

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2024-000788

RECEIVED

Aug 12 2026

SC Court of Appeals

Balfour Beatty Construction, LLC, Appellant,

v.

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

And

Library Associates, LLC, Third-Party Plaintiff,

v.

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

Of which Library Associates, LLC is the Respondent.

SUPPLEMENT TO THE RECORD ON APPEAL – VOLUME 3 OF 22

James Lynn Werner (S.C. Bar No. 6029)
Katon E. Dawson, Jr. (S.C. Bar No. 101167)
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 255-8000
jimwerner@parkerpoe.com
katondawson@parkerpoe.com

Thomas C. Hildebrand, Jr. (S.C. Bar No. 2501)
Robert C. Byrd (S.C. Bar No. 1069)
850 Morrison Drive, Suite 400
Charleston, SC 29403
(843) 727-2650
tomhildebrand@parkerpoe.com
bobbybyrd@parkerpoe.com

*Attorneys for Appellant Balfour Beatty
Construction, LLC*

The Law Office of Jesse Sanchez, LLC
Jesse Sanchez, Esq. (S.C. Bar No. 101906)
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, SC 29464
(843) 814-8181
jesse@jessesanchezlaw.com

Bundy McDonald, LLC
W.H. Bundy, Jr., Esquire (S.C. Bar No. 1012)
1516 Old Trolley Rd, 2nd Floor
Summerville, SC 29485
walter@bundymcdonald.com

*Attorneys for Respondent Library
Associates, LLC*

INDEX

Page(s)

“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.

Volume – 1

***Trial Order, filed October 6, 2023 — Convenience Copy
with Updated Record References Supp. R. C-1¹**

Annex – Record Matter Underlying the April 12, 2024 Attorneys’ Fees
and Punitive Damages Orders Supp. R. C-49

Section 1 – Orders

Form 4 Order Judgment in Favor of Library Associates, LLC Against Balfour Beatty Construction, LLC
for Attorneys’ Fees and Costs, filed April 12, 2024..... Supp. R. 1

Order Amending Post Judgment Interest Amount, filed April 26, 2024..... Supp. R. 7

Section 2 – Transcripts

Transcript of the March 13, 2024 Hearing on Balfour Beatty Construction, LLC’s Motion to
Alter/Amend Order Granting Judgment to Library Associates, LLC and Library Associates, LLC’s
Petition for Attorneys’ Fees and Costs Supp. R. 9

Transcript of the April 2, 2024 Hearing on Balfour Beatty Construction, LLC’s Motion to Require
Library Associates, LLC to Elect a Remedy and Library Associates, LLC’s Petition for Attorneys’ Fees
and Costs (Pages 1-4 and 29-38 also appear in the printed Record at R-1507 to R-1520) Supp. R. 252

Exhibits Admitted at the April 2, 2024 Hearing (Exhibits 1–5)..... Supp. R. 331

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.

Excerpts from Trial Transcript of September 13, 2021 – December 3, 2021 (designated pages not included in the printed Amended Record)..... Supp. R. 406

September 14, 2021 (Day 2)

Alec Dooley — Cross by Mr. McDonald Supp. R. 406

Volume – 2

Alec Dooley — Cross by Mr. Kelly..... Supp. R. 490

September 15, 2021 (Day 3)

Tim Spano — Cross by Mr. Bundy..... Supp. R. 491

Tim Spano — Cross by Mr. Kelly Supp. R. 494

September 16, 2021 (Day 4)

James McAuliffe — Direct by Mr. Hildebrand (cont'd) Supp. R. 495

September 17, 2021 (Day 5)

Nick Starcevic — Direct by Mr. Hildebrand (cont'd) Supp. R. 497

Nick Starcevic — Cross by Mr. Bundy..... Supp. R. 501

September 20, 2021 (Day 6)

Nick Starcevic — Cross by Mr. Bundy..... Supp. R. 521

September 21, 2021 (Day 7)

Nick Starcevic — Cross by Mr. Bundy..... Supp. R. 852

Volume – 3

David Simonton — Direct by Mr. Hildebrand (cont'd)..... Supp. R. 1019

September 22, 2021 (Day 8)

David Simonton — Cross by Mr. Bundy..... Supp. R. 1020

September 23, 2021 (Day 9)

David Simonton — Cross by Mr. Bundy..... Supp. R. 1140

David Simonton — Redirect by Mr. Hildebrand Supp. R. 1243

David Simonton — Recross by Mr. Bundy (cont'd) Supp. R. 1244

Casey Thompson — Direct by Mr. Hildebrand Supp. R. 1276

Casey Thompson — Cross by Mr. Bundy Supp. R. 1300

Casey Thompson — Redirect by Mr. Hildebrand..... Supp. R. 1334

Casey Thompson — Recross by Mr. Bundy..... Supp. R. 1335

Volume – 4

October 25, 2021 (Day 11)

Mark Boe — Direct by Mr. Bundy (cont'd) Supp. R. 1456

October 26, 2021 (Day 12)

Mark Boe — Direct by Mr. Bundy Supp. R. 1525

Mark Boe — Redirect by Mr. Bundy (cont'd)..... Supp. R. 1526

Grady Query — Direct by Mr. Bundy (cont'd)	Supp. R. 1531
<i>October 27, 2021 (Day 13)</i>	
Grady Query — Redirect by Mr. Bundy (cont'd)	Supp. R. 1613
Jim Clements — Direct by Mr. Bundy	Supp. R. 1617
<i>October 28, 2021 (Day 14)</i>	
Jim Clements — Cross by Mr. Hildebrand (cont'd)	Supp. R. 1765
Jim Clements — Cross by Mr. Terry (cont'd)	Supp. R. 1782
Jim Clements — Redirect by Mr. Bundy	Supp. R. 1783
Kim Bennett Brown — Direct by Mr. McDonald	Supp. R. 1819
<i>October 29, 2021 (Day 15)</i>	
Kim Bennett Brown — Direct by Mr. McDonald	Supp. R. 1849

Volume – 5

<i>November 1, 2021 (Day 16)</i>	
Kim Bennett Brown — Direct by Mr. McDonald	Supp. R. 1951
Kim Bennett Brown — Cross by Mr. Terry	Supp. R. 2051
Kim Bennett Brown — Redirect by Mr. McDonald	Supp. R. 2053
Court Reporter Certificate	Supp. R. 2058
<i>November 2, 2021 (Day 17)</i>	
Sam Hadley — Direct by Mr. McDonald (cont'd)	Supp. R. 2059
<i>November 2, 2021 (Day 18)</i>	
Sam Hadley — Direct by Mr. McDonald	Supp. R. 2170
Sam Hadley — Cross by Mr. Hildebrand (cont'd)	Supp. R. 2237
Sam Hadley — Cross by Mr. Windle	Supp. R. 2277
Sam Hadley — Cross by Mr. Terry	Supp. R. 2285
Tim Spano — Redirect by Mr. Hildebrand	Supp. R. 2301
Tim Spano — Recross by Mr. Bundy	Supp. R. 2302
<i>November 4, 2021 (Day 19)</i>	
Proceedings before the Court (colloquy)	Supp. R. 2310
<i>November 29, 2021 (Day 20)</i>	
Mark Doran — Recross by Mr. Bundy	Supp. R. 2320
<i>December 3, 2021 (Day 23)</i>	
Proceedings before the Court (colloquy re joint prosecution and defense agreements)	
.....	Supp. R. 2340

Section 3 – Exhibits

Balfour Beatty Construction, LLC's Exhibit 27 (Printed Record includes only pages 1, 3-12, 23, 47-49, 53, 55, 67 at R-2520)	Supp. R. 2348
---	---------------

Volume – 6

Balfour Beatty Construction, LLC’s Exhibit 60.....	Supp. R. 2419
Balfour Beatty Construction, LLC’s Exhibit 209.....	Supp. R. 2422
Balfour Beatty Construction, LLC’s Exhibit 252.....	Supp. R. 2521
Balfour Beatty Construction, LLC’s Exhibit 253.....	Supp. R. 2526
Balfour Beatty Construction, LLC’s Exhibit 260.....	Supp. R. 2528
Balfour Beatty Construction, LLC’s Exhibit 264.....	Supp. R. 2531
Balfour Beatty Construction, LLC’s Exhibit 329.....	Supp. R. 2533
Balfour Beatty Construction, LLC’s Exhibit 352.....	Supp. R. 2535
Library Associates, LLC’s Exhibit 2 (Complete).....	Supp. R. 2537
Library Associates, LLC’s Exhibit 4 (Complete).....	Supp. R. 2727

Volume – 7

Library Associates, LLC’s Exhibit 5 (Complete).....	Supp. R. 2913
Library Associates, LLC’s Exhibit 6 (Complete).....	Supp. R. 3058
Library Associates, LLC’s Exhibit 15.....	Supp. R. 3202
Library Associates, LLC’s Exhibit 17 (Complete).....	Supp. R. 3206
Library Associates, LLC’s Exhibit 18.....	Supp. R. 3214
Library Associates, LLC’s Exhibit 19.....	Supp. R. 3216
Library Associates, LLC’s Exhibit 20.....	Supp. R. 3218
Library Associates, LLC’s Exhibit 21.....	Supp. R. 3221
Library Associates, LLC’s Exhibit 22.....	Supp. R. 3225
Library Associates, LLC’s Exhibit 23.....	Supp. R. 3227
Library Associates, LLC’s Exhibit 24.....	Supp. R. 3229
Library Associates, LLC’s Exhibit 25.....	Supp. R. 3233
Library Associates, LLC’s Exhibit 26.....	Supp. R. 3235
Library Associates, LLC’s Exhibit 27.....	Supp. R. 3237
Library Associates, LLC’s Exhibit 29.....	Supp. R. 3240
Library Associates, LLC’s Exhibit 30.....	Supp. R. 3243
Library Associates, LLC’s Exhibit 31.....	Supp. R. 3246
Library Associates, LLC’s Exhibit 32.....	Supp. R. 3256
Library Associates, LLC’s Exhibit 33.....	Supp. R. 3258
Library Associates, LLC’s Exhibit 34 (Complete).....	Supp. R. 3260

Volume – 8

Library Associates, LLC’s Exhibit 36	Supp. R. 3447
Library Associates, LLC’s Exhibit 37	Supp. R. 3450
Library Associates, LLC’s Exhibit 38	Supp. R. 3452
Library Associates, LLC’s Exhibit 40	Supp. R. 3464
Library Associates, LLC’s Exhibit 41	Supp. R. 3474
Library Associates, LLC’s Exhibit 42	Supp. R. 3478
Library Associates, LLC’s Exhibit 43	Supp. R. 3487
Library Associates, LLC’s Exhibit 46	Supp. R. 3490
Library Associates, LLC’s Exhibit 47	Supp. R. 3497
Library Associates, LLC’s Exhibit 48	Supp. R. 3505
Library Associates, LLC’s Exhibit 49	Supp. R. 3509
Library Associates, LLC’s Exhibit 51	Supp. R. 3511
Library Associates, LLC’s Exhibit 52	Supp. R. 3513
Library Associates, LLC’s Exhibit 53	Supp. R. 3560
Library Associates, LLC’s Exhibit 54	Supp. R. 3572
Library Associates, LLC’s Exhibit 55	Supp. R. 3584
Library Associates, LLC’s Exhibit 56	Supp. R. 3596
Library Associates, LLC’s Exhibit 57	Supp. R. 3608
Library Associates, LLC’s Exhibit 58	Supp. R. 3620
Library Associates, LLC’s Exhibit 59	Supp. R. 3631
Library Associates, LLC’s Exhibit 63	Supp. R. 3634
Library Associates, LLC’s Exhibit 64	Supp. R. 3641
Library Associates, LLC’s Exhibit 65	Supp. R. 3662
Library Associates, LLC’s Exhibit 66	Supp. R. 3675
Library Associates, LLC’s Exhibit 67	Supp. R. 3681
Library Associates, LLC’s Exhibit 68	Supp. R. 3705
Library Associates, LLC’s Exhibit 69	Supp. R. 3716
Library Associates, LLC’s Exhibit 70	Supp. R. 3724
Library Associates, LLC’s Exhibit 71	Supp. R. 3734
Library Associates, LLC’s Exhibit 72	Supp. R. 3748
Library Associates, LLC’s Exhibit 73	Supp. R. 3759
Library Associates, LLC’s Exhibit 74	Supp. R. 3764
Library Associates, LLC’s Exhibit 75	Supp. R. 3774

Library Associates, LLC's Exhibit 76.....	Supp. R. 3778
Library Associates, LLC's Exhibit 77.....	Supp. R. 3783
Library Associates, LLC's Exhibit 78.....	Supp. R. 3795
Library Associates, LLC's Exhibit 79.....	Supp. R. 3824
Library Associates, LLC's Exhibit 80.....	Supp. R. 3862
Library Associates, LLC's Exhibit 82.....	Supp. R. 3867

Volume – 9

Library Associates, LLC's Exhibit 83.....	Supp. R. 3886
Library Associates, LLC's Exhibit 84.....	Supp. R. 3911
Library Associates, LLC's Exhibit 85.....	Supp. R. 3931
Library Associates, LLC's Exhibit 86.....	Supp. R. 3956
Library Associates, LLC's Exhibit 87.....	Supp. R. 3981
Library Associates, LLC's Exhibit 88.....	Supp. R. 3992
Library Associates, LLC's Exhibit 92.....	Supp. R. 4346
Library Associates, LLC's Exhibit 93.....	Supp. R. 4353

Volume – 10

Library Associates, LLC's Exhibit 94.....	Supp. R. 4393
Library Associates, LLC's Exhibit 95.....	Supp. R. 4506
Library Associates, LLC's Exhibit 96.....	Supp. R. 4510
Library Associates, LLC's Exhibit 97.....	Supp. R. 4514
Library Associates, LLC's Exhibit 98.....	Supp. R. 4518
Library Associates, LLC's Exhibit 99.....	Supp. R. 4522
Library Associates, LLC's Exhibit 100.....	Supp. R. 4524
Library Associates, LLC's Exhibit 101.....	Supp. R. 4527
Library Associates, LLC's Exhibit 102.....	Supp. R. 4546
Library Associates, LLC's Exhibit 103 (Printed Record includes 111 pages at R-7523).....	Supp. R. 4643
Library Associates, LLC's Exhibit 107 (Complete).....	Supp. R. 4781
Library Associates, LLC's Exhibit 108 (Complete).....	Supp. R. 4792
Library Associates, LLC's Exhibit 109 (Complete).....	Supp. R. 4808
Library Associates, LLC's Exhibit 110 (Complete).....	Supp. R. 4830
Library Associates, LLC's Exhibit 111 (Complete).....	Supp. R. 4850

Volume – 11

Library Associates, LLC's Exhibit 112 (Complete).....	Supp. R. 4894
Library Associates, LLC's Exhibit 113 (Complete).....	Supp. R. 4986
Library Associates, LLC's Exhibit 115 (Complete).....	Supp. R. 5078

Library Associates, LLC's Exhibit 116 (Complete).....	Supp. R. 5136
Library Associates, LLC's Exhibit 117 (Complete).....	Supp. R. 5269

Volume – 12

Library Associates, LLC's Exhibit 118 (Complete).....	Supp. R. 5371
Library Associates, LLC's Exhibit 119 (Complete).....	Supp. R. 5494
Library Associates, LLC's Exhibit 120 (Complete).....	Supp. R. 5634
Library Associates, LLC's Exhibit 121 (Complete).....	Supp. R. 5717

Volume – 13

Library Associates, LLC's Exhibit 122 (Complete).....	Supp. R. 5871
Library Associates, LLC's Exhibit 123 (Complete).....	Supp. R. 6016
Library Associates, LLC's Exhibit 124 (Complete).....	Supp. R. 6133
Library Associates, LLC's Exhibit 125 (Complete).....	Supp. R. 6281

Volume – 14

Library Associates, LLC's Exhibit 126 (Complete).....	Supp. R. 6526
Library Associates, LLC's Exhibit 127 (Complete).....	Supp. R. 6724

Volume – 15

Library Associates, LLC's Exhibit 128 (Complete).....	Supp. R. 7053
---	---------------

Volume – 16

Library Associates, LLC's Exhibit 129 (Complete).....	Supp. R. 7379
Library Associates, LLC's Exhibit 130 (Complete).....	Supp. R. 7652

Volume – 17

Library Associates, LLC's Exhibit 131 (Complete).....	Supp. R. 7938
Library Associates, LLC's Exhibit 132 (Complete).....	Supp. R. 8245

Volume – 18

Library Associates, LLC's Exhibit 133 (Complete).....	Supp. R. 8542
---	---------------

Volume – 19

Library Associates, LLC's Exhibit 134 (Complete).....	Supp. R. 8807
Library Associates, LLC's Exhibit 135 (Complete).....	Supp. R. 9051

Volume – 20

Library Associates, LLC's Exhibit 136 (Complete).....	Supp. R. 9281
Library Associates, LLC's Exhibit 137 (Complete).....	Supp. R. 9518
Library Associates, LLC's Exhibit 138 (Complete).....	Supp. R. 9694

Volume – 21

Library Associates, LLC's Exhibit 139 (Complete).....	Supp. R. 9883
Library Associates, LLC's Exhibit 140 (Complete).....	Supp. R. 10087

Volume – 22

Library Associates, LLC’s Exhibit 144	Supp. R. 10497
Library Associates, LLC’s Exhibit 145	Supp. R. 10500
Library Associates, LLC’s Exhibit 147 (Complete).....	Supp. R. 10503
Library Associates, LLC’s Exhibit 148 (Complete).....	Supp. R. 10511
Library Associates, LLC’s Exhibit 149 (Complete).....	Supp. R. 10519
Library Associates, LLC’s Exhibit 152	Supp. R. 10528
Library Associates, LLC’s Exhibit 153	Supp. R. 10532
Library Associates, LLC’s Exhibit 154	Supp. R. 10534
Library Associates, LLC’s Exhibit 155	Supp. R. 10538
Library Associates, LLC’s Exhibit 157	Supp. R. 10542
Library Associates, LLC’s Exhibit 160	Supp. R. 10547
Library Associates, LLC’s Exhibit 161	Supp. R. 10550
Library Associates, LLC’s Exhibit 162	Supp. R. 10552
Library Associates, LLC’s Exhibit 163	Supp. R. 10554

1 MR. BUNDY: Your Honor, I move to
2 introduce this document as an exhibit in this
3 case, No. 38.

4 THE COURT: Exhibit 38?

5 MR. BUNDY: Yes, Your Honor.

6 MR. HILDEBRAND: No objection, Your
7 Honor.

8 THE COURT: Without objection.

9 (DFT. EXH. 38 was received in
10 evidence.)

11 BY MR. BUNDY:

12 Q. All right. Let's look at Exhibit No --
13 let's look at change order number 6, all right?

14 A. Okay.

15 Q. It's accepted by Premier on March 3,
16 '17; accepted by Nick Starcevic on March 6, '17,
17 right?

18 A. Yes, sir.

19 Q. And if we turn to the third page three,
20 there's a thing that says change order approval
21 cover sheet, correct?

22 A. Yes, sir.

23 Q. The amount is 147,198.74.

24 A. Yes.

25 Q. Okay. And under the heading, total add

1 slash, deducted results of charge orders dollar
2 value, which includes all applicable tax, right?

3 A. Yes.

4 Q. And there are three items that have been
5 blacked out, buy out contingency. What does that
6 mean?

7 A. It's -- we bought a subcontractor for
8 less than a budget. It goes to buy out.

9 Q. RCO, what does that mean?

10 A. Request for change order.

11 Q. Back charge subcontractor, what does
12 that mean?

13 A. The back charge for the subcontractor.

14 Q. Okay. Can you tell from this -- from
15 the face of this change order, number 6, what
16 subcontractor is going to be back charged for the
17 work or any of the work in this change order?

18 A. No, sir.

19 Q. Sir?

20 A. No, sir.

21 Q. You cannot tell?

22 A. No, sir.

23 Q. Okay. All right. Let's go to No. 7,
24 signed by Brian O'Shaughnessy on April 3, signed
25 by you April 17 as project manager; is that

1 correct?

2 A. Sorry, No. 7? April 17th, yes.

3 Q. Okay. Let's look at the descriptions of
4 this change order. CI number 923 is 2/6/17,
5 L3-L4 footing bad masonry openings. Is that a
6 back charge to somebody?

7 A. Fixing bad masonry openings on level 3
8 and level 4 appears to be a back charge.

9 Q. Against who?

10 A. The Masonry.

11 Q. The Mason?

12 A. Yes.

13 Q. Old North State Masonry.

14 A. Yes.

15 Q. The next one is CI number 924,
16 description 2/5/17, water proofing eight windows
17 on L4, three sizes of window with rapid seal
18 \$665.28. Is that a back charge?

19 A. I'm not sure.

20 Q. Okay. The next one is CI number 925,
21 water proofing windows on L4 that had wrong
22 openings, 559.47. Is that a back charge?

23 A. I believe so. We've got the last one
24 where I'm looking at it.

25 Q. Is that a back charge to OSM?

1 A. I believe both of these are.

2 Q. Okay. Masonry repairs of windows on
3 time, material is \$1,359.79. Is that a back
4 charge, CI number 926?

5 A. It appears so.

6 Q. Okay. Now, this change order between
7 Premier Exterior and Balfour Beatty contains the
8 release language as follows, does it not? This
9 change order constitutes full and complete
10 settlement, meaning all cost referred to and/or
11 described herein, including but not necessarily
12 limited to all applicable taxes, insurance, bond,
13 and supervision, overhead and profit, labor,
14 labor impact, materials, changes, delays,
15 acceleration and inefficiencies for any claims
16 therefore, and the subcontractor hereby waives
17 any and all claims for such damages associated
18 with or related to the work covered by this
19 change order, all previous change orders, and
20 based subcontract amount, and all conditions
21 occurred to date. Did I read that correctly?

22 A. I believe all the change orders had the
23 same language on them.

24 Q. Okay.

25 A. So we --

1 Q. All right.

2 A. -- just assume that's the same.

3 Q. The next change order is number 8,
4 Premier Exterior and it's add of \$6,240; is that
5 correct?

6 A. Yes, sir.

7 Q. The descriptions is CI number 1207, and
8 it says five guys for three rooms. What is that
9 for?

10 A. Housing for their additional work.

11 Q. Okay. And is that a back charge to
12 somebody?

13 A. It's hard to say.

14 Q. Hard to say. It wasn't signed by you.
15 Was it paid?

16 A. I do not know.

17 Q. Okay. The next page --

18 A. I would assume it was.

19 Q. The next page is the change order
20 approval cover sheet that goes with change order
21 eight; is it not?

22 A. Yes.

23 Q. All right. Again, we have the blocks
24 buyout contingency FRN 7 checked, correct?

25 A. Yes.

1 Q. Does that have anything to do with this
2 change order?

3 A. Yes, sir.

4 Q. Back charge subcontractor, SFRN number
5 10, do you know what subcontractor would be back
6 charging for \$6,240?

7 A. We were trying to figure out who was
8 responsible. We were going to use buy out
9 contingency or back charge at the time, but we
10 knew we had to -- we knew it was extra work for
11 the stucco subcontractor. So we checked both
12 boxes.

13 Q. And then if we go underneath that it
14 says reviewed by, the approved boxes is checked,
15 and it says signed and dated buyer, Shanti
16 Pieniak. Who was that?

17 A. Shanti Pieniak was the project
18 coordinator at the time.

19 Q. All right. And the buyer-manager Nick
20 Starcevic. That's you, right?

21 A. Yes, it is.

22 Q. So you did approve this change order?

23 A. Pardon?

24 Q. You did approve this charge order or
25 not? You didn't sign it, but did you approve it?

1 A. Yes.

2 Q. Yes, you approved it?

3 A. Yes.

4 Q. All right. Let's go to number 10. This
5 is a \$100,000 add to Premier Exteriors contract;
6 is that correct?

7 A. Yes.

8 Q. Signed by you on June 30?

9 A. Yes.

10 Q. '17?

11 A. Yes.

12 Q. Okay. And if we look to the change
13 order approval cover sheet on the next page, it
14 says buy out -- it says back charge
15 subcontractor. Is this 100,000 a back charge to
16 the subcontractor?

17 A. At the time we did not know it was --
18 whether it was a buy out contingency, back charge
19 subcontractor or hold the owner and design team
20 responsible.

21 Q. Is there anything on the form which says
22 you did not know, or does it simply say back
23 charge subcontractor?

24 A. The form says back charge subcontractor
25 or buy out contingency.

1 Q. All right. And then the next one is
2 change order 16. And it's for 12,295. T and M
3 work for 5/23 through 6/6 in the amount of 9,630.
4 Do you know what that was for other than just
5 time and material?

6 A. No, sir.

7 Q. You don't know who -- you don't know why
8 that work had to be done?

9 A. I don't remember it.

10 Q. Okay. All right. And then there's a
11 main entry high bill. What is that about?

12 A. The CMU was out of plumb at the main
13 entry and we had to build it up to --

14 Q. Okay.

15 A. -- get a good finish on the stucco.

16 Q. All right. And it was the architect's
17 fault that the CMU was out of plumb?

18 A. I didn't say that.

19 Q. I'm asking you. Was it the architect's
20 fault that the CMU was out of plumb?

21 A. I don't remember the exact condition.

22 Q. Who laid the CMU? Did the architect lay
23 the CMU?

24 A. The mason did. The architect inspected
25 the tolerance in the masonry, which differed from

1 the tolerance they had in the stucco. So there's
2 a gap there and that the architect is responsible
3 for.

4 Q. Are you finished?

5 A. Yes.

6 Q. Okay. This doesn't say tolerance. It
7 says out of plumb. What does plumb mean?

8 A. There's plumb, which is straight, and
9 there's out of plumb.

10 Q. And so this doesn't say out of
11 tolerance, does it?

12 A. No, sir.

13 Q. It says out of plumb, correct?

14 A. It says main entry height built.

15 Q. It doesn't say out of plumb?

16 A. I don't see it.

17 Q. I thought you just testified something
18 that was out of plumb?

19 A. You asked me what this said.

20 Q. What do you say? Are you saying it's
21 out of plumb or it was out of tolerance? Which
22 is it? I don't care.

23 A. I'm not sure.

24 Q. You're not sure. Okay. Well, let's do
25 it this way. You've watched masons put block up,

1 right?

2 A. Yes, sir.

3 Q. Okay. And now they use lasers, but they
4 also used to use levels, four foot wooden levels
5 to lay masonry, right? Have you ever seen a
6 mason lay brick or block?

7 A. Yes, sir. I've watched quite a few of
8 them on projects.

9 Q. Do you know how to lay block?

10 A. I've never done it.

11 Q. Well, I have. Now, when you go to lay a
12 block, you put your mason's level up four feet
13 and there's a little bubble in there, right,
14 inside the level? Do you know what level is?

15 A. I do.

16 Q. Okay. And there's a bubble inside of
17 it, and if you get in between the two lines that
18 means that whatever your working against, if it's
19 in between -- if that bubble is in between those
20 two little lines that means it's plumb, straight
21 up and down, as it relates to the elevation,
22 right?

23 A. How straight?

24 Q. Pardon me?

25 A. How straight? There's a --

1 Q. Absolutely straight.

2 A. Yes.

3 Q. It's absolutely straight. And then you
4 have things in the contract called tolerance,
5 which allow things to be out of perfectly
6 straight, correct?

7 A. Yes.

8 Q. You understand these concepts. They're
9 not new to you, are they?

10 A. No, sir.

11 Q. Okay. And is there in the construction
12 industry a general understanding when something
13 is out of plumb it doesn't mean the spec, but if
14 it within tolerance, it could meet the spec and
15 still with be out of plumb, correct? Is that
16 correct?

17 A. Yeah. Generally speaking, yes.

18 Q. Something that is within tolerance --
19 something that is out of plumb and also out of
20 tolerance does not meet the requirements of the
21 documents, does it?

22 A. Correct.

23 Q. Okay. So when somebody refers to
24 something as out of plumb, I would like you to
25 consider that for purposes of my question that

1 it's not meeting the specifications, it's outside
2 of tolerance?

3 A. Outside of tolerance. Out of plumb is
4 outside of tolerance.

5 Q. Man.

6 A. Plumb is inside the tolerance.

7 Q. Was -- did my client lay -- did Library
8 Associates lay any block on this job?

9 A. Not that I'm aware of.

10 Q. Did they have any responsibility to see
11 that the block work was plumb?

12 A. No, sir.

13 Q. All right. Well, did the architect lay
14 any block on this job?

15 A. No, sir.

16 Q. Did the project manager lay any block on
17 this job?

18 A. For who?

19 Q. For anybody.

20 A. I don't know if any Old North State
21 Masonry project managers did or not.

22 Q. I didn't mean project manager. Well,
23 did you lay any block on the job?

24 A. No, sir.

25 Q. But was your company responsible to make

1 sure that the block was laid was within
2 tolerance?

3 A. Yes, sir.

4 (DFT. EXH. 34 was marked for
5 identification.)

6 Q. Okay. Thank you. Now, let's look at
7 Exhibit 34. Can you identify Exhibit 34, please?

8 A. Marion Square pay application number 38.

9 Q. Look inside and see if it's the accurate
10 copy of the pay application 34?

11 MR. HILDEBRAND: Is this one that
12 you earlier introduced?

13 MR. BUNDY: Pardon me?

14 MR. HILDEBRAND: Is this an earlier
15 one?

16 THE WITNESS: Pay application 38.

17 MR. BUNDY: Excuse me, 38.

18 THE WITNESS: 38.

19 MR. BUNDY: 38, I'm sorry.

20 BY MR. BUNDY:

21 Q. All I'm doing, Mr. Witness, is asking
22 you to look at the document and identify as an
23 accurate copy of the original.

24 A. I believe so. It looks accurate.

25 Q. Thank you.

1 MR. BUNDY: Your Honor, I move to
2 introduce this exhibit into evidence. No
3 objection?

4 THE COURT: Sure. Show it to
5 Mr. Hildebrand, if you would.

6 (DFT. EXH. 35 was marked for
7 identification.)

8 BY MR. BUNDY:

9 Q. While he is looking at, Mr. Starcevic,
10 look at Defendant's Exhibit 35 for identification
11 and tell me if you identify it?

12 A. Pay application number 42.

13 Q. Does it appear to be an accurate copy of
14 the original?

15 A. It's a lot of pages to say. It looks
16 like --

17 MR. BUNDY: Your Honor, I move to
18 move Exhibit 35 into evidence.

19 THE COURT: Okay.

20 MR. HILDEBRAND: 38 appears to be
21 in order, sir.

22 THE COURT: All right. That's
23 marked as Defendant's 34, correct?

24 MR. BUNDY: This one, 35, any
25 objection?

1 MR. MCDONALD: 38 is 34, Your
2 Honor, and 42 is 35.

3 THE COURT: I got it. It's like
4 playing football up here.

5 MR. BUNDY: I quit. I retire.

6 MR. HILDEBRAND: Got it.

7 (DFT. EXH. 34 and 35 were received
8 in evidence.)

9 BY MR. BUNDY:

10 Q. All right, Mr. Starcevic. Did you see
11 or did you observe or were you in the courtroom
12 when the three expert witnesses testified for
13 Balfour Beatty?

14 A. I was here for either all or a portion
15 of Mr. Huyghe.

16 Q. You were here for what?

17 A. All or a portion of Mr. Huyghe's.

18 Q. Okay. Anybody else?

19 A. No, sir.

20 Q. Okay. What interaction did you have
21 with Mr. Huyghe in this job?

22 A. During the job, none. I believe I met
23 with him once or twice afterwards in preparing of
24 the claim.

25 Q. In preparation of the claim?

1 A. Yes, sir.

2 Q. What time period would that have been?

3 A. I don't remember. Late 2019, early
4 2020.

5 Q. Okay. You have the claim here -- it's
6 right there. Would it have predated the date on
7 that claim?

8 A. I don't remember.

9 Q. Okay.

10 A. Again, I don't know.

11 Q. Did you meet with him after the claim
12 was filed?

13 A. I believe so.

14 Q. You don't believe so?

15 A. I do believe so after March 6th, 2019.

16 Q. What was the nature of your meeting?
17 What did you provide to Mr. Huyghe?

18 A. The information, documentation, anything
19 he requested.

20 Q. Anything he requested?

21 A. Yes, sir.

22 Q. Okay. And can you tell me what he
23 requested?

24 A. I cannot. I don't remember.

25 Q. Did you provide him any written reports

1 or memos or anything like that?

2 A. Personally, no.

3 Q. Okay. Did you provide any information
4 related to discovery requests in the litigation?

5 A. I don't know.

6 Q. Okay. Do you know what a discovery
7 request is?

8 A. From you?

9 Q. Yeah. From Library Associates.

10 A. I don't remember if I did or not.

11 Q. Okay.

12 A. I really don't.

13 Q. So you don't have any recollection of
14 somebody bringing you say a list of what we call
15 interrogatories or questions to be answered to
16 ask for your assistance in answering those
17 questions?

18 A. I believe -- I don't remember if they
19 came from you or Ms. Hadley. I remember there
20 was some information that she requested that I --
21 (inaudible) had supported. I don't remember the
22 specifics.

23 Q. Do you have any recollection of someone
24 bringing you a request for a production of
25 documents and you being asked to collect those

1 particular document?

2 A. I believe so. Not really. Not really.
3 I believe that happened but --

4 Q. Okay.

5 A. -- most of my digital document are
6 available.

7 Q. Do you know whether or not Balfour
8 Beatty in this litigation sent any discovery
9 requests to any of its subcontractors asking for
10 information?

11 A. I don't. I wouldn't have done that. So
12 I don't know if they were actually sent or not.

13 Q. Were you involved at all during the
14 litigation process in trying to ascertain either
15 -- for anybody, the lawyers, your boss, or
16 anybody else -- what claims Balfour Beatty may
17 have back against subcontractors or the validity
18 of the subcontractors claims that were being
19 passed through?

20 A. I'm sorry. Can you ask that again?

21 Q. Sure. During the litigation progress,
22 and by that I mean after the litigation has
23 commenced --

24 A. Okay. That the March 6th date or --

25 Q. Pardon me?

1 A. Was that March 6th of '19.

2 Q. Yeah, that's fine.

3 A. Okay.

4 Q. Let's just use January 1 through today.

5 A. Of '19.

6 Q. '19 through today. During that time
7 period, were you ever tasked with the job of
8 making a determination about the validity of back
9 charges against Balfour Beatty's subcontractors?

10 A. Tasked?

11 Q. Asked to.

12 A. I believe so. Sorry, I don't remember.

13 Q. Okay. All right. During that same
14 period of time, were you ever asked to or tasked
15 with the job of reviewing any of the
16 subcontractor claims which were being made by
17 subcontractors through Balfour Beatty for their
18 viability, adequacy, whatever word you want to
19 use?

20 A. Yes.

21 Q. Were you ever asked to do that?

22 A. Yes.

23 Q. Okay. And who asked you to do that?

24 A. I don't remember who.

25 Q. And what determination did you make as

1 to your claims that you were asked to review?

2 A. I don't remember my determination. I'm
3 sure I provided that information on though.
4 There was a handful of them.

5 Q. Now, how about the other two witnesses?
6 Did you ever talk to Doran, D-O-R-A-N, did you
7 ever talk to him?

8 A. Yes, sir.

9 Q. When did you talk to him?

10 A. A number of times, maybe six or seven
11 times, maybe once a month for a six, seven month
12 period.

13 Q. And on average how long did those
14 conversations last?

15 A. Typically an hour -- 30 minutes to an
16 hour.

17 Q. Over the phone?

18 A. There was a meeting or two in person in
19 our office.

20 Q. Who else was there?

21 A. Dave Simonton, Joe Lauricella, Tim
22 Spano. I believe Tom Hildebrand was at one or
23 two. Taylor Morrison was at one or two or a
24 handful of them, if not all of them, and then an
25 associate of Mr. Doran was there.

1 Q. And what was the nature of Mr. Doran's
2 inquiries of that group?

3 A. Ask schedule questions, asking for
4 supporting information, what happened, a lot of
5 fact finding.

6 Q. With regard to those fact finding
7 matters, was any review made of the daily
8 reports?

9 A. You have to ask him. I don't remember.

10 Q. How about project photographs, did y'all
11 look at project photographs?

12 A. I don't remember what he looked at as
13 far as it relates to photographs.

14 Q. What was it as far as?

15 A. As far as it relates to photographs, I
16 don't remember what he looked at.

17 Q. The photographs you looked at may have
18 been sparse, but aren't there thousands of
19 pictures in this building during construction?

20 A. Yes, sir.

21 Q. Because the owner, in fact, paid for and
22 hired a professional photographer to photograph
23 this building from soup to nuts, and there's a
24 website which contains thousands of photographs,
25 correct?

1 A. There's a website that has thousands of
2 photographs.

3 Q. Okay. And did you ever sit down with
4 that group and y'all together visit that website
5 and look at these photographs in these
6 discussions to try to determine what happened
7 when and where the delay was?

8 A. I don't know. I don't remember that
9 happening.

10 Q. Okay. One thing we can know for sure is
11 that in determining the delay analysis the groups
12 that met with the delay experts saw no real -- or
13 did not look at the project photographs or view
14 the daily reports; is that correct?

15 A. I did not say that. I said I did not.
16 You would have to ask them what they reviewed.

17 Q. Okay. Who was the other witnesses that
18 was here with us? I think that's all I've got.
19 Oh, one more question. With regard to these
20 meetings with Mr. Doran, did the lawyers provide
21 information to the expert about when the delays
22 occurred and how they occurred or whatever it was
23 they were trying to get Mr. Doran to do?

24 A. I don't know. My understanding was
25 Mr. Doran used the information that was available

1 to him, schedules, archives, RFI's, that's my
2 understanding of how he came up with his report.

3 Q. Do you know whether Mr. Doran was told
4 what result he was supposed to reach in order --

5 A. No, sir.

6 Q. -- to get paid and to testify?

7 A. I do not know.

8 Q. Okay. All right. Now, we got a guy
9 named Huyghe. Did you meet with him?

10 A. He's the one we already talked about.

11 Q. Okay. So we got one more. How about
12 McAuliffe?

13 A. No, sir, never met him --

14 Q. Never met him?

15 A. -- until after his testimony.

16 MR. BUNDY: Okay. Thank you, sir.
17 That's it for me.

18 THE COURT: All right, sir.

19 Mr. Hildebrand, it's 12:30. I assume you've got
20 some redirect. Do you want to -- we started late
21 down to --

22 MR. HILDEBRAND: Can you give me
23 just a few minutes to confer with my counsel?

24 THE COURT: Sure.

25 MR. HILDEBRAND: I'm not sure about

1 how long it will take.

2 THE COURT: That would be fine. I
3 want to get Mr. Starcevic out of here if I can.

4 THE WITNESS: Don't worry about me.

5 MR. HILDEBRAND: Do we need the
6 subcontractors and their counsel before I ask any
7 questions?

8 MR. KELLY: I don't have any
9 questions.

10 THE COURT: Okay. Thank you,
11 Mr. Kelly. Apparently not.

12 MR. HILDEBRAND: If you will give
13 me just a few minutes?

14 THE COURT: Sure.

15 (A recess transpired.)

16 MR. HILDEBRAND: Well, I think I'm
17 really going to hurt Nick's feelings with this,
18 but I don't have any questions.

19 THE WITNESS: Are you sure?

20 THE COURT: All right. Very good.

21 All right. Mr. Starcevic, you may step down, and
22 I'm assuming they've got no more questions for
23 you. It's 12:40. We started a little bit late,
24 but why don't we just plan to come back and 2
25 o'clock and you can call your next witness.

1 MR. HILDEBRAND: Okay. Thank you,
2 Your Honor.

3 THE COURT: And who would that be?

4 MR. HILDEBRAND: It would be David
5 Simonton, but I would like to get through the
6 deposition -- the exhibits to come in through the
7 depositions and work through that for an hour.

8 THE COURT: Okay.

9 MR. HILDEBRAND: It may take an
10 hour, but we can start with the next witness
11 after that.

12 THE COURT: Okay.

13 MR. MCDONALD: And, Your Honor,
14 I've got -- we've got waves of these things; so I
15 was able to do what I said I was going to do and
16 put together the objections and the counter
17 designations into some of them.

18 Some of them I've gotten through the
19 objections and the counter designations, but it's
20 not in the document that I have created. So some
21 of them will have to go on the record. Others I
22 have got copies -- both of them I've got copies
23 to hand up so you can see what the objections
24 are.

25 THE COURT: Okay. All right.

1 Let's plan to do that at 2 o'clock.

2 MR. BUNDY: Can I ask for some
3 clarification?

4 THE COURT: Yes.

5 MR. BUNDY: I know you've quashed
6 my subpoena, but did you quash it because it
7 wasn't properly served, or did you quash it
8 because you didn't like the subpoena, or did you
9 do both? Because if it wasn't properly served,
10 I'm going to serve it again and see if I can fix
11 that. If you didn't -- if that wasn't the
12 reason, then I won't go through the trouble.

13 THE COURT: Okay. All right. Let
14 me give you --

15 MR. BUNDY: And this afternoon is
16 fine. You don't have to do it right now if you
17 don't want to.

18 THE COURT: Well, I will tell you
19 what I -- I have already written down my ruling,
20 so I will give it to you. I've just got to type
21 it up.

22 The Court orders the subpoena quashed
23 based on representations that all documents have
24 already been provided through discovery in either
25 electronic or paper production. And then, of

1 course, I was going to add that it wasn't
2 properly served. So if you want to try and
3 reserve it, you can. But that's my ruling.

4 MR. BUNDY: If I can fix something,
5 I want to try to fix it.

6 THE COURT: I'm with you. I'm with
7 you.

8 MR. MCDONALD: And, Your Honor, you
9 mentioned something yesterday about you want to
10 do some housekeeping as to who is in and who is
11 out. I've got those. So you can have them
12 whenever you want.

13 THE COURT: All right. Let's do
14 that at 2 o'clock. Okay. Perfect. See you
15 then.

16 (A recess transpired.)

17 THE COURT: All right. So I want
18 to get started. Let's do some housekeeping on
19 exhibits and then deposition and deposition
20 exhibits. I think we have an issue about that.

21 MR. MCDONALD: Your Honor, I don't
22 know exactly how you want to do it, but what the
23 rule requires is that they provide us with the
24 excerpts and the exhibits, and then at the time
25 they offer them, then we would provide, if we so

1 chose, counter designations and objections to
2 those exhibits.

3 Thus far in trial, what's been offered
4 by the plaintiff is the individual deposition of
5 Mr. Kim Brown, and we had our arguments over
6 that.

7 THE COURT: Right.

8 MR. MCDONALD: So I don't know what
9 he's going to do. I don't know what he's going
10 to offer, when he's going to offer it.

11 THE COURT: Okay.

12 MR. MCDONALD: But I've got my
13 stuff ready to go to put on the record. Now,
14 having said that, as I discussed before lunch,
15 this has been kind of a rolling procedure. So I
16 do have written out my objections -- and I don't
17 know how Your Honor wants to do it. I understood
18 from your ruling is you wanted to read these.

19 THE COURT: Yeah. Well, let me
20 make sure the first base has been gotten to, and
21 that is that y'all have received the designations
22 of the deposition excerpts. Have you gotten
23 that?

24 MR. MCDONALD: Yes, sir.

25 THE COURT: All right. So we are

1 at first base. Now, second base would be any
2 counter designations.

3 MR. MCDONALD: And objections.

4 THE COURT: And objections.

5 MR. MCDONALD: And the way I have
6 it, Your Honor, is, as I said, there's rolling --
7 so the first ones that came through, Mr. Michael
8 Bennett, the 30(b)(6) deposition of Library
9 Associates; the first Jennifer Faulkinberry
10 excerpts; and the first -- his name is Winfred
11 Lindsay, but he goes by Buck, as you've heard in
12 the trial.

13 THE COURT: Right.

14 MR. MCDONALD: I have those written
15 out what my objections are, and to the extent we
16 have counter designations, they're in there as
17 well.

18 THE COURT: Okay.

19 MR. MCDONALD: I also have written
20 out the -- and I've got a copy for Your Honor,
21 and I don't know exactly -- I thought Your Honor
22 said that you wanted to read them. But -- so
23 this would avoid all of that. I could just hand
24 up my objections. The ones that I have come in a
25 rolling portion, I need to put on the record.

1 But the other written objections -- or
2 not objections, but counter designations relate
3 to Ms. Karen Jenkins and Mr. Woody Faust.
4 They're with ECI, the interior designer.

5 So I'm prepared those up to Your Honor
6 if Your Honor is going to read it, then you would
7 be able to make a determination. And I would
8 like to mark it as a Court's exhibit so I'm
9 protected on the record for my objection.

10 THE COURT: Sure. Karen Jenkins.
11 And what was the other witness?

12 MR. MCDONALD: Mr. Woody Faust,
13 F-A-U-S-T.

14 THE COURT: Faust, okay.

15 MR. HILDEBRAND: Your Honor,
16 perhaps what I should do and what I would suggest
17 is, I would like to mark my -- the plaintiff's
18 excerpt designation for the depositions -- the
19 deposition excerpts for each one that I would
20 like to introduce.

21 THE COURT: Okay.

22 MR. HILDEBRAND: And then we can --
23 if he has a counter designation, let me just --
24 if I could just introduce all of those as
25 exhibits.

1 THE COURT: Okay.

2 MR. HILDEBRAND: And then we can go
3 through each one if you -- as you would prefer
4 them and then talk about exhibits that I'd like
5 to come through as well.

6 THE COURT: Well, why don't -- why
7 don't we do this -- have you gotten the counter
8 designations back as well?

9 MR. HILDEBRAND: No, sir.

10 THE COURT: You don't have those
11 back. Were those only as to those two witnesses
12 that you had?

13 MR. MCDONALD: I have counter
14 designations as to Mr. Jenkins, Mr. Faust,
15 Library Associates 30(b)(6), volume two. The
16 rest on those are objections. I have a counter
17 designation from Mr. Jim Ward, and then the rest,
18 supplemental Buck Lindsay deposition;
19 supplemental Jennifer Faulkinberry deposition;
20 and then we've got a significant issue with
21 Mr. Clements' deposition -- depositions.

22 THE COURT: Okay. Supplemental on
23 Buck Lindsay and who else?

24 MR. MCDONALD: Ms. Faulkinberry.
25 They added some exhibits and some testimony for

1 the two of them.

2 THE COURT: Okay. Jim Ward, Buck
3 Lindsay, Ms. Faulkinberry, and then there was one
4 more, I think you said?

5 MR. MCDONALD: Yes. And then we
6 have -- I have some significant objections to
7 Mr. Clements' deposition in toto. And exhibits
8 from that deposition.

9 THE COURT: Gotcha. Okay. All
10 right. At least I know what we're doing. So you
11 want to just publish what your exhibit -- who
12 your deposition notices are and who you're
13 looking to submit?

14 MR. HILDEBRAND: Yes, sir.

15 THE COURT: Let's cover them. You
16 have an overarching objection to all of them or
17 have you done it individually as to each
18 presentation?

19 MR. MCDONALD: I've got -- I've got
20 two objections that are overarching as to
21 Mr. Clements. I've got an objection that's
22 overarching as to Mr. Bennett. Then I've also
23 got individual objections to exhibits that are in
24 depositions.

25 THE COURT: Okay. All right. I

1 will take --

2 MR. MCDONALD: Again, as I
3 understood your ruling, the way I tried to
4 organize it was, you would have in one place, our
5 objections and counter designations.

6 Because as sure as -- I'll just give you
7 an example. A lot of these times there's just a
8 discussion about some document. There's no
9 foundation laid for it. There's no -- nothing.
10 It reads like a discovery deposition.

11 THE COURT: Okay.

12 MR. MCDONALD: So I've got
13 objections to that, but I don't know how you're
14 going to rule on it without looking at the
15 excerpts.

16 THE COURT: I'm with you. I'm with
17 you. All right. So go ahead and publish who
18 you've got, and then let's -- let's take them up
19 individually as a deposition.

20 MR. HILDEBRAND: Okay. Yes, sir.
21 So I would like to mark for identification as
22 Exhibit 300, Plaintiff's Exhibit 300, the
23 plaintiff's excerpt designation for the
24 deposition of Kimberly Brown, and that's both her
25 individually and as a 30(b)(6) representative.

1 MR. MCDONALD: May I see that?

2 THE COURT: This is Plaintiff's

3 300. Okay.

4 (PLF. EXH. 300 was marked for
5 identification.)

6 MR. MCDONALD: Your Honor, this
7 still has the exhibits that we went through and
8 we object -- remember, they were withdrawn and --
9 because it was portions of the contract. It was
10 the notice.

11 We already went through Ms. Brown. We
12 already did that. That's already occurred. We
13 put all our objections on the record. Remember I
14 said, well, this isn't even referenced on this
15 page, and then it was withdrawn, and then he
16 handed up the deposition of Ms. Brown. So I
17 don't know why we're doing that again.

18 Now, with regard to the 30(b)(6), volume
19 two -- it's not described as volume two on here.
20 That's covered in my written document I have
21 here. I don't know why we're kind of continuing
22 with that.

23 THE COURT: So let's go into
24 Ms. Brown. You've got both individually and
25 30(b)(6)?

1 MR. HILDEBRAND: Yes, sir. They're
2 all in one section.

3 THE COURT: All right. To what
4 extent is this? What stuff -- the ground we've
5 already covered. Is this something -- you can go
6 ahead and make your record. I don't have a
7 problem with that. Go ahead.

8 MR. HILDEBRAND: Okay.

9 THE COURT: As to what she's --
10 what you seek.

11 MR. HILDEBRAND: Plaintiff's
12 Exhibit 3 are plaintiff's deposition excerpts for
13 Kimberly Brown.

14 THE COURT: Got it.

15 MR. HILDEBRAND: I would like to
16 introduce that. Then --

17 THE COURT: That was 300, right?

18 MR. HILDEBRAND: Yes, sir. And
19 then the next one are Plaintiff's excerpt
20 designations for the deposition of Michael
21 Bennett, which would be Plaintiff's 301. And the
22 next one would be --

23 (PLF. EXH. 301 was marked for
24 identification.)

25 MR. MCDONALD: May I have a copy?

1 MR. HILDEBRAND: Sure. Okay. Then
2 the next one would be 302, which would be
3 plaintiff's excerpts for the deposition of Buck
4 Lindsay.

5 THE COURT: Is that all one
6 deposition, or is that a compilation?

7 MR. HILDEBRAND: Yes, sir.

8 THE COURT: Okay. All right.

9 (PLF. EXH. 302 was marked for
10 identification.)

11 MR. HILDEBRAND: And then 303 would
12 be excerpts for Jennifer Faulkinberry.

13 (PLF. EXH. 303 was marked for
14 identification.)

15 MR. HILDEBRAND: We have 304,
16 excerpts of Woody Faust. 305 would be Jim
17 Clements.

18 (PLF. EXH. 304 and 305 were marked
19 for identification.)

20 MR. MCDONALD: Do you have 304?

21 THE COURT: 304 was Woody Faust.

22 MR. MCDONALD: Do you have 305,
23 Tom?

24 MR. HILDEBRAND: 305 was Jim
25 Clements. 306 is Phil Garcia. Okay. That was

1 taken down by video; so I don't think we need to
2 introduce that. And the last one would be -- 306
3 would be Karen Jenkins.

4 THE COURT: Karen Jenkins?

5 MR. HILDEBRAND: Yes, sir.

6 (PLF. EXH. 306 was marked for
7 identification.)

8 MR. HILDEBRAND: And there's one
9 other one for Jim Lord.

10 THE COURT: And what was that one?

11 MR. HILDEBRAND: There will be one
12 more for Jim Lord. This would be 307.

13 THE COURT: Plaintiff's 307?

14 MR. HILDEBRAND: 307, yes, sir. So
15 would you like these, Your Honor?

16 THE COURT: Okay. Very good.

17 (PLF. EXH. 307 was marked for
18 identification.)

19 MR. HILDEBRAND: And I would like
20 to introduce those, please.

21 THE COURT: Okay. So these are
22 Plaintiff's deposition excerpts listed 300
23 through -- I've got 306, but you're handing up
24 307?

25 MR. HILDEBRAND: Yes, sir, sorry.

1 THE COURT: So awaiting that,
2 Mr. McDonald, do you want to go through, or do
3 you want to start with 300? Let's just start
4 there, or do you want to make your overarch in
5 one first? What do you want to do?

6 MR. MCDONALD: Yes, sir. If Your
7 Honor wants to start with 300, that's fine with
8 me.

9 THE COURT: All right.

10 MR. MCDONALD: Okay. 300 is the
11 individual depositions of Ms. Brown. Previously,
12 I already put my objections on the record as it
13 relates to those. They've already been handed
14 up.

15 Unfortunately, this document, Exhibit
16 300, contains exhibits that were previously
17 withdrawn prior to handing up to Your Honor, and
18 my notes indicate those would be Exhibit Bennett
19 4.

20 MR. HILDEBRAND: Give me one
21 second.

22 MR. MCDONALD: Which was the
23 settlement agreement from 2007, Goff D'Antonio,
24 whoever it was, and it has no relevance. That
25 was withdrawn.

1 MR. HILDEBRAND: Okay.

2 MR. MCDONALD: Exhibit 13 was
3 withdrawn. That's a pleading.

4 THE COURT: Exhibit 13?

5 MR. MCDONALD: Yes, sir. Exhibit
6 14 was objected to and withdrawn, a portion of
7 the contract was already in evidence. A portion
8 of the portion of the contract was already in
9 evidence. There is no Exhibit 5, for Exhibit
10 Bennett 5.

11 THE COURT: That does not exist or
12 it just wasn't part of the record?

13 MR. MCDONALD: Just wasn't -- it
14 didn't -- wasn't referenced in those page
15 numbers.

16 THE COURT: Okay.

17 MR. MCDONALD: And then I've got an
18 objection, and I don't have in my notes whether
19 this was withdrawn or not, but Exhibit 31 is
20 hearsay.

21 THE COURT: Okay.

22 MR. HILDEBRAND: And this is Kim
23 Brown?

24 MR. MCDONALD: This is Kim Brown.
25 And no foundation. And then right after Exhibit

1 31, Your Honor will note that Exhibit 5 pops up
2 again, which was withdrawn.

3 THE COURT: That's the same Exhibit
4 5?

5 MR. MCDONALD: I believe so.

6 THE COURT: Okay.

7 MR. MCDONALD: Now, I will do it
8 however Your Honor desires. As to the -- the one
9 that's identified as Kimberly Bennett Brown,
10 April 19th, 2001, Your Honor, on Exhibit 300.

11 MR. HILDEBRAND: If I may
12 interrupt, I think I can make this a little bit
13 easier. I know it's kind of complicated with all
14 of the depositions and such.

15 THE COURT: Yeah. That's all
16 right.

17 MR. HILDEBRAND: What I've done is
18 I've got a chart prepared which shows the -- up
19 at the top, it shows the deponent and then a
20 short description of the exhibit, and then where
21 it says, trial exhibit number, that's actually a
22 tab number in our notebooks and then in evidence
23 when.

24 So if you -- if we're going through
25 the -- my designations, which are on the left,

1 each one of those separate shows a separate
2 exhibit number, and then you can look at the tab
3 in our notebook to correlate which ones go where.

4 THE COURT: Got it. Okay.

5 MR. MCDONALD: Your Honor, I have
6 no idea what the short description of exhibit is.
7 I'm about to make objections to a multitude of
8 these exhibits, and I think it's improper to
9 submit this for any purpose.

10 THE COURT: You're talking about
11 the --

12 MR. HILDEBRAND: It's not an
13 exhibit, Your Honor. It's just a tool to help
14 you to expedite this process.

15 THE COURT: Yeah. I actually like
16 this. It's not going to be evidence, but it's
17 going to help us get through this process, I
18 hope.

19 MR. MCDONALD: I'm concerned
20 though, Your Honor. The prejudice to me is, this
21 a -- my client -- this is a six-page document
22 that has exhibits that the vast majority are not
23 in evidence. Okay?

24 And there's no way for you to know
25 because they've now all been compiled. Why don't

1 we wait and go through all of the objections I
2 had. There may be ten of these left.

3 THE COURT: That's what I'm here
4 for. That's what we're doing.

5 MR. MCDONALD: All right. So, Your
6 Honor --

7 THE COURT: So you've made your
8 list as to Ms. Brown?

9 MR. MCDONALD: Yes.

10 THE COURT: She's on page -- it
11 looks like about page 4 of this -- or 5 of this
12 document.

13 As to those documents to which he has
14 raised an objection, Mr. Hildebrand, do you have
15 any objection to those?

16 MR. HILDEBRAND: I haven't even
17 seen his designation of -- first, as
18 housekeeping, let me -- I've got Jim Lord's
19 deposition, which will be 307.

20 THE COURT: Okay. All right.

21 MR. MCDONALD: Just as another
22 note, the exhibits are listed both in trial
23 exhibit and deposition exhibit numbers.

24 MR. HILDEBRAND: Right. That's
25 just --

1 MR. MCDONALD: Well, that's a layer
2 of confusion.

3 MR. HILDEBRAND: Well, because the
4 exhibit number obviously is that it's -- that's
5 how it's designated in the deposition.

6 THE COURT: Okay.

7 MR. HILDEBRAND: So that should
8 clarify that. So 307, which I will now hand to
9 you and would like to introduce, would be the
10 excerpts for the deposition of Jim Lord.

11 THE COURT: Okay.

12 MR. MCDONALD: The individual, Kim
13 Bennett Brown deposition has already occurred in
14 this trial. All I did was go back through my
15 notes about something that has already occurred.

16 So I don't know what opposing counsel
17 means by, I don't have the -- this is an event
18 that we've already discussed. We've already been
19 through Kim Bennett Brown's individual deposition
20 exhibits. The ones I objected to, I understood
21 were withdrawn, and deposition excerpts were
22 handed up to you.

23 So I didn't know that we were going to
24 go back through that. Obviously, I had a number
25 that I was aware that we could have gone through.

1 I certainly can if Your Honor wants me to do
2 that. That's why -- I thought I just did that.
3 I made the objections on my understanding of the
4 ones I thought had been withdrawn.

5 THE COURT: Okay. And you've
6 lodged that; so let me go back through and make
7 sure Mr. Hildebrand is either in agreement or if
8 he's not in agreement, then we will have to work
9 through it. Okay?

