THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2024-000788

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 THE RECORD ON APPEAL – VOLUME 1 OF 22

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"Supp. R." refers to this Supplement to the Record on Appeal, submitted electronically pursuant to the Court's June 23, 2026 Order granting Respondent leave to file an electronic supplemental record. The Supplement contains materials from the proceedings below designated by Respondent that do not appear in the printed Amended Record on Appeal, together with the complete versions of voluminous exhibits whose first pages appear in the printed Record (cross-referenced under "Printed R-"). Library Associates, LLC's Filing of March 13, 2024 Hearing Exhibits appears in full in the printed Record at R-8793 to R-9825 and is not duplicated here.

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[1] The original Trial Order, with the Court's citations as written, appears in the printed Amended Record on Appeal at R-79 to R-125. The Trial Order contains citations to matter, which the Trial Court relied upon in making its determinations. The version at Supp. R. C-1 (Volume 1) is a supplemental convenience copy that updates those citations by setting out, at the foot of each page, the pages of the Amended Record (R-) and this Supplemental Record (Supp. R.) to which they correspond, so that the Court is not burdened with searching the Record for the matter the Trial Court cited. The text of the Order itself is unaltered.

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TRIAL ORDER, FILED OCTOBER 6, 2023

CONVENIENCE COPY WITH UPDATED RECORD REFERENCES

The original Trial Order appears in the printed Amended Record on Appeal at R-79 to R-125. The copy that follows is provided for the Court's convenience. Respondent has added, at the foot of each page, references which correspond to where the matter relied upon by the Master on that page of the Order appears in the Amended Record on Appeal (cited as "R-") and in this Supplement (cited as "Supp. R."), so that the Court is not burdened with searching for the underlying matter. The references are drawn from Exhibit B to Respondent's Motion to Amend Designation of Matter to be Included in the Record on Appeal, filed June 4, 2026, conformed to the pagination of the Amended Record and this Supplement. A header on each page identifies the copy as a convenience copy. The Court's citations to the underlying materials appear in the Order as written; the added references conform those citations to the pagination of the Amended Record and this Supplement. The text of the Order itself is unaltered.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2019-CP-10-01108
Balfour Beatty Construction, LLC Plaintiff, v. Library Associates, LLC; and Metropolitan Life Insurance Company, a New York Corporation. Defendants.	)	**ORDER**
Library Associates, LLC, Third-Party Plaintiff, v. Lithko Contracting, LLC, Watson Electrical Construction, Co., LLC, Old North State Masonry, LLC, Third-Party Defendants.	)	

This matter was tried before this Court on non-consecutive days beginning on September 13, 2021 and concluding on December 3, 2021[1] and filed by Plaintiff Balfour Beatty Construction, LLC (hereinafter "Contractor") against Library Associates, LLC (hereinafter "Owner"). Owner answered, counterclaimed, and filed a third-party complaint against various subcontractors and material suppliers. Numerous additional actions were filed by subcontractors and material

[1] The Court's Order was delayed in obtaining the completed transcript. The Court wishes to acknowledge the parties and counsel's patience in awaiting the transcript – which the Court finds to be well-prepared.

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suppliers to Contractor that were consolidated with the above captioned case. Most of those subcontractors and material suppliers are no longer parties hereto.[2]

Contractor pursued the following causes of action (1) foreclosure of a mechanic's lien against Owner's Property; (2) breach of contract against Owner; (3) quantum meruit/quasi contract; (4) attorneys' fees pursuant to S.C. Code Section 27-1-15; (5) abandonment, waiver, and/or estoppel; (6) cardinal change; (7) indemnity; (8) breach of implied warranty of plans and specifications; (9) first to breach; and (10) breach of contract accompanied by a fraudulent act.

Owner pursued the following causes of action against Contractor (1) breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) indemnification; (4) declaratory relief; (5) unfair trade practices; and (6) civil conspiracy.

Owner additionally pursued causes of action against Third Party Defendants Lithko Contracting, LLC ("Subcontractor Lithko"), Old North State Masonry, LLC ("Subcontractor ONSM") and Watson Electrical Construction, LLC ("Subcontractor Watson") for (1) declaratory relief and (2) civil conspiracy.

Prior to the scheduled presentation of their cases in chief, Subcontractors Lithko, ONSM, and Watson dismissed their claims against Owner. Subcontractors Lithko and ONSM dismissed their respective mechanic's liens. As such, Owner is hereby deemed the prevailing party and is entitled to attorneys' fees and costs, pursuant to S.C. Code Ann. Section 29-5-10, et seq, as to those parties.

Based upon all the evidence and weighing the credibility of the witnesses, this Court makes the following findings of fact and conclusions of law.

[2] Some of these subcontractors have summary judgment orders in their favor that are subject to pending Rule 59(e), SCRCP motions filed by Contractor. This Order does not address those claims and rulings on those pending motions will be made by separate order. Each of those Subcontractors have dismissed any and all claims against Owner.

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I. The Contract

This case arises out of the construction of a luxury hotel in downtown Charleston, South Carolina known as the Hotel Bennett ("Project"). The contract for the construction of the Project is what is known in the industry as a "Cost Plus with a Guaranteed Max" contract. It is on a form originally created by the American Institute of Architects "AIA". Plaintiff's Ex. 56. The underlying forms in this matter consist of AIA-A133 ("Agreement"), Exhibit A to the Agreement, and the General Conditions known as AIA-A201. Id. In addition to the Agreement and the General Conditions, the Contract Documents include "Drawings, Specifications, Addenda issued prior to the execution of the contract, other documents listed in the Agreement and Modifications issued after the execution of the Agreement. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive, or (4) a written order for a minor change in the work issued by the Architect." See Section 1.1.1 of the AIA-A201. These will sometimes be collectively referred to as the "Contract Documents."

At its essence, this contract provides that Contractor is entitled to be paid for eligible costs ("Costs of the Work") incurred for the work on the project plus a fee subject to a maximum amount ("GMP"). Section 2.2.1 of the AIA-A133. To be clear, the maximum amount is just that—it is not a minimum amount. Unlike a lump sum contract, Contractor is entitled only to the lesser of the "Cost of the Work" plus a fee or the "GMP". Section A.1.1 of Exhibit A to AIA-A133; Section 2.2.1 of the AIA-A133; Article 6 of the AIA-A133.

Owner, along with Owner's Representative Jim Clements, issued a request for proposal ("RFP") for this Project to interested bidders. Defendant's Ex. 103; Transcript, pp. 3142-3148. Contractor responded to the RFP. Defendant's Ex. 39. On September 22, 2014, Owner and Contractor entered into the Agreement-AIA-A133. Plaintiff's Ex. 56. Though the parties utilized

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3142-3148 = R-1315-1321; BBC Ex. 56 (AIA-A133) = R-2545; Lib. Ex. 39 = R-7077; Lib. Ex. 103 = R-7523

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the AIA form, significant changes were made to the contract terms through extensive negotiations. Deposition Testimony of Mike Baumbach.

The AIA-A133 Agreement was broken down into two phases. The first phase was preconstruction phase to develop the GMP. Section 2.1 and 2.2 of AIA-A133; Transcript pp. 3154-3155. Contractor was paid a separate fee for the preconstruction phase. Article 4 of AIA-A133. The preconstruction portion stated that Contractor "shall, through preconstruction, review the constructability of the Architect's plans and specifications and shall notify the Owner and Architect in writing of any discovered defects, deficiencies, or recommended changes." Section 2.1.8.1 of the AIA-A133. Contractor, in fact, approached Owner and requested an additional $36,000.00 in preconstruction costs to further develop and evaluate the design development documents. Transcript, pp. 3166-3170. The Owner paid Contractor the additional preconstruction costs for "higher cost security." Id. Contractor and the Architect "worked in conjunction with each other" during the preconstruction period. Id.

The second phase of the AIA-133 Agreement was the construction phase. Section 2.3 of the AIA-A133. This phase began once the Contractor submitted the GMP and the Owner agreed to proceed. Section 2.2.1 of the AIA-A133. The GMP and the project schedule or duration are both created by Contractor. Transcript, pp. 3171-3173. Just prior to the submission of the GMP, Contractor informed Owner that it needed to add an additional $870,000.00 for general conditions to the GMP. Transcript, pp. 3175-3179. The Owner agreed to the additional sums. Id. In March of 2015, Exhibit A to the AIA-A133 was executed which included a GMP of $59,344,747.00 and a project duration of 28 months from the Notice to Proceed. Plaintiff's Ex. 56. Owner did not have any involvement in the creation of the schedule for the Project. Transcript, p. 3194. The Contractor was "solely responsible" for the schedule. Section 3.10.4.7 of the AIA-A201.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3154-3155 = R-1322-1323; Tr. 3166-3170 = R-1324-1328; Tr. 3171-3173 = R-1329-1331; Tr. 3175-3179 = R-1332-1336; Tr. 3194 = R-1337; BBC Ex. 56 (AIA-A133) = R-2545

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The Notice to Proceed was issued on March 19, 2015. Defendant's Ex. 2.

II. The Role of This Court

The Contract Documents expressly acknowledge that claims and disputes will arise during the construction of the Project. Section 4.3 of the AIA-A201. "A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract." Section 4.3.1 of the AIA-A201. "The term 'Claim' also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." Id. "Claims must be initiated by written notice." Id. "The responsibility to substantiate Claims shall rest with the party making the Claim." Id.

There are two contractual time limitations on Claims. Claims must be initiated within thirty (30) days, except for claims involving a claimed delay, and a request for extension of time which must be initiated within twenty (20) days. Sections 4.3.2 and 8.3.4 of the AIA-A201.

An initial decision by the Architect on all timely Claims, arising prior to the date Final Payment is due, is a condition precedent to either party instituting litigation. Section 4.4.1 of the AIA-A201. After an initial decision by the Architect, this Court then has jurisdiction to review that decision. Section 9.2 of the AIA-A133.

III. Failure of Condition Precedent

Section 4.4 of the AIA-A201 deals with resolution of claims and disputes between Contractor and Owner. Plaintiff Ex. 56. Section 4.4.1 states in pertinent part as follows:

"Decision of the Architect. Claims, including those alleging an error or omission by the Architect[3] but excluding those arising under sections 10.3 through 10.5[4], shall be referred

[3] As more fully explained herein, the only architect to testify at the trial of this matter, James McAuliffe, was called by Contractor over the objection of Owner; however, Mr. McAuliffe testified that he was not, and could not, testify that the Architect for this project committed an error or omission. Transcript pp. 852-853.

[4] These sections relate to hazardous materials. No claims have been made related to hazardous materials in this action.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 852-853 = Supp. R. 495-496; BBC Ex. 56 (AIA-A133) = R-2545; Lib. Ex. 2 = Supp. R. 2537

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initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the claim has been referred to the Architect with no decision having been rendered by the Architect."

On January 25, 2019, Contractor submitted a letter to Jim Clements that was identified as Contractor's "Consolidated Claim (Preliminary)." Plaintiff Exhibit 252. This will be referred to herein as the "four-page letter." The Architect was copied on the letter. Id. The four page letter contained no supporting documentation. Id. The letter stated, in part, that it was "based on a preliminary accounting of costs that have been incurred through the noted dates; however, because work on the Project continues a final accounting of costs presentable to the Owner cannot be done. Once the work by Balfour Beatty and its subcontractors is completed a full accounting of those additional costs will be provided by supplement or amendment." Id. There are no specific claims identified within the four page letter. Id. It does not refer to any specific requests for change order or unpaid certified pay applications. Id. The four page letter does, however, contain an "aggregate" amount of $22,452,282.51 for the claim.

Also on January 25, 2019, Contractor filed a mechanic's lien on Owner's property in the amount of $8,409,658.54. Defendant's Ex. 44. Contractor filed the mechanic's lien on the same day that it represented "work on the Project continues…". Plaintiff Ex. 252. Moreover, Mr. David Simonton testified on behalf of the Contractor that the last day of work on the project was April 26, 2019. Transcript, p. 1802.

To perfect and enforce a lien, one must timely complete the following three steps found in sections 29–5–90 and 29–5–120 of the South Carolina Code: (1) serve and file a notice or certificate of the lien, (2) commence a lawsuit to enforce the lien, and (3) file a lis pendens. *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC,* 409 S.C. 331, 762 S.E.2d 561, 566-67 (2014). **"The trigger for determining when all three of these events must be performed**

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 1802 = Supp. R. 1019; Lib. Ex. 44 = R-7199; BBC Ex. 252 = Supp. R. 2521

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is the date when the supplier ceases furnishing labor or materials." Id. (emphasis supplied). "Section 29–5–90 requires that, **within ninety days after he ceases to furnish labor or materials** for a building or structure, the party asserting a lien must serve upon the owner (or person in possession of the property) and file with the register of deeds or clerk of court a notice or a certificate that includes a statement of the amount due him, together with a description of the property intended to be covered by the lien, the name of the owner of the property, if known, and other required information." (emphasis supplied).

I find that Contractor failed to perfect its Mechanic's Lien pursuant to S.C. Code Ann. Section 29-5-90.

Section 4.4.2 of the AIA-A201 states in pertinent part as follows:

"The Architect will review Claims and within ten days of receipt of the claim take one or more of the following actions: (1) request additional supporting data from the claimant…"

Plaintiff Ex. 56.

Section 4.4.4 of the AIA-A201 states in pertinent part as follows:

"If the Architect requests a party to…furnish additional supporting data, such party shall respond within ten days after the receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or additional supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or in part."

Pursuant to Sections 4.4.1, 4.4.2, and 4.4.4, the Architect responded on February 4, 2019 and requested "additional supporting data." Plaintiff Ex. 253. Specifically, the Architect stated:

"We have thoroughly analyzed the content of the letter. In the absence of any detail supporting the claim, we can draw no conclusion as to the legitimacy of the claim, except to say it appears to be grossly overstated. The owner disputes the claim. We have a duty to render an initial decision on this disputed claim within 10 days of receipt. To exercise that duty, we request additional supporting data on the claim. Please provide complete and verifiable detail substantiating each and every element of the claim. We must have specificity concerning the detail of impact on contract time and amount that might be your basis of any component of the claim. You have a

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duty to reply to this response to you [sic] claim within 10 days, however, given the serious nature and complexity of the claim, in this case only, we extend the deadline to 30 days."

Plaintiff Exhibit 253.

Contractor commenced this litigation on March 5, 2019,

(1) prior to the passage of 30 days from the Architect's February 4, 2019 letter;

(2) prior to the submission of the requested "additional supporting data";

(3) prior to any initial decision rendered by the Architect on the January 25, 2019 claim;

(4) prior to the submission of a "final claim" or "final accounting" by Contractor as identified in the January 25, 2019 letter;

(5) prior to the submission by Contractor of a final payment request or the documentation required pursuant to Section 7.2.1 of the AIA133[5];

(6) prior to the submission by BBC of a final accounting pursuant to Section 7.2.2 of the AIA133[6];

(7) while Contractor was still working on the Project;

(8) AFTER cutting off Owner's access to the project documents on the EGNYTE website (Transcript, pp. 2204-2207; Plaintiff's Ex. 258) and

(9) while there were no certified pay requests that required payment by the Owner (Transcript p. 2241; Transcript, p. 4316).

On March 6, 2019, subsequent to commencing the present litigation, Contractor submitted four volumes of additional documents "in response to the [Architect's] letter dated February 4, 2019." Defendant Ex. 11, 12, 13, and 14.

[5] Hadley testified a request for Final payment pursuant to Section 7.2.1 of the AIA133 has never been submitted. Transcript p. 3907.
[6] Hadley testified a request for Final accounting pursuant to Section 7.2.2 of the AIA133 has never been submitted. Transcript p. 3908.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 2204-2207 = R-1009-1012; Tr. 2241 = Supp. R. 1207; Tr. 3907-3908 = R-1393-1394; Tr. 4316 = R-1476; BBC Ex. 258 = R-4389; Lib. Exs. 11-14 = R-4966, 5770, 6309, 6849; BBC Ex. 253 = Supp. R. 2526

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On April 26, 2019, Contractor wrote to the Architect and stated that: (1) requesting further information is not a rejection of the claim; (2) Contractor considers the Architect to have rejected its claim on April 24, 2019 (which was 50 days after it commenced litigation); and (3) that it demanded mediation pursuant to Section 15.2.6.1 of the AIA-A201. Plaintiff Ex. 264.

"If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises." *McGill v. Moore*, 672 S.E.2d 571, 381 S.C. 179 (2009) see also *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App.1994) (recognizing that a condition precedent is a fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises).

I find that Contractor failed to comply with the condition precedent of obtaining an initial decision from the Architect prior to commencing the present litigation. I find nothing to indicate that the condition precedent was excused by Owner. I further find, as will be discussed in more detail herein, that the "final claim" that was ultimately presented before this Court was submitted only in Contractor's reply case without any testimony from a witness authenticating, explaining, or swearing to the "final claim." Since the "final claim" was not created until sometime after November 4, 2021, the Architect did not and could not render an initial decision on the "final claim." Transcript pp. 4402-4410; Plaintiff's Exhibit 352. Furthermore, since the Contractor has never submitted a request for final payment, no final payment would be due and an initial ruling would still be required under the Contract Documents. Section 4.4.1 of the AIA-A201.

Though the failure of the condition precedent is fatal to the Contractor's claim, the Court will continue to make findings of fact and conclusions of law as additional and alternative support for the rulings contained herein.

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IV. Hadley Audit

At the trial, Owner offered the testimony of Ms. Sandra "Sam" Hadley as an expert in "accounting and auditing, construction accounting and auditing, and damage compilation in construction projects." Transcript pp. 3901-3902. Hadley was qualified as an expert in those fields without objection. Id. Hadley was employed by Cotton and Company and CPMI—construction accounting firms that are hired to "evaluate costs incurred on a project to ensure they complied with contract terms" on both private and public construction projects. Transcript p. 3888. Hadley is a certified public accountant, a certified government financial manager, certified fraud examiner, and certified in financial forensics. Transcript pp. 3890-3893; Defendant's Ex. 150.

I find Hadley was qualified, prepared, reliable, present at virtually the entire trial, and credible for every aspect of the testimony she provided. Additionally, I find Hadley performed the only audit or accounting that was done on this Project. Contractor did not provide a final accounting or an audit for the Project—notwithstanding the mandatory, fundamental, and unambiguous requirements the Contract Documents required it to do. Plaintiff Ex. 56.

Section 6.11.1 of the AIA133 states as follows:

"The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda, and other data relating to this Contract. The Construction Manager shall preserve these records for a period of four (4) years after final payment, or for such longer period as may be required by law."

Moreover, Section 7.1.11 of the AIA133 states as follows:

"The Owner has the right, at its sole discretion, to perform periodic examinations, audits, and verifications of the Construction Manager's cost accounting records and other Project documentation. The Contractor shall make all its records available to the Owner upon reasonable

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advance notice and shall provide the Owner with copies of specific records from time to time upon reasonable request."

See also Sections 7.2.2 and 7.2.3 of the AIA-A133.

Pursuant to the foregoing sections of Contract Documents, on April 22, 2019, Hadley wrote to Contractor requesting specific documentation required to perform an audit of the project costs or "cost of the work" as that term is defined at Article 6 of the AIA-A133. Transcript pp. 3923-3925. On April 30, 2019, Contractor responded that it was refusing to produce any documentation, data, or response to support the contractually required audit. Defendant's Ex. 50; Transcript p. 3926; Transcript p. 2274.

As a direct and proximate result of Contractor's refusal to produce documents, data or accountings, Hadley was forced to rely on anecdotal information available to Owner. Transcript pp. 3926-3927. At the time of Contractor's refusal to produce documents, Contractor had also shut down Owner's access to the Egnyte document repository for the Project. Transcript, pp. 2204-2207; Plaintiff's Ex. 258. Contractor's witness Alec Dooley testified that the Egnyte site was a shared folder service that contained "everything". Transcript, p. 392. Based solely upon that anecdotal information, Hadley concluded, as of June 11, 2019, that there was approximately $7,700,000.00 of duplicative and potentially excessive mechanic's lien amounts. Transcript pp. 3926-3927. At this time, Contractor and its subcontractors had filed mechanic's liens in the total amount of $26,341,655.00. Transcript pp. 3927-3928.

As of September 17, 2019, Hadley was able to conclude that approximately $13,800,000.00 of the mechanic's lien amounts were duplicative and potentially excessive. Transcript pp. 3929-3930. All the while, Contractor continued to refuse to comply with the contractually required audit procedures. Id.

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On October 2, 2019, the Court[7] issued an order directing Contractor and certain subcontractors to produce specific documents related to the lien amounts. Transcript p. 3930. As a result of the October 2, 2019 Order, Hadley received responses from Contractor and subcontractors. Id. On November 27, 2019, Hadley was able to identify $17,400,000.00 in duplicative, potentially excessive, and uncorrelated mechanic's lien amounts. Transcript, p. 3931. Meanwhile, Contractor continued to refuse to comply with the audit provisions mandated by the Contract Documents. Id.

On March 17, 2020, upon motion of Owner, this Court entered an Order directing Contractor to comply with the audit provisions of the Contract Documents. March 17, 2020, Order Granting Owner's Motion for Affirmative Injunction; Transcript p. 3931.

On June 17, 2020, again upon motion of Owner, this Court issued an Order to Enforce which, for the second time, directed Contractor to comply with the audit provisions of the Contract Documents. June 17, 2020, Order to Enforce; Transcript, p. 3931. The Order to Enforce expressly found that the audit was a matter of "contract" and not "discovery" in litigation. Id.

During the month of July 2020, Hadley attempted to conduct the audit as required by the Contract Documents and twice ordered by this Court. Transcript pp. 3932-3939.

On August 3, 2020, Hadley again notified the Court and Contractor that Contractor was not allowing Hadley to perform the audit. Transcript, pp. 3939-3940. As of November 16, 2020, Hadley was unable to finish the audit work. Transcript, p. 3941. As of December 16, 2020, twenty (20) months after attempting to audit the records of Contractor, the only claim amount Hadley had from Contractor was the January 25, 2019, four-page claim letter in the amount of $22,452,287.00. Transcript, p. 3945.

[7] The Honorable Bentley Price issued this ruling prior to this action being referred to this Court.

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On September 10, 2021, over two and a half years after the January 25, 2019 four page claim letter in the amount of $22,452,287.00 and three days prior to the trial, Contractor submitted a new claim[8] in the amount of $11,872,194.00. Transcript, pp. 3945-3946. Two days later, on Sunday, September 12, 2021 (the day before the trial began) Contractor submitted yet another new claim in the amount of $13,064,917.00 Transcript, pp. 3946-3947.

As of the first week of trial, Hadley testified that Owner still did not have sufficient information from the Contractor for the Contractor's claim. Transcript, pp. 3947-3948. On September 20, 2021, Contractor submitted another new claim in the amount of $13,569,659.00. Id.

The next day, on September 21, 2021, Contractor submitted its fourth (4th) claim in eleven (11) days in the amount of $13,896,742.00. Transcript, p. 3948. This was the last "claim" that was provided to Hadley for audit and testimony[9]. Id. The September 21, 2021, claim was NOT the final claim submitted by Contractor, however. The final claim submitted by Contractor was on November 29, 2021 in Contractor's case in reply. No witness was offered to testify about, authenticate, explain, or swear to the final claim documents. Transcript pp. 4402-4411. The November 29, 2021 final claim was in the amount of $13,631,888.60. Plaintiff's Ex. 352.

Section 7.2.1 of the AIA133 states as follows:

"Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Construction Manager when

.1 the Construction Manager has fully performed the Contract except for the Construction Manager's responsibility to correct Work as provided in Section 12.2.2 of AIA Document A201-2007, and to satisfy other requirements, if any, which extend beyond final payment;

.2 the Construction Manager has submitted a final accounting for the Cost of the Work and a final Application for Payment; and

[8] Due and owing to the fact that the Contractor failed to provide a final accounting and failed to provide supporting documentation for the January 25, 2019 "claim" and the September 10, 2021 "claim" (as well as the four [4] subsequent "claims"), this Court does not draw a distinction between a "new claim" and a "new claim amount."
[9] Ms. Hadley testified on November 2-3, 2021 in the trial of this matter.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3945-3948 = Supp. R. 2074-2077; Tr. 4402-4411 = Supp. R. 2310-2319; BBC Ex. 352 = Supp. R. 2535

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.3 all close-out documents as required by the Contract Documents, including but not limited to, as-built drawings in paper and electronic format, instructions to the Owner's representatives on all building systems, and completion of all punch list items outstanding: and

.4 a final Certificate for Payment has been issued by the Architect.

The Owner's final payment to the Construction Manager shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:
The Construction Manager's final accounting is a complete and full accounting of costs incurred by the Construction Manager in performance of the Work, organized according to the Construction Manager's schedule of values and cost codes and correlated to the costs to be reimbursed under Article 6 of this Agreement."

I find that Contractor NEVER submitted a final payment request or the documentation required pursuant to Section 7.2.1 of the AIA133, prior to the commencement of the trial. Transcript p. 3907.

Moreover, Section 7.2.2 of the AIA133 states as follows:

"The Owner's auditors will review and report in writing on the Construction Manager's final accounting within 60 days after delivery or the final accounting to the Architect by the Construction Manager. The Construction Manager's final accounting is a complete and full accounting of costs incurred by the Construction Manager in performance of the Work, organized according to the Construction Manager's schedule of values and cost codes and correlated to the costs to be reimbursed under Article 6 of this Agreement Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the AIA Document A20l-2007. The time periods stated in this Section supersede those stated in Section 9.4.1 of the AIA Document A201-2007. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting."

I find that Contractor NEVER submitted a final accounting or the documentation required pursuant to Section 7.2.2 of the AIA133. Transcript p. 3908.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3907-3908 = R-1393-1394

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This Court has been perplexed as to why the Contractor refused and failed to perform the accounting or provide the documentation for the audit. Transcript p. 4008.[10] Owner has incurred $530,000.00 in costs from Cotton and Company to perform an audit of a contractually required final accounting that the Contractor failed to do. Transcript, pp. 3954-3955. In fact, during the trial, Hadley sat in the rear of the courtroom and continued to try and audit the Project and the numerous iterations of the new claims submitted by Contractor during trial. Transcript, pp. 3955-3957; Transcript pp. 4149-4150.

After two and a half years of attempting to audit the Contractor's records, Hadley, who this Court found both impressive and credible, concluded and testified to a reasonable degree of accounting and auditing certainty as follows:

(1) There were two guaranteed maximum price ("GMP") portions of this contract. Transcript, pp. 3910-3911. A GMP contract is a cost reimbursable contract that allows a contractor to get reimbursed for eligible costs of the work subject to the GMP. Id. The first GMP in this contract relates to the general conditions for Contractor. Transcript, p. 3911. The second GMP in this contract relates to the primary portion of the work which is the bulk of the costs paid to the subs. Id.
(2) The final reconciliation of the eligible costs of the work and the GMP for the general conditions is $3,319,212.00. Transcript, pp. 4109-4110.
(3) The final reconciliation of the eligible costs of the work and the GMP for the primary portion is $55,544,734.00. Transcript, pp. 4107-4108.
(4) Contractor was also due $66,779.00 for preconstruction services. Transcript, pp. 4110-4111.
(5) Contractor was entitled to a fee of 2.5 percent of the GMP. Transcript, pp. 4110-4111. The Contractor's fee would be in the amount of $1,483,090.00. Id.
(6) The total of the final reconciliations of the eligible costs of the work and the GMP for the general conditions and the primary portion of the contract as well as the preconstruction and construction fees is $60,413,815.00. Transcript, pp. 4110-4111.
(7) The Contractor has been paid $59,994,390.00 to date. Transcript, p. 4111.

[10] One of this Court's concerns stated during the trial was that Contractor's actions during the construction indicated to this Court that they had either not read the Contract or chose to follow their usual procedures rather than follow the express terms of the written Contract.

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(8) Therefore, prior to the award of any set off amounts for liquidated or other damages, there remains a "delta" or maximum balance potentially owed to the Contractor of $419,425.00. Transcript, p. 4111; Transcript, pp. 4120-4121.

I find Hadley's conclusions to be credible, reasonable and consistent with the terms of the Contract Documents. I further find that, due and owing to the Contractor's failure to perform a final accounting for the Project and its repeated obfuscation of the auditing process, Hadley's conclusions are adopted as this Court's findings by the greater weight of the evidence.

V. Contractor's Requests for Change Order

At the outset, to the extent the costs contained in these requests for change orders ("RCO") are properly "costs of the work" as defined by the Contract Documents, Ms. Hadley has already included the costs of the RCO in her audit conclusions which have been adopted by this Court. Notwithstanding the foregoing, the Court herein considers the terms of the RCOs as additional support for its ruling or, as alternative findings of amounts due, in the event that a subsequent review of this Court's findings is required.

Article 7 of the AIA-A201 provides that the Contract Sum and Contract Time can only be adjusted by Change Order, Construction Change Directive or minor changes by Architect.

Contractor submitted two exhibits related to requests for change orders ("RCO") on the Project-Plaintiff's Ex. 329 and Plaintiff's Exhibit 12. Plaintiff's Ex. 329 is an excel spreadsheet that contains no supporting documentation or data. It simply contains an "RCO" column in the amount of $2,306,397. Plaintiff's Ex. 12 is a notebook containing numerous RCOs with some supporting documentation and data. However, the amounts for RCOs in Plaintiff's Ex. 12 and Plaintiff's Ex. 329 do not correlate to one another. Transcript pp. 3598-3600. Since Plaintiff's Ex. 329 contains no supporting documentation, the Court considers Plaintiff's Ex. 12 and the RCO's contained therein.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3598-3600 = Supp. R. 1859-1861; Tr. 4110-4111 = R-1424-1425; Tr. 4120-4121 = R-1427-1428; BBC Ex. 12 = R-1542; BBC Ex. 329 = Supp. R. 2533

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RCO 27: This RCO is dated on January 13, 2016 in the amount of $124,089.00. It purports to relate to the "1000 Year Storm Delay & Recovery Cost". It is unexecuted. The RCO has no supporting documentation or subcontractor invoices. Owner, however, produced the actual executed change order 27 dated January 26, 2016 in the amount of $0.00 for the same "1000 year Storm Delay." Defendant's Ex. 144. Moreover, the $115,969.21 contained in the unexecuted RCO 27 was actually already paid by the Owner. Transcript, pp. 3602-3607.

Ruling: Contactor is not entitled to resubmit an RCO that predates an executed change order for the same work. Section 7.2.1 of the AIA-A201. Moreover, Contractor is not entitled to be paid twice. RCO 27 is denied. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 75: This RCO is undated in the amount of $5,989.93. It contains no supporting documentation or subcontractor invoices. It is unexecuted. Transcript, p. 3607.

Ruling: Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. Since this RCO is undated, Contractor cannot meet its burden to show that it complied with the contractual time limitations. Contractor also failed to show that the Architect gave an initial ruling on RCO 75 as required. Section 4.4.1 of the AIA-A201. Additionally, Contractor must provide sufficient information to support the RCO. Section 7.1.2 of the AIA-A201; Section 7.2.2 of the AIA-A201. RCO 75 is denied.

RCO 88R1: This RCO is dated March 7, 2019—two days after this action was filed by Contractor—in the amount of $56,414.30. It is unexecuted. It does contain supporting documentation from Subcontractor Lithko. However, the supporting documentation is dated from 2015-2016—in excess of three (3) years prior to the date of RCO 88R1. Moreover, RCO 88R1 does not include any back charges to Subcontractor Lithko as recognized by Contractor. Transcript, pp. 3608-3622; Defendant's Exhibit 28. Finally, Subcontractor Lithko withdrew its claims at the trial of this action.

Ruling: The RCO postdates the filing of this action by the Contractor. It necessarily follows that the Architect could not and did not give an initial ruling on RCO 88R1 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. Based upon the supporting documentation, this claim is in excess of three (3) years old. RCO 88R1 is also not proper due and owing to the internal change order (Defendant's Ex. 28) where the back charges that were for the Owner's benefit were "internally" deleted by Contractor and Subcontractor Lithko. Section 6.7.3 of the AIA-A133. The deleted back charges exceed the amount of RCO 88R1. Finally, Lithko no longer has a claim, and, therefore, the amounts claimed in RCO 88R1 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. RCO 88R1 is denied.

RCOs 103R1 and 118: These RCOs are dated December 16, 2017 and June 6, 2017. They are in the amounts of $290,257.91 and $21,036.56, respectively. They are unexecuted. They both relate to invoices from Subcontractor BMCC. Subcontractor BMCC dismissed its claim in this action, and was actually paid directly by Owner. Transcript, pp. 3622-3630.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3602-3607 = Supp. R. 1863-1868; Tr. 3608-3630 = Supp. R. 1869-1891; Lib. Ex. 28 = R-6915; Lib. Ex. 144 = Supp. R. 10497

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Ruling: Subcontractor BMCC dismissed its claim after being paid directly by the Owner; therefore, the amounts claimed in RCOs 103R1 and 188 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCOs 103R1 and 118 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and these RCOs would be granted.

RCO 122R1: This RCO is dated November 27, 2017. It states it is for a "structural delay claim." The RCO is in the amount of $1,012,042.00. It is unexecuted. The breakout of the RCO has Contractor "General Conditions" in the amount of $321,255.00. There is no supporting documentation for this General Conditions amount. It contains $119,277.00 for "hoisting, staging and logistics." The remainder of the RCO is for Subcontractors Watson Electrical, PASCO, BMCC, and Lithko. All of these subs have dismissed their claims. Watson Electrical was granted Summary Judgment against Contractor; however, Watson Electrical's attorney swore under oath that the amounts awarded for Summary Judgement did not involve the Owner. See September 9, 2021 Affidavit of Don Terry, Esq.; see also September 13, 2021 Order (citing to Section 10.D. of Watson's Subcontract); see Defendant ONSM Ex. 2 (containing Section 10.D. and only providing for attorneys' fees on "claims not involving the Owner"). With regard to PASCO, Contractor's Subcontractor Status Report shows that PASCO is owed nothing on this Project and, in fact, owes Contractor $107,261.19 for back charges. Defendant's Ex. 63; Transcript, pp. 3633-3635. With regard to BMCC, Owner has paid that subcontractor directly. Transcript, pp. 3635-3636. Finally, Lithko's back up documentation for their portion of RCO122R1 is inadequate and predates a lien waiver it executed for September 30, 2016 saying there were no claims outstanding as of that date and all were waived. Defendant's Ex. 69; Transcript pp. 3638-3648.

Ruling: Subcontractors Watson Electrical, Lithko, PASCO, and BMCC dismissed their claims; therefore, the amounts claimed in RCO 122R1 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Additionally, Contractor must provide sufficient information to support the RCO. Section 7.1.2 of the AIA-A201; Section 7.2.2 of the AIA-A201. There is no back up documentation for the "General Conditions" or "hoisting, staging and logistics." Finally, the extended "General Conditions" could only be recoverable if it was shown that the requested changes "directly impact the critical path." Section 5.3.1 of the AIA-A133. Contractor did not provide any testimony related to RCO 122R1's impact on the critical path. There are no actual dates even listed on the RCO. Contractor failed to even attempt to enter into evidence any project schedules for that rough time period in 2016. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid in the amount of $487,321.00 and this RCO would be granted.

RCO 159: This RCO is August 21, 2017. It is in the amount of $242,633.32. It is unexecuted. It states it is for FFE changes. The Subcontractor involved is Westley Contracting; however, Westley Contracting has never made a claim. Indeed, Plaintiff's Ex. 329 does not show any RCO money going to Westley. Transcript, p. 3652. Moreover, of the nineteen (19) entries on the cover letter, the work for sixteen (16) of them was never done. Transcript, p. 3652. None of the attachments purportedly backing up RCO 159 are attached to the copy in Plaintiff's Ex. 12. Transcript, pp. 3653-3655.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3633-3635 = Supp. R. 1894-1896; Tr. 3635-3636 = Supp. R. 1896-1897; Tr. 3638-3648 = Supp. R. 1899-1909; Tr. 3652-3655 = Supp. R. 1913-1916; BBC Ex. 12 = R-1542; Lib. Ex. 63 = Supp. R. 3634; Lib. Ex. 69 = Supp. R. 3716; BBC Ex. 329 = Supp. R. 2533

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Ruling: Subcontractor Westley Contracting never made a claim; therefore, the amounts claimed in RCO 159 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Moreover, it is undisputed that the vast majority of the claims work was never done. Additionally, Contractor must provide sufficient information to support the RCO. Section 7.1.2 of the AIA-A201; Section 7.2.2 of the AIA-A201. It failed to even attempt to include the attachments outlined in the cover letter. Contractor also failed to show that the Architect gave an initial ruling on RCO 159 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and RCO would be granted.

RCO 161: This RCO is dated August 26, 2017. It is unexecuted. It is in the amount of $17,376.00. The subcontractors involved are Subcontractor BMCC and Subcontractor Precision Walls. Both subcontractors have dismissed their claims after being paid directly by the Owner. Transcript, pp. 3655-3656. The supporting documentation dates from 11 months to 20 months prior to the date of the RCO.

Ruling: Subcontractors Precision Walls and BMCC dismissed their claims; therefore, the amounts claimed in RCO 161 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Moreover, Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This claim is untimely. Contractor also failed to show that the Architect gave an initial ruling on RCO 161 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 178: This RCO is dated October 10, 2017 in the amount of $2,142.00. It is unexecuted. The subcontractor involved is Subcontractor Westley Contracting; however, Westley Contracting has never made a claim. Indeed, Plaintiff's Ex. 329 does not show any RCO money going to Westley Contracting. Transcript, p. 3658.

Ruling: Subcontractor Westley Contracting never made a claim; therefore, the amounts claimed in RCO 178 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 178 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 184: This RCO is dated November 9, 2017 in the amount of $57,467.82. It is unexecuted. It states that it is for Hurricane Irma Prep and Recovery. The subcontractor's involved are Subcontractor Premier Exteriors and Subcontractor First Choice Glass. Both of those subcontractors have dismissed their claims. BBC claims direct expenses and an increase in the contract sum in the amount of $15,515.00. However, even if this were a delay under the Contract Documents, it would be a Class 2 delay for weather and no increase in the contract price is recoverable when a delay is a Class 2 delay. See Sections 8.3.2 and 8.3.3 of the AIA-A201.

Ruling: Subcontractors Premier Exteriors and First Choice Glass have dismissed their claims; therefore, the amounts claimed in RCO 184 could never be "costs of the work" as defined by the

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Contract Documents. Section 6.3 of the AIA-A133. Moreover, a Class 2 delay can never result in an increase in contract price. See Sections 8.3.2 and 8.3.3 of the AIA-A201. Contractor also failed to show that the Architect gave an initial ruling on RCO 184 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to one (1) day extension and for Contractor's cost of work.

RCO 212R1: This RCO is dated October 19, 2018 in the amount of $21,253.00. It is executed by the Owner. The subcontractor involved is Subcontractor Robert Thomas. The Owner paid Subcontractor Robert Thomas directly, and Subcontractor Robert Thomas dismissed its claim. Transcript, pp. 3660-3664.

Ruling: Because the Owner paid Subcontractor Robert Thomas directly, in RCO 212R1 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. RCO 212R1 is denied.

RCO 215: This RCO is dated August 14, 2018 in the amount of $14,937.63. It is unexecuted. It states that it is for "Lutron Lighting Control Revision." The subcontractor involved is Subcontractor Watson Electrical. Plaintiff's Ex. 329 does not show any RCO money going to Watson Electrical. Transcript, p. 3664. Further, Subcontractor Watson Electrical has dismissed its claims in this action. Watson Electrical was granted Summary Judgment against Contractor; however, Watson Electrical's attorney swore under oath that the amounts awarded for Summary Judgement did not involve the Owner. See September 9, 2021 Affidavit of Don Terry, Esq.; see also September 13, 2021 Order (citing to Section 10.D. of Watson's Subcontract); see Defendant ONSM Ex. 2 (containing Section 10.D. and only providing for attorneys' fees on "claims not involving the Owner"). Finally, the supporting documentation is dated thirteen (13) months before the RCO.

Ruling: Subcontractor Watson Electrical has dismissed their claims; therefore, the amounts claimed in RCO 215 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This claim is untimely. Contractor also failed to show that the Architect gave an initial ruling on RCO 215 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid for cost of work and this RCO would be granted.

RCO 221: RCO 221 is dated February 6, 2018 in the amount of $846.12 for window tinting. The subcontractor involved is Subcontractor Koch/Strongtower. They are no longer pursuing claims against the Owner. Subcontractor Koch/Strongtower was granted summary judgment for claims against Contractor not involving the Owner. See Koch/Strongtower December 1, 2021 Memorandum (adopting Low Country Case & Millwork's explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner").

Ruling: Subcontractor Koch/Strongtower has dismissed their claims; therefore, the amounts claimed in RCO 221 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 221 as required. Section 4.4.1 of the AIA-A201. RCO 221 is denied.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3660-3664 = Supp. R. 1921-1925; BBC Ex. 329 = Supp. R. 2533

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RCO 223: This RCO is undated and unsigned by the Contractor in the amount of 3,304.78. It is unexecuted. It contains no supporting documentation.

Ruling: Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. Since this RCO is undated, Contractor cannot meet its burden to show that it complied with the contractual time limitations. Contractor also failed to show that the Architect gave an initial ruling on RCO 223 as required. Section 4.4.1 of the AIA-A201. Additionally, Contractor must provide sufficient information to support the RCO. Section 7.1.2 of the AIA-A201; Section 7.2.2 of the AIA-A201. RCO 223 is denied.

RCO 227: This RCO is dated April 19, 2018 in the amount of $9,169.01. It states it is for "warehousing and handling-mirrors for a period beginning on May 22, 2017. The Contract Documents say that installation of the Owner provided mirrors is included in the original contract sum. Plaintiff Ex. 56; Transcript, pp. 3668-3669.

Ruling: Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Further, the Contractor failed to meet its burden that this was a change. Plaintiff Ex. 56; Transcript, pp. 3668-3669. Contractor also failed to show that the Architect gave an initial ruling on RCO 223 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid for cost of work and this RCO would be granted.

RCO 246: This RCO is dated September 4, 2018 in the amount of $31,157.12. It is unexecuted. It states it is for "elevator cab finishes." The subcontractors involved are Subcontractor Low Country Case & Millwork and Subcontractor Watson Electrical. They are no longer pursuing claims against the Owner. Subcontractor Low Country was granted summary judgment for claims against Contractor not involving the Owner. See October 19, 2021 Memorandum of Low Country Case & Millwork with explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner"). Subcontractor Watson Electrical has dismissed its claims in this action. Watson Electrical was granted Summary Judgment against Contractor; however, Watson Electrical's attorney swore under oath that the amounts awarded for Summary Judgement did not involve the Owner. See September 9, 2021 Affidavit of Don Terry, Esq.; see also September 13, 2021 Order (citing to Section 10.D. of Watson's Subcontract); see Defendant ONSM Ex. 2 (containing Section 10.D. and only providing for attorneys' fees on "claims not involving the Owner"). The change was also necessitated due and owing to an error in the shop drawings that was the responsibility of the Contractor. Transcript, pp. 3670-3671.

Ruling: Subcontractors Low Country and Watson have dismissed their claims; therefore, the amounts claimed in RCO 246 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 246 as required. Section 4.4.1 of the AIA-A201. Further, the Contractor failed to meet its burden that this was a change. Contractor also failed to show that the Architect gave an initial ruling on RCO 223 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid for cost of work and this RCO would be granted.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3668-3669 = Supp. R. 1929-1930; Tr. 3670-3671 = Supp. R. 1931-1932; BBC Ex. 56 (AIA-A133) = R-2545

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RCO 249: This RCO is dated August 10, 2018 in the amount of $5,129.09. It is unexecuted. The subcontractor for this RCO is Subcontractor Premier Exteriors. They have dismissed their claims in this action.

Ruling: Subcontractor Premier Exteriors has dismissed their claims; therefore, the amounts claimed in RCO 249 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 249 as required. Section 4.4.1 of the AIA-A201. RCO 249 is denied.

RCO 250: This RCO is dated August 13, 2018 in the amount of $1,462.80. It is unexecuted. The subcontractor involved in this RCO is Subcontractor First Choice Glass. They have dismissed their claims in this action. The supporting documentation is from 2016. Transcript, pp. 3672-3673.

Ruling: Subcontractor First Choice Glass has dismissed their claims; therefore, the amounts claimed in RCO 250 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 250 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. RCO 250 is denied.

RCO 251: This RCO is dated August 31, 2018 in the amount of $22,305.58. It is unsigned by Contractor. It is unexecuted. It states it is for "Dining Room Millwork Change." The subcontractor involved is Subcontractor Low Country Case & Millwork. They are no longer pursuing claims against the Owner. Subcontractor Low Country was granted summary judgment for claims against Contractor not involving the Owner. See October 19, 2021 Memorandum of Low Country Case & Millwork with explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner").

Ruling: Subcontractor Low Country has dismissed their claims; therefore, the amounts claimed in RCO 251 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 251 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 253: This RCO is dated August 14, 2018 in the amount of $10,055.16. It is unexecuted. It states it is for "Add Crown at Dome Rotundas." The subcontractor involved is Subcontractor Low Country Case & Millwork. They are no longer pursuing claims against the Owner. Subcontractor Low Country was granted summary judgment for claims against Contractor not involving the Owner. See October 19, 2021 Memorandum of Low Country Case & Millwork with explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner").

Ruling: Subcontractor Low Country has dismissed their claims; therefore, the amounts claimed in RCO 253 could never be "costs of the work" as defined by the Contract Documents. Section 6.3

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of the AIA-A133. Further, Contractor failed to meet its burden of proof that this was a change. Transcript, pp. 3674-3675. RCO 253 is denied.

RCO 254: This RCO in the amount of $41,082.30 was withdrawn at trial by Contractor. Transcript, pp. 1224-1225.

Ruling: RCO 254 is WITHDRAWN.

RCO 255: This RCO is dated August 31, 2018 in the amount of $11,789.32. It is unexecuted. It states it is for "Add Trim to Conceal Pocket Door Header" The subcontractor involved is Subcontractor Low Country Case & Millwork. They are no longer pursuing claims against the Owner. Subcontractor Low Country was granted summary judgment for claims against Contractor not involving the Owner. See October 19, 2021 Memorandum of Low Country Case & Millwork with explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner"). The supporting documentation for the RCO is nine (9) months prior. Moreover, the reason given for the change was to conceal faulty work. Transcript, p. 3677.

Ruling: Subcontractor Low Country has dismissed their claims; therefore, the amounts claimed in RCO 255 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 255 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof that this was a change. RCO 255 is denied.

RCO 258: This RCO is dated March 28, 2019—three weeks after this action was filed by Contractor—in the amount of $65,782.09. It is unexecuted. It states it is for additional mock-up revisions. Each of the subcontractors involved in the RCO have either made no claims or have dismissed their claims. Moreover, the back-up documentation 2017 and 2018. Finally, the Owner actually performed the demolition of the mock-up with its own contractor. Transcript, p. 3680.

Ruling: The RCO postdates the filing of this action by the Contractor. It necessarily follows that the Architect could not and did not give an initial ruling on RCO 258 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. Based upon the supporting documentation, this claim is untimely. Further, because the subcontractors have dismissed their claims, the amounts claimed in RCO 258 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor failed to meet its burden that it even performed the work. Contractor also failed to show that the Architect gave an initial ruling on RCO 258 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 259: This RCO is dated August 30, 2018 in the amount of $33,398.68. It is unexecuted. It states it is for "Hudson Street Storm Repair." The Subcontractor involved is Gulf Stream. They have dismissed their claims.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 1224-1225 = Supp. R. 497-498; Tr. 3674-3675 = Supp. R. 1935-1936; Tr. 3677 = Supp. R. 1938; Tr. 3680 = Supp. R. 1941

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Ruling: Because Gulf Stream have dismissed their claims, the amounts claimed in RCO 259 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 259 as required. Section 4.4.1 of the AIA-A201. RCO 259 is denied.

RCO 260: This RCO is dated March 1, 2019 in the amount of $5,586.12. It is unsigned by the Contractor. It is unexecuted. The subcontractor involved is Subcontractor Quantum. They have dismissed their claims. The supporting documentation is from November 27, 2018.

Ruling: Because Quantum has dismissed their claims, the amounts claimed in RCO 260 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 260 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. Based upon the supporting documentation, this claim is untimely. RCO 260 is denied.

RCO 261: This RCO in the amount of $71,723.42 was withdrawn by Contractor at the trial of this matter. Transcript, pp. 1230-1231.

Ruling: RCO 261 is WITHDRAWN.

RCO 262: This RCO is dated August 31, 2018 in the amount of $15,635.00. It states it is for "TV wall revisions." It is unexecuted. The subcontractors involved are Subcontractor Precision Walls and Subcontractor Watson Electrical. Each has dismissed their claims in this action. The supporting documentation is dated August 2017 and January 2018.

Ruling: Subcontractors Precision Walls and Watson Electrical have dismissed their claims; therefore, the amounts claimed in RCO 262 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 262 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid for GMP and cost of work and this RCO would be granted.

RCO 264: This RCO is dated September 4, 2018 in the amount of $14,390.21. It is unsigned by the Contractor. It is unexecuted. It states it is for "sprinkler heads in TV walls." The subcontractor involved is Subcontractor PASCO. They were responsible for the selection of the sprinkler head locations. Transcript, pp. 3693-3694. Subcontractor PASCO has dismissed its claims in this action. The supporting documentation is from January 8, 2018. Contractor's Subcontractor Status Report shows that PASCO is owed nothing on this Project and, in fact, owes Contractor $107,261.19 for back charges. Defendant's Ex. 63; Transcript, pp. 3633-3635.

Ruling: Subcontractor PASCO dismissed their claims; therefore, the amounts claimed in RCO 264 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-

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A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 264 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Contractor failed to meet its burden that the Owner is responsible for this work. RCO 264 is denied.

RCO 266: This RCO is dated September 7, 2018 in the amount of $2,203.74. It is unexecuted. It states that it is for "additional framing and sheetrock requests." The subcontractor involved in Subcontractor Precision Walls. They have dismissed their claims in this action. The supporting documentation is dated April 2017.

Ruling: Subcontractor Precision Walls has dismissed their claims; therefore, the amounts claimed in RCO 266 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 266 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. RCO 266 is denied.

RCO 267: This RCO is dated September 7, 2018 in the amount of $7,922.44. It is not signed by the Contractor. It is not executed. It states it is for "Rooftop Bar Millwork." The subcontractor involved is Subcontractor Low Country Case & Millwork. The supporting documentation is from June 14, 2017.

Ruling: Subcontractor Low Country has dismissed their claims; therefore, the amounts claimed in RCO 267 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 267 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. RCO 267 is denied.

RCO 268: This RCO is dated September 24, 2018 in the amount of $51,979.21. It is unexecuted. It states it is for "allowance reconciliation." The subcontractors involved in this RCO are Subcontractors Low Country, SEAS, and First Choice Glass. They have all dismissed their claims in this action. Transcript, pp. 3701-3702. The supporting documentation is from July of 2018.

Ruling: Subcontractors Low Country, SEAS, and First Choice Glass have dismissed their claims; therefore, the amounts claimed in RCO 268 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 268 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 270: This RCO is dated March 12, 2019—a week after this action was filed by Contractor—in the amount of $49,885.72. It is unexecuted. It states it is for "framing and drywall change

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3701-3702 = Supp. R. 1959-1960

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orders." The subcontractor involved is Subcontractor Precision Walls. They have dismissed their claims. Moreover, the supporting documentation is from 2017 and 2018.

Ruling: Subcontractor Precision Walls has dismissed their claims; therefore, the amounts claimed in RCO 270 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 270 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 271: This RCO is dated March 12, 2019—a week after this action was filed by Contractor—in the amount of $41,394.11. It is unexecuted. It states it is for "painting change orders." The subcontractor involved is Subcontractor Quantum. They have dismissed their claims. Moreover, the supporting documentation is from 2018. Finally, the supporting documentation references back charges to other subcontractors and defective work of other subcontractors. Transcript, pp. 3705-3710.

Ruling: Subcontractor Quantum has dismissed their claims; therefore, the amounts claimed in RCO 271 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 271 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof to show that the work in RCO 271 was the responsibility of the Owner. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 272: This RCO is dated March 7, 2019—two days after this action was filed—in the amount of $19,286.37. It is unexecuted. It states that it is for "ornamental metal change orders". The subcontractor involved is Subcontractor Tate Ornamental. They have never made a claim. The supporting documentation is from 2017- 2018.

Ruling: Subcontractor Tate Ornamental has never made a claim for these costs; therefore, the amounts claimed in RCO 272 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 272 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 273: This RCO is undated, unsigned and is addressed to and from the same person at Contractor. It is in the amount of $111,644.29. The subcontractor involved is Subcontractor David Allen. They have dismissed their claims in this action. It contains insufficient supporting documentation to understand when the alleged costs were incurred or how they may have been a or who is responsible for the change.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3705-3710 = Supp. R. 1963-1968

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Ruling: Contractor failed to meet its burden in all regards on RCO 273, including all notice provisions in the Contract Documents. Subcontractor David Allen has dismissed their claims; therefore, the amounts claimed in RCO 273 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 273 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof to show that the work in RCO 273 was the responsibility of the Owner. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 274: This RCO is undated, unsigned and is addressed to and from the same person at Contractor. It is in the amount of $30,537.68. The subcontractor involved is Subcontractor Quantum. They have dismissed their claims in this action. The supporting documentation is from 2018.

