THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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

Appellate Case No. 2024-000788

Balfour Beatty Construction, LLC, Appellant,

v.

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

And

Library Associates, LLC, Third-Party Plaintiff,

v.

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

Of which Library Associates, LLC is the Respondent.

SUPPLEMENT TO THE RECORD ON APPEAL – VOLUME 4 OF 22

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

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as watching a video deposition in Court because you see the demeanor of the witness. And you can do all of those things, which you just simply can't do.

So I'm going to respectfully request that you actually watch them in Court because if you watch them in Court with all of us, then the next witness will make more sense to you. I will be using these video depositions to lay a foundation for the next witness so that things will flow and make some sense.

THE COURT: Okay.

MR. BUNDY: And they're fairly short. I don't know that any video depositions last more than 20 minutes or 30 minutes.

MR. MCDONALD: Yeah, more like 20 minutes.

MR. BUNDY: 20 to 25 minutes for each. I mean, a lot of them are just -- I went and took all the depositions of everybody at Balfour Beatty that worked on this job basically in the field.

THE COURT: Okay.

MR. BUNDY: You know, did you know anything about it? No, I was -- spent my whole

time (inaudible) drinking coffee. Okay, thank you very much. And I just went to the next one.

MR. HILDEBRAND: Your Honor --

THE COURT: Okay. Sounds like we might take two weeks to get there.

MR. BUNDY: Yeah, it will take two weeks.

MR. KELLY: And that was my question.

THE COURT: So I may have to be looking for another two weeks, and I can tell you, it's going to be hard to find between now and the end of the year. That's one of the reasons why I was trying to get you guys out of the case, but we will get to that in a minute.

MR. HILDEBRAND: Your Honor, I object to what Mr. Bundy just proposed. I, on several occasions --

THE COURT: Yeah.

MR. HILDEBRAND: -- have asked the Court, I would like put -- to read these depositions into the record, and you've said -- and I understand it -- look, I can read, and this is something that I can do out of Court.

So now, Mr. Bundy -- the Court has said,

Tom, you're just going to have to live with that. Now, what Mr. Bundy wants to do is basically read all the depositions into evidence in here in Court, except he wants to do it through videos. So I would ask, what's fair is fair, Your Honor. What I was -- what he did with me, I think is the same thing with Mr. Bundy.

If he wants to submit a deposition by video or by written transcript, then the Court should not do it in open court because that -- what that does is -- I think it's always important that in jury trials, I read the transcripts, and I think it makes the impact. I think it would be unfairly prejudicial to me for me not to have read them into Court, but now Mr. Bundy does get the chance to have them read in Court through the video.

So I would ask that you apply the same rule to him that you did to me, any of his excerpts, whether he wants to do them by video or by reading them into the Court, that you do on your own time, like you did with me.

MR. BUNDY: I agree with Mr. Hildebrand. I don't want to do anything that's unfair to Mr. Hildebrand. That's the last

thing I want to do. Okay?

So what I would propose is one of two things, that either I send you those video transcripts, you watch them at your leisure, right? Any time you want to, there will be -- I will send him the copy of it first. He can get anything added to it that he wants to add to it, right?

THE COURT: Okay.

MR. BUNDY: But I would also suggest, if you're going to do that, why not let me go ahead and get them to you before we start the trial, and you could have already watched them.

And then, when you get to the courtroom on Monday morning, you can hit the ground running. You will know what all of my witnesses are going to say that I would have put up before you, and it will save you from having to stay up until 10 or 11 o'clock at night, and it will give you something to do for the next four weeks.

Mr. Hildebrand: I'm in agreement. That's fine with me. So if he can get me those --

THE COURT: All right.

MR. HILDEBRAND: If he's already done it, he can get it to me within --

MR. BUNDY: Okay. So that's great. We will work that out.

THE COURT: Yeah, how much time would you like -- how much time do you need to get your vignettes -- I'm going to call them vignettes -- together?

MR. BUNDY: Well, he's going to be writing a brief, so I don't know how much time he's going to have left to do that. I can probably get the videos to you -- if we get the brief to you on the 4th, so it will probably take him a week to get that done.

So by the 11th, I will get Mr. Hildebrand the video transcripts edited, and then I would take it -- it would take Tom, what, a week for you or two or three days for you to give me your adds?

MR. HILDEBRAND: It's more -- it's taking him a lot of time. Why can't you give them -- are they ready now?

MR. BUNDY: Pardon me?

MR. HILDEBRAND: Are they ready now, the vignettes?

MR. BUNDY: The what?

MR. HILDEBRAND: The vignettes. You've said you spent a lot of time already on them. Are they already -- do you have them?

MR. BUNDY: I've got the videos. Tom, I haven't edited them yet.

THE COURT: Okay.

MR. BUNDY: Because my case doesn't start until October the 24th. I'm willing to do it in the next ten days.

MR. HILDEBRAND: All right.

THE COURT: Yeah, okay. I'm with you.

MR. HILDEBRAND: All I'm saying is, Your Honor, it -- it takes longer than you might think.

THE COURT: Hey, the best case I ever had, they had a video. They played it for the opposing lawyer. He objected to the sound because it was a fire in an animal hospital.

I said, okay, if you're going to object to the sound, I will take the sound out. It looked like a World War II movie when we took the sound out. Okay? And then they -- as soon as they sent in the edited version, he called me,

and they settled the case. I was like, that's how it worked for me.

MR. BUNDY: Well, I tell you what I will do to even make it easier. Okay?

THE COURT: But what he's entitled to is some advance notice -- and I don't know whether you have got just the deposition excerpts he can look at. Then you can do your editing. He can look at the excerpts that you propose, put his excerpts in.

MR. BUNDY: Right.

THE COURT: He might be able to do it, so y'all can do the editing at the same time.

MR. BUNDY: Sure.

THE COURT: Then all I've got to do is look at it once.

MR. HILDEBRAND: Okay.

MR. BUNDY: I will tell you what I'll do, I'll give you a list of videos right now that I'm going to take excerpts out of so y'all can pull them out and start looking at it. Okay?

THE COURT: Okay.

MR. HILDEBRAND: But that doesn't really help me because I don't know --

MR. BUNDY: Well, what do you want

me to do, Tom?

MR. HILDEBRAND: Well, just -- all I was alluding to, Your Honor, is, I -- you mentioned maybe needing a couple of days or three to four days. I don't know if that would be sufficient.

MR. BUNDY: Give him a week. I don't care.

MR. HILDEBRAND: Okay. I don't know that we've got enough -- as long as we can get them -- do you have the designations?

MR. BUNDY: Not yet, Tom.

THE COURT: Okay. All right.

MR. HILDEBRAND: Okay. I just -- I'm going to need at least, gosh, ten days probably.

MR. BUNDY: No problem.

THE COURT: Yeah. Okay.

MR. BUNDY: I don't want to be unfair.

THE COURT: If y'all can get those to me on about the same timeframe, that would be great. Okay?

MR. BUNDY: We will get it done sir.

THE COURT: You've got to do the depo excerpts. Y'all can just get that typed up and ship that over to him.

Y'all can see what they're trying to put in there, and you can put whatever y'all want in there and then have -- if y'all can agree then on what the video is going to look like and do that one time, that would be great.

MR. BUNDY: Great.

THE COURT: And then all I've got to do is find me a computer to turn on.

MR. BUNDY: You know, some of the video depositions aren't more than an hour long at most.

MR. MCDONALD: I mean, once they're edited, some of them --

MR. BUNDY: Well, even if they aren't edited, some of them aren't but an hour. I'm not a big, long deposition taker.

THE COURT: Yeah.

MR. BUNDY: So we may end up just saying, just watch what you want. I don't care, you know.

THE COURT: Put it on a disc and send it to my office. I'll slap it in the

computer. I've still got -- I've still got one computer left with a disc drive.

MR. KELLY: Your Honor, if I could pause this conversation while y'all move things forward. I'm just selfishly wondering about that next two-week period.

THE COURT: Whether or not you want to even be here?

MR. KELLY: Correct.

THE COURT: All right.

MR. KELLY: I'm supposed to be out of town for Sewanee's homecoming.

THE COURT: Well, by all means, go to Sewanee.

MR. KELLY: Well, I'd love to go, but I'd hate to miss something important, Your Honor.

THE COURT: There's nothing important going on here, you know that.

MR. BUNDY: We'll call you.

MR. KELLY: Well, as you know, we've got like four or five subcontractors still out with some variety of claims.

THE COURT: Sure.

MR. KELLY: And I just -- it seems

impractical that they put up -- they put up their case, Tom put up whatever rebuttal case he has got, and then we would still be able to --

THE COURT: I'm going to --

MR. KELLY: -- do the subcontractor claims.

THE COURT: Mr. Kelly, I'm going to make sure your client gets his day in Court. Okay?

MR. KELLY: I appreciate it, Your Honor.

THE COURT: All right. I will guarantee you that. It is not looking real good right now for the week of November the 1st, but we're going to work towards it.

MR. KELLY: And that's okay, even if we have to push it out. I just want to have some idea of when that may be.

THE COURT: Yeah. And when I get back in my office, I'm going to look at my calendar and see when those subcontractor cases are going to come up. Okay?

MR. KELLY: Thank you, Your Honor.

THE COURT: All right.

MR. HILDEBRAND: And if it would be

easier on you -- I know it's -- you've got, gosh, ten days to get your brief together. If you just want to give the Judge the video depositions and have him look at them in toto, then I'm fine with that.

MR. BUNDY: Okay.

MR. HILDEBRAND: Do you want to do that?

THE COURT: I'm not.

MR. BUNDY: I know.

THE COURT: I would much rather watch something else on television. Okay?

MR. BUNDY: If the Judge wants edited depositions, okay.

THE COURT: Listen, y'all have been living this thing for at least two years, if not more.

MR. HILDEBRAND: Fair enough.

THE COURT: Mr. Bennett for about 20, so anyway. All right. Thank you all very much. I'm thinking we made some progress here today. I plan to see y'all on the 25th. I'll look for those briefs on or about the 4th and the 15th.

MR. MCDONALD: And the exhibit

boxes -- I'm just going to collect our exhibits and put them in a box.

THE COURT: Yeah. I think it's going to take about an hour to get ourselves together here and packed up and take what we need.

MR. HILDEBRAND: Maybe we need to address it, Your Honor. Is there a place to put all these? And as I understand it, we will take -- the plaintiff will take all of our exhibits back, and then --

THE COURT: Yeah. I think we each need to be -- we're going to need to have access to this place for at least the balance of the day. I'm sure somebody can be here for that. All right. Thank you.

(The hearing was concluded at 11:34 a.m.)

CERTIFICATE OF REPORTER
STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

I, Jennifer M. Adams, Certified Shorthand Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the witness whose attached in the foregoing hearing was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth in the within-entitled cause; that said hearing was taken at the time and location therein stated; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing is a full, complete and true record of the testimony of the witness and of all objections made at the time of the examination; and that the witness was given an opportunity to read and correct said hearing and to subscribe the same.

Should the signature of the witness not be affixed to the hearing, the witness shall not have availed himself/herself of the opportunity to sign or the signature has been waived.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal on August 25, 2022 at Charleston, Charleston County, South Carolina

_____
Jennifer M. Adams
Court Reporter And Notary Public
My commission expires: 03/15/2032

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

BALFOUR BEATTY CONSTRUCTION, LLC,
Plaintiff,
-versus-
LIBRARY ASSOCIATES, LLC; AND METROPOLITAN LIFE INSURANCE COMPANY, A NEW YORK CORPORATION
Defendants.

VOLUME ELEVEN
Case No. 2019-CP-10-1108

LIBRARY ASSOCIATES, INC.,
Defendant/Third-Party Plaintiff,
-versus-
LITHKO CONTRACTING, LLC; GUY M. BEATY, INC.; BERNHARD MMC, LLC GULF STREAM CONSTRUCTION CO., INC; PRECISION WALLS, INC.; PALMETTO AUTOMATIC SPRINKLER COMPANY, INC.; ET AL,
Third-Party Defendants.

Hearing before the Honorable Mikell R. Scarborough, reported by Jennifer M. Huggins, Court Reporter and Notary Public, at 9:30 a.m. on October 25, 2021 at 100 Broad Street, Courtroom 2A, Charleston, South Carolina.

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THE COURT: Okay. Folks, we're back for round two in our beautiful courthouse in downtown Charleston. I didn't know they were inviting the First Lady, but apparently she's next door. I thought it was this case that brought all of the security down. Apparently, Air Force One came in last night, I was told. So anyway, that probably provides that.

We've got the next two weeks set aside to be here. We're going to get into the defendant's case. Plaintiff's put their case up two weeks ago. I did rule on the directed verdict motion, the motion for nonsuit, only ask to -- only granted it as to the one cause of action, which was implied covenant of good faith and fair dealing.

Those of you who are here on the subcontractor claims, y'all may have some interest. I had granted -- as you all know, I had granted summary judgment on some of those claims. No sooner than I had granted summary judgment, then objections and Rule 59(e) motions were raised. And so I've just sort of held off on that.

So I probably need to get into that, and

quite frankly, I've sort of had to rethink where I was. And so as we go through the main trial, I think it will become more and more apparent as to what we need to do relative to those subcontractor claims.

And then I see Mr. Steele back there. I did deny y'all's motion to produce some additional documentation. I haven't received -- I'm not aware of anything subsequent to that. We can cross that bridge if we need to get there. That was my position. I entered those orders in the middle of last week, I think it was.

So before we start, I did have one issue, Mr. Bundy, they informed me you wanted to ask me about something. Let me tell you, it's my rule -- it's the Chief Justice's rule, enforced by the clerk and the sheriff's office to wear the masks as you come and go from the building.

It's my rule that, once you're in the courtroom, if you have been vaccinated and you're comfortable with removing your mask, you're certainly free to do so. So that's just my rule. If you're not vaccinated and you're not comfortable with doing that, I would suggest you keep it on. It makes it a lot easier for me to

hear people and also to assess their credibility, which is part of what my job is a nonjury Judge.

Anything further?

MR. BUNDY: Judge, does that exception apply to the room we're using downstairs?

THE COURT: If you're in that room, I think you can take that off. Okay? But I think coming and going, I would like you to do that.

And just so I'm clear, I know the plaintiffs were using what was considered counsel chambers. I tried to set y'all up. I don't know if you have taken over that today or whether or not the administer's office, but there's actually two offices, both on the Broad Street side of this building.

One has got a huge conference table, so it might make it easier for y'all to work in. The other one has got some smaller tables. But since we're sort of moving into the defendant's case, it would make some sense for y'all to take that over. I've got no problem with that.

One thing that has come up is on Friday afternoon at 5:30, this room is going to be used

for some proceeding. I don't know what it is. But we've been finishing up around lunchtime on Fridays. I plan to do that again this week as well.

I know y'all have brought a lot of documents in here, a lot of boxes. We're going to see if we can't find a place here for them to stay so you don't have to physically relocate them over the weekend. I'll just make sure we get that done. We will cover that again on Thursday and on Friday.

All right. So based upon that, are there any matters that I need to take up before we start? I'll start with Mr. Bundy on the defense.

MR. BUNDY: The only thing that comes to my mind, Your Honor, are these depositions that we submitted, and Mr. Hildebrand has now given his counter designations.

I assume that all of those have been completed, done, and the only issue is, as I understand it, is my expert witness, Mr. Pat O'Connor -- they made a motion in limine. And I don't know if that's the appropriate -- I hadn't offered him yet, but --

THE COURT: Right.

MR. BUNDY: But our position, I think, as we stated in our memorandum and response, and so whichever way Your Honor rules, I think you're going to have to read it regardless.

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

MR. HILDEBRAND: I guess there are two issues. One, is it appropriate to introduce his deposition testimony as proof opposed to calling him in live.

THE COURT: Right.

MR. HILDEBRAND: And he wasn't taken de bene esse, and I don't -- it's up to your discretion for it. But I don't think it's -- I've never seen the rule of civil procedure oppose where a witness, who's just an expert witness, can just testify through his --

THE COURT: Through deposition?

MR. HILDEBRAND: Deposition, yes, sir.

THE COURT: I think you had a -- you had a further objection as to what he was opining upon, did you not?

MR. HILDEBRAND: Right, right. Yes, Your Honor, and just for a very brief synopsis, there are a couple provisions in the contract that he has offered opinions on. One is whether the owner has to give notice that -- or whether liquidated damages are a claim.

And he says that, in his opinion, they are not. I don't think that his opinion is relevant. I mean, you can look at the contract language, and you can determine whether you think that it's applicable or not. Whether he thinks it's applicable or not is, I think, irrelevant.

He also says that he serves with the AIA, and the AIA has rewritten some of the contract -- standard contract provisions so that liquidated damages in the newer versions are explicitly -- apparently, there are explicit sections as to whether you now have to give explicit -- whether the owner has to give explicit notice.

Again, I think that's irrelevant. I mean, contracts change. People can change, and what you might do with a contract later on, what third parties might do with a contract later on, I think is irrelevant. I think that you can look

at the contract, and you can determine whether you think it's ambiguous.

And if you think it's ambiguous, then you can consider whether you want to take his opinion. But I don't think that it's relevant. And I don't think that you need to have a third party come in and give opinions about what he thinks the contract is.

THE COURT: Okay. I agree. All right. Very good. Mr. Bundy?

MR. BUNDY: Thank You, Your Honor. The first issue is, I'm glad to bring him down here. That's not the problem. I was trying to move things along.

In reading his deposition, everything was accomplished that I needed to accomplish. I'm glad to bring him down here from Minnesota, but I don't want to bring him down here from Minnesota, and you tell me, I'm not going to let him testify.

THE COURT: Right.

MR. BUNDY: So that would be the first issue because if you're not going to let him testify, then I would just offer deposition as a proffer as to what he would have said and

that would take care of my record.

With regard to the substantive response of counsel, custom uses in the industry is always relevant to the interpretation of a contract, specifically ready to the industry you're talking about.

I mean, uniform commercial clothing is absolutely clear in interpreting commercial documents. It's codified. The custom and usage applies in making the interpretation. That doesn't make the document ambiguous. These documents aren't ambiguous. But Your Honor is entitled to the benefit of the custom usage in the industry.

Counsel is correct, the AIA has, in later editions, made it absolutely clear to those people who didn't understand it before, and apparently, there are more people out there that didn't understand it than I thought -- that in fact, liquidated damages have not, nor has it ever been a claim in the 30-something years I've been doing this for the AIA documents.

And that's clear from Mr. O'Connor's testimony. And of course, clever lawyers can do all kind of things, and I guess finally the AIA

got tired of listening to it and made it more specific. But it's always been the case.

So, Your Honor, first, I need a ruling on whether or not I should bring him. And if I should bring him, then I will be glad to get him here. Thank you, Your Honor.

THE COURT: All right. So let me just say this, having reviewed it, what my initial thoughts are is, it does come as a motion in limine, and it could change. But we need to address it. And so, as to Balfour Beatty's motion in limine, as to the use of Patrick O'Connor's deposition -- this is your expert, correct?

MR. BUNDY: Yes, Your Honor.

THE COURT: I was inclined to grant that motion on the basis that, if he's seeking to opine to this Court what the meaning of the contract is, I don't believe he is entitled to do that. If what you're telling me is that his -- I think that's within the purview of the Court. Okay?

MR. BUNDY: Correct.

THE COURT: If what you're telling me is that he's being offered for some historical

basis or background knowledge as to what the AIA contracts were or what is involved with this -- I have had other cases in which I have allowed that testimony, but it's for that limited purpose. And it's not to opine upon what would be an ultimate issue for the Court's decision. I just want to be clear on that.

MR. BUNDY: I'm not seeking to replace Your Honor. I just to get some more sort of meat to this story so you'll have the context within which these contracts are used.

THE COURT: Right. And then not having reviewed the deposition, I would think it would be better that he be here personally to make that record rather than --

MR. BUNDY: I will have him here.

THE COURT: -- putting in the form of a discovery deposition.

MR. BUNDY: I will have him here, Your Honor. I may have to call him out of turn, if that's --

THE COURT: That's always fine.

MR. BUNDY: Because he's in Minnesota.

THE COURT: Yeah, no problem.

There's a direct flight somewhere on some airline that's doing that. I don't know if they started yet or not, but anyway, you can get from Minneapolis to here. Just things continue to amaze you in Charleston, South Carolina.

MR. HILDEBRAND: Well, Your Honor, I am inclined to admit, I will just withdraw my objection then. He can just introduce the deposition testimony.

THE COURT: You would rather it come in in the form of deposition testimony?

MR. HILDEBRAND: That's fine. If you're going to allow his testimony -- I don't think it's appropriate, but you've already ruled on --

THE COURT: Yeah.

MR. HILDEBRAND: -- on the limited issue. And if he wants to introduce the deposition sections that relate to that, then that's fine with me.

MR. BUNDY: I can't argue with that.

THE COURT: Okay.

MR. BUNDY: Thank you, sir.

THE COURT: We'll get that. I'm

sure we'll cross that bridge another time.

MR. HILDEBRAND: Thank you, Your Honor. I haven't seen your order on the directed verdict, but on the implied warranty breach of the implied obligation of good faith and fair dealing. I mean, that's not a separate cause of action, but it does --

THE COURT: Right.

MR. HILDEBRAND: -- it is an issue because it's part of South Carolina law. Again, you will decide.

THE COURT: It's contained --

MR. HILDEBRAND: It's not physical, it's applicable. Just simply it's not in a separate cause of action.

THE COURT: Correct, right.

MR. HILDEBRAND: Lastly, Your Honor, is, have you had -- did you take a chance to look at the supplementary conditions and did you decide there?

THE COURT: Yeah. I believe -- I thought we had issued that order. We have had all kind of issues with the electronic filing system. But I did that. I left town late last week, but I thought I had issued an order that

should have been of record, so hold on. On the supplementary conditions, I granted that because I think everybody was in agreement as to what was and was not in the contract --

MR. HILDEBRAND: That they are not?

THE COURT: -- on the supplemental conditions.

MR. HILDEBRAND: But they're not?

THE COURT: Correct, correct.

MR. HILDEBRAND: Thank you, Your Honor.

MR. BUNDY: Just some housekeeping, I will give you Mr. O'Connor's deposition now.

THE COURT: Okay.

MR. BUNDY: So you will have all the depositions, all the exhibits to go with them, and we're done with that.

THE COURT: All right. Do you want to submit the whole thing or you want to do --

MR. BUNDY: Yes.

THE COURT: All right. Have y'all had a chance to review?

MR. HILDEBRAND: We haven't done a counter designation, but I can have that -- today is Monday -- by Wednesday morning.

MR. BUNDY: Sure. Not a problem.
THE COURT: We'll check on it. I thought that that order was filed, but anyway, I cleared my cubicle again this morning. I know I cleared it before I left town on Thursday. We'll find out what's going on with that.
MR. HILDEBRAND: Did you just send written designations or was it on video?
MR. MCDONALD: Yes. We've got copies of the video. It's all right here. So we've got for you of the videos. We've got -- and it's been edited with your counter designations.
MR. HILDEBRAND: Oh, you've got the --
MR. MCDONALD: Yeah.
MR. HILDEBRAND: One last housekeeping, Your Honor. I understand that there was one exhibit when you went through -- when we took several hours to try to figure out and were asked --
THE COURT: What's in and what's out?
MR. HILDEBRAND: Yeah. There was one, I think it was Exhibit 312. We had done a

separate binder where the architect's agent had signed off on the punch list, and I think that that was introduced into evidence that we've now had a chance to get from the court reporter the record that noted that that was in evidence. So I think that that was -- what number was that? It should be Plaintiff's 312.

THE COURT: It's on my list as a number in front of it, and that's all I can tell for now. Have y'all had a chance to review the record?

MR. HILDEBRAND: Yes, sir.

THE COURT: The record says it's in, does it not?

MR. HILDEBRAND: Yes, sir.

THE COURT: Okay. All right. Then that should be in.

MR. MCDONALD: Your Honor, I haven't reviewed the record, but did the record say it was in over objection?

THE COURT: I don't have any note other than 312. 313 was for ID only, and those were some discovery answers is what I showed on that. So there was an issue on 313, but 312 itself, I'm assuming to be in.

MR. MCDONALD: Yes, Your Honor, there was an objection.

THE COURT: So it was in over objection?

MR. MCDONALD: Yes, sir.

THE COURT: Okay. That apparently took place on Thursday, the 23rd of September was the day that was introduced. It looks like my notes do not reflect anything other than it came in over objection.

Okay. All right. So that, Mr. Bundy, you had reserved the right to make an opening statement, and if you would like to do that, you certainly may. I have some idea what this case is about, and I'm happy to get started if you would like.

MR. BUNDY: I will pass.

THE COURT: All right. Very good. Thank you, sir. All right. So into the defendant's case, you may proceed.

MR. BUNDY: Thank you, Your Honor.

THE COURT: All right, sir.

MR. BUNDY: Your Honor, Library Associates calls Mark Boe to the stand.

THE COURT: All right, sir.

THE COURT: Without objection.
MR. BUNDY: Here's your copy, Your Honor.
THE COURT: Thank you, sir.
(DFT. EXH. 92 was received in evidence.)
BY MR. BUNDY:
Q. All right. Mr. Boe, I don't want to go into too much, but I would like to ask you a few things. With regard to your experiences as set forth -- and I think you just went through that -- what are your areas of expertise, mr. Boe, based upon education and experience?
A. Primarily what I've done over the last 30-plus years, probably 40 years now, is delay and disruption. So loss of productivity and delay of construction projects and various types of projects, lots of different kinds.
Q. And it says here that you have contract dispute resolution, CPM schedule delay analysis, labor productivity, and damages resulting from delay and disruptions of the CPM schedule.
A. Right.
Q. Is that pretty much --
A. And pretty much I've been --

Q. Now, your official affiliations are what, sir?

A. I have a professional engineering license from Pennsylvania and Washington State. I will probably get that here too at some point.

But I'm a member of AACEI, the American -- let's see -- Association for the Advancement of Cost Engineers International, and I'm a planning scheduled professional through them. And then I'm also a member of CMAA, Construction Management Association and the ABA construction forum.

Q. And it says here you've had a couple of publications; is that correct, as listed here?

A. Yes.

Q. And these are in the same general area of expertise?

A. Yes.

Q. Okay. And it appears as though you've given seminars and speaking engagements over the last 30 years?

A. About that, yes.

Q. Okay. And we've got a list of projects here. It takes up about -- it looks likes about two pages, two or three pages?

A. Three or four pages, yeah.

Q. Starting in, it looks like, 1979 all the way to up to today, correct?

A. Right.

Q. And I noticed that this particular job is listed number 4 from the top, right?

A. Yes.

Q. Okay. Have you done any work for the United States Government?

A. I've done a lot of work for the US Government.

Q. Will you tell us what particular departments in the government you worked for?

A. We have a -- I have a term contract with the State Department to review schedules and do claims work. We do -- I do a lot of work with the Department of Justice. In the past 30 years, I've worked with the Department of Justice on 100 cases maybe.

Q. And in your work with the Department of Justice, how is that -- are these projects that the Department of Justice is building, or are these projects you're somehow involved with tangentially?

A. No. This is the civil group, civil

construction litigation group, so the Federal Circuit and Claims Court attorneys, and so they are cases that were delay cases or disruption cases.

Q. Do you have any clearance with the government?

A. I do. I have secret clearance.

Q. And why would you need a secret clearance in order to do construction litigation with the Department of Justice?

A. Well, we've had several cases where they were -- where there were confidential contracts, or top secret contracts, and our State Department contract requires us to have the clearance.

Q. So apparently at least the Federal Government trusts you?

A. Apparently.

Q. Can you tell me any projects you've worked on in other parts of the world?

A. Sure. I recently completed a case, settling with the State Department, OBO, the Office of Overseas Building, and that was having to do with some housing projects in Haiti. And I also did a project that had a case where it went to trial. Was in the Mumbai Embassy, US Embassy

in Mumbai. And then another case that is in Palau which (inaudible).

COURT REPORTER: Can you speak up for me? I'm having trouble hearing you.

THE WITNESS: I will try.

BY MR. BUNDY:

Q. Have you ever provided expert testimony before today?

A. Yes, the last page --

Q. Would it be found on the -- that would be the last page of your resume?

A. Yes.

Q. Okay. And if you would, just tell the Court basically where you have been qualified as an expert in those issues.

A. For the most part, I think the Civilian Board of Contract Appeals and the US Federal Claims Court and then several arbitrations.

Q. Put aside arbitrations, what is the business of the Federal Claims Court? What do they do?

A. It's basically, they do -- they review construction cases -- many other types of cases, but construction cases is obviously what we did.

Q. Have you ever been appointed as a court

Q. And how much is Balfour Beatty asking for based on the contents of this four page letter?

A. $22,452,000.

Q. And do you have an opinion as to whether or not my client should have stroke them a check for $22,452,282.51 based upon the contents of this four page letter?

A. Yes, that would be really premature.

Q. And what about this letter -- when analyzing this letter, what were you able to determine about this claim as an expert in reviewing claims?

A. So, generally, I focus on delay, loss productivity and disruption. In this case, there's some line items here that we say what some of the items were in the claim.

But there's no -- there's no backup to these things. There's nothing that says, here's the number of days of delay. That might be stated here, but without any analysis at all, just saying, this is the total general conditions claim.

So without a delay analysis, if you start with that idea, you need to have a delay

affidavit for the leads, and other than that, nothing.

Q. And in or about November, did you come to any conclusions, have any opinions about the documents you had reviewed up until that point and the status of the claim?

A. Well, the status hadn't changed. So I hadn't looked at anything.

Q. How would you characterize the delay claim methodology that the -- that Balfour Beatty is making? How would characterize this type of delay claim?

A. Well, really, the only way to -- the only thing I could call it is a total time claim. It essentially says, we were delayed. The owner was at fault, and we're owed that much time. We're owed all of the damages all of the time.

Q. And is that total time claim generally recognized? How is that dealt with in your field?

A. I was on a case at some point in the past, and the Judge referred to it as virtually worthless.

Q. And why is that?

A. Because there's no cause and effect, in

large part, and it's very conclusory. It essentially says, there's this much delay, a bunch of stuff happened -- a bunch of things happened, a bunch of change orders, a bunch of RFIs, and therefore, that's what caused the delay.

And sometimes there's additional research and additional documentation behind it, and sometimes there's not. But ultimately, on that case, the Judge kind of determined that it was in total time.

Q. What is a critical path analysis? What is a critical path when talking about scheduling?

A. Well, I mean, I read through Mr. Doran's testimony, and I think he defined it fairly well. A critical path schedule is the amount of time, the shortest amount of time, the longest continuous path on a project that you can, you know, identify. And it's very important that float be taken into account.

So before this just -- and I know Mr. Doran talked about a turkey dinner. I don't want to talk about that. But bottom line, there's time on some activities that wouldn't impact if you delay a few days. It doesn't

11th timeframe when the second floor was supposed to have started. And as it -- so that's the definition, or that's the time period, August 11th, 2016.

And the delay that actually occurred, based on those -- during that time, Mr. Doran has identified 20 days due to the hurricane, plus a day caused by utility outage. I know I've seen testimony that he said there was a day of crane delay, crane downtime, and then 15 days for the contractor. But it only adds up to 36 days. So I don't think -- and there is 36 days of delay.

Q. Okay. And what is your opinion with regard to his period one delay?

A. Well, the 20 days is indisputable. I don't have any problems with it.

Q. And the architect gave him 20 days, right?

A. The architect gave him 20 days, and then the additional time, I had in my report some arguments about -- back and forth about whether that 15 days was early completion or not. I don't think that really matters. I, frankly, think that it's just part of the structure delay if I get to that part of it.

So if I do the calculation the way I've done it, where I said, that delay in the structure is from November 22nd to setting the pool, to March 3rd. That should be the same calculations and basic calculation as Mr. Doran's. And then I just subtract out the 20 days or 21 days to get how much was the structure delays, 52 days or 53 days.

Q. Okay. Were there any allegations regarding early completion in his analysis? I thought there was some early completion. What is your understanding of that?

A. His argument in the -- in his report, and it had something to do with early completion. I don't think he testified to that, and so I kind of dropped that part of my argument.

Q. All right. Let's talk about period two. What is period two in Mr. Doran's analysis?

A. Period two is the full extent of this time where the second floor, the ballroom ceiling framing was delayed. So he measures August 11th of 2016 to March 3rd of 2017, and that's where he comes up with the 203 days of delay.

And frankly, you know, what I believe is that the 203 days of delay, there were -- if you

count the days that way, there's 203 days. And my problem is, there's only 73 of them caused by the structure. The delay to the structure is only 73 delays.

Q. And the remainder of those days were caused by what?

A. The bust in the schedule.

Q. Bust in the schedule. Okay.

A. I keep using different terms, just so you know, and I apologize for that. The as planned versus the as built schedule, that his methodology.

So I really should refer to the -- you know, that initial schedule as that as planned schedule each time. But I fall into calling it a baseline or an initial schedule. But it's the exhibit that we just looked at. I think it's 93, but the MSH000.

Q. Mr. Doran referred to design milestones, design complete milestones. What was your understanding of that portion of his analysis, if any?

A. Well, so an as built milestone or even a milestone or an as built was put into the schedule. In the contemporaneous schedules, they

put into the schedule an additional activity that said, design complete.

And from my perspective, that's -- he wanted to say, that's what drove the schedule, but I just think that's an overly simplistic view. There were a lot of activities that led to what he calls the design complete. Design complete meaning, that's where the subcontractor can create these shop drawings and start building what he's supposed to build.

Well, there was a process before that where the -- where the contractor builds a model, a BIM, and then questions are asked, RFIs are asked and answered. And that's the date we're kind of talking about.

Q. Are you saying that, simply because there was a day for design complete and it was not met, that that does not necessarily mean that that delay was caused by the designer? Is that what you're saying?

A. Yes. It wasn't necessarily caused by the designer, but there was a series of activities that led up to it or should have led up to it. That's not how the schedule was put together.

Q. All right. Were you able to determine, further down that line, or did -- was there, in this analysis, any cause and effect relationship between a failure to meet a design complete and an actual delay? Was there causation there for you to look at?

A. This is maybe the place where it got close in some of the items. In the sixth floor, for example, there was a lot of back and forth about the sixth floor delay.

But there still was no real tie between what was it about, the design, that couldn't proceed, other than you couldn't put the sleeves in. What was it? What specific change? What was that -- you know, each floor would be different, et cetera, but what was it that caused that change, that caused that time?

Q. And is that the kind of information you would expect to find in an analysis?

A. I would hope to, yes.

Q. All right. During period two, in your review of documents -- and let's talk for a minute about your review of documents. As you sit here today, can you tell the Judge generally, or as broadly as you want to, what documents

you've actually looked at, put your hands on and your eyes on to earn $450,000 in fees?

A. I mean, I would like to think that I've looked at every type of document. I can't say that I've looked at every detail of every document, and one of the examples is the BIM models. I didn't look at the BIM models.

Q. Have you looked at all the daily reports?

A. Myself or somebody that works with me have looked at every daily reports.

Q. Have you looked at all interim schedules?

A. Yes.

Q. Okay. And would that be something usual or unusual for you to do is a forensic schedule analysis, to look at those things?

A. It would be very unusual not to do that.

Q. Now, during period two, based on your review of the documents, were you able to determine if there were or were not any subcontractor problems on this project?

A. Well, there were a lot of subcontractor problems during that time.

Q. And how would those subcontractor

problems impact your analysis if you had been called on to, instead of just simply critiquing Mr. Doran's work product, but even asked to provide a delay analysis yourself?

A. Well, I mean, the primary thing is that I would have to take them into account. I would have to know that they occurred and take them into account, one way or another, either to -- on purpose say, this did not cause a concurrent delay or this did cause a concurrent delay.

And so the way you would look at that is, you find out what's on the critical path now and is that impacted by these subcontractors, by this problem? And one example is the tower crane. The tower crane was a major sticking point. It was a problem on the project. We had a lot of down time.

Q. All right. We previously discussed the fact that there was a bust schedule related to the tower crane, and that is its erection and demolition, but have you discovered there were actual problems in the field with the erection and use and demolition of the tower crane?

A. Yes. The tower crane broke down on a --

Q. Okay. I would like you to give us those

examples, please, for the record. What has your investigation revealed?

A. January 18th of 2016, the tower crane was down for approximately seven days. Now, if the structure is critical, if the concrete work going up the building is critical -- and this is before there's any real alleged design problems, so this is the lower part of the (inaudible).

Losing a tower crane for seven days sounds like it has to impact the project. In February, the same time frame, February 17th of 2016, the tower crane's main motor is shot and this unit is a nightmare. So the BBC folks on the project were upset at the old crane that they got. And they complained several times, and there was a lot of detail about it.

In June of 2016, so this was around the time that the fifth floor is being worked, into the sixth floor, so it's the time frame of that -- you know, the start of those delays. The tower crane shut down for several days, and I quote, "We have lost about three weeks so far from the crane breakdowns and have six to seven months to go."

So the six to seven months to go was

A. Yes. Thank God with your team's assistance, that's (inaudible).

Q. In your review of Mr. Doran's forensic analysis, did you see any indication that he had any of this information involved -- that was involved in his decisions?

A. No. I think I said before, I did see something, I think, in his testimony about one day of down time.

Q. All right. Let's talk about some more subcontractors in period two. Old North Masonry (sic). And, again, your comments are based on documents that are in evidence. The daily reports are in evidence, and you've read the daily reports, correct?

A. Yes, sir.

Q. Okay. So what we're doing now is talking about the evidence, and so I would like you to tell me, based on the evidence in this case that you've looked at, what subcontractor problems were there in period two as defined by Mr. Doran with Old North State Masonry? Can you give me that information? Do you have it?

A. There's basically nothing that Mr. Doran included on Old North other than to say -- that

Mr. Doran included other than to say that the masonry wasn't critical.

Q. Okay. Did you look at any Old North State Masonry e-mails or anything like that to the owner or to the contractor between the two that relates to this analysis?

A. Yes.

Q. All right. Would you tell us about those, please.

A. Sure. But, you know, first of all, by the end of this period, so in March of 2017, there had been three curing notices sent to Old North. So Balfour Beatty had forwarded three different times, said, you are delaying the project.

On December 7, 2016, Mr. Spano from Balfour Beatty said, we need a meeting or a call with ONS, so Old North State -- the delays on the entry stairwell, fifth floor, and exterior repairs are greatly affecting our critical path and the building drawing. I want to discuss the schedule effects from completion delay in these areas as -- I'll just stop there.

And then on February 8th -- so that was December of 2016. On February 8th of 2017,

Mr. Spano said, there is no ONS presence at today's sub meeting that is half over. As critical path and as masonry is, ONS needs a competent person that all pull planning. Pull planning is a scheduling type meeting, and sub meetings. In December of 2016, Balfour Beatty forwarded a cure notice.

Q. Tell the Judge what a cure notice is, as you understand it, based on the subcontract documents between Old North State Masonry and Balfour Beatty Construction.

A. From my perspective, it's a threat of termination. It is a notification of delay and a threat. It is the first step in the termination process.

Q. And how is the cure notice different from an e-mail saying, you know, you're late, get some more people on the job?

A. It's always -- it's always a situation where we know that the contractors push subcontractors, and whether it's critical or not -- but in a situation where you get serious enough that you say, I'm going to send you a cure notice. I'm going to threaten to terminate to -- or, you know, I want you to cure your defect or

we will go to the next step. It's a lot more serious. You just don't see that on a regular basis for unimportant items.

Q. All right. So let's continue with this December 2016 cure notice.

A. It provides the -- so the detail below provides additional clarification for items of Old North State that need attention to. We have concerns that Old North State Masonry has the proper manpower and the supervision on-site to meet the schedule and quality necessary to complete this project.

We continued to get excuses on why work cannot be done instead of solutions to make this project a success. The recovery plan needs to be submitted to my attention.

Q. Okay. Now, that's of December 2016. Did Balfour Beatty in fact issue another cure notice a month later?

A. Yes.

Q. All right. Can you tell us about that, please?

A. We've got the items in this case -- and, again, the critical path of the project, you know, on the contemporaneous schedules continued

in this time frame, and so this is not my analysis of the -- that's what the contemporaneous schedules show.

Q. So just to be clear, this is not Mark Boe on critical path on this job? This is the schedule that was in existence, created by Balfour Beatty, which put this work on the critical path; is that correct?

A. On their contemporaneous critical path, yes.

Q. Okay. And tell me about the cure notice.

A. So this cure notice went through floor by floor and discussed what the process would continue to be.

BBC has acknowledged the extended dates and change in scope. We have committed to pay every penny and give every request. So there are other issues that were going on at that time, and BBC is going to issue, extend dates, and change in scope.

THE COURT: And what is the date on that?

THE WITNESS: It's January of 2017.

BY MR. BUNDY:

Q. Just start all over again. Can you start reading from the beginning, please?

A. BBC has acknowledged the extended dates and change in scope. We have committed to pay every penny and give every requested schedule extension to ONSM for the sleeve issue.

But ONSM has not committed to keeping the schedule. 80 percent of that value has been paid. We're grossly behind schedule, after incorporating your requested extensions. See below for actual dates this project has experienced.

And then it says, the January 24th response shows no commitment by Old North State to cure the schedule. We're now plus or minus 50 days behind schedule, mostly in part to masonry, after we acknowledge and pay for the additional time on level 1, level 3, and level 4.

So I'm not hiding the idea that there's other things going on, but this says that, in addition to that, there are 50 more days for Old North State.

Q. And did you see any evidence that Mr. Doran considered any of this information in arriving at his conclusions?

A. No.

Q. Okay. Do you have any opinion as to whether he should or should not have?

A. Yes, he should, and I don't want to overstate that. He says in his report, in his analysis, that the masonry wasn't critical because they broke a tie semblance because they broke a tie from exterior to interior.

And therefore, he has kind of dismissed that masonry. My problem with that is, contemporaneously, they're beating on the mason. At the same time, they're writing schedules that say, that that's what on the critical path, not other items of the project, not the -- you know, not the second floor at that point. But they're pointing at the mason for this delay.

Q. So Doran disagrees with the people on the job about what was going on the job, essentially?

A. Essentially.

Q. Okay. Did you have any indication that he was ever on the job during this period, Mr. Doran?

A. I have no idea.

Q. Okay. All right. Then, again, in March

of 2017, there was another notice of cure letter to ONSM; is that correct?

A. Yes.

Q. All right. Tell us about that one.

A. In this case, so this is March of 2017, the exterior skin continues to slip. It is evident that we were not achieving the agreed to rate of installation due to a multitude of issues.

And in parentheses, it says, BBC acknowledges not all issues are a hundred percent ONSM. BBC has gone above and beyond to coordinate ONSM on the precast setting and provide the books necessary for installation.

If precasting needs to be cut, modified, repaired, et cetera, it needs to be done in a manner that does not delay the installation. It is clear that the necessary manpower is not on the site as Toby Holloway promised, an expert crew on-site, 3/13/17, to speed up installation. And that crew is not on-site as of 3/15/2017.

Due to the lack of production, ONSM is directed to work on level 9 parapet southeast door surrounds and level 2 cornice. I do want to note that this is March of 2017. It's a cure

notice that's talking to the mason. It talks to specific areas that they need to accelerate and to move faster.

But, again, the contemporaneous schedules say that masonry is critical, but Mr. Doran says that the second floor ceilings, the ceiling framing is what is critical.

Q. Mr. Boe, did the daily reports have a place for the author of the report to note problems with the design or other problems that are being experienced at the time?

A. I'm trying to think in this case. I'm sure they do, and generally speaking, there's some comments like that.

Q. And in your consideration of daily reports, do you also consider the fact that daily reports don't contain certain information you would expect to see, and therefore, that is proof that those things didn't happen? Do you consider that?

A. I try not to prove the negative in the situation like that.

You know, they may miss it for a week or something like that, but you usually expect to see something, especially if there's a tradition

or a practice of, they regularly put in something, and then they miss this one or they miss this large item that Mr. Doran says is critical. At the same time, they are putting in some of the subcontractor problems.

Q. Well, let me put it to you another way. A daily report has a place in it for delays, delays occurring today, right?

A. Yes, sir.

Q. And you go to the daily report, and there's nothing right there, right? Is that evidence, at least to some extent, that nothing happened that day because nobody put it down?

A. I try to use it sparingly that way.

Q. Okay.

A. It's evidence, but it's not -- it doesn't convince me completely.

Q. I understand. Let me put it to you this way. Has a delay job, and there was not a single daily report that recorded any delay over a three year period, but you think that would be significant in determining whether there was any delay on the job?

MR. HILDEBRAND: Object to the leading, Your Honor.

MR. BUNDY: I'll withdraw it.

BY MR. BUNDY:

Q. Now, that was in March of 2017. Who is Precision Walls, and what they did?

A. Precision Walls is a drywall contractor, who was involved in the ceilings. Specifically, the ceilings and the --

Q. Were they involved -- were they doing work during this period two of Mr. Doran, or do you know?

A. What about Mr. Doran? Sorry, I missed your question.

Q. Well, I'm trying to figure -- the Precision Walls, did you find any evidence in the daily reports of any problems with Precision Walls?

A. Yes.

Q. Okay. Tell his Honor what problems you saw on the daily reports as it related to the work of Precision Walls.

A. So the big picture was that Mr. Doran's critical path, starting in March 3rd of 2017, is the ceilings, these barrel ceilings in the ballroom of the second floor.

