

1 it's -- it's between Mr. Keith and Mr. Predovich.
 2 Mr. Keith says: Here we go, we have to resolve
 3 this Monday. I'm scheduling the inspector for
 4 Tuesday.
 5 Did he ever share that e-mail with you?
 6 A. No, he did not.
 7 Q. If we could go to TA 409. Is this
 8 another revision to PR 18?
 9 A. Yes, it is.
 10 Q. And what's the date of this revision?
 11 A. July 26th of 2011.
 12 Q. And if we go to the second page, what's
 13 occurring with this revision?
 14 A. There's changes and it appears to be
 15 creating rated ceilings and walls.
 16 MR. BECKER: I'm sorry, what about the
 17 ceiling and wall?
 18 THE WITNESS: It appears to be creating
 19 rated ceilings and walls.
 20 MR. BECKER: Thank you.
 21 Q. (By Mr. Madigan) And what's the rating
 22 of the walls shown with this change -- or that's
 23 bubbled out?
 24 A. It says one-hour fire-rated ceiling

1 slash roof assembly.
 2 Q. Now, the revised PR that we just looked
 3 at was dated 7/26/2011. If we go further into
 4 this PR, do we see sketches that were being issued
 5 later than that?
 6 A. Yes. These sketches were dated, I
 7 believe SHP uses more of a European format for
 8 dating, and so this would be August 8th of 2011.
 9 Q. So is this a sketch showing how the
 10 rating is supposed to achieve -- showed to be
 11 achieved in this building?
 12 A. Yes.
 13 Q. How about page 12? Is this another
 14 sketch being given to TransAmerica showing them
 15 how to -- they're to -- to construct these walls?
 16 A. Yes.
 17 Q. Are there any architectural plans with
 18 these details?
 19 A. No, there's not.
 20 Q. Now, had the wall panels been
 21 fabricated at this point in time?
 22 A. Yes, they had.
 23 Q. What's the significance of changing
 24 fire ratings of walls when they've -- when you're

1 using a panelized system?
 2 A. You have to find -- it's mostly the
 3 terminations of things that you have to worry
 4 about. But what it ultimately comes down to is
 5 you have to go in and rework the panels. You have
 6 to add -- either add -- add or significantly
 7 modify the panels to get what they're after here.
 8 Q. Is it as simple as just adding more
 9 drywall, adding another layer of drywall?
 10 A. No. It -- you've got to take the panel
 11 apart in some instances, maybe even take it out of
 12 its position and take it down, disassemble parts
 13 of it and then add whatever framing that they
 14 might be requiring and then put it all back in
 15 place. Some of the panels it was -- it was more
 16 efficient to discard.
 17 Q. If we could go to TA 417.
 18 This is an e-mail from yourself to Lend
 19 Lease. And what's taking place here in this
 20 e-mail?
 21 A. We are -- we're being directed to
 22 proceed with the work shown in PR 18. And it --
 23 it's to be done time and material until PR 18 is
 24 revised and pricing is finalized.

1 Q. And is this an example where Mr. Smith
 2 is providing direction without a signed change
 3 order?
 4 A. Yes.
 5 Q. If we could go to TA 419.
 6 This is an e-mail from Mr. Smith. And
 7 the subject is chase walls at bathrooms, and it's
 8 dated August 3rd, 2011. What's going on with the
 9 bathrooms at this point in time?
 10 A. He's telling us that we'll need to
 11 review our drawings at the dorm separation walls
 12 that require two layers of drywall. He's telling
 13 us that we have not in the bathroom chases -- you
 14 have not drywalled the chases shown.
 15 What's happening is you're catching
 16 buildings in different stages of the completion
 17 when these changes are rolled out and so he's
 18 going out there and seeing things not consistent
 19 with the latest information given and assumes it's
 20 rework.
 21 Q. His note there also says, to date
 22 there's no doors in place, open windows and
 23 ceiling and insulation is not completed -- is no
 24 completed.

1 Were the exterior doors and windows in
2 TransAmerica's package?
3 A. They were not.
4 Q. But was -- based on this e-mail, was
5 Mr. Smith expecting TransAmerica to --
6 THE COURT: Excuse me, did you say
7 ceiling or doors or windows and doors? Did you --
8 I want to have that question back.
9 MR. MADIGAN: Sure.
10 Q. (By Mr. Madigan) TransAmerica did not
11 have the exterior windows and doors in its scope
12 of work?
13 A. That's correct, it was not in our
14 scope. It's no hole aluminums.
15 Q. Now, in August of 2011, it's humid out,
16 is Mr. Smith expecting TransAmerica to address the
17 humidity in these buildings?
18 A. Let's see, what he's actually saying
19 here is I referred earlier to those mechanical
20 rooms that they asked us to install ahead of time,
21 and he's noting that we had installed standard
22 type X fire-rated drywall ahead of the -- the
23 enclosure which was the windows and doors being
24 installed, but we were asked to do that by Clay.

1 Q. Now, is this fire-rating issue, is this
2 affecting how the shower stalls are being
3 constructed?
4 A. Yes, it is. Because originally in --
5 when we got the shop drawings from TP Mechanical
6 for the shower, the shower is just a standard
7 flanged shower unit, one piece that gets
8 installed. And what typically occurs is there's
9 no drywall behind it and you -- you install the
10 shower directly to framing and then the finished
11 layer of drywall overlaps the flange and that's
12 the finished piece.
13 Q. If we could pull up TA 1023-1.
14 THE COURT: I have a question.
15 Mr. Madigan, could you back up to that? Just pull
16 up -- Mr. Wilhelm?
17 THE WITNESS: Yeah.
18 THE COURT: This last sentence in the
19 next-to-last paragraph says, all standard drywall
20 installed was at your risk.
21 Did you have a signed change order to
22 install anything other than standard drywall in
23 that location --
24 THE WITNESS: No.