Ruling: Contractor failed to meet its burden in all regards on RCO 274, including all notice provisions in the Contract Documents. Subcontractor Quantum has dismissed their claims; therefore, the amounts claimed in RCO 274 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 274 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof to show that the work in RCO 274 was the responsibility of the Owner. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 275: This RCO is dated April 12, 2019—five weeks after this lawsuit was filed. It is in the amount of $67,384.91. It is not signed by the Contractor. It is unexecuted. The subcontractors involved are Subcontractors David Allen, Quantum, Precision Walls, BMCC, and Low Country. All have dismissed their claims. The supporting documentation for the RCO is from late 2017 to early 2018. Finally, the supporting documentation reveals that the costs claimed in RCO 275 is related to defective work. Transcript, pp. 3714-3724.

Ruling: Subcontractors David Allen, Quantum, Precision Walls, BMCC, and Low Country have dismissed their claims; therefore, the amounts claimed in RCO 275 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 275 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof to show that the work in RCO 275 was the responsibility of the Owner. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 276: This RCO is dated March 13, 2019—eight (8) days after this lawsuit was filed by Contractor. It is in the amount of $78,632.10. It is unexecuted. The subcontractor involved is

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Subcontractor Low Country Case & Millwork. They have dismissed their claims against the Owner. Subcontractor Low Country was granted summary judgment for claims against Contractor not involving the Owner. See October 19, 2021 Memorandum of Low Country Case & Millwork with explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner"). The supporting documentation is from 2017-2018. Finally, RCO 276 contains amounts previously paid by the Owner and amounts contained in other RCOs. Transcript, pp. 3724-3731.

Ruling: Subcontractor Low Country dismissed their claims; therefore, the amounts claimed in RCO 276 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 276 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Contractor failed to meet its burden of proof to show that the work in RCO 276 was the responsibility of the Owner. Contractor has already been paid for costs it claims in the RCO. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 277: This RCO is dated March 13, 2019—eight (8) days after this lawsuit was filed by Contractor. It is in the amount of $138,304.56. It is unexecuted. The subcontractor involved is Subcontractor Miscellaneous Steel Industries. They have never made a claim for any of these amounts. The supporting documentation is dated 2015-2017.

Ruling: Subcontractor Miscellaneous Steel Industries has never made a claim for these costs; therefore, the amounts claimed in RCO 277 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 277 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 278: This RCO is dated March 29, 2019—three (3) weeks after this lawsuit was filed by Contractor. It is in the amount of $8,511.80. It is unexecuted. The subcontractor involved is Subcontractor Koch/Strongtower. They are no longer pursuing claims against the Owner. Subcontractor Koch/Strongtower was granted summary judgment for claims against Contractor not involving the Owner. See Koch/Strongtower December 1, 2021 Memorandum (adopting Low Country Case & Millwork's explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner"). The supporting documentation is from June 25, 2018.

Ruling: Subcontractor Koch/Strongtower has dismissed their claims; therefore, the amounts claimed in RCO 278 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 278 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the

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AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 279: This RCO is undated and unsigned by the Contractor. It is unexecuted. It is in the amount of $228,811.20. In the cover letter there is a chart with 43 line entries. Attached to the cover letter are tabs A through X. Transcript, p. 3735-3736. All of the subcontractors identified on Tabs A through X have dismissed their claims. This RCO was never submitted to the Owner. Transcript, p. 3738.

Ruling: Contractor failed to meet its burden in all regards on RCO 279, including all notice provisions in the Contract Documents. All subcontractors involved dismissed their claims; therefore, the amounts claimed in RCO 279 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 279 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof to show that the work in RCO 279 was the responsibility of the Owner. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

For all the reasons stated herein, I find that Contractor is NOT contractually entitled to recover for any of the RCOs contained in Plaintiff's Ex. 12. I further find that the Contractor submitted forty-one (41) requests for change orders, totaling in excess of $2.3 million,[11] for which it had no entitlement due to its failure to follow the Contract terms. This is particularly true given:

(1) Contractor refused to perform a final accounting. Transcript p. 3908;

(2) Contractor refused to comply with the contractually required audit for the entirety of this action. Defendant's Ex. 50; Transcript p. 3926; Transcript p. 2274;

(3) Contractor purposefully shut down Owner's access to the Egnyte site. Transcript, pp. 2204-2207; Plaintiff's Ex. 258;

(4) Contractor came into this Court and sought to recover amounts it had previously been paid by Owner, but it had not in turn paid to subcontractors as it certified that it had paid and as was required by law to do so. See Testimony of Kim Brown and Sam Hadley;

(5) Every single subcontractor that filed a mechanic's lien dismissed it and withdrew their claims prior to or during the trial of this action; and

(6) Balfour failed to put up a single subcontractor witness to explain the forty-one (41) RCOs, notwithstanding the fact that the subcontractors that either never made a claim or dismissed their claims made up in excess of 90% of the RCO amounts.

[11] As stated above the amounts for RCOs contained in Plaintiff's Ex. 12 and Plaintiff's Ex. 329 do not match. Therefore, the Court does not have an exact number.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 2204-2207 = R-1009-1012; Tr. 2274 = R-1016; Tr. 3735-3736 = Supp. R. 1993-1994; Tr. 3738 = Supp. R. 1996; Tr. 3907-3908 = R-1393-1394; Tr. 3924-3927 = R-1403-1406; BBC Ex. 12 = R-1542; BBC Ex. 258 = R-4389; Lib. Ex. 50 = R-7212; BBC Ex. 329 = Supp. R. 2533

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Contractor's Critical Path Schedule

The Contract Documents expressly require what is known as a "Critical Path Method" or "CPM" schedule. Section 3.10.4.2 of the AIA-A201. The Contractor is "solely responsible" for the schedule. Section 3.10.4.7 of the AIA-A201. Contractor must show that any changes "directly impact the critical path." Section 5.3.1 of the AIA-A133. On this Project, Contractor employed Joe Lauricella, an in-house scheduling manager to create and manage the CPM schedule. Transcript, pp. 384-385. This Court notes that Mr. Lauricella was not presented as a witness by Contractor at trial and was informed he was no longer employed by the Plaintiff.

Contractor was required to submit an initial schedule that, if followed, would allow Contractor to complete the work by the substantial completion date of July 2017. Section 3.10.4.1 of the AIA-A201; Transcript pp. 4248-4249. This initial schedule was required to be submitted to the Architect and Owner within fourteen (14) days of the Notice to Proceed. Section 3.10.4.1 of the AIA-A201. This initial CPM schedule is referred to as the "as-planned schedule." Transcript, p. 4250. In Contractor's "as-planned schedule," there was a four (4) month bust because it failed to include the removal of the tower crane required to set the ninth-floor pool in place. Transcript pp. 4250-4251; Transcript pp. 2671-2674. This bust in the as-planned schedule by Contractor impacted all portions of the Contractor's updated schedules that were required by Section 3.10.4.5 of the AIA-A201; Transcript, pp. 2673-2674. In fact, it took Contractor nineteen (19) months—over two-thirds of the as-planned project duration of twenty-eight (28) months—before they inserted it into the logic of an updated schedule. Id.[12] This practice of changes in the logic of the CPM schedules, removal of restraints and the reduction and increases in durations by the

[12] The Court further finds this project delay accounted for the Contractor's decision to recall David Simonton from retirement in December 2017 to try and put the Project back on track to completion by taking over as its Project Manager.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 384-386 = Supp. R. 434, R-672-673; Tr. 2666-2705 = R-1109-1148; Tr. 2669-2674 = R-1112-1117; Tr. 2674-2675 = R-1117-1118; Tr. 4248-4251 = R-1450-1453

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Contractor - without notice to the Owner - was systemic on this Project and will be discussed more specifically below.

In the absence of Lauricella, Contractor offered the testimony of Mark Doran—a scheduling expert. Doran testified that the Project was originally scheduled to be completed by July 30, 2017. Transcript, p. 724. He testified that the Project was not complete until December 28, 2021—a difference of 516 days. Id. He concluded that, of the five hundred and sixteen (516) days of delay to the Project, Owner was responsible for four hundred and ninety-four (494) days, neither party was responsible for twenty-one (21) days, and Contractor was responsible for a single (1) day of delay. Transcript, pp. 808-814.

Owner offered the testimony of Mark Boe, who was qualified as an expert in the field of scheduling, delay claims, and construction claims. Transcript, pp. 2607-2609. Boe gave several opinions.

1. He concluded that the "four notebooks" submitted on March 6, 2019 were essentially useless. Transcript, pp. 2615-2662; Plaintiff's Ex. 261.
2. Boe concluded that Doran used the wrong CPM methodology. Transcript, p. 2665. The methodology utilized by Doran to essentially conclude that the Contractor was not responsible for any delay on this Project failed to meet industry standards for CPM scheduling as recognized in learned treatises. Transcript, pp. 2667-2705; Defendant's Exs. 89-90.
3. Boe concluded that Doran made a significant error even when employing a rejected methodology as Doran ignored the Contractor's own critical path as identified by the Contractor's own employees and schedulers contemporaneously with the work itself. Transcript, pp. 2666-2669. Doran was forced to ignore or reject the Contractor's actual schedules in order to reach his conclusion. Id.
4. Boe concluded that, like Contractor's as-planned schedule, Doran failed to consider the removal of the tower crane in his conclusions of the critical path and delay analysis. Transcript, pp. 2669-2674. This was a significant error because Doran had the tower crane on his critical path. Id.
5. Boe concluded that even with Doran's improper methodology he failed to identify any cause and effect for any of his delay claim. Transcript, pp. 2674-2675.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 724 = R-724; Tr. 808-814 = R-808-814; Tr. 2607-2609 = R-1053-1055; Tr. 2615-2662 = R-1060-1107; Tr. 2665 = R-1108; Tr. 2666-2705 = R-1109-1148; Tr. 2669-2674 = R-1112-1117; Tr. 2674-2675 = R-1117-1118; Tr. 2675-2676 = R-1118-1119; Tr. 2716-2768 = R-1151, Supp. R. 1472-1513, R-1152-1154, Supp. R. 1514-1520; BBC Ex. 261 = R-4391

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6. And finally, Boe concluded that Doran ignored significant delays and manpower problems caused by the Contractor's subcontractors. Transcript, pp. 2675-2676; 2716-2768; Defendant's Ex. 91; Transcript, pp. 2794-2871.

Owner also offered the testimony of Grady Query, III, who was also qualified as an expert in scheduling, delay claims, and construction claims. Transcript, p. 2949. Query actually dealt with Lauricella during the Project. Transcript, p. 2950. Unlike Doran, Query analyzed Contractor's actual contemporaneous CPM schedules and gave several opinions.

1. Contractor deleted activities and actual dates from its schedules which hindered the ability to review Contractor's schedules. Transcript pp. 2968-2969.
2. He concluded that the Contractor's schedule "has such significant fatal flaws that it is neither an effective forecasting or coordination tool." Transcript, pp. 2970-2971.
3. Query explained how predecessor and successor activities worked on a CPM schedule. Transcript, pp. 2973-2978. He explained how Contractor manipulated the predecessor and successor activities with "restraints" or "constraints." Transcript, pp. 2978-2982. Query concluded that Contractor's use of inappropriate constraints on one-third of all its activities gave false information and makes an activity appear critical when it is not. Id. Query testified that the use of even a single inappropriate constraint on a federal project would lead to the rejection of the schedule. Id. He concluded that Contractor used an exorbitant amount of restraints or constraints that inappropriately dictated logic and gave false data on the scheduled activities. Transcript, pp. 2989-2992. These inappropriate changes in the logic of the schedule violated the terms of the Contract Documents. Id; Section 4.10.4.1 of the AIA-A201.
4. Query concluded that Contractor was changing activity ID codes in the schedule. Transcript, pp. 3002-3004. This practice changes how a given activity appears on the critical path and it is a "serious problem." Id.
5. He concluded that critical milestones listed in the schedule were inaccurate. Transcript, pp. 3008-3009.
6. Query concluded that the schedules the Contractor employed could never "accurately predict" when the Contractor was going to finish the job. Transcript, pp. 3010-3012.
7. And finally, Query concluded that the failure to accurately schedule the completion of the Project directly impacted the Owner's ability to hire staff and supply services for the opening of the Project. Id.

I find that the Contractor failed to comply with its scheduling obligations under Section 3.10 of the AIA-A201. I find that, as a direct result of the Contractor's failure to schedule the

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Project in accordance with the terms of the Contract Documents, the only witness who testified as to scheduling for Contractor, Doran, ignored all the Contractor's schedules. [13] I further find that the methodology utilized by Doran violated industry standards and contained numerous errors that significantly impacted any weight this Court could give to Doran's conclusions. As such, I find that the Contractor failed to meet its burden of proof to support an extension of Contract Time. I find the testimony of Boe and Query to be more credible, informative and supported by the greater weight of the evidence. Finally, I find the Contract Time extension was not included in the RCOs submitted to this Court and was not ruled upon by the Architect as required by Section 4.4.1 of the AIA-A201.

Section 2.3.1.3 of the AIA-A133 provides "In the event the Construction Manager does not achieve Substantial Completion of the Work within the Contract Time, including approved extensions, the Contractor shall pay to the Owner as liquidated damages and not as a penalty the (*sic*) Nine Thousand Five Hundred Dollars ($9,000.00)[14] per day for each calendar day the actual time of performance to achieve Substantial Completion exceeds the authorized contract time, which amount shall not exceed the amount of the Contractor's stated Fee."

The Project had an initial Substantial Completion date of July 30, 2017. Plaintiff's Ex. 56. The Contract Time was extended by twenty (20) days to August 19, 2017. Defendant's Ex. 144. Contractor did not achieve Substantial Completion until February 15, 2019. Plaintiff's Ex. 260. This is a period of Five Hundred and Forty-Five Days. Given the duration of the delay and the

[13] Doran analogized the initial critical path schedule to the cooking of the turkey and preparation of Thanksgiving dinner – a good analogy but apparently not followed by the Contractor on this project.

[14] The Court notes the $9,500.00 difference between the written amount and the numerical amount. However, because the Contract contained a cap on the amount of liquidated damages and the cap is reached due to the duration of the delay, the discrepancy need not be resolved.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: BBC Ex. 56 (AIA-A133) = R-2545; Lib. Ex. 144 = Supp. R. 10497; BBC Ex. 260 = Supp. R. 2528

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cap on liquidated damages, Hadley did the calculation of liquidated damages in the amount of $1,483,090.00. Transcript, pp. 4120-4121.

I find that the amount of liquidated damages is $1,483,090.00. While entitlement to liquidated damages was disputed, the record contains no contradictory calculation of the amount.

VI. Contractor's Claims

I find that the Contractor failed to meet its burden of proof on any of its causes of action. This failure, coupled with Hadley's audit conclusions, demonstrates that Contractor is not entitled to any additional payments under the Contract Documents.

A. Damages

In addition to the RCO Notebook (Plaintiff's Ex. 12) discussed above, Contractor submitted two damage claims into evidence—both over the objection of the Owner. The first were Plaintiff's Exs. 329[15], 330 and 331 excel spreadsheets produced to the Defendant during the trial on September 21, 2021 ("September 21, 2021 Claim"). Transcript, p. 3948. The documents contain no supporting documentation. Plaintiff's Ex. 329 contains the most information; however, the testimony offered by Contractor regarding Plaintiff's Ex. 329 was very limited. Transcript, pp. 2378-2400. No testimony was offered as to how the Plaintiff's Ex. 329 related to any requests for change orders or any of the testimony of Contractor's other witnesses. It was simply described by Contractor's comptroller as a total cost claim plus interest.[16] Transcript, pp. 2378-2379; Transcript, pp. 2456-2459.

On the contrary, Hadley spent a considerable amount of time and effort evaluating the September 21, 2021 Claim within the context of her audit. Transcript, pp. 3958-4104. Hadley discovered duplication, accounting irregularities, double charges, deletion of back charges that

[15] Contractor's Project manager for the entire Project had no role in the preparation of Plaintiff's Ex. 329.
[16] As this is a GMP Contract, the Court allowed this Exhibit into evidence, but discounts its weight as evidence.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 2378-2400 = Supp. R. 1277-1299; Tr. 2456-2459 = Supp. R. 1317-1320; Tr. 3945-3948 = Supp. R. 2074-2077; Tr. 3958-4104 = Supp. R. 2084-2230; Tr. 4120-4121 = R-1427-1428; BBC Ex. 12 = R-1542; BBC Ex. 329 = Supp. R. 2533

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were for the Owner's benefit, payments made to Contractor by Owner that were not paid to Subcontractors and were claimed again before this Court, failure of documentation, and inconsistencies with documentation that was provided when she performed her audit in the courtroom during trial. Id. At the conclusion of her review of the September 21, 2021 claim and her audit, Hadley concluded, to a reasonable degree of accounting and auditing certainty:

> "So given the magnitude of errors and the fact that there's a lot of money on there that Library [Owner] has already paid, and there is a significant amount of money that's duplicative of other amount on there, you can't rely on this document to make payments to BBC [Contractor] because I have identified duplication errors and unsupported documents that are too significant to rely on it in part or in whole."
>
> Transcript, p. 4104.

I find by a greater weight of the evidence that the September 21, 2021 claim is unreliable. I find, given the lack of supporting documentation, the magnitude of errors, and the fact that there is no proximate causation for Contractor's submission of "total costs," this Court gives no weight to the September 21, 2021 claim. As such, Contractor failed to meet its burden of proof for its claim. Section 4.3.1 of the AIA-A201.

The second damage claim submitted into evidence, over the Owner's objection, was offered in Contractor's reply case on November 29, 2021. Plaintiff's Exs. 352-353. "Any Plaintiff in a civil action must first produce and disclose the entire evidence in support of his case; after the defendant has offered all of his evidence, the plaintiff may reply. Reply testimony should be limited to rebuttal of matters raised in defense; it should not be used to complete plaintiff's case in chief." *McGaha v. Mosley*, 283 S.C. 268, 322 S.E.2d 461 (S.C. App. 1984). There was not a witness offered to explain it, authenticate it, swear to its accuracy, or to be cross-examined on it. It was simply handed up to the Court by the attorney for Contractor. Transcript, pp. 4402-4411. Owner had no ability or opportunity to compare it to the September 21, 2021 claim.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3958-4104 = Supp. R. 2084-2230; Tr. 4402-4411 = Supp. R. 2310-2319

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I find, given the unreliability of Contractor's September 21, 2021 claim, the submission of the November 29, 2021 claim in reply and without any testimony to explain it, and the fact that there is no proximate causation for Contractor's submission of "total costs," this Court gives no weight to the November 29, 2021 claim. As such, Contractor failed to meet its burden of proof for its claim. Section 4.3.1 of the AIA-A201.

I further find that Contractor's failure to perform the contractually required final accounting, failure to submit a final pay application, and failure to comply with the audit provisions of the contract for over two years supports the Court's conclusion that the spreadsheet claims are unreliable.

This Court is unable to determine that any of the amounts on the September 21, 2021 and November 29, 2021 claims constitute "costs of the work" due to the lack of supporting documentation for the two claims. See Article 6 of the AIA-A133.

This litigation started with the January 25, 2019 "four page letter" claim in the amount of $22,452,287.00 that had no supporting documentation. Notwithstanding the fact that the Contractor filed this action prior to submitting what it contended was the supporting documentation to the Architect as contractually required, the only supporting data for any of the claims is the "four notebooks." Defendant's Exs. 11, 12, 13, 14. Contractor testified in its SCRCP Rule 30(b)(6) deposition that everything anyone needed to analyze the claim was in the "four notebooks" Contractor 30(b)(6) Deposition, pp. 107-109. However, the Contractor failed to put up a witness to adequately explain, describe or show any causal connection between any of the claims and the "four notebooks." Neither Jim Clements, Hadley, or Boe gave the "four notebooks" any weight. Likewise, this Court is unable to make a correlation or proximate causation of any

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kind between the "four notebooks" and the Contractor's September 21, 2021 and November 29, 2021 claims.

Finally, I find that the existence and terms of the Joint Prosecution and Defense Agreements between Contractor and certain subcontractors make difficult any determination that any of the amounts claimed in the September 21, 2021 and November 29, 2021 claims could be "costs of the work." Plaintiff Ex. 209.

B. Lien Foreclosure

Due and owing to the fact that the Contractor is not owed any amounts under the Contract, it follows that Contractor's foreclosure action must be dismissed. The Court does not ignore however that, for over two years, over $26,341,655.00 of mechanic's liens were filed on Owner's property. Transcript pp. 3927-3928. The testimony is that the mechanic's liens were excessive and duplicative. Transcript, p. 3931.

Owner is hereby deemed the prevailing party and is entitled to attorneys' fees and costs pursuant to S.C. Code Ann. Section 29-5-10, et seq.

C. Breach of Contract

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009).

Here, the only element met by Contractor is the existence of the contract. Owner is not in breach of the contract as no breach has been shown. In fact, Contractor's representative, David Simonton testified that all certified payment applications were paid. Transcript, p. 4316. Moreover, Contractor failed to demonstrate that it is owed any sums under the contract. Contractor's breach of contract cause of action is dismissed.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3924-3927 = R-1403-1406; Tr. 3927-3928 = R-1406-1407; Tr. 3931 = R-1410; Tr. 4316 = R-1476; BBC Ex. 209 = Supp. R. 2422

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D. Quantum Meruit/Quasi Contract

"Absent an express contract, recovery under quantum meruit is based on quasi-contract, the elements of which are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." *Webb v. First Federal Savings and Loan Ass'n.*, 300 S.C. 507, 388 S.E.2d 823 (Ct.App.1989). "If the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit." *Swanson v. Stratos*, 564 S.E.2d 117, 350 S.C. 116 (S.C. App. 2002).

Here, we have an express contract under which no money is owed. Contractor may not then recover under a theory of quantum meruit/quasi contract. Otherwise, the terms of a cost plus contract with a guaranteed maximum price could never be enforceable. Accordingly, Contractor's quantum meruit/quasi contract cause of action is dismissed.

E. Section 27-1-15 Claim

S.C. Code Section 27-1-15 states as follows:

> Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

Here, there is no evidence that Owner failed to "reasonably" and "fairly" investigate the merits of Contractor's claims. In fact, the evidence is that Owner attempted to investigate and audit the claims for over two years. This effect was undertaken by Owner despite Contractor's

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contractual duty to perform the audit. Contractor's S.C. Code Section 27-1-15 cause of action is dismissed.

F. Waiver

"A waiver is the intentional relinquishment of a known right." *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 338, 676 S.E.2d 139, 145 (Ct. App. 2009).

There was no evidence in this case the Owner intentionally waived any rights. In fact, the Contract Documents specifically do not allow for waiver unless there is a signed writing, which I do not find in the record. Section 13.4.2 of the AIA-A201. Contractor's waiver cause of action is dismissed.

G. Cardinal Change

Cardinal Change is not a cause of action. See Rule 12(b)(6), SCRCP. Moreover, out of the forty-one (41) RCOs submitted by Contractor it could not prove entitlement to a single one. Contractor's Cardinal Change cause of action is dismissed.

H. Indemnity

The only indemnity provision in the Contract Documents is found at Section 3.18 of the AIA-A201. However, none of the language of that section applies to any of the damages sought by Contractor. Moreover, due and owing to the fact that Contractor has not proven entitlement to any damages, there necessarily could NOT be any amounts to recover for indemnification. Contractor's indemnification cause of action is dismissed.

I. Breach of Warranty of Plans and Specifications

In South Carolina, there exists an implied warranty of fitness of plans and specifications. *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951). Here, however, none of the plans and specifications were entered into evidence by the Contractor. The Contractor did not provide any

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expert testimony that the Architect's plans or specifications fell below the standard of care. In fact, the only witness offered by the Contractor testified that he was NOT going to testify the Architect's plans fell below the standard of care. Transcript pp. 852-853.[17] Further, Contractor's failure to prove any damages is also fatal to this cause of action. Contractor's breach of implied warranty of fitness of plans and specifications is dismissed.

J. First To Breach

There is not a cause of action in South Carolina for "First to Breach." See Rule 12(b)(6), SCRCP. Additionally, the evidence is that Contractor first breached the contract within fourteen (14) days of the Notice to Proceed by submitting a busted as-planned schedule that omitted the removal of the tower crane. Transcript, pp. 4246-4251. Contractor's first to breach cause of action is dismissed.

K. Breach of Contract Accompanied by A Fraudulent Act

The elements of a claim for breach of contract accompanied by a fraudulent act as "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). In the present case, Contractor has failed to prove even a breach of the contract. There is also no evidence that Owner engaged in any fraudulent acts at any time. Contractor's breach of contract accompanied by a fraudulent act is dismissed.

[17] While Contractor complained at length that the Architect's plans were neither "100% +" nor were they "Bimmed," Contractor had reviewed the plans in the pre-construction phase before proceeding and further acknowledged that the Contract did not require the plans to be "Bimmed."

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 852-853 = Supp. R. 495-496; Tr. 4246-4247 = Supp. R. 2302-2303; Tr. 4248-4251 = R-1450-1453

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VII. Owner's Claims Against Contractor and Subcontractors

In addition to the liquidated damages to be awarded to the Owner in the amount of $1,483,090.00, I find that Owner met its burden of proof as follows:

A. Breach of Contract

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009).

I find that Owner and Contractor entered into a valid and enforceable contract. I find that Contractor breached the following provisions of the Contract:

1. Contractor "accepted the relationship of trust and confidence" and "covenant[ed] with the Owner to cooperate with the Architect and exercise [Contractor's] skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish and supply at all times an adequate supply of workers and materials; and to perform the work in an expeditious and economical manner consistent with the Owner's interests. Section 1.2 of the AIA-A133.
2. Contractor was to be "solely responsible for the acts and omissions of its subcontractors." Section 2.1.6 of the AIA-A133. Contractor was to make the Owner an intended third party beneficiary of "all agreements" between Contractor and subcontractors. Id. I find that Contractor breached this provision.
3. Contractor is solely responsible for scheduling, phasing and coordination of the work. Section 2.3.1.4 of the AIA-A133; Section 3.10 of the AIA-A201. I find that Contractor breached this provision.
4. Contractor "shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes." I find Contractor breached this provision.
5. Contractor was required to account for back charges to be assessed between its subcontractors for the benefit of the Owner. Section 6.7.3 of the AIA-A133. I find Contractor breached this provision.
6. Contractor was required to keep "full and detailed accounting records" and to "substantiate all costs incurred." Section 6.11.1 of the AIA-A133. I find the Contractor breached this provision.
7. Contractor was required to submit to an audit of its books and records. Sections 6.11.1 and 7.1.11 of the AIA-A133. I find the Contractor breached this provision.

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8. Contractor was required to summarize its cost records and maintain complete "back up documentation." Section 7.1.4 of the AIA-A133. I find the Contractor breached this provision.
9. Contractor was required to submit a final accounting for the Project. Section 7.2 of the AIA-A133. I find the Contractor breached this provision.
10. Contractor was required to provide all "management staff with whatever additional supervisory personnel are required to ensure that the Work will be completed by the Contractual date of Substantial Completion. Section 3.3.4 of the AIA-A201.
11. Contractor was required to employ a competent superintendent and necessary assistants. Section 3.9.1 of the AIA-A201.
12. Contractor was required to be solely responsible for all of the scheduling requirements. Section 3.10.1 of the AIA-A201. I find Contractors breached these provisions.
13. Contractor was required to bond-off subcontractor liens. Section 9.3.1.2 of the AIA-A201. I find Contractor breached this provision.
14. Contractor was required to promptly, and at its own expense, correct defective work. Section 12.2.1 of the AIA-A201. I find the Contractor breached this provision.

Section 2.4 of the AIA-A201 states, in pertinent part, that "If the Contractor defaults or neglects to carry out the work in accordance with the Contract Documents" and the Owner provides notice to the Contractor of such failure, Owner may proceed to perform the work itself. Owner put Contractor on notice of the defective work. Defendant's Exs. 104 and 105. Owner then performed the work through other contractors. Transcript, pp. 3819-3827. Owner incurred costs performing work or self-performing work that Contractor was contractually required to perform, but Contractor either failed to perform the work or the work was defective and not in compliance with the Contract Documents. Defendant's Ex. 146B; Transcript, p. 3817. This work included warranty work, laundry costs, labor, cleaning fees, repair work, painting work, punch list repair work, fixtures, and pool repairs. Transcript, pp. 3819-3827; Transcript pp. 3247-3255; Transcript, pp. 3267-3272. Defendant's Exhibit 146B contains proper and complete supporting documentation. The total amount of the Owner supplied work is $2,256,764.00.

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3247-3255 = R-1338-1346; Tr. 3267-3272 = R-1347-1352; Tr. 3817 = R-1353; Tr. 3819-3827 = R-1354-1362; Lib. Ex. 146-B = R-8178

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I find the Owner was required to perform work that the Contractor failed to perform. I find that the amount of $2,256,764.00 is reasonably supported and directly and proximately caused by the Contractor's failure to perform the contractually agree to work.

B. Breach of Contract Accompanied by a Fraudulent Act

The elements of a claim for breach of contract accompanied by a fraudulent act as "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002).

I find Contractor's failure to perform its own accounting and repeated obfuscation of the accounting and audit process constituted not only a breach of the contract but that it was accompanied by fraudulent intent. I find that the true purpose of trying to avoid the audit was not for the reasons stated by Contractor in Defendant's Ex. 50, but instead to avoid, for as long as possible, the discovery that Contractor's claim was not $22,452,287.00 or any of the iterations of Contractor's spreadsheets. The actual claim, once Hadley was finally able to perform her work, is determined to be $419,425.00. Transcript, p. 4111; Transcript, pp. 4120-4121. This amount is prior to the award of any amounts of set off for liquidated damages or other damages.

Ultimately, I find that the Contractor is owed nothing. I find that Contractor breached this Contract, and the breach was accompanied by a fraudulent act. The Court asks:

What is the purpose of filing duplicative and excessive liens? What is the legitimate purpose of refusing to do an accounting or allow one's books and records to be audited?

The Court concludes that there is not a legitimate one. The only purpose would be to attempt to force an Owner into submission. This is especially true given Contractor's repeated

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 4110-4111 = R-1424-1425; Tr. 4120-4121 = R-1427-1428; Lib. Ex. 50 = R-7212

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assertions that the Owner did not have sufficient funds to pay their claim. See Paragraph 52 of Plaintiff's Second Amended Complaint.

I further find the Contractor's undisclosed internal change orders violate the express terms of the Contract Documents and the essence of a cost-plus contract to be further evidence of fraudulent intent.

This Court, therefore, orders a bifurcated hearing on punitive damages pursuant to S.C. Section 15-32-510 et seq. for Contractor's breach of contract accompanied by a fraudulent act.

C. Declaratory Relief/Indemnification

I find and do declare, pursuant to S.C. Code Sections 15-53-30 and -40, based upon the accounting work and audit performed by Hadley, the mechanic's liens filed by Contractor and Subcontractors Lithko, Watson and ONSM are or were duplicative and excessive. The only remaining mechanic's lien is the Contractor's lien which is dismissed pursuant to the Court's rulings herein. As such, I order, pursuant to S.C. Code Ann. Section 15-53-100, Contractor and Subcontractors Lithko, Watson and ONSM to pay all costs incurred by Owner for the services of Hadley. At the trial, Ms. Hadley stated that her costs incurred were in the approximate amount of $530,000.00. Transcript, pp. 3954-3955. Owner shall prepare and file an affidavit of Hadley's costs within thirty (30) days from the entry of this Order.

D. Unfair Trade Practices

To recover in an action under the UTPA, the claimant must show: (1) the opposing party engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the claimant suffered monetary or property loss as a result of the opposing party's unfair or deceptive act(s). S.C. Code Ann. §§ 39-5-10 to -560; *Wright v. Craft*, 640 S.E.2d 486, 372 S.C. 1 (Ct. App. 2006).

The original Order, with the Court's citations as written, appears in the Amended Record on Appeal at R-79 to R-125. This convenience copy updates those citations by setting out below the pages of the Amended Record (R-) and the Supplemental Record (Supp. R.) to which they correspond: Tr. 3954 = Supp. R. 2083; Tr. 3955-3957 = R-1421-1423

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I find that Contractor engaged in acts which were unfair and deceptive in the conduct of trade or commerce. I find that these acts which were capable of repetition, were in fact repeated; however, I find that this is a private contract dispute between these parties which does not affect the public interest. Accordingly, this cause of action is dismissed.

E. Civil Conspiracy

"[A] plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cnty. Sch. Dist*., 433 S.C. 562, 861 S.E.2d 774 (S.C. 2021).

I find that Contractor combined with Subcontractors Lithko, ONSM, and Watson entered into a Joint Defense and Prosecution Agreement. Owner contends the Agreement, by itself, was lawful, but sought to achieve an unlawful purpose of extorting money from the Owner.

The Court finds the communications undertaken through this Agreement to be privileged under the Common Interest Rule. Transcript pp. 5036-5043. Because the defense and prosecution of claims among co-Defendants is recognized as a legitimate legal process, I find no overt act in furtherance of the Agreement, in this instance, will support a recovery under the civil conspiracy cause of action. See *Tobaccoville USA v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010). Also *Paradis v. Charleston Cnty. Sch. Dist.*, supra.

IT IS THERFORE ORDERED AS FOLLOWS:

I. Judgment is to be entered in favor of Library Associates, LLC on its breach of contract cause of action against Balfour Beatty Construction, LLC in the amount of **$3,320,329.00.** This amount is arrived at by adding the liquidated damages sum ($1,483,090.00) and the cost to complete damages ($2,256,764.00) for a subtotal of

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$3,739,854.00. The contract balance of $419,425.00 is then subtracted for a setoff to arrive at the judgment amount of $3,320,329.00.

II. Judgment is to be entered in favor of Library Associates, LLC on breach of contract accompanied by a fraudulent act cause of action against Balfour Beatty Construction in the amount of $**3,320,329.00**.

III. A hearing on punitive damages will be set by future Order of this Court.

IV. Library Associates, LLC is hereby instructed to submit its attorneys' fees and costs petition as the prevailing party against Balfour Beatty Construction, LLC, Lithko Contracting, LLC, Watson Electrical Construction, Co., LLC and Old North State Masonry, LLC under the mechanic's lien statute, S.C. Code Section 29-5-10, et seq., within thirty (30) days of the date of this Order.

V. Library Associates, LLC is further instructed to submit an affidavit of Hadley's costs pursuant to S.C. Code Ann. Section 15-53-100 within thirty (30) days of this Order.

IT IS SO ORDERED!

_____
Mikell R. Scarborough
Charleston County Master-In-Equity

_____, 2023

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Charleston Common Pleas

Case Caption: Balfour Beatty Construction LLC VS Library Associates LLC , defendant, et al

Case Number: 2019CP1001108

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2023-10-06 13:53:11 page 47 of 47

ANNEX – RECORD MATTER UNDERLYING THE APRIL 12, 2024 ATTORNEYS' FEES AND PUNITIVE DAMAGES ORDERS

Per Exhibit B to Respondent's Motion to Amend Designation of Matter (June 4, 2026), conformed to the Amended Record and this Supplement.

Order Awarding Attorneys' Fees and Costs, filed April 12, 2024	R-126 to R-131
Order Awarding Punitive Damages, filed April 12, 2024	R-132 to R-143
Transcript of the March 13, 2024 Hearing (in its entirety)	Supp. R. 9 to 251
Library Associates, LLC's Filing of March 13, 2024 Hearing Exhibits (complete)	R-8793 to R-9825
Library Associates, LLC's Exhibit 2 (complete; fee backup)	Supp. R. 2537
Library Associates, LLC's Exhibit 3 (complete; fee backup)	R-4747 to R-4965
Library Associates, LLC's Exhibit 4 (complete; fee backup)	Supp. R. 2727
Transcript of the April 2, 2024 Hearing (pages 1-4, 29-38)	R-1507 to R-1520
Transcript of the April 2, 2024 Hearing (complete)	Supp. R. 252 to 330
Exhibits Admitted at the April 2, 2024 Hearing (Exhibits 1-5)	Supp. R. 331 to 405

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO.: 2019-CP-10-01108

BALFOUR BEATTY CONSTRUCTION, LLC
PLAINTIFF(S)

LIBRARY ASSOCIATES, LLC
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
LIBRARY ASSOCIATES, LLC	BALFOUR BEATTY CONSTRUCTION, LLC	$2,782,789.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	3062	
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**
	CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

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9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

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Charleston Common Pleas

Case Caption:	Balfour Beatty Construction LLC VS Library Associates LLC , defendant, et al
Case Number:	2019CP1001108
Type:	Order/Judgment and Form 4

So Ordered

s/Mikell R. Scarborough 3062

ELECTRONICALLY FILED - 2024 Apr 26 3:27 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1001108

STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON** Balfour Beatty Construction, LLC, Plaintiff, v. Library Associates, LLC; and Metropolitan Life, a New York Corporation Defendants, Library Associates, LLC, Third-Party Plaintiff, v. Lithko Contracting, LLC, *et al.* Third-Party Defendants.	**IN THE COURT OF COMMON PLEAS** **NINTH JUDICIAL CIRCUIT** CASE NO.: 2019-CP-10-01108 **ORDER AMENDING POST-JUDGMENT INTEREST AMOUNT**

This matter came before the Court on Balfour Beatty Construction, LLC's ("Balfour") Motion to Reconsider ("the Motion") this Court's Order denying Balfour's motion to reconsider the Order granting partial summary judgment to Watson Electrical Construction, LLC ("Watson"), dated April 12, 2024. For the reasons set forth in Balfour's Motion filed on April 22, 2024, Balfour's Motion is **GRANTED** as follows:

The Court's April 12, 2024, Order Denying Balfour's motion to reconsider granting Summary Judgment in favor of Watson is amended to state in Footnote 2: "As of the date the Motion was heard, $225,774.15 in post-judgment interest has accrued."

All other findings and statements in the Court's April 12, 2024, Order denying Balfour's motion to reconsider remain unaffected.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

ELECTRONICALLY FILED - 2024 Apr 26 3:27 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1001108

Charleston Common Pleas

Case Caption: Balfour Beatty Construction LLC , plaintiff, et al VS Library Associates LLC , defendant, et al

Case Number: 2019CP1001108

Type: Order/Other

So Ordered

s/Mikell R. Scarborough 3062

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

BALFOUR BEATTY,
Plaintiff,
vs. CASE NO. 2019-CP-10-01108
LIBRARY ASSOCIATES, LLC, ET AL.,
Defendants.

Motion for Attorney's Fees, Motion to Elect a Remedy Hearing

Testimony and Notes of Evidence, taken in the above-entitled and -numbered cause, before the Honorable Mikell R. Scarborough, Judge, presiding on March 13, 2024.

Reported by:
Roxanne M. Easterwood, RPR

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P R O C E E D I N G S

* * * * * *

THE COURT: Folks so we're back on the record. This is the Balfour Beatty Construction case versus Library Associates. And the Court issued its order to try this case in the fall of 2021. The Court issued its order October 6, 2023. So we're here today basically on motions to reconsider. And I tried to get out the sort of schedule and outline of what I wanted to do. So what I really wanted to start with today, I want to try to address all of these issues today, if possible. Although I did put something for sometime in April on the issue of punitive damages. I'm sure we'll cover that later.

What I really wanted to try to get done today was -- this morning, I should say, is to take care of a lot of these motions to reconsider with the subs. So, hopefully, we can get them taken care of after some length of time. So I wanted to do that. But I'm looking at my memo I sent out last week as to the order I wanted to take them in, and so the first one actually I had on here was Library's motion to alter, amend, and make additional findings of fact. I just

don't want to get bogged down in that. Can we take that up later? Do you want to address that, Mr. Bundy?

MR. BUNDY: Certainly, Your Honor. We'll do anything you'd like.

THE COURT: Is Mr. Wheeler here? There he is. Okay. I want to try to get into the subcontractor issues having to do with Balfour Beatty first and then see if we can't clear out some of the courtroom and then start going into some of the meatier issues I think we have to get into. So, Mr. Wheeler, you're here. Are you ready to proceed?

MR. WHEELER: Yes, sir.

THE COURT: Just in order, so y'all know, I have Strong Tower issues, then I was going to do Lowcountry Case & Millwork, Premier, and then Watson Electrical, before we get to Old North State, and Lithko.

It's actually Balfour's motion to reconsider the grant of summary judgment to Strong Tower, and then what Strong Tower has moved to do is to convert it into a final judgment and then enter that judgment, right?

MR. WHEELER: Correct, Your Honor.

THE COURT: Who is going to handle that? Mr. Werner?

MR. WERNER: Yes, Your Honor. Thank you. As a preface to all of these things, Judge, let me say from my perspective that, obviously, we have submitted memoranda to you with respect to these various things. It is my judgment and experience that it's not a good use of time to just read to you the things that we've already submitted.

THE COURT: If you do that I'll hold you in contempt. The one thing you can do is you can rest assured that I have read your memoranda, your motions. So I'm somewhat familiar with what we're doing, but I want to take up these issues so that we can cover them for the record so that y'all are covered, and when we get to y'all's motion to reconsider, as opposed to the Court's order, of which there were 122 entries, we're not going to go through those seriatim either. I'll give you an idea of how we're going to take care of that when we get to that.

MR. WERNER: That's what I was going to say, Judge. My primary purpose is to be here to answer questions to the extent that there are

things that you think are important for you to make your final decision.

THE COURT: Right. Fair enough.

MR. WERNER: With respect to the issue about -- and this really bleeds over to all of the subcontractor summary judgment issues. The fundamental position and the fundamental basis of the motion to reconsider is that in each of those cases it is our position, and we believe that the record before the Court at that time established that there were, in fact, questions of material fact as to whether or not the subcontractors were due the money and the amounts specifically that they had claimed.

You know, what the records -- what we believe the records showed at that time was that there were -- there had been issues raised by the owner then made in response to the summary judgment motions by Balfour indicating that there were questions as to whether or not the quality, acceptability, and amount or value of the work were being challenged. And if they were, then Balfour Beatty would be entitled to setoffs with respect to each of those subcontractors.

Again, I'm sort of making this

generally, if that's all right with you.

THE COURT: Yes, that's fine. I think they were all about the same; were they not?

MR. WERNER: Yes. So with respect to the summary judgment issue, that's really the fundamental question on our motions to reconsider.

Now, with Strong Tower we have a separate issue about them trying to certify the judgment.

THE COURT: Sure.

MR. WERNER: But generally speaking, that is the basis of our motions. And I know those matters were briefed, like, two years ago, before my time in this case. But, again, I'm happy to respond if Your Honor has particular things that you want to discuss or questions, but to go back and try to belabor the evidence, I don't intend to do that.

THE COURT: As to the setoff, do you have any position on that at this time?

MR. WERNER: As to what it should be?

THE COURT: Right.

MR. WERNER: I think that's, again, one of the problems that we've raised in the papers, Judge, is that, frankly, we think that your order

on the summary judgment decisions and your order in the big case, the dispute between Balfour Beatty and Library Associates, are irreconcilable.

I mean, you cannot have found as you -- you used essentially the same statement in each order, that is, that they had done the work in accordance with the subcontract and that the work had been accepted by Balfour Beatty and the owner and they were entitled to be paid.

With all due respect, it is not possible for that to be true and those things not to be cost of the work or to the amounts legitimately covered in the mechanic's lien. So that, frankly, prevents us from saying -- I mean, based on your bigger ruling, none of them are due. We don't think that's correct, but that's the irreconcilable problem given the two different -- the two sets of orders I guess you would call it.

THE COURT: I'm with you. Thank you very much.

MR. WERNER: Thank you, Judge.

THE COURT: Mr. Wheeler.

MR. WHEELER: Yes, Your Honor, thank you. Sam Wheeler on behalf of Strong Tower Construction, LLC. Just a couple of responses. I

also won't try to belabor the point. We've briefed it pretty well. It's been briefed for a couple of years now.

But I think the problem is this general lumping of all the subcontractors in with the owner, with everybody else. They're not parsing out who might be owed what, and then every single subcontractor has come forth and said here is what we're owed, here is how we established it, and Your Honor has awarded us those awards. So it's one issue.

The definition of a cost in the primary cost and whether or not Your Honor found that our awards were considered costs or not is pretty irrelevant to my individual or my client's individual award. So that is getting lumped into this, and I just want to be sure that you're extracting that from the actual situation. What that contract has defined as costs should not be considered as a part of this reconsideration motion.

As I understand, the motion is basically two arguments they're making. One is we don't know what's going to happen at trial. We might have a setoff issue. That is not the

summary judgment standard at the time, two and a half years ago. The summary judgment standard is present some issues of material fact. They didn't do it, and, apparently, they still can't do it. You just asked a question: What happened at trial that would entitled you to a setoff? We don't know. So this has been our problem for two and a half years.

So being potential clairvoyant at the time we are awarded summary judgment, hey, we might get popped at trial, we might be entitled to setoff. Maybe you shouldn't have gone through trial. Maybe you should have settled these claims. Maybe you shouldn't have got popped at trial, but there was no issue. They didn't point to any issue of material fact at the time we moved for summary judgment. So they didn't come to you with any fact that would allow them to withstand the motion for summary judgment.

The other issue I understand them to raise is they don't think we're entitled to fees under the subcontract. That is very important at this point because fees, as you have seen for everybody, are start, take, outkick the actual claims (sic). The subcontract is very, very clear

that if there is a dispute that doesn't involve the owner, then they have the election to take it to arbitration. They, obviously, didn't elect to go to arbitration. They elected to come to litigation and referred it to you.

So Section 10D of the subcontract then governs that. It says if you have to go to litigation, the prevailing party is entitled to fees. They're saying this involves the owner; they didn't pay us, so it involves the owner. Everybody knows in South Carolina, an owner not paying a contractor does not allow the contractor not to pay its subs.

We have an isolated contractual claim against just Balfour Beatty. We have no claims against the owner. In fact, we have dismissed all of our claims against the owner. Nor do we have a right to bring a contractual claim against the owner. We don't have a contract with the owner. We have a single contract claim against the one entity. We were awarded money under that contract. That's it. This doesn't involve the owner. So that fees provision is triggered in the subcontract, and we're absolutely entitled to fees. We're entitled to the award. We're

entitled to interest. We would ask that you not disturb that ruling. Thank you.

THE COURT: Thank you, Mr. Wheeler. Do you want to be heard on the attorney's fees question?

MR. WERNER: Yes, Your Honor.

THE COURT: It's in the brief. I just want to make sure it's on the record.

MR. WERNER: Just sort of quickly in reply and to deal with that question. To say that the issues with the owner do not matter and are not a part of the subcontract disputes is simply not correct. There are flow-down, flow-through clauses in every one of these subcontracts. So when the owner raises issues, when the owner says that money is not due, that is an issue that passes through to some contractors. Balfour Beatty has that right to pass that through.

The question here, all of these folks may be right if they had gone through trial and these were the positions that ended up, but we're talking about summary judgment. There just had to be a question of material fact, not the resolution of those questions. So it was just, we think, premature to, in fact, have given them the

judgments that they sought.

Now, with the attorney fee question, I mean, it is certainly a slightly unusual provision in the contract the way it is written, but, again, these are situations that did, in fact, involve the owner. I guess the argument that we just heard is, well, you can't have a pay if paid. That's true. But pay when paid or the idea that payment is not due when the owner is, in fact, challenging whether or not the work is accepted and it is due is a different question, and that's where we were at the time of summary judgment, and that's why we think, again, they weren't entitled to summary judgment and why they weren't entitled to the awarded fees.

THE COURT: Thank you.

MR. WHEELER: Just one response, Your Honor. If you recall, this is a bit of a tortured background, obviously, but I actually moved for summary judgment once early in the case. The argument was we don't know what all of these people are going to say. We don't know what the experts will say. We don't know what Library Associates will say, so you need to come and sit in on all of the depositions, like the lower-level

parties that we are, and at the end we'd say, you know, do you know this party, do you have any claims against them, you know, at the end of the deposition where you look kind of foolish because it looks like you're billing your clients for nothing, but this is what they asked us to do.

So Your Honor, actually, after we did all of this, somewhat invited the subs to come and make additional motions for summary judgment, said, hey, I think we have gotten through enough of this discovery. And we deposed all of the experts, all of the representatives from these parties, and nobody said a darn thing about at least my client, and I think a lot of the other subs. Either they didn't remember or they didn't have any issue. So I don't know where in the course of this litigation the owner or where they construed the owner making claims at least against my client. There are no claims against them.

Again, just to be clear, the summary judgment standard is not to think about what might happen at trial. It's to present an issue of fact.

THE COURT: At the time of the hearing?

MR. WHEELER: At the time of the

hearing.

THE COURT: I'm with you on that.

MR. WHEELER: It wasn't presented.

THE COURT: Your only claim was breach of contract as to the general contractor, correct?

MR. WHEELER: Correct.

THE COURT: Mr. Bundy, do you agree with that? Y'all have got no claim against any of these subs, do you?

MR. BUNDY: We ain't mad with anybody, Judge.

THE COURT: Very good.

MR. WHEELER: In fact, I would love to see some of the records and with various, you know, times we're here, because the entire time Balfour's representatives and counsel are saying we're entitled to money, the subs are entitled to money, everybody is entitled to money. That's the position that they rode all the way through trial, and it didn't work out, but it doesn't mean we're not owed money. It doesn't mean it presented an issue of fact at the time we moved for summary judgment.

THE COURT: In answer to the entry of the judgment, that would just be confirming the

Court's prior ruling; would it not?

MR. WHEELER: To certify the judgment? Yes, I think it's well within your discretion to certify under 54b. They have raised the issue that it's only allowed in certain exceptional or weird circumstances.

I would present to you that this case, there is no better example of exceptional or unjust circumstances than allowing a subcontractor like me -- I'm an $82,000 judgment and 50,000 or $60,000 in fees -- to sit around and wait for two and a half years. It should be certified.

I know we're close to the end here, but I really foresee a lot of activity. We have the punitives hearing. We will certainly, if -- Your Honor has said that they're entitled to punitives and they will be awarded. To what level I don't know. I can only assume they will file a motion to reconsider. They will be back summer sometime; I don't know. And then it is looking like this is going up on appeal, if I had to guess.

And, you know, I'm the most prophetic person in this room, apparently. But it's going to go up on appeal, and they're going to have to

start posting some pretty big bonds. That's not my fight, but this is going to be a prolonged fight.

I think at this point the subs really should be entitled to have their -- at least me and whoever else wants to make that motion -- have their judgment certified as final and let them go up on appeal or let them get figured out.

They say judicial economy. I say judicial economy is in favor of allowing an isolated sub with an isolated judgment go fight whether it's on appeal or just try to settle it. That's judicial economy.

THE COURT: All right.

MR. WERNER: On that issue, Judge, again, we put it in the brief, the fact of the matter is they don't have a final judgment. They tried to jump the gun and asked you to certify before our time even to file the 59(e) motion expired. We filed it in time. They don't have a final judgment. You can't certify a non-final judgment, and you can't execute on a non-final judgment, as I think you implicitly recognized when you issued the stay saying that couldn't do it. I mean, they're just wrong about that. I

understand their frustration, but they're just wrong.

THE COURT: Okay.

MR. WHEELER: I would contend that the sequence of events need to be deny the motion to reconsider, then certify the judgment. But that is a functional, easy process for Your Honor to take.

THE COURT: I agree with that. That's probably what I'll do. I'll ask you to prepare a proposed order just addressing that issue and how you want it to read. Send it to me within three weeks.

MR. WHEELER: Thank you, Your Honor.

THE COURT: Lowcountry Millwork, Mr. Rannik, come on forward. Mr. Rannik, I give you credit, everybody wanted to jump on your memoranda.

MR. RANNIK: Judge, I just wanted to add a few points, and first I'd like to incorporate what Mr. Wheeler so eloquently argued.

A few other issues. Some are significant. Some are pretty minor. We'll start with the minor one. Rule 59(g), of course, says that a motion for reconsideration needs to be -- a

courtesy copy needs to be sent to the Court. I'm not sure that happened here. I don't have any record that it did. Not significant, but I'll point it out.

THE COURT: I got it. Somewhere along the line, I can assure you I got it.

MR. RANNIK: All right. There was the discussion about whether summary judgment was appropriate, because at the time they was still, arguably, some potential for setoff. Now, we cited a case in our memoranda that says the potential for a setoff is not a dispute of material fact that would defeat summary judgment. So I think that issue can be put to bed.

There was also a discussion of, hey, when paid, being permissible even if paid is not. I would refer Your Honor to their 2023 Court of Appeals decision in J&H Grading, which says, no, actually, pay when paid is not enforceable, and any delay of more than 90 days to pay a sub is per se unreasonable. And I've got a copy of that case. It's 441 S.C. 272, and that's Court of Appeals 2023. I have a copy as well.

Third, I would note that -- or fourth, I would note there still, apparently, has been no

finding that Lowcountry or any of the subs that I can think of caused any delay or any of the work was deficient or defective in any way. So the record remains where we were. Everyone said Lowcountry did a great job, they didn't cause a delay, and they're entitled to be paid.

Finally, even if there had been a finding at trial that there was some delay caused by Lowcountry, I don't know that that would have been binding on Lowcountry, because at that point summary judgment had been granted. We were not part of the case anymore, and we didn't have the opportunity to cross-examine, et cetera, et cetera.