And that was critical path that had to

be done right away. And what we found is that the discussions between Balfour Beatty and Precision were more like, you need labor in different places, not -- not specific.

There are some specific references to that, but it doesn't seem like a priority in these documents. So in March 2nd of 2017, so that's right at the time when the tower crane was removed, and they were ready to start that activity. Balfour writes -- or this was from Precision to Balfour.

We gathered intel from our troops today, and here's our position. The ninth floor, we are behind schedule. So there's a predecessor e-mail to this that says, you're behind schedule. And so they're responding and trying to find out what their status is.

So the ninth floor, we are behind schedule. We're tying up loose ends on the first and second floors. Some we own; the majority we don't. So that still could indicate that there's problems with getting that work -- being able to start on that.

We have been stopped from hanging some ceilings on the first due to other trades,

hanging on the third floor, full tilt, but leaving loose ends behind out of our control, such as pocket doors. Framed up to seventh for the most part, except for areas out of our control. So they are making progress up the building.

The eighth floor is laid out a hundred percent and ready to frame, but not yet on schedule. Our plan is to have nine, one, and two complete with what is available by the end of next week. We will hang on for -- next week we will up our manpower a bit and by the end of the week.

The electrician seemed to be blaming us for holding them up, but from what I gather, that's not the case. We'll look at that later. So the main point here was just that the second floor doesn't seem to be an emphasis, and we know, from the contemporaneous schedules, that there was ten weeks of float in those schedules, in that work.

So soon after that, Tim Spano responded or sent an e-mail that said, per our walk through today, to Precision with the frames -- this is March 7th. The framing on floors five and six

needs to have framing, punch, including shaft walls to be completed by Friday for MEP, starting on Monday before six.

Floor seven is wide open and has been for a week, and floor eight is ready for framing in all areas except for the (inaudible). So they're waiving all those areas from waiting for framing, waiting for Precision. Precision is not keeping up.

We also have a lot of areas available on floor two for ceiling framing. BBC removed the tower crane a month ago so P. Walls could get these areas, and we are not taking advantage of a few guys working on (inaudible). So it's not that they've let it go.

But they're -- and they are saying, you need to get to it, but it's not -- it doesn't sound like that they are hundreds of days behind schedule, and it doesn't sound like that's -- and we know that the schedule indicates 10 weeks of float.

Q. All right. What else? Anything else on Precision Walls that you need to talk about?

A. This is slowing me down a little bit, sorry. Yeah, I don't think so. That's period 2.

So that's really the beginning of period 3.

Q. There's a note here on March 7. It says, we also have a lot of areas available on floor two with ceiling framing, ISO rod install, AC framing, barrel ceiling, et cetera.

BBC removed the tower crane a month ago, so P. Walls could get these areas, and we are not taking advantage of it with a few guys working ceilings on two. What does that imply to you, if anything?

A. Just what I was saying before, that it doesn't seem to be a priority. It doesn't seem to be something that they're really pushing. It's, hey, this is where you need to --

Q. All right. If you would then, let's summarize for his Honor, your opinions to a reasonable degree of certainty on period 2 of Mr. Doran's analysis, if you will.

A. So the primary item on period 2 is that the delay -- the delay from the baseline schedule to this update, this time period is that 203 days of delay to the -- that Mr. Doran alleges as to the structure.

But I think we've made clear that that delay, the delay in the structure, the real delay

in the structure is only 73 days. You take out the 20 days or the 21 days for the hurricane, and the one day other than that, and we're really down to 54.

So Mr. Doran has 168 days during that time, and I think it's 53. That's a huge difference. So that's the primary. The second item is that the critical path, what he called the as built critical path at that time does not confirm to what the contemporaneous schedule was.

It doesn't -- if Balfour knew that the second floor was critical, I would expect to see real progress, and as we've talked about with period 3, that whole period, there was a lot of delay that was lost on that second floor without it ever being considered to be on the critical path. If they had known that there was critical -- if the owner had known that was on the critical path, there could have been a difference.

Q. Does the contractor have any obligation during the job to advise the owner of what the actual delays are, where the critical path is?

A. Yes.

Q. And what benefit does the owner have?

What benefit does the owner get from the contractor who is able to tell the owner what the delay is, where it is and what the effect of it is and when it's going to be over? What benefit does the owner get from that information?

A. They get a ton of benefit. They can look at where they want to make changes. They can make changes to things that aren't critical or they can be willing to pay for delay that might be critical.

You can make a positive decision to say, I'm willing to pay for that or I'm willing to pay for acceleration. I'm willing to pay something for that contractor to accelerate because I want that change. I want that difference.

But if you don't know that that's on the critical path or if you're not told that that's on the critical path, now to hear afterwards that that long period of time was caused by something that was never on the critical path, there's nothing the owner can do about it. It's too late.

Q. All right. Now, you say that instead of Mr. Doran's 168, you came up with 53. Are you saying that the owner is responsible for those 53

days?

A. No.

Q. Okay.

A. I'm not testifying as to what the cause was or whether -- or what was on the critical path at that time. I'm saying that the contemporaneous schedules don't show it, and I can't look at it and see cause and effect.

BY MR. BUNDY:

Q. So assuming there was a 53 day delay, whose responsibility is it under the contract documents to prove responsibility for that 53 days?

A. The contractor.

Q. All right. Let's go to period 3. What was Mr. Doran's period 3?

A. Period 3 is essentially from the time they were able to start the ceiling framing in the ballroom to the time that the drywall was able to be completed in the ceiling. I have to look and see what exactly -- how many days that was.

But basically it expands the time frame from August 11th of 2000 -- no, I'm sorry, from March 3rd of 2017 to October 7th of 2017. So

it's a seven month time frame, and during that time, 95 days was lost.

And Mr. Doran's conclusion is that 95 days was lost on the second floor in the ballroom due to a bunch of -- a sequence of changes. So he shows a timeline that shows a bunch of changes, a bunch of things that happened in that area.

Q. And what is your analysis of his position? What is your position on that period 3 delay?

A. So in summary, at the beginning of the period, there was 10 weeks of float on that activity.

Q. And that 10 weeks of float was determined by whom?

A. BBC's schedule. I'm not making an independent analysis of what's the critical at that time. It's BBC's contemporaneous schedule on March 3rd; so it was 10 weeks of float to the critical path. And then, at the end of that period, the activity that Mr. Doran says is critical on that same floor has 13 weeks of float. So it's clear that -- clear to me that something else is critical and not the second

floor.

Q. All right, sir. Were there any subcontractor problems during Mr. Doran's period 3?

A. Yes.

Q. Would you tell us about those?

A. Just in summary, there were some problems with getting the proper manpower, and there were problems with guest room drywall and the MEP work.

BBC issued cure notices to the electrician and to the HVAC subcontractor and had executive meetings with the electrician and drywall subcontractor to address -- to get them to increase the manpower.

Q. All right. Well, let's go through these, please. In March of '17, did you find any information regarding Watson Electric? Any problems with their work?

A. Yes. So this first meeting was in March -- or their first e-mail was March 15 of 2017. Per our meeting last week -- so this is Mr. Starcevic's e-mail, so it's a BBC e-mail to Watson Electric.

Per our meeting last week, Watson was to

complete level 5 guest rooms by 3/10/17 and start level 6 guest rooms on 3/13/17. Neither of these states were accomplished. We also failed multiple overhead inspections on level 2 and level 3, partly due to Watson deficiencies. Provided manpower count and recovery schedule to show your claim and get back on schedule.

Q. Keep going.

A. Include all rough-in testing inspection dates through (inaudible) and completion of all loose ends, fire caulking punch on level 1 through 5 and repair of any damage caused to other trades. Holes in walls, removed insulation, et cetera.

Q. Did you see any pattern or any recurring damage to the work by subcontractors to other subcontractor's work on this project?

A. There's lots of mentioned information, and it gets really severe in this period into the next period, especially with respect to the sprinkler contractor. The sprinkler contractor on the third through eighth floor put in the wrong kind of heads. They put in semi -- you can see that the heads, and you weren't supposed to. They were supposed to be completely enclosed up

above. And so you're supposed to have something that pops off so -- when the sprinkler goes off. And what that caused is --

Q. Let me stop you there. Did the sprinkler contractor put in the heads specified by the specifications initially?

A. No.

Q. Okay. And when that head was -- and was that information available to BBC as well as the subcontractor doing the work? If they chose to look, they would have known it was the wrong head?

A. Yes.

Q. Okay. And it's part of what you hire a construction manager for is quality control?

A. Of course, yes.

Q. Okay. So explain to the Judge then, when they put this head in, it's the wrong sprinkler head, and this is sprinkler heads in how many different rooms?

A. I don't know. Third through eighth floor. So it's -- I don't think the eighth floor had drywall in yet, so they probably hadn't completed the work going up to the eighth floor.

Q. Essentially every room in the hotel?

A. Right.
Q. Okay. Every guest room in the hotel, they put in the wrong sprinkler head, so --
A. There's 350 heads that had to be changed.
Q. 350 heads that had to be changed?
A. I don't know if it's --
Q. Okay. And this was in March of '17?
A. Yeah. I don't know if it was in every room or any of that. I know that it's 350 heads.
Q. I'm good with 350. What was the state of completion when they finished putting in the wrong sprinkler head? By that, I mean, was the sheetrock up? What was in place?
A. The sheetrock was in place.
Q. Was the sheetrock mudded?
A. It had been finished, yes.
Q. Had it been painted?
A. Some of it had been painted.
Q. Okay. So if the proper sprinkler head had been put in, what would have been the next step? Finish painting?
A. Finish painting.
Q. Okay. So the wrong sprinkler head was put in. What was involved in the 350 instances

in order to correct that defective work?

A. The contractor, Pasco, had to go back in and cut around each sprinkler head, make the change -- cut the drywall around the sprinkler heads, make the change, and then Precision had to come back in and patch that -- patch those -- each of those holes.

Q. Would the contractor coming back in to change the sprinkler head affect other trades working in that room doing other jobs?

A. It could have. It depends on where it was in the process. But we do know that the estimate from the Precision Drywalls for that work was in the --

Q. Is there a line item or a schedule, a baseline schedule created by BBC on this job that says, repair defectively installed sprinkler heads? Did they plan on that when they planned this job?

A. No.

Q. Okay. Should they have?

A. No.

Q. Okay. So we've got Watson. What about BMCC in April of 2017 during this period? What, if anything, did you find the records showed

regarding their work?

A. So in April of 2017, there's another e-mail from Mr. Starcevic, on April 5th of 2017. It was brought to our attention that BMCC will not be ready for framing inspection on level 5 b until next Wednesday, April 12th.

It's a 15-day delay to the framing inspection. Must be cured immediately. We need a plan for BMCC to -- by close of business Friday and how you intend to make up for lost time on levels 6, 7, and 8. Call me with questions.

Q. Did you see any evidence that Mr. Doran considered this issue in his analysis?

A. No.

Q. All right. Now, in May of '17, during this same period, were there any -- did you find anything related to the work of either Precision and/or Watson?

A. This is where the -- BBC basically initiated executive meetings with both Precision and Watson to talk about manpower, to try to get them to increase the manpower.

Q. And this e-mail is dated May 1. Who is it Tony Stoneking? Is that who wrote this?

A. Yes.

Q. And who is he? Do you know what his job was or his position was?

A. I don't offhand. The project executive, I think.

Q. All right. Now, in May of '17, Precision Walls, did they -- did you find any indication that they were damaging the work of other trades or vice versa?

A. Vice versa.

Q. Okay. So what did you find?

A. So this is May 5th, 2017, e-mail from Precision.

Q. All right. Tell us what you found. If you would, just read whatever you think is significant.

A. I have requested, in numerous meetings, that the damages to our work stop, and this is obviously not the case. Not only are we having to expend manpower that could be doing more productive things, there are issues in pictures shown below. They had pictures shown.

We're becoming a scapegoat for everyone to not complete their work overhead. Precision Walls has taken ownership of the areas where drywall was not hung correctly around pipes and

had to re-fix these locations.

Q. Well, let's talk a minute about Precision Walls' failure to correctly handle or correctly hang drywall around pipes. Are you familiar with that problem?

A. Yes. I mean, generally speaking, they -- this is usually in the corridor type work, and they have to be -- they have to be fire caulked, et cetera. So the drywall has to be put in there as fire rated.

Q. But are you aware that this causes problems with the finished plumbing fixtures, or do you have any knowledge of that?

A. I don't know.

Q. Okay. But it's an acknowledgement of Precision Walls, that they in fact had not hung drywall correctly around pipes, right?

A. Right.

Q. All right. Let's move on. How about Watson Electric? Did you find anything in your review of the documents relevant to Watson Electric during this period?

A. Well, first the -- some of the activities that were in the schedules took significantly more time than what was planned.

To the extent that, you know, that really was in the daily reports, we've got a ton of -- I would say it's June 21st, 2017, Watson working on all levels to resolve QC issues, roughing in on level 8.

Q. And what does QC mean?

A. Quality control. So if there's any problems with defective work or quality control. The same thing, July 13th of 2017, with Watson working on all levels to resolve QC issues throughout the building. Installing the light fixtures, rough-in on seven and eight. And then on July 25th, working with Nexgen on all levels to resolve QC issues throughout the building.

Q. Do you have any indication of whose QC issues they're talking about? Are they talking about their own issues or somebody else's?

A. This appears to be QC issues for work done by Watson.

Q. All right. How about in September of '17? Did you find anything related to any of Watson's work in that time frame?

A. This is an e-mail from Ryan Ledford dated Tuesday, September 19th, 2017, and it talks to specific issues with Watson.

So the top of the issues, it is obvious that Watson and other trades are overwhelmed by the amount of work to complete. They simply don't have enough manpower to handle the activities at hand. And then he follows up with, it's a red herring to state that design issues are holding up work.

Q. Let me stop you there. Who is Ryan Ledford?

A. He is one of the project engineers on the project.

Q. And he wrote to whom? Who did he write this e-mail to?

A. To David Stanton.

Q. And what was his job?

A. I don't know where exactly he stands. Maybe the president of Balfour Beatty.

Q. And there was -- and he CC'd Tim Spano and Nick Starcevic, correct?

A. Yes.

Q. And he says, it's a red herring to state the design issues are holding up work, right?

A. That's what he says.

Q. Did you find any e-mails or notes or any indication that either Mr. Stanton, Mr. Spano, or

Mr. Starcevic wrote to Mr. Ryan Ledford and said, no, you're wrong, it's not a red herring?

A. I didn't see anything.

Q. All right. Let's keep on going. What was below that that you thought was significant?

A. Well, this is a situation in August 31st of 2018. It's a statement by Tony Stoneking. He is the BBC vice president. Watson is a good sub for the past 20 years with me, but has greatly struggled on the last two jobs at Marion Square and Garner.

Yes, I know there are two sides to every story, especially at Marion, but this is a huge job and tight schedule with no margin for error. On those two jobs, they struggled with quality manpower, supervision, safety practices, quality installations, refusing to do changes at Garner, so not here. Change order price inflation, all of which ties up a lot of our resources.

Q. I don't know. Let's go back one. Did you read the last portion of the one previously with Watson?

A. No. Ryan Ledford's statement, after saying it's a red herring, to state the design issues are holding up work, he says, it's due to

poor QC, that we are in a position now where multiple trades must be involved to fix these issues.

Q. Okay. And that was the same one we talked about earlier. Did you see any return correspondence, meaning the people he sent this to that said, no, QC problems are not; you're wrong about that?

A. No.

Q. Okay. All right. So what is your -- how do we summarize your analysis of Mr. Doran's period 3?

A. So, essentially, I believe the as built critical path, again, is undocumented and doesn't match, doesn't correspond at all, completely conflicts with the contemporaneous schedules at the time.

Ten days -- ten weeks of float at the beginning, 13 weeks of float on activities that he calls the as built critical path at the end, and at the same time there are things going on with the subcontractors, manpower problems, et cetera, during the same period that really weren't accounted for in that analysis.

Q. All right. Let's go to period 4.

THE COURT: Let's take a break.
MR. BUNDY: Sure.
(A recess transpired.)
THE COURT: Okay.
MR. BUNDY: If it pleases the Court.
THE COURT: Yes, sir.
BY MR. BUNDY:
Q. Mr. Boe, let's talk about Mr. Doran's period 4. Refresh the Judge's recollection, if you would, about what Mr. Doran's period 4 was.
A. Mr. Doran's period 4 essentially is a period of seven or eight months. Let me get to that. It was the period from October 7th of 2017 to June 18th of 2018.
So, you know, a good portion, 254 days, and during that period, 141 days of delay occurred according to Mr. Doran. And that delay all occurred -- the critical path of the as built -- of his as built critical path showed the barn doors, the changes through the barn doors and then the completing of the installation of the barn doors was the cause of delay during that period.
Q. Do you have any criticism of that

analysis?

A. As with the other periods, the item that he chose as the as built critical path was never critical on the contemporaneous schedules.

So, again, this is -- I don't want to say it's the easy way out, but it kind of is the easy way out. To pick an item that took a long time rather than looking at the details to figure out what was driving from month to month, what really drove the project during that time.

And frankly, sometimes it is that big picture, that long delay that might be the actual critical path. But usually at least the schedules, the contemporaneous schedules, will eventually tell you that that was what was critical. And that just isn't the case.

Q. So put aside what Mr. Doran may have speculated or wanted to believe, what did the people building and planting the job believe at that time relative to these doors --

MR. HILDEBRAND: Objection, Your Honor. Calls for speculation.

BY MR. BUNDY:

Q. -- based upon the schedules?

A. Yeah.

Q. What did -- I mean, what did the schedule that applied to that period created by Balfour Beatty show as it related to the criticality, if any, of the barn doors?

A. They had float available throughout the period.

Q. So either the people on the job were wrong or Doran was wrong?

A. Right.

Q. They both can't be right, correct?

A. That's right.

Q. And these learned treatises that you rely on in arriving at your conclusion, typically which trumps the expert's belief or the schedules in place by the people actually doing the work?

A. My experience, it's the schedules on the project, the contemporaneous schedules, and it does make sense.

Q. Who is in the best position to know?

A. Right. There has to be -- well, sometimes the expert is, and I admit it. Sometimes the expert is in a better position to know when it's a small change from the critical path with some difference, sometimes that's the case.

But most of the time -- you have to have evidence, though. You have to have an idea. You have to have something solid that says, I'm going to differ with that schedule because of something. There's going to be something there. And I haven't seen anything that tells me that this was really what was driving that project for 144 days of delay.

There were tons of our things going on, and honestly, Mr. Doran talked to several other items during this period. He talked to stair 4 changes. He talked to some elevator change. He talked to a front desk, an addition of the front desk, and he talked about the pool.

The problem with that kind of -- you know, first you state that the critical path is driven by these barn doors, and that wasn't what was on the critical path on the project. But that's your as built critical path. And then you have a subgroup that says stair 4. Well, stair 4 did have some schedules, contemporaneous schedules where stair 4 was on the critical path. But eventually the changes weren't done on stair 4.

The elevator change has to do with a

change that was made in June of 2018. So Mr. Doran seems to assume that because it was made in June, therefore, it must be critical, and I can't go there. If it was critical, if the change was made out there, what was -- why wasn't the elevator done long before that? I don't know the answer.

Q. During this period, did the -- BBC continue to experience subcontractor caused delays?

A. Yes.

Q. During period 4?

A. Yeah.

Q. Would you give the Judge examples and what your investigation revealed?

A. And I think the primary item is the Precision Walls that -- between Precision Walls and Pasco, the repair of those -- of those holes is primarily during this period, not the previous period, sorry. I was getting a little bit of ahead of myself on that.

So beginning in December of 2017, there's some manpower problems with Precision Walls. From Mr. Starcevic to Precision, it is very clear that Precision Walls needs more

framers, hangers, finishers on the project. We have walked this list twice now and mostly remain status quo. And now we have lost two days on hanging level 8.

If we don't see the appropriate actions taken in the next 48 hours, we bring in necessary manpower to get this job finished. So they're threatening to bring in additional manpower because Precision Walls was not meeting the schedule.

Q. In order to supplement the subcontractor's forces, what generally is required in terms of the status of the job?

A. I mean, I guess theoretically, you can terminate -- you can terminate for convenience and bring in somebody else. But generally speaking, it's -- you have a good reason that you need that additional work done.

You're paying extra money -- real extra money to get that work done. It's -- it's an indicator that it might be critical. I take that and the information from the schedule and whatever else contemporaneous documents might tell me to make that analysis.

Q. All right. And then what about

December? There's an e-mail from Spano to Precision Walls.

A. Right.

Q. December the 19th of 2017?

A. Right. So Mr. Spano says, there is no (inaudible) here. Just want to complete the job and stop weekly schedules slipping from items in areas that are in our control and not caused by changes of the owner. I look forward to walking again tomorrow, and I hope that most of these items can be crossed off the list.

So it's not saying that there aren't some problems from the owner. And we're talking in this case about upper floors. That's the work that Precision is working on at that time in December of 2017.

Q. So at least we have one indication over a four-year job for Mr. Spano that at least some things were not caused by changes of the owner?

A. Right.

Q. Do you recognize where the one day came from?

A. No.

Q. All right. In 2018, with Precision Walls, what did you learn about that from your

investigation?

A. Well, so there is an e-mail from Mr. Starcevic on January 3rd, to Precision Walls. Why have finishers not been on level 8? I'm not sure we're getting our point across because we have seen no increase in manpower over the last month, and the same areas continue to drag along.

The original list below remains largely incomplete with our notes (inaudible). And the point here, at the same time, the contemporaneous schedule shows -- shows a near critical path minus 200 days of float.

And I frankly don't know what the contemporaneous schedule showed about the critical path. So I've written down near critical for the eight floor drywall, frequent finish drywall ceilings.

COURT REPORTER: Can you speak up just a little bit?

THE WITNESS: Sure.

Tape and finish drywall ceilings and soffits at level 8.

And we were able to track that and know that there was -- between the beginning of this period and the time when that eighth floor work

was actually done, it was about six weeks of delay. There was delay from December into January. Now, I'm not saying --

BY MR. BUNDY:

Q. And that six weeks --

A. I'm not saying that it's critical. I'm not saying that's it's --

Q. I understand that.

A. -- contemporaneous schedules --

Q. But the six weeks delay, your analysis is based on BBC's schedule, right?

A. My review was based on BBC's schedule.

Q. You just simply took their contemporaneous schedule and compared that to the actual work, and it shows six week delay --

A. Right.

Q. -- in that work?

A. In a pretty short time, two or three months.

Q. All right. Now, with regard to Precision Walls, there was a notice to cure issue -- a notice to cure issue in January 2018?

A. So a notice to cure was issued on January 8th from Mr. Starcevic, see the attached notice of cure.

We have walked the building weekly, sent lists and add on-site coordination meetings in an attempt to draw attention to the lack of manpower and quality control on-site. We have not seen an improvement over the last month, and the schedule continues to slip. Please respond.

Q. Okay. So overall, can you tell us how many notices to cure were issued to Precision Wall over this job?

A. I can't.

Q. All right. Well, let's go on to Pasco. I think that Pasco -- this is the sprinkler problem that we discussed?

A. Yes.

Q. It's a different period?

A. And I mean, factually, it's the same --

Q. Well, let's --

A. Factually, it's the same points. The wrong sprinkler heads were -- were installed, had to be replaced, causing rework by the -- not just Pasco but also with Precision.

Q. Okay. Well, let's look at this e-mail from Alec Dooley to Dean Smith and Pat. It says -- it's to the Pasco team, concealed sprinkler heads. Are you with me?

A. Yes.

Q. Dated October 9, 2017. If you would, tell us what this e-mail reflects.

A. Well, it says, it has been brought to our attention over the past week or so, so October, right at the beginning of this period -- over the last week or so about the installation of concealed heads on the project.

To be clear, our contract with Pasco states, concealed heads included in all first and second floor public areas, and all areas with chips in wallboard ceilings. Concealed heads also included for guest room floors three to eight. All public hard ceilings are concealed heads.

It's my observation that many of the heads installed to this point on the guest room floors are not concealed-type sprinklers heads. Please advise as to when this will be corrected. If need to discuss further (inaudible), we will.

Q. Do you know whether it's possible to determine, by looking at a sprinkler, whether it's concealed or not? Whether the head is concealed or not?

A. My limited knowledge of sprinkler heads

says, 12 man hours per patch times 350 locations, right?

A. Yes.

Q. Can you give me any idea of what would make up 12 hours to do a patch on one sprinkler head?

A. Not really.

Q. Got any idea of how many men it would take and what they would be doing for 12 hours on one sprinkler head?

A. This is patching the ceiling. So what they're really talking about is --

Q. Well, the response was, please provide more details on how you came up with 4200 hours.

A. Right. And the reason, I mean, that I would say is, they're worried that they can't get the proper finish to get it so that it fades in so that you can't see it. And if you can see it, but it's not going to be acceptable.

Q. Okay. So law firms like to get about 2400 hours a year out of some lawyer per year, so this is roughly two years worth for work if you had one guy dong it?

A. Yes.

Q. All right. If you could, just wrap up

this sprinkler defect issue in your mind for the Judge.

A. Right. So this sprinkler activity just required -- required them to go into these ceilings, rip out -- and my understanding is that because the contractor -- because Precision wanted so much money for it, they ended up -- Balfour Beatty ended up hiring a different contractor to come in and do that -- to finish the work.

So the change order ended up going to somebody else with additional work, rather than the folks who were doing the actual work here. But that 4200 hours -- I don't know what the number ended up being, but it was -- it's a significant amount of work.

And I will point out that none of that is in the schedule. It is not in the contemporaneous schedules. They didn't put an activity in there. It's not in the as built schedule. It is not in Mr. Doran's analysis.

And in fact, one of the things that Mr. Doran points out is that there was a change order done where there was -- I can't remember which term it was. On his -- his page 56 of his

slides, he talked about CCD number 3, which was custom color sprinkler heads. And in that situation, he was talking about this as it was close to critical or somewhat critical, and that happened in April of 2018.

Well, that change was only for the second floor, and it was 64 hours in total to replace, to buy new sprinkler heads, just the concealed part, and replace it. 64 man hours, as opposed to -- and that's in his report and on the -- but this item over here with 4200 hours, that -- and that only -- that doesn't include the sprinkler guy. That only includes the finisher.

Q. All right. So let's wrap up period 4 and summarize your analysis of period 4 for the Judge from Mr. Doran's analysis.

A. So we're back to the same thing. The critical path, he testified that the critical path was the barn doors. They were never critical in the contemporaneous schedules.

I don't know how he got to that conclusion that the barn doors were critical. He testified that stair 4 and some elevators and the front desk and the pool all might have been also critical.

But really, one of the things that I noted from the -- from reading the transcript was kind of a discussion where it was -- it was a question from Mr. Hildebrand that said, if you -- so if we find out at some point that the -- and obviously I'm summarizing and trying to do this as well as I can -- but if the critical path is barn doors, and we find out that the barn doors problems wasn't caused -- wasn't an owner problem, then you've got down below it, stair 4, and that's critical.

And you've got below that, elevator change, and you've got below that, front desk. So that's the critical path. Well, that's really not how delay analysis works. I mean, there was -- Mr. Doran said, yes, as an answer to that. But I think it was -- I think he misunderstood the question -- or at least maybe I did. I don't think so.

But the idea is, if you have one of those paths that's not their fault, that's not the owner's fault, that's what concurrency turns into. If this is -- these items are all concurrently critical, if they're critical or very close to critical and one of those items was

caused by the contractor, that's all it takes.

It doesn't matter what the weight of all these things is, and it doesn't matter that there's -- there's three or four charts that Mr. Doran included that include 15, 20 items that he lists down. And those don't matter at all.

What matters is the critical path and near critical, if you can show that it's within a few days of critical. But you can't -- the weight of having -- it's back to those RFIs. The weight of having thousands of RFIs, it doesn't matter. It's a question of what caused the real critical path delay, and can you demonstrate it.

Q. All right. Let's move to his final period, period 5, and if you would refresh the Judge's recollection about Doran's position on his period 5.

A. Okay. So basically, this period begins in June of 2018. And it ends with Mr. Doran stated December 28th, 2018, substantial completion of this work.

One thing is, the substantial completion declared by the architect is significantly later. It's in February of 2019. I didn't -- don't come to a conclusion as to whether any of this is

right or not. I didn't perform an opinion or an evaluation of what this substantial completion date was.

So I'm just kind of pointing this out. But during this period, Mr. Doran has a delay of 76 days, and it appears to be a delay due to the elevators. But there's also discussion of the pool. There is also a discussion of some other things during that period.

I -- my review of the elevator (inaudible) was there was lots more going on than just the change that was issued in June of 2018, that there was something that drove the project out to June of '19 and then beyond that. And Otis had some real problems with completion. There was a cure notice written to Otis the elevator manufacturer and the installer during this project.

So during October and November of 2018, Otis didn't complete its remaining work on elevators one through five because it's -- it put its crews on other jobs, and these are from letters and e-mails from BBC. Otis had the DOL elevator inspection move to an alternate job, Otis's job site in November 9th of 2018.

So instead of coming to this project, they went to an alternate site. You know that date had been scheduled for Hotel Bennett. The failure to pass the inspection was due to unfinished wiring as opposed to the changes by the South Carolina codes, according to the documents. And I'm not an expert in codes or electrical or elevator work.

And then on November 17th, BBC provided a formal notice to cure and notice of delay on this for its failure to complete its work and threaten notice with liquidated damages. It just doesn't appear that that delay is caused by elevators.

Q. All right. And the final issue, I want to discuss with you. As part of your review or analysis of Mr. Doran's work product, did you look into whether or not there existed any manpower issues that BBC had with its subcontractors?

A. We attempted to do some analysis to try to find out. From daily reports, et cetera, we found lots of different locations where there were discussions of manpower, problems with manpower.

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

BALFOUR BEATTY CONSTRUCTION, LLC, Plaintiff, -versus- LIBRARY ASSOCIATES, LLC; AND METROPOLITAN LIFE INSURANCE COMPANY, A NEW YORK CORPORATION Defendants.	VOLUME TWELVE Case No. 2019-CP-10-1108
LIBRARY ASSOCIATES, INC., Defendant/Third-Party Plaintiff, -versus- LITHKO CONTRACTING, LLC; GUY M. BEATY, INC.; BERNHARD MMC, LLC GULF STREAM CONSTRUCTION CO., INC; PRECISION WALLS, INC.; PALMETTO AUTOMATIC SPRINKLER COMPANY, INC.; ET AL, Third-Party Defendants.	

Hearing before the Honorable Mikell R. Scarborough, reported by Jennifer M. Huggins, Court Reporter and Notary Public, at 9:30 a.m. on October 26, 2021 at 100 Broad Street, Courtroom 2A, Charleston, South Carolina.

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this, and then were you copied on it? Is this part of your business records? This is just a suggestion, Your Honor.

THE COURT: Well, I think the question for the Court is, one, just because it's attached to this, and it may be a business record or was produced as a business record, that in and of itself does not resolve the hearsay objection.

The hearsay objection, there's got to be some other basis for it. If it's an admission against interest by a party, well, there's your hearsay. It's non-hearsay at that point, and then it's admissible.

That's why I say, if they're all the same and you're telling me it's a blanket objection, then we can just cross it on the first one. But if there's any difference in there, then y'all just need to bring that to my attention. Okay?

MR. BUNDY: I think we need to deal with each one of them individually.

THE COURT: All right. Okay.

DIRECT EXAMINATION

BY MR. BUNDY:

Q. Good morning, Mr. Boe.

Q. Oh, you read the transcript. You were asked about whether -- you were asked about what it would cost an owner to do a critical path schedule on this job, right?

A. Yes.

Q. A couple of hundred thousand bucks, right?

A. Yes. Over and above what I --

Q. Whatever.

A. -- we've already done.

Q. Well, if you compare the contractor's knowledge about his job over three years, where it has his own schedule. He created the schedule. He updated it 40-some-odd times, right? He should be able to come up with a critical path every month doing that entire job, right?

A. Yes.

Q. Okay. And so the owner is at an extreme disadvantage, but the general contractor doesn't even know where the critical path is and can't produce a document where he asked for 22 million dollars that even shows where it is, right?

MR. HILDEBRAND: Objection. Your Honor, this is leading. This is redirect.

BY MR. BUNDY:

Q. Were you aware of any type of agreement?

A. No.

Q. Does the contract have claims procedures?

A. Yes.

Q. Okay. And in your experience, 30-some-odd years, is it preferable to handle claims as they come up during the job, or do you wait until the end of the job and try to solve problems that occurred two and three years earlier?

MR. HILDEBRAND: That's leading, Your Honor. Objection.

BY MR. BUNDY:

Q. When is the best time to resolve claims on the job?

A. During the job.

Q. And what does the contract say regarding when you resolve claims on the job?

A. I'm sure -- I just can't tell you exactly what the contract says.

Q. Does the contract provide for notice of claim?

A. Yeah. I believe it's 20 days.

MR. BUNDY: That's all I have. Thank you.

THE COURT: 20 days was your answer, right?

THE WITNESS: Yes.

THE COURT: Yeah.

MR. HILDEBRAND: Nothing further, Your Honor.

THE COURT: All right. Mr. Boe, I just have -- I think it's just one question, and I'm pretty sure -- you may have covered it. I just want to make sure. You did not do a critical path analysis, you've been clear about that.

THE WITNESS: Yes, sir.

THE COURT: But when you were first presented with the claim, I think your testimony -- I was just trying to verify this -- your claim was that there was no critical path analysis that was submitted along with that claim to allow you to be able to adequately resolve or investigate the claim. Is that the gist of what your initial testimony was?

THE WITNESS: Right. The only -- the only portions of the claim -- there were some

general allegations that talk to, for sure, the structure and the design problems up front, but just nothing that said, this is the critical path. This is where the problems were on the project. This is what extended the project.

And usually, it's at least some specific periods or saying at these specific times, et cetera. I mean, it could have been in a form, something like what Mr. Doran presented. At least that is something that we can analyze and look at and disagree with, honestly. But at the same time, find out where we do have some agreement hopefully to try to help resolve.

THE COURT: But what you're saying -- I guess your testimony is, without that analysis, it's difficult to make that determination; is that what I understand you're saying?

THE WITNESS: What we find is that we couldn't. There is that long list of notice of delays to the owners in some of the backup documents, but even that doesn't tell what's critical and what's not and how much the allegation is, about specific amounts of time.

THE COURT: Okay. All right.

THE WITNESS: Okay.
THE COURT: Gentlemen, any questions? Any follow-up questions?
MR. BUNDY: No, Your Honor.
THE COURT: Mr. Boe, can he be relieved?
MR. BUNDY: Yes, Your Honor.
THE COURT: Well, Mr. Boe, happy to have you stick around, but you can come right on out of that witness chair, if you would like.
And, Mr. Bundy, just so I'm clear, I assume he is an expert witness. Can he be excused at this time? All right. Very good. Thank you very much, Mr. Boe.
MR. BUNDY: Your Honor, my next witness will be Grady Query.
THE COURT: All right. Mr. Query, come on forward.
(GRADY QUERY, having first been duly sworn, testified as follows:)
THE COURT: Please be seated, and if you would give us your full name and address for the record, please, sir.
THE WITNESS: It's Grady Wolfram, W-O-L-F-R-A-M, Query, Q-U-E-R-Y. And my address

you paid on this job?

A. We had agreed to -- once our services were defined, we agreed to a flat fee, I believe, of $4,800 to do an initial audit on the schedule and how it -- you know, whether it's a viable CPM and that it can -- you know, can perform the functions of a construction schedule, documenting, forecasting, and coordinating.

Q. So you were first hired -- what is it to do a schedule audit? What is a schedule audit?

A. Basically, we want them to basically -- it can take many forms. We really wanted to sort of drill down on all three of those because that's -- basically, the main functions of the CPM scheduling is being able to forecast the completion date for future work, coordination of near term work.

And then also a secondary function is to document, and, you know, to document when things actually happened when you apply actual dates and they're locked into the schedule.

Q. Do you have an opinion to a reasonable degree of certainty whether a CPM schedule is a necessary tool that a contractor needs in order to build a structure such as the Hotel Bennett?

A. I'm rather biased in that opinion. Yes, I think that's a necessary tool, yes.

Q. And in fact, if that tool is broken, will it affect the building and the building of the project?

A. Absolutely.

Q. Okay. So is your audit, in effect, the way -- to determine whether the tool, the scheduling tool works or not, is broken or not?

A. Yes, sir.

Q. Okay. Now, have you seen the contract in this case?

A. I have.

Q. Okay. There is a written contract between these parties, right?

A. Yes, sir.

Q. Okay. Now, if you would, let's look at the contract. I think it's in front of you. It's exhibit -- I believe this is 91.

MR. HILDEBRAND: Your Honor?

THE COURT: Just one second. Yes, sir.

MR. HILDEBRAND: I've taken this man's deposition. He was identified as a scheduling expert, and he issued -- he came out

attention what was required because this gentleman went out and looked at their schedule and has opinions, right? He's not going to offer an opinion that it breached the contract. Whoa, Well, that's your job.

THE COURT: Right.

MR. BUNDY: But it is my job to bring to your attention what the contract says, so his testimony will make some sense to you.

THE COURT: I'm in agreement with that. I think he's still laying a foundation. I'm going on allow it. Go ahead.

MR. BUNDY: Thank you, Your Honor.

BY MR. BUNDY:

Q. All right, Mr. Query. These parties signed the contract, and it's Exhibit -- it's the AIA 201-2007 edition -- AIA 201-2007 edition.

MR. BUNDY: For the record, Your Honor, its Exhibit 56.

THE COURT: All right.

THE WITNESS: I'm not sure if that matches.

THE COURT: The A133 is the front part.

MR. BUNDY: It's A201.

THE COURT: A201 is going to be about an inch into it. 201 is in there.

BY MR. BUNDY:

Q. All right. Are you good?

A. Yes, thank you.

Q. All right. If you would, turn to page 17 of the AIA document A201-2007 edition. Are you there?

A. Got it. Yes, sir.

Q. Paragraph 3.10.1. Do you see that under contractor's construction schedule?

A. Yes, sir.

Q. Okay. Would you read it for the record, that paragraph, please.

A. The contractor shall prepare and submit for the owners and architects that have permissions, the contractor's construction schedule for the work within 14 days after being awarded the contract. The schedule should not exceed time limits current under the contract document.

The documents shall be revised at appropriate intervals as required by the conditions of the work and project shall be related to the entire project to the extent

required by the contract documents, and shall provide for expeditious and practical execution of the work.

Q. All right. 3.10.2, what does that require?

A. The contractor shall prepare and keep current for the architect's approval, a schedule of submittals, which is coordinated with the contractor's construction schedule and allows the architect reasonable time to review -- the architect reasonable time to review the submittals.

Q. 3.10.3, what does it require?

A. The contractor shall perform the work in general accordance with the most recent schedules submitted to the owner and architect.

Q. 3.10.4, what does it require?

A. The contractor will be required to comply with the following as they relate to the planning and scheduling of the work.

Q. All right. Let's start with the first thing that's required under 3.10.4.1. What does that require?

A. The contractor shall include in his price, adequate time to properly schedule all

aspects of the contract documents. The contractor shall deliver to the owner and architect an initial construction schedule within 14 days of the notice to proceed, or at such time as may be mutually agreed upon by the owner, architect, and contractor.

Once all data needed by the contractor is obtained, the contractor will then develop an overall construction schedule that, when complete, will be the guide against which the contractor's performance and progress of work will be measured.

When the construction schedule is complete, the contractor, after consultation with all subcontractors and materials, suppliers, shall confirm in writing to the architect that the construction schedule is reasonable and achievable by the contractor, subject to any extensions of time as provided for elsewhere in the contract documents.

The contractor shall therefore give prompt specific notice to the owner and to the architect of any change in the logic of the construction schedule or any part thereof, the removal of any restraints or the reduction or

increase of any durations.

Q. What does 3.10.4.2 require of the schedule?

A. The construction schedule shall be a critical path method, CPM type of schedule consisting of one, a single critical path delineation; two, designations of detailed activities and a restraint in relationships; three, milestones and restraints for all activities including owner-awarded contracts through the date of project completion, and four, dates for submission and return of shop drawings and other submittals.

The dates for submission and return of shop drawings must be reviewed and approved by the architect. The construction schedule must show all activities necessary for substantial completion as defined by section 9.8 and elsewhere in the construction documents.

Q. All right. What does 3.10.4.3 require?

A. The contractor shall meet with the architect after creation of the initial construction schedule and will work in good faith with the architect to establish a schedule for turnaround times for shop drawings and other

submittals and times for responses to RFIs.

Q. And what does 3.10.4.4 require?

A. The contractors shall coordinate the construction schedule with the various schedules of the owners, other contractors, suppliers, and vendors, if any.

The contractor shall immediately notify the owner and architect of any unresolved conflicts between the various contractors, suppliers, and vendors, and any delay among them that may affect the progress of the work.

The responsibility does not alter any other provisions of the contract documents including the obligations of the contractor with respect to the contract time, the construction schedule, or the management and coordination of the work.

Q. What does 3.10.4.5 require?

A. Periodic meetings will be held at least once per month to assess the state of completion of the project and to update the construction schedule as necessary.

Based on observations and assessments made at these meetings, the contractor shall take, or in the event the delay in question is

not the responsibility of the contractor, propose the necessary and appropriate actions to resolve the issues that could delay the work and to outline and implement plans to remedy work behind schedule.

Q. What does 3.10.4.6 require?

A. The architect and owner shall be provided copies of the construction schedule as periodically updated in electronic format as maintained by the contractor.

Q. What does 3.10.4.7 require?

A. The contractor is solely responsible for its obligations regarding the construction schedule.

Review of the initial construction schedule and subsequent reviews of the construction schedule by the architect and owner do not operate to imply agreement by the -- sorry, do not operate to imply agreement by the architect or owner that the means and methods of planning of the work utilized by the contractor are adequate or will accomplish the work in the time shown on the construction schedule.

The contractor shall take all actions to ensure the work's successful planning and

execution within the stipulated contract time.

Additionally, review of the construction schedule by the owner for its consultants shall not make the owner or architect responsible for the contractor's scheduling obligations or the accuracy of the construction schedule prepared by the contractor.

Q. And what does the final 3.10.4.8 require?

A. The contractor represents the owner that the initial construction schedule and all subsequent construction schedules, in parentheses, including updates and amendments, have been prepared in good faith and are accurate to the best of the contractor's knowledge.

The contractor acknowledges that the owner and the architect will rely on the construction schedule in regard to any and all decisions or actions by either in regard to the project.

Q. In your opinion, is the scheduler on this job an important aspect of what the construction manager was to provide?

A. Yes.

Q. All right. So let's talk about when you

first got involved when Mr. Clements called you. What was the date again, Mr. Query?

A. It was -- I don't remember the exact date of the phone call, but I believe it was sometime in August 2017.

Q. Okay. Now, in August or September of '17, this lawsuit was two years away from being filed, correct?

A. Yes.

Q. Okay. So you weren't hired, at least at that time, when there was an pending litigation, right?

A. It was understood the project was in trouble, but that was not what I was hired for.

Q. Nobody was hoping for litigation as far as you know?

A. No.

Q. Okay. So you started out, and you went to -- and what did you do? What was the time? When did you go out to the job and what did you do?

A. We went out -- we received the schedule that we were going all get the audit was before August 2017 schedule prepared by -- it was an updated schedule prepared by Balfour Beatty.

Q. And that would have been Mr. Lauricella's schedule?

A. Yes, sir.

(DFT. EXH. 94 was marked for identification.)

Q. Okay. I'm going to hand you what's been marked for identification as Defendant's Exhibit 94 for identification and ask if you can identify that document?

A. That is the audit that I prepared.

Q. This is the first audit you did?

A. Yes, sir.

Q. Okay. And this is your work product, your document, you're the author of it?

A. Yes, sir.

MR. BUNDY: Your Honor, I move to introduce Exhibit 94 into evidence.

MR. HILDEBRAND: No objection.

THE COURT: Without objection.

(DFT. EXH. 94 was received in evidence.)

MR. BUNDY: Judge, I'm going to strike out the ID, and I'm going to hand it to you.

THE COURT: All right, sir. Thank

you.

BY MR. BUNDY:

Q. All right. Mr. Query, walk me through this document. You can either read it, paraphrase it, or whatever you think is the most beneficial way to handle it.

A. All right. I did an initial job --

MR. HILDEBRAND: Wait for a second, please.

BY MR. BUNDY:

Q. Go ahead.

A. We did several job walks there. I did an initial job walk on -- I don't remember the exact date -- and took notes, general notes concerning what I -- observations of the construction site.

Q. All right. Well, it says here you did it on August the 28th.

A. Yeah. And then we did -- I did another job walk on -- well, actually I didn't. I had --

Q. And one three weeks later?

A. Yes.

Q. It's in the letter. You can use the letter if you need to.

A. No. Well, we did several walks coming

up to that. So on the 27th, we did a partial walk. I couldn't stay there because I couldn't get back in the building because that was the day that there was a shooting. It was at the restaurant right next door.

So the 28th, went there for the final walk, did the -- and basically observed the status of the schedule -- of the construction compared back to the 4 August schedule.

Q. And you started out with your executive summary of findings, correct?

A. Exactly.

Q. This is a letter you wrote to me, right?

A. Correct.

Q. This is a letter you wrote to me?

A. Yes, sir.

Q. Okay. And what were your findings in your executive summary?

A. So the first -- as spelled out here, the first exercise of audit reviews the accuracy of short-term forecasted progress, and we did that by observing manpower totals for each area.