10 MR. HILDEBRAND: So for Kimberly
11 Brown, if you are looking at my chart that I've
12 just handed you --

13 THE COURT: Yep.

14 MR. HILDEBRAND: -- it looks like
15 Exhibit 4 is out, which I don't think is on
16 there.

17 MR. MCDONALD: It is on here. It
18 is on here.

19 MR. HILDEBRAND: Okay. I gotcha.
20 So Exhibit 4 is out. 13 is out. 14 is out. And
21 5 is out. So as I -- the rest of the exhibits
22 are now in.

23 MR. MCDONALD: No, no, no, that's
24 not correct.

25 THE COURT: Just stop right there

1 because that gets you through that August 4
2 deposition date. How about August 5? There was
3 an objection lodged to Exhibit 31, which was an
4 e-mail chain apparently.

5 MR. HILDEBRAND: All right, sir.
6 So do you have notebook number 2 in front of you?
7 That's what we need to look at.

8 MR. MCDONALD: No, Your Honor. The
9 process, we need to look at the deposition
10 transcripts --

11 THE COURT: Yeah, hold on.

12 MR. MCDONALD: -- and see if
13 there's actual foundation.

14 THE COURT: Yeah. Let's address
15 the document itself. So one are we talking about
16 and where are we?

17 MR. HILDEBRAND: This is Exhibit 31
18 to Kim Brown's deposition on Wednesday, August 5,
19 which is -- which should be tab 62.

20 THE COURT: Tab 62. Okay. All
21 right.

22 MR. MCDONALD: I'd just like to
23 make sure my record is clear.

24 THE COURT: Yeah.

25 MR. MCDONALD: The deposition is

1 what's being offered into evidence. If the
2 questioning in the deposition is insufficient to
3 lay a foundation, insufficient to make the
4 document admissible, there are no do overs.

5 There's no counsel arguing, this is what
6 the document is, here's who it's from. All that
7 goes away. It's just like we're in court. If
8 this is what he wants to do is to offer a
9 deposition excerpt, then that's what he's stuck
10 with.

11 If he doesn't lay the proper foundation
12 in the deposition, then it doesn't come in.
13 That's my position, Your Honor.

14 THE COURT: My question to you
15 would be, was an objection lodged at the time of
16 the deposition?

17 MR. MCDONALD: There are no
18 objections --

19 THE COURT: I asked you a question,
20 Mr. McDonald, that's a yes or no answer. Was an
21 objection lodged at the time of the deposition?
22 That's how you protect your record.

23 MR. MCDONALD: To answer your
24 question, Your Honor, no.

25 THE COURT: All right. What is the

1 basis for the objection? Lack of foundation?

2 MR. MCDONALD: Lack of foundation,
3 hearsay.

4 THE COURT: Lack of foundation and
5 hearsay. All right.

6 MR. MCDONALD: And just to be
7 clear, the document also wasn't offered into
8 evidence at the deposition either. So I don't
9 believe there was anything to object to.

10 THE COURT: Okay. But it would
11 be -- apparently, it's described as an e-mail
12 chain between Kim Brown and Jim Clements,
13 correct?

14 MR. HILDEBRAND: Yes, sir.

15 MR. MCDONALD: From Jim Clements to
16 Kim Brown, yes, sir.

17 THE COURT: Okay. And so it's
18 offered on what basis?

19 MR. HILDEBRAND: As a statement by
20 a party opponent. It's her e-mail chain, Your
21 Honor. Kim Brown, the deponent, was asked about
22 these, and she responded to questions about it.
23 Your Honor, the --

24 THE COURT: That's about all I need
25 to know for now.

1 MR. HILDEBRAND: Okay.

2 THE COURT: Statement by party
3 opponent?

4 MR. HILDEBRAND: Right.

5 THE COURT: Hearsay exception?

6 MR. HILDEBRAND: Yes, sir.

7 THE COURT: All right. And, again,
8 the basis is hearsay and lack of foundation?

9 MR. MCDONALD: Yes. And it's
10 not --

11 THE COURT: Does she not
12 acknowledge that it's her statement in her
13 deposition?

14 MR. MCDONALD: This is from
15 Mr. Clements to Ms. Brown.

16 THE COURT: I understand.

17 MR. MCDONALD: So --

18 THE COURT: Does she acknowledge
19 receiving it?

20 MR. MCDONALD: She says, okay, I'm
21 handing you Exhibit 31. Do you see at the top of
22 that it's to you from Jim Clements? Answer is
23 yes. Then he goes to read from the documents,
24 and then asks questions about what was said in
25 the document about seal impacts.

1 THE COURT: Okay. So in other
2 words, Ms. -- wait a minute. There's something
3 in here from Kim Brown. Hold on. She does join
4 in there in the middle. You not be aware of how
5 important the sealant had issue as to Mike.
6 There are a few hot button issues, and this is
7 one. That's her statement, is it not?

8 MR. MCDONALD: In the middle of
9 that e-mail, yes.

10 THE COURT: Right.

11 MR. MCDONALD: And I don't
12 believe -- but I would object to the whole
13 document coming in without foundation for the
14 entirety of it.

15 THE COURT: All right. Objection
16 noted. Otherwise, it's hearsay between the
17 others. Is that what you're telling me?

18 MR. MCDONALD: Yes, sir.

19 THE COURT: Clearly her statement
20 comes in party opponent. Do you agree or
21 disagree with that one?

22 MR. MCDONALD: Well, subject to my
23 previous objection, that she's -- you ruled that
24 this deposition could come in.

25 THE COURT: Right.

1 MR. MCDONALD: Obviously I objected
2 to that because she's not an officer, director or
3 managing agent of Library Associates. Subject to
4 previous objection, Your Honor has taken me past
5 that and said, I'm allowed to read that. And I
6 would have to agree, it would be a party opponent
7 in that instance.

8 THE COURT: All right. Well, her
9 statement would be an admission. His statement
10 may well be hearsay. I don't know if it's being
11 offered somewhere else or not. Okay. So that
12 would be my ruling there. Clearly her testimony
13 is admissible.

14 MR. HILDEBRAND: Your Honor, if we
15 can address -- I'm happy to address Jim Clements
16 now because he's certainly in a lot of these
17 exhibits.

18 THE COURT: Sure. I have no doubt
19 about it.

20 MR. HILDEBRAND: Let's do that.

21 THE COURT: Let's finish with Kim
22 Brown, though. Was that Exhibit 31?

23 MR. HILDEBRAND: Yes, sir.

24 THE COURT: All right. So I'm
25 going to allow it as an admission -- or a

1 statement by a party opponent for now. The other
2 information in there may well be hearsay, but it
3 sounds like we're going to talk about him next,
4 him being Jim Clements. Okay?

5 MR. HILDEBRAND: Yes, sir.

6 MR. MCDONALD: All right. Your
7 Honor, we object in toto for use of Mr. Clements'
8 deposition in these proceedings. Mr. Clements
9 works at Matrix Program Consulting and is not a
10 party to this action; therefore, rule 32(a)(1)
11 does not apply. He is not an officer, director,
12 or managing agent of a party to this action;
13 therefore, rule 32(a)(2) does not apply.

14 What you would get to is rule 32(a)(3),
15 the deposition of a witness, whether or not a
16 party may be used by any party for any purpose if
17 the Court finds. First, A, the witness is dead.
18 I can assure you Mr. Clements is alive.

19 THE COURT: Okay.

20 MR. MCDONALD: B, the witness is a
21 greater distance than one hundred miles from the
22 trial -- from the place of trial or hearing or is
23 out of state. Unless it appears that the absence
24 of the witness was procured by the party offering
25 the deposition, in this case, it would be Balfour

1 Beatty.

2 Your Honor, I know that they have
3 procured his absence so that would not apply. He
4 lives in Georgetown, South Carolina, at 322
5 Prince Street, Georgetown, South Carolina 29440,
6 a distance of 61 miles.

7 THE COURT: Okay.

8 MR. MCDONALD: It would not apply.
9 If the witness is unable to attend or testify
10 because of age, illness, infirmity, or
11 imprisonment. No evidence of that. If the party
12 offering the deposition has been unable to
13 procure the attendance of a witness by subpoena.
14 No evidence of that.

15 E, upon application of notice, none of
16 which has been done, that such exceptional
17 circumstances exist, none of which has been
18 shown, as to make it desirable in the interest of
19 justice and with due regard in accordance with
20 presenting testimony of witnesses orally in open
21 court to allow the deposition to be used.

22 E does not apply; therefore, the
23 deposition of Jim Clements cannot be read into
24 evidence at this trial. If they want to subpoena
25 him and put him on the stand, they can have at

1 it.

2 THE COURT: All right.

3 Mr. Hildebrand?

4 MR. HILDEBRAND: May I address
5 this, Your Honor?

6 THE COURT: Sure.

7 MR. HILDEBRAND: I'll agree with
8 this point. Here in a nutshell, Your Honor, is
9 the argument relative to Jim Clements.

10 THE COURT: Okay.

11 MR. HILDEBRAND: On the very front
12 page of the contract that is in evidence, it
13 says, the owner's designated representative is
14 Jim Clements. In the contract that was signed,
15 that I've cited in this brief under section 3.2,
16 it says, the owner's designated representative.
17 The owner shall identify a representative
18 authorized to act on behalf of the owner with
19 respect to the project.

20 So Mr. Clements is their designated
21 representative. The owner has explicitly
22 authorized him in this contract. And I went
23 through this with Mr. Bennett. It's in his
24 deposition. It's in Kim Brown's. It's in Jim
25 Clements'.

1 Yes, he is the designated representative
2 in the contract. On top of that, we have, under
3 there, a discovery response from the -- from
4 Library Associates where they identify Jim
5 Clements as a witness, and I would like to read
6 that to you.

7 It says, Mr. Clements served as the
8 owner's representative for the project. He may
9 provide opinion testimony related to all aspects
10 of the project, including but not limited to,
11 scheduling, supervision, sequencing,
12 coordination, management, construction of the
13 project.

14 So the -- for them to argue that he's
15 not their agent is contrary to their -- to the
16 express representations in the contract. So that
17 establishes that he is an agent in fact under the
18 contract.

19 The next provision that I would like to
20 cite to you is -- and this is under rule
21 801(d)(2), subsections C and D, and this is
22 under -- again, Your Honor, I've mentioned this
23 before.

24 It is labeled an admission by a party
25 opponent, but it's actually not that. It's a

1 statement. If you read the actual rule, it says,
2 C, a statement by a person authorized by the
3 party to make a statement concerning the subject.

4 So here, explicitly, Mr. Clements, under
5 the contract, is their agent. He's been
6 authorized under the contract to speak for them,
7 and then they've designated him in discovery as
8 the person who was their project representative
9 and is going to testify about everything in the
10 case.

11 So under C, it's a statement by a party,
12 and then D, a statement by the party's agent or
13 servant concerning a matter within the scope of
14 the agency or employment made during the
15 existence of the relationship.

16 And there again, you've got his -- these
17 documents that we've indicated are documents that
18 he made during the project. And he's been
19 designated as their witness in this case to
20 testify about all those things. So without
21 further ado, I think that clearly it's under the
22 rules, and his deposition should come in and
23 his -- the exhibits.

24 THE COURT: All right. You're just
25 seeking deposition excerpts, but you're offering

1 them as the agent of the plaintiff --

2 MR. HILDEBRAND: Yes, sir.

3 THE COURT: -- of the defendant,
4 Library Associates?

5 MR. HILDEBRAND: Yes, sir.

6 THE COURT: All right.

7 Mr. McDonald?

8 MR. MCDONALD: We're conflating at
9 least three things. The first is, what an
10 owner's representative is pursuant to the
11 contract documents.

12 The second is, what the rule requires an
13 officer, director, or a managing agent. You
14 could have a million kinds of agents for a
15 corporation. This says a managing agent of
16 Library Associates. If he was a managing agent
17 of Library Associates, there would be no reason
18 to have him sign a contract to be the owner's
19 representative. Those two things couldn't exist
20 at the same time.

21 He's not the managing agent. Saying
22 that had responsibilities as the owner's
23 representative on the construction job itself has
24 no bearing on whether he's the managing agent of
25 the entity itself. And we're incredibly

1 prejudiced because none of these things are met.

2 There's no evidence that he's the
3 managing agent of Library Associates other than
4 he's the owner's representative under the
5 contract documents, which is something completely
6 different.

7 And also, if Your Honor will recall,
8 Mr. Starcevic, to great accord, referred to
9 Mr. Clements as just the messenger, that he
10 couldn't make any decisions. That's the
11 testimony under oath from Balfour Beatty from
12 this stand in front of you.

13 And now it's, not only can he make
14 decisions, he's the managing agent of the entity
15 itself. And I think that's completely at odds
16 with the rule, with the testimony, and with the
17 conflation of these three things.

18 And I would just say for the record,
19 under rule 30(j), all objections except those
20 which would be waived or if not made at
21 the dep -- if not made at the deposition pursuant
22 to rule 32(d)3, and those necessary to assert a
23 privilege, to enforce a limitation on evidence as
24 directed by the Court, or present a motion
25 pursuant to 30(b) shall be preserved. And this

1 is conduct during depositions.

2 I would also refer -- if the document
3 itself is not offered into evidence, which it was
4 not, then there would be no objection to be made
5 at the deposition itself, even if I could make a
6 deposition -- an objection at the deposition
7 itself.

8 THE COURT: All right.

9 MR. MCDONALD: And this is from
10 32(d), Your Honor, 3(a) and (b).

11 MR. HILDEBRAND: Your Honor, he --
12 with all due respect, Mr. McDonald is not reading
13 from you the rule of evidence, which is very
14 clear. All it says is, a statement by a person
15 authorized by the party to make a statement
16 concerning the subject.

17 THE COURT: Well, let me ask you
18 this question. If he's in Georgetown, what's the
19 problem with getting him here?

20 MR. HILDEBRAND: Well, maybe I
21 could subpoena him, but that's not the issue,
22 Your Honor, with all due respect.

23 The issue is, under the rules, am I
24 allowed to read the statements of their agent?
25 And I'm allowed to do that. It's clear under the

1 rule. And, also, it's clear under the case law,
2 which I've cited in my brief. A statement by an
3 agent of a party within the scope of his agency
4 is admissible against the principal. That's in
5 Hunter v. Hyder, a case, Rookard v. The Railroad
6 Company.

7 The general rule is that declarations or
8 admissions of the agent within the scope of his
9 agency are admissible into evidence in a suit
10 against the principal. Mr. Clements, good Lord,
11 Your Honor, Mr. Clements was their agent. He was
12 out there all the time. He was in all of these
13 e-mails. He was so integrally involved as the
14 owner's designated representative on this
15 project.

16 For them to argue that he wasn't their
17 agent is just -- I think you've already heard the
18 testimony, and I think that you can -- certainly,
19 it's appropriate. And talk about prejudicial, it
20 is highly prejudicial. I might call somebody and
21 I can cross-examine them on the record, and it's
22 all convoluted and not clear.

23 Here, the rule allows me -- 32 allows me
24 to introduce deposition testimony that is
25 otherwise admissible for any purpose, the South

1 Carolina Rules of Civil Procedure, 32.

2 THE COURT: All right. It looks
3 like you're trying to get a lot of exhibits in
4 through him as well, you know?

5 MR. HILDEBRAND: Yes, sir.

6 MR. BUNDY: Your Honor, if I may
7 say something?

8 THE COURT: Yep.

9 MR. HILDEBRAND: Your Honor, it was
10 inappropriate for separate --

11 (Overlapping dialogue.)

12 MR. BUNDY: May I say something?

13 THE COURT: All right. Go ahead.
14 I'm going to allow him to speak. Go ahead.

15 MR. BUNDY: Thank you. Opposing
16 counsel wants to put the cart before the horse.
17 The evidentiary rules are the cart. The horse is
18 the rule relating to the introduction of
19 depositions. That's the first hurdle he has to
20 overcome. He can't use the rules of evidence to
21 overcome the rules of civil procedure. The rules
22 of civil procedure specifically require a
23 managing agent. He has not proven that.

24 Two, the rules with regard to the use of
25 depositions say, as we've reported, that

1 objections are preserved, all of them except to
2 the form of the question. Your Honor, that's the
3 whole purpose of this form of the -- this object
4 to the form is so people won't argue.

5 In addition to that, even if you read
6 the rule in its most favorable light, it requires
7 that we could have cured this problem at the
8 deposition. He did not offer this exhibit into
9 evidence at trial at the deposition. So there
10 was nothing to object to.

11 When we used to take de bene esse
12 depositions, Your Honor remembers that, you
13 couldn't -- you went into a de bene esse
14 deposition and it was just as if you were in
15 trial, and you had to say, here's the foundation.
16 But you had to actually make an offer of the
17 evidence so your adversary got the opportunity to
18 say, no, I object.

19 We no longer have de bene esse
20 depositions because we don't need them anymore.
21 But we still have rules, which require us to be
22 put on notice that he intends to introduce these
23 things at trial.

24 I can't stop him from marking a piece of
25 paper as an exhibit. I would be put in jail. He

1 would be calling you wanting to know why I'm
2 obstructing his deposition, why I'm saying, you
3 haven't offered it into evidence and why I'm
4 doing hearsay and all the rest of it.

5 We have got to have some rules that we
6 can rely on. And when we go to a deposition and
7 the adversary only refers to an exhibit, and I
8 cannot prohibit him from marking it. I don't
9 have an objection against, you can't mark the
10 exhibit.

11 But I do have an objection that it's not
12 admissible, but I can't make the objection until
13 the evidence is offered into evidence. And now
14 he's offering it into evidence, and he's stuck
15 with what he put in the deposition. Thank you,
16 Your Honor.

17 MR. HILDEBRAND: Your Honor, may I
18 respond?

19 THE COURT: Yes.

20 MR. HILDEBRAND: Rule 32, the use
21 of depositions in court proceedings. It says
22 that the deposition of a party or anyone can be
23 used for any purpose, and that's where -- and
24 here, Your Honor, this is where the rubber really
25 hits the road here, Your Honor.

1 And it's a common sense analysis. And I
2 think that that's what you have done from the
3 start in your questions. Here's the common
4 sense.

5 What this rule was designed to do is, if
6 you look at the very first paragraph of
7 authentication, requirements of authentication,
8 one, or A, general provision, the requirement of
9 authentication for identification as a condition
10 precedent to admissibility is satisfied by
11 evidence sufficient to support a finding that the
12 matter in question is what its proponent claims.

13 Your Honor, you hit the nail on the
14 head. Are they denying -- am I trying to sneak
15 something in here? Are these fraudulent
16 documents? Are these fraudulent statements? No.
17 All you have to do is -- if you look at this and
18 say, you know, Mr. Bundy, maybe that's a
19 technical argument, but I'm looking at the
20 documents.

21 Unless you can have an affidavit or
22 something saying that these are not the e-mails
23 from your agent and this is not the testimony of
24 your agent, then all you have to do is satisfy
25 yourself as to the sufficiency of the evidence.

1 So I can see your --

2 MR. MCDONALD: Five seconds?

3 MR. HILDEBRAND: Is everybody going
4 to be allowed to argue?

5 MR. MCDONALD: Because he -- he
6 just read a truncated chopped up version. The
7 rule says, the deposition of a party for anyone,
8 who at the time of the taking of the deposition
9 was an officer, director, or managing agent.

10 Mr. Clements' first deposition was taken
11 August 25th, 2020. Mr. Starcevic just testified
12 the job was over in April of 2019. There's no --
13 there's no way that this complies with that rule.
14 Thank you very much.

15 THE COURT: Well, I was going to
16 ask you that because I do think that's a
17 significant factor on this.

18 The deposition of the party or anyone
19 who at that time of taking the deposition was the
20 agent of a person. So was he still the agent?
21 Clearly he was the agent at the time of the
22 contract, but his deposition wasn't taken until
23 some time later, correct?

24 MR. HILDEBRAND: But they
25 identified him even now as their -- in the

1 discovery response, they're going to call him to
2 testify about his involvement in -- as their
3 agent.

4 But, Your Honor, there are two
5 complete -- there are several different ways that
6 this comes in. The primary argument that we
7 have, and the one cited first in my brief is
8 under -- is it authenticated. And I think you're
9 convinced that these are his statements and this
10 was his deposition.

11 So the only issue then, very simply is,
12 is it a statement as noted in my brief. Is it --
13 that's all it requires. That's all the rule
14 requires.

15 C, this is not hearsay. A statement by
16 a person authorized by a -- the party to make a
17 statement. He was -- he's designated as their
18 representative. It's ludicrous, Your Honor.

19 THE COURT: Let me ask you this
20 question: Are all of the statements of
21 Mr. Clements that are offered into evidence, are
22 they all made contemporaneous with the time of
23 the contract being performed? In other words, do
24 they all predate March of 2019 or whenever the
25 project --

1 MR. HILDEBRAND: Yes, sir. All of
2 the e-mails, all of the documents, yes, sir.

3 THE COURT: They're all in that
4 time frame?

5 MR. HILDEBRAND: Yes, sir.

6 THE COURT: All right. Well, then
7 I'm going to -- on that basis then, I'm going to
8 allow it. Okay?

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

11 THE COURT: I will allow it. I'm
12 going to review it. I will look at the
13 documents. If I find something that I don't
14 think there's a basis for, I'm going to raise
15 that -- I will bring that point to you. But
16 other than that, I think it can be used --

17 MR. HILDEBRAND: Thank you, Your
18 Honor.

19 THE COURT: -- in the plaintiff's
20 case. Okay?

21 MR. MCDONALD: And our objection is
22 noted on the record?

23 THE COURT: Objection is noted,
24 yeah.

25 MR. HILDEBRAND: I think the next

1 one would be --

2 MR. MCDONALD: Well, I've got
3 objections to them if they're -- we're going to
4 talk about them, I think we've got to go through
5 the whole objections to them, to Mr. Clements.
6 All right. The first one is Exhibit 50. That is
7 various pages, as I understand it, from
8 Mr. Clements' website. It's hearsay.

9 THE COURT: Okay.

10 MR. HILDEBRAND: That was a
11 document that he specifically identified right
12 then and there as a current document.

13 THE COURT: Hold on a second. This
14 outline describes it as a Matrix program
15 management documents is what that describes that
16 as, Exhibit 50.

17 MR. MCDONALD: The page is off the
18 website. That's not --

19 MR. HILDEBRAND: Which he
20 identified, which is -- he authenticated. This
21 is what he --

22 THE COURT: Is this his company,
23 Matrix?

24 MR. MCDONALD: Yes, Your Honor.

25 THE COURT: Is that his company? I

1 will allow that.

2 MR. MCDONALD: All right. Bennett
3 Exhibit 5, previously withdrawn, is also not even
4 referenced on page 51.

5 THE COURT: That's the A133 2009?

6 MR. MCDONALD: Yes, sir.

7 THE COURT: According to this, it's
8 in evidence as tab 56 of the first document put
9 into evidence.

10 MR. MCDONALD: All right. Those
11 are two different documents. Mr. Spano put it
12 into evidence, and they had a very difficult time
13 finding the original. They finally went back and
14 replaced 56. Exhibit 5 is not Exhibit 56.
15 That's another reason why I have a problem with
16 this spreadsheet.

17 THE COURT: Okay.

18 MR. HILDEBRAND: We will withdraw
19 that one, Your Honor.

20 THE COURT: All right. Withdrawn.

21 MR. MCDONALD: All right. Now I go
22 to page 135, line A through 23, Exhibit 54.
23 There is no Exhibit 54 identified on page 135,
24 which also, if you go back in the deposition, it
25 hadn't been designated. It's an e-mail about

1 draft specs dated March 6th, 2014. It's parol
2 evidence.

3 THE COURT: The objection --

4 MR. HILDEBRAND: He was asked about
5 that, Your Honor, and he testified about it.
6 They were documents during this project that he
7 testified about. It's very similar.

8 THE COURT: Okay. His objection is
9 it's parol evidence outside of the contract. Do
10 you have a position on that?

11 MR. HILDEBRAND: Yes, sir. And
12 this is one of the points that we haven't gotten
13 to yet, but here's one of the issues, is that the
14 contract that was signed, if you have it in front
15 of you, that's Exhibit 56, that we went around
16 about. It says -- it lists specifically --
17 there's a listing as an exhibit of documents that
18 are in the specifications and a listing of all
19 the drawings.

20 So every single drawing in every
21 document that was a specification is listed.
22 Okay. The specifications were provided by the
23 architect and are included in this big stack. So
24 we have this big stack of specifications. We
25 have all of the drawings.

1 When the contract was ready to be
2 signed, Balfour was given this stack of
3 specifications from the architect in the
4 drawings, and administrative assistant then, when
5 we were asked to list what are the contract
6 documents, and administrative assistant went
7 through them and said, okay, page 1 is this; page
8 2 is that, and listed all the documents in here.

9 One of the documents in here are -- is
10 titled supplementary conditions. And what
11 happened was, the architect accidentally
12 installed -- inserted some supplementary
13 conditions.

14 Now, how do we know it was by -- it was
15 accidental? Because the documents relating to
16 the negotiation of the contract, specifically
17 with Mr. Bundy and people on his side, and
18 explicitly with us said, these supplementary
19 conditions are not part of the contract, and
20 these provisions are not part of the contract.

21 So what happened was, they were
22 accidentally inserted. The documents that talk
23 about what should be in the contract and should
24 not be specifically say, those supplementary
25 conditions are not in the contract. And in fact,

1 you will recall that Mr. Bundy filed a pleading
2 with this Court saying, the contract is what I've
3 attached, and these supplementary conditions were
4 not a part of it and were done by -- included by
5 accident.

6 We have the same -- I think that it's --
7 I don't know if they've changed their mind now or
8 they want to try to say that they are included,
9 but they're not. And that's what I just wanted
10 to establish with Mr. Clements and Mr. Bennett
11 and Kim Brown. And I can establish it through
12 our witnesses as well. Look, they got stuck in
13 there, but they weren't part of it. And that's
14 what that document goes to.

15 THE COURT: Is that a fact at
16 issue? That's my question.

17 MR. HILDEBRAND: I don't know.

18 MR. MCDONALD: Your Honor, you're
19 telling me -- this is one page of a deposition.
20 This is the prejudice. This is the essence of
21 what's occurring. One page of the deposition.

22 THE COURT: Is that a fact at
23 issue? The question is simple.

24 MR. MCDONALD: I don't know what
25 the fact is that he's putting forth other than

1 what Mr. Hildebrand just argued. I'm going from
2 Mr. Clements' testimony at page 135 that doesn't
3 reference an Exhibit 54. It doesn't say that on
4 this page.

5 So what happens to me is, he then says,
6 move 54 into evidence. Then 54 can be used for
7 whatever purpose he wants to use it for. I have
8 no idea what he is going to argue in the future.

9 THE COURT: All right. Well, let
10 me -- I understand what the objection is now, and
11 I understand what you're saying. But if I'm
12 going to read the deposition excerpts, and when I
13 read the deposition excerpts, there is no Exhibit
14 54, I'm going to strike through it, and it ain't
15 going to come in. Okay?

16 MR. MCDONALD: You've just cut this
17 process by hours.

18 THE COURT: Yeah. Okay. If it's
19 not there, it ain't there. Okay. And some live
20 witnesses are going to have to come in here and
21 testify to the basis for the document. Okay?

22 MR. MCDONALD: All right. And then
23 after Your Honor does review it, if there --
24 because I'm not saying you'll come to the exact
25 same conclusion I do. I hope you do, okay, but

1 to the extent you don't, then could we get a list
2 of things saying, okay, here's the --

3 THE COURT: Yeah.

4 MR. MCDONALD: -- ones I let in?

5 THE COURT: Oh, yeah. I will be
6 reading and marking at the same time.

7 MR. MCDONALD: And then, once we do
8 that, I think we could cut this way down, and you
9 say, all right, I've got six exhibits left,
10 McDonald, what do you have to say on your
11 objections? That will save a lot of time.

12 MR. BUNDY: It should be on the
13 record.

14 MR. MCDONALD: And then on the
15 record.

16 THE COURT: Yeah.

17 MR. BUNDY: I don't have anything
18 to appeal if I don't know what you're doing.

19 THE COURT: You're going to get --
20 you're going to get my ruling, and I will give
21 you my record, and that's what I've been trying
22 to do.

23 MR. MCDONALD: Thank you.

24 THE COURT: Listen, I'll tell you
25 like I tell everybody else, I don't care if I get

1 affirmed or reversed. I just don't like to get
2 remanded. Okay? Y'all take it up there. Y'all
3 argue it all day long and let's not have to do it
4 again. Okay?

5 MR. BUNDY: Absolutely.

6 THE COURT: My hope is, I'll get
7 affirmed. But I don't mind getting reversed if I
8 don't get remanded.

9 MR. BUNDY: Absolutely.

10 THE COURT: If I have to try it
11 again with new rules, I don't like it. Okay.
12 It's just the way it is. Okay. And neither does
13 anybody else. I fully understand that. We don't
14 waste time. We want to make a record. I'm
15 trying to make sure we all get the record
16 covered. Okay?

17 MR. HILDEBRAND: I understand, Your
18 Honor. I think that each one of these -- each
19 exhibit is referenced in our designations. So I
20 believe we've done that. But on top of that,
21 I --

22 THE COURT: If I read whatever that
23 line is and there's no Exhibit 54 --

24 MR. HILDEBRAND: Right.

25 THE COURT: -- I'm going to --

1 MR. HILDEBRAND: I'm with you.

2 THE COURT: I'll be scratching that
3 through.

4 MR. HILDEBRAND: But the bigger
5 question that you just asked is, can we -- this
6 is where we really cut -- this is a dub in
7 eliminating potentially a lot of testimony. Is
8 that an issue? Do y'all claim that the
9 supplementary conditions are part of the
10 contract?

11 I'm not asking you, Mr. Bundy.

12 MR. BUNDY: Well, I'm going to give
13 you an answer. We claim that you have the burden
14 of proof. I don't agree to anything. That's
15 what we claim, Mr. Hildebrand. You are in the
16 plaintiff's seat, put up your case.

17 THE COURT: I got it. I got it.
18 All right. I'm with you. I understand that
19 answer, too. Okay. The plaintiff has got the
20 burden of proof.

21 MR. MCDONALD: So, Judge, just so
22 I'm clear, the Clements exhibit being offered
23 through the deposition testimony of Mr. Clements,
24 which has the overarching objection and has been
25 overruled, Your Honor will read the deposition

1 and then compile a list of those exhibits that
2 Your Honor feels is appropriate, and at that
3 time, we will probably have narrowed it down a
4 good bit. And we can put objections on the
5 record, if there are in fact any objections ever
6 made.

7 THE COURT: Right. Got it.

8 MR. HILDEBRAND: But obviously it
9 was very important, much more limited to decide
10 whether the -- it's simply, did we reference the
11 exhibit in the designations?

12 THE COURT: Right.

13 MR. HILDEBRAND: It's as simple as
14 that. It's a litmus test.

15 THE COURT: I want to make sure
16 that -- there needs to be a basis for it in the
17 deposition transcript and then the document
18 itself, correct?

19 MR. HILDEBRAND: That they are
20 listed and that they are referenced in the
21 testimony.

22 THE COURT: Yeah. Okay.

23 MR. MCDONALD: And at that time, we
24 will --

25 THE COURT: I understand your

1 concern because it's fraught with potential
2 problems, none the -- none the worst of which
3 would be hearsay and authentication. Okay?

4 MR. MCDONALD: Yes.

5 THE COURT: Some of the same issues
6 we've been fighting.

7 MR. MCDONALD: And we're going to
8 reduce them -- I believe, Your Honor, we'll
9 reduce them down significantly and make this task
10 a lot more --

11 THE COURT: I'm all for that.

12 MR. MCDONALD: Thank you. All
13 right. So the next one we have is -- actually,
14 the next one is -- except for Mr. Lord, which
15 will be very brief, I will have one counter
16 designation that I'll put on the record, and we
17 can get that squared away, however he publishes
18 it.

19 THE COURT: Okay.

20 MR. MCDONALD: The next one, Your
21 Honor, as it relates to Mr. Bennett, Library
22 Associates 30(b)(6) deposition, Ms. Faulkinberry
23 and Mr. Lindsay, I have in writing for Your Honor
24 to review at your leisure.

25 THE COURT: Okay.

1 MR. MCDONALD: I will say that the
2 only two things I want to put -- may I approach,
3 Your Honor?

4 THE COURT: Yes, sir.

5 MR. MCDONALD: The only two things
6 that I wanted to bring to your attention is, as
7 to Mr. Bennett, there is the overarching
8 objection that Mr. Bennett is not a party and is
9 present in the courtroom. All the rest of them
10 are specific to the excerpts that are offered.

11 And then the last thing I want to bring
12 to your attention is that you will note that on
13 5, under Mr. Bennett, it said Exhibit 1. I have
14 hand drawn in a zero. This is what happens when
15 you are doing it later at night.

16 THE COURT: Is it No. 10?

17 MR. MCDONALD: It's No. 10, yes,
18 sir. I've got a zero there. Thank you very
19 much.

20 THE COURT: Thank you.

21 MR. MCDONALD: Also, in addition to
22 those written objections and counter designations
23 that I just handed up, Your Honor.

24 THE COURT: Do you have a copy of
25 that?

1 MR. MCDONALD: And I'm not familiar
2 with this exhibit numbering of deposition
3 excerpts; so that's how Your Honor is going to
4 keep track of them, and I can assign an ID number
5 to ours, too, which is our counter designations
6 and objections. I know they're not exhibits
7 themselves in trial, but he has marked his 301
8 through 307.

9 THE COURT: Okay.

10 MR. MCDONALD: So that's one way of
11 keeping up with mine, too.

12 THE COURT: And yours is all on one
13 sheet, right?

14 MR. MCDONALD: Well, there's
15 another sheet for two of them that came later.

16 THE COURT: Okay.

17 (DFT. EXH. 400 was marked for
18 identification.)

19 MR. MCDONALD: That I mean, I can
20 mark them some high number. I don't mind marking
21 ours Defendant's 400, you know, just so we
22 know --

23 THE COURT: Just to get back.

24 MR. MCDONALD: If that's okay with
25 Your Honor. So the deposition -- deposition

1 designations for use at trial from Library
2 Associates, both objections and counter
3 designations for Michael Bennett 30(b)(6), volume
4 2 of Library Associates, Jennifer Faulkinberry,
5 and Winfred Lindsay are identified as Exhibit
6 400.

7 THE COURT: Okay.

8 MR. MCDONALD: And then the next
9 document, Your Honor, which we'll call 401. May
10 I approach?

11 THE COURT: Yes, sir.

12 MR. MCDONALD: Is counter
13 designations for Mr. Jenkins and Mr. Faust.

14 THE COURT: All right, sir.

15 MR. MCDONALD: And there's a very
16 brief -- and then finally as to the ruling.

17 THE COURT: Do you want to make
18 that 401?

19 MR. MCDONALD: That's 401, Your
20 Honor.

21 (DFT. EXH. 401 was marked for
22 identification.)

23 MR. MCDONALD: And finally, as to
24 the ruling of Jim Lord, which is their 307, we've
25 got objections to their Exhibit 126. This is

1 eight months. This document is eight months
2 before the contract GMP. The actual design this
3 is in reference to design documents leading up to
4 the actual design document.

5 THE COURT: Okay.

6 MR. MCDONALD: I know what they are
7 as well. I think it's important for, Your Honor,
8 to understand with regard to this particular
9 objection something I'm not sure has come up yet.
10 You lead up to a contract in this case, right, in
11 September of 2014. You sign a contract.

12 But with GMP contract -- cost plus for
13 GMP, everybody has the right once contractor,
14 construction manager comes up with the GMP to
15 say, I'm good. That's -- we're walking away.
16 You still owe them for the pre-construction and
17 you walk away.

18 That doesn't occur until February of
19 '15. So you've got a lag between September of
20 '14 and February of '15 before the GMP is arrived
21 at. During that time, you have addendum in the
22 contract drawings, you have changes to the
23 contract drawings, you have a bunch of things
24 that occur in order to firm up as Your Honor
25 might imagine, the GMP. So I only tell you that,

1 that it could be that they're being offered to
2 say, look, they're saying that the plans aren't
3 in good order.

4 What we would really like if Your Honor
5 would take specific care to know when the
6 conversation in these e-mails that I take the
7 position number 11 because the design part of the
8 contract document. I've pointed that out to Your
9 Honor. I think it's important as you evaluate
10 this. So our objection to the Exhibit 126 for
11 Jim Lord would be -- that would be our objection.

12 Then we have a counter designation, and
13 that is -- and, Your Honor, I don't have this one
14 written out so perhaps -- I'm going to put it on
15 the record, but perhaps you may on Exhibit 307
16 make a note to yourself -- counter designation is
17 page 51, line 6 through page 52, line 21.

18 THE COURT: Page 56 through page?

19 MR. MCDONALD: Page 51, line 6,
20 through page 52, line 21.

21 THE COURT: Okay. This is the next
22 page?

23 MR. MCDONALD: Yes, sir.

24 THE COURT: Okay.

25 MR. MCDONALD: And subject to my

1 previous objections and your previous rulings as
2 to how we're going to handle Mr. Clements in
3 order to scale it down, that's all I have, Your
4 Honor.

5 THE COURT: All right. I agree
6 with you.

7 MR. MCDONALD: Oh, just to be
8 clear, I know I brought this up before when we
9 were talking about this. Obviously -- and this
10 isn't contributable to Your Honor, this happened
11 earlier in my career, I was entitled to put in
12 evidence in my case in chief, even if I don't
13 counter --

14 THE COURT: I'm going to allow you
15 to do that.

16 MR. MCDONALD: Thank you, Your
17 Honor.

18 THE COURT: You'll get your day in
19 Court.

20 MR. HILDEBRAND: Your Honor, I'm
21 not, it's perplexing -- I guess what Mr. McDonald
22 is trying to argue is that any documents that
23 post date the GMP are irrelevant, but that's not
24 the case. And if you look at the specific --

25 THE COURT: Well, what the -- what

1 was the actual date of the contract? I don't see
2 it in front o me. What's the date that we saw it
3 was signed, was it March --

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: -- of '15, isn't that
6 that?

7 MR. MCDONALD: September of '14,
8 and then the GMP, and then it's September of '15.
9 There's no contract until there's a GMP.

10 THE COURT: All right. I gotcha.
11 And this happened in the inter-meeting period of
12 time or does this predate that?

13 MR. HILDEBRAND: What it was, Your
14 Honor --

15 THE COURT: Go ahead.

16 MR. HILDEBRAND: -- is that the
17 hundred percent drawings that were designated as
18 the hundred percent drawings, the architect is
19 talking about, look, we're giving them a hundred
20 percent drawings. That's what is being
21 referenced, and they're saying, these documents
22 are gross negligence.

23 I've got a specific brief on that
24 exhibit, and the reasons that they don't want
25 that exhibit in is because it is such a smoking

1 gun against them. I mean, here's what the fellow
2 says, these are the architect -- these are two
3 architects in-house talking about the drawings.

4 MR. BUNDY: Objection. It's not in
5 evidence. It's not in evidence. You can't make
6 an argument in trial of something that's not in
7 evidence.

8 THE COURT: Let's just say this,
9 I'm going to accept it as a proffer right now,
10 and I will make a decision about really whether
11 it's admissible or not. How about that? How
12 about if I figure this out?

13 MR. BUNDY: That's fine. If I can
14 make objections. That's fine.

15 THE COURT: Let's go ahead and put
16 proffer in the air. I got to figure out more
17 things about it, reading last night it was -- I
18 was boning up on my parol evidence rule because
19 guest what.

20 That's what just came up today. I've
21 been reading every night. I know y'all are busy,
22 too. I've been reading every night, too. I just
23 want y'all to know.

24 MR. HILDEBRAND: All right, sir.

25 THE COURT: So I'm going to give

1 you a response tomorrow as to what I found was --
2 what was acceptable, what was not acceptable. So
3 y'all can keep track of what I found was
4 admissible. I certainly understand why it's
5 being offered. Okay. Thank you. Yes, sir.

6 MR. HILDEBRAND: Yes, sir.

7 THE COURT: And this is on
8 Mr. Lord, right?

9 MR. HILDEBRAND: Yes. It's the
10 exhibit that Mr. McDonald was specifically
11 referencing, number 126.

12 THE COURT: You lost me on that
13 one.

14 MR. HILDEBRAND: What I'm handing
15 you is an --

16 THE COURT: Exhibit 126. Okay.
17 I'm sorry. Yeah. Yeah. Yeah. Got it. Okay.

18 MR. HILDEBRAND: All right. So as
19 I understand it where we stand, Your Honor,
20 except for the exhibits that were stricken from
21 Kim Brown's deposition, all other -- at this
22 point all of the deposition transcripts,
23 designations that plaintiff has offered are in.

24 Their counter designations are in, and
25 the only issue before the Court at this point is

1 whether the exhibits that we have referenced are
2 in evidence. Is that where we stand? That's my
3 understanding.

4 THE COURT: Yes.

5 MR. MCDONALD: What I handed up is
6 not just counter designations. 400 and 401 also
7 contain objections to the exhibits offered in
8 those depositions, and they are spelled out what
9 they are. It's not just objection, and the
10 ground for it are in there.

11 THE COURT: Just one second.

12 MR. MCDONALD: But as I asserted
13 before, because of the nature of the objection
14 and the nature of what Your Honor is going to do,
15 read the deposition excerpt, I don't know how you
16 do it without looking at the deposition excerpt
17 to make that determination. That's why I did it
18 that way, Your Honor.

19 THE COURT: Okay. All right. Have
20 y'all had a chance to review each of these back
21 and forth?

22 MR. HILDEBRAND: They've seen mine.
23 I haven't seen theirs.

24 THE COURT: Okay.

25 MR. HILDEBRAND: I haven't got

1 further?

2 MR. HILDEBRAND: No, sir.

3 BY MR. HILDEBRAND:

4 Q. Mr. Simonton, do you recall the last
5 date of work that Balfour had on this project?

6 A. April 26th, excuse me, April 26th, 2019.

7 Q. Do you remember what day of the week
8 that was?

9 A. I believe it was a Friday. It was a
10 momentous day.

11 Q. What was the -- do you remember what was
12 going on with the final work materials?

13 A. We were working on shutters, finishing
14 up some shutters, and then we see they were
15 working on the fence between the two buildings.

16 Q. Okay.

17 MR. HILDEBRAND: I would like to
18 publish -- let's turn to Exhibit 56 and binder
19 two there.

20 THE COURT: 56?

21 MR. HILDEBRAND: Yes, sir. And the
22 A201, go to that.

23 THE COURT: I'm sorry, I missed it.

24 MR. HILDEBRAND: A201.

25 THE COURT: A201?

1 minutes, or are you ready?

2 MR. BUNDY: Yeah. I'd like to
3 clean up a little bit.

4 THE COURT: Let's take five minutes
5 and clean up.

6 (A recess transpired.)

7 THE COURT: Very good. All right,
8 Mr. Bundy.

9 MR. BUNDY: Thank you, Your
10 Honor.

11 CROSS-EXAMINATION

12 BY MR. BUNDY:

13 Q. All right, sir. Do you have the Exhibit
14 56 in front of you?

15 THE COURT: The contract documents?

16 MR. BUNDY: Contract documents.

17 BY MR. BUNDY:

18 Q. All right. Mr. Simonton --

19 A. I'm looking for them, Mr. Bundy.

20 Q. Are you ready?

21 THE COURT: He is still looking on
22 it.

23 Q. Oh, okay. That's all right. We will
24 get it later, that's fine.

25 A. Okay.

1 Q. We will just start with number 2.

2 Mr. Simonton, how old are you?

3 A. 68.

4 Q. 68?

5 A. Yes, sir.

6 Q. Young man.

7 A. Thank you.

8 Q. I got two years on you. All right. So
9 you were born in 1953?

10 A. Yes, sir.

11 Q. All right. And how old would you have
12 been when Mr. Starcevic was born?

13 A. His birth date is not up.

14 Q. Sir?

15 A. His birth date -- I mean, his birth date
16 is not on there.

17 Q. Well, I believe he was 22 years old in
18 2009, so let's back up. Do that for me. That
19 would be 1999, 1989, 1987, right? '53 from '87
20 is how much?

21 A. '53 from '87?

22 Q. Because you were born in '53 and he was
23 born in '87. So how much is '53 from '87?

24 A. 34.

25 Q. 34 years old. All right.

1 MR. HILDEBRAND: 32.

2 MR. BUNDY: 32.

3 BY MR. BUNDY:

4 Q. And where were you working and how old
5 were you in 2009?

6 A. Here we go with math.

7 Q. 53? You don't know?

8 A. You just said 53.

9 Q. You were 53?

10 A. Uh-huh.

11 Q. Okay. All right. At 53, how does your
12 experience in the construction industry compared
13 with his experience at 22? He was a graduate at
14 Chapel Hill, BS management and society. Who knew
15 more about construction, you or him?

16 A. 53?

17 Q. In 2009, when he was 22 and you were
18 whatever 53 years old or however old you were, 53
19 I guess.

20 A. And the question is who had more
21 experience?

22 Q. Who had more experience when he started
23 work, when he got out of college in the
24 construction industry, you or him?

25 A. I did.

1 Q. Okay. And how many years experience did
2 you have at that time in 2009?

3 A. I started when I was 19.

4 Q. 30 something years experience?

5 A. 30 something years.

6 Q. Okay. All right. And in 2015, when he
7 took over the job, he would have had an
8 additional six years of experience and you would
9 have had roughly 40 years of experience at that
10 time, right?

11 A. Yes.

12 Q. Okay. And in 2015, you were retired or
13 not?

14 A. No, sir. I was in San Antonio building
15 a confidential data center for a major software
16 supplier.

17 Q. Gotcha. You need to speak up a little.
18 All right?

19 A. Okay.

20 Q. Have you ever seen this document before
21 and I -- excuse me, the title of this, for the
22 record, is a request for proposal for
23 preconstruction and construction management
24 services related to hotel at Marion Square,
25 Charleston, South Carolina?

1 A. Yes, sir, I reviewed this document.

2 Q. All right. When did you first review
3 it?

4 A. April of '19.

5 Q. April of '19?

6 A. Yes, sir.

7 Q. So that was how many years after the
8 proposal was sent out? When does this say this
9 was released to bidders?

10 A. 2013.

11 Q. All right. So the first time you saw
12 this document was six years after it was released
13 to bidders, right?

14 A. Yes, sir.

15 Q. All right. When did you first become
16 aware of the -- well, let me -- I will withdraw
17 that question. You were not involved in the bid
18 proposal, the response to the RFP for this hotel,
19 were you?

20 A. No, sir.

21 Q. The answer is no?

22 A. No, sir.

23 Q. Okay. Did you even know that Balfour
24 Beatty was replying or responding to a request
25 for proposal in the year 2013 on the hotel in

1 Charleston, South Carolina?

2 A. No, sir.

3 Q. No. And what were you working on in
4 2013?

5 A. Richland Data Center for Bank of
6 America.

7 Q. Okay. When did you first become aware
8 that Balfour Beatty had a project in Charleston
9 at the hotel at Marion Square?

10 A. When Pat Dean called me.

11 Q. And Pat Dean called you in October of --
12 or well, you tell me when Pat Dean called you.

13 A. It was late October of 2017.

14 Q. 2017. And the job in October of 2017
15 had been going on for how long?

16 A. 28, 29, 30 months. About 30 months, I
17 believe.

18 Q. Two years roughly, two and a half years?

19 A. Yeah, 30 months.

20 Q. Okay. So it was 13 -- four years after
21 the request proposal was issued to contractors to
22 respond to before you even knew about the
23 existence of this hotel?

24 A. Yes, sir.

25 Q. Okay. And you never read it and weren't

1 aware of the existence of this hotel until you
2 got called by Pat Dean in December of 2017?

3 A. October of 2017.

4 Q. October of 2017. All right. Have you
5 ever seen this document, which is entitled,
6 response to RFP, hotel at Marion Square,
7 Charleston, South Carolina, dated November 6,
8 2013?

9 A. Yes, sir.

10 Q. When was the first time you saw it?

11 A. Early 2019.

12 Q. 2019?

13 A. Yes, sir.

14 Q. Okay. Roughly six years after it was
15 submitted by Balfour Beatty?

16 A. Yes, sir.

17 Q. Okay. What is the purpose, if you know,
18 of an owner sending out requests for proposals to
19 contractors, construction managers for project
20 they're interested in having contractor's price?

21 A. Basically an owner would like to know
22 your qualifications, projects you built, your
23 credit worthiness, and have an idea of the cost
24 and the schedule.

25 Q. Okay. And why would an owner want to

1 know that before he even signed a contract to pay
2 somebody close to 60 million dollars?

3 A. Make sure he's got the right team.

4 Q. And would a contractor -- or an owner
5 interview more than just one contractor,
6 typically, correct?

7 A. In the RFPs I've been in, yes, sir.

8 Q. Okay. And why would you send a proposal
9 to more than one contractor to respond with a
10 response?

11 A. So you can level the actual participants
12 there.

13 Q. Right. Because it's important, is it
14 not, to a developer to know the team he is going
15 to be dealing with for the next two to three
16 years?

17 A. The team and the number.

18 Q. Okay. Well, have you ever had the
19 experience in your career that an owner was
20 willing to pay a higher number to get a better
21 team?

22 A. Yes.

23 Q. Okay. And in fact, companies like
24 Balfour Beatty spend as much time convincing you,
25 they got the right team as they do convincing

1 you, they got the right number; is that true or
2 not?

3 A. Yes.

4 Q. Okay. And they don't send to the RFP, a
5 Nick Starcevic to convince you that you can build
6 a hotel under the management of a guy who is 28
7 years old, do they?

8 A. We've sent 28 year olds to propose on a
9 hotel.

10 Q. Okay. So you're telling this Court that
11 your experience with Balfour Beatty over the last
12 40 years is that they send a 28-year-old man,
13 young man, to a developer like Mike Bennett to
14 build a 60 million dollar hotel and say, Mike, I
15 would like to meet Nick Starcevic?

16 He is 28 years old. He has put an air
17 conditioner in and he has upfitted some
18 buildings, and he is going to be your project
19 manager to build a 60 million dollar hotel? Is
20 that what Balfour Beatty does?

21 A. I don't know what Balfour Beatty does.

22 Q. There you go. And you don't know what
23 they did in this instance, do you?

24 A. No, sir.

25 Q. Okay. Well, I will tell you what --

1 let's do. Would the best evidence be what they
2 sent to my client and brought to a meeting to try
3 to convince him to enter into a 60 million dollar
4 contract, what you're holding in your hand?

5 A. Was that a question, sir?

6 Q. Yes, sir. Would that be the best
7 evidence to determine what Balfour Beatty in fact
8 represented to my client they were going to do if
9 they were awarded this job? That would be the
10 best evidence because you were not there,
11 correct?

12 A. Yes, sir.

13 Q. Okay. Well, let's see what they did.
14 Show the -- tell us first what the cover of this
15 looks like. What is the picture on this RFP?
16 What is that a picture of?

17 A. The Ritz, Charlotte.

18 Q. And who built the Ritz-Carlton in
19 Charlotte?

20 A. Balfour Beatty.

21 Q. There you go. Why do you think they
22 would put that on the cover of an RFP that
23 requested a team to build a luxury hotel in
24 Charleston?

25 A. Because it's a luxury hotel in

1 Charlotte.

2 Q. Right. Would it make sense, they were
3 trying to convince Mr. Bennett, we built a luxury
4 hotel in Charlotte on time and on budget, and we
5 are the people that can build your hotel here in
6 Charleston because we know how to do it. Fair
7 enough?

8 A. Fair enough.

9 Q. All right. And do you know who your --
10 who Balfour Beatty's competitors were to try to
11 get this job?

12 A. No, sir, I don't.

13 Q. You do not. Okay. Is an owner, when
14 they send an RFP, unlike the government, are they
15 free to invite anybody they want to, to submit an
16 RFP?

17 A. Yes, sir.

18 Q. All right. Balfour Beatty doesn't have
19 the authority to call up Mike Bennett and say,
20 you will send us an RFP, and we will come to your
21 office, and we will give you a price whether you
22 want us to or not? They don't have that right,
23 do they?

24 A. No, sir.

25 Q. Okay. They were invited, and if they

1 didn't have the qualifications or the reason to
2 believe that they could comply with the terms of
3 the RFP, they had the absolute right to say, no,
4 sir, Mr. Bennett, we're not interested because we
5 don't like you, we don't like the ties you wear,
6 or we simply don't have the people available that
7 we could be honest in telling you we could build
8 this hotel. They had the absolute right to do
9 that, do they not?

10 A. Yes, sir.

11 Q. Okay. What did they do instead,
12 Mr. Witness? They sent a picture of this hotel
13 to my client. Okay? And let's look at this page
14 here, proposed team, page 7. Do you see that?

15 A. (No audible response.)

16 Q. Do you see it?

17 A. Yes.

18 Q. All right. Does it say, our proposed
19 team has been hand selected for the hotel at
20 Marion Square project. Each member has
21 experience working on complex hospitality
22 projects and has delivered best in class,
23 high-end facilities, luxurious amenities and
24 sustainable environments. Did they make that
25 representation?

1 A. That's what I'm reading with you.

2 Q. Okay. Our relationship with Lindsay,
3 Pope, Brayfield, Clifford and Associates will
4 allow our team to hit the ground running without
5 a learning curve. What does that mean, sir?

6 A. Means that we have experience with the
7 architect.

8 Q. Okay. But what's a learning curve?

9 A. Without trying to learn how Lindsay Pope
10 designs a project.

11 Q. Well, not only how Lindsay Pope does,
12 that you have experience working on hospitality
13 projects. Our relationship would allow our team
14 to hit the ground running without a learning
15 curve.

16 Do you imply that to mean that they --
17 that the learning curve related only to their
18 relationship with the architect or that the
19 quality of their team also didn't have a learning
20 curve?

21 A. The quality of their team.

22 Q. Okay. Do you think Mr. Starcevic was
23 facing a learning curve at 28 years old when he
24 hit that hotel that was behind schedule and a
25 mess when he got there?

1 A. He had the ability to move into the
2 project to figure out what was going on with it.

3 Q. Right. But he had a learning curve in
4 front of him, did he not?

5 A. Very fast learner.

6 Q. He's a fast learner?

7 A. Yes, sir.

8 Q. Very fast learner. Okay. Our team has
9 what it takes to deliver your project and exceed
10 your expectations. A complete look at our team
11 skills as outlined in the following pages.

12 At the top is hotel at Marion Square.
13 On the left is the LPBC architecture,
14 engineering, interiors. On the right, Bennett
15 Hospitality and Matrix. Directly underneath it
16 is the project executive, Mike Baumbach
17 B-A-U-M-B-A-C-H.

18 Do you know whether or not Mr. Baumbach
19 showed up representing Balfour Beatty trying to
20 get this job?

21 A. I don't know if he showed up or not.

22 Q. Okay. Would you expect in the
23 reasonable course of things, that if Balfour
24 Beatty wanted to get this job and sent this
25 brochure to my client in advance of the meeting,

1 that Mr. Baumbach would deign to show up and make
2 a presentation. Do you think he would probably
3 come?

4 A. Yes.

5 Q. Okay. Tell me about Mike Baumbach. Do
6 you know him?

7 A. Yes, sir.

8 Q. Okay.

9 A. He used to be my boss.

10 Q. Pardon me?

11 A. He used to be my boss.

12 Q. Used to be your boss. Was he
13 incompetent?

14 A. No, sir.

15 Q. Okay. Was he competent?

16 A. Yes, sir.

17 Q. Okay. Was he a pilot in the military?

18 A. I don't know, sir. You would have to
19 ask him.

20 Q. Okay. So you don't know if he was a jet
21 pilot?

22 A. No.

23 Q. Okay. Was he a personable gentleman?

24 A. Yes, sir.

25 Q. Was he well experienced in the

1 construction business?

2 A. Yes, sir.

3 Q. Did he work on the Ritz-Carlton?

4 A. No, sir.

5 Q. Okay. What was his position with
6 Balfour Beatty at or about the time this proposal
7 was presented and this brochure or response was
8 given to my client?

9 A. He was a business unit leader of
10 Charlotte.

11 Q. Okay. That was in November of 2013?

12 A. Yes, sir.

13 Q. Okay. Roughly four years before you
14 ever heard of this job, correct?

15 A. Yes, sir.

16 Q. Do you know how long, once the job was
17 awarded to Balfour Beatty, Mike Baumbach was on
18 the job?

19 A. No, sir.

20 Q. Okay. You know he was fired, right?

21 A. I heard that in the trial, sir.

22 Q. Pardon me?

23 A. I heard that in the trial, sir, I
24 believe.

25 Q. You believe he was fired?

1 A. That's what I heard, yeah.

2 Q. That's what you heard. And did you hear
3 he was fired about four to six months into the
4 job?

5 A. No, sir.

6 Q. Well, when was he fired?

7 A. I just heard he was fired.

8 Q. Okay. Was he working on the job when
9 you got there?

10 A. On this job?

11 Q. Yes, this job, the job to Hotel Bennett.
12 That's the job we're here today about.

13 A. He was not on the project when I got
14 there.

15 Q. There you go. Was he on the project
16 when Starcevic, this fast learner, got there in
17 May of 2015?

18 A. I would assume he was. You said he was
19 fired six months into the job.

20 Q. Pardon me?

21 A. You said he was fired six months into
22 the project.

23 Q. Yeah. I said that's what I thought, but
24 I was asking you. You don't know?

25 A. I don't know, sir.

1 Q. Okay. So you don't know when he was
2 fired. We will just leave it at that. But you
3 do know he was fired. Do know why he was fired?

4 A. No, sir.

5 Q. Okay. Would it surprise you to know it
6 was a direct result of infighting within the
7 corporate hierarchy of Balfour Beatty
8 Construction?

9 A. I can't answer that question. I don't
10 know about it.

11 Q. Do you know of any corporate infighting
12 that was going on in Balfour Beatty Construction
13 in Charlotte in the 2013 and '14 time period?

14 A. I don't know, sir. I was in Richmond,
15 Virginia.

16 Q. All right. This chart that you
17 testified you did planned versus actual
18 supervision?

19 A. Yes, sir.

20 Q. You said you created that chart?

21 A. Yes, sir.

22 Q. Okay. I don't see Mr. Baumbach -- well,
23 strike that. I don't see any corporate act plan
24 versus actual labor on this project. You don't
25 have that on there, do you?