So with that, Your Honor, I'll sit down and stop talking, but we would ask that the original ruling not be disturbed.

THE COURT: Very good. Any additional response?

MR. WERNER: No. I think they were incorporated in the final.

THE COURT: I'll deny the motion there. If you will submit your proposed order within three weeks. To the extent y'all want this to be a final judgment, go ahead and submit a Form 4

with that stating what the judgment amount was.

MR. RANNIK: Thank you, Your Honor.

THE COURT: Very good. Thank you. Next is Premier Exteriors.

MR. HUGHES: Robert Hughes on behalf of Premier Exteriors.

THE COURT: All right. Mr. Hughes, anything you wish to add?

MR. HUGHES: I'm going to adopt what these two gentlemen very articulately argued already. The only other point that I would note is there was some discussion about the cost of the work. I do want to point out that, you know, I think -- I note my client, Premier, and most other subs had submitted affidavits from their representatives that talked about the work that they did. Some of the work that my folks did that, you know, they're not paid for is work that was corrective in nature because of some sort of issue with another sub's work that they had to come back and do work. That's a Balfour Beatty problem, and it doesn't mean that the owner necessarily has to pay them for that. You see what I'm saying?

The sub did the work. Balfour

authorized it, and just because the owner doesn't necessarily owe that work doesn't mean that Premier, the sub that did the work, shouldn't get paid.

THE COURT: Did not -- do not get paid, right?

MR. HUGHES: Right. If they didn't cause that work and they did the corrective work at Balfour Beatty's request, they ought to get paid for it. That's just one type, one category of work that subs were doing. It might not fall in the cost of work category at trial on the underlying contract. So I just want to make that clear.

And, you know, again, the setoff issue I think we have talked about pretty well, but the fact that there was some language in the contract, you know, they had the opportunity to present evidence at that time showing that Premier and each of the other subs that got summary judgment potentially had some fault for some of the delays or quality issues that would give rise to that right of setoff, but they failed to do that. That's why Your Honor granted the orders back when you did.

We all relied on what happened then in that setting. We relied on the invitation to do this. And, you know, my folks were owed a very small amount of money in the big scheme of things, spent $73,000 in attorney's fees paying me to go to all of these depositions. And, you know, I took the evidence I needed from those depositions to get that judgment, and based on that, we opted to not go to trial. And I think equity dictates that we keep the judgment you entered back in 2021.

THE COURT: Very good. Thank you, Mr. Hughes.

MR. WERNER: Judge, may I, just one thing that that triggers?

THE COURT: Yes, certainly.

MR. WERNER: You asked about attorney's fees earlier. What you just heard from Mr. Hughes, frankly, is illustrative of why the attorney's fees are not, in fact, owed to these subcontractors. You just heard Mr. Hughes say that they went to the various depositions, participated in them so that they could accumulate the evidence about the disputes between the owner and Balfour and potentially the subcontractors.

That itself is, in fact, a statement that there was an issue that involved the owner as well as Balfour Beatty in their claims, and when that is the case, the very clause that they are trying to argue does not apply, and they do not get their attorney's fees.

THE COURT: I'll find today that they are entitled to attorney's fees. I'll grant yours as well. Send me an order, if you would.

MR. HUGHES: Thank you, Your Honor.

THE COURT: Next up, Watson Electric, Mr. Terry.

MR. TERRY: Good morning, Your Honor. Don Terry, here on behalf of Watson Electric -- Electrical Construction. I also will adopt the arrangements made by these gentlemen as well and rely on the -- we have submitted two memoranda, one back when the motion for reconsideration was originally filed, and then a supplemental memorandum last week.

I want to talk about a few things that have been raised here. As you have recognized, the time for considering summary judgment was back then, not at trial. In fact, trial doesn't impact summary judgment. It's the other way around;

summary judgment impacts trial, because the undisputed facts that were found at or were recognized in summary judgment orders are established for the sake of trial.

Now, Balfour raises this issue of setoff. And, one, Watson's breach of contract claim against Balfour has nothing to do with claims against the owner, but we've got a statute in this state that discusses setoff, and that's 29-7-20, Paragraph 3, and here is what it says, Your Honor -- and I didn't include this in the memorandum: The right to setoff exists if with your application for payment to the owner you send a certified accounting to the owner saying we're not going to pay this sub, and you have to send that same certified accounting to the sub. There is no -- they didn't raise that at summary judgment. They didn't raise it at trial. It never came up. So the right to setoff does not exist.

Whether it's cost of the work is really irrelevant for summary judgment, and I'm going to explain in part why, Your Honor. Watson can be entitled to be paid for work under a change order approved by Balfour, but that doesn't mean

that Balfour ever submitted that change order to the owner. So, therefore, whether the owner pays that or not is irrelevant. It's got nothing to do with the owner's conduct. Additionally, to the extent that Balfour has been paid by the owner for Watson's work, that's also -- any summary judgment related to that is also not conduct involving the owner.

THE COURT: I think y'all had -- did y'all not argue that point as well?

MR. TERRY: Well, back then we may have -- I don't know if we argued back then. I don't want to misrepresent anything. We certainly can see what happened at trial.

THE COURT: One of these subs was able to show that the owner had paid $200,000 towards their claim. I thought that was Watson.

MR. TERRY: I think that issue comes up at the trial, Your Honor. I can't remember if it came up at summary judgment. It definitely came up at trial.

THE COURT: It came up at trial.

MR. TERRY: What was shown by Library Associates was that Balfour admitted it had been paid $206,000 for Watson's work back in I think

it's 2018 that Balfour never paid to Watson.

THE COURT: Yes, that was in your supplement memo of last week.

MR. TERRY: Yes, sir.

THE COURT: I thought I had seen that. That doesn't take us back to the time of summary judgment.

MR. TERRY: It does not.

THE COURT: But it came up during the trial.

MR. TERRY: What's interesting about that, Your Honor, is if they were holding that money back in 2018, that occurred prior to summary judgment. Now, this flow-through argument, there's no flow-through argument for money that had been paid to Balfour already. It's, frankly, irrelevant having the flow-through to the owner.

The attorney's fees is clearly allowed to Watson under the contract under Paragraph 10B, because it's claims that do not involve the owner.

At the time that the summary judgment was granted, discovery had been closed in this case. It was over. There was nothing else to do, and Balfour didn't bring forth any evidence to show there was a question of material fact.

There's one other thing that I think is interesting about this, is if you were to grant Balfour's motion here to reconsider Watson's summary judgment, I have tried to understand what that means for us. And, frankly, I can't find a case that says anything about it, but what I think it does is it means you create your own mistrial.

THE COURT: It would be a quagmire, wouldn't it?

MR. TERRY: We ask that you deny Balfour's motion for reconsideration of Watson's summary judgment.

THE COURT: Very good. Anything on that one, Mr. Werner?

MR. WERNER: Nothing. I appreciate that.

THE COURT: I'll grant that -- deny their motion, grant your request for judgment.

I think that gets us to -- I have a Watson Electrical's motion to reconsider, but how about Old North State Masonry? Let's talk about that first. I'll come back to y'all's motion to reconsider that has to do with other causes.

MR. WINDLE: Steele Windle, for Old North State Masonry. Your Honor, Old North State

Masonry doesn't have summary judgment. So this is totally different basis for the motion for reconsideration.

THE COURT: Right.

MR. WINDLE: What Old North State Masonry is requesting is the Court reconsider and alter, amend its finding that Old North State Masonry is responsible or should be assessed expert witness fees and costs for Cotton & Company and Sam Hadley.

The basis for the motion -- well, when you read the order, the Court discusses testimony from Sam Hadley that the lien claims were duplicative and potentially excessive, and she says that four or five times throughout the order.

The Court goes on to discuss whether or not the lien claims were excessive. I want to discuss that. The Court then discusses problems with the audit. The Court has substantial issues with the audit.

And then there were testimony in regarding Change Orders 19 and 20 of Old North State's subcontract, and the argument there was that the owner -- this is the argument by Library -- was that Library was being denied the

benefit of back charges. So let me address each one of those briefly.

In regard to Ms. Hadley's testimony about a duplicative lien, the lien law in South Carolina authorizes and allows and permits a duplicative lien in the situation of a general contractor and a subcontractor. It's legal. It's authorized. That's what the general contractor and the subcontractor are supposed to do. The subcontractor is entitled to be filing a lien for any amount that he claims is owed, which Old North State Masonry did. The general contractor is entitled to file a lien for what the general contractor is owed.

The general contractor is owed for the work of Old North State Masonry and all of the other subs. So the general contractor includes in his lien the monies that are owed to the subs, including Old North State Masonry. Old North State Masonry has its separate ballot and legitimate lien for what it's owed.

There is duplication there, but it's not wrongful duplication. It's duplication authorized and allowed by the lien law.

THE COURT: Allowed by statute, right?

MR. WINDLE: Yes, sir.

THE COURT: I got it.

MR. WINDLE: So when Ms. Hadley or Library is complaining about duplication of liens, that's what we're talking about. There's nothing wrong with it.

In regard to the testimony that liens were potentially excessive, there was no evidence presented that the lien claimed by Old North State Masonry was excessive.

Old North State Masonry should not be assessed a penalty of having to pay expert witness fees and costs of Cotton & Company based on a general statement by Hadley that the liens were potentially excessive.

There was no evidence presented that Old North State Masonry willfully and knowingly filed a lien for more than what Old North State Masonry was owed, and that's what the lien law says you have to look for, willfully and knowingly filed a claim in excess of the amount that is actually owed.

THE COURT: Statute allows for a mistaken belief, but not willful violation, right?

MR. WINDLE: Right. Exactly. Yes,

sir.

In regard to the issue with the audit, the Court went to great lengths in the order to describe the concerns and issues with the audit, but what I want to address and make sure the Court is aware of is this: There is an audit provision in the prime contract between Library and the owner. Old North State Masonry did nothing to interfere with the owner's rights to audit the cost of the work after the project was completed. That is the responsibility of Balfour Beatty.

Actually, the contract says Balfour Beatty is supposed to provide a final accounting of the cost of the work. Well, that doesn't involve Old North State Masonry. That is Balfour Beatty's obligation to do that, and if for some reason that wasn't done or wasn't done properly or wasn't done completely, that's not Old North State Masonry's responsibility.

I don't want Old North State Masonry to get tainted in that situation, because we don't have -- there isn't a provision in our subcontract saying that the contractor has a right to audit at the end of the job, and there was no evidence -- like I said, there was no evidence presented that

Old North State Masonry interfered with, impeded, hindered the audit that Library was entitled to do to verify the cost of the work.

The next thing that was discussed in the order was the change orders, and Library went to great lengths to attempt to demonstrate that this was an attempt to deny the owner of the benefit of back charges. Well, what I need to make sure the Court is aware of is this is that -- several things. One, Old North State Masonry has a lump sum subcontract, not a cost-plus contract.

Under that lump sum contract, Old North State Masonry has no obligation to give anyone the benefit of any back charge. It's just a lump sum contract. It's not -- Old North State Masonry is not involved in calculating or verifying the cost of the work, and whether or not -- and that's Balfour's responsibility, and Old North State Masonry has no involvement in what Balfour tells the owner about those back charges. That's strictly between Balfour and the owner. So if the owner is contending that the owner has been denied the benefit of a back charge, it's because Balfour didn't tell them, but there was no evidence of that. This is important, Your Honor.

Counsel for Library went to great lengths to go through the change order and make arguments about the effect -- what it means and what the effect was, but what counsel for Library didn't do is present evidence of what Balfour told Library about that change order. Now, follow me, please. For all we know, Balfour told Library about that change order and gave Library the benefit of those back charges. For all we know, there was no evidence that that didn't happen.

What I'm telling you is that Old North State Masonry wasn't involved in the communications between Balfour and Library. Old North State Masonry had no obligation to inform Library of anything in regard to these change orders. In fact, Old North State Masonry is prohibited by provisions in its subcontract from communicating with Library.

Another point, Your Honor, is simply this: Old North State Masonry is trying to negotiate various back charges to its lump sum contract. It does so and explains on the very face of the change order what was being done, here is what we're doing. It's the language that Library pointed out to you.

Now, for Library to be accurate you'd have to believe that Old North State Masonry, intending to do something wrong, is going to prepare a document and explain exactly how they did something wrong right on the face of the document, right on the face of the change order, knowing that that document was going to be presented to the auditors pursuant to the audit provision in the prime contract; that doesn't make sense, after litigation.

Well, in conclusion, Your Honor, Old North State Masonry requests that the Court alter, amend, reconsider its finding that Old North State Masonry is responsible for any portion of the expert witness fees of Cotton & Company because Old North State Masonry did nothing wrong in this situation. It wasn't a wrongfully duplicative lien. There was no proof that any lien claimed by Old North State Masonry was excessive. There was no evidence of willfully and knowingly filing a lien claim for an amount you weren't owed. Old North State Masonry didn't interfere with or impede the audit by Cotton & Company, and there was -- from Old North State Masonry's perspective, when negotiating the change order, they're

negotiating a change order to their lump sum contract, and they have no obligation to report to Library, who they don't have a contract with, how that negotiation of that change order to their lump sum contract might affect the cost of the work under Balfour and Library's cost-plus contract. Thank you.

THE COURT: Okay. Mr. Werner, anything on that one?

MR. WERNER: The motion is really directed at Library, but, I mean, we're going to talk about some of those same issues later. If you want to talk about them now, we can, but I think it probably makes sense to do them as a part of our motion.

THE COURT: I agree.

MR. WERNER: I will adopt some of what he argued as part of what we've argued to you as well.

THE COURT: Bundy, do you want to be heard?

MR. BUNDY: That's up to you, Judge. Apparently, I was confused for 28 days about what happened. I'll try to figure out what I did wrong. Apparently, I did a lot of wrong things in

this case. One being legal fees, but that's another issue. Apparently, you did a million things wrong yourself.

THE COURT: I've been known to do that.

MR. BUNDY: I'm a little confused. So it's a point of clarification. Are they taking the position that you don't have to pay legal fees or costs?

MR. TERRY: This was just addressed to the expert witness --

THE COURT: This relates to the finding by --

MR. TERRY: -- fees and costs. We'll talk about attorney's fees later.

MR. BUNDY: Do you concede you're responsible for legal fees?

MR. TERRY: To some extent under the lien law, yes.

MR. BUNDY: I'm the country ham. I mean, we won, right?

MR. TERRY: Mr. Bundy, I didn't say anything about attorney's fees right now. We'll do that later.

MR. BUNDY: So let's talk about this country ham. Okay?

THE COURT: All right.

MR. BUNDY: My recollection of this case, a little different from his, is that these people voluntarily filed a $1.2 million lien against my client, and we spent four years litigating this case. When it came their turn to put up their lien, they put a guy on the witness stand and said we quit, we quit. And I asked him why did you quit. His response was, because of you. Me? Yeah. Yeah, because you said you were going to fight us forever and you were never going to pay this bill, and that's what you've always been saying, and so we quit.

Now, duplicative lien, this is an excessive and duplicative lien, as you found. There was no basis for it. There was no evidence introduced in front of you to substantiate a single dime of it.

The notion that they're entitled to some credit for not coming in and keeping us from getting an audit, that's none of their business. And they want credit for not coming in and not meddling in somebody else's business. This is all fantasy stuff. Okay. It's all fantasy.

It takes a lot -- it comes with some

ill grace, as Mr. Howe used to say, to file a $1.2 million lien and come in here in front of you and say it's okay under the statute to do it, perfectly okay, that we, the subcontractors, and the general subcontractor don't have to sit down together and say, you know what, your lien is already included in my lien, okay, but what we're going to do, because we think the statute says we can do it, we're going to double up and make Bennett lose $40 million on his hotel because we think we can do it.

We went in front of this court seven times over a three-year period, starting with the judge who now lost his job and for good reason. He wouldn't give us any relief. We spent time and time again. You issued rule to show cause, as they would never show us the bill. And when these gentlemen finally had to come down here from Charlotte, four years later, after sitting in that courtroom for three months and watching this case, said we quit, and now they don't think that they're responsible. It's outrageous.

Thank you, Judge.

THE COURT: Let me ask you this: My recollection is that Old North State Masonry is in

a little bit different position from the other two entities who represent Watson Electric, y'all actually settled with; did you not?

MR. BUNDY: No. That's Watson Electric's position. We're going to talk about it. I didn't settle with them. They counteroffered. Under the common law when somebody makes an offer and you counteroffer, the offer is withdrawn. Randy Bell taught me that the first day of law school. Apparently the statute doesn't get rid of that.

THE COURT: The other one was bonded off. We talked about that as well, right?

MR. BUNDY: Yes. Sorry, Your Honor, I didn't mean to yell. That's just me. I can't help it.

THE COURT: Let's talk about, before I get to --

MR. WINDLE: Your Honor, may I?

THE COURT: Yes, I'm happy to hear from you.

MR. WINDLE: A brief response. One, there is nothing illegal or wrongful with filing a lien in accordance with the lien law and then choosing to dismiss it. Every lien claimant has

the right to do that. There's nothing in the lien law that says once a trial starts you can't dismiss it without getting penalized. That's not the law, period.

Now, our lien -- the Old North State Masonry lien arose at the time -- 100 percent at the time Old North State Masonry started work. That's a declaration under the lien law. Once you have those lien rights, if you file a proper lien you have the legal right to dismiss it at this time without penalty unless it's willful -- unless it's excessive, wrongfully excessive or willfully and knowingly contains amounts that the lien claimant is not entitled to be paid for. Thank you.

THE COURT: Just so I'm clear, there is no question but that y'all dismissed your claim during the trial; is that right?

MR. WINDLE: Yes, sir, we did.

THE COURT: Towards the end of the trial, as I recollect.

MR. WINDLE: Yes, sir, for many different reasons, we did.

THE COURT: While we're on the subject, you want to mention Watson Electric?

MR. WINDLE: Old North State Masonry.
THE COURT: Lithko.
MR. WINDLE: Lithko, I'm sorry. Lithko was in a similar situation, but also in a very different situation.
THE COURT: Yes.
MR. WINDLE: Lithko actually filed two liens. And the major difference between the Lithko situation and Old North State Masonry situation is that Balfour bonded quickly, promptly, bonded off both of Lithko's liens at Balfour's cost and no cost to Library.
And at that point in time, when a lien is bonded off, it is removed from the owner's real property. The lien is then attached to the bond. So once the liens were bonded off -- and they were bonded off, both, within ten days of me filing them out, Lithko and Balfour doing the bonding, purchasing the bond and filing the bond.
There is no claim on the owner's real property, and because those liens aren't on the real property, the Lithko liens having been bonded off don't affect the owner's ability to do anything they want to do with the property: refinance, get a -- sell the property, because

there's no Lithko lien to interfere with anything.

In Lithko's situation, Lithko is opposing or asking the Court to reconsider, alter, amend its order stating that Lithko was responsible for any of the expert witness fees of Cotton & Company for virtually the same reasons as Old North State Masonry. Lithko's liens, even though they were bonded off and didn't affect the owner, were not wrongfully duplicative. There was no evidence that Lithko's liens were excessive. Lithko did not interfere with the audit of Balfour's project records by Library to verify the cost of the work.

And if there's any issue or question about Change Order Number 34, signed by Balfour and Lithko, reconciling various change orders and back charges, the same argument exists: Lithko has got a lump sum contract. Lithko doesn't communicate with Library. So if Library says that Lithko somehow denied the owner the benefit of some back charges, that's just not accurate.

Lithko, under its lump sum contract with Balfour, has no obligation to inform Library about the negotiation of these change orders. That's Balfour's responsibility. And there was no

evidence presented at trial that Balfour did that or didn't do it. For those reasons there's no -- we would submit to the Court that there's no basis for ordering Lithko to pay any of the expert witness fees of Hadley and Cotton & Company.

I do want to say this: They filed it legitimately. It was bonded off. Once it's bonded off, neither Cotton & Company or Library had any reason to review or analyze the lien claim. It's not on their property.

Here's what's important, Your Honor, is that Lithko made two claims. One was a breach of contract claim, and the lien claim. Well, there is no lien claim. The lien claim has been bonded off. Here is the important points, the damages claimed by Lithko for the breach of contract claim are the exact same damages as specified in the lien claim.

Now this is getting into the argument for more of attorney's fees.

THE COURT: Right.

MR. WINDLE: But if there is any review or analysis of Lithko's damages by counsel for Library, it could only be for reviewing the damages under the breach of contract claim. The

lien claim is gone. So if I go through their bills and I see reviewing Lithko lien claim, that's an inaccurate statement, because it's actually reviewing the damages for the breach of contract claim.

THE COURT: I get your argument, because there is no lien once it's bonded off?

MR. WINDLE: Once it's bonded off. So, thank you, Your Honor.

THE COURT: Okay. Do you want to be heard on that?

MR. BUNDY: Thank you, Your Honor. The issue with the bonding off is a very interesting one, and the reason it's interesting is because the general contract between Balfour Beatty and Library required that Balfour Beatty bond off on the lien claims of subcontractors. If you read it closely, it says: Bond them off or otherwise deal with it, right.

The very reason that you have that contract provision is to prevent double liens. If the general contractor had complied with his contract provision and bonded off all of the subcontractor liens, or they could have even saved money by not even bonding them off. They could

have simply sat down with their subcontractors and said we're going to reduce our lien by your liens, okay, and in effect bond those liens off, okay, because it's -- they doubled up, right.

Let's say the subcontractors had $6 million in liens, right, and the general contractor has another 6 million bucks, okay, so that's 12. What they did instead was they said, all right, the subs are going to put 6 on. They owe us 6, but we owe the subs, so we'll add another 6, which is exactly what they did. They took $12 million worth of liens and turned it into $18 million worth of liens. That's exactly what they did here, except they turned 8 into 22, or whatever it was.

My point is is that while they say that the statute allows them to do all of these nefarious things and permit extorsion -- because that's really what they're saying is that the statute permits extortion. Because we know they committed extortion because they started out this case by saying that Mr. Bennett doesn't have any money, and that's why he's not paying us. You didn't buy that, but nevertheless because they took that position, that's why they doubled the

lien up. That was their modus operandi. That was their intent.

So by failing to bond off these liens, okay, the general contractor by failing to bond off the liens, which was their absolute right and duty, and incur that cost, which was a breach of contract in and of itself, right -- that was a major breach of contract. That's a material breach of contract, failing to bond these liens off or otherwise deal with it. They could have dealt with it by just what I explained, by reducing their total lien by the amount.

We probably wouldn't have the situation that we have, and it wouldn't be nearly as bad as it is, because if they had done the right thing, played by the rules and not tried to commit extortion through technical and really obtuse -- the legislature in South Carolina in conjunction with the Sea Pines case I guarantee you never intended to allow contractors to commit extortion in order to get paid.

If this case is reversed, then developers in South Carolina are going to have a heck of a time deciding to come down here and work, because every single subcontractor and

general subcontractor in this state will know if we put enough liens on this developer and this owner, we will bring him to his knees and we will murder and prosecute him.

This is a black swan. They ran into a -- you know what a black swan is? This is a black swan. Balfour Beatty ran into a black swan. This is how they do business worldwide. They have been convicted of criminal -- they have been convicted of crimes, okay, for stealing money up at an Air Force base. This is who these people are. That's who they have always been.

MR. WERNER: Judge, I'm sorry, I object. We have gone --

MR. BUNDY: It took you too long.

MR. WERNER: -- we have gone too long in pontification.

THE COURT: Hold on. Hold on. We might get to that on the punitive damages case. We're not there yet.

MR. BUNDY: It's just a preview. I'm sorry.

THE COURT: Let me ask you this question: If the statute clearly allows for duplicative liens, then they --

MR. BUNDY: It does not. I don't concede that.

THE COURT: -- but then the question becomes one of excessive liens.

MR. BUNDY: Right.

THE COURT: I'm trying to distinguish between the two.

MR. BUNDY: Based on the result and based upon -- and the other thing that's fascinating to me is the argument that there was no evidence that the -- they didn't put any evidence. They're the ones who quit. They didn't come into court and put any evidence. To the contrary.

I put in a document that on its face appeared to be conspiratorial and against the document he's referring to. Now, then he doesn't put in any evidence. Doesn't come into court. Doesn't put on a witness. Sits there and listens to it for four weeks, and now because I didn't prove a negative -- it's impossible to do.

I put in the evidence that I had. You looked at in the confines of everything and determined in your mind, since there was no evidence from them, right, they got -- the

document says what it says. You interpreted it the way you have interpreted it. I interpret it the way I interpret it. I argued it based on circumstantial evidence and the surrounding circumstance.

Now they come in and say I know we didn't put in any evidence, we didn't really even show up, but you, Bundy, didn't come in and show that this -- that something happened that didn't happen. I don't quite understand the double negative. I don't think you could ever prove what they're -- the burden that they're putting on somebody is impossible to prove. So as long as they don't show up and respond to anything, I lose. I mean, it doesn't really make any sense.

You know, as it relate to his motion, I take the position that they dropped their lien, didn't come in, they filed a lien, and they lost, okay, and it's basically it. They lost. They should have to pay attorney's fees, and they should have to pay the costs related to their conduct as outlined in your order and as explained to you over 25 days in trial based on the documents and the testimony, not what didn't occur.

They want you to do things based on what didn't happen, what didn't occur, what wasn't presented.

THE COURT: Your claim against Lithko was in the third-party claim arising, because y'all had no contract with them, correct?

MR. BUNDY: The claim we had against them was for civil conspiracy, which Your Honor -- we're going to talk about that later, right? I didn't quite get to the finish line on that, in your mind.

THE COURT: Right. Okay.

MR. BUNDY: Thank you, Your Honor.

THE COURT: All right. Mr. Windle.

MR. WINDLE: Just two brief comments. One, as I said in regard to Old North State Masonry, there is no prohibition in the lien law about when you can or cannot dismiss your lien. You can dismiss it at any time. Lien law doesn't penalize you for deciding not to pursue it. You can decide not to pursue it for hundreds of different reasons. All legal reasons.

Now, the only other comment is this, and I should have made this before, is that Lithko would request that the Court reconsider, alter,

amend its finding that the only purpose for filing duplicative liens was to break the owner's will and bring the owner to its knees on the basis of the fact that all Lithko did was file a valid, legitimate lien in accordance with the provisions of the lien law of South Carolina. It was bonded off. At that point Library is not defending a lien claim. The surety bond company is defending the lien claim.

The final comment is this: In regard to how the Court determines whether a lien is excessive or not, the case law was very clear that that's not determined by the outcome at trial. It simply is not. It's determined when the lien is filed and whether the lien claimant willfully and knowingly knew that he was asking for something that he wasn't entitled to, and there's no evidence of that in regard to Old North State Masonry or Lithko in this case.

THE COURT: You said on both of these clients, y'all had lump sum contracts? There was a set amount from the word go?

MR. WINDLE: Yes, sir. There was nothing in our contract that said we had to calculate any cost of any work, whether it's our

work or Balfour's work. We had no obligation to calculate what costs were reimbursable under Library and Balfour's cost-plus contract or any obligation to verify that. That was them, and I -- and everything else that Mr. Bundy said was directed to Balfour, not Lithko. Thank you.

THE COURT: Thank you. I think Watson had something similar. You want to be heard on that one?

MR. TERRY: Yes, sir, Your Honor. Your Honor, before I argue this motion, I think it's appropriate that I ask that you sequester Mr. Infinger. I don't know what you're going to do with his affidavit. I don't know if they're going to put him up. What I don't want him doing is sitting here listening to arguments and changing what he might testify to when he's put on the stand.

THE COURT: I don't intend to have him testify. I have his affidavit. I intend to allow the affidavit, just so y'all know. The affidavit is his expert opinion. To the extent it gets into legal conclusions, I'm not going to consider that. I know that was part of what the argument was, but he's quite competent as an attorney. He's well

known around here. And I don't think anything you say is really going to change his opinion, but I don't intend to take testimony from him, okay. He's stated what he's going to state.

MR. TERRY: Thank you, Your Honor.

MR. BUNDY: I don't think anything I'm going to say is going to change Marvin's opinion. He doesn't listen to me at all.

MR. TERRY: Again, Your Honor, I'm Don Terry, here on behalf of Watson Electrical. We have filed a memorandum in support of our motion to reconsider your October 6th order.

I want to start out, Your Honor, talking about your September 14, 2021, order. In that order you held that Watson and Library had settled -- your words are: Resolved all claims arising out of or relating to Watson's mechanic's lien.

That order, there was no motion for reconsideration of that order filed. Still to this day there's been no motion. And we went to trial with that order in place, Your Honor. And during trial we objected any time there was an attempt to offer evidence related to Watson's mechanic's lien, and we'll talk about that.

So, Your Honor, there's really -- when that claim was settled, that ended the inquiry for this court about all claims related to and arising out of Watson's mechanic's lien. That resolved Watson's mechanic's lien. It resolved Library's declaratory action against Watson, because it only related to mechanic's lien as being excessive and duplicative. And to the extent that it -- that Library's civil conspiracy claim against Watson related to the mechanic's lien, it resolved that too. That's how we came to trial.

Now, your order states a few things that are incorrect about Watson's claim, and sometimes you refer to -- you list the subs. Sometimes you just say "subcontractor." But what you say is prior to trial the subcontractors, including Watson, dismissed all of his claims. That is not what happened here, Your Honor. Watson settled its lien claim and all claims arising out of or relating to its lien, and Watson pursued a negligence claim at trial, which you granted directed verdict for Library Associates. So that issue needs to be corrected to get the order right.

Now, because these claims were

settled, particularly, like, Watson's mechanic's lien claim --

THE COURT: I think that was in a footnote, wasn't it, what you just referred to?

MR. TERRY: In the footnote it says "subcontractors," but when you're discussing --

THE COURT: Page 2: "The subcontractors have discussed any and all claims against owners." That would not be correct, because y'all settled, correct?

MR. TERRY: We settled one. We pursued one, the negligence claim. Then in several of the paragraphs where you're discussing Balfour Beatty's change order request, you say Watson dismissed all of its claims prior to trial; that needs to be fixed as well just to get the record right.

THE COURT: I'll let you point that out to me somewhere later on. All right?

MR. TERRY: All right. Now, we -- in our brief, we discuss a few cases. One is the Seckinger versus Excalibur Vessel. And that case discusses that -- I should read my notes. Let me just say it this way, because the case is settled, Library can't be the prevailing party on Watson's

mechanic's lien claim. Therefore, as a non-prevailing party, it cannot be entitled to attorney's fees.

Now, our case law says that to be a prevailing party there must be some victory -- a victory in some degree on the merits. Watson and Library didn't litigate Watson's mechanic's lien claim. In fact, Mr. Bundy during trial says the only claim we have against the subs is our civil conspiracy claim. And I'll concede if he thinks this mechanic's lien claim continued to trial, he's defending that claim, but there is a declaratory action, Your Honor. He wasn't pursuing that against Watson either. Library wasn't pursuing against Watson.

So, Your Honor, the Court -- the October 6th order should be amended or altered such that you find that Library was not the prevailing party against Watson on the mechanic's lien claim. The same should be done as it relates to the declaratory action claim, because that claim was also resolved by your September 14th order.

Now, there is another issue here, Your

Honor. Now, you granted judgment for Watson in your order resolving all claims relating to and arising out of Watson's mechanic's lien. Albeit it was only for $100, you granted judgment. Under the mechanic's lien statute, the remedy is not a money judgment. The remedy is to sell the property at foreclosure to satisfy the judgment. So your order should be amended to resolve that issue as well.

THE COURT: I assume you have not received your $100; is that right?

MR. TERRY: I am relatively confident my client has not received the $100. So because Library and Watson settled all claims relating to or arising out of Watson's mechanic's lien, I ask that you alter, amend the order as requested.

THE COURT: All right. Very good.

MR. BUNDY: Thank you, Your Honor. Instead of what my adversary thought I was doing, I'd like to tell you what I thought I was doing, because apparently they're two different things. What I thought I was doing was defending a mechanic's lien statute based on a lien they brought. I thought I was prosecuting a DJ action against all defendants, and I thought I was

bringing a civil conspiracy claim against those people. That's what I thought I was doing, okay.

THE COURT: Okay.

MR. BUNDY: What happened was that when we got close to trial -- and I'm speculating here, but I think it's based on -- it's pretty good, kind of a good basis in fact, that all of these subcontractors realized they were going to have to come down to court and put evidence in front of you that they were owed any money, and they all got cold feet because they realized they didn't have a case. All they had was a bunch of allegations in court about not doing anything wrong and all of this. When the rubber hit the road, they all quit, but I saw it coming, okay.

I figured under the mechanic's lien statute, because -- believe it or not, this ain't my first rodeo. I went and offered $100 to settle what was his lien, 1 million 8. That's a pretty good settlement, okay. I didn't think he would take it, but I wanted to at least cut that prevailing party attorney's fees, poker game in half. Do it all the time.

I've been able to do it in the past where you send them back and forth to each other,

and you realize you're getting ready to go down and try a case over $500 because y'all have now squeezed in the middle to try to keep from getting banged for attorney's fees. So that's what I did, I made the offer.

Now, the mechanic's lien statute, if you read it, if you bother to read the whole thing, I believe it starts either at the beginning or at the end and points out that this is a statute and does not abrogate the common law. We're still going to have the law, the common law applied to the statute to the extent it's not changed by the statute itself.

When it was determined -- when it was determined unconstitutional back a while back that the statute was unconstitutional because only contractors could get fees, they tried to fix it. All right. I think they did fix it. They turned it into this game of back and forth. I think the statute even talks about lower offer back and forth, but nowhere in the statute does it say that what you learned the very first day you walked into the contracts class was no longer the law, which is that if I make you an offer to settle for 100 bucks and you call me back and you send me

back a counteroffer -- I think in their case they sent a counteroffer of $800,000, some number. You know, you want to pay us 100; we'll take 800.

I assume he thought we were going to go back and forth and I was going to pay him some money. I never intended to pay him anything. I wanted to put a penny in there, but I didn't want to insult him. I said, here, that's about what your case is worth, maybe a penny. Zero is what his case is worth.

So he sent me back a counteroffer. He being the lawyer representing these people. At that point I'm done. I made an offer. I offered to buy the Rolls-Royce for $10. They said they would $800,000. I walked off the lot. I don't want your Rolls-Royce. That was the end of it. There's nothing in the statute which says to you, no, this is a continuing offer for 15 days. In other words, what the statute would have to say is the offer remains open for 15 days, but it doesn't say that, okay. It just says make an offer, and within 15 days you get to answer it.

Just like we learned in law school: Here is an offer. I'll sell you something for 100 bucks, and you have 15 days to respond. Now, you

can respond on the 15th day, and if you say I'll take the 100 bucks, I have to sell it for 100 bucks, but that doesn't mean that you get to come back and say, no, I want 500, and we're going to negotiate back and forth for 14 days and on the 15th day you go, okay, I'll take the offer you made originally. We couldn't have commerce that way. We couldn't have a business world if that were the way it is. And that's not what the statute meant, and it violates common sense. Okay. It just doesn't make any common sense.

Sometimes I'm afraid I think like a lawyer, like I was taught to think. That's what we went to law school for three years for, to think like a lawyer, not like a layman. Half the laymen out there would think you can do this, but you can't. So that's where we are. That's where the statute is, just as to the mechanic's lien.

I didn't offer to settle anything else for $100. It was just the mechanic's lien, and that was what the offer was made under the rubric of the statute we're dealing with. So not only do they misinterpret the statute; they're turning it into something it doesn't even say. Okay. So what happened? I assumed it was over, okay. And

then they show up and said, oh, no, we're done for 100 bucks. No, you made a counteroffer. No, the statute says we don't agree with you. So I brought it to your attention. We argued it, and you disagreed with me. That ain't unusual. Okay.

There's nothing in the rules, however, that says I have to do anything. I don't have to make a motion to reconsider. Motions to reconsider relate to things that are not clearly determined in your ruling. Somehow these people have taken a 59(e) motion and turned it into a condition preceding the filing of an appeal. That's not what it says. That's not what it's for.

You were very clear with me: No, I don't agree with you. Okay. Well, I'm not going to argue with you. I do, and I apologize for it about stuff you already ruled, but I try not to. Okay. In this case I did the right thing. I didn't argue with you. So when I stand up in court and say all that's left is this, that is all that was left because you took the rest away from me. I'm not going to sit there and argue again.

So where we are is, in my opinion, there was no settlement because it was a

counteroffer, and that took care of my offer. That's the position I took then. That's the position I take now.

As it relates to the declaratory judgment action, they were always a declaratory judgment defendant. I don't have to name the particular defendant I'm producing evidence against. If I have them in court, I just put the evidence in and you make the determination of what applies to whom. I don't say, well, when we talked about this, what about this guy, this guy, I'm prosecuting my declaratory judgment action.

There is nothing in the statute or in any law in South Carolina that I'm aware of which says you can't bring other causes of action with a mechanic's lien statute. Declaratory judgment statute stands on its own. I can get relief under all kind of different things. Now, I can't get double relief, but I can certainly get cumulative relief. That's what I'm asking for is cumulative relief, not double relief, because you can't get relief from the extortion conduct of these people without a declaratory judgment. You can't get it in a mechanic's lien statute, and you can't get it under punitive damage, because you can't award

enough punitive damages that's going to be upheld on appeal to get back to my client what he's lost. That's just where we are.

Where we are is I think he's done. He didn't show up for court. He didn't present his mechanic's lien, but if he wants to bring it again and go down there and try that mechanic's lien he's got against me, I'm ready to go. We'll start in the morning at 9:00 o'clock. I'm ready to go, because I have enough sworn testimony that the owner did nothing wrong, okay, and enough sworn testimony that he didn't get paid money we paid to get him paid, okay. I'm pretty comfortable I'm going to be at zero again. He's going to pay these fees either this time or next time.

Thank you, Judge.

THE COURT: Certainly.

MR. TERRY: May I, Your Honor? One, I want to make sure, be clear, I don't remember any argument at all on Watson's motion. I don't think it occurred. I'm unaware of any record where Mr. Bundy came in and argued against any settlement which resulted in your order that says all claims arising out of and relating to Watson's mechanic's lien are resolved. Your order was

issued.

THE COURT: Back on the September 14th order, right?

MR. TERRY: Yes, Your Honor.

THE COURT: That would have been during, like, the first week of trial; was it not?

MR. TERRY: It was issued during the first. So the settlement occurred before that, but then you don't issue the order until I believe it's the first day of trial, Your Honor.

THE COURT: I think that's right. September 13th is the first day of trial.

MR. TERRY: Yes, Your Honor. I don't think there's any.

MR. BUNDY: I brought it to your attention I didn't agree with it. I don't know if I was allowed argument, but I brought to your attention that I did not agree there was a settlement, that there had been an offer and counteroffer. I'm satisfied of that.

MR. TERRY: This counteroffer he's talking about, he didn't present that to the Court. Where is it at?

THE COURT: There's an order that's been setting out there for quite a while.

MR. TERRY: Yes, Your Honor. So Watson comes to trial with an order that says all claims arising out of and related to his mechanic's lien are resolved, that and judgment in favor of Watson? Well, Watson has no reason to come into court and present offer on a mechanic's lien. Watson has no reason to come into court and defend a declaratory action.

You asked me -- it's in the record -- during trial if you're out of this case, why are you still here? And the response was we're a defendant to a civil conspiracy claim, and we have a negligence claim. Nobody disagreed with that. That's what we were there for. That was it. And if you find otherwise, we're back at this mistrial again. That's where we're at.

So we ask that you grant our motion to reconsider.

THE COURT: It's 11:20. I want to take a ten-minute break. Then let's come back and start getting into the matter between Balfour and Library Associates. I'll start with y'all's motions to reconsider.

MR. BUNDY: Thank you, Judge.

(A recess was taken.)

THE COURT: I'm going to reserve judgment on those motions to reconsider. I think we're going to get back into attorney's fees probably later in the day. What I wanted to take up now was Library's motion to alter, amend, make additional findings about.

MR. HILDEBRAND: If I may, before you get started, Your Honor, I'd like to get on the record my motion or my request that the election of remedies be heard and be heard before addressing the other issues related to Library.

THE COURT: It's denied. I don't need to hear any more.

MR. BUNDY: May it please the Court, Your Honor. Your Honor, this is our motion to reconsider. As I said earlier, I view motions to reconsider as just simply making sure in the record that Your Honor has ruled on things. I'm not arguing particularly with you because I know you're not going to change your mind. I don't want you to particularly, but that's the purpose of these things.

THE COURT: Sure.

MR. BUNDY: Really, our motion is out of an abundance of caution in some sense because

we, both sides, gave you proposed orders. And in the main, you signed our order, okay. And you added a lot -- you added things, and it's your order. It's not ours, but it's the one we proposed or most of it is. There were two things that you didn't do that were in our order specifically. It was on Page 47 of our proposed -- let's start with Page 47 of our proposed order, which is: It is therefore ordered as follows.

THE COURT: Okay.

MR. BUNDY: Item 2, judgment in favor of Library Associates in the amount of 24 million 458. And then Number 3 was judgment in favor of Library conspiracy. And so basically it was a conspiracy and the unfair trade practices claim, right?

THE COURT: Right.

MR. BUNDY: You didn't sign those. I'm sure you ruled on it, but I just want to make sure that it's clear in the record, right, that I brought that up. Specifically on Page 46 of the proposed order, we had a paragraph, the two paragraphs before civil conspiracy, where the proposed order finds the necessary elements of an

unfair trade practice, and you took out those two paragraphs.

And then on the following page, Page 47 related to the civil conspiracy, we had some proposed language which you omitted, right. So I just want to make it clear that by omitting those things, you have ruled on them. That's all. So to reserve my rights on appeal.

That's all I'm trying to do. I'm not trying to mouse trap anybody. I'm not asking you to go through the whole order, but those are the only two things here you didn't do. So I just want to make sure it's clear in the record that you ruled on those things, unfortunately against me. I can argue now, but I would rather just say you and I have a legitimate disagreement about that. You have your reasons. I have my reasons. I think I have stuff in the record; you don't. We will go figure that out in Columbia.

The only other thing we specifically brought to your attention is dismissing the third-party defendant, Balfour Beatty Construction Group, Inc., under the guarantee. You dismissed that, and we respectfully submit that's error. And so I wanted to make sure that's preserved on

appeal.

Those are the only complaints I have with an otherwise perfect order.

THE COURT: The dismissal of the construction group as guarantee, that came sometime during the trial, as I recall.

MR. BUNDY: Or early. It could have been before trial.

MR. WERNER: It was during trial, Judge. You essentially did it as a directed verdict, as I understand it.

THE COURT: As a directed verdict. That's kind of my recollection.

As to the Unfair Trade Practices Act, I did not find for you on that because I found that this was essentially a private contract between two parties.

And on the civil conspiracy, I really linked in to the joint defense of prosecution agreement and found that was a legitimate process. That's why I ruled against you in those areas.

MR. BUNDY: Just for the record, they sued each other. So I'm not so sure they didn't get the benefit of a joint defense agreement and get to sue each other, but that's an argument we

have in Columbia.

With regard to private, you just disagree with that?

THE COURT: Yes.

MR. BUNDY: Thank you, sir.

THE COURT: Based on what you just told me, we might have a lot more arguments on that, but we'll see.

MR. BUNDY: Thank you.

MR. TERRY: As I understand Library's motion, they're asking you to adopt their originally-proposed order. Are they withdrawing everything other than what they just argued?

MR. BUNDY: I'm not withdrawing anything. Okay. I made my motion. It means whatever it means.

THE COURT: So your motion to alter, amend, make additional findings which was filed October 16th is denied. Okay, just so that's clear on the record.

MR. BUNDY: Thank you.

THE COURT: So I think on the list of eleven motions, the Court has now ruled on the first six. I've taken 7, 8, 9 under consideration, and that gets into Balfour Beatty's

motion to alter, amend. I wanted to start taking that up. I plan to break for lunch around 12:30 or so. But I did have some thoughts on how to take that up, and I want to share those with you.

And I also will commend whoever wrote y'all's brief -- I think it was Mr. Werner -- in support of that, not the motion itself, but the memoranda, because it did attempt to categorize these things, and that was what I wanted to address.

As I read Balfour Beatty's 59(e) motion, there were 122 entries. And to the extent there was a failure to rule, those were Numbers 90 through 122, you are entitled to a ruling. Okay. That's the purpose of the 59(e) motion.

To the extent the Court committed errors of law, those are Numbers 75 through 77, all contained in Page 17 of your motion, you're entitled to argue those.

To the extent there's a claim or no basis in the record, the rest of the allegations, to my way of thinking, are just comparisons with the Court's weighing testimony, and if I found one witness more credible than another, I get to make that decision. And that's probably the one thing

that the Court of Appeals, Supreme Court cannot overturn, is when I make a decision if I find somebody credible or not. The rest of it y'all are free to argue for the rest of your lives. But anyway, that's my interpretation of a 59(e) motion.

I did have some specific questions, and without getting too far into it, as to Item Number 105. It was reference to forfeiture. I don't remember ever discussing forfeiture, but I suspect that y'all were referring to liquidated damages is what I suspect you're referring to.

MR. WERNER: You're talking about in the motion itself?

THE COURT: In the motion itself, yes, sir.

MR. WERNER: I'll pull it out. I have tried to get up to speed, but you are correct that I did not.

THE COURT: These are my first thoughts. I went through the whole thing to start with, and that's been hanging around a little while. So I just wanted to share those with you. I actually had three of them, but 105, or fail to rule on the doctrine of forfeiture, I never -- I

don't recall any discussion of the doctrine of forfeiture at trial.

MR. HILDEBRAND: What that related to, Your Honor, it was in our proposed order that the Court abhors a forfeiture and basically by allowing or insisting on strict compliance with a noticed provision, and then finding that Balfour because it did not arguably comply with the strict notice provision is entitled to nothing. We don't get the $5 million under the contract. We don't get our $3 million for RCOs. We don't get the $3 million in the delay damages that we suffered. Then our argument is --

THE COURT: That constitutes a forfeiture?

MR. HILDEBRAND: It becomes a forfeiture, right.

THE COURT: I just wanted to make sure I understood what that was.

The other one I had was 112, which is on the next page. It says: Order failed to rule over the sum of Library's claims are barred by parol evidence of statute of fraud. That would have been a discovery objection at some point in time during the trial, and I'm assuming, again,

that's something that is well within the discretion of the Court at the time of trial if you can show an abuse of discretion. I just point -- those are the two I point out to you.

So those are the ones that I -- as I read them, I just was -- forfeiture I was just grasping at straws on, but it may well have been in your proposed order, which I would have read, but clearly didn't agree with.

And then the other stuff is just sort of parol evidence, but that was just my initial review. And then I did discuss about -- I made a note to myself on Library's motion about Item Number 2, which was a dismissal of construction group, and we discovered that. So that's covered.

With that then, I think I'm ready to proceed. If y'all want to start, let's get started, Mr. Werner.

MR. WERNER: Again, Judge, if you have a list of questions -- I mean, again, I don't -- Mr. Bundy and I don't agree on a lot, but I do agree that while our courts have said that Rule 59(e) motions can generally be regarded as motions to reconsider and you can sort of ask just to visit again, the primary purpose is to make

certain that if there is anything that the parties believe was raised and not ruled upon, that the Court has to be given the opportunity to do so in order to preserve for appeal.

We agree that it's the motions that matter. Their motion either does or doesn't. Ours either does or doesn't. What's written in the memo, what's argued here today is really just attempts to convince you.

And, again, my view largely is if you have questions, I want to convince you on questions you have, but I'm not going to just belabor, you know, where you are. We have written down what we think were places where -- and you are correct, in many cases we think that what you failed to, in fact, consider and answer were issues of law.

And so I'm glad to sort of start and go through it, or I'm glad to first sort of address what you have, and then if there's anything else I want to say, I'm glad to do that. So if you have guidance, I'm happy to take that. Otherwise, we can work our way through it.

THE COURT: Let me whip through here, because I don't know that I -- it was one, and I

can't remember whose memo it was, but there was one issue that had to do with the rescinding of the rule to show cause, and the allegation was -- I think it was in Balfour's motion. The allegation was that by rescinding the rule to show cause, the Court ruled on merit of that issue, which had to do with the audit provisions.

MR. WERNER: I know that wasn't specifically addressed in the memo that we submitted. I do have a vague recollection about that as being one of the grounds in the motion. You know, we have made the argument generally about the counting and audit issues, and, you know, what we have presented to the Court, frankly, is that we think the order reflects, again, respectfully, a fundamental misunderstanding of the contract.

You know, the contract provided that Balfour would submit the cost report that went with each application for payment as they went through the job, right, and they introduced -- those were introduced as evidence, and they reflected -- for whatever time period each was, there was a report of the costs incurred. Obviously, you accumulate those to where at the

end you have a final job cost report. That's the way all contractors do it.

So the record, we believe, contains evidence that, in fact, a full and final accounting of the job costs was done and was provided to Library -- actually, to the architect and Library, I believe.

The audit provision --

THE COURT: That would have been done in the payment requests; is that right?

MR. WERNER: Correct. It was done in each one, and the testimony in the record was when the job was finished, it was done in a cumulative sense, the final job cost report, if you will.

THE COURT: Do you have a date on when that was submitted? I don't recall that.

MR. WERNER: I don't, as I stand here, Judge, I apologize. I do think -- I think the testimony did still -- did also reflect, however, that the unresolved change order request -- I can't remember whether they called them RCOs or PCOs -- were still not reflected in the job cost reports. They were kept separately because they had not been yet added to the contract. They were requested change orders, which, if not ruled upon

or if denied, would then become claims.

Your Honor made some findings that, you know, they were not submitted to the initial decisionmaker and, therefore, not ruled upon and, therefore, a condition wasn't met. Well, the initial decisionmaker was the architect. Each of those things was submitted to the architect in the normal course. So they were submitted to the initial decisionmaker. Balfour -- no contractor can make him do his job, but if he doesn't in some period of time, contract essentially reflects that they become claims.

So -- and I'm sorry, what I was saying is so you've got that issue of the job cost reports and the accounting for the costs of the work. Separate and apart from that is the audit provision. The audit provision is not a responsibility of Balfour Beatty. That is a right and an obligation of the owner at the owner's expense. Balfour is not required to pay for it. The only thing that Balfour is required to do is provide the cost information, which, again, the record reflects it did literally with each application and then at the end. And then if there are questions, I think it does indicate

they're supposed to try to be responsive to questions or provide additional information. And, again, my read of the transcript is there was testimony that there were questions asked, there was additional material provided, and that that was done.

So we believe that your order does not, in fact, address the fact that the accounting, which was Balfour's obligation, was, in fact, performed. Now, again, that is subject to being questioned. We don't dispute that. And to suggest that we breached the contract with respect to the audit provisions just, frankly, mischaracterizes the contract. We don't have the audit obligations. They do.

Let me -- I apologize for sliding things in as we get to them, but that's another factor, frankly, that goes to this whole issue about the Hadley fees or the audit fees or whatever. Again, they had an obligation, if they wanted to do it, to do and pay for an audit. They don't get to shift those costs to us. Now, if you -- I recognize if you found that there was something special, something different that added to those costs, I mean, I suppose you could try to

find that, but they don't just get to put their audit costs over on to Balfour, which, based on the testimony, seems to be what they are doing. They are reporting the whole audit cost as now seeking to get it from Balfour.

So that -- we sort of jumped ship, but that is the argument that we have made, and that is the focus of the motion on the issues related to the accounting and the audit.

THE COURT: Is it your position, then, that the accounting information was done and provided in all steps of the process so that they could have done an audit at any time?

MR. WERNER: Yes, they could have audited literally costs with each pay application, because the contract says that that would be provided, and the evidence is it was provided with each application for payment. Now, I admit nobody is going to audit the first application for payment.

THE COURT: Contract provided for two audits?

MR. WERNER: That's correct. In terms of formal audits where they would perhaps do a report of something, that's correct.

THE COURT: Those are going to be the costs borne by the owner, correct?

MR. WERNER: Correct.

THE COURT: Audits were?

MR. WERNER: Correct.

THE COURT: Then my issue became, as you're probably well aware, that at some point in time Balfour calls the owner in breach, files the mechanic's lien, brings the action, and at some point in time they, commensurate with that -- I have a timeline here somewhere -- is what we call the four-page letter. This is, hey, this is how much you owe us, and they shut down the Egnyte site.

Once the Egnyte site is shut down, they don't have any way to go behind them and check the records. That was one of the things that the Court was very concerned with, because it seemed to me that in order to be able to do an audit you would need to be able to get access to the records.

Somebody made the decision sometime in the January -- somewhere between the date of the mechanic's lien and January of 2019 and the date that the action was filed, March 5, 2019, to shut

down that Egnyte site, and they no longer had any access to the documentation to review the request.

Here's my timeline: So there was a pre-construction contract in which Balfour was entitled to review the plans. Okay. The plans were submitted. The architect says they're 100 percent plus. Okay. Nothing in the contract required them to be that. There was nothing in the contract required them to be BIM, but we spent a lot of time talking about that.

Then we moved into -- once the pre-construction phase is done, we moved into the construction phase. It's a $60 million contract proposed to be performed in 28 months. Notice to proceed filed March 19th of 2015. Balfour Beatty files its mechanic's lien January 25, 2019, commensurate with they sent a four-page letter and said, hey, you owe us $22.4 million.