1 THE COURT: -- at the time of this
2 e-mail?
3 THE WITNESS: No, I did not.
4 THE COURT: Thank you.
5 Q. (By Mr. Madigan) If we could go to TA
6 1023-1.
7 You just described the shower stalls.
8 Is this picture -- is this a picture of the shower
9 stalls?
10 A. Yes, it is.
11 Q. And is this a picture where the shower
12 stalls are being -- are attached directly to the
13 studs or the wood -- the wood framing?
14 A. Actually, in this picture, it --
15 there's a layer of drywall behind it. This would
16 have been sometime after the original
17 installation. At least the one I'm looking at.
18 Q. If we could go to TA 1023-2.
19 A. Right. What this -- what this is
20 showing, I'm going to -- the one in my book is a
21 little better. Okay. What you have here is this
22 is -- I'm going to call this somewhere in the
23 middle of the cycle. What you have is an unrated
24 wall to its right where it's --

1 MR. BECKER: I'm sorry, Your Honor,
2 this photograph is not decipherable.
3 THE COURT: Well, he can describe what
4 he's looking at from his own personal knowledge,
5 but this photograph is not going to do you or me
6 or anybody any good because it's just too dark. I
7 agree.
8 THE WITNESS: I can -- I think I can
9 explain the process if you want.
10 THE COURT: If you could explain from
11 looking at TA 1023-2 what it is we're looking at,
12 that's fine. We have no way of --
13 THE WITNESS: Okay.
14 THE COURT: -- understanding.
15 THE WITNESS: It's really I think kind
16 of simple. The shower pieces are one-piece
17 ceilings, fiberglass flange, it's fairly common in
18 the industry. When you ask for the shop drawings
19 so that you have dimensions for these, what you
20 get is the rough opening size required in framing,
21 okay? Because this unit attaches to framing.
22 So when a fire rating is now required,
23 it -- the fiberglass shower isn't rated. So now
24 you've got to put a piece of drywall behind the

1 shower. And there was a question on the job
2 whether that had to be one or two because of what
3 the inspector was going to allow for this -- this
4 assembly at this -- at this shower.

5 So there were actually several versions
6 of rating systems that occurred. And what this
7 picture is attempting to show -- so there's times
8 where you go from what should have occurred is a
9 framed rough opening to now if a shower has a
10 rated wall let's say to its back, you've got to
11 pull that out, put in a layer of drywall behind it
12 and then fur out the end walls.

13 THE COURT: Understood.

14 THE WITNESS: And then you might have
15 conditions where there's another wall where
16 there -- it comes to a corner, and so you have a
17 rated wall here and here, and now you've got to
18 undo the other wall that's adjacent to it because
19 there wasn't enough play.

20 THE COURT: When you say, "here and
21 here," you're talking about in the back and then
22 the side?

23 THE WITNESS: Yes.

24 THE COURT: Okay.

1 all different. Every one of them. Maybe not
2 every one of them, but literally, you know, there
3 might be a couple that are of similar condition, a
4 couple more of similar condition and so on.

5 THE COURT: Okay.

6 Q. (By Mr. Madigan) So you were talking
7 about different conditions throughout the dorm.
8 If we pull up 1426.

9 What is this a floor plan of?

10 A. This is a blind elementary dorm
11 building.

12 Q. And how many shower stalls are depicted
13 there?

14 A. There's three in the dorm rooms.

15 There's -- also for the record, there's another
16 common bathroom, but that's generally outside of
17 the area, so...

18 Q. And this area that you reference, this
19 is the area that's being affected by the fire-
20 rating changes?

21 A. That's correct.

22 Q. So there's three in a blind elementary.

23 If we go to 1427.

24 How many are in a blind high school?

1 THE WITNESS: And that's actually what
2 this picture tries to show. So now you have a
3 situation where it won't physically fit, so now
4 you've got to literally undo the wall that's
5 opposite it and relocate it before you can -- can
6 do that fix.

7 THE COURT: Basically reframe it?

8 THE WITNESS: Yes. And then I believe
9 there -- and I'm summarizing. There -- for every
10 so many rooms and so many bathrooms, there could
11 be just as many conditions, you know? This was
12 depending on where one fell next to one of these
13 walls.

14 And so you could have some bathrooms
15 that I think to the corridor wall they were a
16 little more sensitive about wanting it to have the
17 two layers, and to the adjacent dorm walls they
18 wanted at least one wall and stuff like that. So
19 what you get is you get two and three iterations
20 of what to do with these shower unit dimensions
21 from --

22 THE COURT: Depending what you
23 encounter?

24 THE WITNESS: That's right. And it's

1 A. There's seven.

2 Q. So if we go to 1428.

3 How many shower stalls are on the blind
4 campus?

5 A. 30.

6 Q. So if -- would the same number -- would
7 you have the same number over on the deaf side?

8 A. That's correct. There would be 60
9 total.

10 Q. So if we go to 1429. So between both
11 campuses, the shower condition is occurring how
12 many times?

13 A. 60 times.

14 Q. If we can go to TA 421. If we could go
15 to the second page.

16 This is an e-mail from you, Josh, dated
17 August 4th, 2011. The subject line is ceiling
18 framing. What was the purpose of this e-mail?