1 A. Yes, sir.

2 Q. You do?

3 A. On the plan.

4 Q. On the plan. Where is Baumbach's name
5 on there?

6 A. Project executive, 25 percent.

7 Q. Let me see what you got. Project
8 executive. What does 25 percent mean?

9 A. 25 percent of his time.

10 Q. 25 percent of his time. And you've got
11 a date there of March of 2015.

12 A. Yes.

13 Q. All right. Which project executive was
14 that?

15 A. That's May.

16 Q. Okay. Which project executive was that
17 in May? What was his name?

18 A. Mike Baumbach, I assume.

19 Q. Well, you did the chart, sir. You don't
20 know?

21 A. This is the chart from the labor. It
22 doesn't have anybody's name except Tim Spano
23 (inaudible). It didn't have a name. It just
24 said project executive.

25 Q. When you were -- you compiled the data?

1 A. That's what I saw.

2 Q. You compiled the data in the chart?

3 A. Yes, sir.

4 Q. And when you compiled the data, did you
5 see the name of the person whose data you were
6 compiling in 2015?

7 A. There was no name on that.

8 Q. There was no name. Well, what record
9 did you look at in order to determine that the
10 project executive was there in May?

11 A. Staffing plan.

12 Q. Pardon me?

13 A. Preplanned staffing chart.

14 Q. Okay. The preplanned staffing chart?

15 A. Yes.

16 Q. And it didn't mention anybody by name?

17 A. No, sir.

18 Q. Okay. Well, it did in the RFP. It said
19 Mike Baumbach was going to take that position,
20 but you weren't aware of that until today, right?

21 A. No.

22 Q. All right. Now, then we've got the rest
23 of your team under project solutions. What are
24 project solutions? What does that mean? Do you
25 know?

1 A. Preconstruction.

2 Q. Preconstruction?

3 A. Yes.

4 Q. Okay. Bill Lorenzo, was he involved?

5 His name is here. Do you know Bill?

6 A. Yes, sir.

7 Q. Was he involved in this project?

8 A. I have seen documents from him.

9 Q. Okay. What documents have you seen and
10 when are they generally dated?

11 A. 13 on the -- on the original estimate.

12 Q. Okay. And how much -- okay. What about
13 Keith Rossi? Do you know Keith?

14 A. Yes, sir.

15 Q. Was he involved?

16 A. Yes, sir.

17 Q. Okay. And how do you know that?

18 A. I saw documents with his name on it.

19 Q. How about John Kochkowski (ph)? Was he
20 involved?

21 A. I've seen documents with John on it.

22 Q. And that means to you, he was involved?

23 A. Yes, sir.

24 Q. Okay. And Ryan Lawrence, what was his
25 job? I mean, was he involved?

1 A. He's a BIM manager. I'm not sure if he
2 was involved in this book.

3 Q. Okay. Well, let me back up a little
4 bit. There are two sort of aspects to this
5 proposal. There's the original preconstruction
6 work that's done to establish the budget, the
7 amount of the ultimate GMP, and there's also a
8 year or so of going over the plans and
9 specifications and working with the architect,
10 right?

11 A. I would have to look at the RFP again to
12 see what other dates were.

13 Q. Isn't it true that my client paid
14 Balfour Beatty \$68,000 to do preconstruction
15 work, which included working with the architect,
16 to look at the drawings and make sure they were
17 complete and what Balfour Beatty wanted, right?
18 That's true, isn't it?

19 A. They worked with the owner or the
20 architect.

21 Q. Okay. Is that true, for over a year?
22 True?

23 A. I assume they did, yes, sir.

24 Q. Well, they got paid 60 -- did they get
25 paid \$68,000? That's true, isn't it?

1 A. Yes, sir.

2 Q. All right. Okay. So this project
3 solutions team, that's the team that would have
4 done that work, right?

5 A. Yes, sir.

6 Q. Okay. Keith Rossi is a preconstruction
7 manager. What was he going to manage during --
8 what did or was he supposed to -- or would he
9 have been supposed to have managed during
10 preconstruction?

11 A. There are other estimators in the office
12 that work under Keith.

13 Q. Okay. All right. And Kochkowski (ph,
14 he is an MEP preconstruction manager, correct?

15 A. Yes, sir.

16 Q. That's what it says, correct?

17 A. Yes, sir.

18 Q. Mechanical, electrical, and plumbing,
19 right?

20 A. Yes, sir.

21 Q. And why do you need an MEP
22 preconstruction manager on a job like this during
23 the preconstruction phase?

24 A. To help work through the mechanical
25 estimates and budgets.

1 Q. And find clashes, figure out where
2 things are going to go and the best way to run
3 things, right?

4 A. No, sir.

5 Q. No, sir. Okay. Do you do any value
6 engineering during this period?

7 A. Yes, sir.

8 Q. What is value engineering, sir?

9 A. That's where you take a product that
10 they may specify, if it's \$100 and you find a
11 product that's it's equal to or better for \$50,
12 and you propose that to an owner so they can try
13 to save money and trim money out of the budget.

14 Q. And that's a way of selling yourself to
15 a developer to say more or less, I can sit down
16 with the architect. He may have an idea. I'm a
17 builder. I build fancy hotels. I may have a
18 better idea, and it'll even save you money,
19 right? That's the way that game is played,
20 right?

21 A. I don't know if it's a game.

22 Q. Is that what's said?

23 A. Yes.

24 Q. Is that an asset that the contractor
25 brings to the developer in order to convince him

1 to hire him?

2 A. Yes.

3 Q. Does the developer also tell -- does the
4 contractor with a proposal like this also tell
5 the developer that we have the ability to look at
6 these architectural drawings and tell you whether
7 they would work or not and whether they're
8 constructible?

9 A. They go through a review of the drawings
10 and issue RFIs, qualifications and assumptions on
11 what the job needs to do to be able to build.

12 Q. All right. I'm limiting my questions
13 now to preconstruction, and you understand that,
14 right? I'm not talking about during the job.
15 I'm talking about preconstruction.

16 A. Yes, sir.

17 Q. Preconstruction services.

18 A. Yes, sir.

19 Q. Okay. What does constructability mean?
20 What does that term mean?

21 A. Go through the billing and find issues
22 that may not be constructible and make sure that
23 the plans all flow together.

24 Q. And the contractor, as another selling
25 point to the developer to convince him to hire

1 Balfour Beatty, represents to the owner that we
2 will do a constructability review to eliminate
3 problems.

4 We'll look through the drawings. If
5 you'll pay us \$68,000 because we are builders and
6 contractors, and we know better than the
7 architect. Have a look at a set of drawings to
8 determine whether you can actually construct the
9 building as designed; isn't that true?

10 A. Yes.

11 Q. Okay. Because it's one thing to be able
12 to -- be able to draw something very pretty, but
13 you get the plans and specifications, and it
14 might really be pretty on paper, but you can't
15 build it, correct?

16 A. Correct.

17 Q. All right. And in your years of
18 building stuff, I'm sure you've run into
19 architects who think just because they can put
20 something on a sheet of paper and give you three
21 or four details, that you can actually go out
22 there and do it?

23 A. Yes, sir.

24 Q. It happens all the time, doesn't it?

25 A. Yes, sir.

1 Q. And that's one of the selling points of
2 construction management, RFPs and
3 preconstruction, so that the contractor that you
4 are putting your faith in to know how to build a
5 building will do a constructability review, so
6 you will not have problems that this
7 sophisticated contractor has run into before,
8 knows how to find and knows how to fix in
9 advance, correct?

10 A. Find as many issues as you can,
11 Mr. Bundy.

12 Q. All right.

13 A. You can't find one hundred percent of
14 the issues.

15 Q. Okay. Nobody is perfect, are they?

16 A. (No audible response.)

17 Q. Correct?

18 A. I haven't found anybody that's perfect.

19 Q. Okay. And you've never seen a perfect
20 set of construction documents, have you?

21 A. I've seen good sets.

22 Q. Have you ever seen a perfect set of
23 construction documents?

24 A. No.

25 Q. Okay. It's not humanly possible to make

1 a perfect set of construction documents, is it?

2 A. No.

3 Q. Okay. And Balfour Beatty didn't believe
4 that they were going to get a perfect set of
5 construction documents at any time during this
6 job, did they?

7 A. I don't know what they believe, sir.

8 Q. Okay. It would not be reasonable for
9 the contractor to believe that he was going to be
10 provided a perfect set of documents?

11 A. I don't know what they believed,
12 Mr. Bundy.

13 Q. So it would not be reasonable for a
14 contractor to believe that the plans and
15 specifications he's going to receive on a 60
16 million dollar hotel were going to be perfect?

17 A. We would believe that they would be
18 reasonably coordinated.

19 Q. Okay. So the answer to my question is
20 no, no reasonable contractor would believe that
21 they were going to receive a perfect set of
22 construction documents, correct?

23 A. Agreed.

24 Q. And if a contractor did believe that,
25 they would owe the developer the obligation to

1 say, we expect and will not sign a contract with
2 you unless you provide a perfect set of
3 documents. They could have at least done that,
4 right?

5 A. I've never seen that case before.

6 Q. Okay. All right. Let's look at the
7 next gentleman, Ryan Lawrence. Now, his title --
8 he says he is an LEDAP. Now, LED is always green
9 stuff, right?

10 A. Yes, sir.

11 Q. That lady up in -- yeah, whatever.

12 A. Yes.

13 Q. All right. And then you've got BD plus
14 C. What is BD plus C?

15 A. I don't know, sir.

16 Q. All right. So let's put aside the green
17 new deal and talk about his title as BIM manager,
18 okay?

19 A. Yes.

20 Q. Were they told and represented in the
21 requested proposal that during preconstruction
22 services, there would be a gentleman named Ryan
23 Lawrence, a green deal guy who was going to BIM
24 manage this project? Were we told that?

25 A. I would have to find that proposal.

1 Q. Okay. They listed him as part of the
2 project team, did they not?

3 A. Yes, sir. But they are --

4 Q. Why would you list somebody on a project
5 team who had title of BIM manager and not provide
6 him for preconstruction services?

7 A. I don't know, sir.

8 Q. Pardon me?

9 A. I do not know, sir.

10 Q. You don't know. Well, it would be a
11 misrepresentation, would it not, to come to
12 Charleston and tell Mr. Bennett that, we got this
13 gentleman here named Ryan Lawrence, who's going
14 to be on your team under project solutions, and
15 he is the BIM manager and yet not use him on the
16 job during preconstruction. That would be a
17 misrepresentation, would it not?

18 A. If there was no BIM model, what would he
19 do?

20 Q. Now, then we go to project execution.
21 Now, this portion of the project is the actual
22 construction or the execution of the project,
23 correct?

24 A. Yes, sir, the operations.

25 Q. And we don't mean execution in the sense

1 of the electric chair or anything like that,
2 right?

3 A. No, sir.

4 Q. Although this project was murdered by
5 Mr. Starcevic.

6 MR. HILDEBRAND: Objection, Your
7 Honor.

8 THE COURT: Noted. All right.

9 BY MR. BUNDY:

10 Q. Now, the first name on here is Bret
11 Estridge. He was going be the senior project
12 manager, correct?

13 A. Yes.

14 Q. That's what it says?

15 A. That's what it says.

16 Q. Well, the senior project -- was he ever
17 on this job as the senior project manager?

18 A. I didn't see his name on the records,
19 no, sir.

20 Q. Okay. So the answer is no?

21 A. No.

22 Q. Okay. Not taped. He's an interior
23 project manager. What does an interior project
24 manager do on luxury hotel like the Ritz-Carlton
25 that was just built by Balfour Beatty when they

1 rolled down here to Charleston and convinced Mike
2 Bennett to hire them to build his hotel?

3 A. He's the project manager on the
4 interiors.

5 Q. What does that mean?

6 A. Finishes inside of the hotel.

7 Q. But what does he do? What is he
8 managing? What does he do?

9 A. He manages that team that manages the
10 subcontractors and make sure that --

11 Q. To make sure what?

12 A. That the hotel was built per the
13 documents.

14 Q. Okay. Was he on this job?

15 A. Knox came down a few times while I was
16 here, yes, sir.

17 Q. How many times did he come?

18 A. While I was here, three or four times.

19 Q. Three or four times. Hunt Werner,
20 project manager. Do you know Hunt?

21 A. Yes, sir, I do.

22 Q. Was he ever on this job?

23 A. No, sir.

24 Q. No, sir. Now, the project manager we
25 got in May of 2015 was this fellow right here,

1 Starcevic?

2 A. Yes, sir.

3 Q. How old or how experienced was Hunt
4 Werner?

5 A. I would say he was probably Nick's age
6 when he (inaudible).

7 Q. You would say he was Nick's age when --

8 A. He was probably 20 -- I'm trying to
9 think how old he would be. We never celebrated
10 his birthday on the job, but --

11 Q. Do you think he was the same age as
12 Starcevic?

13 A. Probably 25.

14 Q. Was he 25 in 2015?

15 A. He was probably 28.

16 Q. Okay. So you're telling me that they in
17 fact did tell Mike Bennett that the project
18 manager on your team is going to be 28 years old.
19 Do you believe that to be true?

20 A. Yes, sir.

21 Q. Okay. But he never was on the job,
22 right?

23 A. No, sir.

24 Q. Okay. So y'all substituted 28 year
25 olds, correct?

1 A. (No audible response.)

2 Q. Is that what your testimony is?

3 A. We sent -- they sent Nick Starcevic down
4 here to build this job.

5 Q. Katie Wirth, LEDAP, BD plus C, assistant
6 project manager. Was Katie Wirth ever on this
7 job?

8 A. No, sir.

9 Q. Pat Ricky, senior superintendent. Was
10 he ever on this job?

11 A. No, sir.

12 Q. Do you know Pat?

13 A. I hired Pat.

14 Q. You hired him?

15 A. Uh-huh.

16 Q. Is he competent?

17 A. Yes, sir.

18 Q. Is he very competent?

19 A. Yes.

20 Q. Is he very good at what he does?

21 A. Yes.

22 Q. Would he have been a perfect senior
23 superintendent for this project?

24 A. Nothing is perfect, as you said a while
25 ago.

1 Q. Would he have been an exceptional
2 selection for a project superintendent on this
3 job?

4 A. He would have been a good
5 superintendent, yes.

6 Q. Okay. But he never showed up, correct?

7 A. No, sir.

8 Q. Okay. Dave Nugent, interiors
9 superintendent. Do you know Dave?

10 A. Yes, sir.

11 Q. Did Dave ever show up on this job?

12 A. No, sir.

13 Q. Is he a competent interior
14 superintendent?

15 A. Yes, sir.

16 Q. All right. And tell me what the
17 interior superintendent does.

18 A. He manages the inside of the -- inside
19 of the shell.

20 Q. Okay. So he would have been working
21 with Knox Tate, project managing and project --
22 and superintending the interiors, right?

23 A. Yes.

24 Q. Because the interiors were important,
25 right?

1 A. Yes, sir.

2 Q. In a luxury hotel?

3 A. In a hotel, yes, sir.

4 Q. Okay. Sean Prendergast, was he on this
5 job?

6 A. No, sir.

7 Q. Do you know Sean?

8 A. Yes, I hired him.

9 Q. Okay. Is he competent?

10 A. Yes.

11 Q. Is he very competent?

12 A. He is competent.

13 Q. Is he the type of guy you want building
14 your hotel if you own one or were building one?

15 A. The structure, yes.

16 Q. Okay. You would have been upset if he
17 had been on your job, right?

18 A. He wasn't.

19 Q. When you came to work on this job --

20 A. He was on my job.

21 Q. He was on this job?

22 A. No, he was on this job that they were
23 on.

24 Q. I'm sorry?

25 A. He did the upfit of the bank tower.

1 Q. He did the upfit of what?

2 A. The bank tower. He was on the upfit of
3 the bank tower.

4 Q. The bank tower?

5 A. Yeah, which is right next door to the
6 Ritz.

7 Q. Okay. Gotcha. But I'm talking about
8 Mr. Bennett's hotel. I'm not familiar with the
9 bank tower, and I don't really care about it.
10 What I want to know is, when you got to the
11 Bennett Hotel in December of 2017, would you have
12 liked to have seen or would you have been
13 disappointed if Sean Prendergast has been on this
14 job?

15 A. I would not have been disappointed.

16 Q. Okay. And would you have been
17 disappointed to see Dave Nugent?

18 A. No, sir.

19 Q. Would you have been disappointed to see
20 Pat Ricky?

21 A. No, sir.

22 Q. How about Bret Estridge?

23 A. No, sir.

24 Q. How about Knox Tate?

25 A. No, sir.

1 Q. How about Hunt Werner?

2 A. No, sir.

3 Q. How about Katie Wirth?

4 A. No, sir.

5 Q. All right. But none of them were on the
6 job except Mr. Tate for a couple of times? None
7 of those people were there, correct?

8 A. Correct.

9 Q. And you can't tell me, can you, that
10 when you arrived, if the people on this team had
11 in fact come to this job and built it, they may
12 have been on time and on budget? You can't tell
13 me that wouldn't have happened if they sent this
14 team, can you?

15 A. I can't tell you that, no.

16 Q. Okay. Now, we were told, Mike Bennett
17 was told, that these people were coming, and it
18 wasn't going to be on time and budget. They
19 didn't provide them and it wasn't. Do you see a
20 correlation there, sir?

21 A. This team never -- this team working
22 through the changes I got, it would have still
23 been the same issues.

24 Q. It would have been the same? Okay.
25 Gotcha. Andrew Cook, do you know Andrew?

1 A. Yes, sir.

2 Q. All right. And is he competent?

3 A. Yes, sir.

4 Q. All right. Now, then we go back and the
5 rest of this RFP or the response to the RFP goes
6 into great detail going through each one of these
7 gentlemen and ladies credentials.

8 MR. BUNDY: And I would ask now,
9 Your Honor -- first, I would like to mark this
10 for identification.

11 THE COURT: All right.

12 MR. BUNDY: I don't know what our
13 next exhibit is.

14 MR. MCDONALD: Your Honor, I had
15 39.

16 THE COURT: So we'll mark it
17 Plaintiff's 39 -- Defendant's 39, I'm sorry.

18 (DFT. EXH. 39 was marked for
19 identification.)

20 MR. BUNDY: Your Honor, I move to
21 introduce Defendant's Exhibit 39 for
22 identification into evidence.

23 THE COURT: All right. Any
24 objection there?

25 MR. HILDEBRAND: Well, Your Honor,

1 are we going to apply the same rules on
2 cross-examination as we do on direct? Because if
3 we are, then he can't -- this gentleman can't
4 authenticate this document.

5 MR. BUNDY: He just did. He said
6 he looked at it. He said he'd seen it.

7 MR. HILDEBRAND: Well, that's not
8 the test. As you -- we went through this ad
9 nauseam with people who can identify and say that
10 they had seen it and have looked at it and
11 studied it, and every single time, Mr. Bundy
12 would jump up and say, that has not been
13 authenticated, I object. And you sustained many
14 of those objections, I would say most of them.

15 So now, he is trying to authenticate a
16 document from a fellow who says that he was not
17 involved in the project and had nothing to do
18 with the RFP. So I think it's just
19 inappropriate, Your Honor. There's no foundation
20 for it.

21 If he wants to call another witness,
22 just like I did with documents, to establish the
23 foundation and introduce that, then fine.

24 THE COURT: Noted and overruled.
25 Go ahead. It's in evidence.

1 MR. BUNDY: Thank you, Your Honor.

2 THE COURT: Yeah. Response to the
3 RFP, right?

4 MR. BUNDY: Yes.

5 (DFT. EXH. 39 was received in
6 evidence.)

7 MR. HILDEBRAND: Your Honor, may I
8 ask you, just based on, are we -- for
9 cross-examination, are we or --

10 THE COURT: The rules are the same.
11 I don't see how that's going to hurt you. Okay?

12 MR. HILDEBRAND: Okay.

13 THE COURT: All right. Part of my
14 rationale, it doesn't hurt. Okay?

15 MR. HILDEBRAND: All right.

16 THE COURT: All right. It's like
17 leading a witness. What's your name? Where do
18 you come from? That ain't going to hurt you.

19 BY MR. BUNDY:

20 Q. You got to the job -- you retired when?

21 A. December 28, 2020.

22 Q. 2020?

23 A. Yes.

24 Q. And when you retired, your position was?

25 A. Vice president of operations.

1 Q. Okay. And what was your salary when you
2 retired, your annual salary?

3 A. \$180,000 a year.

4 Q. Okay. And then you retired, and I
5 assume they quit paying your salary after you
6 retired?

7 A. Yes, sir.

8 Q. And then you went on pension or you had
9 retirement, whatever that was?

10 A. Yes.

11 Q. Okay. And what did you do -- and you
12 were retired for how long? You retired for what,
13 two years?

14 A. I retired in 2020. I retired the first
15 time in '16 and went back to work in '17. And I
16 retired in December 28, 2020, of last year. It's
17 2021 right now, so I retired December 28th.

18 Q. Okay. I guess I'm trying to get through
19 it here. The first time you retired was in '16?

20 A. Yes, sir.

21 Q. And then you went back to work in '17?

22 A. Yes, sir.

23 Q. So you retired for a year -- a little
24 over a year?

25 A. Close to a year.

1 Q. Okay. And during that year, you didn't
2 get paid a salary? You were on retirement?

3 A. Not by Balfour Beatty, no, sir.

4 Q. Okay. Who were you employed by during
5 that year?

6 A. Lingo Construction.

7 Q. What did you do for them?

8 A. Helping them open -- helping them
9 maintain an office in Oklahoma City.

10 Q. What did they involve?

11 A. Hard bid jobs, working on hard bid jobs,
12 finishing up an Embassy Suites Hotel and bidding
13 on a library. That was all I was working on, and
14 I finished.

15 Q. Okay. Were you still working for those
16 people when you were called to come out of
17 retirement to work on the Bennett Hotel?

18 A. No, sir, I wasn't. I wasn't working at
19 the time.

20 Q. Okay. So how long were you without --
21 were you not with --

22 A. About a month or two months, a month or
23 two.

24 Q. And you were living in Texas?

25 A. Yes, San Marcos.

1 Q. With your wife?

2 A. Yes.

3 Q. Okay. And did you get a call from Dean?

4 A. Pat Dean.

5 Q. In October?

6 A. Yes.

7 Q. And he said he wanted you to come back
8 to work?

9 A. Yes. He asked me if I would come out --
10 yes, come back to work.

11 Q. And what did he tell -- did he tell you
12 why he wanted you to come back to work?

13 A. He wanted me to come out to Charleston
14 to help him --

15 Q. Okay. Did he tell you why?

16 A. -- on this project on Hotel Bennett.
17 They had a hotel there; needed some help on it,
18 and they had some other work that they were
19 looking at.

20 Q. Exactly what kind of help did he need
21 and why did he need you?

22 A. My experience in building the jobs,
23 finishing jobs, starting jobs.

24 Q. Was there any particular thing that he
25 was needing your help on?

1 A. (Inaudible).

2 Q. In other words, other than just saying,
3 come back to work and help me finish this hotel,
4 is that all he said, or did he say, this is
5 what's going on down here. I have these specific
6 problems, and I need you to deal with it.

7 A. No, sir, he did not go into specifics.

8 Q. Okay. And did he send -- and how long
9 did it take you to decide to move to Charleston?

10 A. About a week to two weeks, about two
11 weeks.

12 Q. All right. And I assume your wife was
13 all for moving to Charleston, right?

14 A. Yes. We've enjoyed the company moving
15 us around the country. We enjoyed coming here
16 when we lived in Charlotte.

17 Q. All right. And what salary did you go
18 back to work at?

19 A. 175.

20 Q. Did you get a bonus for moving?

21 A. No, sir, I don't believe I did.

22 Q. And were you paid that salary until you
23 retired the second time in 2020?

24 A. I had gotten some raises, 180, 185,000.

25 Q. Okay. All right. And you retired, and

1 the last job you worked on for Balfour Beatty was
2 the Hotel Bennett?

3 A. Yes, sir.

4 Q. All right. And after the Hotel
5 Bennett -- when was the Hotel Bennett finished
6 from your standpoint in regards to your work on
7 this site, the work on the hotel?

8 A. April 26, 2019.

9 Q. April 26th. Okay. And that was in what
10 year?

11 A. 2019.

12 Q. '19. And so you worked on the Bennett
13 Hotel from April of '19 until you retired in?

14 A. December 28, 2020.

15 Q. And during that period of time, since
16 the hotel was finished, what were your duties on
17 behalf of Balfour Beatty as it related to the
18 Hotel Bennett?

19 A. Going through the documentation, going
20 through the subpoenaed documents from -- that we
21 had received and working on getting the files in
22 order and getting them --

23 Q. For what purpose?

24 A. For discovery and working with our
25 lawyers.

1 Q. All right. So you went from a builder,
2 contractor to a litigation support type position?

3 A. Yes, sir.

4 Q. Okay. And how much experience prior to
5 this job did you have with litigation support?

6 A. I haven't been in litigation.

7 Q. Pardon me?

8 A. We haven't been in litigation before.

9 Q. I'm asking you, though. What experience
10 did you have prior to this in litigation support?

11 A. None.

12 Q. Okay. How is it you knew what to do?

13 A. Direction from our attorneys and
14 in-house counsel.

15 Q. Do you have a paralegal degree?

16 A. No, sir. I don't have a degree.

17 Q. Do you have a general contractor's
18 license in South Carolina?

19 A. No, sir.

20 Q. And how often did you meet with counsel
21 in your support -- litigation support role?

22 A. We had a call once a week.

23 Q. Once a week?

24 A. I'm sorry, every two weeks, I believe.

25 Q. Every two weeks?

1 A. Yeah.

2 Q. Now, you were being paid 180,000 bucks
3 during this period of time to perform litigation
4 support by Balfour Beatty Construction, and I
5 assume that's what, a 40 to 50 hour a week job?

6 A. Yes, sir.

7 Q. Okay. So you worked somewhere between
8 40 and 50 hours a week for litigation support for
9 Balfour Beatty in this case from roughly April of
10 2019 until what day again?

11 A. December 28th, 2020.

12 Q. How many months is that? I'm not
13 thinking clearly. I'm tired.

14 A. 18 months.

15 Q. 18 months. Okay. And that's roughly --
16 do you think you worked 40 or 50 hours every
17 week?

18 A. Sometimes I worked 30 hours.

19 Q. 30 hours?

20 A. Yes, sir.

21 Q. Did you have an office down at Parker
22 Poe or whatever the name --

23 A. No, sir. I worked from home.

24 Q. You worked from home?

25 A. After -- when COVID hit, I worked from

1 home starting in January of 2020.

2 Q. Did you like the help you do, this work?

3 A. No, sir.

4 Q. Did you have any assistance, a secretary
5 or anything?

6 A. No, sir.

7 Q. Did you study the law while you were
8 doing this?

9 A. No, sir.

10 Q. And did you read the rules of discovery?

11 A. No, sir.

12 Q. You didn't read the Civil Rules of South
13 Carolina?

14 A. No, sir.

15 Q. All right. Were you ever asked to give
16 any legal advice to Mr. Hildebrand?

17 A. No, sir.

18 Q. Did you give, in fact, any legal advice
19 to Mr. Hildebrand?

20 A. No, sir.

21 Q. Okay. So you were working 40 hours.
22 That's 160 hours a month times -- how many months
23 did he say? So tell me what a typical week would
24 have been for you as it related to litigation
25 support from when became your full-time job over

1 that period of time.

2 A. Typical week was being -- requests came
3 in from the lawyer, to work through that, to make
4 that a priority. But a typical week was going
5 through the subpoenaed documents.

6 Q. Can you give me an example of the kind
7 of things you were asked to do?

8 A. To go through the subpoenaed documents
9 and look to see what was going on the Bennett
10 side and on the Library Associates' side and the
11 architect and Jim Clements.

12 Q. Okay. Were you asked to find particular
13 things?

14 A. I don't recall.

15 Q. Were you -- was it your desire to try to
16 find things that did not confirm with
17 Mr. Hildebrand's theory of the case? And by
18 that, I mean, things that he told you maybe
19 happened, but then you looked into it and found
20 out, no, it didn't really quite happen that way.

21 MR. HILDEBRAND: Objection, Your
22 Honor. I think he's asking for attorney-client
23 privilege information. What I told him, what he
24 told me, and our discussions were attorney-client
25 privilege.

1 THE COURT: All right. Do you want
2 to rephrase that?

3 MR. BUNDY: Sir?

4 THE COURT: Do you want to rephrase
5 that?

6 MR. BUNDY: Yes, sir, I will
7 rephrase it.

8 BY MR. BUNDY:

9 Q. As a result of trying to perform any
10 tasks that you were asked to perform, did you
11 ever find any evidence that was inconsistent with
12 the results sought?

13 A. (Inaudible).

14 Q. Pardon me?

15 A. Result of what, sir?

16 Q. The results of any requests that were
17 made of you, did you then do a review and
18 determine that you were unable to find evidence
19 of what you'd been requested to find?

20 MR. HILDEBRAND: Your Honor, that's
21 a back door to -- he can just ask him what he
22 did, but he's -- that's a back door question in
23 trying to find out what our discussions were, and
24 I think it's just getting into an area that I
25 think is improper.

1 MR. BUNDY: He's a witness in this
2 case. He has taken the witness stand, and he's
3 given opinions. And he has talked about facts,
4 and he has talked about what he found. And all
5 I'm trying to find out is what he did.

6 MR. HILDEBRAND: Okay. And he can
7 ask him his opinions of what he found and what he
8 did.

9 But I don't think he can talk about -- I
10 think it's inappropriate and attorney-client
11 privilege to ask him what discussions and to --
12 really, what he's basing -- asking him is to
13 testify in response -- it's a veiled attempt to
14 get him to testify about discussions that I had
15 with him.

16 And it's just an improper area, Your
17 Honor. He can ask about his personal knowledge
18 and what he did and what his opinions are.

19 THE COURT: I'm going to sustain
20 the objection and ask you to rephrase the
21 question and try to keep it away from any advice
22 that he would have gotten from counsel. Okay?

23 MR. BUNDY: I will do my best.

24 THE COURT: All right.

25 BY MR. BUNDY:

1 Q. Is Mr. Hildebrand your personal lawyer?

2 A. No, sir.

3 Q. Okay. Is Mr. Heuer your personal
4 lawyer?

5 A. No, sir.

6 Q. I can't get his name straight. Is it
7 Heuer.

8 THE COURT: Is it -- you pronounce
9 it Heuer?

10 MR. HEUER: I do.

11 MR. BUNDY: You pronounce it
12 different than the way it's spelled.

13 THE COURT: I'm sorry?

14 MR. HEUER: Yes, yes, Your Honor.
15 It's pronounced as Heuer.

16 THE COURT: Heuer. All right.

17 MR. HEUER: That's okay. It's been
18 pronounced so many different ways and so over my
19 years, it's --

20 THE COURT: Well, I'm on a
21 foundation for it.

22 MR. BUNDY: Change the spelling on
23 it and they might get it right.

24 THE COURT: They spell it the same
25 way, and they pronounce it Huer. So that's what

1 I've been saying all this time. But I will try
2 and get Heuer down there.

3 BY MR. BUNDY:

4 Q. Is Mr. Heuer your lawyer?

5 A. He's our corporate lawyer.

6 Q. He's the corporate lawyer. All right.

7 In your research, did you find anything that the
8 architect did right?

9 A. That's a broad question.

10 Q. Pardon me?

11 A. That's a broad question.

12 Q. It is a broad question, it certainly is.

13 You don't have an answer?

14 A. There were things that he did right.

15 Q. All right. Were there things that he
16 did right?

17 A. Yes, sir.

18 Q. Okay. Did he do the majority of things
19 right?

20 A. I can't answer that.

21 Q. Okay. In your research, did you find
22 anything that Balfour Beatty did wrong?

23 A. I saw a few things, yes, sir.

24 Q. Sir?

25 A. I saw a few things.

1 Q. A few things?

2 A. That I remember. I looked at thousands
3 and thousands of documents.

4 Q. Right. But if there were only a few,
5 y'all would remember them? I mean, this is --
6 how many are a few? How many mistakes did
7 Balfour Beatty make on this job?

8 A. The documents I saw was some
9 correspondence. I believe you read one of them
10 the other day about -- from Ryan Ledford. I did
11 see that one.

12 Q. Okay. And did you agree with Ryan on
13 that?

14 A. I have no opinion. I wasn't there.

15 Q. Okay. So your opinions then in this
16 case are related solely to things you know when
17 you were there?

18 A. No, sir.

19 Q. They're not?

20 A. No.

21 Q. Except when it comes to opinions that
22 people had at Balfour Beatty, that Balfour Beatty
23 did wrong. Then you don't have an opinion
24 because you weren't there? Is that where we are?

25 A. No, sir.

1 Q. Okay. Anything else that you know that
2 Balfour Beatty did wrong related or made a
3 mistake on this job?

4 A. I can't recall.

5 Q. Well, you just said there were a few.
6 Certainly there must be -- so far you hadn't said
7 a single one. You said there were a few. I'd
8 just like to know if there are any. If there
9 weren't any, just say, no, we didn't make any
10 mistakes.

11 A. I'm trying to think, sir.

12 Q. Okay. And you can't think of any right
13 now?

14 A. No, sir.

15 Q. Okay. Now, the estimate, have you
16 reviewed the estimate on this job?

17 A. The estimate?

18 Q. Yes. The estimate or budget from which
19 the guaranteed maximum sum was arrived at?

20 A. I reviewed the GMP.

21 Q. Yes, the GMP. Have you reviewed the
22 documents that support that?

23 A. Yes.

24 Q. All right. Is that estimate perfect?

25 A. It's an estimate.

1 Q. Is it perfect?

2 A. No.

3 Q. No. All right. Now, the cost incurred
4 by Balfour Beatty on this job -- did Balfour
5 Beatty incur a single cost on this job, one
6 dollar that was a result of its mistakes?

7 A. I haven't seen that dollar, no, sir.

8 Q. Pardon me?

9 A. I haven't seen that dollar.

10 Q. You haven't seen that?

11 A. No.

12 Q. Okay. All right. So while it's not
13 possible to create a perfect set of drawings, it
14 is possible to build a 60 million dollar hotel
15 and make no mistakes, correct?

16 A. No, sir. We deal with mistakes every
17 day.

18 Q. Well, I know you might deal with them
19 every day, but I want to talk about the Bennett
20 Hotel. If you didn't spend a single dollar more
21 than should have been spent; in other words, made
22 no monetary mistakes, that would be a perfectly
23 run job?

24 A. Yes, sir.

25 Q. Okay. So all I'm trying to do is

1 establish that while the architect -- the
2 architects can't create perfect documents,
3 Balfour Beatty can and did at the Bennett Hotel
4 run a perfect job, correct?

5 A. We ran a job.

6 Q. Okay. All right, sir. Let's turn to
7 Exhibit 258 in Balfour Exhibit book 250 through
8 282, please.

9 A. 258? Okay. I got it. Which tab, sir?

10 Q. It's tab number 258. It's in book
11 number Balfour Exhibits 250 to 282. Exhibit 258.

12 A. I'm there.

13 Q. Are you there?

14 A. Yes, sir.

15 Q. Okay. If you could look in the middle
16 paragraph, please, the one, two, three, fourth
17 line down starting with the word the -- the
18 sentence starting with the owner. Do you see
19 that?

20 A. Yes, sir.

21 Q. All right. What is the Egnyte,
22 E-G-N-Y-T-E, site?

23 A. That is a cloud-based -- basically a
24 cloud-based server for documents.

25 Q. And this letter is written in March of

1 2019?

2 A. Yes, sir.

3 Q. And this is before you had finished
4 working on the hotel, which you had started
5 already doing your work as a litigation
6 assistant, correct?

7 A. Yes.

8 Q. Okay. Because toward -- between say
9 roughly maybe January through when you finally
10 stopped working on the job, January through April
11 of 2019, you actually were doing both jobs. You
12 were finishing the hotel, but you were also
13 acting as a litigation consultant or a litigation
14 assistant or whatever you want to call it, or
15 support staff?

16 A. I was supporting it.

17 Q. Litigation support. Okay. So you were
18 doing both of those things?

19 A. Yes.

20 Q. Okay. And during that four-month
21 period, what percentage of your time do you think
22 you spent working on the hotel as opposed to
23 litigation support? January -- let's just go by
24 month, January?

25 A. Probably four hours a day, half and

1 half.

2 Q. Okay. February?

3 A. Probably half and half.

4 Q. March?

5 A. Probably 20 percent on the job; 80
6 percent on support.

7 Q. So it would be 32 hours a week in March
8 2019?

9 A. Yeah.

10 Q. Okay. April?

11 A. Probably about 10 percent of my time on
12 the job.

13 Q. So roughly 36 hours a week. And then
14 when May came, you were doing 100 percent of your
15 time, 40 hours a week or roughly sometimes 30,
16 working as a litigation support, correct?

17 A. Yes.

18 Q. Okay. What access, if any, did you have
19 to the Egnyte cloud-based site?

20 A. I had access.

21 Q. You had access?

22 A. Yes.

23 Q. Did you have control over what was on
24 the site?

25 A. Yes, I could control what was on the

1 site.

2 Q. Did you have the authority to remove
3 things from the site?

4 A. Yes, I could remove stuff.

5 Q. Okay. And tell us what was on that
6 site, specifically, you know, the types of
7 documents, if you would?

8 A. The types of documents? That was RFIs.

9 Q. Request of information.

10 A. There were RCOs.

11 Q. Request for change orders?

12 A. OCO is the owner change orders.

13 Q. Change orders.

14 A. Project photos.

15 Q. Project photos.

16 A. Billing, owner billing, subcontractor
17 billing. It was -- the staff had some files in
18 there that had their name by them where they
19 could park their documents in there.

20 Q. Is the Egnyte site the ultimate
21 repository of all contract documents roughly that
22 were created during the job?

23 A. It's the majority of the documents, yes.

24 Q. Okay. By majority, what do you mean?
25 98 percent?

1 A. Well, there was Constructware that had
2 the contracts in it, but the contracts were also
3 in that.

4 Q. All right.

5 A. And then they also had the RFIs, which
6 those were -- they would sync up and would be in
7 with that.

8 Q. Right.

9 A. There was two systems, but the --

10 Q. Right. But the larger database was the
11 Egnyte?

12 A. Yes.

13 Q. And so other databases like -- what was
14 it called?

15 A. Constructware.

16 Q. Constructware you could dump part of
17 what was Constructware into the Egnyte site?

18 A. Yes, sir.

19 Q. And you could dump other things into the
20 Egnyte site?

21 A. Yes, sir.

22 Q. Okay. So, basically, if we try to make
23 this analog instead of digital, it would be as if
24 all the project documents were kept in this one
25 room?

1 A. It's a big room, yes, sir.

2 Q. Referred to now digitally as the cloud,
3 right?

4 A. Yes, sir.

5 Q. Okay. And then outside this room, there
6 would be copies of those documents in other rooms
7 in this building, if we use the building as our
8 example, right?

9 A. Yes.

10 Q. Okay. And this cloud, like in this
11 room, has locked doors in it, right?

12 A. Yes.

13 Q. The Judge can lock this room up?

14 A. Yes, sir.

15 Q. So documents can be protected so that
16 only certain people with keys can get in --

17 A. Yes, sir.

18 Q. -- To view those documents, right?

19 A. Yes, sir.

20 Q. All right. But the majority, if not --
21 well, 90 percent of all the documents, if you
22 wanted to find out what the history of this job
23 was and the documents that were created by the
24 owner, the contractor, the architect, whoever was
25 involved with this job, because Balfour Beatty

1 was the construction manager and part of its job
2 was to keep all the records in good stance so
3 people could use them and go back to them,
4 correct?

5 A. Without having to search through their
6 e-mail and find things.

7 Q. Pardon me?

8 A. Without having to serve through their
9 e-mail and find things or go to their files, yes.

10 Q. Okay. But that was part of what y'all
11 were paid for was to keep up all the contract
12 documents and make sure that all these papers
13 were kept so that everybody could get to them and
14 the job was managed properly?

15 A. Yes, sir.

16 Q. Okay. I mean, that was a big part of
17 y'all's job. You had to manage subcontractors,
18 right?

19 A. Yes, sir.

20 Q. But y'all didn't actually do any work in
21 terms of hard labor or building materials or
22 anything like that?

23 A. No, sir.

24 Q. Y'all were briefcase contractors in the
25 sense that you just carry the briefcase and you

1 went around and everybody else did all the work?

2 A. That's what a construction manager does.

3 Q. Sir?

4 A. That's a construction manager.

5 Q. So a construction manager is basically a
6 briefcase contractor. So -- and part of what you
7 do as briefcase contractor is in your briefcase,
8 you keep all the books and records, right?

9 A. (No audible response.)

10 Q. You manage all the books and records?

11 A. All for Balfour Beatty, yes.

12 Q. All of Balfour Beatty's or all of the
13 records that belong to everybody?

14 A. We managed Balfour Beatty's documents,
15 the submittals, things we're required to do on
16 this project, yes.

17 Q. Well, the documents created during this
18 job don't belong to Balfour Beatty, do they?

19 A. We created them.

20 Q. When you created a change order and a
21 change order sign, do y'all take the position
22 that y'all own that document --

23 A. No, sir.

24 Q. -- and nobody can get it but y'all?

25 A. No, sir.

1 Q. All right. How about the request for
2 information? Is that now y'all's documents so
3 nobody else can see?

4 A. No, sir.

5 Q. Okay. Tell me what documents, as the
6 construction manager on this job, y'all are
7 legally or contractually entitled to withhold
8 from the owner?

9 A. The employee -- I mean, the confidential
10 documents from the lawyers.

11 Q. Okay. Pardon me? I'm sorry.

12 A. The legal documents.

13 Q. Legal documents. Letters between --

14 A. Correspondence.

15 Q. -- Mr. Heuer?

16 A. Correspondence between our
17 attorney-client privilege.

18 Q. Attorney-client privilege. Okay. What
19 else?

20 A. That's all I know, sir.

21 Q. That's all you know. So all the rest of
22 these documents that relate to this project
23 should be, as a matter of contract, available to
24 the owner for his review at any time, correct?

25 A. During the project.

1 Q. Just during the project?

2 A. And if they're paying us.

3 Q. Pardon me?

4 A. During the project and if they're being
5 paid.

6 Q. During the project --

7 A. Earlier you said we were getting -- we
8 were paid to maintain these documents.

9 Q. Right.

10 A. We weren't paid, sir.

11 Q. You weren't paid, so you --

12 A. The payments were cut off in September
13 of 2018.

14 Q. Okay. So from that point forward, you
15 had no obligation to allow access to those
16 documents? Change orders, requests for
17 information and all the rest of it?

18 A. No, sir.

19 Q. Well, what -- tell me what it is that my
20 client could no longer look at because you
21 contended that the payment -- the failure to pay
22 the 17, which of course we're going to talk about
23 later, permitted you to withhold documents from
24 my client that were part of the project file?

25 A. We weren't being paid.

1 Q. No. Okay. Fine. So what Balfour
2 Beatty did is when they stopped getting paid in
3 September of 2019, according to you -- or 2018
4 right? 2018 or '19? It's '19 or is it '18? I
5 can't remember. It's '18, isn't it?

6 A. Yeah, early '19.

7 Q. Okay.

8 A. I believe that check came in in '19.

9 Q. Okay.

10 A. I'm not sure what date.

11 Q. Okay. So at some point, and you tell me
12 when it was -- well, strike that. You were the
13 person in charge of the job in September or
14 October, December of '19. This was your job.
15 You came down here to run it and finish it?

16 A. Yes.

17 Q. You were the guy that everybody took
18 orders from?

19 A. On the side, yes.

20 Q. Okay. And you were the one that dealt
21 with Mike Bennett, Kim Brown, Jim Clements?

22 A. I was one of the ones, yes.

23 Q. And the architect, correct?

24 A. I was one of the ones.

25 Q. Okay. And you were in control of the

1 Egnyte site?

2 A. Myself, Nick --

3 Q. And who else?

4 A. Our IT department.

5 Q. Okay. When did you decide, for whatever
6 reason you say it's nonpayment -- that you were
7 no longer going to allow the owner access to the
8 project documents?

9 A. I believe it was February, February of
10 2020.

11 Q. Okay. And what contract provision are
12 you relying on, sir? It's -- the contract is
13 found at tab -- I think it's -- is it 56 or 57?

14 THE COURT: 56.

15 BY MR. BUNDY:

16 Q. Turn to tab 56.

17 A. Which book, sir?

18 Q. Sir?

19 A. Which book?

20 Q. I think it's in the first --

21 THE COURT: Volume 2. I think it's
22 volume 2, tab 56.

23 THE WITNESS: I found it.

24 BY MR. BUNDY:

25 Q. Do you want me to repeat my question?

1 A. What was the tab?

2 Q. Sir.

3 A. What was the tab?

4 Q. 56.

5 A. Okay.

6 Q. Looking at tab 56, what contract
7 provision did you rely on to no longer allow the
8 owner access to the project documents?

9 A. We had a discussion internally. We had
10 a lot of legal documents on there. We weren't
11 being paid and we cut off access.

12 Q. You cut off access from the Egnyte site
13 in February. Did you also do it based on the
14 advice of counsel?

15 A. Yes.

16 Q. So at the advice of counsel, y'all cut
17 off my client's access to the Egnyte site.
18 Putting aside the advice of counsel, though, I
19 would love to hear it. I would like you to tell
20 us what contract provision that you believe that
21 to be done under the terms of this contract with
22 the understanding that you spent approximately
23 4,000 hours working on this case?

24 A. I don't know the contract provision.

25 Q. Sir?

1 A. I don't know of a contract provision.

2 Q. You don't know what, sir?

3 A. I don't know of a contract provision
4 that you asked me a question about.

5 Q. There is no contract provision, no
6 agreement between Balfour Beatty and Library
7 Associates that allowed Balfour Beatty to cut off
8 the Egnyte site, is there?

9 A. Egnyte is not in the contract.

10 Q. Let's start with the ordinances. Where
11 is the ordinance that --

12 A. I don't know of an ordinance.

13 Q. Where in the County of Charleston is
14 there an ordinance --

15 A. I don't know.

16 Q. -- or anywhere in the state statutes and
17 law of our general assembly that that is allowed?

18 A. I don't know, sir.

19 Q. Where under the federal ordinances is it
20 allowed?

21 A. I don't know, sir.

22 Q. Where in the Constitution is it allowed?

23 A. I don't know, sir.

24 Q. So there was no legal basis, there was
25 no contractual basis to do it. You did it purely

1 based on advice of counsel?

2 A. As a discussion, yes.

3 Q. Pardon me?

4 A. As we discussed, yes.

5 Q. As y'all discussed it?

6 A. Yes.

7 Q. Gotcha. Now, before access was cut
8 off -- now, what -- how much access was cut off?
9 Was the entire site cut off? Using my room
10 analysis, was this room locked now to Library
11 Associates and its attorney?

12 A. Yes, sir. They could not sign into
13 Egnyte.

14 Q. Okay. So the books and the records and
15 all the records in this case related to the
16 Bennett Hotel, you know, hypothetically or
17 allegorically if this room were locked out,
18 Library Associates was locked out during -- from
19 February until now, then we have not been able to
20 get access, have we?

21 A. No, sir.

22 Q. The only way we've been able to get
23 access to the documentation relating to this
24 hotel, which my client paid you to built or paid
25 Balfour Beatty to build, is to bring discovery

1 requests and go through litigation, correct?

2 A. Yes, sir.

3 Q. And a great deal of money and time and
4 legal fees and arguments have occurred in this
5 case because we had to go through the entire
6 process to get to documents, and you cannot give
7 me a single reason why you have the right to hide
8 those documents from us except the advice of
9 counsel; is that correct?

10 A. Yes.

11 Q. Okay. Would it surprise you to know
12 that the cost to my client of that decision just
13 related to the inability to get to those
14 documents, without having to go through
15 litigation, probably exceeds 1 million dollars?
16 Does that surprise you?

17 A. I have no comment.

18 Q. Why don't you think about -- without
19 telling me how much you paid the law firm that's
20 representing y'all, whatever that number is --

21 MR. HILDEBRAND: Objection, Your
22 Honor.

23 BY MR. BUNDY:

24 Q. And tell me, based upon that number --
25 I'm not asking you for the answer, but do you

1 know how much they've charged to represent you?

2 A. No, sir.

3 Q. You don't have any idea what they
4 charge?

5 A. No, sir.

6 Q. Okay. Well, I will just leave that
7 alone. Okay. Now, we know as of February,
8 whatever day you selected, and that was two years
9 ago or more, we didn't have access to our
10 documents. Prior to that time, what access did
11 we have to the Egnyte site?

12 A. We've had access, and I'm trying to
13 remember if you don't mind --

14 Q. Sure, take your time.

15 A. I believe we had access to the change
16 orders.

17 Q. All of them?

18 A. Yes.

19 Q. And all of the e-mails?

20 A. Yes.

21 Q. Yes, yes, yes and yes?

22 A. Yes, sir.

23 Q. What else?

24 A. That's all I recall was those.

25 Q. Budgets, did we have access to your

1 contracts or budgets?

2 A. I don't recall.

3 Q. Did we have access to your change orders
4 with your subcontractors?

5 A. I don't recall that.

6 Q. Should we have?

7 A. I don't see why not. I mean, it's part
8 of our business. It's change orders. I can't
9 say if you had access or not.

10 Q. You don't know?

11 A. I don't know if you had access or not.

12 Q. Should we have had access is my
13 question?

14 A. Yes.

15 Q. Because it's a cost-plus job?

16 A. Yes, sir.

17 Q. This is supposed to be an open contract
18 job, what they call an open-book job, right?
19 Correct?

20 A. Yeah.

21 Q. Where at any time the owner want to look
22 at the books and records, the owner can come in
23 and look at them because it's a cost-plus job?

24 A. They have that right, yes.

25 Q. You understand, do you not, that you are

1 spending the owner's money in a cost-plus job?

2 You're not spending your own money?

3 A. Yes, sir.

4 Q. And you acknowledge that Balfour Beatty
5 has a fiduciary obligation to spend my client's
6 money wisely, in good faith, and report those
7 expenses and be subject to a contract audit? You
8 agree with that?

9 MR. HILDEBRAND: Objection, Your
10 Honor.

11 THE COURT: What's the basis for
12 your objection?

13 MR. HILDEBRAND: It calls for a
14 legal conclusion. Mr. Bundy likes to talk about
15 the contract, likes to talk about the contract
16 terms. If he wants to ask him about the contract
17 and refer him to it, that's fine. There's
18 nowhere in the contract that says that we owe a
19 fiduciary obligation.

20 THE COURT: I'll sustain that.

21 BY MR. BUNDY:

22 Q. All right. Let's go to the contract,
23 sir. We're on 56?

24 A. Yes, sir.

25 Q. And I think what we're going to look at,

1 and I will find it. I want to go to -- all
2 right. Let's go to AIA document A133 2009,
3 edition page 3.

4 A. Page 3.

5 Q. Do you see it?

6 A. Just a second.

7 Q. Right underneath, it's under general
8 provisions, right?

9 A. I'm there, sir.

10 Q. Now, you're familiar with the AIA
11 documentation, are you not?

12 A. Yes, sir.

13 Q. Have you used them before?

14 A. Yes, sir.

15 Q. Are you conversive in the documents?

16 A. I've read them. I haven't read these in
17 a couple years.

18 Q. Why don't we look at a couple things.
19 Let's go to the first page. Let's look at the
20 right-hand section. It says, additions and
21 deletions. Do you see that on the very first
22 page?

23 A. Oh, I'm sorry.

24 Q. Right over here.

25 A. Yes.

1 Q. We will read it together. Additions and
2 deletions. The author of this document has added
3 information needed for its completion. The
4 author may also have revised the text of the
5 original AIA standard form.

6 An additions and deductions report that
7 notes added information as well as revisions to
8 the standard form text is available from the
9 author and should be reviewed. A vertical line
10 in the left margin of this document indicates
11 where the author has added necessary information
12 and/or deleted from the original AIA.

13 A. Yes, sir.

14 Q. Do you see in the left-hand margin over
15 the lines?

16 A. Yes, sir.

17 Q. That shows you something has been added
18 there?

19 A. Yes.

20 Q. Go a couple pages in from the standard
21 provisions. You would know there is page 34 over
22 the line, correct?

23 A. Yes.

24 Q. And that's an indication to anyone
25 reading this document, the original version of

1 this standard form agreement had different
2 language, correct?

3 A. Yes.

4 Q. And if we go back to the first page, we
5 have been told there is available a report called
6 an addition and deletion report. Someone can go
7 back and just simply (inaudible)?

8 A. Yes, sir.

9 Q. Look at the bottom of this document.
10 This document is an appropriate contract. Its
11 owned by the American Institute of Architects,
12 right?

13 A. Yes, sir.

14 Q. And in order to use this document, you
15 have to pay a fee, right?

16 A. Yes, sir.

17 Q. And we all used to go down to the plans
18 shop, and you had to buy them. I'm old enough to
19 remember when the AIA, they would mail you a copy
20 of it. It was three or four bucks, right?

21 A. Yes, sir.

22 Q. Do you remember that?

23 A. Yes, sir.

24 Q. And if you wanted to change it back then
25 before we had computers, you had to literally

1 strike it through maybe even restrike the whole
2 document to get what you want. Do you remember
3 that?

4 A. Uh-huh.

5 Q. Now, it's a gotten a lot easier.
6 Anybody can buy it if you are willing to pay. I
7 used to do this kind of work. It's easier when
8 you do that. You buy that. It gives you the
9 ability to know and look at the bottom of the
10 first page. You will know this document is
11 produced by AIA, 153422334.32 on September 22nd,
12 2014, under order number so-and-so.

13 A. Yes, sir.

14 Q. That tells you, whoever bought this,
15 that's the order.

16 A. Yes, sir.

17 Q. It goes on to say under the first
18 paragraph, this document has important legal
19 consequences. Do you agree with that statement?

20 A. Yes.

21 Q. I'm on the first page.

22 A. Yes.

23 Q. Do you agree it has important legal
24 consequences?

25 A. Yes.

1 Q. So you agree with me?

2 A. Yeah. Yes, sir.

3 Q. It's sort of line by line, don't put
4 this next to a hot wire building, right?

5 A. Yeah, that's right.

6 Q. Be aware, that's a warning that's on
7 this document?

8 A. Yes, sir.

9 Q. It says, consultation with an attorney
10 is encouraged with respect to its completion or
11 modification. Do you know whether or not Balfour
12 Beatty was able to afford a lawyer back in 2015?

13 A. Outside attorney or inside attorney?

14 Q. Either one. Were they able to afford a
15 lawyer?

16 A. Yes.

17 Q. In fact, they had a lot of lawyers. How
18 many inside counsel does Balfour Beatty have?

19 A. In Charlotte? One.

20 Q. Well, let's start with Charlotte.

21 A. Charlotte, one; Florida, one.

22 Q. And Balfour Beatty is a smaller entity
23 of larger multinational corporation, is it not?

24 A. Yes, sir.

25 Q. One of the larger construction companies

1 in the United Kingdom, correct?

2 A. That's what I read, yes, sir.

3 Q. According to the London Times, that is
4 the case. You know and I know that Balfour
5 Beatty had the ability, if they wanted to, and
6 that they in fact did get this document reviewed
7 by their legal counsel, correct?

8 A. Yes, sir.

9 Q. It's doubtful that this corporation
10 would permit the Charlotte office to sign a
11 contract of this magnitude without having a
12 lawyer look at it?

13 A. John Heuer looked at it.

14 Q. Mr. Heuer looked at the contract before
15 it was signed by Balfour Beatty or somebody's
16 head was probably going to roll, right?

17 A. I would assume so.

18 Q. You're going to agree with me that they
19 did review it and had it reviewed by a lawyer as
20 they were warned to do?

21 A. Yes, sir.

22 Q. General conditions of the contract for
23 construction, is adopted in this document by
24 reference. What does that mean, sir?

25 A. It's part of this document.

1 Q. It's part of this document, but what
2 does it mean?

3 A. They go together.

4 Q. It's the legal technical incorporated by
5 reference reprint referring you to it, and we've
6 agreed to that, too, right?

7 A. Yeah.

8 Q. Do not use with other general conditions
9 unless this document is modified. What does that
10 mean, sir?

11 A. If it tells you to use another document.

12 Q. Right. You don't use the engineer's
13 general conditions?

14 A. Right.

15 Q. What is the -- there's another set of
16 documents they're using now?

17 A. Yeah.

18 Q. There are basically companies that now
19 compete for trying to sell the standard form.
20 The National Society of Professional Engineers
21 has one, and there's Doc Bill or whatever they
22 call that thing.

23 A. Yeah.

24 Q. Now, let's go to page 3. And page 2 is
25 simply a table of contents. Right after we

1 determine on the first page who is who, where the
2 project is, we need to know where the project
3 is -- we get to the design phase of the project,
4 right?

5 A. Yes, sir.

6 Q. And the contract documents is a defined
7 term in this contract, is it not?

8 A. Yes.

9 Q. Okay. And looking at Article 2, 5.2.1,
10 at the bottom, it says, if anything in the other
11 contract documents, other than a modification, is
12 inconsistent with this agreement, this agreement
13 shall govern. What do they mean?

14 A. This document overrules the other
15 documents.

16 Q. Correct. That's what it means. And the
17 very next thing in this contract, which is at the
18 very first of this contract, does that signify
19 importance to you in terms of what's important in
20 the contract and what the party wants, you know,
21 and what's in the first of this agreement that
22 we've agreed on, right?

23 A. Yes, sir.

24 Q. The next thing we want to agree on,
25 right, is what's the relationship going to be?

1 Who is going to do whatever and what is the level
2 of care that's going to be required?

3 A. Yes, sir.

4 Q. And that's done, is it not, right here
5 under relationship of the parties. The
6 construction manager, that would be BBC, correct?

7 A. Yes, sir.

8 Q. The construction manager accepts the
9 relationship of trust and confidence. Do you see
10 that?

11 A. Yes, sir.

12 Q. Established by this agreement. Okay.
13 What does the relationship of trust and
14 confidence mean to you? What does trust mean?
15 Let's start out with the basic stuff. What does
16 trust mean?

17 A. Trusts means that they trust you.

18 Q. Trust means you're going to do what you
19 say you'd do?

20 A. Yes.

21 Q. And we can trust you to do what you are
22 going to say? You agreed that we can trust you,
23 right?

24 A. Yes.

25 Q. That's a relationship to Mr. Bennett.

1 You can trust us. We will do what we say we were
2 going to do, right?

3 A. Yes, sir.

4 Q. Do you believe Mr. Bennett would have
5 signed this document if this document says, you
6 can't trust us?

7 A. No, sir.

8 Q. Now, the next thing is the relationship
9 of confidence. What do you think that the
10 relationship of confidence means as it relates to
11 the relationship between these two parties and
12 the duties of Balfour Beatty in performing this
13 contract?