MR. WERNER: But that's not what the amount of the lien file was.

THE COURT: No. The lien was for $8.4 million. You owe us 22, but lien is 8.4. On the 4th of February the architect responds and requests documentation, and instead of 10 days, he says we'll give you 30 days. That's February 4,

2019. Less than 30 days later, March 5, 2019, the summons and complaint gets filed. Somewhere in that time period the Egnyte site gets shut down. And then on the 6th of March, the date of the filing the summons and complaint, the four-page notebook was submitted. I think the testimony was the last day of work was in April of 2019 by Balfour Beatty.

So that's my timing on that. I can't remember, but once the Egnyte site shut down there's not much they can do, is there? There was argument about first the breach. We can talk about that in a minute. But anyway I'm trying to figure out who made that decision and why that was done, because that kept them from doing what they wanted to do. If the process was going to get resolved, it wasn't going to get resolved in that fashion. I can tell you that, so.

MR. WERNER: Again, I understand your description of it. I don't think the conclusions are necessarily correct. Again, they had cost records throughout. So to say that they didn't have access to that information, they may not have had -- and I -- Mr. Hildebrand can speak to the question about what that evidence showed about

shutting down the site.

My understanding is the testimony of the comptroller was that, in fact, when requested, they did, in fact, provide the information. Now, whether it was by reopening the site or otherwise, I don't know. I don't know.

THE COURT: I don't think that ever happened, but I could be wrong about that. We spent a lot of time trying to get that information.

MR. HILDEBRAND: I can address that timeline very quickly. I think what happened was we filed a suit. We filed a mechanic's lien. Filed a suit to foreclose. Now we're now in litigation.

The request from Cotton & Company for an audit came after the lawsuit was filed. So the response -- and it was after the time period that was set out in the contract. It was late. So we said it's late, you've requested it after the time period of the contract, and we are now in litigation, and, therefore, the rules of discovery apply. So if you want documents, as in any case that's in litigation, simply require them, and you can accomplish the same thing in litigation by

looking at the documents and responding to it.

Mr. Bundy then filed a motion for an injunction, and our response was, well, Your Honor, they never pled an injunction. There is no such motion for it. So we think that they simply need to request the documents and do their audit in discovery.

There was nothing nefarious about it. That's all it was. That's how it's been handled in every other case I've worked on. When you have a dispute that goes into litigation, you go into discovery, and that's how things are handled. So there's no obfuscation.

And, in fact, then there was a dispute by Ms. Hadley, once she started the audit, about what the audit was entitled, was intended to encompass. And under the contract, it is simply the cost of the work. You filed -- she said, well, I want additional information for your delays and other claims. And our people said, well, I don't think that that's required under the audit that's allowed under the contract.

So Mr. Bundy filed a motion and said they're not providing all -- they're not answering all of the questions that Ms. Hadley has about all

of the claims, and that's where we had a hearing before you and I worked through every provision in the contract, and then you said, yeah, you're right, Mr. Hildebrand, looking at the contract documents, they're entitled to the information for the cost of the work as it's defined, because claims were excluded. And you said this other information is not related to that, so I find that the rule to show cause should be rescinded.

THE COURT: I'm not sure I agree with that. I just found it. It's Page 34 of the memo, the conclusions. I think this is right. Hold on. Yes, it's in a footnote. So this is at the bottom of Roman VII, which heading is: The Court erred in its finding with respect to the accounting --

MR. WERNER: The footnote is actually in the section above that, but the footnote is at the bottom of 34 under that section.

THE COURT: See the order granting. So the language was: The conclusion of the October 6th order was that Balfour breached the contract by failing to perform the accounting. All our provisions of the contract of the prior -- prior findings that Balfour did, in fact, comply with the obligations under Section 61110711,

Footnote Number 8: See order granting plaintiff's motion to vacate August 7, 2020, order to show cause.

That order didn't make any such finding that Balfour complied with its obligations. Under order, Balfour sent somebody down to answer questions under oath on a rule to show cause and found out that they had done that.

So the fact it was done is different from whether or not the court agrees substantively with what happened there. I emphatically say no. I vacated the rule to show cause because they agreed to participate. I didn't make that finding of fact. That was one and done. So that's my interpretation.

MR. BUNDY: If I may, just a couple of comments. I don't know what this has got to do with a 59(e) motion. This was an argument made to you three years ago. He lost it then. I'm not sure the argument is any better today.

The primary thing I'm hearing is that we believe. Well, I don't know what they believe, but I believe they're engaging in magical thinking. This is not what occurred over the last four years.

We wrote -- Cotton wrote a letter to them saying, we want the documents for the audit. They wrote back and said, no, we're not going to give you access to your documents because we're in litigation. That's been their premise the entire time, that once you file a lawsuit, the contract documents no longer apply and we run the show, we're in litigation.

I believe you have ruled on that. I believe it's clear you have ruled on that, and let's let the Supreme Court rescind an order out to the bar at large that once you file litigation, then you can't do any -- the contract no longer applies, everything is in discovery, and you've got to respond to mega law firms' stuff the next four years. That's what they want so they can extort money and keep this thing in the air as long as they can and then they have to come to trial and put up their proof, and they can't even get past directed verdict.

THE COURT: So that was my -- that was one that sort of stuck out at me. I'm happy to talk about some other stuff, but that's really where I wanted to go on that issue. I don't agree with that. The Court didn't make a substantive

finding. I just said, hey, there's no -- apparently, there's no sense of fulfilling the rule to show cause if, in fact, they have showed up and provided what they're supposed to provide.

However, I will say that at and during the time of trial, Ms. Hadley was still trying to get documentation. That was just an ongoing theme throughout this whole case, looking to find documentation to support the claim. So they were defending the claim.

MR. WERNER: Well, asking for information to defend the claim is not the same as exercising legitimate audit rights under the contract.

THE COURT: I understand that. Having reread it, I agree with you that the audit provision is the responsibility of the owner. The accounting is the responsibility of the contractor, right?

MR. WERNER: That's correct.

THE COURT: That's what the contract says, right?

MR. WERNER: That's correct.

THE COURT: Hard to audit if you don't have the documentation you need to audit with.

That's the point. That's the difficulty there, and that's the obvious.

MR. WERNER: The record will say what it says as to whether or not they had that information.

THE COURT: That's the Court's problem with the obfuscation argument. That's really what I was concerned about.

MR. WERNER: Judge, please stop me if you have any questions about anything we're doing. Otherwise, I'll tick off a few things. I said I would get back to this.

The mechanic's lien argument, again, we have put all of this into the brief. What I understand your order found was that it was untimely because it was filed before they had finished the work, and we cited you the case, and there's actually -- I can't remember now whether it was concurring or dissenting opinion where former Chief Justice Toal really went into it and talked about it.

The case law is that -- and the statutes say you can file a lien at any time you haven't been paid. The key to that is is that the filing date on that lien, so that the world can

judge it, that simply sets the time that you then have to bring your foreclosure suit. So the idea that they --

THE COURT: In order to perfect?

MR. WERNER: Correct. Liens arise -- it's beyond question, they arise inchoate the moment you turn the first shovel, and they exist, and then you have duties to give appropriate notices and then the foreclosing time.

THE COURT: Right.

MR. WERNER: Giving and filing a notice of a lien before the work is finished is, in fact, a timely lien, and it will remain a timely lien as long as they file the foreclosure suit based on that trigger date, not the last date of work. And that happened here. I mean, the timing is clear, and they filed it within the time, the statutory-required time, after they filed the notice of lien.

Respectfully, we think that what you've said in your order is just factually incorrect and it's not consistent with the law.

And as to the issue about it being duplicative or excessive -- again, this is where I said I would come back and just -- I think what

Mr. Windle said to you is accurate. I mean, the statute -- in fact, they even created separate sections to make it clear that there were separate and independent rights of the general contractor and the subs. And inevitably, those will be duplicative, and that does not make the claim duplicative or extortive or anything else.

It's people exercising their statutory right, and that's why the law is -- contrary to what you heard argued, that's why the law is that once someone foreclosures one lien on the property, they're all foreclosed at the same time, so that when it comes to Your Honor, it gets sorted out. There aren't duplicative payments. There aren't excessive payments. It gets sorted out.

And we just think that your findings that the lien was somehow improper or invalid are just not -- I mean, they just can't stand.

THE COURT: As to the duplicative, I may be certainly agreeable with that, to a point, I have an objection here. Let's talk about the excessiveness. Let's talk about how did it get to be where it just kept moving around from time to time? As I said earlier, you had a $22 and a half

million claim sent by four-page letter, but you have $14 million less lien filed.

MR. WERNER: Well, because there are things that are not lienable that are claimable. I mean, you know, a lien is for the labor or materials or services actually inputted into the property.

A lien, and it -- the statute and case law says and that includes, you know, profit and overhead if they are part of the contract, and then it defines the extent of that.

But unresolved claims for, like, delay damages or lost productivity or many of the things that can arise in projects like this aren't necessarily lienable. They may be claimable, but they aren't necessarily lienable.

I think what it shows, frankly, is there was a real effort here to separate what was lienable versus what they thought they actually had a contractual claim right to seek and recover. So I think, frankly, the totality of the evidence reflects that there was a serious effort made not to be duplicative or excessive.

And, you know, you heard the pontification earlier that they had a duty to bond

these out. Well, the contract specifically says that that duty does not exist when the reason that there is no payment is because the owner has not made payment. It's in the contract.

Now, again, and Mr. Windle correctly I think he even cited you the case, you don't judge this at the end of the time that you try all of the merits. You judge it at the time the liens are filed, and there was no evidence that at the time the liens were filed that any of those excessive or duplicative circumstances existed.

You know, we attempted, Judge, to address the breach of contract issue, but that's sort of a factual. I mean, if there is anything in that that you would like to talk about, we could sit here all day and talk about that.

THE COURT: I don't think that's going to be productive, do you?

MR. WERNER: Let's talk about the costs not recoverable, because that was a finding that you made adopting essentially the testimony of Ms. Hadley, that -- and as I understand this, and it was articulated several different ways, but I think I understood that the basis of her opinion, which you adopted, was that you cannot include

amounts which were awarded to subcontractors either by way of summary judgment or which were resolved with contractors by way of some sort of settlement. Well, neither of those things has anything to do with whether or not they are allowable costs under the contract. The contract defines allowable costs, and they are costs incurred in connection with the work required under the contract.

And, you know, I mean, technically, Judge, every payment along this process, whether it's the payment from the owner to the contractor or the contractor with subcontractors is a settlement. And, in fact, all of them are accompanied by a waiver or release document as they go along.

I mean, the idea that just because it's paid as some sort of settlement means it can't be a cost of the work, I mean, if we're going to be bombastic, that's ridiculous. And the idea that because it comes to a decision about summary judgment, determining what the final amount was is, again, equally ridiculous that that disqualifies it from being a cost of the work. I mean, amounts paid to subcontractors is

specifically one of the enumerated costs of work in the contract, and the broad definition of -- is, you know, all costs incurred in prosecuting the work under the contract.

So, I mean, the decision to adopt Ms. Hadley's testimony and say that these things are not costs of the work is just -- I mean, we don't think that's defensible under any scenario, Judge.

Let me say, I mean, I think -- and I know that from reading some of the orders that you wrestled with this, but, you know, again, I know stuff is flying over 28 days, but the bottom line here is there just needs to be a determination of what were the costs associated with the work that went into the job under the contract. Figure out whatever that total number is. That has nothing to do with the fact that there may, in fact, subsequently be questions about whether there are back charges or whether there are delay claims for the contractor or liquidated damages from the owner. Those things all then are adjustments that would get paid to the cost of work. They don't have anything to do with determining the cost of the work, which is another reason why -- you know,

you've said that Ms. Hadley's testimony, she was asking for a lot of things to analyze the claim. Well, that's not the -- auditing is allowed under the contract. It's simply to determine the cost of the work. Determining the claims and whether or not there might be a back charge or a setoff is a part of their defense, but it has nothing to do with auditing the cost of the work.

We talked about the delay, liquidated damage issue and tried to lay out the issue, and we just think the fact of the matter is that there was no effort -- I mean, I have looked at the transcript. There was no testimony that, in fact, tried to establish the cause of the delays, each of the delays, whatever they were that occurred along the job, to determine which ones affected the critical path and to determine whether or not there was excusable delay, a compensable delay, or a concurrent delay. And under the law, if there are concurrent delays, neither side is entitled to recover at all. Contractor can't get delay costs. Owner can't get delay damages or liquidated damages.

I keep confusing in my mind -- I apologize -- plaintiff or defendant.

THE COURT: Easy to do in this case.

MR. WERNER: Yes. Library simply -- they didn't even admit evidence toward those things. So we think that there was no basis in the record for the finding that they were entitled to the liquidated damage that they claimed and which you awarded to them.

Again, I'm not going to -- if you want to talk about anything specific, I'll do my best to do it. I don't want to try to just go through everything.

THE COURT: I touched on this briefly earlier, but there was one of the plaintiff's causes of action, Balfour's cause of action, was first a breach or cardinal breach or something like that.

MR. WERNER: Right.

THE COURT: The complaint there had to do with the plans. I touched on that a little bit earlier. But at the same time, the owner's position is, you know, hey, they approved a schedule, completion schedule, which totally omitted the removal of the crane from the thing, and there was some point in time when that crane was hung up in the middle of the hotel and kept

this thing, got this thing off track, bad off track for some period of time.

Then I go into the argument about when David Simonton came in. David Simonton got called into the project I think about the time that the matter was supposed to have been concluded. He came out of retirement and went to work and tried to salvage the thing, and it still took another 15 months, something like that, to get this thing resolved.

So my query being is there any significance to, first, the breach and then, therefore, what was the breach that caused this whole process to go haywire, because it does seem to me that what happened in reality was not always what went on in the contractual documents. These parties are going down two separate paths, and the whole thing has come to a head.

MR. WERNER: Well, certainly, there is a doctrine that talks about that if you -- if you commit the prior material -- a prior material breach, it can affect your rights to then enforce other rights or claims down the line. No question, there is such a document.

The question is what constitutes a

material breach at any given time, and was that breach waived or are they estopped from popping up two years later and saying, aha, I got you from something that I didn't say a word about for two years. And generally, the law is pretty consistent that, no, they can't do that.

So, you know, in terms of responding about what is the issue with a material breach, prior material breach, I think that's what the law is. I haven't seen anything that suggested that those issues were raised as material breaches until they're looking for excuses for not paying.

You know, I did see the cardinal change in the thing. I mean, you know, cardinal change is -- first of all, it can be a lot of different things.

THE COURT: I assume that's a term of art.

MR. WERNER: Well, yeah, loose art. You know, it would be a cardinal change to say I want you to build me a two-story building, and then I issue changes to make it a three- or four-story building. That certainly would be a cardinal change.

I'm not sure that I saw from either

side anything during the -- in the transcript at least about a cardinal change. So I'm not sure if that's really an issue for Your Honor at this point.

Sorry, I'm just trying to make sure I look back at the categories we have talked about with you.

MR. BUNDY: Your Honor, do you mind if I respond as we go along?

THE COURT: Sure. Go ahead.

MR. BUNDY: First off, it does matter, at least in my experience, who the plaintiff is and who the defendant is. That's pretty important in my world as a lawyer. I'm not a litigator. I'm a trial lawyer. Unfortunately, as a trial lawyer, I don't get paid. As a litigator, they do.

THE COURT: I think you have made that point.

MR. BUNDY: They were the plaintiff.

THE COURT: They have the burden of proof.

MR. BUNDY: They brought the case. They had the burden of proof and failed miserably. What Mr. Werner has done is pointed out all of the

things that Mr. Hildebrand did not do. They can't fix it now. If they had called Mr. Werner instead of Mr. Hildebrand, we might not be here; the result might be different.

They didn't do any of this. Okay. They came into -- they were late. All we have to do is prove this is the day it was over, this is the day you said you were going to finish, you don't have any time extensions. Now you prove to me, one, that you asked for a time extension; two, you're entitled to, whether it's concurrent, all of that.

That's what threw these people for a loop: Bundy didn't take the bait. They threw a mud ball at you. They tried to make this your problem. They brought a bunch of mud into the court, okay, and made you sort it out. You refused to do it.

They sued my client, alleging the architect was negligent, thinking dumb ass Bundy -- excuse me, dumb Bundy is going to sue the architect. I'm not going to sue the architect. You sue him. They didn't even put the architect on the stand in a case where they said in a $24 million case there were defective plans. They

put a witness up who said he didn't look at it.

They had a scheduling expert. He was a clown, and you showed him to be a clown. He was more worried about turkeys and lunch than he was proving anything.

Their own witnesses admitted on cross-examination that we paid every single pay request, that we paid it in time, and that they were not due any payments unless it was on a certified pay request.

This is magical thinking. They want you to rethink this case, the case they wish they had now tried, and the case Mr. Werner is pointing out to Mr. Hildebrand he should have tried. And it's now too late.

Thank you.

MR. WERNER: Judge, affirmative defenses, including setoffs, are their burden of proof, not ours.

THE COURT: Right.

MR. WERNER: They didn't carry their burden of proof to establish delay damages chargeable against Balfour in this case, but they were awarded in the form of liquidated damages in Your Honor's order.

The same thing is true with respect to these -- what I think -- at least I refer to it as repair costs, the largest of which was the repainting and Sheetrock stuff. They had the burden to establish that, in fact, that work was defective.

Now, as I understand it with regard to the painting and Sheetrock work, it boiled down to the question of whether or not it was a Level 4 finish and an eggshell finish. Those are not -- unless you have a long part of your history, Judge, that I'm not aware of, those are not matters of common knowledge either for you or for a jury, if it had been a jury case.

They had the burden to establish that there were, in fact, defects under those standards, what those standards were, and that it was defective. And they had to do that by expert testimony, and they didn't even try, but they were awarded everything that they were asking for, and that is error.

THE COURT: Very good.

MR. WERNER: I'm trying to make sure I don't bleed over on to this motion with the one that goes with their petition for attorney's fees.

THE COURT: I'm about to take that up, unless y'all want to take a break.

MR. LINTON: Your Honor, may I ask about procedure?

THE COURT: Sure.

MR. LINTON: In some prior situations, petitions for attorney's fees, similar to what Mr. Bundy has submitted, goes to the Court. The Court then can ask for backup records if he chooses. Mr. Bundy put that in the petition. It's been filed, but both the petition and all of the backup documents have been produced electronically to him and provided to Your Honor.

We have one witness who has just done some mathematical calculations for a summary of prejudgment interest, that sort of thing, but earlier you suggested you didn't think Mr. Infinger needed to testify.

The one point that might be of service to the Court is that he did a survey of various counsel around Charleston from which he derived what would be a typical hourly rate fee. I understand they have an argument that they don't think we should get an enhanced fee, but if they wish to contest whether the hourly rate that

Mr. Infinger has concluded, I would like for him to testify for ten minutes about how he arrived at that opinion, who all he talked to. I think it would be of benefit to the Court. If the position is more of an argument of law and they're not contesting the $600 an hour and that sort of thing, then we don't really need Mr. Infinger to testify.

Secondly, all of these backup documents I planned to put in as exhibits, but they've been filed. I thought just for simplicity, we would have one witness identify that, yes, these are all of the bills, they have been paid. We may be able to stipulate to that. But as you can tell, there is not a lot of stipulations this morning.

THE COURT: Hadn't been much in this case at all. So that probably presents us with a good time to maybe take a break. I'm happy to do it. It was not my intention today coming in here that this was an evidentiary hearing. I typically take affidavits in support of attorney's fees. That's really what this is at their face, but if what y'all would like to do would be to cross-examine Mr. Infinger and you say you would

like to have him called to testify, then I'll keep him around for that purpose. I don't know that you want to do that.

MR. WERNER: I'll be absolutely blunt about where we stand on the attorney's fees issues.

THE COURT: Y'all don't think you should have to pay anything. I don't want to make the argument for you.

MR. WERNER: We have argued about the legitimacy and propriety of the request in general with some legal issues, et cetera, absolutely. As I said, I know Your Honor got them even later than we did, but we only got these records about the actual bills --

THE COURT: Itemized bills.

MR. WERNER: Yes, I think it was the day before we had the status conference. We haven't had adequate time to really go through them all. We have tried to look at some things, and we can raise some broad general things. One has been handled already, and that is, as I understood it, that they have stipulated that the two years of billings that preceded even the filing of the lien, they're withdrawn. I want to

make sure that is correct and on the record.

THE COURT: Yes, that's my understanding.

MR. LINTON: They're not applicable regarding the mechanic's lien. They would be applicable for declaratory judgment.

MR. WERNER: That's a whole different argument, Your Honor. Obviously, we have a separate argument about the whole idea of enhancement. That argument breaks down, again, into two things. One is that they didn't even ask for it with the petition. So it's untimely, and they can't do it. And we have got some other arguments about when it's appropriate and when it's not.

In terms of Mr. Infinger's affidavit, I would have a few questions to Mr. Infinger about how he arrived at those rates. Generally speaking, it is not my intent today or probably at any point to try to go through and nitpick the bills. In other words, based on what I can see -- and I -- again, I haven't had the chance to finish a real review, but I don't think this is a case where I'm going to for a moment say, well, they wrote down 20 hours for this, and it only should

have been 10. We're not going to do that.

Even an expert doesn't -- it's not ipse dixit. He still has to establish that there is a legitimate basis recognized in the field for his conclusions, and on the affidavit there is none for the 600 and 400 increases. So I would have a few questions. They indicate that's what they would be offering him for. So I think it probably is worth him, if he's here and we're all here and we're going to talk about that, probably worth it to do that here today. I won't have a long -- I'm not going to do a long cross-examination or anything.

THE COURT: Okay.

MR. LINTON: Thank you, Your Honor. I guess the other question is Mr. Hildebrand submitted an affidavit. Do you plan to offer him on this?

MR. WERNER: I don't. I mean, other than what we said in the affidavit.

THE COURT: Do you want to take the lunch break and get yourself together to do that?

MR. WERNER: Sure, we can do that.

THE COURT: I'm sure Mr. Infinger would rather get up and do that. I just don't know how

long it's going to take. My experience with lawyers with three questions is about three hours.

MR. WERNER: I can assure you that won't be the case today. It may be more than three questions, but maybe three or four minutes, not hours.

MR. LINTON: We have one other witness, basically documenting all of the files that have been electronically filed. We may be able to stipulate to these.

THE COURT: Let's take a break now. It's 12:30. Let's take a lunch break and come back here about quarter to 2:00. Let's do that, see if we can't get Mr. Infinger out of here this afternoon and whatever else you have going on.

(A lunch recess was taken.)

THE COURT: I hope y'all had a chance to get some lunch. We were moving down our list of motions, and I believe we were at the point where we would be at Number 11 on this list, which would Library Associates's petition for attorney's fees. That's where we are.

MR. WERNER: Judge, may I? There were three more items that I just want to make sure I at least briefly covered that were in our motion

to alter, amend.

THE COURT: Sure.

MR. WERNER: The three remaining that I wanted to at least mention, Judge, were -- we included the argument about the condition preceding toward the notice issue that was addressed in your award, and we think that, again, frankly, as it relates to the unexplained or unanswered condition in the order is, Your Honor, of course, found that Balfour had failed to satisfy conditions preceding as it related to claim notices and things like that, but you -- and you found that there was no problem with the owners, but you didn't ever address how it was that they had satisfied the notice requirements which apply equally to them that they do to Balfour. So that was an issue that we raised there.

Again, if you have things that you want to talk about, I'm happy to do that. Otherwise, I'm just going to sort of conclude what we didn't address this morning.

THE COURT: I want to make sure I'm clear. I made notice requirements as relates to Library?

MR. WERNER: Yes. What you concluded was there were notice requirements in the contract as they relate to claims and the like. You found that Balfour had failed to satisfy them, therefore they lost. You simply found that those were not a problem for Library, but you never found how it was that they had satisfied when they also didn't present evidence that they had given notices of things like the assessment of liquidated damages and other things.

The next one was the breach of contract accompanied by fraud. We addressed this at some length in the argument. Your order only talks about the things that you found established, in your mind, intent, but you never identified any actual breach -- any fraudulent act accompanying the breach. So that, we think, is a fatal defect in the conclusion.

And then the last issue was the issue of bifurcating, as you referred to it, the issue of punitive damages. As we cited to Your Honor, frankly, we don't think that, given the posture when you issued the order, that you had that ability. There was no -- and the law is you have to do that before the trial ends, and there was no

motion to bifurcate during the -- up to and including the end of the trial. There was no order bifurcating. The first time you did it was in your order issued -- you know, I don't know how many months after the trial had finished. We think the law establishes that's not timely. Therefore, there can be no bifurcation.

We also asked the issue that you cited to a particular statute that you thought gave you the authority. We cited the fact that when you look at that statute, it doesn't apply to those circumstances.

So those were the other three things just to cover, Judge. Thank you.

THE COURT: Any response?

MR. BUNDY: No.

THE COURT: As to the intent and the act, the intent I think has been -- the act is the failure to provide documentation. But on the issue of punitive damages, I do think the Court acting non-jury could do it at trial, but, frankly, I think it's better to provide procedural due process and give y'all an opportunity to have a hearing on the question. That's why I decided I'd bifurcate the issue rather than just start

searching for information. That's my response.

Now let's get into attorney's fees. All right.

MR. LINTON: Your Honor, Mr. Werner, to make sure we have a record for this hearing, we have several exhibits that have been filed. I understand Exhibit 1 would be the petition for attorney's fees. Exhibit 2 contains the same data as in the petition, except for the prejudgment interest is added from the date each payment was made, whether it was interest that was paid on a loan, excess interest for the statements for the legal fees and other expert fees. The summary of hours of Bundy McDonald from 2019 to 2023, and all monthly statements, 70-some. These were produced last week.

THE COURT: Number 1 was the petition for attorney's fees, which I think has previously been submitted. Exhibit Number 2 is what, Mr. Linton?

MR. LINTON: Exhibit Number 2 is the information that's in the petition, except prejudgment interest has been calculated and bills attached when payments were made. Exhibit Number 3 is all of the monthly statements that you

have been furnished from Bundy McDonald.

MR. TERRY: I object to those as being provided untimely.

THE COURT: Objection overruled. Go ahead.

(Defendant Exhibit 1, Petition for Attorney's Fees, marked for identification.)

(Defendant Exhibit 2, Attorney's Fees Petition with Attached Prejudgment Interest Calculated and Bills, marked for identification.)

(Defendant Exhibit 3, Bundy McDonald Monthly Statements, marked for identification.)

MR. LINTON: Exhibit Number 4 are all of the backup documents for the other charges reflected in the fees for experts and things like that.

(Defendant Exhibit 4, Backup Documents in re: Fee Charges, marked for identification.)

MR. TERRY: Object to that as untimely as well.

MR. LINTON: Exhibit 5 is affidavit of Marvin Infinger.

(Defendant Exhibit 5, Affidavit of Marvin Infinger, marked for identification.)

MR. TERRY: Object as untimely as well.

MR. LINTON: Exhibit 6 is the same calculation regarding future losses and interest payments reduced to present day value.

(Defendant Exhibit 6, Future Loss Reduced to Present Value, marked for identification.)

MR. TERRY: Have these been produced before today, Johnny?

MR. LINTON: Except for Lancer.

THE COURT: That one I think is new, right?

MR. WERNER: Judge, Mr. Linton showed those to me before. I have no objection for them being marked for identification. I think that's important. Obviously, we already raised in our motions we object to them as being relevant or admissible, including for the reasons that they are late.

MR. LINTON: I understood that to be our agreement.

THE COURT: Y'all have an agreement that they are marked for identification, but not admissible. You're objecting to admissibility of 3, 4, 5, and 6?

MR. TERRY: Whatever I said. And the

last one, whatever number it is.

THE COURT: Exhibit 6, future loss reduced to present value is what they are.

MR. LINTON: Even though you already ruled, you're going to consider them, I believe, overruling the objections on timeliness.

I would like to make sure the record is clear that Mr. Bundy filed his petition back in November of last year, and under the Declaratory Judgment Act, normally the procedure would be for the Court to issue a rule to show cause if it deems that further inquiry is necessary where the resisting party would have the burden of proof.

Mr. Bundy's petition advised the Court that if it was wished to view the documents in camera, that he would provide them. When we had the status conference, we provided you all of Bundy McDonald and all counsel billing records that afternoon.

I just want to make sure that the record is clear that no motion had been filed by any of the other parties to request these documents. And I did tell Mr. Werner during the break, subject to Your Honor's approval, that if he wanted extra time to go through all of the

bills and backup, that that was fine. Two weeks, would that be adequate?

MR. WERNER: That's fine.

THE COURT: Okay. Ms. Brown.

KIMBERLY BENNETT BROWN

being first duly sworn, testified as follows:

THE COURT: Give us your full name and address for the record, please.

THE WITNESS: My full name is Kimberly Bennett Brown. I reside at 1046 Dominion Drive, Hanahan, South Carolina 29410.

THE COURT: Thank you ma'am.

DIRECT EXAMINATION

BY MR. LINTON:

Q. Ms. Brown, I believe you testified in the trial. So the Court is familiar with you. What is your current position?

A. My current position at Bennett Hospitality is COO.

Q. Now, I've identified several exhibits. The petition, which is Exhibit 1, was filed on behalf of Bennett Hospitality?

A. It was filed --

Q. Excuse me, on behalf of --

A. -- of Library Associates, yes, that's

correct.

Q. Prior to filing that, what involvement did you have to make sure it was accurate?

A. I reviewed all of the invoices and put together the invoice packages for all of the expert witness costs, the legal costs, and all of the loan modification costs, as well as I calculated the interest and the additional costs that Library Associates was going to incur due to the inability of being able to refinance the loan.

Q. When you said all of the additional costs, explain to the Court how you made that determination of interest, additional interest costs?

A. On the Item D in the petition on the additional interest cost, we calculated what would have been due if we were able to refinance the loan with a permanent financing as of the end of January of 2020 through the date of the order, which I believe was October 6th. We calculated what the interest rate would have been on the permanent loan financing on MetLife versus what we actually paid in interest, which was still based on the construction loan interest rate.

Q. Exhibit 2, I think you calculated what

the prejudgment interest is on all of the excess charges that were incurred because of the mechanic's lien and not being able to secure permanent financing; is that correct?

A. That's correct. On Exhibit 2, I've taken each of the costs and added the prejudgment interest and came up with a new total amount. That's correct.

Q. Exhibit 3 and Exhibit 4 are the backup bills for Bundy McDonald and backup bills for various experts that were included in the petition?

A. That's correct.

Q. Have all of those bills been paid?

A. Yes, they have.

Q. Have you reflected the date of payment so that interest is only accumulating since the date of payment?

A. That's correct.

Q. Exhibit 6, you have concluded that -- why don't I show you this. What have you concluded is the present day value?

A. We concluded a present day value by calculating what the interest rate would have been on a permanent financing through MetLife in

January of 2020, and that rate would have been 4.047 percent, against a rate of what we could have gotten permanent financing for in November of 2023, at 7 and a half percent. That was actually a little bit lower. It was in the 7 and a half to 8 percent range, but we used the 7 and a half percent number.

So I ran amortization schedules to show what the interest would have been on the -- as of 2020 versus the interest on 2023, came up with a difference, and then came up with a present value of that difference by discounting that by using the U.S. treasury rates. They don't have a 25-year treasury rate. They have a 20-year treasury rate and a 30-year treasury rate.

We interpolated the 25-year rate by averaging the two, 20 and 30 together, to come up with 4.33 percent discounted rate and applied that to every payment for the 25-year period for the 300 months, and we came up with a present value of that number of --

Q. I think it's on the last page.

A. It's on the last page, this is $22,036,835.

MR. LINTON: Your Honor, that's all we

have.

CROSS-EXAMINATION

BY MR. WERNER:

Q. Ms. Brown, I'm sorry, bear with me a second since I still don't have copies of these things in front of me. Let me make sure I understand.

So with respect to the amounts paid to the Law Firm of Bundy McDonald, you have simply added up the invoices you received from them and which you have paid, and you have now supplied both the backup to that, and you have totaled that out; is that what I understand?

A. We went over a lot of things. That is one of the items in Exhibit Number 2, that's correct.

Q. Do I understand that you have now attempted to also add prejudgment interest to that number?

A. That's correct.

Q. What interest rate did you use?

A. 8.75 percent.

Q. Where did you get that interest rate number?

A. I believe it was confirmed by counsel.

Q. But my question is where did you first get it? Was it given to you by counsel?
A. Yes.
Q. Now, there was no interest in the petition, correct, on the attorney's fees? You did not ask for interest on the attorney's fees in the petition?
A. That's correct.
Q. You provided the affidavit in support of that petition, right?
A. I did, yes.
Q. You also, if I understood your testimony a minute ago, talked about that there were things that had been incurred and were to be incurred. Did I hear that correctly?
A. I don't believe I said that.
Q. The future financing costs, you have not actually incurred those yet, correct?
A. Oh, excuse me. We have not incurred those at this time, that's correct.
Q. Did you have a permanent financing commitment back in whatever the earlier of the two dates that -- you gave two dates, one in 2023 and an earlier one?
A. I had an email and an amortization

statement from the lender in January of 2020, at the end of January of 2020, which is at -- we were anticipating being able to put the permanent financing in in March of 2020. That was when the original construction loan would have matured.

There was a -- the original court hearing was set. We thought in talking with our lender, MetLife, that that court hearing was going to hopefully settle the case at that time and that we would be in a position in March of 2020 to go ahead and put the permanent financing on the hotel with MetLife. Unfortunately, that didn't happen, and this is where we find ourself today.

Q. So is the answer to my question that you did not, in fact, have a written loan commitment at that time for the permanent financing?

A. I did not have a written loan commitment, but I did have a written email. That's correct.

Q. The last thing, I think, you -- if I'm remembering this, that you talked about, the last exhibit was your attempt to reduce the not yet incurred future financing number that was stated in the petition to present value; is that correct?

A. That's correct.
Q. You did not do that at the time of the petition, correct?
A. That's correct.
Q. That was not a number included or a calculation included?
A. Correct.
Q. Do you have working papers backing up the work that you have done to make these calculations and stuff?
A. Yes, I have the amortizations.
Q. Do you have them with you?
A. I do have them with me, yes.
MR. WERNER: Judge, we would ask that we have the opportunity to see those if she's going to testify to them.
THE COURT: Sure.
BY MR. WERNER:
Q. When did you first calculate -- and I'm talking about even the higher number now before you discounted it to present value recently. When did you first calculate this what was originally stated as a $41 million future financing number?
A. It was, you know, between the order of

October 6th and the filing of November 6th.

Q. So you didn't even have that calculation at the time of trial?

A. No.

Q. It wasn't -- certainly wasn't introduced at trial, was it?

A. I don't believe that that endeavor was introduced at trial. It was a very long trial. I don't know if that -- I can't recall if that item was talked about at trial.

Q. Did you sit through the whole trial?

A. I did.

Q. You didn't testify about it at trial, did you?

A. I did not testify about it at trial.

Q. Were you the one who was dealing with the efforts to refinance the loan, the construction loan?

A. Yes, I was involved in that. I was involved in the original financing of the loan and the efforts involving the refinance of the loan.

Q. What were all of the reasons that prevented you from refinancing at the time that the -- I think you testified it as being 2020?

A. That's correct. The mechanic's lien

was in place.

Q. Was that the only thing that prevented the refinancing? That's the only thing the banks raised to you as an impediment to refinancing?

A. That's correct.

Q. Do you have correspondence with the banks about that?

A. You know, everything that we have correspondence-wise was produced at trial or -- excuse me, produced during discovery. I believe all sides also received MetLife, the lender's, information through discovery.

Q. You testified at trial, correct?

A. That's right.

Q. While you were the witness, was any of that introduced into evidence at trial?

A. No, I don't believe so.

MR. WERNER: That's all I have, Judge.

THE WITNESS: I do have one thing. I think this might have been -- this actually -- this exhibit is a mistake. The one that I have is a little bit higher than this one. So I wanted to point that out.

THE COURT: When you say that, I assume you mean the number is a little higher?

THE WITNESS: The number is a little higher.
MR. WERNER: What exhibit number are we referring to?
THE WITNESS: Exhibit 6.
MR. LINTON: Is that the one with your handwritten note on it?
THE WITNESS: No. The one with my handwritten note is Exhibit 2. This is the present day value calculation.
MR. LINTON: Your Honor, on Exhibit 2 there was $150,000 error that she corrected and put her initials by. We have nothing further.
MR. WERNER: Judge, I want to know, is Exhibit 6 the exhibit or is it not?
THE WITNESS: No, that's the one that we redid. I think this might have been the old copy. I do have the current one with me.
THE COURT: You have a corrected one with you?
THE WITNESS: Yes, I do.
THE COURT: You want to remark that one and make sure? Take a look at that.
THE WITNESS: Yes.
THE COURT: Mr. Terry, I'll certainly

give you a chance to ask questions, if you have any.

MR. WERNER: We would -- obviously, we would lodge the same objections to the admissibility of this substantive exhibit.

THE COURT: We'll call it 6A. Yes, you located that. We'll mark the revised one as 6A so we can distinguish between the two.

MR. WERNER: That's fine, Judge. Thank you.

(Defendant Exhibit 6A, Future Loss Reduced to Present Value, Revised, marked for identification.)

MR. LINTON: We have nothing further, Your Honor.

THE COURT: Ms. Brown, you have 6 in front of you. Is that your corrected copy?

THE WITNESS: Yes.

THE COURT: You want to check?

THE WITNESS: Yes.

THE COURT: That's correct? You're comfortable with that?

THE WITNESS: Yes.

THE COURT: Anything further? Mr. Terry, anything?

MR. TERRY: I don't have any questions.
THE COURT: Very good. You may step down. We normally hand these to the court reporter. In this case, they get to go back to you. You get to put them into evidence.
MR. WERNER: Johnny, if you don't mind, when you get copies, get us copies. We don't need a recopy of the big stacks, just the little.
MR. LINTON: Your Honor, we call Mr. Infinger.
THE COURT: Mr. Infinger, come on up. Everybody's favorite place, witness stand.

MARVIN INFINGER

being first duly sworn, testified as follows:
THE COURT: Mr. Infinger, give us your full name and address, please, sir.
THE WITNESS: Marvin D. Infinger. 146 Wappoo Creek Drive, Charleston, 29412.
THE COURT: Thank you, sir.

DIRECT EXAMINATION

BY MR. LINTON:
Q. Mr. Infinger, your affidavit has been put into evidence. I'd like for you just to elaborate on your methodology in determining what would be a reasonable hourly rate for any of the

counsel who participated?

A. If I may, in undertaking this, I looked both at the standing, to start with, of Mr. Bundy or in conjunction with what the customary fees would be, and to assure that my judgment about Mr. Bundy's standing, which is at the top of the heap in the profession of trial lawyers, I contacted some old colleagues who are in the construction business and some of whom weren't.

Brew Hagood was one, and I picked him because he's sort of a dean-like figure I think at the construction bar, has been at it I think the exact same number of years as has Bill, and his assessment of Mr. Bundy was none better, formidable opponent, top of the heap.

I then went to another so-called dean, and this is more of the defense side of the construction bar, Allen Gibson. His assessment was, not verbatim, but in substance exactly the same. Both indicated that he was such an effective lawyer that he was a fellow to be somewhat feared.

I then went to another dean of the bar who had seen many, many sorts of representations

and trials over the years, and that's Gedney Howe, old Gedney Howe, now-old Gedney Howe.

THE COURT: That would be Gedney, III, correct?

THE WITNESS: Your Honor, with the numbers, I think so. I think that's correct.

Mr. Bundy had worked for Gedney I think five, six, seven, eight years. So he had seen him up close and personal when he was still pink-faced and a young lawyer, and had stayed in touch with him but had not had that much -- how shall I put it -- collaboration in lawsuits with him following the separation from employment, but Mr. Howe said that among all the many lawyers that he had dealt with over his entire career in all sort of fields, that Bill Bundy was absolutely a top 10 percenter.

I have had experience with Bill Bundy, sporadic, but memorable. And in my dealing with Mr. Bundy, particularly in one of the first -- not first, but a really, really large case back in the '80s, I guess it was, when the Omni or Charleston Place was rebuilt in effect from skin and external skin to the internal skin, I was counsel for the masonry contractor, and we fought and we fought,

and it was a big enough case where a retired federal judge was appointed by -- I think Judge Norton had it -- to come to Charleston, spend a week, where we conducted a summary trial before him, and it included the whole week. You know, testimony was taken. Witnesses were examined in a little more, you know, compressed way. And then at the end of that, the retired judge was to conduct a week-long mediation sharing what his impressions were and that sort of thing. We ultimately got it settled, but I'm here to tell you, Bill Bundy was a sight to behold and impressive in the extreme.

And finally, sort of a collective enhancer of his standing is the fact that he's a fellow of the American College of Trial Lawyers. So that's a collective judgment of the membership of the South Carolina chapter. And of course, he was approved by the national chapter. And that is still quite the enhancer to standing at the bar if you're a trial lawyer.

As to the attorney's fees, I went back to Allen Gibson, who is with Womble Bond Dickinson. He gave me a range in complex litigation, including complex construction

litigation, of between $630 an hour and $875 per hour.

I then went to a generalist or one of the better trial lawyers in the state, I think most would conclude, Ed Westbrook, who has tried numerous cases in many genre of disputes, and he has some hourly work. And his hourly work is at $850 an hour.

I then went to Brad Waring, whom I have used before in an attorney's fee report that I had prepared for the federal court in a case, and asked him to give me a low range. He had a high range, but what is a low range at Butler Snow for this type of litigation or complex commercial litigation, and he said that would be $550 per hour.

And then I've had my own experience before -- I'm floating downwardly a little bit as far as what I'm doing as a lawyer, but at Nexsen Pruet my rate was 550 to $600, not in all cases, but in many cases and many undertakings that I've taken on.

I also reviewed the report, the Federal Report that I alluded to earlier, which was in a matter called -- I've written it down

here -- IHS Global versus Trade Data, I think it was. And that was sort of a complex case in this way: It dealt with the sale of a business bought by IHS. They paid $130 million for it, and there were all sorts of noncompete, non-disclosure arrangements and that kind of thing. The seller pocketed the 130, and the nature of the suit was they immediately began competing. And so there was a lot of work that had to be done to sort of connect the dots and show that, and the rate for the firm, the name of which escapes me right now, was between 575 and 750 per hour depending on experience.

Allen Gibson's range is way over 630 to 875. 875 was very experienced, accomplished lawyers. 630 mid range, that sort of thing.

And then I looked at -- I say a couple of cases. I looked at the leading case on attorney's fees or one of them, the Layman case, which was a case that was -- I think I have a footnote -- decided in 2008, I believe. Yes, I see, yes, 15 years ago in the footnote, where they applied a $600 an hour reasonable hourly rate.

And knowing that Bill Bundy is one of the top trial lawyers in the state, I figured that

$600 is a customary fee and at the low end.

Now, I do want to clarify something. I did that for dual purpose. One, what he had actually charged at 400 is extremely low for this type of litigation given his talents. And so the 600 rate establishes that.

If the Court chooses, I think the Court could adjust it. It's a statutory attorney's fee, which requires reasonableness. Under the factors that I thought I was required to look at, my undertaking was not what the contract rate was, but what the customary fee is, and so that's how I determined that. That's a lot of words.

BY MR. LINTON:

Q. Did you review any published opinions from either the federal court or from the South Carolina Supreme Court regarding the rate of attorney's fees that had been approved?

A. I did. I think in Judge Duffy's case that I allude to in the affidavit of Santee Cooper, I believe the rate that was applied -- it was either 6 or $700 per hour. That was the inverse condemnation case with the Santee backing up and, you know, preventing use of land,

constituting a taking, and it's $219 million awarded, I think.

Judge Duffy declined to apply the contingency ratio between the Bell firm and the plaintiffs, but did a lodestar calculation and utilized. It was 6 to $700, as I recall it.

And in the Maybank against BB&T case, Justice Hearn I believe applied between -- I think it was $600.

Q. Did you consider the question of whether all of the work was devoted to mechanic's lien litigation or needed to be segregated?

A. I did it in -- yes. Yes. I came to some conclusions. The first thing I did was spot check, but didn't go through every invoice, every statement, but spot checked the statements actually rendered, and it was exceedingly difficult to discern between mechanic's lien and breach of contract claims.

And so I then started poking around in the record, and in looking at the record, I noticed that there had been a proposed -- which it was referred to earlier today, but a proposed order by Balfour Beatty, which is a representation to the Court that this is what the evidence has

established and this is what the Court should find and noticed a couple of things. One is that at the conclusion of that order of the ten or so causes of action that were asserted, Balfour sought recovery on only three. One was the breach of contract, the second was quantum merit, and the third was the mechanic's lien claim, and to a penny they were exactly the same.

I then went to the order again, and I believe I have -- I think I have the page numbers here. The figure -- and I'll go to my affidavit -- that was exactly the same for all three was $11,160,550.48. And if you go to Page 99 and 100 of the proposed order, that figure is rendered by what was claimed to be an enhanced guaranteed maximum price, and that was -- I didn't write down the dollars and cents, but it was $71 million-plus. That was -- from that was subtracted what was claimed to have been 58 million-plus from the 71 million, and that rendered the amount of $11,160,550.48, which showed to me that the exact same proof that was utilized to establish the mechanic's lien was utilized in establishing its contract claim.

Q. Where did you find that?

A. That was in the proposed order submitted by Balfour to His Honor under request.

The other thing that I found interesting in the proposed order was something that was discussed a little earlier today, and that was apparently Balfour took out some subs' claims in mechanic's liens, and I believe it was a million 7 that they paid in settlement to several subs, and they concluded in that order that was proposed that that was part of the cost of work, but the lien went away. They did the same thing with the summary judgment.

We heard the motions for reconsideration today about the summary judgment, but they took the same approach, that the summary judgment awards were also part of the cost of the work.

Now, we have no -- Balfour had no contractual -- excuse me. Library had no contractual claim with the subs, but they were liened by those subs, and those subs had encumbered the property, and they encumbered the property.

And we heard about the difficulties with financing that we just heard from the stand

here from Kim. The other thing that struck me about it was the fact that there was a requirement, as found by the Court, that those -- that the subcontractor claims should have been bonded off in the first instance, and that's a judicial additional determination, so I'm not giving opinions on that, but, you know, the encumbrances would have been far reduced had that contractual obligation as found by judicial determination been undertaken.

Q. I believe you considered the application of a lodestar to a reasonable fee?

A. Well, I did. You know, there are a couple of things. I heard in Kim's testimony in cross-examination from Mr. Werner that we -- not included was the future financing cost damage, but -- you know, at trial, but, I mean, that wasn't available at trial. The interest rate difference didn't occur until 2023. The trial finished in 2021.

So that was part of what I would consider to have been an extraordinary result, an extraordinary victory, winning every step of the way, and recovering on its counterclaim $3 million. You know, it doesn't get much better

than that as a victory.

And with his reputation, his trial skills -- I'm talking about Mr. Bundy -- the complete victory, I looked to Judge Kaye Hearn in the Maybank against BB&T case and opined that a lodestar enhancement should be applied and that that is a good range. If it's good enough for Chief Justice Hearn, perhaps it ought to apply in this case.

MR. LINTON: Your Honor, I think that's all we have.

THE COURT: Okay. Mr. Werner.

CROSS-EXAMINATION

BY MR. WERNER:

Q. Mr. Infinger, let me make sure I understand some of what you said. First of all, let me make sure, you didn't attend a moment of the trial, did you?

A. Not one moment.

Q. When were you retained to render -- give an affidavit or render an opinion in this case?

A. It would have been, I think first contact, somewhere in late -- mid-January.

Q. Of 2024?

A. Yes.
Q. Were you aware that the petition for attorney's fees as ordered by the Court had already been submitted?
A. Not at that time.
Q. Did you read the petition that had been submitted as ordered by the judge?
A. Not at that time, but I've certainly read it since, yes.
Q. Did you review -- are you familiar with NALFA, the National -- it's more or less a compendium of depository of information about attorney's fees, locally, regionally, nationally, et cetera, N-A-L-F-A?
A. No, I did not refer to that, but I referred to lawyers and firms which had the capability of handling cases of this complexity, a complexity that in reviewing the record before this I didn't appreciate as much as I do after what I heard today. I mean, it was a complex mess it sounds like, and so I'm not sure that those sort of general compendiums would -- how shall I put it -- get to the granular level that I tried to get to with lawyers and firms who had the capacity to handle this sort of litigation.

Q. Are you familiar that NALFA is, however, one of the resources and authorities cited by judges in courts all over this country in connection with and support of attorney fee decisions?

A. I wouldn't disagree with you on that. Yes, I'd take your word for it.

Q. You didn't consult it at all in forming your opinions?

A. I did not, no.

Q. Is it your testimony that only someone of either Mr. Bundy or someone of Mr. Bundy's ilk would have taken or could have handled this case?

A. Let me put it this way: Certainly others could have been on the case. Certainly others could have, but the population -- and do it as well as he did it, but that population is pretty small.

Q. Did you consider what the various fees of other lawyers who could have handled it that way were?

A. Well, Allen Gibson, yeah.

Q. Are you regarding Mr. Bundy and Mr. Gibson of being of a different ilk in terms of experience, longevity, et cetera, or do you regard

them as being similar?

A. I would think Allen is probably a little less experienced in the courtroom than is Bill.

Q. Did you inquire -- you have talked about several people that you have spoken to to ask them about fee rates?

A. Yes.

Q. So in part, your opinion is based on the opinion of others; is that correct?

A. My opinion with respect to fees is based partially on conversations with others and partially by my own personal experience up until a year or two ago of handling pretty complex litigation and what my rates in two firms were.

Q. Did you evaluate -- you're aware this case -- I mean, the bills that were submitted range from 2016 through 2023, I think?

A. That's right.

Q. Did you evaluate the way rates changed in the marketplace between -- over that span of years?

A. I did not. All I can say is that the IHS case that I referred to in the federal court was about 2020, I think it was, and they were --

the survey -- the informal survey that I made bore similar figures as far as hourly rates were concerned.

Q. But those people, did you ask them about the way rates had changed or what their opinions about the appropriate rates between 2016, 2017, 2018, 2019, 2020, 2021?

A. Not in that granular way, no.

Q. You've been practicing law during all that period, right?

A. For 47 years.

Q. We've both been doing it too long.

A. I'm a little ahead of you as far as longevity.

Q. Not as far as you think. I'm in 43 years.

You are aware that, in fact, it is common that rates change on a yearly basis, correct?

A. They can from firm to firm. That has not been my experience over the past three or four years, but they've remained pretty stable as far as I can tell.

Q. What about from 2017 to 2018? 2018 to 2019?

A. I think there was a big change -- how shall I put it -- in firms when firms started growing and becoming more regional and national, and that sort of caught on, and that would have been -- when that really started happening I would say, around Charleston, right around 2000 probably, maybe a little before then.

Q. I take it your experience is common with a lot of lawyers and that is there is a so-called published rate, and then there is the rate you actually can charge and get paid by clients, right?

A. I think that's true, and I think there's some give and take in that for sure, yeah.

Q. And, I mean, you have described that based on the conclusions you have reached from talking to others, you think Mr. Bundy is an astute, smart guy, savvy lawyer, et cetera, right?

A. If I can know anything, I know that.

Q. He agreed and was, in fact, paid 400 an hour throughout this case; is that right?

A. There's no question about that.

Q. That's all his client paid, correct?

A. That has not been confirmed to me, but I'm pretty sure that 's right. Yes, that's right,

because Kim testified to that. And as I stated at the start of this, I included that rate to more accurately reflect what a customary rate would be. And the Court, if the Court wants to adjust it, fine. If the Court wants to deal with what I consider to be a very low rate at 400 an hour, it would still be my suggestion and my opinion that whichever of those rates is chosen, if attorney's fees are awarded, should be enhanced by a lodestar factor.

Q. You said that you have made at least some review of the actual billing records; is that right?

A. Yes.

Q. Tell me what some is, the best you can.

A. Sort of random entries on random statements in looking at the entries and how the entries generally were made.

Q. Did you look for entries which were -- you're familiar with the term "block billing," right?

A. Yes.

Q. Where it refers to a number of different things done in just one lump block of

time?

A. Yes, there was some billing, yes.

Q. Did you try to figure out how much?

A. No.

Q. Did you observe that in many of those block billing cases there were five or six different things referred to in the block, only one of which was specifically called the mechanic's lien work?

A. I saw some entries where there were -- yeah, where there were various descriptions, no question about that, of different facts and different undertakings, some of which included mechanic's lien -- mentioning mechanic's lien with mentioning other things, which is why I went to the record and the proposed order, as I described, and took what I considered to be and what I know to be -- because I know Tom Hildebrand to be a fine lawyer and a fine man -- a good faith submittal to the Court saying this is what the evidence was, this is what the damages were in the mechanic's lien action and in the contract action, and they were both based on an enhanced guaranteed price to the penny.