19 A. I'm, again, documenting things that
20 we've been told or directed to do in different
21 formats and trying to put it in one place.

22 Q. If we go to the page 1, you can see an
23 e-mail between Clay Keith, Josh Predovich and Jim
24 Smith. Were you copied in on this e-mail?

1 A. I was not.
 2 Q. It says on item three, are we to direct
 3 them to proceed as submitted to plans examiner or
 4 should we stop them if they get this -- if they
 5 get to this area? I do not believe they are ready
 6 to hang drywall, but need to know if the answer is
 7 delayed from Sakhir. Please provide direction on
 8 how we should have them proceed.
 9 During construction, were you ever made
 10 aware of this?
 11 A. No, I was not.
 12 Q. If we go to TA 422. If we could go to
 13 page 3.
 14 What's occurring in this e-mail from
 15 Mr. Smith to you on August 5th, 2011?
 16 A. He is taking issue with the cost of
 17 insulation that we had responded to a PR. And
 18 he's suggesting or, I don't know, demanding, I
 19 guess, but strongly suggesting that we -- that
 20 he's telling me that recovery board is in stock at
 21 Modern Builders Supply and was -- has taken issue
 22 with the cost of the insulation.
 23 Q. Was it difficult dealing with the
 24 multiple pricing revisions on this project?

1 A. Yes.
 2 THE COURT: I have a question,
 3 Mr. Madigan. Just on this -- on this example
 4 here, when you submitted a cost for your
 5 materials --
 6 THE WITNESS: Uh-huh.
 7 THE COURT: -- did you submit that from
 8 an invoice?
 9 THE WITNESS: It was submitted from
 10 a -- yeah, the backup would have been a -- my
 11 subcontractor's pricing, which would have included
 12 his material pricing, yes.
 13 THE COURT: Okay. Would that included
 14 his overhead and profit?
 15 THE WITNESS: Yes.
 16 THE COURT: Okay. Thank you.
 17 Q. (By Mr. Madigan) If we go to that
 18 first page, it's an e-mail from Mr. Keith to
 19 Mr. Predovich. He's asking Mr. Predovich, do we
 20 do it as you requested per the PR or not? We
 21 can't have every direction given debatable, which
 22 in TA's eyes is delay by you.
 23 Did Mr. Keith ever include you in on
 24 this e-mail?

1 A. No, he did not.
 2 Q. So we're into August. Is PR 18
 3 resolved as of this point in time?
 4 A. No. There's still revisions ongoing.
 5 Q. If we go to TA 424.
 6 Is this an example of one of the
 7 ongoing revisions?
 8 A. Yes, it is. It's a sketch that was in
 9 the original issuance or revision one and it's
 10 being further revised.
 11 Q. There's a reference there about fire
 12 caulk.
 13 A. Yeah.
 14 Q. What's going on there?
 15 A. In this version, they're adding fire
 16 caulk at the framing at the first layer of
 17 drywall.
 18 Q. If we go to TA 427. This is an e-mail
 19 that you wrote August 12th, 2011 to Mr. Keith and
 20 Mr. Predovich. Did you still have questions with
 21 respect to PR 18?
 22 A. Yeah, we had a lot of questions with
 23 respect to PR 18.
 24 Q. Okay. And at least some of those

1 questions are detailed in this e-mail?
 2 A. Yeah. I was trying to give a
 3 comprehensive list of things that needed to be
 4 answered. And I was turning this in as an RFI,
 5 but then I was also e-mailing it to him so that it
 6 wasn't just dropped into an RFI.
 7 Q. Your first reference is about access
 8 panels?
 9 A. Yes.
 10 Q. Explain what you meant.
 11 A. From conversation, what was happening
 12 is -- okay, I'm hearing a lot of what I'm knowing
 13 on this stuff in conversation. And if you're
 14 adding draft walls in the access up in the attic,
 15 then if you have an access panel at one end of the
 16 building, that's not going to do you a lot of good
 17 when there's several draft walls between you and
 18 the other end of the building.
 19 So I was assuming that they would want
 20 to be adding access panels to the -- to the change
 21 as -- that was going to be required.
 22 THE COURT: Mr. Wilhelm, when you say,
 23 "draft walls," you're talking about walls that
 24 extend from the ceiling up to the roof?

1 THE WITNESS: That's correct, yeah.
 2 So I'm asking specifically -- I'm
 3 stating there's been conversation about them,
 4 please provide the location type and rating of the
 5 access panels required. There was also some
 6 questions regarding -- regarding ladder accesses
 7 at that time. And I'm asking, will more be
 8 required to a draft stop? I don't know if they
 9 want more ladders or not.
 10 Q. (By Mr. Madigan) If we could go to TA
 11 434. And I would like to start with the second
 12 page, that second -- this is an e-mail from
 13 Mr. Miller to Lend Lease and you're copied in on
 14 it?
 15 A. Uh-huh.
 16 Q. And the date of this e-mail is?
 17 A. The date of this e-mail is August 17th,
 18 2011.
 19 Q. And in this e-mail, what is Mr. Miller
 20 expressing to Lend Lease in terms of how
 21 directives and information are being transmitted?
 22 MR. BECKER: Objection. Hearsay.
 23 THE COURT: Sustained.
 24 Q. During this part of the project, how