So we walked through and just documented exactly who was on site and the status of that site and -- and took pictures of what it was, and

then compared that to what the 4 August update was showing.

Q. Okay.

A. From there --

Q. Then the second part of your audit does what?

A. So the second part of the audit, we also determined whether this -- it appeared to specification requirements and to accept scheduling practices.

So we actually take the schedule, the actual XER digital format, and look at it in the scheduling software and determined, you know, if it's -- if it's adhering to acceptable scheduling practices.

Q. All right. You have a sentence here that says, the main function of the CPM schedule are coordination, communication, documentation, and forecasting. Are those main functions consistent with the contract provisions we read?

A. Yes.

Q. Okay. And are they consistent with what CPM schedule review is for --

A. Exactly.

Q. -- in your business, day in and day out?

ascertain affect, that finishing or not finishing an activity would have upon the overall project.

Q. All right. Let me stop you there. It says they do not have successors. What are successors?

A. So in a CPM schedule, you only want two open-ended items, which means, notice to proceed would not have a predecessor. That's the initial activity.

And then the final activity of completion would not have a successor. That's the final activity. Everything else needs to have -- can't be open-ended or it fails to function and gives false float.

Q. Can you turn here a second and let's see if we can figure this out?

A. Sure.

Q. Notice to proceed, NTP, right?

A. Yes.

Q. It has no predecessor because nothing is going on before the notice to proceed, correct?

A. Yeah.

Q. Substantial completion, it has no successor because there's nothing that goes on after that for purposes of determining the delay,

right?

A. Correct.

Q. Okay. But every activity in the middle, all these activities should connect to something else. This is the preceding, if A -- if B is this activity, previous to that, this is A. That's the predecessor's activity?

A. Correct.

Q. Over here is C, that's the successor activity, correct?

A. Correct.

Q. And what you're telling the Judge, are you not, is that you found that there were instances of no successor activities, correct?

A. There is a lot them, yes, sir.

Q. Okay. And what's the problem with that from a scheduling perspective?

A. It doesn't allow the schedule to calculate properly, so it applies false float to schedules that are open-ended.

So schedules when you -- you know, I can give an example of how we would calculate a schedule. And so -- and this is an example I use to explain how a CPM schedule does a forward and backward pass and how it's created. So the

schedule is created, you know, of activities and relationships.

And for this illustration, we use a long table with a calendar or a time scale at the top, and the activities are little tiles. And the length of the tile is representative of their -- of the duration. So one inch for one day; two inches for two days, and you would --

Q. So this is your alternative turkey dinner?

A. Exactly.

Q. This is your way of explaining how it really goes, not a turkey dinner?

A. Yes.

Q. Okay.

A. Sort of relating to different subjects, but as you --

Q. Well, you can't turn the turkey dinner upside down and work back the other way. Like you can't make a reserve pass on a turkey diner because people aren't going to throw up their food and go back the other way, right?

A. Good point.

Q. Okay. So let's go through the tile analysis.

A. So you stack these tiles. You start with NTP, and as you would constrain that, that's a contractual start date. So you constrain that or glue that to the table, so to speak, being our analogy for constraint.

And then you would stack upon that. You would have a tile that stacks upon that of preparing the site, and then another tile for excavating footings, and then another tile for setting rebar in the footings. And you'd probably have a secondary path that also leads from NTP of preparing rebar shop drawings, delivery of rebar, and that's also stacked and the installation of the rebar is stacked on that.

And you go all the way through the project to the end, which is substantial completion, and then you glue that down because that's a contractual date, and that should be -- that's nonmoving. And then in order to calculate the schedule, you basically would do a forward pass, which means you would pick up the right-hand part of the table and all the tiles would shift back towards NTP.

And then you can look at the top of the table where the time scale is and you can see

exactly what -- this is the earliest time that this activity can start. And at the same time, you can identify the longest path through the project, which is the critical path.

Then to do a backwards pass, you would pick up the left-hand side of the table. And then the tiles that move the most, that's -- they have the most float. So how far a tile moves is how much float it has. And then, when it gets to the back of it, then you can look at the top of the time scale, and you can see exactly when the late date is, which is the last date that that activity can occur, start or finish, and not impact the completion date.

And once again, the longest path or the critical path would be nonmoving because that's uninterruptible and the longest path.

Q. And that's what the computer algorithm does when you put the information in, essentially, right?

A. Essentially.

Q. Okay. So the computer, in its head, is raising and lowering the table, but it's not -- it's using math and algorithms to get there, right?

A. Exactly.

Q. Okay. But does the computer sort of -- I don't know -- saying, junk in, junk out, apply to scheduling and computer analysis?

MR. HILDEBRAND: Objection, Your Honor.

MR. BUNDY: I will withdraw it.

THE COURT: Okay.

BY MR. BUNDY:

Q. So other than -- then you say, at first we had a problem with -- to have successors. Then very few of the owner furnished equipment dates shown in the schedule are accurate. What did you mean by that?

A. Well, to finish the successor --

Q. Sure.

A. I didn't really finish that analysis.

Q. Oh, I'm sorry.

A. Now, as far as open -- as it relies to open-ended activities, an open-ended activity, when you tilt the table, it's going to fall on the floor. So you're basically -- that is going to provide false float because there's nothing that's tying it to anything.

So whether it -- if it doesn't have a

predecessor, it goes all the way back to NTP, or if it doesn't have predecessor, it goes -- it's saying, hey, this is the very last thing I can do and then I can open the project and open the hotel.

Q. Okay. But there's nothing to stop that tile from falling off the table if you don't have a successor?

A. Exactly.

Q. Okay. So then what are restraints, Mr. Query?

A. So that's how Balfour Beatty got around that is they constrained those opened activities in order to keep them in place.

And they didn't just stop there because, as -- you know, once you started looking at subsequent schedules, where they had all of the activities including them, not just the ones to the right, the remaining work activities, one out of ten activities -- one out of ten of the total activities of the -- there's like 2,000-something activities, just over 2,000. Well over 200 on every schedule I reviewed, had open ends.

And beyond that, 30 to 33 percent, one out of three activities had constraints. So

that's basically gluing one-third of all of those activities to the table. And that's a very important -- you know, two of the most important aspects of the CPM schedule are elasticity and being readable.

So readable not just in the fact that, you know, you need to be able to say, okay, this defines what I'm doing and where I'm doing it and who's doing it, but also readable in the intent. So that's the thing. You can't read intent on the constraints. And, furthermore, they used the wrong type of constraints. So there's --

Q. What was wrong with the constraints they used?

A. Typically, when you're using constraints and you really need to be very judicial about the use of constraints because they absolutely alter the float in the schedule.

So, typically, you would use a constraint -- there's eight types of constraints you can use in the CPM schedule or in the (inaudible) software. The four that would be acceptable for just -- you know, if you knew a specific delivery date or something, you would use start on or after, and you would -- that

constraints that had to just start on or after that date.

So that is -- that would be liberally used, that would be okay. What they did is use start on or finish on. That is absolutely inappropriate because what that does is makes that activity critical. So there would be very, very few times -- you would use that for the empty fee and for a contractual date after you finish.

You would not use that for, you know, activities within the body of a schedule except for rare occasions where say you were doing school work and you're building an addition to school, but you did have some renovation work and for summer work. So that's critical work within that time period.

So you would use that constraint so -- because you don't want -- that's not -- finishing that work isn't driving the finish, it's dictated by the teachers coming back. So it's sort of a mini schedule within a schedule, and you would assign those constraints for that, and then that would have its own critical path when (inaudible).

So what you do when you use start on, finish on constraints is you're assigning zero float to all these miscellaneous activities which could be completely non-consequential activities. They could put face plates on an electrical switch or something. So it's just -- once you do that, you've taken away the ability of the schedule A to be elastic, but, B, it's giving -- not only is it not working, but it's giving false information.

Q. Does it make it harder to review the logic or understand the logic of the schedule?

A. You have no idea why a constraint was made, and we found that consistent in our reviews, that all these constraints -- it's just -- and they're -- as we read, they're under contractual obligation to explain that, and every time they use one. So when they -- when they put one in, there's absolutely no explanation of why it was there or what the purpose of that constraint is.

Q. In your opinion on a job of this size and schedule for a job of this size, how many constraints of the type that would be reasonable would you expect to see?

A. If it -- in reviewing, if I -- which I do, you know, a fair amount.

Q. Right.

A. If I had one start on constraint that was inappropriate, I would reject that schedule. If I submitted that to someone else -- in any Federal project, you have to have approval for use of any constraint, and which means that you don't get to use them.

They don't approve them. So, I mean, one constraint would reject -- you would have a rejected pay app, and you have rejected schedule. You're just -- you have to use them very sparingly.

Q. Okay. All right. Let's keep going. You say you completed the walk through.

A. So we were at the owner furnishing.

Q. Yeah. What I want to -- what I want to go to is the next page. It says that, as shown in the progress review section, the Balfour Beatty schedule is ineffective in even forecasting the very shortest terms. Now, what does that mean?

A. So when we walked the job on 28 August, there was a fair amount of deviation, much more

than you would expect within a progress cycle. So just from 4 August to 28 August, there was -- it's just, they were not following the schedule, which we read was a contract requirement. And it's spelled out.

When we went through, and later on in this report, it shows -- you know, we take a little excerpt from the schedule, broken -- you know, from the WBS, how they define this -- the areas in the schedule. We show that schedule in our report.

We list the activities that should have been completed during that time, and then we list basically what we observed during the time frame on our 28 August walk through and then noted whatever manpower we saw in the area. And we just saw enough deviations that would -- you would not expect to see that many deviations in that short of time frame.

Q. The next sentence says, the lack of crew to -- the crew flow logic in the schedule also compounds the inaccurate forecasting by unreasonably stacking (inaudible) and allowing finishes to occur in the schedule much sooner than is realistic. What did you mean by that?

A. All right. There just wasn't very much crew flow logic in the schedule, which you would expect to see. I mean, the schedule was set up as you would -- with the assumption that you have this infinite number of resources. That's typically not the case in construction.

You have finite on resources, so you would link one crew, say the electrical crew on one floor to the next floor. So if they fall behind there, it will drive them on the next floor. Well, there just wasn't really hardly any crew flow logic at all, which meant that basically, if they fell behind on one -- one floor, they would just start stacking up and would be -- expect the schedule would show them working on all nine floors at one time.

Q. Okay. Let me ask you this just to clean things up a bit. This opinion -- there are other opinions in your letter and other documents we're going through. Are these opinions yours to a reasonable degree of certainty?

A. Yes.

Q. Okay. So I don't need to ask you that every time. All of your opinions are going to be to a reasonable degree of certainty in your area

of expertise; is that correct?

A. Yes, sir.

Q. All right. So then you go on, and you say in the second portion of the audit exercise, adjustments were made to the schedule to match progress observations. What are you trying to get across here in this paragraph?

A. Well, we were asked to try to forecast a completion date. That would really be difficult, not having access -- well, I would say it'd be impossible not having access to the planning team, to their subcontractors, their suppliers. So, basically, what we were trying to do was basically just fix what we could in their schedule and see what the variance would be.

So we basically went through and tried to reasonably close the open-ended activities, assigning them reasonable relationships to successors, predecessors, basically adjusting -- I think we also adjusted -- one of the things we looked at was whether or not they were adhering to -- there was a lot of owner furnished contractor installed equipment that had specific delivery dates.

And we wanted to make sure that they

were matching what the owner had furnished them as far as the delivery dates, and they were wildly off from that. So we adjusted those delivery dates to be accurate as well.

Q. Let me ask you this: Was it your intention, when you went through this job, to take over the contractor's means, methods, and scheduling and tell him how to do his job?

A. Not at all.

Q. Okay. What was your -- or what did you see as your purpose as it related to Balfour Beatty?

A. Basically, we were just trying to assess the schedule, but it was relayed to me that -- it was told that I might be taken on as a third-party scheduler for Balfour Beatty.

So it was really trying to spell out what was wrong with the schedule and how it was broken, and then hopefully, they might realize that they might be out of their depth and might need a little bit of help.

Q. Okay. So you -- if Balfour Beatty had asked if you were available to go to work for them and help them to figure out this mess, correct?

A. Absolutely.

Q. Okay. But they never took advantage of that?

A. No.

Q. Okay. And in fact, how did they respond to your information and your suggestions or observations?

A. I didn't get a response.

Q. Okay. Do you have an opinion to a reasonable degree of certainty, based on what you saw and did over the next months, whether if you had been hired by Balfour Beatty, you would have been able to assist them and get this job done quicker?

A. I think I would have been of assistance, and I think that -- yes, I agree with that.

Q. Okay. All right. The next paragraph is resulting changes may result in large variants to each and every major completion of milestone, most notable, which is the overall hotel opening activity 1050 now reflects a 29 June '18 completion date resulting in a loss of 57 calendar days from the previous completion date of May 3, '18. What are you trying to tell us here?

A. Basically, when we went and made those changes just to -- of what we could, just to try to bring the schedule back into, you know, some form of acceptable scheduling practices, it pushed out the completion date from 3 May to 29 June 2018.

Q. So you immediately were able to show them that they in fact were an additional 60 days later than they thought they were, approximately?

A. Yes.

Q. Okay. And did they respond to that in any way that you recall?

A. No.

Q. Did they deny it or did they accept it, or they just didn't respond at all as far as you can recall?

A. I didn't personally give this report to them, so I can't --

Q. Okay. All right. What is this project milestone update block? What is this showing us?

A. Basically, this relates to what we just talked about. It's basically their major milestones that they showed on their 4 August schedule and then in the next chart, it basically shows what the resulting milestones move to once

you basically try to fix what you could in the schedule.

Q. Okay. Let's turn over to -- you've got a little drawing on the next page, but I want to go to the next page under constraints. Are you with me?

A. Yes.

Q. Okay. An exorbitant amount of activities -- and what do you mean by that -- have been assigned restraints -- constraints dictating logic. Can you put that in more understandable terms for us?

A. Well, if you see above that, you see the schedule overview, and there is 787 activities. Now, understanding that they deleted all the activities with the actual dates; so that's just part of the schedule. And of those activities, 96 are constraints, which is exorbitant.

Q. What would you expect to see -- how many constraints would you expect to see?

A. Well, once again, there is the wrong type of constraints, too, which is extremely important, but much less than that, and not only the number, but how they're used.

They're used inappropriately to dictate

logic and to constrain things in mid-air rather than -- a true CPM should always allow the logic to dictate the dates, not just it go, oh, I think this is going to finish here. I'm going to constraint it there.

Because that might be applicable on 4 August, but then come the next update, you've got to go back and change all those to where you think they're going to be there. That's not what a CPM is supposed to do. It's supposed to think for you. It's supposed to -- you put in the activities. You put in the logic. And then, once you calculate it, it lets you know what has float, when things are going to finish.

I mean, it's not rare that, when doing an update, the project manager will tell me, we're doing it here. But you have to backtrack him and say, that's great, but, you know, there's -- A, B, and C have to happen before we get to D.

So how are -- you know, I'm not showing on my schedule that we can do it on that date. So you have to have that conversation and then adjust the logic to get that date. You just don't arbitrarily go, okay, yeah, we will set it

on that date. That breaks the logic and it makes it a nonfunctioning CPM.

Q. Is it sort of reverse engineering a schedule, or is it even worse than that?

A. Well, it's worse in the fact that it gives false data.

Q. Okay. I gotcha. All right. Let's keep going. Since Balfour Beatty sent the schedule -- sent the schedule with only activities in progress and not completed, in the extra file they submitted for this review is understandable, while the large amount of constraints were present. What does that mean? If you could explain it.

A. Well, I was just trying to be as reasonable as possible and sort of give them the benefit of the doubt. Since they had not really given me a full CPM -- maybe the reason for all of those constraints was the fact that, because there wasn't predecessor logic in there from actuals, maybe that was the reason that the constraints weren't there.

But as -- and I was just trying to be fair in my analysis of not really trying to throw the book at them on -- about that, but just to

point out how it could be that all these constraints would be in there.

Now, on subsequent reviews, we -- that was absolutely not the case. It was actually worse than we thought, that it was -- as I said, one out of three activities in a 2000-plus activity schedule were constrained, and that one out of ten were open-ended.

Q. Would that schedule, as you just described, comply with the contract provisions as we read?

A. Not at all.

Q. Okay. All right. Let's keep going. You've got activities without predecessors. When you say it's completely unacceptable, number 89.

A. That -- once again, I'm not really going to throw the book at them on this one for that because they deleted all the predecessors because they deleted all the actual dates. What's more concerning is the ones without successors.

Q. Okay. Tell me about that one. There were 20 of those.

A. Well, there should only be one, as we stated. There should be the hotel opening. And then I -- because it's serious, I went ahead and

listed exactly what all 20 of those are below it. And you could see it. I mean, some of these are -- you know, the hotel opening is one of them; so 19 are inappropriate.

Q. All right. Well, to use -- to go back to your tile example, these -- other than the hotel opening, would these be the tiles that would fall off the table --

A. Exactly.

Q. -- when you picked up one end of it?

A. Yes, sir.

Q. Okay. All right. Then we've got schedule calendars.

A. Basically, just to be complete, I wanted to call out -- because not only this is -- this analysis is also trying to give information to the owner on what he's looking at in the schedule. So I wanted to call out that, you know, you can't discern that, and that's what they were -- the owner was handed, our PDFs or printouts of the schedule.

So you can't discern what a calendar would be or assigned for each activity. So I just wanted to call out that, hey, there are certain calendars -- certain activities assigned

to a six-day calendar. I also mentioned that there are no weather days, inclement weather, you know, a specific calendar for that, which is typical.

And it is an AGC standard that you would assign -- say if you're -- any activity that could be impacted by weather, rain, cold, you would typically put in non-work days anticipating how many of those days would be each month. So you would sort of bake into the schedule your anticipated non-work days due to that. So they didn't have that in there.

Q. And you're not entitled to a time extension for anticipated weather, are you?

A. No.

Q. Okay. So you -- the contract speaks to that. You have to anticipate what the normal weather is, correct?

A. Correct.

Q. And you build it in the schedule?

A. Because -- yeah, it has to be because you don't --

Q. You're not going to get an extension for it. Let's talk a minute about --

THE COURT: Let's take a break for

five minutes.

(A recess transpired.)

THE COURT: All right. Mr. Bundy?

MR. BUNDY: May it please the Court.

THE COURT: Yes.

BY MR. BUNDY:

Q. When we broke, I was getting ready to ask you about a format in which you receive schedules from Balfour Beatty. Okay? Tell me what you got from Balfour Beatty as you were working along monthly to look at their schedules. Did you get --

A. When you transmit a Primavera P6 schedule, it's exported, and it's stored in an XER file. And that basically contains all of the schedule data. And then you would take that and then import it in your database and then use that software, the P6 Primavera software to then open it and examine it.

Q. So you would be given the underlying information?

A. Exactly.

Q. Which would include the logic and the restraints and all of that?

A. Correct.
Q. Is that right?
A. Well, except that we didn't get all of that.
Q. No, I'm not asking you what you got. I'm asking you what you would normally expect to get.
A. Exactly.
Q. Okay. Would it be comparable to, instead of getting a spreadsheet, let's say, electronically that allows you to manipulate the spreadsheet, instead they just printed a copy of it and sent it to you without being able to get the underlying stuff, or is that comparable?
A. No. I would be able to -- I just could only open up half of it. So only the things to the right of the data date, the remaining work would --
Q. So tell me -- and what do you normally get from a contractor when you do these kinds of things? Let's do it that way.
A. Typically, I mean, you would get an XER file, and then you would load it into your database.
I did have to go to an additional step

because -- and you see this typically with schedulers that are not very -- you know, people that don't really work in the scheduling industry don't know any better. But their database was extremely corrupted, and it had what was called -- it's POBS float.

So there's a subroutine inside the XER file that basically, when Primavera was bought out by Oracle, they just basically print -- made this whole new software, and then forced it on everyone. And it was flawed, and they never fixed it because that's probably 0.001 percent of their gross income, and they didn't care.

So immediately within the scheduling industry, we found that this subroutine, basically, when you used an old schedule, it would sort of kick in, and then every time you imported or exported and it had global data in it -- so it applied to every project in your database, it would double.

And then so it didn't just increase in size, it exponentially increased its size. So what they sent me was actually an 18 meg XER file. But then when you -- if you input that into your database, you've now corrupted your own

database, which means you've got -- with a database of my size, it's probably two to three days worth of work.

So I would go in, and then basically extract that corrupted POBS float out of there, and that reduced it down to 1.7 date. So that would give you some indication of just how corrupted that is, and it also gives you an insight to what Joe was working with and the fact once the database --

Q. Now, by Joe, you mean Lauricella?

A. Yes. If that corrupted, it is painfully slow to do any calculation or work within that schedule.

Q. Well, when you got these PDFs or whatever you got, were they calculated? Had he run the calculations?

A. Well, later on when we received some, that -- and, no, we -- so we had -- that's the first thing you do when you receive a schedule is then you calculate it. You would expect -- and, you know, 9,999 times out of 10,000, you would never see one move.

You're basically giving someone a document that should be complete. So there's

multiple problems with that. So when you send someone an XER file that's not calculated, that meant he basically made some changes. So like I was saying in my illustration earlier when we talked about the rebar.

So maybe you update the schedule, and you say, hey, the rebar is not coming in. It's going to take now instead of a week to do, it's going to take six weeks to do, which is -- should then push out setting the rebar. The problem is, you don't calculate it. So that means all you did was just change that duration on that, and that reflected.

But the underlying cause and effect has not been realized. So that rebar is still probably sitting well before the delivery date of the rebar. So it's another way of a broken schedule. But the worst -- there's multiple problems with that, and the fact that everyone else is looking at PDFs.

So it's great for me. I can hit F9 and calculate it. Everyone else, you know, they're looking at the wrong schedule. It's not been calculated; so the dates are wrong. So that's distributed to everybody, and it's just wrong.

And the other problem is that, if you were doing -- you know, if you were looking at PDFs in a forensic aspect, you were -- the same thing. You're not open -- you're looking at that. What you do is you go back and compare those dates. It doesn't calculate it when it compares those dates.

So if I was little going back and looking at a previous schedule, a PDF or even assigning -- an easy way to compare dates is to assign our previous schedules as baselines. So now we'll run reports comparing, okay, this activity is now showing finishing on this date. What was it supposed to be on the original baseline? What was it supposed to be on update number 22?

And you can look at those, but when you look at those, you're now looking at uncalculated schedules. So the dates are wrong.

Q. If you have this corrupt database with this glitch in it that Lauricella was using, how does that affect the time it takes to calculate things in that corrupt database?

A. It really slows it down, and I really brought it up just to get insight as to why maybe

some of these things were being done is just time saving maybe. Because it just -- it really falls outside of any practical application of CPM scheduling.

Just some of the things he was doing you just do not, do and I was just trying to give some benefit of the doubt, why you would do that, and that's because it was just so slow and tedious to work in this database.

Q. I'd like to be a little more specific. On your software, which is not corrupt, I assume, right? And it's not corrupt -- for one reason, you didn't download Lauricella. If you had, your whole database would have been corrupt, right?

A. Correct.

Q. How do schedulers take it as between professional schedulers when you send another scheduler a corrupt database?

A. I mean, I'm fairly certain I went to -- when we did meet, I pointed this out to him. And you get a first pass. But after a while, you're basically sending me a virus. So it's a hostile act after a while.

Q. Fair enough. When you punch F9 to do the calculations, which I assume is the key,

right, the function key?

A. Correct.

Q. You get your calculation in what, a second?

A. A second.

Q. Okay. When Lauricella punches his F9 key with a corrupt database, how long does it take him to get his calculation?

A. With a -- something like that, it would probably be 20 seconds.

Q. 20 seconds. So for every minute that you work and do calculations, you can do 60, and Mr. Lauricella would do three, on average?

A. That would be a fair --

Q. Is at least -- is that at least one explanation as to why he would have been reluctant to be calculated?

MR. HILDEBRAND: Objection, Your Honor. Calls for speculation.

THE COURT: Sustained.

BY MR. BUNDY:

Q. All right. Let's go back to the -- anything else we need to know about the quality of the schedules you received from Balfour Beatty as it relates to the formatting or software

aspect of it?

A. Well, I mean, there was other -- another great error is changing -- once you have established an activity ID code, you don't -- you don't change the description. Everything in the database is keyed off of that unique code, assigned to that activity.

Q. Give me an example about what you're talking about.

A. So when -- the same thing, so if I -- and this happened on -- this was on the item that was driving the majority of the schedules that I saw. The longest lead item was the Hope's doors, and that the Hope's doors were basically -- we had spoken to, you know, the very fancy doors out front, and they were on the mockup.

And it was ascertained that they were not going to be allowed to move these Hope's doors from the mockup onto the building until -- so they basically were going to need two sets of Hope's doors.

So this was what was -- it was hope that this could be a workaround item and that the (inaudible) would come to their senses, but still, it was a situation, and it was always --

it was on the schedule. And basically, the Hope's doors had an activity ID. They had changed one, and it was previously setting the trash can compactor in the alleyway.

So they -- it might seem innocuous, but here, if you were -- when you go back and look and say, hey on previous schedules, how critical are these Hope's doors, you're not -- you're comparing the Hope's doors to how critical the trash compactor is. So it's a serious problem.

Q. Be like calling animals different names at the zoo, huh? All right. So anything else with the software? Are you looking for something?

A. Yeah, I was. And you were just asking me just basically what fallacies I had found in the schedule.

Q. Okay. Let's go back to the letter if you would.

A. Okay.

Q. Let's go back to where we were. I want to look at the underneath -- we were on the weather before we got sidetracked on this computer virus problem. Let's go back to that page, if we could, because you've got calendars

used in the schedule. I would like to talk to you about that.

A. Sure.

Q. Okay. Now, what do you mean by calendars used in the schedule?

A. As I said before, we -- I really wanted to -- it's not only just -- I mean, it's a document that the owner needs to use to sort of understand the schedule.

In fact, he doesn't -- he can't ascertain what calendar is assigned to each activity, just looking at a PDF. So, A, I wanted to point out, there was no inclement weather on exterior work. That would be industry standard.

And then I went on to just list, you know, most activities were on a five day work week and then just wanted to, in here, list it -- there are some activities that are on a six day calendar. And it's just wanting to call those out, and basically for no other reason than just to say, okay, these are the guys you should be expecting to see on Saturday.

Q. Okay. What use to an owner is an accurate schedule when the owner is thinking about making a change? Why would the owner want

to know what the actual schedule on the job was in considering a change?

A. Because there is a cause and effect. You can -- you can input the change into the schedule and see what the effect is.

Q. Okay. And that allows the owner to make an informed decision about whether that particular change may or may not be a good idea?

A. Correct.

Q. Okay. And did this schedule, as you saw it when you were on this job, permit the owner to make informed decisions about proposed changes?

A. No.

Q. Okay. And would that be consistent with the contract requirement, a schedule that did not inform the owner about the effect of proposed changes?

A. No.

Q. Okay. All right. We've got a seven day week, solely used on the calendar for curing the stucco. What is the significance, if any, of that note?

A. Not really. I'm just noting the different calendars and that that's an appropriate assignment for a curing.

Q. Okay.

A. I mean, it's -- that's just the passage of time, so you would count Saturday and Sunday for a curing activity.

Q. Okay. How about Marion Square hotel for a five day work, assigned the majority of activities. Holidays are included but only through the end of 2017, so at least one day will be lost for New Years Day. What's the significance? Are you just pointing out they're going to miss a day?

A. Just pointing out that they're planning on working on New Year's Day. It is typically not -- we don't typically expect that.

Q. Okay. What about the Marion Square -- is that the sixth day?

A. That's what I was talking about. That's just calling out which activities are assigned to work on Saturdays, so a six day work week. And the majority of it was floor tile. So just to point out that you should be expecting to see the tile value on Saturday.

Q. All right. Let's go to the next page. It says here, the longest path is driven by hanging a drywall on the seventh floor wall. Is

that your analysis or theirs? I'm not sure.

A. No. This is strictly taking -- I just wanted to point out what the critical path was on the 4 August schedule as per Balfour Beatty's schedule.

And it's basically -- the longest path is driven by anchored drywall on the seventh floor walls. This drives the ceiling and soffit framing and subsequent rough-in once the overhead inspection was cleared on 26 September, the ceilings can be sheetrocked, taped, finished and painted -- sorry, the paint dries, tile and millwork installation.

Once millwork is complete, wall covering proceeds followed by mechanical trim out, carpet and final paint. Final paint dries and supplied FF&E as well as crown molding and baseboard, which drives the final the punch activities.

Q. Okay. In your opinion, if a contractor schedules a job properly and has a proper schedule with proper updates, should that contractor be able to tell you where the critical delays are all through the job as they occur?

A. Absolutely.

Q. Okay. So is there a reason that a

contractor would not be able to do that until after the job was over, until after a claim was made, until after they hired an expert, and then two years after the job was over, finally come up with a critical claim? Any reason for that?

MR. HILDEBRAND: Objection to the leading question, Your Honor. He just asked the -- his opinions on that.

MR. BUNDY: I will withdraw it. All right. Let's go to owner coordination.

BY MR. BUNDY:

Q. It says here, the critical milestone listed in the schedule are inaccurate. What does that mean?

A. There are owner furnished contractor installed items that were in the schedule, and that was just part of our audit was to go to the owner.

And specifically, we were assigned that -- I was told that Deborah Robinson was responsible for supplying that -- those items and just have her confirm or deny whether that was -- are these dates right? And she, you know, basically said, no, they're widely inaccurate.

Q. Is that her -- this is her redline

response?

A. Exactly. This was her comments on this.

Q. What effect does it have when the contractor doesn't even know the actual date that the owner's deliverables are going to get there?

A. In reality or in this schedule?

Q. Either way, either way.

A. Well, they are two different things.

Q. Okay.

A. In reality, it would be a big problem. In this schedule, they had -- FF&E is -- they made wild changes. It would change from one update period to the next on what drove FF&E -- typically, FF&E is driven by a life safety inspection, and once you get your GCO, you can put in FF&E items.

And they -- it went back and forth, and then they finally -- it was deleted, any relationship between the safety inspection. And it was just driven by just random milestone which had no predecessor, and it was just hanging out in the middle of the space, and we pointed that out on a couple of updates.

Q. In your opinion, to a reasonable degree of certainty, was this contractor ever, after you

got on this job, to accurately predict when they were going to finish this job?

A. No.

Q. Okay. And what obligations did the owner have to undertake prior to the completion of this hotel in order to have the hotel up and running that you're aware of?

A. Well, it's broken out in the schedule of 60 day prior, 30 day prior. You will see that on the top of every schedule, and that sort of -- that list, you know, when -- when they're hiring and bringing you on staff, when they're having -- you're doing your startup kitchen equipment, making test meals, and it just sort of runs through the litany of everything that drives the opening of the hotel.

Q. And what about the general manager and the sales force? Do they have to be hired in advance of the completion of the hotel?

A. Yeah, within 60 days, not -- not too soon.

Q. Okay. Well, what happens if you're told the hotel is going to finish early and you go ahead and hire those people? Is that a loss? Is there any reason to do that? What's the effect

of that?

A. You're hiring them to do nothing.

Q. Right. You're wasting money?

A. Yeah.

Q. Okay. And with that type of schedule, a schedule that was unable to accurately predict when the hotel was going to be finished as the job progressed, would that be inconsistent with the requirements of the contract terms as it relates to the scheduling?

A. Yes.

Q. Okay. All right. I'm not going to -- the rest of this exhibit is basically photographs and what -- I mean, what is the -- I don't want to go through all of this. What is the rest of it?

A. That was just basically us going through each area and then calling out, here's what the schedule is showing, here's what we see, here's a comparison between calling out how many people we saw in an area. So I think we did cover that.

(DFT. EXH. 95 was marked for identification.)

Q. All right. Now, I would like to hand you what's been marked for identification as

Defendant's Exhibit 95 for identification. Can you identify that for me, please?

A. That's our report that we generated on December 23rd.

Q. All right. Now, did this report also contain, in its original form, all these photographs and the same thing in the previous one?

A. It did.

Q. Okay. But we've omitted it for purposes --

A. Exactly.

Q. -- of this to keep the paper down, if nothing else.

MR. BUNDY: Your Honor, I move to introduce this, Defendant's Exhibit 95, into evidence.

MR. HILDEBRAND: No objection.

THE COURT: Without objection. This is a report dated when?

MR. BUNDY: It's dated December the 23rd, 2017.

THE COURT: Okay.

MR. BUNDY: Here's your copy.

THE COURT: Thank you, sir.

(DFT. EXH. 95 was received in evidence.)

BY MR. BUNDY:

Q. All right, sir. We are now 90 days later, roughly?

A. From August to December, yes, sir.

Q. Okay. Tell the Judge what you determined when you went to the job and then issued your report on December 23, 2017, as reflected in Exhibit 95.

A. Basically, we did the previous audit, and, obviously, we weren't brought on as a third party scheduler. And then later on, they had asked -- I believe Library Associates asked or Jim, I forget who -- asked, can you please come do another audit?

At that time, we were given a full XER file of all activities, both actual and uncompleted. So we had the full file that we could then evaluate.

Q. All right. And what were your conclusions to a reasonable degree of scheduling certainty as a result of this audit?

A. So we -- I'll just read the summary, if I may. The previous audit of the 4 August

schedule update projected a 29 June date for the hotel opening. And that was basically by just using their own projection, just by fixing the schedule.

And I will -- I want to qualify that, in that, our previous report, we spelled out that -- I mean, we were not providing projection. I mean, we said specifically that we feel that maybe you could finish this on the date that you're showing. We just don't -- this is not a viable CPM.

We have no way of knowing that, and we have no access to verify to your subcontractors, suppliers, and the project team. So, basically, that 29 June date was basically just us saying, we're going to fix this as best we can, and that's how we came to that date.

Q. You can drive your car to New York, you just can't head south and get there?

A. Yeah.

Q. Okay. So what else did you determine?

A. So in the interim of -- between August and December, we had discussions that basically, there was a -- there was supposed to be -- and originally, I believe, in the original schedule,

there was an eight week time that belonged to the owner for training. And that was between the TCO and basically the hotel opening.

And at some point, that had been reduced down to seven weeks, and it was our argument that that needs to be -- that time belongs to the owner. You can't just arbitrarily make changes to the schedule, and that it needs to be put back there.

And then we just maybe, you know, wanted to point out that our projection of 29 June should actually be 9 July because of that. And then we did a walk through on 13 December based on -- there are 4 December update.

And the first thing we did was compared basically the 4 December schedule with the 4 August schedule. And that's the next thing that shows here in this chart is just how much variance is between, you know, one and the other.

So you've got some that go up to 111 days of variance. But you -- I mean, you do have some that are up to 27 days ahead of schedule. So there's wide variance between one schedule and the next schedule. And then the next part of the analysis we talk about, we do it -- our side log

and comparing what we saw on 13 December to an update that was only done nine days earlier.

And every single area we saw was not only behind that schedule, but we saw some activities on, I guess, third, fourth, fifth, sixth, seventh west terrace and east lobbies that actually had work that was shown to be a hundred percent that was actually -- still was not complete and ongoing, which, once again, is a real big -- that's obviously -- then I can speak to the documentation side of the fallacies of the schedule.

You know, the third -- weather forecast coordinates and documents; so if it fails in all three categories now, which is a problem if you're looking back at schedules and using that as basically your basis of finding out when things happen because that's not when they happen. It's wrong.

Q. So if Doran was using interim schedules to -- for his analysis based on input that was wrong and completion dates, that would affect his collusion, I assume, would it not?

A. If that's his only source for dates.

Q. All right. So the failure to accurately

put in the schedule what the completion is or the misrepresentation in the schedule of what is actually in place, does that comply with the terms of the contract documents?

A. Not at all.

MR. HILDEBRAND: Objection, Your Honor. The way he categorized it as a misrepresentation I think is unfounded and inappropriate.

BY MR. BUNDY:

Q. Was it true what they put in the as built as opposed to what was really there? Is that true?

A. The actuals were wrong.

Q. Okay. So an untruth could be a misrepresentation, could it not?

A. (No audible response.)

Q. I hand you now Exhibit -- are you done with this one? Anything else we need to talk about on that one?

A. No.

(DFT. EXH. 96 was marked for identification.)

Q. Okay. I hand you now Defendant's Exhibit 96 and ask if you can identify that.

A. That's the report we did on March 15th.

MR. BUNDY: Your Honor, I move to introduce Defendant's Exhibit 96 into evidence.

THE COURT: All right. Without objection?

MR. HILDEBRAND: No, sir.

THE COURT: All right.

(DFT. EXH. 96 was received in evidence.)

BY MR. BUNDY:

Q. All right. Mr. Query, where are we in March 15 of 2018?

A. We were once again asked to come out and audit a schedule. They had released one in 14 February, and then immediately before we really had done the audit, they released another one in 7 March. So we just combined these two into the one audit.

And at this point -- well, so the hotel opening is showing as 16 January of '19 completion date, which is driven by the fabrication of the Hope's doors. And it's -- at this point, our involvement -- or we tried to take a different tact to basically best facilitate the project on what we were doing and

not just giving, hey, this CPM was broken.

It wasn't really giving any results, so we basically wanted to drill down and say -- and help the owner and me and, quite frankly, Balfour Beatty understand, this is what the schedule is saying. Let's drill down and understand what the driving factors that are shown in the schedule. So we basically took the -- what the sixth, and it just turned out to be sixth.

The longest critical paths, which are driving the project, and we kept drilling down into each one until basically got to -- there are so many paths that are now driving this date, but there is no reason to really go any further than this. It really -- you can't resolve this many problems, so that's kind of what we would use just drop-dead data.

Okay, you're probably not going to better this date as a completion date. And then anything that's longer than that is listed here, and we basically wanted to give our understanding and then also start a conversation, which we had meetings and different conference calls with Balfour Beatty to understand, okay, this is what you're showing.

You know, help us understand. Let's all get on the same page of what this issue is, and hopefully we can start resolving these issues. And that way -- I felt that was my best way to serve the project at that point.

Q. All right. And what was Balfour Beatty's response to all of that, generally?

A. Generally, there -- they were very cooperative with that -- with that effort, and they were more than happy to talk about these issues.

Q. Did they implement any changes to effectuate your suggestions?

A. We did -- well, stair four was one where we identified, you know, going down, and we identified stair four. And it was one of the longer paths and had a conversation there about, okay, explain to us what we're seeing here because I'm -- it was confusing in the fact that they had -- stair four was basically driven.

We then had this field measurement activity for field measuring the millwork, but it extended well past the fabrication and even installation of the millwork.

Q. Let me see if I understand it. Before

you can do millwork, you have to field measure it, right?

A. That would be the -- yes.

Q. Yeah. You want to measure something before you cut it, right?

A. Right.

Q. And field measurements are required, are they not?

A. Yes.

Q. At least it's good practice?

A. Yeah.

Q. Okay. So are you saying that the schedule had them installing the millwork before they were doing the field measurements for the millwork?

A. It was extending past the field measurements.

Q. Okay. All right.

A. And then there was a large gap, and then there was a constraint that just held the glass railing in place. And there was no -- nothing driving it. There was some predecessors, but there wasn't anything driving it because it was constrained there.

And we just wanted to -- this is one of

the things we talked about just to help us understand what's going on here. And their explanation was, it's actually two field measurements, and that's the reason it's extending past it. And the second gap in time is the fabrication of the glass railings.

So we just said, why don't we -- and I think we were together and just helped Joe. It was like, Joe, let's -- if there's two field measurements, how -- let's put in two field measurement activities, and we can clearly see field measurements for millwork that drives obviously fabrication, installation.

And then once that millwork was done, you could then take the field measurements for the glass railings and then install the glass railings. So at that time drove, you know, basically life saving inspection.

And actually, when we put all that logic in there, it actually made the delay to the stair four longer than what they were showing. And at that time, basically Mr. Clements had said, we're not doing the change to stair number four. We're not changing the millwork there.

So based upon that, they -- and I don't

know. I can't speculate why they took it out, but they took out the millwork for a change and then in the next update, we understood that -- we were confused into why this sequence was still here as far as waiting on millwork. You know, that we were still field measuring and waiting for that change.

Millwork is still driving the field measurements for the glass railings. And it was explained that we still need -- there's still even in the base bid scope, there's millwork that needs to be measured in order to fabricate the glass railings.

So then another iteration, it was decided that we can just install rough carpentry, and then basically take out -- you know, then you can immediately take the field measurements from glass railings. And that fabrication time can then -- can be going on at the same time. And the next schedule update showed the same thing.

You know, we said, you're not -- this is not showing rough carpentry. This is showing you waiting until the end of the millwork being installed to take the field measurement of the glass railing. And they -- at that point, they

did argue with us, that they said, no, that's right. And in our report, we just put that fragment in there to say, no, you're wrong. That's not what it's showing.

And then in subsequent timelines, the next update, they had increased -- not only did they increase the duration time for some -- it was either the millwork or the glass railing from -- I think from the 7 March to the May update that we evaluated. They had added seven weeks of fabrication time in there.

So with -- and as a contract requirement, there were no explanation. So there's no way to know why that was added in there. And they also added subsequent activities of installing stair treads, all adding time to this item and delay. And then on our last update on -- when we looked at August 18th, it's all deleted. It was all gone.

Q. All right. Did you get a hint of stubbornness from Balfour Beatty in trying to help them?

A. Not really, not really.

Q. Well, do you have any explanation for why they would not change the schedule when you

pointed it out? I mean, I guess I'm just trying to figure out why that would be if you know?

A. I mean --

Q. Okay.

A. I can speculate, but --

Q. Okay. That's fine. All right. Anything else on this one you need to point out?

A. No.

Q. It looks like there's still 263 activities that do not have a successor or predecessor, and over a third of the most recent schedules have constraints. Is that -- that problem still existed?

A. That's consistent with every schedule I got. Obviously, the first one didn't have as many because they deleted the schedule -- the activities were deleted. But it was consistent with every schedule I got since then.

Q. And when you brought this to Lauricella's attention, was there a response of any kind?

A. I don't recall what it -- I don't recall.

Q. Do you have any idea, one way or the other, whether he understood what you were

talking about? Did you feel like you at least were communicating with him about what was going on or do you think it was a lack of understanding or ability to communicate?

A. I don't -- I really can't tell you what, you know.

Q. In your experience with other professional schedulers, have you been able to converse with them in this language and talk about constraints and successors and all of that without undue problems?

A. With other professional schedulers, I have.

Q. Okay. Mr. Lauricella was an in-house scheduler; is that correct?

A. Correct.

Q. Okay. When did the bust -- when was that discovered with the crane? When was that discovered?

A. It was prior to my involvement, prior to August of 2017.

Q. Okay. And do you know who discovered that?

A. I think it would be internal.

Q. To Balfour Beatty?

A. I believe.

(DFT. EXH. 97 was marked for identification.)

Q. Okay. Exhibit 97 for identification. Can you tell us what that is?

A. That's a report we prepared on March 24th.

MR. BUNDY: Okay. Your Honor, I move to introduce Exhibit 97 from March 24th, another scheduling report.

THE COURT: All right, sir.

MR. HILDEBRAND: No objection, Your Honor.

THE COURT: Without objection.

(DFT. EXH. 97 was received in evidence.)

BY MR. BUNDY:

Q. All right. So where are we in March of 2018 relative to your schedule analysis?

A. Right now the hotel opening is showing a 19 December completion date, which is driven by the -- once again, the fabrication of the Hope's doors. And basically on all iterations of our progress from that point forward. We basically followed the same format with trying to drill

down.

So here are the basically -- the longest path driving the project and then we try to identify it, okay, here's where the line in the sand is, where there's so many basically driving factors that you can't really anticipate finishing prior to this date.

Q. Okay. And then I believe if we turn to the second page, under schedule structure and continuity, you point out, beyond the typical errors found in BBC's schedule to-date, it was discovered that BBC has been changing the activity description for the same activity rather than adding an additional activity. This is what you discussed earlier; is that correct?

A. Exactly.

Q. And then you also pointed out, as is the case, there are numerous critical activities that do not have successors, et cetera, et cetera. That problem just continued?

A. Correct.

Q. Okay. And the virus remained in their software, right? They never got rid of the virus?

A. No.

Q. Okay. Do you know whether they fixed it yet?

A. I don't.

(DFT. EXH. 98 was marked for identification.)

Q. Okay. On May 20, 2018, is this your report?

A. That is.

MR. BUNDY: Your Honor, I move to introduce Exhibit 98 into evidence.

THE COURT: All right, sir. Without objection?

MR. HILDEBRAND: No, sir.

THE COURT: Thank you.

(DFT. EXH. 98 was received in evidence.)

BY MR. BUNDY:

Q. All right. Where are we in May of 2018, just if you would.

A. The hotel is now showing a 28 Feb '19 completion, which is driven by the release of basically the Hope's doors. And they -- so this -- it's pushed out because they have now increased the fabrication time.

Q. Okay. And the schedule structure and

continuity problems remained?

A. Yes, sir.

(DFT. EXH. 99 was marked for identification.)

Q. Exhibit 99 is your June 17, 2018, report?

A. That's it.

MR. BUNDY: Your Honor, I move to introduce Exhibit 99.

THE COURT: All right, sir. Again without objection?

MR. HILDEBRAND: No objection.

MR. BUNDY: Thank you.