Q. You mean an increased guaranteed

maximum price?
A. Yes.
Q. Adjusted maximum guaranteed price?
A. Exactly.
Q. You made reference to the fact that you looked at what Balfour's claims were. You were aware that Library, in fact, prosecuted its own separate counterclaims, right?
A. I was aware of that.
Q. Unfair trade practice claim, conspiracy claim; you were aware of those things?
A. That Balfour asserted them?
Q. No. That Library asserted?
A. Yes. I was aware of that, yes.
Q. Did you look in the time entries to find entries that referred only to research on the conspiracy claim or on the unfair trade practice claim? Did you see that there were entries that were limited to those activities?
A. Not from that. I discerned from the very detailed order that, based on what the judge and the lawyers were talking about in this case, that there was, in other words, a court finding, court declaration that documents were withheld, things were delayed, liens were duplicative or

exaggerated, and that those things led to a finding of unfair trade practices, disposition of unfair and deceitful actions, but it did not invoke the statute because it was a private contract and not a public contract, but there was a finding based on that underlying milieu of not producing documents, of producing documents after the trial started without authentication, without any rationalization to them, and that the basic thing that was concluded was that those were fraudulent acts. Those were unfair and deceitful acts. And so, I mean, that's what I got out of it.

Q. So is it your testimony, then, that you believe that the prosecution of a claim under the Unfair Trade Practices Act constitutes work done in defending a mechanic's lien action?

A. If the same facts support it, yes, if it's the same proof.

Q. There is a difference in prosecuting a claim and defending against a different claim, isn't there?

A. There can be. In this case there wasn't.

Q. You know that how?

A. I know that by -- when I say I know that, that is my opinion. I'm not the one who sat in this courtroom for 26 days pursuant to your previous question. The Court was. So, you know, I should think that the Court would be in a position to determine if my determinations of the same evidence, the same foundation for the claims that were set forth by the counterclaims of Library Associates were intertwined to such an extent that you can't segregate it, as Judge Duffy found in the Maybank -- not Maybank case -- in the Sauder case. I always want to say Sonders.

The judge is the best judge of that. He's the one that sat here for 29 days and listened to it.

Q. In Maybank -- you referred to Maybank earlier. In Maybank, the Supreme Court mentioned the same thing that you just have, that they thought there was an intertwining and some of that stuff, but they still said because there were, in fact, other issues that, in fact, a downward adjustment of the fees was probable, didn't they?

A. They did.

Q. Of 20 or 25 percent?

A. I think it was 20 percent. And I

allude in the affidavit that, you know, based upon the counterclaims, 500 pages of the 5,000 pages dealt with third-party claims that were a little different than the counterclaims, which proof of which consisted of days late times 9,000 for liquidated damages, an arithmetic undertaking, and the 2 million some-odd to finish the work, which consumed 20 pages of the transcript, according to the Court's order.

Q. You do agree that an award of attorney's fees pursuant to the mechanic's lien statute, which is what we're talking about here, is expressly intended to be a compensatory award, correct?

A. I'm not the legislature. I just know what the statute reads: Prevailing party is entitled to reasonable attorney's fee.

Q. It's intended to be compensatory for what they incurred, isn't it?

A. That can be the effect of it, yes.

Q. Attorney's fees are not a part of the damages, are they?

A. No.

MR. WERNER: I think that's all I have right now.

THE WITNESS: Thank you.
THE COURT: Mr. Terry, do you have anything.
MR. TERRY: Yes, Your Honor.
CROSS EXAMINATION
BY MR. TERRY:
Q. Mr. Infinger, I'm Don Terry. Good to meet you this morning.
A. How do you do?
Q. Doing very well. I hope you are.
THE COURT: We made it to the afternoon, Mr. Terry. 3:00 o'clock.
BY MR. TERRY:
Q. Mr. Infinger, in your affidavit you mentioned some contractors. Who are they?
A. The subcontractors, there were three that were remaining: Lithko, and your client, which I think was the electric company.
Q. Watson, yes, sir.
A. Watson, and the brick company.
Q. Old North State Masonry. Then are you aware that there were mechanic's liens filed by other subcontractors?
A. Oh, I absolute was, yeah.
Q. Did you evaluate how much time was

spent defending the mechanic's liens that were filed by other subcontractors?

A. I did. And, again, the reason for that was the ultimate award that was submitted to the Court by the proposed order was exactly the same for the mechanic's lien as it was for contract as it was for quantum merit order.

Q. The subcontractors didn't have breach of contract claims against Library Associates, right?

A. They did not.

Q. So you didn't evaluate whether their lien claims were the same as their breach of contract claims against Balfour, correct?

A. Well, if their breach of contract claims against Balfour did not include Library Associates, I don't -- I don't follow you. Library Associates wasn't a party to the contract.

Q. How much of the attorney's fees that Library Associates incurred are related to defending against Watson's mechanic's lien?

A. I'm sorry?

Q. How much of the attorney's fees that Library Associates incurred relate to defending Watson's mechanic's lien?

A. Specifically, I don't know.
Q. That's because the billing statement -- from the billing statements you can't tell, right?
A. I can't tell from the billing statements that, you know, this much was allotted to Watson mechanic's lien, you're right.
Q. How much of the cost that Library Associates is seeking relate to defending Watson's mechanic's lien's?
A. I don't have that information.
Q. Right. That's because there's no way to apportion those costs amongst the various subcontractors and Balfour, right?
A. Well, you say that. I mean, I suggest you could probably apportion it by determining what the liens in total were and what the percentage of Watson's lien was as to the total amount of mechanic's liens filed. I would imagine you could do it that way. That would be a logical way to do it.
Q. The attorney's fees that you evaluated -- Library Associates attorney's fees that you evaluated, when did they start incurring attorney's fees relating to defendant Watson's

mechanic's lien?

A. Well, if the claim was made in January of 2015, the lawsuit was started in March of 2019, a mechanic's lien was filed I think contemporaneously with the start of the lawsuit or shortly thereafter, and I think it was for 8 million some-odd dollars. I don't know if Watson's mechanic's lien was included in that or not, but you can still run through the same exercise I suggested earlier and sum up the mechanic's lien and allot the proportionate share of those mechanic's liens to the subs.

Q. Right. You agree that Library can't defend against Watson's mechanic's lien until Watson actually files that lien, right?

A. Well, I guess you could take preventative measures, but I think practically, yes, I think you're right.

Q. Do you agree that -- or you agree it's unreasonable for Library Associates to defend against a mechanic's lien that's been settled, don't you?

A. I can't understand your question.

Q. Sure. If a mechanic's lien claim is settled, there would be no need to keep defending

that lien, right?

A. Yes, if a mechanic's lien was settled and the mechanic's lien in effect fell off the building, yeah. Yeah, I agree with that.

Q. If the Judge issues an order saying that the mechanic's lien claim is resolved, there's no reason for Library to keep defending that claim, is there?

A. The defense -- let me answer it this way: The defense of the mechanic's lien actions were based on the evidence that was presented, that the filings that were made to support work done, charges incurred, contractual undertakings paid for were of no probative value, and so all of the mechanic's liens were defended on the basis that there was absolute failure of proof in them with the exception of a few that were settled.

So I don't know -- I mean, in the abstract, I can agree with you, but as things played out in the courtroom, they were bunched together and defended in the same manner.

Q. Right. So it's your opinion that Library Associates was entitled -- is entitled to attorney's fees for all of the attorney's fees that were incurred during trial as it relates to

Watson's mechanic's lien, correct?

A. I have told you I can't give you any sort of specific amount as to Watson's mechanic's lien. I cannot. I have suggested a way to determine an apportionment. That's as good as I can do.

MR. TERRY: Those are all the questions I have. Thank you, Your Honor.

THE WITNESS: Thank you.

REDIRECT EXAMINATION

BY MR. LINTON:

Q. Mr. Infinger, Mr. Werner was asking you if customary rates had fluctuated over the last couple of years. I think you had previously referred to the Layman decision and Sauder decision in 2008 and 2011 where the Court said customary fee for complicated work like this was $600 an hour?

A. I did review those.

Q. In your own experience, has there been any substantial decrease in attorney rates over the last 15 years?

A. No.

MR. LINTON: Thank you.

THE COURT: Anything further? No.

Okay. Mr. Infinger, thank you very much for coming today.

THE WITNESS: Thank you, Your Honor.

THE COURT: You can stay or go. Whatever suits you.

THE WITNESS: Depends what my orders are.

THE COURT: Anything further?

MR. LINTON: Nothing by way of testimony, Your Honor.

THE COURT: Let me hear from you on your request. And do y'all want time to respond, other than what you've gotten today? What are you asking for?

MR. WERNER: I mean, we have briefed thoroughly what we think are the problems in terms of timeliness, the legal issues and stuff. Again, I'm happy to argue those things.

What Johnny discussed was, obviously, we have not had adequate time to really thoroughly get through the invoices. He offered if we had another couple of weeks for that, would that be helpful. Certainly it would, and so I would not propose to go into, you know, a detailed assault on time entries and stuff like that today if we

have two weeks to do that, Your Honor.

THE COURT: I've already floated the idea of coming back in a few weeks for a punitive damages assessment. I know y'all objected to that, but I'm still planning on doing that. Maybe we could take it up at that time.

MR. WERNER: Not ex parte, but on the timing of that, I'd like to be heard in private with counsel about the timing of that.

THE COURT: Timing, sure. I have some alternate dates as well. I just want to make sure y'all are aware of that.

MR. HILDEBRAND: Your Honor, the issue that I have is that the date that you proposed was Friday, April 5th.

THE COURT: Correct.

MR. HILDEBRAND: I have a date certain in a case that's scheduled to start that Monday, Monday after, so the next business day. It's a pretty big case.

THE COURT: April 8th sound right?

MR. HILDEBRAND: Yes, sir. Yes, sir. It's a date certain. We on Monday mediated the case for the fourth time and are still millions of dollars apart.

THE COURT: That's with a B?
MR. HILDEBRAND: Millions, no. M.
THE COURT: Just an M. Okay. Federal government is not involved then.
MR. HILDEBRAND: Yes, sir. I think there are 30 parties. I represent the general contractor at the tip of the spear. So it would be real inconvenient for me to start that date.
THE COURT: How long is your trial scheduled for?
MR. HILDEBRAND: It's scheduled for two weeks. That following week, though -- or the week of April 22nd, I'm free any day that week, or do you have some other day that you might suggest based on Mr. Werner's comments also?
MR. BUNDY: Your Honor, I would only point out that paying millions of dollars in interest is very inconvenient to my client as well.
THE COURT: I understand. You still want to talk in chambers?
MR. WERNER: If you don't mind, Your Honor.
THE COURT: Let's talk behind the wall. We'll be right back.

(A recess was taken.)

THE COURT: Mr. Linton, back on the record.

MR. LINTON: Your Honor, one thing that Mr. Werner and I agree on is that the brief probably shouldn't be repeated in oral argument. Your time is better spent just reviewing them. I do want to highlight a couple things, because they continue to make what I think are erroneous arguments.

One, they have objected to the timeliness of those attorney's fees and costs. And under the Declaratory Judgment Act, it's entirely appropriate to seek further relief, as we have done. They also seem to be objecting to any prejudgment interest for all of those extra costs that -- I keep wanting to say in hospitality, Your Honor, but Library Associates has incurred. Now, that's computed as a matter of right and a matter of law, and so I think that objection is completely erroneous.

We do recognize that the mechanic's lien statute has certain restrictions. Those are not applicable to the declaratory judgment action and the relief we seek there. As a matter of

fact, as you know from the cases we've cited, that act is remedial and is to be construed liberally and to make sure the complete authority for the Court to do justice and make sure that when there's been a wrong committed, there is a remedy.

And so I just want to make sure that I had emphasized that we've been timely, and their own brief acknowledges that a contract between a lawyer and client is not binding on the Court. It cuts both ways. It's not binding, when it's too much, on the Court and, likewise, when it's been paid in full. Mr. Bundy was entitled to every bit of that fee if he lost the case. We think that the appropriate and reasonable fee to compensate him for the extraordinary result, as well as the efficient way in which he handled it.

I have made a motion for the other side to produce their bills, if they were going to contest the rate, and so they have Mr. Infinger's affidavit. Of course, Your Honor is free to set the rate higher or lower than that, but if they're going to contest $600 an hour for Mr. Bundy, I would like them to produce their fees so that we can -- I assume they charge a reasonable rate, and see what it is.

THE COURT: Okay. Anybody want to take that?

MR. LINTON: Also, one last thing, the fee requests and costs to date have just been submitted through November. We need to update that through today, and we'll do so next week.

THE COURT: Mr. Werner.

MR. WERNER: Again, just on the issues sort of that Mr. Linton sort of raised. First of all, Judge, this idea that bringing a claim under the declaratory judgment action is a carte blanche to just keep sort of time on this is absolutely incorrect.

If Your Honor looks at the case, the decision of Robison, R-O-B-I-S-O-N, versus Asbill. I don't know whether you prefer the South Carolina cite or the Southeast cite. But it's 328 S.C. 450, 492 S.E. 2d 400. Really clarifies the idea that the provision in Section 120, I think it is, that they seem to think gives them this ability to just keep taking bites only applies when the only claim you bring is a claim for declaratory judgment. If, in fact, you bring and pursue other claims, you are done. It's more than that.

Let's look at the fact that they did

not plead with the necessary particularity or specificity. In fact, none. They just threw in the words "direct," "actual," "incidental," "consequential," and "special damages," with no delineation. Our court has clearly said that's not adequate. You can look at the decision in Norwest Properties versus Strebler, which is 424 S.C. 617, 819 S.E. 2d 154.

So they never plead for special damages. There is no question that what they are now asking for are special damages. They are not costs associated with the litigation.

Let's look at their proposed order to Your Honor. They say adopt their proposed order in their earlier motion. Well, they didn't say a word about any of this in their proposed order to you. What they said in their proposed order was that they thought that you were incorrect on your rulings at trial and that they should be able to get their lost profits, and I think it was a $2 million claim where they said that they put people up in an alternate hotel or whatever and called that an actual cost. Those are the two things that Your Honor ruled at trial were excluded.

They made a proffer about only those two things, not the increased financing costs, not anything else, and now they want to suggest to you that having received only a proffer, that now you're supposed to take that proffer and just give them those amounts. It's not the way proffers work. They never have worked that way.

A proffer simply reserves for them this is what the testimony would have been. That testimony has never been suggested to cross-examination, counter evidence, or anything else. The only way you could do that is we would have to get an order opening the whole damn thing back up, excuse me, and try all of that the right way if you're going to allow it in, but Your Honor made the correct ruling. Those are consequential damages barred by the express provision in the contract.

So those are the only things based on what he just said. I mean, they don't get what they're trying to do through the declaratory judgment action.

MR. LINTON: Your Honor, in the Maybank decision, the consequential damages provision is inapplicable when actual fraud is proved. You've

found actual fraud, and these are costs. This is a direct cost that we've had every single month, payable every month, accruing every day.

THE COURT: Very good. Anything further? Mr. Terry.

MR. TERRY: Your Honor, on behalf of Watson, my goal is not to come back when we get here, and that will depend on what you do with Watson's motion for reconsideration, if you decide it before the next hearing. Although I imagine I will have to be back for Old North State Masonry.

Quickly, let me talk about this Maybank decision that they just brought up. My reading of that case that's related to fraud in the inducement, the formation of the contract, not fraud after the contract has been entered into, but that's for you to decide.

THE COURT: Wait. You're getting that out of Maybank?

MR. TERRY: That's my recollection.

THE COURT: Maybank is a SCUTPA claim. So probably not that one. I read that one, too.

MR. TERRY: Maybe I'm getting them confused. We submitted a memorandum. We, obviously, relied on that. Just like I've already

argued, Your Honor, Library Associates wants you to ignore your order that says all claims arising out of and relating to Watson's mechanic's lien between Library and Watson are resolved. The declaratory action is about Watson's mechanic's lien. The mechanic's lien defense is about Watson's mechanic's lien. That's already been decided, Your Honor. It was decided before trial, and they're not entitled to attorney's fee under either theory. They're also not entitled to costs under either theory.

Now, as explained clearly in our memorandum, there has to be some way to apportion attorney's fee, even if you determine there was allowable attorney's fee, between the defense of the mechanic's lien. And the mechanic's lien statute says: The mechanic's lien. It doesn't say all of the liens collectively. There is an obligation for them to determine or to bring forth evidence of what they spent defending Watson's mechanic's lien, what costs relate to Watson's mechanic's lien, and even Mr. Infinger can't do it. The expert they bring here can't apportion the attorney's fee to Watson.

Not only can't Mr. Infinger apportion

attorney's fees to Watson, he believes -- and -- and Library seeks attorney's fees for defending a lien before it existed. Watson's mechanic's lien wasn't even filed until March 8th.

THE COURT: That was back in '19?

MR. TERRY: '19, yes, sir.

THE COURT: Right after the institution of the action. All right.

MR. TERRY: They want attorney's fee for after the lien is settled, which includes all of the time they spent at trial. They ignore Precision Wall's attorney lien. They ignore Pleasant Places's attorney lien. They ignore all of the subs' liens and the attorney's fee related to defending those, and they just say it's all intertwined together.

You heard dozens of claims in this case and dealt with dozens of subcontractors, and they can't possibly all be -- all the work can't be related to Watson's mechanic's lien, Your Honor, because they can't -- one, they're not entitled to it due to the settlement. And even if they were, they can't apportion it. They're not entitled to any attorney's fee against Watson.

Thank you, Your Honor.

THE COURT: Mr. Terry, what I'll have you do, you're here on Watson and --

MR. TERRY: And Lithko.

THE COURT: I know y'all are together. I know y'all are in the same firm.

MR. TERRY: I deal with just Watson. He deals with Lithko and Old North State Masonry.

THE COURT: I want you to submit a proposed order prior to this hearing, if you will give me -- I'm shooting for April 1st. If you could get me something within the next two weeks or whatever the end of two weeks is. Today is the 13th, 27th. If you could get me something prior to that, I'll see if I can't -- I'll take a look at it. Okay.

MR. TERRY: That's Watson's motion to reconsider and their motion --

THE COURT: Watson's motion to reconsider, and you can put your claim of attorney's fee in there. Make sure they get a copy of it. I may or may not issue it prior to the hearing. I'll take a hard look at it.

MR. TERRY: Lithko is almost in the same boat, Your Honor. Those liens were bonded off.

THE COURT: If you want to take the Lithko order, you can, those two. I think Old North State Masonry is a little bit different element.

Mr. Windle, I'll be glad to hear from you.

MR. WINDLE: Your Honor, I'd like to talk briefly about any assessment of attorney's fee against Old North State Masonry or Lithko under either the Declaratory Judgment Act, Unfair Trade Practices Act.

First, with Lithko, you heard Kim Brown testify that these mechanic's liens are preventing the refinancing. Lithko's lien was bonded off within days of being filed. It has never prevented refinancing. Old North State Masonry's lien was dismissed in trial in 2021. I think December 2021.

THE COURT: During the trial, right.

MR. WINDLE: Yes, sir. Old North State Masonry had the right to dismiss it at that time. There's nothing wrongful about that. They shouldn't be penalized for dismissing it. But the point here is since December 2021, Old North State Masonry's lien hasn't been preventing any

refinancing. So they come in here and ask for refinancing costs up to today, that's improper as to both Old North State Masonry and Lithko.

THE COURT: I'll ask you to submit a proposed order. You can certainly lay that out there. Just remind me that your client, Old North State Masonry, abandoned their claim at trial, however you want to put it, okay. Just make sure I'm clear on that.

MR. WINDLE: Yes, sir. The testimony was, Mr. Bundy said it right, the president of Old North State Masonry decided he didn't want to be involved in appellate proceedings for eight years and he said, I want out of here. There's nothing wrong with that.

THE COURT: He doesn't want the cheese. He just wants out of the trap. I know about that.

MR. WINDLE: In regard to the assessment of attorney's fees in regard to Old North State Masonry, for all the reasons that I mention this morning, no wrongful duplication, no excessive, all of that, no interference with the audit, no improper activities in regard to the change orders and trying to prevent Library from getting some credit on its cost-plus contract,

because that wasn't our responsibility.

In short, Lithko did nothing wrong. They filed a lien to get paid for their cost overruns on the job. They filed a lawsuit to enforce it. They decided they didn't want to pursue it. They dismissed it.

Same thing with Old North State Masonry: There was no misrepresentation, deception, anything wrongful about that, nothing that would support an award of attorney's fee under unfair and deceptive trade practices or the declaratory judgment act.

Now, in regard to attorney's fee under the lien law, Lithko should have to pay zero. Library was not defending a lien claim from Lithko. The lien was bonded off, number one. But, number two, even if they were entitled -- well, they're just not, period.

In regard to Old North State Masonry, Library Associates was the prevailing party on the lead claim based upon that offer/counteroffer provision in the lien law. Library's offer was closer to the actual result. They're entitled to a reasonable attorney's fee, but they are to prove what that is.

I've been through two-thirds of the bills that they have provided, and, as Mr. Werner said, they are block billing, and Mr. Infinger acknowledged on cross or when he was examined by Mr. Werner, they're block billing. They don't define specifically the time spent by counsel for Library defending against the Old North State Masonry lien claim and only the Old North State Masonry lien claim.

That's what the statute says they have to do in order to get -- recover attorney's fee. Block billing is not allowed, and these time entries have to specifically show the amount of time spent either prosecuting or defending the lien claims. In this case, their case, defending Old North State Masonry's lien claim.

THE COURT: Was Old North State Masonry in that joint prosecution and defense agreement?

MR. WINDLE: Yes, sir, they were. I will take a minute to tell you, like I told you during trial, there is nothing illegal, improper, deceptive, misrepresentation, anything in regard to a joint defense, joint prosecution, tolling agreement in a construction dispute. It's used by contractors, general contractors, and

subcontractors, and it has been for the 40 years I've been practicing law.

It's also used by owners and architects the same way. There's nothing improper about it that would support an award of attorney's fee under any other claims.

Thank you very much.

THE COURT: Very good. Y'all want to take a couple of weeks, and then Mr. Werner review this and just plan to get back -- just let me know? If April 1st doesn't work just let me know. That makes it Easter Monday. That's what that is. I looked at my calendar. That's why I picked that. I try to keep that date open. It used to be a school holiday. I don't know if it is anymore. It used to be when I started here about 20 years ago. Anyway, that's why it's open. Let me know all that. I'll give you a chance to review those as well.

Then the proposed orders I have asked for, they should be provided to everybody. I'll make sure that y'all get a chance to review them before I enter them. We'll plan to come back here whenever we do. I hope it's the 1st. At that time we'll entertain the issue of punitive

damages. We'll follow up on this issue about attorney's fee, and then there will be -- we'll have the motion to elect at that time. Okay.

I think that's what we've got left. Thank you for your participation and attention today.

MR. HILDEBRAND: Thank you, Your Honor.

MR. BUNDY: Thank you, Judge.

MR. WERNER: Thank you.

(The proceedings were concluded at 3:40 p.m.)

CERTIFICATE OF REPORTER

I, Roxanne M. Easterwood, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 13th day of March, 2024, at Charleston, Charleston County, South Carolina.

_____

Roxanne M. Easterwood, RPR

My Commission expires

February 1, 2025

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South Carolina Rules of Civil Procedure

Part V. Depositions and Discovery

Court Rule 30

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds

that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

DISCLAIMER: THE FOREGOING CIVIL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY. THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE STATE RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS

COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CASE NO. 2019-CP-10-01108

BALFOUR BEATTY CONSTRUCTION, LLC,
Plaintiff,
versus

LIBRARY ASSOCIATES, LLC; AND METROPOLITAN LIFE INSURANCE COMPANY, A NEW YORK CORPORATION,
Defendants.

LIBRARY ASSOCIATES, LLC,
Third-Party Plaintiff,
versus

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.

H E A R I N G

BEFORE: JUDGE MIKELL R. SCARBOROUGH
DATE: APRIL 2, 2024
TIME: 2:03 P.M.
LOCATION: CHARLESTON COUNTY COURTHOUSE
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(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

THE COURT: Good afternoon, everybody. We are back for Balfour Beatty versus Library Associates. All right. We have the matter set for today. The Court set this in its order of judgment back in October, saying the Court was going to have a bifurcated hearing on punitive damages, pursuant to the statutory scheme in section 15-32-510. It's set for the determination of punitive damages under the breach of contract accompanied by a fraudulent act. Cause of action, which the Court found in favor of the Library Associates, depending on its counterclaim.

We had a hearing last month, March 13th, I think it was. The Court addressed a bunch of the motions, got a bunch of orders under review. I'm just about ready to rule on those, but I wanted to take these up today and move forward on this.

I received, just yesterday, Mr. Werner's motion in limine regarding the hearing on punitive damages. I need to take that up, I think, before we start. And I also received an affidavit that had not yet ruled on the attorney's fees, and that was the affidavit of Franklin Worrell, I received. I think that was yesterday as well.

MR. BUNDY: It should have been last week.

THE COURT: It came in late on the 28th. I took Friday off, so I saw it yesterday for the first time. All right. But I had to schedule for yesterday. Anyway, so we've got that to talk about as well. Any other matters that we need to take up before we commence, then, with the hearing, Mr. Hildebrand or Mr. Werner?

MR. WERNER: Just the election of (inaudible) when you were going through ---

THE COURT: We will -- we will get to that. That will be the last thing I'm going to make them do.

MR. WERNER: All right. Thank you.

THE COURT: They need to know what their claims are and go from there, but we'll take that one up as well.

MR. BUNDY: The only -- just to make sure that it didn't get lost in the shuffle, Watson and Lithko submitted proposed orders to you, and did not copy us.

THE COURT: Okay.

MR. BUNDY: And I have a response I'd like to make to both of those.

THE COURT: All right. Okay.

MR. BUNDY: I can argue it. I didn't prepare

a proposed order.

THE COURT: Okay.

MR. BUNDY: I just want to argue our points so you'll have them in the record.

THE COURT: Okay. Why don't we go ahead and do that now, and then we'll jump right into it. Go ahead, if you're prepared to do that.

MR. BUNDY: Thank you very much, Your Honor. I'm going to begin with Watson's motion of proposed order.

THE COURT: All right.

MR. BUNDY: I'm going to hand up a document, which is simply a record of what's in the file.

THE COURT: Okay.

MR. BUNDY: It's called Watson with Electrical Beam Time Line, okay?

THE COURT: All right.

MR. BUNDY: What's important here, at least from my standpoint, is if you look -- I think all of it's important, but to the point, the Library Associates, on July 29, filed an offer for the Watson Mechanics for $100, it was on the 29th of July, 2021.

THE COURT: Okay.

MR. BUNDY: On August the 6th, 2021, Watson

filed a counteroffer in response to the offer.

My first argument, before we get to the statute, which I think covers this, is that the mechanics of the statute is not a derogation of the common law. And in common law, I think maybe the second day of Randy Bell's class in 1976, I hate to admit, he informed everybody in the room that a counteroffer was a rejection of the offer, and that had been the law in Blackstone for many, many years. And I don't believe that if our general simply intended to change that basic tentative contract principle, that they would have omitted to tell us that's what they were doing.

Now, what Watson did, however, was -- is on September the 9th, if you go down and look on September the 3rd, Watson purports to file an acceptance at the Library's original offer of $100 making a counteroffer on August the 6th. Now that's some -- 30 some-odd days, okay --

THE COURT: Okay.

MR. BUNDY: -- later.

THE COURT: All right.

MR. BUNDY: After a counteroffer had been made, an acceptance was made some 30 days later. And I would also point out to the Court that,

contrary to the suggestion or the inference that was made by opposing counsel, that no such counteroffer was made, and I didn't prove it. It's proved by the record of this court. I didn't feel like I needed to come in and argue against the record. I was being gas lighted, but that's just my opinion.

THE COURT: Okay.

MR. BUNDY: Now, if you go to the statute, what the statute says, at -- let's see, Section 29-5-20, that's a lien, labor, the lien of labor, et cetera, et cetera. Section C, which I think you need to get to it if you don't mind, because I think we're reading together since we're trying to read English as well.

THE COURT: 29-5-20?

MR. BUNDY: Yes, sir. It's --

THE COURT: Section C.

MR. BUNDY: -- 29-5-20(C).

THE COURT: Okay.

MR. BUNDY: And I would first point out, to the general rule of statutory construction, is that you don't try to achieve the most strained language possible. You try to read it in a common -- common method of reading the English language,

which would be appropriate item modifying and predicating the previous language.

So what it says in C is, not less than 15 days before the first term of court at which time the trial is set, either party may file and serve on the other party an offer of settlement, and within ten days thereafter, the party may respond by filing and serving his offer of settlement.

So I believe a fair reading of this is that 10 days from the day you file your offer, they have to file the acceptance. Otherwise, it expires. The offer expires on its own in ten days because you've got ten days to answer. It's a self -- it's a self-expiring offer under the statute. But even if it weren't, they made a counteroffer which expired. But at any rate, they went on and so -- and they say -- and then it goes on to say, the offer shall state, et cetera, et cetera.

And then it goes -- and it also says that within 15 days. Now, what they're doing in their interpretation is conflating the 15 days to say that somehow any offer you make prior to 15 days remains open until five days before trial starts, which, of course, I believe is, one, nonsensical,

but, two, they would have had to have described it differently to make it plain to the English language, I believe.

So -- and the reason I -- and it's further -- I think it makes more sense, because if you read what happens if the term of court is not met, how it's -- what happens thereafter, the same thing goes on and on and on again. So the notion that they can make a counteroffer later than ten days and then come in and wait five days before trial because they did get the math right, ten from fifteen is five; that's all they've got right -- is in my opinion, incorrect, with all due respect.

Now, the other issue -- the other issue is this, is, I think, somehow they fail to distinguish or understand or appreciate the fact that a mechanic's lien is an in rem action; it's not an in personam action. And I'm sure Your Honor is aware of the distinction, but maybe counsel is not.

In an in rem action, which is what a mechanic's lien is, if you prevail, you can foreclose on your lien because you have established an interest in a piece of real estate, an in rem thing, the horse, okay. And what the

statute says in 29-5-260 is, sale of premises if lien is established. If the lien is established; no lien has been established. What this was, when you have an offer of settlement, it turns an in personam action -- an in rem action into an in personam action, okay?

So what happens if the settlement was actually -- if the settlement had actually been properly accepted, which we disagree with, and we refuse to pay up to a hundred bucks, they would have come to you and said, enforce the settlement. And you would have issued a judgment of $100 in personam against Library Associates because you can't issue an in personam judgment against a piece of real estate. That's the whole purpose of this settlement.

THE COURT: Okay.

MR. BUNDY: And so two things: one, there was no settlement. Two, I think it's beyond credulity to believe that Your Honor is going to put the Bennitt Hotel up for sale down in the courthouse for a hundred bucks, okay. I don't think we're going to go through that exercise. I hope not, okay. So, that's not going to happen.

THE COURT: You'd get some bidders at that

price, I'm sure.

MR. BUNDY: I'm sure. It's better than that. The other thing is, of course, then the next gaslight that you're faced with is this allocation is going to be a mistrial. A mistrial of what? No trial took place. The lien was never tried. Their lien hadn't been tried. And certainly not even they would contend that our Court is going to unwind $10 million in lawyer's fees, 22 days of your time, and five years of work by a lot of people because they don't understand the mechanics of main law. I don't think that's going to happen, okay? All that needs to happen from our perspective is, Your Honor, is look at what you've looked at. I don't think you've really had all the facts in front of you at the time you issued the ruling in the heat of a trial. I'm sure you were glad to get rid of anything, okay. I get it. I get it. But we are where we are now.

THE COURT: Okay.

MR. BUNDY: We're perfectly prepared to defend that lien. You can call us in the morning at nine o'clock. We'll be down here. That's that.

THE COURT: All right.

MR. BUNDY: The other one is the Lithko matter. Now Lithko is an interesting situation. If I might, I'd like to hand up a couple things. One is the complaint filed by Lithko. These are filed documents, just to make it easy on you. There's the complaint filed by Lithko. The answer.

THE COURT: All right.

MR. BUNDY: The lis pendens --

THE COURT: All right.

MR. BUNDY: -- filed by Lithko.

THE COURT: All right.

MR. BUNDY: Okay. And this is the third-party defendant; Lithko's contract offer settled. Now, Lithko's argument, as I understand it, is because there was a bond -- Lithko's argument, as I understand it, is because there was a bond, there's somehow -- they're done -- they're good, right, in nonlegal terms, okay?

THE COURT: Okay.

MR. BUNDY: The problem with it is -- there's a case that I put in front of you called Keeney's Metal Roofing, Inc., versus Palmieri. It is the Court of Appeals South Carolina, June 4, 2001. And in that case, if Your Honor will turn to the

third page.

THE COURT: Let me make sure I get that. Is it included in the --

MR. BUNDY: Yes, sir. It should be in the -- it should be in what I just handed you as your case in there, the next one probably, so if you don't have it, I can give it to you.

THE COURT: I don't.

MR. BUNDY: Okay. Hold on. Here we go.

THE COURT: Thanks a lot. All right.

MR. BUNDY: In Palmieri, if you go to the conclusion, it says, (as read) Keeney's named Appellants as Defendants in its foreclosure action.

THE COURT: Okay.

MR. BUNDY: Keeney did so knowing a surety bond had been purchased to discharge Appellants' property from the lien. Appellants incurred attorney's fees and costs defending against the lien, okay?

For whatever reason, and I can't answer for Lithko or their counsel or whatever they did, they had a surety bond, they sued on a surety bond, but they also foreclosed on the lien and filed a lis pendens. They had the absolute right to do that.

I've got no problem with their right to do it. What they don't have the right to do, as Mr. Howings (phonetic) would say, is fry ice. They can't have it both ways, okay? So they did not prevail. And in this case, what they said was, pursuant to rules of the court procedure, barred from attaining relief. And they reversed it. No, you can be the refactor of a prevailing party, even though a mechanic's lien has been bonded off, if you choose to also foreclose and follow lis pendens, which they did.

So I'd like you to consider those facts and legal arguments when you look at their proposed order, Your Honor. Thank you very much.

THE COURT: Very good. Terry, do you want to respond first for Watson?

MR. TERRY: Yes. Your Honor, for Watson Electrical. Thank you. I'm not sure what Mr. Bundy is arguing out here. The Library didn't make a motion to reconsider your judgment in favor of Watson. Now, Mr. Bundy mentioned, or said, that you should have -- we should have come and asked you to issue a judgment. You did, in fact, issue a judgment for Watson in the amount of $100.

Under the statute, the -- there's not an

offer and counteroffer. There's offers of settlement, which are similar to an offer of judgment. So you could have two competing offers of judgment out there that can or cannot -- that can be accepted, which is exactly what you -- what happened here. Now, as far as the timing, in your order, you lay out the timing that Watson timely accepted the offer.

So, I'm not sure what we're arguing. There's no motion to reconsider here. We went to trial with an order in place that nobody had ever tried to have, set aside, undone, revoked, or otherwise.

I agree that the case hasn't been tried on behalf of Watson, and that's because it was settled when the offer of settlement, as I said, just like an offer of judgment, was accepted. And this idea that the common -- about the common law. If the common law is what controls us here, Your Honor, then when Watson made a counteroffer, a counteroffer of settlement -- an offer of settlement, the Library's offer would have been void. It wouldn't exist anymore. There would have been not only nothing to accept, but nothing for this Court to consider on prevailing party issue. And so, if that's the case, then, when we

go to try -- if we have to go try this lien claim, Watson, very well, could still be the prevailing party because Watson would be the only one with an offer out there. Now, I don't believe that any of that matters because this Court's already determined that the offer was accepted and we went to trial under that premise. That's all I have, Your Honor. Thank you.

THE COURT: Let me just ask you before you sit down. If any question but that the offer of settlement for $100 was outstanding and shortly thereafter, by my calculations, it's like six or seven days, that a counteroffer was submitted by Watson; is that correct?

MR. TERRY: I believe that's correct. And I don't know what gas lighting he's talking about. He brought it up at the last hearing and I said, show it to us. And, frankly, at that hearing, I hadn't considered it. I don't know. I didn't know whether it had been made or not. There was a offer of settlement submitted by Watson shortly after the Library's offer was submitted.

THE COURT: Okay. And your position is that you all ultimately accepted that $100 offer; is that correct?

MR. TERRY: It is, and you issued an order.

THE COURT: I want to make sure I'm clear on that. Okay. All right. Very good. All right, Mr. Wendell?

MR. WENDELL: Yes. The only thing that I have to say in response to Mr. Bundy's case law is that if you look at the complaint, this goes complaint to enforce its limits.

THE COURT: Got it.

MR. WENDELL: And if you look in the caption of the case, the bonding company, Travelers Casualty Insurance Company of America is named. And then if you turn to page six under the third claim for relief, where it says Enforcement of Claim of Lien on Real Property, paragraph 31, Balfour filed a surety bond for release of the mechanic's lien. Paragraph 32, Balfour filed a surety bond for release of the second mechanic's lien. Paragraph 33, pursuant to the terms of the first and second bonds in the South Carolina lien statute, the first and second bonds stand in the place of the property with respect to the obligation claims. 34, Travelers binds itself to ensure payment of the amount fully determined to be due in satisfaction of the liens. And 35,

fiscal timely filed its action to enforce the liens. This is a cause of action against the bonding company, Travelers, not Library Associates, which distinguish them from the Keeney case completely. Thank you.

THE COURT: All right.

MR. BUNDY: I would only point out the second cause of action. It says, enforcement of mechanics lien, and they filed a lis pendens.

THE COURT: All right.

MR. BUNDY: You completed the alternative. I don't dispute that.

THE COURT: Okay. All right. Well, I knew you had a response. I was wondering what it was. Now I know what it is. I'll take it under advisement before I issue those orders.

MR. BUNDY: Thank you, Your Honor. Okay.

THE COURT: All right.

MR. HILDEBRAND: Your Honor, one more prefatory thing.

THE COURT: Yes.

MR. HILDEBRAND: Tom Hildebrand, for the Court Reporter, for Balfour. We are in the same situation where we did not get the proposed order from Watson before it was sent to the Court. We

have made them aware that we think that there's a computational error in it.

THE COURT: Okay.

MR. HILDEBRAND: I understand that Don's going to talk to his client and will consider whether he's going to reissue that.

THE COURT: Okay.

MR. HILDEBRAND: So we would ask for ten days or seven days to try to work that out and advise you one way or the other if he either submits a separate proposed order, or whether we submit an objection.

THE COURT: Okay. All right.

MR. HILDEBRAND: Thank you.

MR. TERRY: Your Honor, the issue of matters that was brought to my attention this morning is the interest calculation may include interest on the $206,000 that was paid during trial. We're trying to figure out what that $206,000 was paid for.

THE COURT: Okay.

MR. TERRY: And, assuming that it was paid for something for which summary judgment was granted, then Library -- Watson would not be entitled to that interest.

THE COURT: Okay.

MR. TERRY: So, we'll fix that.

THE COURT: Okay. You think y'all can get that resolved within ten days; give me something by the 12th, Friday the 12th?

MR. TERRY: I was hoping to have it resolved before I stood up here, Your Honor.

THE COURT: By the end of the hearing.

MR. HILDEBRAND: Ten days for Friday.

MR. TERRY: Yes, sir.

THE COURT: All right. Let me do that. Let's give that time for you, okay? All right. Very good. All right. I'll make that note and then we'll go from there. All right. Thank you. Now that gets us back to, I believe, where we were, which is Mr. Werner's motion in limine on the return -- on the punitive damages here. Mr. Werner?

MR. WERNER: Thank you, Judge. The motion obviously in part is as I think we said in the previous submission. There have been no -- although this is just, according to the Court's order, a bifurcation of the original case we have received no notice as to witnesses, exhibits, what is going to happen. And so out of an abundance of

caution, largely based on the quote preview that Mr. Bundy gave to the Court at our -- at the March 13th hearing, we pointed out that if they intend to try to introduce evidence, testimony, or documents about other acts, other judgments, other criminal convictions, civil fines, the things that were referenced in the statute which pertain to another entity other than Balfour Beatty Construction, LLC, they cannot do so. They are not relevant as defined by the statute, and they are not admissible. So that is -- that is one of the key issues in the -- in the motion.

The other thing is that to the extent they intend, again, to offer evidence that does not arise from or relate to the actual conduct complained of in this case, in the cause of action that Your Honor has said could form the basis of a punitive damage award by the terms of the statute itself such information is not material, not relevant, therefore not admissible.

And so, we moved in limine to exclude any of that evidence from the record. So that -- that is the -- excuse me, the essence of the -- of the motion in limine.

THE COURT: All right. I may have jumped

ahead of myself a little bit I need to get back to Mr. Worrell's affidavit. But let's talk about -- let's continue on that. And the basis is in your brief.

MR. WERNER: Yes, sir. At least, it's intended to be.

THE COURT: Yeah. Well, you cited to the order, and you cited to the statute, and then you addressed it all in your memorandum, and I noticed that you did cover, I think it was done in three in my recollection you did it in three -- three steps.

MR. WERNER: Yes, we also included, Judge, the fact that the provision in the statute is not unusual. I mean, it's the same standard that applies in common law, and that is for any material to be relevant, and therefore admissible, it has to relate both in action and time. They have the burden, in fact, by a -- by a clear and convincing evidence to make that link. Otherwise, the evidence isn't admissible.

THE COURT: Right. I agree with that. I certainly agree with that. And we may not introduce evidence not disclosed prior to the trial, was argument number one. Argument number

two, (inaudible) evidence of unrelated incidents, which does not apply to Balfour Beatty Construction, LLC. That's the Plaintiff in this case.

MR. WERNER: Correct. That is the Balfour entity that is at issue.

THE COURT: And then, argument three, evidence of other conduct, punitive damages, and other matters. Civil criminal penalties against Balfour Beatty Construction, LLC, unless the result of the same act of coercive conduct complained of by the Library.

And then you go on to cite Statute 16 -- excuse me, 15-32-520(E). And in particular, you get to elements numbers nine, ten, and eleven. Same active course of conduct, criminal penalties, and civil fines you talked about there. The statute, of course, has got more elements than that. It's got --

MR. WERNER: There are 11, I think, total, but those are the ones that relate to whatever evidence would be admitted about other punitive damage awards, fines, or criminal.

THE COURT: So my question to you was, is it the fact that we're having the bifurcated hearing

that you object to or the way it's being presented or how it's going to be presented? That's my question to you.

MR. WERNER: Well, we included, as one of the issues in our Rule 59(e) motion, the -- if you will, the objections to the fact that the hearing is occurring. We cited the fact that the law, we think, clearly indicates that you can't bifurcate for the first time after the case is over. And the record contains no evidence that there was a motion to bifurcate or any order bifurcating the case until Your Honor issued his order, what was it, 22 months after the close of the trial on October the 6th, I think it was.

And so our position in the 59(e) motion was there is no valid bifurcation. This motion is really -- is certainly not intended to rehash that. I mean, we certainly reserve and continue to take that position. But this really assumes that Your Honor is, as we are, going forward with the hearing. The hearing still has to be conducted in accordance with the statute and the law, and they cannot introduce evidence which is, by definition, not relevant and therefore not admissible.

THE COURT: All evidence has to be relevant. It should be admissible; should it not?

MR. WERNER: Correct.

THE COURT: All right. I agree with that aspect of it. So, what I wanted to put on the record was in the Court's order of October 6, '23, pages 43 to 44 of -- the Court found that there had been a breach of contract accompanied by a fraudulent act. The Court then ordered this bifurcated hearing on the issue of punitive damages. So, because, frankly, I was exhausted at the end of five weeks of trial, okay? And we weren't going there.

So what I have found, and just so you know, that was my first concern with whether or not, procedurally, this was a problem. I found a case that just got decided last December. It's called Portrait Homes versus Pennsylvania Mutual. The only cite I've got on it is a WL site, 2023 WL 8610277. In that case, Judge Roger Young, who's holding court upstairs today, the Court states Judge Young held a separate hearing to determine the issue of punitive damage pursuant to the statutes. That's essentially what we're doing here today.

I also would cite you to Rule 42(b), which talks about either consolidation or separate trials. The Court thinks it's convenient or avoid prejudice are conducive to expedition and economy or can order several trials, and quite frankly, that's what the purpose of this hearing today would be.

So I think on that basis we certainly can go forward with that and I wanted to make sure we're clear of that issue. Let me turn then to Mr. Bundy. Mr. Bundy, how do you intend to proceed today, sir?

MR. BUNDY: What I intend to do today, Your Honor, is to hand up some evidence, which, I assume, is going to be strenuously objected to, but I'm going to hand it up to you, have it marked, and try to get it in evidence. And if it's not allowed, I'm going to offer it for proof and we're going to send it up to Columbia and see what they think.

THE COURT: All right. Very good.

MR. BUNDY: And I'm going to put Mr. Bennitt on the witness stand.

THE COURT: Okay. All right. Okay. Knowing that, then, Mr. Werner, any objection there?

MR. WERNER: Well, I don't know what he intends to offer, Judge, but, I mean, if Your Honor's going to go forward with it, again, we've made our motion. So we'll respond as they try to put evidence in and we'll make whatever objections are appropriate.

THE COURT: Very good. Okay. Thank you, sir. All right, Mr. Bundy. It's your turn, sir.

MR. BUNDY: Thank you, Your Honor. If it may please the Court, Your Honor, we might as well go ahead and get into the -- the objection, presumably -- evidence before I put Mr. Bennitt up. Excuse me one second, Judge.

THE COURT: Sure.

MR. BUNDY: I'm just going to mark them right now, Judge, if that's okay.

THE COURT: That will be fine.

MR. BUNDY: This will be -- do you want to do them one for ID for the purposes of the punitive damage hearings, and we'll have all these numbers again?

THE COURT: That'd be great.

MR. BUNDY: All right. One, for identification.

(Whereupon, the below-described document was

marked as Defendant's Exhibit No. 1.)

MR. BUNDY: This will be Defendant's two, Defendant's three, Defendant's four. This will be five.

(Whereupon, the below-described documents were marked as Defendant's Exhibit Nos. 2, 3, 4, and 5, respectively.)

MR. WERNER: So four bills total that you've marked for identification. Four that you've marked for identification. There are four exhibits you've marked for identification; is that correct?

MR. BUNDY: There are five. I just marked one more.

MR. WERNER: Oh, okay. Sorry.

MR. BUNDY: One through five exhibits, for identification. One through four, I'm going to offer up to the Court without a witness.

THE COURT: Okay.

MR. BUNDY: These are filed documents in the Federal Register and various -- these are public documents. I think you're good with the exceptions of hearsay rule.

THE COURT: All right.

MR. BUNDY: Defendant's 1 is entitled,

Justice Department Announces Global Resolution of Criminal and Civil Investigations with Privatized Military Housing Contract for defrauding U.S. Military.

MR. WERNER: Judge, before they're published up, let me make the objection for the record.

THE COURT: All right.

MR. WERNER: We would object to the admissibility of any of these documents. They do not, in fact, come under any recognized exception to the hearsay rule in South Carolina. When they have been admitted in federal matters, the federal rule differs -- 803(8) differs in South Carolina from the federal rule. The subsection in the federal rule that has been used by a few federal courts, not all, to allow the admissibility of press releases like this does not exist in the state rule. And, therefore, there is no exception to the hearsay rule in South Carolina, under which these would be used.

THE COURT: All right. So, actually, Exhibit Number 1, you object not admissible under the rules of evidence?

MR. WERNER: Well, yes. And then, secondly, we also would object, again, as we've moved in --

in limine, this does not relate to the party in this case, I guess you want to say the defendant, the Plaintiff, of Balfour Beatty Construction, LLC. You can see, from the face of it, it relates to an entity known as Balfour Beatty Communities, which is not the same. And there's no foundation to suggest that they are the same or have sufficient nexus of money.

THE COURT: Okay. You will be heard on that.

MR. BUNDY: Well, Your Honor, there are other exceptions of the hearsay rule. You can let things in just that you find their credibility is adequate to give you assistance in arriving at your decision about punitive damage. I think you have broad discretion with regard to the documents themselves. The documents speak for themselves and it is your determination as to whether or not simply these corporations, by having single purpose entities, can go out and just commit fraud willy-nilly and hide behind the corporate shield. It's interesting they, on the one hand, hide behind the corporate shield and yet then use it as a sword to say, well, these are individuals who do all these bad things, not the corporation. Well the corporation is the legal fiction for which

they're responsible. They're all interrelated. But, again, this is entirely up to you for your consideration. You may find it to be completely irrelevant. We believe it to be highly relevant within the context of a punitive damage here.

THE COURT: Okay. All right. So, in particular, as it relates to this particular document that you have propounded -- I'm looking at this --

MR. BUNDY: Yes, sir.

THE COURT: -- it's dated December 22 of '21, which was right about the time we were -- finished up this trial in particular what does it -- what does it relate to? Who is this? It says Balfour Beatty Communities.

MR. WERNER: This is a False Claim Act settlement and basically what they do is is they were inflating their claim for damages, making false claims for repair work, inflating change orders, and doing that kind of thing. The same thing you do in the hotel's interest.

MR. BUNDY: That's not what it says, Judge. That's not what it says.

THE COURT: All right. All right. Well, I'm going to allow it for now on the basis that I'm

going to look at it and take a look at it and see if we can get it. I think it's admissible. It may not be applicable, but -- or at least it's admissible.

MR. BUNDY: Right. And that's really what I'm simply doing, is bringing --

THE COURT: Right.

MR. BUNDY: -- these things to your attention, for whatever they're worth, okay? But a couple of these things are very informative, particularly the plea agreement, which involved Balfour Beatty Communities, okay. If you look at the one -- once you have a chance to read these, I think you'll understand that there is, in fact, a nexus here.

THE COURT: Okay.

MR. BUNDY: Thank you, Your Honor. Exhibit 2 -- sorry, I didn't know what Exhibit 2 was. There we go, two. Exhibit 2 is entitled to -- entitled Department of Justice. Foreign and U.S. government, nearly $25 million for inflating claims made to Amtrak, and that's 2005. And that relates to, again, claiming for work that was not done and making claims that aren't true. They were false.

MR. WERNER: Same objections, although in this case the additional objection is that there is clearly no temporal relationship, which the law is quite clear, there must be. 2005 and 2019, '20, or '21 do not relate, Judge.

THE COURT: Okay.

MR. BUNDY: The only other thing I would add, Your Honor, is apparently there's not enough money that you can penalize these people to make them quit.

THE COURT: Okay. It's also under the False Claims Act, right?

MR. BUNDY: Thank you.

THE COURT: That relates to Amtrak?

MR. BUNDY: Defendant's Exhibit 3 is an information filed in the United States of America vs. Balfour Beatty Communities.

MR. WERNER: Same objections, Your Honor.

MR. BUNDY: Exhibit Number 4 is a plea agreement.

THE COURT: Is this -- does this relate to the, what was it, Exhibit Number 1?

MR. BUNDY: There are two, there's a -- there are two different -- one happened in 2005. It related to all these Air Force communities they

were supposed to be servicing, and that was the bigger crime, I guess.

THE COURT: Okay.

MR. BUNDY: And then the other one was the conspiracy on the Amtrak. And the last one is Exhibit 4, entitled Plea Agreement. And that's the end of these types of documents.

MR. WERNER: Same objection, Your Honor.

THE COURT: The last two documents are dated the same as the press release, December 21 of '21, correct?

MR. BUNDY: I think so.

THE COURT: Timing-wise, they're right --

MR. BUNDY: Exhibit 2 is Balfour Beatty, LLC. It's the same company.

MR. WERNER: And that's not correct, Judge. None of these -- on their face, none of these relate to the same company.

THE COURT: All right.

MR. BUNDY: All right, Your Honor, that's all I have on that. Those exhibits just speak for themselves. They're worth whatever they're worth. I just want to bring them to your attention.

THE COURT: All right. All right. Just one second.

MR. BUNDY: If y'all are ready to call a witness -- if you're ready, let me know.

THE COURT: Yeah, just one second.

MR. BUNDY: Sure.

THE COURT: That was what I was gonna ask you. On item number two, I assume you got that in front of you. It talks about a false claim to that case. This is the one that's back from October 2005. It clearly says Balfour Beatty Construction. Is that a separate entity?

MR. WERNER: It is, Your Honor. It's not Balfour Beatty Construction, LLC. They're not the same.

THE COURT: Okay. A precursor or just totally different company?

MR. WERNER: Different companies, Judge, do different things.

THE COURT: There's also Balfour Beatty, PLC. Is that the parent corporation?

MR. WERNER: That's the British company, I understand.

THE COURT: Okay. All right. Okay. And then the other two documents, 3 and 4 -- case number -- I see a case number on item number 4.

MR. WERNER: Criminal case number on Exhibit

4, 21-CR-742.

THE COURT: Correct. Criminal case number. And I believe the other one, looks like 3 maybe as well. And it says it's under seal. This is information and the plea agreement commensurate with the same case.

MR. BUNDY: Yes, sir.

THE COURT: Right?

MR. BUNDY: Yes, sir.

THE COURT: And that gets into the same discussion about item number 1. Those are clearly related; are they not?

MR. BUNDY: Yes, your honor. I just think they tend to explain each other and it gives you a feel for the underlying people involved in what they were doing, that's all.

THE COURT: All right. All right. Well, I'm going to find Exhibits 1, 3, and 4 clearly admissible and relevant. Number 5, I will hold on that for now, okay?

MR. BUNDY: All right. Thank you.

THE COURT: Just so you're clear. All right. Do you want to call your witness?

MR. BUNDY: Yes, sir, Micheal Bennitt.

THE COURT: Hi, Mr. Bennitt. Let's go around

and -- okay. Watch yourself over there. Watch that -- there's a ramp over there. It's designed to trip up the lawyers.