1 was -- how was Lend Lease issuing its directives?
 2 A. Okay. This -- the reason this is being
 3 done this way is just like I said earlier. I had
 4 always tried to take anything I was given in a
 5 meeting. Because of the concern about it not
 6 being recorded, I would put it into an e-mail and
 7 send it as what our understanding of the
 8 conversation, what we were told, whatever we're
 9 getting from them. I told Brad Miller to do the
 10 same thing, so Brad Miller was simply recording --
 11 MR. BECKER: Objection. That's going
 12 to bring into hearsay.
 13 THE COURT: Sustained.
 14 Q. (By Mr. Madigan) Was there a separate
 15 meeting between the superintendents?
 16 A. Yes. I originally attend that meeting.
 17 Then at some point I was asked to not attend and I
 18 honored that request for a while, but then after a
 19 while, I -- they started, I don't know, I don't
 20 want to run afoul of what's going on here, but
 21 they started giving more and more information at
 22 those meetings in my absence and so I then resumed
 23 attending them.
 24 MR. BECKER: I'm going to object and

1 move to strike the fact that he's not at the
 2 meeting means he acquired that information through
 3 hearsay.
 4 MR. MADIGAN: He testified he was -- he
 5 attended at least a portion of the meetings. His
 6 testimony was related to he was asked not to
 7 attend. That was -- that was what he was
 8 testifying to. He -- it doesn't have anything to
 9 do with hearsay.
 10 MR. BECKER: Let me clarify my
 11 objection. My objection was to his testimony that
 12 there was more and more information being provided
 13 at those meetings that I was not present for.
 14 That's what I'm objecting to. He can only know
 15 that based on hearsay.
 16 THE COURT: Okay. Well, I think he can
 17 testify as to what his understanding was without
 18 necessarily offering that for the truth of the
 19 matter, so it's overruled. Now, he responded to
 20 what his understanding was.
 21 Q. (By Mr. Madigan) If we could go --
 22 what was the response that Mr. Smith gave to
 23 Mr. Miller's e-mail?
 24 A. He was first I would say chastising him

1 for sending the e-mail to Clay and said I would
 2 like to state that field activities must go
 3 through me, and indicated that Lend Lease has a
 4 chain of operations between the field and office
 5 issues.
 6 Q. And "must" is in all caps?
 7 A. Yes.
 8 Q. If we could go to TA 435. This is an
 9 e-mail that you wrote on August 18th, 2011 to Lend
 10 Lease discussing PR 18. Explain why you wrote
 11 this e-mail.
 12 A. Jim Smith had sent out an e-mail. And
 13 in his view, like with other issues, was that when
 14 these effects were realized in the field, his view
 15 was almost always that it was TransAmerica's
 16 fault. So here again he's -- he's laying into us
 17 for -- for doing something contrary to what he
 18 thinks we've been told to do and I was setting the
 19 record straight. He was specifically talking
 20 about the fire caulk that changed in those prior
 21 to sketches when they -- and I'll read what I
 22 said, I think it summarizes best. But I tell him
 23 we were not installing what was shown in the
 24 drawings. We were installing the fire-rated

1 assemblies that you told us to install per PR 18.
 2 If you look at PR 18 as issued on 7/22 --
 3 MR. BECKER: I'm just going to object
 4 to him reading from the document.
 5 THE COURT: He's the author.
 6 Overruled.
 7 Did you send this e-mail?
 8 THE WITNESS: Yes, I did.
 9 THE COURT: Do you recognize it?
 10 THE WITNESS: Yes, I do.
 11 THE COURT: Okay. I can read.
 12 A. Okay.
 13 Q. (By Mr. Madigan) Yeah. If we can go
 14 to page 2.
 15 A. Okay.
 16 Q. You made a reference there about
 17 intending to work as hard as possible. What did
 18 you mean by that?
 19 A. We had a meeting in early August and
 20 again, their -- their impression of me or
 21 TransAmerica was that I was bringing --
 22 MR. BECKER: Your Honor, I'm going to
 23 object to their impression of TransAmerica. That
 24 would just be speculation on his part.

1 THE COURT: Sustained. I think he can
 2 answer another way.
 3 A. Okay.
 4 Q. (By Mr. Madigan) What was being
 5 expressed -- what was Lend Lease expressing to you
 6 in terms of the performance of TransAmerica?
 7 A. They felt that my -- throughout the
 8 project when I had brought the dimensional issues
 9 or any other problem, as I indicated earlier, they
 10 had the -- their interaction with me I -- I could
 11 tell that they were upset with me. They -- I
 12 felt, you know, that they would have preferred
 13 that I didn't come into their trailer.
 14 MR. BECKER: Objection. Speculation.
 15 Unless they said it, he's just -- he can't get
 16 into their minds.
 17 A. All right. Well, they --
 18 THE COURT: Well, I think he's
 19 testifying as to his impressions, so overruled.
 20 A. So these issues -- these were always
 21 framed to us out in the trailer that, you know, my
 22 bringing these detailed problems to them was
 23 somehow viewed as -- or I viewed them as viewing
 24 it as I'm looking for problems. I'm not out there