(DFT. EXH. 99 was received in evidence.)

BY MR. BUNDY:

Q. All right. So where are we in June of 2018?

A. They had -- Library Associates had asked me to -- for the March -- for the May schedule audit, we just had audited the schedule. We didn't do a site walk. And they asked us, could you please go and do a site walk.

So in June, we basically went and walked the site and basically evaluated, as we had done

before, you know, progress and related it to what is shown on the schedule. And then furthermore in this, we talked about the FF&E, basically, the deleted link. This speaks to that deleted link between life safety and then a TCO, and then installing the FF&E.

And then we just -- it also drills down and just talking about different longest paths and maybe some mitigation or workarounds that could be implemented. Because that was the whole basis of it was to start conversation to make these longest paths go -- get up and go away.

So that was -- it was decided that, you know, the ballroom doors are a life safety issue. They're fire doors, so they needed to be installed. And they were a long lead item.

And there was a possibility of possibly putting temporary doors in there to -- to basically, at the cost of $51,000, to then use those for the life safety. And then once the doors arrived, you would just change them out.

So it's just -- it's basically just trying to be informative of mitigation possibilities that would allow for, you know, how to mitigate impacts that are shown in the

schedule.

(DFT. EXH. 100 was marked for identification.)

Q. Okay. And finally, Defendant's Exhibit 100. Can you identify that?

A. That is our August.

MR. BUNDY: Your Honor, I would move to introduce Defendant's Exhibit 100.

THE COURT: All right, sir. Without objection?

MR. HILDEBRAND: No objection.

(DFT. EXH. 100 was received in evidence.)

BY MR. BUNDY:

Q. All right. The schedule that you were looking at, at this time in August of '18, it would have been MSH 44; is that correct?

A. Correct.

Q. Okay. And the -- and that's August of '18. These schedules -- one of the schedules that Mr. Doran used was MSH 49. Do you remember that in his testimony? He used the baseline, and he used 49, right, for his analysis?

A. I wasn't here for his testimony.

Q. Okay. The last schedule you looked at,

however, was MSH 44?

A. Yes, sir.

Q. Which was roughly five versions earlier?

A. Correct.

Q. Okay. What was -- were the deficiencies in the MSH 44, the last one you looked at? What was wrong with it?

A. Basically everything that we've discussed so far. They've had open-ended items. It had -- you know, one out of ten items were open-ended. One out of three items were constrained. They used the wrong type of constraints that used -- you know, that projected false float on the project schedule.

They -- and this is something we hadn't discussed yet is, they had a lot of out-of-sequence activities. So in an out-of-sequence activity, when you update an activity and it's -- so let me explain it this way.

Q. Sure.

A. So say you're scheduling the mason to go around the building, and he's going to work counter -- he's going to work clockwise around the building.

So he is going north, east, south, west. So -- and you update the schedule, and the mason, for some reason, is now working counterclockwise, so he is going north, west, south, east. So you update the north and now you update half of -- you know, he is 50 percent done on the west elevation.

Well, the problem is, an out-of-sequence error means that you've now -- it's showing you, you've done it. You were supposed to go to the south. You've now updated an activity out of sequence.

So you've got predecessors that are unfulfilled. They're supposed to be done, and their computer is recognizing and -- all these errors are generated when you do a schedule for it. It tells you exactly which activity is wrong and -- so you can easily fix it. So the outer sheath -- that means that now the schedule is showing that -- you know, it's expecting you clockwise and you're going counterclockwise.

So, at that point, what would probably be shown is that you've got -- it's going -- it's going to kick out your west because it's using the logic leftover in the schedule.

Q. But the computer won't tell you if you don't calculate it?

A. Well, no, it won't. It will not, correct.

Q. The computer will tell you all these things if you calculate it, but if you don't calculate it, you can do whatever you want, right?

A. Correct, correct.

MR. BUNDY: That's all I have. Thank you.

THE COURT: Okay. It's almost 5 o'clock. Do you want to go ahead and proceed today?

MR. HILDEBRAND: Gosh, it's going to be a little while.

Do y'all have some questions also?

MR. TERRY: We do.

THE COURT: All right. Y'all want to just come back in the morning?

MR. HILDEBRAND: That's fine with me.

THE COURT: All right. Let's do that. Let's go ahead and break now.

Mr. Query, can you join us in the

morning?

THE WITNESS: I'm running out of suits, Your Honor.

THE COURT: Don't worry about that. All right. Let's come back. We will start back at 9:30 in the morning.

(The hearing concluded at 4:52 p.m.)

CERTIFICATE OF REPORTER
STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

I, Jennifer M. Adams, Certified Shorthand Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the witness whose attached in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and location therein stated; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing is a full, complete and true record of the testimony of the witness and of all objections made at the time of the examination; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself/herself of the opportunity to sign or the signature has been waived.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal on September 12, 2022 at Charleston, Charleston County, South Carolina

_____
Jennifer M. Adams
Court Reporter And Notary Public
My commission expires: 03/15/2032

door.

THE COURT: All right. I'm going to allow you to just touch on them. I don't want to go into any detail.

BY MR. BUNDY:

Q. Well, let's go back to cumulative impact. Why do you think it is ridiculous? What's wrong with it?

A. I mean, you're just throwing a bunch of stuff in a bucket and saying, here's -- this was what delayed the project. There's no cause and effect.

Q. Lack of causation is the basic problem, right?

A. Exactly.

Q. Okay. And what's the problem with the total time method of delay analysis?

A. I mean, it's not really a method. It's more a result. I mean, it's kind of ridiculous to imagine that a project of this scope could be -- one party is the only party responsible for delays.

Q. Are there any similarities between the flaws in the total time analysis and the flaws in the total cost analysis?

A. Again, they're both somewhat ridiculous.
Q. Okay. Now, you simply, in this -- in these letters, you were simply pointing out what the schedule provided by Balfour Beatty said, right?
A. Correct.
Q. You weren't adopting the rationale of that schedule, were you?
A. No.
Q. Okay. In fact, quite the contrary if you read the whole letter. You were quite critical of all of these schedules, correct?
A. Correct.
Q. Okay. Now, let's talk about that. In these meetings that you had or conversations that you had with Balfour Beatty, its representative, and particularly Mr. Lauricella, the scheduler on this job, did you essentially tell him the same thing over the phone that was in these letters, that you don't have proper restraints, that you don't -- you've got open-ended problems and on and on and on?
A. I'm not sure if I touched on every single one, but I definitely said, these are serious issues, and we need to resolve them.

Q. And he needs to -- they're a problem with his schedule, not yours?
A. Correct.
Q. Okay. And did you ever -- did you understand, while you were on this job, as we read into the contract yesterday, that the total responsibility for means and methods in the schedule lies on the contractor?
A. Yeah, it is the fact.
Q. Is there any prohibition in these contracts for the owner to go out and hire another consultant to check on what's been done on the job to see if it's being done properly?
A. I believe, yeah, that they can hire a consultant to come out and inspect it.
Q. They can hire their own QC people, can't they?
A. Uh-huh.
Q. They can hire their own testing engineers if they to want --
A. Yes, sir.
Q. -- correct?
A. Correct.
Q. Were you available in these conversations with Balfour Beatty, to assist them

in any manner that they requested and all they had to do is ask; is that fair?

A. That's fair.

Q. And you were being paid by the owner to do this, right?

A. Correct.

Q. And the owner had no contractual obligation to provide them with any help, did he?

A. Correct.

Q. Okay. And if they had had wanted to, as you essentially offered to them, they could have allowed you to come on board at Mr. Bennett's expense, to assist them in fixing this broken schedule; is that correct?

MR. HILDEBRAND: Objection, leading, and it calls for speculation.

THE COURT: I'm going to sustain that.

MR. BUNDY: Thank you, Your Honor. That's all I have.

THE COURT: Okay. Anything further? I'm sorry.

MR. TERRY: If you'll give me just a minute, Your Honor.

THE COURT: All right, Mr. Terry.

MR. BUNDY: Thank you, sir. Library Associates would call Jim Clements to the stand.

THE COURT: All right.

Mr. Clements?

(JIM CLEMENTS, having first been duly sworn, testified as follows:)

THE COURT: Please have a seat. Watch the back of that chair.

THE WITNESS: Yep.

THE COURT: And if you would give us your full name and address for the record, please.

THE WITNESS: James Michael Clements, 322 Prince Street, Georgetown, South Carolina.

DIRECT EXAMINATION

BY MR. BUNDY:

Q. Jim, where were you born?

A. Washington, DC.

Q. Okay. And what is your educational background?

A. Graduated from the University of South Carolina, a BS in biology and chemistry.

Q. What year?

A. Yes, sir.

Q. All right, sir. During the last 30 years of your -- 30, 40 years of your employment in the construction industry --

A. Yes, sir.

Q. -- how about give the Judge the benefit of your actual work experience, maybe the company you were with, some of the projects you worked on, some of the companies you worked for.

A. Okay.

Q. So what got you here?

A. So I started out working for a mortgage banking company that did its own development. I grew up -- I became a superintendent with them. I then went to work as a general superintendent for a heavy construction company putting lifts, stands -- force mains, lift stations and such.

From there, I started my own commercial firm, but I was living in Kansas at the time and wanted to get back to DC. So I went to work for Clark Construction Group out of Bethesda, Maryland, very, very large.

Q. What do you think they do on an annual basis, or did they?

A. Now, probably close to 4 billion.

Q. Okay.

A. At the time I joined them, they were about 750 million. So I was hired to wrap up a hotel called National Place on Pennsylvania Avenue.

We primarily did some work in the public areas, and there was a few -- it was a big, big -- back in the '70s, it was probably 120 million dollar project. It was a big office component right on Pennsylvania Avenue, just down from the capital.

Q. What was your role on that project?

A. Project manager. And then from there, let's see. I went to build the Bulk and General Mill Facility for Washington, DC, the one that got anthrax. So I built that ground up.

Q. What was your position on that project?

A. Project manager.

Q. Okay.

A. That was about 50 million dollars back in those days. From there, I went into procurement. They had me as a buyer. During that time, I bought out the Grand Hyatt Hotel in Washington, DC, very large five-star hotel. After that project, during that time, they took

me and sent me to the McClain Hilton, and I built a five-star hotel there, McClain Hotel.

Q. And you were the project manager?

A. Yes, sir. Actually, I got promoted to senior project manager at the time.

Q. Okay. Well, it seems to be about time. And who was your boss again during that period?

A. Dick Duffy, the senior vice president of Clark Construction.

Q. Okay. And you're still with the same construction company?

A. Yes, sir, no changes.

Q. Okay.

A. From there, they sent me to Manhattan as a -- I became a project exec there, and I was in charge of the expansion of the Lincoln Center, the Juilliard School of Music.

Q. How big a job was that dollar wise?

A. So that was in early '80s. Well, there was a large condominium component of it. The Juilliard School was five basements deep in Manhattan, five stories above was a giant podium. And on top of that, we have a 46 story luxury condominium tower, and on the other corner, we had a 13-story dormitory for the school.

Q. If you would, just give the Judge some of the -- I think the word they use now, the challenges that you would have been facing in the city of New York, building this type of structure with regard to staging, lay down, bribes, whatever it took to get it built.

A. It's a postage stamp. You know, like all those type of projects, you don't have any place to lay things down. Everything came in on trucks. So you got the union issues related to that, the teamster issues, of course.

But digging a basement five stories down in Manhattan, in shifts is challenging in itself. We had a hundred-year-old Edison gas main -- 30 inch gas main alongside the site, pretty precarious. We're up tight against the Lincoln Center, so foundation systems were underpinning. Very, very challenging project.

But it went well. It went well. Working in New York is not applicable to any other place, maybe Philadelphia or someplace. But the challenges of the unions was burdensome, but, you know, I pride myself in being a good communicator and a consensus builder and worked very, very well. Towards the end of that

project, I was recruited by Bovis International, based in London.

THE COURT: Bogus?

MR. BUNDY: Bovis, yes.

THE COURT: B-O-G?

MR. BUNDY: B-O-V-I-S, Bovis.

BY MR. BUNDY:

Q. They're one of the largest contractor's in the world, aren't they?

A. Correct.

Q. Bovis Lend Lease. Were they Lend Lease at that time?

A. No. Sorry, let me say that -- Lend Lease had bought them, but they hadn't changed the name to Bovis Lend Lease.

Q. And they also bought McDevitt Street, right?

A. They had bought McDevitt Street. Actually, McDevitt Street was the program manager -- what I do for a living now -- on my project for the Lincoln Center.

And they had -- Bovis had bought them, and that really made the (inaudible) guys annoyed when I left. But I got recruited there, and I went to London with my family, and I spent four

years there. Primarily -- they used me primarily for preconstruction development and auditing some projects.

Q. What do you mean by audit?

A. Well, if there's a problem project -- there was a large Ritz-Carlton being built in Barcelona in time for the Olympics at the time. I think it was '86 maybe or something like that, and there was a lot of problems there. And I went down there on a regular basis for a while to try and help cure some of the problems.

Q. Now, in your -- what was your title again with Bovis?

A. You know, I don't -- well, I became director of preconstruction services. I became director of preconstruction services. The only --

Q. You have been referred -- you weren't in the -- I don't know. You probably weren't in the courtroom, but you were seen by Mr. Starcevic as merely a messenger.

A. Oh, really?

Q. Yes, yes.

MR. HILDEBRAND: Objection, Your Honor. It's leading, and it's -- to Mr. Bundy's

point, pitting one witness against another. So I don't think it's a fair statement.

THE COURT: I will sustain that. See if you can rephrase that.

BY MR. BUNDY:

Q. Let me rephrase. When you worked for Bovis Lend Lease and went to Barcelona to solve a problem at the Olympics, were you acting as a messenger?

A. No.

Q. Okay. In your last 35 years, have you ever been employed as a messenger?

A. No.

Q. You don't deliver papers and you don't deliver letters or coffee, do you, sir?

A. No, I don't.

Q. Okay. And Mr. Bennett didn't hire you on this job to be a messenger, did he?

A. No, sir.

Q. Okay. Thank you. Now, let's proceed with your history, not sustaining your --

A. Well, while I was in London, Bovis was building Euro Disney. And the chairman of Bovis International came to me and said there was a problem on Main Street. He sent me over to take

a look at it because the project was opening up in six months. I got to Main Street, and there was nothing there. I came back and explained that to him, and he said, you've got six months to fix it. And I did. No messenger involved in that process.

Q. Just a little bit more on Bovis Lend Lease. Do you have any idea of how much business they're doing now or they were doing at the time you worked for them?

A. No, no. I mean, they were all over the world. I mean, I worked on projects throughout continental Europe, a lot of time in Germany.

In Germany, I headed up the preconstruction on a big mixed-use development called Centro. Back in that day, it was over a billion dollars. I particularly was focused on the large retail development section. At that time, it was 200 million dollars.

THE COURT: And that's where?

THE WITNESS: Centro Oberhausen. That's outside of Dusseldorf.

THE COURT: Dusseldorf, okay.

BY MR. BUNDY:

Q. Let me try it this way.

A. Yeah.

Q. Is Bovis Lend Lease in the top ten contractors in the world?

A. I would hope so. I would think so.

Q. Okay. All right. So after -- so you stayed in your four years working for Bovis Lend Lease?

A. Yes, sir.

Q. And that brings us up to when, Mr. Clements?

A. I came back from Europe in late '86, just about -- I was offered a green card. They asked me to stay, but I really wanted to come back. And I joined a friend of mine who had just been a project manager for McDevitt Street and built a NationsBank Tower in Charlotte. It's a big building.

And so we started a construction company. Because of my experience in Europe with program management, which I feel that they were the leaders and different from construction management, which I can explain if you would like me to.

I marked that business into a program management business. We did do general

construction. One of the things we did as general contractors is we upfitted all the suites in the Panthers Stadium, for instance.

Q. Let me stop you there, and I want ask you to expand on the distinction between the construction manager and the program manager for the Judge's edification.

A. You know, they're often confused, and sometimes I'm not sure I even have the right story. But a construction manager is licensed to direct subcontractors. You talk about (inaudible).

In the State of South Carolina, where I reside, to be a project manager, which is what was my primary business or program manager, my role is to support the client in developing its product.

And by that, I mean, because I have a general contractor's license in North and South Carolina, I'm also the broker-in-charge for my company in North and South Carolina. Because of that experience, I helped them with land selection for farm and development, finalizing budgets.

And then I competitively bid the work,

the general contractor, the design, all the interior components, FF&E, security systems, furniture. I do a lot in the healthcare marketplace, particularly. But that is my role is to reinforce.

By that, I mean, I work with clients that have project managers, so Mr. Bennett is a good example of that, to be honest with you. But when they come upon a project that is out of their wheelhouse, they want some depth. They hired me.

And so the idea there is that I bring my experience to them on a fee basis to supplement them and to provide guidance and support. And that's why Mike hired me because I had -- I knew Mike in college. He and my younger brother were -- still are very close friends.

But Mike asked me to take a look at this. In fact, I chased Mike for some work for a while, but he said he didn't need any help because he was cranking out the limited service hotels like they were nobody's business.

But along came this project, and Mike made no bones about it being something out of his wheelhouse with regard to it being, you know, a

five-star type of opportunity and a much larger project. And so we got together, and then Mike hired me to support he and Kim in the construction process.

Q. Okay. Given your experience at or about the time Mike hired you, did you feel comfortable taking on this project? Did you feel like you were capable or qualified to handle this hotel?

A. Absolutely.

Q. Okay. Because in terms of just percentages, a 50 or 60 million dollar hotel is not a particularly large project in your history, is it?

A. No, but it was the prestige of it, to be honest with you. It wasn't about the money, although money is nice. But I really -- I'm at the twilight of my career, and it was a significant project that I would like to have on my resume.

And I was anxious to do the work, and I had just relocated to Georgetown. So, you know, it's 70 miles away, and it's something everything that I really wanted to do, plus Mike, you know, I know him, and we got along pretty good.

Q. Tell the Judge a little bit about Mike

Bennett's management or lack of management style when he starts to do something like this. Is he -- I mean, you tell me. What was your experience with the way he handles these types of things, and once he decides to turn something over to somebody, what his involvement is and that sort of thing, based on your actual experience?

MR. HILDEBRAND: Well, Your Honor, I think that calls for speculation. If he wants to say what Mike would benefit on this project, fine. But he said, tell him about what his -- what Michael Bennett does for the projects when he develops projects. I think if he directs it to this project, then --

THE COURT: All right. I would imagine that's all he knows, but he can expand on that. I'll overrule the objection.

THE WITNESS: So I only know Mike from this project, from a working relationship; so we'll clarify that. So Mike was very, very, very involved in the preconstruction process. We engaged Balfour Beatty -- well, we went through an RFP -- excuse me, let me back up.

I'm not sure that Mike ever went through

an RFP process in terms of the project. And also most of Mike's work was lump sum, and so I brought to the -- the opportunity to CM at risk, which I have extensive experience in, and this my preferred format for construction.

THE COURT: What type of risk was that?

THE WITNESS: CM, Construction manager at risk, the A133 contract agreement.

THE COURT: All right.

THE WITNESS: So in fact, that's how I met Mr. Bundy. We met up close to where he lived, and we discussed the contract format. And my preference to use the AIA document and -- as opposed to the --

MR. BUNDY: Consensus.

THE WITNESS: -- consensus document. We chose that format. And then from there, we initiated an RFP process, and give the --

BY MR. BUNDY:

Q. And RFP stands for what?

A. Request for proposal process. And given the complexities of the project, you need a good firm to take a look at it. And my number one

priority is to get the best people on the team. Number one, it makes my life easier, but my management philosophy is, let the people do what they're good at and go from there.

And if there's problems, you solve the problems. So I had finished a hotel project with Balfour Beatty at the end. It went okay. The client was very, very happy. It was about a 30 million dollar project in Charlotte.

Q. What project was that?

A. Sorry, I said hotel, I apologize. It was a law school. There was a law school in Charlotte. And Mike Baumbach, who is a very close friend of mine, had come on board with Balfour Beatty, and he actually helped finish up that project. And, you know, I thought a lot of him.

And so this opportunity came up, and Mike had built hotels as well as -- not just in -- well, he had built hotels in Charleston, and he was familiar with the foundations. And I thought that Balfour Beatty would be a good candidate. I knew Mike primarily from healthcare work because a bunch of my work is -- at that time was healthcare.

Q. And by Mike, you mean Mike Baumbach?

A. Yes, sir, Mike Baumbach, Mike Baumbach. I had also worked a lot with WM Jordan, a very large company, and invited them to the table. And then the Bennetts had just finished up a project with a company called Welbro in Savannah, and they wanted them included.

And so we initiated a very, very formal RFP process, request for proposal process. It probably initiated in September of 2015, and by -- I believe it was around December 2015, we had signed up Balfour Beatty. And that was for -- let me explain that.

In the 133 format, it's a two-stage agreement. So for first stage is a nonbinding preconstruction agreement, and then the second stage, you execute amendment to do construction. So we executed the initial -- we signed the contract and went forward based on that.

(DFT. EXH. 103 was marked for identification.)

Q. Let me stop you for one second. Can you identify Exhibit 103, please?

A. Yes, sir. That's my RFP along with exhibits from the architect.

MR. BUNDY: Your Honor, I move to introduce this as Exhibit 103 in defendant's case.

THE COURT: Okay.

THE WITNESS: That includes the contract, which is of paramount importance because I never issue an RFP without a contract, specifically because I wasn't trying to hire somebody unless I know what the exceptions are.

BY MR. BUNDY:

Q. All right. But without the contract, you wouldn't be able to know what risk you were taking on, right?

A. Right, absolutely.

Q. And that's -- in order to bid a job, part of it is to allocate risk, right? What risk am I willing to take and what is it going to cost you if I take that risk, right?

A. Particularly in CM, and that's very important because it's a shared risk.

Q. In its simplest form, isn't the contract nothing other than a device to allocate risk between parties for a price?

A. I would agree with that, yes, sir.

MR. BUNDY: Okay. Is it in

evidence or not?

THE COURT: Just one second. Any objection?

MR. HILDEBRAND: So this is a copy of the original RFP and the --

THE WITNESS: And the exhibits, the exhibits meaning the WLE design documents.

MR. HILDEBRAND: Is it a complete copy?

MR. BUNDY: Yes, it's a complete copy. He has testified to it under oath.

MR. HILDEBRAND: Okay. With that representation, I have no objection.

THE COURT: All right. Without objection.

(DFT. EXH. 103 received in evidence.)

BY MR. BUNDY:

Q. Let me have your copy back, and I'm going to give you this one.

A. So in this case, we executed the 133 and started the stage one which was preconstruction.

Q. All right. Let's back up a minute. Slow down a little bit.

A. Okay.

Q. The process of your work as a program manager early on begins with the -- deciding who you're going to recommend -- who you're going to send these to, right?

A. Yes, sir.

Q. Because this is not government work. You're not required to take the lowest responsible and responsive bid, correct?

A. Correct.

Q. Okay. Which causes problems with government work because you've got to take the lowest bid, and then you get change ordered to death, right?

A. That happens.

Q. Yes, it does. So once you've delineated the three or four people you want to interview, okay, then you prepare the documents, correct? Prepare the RFP?

A. Concurrently that's done.

Q. You prepare your request for proposal?

A. Yes, sir.

Q. It's like an invitation to make an offer basically. Here's what we want built. We would like you to look at it and tell us what you think, right?

A. Yes, sir.

Q. Okay. And that's done in conjunction with the architect, consultants, yourself, the owner, and everybody else because everybody has got to decide what they want, right?

A. Yes, sir.

Q. And you also have to make sure the City of Charleston is going to let you build it. You can't built it 32 stories high, right?

A. Yes, sir.

Q. You've got to comply with apparently some rule that BMCC knows about churches that I'm not aware of, but that's another issue, too. So when you -- whose involved -- give me all the people involved in that process. You've got lawyers involved?

A. Well, we have lawyers, the design team. Buck Lindsay was on board at the time. We needed an interior designer. So Design Continuum.

I recommended another firm out of Atlanta. Buck recommended Design Continuum. We issued a -- Buck and I issued a request for proposal from them. Mike interviewed both of them and the decision was taken to use Design Continuum.

MR. BUNDY: Okay. This is Exhibit 103, right? Is that what we said?

THE COURT: Yes.

BY MR. BUNDY:

Q. How much time and effort do you think was involved in creating Exhibit 103?

A. A lot. I mean, it takes a couple OF weeks for me to do.

Q. Okay. But the totality -- do you think this thing costs 50 grand to produce?

A. Well, I had used it before.

Q. Okay.

A. So I had templates to drawn upon.

Q. Not your work, but all the work of everyone else.

A. Oh.

Q. I'm talking about all the work --

A. Oh, no. That's -- yeah, there's lessons learned here from decades.

Q. Pardon me?

A. There are decades of lessons learned here, represented in this document.

Q. Okay. And is one purpose of RFP to try to explain to the potential bidders as clearly as possible, with as few ambiguities possible, as to

what you're looking for? Is that one of the goals?

MR. HILDEBRAND: Objection, Your Honor. He's just flagrantly leading the witness.

MR. BUNDY: I will withdraw the question.

BY MR. BUNDY:

Q. What are the goals of the RFP?

A. Well, the goal of the RFP is really transparency. This is the project we want to build. It lists out our expectations of the contractor.

There was no expectation included with regard to how long it would take or how much it would cost, and with that regard, it was a blank sheet of paper. I have done projects before where I included the owner's budget because they had to stay within the budget.

Or particularly in healthcare, when we have CON issues, there is a hard stop or a constraint or, you know, the CON applications and such like that.

THE COURT: Certificate of need, right?

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: So this document includes chapter and verse of restrictions of the preconstruction process with what is expected, with regard to as design is developed.

The contractor is required to update his pricing, provide schedule updates, go through the terms of construction analysis, give us feedback on that. You know, generally anything you see is wrong, we're looking for help.

The contractor in this format is inadequate, and we were working together synergistically to try and create an open platform to build a project. And it's very explicit, to build it as economically and as quickly as possible. I mean, that's the burden that's just sitting there.

So the contract documents at the time -- we don't put a -- although you could put out a CM RFP with full documents, it's preferable to put out a document where you're at the beginning of the design because you want the support of a construction manager to influence the design, not in terms of means and methods, but in terms of constructability, but also in terms of costs,

schedule, those types of matters.

So this was issued based on schematic design drawings. Schematic design was probably 11 or 12 percent of total design, and the idea is that, for a fixed fee -- in this case, I think Balfour's fee was about $30,000, they bolt on to the design team with me, with the client, any other specialty consultants that we need to bring on board.

And we worked together to refine the design, inform the client, inform the architect, track costs, look at contractibility issues, and at the end of the day, once we're through all the design phases, the contractor is afforded the opportunity to propose a GMP, a guaranteed maximum price.

That's not owed to him. But I've only had one exception in 46 years where the contractor failed to get the project.

Q. All right. So --

A. That's how we ended up. That's where we were.

Q. Sure. So of all the things that the contractor is given for parameters of what you want, what you would like to see, the two things

importantly, they had built the Ritz-Carlton Hotel in Charlotte, and that was a great hook to me to bring them to the table.

Q. And how important was it to you that Baumbach be on this job during construction?

A. Well, I like to say I can work with anybody, but I trusted Mike. And he always told me like it is. And we didn't agree on everything, but we could always settle it.

And so I was hopeful that he would get the work. I would work with anybody, but at the end of the day, you know, my preference certainly would have been to work with Balfour Beatty and Mike.

Q. And eventually it was awarded to -- and was Baumbach mentioned -- is he the one that made the presentation, Baumbach?

A. He was certainly in the interview. Bill Lorenzo was there. Pat Ricci's brother was there as the superintendent. He became sick and his son -- I think his younger brother became the superintendent. There was another older gentleman -- I can tell you.

Q. Yeah, let's look at that. What was Lorenzo -- who was he?

A. Head of preconstruction.
Q. Okay.
A. Bret Estridge, he was the project manager for the Ritz-Carlton project and Knox Tate, who probably has the biggest resume with -- in regards to high quality work at a company called RT Dooley, which Balfour Beatty acquired, and Knox was there, too.
MR. BUNDY: So, Your Honor, let me give you a copy of this.
THE COURT: Is that 39?
MR. BUNDY: 39, yes. I just think you need a copy.
THE COURT: Yeah. All right.
BY MR. BUNDY:
Q. All right. So let's look at -- and this, what we're looking at is Exhibit 39, which was presented at the meeting, at the interview for consideration of Balfour Beatty, correct?
A. Yes, sir.
Q. All right. And there is, on page 7, section A, a proposed team, correct?
A. Yes, sir.
Q. All right. And would you read what it says at the top and tell me whether or not what

was in this paragraph at the top was a representation that was actually made in this meeting? Were the representations in the meeting consistent of what's in the written document?

A. Do you want me to read it?

MR. HILDEBRAND: Objection, Your Honor. It's leading -- again, a flagrant leading question. Representations made. It's just simply the team that was on the RFP. This is a leading question. That's my objection.

THE COURT: All right. The objection is leading. Restate the question.

BY MR. BUNDY:

Q. Okay. Well, would you read the first paragraph at the top of Exhibit 39 into the record, please, under our team.

A. All right. Our proposed team has been hand selected for the hotel at Marion Square project. Each member has experience working on complex hospitality projects and has delivered best in class, high-end facilities, luxury amenities, and sustainable environments.

Our relationship with Lindsay, Pope, Brayfield, Clifford & Associates will allow our team to hit the ground running without the

learning curve. Our team has what it takes to deliver the project and exceed your expectations. A complete look at our team skills and experience as outlined on the following pages.

Q. Okay. And if you would, read into the record who they proposed as the team, and start first -- well, Mr. Baumbach was going to be the project executive. We talked about him, right?

A. Right.

Q. That was the gentleman you knew. Who did they say was going to be the project team for Project Solutions?

A. Bill Lorenzo, who was head of preconstruction; Keith Rossi. I believe he was -- he worked for Bill. John Katschkowsky, it says here, he's MEP. I don't recall him from the presentation. And Ryan Lawrence, then manager.

Q. Okay. So let's -- we've got some initials here I would like to clear up for the record. Mr. Katschkowsky, he was MEP preconstruction. What does MEP stand for?

A. Mechanical, electrical and plumbing.

Q. Okay. And then we've got the BIM manager. What does BIM stand for?

A. Building image modeling.

Q. Okay. Now, the Project Solutions team, what -- you told the Judge earlier that all that was provided when the thing began was schematic drawings, right? You gave these proposed or potential builders or construction managers schematic drawings, not complete drawings, right?

A. Yes.

Q. Was there any misunderstanding as far as you knew, in your conversations with any of the people who submitted a proposal, that they were confused and thought these were a complete set of construction documents?

A. No.

Q. Okay. If they had have been a complete set of construction documents, would it have been necessary to have a Project Solutions team?

A. No.

Q. Okay. So is it true that this work was really going to be done in two phases? First, you have to get a set of construction documents, and that's what this Project Solutions team is going to do, right?

A. Yes, sir.

MR. HILDEBRAND: Objection, Your Honor.

A. Well, they worked with me. They worked with Mike. They worked with WLA, the architect, and Design Continuum, the interior designer. I don't recall anybody else.

Q. Okay. What would have been the nature of their interaction with the architect during that process? We'll call it stage one.

A. Well, certainly requesting clarifications, RFIs. Because you have to understand, you don't have the representative documentation, right? So enough information to price it because each design phase, the contractor's provided updated budget, and for us to assess.

The whole idea is that, you don't go ahead and design the project, only to find out you can't afford it. So you design the phases and then you adjust the design and the scope to mitigate, you know, budget exposure to control costs or to control schedule, those type of things.

Q. Do some people refer to that as value engineering, or is that value engineering?

A. I mean, value engineering is a common term. Value engineering, yes. I think value

engineering is fine.

Q. And during this process, what is the development of the plans? How does the architect develop his plans during that period in interaction with the owner and the other team members, specifically Balfour Beatty's team?

A. Well, we started out the schematic designs as a baseline. Those were priced basically on -- as part of the RFP. Those responses from the RFP help influence the next phase, design development.

And so Buck and his team, along with the interior designer, developed the site development documents, and that creates the second milestone and that is --

Q. Explain to the Judge, if you will, the difference between schematic -- how many stages are there of development of a plan in the typical AIA documents?

A. In the AIA document, three. Schematic, design development, and structure documents.

Q. Okay. And let's talk about, since you provided the schematics in the RFP, tell the Judge what is generally understood in the industry, what should be, and what is in a

schematic set of drawings?

A. Well, schematic set of drawings is just basically the vertical and horizontal reconciliation of the building. It sections through buildings. It might give you some facade studies. It will not typically but can provide single line drawings for HVAC. You know, with a duct running here, it might -- it would provide you with the electrical load of the building. But more often than not, because the MEP design follows the architectural design, the MEP is represented in narrative form. This is what we're going to use, and this is what you should allow. You know, this is the HVAC system, and that's the way to inform the bidders, you know, how you're going to proceed. So most often, the MEP design is not even included in the schematics on the documents. In fact, if I recall correctly, it wasn't.

Q. Okay. And would that area, the MEP area during this preconstruction solution be something that Mr. Katschkowsky would have been doing?

A. In terms of evaluating the design as it progressed, yes.

Q. Okay.

A. That would be the intent.

Q. Okay. That would be the intent. In the schematic drawings, is there any reference to how high the building is going to be, or is that left to be determined later?

A. No. The height of the building was locked in from day one, 105 feet.

Q. Okay. And do you know what that -- whether that was the result of any litigation or contentions between Mr. Bennett and the City of Charleston over a period of 12 years?

A. I know that Mr. Bennett tried for 12 years to get it approved, and I know I got a building that's 105 feet for a reason. In fact, Mike and I worried about putting the lighting protection rod on top of the building.

Q. Okay. So is it true or is not that the building shrunk by 120 feet after the building permit was issued?

A. No. That's ridiculous.

Q. So at 105 feet reduced by 120, we'd have a 15 foot hole then, right?

A. Yes.

Q. And I assume you can do that a lot quicker and a lot cheaper than what we actually

built?

A. Yes, sir.

Q. Okay. So the next part or the next level of an AIA plan for design is a design development, correct?

A. Yes, sir.

Q. And that's the first phase you start at once you start with it. So tell the Judge what the design development phase entails, what the deliverables are, and what input Balfour Beatty had in those deliverables, please.

A. So the design development phase is not a complete document. It's somewhere between 60 to 80 percent a complete document. But basically what it does is its namesake. It has the design, so it has the design concept.

So it may show a cornice piece, but it -- they may not show the cornice everywhere on the project, but it says, this is the cornice that we're going to use. This is the mechanical system that we're going to use. The HVAC system would be much further developed at that time. Interior design would be on -- would start appearing on the documents at that time, but it's not a complete design.

Q. Okay. And at the completion of the design development, are you aware of -- are there any requirements that the architect or the contractor or anybody sign off on them before the architect moves on to the next step? How does that -- how do you know when you are going to go to the next step?

A. I mean, typically, I require the client to sign off at the end to make sure that we are not violating the basic program and the project. I don't recall doing that.

Q. Because the project starts out with the owner telling the architect what his program is, right?

A. Right.

Q. This is what I want. I want a hotel. You know, I don't want a hospital. I want a hotel.

A. Right.

Q. Okay. So when the design development is concluded and the owner signs off with it, do you know whether Balfour Beatty, in this matter, during this phase when they were on the job, what input they would have had in the completion or signoff on the design development? Were they

involved in that?

A. Well, in terms of signoff, no. But they would have provided their best estimate at the time of cost and time.

Q. Okay. So they would have provided some cost at that time?

A. Yeah, absolutely.

Q. And they would have been aware of what those design development documents looked like?

A. Absolutely.

Q. And in fact, do you know whether they had any input into those design development documents through suggestions or value engineering or anything else like that?

A. Yes, absolutely, absolutely.

Q. Do you recall any specifics?

A. Well, for instance, you know, the guest rooms -- if I'm trying to recall correctly, at one time, had a louvered opening or like a window between the bathroom and the bedroom.

And, you know, it was something that was worth of X amount of dollars and decided to take it out. It reappeared later, but that was an example of it. Hardware. I don't -- you know, it's been a long time. We had a lot of value

engineering meetings where we went through cost. Balfour Beatty was very good about its itemization of cost and scope creep, I will call it.

And we worked in a very open and consensus basis in reviewing factors that had added costs and what we might do. And at all times, Mike got the option, in or out.

In fact, the way Balfour Beatty's spreadsheet was set up was the client said, yes, that it went in the project and, no, that it went out of the project. I mean, literally, Manny Teodoro was the estimator that I worked with and who was very conscientious about managing that process.

Q. What is your recollection of the owner's openness to suggestions for Balfour Beatty regarding his involvement in this process?

A. He was very open.

Q. All right. And was there a contract involved in this process? Were there contract requirements and what their duties were in this process?

A. Yes, as spelled out in the A133.

Q. So and did -- were these types of -- was

this type of input what was expected based on what they had agreed to do?

A. Yes, yes.

Q. And with regard to this team of Lorenzo, Baumbach, Rossi, Katschkowsky, and Lawrence, were those the people that were on the team during this period?

A. No.

Q. Okay. Tell me who the people who ended up actually on that team were.

A. Well, Mike certainly took the lead. Bret was involved. I didn't see anybody else from the execution side. Bill might have been involved very little.

But there was a young African-American woman that worked with him. I can't remember her name. She was involved in the preconstruction process. And then Manny Teodoro, who was an estimator, he really provided the bulk of the sweat equity, I guess, in the construction process.

Q. Who was the scheduler on this job for Balfour Beatty? Do you recall?

A. Well, I knew Joe Lauricella from the law school. I don't remember him coming for those

preconstruction meetings.

Q. Okay. So your recollection is Lauricella wasn't involved in the --

A. Not that I --

Q. -- resolutions?

A. Not that I recall.

Q. Okay. In your experience, is that something that would or would not be typical in this process to have the scheduler at least tangentially involved or not?

A. I think the scheduler would be -- he was certainly involved because at the end of the design phases, we're trying to update progress. And in fact, during the course of preconstruction, Balfour Beatty added three months to the actual project schedule.

So obviously somebody was doing some critical path analysis or whatever to complete the project. Whether it was Bill or not, I don't know.

Q. When you say add, what would they add? What was the number -- where did the number come from that they were adding to, the duration that they were -- they came from? Do you understand my question?

advantage of. Because liquidated damages never sufficiently cover the exposure.

MR. HILDEBRAND: Objection, Your Honor. This is not responsive to a question, and it's just speculation. We have liquidated damages, and he can testify that that's what they are in the contract. But for him to --

THE WITNESS: No, I'm just --

MR. BUNDY: He's explaining a contract term in a contract case.

THE COURT: I'm going to allow it. Overruled. Go ahead.

BY MR. BUNDY:

Q. Where we were? I think we were talking about the calculation of the --

A. Liquidated damages.

Q. Okay. If you would continue.

A. Well, I will just wrap it up. Mike Baumbach and Mike Bennett agreed to that liquidated damages number. It's in -- well, I won't go further.

Q. No, you can. I mean, he doesn't get to say. Okay. You answer your question.

A. Well, it's a very important number because if the number is too high, you can't get

GMP, Mike had been working with this lender, and they closed. And we issued Balfour Beatty a notice to proceed. That was mid March, as we all know, and we went to work.

Q. Mid March of what year?

A. '15.

Q. '15. All right. So, now, let's go back to the request -- the response to the request for proposal. Do you have that in front of you?

A. Yes, sir.

Q. Okay. Now, this project execution team, how much time had transpired between the time that this proposal was made listing the people that were going to be on the project execution team and when the job started -- when this noticed to proceed started?

A. Well, the proposal was received in the fourth quarter of '13.

Q. Okay.

A. And we started work March 2015, so 12 to 18 months.

Q. Okay. So 18 months have transpired between the first and second portion of this response, correct?

A. Yes, sir.

Q. Okay. And if Bennett had said no, I'm not paying the $800,000, this project execution team wouldn't have had anything to do?

A. Yes.

Q. Correct?

A. Yes.

Q. Okay. But he did pay $800,000. So now, let's look at the project execution team that was proposed from the response that was originally given and the project execution team that actually showed up on the job some 18 months later. Okay. Let's start with Baumbach. Was he there?

A. I will save you time. Mike Baumbach is the only guy.

Q. Pardon me?

A. Mike Baumbach is the only person.

Q. Bret Estridge didn't show up?

A. No.

Q. Knox Tate didn't show up?

A. No.

Q. Hunt Werner didn't show up?

A. No.

Q. Katie Worth?

A. No.

Q. Pat Ricci?
A. No.
Q. Dave Nugent?
A. No.
Q. Sean Prendergast?
A. No, I don't recognize him.
Q. And Andrew Cook?
A. I don't recognize that at all.
Q. So out of the nine, we got one?
A. There might have been a very brief time that Bret was there, but he was pulled off and put on another project. But when we started the project in March, Tim Spano was the project manager, and Pat Ricci's brother, Dan -- I'm sorry, I take it back. That's not true. Another superintendent -- Bob Cotherman was the superintendent. So it was Tim Spano and Bob Cotherman and then Mike Bennett.
Q. Mike Baumbach?
A. I'm sorry, Mike Baumbach. And I believe Nick Starcevic was on the team at that time, too.
Q. Let me ask you this: We know now that there was 18 months between the time they started the first phase until they went to the second phase, correct?

A. Yes, sir.

Q. Did the request for proposal advise that there was going to be some time between the first and second? Did everybody know there was going to be some time period between the Project Solutions team working before the project execution team began their work?

A. By virtue of the preconstruction period, yes.

Q. Okay. And what was the original prospective duration of that period? Was there an --

A. Of preconstruction?

Q. Yep.

A. I honestly don't remember.

Q. Okay. Well, it was actually 18 months. Did that -- I'm trying to figure out, how much did that -- did that time actually extend, and if it did extend, approximately how much did it extend?

A. Well, the preconstruction period would have lasted as long as Buck Lindsay would have taken to complete its final construction documents.

Q. All right.

A. And I want to say that that was probably -- I would be guessing, but I would -- Buck had a very fast design schedule, and my thought, that was somewhere on the order of 120 to maybe, you know, 180 days.

Q. So six months?

A. Six months.

Q. Okay. So it roughly lasted about a year longer than you would have thought?

A. Yes.

Q. Okay. But was that a function of the altered proposal that was given to Bennett to either pay us the extra 37,000 bucks in some more time or let us do it now?

A. Well, certainly six more months was added to it by the option to extend the preconstruction period.

Q. At the time the extension was given or at any time before work began, were you -- did Balfour Beatty ever advise you, as the program manager, that you're not going to get any of these team members?

A. No.

Q. All right. And would that have made any difference to you one way or the other? If you

known when they came to you with the RFP, when you signed it and agreed to it -- if they told you look, 18 months has passed, we don't have any of those people, we're not sending them, okay? All you get is Baumbach. What would your advice have been to Mr. Bennett?

MR. HILDEBRAND: Objection. Calls for speculation, Your Honor.

THE COURT: I will sustain that.

MR. BUNDY: Thank you, Your Honor.

BY MR. BUNDY:

Q. All right. So let's go to what -- who showed up and what they were going to do and how long they were there.

A. Well, I mentioned Jeff Sandeen. Mike Baumbach actually hired him. He had just come off -- I had thought it was a big Marriott or some very nice five-star hotel, and the intent was for Jeff to build the project.

Q. Okay.

A. To be the project manager.

Q. Did you interview Sandeen?

A. Did I interview him?

Q. Uh-huh.

A. No. But I met them, and he was involved

towards the tail end of the preconstruction because he brought -- was brought on board then. And I remember going to meet certain -- like a millwork provider to interview them with him. He obviously had a lot of experience, a very qualified guy.

Q. Do you know whether or not the contract has any provisions related to substitution of project managers and superintendents, et cetera, personnel in the field, that allow the owner to object to changes or requires the general contractor to notify the owner in advance of any change to give him an opportunity to object? Do you know whether that's in the contract or not?

A. No, I don't. I've used it before, but I don't recall whether it's in it.

Q. Okay. All right. So who else showed up in March?

A. Well, as I said, it was -- Baumbach was boots on the ground. Baumbach headed up all the procurement. He was doing all the buying. I'm sure Tim Spano was helping him, but at the end of the day, Mike Baumbach had the relationships. And he was buying out the project firsthand. I know that for a fact.

Q. Okay. What do you mean by buying out? Tell the Judge, if any, what is the importance of a buy out?

A. Well, because it's -- well, simply stating is that Balfour Beatty now has the work.

They've been working with a group of subcontractors from the preconstruction process. Now it's time for the rubber to meet the road and finalize contracts with these people competitively, which is the premise of the stated agreement, and get them on board.

And there is a formal process of notification in the contract where they would recommend somebody -- recommended a subcontractor and show the -- well, I may be confusing projects. There would be a notice of award, and that was carried out. And during the process, Mike also developed a buyout log.

Q. Mike Baumbach?

A. Mike Baumbach, sorry.

Q. Okay.

A. I will start saying Bennett for Mike Bennett.

Q. Yeah. There you go.

THE COURT: A buyout award?

THE WITNESS: Right. So as you award a contract, Balfour Beatty had a schedule of value in mind of what that was worth. And when they made the award, if it was less than that was their money because it -- but because it's an open book, they declared it.