THE WITNESS: Okay. Can I go here?

THE COURT: Yes, sir. I haven't lost a witness yet. I've lost a couple of lawyers.

Whereupon,

MICHAEL BENNITT,

first being duly sworn, on oath, was questioned and testified as follows:

THE COURT: Thank you, sir. Please have a seat. And when you get comfortable, Mr. Bennitt, give us your full name and address for the record, please, sir.

THE WITNESS: Micheal Roy Bennitt, 143 Tradd Street, Charleston, South Carolina.

THE COURT: 29401?

THE WITNESS: 29401.

THE COURT: Thank you, sir.

MR. BUNDY: May it please the Court?

THE COURT: Yes, sir.

E X A M I N A T I O N

BY MR. BUNDY:

Q. Mr. Bennitt, I want to hand you what's been marked as Exhibit 5 to this punitive damage here. Can you

identify that document?
A. Yes, sir.
Q. Tell me what it is.
A. It's a letter I wrote to the CEO of Alfred Beatty.
Q. All right, sir. And before we get into the letter, tell me what is your interest in Library Associates to defend the counterclaiming plaintiff in this action?
A. What is my interest, meaning my ownership interest?
Q. Sure. Yeah, your ownership interest.
A. I own the majority of the entity, and then a children's trust setup owns the other part of the entity.
Q. Okay. And who is the final decision maker with regard to Library Associates?
A. I am. Micheal Bennitt.
Q. All right. And how long have you been developing hotels, Mr. Bennitt?
A. Since 1990.
Q. Okay. And prior to this hotel, how many hotels did you develop?
A. I think 20 or 21.
Q. Okay. And how -- what does that average out to, starting a new hotel, on average, if you do that many hotels over that period of time?
A. I was starting one about every year and five months, year and a half.

Q. Okay. For 20 some-odd years?
A. For 23 -- the last 23 years, I've started one about every 15 or 16 months, on average.
Q. Did this particular hotel have any impact on that 15-month turnaround time?
A. I haven't started one since we got started in the lawsuit. I haven't started anything new since the lawsuit, since January of '19.
Q. January of '19, okay. And do you -- can you tell me why you haven't started anything since January of '19?
A. I had a $25 million lien against me that I didn't know what was gonna happen. It was the biggest thing that ever happened to me in my life. And we weren't -- we didn't do anything. I didn't realize it was gonna take five years. Well -- and I still have a lien on the property.
Q. I've got you. But for this lien, would you have continued to develop hotels on a 15-month basis, as you had previously done for the 20 previous years?
A. Yes.
Q. Okay. No doubt in your mind?
A. No doubt in my mind.
Q. Okay. You had finance, land, projects?
A. I'm hopeful now that this case is over that I can start several of them later this year.

Q. And, approximately, in your opinion, what damages have you suffered in terms of the inability to finance, however you want to calculate it, that you could explain to the Judge from your perspective, as a developer of 20 some-odd years' experience, what damages have you sustained, or your company sustained, as a result of this lien?

MR. WERNER: Objection, Your Honor.

THE COURT: Basis?

MR. WERNER: Speculation and conjecture.

THE COURT: Overruled. You can answer.

BY MR. BUNDY:

A. Well, the additional damage to me and my family, apart from the cases, the lack of ability to start any new projects, which, in a normal five-year span, I would have started two or three. And so, that time, I'll never get back. Now, maybe I'll build those two or three in the next five years, but I will have lost that five-year period. I don't know that it's calculatable as to the damages we've received, because of the inability to do any projects since we have been served papers on this.

Q. What about financing? What effect did this lien or these liens have on your ability to refinance?

A. I couldn't refinance it.

Q. And did you -- have you calculated a loss that you've incurred?
A. No, unfortunately --
MR. WERNER: Same objection, Your Honor.
THE COURT: Overruled. Go ahead.
MR. BUNDY: Thanks.
BY MR. BUNDY:
A. At the time, we could have refinanced the loan at three percent, and we're currently paying -- I don't know the exact number, but it's close to ten percent.
Q. Okay. And the total would be what if you had to put a number to it?
MR. WERNER: The same objection, Your Honor.
MR. BUNDY: You can answer the question.
BY MR. BUNDY:
A. I think those damages are 40 or $50 million that we're not -- it's going to run with us for the ownership of this project, until we pay off the mortgage.
Q. Okay. So, an additional 40 or $50 million you're going to have to pay?
A. Yes.
Q. Okay. With no consideration of return, other than just interest out the door?
A. And by the way, that answer, I believe, was included in the claim. But it's about six or seven percent on $65

million for 20 or 25 years.
Q. I understand. All right. Well, let's go to Exhibit Number -- I guess it's five or six. Which one is it? It's up in the corner right here. I don't know. That's right there. I think it's five.
A. This says five, and then, over here, it says ten.
Q. It's five, okay. So you wrote this letter?
A. I did.
Q. Did you compose it?
A. I did.
Q. You didn't type it, but you composed it?
A. I did.
Q. Okay. This was composed apparently and sent in roughly June of 2018; is that correct?
A. I believe that's about correct.
Q. Okay. And that's -- and this litigation has begun in what, about a year after that?
A. Yes.
Q. All right. Just generally, Mr. Bennitt, what was the status of the hotel in 2018 that, I guess, prompted you to write this letter?
A. We were probably a year behind schedule at that point, if not more. We couldn't get any answers from the people in the field from Balfour Beatty. About when we could -- when we would finish. They would never give

us a finish date. We had a full, management company -- third-party management company that was on our payroll for an extra probably two years in anticipation of when the hotel was supposed to open versus when it did open. And so I thought I would write the CEO of the company that was building the hotel and give him my personal story, and that I needed help.

Q. Had you ever met him before?

A. I had not.

Q. All right. If you would -- as I remember, this job was awarded based on request proposals; is that correct?

A. That's correct.

Q. And in that, were you involved in that process?

A. I was.

Q. And that's an interview process, right?

A. That's correct.

Q. And as a result of that interview, you hired Balfour Beatty?

A. That's correct.

Q. And I presume they had a team that came to that interview?

A. Yes.

Q. All right. How did the people who came to that interview on that team that you selected to build a hotel compare with the people who were in the hotel in

June of 2018 building the hotel?
A. Yeah, I know several of them weren't on the same team. I don't know how many were or were not. But the key quarterback, who I looked to be who was my point person, was terminated shortly after the contract had been signed.
Q. Okay. And did that --
A. He testified in this case. His name was Mike Bombat.
Q. And did that have an effect on the hotel, as far as you're concerned?
A. I think it did. He was the point person. He was one of our big reasons for hiring Balfour Beatty.
Q. All right. So let's go through the letter, just very briefly. And if you would, explain to the judge what it was you were trying to accomplish by writing a letter to a man you had never met.
A. I -- well he ran his company and I ran my small company and I -- I was -- I couldn't get an answer out of Alfred Beatty, and I thought if I wrote this man a personal letter, that he would at least contact me and try to help me as we try to figure out how we could get this hotel open.
Q. Are the things in this letter true?
A. The things that I wrote, yes, they're true.
Q. And they were true then, and they're true now, right?

A. Well, my mother's no longer alive, but when the letter was written, she was.
Q. Now, let's turn the page, if you will.
MR. BUNDY: Judge, I'll let you read the letter. There's no sense in going through it.
THE COURT: Okay.
BY MR. BUNDY:
Q. Is this the response you got, an email?
A. Yes.
Q. All right. And did he ever call you?
A. No.
Q. Did you get any other response from anybody regarding your letter to the Chief Executive Officer of Balfour Beatty other than this email?
A. No.
Q. Okay. It says, let me first reiterate about Balfour Beatty's commitment to completing your hotel.
After you got this email, did you see any difference in Balfour Beatty's commitment?
A. No.
Q. Okay. I am aware of some of the challenges. Do you know which ones he was aware of?
A. I don't.
Q. And he had full confidence that you have the correct team and leadership to complete the project.

Now, from that date, June 21, 2018, did you, in fact, based upon what occurred over the next year and a half, have, in fact, the correct team and leadership to complete the project?

A. There was no change in the team.

Q. Okay. All right. He says, I have discussed the project in great length with Pat Dean.

And you wrote the letter -- you wrote the letter to him on -- sent to him on the 15th; right? That's when -- so it was sent by Melissa Pence on the 15th at 1:00, right?

A. Yes.

Q. And you got an answer about six days later at 12:00.

A. Okay.

Q. So, apparently, between Friday, when you sent it, and Thursday of the following week, this gentleman, Mr. Bloden (phonetic) or Blondin (phonetic), or whatever his name is, had discussed the project in great length with Pat Dean.

Who is Pat Dean?

A. He was the head of Balfour Beatty in this region or in Charleston. I'm not sure.

Q. How often was he on this job?

A. I don't know.

Q. Okay. Do you know how much involvement he had with the

job?
A. I wasn't there on a daily basis, so I don't know.
Q. Okay. Did you have any discussion with Mr. Dean after this letter?
A. I did.
Q. Okay. What did Mr. Dean have to say about it?
A. He said, don't call the CEO again.
Q. And why did he tell you that?
A. He said, we can -- we'll fix it. You don't need to call the -- bring the CEO into this.
Q. So apparently, he wasn't happy that you had written the CEO?
A. I think that's the way I took that.
Q. Okay. Did you bother the CEO again?
A. I did not.
Q. Okay. And I believe he has reached out to you to discuss what is needed to complete this project. Well, that may be what he believed, but what, in fact, happened, if you know, regarding his reaching out to you, whatever that means?
A. Nothing changed.
Q. Did Dean reach out to you other than to tell you, don't you be writing my boss again?
A. Not really.
Q. That was the reach out you got?

A. Yes.
Q. That's all I have. Thank you.
THE COURT: Mr. Werner?
E X A M I N A T I O N
BY MR. WERNER:
Q. Hey, Mr. Bennitt. We've not had a chance to meet before. I'm Jim Werner. I'll try to keep this brief. The owner of the hotel is Library Associates, LLC; is that correct?
A. Correct.
Q. How many other hotels has Library Associates, LLC, developed?
A. That's the LLC that owns the hotel.
Q. Right. So how many have they developed?
A. Each hotel is developed under its own LLC.
Q. So you use special-purpose entities as well?
A. We use an LLC to develop each ownership of each hotel.
Q. Separate LLCs?
A. That owns the real estate and owns the hotel.
Q. So --
A. Bennitt Hospitality is the company that develops them, they're owned by them.
Q. But Bennitt Hospitality is not a party in this lawsuit, correct?
A. They're not the owner of the hotel.

Q. So, the party to this lawsuit, the Library Associates, LLC, has not lost any additional opportunities to develop other hotels has it.
A. Each hotel is -- the 23 hotels that I own, they're each owned individually. I can't imagine Library could get a -- could develop another hotel with the lien it has on the existing one. But they all are developed under their individual LLC.
Q. And Library Associates, LLC, had never developed another hotel before this one happened?
A. It's by design that there would be --
Q. I understand that, sir. I'm asking a simple question. It has not been --
A. I'm trying to give a simple, honest answer, sir.
Q. Well, answer the question. It has not developed any other properties besides this one?
A. I've developed 23 hotels, each an individual LLC.
Q. But the party in this case is Library Associates, LLC. You're aware of that, right?
A. Right. I'm aware of that.
Q. Okay. And it hasn't developed any other hotels?
A. It's not designed to develop another hotel.
Q. But it's the one that owns this hotel, and it's the party in this case, isn't it?
A. It's the one who owns this hotel and is the party in

this case.
Q. And it's the one who made the contract with Balfour Beatty?
A. That's correct.
Q. Okay. Now, about that contract, did you read that contract before you signed it?
A. I rely on --

MR. BUNDY: Your Honor, I'm objecting. I don't see how this is relevant to the punitive damage hearing.

THE COURT: I'm -- I'll allow some leeway, go ahead.

BY MR. WERNER:
Q. Did you read the contract before you signed it?
A. I would rely on counsel.
Q. So you didn't read it?
A. It's been -- it's probably been ten years ago. I don't remember.
Q. So you didn't -- you don't remember that you signed a contract that had a waiver of consequential damages in it?

MR. BUNDY: Your Honor, this has got nothing to do with punitive damages. I object. You've already ruled on consequential damages, and this gentleman's --

THE COURT: I have. I've ruled on that.

MR. WERNER: Your Honor, he's trying to paint a picture about what affected the party in this case. The only party that can get relief in this case, who hasn't developed any other properties. They're claiming that they've lost all of these opportunities. They haven't developed any other properties, and they signed a contract with a waiver of consequential damages, which expressly includes a waiver of damages for profits and financing costs. I think we have a right to find out, when they're claiming that they have this injury for this party, whether or not that's the case.

MR. BUNDY: May I be heard?

THE COURT: Sure. Go ahead.

MR. BUNDY: You found these people have committed fraud. Fraud trumps a consequential damages waiver. Nobody enters into a contract with a crook and says, I'm waiving consequential damages. No, they're going to steal from them. So fraud trumps everything, Judge. And that's what we're here about today, is fraud.

MR. WERNER: Fraud doesn't trump everything. There's no finding in this case that it trumps

everything. There's no claim that it trumps. They haven't even alleged fraud in the inducement, Your Honor. This case wasn't tried with a fraud in the inducement claim. So, that's just plainly not correct. And I think I have a right, when they're asking you to award punitive damages, to ask fundamental questions about what really happened to the party in this case.

THE COURT: Go ahead. I'll allow it. Go ahead.

BY MR. WERNER:

Q. By the way, Balfour Beatty did finish this project, correct?

A. Pardon me?

Q. Balfour Beatty finished this hotel for you, correct?

A. I actually had Robins & Morton do the work. Balfour Beatty wouldn't finish the painting.

Q. Well, they had done the painting and you wanted it repainted; is that right?

A. It was not painted to the proper level.

Q. And other than you, who made that determination?

MR. BUNDY: Your Honor, I object. You made that determination. You've made that determination. So I'm not so sure we need to go back and question your determination. That's what

Columbia does.

MR. WERNER: And I have a right to make a record for the people in Columbia to do that, Judge.

THE COURT: Go ahead.

BY MR. WERNER:

Q. Who made that determination, other than you?

A. I think it was a contract to determine what the level of quality was, if it didn't meet that level of quality.

Q. Who made the determination if it didn't meet --

A. I don't know.

Q. Okay.

A. Maybe an architect, maybe an engineer, maybe the project manager. I don't know.

Q. How many of Library Associates, LLC -- how many employees does that entity have?

A. It's the ownership of the hotel.

Q. So how many employees does it have?

A. I don't think it has any employees. It's a real estate holding entity.

Q. And you made the comment that there was a 20 -- $25 million lien against the property. That's not correct, right?

A. That's what I understand. I think it was 12, and it

was duplicative, and so it was 24 or 25. I remember when I was trying to get a bond, it was in the 30s, because it had to be a multiple of that number.

Q. Yeah, the bond has to be one and a third times the amount --

A. Okay. That's the thing. That's what it was. There's still a lien on the property.

Q. Do you know how -- do you know what lien is still on the property?

A. I don't know what it is today. It should be removed though.

Q. And why didn't you bond it all?

A. I couldn't get a bond.

Q. To whom did you try to -- from whom did you try to get a bond?

A. We talked to some that -- I don't know if they were bonding companies. It was back some time, and the lender ultimately didn't require me to.

Q. The lender required you to bond it off?

A. Did not require me.

Q. Oh.

A. At the end of the day, did not require me.

Q. Okay. I think you told me in the end you don't remember, but from whom did you try to get bonds to bond off the liens?

A. We talked to some bond company, insurance company, I think is who --
Q. You don't remember which one?
A. I don't.
Q. Did you talk with more than -- did you try to get a bond from more than one?
A. I called. I talked to that one group, and then the lender didn't require it.
Q. Okay. And what was the response you actually got from that insurance company, bonding company?
A. I don't recollect exactly, but to get a bond, you have to either have the cash in the bank for that amount, or you'd have to have something they would accept in lieu of cash that would not have a lien on it.
Q. They would require some sort of indemnity agreement in order to give you the bond, is that right, that you would indemnify them, the bonding company?
A. I think I had to -- would have put the money in the bank to get the bond. So to secure the bond, or to secure it in some other manner that they would accept.
Q. And do you remember what the amount that they said that you would be --
A. I think it was in the 30s number, I do remember. I think it was -- what did you say, 150 percent or 130 percent?

Q. One and a third times.
A. So it was somewhere around there, between 24 and 30 million.
Q. Balfour Beatty lien was never more than 12 million -- roughly $12 million, correct?
A. I understand that there were liens from all the subs and Balfour Beatty total 24 million.
Q. You understand, meaning someone else told you that, you think?
A. That's what I believe is the case. I think that's true. I'm sure someone told me.
Q. Do you know what the value of the remaining lien on the property is right now?
A. I don't.
Q. Okay. And so, do I understand from what you're saying, when you said the lender then didn't actually require you to do it? So the presence of that lien on the property is not affecting the use or operation of that property at this time?
A. It's not allowing me to pay off that loan.
Q. It's not allowing you to pay off the loan?
A. To refinance that loan with that lender.
Q. Oh, so you're -- okay. So you're saying the lender didn't require you --
A. The lien wanted me to refinance it with the lender at a

much lower rate.
Q. Okay. And when did you try to refinance it, specifically?
A. With the lien, we haven't tried recently.
MR. WERNER: I think that's all I have for the witness. Thank you, Mr. Bennitt.
MR. BUNDY: Nothing further, Your Honor.

E X A M I N A T I O N

BY THE COURT:
Q. And Mr. Bennitt, just to follow up, the loan is in the Library Associates' name?
A. That's correct.
Q. The owner of the entity?
A. Yes.
Q. And so, the damages that you claim there are the fact that you are unable to refinance at a lower rate?
A. That's correct.
Q. You projected that at some 67 percent over?
A. Well, rates back then were three and under, and today they're about ten.
Q. Right. Right.
A. I think the bank's lawyers back there, they might know what my rate is for somebody. It's about ten percent.
Q. Okay. All right. And that's projected over what period of time?

A. I think over the course of that loan.
Q. Okay. All right.
A. But for the last five years alone, it's been a significant amount, probably an average of four points over the last five years.
Q. Over and above?
A. About 65 million over, and above what I would have got.
Q. Right. Right. What you could have refinanced for --
A. Correct.
Q. -- due to the lien?
A. Yes.
Q. Got it.
A. It's hard to get a bond on a lien. You've gotta have the amount of money in cash to get that lien, or you've gotta have real estate that ain't got no debt.
Q. I know Mr. Trump's had that problem recently.
A. You know, on a much smaller scale, it's exactly what that was.
Q. Yeah, I'm with you on that one.

THE COURT: Okay. All right. I don't have any further questions. All right. Anything further? Very good. Thank you, Mr. Bennitt. You had that letter that was Exhibit 5 you wanted to put into evidence?

MR. BUNDY: Yes, sir.

THE COURT: All right.

MR. BUNDY: I'll move to introduce it now. Like I told you, Judge, even rich people ain't got that kind of money. Your Honor, that's all -- that's the only thing -- that's all I want to put today.

THE COURT: Very good.

MR. BUNDY: Thank you.

THE COURT: All right. Mr. Werner, anything else?

MR. WERNER: Not with punitive damage issue, no, Your Honor.

THE COURT: All right. Very good. All right. So I just wanted to make a few findings and then on the issues before the Court. I have looked at some cases. One of the recent ones was Johnson versus Sam English Grading on the issue of punitive damages. It was admissible. The admission of evidence is within a trial court's discretion. For a reversal, based on the conviction of evidence, the Appellant's got to show both error and resulting prejudice. The Court has wide discretion in apparent relevancy. Evidence is relevant and admissible if it intends to establishment and make, more or less probable,

some matter at issue. So that's where we all are on the issue of punitive damages. I just wanted to make a note to myself.

As I understand it, the discretion for that would be wide-ranging, and discretion runs anywhere from zero dollars to, under the statute 15-32-530, I believe it is -- it's either 520 or 530. Let me flip to the right statute. 520 talks about the evidence. The Court has to be established to prove by clear and convincing evidence the harm as a result of the Defendant's willful or reckless conduct. And then, it sets forth, in fact, 11 separate elements that need to be addressed for the determination of punitive damages. And the Court's setup of the statute is for the Court to review any award of punitive damages to make sure it is not a result of passion, prejudice, or caprice.

And then, 530, sets forth the statute of criteria, how much can be allowed. Section A, excepting B and C, three times the amount of compensatory damages or 500,000. The -- if the Court determines that the wrongful conduct was motivated primarily by an unreasonable financial gain, and determines the unreasonably dangerous

nature of the conduct, together with the high likelihood of injury, was known or approved by the managing agent, director, officer, or person responsible for making policy decisions. And then, four, to the Defendant's actions could subject the Defendant to conviction of a felony, and that would be a proximate cause of the Plaintiff's damages. If the trial court determines that either one or two, that's who's aware -- somebody in the scheme of the company was aware of what was going on and/or there was a potential for a felony, then punitive damages must not exceed the rate of four times the amount of compensatory damages, with a sum of $2 million. If the trial court determines that neither one or two apply, the Court should reduce the award and enter judgment for punitives as it may. However, when one of the following applies, there is no cap on punitive damages. That's Section C. At the time of injury, the Defendant had an intent to harm, and determines the conduct did, in fact, harm the Claimant. C one, C two, and has pled guilty or been convicted of a felony arising out of the same act or course of conduct complained of by the Plaintiff, and that course of conduct was a

proximate cause of the Plaintiff's damages. And three has to do with the influence of alcohol and drugs, and I don't think that's applicable at all, okay?

MR. BUNDY: Yes, sir.

THE COURT: So, that's the statute that we're going to be looking at in the finding. Anything you wish to add to that, Mr. Bundy?

MR. BUNDY: No, Your Honor. The only thing is that I don't -- I don't know if I'm going to make a closing argument, so I won't rant. But I would point out to you that, the limitations you face constitutionally and statutorily with punitive damages are not going to solve this problem. And it's not going to stop this kind of -- I believe that the only place that adequate remedy can be obtained in this case is through the cost methodology in the declaratory judgment action because you have a wide range of abilities there to correct a wrong, okay. It's wrong, what they did. They put an excessive lien on this man's property. They did all the things you had found. I don't need to go through them. You know what they are. And they're going to win. They're going to win unless they -- unless Mike can get

back to where he was before they did what they did. And they're going to do it again. Because it's like anybody else. If I can rob a bank for $20 million and do five years, and get the $20 million when I get out, that's a pretty good wage, okay? So that's the way I see these people. Thank you.

THE COURT: Mr. Werner?

MR. WERNER: Judge, just to follow up on your -- I'm not sure to what extent you were speaking to us or to what extent you were just kind of going through it in your own mind out loud, but I think there are some serious limitations on -- on the ultimate issue you were going through. No less than the United States Supreme Court. Affirm by quoting the United States Supreme Court twice by our State Supreme Court is the fact that punitive damages in fact must be premised on the liability that gave rise to the compensatory damages under the claim that would allow punitive damages. I will remind Your Honor that you found no compensatory damages under the breach in contract accompanied by a fraudulent act. The fact that the -- that even if you find that you think that the Defendant -- I use the word

Defendant because that's obviously the normal --

THE COURT: It is hard to hear in reverse. It's hard to figure out sometimes.

MR. WERNER: -- is a terrible person or did other things on other projects, the U.S. Supreme Court and the State Supreme Court have said unequivocally that doesn't matter and cannot support a finding. It's not even a basis for you to use your discretion in awarding punitive damages. So this isn't just, I have discretion. I can do what I want. It's not. And there have to be compensatory damages associated with, in this case, the so-called fraudulent act that completes the cause of action. In your order you identified no fraudulent act. You awarded no damages based on a fraudulent act. The damages you awarded were both simple breach of contract damages, liquidated damages, and cost of repair for a couple of items of work, the painting being the primary one.

The truth of the matter is, they have not met the required burden. You don't have before you the requirements to award punitive damages. In this case, based on your findings in the earlier report. There doesn't exist a completed cause of

action upon which you can award punitive damages in this case. It just doesn't exist, and it's not a matter of discretion.

The discretion relates to the question of, if all of those things are met under the law, it -- yeah, you know, do I find that it takes a million dollars? Do I find it takes $10? No one, I think, can dispute that that's where discretion either for the jury or for you in reviewing the jury or making the decision here in a non-jury matter. But you don't have discretion to impose punitive damages when it doesn't meet the test of the law. And here it doesn't. It just doesn't. And there's certainly no basis to go beyond the three time cap. That -- that is in 15 -- that is in 530.

So, you know, again, I don't know to what extent you were trying to engage us, but in response to your thinking out loud, I think those are the realities that -- that confront Your Honor. I mean, they just -- they just do. And, you know -- well, I'll leave it at that.

THE COURT: Okay. All right. The other thing that I sort of glossed over, but I wanted to bring it to y'all's attention, because I was

working on the issue of the attorney's fees, was the affidavit of Mr. Worrell that was submitted. Have y'all had a chance to review that? I wanted to hear what y'all's position on that was.

MR. LINTON: Your Honor, we reviewed it and considered it quite inadequate and unhelpful. The real question is, will it assist the Court who presided over all these proceedings? It doesn't attempt to set an hourly rate. It doesn't attempt to say what a reasonable fee would be. It's simply going through the records with no ability to reflect on what was going on in the trial and say, oh, they didn't put it down this way.

And South Carolina Supreme Court Acting Chief Justice Hearn, in the Maybank decision, covers it all beautifully, I might add. They also -- I take issue with Mr. Werner saying that fraud doesn't trump things. He says it has to be fraud and inducement. The Court doesn't say that, fraud, because it's an evil act, not just constructive fraud. Actual fraud does trump things.

And at the conclusion of the last hearing, Mr. Werner referred to two cases that had not been previously referenced. I think you all wrote those down. One of them is Robison versus Asbill,

and this relates to the declaratory judgment and the discretion that the court has to do justice. It's a remedial statute. It's entitled to give wide discretion to the court. Recited cases from other jurisdictions in which the damages we've asked for and testified to earlier were presented. And so we particularly call that case to your attention and has full relief.

THE COURT: All right. Very good. Robison versus Asbill, right?

MR. LINTON: Yes, Your Honor.

THE COURT: A-S-B-I-L. Very good. All right. Mr. Werner?

MR. WERNER: I just want to point out, Judge, we talked about this the last time. The Supreme Court in Maybank recognizing in that case that there were multiple causes of action that, clearly, while they found that there was some, if you will, overlapping or intermingling of things, they still found that you can't have all of that stuff and everything related only to the one cause of action related to the attorney's fees.

THE COURT: Right.

MR. WERNER: And they, in fact, imposed a reduction, not an enhancement of fees. And what

-- what was provided in the affidavit from Mr. Worrell, we're not trying to tell Your Honor. I mean, you do have the final analysis of judging whether or not they have met their burden. What that affidavit provides you is information that they have not met their burden, that by the face of their own billing statements, it is absolutely clear that much -- in fact, as much as 75 percent of their time entries have little or nothing to do with the one thing that Your Honor said they can apply for attorneys, and that's the defense of the mechanic's lien foreclosure.

THE COURT: Okay.

MR. LINTON: Okay. Your Honor, two things. One, in Maybank, I believe they did have an enhancement, and the reduction was 20 percent.

THE COURT: Right.

MR. LINTON: And there were many more causes of action that were unsuccessful. And under the Declaratory Judgment Act, we're not restricted to the fees related to the mechanic's lien. All of the fees have been testified to and would be appropriate for you to consider under the Declaratory Judgment Act.

MR. WERNER: The Declaratory Judgment Act

doesn't say anything about their entitlement to fees. It talks about costs.

THE COURT: Costs, right. I'm with you.

MR. WERNER: And they signed a contract that says financing costs and profits are not recoverable. And you know that that was the case in the law in this case.

THE COURT: I remember what I read. I --

MR. LINTON: The only other thing that Mr. Werner leaves out about the statute is this may be just and proper.

THE COURT: Just and proper, okay. Very good. All right.

MR. TERRY: I have a Watson -- I don't know if they can be heard quickly on the petition for attorneys fees.

THE COURT: Sure.

MR. TERRY: All right. Mr. Bundy brought up that Watson's mechanic's lien claim hadn't even been tried. Therefore, the Library clearly can't be prevailing party on that claim. Therefore, no lawyer's attorney's fees can be granted against Watson. We found the same thing when reviewing the Library's attorney's fee statements. There's absolutely no way to determine from those records

how much was spent defending each and every lien claim, just as their own expert testimony. Thank you, Your Honor.

THE COURT: Okay. All right, very good. All right, folks.

MR. WENDELL: Your Honor.

THE COURT: Yes, sir.

MR. WENDELL: At the danger of being repetitive, I just want to say that we now have had the opportunity to go through all of Library's, counsel's, records. Just like Mr. Werner said, the vast majority of them are block building with a time set aside. There's no indication that this work or this time was spent defending the lien, as required by the statute. And we've got spreadsheets to back that up. Thank you.

THE COURT: Okay. Very good. All right, folks. I think you pretty much beat this horse dead. Anything -- any other matters before the Court?

MR. HILDEBRAND: Yes, sir.

THE COURT: All right. You've got your motion. All right.

MR. HILDEBRAND: Your Honor.

THE COURT: Glad to hear from you, Mr. Hildebrand.

MR. HILDEBRAND: Thank you, Your Honor. We filed a motion initially on October 16, 2023, right after we got your order, a motion to require the Library to elect its remedy. When the Library then started arguing that a lot of damages should be awarded under the declaratory judgment, I added the declaratory judgment finding as another cause that, or another remedy to which they must elect.

THE COURT: Okay.

MR. HILDEBRAND: We submitted a memorandum in support of our motion, and that last -- the amendment motion was filed on March 8, 2024, adding the declaratory judgment provision. And I actually cited in that motion the case of Inman versus Imperial Chrysler-Plymouth, Inc., 397 S.E.2nd 774, which says that, quote, a defendant may raise the issue of election of remedies at any stage of the case. And then, this is very telling. Indeed, to carry out the doctrine's purpose, the trial judge should, on his own motion, require election if he lets both causes of action go to the jury. And in this case, the claims that required election were UT Unfair Trade

Practices Act and fraud, and the Court said they both arise out of the same nuclear facts, the facts are the same. You have to elect a remedy.

So, in this case, we have, in your order, after discussing all the various claims, your order very clearly said, I'm going to find under three causes of action. One, breach of contract. Two, breach of contract company by fraudulent act. And, three, declaratory judgment action. The case law was clear again when the same operable facts underlie those claims, then there must be an election. I cited it in our brief, the case of Smith versus Canal, where it said, in action for breach of contract, in breach of contract accompanied by a fraudulent act, quote, are really only a single claim sounding in contract. Here's another quote: when an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both. However, the plaintiff may not recover both. So I think Your Honor said that typically, when you've made orders, you've typically enforced that as well. When you've had alternative calls of action or damages that you've awarded, you require an election.

Here, the breach of contract award, the monetary award, was identical in your order to the breach of contract accompanied by fraudulent act. The damages are the same. If you look at the declaratory judgment action and the -- your order that found for the declaratory judgment action, you'll see that what you say is, basically, you found under the same set of facts for your findings of declaratory judgment, that you found for breach of contract and breach of contract accompanied by fraudulent acts. They're all the same. So under the case law, Library Associates, as the plaintiff and counterclaim must elect their remedy, and I think that they need to do so now. Everything else has been heard, and I think they need to elect their remedy.

THE COURT: Okay. Well, it's my practice, just so you know, I don't make them hedge against themselves. They are required to elect, but I don't require them to elect until after the verdict is back in, so at that point in time, they're not allowed to go up with purpose. Requiring the election of remedies is not to allow for a double recovery. You only get one recovery. That recovery can be whatever that recovery is, be

it under breach of contract, breach of contract for fraud, or in this case, DJ, actually, which is, that's really what they're doing.

So I think I've seen a number of cases in which the Court has required people to elect a remedy prior thereto, but I don't think that's the proper way to divide it. So I'm not required to do that until such time as this court issues its final order, which I'm hoping to get to y'all real soon, okay.

MR. HILDEBRAND: And when they have, we're doing what, five days or a week to --

THE COURT: Y'all asked for ten days on the other issue.

MR. HILDEBRAND: That's fine.

MR. BUNDY: What are they asking for?

THE COURT: Well, they asked for ten days on the question about the -- what we first took up about Watson and Lithko. I'd like to get y'all in order about that time myself on what we've had to hearing on today, okay?

MR. HILDEBRAND: Okay. My question was on the election. Were they asking you guys to elect once the order comes out?

THE COURT: Yeah, I'll give them a certain

time period to elect. I typically do it. My experience has been they always go for the higher number. That's not always the one that I would choose, but that's what people tend to do. So once I've issued that final order on the issue of punitive damages, which is what's coming out of this hearing, essentially, then I'm required to do a letter. There'll be multiple -- there are multiple remedies. There's only one election of remedies, really, is what I'm getting at.

MR. HILDEBRAND: And it'll be, just real clear, either like A, B, or C, breach of contract, breach of contract will come by fraud, or --

THE COURT: Right.

MR. HILDEBRAND: Okay. Thanks.

THE COURT: Okay.

MR. LINTON: Your Honor, the only other thing is we do need to update costs and attorney's fees. Since the last meeting we do that --

THE COURT: If you want to do that, you better do that soon. All right. I'm about to send out a flurry of orders. I got a bunch of them. I held off on these because we wanted -- I knew you wanted to respond to the Watson and Lithko issues and we'll get that. So now we'll

put that in the -- I'd like to get something in here by 12 so we get this thing done, okay?

MR. BUNDY: Thank you, Your Honor.

THE COURT: All right. Folks, thank y'all for coming in. Good to see you again. I'm hoping we're near the finish line.

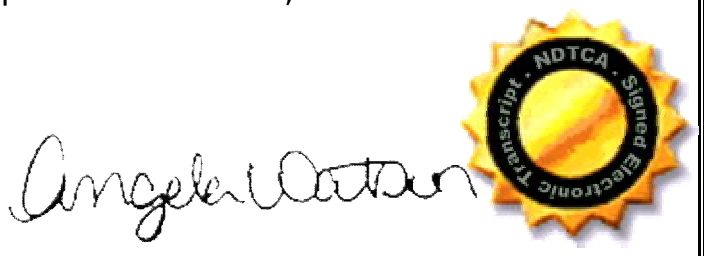
(THERE BEING NO FURTHER QUESTIONS, THIS HEARING CONCLUDED AT 3:47 P.M.)

CERTIFICATE OF REPORTER

I, Angela Watson, a Notary Public in and for the State of South Carolina, do hereby certify that the foregoing hearing was taken before me on the date and at the time and location stated on page 1 of this transcript.

That the witness was duly sworn to testify to the truth, the whole truth, and nothing but the truth.

That I am not related to nor the employee of any of the parties hereto, nor related to or employed by any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.



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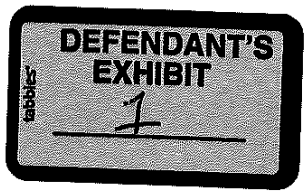
Angela Watson, Court Reporter
Notary Public for S.C.
Commission Expires: July 8, 2033



PRESS RELEASE

Justice Department Announces Global Resolution of Criminal and Civil Investigations with Privatized Military Housing Contractor for Defrauding U.S. Military

Wednesday, December 22, 2021

For Immediate Release

Office of Public Affairs

Balfour Beatty Communities Pleads Guilty and Agrees to Pay Over $65 Million in Fines and Restitution for Fraud Scheme

Today, the Department of Justice announced a global resolution of its criminal and civil investigations into Balfour Beatty Communities LLC (BBC), one of the largest providers of privatized military housing to the U.S. Armed Forces, for defrauding the U.S. Air Force, U.S. Army, and U.S. Navy, in connection with a scheme to defraud the U.S. military.

BBC pleaded guilty to one count of major fraud against the United States in connection with a criminal information filed today in the District of Columbia. U.S. District Judge Emmet G. Sullivan accepted the plea and sentenced BBC to pay over $33.6 million in criminal fines and over $31.8 million in restitution to the U.S. military, serve three years of probation, and engage an independent compliance monitor for a period of three years.

Separately, BBC also entered into a False Claims Act settlement with the United States to resolve its civil liability for $35.2 million. The amounts paid under the civil settlement will be credited against the amounts owed under BBC's criminal plea.

"Instead of promptly repairing housing for U.S. servicemembers as required, BBC lied about the repairs to pocket millions of dollars in performance bonuses," said Deputy Attorney General Lisa O. Monaco. "This pervasive fraud was a consequence of BBC's broken corporate culture, which valued profit over the welfare of servicemembers. Today's global resolution sends a clear message to companies that if they do not maintain adequate compliance programs, voluntarily self-disclose misconduct, and fully cooperate with the government, they will pay a price that outweighs the profits they once reaped."

According to court documents, BBC was a diversified real estate services company, headquartered in Malvern, Pennsylvania, that operated privatized military housing communities at 21 U.S. Air Force, 18 U.S. Navy, and 16 U.S. Army bases across the United States, in which tens of thousands of service members and their families lived. BBC earned fees for the various phases of development and management of each housing community, from design and construction to ongoing community management and maintenance, and service members paid their living allowance, known as Basic Allowance for Housing, to BBC to live in these communities.

BBC's fees for the ongoing property management and maintenance of its military housing communities generally consisted of a base fee, paid to BBC monthly, and performance incentive fees, paid to BBC quarterly or semi-annually. Performance incentive fees were only payable upon the approval of the relevant service branch. To obtain the incentive fees, BBC was required to submit to the service branches proof that it had satisfied performance objectives related to, among other things, maintenance of the housing communities and resident satisfaction. The service branches relied on BBC's submissions in deciding whether to approve

the payment of relevant performance incentive fees.

According to court documents, from around 2013 to around 2019, BBC employees, including former community manager Stacy Cabrera (who pleaded guilty to related charges on April 21) and former regional manager Rick Cunefare (who pleaded guilty to related charges on June 9), and others, falsified information so that BBC's incentive fee requests falsely reflected that BBC had met performance objectives. In reality, BBC did not meet those objectives in many of the quarters during that time. These objectives primarily related to maintenance and resident satisfaction at various military housing projects. Specifically, BBC employees altered or manipulated data in property management software and destroyed and falsified resident comment cards to falsely inflate these metrics and, ultimately, to fraudulently induce the service branches to pay performance incentive fees which BBC had not earned.

As a result, according to court documents, there were lengthy and unnecessary delays in the resolution of maintenance issues to the detriment of servicemembers and their families. In addition, the military service branches were provided an inaccurate assessment of the state of BBC's military housing communities and were unable to assess, and potentially correct, BBC's performance.

A number of relevant considerations contributed to the department's criminal resolution with BBC, including the nature and seriousness of the offense, the pervasiveness of the misconduct among BBC's employees and at multiple military installations, and the state of BBC's compliance program and the progress of its remediation, including the fact that BBC's compliance program and internal controls have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future.

As part of BBC's plea agreement, BBC agreed to cooperate fully with the United States in all matters relating to the conduct covered by the plea agreement and other conduct under investigation by the United States, to self-report violations of U.S. federal criminal law, and to continue to implement a compliance and ethics program designed to effectively detect and deter violations of U.S. anti-fraud laws throughout its operations.

"In defrauding our country's military services, BBC took advantage of their unique position as a military housing provider and put greed and personal profit above our servicemembers," said FBI Deputy Director Paul M. Abbate. "Today's guilty plea reaffirms the FBI, along with our partners, are committed to preventing such disgraceful crimes and will work tirelessly to bring those who engage in this type of crime to justice."

"The Air Force Office of Special Investigations is committed to protecting the integrity of the Department of the Air Force's procurement process," said Special Agent Paul Wachsmuth, Director AFOSI Office of Procurement Fraud Investigations. "The extensive and dedicated collaborative efforts between AFOSI, the Air Force Audit Agency, Defense Criminal Investigative Service, and the Department of Justice in this investigation was paramount in ensuring the safety and well-being of our warfighters and their families."

"The health and safety of service members and their families remains of critical importance to the DoD Office of Inspector General's Defense Criminal Investigative Service (DCIS)," said Principal Deputy Director James R. Ives of DCIS. "DCIS and our law enforcement partners are committed to working with the Department of Justice to hold companies accountable when they emphasize profits over the well-being of those who honorably serve our nation."

"This judgment demonstrates the commitment CID Special Agents have to protect soldiers' families against deceitfulness and fraud, while also ensuring the integrity of the military privatization housing initiative, which is to provide safe, quality, well-maintained housing for our military families," said Special Agent in Charge Frank Robey of the Army Criminal Investigation Division's (CID) Major Procurement Fraud Unit. "Throughout this investigation, Army CID special agents worked closely with federal authorities emphasizing the importance of successful partnerships with other law enforcement agencies."

"Balfour Beatty's scheme to delay service request entries into their electronic tracking system to increase their performance-based award violated their contract and wasted valuable taxpayer money," said Special Agent in Charge Thomas Cannizzo of the NCIS Southeast Field Office. "NCIS and our partners remain committed to rooting out fraud and corruption that threatens the integrity of the Department of the Navy's procurement process."

"The men and women who live in our nation's military housing, including those at Fort Stewart and Fort Gordon, deserve prompt and professional maintenance service from their housing providers," said U.S. Attorney David H. Estes for the Southern District of Georgia. "That BBC would not only fail to deliver this service, but also falsify information to line their own pockets is despicable. Our office will work tirelessly with our law enforcement partners, and other components of the Department of Justice, to make sure those who provide subpar service to the military and lie about it are held accountable."

"The Western District of Texas is home to some of the largest military installations in the country and our district works tirelessly to protect and serve our military families," said U.S. Attorney Ashley C. Hoff for the Western District of Texas. "The resolution entered with BBC concerns conduct that impacted military families in our district at Lackland Air Force Base and Fort Bliss Army Base. This resolution is an important step in holding private military housing providers accountable to our servicemembers and their families."

"The defendants' greed undermined a program designed to protect servicemembers' homes while they courageously fight to protect our homeland," said Acting U.S. Attorney Robert J. Troester for the Western District of Oklahoma. "Servicemembers and their families deserve better. The U.S. Attorney's Office is committed to working with our law enforcement partners to protect our military community from fraudulent conduct of all kinds, particularly the integrity of DoD housing programs."

This resolution follows the prior entry of guilty pleas by two BBC managers. In April 2021, Stacy Cabrera, a former community manager of BBC, pleaded guilty to conspiracy to commit wire fraud. In June, Rick Cunefare, a former regional manager of BBC, pleaded guilty to major fraud against the United States.

Air Force OSI, DCIS, Army-CID, NCIS, and the FBI's Oklahoma City Field Office investigated the case. The Air Force Audit Agency also provided assistance.

Trial Attorneys Michael P. McCarthy and Siji Moore of the Department of Justice Criminal Division's Fraud Section prosecuted the case. Trial Attorneys Laura E. Hill and Elspeth England of the Civil Division's Fraud Section, Assistant U.S. Attorney Ron Gallegos of the U.S. Attorney's Office for the Western District of Oklahoma, Assistant U.S. Attorneys Jonathan Porter and Patrick Schwedler of the U.S. Attorney's Office for the Southern District of Georgia, and Assistant U.S. Attorneys Mary Kruger and Jacquelyn Christilles of the U.S. Attorney's Office for the Western District of Texas handled the civil matter.

Updated June 30, 2023

Attachments

BBC Information.pdf [PDF, 201 KB]

BBC Plea Agreement [PDF, 25 MB]

Topic

FALSE CLAIMS ACT

Components

Civil Division | Criminal Division | Criminal - Criminal Fraud Section | Office of the Deputy Attorney General | USAO - Georgia, Southern | USAO - Oklahoma, Western | USAO - Texas, Western

Press Release Number: 21-1293

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PRESS RELEASE

Justice Department Sues Six Health Plans and Their Alliance for Concealing Overpayments for Military Managed Care Program

The United States filed a complaint alleging that six health plans participating in the Uniformed Services Family Health Plan (USFHP) program, as well as their trade group, the US Family...

March 13, 2024

PRESS RELEASE

Argus Information & Advisory Services Agrees to Pay $37M to Settle Allegations that it Misused Data Obtained Under Government Contracts

Argus Information & Advisory Services Inc. (Argus) has agreed to pay the United States $37 million to resolve claims under the False Claims Act and the Financial Institutions Reform, Recovery...

March 12, 2024

PRESS RELEASE

Generic Pharmaceuticals Manufacturer Pleads Guilty, Agrees to $1.5 Million Criminal Penalty for Distributing Adulterated Drugs and $2 Million to Resolve Civil Liability under the False Claims Act

KVK Research Inc., a generic drug manufacturer in Bucks County, Pennsylvania, pleaded guilty today to criminal charges that it introduced adulterated drugs into interstate commerce.

March 6, 2024

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FOREIGN & U.S. FIRMS TO PAY GOVERNMENT NEARLY $25 MILLION FOR INFLATING CLAIMS MADE TO AMTRAK

WASHINGTON, D.C. - A joint venture of engineering and construction companies has agreed to pay the United States $24.75 million to settle allegations that the firms violated the False Claims Act, the Justice Department announced today. The government asserts the companies violated the False Claims Act by knowingly submitting inflated claims on Amtrak's project to electrify the rail corridor between New Haven and Boston. Balfour Beatty Construction; Massachusetts Electric Construction Company; their joint venture BBC-MEC; J. F. White Contracting Company; and Northeast Corridor Foundations, a joint venture between J.F. White and BBC-MEC, are alleged to have overcharged Amtrak for the installation of an overhead system used to deliver electricity to locomotives. The allegations are that the parties inflated claims regarding the foundations for the poles, the electrical power system, and for delay and disruption of the overall project. The overcharges were paid with grant funds provided to Amtrak by the federal government. "This settlement sends a clear message that the Justice Department will investigate and resolve financial fraud perpetrated by contractors of federal grantees," said Peter Keisler, Assistant Attorney General for the Civil Division. BBC-MEC was the prime contractor on the project and J.F. White was a partner in the subcontractor whose responsibility was to install the foundations for the poles. BBC is a subsidiary of London-based Balfour Beatty PLC, and MEC is a subsidiary of Peter Keiwit & Sons, Inc. BBC's primary U.S. office is in Atlanta. MEC and J.F. White are based in Boston. "The whistleblower provision of the False Claim Act offers a powerful financial incentive," said U.S. Attorney Kevin J. O'Connor of the District of Connecticut. "Individuals with knowledge of fraud against the government are encouraged to contact the U.S. Attorney's Office." This case was originally filed under the qui tam or whistleblower provisions of the False Claims Act by Ian Cartwright, a former Balfour Beatty employee. As a result of the settlement, Cartwright will receive $3,898,125 of the total recovery. Under the whistleblower provisions of the False Claims Act, private parties can file an action on behalf of the United States and receive a portion of the proceeds of a settlement or judgment awarded against a defendant. The settlement resulted after a lengthy investigation by the Justice Department made in conjunction with the Federal Bureau of Investigation and Amtrak's Office of Inspector General. The case is entitled U.S. ex rel. Cartwright v. Balfour Beatty, et al., Civil No. 3:99CV02585 (JCH) (D. CT.).

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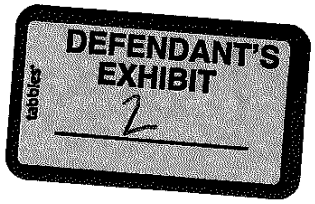
05-532



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	**CRIMINAL NO.**
	)	
v.	)	**VIOLATION: 18 U.S.C. § 1031(a)(1)**
	)	**(Major Fraud against the United States)**
BALFOUR BEATTY COMMUNITIES, LLC	)	
	)	
	)	**UNDER SEAL**
Defendant.	)	
	)	

INFORMATION

The United States of America hereby charges that:

Background

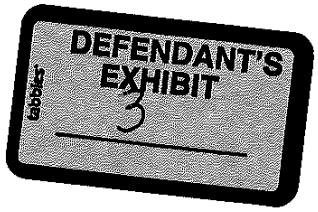
At all times material to this Information:

Relevant Individuals and Entities

1. Balfour Beatty Communities LLC ("BBC") was a diversified real estate services company headquartered in Malvern, Pennsylvania. BBC was a division of a publicly traded multinational real estate and construction company based in the United Kingdom, for which securities were traded as American Depositary Receipts in the United States. BBC was one of the largest for-profit providers of military family housing in the United States.

BBC's Operation of Military Housing Communities

2. Beginning in approximately 2003, the U.S. Department of Defense engaged a BBC predecessor entity to develop and manage military housing communities at 21 U.S. Air Force, 16 U.S. Army, and 18 U.S. Navy installations across the United States. BBC entered into agreements with branches of the U.S. Armed Forces to own, develop, and manage military housing communities, including at Lackland AFB, Travis AFB, Vandenberg AFB, Tinker AFB, Fairchild



AFB, Fort Stewart, and Hunter Army Airfield. These agreements were generally valued at more than $1,000,000.

3. BBC was paid fees by the U.S. Air Force, U.S. Army, and U.S. Navy for the various phases of development and management of each housing community, from design and construction to ongoing community management and maintenance.

4. BBC's fees for the ongoing property management and maintenance of its military housing communities generally consisted of (1) a base fee, paid to BBC monthly, and (2) performance incentive fees (the "Performance Incentive Fees"), paid quarterly or semi-annually. Performance Incentive Fees were only payable upon the approval of the relevant service branch. To obtain the service branches' approval, BBC was required to satisfy certain performance objectives that were set out in the agreements that governed the military housing projects (the "Performance Objectives").

5. To obtain Performance Incentive Fees, BBC was required to submit to the service branches documentation and a statement that it had satisfied the Performance Objectives, including the objectives related to maintenance and customer satisfaction described above. These submissions were material to the decision-making of the service branches, which relied on BBC's submissions in deciding whether to approve the payment of relevant Performance Incentive Fees.

6. From in or around 2013 through in or around 2019, employees and agents of BBC, acting in the scope of their employment and at least in part for the benefit of BBC, submitted materially false and fraudulent information to the U.S. Air Force, U.S. Army, and U.S. Navy regarding maintenance requests at the military housing communities. As a result of BBC's false misrepresentations, the service branches had an inaccurate view of the state of BBC's military

housing projects. As a result, the service branches' ability to timely assess and correct BBC's true performance was negatively impacted.

COUNT ONE
Major Fraud Against the United States
(18 U.S.C. § 1031)(a)(1)

The Scheme and Artifice to Defraud

7. From in or around 2013 and continuing through in or around 2019, in the District of Columbia and elsewhere, the defendant,

BALFOUR BEATTY COMMUNITIES,

in any grant, contract, subcontract, subsidy, loan, guarantee, insurance, and other form of Federal assistance, and in any procurement of property and services as a prime contractor with the United States and as a subcontractor and supplier on a contract in which there was a prime contract with the United States, where the value of such grant, contract, subcontract, subsidy, loan, guarantee, insurance, and other form of Federal assistance, and any constituent part thereof, was $1,000,000 or more, knowingly executed and attempted to execute a scheme and artifice with the intent to defraud the United States.

Purpose of the Scheme and Artifice

8. The purpose of the scheme and artifice was for BBC to unlawfully enrich and benefit itself by: (1) making false and fraudulent representations to obtain certain Performance Incentive Fees from the U.S. Air Force, U.S. Army, and U.S. Navy to which BBC was not entitled; and (2) concealing the scheme and artifice.

Manner and Means of the Scheme and Artifice

9. The manner and means by which BBC sought to, and did, achieve the purpose of the scheme and artifice included the following:

a. BBC employees made false representations to all three service branches that maintenance issues raised by residents were being addressed in a timely manner, when in fact many were not.

b. On multiple occasions, BBC opened work orders in response to resident complaints about acute (*e.g.*, leaks) and long-term (*e.g.*, warped floors) maintenance issues, and then closed the work orders prior to completing the required work. On such occasions, BBC falsely represented to the service branches that the work had been completed in a sufficiently timely manner to qualify for Performance Incentive Fees.

Execution of the Scheme and Artifice

10. From in or around 2013 to in or around 2019, in many quarters in which BBC did not legitimately meet certain Performance Objectives, primarily those related to maintenance and customer satisfaction, at various military housing projects, BBC employees falsified information so that BBC's Performance Incentive Fee requests falsely reflected that BBC had met those objectives. Specifically, BBC employees altered or manipulated data in property management software and destroyed or falsified resident comment cards to falsely inflate BBC's performance metrics and, ultimately, to fraudulently induce the service branches to pay Performance Incentive Fees which BBC had not earned and to which BBC was not entitled.

11. These false submissions were material, in that they influenced and were capable of influencing the decisions of the service branches.

12. In devising and executing this scheme to defraud, BBC employees acted in the scope of their agency and employment at BBC and acted at least in part to benefit BBC.

13. The scheme resulted in gross pecuniary loss to the U.S. Department of Defense of $18,700,000. BBC's closing of work orders before the work was completed resulted in some

instances in unnecessary delays in the resolution of maintenance issues to the detriment of residents.

All in violation of Title 18, United States Code, Section 1031(a)(1).

