 11 general contractor? 12 A. They were the construction manager. 13 Q. Okay. What is -- is there any 14 distinction in your mind as them being called a 15 construction manager or a general contractor or 16 alpha dog or whatever you want to say, the fact 17 that it was -- they were called a construction 18 manager as opposed to a general contractor, did 19 that have any significance to you on this job? 20 A. No. 21 Q. Okay. And for the following project, 22 hotel Marion Square, do you see that? First page. 23 A. Let me retract that question for just a 24 second. In this contract, which is an A133, they 25 are labeled as a construction manager. And because

Page 110 1 this is the contract that was used, the 133, the 2 construction manager does have different 3 responsibilities or additional responsibilities 4 than if a typical job was signed within AIA 101, 5 which would call the contractor a general 6 contractor. 7 So even though that they were the 8 general contractor, they were also the construction 9 manager as part of this definition of this 10 contract, which gave them additional 11 responsibilities. 12 Q. Okay. The primary responsibility -- 13 this agreement gives the construction manager 14 more -- basically you agree on a -- you sign a deal 15 before you have a guaranteed maximum price, 16 correct? 17 I mean, what is the distinction? You 18 tell me what your understanding of the distinction 19 is between a construction manager and a general 20 contractor. 21 A. In this particular contract they are 22 identified as the construction manager. 23 Q. Okay. 24 A. And they are responsible for all of the 25 accounting and managing and it's their complete	Page 112 1 responsible for their subcontractors, for the -- if 2 it's a cost plus, they're responsible for the cost 3 and supporting the costs for the project? I mean, 4 I'm just trying to get your understanding of what 5 the distinction is, if you have any. 6 A. Again, I believe this document requires 7 them -- and without you allowing me to review the 8 document to come up with specific items, the 9 construction manager has more responsibilities than 10 a typical general contractor would in signing an 11 A101. 12 Q. Do you know why the decision and what 13 reasons, if any, underlaid the decision for Balfour 14 to be a construction manager as opposed to a 15 general contractor to be labeled as such in this 16 contract? 17 A. It was the decision -- and I'm not 18 sure -- I don't recall why the decision was made, 19 but the decision was to have the A133 and have it 20 be a cost of work plus a guaranteed maximum price. 21 Q. Have you used this contract before, 22 this contract form? 23 A. No. 24 Q. So you always use the A101 and 201? 25 A. Yes.
Page 111 1 responsibility to manage all the subcontractors -- 2 Q. How does that differ from any other 3 contract that a general contractor would sign? 4 A. Give me a second here. 5 Q. Let me ask you this: Without reference 6 to the contract, tell me what your understanding -- 7 without referencing the contract, Miss Brown, going 8 from your understanding sitting here today in front 9 of me, what is the distinction, if any, between a 10 construction manager and a general contractor? 11 A. Again, they have -- this -- the 12 construction manager has additional 13 responsibilities that a general contractor would 14 have when they would typically sign an A101 15 contract for a job. 16 Q. Okay. But if you have a -- and what 17 other responsibilities are those? 18 No, based on your recollection. Tell 19 me your understanding. 20 A. They're completely responsible for all 21 the accounting on the job, they're responsible for 22 their subs, they're responsible for the schedule of 23 the job. They have complete responsibility. 24 Q. Okay. Isn't that the responsibility of 25 a general contractor on any job, that they're	Page 113 1 Q. Have you ever had a contract that was 2 cost plus with a guaranteed max? 3 A. No. This was the first one. 4 Q. Okay. So all of your other -- your 5 prior contracts were just simply for a negotiated 6 stipulated sum? 7 A. A lump sum contract, yes. 8 Q. Okay. For the other 19 hotels that 9 Mr. Bennett's constructed, correct? 10 A. Yes. 11 Q. All right. Continuing down on Page 1. 12 I'm sorry, Page 1 of the contract. The first page. 13 Cover page. I'm sorry, you kept turning. 14 Actually, I think it is enumerated as Number 1. 15 A. Yeah. 16 Q. All right. We were working down 17 through the terms. Architect is Winford Lindsay 18 Architect? 19 A. Yes. 20 Q. And the owner's designated 21 representative is Jim Clements, major program 22 management services, correct? 23 A. Yes. 24 Q. And for the architect, Winford Lindsay 25 Architect, any responsibilities that he's to

Page 114 1 perform under the contract or -- that's a general 2 question. Let me rephrase. 3 Where the contract references that the 4 architect is to perform certain functions, then 5 Winford Lindsay Architect is that entity, correct? 6 A. Yes. 7 Q. And where the owner -- where the 8 contract says that the owner's designated 9 representative is to be Jim Clements, then he's the 10 person, correct? 11 A. Yes. 12 Q. Okay. Who, if anybody, was involved 13 with the negotiation of the agreement for Jim 14 Clements? 15 A. That would have been Michael. 16 Q. How about for the actual -- the actual 17 wording verbiage of that agreement? Who negotiated 18 it, in other words? 19 A. I don't recall. I was finishing up 20 another hotel project at the time and I was not 21 involved in that. 22 Q. So it was only Michael to your 23 knowledge? 24 A. I'm sure Michael had someone review it 25 for him. Whether it was Mr. Bundy or one of our	Page 116 1 Q. And, in fact, you just finished -- 2 hadn't the Embassy Suites just finished where you 3 all were involved in a dispute that necessitated 4 the imposition of liquidated damages? 5 A. Yes. 6 Q. So you're very aware and very 7 knowledgeable of what a liquidated damages 8 provision is for, agreed? 9 A. I am knowledgeable about what a 10 liquidated damages clause is, yes. 11 Q. And you negotiated that on -- into all 12 of the contracts that Library -- I'm sorry, that 13 Bennett Hospitality has negotiated with general 14 contractors. Each one of the A101's has a 15 liquidated damages provision, correct? 16 A. No. 17 Q. They don't? 18 A. No. In our contracts with CPI, we 19 don't have liquidated damages provisions in their 20 contracts. 21 Q. Anybody else? 22 A. As I testified earlier, they had built 23 the last eight hotels for us. We had the 24 liquidated damage clause in there with Welbro and 25 we had the liquidated damage clause in there with
Page 115 1 other attorneys, I'm not sure. I don't recall. 2 Q. Does Tracy Ray actually practice law? 3 Is she a practicing lawyer? 4 A. I believe she keeps up with her 5 continuing education, but she works for us. She 6 does not practice law. 7 Q. So any legal work she does is strictly 8 for Bennett Hospitality? 9 A. Correct. 10 Q. And its related entities? 11 A. Correct. 12 Q. All right. Turn to Page 7 of the 13 agreement, if you would, please. At the very 14 bottom under 2.3, construction phase, under Section 15 2.3.1.3 there is a provision for liquidated damages 16 at a rate of and then it's spelled out 9,500 17 dollars and then the -- or the numeral is 9,000 18 dollars. Do you see that? 19 A. I do. 20 Q. Okay. Who negotiated that amount? 21 A. As I recall, that was Jim Clement who 22 negotiated that amount. 23 Q. Okay. And you were involved in it, 24 though, weren't you? 25 A. I was involved in it, yes.	Page 117 1 Balfour Beatty, but it's not in our other 2 contracts, no. 3 Q. What is the intention of the -- what's 4 the reason for having a liquidated damages 5 provision? 6 A. The daily revenue that you lose from a 7 hotel is a very large number. In a hotel like 8 Hotel Bennett, that could be, you know, a hundred 9 to 150,000 dollars a day in revenues. So a 10 liquidated damage amount even what our net loss 11 would be would be such a high number that a 12 contractor would never agree to it, roughly 30,000 13 dollars a day that we lost in revenues for the 14 hotel not being open. 15 Knowing that the contractor would never 16 agree to a 30,000 -- what our true net loss was, we 17 were able to negotiate a number that at the time we 18 knew would not cover our losses but that we felt 19 comfortable with and that Balfour Beatty felt 20 comfortable with. 21 Q. Okay. So the liquidated damages is an 22 agreement between Library Associates and Balfour 23 Beatty that for every day of delay that is 24 determined to be the fault of Balfour Beatty, that 25 that's what Library Associates would collect as

Page 118 1 damages, agreed? 2 A. Correct. 3 Q. Okay. Did you have any specific 4 involvement with negotiating that provision? 5 A. I recall that Jim Clement was 6 negotiating that with Balfour Beatty. I recall 7 that he may have come back with a number lower. I 8 recall he -- that we probably had the conversation 9 that our liquidated damage clause in that current 10 contract with Welbro was 9500 dollars a day and 11 that that's what we would be willing to accept even 12 though that that -- the actual loss would be 13 higher, and he was the one who was able to 14 negotiate that with Balfour Beatty. 15 Q. To negotiate it higher? 16 A. To negotiate the 9500 dollars. 17 Q. What was the figure before the 9500 18 dollars? 19 A. You know, I don't recall. It was 20 probably in the 7,000 dollar range. 21 Q. Okay. But the final agreement was that 22 for each day of delay, Balfour -- the 23 responsibility of Balfour, they would be liable for 24 9,00 dollars -- or 9500 dollars? 25 A. 9500 dollars.	Page 120 1 formal or informal training or CLE's or continuing 2 education or anything else regarding scheduling? 3 A. No, I do not. 4 Q. Do you have any -- do you profess any 5 expertise or understanding of critical path or 6 other scheduling aspects? 7 A. I understand what critical path is. 8 Q. What is it? 9 A. Critical path are items in the job that 10 have to be complete at a certain time in order for 11 the job to move forward. 12 Q. Okay. Is there a science involved with 13 that? 14 A. Not that I'm aware of. I'm not a 15 scheduling expert. They have the -- they were in 16 charge of scheduling the job. 17 Q. Okay. Do you do critical path analysis 18 and do you use any of the computer programs to 19 develop critical paths or schedules for jobs? 20 A. No, I do not. 21 Q. Does anybody with Bennett Hospitality? 22 A. No. 23 Q. Do you know whether anybody from 24 Library Associates reviewed the schedule that was 25 proposed by Balfour Beatty that included the
Page 119 1 Q. Okay. How did that -- there's a 2 discrepancy between the written part and the 3 numeric aspect. Who drafted that actual language, 4 do you know? 5 A. I believe Mr. Bundy did. 6 Q. Okay. So do you know how that 7 happened, why -- what the discrepancy is? 8 A. I don't know how that happened. 9 Q. Was there a discussion -- after the 10 contract was signed, do you remember any 11 discussions with Balfour Beatty about which rate 12 was the agreed upon rate? 13 A. I don't recall any discussions. 14 Q. So you don't know whether there's an 15 agreement -- a meeting of the minds, so to speak, 16 after the contract was signed as to which provision 17 was going to apply? 18 A. I do not. 19 Q. What is your understanding of how the 20 project schedule was developed or do you have any 21 understanding of it? Do you know what a schedule 22 is? 23 A. No. Balfour Beatty had the scheduling 24 software that they scheduled the project. 25 Q. Okay. Do you have any training, any	Page 121 1 original completion date of July 31, 2017? 2 A. I believe Jim Clement reviewed the 3 schedule. I looked at the schedule. 4 Q. Okay. How about the architect? 5 A. I do not recall if the architect -- 6 well, the schedule would have been part of the 7 initial OAC meetings of which Balfour Beatty would 8 have given the architect the schedule. 9 Q. Okay. What I'm getting at is the 10 completion date that was set out in the contract 11 that I think we've already discussed was -- when 12 you do the math, it works out to July 31, 2017? 13 A. Yes. 14 Q. All right. There was a schedule that 15 underlaid that date, agreed? 16 A. Yes. 17 Q. Okay. Did either Jim Clements or the 18 architect review that schedule to your knowledge? 19 A. Yes, I believe they did. 20 Q. Okay. So both Jim Clements and the 21 owner -- I'm sorry, Jim Clements and the architect 22 were aware of and familiar with the original 23 contract to completion date? 24 A. Yes. 25 Q. Under -- on Paragraph 9 of the

Page 122	Page 124
1 complaint, Article 3, owner's responsibilities, it 2 says: The owner shall provide information with 3 reasonable promptness. 4 A. I'm sorry, where are you reading? 5 Q. On Page 9 of the agreement. 6 A. Okay. 7 Q. Okay. 8 A. What section? 9 Q. Article 3, Paragraph 3.1.1. 10 A. Okay. 11 Q. The owner shall provide information 12 with reasonable promptness. Do you see that? 13 A. Yes. 14 Q. Did you understand that that was an 15 obligation of the owner while this project was 16 ongoing? 17 A. I see that's written here, yes. 18 Q. So did you understand that while 19 construction was ongoing, the owner was going to be 20 asked questions about selections and other things 21 that it wanted and it was going to have to provide 22 guidance to the design people and/or Balfour Beatty 23 in order for the project to go forward? 24 A. Yes. 25 Q. Okay. And you understand that if the	1 decision on a particular aspect of work and we need 2 it within two weeks? Do you remember that 3 happening sometimes on this job? 4 A. No. 5 Q. Well, if they asked you to have it 6 within a certain time period, do you agree that it 7 would be appropriate for the owner to provide that 8 information within that time period? 9 A. If that information was readily 10 available, yes. 11 Q. Well, whether it was readily available 12 to the owner or not, if the -- if the owner just 13 can't make the -- can't get the information for 14 whatever reason, that's not the contractor's fault, 15 is it? 16 A. No, but I'd have to have a specific -- 17 Q. Okay. How about Jim Clements, does he 18 have knowledge of scheduling? 19 A. I would think that he would, yes. 20 Q. Okay. Do you have any -- do you know 21 whether he did or not based on your -- how long -- 22 the contract time was 28 months, so it would have 23 been in May of 2015 approximately when it got 24 started and was completed in December, January of 25 '19, '20.
Page 123	Page 125
1 owner does not provide that guidance that it's 2 required to, that that piece of work cannot go 3 forward, agreed? 4 A. Okay. 5 Q. All right. So it's just pretty 6 commonsensical, isn't it, that if the owner -- if 7 the owner is required to provide information and it 8 doesn't do so within a reasonable time, then 9 whatever information they're supposed to provide is 10 going to cause a delay to that particular piece of 11 work. That's pretty commonsensical, isn't it? 12 A. It may cause a delay to that piece of 13 work, but it may not cause a delay to the critical 14 path. 15 Q. Okay. All right. With that 16 understanding. 17 A. Yes. 18 Q. However -- 19 A. Yes. 20 Q. Right. But -- okay. What is a 21 reasonable time in your view? 22 A. It depends on what the question was. 23 Q. Okay. Well, what if the contractor 24 says, look here, owner, we have -- we need 25 information from you to make a selection and make a	1 A. Yes. 2 Q. So that's a pretty long time. 3 A. It started in March -- March of 2015. 4 Q. So about a four-and-a-half-year 5 construction period? 6 A. Yes. 7 Q. Did you get to know Mr. Clements pretty 8 well during that time? 9 A. I did. 10 Q. Did you like him? 11 A. I did. 12 Q. Do you have any complaints whatsoever 13 of his work? 14 A. No. 15 Q. Okay. How about the architect, same 16 answer? 17 A. I like Buck. I don't have any 18 complaints about Buck's work. 19 Q. Okay. So the only complaints with 20 regard to this are Balfour, correct? 21 A. Yes. 22 Q. And its subcontractors, correct? 23 A. Correct. 24 Q. All the complaints and criticisms are 25 Balfour, correct?