1 trying to resolve issues, and that couldn't be
 2 further from the fact as we discussed earlier.
 3 We were -- I was doing personally a lot
 4 of work to try to feed the information into the
 5 architect so that we could over -- you know,
 6 overcome these issues. You know, I didn't -- you
 7 know, that letter that we sent early in the
 8 project that lists the schedule activities
 9 impacted by the casework, the earlier response to
 10 PR 18 where I sent a page of detailed thought on
 11 what we're going to need to be able to answer
 12 these questions.
 13 And here again -- so they call a
 14 meeting and they basically say quit doing that.
 15 They say basically if -- if we tell you to go out
 16 and do something and you know that it's wrong, go
 17 out and do it and we'll write you a change order.
 18 And so I'm responding to them and I say, Clay, you
 19 know, we'll work as hard as we can to cooperate
 20 and get this job done. I'm trying to express
 21 that, look, my intent is to just to always work
 22 with you. That's all I've ever intended to do.
 23 He gives me some of the answers that I've asked
 24 for about how the fire stopping and the DIC

1 inspection process is going to go.
 2 Q. (By Mr. Madigan) And I want to stop
 3 you there.
 4 At item No. 2, the fire stopping
 5 details were to be inspected with Jim Smith and
 6 the DIC inspector yesterday. You didn't say in
 7 there with anybody from TransAmerica, did you?
 8 A. No. Here again, we were not allowed to
 9 be in those meetings.
 10 Q. And what did you go on to say about
 11 that inspection?
 12 A. We were told to wait on the results of
 13 that conversation and the inspection. Brad Miller
 14 met with you yesterday to review what will need to
 15 be done. I'm -- I'm telling them that we -- we
 16 installed the two layers of drywall as instructed.
 17 And after the rating details were produced and
 18 reviewed by the DIC, and I show the attached
 19 sketch that's revised on 8/08/11, is determined
 20 that fire caulking should go in these mechanical
 21 rooms. Nevertheless the drywall was installed
 22 without any caulking.
 23 MR. BECKER: Again, Your Honor. Just
 24 reading from the document. Objection.

1 THE COURT: Overruled. You can
 2 summarize. You don't need to read.
 3 A. Okay. So what I'm -- all I'm pointing
 4 out with this series is they've come back at us in
 5 my mind very accusatory, you know, here yet again
 6 you're making a pain out of yourself. And I'm
 7 saying, no, that's not at all what's happening.
 8 What's happening here is we have an
 9 original version of the document, you told us to
 10 proceed per that. That changed. I'm laying out
 11 the facts of why that changed and now you're going
 12 back and saying we're the ones that didn't do
 13 something right? And all we did was do what you
 14 told us to. And, again, what they -- what's
 15 tripping them up is these -- when we're getting
 16 these changes late in the game, these aren't
 17 theoretical anymore. There's buildings out there
 18 that got constructed the way everything was
 19 approved up to that point in time.
 20 Q. (By Mr. Madigan) If we could go to TA
 21 1005. Explain what's going on in this picture.
 22 A. We -- there was a punch list item to
 23 caulk the gaps in the studs. And what -- what I
 24 believe was originally planned and would be

1 somewhat legitimate was caulk the studs where two
 2 panels meet. But that's not what they directed --
 3 they required to be done. So the only way we
 4 could satisfy that item was -- was to do as you
 5 see here, which I've never seen before. This also
 6 should be noted that I believe this is a product
 7 of how contentious the job had gotten at that
 8 point in time.
 9 Q. If we go to --
 10 THE COURT: Excuse me. Have you ever
 11 seen this -- this -- have you ever seen any
 12 requirements in the code that call out this type
 13 of caulking?
 14 THE WITNESS: No.
 15 THE COURT: Okay.
 16 THE WITNESS: I'm not aware of any.
 17 MR. BECKER: I didn't hear the last
 18 part of that.
 19 THE COURT: He said, no, I'm not aware
 20 of any.
 21 Q. (By Mr. Madigan) Of all the
 22 construction projects that you've been on, have
 23 you ever seen this before?
 24 A. No.

1 Q. Have you ever had to do this before?
 2 A. No. It -- there's -- at the bottom,
 3 that's not uncommon at the -- where the sill plate
 4 meets the concrete as it wouldn't be to do it at
 5 the top, at -- or at a -- at a joint of two
 6 panels. But what you see here is every time
 7 there's two studs put together, there's caulk and
 8 that -- I mean, that's just -- that's --
 9 Q. If we could go to TA 459.
 10 What's going on in this e-mail dated
 11 September 2nd, 2011?
 12 A. Okay. In the meetings in the trailer
 13 they've started to do, I don't know, I'm going to
 14 say planning on the marker board, and that's what
 15 I'm indicating. And there's a picture attached
 16 that says we have incorporated the plan. That's
 17 what I'm referring to. And I'm telling him that,
 18 you know, there's certain things we're going to do
 19 and that we also need -- I'll summarize here, as
 20 requested, we plan to show our progressing on the
 21 later buildings to complete the work in the early
 22 buildings. We plan to move ahead one building at
 23 a time in two through the framing remainder of B7,
 24 B5, B3 and D1, the last roughly half the

1 buildings. And then I'm letting them know by my
 2 calculations provided the 18 days per the current
 3 pending changes will recover the schedule. And
 4 then I was letting them know that I was working on
 5 bringing in more carpenters.
 6 Q. So at this point in time, is
 7 TransAmerica trying to move the project forward?
 8 A. Yes, we are.
 9 Q. If we could go to that second page.
 10 Explain what was going on with the
 11 pending changes that were regarding time.
 12 A. I'm kind of letting him know that, you
 13 know, thus far, you've been unwilling to award
 14 time. And I'm letting him know that to date there
 15 have been 25 pricing requests issued and they're
 16 affecting current and past work. So in summary
 17 here, I'm letting him know that, you know, he's
 18 going to have to start awarding some time here.
 19 Q. If we go to page 3, this is an e-mail
 20 from Mr. Keith. And he indicates communication
 21 continues to be an issue with the team. What's
 22 your response to criticisms of TransAmerica's
 23 communication?
 24 A. I think the communication issues relate