14 A. Confidence goes along with trust.

15 Q. Sort of belt and suspenders sort of
16 definition?

17 A. Yes, sir.

18 Q. If you misunderstand about what belt,
19 it's too tight or too loose, I can also put on
20 suspenders, right, so we know I can hold my
21 britches up, right?

22 A. Yes, sir.

23 Q. And covenant, what does covenant mean?

24 A. Covenants are the documents that
25 basically --

1 Q. Sir?

2 A. The documentation covenants.

3 Q. Have you ever heard of the Ark of the
4 Covenant?

5 A. Yes.

6 Q. Have you ever heard of that?

7 A. Yes, sir.

8 Q. What does that term relate to?

9 A. I never (inaudible).

10 Q. And covenants with the owner. Covenant
11 sounds like a pretty serious word to me. Do you
12 take it serious?

13 A. Yes, sir.

14 Q. To cooperate with the architect?

15 A. Yes, sir.

16 Q. And exercise the construction manager's
17 skill and judgment, right?

18 A. Yes.

19 Q. In furthering the interests of the
20 owner. Now, what does that mean? We promise the
21 covenant confidently that we're going to further
22 the owner's interests. What does that mean?

23 A. Carry forward his interests.

24 Q. Well, does it also mean -- it doesn't
25 say anything about Balfour Beatty's interests,

1 does it?

2 A. No.

3 Q. It says the owner's interests, right?

4 A. Yes.

5 Q. So what it does say, does it not, we're
6 going to put the owner's interests over our own
7 interests? We're going to further your
8 interests?

9 A. It says, furthering the interests of the
10 owner.

11 Q. Of the owner?

12 A. I don't see where it says over ours.

13 Q. No, it doesn't say anything about yours
14 at all. In other words, there's nothing Balfour
15 Beatty needs to do other than further the
16 interests of the owner. It doesn't say, and
17 further the interests of the Balfour Beatty.
18 That language is not in there, right?

19 A. No.

20 Q. So the exclusive goal, the promise --
21 Mike Bennett and Library Associates never agreed
22 to further the interests of Balfour Beatty, did
23 he?

24 A. I don't see it in this contract.

25 Q. What he agreed to do was to pay for the

1 work according to the terms of the contract and
2 the job ran in a manner using skill and judgment
3 to further the interests of the owner, to furnish
4 efficient construction administration. Now, what
5 does efficient construction administration mean?

6 A. Efficient to me means organized
7 efficiently.

8 Q. Does it also make you not waste money?

9 A. Efficient, yes.

10 Q. You're not wasting my money, mine being
11 Library Associates?

12 A. Yes, sir.

13 Q. It's not lump sum job. He is going to
14 pay the bills if y'all do what you're supposed to
15 do under the contract, right? But y'all are also
16 going to furnish efficient construction
17 administration and you're also going to furnish
18 efficient management services, right?

19 A. Yes, sir.

20 Q. That modifies all of these terms, does
21 it not?

22 A. I don't know, sir. I'm not a lawyer.

23 Q. And supervision, right?

24 A. Yes.

25 Q. Okay. Does it make sense that you would

1 agree to furnish efficient construction and not
2 agree to furnish efficient supervision?

3 A. No, sir.

4 Q. So that word efficient modifies all of
5 those obligations, correct?

6 A. I can't really say if it does or not.
7 They are in the contract, sir.

8 Q. Okay. To furnish at all times. Do
9 you -- the word all in there, what does that
10 imply to you, sir, all times?

11 A. All times, all times as needed.

12 Q. Without a break. There will never be a
13 time on this job where I'm not furnishing an
14 adequate supply of workers and materials. That's
15 not going to happen, right?

16 A. Yes.

17 Q. And to perform the work expeditious.
18 What does expeditious mean?

19 A. Fast, quick.

20 Q. And economical manner consistent with
21 the owner's interests, right?

22 A. Yes.

23 Q. There is nothing in that first sentence
24 that talks about anything other than what Balfour
25 Beatty is going to do for Library Associates,

1 right?

2 A. I don't see anything.

3 Q. Okay. And it sets the standard of
4 performance that is agreed upon as outlined in
5 this paragraph; is that correct?

6 A. That's correct.

7 Q. Okay. Now, in return, let's see what
8 the -- what does the owner agree to do? He
9 agrees to furnish or approve in a timely manner
10 information required by the construction manager,
11 and that's one of the complaints y'all have about
12 the owner, right?

13 A. Yes, sir.

14 Q. He didn't do that. And to pay payment
15 to the construction manager in accordance with
16 the requirement of the contract documents,
17 correct?

18 A. He's supposed to, yes.

19 Q. That's what it says. He has agreed to
20 do that?

21 A. Agreed to do.

22 Q. Didn't agree -- did not agree to pay you
23 except in accordance with the requirement of the
24 contract documents, correct?

25 A. Correct.

1 Q. Didn't agree for Library Associates --
2 didn't agree to pay you simply because you think
3 you ought to be paid. You had to comply with the
4 contract documents in order to be entitled
5 legally and contractually to be paid, correct?

6 A. Yes. Yes, sir.

7 Q. We have to go to this contract to
8 determine whether or not you're entitled to be
9 paid. It's not what you think; it ain't what I
10 think.

11 A. Yes, sir.

12 Q. And you leave a job, do whatever you do
13 at your own ability, if you take position, I'm
14 owed money, if you do something that you pay --

15 MR. HILDEBRAND: Object to the
16 form, Your Honor.

17 THE COURT: Okay.

18 MR. HILDEBRAND: I will withdraw
19 the objection.

20 BY MR. BUNDY:

21 Q. Have you ever learned (inaudible)?

22 A. Yes, sir.

23 Q. And that's not a breach is it? That's
24 the government decided they're running the money
25 because we can't print it fast enough; so those

1 are -- we can agree to the relationship of the
2 parties, right?

3 A. Yes, sir.

4 Q. Okay. And you don't know, as you sit
5 here today, whether or not, as a matter of law,
6 that creates a fiduciary duty or not?

7 A. I do not know that.

8 Q. That will be for the Judge to decide?

9 A. Yes, sir.

10 Q. And the Judge is going to determine what
11 the level of responsibility is?

12 A. I assume so, yes, sir.

13 MR. BUNDY: Your Honor, it's a good
14 time to quit.

15 THE COURT: Do you want to go a
16 little further?

17 MR. BUNDY: I can, sure.

18 BY MR. BUNDY:

19 Q. Tell me, if you will, and show me in the
20 contract where Library Associates has to pay
21 Balfour Beatty anything other than an amount
22 certified by the architect in a pay request. Do
23 you understand my question?

24 A. Pay requests have to be approved by the
25 architect.

1 Q. My question was a little bit different
2 from that. The only way you can get paid on this
3 job, under this contract, is through progress
4 payments. We have to make an application for
5 progress payments, correct?

6 A. Yes, sir.

7 Q. You don't get paid for change orders, do
8 you, as a change orders -- in other words, you
9 don't send a change order to an architect and
10 that change order gets paid outside the payment?

11 A. There's no outside payment.

12 Q. That's not the way it works. The way it
13 works is, the only way you can pay under this
14 contract is to submit an application for payment
15 every 30 days with appropriate backup, and that
16 backup may contain change orders. It may contain
17 information. It would contain whatever we think
18 we're entitled to, right?

19 A. Yes, sir.

20 Q. And the architect looks at it, okay.
21 And he says, you know, you're entitled to this
22 million bucks you asked for and signs it, sends
23 it to the owner, right?

24 A. Yes, sir.

25 Q. If the owner doesn't pay that, he's in

1 breach of contract?

2 A. Yes.

3 Q. The owner has to pay. He didn't have
4 any choice. He has to pay a certified pay
5 request, right, within a certain period of time?

6 A. Yes, sir.

7 Q. Unless that certified pay request gets
8 decertified by the architect before that payment
9 is due, correct?

10 A. Yes, sir.

11 Q. Did you see an architect has the right
12 to desert a pay request if he finds evidence
13 occurred after certifying that now requires him
14 to decertify it, right?

15 A. Yes.

16 Q. And the filing of a mechanic's lien on a
17 job is just the type of thing that would cause
18 the architect to decertify a certified pay
19 request, correct?

20 A. Yes.

21 Q. Okay. So while you might have and you
22 might put in evidence for a signed pay request,
23 you might forget because a lien was filed, that
24 was not legally paid because the lien had been
25 filed, correct?

1 A. Yes, sir.

2 Q. So we established, if the owner doesn't
3 pay a certified pay request within the time
4 allowed, the next thing that occurs is Balfour
5 Beatty writes a letter and says, look here, dude,
6 I've got a bill over here, and you agreed you
7 would pay it if I got it certified. I certified
8 it, got 10 days or whatever the time period is,
9 right?

10 I didn't get my -- if he's walking off
11 this job, I'm walking off this job. I'm going to
12 give you seven days to send me my money or 10
13 days or whatever the contract requires. If you
14 don't get the money, you can then walk off the
15 job, right?

16 A. Balfour Beatty didn't do that.

17 Q. I'm not asking you.

18 A. I thought you said we did.

19 Q. If you had a certified pay request.

20 A. You could -- there are clauses in the
21 contract.

22 Q. Maybe myself and the judge know a little
23 bit about how the payment process works. You're
24 the contractor's lawyer trying to figure this
25 out. So the certified pay request is the only

1 Charlie won the golden ticket, so to speak,
2 that's going to get you paid on this job, right?

3 A. Yes.

4 Q. And you can never breach a contract for
5 not being paid a payment that is not certified --

6 A. Exactly.

7 Q. -- to pay and absolutely has to occur
8 before you have any legality for it to be paid,
9 correct?

10 A. Exactly.

11 Q. As an example, if you send a pay request
12 in, there's a place in the form to put change
13 orders in, right? So if during the 30-day period
14 between the last pay request and this one, you
15 have an executed change order that has been
16 performed?

17 A. Yes, sir.

18 Q. And say you told us to do this or we did
19 it, I sent it to the architect. The architect
20 signed it. You received the benefit of it. I
21 want my \$10,000, and I want it now.

22 A. Right.

23 Q. The architect gets it, and he goes, you
24 know what? Here it is. They owe it. I'm going
25 to add \$10,000 to the pay request. I'm amending

1 the contract sum by 10,000, extending the
2 contract duration. If that change order allows
3 everybody to agree on a time extension, I'm going
4 to extend the contract time, right?

5 A. Yes, sir.

6 Q. Now, if you send a pay request that has
7 unsigned and unagreed to the change order; in
8 other words, something y'all did that for
9 whatever reason, the owner said, I don't agree
10 with it. It's too much money. You should have
11 done it to start with, whatever reason my client
12 wouldn't agree to the change order.

13 And the architect gets that, and the
14 architect goes, you know what? This doesn't meet
15 the requirements at this time for me to certify
16 this change order so I'm not going to certify it
17 and I'm not going to add to the pay request.
18 Other things have to occur, right?

19 A. Yes, sir.

20 Q. If he doesn't put in a pay request and
21 doesn't certify it, you may ultimately be
22 entitled to a change order, but you're not
23 entitled to payment then because you don't have a
24 certified pay request that includes the change
25 order; is that correct?

1 A. Correct.

2 Q. And that's the way construction works,
3 right?

4 A. Yes, sir.

5 Q. Okay. So the purpose of all of this
6 having monthly draws, among other things and
7 getting y'all paid -- of course we want to get
8 you paid because we want to have a hotel, right?

9 A. Yes, sir.

10 Q. So every 30 days, everybody know where
11 they are on this job, right?

12 A. Yes, sir.

13 Q. We can take y'all's documents. We do
14 not know whether or not Balfour Beatty was aware
15 that this job was being financed by MetLife?

16 A. Yes, sir.

17 Q. You know they do, right?

18 A. Yes, sir.

19 Q. And you know the bank has certain
20 requirements in order to fund a drawing. Y'all
21 knew that, right?

22 A. Yes, sir.

23 Q. And you know it's going
24 from (inaudible)?

25 A. Yes, sir.

1 Q. It didn't come off the 60 million
2 dollars in cash to build a hotel, did it?

3 A. It would not surprise me, no, sir.

4 Q. How many construction jobs of any size
5 have you worked on in your career where there was
6 not financing?

7 A. Oh, gosh.

8 Q. Sir?

9 A. I'm trying to count them. There was
10 multiple projects.

11 Q. And what was the biggest one that didn't
12 have any dollar amount?

13 A. Bank of America. They finance their own
14 jobs. Microsoft.

15 Q. Okay. All right.

16 A. Lowe's. I can keep going. Do you want
17 the list?

18 Q. You're not really that familiar with the
19 banking process and how bank and draws are?

20 A. I am familiar with it.

21 Q. This is an unusual job where your client
22 is not a multi (inaudible) where idiot Bill Gates
23 is.

24 A. I don't agree, sir.

25 Q. Have you seen him lately on TV? So the

1 documentation gets prepared to send for a draw,
2 and the way that y'all did this, I believe you
3 heard the other day is, everybody sat around in
4 the room, and y'all talked and did what they call
5 a pencil drawing to figure out where you are
6 generally, right?

7 A. Yes, sir.

8 Q. At that meeting, of course, Kim Bennett
9 Brown, maybe the architect's representative,
10 maybe Jim Clements, the messenger was -- did he
11 bring coffee back and forth to these meetings?

12 A. I don't know what question that is.

13 Q. Well, the question was of Mr. Jim
14 Clements. He was described as a messenger, okay,
15 much like somebody you see riding around buying
16 coffee and things.

17 A. I treated Mr. Clements with respect.

18 Q. I'll respect you.

19 A. I didn't refer to him as a messenger.

20 Q. Mr. Starcevic did, and he was the
21 project manager.

22 A. I haven't seen that.

23 Q. He did it in open court. At any time
24 when you went to these pencil drawings, meetings,
25 you didn't believe that Kim Bennett Brown and --

1 because the architect was in that meeting, they
2 agreed to everything y'all were saying, didn't
3 they?

4 A. I don't recall Kim Brown being there.

5 Q. Was the architect at these meetings?

6 A. Yes, the architect.

7 Q. If the architects at the pencil meeting,
8 this looks -- okay, to me, this looks fine. Did
9 you think that will be the end of the inquiry,
10 that the architect did not have the right to go
11 back after you sent out the information and then
12 come to a different conclusion?

13 A. They have the right.

14 Q. They have a right to look at all these
15 documents, right? Y'all didn't have the whole
16 drawing put together. Y'all were sitting
17 together, but didn't have all the information,
18 did you?

19 A. Not sitting there, no.

20 Q. And given the architect -- half of all
21 the information y'all were going to provide, was
22 stuff they never saw?

23 A. No, sir.

24 Q. And it's not provided for in the
25 contract, is it?

1 A. No, sir.

2 Q. Once you finish that and y'all would go,
3 Starcevic would sit down with his computer and he
4 would type in the progress payment forms because
5 you fill it in on the computer, right?

6 A. Yes, sir.

7 Q. You don't have to write anything out
8 anywhere?

9 A. You have to enter it.

10 Q. All the -- you don't have to refill in
11 the schedule of values unless you change it,
12 right?

13 A. Yes.

14 Q. And what did you agree -- it ain't that
15 complicated, is it?

16 A. No, sir.

17 Q. Y'all would get all that together and
18 you would send it to the architect, but it also
19 went to the bank, right?

20 A. Yes, sir. The pencil company would go
21 too.

22 Q. Because the bank, one, is where the
23 money was coming from, right? And two, the bank
24 was going to have a mortgage on the property, a
25 first mortgage on the property. Do you

1 understand mortgages?

2 A. Yes.

3 Q. In other words, Mr. Bennett put up the
4 land and he put 5 to 6 million to put in escrow
5 to know he had 20 percent. He had an agreement
6 with the bank probably 8 feet deep, I'm sure. So
7 y'all knew that they were going to look at his
8 draws and that they were going to fund it.

9 And they were going require releases of
10 lien and a clean title so that when they paid
11 that money, they knew somebody couldn't come in
12 and claim a lien after they paid it and be ahead
13 of the bank's first mortgage, right? They got
14 more sense than that, right? They know how to
15 protect their assets?

16 A. Yes, sir.

17 Q. In order to get the bank to fund y'all,
18 you had to send the pay request to the architect,
19 who looks at it, they make sure the work is
20 reasonably being accomplished generally where
21 they say it is. They don't guarantee things.
22 They basically say, we looked at it, but we ain't
23 responsible for none of it because the architect
24 ain't responsible for nothing, right?

25 A. Right.

1 Q. So then it goes to the bank with these
2 lien releases which they rely on and then it goes
3 to the architect and the architect certifies it,
4 the bank looks at everything, and they say, okay,
5 It looks like we, the bank, are protected. The
6 architect signs it. Mrs. Brown sends it over to
7 the bank to stroke a check in her account.

8 Then she pays y'all whatever the
9 architect filled the bill as. The architect is
10 signing as payor almost, right, so you get your
11 money and everybody is -- nobody is mad at
12 nobody. We know exactly where we are starting
13 fresh every month, right?

14 A. Yes, sir.

15 MR. HILDEBRAND: Objection, Your
16 Honor.

17 THE COURT: One second. Objection
18 basis?

19 MR. HILDEBRAND: There was a
20 supplementary -- a long lead in. He needs to ask
21 simple questions. That was about ten sentences
22 of the world according to Bill Bundy. Then he
23 asked maybe a question at the end. It's unclear
24 what he's asking the fellow. It's unfair for him
25 to then answer the question at the end after the

1 long speech as to what he is even going to
2 answer. I would ask him to ask simple or
3 specific questions without the speech before.

4 THE COURT: Objection is overruled.
5 Go ahead.

6 MR. BUNDY: Thank you, Your Honor.

7 BY MR. BUNDY:

8 Q. So that's the pay request process?

9 A. Yes, sir.

10 Q. Do you have one single certified pay
11 request in this entire file that was not paid?

12 A. Not paid?

13 Q. Right. A certified pay request that was
14 not paid. Do you have an example of one you can
15 get to me?

16 A. Pay app 43, I believe.

17 Q. 23?

18 A. 43.

19 Q. Was certified?

20 A. Certified.

21 Q. Okay. And was there a lien filed
22 afterwards?

23 A. There was a lien that we cleared.

24 Q. But until you cleared it, it wasn't due,
25 was it?

1 A. No, sir. That's why I cleared it.

2 Q. By the time that you cleared it, did
3 anything else occur that would have been
4 prevented payment certification by the act or
5 justified a decertification?

6 A. I don't know of anything.

7 Q. We will get to that later on maybe in my
8 case. Other than 43 -- and when was 43?

9 A. I think it was October.

10 Q. October of 2018?

11 A. '18, I believe it was.

12 Q. Now, did you write a letter when you
13 didn't get the paid certified pay request? Did
14 you get notice of stopping work?

15 A. No, sir. We wrote a letter.

16 Q. Did you stop work?

17 A. Not that I know of.

18 Q. Did you get an answer as to why you
19 weren't paid the certified pay request?

20 A. I don't recall an answer.

21 Q. Okay.

22 A. I'm sorry, I do recall an answer. They
23 were going to withhold our funds -- withhold our
24 funds. We got that accounting from Buck, I
25 believe.

1 Q. So he told you why he was withholding.
2 That was later on, though?

3 A. Yeah. But it was pretty close to when
4 we would have gotten paid.

5 Q. What is a final pay request?

6 A. I can't hear.

7 Q. What is a final pay request?

8 A. It's when everything is introduced up.
9 The final gets everything paid. All the bills
10 are paid and everything.

11 Q. It's the last pay app?

12 A. Basically, yes, sir.

13 Q. Where is that in this file, the final
14 pay request, where you were a hundred percent
15 complete, and you asked to receive final payment,
16 and you put a number on a pay application that
17 was certified?

18 A. I would have to hunt for it, but I don't
19 know where it is, sir.

20 Q. Do you think it even exists?

21 A. I don't believe it exists.

22 Q. On this job, the contractor claims he's
23 never been paid, never submitted a final pay
24 request; is that correct?

25 A. There's two or three other pay apps that

1 weren't signed or reviewed after 43. We kept
2 sending pay apps that never were funded.

3 Q. But you did work after that, right?

4 A. After those pay apps, up until that
5 point, yes, sir.

6 Q. And kept working and never another --

7 A. We submitted pay apps for the work that
8 we did.

9 Q. So you did not send the final pay app.
10 That's all I'm trying to understand. All right.
11 If pay applications are the only way you get paid
12 under the contract, how can my client pay a final
13 pay app if you never sent it?

14 A. The final pay app would have been the
15 other three pay apps. We weren't then going to
16 submit a final payment. You don't submit a final
17 pay app before you finish.

18 Q. Once you don't get a pay app certified,
19 even though you continue working, you no longer
20 have an obligation to submit a final pay app,
21 even though you continue working? And when you
22 finish, you don't have a to submit a final pay
23 app?

24 A. We did not submit a final pay app, no,
25 sir.

1 Q. But the pay apps that you sent in that
2 weren't certified, they don't -- haven't been due
3 because they weren't certified?

4 A. They weren't certified by the architect,
5 no, sir.

6 Q. So you have a series of pay apps that
7 you sent in that were not owed, and so if you
8 couldn't get paid because the architect did not
9 certify them, you still did not submit a final
10 pay app?

11 A. We did not send a final pay app.

12 Q. And was all of this on the advice of
13 counsel?

14 MR. HILDEBRAND: Objection, Your
15 Honor. He's asking for attorney-client
16 privilege.

17 THE COURT: I will sustain that.

18 BY MR. BUNDY:

19 Q. Why didn't you submit a final
20 application every 30 days and a final pay
21 application as required by the contract?

22 A. We didn't send it.

23 Q. Okay. You just didn't do it?

24 A. We didn't do that.

25 Q. And you believe that to be a legal

1 reason, or do you --

2 A. I'm not an attorney.

3 MR. BUNDY: Judge, I think I'm done
4 for the day.

5 THE COURT: Okay. Let's stop here.
6 Mr. Simonton, you're still under oath, so you're
7 still not to consult with anyone or have anyone
8 consult with you. We'll see y'all in the morning
9 at 9:30 a.m.

10 (The hearing concluded at 5:31 p.m.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Adams, Certified
5 Shorthand Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness whose attached in the
8 foregoing hearing was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but
10 the truth in the within-entitled cause; that said
11 hearing was taken at the time and location
12 therein stated; that the testimony of the witness
13 and all objections made at the time of the
14 examination were recorded stenographically by me
15 and were thereafter transcribed by computer-aided
16 transcription; that the foregoing is a full,
17 complete and true record of the testimony of the
18 witness and of all objections made at the time of
19 the examination; and that the witness was given
20 an opportunity to read and correct said hearing
21 and to subscribe the same.

22 Should the signature of the witness
23 not be affixed to the hearing, the witness shall
24 not have availed himself/herself of the
25 opportunity to sign or the signature has been
26 waived.

27 I further certify that I am neither
28 related to nor counsel for any party to the cause
29 pending or interested in the events thereof.

30 Witness my hand, I have hereunto
31 affixed my official seal on August 9, 2022 at
32 Charleston, Charleston County, South Carolina

33 _____
34 Jennifer M. Adams
35 Court Reporter And Notary Public
36 My commission expires: 03/15/2032

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

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

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

18 Hearing before the Honorable Mikell R.
 19 Scarborough, reported by Jennifer M. Huggins,
 20 Court Reporter and Notary Public, at 9:30 a.m. on
 21 September 23, 2021 at 100 Broad Street, Courtroom
 22 2A, Charleston, South Carolina.

23

24

25

1 A P P E A R A N C E S

2
3 ON BEHALF OF PLAINTIFFS:

4 PARKER POE ADAMS & BERNSTEIN, LLP
5 BY: THOMAS HILDEBRAND, JR., ESQ.
6 BY: ROBERT C. BYRD, ESQ.
7 200 Meeting Street
8 Suite 301
9 Charleston, SC 29401
10 (843) 727-6315
11 Tomhildebrand@parkerpoe.com
12 Bobbybyrd@parkerpoe.com

13
14 ON BEHALF OF DEFENDANT LIBRARY ASSOCIATES:

15 BUNDY MCDONALD, LLC
16 BY: WALTER H. BUNDY, JR., ESQ.
17 BY: M. BRENT MCDONALD, ESQ.
18 1516 Old Trolley Road
19 Second Floor
20 Summerville, SC 29485
21 (843) 492-0221
22 Walter@bundymcdonald.com
23 Brent@bundymcdonald.com

24 ON BEHALF OF DEFENDANT WATSON ELECTRICAL:

25 SMITH TERRY JOHNSON & WINDLE
26 BY: DON R. TERRY, ESQ.
27 150 Milestone Way
28 Suite C
29 Greenville, SC 29615
30 Dterry@smithterrylaw.com

31 ON BEHALF OF DEFENDANT OLD NORTH STATE & LITHKO:

32 SMITH TERRY JOHNSON & WINDLE
33 BY: STEELE B. WINDLE, III, ESQ.
34 150 Milestone Way
35 Suite C
36 Greenville, SC 29615
37 Awindle@smithterrylaw.com

1

ON BEHALF OF DEFENDANT DAVID ALLEN COMPANY:

2

KELLY LAW FIRM, LLC

3

BY: RUSSELL BRITTON KELLY, ESQ.

689 King Street

4

Charleston, SC 29403

Britt@kellylawsc.com

5

6

ON BEHALF OF DEFENDANT METROPOLITAN LIFE:

7

BUIST BYARS & TAYLOR, LLC

BY: G. HAMLIN O'KELLEY, ESQ.

8

652 Coleman Boulevard

Suite 200

9

Mt. Pleasant, SC 29464

Hamlin.okelley@buistbyars.com

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 INDEX OF WITNESSES

2	PLAINTIFF'S WITNESSES	<u>PAGE</u>
	DAVID SIMONTON	
3	Cross-Examination by Mr. Bundy	2167
	Redirect Examination by Mr. Hildebrand	2278
4	Recross-Examination by Mr. Bundy	2331
5	CASEY THOMPSON	
	Direct Examination by Mr. Hildebrand	2364
6	Cross-Examination by Mr. Bundy	2439
	Redirect Examination by Mr. Hildebrand	2473
7	Recross-Examination by Mr. Bundy	2476
8	Certificate	2479

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: Okay. Good morning.
2 It's a much nicer day out today than yesterday.
3 Are y'all ready to get started.

4 MR. HILDEBRAND: Yes, sir.

5 MR. BUNDY: I would like to bring
6 up one thing just for a housekeeping matter that
7 may be helpful.

8 It was brought up yesterday, there is a
9 declaratory judgment action before you as part of
10 this case, and the issue in this case is, what is
11 the contract? What constitutes the contract?

12 I -- you've heard the arguments. I
13 mean, you know what the sides are. I don't
14 really have an argument one way or the other; in
15 other words, I just want to know what the
16 contract is, and you're the only person that can
17 tell me that, right?

18 THE COURT: Right.

19 MR. BUNDY: And it's going to be
20 difficult for me to try a contract case starting
21 on October the 25th, my contract case, without
22 knowing what the contract is, without your
23 ruling, right?

24 So if I -- I would ask that you rule on
25 that, if it's at all possible, between now and

1 the time we go back to trial so that there will
2 be no -- because if you don't, I'm going to have
3 to put in two theories of recovery, I guess,
4 because I'm going to be dealing with two
5 different contracts -- one with and one without
6 the supplemental conditions.

7 THE COURT: Okay.

8 MR. BUNDY: This case is confusing
9 enough as it is, right?

10 THE COURT: Okay. Yeah. I'm with
11 you on that.

12 MR. BUNDY: Okay. Thank you.

13 THE COURT: When plaintiff finishes
14 their case, I'm going to have you -- I will
15 entertain that motion, and then we'll discuss it
16 on the record.

17 MR. BUNDY: Perfect.

18 MR. HILDEBRAND: Okay.

19 THE COURT: And then I'll make a
20 decision at some point in time. I don't know
21 when that's going to be, but I'll make a decision
22 on that question.

23 MR. HILDEBRAND: That was going to
24 be my --

25 THE COURT: And I think that will

1 focus --

2 MR. HILDEBRAND: Well, that was my
3 point, Your Honor, was that -- I think it's
4 inappropriate for an interlocutory order, to rule
5 on part of it. Particularly, there's disputed
6 evidence. And that's simple.

7 What I've asked Mr. Bundy, I say, tell
8 us. If you don't dispute it, then just be up
9 front with the Court and tell us and let's get
10 rid of that. If he doesn't want to, then he's
11 put himself in that predicament.

12 MR. BUNDY: No, no, no, no.

13 THE COURT: We will cover that.

14 MR. BUNDY: Just let me say this,
15 it's not up to me what's in that contract.

16 THE COURT: I understand that.

17 MR. BUNDY: And I don't -- the
18 contract was between the parties. I had nothing
19 to do with what contract they entered into. So I
20 don't -- I think it is appropriate for me to say
21 what my position is on what's in that contract.
22 I think it's --

23 THE COURT: Okay.

24 MR. BUNDY: I just need a ruling.
25 It doesn't matter to me, from a legal standpoint,

1 because I'm going to win either way. So, you
2 know, I just need the ruling.

3 THE COURT: I don't know. It
4 looked like a pretty tight contract to me when I
5 read it, but that's --

6 MR. BUNDY: Right.

7 THE COURT: Let's figure out what's
8 in it. That's what you're asking, what's in the
9 contract?

10 MR. BUNDY: Right. What contract
11 case am I trying?

12 THE COURT: Yeah. All right. I'm
13 with you on that one.

14 MR. BUNDY: Where does my plane
15 ticket take me?

16 THE COURT: All right.
17 Mr. Simonton, I hope you had a decent night last
18 night.

19 THE WITNESS: Yes, sir.

20 THE COURT: Are you ready for some
21 more?

22 THE WITNESS: Yes, sir.

23 THE COURT: All right. You're
24 still under oath.

25 THE WITNESS: Thank you.

1 CROSS-EXAMINATION

2 BY MR. BUNDY:

3 Q. Good morning, Mr. Simonton. How are
4 you?

5 A. Good morning, great.

6 (DFT. EXH. 40 was marked for
7 identification.)

8 Q. I want to start this morning with --
9 Mr. Simonton, I'm going to hand you what's been
10 marked for identification purposes as
11 Defendant's -- I guess it's Defendant's Exhibit
12 40 for identification. Can you identify this
13 document for me, please, sir?

14 A. Yes, sir. It's a notice of mechanic's
15 lien, and it's a certificate of mechanic's lien.

16 Q. And what property is this notice
17 liening? What real estate is it liening?

18 A. Library Associates.

19 Q. So the land that this hotel is on,
20 correct?

21 A. Yes, sir.

22 MR. BUNDY: All right. Your Honor,
23 at this point, I would like to move this into
24 evidence.

25 THE COURT: All right.

1 MR. HILDEBRAND: Well, he certainly
2 hasn't authenticated it. If we're going to stick
3 to the authentication, I think -- it's not our
4 mechanic's lien. It's somebody else's. This
5 gentleman --

6 MR. BUNDY: The document itself is
7 authenticated under the rules. It's filed in
8 the --

9 THE COURT: It's a matter of
10 record, is it not? Is Guy Beatty in the -- in
11 this case? Are they still in the case?

12 MR. BUNDY: No, sir. They're the
13 subcontractor to Bernhard.

14 THE COURT: Okay. Sub to Bernhard,
15 which is also out, right?

16 MR. BUNDY: Right.

17 THE COURT: Okay.

18 MR. HILDEBRAND: And this is in a
19 different case, Your Honor. Just like we were --

20 THE COURT: Hold on. Hold on. Go
21 ahead. Is the purpose of this to establish a
22 date, time, or notice? Is that what you are
23 offering this for?

24 MR. BUNDY: The purpose of this is
25 to prove that a lien was filed on this project,

1 on this date, by a second-tier subcontractor and
2 how it affects the contract relationship between
3 these parties, how it affects the ability of the
4 contractor to get paid, and how the contract
5 works once somebody files a lien. All is set
6 forth in the contract.

7 THE COURT: Okay.

8 MR. HILDEBRAND: Well, he can do
9 that, Your Honor. I'm simply -- Mr. Bundy
10 objected yesterday when I tried to introduce
11 documents from another court proceeding.

12 So it just doesn't seem like we're
13 playing by the same rules, when I go to introduce
14 pleadings from another case from them, and he's
15 trying to introduce, through this witness, a
16 document that this witness has no knowledge
17 about.

18 So if he wants to authenticate it in
19 some other manner and he says that it can be
20 authenticated, then fine. But I don't think it's
21 appropriate for this witness to authenticate a
22 document that he knows nothing about.

23 MR. BUNDY: Your Honor, the
24 document itself --

25 THE COURT: I'm going to allow it

1 into evidence. It's a public record. It's a
2 filed public record.

3 (DFT. EXH. 40 was received in
4 evidence.)

5 MR. BUNDY: Thank you.

6 THE COURT: And you will have to
7 refresh my memory on the other one because I
8 don't recall specifically why we got into that
9 one.

10 MR. BUNDY: There's a rule of
11 evidence that applies. I can find it for you.

12 THE COURT: Yes, yes, I know. It's
13 a public record.

14 MR. BUNDY: All right. Now, a few
15 questions on -- 40 is in evidence, right?

16 THE COURT: 40 is in evidence.

17 MR. BUNDY: Thank you.

18 BY MR. BUNDY:

19 Q. All right, sir. This is a lien filed by
20 Guy Beatty, Inc. And do you know what their job
21 was on this -- what their role was on this job?

22 A. I believe they were the insulator for
23 the project, for Bernhard, BMCC.

24 Q. For Bernhard. They were a
25 subcontractor, a second-tier subcontractor is

1 what's typically referred to in the industry,
2 correct?

3 A. Yes.

4 Q. And they filed this lien on what date?
5 Look at the second page, please. Okay. What is
6 the lien? What is the lien dated? It's the
7 second page at the bottom.

8 A. First day of November of 2018.

9 Q. 2018. This is about a month before you
10 got the job or little -- around about a month and
11 a half?

12 A. No. I had been on the job for almost a
13 year.

14 Q. Oh, you'd been on the job for a year at
15 that time. Okay. So you were aware when this
16 lien got filed?

17 A. Yes, sir, we were notified by the owner.

18 Q. Okay. And if we look at exhibit A,
19 that's a description of this project, correct?

20 A. Yes, sir.

21 Q. All right. And the lien -- and there is
22 an affidavit verified statement of account; is
23 that true, beginning on -- well, there's two
24 pages entitled affidavit verified statement of
25 account, right?

1 A. Yes, sir.

2 Q. And what is your understanding of
3 affidavit verified statement account in a lien
4 case?

5 A. That's the person that signed it that
6 it's true.

7 Q. Okay. Now, you are familiar -- in fact,
8 filing -- you filed liens on behalf of Balfour in
9 this job, right? So this is not a form or
10 document you're unfamiliar with, right?

11 A. I didn't personally file a lien.

12 Q. Okay. All right. Now, the lawyer
13 representing Guy Beatty, Inc., was a Mr. Allen
14 West, with the law firm of Hamilton, Stephens,
15 Steele and Martin; is that correct?

16 A. Yes, sir.

17 Q. All right. And do you know whether
18 anyone in that law firm, specifically Mr. Steele,
19 represents in this matter still Lithko and Old
20 North State State Masonry?

21 A. I have to trust that statement. I'm not
22 sure.

23 (DFT. EXH. 41 was marked for
24 identification.)

25 Q. Okay. Thank you. All right, sir. So

1 the next document I would like to have you look
2 at is what's going to be marked -- sorry, wrong
3 page -- as the document that has been marked for
4 identification as Defendant's Exhibit 41. I'm
5 going to ask you to look at it and I'm going to
6 ask you to identify it for me, please.

7 MR. BUNDY: 41, Your Honor?

8 THE COURT: Okay.

9 THE WITNESS: It's an e-mail from
10 James Clements to Kim Brown, it looks like, or
11 Kim Brown to Jim Clements. Yeah. Kim Brown to
12 James Clements, dated February 2nd, 2021.

13 BY MR. BUNDY:

14 Q. Okay. Let's look at the first page of
15 this e-mail. You are a CC recipient, are you
16 not, of these e-mails?

17 A. Yes, sir. I had to find my name.

18 Q. Okay. In fact, the first e-mail from
19 Faulkinberry -- it's from Jennifer Faulkinberry
20 to David Simonton. That's you, right? Well,
21 that's in the middle of the e-mail.

22 A. Yes, sir.

23 Q. All right. Okay. Anyway, what I want
24 to do is, let's get on the first page. This is
25 an e-mail from Kim Bennett Brown, and it says, I

1 just heard back from the title abstractor and Guy
2 C. Beatty lien is still on file and has not been
3 released. And that e-mail is dated what date,
4 December 30, 2018?

5 A. Yes, sir.

6 Q. Okay. And what is a title abstractor?
7 Do you know?

8 A. The person that searches the title.

9 Q. Right. And the title abstractor, every
10 month because the bank requires it, goes to the
11 RMC office and make sure there are no liens on
12 the project. If there are liens on the project,
13 he looks to see if that lien has been bonded off,
14 right?

15 A. Yes, sir.

16 Q. And when a lien gets bonded off, it's no
17 longer a cloud on the real estate because it's
18 been replaced by a cash bond typically put up by
19 an insurance company or a cash bond put up by
20 anybody, right?

21 A. Yes, sir.

22 Q. All right. And a contract document
23 between Library Associates and Balfour Beatty
24 Construction requires that Balfour Beatty
25 Construction bond off or otherwise satisfy liens

1 filed by subcontractors, second-tier
2 subcontractors, anybody who performs any work on
3 this job?

4 A. Is that a statement?

5 Q. Sir?

6 A. Is that a question?

7 Q. Yes. Isn't it true?

8 A. Yes.

9 Q. It started with that?

10 A. All right.

11 Q. So the lien had been filed on or about
12 November 1, I think it was --

13 MR. BUNDY: Was it November 1 --

14 THE COURT: Yes.

15 MR. BUNDY: -- that we looked up?

16 BY MR. BUNDY:

17 Q. So here it is December 30, roughly 60
18 days later, and this lien has yet to be bonded
19 off or satisfied; is that correct?

20 A. That's correct.

21 Q. Okay. Now, there's the top e-mail from
22 James Clements to Kim Brown with the copy to you.
23 Do you see that?

24 A. Yes, sir.

25 Q. On December 31?

1 A. Yes, sir.

2 Q. At 7:56 a.m.?

3 A. Yes, sir.

4 Q. And it says -- and I want to ask you, is
5 this a true statement? Simonton and I, that's
6 you, you're Simonton, and I, and I is James
7 Clements, spoke on Friday. BBC is still trying
8 to address the issue either with MCC or bond it
9 off them self, correct?

10 A. Correct. That's what it says.

11 Q. Okay. Now, the BB -- Balfour Beatty
12 Construction is not entitled to be paid if there
13 is an unbonded lien pending on this job, are
14 they?

15 A. It appears that way, yes, sir.

16 Q. That's what the contract says, isn't it?

17 A. I would have to read the contract.

18 Q. All right. So let's look at --

19 MR. BUNDY: Your Honor, I would
20 like to move this into evidence, I believe it's
21 Exhibit 41.

22 MR. HILDEBRAND: No objection.

23 THE COURT: Without objection.

24 (DFT. EXH. 41 was received in
25 evidence.)

1 (DFT. EXH. 42 was marked for
2 identification.)

3 BY MR. BUNDY:

4 Q. Mr. Simonton, I now hand you what's been
5 marked for identification, Mr. Clements -- or I'm
6 sorry, what's been marked for identification as
7 Defendant's Exhibit 42. I ask you to look at
8 that, please, and ask if you can identify it?

9 A. It's an e-mail from Nick Starcevic to
10 myself, James Clements, Kim Brown, copy to
11 Jennifer Faulkinberry and Stephen Ewart.

12 Q. Let's start at the bottom. And I think
13 the first -- the e-mail chain -- the e-mails
14 confuse me because you always have to work
15 backward. I'm not used to that and never will
16 get used to it.

17 A. Right. Yes, sir.

18 Q. The original message was from James
19 Clements sent on January 10, 2019 to Kim Brown,
20 and you were the copy recipient; is that correct?

21 A. Yes, sir.

22 Q. And on January 10th, Kim -- this is to
23 her from Jim Clements, subject MCC lien, Kim,
24 Dave is going to submit the bond today. Who is
25 Dave?

1 A. That would be my nickname.

2 Q. All right, Dave. He asked that you
3 request the bank to do their title search on
4 Monday morning. Now, that would be the Monday
5 following I guess Thursday, January 10, right?

6 A. Yes, sir.

7 Q. Is that a true statement? Did you, in
8 fact, ask Jim Clements to ask Kim Brown not to do
9 the title search until Monday?

10 A. Requesting the bank, yes, sir.

11 Q. Right. And the reason you did that is
12 because the documents have to be filed. They
13 have to be recorded, right?

14 A. Yes, sir.

15 Q. And what you didn't want to happen was
16 to go to all the trouble now of finally getting a
17 bond on or around January 10 and have the
18 abstractor go down there on Friday afternoon and
19 the paperwork wasn't done because the clerk
20 wasn't able to get to it. So you're right back
21 where you started, right?

22 A. Yes, sir.

23 Q. So you figured that if you waited and
24 you asked Kim to wait until Monday, which would
25 be the Monday following January 10, which is a

1 Thursday; so it would be -- Friday would have
2 been the 11th; Saturday would have been the 12th;
3 Sunday would have been the 13th. You were asking
4 her to wait until January the 14th, 2019, to go
5 search the title?

6 A. Yes, sir.

7 Q. And you knew that the bond -- and you
8 knew that this request to wait to search the
9 title was going affect the bank's ability to pay?

10 A. Yes, sir.

11 Q. Because as long as that lien was there,
12 you weren't entitled to your payment?

13 A. Yes, sir.

14 Q. Okay. And was your request to Ms. Brown
15 from Mr. Clements complied with; do you know?

16 A. I don't remember, sir.

17 Q. All right. Let's look at the top
18 e-mail, and it says -- well, let's look at the
19 one above it. This is from you, right, to Jim
20 Clements?

21 A. Yes, sir.

22 Q. Jim -- no, Tim forwarded to you. Here
23 is a copy of what we're filing. We will let you
24 know of any issues at the county. So you sent
25 that on Thursday, January 10 about 12:30 in the

1 afternoon?

2 A. Yes, sir.

3 Q. All right. And then on January the
4 14th, Starcevic sent a copy to you, Clements, Kim
5 Brown of the file copy of the bond that releases
6 the mechanic's lien, correct?

7 A. Yes, sir.

8 Q. All right. And we look at this document
9 and it says in the title, surety bond for release
10 of mechanic's lien.

11 Mechanic's lien filed on November 5,
12 2018 and recorded at page 0758 -- book 0758, page
13 160, and the bond number is 106943603, and the
14 bond attached was filed, and it's dated the 8th
15 day of January; is that correct, 2019?

16 A. Yes, sir.

17 Q. Okay. And going back to the first page,
18 Mr. Starcevic, after he said, find copy attached,
19 asked the question to you: What's the status of
20 November's pay application, right?

21 A. He asked it to myself and Jim Clements.

22 Q. And Kim Brown?

23 A. And Kim Brown, yes, sir.

24 Q. Okay. Now, isn't it true that the
25 November pay application that he was talking

1 about was not funded because his subcontractor
2 filed -- a second-tier subcontractor filed a lien
3 and it took Balfour Beatty Construction from
4 November 1, 2018 until January -- where were
5 we -- until January the 8th, 2019 to bond off
6 this lien, correct?

7 MR. HILDEBRAND: Objection, Your
8 Honor, calls for speculation.

9 THE COURT: I will allow it. Go
10 ahead.

11 MR. BUNDY: All right. Your Honor,
12 I would move this document into evidence, please.

13 THE COURT: 42?

14 MR. HILDEBRAND: No objection, Your
15 Honor.

16 (DFT. EXH. 42 was received in
17 evidence.)

18 MR. BUNDY: Is it in?

19 THE COURT: Yes.

20 BY MR. BUNDY:

21 Q. Read the whole document to yourself and
22 then let me know when you're ready to discuss it.
23 Ready? Okay?

24 A. Okay.

25 Q. All right. Can you identify this

1 document as an e-mail that was sent to Nick
2 Starcevic for the copy to you and other --
3 directly to you and Nick Starcevic -- there were
4 two people it was sent to, you and Starcevic,
5 correct?

6 A. Yes, sir.

7 Q. Okay. And there's copy recipients,
8 which would include Clements, Kim Brown, Buck
9 Lindsay and Marty Wall, right?

10 A. Yes. And a few others.

11 Q. Who is Marty Wall?

12 A. At that time, I believe he worked for
13 Bennett Hospitality on the side.

14 Q. Okay. What was the status of the hotel
15 on January 21, 2019, in terms of the
16 construction?

17 A. We were working on finishing up some
18 CCDs, coolers, shutters.

19 Q. All right. The letter reads -- the
20 e-mail reads as follows, in the first paragraph,
21 does it not, quote, as noted in Buck's
22 substantial completion survey and comments
23 12/18/18, the level of finishes in the guest
24 rooms were unacceptable.

25 BBC has taken the position that punch

1 work was complete and BBC would not work further
2 to improve the guest room finishes. Is that what
3 it says?

4 A. Yes, sir.

5 Q. Is it true? Is the statement true?

6 A. Yes, sir.

7 Q. Okay. Next paragraph, consequently, the
8 owner has undertaken the improvement of the guest
9 room finishes with the significant repainting.
10 To achieve this work, the owner mobilized
11 approximately 80 painters a day to repaint the
12 guest rooms.

13 This work is also critical to meeting
14 the hotel opening date. As of this Friday, the
15 work continues and is the owner's hope to
16 complete this remedial work by early February.
17 Is that a true statement?

18 A. That's what she wrote, yes, sir.

19 Q. Well, is it true, though, that the owner
20 undertook the improvement of the guest room
21 finishes with significant repainting?

22 A. Yes, sir.

23 Q. Is it true that to achieve this work,
24 the owner mobilized approximately 80 painters a
25 day to repaint the guest rooms?

1 A. I don't -- I didn't actually count the
2 painters, no, sir.

3 Q. Well, was it a bunch of them?

4 A. It appeared to be, yes.

5 Q. There were painters everywhere, weren't
6 there?

7 A. Yes.

8 Q. How many guest rooms floors are they?

9 A. Three through eight.

10 Q. So five floors. Would it surprise you
11 if it would take 80 painters to repaint five
12 floors if you were trying to get it done as
13 quickly as possible?

14 A. Yes, sir, it would.

15 Q. Okay. Did Library Associates, during
16 the Christmas holiday, hire painters to come in
17 and try and finish this job over the Christmas
18 holiday? And by that, I mean between December 20
19 and December 31 to get this hotel finished?

20 A. I was onsite and did witness painters,
21 yes.

22 Q. Do you know what kind of effort it took
23 by Mr. Bennett of Library Associates to convince
24 people to provide 80 painters over the Christmas
25 holiday to finish this hotel which Balfour Beatty

1 refused to do?

2 MR. HILDEBRAND: Objection, Your
3 Honor. That's the -- the preparatory statements
4 included in the question are inappropriate. He
5 can simply ask him what he knows and what his
6 observations are.

7 But his -- the inclusion of what Michael
8 Bennett might have been thinking or what somebody
9 else might have been thinking is irrelevant. I
10 think he ask -- needs to ask the witness what he
11 knew and what he did, not what other people did.

12 THE COURT: Overruled. Go ahead.

13 MR. BUNDY: Thank you.

14 BY MR. BUNDY:

15 Q. All right. Let's go to the next
16 paragraph. As a consequence of this deficient
17 work -- now, the person writing this letter and
18 characterizing the work of Balfour Beatty as
19 defect is who? Who is making that statement?

20 A. It appears Jennifer Faulkinberry.

21 Q. Okay. And she works for Winfred Lindsay
22 Architects, right?

23 A. Yes, sir.

24 Q. Okay. And she's the one that -- she
25 works for the architect that Balfour Beatty

1 agreed would be the initial decision maker about
2 what work was defective, what work wasn't
3 defective, whether punch lists were finished or
4 whether they weren't finished; is that true?

5 A. The architect does sign off on the punch
6 list, yes, sir.

7 Q. But the architect is the initial
8 decision maker regarding disputes between the
9 owner and the contractor under the terms of this
10 contract; is that correct?

11 A. That's what the contract says.

12 Q. Okay. That's what the contract says.
13 And if nobody appeals or objects or otherwise
14 complains about an architect's decision,
15 everybody lives with it, and you move on, right?

16 A. Yes, sir.

17 Q. All right. And if one party doesn't
18 agree with the architect's decisions, there are
19 procedures in the contract to resolve disputes,
20 which is the architect -- when the architect's
21 decision is not accepted by one of the parties,
22 correct?

23 A. Correct.

24 Q. And those dispute procedures are
25 important contract provisions; are they not?

1 A. Yes, sir.

2 Q. And they need to be followed in order to
3 achieve the end result, right, which is a final
4 decision?

5 A. Yes, sir.

6 Q. Okay. So the architect's initial
7 decision is, as stated in the contract, is a
8 condition precedent to recovery on such things
9 like change orders, CCD's, and the rest of it,
10 correct?

11 A. Yes, sir.

12 Q. And if the contractor or the owner
13 doesn't agree with the condition -- doesn't agree
14 once that condition precedent has been met, they
15 have rights and remedies as established in the
16 contract, correct?

17 A. Yes, sir.

18 Q. Okay. And it goes on to say, as a
19 consequence of this deficient work, BBC's
20 unwillingness to correct -- is that a true
21 statement that BBC was unwilling to correct what
22 the architect had decided was deficient work?

23 A. We answered this -- I believe we
24 answered this letter that we asked for a change
25 order because it was a change to the contract.

1 Q. Right.

2 A. And nothing was put forth to it.

3 Q. Right. But unless you got a change
4 order, you refused to go forward and repair the
5 deficient work?

6 MR. HILDEBRAND: Object to the
7 form.

8 MR. BUNDY: Your Honor, this is
9 cross-examination.

10 THE COURT: Overruled.

11 THE WITNESS: I don't see what the
12 deficient work is, sir, on this e-mail.

13 BY MR. BUNDY:

14 Q. It goes on to say, the owner has
15 received his first invoice from Robins and Morton
16 of \$518,830 for the repairs to-date. The invoice
17 and backup are accessible by the following
18 link -- and I'm not going read that into the
19 record because it would give me a headache.

20 Did you go to this link and review what
21 was there that would have informed you about what
22 the \$518,830 was for?

23 A. I don't know, but I don't recall if I
24 did or not.

25 Q. Because you didn't even look probably?

1 A. I can't answer that, sir.

2 Q. So you aren't in a position here today
3 to dispute that that number is not accurate,
4 correct?

5 A. Without looking at invoices, it's
6 \$518,830.

7 Q. Right.

8 A. I have to assume. I didn't open it up
9 and add it up.

10 Q. Right. Correct. Okay. Well, according
11 to our conversations yesterday, by the time you
12 left Balfour Beatty the second time and when you
13 got off this \$180,000 a year payroll to be the
14 support -- to provide legal support, you spent
15 approximately 3,240, hours, correct? If you do
16 the math that we went through yesterday.

17 A. Okay.

18 Q. And so in all of that time and all of
19 that work, you didn't go back and look at these
20 invoices to prepare a chart to point out to the
21 Judge how these invoices are incorrect or
22 anything about these invoices at all? You
23 haven't done anything at all related to the
24 validity of these invoices?

25 A. No, sir.

1 Q. And you're not in a position to --
2 strike that question. Please note the attached
3 does not include invoices for CPI Construction,
4 who the owner has also engaged to assist with
5 painting the guest rooms. Now, who is CPI
6 Construction?

7 A. That's a third party construction
8 company here, I believe they're located here.

9 Q. Are they a small organization, or do you
10 know anything about them?

11 A. I have no idea, sir.

12 Q. How about Robinson Morton, are they a
13 small organization?

14 A. I believe they are out of Alabama. I
15 can't tell you their size. I know their name.

16 Q. Okay. Do you know whether they do any
17 work for the Medical University, maybe built an
18 entire --

19 A. Yes, sir. They built the hospital over
20 there.

21 Q. Now, have you ever built a hospital?

22 A. Yes, sir.

23 Q. Okay. They're not complicated at all,
24 are they?

25 A. It's like a hotel except it's got med

1 guests in it.

2 Q. Pardon me?

3 A. It's like a hotel except it's got med
4 guests in it.

5 Q. And is it complicated or not?

6 A. Yes, sir.

7 Q. Okay. And it goes on to say, does it
8 not, in view of the progress for the owner
9 furnished work today, invoices in hand and
10 remaining work to complete, it is the -- it is
11 our estimate, the remedial repairs could reach in
12 excess of \$1 million, right? That's what it
13 says?

14 A. Yes, sir.

15 Q. Per article 9.5, decisions to withhold
16 payment -- now, that's a cite to the contract,
17 right?

18 A. Yes, sir.

19 Q. Okay. We recommend, and we are the
20 architect, that's who she's referring to, right?

21 A. I have to assume so, yes.

22 Q. We recommend withholding funds from
23 application for payment, 43 in October, 44 in
24 November, and future contractor pay requests to
25 offset these costs incurred to-date as well as

1 anticipated completion costs, correct?

2 A. Correct.

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

9 A. Yes, sir.

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

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

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

18 A. We protested this.

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

25 The failure of payment of 43 and 44 had

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

4 A. 43, I believe was, yes.

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

7 A. I'm not sure about 44.

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

15 A. No, sir.

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

20 A. Yes, sir.

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

1 A. Can you restate that? I apologize.

2 Q. Sure. Sure. Sure. By the time Balfour
3 Beatty bonded the lien off in January 2019,
4 circumstances at the hotel had changed from the
5 existing conditions or the existing circumstances
6 as of November 1, 2018, right?

7 A. Yes, sir.

8 Q. Okay. So if Balfour Beatty had bonded
9 the lien off on November the 2nd, they would have
10 been paid their draw, right? Because that's the
11 only reason you didn't get paid, right? You
12 would have gotten paid for payment of 43, right?

13 A. Yes, sir.

14 Q. All right. And if you had bonded it
15 off, you would have gotten paid 44, right?

16 A. Yes, sir.

17 Q. Because it took y'all so long to bond
18 off a lien, which was required by the contract,
19 the delay of some 70 days.

20 In that time period, Balfour Beatty
21 refused to correct deficient work, and the
22 architect now had that new information and was
23 required to review it and under 9.5 -- article
24 9.5, decided to decertify those pay requests,
25 which would have otherwise been due back in

1 November and December, but were not paid because
2 of the lien.

3 But now those pay requests, while the
4 lien may have been bonded off, are not due
5 because the deficient work that y'all refused to
6 do, and that there was over \$1 million out of
7 Bennett's pocket to fix that work. And she
8 reduced the pay requests by that amount or more,
9 correct?

10 A. That's what she says, yes, sir.

11 Q. Okay. The last thing she says is, we
12 also consider current open punch list items,
13 including but not limited to, the exterior facade
14 of the building as cause to recommend against
15 further reduction of the contractor retainage
16 until WLA can verify all punch work has been
17 satisfactorily completed, correct?

18 A. I don't see that in my --

19 Q. It's up at the top. Did yours get cut
20 off?

21 A. Yes, sir.

22 Q. I apologize.

23 A. Okay.

24 Q. I'm going to change the sticker so we
25 have a clean copy. Is that what it says,

1 Mr. Simonton?

2 A. Yes, sir.

3 (DFT. EXH. 43 was marked for
4 identification.)

5 MR. BUNDY: Your Honor, at this
6 time, I would move into evidence Exhibit 43,
7 previously ID'd. And, Your Honor --

8 Tom, is your second page complete? Do
9 you have a line at the top of your second -- did
10 I hand you an exhibit?

11 MR. HILDEBRAND: You did.

12 MR. BUNDY: With the Court's
13 permission, Your Honor.

14 THE COURT: Yeah.

15 MR. BUNDY: The one I have has the
16 line on the second page, but mine is highlighted
17 for my use in cross-examination, but I would
18 still like to use it. And if necessary, I can
19 substitute it later.

20 THE COURT: Looks like he's handing
21 you a clean one.

22 MR. BUNDY: There you go. Earning
23 his keep, Judge.

24 THE COURT: Trying to keep you
25 straight, I'm sure.

1 MR. BUNDY: I move this into
2 evidence, Your Honor.

3 THE COURT: All right. Any
4 objection?

5 MR. HILDEBRAND: No, sir.

6 THE COURT: Without objection.

7 (DFT. EXH. 43 was received in
8 evidence.)

9 BY MR. BUNDY:

10 Q. Thank you, Mr. Simonton. Now, we're
11 going to move on to another topic. Let's see,
12 there is an Exhibit 252. It should be in one of
13 these books that you have in front of you.

14 A. Right here on top.

15 Q. Perfect. If you would turn to Exhibit
16 252.

17 A. I am there.

18 Q. And the problem is I am not.

19 MR. BUNDY: I believe, Your Honor,
20 252 is in evidence.

21 THE COURT: I think it is. Hold on
22 one second and I will verify it. It is.

23 MR. BUNDY: All right. Thank you,
24 Your Honor.

25 BY MR. BUNDY:

1 Q. All right. Mr. Simonton, this is a
2 letter that you -- was introduced from your
3 direct examination. And is this letter the
4 notice you were referring to earlier about why --
5 when you disagreed with Ms. Faulkinberry, or is
6 this as stated, the consolidated claim
7 preliminary, or is it both?

8 A. This is the consolidated claim
9 preliminary.

10 Q. Okay. And it's dated January 25th,
11 2019, correct?

12 A. Yes, sir.

13 Q. And the last exhibit we looked at was
14 from Jennifer Faulkinberry on January 21, 2019,
15 right?

16 A. Yes, sir.

17 Q. Wherein she says I'm -- she said what
18 she said. I'm reading and decertifying, and
19 I'm -- and we're going to go forward. Whatever
20 this says, that's what she said. Okay. So four
21 days later, right? We're four days later --

22 A. Yes, sir.

23 Q. -- right, the 25th of January, 2019,
24 correct?

25 A. Yes, sir.

1 Q. All right. Consolidated claim
2 preliminary. Mr. Simonton, your name is at the
3 bottom of this letter, sincerely, David Simonton,
4 VP, right?