Page 130 1 specific item, so I can't recall or specifically 2 say that it should have been in this job. I'm not 3 sure if Balfour Beatty may have told Jim that it 4 would be in the subcontractors, so I cannot testify 5 to that. 6 Q. All right. Let me back up for a 7 second. Let's talk about Jim Clements and his 8 responsibilities and your understanding of what he 9 was to provide. You all -- Library Associates 10 contracted with Matrix through Jim Clements -- Jim 11 Clements is Matrix, correct? 12 A. Correct. 13 Q. All right. To act as the designated 14 representative or owner's representative of this 15 job, right? 16 A. Yes. 17 Q. And we'll turn to his contract shortly 18 and I'll ask some questions about it, but it's 19 basically the owner was asking for Jim Clements to 20 give Library Associates before the contract was 21 signed with Balfour Beatty his recommendations and 22 advice as to what would be appropriate and 23 necessary in the contract in order to make the job 24 successful, agreed? 25 A. Yes.	Page 132 1 A. I don't recall the exact date that the 2 architect was hired or the exact date that Jim 3 Clement was hired. 4 Q. That's not my question. What's your 5 recollection of who was hired first? 6 A. I don't recall. 7 Q. Okay. Well, if Jim Clements, if you're 8 going to rely on him to -- was Jim Clements on 9 board before the architect's contract was signed? 10 A. I don't have the exact date that the 11 architect's contract was signed in front of me. I 12 don't recall. 13 Q. Did Jim Clements ever make any 14 recommendations to you about or to -- I understand 15 that you weren't involved with any of the 16 negotiations with Jim Clements, correct? 17 A. Not at the beginning, but yes, no. 18 Q. That went into his contract? 19 A. No. 20 Q. Okay. To your knowledge did Jim 21 Clements make any suggestions to Library Associates 22 about how often he felt he needed to be on the job 23 physically? 24 A. No, I do not recall. 25 Q. Same question with regard to the
Page 131 1 Q. And same with the architects, agreed? 2 A. Yes. 3 Q. All right. You all are asking Jim 4 Clements to bring in his credentialed experience to 5 advise you on the contract terms and which forms of 6 contract would be appropriate and otherwise in 7 order to arrive at a successful project for the 8 owner, correct? 9 A. Yes. 10 Q. Okay. Did Jim Clements ever advise the 11 owner to your recollection that anything the owner 12 was doing was causing or contributing to any of the 13 delays on this job? 14 A. I don't recall any specific instance, 15 no. 16 Q. Nor general instance? 17 A. I don't specifically recall. 18 Q. I'm not -- so do you have a general 19 recollection that Jim Clements was telling the 20 owner that its errors or omissions or acts or 21 omissions were contributing to or causing delays? 22 A. I don't recall any conversation. 23 Q. Okay. The first person to be -- who 24 was the first person to be hired among the 25 architect, the general contractor and Jim Clements?	Page 133 1 architect. 2 A. No, I do not recall. 3 Q. Same question with regard to the 4 interior designer. 5 A. No, I do not recall. 6 Q. Okay. Turn to, if you would, Page 49 7 of the general conditions. 8 A. Of the 201? 9 Q. Yes, ma'am. Okay. Do you see kind of 10 in the middle of the page 15.1.6, claims for 11 consequential damages? 12 A. Yes. 13 Q. Do you recall any discussion about that 14 paragraph with anyone prior to this contract being 15 executed by Library Associates? 16 A. No, I don't recall. 17 Q. Reading that here today, claims for 18 consequential damages. The contractor and owner 19 waive claims against each other for consequential 20 damages arising out of or relating to this 21 contract. This mutual waiver includes, one, 22 damages incurred by the owner for rental expenses, 23 for losses of use, income, profit, financing, 24 business and reputation, and for loss of management 25 or employee productivity or of the services of such

Page 134	Page 136
1 persons. Do you understand that paragraph? 2 A. Yes. 3 Q. Okay. Did you have any discussion with 4 anybody about it when this contract was signed? 5 A. Not that I recall. 6 Q. Is that part of the contract? Do you 7 have any dispute about that? 8 A. No. 9 MR. HILDEBRAND: Okay. I'm going to 10 move into another area now. Why don't we take just 11 a five-minute break. 12 THE WITNESS: Okay. 13 (A recess transpired.) 14 (EXHIBIT 16, AIA Document B101 - 2007, 15 was marked for identification.) 16 BY MR. HILDEBRAND: 17 Q. I'm going to hand to you what's been 18 marked as Exhibit 16. I don't have a whole lot of 19 questions, but I do have some on this. Do you 20 recognize this document? 21 A. I recognize this as being the architect 22 contract, yes. 23 Q. Okay. And I've marked that as Exhibit 24 16. And I would like for you to turn to Page 8 of 25 the agreement and the very bottom. Do you see	1 looked at the architect's contract that did not 2 include them. Will you agree with me from based on 3 what we've looked at, there is no contractual 4 obligation of either the general contractor or 5 architect to provide BIM services for this job? 6 A. Not when the contracts were signed, 7 correct. 8 Q. Okay. Well, were there any changes? 9 Was there a change to the contract where it says, 10 okay, explain that answer? 11 A. Not to -- not that I recollect. Again, 12 as per earlier, the only recollection that I have 13 is that the -- I believe it was the mechanical 14 contractor was going to provide BIM services. 15 Q. All right. So would you agree with me 16 that if the owner -- if either the architect or 17 contractor was contractually required to provide 18 BIM, it appears that they -- that that was not 19 included, agreed? 20 A. That's correct. 21 Q. Okay. And would it stand to reason 22 that if they had been asked to provide for that 23 service that it would have been added additional 24 cost to the owner? 25 A. Yes.
Page 135	Page 137
1 where it says Article 4, additional services, and 2 the very last one is 4.1.6? 3 A. Yes. 4 Q. And it says building information 5 modeling not provided? 6 A. Yes. 7 Q. Do you have any recollection of any 8 discussions you had with anybody relative to 9 whether the architect was going to be contractually 10 required to provide BIM for this job? 11 A. No. 12 Q. So you don't recall -- you have no 13 recollection of the architect saying, look, this is 14 a complicated job and the industry standard is that 15 we need to use BIM to make it go smoothly, no 16 memory of discussions like that? 17 A. No, I do not. 18 Q. Nor any recommendations from Jim 19 Clements saying that it's his recommendation to the 20 owner that really this is something we need to 21 have, you just don't remember anything about it? 22 A. I do not recall, no. 23 Q. Okay. Well, if the -- we've now looked 24 at the general contractor's contract, which I 25 believe we agreed did not include them, and we	1 Q. Turn then to -- let me ask you this: 2 Do you know -- do you have any knowledge of any 3 agreements with the architects to -- between 4 Library Associates and the architect regarding them 5 being a defendant or a potential party to this 6 litigation or anything like that? 7 A. Repeat the question. 8 Q. Are there any agreements to your 9 knowledge between Library Associates and the 10 architect where the agreement is that the architect 11 won't be made a party to this litigation but can be 12 named later on or that the statute of limitations 13 being -- is being tolled, T-O-L-L-E-D, or any sort 14 of agreement -- arrangement or agreement whatsoever 15 with the architect as to their being liable or 16 potentially liable for any of the issues in this 17 lawsuit? 18 A. No. 19 Q. Same question with the interior 20 designer. Are you aware of any agreements with 21 them relative to any exposure they might have? 22 A. No. 23 Q. How about with the -- with Jim Clements 24 of Matrix? 25 A. No.

Page 138 1 Q. Same answer? Are you -- let me expand 2 that question just a bit beyond just if there is 3 actually an agreement. Have there been any 4 discussions about any such agreements? 5 A. No. 6 Q. Have there been any discussions to your 7 knowledge between Library Associates -- discussions 8 or communications of any sort between Library 9 Associates and the architects about them being 10 liable for the -- any of the damages that Balfour 11 Beatty has claimed in this matter? 12 A. No. 13 Q. Okay. Same question for DCI? 14 A. No. 15 Q. And Jim Clements? 16 A. No. 17 Q. Do you know if the architect has put 18 their insurance carrier on notice of a potential 19 claim? 20 A. I do not know. 21 Q. Okay. Turn to the last page of that 22 agreement, if you would, please. Do you recognize 23 this document? 24 A. I recognize it as being a certificate 25 of liability insurance. I don't recall seeing the	Page 140 1 A. It's the contract with DCI, the 2 interior designer. 3 Q. And it is dated December 20, 2013? 4 A. Yes. 5 Q. Look on Page 13 of that, if you would, 6 please. At the very bottom, Article 11, 7 compensation. For the designer's services, the 8 owner shall compensate the designer at the -- for 9 the lump sum of 360,000 dollars. Do you remember 10 that? 11 A. Yes. 12 (EXHIBIT 18, Invoice Register dated 13 5/7/19, was marked for identification.) 14 BY MR. HILDEBRAND: 15 Q. I'm handing you what's been marked as 16 Exhibit 18. And this is an invoice register for 17 DCI from December 2013 to May of 2019. Do you 18 recognize this? 19 A. No, I do not recognize this. 20 Q. Okay. It's an invoice register. And 21 right under invoice register it says Design 22 Continuum. And on the third page, last page, 23 bottom right, it says that the total charges for 24 this job were \$820,774.83. Do you see that? 25 A. No. No, I don't.
Page 139 1 specific document, but it's seven years old. 2 Q. Okay. It indicates under -- are you 3 familiar with this form? 4 A. Yes. 5 Q. It's an ACORD form? 6 A. Yes. 7 Q. And do you see under Section C 8 professional liability? 9 A. Yes. 10 Q. Each claim is a million dollars and 11 there is a provision under the third Section A for 12 umbrella liability of 2 million dollars? 13 A. Yes. 14 Q. Okay. Do you know if there was -- is 15 any agreement between Library and the architects 16 that they provide any tail coverage or continuing 17 coverage for some period of time relative to their 18 work on this project? 19 A. Not that I'm aware of. 20 (EXHIBIT 17, AIA Document B152 - 2007, 21 was marked for identification.) 22 BY MR. HILDEBRAND: 23 Q. All right. I've handed you what I have 24 marked as Exhibit 17 and would ask if you can 25 identify that.	Page 141 1 Q. I gave you the wrong page. We'll try 2 this again. I've now handed you a document, 3 Exhibit 18, which has been identified as invoice 4 register. Do you see that, upper left on the first 5 page? 6 A. Yes. 7 Q. And do you see on the third page at the 8 bottom right it says final totals, \$820,774.83? 9 A. I see that number, yes. 10 Q. Okay. Do you know if that reflects the 11 total billings from DCI for this job? 12 A. Bear with me. This is the first time 13 I've ever seen this document. Yes, those numbers 14 look right to me. 15 Q. Okay. Does that sound right to you 16 about the -- 17 A. Yes. Because if you look at their 18 contract -- there's two different invoices. There 19 is Job Number 630001.01 and then there are jobs the 20 invoices related to 630002.01. The first one where 21 the project total fees are 419,500 dollars, that is 22 about 59,000 dollars higher than the 360,000 dollar 23 project cost. And that was due to the monthly 24 services that they provided under the contract due 25 to delays in the job with Balfour Beatty.

Page 142 1 This job was supposed to be finished 2 and opened in '17, but they had to provide services 3 going on through 2019 which we had to pay them for 4 those services on a monthly basis. The 237,000 is 5 for reimbursables. That's for flights to 6 Charleston when they came, that's for hotel stays, 7 that's for any other items that would be considered 8 reimbursables in their contract. 9 And so the total for that 630.001 is 10 656,000 dollars. Again, a lot of that is due to 11 the delays. If you'll look for invoices from all 12 through January '18 through '19, all of those are 13 due to delays in the job. 14 63002, is -- 15 Q. I'm sorry, show me where you're -- 16 A. 63002 here is a different -- 17 Q. That's on the third page? 18 A. Yes, where it says additional services, 19 where we requested additional services from them 20 after the -- that wasn't part of the original 21 contract, additional design that they've provided. 22 And they base their fees on a per hourly cost and 23 those totals were 159,000 dollars with the 24 reimbursables on that portion being 4200. So yes, 25 that --	Page 144 1 Q. On the second page? 2 A. On the second page -- excuse me, on the 3 date, yeah, you can see the additional cost and 4 fees from '18 and '19. Those were 3500 dollars a 5 month for additional -- just additional fees for 6 their construction administration. Actually, that 7 goes back to 2017. They billed one lump sum at the 8 14,000 that went back until -- that was four months 9 old. You have to look at the actual invoices. 10 Q. Okay. So did DCI tell you -- so is it 11 your contention that all of the 419,000 dollars is 12 attributable to Balfour Beatty's delays? 13 A. No. The 419,000 is 360,000 of the 14 original lump sum. 15 Q. Okay. 16 A. That's the original contract. 17 Q. Okay. 18 A. Okay? The addition, 419,500, was the 19 additional time that they spent on the job. The 20 419 -- you'd have to subtract the 419 five from the 21 360. 22 Q. Okay. 23 A. But that's an additional 59,500 dollars 24 in administration that they spent on the job. 25 Q. Okay.
Page 143 1 Q. Okay. Regardless, my simple question 2 was: So that does sound -- comport with your 3 recollection of what they billed? 4 A. Correct. 5 Q. So the final billing to Library 6 Associates was 820,774 dollars, you've got no 7 reason to dispute that? 8 A. No. 9 Q. Okay. And so the original contracted 10 amount was 360,000 dollars? 11 A. Plus reimbursables, plus additional 12 services per the contract. 13 Q. Okay. So the original did not include 14 anything -- did not include reimbursables? 15 A. No. It said in here that reimbursables 16 will be in addition and any additional services 17 would be at a per hour cost. 18 Q. So where do you -- so the contract 19 administration, it was over and above the 360,000 20 dollars, where do you get -- 21 A. Yeah, if you look at the time that they 22 spent -- 23 Q. This is the invoice register, Exhibit 24 18? 25 A. Yes. If you look --	Page 145 1 A. Due to the additional time due to the 2 delays in the hotel. 3 Q. Okay. Is there any document that says 4 that's from DCI saying -- that to your knowledge it 5 says that's what's caused by the delays? 6 A. The invoices and there was -- there 7 was -- I'm sure that there was a letter sent or 8 some type of correspondence since saying that, you 9 know, we have now passed the contract time period, 10 it was supposed to open and -- you know, this was 11 supposed to open in 2017 and we need to charge an 12 additional 3500 dollars a month. 13 Q. Okay. What would you have expected to 14 pay but for the alleged breaches of Balfour, the 15 360 plus contract administration? 16 A. Plus -- 360 plus the reimbursables, 17 yes. 18 Q. So approximately what? 19 A. I'd have to -- in general terms, 20 probably about 500,000. 21 Q. Okay. So the difference of that 320 22 you claim is attributable to Balfour? 23 A. It was partially due to the delays. 24 But the additional services, which are under 25 630002.01, some of those may have been attributable

Page 146

1 to Balfour and some of those just may have been
2 attributable to additional things that we had asked
3 them to do after the contract time.
4 Q. Okay. So have you talked to DCI and do
5 you know what their contention is as to what the --
6 what their overages, what caused their overages?
7 A. I have not had that discussion with
8 them, no. I haven't spoken to them regarding that.
9 Q. Okay. Is it your recollection that
10 they specifically say on their invoices caused by
11 Balfour's delay?
12 A. No, I do not believe their invoices say
13 that. I do recall receiving notification from them
14 due to -- due to the delays in the hotel that they
15 will need to charge an additional 3500 dollars a
16 month in administration.
17 (EXHIBIT 19, Invoice Register dated
18 5/7/19, was marked for identification.)
19 BY MR. HILDEBRAND:
20 Q. Okay. Now, Exhibit 19 is a document
21 which shows in the top left cash receipts. Do you
22 see that?
23 A. Yes.
24 Q. Both of these documents are dated the
25 same date, May 7, 2019?

Page 147

1 A. Yes.
2 Q. Cash receipts are 785,334. So it's
3 about 35,000 less than their total billings. Do
4 you know what the explanation is for that?
5 A. It may have been what that was at that
6 point. I believe that they have been paid in full
7 since May of 2019.
8 Q. So you think they've been paid in full
9 820,000 dollars?
10 A. I believe so, yes.
11 (EXHIBIT 20, Project Management
12 Agreement Between Owner And Project Manager, was
13 marked for identification.)
14 BY MR. HILDEBRAND:
15 Q. I've handed you what I've marked as
16 Exhibit 20 and would ask if you can identify that
17 one.
18 A. This is a contract from Jim Clements
19 not executed by Library Associates.
20 Q. Okay. Do you know -- do you have any
21 reason to believe that it was not or that this is
22 not the actual contract that was in place?
23 A. I -- I do not recall.
24 Q. Okay. Let's look under Article 1,
25 project management services, project start-up

Page 148

1 phase, 1.1.2. Prepare master project schedule,
2 delineating tasks, milestones and deadline dates to
3 ensure project is completed on schedule. Do you
4 know if Mr. Clements did that?
5 A. I don't recall.
6 Q. If that was one of his contractual
7 requirements, do you have any explanation for why
8 he would not have done that?
9 A. No.
10 Q. Under the next section at the top of
11 Page 2, predesign and design phase, the third
12 paragraph down, 1.2.3, update the master schedule
13 with new and revised information when appropriate.
14 Do you know if that was done?
15 A. Not that I'm aware of. I don't recall.
16 Q. Under 1.2.8 on that page, manage the
17 design team and the owner's consultants to ensure
18 necessary design information is incorporated into
19 the design and construction documents. Did he do
20 that?
21 A. He was involved in the preconstruction
22 design meetings with Balfour Beatty, with Buck
23 Lindsay and with the design team from DCI in
24 meetings to incorporate into the design of the
25 construction documents, yes.

Page 149

1 Q. Well, it says necessary design
2 information -- to ensure necessary design
3 information is incorporated into the design and
4 construction documents.
5 A. Yes. He was in those meetings to
6 ensure that the design and the construction -- that
7 information was incorporated into the design and
8 construction documents. It was -- the meetings
9 consisted of Balfour Beatty, it consisted of DCI,
10 it consisted of Buck Lindsay and it -- those
11 meetings were held on a monthly basis during the
12 design -- the predesign and design phase.
13 Q. And that's what Jim Clements'
14 responsibility was on this project?
15 A. Yes.
16 Q. Agreed?
17 A. Yes.
18 Q. Okay. 1.2.10, manage key team members
19 to ensure all necessary decisions are made by the
20 appropriate persons at the appropriate time.
21 That was his responsibility?
22 A. In the predesign and design phase, yes.
23 Q. Review and comment on all pay
24 applications, purchase orders and invoicing from
25 all consultants?