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1 directly back to the project's documentation. As
2 I've said, it -- you know, this isn't -- this
3 isn't how you normally set about to do a
4 construction project.
5 Q. It says, we continue to struggle with
6 TransAmerica taking any guidance or working in
7 sequence to coordinate all trades.
8 When you started this project, was it
9 your expectation that you would be using binders
10 to give to the carpenters out in the field to
11 install the work?
12 A. No. And this is hitting at exactly
13 what I was telling them earlier in the project
14 that as you start to get these buildings built,
15 there's going to be a problem of coordinating with
16 subsequent trades and the other primes.
17 Q. If we could pull up TA 462.
18 On September 7th, 2011, did
19 TransAmerica have to stop its drywall at least in
20 a portion of the buildings?
21 A. Yes.
22 Q. Why did it have to stop drywall?
23 A. Well, Jim Smith personally did.
24 Apparently because there's a potential change

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1 coming.
2 Q. At this point in time, do you know if
3 the full approval for the fire protection system
4 had been issued?
5 A. I do not.
6 Q. Did TransAmerica's drywall activities,
7 did they enclose at least a portion of the fire
8 protection piping system?
9 A. Yes, they do.
10 Q. So would you need to have prior
11 protection approval before you could fully enclose
12 any of these buildings?
13 A. Yes, you would.
14 Q. I would like to pull up Joint Exhibit
15 F-13, which is change order 13. The change order
16 date says what?
17 A. The per schedule recovery meeting held
18 on July 25th.
19 Q. What's the date of the change order?
20 A. You mean signed or --
21 Q. No, the change order date up at the
22 top?
23 A. I'm sorry, August 10th, 2011.
24 Q. And what date -- sorry.

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1 What date was it signed by the OSFC?
2 A. September 26th, 2011.
3 Q. So attached to this change order was a
4 revised schedule?
5 A. That's correct.
6 Q. And if we go to that first -- or that
7 second page it says, per signed-off baseline
8 schedule dated 7/21/2011.
9 Now, this change order was signed in
10 late September. Does it include any schedule
11 updates between July and September?
12 A. No. It's noted on the top here that it
13 would be per signed-off baseline schedule July 21,
14 2011.
15 Q. And if we go to that first page -- the
16 first page of the change order. If you could blow
17 up the check reason for change. No. Up at the
18 top.
19 What does it say?
20 A. Field condition.
21 Q. Did they check design clarification and
22 correction?
23 A. No, they did not.
24 Q. If we could go to Joint Exhibit -- or

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1 I'm sorry, if we can go to page 3. And if we
2 could blow that up.
3 What's the completion date now of the
4 dorms?
5 A. The last date there is February 14th,
6 2012.
7 Q. And what was your expectation in terms
8 of TransAmerica's activities based on this
9 schedule?
10 A. This just simply shifts the dates back.
11 It's just a -- it just shifts the dates.
12 Q. I'm sorry?
13 MR. BARCLAY: Your Honor, I'm having
14 trouble hearing.
15 THE COURT: Just shifts the dates.
16 You'll have to speak up, Mr. Wilhelm.
17 THE WITNESS: Okay. I'm sorry.
18 THE COURT: It's easy to do.
19 MR. BECKER: I'm sorry, say it one more
20 time. He said what?
21 THE COURT: It just shifts the dates.
22 THE WITNESS: Just changes the dates
23 that are attached there.
24 THE COURT: Five letter word.

1 Q. (By Mr. Madigan) So based on -- based
 2 on this change order, when did you expect
 3 TransAmerica to be off the job?
 4 A. 14th of February 2012.
 5 Q. And did that happen?
 6 A. No, it did not.
 7 Q. If we could go to TA 470. Now, I'll
 8 ask you a few more questions about the Joint
 9 Exhibit F-13. When you signed Joint Exhibit F-13,
 10 were you aware of all the frustrations that Lend
 11 Lease had expressed to SHP early on in the project
 12 about the design documents?
 13 A. No, I was not.
 14 MR. BECKER: Again, I'm going to object
 15 to his characterization of those expressions.
 16 THE COURT: Sustained. Ask it another
 17 way.
 18 Q. (By Mr. Madigan) When you signed
 19 change order 13, were you aware of the discussions
 20 that Lend Lease had with SHP regarding its design
 21 documents?
 22 A. I was not.
 23 THE COURT: As reflected in this
 24 exhibit?