Respectfully submitted,

Joseph S. Beemsterboer
Illinois Bar No. 6280961
Acting Chief, Fraud Section
Criminal Division
United States Department of Justice

By:

/s/Michael P. McCarthy
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	**CRIMINAL NO. 21-CR-742 (EGS)**
v.	)	**VIOLATION: 18 U.S.C. § 1031(a)(1)**
BALFOUR BEATTY COMMUNITIES, LLC	)	**(Major Fraud against the United States)**
Defendant.	)	

FILED
DEC 22 2021
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

PLEA AGREEMENT

The United States of America, by and through the Department of Justice, Criminal Division, Fraud Section (the "Fraud Section"), and the Defendant, Balfour Beatty Communities, LLC ("BBC" or "Defendant"), by and through its undersigned attorneys, and through its authorized representative, pursuant to authority granted by the Defendant's Operating Agreement, hereby submit and enter into this plea agreement (the "Agreement"), pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. The terms and conditions of this Agreement are as follows:

Term of the Defendant's Obligations Under the Agreement

1. Except as otherwise provided in Paragraph 11 below in connection with the Defendant's cooperation obligations, the Defendant's obligations under the Agreement shall last and be effective for a period beginning on the date on which the Information is filed and ending three years from the later of the date on which the Information is filed or the date on which the independent compliance monitor (the "Monitor") is retained by the Company, as described in Paragraphs 24-26 below (the "Term"). The Defendant agrees, however, that, in the event the Fraud Section determines, in its sole discretion, that the Defendant has failed specifically to perform or

DEFENDANT'S EXHIBIT 4

to fulfill completely its obligations under this Agreement, extensions of the Term may be imposed by the Fraud Section, in its sole discretion, for up to a total additional time period of one year, without prejudice to the Fraud Section's right to proceed as provided in Paragraphs 27-30 below. Any extension of the Term extends all terms of this Agreement, including the terms of the monitorship described in Attachment D, for an equivalent period. Conversely, in the event the Fraud Section finds, in its sole discretion, that there exists a change in circumstances sufficient to eliminate the need for the monitorship in Attachment D, and that the other provisions of this Agreement have been satisfied, the monitorship may be terminated early.

The Defendant's Agreement

2. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the Defendant agrees to waive any right it may have to grand jury indictment or to challenge venue in the District Court for the District of Columbia, and to plead guilty to a single count criminal Information charging the Defendant with Major Fraud against the United States, in violation of Title 18, United States Code, Section 1031(a)(1). The Defendant further agrees to persist in that plea through sentencing and, as set forth below, to cooperate fully with the Fraud Section in its investigation into the conduct described in this Agreement and other conduct related to its management of housing on, at, or near military installations operated by the United States Department of Defense.

3. The Defendant understands that, to be guilty of this offense, the following essential elements of the offense must be satisfied:

a. The defendant knowingly executed or attempted to execute a scheme with the intent to defraud the United States by using materially false or fraudulent pretenses, representations, or promises;

b. The scheme took place as part of a grant, contract, subcontract, subsidy, loan, guarantee, insurance, and other form of Federal assistance as a contractor with the United States; and

c. The value of the contract was $1 million or more.

4. The Defendant understands and agrees that this Agreement is between the Fraud Section and the Defendant and does not bind any other component of the Department of Justice or any other federal, state, or local prosecuting, administrative, or regulatory authority. Nevertheless, the Fraud Section will bring this Agreement and the nature and quality of the conduct, cooperation, and remediation of the Defendant, its direct or indirect affiliates, subsidiaries, and joint ventures, to the attention of other prosecuting authorities or other agencies, as well as debarment authorities, if requested by the Defendant.

5. The Defendant agrees that this Agreement will be executed by an authorized corporate representative. The Defendant further agrees that a resolution duly adopted by the Defendant's Class A Manager in the form attached to this Agreement as Attachment B, authorizes the Defendant to enter into this Agreement and take all necessary steps to effectuate this Agreement, and that the signatures on this Agreement by the Defendant and its counsel are authorized by the Defendant's Class A Manager, on behalf of the Defendant.

6. The Defendant agrees that it has the full legal right, power, and authority to enter into and perform all of its obligations under this Agreement.

7. The Fraud Section enters into this Agreement based on the individual facts and circumstances presented by this case and the Defendant, including:

a. the nature and seriousness of the offense, as described in the Statement of Facts attached hereto as Attachment A ("Attachment A" or "Statement of Facts"), which included

fraud affecting the United States Air Force, United States Army, and United States Navy, and which negatively affected military servicemembers and their families;

b. the pervasiveness of the offense among the Defendant's employees and at multiple military installations, and the involvement of regional management-level employees in the criminal conduct, as described in the Statement of Facts;

c. the Defendant did not receive voluntary disclosure credit because it did not voluntarily and timely disclose to the Fraud Section the conduct described in the Statement of Facts;

d. the Defendant did not conduct appropriate remedial actions in a timely manner;

e. the Defendant received credit for cooperation under U.S.S.G. § 8C2.5(g)(2) because it provided to the Fraud Section all relevant facts known to it, including information about the individuals involved in the conduct described in the attached Statement of Facts; however, the Defendant did not qualify for additional cooperation credit under the Fraud Section's Corporate Enforcement Policy;

f. the Defendant had an inadequate and ineffective compliance program and internal controls during the period of the conduct described in the attached Statement of Facts; however, since the initiation of the Fraud Section's investigation, the Defendant has begun to develop enhancements to its compliance program and strengthen its internal controls, including the appointment of a Chief Compliance Officer;

g. the Defendant has committed to continuing to enhance its compliance program and internal controls, including ensuring that its compliance program satisfies the minimum elements set forth in Attachment C to this Agreement (Corporate Compliance Program);

h. based on the state of the **Defendant's** compliance program and the progress of its remediation, including the fact that the **Defendant's** compliance program and internal controls have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future, the Fraud Section determined that an independent compliance monitor **(the "Monitor")** is necessary as set forth in Attachment D to this Agreement (Independent Compliance Monitor);

i. the Defendant has no prior criminal history or history of civil or regulatory enforcement action;

j. the Defendant has agreed to continue to cooperate with the Fraud Section in any ongoing investigation of the conduct of the Defendant and its subsidiaries, affiliates, officers, directors, employees, agents, business partners, consultants, and subcontractors relating to violations of Title 18, United States Code, Section 1031(a)(1) and other criminal offenses; and

k. accordingly, after considering (a) through (j) above, the Fraud Section determined that the starting point for determining the **Defendant's** fine amount should be between the low end and the mid-point of the applicable U.S. Sentencing Guidelines fine range, and that the Defendant should not receive any discount off the fine amount under the Corporate Enforcement Policy.

8. The Defendant agrees to abide by all terms and obligations of this Agreement as described herein, including, but not limited to, the following:

a. to plead guilty as set forth in this Agreement;

b. to abide by all sentencing stipulations contained in this Agreement;

c. to appear, through its duly appointed representatives, as ordered for all court appearances, and obey any other ongoing court order in this matter, consistent with all applicable U.S. and foreign laws, procedures, and regulations;

d. to commit no further crimes;

e. to be truthful at all times with the Court;

f. to pay the applicable fine and special assessment;

g. to continue to implement a compliance and ethics program designed to prevent and detect violations of U.S. anti-fraud laws throughout its operations, including but not limited to the minimum elements set forth in Attachment C of this Agreement; and

h. to retain an independent compliance monitor in accordance with Attachment D of this Agreement.

9. Except as may otherwise be agreed by the parties in connection with a particular transaction, the Defendant agrees that in the event that, from the effective date of this Agreement through the conclusion of the three-year term of probation ("Term"), the Defendant undertakes any change in corporate form, including if it sells, merges, or transfers business operations that are material to the Defendant's consolidated operations, or to the operations of any direct or indirect parent companies, subsidiaries, or affiliates involved in the conduct described in the attached Statement of Facts to this Agreement, as they exist as of the date of this Agreement, whether such sale is structured as a sale, asset sale, merger, transfer, or other change in corporate form, it shall include in any contract for sale, merger, transfer, or other change in corporate form a provision binding the purchaser, or any successor in interest thereto, to the obligations described in this Agreement. The purchaser or successor in interest must also agree in writing that the Fraud Section's ability to declare a breach under this Agreement is applicable in full force to that entity.

The Defendant agrees that the failure to include these provisions in the transaction will make any such transaction null and void. The Defendant shall provide notice to the Fraud Section at least 30 days prior to undertaking any such sale, merger, transfer, or other change in corporate form. The Fraud Section shall notify the Defendant prior to such transaction (or series of transactions) if it determines that the transaction(s) will have the effect of circumventing or frustrating the enforcement purposes of this Agreement. If at any time during the Term of this Agreement the Defendant engages in a transaction(s) that has the effect of circumventing or frustrating the enforcement purposes of this Agreement, the Fraud Section may deem it a breach of this Agreement pursuant to Paragraphs 28 through 30. Nothing herein shall restrict the Defendant from indemnifying (or otherwise holding harmless) the purchaser or successor in interest for penalties or other costs arising from any conduct that may have occurred prior to the date of the transaction, so long as such indemnification does not have the effect of circumventing or frustrating the enforcement purposes of this Agreement, as determined by the Fraud Section.

10. The Defendant shall cooperate fully with the Fraud Section in any and all matters relating to the conduct described in this Agreement and the attached Statement of Facts, and other conduct under investigation by the Fraud Section or any other component of the Department of Justice at any time during the Term, until the later of the date upon which all investigations and prosecutions arising out of such conduct are concluded, or three years from the date this Agreement is entered. At the request of the Fraud Section, the Defendant shall also cooperate fully with other domestic or foreign law enforcement and regulatory authorities and agencies in any investigation of the Defendant, its parent company or its affiliates, or any of its present or former officers, directors, employees, agents, and consultants, or any other party, in any and all matters relating to the conduct described in this Agreement and the Statement of Facts. The Defendant's cooperation

pursuant to this Paragraph is subject to applicable law and regulations, including data privacy and national security laws, as well as valid claims of attorney-client privilege or attorney work product doctrine; however, the Defendant must provide to the Fraud Section a log of any information or cooperation that is not provided based on an assertion of law, regulation, or privilege, and the Defendant bears the burden of establishing the validity of any such an assertion. The Defendant agrees that its cooperation pursuant to this paragraph shall include, but not be limited to, the following:

a. The Defendant shall timely and truthfully disclose to the Fraud Section all factual information with respect to its activities, those of its parent company and affiliates, and those of its present and former directors, officers, employees, agents, and consultants, and those of its subsidiaries, including any evidence or allegations and internal or external investigations, about which the Defendant has any knowledge or about which the Fraud Section may inquire. This obligation of truthful disclosure includes, but is not limited to, the obligation of the Defendant to provide to the Fraud Section, upon request, any document, record or other tangible evidence about which the Fraud Section may inquire of the Defendant.

b. Upon request of the Fraud Section, the Defendant shall designate knowledgeable employees, agents or attorneys to provide to the Fraud Section the information and materials described in Paragraph 10(a) above on behalf of the Defendant. It is further understood that the Defendant must at all times provide complete, truthful, and accurate information.

c. The Defendant shall use its best efforts to make available for interviews or testimony, as requested by the Fraud Section, present or former officers, directors, employees, agents and consultants of the Defendant and any subsidiaries of the Defendant. This obligation includes, but is not limited to, sworn testimony before a federal grand jury or in federal trials, as

well as interviews with domestic or foreign law enforcement and regulatory authorities. Cooperation under this Paragraph shall include identification of witnesses who, to the knowledge of the Defendant, may have material information regarding the matters under investigation.

d. With respect to any information, testimony, documents, records or other tangible evidence provided to the Fraud Section pursuant to this Agreement, the Defendant consents to any and all disclosures to other governmental authorities including United States authorities and those of a foreign government of such materials as the Fraud Section, in its sole discretion, shall deem appropriate.

11. During the term of the cooperation obligations provided for in Paragraph 10 of this Agreement, should the Defendant learn of any evidence or allegation of a criminal violation of U.S. federal law, the Defendant shall promptly report such evidence or allegation to the Fraud Section. Thirty days prior to the end of the term of the cooperation obligations provided for in Paragraph 10 of this Agreement, the Defendant, by the President and Class A Manager of the Defendant, and by the President of the Defendant, will certify, in the form of executing the document attached as Attachment E to this Agreement, to the Fraud Section that the Defendant has met its disclosure obligations pursuant to this Paragraph. Each certification will be deemed a material statement and representation by the Defendant to the executive branch of the United States for purposes of Title 18, United States Code, Section 1001, and it will be deemed to have been made in the judicial district in which this Agreement is filed.

12. The Defendant agrees that any fine or restitution imposed by the Court will be due and payable in full within thirty days of the entry of judgment following such sentencing hearing, and the Defendant will not attempt to avoid or delay payment. The Defendant further agrees to pay the Clerk of the Court for the United States District Court for the District of Columbia the

mandatory special assessment of $400 per count within ten business days from the date of sentencing.

The United States' Agreement

13. In exchange for the guilty plea of the Defendant and the complete fulfillment of all of its obligations under this Agreement, the Fraud Section agrees it will not file additional criminal charges against the Defendant or any of its direct or indirect affiliates, subsidiaries, or joint ventures relating to (a) any of the conduct described in Attachment A, including from 2013 through 2020, or (b) information made known to the Fraud Section prior to the date of this Agreement. This Paragraph does not provide any protection against prosecution for any crimes in the future by the Defendant or by any of its officers, directors, employees, agents, or consultants, whether or not disclosed by the Defendant pursuant to the terms of this Agreement. This Agreement does not close or preclude the investigation or prosecution of any natural persons, including any officers, directors, employees, agents, or consultants of the Defendant or its direct or indirect affiliates, subsidiaries, or joint ventures, who may have been involved in any of the matters set forth in the Information, Attachment A, or in any other matters. The Defendant agrees that nothing in this Agreement is intended to release the Defendant from any and all of the Defendant's excise and income tax liabilities and reporting obligations for any and all income not properly reported and/or legally or illegally obtained or derived.

Factual Basis

14. The Defendant is pleading guilty because it is guilty of the charge contained in the Information. The Defendant admits, agrees, and stipulates that the factual allegations set forth in the Information and Attachment A are true and correct, that it is responsible for the acts of its

officers, directors, employees, and agents described in the Information and Attachment A, and that the Information and Attachment A accurately reflect the Defendant's criminal conduct.

The Defendant's Waiver of Rights, Including the Right to Appeal

15. Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 limit the admissibility of statements made in the course of plea proceedings or plea discussions in both civil and criminal proceedings, if the guilty plea is later withdrawn. The Defendant expressly warrants that it has discussed these rules with its counsel and understands them. Solely to the extent set forth below, the Defendant voluntarily waives and gives up the rights enumerated in Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410. Specifically, the Defendant understands and agrees that any statements that it makes in the course of its guilty plea or in connection with the Agreement are admissible against it for any purpose in any U.S. federal criminal proceeding if, even though the Fraud Section has fulfilled all of its obligations under this Agreement and the Court has imposed the agreed-upon sentence, the Defendant nevertheless withdraws its guilty plea.

16. The Defendant is satisfied that the Defendant's attorneys have rendered effective assistance. The Defendant understands that by entering into this agreement, the Defendant surrenders certain rights as provided in this agreement. The Defendant understands that the rights of criminal defendants include the following:

a. the right to plead not guilty and to persist in that plea;

b. the right to a jury trial;

c. the right to be represented by counsel – and if necessary have the court appoint counsel – at trial and at every other stage of the proceedings;

d. the right at trial to confront and cross-examine adverse witnesses, to be

protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; and

e. pursuant to Title 18, United States Code, Section 3742, the right to appeal the sentence imposed.

Nonetheless, the Defendant knowingly waives the right to appeal or collaterally attack the conviction and any sentence within the statutory maximum described below (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742, or on any ground whatsoever except those specifically excluded in this Paragraph, in exchange for the concessions made by the United States in this plea agreement. This agreement does not affect the rights or obligations of the United States as set forth in Title 18, United States Code, Section 3742(b). The Defendant also knowingly waives the right to bring any collateral challenge challenging either the conviction, or the sentence imposed in this case. The Defendant waives all defenses based on the statute of limitations and venue with respect to any prosecution related to the conduct described in Attachment A or the Information, including any prosecution that is not time-barred on the date that this Agreement is signed in the event that: (a) the conviction is later vacated for any reason; (b) the Defendant violates this Agreement; or (c) the plea is later withdrawn, provided such prosecution is brought within one year of any such vacation of conviction, violation of agreement, or withdrawal of plea plus the remaining time period of the statute of limitations as of the date that this Agreement is signed. The Fraud Section is free to take any position on appeal or any other post-judgment matter. The parties agree that any challenge to the Defendant's sentence that is not foreclosed by this Paragraph will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) this waiver. Nothing in

the foregoing waiver of appellate and collateral review rights shall preclude the Defendant from raising a claim of ineffective assistance of counsel in an appropriate forum.

Penalty

17. The statutory maximum sentence that the Court can impose upon the Defendant for a violation of Title 18, United States Code, Section 1031(a) is a fine of $10,000,000 or twice the gross pecuniary gain or gross pecuniary loss resulting from the offense, whichever is greatest, Title 18, United States Code, Sections 1031(c) and 3571(c)-(d); five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of $400, Title 18, United States Code, Section 3013(a)(2)(B). In this case, the parties agree that the gross pecuniary gain resulting from the offense is $18,700,000. Therefore, pursuant to Title 18, United States Code, Section 3571(d), the maximum fine that may be imposed is $37,400,000.

Sentencing Recommendation

18. The parties agree that pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the Court must determine an advisory sentencing guideline range pursuant to the United States Sentencing Guidelines. The Court will then determine a reasonable sentence within the statutory range after considering the advisory sentencing guideline range and the factors listed in Title 18, United States Code, Section 3553(a). The parties' agreement herein to any guideline sentencing factors constitutes proof of those factors sufficient to satisfy the applicable burden of proof. The Defendant also understands that if the Court accepts this Agreement, the Court is bound by the sentencing provisions in Paragraph 16.

19. The Fraud Section and the Defendant agree that a faithful application of the United States Sentencing Guidelines (U.S.S.G.) to determine the applicable fine range yields the following analysis:

a. The 2018 U.S.S.G. are applicable to this matter.

b. Offense Level. Based upon U.S.S.G. § 8A1.2(b)(2)(B):, the total offense level is 26, calculated as follows:

§ 2B1.1(a)(2)	Base Offense Level	6
§ 2B1.1(b)(1)(K)	Amount of Loss/Gain	+20
TOTAL		26

c. Base Fine. Based upon U.S.S.G. § 8C2.4(a)(3), the base fine is $18,700,000 (the pecuniary gain to the Defendant from the offense)

d. Culpability Score. Based upon U.S.S.G. § 8C2.5, the culpability score is 7, calculated as follows:

(a)	Base Culpability Score	5
(b)(2)	Organization had 1,000 or more employees and tolerance of the offense by substantial authority personnel was pervasive throughout the organization	+4
(g)(2)	The organization cooperated in the investigation and affirmatively accepts responsibility for its misconduct	- 2
TOTAL		7

Calculation of Fine Range:

Base Fine	$18,700,000
Multipliers	1.40 (min) /2.80 (max)
Fine Range	$26,180,000 (min) / $52,360,000 (max)

20. Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the United States and the Defendant agree that the following represents the appropriate disposition of the case, and agree to recommend jointly at a hearing to be scheduled at an agreed upon time that the Court impose the following sentence:

a. Fine. The Fraud Section and the Defendant agree to recommend jointly that the Court impose a sentence requiring the Defendant to pay a criminal fine of $33,660,000, payable in full within thirty days of the entry of judgment following such sentencing hearing. The Defendant shall not seek or accept directly or indirectly reimbursement or indemnification from any source with regard to the penalty or disgorgement amounts that Defendant pays pursuant to the Agreement or any other agreement entered into with an enforcement authority or regulator concerning the facts set forth in Attachment A. The Defendant further acknowledges that no tax deduction may be sought in connection with the payment of any part of this $33,660,000 fine. The Fraud Section believes that a disposition that includes a fine of $33,660,000 is appropriate based on the factors outlined in Paragraph 7 of the Agreement and those in Title 18, United States Code, Section 3553(a). The Fraud Section and the Defendant agree that the fine amount may be offset by $22,313,214, which is the total amount of nonrestitutionary damages and penalties that Defendant will pay pursuant to the settlement between the Defendant and the Civil Division of the Department of Justice, relating to the conduct described in the attached Statement of Facts.

b. Mandatory Special Assessment. The Defendant shall pay to the Clerk of the Court for the United States District Court for the District of Columbia within ten days of the time of sentencing the mandatory special assessment of $400 per count.

c. Restitution. The Defendant agrees to pay restitution in the amount of $31,872,209, as agreed upon by the parties, pursuant to Title 18, United States Code, Section

3663(a)(3). The Fraud Section and the Defendant agree that this amount may be offset by $12,981,261.91, which is the total amount of restitution that Defendant will pay pursuant to the settlement between the Defendant and the Civil Division of the Department of Justice, relating to the conduct described in the Statement of Facts.

d. Probation. The Fraud Section and the Defendant agree that a term of organizational probation for a period of three years shall be imposed on the Defendant pursuant to Title 18, United States Code, Sections 3551(c)(1) and 3561(c)(1). The parties agree, pursuant to U.S.S.G. § 8D1.4, that the term of probation shall include as conditions the obligations set forth in Paragraphs 8 and 10 above as well as the payments of the fine and restitution amounts set forth in Paragraph 20(a) and (c).

21. This Agreement is presented to the Court pursuant to Fed. R. Crim. P. 11(c)(1)(C). The Defendant understands that, if the Court rejects this Agreement, the Court must: (a) inform the parties that the Court rejects the Agreement; (b) advise the Defendant's counsel that the Court is not required to follow the Agreement and afford the Defendant the opportunity to withdraw its plea; and (c) advise the Defendant that if the plea is not withdrawn, the Court may dispose of the case less favorably toward the Defendant than the Agreement contemplated. The Defendant further understands that if the Court refuses to accept any provision of this Agreement, neither party shall be bound by the provisions of the Agreement.

22. Additionally, if the Court directs the preparation of a PSR, the Fraud Section will fully inform the preparer of the PSR and the Court of the facts and law related to the Defendant's case. At the time of the plea hearing, the parties will suggest mutually agreeable and convenient dates for the sentencing hearing with adequate time for any objections to the PSR and for consideration by the Court of the PSR and the parties' sentencing submissions.

Independent Compliance Monitor

23. Promptly after the Fraud Section's selection pursuant to Paragraphs 24 below, the Defendant agrees to retain a Monitor for the term specified in Paragraph 9. The Monitor's duties and authority, and the obligations of the Defendant with respect to the Monitor and the Fraud Section, are set forth in Attachment D, which is incorporated by reference into this Agreement. Within thirty business days after the entry of judgment under this Agreement, the Defendant shall submit a written proposal to the Fraud Section identifying three monitor candidates, and, at a minimum, providing the following:

a. a description of each candidate's qualifications and credentials in support of the evaluative considerations and factors listed below;

b. a written certification by the Defendant that it will not employ or be affiliated with the Monitor for a period of not less than two years from the date of the termination of the monitorship;

c. a written certification by each of the candidates that he/she is not a current or recent (*i.e.*, within the prior two years) employee, agent, or representative of the Defendant, or its direct or indirect parent companies, subsidiaries, affiliates, joint ventures or related entities, and holds no interest in, and has no relationship with, the Defendant, its direct or indirect parent companies, subsidiaries, affiliates, joint ventures or related entities, or its employees, officers, or directors;

d. a written certification by each of the candidates that he/she has notified any clients that the candidate represents in a matter involving the Fraud Section (or any other U.S. Department of Justice component) handling the monitor selection process, and that the candidate has either obtained a waiver from those clients or has withdrawn as counsel in the other matter(s);

and

e. a statement identifying the monitor candidate that is the Defendant's first, second, and third choice to serve as the Monitor.

24. The monitor candidates or their team members shall have, at a minimum, the following qualifications:

a. demonstrated expertise with respect to federal anti-fraud laws, including experience counseling on these issues;

b. experience designing and/or reviewing corporate compliance policies, procedures and internal controls, including anti-fraud policies, procedures and internal controls;

c. the ability to access and deploy resources as necessary to discharge the Monitor's duties as described in the Agreement; and

d. sufficient independence from the Defendant to ensure effective and impartial performance of the Monitor's duties as described in the Agreement.

25. The Fraud Section retains the right, in its sole discretion, to choose the Monitor from among the candidates proposed by the Defendant. Monitor selections shall be made in keeping with the Department's commitment to diversity and inclusion. If the Fraud Section determines, in its sole discretion, that any of the candidates are not, in fact, qualified to serve as the Monitor, or if the Fraud Section, in its sole discretion, is not satisfied with the candidates proposed, the Fraud Section reserves the right to request that the Defendant nominate additional candidates. In the event the Fraud Section rejects any proposed Monitors, the Defendant shall propose additional candidates within thirty business days after receiving notice of the rejection so that three qualified candidates are proposed. This process shall continue until a Monitor acceptable to both parties is chosen. The Fraud Section and the Defendant will use their best efforts to

complete the selection process within sixty calendar days of the execution of this Agreement. The Fraud Section retains the right to determine that the Monitor should be removed if, in the Fraud Section's sole discretion, the Monitor fails to conduct the monitorship effectively, fails to comply with this Agreement, or no longer meets the qualifications outlined in Paragraph 24 above. If the Monitor resigns or is otherwise unable to fulfill his or her obligations as set out herein and in Attachment D, the Defendant shall within twenty business days recommend a pool of three qualified Monitor candidates from which the Fraud Section will choose a replacement.

26. The Monitor's term shall be three years from the date on which the Monitor is retained by the Defendant, subject to extension or early termination as described in Paragraph 1. The Monitor's powers, duties, and responsibilities, as well as additional circumstances that may support an extension of the Monitor's term, are set forth in Attachment D. The Defendant agrees that it will not employ or be affiliated with the Monitor or the Monitor's firm for a period of not less than two years from the date on which the Monitor's term expires. Nor will the Defendant discuss with the Monitor or the Monitor's firm the possibility of further employment or affiliation during the Monitor's term.

Breach of Agreement

27. If the Defendant (a) commits any felony under U.S. federal law; (b) provides in connection with this Agreement deliberately false, incomplete, or misleading information; (c) fails to cooperate as set forth in Paragraphs 10 and 11 of this Agreement; (d) fails to implement a compliance program as set forth in Paragraph 8 of this Agreement and Attachment C; (e) commits any acts that, had they occurred within the jurisdictional reach of Title 18, would be a violation of Title 18; or (f) otherwise fails specifically to perform or to fulfill completely each of the Defendant's obligations under the Agreement, regardless of whether the Fraud Section becomes

aware of such a breach after the term specified in Paragraph 1 of the Agreement, the Defendant shall thereafter be subject to prosecution for any federal criminal violation of which the Fraud Section has knowledge, including, but not limited to, the charges in the Information described in Paragraph 1, which may be pursued by the Fraud Section in the U.S. District Court for the District of Columbia or any other appropriate venue. Determination of whether the Defendant has breached the Agreement and whether to pursue prosecution of the Defendant shall be in the Fraud Section's sole discretion. Any such prosecution may be premised on information provided by the Defendant. Any such prosecution relating to the conduct described in the attached Statement of Facts or relating to conduct known to the Fraud Section prior to the date on which this Agreement was signed that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the Defendant, notwithstanding the expiration of the statute of limitations, between the signing of this Agreement and the expiration of the term described in Paragraph 1 of the Agreement plus one year. Thus, by signing this Agreement, the Defendant agrees that the statute of limitations with respect to any such prosecution that is not time-barred on the date of the signing of this Agreement shall be tolled for the term described in Paragraph 1 of the Agreement plus one year. The Defendant gives up all defenses based on the statute of limitations, any claim of pre-indictment delay, or any speedy trial claim with respect to any such prosecution or action, except to the extent that such defenses existed as of the date of the signing of this Agreement. In addition, the Defendant agrees that the statute of limitations as to any violation of federal law that occurs during the term of the cooperation obligations provided for in Paragraph 10 of the Agreement will be tolled from the date upon which the violation occurs until the earlier of the date upon which the Fraud Section is made aware of the violation or the

duration of the term plus five years, and that this period shall be excluded from any calculation of time for purposes of the application of the statute of limitations.

28. In the event the Fraud Section determines that the Defendant has breached this Agreement, the Fraud Section agrees to provide the Defendant with written notice of such breach prior to instituting any prosecution resulting from such breach. Within thirty (30) days of receipt of such notice, the Defendant shall have the opportunity to respond to the Fraud Section in writing to explain the nature and circumstances of such breach, as well as the actions the Defendant has taken to address and remediate the situation, which explanation the Fraud Section shall consider in determining whether to pursue prosecution of the Defendant.

29. In the event that the Fraud Section determines that the Defendant has breached this Agreement: (a) all statements made by or on behalf of the Defendant to the Fraud Section or to the Court, including the attached Statement of Facts, and any testimony given by the Defendant before a grand jury, a court, or any tribunal, or at any legislative hearings, whether prior or subsequent to this Agreement, and any leads derived from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings brought by the Fraud Section against the Defendant; and (b) the Defendant shall not assert any claim under the United States Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule that any such statements or testimony made by or on behalf of the Defendant prior or subsequent to this Agreement, or any leads derived therefrom, should be suppressed or are otherwise inadmissible. The decision whether conduct or statements of any current director, officer or employee, or any person acting on behalf of, or at the direction of, the Defendant, will be imputed to the Defendant for the purpose of determining whether the Defendant has violated any provision of this Agreement shall be in the sole discretion of the Fraud Section.

30. The Defendant acknowledges that the Fraud Section has made no representations, assurances, or promises concerning what sentence may be imposed by the Court if the Defendant breaches this Agreement and this matter proceeds to judgment. The Defendant further acknowledges that any such sentence is solely within the discretion of the Court and that nothing in this Agreement binds or restricts the Court in the exercise of such discretion.

Public Statements by the Defendant

31. The Defendant expressly agrees that it shall not, through present or future attorneys, officers, directors, employees, agents, or any other person authorized to speak for the Defendant make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by the Defendant set forth above or the facts described in the Information and Attachment A. Any such contradictory statement shall, subject to cure rights of the Defendant described below, constitute a breach of this Agreement, and the Defendant thereafter shall be subject to prosecution as set forth in Paragraphs 27-30 of this Agreement. The decision whether any public statement by any such person contradicting a fact contained in the Information or Attachment A will be imputed to the Defendant for the purpose of determining whether it has breached this Agreement shall be at the sole discretion of the Fraud Section. If the Fraud Section determines that a public statement by any such person contradicts in whole or in part a statement contained in the Information or Attachment A, the Fraud Section shall so notify the Defendant, and the Defendant may avoid a breach of this Agreement by publicly repudiating such statement(s) within five business days after notification. The Defendant shall be permitted to raise defenses and to assert affirmative claims in other proceedings relating to the matters set forth in the Information and Attachment A provided that such defenses and claims do not contradict, in whole or in part, a statement contained in the Information or Attachment A. This Paragraph does not apply to any

statement made by any present or former officer, director, employee, or agent of the Defendant in the course of any criminal, regulatory, or civil case initiated against such individual, unless such individual is speaking on behalf of the Defendant.

32. The Defendant agrees that if it or any of its direct or indirect subsidiaries or affiliates, or its parent company, issues a press release or holds any press conference in connection with this Agreement, the Defendant shall first consult the Fraud Section to determine (a) whether the text of the release or proposed statements at the press conference are true and accurate with respect to matters between the Fraud Section and the Defendant; and (b) whether the Fraud Section has any objection to the release or statement.

Complete Agreement

33. This document states the full extent of the Agreement between the parties. There are no other promises or agreements, express or implied. Any modification of this Agreement shall be valid only if set forth in writing in a supplemental or revised plea agreement signed by all parties.

AGREED:

FOR BALFOUR BEATTY COMMUNITIES, LLC:

Date: December 22, 2021 By: _____
Christopher Williams
President and Class A Manager
Balfour Beatty Communities, LLC

Date: December 22, 2021 By: _____
David Bitkower
David B. Robbins
Jenner & Block LLP
Outside counsel for Balfour Beatty Communities, LLC

FOR THE DEPARTMENT OF JUSTICE:

JOSEPH S. BEEMSTERBOER
Acting Chief, Fraud Section
Criminal Division
U.S. Department of Justice

Michael P. McCarthy

Michael P. McCarthy
Babasijibomi Moore
Trial Attorneys

ATTACHMENT A

STATEMENT OF FACTS

The following Statement of Facts is incorporated by reference as part of the Plea Agreement ("Agreement") between the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section") and Balfour Beatty Communities, LLC ("BBC"). BBC hereby agrees and stipulates that the following information is true and accurate. BBC admits, accepts, and acknowledges that under U.S. law it is responsible for the acts of its employees and agents as set forth in this Statement of Facts, which acts BBC acknowledges were within the scope of the employees' and agents' employment and, at least in part, for the benefit of BBC. This Statement of Facts does not contain all the facts known to the Fraud Section or BBC; the Fraud Section's investigation into individuals is ongoing. Had this matter proceeded to trial, BBC acknowledges that the Fraud Section would have proven beyond a reasonable doubt, by admissible evidence, the facts alleged below and set forth in the criminal Information attached to this Agreement:

Relevant Entities and Individuals

1. BBC was a diversified real estate services company headquartered in Malvern, Pennsylvania.

2. Rick Cunefare ("Cunefare") was a citizen of the United States whose primary residence was in Phoenix, Arizona. From in or around 2013 through in or around 2015, Cunefare was employed by BBC as a Regional Property Manager, which was a regional-level supervisory role within BBC. He oversaw the military housing communities that BBC operated at Lackland Air Force Base ("AFB"), Travis AFB, Vandenberg AFB, Tinker AFB, and Fairchild AFB, which were Department of Defense installations.

3. Stacy Cabrera ("Cabrera") was a citizen of the United States whose primary residence was in Converse, Texas. From in or around 2013, to in or around 2016, Cabrera was employed as a Community Manager at Lackland AFB.

Background on Privatized Military Housing

4. The Military Housing Privatization Initiative ("MHPI") was a statutorily established program designed to attract private sector financing, expertise, and innovation to provide necessary housing for military servicemembers, their families, and other dependents faster and more efficiently than traditional military construction processes would allow. Put into effect via the National Defense Authorization Act for Fiscal Year 1996, Public Law 104-106 (110 Stat. 186, Section 2801), a goal of the MHPI was to provide military families access to safe, quality, affordable, well-maintained housing in a community where they would choose to live, while also allowing them the convenience of being near military bases and other institutions consistent with their duties.

5. Branches of the U.S. Armed Forces, including the Air Force, Army, and Navy, which are components of the U.S. Department of Defense ("DOD"), and agencies of the United States, have used authority granted to them under the MHPI to enter into agreements with private real estate developers to develop, maintain, and operate housing for U.S. military members at military bases around the United States.

6. Basic Allowance for Housing ("BAH") was an allowance provided to servicemembers stationed in the United States that is intended to cover housing costs in local civilian housing markets when government housing is not available. Under the MHPI, servicemembers generally used their BAH to pay rent and other fees to the private developers that

operate housing communities in which servicemembers elected to live.

BBC's Development and Management of Privatized Military Housing Communities

7. Beginning in approximately 2003, a BBC predecessor entity entered into agreements with branches of the U.S. Armed Forces to own, develop and manage military housing communities at military installations across the country. These agreements were generally valued at more than $1,000,000. BBC received payments under these agreements.

8. Ultimately, BBC became one of the U.S. military's largest providers of privatized military housing, operating military housing communities at approximately 21 Air Force bases, 16 Army bases, and 18 Navy bases, in which tens of thousands of servicemembers and their families lived.

9. BBC was obligated, at all times, to be truthful in its representations to the service branches and DOD, and to endeavor to provide safe and habitable housing for military servicemembers and their families.

10. Part of the compensation that BBC received in connection with these military housing communities came in the form of fees that BBC was paid for the various phases of development and management of each housing community, from design and construction to ongoing community management and maintenance.

11. BBC's fees for the ongoing property management and maintenance of its military housing communities generally consisted of (1) a base fee, paid to BBC monthly, and (2) performance incentive fees (the "Performance Incentive Fees"), paid to BBC quarterly or semi-annually.

12. Performance Incentive Fees were only payable upon the approval of the relevant service branch. To obtain the service branches' approval, BBC was required to satisfy certain

performance objectives that were set out in the agreements that governed the military housing projects (the "Performance Objectives"). For example, the Fee Management Plan for the AMC West Air Force housing project, which consisted of military housing communities at three Air Force bases, included approximately eight Performance Objectives that, if met, entitled BBC to 100% of the quarterly Performance Incentive Fees for the AMC West project.

13. While the details of how BBC satisfied the Performance Objectives varied from housing project to housing project, objectives themselves generally fell into four categories: (1) maintenance requests (e.g., to earn the Performance Incentive Fees, BBC had to respond to and/or complete maintenance requests within certain agreed time frames); (2) resident satisfaction (often measured by comment cards); (3) the timely completion of tasks, such as supplying documents and reports; and (4) a local commander's evaluation of BBC's performance.

14. To track and manage maintenance requests at the housing projects that it managed, BBC used a property management software called Yardi. Generally, when residents encountered a maintenance issue in their housing units, which could include anything as minor as a ripped screen or more serious such as a major water leak, they would report the issue to an on-site management office staffed by BBC employees. Generally, a BBC Work Order Administrator would enter information about the issue into Yardi, which generated a work order that could be used to track the maintenance issue. The Work Order Administrator used Yardi to schedule the issue for repair, to be carried out by BBC Maintenance Technicians and contractors; track progress of the repair; and document its completion. When the work was completed, the Work Order Administrator would "close out" the work order.

15. BBC also used Yardi to track its satisfaction of the maintenance work order-related Performance Objectives and then generated Quarterly Maintenance Reports from that data.

16. BBC collected resident satisfaction data by distributing comment cards to residents, often in connection with maintenance at residents' homes. BBC employees then collected the cards. This data was significant, because it helped ensure that servicemembers and their families lived in clean, comfortable, and safe housing while engaged in their duties on behalf of the military.

17. To obtain Performance Incentive Fees, BBC was required to submit to the service branches documentation and a statement that it had satisfied the Performance Objectives, including the objectives related to maintenance and customer satisfaction described above. These submissions were material to the decision-making of the service branches, which relied on BBC's submissions in deciding whether to approve the payment of relevant Performance Incentive Fees.

18. BBC's submissions generally consisted of a report prepared using data from Yardi and other sources (e.g., comment card metrics) and a written letter, that BBC employees submitted to the service branches quarterly or semi-annually. Figure 1, below, is an example of an excerpt from a Performance Incentive Fee request letter that was submitted to the Air Force for the AMC West housing project for the fourth quarter of 2014.

RE: AMC West Q4 2014 Incentive Management Fee Request

Attached is our AMC West Q4 2014 incentive fee submittal with supporting documents.

Summary of Incentive Fees are as follows:

Community and Maintenance Management Incentive Fee
Recommended for Approval: $358,624.00

Performance for the Development Incentive Fee
Recommended for Approval: $15,089.99

Performance for the Renovation Incentive Fee
Recommended for Approval: $10,204.00

Total Request: $383,917.99

Figure 1

19. All three service branches to which BBC submitted requests for Performance

Incentive Fees were limited in their ability to independently verify the accuracy of BBC's data, and thus these service branches relied on the accuracy of the data that BBC submitted in evaluating whether BBC had met the Performance Objectives.

20. Upon the service branches' approval of BBC's Performance Incentive Fee request letters and data, BBC would generally be authorized to receive distributions from an account in which Performance Incentive Fee funds were set aside.

Overview of BBC's Scheme to Defraud the U.S. Military

21. From in or around 2013 to in or around 2019, in many quarters in which BBC did not legitimately meet certain Performance Objectives, primarily those related to maintenance and customer satisfaction, at various military housing projects, BBC employees, including Cunefare, Cabrera, and others, falsified information so that BBC's Performance Incentive Fee requests falsely reflected that BBC had met those objectives. Specifically, BBC employees altered or manipulated data in Yardi and destroyed or falsified resident comment cards to falsely inflate these metrics and, ultimately, to fraudulently induce the service branches to pay Performance Incentive Fees which BBC had not earned and to which BBC was not entitled.

22. These false submissions were material, in that they influenced and were capable of influencing the decisions of the service branches.

23. In devising and executing this scheme to defraud, Cunefare, Cabrera, and others acted in the scope of their agency and employment at BBC and acted at least in part to benefit BBC.

The Effects of BBC's Scheme on Servicemembers and Their Families

24. BBC employees, acting to benefit BBC, made false representations to all three service branches that maintenance issues raised by residents were being addressed in a timely

manner, when in fact many were not.

25. For example, on multiple occasions, BBC opened work orders in response to resident complaints about acute (*e.g.*, leaks) and long-term (*e.g.*, warped floors) maintenance issues, and then closed the work orders prior to completing the required work. On such occasions, BBC falsely represented to the service branches that the work had been completed in a sufficiently timely manner to qualify for Performance Incentive Fees.

26. BBC's closing of work orders before the work was completed resulted in some instances in unnecessary delays in the resolution of maintenance issues to the detriment of residents.

27. As a result of BBC's false representations, the service branches had an inaccurate view of the state of BBC's military housing projects. As a result, the service branches' ability to timely assess and correct BBC's true performance was negatively impacted.

Specific Actions by BBC Employees to
Supply the Air Force with False Information

28. The following specific actions by BBC employees had the effect of supplying false information to the Air Force, were in furtherance of the scheme to defraud, and were carried out by employees and agents of BBC acting within the scope of their employment or agency, and for the benefit of BBC.

Actions by Cunefare

29. Cunefare gave instructions to Cabrera and others, who were agents and employees of BBC, to manipulate and falsify work order data in Yardi in multiple quarters so that BBC's requests for Performance Incentive Fees would reflect that BBC had met Performance Objectives, when in truth and in fact, it had not. This allowed BBC to obtain Performance Incentive Fees to which it was not entitled, and to reap the pecuniary benefits of the scheme.

30. Specifically, Cunefare directly supervised military housing community managers, including Cabrera, who were responsible for overseeing the day-to-day management of several of BBC's military housing communities.

31. In addition to other oversight duties, Cunefare was responsible for reviewing and approving Quarterly Maintenance Reports prepared by the community managers and their subordinates and ensuring that the numbers in the Quarterly Maintenance Reports were submitted to the Air Force with the Performance Incentive Fee request letters.

32. Cunefare knew that the Quarterly Maintenance Reports he approved were used to report maintenance-related Performance Objectives to the Air Force, and to obtain the Air Force's authorization for the Performance Incentive Fee each quarter. Cunefare further understood that meeting Performance Objectives and achieving Performance Incentive Fees were important goals for BBC, because meeting these goals would allow BBC to obtain more money from the Air Force.

33. In quarters in which BBC did not legitimately meet the maintenance-related Performance Objectives, Cunefare gave instructions to community managers and others that resulted in the community managers and others manipulating and falsifying information in Yardi so that the Quarterly Maintenance Report would falsely reflect that BBC had met the objectives. These actions had the effect of falsely inflating BBC's Performance Objectives.

34. As a result of Cunefare's actions, BBC employees manipulated and falsified information in Yardi in quarters to ensure that they met their Performance Objectives, and BBC obtained the Performance Incentive Fee.

35. By directing information to be manipulated in Yardi, Cunefare and other BBC employees knowingly and intentionally caused false information regarding the Performance Objectives to be supplied to the Air Force on a quarterly basis, deceiving the Air Force into

believing that BBC was meeting the Performance Objectives required to obtain Performance Incentive Fees, and enriching BBC at the expense of the Air Force, when in fact BBC was unable to keep up with maintenance issues at many of the military housing communities that it managed.

Actions by Cabrera

36. As the Community Manager for Lackland AFB, Cabrera was the senior on-site BBC employee responsible for overseeing the day-to-day management of the privatized military housing community there. Approximately 20 BBC staff members reported to Cabrera.

37. Cabrera knew that her Quarterly Maintenance Report was used to report the Performance Objectives to the Air Force, and to obtain the Air Force's authorization for the Performance Incentive Fee for Lackland AFB each quarter.

38. Cabrera worked with Cunefare and others to manipulate and falsify information in Yardi in multiple quarters so that Quarterly Maintenance Reports would falsely reflect that BBC had met Performance Objectives, when in truth and in fact, as Cabrera and other BBC employees well knew, it had not. This allowed BBC, acting through these employees, to submit materially false and fraudulent requests to the Air Force for payment of Performance Incentive Fees to which it was not entitled.

39. Specifically, in quarters in which BBC did not meet the Performance Objectives, Cabrera manipulated and falsified information in Yardi so that the Quarterly Maintenance Report for Lackland AFB would falsely reflect that BBC had met the objectives.

40. Cabrera admitted that she knowingly and intentionally directed her subordinates to manipulate information in Yardi by, among other things, adjusting completion times for work orders, "closing" work orders early, or marking work orders "complete" prior to maintenance work

actually being performed. These actions had the effect of falsely inflating BBC's Performance Objectives at Lackland AFB.

41. On various occasions, Cabrera personally manipulated and falsified information in Yardi to create false Quarterly Maintenance Reports which were submitted to the Air Force.

42. By manipulating information in Yardi, and directing information to be manipulated, Cabrera and other BBC employees knowingly and intentionally caused false information regarding the Performance Objectives to be supplied to the Air Force on a quarterly basis, deceiving the Air Force into believing that BBC had met the Performance Objectives necessary to receive Performance Incentive Fees related to work order performance.

BBC's Inadequate Controls Contributed to the Misconduct

43. In addition to the specific criminal actions admitted to above, widespread failures at the regional and BBC corporate and executive levels contributed to its provision of false information to the service branches.

44. Specifically, a regional vice president pressured subordinates to meet metrics without regard to accuracy and to ensure that Quarterly Maintenance Report metrics were above thresholds necessary to obtain Performance Incentive Fees.

45. In addition, a regional vice president, and at least two regional property managers (in addition to Cunefare) issued directives to subordinates to meet Performance Objectives and benchmarks in terms that subordinates reasonably interpreted as encouraging improper behavior.

46. In addition to actively promoting the falsification of data, regional personnel were aware of data discrepancy and data falsification allegations and failed to take corrective action.

47. BBC corporate-level employees, including at least one senior vice president, prioritized the payment of Performance Incentive Fees over addressing concerns about the

accuracy of Yardi data.

48. Individuals at the executive level, including BBC's former Chief Operating Officer, contributed to pressure to qualify for and collect Performance Incentive Fees, and were aware of warning signs of Performance Incentive Fee-related misconduct, including concerns raised by the service branches, but failed to take immediate action to investigate the allegations and correct any misconduct. In at least one instance, an executive vice president downplayed Air Force concerns, including about Yardi data accuracy and the falsification of comment cards.

49. These actions and failures to act had the effect of permitting lower-level BBC employees to execute the scheme to defraud, but also allowing it to continue despite warning signs as early as 2016.

50. BBC, acting through its employees and agents, acted knowingly and with the intent to defraud the service branches in connection with military housing contracts.

Quantification of Losses to the Service Branches

51. From in or around 2013 to in or around 2020, the Air Force, Army, and Navy collectively sustained a loss of approximately $18,700,000 as a result of BBC's scheme to defraud. BBC accepts that this figure is the proper measure of loss for the purposes of calculating the appropriate fine under the U.S. Sentencing Guidelines.

Balfour Beatty Communities, LLC
President and Class A Manager

ATTACHMENT B

CERTIFICATE OF CORPORATE RESOLUTIONS

WHEREAS, Balfour Beatty Communities, LLC (the "Company") has been engaged in discussions with the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section") regarding issues arising in relation to the Fraud Section's investigation of violations of Title 18, United States Code, Section 1031(a)(1), Major Fraud against the United States by the Company;

WHEREAS, in order to resolve such discussions, it is proposed that the Company enter into the Plea Agreement with the Fraud Section (the "Agreement");

WHEREAS, the Company's General Counsel and External Counsel advised the President and Class A Manager of the Company, Christopher Williams, of the Company's rights, possible defenses, the Sentencing Guidelines' provisions, and the consequences of entering into such agreement with the Fraud Section;

Therefore, the President and Class A Manager of the Company has RESOLVED that:

1. The Company (a) acknowledges the filing of the one-count Information charging the Company with a felony violation of Major Fraud against the United States in violation of Title 18, United States Code, Section 1031(a)(1); (b) waives indictment on such charge and enters into the Agreement with the Fraud Section; and (c) agrees to pay a Total Criminal Monetary Amount of $65,532,209 under the Agreement with respect to the conduct described in the Information;

2. The Company accepts the terms and conditions of the Agreement, including, but not limited to, (a) a knowing waiver of its rights to a speedy trial pursuant to the Sixth Amendment to the United States Constitution, Title 18, United States Code, Section 3161, and Federal Rule of Criminal Procedure 48(b); and (b) a knowing waiver for purposes of the

Agreement and any charges by the United States arising out of the conduct described in Attachment A to the Agreement of any objection with respect to venue and consents to the filing of the Information, as provided under the terms of the Agreement, in the United States District Court for the District of Columbia; and (c) a knowing waiver of any defenses based on the statute of limitations for any prosecution relating to the conduct described in Attachment A to the Agreement and in the Information or relating to conduct known to the Fraud Section prior to the date on which the Agreement is signed that is not time-barred by the applicable statute of limitations on the date of the signing of the Agreement;

3. The President and Class A Manager of the Company is hereby authorized, empowered, and directed, on behalf of the Company, to execute the Agreement substantially in such form as reviewed by the Company's General Counsel and External Counsel at this meeting with such changes as the President and Class A Manager of the Company may approve;

4. The President and Class A Manager of the Company is hereby authorized, empowered, and directed to take any and all actions as may be necessary or appropriate and to approve the forms, terms, or provisions of any agreement or other documents as may be necessary or appropriate to carry out and effectuate the purpose and intent of the foregoing resolutions;

5. All of the actions of the President and Class A Manager of the Company, which actions would have been authorized by the foregoing resolutions except that such actions were taken prior to the adoption of such resolutions, are hereby severally ratified, confirmed, approved, and adopted as actions on behalf of the Company; and

6. The President and Class A Manager of the Company further authorizes, empowers, and directs the General Counsel of the Company, Leslie Cohn, to appear in the United States District Court for the District of Columbia on behalf of the Company as its

corporate representative to take such actions as may be necessary or appropriate to enter the plea of guilty and in connection with sentencing.

Date: December 22, 2021 By: _____

Christopher Williams
President and Class A Manager
Balfour Beatty Communities, LLC

ATTACHMENT C

CORPORATE COMPLIANCE PROGRAM

In order to address any deficiencies in its internal controls, compliance code, policies, and procedures regarding compliance with U.S. anti-fraud laws, Balfour Beatty Communities, LLC ("BBC" or the "Company") agrees to continue to conduct, in a manner consistent with all of its obligations under this Agreement, appropriate reviews of its existing internal controls, policies, and procedures.

Where necessary and appropriate, the Company agrees to modify its compliance program, including internal controls, compliance policies, and procedures, in order to ensure that the Company maintains an effective compliance program that is designed to effectively detect and deter violations of U.S. anti-fraud law. At a minimum, this should include, but not be limited to, the following elements to the extent they are not already part of the Company's existing internal controls, code of conduct, policies, and procedures:

High-Level Commitment

1. The Company will ensure that its directors and senior management provide strong, explicit, and visible support and commitment to its corporate policy against violations of U.S. anti-fraud laws and its code of conduct and demonstrate rigorous adherence by example. The Company will also ensure that middle management, in turn, reinforces those standards and encourages employees to abide by them. The Company will create and foster a culture of ethics and compliance with the law in its day-to-day operations.

Policies and Procedures

2. The Company will develop and promulgate a clearly articulated and visible corporate policy against violations of U.S. anti-fraud laws, which policy shall be memorialized in a written code of conduct.

3. The Company will develop and promulgate compliance policies and procedures designed to reduce the prospect of violations of U.S. anti-fraud laws and the Company's code of conduct, and the Company will take appropriate measures to encourage and support the observance of the code of conduct and related ethics and compliance policies and procedures against violation of U.S. anti-fraud laws by personnel at all levels of the Company. These policies and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of the Company. The Company shall notify all employees that compliance with the code of conduct and related ethics and compliance policies and procedures is the duty of individuals at all levels of the Company.

4. The Company will ensure that its privatized military housing portfolio maintains an effective system of internal controls designed to ensure the making and keeping of fair and accurate reports and records of the Company's facilities management operations, corresponding claims for and payments of fees relating to that work, and policies and procedures designed to effectively detect and deter violations of U.S. anti-fraud law. The system should be designed to provide reasonable assurances that facilities management activities are recorded as necessary to permit accurate and transparent billing in conformity with applicable contracts and legal standards.

Periodic Risk-Based Review

5. The Company will develop these compliance policies and procedures on the basis of a periodic risk assessment addressing the individual circumstances of the Company.

6. The Company shall review these policies and procedures no less than annually and update them as appropriate to ensure their continued effectiveness, taking into account relevant developments in the field and evolving industry standards.

Proper Oversight and Independence

7. The Company will assign responsibility to one or more senior corporate executives of the Company for the implementation and oversight of the Company's code of conduct and related ethics policies and procedures. Such corporate official(s) shall have the authority to report directly to independent monitoring bodies, including internal audit, or the Company's sole member, and shall have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy.