Page 150	Page 152
1 A. In the predesign and design phase, yes. 2 Q. All right. How about pre-construction, 3 next page, 1.3, pre-construction and construction 4 phase, 1.3.4. Provide the day-to-day management of 5 the project, including coordination of the design 6 and construction teams as well as owner's FF&E 7 suppliers and statutory authorities. Was that his 8 responsibility? 9 A. Yes. 10 Q. Did he perform it? 11 A. Yes. 12 Q. 1.3.6, manage contractor's schedule 13 preparation and follow through, monitor schedule 14 progress and report on schedule delays. 15 Same question, that was his 16 responsibility and what he did? 17 A. Yes. 18 Q. All right. On Page 4, third item down. 19 Let's back up under the bottom of Page 3, 20 deliverables, 1.6 at the bottom. 21 With the design phase, his obligations 22 to you were to provide a strategic development 23 schedule incorporating milestone design, statutory, 24 procurement, construction and occupancy activities. 25 Then it talks about his obligations for	1 experience and the fees were going to be paid to 2 him to make sure that the owner's vision was 3 transferred to the design team and the construction 4 team so that they were contractually obligated to 5 build what it was that the owner wanted, agreed? 6 A. Yes. 7 Q. So if there was a -- if Jim Clements 8 did not convey to Balfour Beatty what some of the 9 owners's requirements and expectations were such 10 that they were included in Balfour Beatty's 11 contract, then that would fall on Clements, agreed? 12 A. Yes. 13 Q. And we went through the contracts just 14 a few moments ago that talk about the BIM. And the 15 BIM was not included in either Balfour's contract 16 or the architect's contract, therefore that 17 omission would be Jim Clements' responsibility, 18 correct? 19 A. It was not included in the contract. I 20 don't think that I testified that it was the 21 owner's request to have BIM, so how could it be in 22 an omission? 23 Q. Okay. Well, if Balfour or the 24 architect -- would you agree with me -- based on 25 your knowledge of Jim Clements, are you pretty
Page 151	Page 153
1 the bidding and negotiation phase and then the 2 construction phase. Under the construction phase, 3 it says he will provide weekly meeting minutes, 4 including action items list, monthly cost reports 5 and variance analysis, including the estimated cost 6 to complete the project and owner contingency 7 reserves, monthly schedule updates and some other 8 things. Those were his obligations of what he 9 provided? 10 A. That's what this contract says, yes. 11 Q. Okay. That's what you all -- this 12 contract embodies what you all expected to close, 13 correct? 14 A. Right. 15 Q. And it says just below that his 16 compensation would be 12,000 dollars per month, is 17 that correct? 18 A. Yes. 19 Q. Jim Clement's charge was to meet -- 20 he's the owner's representative and his charge was 21 to meet with the owner and determine what your 22 goals were and what you wanted the project to come 23 out to in broad strokes, agreed? 24 A. Yes. 25 Q. And then it was his job based on his	1 impressed with him and his knowledge of 2 construction management by being an owner's 3 representative? 4 A. Yes, he's knowledgeable about 5 construction. 6 Q. It would have been pretty easy for him 7 if he had wanted to add it to the contracts of 8 Balfour and the architect BIM provisions. If that 9 had been important to him, he could -- it would 10 have been very easy for him to have that, agreed? 11 A. Yes. 12 Q. And because they worked on the 13 contracts, he knew and Library Associates knew the 14 BIM obligations were not included within the 15 responsibilities of Balfour or the architects, 16 agreed? 17 A. At the signing of the con -- yes. 18 Q. Okay. Unless that changed somewhere? 19 A. Correct. 20 Q. Unless there was an addendum or 21 revision of the contract? 22 A. Yes. 23 Q. Okay. The next document that I'd like 24 to ask you about I want to mark as Exhibit 21. 25 (EXHIBIT 21, E-mail chain dated 11/9/15

Page 154	Page 156
1 to Kim Brown from Marty Wall, with attachments, was 2 marked for identification.) 3 BY MR. HILDEBRAND: 4 Q. And it looks to me from what I can -- 5 let's see here. This is a -- 21 is a letter to 6 M. Wall at Bennett Hospitality. Who is M. Wall? 7 A. That's Marty Wall. 8 Q. Is he still with the company? 9 A. He is. 10 Q. What is his responsibility? 11 A. He currently is the general manager of 12 the hotel. 13 Q. Okay. Who was it who brought 14 Salamander into the picture? 15 A. We interviewed two management companies 16 prior to selecting Salamander. It may have been 17 Marty that suggested Salamander. I don't recall. 18 Q. Okay. Who was the other company that 19 you all -- 20 A. Charlestowne Management. 21 Q. For Exhibit 21, that's a document where 22 Salamander from what I can see, it looks like 23 Salamander was initially contacted about a month 24 before. On October 1 there's an e-mail from Marty 25 Wall to Karen Jenkins saying I'm introducing you to	1 A. You bring the general manager on board 2 six months. This was a bigger hotel with more 3 employees. We brought him on nine months before, 4 yes. 5 Q. Okay. 6 A. Or you hire the management company. 7 Q. Did you confer with anybody to -- did 8 you vet that time period with anybody else as to 9 this particular hotel and for a luxury five-star 10 hotel whether six to nine months would be the 11 appropriate time for Salamander to come on board? 12 Six to nine months before completion. 13 A. We did not vet that out. That's just 14 our experience in industry standards. 15 Q. Okay. I guess if you all hadn't done a 16 five-star hotel, how would you know that that is 17 the appropriate time, just a guesstimation? 18 A. That's just industry standards out 19 there. Marty, who is the general manager, was the 20 general manager at Palmetto Bluff, which is a 21 five-star hotel as well, and he may even have been 22 part of that conversation of when to bring the 23 management company on. 24 Q. So tell me again what Marty Wall's 25 general responsibility is.
Page 155	Page 157
1 Prem Devadas. Is that how you pronounce his name? 2 A. I don't see that e-mail. 3 Q. I'm just referencing some facts. It 4 looks like -- 5 A. Karen Jenkins is with DCI. There would 6 be no reason for Marty to contact Salamander with 7 Karen, I believe. I don't know. 8 Q. Okay. Well, the point is, from what I 9 could see it looks like Salamander was brought on 10 board about a month before this Exhibit 21 is -- 11 A. No, I believe we were in talks with 12 Salamander in 2015 and through '16, but I think the 13 actual management contract was signed in December 14 of 2016 with Salamander -- 15 Q. Right. 16 A. -- in anticipation because you 17 typically hire your managers six months to nine 18 months prior to opening and at that point we 19 thought that we would be opening in October of '17 20 so we brought them on in December of 2016. 21 Q. Okay. So is that -- based on your 22 experience with I guess the 21 hotels that you all 23 own or the number of hotels you all had over the 24 years, that's what you all have found is the 25 appropriate time to bring a manager on board?	1 A. He is the general manager of the hotel. 2 Q. When was he hired? 3 A. I don't recall when he first came from 4 Palmetto Bluff to us. He was working on a 5 part-time basis, so I don't recall when he became a 6 full-time employee. 7 Q. Do you have an approximation? 8 A. I -- I don't -- I don't. I don't 9 recall. 10 Q. All right. So what is the distinction 11 between Marty Wall and Salamander? 12 A. Salamander's the management company. 13 Marty is the general manager of the hotel. It is 14 quite unusual that the general manager does not 15 work for the management company, but in this case 16 this is the agreement that we've had with the 17 management company, that the general manager's an 18 employee of Bennett Hospitality but manages the 19 hotel, is the general manager of the hotel. All 20 other employees in the hotel are Salamander 21 employees. 22 Q. Okay. Why would that -- why did that 23 come about? 24 A. We just thought that that would be a 25 better situation for us there and they had no



Deposition of:
Kimberly Bennett Brown

August 5, 2020

In the Matter of:
Balfour, Beatty v. Library Associates

[A. William Roberts, Jr & Assoc.](#)

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Page 192 1 would it go back to Balfour to finalize? 2 A. The -- there were copies of pencil 3 copies given to everybody, just only the three or 4 four summary pages of the pay app, and that was all 5 of the backup information. 6 Q. Okay. 7 A. I think once the pencil copy was done 8 and the architect took it, they then -- if they had 9 any questions with Balfour Beatty or if there was 10 any changes to be made, they would be the ones who 11 corresponded with Balfour Beatty on any of the 12 changes to the pay app. Balfour Beatty would then 13 send the pay app with the backup again to the 14 architect for their final review. 15 I do not recall -- the pencil copy 16 typically didn't to my knowledge be sent back to 17 Balfour Beatty. I'm not sure. I -- you know, I 18 shredded my copies of the pencil copies because 19 they weren't finalized. It was just something to 20 use during the OAC meetings. 21 Q. Okay. So when the -- so the architect 22 would review and approve the pay app and then 23 forward it to you with the backup documentation? 24 A. That's correct. 25 Q. Okay. And would you get that by	Page 194 1 A. Correct. 2 Q. Okay. And you -- when you would get 3 the pay applications from the architect, would you 4 just -- would you review them at all or would you 5 just sign them? 6 A. I don't believe I signed the pay apps. 7 Q. Signed off on them. 8 A. I would review -- I would take the 9 information from that pay app, then it was compiled 10 into the pay app with other invoices that the owner 11 had to send to the lender. 12 Q. Okay. So your approval was your 13 forwarding of those documents to the lender for 14 funding? 15 A. Correct. 16 Q. If there was anything -- during the 17 pencil copy when it was discussed, did you ever 18 request additional information on any of the line 19 items from Balfour? 20 A. I don't recall. 21 Q. After any of the pay apps had been 22 signed by the architect, did any of them go back to 23 Balfour Beatty for revision -- further revision for 24 one reason or another to have them redone? 25 A. I don't recall.
Page 193 1 e-mail? 2 A. I would, yes. 3 Q. And the backup documentation was pretty 4 extensive because this was a cost per a guaranteed 5 maximum price, correct? 6 A. That's correct. In some cases it may 7 be 500 pages. 8 Q. Okay. And the architect -- the 9 architects and you had the opportunity during the 10 pay app process to if you saw something that you'd 11 like additional explanation on or you didn't think 12 the backup was appropriate, then you could request 13 that information from Balfour and often did, 14 agreed? 15 A. I typically reviewed on the architect's 16 review of the pay app. I did not go through all of 17 the backup invoices. That is what we were paying 18 the architect to do. 19 Q. Okay. So it's the architect's 20 responsibility to review all the backup and satisfy 21 itself that what Balfour was presenting to the 22 owner for payment was appropriate and the -- and it 23 had satisfied its obligations to document that the 24 value of the work in place was, in fact, there, 25 agreed?	Page 195 1 Q. Okay. If the owner disagreed with -- 2 were there times when the owner would get a pay 3 application from Balfour Beatty and disagree that 4 some of the work called for was appropriate or not 5 and ask them on the pencil copy to delete it? 6 A. I don't recall personally ever doing 7 that. That was also Jim Clements' responsibility 8 as the owner's representative. He may or may have 9 not in certain instances. 10 Q. Okay. So would the -- for the review 11 of each of the pay apps, that would have been done 12 by both Jim Clements and the architect? 13 A. Jim Clement was always in the OAC 14 meeting when the pencil copy was delivered to 15 everyone. If he saw something in that pencil copy, 16 it was his responsibility to point that out to 17 Balfour Beatty, which he may or may have not done. 18 Q. Were there any instances where the 19 architect certified a particular amount for payment 20 that you actually -- when payment was made to 21 Balfour, it was less than the amount certified in 22 the pay app? 23 A. I recollect there may have been one 24 instance when after the architect had certified the 25 pay app and the bank was going to fund the pay app,

Page 200	Page 202
1 reviewed? 2 A. I review them typically throughout the 3 day. I don't review every e-mail. 4 Q. You don't -- would you have reviewed 5 every e-mail for this job that you got? 6 A. I don't recall. 7 Q. Would you have a reason to believe that 8 you didn't? 9 A. I receive hundreds of e-mails per day. 10 There's some that I miss. In my e-mail box 11 currently, I have over 100,000 e-mails and there's 12 probably showing about 30,000 unread e-mails. I 13 possibly could have missed e-mails from this job 14 that I did not read. 15 Q. Okay. It's possible, but you 16 endeavored to review all of the e-mails that came 17 to you from Balfour Beatty or Jim Clements or the 18 architects on this job, can we agree to that? 19 A. Yes. 20 Q. Okay. And this e-mail -- do you recall 21 this e-mail? 22 A. I don't recall this specific e-mail, 23 no. 24 Q. Okay. Well, I can -- I just want to 25 refer to a particular portion. On Paragraph 3 D	1 that. 2 Have you looked for that in this 3 litigation? 4 A. No, I have not. 5 Q. Okay. And I haven't -- is there -- 6 I've reviewed the OAC meeting minutes and other 7 correspondence and I again haven't found any notice 8 of a claim by the owner for liquidated damages 9 going back through the OAC meetings. 10 Do you recall any oral assertions or 11 claims by the owner to Balfour Beatty for 12 liquidated damages prior to this? 13 A. I do not recall. 14 Q. Okay. Have you talked to anybody else 15 to whether a claim for liquidated damages had been 16 made orally or in writing to Balfour Beatty prior 17 to this -- 18 A. I have not. 19 Q. -- e-mail of February 11, 2019? 20 A. I have not. 21 Q. Okay. And from your testimony 22 yesterday, the liquidated damages in your view 23 began to run on a per-day basis starting on the 24 contract extension time of August 19, 2017 because 25 all of the delays were solely attributable to
Page 201	Page 203
1 with liquidated damages, do you see that? 2 A. Yes. 3 Q. Okay. I've reviewed all of the 4 documents in this case and the -- this is the first 5 notice of an assertion of a claim for liquidated 6 damages to Balfour Beatty in this matter. Would 7 you disagree with that? 8 A. I have not reviewed all of the 9 documents in this case, so I cannot state that I 10 agree or disagree to that. 11 Q. Okay. Let me ask you this then, 12 Miss Brown. Are you aware that prior to this point 13 any claim being made by the owner to Balfour Beatty 14 for liquidated damages? 15 A. I do not recall. 16 Q. Okay. So you're -- the answer is you 17 don't -- you're not aware of any? 18 A. I do not recall. 19 Q. Right. Since you don't recall, you 20 can't testify that you're aware of any notice to 21 Balfour Beatty of liquidated -- of a claim for 22 liquidated damages prior to this letter, agreed? 23 A. I don't recall if there was or there 24 was not. 25 Q. All right. The documents will speak to	1 Balfour Beatty, agreed? 2 A. Correct. 3 Q. All right. So from day one, every 4 single day, approximately 10,000 dollars per day of 5 liquidated damages the owner felt it was entitled 6 to from Balfour Beatty starting August 19, 2017, 7 agreed? 8 A. There was a cap on the liquidated 9 damages that was based on the total amount of the 10 actual general contract fee. 11 Q. Okay. Have you been involved in a 12 project before where -- what is the longest period 13 of time that a project has been delayed from final 14 completion that you've been involved with? 15 A. Approximately 60 days. 16 Q. And that was Embassy Suites that we 17 talked about yesterday? 18 A. Correct. 19 Q. So there the delay claim didn't arise 20 until the very end because it's only 60 days, 21 correct? 22 A. Correct. 23 Q. Here, though, the delay claim arose 516 24 days before final completion, so your claim -- your 25 claim in your mind against Balfour arose about a

Page 204

1 year and a half before final completion, agreed?

2 A. Repeat the question.

3 Q. Okay. In this project I think it's

4 pretty clear that your claim against Balfour Beatty

5 for liquidated damages arose in your view from day

6 one of the -- that the project was not completed as

7 contracted for, which is August 19, 2017, agreed?

8 You told me that several times.

9 A. Yes. That says per the contract

10 requires that, yes.

11 Q. Okay. And you had the right at that

12 point to assert specifically to Balfour Beatty on

13 the -- each pay application that you were going to

14 deduct liquidated damages against them right then,

15 agreed?

16 A. I'd have to read the term of the

17 contract to see when liquidated damages would be

18 assessed in the pay applications.

19 Q. Okay. Well, let's look at the damages

20 provision then. Because I think the contract is

21 under Tab 14, exhibits for Michael Bennett's

22 deposition. Do you see that under 2.3.1.3 in 133?

23 A. Yes.

24 Q. Okay. So my question is: From day one

25 under the contract, the liquidated damages apply

Page 205

1 for every day that the contractor is at fault or

2 responsible for that delay, agreed?

3 A. Yes.

4 Q. Right. And the owner has that right to

5 collect those liquidated damages as of day one,

6 agreed?

7 A. Yes.

8 Q. Okay. And has the right to assert them

9 as of day one, agreed?

10 A. Yes.

11 Q. And it has the right to notify the

12 contractor and to notify on pay applications or

13 otherwise, look, contractor, we think you're

14 delayed right now and we are not going to pay you

15 this pay application and we're going to reduce it

16 by the liquidated damages because that's a right

17 that you have right then, agreed?

18 A. A right, yes.

19 Q. Right. And for the 10,000 dollars --

20 approximately 10,000 dollars a day that was

21 asserted, how would the -- unless the owner tells

22 the contractor, look, we are -- we think that you

23 are late and we think that this delay is your fault

24 and we intend to assert liquidated damages, unless

25 the owner or somebody else tells the contractor

Page 206

1 that that is a claim that the owner has and intends

2 to make, how would the contractor know that the

3 owner's going to make it or not?

4 A. I don't think it's the obligation of

5 the owner to notify the contractor that it's going

6 to make the claim of liquidated damages.

7 Liquidated damages are in the contract as a right

8 that the owner has. It doesn't -- I do not believe

9 it is stated the time period in which the owner has

10 to make the claim for liquidated damages.

11 Q. Okay. So it's a right -- it's a claim

12 that you had but that you did not make against

13 Balfour, and Balfour continued its work without

14 knowing that you intended to assert that claim?

15 MR. BUNDY: Object to the form of the

16 question.

17 BY MR. HILDEBRAND:

18 Q. Agreed?

19 MR. BUNDY: You can answer it. I'm

20 just objecting to the way he asked it.

21 THE WITNESS: Repeat the question,

22 please.

23 BY MR. HILDEBRAND:

24 Q. The liquidated damages claim that the

25 owner had was not made known to Balfour until

Page 207

1 February of 2019 even though it arose according to

2 your testimony in August of 2017, and therefore

3 Balfour to your knowledge continued its work

4 without having received a liquidated damages claim

5 by the owner?

6 MR. BUNDY: Object to the form of the

7 question.

8 BY MR. HILDEBRAND:

9 Q. Agreed?

10 A. I do not recall. There may have been

11 conversation regarding liquidated damages, but I do

12 not recall that this specific notice by the

13 architect was the first time that liquidated

14 damages were mentioned to the contractor.