5 A. Yes, sir.

6 Q. You sent a copy to Brown, Tom Ryan, the
7 lenders, employee Jennifer Faulkinberry, the
8 architect, and Buck Lindsay the architect,
9 correct?

10 A. Yes, sir.

11 Q. Why did you send this to the lender?

12 MR. BUNDY: Your Honor, might I
13 take my coat off?

14 THE COURT: Yeah. Go ahead.

15 BY MR. BUNDY:

16 Q. Do you understand my question?

17 A. Yes, sir. I'm trying to remember. I
18 believe it was in the lender agreement that we
19 had to notify them also.

20 Q. Do you believe that was in the
21 agreement?

22 A. I would have to look at it again, sir.

23 Q. Well, whether you had to do it per the
24 agreement or not, do you have any knowledge of
25 what effect this letter would have on the

1 lender's relationship with the borrower?

2 A. No, sir.

3 Q. Okay. And the letter was not written,
4 was it, with the intent to affect that
5 relationship? You weren't trying to drive a
6 wedge between the lender and the owner, were you?

7 A. No, sir.

8 Q. Okay. Because the very last thing you
9 want to do if you're trying to get money from a
10 developer is to anger the lender so they won't
11 pay -- they won't fund draws. That wouldn't be
12 in your best interest, would it?

13 A. No, sir.

14 Q. Okay. Mr. Simonton, do you testify
15 under oath that you wrote this -- drafted this
16 letter?

17 A. This letter was drafted by ourselves and
18 our legal counsel.

19 Q. Yourself and who?

20 A. Legal counsel.

21 Q. Legal counsel. Okay. I would like you
22 to look at it and tell me what portions you
23 drafted.

24 A. Replaced the damages in there.

25 Q. Sir?

1 A. I pulled in the damages on there.

2 Q. But the rest of the language was given
3 to you by somebody else?

4 A. Yes, sir.

5 Q. All right. Now, yesterday you testified
6 that in January 2019, your time was divided
7 equally between finishing the hotel and
8 litigation support, correct?

9 A. Yes, sir.

10 Q. Okay. When you provided the damages,
11 were you providing them as litigation support or
12 were you providing them as the VP of Balfour
13 Beatty in charge of finishing this hotel?

14 A. I would say it's both.

15 Q. Both?

16 A. Both.

17 Q. Let's go through it. So since we're
18 really not going to be discussing anything that
19 you drafted until we get to the end of the
20 letter, which is true, right? That's true.
21 Until we get to the numbers, all we will be
22 discussing is language given to you to put your
23 signature over it?

24 A. Yes, sir.

25 Q. Now, before you signed this letter, did

1 you read it to make sure that it was worthy of
2 your signature? In other words, it was correct.
3 The information in the letter that you signed
4 provided to you by somebody else, did you confirm
5 that information was correct?

6 A. Yes, sir.

7 Q. All right. And when you confirmed it,
8 were you confirming it as litigation support or
9 as vice president of Balfour Beatty Construction?

10 A. Vice president of Balfour Beatty
11 Construction.

12 Q. Okay. So let's say -- let's see what
13 you said. Let's go to the third paragraph where
14 you say that the claimants have incurred
15 substantial damages -- and the claimants are
16 Balfour Beatty -- and reimbursed costs for
17 consolidated claim in the amount of
18 \$22,452,282.51, parentheses, the claim amount; is
19 that correct?

20 A. Yes, sir.

21 Q. And the claim amount is comprised of the
22 components described below, based on preliminary
23 accounting of the costs that have been incurred
24 through the noted dates; however, because work on
25 the project continues to a final accounting, the

1 cost presentable to the owner cannot be done.

2 Once the work by Balfour Beatty and its
3 subcontractors is complete, a full accounting of
4 all those additional costs will be provided by
5 supplement or amendment. Is that what it says?

6 A. Yes, sir.

7 Q. All right. When was the full accounting
8 of those additional costs provided by supplement
9 or amendment provided?

10 A. I believe whenever we turned in our
11 claim books.

12 Q. When you turned -- when the claim books
13 were turned in. Okay. And that claim book
14 constitutes Balfour Beatty's claim, correct?

15 A. Yes, sir.

16 Q. And that claim book was the last
17 supplement that y'all made on account of your
18 claim, correct?

19 A. I believe so, yes.

20 Q. Okay. And that's what we're here trying
21 to get -- trying to present evidence to the Judge
22 so we can get a decision from the Judge about how
23 much of the claim you're entitled to, correct?

24 A. Yes, sir.

25 Q. And we're here because we all agreed to

1 for production from them -- or the records will
2 reflect, until well over a year later.

3 We went through this before, Your Honor,
4 where we voluntarily provided them all of the
5 construction documents early in the process. So
6 this is a red herring that he's described to this
7 guy, and it's based on factual inaccuracies.

8 I would like for Mr. Bundy to show you
9 where we did a subpoena to his client asking them
10 for documents, and we've provided them all of
11 those.

12 THE COURT: I acknowledge your
13 objection, but it's within the witness's purview
14 as to whether or not he knows that a subpoena was
15 sent. That's what cross-examination is all
16 about. If he doesn't know it, he doesn't know.
17 If he knows, he knows.

18 MR. HILDEBRAND: All right. Thank
19 you.

20 BY MR. BUNDY:

21 Q. Yesterday on direct, you said in your
22 duties, as a litigation support person, you
23 reviewed subpoenaed documents; did you not?

24 A. Yes, I did.

25 Q. Isn't that what you said yesterday under

1 oath?

2 A. Yes, sir.

3 Q. Okay. What subpoenaed documents were
4 you referring to?

5 A. The Kim Brown, Jim Clements, WLA, Buck
6 Lindsay, I believe Jennifer Faulkinberry, ECI
7 Interior, architect.

8 Q. And do you know why those documents were
9 subpoenaed?

10 A. To review for this case.

11 Q. All right. Let's continue to look on.
12 Entitlement. Now, the entitlement language is
13 also not your language, but you have adopted it
14 as being true, correct?

15 A. Yes, sir.

16 Q. From early in the job to the present
17 day. Now, you weren't on the job early in the
18 job, right?

19 A. No, sir.

20 Q. The work of Balfour Beatty and its
21 subcontractors would make it difficult and costly
22 and longer duration as a result of errors,
23 additions and failures of the owner, or notice
24 for which the owner is responsible.

25 Examples, number 3. Let's go to number

1 3. Failure to timely and promptly pay undisputed
2 amounts to Balfour Beatty. What undisputed
3 amounts that were certified by the architect for
4 payment by Library Associates are you talking
5 about?

6 A. Payment applications.

7 Q. Sir?

8 A. Payment applications.

9 Q. 43?

10 A. 43.

11 Q. 44?

12 A. 44, and I believe 45 was there at that
13 time. I would have to go back and look at the
14 date.

15 Q. But none of those pay applications were
16 certified, correct?

17 A. No, sir.

18 Q. Okay. In the amount, you say
19 undisputed. They were undisputed from Balfour
20 Beatty's position, correct?

21 A. They were undisputed from the
22 architect's position, I believe.

23 Q. Pardon me?

24 A. Undisputed amounts.

25 Q. But who was -- were the -- Balfour

1 Beatty took the position these amounts were
2 undisputed. Did the architect take the position
3 that these amounts were undisputed?

4 A. I don't remember seeing disputed amounts
5 or undisputed in her e-mail earlier.

6 Q. All right. 5. Let's skip over it.
7 Let's go to 9. They or the owner either
8 authorize or direct its design consultants to
9 provide adequate, timely, and sufficient
10 additional services, including building
11 information modeling, preconstruction and
12 construction phases of the project.

13 Now, yesterday, we looked at the request
14 for response, the request for proposal, and
15 Balfour Beatty, at least in its proposal, had a
16 BIM coordinator listed and his picture and all in
17 the proposal, right?

18 A. Yes, sir.

19 Q. We went through that yesterday?

20 A. Yes, sir.

21 Q. Okay. Let's go to 12. Repeated
22 failures on the part of the owner and the owner's
23 representative and others to refrain from
24 directly communicating with Balfour Beatty
25 employees, rather than communicating with Balfour

1 Beatty authority and its representatives, all
2 with the purpose of undermining leadership on the
3 project and making the progress more difficult
4 and costly.

5 Do you have -- let me ask you this. Why
6 did Library Associates do things with the purpose
7 of undermining Balfour Beatty's leadership on the
8 project? Why would -- why would a developer do
9 that, or why would this developer do that?

10 A. I'm not sure, sir. I can't read minds.

11 Q. Okay. But you do know that you think
12 Mike Bennett, Kim Bennett Brown and everybody at
13 work, or anybody other than Balfour Beatty's
14 purpose was to sabotage the building of their own
15 hotel?

16 A. I don't see sabotage in there.

17 Q. All right. Let's go to 14. Failure of
18 the designer to conform with applicable laws,
19 right?

20 A. Yes, sir.

21 Q. What laws were violated by the designer
22 in this case?

23 A. The elevators had to be -- all the
24 lighting in the lobbies had to be changed to come
25 on during emergencies.

1 Q. Right.

2 A. And it wasn't. I mean, as we went
3 through our inspections, things came up that
4 weren't correct in accordance with the law of
5 that particular -- the codes.

6 Q. I would like you to list all of them
7 that you know of.

8 A. The elevator lighting; the fire curtains
9 on the elevator front on level 9 because of the
10 positions on two different ones; the pool level;
11 the exhaust for the pool equipment room, as well
12 as make up air for the equipment room.

13 Q. Okay.

14 A. And closing off the discharge of those
15 possible fumes onto the pool side; fire
16 extinguisher cabinet locations, we moved some of
17 those.

18 Q. Okay.

19 A. I'm just trying to remember all of them.

20 Q. Sure. Well, it's a pretty serious
21 allegation, isn't it? I mean, you're alleging
22 that the architect violated the law. That's a
23 pretty serious allegation.

24 A. Violated the codes, yes.

25 Q. That's a pretty serious allegation. I

1 would like to know all that you know of.

2 A. That's all that I can remember right
3 now.

4 Q. Okay. Now, of the \$22,452,282.51, how
5 much of that relates to damages caused by the
6 failure to conform with applicable laws?

7 A. I don't have that break out.

8 Q. Well, is it 22 million dollars? Did
9 y'all lose 22 million dollars because you didn't
10 have the right lights in the elevator?

11 A. No, sir.

12 Q. Did you lose 20 million dollars?

13 A. I don't know, sir.

14 Q. Did you lose a million dollars?

15 A. I don't have that break out.

16 Q. Did you lose a hundred dollars?

17 A. I don't have that break out.

18 Q. You've been in the construction business
19 for 40-some-odd years. Can you give me your best
20 estimate as to how much additional cost was
21 actually incurred by Balfour Beatty as a direct
22 and approximate result of the code violations you
23 have listed or any other code violations that you
24 may know of?

25 A. The time and the money, probably

1 somewhere between 100 and \$150,000.

2 Q. \$150,000?

3 A. I'm just guessing.

4 Q. Okay. Good. A guess is fine. Did you
5 file a notice of claim during the job for that
6 \$150,000?

7 A. No, sir.

8 Q. You did not?

9 A. No, sir.

10 Q. Well, aren't you required under the
11 contract to bring to the architect's attention a
12 code violation if you discover it?

13 A. We did.

14 Q. But you never asked for any money
15 because of it?

16 A. We were trying to close out the job, get
17 it finished and turn it over.

18 Q. Right. I know you were trying to close
19 out the job. But the answer to my question is,
20 no, you didn't ask for any money because of it,
21 correct?

22 A. We put money into CCD cause of it.

23 Q. How about ordinances? Did the
24 architect -- what ordinances did the designer
25 fail to conform with?

1 A. I don't recall, sir.

2 Q. Okay. And what about codes? Is that
3 what we've already discussed?

4 A. Yes, sir.

5 Q. Would that be a building code?

6 A. Yes, sir.

7 Q. Rules and regulations. Now, what rules
8 are you talking about? Whose rules?

9 A. I'm not sure, sir.

10 Q. What regulations?

11 A. Regulations would be the codes.

12 Q. I will go back to the codes again.

13 A. Yeah.

14 Q. Now, just that one allegation 14, how --
15 and this is -- weren't you supposed to send your
16 claims to the architect for review?

17 A. I believe we sent it to Jim Clements,
18 who was the owner's representative.

19 Q. But Jim Clements was only a messenger?
20 Was he going to take the letter and drive it down
21 to Atlanta and deliver it like an hourly
22 messenger boy?

23 A. I believe he did send it to the
24 architect, sir.

25 Q. Well, no, y'all sent him a copy.

1 There's no doubt about that. Y'all sent him a
2 copy. But you didn't send the direct claim,
3 right?

4 A. Yes, sir.

5 Q. Okay. And where in this contract does
6 it say you submit your claims to the owner's
7 representative, the messenger, as opposed to the
8 architect?

9 A. I would have to read it and find it.

10 Q. Well, did you read it before you signed
11 the letter that was drafted by somebody else?

12 A. I'm sure I did at the time.

13 Q. Okay. And since you did and you're sure
14 you did, then we should be able to look in that
15 contract, and it's going to say somewhere in that
16 contract, send your claims to the messenger or to
17 the guy that we have designated as our
18 representative. We're going to find that in the
19 contract, right?

20 A. I'm not sure.

21 Q. But you were sure when you wrote the
22 letter that that's what we would find?

23 A. I sent this to Jim Clements, yes.

24 Q. Okay. Now, you know the architect has
25 to review claims, whether you send it to him

1 directly or indirectly, and you sent it to him in
2 a copy, right?

3 A. Yes, sir.

4 Q. There's no doubt that he got it, right?
5 It's a small detail. But you knew the architect
6 was going to be reviewing the claim and was going
7 to have to make a decision, correct?

8 A. Yes, sir.

9 Q. How would the architect know, based on
10 what is in this letter, what applicable laws,
11 ordinances, codes, rules or regulations this
12 architect allegedly failed to include in his
13 design? How would he know what you were talking
14 about?

15 A. Because he issued the changes to fix the
16 issues that we had with the elevators and the
17 pool.

18 Q. Right. That's true. But you didn't put
19 it in the letter. You didn't tell him in the
20 letter that the architect made a massive error.
21 Okay. A massive error, violated laws, rules,
22 codes, violations, in the elevator.

23 So at least he could look at it and go
24 back and say, yeah, you know, he's right. We did
25 make a mistake. Now, it ain't worth 22 million

1 dollars, and it might not be worth but \$50.

2 But how is an architect supposed to
3 review a claim and be fair to both sides if the
4 person making the claim doesn't give him
5 sufficient information to arrive at a reasonable
6 decision?

7 MR. HILDEBRAND: Objection, Your
8 Honor, calls for speculation.

9 THE COURT: Overruled.

10 THE WITNESS: That's why it's
11 preliminary.

12 BY MR. BUNDY:

13 Q. Oh, that's why it's preliminary?

14 A. Yes, sir.

15 Q. So he's supposed to ignore it and wait
16 for the next one to come? What's he's supposed
17 to do with a preliminary claim?

18 A. He's supposed to review it, and if he
19 needs more documentation, ask for more
20 documentation.

21 Q. Gotcha. Okay. Now, isn't it true that
22 in this contract, the burden, the job to prove
23 the claim is on the party making the claim?

24 A. Yes, sir.

25 Q. Okay. So this is not some sort of a

1 Russian deal or Chinese show trial where you are
2 presumed guilty and then you have to come in and
3 prove innocence. In fact, it's the same burden
4 we have in this Courtroom. You want 22 million
5 dollars, it's up to you to prove you're entitled
6 to 22 million dollars, right?

7 A. Yes, sir.

8 Q. It's not up to us to look at some
9 numbers all pulled out of the air and explain why
10 you're not entitled to it, is it?

11 A. These numbers weren't pulled out of the
12 air.

13 Q. Okay. 15, we can go past that. 16,
14 abandonment by the owner. Now, what does
15 abandonment mean?

16 A. To not do it.

17 Q. Okay. Of much, if not all, of the
18 administrative provisions of the contract, that's
19 what you said, right?

20 A. Yes, sir.

21 Q. All right. Exhibit 56 is in evidence.
22 It's the contract. Could you turn to it, please?

23 A. Which binder is that in, Mr. Bundy?

24 Q. It's 56, Mr. Simonton. I think that's
25 binder 2 of 5.

1 THE COURT: It's in the second
2 binder.

3 A. Yeah, here it is. Exhibit 56?

4 Q. Yes, Your Honor. I mean, yes,
5 Mr. Simonton. What do you need?

6 A. Well, I was opening up that binder. Go
7 ahead. I'm there.

8 Q. What I want to do is briefly just
9 compare the allegation to the contract. The
10 owner's abandonment of the contract by
11 selectively enforcing provisions only when the
12 circumstances may have been favorable to the
13 owner.

14 All right. If you turn -- and you can
15 certainly show anything else you want to, but
16 this is probably as good a place as any to start
17 with. If you look at the back of this -- towards
18 the back of the exhibit, where the 201 document
19 is, the A201. And if you would turn to page 21,
20 please. At the top of the page, it says, article
21 4, architect.

22 A. All right. I'm on page 21, 201.

23 Q. Now, page 21, 22, 23, 24, 25 contain the
24 provisions of article 4 entitled architect,
25 right?

1 A. Yes, sir.

2 Q. All right. I'd like you to tell us
3 every provision that was selectively abandoned.
4 No. No. No. I'd like you to tell me what
5 provisions you contend -- let's do it this way.
6 What contract provisions are you talking about?

7 And you just tell me. You don't need to
8 read them all out loud. If you could just list
9 them by number. What provisions are you
10 referring to that we -- whatever this means, the
11 owner's abandonment of the contract.

12 Let's start there. Are you saying the
13 owner just threw the entire contract out at some
14 point and didn't comply with it at all?

15 A. I don't believe it says that, no, sir.

16 Q. Pardon me?

17 A. I don't believe it says that.

18 Q. Okay.

19 A. I'm trying to find it.

20 Q. So you wrote it, and you had copied it.
21 So what I'm looking for is -- I'm trying to
22 represent my client. I'm trying to understand
23 what this case is about.

24 Please list for the Court every article
25 in this contract that you are talking about in

1 Exhibit 252, the letter January 25, 2019,
2 consolidated claim preliminary, paragraph 18 on
3 page 3 of that letter. And take your time.

4 A. You're talking about number 16, aren't
5 you, Mr. Bundy?

6 Q. Sir?

7 A. You're talking about number 16, right?

8 THE COURT: We were on 16.

9 BY MR. BUNDY:

10 Q. Yes, sir. Number 16. What numbers were
11 you referring to in the contract when you made
12 that statement? What numbers were you referring
13 to?

14 Because there's no numbers in the
15 letter, and presumably, I don't know that the
16 architect would know what paragraphs you were
17 talking about because this is the something the
18 owner did. I think the architect should have
19 been told which portions of this contract that
20 the money needed to be reviewed, what he's
21 abandoned?

22 MR. HILDEBRAND: Your Honor, I'm
23 not sure there's a question here. What was --

24 MR. BUNDY: The question is, what
25 contract provisions is he referring to in that

1 paragraph?

2 MR. HILDEBRAND: Your Honor, I
3 object. I think this is a waste of the Court's
4 time. If Mr. Bundy had wanted to have
5 specificity on these, he could have sent those
6 out on interrogatory and we could have answered
7 those.

8 But to take up the Court's time now and
9 this witness to review each aspect of the
10 contract and A201 to try to figure out on Court
11 time what elements there might be, that's what
12 you do during discovery. It's inappropriate to
13 conduct discovery during the trial.

14 THE COURT: All right. Let's take
15 five minutes. I will let him review it, and we
16 will go from there.

17 (A recess transpired.)

18 BY MR. BUNDY:

19 Q. All right, sir. Ready to go?

20 A. I believe I found some and, yes, sir.

21 Q. All I need is -- so we can move along
22 is, you just give me the number -- the paragraph
23 number by number, and we'll move along to another
24 topic.

25 A. 4.2.8.

1 Q. 2.8?

2 A. 4.2.8.

3 Q. 4.2.8. Okay.

4 A. Do you want me to read it?

5 Q. No. I just want the numbers.

6 A. 9.4.1.

7 Q. 9.4.1? Okay.

8 A. Yes, sir. 11.3.1 --

9 Q. 11.3.1. Okay.

10 A. And 11.3.1.3.

11 Q. And 11.3.1.3.

12 A. 11.3.1.5.

13 Q. 11.3.1.5. Okay. So the contract
14 provisions that you were referring to in this
15 letter of January 25, 2019, in evidence as
16 Exhibit 252, are they not? 4.2.18, right?

17 A. That's what I pointed out, yes, sir.

18 Q. Okay. 9.4.1?

19 A. Yes, sir.

20 Q. 11.3.1?

21 A. Yes, sir.

22 Q. 11.3.1.3?

23 A. Yes, sir.

24 Q. 11.3.1.5?

25 A. Yes, sir.

1 Q. Okay. Now, let's go back to the letter,
2 and let's go to -- I will call them
3 allegations -- item number 19 in Exhibit 252,
4 which reads as follows, does it not: Failure on
5 the part of the owner and its design consultants
6 to reasonably and with impartiality on the part
7 of the architect to interpret and administer the
8 contract documents.

9 Now, the part I want to focus on is the
10 reference to the architect. So the allegations
11 is that the architect did not act reasonably with
12 impartiality; is that correct? That's the
13 allegations?

14 A. Yes, sir.

15 Q. Okay. On what do you base that
16 allegation? What facts do you base that on?

17 A. I would have to go back there and review
18 the correspondence.

19 Q. Okay. So as you sit here today, you
20 can't give me a single example where the
21 architect did not act with impartiality and
22 reasonably?

23 A. The punch list.

24 Q. The punch list.

25 A. That's one that comes to my mind.

1 Q. Okay. Other than the punch list, what
2 else did they do that would -- in your opinion,
3 you believe that they did unreasonably and
4 without impartiality?

5 A. I would have to go back. I can't
6 recall.

7 Q. Now, this allegation obviously doesn't
8 include anything that the architect may have done
9 after this date, does it?

10 A. I don't believe this is in the time
11 period.

12 Q. Right. I guess what I'm asking you is,
13 you're not alleging here that in the future, the
14 architect is going to do something unreasonably
15 and without impartiality? You're just talking
16 about what he's done, in your opinion, up until
17 that date?

18 A. Well, he quit.

19 Q. Sir?

20 A. I said he quit.

21 Q. He quit?

22 A. He said his duties were resolved.

23 Q. I'll ask you that question in a minute.
24 We're going to get there. What I'm trying to
25 figure out, Mr. Simonton, is the allegations

1 you're making on January 25, 2019. And all I'm
2 asking you, are you taking the position January
3 25, 2019 that in the future the architect will
4 not be reasonable or act impartial?

5 A. I can't predict the future.

6 Q. Exactly. I just wanted to understand
7 that.

8 A. I wanted to understand the question.

9 Q. Because only thing that you could come
10 up with today about him being unreasonable and
11 impartial is his opinions on the punch list,
12 right?

13 A. That's all I can think of today without
14 reviewing the documents.

15 Q. In your opinion, he over-punched the
16 job?

17 A. He signed off on the project, that it
18 was complete.

19 Q. I get it. All right. Do you have any
20 evidence after January 25, 2019 that the
21 architect failed to act reasonably and
22 impartially?

23 A. He left the job on February 15, and we
24 had asked for mediation.

25 Q. Okay. And was that unreasonable and not

1 impartial when he left the job, as you say, in
2 February?

3 A. It doesn't leave anybody to -- I mean,
4 we're supposed to go through him for our
5 mediation. We're supposed to notify him.

6 Q. Okay. Gotcha. We'll go through that.
7 The next allegation is -- I want to strike that.
8 Let's move on. All right. In the closing, is
9 this your language in the closing?

10 A. No, sir.

11 Q. Okay. Is this language true? Balfour
12 Beatty and its subcontractors wish to resolve
13 this matter and these claims with the owner,
14 whether it be informally or through the dispute
15 resolution process prescribed by the contract
16 documents that were principally drafted by the
17 owner; is that true?

18 A. Yes, sir.

19 Q. Okay. What difference -- why did you
20 put in this letter, principally drafted by the
21 owner? What difference does that make?

22 A. It doesn't.

23 Q. Right, it doesn't. Because Balfour
24 Beatty was not required -- nobody held a gun to
25 the corporate head of Balfour Beatty and made

1 them sign this contract, did they?

2 A. I don't know if anybody held a gun to
3 Balfour Beatty.

4 Q. Nobody made y'all enter into this
5 agreement?

6 A. No, sir.

7 Q. Okay. And the agreement was reviewed by
8 your counsel, and it was signed, correct?

9 A. Yes, sir.

10 Q. And it has a dispute resolution process
11 in it, right?

12 A. Yes, sir.

13 Q. Do you contend that that language
14 regarding the dispute resolution process is
15 ambiguous, that you don't really know what it
16 means?

17 A. If you read it paragraph by paragraph,
18 you understand what it means, yeah.

19 Q. Right. But my point is that y'all were
20 able -- you say you're willing to -- you want to
21 go through the dispute resolution process
22 prescribed by the contract document. Does that
23 mean you want to follow the contract and go
24 through the dispute resolution process so you can
25 resolve the dispute?

1 25th day of January, 2019, right?

2 A. Yes, sir.

3 Q. And that's the exact same day that you
4 dated the letter to Mr. Clements, the one we were
5 looking at earlier, right?

6 A. Which one?

7 Q. The letter we were looking at earlier,
8 which was Exhibit 252.

9 A. Yes, sir.

10 Q. It's dated exactly -- it's dated the
11 same day as this lien?

12 A. Yes, sir.

13 Q. Yes?

14 A. Yes, it is the same day.

15 Q. Did the letter go out before or after
16 you filed the mechanic's lien?

17 A. I'm not sure.

18 Q. Okay. And did -- how did the language
19 get to you from the lawyer to put into the
20 Balfour Beatty letterhead? Were you delivered
21 some draft and then put that in the letterhead
22 and then added your numbers to it? Is that how
23 it went?

24 A. You're talking about this or --

25 Q. Yes, sir, the letter.

1 A. Yes, sir.

2 Q. That's how it happened. Okay. And the
3 lawyer also provided you with the draft of the
4 mechanic's lien, correct?

5 A. Yes, sir.

6 Q. You signed the letter. You didn't sign
7 it under oath, but you did sign the mechanic's
8 lien under oath?

9 A. Yes, sir.

10 Q. Now, the letter has a claim number of
11 \$22,452,282.51, correct?

12 A. Yes, sir.

13 Q. The mechanic's lien, however, is for
14 \$8,409,658.54, correct?

15 A. Yes, sir.

16 Q. What makes up the difference -- what is
17 the difference there? It would be roughly \$14
18 million. Where is -- what is that difference
19 made up of?

20 A. Subcontractor claims, I believe.

21 Q. The subcontractor claims. All right.
22 So you didn't file a lien, at least at this
23 point, for any of the subcontractors' claims?

24 A. No, sir.

25 Q. Even though the subcontractors billed

1 y'all, and y'all billed Library Associates,
2 right?

3 A. Subcontractor claims came in, and we
4 would pass those forward to them.

5 Q. But you didn't put them in this lien?

6 A. No, sir.

7 Q. Okay. Do you recall whether the
8 subcontractors told you they were going to
9 subsequently file another 14 million dollars
10 worth of liens?

11 A. No, sir.

12 Q. How did you know -- did you know they
13 were going to file liens at all?

14 A. I didn't ask them if they were filing
15 liens. I did see the liens once they were filed.

16 Q. Right. But before they filed them, they
17 didn't confer with you?

18 A. Not with me personally, no, sir.

19 (DFT. EXH. 45 was marked for
20 identification.)

21 Q. All right. Let's look at the next
22 document. All right. Mr. Simonton, I want to
23 hand you now, I believe, what's been marked for
24 identification as Defendant's Exhibit 45,
25 correct?

1 A. Yes, sir.

2 Q. Can you identify that document?

3 A. It is a certificate -- notice of
4 certificate of mechanic's lien from Gulf Stream
5 Construction Company.

6 Q. Okay. And what day is it dated? It's
7 on the last page.

8 A. February 4, 2019.

9 Q. February the 4th?

10 A. Yes, sir.

11 Q. So roughly 10 days after your lien of 8
12 million dollars, Gulf Stream files a lien for
13 \$119,000?

14 A. Yes, sir.

15 Q. And they were a subcontractor to Balfour
16 Beatty?

17 A. Direct subcontractor.

18 Q. Did y'all bond off this lien?

19 A. No, sir.

20 MR. BUNDY: Your Honor, I move to
21 introduce this into evidence.

22 MR. HILDEBRAND: No objection.

23 THE COURT: Without objection.

24 (DFT. EXH. 45 was received in
25 evidence.)

1 BY MR. BUNDY:

2 Q. If you would, let's turn to Exhibit 292.

3 A. 292?

4 Q. Yes, sir. Have you ever seen this
5 letter before?

6 A. This transmittal?

7 Q. Yes. It's October 19, 2018. It's to
8 Ms. Brown from Starcevic.

9 A. 292?

10 Q. You are copied --

11 THE COURT: Hold on. We're off
12 somehow. The one I'm looking at is dated
13 February 1 of '19. 292?

14 MR. MCDONALD: 292. 2-9-2. It
15 should be pay app 45.

16 THE WITNESS: It is pay app 45. It
17 has got a trasmittal.

18 THE COURT: A transmittal letter?

19 THE WITNESS: Yes.

20 MR. BUNDY: It's pay app 45, right?

21 THE COURT: Okay. All right.

22 BY MR. BUNDY:

23 Q. And who signed that on behalf of Balfour
24 Beatty?

25 A. I believe that's Nick Starcevic's

1 signature.

2 Q. Okay. And it's signed under oath; is
3 that correct? Before Nicholas Weg -- something,
4 W-E-G-E-M-E-R?

5 A. Wegemer.

6 Q. Yeah. Who is that? Do you know?

7 A. He is a senior project manager that
8 works for Balfour Beatty.

9 Q. Was he in Charleston when he signed
10 this?

11 A. Yes, sir.

12 Q. And are you familiar with the
13 certificate that Balfour Beatty swears is true,
14 to the left of his notary?

15 A. Yes, sir. I've read that, yes.

16 Q. And as far as you know, was
17 Mr. Starcevic's statement true when made on
18 January 28, 2019? Actually, it was made on --
19 the statement was made on the 28th day. It was
20 scribed and sworn before me, this 28th day of
21 January, 2019. That was the day it was sworn to,
22 right?

23 A. Yes, sir.

24 Q. Okay. All right. And what is the
25 amount that is being requested?

1 A. \$2,470,474.72.

2 Q. Okay. And there was, according to this,
3 a balance to finish plus retainage of
4 \$276,692.54. That's at least what the
5 certificate says, right?

6 A. That's what it says on the front, yes,
7 sir.

8 Q. So on January the 28th, three days after
9 you certified that you were owed 8 million
10 dollars in a mechanic's lien, three days after
11 you sent a letter saying you were owed 22 million
12 dollars in your claim letter, Starcevic submits a
13 pay request, number 45 to the owner for the
14 period from December 1, 2018, ending 12/31/2018
15 and swears under oath that the current payment
16 then due is \$2,470,474.72; is that correct?

17 A. That's what it says.

18 Q. All right. So within the space of the
19 25th, the 26th, the 27th, the 28th -- in the
20 space of four days -- four days after substantial
21 completion, which I assume y'all contend is the
22 end of December 2018, correct?

23 A. Yes, sir.

24 Q. Within the space of four days, three
25 weeks after substantial completion, you ask my

1 client, or tell my client, that he either owes
2 you 22 million dollars, 8 million dollars.

3 But then on the document, everybody
4 agreed and that you agreed with me yesterday, was
5 the only way you could get paid on this job. You
6 sent a pay request to the architect, sworn to be
7 the truth, and said what you were entitled to on
8 that day was \$2,470,474.72. That is correct, is
9 it not?

10 A. That's what it says, yes, sir.

11 Q. Okay. Which one are we supposed to pay?

12 A. You have to back up to 43, 44 and 45,
13 execute all the change orders and the OCOs, and
14 that would give you to the value.

15 Q. All right. Do you see the architect's
16 certification anywhere on this document?

17 A. No, sir.

18 Q. Sir?

19 A. No, sir.

20 Q. So therefore, this money was not
21 due because the -- and still is not due because
22 the architect has never certified a pay request?

23 A. That's correct.

24 Q. Okay. And this was the last pay request
25 y'all ever submitted to the architect?

1 A. Yes, sir. I don't believe that 46
2 exists.

3 Q. What y'all did is submit no more pay
4 requests, shut down our access to the Egnyte
5 site, and filed a lawsuit, right?

6 A. I'm not sure when the lawsuit was filed.

7 Q. We're getting ready to get to that.
8 There you have it.

9 THE COURT: All right. Before you
10 get there.

11 MR. BUNDY: Sir?

12 THE COURT: Before you get there,
13 if I'm not mistaken, we kept this out of
14 evidence. Do you want it into evidence?

15 MR. BUNDY: What's that?

16 THE COURT: 292.

17 MR. BUNDY: Sure.

18 THE COURT: I was going to let you
19 make that motion.

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

22 THE COURT: All right. It was kept
23 out because -- on the basis that it had not been
24 signed by the architect as a certified pay
25 request. But it's been used --

1 MR. BUNDY: But I'm offering it for
2 a different purpose now.

3 THE COURT: I understand that.
4 It's in evidence.

5 MR. BUNDY: Thank you.

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

8 (DFT. EXH. 46 was marked for
9 identification.)

10 BY MR. BUNDY:

11 Q. Exhibit 46 for identification. Can you
12 identify Exhibit 46 for the record?

13 A. It's a notice of certificate of
14 mechanic's lien from Precision Walls.

15 Q. And when was it filed, sir?

16 A. I believe January 31st, 2019.

17 Q. And how much was it for?

18 A. \$1,236,284.65.

19 Q. Was it bonded off?

20 A. No, sir.

21 Q. No?

22 A. No, sir.

23 MR. BUNDY: I move to introduce it
24 into evidence, Your Honor.

25 THE COURT: Defendant's 46, I will

1 allow it.

2 MR. BUNDY: Thank you.

3 (DFT. EXH. 46 was received in
4 evidence.)

5 (DFT. EXH. 47 was marked for
6 identification.)

7 BY MR. BUNDY:

8 Q. I hand you now what's been marked as
9 Exhibit 47 for identification, and I ask you to
10 identify this document for me, please.

11 A. This is a notice of certificate of
12 mechanic's lien, Bernhard MCC.

13 Q. When was it filed?

14 A. I believe the 5th day of February, 2019.

15 Q. Okay. And how much is it for?

16 A. \$6,539,992.14.

17 Q. Did y'all bond this one off?

18 A. No, sir.

19 MR. BUNDY: Your Honor, I move to
20 introduce this exhibit into evidence.

21 THE COURT: In evidence.

22 (DFT. EXH. 47 was received in
23 evidence.)

24 (DFT. EXH. 48 was marked for
25 identification.)

1 MR. BUNDY: Did I give you a copy?

2 THE COURT: Yeah. I got one.

3 BY MR. BUNDY:

4 Q. I hand you now what's been marked as
5 Exhibit 48 for identification purposes. Can you
6 identify Exhibit 48?

7 A. Yes, sir. It's a letter from Library
8 Associates dated February 10, 2019, to Mr. Pat
9 Dean.

10 Q. Are you copied on the letter?

11 A. Yes, sir.

12 Q. Does it say, from Ms. Kimberly Brown,
13 authorized agent of Library Associates via
14 certified mail. Dear Mr. Dean, please accept
15 this letter as official notice that Library
16 Associates, LLC, is in receipt of the
17 above-referenced mechanic's lien dated February
18 5, 2019.

19 The reference is Bernhard MCC versus
20 Library, the lien we just looked at for 6 and a
21 half million dollars. In accordance with section
22 9.3.1.2 of AIA 201 of the contract documents for
23 hotel at Marion Square, parentheses, project
24 between Library Associates, LLC, parentheses,
25 Owner, and Balfour Beatty Construction, LLC,

1 construction manager. The contractor shall
2 immediately bond such lien in accordance with
3 applicable law or otherwise, cause such lien to
4 be discharged at the contractor's sole expense.

5 Now, if you need to, you can turn to the
6 contract, I believe, which is Exhibit 56, and I
7 would ask you to confirm that, in fact, section
8 9.3.1.2 of the AIA 201, a portion of the contract
9 between these parties, in fact, does require that
10 Balfour Beatty Construction Company, as requested
11 by Ms. Brown, bond off the BMCC lien?

12 MR. BUNDY: Your Honor, I move to
13 put this in evidence while he is looking at it.

14 THE WITNESS: You asked me to look
15 at it.

16 THE COURT: All right. Without
17 objection.

18 (DFT. EXH. 48 was received in
19 evidence.)

20 THE WITNESS: 9.3.1.2. I'm sorry.
21 I'm on 133.

22 BY MR. BUNDY:

23 Q. The top of page 34.

24 A. That's what I'm looking at. Okay. I
25 read it.

1 Q. All right. Does it require, under the
2 terms of the contract, that Balfour Beatty bond
3 off the BMCC lien for 6 point something million
4 dollars that we just put in evidence?

5 A. Yes, sir. It basically states that,
6 sir. I understand.

7 Q. It basically what?

8 A. In accordance with 933 A201.

9 Q. Yeah. When this -- she's demanding that
10 y'all bond it off. She's referring to a contract
11 provision, saying you're obligation to bond it
12 off. That's what the contract provision says,
13 correct?

14 A. Yes, sir.

15 Q. And you didn't do it, did you?

16 A. No, sir.

17 Q. Okay. So that would be a breach of the
18 contract between Balfour Beatty and Library
19 Associates?

20 MR. HILDEBRAND: Objection, Your
21 Honor. Calls for a legal conclusion. And he's
22 not an employee of Balfour Beatty. I think it's
23 an improper question.

24 THE COURT: I'm going to --
25 overruled. Go ahead and ask him. If he can

1 answer it, he can answer it.

2 MR. BUNDY: Sir?

3 THE WITNESS: Ask the question
4 again.

5 THE COURT: You can ask it again.

6 MR. BUNDY: Ask it again?

7 THE COURT: Yes.

8 BY MR. BUNDY:

9 Q. The failure of Balfour Beatty
10 Construction to bond off the Bernhard lien as
11 requested by Ms. Brown on February, 10, 2019,
12 which references section 9.3.1.2 of the
13 contract -- Balfour Beatty's failure to bond off
14 that lien was not consistent with the terms of
15 the agreement between Balfour Beatty and Library
16 Associates, was it?

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

19 THE COURT: Objection noted.
20 Overruled. Go ahead.

21 THE WITNESS: That's what it says,
22 that the owner also has a right to bond off the
23 lien within 14 days.

24 BY MR. BUNDY:

25 Q. And you didn't do it?

1 A. No. But the owner has the right to bond
2 off the lien within 14 days, and subtract those
3 monies from the contractor.

4 Q. It says, if the contractor fails to bond
5 off such lien within 14 days, the owner may bond
6 off such lien by statutory cash and deposit it.
7 But let's read above it. Let's read the whole
8 thing.

9 With each application for payment,
10 contracts are issued --

11 (Reporter interruption.)

12 Q. -- verifying that all parties submitting
13 applications for payment have been or will be
14 paid and entitled to all work billed for under
15 the application as passed to the owner.

16 That's what it says, right?

17 A. Yes, sir.

18 Q. All right. And y'all put into evidence,
19 I believe, in one exhibit, all of the lien
20 waivers that y'all filed when you put in for a
21 pay request, right? The conditional lien
22 waivers?

23 A. Yes, sir.

24 Q. So that was -- you did that to comply
25 with this provision, right?

1 A. It's a requirement of the contract to
2 put in that lien waiver.

3 Q. Right. Well, let's look at the next
4 requirement. If any subcontractor -- was
5 Bernhard MCC a subcontractor to Balfour Beatty on
6 this job?

7 A. Yes, sir.

8 Q. Sub-subcontractor labor or materials,
9 labor or supplier of materials files a lien or
10 notice for claim for unpaid labor or materials
11 against the owner's property.

12 Did Balfour Beatty's subcontractor
13 Bernhard MCC file a lien of claim for unpaid
14 labor, materials against the owner's property on
15 this job?

16 A. Yes, sir.

17 Q. The contractor agrees -- and the
18 contractor would be Balfour Beatty, right?

19 A. Yes, sir.

20 Q. To immediately -- and what does
21 immediately mean to you?

22 A. Right then.

23 Q. Bond such lien in accordance with
24 applicable law or to otherwise cause such lien to
25 be discharged at the contractor's sole expense,

1 so long as the owner is not in default of payment
2 of any uncontested amount, and such nonpayment is
3 the cause for the nonpayment to the
4 subcontractor.

5 Now, we've established that there were
6 no unpaid certified pay requests due at the time
7 this lien was filed, correct?

8 MR. HILDEBRAND: Objection, Your
9 Honor. It's a misstatement of -- he's conflating
10 the terms of uncontested amount is not the same
11 as whether there are liens that have been filed.
12 I think it's a conflation. I think it's
13 confusing to the witness, and I would ask that it
14 be rephrased.

15 THE COURT: All right. Overruled.
16 Go ahead.

17 MR. BUNDY: Thank you, Your Honor.
18 BY MR. BUNDY:

19 Q. Is that true or not?

20 A. I'm trying to remember, but I believe
21 that the architect said there was 1.5 million
22 left over in uncontested amounts.

23 Q. The architect said that in an e-mail,
24 right? Or a letter, right? Y'all put it in
25 evidence, whatever it was?

1 A. Yes, sir.

2 Q. But let's look at the contract --
3 e-mails are not contract documents, are they?

4 A. It says in the contract, you can use
5 e-mails (inaudible) on the project.

6 Q. Are e-mails listed as contract documents
7 and the description of contract documents in this
8 contract? Yes or no?

9 A. No.

10 Q. No. But applications and certificates
11 for payment are contract documents, are they not?

12 A. Yes, sir.

13 Q. Okay. Let's look again then at Exhibit
14 292, which we just went over.

15 A. Yes, sir.

16 Q. It's application for payment number 45.
17 It was submitted on January 28th, 2019, and it
18 has not been certified for payment by the
19 architect.

20 A. No, sir, it hadn't.

21 Q. And that's the last pay request y'all
22 submitted?

23 A. Yes, sir.

24 Q. And there were no preceding pay requests
25 that were certified that haven't been paid,

1 correct?

2 A. I believe 43.

3 Q. Was it certified?

4 A. Yes, sir.

5 Q. And it's not been paid?

6 A. No, sir.

7 Q. What about decertified? Didn't we go
8 over this morning that 43 was decertified?

9 A. Yes, sir.

10 Q. And it was decertified after it was
11 certified, correct?

12 A. I believe so, yes.

13 Q. It wasn't decertified and recertified.
14 It was certified and decertified, so it was not
15 certified. 43 was not certified, was it?
16 Ultimately, 43 was not certified?

17 A. It was -- ultimately, it was
18 decertified.

19 Q. 44 was not certified?

20 A. No, sir.

21 Q. 45 was not certified?

22 A. No, sir.

23 Q. And you didn't submit any more pay
24 requests after this one?

25 A. No, sir.

1 Q. Okay. So let's read it again.

2 Contractor agrees to immediately bond
3 such lien in accordance with the applicable law
4 or to otherwise cause such lien to be discharged
5 at the contractor's sole expense, so long as the
6 owner is not in default of the payment of any
7 uncontested amount, and such nonpayment is the
8 cause for the nonpayment to the subcontractor,
9 right?

10 A. Yes, sir.

11 Q. Okay. The contractor shall not be
12 relieved of its obligation to bond off liens even
13 if the contractor disputes the obligation to pay
14 the lienholder, correct?

15 A. That's what it says.

16 Q. Did y'all dispute the obligation to pay
17 BMCC? Because they also claim that you owed them
18 that same amount of money under the subcontract,
19 right?

20 A. We didn't receive the pay application
21 from them. We received --

22 Q. You didn't get a pay application?

23 A. I mean, we got a claim.

24 Q. Okay. So when y'all don't get a pay
25 application from the subcontractor, y'all don't

1 have to pay them, but if y'all don't send us one,
2 we've got to send you money anyway? Is that the
3 way it works?

4 A. We sent you pay applications.

5 (DFT. EXH. 49 was marked for
6 identification.)

7 Q. Okay. All right. Mr. Simonton,
8 Defendant's Exhibit 49 for identification, sir.

9 A. Okay.

10 Q. Do you recognize this e-mail from Buck
11 Lindsay to you?

12 A. Yes, sir.

13 Q. You're David, right?

14 A. Yes, sir.

15 Q. David, yesterday Kim Brown transmitted
16 liens to those addressed here that have been
17 filed on the Bennett Hotel by Gulf Stream,
18 Bernhard, and Precision Wall. They further
19 complicate our already complicated need to reach
20 project closeout. How do you propose to address
21 them?

22 Also, I have not heard back from you on
23 my e-mail to you of February 8, 2019, asking for
24 specific information to be completed on the
25 proposed matrix needed for me to make an initial

1 determination on the date of substantial
2 completion. Did you get that e-mail?

3 A. I believe I did, yes.

4 MR. BUNDY: Your Honor, I move to
5 introduce it into evidence.

6 THE COURT: Any objection?

7 MR. HILDEBRAND: No objection.

8 THE COURT: Without objection.

9 (DFT. EXH. 49 was received in
10 evidence.)

11 BY MR. BUNDY:

12 Q. All right. I hand you now a document
13 entitled, Balfour Beatty Construction, LLC,
14 plaintiff, versus Library Associates, LLC, and
15 Metropolitan Life Insurance Company, a New York
16 corporation, summons, 2009-CP-10-1108. What is
17 the date of this summons?

18 A. March 5th, 2019.

19 Q. Okay. And if you turn to the next page,
20 it says, complaint nonjury referral to
21 Master-in-Equity requested. Do you see that?

22 A. Yes, sir.

23 Q. Now, this was transmitted by the letter
24 on the back of these documents of March 5th by
25 Mr. Hildebrand; is that true?

1 A. Yes, sir.

2 Q. Okay. And if you turn one more page
3 back to Exhibit B, it's a copy of a Balfour
4 Beatty letter dated January 29, 2018. Do you see
5 that?

6 A. Yes, sir.

7 Q. Who is -- who wrote that letter?

8 A. My signature is on it.

9 Q. Sir?

10 A. My signature is at the bottom.

11 Q. It's your signature, but you didn't
12 write the letter, did you? I mean, you didn't
13 draft this letter? Or did you? I'm just asking
14 you.

15 A. I was trying to remember.

16 Q. If you don't remember, that's fine, too.

17 A. I can't remember.

18 Q. And was this letter sent out under your
19 contractor -- wearing your contractor hat, or was
20 it sent out wearing your litigation support hat?

21 A. I'm not sure.

22 Q. Sir?

23 A. I'm not sure what I was doing on that
24 day.

25 Q. And what the letter says is -- it's to

1 Mr. Clements. Again, he is the messenger, right?

2 A. I don't know. You keep calling him
3 that.

4 Q. I'm just using Mr. Starcevic's
5 characterization.

6 Dear Mr. Clements, Balfour Beatty
7 Construction, LLC, has expended labor, services,
8 and materials general contractor for the hotel at
9 Marion Square under contract with Library
10 Associates and is currently owed \$8,409,658.54,
11 as witnessed by the attached verified statement
12 of account.

13 Demand is hereby made for payment of
14 \$8,409,658.54 as provided by South Carolina code
15 section 27-1-15 as amended. Do you know what
16 that code section references?

17 A. No, sir. I'm sure I looked it up that
18 day.

19 Q. Okay. All right. And you sent a copy
20 to Mike Bennett via certified mail, right?

21 A. Yes, sir.

22 Q. Do you know when the hotel opening was?

23 A. I believe they had a soft opening on the
24 27th of January.

25 Q. Okay. Do you know if there was a party

1 on March the 5th at Mr. Bennett's Hotel?

2 A. I don't know that, no, sir.

3 Q. You don't know?

4 A. I don't know, no, sir.

5 Q. Okay. So you wouldn't know whether or
6 not on the very day you filed a -- how much are
7 y'all looking for in this lawsuit? I think we
8 can find that somewhere in here. Yeah, here it
9 is. Look at the last page. Yeah. What is page
10 2?

11 Well, let's start with the certificate
12 of mechanic's lien. I think we can -- the
13 certificate of mechanic's lien is the one we
14 previously looked at.

15 So on January 25th, filed a lien for
16 \$8,409,658.54. And then on March 5, which would
17 be page 13, you sought to foreclose that lien,
18 and you asked for additional -- and you asked for
19 attorney's fees and costs, right?

20 A. Are you on page 13 of the front
21 document?

22 Q. Isn't it true --

23 A. Yes, sir. I see that now. I see it
24 now.

25 Q. Isn't it true, on the day this lien was

1 filed, Mike Bennett was having an opening party
2 at the Hotel Bennett for all of his guests,
3 friends, families, supporters, the mayor --
4 ex-mayor of Charleston were all there to
5 celebrate the opening of this hotel; isn't that
6 true?

7 A. I do not know if he was having a party
8 on March 5th.

9 Q. Was it coincidental or was it
10 intentional to file a lien foreclosure action on
11 my client's hotel on the day of his party, a
12 hotel he had been trying to get built for over 20
13 years under his family's name?

14 A. Not knowing that he was having a party,
15 I'm sure it was coincidental.

16 Q. Well, do you know whether Mr. Hildebrand
17 knew he was having a party or not?

18 MR. HILDEBRAND: Objection, Your
19 Honor. It calls for speculation.

20 THE COURT: I will sustain that.

21 MR. BUNDY: All right.

22 THE WITNESS: Does this have a
23 sticker on it?

24 MR. BUNDY: Your Honor, could I
25 get about --

1 THE COURT: No, that doesn't come
2 into evidence. That's the pleading.

3 MR. BUNDY: Sir?

4 THE COURT: That doesn't come into
5 evidence. It's a pleading, which answers the
6 issue that Mr. Hildebrand brought up earlier. I
7 wouldn't let him put in those --

8 MR. BUNDY: I hadn't offered it.

9 THE COURT: No, I realize that. He
10 was asking for it.

11 THE WITNESS: It didn't have a
12 sticker on it. I just wanted to make sure.

13 MR. BUNDY: Do you mind if I take
14 five minutes to sort of regroup? I might be able
15 to wind it up.

16 THE COURT: Okay. That will be
17 fine.

18 (A recess transpired.)

19 (DFT. EXH. 51 was marked for
20 identification.)

21 BY MR. BUNDY:

22 Q. All right, sir. This is Exhibit 51 for
23 identification. Is this a letter that Jim
24 Clements wrote to Buck Lindsay on March 14, 2019,
25 on which you were the first copy recipient?

1 A. Yes, sir.

2 Q. Do you remember getting this letter?

3 A. Yes, sir.

4 MR. BUNDY: Your Honor, I move to
5 put this letter into evidence as Exhibit 50, I
6 believe it is.

7 THE WITNESS: 51.

8 MR. BUNDY: 51?

9 THE COURT: 51. There was no 50,
10 for the record.

11 MR. BUNDY: Sir?

12 THE COURT: There was no 50, so
13 we're going to call it 51. And that's without
14 objection.

15 MR. BUNDY: So this is 51?

16 THE COURT: Did you mark -- is it
17 marked 50?

18 MR. BUNDY: It's already been
19 marked as 50, but I can change it. No, it's 51,
20 I'm sorry.

21 THE COURT: That's fine. Let's
22 call it 51. That's fine.

23 BY MR. BUNDY:

24 Q. I'm going to read it to you, and we'll
25 talk about it. Okay? Clements sends this letter

1 as a Matrix program management services. He was
2 the project representative, right?

3 A. Yes, sir.

4 Q. And he was the man that y'all sent the
5 consolidated claim to, right, that we discussed
6 earlier?

7 A. Yes, sir.

8 Q. So he's writing Buck Lindsay.
9 Dear Buck, re: BBC consolidated claim letter.
10 We're now talking -- this is his response to your
11 letter we discussed, right?

12 A. To Buck, yes, sir.

13 Q. Dear Buck, Library Associates is now in
14 receipt of documentation from the contractor
15 supporting the consolidated claim preliminary
16 submitted by Balfour Beatty Construction on
17 January 25, 2019. Winford Lindsay Architects was
18 carbon copied on the submittal.

19 Now, what he's referring to -- if you
20 can just put up here the documents, the claim
21 that we're talking about so the judge can see
22 what it is we're talking about?

23 So what we're talking about is
24 Defendant's Exhibit 11; then it's Exhibit 12;
25 then it's Exhibit 13, and here's the other piece

1 of it, Exhibit 14, right?

2 A. I think that's the rest of it.

3 Q. There were four pieces to it. This is
4 all of it.

5 A. I don't see a sticker on it. Yeah,
6 there it is.

7 Q. It fell off. 11, 12, 13 and 14 in front
8 of you looks to be about 13 inches and maybe
9 seven-sixteenths or something. So that's what he
10 is talking about. Given the extent of documents
11 provided by the contractor. He's talking about
12 this right here?

13 A. Yes, sir.

14 Q. You would agree that's an extension of
15 the documents, would you not?

16 A. Quite a bit.

17 Q. And in fact, you were doing your
18 litigation support at this point in time. I
19 think you said earlier yesterday that in March,
20 80 percent of your time was in litigation
21 support?

22 A. I believe so.

23 Q. Okay. And you did this litigation
24 support for almost two years, right?

25 A. Year and a half, two years, yeah.

1 Q. At \$185,000 a year. So those two years,
2 roughly \$380,000 worth of salary you made while
3 providing litigation support, right?

4 A. I'm not sure what I made. I'd have to
5 look at my --

6 Q. Well, you were making -- you just said
7 yesterday about \$180,000?

8 A. Yeah.

9 Q. Can we say it would be at least \$360,000
10 salary you received while providing litigation
11 support?

12 A. Probably close to that.

13 Q. Okay. All right. And then, in addition
14 to that, there would be fringe benefits provided
15 as well, medical and all the things you would get
16 as a vice president?

17 A. All employees do.

18 Q. Right. But, I mean, that -- those are
19 benefits. Those are salary benefits. If
20 somebody was going to charge somebody, say, like
21 Library Associates, for your labor for those two
22 years, under the contract -- if it was done under
23 the contract, not only would Balfour Beatty be
24 entitled to what they pay you, but they would be
25 entitled to whatever they -- whatever fringe

1 benefits that they provided to you. That's part
2 of the cost of the work, right?

3 MR. HILDEBRAND: Objection, Your
4 Honor.

5 BY MR. BUNDY:

6 Q. Okay. Now, what he says is that, given
7 the extent of the documentation provided -- and
8 we've agreed it's extensive -- the owner requests
9 45 days to review the material and respond with
10 comments prior to ruling on your claim. Do you
11 consider that to be an unreasonable request?

12 A. No, sir.

13 Q. Because you're asking for 22 million
14 bucks. We ought to have a little bit of time to
15 look at it, you know?

16 A. Okay.

17 Q. By requesting additional time to review
18 the material, the owner in no way waives any
19 rights under the contract documents with regard
20 to contesting all portions of the contractor's
21 consolidated claim or any other claim. That's
22 not unreasonable, is it?

23 A. No, sir.

24 Q. I mean, he shouldn't be penalized for
25 reading your claim, right?

1 A. No, sir.

2 Q. Okay. The owner would request that you
3 direct the contractor to reestablish all folders
4 previously included in the shared document
5 control Egnyte site. Is that what he asked for,
6 right?

7 A. Yes. He asked the owner -- he asked the
8 architect to direct the contractor.

9 Q. You?

10 A. Yes.

11 Q. What he is saying is, huh, in order to
12 review this claim -- which is extensive -- I need
13 two things. I need another 45 days, and I need
14 access to the Egnyte site because it's a shared
15 document control file.

16 And he's saying this includes, but is
17 not limited to, access to the contractors or
18 subcontractors agreements, daily reports and
19 punch lists as the owner believes this
20 information to be pertinent to the evaluation of
21 contractor's consolidated claim. That's a
22 reasonable request, isn't it?

23 A. He requested it.

24 Q. Yeah. I mean, but it's reasonable,
25 right, to ask for those documents?

1 A. He's asking for them to get to -- he
2 could have asked for the documents.

3 Q. Sir?

4 A. He could have asked for the document.

5 Q. Well, but he is asking for access to the
6 Egnyte site.

7 A. He's asking the architect to direct us
8 to give them access to the Egnyte site.

9 Q. Right. Did the architect ask you to do
10 it?

11 A. I don't recall that he did.

12 Q. But you would have reviewed it because
13 you said yesterday, once you didn't get paid, you
14 took them off the Egnyte site and weren't going
15 to let him use it, right?

16 A. I don't know.

17 Q. Well, you'd apparently already done it
18 because he was asking you to get access?

19 A. Right.

20 Q. Okay. The owner submitted -- it says,
21 this includes, but not limited to, daily reports,
22 et cetera. The owner submits this request is
23 consistent with section 4.4.2 of the A201 and the
24 AOR -- that's the architects of records, right?

25 Architects of records' right to, one,

1 request additional supporting data from the
2 claimant or a response with supporting data from
3 the other party. The owner will await your
4 response pursuant to section 4.2.2 of the AIA
5 201.

6 And you were copied on this, so you knew
7 that he was asking the architect -- and
8 indirectly asking you to do it, right?

9 A. That's for the architect to do,
10 directly.

11 (DFT. EXH. 50 was marked for
12 identification.)

13 Q. Okay. All right. I hand you now
14 Exhibit 50 and ask you if you can identify this
15 letter you wrote to Sam Hadley. Do you recognize
16 this letter?

17 A. Yes, sir.

18 Q. And you wrote it?

19 A. I signed it.

20 Q. Sir?

21 A. I signed the letter, yes.

22 Q. You signed the letter, but you didn't
23 draft it, did you?

24 A. Not all of it, no, sir.

25 Q. What parts did you draft?

1 A. The last sentence.

2 Q. The last sentence?

3 A. Yeah.

4 Q. Okay.

5 MR. BUNDY: Your Honor, I move to
6 introduce this Exhibit 52 -- no, 50, excuse me,
7 50.

8 THE COURT: This is going to be 50?

9 MR. BUNDY: Yeah.

10 THE COURT: Exhibit 50 is
11 Mr. Simonton's letter. Did you want 51 in as
12 well?

13 MR. BUNDY: Yes, sir. I'm sorry.

14 THE COURT: All right. I will
15 grant that.

16 (DFT. EXH. 50 and 51 were received
17 in evidence.)