And they had a procurement log, and it showed all the subcontractors as they bought them out, and it actually showed the buyout, whether they were ahead or behind. And the buyout was about -- I recall this because it was about 2 percent, because they argued with me during preconstruction about whether they would buy that much out.

BY MR. BUNDY:

Q. What do you mean -- 2 percent of what?

A. Total contract value.

Q. When you say the buyout was 2 percent, I don't know what that means. What do you mean by that?

A. Well, you have the contract of 60 million dollars. The buyout was 1 million 2.

Q. Who are you buying out for 1 million 2?

A. Well, during preconstruction, the subcontractor might have given you price of 8

million dollars for HVAC and plumbing, but you bought for 7 million or 7,500,000. Well, that's savings.

Q. Okay. So you're -- so buyout and savings are equated? They're the same thing in this?

A. Yes, yes. At the end of the day, when there's a final reconciliation, they are the same thing.

Q. Okay. So as an example, contractor says, we got a GMP of 6 million bucks, and 59 million of it is subcontractors. You sign the contract, and they go to the subs and beat them up, and they get it for 58. So the delta of 1 million dollars is the buyout?

A. Right.

Q. That's the savings. Now, who gets the use of that money?

A. The contractor.

Q. The contractor gets the use of that money because it's a cost plus job?

A. Well, it's his money, yes.

Q. It's the owner's money, but the contractor has to -- gets to spend it?

A. Yeah. This is not to be confused with

contingency.

Q. Right. Exactly. That's what I'm trying to understand. Okay. So this buyout process -- I forgot to ask you earlier. What role or what involvement, if any, did the subcontractors have in the deliverables or the information that was provided to you or anyone on the team during the Project Solutions phase or preconstruction phase?

A. You know, they were very involved. I remember specifically meeting in Buck's office in Atlanta with Balfour Batty. Jeff Sandeen was there. Proposed electrical, a subcontractor, was there, and there was --

Q. Do you know which subcontractor it was?

A. It wasn't the awarded one, I know that.

Q. Okay.

A. MCC was at the table, and we were reviewing mechanical design, and, you know, just in a very cooperative, open book analytical type of process, means and methods, that type of thing.

And that's a very important component of the preconstruction process because you need pricing that is on the street versus something that you dream up in your head, right? You want

to have boots on the ground. So when you go -- as a contractor, when I go to work the project, I want to have some cost of liability of what I'm putting out there.

Q. All right. Did BBC make the commitment on the guaranteed maximum price before they went out to buy out the job?

A. Yes.

Q. Okay. So they're already --

A. As far as I know, yes.

Q. Okay. So they're already stuck with that number, so now --

A. Yes.

Q. -- they just can't go out in the world having no idea what they're going to end up with because they have already committed to a price, a total price?

A. Yes.

Q. Okay. So you say that Bernhard MCC, which I guess was MCC at the time, was involved in this preconstruction process, right?

A. Very.

Q. And they were the mechanical, electrical, and plumbing contractor?

A. Very.

Q. Well, they were the mechanical and plumbing contractor?
A. Yes, sir.
Q. And I noticed that there was a gentleman named John Katschkowsky, who was going to be the MEP, the preconstruction manager, right?
A. Yes, sir.
Q. Did you ever see him working on this job?
A. No, but there was another person involved.
Q. Okay.
A. I'd have to look at -- if I saw a project name listed. I'd have to think about it.
Q. Were you surprised that the MEP contractor, the electrical contractors were involved in the preconstruction process?
A. No, not entirely.
Q. Okay.
A. Not entirely.
Q. Okay. All right, sir. So let's go back to who showed up on the job and how long they were there. We talked about Baumbach did the buyout and the procurement, right?
A. Yes.

Q. Okay. So who else showed up to build this building initially?

A. Bob Cotherman.

Q. Okay. And what was his job, as you recall?

A. Well, he introduced himself as the general superintendent.

Q. Okay.

A. And what that means is the superintendent of superintendents. He's like, you know, the guy.

Q. Right.

A. And that's the way he was introduced to me. And so Bob started the project as superintendent, and Tim Spano was the project manager. As I said, Nick Starcevic was there. And they had another young man. He's what we call an engineer or assistant project manager.

Q. A field engineer maybe?

A. Yeah, a field engineer. Well, he was in the office more.

Q. Okay.

A. So I'm trying to remember now. Tim Spano was the project manager, so Nick Starcevic, I think, was the APM, assistant project manager

months. Anything that stands out in your mind that you think the Judge --

A. Well, piling started on time.

Q. Okay.

A. Piling finished on time. The original Balfour schedule called for the BAR mockup to be installed no later than September, I think. Well, let me digress a little bit.

So we got started in March. Then Hurricane Matthew hit in May. So that was an unforeseen condition, and Balfour Beatty was granted a 20 day extension to the contract. That was the only contract extension given at the time.

Q. Okay. Do you know how much they asked for?

A. They got 20 days, but they asked for a month.

Q. Okay. So they asked for 30 days and they got 20 days?

A. Yes.

Q. Did they ask for any money?

A. They did ask for money.

Q. Did they get it?

A. No.

Q. Okay. And why not?

A. Well, at the time, two reasons. One is, I felt it was builder's risk claim that had to be pursued, but the other side of it is that I felt they had some culpability in terms of the cost setting.

Q. Why is that?

A. Well, the foundation design was it -- I'm sorry. Basically, we filled a big bathtub with sheet piling, and we used dirt wedges up against the sheet piling to brace them, and that helped get the basement open.

When Hurricane Matthew came, there was no protection made to safeguard those wedges. And we had a dewatering system in place, but it was pretty minor, to be honest with you.

Q. And whose responsibility was the dewatering system?

A. Balfour Beatty.

Q. And when you say "minor", you mean not big enough?

A. Well, the building was not designed to have a permanent well point system. As I said, we were designing the bathtub basically.

Q. Okay.

A. And we got this huge rain, and it washed out the wedges and filled up the bathtub. And that was the good news because the water pressure helped keep the sheet piling in place.

But in the back of my mind -- and Balfour Beatty, to their credit, responded immediately with extra pumps and pumped it out, but by then, we had lost a lot of work. And that's not to say that protective measures could have mitigated, but I still felt that there was some responsibility at some level.

Certainly, it wasn't the owner's job site. The owner wasn't in control of the means and methods. But at the end of the day, I did not -- I rejected the cost. Balfour Beatty rewrote the change order for time, and we executed it for time.

Q. And they signed it?

A. Yes, sir.

Q. Okay. Did the architect rule on it? Was it taken to the architect?

A. It didn't go that far.

Q. All right. And was there any reservation of rights or claims for additional money?

A. No.
Q. Okay. So it was just a modification signature to the contract?
A. Yes.
Q. Okay. So let's go on. And what -- after that, what do you recall? What's going on with the job?
THE COURT: Do you want to take a break now?
THE WITNESS: Sure.
THE COURT: Let's go ahead and break before you get into all of that. And let's come back. It's almost 1. Let's plan to come back at 2, 2:30.
MR. BUNDY: 2:30? Thank you, Judge.
THE COURT: Mr. Clements, you're admonished. You're not to speak to anyone about your testimony.
THE WITNESS: I was going to ask you. I wasn't sure.
THE COURT: Yeah. Okay? Either side.
MR. HILDEBRAND: Nor review any information or anything else.

THE COURT: Right. Right.

(A recess transpired.)

THE COURT: All right. Mr. Bundy?

MR. BUNDY: May it please the Court.

BY MR. BUNDY:

Q. Mr. Clements, what is a constructability review?

A. The constructability review, in my mind, is the analysis of best practices. It's just the best way we can build. For instance, given the floor-to-floor heights of the Bennett Hotel, you wouldn't necessarily use an 8-inch floor slab because you've got some different dimensions, so you would introduce post-tensioning, for instance.

Constructability review would have a lot to do with how the precast is implemented. You know, the means and methods of the constructing; hoisting it, mobile crane, tower crane, derricks off of floors, you know, items like that.

So it's really what we rely on the contractor to -- you know, we want to build as economical a building as possible. And to the extent that he can influence that design through

economies of the construction process, we want to take advantage of that. I mean, that's what we relied on.

Q. And is there a distinction between value engineering and a constructability review, those two different things?

A. They are two different things, but one can lead to another. I mean, obviously you have economies by taking certain steps and turns up your means and methods that were related to cost savings or time savings. And time is money.

Q. But is it -- if you had a product, you specified product A and the contractor knew of product B, would it serve the same purpose?

A. Yeah.

Q. That would be more in line of a value engineering; is that correct?

A. Yes.

Q. Okay. And the constructability review, as I understand what you're saying, is the contractor looking at the building and saying, this is the preferred way to assemble this project; is that correct?

A. Yes.

Q. Which may result in economies?

A. Yes, to his benefit.

Q. Did Balfour Beatty do a constructability review on this job?

A. I don't recall such, no. Nothing formal.

Q. Okay. Would you expect the contractor to do that in this situation? In other words, if they were going to -- if they were involved in the precon process, as part of that process with developing drawings, would you expect them to do a constructability review if they were going to give you a price?

A. I don't know that they didn't do it, but I presume that the economies of the construction were already built into the design, and there was nothing to proffer.

Q. Okay. All right. So where we were before was, I think, toward the -- we were roughly 90 to 120 days into this project, was I think where we had left before we had lunch.

A. Yes, sir.

Q. If you can just start again and tell us what -- in your mind, what you recall of how the project progressed from that point forward.

A. Well, you know, we talked a lot about

critical path, right? And when you first start a project, there's not a bunch of critical paths, right? There's only one.

And that's to get to -- particularly in what I will call this -- euphemistically, it's a high-rise building. I mean, it is in Charleston. And that's basically to get the building topped out as quickly as possible, to get permanent power as quickly as possible, to get vertical transportation as quickly as possible.

I mean, there's not a lot else going on. I mean, you had some other work going on, but in terms of getting the building to a point where it's on schedule, tracking well, those are critical items.

Another critical item, of course, as a side bar, was the BAR approval, and that's in Charleston, which I had never done before. It requires a full scale mockup of the site, and that's inspected. But let me digress a little bit.

So as I recall correctly, the GMP schedule called for the building to top out 17 months after we broke ground. It actually topped out at 22 months. In fact, I think the early

2016 schedules actually would be HMS 13 -- HMS 11, I believe, showed permanent power on 1/25. And, in fact, we reached permanent power, I think, on 1/24.

But getting those elevators started -- getting the building topped out is critical, and getting elevators going is critical.

And schedule -- I mean, one schedule that comes to mind is the data date August 2016, HMS 13. They actually showed the permanent power coming on after the installation of -- about concurrent with the completion of the elevators. But that schedule and the one prior in May and then the -- prior to that in February, all showed elevators 1 through 4 being completed in four months.

You're talking about a nine story building, but I'm not a $4 billion contractor, and honestly, I'm not doing the schedule that's in question. I state that only because that was information that I was given.

The reality is that that elevator started in May 2017, so long after we had permanent power. Permanent power is a critical predecessor for starting your elevators. Those

elevators were completed -- actually, the LLR initial inspection was completed in November of 2018.

So it's just my opinion, it took a long time to get those elevators, and that is one of the most critical activities that are in the schedule. It was clearly late, and I will state right now, the owner had no impact on the delivery of that elevator. None, whatsoever.

We did have some influences on it, some aesthetic issues, but at the end of the day, that elevator was woefully late, and the timing of its completion was actually consistent with the other statutory inspections that were required for substantial completion. Excuse me. For TCO.

Q. Temporary certificate?

A. Temporary certificate of occupancy. May I opine on that a little?

Q. Yeah.

A. So there's a difference between TCO and substantial completion. This is -- I mean, it's a very important criteria and one that I argue with contractors on a regular basis. You can get a TCO from the city to say that this building is safe to occupy. That does not mean that the

building is ready for the owner's beneficial occupancy, which is, by definition, substantial completion.

So I just want to make that clear because in November of 2018, we got a TCO. At the time we did not have substantial completion. And, in fact, we didn't have a certificate of substantial completion until some time in February. That's a whole argument upon itself.

But let me go back. So that critical path -- we did well on the temporary power date. But the primary elevators didn't start until May, and a lot of that, I believe, was driven by the completion of the crate elevator. That crew went from there to the main stacks of elevators, and the schedule was -- as I understood the schedule, predicated on having two crews working on those elevators.

That eventually did happen, but still, the elevators were very late. And for months, somebody was in the elevators jacket is all I can tell you. That's -- I think that's a very important point. With regard to --

Q. Let me ask you this -- it may be self-evident -- why the elevators were important,

but if you would just expand on why the elevators are so important once you get permanent power to the completion and construction of a building, of a multi eight or nine story building?

A. Well, substantial completion is a benefit for occupancy of the building. You have to have vertical transportation. Vertical transportation are for -- is state regulated, right? And it's not just a matter of LLR coming out and inspecting it. The fire marshal is heavily involved with it.

So it is, I think, second only to the fire alarm system, probably one of the most critical, if not the most critical activity in a high rise building.

Q. Okay. And to the best of your information and belief, what was the cause of the delay of the elevators?

A. I have no idea.

MR. HILDEBRAND: Objection, Your Honor. This witness has not been qualified as a scheduling delay expert. I took his deposition, and I asked him -- gosh, it's real clear.

Do you consider yourself to be a critical path method scheduling expert? No. I

witness, are helpful to a clear understanding of the witness's testimony, or the determination of the issue in fact. It does not require special skill, knowledge, or training. In other words --

THE COURT: Lay opinion.

MR. BUNDY: I didn't ask him about CPM. I said nothing about CPM. I just asked him, since he was the project program manager on the job, did he know why the elevator was late, and his answer was?

THE WITNESS: I have no idea.

BY MR. BUNDY:

Q. Thank you. But it was late?

A. Yes.

Q. Thank you.

A. Yes.

Q. Were there ever any claims made for delay or additional compensation that you're aware of related to the inability to put the elevator in?

A. No.

Q. Okay. And would the contract documents have required such a claim if a claim, in fact, existed?

A. Absolutely, as executed per --

Q. Is the owner obligated to go out and look for claims to help the contractor make claims back against the contractor?

MR. HILDEBRAND: We're back into the leading questions, Your Honor.

MR. BUNDY: I will withdraw it.

THE COURT: Okay.

BY MR. BUNDY:

Q. All right. So we were on the elevators. So now what -- let's say we're in the summer of the first -- started in March. Let's say that summer. Now, where are we in terms of the representatives of Balfour Beatty on this job? Is Baumbach still around? Are all the same -- Cotherman and all those people still there?

A. No.

Q. All right. Tell us what happened to Mr. Baumbach.

A. I found that out after the fact. Mike Bennett got a call from Pat Dean to tell him that Mike Baumbach had been let go as well as Bob Cotherman.

Q. When was that?

A. It was just right at Christmastime, '15.

Q. And that would be roughly six months

into the job?

A. Closer to nine.

Q. Closer to nine?

A. Yeah.

Q. Okay. And was the job owner or -- was the job on time at that time or generally on time, or what was the status of the job?

A. I would characterize it as generally on time.

Q. Okay. All right. And what was the effect of -- in your observations -- from your observations on the job -- let me back up. You were on the job the whole time, right?

A. Yes, sir.

Q. And how often were you on the job?

A. You know, at least once a week. You know, when we got closer to the end, I would be there for days at a time.

Q. And what kind of meetings did you go to during the progress of this job?

A. Well, I chaired a weekly OAC meeting.

Q. That's on site?

A. On site. Owner, architect, contractor meeting. And then during the BIM process, we had weekly BIM calls, which I participated in and

then just general correspondence.

Q. Tell me about these weekly OAC meetings. Were they a contract requirement?

A. They were an RFP requirement. I don't recall them being a contract requirement.

Q. Did they occur every week?

A. Yes, they did with few exceptions.

Q. Sir?

A. With few exceptions.

Q. And up to -- was it usually the same day every week?

A. Yes, sir.

Q. What day was that?

A. I want to say Wednesday for some reason.

Q. Okay. And where were these meetings held?

A. In Balfour Beatty's office.

Q. In Charleston?

A. Yes, sir.

Q. And how long would they last until?

A. I mean, they could last an hour; they could last three hours.

Q. And in preparation for the meeting, what, if anything, would be distributed or discussed in order to make sure the meeting was

efficient?

A. Well, I always did the agenda. I did meeting minutes. Balfour Beatty would provide a two week look ahead schedule, and then monthly, they would have kind of a monthly report, maybe some photos and summaries.

Q. Okay. And who else was -- who attended the meetings initially on behalf of Balfour Beatty, the initial OAC meetings, if you recall?

A. The initial ones, I don't recall specifically. I mean, Mike Baumbach had to be there.

Q. And who would attend on behalf of the architect?

A. Jennifer Faulkinberry, who was their project manager.

Q. And who attended on behalf of the owner?

A. I would.

Q. Did Kim Bennett Brown go to those meeting?

A. Occasionally.

Q. Did Mike go to those meetings -- Bennett?

A. No.

Q. So tell me about the format of the

meeting. I mean, I'm sort of imagining we're walking into the meeting. How did it go? What was done, and how was it handled?

A. Well, the agenda was fairly traditional. I mean, we started off with the design topics. We would go through contract status. We would go through change order status and, you know -- sorry. Contractor status. And then owner issues, owner questions. The owner was the last part.

Q. And was there a prepared agenda before the meeting?

A. Every meeting.

Q. And you prepared it?

A. And sent it out in advance.

Q. And was there a record made of what occurred at the meeting?

A. Yes, my minutes.

Q. And then what would happen with those documents that were created as a result of the meeting? The meeting minutes, what would happen to them?

A. Well, they would be distributed to everybody.

Q. After the meeting and before the next

meeting?

A. Yes, usually within a couple of days.

Q. And were people given the opportunity to amend or otherwise correct meeting minutes if they thought something had been mistranscribed or misunderstood?

A. Absolutely.

Q. And was that done?

A. A few times, yes. Toward the end of the project, Nick Starcevic took exception to things, maybe a half dozen or dozen times. And I can't think of one time that I didn't accommodate the clarification.

Q. But up until, I guess, toward the end of the job, there wasn't that much dispute about what had happened at a particular meeting in terms of the record keeping?

A. No, not in terms of record keeping.

Q. And once those records were distributed and people made whatever comments they were going to make, were items that were still outstanding moved to the next meeting?

A. Yes, action items. And the responsibility was assigned.

Q. And that happened every week?

A. Every week.

Q. And, generally, how did those meetings go in your opinion?

A. I thought -- they were very productive. I mean, Balfour Beatty and WLA and Design Continuum and myself, we worked through issues.

I mean, it's no secret that it was a challenging project, a lot going on, a lot of challenges for us. And, you know, my basic management approach was to manage the project and the schedule weekly through those action items to see what's coming up and to keep the design team ahead of -- or as current as possible with challenges.

And then even Balfour Beatty would have a challenge that would come up and ask for some help with the architect, and we would work through those things, and then try to stay on top of change orders as well.

Q. Were these meetings adversarial in the sense of a lot of contention?

A. You know, I lost my temper one time, which I regret, which was right around Thanksgiving when Balfour Beatty was trying to hand me the keys to the building, which I took

exception to, and I regret that.

But to say that they were adversarial, I don't remember any throw-down fights or anything like that. They were formal at times and, you know, strong discussions, but they were working meetings.

Q. Okay. Fair enough. Overall, were they productive?

A. Very.

Q. Do you think they moved the job along and were productive?

A. Well, I say yes simply because if you think about what transpired, the challenges that we had, at the end of the day, we had one claim for the sixth floor delay.

And despite all these other occurrences of notices, of e-mails with notices of delay or challenges that we had with getting design completed, at the end of the day, there was only one delay -- well, I take it back. One formal delay properly executed in the entire project over the course of the project.

So I take pride in that. I mean, we worked very, very hard to mitigate issues throughout the course of the project.

Q. So in your mind, as of, let's say, the first of 2019, there was only one outstanding claim?

A. There was only one outstanding formal claim made.

Q. And what was the approximate amount of that claim, if you recall?

A. $140,000 in, I think, 20 days.

Q. And so in January -- and that was right toward the end of the job?

A. No, no. This was in July of 2016 prior to top out.

Q. Okay. So that was the claim? That was the only outstanding claim?

A. Formal claim, yes, formal claim made.

Q. As of the date of substantial completion or thereabouts?

A. That's correct.

Q. Okay. So how did that claim of 100 and something thousand dollars in 20 days, the formal claim that you -- that was still outstanding from 2016, compare with the $22 million claim that was received in January?

A. I was flabbergasted.

Q. So you hadn't anticipated that?

A. No.
Q. All right. So let's talk then -- let's go back. Baumbach is out. And that was roughly December of 2015?
A. '15.
Q. So nine months into the job. Cotherman, what happened to him?
A. He's out, same time.
Q. And do you know why he was out?
A. Mike Baumbach told me later why.
Q. Okay. And as a result of that conversations, what do you --
MR. HILDEBRAND: Objection, Your Honor. It's clearly hearsay. It's based on his --
THE WITNESS: That's why I didn't say anything.
BY MR. BUNDY:
Q. As a result of the conversation you had with Baumbach --
A. Yes, sir.
Q. -- as a result of that conversation --
A. Yes, sir.
Q. -- did you determine why he was let go?
MR. HILDEBRAND: It's the same

thing.

MR. BUNDY: I'm not asking him what the -- I'm not asking him what he said. I'm asking him, did you, as a result of the conversation, learn why Cotherman was fired.

MR. HILDEBRAND: Your Honor, it's an answer based on hearsay. It's just like it's one -- the same thing he's testified about hearsay. It's just a roundabout circle way to do it.

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

MR. BUNDY: I respectfully just --

THE COURT: I think he's already touched on this. I'm going to allow it.

MR. BUNDY: Okay. Thank you.

THE COURT: Don't tell me what he said. Tell me what you learned and how you learned it.

BY MR. BUNDY:

Q. As a result of that, did you learn why he was fired?

A. Mike felt he was incompetent, and he was demanding to get him replaced with Pat Dean from the very beginning. He couldn't stand him.

Q. All right. Now, after Baumbach leaves and Cotherman leaves, and he was the general superintendent, did anybody else leave during that period that you can recall?

A. No. We did have Dan Ricci overlap Bob, which was tremendous.

Q. And how long was Dan Ricci on the job?

A. So just after we topped out.

Q. Okay. So after you topped out when?

A. January 7th, 2017, I think.

Q. And he left, and who replaced him?

A. Nobody. Well, I take that back, sorry. He left, and Tim Spano was promoted to superintendent. And then Nick Starcevic was promoted in Tim's spot to project manager.

Q. Okay. Do you recall any other changes in personnel after Cotherman and Baumbach left the job, on the job for the remainder of the job? Were there other personnel changes?

A. Well, there were people added. You know, as the project became larger and more complex, Balfour Beatty added superintendents on the project. The initial project engineer was fired shortly after, I think, the first quarter of '16. Another person took that spot. That

person did well.

There were some interns that came through, and then in -- later in 2016, I believe, Alec Dooley came on board who was -- what we thought was just really a fabulous assistant project manager.

Q. Okay. Based on your observations of the site, did this change in personnel affect the progress of the job?

A. It wasn't self-evident to me.

Q. Do you know whether it affected the quality of the work?

A. Nothing that I could testify to.

Q. Fair enough. Okay. What were your -- in your mind, if you would, what were your -- well, let me ask you this. Were there any problems on this job insofar as the work product that Balfour Beatty was concerned with in your mind?

A. The quality?

Q. Yeah.

A. Yes.

Q. And what were those problems?

A. It was at the level of finishes. We had a relatively young project team, and we were

building a five-star hotel. We had an interior superintendent -- like Ryan Ledford, I think, is his name. Very nice guy. Very nice guy. But I don't think he ever stayed in a Ritz-Carlton. I don't think the expectation was made clear to him.

And as a consequence, the level of quality, I don't think, was -- expectation was met, to be honest with you. And at the end of the day, it came down to the architect of record ruling on it. You know, I'm not just -- I understood what the expectation was.

But, you know, in December, Buck Lindsay had visited the site. David Simonton had requested substantial completion twice in early November prior to even getting a TCO. And Buck visited -- I asked Buck to come visit the site, and he did. And he -- I'm sure that one of you have the correspondence in the file that it was not complete.

Q. Okay.

A. And he took exception to the quality in the guest rooms as well, and the punch list process, you know, goes on ad nauseam.

Q. We will come back to that. With regard

to the scheduling of this project -- and I think we've established Balfour Beatty was responsible for the scheduling. Were there any problems with the scheduling on this job?

A. In terms that I saw --

Q. Yes.

A. -- where things were out of sequence, I did not see those matters. I knew of challenges in the field with getting work complete just by my working relationship, but I didn't see them put something in too early or too late that I recall right now in terms of treating their own conflicts.

Q. Okay. What was your experience with the change order process as handled by Balfour Beatty on this job? How did that go? When there was a change or a CCD or RFI, whatever it was, how did they handle those? And how did that compare to the requirements of the contract documents?

A. Well, let's CCDs aside for just a minute.

Q. Okay.

A. So there were a lot of change orders. Anytime I got a change from Balfour Beatty, the first thing I did was submit it to the architect

for a ruling. Is this a valid change?

And to be honest with you, I don't remember an occasion where, if there was a conflict in the drawings that -- well, I take that back. I always went to the architect first. I mean, I would look at it, but it's not up to me to say whether it's a valid change or not. That's not the way I run a job site.

Q. Okay. And the change orders were initiated by Balfour Beatty?

A. Yes. And some were initiated by the client as well. You know, if the client originated changes, they're straightforward. But with Balfour Beatty changes, they all went to the architect because it's his design, and he's telling me that it's a change.

Q. Okay. So how would that process go? You would turn it over to the architect.

A. First thing I did -- I wouldn't even look at the price or anything. I'd just sent it to the architect. Is this a change? Yes. Okay. Then we would delve in, and I would work with Balfour Beatty with the architect's support, with the engineer of record's support to evaluate the changes in terms of costs.

The biggest challenge that -- well, one of the challenges -- we had a lot of change orders. Well, I've been on projects with more change orders, but the challenges in the change order process were that, if there was a bulletin issued, that would be -- like for a change order, it would cover several trades, right?

One comes to mind. When we put in the barn doors in the bathrooms, right? So these are doors. They have to be painted. So we might just have the door material costs as a change order as opposed to the door and the painting cost.

And this is particularly the case with larger changes that affected MEP, like RCO 103, which was a modified change. It was a mechanical change, but it affected drywall and power and everything else.

But we received the changes for the most part -- and I will say, in fairness, probably about at least 50 percent of the time, trade by trade. So in fairness to the client, never really knew what the total cost was until we got to the last subcontractor.

Owner-initiated changes, we had a better

idea of those because we tabled them. And I would try and get an order of magnitude from Balfour Beatty, and they were cooperative in that because then I would go back to Mike and Kim and say, you know, this is going to cost X amount of dollars because I didn't want to waste Balfour's time pricing it up for the subs' time.

I just wanted to get a -- we call it a high early number, and then I would go back to Mike or Kim, and they would tell me whether to push forward. Then I would authorize the architect to break the -- to issue a supplemental service, a bulletin, ASI, whatever you want to call it and -- to Balfour Beatty for pricing.

And sometimes it was not just for pricing, but it was to proceed with pricing to follow. That's a good segue to a CCD discussion. So the construction change directive, that use was initiated by David Simonton in January 2017, I believe it was.

Q. So you hadn't used any prior to that?

A. No.

Q. Okay.

A. And the reason being is that there was scope that was not GMP scope, and David wanted to

use CCDs for that.

Q. Construction change directive?

A. Construction change directives. And with the exception of two that I recall, the CCDs were paid on a cost plus basis. So they would do the work.

There were -- I don't know -- 40 CCDs probably, maybe a couple more. And we would pay progress payments on the CCDs with every pay application, and that covered not only their direct costs but their indirect costs, meaning staff costs and fees.

So let me think. It might have been January 2018. I don't know. I'd have to go back and look and see -- the first CCD was CCD 2. We didn't use CCD 1. But basically we covered their costs, without question, on those CCDs.

And those -- and we used them for additional work, and I guess basically to expedite things so we didn't have to go through the change order process because things were moving fast. We didn't want to delay anything.

And I think David was right because it was very beneficial in mitigating, you know, potential delays because we've got to arm wrestle

over what something costs. We just knocked it out. We just did it.

Q. Okay. Did you ever use CCDs in the instance where the owner thought that work was included in the contract and the contractor said, no, we didn't agree to do this, and so in order to move it along, y'all issued a CCD in order to get the work done and figure out who's going to pay for it later?

A. Yes.

Q. Okay. And that was the only way they would do the work, right, if you -- disputed work?

A. I only recall one particularly disputed work. That was the shutters, and we did use a CCD on that.

Q. Now, what about time -- what about claims related to change order work either generated by the contractor or the owner? Any time extensions that were requested? How were those handled during the project?

And well, first, what was required, from your standpoint, if they were going to get time and what did they do and how were they resolved, if they were?

A. Well, I mean, just like any change order, you're supposed to provide evidence of the cost and the time. I don't recall receiving change orders with a specific request for a time extension.

I do recall receiving change orders, Balfour Beatty qualifying that they would assess time impact at a later date, and that was a big thing with Kim, as she -- as an owner, they wanted to see, if we're going to sign a change order, let's sign a change order. You know, there's time, put it on the table.

But, you know, certainly the bulk of 2018, there were change orders received that were qualified, and the good news -- I mean, conversely, the CCDs addressed that.

Q. How?

A. Well, I take that back. As I think about it now, Balfour Beatty actually put qualifiers on the back of the CCDs as well. So I rescind that position -- that point.

Q. Are you aware of any -- what reasons would there have been or impediments would there have been to Balfour Beatty at the time the change work was to be performed, to provide a

fragment to show where this work was, that it was on the critical path, and they wanted a time extension?

A. I mean, there's nothing to prevent a contract from doing that. In fact, at one point before Simonton came on board, David Stanton was there, who I knew very, very well from our past history, and we were talking about the amount of changes.

And I said, if you need more staff, ask for it. And I don't mean necessarily Balfour Beatty, but I told him I would go to Mike Bennett and say, hey, we've got a lot of change orders. We've got to add another FTE. I mean, what's it going to cost? $100,000 a year? In the scope of things, it's insignificant, right?

But Balfour did not jump on that offer. I mean, David didn't. I don't know what he did with it or not, but nothing became of that.

Q. Do you know whether or not the contract requires a critical path analysis in order to get a time extension?

A. It absolutely should, I mean, yes, yes.

Q. And were you ever provided with any change order request notwithstanding there was

reservation and rights with a change order requesting time with the critical path analysis at any time during this job?

A. Well, the sixth floor change order was the closest thing, you know, because we were up to our necks in the BIM process. And Balfour Beatty put together a change order, a claim, with the change order. And it showed where we should have been and the impact of our inability to BIM sixth floor west. And that was the closest thing that I saw to a critical path analysis.

And to Buck's credit, when he analyzed it, he recognized it. In his -- in his initial ruling, I will call it, he offered time as well as money.

Q. All right. And in response to that initial ruling, did Balfour Beatty issue an amended change order incorporating what Buck had agreed to?

A. No.

Q. Well, how were you -- how was the owner going to pay this -- or give this time without the proper documentation from the contractor that they wanted that?

MR. HILDEBRAND: Objection, Your

Honor.

Q. How does the contract work when that's the case?

MR. HILDEBRAND: Objection, Your Honor. It's a leading question, and it's a loaded question because he said without the proper documentation. There's no requirement of a documentation after a claim has been made in the contract for the owner to pay.

If there's an undisputed amount, then it's undisputed. But there's no requirement -- if Mr. Bundy wants to go through the contract later on or whatever, but he can't preface his questions that -- one, they're leading; two, they're improperly prefaced.

MR. BUNDY: I'll be glad to argue it right now.

BY MR. BUNDY:

Q. The only way to get paid on this job is through a pay request, right?

A. Yes, sir.

Q. The owner doesn't pay change orders, do they?

A. No, sir.

Q. Okay. You pay pay requests, which may

include change orders, approved change orders?

A. Approved change orders.

Q. Okay. So there's no provision in this contract for payment other than a pay request signed by the contractor, the architect, and the owner -- or at least signed by the architect? The owner is required to pay pay requests signed by the architect and the contractor, correct?

A. Yes, sir.

Q. Okay. And nowhere on this job is there a piece of paper signed by the architect and the contractor that includes that work, is there?

A. Which work?

Q. The work we were just discussing, the work --

A. No.

Q. Thank you very much. All right, sir. So we were talking about the meetings and the monthly meetings. Tell me a little bit about these monthly meetings. What occurred on those meetings?

A. Just additional handouts for Balfour Beatty, kind of like photos. They would include my same meeting agenda. They would identify challenges, you know, information needed, much

the same. And we would go through them.

Q. Okay. Let's talk a minute --

A. Sorry, let me back up. They would also -- initially, in the job, they would include the buyout, you know, tracking that, you know, subs to be awarded, those types of general information.

Q. Right. Okay. Were RFPs and these change requests discussed at these weekly meetings or monthly meetings?

A. I don't understand RFPs.

Q. I mean, well, not RFPs, the request for change orders.

A. Yes.

Q. RCOs and those things.

A. Yes. I tried very hard to stay on top of them.

Q. Okay.

A. Alec Dooley was particularly good in terms of supporting those efforts.

Q. And were you able to resolve those during the project?

A. Well, I remember -- I think we paid about 4 and a half million dollars in change orders, so it wasn't like, you know, we weren't

paying change orders, right?

Q. All right. Let's talk a minute about the -- I want to talk about the Hope's doors a minute and that process. You talked about the BAR. BAR stands for Board of Architectural Review?

A. Yes.

MR. BUNDY: I think Judge will take judicial notice they're not an easy crowd to deal with.

THE COURT: I'm well familiar with them.

BY MR. BUNDY:

Q. So the mockup. Tell me what the mockup was that BAR required and when they required it to be complete, and what was the predecessor event, and how it affected the job. Do you understand my question?

A. Yes. You may have to remind me of a couple points.

Q. Sure.

A. So the actual mockup is included in the contract documents. I personally took the proposed mockup drawings to the BAR's office to get them stamped and certified because you had to

have that to get the building.

So it was a full-scale mockup. I don't recall what -- it included -- I have to think about it now. Certainly the precast -- the big pieces of precast Arriscraft doors, handrails up on the pool. It was kind of the -- the obelisks that are on the balcony. It was quite a little pallet of things.

Q. Is it -- just for the record, is it similar to like almost a Hollywood set where you see in front of these construction projects what looks to be like a part of the building, but you go around behind and there's nothing there, much like a cowboy set in a cowboy movie, right?

A. Yes, sir.

Q. Okay. And that's the purpose, and so when -- is the purpose so that there will be an actual sample because the mockup is just basically a sample.

This is what we're telling the Board of Architectural Review we'll do. We're going to put a golden egg every 4 inches because it's historic. And they go and count the golden eggs when you go to build it, right?

A. Yes, sir.

Q. Okay. So one of the golden eggs that had to be in this mockup was a Hope's door, correct, or was it?

A. It was. It wasn't in the original mockup design.

Q. Right.

A. But the BAR has the liberty to come out there, assess it, look at the building, and say, I want one of those and one of these.

Q. Okay.

A. And we had to accommodate them. The Hope's door was one of those items.

Q. Okay. So that's the golden egg they wanted?

A. Yes.

Q. Because I assume they're not contributing to the hotel's --

A. No.

Q. -- budget, right?

A. No.

Q. They're just picking how nice they want somebody else's stuff to be. So they pick out this golden egg, this Hope's door, right? And when was this mockup supposed to have been completed by the contractor, and what was the

significance of that date?

A. Well, the -- I believe the GMP drawing -- the GMP schedule called for it to be complete September of 2015, if I recall.

Q. When?

A. September 2015, within six months of the project because you want to get it out there as fast as possible. The reason why is that, as it was explained to me by the BAR, you're not allowed to put any of that on the building until it is approved.

Q. So you can't go put stuff up and then come back later and ask for forgiveness as opposed to approval? I assume they've been down that road, right?

A. Yes, sir.

Q. Okay. And much like they just did to The Dewberry over here, they don't have a bar anymore, right?

MR. BUNDY: Do you know that, Judge?

THE COURT: I heard that.

BY MR. BUNDY:

Q. So it was supposed to have been done or completed in December of --

A. September, as I recall, of 2015.
Q. September of 2015.
A. Yes, sir.
Q. And until it's approved and erected, the contractor is not supposed to go do any of that work?
A. That's per the BAR.
Q. Per the BAR. And they got the right to stop you, right?
A. I would presume so, yes, sir.
Q. They do. I think they do. When was it actually -- when was this mockup actually done?
A. April 2016, we got a notice from Tim Spano that it would be ready for owner inspection first.
Q. How many months late was that?
A. Do the math for three -- seven months.
Q. So we're in April now and Spano says, it's ready?
A. He said it would be ready by a certain date. I don't remember the date, but it was around April. Then I got an e-mail shortly thereafter that said that, no, we're not ready. And I think you will find correspondence that at the time Old North State was put on notice by

Balfour Beatty for quality issues pertaining to the mockup.

Q. What notice were they put on? What were they told?

A. Balfour Beatty took exception to the work that Old North State had done on the mockup.

Q. So how did this proceed? How did this problem go forward?

A. Mike Bennett and I -- I believe we saw the mockup shortly before the BAR's first visit, which was in September. At that time Mike and I came out there and took a look at it, and we took exception to quality issues.

Q. If you -- to the best of your recollection, what quality issues did you take exception to?

A. The caulking, cleanliness of the stone, inconsistent joint gaps, you know, between precast and the Arriscraft. You know, very, very discernable items. In fact, Tim Spano was there with Mike and I and Jeff Sandeen.

Q. And did they dispute your observations regarding the quality of the work?

A. They did not, but Jeff Sandeen turned to Tim Spano and said, don't change a thing. Let's

see if we can get by with this.

Q. And who was he going to try to get by, the BAR?

A. The BAR.

Q. Good luck with that. All right. So what happened after that?

A. Well, the BAR -- I think their first inspection was in September, and they took exception to it for quality control issues.

Q. Same exceptions you had taken?

A. Yes. And I'm not certain, but I believe they added -- at that time, added a few more things they wanted us to take a look at. I don't remember the sequence exactly.

Q. Okay. So what -- move us on down the road with this mockup.

A. Well, let's back up to the Hope's door.

Q. Okay.

A. So we didn't order a Hope's door for the mockup. We didn't have one on the job at the time.

Q. Right.

A. So what we did is we took a Hope's door from the hotel and stuck it in the mockup.

Q. And how much is a Hope's door? Are they

expensive?

A. About 60 to $70,000, as I recall.

Q. And if you had ordered one for the mockup, what would you have done with this 60, $70,000 door after the job was finished?

A. Mike Bennett would have it on his farm, I think, but that's about it.

Q. Expensive door to nowhere.

A. It was.

Q. So what happened next?

A. Well, we went back and forth between the BAR -- the BAR came out several times looking at the mockup. But then they became focused on the building because it's one thing to -- well, let me back up.

Because of the schedule and because we did not have BAR approval, Dave Stanton directed the Old North State, or whomever, to go ahead and, you know -- let's get the CMU running, get the Arriscraft up there, get the precast up there. I can't blame them. I probably would have done the same thing.

But he wasn't going to wait for the BAR. BAR didn't appreciate it, but I think based on -- I don't know why they didn't stop us, but they

didn't stop us.

Q. Okay. Do you know what experience these out-of-town people have with the BAR, the Balfour Beatty people, what experience they have with the Board of Architectural Review in Charleston, South Carolina?

MR. HILDEBRAND: That's speculative. Objection, Your Honor.

A. I don't know.

Q. All right. So you took the Hope's door out of the hotel and put it in the mockup, right? That's what -- was that Balfour Beatty's idea or y'all's idea?

A. I think it was a joint idea. We had to get the mockup done.

Q. Whatever it took?

A. Yeah.

Q. And the idea was to put it back in once the mockup got approved?

A. Yes.

Q. But until the mockup got approved, you couldn't put it back in?

A. Right. The mockup didn't get approved until end of June 2018.

Q. Okay. And what effect did the inability

to get the mockup approved by the BAR have on the progress of the work?

A. Well, it didn't have much because Balfour Beatty just went ahead and ran the facade up. At the end of the day, no claims could be made on the delay in that regard. They just went ahead and ran with it.

Q. All right. And were there any problems with the facade or the quality of work at the facade?

A. Yeah. The BAR took exception to the jointing. Now, in fairness, there was a couple of locations where by design, the jointing wasn't absolutely symmetrical over some door headers.

But once we showed them that information on the contract drawings, you know, they kind of looked away. But it had more to do with chips and repairs on the precast -- cleanliness of the Arriscraft. Arriscraft is a very -- I think, a soft and absorbent stone, and it's very difficult to keep clean, but it was dirty. The precast was dirty.

Jointing particularly on the precast was inconsistent. You might have 2 inches here or an up tight here, you know, almost a butt joint, and

then there might be a half inch over here. I think the requirements were something like three-quarters to an inch or something like that.

And the BAR really took exception to that, and ultimately, they approved the mockup. And the final review was going to be based on the quality of the building at the end of the day.

Q. Okay. What effect did the Hope's doors have on completion from your standpoint?

A. None.

Q. Okay. And the issues related to the mockup were quality of workmanship issues as opposed to design issues; is that fair?

A. There were -- the trellis over the third floor, for instance, the design was for a transparent state. The BAR didn't like seeing the grain of the wood. It was too transparent, so they -- we ended up painting it with a solid stain. You know, that's not a Balfour Beatty issue. That's a BAR requirement.

Q. Right.

A. The obelisks that are on the third-floor balcony are segmented. And if I recall correctly, BAR took exception to some of that segmentation, and so we ended up using like a

Bondo or something to cover it up.

So it's fair to say that there were changes made by the BAR. It was not just quality control, but at the end of the day, the overriding issue was quality control. And the reason for that is that, in order to get a TCO in Charleston, you need the BAR to sign off.

And at the time -- at the end of November when we were getting the sign offs for elevators and fire marshals and things like that, we still hadn't completed the facade work, and we didn't even have a punch list.

And it was only because of Jennifer Faulkinberry having developed a relationship with this one architect, the BAR said, all right, I will let you open, but I want that punch list. And Jennifer got that punch list in late January 2019.

Q. How, if any -- how, if at all, in your opinion, did Balfour Beatty's proceeding with work before mockup approval affect the BAR's approach and relationship with this job?

A. They were not happy with us.

Q. And did that cause any problems?

A. I can't say specifically that it did,

late in its delivery?

A. Well, this was December. I mean, you want to go back and look at August 2017.

Q. Well, based on the number of time extensions that had been given --

A. Only one, 20 days.

Q. 20 days. Okay. So how late was the building, assuming the 20 days?

A. Well, I believe the adjusted contract time was -- I think it was August 2017; so you're talking 18 months or something like that.

Q. And if Balfour Beatty, based on what Buck told them about their other and only proper claim, they could get 20 days. If they had asked for it, they would have gotten another 20 if they had sent in the request, right?

A. Yeah.

MR. HILDEBRAND: Objection. He's leading, Your Honor.

BY MR. BUNDY:

Q. So there's a meeting -- there's a meeting, and the owner of the hotel is looking at his building, which is 18 months late, give or take?

A. I think that's true, yes.

Q. With 20 days of time extension given?
A. Granted, right.
Q. Okay. And was he -- what was his demeanor? What was going on as far as you could tell with the owner of a $60 million hotel that was 18 months late and looking at doors falling off and paint that was not properly done?
MR. HILDEBRAND: Objection, Your Honor. There's -- it's just a factual inaccuracy. There was one door that was off the track, not doors falling off.
THE COURT: All right. I will sustain it. What was his demeanor is what you asked him.
MR. BUNDY: Yes.
BY MR. BUNDY:
Q. What was his reaction to that visit, given the lateness and the condition of the room?
A. It wasn't yelling or screaming or anything like that, but I think at that point, he knew he had a problem, to be honest with you.
Q. And let's back up a second. Had there been an attempt, up until that point or at any time before that point, for Mr. Bennett or you to try to get out of the contractor, when are you

going to finish the job? Earlier, before that, did you -- had you requested the --

A. Well, sure. I mean, that's one of the reasons we brought Grady on board. You have to think about that. I was managing critical items to make sure that they did not impact the completion schedule of the project.

Balfour's schedules, I would get those, and my focus really wasn't on their means and methods. I was looking at the owner's countdown when they would -- you know, when Salamander was going to get involved and start --

Q. Who is Salamander?

A. Salamander is the operator.

Q. Okay.

A. I don't know if they're still the operator, but they were the operator. And I didn't spend time looking at a lot of activity relationships that had nothing to do with me.

Q. Right.

A. You know, the things that Balfour had to do with getting the job done, that was all on them, you know, their schedule. I was concerned with the end date being pushed out, and they would show schedules and show impacts like the

Hope's door, stair 4, or the ballroom doors pushing these dates out.

And that was one of the big advantages of having Grady on the project. I mean, because if something came up and I wasn't particularly focused on the detail of what the impact is, Grady was. So he was my backup.

And we he had a couple meetings in the Balfour Beatty office on Meeting Street to discuss those impacts. And as a consequence of that, I got the Hope's door approved to get pulled out of the mockup. I went to Mike Bennett, and I said, how much do you like this stair 4? He was like -- I said, well, you might have to just -- the wall covering like the GMP. And he goes, no. Stair 4 goes away.