15 Q. Okay. Let's assume that your

16 testimony -- let's assume that there's no prior

17 writing. And if there is going to be a claim, is

18 there a notice provision in the contract that if

19 a -- one of the parties to the contract has a claim

20 that they need to notify the other party about it?

21 A. I'd have to review the contract.

22 Q. So you can't answer that without

23 reviewing the contract?

24 A. Not from recollection, no.

25 Q. Okay. So every -- the owner -- you

Page 216	Page 218
1 telling me that you had no intention -- it wasn't 2 until February of 2019 that you intended to -- even 3 though you knew that in your view liquidated 4 damages were accruing against Balfour in August 5 of -- began to accrue in August of 2017, is it your 6 testimony that you had -- you weren't intending to 7 assert those liquidated damages until the end of 8 the contract? 9 A. No, that is not my testimony. My 10 testimony is that it's a right that we have under 11 the contract. 12 Q. Right. And you didn't think that you 13 needed to make it until the very end of the 14 contract, agreed? Obviously, because you didn't 15 make it. 16 A. Being the second job that had 17 liquidated damages in it and, as we testified 18 earlier, the other job was at the end of the job. 19 In our mind that is when liquidated damages are 20 assessed, at the end of the job. 21 Q. I'm not asking you that. You didn't 22 feel -- you knew that they arose 500 -- that 23 liquidated damages in your view should have been 24 assessed and arose in favor of the owner in August 25 of 2017, but you didn't think that -- you intended	1 damages per daily limit of 9500 dollars, let's 2 assume that that was correct -- I know that the 3 architect said it was 9,000, and I'm going to come 4 back to this in just a minute. 5 So after 30 days from August 19, 2017 6 at 9500 dollars a day, after 30 days the owner you 7 felt, if you had simply done the math, that Balfour 8 was obligated to pay the owner 285,000 dollars, 9 agreed? It's simple math, right? 10 MR. BUNDY: Object to the form of the 11 question. 12 THE WITNESS: Yes. 13 BY MR. HILDEBRAND: 14 Q. Okay. And after -- I could tell you 15 after 30 days it's 285,000 dollars. After 60 days, 16 it goes to 570,000 dollars. After 90 days, it goes 17 to 855,000 dollars. What -- do you think that if 18 the owner had made a -- had given Balfour notice of 19 a claim for liquidated damages in September of 2017 20 that it was going to deduct 285,000 dollars from 21 their contract, do you think that would have gotten 22 Balfour's attention? 23 A. I cannot tell you what would get 24 Balfour's attention. 25 Q. Based on your knowledge of Balfour, do
Page 217	Page 219
1 to assert them against Balfour beginning in 2017, 2 but you didn't think that it was your obligation to 3 inform Balfour until the end of the job, correct? 4 A. Yes. 5 Q. And when the liquidated damages were 6 asserted in 20 -- I'm sorry, in February of 2019, 7 then the owner said we are not going to pay this 8 last pay app because we're going to deduct the 9 liquidated damages, correct? 10 A. That was one of the items -- 11 Q. Okay. Whether it was one of the items 12 or many, the owner said in 2013, okay, Balfour, 13 we're going to deduct liquidated damages from this 14 pay application, correct? 15 A. In 2019. 16 Q. 2019. 17 A. Yes. 18 Q. Okay. You all could have done that any 19 time, couldn't you? 20 A. As per the terms of the contract, we 21 could have, yes. 22 Q. Right. 23 A. But we're not obligated to. 24 Q. Okay. I've done just a little bit of 25 math on this issue. And if we assume a liquidated	1 you think that would have provoked a response? 2 A. Possibly. 3 Q. You know dang well it would, wouldn't 4 it? If you're going to tell Balfour we're going to 5 deduct 285,000 dollars from your paycheck or from 6 your pay application, you know dang well that 7 Balfour Beatty would have had a pretty aggressive 8 response to that, wouldn't they? 9 A. That's an assumption. 10 Q. So you're not -- we're going to just 11 say that you're confident that Balfour Beatty, if 12 you had -- the owner had asserted liquidated 13 damages back in August of -- or September of 2017 14 for 285,000 dollars and say we're going to deduct 15 this from your pay application and only pay you the 16 undisputed amount, you don't think that would have 17 provoked a response from Balfour? 18 A. I cannot tell you what Balfour Beatty 19 would do. 20 Q. Okay. How about after 60 days when the 21 amount goes to 570,000 dollars, do you think that 22 that would have provoked a response from Balfour? 23 A. Again, I cannot speak for Balfour 24 Beatty. 25 Q. How about at 90 days when it's 855,000

Page 220

1 dollars, would that have provoked a response?

2 A. I cannot speak for Balfour Beatty.

3 Q. How about after 120 days when it's

4 1,140,000 dollars, what do you think Balfour would

5 have done?

6 MR. BUNDY: Object to the form of the

7 question. You're badgering the witness.

8 THE WITNESS: I cannot speak for

9 Balfour Beatty.

10 BY MR. HILDEBRAND:

11 Q. I'm sorry?

12 A. I cannot speak for Balfour Beatty.

13 Q. What do you think that after 150 days

14 of liquidated damages accrued that you were

15 intending to assert against Balfour Beatty, if you

16 had made that 150 days after August of 2017 and

17 that total is 1,425,000 dollars, what do you think

18 Balfour Beatty would have done if you'd have made

19 that claim?

20 MR. BUNDY: Object to the form of the

21 question.

22 THE WITNESS: I cannot speak for

23 Balfour Beatty.

24 BY MR. HILDEBRAND:

25 Q. Okay. If a -- is it a right under the

Page 221

1 contract for a contractor to -- if you all had

2 asserted liquidated damages in each of those months

3 and deducted them from each pay application, then

4 you would not be paying Balfour the amount that it

5 asserts that it is owed under the contract? Pretty

6 simple, agreed?

7 A. Repeat the question.

8 Q. All right. If you -- if Balfour

9 submits a pay application and you say -- let's

10 assume it's the first pay application that was

11 submitted after August of 2017 and you say we're

12 going to deduct 285,000 dollars in liquidated

13 damages, then that is obviously a deduction from

14 the -- from the pay application and Balfour would

15 not be paid the full amount of what it claims it's

16 due, agreed?

17 A. That would be a deduction from the pay

18 app by the architect.

19 Q. Okay. Right. By the architect,

20 agreed?

21 A. Yes.

22 Q. Okay. And after 60 days, it would be

23 570,000 dollars by the architect, agreed?

24 A. Accumulative.

25 Q. Right. Under the contract if you had

Page 222

1 made those claims against Balfour when they arose,

2 would Balfour Beatty have had the right -- if you

3 didn't pay what it claimed it was owed under the

4 contract, would it have a right to stop work?

5 A. I'd have to read the section of the

6 contract. I'm not -- I don't recall the exact

7 language.

8 Q. Okay. Would a reasonable response if

9 the -- if the owner wanted to assert liquidated

10 damages against Balfour, don't you think that's

11 just fundamentally fair that that be done when

12 the -- when that claim arose to give Balfour a

13 time -- appropriate time to respond to the claim

14 and to -- if they needed to change something or do

15 something different, that now they know that the

16 owner is asserting liquidated damages so they're on

17 notice of it and if they need to change their

18 actions they can do so?

19 MR. BUNDY: Object to the form of the

20 question.

21 THE WITNESS: Repeat the question.

22 BY MR. HILDEBRAND:

23 Q. The question is simply do you think

24 that it is fundamentally fair if you've got a claim

25 against Balfour that you're going to assert

Page 223

1 liquidated damages, don't you think that it's

2 fundamentally fair for the owner to just tell them

3 on day one, look, we're going to assert liquidated

4 damages against you to give them an opportunity to

5 respond to the liquidated damages and if they think

6 that they're responsible, then how they can change

7 it and change their behavior so to bring that

8 problem to a head and to try to avoid future

9 liquidated damages?

10 MR. BUNDY: Object to the form of the

11 question.

12 THE WITNESS: I think you have to be

13 bound by the contract. I don't think that the

14 contract says you have to be, in your words,

15 fundamentally fair. It's what the contract says.

16 BY MR. HILDEBRAND:

17 Q. Okay. So even if you thought it was

18 fair, fundamental fairness is -- didn't come into

19 the equation as far as you're concerned, you just

20 didn't think you were required to assert liquidated

21 damages until the end of the job because that's

22 what you thought was required under the contract,

23 agreed?

24 A. Yes.

25 Q. Okay. And when the liquidated damages

Page 224

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

Page 225

1 Q. So what was intended, whether it was
2 9500 dollars or 9,000 dollars, that's something for
3 Jim Clements to answer?
4 A. Yes.
5 Q. And you're willing to go by what he
6 says?
7 A. Yes.
8 MR. BUNDY: Object to the form of the
9 question.
10 BY MR. HILDEBRAND:
11 Q. And your testimony today is that you
12 don't recall any discussions internally at Library
13 Associates about whether liquidated damages should
14 be assessed against Balfour Beatty as soon as they
15 arose and continuously as they arose, is that your
16 testimony?
17 A. I do not recall any internal
18 conversations about assessing liquidated damages as
19 soon as they occurred.
20 Q. Okay. Well, when did that -- did it
21 ever come up? Were they ever discussed prior to
22 February of 2019?
23 A. Yes.
24 Q. Internally?
25 A. Yes.

Page 226

1 Q. Okay. When?
2 A. I don't recall exactly when.
3 Q. Was it right at the end of the job or
4 right when they first started? The opening day was
5 very critical to Michael Bennett he testified,
6 correct?
7 A. Yes.
8 Q. Right. For a lot of different reasons,
9 right?
10 A. Yes.
11 Q. And he knew that there was liquidated
12 damages in the contract, didn't he?
13 A. Yes.
14 Q. Right. And he knew they were about
15 10,000 dollars a day, didn't he?
16 A. Yes.
17 Q. Right. So Michael Bennett never -- you
18 never said to him, he never said to you, wow, the
19 project is -- it's after the agreed-upon completion
20 date, we've got liquidated damages -- a liquidated
21 damages claim against Balfour Beatty, that never
22 came up?
23 MR. BUNDY: Object to the form of the
24 question.
25 THE WITNESS: We knew he had the right

Page 227

1 to claim liquidated damages under the right of the
2 contract.
3 BY MR. HILDEBRAND:
4 Q. Did you ever discuss it with Mike
5 Bennett?
6 A. We had that conversation that the
7 liquidated damages was a right of ours under the
8 contract.
9 Q. Right. And you all had that discussion
10 shortly after, or did you, prior to February --
11 prior to 2019, did you ever have that discussion
12 with Michael Bennett?
13 A. Yes. I can't exactly tell you when,
14 but, yes, prior to February' 19, yes.
15 Q. Okay. Did you have any discussion
16 about whether you should assert and make that claim
17 against Balfour Beatty right away or wait until the
18 end of the job?
19 A. I don't recall having a conversation
20 saying that we need to make the claim right away.
21 Q. So there's no discussion about whether
22 you need to -- you should make it now or later?
23 A. Correct.
24 Q. Okay. Now, were you ever advised by
25 the architect that he felt that liquidated damages

Page 228

1 had begun to accrue against Balfour Beatty prior to
2 February of 2019?
3 A. I don't specifically recall.
4 Q. Okay. Well, is Buck Lindsay a pretty
5 smart guy?
6 A. Yes.
7 Q. Is he a good architect?
8 A. Yes.
9 Q. Is he experienced in the field?
10 A. Yes.
11 Q. Would you expect him to know what
12 liquidated damages are?
13 A. Yes.
14 Q. Would you expect him to know that if he
15 felt that it was Balfour Beatty's responsibility to
16 pay liquidated damages that he should -- would or
17 should have known that as of August of 2017?
18 MR. BUNDY: Object to the form of the
19 question.
20 BY MR. HILDEBRAND:
21 Q. What I'm getting at is wouldn't you
22 expect that if the architect, either Buck Lindsay
23 or Jennifer Faulkinberry, felt that liquidated
24 damages should be assessed against Balfour Beatty,
25 that they would have told you and should have told

Page 229

1 you shortly after August of 2017 when those damages
2 began to accrue?
3 MR. BUNDY: Object to the form of the
4 question.
5 THE WITNESS: I cannot speak for what
6 they should or shouldn't.
7 BY MR. HILDEBRAND:
8 Q. Well, wouldn't your -- your
9 expectations, if you're paying an owner -- I'm
10 sorry, if you're paying an architect to review pay
11 applications and oversee the job and oversee the
12 schedule and they know that it is beyond the
13 contracted completion date, wouldn't you expect
14 them if they felt Balfour was responsible to tell
15 you, look, we think Balfour's responsible and you
16 have a claim against them for liquidated damages,
17 wouldn't that be an appropriate expectation by you?
18 MR. BUNDY: Object to the form of the
19 question.
20 THE WITNESS: I mean, we knew we had
21 liquidated damages in the contract. Do I expect
22 Buck to tell me I have liquidated damages in the
23 contract?
24 BY MR. HILDEBRAND:
25 Q. No.

Page 230

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

Page 231

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

Page 232

1 MR. BUNDY: Object to the form of the
2 question.
3 THE WITNESS: I can't speak for
4 Balfour.
5 BY MR. HILDEBRAND:
6 Q. You discussed yesterday that -- I think
7 you said that Michael Bennett never reviewed pay
8 applications, is that right?
9 A. Yes.
10 Q. Okay. Did Michael Bennett have any
11 involvement whatsoever with reviewing the budget on
12 this project and what the original construction
13 contract was -- let me start over.
14 Was Michael Bennett involved with
15 negotiating the guaranteed maximum price that was
16 in the contract as the date that was originally
17 signed by Balfour Beatty?
18 A. He was involved in the negotiations
19 with Balfour Beatty, yes.
20 Q. Okay. So he knew that the original
21 contract amount was 59,000 dollars -- 59 million --
22 approximately 60 million dollars, agreed?
23 A. Yes.
24 Q. Okay. And then it went up -- the
25 agreed upon contract amount went up by about 5

Page 233

1 million dollars, correct?
2 A. Yes.
3 Q. All right. Was Michael Bennett aware
4 of the incremental increases to the contract amount
5 as they occurred?
6 A. As I testified yesterday, he was aware
7 of a few of those items when we elected to add the
8 pool cover, but other than that, no.
9 Q. Okay. So the answer is he knew about
10 the original contract amount, but did not -- was
11 not informed that the contract had gone up by about
12 5 million dollars, agreed?
13 A. He knew we had change orders, but he
14 was not involved in the -- in those discussions.
15 Q. Right. The answer to my question is he
16 negotiated -- negotiated the original price of the
17 contract, but then changes and change orders and
18 the costs and all of that, that's something he was
19 not involved with nor aware of, agreed?
20 A. He was not involved with, yes.
21 Q. Right. Who actually negotiated the --
22 when change orders were made, who negotiated the
23 prices in those?
24 A. The request for change orders were
25 submitted by Balfour Beatty to Jim Clement. We

Page 234

1 would then have a meeting with Balfour Beatty, Jim
2 Clement, myself, and typically the architect would
3 be on the phone. We would review each request for
4 change order. If we felt that the request for
5 change order was not appropriate or we had
6 questions, we would then have Balfour Beatty go
7 back to the subcontractor requesting the request
8 for change order. If we thought the request for
9 change order was appropriate, then Jim Clement and
10 the architect would advise me that their position
11 was the request was appropriate and then we would
12 sign the request for change order.
13 MR. HILDEBRAND: Why don't we take a
14 five-minute break.
15 THE WITNESS: Okay.
16 (A recess transpired.)
17 BY MR. HILDEBRAND:
18 Q. I think I've established this, but I
19 just want to be crystal clear that -- the question
20 is prior to 2019, did you ever have a discussion
21 with anyone about whether liquidated damages should
22 be assessed against Balfour Beatty sooner as
23 opposed to later?
24 A. There was never a discussion on the
25 timing of when to impose the liquidated damages.

Page 235

1 Q. Okay. And nobody told you that
2 liquidated damages in their view should be assessed
3 or were assessable against Balfour Beatty prior to
4 2019, correct?
5 A. Repeat the question, please.
6 Q. And nobody told you that liquidated
7 damages were -- should be assessed and were
8 assessable against Balfour Beatty prior to 2019,
9 agreed?
10 A. We knew they were assessable. No one
11 told us that they should be assessed prior to 20 --
12 actual assessed prior.
13 Q. And I'm not talking about that the
14 claim should be made, the notice that claim should
15 be made, but did you -- I understand that -- you
16 understood that you believed that the owner had
17 liquidated damages claims against Balfour Beatty.
18 Did anybody else, in fact, ever tell
19 you that, look, we think that there are delays and
20 we think that they are the responsibility and
21 were caused -- of Balfour and were caused by
22 Balfour and the fact that you got them, they
23 started to accrue, did that conversation ever take
24 place?
25 A. Yes.