18 MR. BUNDY: Your Honor, can you see
19 it? You've got a copy of the letter, too.

20 THE COURT: Yes, I do.

21 BY MR. BUNDY:

22 Q. Okay. Let's go through your letter,
23 sir. It says, Dear Mr. Hadley. Do you know
24 whether Sam Hadley is a man or a woman?

25 A. I know now. She's a woman.

1 Q. Here she is in the back.

2 A. Yes, sir.

3 Q. Re: Hotel at Marion Square, notice of
4 project cost review response. Dear Ms. Hadley, I
5 am in receipt of your letter of April 22nd, 2019.
6 Now, what did she ask for in her letter?

7 A. I believe it was audit documents.

8 Q. Audits documents?

9 A. Yeah.

10 Q. For efficiency, this response will
11 incorporate the same definitional terms used in
12 your letter. Your request for documentation is
13 inappropriate for numerous reasons, to include,
14 but not limited to, those enumerated below.

15 First, the owner is in breach for
16 failure to pay Balfour Beatty, and as such, is
17 not entitled to any benefits of the contractor,
18 except as it might be able to prove in litigation
19 that has now been initiated. Is that what you
20 said?

21 A. That's what it says.

22 Q. Do you believe that to be true?

23 A. That's what it says.

24 Q. No. Do you believe it to be true,
25 accurate?

1 A. Yes.

2 Q. Okay. And you wrote this as a
3 litigation support person in April because that
4 was your full-time job in April 2019, was
5 litigation support, correct?

6 A. I believe so, yes, sir.

7 Q. Okay. At \$185,000 a year? Do you know
8 how much a paralegal makes a year?

9 MR. HILDEBRAND: Objection, Your
10 Honor. This ongoing commentary is --

11 MR. BUNDY: I'll withdraw it.

12 THE COURT: Sustained on that one.
13 Go ahead.

14 BY MR. BUNDY:

15 Q. Second, the mechanism for the owner to
16 obtain documentation as alluded to in the
17 preceding response is through the litigation that
18 is now pending. And you believe that to be true
19 as well?

20 A. Yes, sir.

21 Q. Third, the owner has waived its right to
22 receive the requested information for numerous
23 reasons. All right. Can you articulate those
24 numerous reasons for me?

25 A. It's the sentence below.

1 Q. Sir?

2 A. The sentence below.

3 Q. Finally -- no, no, no. This says,
4 third, the owner has waived its right to receive
5 the requested information for numerous reasons.
6 What are those numerous reasons?

7 A. I can't recall.

8 Q. You don't know as you sit here today?

9 A. No, not right now.

10 Q. Did you know any at the time?

11 A. I can't tell you if I did or not.

12 Q. If you knew him at the time, why didn't
13 you list them in the letter?

14 A. I can't recall why, if it's not in
15 there.

16 Q. Well, was it because they were just too
17 numerous? There were so many waivers of my
18 client's rights, that there was so many of them,
19 you couldn't list them all, right?

20 A. I can't tell you if there was or not.

21 Q. And since there was so many, you didn't
22 bother to list any, correct?

23 A. I don't see any here, no, sir.

24 Q. Okay. Finally, the request is untimely
25 as substantial completion was received on

1 constitute the entire claim?

2 A. At the time, yes, sir.

3 Q. Has the claim changed since then?

4 A. No, I don't believe so. I mean --

5 Q. Sir?

6 A. I'm looking at the date -- but, yeah,
7 that's the claim.

8 Q. You're looking for the date of it?

9 A. No, no, I said -- yeah, I mean, there's
10 nothing in the future in this. The date passed.

11 Q. But since that time, y'all have changed
12 this claim numerous times, haven't you?

13 A. I think the value has changed.

14 Q. The amount of money y'all want?

15 A. Yeah.

16 Q. The number of Benjamins you need?

17 A. Yeah.

18 Q. In your claim, do you get to 22 million
19 dollars? Are you able to take those binders and
20 add it all up and get to a 22 million dollar
21 number?

22 A. I believe it's in there, yeah.

23 Q. Okay. It's in there somewhere, right?

24 A. Yeah.

25 Q. Now, your work for two years as a

1 litigation support person, is that included in
2 the cost of the work that y'all are asking for on
3 this job?

4 A. I'm not sure. You would have to ask
5 Mr. Thompson.

6 Q. Now, do you know where in the contract
7 it provides that my client has to pay litigation
8 support against my client as a cost of the work
9 to build the Bennett Hotel?

10 A. I believe it's in there, yes, sir.

11 Q. So if we look at the cost of the work,
12 it's going to say, in addition to everything
13 else, the contractor is entitled to the cost of
14 litigation support personnel? Somewhere in there
15 it's going to say that?

16 A. I would have to read it.

17 Q. But if you're entitled to it, it should
18 be in there, shouldn't it? It should be in
19 there. We don't need to look for it now, but it
20 ought to be in there if you're asking for it?

21 A. I'm not sure we're asking for it. I'm
22 not sure. You have to ask Mr. Thompson what it's
23 in --

24 Q. Well, we will rely on Ms. Hadley or your
25 witness to tell us that. Did Starcevic work on

1 this claim with you?

2 A. He did at first. He did for a little
3 bit.

4 Q. Did Casey Thompson, the comptroller,
5 work on this claim for you?

6 A. As far as the numerical value, yes, sir.

7 Q. Okay. You said that you supplied daily
8 tickets to support your CCDs, right, construction
9 change directives? Y'all have provided the daily
10 records, right, or did you?

11 A. Daily records?

12 Q. Did Balfour Beatty supply daily tickets
13 to support the CCDs that you were directed to?

14 A. Yes, sir.

15 Q. Were those daily tickets kept on the
16 Egnyte site?

17 A. I believe they were, yes, sir.

18 Q. But after January 2019, my client would
19 have had no access to those daily tickets,
20 correct?

21 A. I'm trying to remember. I believe they
22 were sent over with the pay app, the actual
23 ticket -- copies of the ticket.

24 Q. Did you include daily tickets in your
25 four binders that support your claim, which

1 includes CCD?

2 A. I would have to look.

3 Q. Is your claim letter of 22.4 million
4 dollars a request for payment, or is it a request
5 to increase the guaranteed maximum price?

6 A. Request for payment.

7 MR. BUNDY: Thank you very much for
8 your time.

9 MR. HILDEBRAND: I've got quite a
10 few questions, Your Honor. It might make sense
11 to reorganize. It might be a good time to take a
12 break.

13 THE COURT: It's 12:20, so let's go
14 ahead and break. Let's come back at 1:45.

15 (A recess transpired.)

16 THE COURT: All right. Redirect,
17 Mr. Hildebrand?

18 MR. HILDEBRAND: Yes, sir.

19 THE COURT: All right.

20 MR. HILDEBRAND: Bear with me, just
21 one minute.

22 THE COURT: Sure.

23 REDIRECT EXAMINATION

24 BY MR. HILDEBRAND:

25 Q. All right. Mr. Simonton, are you ready?

1 35 of the contract. It's Exhibit 56. Do you
2 just want to read my copy?

3 A. No, I've got it right here. Okay. What
4 page?

5 Q. Pardon me?

6 A. Where did you go?

7 Q. I want to go to 9.5., the actual
8 paragraph that Jennifer Faulkinberry told you she
9 was referring you to, to withhold -- the decision
10 to withhold certification. Are you there?

11 A. I'm there.

12 Q. Doesn't the letter say, I recommend we
13 withhold certification pursuant to 9.5. That's
14 what the e-mail says, doesn't it?

15 A. Yes, sir.

16 Q. Okay. It doesn't say decertified, does
17 it?

18 A. No, sir.

19 Q. I used the word decertify as a term of
20 art. I guess I'm just not quite as articulate as
21 I should be. But Jennifer Faulkinberry was
22 pretty articulate. She referred to it exactly
23 like it's written in the contract.

24 Decision to withhold certification,
25 that's what this is described as in the contract.

1 Bill Bundy doesn't get to say what's in the
2 contract. It doesn't say decertification. I
3 apologize to you and the Court for using the bad
4 word. I want to use contract.

5 She told you they were going to decide
6 to withhold certification. She cited the
7 article, and she did it, didn't she? In that
8 e-mail, she did it?

9 A. Yes, sir.

10 Q. Okay. Now, what I want to talk about is
11 this bench notion about having players on the
12 bench, right, like this is some big football
13 game?

14 Whether or not things started a year
15 later and whether or not Mike Baumbach was on the
16 bench or whether or not Mike Bennett agreed to
17 pay or didn't agree to pay money, the truth is,
18 Baumbach showed up on that job a year later and
19 was there for six months until he got fired.
20 That's the truth, isn't it?

21 MR. HILDEBRAND: Your Honor, we're
22 passing the levels of the quorum we might use. I
23 just don't think it's -- I think this witness is
24 being harassed. He is elderly. I know he's got
25 12 stents in his heart. I just don't think it's

1 appropriate, and I think Mr. Bundy needs to lower
2 his tone.

3 THE COURT: Okay.

4 BY MR. BUNDY:

5 Q. I apologize to you. I was not aware of
6 your medical condition. Please accept my
7 apology.

8 Isn't it true that Mike Baumbach showed
9 up on this job as agreed in the request for
10 proposals -- as represented in the request for
11 proposals, and he was there for six months until
12 he was fired?

13 A. Yes.

14 Q. Okay. And Mike Bennett didn't have
15 anything to do with his firing, did he?

16 A. I'm not aware of what he got fired for.

17 Q. He was fired because of conflict within
18 the corporate office up in Charlotte, right?

19 A. I don't know. I really don't know.

20 Q. Okay. So the fact that they were
21 supposed to start in '14 and they started in '15
22 had absolutely nothing to do with any bench
23 concept or anything at all? Baumbach was
24 supposed to be there.

25 He showed up, and he got fired because

1 it was his duty in Charleston inside the
2 corporate offices, correct? Isn't that true?

3 A. I don't know when he was fired.

4 Q. But you know he showed up, and you know
5 he got fired six months later?

6 A. Yes.

7 MR. BUNDY: Okay. Now, let's go to
8 the -- could you put on the screen, sir, that
9 exhibit about Jennifer Faulkinberry on any of the
10 punch list stuff?

11 THE COURT: Defendant's 43?

12 MR. BUNDY: If you are in here, I
13 would like to respectfully request that you do --
14 Mr. Hildebrand, do you oppose that idea, that I
15 put something on the screen?

16 MR. HILDEBRAND: On this occasion,
17 I will --

18 MR. BUNDY: Pardon me?

19 MR. HILDEBRAND: On this particular
20 exhibit, I'll agree to that. But I don't agree
21 to you just carte blanche using our --

22 MR. BUNDY: No, no. I just want to
23 use it one time. I promise you, I'll never ask
24 you for another favor.

25 THE COURT: Defendant's No. 43?

1 MR. BUNDY: I'm referring to the
2 one that's Jennifer Faulkinberry complaining
3 about Mike Bennett.

4 THE COURT: Oh, that's 152, I'm
5 sorry. I'm sorry, 152. Yeah, sorry about that.
6 That is a Plaintiff's Exhibit, I'm sorry. If it
7 helps, I've read the deposition and saw what she
8 said. She backed off of the statement, if that
9 helps. But anyway, go ahead. You get to ask the
10 question.

11 BY MR. BUNDY:

12 Q. Right. What I want to ask you is, one
13 of the complaints that you made -- let's go to
14 Exhibit 252, please. Go to the paragraph, sir,
15 where you -- let's see. It relates to the
16 architect. Here we go. Failure on the part of
17 the owner and its design consultants to --
18 failure on the part of the owner and its design
19 consultants, to reasonably, with impartiality on
20 the part of the owner -- can you find it?

21 A. I'm right there at 19.

22 Q. Pardon me?

23 A. 19.

24 Q. 19.

25 A. Do you want to him to find it?

1 Q. No. I want him to put the letter --

2 MR. HILDEBRAND: 152 or 252?

3 THE COURT: Yeah, we switched gears
4 on you. I'm not sure this is in response to what
5 they went into. What's the question?

6 BY MR. BUNDY:

7 Q. The question is this: You put up an
8 e-mail where the architect was being critical of
9 the owner, saying that he was punching the rooms
10 and she couldn't figure it out, right?

11 And your lawyer asked you to go over it,
12 so I assume it was supposed to be helpful to
13 y'all, right? Do you remember the e-mail we just
14 went over?

15 A. Yes, sir.

16 Q. Okay. Now, do you consider her
17 statement in the e-mail that the -- essentially,
18 which she later retracted in her deposition, but
19 do you consider that statement in an e-mail where
20 she complains about her owner's activities as not
21 acting with impartiality to interpret and
22 administer the contract documents.

23 It seems like that's exactly what she's
24 doing. She's taking the contractor's side on
25 that issue. Are you unhappy with that e-mail?

1 A. No, sir.

2 Q. Okay. So the decisions that she makes
3 that y'all don't like, she's impartial and
4 improperly active. However, when you do like it,
5 she's being perfectly impartial and then doing
6 the right thing.

7 So y'all pick and choose when you like
8 the architect's conduct, correct? You like some
9 of it; you don't like others. I'm sure
10 Mr. Bennett doesn't like that e-mail. Maybe he
11 feels like he wasn't being treated impartially
12 and fair. But you know what? We're willing to
13 live with the contract.

14 A. (No audible response.)

15 MR. BUNDY: Okay. I believe that
16 does it for me. Thank you, sir. Sorry I yelled
17 at you.

18 THE WITNESS: That's all right.

19 THE COURT: Mr. Simonton, I hate to
20 tell you this, but I've got a couple of questions
21 for you.

22 THE WITNESS: Almost.

23 THE COURT: You're close. The
24 first one has to do with the Egnyte system. Can
25 the owner upload or alter documents into that

1 system, or is that strictly under the control of
2 the contractor?

3 THE WITNESS: I'm not sure what
4 rights they have, but as an administrator, you
5 can upload, alter documents --

6 THE COURT: Right.

7 THE WITNESS: -- and download. We
8 had a file share outbox that they could upload,
9 you know, submittals in and things like that, but
10 I believe they could upload them. As far as
11 altering documents, I don't believe that he can
12 alter documents.

13 THE COURT: Okay. All right. So
14 they could have gone online, they could have
15 looked. They couldn't change anything, but they
16 could add is what you're telling me?

17 THE WITNESS: Yeah. And they can
18 download documents.

19 THE COURT: And, of course, they
20 can download them, right, if they can see them,
21 right?

22 THE WITNESS: Yes, sir.

23 THE COURT: Okay. All right. That
24 was one question, and the other question is back
25 in the contract. It's on the page 17 of Exhibit

1 56 in A133, section 7.1.

2 THE WITNESS: I'm getting there.

3 A201?

4 THE COURT: No. This is actually
5 in the A133.

6 THE WITNESS: Okay. Hold on.

7 Okay.

8 THE COURT: We had some
9 discussions -- this revolves around the Egnyte
10 and the closing of the Egnyte system. 7.1.11.2,
11 it's on page 17 of the contract.

12 THE WITNESS: 7.1.2?

13 THE COURT: 7.1.11.2. Right in the
14 middle of page 17.

15 THE WITNESS: I'm there, Your
16 Honor.

17 THE COURT: All right. Very good.
18 All right. So this is talking about owner
19 audits, the 60 days. There was a 60-day comment
20 at the time the Egnyte system was closed.

21 And just as we read that, it says,
22 within 60 days of receipt of notice from the
23 owner, if the construction manager disagrees with
24 the owner's audit, the construction manager must
25 notify the owner in writing of the basis. I

1 don't see in there where it says they have to
2 demand it within 60 days. That's my question for
3 you.

4 THE WITNESS: Your Honor, if I may,
5 7.1.11.3?

6 THE COURT: .3.

7 THE WITNESS: The number of odds
8 not to exceed two. One at 50 percent complete if
9 desired.

10 THE COURT: Okay.

11 THE WITNESS: And the other at
12 final completion and not to exceed 60 days beyond
13 substantial completion.

14 THE COURT: Gotcha. Okay. All
15 right. So it's 11.3. I think we went through
16 that once before. And then, finally, in the 201,
17 section 4.2 under administration of the contract.

18 THE WITNESS: 4.2.1?

19 THE COURT: Yes.

20 THE WITNESS: I'm there, Your
21 Honor.

22 THE COURT: All the administration
23 of the contract was done by the architect, was it
24 not? Is there -- is there work that the owner
25 would do in the administration of the contract?

1 And this does get into that document we were just
2 discussing.

3 THE WITNESS: It was done by
4 issuing of the SI, the supplemental instructions,
5 and things like that, sign the pay app. Jim
6 Clements did administer some of the contract.

7 THE COURT: As the owner's rep,
8 right?

9 THE WITNESS: As the owner's rep.

10 THE COURT: Okay. All right.
11 Okay. That's really all the questions I had for
12 you.

13 Gentlemen, if y'all have any follow-up,
14 you're welcome to it, but that's just --

15 MR. BUNDY: No, Your Honor.

16 THE COURT: I'm checking boxes
17 here. Okay?

18 MR. HILDEBRAND: No, sir.

19 THE COURT: Mr. Simonton, at long
20 last, you may be able to return to Texas one of
21 these days.

22 THE WITNESS: One of these days,
23 sir.

24 THE COURT: We're happy to have you
25 around here. Thanks for putting up with us for

1 three days. Let's take about a 10-minute break,
2 and then we will come right back. All right?

3 (A recess transpired.)

4 THE COURT: All right,
5 Mr. Hildebrand?

6 MR. HILDEBRAND: All right, sir. I
7 would now like to -- I've got the actual exhibits
8 that I would like to introduce into evidence
9 since we're not going to read them.

10 THE COURT: Okay.

11 MR. HILDEBRAND: I think it's
12 perfect to make -- put them in the record.

13 THE COURT: Sure. I've got a cheat
14 sheet you gave me. Do you want to work from that
15 or what do you want to do?

16 MR. HILDEBRAND: I will just go
17 through them and I'll just go one -- I'm actually
18 just marking the miniscripts as Exhibits so that
19 they're in the record.

20 THE COURT: Okay. Okay. All
21 right.

22 MR. MCDONALD: Just so I'm clear,
23 he's talking about you marking the deposition
24 transcripts --

25 THE COURT: Deposition transcripts.

1 MR. MCDONALD: -- as exhibits so he
2 has which ones he's marked? Is that -- do we
3 know which ones he's offered excerpts from? Is
4 that what we're doing?

5 MR. HILDEBRAND: Well, I've already
6 marked the excerpts as an exhibit.

7 THE COURT: Right.

8 MR. HILDEBRAND: So these are the
9 actual depositions that go with the excerpts so
10 they're on -- in the record.

11 THE COURT: Okay. The full
12 transcript?

13 MR. HILDEBRAND: Yes, sir.

14 THE COURT: Not just the --

15 MR. MCDONALD: The transcript?

16 MR. HILDEBRAND: Right.

17 THE COURT: Right. Okay.

18 MR. HILDEBRAND: So I'm going to
19 mark Michael Bennett for the record. Michael
20 Bennett deposition September 26, 2019, as
21 Plaintiff's Exhibit 314.

22 MR. MCDONALD: Do you have the
23 originals for those?

24 MR. BUNDY: Your Honor, I think we
25 should use the original depositions if we're

1 going to make them a Court exhibit. I mean, that
2 just -- typically what happens --

3 THE COURT: Let me tell you, these
4 four in ones are a lot easier to read. Okay?

5 MR. BUNDY: Okay. That's fine.

6 THE COURT: All right. That's the
7 only reason I was able to get -- I didn't finish
8 reading until 1 o'clock in the morning. Okay?

9 MR. BUNDY: That's fine. I just --
10 you know, some judges are pretty particular about
11 originals, and if you're not, that's fine.

12 THE COURT: I'm not, I'm not. I
13 just like -- as long as it says what it says, and
14 I hadn't seen where it didn't say what it says.

15 MR. BUNDY: Okay. That's fine.

16 THE COURT: Okay.

17 (PLF. EXH. 314 through 319 were
18 marked for identification.)

19 MR. HILDEBRAND: So Michael
20 Bennett, September 26th is 314; September 27 is
21 315. Kimberly Bennett Brown, August 4, 2020 will
22 be 316; August 5, 317; Kim Brown, August 6, 318;
23 Kimberly Brown of April 29, 2021, 319.

24 THE COURT: All right.

25 (PLF. EXH. 320 through 327 were

1 marked for identification.)

2 MR. HILDEBRAND: Jim Clements
3 October 5, 2020, 320; Clements, August 25, 2020,
4 321; Clements, August 26, 2020, 322; Clements,
5 April 22, 2021, 323; Jennifer Faulkinberry,
6 November 17, 2020, 324; Woody Faust, November 16,
7 2020, 325; Karen Jenkins, November 16, 2020, 326;
8 Winfred Buck Lindsay, September 9, 2020, 327.

9 THE COURT: Okay.

10 MR. HILDEBRAND: All right, sir.
11 So then I think you were kind enough to indulge
12 me to introduce a very short synopsis of each of
13 the depositions that -- each of these would be
14 less than 10 minutes and I'll just be a couple
15 minutes. I would like to do that now if I may.

16 THE COURT: Okay. All right. Let
17 me ask before we get into that: Do you have any
18 additions or objections to the deposition
19 excerpts?

20 MR. MCDONALD: Yeah. I've already
21 handed all of those up.

22 THE COURT: All right. Got it.
23 All right.

24 MR. MCDONALD: Now, my
25 understanding was -- so I handed mine up as

1 Exhibits 400 and 401.

2 THE COURT: Okay.

3 MR. MCDONALD: 400 were both the
4 additional counter designations and the
5 objections to exhibits, and then as I understood
6 Your Honor's ruling with regard to the --
7 Mr. Clements' deposition, because there were so
8 many portions that didn't even reference the
9 exhibits themselves --

10 THE COURT: Yeah.

11 MR. MCDONALD: -- you were going to
12 make a ruling, and then we could get an
13 understanding as to which to narrow that down.
14 And then if there were -- whatever ones were
15 left, then I can make my actual objection on the
16 record as to those.

17 THE COURT: Okay. All right.
18 Let's go through that. Are you ready to go
19 through that?

20 MR. HILDEBRAND: Yes, sir.

21 THE COURT: All right. Let's see.
22 This is Jim Clements. Yeah. He was the most
23 voluminous one. Let me see if I can locate this.
24 All right. I've got copies of 400 and
25 401 in front of me. All right. Let's do

1 Mr. Clements. I'm not seeing one for

2 Mr. Clements. 400 and 401.

3 MR. MCDONALD: Yes, Your Honor. If
4 you'll recall, 400 and 401 were the -- related to
5 the ones that, on their face, they relate to.

6 Mr. Clements, we were going to go through orally.

7 THE COURT: Okay. All right.

8 MR. MCDONALD: And at least half of
9 them don't appear on the lines that were
10 designated.

11 THE COURT: Yeah, I had that
12 problem.

13 MR. MCDONALD: Yeah. So I thought
14 we could -- when we were discussing it, I thought
15 we had decided, if we would narrow it down to the
16 ones that just don't appear, and then that would
17 eliminate so many of them, and we could argue
18 about the ones we needed to argue about.

19 (PLF. EXH. 4, 6, 8, 14, 15, 16, 17,
20 22, 56, 71, 88, 90, 92, 94, 100, 111, 117, 132,
21 133, 155, 164, 283 were marked for identification
22 and received in evidence.)

23 THE COURT: Okay. All right. I
24 will tell you what I'm going to do. I've gone
25 through them, and he had four separate

1 transcripts.

2 So let me go through, and I will tell
3 you what's in, and then y'all can argue about it
4 after I have ruled. I'm going to go through
5 them. So his Tuesday, August 25, 2020, exhibit
6 list. Exhibit 50 was in. Exhibit to Bennett 5
7 was the contract documents, so that's Exhibit 56.
8 It should not be a problem.

9 Exhibit 54 in; Exhibit 56 in; Exhibit
10 Brown 32 in; Exhibit Brown 35 in; Exhibit 59 in;
11 Exhibit 61, 62, 63, 65, 68 and 69 were all in
12 evidence. Exhibit 72 was not in. That was an
13 e-mail from Mr. Simonton. That may have come in
14 somewhere else. So that's Trial Exhibit 151. I
15 don't know the status of that. We will cover
16 that in a minute. Okay?

17 Exhibit 73 was in. Exhibit Brown 25 was
18 not in. I believe that was Trial Exhibit 167.
19 Then it continues on. These are all in: 76, 77,
20 78, 79, 84, 87. Exhibit 89 was not in. That was
21 a 33 paged Palmetto scheduling with remain scope
22 audit. Exhibit 90 and 92 both in.

23 On Exhibit 94, I just put a question
24 mark, and this is where I started to find some
25 difficulty. It's apparently Trial Exhibit 285.

1 It's an e-mail from Ms. Faulkinberry referenced
2 to Lutron Lighting Systems.

3 I just couldn't find it, the document
4 itself. I looked around. Usually I look about
5 two pages before and two pages after it, and I
6 couldn't locate it. I just questioned marked it,
7 so we can come back to that one.

8 Exhibit 98 was in. Okay? Next, is
9 Mr. Clements' October 5, 2020, deposition. Here
10 Exhibit 128 was not in. 130 in; 134 in; 135 not
11 in; 142 in; 145 in. And the next two, which is
12 69 and 71, I just had question marks on it. I
13 could not locate them. They're Trial Exhibits
14 133 and 148 according to this record.

15 And then Mr. Clements' April 22 and 21
16 deposition Exhibit 2, again, I had a question
17 mark and then Exhibit 99 was in. Okay? So if
18 that helps.

19 MR. MCDONALD: Well, I can make it
20 quick.

21 THE COURT: I don't know if it does
22 or not, but go ahead.

23 MR. MCDONALD: So my first
24 objection is, I don't believe that the Court can
25 go two pages back or two pages forward on things

1 that are designated. I made this objection
2 before, so I'll be very brief, Your Honor.

3 There aren't any do overs. There's not
4 additional things that get added either in the
5 designations that are made, the proper foundation
6 is laid, in order to get it with an exception to
7 hearsay, if it's about hearsay, or just lay the
8 proper foundation. So we would object to those.

9 So I think Your Honor -- I understand
10 what Your Honor's ruling is, but if you would
11 indulge me, I will go through the ones that I
12 believe are not referenced in the designations do
13 those all at once.

14 THE COURT: All right.

15 MR. MCDONALD: Okay. And that's
16 Exhibit 5 with Bennett, Exhibit Bennett 5,
17 designation page 51, lines 10 through 12.
18 Exhibit 54 --

19 THE COURT: Let me stop you and ask
20 this question. My records -- my notes reflect
21 that's Exhibit 56, which is the contract
22 document. You just want it out of the
23 deposition?

24 MR. MCDONALD: No, you're correct.
25 I just don't want -- we have whatever dispute we

1 have over the contract documents.

2 THE COURT: Yeah.

3 MR. MCDONALD: I think it's going
4 to be incredibly confusing to have another set
5 that is called Exhibit 5 when there's already
6 Exhibit 56 that he has put in. So that doesn't
7 make any sense to me to have --

8 MR. HILDEBRAND: We can withdraw
9 that, Your Honor.

10 THE COURT: Yeah. All right. I
11 wanted to be clear on that. Yeah. To the extent
12 we've got -- we had that today. We had
13 deposition 122 was also Trial Exhibit 152. We're
14 trying to call them by their trial exhibits. I'm
15 with you.

16 MR. MCDONALD: Yes, sir, thank you.
17 So I'm going to list the ones that do not appear
18 with any foundation.

19 THE COURT: Okay.

20 MR. MCDONALD: That is -- and I'll
21 just list the exhibits. Exhibit 54, Exhibit 56,
22 Exhibit Brown 32, Exhibit Brown 35, Exhibit 63,
23 Exhibit 68, Exhibit 69, Exhibit 76, Exhibit 78,
24 Exhibit 59.

25 THE COURT: 59?

1 MR. MCDONALD: Yes, sir. Exhibit
2 98, Exhibit 134, Exhibit 135, Exhibit 142, and
3 Exhibit 145.

4 Now, as it relates to the remaining
5 exhibits that I do have objections to, I have a
6 hearsay objection to Exhibit 62. I have a
7 hearsay and no foundation objection to Exhibit
8 87. I have a hearsay and no foundation objection
9 to Exhibit 92. I have a hearsay objection and no
10 foundation to Exhibit 130.

11 I also have a note here that says, RCO
12 74 is not in dispute. It's not in the book. But
13 that's just a note from when I did this three
14 nights ago.

15 THE COURT: I think I had that same
16 experience one time. All right.

17 MR. MCDONALD: Thank you.

18 THE COURT: And on that one, the
19 only one I'm in agreement with you on so far is
20 Exhibit 135.

21 MR. MCDONALD: Thank you, Your
22 Honor. I'm just making my record.

23 THE COURT: All right.

24 MR. MCDONALD: Now, as it relates
25 to 400 and 401, those have been marked as

1 exhibits. Your Honor has a copy. They're in
2 writing. I don't have anything to add to those;
3 so you have my position on what those objections
4 are.

5 The last thing I have is an anomaly. I
6 believe Your Honor said that there was an Exhibit
7 122 to Ms. Jennifer Faulkinberry's deposition,
8 and I believe it was shown on the screen.

9 THE COURT: Right.

10 MR. MCDONALD: Well, I only have
11 what was handed to me which was marked as
12 Plaintiff's Exhibit 303 for Ms. Faulkinberry's,
13 and I don't have an Exhibit 122.

14 THE COURT: Yeah, hold on one
15 second. Yeah, and that was one of my notes, I'm
16 sorry. I found Exhibit 121, and I did not find
17 Exhibit 122.

18 MR. MCDONALD: And it's not listed.
19 It's not even designated.

20 THE COURT: It's not designated, I
21 agree. I'm pretty sure it was in there. It just
22 wasn't -- I couldn't find it, and I'm about a
23 hundred percent certain that it's also Trial
24 Exhibit 152, which did come into evidence today.

25 MR. MCDONALD: I just wanted to

1 clear -- for my own purposes, just put it on the
2 record.

3 THE COURT: Okay.

4 MR. MCDONALD: It doesn't have an
5 Exhibit 122 --

6 THE COURT: Okay. All right.

7 MR. MCDONALD: -- for
8 Ms. Faulkinberry's deposition. Thank you very
9 much, Your Honor.

10 THE COURT: All right.

11 MR. MCDONALD: I don't know what is
12 about to happen. I wasn't privy to any of this,
13 but I object to reading excerpts of excerpts. I
14 have no idea what he's about to read.

15 And I think it's improper to -- and
16 inconsistent with the rule, to name excerpts and
17 then call those excerpts and the highlighted
18 excerpts, not disclosing the other side of them
19 and then read them again to the Court when the
20 Court has already read the excerpts. So I don't
21 know what this procedure is, but I object it.

22 THE COURT: And if this was
23 Tuesday, I might have allowed you to do it, but
24 I'm not sure I'm going to let you do it now,
25 Mr. Hildebrand. I've read -- I've read this

1 stuff. I've read all the stuff y'all have asked
2 me to read. Okay?

3 To the extent that they're marked and --
4 they're in the record. Okay? I have read this
5 stuff. Sometimes they give you something and
6 sometimes they take it away, just like the case.
7 Okay?

8 MR. HILDEBRAND: May I read one of
9 them?

10 THE COURT: I will let you read
11 one.

12 MR. HILDEBRAND: Okay.

13 THE COURT: I will give you five
14 minutes. If you go over 5 minutes, I'm going to
15 shut you down.

16 MR. HILDEBRAND: All right.

17 MR. MCDONALD: And my objection
18 remains the same, Your Honor.

19 THE COURT: Okay. That would be
20 the same five minutes. It's not the same five
21 minutes I gave you on opening statement, by the
22 way. Whose deposition do you want to read?

23 MR. HILDEBRAND: This will be
24 Michael Bennett.

25 THE COURT: All right. If you hold

1 on a second, I will find it, and I will read
2 along with you.

3 MR. HILDEBRAND: All right, sir.

4 THE COURT: Tell me where you are.

5 MR. BUNDY: Your Honor, if this is
6 a time savings account, can I put five minutes on
7 mine?

8 THE COURT: You can jump up in five
9 minutes. All right. There was an objection
10 in -- I think it was in 400 of Mr. Bennett
11 because he's here and he is not a party, but I'm
12 going to allow you to put in. All right. This
13 is plaintiff's designations. Where are we?

14 MR. HILDEBRAND: Page 45.

15 THE COURT: All right. Just one
16 second. Be my guest.

17 MR. HILDEBRAND: All right. Lines
18 14 through 21.

19 Question: No, the last page under tab
20 2, that's it. The second paragraph, quote, "This
21 will be the five star luxury hotel in downtown
22 Charleston, Bennett said Thursday. I believe it
23 will be the finest hotel ever built in our city,
24 certainly ever built in our lifetime." Was that
25 an accurate description.

1 Answer: I believe so. I think so.

2 THE COURT: Accurate quotation.

3 MR. HILDEBRAND: Yes, sir, from the
4 newspaper article.

5 THE COURT: Are you reading from
6 our local newspaper?

7 MR. HILDEBRAND: Yes, sir. He
8 admitted it, so it must have been --

9 THE COURT: Well, I don't always
10 believe what they write. Okay? Just so you
11 know. All right. But go ahead.

12 MR. HILDEBRAND: Paragraph -- page
13 48, lines 1 through 6, and then two paragraphs
14 down from that.

15 This hotel was more than just a hotel to
16 me, Bennett said. It's not just an investment,
17 it's more than that. It's our family's personal
18 stake in the ground. Was that an accurate quote?

19 Answer: I believe so.

20 Page 52, the John Carroll Doyle painting
21 on the wall is just a few inches too high. It's
22 too bad Michael Bennett wasn't there the day they
23 hung it because for him, from the way the
24 painting hangs in the guest room to the
25 crown-embroidered pillows on the beds to the

1 little, "Hotel Bennett" branded soaps in the
2 bathroom, it's all important. Is that an
3 accurate statement?

4 I think so, was the answer.

5 THE COURT: Okay.

6 MR. HILDEBRAND: Page 56, line 2.
7 The next quotation is, quote, "I could have
8 cheapened it." Then said, but I never did. Is
9 that an accurate quotation?

10 I think that's an accurate quotation,
11 uh-huh.

12 Top of the next page. At the ground
13 breaking ceremony, Bennett declared that his
14 hotel would be built with the finest materials
15 including limestone, marble, bronze and copper.
16 He wanted the Hotel Bennett to look like it's
17 been there for a long time and will continue to
18 be here for a long time.

19 That's why he said, he was picking the
20 doors that would open onto the double staircase
21 in the hotel's grand lobby. When he was picking
22 them, he went to Hope's, a century old window and
23 door manufacturer. He actually flew there to the
24 company's facility in New York State and ate
25 lunch at the factory. Is that a fair statement.

1 Answer, that's true.

2 MR. MCDONALD: Are you read the
3 whole answer?

4 MR. HILDEBRAND: Page 59, line 2,
5 next paragraph.

6 Question: During the next week, the
7 lobby will fill with the work of local painters
8 and photographers, each with their own dedicated
9 quadrant of the space.

10 Bennett handpicked and also visited in
11 person when possible, the local artists involved,
12 all of whom are artists of his day. He said John
13 Carroll Doyle, West Fraser, Jack Alterman, Will
14 McCullough, and Mickey Williams.

15 Answer: I will take credit for that. I
16 did decide to call those. Of course, John has
17 passed away, John Doyle, but I did contact those
18 artists to include them in the hotel.

19 Page 87, question: My simple question
20 is that you, as the owner, nobody holds a gun to
21 your head and says, you've got to sign the
22 contract, correct?

23 And anything that's important to you to
24 put in that contract, you could pipe up and raise
25 your hand and say, I want this is my contract and

1 insist that be a term. Then the other side can
2 say either yes or no, but you have the
3 opportunity to put it in the contract if you want
4 to.

5 Answer: I don't get involved with the
6 contracts or the details of the contracts. I do
7 not read the contract. I signed it based on the
8 advice of counsel and Kim.

9 The next one, page 107.

10 Question: Where there have the contract
11 that was signed on this job date of September 22,
12 2014.

13 Answer: That's the date I signed the
14 contract.

15 Question: That's the date shown at the
16 top of the contract on the very first page at the
17 top, September 22, 2014.

18 Answer: Yes, sir, I see that.

19 Question: Did the design of the
20 building change after that date?

21 Answer: I don't know.

22 Question: You have no recollection?

23 Answer: I'd asked Kim, the project
24 manager. They could probably tell you.

25 Page 111, line 11.

1 Question: I guess Mr. Bennett -- I'm
2 just a little bit perplexed. If this is the
3 biggest project of your life and the descriptions
4 of it were as we talked about, it just seems that
5 you would remember what happened from the time
6 the contract was signed up through construction,
7 but you just don't, correct?

8 Answer: Tom, I'm working on 10 other
9 hotel projects. My sister, Kim, would perhaps
10 have any answer that I couldn't, and that's the
11 way our company has always been run, Tom. I
12 don't get involved with things once they start
13 up. I'm just not involved with them.

14 Question: But you were involved in this
15 project? You were heavily involved, weren't you?

16 Answer: Tom, I don't think I reviewed
17 one construction draw in the several years. I
18 never reviewed any of this. So the draws would
19 be approved by whoever they're approved by. I
20 don't -- I assume the project manager, the
21 architect, my sister, Kim. That's how we operate
22 the company. And I don't get involved with all
23 of those details of any of those things.

24 THE COURT: All right. That's
25 good. That will do.

1 MR. HILDEBRAND: All right.

2 THE COURT: All right.

3 MR. HILDEBRAND: Your Honor, may I
4 read two more sentences?

5 THE COURT: No, no, no. You've run
6 out of time.

7 MR. HILDEBRAND: I hear you.

8 THE COURT: I'm telling you, I read
9 it. It's all highlighted there. I appreciate
10 that.

11 MR. HILDEBRAND: Yes, sir. Thank
12 you very much.

13 THE COURT: It makes my job easier,
14 and I appreciate it. Do you still planning on
15 calling an expert witness?

16 MR. HILDEBRAND: Yes, sir.

17 THE COURT: All right. Are you
18 ready to start with him?

19 MR. HILDEBRAND: Yes, sir.

20 THE COURT: All right. Let's get
21 rolling on that one. Let's see how that goes
22 today.

23 MR. HILDEBRAND: All right. The
24 plaintiff would call Casey Thompson.

25 THE COURT: Mr. Thompson, watch

1 your step over there, especially watch the back
2 two legs on that chair.

3 (CASEY THOMPSON, having first been
4 duly sworn, testified as follows:)

5 THE COURT: Please have a seat, and
6 when you get comfortable, if you will give us
7 your full name and address for the record.

8 THE WITNESS: Yes, my name is Casey
9 Thompson. Last name is spelled T-H-O-M-P-S-O-N.
10 Home address is 125 East Broad Street, Newnan,
11 Georgia 30263.

12 THE COURT: Newnan?

13 THE WITNESS: Yes, sir.

14 THE COURT: Very good. Thank you,
15 sir.

16 DIRECT EXAMINATION

17 BY MR. HILDEBRAND:

18 Q. Mr. Thompson, where are you from
19 originally?

20 A. Atlanta, Georgia.

21 Q. All right. Born and raised there?

22 A. Yes, sir.

23 Q. Is that where you still live?

24 A. South of Atlanta, in suburbs, yes, sir.

25 Q. All right. Where did you go to school?

1 identification.)

2 BY MR. HILDEBRAND:

3 Q. And then I have also got a summary on
4 the damages that I will premark as Exhibit 332.
5 I will hand you that. All right. Are you ready?

6 A. Yes, sir.

7 Q. Okay. So I've marked as Plaintiff's
8 Exhibit for identification 329, 330, and 331.
9 Let's start with Exhibit 329, and if you could
10 tell me what this is.

11 A. Yes. So this is just the damages
12 summary for each party involved in the project,
13 that being Balfour Beatty Construction as well as
14 all the subcontractors that held subcontracts on
15 this project.

16 I compiled this using multiple reports,
17 the first being the subcontractor status report.
18 And the subcontractor status report shows the
19 original contract value, the revised contract
20 value for each subcontractor as well as the
21 amount that they've been paid and the retainage
22 that's held on that subcontractor.

23 Q. Okay.

24 A. So that was used to compile the majority
25 of the contract balance, the open payables, open

1 contract balance and retainage line items.

2 Q. All right. And then just briefly --
3 we'll get into these in more detail in just a
4 minute. Can you briefly tell the Judge -- so you
5 said that Exhibit 329 is a general compilation of
6 the data which you're going to testify about here
7 shortly; is that correct?

8 A. That's correct.

9 Q. And then 330 is what?

10 A. 330 is -- this was a total cost, an
11 exhibit put together just to show Balfour's
12 totaled incurred costs as well as any unexecuted
13 OCOs, pending RCOs, and cost and taxes those
14 items would have on our total cost of this
15 project.

16 Q. Okay. Now, let me make sure we're on --
17 I've got my exhibits marked the same as yours.
18 Is this the first one you had marked?

19 A. 329, yes, sir.

20 Q. And then 330 is this one?

21 A. That's right.

22 Q. Okay. And then 331?

23 A. That's right.

24 Q. Okay.

25 MR. BUNDY: Is he describing the

1 wrong exhibit? Did he properly describe the
2 exhibits?

3 MR. HILDEBRAND: Yeah, the one that
4 he had in his hand.

5 BY MR. HILDEBRAND:

6 Q. So what's the screen now is exhibit
7 what?

8 A. That is 330.

9 Q. Okay. Now, let's go to 331.

10 MR. BUNDY: Let me, just so I
11 understand, 330 is the total cost number?

12 THE WITNESS: Yes, sir.

13 MR. BUNDY: Okay. All right.

14 BY MR. HILDEBRAND:

15 Q. All right. And then 331?

16 A. So 331 would be a proposed GMP based on
17 multiple things, right? Current GMP factoring in
18 extended general conditions and general trades,
19 unexecuted owner change orders, unexecuted
20 request for change orders, RCOs or pending RCOs,
21 subcontractor damages.

22 And then I've got some of the deducts,
23 which were findings in the Cotton and Company
24 audit report, which would agree with, that we've
25 also backed out of the GMP. This also includes

1 markup on any increased -- proposed increase of
2 GMP.

3 MR. BUNDY: Could you take that off
4 the screen until it goes into evidence, please?

5 BY MR. HILDEBRAND:

6 Q. All right. So tell me -- let's start at
7 the beginning and kind of work down.

8 A. Okay.

9 Q. What was your involvement with the final
10 pay applications and getting together the
11 documents and the damages that you are prepared
12 to testify about here today? Tell me what you
13 did.

14 A. Yeah. So I didn't have much involvement
15 with final pay applications. My involvement with
16 the project was very limited at that time.

17 I was more so involved with the audit
18 process and compiling all the documents that were
19 requested and provided supporting documents for
20 Cotton and Company as they went through their
21 audit process, answering any of their questions
22 that they may have had throughout that process.

23 Q. Okay. As part of that audit process and
24 your involvement with compiling the damages, are
25 you personally and intimately familiar with all

1 of the data that comprise of your opinions here
2 today?

3 MR. BUNDY: Objection, leading.

4 THE COURT: I'm going to allow it.
5 Go ahead.

6 THE WITNESS: Yes.

7 BY MR. HILDEBRAND:

8 Q. Okay. What are Balfour's damages in
9 this matter?

10 MR. BUNDY: Objection. Well, no,
11 go ahead. Go ahead.

12 A. It's \$13,896,000.

13 Q. All right. And what are they comprised
14 of?

15 A. So we have unpaid cost and retainage.
16 We've got unexecuted owner change orders, pending
17 RCOs, so the contractor damages.

18 MR. BUNDY: Objection. Now, he
19 hasn't put the document in evidence. The witness
20 is reading from a script and hasn't moved to put
21 the document in evidence. He clearly doesn't
22 know this stuff by memory. Okay?

23 So if he's going to read from a document
24 or a summary, I respectfully request that he
25 first has to get the document in evidence. Then

1 he can read from it, and we can argue about it
2 and do whatever we're going to do.

3 Now, when he makes that motion, I have
4 an objection, but I'm not going to make an
5 objection to a motion that hadn't been made. But
6 I object to this procedure.

7 THE COURT: Okay. All right. So
8 we've got the documents, and I'm assuming he's
9 prepared the documents?

10 MR. HILDEBRAND: Yes, sir.

11 THE COURT: Have him form the
12 basis -- have him lay some foundation for the
13 documents so we know what they are.

14 THE WITNESS: Okay. I can put it
15 away.

16 BY MR. HILDEBRAND:

17 Q. Okay. Well, let's do this. I was
18 trying to make it a little bit easier, Your
19 Honor, but -- and to have him testify before it
20 actually -- that's usually what you do. You lay
21 a foundation, have him testify about the
22 document, how he prepared it, what his
23 involvement was, and then you move it into
24 evidence.

25 THE COURT: Yeah.

1 MR. HILDEBRAND: That's what I
2 was --

3 THE COURT: Go ahead and have him
4 lay the foundation for it.

5 MR. HILDEBRAND: All right. Let's
6 do that.

7 BY MR. HILDEBRAND:

8 Q. Okay. Let's do that, Mr. Thompson.

9 A. Okay.

10 Q. Plaintiff's Exhibit 329, go ahead and
11 get that in front of you.

12 A. Okay.

13 Q. All right. That's the long spreadsheet?

14 A. Yes, sir.

15 Q. Did you prepare this document?

16 A. Yes, sir.

17 Q. What does it reflect?

18 A. It reflects our total damages on the
19 project.

20 Q. All right. And this was drafted by you
21 as part of your job with Balfour Beatty as the
22 controller?

23 A. Yes, sir.

24 Q. And all of these documents -- all of the
25 information that is compiled herein is based on

1 information that has been provided to Library
2 Associates through the audit process and through
3 discovery?

4 A. Yes, sir.

5 MR. HILDEBRAND: All right. I
6 would like to introduce this as Plaintiff's
7 Exhibit 329.

8 MR. BUNDY: Okay. Well, I -- and I
9 don't know if I can do voir dire on this witness,
10 but I'm not so sure he understood that question.
11 I don't believe the answer for that question is
12 yes because we've been getting documents and
13 updated financial information on this claim as
14 late as three days ago.

15 This claim has changed in the last three
16 weeks, four or five times. Okay? And every time
17 we go home at night, there's a new one. Okay?
18 The underlying data that is -- that makes up this
19 information has changed. Okay?

20 So it's a summary he's trying to offer
21 under 1006. I've a motion that I made before
22 you, before trial started to Library Associates,
23 LLC's motion for an order, requiring Balfour
24 Beatty Construction, LLC, to produce the
25 originals or duplicates in court pursuant to Rule

1 1006, the South Carolina Rules of Evidence
2 summaries.

3 The legal basis for this motion is as
4 follows: The contents of voluminous writings,
5 recordings, photographs, which cannot
6 conveniently be examined in court, may be
7 presented in the form of a chart, summary, or
8 calculation provided the underlying data are
9 admissible into evidence.

10 The originals or duplications shall be
11 made available for examination or copying or both
12 by other parties at a reasonable time and place.
13 Okay? The Court may order they be produced in
14 court, and that's why I tried to get subpoena,
15 and I've tried to get an order making them bring
16 all this in.

17 THE COURT: Okay. Objection noted.

18 MR. BUNDY: We don't have the
19 underlying documents, nor do we have it available
20 to us. They denied us access to the Egnyte site
21 until you ordered them to give it to us. So I
22 don't -- at this late in the day, to come up with
23 anything other than for damages, what has been
24 testified to at least four times, that what's
25 contained in Exhibit 13, 12, 11 --

1 THE COURT: And 14.

2 MR. BUNDY: -- and 14 contains all
3 their claim and all we get to know about it. I
4 took their 30(b)(6) deposition.

5 THE COURT: I'm with you. All
6 right. Have him describe this document for me,
7 generally, what he's doing here. He has got two
8 columns. Have him explain the columns and then
9 let's talk about how he plugged the numbers in.

10 MR. HILDEBRAND: All right, sir.

11 THE COURT: And the numbers have
12 got to be in evidence already because otherwise
13 he doesn't get to testify about it.

14 MR. HILDEBRAND: Right.

15 BY MR. HILDEBRAND:

16 Q. Explain to the Judge what these line
17 items are, what the different colored columns are
18 and such.

19 A. Okay. So --

20 Q. Explain to Judge what this is.

21 A. Sure. So first we have the contract
22 balance, and then it says open payables, open
23 contract balance, owner change orders.

24 THE COURT: All right. Let's start
25 on the left-hand margin. Let's go down first,

1 and then let's go across the top. So I'm
2 assuming that everybody listed on the left is
3 either the contract or the subcontractor?

4 THE WITNESS: That's correct.

5 THE COURT: All right. Now that
6 gets that column out of way. Now take me across
7 the right.

8 THE WITNESS: Yes, sir. So next we
9 have the total column, which comprises the
10 columns to the right for the contract balance
11 highlighted in yellow there, open payables, open
12 contract balance, owner change orders, retainage,
13 and agreed upon audit deducts.

14 THE COURT: All right.

15 THE WITNESS: Next, we have RCOs.

16 THE COURT: Those are requested
17 change orders.

18 THE WITNESS: Request change
19 orders.

20 THE COURT: All right.

21 THE WITNESS: Yeah. And so what
22 I've done here, as with the contract balance, is
23 broken this down to what value would be paid to
24 each party.

25 THE COURT: Okay.

1 THE WITNESS: The same with delay
2 damages. Miscellaneous claims and interests,
3 this is interest on open contract balance and
4 retainage as well as pending RCOs and unexecuted
5 change orders.

6 THE COURT: Okay.

7 THE WITNESS: And then next I have
8 the summary judgment detail. Any value that's
9 been granted through summary judgment, attorney's
10 fees and costs applied to that as well as
11 prejudgment interest.

12 And then this is just the data that I
13 had at the time of filing the report. That's why
14 there's so many iterations of what's been
15 provided; so I'm trying to make this as accurate
16 and as current as possible.

17 THE COURT: Okay. And so how
18 current is this document? When did you last
19 input data?

20 THE WITNESS: It was probably three
21 days ago, two days ago -- two to three days ago.

22 THE COURT: Maybe Monday before you
23 came down here?

24 THE WITNESS: I was down here
25 Monday.

1 THE COURT: You were? Okay.

2 THE WITNESS: Yeah, it was Monday.

3 THE COURT: All right. Okay. He
4 explained it to me at least. All right. Now,
5 let's get into it.

6 BY MR. HILDEBRAND:

7 Q. Okay. So on the -- so the contract
8 balance is the yellow section?

9 A. Yep.

10 Q. Tell us about the -- so you have the
11 total next to Balfour Beatty, \$272,423.74. Can
12 you explain to the Judge what that was?

13 MR. BUNDY: Your Honor, I don't
14 want to interrupt anymore. I know you're tired
15 of listening to me, but I -- it seems like, to
16 me, this document has to go into evidence if he
17 is going to use it to testify, and it has to go
18 in under some rule.

19 THE COURT: All right. He is
20 describing it for me right now. So --

21 MR. BUNDY: Right. But now, he is
22 going into the particulars of the numbers and how
23 they were arrived at and the best evidence on the
24 best evidence rule are the documents themselves.

25 And the summary rule of 1006 is a

1 replacement for the best evidence rule, but it
2 has to have -- it has requirements. And one of
3 the requirements is that the underlying
4 information be provided to me in a reasonable
5 fashion, at a time and place.

6 And I can't tell you here today, because
7 he just said he finished this three days ago,
8 whether this is information he got three days
9 ago, three years ago, or maybe we will get
10 tomorrow. I just don't know where it comes from.

11 THE COURT: All right. Objection
12 is noted. I'm going to have him take him through
13 it.

14 MR. BUNDY: Okay. Thank you.

15 THE COURT: Okay. Go ahead.

16 BY MR. HILDEBRAND:

17 Q. Okay. The primary documents and the
18 primary opinions in this matter were finished
19 many, many months ago, correct, at the end of
20 this job?

21 A. That's correct.

22 Q. The tweaks that have occurred have
23 occurred because of new settlements and moving
24 parts that you've encountered, and you've tried
25 to reflect those recent weeks into this report to

1 make this as accurate as you can for the Judge,
2 correct?

3 A. That's right. And you can see here on
4 the spreadsheet any -- any settlements
5 highlighted in light gray. It's been altered due
6 to settlement or summary judgment. So that --
7 yeah, the changes have been very small. It's
8 just any settlement or summary judgment has
9 taken place --

10 Q. Okay.

11 A. -- In last few days.

12 Q. All right. Well, explain this to the
13 Judge, what these numbers are, and at the very
14 bottom right is the total amount due, which is
15 \$13,896,741.79. So that's the end point?

16 A. Yes, sir.

17 Q. Tell him -- can you walk through and
18 answer any questions the Judge might have to
19 explain how you got there?

20 A. Sure, yeah. So, again, I took the
21 subcontractor's status report to reflect any open
22 payables, open contract balance or damage due to
23 the subcontractors.

24 Q. Let me stop you there just for a second.

25 A. Okay.

1 Q. What is the subcontractor status report?

2 A. So the subcontractor status report is an
3 internal report that has been produced a number
4 of times through the audit process and discovery.
5 It shows all of our subcontractors that took part
6 on the project.

7 Just, it's a simple -- it shows the
8 contract value. Here's how much they've invoiced
9 and here's how much they have been paid; here's
10 how much retainage has been held on that
11 subcontractor. So it's just a financial summary
12 of all of the parties involved.

13 Q. And that's a business record of Balfour?

14 A. Yes, sir.

15 Q. All right, sir. So I'm sorry, I
16 interrupted you. I was asking you to go through
17 this to explain to the Judge how you got to
18 the -- that final number. So can you explain to
19 us the --

20 A. Sure. So, again, using the
21 subcontractor status report. We also have an OCO
22 tracker, RCO tracker, right, that breaks down the
23 values included in each -- on our change order 19
24 through 22, those that have been -- that are
25 unexecuted. Then we have the audit deducts as

1 well which came from the Cotton and Company
2 report from, the audit that took place between --

3 Q. Okay.

4 A. -- Balfour and ourselves to get to a
5 total contract balance of \$2,589,356, which
6 includes the owner change orders and audit
7 deducts.

8 Q. Can you speak up a little bit, please?

9 A. Sorry, so that gets to the total
10 contract balance of \$2,589,356.51, which includes
11 the owner change orders and the audit deducts.

12 Q. Okay.

13 A. Then next we have the RCOs.

14 Q. Okay. So under the contract balance,
15 you've got the amounts that are owed directly
16 to -- explain, for example, next to Balfour
17 Beatty, where you have the total, and then you
18 have open payables, OCOs, retainage, and audit
19 deducts. Explain that to the Judge?

20 A. Yep. So the \$272,423.74 to Balfour
21 Beatty Construction is made up of open payables,
22 any owner change orders -- unexecuted owner
23 change orders, retainage and audit deducts.

24 So what we did was I used pay app 42,
25 which was the last pay app that's been funded.

1 We calculated the retainage, backed out from the
2 subcontractor's status report how much retainage
3 was owed to the subcontractors to really just
4 hold the remaining balance of retainage that
5 Balfour has funded to some of the subcontractors
6 to push the job along and close the subs out
7 to-date, right?

8 Open payables is just like it's costs
9 that we've again fronted to subs or incurred on
10 our end that are still due to Balfour. Owner
11 change orders, this is really just markup on the
12 pending change orders as well as any costs that,
13 again, we would have contributed to the
14 subcontractors to push the job along or close
15 those subcontractors out.

16 The audit deducts, again, these are just
17 the agreed to audit deducts in the -- I've
18 referenced the report. And there was roughly 1.1
19 million dollars of audit deducts.

20 Q. How much? I'm sorry.

21 A. 1.1 million dollars. We agreed to
22 613,000 of those deducts.

23 THE COURT: Okay.

24 Q. So under that section --

25 A. Yep.

1 MR. HILDEBRAND: Do you have any
2 questions there, Your Honor? I want you to
3 understand it.

4 It can be a little confusing because you
5 saw the contract balance that was under the pay
6 apps, and that differs from this; so I want you
7 to understand it. So I'm happy for you to ask
8 questions as we go through each one of these as
9 you would like.

10 THE COURT: All right. So I'm
11 clear, what I did was I added the open payables,
12 the OCOs and the retainage, and I subcontracted
13 the audit deducts, and I came up with the number
14 that you have listed under the total column.

15 THE WITNESS: That's correct.

16 THE COURT: Is that correct? All
17 right. Got it.

18 MR. HILDEBRAND: Okay.

19 MR. BUNDY: Since we're asking
20 questions as we go, may I ask a question?

21 THE COURT: Well, why don't you
22 hold off for now. I've got to understand it
23 first.

24 BY MR. HILDEBRAND:

25 Q. All right. So RCOs, can you explain

1 that to the -- what that blue column is?

2 A. Yes, sir. So we have any RCOs that are
3 pending on this project. So what we did was we
4 went through each RCO and identified which value
5 was Balfour's and which value was -- belonged to
6 the subcontractors.

7 And we've broken that down accordingly
8 here to get to a total of 2,306,397, and, again,
9 these have been altered due to settlements and
10 summary judgment.

11 Q. Okay. So if we took all of the RCOs
12 that have already been testified at length by
13 Nick Starcevic in this case and then you take
14 each individual one, what you taking the time to
15 do is to look at the underlying records and see,
16 of which RCO, how much would be allocable to
17 direct costs by subcontractors and then what
18 Balfour is requesting as directly applicable to
19 it? Is that a fair statement?

20 A. Yes, sir.

21 Q. All right. So when you did that, you
22 went through each one, and you determined that
23 \$1,019,127.49 is allocable to Balfour, and then
24 the rest of the subs, which comes to the total of
25 \$2,306,397, correct?

1 A. That's correct.

2 Q. Okay. All right. There was one RCO
3 that is -- would this be a good time to discuss
4 RCO 279, or do you think it would be easier and
5 clearer to talk about that later?