Training and Guidance

8. The Company will implement mechanisms designed to ensure that its code of conduct and related ethics policies and procedures are effectively communicated to all directors, officers, employees, and, where necessary and appropriate, agents, outside parties, and/or business partners. These mechanisms shall include: (a) periodic training for all directors and officers, all employees in positions of leadership or trust, positions that require such training (e.g., internal audit, sales, legal, compliance, finance), and, where necessary and appropriate, agents, outside parties, and/or business partners; and (b) corresponding certifications by all such directors, officers, employees, agents, outside parties, and/or business partners, certifying compliance with the training requirements. The Company will conduct training in a manner tailored to the audience's size, sophistication, or subject matter expertise and, where appropriate, will discuss prior compliance incidents.

9. The Company will maintain, or where necessary establish, an effective system for providing guidance and advice to directors, officers, employees, and, where necessary and appropriate, agents, outside parties, and/or business partners, on complying with the Company's code of conduct and related ethics policies, and procedures, including when they need advice on an urgent basis.

Internal Reporting and Investigation

10. The Company will maintain, or where necessary establish, an effective system for internal and, where possible, confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, agents, outside parties, and/or business partners, concerning violations of U.S. anti-fraud laws or the Company's code of conduct and related ethics policies and procedures.

11. The Company will maintain, or where necessary establish, an effective and reliable process with sufficient resources for responding to, investigating, and documenting allegations of violations of U.S. anti-fraud laws or the Company's code of conduct and related ethics policies and procedures. The Company will handle the investigations of such complaints in an effective manner, including routing the complaints to proper personnel, conducting timely and thorough investigations, and following up with appropriate discipline where necessary.

Enforcement and Discipline

12. The Company will implement mechanisms designed to effectively enforce its code of conduct and related ethics policies and procedures, including appropriately incentivizing compliance and disciplining violations.

13. The Company will institute appropriate disciplinary procedures to address, among other things, violations of U.S. anti-fraud laws and the Company's code of conduct and related

ethics policies and procedures, by the Company's directors, officers, and employees. Such procedures should be applied consistently and fairly, regardless of the position held by, or perceived importance of, the director, officer, or employee. The Company shall implement procedures to ensure that where misconduct is discovered, (a) reasonable steps are taken to remedy the harm resulting from such misconduct; (b) appropriate steps are taken to prevent further similar misconduct, including assessing the internal controls, code of conduct, and related ethics policies and procedures; and (c) necessary modifications are made to ensure the overall compliance program is effective.

Mergers and Acquisitions

16. The Company will develop and implement policies and procedures for mergers and acquisitions requiring that the Company conduct appropriate risk-based due diligence on potential new business entities, including appropriate due diligence regarding U.S. anti-fraud laws by legal, accounting, and compliance personnel.

17. The Company will ensure that the Company's code of conduct and related ethics policies and procedures regarding U.S. anti-fraud laws apply as quickly as is practicable to newly acquired businesses or entities merged with the Company, and that the Company will promptly (a) train the directors, officers, employees, agents, and business partners consistent with Paragraphs 8-9 above on the Company's code of conduct and related ethics policies, and procedures; and (b) where warranted, conduct an audit of all newly acquired or merged businesses as quickly as is practicable concerning compliance with U.S. anti-fraud laws.

Monitoring and Testing

18. The Company will conduct periodic reviews and testing of its code of conduct and related ethics policies and procedures designed to evaluate and improve their effectiveness in

preventing and detecting violations of U.S. anti-fraud laws, as well as of the Company's code of conduct and related ethics policies and procedures, taking into account relevant developments in the field and evolving international and industry standards. The Company will ensure that compliance and internal control personnel have sufficient direct and indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing. Based on such review and testing and its analysis of any prior misconduct, the Company will conduct a thoughtful root cause analysis of such misconduct and timely and appropriately remediate to address such root causes.

Balfour Beatty Communities, LLC
President and Class A Manager

ATTACHMENT D

INDEPENDENT COMPLIANCE MONITOR

The duties and authority of the Independent Compliance Monitor (the "Monitor"), and the obligations of Balfour Beatty Communities, LLC (the "Defendant"), on behalf of itself and its subsidiaries and affiliates, with respect to the Monitor and the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section"), are as described below:

1. The Defendant will retain the Monitor for a period of three years (the "Term of the Monitorship"), unless the extension or early termination provision of Paragraph 1 of the plea agreement (the "Agreement") is triggered.

Monitor's Mandate

2. The Monitor's primary responsibility is to assess and monitor the Defendant's compliance with the terms of the Agreement, including the corporate compliance program in Attachment C, to specifically address and reduce the risk of any recurrence of the Defendant's misconduct. During the Term of the Monitorship, the Monitor will evaluate, in the manner set forth below, the effectiveness of the internal controls, record-keeping, and financial reporting policies and procedures of the Defendant as they relate to the Defendant's current and ongoing compliance with U.S. anti-fraud laws and applicable Department of Defense regulations and take such reasonable steps as, in his or her view, may be necessary to fulfill the foregoing mandate (the "Mandate"). The Mandate shall also include an assessment of the Board of Directors' and senior management's commitment to, and effective implementation of, the corporate compliance program as described in Attachment C of the Agreement.

Defendant's Obligations

3. The Defendant shall cooperate fully with the Monitor, and the Monitor shall have the authority to take such reasonable steps as, in his or her view, may be necessary to be fully informed about the Defendant's compliance program in accordance with the principles set forth herein and subject to applicable law, including applicable data protection and labor laws and regulations. To that end, the Defendant shall: facilitate the Monitor's access to the Defendant's documents and resources; not limit such access, except as provided in Paragraphs 5-6; and provide guidance on applicable local law (such as relevant data protection and labor laws). The Defendant shall provide the Monitor with access to all information, documents, records, facilities, and employees, as reasonably requested by the Monitor, that fall within the scope of the Mandate of the Monitor under the Agreement. The Defendant shall use its best efforts to provide the Monitor with access to the Defendant's former employees and its third-party vendors, agents, and consultants.

4. Any disclosure by the Defendant to the Monitor concerning corrupt payments, false books and records, and internal accounting control failures shall not relieve the Defendant of any otherwise applicable obligation to truthfully disclose such matters to the Fraud Section, pursuant to the Agreement.

Withholding Access

5. The parties agree that no attorney-client relationship shall be formed between the Defendant and the Monitor. In the event that the Defendant seeks to withhold from the Monitor access to information, documents, records, facilities, or current or former employees of the Defendant that may be subject to a claim of attorney-client privilege or to the attorney work-product doctrine, or where the Defendant reasonably believes production would otherwise be

inconsistent with applicable law, the Defendant shall work cooperatively with the Monitor to resolve the matter to the satisfaction of the Monitor.

6. If the matter cannot be resolved, at the request of the Monitor, the Defendant shall promptly provide written notice to the Monitor and the Fraud Section. Such notice shall include a general description of the nature of the information, documents, records, facilities, or current or former employees that are being withheld, as well as the legal basis for withholding access. The Fraud Section may then consider whether to make a further request for access to such information, documents, records, facilities, or employees.

Monitor's Coordination with the Defendant and Review Methodology

7. In carrying out the Mandate, to the extent appropriate under the circumstances, the Monitor should coordinate with Defendant's personnel, including in-house counsel, compliance personnel, and internal auditors, on an ongoing basis. The Monitor may rely on the product of the Defendant's processes, such as the results of studies, reviews, sampling and testing methodologies, audits, and analyses conducted by or on behalf of the Defendant, as well as the Defendant's internal resources (*e.g.*, legal, compliance, and internal audit), which can assist the Monitor in carrying out the Mandate through increased efficiency and Defendant-specific expertise, provided that the Monitor has confidence in the quality of those resources.

8. The Monitor's reviews should use a risk-based approach, and thus, the Monitor is not expected to conduct a comprehensive review of all business lines, all business activities, or all markets. In carrying out the Mandate, the Monitor should consider, for instance, risks presented by: (a) organizational structure; (b) training programs or lack thereof; (c) compensation structure; (d) internal auditing processes; (e) internal investigation procedures; (f) reporting mechanisms; (g) corporate culture; and (h) employee incentives and disincentives.

9. In undertaking the reviews to carry out the Mandate, the Monitor shall formulate conclusions based on, among other things: (a) inspection of relevant documents, including the Defendant's current policies and procedures governing compliance with U.S. anti-fraud laws and applicable Department of Defense regulations; (b) on-site observation of selected systems and procedures of the Defendant at sample sites, including internal controls, record-keeping, and internal audit procedures; (c) meetings with, and interviews of, relevant current and, where appropriate, former directors, officers, employees, business partners, agents, and other persons at mutually convenient times and places; and (d) analyses, studies, and testing of the Defendant's compliance program.

Monitor's Written Work Plans

10. To carry out the Mandate, during the Term of the Monitorship, the Monitor shall conduct an initial ("first") review and prepare a first report, followed by at least two follow-up reviews and reports as described in Paragraphs 16-19 below. With respect to the first report, after consultation with the Defendant and the Fraud Section, the Monitor shall prepare the first written work plan within sixty (60) calendar days of being retained, and the Defendant and the Fraud Section shall provide comments within thirty (30) calendar days after receipt of the written work plan. With respect to each follow-up report, after consultation with the Defendant and the Fraud Section, the Monitor shall prepare a written work plan at least thirty (30) calendar days prior to commencing a review, and the Defendant and the Fraud Section shall provide comments within twenty (20) calendar days after receipt of the written work plan. Any disputes between the Defendant and the Monitor with respect to any written work plan shall be decided by the Fraud Section in its sole discretion.

11. All written work plans shall identify with reasonable specificity the activities the Monitor plans to undertake in execution of the Mandate, including a written request for documents. The Monitor's work plan for the first review shall include such steps as are reasonably necessary to conduct an effective first review in accordance with the Mandate, including by developing an understanding, to the extent the Monitor deems appropriate, of the facts and circumstances surrounding any violations that may have occurred before the date of the Agreement. In developing such understanding, the Monitor is to rely, to the extent possible, on available information and documents provided by the Defendant. It is not intended that the Monitor will conduct his or her own inquiry into the historical events that gave rise to the Agreement.

First Review

12. The first review shall commence no later than one hundred twenty (120) calendar days from the date of the engagement of the Monitor (unless otherwise agreed by the Defendant, the Monitor, and the Fraud Section). The Monitor shall issue a written report within one hundred fifty calendar (150) days of commencing the first review, setting forth the Monitor's assessment and, if necessary, making recommendations reasonably designed to improve the effectiveness of the Defendant's program for ensuring compliance with U.S. anti-fraud laws and applicable Department of Defense regulations. The Monitor should consult with the Defendant concerning his or her findings and recommendations on an ongoing basis and should consider the Defendant's comments and input to the extent the Monitor deems appropriate. The Monitor may also choose to share a draft of his or her reports with the Defendant prior to finalizing them. The Monitor's reports need not recite or describe comprehensively the Defendant's history or compliance policies, procedures and practices. Rather, the reports should focus on areas the Monitor has identified as requiring recommendations for improvement or which the Monitor otherwise

concludes merit particular attention. The Monitor shall provide the report to the governing body and contemporaneously transmit copies to:

Avi Perry
Acting Chief, Market Integrity and Major Frauds Unit
Andrew Gentin
Acting Chief, Corporate Enforcement, Compliance, and Policy Unit
Criminal Division, Fraud Section
U.S. Department of Justice
1400 New York Avenue N.W.
Bond Building, Eleventh Floor
Washington, D.C. 20005

After consultation with the Defendant, the Monitor may extend the time period for issuance of the first report for a brief period of time with prior written approval of the Fraud Section.

13. Within one hundred fifty (150) calendar days after receiving the Monitor's first report, the Defendant shall adopt and implement all recommendations in the report. If the Defendant considers any recommendations unduly burdensome, inconsistent with applicable law or regulation, impractical, excessively expensive, or otherwise inadvisable, it must notify the Monitor and the Fraud Section of any such recommendations in writing within sixty (60) calendar days of receiving the report. The Defendant need not adopt those recommendations within the one hundred fifty (150) calendar days of receiving the report but shall propose in writing to the Monitor and the Fraud Section an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which the Defendant and the Monitor do not agree, such parties shall attempt in good faith to reach an agreement within forty-five (45) calendar days after the Defendant serves the written notice.

14. In the event the Defendant and the Monitor are unable to agree on an acceptable alternative proposal, the Defendant shall promptly consult with the Fraud Section. The Fraud Section may consider the Monitor's recommendation and the Defendant's reasons for not adopting

the recommendation in determining whether the Defendant has fully complied with its obligations under the Agreement. Pending such determination, the Defendant shall not be required to implement any contested recommendation(s).

15. With respect to any recommendation that the Monitor determines cannot reasonably be implemented within one hundred fifty (150) calendar days after receiving the report, the Monitor may extend the time period for implementation with prior written approval of the Fraud Section.

Follow-Up Reviews

16. A follow-up review shall commence no later than one hundred and eighty (180) calendar days after the issuance of the first report (unless otherwise agreed by the Defendant, the Monitor and the Fraud Section). The Monitor shall issue a written follow-up ("second") report within one hundred twenty (120) calendar days of commencing the second review, setting forth the Monitor's assessment and, if necessary, making recommendations in the same fashion as set forth in Paragraph 12 with respect to the first review. After consultation with the Defendant, the Monitor may extend the time period for issuance of the second report for a brief period of time with prior written approval of the Fraud Section.

17. Within one hundred twenty (120) calendar days after receiving the Monitor's second report, the Defendant shall adopt and implement all recommendations in the report, unless, within thirty (30) calendar days after receiving the report, the Defendant notifies in writing the Monitor and the Fraud Section concerning any recommendations that the Defendant considers unduly burdensome, inconsistent with applicable law or regulation, impractical, excessively expensive, or otherwise inadvisable. With respect to any such recommendation, the Defendant need not adopt that recommendation within the one hundred twenty (120) calendar days of

receiving the report but shall propose in writing to the Monitor and the Fraud Section an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which the Defendant and the Monitor do not agree, such parties shall attempt in good faith to reach an agreement within thirty (30) calendar days after the Defendant serves the written notice.

18. In the event the Defendant and the Monitor are unable to agree on an acceptable alternative proposal, the Defendant shall promptly consult with the Fraud Section. The Fraud Section may consider the Monitor's recommendation and the Defendant's reasons for not adopting the recommendation in determining whether the Defendant has fully complied with its obligations under the Agreement. Pending such determination, the Defendant shall not be required to implement any contested recommendation(s). With respect to any recommendation that the Monitor determines cannot reasonably be implemented within one hundred twenty (120) calendar days after receiving the report, the Monitor may extend the time period for implementation with prior written approval of the Fraud Section.

19. The Monitor shall undertake a second follow-up ("third") review not later than one hundred fifty (150) days after the issuance of the second report. The Monitor shall issue a third report within one hundred and twenty (120) days of commencing the review, and recommendations shall follow the same procedures described in Paragraphs 16-18. Following the third review, the Monitor shall certify whether the Defendant's compliance program, including its policies, procedures, and internal controls, is reasonably designed and implemented to prevent and detect violations of U.S. anti-fraud laws and applicable Department of Defense regulations. The final review and report shall be completed and delivered to the Fraud Section no later than thirty (30) days before the end of the Term.

Monitor's Discovery of Potential or Actual Misconduct

20. (a) Except as set forth below in sub-paragraphs (b), (c) and (d), should the Monitor discover during the course of his or her engagement that:

- improper payments or anything else of value may have been offered, promised, made, or authorized by any entity or person within the Defendant or any entity or person working, directly or indirectly, for or on behalf of the Defendant; or
- the Defendant may have maintained false books, records or accounts; or
- the Defendant may have failed to implement a system of internal accounting controls that is sufficient to accurately record the Defendant's transactions (collectively, "Potential Misconduct"), the Monitor shall immediately report the Potential Misconduct to the Defendant's General Counsel, Chief Compliance Officer, and/or Audit Committee for further action, unless the Potential Misconduct was already so disclosed. The Monitor also may report Potential Misconduct to the Fraud Section at any time, and shall report Potential Misconduct to the Fraud Section when it requests the information.

(b) In some instances, the Monitor should immediately report Potential Misconduct directly to the Fraud Section and not to the Defendant. The presence of certain factors militates in favor of reporting Potential Misconduct directly to the Fraud Section and not to the Defendant, namely, where the Potential Misconduct involves senior management of the Defendant or involves obstruction of justice.

(c) If the Monitor believes that any Potential Misconduct has occurred or may constitute a U.S. criminal or regulatory violation ("Actual Misconduct"), the Monitor shall immediately report the Actual Misconduct to the Fraud Section. When the Monitor discovers Actual Misconduct, the Monitor shall disclose the Actual Misconduct solely to the Fraud Section, and, in such cases, disclosure of the Actual Misconduct to the General Counsel, Chief Compliance Officer, and/or the Audit Committee of the Defendant should occur as the Fraud Section and the Monitor deem appropriate under the circumstances.

(d) The Monitor shall address in his or her reports the appropriateness of the Defendant's response to disclosed Potential Misconduct or Actual Misconduct, whether previously disclosed to the Fraud Section or not. Further, if the Defendant or any entity or person working directly or indirectly for or on behalf of the Defendant withholds information necessary for the performance of the Monitor's responsibilities and the Monitor believes that such withholding is without just cause, the Monitor shall also immediately disclose that fact to the Fraud Section and address the Defendant's failure to disclose the necessary information in his or her reports.

(e) Neither the Defendant nor anyone acting on its behalf shall take any action to retaliate against the Monitor for any such disclosures or for any other reason.

Meetings During Pendency of Monitorship

21. The Monitor shall meet with the Fraud Section within thirty (30) calendar days after providing each report to the Fraud Section to discuss the report, to be followed by a meeting between the Fraud Section, the Monitor, and the Defendant.

22. At least annually, and more frequently if appropriate, representatives from the Defendant and the Fraud Section will meet to discuss the monitorship and any suggestions,

comments, or improvements the Defendant may wish to discuss with or propose to the Fraud Section, including with respect to the scope or costs of the monitorship.

Contemplated Confidentiality of Monitor's Reports

23. The reports will likely include proprietary, financial, confidential, and competitive business information. Moreover, public disclosure of the reports could discourage cooperation, or impede pending or potential government investigations and thus undermine the objectives of the monitorship. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public, except as otherwise agreed to by the parties in writing, or except to the extent that the Fraud Section determines in its sole discretion that disclosure would be in furtherance of the Fraud Section's discharge of its duties and responsibilities or is otherwise required by law.

Balfour Beatty Communities, LLC
President and Class A Manager

ATTACHMENT E

CERTIFICATION

To: United States Department of Justice
Criminal Division, Fraud Section
Attention: Chief of the Fraud Section

Re: Plea Agreement Disclosure Certification

The undersigned certify, pursuant to Paragraph 11 of the Plea Agreement ("the Agreement") filed on December 22, 2021 in the United States District Court for the District of Columbia, by and between the United States of America and Balfour Beatty Communities, LLC (the "Company"), that undersigned are aware of the Company's disclosure obligations under Paragraph 10 of the Agreement, and that the Company has disclosed to the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section") any and all evidence or allegations of conduct required pursuant to Paragraph 10 of the Agreement, which includes evidence or allegations of any violation of the U.S. fraud laws committed by the Company's employees and agents upon any domestic government agency ("Disclosable Information"). This obligation to disclose information extends to any and all Disclosable Information that has been identified through the Company's compliance and controls program, whistleblower channel, internal audit reports, due diligence procedures, investigation process, or other processes. The undersigned further acknowledge and agree that the reporting requirements contained in Paragraph 10 and the representations contained in this certification constitute a significant and important component of the Agreement and of the Fraud Section's determination whether the Company has satisfied its obligations under the Agreement.

The undersigned hereby certify that they are the President and Class A Manager of the Company, and the President of the Company, respectively, and that each has been duly authorized by the Company to sign this Certification on behalf of the Company.

This Certification shall constitute a material statement and representation by the undersigned and by, on behalf of, and for the benefit of, the Company to the executive branch of the United States for purposes of 18 U.S.C. § 1001, and such material statement and representation shall be deemed to have been made in the District of Columbia. This Certification shall also constitute a record, document, or tangible object in connection with a matter within the jurisdiction of a department and agency of the United States for purposes of 18 U.S.C. § 1519, and such record, document, or tangible object shall be deemed to have been made in the District of Columbia.

Date: _____ Name (Printed): Christopher Williams

Name (Signed): _____
President and Class A Manager
Balfour Beatty Communities, LLC

Date: _____ Name (Printed): Richard Taylor

Name (Signed): _____
President
Balfour Beatty Communities, LLC

Press Release (RNS)

Resolution reached between Balfour Beatty Communities, LLC and the U.S. Department of Justice

22 December 2021 US

Balfour Beatty plc ("Balfour Beatty" or the "Company") announces that, as of 22 December 2021, its U.S. subsidiary Balfour Beatty Communities, LLC ("Communities") has reached a resolution with the U.S. Department of Justice ("DOJ"). The resolution resolves the DOJ's criminal and civil investigations into specific performance incentive fees improperly claimed by Communities between 2013 and 2019 related to maintenance work at certain United States

Antonia Walt

Head of Corporate Communications

antonia.walton@balf

military housing installations. Under the terms of the resolution, Communities has pleaded guilty to one count of fraud and has agreed to the appointment of an independent compliance monitor for a three-year period. Communities cooperated fully with the DOJ in its investigation.

Communities will pay a total resolution amount of U.S. $65.4 million (£49.0 million at the current exchange rate) comprising approximately $33.6 million in penalties and $31.8 million in restitution.

Balfour Beatty is committed to the highest standards of ethical conduct. The wrongdoing that took place is completely contrary to the way the Company expects its people to behave. The Company apologises for the actions of Communities to all its stakeholders. It has been made clear to all employees that breaches of policies, procedures, or law will not be tolerated. Communities welcomes the appointment of the independent compliance monitor and looks forward to a constructive engagement.

In 2019, the Company undertook an in-depth review of operations at Communities and, as a result, a series of changes have been made to prevent this type of misconduct from occurring in the future. These involved the restructuring of the Communities management team including the

additional appointment of several key executives and a Chief Compliance Officer for the U.S. In addition, Communities has enhanced its ethics and compliance training for all employees and has made significant improvements to the maintenance work order processing system, underpinned by enhanced controls and protocols that are aimed to prevent misuse and strengthen oversight.

Communities is committed to delivering a consistently high level of service to the military residents it serves and will continue to work closely and constructively with its military partners to achieve this.

The resolution brings the investigation of Communities to a close.

This announcement contains inside information. The person who arranged for the release of this announcement on behalf of the Company is Tracey Wood, Group General Counsel and Company Secretary.

ENDS

Analyst/investor enquiries:

Angus Barry
+44 (0)7966 281635
angus.barry@balfourbeatty.com

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Balfour Beatty

Balfour Beatty plc is registered in England as a public limited company.

Registered No: 395826
Registered Office: 5 Churchill Place, Canary Wharf, London, E14 5HU

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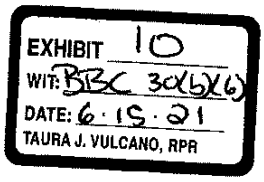
Ex 5



Topic 39 - Leon Blondin Letters.pdf

Balfour Beatty
Leon Blondin
CEO
3100 McKinnon Street
Dallas, TX 75201

Dear Leon,

My name is Michael Bennett. Your company is building a luxury hotel for my family in Charleston, SC. I am writing this letter asking for your help. I would like to give you a little background on this project.

I bought this property in 1994 and rented the existing building to Charleston County to use as a library for a while. I started working on this project in 2003. Our great Mayor of Charleston of 40 years, Joe Riley, insisted that I build a beautiful, luxury hotel on this site. He worked with us throughout the project to help get it approved. Charleston is a historic city and getting approvals can be challenging. Having his support was instrumental in getting this project approved. This hotel took ten years to finally get approved and went all the way to the SC Supreme Court. We won at the Supreme Court and went to work.

We interviewed multiple contractors and selected Balfour Beatty. We broke ground in April 2015. The hotel was scheduled to open in August 2017. For a variety of reasons, we are still under construction with a finish date that is hard to predict. To me there appears to be a shortage of workers and a lack of leadership and management.

I need your help. We have tried to encourage the Balfour Beatty management team to bring more workers and leadership to the job. For whatever reason that has not happened. So, after much time, I have reached out to other construction companies for advice and help. I have a company that is willing to come in, bring senior management and try to help all of us get this hotel open. I think with this new fresh group and with the cooperation and help of Balfour Beatty we will get this hotel opened sooner.

This is my request from me, the owner, to you the CEO of Balfour Beatty to help resolve this problem. I ask that your team welcomes and cooperates with this construction company. They will help assist your team any way possible. Let us team up, cooperate and get the job done. This will result in the hotel opening sooner, which is good for us all.

This is the most important project of my life. It took 10 years to get this approval and when finished can be one of the finest hotels around and it will carry my family's name, Hotel Bennett, named after my mother and father. My mother is 96 and still works for me 5 days a week. My father shined shoes across the street from the hotel in the depression. This project is very important to me.

Please help me get this hotel opened and let's work together with this contractor who is willing to help.

My office number 843-722-8169 x241 and my personal cell is 843-870-7587.

Thank you very much,

Michael R. Bennett

To: Melissa Pense[melissa@bennetthospitality.com]
Cc: Dean, Pat[pdean@balfourbeattyus.com]
From: Blondin, Leon[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FC87235D2217427DBCC2A17E5A418C74-LEON BLONDI]
Sent: Thur 6/21/2018 12:26:58 PM (UTC)
Subject: RE: Letter from Mike Bennett

Mr. Bennett:

Thank you for reaching out. Let me first reiterate Balfour Beatty's commitment to completing your hotel. I am aware of some of the challenges but I have full confidence that you have the correct team and leadership to complete this project. I have discussed this project in great length with Pat Dean and believe he has reached out to you to discuss what is needed to complete this project, I would encourage you to take him up on that offer working together towards that common goal of opening this hotel.

Sincerely,

Leon Blondin
Chief Executive Officer | Balfour Beatty
O: (703) 460-9125 | C: 703-819-0353
E: lblondin@balfourbeattyus.com | www.balfourbeattyus.com
11325 Random Hills Road, Ste. 500, Fairfax, VA 22030

Balfour Beatty **Build to Last**
Lean. Expert. Trusted. Safe.

From: Melissa Pense <melissa@bennetthospitality.com>
Sent: Friday, June 15, 2018 1:44 PM
To: lblondin@bblius.com
Subject: Letter from Mike Bennett

Hello Leon,

The attached letter is from Michael Bennett in Charleston, SC. Balfour Beatty is building his hotel.

https://www.balfourbeattyus.com/our-teams/charleston/community-involvement

Many thanks,
Melissa

Melissa Pense on behalf of Michael Bennett
Bennett Hospitality
(843) 722-8169 ext. 241
17 Lockwood Dr. Ste. 400
Charleston, SC 29401
melissa@bennetthospitality.com

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bed stands -- bed headboards were now too tall because the ceiling came down. So we had to go cut these -- all of the -- the bottom legs out of the owner's finished products to then stick them on the wall and get them to fit to -- at which point we could tie the millwork into them.

MR. BYRD: I don't have any further questions.

THE COURT: Okay. Let's take five minutes right now.

(A recess transpired.)

THE COURT: All right. Mr. Dooley, Mr. McDonald is going to ask you a few questions. All right?

MR. MCDONALD: Thank you very much, sir.

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. MCDONALD:

Q. Mr. Dooley, you are from Ohio?

A. Yes, sir.

Q. When did you get down here?

A. Today. I'm sorry, for this trip?

Q. Yes, sir.

A. Yesterday afternoon.

Q. Okay. Are you being compensated for your time here today?

A. My expenses are being reimbursed.

Q. Okay. Other than reimbursement on expenses, anything else?

A. No.

Q. All right, sir. And you were onsite from March of 2016 to September of 2017; is that correct?

A. September 2018.

Q. September of 2018; is that correct?

A. Yes.

Q. And how confident are you with that date, September of 2018?

A. Very.

Q. Very confident?

A. (No audible response.)

Q. And, in fact, you took a two-week sabbatical, vacation, whatever you want to call it, after you left the Hotel Bennett project after September of 2018 before going to work for your family company, right?

A. Correct.

Q. Okay. So you have a very high degree of confidence in the fact that you left the job in

September of 2018; is that correct?

A. I left on Labor Day.

Q. Labor Day. All right. Did you work on the Hotel Bennett at any point after you left on Labor Day of 2018?

A. No, sir.

Q. Now, when you were there -- when you arrived in March of '16, was Mr. Ledford onsite?

A. No.

Q. Okay. Who were the folks on-site when you arrived in March of '16? And what we're going to do is we're going to break it down the way it was broken down yesterday. The field superintendent group and the trailer management group. Fair enough?

A. Yes, sir.

Q. All right. So who was there when you got there in March of '16?

A. The field was being managed by Robert Cotherman and Daniel Ricci.

Q. Okay. And what were their titles?

A. Bob would have been a general superintendent.

Q. That's Cotherman?

A. Yes.

Q. Okay.
A. And Daniel Ricci was the superintendent.
Q. Anybody under Mr. Cotherman or Mr. Ricci?
A. There was a laborer. From a management standpoint, no.
Q. So they were the two field guys when you got there?
A. Yes.
Q. And had you had any experience with Mr. Cotherman in the past?
A. No. I hadn't met any -- either of them before I came to the jobsite.
Q. Didn't know Mr. Ricci and didn't know Mr. Cotherman?
A. No.
Q. Did you work on the Ritz-Carlton for Balfour Beatty in Charlotte?
A. No.
Q. Do you know whether Mr. Cotherman did?
A. I do not know.
Q. Do you know whether Mr. Ricci did?
A. I don't know.
Q. Fair enough. Was Mr. Cotherman on the job the entire time that you were there from

March of '16 to September of '18?

A. No.

Q. Was he fired by Balfour Beatty?

A. Yes.

Q. Okay. And was Mr. Ricci on the site the entire time you were their superintendent from March of '16 to September of 2018?

A. No.

Q. All right. When you arrived in March of 2016, who was on the project management side? Who was in the trailer?

A. Tim Spano, Brandon Denny, and Clark Johnson.

Q. Clark Johnson?

A. Yes.

Q. Was Mr. Denny on the job -- or let's back up. Mr. Spano, he was the senior project manager, correct?

A. Yes.

Q. He was the lead guy that was on the -- that was actually on the site every day?

A. Yeah. Yes.

Q. Fair enough. And what was Mr. Denny's title?

A. Senior project manager.

Q. Okay. And I wanted to ask you about that. The project engineer title is the title that Balfour Beatty uses, correct?

A. Correct.

Q. You're not an engineer?

A. I'm not a professional engineer, no.

Q. Okay. So just because they call you a project engineer, that -- you didn't go to school for engineering? You don't hold a South Carolina PE? You're just not an engineer?

A. Correct.

Q. Okay. All right. And Mr. Denny, what was his title?

A. Mr. Denny was senior project engineer.

Q. He was a senior project engineer. Do you know if Mr. Denny was, in fact, an engineer or if that was also a function of Balfour Beatty calling employees project engineers?

A. I don't know Mr. Denny's educational background.

Q. Fair enough. And what was Mr. Johnson's title?

A. Project engineer.

Q. Okay. And so were there going to be two project engineers, yourself and Mr. Johnson when

you arrived, or was there going to be some overlapping, he was going to train you, or how did that work?

A. I don't know what the initial intent was, but I worked with Clark for about a month, and then he was let go from the Balfour Beatty, and I resumed his responsibilities and worked with Brandon.

Q. And do you know if Mr. Johnson was let go at the same time that Mr. Cotherman was let go?

A. Yes. I mean, yes, they were.

Q. They were in fact let go at the same time?

A. Yes.

Q. Okay. And were you involved in any discussions about why they were let go?

A. I was not involved with any discussions before the fact.

After they were let go, Tim and the HR woman, Teresa Newman, kind of brought us together to let us know what was going on, that they weren't the right fit for our team moving forward. And that was the discussion that was had that day after two of our team members were

let go.

Q. And that's all you know?

A. That's the -- that's all that I know, yeah.

Q. And Mr. Denny, was he there the whole time that you were there from March of '16 to September of '18?

A. No.

Q. Okay. And when did Mr. Denny leave?

A. Honestly, I don't know which day he stopped working on the project.

Q. Could you give me a year?

A. I think I'm going to -- he was not there in 2017. Let me -- so Brandon transitioned to a role in our building technologies team, which is -- the BIM coordination team is a part of that. And so he was -- he stopped working with us at that time point, which would have been the summer of '16.

I mean, he stopped being a day-to-day manager of the project, but he was still involved in doing the laser scanning and like quality control work for us as we were pouring the decks in the summer and into the -- into the fall. And then he stopped doing that, and I don't know when

he -- if like -- so I don't know when he stopped doing that.

Q. So sometime in the summer or fall of '16?

A. Yes.

Q. Okay. Summer or fall of 2016. Now, is that everybody? Is that the team at the time you arrived? You've got Cotherman. You've got Ricci. You've got Spano. You've got Denny, and you've got Johnson and you showed up, right?

A. Right.

Q. And that's the team -- that's the Balfour team, correct?

A. Yep.

Q. Okay. All right. Do you know whether or not any of that team, when you showed up in March of '16, had worked on the Ritz-Carlton in Charlotte?

A. I don't know.

Q. Fair enough. All right. Now, at some point in your tenure, from March of '16 to September of '18, did Mr. Marty Dale show up?

A. Yes.

Q. Okay. And when was that?

A. Summer of '16.

Q. Summer of '16. Okay. And what was his role?

A. Senior superintendent.

Q. Did he replace Mr. Cotherman?

A. No. Because -- no. Because Bob was the general superintendent over the whole project, and then, when Marty came in, the decision was kind of made to split that high-level responsibility and have Dan focus on the structure, and building up the structure, and have Marty finish on the interiors.

So, like, I don't think that -- like, Bob would have overruled Dan if there was, like, a disagreement in how we were supposed to proceed with things.

Q. And when you say "Bob", you're talking about Mr. Cotherman?

A. Robert Cotherman, sorry. Robert Cotherman would have overruled Dan because Robert Cotherman would have been Dan's superior.

Q. Okay.

A. Where with the new arrangement, it was more of a partnership, and one guy was focused on the structure and one guy was focused on the interior.

Q. Okay. Between Mr. Ricci and Mr. Dan?
A. Yes, sir.
Q. Okay. And how long did you say Mr. Ricci was the on the job while you were there from March of '16 to September of '18?
A. He would have left at Christmas of 2016.
Q. December of '16?
A. Yes.
Q. Okay. All right. And Mr. Dale would have showed up summer or fall of '16; is that right?
A. Summer.
Q. Summer of '16. Okay. And Mr. Dale, was more -- was he more interiors, or was he more structure? I'm sorry, I didn't write that down.
A. Interiors.
Q. He was the interiors guy?
A. Yeah.
Q. Okay. Did you ever see a gentleman called Knox Tate on this job?
A. He walked the job when I was -- a couple of times. He was never there -- like, he was never there every day for like a week, but I -- he had been to the project, and I had walked the project with him before.

Q. Okay. So other than walking the project with him, did you -- while you were from March of '16 to September of '18, did Mr. Knox Tate do anything?

A. He didn't have a role in the day-to-day of the project, no.

Q. Did he have any role other than walking the project with you?

A. Well, when he walks the project, he would provide like a -- like, whenever a Balfour executive-level guy would walk the project, he would issue a -- like, hey, here's some things that I saw that you guys have a peer review-type thing. Like, hey, this is what you guys need to look for. And so Knox did that the one time that he came.

Q. The one that he came?

A. The one time I walked with him, yeah.

Q. All right. And so Mr. Ricci leaves in December of '16. How long is Mr. Dale on the job?

A. Marty was -- Marty was there -- he left at some point to go -- for like a two- or three-month period, and I don't recall when.

And then he came back, and then he left

again in the -- right in the spring before I left. So I would say he was on -- he was on the project from the summer of '16 to the spring of '18, but there was a three-month gap somewhere where he had to go handle another issue.

Q. Okay. So summer of '16 to spring of '18. So what is that? Some 20 months, something like that?

A. Yeah.

Q. And then out of that, there was a three-month hiatus for Mr. Dale --

A. Yeah. I'm sure that people knew where he went. I don't recall what projects he went to.

Q. Well I'm only interested in -- he wasn't on this job for that three months?

A. Right.

Q. Okay. Fair enough. All right. Mr. Johnny Eldridge, did he ever show up on the job?

A. Oh, yeah.

Q. Okay. And what time did he show up?

A. About a month after I did.

Q. Okay. So he's there maybe April of '16?

A. Yeah.

Q. And how long is Mr. Eldridge on the job?
A. Johnny was there until I left.
Q. Okay. So he was pretty much there the whole time as you?
A. Yep.
Q. And what was his title?
A. He was a superintendent. We treated him as our MEP superintendent. Johnny is a master electrician by trade. So he was there -- he was the one that handled the MEP rough-in portion of the project for us. But his title was superintendent.
Q. And did Mr. Eldridge communicate -- do you know whether or not Mr. Eldridge communicated with the MEP, mechanical, electrical, plumbing, right? Am I correct on that?
A. Yes, sir.
Q. With the MEP subcontractors? Was that kind of his specialty?
A. Yeah. He worked with the superintendent and every superintendent very closely, yes.
Q. And that's because he was a master electrician, right?
A. Uh-huh.
Q. Is that a yes?

A. Yes.
Q. I'm not trying to be rude. She just has a difficult time --
A. I understand. I had this issue in my deposition.
Q. That's all right. All right. So Mr. Eldridge was there pretty much the whole time as you were. He was the superintendent, master electrician. And then Mr. Ledford, did there come a time where Mr. Ledford showed up?
A. Yes. He showed up about two months after I did, in May of 2016, and he was there until I left the project.
Q. Okay. And what was Mr. Ryan Ledford's title?
A. He was a senior project engineer also.
Q. So he's below Mr. Eldridge, right?
A. Correct.
Q. All right. And he showed up in May of '16?
A. Uh-huh.
Q. Is that a yes?
A. Yes.
Q. And he was there until you left, right?
A. Yes.

Q. And did he have a specialty like Mr. Eldridge did?
A. No.
Q. He was just an assistant project engineer?
A. Well, he was a senior project engineer.
Q. A senior project engineer. Gotcha. And once again, he's not an engineer. It's just, that's what Balfour calls him?
A. Correct.
Q. All right. What about Mike Jansen? Did he ever show up while you were there?
A. Yes. He was there for a few months, three or four, and I don't recall the exact time frame.
Q. And what was his title?
A. He was general superintendent.
Q. Did he have any specialties?
A. Not that I know of it.
Q. Okay. And he was there was for three or four months, and you don't -- sometime while you were there?
A. I would be guessing if I gave you a time frame.
Q. No, I don't want you to guess. You said

three or four months, you thought he was there; is that correct?

A. No. He was definitely there for that amount of time.

Q. That's all I'm trying to establish. He was there for three or four months during the time while you were -- while you were on the job, you just don't know when that three or four months occurred?

A. Yes, sir.

Q. Thank you very much. What about a gentleman called Heath Bradford? Did he ever show up when you were there?

A. Yeah.

Q. And how long was he there?

A. He was probably there for a little bit closer to six months.

Q. And what was his title?

A. He was a superintendent.

Q. Do you know what six months portion Mr. Bradford was there?

A. I'd be guessing again.

Q. He was a superintendent, too, right?

A. Correct.

Q. All right. And who was Mr. Bradford --

who did he report to? Do you know?

A. Tim Spano.

Q. Even though he was on the superintendent side?

A. Correct.

Q. So did the senior superintendent, which is the field guy, right?

A. Correct.

Q. Did he report to the senior project manager? Is that how it works?

A. Yes.

Q. Okay. When Mr. Bradford was there for six months, he was the lead senior superintendent?

A. Well, when he was there, I don't -- I don't -- when he was there, all the superintendents were reporting to Tim.

Q. Okay. When you're saying all the superintendents, are you saying all the senior superintendents or just any? If you've got superintendent in your title, you're reporting to Mr. Spano?

A. No. So when Heath was there, he, Johnny Eldridge, and at this point, Ryan Ledford was assistant superintendent, they were all reporting

to Tim.

Q. Directly to Mr. Spano?

A. Yes.

Q. Gotcha. So Mr. Bradford is there with Mr. Ledford and Mr. Eldridge?

A. And Marty would have been there as well.

Q. And Mr. Dale is still there?

A. There was overlap there, yes.

Q. Okay. So you've got four superintendents, whether they be senior or assistant, and they're all reporting to Mr. Spano?

A. Correct.

Q. Okay. Now, what about Mr. Zanowski, Steve Zanowski?

A. He was on the jobsite.

Q. And what was his title?

A. I think that he was an assistant superintendent.

Q. When was he there?

A. He was there during the punch list phase of the project; so spring, summer of '18.

Q. And he was an assistant superintendent?

A. I believe so.

Q. Okay. And he's there spring or summer,

so he's there four, five, six months, something like that?

A. During my time there -- I don't know about after I was gone, but during my time, I worked with him for six months.

Q. He was still there when you left?

A. Yes.

Q. Okay. What about a gentleman who doesn't have the last name yet, but has the first name AJ?

A. AJ Wachsberger.

Q. AJ Wachsberger?

A. Yes.

Q. Can you spell that?

A. No.

Q. Okay. That's fair enough. All right. And what was Mr. Wachsberger's title?

A. He was a project engineer.

Q. Project engineer on the superintendent side or the project management side?

A. Superintendent side.

Q. Superintendent side. Okay. And when was Mr. Wachsberger there?

A. May of '18 until I left.

Q. And is he, too, reporting to Mr. Spano

at the same time the other four individuals are?

A. I don't recall because AJ was just out of college. He graduated that year. So Balfour normally has, like, some sort of mentor.

That would have been like -- it would have been me if I wasn't leaving or Nick Starcevic. So I don't know that was handled, but he was working actively with the superintendents on the field. I don't know who signed his time cards.

Q. He was just out of college?

A. Yeah.

Q. And you mentioned Mr. Starcevic. When we talked about the original team, I know Mr. Spano was there and Mr. Starcevic was not there, correct, when you got there in March of '16?

A. Nick wasn't there in March.

Q. When did Mr. Starcevic show up?

A. He started getting involved in the project the following month after I'd been there for about four weeks, in April, mid April.

And then he was at the -- the jobsite office was right across the street at 301 Meeting Street, right at that basketball stadium; so that

was like our field office. And he was there every day from May of '16 until I left the project.

Q. Okay. And he was on the project management side, right?

A. Right.

Q. He was on the trailer side, right?

A. Correct.

Q. All right. What about Mr. Travis Ferris? Did he ever show up on time?

A. Yes. He was there in the summer of '18.

Q. Summer of '18. And what was his title?

A. He was an assistant superintendent.

Q. Okay. All right. Superintendent. And was he there when you left?

A. Yep.

Q. And was he reporting with -- directly to Mr. Spano along with the other five superintendents?

A. May I clarify?

Q. Sure.

A. I believe he had just left right before I left.

Q. Okay. So he was there until August of '16 --

A. Yes.
Q. -- or something like that?
A. Yes.
Q. Or of '18, sorry.
A. Correct.
Q. All right. Anybody else on the super side that I haven't mentioned that was there while you were there? Not necessarily the whole time while you were there, but on-site while you were on-site?
A. Yes, sir, a gentleman named Peter Waterfield.
Q. Pierre?
A. Peter.
Q. Peter Waterfield?
A. Yes.
Q. All right. And when did Mr. Waterfield show up?
A. The summer of '16.
Q. Summer of '16?
A. Yep.
Q. And how long was Mr. Waterfield there?
A. The fall of '17.
Q. Okay. And what was his title?
A. He was a superintendent.

Q. And do you know his reason for leaving?
A. He was let go. I don't know why.
Q. He was let go as well. Did you have a little team meeting with HR after he was let go to tell you why he was let go?
A. No.
Q. Okay. Anybody else, other than Mr. Waterfield and the people I brought up hereto forward?
A. Yes.
Q. Who's that?
A. So there was like a two-month period where a gentleman named Sachin Arunkumar out of Atlanta.
Q. I try to use last names, but I'm going to use Sachin. Sachin Arunkumar?
A. Yeah.
Q. And he was there for a two- or three-month period?
A. He was assisting us remotely with some of the change order pricing.
Q. Change order pricing. Okay. Was he an employee of Balfour Beatty?
A. Yes.
Q. And how long was he assisting with some

of the change order pricing?

A. About two months.

Q. Two months. And when was that two-month span?

A. It would have been the late spring of '17.

Q. The late spring of '17. All right. Anybody else on the field side?

A. We had a project administrator and Shanti Pieniak was working with us in the office.

Q. What is the -- I'm sorry. I cut you off. If you need to finish, go ahead.

A. That's it.

Q. Project administrator, that's the first time I've heard that title with Balfour. What was the role of the project administrator?

A. So she was essentially helping keep us organized, helping with -- print off documents and drawings and copies and handling certain office duties for us is how she started. And then she -- because she was so organized, we actually had her start helping organize the punch lists for the superintendents.

So as the punch list would, you know, check off their -- the work being completed,

Shanti would actually, you know, consolidate the list of what was approved or what was left to be done. And she would go around the rooms and post those signs in each and every room and update the software, working with the superintendents to kind of help keep them organized.

Q. Okay. So Ms. Pieniak started out as a -- on an administrative role in the office printing off documents and drawings; is that fair?

A. Right, yeah.

Q. Okay. And then she moved on to basically -- and I'm not putting words in your mouth -- but a punch list administrative role. She updated the software. She took things that had been signed off by somebody else --

A. Right.

Q. -- and updated the list; is that correct?

A. You're correct, with the clarification that, the information she was given to do was told to her by the superintendents.

Q. Gotcha. So she wasn't going into the room and saying, this room is done, and I'm going to sign off on it?

A. She wasn't making that determination by herself, no.

Q. Okay. She wasn't making those decisions. She was merely taking decisions that were made by other superintendents and putting in whatever software Balfour has or updating whatever lists are out there; is that fair?

A. Yes, sir.

Q. All right. Anybody else other than Ms. Pieniak?

A. We had a bevy of college interns over the summer that would have been helping me as -- they would have been helping me as like assistant project engineers. We would have Alec Barr for one summer and Kevin Haslett for one summer.

Q. And I'm not trying to cut you off, but college interns, are you talking about students from the College of Charleston?

A. No. From like Clemson and Virginia Tech.

Q. Okay. And they would come in on an unpaid internship or a paid internship?

A. They were paid.

Q. Okay. And they would assist the project engineer and the assistant project engineer?

A. They would serve as an assistant project engineer. They would assistant the project engineer and the project manager.

Q. Okay. And like Ms. Pieniak, did they have any ability to make any actual decisions?

A. No.

Q. Anybody else?

A. Well, would you like me to name like our safety officers that came in to inspect the jobsite?

Q. Safety -- a safety officer, to be clear, is somebody from home office that comes and makes sure your temporary railings are up and that the job is running pursuant to whatever Balfour's safety guidelines are; is that correct?

A. Correct.

Q. Okay. It doesn't have anything to do, other than making sure y'all are compliant, keeping people safe, and making sure OSHA is not out there writing tickets, right?

A. Correct. They would also consult on some means and methods and how we were planning on doing certain activities and the safest way possible.

Q. Okay. So they would consult from a

safety standpoint on how y'all were planning on tackling a particular task?

A. Correct. Like, yes. Do you want me to name those people or no?

Q. No. How many different -- I only need to know how many different safety officers there were?

A. Three.

Q. Three. Okay. Anybody else other than the safety officers?

A. We had our scheduling manager, Joe Lauricella.

Q. Okay. And the scheduling manager. What did Mr. Lauricella do?

A. So Joe was the -- Joe is the one that ran the actual scheduling software. He would issue a report to the field staff, the project manager, and at that point, I was the assistant project myself. He'd fill out these reports with dates so that he could put it into the master schedule and then run a report for us.

And then he would also walk the jobsite as well in order to help gauge -- so that he could gauge where -- like, what -- see how the schedule that he had in his hand matched up to

Mr. Simonton got there in the fall of '17, he was in the office every day on King Street?

A. Yes.

Q. Okay. And was there anybody else in Mr. Simonton's role prior to the fall of '17?

A. David Stanton.

Q. Mr. Stanton. Okay. And was he in the office every day?

A. No.

Q. How often was he in the office or on-site?

A. I would say over the course of a two-week period, three days. So, like, he might be here for half a week one week and then would be gone for a week and then he'd come back. It was kind of depending on what was going on.

Q. What about Mr. Jeff Sandeen?

A. Jeff was on-site maybe one day every three weeks for the first like -- the first summer that I was there, and then David Stanton starting getting involved.

Q. So it was Sandeen in that role that we're talking about, this executive role -- he didn't go quite as much. Then Stanton shows up. He went a little bit more. And then Simonton

shows up and replaces Stanton; is that fair?

A. Yes.

Q. Okay. All right. What about Mike Baumbach?

A. I never worked with Mike on this project.

Q. All right. Have we covered the team?

A. Yeah.

Q. All right.

MR. MCDONALD: Your Honor, I'm going to mark for identification purposes -- I have asked the court reporter if she's okay with this procedure, but I'd like to ask you as well. I'd like to mark for identification purposes and hand it to the witness and lay some foundation.

THE COURT: Sure.

MR. MCDONALD: Thank you very much. I'm going to mark this, with the court reporter's permission, for ID purposes as 1.

(DFT. EXH. 1 was marked for identification.)

BY MR. MCDONALD:

Q. Take a look at that document, and the first question I'm going to ask you, sir, is if you recognize it?

A. I recognize this e-mail.
Q. Okay. What do you recognize it to be?
A. It's an e-mail from me saying to Jim Clements that I have uploaded the Multivista photos.
Q. Okay. And is it a true and accurate copy of the e-mail sent by you to Mr. Clements on Wednesday, April 25th of 2018?
A. It appears to be, yes.
Q. Okay. And our rules of evidence require the next question was, but I don't think they anticipated e-mails -- was this sent on or contemporaneous with 4:57 on Wednesday, April 25th, 2018?
A. I'm sorry. Can you repeat the question?
Q. Yeah. Was this e-mail sent on or contemporaneous with at 4:57 on April 25th, 2018?
A. I dont know what the word "contemporaneous" means.
Q. At the same time, sir.
A. Okay. It appears to be, yes.
Q. It's got a time there?
A. It's got a timestamp on it, yes.
Q. All right. And you sent it, correct?
A. It appears so, yes.

Q. And you sent it as -- in your capacity as an assistant project manager for Balfour Beatty Construction, correct?

A. Yes.

Q. And it relates to the Hotel Bennett project, right?

A. Yes.

MR. MCDONALD: Your Honor, at this time, I would move into evidence Defendant's Exhibit 1.

THE COURT: Any objection?

MR. HILDEBRAND: No objection.

THE COURT: Without objection.

MR. MCDONALD: May I approach, Your Honor?

THE COURT: Yes, sir. Thank you.

(DFT. EXH. 1 was admitted into evidence.)

BY MR. MCDONALD:

Q. All right, sir. This e-mail references something called multi-vista photos; is that correct?

A. Yep.

Q. Do you know what those are?

A. I know that Multivista was a company

that was hired to take progress photos of the project. I don't know who hired them, if it was the Bennetts or Jim Clements, but I know Balfour -- my understanding is Balfour didn't hire them.

Q. Okay.

A. And so that's what I know that they are.

Q. Great. And you used the term -- and I didn't have a chance to write it down -- but what type of photos were they taking?

A. Progress.

Q. Progress photos. What are progress photos?

A. Photos taken during the course of construction to document the progress of the construction.

Q. Okay. And do you know how often they were out there taking photos?

A. Monthly. Yeah, something like that. They weren't there every day, but like I recognized the guy when I saw him.

Q. Okay. All right. And it says, Jim, I've successfully uploaded the Multivista photos onto a shareable link, see below. Did you, in fact, do that?

Q. And what about change order requests or RCOs, request for change orders?

A. The same response. I don't know if we did that or not.

Q. Fair enough. All right, sir. At some point in time, you were promoted on this job; is that correct?

A. Yes.

Q. All right. And one of the things that came along with that promotion was the additional responsibility of being involved in the pay application process; is that right?

A. I took on an added responsibility, yes.

Q. Okay. All right. And prior to taking on that added responsibility, or shortly thereafter, did you have occasion to review the contract to see what the pay application process entailed?

A. I don't ever remember doing that.

Q. Okay. All right. Do you know whether or not the contract document, or portion of the contract document, identified as the A133 details the pay application process at Article 7?

A. I don't. I don't know what Article 7 -- or I don't know what those terms read.

Q. Okay. Have you ever reviewed the contract for this job?

A. I have read excerpts of the contract at certain points in time, but I never sat down and read the contract from start to finish.

Q. Did you ever read the contract as it relates to the pay application process?

A. I don't recall ever doing that, but it was -- I probably should have, yeah.

Q. Notwithstanding the fact that you didn't read the contract as it relates to the pay application process, isn't it true that for -- that what's submitted to the owner for payments are certified pay requests from the architect; is that correct?

A. I would say, yes.

Q. Okay. So how the process works is you gather up your costs, your subcontractors and whatever cost Balfour Beatty takes the position as the cost of work, you-all compile that information, correct?

A. That was my job was the compilation, yeah.

Q. That was your job, right?

A. Yep.