Page 236

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

Page 237

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

Page 238

1 back to the subcontractors. Don't believe that
2 they scheduled the subcontractors appropriately.
3 Q. Okay. Anything else?
4 A. Not that I can recall.
5 Q. Do you understand that Balfour Beatty
6 did not actually self-perform the work on this job,
7 that it hired subcontractors to actually provide
8 materials and install them?
9 A. Yes.
10 Q. Okay. So all of the actual -- what you
11 see there, all the physical properties of the
12 building were installed by subcontractors, agreed?
13 A. Yes.
14 Q. Okay. Going back to -- would you
15 expect that if -- if the -- if the lay claims were
16 made against Balfour that it would -- that some of
17 those delay claims, some or all, may be -- may
18 involve subcontractors and their work?
19 A. That would be a part of the delay
20 claim.
21 Q. Okay. What I'm getting at is if -- if
22 subcontractors are performing all of the work,
23 don't you think it would be -- and if the owner has
24 the position that Balfour is delaying the project
25 and the owner intends to assert liquidated damages,

Page 239

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

Page 240 1 were going to be made until the very end of the job 2 when it's too late to do anything about them, do 3 you think that there's anything fundamentally 4 unfair to the subs with saying that they were in 5 the wrong when they were not notified of it during 6 the job? 7 A. I do not believe that's our 8 responsibility. 9 Q. Okay. The pay application process that 10 we talked about a little bit earlier, is the -- an 11 appropriate time for the owner to -- through the 12 architect and through the owner's representative, 13 Jim Clements, to determine to request whatever 14 backup documentation it deems is appropriate in 15 order to establish the cost of the work that 16 Balfour is requesting payment for under a 17 particular pay application, correct? 18 A. At the pay app meeting, again a pencil 19 copy was provided. After that copy was provided, 20 the architect reviewed the application. The 21 architect went back to Atlanta. Balfour Beatty 22 sent them all the backup invoices that were 23 attributed to each line item on the pay app. 24 Q. Okay. What I'm getting at is the owner 25 has the opportunity, every pay application, to	Page 242 1 A. As I read Section 7.1.11 of the 2 contract, the owner has the right and its sole 3 discretion to perform periodic examinations, audits 4 and verification of construction manager's cost 5 accounting records and the project documentations. 6 What you may be referring to is 7 7.1.11.3 where it says the cost, just the cost of 8 two audits shall be included in the price of the 9 contracts. It doesn't specifically say that we are 10 limited to audits. And, in fact, in Section 6.11, 11 it states that the construction manager shall keep 12 full and detailed records of accounts related to 13 the work and the cost and exercise such control as 14 may be necessary for proper financial management 15 under the contract and to substantiate all costs 16 incurred. 17 Q. Okay. I stand corrected. So, in fact, 18 the owner had the option if it wanted to to request 19 an audit anytime throughout the project and as many 20 times as it wanted to, correct? 21 A. Correct. 22 Q. All right. But only two of those would 23 be included within the GMP and anything -- so the 24 inference is that if additional audits were 25 requested, then they would be an add to the
Page 241 1 request -- to review all the documentation that's 2 provided by Balfour and determine whether it thinks 3 it's appropriate and adequate; and if it doesn't 4 think it's appropriate and adequate, then it can 5 request additional information from Balfour, 6 correct? 7 A. The architect is the one who reviewed 8 all of the backup invoices to certify the pay app. 9 Q. Right. I understand that. And if the 10 architect has any questions or doesn't think that 11 what is being provided is necessary, then it has 12 the ability and the obligation to request Balfour 13 for additional information, doesn't it, on each pay 14 app? 15 A. That's correct. 16 Q. Okay. Are you familiar with the audit 17 provisions of the contract? 18 A. I am. 19 Q. Okay. And there are two audit -- 20 there's a provision in the contract for two audits, 21 one midway through the project and then one at the 22 end, correct? 23 A. I'd have to read that specific section 24 of the contract. Can I review that? 25 Q. Sure. Absolutely.	Page 243 1 contract as an added cost, correct? 2 A. Correct. 3 Q. Okay. So do you know what the industry 4 practice is for GMP contracts and audits are 5 typically done? 6 A. I do not. 7 Q. Okay. My question is: If the owner 8 had any reservations or questions or problems with 9 any of Balfour Beatty's submissions each month with 10 the pay apps that it provided, despite the fact 11 that it requested whatever information was 12 satisfactory in order to make payment, why were no 13 requests for audits made during the project? 14 A. I do not believe that there was any -- 15 let me think about this for a second. 16 Q. In other words, why didn't the owner -- 17 there were no requests for audits during the job or 18 were there? 19 A. No, there was not. 20 Q. Not until the Cotton & Company letter 21 dated in the spring of 2019, correct? 22 A. That's correct. And that was due to 23 the letter that we received from Mr. Simonton 24 claiming 21 million dollars was owed on the 25 contract when the pay apps only showed less than

Page 260 1 Q. Okay. So regardless of what her 2 credentials might or may not have been, what -- do 3 you have any specific criticisms of her work? 4 A. I don't believe she was experienced 5 enough to run subcontractor crews. 6 Q. Well, you had only -- you were only on 7 the job about once a month, correct? 8 A. No. Typically I would say two or three 9 times a month. Towards the end of the job, it was 10 probably a little more frequent. 11 Q. Okay. Any other people who you had a 12 criticism of their professional competence at 13 Balfour? 14 A. Early on, I believe his name was Bob, 15 he was the early construction manager doing the 16 site work. I believe he was even let go by Balfour 17 Beatty due to not performing on the job. 18 Let's see. I believe one of the 19 project managers, Tim, I believe maybe his style 20 was a little different than what we would have 21 expected and it appearing that he did not have 22 control of the subcontractors on the job. 23 Q. In what regard? Tell me exactly what 24 you're talking about. 25 A. Kind of hard to quantify. It was just	Page 262 1 Q. Any Balfour employees who you commend, 2 you're very happy with? 3 A. There was one gentleman during the 4 course of the job, his name was Marty Dale. 5 Unfortunately, he had some knee injuries and he was 6 not on the job for that long. There was a young 7 African American who was just a laborer, I believe, 8 his name was Stacey, he was very good on the job. 9 Q. Okay. Anybody else? 10 A. You know, in the beginning with Mike 11 Baumbach, who was the original project manager. 12 Unfortunately, Balfour Beatty let him go within a 13 few months of commencing the job. And that's all I 14 can recall off the top of my head. 15 Q. Okay. 16 A. I take that back. There's another 17 gentleman whose name was Alec Dooley. He was -- he 18 worked in the office. He left approximately 19 sometime in the summer or fall of I think right 20 before the hotel opened, so that would have been 21 2018. He left to go back home to work for his 22 father's company as I recall. 23 Q. The lender on the project is Met Life? 24 A. Correct. 25 Q. And the -- when I deposed Michael
Page 261 1 the appearance that the subcontractors ran that job 2 and not the project managers. 3 Q. And that's the appearance -- how 4 often -- when you actually went inside the hotel, 5 how long were you there? 6 A. You know, sometimes 20 minutes, 7 sometimes a few hours. 8 Q. All right. That observation would be 9 based on what could be a 20-minute visit to the 10 hotel or a couple of hours? 11 A. It would also be based on how they 12 presented themselves in job meetings, phone 13 conversations, e-mail. So just not eyewitness at 14 the hotel itself, but it encompasses all of the 15 items I just recalled. 16 Q. You just didn't like Tim's style? 17 A. I don't believe his style was conducive 18 to managing the subcontractors on the job. 19 Q. In your lay opinion? 20 A. In my opinion of working with other 21 contractors as well in other hotel projects. 22 Q. All right. Anybody else in particular 23 you've got a criticism of? 24 A. That's all I can recall off the top of 25 my head.	Page 263 1 Bennett, he said that he was still in negotiations 2 with them and still attempting to bond off the 3 mechanic's liens on this job. Are you familiar 4 with that? 5 A. Yes. 6 Q. Where do things stand with Met Life 7 now? 8 A. They haven't required us to bond off 9 the mechanic's lien at this point. 10 Q. Are you -- is there a date by which the 11 liens have to be bonded off? 12 A. Not that I recall. 13 Q. So are you -- so is there no 14 requirement at all for bonding of liens? 15 A. Not that I recall at this point in 16 time. 17 Q. Okay. Is there a written agreement 18 with them on that? 19 A. Yes. 20 Q. And who would have that? 21 A. I would have a copy in my office. 22 Q. So what other terms are there? Are 23 they -- is foreclosure imminent or anything like 24 that? 25 A. No.

Page 296	Page 298
1 Jim, as I reported to Mike yesterday -- it says 2 dad, but I think it meant to say had -- a good 3 meeting with Ann and her associate, Gary. 4 Do you know who those persons would be? 5 A. I don't know. 6 Q. I'm just curious -- 7 A. I don't know. 8 Q. -- if you knew who those two persons 9 were. 10 A. No. 11 Q. Okay. So the e-mail is dated November 12 6, 2013 that came from Buck Lindsay to Jim 13 Clements. What I want to ask you about is the next 14 to last paragraph at the bottom. 15 It says: Lastly, I owe you an updated 16 owner/architect agreement, which I will address in 17 the morning. Among a few items that it needs to 18 address is the addition of BIM modeling services. 19 I've solicited two proposals for that work, one for 20 46,331 dollars and the other 51,500 dollars. To 21 either of these numbers I'll need to add time for 22 my team to build in the vertical attribute 23 character to all their work. After problems on the 24 Embassy with the above-ceiling clashes, Kim was 25 very anxious to find a solution to avoid this for	1 Q. Do you remember problems in the 2 ceilings at the Embassy Suites? 3 A. I do not recall. 4 Q. All right. Do you remember any -- 5 receiving any information from Jim Clements 6 regarding a proposal on the first and second floors 7 for -- from Balfour for assistance with 8 pre-construction BIM services? 9 A. No. 10 Q. At a cost of a little over 8,000 11 dollars? 12 A. No. 13 (EXHIBIT 31, E-mail chain dated 5/16/15 14 to Kim Brown from James Clements, was marked for 15 identification.) 16 BY MR. HILDEBRAND: 17 Q. Okay. I'm handing you Exhibit 31. And 18 do you see at the top of that it's to you from Jim 19 Clements? 20 A. Yes. 21 Q. Okay. And the first line says: Kim, 22 thanks. I am fully aware of how important this 23 issue is to Mike. We were both in the room when 24 he -- Mike went off like a rocket when this 25 first -- when I first brought this to his attention
Page 297	Page 299
1 Marion. BIM is the answer, but it carries a cost. 2 Do you recall any discussion or -- with 3 Jim Clements or the architect about requesting the 4 architect's request for BIM -- additional BIM 5 compensation? 6 A. No, I do not recall. 7 Q. But regardless, it was not included in 8 their contract as we reviewed yesterday, correct? 9 A. It was not included in the architect's 10 contract, that's correct. 11 Q. Right. Nor in Balfour's, correct? Did 12 we go through that? 13 A. Again, as I testified yesterday, it was 14 not listed in Balfour's contract. I recall that it 15 was part of the subcontract with I believe the 16 mechanical contractor for them to provide BIM. 17 Q. Okay. So you don't know why this was 18 not followed up and why this was not included in 19 the architect's contract? 20 A. This is the first time I've seen this 21 e-mail. I have no idea. 22 Q. Okay. It says after problems on 23 Embassy with the above-ceiling clashes. Do you 24 know what he's talking about here? 25 A. I do not recall.	1 that we had guest room ceilings under nine feet. 2 So I want to ask you about that. Were 3 the -- tell me about the ceiling heights and how 4 important that it was to Mike as far as guest rooms 5 are concerned. 6 A. In most of our hotels, we -- guest room 7 ceilings are nine feet. 8 Q. So was that a huge issue to Mike, the 9 ceiling heights in the guest rooms? 10 A. Yes, it was an important issue to Mike 11 to have the ceiling heights at nine feet. 12 Q. It was a huge issue for him, wasn't it? 13 A. It was an important issue for him, yes. 14 Q. Do you disagree with my 15 characterization as huge? 16 A. It was very important to him. 17 Q. Okay. This is from Jim Clements to 18 yourself. I want to ask you about the next e-mail 19 below that. This is in response to -- it's from 20 you to Jim Clements. 21 And the first line says: You may not 22 be aware of how important the ceiling height issue 23 is to Mike. There are a few hot buttons and this 24 is one at the top. 25 And then below that, this is kind of a

Page 324 1 A. No. It was -- it was not included in 2 the contract documents, but it -- the contract 3 documents did not specifically state that Balfour 4 Beatty would not provide the BIM. 5 Q. So are you arguing that even though the 6 contract said -- let's take a look at the contract 7 document. I want you to take a look at Exhibit 12 8 from the exhibits from yesterday. Page 22 of 133. 9 Number 4, 12.2. The following documents comprise 10 the agreement, AIA document E202, building 11 information modeling protocol if completed or the 12 following. The E202 was never completed to your 13 knowledge, agreed? 14 A. Agreed. 15 Q. And there's nothing set out in this 16 contract that said something else is going to 17 require Balfour to provide BIM, agreed? 18 A. Agreed. 19 Q. Okay. So there were some pre-contract 20 discussions about what Balfour could provide, but 21 that was not included in the contract, agreed? 22 A. That was not in the contract. 23 Q. Right. And anything that -- any 24 comments or agreements that were orally made at a 25 meeting that were not included in the contract are	Page 326 1 coordinating. 2 Q. There's no requirement -- is it -- do 3 you have any knowledge about whether it's 4 appropriate or inappropriate for Balfour, if it 5 wants to, to engage in BIM exercises with its 6 subcontractors outside of anything that the 7 architect is doing? Do you have any knowledge 8 about that? 9 A. Repeat the question. 10 MR. HILDEBRAND: Can you repeat the 11 question, Terri? 12 (The record was read back by the court 13 reporter.) 14 THE WITNESS: As I stated earlier, I 15 did not participate in the BIM calls, but there 16 were biweekly or monthly BIM calls that Balfour, 17 the architect, the subcontractors and Jim Clement 18 participated in. 19 (EXHIBIT 36, E-mail dated 11/2/16 to 20 Brian Rinehart from James Clements, with 21 attachment, was marked for identification.) 22 BY MR. HILDEBRAND: 23 Q. I just handed you an e-mail from Jim 24 Clements, who's your man, right? 25 A. Yes.
Page 325 1 not part of the contract, are they, Miss Brown? 2 A. They're not part of the contract. 3 Q. Right. It would be -- it would have 4 been very simple if Jim Clements or Balfour -- or 5 Library Associates wanted to include BIM by putting 6 that in Balfour's contract, agreed? 7 A. As I testified earlier, I do believe 8 that Balfour did require their sub to perform the 9 BIM. 10 Q. And, in fact, the architect it appears 11 made a proposal to Library Associates to provide 12 BIM as part of its work. And we saw from the 13 contract yesterday that BIM was not required, 14 agreed? 15 A. It was not included in the contract. 16 Q. So that's on the owner and that's on 17 BBC, isn't it? If you all wanted it, you should 18 have required it; if you didn't want it, then don't 19 require it, correct? 20 A. I want to go back to the last page on 21 Exhibit 32 where Tim Spano wrote BBC has gone above 22 contracted requirement of BIM coordinating. So 23 maybe it wasn't in that first contract, but at some 24 point in time there was a contract requirement of 25 BBC as outlined in this e-mail for BIM	Page 327 1 Q. To Brian Rinehart with the interior 2 designer, correct? 3 A. Yes. 4 Q. And Karen Jenkins with the interior 5 designer, correct? 6 A. Yes. 7 Q. And yourself? 8 A. Yes. 9 Q. And it's dated -- the subject is sixth 10 floor delay, November 2, 2016. And Jim Clements 11 says: Brian, thanks for taking my call this 12 morning. Per our discussion when you have time, 13 please review the attached spreadsheet from BBC 14 identifying RFI issues resulting in the sixth floor 15 delay. I've added a column, who is responsible. 16 Based upon my review of BBC RFI's, it is my current 17 submission that most are pure building coordination 18 issues and the owner-related changes were not fully 19 coordinated by WLA or as a result of existing 20 coordination issues in the building resulted in 21 RFI's and coordination issues. 22 And he has attached to this a listing 23 from Jim Clements. On the left-hand side -- do you 24 see on the next page at the top, who is 25 responsible? Do you see that line, Miss Brown?