I mean, those never impacted the ability of the project to open. I mean, you can say that they were aggravations, but at the end of the day, nobody was standing around twiddling their thumbs saying, gee, I wish stair 4 was done because we could open up this hotel. It didn't happen.

Q. At or about the time Grady got on board, what was your confidence level in the

contractor's ability to tell the owner when this hotel was going to be finished?

A. It was weak, and Mike was particularly uncomfortable with it.

Q. All right. And you used the term earlier -- I can't quite -- was it ramp up, or I think it had to do with having to hire people in preparation for --

A. Yes.

Q. -- the substantial completion date?

A. Well, that's what predicated all of this.

Q. Okay. Well, that's what I really -- what's so important about -- why would Mike care because of when they finished it as it related to other people that might be running the hotel?

A. Well, what Mike explained to me is, I have to hire 150 people. I don't want to do it twice. I don't want to pay these people to hang around if I can't put them to work. Simple, at the end of the day.

Q. And what about trying to hit the ground with the hotel and booking people when the hotel opens? Is there any work you have to do in advance or advertise or any of those things to

start booking weddings and all of that?

A. Well, I know for a fact that they had to cancel events because the hotel wasn't ready.

Q. Okay. So let's go -- we're going to go back and forth a little bit, and maybe we can stick with Grady a while. What was the purpose of hiring Grady? Why did you hire Grady?

A. Mike came to me and said, I'm not convinced they're going to be done. What should we do? And I said, we need to hire a third-party scheduler.

Q. Okay. And Balfour Beatty had a scheduler. Why not just go to him and ask him, what's going on?

A. Well, because they were scheduling and saying that they were going to get it done.

Q. And it wasn't happening?

A. It wasn't apparent, no. There was concern, and at least we wanted to validate them, not to -- you know, potentially they were right. And they knew, being a $4 billion company, they knew a hell of a lot more about completion than we did.

So Mike said, I need a scheduler. So I called Brian Black with Cummings in Columbia.

He's a friend. He actually tried to buy my company at one time. I'm supporting him with my healthcare relationships. And I tried to hire Cummings to come in and take a look at the hotel.

And initially, he said yes, but then he had to contact the other offices, and we found out that they had a relationship with Balfour Beatty in California. And he had to recuse himself, or whatever the right term is. I said, well, who do I call? And he gave me Grady's number.

Q. Okay. So you didn't know Grady before this?

A. No.

Q. And I think we've heard -- you were in the courtroom when Grady testified. Is his recollection of why he was hired and what he was told, was that --

A. Well, he was hired to validate the schedule. I mean, that's where it started, and then once we were suspicious of the completion status of the schedule, we retained him to continue to do what he calls audits.

And he was like a safety blanket for me to keep an eye on the Balfour Beatty schedules in

terms of the completion status.

Q. All right. And how was Grady's relationship with this job handled in terms of who he reported to and who he -- how it worked? How was that set up?

A. If I recall correctly, we hired Grady, but he worked for you.

Q. And there was discussion this morning that you did not provide his reports to --

A. No.

Q. -- Balfour Beatty, correct?

A. No, no, no.

Q. And that was done on the advice of counsel; is that correct?

A. Well, yes, and just commonsense. In one aspect, because we're not the scheduler on the project. I used -- we used those schedules to ask questions and to validate.

Q. What was your concern, if you actually provided all this stuff to Balfour Beatty and tell them, this is how you need to schedule a job and all of that, where would that have ended up?

A. Well --

Q. What was your concern about where -- what was your concern about where that would have

ended up?

A. I never interfere with the contractor's means and methods because I want no responsibility with that, end of story.

Q. Okay. But notwithstanding the reports themselves, based on my advice, it was not sent, based on legal advice to my client. It was not sent to Balfour Beatty. Was the information gleaned from Mr. Query, provided orally to Balfour Beatty to assist them?

A. Well, we sat -- I know of at least two times we sat in Balfour Beatty's office with David and Nick. I don't -- I think Lauricella might have been at one of the meetings because we were looking at the end dates and trying to pull items forward.

And they were working meetings. You know, what is driving this? What can we do? Just as he explained in his testimony, Query explained in his testimony.

Q. Did the information provided by Grady provide you, as the program manager, with the ability to assess or otherwise better understand what the contractor was presenting to you as its schedule and what was going to happen down the

line?

A. Yes, that's what I needed.

Q. And once you received this information from Mr. Query, what effect did it have on your confidence about the viability and accuracy of the schedules and the dates being provided by the general contractor to Library Associates?

A. Once I -- let me -- towards the end of the project, the dates that Balfour Beatty were offering were based on worst case scenarios.

You know, if we had to go order a Hope's door, if we could even get them to make one, that would take six months to do. The hotel would open up in, you know, July of 2019. Well, I wasn't going to stand for that. I mean, that's not a reality. Surely we could do something better than that.

Same thing with stair 4. You know, all I need is a handrail, and I need, you know, non-skid steps and whatever the lumen lighting requirement is, and I got a stair. It doesn't have to have marble on it or wallpaper on it or anything.

So I was using Grady to help me identify the activities that were driving the end date up.

And to Balfour's credit, they were showing them to me as well.

But collectively, we worked together to fix that. It's like the ballroom doors. I mean, the ballroom doors were a big deal, but they were never anything to stop the project because we resolved it. The same thing with stair 4. Same thing with the Hope's door.

Q. How did Balfour's or the lack -- your loss of trust or whatever you want to use in Balfour's ability to schedule this job, how did that affect your ability to determine what effects change orders and other things might have on this job?

MR. HILDEBRAND: Your Honor, I think that's a misstatement of his prior testimony.

MR. BUNDY: I will withdraw the question.

THE COURT: All right.

BY MR. BUNDY:

Q. So let's go back to -- well, let me ask you this: Was Grady's work product beneficial to you?

A. Yes.

amended. If you would, read into the record 3.11 entitled documents and samples at the site.

A. The contractor shall maintain at the site for the owner one copy of the drawing specifications, addendum, change orders, and other modifications that had been ordered and marked currently to indicate field changes and selections made during construction. And then one copy of approved shop drawings, product data, samples, and similar required submittals.

These shall be available to the architect and shall be delivered to the architect for submittal to the owner upon completion of the work as a record of the work as constructed.

Q. All right. I just wanted to bring that to the Court's attention. Now, what I would like to do, Mr. Clements, is talk a minute about the -- what's referred to as the Egnyte site.

Tell the Court, if you will, what the document handling protocol that was used on this job; in other words, when you had these meetings and you had CCDs and all these documents, I mean, a good bit of paper was generated, right?

A. Tremendous.

Q. Okay. And in this 21st Century, all

that gets digitized in one fashion, form, or another, correct?

A. Yes, sir.

Q. And what services or software, Cloud services did Balfour Beatty provide for use by the project team in order to keep up with all of these documents?

A. Well, Balfour Beatty had a system called Egnyte.

Q. Can you spell that for me?

A. E-G-N-Y-T-E, I think it was.

Q. Okay. And is that a software thing?

A. Cloud-based software.

Q. Cloud-based software?

A. Yeah. It's like -- I think it functions similar to Procore, which is probably what you hear more often with contractors. So in the very beginning of the project, you have to decide who is going to hold the contract documents, meaning change orders.

Q. Yeah. Where is the repository going to be?

A. And the reason you do this is that, you don't want two or -- two or three different captions of documents out there. You want to

have one that is absolutely current as is stated in this document.

Q. And do you want to make sure everyone involved has access to those documents?

A. Certainly on the project team, yes.

Q. And why would you want to make sure that the owner and the contractor and the architect all had access to the same group of documents?

A. Well, for instance, if there was a change order that we were looking at, we wanted to make sure we had the most recent change because the change orders get revisioned.

Or certainly if there was a -- you could have a modification, which was a major issue on the drawing that is impacted subsequently by a bulletin. You want to make sure that you have the latest information.

Even for Balfour Beatty's own protection, if they submit a change order, they would qualify it based on, you know, mod 5 dated such and such. And if we would review the change order with the architect initially, as I would do, he'd say, well, this was subsequently modified by bulletin X.

Q. So as the construction manager, was one

of the duties of the construction manager, in addition to scheduling the job and carefully spending the owner's money, to manage the documents created?

A. Yes.

Q. All right. And is document management important on a $60 million hotel job?

A. On any job.

Q. And what entity determined how those documents would be identified for purposes of revisions or anything else as it related to this project in this repository referred to as the Egnyte site?

A. I'm not sure I understand the question, but Balfour Beatty would record and upload all the documentation including documentation that was superceded. I mean, it was really a very, very comprehensive repository of information.

Q. And does the Egnyte site contain the historical record of the job?

A. Absolutely.

Q. So that if it's necessary to check the history of a particular change order event, you can go back to day one and presumably track it all the way through, if properly kept?

A. Yeah. They did a very good job with that.

Q. Okay. And the Egnyte site was available during the project, was it not, to you?

A. Oh, yes, yes. We had logins.

Q. Did you make use of it? Did y'all use the Egnyte site?

A. Regularly. Well, because -- as a consequence of that, I didn't even keep paper copies of things, and I kept very little physical copies of things because I had this Bible that we worked on.

Q. And did it also allow you in this modern age, to work from home and work on a computer or a handheld computer anywhere you wanted to because you could get those documents from anywhere?

A. Correct.

Q. And you could come to Charleston, and you wouldn't have to put three pieces of paper in a briefcase, and you can talk about 1,000 documents?

A. Yes.

Q. And everyone made regular use of this tool, right?

A. Yes.

Q. And much like the schedule, it was an important tool?

A. Very.

Q. Okay. Now, when did the Egnyte site first become available for your use?

A. As far as I recall, the very beginning of the project. The first thing you upload is the GMP documents.

Q. And would y'all, in these meetings, put the Egnyte site up on the computer and look at it together, or are all of you on the same computer, looking at the same document? Did you send each other documents off the Egnyte site? How did y'all go about actually using it?

A. It was for reference.

Q. Reference.

A. I mean, we would pull documents from it or an e-mail may reference a document in the Egnyte site.

Q. So if somebody couldn't remember what happened eight months ago, you could go back and at least see what the records say?

A. I mean, something as simple as what day did Kim Brown sign this change order. There

would be a copy of the executed change order --

Q. Or as simple --

A. -- or a CCD.

Q. Or as simple as what color drapes did we decide to put in room 302?

A. Yeah, that should be there, yes, sir.

Q. Okay. And the other use of it, of course, is once you start to use the hotel, going forward, you've got a way to run the hotel. You've got an operator's manual basically, right? Because wouldn't the operator's manuals be in there as well?

A. Submittals would be included in that. So to the extent closed out documents were submittals, they would be reflected there. But obviously the owner would take those in hand, either in hard copy or digital form for its own repository.

Q. But let's just go to the submittals. When somebody sends a submittal, it has the manufacturer's information, right?

A. Yes, sir.

Q. With part numbers and all the rest of it, right?

A. Yes.

Q. So here we are four years later. If the building engineer wants to know what the part number is for something that's broken, he can go back to these records and he can find it presumably?

A. If it was still up.

Q. If it was still up?

A. Right.

Q. Okay. So during what period of time was the owner of this building -- well, let me stop you there. Whose documents are these?

A. The owner's.

Q. So the owner's documents are being -- just like the owner -- the contractor is spending the owner's money, and he's also holding the owner's documents? The contractor doesn't own these documents, does he?

A. Not in my opinion.

Q. The owner is the one paying for these documents. So during what period of time did the owner have access to his documents which were controlled by Balfour Beatty?

A. Throughout the project until towards the end of the project.

Q. All right.

A. Post-occupancy, I think, is right around the first of the year.

Q. Is it your testimony that Balfour Beatty denied access to the owner of the owner's documents existing on the Egnyte site?

A. Well, they shut it down, so we did not have access.

Q. And when was that?

A. I believe it was the first of the year, to be honest with you.

Q. And did you complain about that to the architect?

A. No. I complained to Balfour Beatty.

Q. Oh, you complained to Balfour Beatty. And to who -- who at Balfour Beatty did you complain to?

A. I know specifically with David Simonton, but I presume also with Nick Starcevic because I thought perhaps it might a computer glitch or something.

Q. Computer glitch?

A. Right.

Q. And what were you told when you -- did you ask for access to your client's documents?

A. Yes.

MR. HILDEBRAND: Objection, Your Honor.

Q. And what were you told?

A. I didn't get an answer.

MR. HILDEBRAND: Objection, Your Honor. I don't see the relevancy of any of this.

MR. BUNDY: Pardon me?

THE COURT: I do. Overruled. It's relevant.

BY MR. BUNDY:

Q. What were you told by Balfour Beatty's project manager or whatever Mr. Simonton's title was at the time, when you asked him for access to your client's, the owner's, documents on his hotel?

A. Well, I didn't receive a response initially, but eventually, I did get a response from David that said, tell me which ones you want.

Q. Tell me which ones you want. So you were given limited access maybe?

A. At best.

Q. Had you ever agreed to limited access?

A. No.

Q. Are there some documents in there that

are owned by Balfour -- that are owned Mike Bennett and others that aren't?

A. Say that again.

Q. Are there some documents in Egnyte that are owned by Balfour Beatty but not owned by Michael Bennett as part of his project, or is he entitled to all of it?

A. I don't know because there could be, you know, levels within Egnyte that I wouldn't have access to.

Q. All right. Did the lack of access to the Egnyte site hinder you in any way in trying to determine the viability of change orders, claims, and particularly the claim that was made in this four volume set of books?

A. Yes.

Q. Okay.

A. Once we got the hotel open, I had anticipated trying to reconcile change orders, and that was the primary reason I was trying to access the Egnyte site. At the time I was trying to do just a consolidated claim draft or whatever it was. It wasn't even on the table.

Q. This is before it went from 20 days and a couple hundred thousand dollars to 24 million

dollars?

A. Yes, sir.

Q. During that period of time?

A. Yes, sir.

Q. So during -- so prior to this 24 million dollar claim, you were not allowed access to the Egnyte site?

A. Just prior, yes, sir.

Q. And were you ever given access afterwards?

A. No. I was offered documents on a limited basis, but I did not pursue that because I wanted all of them.

Q. Okay. Could you have used those documents --

A. Absolutely.

Q. -- had you been able to --

A. Absolutely.

Q. -- look at them?

A. Well, I had every intention of at least going through every outstanding change order with the design team, certifying them for entitlement, at least getting them to a point where we knew what the exposure was, for lack of a better word, the total cost -- the cost.

Q. And since you had not kept hard copies -- why hadn't you kept hard copies all along?

A. Well, I had some, but, you know, it just takes up too much space. You know, I don't carry hard copies of anything.

Q. Were you ever advised by Balfour Beatty, when this job is over, we're cutting off all these documents. You're not getting to them, so you better keep hard copies?

A. No.

Q. Did you anticipate they would do that?

A. I've never had it happen in my career.

Q. All right. So it's never happened in your career?

A. No.

Q. Okay. And you believe you were hindered by your -- the unavailability of your client's documents in order to adequately respond to their claims and to look at change orders?

A. Correct.

Q. And as we sit here today, you still haven't had access?

A. No.

Q. Okay. All right. I'm just about done.

The four binders -- while he is looking for that, let me ask you this: The claim that you thought you were going to get before you got the 22 or 24 billion dollar claim was the claim on the sixth floor?

A. Yes, sir.

Q. And what was your understanding about the nature and amount of that claim that you were going to receive, if any?

A. That I was going to receive?

Q. Yeah, or the owner was going to -- you expected a claim from the contractor on the sixth floor; is that correct?

A. We received a claim.

Q. Okay. Tell me about that claim.

A. Well, the -- it was delivered to the architect with the qualifier that he was supposed to respond in 20 days. He did. I don't recall him even asking for additional information, but he did respond.

And to paraphrase Buck, he felt that the owner was liable as well as the contractor, who split the (inaudible). And subsequent to that, we actually scheduled -- I will call it a mediation or something at your office to go ahead

and settle it.

Q. Right.

A. You know, it was your -- your rule to me was, we settle every claim as soon as we get it. Don't let them add up. And so --

Q. And I think I told you that the day we started talking to each other, right?

A. Yes.

Q. A few years earlier?

A. Yes, that was the rule. And so we met at your office, and the night before, I think, or if not that day, Balfour Beatty added the seventh and ninth floor to try to bundle it all up. But those claims were not properly documented as evidence of Buck's response, that he needed additional information and --

Q. So that mediation was unsuccessful?

A. It was a total waste of time.

Q. And then the next claim that came was this 22 million dollar claim?

A. Yeah. In fact, in January of 2018, David Simonton sent Kim a letter revising the sixth, seventh, and ninth floor claims to $1,023,000, and as I recall, attached some Sunbelt Rental receipts or something to them.

Q. So in January, the claim was a million or so?
A. 1 million 23, I think.
Q. And that was the only claim you were aware of?
A. That was the only one I was ever aware of.
Q. Only one -- was that one submitted to the architect?
A. No. That went to Kim.
Q. Okay. And who were claims supposed to go to first?
A. The architect.
Q. Okay. So the only claim that was actually filed in this case, ruled over by the architect, and paid was the one about the hurricane, right?
A. No, about the sixth floor.
Q. Okay. All right. So --
A. To my memory. I don't remember any other.
Q. So let's look at -- do you remember receiving or seeing Exhibit 252, which for the record is a January 25, 2019 letter? And I believe it's sent to you.

A. Uh-huh, yes, I remember seeing this. What's the date? January, yes. That's January 25th.

Q. 2019?

A. Yeah. I remember this because I think Balfour Beatty filed an 8 million dollar lien the next day.

MR. BUNDY: Okay. Do you want to wait to get that letter, Judge?

THE COURT: I got it.

BY MR. BUNDY:

Q. So this is a claim, right, or it's a letter --

A. It's a letter.

Q. -- demanding money?

A. It's a letter.

Q. Okay. And it demands.

A. Well, it's an offer -- I interpreted it as an offer of negotiation.

Q. Okay. And basically, what does Balfour Beatty want you to -- what check do they want you to stroke based on a four-page letter?

A. $22,452,282.51.

Q. Which exceeded the claim that you were aware of by some 21 million dollars?

A. Yes, sir.

Q. Okay. And how many days did they want? Did they take -- did they take any responsibility for a single day of the 18 months of delay?

A. I never saw any record or offer of that.

Q. Okay. All right. Now, under the contract documents, are they supposed to send claims to you, or are they supposed to send them to the architect?

A. To the architect.

Q. All right. Do you see -- was the architect copied?

A. Yes.

Q. Okay. Was the architect asked to respond?

A. The architect responded on his own, as I recall.

Q. Okay. Now, the subs -- refresh your recollection, if you need to, about the contents of the letter, and tell if you would have been able, in good faith, to recommend to Mike Bennett he stroke these people a check for 22 million dollars?

A. No, I would not have.

Q. How does this claim letter compare to

what you're typically used to in your field when contractors make claims?

A. Well, again, I don't think it's a claim. It's some kind of a statement.

Q. Okay.

A. I'd call it almost a demand letter. I want 22 million dollars.

Q. Okay.

A. And you want -- and I would like to, I guess, negotiate.

Q. Sort of like, give me all your money, right?

A. Yeah.

MR. HILDEBRAND: Objection, Your Honor.

BY MR. BUNDY:

Q. Empty the cash drawer. All right. So then the architect gets this, and what does he do?

A. He asks for time and for backup.

Q. Do you think that was a reasonable request on a 22 million dollar claim based on a four-page letter?

A. And for the owner, too.

Q. Sure.

A. I think we asked for a month with the digital backup, if I recall.

Q. Okay. So eventually, you received -- somebody received -- Buck received, I guess, a four-volume treatise, right? What we got is this four-volume treatise, Defendants 11, 12, 13, and 14.

And the first two pages is the cover letter to Mr. Lindsay. Do you see that?

A. Yes, sir.

Q. And what's the date of that?

A. March 6th, 2019?

Q. So roughly 60 days have transpired since the letter demanding 22 million bucks?

A. Less than that.

Q. All right. And did you look at these claims? Did you look at this -- these documents?

A. I did when it was -- when I received a copy of it, I did.

Q. When did you receive a copy?

A. About the same time that it was issued.

Q. Okay.

A. I did not go through all 2,000 pages or whatever it is.

Q. Did Lindsay go through it?

A. I can't answer that question.

Q. Did he issue any rulings on or any opinions on the validity or viability of the claim?

A. I don't recall.

Q. Okay. Was that a requirement to proceed to the next step? The first thing you've got to do is ask the architect and see what he says, right?

A. Yes, sir.

Q. And do you understand that, before you file a lawsuit, you've got to get a decision from the architect?

MR. HILDEBRAND: Objection, Your Honor.

A. I didn't know that.

Q. Fair enough. He don't know.

A. I don't know that.

Q. So, you know, your review of this claim -- what is your opinion of the viability of this claim as presented in this document? What could this document inform you of that would give you any reasonable grounds to pay Balfour Beatty a single dime or give them one single day of time extension?

MR. HILDEBRAND: It's a leading question, Your Honor. If he can just ask him his -- have you read it? And what his responses were, what his takes were. Obviously, it's a very leading question. He can ask what he did to resolve and what his recommendations were.

THE BUNDY: I believe that question --

(Attorneys talking over each other.)

MR. HILDEBRAND: -- without Mr. Bundy testifying.

MR. BUNDY: I believe I prefaced my question with what, which I believe makes it, by definition, a non-leading question.

THE COURT: Okay. I'm going to overrule that. Go ahead.

MR. BUNDY: Thank you, Your Honor.

BY MR. BUNDY:

Q. What in this claim -- what information in this claim, based upon your recollection and review of it, would lead you to believe that the contractor was entitled to one dime or one day of time extension based on the information contained in this claim?

A. Well, I mean, just taking the letter itself and tab 5 and volume 1, there's support for contract balance and retention, which consists of pay applications 43, 44, and 45.

The contractor liened the project before he completed work to start it all and the subcontractors named in this liened the project before they completed the work. And maybe that's their right to do. I don't know, but the owner, and certainly the lender, is not going to make payments when there are outstanding liens.

And this was the case for pay apps 43 and 44. And 44 was further encumbered because upon receipt -- I think it was mid December. By the end of December, Jennifer had written to Nick Starcevic and said, these numbers don't work. You know, I need some help.

Subsequent to that, in January, of course, is when we found out we're spending a million and a half dollars to complete the guest rooms. And I had petitioned the architect, based on our exposure, that we had a right to protect the owner's interest with offset.

And so Jennifer told Nick Starcevic that she could not reduce retention, and that was in

January. And then we got this, I think, on the 25th. We got one. This is the first thing on the 25th, and we got the Balfour Beatty 8 million dollar lien, I think, the next day. And sprinkled in there are liens from P Walls and MCC, Old North State. I mean, it was a cluster.

And to top that off, after all that happened, Balfour Beatty submitted pay application 45 with all of that still sitting on the table.

Q. And what was -- and Balfour Beatty's 45 only asked for, what, 2 million bucks?

A. I don't recall what it was. I mean, given the circumstances that were on the table, it just didn't --

Q. Well, that letter talks about 43, 44, and 45 as the pay application. We don't pay applications if they haven't been signed by the architect, do we? We're not obligated, right?

A. No, but Jennifer signed 43.

Q. But she rescinded it thereafter?

A. Subsequently rescinded it, yes. I asked her to certify -- to renew and certify 44, thinking that Balfour Beatty was -- at the time there was only one lien by Guy M. Beaty, and this

was in -- that occurred December 1st. And I figured, well, shoot, they'll have this bonded off in two weeks.

Q. And how big was that lien?

A. I don't know. I don't recall. I think it was a million bucks in round numbers.

Q. Okay.

A. But that lien was not released until the second week in January. I don't know why it took from --

Q. And whose obligation is it to bond off liens to subcontractors?

A. The contractor.

Q. Okay. So after the -- it's obvious we didn't pay the demand in the claim in front of you and around you. What happens after that in terms of your work on this job?

A. Well, I think my work stopped between the shut down of Egnyte and not being able to at least go through and validate change orders that I had on hand, which I wanted -- I didn't want to be -- I wanted to try and reconcile things as best I could.

And then this occurred, and this is nothing that I could do anything with, given the

enormity of it and the subsequent liens and then lawsuit in February, I think. It was a legal matter. And I was available to -- for support. And that basically ended my involvement in the project until further discovery requests and I became involved in this.

Q. All right. So were you or were you not involved in Library Associates' attempt to try to audit the books and try to get to the cost -- the actual cost on this job? Were you involved in that process?

A. No.

MR. BUNDY: I believe that's enough for me, Judge. Thank you.

THE COURT: Okay. It is 4:37, and I suspect you're going to take a little longer than 20 minutes to cross-examine Mr. Clements.

MR. HILDEBRAND: I will, and I think I can probably make it a little more efficient if I just have a little time with my documents, based on what he says. I think if we start in the morning, it will be quicker actually.

THE COURT: Very good. Sure. Gentlemen, do y'all want to cross-examine as

CERTIFICATE OF REPORTER
STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

I, Jennifer M. Adams, Certified Shorthand Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the witness whose attached in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and location therein stated; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing is a full, complete and true record of the testimony of the witness and of all objections made at the time of the examination; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself/herself of the opportunity to sign or the signature has been waived.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal on September 25, 2022 at Charleston, Charleston County, South Carolina

_____
Jennifer M. Adams
Court Reporter And Notary Public
My commission expires: 03/15/2032

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

BALFOUR BEATTY CONSTRUCTION, LLC, Plaintiff, -versus- LIBRARY ASSOCIATES, LLC; AND METROPOLITAN LIFE INSURANCE COMPANY, A NEW YORK CORPORATION Defendants.	VOLUME FOURTEEN Case No. 2019-CP-10-1108
LIBRARY ASSOCIATES, INC., Defendant/Third-Party Plaintiff, -versus- LITHKO CONTRACTING, LLC; GUY M. BEATY, INC.; BERNHARD MMC, LLC GULF STREAM CONSTRUCTION CO., INC; Precision Walls, INC.; PALMETTO AUTOMATIC SPRINKLER COMPANY, INC.; ET AL, Third-Party Defendants.	

Hearing before the Honorable Mikell R. Scarborough, reported by Jennifer M. Huggins, Court Reporter and Notary Public, at 9:30 a.m. on October 28, 2021 at 100 Broad Street, Courtroom 2A, Charleston, South Carolina.

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Q. The question was simply --
A. I can't remember it. I'm not messing with you.
Q. Right. The simple issue -- the simple fact that I was trying to over -- get across was that the issue was not that Mr. Bennett could not make changes because he certainly can.
A. Right.
Q. But if he wants to make changes, he needs to be prepared to recognize the consequences that those changes are -- when they impact the cost and time. Agreed?
A. Yeah. It's not universal because not all changes impact cost and time, but some may.
Q. Right. Would you agree with me that the best -- would you agree with me that it's certainly inarguable that there were -- after the GMP was signed on this project, that a lot of changes were made by Mr. Bennett? His vision continued to develop as this project was ongoing?
A. I would say, no, and I will tell you why. Because if you go back and go through the history of the change order log, you will find very few changes are directed by Mr. Bennett. The bulk of the changes are driven by design

conflicts from -- that we discovered through the BIM process.

That's one thing I have a lot of empathy for Mr. Bennett on in this project is he didn't sit there and just start changing things, you know? It was the design that was the most challenging aspect of the project, given the limitations of the height and the strengths of the floor-to-floor. And that's the bottom line.

But to say Mr. Bennett made a bunch changes would be a falsehood.

Q. Okay. Well, I appreciate that. So the design issues were the biggest issue, but it's inarguable that Mr. Bennett did make -- for example, after the GMP was signed, he decided to change the rooms from -- half the rooms from just regular rooms to suites. That was one major change, wasn't it?

A. No, that's not true. The top three floors -- we took two rooms out of each floor and combined them. So, say, half the rooms, you would be talking about 90 rooms. In this case, we're talking about taking 18 or maybe 12 out of them.

Q. How about removing the columns in the

ballroom? Do you think that was --

A. That was a non-event. It imposed no constraint, no conflict of Balfour Beatty. They submitted a change order. They didn't want any time. There's less work for them at the end of the day. There was no claims made, no calls for time. It turned out that it was absolutely a fabulous thing for the project.

Q. Well, I understand that the --

A. But there was no impact to the project at the time, no.

Q. Okay. Well, in a nutshell, can you -- what would be the reason that the contract went up? The GMP went up from -- the project was 60 million to 65 million dollars?

A. Well, I think we just talked about that. I think it was -- predominantly there were design conflicts in the design that were found out during the BIM process.

And there were some changes by Mr. Bennett. You know, for instance, the consolidation of the rooms on the upper floors. But there were -- I'm talking from memory. There were not abundant structural changes. They were primarily aesthetic changes, if I recall

correctly.

Q. Okay. Let's talk about the RFP and the responses that were addressed yesterday. Do you have Defendant's Exhibit 103 in front of you?

A. Oh, the RFP? My RFP?

Q. Yes, sir.

A. Yes, sir.

Q. Okay. So this is the -- when this job was -- when the RFP went out to Balfour and others, and when they were having their discussions with the owner, this is the basis for what their -- what they were to provide bids for or to provide their presentations for; is that correct?

A. Collectively, yes.

Q. Okay. And on the -- can you turn to the third page of this with me, please, sir? All right. Under number C, the anticipated start date for the new construction is 1 March, 2014, correct?

A. I'm sorry, under C?

Q. Yeah, on the third page.

A. Yes, thank you.

Q. All right. So the anticipated start date is 1 March, 2014, and below that, the --

under key dates are as follows: The interview -- the last one there is, interview and award is November 22, 2013, right?

A. Uh-huh. Yes, sir.

Q. So the start date, the anticipated start date, according to the RFP, and that's what the -- the anticipated start date was March 2014, but the actual start, when the notice to proceed, was March 2015, correct?

A. Yes, sir.

Q. So it was a year later than what was shown on here?

A. Yes, sir.

Q. There was a lot of discussion yesterday, Mr. Clements, about the project team that was proposed by Balfour and -- are you familiar with a mechanism whereby if an owner wants to -- if a particular person is really important to an owner and a particular team is important to an owner, then an owner can say, look, I want to include in my contract these particular team members, and I'm willing to pay whatever price is necessary to make sure that they work on the project.

Are you familiar with that?

A. No. What I'm familiar with is writing

into the contract certain individual's names, not to be replaced without owner's permission, not to be unreasonably withheld. I never had a client pay a premium for it.

Q. Okay. Well, are you familiar with a -- if the start date of a project is unknown and it's anticipated that it could be some indefinite point in the future, that -- what's called a bench agreement, where those persons, if they're going to be sitting around waiting for the project to start, that an owner would need to pay some amount to have them available because they wouldn't be available to work on other projects?

MR. BUNDY: Objection.

A. No, not that I'm aware of.

MR. BUNDY: I will withdraw the objection.

BY MR. HILDEBRAND:

Q. There was some discussion about that Balfour had done the Ritz-Carlton in Charlotte, and there was some discussion about that during our review process. Do you remember that yesterday?

A. Yes, sir.

Q. Was Mike Baumbach involved with the

Ritz-Carlton? Do you know?

A. Mike Baumbach -- I don't know for sure. I can't answer that, honestly. I don't think he was working for Balfour Beatty at the time, but I'm not -- sorry. Let me back up.

I thought the Ritz-Carlton might have been -- was a joint venture between Balfour Beatty and RT Dooley, and I think -- I thought that relationship blossomed under that. Actually, I withdraw that. I can't answer that question.

Q. Fair enough. So the start date of the project, as referenced in the RFP, was March of 2014, but the actual start date was about a year later. And is it true that the primary driver of that delayed start was the continued development of the design?

A. No. The design went quite quickly, to be honest with you. It was going back and forth in terms of the value engineering analysis, of options in terms of trying to not just -- well, I take it back.

The value engineering process drove a lot of the design. For instance, yesterday in my testimony, I referenced the louvered doors

between the bathroom and the bedroom. For instance, that was a topic of a conversation, and Balfour Beatty provided the cost of that. And Mike had the option to leave it in or take it out.

So there was a lot of massaging going on to refine the design to meet Mr. Bennett's expectations, as well as to drive to the final costs.

Q. Okay. All right. Well, there was some discussion yesterday about the project meeting minutes that you had developed -- there was a good bit of talk about that and how they were developed, and they were -- I think he said, maybe weekly or so, and there was an agenda.

And then that was a time, you would agree, that if anybody had a complaint or a comment or anything, any issue that they wanted to get out on the table, that was probably the best time to do it?

A. Yes, sir.

Q. Is that a fair statement?

A. Yes, sir.

Q. All right. Are you aware of any comments in any of the meeting minutes or

owner is saying was not done appropriately, so the Judge can look at those and say, yeah, I can see where that's not appropriate?

A. I don't have anything with me, no.

Q. Do any such documents exist, to your knowledge?

A. There were photographs taken -- considerable photographs taken by CPI, as well as Robins & Morton. But it should be discoverable somewhere around here.

Q. So would you agree with me that the standard for the rooms was that they were not going to be punched or that there would not be deficiencies that were -- there was only deficiencies that were observable from a 5 foot distance or greater was the standard to which the rooms were to be punched, correct?

A. Except in the bathrooms.

Q. Right. And that's because the bathrooms are so small that sometimes you can't even get 5 feet away?

A. And the lighting is so bright.

Q. Gotcha. So no flashlights, nothing within 5 feet. If that standard was not acceptable to the owner, in your view, should the

owner and the architect have approved it?

MR. BUNDY: Objection.

THE COURT: Overruled. Go ahead.

THE WITNESS: Ask the question again.

BY MR. HILDEBRAND:

Q. If that punch standard, not less than 5 feet and no flashlights used, if that was not acceptable and if that level of quality was not acceptable to the owner and the architect, they shouldn't have approved it, should they?

A. I agree.

Q. And if the level of the painting -- if the owner wants to get up within a foot or if they want a higher level of quality than is shown in the agreement, not less than 5 feet and no flashlights -- if they decide that they want something higher, then that would be a change that the owner would be responsible for. Agreed?

A. Yes.

Q. Do you know when the painting was finished on these rooms?

A. No, not specifically.

Q. If --

A. From what I understand --

to be on board prior to opening, some period prior to that. Now, your -- specifically with regard to a hotel operator, I really can't offer an opinion on that. This was the first hotel I had ever managed as a program manager.

Office buildings, hospital work, you know, things like that, it's advantageous to have the building manager on board. For instance, Ryan Quinlan, to have him involved towards the end of the project, the last six months of the project or year, it's very advantageous.

Q. All right. Prior to this job, what was the highest dollar job that -- project that you had worked on where you were working not for another company in terms of a million dollar project earlier in your career, but as matrix management? What was the highest dollar project that you've worked on prior to this one? Do you recall?

A. St. Francis Cancer Center was 50 million dollars. I have a 55 million dollar project right now.

Q. Prior to this one?

A. Oh, prior to this?

Q. Yes.

A. It was the St. Francis Cancer Center, that actually went forward.

Q. There was some discussion about the damage that occurred --

A. I take that back. That's not true. I managed some healthcare work for St. Francis in Richmond. I did a 60 million dollar vertical expansion of a med-surg tower in Richmond.

Q. Prior to this?

A. Yes.

Q. All right. So there were a couple of projects from around 50 to maybe 60 million. Two that were, prior to this project --

A. Yes, sir.

Q. -- that were comparable to this?

A. Yes, sir.

Q. Okay. There was some discussion about the major rains that occurred during a hurricane when the project had yet to come out of the hole. Do you remember that?

A. Yes, sir.

Q. And you said that the site had become flooded and had damaged some of the earth wedges?

A. Yes, sir.

Q. All right. Do you know who -- do you

more than that, to be honest.

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

A. Yes, sir.

Q. And an L4 finish was specified, correct?

A. Yes, sir.

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

A. The drywall finish?

Q. Yes, sir.

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

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

A. When they skimmed the walls?

Q. Yes, sir.

A. I never saw that.

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

A. No.

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

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

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

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

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

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

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

A. No.

was, did he review his deposition.

THE COURT: All right.

THE WITNESS: I did not review my deposition.

BY MR. HILDEBRAND:

Q. Let me ask you this: Do you recall getting delay notices from Balfour Beatty throughout this project?

A. I got e-mails titled, delay or notice of delay. Yes, I do remember those.

Q. All right. And there's no question in your mind that Balfour -- maybe you didn't consider that they made an appropriate claim or whatever, but there's no question in your mind that Balfour was putting the owner on notice that it was being delayed on this project on many occasions and for many different things. Do you understand?

A. I interpreted that as an opportunity for the owner to mitigate the issue of the e-mail. For instance, if something was going to be late and Nick Starcevic sent me an e-mail that said, notice of delay, it was a heads up that this is going to be a problem, and then we would work on it and knock it out. None of those ever

developed into full claims.

Q. Well, would you agree with me that, even if Balfour was not following the contract to the T, that they were intending, from your perspective, to provide delay notifications?

MR. BUNDY: Objection.

THE COURT: I will sustain that.

BY MR. HILDEBRAND:

Q. All right. Let's talk about the -- from your -- prior to a notice from the architect in February of 2019, where the architect was saying that the owner had a claim for liquidated damages, are you aware of any notice prior to that from the owner that it was going to or intended to assert liquidated damages against Balfour or --

MR. BUNDY: Objection.

THE COURT: Speculation?

MR. BUNDY: The best evidence of what that e-mail says is the e-mail. The e-mail does not say the architect -- from the architect that we were asserting a claim. A liquidated damage is not a claim, so we didn't assert it as a claim. It is a reality.

THE COURT: Okay.

MR. BUNDY: We don't make claims for liquidated damages, and the architect didn't say that.

THE COURT: All right. Do you want to restate the question?

MR. HILDEBRAND: Well, let's turn to that document.

THE COURT: Okay.

MR. BUNDY: And just let me finish my thing. And the contract does not refer to liquidated damages.

BY MR. HILDEBRAND:

Q. This is 254.

THE COURT: What numbers? I'm sorry.

MR. HILDEBRAND: This is 254.

BY MR. HILDEBRAND:

Q. All right. Exhibit 254. Do you recognize -- this an e-mail from Buck Lindsay to David Simonton, February 11, 2019. You're copied, Kim Brown is copied, and it's titled, contract closeout. Do you see that?

A. Yes, sir.

Q. Do you recognize this document?

A. Yes, I do.

in coming. Like, for instance, the MOD 5 for the RCO 103, the mechanical change, that pricing wasn't received until after the work was well in advance, if that's what you mean.

Q. Now, you talked a little bit about the schedule of the work. Let's talk about that for a just little bit. The construction schedule is a tool that's used to help coordinate the work on the project, right?

A. Yes, sir.

Q. All right. And like we talked about earlier, a subcontractor would use that schedule as a tool to coordinate his labor and material on the project, right?

A. Absolutely.

Q. Okay. And at some point during the project, it came to your attention that, at least your belief was, through Grady Query, that the Balfour Beatty schedule was wrong, right?

A. It had some fallacies in it, yes, sir.

Q. Okay. And you never told any of the subcontractors that Balfour Beatty's schedule was wrong, did you?

A. No.

MR. TERRY: That's all the

questions I have.

REDIRECT EXAMINATION

BY MR. BUNDY:

Q. The contract specifically prohibits the owner from talking to the subcontractor, correct?

A. I don't know if it's true, but that's just a golden rule, you don't talk to the subs.

Q. Well, isn't it the case, the owner -- the contractor complained to the owner and the architect about the owner talking to the subcontractors? Do you remember that?

A. When you say -- talking to them in conversation?

Q. Yeah.

A. I mean, we talked, but in terms of directly giving them authorization outside of the general contractor, that didn't happen.

Q. Okay. Let's talk about Mr. Baumbach and whatever this paying people in advance to hang around for a job. I think you said you weren't familiar with that process?

A. The bench?

Q. Yeah, the bench.

A. No, I never heard of it before.

Q. Even if you had benched Mr. Baumbach, he

was still fired, right? So when -- and he started the job, he was just fired?

A. Yes, sir.

Q. Okay. So there was no -- is there any way for an owner to prevent a contractor from firing his employees?

A. Not that I'm aware of.

Q. Okay. So the decision not to have Baumbach was purely Balfour Beatty's?

A. Yes, sir.

Q. Okay. Let me ask you this: If a contractor did not think that the liquidated damage clause was going to be enforced, then why would they make a delay claim?

MR. HILDEBRAND: Objection, Your Honor. It calls for speculation.

MR. BUNDY: I'll withdraw it.

BY MR. BUNDY:

Q. What would be the contracture -- in your experience, as a program manager, if the contractor didn't think the liquidated damage clause was going to be enforced by the owner, what would be the reason or rationale for even making a delay claim?

MR. HILDEBRAND: Same objection,

Your Honor. It's speculation and Mr. Bennett --

THE COURT: I'm going to sustain the objection unless you want to lay a little more foundation. Go ahead.

BY MR. BUNDY:

Q. This contract has very specific requirements related to change orders, does it not, and time extensions, correct?

A. Yes, sir.

Q. Okay. And in fact -- if I can find the contract. Give me one second here. Paragraph 8.3.4 of the general conditions, AIA 201-2007 edition, page 32, documents in evidence. If you would, read for the record, 8.3.4.

A. All requests for time extensions to the contract shall be --

Q. Hang on one second. Let's let the Judge get there.

THE COURT: Page 30?

MR. BUNDY: Page 32.

THE WITNESS: 32. It's 8.3.4.

MR. HILDEBRAND: Your Honor, there were no questions, to my recollection, to this witness about time extensions for Balfour's claims. The questions were related to the

contractor was experiencing delays, and that we were seeking damages for delays.

The claim provisions are something you will have to determine under South Carolina Law, but the question -- that's not the question. The question is, would this witness -- did I -- the simple question is, did I ask him anything about Balfour's claims and the provisions that relate to claims.

And Mr. Bennett has cross-examined our witnesses already on that. There's no questions about that. The only questions to him were, on the liquidated damages, did the owner give any notice until January of 2019. That was it. So his -- I think his questions need to be directed to that, not to these other issues.

THE COURT: All right. He's going to go into the contract. I'm going allow him to do that. Objection overruled.

MR. BUNDY: Thank you.

BY MR. BUNDY:

Q. Slowly, would you please read what's in this contract related to that paragraph.

A. All requests for time extensions to the contract shall be issued in writing by the

contractor to the architect within 20 days -- within 20 calendar days, other than which caused the delay.

This requirement shall be strictly enforced. Written notice is a condition precedent to entitlement to any time extension, and all parties agree to that the owner will be prejudiced by the lack of a timely written notice of a request for time extensions.

All requests for time extensions to the contract received by the architect from the contractor after 20 calendar days of any event which caused a delay shall not be recognized. The contract time shall include due allowance for days expected to be lost due to precipitation.

All days lost due to precipitation shall be documented and verified by the contractor at the project progress meetings. Acceptable sources for documentation of days lost due to precipitation shall include the National Oceanic Atmospheric Administration, the National Weather Service, the US Army Corps of Engineers, the National Climate Data Center, and any other source chosen to be recognized by the architect for the purpose of this contractor.

If the contractor agrees that it may expect to lose working days due to precipitation in accordance to the following table.

Q. Okay. Now, if you would read 8.3.5.

A. Are you there?

Q. 8.3.5.

A. Neither the owner, nor the architect will be obligated or liable to contractor for, and contractor hereby expressly waives claims against the owner and architect on account of damages, costs, expenses, or related impacts that the contractor, its subcontractors, sub-subcontractors, suppliers, or other persons may incur as a result of a class 2 cause enumerated in section 8.3.2.

The contractor, likewise, weighs claims for damages, costs, or expenses incurred by the contractor, its subcontractors, sub-subcontractors, and suppliers due to delay resulting from a class one cost, except and solely to the extent of those costs allowed under section 7.3.6, plus any necessary site specific, general conditions incurred by the contractor as a result of the delay.

Q. Just go ahead finish reading. Read that

sentence on the delay.

A. Oh, I'm sorry.

MR. BUNDY: Do you want to read it, Judge and just leave it out? I mean, I'm glad to -- the whole section applies.

THE COURT: The 8.3 section?

MR. BUNDY: Yes, sir. The whole section applies. I would like to read it, if it's okay with you.

THE COURT: Go ahead. Go ahead.

THE WITNESS: 8.3.6.

The contractor further waives any claim relating to time that is not made in accordance with applicable provisions of section 4.3 provided; however, extensions of time associated with the change order that adjusts the scope of work or cost of the work shall be noticed and resolved as a part of an -- contemporaneously with the procedures of article 7.

A change order issued pursuant to a claim under article 4 or change -- or change in the work under article 7 shall be a final adjudication of all time and impact, costs associated with such change order, and shall release and waive any and all claims, costs, or

damages resulting from such change orders, whether or not accounted for in the change order as executed.

8.3.7. The contractor also waived and releases any claim for additional costs of any nature premised upon owner's failure to give an extension of time unless the contractor has given to owner and architect within the applicable time limits set forth in the contract documents.

A written request for an extension of time identifying their causes for delay and the days requested in accordance with the provisions of section 8.3.3, and includes such requests as an outstanding change order as required by section 4.3.1.1.

8.3.8. The contractor is not entitled to a separate extension of the contract time from each one of the causes of delay that may have current or interrelated effects on the progress of the work. Concurrent causes of delay shall be considered a single delay.

Furthermore, the contractor is not entitled to an extension of the time for concurrent delays that include delays due to the fault of the contractor that, regardless of the

delay caused by the owner, increased the duration of the work.