1 MR. MADIGAN: Yes.
 2 THE COURT: Mr. Madigan?
 3 MR. MADIGAN: Yes.
 4 A. Or -- yeah.
 5 Q. (By Mr. Madigan) Moving on to TA 470.
 6 Is this another example as of September 21st, 2011
 7 where TransAmerica's being directed to proceed
 8 with work just based on an e-mail?
 9 A. That's correct.
 10 Q. Now, as of this point in time, is PR
 11 18, has that been incorporated into a change
 12 order?
 13 A. No, it has not.
 14 Q. But the work is still proceeding?
 15 A. That's correct.
 16 Q. If we can go to TA 477. This is
 17 proposal request No. 28, dated September 30th,
 18 2011. What is this for?
 19 A. This is for additional draft stopping,
 20 fire-rated walls, ceiling termination
 21 requirements, attached sketches. And he's also
 22 saying to include rework of study care ceilings
 23 and other rework.
 24 Q. Is there a note there about contractor

1 to correct sequence of work at dorms where this
 2 framing has not been installed?
 3 A. Yes.
 4 Q. And was there an attachment to this PR?
 5 A. Yes, there was. And it, again, is --
 6 it's life safety drawings, some truss shop
 7 drawings, an elevation and some sketches.
 8 Q. Now, this PR says, provide pricing per
 9 the attached sketches. Are anywhere in these
 10 attached sketches a revised architectural plan
 11 with dimensions on it?
 12 A. No, there's not.
 13 Q. How is this change and the other
 14 changes affecting the project as of this point in
 15 time?
 16 A. Oh, it's -- it's delaying the project.
 17 It's causing a lot of rework and it's having an
 18 impact.
 19 Q. If we can go to TA 483.
 20 This is a letter you wrote to Mr. Keith
 21 on October 7th, 2011. Were you providing
 22 Mr. Keith with information for a recovery plan?
 23 A. Yes, I was.
 24 Q. And what was your plan or what

1 information did you provide Mr. Keith?
 2 A. Okay. The three parts, award and
 3 adjustment of schedules for the changes, and I
 4 indicated, see attached letter. Payment of
 5 overtime for finishes. See attached letter for
 6 overtime and resequencing of the schedule for
 7 finishes. And I indicated that would accelerate
 8 the finishes and also that it couldn't occur
 9 separate from overtime. And then I also gave a
 10 more detailed schedule layout. You know, I don't
 11 have the schedule software. Well, we have that
 12 software, but I didn't have the functioning
 13 program that this project used to -- to do that,
 14 so I had to do the best I could with -- on paper
 15 so that they could put it into the schedule.
 16 Q. Now, when you provided this schedule
 17 information, did you have the full -- or I'm
 18 sorry, let me rephrase that.
 19 When you provided the schedule
 20 information, did you have the full construction
 21 set that SHP had submitted to DIC for the
 22 August 2011 interim plan approval?
 23 A. No. And I at the time was not aware of
 24 that submission.

1 Q. If we can go to TA 484.
 2 THE COURT: Mr. Madigan, in that last
 3 question --
 4 MR. MADIGAN: Yes, we can --
 5 THE COURT: -- are you referring to TA
 6 902 and TA 914? Are those the two you're
 7 referring to?
 8 MR. MADIGAN: I'm referring to TA 902
 9 for the deaf and TA 914 for the blind.
 10 THE COURT: Okay. Thank you.
 11 Q. (By Mr. Madigan) Now, on this same
 12 day, did you also provide notice of delay on all
 13 buildings?
 14 A. Yes, I did. Let me find that here.
 15 MR. BECKER: Is this 484, Mike?
 16 MR. MADIGAN: Yes, it is.
 17 THE WITNESS: How much of -- Your
 18 Honor, how much do you want me to read or not read
 19 or summarize or what?
 20 THE COURT: Well, what was the -- was
 21 there a question?
 22 MR. MADIGAN: Sure.
 23 Q. (By Mr. Madigan) Let me -- let me
 24 focus your attention, Josh, on -- on the first

1 sentence in 8.1.1 about major changes. What's
 2 going on at this point?
 3 A. We're doing -- we've been directed to
 4 do a lot of work, but there's been no accounting
 5 for that either in the schedule or financially.
 6 Q. In this same paragraph, did you
 7 reference the completed and updated construction
 8 drawings had never been issued?
 9 A. Yes, I did.
 10 Q. In this paragraph, did you note that
 11 this work impacts all buildings and has been a
 12 steady drain to TA's manpower and considerable
 13 overtime spent to date?
 14 A. Yes, I did.
 15 Q. At 8.1.2.1 it says -- what's going on
 16 with PR 18?
 17 A. We've repriced it four times and
 18 changes are continuing. Work started as directed
 19 in the field and was being installed and now we're
 20 doing rework on that work and we're 55 days into
 21 it.
 22 Q. How long had this issue spanned?
 23 A. 55 working days as of that.
 24 Q. At eight -- on that second page at

1 8.1.2.5, what was your suggestion?
 2 A. Finalize all changes and remove all
 3 open pricing and will -- and resolve all open
 4 pricing and time. See attached schedule.
 5 Q. And then with this, did you provide
 6 some information about the time that you were
 7 seeking?
 8 A. Yes, I did.
 9 Q. If we could go to TA 484-A.
 10 THE COURT: Mr. Madigan, can -- can --
 11 I think I know the answer to this question, but
 12 should I assume that 8.1.2.5 refers to the general
 13 conditions?
 14 THE WITNESS: Yes, it does.
 15 THE COURT: And just so we have a
 16 clear -- maybe a clear --
 17 MR. MADIGAN: I'll clarify.
 18 Q. (By Mr. Madigan) Did you model this
 19 October 7th, 2011 letter after the article 8
 20 provisions?
 21 A. Yes, I did.
 22 Q. And in this letter are you talking
 23 about additional time needed to perform the work?
 24 A. Yes, I did.