Page 336	Page 338
1 next question, if it was not, do you know why not? 2 A. I believe that Balfour Beatty did not 3 agree with the result from the architect and they 4 demanded mediation. And we went to the mediation 5 and could not come to any terms, so I'm not sure 6 that once they demanded the mediation if the 7 architects -- it's my opinion that if Balfour 8 Beatty would have accepted the architect's review 9 of the claim of the 20 days and the additional 10 amount of 72,454, they would have requested a 11 change order for that amount. And I see no reason 12 why the owner would not have given them the change 13 order or the contract time because that's what the 14 architects had reviewed and awarded in that case. 15 Q. Okay. Well, if a change order is done, 16 that's a mutual agreement that Balfour Beatty 17 agrees -- would have agreed with the 72,000 18 dollars, right? 19 A. Correct. 20 Q. Once you have a change order, then you 21 can't come back and say later, well, you know, I -- 22 I want to renegotiate what was in that change 23 order, it's over and done with, that issue's 24 settled, right? 25 A. Correct.	1 have prohibited the owner from paying Balfour what 2 it felt was appropriate, the 72,000, and given the 3 extension without requiring a release, it can still 4 pay the amount that's not in dispute and leave the 5 unresolved part to be addressed later, can't it? 6 A. It was Balfour Beatty who was disputing 7 the amount of the architect's award, so we would 8 have given them 20 days and we would have paid the 9 72,000 dollars and we would have called that full 10 settlement. In my opinion, Balfour Beatty probably 11 wouldn't accept that as a full settlement, but 12 that's their decision. 13 Q. Okay. Well, you understand, though, 14 that the owner has the right to only pay -- if 15 there's a claim for -- just like with the 16 retainage, if Balfour Beatty says we want 5 percent 17 and you say we're only going to pay 10, then you 18 pay the pay app that you feel is not disputed and 19 then the 5 percent remains to be determined at a 20 future date? 21 MR. BUNDY: Object to the form of the 22 question. 23 THE WITNESS: No, I believe that's -- 24 contractually it says 10 percent for the retainage 25 in that instance. This is Balfour Beatty
Page 337	Page 339
1 Q. Okay. My question to you, though, is 2 if the architect said, look, we think that Balfour 3 should be paid 72,000, Balfour said that's not 4 acceptable, we think we're owed more, then the 5 72,000 dollars is undisputed, isn't it? 6 A. I don't believe Balfour Beatty would 7 think that the 72,000 was undisputed. They're the 8 ones who would not accept the 72,000 for the 20 9 days. 10 Q. Right, in full settlement of the claim, 11 but the architect says we think it's only 72,000 12 dollars, Balfour says, no, we think it's more, but 13 why would the owner pay the part that was 14 undisputed, the 72,000, and say, okay -- 15 A. Balfour -- 16 Q. -- we're going to pay -- let me finish. 17 We're going to pay the 72,000 dollars and, Balfour, 18 if you think it's more, then you can pursue that 19 later. 20 A. No, I believe the only way we would 21 have paid the 72,000 and given them the additional 22 time was to say that that was a final settlement, 23 as that was the architect's award to them on that 24 claim. 25 Q. Okay. Well, nothing prohibits or would	1 specifically not accepting what the architect award 2 was on that claim. They disputed that. They 3 wanted to go to mediation. We went to mediation. 4 It was not settled. 5 BY MR. HILDEBRAND: 6 Q. Okay. The architect said we think that 7 Balfour Beatty is owed 72,000 dollars. Balfour 8 Beatty says we think we're owed more. But that 9 part is undisputed, the 72,000 dollars, isn't it? 10 A. From the architect's point of view, but 11 not from Balfour Beatty's point of view. 12 Q. Right. Miss Brown, who is -- have you 13 ever heard of Grady Query? 14 A. Yes. 15 Q. Who is he? 16 A. He works for one of the scheduling 17 consultants. 18 Q. All right. So how did he get involved 19 with this project? 20 A. After many attempts of requesting 21 schedules from Balfour Beatty and not receiving 22 those schedules in any type of timely manner, we 23 were very concerned on the schedule. Jim Clement 24 went out and found I believe Mr. Query to -- so 25 that Library Associates would have a third-party



Deposition of:
Kimberly Bennett Brown

August 6, 2020

In the Matter of:
Balfour, Beatty v. Library Associates

[A. William Roberts, Jr & Assoc.](#)

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Page 563	Page 565
1 approximation of what those sums are sitting here 2 today? I know you said it was over 2 million. You 3 don't remember if it's 2.3 or 2.5? It's less than 4 3 but more than 2? 5 A. I don't know what remains in that 6 account. This is Met Life's account. I'd be more 7 than happy, as Brent said, to call Met Life up and 8 get the exact balance in the account. 9 Q. Okay. Well, so whatever that account 10 balance was, if the final -- if the contract 11 balance with retainage to Balfour as of Pay 12 Application 45 was approximately 6 million dollars, 13 let's say, if the balance in the construction loan 14 was say 2 million dollars, where would the 15 remainder come from? 16 A. Well, as we spoke about earlier, Pay 17 Apps 44 and 45 were not approved by the architect. 18 I believe when we looked at one of the pay apps 19 yesterday, there were certain change orders in 44. 20 And I don't recall seeing 45, so I don't recall the 21 change orders that Balfour Beatty submitted for 45. 22 Now, as also we talked earlier that I 23 would put in the funds if there was an approved pay 24 app by the architect that included change orders 25 that were over and above the contract with Balfour	1 the -- assuming that the final contract amount is 2 65 million dollars -- and I can take some time to 3 prove this point since it's in a filing from your 4 attorney. 5 A. Sure. Or if you have Pay App Number 44 6 and 45, I can go through that. 7 Q. Exhibit 27 is Pay App 45. 8 A. Exhibit 27? 9 Q. I think a quicker way to do this 10 probably -- 11 A. It would be -- here we go. As we 12 talked about yesterday, those two figures, the 13 256,000 in Pay App 45, I would not have been 14 required to fund the lending account at that point 15 in time because that pay app had not been approved. 16 I'm not sure what Pay App 44 was as far as change 17 orders. 18 Q. Let's assume that the Figure 3 contract 19 sum today, \$65,238,466.99, let's assume that's the 20 contract amount. 21 A. Yes. And the net change by the change 22 orders was 5,893,719. That included these change 23 orders and previous change orders on 44 that I 24 don't have here in front of me. 25 Q. Okay. That's fine.
Page 564	Page 566
1 Beatty, then I would put those funds in first and 2 then Met Life would disburse those funds. 3 So if there is any change order funds 4 included in 44 and 45, I would have not put those 5 funds in the hotel because the architect -- or in 6 the lender's account because the architect has not 7 certified to the bank that those have been 8 approved. 9 Q. My simple question is: Let's assume 10 that there's 2 million dollars remaining in the 11 construction loan account that Met Life has and 12 let's assume for the sake of argument that the 13 contract amount had increased from approximately 60 14 million dollars to approximately 65 million 15 dollars. There's a approximately 5 and a half 16 million dollar increase. In my hypothetical there 17 would be a 3 and a half million dollar deficit. 18 Where would that money come from? 19 A. If those pay apps were approved by the 20 architect, then we would be required as we did with 21 the other pay apps to put the cash into the Met 22 Life account for those change orders and then there 23 would be sufficient funds in that account to cover 24 the payment that's due. 25 Q. Okay. My question, though, is: Was	1 A. Okay. 2 Q. My simple question is: Let's assume 3 that there's 2 million dollars remaining in the Met 4 Life account. Under these figures, approximately 3 5 and a half million dollars would remain to be paid 6 to fully pay the contract amount, agreed? 7 A. Agreed. But as I said, that I had put 8 in those change orders as required by the lender 9 every time that they incurred in the contract, yes. 10 Q. Okay. But regardless of what you've 11 put in, the only amount that would remain in the 12 Met Life account in my hypothetical would be 2 13 million dollars, so there would still be a deficit, 14 right, that Library Associates would have to fund 15 to make the final payment, agreed? 16 A. That's correct. 17 Q. Okay. My question is -- and in my 18 hypothetical it would be 3 and a half million 19 dollars? 20 A. Approximately. 21 Q. Okay. Did Library Associates have 22 those funds in its account in December of 2018? 23 A. I don't think it really matters where 24 Library Associates get those funds at, it's just 25 required by the bank to have those funds in the

Page 567

1 bank when the pay app is approved.
2 Q. Okay. My question, though, is: Did
3 the Library Associates account have that 3 and a
4 half million dollars in its account in December of
5 2018?
6 A. Again, it's Met Life's account we're
7 talking about, correct?
8 Q. Well -- the only payments -- so even if
9 you had to pay your equity, you would pay it to Met
10 Life first and then redistribute?
11 A. That's correct.
12 Q. Okay. Did Library Associates have a
13 bank account?
14 A. Library Associates has a bank account,
15 yes.
16 Q. Right. What was the balance of that
17 bank account as of December 2018?
18 A. I don't recall.
19 Q. Approximately. Give me an
20 approximation.
21 A. I don't recall.
22 Q. Was it less than a million dollars?
23 A. I don't recall.
24 Q. Was it 3 and a half million dollars?
25 A. I don't recall.

Page 568

1 Q. You have no recollection?
2 A. I don't recall.
3 Q. Do you think it was sufficient to
4 pay -- if Library Associates agreed that it was
5 going to pay the full contract amount, was there
6 sufficient funds in the Library Associates account
7 to pay the full contract amount along with what was
8 in the Met Life account?
9 A. I don't recall.
10 Q. If there weren't funds in the Library
11 Associates account, where would they have come
12 from?
13 A. Other accounts that Michael Bennett may
14 have.
15 Q. Okay. Was there liquidity --
16 sufficient liquidity to have funded 3 and a half
17 million dollars?
18 A. Yes.
19 Q. Okay. Have you ever been deposed
20 before?
21 A. Yes.
22 Q. How many times?
23 A. I believe this is my fourth time.
24 Q. What were the other matters?
25 A. The first was back in the '90s. It was

Page 569

1 a trip and fall. I represented the landlord.
2 Q. All right. What's the next one?
3 A. The next one is -- was a personal
4 injury where I was hit by a drunk driver on a
5 Saturday afternoon.
6 Q. What's the next one?
7 A. And I sustained injuries. And then the
8 third one was the litigation with the Welbro
9 contractor on the Embassy Suites in Savannah that
10 we have spoken about.
11 Q. Who was the architect on that project?
12 A. Buck Lindsay.
13 Q. Who was your attorney?
14 A. Hunter Maclean in Savannah.
15 Q. Who specifically?
16 A. Chris Phillips.
17 Q. And who represented Welbro?
18 A. They are out of Orlando. I don't
19 recall their law firm in Orlando.
20 Q. And that was filed in Georgia?
21 A. Yes.
22 Q. And was it -- so it would have been in
23 whatever -- it was in State Court?
24 A. No. We actually settled it through
25 mediation.

Page 570

1 Q. No, the case was filed -- when you were
2 deposed, the case was in State Court, not Federal
3 Court?
4 A. Correct.
5 Q. So it would have been filed in the
6 county where Savannah is?
7 A. Correct.
8 Q. Okay. Let's turn, please, to Exhibit
9 28.
10 A. 28?
11 Q. Yes, ma'am. We got about halfway
12 yesterday and then stopped, so I can ask you a
13 general question or we can go through these
14 individually. And my simple question is -- one
15 general question is: Do you have any dispute -- do
16 you know of any dispute sitting here today as to
17 whether any of the work and materials that are
18 reflected in these RCO's were, in fact, used for
19 the construction of the project?
20 A. I cannot confirm or deny. We can go
21 through each one. But where the description is
22 supplemental instruction, I'm not -- don't have
23 that supplemental instruction in front of me. When
24 it says it's a modification change, I can't
25 specifically say that that change is in the hotel.

In the Matter Of:
South Carolina v Library Associates

Kimberly Brown

April 29, 2021



934 Glenwood Ave SE
Suite 250
Atlanta, GA 30316
855.478.7376

R-9956

I N D E X		Page 192
	PAGE	
EXAMINATION:		
By Mr. Hildebrand.....	194	
By Mr. Timbes.....	238	
By Mr. Rannik.....	284	
By Mr. Freeman.....	301	
By Mr. Wheeler.....	320	
By Mr. Wright.....	325	
By Mr. McDonald.....	343	
By Mr. Terry.....	362	
By Mr. Hildebrand.....	368	
By Mr. Timbes.....	385	
Certificate of Reporter.....	389	
INDEX OF EXHIBITS		
	PAGE	
Exhibit 21 Balfour's Cross-Notice of the		
30(b)(6) Deposition of Library		
Associates.....	196	
Exhibit 22 Ms. Brown's Working Copy of		
Balfour's Cross-Notice of the		
30(b)(6) Deposition of Library		
Associates with Cover Letter.....	197	

Page 194

1 KIMBERLY BENNETT BROWN

2 being first duly sworn, testified as follows:

3 EXAMINATION

4 BY MR. HILDEBRAND:

5 Q Ms. Brown, we met before. I'm Tom

6 Hildebrand. I represent Balfour Beatty

7 Construction, LLC, in this matter.

8 The same instructions that I had given

9 you before and just some general guidelines to try

10 to make the deposition go more smoothly, if you

11 want to take a break, just let me know, and I'll be

12 glad to do that.

13 If you'd like for me to repeat my

14 questions or rephrase them, please just let me

15 know, and I'll be happy to do that.

16 Please let me finish my question before

17 you start your answer, and I'll likewise

18 reciprocate, okay.

19 A Okay.

20 Q Are you feeling well today?

21 A Feeling fine.

22 Q Are you under the influence of any

23 medications or any other substances that might

24 affect either your ability to understand my

25 questions or to respond to them?

		Page 193
	PAGE	
Exhibit 23 Quantum Coatings Cross-Notice of		
the 30(b)(6) Deposition of		
Library Associates.....	283	
Exhibit 24 Lowcountry Case & Millwork's		
Amended Cross-Notice of the		
30(b)(6) Deposition of Library		
Associates.....	287	
Exhibit 25 Change Order Log.....	292	
Exhibit 26 3/13/19 Email to Clements from		
Starcevic.....	294	
Exhibit 27 Joinder to the Joint Prosecution,		
Defense, and Tolling Agreement....	343	
Exhibit 28 Materials Provided in Support of		
Lowcountry's Cross-Notice.....	290	
- - -		

Page 195

1 A No.

2 Q You were deposed in this matter several

3 months ago. Do you recall that?

4 A I do.

5 Q Was the testimony that you gave in your

6 prior deposition truthful and accurate?

7 A Truthful and accurate at the time that I

8 gave my deposition as I can recall, yes.

9 Q Well, is there anything inaccurate,

10 sitting here today, or untruthful that you want to

11 retract from your prior deposition?

12 A I did not read my prior deposition prior

13 to this deposition, but not to my knowledge.

14 Q So to your recollection sitting here

15 today, there is nothing in your prior deposition

16 that you believe needs to be changed, correct?

17 A Not that I can recall, correct.

18 Q Is there anything in your prior

19 deposition -- you're testifying as -- I'm sorry. I

20 can't remember. What is your position with the

21 company?

22 A With Library Associates?

23 Q Okay, Library Associates.

24 A I'm an authorized agent, and I'm the

25 secretary of Library Associates Management, Inc.,

Page 196

1 LLC, which is the managing member for Library
2 Associates.

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

11 **A I don't believe so. I did not prepare**
12 **for my deposition, for my personal deposition. I**
13 **have spent time preparing for this deposition. So**
14 **maybe some items that I didn't recall at the time**
15 **of my personal deposition I may have more**
16 **information on now that I have prepared as the**
17 **30(b)(6) for Library Associates.**

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

22 **BY MR. HILDEBRAND:**

23 **Q We have premarked as Exhibit 21 Balfour's**
24 **30(b)(6) deposition notice, and that's just a clean**
25 **copy of it, and then let's mark as 22 your working**

Page 198

1 several copies that way.

2 **BY MR. HILDEBRAND:**

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

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

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

22 **Q Take your time.**

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

25 **Q And that's a full and complete response**

Page 197

1 **copy that has my cover letter on it.**
2 **(Exhibit 22, Ms. Brown's Working**
3 **Copy of Balfour's Cross-Notice of the**
4 **30(b)(6) Deposition of Library Associates**
5 **with Cover Letter, was marked for**
6 **identification.)**

7 **BY MR. HILDEBRAND:**

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

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

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

19 **A Correct.**

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

Page 199

1 **to Item Number 4, correct?**

2 **A Yes.**

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

8 **A Yes, that would be the same response.**

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

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

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

Page 200

1 Do you have -- going through those items on that

2 report, do you have testimony on behalf of Library

3 Associates as to what the length of the delays were

4 that are itemized on that exhibit?

5 A No, I do not.

6 Q And do you have any testimony that any of

7 those delays actually impacted the critical path?

8 A Because we have not received the critical

9 path analysis from Balfour Beatty to allow us to

10 review that to determine if any of those delays

11 would have impacted the critical path, I have no

12 information at this time on that.

13 Q Actually, Number 5 was delays caused by

14 any of the owner's direct contractors, agents,

15 consultants, representatives, design and

16 engineering professionals. So, again, same

17 response?

18 A Yes.

19 Q And then six actually is any delays

20 caused by Library itself. Same response?

21 A I believe six is --

22 Q I'm sorry. Subcontractor -- seven is

23 Library. So same response as to Number 7?

24 A Yes.

25 Q Number 8 is increases to the project

Page 202

1 critical path method and that they were the ones

2 who were responsible for that.

3 Q And that's in the 201?

4 A That's in the 201.

5 Q Number 17, the reasons Library has not

6 made payment on the Applications for Payment 43,

7 44, and 45, I think that was covered yesterday. Is

8 that correct?

9 A That's correct.

10 Q Is there anything else you need to tell

11 me or we need to discuss on that?

12 A No, I don't believe so.

13 Q Defective or incomplete work relating to

14 the project, is there anything that was not

15 discussed yesterday or any items that were not

16 articulated?

17 A No.

18 Q Number 22, any written notifications

19 given to Balfour identifying alleged defects or

20 deficiencies in the work, is there anything that

21 has not been previously identified?

22 A They were notices I believe from Buck

23 Lindsay. I'm not sure if we reviewed that

24 yesterday. I believe it was a notice on 12/18.

25 Q 12/18 of what?

Page 201

1 duration claimed by Library to have been caused by

2 Balfour. Same response?

3 A Yes.

4 Q Number 9, increases to the project

5 duration alleged to have been caused by Library's

6 direct contractors, agents, consultants, design and

7 engineering professionals. Same answer?

8 A Yes.

9 Q Number 10, increases to the project

10 duration alleged to have been caused by each

11 subcontractor of Balfour, including each specific

12 project schedule activity, the length of the

13 duration, and its impact on the critical path.

14 Same response?

15 A Yes.

16 Q And then Number 11, same question, any

17 increases to the project duration caused by Library

18 directly. Same response?

19 A Yes.

20 Q So jumping down to Number 13, the

21 critical path of the project schedule, same

22 response?

23 A Yes. And in addition, the responsibility

24 of Balfour as the construction manager under

25 Section 3.10.4.2 where the schedule shall be a

Page 203

1 A 12/18/18. That was a note from Buck

2 Lindsay to Dave Simonton, and it had copied myself,

3 Jim Clements, and Jen Faulkinberry where

4 Mr. Lindsay had visited the building and gave

5 notice to Mr. Simonton of Balfour Beatty of the

6 deficiencies that he had found at the time of his

7 walk-through.