6 MR. BUNDY: I object to that
7 question, asking the witness how to do it. I
8 don't know how that works.

9 THE COURT: Yeah. Let's just move
10 forward.

11 MR. HILDEBRAND: All right.

12 BY MR. HILDEBRAND:

13 Q. All right, sir. Delay damages, can you
14 explain those to the Judge, please?

15 A. Sure. So you've got roughly 5 million
16 dollars of delay damages, and Balfour Beatty's
17 portion is made up of extended general
18 conditions, extended general trades as well as
19 any markup on the subcontractor delays, delay
20 damages below.

21 Q. And those totaled what?

22 A. So we have \$1,970,717 for Old North
23 State Masonry and \$12,459.96 cents for Lithko
24 Contracting.

25 Q. And the total for -- of the delay claim

1 is what?

2 A. \$4,990,366.05.

3 Q. All right. And then explain to the
4 Judge, if you would, miscellaneous claims and
5 interest. What is that?

6 A. So this is the interest on any open pay
7 apps from Balfour Beatty to Library as well as
8 the owner change orders and pending RCOs, is that
9 value we're assuming would be paid to Balfour
10 Beatty.

11 So per the contract, we took the legal
12 rate annually from the day -- from the date that
13 the pay app was due or the owner change order was
14 billed for and (inaudible) because it was billed
15 through a few different pay apps.

16 Q. All right.

17 A. And the RCOs were calculated off of the
18 last pay app date.

19 Q. All right. How about summary judgment,
20 attorney's fees, and cost of prejudgment
21 interest? Can you explain to Judge how you came
22 up with those figures?

23 A. Yeah. So I've been getting these
24 numbers just as they come up or as summary
25 judgments were made. I'm adding them in to the

1 sheet as I get them. It's sort of a live
2 document to keep up with everything that's going
3 on.

4 Q. All right. Let's turn to -- would it be
5 easier to go through the summary here?

6 A. Yeah, sure.

7 Q. All right, sir.

8 MR. HILDEBRAND: So do you have any
9 questions on that chart, Your Honor?

10 THE COURT: No. I think I'm
11 following. That's 329? I'm sorry, are you on
12 329 or 330?

13 THE WITNESS: This is 332.

14 MR. HILDEBRAND: 3 -- yeah.

15 THE COURT: Yeah, okay. I'm sorry.

16 THE WITNESS: 332, I believe.

17 MR. HILDEBRAND: Right.

18 THE COURT: All right.

19 MR. BUNDY: 332?

20 THE WITNESS: Yes, sir.

21 THE COURT: The one that says
22 Balfour Beatty damages.

23 MR. BUNDY: This one?

24 THE WITNESS: Yes, sir.

25 MR. HILDEBRAND: Right.

1 BY MR. BUNDY:

2 Q. Where do you live? Charlotte?

3 A. I live in Newnan, Georgia.

4 Q. Oh, Georgia. Well, you definitely want
5 to go home.

6 Good afternoon, how are you?

7 A. Doing well. How are you?

8 Q. Good. How many prior cost plus with the
9 GMP contracts have you audited in your career?

10 A. I'm not aware of an approximate number.
11 Probably somewhere 10 to 15 projects.

12 Q. Okay. And could you get Exhibit 56 in
13 front of you, please?

14 A. Yes, sir. Sorry, I'm not familiar with
15 the books yet.

16 THE COURT: All right. So that's
17 binder 2 and tab 56.

18 MR. HILDEBRAND: Your Honor, while
19 I'm thinking of it, if I could interrupt just for
20 a second, I would like to move those exhibits
21 into evidence that we marked.

22 THE COURT: Okay. That's 329, 330,
23 331 and 332, correct?

24 MR. HILDEBRAND: Yes, sir.

25 THE COURT: All right. I'm going

1 allow it. Over your objection, I'm going to
2 allow it. Okay. All right.

3 MR. HILDEBRAND: Thank you.

4 (PLF. EXH. 329 through 332 were
5 received in evidence.)

6 BY MR. BUNDY:

7 Q. Did you find it, Mr. Thompson?

8 A. Yes, getting there.

9 THE COURT: Let me give y'all this.
10 Mr. Bundy, hand him that.

11 THE WITNESS: I got it.

12 THE COURT: I think that's the
13 original. It's a lot easier to work with than
14 that big old book.

15 BY MR. BUNDY:

16 Q. What I've handed you is Exhibit 56, I
17 believe?

18 A. Yep. I'm with you.

19 Q. All right. Now, are you familiar with
20 AIA documents?

21 A. Yes, sir.

22 Q. Okay. And you understand that the lines
23 on the left-hand side are modifications to the
24 document?

25 A. Yes, sir.

1 Q. All right. And I presume that when you
2 did this calculation trying to decide what the
3 costs were under the contract, you went to the
4 contract itself to determine what costs were and
5 were not included in the cost of the work,
6 correct?

7 A. Correct.

8 Q. You didn't rely on Casey Thompson on
9 cost plus contracts to come up with your own
10 number, did you?

11 A. No, sir.

12 Q. And you have not published any treatises
13 on Casey Thompson cost of the work contracts,
14 have you?

15 A. No, sir.

16 Q. And did you look at the standard
17 provisions of the AIA cost plus contract terms
18 and compare them to the amended provisions in
19 this contract?

20 A. I looked at this contract.

21 Q. Okay. But in other words, you didn't
22 look at the original unaltered contract to see
23 what changes have been made?

24 A. No, sir.

25 Q. Okay. And is it fair to say then that

1 you don't know, even though you've done 15 audits
2 in the past, whether or not you actually audited
3 a contract exactly like this one that had been
4 modified like this one?

5 A. That's correct.

6 Q. That's true, isn't it?

7 A. Yes, sir.

8 Q. Okay. So let's -- were you in the
9 courtroom the other day -- I keep losing track of
10 time -- when Mr. Simonton talked about this
11 letter that he wrote on April 30, 2019, which is
12 in evidence? Do you remember that?

13 A. I'm not sure that I do.

14 Q. Where Mr. Simonton says, I'm not --
15 you're not going to audit these books. We're not
16 going to let you audit these books and records.
17 Isn't that what he says? Is that what he says?

18 A. I don't know.

19 Q. You don't know? You can't read it?

20 A. Let's see. So first -- I can read it.
21 Efficiency that's responsible incorporates same
22 (inaudible) request for documentation as
23 inappropriate for numerous reasons including but
24 not limited to -- I just don't see where he said,
25 no, we're not going to provide it. He did say

1 that -- he did say that the request is
2 inappropriate.

3 Q. Okay. So you don't even know, as you
4 sit here today, and you weren't in court when
5 Mr. Simonton testified at least on ten different
6 occasions that he refused and would not allow
7 Library Associates to audit this contract? You
8 weren't here and didn't hear that?

9 A. I can't recall.

10 Q. You can't recall.

11 A. You just showed me the letter.

12 Q. Okay. Well, let's just suppose that in
13 fact that's what this letter means, and that's
14 what the man who wrote the letter intended to do.
15 No, you will not audit this job. Okay?

16 A. I can't come to that conclusion, sir.

17 Q. Okay. Well, we didn't audit it. Well,
18 let me see if I can help you with this
19 conclusion. We had to go to court and get a rule
20 to show cause.

21 In fact, you were involved in our rule
22 to show cause. Do you remember? You were -- we
23 asked for a rule to show cause to hold you in
24 contempt of court for failing to produce
25 documents. Do you remember that?

1 A. I do remember that one.

2 Q. Yeah, I bet you do. So now, does that
3 refresh your recollection that y'all refused to
4 get -- give us an audit?

5 A. Sir, respectfully, under the contract
6 terms, we were required to go through an audit if
7 requested of the incurred cost of the project,
8 and that's exactly what we were --

9 Q. That you when you did after a judge
10 threatened to put you in jail if you didn't do
11 it. Okay?

12 MR. HILDEBRAND: Objection, Your
13 Honor, relevance.

14 A. No, sir.

15 MR. BUNDY: It's very relevant.

16 THE COURT: Overruled. He can go
17 ahead.

18 THE WITNESS: I disagree with that.

19 BY MR. BUNDY:

20 Q. Okay. You disagree with that. Where in
21 the contract does it require or give us
22 audit rights? What provision of the contract
23 gives us audit rights?

24 A. 6.11.1.

25 Q. Okay. And when we finally got a judge

1 to demand audit -- to give us the audit, at or
2 about the time this letter was written on April
3 30, 2019 and sent certified mail, we had been
4 denied access to the Egnyte site. You're aware
5 of that, aren't you?

6 A. I did hear that.

7 Q. Okay. And you know it to be true, don't
8 you?

9 A. I don't know it to be true.

10 Q. Well, finally, we got the right to do
11 it, even though y'all wouldn't do it without a
12 court order, and lo and behold, we did it, and
13 how much did you now determine, two years
14 later -- how much do you now concede that y'all
15 had overcharged Library Associates?

16 A. Overcharged?

17 Q. Yes. You charged them \$613,000 that was
18 disclosed when we finally got the audit. It was
19 \$613,000 worth of costs that you now agreed
20 should not have been in the cost of the work;
21 isn't that true?

22 A. For my report today, yeah, that's
23 correct.

24 Q. That is correct, right.

25 A. That's what we agreed to.

1 Q. And if we had -- if we had put up with
2 Mr. Simonton's bullying behavior, y'all would
3 have been picked up an extra \$613,000 by your own
4 admission, correct?

5 MR. HILDEBRAND: Objection, Your
6 Honor. That's an absolute falsehood. We are in
7 litigation. They could have gone through
8 discovery. There was an argument about this. He
9 could have gotten the same information through
10 discovery that we got through the audit. It's
11 just a badgering, inappropriate question.

12 THE COURT: Overruled. Go ahead.

13 BY MR. BUNDY:

14 Q. Now, the \$613,000 is just simply what
15 you concede. What does Cotton and Cotton Company
16 say that number is?

17 A. I believe it's \$1,072,000.

18 Q. 1 million 72. So that's between Cotton
19 and Casey Thompson on cost plus jobs, we're
20 somewhere between 1 million 72 of unauthorized
21 costs, at most, and at least 613,000 worth of
22 unauthorized costs at least, correct?

23 A. Yes, sir.

24 Q. Okay. And now, so you followed the
25 contract on the cost of the work, and you applied

1 those contract provisions to your conclusions; is
2 that correct?

3 A. Yes, sir.

4 Q. All right. Let's look at Exhibit 329,
5 this one. Can you get that one in front of you?

6 A. Yeah. Okay. I'm with you.

7 Q. All right. The first column is the --
8 are payables; is that right?

9 A. Open payables.

10 Q. Yeah, open payables, the first column.

11 A. That's the total column right there.
12 The first column is the total column.

13 Q. Okay.

14 A. The total contract.

15 Q. Where are the -- have all of these
16 amounts been paid in the left-hand corner?

17 A. No, sir.

18 Q. Okay. That's what I was trying to get
19 to. Let's start out with Balfour Beatty.
20 Balfour Beatty is -- owes itself or we owe
21 Balfour Beatty \$272,423.74, right?

22 A. That's correct.

23 Q. And what does that open payable relate
24 to?

25 A. That open payable relates to costs that

1 Balfour Beatty has incurred that has not been
2 funded from Library.

3 Q. Okay. And is that based on a certified
4 pay request that has not been paid?

5 A. Yes, sir.

6 Q. Which certified pay request?

7 A. Pay app 42.

8 Q. Pay app 42 was certified?

9 A. Yes, sir. Pay app 42 was paid.

10 Q. 42 was paid.

11 A. Yeah. These are the open amounts
12 remaining that have not been funded yet.

13 Q. No. My question to you was, was 272,000
14 certified by the architect to be paid and was not
15 paid?

16 A. It has not been invoiced. It was -- it
17 was to be billed on that pay application.

18 Q. To be billed. Okay. All right. Now,
19 the remaining amounts, which are approximately
20 2.2 million dollars, right? Is my math pretty
21 close on that column? The total at the bottom is
22 2,589,356.51, right?

23 A. Yes, sir.

24 Q. And if we take out the \$272,423.74, what
25 remains would be all the monies that are owed by

1 Balfour Beatty to its subcontractors, correct?

2 A. That's correct.

3 Q. And that number is approximately 2.2
4 million dollars, give or take, right?

5 A. Yes, sir.

6 Q. Does the definition of cost of the work
7 include unpaid amounts, or do you have to pay
8 those costs in order for them to be cost of the
9 work? Look at the contract if you need to, sir.
10 That's probably the best place to go. Let's see
11 what it says. What does it say?

12 A. Okay.

13 Q. Do we end up finding ourselves on page
14 12 of the A133?

15 A. I'm with you.

16 Q. Sir?

17 A. I'm with you.

18 Q. Okay. Article 6 entitled, cost of the
19 work for construction pays.

20 A. On page 12, the 133?

21 Q. Sir?

22 A. Page 12 of the 133.

23 Q. Page 12 of the 133.

24 A. All right. Now I'm with you. The term
25 cost of the work shall mean costs necessarily

1 incurred by the construction manager in the
2 proper performance of the work.

3 Q. Yes, that's it.

4 A. Yep.

5 Q. Have costs not paid been incurred?

6 A. Cost incurred is -- just in terms of the
7 reports and how we record the cost, that cost has
8 been recognized as we receive invoices from
9 subcontractors, but some of that has not been
10 paid because we have not been funded for that
11 cost from Library.

12 Q. Well, I don't see the word recognized in
13 this thing. It says incurred.

14 A. That's right.

15 Q. Okay. And so none of costs for the
16 subcontractors in the first line underneath
17 Balfour Beatty in your Exhibit 329, which is
18 approximately 2.2 million dollars, have been
19 incurred?

20 A. That's correct. But it hadn't been
21 approved by the owner.

22 Q. Pardon me?

23 A. We don't issue payments to
24 subcontractors without the approval and the
25 funding of the owner. It's the owner's money.

1 Q. Where does it say in the contract that
2 that's the case, or is that just a Balfour Beatty
3 policy?

4 A. You're right.

5 Q. Correct?

6 A. Correct.

7 Q. Okay. It's not in the contract.
8 Balfour Beatty's policy is and it's subcontracts
9 say that we don't pay you until we get paid, but
10 the contract you have with my client says you
11 can't recover costs unless it's been incurred and
12 approximately 2.2 million dollars of these costs
13 here have not been incurred, right?

14 A. Some of the cost has been incurred.

15 Q. Well, some of these in the first column?

16 A. Yes, sir, the Balfour Beatty costs and
17 that cost has been incurred.

18 Q. Okay. How about the rest of them all
19 below it?

20 A. I would have to look into it just to
21 make sure, but --

22 Q. But probably not?

23 A. -- probably not.

24 Q. To a reasonable degree of accounting
25 certainty not, okay. So then the next line is

1 open payables. What does that mean?

2 A. Those are values that have been invoiced
3 from the subcontractors that have not been paid
4 yet.

5 Q. And those costs have not been incurred?

6 A. That's right.

7 Q. What's the next -- open contract
8 balance, what does that mean?

9 A. Cost of the invoice from the
10 subcontractors.

11 Q. Okay. And those costs have not been
12 incurred?

13 A. Correct.

14 Q. All right. The next one is OCOs. That
15 totals \$286,000. Have those costs been incurred?

16 A. Some of them have, yes.

17 Q. Some of them. Can you tell -- will you
18 read to the Judge which ones have?

19 A. So the Balfour Beatty costs from the
20 OCOs, some of them have been incurred.

21 Q. Okay.

22 A. 82,124, I would -- roughly 20-some-odd
23 thousand dollars that has incurred.

24 Q. Okay. How about all the numbers
25 underneath it?

1 A. To my knowledge, no.

2 Q. Okay. So so far on your chart, we've
3 got incurred costs of approximately \$350,000.
4 Now we go to retainage. This is just what's
5 owed -- this is what's owed to Balfour Beatty,
6 612, right?

7 A. That's correct.

8 Q. And the retainage is what's owed to the
9 subcontractors?

10 A. That's correct.

11 Q. But that cost hadn't been incurred
12 either?

13 A. It hasn't been paid.

14 Q. All right. It hadn't been incurred.

15 A. I would have to look at the definition
16 of incurred to agree with that.

17 Q. Now, RCOs, you have RCOs for Balfour
18 Beatty of \$1,019,127.49, correct?

19 A. Correct.

20 Q. Has that cost been incurred by Balfour
21 Beatty?

22 A. Some of it has. I would say about
23 \$900,000 of that cost has been incurred.

24 Q. Okay. So now we're at 900, 1 million 3.
25 We're roughly at 1,250,000 --

1 A. Uh-huh.

2 Q. -- incurred costs? Now, how about all
3 the costs below it that add up to 2,306,000?
4 Those costs have not been incurred, have they?

5 A. Some of them probably have, but I can't
6 say with any certainty.

7 Q. The delays to Balfour Beatty --

8 A. That's have been incurred.

9 Q. Those have been incurred?

10 A. Yes, sir.

11 Q. Okay. And what qualifies -- what has to
12 happen for Casey Thompson on the delays to end up
13 in the delay damages cost column?

14 A. So those costs are for extended general
15 conditions and extended general trades, that that
16 cost has been spent by Balfour Beatty, right, as
17 well as the subcontractor costs that have been
18 incurred due to the delay claims, due to the
19 delays.

20 Q. Okay. The subcontractor costs are
21 those -- have the subcontractors incurred those
22 costs, or has Balfour Beatty incurred those
23 costs?

24 A. That would have to be -- you would
25 probably have to ask the subcontractor because I

1 have not seen any costs incurred by Balfour
2 Beatty for those items.

3 Q. Okay. I guess I didn't understand your
4 answer.

5 A. So the Balfour Beatty portion has been
6 incurred.

7 Q. Right. Okay.

8 A. These two, Lithko and Old North State --

9 Q. Right. You don't know whether they've
10 been incurred or not?

11 A. No, sir.

12 Q. All right. Miscellaneous claims and
13 interest?

14 A. That has not been incurred by any --
15 that's interest that would be due on past due
16 amounts.

17 Q. All right. Now, Mr. Simonton testified
18 that he was on the payroll two years after the
19 job was over and was paid roughly \$185,000 a year
20 to do litigation support while an employee of
21 Balfour Beatty. Is that salary paid to him in
22 this cost incurred anywhere?

23 A. No, sir.

24 Q. Okay. So the salary of Mr. Simonton is
25 not in here?

1 A. No, sir. So, you know, if I can
2 elaborate?

3 Q. Absolutely.

4 A. Anytime that Mr. Simonton spent on legal
5 matters, we had a separate sub job set up for
6 legal expenses in which he charged all of his
7 time to that sub job, and that was not included
8 in any of his costs.

9 Q. What was his rate for legal services,
10 for legal matters? What was his hourly rate?

11 A. Whatever his salary was.

12 Q. Okay. So he was making \$185,000 a year
13 and working 40 hours a week. So whatever that
14 works out to, at least that's a second, third
15 year associate in New York, right?

16 A. I don't know.

17 Q. All right. Now, the other Exhibit 330,
18 you referred to this as a total cost analysis?

19 A. Yes, sir.

20 Q. Okay. So this would be a total cost
21 claim. If you took all -- basically what you did
22 was for 330, you took all the costs on the job,
23 attributable to building the job, you subtracted
24 what you'd been paid, and then you asked for the
25 difference? That's the total cost claim, right?

1 A. Sure.

2 Q. And that's what that is, right?

3 A. Yes, sir.

4 Q. And the total cost claim number comes
5 out to what?

6 A. 72 or \$71,884,281.

7 Q. But what is the claim, though? What's
8 the difference between what you spent and what
9 you were paid?

10 A. 11,889,890.

11 Q. And what is your claim if we don't use
12 what you actually spent minus what you got paid?
13 13 million dollars now, right?

14 A. What's that?

15 Q. The claim -- if you just take all of
16 your costs and that would include what you owe to
17 subcontractors and all the rest of it. We went
18 through all of that, right?

19 A. Yes, sir.

20 Q. If you just look at all those numbers
21 and assume that you -- you think they're going to
22 get paid. We don't know whether they are not,
23 but they're not incurred costs under the
24 contract, but you, for purposes of analyzing the
25 job for total cost claim, have used those numbers

1 to put -- to arrive at your quote, unquote total
2 cost?

3 A. That's right.

4 Q. From that, you subtracted what you have
5 been paid, correct?

6 A. Yes, sir.

7 Q. And you come up a number, a difference
8 of 11 million dollars or so and change?

9 A. Yeah.

10 Q. And if you got that, then you would have
11 not lost anything on the job? In fact, that
12 number would include making a profit, would it
13 not or would it?

14 A. Maybe a slight profit, yeah.

15 Q. Okay. So with the profit, overhead and
16 all costs to be paid but not yet paid, we
17 subtract what we have paid you, and you get to 11
18 and something million dollars. But when you go
19 to this contract and you analyze it under a total
20 cost approach, you come up with an even larger
21 number, right? 13 something million dollars.

22 A. The damages?

23 Q. Yeah.

24 A. Well, that includes interest, and that
25 cost doesn't include interest.

1 Q. It doesn't include interest. Does it
2 include -- but it includes delay damages, right,
3 the total cost?

4 A. Yes, sir.

5 Q. They're what you characterize as delay
6 damages?

7 A. Yes, sir.

8 Q. Okay. So is that the difference, the
9 interest, essentially, the million something
10 dollars in interest?

11 A. Yes, sir.

12 Q. Okay. And what triggers the obligation
13 to pay interest?

14 A. It's stated in article 13 of the
15 contract.

16 Q. It has to be due, doesn't it?

17 A. Yes, sir.

18 Q. Okay. So if the money is not due,
19 you're not entitled to interest on it, right?

20 A. That's a fair statement.

21 Q. Sir?

22 A. That's a fair statement, yes, sir.

23 Q. And the Judge is going to whether -- and
24 the Judge decides whether it's due.

25 A. Yes, sir.

1 Q. But the architect had a say in that as
2 well because he got the certified pay requests,
3 right?

4 A. That's right.

5 Q. And if he didn't certify the pay
6 requests, the owner had no obligation to pay?

7 A. That's an accurate statement.

8 Q. So it couldn't have been due under the
9 contract?

10 A. Sure.

11 Q. Okay. And this prejudgment interest
12 that you want, that was something you got from --
13 your counsel told you to put prejudgment interest
14 in there?

15 A. I just got the numbers, yes, sir.

16 Q. Okay. And what did they tell you or
17 what did you understand how you would calculate
18 prejudgment interest? What is interest only?

19 A. Sir, I just got a spreadsheet with the
20 numbers.

21 Q. They sent you the numbers. Okay.

22 A. I just got a spreadsheet with the
23 numbers, yep.

24 Q. So Parker Poe is part of your accountant
25 department over at Balfour Beatty?

1 A. I wasn't aware if Parker Poe put them
2 together. I wasn't here --

3 Q. Do you even know who put it together?

4 A. No, sir.

5 Q. But it's in your claim, and Balfour
6 Beatty is looking for it, right?

7 A. Yes, sir.

8 Q. And if somebody would have put in 8
9 million dollars in prejudgment interest, you
10 would have stuck that in there, too, right?

11 A. I might have some questions about that.

12 Q. Oh, you would? In that prejudgment
13 interest world, where do you start questioning
14 prejudgment interest? Around 3 or 4 million, or
15 is it a little sooner?

16 A. I don't know, sir.

17 Q. Gotcha. Let's see. What else do we
18 got? I'm just about through. These -- are you
19 aware of the existence of a document that's
20 entitled joint prosecution defense and tolling
21 agreement?

22 A. No, sir.

23 Q. You don't know anything about that, do
24 you?

25 A. No.

1 Q. So you wouldn't know about any
2 agreements by and between Balfour Beatty and its
3 subcontractors including Lithko, Old North State
4 Masonry? They're the only two, I think, that are
5 left. Watson bailed on it recently.

6 A. I'm not familiar with those, sir.

7 Q. But in this contract or agreement,
8 the -- they agree -- let me see if I can find
9 this. This document that you prepared, it shows
10 that Balfour Beatty owes BMCC money, doesn't it?

11 A. Yes, sir.

12 Q. How much does it show that y'all owe
13 BMCC? Do you need to know the page?

14 A. It wouldn't be on this document.

15 Q. It wouldn't?

16 A. It would be on 329.

17 Q. Okay.

18 A. So to my knowledge, BMCC was -- there
19 was a settlement between Library and BMCC for
20 \$625,000. Now, that did not cover their
21 remaining retainage or their RCOs. So, in my
22 position, I wasn't sure if that still was going
23 to be payable for Balfour Beatty or if that had
24 been wiped clean, right?

25 Q. Well, you don't -- you don't know of any

1 agreements between Balfour Beatty and BMCC where
2 BMCC says, we don't want our \$365,000, do you?

3 A. I hadn't seen anything.

4 Q. Okay. When do you think you're going to
5 get around to paying that money, the 365? Do you
6 think you're going to pay it? You're going to
7 pay it at some point, right? When y'all get your
8 money, you testified you're going to pay all the
9 subs?

10 A. That's right.

11 Q. Let me give you a heads up on this
12 check. When you decide to cut that check, send
13 it to me, okay, because that claim belongs to my
14 client.

15 MR. HILDEBRAND: Objection, Your
16 Honor.

17 BY MR. BUNDY:

18 Q. Make it payable to Library Associates
19 care of Bundy McDonald's trust account, and I
20 will send you the appropriate documentation. All
21 right, sir. For the record, this is a document,
22 which can be found under tab 908?

23 MR. MCDONALD: 209.

24 MR. BUNDY: Pardon me?

25 MR. MCDONALD: 209.

1 THE COURT: 209.

2 BY MR. BUNDY:

3 Q. Excuse me, tab 209. It's entitled,
4 joint defense agreements. It's a nice summary
5 for us, and behind it are a series of tabs that
6 contain joint defense agreements. So I'm going
7 to pick one, and let's you and I look at it real
8 quick because you've never seen it before?

9 A. I haven't, no, sir.

10 Q. Okay. You don't know if it would change
11 your opinion of what you put in this document or
12 not, do you because you ain't seen it yet? It
13 was signed by Lithko Contracting on June 3, '19?

14 A. Okay.

15 Q. All right. Then in existence to --

16 MR. HILDEBRAND: Your Honor, can I
17 ask him to go back to the podium, please?

18 MR. BUNDY: Well, I don't --

19 MR. HILDEBRAND: I think it's
20 inappropriate. You can ask him what --

21 MR. BUNDY: Well, I was trying to
22 avoid having to hand him another document with a
23 different sub on it, but we can do it that way.

24 BY MR. BUNDY:

25 Q. I hand you what I represent to you is

1 another copy of the same document, but this one
2 is signed by Bernhard MCC, LLC. I got their
3 claim. It don't matter. So let's read -- let's
4 start at the top.

5 This joint prosecution defense and
6 tolling agreement is effective upon execution by
7 each party, and the effective date is between
8 Balfour Beatty Construction, Bernhard MCC, LLC,
9 David Allen, Lithko, Old North State Masonry,
10 Watson, et cetera, right? So they entered into
11 the same agreement with a lot of people. But
12 since everybody signed it at different times,
13 they had to keep reproducing it, right? All
14 right.

15 So let's look at -- let's go to G.
16 Whereas subcontractors, as defined above, have
17 certain claims that may be related to acts or
18 omissions attributable to the contract on the
19 project, resulting in extra cost, each such
20 contractor's incurred concerning their respective
21 (inaudible). Have you ever seen a joint
22 prosecution defense and tolling agreement at any
23 time before?

24 A. No, sir.

25 Q. You didn't even know those things

1 existed until right now, did you?

2 A. I knew they existed. I've heard the
3 term, yes, sir.

4 Q. H, whereas contractor may have certain
5 claims related to acts or omissions contributable
6 to one or more subcontractors or other
7 subcontractors result in an extra cost, the
8 contractor has incurred concerning their
9 respective work under the prime contract or other
10 contracts related to the job.

11 In it's simplest form, sir, aren't they
12 saying, we've got claims against each other?
13 I've got claims -- I'm the subcontractor. I've
14 got claims against you. You're the general --
15 I'm the general contractor. I've got claims
16 against you, right? Read it slowly if you need
17 to.

18 A. I don't know if I want to interpret
19 that.

20 Q. That's not how you would interpret it?

21 A. It's not for me to interpret.

22 Q. Okay. But you can read it, though,
23 right?

24 A. I can read, yes, sir.

25 Q. Okay. You can -- how do you understand

1 and what do you understand it to try to say? If
2 you were trying to explain it to a child, what
3 would you say this meant?

4 A. I mean, I can agree that the contractor
5 was -- may have certain claims related to acts or
6 omissions contributable to one or more
7 subcontractors or other subcontractors. Yeah.
8 It's pretty simple.

9 Q. It is pretty simple and pretty
10 straightforward. Let's go to page 8. 22,
11 paragraph 22. Are you with me?

12 A. Yes, sir.

13 Q. Page 8.

14 A. Yes, sir.

15 Q. Do you know what a tolling agreement is?

16 A. No, sir.

17 Q. All right. Well, let's read -- I will
18 read it to you, and you can learn. We will learn
19 together.

20 A. Maybe.

21 Q. Contractor and subcontractors agree that
22 with respect to any and all rights, duties,
23 claims and defenses or potential rights, duties,
24 claims, or defenses arising from or in any way
25 connected with the subcontracts.

1 Subcontractor claims, owner-related
2 claims or -- and/or the project, the claims, all
3 applicable statutes of limitations of proposed
4 and shares, et cetera, will be tolled on this
5 effective date. Do you understand? What does
6 that mean to you, if anything?

7 THE COURT: Do you have a copy of
8 that?

9 MR. BUNDY: I'm sorry, Your Honor.
10 Are you aware --

11 BY MR. BUNDY:

12 Q. While we're looking for that, are you
13 aware of any change order agreements between
14 Balfour Beatty and its subs wherein and whereby,
15 if Balfour Beatty collects any portion of the
16 subcontractor's claim, they get paid a certain
17 amount of money up to a certain point?

18 A. I'm not aware of anything.

19 Q. Okay. How would you book that? If
20 there was an agreement -- let's say that if
21 Watson's claim or if Lithko's claim was going to
22 get passed through to the owner and whatever they
23 got out of it, the first \$90,000 was going to go
24 back to Balfour Beatty. How would you book that
25 \$90,000?

1 A. So that would be -- that would probably
2 be a deductive change order of some sort.

3 Q. A deductive change order of some sort?

4 A. But I would have to see the specifics.

5 Q. Let turn to page 3, item D.

6 A. Yes, sir.

7 Q. Contractors and subcontractors agree to
8 promptly meet, negotiate and resolve all claims
9 between contractor and subcontractor, (contractor
10 and subcontractor claim), if at all possible.

11 Upon resolution of owner-related
12 claims -- until, excuse me -- until resolution of
13 owner-related claims, subcontractors agree that
14 it will assert no claim against contractor except
15 as necessary to perfect lienholders. And
16 contractor agrees that it shall assert no claim
17 against any of its subcontractors.

18 Now, do you read that to mean that
19 somebody who signs this agreement is not going to
20 assert the claims that the subcontractor might
21 have against the general contractor, right? Is
22 that fair to say?

23 A. Yes, sir.

24 Q. Subsequently, subcontractors and the
25 contractors respectively have the right to assert

1 claims against one another for any amount not
2 recovered from the owner or others.

3 Now, does that mean that the
4 subcontractor claims that you put in this report
5 of yours may well not end up being that total
6 amount of money? It might be a different amount
7 of money if the Judge decides differently. And
8 then, at that point, Balfour Beatty and the
9 subcontractor are going to decide how they're
10 going to divide that money up?

11 A. Sure.

12 Q. Okay. But you weren't aware of that
13 when you prepared this document?

14 A. No, sir.

15 Q. Okay. So necessarily, you didn't
16 inquire of anybody as to what their intentions
17 were or how they were going to handle these
18 monies in this settlement between the two
19 subsequent to the -- subsequent to paying any
20 money in this litigation, correct?

21 A. Can you repeat that?

22 Q. All right. I'm just about done. Oh, I
23 know one more thing I would like to ask you.
24 There was a -- where is the deduct thing you did
25 for the credit?

1 A. For the audit.

2 Q. Yeah, for the audit. Where is that?

3 A. It is --

4 Q. Okay. I'm just curious about one thing
5 here. I just want to ask you one question.

6 A. Okay.

7 Q. Here we go. This is what I'm looking
8 for. I want to start right here, interest. I
9 don't want to stand too close to you because your
10 lawyer won't like that. What's the interest you
11 want?

12 A. \$1,313,957.13.

13 Q. Okay. And that's based upon a claim of
14 what?

15 A. So the interest is on our RCOs, OCOs,
16 and unpaid cost and retainage.

17 Q. Okay. And then you add the interest,
18 right? You add the interest to the total of
19 everything above, and then, after you added the
20 full interest -- so the interest is on the total
21 of all of the lines above it?

22 A. No, it's not on all of the total of all
23 the lines. It's on unpaid cost and retainage,
24 owner change orders and RCOs.

25 Q. Okay.

1 A. Yes, sir.

2 Q. Does the audit deduction reflect --
3 change those numbers? In other words, shouldn't
4 that -- shouldn't the audit deduction be above
5 the calculation of interest so you're not
6 calculating interest on a larger amount and
7 then --

8 A. It would --

9 Q. Sir?

10 A. I'm sorry, I don't meant to interrupt
11 you.

12 Q. No, that's okay. Go ahead.

13 A. So it would come out to the same number
14 because the interest is only calculated on those
15 values.

16 Q. Right. But aren't those values reduced
17 by the agreed upon audit deducts?

18 A. Well, that's total cost. So the -- so
19 this is more so pertaining to the open invoices,
20 right?

21 Q. Gotcha.

22 A. Yeah. And I would not have -- the cost
23 is well in excess of those invoices.

24 MR. BUNDY: Okay. All right. Have
25 a safe trip home.

1 THE WITNESS: Thank you.

2 MR. HILDEBRAND: I have just a
3 couple more.

4

5 REDIRECT EXAMINATION

6 BY MR. HILDEBRAND:

7 Q. Very quickly, Mr. Thompson.

8 A. Yes, sir.

9 Q. Let's turn to Exhibit 56 again real
10 quick, please.

11 A. Okay.

12 Q. All right. And the A133, page 12.

13 A. Okay.

14 Q. All right. Article 6, cost for the work
15 for construction phase. Are you with me?

16 A. Yes, sir.

17 Q. All right. That's not it.

18 THE COURT: You're in the contract,
19 right?

20 MR. HILDEBRAND: Right.

21 BY MR. HILDEBRAND:

22 Q. All right. So page 12 of the A133. Are
23 you with me?

24 A. Yes, sir.

25 Q. Up at the very top, 6.1, cost to be

1 Would that imply that that was a paid
2 condition or incurred condition to you?

3 MR. BUNDY: Objection, leading.

4 THE COURT: I'm going to allow it.
5 Go ahead.

6 THE WITNESS: Can you repeat the
7 question?

8 BY MR. HILDEBRAND:

9 Q. How does that impact whether the -- is
10 there a requirement under that section, in your
11 view, for the contractor to pay the
12 subcontractors in advance of being paid by the
13 owner?

14 A. No, sir. This would rely on the receipt
15 of payment from the owner prior to being --
16 paying the subcontractor.

17 MR. HILDEBRAND: That's all I have,
18 Your Honor.

19 RE CROSS-EXAMINATION

20 BY MR. BUNDY:

21 Q. Are you aware of a statutory requirement
22 regarding payment of subcontractors once the
23 contractor has been paid?

24 A. I read a book on it.

25 Q. Sir?

1 A. Yes, sir.

2 Q. It's illegal in South Carolina, is it
3 not, to take money or to get the money and not
4 pay the subcontractor, right?

5 A. Yes, sir.

6 Q. Okay. And it's also illegal to withhold
7 money from a subcontractor that you have received
8 from the owner for back charges unless you tell
9 the owner you're going to do it, right? That's
10 illegal, too?

11 A. I don't know.

12 Q. You don't know. That's okay.

13 MR. BUNDY: That's all I have.
14 Thank you. Have a nice trip.

15 MR. HILDEBRAND: Nothing further.

16 THE COURT: Mr. Thompson, thank you
17 for coming, sir. Appreciate it. It's 6:20. I
18 suggest we break for the evening. Let's come on
19 back tomorrow. You don't plan to call anyone
20 else, do you?

21 MR. HILDEBRAND: No.

22 THE COURT: We will get our
23 documents in a row tomorrow, and then we will go
24 from there.

25 MR. BUNDY: Because there are not

1 going be any more witnesses?

2 THE COURT: Right.

3 (The hearing was concluded at

4 6:21 P.M.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Adams, Certified
5 Shorthand Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness whose attached in the
8 foregoing hearing was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but
10 the truth in the within-entitled cause; that said
11 hearing was taken at the time and location
12 therein stated; that the testimony of the witness
13 and all objections made at the time of the
14 examination were recorded stenographically by me
15 and were thereafter transcribed by computer-aided
16 transcription; that the foregoing is a full,
17 complete and true record of the testimony of the
18 witness and of all objections made at the time of
19 the examination; and that the witness was given
20 an opportunity to read and correct said hearing
21 and to subscribe the same.

22 Should the signature of the witness
23 not be affixed to the hearing, the witness shall
24 not have availed himself/herself of the
25 opportunity to sign or the signature has been
26 waived.

27 I further certify that I am neither
28 related to nor counsel for any party to the cause
29 pending or interested in the events thereof.

30 Witness my hand, I have hereunto
31 affixed my official seal on August 18, 2022 at
32 Charleston, Charleston County, South Carolina

33 _____
34 Jennifer M. Adams
35 Court Reporter And Notary Public
36 My commission expires: 03/15/2032

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

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

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

17 -----
 18 Hearing before the Honorable Mikell R.
 19 Scarborough, reported by Jennifer M. Huggins,
 20 Court Reporter and Notary Public, at 9:30 a.m. on
 21 September 24, 2021 at 100 Broad Street, Courtroom
 22 2A, Charleston, South Carolina.

23

24

25

1 A P P E A R A N C E S

2
3 ON BEHALF OF PLAINTIFFS:

4 PARKER POE ADAMS & BERNSTEIN, LLP
5 BY: THOMAS HILDEBRAND, JR., ESQ.
6 BY: ROBERT C. BYRD, ESQ.
7 200 Meeting Street
8 Suite 301
9 Charleston, SC 29401
10 (843) 727-6315
11 Tomhildebrand@parkerpoe.com
12 Bobbybyrd@parkerpoe.com

13
14 ON BEHALF OF DEFENDANT LIBRARY ASSOCIATES:

15 BUNDY MCDONALD, LLC
16 BY: WALTER H. BUNDY, JR., ESQ.
17 BY: M. BRENT MCDONALD, ESQ.
18 1516 Old Trolley Road
19 Second Floor
20 Summerville, SC 29485
21 (843) 492-0221
22 Walter@bundymcdonald.com
23 Brent@bundymcdonald.com

24 ON BEHALF OF DEFENDANT WATSON ELECTRICAL:

25 SMITH TERRY JOHNSON & WINDLE
26 BY: DON R. TERRY, ESQ.
27 150 Milestone Way
28 Suite C
29 Greenville, SC 29615
30 Dterry@smithterrylaw.com

31 ON BEHALF OF DEFENDANT OLD NORTH STATE & LITHKO:

32 SMITH TERRY JOHNSON & WINDLE
33 BY: STEELE B. WINDLE, III, ESQ.
34 150 Milestone Way
35 Suite C
36 Greenville, SC 29615
37 Awindle@smithterrylaw.com

1

ON BEHALF OF DEFENDANT DAVID ALLEN COMPANY:

2

KELLY LAW FIRM, LLC

3

BY: RUSSELL BRITTON KELLY, ESQ.

689 King Street

4

Charleston, SC 29403

Britt@kellylawsc.com

5

6

ON BEHALF OF DEFENDANT METROPOLITAN LIFE:

7

BUIST BYARS & TAYLOR, LLC

BY: G. HAMLIN O'KELLEY, ESQ.

8

652 Coleman Boulevard

Suite 200

9

Mt. Pleasant, SC 29464

Hamlin.okelley@buistbyars.com

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1	INDEX OF WITNESSES	
2		<u>PAGE</u>
3	Certificate	2578
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 THE COURT: All right. So what
2 I've been working on is getting just a list of
3 all the exhibits. I think we probably need to go
4 over that this morning to make sure what's in and
5 what's not in, cover that one.

6 And I'm trying to get as -- trying to
7 take my handwritten notes on my exhibit list and
8 make it so it's legible for somebody else so it
9 can be typed up, and y'all can verify it. Okay.

10 MR. BUNDY: Since the clerk doesn't
11 keep the exhibits, right?

12 THE COURT: Yes, sir.

13 MR. BUNDY: My father was a
14 professional gambler. He always taught to me to
15 initially trust everybody.

16 THE COURT: Yeah.

17 MR. BUNDY: But you always cut the
18 cards.

19 THE COURT: Right.

20 MR. BUNDY: Okay. And so what I
21 would like to do is to determine where we're
22 going to keep these exhibits.

23 THE COURT: Okay.

24 MR. BUNDY: The chain of custody,
25 the integrity of the exhibits and if either

1 party, for some reason unbeknownst to me, would
2 need access to those exhibits, it will have to be
3 with the permission of some neutral and detached
4 party.

5 THE COURT: Okay.

6 MR. BUNDY: You know, it's
7 perfectly okay -- and maybe you can't do it --
8 just to keep them in your chambers over here and
9 lock them up or find a room somewhere.

10 And then the clerk -- I'll agree that
11 the clerk is not responsible for anything. But
12 it just seems to me to be easier if we could just
13 keep them over here somewhere and locked up in a
14 room.

15 THE COURT: It will be. I've
16 gotten instructions that they're not going to be
17 kept in this building; however, I'm happy to keep
18 them in my courtroom or my chambers, either one.

19 Typically, what we do, just so y'all
20 know, is the plaintiff takes back the plaintiff's
21 exhibits and the defendant takes back the
22 defendant's exhibits because y'all are
23 responsible for uploading the exhibits. Okay?

24 I don't know if they're doing that in
25 the Circuit Court or not, but that's what I have

1 been instructed. And we cannot -- we, as the
2 Court, cannot upload exhibits. It's just
3 physically impossible because the system doesn't
4 allow us to do it.

5 So when somebody sends me a proposed
6 order with a plat as an exhibit, for example, I
7 can't upload the plat. And I manipulate about 99
8 percent of the orders that come to me so I can
9 manipulate the order, and then I have to send it
10 back to the lawyer and have the plat attached to
11 the order that I want to sign and have it
12 uploaded in the systems.

13 So that's just how that's been working.
14 It is extremely different than what it used to
15 be, no doubt about it, and I had some concerns
16 about it the first time that I had it. But I
17 have not yet had any problems with the system
18 because, as I say, the plaintiff takes their
19 exhibits and uploads them to the server for the
20 clerk's office.

21 And that needs to be done in small
22 pieces, they always like to say. All right.
23 Mr. O'Kelley has probably done this more than
24 anybody. He's back there shaking his head. And
25 then the defendant takes theirs and uploads them

1 in the system. How we're going to get these big
2 plans uploaded is beyond me. Okay?

3 MR. BUNDY: I'm not too sure
4 they're in evidence, are they?

5 THE COURT: I'm not sure if the
6 plans came into evidence either.

7 MR. BUNDY: I don't think they have
8 been.

9 THE COURT: That was the one thing
10 y'all keep stepping over to get to me.

11 MR. BUNDY: Well, these plans are
12 used to being stepped on. My concern is that we
13 have notebooks full of documents that aren't in
14 evidence.

15 THE COURT: Right.

16 MR. BUNDY: And it's extremely
17 complicated. I mean, when I first started doing
18 this, if you touched an exhibit in Federal Court
19 and took it out of that building, you'd better be
20 ready to go back with your toothbrush.

21 THE COURT: Right.

22 MR. BUNDY: So I would just really
23 ask Your Honor to keep these original exhibits
24 somewhere in this building and then maybe if they
25 have to be uploaded, to be uploaded at the end of

1 the case.

2 THE COURT: Oh, yeah, yeah, yeah.
3 They don't need to be uploaded until the case is
4 all over.

5 MR. BUNDY: Okay.

6 THE COURT: You know, I hold out
7 hope y'all can settle this thing between now and
8 October 25th, but I don't expect that to happen.

9 MR. BUNDY: I can guarantee you it
10 ain't going to happen. So anyway, that's just my
11 concern.

12 THE COURT: Yeah, yeah.

13 MR. BUNDY: And I'd like for us,
14 before we leave today or at least Mr. McDonald
15 leaves -- because I'm going to leave him with
16 this task. I ain't doing it.

17 THE COURT: Yeah. No, I'm with you
18 on that one.

19 MR. BUNDY: You know, that --

20 THE COURT: I have been offered the
21 chambers, which is downstairs from here, but I
22 have yet to speak directly with the clerk to see
23 if we could use that room. That would be ideal
24 because they don't actually leave this building.
25 But the initial inquiry I got was shot down. So

1 then we've got start traveling back and forth.
2 At least it's not raining today, you know. So
3 anyway, so that's kind of where we are with the
4 exhibits.

5 MR. BUNDY: Right.

6 THE COURT: I'm hoping y'all have
7 kept a pretty good record as to what exhibits
8 have come in. I have tried to do that. I keep
9 both my notes, and I learned a long time ago,
10 keep a separate exhibit sheet if there are lots
11 of exhibits.

12 And so I -- sometimes I find myself
13 writing on the wrong pad, but anyway, I've got
14 the numbers down here. So I'm happy to go over
15 that now if you would like. I know the plaintiff
16 needs to make sure that that's done in order for
17 them to conclude their case, which is what we're
18 hoping to do here today. And that leads to
19 defense motions, and we will cover those today.

20 Anything else that we need to talk
21 about?

22 MR. HILDEBRAND: I just want to say
23 that you'll see that Mr. Heuer is not sitting
24 next to me. He got a call in the night about a
25 family emergency and had to take off at the crack

1 of dawn to get back to Charlotte.

2 THE COURT: Okay.

3 MR. HILDEBRAND: He apologizes to
4 the Court and said, he means no disrespect,
5 whatsoever, and does not want the Court to think
6 that he was not interested in this last day, that
7 he just had to get back to his family for
8 something. I don't know what exactly it was,
9 but --

10 THE COURT: Okay. All right.
11 That's fine. And Mr. Byrd's said yesterday he
12 had some sort of medical procedure to do this
13 morning.

14 MR. HILDEBRAND: Procedure. It was
15 supposed -- I think it was supposed to have been
16 done at 8 or 8:30; so he confident would be here
17 by 9:30, but --

18 THE COURT: Okay.

19 MR. HILDEBRAND: It ran over
20 apparently, but I think he will be here.

21 THE COURT: Okay. Yeah, he
22 informed me of that.

23 Mr. McDonald?

24 MR. MCDONALD: Your Honor, I've
25 done my earnest best to keep track of the

1 exhibits as they came in.

2 THE COURT: Okay.

3 MR. MCDONALD: And while they would
4 be not in --

5 THE COURT: Numerical sequence?

6 MR. MCDONALD: -- numerical
7 sequence --

8 THE COURT: Right.

9 MR MCDONALD: -- I did keep track
10 of them as they came in, and I would be happy to
11 start with what I think came in.

12 THE COURT: You've got a list as
13 well?

14 MR. HILDEBRAND: I got a typed up
15 list.

16 THE COURT: All right. Well, y'all
17 each have got y'all's list. That's perfect
18 because I've got my own, and I -- and it should
19 be chronological but not numerical, right?

20 MR. MCDONALD: Chronological, not
21 numerical, you're correct.

22 THE COURT: Right.

23 MR. MCDONALD: As they came in --

24 THE COURT: In time?

25 MR. MCDONALD: -- in the trial,

1 yes, sir.

2 THE COURT: And does that -- was
3 that yours as well, or is yours numerical?

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: Okay. Well, let's go
6 down that list.

7 MR. HILDEBRAND: Let's --

8 THE COURT: The one thing I did not
9 have -- here they are. I just found them. All
10 right. I think my list is pretty full. Let's
11 see if we can agree.

12 MR. MCDONALD: I'm through page 1,
13 and I concur with page 1.

14 THE COURT: Oh, you do?

15 MR. MCDONALD: Now, what is not
16 obviously listed on this is contemporaneous
17 objections, but that they are in. Whether
18 they're in without objection or over objection is
19 not noted on here. But Your Honor has moved each
20 of the exhibits listed on page 1.

21 MR. HILDEBRAND: And you're working
22 off of my sheet?

23 MR. MCDONALD: And I'm working off
24 of plaintiff's sheet.

25 THE COURT: Okay. Okay. Well,

1 that works even better than what I've been doing.

2 MR. MCDONALD: And maybe we should
3 identify this as something.

4 THE COURT: Yeah. You want to call
5 this the exhibit -- let's just call it exhibit
6 log. Okay?

7 MR. MCDONALD: Exhibit log?

8 THE COURT: Let's just call it
9 exhibit log. I will call it Court's exhibit log
10 for the benefit of Judge McDonald (sic). It's
11 nice and typed up. So page 1 looks good.

12 MR. MCDONALD: Yes, sir.

13 THE COURT: Mr. McDonald, very
14 good. All right. Let's flip on over. Let's go
15 to page 2. Here we go.

16 MR. MCDONALD: Okay. On page 2,
17 tab 26, I just want to verify that that is the
18 replaced tab 26. If I recall, it was originally
19 the first page of every schedule, and it was
20 replaced with a dated -- just dates of each
21 updated schedule.

22 THE COURT: All right. Just one
23 second. 26 was replaced?

24 MR. MCDONALD: 26. And by
25 Balfour's description, it looks like that is the

1 replaced one because it says, list of schedule
2 dates typed out during trial.

3 THE COURT: Okay.

4 MR. MCDONALD: I just wanted to be
5 certain of that.

6 THE COURT: Okay. That appears
7 correct?

8 MR. HILDEBRAND: Yes.

9 THE COURT: Thank you. All right.
10 Other than that, page 2 look okay?

11 MR. MCDONALD: I'm almost through
12 IT.

13 THE COURT: Okay.

14 MR. HILDEBRAND: Your Honor, if you
15 would like, I would be happy to keep this current
16 while we progress with the trial and provide it
17 to you daily or whatever.

18 THE COURT: That would be great;
19 that would be good.

20 MR. MCDONALD: And I don't have a
21 103 on page 2.

22 THE COURT: Plaintiff's Exhibit
23 103? 12/28/2016 BBC demand for mediation. It's
24 from Kim Brown's deposition, Exhibit 37.

25 MR. MCDONALD: It says it came in

1 through Spano, but I don't have that in my notes.

2 THE COURT: Okay. I do, and I had
3 it coming in. So I think that's when there was
4 that dispute, and it was asked for mediation.

5 MR. MCDONALD: Your Honor, I have
6 no allusion that your notes do not trump my
7 notes. I understand that. I just -- for the
8 record, I just want to say, I don't have that in
9 my notes.

10 THE COURT: Okay. Just one second.

11 MR. MCDONALD: So with the
12 exception of tab 103, page 2, it appears
13 consistent with my notes.

14 THE COURT: Okay. Let me see if
15 I've got anything on that. Tab 103 was a
16 question, but I had it in evidence, so just one
17 second.

18 MR. MCDONALD: On page 3, tabs 205
19 and 206 are not in evidence. They are a response
20 for request to admit.

21 THE COURT: On which one? I'm
22 sorry.

23 MR. MCDONALD: On page 3, tabs 205
24 and 206. It has not come into evidence because
25 they were requested to admit.

1 THE COURT: 205 and 206?

2 MR. MCDONALD: Yes, sir.

3 MR. HILDEBRAND: I thought that
4 they did actually.

5 THE COURT: Yeah. My notes reflect
6 that those did come into evidence. They are
7 pleadings, but they are -- I think requests to
8 admit would be admissible. We talked about that
9 at one time, about they're being verified.

10 MR. MCDONALD: Okay. I just wanted
11 to put it on the record.

12 THE COURT: Okay. So I had them in
13 evidence. Okay?

14 MR. MCDONALD: Tabs 211 and 212 are
15 the first page of the pay applications, and they
16 were admitted for notice purposes only. Tab 213,
17 I do not have as not admitted. That was the
18 unsigned pay application 44.

19 THE COURT: Yeah. 211, 212, 213,
20 and then if I remember right, 213 -- these are
21 the final pay apps. My notes reflect that we
22 allowed those for notice of the pay application,
23 but they did not originally come in. I think
24 later they did.

25 MR. MCDONALD: Pay application 45.

1 The first page of pay application 45, I believe,
2 came in for the date purposes.

3 THE COURT: Right.

4 MR. MCDONALD: But I didn't have --
5 I'll just put it on the record, I didn't have 44
6 as coming in.

7 THE COURT: Yeah. Number 44?

8 MR. MCDONALD: Yes, sir. And, no,
9 that would be tab 213, which is already -- I
10 referred to it by pay application number 44, tab
11 213.

12 THE COURT: Right. For some
13 reason, I didn't have 14 written down. My notes
14 reflect that those were allowed for notice
15 purposes at that time. I think later on, we -- I
16 think they may have come in.

17 MR. HILDEBRAND: Right.

18 THE COURT: So I think this may
19 be -- this may update those later in time. But
20 that's -- those are the pay apps is what those
21 are. Initially, if they were signed, we allowed
22 them. That would have been -- if memory serves
23 me right, 42 was submitted, right?

24 MR. MCDONALD: Pay app 42 was
25 submitted, certified, and paid.

1 THE COURT: Right. 43 submitted.

2 That was one, I think, that was decertified was
3 the term we used?

4 MR. MCDONALD: At the risk of using
5 decertification --

6 MR. HILDEBRAND: It was not
7 certified.

8 THE COURT: It was or it was not?

9 MR. HILDEBRAND: That's one --

10 THE COURT: That's the one --

11 MR. HILDEBRAND: It was not.

12 THE COURT: That was the one that
13 was signed off, and then -- but then withdrawn
14 pursuant to the correspondence we had in January
15 of '19?

16 MR. MCDONALD: Yes, Your Honor.

17 THE COURT: And that's the one you
18 were fighting over yesterday. That's 43, right?

19 MR. MCDONALD: Yes, sir.

20 MR. HILDEBRAND: Not to belabor,
21 but we don't know when it was withdrawn. We
22 think there were some deducts that were noted,
23 but it was not actually withdrawn. There was
24 no -- the actual pay application was never
25 withdrawn. It was never by the architect. There

1 was no decertification.

2 THE COURT: All right.

3 MR. HILDEBRAND: So I just wanted
4 to state that for the record.

5 THE COURT: I gotcha. So back to
6 that, my notes reflect, initially allowed it for
7 notice purposes. I think we talked about them
8 later. We went into them to some degree. Is
9 there is an objection that --

10 MR. MCDONALD: No, no.

11 THE COURT: Does there remain an
12 objection to any of those pay apps?

13 MR. MCDONALD: No, that's fine.

14 THE COURT: Okay. Good. All
15 right. They're all in.

16 MR. MCDONALD: All right. I do not
17 have 215 as in.

18 THE COURT: You know, again, I put
19 it on there for -- my notes reflect it was for
20 notice purposes at that time. I know we went
21 back into it some time later.

22 MR. HILDEBRAND: I think they were
23 admitted later.

24 MR. MCDONALD: The next one is Phil
25 Garcia, the transcript portions.

1 THE COURT: Yeah.

2 MR. MCDONALD: And that was, I
3 believe, taken down by Madam Court Reporter.

4 THE COURT: I believe it was, yeah.
5 That was -- that all came out of the video?

6 MR. MCDONALD: Yes, sir.

7 THE COURT: And she took that down,
8 so that would be within -- that should be within
9 the record.

10 MR. HILDEBRAND: Right.

11 THE COURT: Objection there.

12 MR. HILDEBRAND: So that's not an
13 exhibit in?

14 THE COURT: Right. We will take
15 that out.

16 MR. HILDEBRAND: Right.

17 MR. MCDONALD: 231 is the Doran
18 PowerPoint presentation.

19 THE COURT: Right.

20 MR. MCDONALD: Just to be clear
21 with that, did you let that in for demonstrative
22 purposes?

23 THE COURT: 231, right?

24 MR. MCDONALD: Yes.

25 THE COURT: Yeah, I did. My notes

1 do not show it as an exhibit.

2 MR. MCDONALD: Okay.

3 MR. HILDEBRAND: Your Honor, I
4 think that was in. It was number 231, and we did
5 specifically move to have that entered, and I
6 think it is in evidence.

7 THE COURT: All right. Hold on a
8 second. That was Mark Doran's --

9 MR. HILDEBRAND: Yes, sir.

10 THE COURT: -- PowerPoint
11 presentation he did? All right. It comes in.

12 MR. MCDONALD: Steve Huyghe,
13 PowerPoint presentation, no number.

14 MR. HILDEBRAND: I know that we
15 moved that one in just like we did with
16 Mr. Doran's, but perhaps I didn't identify what
17 the specific number was. We can do that now.

18 MR. BUNDY: Your Honor, I object to
19 putting in evidence now. I mean, you're done.
20 There's not a witness here to identify anything.
21 It was purely for demonstrative purposes at most.
22 I know I objected to it. I objected to
23 everything.

24 MR. HILDEBRAND: It was in, Your
25 Honor. The only question is, there wasn't a

1 physical sticker. That's an administerial act.

2 THE COURT: Yeah, yeah. He is the
3 one that did the development design and
4 construction?

5 MR. HILDEBRAND: Yes, sir.

6 THE COURT: All right. That was
7 McCullough?

8 MR. MCDONALD: And there were a
9 number of things he wasn't allowed to testify
10 about, Your Honor.

11 THE COURT: Right. I think this is
12 McCullough's here is what I have got, the one
13 I've got in front of me.

14 MR. HILDEBRAND: I think Huyghe's
15 was the -- I think the really thick one.

16 THE COURT: Does that look like it?

17 MR. HILDEBRAND: That's Huyghe's.

18 THE COURT: That's Huyghe's?

19 MR. HILDEBRAND: That's the one
20 we're talking about.

21 THE COURT: Hold on a second.

22 MR. BUNDY: Remember, Your Honor,
23 there were parts of that that talked about the
24 owner's thing, and you said that he couldn't
25 testify to that.

1 THE COURT: Right.

2 MR. BUNDY: He was supposed to take
3 those out and then use the rest of them. My
4 recollection is it was for demonstrative
5 purposes, but you may have let it in. But I know
6 I objected to it so.