8.3.9. The contractor shall not be entitled to any additional compensation for its inability to complete the work early (or prior to the date of substantial completion set forth in this, in the agreement) due to a class one or class two cause as enumerated above.

BY MR. BUNDY:

Q. Thank you. Now, after the original -- the contract was extended by 20 days, right?

A. By change order.

Q. And that was the only extension of the contract?

A. By change order, yes, sir. On extension, yes, sir.

Q. Right. Given that -- once that 20 days was given, do you know whether or not BBC and the people that worked there were aware of the date of substantial completion of this job? Were they aware that there was a completion date?

A. Yes.

Q. Did you actually discuss it with them?

A. I think we looked at it in OAC meeting minutes and such, yes.

Q. And after the original substantial completion date passed and the 20 days was added, do you believe that Balfour Beatty was aware they were late and past the substantial completion date?

MR. HILDEBRAND: Objection, Your Honor, that calls for speculation. And he's not qualified to answer that, that Balfour was aware that they were late. Because it assumes that we were at fault in causing the delays and that we are the ones who allowed that. And I don't agree with that. That's for you to decide, not by this witness.

THE COURT: All right.

MR. BUNDY: Your Honor, I --

THE COURT: Restate the question, if you would, because you did ask what Balfour Beatty thought.

BY MR. BUNDY:

Q. Well, based on your personal knowledge of discussing this case with Balfour Beatty employees at meetings held every week from the time the original substantial completion date until the substantial -- the end of the job, did any of them ever acknowledge to you that the time

the whole paragraph slowly, 9.8.2.

A. When the contractor considers that the work or a portion thereof, which the owner agrees to accept separately, to substantially complete, the contractor shall prepare and submit to the architect, a comprehensive list of items to be completed or corrected prior to final payment.

The failure to include an item on such list does not alter the responsibility of the contractor to complete all work in accordance with the contract documents.

Q. Okay. And would you read paragraph 9.8.3.1?

A. If the architect fails to grant substantial completion on such reinspection and determines that additional inspections are necessary, contractor shall reimburse owner for all reasonable architect fees charged to owner for such reinspections provided -- that the need for such reinspections was due to the contractor's fault.

(DFT. EXH. 104 was marked for identification.)

Q. All right. I hand you now what's been marked as Defendant's Exhibit 104, let me put --

THE COURT: Without objection.

(DFT. EXH. 104 was received in evidence.)

BY MR. BUNDY:

Q. In the middle of the -- well, at the very top -- we're going to go sort of backwards a little bit. Buck makes a statement to Kim Brown and others including Starcevic, Simonton, et cetera. What does he say at the top related to the topics below?

A. Also salient to the below dialogue is the attached general condition excerpt, paragraph 9.8.2, confirming that just because a punch list doesn't contain an item needing attention, that does not relieve the GC of the duty to address that new item.

Q. And that was the paragraph you just read earlier, right?

A. Yes, sir.

Q. Okay. Now, there's -- now, we go down a little bit, and it's from Buck Lindsay to -- it says David. That would be David Simonton?

A. Yes, sir.

Q. What is Buck telling Mr. Simonton on December 12, 2018. If you could read that into

the record, please.

A. David, regarding the attached letter and e-mail below, I have spoken with Barbara DeMatteo and Ray Mendoza of construction's commitment, who as a consultant to us, punched the guest rooms for the Bennett Hotel.

There were originally punches done for the two mockup rooms, which should have served as a comparative standard for finish acceptability. Then there were two complete punch runs through every room, the second of which included some tradesmen, who fix defects, as they were pointed out, and some items that were to be addressed thereafter.

Then, on subsequent reviews, Ray noted that items had been listed on the second round were not done, and that new issues have shown -- moved sprinkler heads, mirror screw holes over desks stained from workmen leaning on tables, for example. A few other items have also been noted in the correspondence over the last few days.

Should I continue?

Q. Yeah.

A. We understand that DFF maintains the room punch work has been signed off on. Barbara

and Ray reported to me just now that they don't sign off rooms. They prepare punch lists addressing a room at a point in time.

It is possible that all items on particular room lists are complete, but then subsequent items are noted, which remains valid punch work. In any case, construction commitment. The first sentence is --

Q. Well, the first sentence at the top is the same as the bottom sentence.

A. Oh, sorry. In either case, construction commitment has not signed off punch work. There are necessary punch duties that remain with DCC. Since the status of the punch work remains, in the next few days, I intend to review rooms myself to make a determination. Thanks, Buck Lindsay, architect.

Q. All right. Now, this e-mail chain started, I believe, with your e-mail to Simonton, right?

A. Yes, sir.

Q. Would you read that to us, please?

A. Down at the bottom?

Q. Yes, sir. Yeah.

A. They confirmed our conversation with

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

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

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

A. I did.

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

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

Q. All right, sir.

(DFT. EXH. 105 was marked for identification.)

MR. BUNDY: Your Honor, this has been marked 105 for identification.

THE COURT: All right. Did you move 104 in?

MR. BUNDY: Well, I move to introduce that, and I got the previous exhibit in, I believe.

THE COURT: Yes, it is. I'm sorry.

(DFT. EXH. 105 was received in evidence.)

BY MR. BUNDY:

Q. All right, sir. I hand you what's been marked 105 for identification and ask you if you can identify that document?

A. It's a memo from Buck Lindsay to David Simonton dated 12/18/18.

Q. And are you copied?

A. I am.

Q. Do you remember this document?

A. I do.

Q. All right. Would you read it in before I move to introduce it into evidence.

A. Visited the ref hotel on 12/18/18. The

subject header is referenced Bennett Hotel, Charleston, South Carolina. So visited the ref hotel on 12/18/18 to verify the status of the contractor's approach towards substantial completion.

See general conditions paragraph 9.8 and supplementary condition paragraph 1T for a complete definition of substantial completion.

Prior to the visit, review the following listed previously punched published punch list. Walk the building from top to bottom, viewing all public and back of house areas and random viewing of guest rooms on each floor. The project is approaching substantial completion, but it is not there as of this date.

Then he lists these items. Guest rooms punch list, first round DeMatteo team, guest room punch list. Second round, DeMatteo team, 11/20/18. Guest room punch list, Salamander. First/second floor punch list, WLA 11/01/18, 12/06/18.

Ninth floor punch list, WLA 11/26/18. Stairwells, WLA 11/26/18. BOH, meaning back of house, WLA 8/24/18. Basement, WLA. Lighting, LEB, 11/09/18. Electrical, WLA 9/08/18.

Mechanical, WLA 11/08/18. Tab (inaudible) 1/13/18.

Note that the preparation of punch list is a duty of the contractor, GC paragraph 9.8.2, which to our knowledge, they have not provided. To date, the contractor has not responded as to the status of any of the above reports.

Today, Tim Spano handed Lindsay a copy of the first and second floor punch mentioned above stating that, in the last few days, he had personally verified completion of (most of those items).

It has also been reported in the last few days that the fire marshal provided a list of 13 items that had to be addressed before he would return for another review. The owner and the architect have requested a copy of this list from the contractor, however, it has not been provided.

The contractor verbally mentioned one item on the list. The fire extinguisher cabinet on the southeast corner on the first floor dining cannot be blocked by the main cabinet. NFPA 10 required that FEs, being fire extinguishers, be provided for each floor, 7,000 square feet of

floor area, and within 75 feet travel distance from anywhere on the floor.

Because of the number of FE cabinets on this floor (10 each, see notes N1 on A101) and their distribution, the FE in question is not required. The FE, the FM may -- FM meaning fire marshal may allow it to stay (as it is not required) or required to be abandoned.

The contractor has claimed being done with guest room punch lists and stated repeatedly that they should not be exposed to continuing new punch lists. Architect replied that the contractor has a continuing duty to deliver contract compliant work which succeeds any sequence of punch list.

Owner reported that given the contractor's refusal to address guest room punch work and owner first consultant was presently assisting in guest room punch list deficiency correction. Blue tape tags have been placed around many rooms indicating finish flaws in the work that require further attention.

Owner is mobilizing forces himself to utilize these conditions, which may in some or most cases, require complete re-prepping and

re-painting of rooms. In walk-through, Lindsay took many notes and photos of incomplete work and unacceptable finishes.

Findings are not enumerated here since most are self-apparent (missing electrical cover plates, et cetera) or have been listed on the above-mentioned plus punch list. End of report.

Q. Now, there was a discussion in your cross-examination about the flashlight 5 foot rule. Okay? Applying the 5 foot no flashlight rule, were these rooms acceptable under that rule?

MR. HILDEBRAND: Object to the leading question, Your Honor. He needs to ask him what --

BY MR. BUNDY:

Q. Okay. How, if at all, were those rooms acceptable under the 5 foot no flashlight rule?

A. You didn't have to be with less than 5 feet to see the deficiencies.

Q. Okay. And did you see multiple deficiencies --

A. Yes.

Q. -- outside of 5 feet?

A. Yes.

Q. And did you need a flashlight?
A. No.
Q. Okay. Now, let's talk a minute about these -- let's talk a minute about eggshell paint versus flat paint, right?
A. Yes, sir.
Q. Did the contractor know -- or was the original specification on this job for eggshell paint?
A. Let me say that the contractor did not qualify the paint finishes with regard to the guest rooms. So what was in the specs was always in the specs. It was never changed.
Q. Okay. But by qualify, you mean ask any questions or --
A. Yes.
Q. -- eggshell had always been in there?
A. Yes, sir.
Q. Is it known in the industry, what you testified to earlier, that eggshell paint has to be corrected from corner to corner?
A. Yes, sir.
Q. Okay. So Balfour Beatty went into this job with their eyes open and knew that they were going to have to use eggshell paint, and that, if

there was a flaw, it would have be repainted from corner to corner, or they should have known?

MR. HILDEBRAND: Your Honor, objection. This is direct. It's not cross.

THE COURT: That's sustained. That's sustained.

BY MR. BUNDY:

Q. Now, flat paint was used to repair the work, right?

A. Yes, sir.

Q. Okay. What is the relative cost of flat versus eggshell paint? Do you know?

A. The flat is less expensive, particularly due to labor because of the touchup project.

Q. So you were the program manager --

A. Yes, sir.

Q. -- during the preconstruction period, correct?

A. Yes, sir.

Q. If you had been -- if it had been brought to your attention they wanted to use flat and eggshell, what would you, Jim Clements, have recommended to the owner?

A. Flat.

Q. Okay. And it wouldn't have cost the

contractor any more money. In fact, it would have cost them less money and saved the owner money?

A. In my opinion, yes.

Q. Okay. Thank you. Now, let's look at Exhibit 100. I think you should have it in front of you somewhere. Are you with me, Mr. Clements?

A. Yes, sir, I am.

Q. All right. This document is in evidence as Defendant's Exhibit 100. What is the architect of record -- what is the architect of record's decision here on the level 6 structural delay claim dated 9/26/16?

A. Okay. Do you want me to read it?

Q. No. I mean, if you could just go to the bottom of it. You don't need to read the whole thing. Just go to the bottom of it and tell me what his conclusion was on the second page.

A. On the second page?

Q. Yeah. I believe it's the bottom of second page.

A. Given the complexity of these factors and the intermingled responsibilities contributing to the claim delay, we can only render a subjective determination as to

responsibility to pay for the related costs. We approved 50 percent of the costs for a change to the contract amount of $72,454 and then changed the contract time of 20 days.

Q. Did the contractor ever submit a change order for $72,454 in a 20 day time extension?

A. No.

Q. Okay. In fact, they disputed this decision, correct?

A. Yes.

Q. Okay. So then it goes to the next level?

A. Yes.

Q. Under dispute resolution process?

A. Yes.

Q. Okay. Now, let's turn to Exhibit 103, the same book. Do you see that?

A. Yes, sir.

Q. And would you read that into the record, please?

A. It's a letter dated December 28th, 2016, from Tim Spano to Kim Brown.

Ms. Brown, based on the architect's decision letter received from WLA on December 21, 2016, to the Lithko backup requested for the

sixth floor delay, 07 for article 15.2.6.1 of the prime contract, Balfour Beatty Construction demands mediation in this matter, and we disagree with the architect's decision and retain all rights to the full claim.

Q. All right. So that's the next step in the process?

A. Yes, sir.

Q. Okay. Now, let's go to -- and that relates just to the sixth floor?

A. That's correct.

Q. Okay. And now, let's go to Exhibit 120 in that same book. All right. This is in evidence. This is Plaintiff's Exhibit 120. This is a decision from WLA. It would probably be better to read this -- let me ask you this. Does this decision relate to L6, which is what we previously looked at, right?

A. L6, yes.

Q. It relates to L6, L8 and L9?

A. Sorry, I see it now. Yes.

Q. Okay. So L6 has now been rolled into this decision again?

A. Yes, sir.

Q. And there's a claim for L8?

A. No, 6, 7, and 9.
Q. This says 6 -- mine says it is 8.
A. There was never a claim made on 8.
Q. Okay. So this is a misprint? It's 7?
A. I'm only -- I know no claim was made on 8, and this is for 6, 7, and 9 is what I see. Oh, I see down at the bottom, to date for L7, 8, and 9 delay. I think it's a typo, to be honest.
Q. Okay. So up at the top, he says, addressing L6, 8 and 9, but to date, he says L7, 8, and 9?
A. Yes.
Q. Okay. So what was the architect's decision on these claims?
A. Shall I read them?
Q. Let's just read the --
A. The bullet points?
Q. Yeah. Why don't you read the second page because this -- I think the -- why don't you just read the whole thing. I think it makes more sense just to read the whole thing.
A. Date, December 4th, 2017. It's a letter from Buck Lindsay to David Simonton copied to myself, Kim Brown, and Jennifer Faulkinberry with WLA.

Q. And it relates to RCO 122R, which stands for revised, correct?

A. Yes, sir.

Q. Okay. Would you read us that?

A. We're in receipt of your November 27, 2017, e-mail containing RCO number 122R addressing L6, L8, and L9 structural delays with a total value of $1,012,042, along with related backup material.

This RCO is a revisit of your earlier letters of delay and notice as follows: One, level 6 structural delay claim of 27 days and $260,135.07 in cost, to which we replied on October 14th, 2016, that we approved 20 days, and that sufficient backup was not presented to evaluate the dollar claim. BBC did not reply to the architect's final decision.

Q. Initial decision?

A. Initial decision. Thank you. Level 6, structural delay claim revised of 22 days and $221,945 in costs, to which we repeated on December 21, 2016, that we approved 20 days, and that we approved $72,454 in related costs for reasons given.

BBC did not reply to the architect's

initial decision. Level 7, structural delay claim, dated 1/16/17 for nine days and $95,815.68 in related costs, which we rejected with explanation in our February 8, 2017, letter. BBC did not reply to the architect's initial decision.

Level 9, structural delay claim dated April 10, 2017, for 21 days and $131,640.60. WLA did not reply to this claim since BBC issued notice that they received mediation to resolve levels 6, 7, and 9 combined.

Q. Okay. Let me stop you here. Does this sort of confirm your recollection that there was never a claim for level 8?

A. No, that is true.

Q. Okay. Because he doesn't refer to level 8?

A. No.

Q. Okay. All right. So let's keep going.

A. Without giving a reply to the architect's initial decision on these matters, BBC requested mediation to resolve them, which was conducted on May 30, 2017. The parties were unsuccessful in resolving their disputes.

To date, for L7, 8, and 9, structural

delay claims, the architect has published an initial decision recommending award of 20 days and $72,454 in related costs. The additional information in RCO 122R does not provide any new information to substantiate any change to that recommendation.

Underlying reasons for the original initial decisions and the affirmation of those decisions herein are as follows: A, the cause of delays was the inability of the BIM system coordination work to keep ahead of the actual L6 through L9 structural work, thereby delaying the construction work.

BBC then president, Michael Baumbach, as an element of their selection for the project, offered to provide BIM services. There was a benefit to BBC and their team of subcontractors to provide BIM services on their project. And they were able to modify systems organizations to better suit their processes (prefabrication of the elements) and to reduce their own costs.

Through the periods of the project in question, it was apparent that BBC BIM capacity was overloaded, not adequately manned for the work, and was not able to keep up with their own

field work. At one point in the BIM process, the BCC BIM manager for the project left BBC's employ, and there was no BBC BIM support.

In the latter stages of the delay questions, the owner asked the architect to combine and engage additional BIM support services to supplement BBC's effort, which was done. BBC was engaged and paid for preconstruction services during the course of the construction documentation preparation.

They were involved in the early pricing work as the plans were being developed and were expected to provide input on construction logic and set up. They had adequate opportunity during this period to identify systems, conflicts, and to suggest alternative system organization methods. They did not offer any input in this regard.

C, the owner reserves the right to invoke construction contract provision A201 and A834, wherein claims for delays. They're not submitted to the architect within 20 days of the event, giving rise to delay, shall not be recognized.

Q. Okay. Thank you. Now, let's look at

exhibits --

MR. BUNDY: Have I put 104 in, Judge?

THE COURT: I believe so.

MR. BUNDY: Okay. Thank you.

BY MR. BUNDY:

Q. All right. Let's look at some exhibits that you went over in your cross-examination. Let's look at 273. That's a different book.

A. Okay.

Q. All right. You've got 273. Let's look at 273, and it says, based upon orders reviewed (inaudible) change order request RCO 139, right?

A. Yes, sir.

Q. And it says -- was that paid? Has that RCO been paid?

A. Actually, in this particular case, it turned out to be the contractor's -- misinterpretation of the contract documents.

Q. Okay.

A. And they repaired it at no cost to the owner.

Q. Okay. They didn't -- okay. But let's also go and compare 273 to 276. Turn to 276. All right. Now, it relates to RCO 139 and RFI

0991 as well, right?

A. Yes, sir.

Q. This is just simply another copy of the same document, isn't it?

A. It appears to be.

MR. BUNDY: Your Honor, at this point, I would object to the introduction of duplicate exhibits. I was unaware at the time, and couldn't keep up, but I would have objected at that time if I had known.

THE COURT: All right.

MR. BUNDY: I would ask that document be removed from evidence.

THE COURT: So Plaintiff's 273 and 276 appear to be the same.

MR. BUNDY: Yes. I would like to get one of them out of here.

THE COURT: Okay. All right. Let me make sure he sees the same.

MR. HILDEBRAND: No problem, Your Honor.

MR. BUNDY: Which one are we going to get ride of?

THE COURT: Let's get rid of 276. Let's just take the first one. I forget which

one we were in, but we were moving quickly then.

MR. HILDEBRAND: Yeah. I'm sorry. So we will take out 276?

THE COURT: Let just remove 276.

(PLF. EXH. 276 was removed from evidence.)

BY MR. BUNDY:

Q. Okay. All right. So let me understand something. This RCO was not paid or wasn't -- it ended up -- didn't have a cost to it?

A. I guess you could say it was rejected because it was incorrect. The contractor position was incorrect. I remember specifically of Jennifer Faulkinberry and I going to an AGA bathroom and discussing the location of the AGA valves.

But the code requires them to be located in such a manner, and there was, as I recall, misinterpretation by the contractor and it did not result in an owner change.

Q. Okay. So all you're doing here is providing the architect the required contractual notice that he's entitled to when a contractor writes you and says, the architect has made a mistake, right?

further to the notice SI 38 and 39 based upon owner review service written notice. This is consequent -- strike that all of that.

The last line in the first paragraph says, consequently, CCD 25 has been issued to the contractor to pipe and relocate FCU6. Was the contractor paid for this?

A. Yes.

Q. All right. So let me see if I get it straight. The architect made a mistake, and the owner is paying for it, right?

A. Yes, sir.

Q. What harm has there been to the contractor?

A. None.

Q. Okay. And then it's the contract -- owner's decision if he wants to go after the architect or not, right?

A. Yes.

MR. BUNDY: Okay. That's all I have, Your Honor. Thank you.

THE COURT: Okay.

MR. HILDEBRAND: I have some follow-ups.

THE COURT: All right.

MR. BUNDY: Hold on. I'm getting a note here. I'm told to put in 167.

THE COURT: 167?

MR. BUNDY: Yes. Sorry, Judge, I misplaced the book.

BY MR. BUNDY:

Q. All right. Mr. Clements, tab 167, do you have that in front of you? This is a Plaintiff's Exhibit, I believe.

A. 167?

Q. Yeah, 167.

MR. BUNDY: Judge, are you with me?

THE COURT: Yes, sir.

MR. BUNDY: Thank you.

BY MR. BUNDY:

Q. All right. 167 is -- can you identify it, please?

A. This is Buck Lindsay's e-mail, 11 of February 2019, regarding a contract closeout status.

MR. BUNDY: All right. Your Honor, I move to put this into evidence.

THE COURT: Mr. Clements was copied on it?

THE WITNESS: Sir?

MR. TERRY: We've not been provided any exhibits along the way here. They're handing them to Mr. Hildebrand, to yourself, but we don't see them.

THE COURT: Okay.

MR. TERRY: We don't -- we need copies of these exhibits as we go forward. So we request to get them.

MR. BUNDY: Come on up. Glad to have you.

THE COURT: All right. Let's work for another hour or so, and let's work today because I think, if I understood correctly, y'all have got Ms. Brown up next.

Mr. McDonald?

MR. MCDONALD: Thank you very much, Your Honor. May it please the Court. Library Associates would call Kim Bennett Brown.

(KIM BENNETT BROWN, having first been duly sworn, testified as follows:)

THE COURT: Please have a seat, and if you would, when you're comfortable, give us your full name and address, please.

THE WITNESS: My full name is Kimberly Bennett Brown. I reside at 1046

Dominion Drive in Hanahan, South Carolina 29410.

THE COURT: Thank you, ma'am.

DIRECT EXAMINATION

BY MR. MCDONALD:

Q. Ms. Brown, how are you doing this afternoon?

A. Doing fine, thanks.

Q. Good. Would you tell the Court a little bit about yourself, where you're from. You just said you live in Hanahan. Have you lived there your whole life?

A. No. I was born in Charleston, raised in West Ashley. Went to Bishop England High School, graduated in 1980. Went to the College of Charleston for a couple of years, and then went to Trident Tech for a little over a year.

And in 1983, Mike came to me, he and his good friend Hank Hofford had just started a business, and wanted to know if I wanted to come work for them. And so I started on January 2nd, 1984. And I've been there --

Q. Well, before you get there, what kind of business was it in 1984 for Mr. Bennett and Mr. Hofford?

A. It was Bennett Hofford Construction at

prepare, you then prepare the bank's pay application that includes the contractor's pay application?

A. That's correct.

Q. Okay. I just want to be clear about that. So when you say you review pay applications, what you're talking about is, you review the pay application from the contractor when it comes in the door at your office?

A. That's correct, once it's signed also by the architect.

Q. Yes. And once again, you've been involved in this process since about 1998?

A. Correct.

Q. Okay. All right. Let's talk about Hotel Bennett. What was your involvement -- and with the understanding that this is -- the development of this project has been going on for many, many years, so I don't want to belabor the points that don't have anything to do with what brings us here today.

But would you just explain briefly for the Judge, as you can, your involvement in the development of this project, and then we'll get more detailed as we get into the construction

contract setting in or about 2013, somewhere in there. But, just generally, give the Judge the lead up prior to that.

A. Prior to 2013?

Q. Yes, please.

A. Okay. So involved with Mike with working with his vision, working with the architects, going through the approval processes with the DRV and then BAR for the approval of the hotel.

Worked prior to 2013, you know, working to try to obtain financing, putting together performative to submit to the lender and the lender packages to try to obtain the financing.

Q. Okay. And that was obviously extended out over a long period of time. I think you said the acquisition was 1994 or somewhere in there?

A. That's correct.

Q. And so all the way up to 2013, a lot going on. Okay. In or about 2013, were you involved with Mr. Clements, who testified that he created the request for proposal be sent out to contractors?

A. I was not involved with his RFP.

Q. Okay. And how did it come to be that

Mr. Clements was hired by Library Associates?

A. As Mr. Clement testified, his brother was a roommate of Mike's at South Carolina. I think Mike had run into Mr. Clements' brother and knew what Mr. Clements was doing at the time and being project manager.

And his brother suggested that he would be a good fit for Mike's needs at Hotel Bennett. So we had Mr. Clements come to the office, interviewed him. We agreed and decided to hire him.

Q. And had you all used the program manager -- had Library Associates used a program manager, had Bennett Hospitality used a program manager in the past?

A. No.

Q. Okay. So this was your first occasion to use one?

A. Correct.

Q. Do you know why the decision was made to use one now for this project when you hadn't utilized one in the past?

A. The hotels in the past that we had built were limited service hotels. We had the experience and didn't require a project -- or

program manager. This being a five-star and also this being non-flagged, we thought it would be very beneficial to have a program manager.

Q. And at the risk of insulting Your Honor, but I didn't know, can you explain to him what it means to be flagged or non-flagged?

A. A flag is having a franchise as Hilton or Marriott.

Q. Okay. And so one of the reasons that this hotel was going to be non-flagged played into your or your-all's decision to have Jim come on board as a program manager?

A. Correct.

Q. Okay.

A. In fact, I think Mike said, Jim is going to make your job a whole lot easier, Kim.

Q. So you were all for it?

A. I was all for it.

Q. Okay. Perfect. All right. And so you weren't involved in Jim's creation of the request for proposal to the various contractors. Were you involved with the interview process?

A. I was involved in the interview process. I sat in the interviews with all of the contractors.

Q. Okay. And how many contractors did y'all interview?

A. It was three.

Q. Okay. And who were they?

A. It was Balfour Beatty, (inaudible), and I can't remember the name of the third. I know Mr. Clements had stated it in his deposition or in his testimony.

Q. All right. And did you have any role in selecting those three contractors to come and interview?

A. I had input into the process. We all had discussion in who we thought would be the best contractor, and we selected Balfour Beatty.

Q. Okay. And you went to the interview with Balfour Beatty?

A. Yes.

Q. And do you recall who was in attendance there on behalf of Balfour Beatty?

A. I know Mike Baumbach was.

Q. Let me ask you this: Do you know who gave the presentation on their behalf?

A. I don't remember at the time.

Q. Okay. But you know Mike Baumbach was there?

A. Yes.
Q. Anybody else?
A. Bill Lorenzo may have been there.
Q. Okay.
A. Bret Estridge may have been there, but I can't recall.
Q. Okay. And did y'all make a decision as to which three contractors to hire after the three interviews -- after the completion of the three interviews?
A. Yes.
Q. Okay. And were you involved in that -- those discussions and that decision making process?
A. Yes.
Q. Was Balfour Beatty the low number when they put their numbers on a proposed GMP?
A. No.
Q. Okay. Where were they?
A. They were either the highest or second highest. I know they were not the lowest.
Q. So they were -- since there was only three, they were either in the middle or on the top?
A. Correct.

Q. Okay. And were you involved in discussions as to why Balfour Beatty was chosen over the other two contractors?

A. As Jim testified, he felt very strongly and was very comfortable with Balfour Beatty, and because he had worked with Mike Baumbach before, we kind of took his advice and all agreed that Balfour Beatty would be the best one for the job.

Q. Okay. Were you involved on behalf of Library Associates or Bennett Hospitality in the back and forth of the preconstruction process for Balfour Beatty?

A. Yes. We had many preconstruction meetings that were held at our offices at the Rice Mill building on the first floor, and I was involved in those meetings.

Q. Okay. And explain to Your Honor how that works, the preconstruction. Did it occur prior to signing the contract in September of 2014?

A. Yes.

Q. Okay. So if we're going to explain to Your Honor the first phase as preconstruction, that's what I want to talk about now, and we'll talk about two phases after that. Okay?

You're involvement -- or what was your involvement in the preconstruction phase, and by that, I mean, post-selection of Balfour to be the contractor, to move forward with Balfour as the contractor, but pre-September of 2014. Okay?

A. Okay.

Q. All right. What was your role during that period?

A. Like I said, I attended the preconstruction meetings. There were usually four or five people from Balfour Beatty. Buck Lindsay was at those meetings. Mike Bennett attended those meetings.

Q. What was the purpose of the preconstruction meetings? Why were you having them?

A. It was to have the contractors review the plans, as to the state that they were in.

They would then also take the plans back with them, review them some more. We would have these meetings at least once a month, and they would come back during the course of the design to give their input and make suggestions, see where there were issues.

Like I said, this went on from -- for

about a year. So there was at least 12 meetings. And, you know, there was input from -- in some of the meetings, to be interior designers were there also.

Q. That's DCI?

A. That's DCI.

Q. Okay.

A. Right. And so it was a collaborative effort to review the plans and to make suggestions on how things could work better. We talked about costs. It was just a collaborative effort to get to the point where the contract was designed.

Q. During this time, was the purpose of the project going to be a five-star hotel?

A. Always.

Q. Always. All right. So DCI was involved during preconstruction. That's the interior designer?

A. Yes.

Q. The architect, that's Mr. Lindsay, right, or Buck?

A. Correct.

Q. Okay. Who was involved during the preconstruction meetings on behalf of Balfour?

A. Jeff Sandeen was there.
Q. Okay.
A. Mike Baumbach was there. Bill Lorenzo had attended a few. Bret Estridge was there. And Manny Teodoro, who was the estimator, was there. And like Jim mentioned, there was an African-American woman, who was also an estimator, and I can't recall her name.
Q. And during this period, which would have been late 2013 to September of 2014, how many of these preconstruction meetings where y'all went over the plans and you discussed the collaborative effort? How many would you say occurred?
A. You know, probably around 12. I know they're usually once a month. There could have been a few months that we didn't have them, but once the plans were at a certain design point, and they would be sent to Balfour Beatty to review. And then we would all come together for these meetings --
Q. Okay.
A. -- to discuss any issues.
Q. And so then, on September 22nd of 2014, the contract between Balfour and Library

Associates was actually signed, correct?

A. Correct.

Q. Did you have any involvement in the negotiation in the terms of that contract?

A. I did have some involvement in the negotiation of the terms of that contract.

Q. And is that based on the fact that that had been your role at Bennett Hospitality since 1998?

A. That's correct.

Q. All right. Now, so the next phase I want to talk about, Ms. Brown, is the phase from September of 2014 and the signing of the contract in February of 2015, which is the GMP. Okay?

A. Okay.

Q. All right. First of all, do you recall any discussion or proposal by Balfour to extend the preconstruction period?

A. Yes. We paid an additional 30-plus thousand dollars to extend that preconstruction period.

Q. And what was the purpose of extending the preconstruction period?

A. Is to even -- to get the plans themselves as tight as they can possibly be.

Q. Okay. And who came up with that idea? I mean, tell me a little bit more about that.

A. I'm not sure. I know that Jim had testified that that was Balfour Beatty's idea.

Q. Okay. So you know because of what Jim --

A. That's correct.

Q. Okay. All right. What was your role during that period that -- what we'll call the second period of preconstruction, from September of 2014 to February of 2015?

A. Well, I know that one of the items in July of 2014, as it was stated, but had given them 100 percent plans. It was in November of 2014, after the VE items were negotiated.

And then there was some items that were listed as possible VE items that we could take. There was like -- if I remember correctly, there were three different sections. Your VE items that you're going to take, here's some tentative ones, possible ones.

And we could kind of pick and choose. And so going through that process during that time period, from September through March of that time, we were trying to figure out, you know,

what VE items we wanted to include in the plans and which ones we decided that -- you know, we wanted to stick with what Buck had originally drawn.

Q. Okay. So were the plans still being developed over this period, this second period of preconstruction, from September of '14 to February of '15?

A. Yes.

Q. Okay. And was the same individuals involved: Balfour Beatty, architect, and interior designer?

A. Yes.

Q. All right. And then in February of '15, there is the Exhibit AOR the GMP amendment, correct?

A. Correct.

Q. All right. And what was your understanding about that document? What occurred then?

A. That document actually specified the actual price of the GMP.

Q. Okay. And prior to the signing of that document in February of '15, could Balfour Beatty have walked away except they would have been

entitled to their preconstruction fee?

A. That's correct.

Q. Okay. So even though you -- even though the contract was signed in September of '14, until you arrive at a GMP, the contractor was able to walk away?

They're entitled to a preconstruction fee, and they come back with some crazy number and the owner can say, I've had about all the fun I've had here, and the owner could walk away, correct?

A. Correct.

Q. Okay. Who came up with the actual number of the GMP in February of '15?

A. Balfour Beatty.

Q. Okay. And the GMP in February '15 also establishes the duration of the project, correct?

A. Correct.

Q. All right. Who came up with the duration of the project?

A. Balfour Beatty.

Q. So the next period I want to talk about, Kim, is your involvement during the construction itself. And what I would like to focus on is, first, what your -- what types of things you did,

what your role was with construction.

And so earlier you testified that typically you were involved in negotiating the contract. We've already come into that, right?

A. Correct.

Q. All right. And during the construction of the Hotel Bennett, did you attend weekly and monthly OAC meetings?

A. I attended the monthly OAC meetings, and sometimes I -- you could conference call on the weekly meetings, and occasionally I would do that. But I was typically at the monthly meetings.

Q. Okay. And what was your role or purpose for being at the meetings?

A. Just to understand where the project was going. Jim would give me updates on a regular basis, but just to -- you know, because the bank also had the inspector at those meetings, and so just to attend to inspect through the walk-through with the building, and also to, you know, review the pay apps with the contractor.

Q. Okay. So let's back that a little bit. Was there any discussion in those meetings, in those monthly meetings to review proposed change

orders from the contractor?

A. Early on maybe, but starting in really 2016, I believe, or late 2015, we would actually have RCO meetings that would take place at our office that would occur probably every two weeks that were outside of the OAC meetings.

Q. Okay. I'm sorry, go ahead.

A. Early on, if there was an RCO, they would send it to Jim, and then Jim would review it, as he stated, and send it to the architect for entitlement, and then he would bring it to me.

Q. To review?

A. To review and then to sign off or agree or disagree with it.

Q. Okay. So we've got two things. We've got you attending monthly OAC meetings with the purposes of being there, understanding what's going on, and being the liaison with the bank; is that fair?

A. Correct.

Q. Okay. And then there were also meetings that you had at your office that were dedicated solely to the review of RCOs and those occurred every couple of weeks?

A. Yes, starting like I said, in 2016 sometime.

Q. 2016. Okay. And I assume, since you brought it up, that you were in attendance in those RCO meetings?

A. Yes.

Q. Okay. All right. And we will come back to that, but I just want to get your role, a flavor for your role.

All right. So there's review of change orders, then attend the OAC meetings. Did you review the contractor pay applications as they came in?

A. Yes. During those meetings, the contractor would provide a pencil copy, which is just the first three pages of the pay app with no backup, and we would go through those pay apps as a group, line item by line item.

Q. Okay. And then the first three pages of the pay application -- and we'll go through in some time. It's just the cover page that says a bunch of information and then drops down to how much we want, and then two spreadsheets, correct?

A. That's correct.

Q. And those spreadsheets were referred to

as the schedule of values, correct?

A. Correct.

Q. Okay. So the pencil copy that you would get to first review, didn't have any backup documentation? It just had essentially the cover sheet and the updates to the schedule of values?

A. Correct.

Q. All right. And so you would review those, and what was the next step in the pay application review process that you undertook?

A. At that point, if there were any questions in the pay app from the architect, she would ask those questions. Then Balfour would send the pay app with all the backup to the architect.

Once the architect signed off, then she would send it to me, and then that's the -- kind of the next step. That's when I included the contractor's pay app, that the architect had signed off into the owner's pay app to the bank.

Q. Okay. So let me stop you there. When you said that -- so then the pay application would come in with the backup in kind of a final form, right?

A. Correct.

Q. Signed by the contractor?
A. Correct.
Q. Okay. There's a space for the contractor to sign it, correct?
A. Correct.
Q. All right. Then it would go to the architect?
A. Correct.
Q. Right. And then, when you said the architect signs off on it, is that the same thing as certifying a pay application as required by the contractor?
A. Yes.
Q. Okay. Did the owner pay pay applications that were not certified by the architect?
A. No.
Q. Was the owner required to pay pay applications that they were not certified by the architect?
A. No.
Q. So you would get the architect's certification, and then let's just walk through so we don't have to do this --
A. Okay.

Q. -- with 30 of them. So just generally, so you would get the contractor -- you would get the certified pay application from the architect saying, we've looked at it, we're certifying it based upon the terms of the contract documents, and then what would you do?

A. Like I stated, I would then include that in the owner's pay app that would go to the lender, and I would submit that to the lender.

Q. Okay. And you would submit that to the lender via e-mail, hard copy? How would that work?

A. E-mail.

Q. E-mail. Okay. So you would electronically send the owner's pay application to the bank?

A. That's correct.

Q. Was Balfour Beatty aware, during this process, that you were drawing funds from a federally insured bank?

MR. HILDEBRAND: Objection, Your Honor. She hasn't testified about that, and I don't think there was a federally insured bank. It was a lender, Metropolitan Life Insurance Company; so I think it's a --

BY MR. MCDONALD:

Q. You can answer the question.

A. Balfour Beatty was aware that MetLife was the lender on the project.

Q. And that MetLife was funding the draws?

A. That's correct.

Q. Okay. That you all were coming off the hip for this money, meaning Library Associates?

A. So we had to put in initial equity required by our loan. That initial equity was 10 million dollars.

So before the first pay app was ever funded, we submitted 10 million dollars to MetLife. They held that in one of their accounts. So for the first few pay apps, they would use the money that we had supplied for our equity first before they got into their loan.

Q. And then thereafter, the pay applications were funded from Met Life's loan?

A. That's correct.

Q. Okay. All right. After you e-mailed the pay application to the bank or MetLife, what happened next?

A. There was a third-party reviewer at MetLife. I believe it was T&C Loan Services at

the time. They would review the entire pay app. If they had any questions, they would go back to the architect or the bank inspector to ask questions.

And then, once she was satisfied, they would then order the title update from Foster Gaillard's office, who was the real estate lawyer that handled all of the title work, and the title policy. They would, again, order that title update.

Once the bank received the title update showing the clear title, the bank would fund the money into our development account, and then we would cut checks to everyone who was on the pay app.

Q. Okay. Did the bank have any retainage requirements?

A. The bank had -- for construction, they had 10 percent retainage requirement.

Q. So on the construction draw, the bank required that there be 10 percent retainage?

A. That's correct.

MR. HILDEBRAND: Your Honor, objection. I'd just like to get it straight so the record is straight.

There's not a bank involved. It's a lender. He keeps referring to it as a bank. It's simply Metropolitan Life Insurance Company as a lender. So I just wanted to make the record clear.

THE COURT: All right. Duly noted, but --

MR. MCDONALD: They are what they are, but I will refer to them as MetLife from here on; so it will be whatever they are.

BY MR. MCDONALD:

Q. Okay. All right. So did MetLife require a certain amount of retainage?

A. Yes. MetLife required 10 percent retainage on the construction line item of the schedule of values for the owner's pay app.

Q. Okay. All right. So once MetLife approved the owner draw, how would they get you all -- would they send the money directly to Balfour, or would they send you all the money? What would they do?

A. No. They would wire the funds to our account, and then I would cut the check to Balfour and any of the other companies that we had requested the payment for on the pay app.

BY MR. MCDONALD:

Q. All right. So we talked about the review of pay applications. We talked about the review of change orders. We talked about your role at the monthly OAC meetings and your role at the -- what we'll call the RCO meetings, right?

A. Yes.

Q. What other duties did you have during the construction of Hotel Bennett?

A. That's probably about it.

Q. Okay. And did you interface with Mr. Clements?

A. Yes, all the time.

Q. Okay. And tell me about how that process worked. He said he was on site once a week. Did you go with him?

A. Not typically. He would go to the site, usually get there really early in the morning since he came in from Georgetown, and then either would give us a call afterwards, or he would come to the office and see us and kind of report what he found afterwards.

Q. Okay. And were you his kind of main contact at Bennett Hospitality or Library Associates?

A. Yes.

Q. Okay. And did you have a main contact at Balfour?

A. We kind of interfaced with both Tim Spano, Dave Stanton at the time. But there was no main contact with Balfour.

Q. Well, let me ask it this way. If you had a Balfour question, a question that Balfour needed to answer, was it more typical that you would pick up the phone and call Mr. Clements and say, Jim, I don't understand this, this, and this, can you go figure it out, or would you contact Balfour directly?

A. I would typically go through Jim.

Q. Okay. So Jim undoubtedly had the most interfacing with Balfour?

A. Yes.

Q. Okay. And in those atypical times where you didn't go through Jim, do you recall what those were?

A. Not off the top of my head.

Q. And you said it was usually Mr. Spano or Mr. Stanton?

A. Stanton at the time, but there was -- you know, if we were walking through the site,

and, you know, we might have some questions.

Mr. Dooley might have been there and maybe Mr. Starcevic. But he was usually -- Mr. Starcevic was usually in the office. I didn't communicate with him as much as Mr. Spano or Stanton on the site.

Q. Okay. Did you have any role in the review of aesthetics; meaning, this doesn't look right, wanted to change, or whatever it may be?

A. Yes.

Q. Okay. What was that role?

A. You know, just -- I've worked with Mike over the years building 20 hotels, you know, and knew what we expected as far as the aesthetics of the design. And if I saw something that I didn't think was up to those standards, then, you know, we would let Jim know, and then Jim would give that information to Balfour Beatty.

Q. But during construction of the project, did you have any other responsibilities that we haven't yet talked about?

A. Well, it was during the construction, the process, but I was -- you know, in the beginning of 2016, we started interviewing management companies for operators. We

interviewed Salamander, and we interviewed Charles Towne Management. Maybe that was actually in -- started in 2015.

We selected Salamander in the beginning of 2016, and then I worked with the Salamander folks in the legal department and Foster Gaillard to negotiate the management contract.

Q. Okay. And briefly, if you would, I'm sure His Honor knows generally, can you describe what the role of the management company would be, Salamander?

A. Salamander operates the hotel one hundred percent.

Q. Soup to nuts?

A. Soup to nuts.

Q. Okay. So they staff it?

A. They staff it.

Q. Do they provide marketing?

A. Yes.

Q. Do they book the events?

A. Yes.

Q. And when I say events, because this -- spend just a short period of time, if you would, on the fact that this is a full service hotel and events. And I'm using events in a broad sense.

A. Yes. And so, typically, in a limited service hotel, you don't have large events. You don't have large meeting space. With the Hotel Bennett, we had a beautiful jewel box ballroom, as Mike would call it, and additional conference space that we would book -- that we could hold conferences up to 500 people or weddings up to 3 to 4 or 5, if you will.

Q. How did y'all come to select Salamander?

A. We knew the president of Salamander, as he had once been the operating partner for the Sanctuary, and we knew of his five-star experience.

Q. And who was that?

A. His name was Prem Devadas.

Q. And he is down in Seattle now, right?

A. No. Prem is still the president of Salamander, and he's out of Middleburg, Virginia. Salamander is owned by Sheila Johnson, and he's the president her company. BJ Singh was the general manager of the Sanctuary, and then worked for Prem at the time at the Sanctuary.

Q. Okay.

A. And he was brought on initially as the general manager of the hotel. He had still

retained a house here in Charleston.

But he had been the vice president of operations for Salamander and was living in Middleburg and kind of wanted to get back to Charleston and decided to almost kind of -- almost take a demotion a little bit from his duties at Salamander to be the general manager of Hotel Bennett.

Q. So in addition to the construction side, your role that we talked about, one aspect of it was your involvement in hiring the manager?

A. Correct.

Q. In this case, Salamander?

A. Correct.

Q. Okay. And any other role during the construction side?

A. I would work with the designers and their FF&E packages and work with the purchasing agent, ADM, to purchase all of the FF&E for the hotel.

Q. And that is furniture?

A. Fixtures and equipment.

Q. All right. Anything else on a broad sense?

A. Not that I can think of.

THE COURT: All right, sir. Good morning. Mr. Bundy?

MR. BUNDY: Yesterday I mentioned to you we had an order of preference.

THE COURT: Yes.

MR. BUNDY: We would ask that you read the 30(b)(6) deposition of Balfour Beatty first.

THE COURT: Okay.

MR. BUNDY: And then follow that with the subcontractors. We divided the witnesses up into groups, BBC witnesses, subcontractors, et cetera. So if you would just move from the 30(b)(6) of BBC to the subcontractors. And the order they're in is fine.

THE COURT: All right. Thank you. Very good. Mr. McDonald?

MR. MCDONALD: Thank you very much, Your Honor. May it please the Court.

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. MCDONALD:

Q. Ms. Brown, yesterday we left off going over what your role was during the construction

of the Hotel Bennett, correct?

A. Correct.

Q. And we touched on the broad categories and what your duties were and responsibilities, correct?

A. Correct.

Q. Okay. So where I would like to start today is -- I did a little bit of this with Mr. Dooley, but I want to put application 39 in front of you, which has been -- already in evidence as Defendant's Exhibit 4.

And what I would like to do, Ms. Brown, is walk through the organization of the pay application so we can understand how we go through these RCOs. Okay?

A. Okay.

Q. And it's Defendant's Exhibit 4, and it's in volume one of two of the defendants exhibits. Are you there, Ms. Brown?

A. I am.

Q. Okay. The first page, can you explain to the Judge the various sections of the AIA document G702? And I'd like to -- you can see where the application number is, correct?