8 Q The punch list deficiencies?

9 A In addition some -- the punch list

10 deficiencies and the fact that the contractor had

11 not provided a punch list at that point. It says:

12 It also has been reported in the last few days that

13 the fire marshal provided a list of 13 items that

14 had not been addressed. The owner and architect

15 have requested a copy of the list from the

16 contractor; however, it has not yet been provided.

17 Q Are there any notifications that preexist

18 that one?

19 A There was a notice that Mr. Lindsay had

20 sent prior to his visit on 12/18. It was on

21 12/11/18.

22 Q Any prior to that?

23 A There was notices from Mr. Clements to

24 Pat Dean in October 3rd, 2018. There was a letter

25 from Mr. Clements, October the 26th of 2018 to

Page 204

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

Page 206

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

Page 205

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

Page 207

1 believe we discussed this at some length at your
2 prior deposition. Library Associates was aware and
3 has been aware of the liquidated damages provision
4 in the contract since the time it was executed,
5 correct?
 6 A Correct.
 7 **Q And that was negotiated between Library**
 8 **and Balfour, correct?**
 9 A Correct.
 10 **Q And reading that term in the liquidated**
 11 **damages provision, it's clear that it is invoked or**
 12 **potentially invoked as of the time that the**
 13 **original contract date, as extended by any**
 14 **scheduling orders -- I'm sorry, by any change**
 15 **orders -- that that establishes the date of**
 16 **substantial completion under the contract, and if**
 17 **that date is extended or passed, then the**
 18 **liquidated damages provision potentially comes into**
 19 **play, correct?**
 20 A Correct.
 21 **Q So from my review of the documents, it**
 22 **looks like the -- when you look at the notice to**
 23 **proceed, that the planned schedule date of 28**
 24 **months, the substantial completion was to have been**
 25 **done by July 30, 2017, there was one official**

Page 208

1 20-day extension that was given, which would extend
 2 that date to August 19, 2017, so as of that date,
 3 you were aware that Library Associates had the
 4 right under the contract, if it wished to, to
 5 assert liquidated damages against Balfour, correct?
 6 A Correct.
 7 Q And it's your testimony that Library
 8 Associates intentionally did not assert liquidated
 9 damages against Balfour because it did not think
 10 that it was contractually required to, correct?
 11 A We weren't contractually required to
 12 notice them that we were going to assess liquidated
 13 damages.
 14 Q Right.
 15 A Yes.
 16 Q So let's look at the language of the
 17 contract in A133 2.3.1.3. In the event that the
 18 manager does not achieve substantial completion of
 19 the work within the contract time, including
 20 approved extensions -- and here's the part that I
 21 want to ask you about -- the contractor shall pay
 22 to owner as liquidated damages, and not as a
 23 penalty, the sum of \$9,500, and then it says,
 24 paren, \$9,000 per day, for each day of actual time
 25 of performance to achieve substantial completion

Page 210

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

Page 209

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

Page 211

1 architect in the final payment application for that
 2 project.
 3 Q Well, the architect discussed it with
 4 you, though, didn't they?
 5 A I don't recall specific discussions, but
 6 in general, yes.
 7 Q Right. The architect is the owner's
 8 agent in that respect to make a determination of
 9 whether they thought liquidated damages should be
 10 applied or not?
 11 A I believe the architect in the contract
 12 is the one who makes that final determination, but
 13 I'm sure there was discussions, yes.
 14 Q So the simple point is that Library
 15 Associates knew that Balfour wasn't going to
 16 voluntarily pay liquidated damages. Balfour was
 17 going to have to be -- a claim was going to have to
 18 be made against Balfour by Library where Library
 19 says, look, Balfour, we are going to assess, and we
 20 want you to pay liquidated damages, right?
 21 MR. McDONALD: Object to the form.
 22 THE WITNESS: Yes. I don't believe
 23 we're going to make a claim. The liquidated
 24 damages is not a claim, it's an assessment, and the
 25 architect is -- assessed those in the February 11th

Page 212

1 letter prior to --

2 BY MR. HILDEBRAND:

3 Q Well, is the architect the one who

4 determines whether it's a claim or not and whether

5 they should be assessed?

6 A Again, I don't believe liquidated damages

7 are a claim. I believe the architect needs to

8 review the contract and assess any damages to the

9 contractor per the terms of the contract, and I

10 believe that's what the architect did in the --

11 when he determined the date of the substantial

12 completion in his letter on February the 11th.

13 Q Did you ever discuss with the architect,

14 prior to the first written notice that we've

15 identified in February of 2019, look, architect,

16 liquidated damages have begun to accrue as of

17 August 19, 2017, and can you tell us whether you

18 think that that's a claim or not and whether we

19 need to assess those and make a claim for

20 liquidated damages? Did you have any such

21 discussions with the architect?

22 A No.

23 Q It says under 2.3.1.3 of the AIA 133 the

24 contractor shall pay to owner those liquidated

25 damages.

Page 214

1 liquidated damages for the payment of money,

2 correct?

3 A I believe this sentence and definition

4 says: A claim is a demand or assertion by one of

5 the parties seeking, as a matter of right,

6 adjustment or interpretation of contract terms.

7 The interpretation of contract terms, payment of

8 money, extension, or time or other relief with

9 respect to the terms of the contract.

10 The terms of the contract in the A133 and

11 the section that we were just referring to, I

12 believe it was the 2.3.1.3 -- and I believe

13 Mr. O'Connor testified as our expert that says

14 that, again, the 2.3.1.3 is not a claim, and so

15 that's with respect to the terms of the contract.

16 So this contract does not state that you have to

17 make a claim for liquidated damages.

18 Q Let's break this down. The AIA 133

19 liquidated damages says the contractor shall pay to

20 owner as liquidated damages, and we've agreed that

21 the owner needs to make a demand of the contractor

22 for liquidated damages. We've already talked about

23 that, correct?

24 A No. I believe it's the architect who is

25 the arbiter of the contract, and the architect

Page 213

1 Let's turn to A201, if we can, Ms. Brown.

2 A Okay.

3 Q And I'd like for you to turn to

4 Section 4.3, please. Do you see that?

5 A Yes.

6 Q And that's captioned Claims and Disputes,

7 correct?

8 A Yes.

9 Q And 4.3.1 definition, a claim is a demand

10 or assertion by one of the parties. And Library

11 Associates would be one of the parties, correct?

12 A Library Associates is a party to the

13 contract, yes.

14 Q Right. So a claim is a demand or

15 assertion by one of the parties seeking, as a

16 matter of right, adjustment, or interpretation of

17 the contract terms, payment of money.

18 So if you look at the liquidated damages

19 provision that we just talked about, it says in the

20 event that substantial completion is exceeded, the

21 contractor shall pay to the owner money, and we've

22 talked about that Library Associates knew that it

23 was going to have to make a -- whatever you want to

24 call it if you don't want to call it a claim, it's

25 going to have to make a demand to Balfour to pay

Page 215

1 assessed those damages. I don't believe that the

2 owner has to make a demand for the -- the architect

3 assessed the LDs.

4 Q You're not -- certainly, you're not

5 claiming that -- okay. So is Library Associates

6 asserting a claim against Balfour in this

7 litigation for liquidated damages?

8 MR. MCDONALD: Object to the form.

9 BY MR. HILDEBRAND:

10 Q Yes or no? Is it asserting a claim in

11 this lawsuit for liquidated damages against

12 Balfour?

13 MR. MCDONALD: Same objection.

14 THE WITNESS: It's a claim in the

15 lawsuit, but it is not a claim as -- that we had to

16 make per the terms of the contract. We're having

17 to make that claim because -- we were having to --

18 the architect assessed the liquidated damages, and

19 if there wasn't a lien that was put on this

20 project, then --

21 BY MR. HILDEBRAND:

22 Q We're not talking about the liens, we're

23 talking about this claim for liquidated damages.

24 MR. MCDONALD: She's entitled to

25 finish her answer. Please don't interrupt her.

Page 220

1 about it or what Mr. McDonald may think about it,
 2 the simple point is that he was responding to the
 3 consolidated claim from Balfour, correct?
 4 A I don't believe that that's what it says.
 5 He was just getting his information -- he was
 6 responding to the status of Applications 43, 44,
 7 and 45. He just noted at the very last sentence
 8 that he has confirmed that he had received the
 9 letter from January 25th, but I don't believe he
 10 was writing this email in response to the letter of
 11 January 25th, he was writing this email and
 12 responding regarding Payment 43, 44, and 45.
 13 Q Well, what does the architect -- do you
 14 see -- in Paragraph 3 of Exhibit 25 to your
 15 deposition, do you see, on the first page,
 16 Paragraph 3?
 17 A Yes.
 18 Q Where it says: The owner has specific
 19 claims to be asserted related to time and amount as
 20 the work completes as follows, and then Number D,
 21 liquidated damages, 530 days.
 22 The term that the architect used, as your
 23 agent, was "claims," correct?
 24 MR. MCDONALD: Object to the form.
 25 THE WITNESS: Yes, but that -- if we

Page 222

1 Q Right. And then let's turn to the
 2 definition of claims and disputes under A201 4.3.1.
 3 A claim is a demand or assertion by one of the
 4 parties seeking payment of money.
 5 In this lawsuit, Ms. Brown, are you
 6 asking Balfour to pay Library Associates money for
 7 liquidated damages?
 8 MR. MCDONALD: Object to the form.
 9 THE WITNESS: The architect has
 10 assessed the liquidated damages, again, and as I
 11 went on to say earlier, with respect to the terms
 12 of the contract.
 13 BY MR. HILDEBRAND:
 14 Q My simple question, Ms. Brown, is in this
 15 case, are you -- is Library Associates asking Judge
 16 Scarborough to award Library Associates against
 17 Balfour payment of money for liquidated damages?
 18 MR. MCDONALD: Object to the form.
 19 BY MR. HILDEBRAND:
 20 Q Are you or not?
 21 A We are asking Judge Scarborough to award
 22 us liquidated damages.
 23 Q And you want Balfour to pay liquidated
 24 damages as a result of the claim that has been made
 25 before Judge Scarborough, correct?

Page 221

1 want to get specific, that claim is a little C, and
 2 it's not a capital C, which the claim -- so I
 3 don't -- I believe that might just be a word that
 4 he used. If he was going to assert a claim under
 5 the contract, then the claim would have been
 6 capitalized.
 7 BY MR. HILDEBRAND:
 8 Q So this letter, in your view, is not
 9 asserting a claim? This letter from the -- this
 10 email communication to Balfour you're now stating
 11 was not a claim?
 12 A It's a claim, but it's not a claim as
 13 it -- as the definition in the contract with a
 14 capital C. So liquidated damages, even though he's
 15 got that under his claims that, yes, these are
 16 claims, but the liquidated damages doesn't
 17 necessarily mean that he's stating that it is a
 18 claim as defined under the contract, it is just
 19 part of the contract under 2.3.1.3.
 20 Q So you're making a claim in this
 21 litigation you talked about, correct?
 22 A Correct.
 23 Q Your architect uses the term "claim" in
 24 its letter to Balfour, correct?
 25 A He used that word, yes.

Page 223

1 MR. MCDONALD: Object to the form.
 2 THE WITNESS: We are asking Judge
 3 Scarborough to award us liquidated damages.
 4 BY MR. HILDEBRAND:
 5 Q And you want Balfour to pay them,
 6 correct?
 7 MR. MCDONALD: Object to the form.
 8 THE WITNESS: We're asking him to
 9 award us liquidated damages.
 10 BY MR. HILDEBRAND:
 11 Q Right. And you expect -- and as a result
 12 of that award, you want Balfour to pay you those
 13 liquidated damages in the form of money, correct?
 14 MR. MCDONALD: Same objection.
 15 BY MR. HILDEBRAND:
 16 Q It's a simple question.
 17 A Or a deduction from their contract on
 18 this case.
 19 Q But you expect to be -- what you want at
 20 the end of this thing is to be paid that amount.
 21 Whether it's as a deduction or an affirmative or
 22 Balfour's stroking you a check, you want to be paid
 23 for the liquidated damages, correct?
 24 A We want to be compensated for the
 25 liquidated damages.

Page 228

1 that the judge had determined was not admissible.

2 **Q I don't think that he addressed the**

3 **Paycheck Protection Program, and I think it's**

4 **relevant to your damages, so you're not going to --**

5 **you refuse to testify about that point?**

6 A Yes.

7 MR. HILDEBRAND: And are you going

8 to -- what is your instruction, Brent, as to

9 whether she -- what is your instruction to your

10 client whether she should testify and answer that

11 question or not?

12 MR. MCDONALD: I don't have any

13 instruction. She said that that's the basis of

14 financial information, and you know as well as I

15 do, I wasn't even at the hearing. So if you've got

16 to file a motion, you've got to file a motion.

17 MR. HILDEBRAND: Well, I think it's

18 your obligation to file a motion or not. If your

19 witness --

20 MR. MCDONALD: And I'm not

21 instructing her not to answer. She's saying she's

22 not going to answer it. I'm not instructing her

23 not to answer. And this is the basis of a hearing

24 that I wasn't in attendance at, it was in camera,

25 and so that's where we are.

Page 230

1 **Q I don't have it. My question, that was a**

2 **listing of all of the requested change orders from**

3 **Balfour Beatty in this case?**

4 A I don't believe I saw a listing of

5 requested change orders yesterday.

6 **Q Let me ask you this: Of the list of**

7 **requested change orders that Balfour has that were**

8 **identified in Exhibit 33, have you made a**

9 **determination of which ones of those are properly**

10 **owed and payable to Balfour?**

11 A You need to show me Exhibit Number 33.

12 **Q 38.**

13 A Or 38.

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

15 MR. HILDEBRAND: Do y'all have that

16 here, Brent?

17 MR. MCDONALD: 38?

18 MR. HILDEBRAND: I think I made a

19 copy for you. I know that I did.

20 MR. MCDONALD: You made a copy for

21 me?

22 MR. HILDEBRAND: Yeah. We got a

23 request. I retained the original. It was not made

24 an exhibit because it was so lengthy. But then

25 Kathy had contacted me and said can y'all have an

Page 229

1 BY MR. HILDEBRAND:

2 **Q How about Number 36, the amount of money**

3 **that was available for payment to Balfour in**

4 **Library's banking account or other similar account**

5 **as of the date that Library contends substantial**

6 **completion was obtained, are you going to answer**

7 **that?**

8 A Again, I believe that the judge

9 determined in that hearing that the financial

10 information was not admissible.

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

12 MR. MCDONALD: I'm sorry. What

13 number was that?

14 MR. HILDEBRAND: 43.

15 BY MR. HILDEBRAND:

16 **Q This topic relates to Balfour's RCOs that**

17 **have been identified in a volume with I think about**

18 **35 of them, and I think it was Exhibit -- seems**

19 **like it's Exhibit 33. I'm sorry. It was 38.**

20 **Introduced in your deposition was a list of a**

21 **compilation of all the requested change orders, and**

22 **there was some discussion of those yesterday. Do**

23 **you remember that?**

24 A If you have Exhibit 38 that you'd like to

25 show me.

Page 231

1 exact copy made and send it over.

2 MR. MCDONALD: Yeah. I can check

3 it.

4 MR. HILDEBRAND: We'll come back to

5 that, then.

6 MR. MCDONALD: How about when you

7 get done with whatever else you're going to ask,

8 just let me know, and we'll take a break, and I can

9 see if I can pull it.

10 MR. HILDEBRAND: We've been going

11 for about an hour. Why don't we just take five

12 now.

13 (A recess transpired.)

14 BY MR. HILDEBRAND:

15 **Q If you would turn to my exhibit and**

16 **Number 29, please, Ms. Brown. The legal, factual**

17 **and contractual basis for the reasons that Library**

18 **has not made a claim against its primary architect**

19 **in this matter, Winford Lindsay Architects, what is**

20 **Library's answer to that?**

21 A I have no knowledge on any reason that I

22 would need to make a claim against Winford Lindsay

23 at this time.