7 THE COURT: Okay. Hold on. Here's
8 what I highlighted. He had a lot of background
9 information in here. It's going to be hard to
10 do. It's an awful lot of information. His
11 testimony is clearly in the record.

12 MR. HILDEBRAND: Yes, sir.

13 THE COURT: And so this would
14 just -- this would be for demonstrative purposes.
15 What I would want to do is parse it, so that we
16 go from the plan to the actual. That's what he
17 spent most of his time testifying to.

18 MR. HILDEBRAND: Okay.

19 THE COURT: I will allow that into
20 evidence. It's only part of the document, but it
21 goes along with his testimony, so you can see
22 what he is saying. Okay?

23 MR. HILDEBRAND: Okay. Do you want
24 to -- if you want to just pull those pages out,
25 Your Honor, then we can mark what you have agreed

1 to?

2 THE COURT: Yeah. I'm inclined to
3 allow the end of this thing where he talked about
4 the plan versus the actual. This is -- if I
5 remember right, he's the one -- well, he does
6 have -- he's got the one with the red and the
7 blue which turns into purple.

8 MR. HILDEBRAND: Right.

9 THE COURT: That was what I recall
10 about his testimony, okay, as to what -- when the
11 project, according to him, got off track, so.

12 MR. HILDEBRAND: Right.

13 THE COURT: I'm willing to allow
14 that. Again, it was for demonstrative purposes
15 at the time.

16 MR. BUNDY: There you go.

17 THE COURT: Okay.

18 MR. BUNDY: There you go.

19 THE COURT: All right. So that's
20 like the last 10 or 12 pages. I will give that
21 to you and let you look at that.

22 MR. HILDEBRAND: All right, sir.
23 So would that be --

24 THE COURT: That did not get a
25 number, however.

1 COURT REPORTER: I think that's
2 333.

3 THE COURT: Okay. All right.

4 (PLF. EXH. 333 was marked for
5 identification and received in evidence.)

6 MR. HILDEBRAND: So would that be
7 what the first sticker is for?

8 THE COURT: It's says -- it's not
9 the first sticker, but it's like right behind it.
10 It says -- somewhere in there, the headline is
11 actual.

12 MR. HILDEBRAND: The actual?

13 THE COURT: Yeah.

14 MR. HILDEBRAND: Okay.

15 THE COURT: You can pull those
16 other stickers off if they're confusing.

17 MR. HILDEBRAND: So those are 333.

18 THE COURT: They are 333.

19 MR. HILDEBRAND: Is this your
20 working copy, Your Honor? I want to get it with
21 your notes on it.

22 THE COURT: It is.

23 MR. HILDEBRAND: So why don't I
24 give you this back, so I don't -- neither one of
25 us are --

1 THE COURT: Okay. You already put
2 it on there.

3 MR. HILDEBRAND: Okay. So I will
4 give you your working copy back. That will be
5 333.

6 THE COURT: Okay.

7 MR. HILDEBRAND: We can come back
8 to that one if you would like, Your Honor.

9 THE COURT: Okay.

10 MR. HILDEBRAND: I will pull those
11 same pages. It's the one that starts with the
12 actual. It's like the last report or so.

13 THE COURT: Yeah, the last 20 pages
14 or so.

15 MR. HILDEBRAND: Yes.

16 MR. MCDONALD: After that, I have
17 the remainder of page 3 as consistent with my
18 notes, Your Honor.

19 THE COURT: Okay.

20 MR. MCDONALD: On page 4, the only
21 thing I would note -- well, two things I would
22 note is -- I know Your Honor has this, but it
23 appears that when it goes to a Defendant's
24 Exhibit, there's quite a bit of explanation,
25 whereas the Plaintiff's Exhibit is pretty dry as

1 to the title. So obviously I didn't draft any of
2 this.

3 THE COURT: Right.

4 MR. MCDONALD: They've got quotes
5 from the document and I think that's
6 inappropriate.

7 THE COURT: I think they're
8 probably trying to identify it.

9 MR. MCDONALD: Okay.

10 THE COURT: I've got 27, 28, 29.

11 MR. MCDONALD: Yes, and the one
12 that said, showed Nick but not entered is not in
13 evidence.

14 THE COURT: Yeah, yeah, right.

15 MR. MCDONALD: 28 -- I'd just as
16 soon go by the exhibit numbers for
17 identification. 28 is in and 29 is in.

18 THE COURT: Correct. So I think
19 it's just the four. Okay. 30 has got questions,
20 but I show it in as well.

21 MR. MCDONALD: Yes, sir, Your
22 Honor. On page 5, Plaintiff's 300 through 307, I
23 would just note that my understanding is, those
24 are the page and line number rather than the --

25 THE COURT: Correct.

1 MR. MCDONALD: -- depositions
2 themselves.

3 THE COURT: That's correct. Those
4 are the things I took home and read. Okay.

5 MR. MCDONALD: And those would not
6 themselves be exhibits. They would just be page
7 and line number and deposition excerpts.

8 THE COURT: Yeah, because we --
9 ultimately, we submitted the entire depositions,
10 did we not, in the four-in-one format?

11 MR. HILDEBRAND: I'm sorry, Your
12 Honor.

13 THE COURT: 300 through 307 were
14 the -- that were marked as the deposition
15 excerpts that were submitted by plaintiff to
16 which responses were given, as I recall.

17 MR. MCDONALD: Yes, and objections.

18 THE COURT: And objections were
19 given, and we covered that later on.

20 MR. MCDONALD: And the Defendant
21 400 and 401 are the objections, counter
22 designations.

23 THE COURT: Correct.

24 MR. MCDONALD: But those wouldn't
25 have themselves been exhibits, I don't believe,

1 in the case.

2 MR. BYRD: For 300, as you can see
3 that what was entered, you'll have (inaudible).

4 THE COURT: I had those things a
5 minute ago. All right. So 300 is the
6 plaintiff's excerpts designation for the
7 deposition of Kimberly Brown. So Kim Brown was
8 300.

9 MR. MCDONALD: 56.

10 THE COURT: 56 is the contract.
11 That came in, didn't it?

12 MR. MCDONALD: Okay. Yes, so the
13 rest of page 5, subject to the deposition
14 excerpts, counter designations not being exhibits
15 is consistent with my notes.

16 MR. HILDEBRAND: I'm sorry, which
17 number?

18 MR. MCDONALD: Page 5.

19 MR. HILDEBRAND: And which number?

20 THE COURT: 300 through 307 and 400
21 and 401.

22 MR. MCDONALD: Yeah. Those would
23 just be the -- in the record, so you would know
24 what portion of the exhibits -- what portion of
25 those deposition transcripts were actually

1 submitted into evidence.

2 MR. HILDEBRAND: All right.

3 THE COURT: The best evidence there
4 being the depositions themselves. This just
5 takes you to what's relevant.

6 MR. MCDONALD: For what they
7 designated. So even though they gave you the
8 whole deposition transcript, the portions they
9 haven't designated aren't in evidence or aren't
10 relevant.

11 THE COURT: Okay. Got it.

12 MR. MCDONALD: Page 6, tab 132.
13 That was just proffered.

14 THE COURT: Tab 132?

15 MR. MCDONALD: Yes, sir.

16 THE COURT: That's consistent with
17 my records as well, tab 132.

18 MR. MCDONALD: 141 has the notation
19 which is consistent with my notes that it was
20 only page 1.

21 THE COURT: Okay. Sounds right.

22 MR. MCDONALD: The last one on page
23 6, just to be clear, Plaintiff's tab 226. Is
24 that the same thing as binder 5 of 5?

25 MR. BYRD: I think so.

1 THE COURT: That's the fifth
2 binder?

3 MR. BYRD: Yes, sir.

4 MR. MCDONALD: Okay. So binder 5
5 of 5 is --

6 THE COURT: Yeah, that's correct.

7 MR. MCDONALD: So this is not quite
8 up-to-date. The objections to 14, 17 and 18, I
9 believe, were remedied by the replacement --

10 THE COURT: Okay.

11 MR. MCDONALD: -- Portions.

12 THE COURT: Okay. Yeah. That was
13 the one we wanted to change out?

14 MR. MCDONALD: So the objections
15 were actually still to, I believe 19 through 22.

16 THE COURT: As to the objection?

17 MR. MCDONALD: Yes.

18 MR. HILDEBRAND: Just not 19. 19
19 was admitted.

20 MR. MCDONALD: 19 was signed?

21 MR. HILDEBRAND: Yes.

22 MR. BYRD: Your Honor, if I may, on
23 page 8, the changes are addressed.

24 THE COURT: Okay.

25 MR. BYRD: It just says under

1 Plaintiff 264. They're just the plaintiff.

2 MR. MCDONALD: Okay. So can we get
3 rid of one of these just so we're not --

4 MR. BYRD: Yes.

5 MR. MCDONALD: Okay.

6 MR. BYRD: We will get rid of the
7 first one.

8 MR. MCDONALD: Get rid of the first
9 one on September 21st; is that okay?

10 MR. BYRD: Yeah.

11 MR. MCDONALD: Okay.

12 THE COURT: All right. You lost me
13 on that one but anyway.

14 MR. MCDONALD: So the first one,
15 Your Honor, on the bottom of page 6 --

16 THE COURT: Right.

17 MR. MCDONALD: -- is the September
18 21st where they're attempting to identify
19 Plaintiff's tab 256.

20 THE COURT: Yes.

21 MR. MCDONALD: But that has the old
22 objections. If you go to page 8 and look at
23 September 22nd, the third one down.

24 THE COURT: Okay.

25 MR. MCDONALD: It just says

1 plaintiff. My understanding is that they're
2 going to add that as tab 226 so it's up-to-date.

3 THE COURT: Okay.

4 MR. MCDONALD: But I'm not to page
5 8 yet but I just wanted to jump ahead.

6 THE COURT: Okay. That's where we
7 pick it up. It was not --

8 MR. MCDONALD: Other than those
9 issues on -- other than that issue on page 6, it
10 appears to be consistent with my notes.

11 MR. BYRD: One more thing on page
12 6. Tab 132 was subject to you looking at the
13 Clements depo excerpts.

14 THE COURT: Yeah.

15 MR. BYRD: I lost my chart that had
16 (inaudible) and I'm just wondering if maybe we
17 can go back over it and see.

18 THE COURT: Okay. All right.
19 Yeah. All right. Hold on a second because I did
20 do that later. Which document would that be?

21 MR. BYRD: It's Plaintiff's tab
22 132.

23 THE COURT: Is that an e-mail?

24 MR. BYRD: E-mail from Clements, I
25 believe.

1 THE COURT: If you can identify it
2 from his --

3 MR. BYRD: I believe it's Exhibit
4 56 to the August 25th, 2020 deposition of James
5 M. Clements.

6 THE COURT: Exhibit 56? Yeah,
7 trial Exhibit 132, e-mail from Kim Brown,
8 reference of supplementary conditions review, and
9 I allowed that. Okay.

10 MR. MCDONALD: You have that in as
11 evidence, Your Honor?

12 THE COURT: I do. I haven't
13 reviewed his deposition. I think it was --
14 foundational was part of the process, but he
15 clearly acknowledged that he got it. So 132
16 would be in evidence. Okay? So that's a change.

17 MR. MCDONALD: And, Your Honor,
18 this probably doesn't need to be said, but
19 obviously all of -- there were objections
20 throughout the trial that were contemporaneous to
21 all of this. I'm just acknowledging that it's in
22 and it's subject to all the objections that we
23 made.

24 THE COURT: Sure, sure, sure.

25 MR. MCDONALD: Thank you, Your

1 Honor. Okay. Page 7, I go from binder 5 of 5 to
2 Plaintiff's 289. I don't have 283, 284, 285,
3 286, 287, and 288. It says that Simonton was
4 admitted.

5 THE COURT: I don't think I have
6 those numbers either unless they're in one of
7 these books. Are they in a book? 283 to 292.

8 MR. BYRD: So I have 283, it is
9 Clements depo 92. I have that in through
10 Clements' deposition transcript.

11 THE COURT: Okay. All right. So
12 we're back in Jim Clements. Okay.

13 MR. BYRD: I believe 284 is
14 Clements depo 94. I actually don't have in or
15 out written on that one, so I'm not sure
16 whether -- what your ruling was on that.

17 THE COURT: All right. Hold on.
18 Okay. Yeah, I'm seeing one of these now. And I
19 see on Clements -- so I'm on the log of Clements,
20 and I've got on -- April 20, excuse me, that was
21 a long one.

22 On his August 25, 2020, deposition trial
23 Exhibit 283 and 285. Now, 283 is listed, a
24 November 19, '18 e-mail from Foster referencing
25 design continuums, RCO number 161, which is

1 Exhibit 92 to his depositions. I have that as
2 admitted. Okay? Plaintiff's tab 283, I have in
3 evidence.

4 The next one that I'm showing -- I don't
5 have a 284 in this list. So I'm not sure what
6 that is yet. But then the next one in the list
7 that I've got in front of me shows trial Exhibit
8 285. That's an e-mail from Faulkinberry
9 referencing RCO 2015 to Lutron Lighting.

10 I had a question mark on that one
11 because I couldn't find the foundation for it; so
12 that's one of the ones I raised -- well, we
13 discussed this yesterday.

14 MR. MCDONALD: Also, one of the one
15 that I couldn't find foundation for.

16 THE COURT: Yeah. I couldn't find
17 the foundation on that one.

18 MR. MCDONALD: And then 286 is
19 answer and cross-claims, so would that be a
20 pleading.

21 THE COURT: That was not -- yeah,
22 that's not in evidence.

23 MR. MCDONALD: Yeah, and then --

24 THE COURT: That was proffered but
25 not in evidence.

1 MR. MCDONALD: And then 287 is the
2 A133 2009, and I think the last thing we need is
3 another copy of the A133 2009 with another
4 exhibit number.

5 THE COURT: I agree with that.

6 MR. MCDONALD: Okay.

7 THE COURT: Let's call that Exhibit
8 56. How about that?

9 MR. MCDONALD: Okay. And then I
10 don't have a partially executed pay app 9, 288 in
11 evidence in my notes.

12 THE COURT: 288. Help me out with
13 what -- I see that's a list of items. Refresh my
14 memory on how we were doing that. I don't
15 remember. These were all part of the
16 depositions?

17 MR. BYRD: Well, I cannot answer
18 that question.

19 THE COURT: Okay.

20 MR. BYRD: I didn't put this chart
21 together.

22 MR. HILDEBRAND: I think that we --
23 I just talked to the paralegal that did this.

24 THE COURT: All right.

25 MR. HILDEBRAND: I think that what

1 we need to do is probably go back and add the
2 exhibits that you -- that are in through the
3 depositions.

4 THE COURT: Right.

5 MR. HILDEBRAND: I believe --

6 THE COURT: And insert those?

7 MR. HILDEBRAND: Insert those, yes,
8 Your Honor.

9 THE COURT: Okay. Okay. Y'all
10 have got a current list of that?

11 MR. BYRD: I have a chart, and I
12 think there's maybe one or two where I just
13 didn't get the answer.

14 THE COURT: Okay.

15 MR. BYRD: I'm happy to just walk
16 through that, and if y'all heard differently or
17 if there's any reason to believe differently --

18 THE COURT: On the deposition
19 exhibits, correct?

20 MR. BYRD: Yes, sir.

21 THE COURT: Okay.

22 MR. MCDONALD: Can we just -- I
23 mean, we're six pages in.

24 THE COURT: Yeah.

25 MR. MCDONALD: But can we finish

1 this one and see if we can agree on what we can
2 on this one --

3 THE COURT: All right.

4 MR. MCDONALD: -- and then move to
5 that one?

6 THE COURT: Yeah. Then we'll come
7 back. Let's do that. Let's come back to that
8 one.

9 MR. MCDONALD: So 288, we don't
10 know what that is, and we don't have it in our
11 notes. So can we take it out of this one and --

12 THE COURT: Let's just skip it for
13 now. Let's skip over 288 through 292.

14 MR. MCDONALD: Okay.

15 THE COURT: Okay. And let's see if
16 we can get to some --

17 MR. MCDONALD: Well, 289, 290
18 are -- I have it in, in evidence.

19 THE COURT: 289 and 290?

20 MR. MCDONALD: Yes.

21 THE COURT: Okay.

22 MR. HILDEBRAND: What page are we
23 on?

24 MR. MCDONALD: Page 7.

25 THE COURT: Still on page 7.

1 MR. MCDONALD: 291 did not come
2 into evidence, as I have it in ID.

3 THE COURT: Pay app 44.

4 MR. MCDONALD: 292 did come into
5 evidence.

6 THE COURT: Okay. All right. We
7 will come back. Let's come back to those two.
8 All right. See if we can get back on track.
9 251, I have as in.

10 MR. MCDONALD: Okay. So the
11 remainder of page 7 or all of page 7, the ones
12 that -- so I've got one we just talked about,
13 Plaintiff tab 291, I have that as not in
14 evidence, and Plaintiff tab 256, I have as
15 proffered, not in evidence.

16 THE COURT: 256?

17 MR. MCDONALD: Yes, sir -- nope,
18 forgive me. What 256 was, Your Honor, was the
19 letter from Mr. Heuer. It was -- if you will
20 recall, it was originally put up, and it was
21 unsigned.

22 THE COURT: Right.

23 MR. MCDONALD: And I believe
24 Balfour, the following day, came back with a
25 signed version.

1 THE COURT: Came back in.

2 MR. MCDONALD: And that was
3 substituted, and I believe at that time Your
4 Honor let it in.

5 THE COURT: Yeah, okay. So 256 is
6 in. What was the other one you objected to? I'm
7 sorry. Just before --

8 MR. MCDONALD: I just have 291,
9 which is the unsigned pay app 44.

10 THE COURT: Okay. All right.
11 Let's come back to those in a second. I don't --
12 I questioned 288 and 291. Let's come back to
13 that. But other than that, 7 is okay. Let's go
14 to 8.

15 MR. MCDONALD: 287 and 288 -- 286,
16 287, and 288. 286 -- and this is on page 7 -- is
17 the pleading.

18 THE COURT: Right.

19 MR. MCDONALD: 287 is the contract,
20 and then we have the question on 288.

21 THE COURT: Okay.

22 MR. MCDONALD: On page 8, Your
23 Honor -- well, I will just go through the whole
24 thing, and then we'll come back.

25 THE COURT: Okay.

1 MR. MCDONALD: Okay. On page 8,
2 Your Honor, the first one, it doesn't have a
3 number, September 22nd. It's the fourth one
4 down, and it says plaintiff.

5 THE COURT: Yeah.

6 MR. MCDONALD: That's the Lithko
7 pleading that you did not let into evidence
8 because it settled during the claim of the Lithko
9 case.

10 THE COURT: Isn't that tab -- the
11 third one down, OCO binders, swapping tabs, isn't
12 that the one we just discussed?

13 MR. MCDONALD: No, Your Honor, the
14 fourth one down.

15 THE COURT: Fourth one down. Okay.

16 MR. MCDONALD: Yes, sir.

17 THE COURT: Lithko's answer and
18 cross-claim. Yeah, that's not in evidence.

19 MR. MCDONALD: Right. And I have
20 310 and 311, that they are not in evidence. They
21 were for ID only.

22 THE COURT: All right. That gets
23 back into those e-mails. Hold on one second.
24 All right. On Plaintiff tab 132, Trial Exhibit
25 was Exhibit 56 to Clements' deposition. It's an

1 e-mail from Kim Brown referencing the
2 supplementary conditions review.

3 It was allowed into evidence but limited
4 to explain the provision and not to change the
5 contract is what the statement shows. And my
6 records reflect that to be correct, 132.

7 MR. MCDONALD: Yes, sir. We dealt
8 with that one. I was referring to Plaintiff 310
9 and 311.

10 THE COURT: Oh, I'm sorry.

11 MR. MCDONALD: They had -- they
12 have it noted as a proffer. I just wanted to
13 make sure that was correct.

14 THE COURT: Yes, it would be a
15 proffer. It is not in evidence, it's a proffer.
16 Okay?

17 MR. MCDONALD: The one immediately
18 below that, Your Honor, showed day, but not
19 entered. That's correct, it was not entered into
20 evidence.

21 THE COURT: Okay. All right.

22 MR. MCDONALD: And the remainder on
23 page 8 are consistent with my notes, Your Honor.

24 THE COURT: All right. Very good.

25 MR. MCDONALD: All right. Your

1 Honor, page 9, the only thing I would say is that
2 each of these is consistent with my notes.
3 Obviously I believe the entire transcript was
4 marked and given to Your Honor, but obviously
5 that would be subject to the excerpts that were
6 actually designated rather than the entire
7 transcript itself.

8 On page 10, each of those are consistent
9 with my notes. Obviously Plaintiff's 328 was the
10 Cotton and Company report. That was not entered
11 into evidence, and it was noted on here that it
12 was not entered into evidence.

13 THE COURT: Right, right.

14 MR. MCDONALD: The rest are
15 consistent with my note. Your Honor, the last
16 comment I would have is, I don't know what Jim or
17 counter designations. There were other counter
18 designations that we made. So I just don't want
19 that to be indicative that that was the only
20 counter designations that we made. So I don't
21 know what that note is.

22 THE COURT: Which? I'm sorry, take
23 me, I'm not --

24 MR. MCDONALD: On page 10, I'm
25 sorry. The last page, I don't know what that

1 means. We have other counter designations, and
2 they're identified on -- by Defendant's 400 and
3 401.

4 THE COURT: Yes.

5 MR. MCDONALD: So I just don't know
6 what that one means.

7 THE COURT: 400 and 401. And was
8 that included on here? I'm looking to see.

9 MR. MCDONALD: Yes, sir.
10 Defendant's 400 and 401 were listed on page 5.

11 THE COURT: Okay. All right. Got
12 it. Okay. Yeah. Okay. So you want to go back
13 to the --

14 MR. HILDEBRAND: Yes, sir. So we
15 had provided you and everybody kind of a cheat
16 sheet which showed the deposition exhibits, the
17 exhibits that were coming in through the
18 deposition.

19 THE COURT: Right.

20 MR. HILDEBRAND: So that -- my
21 paralegal is making a copy of that, that we can
22 introduce as a Court's Exhibit if you'd like.
23 And here she goes.

24 THE COURT: Okay. Very timely.

25 MR. HILDEBRAND: Johnny on the

1 spot, yes, sir.

2 THE COURT: Okay.

3 MR. HILDEBRAND: So I think you've
4 got a working copy of that.

5 THE COURT: Okay.

6 MR. HILDEBRAND: So we can mark
7 this as a Court's Exhibit 5, and then what I --
8 do you want to mark this as your -- similar to
9 the other one, a Court's Exhibit, Your Honor?

10 THE COURT: Sure.

11 (PLF. EXH. 5 was marked for
12 identification and received in evidence.)

13 MR. MCDONALD: Your Honor, a lot of
14 this has already been dealt with.

15 MR. HILDEBRAND: It has, and I --

16 THE COURT: I think so. Do you
17 just want to verify it?

18 MR. HILDEBRAND: Right.

19 THE COURT: Okay.

20 MR. HILDEBRAND: So from my notes,
21 the exhibits that are at issue -- turn to second
22 page. So the Court's Exhibit would be 334.

23 (PLF. EXH. 334 was marked for
24 identification and received in evidence.)

25 MR. MCDONALD: Let's start on the

1 first page.

2 THE COURT: Yeah, let's start on
3 the first page because I can see one -- Exhibit
4 108 I did not allow under Buck Lindsay.

5 MR. HILDEBRAND: All right. So
6 let's -- we can go through it.

7 MR. MCDONALD: On Mr. Michael
8 Bennett, Exhibit 3 was withdrawn; Exhibit 4 was
9 withdrawn, and for the record, these are --
10 Judge, this document has the exhibits being
11 referred to as both their deposition numbers --

12 THE COURT: Right.

13 MR. MCDONALD: -- and as a
14 particular trial exhibit number.

15 THE COURT: Yes.

16 MR. MCDONALD: It may make more
17 sense for us to refer to the trial exhibits so
18 it's just not confusing --

19 THE COURT: Absolutely.

20 MR. MCDONALD: -- on the record.

21 MR. HILDEBRAND: All right.

22 THE COURT: Yeah.

23 MR. HILDEBRAND: So Exhibit 3, I
24 don't recall if the -- if it was withdrawn.

25 THE COURT: Those were the

1 newspaper articles?

2 MR. HILDEBRAND: Yes, sir.

3 THE COURT: You read them into the
4 record. I think they ought to be -- they ought
5 to come out. You read them in the record. I
6 allowed that.

7 MR. MCDONALD: Trial Exhibit 1.
8 Then the settlement agreement, the 2010
9 Goff D'Antonio settlement agreement, Balfour 28
10 was withdrawn.

11 THE COURT: Right.

12 MR. MCDONALD: Exhibit 56 is in.
13 We don't have to worry about it being referred to
14 as something else.

15 THE COURT: Right. Okay.

16 MR. HILDEBRAND: Your Honor, going
17 back to the newspaper articles, I know that we
18 talked about it, but I think that they were
19 introduced through his exhibit. He identified
20 those. I would like to keep those in the record.

21 THE COURT: Well, I'm not letting
22 you put them in, so there you go.

23 MR. HILDEBRAND: Okay. All right,
24 sir.

25 THE COURT: Okay. Over your

1 objection.

2 MR. HILDEBRAND: All right. Thank
3 you.

4 MR. BUNDY: Get Mr. Manigault in
5 here, I would like to cross-examine him.

6 MR. MCDONALD: Yeah, but I believe
7 that does it for Mr. Bennett's depositions. The
8 only -- the October of 2018 draw number 43 does
9 not have a trial exhibit number. It just says
10 four pages.

11 THE COURT: Right.

12 MR. BYRD: I don't believe those
13 were included in the trial exhibits, I don't
14 think.

15 MR. HILDEBRAND: Okay. I will
16 withdraw that one, Your Honor.

17 THE COURT: All right.

18 MR. MCDONALD: So as to
19 Mr. Bennett's, we have Trial Exhibit 56 and 53.

20 THE COURT: That's correct.

21 (PLF. EXH. 53 was marked for
22 identification and received in evidence.)

23 MR. HILDEBRAND: And then for
24 the -- I think from my records, Your Honor, we
25 then go to Jim Clements, and you went through

1 yesterday the ones that you took out from him.

2 THE COURT: Yeah.

3 MR. MCDONALD: I'm not trying to be
4 contrary at all, but if we could just go in
5 order. Next is Buck Lindsay, and it may be
6 easier.

7 THE COURT: All right. Let me go
8 through this because 108 I struck. That was --
9 my recollection of the deposition was, it was
10 something pulled off the internet. It wasn't
11 official, and that's why I kept it out. And that
12 was Ms. Faulkinberry's license having been
13 expired. So I kept that out.

14 MR. MCDONALD: And that's 182 in
15 the trial.

16 THE COURT: 182?

17 MR. MCDONALD: Yes, sir.

18 THE COURT: The rest of those on
19 that page were all yeses. Okay?

20 MR. MCDONALD: Okay. The rest
21 on -- for Mr. Lindsay, which would be 29, 30, 32,
22 33, 35, 38, 51, 152, and 54.

23 THE COURT: Yes.

24 MR. HILDEBRAND: Are in.

25 THE COURT: Were all in, correct.

1 (PLF. EXH. 29, 30, 32, 33, 35, 38,
2 51, 54 were marked for identification and
3 received in evidence.)

4 MR. MCDONALD: And those would be
5 subject to my objections on 401 -- or excuse me,
6 400.

7 THE COURT: Yes.

8 MR. MCDONALD: Thank you.
9 Defendant's 1.

10 MR. HILDEBRAND: Jennifer
11 Faulkinberry 182, 46 and 93 are in. Jim
12 Clements.

13 (PLF. EXH. 46 and 93 were marked
14 for identification and received in evidence.)

15 MR. MCDONALD: Hold on, hold on.

16 THE COURT: I did have an -- I also
17 made a note here. I have a 122 question mark. I
18 think that was the one we went back and forth on.
19 Was it 122 or 252? But I might just be way off.

20 MR. MCDONALD: Two things, Your
21 Honor.

22 THE COURT: Yes.

23 MR. MCDONALD: 182 is what you just
24 got rid of in Mr. Lindsay's.

25 THE COURT: Exhibit 108.

1 MR. MCDONALD: But Trial Exhibit
2 182 was also listed for Ms. Faulkinberry.

3 THE COURT: Right.

4 MR. MCDONALD: So that would come
5 out.

6 MR. HILDEBRAND: Okay.

7 THE COURT: Correct.

8 MR. MCDONALD: So it would just be
9 46 and 93?

10 THE COURT: I think that's -- yes.

11 MR. HILDEBRAND: Okay.

12 MR. MCDONALD: Subject to my
13 objections on Defendant's 400.

14 THE COURT: Correct.

15 MR. MCDONALD: Okay.

16 THE COURT: Okay.

17 MR. HILDEBRAND: All right. So on
18 Clements, I've got -- 4 is in; 56 is actually --
19 his deposition exhibit was out but that has now
20 been replaced by a subsequent version.

21 THE COURT: Right.

22 MR. HILDEBRAND: And the rest of
23 those are on pages 6, 132, 71, 88, 90.

24 THE COURT: Stop right there.

25 Those I have all in.

1 MR. HILDEBRAND: Yes, sir.

2 THE COURT: Okay. Bottom of page
3 2.

4 MR. HILDEBRAND: Then on the next
5 page in are 92, 94, 100, 111, 117, 133.

6 MR. MCDONALD: Can you slow down
7 just a second, Tom?

8 MR. HILDEBRAND: Sure.

9 THE COURT: I've got those all in.

10 MR. HILDEBRAND: Okay. Out is 151.

11 THE COURT: Right.

12 MR. HILDEBRAND: In is 155. Out is
13 167.

14 THE COURT: Correct.

15 MR. HILDEBRAND: In are 14, 15, 16,
16 17, 22, 164, and then the bottom of that, which
17 was Exhibit 89 to this deposition, is not in.

18 THE COURT: Correct.

19 MR. HILDEBRAND: And on the next
20 page, Plaintiff's Trial Exhibit or the next
21 Exhibit 8 is in, 283. 285, I'm not sure about.
22 I have a question mark when going through that,
23 Your Honor.

24 THE COURT: Yeah. And that's what
25 I had. I had a question mark about it because I

1 couldn't find a foundation for that one. You
2 remember we talked about that yesterday.

3 MR. MCDONALD: Yeah. And I had
4 more that I couldn't find than you had.

5 THE COURT: Yeah.

6 MR. MCDONALD: But I also couldn't
7 find it.

8 THE COURT: I just couldn't find
9 it. I couldn't find the foundation; so that's
10 going to be a no.

11 MR. HILDEBRAND: Okay. And then
12 Exhibit 98 was in.

13 MR. MCDONALD: Well, it doesn't
14 have a trial exhibit.

15 MR. HILDEBRAND: We'll mark that as
16 the next exhibit. We have a copy of that.

17 So Court Reporter, that will be?

18 COURT REPORTER: 335.

19 THE COURT: 335.

20 (PLF. EXH. 335 was marked for
21 identification and received in evidence.)

22 MR. HILDEBRAND: And then going
23 down to Jim Clements, still Monday, October 5,
24 2020, 128 was out. 130 is in, and we will mark
25 that 336.

1 (PLF. EXH. 336 was marked for
2 identification and received in evidence.)

3 MR. HILDEBRAND: And 134 was in,
4 and we'll mark that 337. 135 out. 142 in, 29
5 pages, and we will mark that 338. 145 is in, we
6 will mark that 339.

7 (PLF. EXH. 337 through 339 were
8 marked for identification and received in
9 evidence.)

10 MR. HILDEBRAND: The next two I
11 have question marks by, Your Honor, so I'm not
12 sure where those --

13 THE COURT: All right. My records
14 show that 133 was admitted at some time during
15 Nick Starcevic's testimony.

16 MR. HILDEBRAND: Yep, it is,
17 correct.

18 THE COURT: Okay.

19 MR. MCDONALD: Where is that? What
20 page is that on?

21 MR. HILDEBRAND: On page 3, seven
22 down.

23 THE COURT: So it's the second
24 trial exhibit from the bottom is the reference,
25 but I had it in evidence at some point in time

1 during Nick Starcevic's testimony.

2 MR. MCDONALD: I don't see it on
3 our Court's exhibit log.

4 MR. HILDEBRAND: All right. Hold
5 on. I was looking at the wrong one.

6 MR. BYRD: It is entirely possible
7 that this is not an exhaustive list of all of the
8 exhibits.

9 THE COURT: Well, there's our
10 problem, but let's see if we can find it.

11 MR. MCDONALD: Your Honor, I have
12 it in my notes as in over objection, Plaintiff
13 133.

14 THE COURT: Yeah. Okay. You
15 showed it as coming in, right?

16 MR. MCDONALD: I have that in my
17 notes.

18 THE COURT: Yeah.

19 MR. MCDONALD: In over objection,
20 Your Honor.

21 THE COURT: Yeah. The next one I
22 did have any reference to.

23 MR. HILDEBRAND: That would be 148?

24 THE COURT: 148. I had a question
25 for it. I couldn't find the foundation for it.

1 MR. MCDONALD: So is that out?

2 THE COURT: So that would be a no,
3 yes.

4 MR. HILDEBRAND: Okay. All right.
5 So then we go down to the very bottom. I had a
6 question mark about the very bottom one, Clements
7 listing of notes. I think he identified those as
8 his notice in his document that he took
9 contemporaneous with that deposition. So I
10 believe (inaudible).

11 THE COURT: These are notes that he
12 would have prepared?

13 MR. HILDEBRAND: Yes, sir, that he
14 brought to his deposition.

15 MR. MCDONALD: It doesn't -- he is
16 going to come testify, and he's going to
17 cross-examine him on them, so it is what it is.
18 They're his notes.

19 THE COURT: All right.

20 MR. MCDONALD: That's just saying
21 they're his notes.

22 THE COURT: Well, I'm going to keep
23 it out for now.

24 MR. MCDONALD: Okay. And then you
25 had 9.

1 MR. HILDEBRAND: Exhibit 9 I had
2 in.

3 MR. MCDONALD: It does not have
4 a --

5 THE COURT: Right.

6 MR. HILDEBRAND: Right. That would
7 need to be marked.

8 THE COURT: Would that be 340?

9 MR. HILDEBRAND: Yeah, 340.

10 (PLF. EXH. 340 was marked for
11 identification and received in evidence.)

12 MR. MCDONALD: Because once again,
13 these would be -- for Mr. Clements, these would
14 be subject to the objections that I have put on
15 the record rather than the written.

16 THE COURT: Yes.

17 MR. MCDONALD: Thank you. All
18 right. Ms. Brown, I think 28 is out. That was
19 withdrawn. 286 out. That's the Lithko pleading.
20 56 is fine, just so long as we're clear that
21 we're going to do 56 instead of a deposition
22 exhibit.

23 MR. HILDEBRAND: Right.

24 THE COURT: Right.

25 MR. MCDONALD: I believe you had 45

1 and 41 as in.

2 (PLF. EXH. 41 and 45 were marked
3 for identification and received in evidence.)

4 MR. HILDEBRAND: I don't have any
5 remaining ones out. Maybe that's the easy way to
6 look at it.

7 THE COURT: I have 177 in, invoice
8 register. I had 42 out, and I had 66 in.

9 (PLF. EXH. 66 and 177 were marked
10 for identification and received in evidence.)

11 MR. HILDEBRAND: Maybe that's an
12 easier way to do it, Your Honor, if you can just
13 tell us which ones you had that are in.

14 THE COURT: Yeah, from there. So
15 on Kim Brown on the list would be the first and
16 second because Trial Exhibits 28, 286, and then
17 the next to last one, number 42 out, all the rest
18 of them in.

19 MR. HILDEBRAND: Okay.

20 THE COURT: Next, Kim Brown from
21 August 5, 2020. I had no on the first one,
22 e-mail from Simonton to Lindsay. That's Trial
23 Exhibit 167. I'm going to allow the next two in,
24 the last one being the contract documents, so 62
25 and 56, of course.

1 (PLF. EXH. 62 was marked for
2 identification and received in evidence.)

3 MR. HILDEBRAND: And then --

4 THE COURT: On Exhibit 68, my notes
5 reflect that I have a question mark. I was going
6 to allow it in, and I have a question on whether
7 or not it was withdrawn. So whether that was in
8 the deposition or it's a Trial Exhibit 68.

9 MR. MCDONALD: If you recall, these
10 are the ones we did first or maybe like the
11 second day of the trial.

12 THE COURT: Okay.

13 MR. MCDONALD: So they had a
14 different -- then we did a big chunk together; so
15 let me pull my notes from that.

16 THE COURT: All right.

17 MR. HILDEBRAND: I believe this is
18 already in. I think this is already in.

19 THE COURT: 68?

20 MR. HILDEBRAND: 168?

21 THE COURT: No. What's this
22 number? It was Trial Exhibit No. 68. And in my
23 notes, we skip from 26 to 70 so.

24 MR. MCDONALD: Sorry, Your Honor,
25 this is the 30(b)(6) one. I have it as withdrawn

1 on my notes, Your Honor, because that was Exhibit
2 22.

3 THE COURT: Yeah, Exhibit 22 to the
4 deposition.

5 MR. MCDONALD: Yeah, to the
6 30(b)(6) deposition. That's the April 29, 2021
7 deposition. I have it as withdrawn.

8 THE COURT: The exhibit?

9 MR. MCDONALD: The exhibit, yes,
10 sir.

11 THE COURT: That's what mine --
12 that's what mine shows.

13 MR. HILDEBRAND: I couldn't
14 remember on that one, Your Honor, I don't have
15 notes; so I will withdraw that.

16 THE COURT: Okay. All right.

17 MR. MCDONALD: I also have the
18 Exhibit 25 as withdrawn.

19 MR. HILDEBRAND: 167.

20 THE COURT: I had no on that one
21 anyway as well as on 29.

22 MR. MCDONALD: And then there is no
23 Exhibit 29 to this deposition.

24 MR. HILDEBRAND: Well, he said --

25 THE COURT: Yeah.

1 MR. MCDONALD: Oh, sorry, Your
2 Honor.

3 THE COURT: I kept all of those
4 out. On the 30(b)(6), I kept those out. While
5 we're at it, on Jim Lord, I allowed that, and
6 then is this where -- this must be where they
7 added that other language of the -- on the
8 counter designations because it only made sense
9 to read it to the next page, page 51, line 6 to
10 page 52, line 21 where I added -- that was a
11 notation.

12 MR. MCDONALD: For my counter
13 designation?

14 THE COURT: Yeah, on the counters.

15 MR. MCDONALD: Yes, Your Honor.

16 THE COURT: So just read. I
17 allowed that and just extended it out another
18 page, I think it was. It was through page 52,
19 line 21, per the counter designation.

20 MR. HILDEBRAND: Okay.

21 THE COURT: Okay.

22 MR. BUNDY: Now, we have that
23 behind us.

24 THE COURT: I think we do. Did we
25 cover everything?

1 MR. HILDEBRAND: I think so, Your
2 Honor. So what I might suggest is, we are going
3 to get the transcript. If there's anything we
4 missed, that we can come back and just to put --
5 and maybe -- would you like for me to consolidate
6 these two for the Court going forward? I don't
7 want it make more -- it might make it easier.

8 MR. BUNDY: Might I suggest we ask
9 the court reporter just to give us the transcript
10 of what she just did over the last hour, provide
11 it to both parties, and then Mr. Hildebrand can
12 accommodate us by taking that transcript and put
13 together a list that we've all agreed on and said
14 in open court?

15 MR. HILDEBRAND: Well, the only
16 problem with that is that there might be exhibits
17 that were somehow missed when we put this
18 together. I think it's accurate, but the
19 transcript would speak for itself. So I will --
20 we'll see the -- I think this is it, Your Honor.

21 THE COURT: All right. Before we
22 finish, I want to go back to Plaintiff tabs 288
23 and 291. We talked about those. That was pay
24 app 9 in December of '15 and pay app 44 in
25 November of '18. I want to make sure that we

1 covered those. Those are the ones I want to go
2 back to.

3 MR. HILDEBRAND: Oh, right. That's
4 on page 7, I believe.

5 THE COURT: Page 7 of the exhibit
6 log. All right. I did not show 288 come into
7 evidence on my list; however, I did show 291
8 coming in. So those are those pay apps.

9 MR. HILDEBRAND: Okay. That's
10 fine. So 291 is in; 288 is out.

11 THE COURT: All right. Just to
12 cover that. I would say for now let's keep them
13 separate if you would.

14 MR. HILDEBRAND: Okay, sure.

15 THE COURT: Just because it's
16 clearer, and then once we've got a chance to look
17 over it, then let's see if we can't merge it as
18 one document --

19 MR. BUNDY: Okay.

20 THE COURT: -- when we finalize
21 this whole process. Okay? At least we can keep
22 it separate that way.

23 It easier for me, if there's a question
24 about it, to go to the deposition and see what
25 the deposition exhibit is right now and then make

1 sure it's in. And then we can transpose it over
2 to the exhibit log when it's all said and done.

3 MR. HILDEBRAND: Okay. Sounds
4 good.

5 MR. BUNDY: Thank you, Your Honor.
6 I have a proposal I would like to make --

7 THE COURT: All right.

8 MR. BUNDY: -- for the next four
9 weeks. As you know, Your Honor --

10 MR. HILDEBRAND: I've got a couple
11 more aspects -- a couple of things I would like
12 to introduce.

13 THE COURT: Okay, okay. Plaintiff
14 has not rested yet.

15 MR. HILDEBRAND: Yes, sir.

16 THE COURT: I'm with you. Just one
17 second. Very good. Okay.

18 MR. HILDEBRAND: All right. Just
19 one more housekeeping matter, we had not
20 introduced the miniscript of Jim Lord's
21 deposition inadvertently, so I would like to do
22 that now, and that would be --

23 THE COURT: Next number would be --

24 MR. HILDEBRAND: 341.

25 THE COURT: 341, right.

1 MR. MCDONALD: What is the date on
2 that?

3 MR. HILDEBRAND: November 18.

4 THE COURT: What was the date
5 again? I'm sorry.

6 MR. MCDONALD: November 18, 2020.

7 THE COURT: 2020?

8 MR. HILDEBRAND: All right. So Jim
9 Lord's deposition will be marked as Exhibit 341,
10 and I would like move to admit that, Your Honor.

11 THE COURT: All right. In
12 evidence.

13 (PLF. EXH. 341 was marked for
14 identification and received in evidence.)

15 MR. MCDONALD: And, again, it's
16 just the excerpts that have been designated?

17 THE COURT: It's only like three
18 pages. Okay.

19 MR. HILDEBRAND: All right. And
20 then last, what I've done, Your Honor, is to --
21 I've got a summary of your orders for -- as to
22 summary judgment with the subcontractor, the
23 amount, and the attorneys' fees totaled,
24 prejudgment interest.

25 THE COURT: Okay.

1 MR. HILDEBRAND: It's a composite
2 of those orders just to make it easier on the
3 Court. So I would like to introduce that as a
4 filed exhibit.

5 MR. BUNDY: There's not a witness
6 on the stand; so I don't know how we introduce
7 evidence in a case without a witness on the
8 stand.

9 THE COURT: All right. It's not
10 going to come into evidence. It's just a summary
11 or compilation?

12 MR. BUNDY: If he's not moving to
13 put it into evidence, then it's just --

14 THE COURT: Well, no, he is, but
15 I'm not going to allow it as evidence. But I
16 will use it as an exhibit. Do you want to use it
17 as a proffer or something, whatever is --

18 MR. HILDEBRAND: As a Court's
19 exhibit.

20 THE COURT: It's a benefit to the
21 Court to add to the calculation numbers. I guess
22 it updates the numbers from what Casey Thompson
23 was talking about or includes those, I'm not sure
24 which.

25 MR. HILDEBRAND: It includes them,

1 yes, sir. And it's just an easier format.

2 THE COURT: Sure.

3 MR. HILDEBRAND: I thought it might
4 be for the Court's sake.

5 THE COURT: Okay.

6 MR. HILDEBRAND: If we can mark
7 this as the exhibit as Court's --

8 THE COURT: Court's exhibit or
9 something? I'm going to call it a proffer again.
10 Do you want to give it the next number?

11 MR. HILDEBRAND: So that would be?

12 COURT REPORTER: 342.

13 THE COURT: 342 for ID. Okay.
14 Let's just call it that. Okay.

15 MR. HILDEBRAND: Thank you, sir.

16 (PLF. EXH. 342 was marked for
17 identification and received as a proffer.)

18 THE COURT: Okay. So we've had six
19 subs get judgment plus some others that settled
20 out, right?

21 MR. HILDEBRAND: Yes, sir.

22 THE COURT: Okay. I don't have a
23 definitive number yet, but we will get to that in
24 a minute. Okay. All right.

25 MR. HILDEBRAND: And the plaintiff

1 rests.

2 THE COURT: There you go.

3 MR. BUNDY: Done?

4 THE COURT: Yes, sir. Thank you
5 very much. Appreciate y'all putting all of that
6 together. Nice, clean record. Very few
7 objections. All right. We're about to hear the
8 principal objection now.

9 All right. You've got a motion to make,
10 Mr. Bundy?

11 MR. BUNDY: Yes, sir.

12 MR. HILDEBRAND: Can we take a few
13 minutes?

14 THE COURT: Do you want a few
15 minutes?

16 MR. HILDEBRAND: I don't know how
17 long it's going to take, but if it's going to
18 take more than just a couple minutes, I would
19 like --

20 MR. BUNDY: It's going to take five
21 minutes.

22 THE COURT: Okay. Go ahead.

23 MR. BUNDY: All right. As I
24 understand the way it works now is you hear
25 directed verdict motions, et cetera. We've got

1 four weeks approximately from Monday before we
2 come back.

3 You have before you, and I believe the
4 issues have been joined, the declaratory judgment
5 decision. I don't think we need to put in any
6 more evidence for now. And, you know, there's no
7 need for anymore evidence on a DJ action. They
8 filed an action, we filed an action, and got it
9 in front of you.

10 So what I would propose is this, is that
11 the defendant has until October the 4th, which
12 would be 10 days to file briefs and motions in
13 writing or with regard to his position on the DJ,
14 his position on our directed verdict motions. So
15 we're going to have quite few and hopefully
16 convince you, but if we don't, so be it.

17 Then the plaintiff would have 10 days
18 until October the 14th to file its reply briefs
19 and its position on the declaratory judgment
20 action. During that time, hopefully this young
21 lady will have concluded the transcript.

22 And so I would request that the Court
23 allow the parties, both of them, to amend their
24 briefs to add actual recitations to the record
25 book and line. Okay? Because we're going to

1 have to -- particularly the plaintiff, because
2 we're not going to have a transcript by the 10th
3 of October or by the 4th of October.

4 So we will be reciting what was based on
5 our notes, recollections, et cetera, and it may
6 well be that we'll be able to substantiate that
7 with the actual transcript language to help you
8 in making the decision.

9 Then I would request, very respectfully,
10 that the Court issue its ruling by October 24th
11 or obviously as early as possible. If you want
12 to do it quicker, that would be great, too. But
13 it would be -- I would like to go into the next
14 phase of this trial knowing where I stand
15 regarding how much the plaintiff has -- how much
16 of the case the plaintiff has left, and also what
17 the contract is as a result of your ruling on
18 declaratory judgment actions.

19 Because, of course, it's going to
20 influence how I try my case when I started on
21 Monday. And that would be my proposal. Thank
22 you, Your Honor.

23 THE COURT: All right. Let me hear
24 you from on that, Mr. Hildebrand.

25 MR. HILDEBRAND: Your Honor, at the

1 directed verdict stage of every case I've ever
2 tried, you -- the other side, the person moved
3 that for directed verdict, they moved right then
4 and there, and they just put their notes on the
5 record, and you argue it.

6 You don't take -- you don't get the
7 transcript and then do briefs and everything
8 else. You move for directed verdict right then
9 and there. And the attorneys' fees are already
10 extremely high in this matter, as you can
11 imagine, and I don't -- I can't imagine how much
12 time and effort that's going to take.

13 I'd like to just have Mr. Bundy make his
14 motions now like it is in every other case.
15 Let's address them. And then as far as the dec
16 action, I absolutely object, and I think it's
17 improper and highly prejudicial.

18 He can't just move for a dec action as
19 part of his case, and I move forward as part of
20 my case, and then him not put up his evidence and
21 whatever evidence that he wants to introduce at
22 trial. That's the way it works. We put up our
23 evidence, and we put in evidence to show the
24 supplementary conditions are not in. He puts up
25 his evidence, and then the Court decides.

1 I think more of a red herring maybe, but it could
2 be pivotal for this case. I don't know.

3 MR. BUNDY: Are you going to -- if
4 you're just going to do the dec case, we don't
5 need this much time, and I can -- and you could
6 probably make that decision quicker if we know it
7 sooner, and I could prepare for trial, if that's
8 the only thing you're going to rule on.

9 But if you -- but I would ask that you
10 in fact allow us to write a brief in five or ten
11 days or whatever on a DJ -- on the directed
12 verdict. I don't know what my opposing counsel's
13 experience has been in trial. I don't how many
14 cases he's tried. I've been trying it for 40
15 years, and that's not my experience, okay,
16 Particularly in nonjury cases.

17 So this gives us the opportunity to put
18 before you, in clear fashion, whatever it is. We
19 can make it short. Okay? Or I can just make a
20 perfunctory motion, and you can deny it, and we
21 can go on with it. And that's fine, too.

22 But I don't see, with the amount of
23 money involved here, why it wouldn't be
24 beneficial to the Court for us to be able to
25 point out to you what we see as the deficiencies

1 in the presentation. It's not as if it's a
2 burden on them because they're the ones who is
3 responsible for the case they put in.

4 It's more of a burden on me because I've
5 got to do two things at once. I've got to not
6 only make a brief and file a motion on a DJ case,
7 I have also got to prepare for trial.

8 THE COURT: Right.

9 MR. BUNDY: He has done. All he
10 has got to do is defend what he has already put
11 in. So I'm just trying to -- I don't know --
12 avoid wasting a lot of time, that's all.

13 THE COURT: Well, I'm all for that.
14 Are you -- I want to make sure I'm clear because
15 my understanding was that the issue you were
16 asking to be addressed was the declaratory
17 judgment action and what is the contract.

18 MR. BUNDY: Correct.

19 THE COURT: Right?

20 MR. BUNDY: Right. That's one of
21 them.

22 THE COURT: Okay.

23 MR. BUNDY: The other issue is, I
24 would like to make written directed verdict
25 motions and brief it as opposed to standing up

1 here now and move for directed verdict, reading
2 the pleadings, and moving for a directed verdict
3 on everything. And you just simply say, well,
4 you know what? He has made a prima facie case.
5 Let's move on, and I'll see you on October 25th.
6 And I'm glad to do it that way.

7 THE COURT: Okay.

8 MR. BUNDY: But it seems to me,
9 that this sitting nonjury four week hiatus,
10 however you pronounce it --

11 THE COURT: Right.

12 MR. BUNDY: -- and a recorded
13 transcript, it might make sense in this case --
14 and you might be -- I'm not suggesting you're
15 going to through them out of Court. But you
16 might narrow the issues coming up in October. I
17 won't have to put in -- I may not have to put in
18 evidence in defense of some of his claims, which
19 he clearly hasn't proven.

20 I'm going to have to try to clean the
21 thing up, and you're not in the position today, I
22 don't believe, to listen to a motion, a verbal
23 motion, and clean this thing up. You know what
24 I'm saying.

25 THE COURT: I'm with you. I think

1 I've got ---

2 MR. BUNDY: So that's all I'm
3 trying to do. You can make it a lot shorter.
4 You can give me until Tuesday if you want to or
5 Monday. I just would like a little time to be
6 able to make it cogent and clear. And I don't
7 know -- the position that at least outlines it
8 for not only you, but him, where I think we are.
9 Thank you, Your Honor.

10 THE COURT: Let me hear from you on
11 that, Mr. Hildebrand.

12 MR. HILDEBRAND: Your Honor, I've
13 never had a case -- and Mr. Bundy, I guess, is
14 alluding to, he thinks he's tried more cases than
15 I have. I don't know. I'm not going to try to
16 swap experiences. He is a good lawyer.

17 I can tell you that every case that I
18 have tried -- and I've probably tried a
19 hundred -- the parties move immediately after the
20 case to -- for directed verdict, and you stand up
21 and you make your motion in every case I've ever
22 had.

23 And I would imagine that's probably been
24 your experience. You've tried a whole bunch more
25 than I have. So I just get concerned. My gosh,

1 this thing has dragged on, and the attorneys'
2 fees are high. That's the usual procedure.
3 That's what I would like for him to follow.

4 And the fact is that, at this point,
5 he's -- Mr. Bundy has alluded to it is, have we
6 put on evidence of our causes of action. And
7 I've been through every single one of them, and I
8 have been through the exhibits and the witnesses
9 that we've introduced and the deposition
10 transcripts that we've introduced, so we put
11 breach of the contract, and then you put whole on
12 a lot of issues.

13 I think if we put in all the evidence --
14 and you're smart enough and tried enough of
15 these, I would think, to look at those same
16 causes of action and say, have we put all the
17 evidence to support those cases? So I would --
18 that's what I would suggest, and let's move
19 forward and not just have open-ends now until the
20 next three weeks or whatever. Let's just decide.

21 THE COURT: Well, let me -- I've
22 not done it this way before, but isn't the burden
23 of proof at this point in time, to establish
24 their motion on the defendants? To toss you out
25 of Court, doesn't the Court have to look at the

1 facts and the like most favorable to the
2 nonmoving party?

3 MR. HILDEBRAND: Right.

4 THE COURT: Clearly that's to your
5 benefit, is it not at this stage?

6 MR. HILDEBRAND: Yes, sir.

7 THE COURT: I have never thought
8 about that, but there are a lot of moving parts
9 here. Do you think you can get me a brief within
10 10 days?

11 MR. BUNDY: Yes, sir.

12 THE COURT: Can you keep that
13 within 25 pages?

14 MR. BUNDY: Yes, sir. I can keep
15 it within any number of pages you deem fit.

16 THE COURT: All right.

17 MR. BUNDY: 25?

18 THE COURT: If you can keep it
19 within 25 pages, I will give you until October
20 4th.

21 MR. BUNDY: Thank you, Your Honor.

22 THE COURT: Mr. Hildebrand, it's
23 unusual, but I'm willing to entertain it that
24 way, and I would ask from y'all's perspective,
25 all you need to do is just show that you've got

1 some evidence in the record that supports your
2 claim. So I think y'all should be fairly
3 straightforward. Okay?

4 What I would like -- I'll tell you what
5 I would like to do, and that would be to try get
6 rid of this red herring about the supplemental
7 conditions.

8 MR. HILDEBRAND: Okay.

9 THE COURT: That's what I would ask
10 that y'all each focus on there, and especially
11 from your perspective. Okay?

12 MR. HILDEBRAND: Okay. Fair
13 enough. So we have 10 days and the same limit on
14 the pages?

15 THE COURT: Sure, yeah, if y'all
16 can do that. I should be able to get to an
17 answer. I will just have to dig into these
18 documents then. Okay? If I don't have one, I
19 will call you about it, but --

20 MR. HILDEBRAND: So our response
21 will be due on the 15th?

22 THE COURT: Yeah. I didn't pull
23 out my calendar, but that sounds --

24 MR. BUNDY: Well, I did -- well, I
25 asked Brent to do it for me. I hope he did it

1 right. 10/4 would be my deadline; 10/14 would be
2 Mr. Hildebrand's deadline.

3 THE COURT: Yeah. All right.

4 MR. BUNDY: And I gave you a
5 deadline of the 24th.

6 THE COURT: Yeah. Okay. So if the
7 plaintiff -- plaintiff can get me something by
8 Monday -- by the end of the day, Monday, October
9 the 4th, I give the -- excuse me, the defendant
10 is going to make the motion in writing by Monday,
11 October the 4th. And if the plaintiff will reply
12 by the end of the day on the 15th, I will give
13 you that Friday, the 15th.

14 MR. HILDEBRAND: Thank you.

15 THE COURT: And then what I will do
16 is, I will plan to get y'all an answer by the
17 22nd, Friday, October 22. Okay? And then we are
18 set to commence the 25th. If you'll bear with me
19 for like two seconds, I will see if I've gotten
20 an answer from the clerk to my request.

21 MR. HILDEBRAND: And that will just
22 be on the briefs? You'll just rule on the
23 briefs, Your Honor.

24 THE COURT: Yeah, yeah.

25 MR. BUNDY: Your Honor, we are

1 going for two weeks? Is that the next round is
2 two weeks?

3 THE COURT: Yes, sir.

4 MR. BUNDY: Okay.

5 THE COURT: Yes, sir. No, I have
6 not gotten a response back from the clerk yet,
7 but let's plan to meet back in here on the 25th
8 unless you hear from me otherwise. Okay? That
9 would be the plan. All right. That will be my
10 preferred plan. I might not get granted that
11 plan, but we will see. Okay?

12 MR. BUNDY: Thank you, Your Honor.

13 MR. KELLY: Your Honor, when we
14 original set these dates, you were going to have
15 the subcontractors go first, and then I know
16 obviously the plaintiff --

17 THE COURT: We switched that
18 around, and we managed to get through the
19 plaintiff's case in two weeks as opposed to both
20 trials.

21 MR. KELLY: We're rolling now. And
22 my assumption is, Mr. Bundy is going to take a
23 while during that first week of October.

24 So I just didn't know what the plan was,
25 assuming -- I don't know if he's going to get it

1 done in one week or not, but if we go into that
2 second week, is the assumption that
3 subcontractors then present their case.

4 THE COURT: Probably go at that
5 time. Do you know how many witnesses roughly
6 you're going to have? I counted up nine
7 including the video deposition that we showed is
8 what I counted.

9 I could be off on my numbers, but -- and
10 we had lots of dealings with the deposition
11 transcripts. But I'm just trying to sort of
12 figure it down. We've averaged about one witness
13 a day is what I'm saying. Okay? We had a couple
14 of them go three days.

15 MR. BUNDY: We got probably seven
16 or eight live witnesses.

17 THE COURT: Okay.

18 MR. BUNDY: But we have a good many
19 video depositions --

20 THE COURT: All right.

21 MR. BUNDY: -- that we will edit
22 and get the clips to Mr. Hildebrand. I convinced
23 my client to spend probably \$100,000 on video
24 depositions because I don't believe reading a
25 deposition is nearly as informative to Your Honor