A. That's correct.

Q. On the top right-hand corner?
A. Correct.
Q. And then the period for that pay application, in this instance, it's June 1st, 2018 to June 30th, 2018, correct?
A. Correct.
Q. Would you explain to the Judge, just in general terms, given that, how these were submitted to y'all?
A. So there was typically an OAC meeting toward the end of each month, and they would account for all of the costs for that month. So this one was probably -- the pay app meeting was probably the very end of June, for all the costs of June 1 through June 30, 2018.
Q. Okay. So is it fair to say that this was a monthly process?
A. Correct.
Q. Okay. All right. And as it comes in, there's some signature blocks here. The first is the signature block of Balfour Beatty, correct?
A. That's correct.
Q. Okay. And do you know who signs this first -- there's two signatures blocks. There was actually three. There's the Balfour Beatty

signature, there's the notary, and then there's the architect's signature?

A. Yes. So the representative from Balfour Beatty would sign it, and his signature would be notarized. And then it would be sent to the architect, and the architect would sign it.

Q. Okay. And in this case, it was submitted by -- it was signed by Mr. Dooley on July 10, 2018, and it was certified by the architect on July 18 of -- it says 2019, but I guess it would have been '18?

A. That's correct.

Q. All right. Okay. And can you explain to the Judge what was above Mr. Dooley's signature, what the certification is?

A. He certified, to the best of his knowledge, that all the information believed in the work covered by the application has been completed in accordance with the contract documents, and that all amounts have been paid by the contractor for the work for which previous certificate for payment were issued, and payments received from the owner, and that current payment shown here is now due.

Q. Okay. All right. Let's flip to the

next page. Ms. Brown, what I would like to do is just generally discuss what the various columns are. The first is the original amount. Can you explain to the Judge what that was?

A. Yes. That's the original schedule of values amounts that also appeared in the GMP contract.

Q. Okay. And then you have change orders. Do you see that?

A. Yes.

Q. Okay. And how did a request for change order or an RCO --

MR. MCDONALD: I'm going to try, Your Honor, not to use acronyms because there's a million acronyms in this.

THE COURT: Sure.

BY MR. MCDONALD:

Q. How does a request for change order turn into an owner change order?

A. The request for change orders would be presented to us. We would then sign the request for change order, if we agreed with it, and then Balfour Beatty would take all the signed approved requests for change orders and consolidate them into an owner change order.

A. Correct.

Q. And if approved and certified by the architect, it was then paid?

A. That's correct. The requests for change orders weren't certified by the architect even though we had a conversation and she -- or Buck Lindsay had agreed to their entitlement before I would sign it. But the architect did sign and certify the OCO, the owner change order.

Q. Okay. So the request for change order, if it was approved by you, you would go ahead and sign it?

A. Correct.

Q. And then it would go to the owner change order that would be signed by owner, contractor, and architect?

A. Correct.

Q. Okay. And then it would be included in a pay application?

A. Correct.

Q. And for that pay application to be funded, it would have to be certified by the architect?

A. Correct.

Q. Okay. All right. Let's go to the next

column entitled budget transfers. What are budget transfers?

A. That is where the contractor transferred dollar amounts from the original schedule of values or the change orders up into the schedule of values.

Q. Okay. And did the owner have anything to do with budget transfers, or did the contractor come up with that?

A. That was the contractor. The owner had nothing to do with that.

Q. Okay. And then you have three columns that I'd like to talk about together. The current amount from the previous application in this period, do you see those?

A. Yes.

Q. Okay. So you have the original amount. The current amount is the new number with the budget transfers and the change orders, correct?

A. That's correct.

Q. All right. And then you have from previous pay applications, that's money that's already been paid, correct?

A. Correct.

Q. And then if you're wanting to look, in

this instance, it's pay application 39, at what the money they're trying to draw for a given pay application, you would look at this period, correct?

A. That's correct.

Q. All right. Okay. Now, this is important, so I want to go slow through this. This period --

MR. HILDEBRAND: Objection, Your Honor. It's your determination what's important, so I think that's --

MR. MCDONALD: I will withdraw it.

BY MR. MCDONALD:

Q. This period, the funds that are listed in this, are they inclusive of retainage?

A. Under the total completed and stored to date?

Q. No. Just the this period column?

A. Yes.

Q. Okay. So the retainage doesn't get taken out of that number until you get all the way to the right-hand side of retainage, correct?

A. Correct.

Q. Okay. And then let's go back to the first page briefly, and if you look, the way to

determine how much the contractor is asking for is line 8, current payment due, and then the amount certified, correct?

A. Correct.

Q. That's the check that's going to be cut to them?

A. That's correct.

Q. Okay. Before we get into the request for change order notebook, as submitted by Balfour Beatty, can you explain to the Judge how the request for change orders were submitted to you throughout the project by the contractor? We're done with that.

A. As I stated yesterday, in the beginning they would give them to Jim, and then Jim would bring them to me to review. During about 2016, I believe, we decided to have usually bimonthly RCO meetings.

At those meetings, Mr. Dooley would be there, Mr. Starcevic. In the beginning, Mr. Stanton, and when Mr. Stanton left the company, Mr. Simonton would attend, and Tim Spano would attend. Jim Clements would be there. We would typically have the architect on a conference call along with the interior designer

on a conference call.

Balfour Beatty would present to us during the weekly meeting what RCOs they wanted to get approved at the time. They were never in sequential order, never in date order. It was just the ones that they determined that they wanted to get us to approve during that week.

Q. Okay. Not to cut you off, but -- so the RCOs each had -- or the request for change orders each had a number associated with it?

A. That's correct.

Q. And when you say they weren't presented in sequential order, what do you mean?

A. I mean, we might get RCO 100 one week, and the next week, we might get RCO number 49. So they were never -- so it was not given to us, RCO 1, 2, 3, 4. It was always whatever they determined that they wanted to present to us that week.

Q. Okay. And did the request for change orders include backup or supporting materials?

A. Typically, they would have some backup from the subcontractors, yes.

Q. Okay. And did you all ever have occasion, if there wasn't sufficient backup, to

request additional backup?

A. Absolutely.

Q. Okay. And explain to the Judge, when a request for change order has an R and then a number, what that means?

A. That means that the -- there was a revision from the previous change order. It was change RCO number 1, for example, and then you might have RCO 1R or RCO 1R1. That was revision one. Some of them had -- you know, R2 might have been the second revision of that change order.

Q. Okay. Did the request for change orders -- how is that broken down as it related to money and time?

A. Typically, there would be a cover letter or cover sheet requesting money, and if there was any time, that it would be in that cover sheet. And then there was the -- some of the subcontractor backup as well.

Q. All right. And you were personally involved in reviewing these requests for change orders as they were submitted by the contractor?

A. Yes.

Q. Okay. All right. If you would, Ms. Brown, to your -- I can grab it for you.

Right here is Plaintiff's Exhibit 12. Do you recognize that notebook?

A. I do.

Q. Okay. And what do you recognize it to be?

A. These are the RCOs, or the potential RCOs that were noted on Balfour Beatty's claim.

Q. Okay. And this folder is already in evidence, correct?

A. Correct.

Q. And were you present when Mr. Starcevic testified about these various RCOs?

A. Yes, I was.

MR. MCDONALD: Okay. Your Honor, I also have Plaintiff's Exhibit 329. It's been blown up. You may recognize it. We discussed it yesterday. I will refer to it.

MR. HILDEBRAND: I'm sorry, it's number 329?

MR. MCDONALD: 329.

THE COURT: I'm trying to remember. That's Defendant's Exhibit?

MR. MCDONALD: Plaintiff's Exhibit 329.

THE COURT: Plaintiff's 329. Okay.

BY MR. MCDONALD:

Q. Ms. Brown, do you see a column on Plaintiff's Exhibit 329 for request for change orders?

A. There is a column there, yes, but it's a little too far away.

Q. It's a little too far. All right. Does the Plaintiff's Exhibit 329 have an RCO column?

A. Yes. It's the one in blue.

Q. Blue. Okay. Now, have you spent any time going through Plaintiff's Exhibit 12?

A. I have, yes.

Q. Do the numbers in Plaintiff's Exhibit 12 correlate to the numbers in this column?

A. No.

Q. Okay. So if you add up all these numbers, it doesn't match this number?

A. Correct.

Q. And when I say this number, I mean the total RCO of the column, $2,306,397?

A. Correct.

Q. That number on Plaintiff's Exhibit 329 does not add up to what's in Plaintiff's Exhibit 12?

A. Correct.

Q. Okay. Let's go through Plaintiff's Exhibit 12, if you don't mind. The first is, in Plaintiff's Exhibit 12, is there a request for change order from Balfour Beatty wherein Balfour Beatty requests for themselves, $1,019,127.49?

A. No.

Q. It's not in there?

A. Not at all.

Q. Did Library Associates ever receive a request for change order from Balfour Beatty for itself in the amount of $1,019,127.49?

A. No.

Q. And it appears to be almost half of the total, correct?

A. Correct.

Q. And did Balfour Beatty actually personally, or as an institution, physically perform any work out there?

A. No.

Q. They were the construction manager?

A. Correct.

Q. On Plaintiff's Exhibit 329, they want virtually half of the request for change orders; is that right?

A. Correct.

Q. And once again, y'all never received a request for change order in the amount of $1,019,127.49, correct?

A. Correct.

Q. And having never received it, it's also not in Plaintiff's Exhibit 12?

A. Correct.

Q. Okay. Let's look at the first one in Plaintiff's Exhibit 12, RCO 27. Are you there?

A. Yes.

Q. All right. And what is the date of that request for change order?

A. January 13th, 2016.

Q. And what is it for?

A. It's a request for time and cost from the thousand-year storm delay. I know that there was previous testimony calling it a hurricane, but this was not a hurricane. This was the thousand-year storm.

Q. And on the one that's included in Plaintiff's Exhibit 12 and brought before this Court, is there money requested?

A. Yes.

Q. How much?

A. A total of $124,089.19.

Q. All right. And what is the backup for that?

A. There is no backup invoices for that. They say it's 115,969.21 for the thousand-year storm and 2,383.15 for the 6-inch diesel pump, but there is no other backup.

Q. Okay. And do you know whether Balfour Beatty self-performed this work?

A. They did not self-perform any work.

Q. And once again, this is dated January 13th, 2016?

A. That's correct.

(DFT. EXH. 144 was marked for identification.)

MR. MCDONALD: Your Honor, I'm going to hand to the witness for ID purposes, Defendant's Exhibit 144.

BY MR. MCDONALD:

Q. Do you recognize that document?

A. Yes.

Q. And what do you recognize it to be?

A. This is the actual change order that was approved for RCO number 27.

Q. Is it a true and accurate copy of that change order?

A. Yes.

MR. MCDONALD: Your Honor, at this time, I would move Defendant's Exhibit 144 into evidence.

MR. HILDEBRAND: No objection, Your Honor.

THE COURT: Without objection. All right.

(DFT. EXH. 144 was received in evidence.)

BY MR. MCDONALD:

Q. All right. And when is this change order dated?

A. This change order is dated January 26, 2016.

Q. So some 13 days after the one that was actually included in the notebook, Plaintiff's Exhibit 12?

A. Correct.

Q. And does this change order include any money?

A. No.

Q. So zero dollars, correct?

A. Correct.

Q. And who is it signed by?

A. It is signed by myself and by Jim Clements.

Q. And who was it signed by on behalf of Balfour Beatty?

A. Tim Spano.

Q. And who -- the change order 27 dated January 13th, 2016 that was included in Plaintiff's Exhibit 12, who signed that on behalf of Balfour Beatty?

A. Tim Spano.

Q. Okay. Did this include -- did the change order that is Defendant's Exhibit 144 dated January 26, 2016, is -- does it include any days?

A. Yes. It includes 20 days.

Q. Okay. So the change order that was actually executed includes 20 days but no money?

A. Correct.

Q. All right. And you mentioned that Balfour didn't do any of the work that was originally included in the unexecuted change order. Do you know if a subcontractor did that work?

A. The site work contractor was Gulf Stream.

Q. Gulf Stream?

A. Gulf Stream.

Q. Okay. Let me see if I can find Gulf Stream up there. Do you still have your copy of Plaintiff's Exhibit 329?

A. Correct.

Q. Is Gulf Stream getting any RCO money?

A. Gulf Stream is not receiving any RCO money.

Q. Let me ask you this: If you turn to the change order -- the unexecuted change order, request for change order that was included in Plaintiff's Exhibit 12, it has a thousand-year storm that has a total of 115,969.21, correct?

A. Correct.

Q. Do you know whether or not y'all paid that money?

A. That was agreed to by the parties to come out of the contingency because that was an unforeseen condition, and all the parties agreed to take that money out of the contingency line item.

Q. Okay. So the $115,969.21, that money has actually been paid?

A. I believe it's been paid, yes.

Q. And has it been paid to Gulf Stream?
A. I'm not sure if it's been paid to Gulf Stream or not.
Q. Okay. But it's been paid to Balfour Beatty?
A. Yes.
Q. And they're asking for it again?
A. Correct.
Q. And this was in 2016?
A. Correct.
Q. All right. Let's go to the next one. Request for change order 75. Are you there?
A. Yes.
Q. On the request for change order 75 on Plaintiff's Exhibit 12, what is the date of that request?
A. There is no date.
Q. Is it signed by Mr. Starcevic?
A. It is not signed by Mr. Starcevic.
Q. Is there any backup to it?
A. There is no backup.
Q. Is there any way to determine, by looking at these two pages, that this is a change?
A. No.

Q. Okay. Let's go to request for change order 88. Are you there?
A. I am.
Q. Okay. When is this request dated?
A. March 7th, 2019.
Q. When was the claim submitted to the architect?
A. March 6th of 2019.
Q. Okay. Do you know when this lawsuit was filed?
A. March 5th of 2019.
Q. So this request for change order is purportedly dated after the claim that was submitted to the architect and after the lawsuit was filed, correct?
A. Correct.
Q. Okay. I would like to go through this document in some detail. It's actually signed by Mr. Starcevic; is that right?
A. Yes.
Q. What I would like to do is turn -- this is request for change order 88R1, correct?
A. Correct.
Q. And if you turn to the second page of the document --

MR. MCDONALD: Your Honor, my copy is printed on both sides. Is your copy printed on both sides, two-sided?

THE COURT: It looks like it is.

MR. MCDONALD: All right.

By MR. MCDONALD:

Q. So if you turn to the second page of the document, you see concrete change orders for Lithko; is that right?

A. Correct.

Q. Okay. And let's look up on Plaintiff's Exhibit 329 and see if Lithko is getting any RCO money. Do you know whether they are?

A. Is it the 436,941?

Q. So Lithko is in the RCO column at the 436,941?

A. Correct.

Q. Okay. So Balfour Beatty is claiming RCOs for Lithko, correct?

A. Correct.

MR. MCDONALD: All right. If you would, Your Honor --

BY MR. MCDONALD:

Q. Ms. Brown, if you would pull out -- it's already in evidence. It's Defendant's Exhibit

28.

MR. MCDONALD: And I think what we're going to have to do, Your Honor, is to keep these next to each other, 28 and this --

THE COURT: 27?

MR. MCDONALD: And our request for change order 88 in Plaintiff's Exhibit 12.

THE COURT: Okay.

BY MR. MCDONALD:

Q. It's right here, Ms. Brown. So do you recognize Defendant's Exhibit 28?

A. Yes, I do.

Q. Okay. And what do you recognize it to be?

A. This is a change order to Lithko from Balfour Beatty. Yeah, change order number 34.

Q. Okay. And let's get some basics down first. When is this change order dated?

A. There's no date on the front page, but it's accepted by Lithko on March 14th, 2019 and signed by Balfour Beatty on April 9, 2019.

Q. Okay. So it was accepted by Lithko some -- one week after Mr. Starcevic submitted a request for change order 88R1, which is included in Plaintiff's 12; is that right?

A. Correct.

Q. Okay. And then it's signed by Balfour Beatty, Mr. Starcevic, on April 9th of 2019, correct?

A. Correct.

Q. All right. And the first thing I would like to do, Ms. Brown, is go through -- if we're on the third page of request for change order 88 and Plaintiff's Exhibit 12, what I would like to do is see if the amounts that are included in this change order or request for change order are also included in Exhibit 28. Okay?

A. Okay.

Q. All right. So $407.39, is that on -- for RFI 466. Is that on Defendant's Exhibit 28?

A. Yes, it is.

Q. Okay. $3,902.24, is that on the Plaintiff's Exhibit?

A. Yes, it is.

Q. Okay. And this says L and M for last minute changes on L2, correct?

A. Correct.

Q. Okay. All right. $3,203.61, is that also on Defendant's Exhibit 28?

A. Yes, it is.

Q. Okay. For three PTB for steel changes?
A. Correct.
Q. Okay. $2,708.25, is that also on Defendant's Exhibit 28?
A. Yes, it is.
Q. $3,810?
A. Yes, it is.
Q. $7,127.43?
A. Yes.
Q. $1,552.50?
A. Yes.
Q. $1,620.19?
A. Yes. It's back on the front page.
Q. $1,456.99?
A. Yes.
Q. $783.04?
A. Yes.
Q. $1,854.91?
A. Yes.
Q. $17,383.83?
A. Yes.
Q. $7,410.66?
A. Yes.
Q. Okay. And then they're claiming here in Plaintiff's Exhibit 12, $53,221.04, correct? And

there's a markup for a total $56,414.30, right?

A. Correct.

Q. Okay. Now, let's go back to Defendant's Exhibit 28. Do you see the amounts that are in the parentheticals?

A. On Exhibit 28, I see those, yes.

Q. Okay. Do you know what those are for?

A. Those appear to be credits or back charges that Balfour is back charging Lithko for.

Q. Okay. Do you see any of those back charges on request for change order 88 as it's included in Plaintiff's Exhibit 12?

A. No.

Q. And what's the total of change order 34, Defendant's Exhibit 28?

A. It's a negative 7,985.08.

Q. Let's go to the verbiage on Plaintiff's Exhibit 28 under the chart that we just looked at. The first asterisks, will you read that to the Judge, please?

A. This change order represents full settlement on any known internal change orders between Lithko and Balfour Beatty.

Q. Okay. So as it relates to Lithko and Balfour Beatty, they're done?

A. Correct.

MR. HILDEBRAND: Objection, Your Honor. She can't -- she can read this document, but Mr. Starcevic --

THE COURT: I'll sustain that, yeah, okay.

BY MR. MCDONALD:

Q. All right. Let's go on. Read the second asterisk, if you would, please.

A. This change order includes DD design related change orders, specifically including CI's number 3049 through 3056, 0734 through 0736, 0738 through 0741 that are part of the claim against the owner design team.

Balfour Beatty has agreed to include these change order requests upon execution of this change order, and in return, will receive the first $100,650.60 of any monies recovered from the aforementioned claim.

Q. Let me stop you there. Was Library Associates aware of this --

A. No.

Q. -- exhibit, Defendant's Exhibit 28 --

A. No.

Q. -- at the time that it was executed?

A. No.

Q. So what this says is, Balfour Beatty is going to submit the change orders we just went over, right?

MR. HILDEBRAND: Objection, Your Honor. He's -- the document speaks for itself. He can have her read it and -- but otherwise, the leading questions and his asking for an interpretation of this witness, who wasn't a part of the conversations. And, again, Mr. Starcevic testified about this at length. It's cumulative. It's leading, and I --

THE COURT: All right. I will sustain the objection as to leading. You can maybe rephrase it.

MR. MCDONALD: I will rephrase.

BY MR. MCDONALD:

Q. Are the amounts that we just looked at and went through that are in change order 88, in Plaintiff's Exhibit 12, included in CI numbers 3049 through 3056, 734 through 736, and 738 through 748?

A. Can you repeat that for me?

Q. Yeah. The numbers we just went through, that we -- the amounts we just went through that

are included in both request for change order 88 and request for -- and you take all the time you need. Request for change order -- or excuse me, Defendant's Exhibit 28, are those amounts also identified as CI numbers 3049 through 3056, 734 through 736, and 738 through 741?

A. Yes.

Q. Okay. So Balfour Beatty agreed to include these change order requests in the claim against the owner; is that right?

A. Yes.

Q. Okay. At the same time stating, this change order represents full settlement of any known internal change orders between Lithko and Balfour Beatty?

A. Correct.

Q. Okay. And what Balfour Beatty, in return will receive, is the first $100,650.60?

A. Correct.

Q. Where is that depicted on Plaintiff's Exhibit 329?

A. It is not.

Q. Do you know whether the contract that Library Associates entered into allows for Balfour Beatty to get portions of the

subcontractor's claims?

A. No.

Q. No, you don't know, or, no, it does not?

A. No, it does not.

Q. How that can be a cost of the work, if Balfour Beatty is getting the money and not paying the subcontractors?

MR. HILDEBRAND: Objection, Your Honor, that calls for speculation.

MR. MCDONALD: Your Honor --

THE COURT: I think that's more --

MR. HILDEBRAND: And legal conclusion, Your Honor.

THE COURT: I think that's the argument. I will sustain the objection.

BY MR. MCDONALD:

Q. All right. So Balfour Beatty -- on this document, Balfour Beatty received the benefit of the back charges, correct?

A. Correct.

Q. And those were not passed along to the owner?

A. Correct.

Q. Okay. Do you know whether that's allowed under the terms of the contract?

MR. HILDEBRAND: Same objection, Your Honor.

THE COURT: I'm going to overrule that one. I think she can -- if she knows, she can answer that one.

THE WITNESS: No, it was not.

BY MR. MCDONALD:

Q. Let's go through the backup of this change order 88. All right. About six pages in, there's a CMC change order 28. Do you see that?

THE COURT: I'm sorry. Which document are we on now?

MR. MCDONALD: We're still on 88, and we're about six pages in. There's a change order from CMC Commercial Metals.

BY MR. MCDONALD:

Q. Before we leave that, Ms. Brown, do you know what the total of the back charges that Balfour received the benefit of but Library did not was? You relied on Sam to do those numbers?

A. Yeah. It's about 200 grand.

Q. Okay. Are you there on the CMC change order 28?

A. Yes.

Q. Okay. And how many times does that

change order appear on the backup?

A. This particular change order appears three times in this backup.

Q. Okay. Now, there's a change order from a Tendon Systems in this backup, the 88?

A. Yes.

Q. And how many times has that appear?

A. That appears twice.

Q. Does the amount of back charges that Library did not receive the benefit of, exceed the amount of change order 88?

MR. HILDEBRAND: Objection, Your Honor. He's flagrantly leading the witness. He just -- if she knows the answer to a question, you can ask her what the -- what the total is or whatever, but for him to make those legal conclusions and have that leading question, it's improper.

MR. MCDONALD: It's just math, Your Honor, and it's not a leading question. There's no other way to ask whether a number exceeds another number. Does the amount of the back charges that we just spent a bunch of times going through exceed the amount of the change order?

THE COURT: Okay.

MR. WINDLE: Objection, Your Honor. There's no correlation between the amount of the back charge or the owner getting the benefit of the back charge. That may be internal just between the general contractor and the subcontractor. The only benefit the owner gets is that they get the work done at no charge.

MR. MCDONALD: Well, if he's going to say that, I would like to respond, Your Honor. This change order is dated March and April of 2019. There wasn't a pay application submitted after that. Okay?

So they don't actually -- they've been paid the money that they've been paid. They're asking for their full amount of retainage over here, the full amount of retainage. They've been paid their contract amount. Okay?

Because this was executed after the pay application, since they're back charging Lithko, the other subcontractor that incurred that cost to make the back charge is still chasing that money as it relates to us. It's twice. The only way we can get to the benefit of the back charge, okay, is if it looked exactly like this, and there wouldn't be any money left over to go to

Lithko.

What they're doing is saying, all right, we're done vis-à-vis each other, okay, but we're still -- even though we're done because we don't owe you any money because we have these back charges we're asserting against you, we're going to ignore those back charges for the purposes of the claim against the owner.

And what we're going to do is, we're going to act like, in Court, that you're going to get that money, that RCO money. We're not going to bring up the back charges. You're not actually going to get it because we're going to get the first $100,000 of it.

But if Your Honor looks at this exhibit, it looks like Lithko is getting that money when they're not. That's all I'm pointing out.

THE COURT: Okay.

MR. WINDLE: That's a nice legal argument, and that will be contradicted clearly when Lithko testifies.

THE COURT: All right. Well, they will be entitled to put that testimony up. I'm going to allow it for now. Go ahead. Overrule the objection.

BY MR. MCDONALD:

Q. Do you know whether or not the amount of back charges in Defendant's Exhibit 28 exceed the amount of charge order 88?

A. Yes, it is.

Q. Thank you. Let's go to the next one, request for change order 103. And what is the date of this document?

A. December 16th, 2017.

Q. Okay. And who is the subcontractor for which the change order is for?

A. This states, mechanical revision.

Q. Okay.

A. And that would Bernhard MCC.

Q. Are you able to look at the backup documentation to make that determination?

A. Yes, I am.

Q. Okay. Has Library Associates agreed to pay Bernhard MCC in settlement of their claims against Library?

A. Yes.

Q. Okay. And do you know how much Library Associates is paying BMCC?

A. Approximately $650,000.

Q. Okay. Now, at the time this was

submitted as Plaintiff's Exhibit 12, had Library Associates agreed to make that payment?

A. Yes.

Q. Next to you is Defendant's Exhibit 34. Could you briefly go to that, Ms. Brown? Do you see it? Can you get it?

A. Yes, I got it.

Q. Are you there?

A. Yes.

Q. All right. Now, on Plaintiff's Exhibit 329, do they have money up there for Bernhard MCC in the RCO column?

A. Yes.

Q. And they also have money up there for BMCC in the retainage column, correct?

A. Correct.

Q. And then they've got interest for it, correct?

A. Correct.

Q. Do you know whether or not Library Associates has agreed to pay Bernhard its retainage?

A. We agreed to pay them $650,000, yes.

Q. All right. I want you to keep Plaintiff's Exhibit 34 open in front of you, and

I'm going to hand you Defendant's Exhibit 11. Do you recognize that?

A. Yes, I do.

Q. All right. And do you understand -- what do you recognize it to be?

A. This is volume one of the four binder claim presented by Balfour Beatty.

Q. Okay. And if you would, go to the section, I believe it's tab 3, and see if you can determine whether or not Bernhard has a claim that's included in that claim notebook? It looks likes it's about half an inch in.

MR. HILDEBRAND: Hold up. I think I've got this mixed up. She might be looking at my copy.

THE WITNESS: No. This is Exhibit 11. It doesn't have your copy on it.

MR. HILDEBRAND: Okay.

THE COURT: Were you looking for 11?

MR. MCDONALD: That's exactly right. Defendant's Exhibit 11. It's tab 3 in there and about a half an inch in.

THE COURT: December 15th letter?

MR. MCDONALD: January 23rd, 2019

letter. Defendant's Exhibit 11, volume one of the claim.

THE COURT: I found January 9.

MR. MCDONALD: January 23rd. It's about that far into tab 3.

THE COURT: All right. I think I got it.

BY MR. MCDONALD:

Q. All right. What I would like to see is, there is a line item -- and this is a claim submitted by Balfour on March 6th of 2019, right?

A. Correct.

Q. And there's a line item in here for BMCC contract balance.

A. Correct.

Q. All right. $137,917.73?

A. Correct.

Q. Okay. And if you go to the fourth page of that document, page 413?

A. Yes.

Q. All right. There's a description of the contract balance amount, correct?

A. Correct.

Q. Okay. And would you read the first paragraph into the record, please.

A. On May 24th, 2018, BMCC submitted application for payment number 31 in the amount of $137,917.73 for work performed on the project. BMCC has not received payment.

Q. Okay. All right. BMCC has not received payment?

A. Correct.

Q. All right. Now, let's go to Exhibit 34 that we were just looking at, which is pay application 38. Was pay application 38 funded?

A. Yes, it was.

Q. It was certified by the architect, correct?

A. Correct.

Q. And the owner paid it?

A. Correct.

Q. All right. Let's look at -- go, if you would, in pay application 38, which is Plaintiff's Exhibit 34, and turn to the portion of the pay application that deals with Bernhard MCC.

MR. MCDONALD: Your Honor, unfortunately, it's almost smack dab in the middle.

THE COURT: Okay. Just found it.

MR. MCDONALD: Perfect.

THE COURT: Okay.

BY MR. MCDONALD:

Q. All right. Are you there, Ms. Brown?

A. Yes, I am.

Q. All right. And what is the pay application for Bernhard MCC?

A. Application number 31.

Q. And is that the same number 31 that was referenced in the claim that Balfour submitted that BMCC said had not been -- they had not been paid?

A. Correct.

Q. And what is the amount of that pay application for BMCC?

A. Current payment due on line 8 was $137,917.73.

Q. All right. And what was the amount in the claim that Balfour submitted on March 6th, 2019 for Bernhard MCC?

A. $137,917.73.

Q. Okay. And this is from May of 2018?

A. Correct.

Q. And Library Associates paid Balfour that $137,917.73, correct?

A. Correct.

Q. And why did Library Associates pay Balfour Beatty the $137,917.73?

A. Because we pay certified pay apps that are certified by the architect.

Q. Is there anywhere on Plaintiff's Exhibit 329 that you-all get a credit for $137,917.73?

A. No.

Q. Okay. Do you know whether or not Library Associates has now had to pay that twice to Bernhard?

A. Yes.

Q. Okay. So Library Associates paid Bernhard in settlement of its claims against it, correct?

A. Correct.

Q. And Balfour is still in here asking for $491,386.90?

A. Correct.

Q. Do you know whether or not that interest calculation takes into account that they've had $137,917.73 of the owner's money since May of 2017?

A. It appears that it does not, or it does.

Q. All right. Let's go to 118, RCO --

request for change order 118, in Plaintiff's Exhibit 12. But before we leave that -- before we go to that, Ms. Brown, in what we looked at earlier was pay application -- we were just looking at pay application 38. What we looked at earlier was pay application 39, correct?

A. Correct.

Q. If you would just grab that briefly. And this, of course, follows pay application 38, correct?

A. That's correct.

Q. On the first page of that, is there a certification that all amounts in the previous pay application have been paid?

A. Yes, it is.

Q. Did Library Associates ever get notice that Balfour Beatty was not going to pay Bernhard MCC that $137,000?

A. No.

Q. In fact, they certified on pay application 39 that they had paid?

A. Correct.

Q. All right. Now, we've got RCO 118. We're done with that. Are you there?

A. Yes.

Q. Okay. And do you know which subcontractor this request for change order was for?

A. This would also be Bernhard MCC.

Q. Okay. And once again, Library Associates has agreed to pay Bernhard MCC directly, correct?

A. Correct.

Q. Okay. All right. Let's go to RCO 122. Are you there?

A. I am.

Q. All right. And when is this dated?

A. November 27, 2017.

Q. And can you give the Judge a little background as to what this particular RCO relates to?

A. It's for the structural delay claim for level 6, level -- it says level 8 and level 9.

Q. Okay. And there was some discussion yesterday and throughout this case about that particular claim, correct?

A. Yes.

Q. Okay. So is this the request for change order that ultimately was submitted for that issue, the structural issue? I think it's been

called a number of different things, but it's level 6, level 7, level 9?

A. Correct.

Q. All right. And this particular one is November 27th, 2017?

A. Correct.

Q. Okay. Do you know when the first one was submitted; meaning, our request for change order 122, the original?

A. I believe that was in 2016.

Q. Okay. And is this the issue that went to -- there was discussion about going to mediation?

A. Yes, it is.

Q. Okay. And it's signed -- this particular request for change order 122 is signed by Mr. David Stanton. Who is he?

A. He was the -- they've got so many titles, I'm not -- the project supervisor. He is -- was in the same role that Mr. Simonton is in at the end of the job, the project exec. I'm not sure.

Q. Okay. All right. And on the second page of the document -- actually, it's on the first page, but it's the back side of the first

page, there is a breakout of numbers, correct?

A. Correct.

Q. All right. And it's got BBC general conditions, $321,255, correct?

A. Correct.

Q. All right. Is there any backup for that number?

A. No.

Q. So it's just a number?

A. Correct.

Q. And then it's got hoisting, staging and logistics for $119,227?

A. Yes.

Q. Is there backup associated with that?

A. There's some backup, but not the total for that number.

Q. Is that the Sunbelt documents?

A. Yes, it is.

Q. Okay. We'll go through those in a bit. All right. Then it has Lithko at $383,720; is that right?

A. Yes.

Q. Okay. Then it has Pasco at $6,262?

A. Correct.

Q. All right. Let's talk about Pasco for a

second. Who is Pasco?

A. Pasco was the sprinkler sub, the fire protection sub.

Q. Okay. So we've got Lithko with Defendant's Exhibit 28 that we went through, right?

A. Yes.

Q. They're first. And we've got Pasco next, correct?

A. Correct.

Q. All right. I'm going to hand you what's been marked as Defendant's 63. It's already in evidence.

MR. MCDONALD: And, Your Honor, this came -- this was in the deposition transcript exhibits; so they're in that stack.

THE COURT: Okay. This is tab 15?

MR. MCDONALD: Tab 15, yes, Your Honor.

BY MR. MCDONALD:

Q. Are you there, Kim -- Ms. Brown?

A. I am.

Q. All right. If you would, go to the final page of that document. Are you there?

A. I am.

Q. All right. This has a line here. This is Balfour Beatty Construction, and it has a line here, extended general conditions claim. Do you see that?

A. On the back page?

Q. Yes, ma'am, about halfway down.

A. Yes, I do.

Q. Okay. And which subcontractor is this for?

A. Pasco.

Q. Okay. And it has a number of $113,376, right?

A. Yes.

Q. All right. And will you read what the comments are?

A. It says, added to claim. No backup or explanation provided.

Q. And this also has a number of parenthetical numbers on it, too, correct?

A. Correct.

Q. And what is the total of those? It's right after remove rejected painted heads, at the very bottom.

A. Yeah. I --

THE COURT: It will add it for you.

THE WITNESS: The total of the ones in the parenthetical?

BY MR. MCDONALD:

Q. Yes.

A. Well, the 14 weeks, the negative 14 needs to be added to the negative 1233, negative 15, negative --

Q. Look at the total at the bottom.

A. Oh, the very total at the bottom is a negative 107,261.19.

Q. Okay. Also on this document, there's a -- on the second and third -- the first page, it says, tab 14. It's the second, third and fourth page is a Balfour Beatty subcontractor status report, right?

A. Correct.

Q. And it shows an open amount of $19,554.19, correct?

A. Correct.

Q. Next, going back to 122, the next is BMCC?

A. Yes.

Q. For $35,782?

A. Yes.

Q. And the owner has agreed to pay BMCC,

correct, Library?

A. Correct.

Q. And the next is Watson Electrical in $99,008?

A. Correct.

Q. All right. And is Watson Electrical getting any RCO money up here on Plaintiff's Exhibit 329?

A. No.

Q. All right. Let's turn to the next page, which is the Balfour Beatty Construction page, correct?

A. Yes.

Q. And this is -- this again identifies what we just looked at on the previous page and then breaks out what the markup is, correct?

A. Correct.

Q. Okay. And then, if we go to the next page, which is the back side of the Balfour Beatty page, what is that?

A. That is the -- it's just a subcontractor scope fee for Lithko.

Q. Is there any dates on that document?

A. The only dates is the one at the very top, November 27, 2017.

Q. Okay. So this is a delay claim that doesn't actually identify any dates? Is that what this is?

A. It has no dates, correct.

Q. Ms. Brown, I'm going to hand you what is Defendant's Exhibit 69. Do you have that?

A. Yes.

MR. MCDONALD: It's in the deposition.

THE COURT: Okay. Thank you.

BY MR. MCDONALD:

Q. And do you recognize the first page of this document?

A. Yes.

Q. What do you recognize it to be?

A. This is the Balfour Beatty pay app number 18 for period, September 1st, 2016 to September 30th, 2016 to Library Associates.

Q. Okay. And was this pay application funded?

A. Yes, it was.

Q. Okay. Funded by the owner?

A. Yes.

Q. Okay. And if you turn to the third page of Exhibit 69, there's a Lithko pay application.

A. Yes.
Q. And that's for the same period, September of 2016, correct?
A. Correct.
Q. All right. And if you turn to the final page of this document, do you recognize that?
MR. MCDONALD: It's Defendant's Exhibit 69, Your Honor.
THE WITNESS: Yes.
BY MR. MCDONALD:
Q. What do you recognize it to be?
A. This is the subcontractor lien waiver.
Q. Okay. And would you read -- and the line where it starts, see Exhibit A, would you read that into the record, the first paragraph?
A. Yes. See Exhibit A attached hereto, parentheses, the property, end parentheses.
On account of labor and services performed and/or material furnished for the construction of any improvements thereon, except for retention and open change order requests, claims, or disputes identified as follows, none.
Q. Okay. None is entered in after any open change order requests, claims, or disputes?
A. That's correct.

Q. Okay. And go to the second paragraph, second sentence.

A. That this is a waiver of all lien rights and other claims which lienor has against the property, the contractor and the owner for all labor, material, and services performed therein -- thereon, including all extras and change orders, that all labor is retained or employed by the lienor, construction or improvements on the property.

All suppliers and subcontractors of lienor who have furnished labor, material, and services for the undersigned for the construction of the improvements on the property, and all labor, services, and materials used by the undersigned in construction of said improvements will be paid in full for the work performed and materials supplied up to and including the 30th day of September of 2016, including the items identified --

Q. Excluding. Excluding.

A. Excluding the items identified hereinabove, if any.

Q. Were any items identified hereinabove?

A. No.

Q. Okay. So through the 30th day of September 2016?

A. Correct.

Q. All right. And if we go back to request for change order 122 on Plaintiff's Exhibit 12 for Lithko, it doesn't have any dates as to when these claims days are for, correct?

A. Correct.

Q. Okay. So we go through the undated Lithko backup, and we wind up at some Sunbelt quotes; is that right?

A. That's correct.

Q. And have you had an opportunity to review these Sunbelt quotes?

A. I have.

Q. All right. The first one is dated May 3rd, 2016.

A. Correct.

Q. And is that prior to September 30th, 2016?

A. Yes, it is.

Q. And what is this one for?

A. This is for scaffolding of Sunbelt. And under scope, it says, Sunbelt Rentals to provide labor and material for two system stair units

that will be erected in one each, stair 3 and stair 6.

Q. Okay. And then under scope at the beginning of phase one, what does it say it's for? It's the second or third sentence.

A. Phase one will be to install the units up to 26 inches high with one landing to the first floor.

Phase two will be to continue up with the units after the building is self-sufficient enough to allow the securing of the stair units to the building and provide access to the second floor.

Phase three is to complete the units up to 45 feet in height and provide access to the third floor.

Q. Okay. So this is a Sunbelt quote from May 3rd, 2016, related to scaffolding on the first, second, and third floor, correct?

A. Correct.

Q. And it is attached to a request for change order that on its face says it's for the sixth, seventh and ninth floor?

A. Correct.

Q. And how much is it for?

A. $13,947.98.
Q. Right. 13,947.98. Okay. And is this signed?
A. No.
Q. What is the next Sunbelt quote as backup for this request for change order 122?
A. It's dated April 14th, 2016.
Q. Is that prior to September 30th, 2016?
A. Yes.
Q. Okay. And who is it submitted to?
A. It is submitted to Balfour Beatty to Bob Cotherman.
Q. Okay. And what is it for, under scope?
A. Under scope, Sunbelt Rentals to provide labor and materials for 154 linear feet times 10 foot high of overhead protection. System scaffolding with aluminum beams and three-quarter inch pressure treated plywood will be used.
Q. And where -- what was that? Where was that?
A. I believe that was the overhead protection on the King Street side.
Q. What is the overhead protection?
A. On the sidewalk, covering the sidewalk so people can walk through without being injured.

Q. And how much is that for?
A. 13,511.54.
Q. And is that signed?
A. No.
Q. What is the next Sunbelt quote that has been attached to the request for change order 122 on Plaintiff's Exhibit 12?
A. Dated July 21st, 2016.
Q. July 21st, 2016. All right. Is that prior to September 30th, 2016?
A. Yes.
Q. Okay. And what is this for?
A. It is also for the overhead protection.
Q. And where is it going to be located?
A. Under specifications, it says that, this is for overhead protection systems, scaffolding, and layering, single layer of each aluminum beams, OSHA wood planking, and three-quarter inch plywood secured on top directly in front of the garage opening.
Q. Where is the garage opening located?
A. On Hutson Street.
Q. On the ground floor?
A. Correct.
Q. All right. And how much is this for?

A. 3,698.82.
Q. Okay. And is this signed?
A. No, it's not.
Q. All right. The next document is a Sunbelt Rentals -- what is this? What is this? It says reservation. What is this, Kim? The previous ones were entitled quotes.
A. Correct. It appears that they've already called to actually reserve this equipment to be delivered to the site.
Q. Okay. So this might -- this says page 1 of 2, 2 of 2, and then terms and conditions, right?
A. Correct.
Q. Okay. All right. What is this for?
A. This appears to be for an electric man lift, but the job location right under the reservation says, 200 Pier View Drive, Simmons Park.
Q. We will get to that in a second. This is for an electric man lift, right?
A. Yes.
Q. And what is the date out?
A. Date out is July 13th, 2016.
Q. And what is the estimated return?

A. July 18th, 2016.
Q. And what is the job number?
A. 1 Simmons Park.
Q. Okay. And what is the total of this?
A. You have to go on page 2 of 2. It is $1,180.10.
Q. Okay. And where did they -- what is this little note here? Were you here when Mr. Starcevic testified?
A. I was.
Q. Okay. And what is this little note here on page 2 of 2 next to the subtotal?
A. Call when driver leaves yard, deliver to Pier View Street side.
Q. So they were going to deliver this thing to Pier View Street side?
A. Correct.
Q. And is Hotel Bennett located on Pier View Street?
A. No.
Q. All right. The next thing we have is what?
A. The next one is gutter systems scaffold quote.
Q. From Sunbelt?

A. Yes.
Q. Okay. All right. And this is dated November 4th, 2016, correct?
A. Correct.
Q. And what is it for?
A. This is to provide top and side protection for two transformers.
Q. And where are the transformers located?
A. They're on the Hutson -- well, the transformers are actually located between the Hotel Bennett and the Embassy Suites, on the alleyway between the two, going from Marion Square to Hutson Street.
Q. On the ground?
A. Yes, they're on the ground.
Q. Okay. And is this signed or dated on the third page?
A. No.
Q. All right. And how much is it for?
A. 6,187.12.
Q. And then the next and final Sunbelt entry is what?
A. This one says, quote, dated, June 8th, 2016 for a shooting boom forklift and a 2-ton electrical chain hoist and a forklift.

Q. And when is the date out for these pieces of equipment?
A. June 13th, 2016.
Q. And what is the estimated date of return?
A. July 11th, 2016.
Q. And what is the total of this document?
A. 3,173.60.
Q. And if we go back to the first page of this document, RCO, request for change order 22, what is the amount -- or it's the first page, but it's the back side of it. It's printed on two sides. What is the amount for the hoisting, staging logistics?
A. 119,227.
Q. Do you know if these Sunbelt Rental things add up to anywhere close to that?
A. No, it doesn't appear to be.
Q. All right. The next entry in this pay application or request for change order 22 relates to which subcontractor?
A. After the hoisting or --
Q. After the Sunbelt.
A. Oh, sorry. That's Pasco.
Q. Pasco. And the total for Pasco is? You

will have to look on the front page. It's pretty small, Pasco's.

A. $6,262.

Q. Okay. And for their backup, Pasco says they're able to go to 21 days on level 7. Are there any dates associated with that or just days?

A. It's just days.

Q. Okay. And then it's got -- for those 21 days, they can do it in $3,225.75, right?

A. That's correct. Page 4 of 5 says, a project manager for 17 hours and a superintendent for 17 hours.

Q. And then they've got 20 days on level 9, right?

A. Correct.

Q. Okay. Are there any dates on that?

A. No.

Q. All right. And so for those 40 days, they're looking for $6,262?

A. Correct.

Q. The next one is which subcontractor?

A. BMCC.

Q. Okay. And BMCC -- the owners paid BMCC, correct, directly?

A. Correct.
Q. Okay. And what is the next subcontractor?
A. Watson Electrical.
Q. Okay. Let's look at that. Is Watson getting any RCO money?
A. No.
Q. Okay. It has L6, 20 days and L7 and 9, 32 days, right?
A. Correct.
Q. Now, are there any -- are there any dates on this?
A. No, there's not.
Q. Just a calculation of man hours, it looks like?
A. Correct.
Q. Okay. And you would be unable to determine, from the backup documentation, when these dates -- these days were claimed on a calendar year?
A. Correct. And there's not even a date on the top of the page.
MR. MCDONALD: Okay. I have no idea what time it is. I'm about to switch gears.
THE COURT: Do you want take a

five-minute break?

MR. MCDONALD: Five minutes would be perfect, Your Honor.

(A recess transpired.)

THE COURT: Okay. All right. Mr. McDonald?

MR. MCDONALD: Thank you very much, Your Honor.

BY MR. MCDONALD:

Q. Ms. Brown, before we broke, we were looking at the Watson backup to RCO, request for change order 122 that's included in Plaintiff's Exhibit 12, and I asked you whether or not in -- rather than just saying days, 20 days or 32 days, does it have any actual dates?

A. No, it does not.

Q. Okay. I hand you what's been marked as Defendant's Exhibit 83.

MR. MCDONALD: It is in the stack from the depositions.

THE COURT: Deposition stack.

BY MR. MCDONALD:

Q. Ms. Brown, do you recognize that document?

A. This is a pay app from Watson to Balfour