24 **Q So is it your position that Winford**

25 **Lindsay has done nothing wrong that has caused or**

Page 232

1 contributed to any of the delays or damages that
 2 have been incurred by either Library or Balfour or
 3 any of the subcontractors? Is that your position?
 4 A I don't have any knowledge from Balfour,
 5 as the construction manager, to notice that any
 6 claims would need to be made against Winford
 7 Lindsay Architects.
 8 Q Well, hadn't Balfour since -- during this
 9 entire project, didn't it write pretty strident
 10 letters that the design issues were the cause of
 11 delays?
 12 A But I still don't have any knowledge on
 13 why I would need to or be required to make a claim
 14 against Mr. Lindsay.
 15 Q Same question regarding Jim Clements.
 16 Why has no claim been made against Jim Clements and
 17 Matrix?
 18 A I have no knowledge from Balfour Beatty,
 19 the construction manager, on why I would need to
 20 make a claim or why Library Associates would need
 21 to make a claim against Jim Clements.
 22 Q How about Design Continuum, the interior
 23 designer?
 24 A Same response.
 25 Q You testified yesterday that in your

Page 234

1 project, were readily available upon request or
 2 otherwise to the owner?
 3 A Not the critical path analysis schedules
 4 that we had requested, and the schedules that were
 5 provided when given to Mr. Grady Query or even to
 6 Mr. Mark Boe, our scheduling expert, again, states
 7 that the schedules were inadequate to determine
 8 certain milestones in the job.
 9 Q This is a very straightforward and simple
 10 question, Ms. Brown. Do you dispute that the
 11 schedules that Balfour kept on this job, from the
 12 first one to the last one, were readily available
 13 to Library and its consultants or anybody else upon
 14 request or otherwise? I'm not asking for an
 15 opinion as to whether you think the schedules were
 16 adequate or were critical path, I'm just saying
 17 were the schedules available if you had wanted to
 18 look at them?
 19 A I remember requesting the schedules of
 20 the critical path and not receiving the schedules,
 21 so no, I cannot confirm that current schedules were
 22 provided to us and they were readily available to
 23 us on this job.
 24 Q So there was a reference to them
 25 yesterday by Mr. Terry in his questioning to you

Page 233

1 view, that Balfour was required to provide the
 2 current schedule with each payment application. Is
 3 that correct?
 4 A Correct.
 5 Q Were Balfour's schedules always available
 6 to the owner throughout this project?
 7 A I don't believe so. In fact, we, again,
 8 asked for critical path schedules that they were
 9 required to supply and did not get critical path
 10 schedules.
 11 Q Well, isn't that what Mr. -- when you
 12 asked Grady Query, with Palmetto Scheduling, to
 13 look at this project, what he did was looked at
 14 Balfour's schedules and then made a determination
 15 whether he felt, based on them, whether the
 16 completion date was correct or not. Isn't that
 17 what he did?
 18 A No. I believe he reviewed the schedules,
 19 and I believe that he had stated that the schedules
 20 did not make sense to him because the certain items
 21 in the schedules and the timing of certain items in
 22 the schedules did not add up to other items in the
 23 schedule or milestones in the schedule.
 24 Q Do you dispute that Balfour's schedules,
 25 as originally published and as revised during this

Page 235

1 that the schedules that had been used by Balfour
 2 were Primavera schedules. Do you remember that?
 3 A Yes.
 4 Q Has someone told you that the schedules
 5 that Balfour published did not use critical path
 6 analysis?
 7 A I believe that the information from Mark
 8 Boe stated that the schedules that he reviewed did
 9 not show correct critical path analysis on the job.
 10 The items that were put into the schedule, it's my
 11 understanding that someone is actually physically
 12 putting in the time and the elements of the
 13 schedule and the dates of the schedule, that what
 14 was entered into the schedule did not make sense.
 15 Q That's not my question. My question is
 16 very simply, and listen to it carefully, please,
 17 has someone told you that the schedules that
 18 Balfour used for the Hotel Bennett did not use
 19 critical path methodology? Has anyone told you
 20 that?
 21 A Mr. Clements I believe told -- has told
 22 me that the schedules that we received from Balfour
 23 did not show critical path.
 24 Q And Mr. Boe didn't start to work with
 25 Library until just recently, correct, within the

Page 368

1 reviewed the other items in the claim.

2 **Q Have you asked him to review the other**

3 **items in your claim?**

4 A I do not believe so.

5 **Q Has Cotton & Company asked you for more**

6 **information so that they can figure out your loss**

7 **of use damages?**

8 A Not that I can recall.

9 **Q That's all the questions I have. Thank**

10 **you.**

11 A Thank you.

12 EXAMINATION

13 BY MR. HILDEBRAND:

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

15 **again.**

16 **Have you had any communications with**

17 **anybody with the architect's office since your last**

18 **deposition?**

19 A Yes.

20 **Q With whom?**

21 A With Buck Lindsay and Jennifer

22 Faulkinberry.

23 **Q And what have you talked to them about**

24 **and why?**

25 A I believe we touched on this yesterday.

Page 370

1 regarding this case, so I don't know what their

2 situation is on this case.

3 **Q So we talked about this at some length in**

4 **your first deposition, but with regard to who**

5 **negotiated the contract, as I understand it, that**

6 **was all done by Bill Bundy for Library Associates.**

7 **Is that correct?**

8 A Yes. We hired Bill Bundy to represent us

9 in the contract negotiations with Balfour Beatty.

10 **Q Before the contract was executed, did you**

11 **have any discussions with anybody regarding the**

12 **liquidated damages provision and whether -- if the**

13 **contractor term was not reached whether Library**

14 **needed to make a claim or not against Balfour?**

15 A Repeat the question, please.

16 **Q You testified earlier that your reading**

17 **of the contract now is that when you look at the**

18 **liquidated damages provision, that there's no**

19 **requirement for Library to file a formal claim**

20 **against Balfour, there was no such requirement**

21 **while the project was ongoing, and that, therefore,**

22 **the liquidated damages are not a claim, and that,**

23 **therefore, Library did not have to comply with time**

24 **limits and other conditions precedent referenced in**

25 **the contract. Isn't that correct?**

Page 369

1 I may have had a conversation with Jennifer for a

2 couple of hours -- or excuse me, a couple of times

3 last week to confirm -- I can't remember. It's

4 been a long two days. As I sit here today, I don't

5 recall the exact conversation with Jennifer

6 Faulkinberry as I sit here right now. I'm sure I

7 discussed that yesterday morning.

8 And then with Buck Lindsay, but I don't

9 specifically remember that conversation, just -- I

10 believe I just called them up and said, hey, we've

11 got a couple of questions for Jennifer. I know

12 that her health hasn't been great lately, and if

13 she would be available.

14 **Q Do you know if Jennifer's planning to**

15 **testify live at trial one way or the other?**

16 A I do not know.

17 **Q Have you talked to her about that?**

18 A No, I have not.

19 **Q How about Buck Lindsay?**

20 A I have not talked with him about that.

21 **Q How about Woody Faust, the interior**

22 **designer?**

23 A I have talked with them. They just

24 finished up a project with us in Mount Pleasant, so

25 I've had numerous conversations with them, but not

Page 371

1 A Yes.

2 **Q My question is before the contract was**

3 **signed, did you have any discussions with anybody**

4 **about that -- or did you even look at that**

5 **provision before the contract was signed and give**

6 **it any thought as to whether a formal claim was**

7 **going to have to be filed or not?**

8 A I remember discussing the amount per day

9 of liquidated damages, but never had any discussion

10 on if a claim had to be made or if even notice had

11 to be given of a claim.

12 **Q All right. So when did you come to the**

13 **interpretation that you are now espousing that no**

14 **notice of claim was required under the contract?**

15 **When did you read the contract and say, "Oh, gosh,**

16 **I don't have to give notice"?**

17 MR. McDONALD: Object to the form.

18 THE WITNESS: I don't believe that I

19 ever thought that I would have to give notice.

20 BY MR. HILDEBRAND:

21 **Q Okay. Well, that would imply a review of**

22 **that particular provision to determine one way or**

23 **the other whether notice would have to be given or**

24 **not. Did that even -- did you even consider that**

25 **issue before the contract was signed?**

Page 372

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

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

17 A Correct.

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

25 A Yes.

Page 374

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

3 MR. MCDONALD: Object to the form.

4 THE WITNESS: Repeat the question,
 5 please.

6 BY MR. HILDEBRAND:

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

15 MR. MCDONALD: Object to the form.

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

18 BY MR. HILDEBRAND:

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

23 MR. MCDONALD: Object to the form.

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

Page 373

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

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

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

11 A And Balfour's legal counsel, yes.

12 Q Okay. And that would be John Hoyer?

13 A Yes.

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

21 MR. MCDONALD: Object to the form.

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

24 BY MR. HILDEBRAND:

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

Page 375

1 BY MR. HILDEBRAND:

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

11 MR. MCDONALD: Object to the form.

12 THE WITNESS: Yes.

13 BY MR. HILDEBRAND:

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

16 MR. MCDONALD: Object to the form.

17 THE WITNESS: None to my knowledge.

18 BY MR. HILDEBRAND:

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

25 Do you have any testimony here today that

Page 380

1 owner the duty to review those to the owner's -- to
 2 the owner's benefit and to act in the best interest
 3 of the owner as they are reviewing the amounts that
 4 the subcontractors are requesting.
 5 BY MR. HILDEBRAND:
 6 **Q When you're reviewing pay applications**
 7 **and Balfour submitted information from**
 8 **subcontractors and said, "We believe this is**
 9 **accurate, pay the pay application," are you saying**
 10 **that you didn't look beyond -- behind Balfour's**
 11 **review, and you just accepted everything that**
 12 **Balfour said?**
 13 **A The architect reviewed all of the pay**
 14 **apps, and I only pay certified pay applications**
 15 **that are certified by the architect.**
 16 **Q You reviewed the pay applications after**
 17 **the architect reviewed them, and a lot of them you**
 18 **had questions and said, "I want more information on**
 19 **this, and I want more data, and I'm not going to**
 20 **pay it until I get it," and a lot of times, the pay**
 21 **applications got further revised after your review,**
 22 **didn't they?**
 23 **A Can you give me a specific pay**
 24 **application that that happened on?**
 25 **Q No. Can you -- isn't that correct, that**

Page 382

1 contract, to bond off all subcontractor liens, as
 2 per the information that Mr. McDonald and I just
 3 went through, and Balfour refused to, per the terms
 4 of the contract, bond off those liens.
 5 BY MR. HILDEBRAND:
 6 **Q That's not my question. My question is**
 7 **if Balfour had reviewed the mechanic's liens and**
 8 **the claims of the subcontractors that were included**
 9 **in the \$22 million joint claim that was made, if it**
 10 **had reviewed those and told you -- and had told**
 11 **Library Associates that it felt that the**
 12 **subcontractors' claims of liens were valid, would**
 13 **you have paid them?**
 14 **MR. McDONALD: Object to the form.**
 15 **THE WITNESS: I pay certified pay**
 16 **requests from the architect. I do not pay liens.**
 17 **I do not pay subcontractor claims. I do not pay**
 18 **liens. I pay certified pay requests from the**
 19 **architect.**
 20 BY MR. HILDEBRAND:
 21 **Q So whether Balfour had reviewed the**
 22 **claims and liens of the subcontractors that are**
 23 **included in the joint \$22 million claim, whether it**
 24 **reviewed them and said pay these or not, you**
 25 **wouldn't have paid them, would you?**

Page 381

1 **you reviewed pay applications carefully once you**
 2 **got a copy and that based on your review, in fact,**
 3 **a lot of them were revised?**
 4 **A No, I do not believe that is the case.**
 5 **The architect is the one who reviewed the pay**
 6 **applications and all of the backup submitted by the**
 7 **subcontractors, and in some instances, those were**
 8 **500 pages worth. I would review the summary copy.**
 9 **I would ask questions, but not every pay app I**
 10 **asked questions and not every pay app I advised.**
 11 **There weren't many that I had actually asked**
 12 **questions. I accepted what the architect had**
 13 **certified.**
 14 **Q Well, let me ask you this, Ms. Brown.**
 15 **Let's cut to the heart of it. If Balfour tells you**
 16 **now that it had, in fact, reviewed the liens and**
 17 **the claims of the subcontractors and found them to**
 18 **be valid, would you pay those liens and claims?**
 19 **MR. McDONALD: Object to the form.**
 20 **THE WITNESS: No, because Balfour**
 21 **has also liened for -- they have the \$8 million**
 22 **lien, or is it the twenty -- yeah, about an**
 23 **\$8 million lien. So no, because Balfour has now**
 24 **also liened the project. But it was the**
 25 **responsibility of Balfour, per the terms of the**

Page 383

1 **A Well, again, like you said, we're talking**
 2 **about two different things. I think Balfour owes**
 3 **the -- is responsible for reviewing those claims**
 4 **and pay requests from the subcontractors to suggest**
 5 **that they're legitimate or not, but I don't pay**
 6 **liens, I don't pay claims, I pay certified pay**
 7 **requests from the architect.**
 8 **Q So you never would have paid a -- if**
 9 **you're saying you don't pay liens or claims, you**
 10 **never would have paid the subcontractors or agreed**
 11 **to their liens or claims, correct?**
 12 **A Correct. I pay certified pay requests**
 13 **from the sub -- from the -- certified pay requests**
 14 **from the architect.**
 15 **Q Okay. Thank you. All of the tabs that**
 16 **you've referenced, is that the black notebook that**
 17 **we looked at this morning that you read out of some**
 18 **of the tabs on?**
 19 **A Yes, it is.**
 20 **Q So let me get this clear. So when liens**
 21 **were filed against the project after the architect**
 22 **in the February email to Balfour saying that**
 23 **Balfour was not going to receive any further**
 24 **payments from the owner and y'all had not paid the**
 25 **pay apps -- all the pay apps to that point, is it**

DEFENDANT LIBRARY ASSOCIATES, LLC'S
TRIAL EXHIBIT #42

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

Filed copy attached.

Whats the status of November's pay application?

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



-----Original Message-----

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

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

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

-----Original Message-----

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

Kim

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

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

Jim Clements
 Matrix Program Management, LLC
 C. 704.905.1165
 jclements@matrixse.com
https://urldefense.proofpoint.com/v2/url?u=http-3A__www.matrixse.com&d=DwlGaQ&c=eapt7ST1afUS6LykE1MB9btkdYISLNUVF7M5AC_OmtM&r=JLQdYEaoUG2oNvVrtQ23J3X2DvQdT3eNVRcgSOoXI5U&m=z3HKQbleQTaA-ry0cexk4lw7IBmqZR4cy7lrwwOLTKk&s=EZV3dOfd15-GhWCCqle1fWIIY_g6ch0dxyloaL2KPf4&e=

Sent from my iPhone. Please excuse any typos.



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NOTE: This page MUST remain
with the original document

**Filed By:**

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

RECORDED

Date: January 11, 2019

Time: 12:54:23 PM

Book

Page

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0771

966

Bond/Rel

Michael Miller, Register
Charleston County, SC

MAKER:

LIBRARY ASSOCS AL

of Sats:

of Pages: 7

of References:

Note:

RECIPIENT:

GUY M BEATY INC

Recording Fee \$ 10.00

Extra Reference Cost \$ -

Extra Pages \$ 2.00

Postage \$ 1.00

Chattel \$ -

TOTAL \$ 13.00

Original Book:

0758

Original Page:

160

DRAWER

Drawer 4

CLERK

SLW



0771

Book



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Page



01/11/2019

Recorded Date



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12:54:23

Recorded Time



STATE OF SOUTH CAROLINA	)	IN THE CHARLESTON COUNTY REGISTER
	)	OF DEEDS OFFICE
COUNTY OF CHARLESTON	)	
	)	
GUY M. BEATTY, INC.,	)	
	)	SURETY BOND FOR RELEASE OF
Petitioner,	)	MECHANIC'S LIEN
	)	
vs.	)	Mechanic's Lien Filed on November 5, 2018
	)	and recorded at
LIBRARY ASSOCIATES, LLC; BALOUR	)	Book 0758, Page 160
BEATTY CONSTRUCTION, LLC;	)	
BERNHARD MCC, LLC,	)	Bond No. 106943603
	)	
Respondents,	)	

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

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

{01301154.}

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

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

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

-signature and notary blocks on next page-

Signature Page
Guy M. Beaty, Inc. Mechanic's Lien

Balfour Beatty Construction, LLC

PRINCIPAL

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

[Signature]
Witness #1
[Signature]
Witness #2

STATE OF North Carolina)
COUNTY OF Mecklenburg)

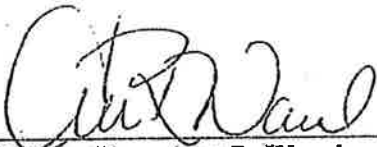
PERSONALLY APPEARED BEFORE ME the undersigned witness and made oath that (s)he saw the within-named Balfour Beatty Construction, LLC by Pat Dean sign, seal, and as his/her act and deed, deliver the within Surety Bond for Release of Mechanic's Lien and that (s)he with the other witness subscribed above,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

Sworn to before me on this 8th
day of Jan, 2019
[Signature] (notary)
My Commission Expires: 9/5/2020

[Signature]
(Witness #1)

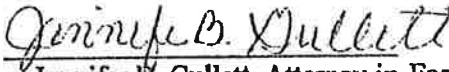


Travelers Casualty and Surety Company of America


Witness #1 Amy R. Waugh

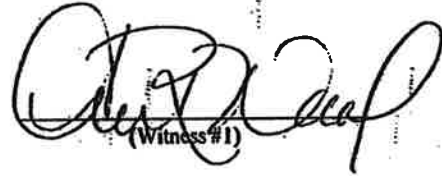
Witness #2 Noah Pierce

SURETY

By: 
Title: Jennifer B. Gullett, Attorney-in-Fact
Address: One Tower Square
Hartford, CT 06183

STATE OF NORTH CAROLINA)
COUNTY OF MECKLENBURG)

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


(Witness #1)

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


(notary)
My Commission Expires: 4/9/2020



{01301154.}

Exhibit A
Description of Property

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

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

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

TRAVELERS

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

POWER OF ATTORNEY

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

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



State of Connecticut

City of Hartford ss.

By: Robert L. Raney
Robert L. Raney, Senior Vice President

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

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

My Commission expires the 30th day of June, 2021



Marie C. Tetreault
Marie C. Tetreault, Notary Public

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

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

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

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

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

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

Dated this 10th day of January, 2019



Kevin E. Hughes
Kevin E. Hughes, Assistant Secretary

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

R-9977

DEFENDANT LIBRARY ASSOCIATES, LLC'S
TRIAL EXHIBIT #43

Gmail

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



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

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

Nick,

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

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

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

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

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

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

We also consider current open punch list items, including but not limited to the exterior façade of the building, as cause to recommend against

R-9979

further reduction of the contractor's retention until WLA can verify all punch work has been satisfactorily completed.

Jennifer

Jennifer G. Faulkinberry

Winford Lindsay Architect

344 West Pike Street direct 770.407.5786

Lawrenceville, GA 30046 fax 770.407.5817

jfaulkinberry@lpballanta.com cell 770.241.2473

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