1 Q. And in this letter are you describing
 2 the events that have -- that have affected
 3 TransAmerica's work as of this point in time?
 4 A. Yes, I did.
 5 Q. And did you give a suggestion on what
 6 to do going forward?
 7 A. Yes. I suggested finalizing all
 8 changes and resolve all open pricing and time, and
 9 then I attached a schedule and claim pricing.
 10 THE COURT: Mr. Madigan, I have a
 11 question on that.
 12 Mr. Wilhelm, what was it about
 13 finalizing all changes and resolving all open
 14 pricing and time that was going to help resolve
 15 this?
 16 THE WITNESS: What I was -- the
 17 reason -- what I guess initiates this is when they
 18 asked for the PR, that includes the rework.
 19 I've -- to that date not gotten any pricing
 20 requests or opportunity to indicate the costs of
 21 these changes, and so I'm saying you need to --
 22 you need to -- you know, we had all these changes
 23 still pending. We've been working on PR 18 and
 24 all the versions thereof and all this stuff just

1 kind of hanging out there. And at this point to
 2 me there seemed to be no effort to say, okay,
 3 we're done designing these buildings, it was still
 4 just -- just in the churn, you know?
 5 THE COURT: Did you just want to know
 6 where you stood?
 7 THE WITNESS: Yes.
 8 THE COURT: Okay. Thank you.
 9 Q. (By Mr. Madigan) If we can go to
 10 484-A. With this letter did you provide
 11 information about the time you had requested with
 12 various PRs?
 13 A. Yes, I did.
 14 Q. If we can go to 488 -- TA 488.
 15 This is an e-mail you wrote
 16 October 12th, 2011. And the subject says, framing
 17 punch list B5 and D7. Based on this e-mail, was
 18 work on PR 18 being noted on a punch list?
 19 A. Yeah. And that was the point of this
 20 e-mail, I was showing them that you're even --
 21 you're even punching our work based on these still
 22 pending PRs.
 23 Q. And as of this point in time, PR 18
 24 hadn't been incorporated into a change order?

1 A. That's correct.
 2 Q. If we can go to Joint Exhibit F-25.
 3 Joint Exhibit F-25 is change order No. 25. The
 4 change order date is November 4th, 2011. What was
 5 the date that the OSFC signed this change order?
 6 A. The OSFC signed on the 12th of
 7 December 2011 -- I'm sorry, 16th of December 2011.
 8 Q. And if we can go to the check reason
 9 for change order towards the top. What does it
 10 say?
 11 A. It says design clarification or
 12 correction.
 13 Q. And if we go to the description and
 14 justification, what does it say?
 15 A. It says costs for additional draft
 16 stopping and fire-rated wall and ceiling
 17 terminations requirements as detailed in PR 28.
 18 Q. So is it based on what was in PR 28?
 19 A. Part of it.
 20 Q. If we go to the second page.
 21 THE COURT: When you say, "part of it,"
 22 you mean part of what was in 28 or part of the
 23 change order?
 24 THE WITNESS: Part of what was in 28.

1 THE COURT: Okay. Thank you.
 2 Q. (By Mr. Madigan) There's a note that's
 3 highlighted. Is that a note that you included?
 4 A. The see note and attached?
 5 Q. No. Further down.
 6 A. Oh. The additional time to be
 7 determined per delay claim resolution?
 8 Q. No. The next --
 9 A. Oh, okay. The note -- the typewritten
 10 note on there?
 11 Q. Yes.
 12 A. Priced on over -- or priced on regular
 13 time includes the scope of work identified
 14 10/17/11. Similar area of work continuing draft
 15 walls at high school buildings.
 16 Q. And you mentioned this just a minute
 17 ago, but if we could scroll down, there's a
 18 handwritten -- there's a handwritten note. What
 19 does that note say?
 20 A. That note says additional time to be
 21 determined by -- per delay claim resolution.
 22 Q. And as of that point in time, you had
 23 submitted an article 8 notice letter?
 24 A. I had.

1 Q. Now, there's additional markups on this
 2 -- on your change order pricing?
 3 A. That's correct. What -- what has
 4 occurred here is the scope of this is getting
 5 whittled down and what they arrive at is what they
 6 simplified on the cover of the change order. This
 7 becomes just the additional draft stopping and the
 8 other issues of rework and things are out of it
 9 and -- and the time, like it says there additional
 10 time to be determined per the delay claim
 11 resolution. So -- and we had given them, you
 12 know, that prior notice and pricing, on
 13 acceleration and all that.
 14 Q. On page 3 is there an itemized list
 15 that Lend Lease reviewed and marked up that
 16 conforms to what this change order is for?
 17 A. Yes. It's very strictly for certain
 18 things. I mean, we get down to haggling over very
 19 specific items there.
 20 Q. If we can go back to page 2. That
 21 handwritten note again. If we could blow -- yep.
 22 There's a reference there for 10 days
 23 that's crossed out?
 24 A. Uh-huh.

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1 Q. Is that 10 days per building?
2 A. I believe so. Oh. Yes, I'm sorry.
3 Underneath the -- where it's overwritten, you can
4 see the per building in the typed font there.
5 Q. If we can go to page 4.
6 Again, were you requesting additional
7 days per building?
8 A. Yes, I was requesting five additional
9 days per building for that scope. And again --
10 Q. And what was the -- and what was the
11 notation?
12 A. Additional days to be awarded per delay
13 resolution.
14 THE COURT: Mr. Wilhelm, when you say
15 per building, are you talking about 12 buildings?
16 THE WITNESS: Yes.
17 THE COURT: Okay. Because I know
18 they're in various stages and --
19 THE WITNESS: Uh-huh.
20 THE COURT: -- I realize they didn't
21 have this yet.
22 THE WITNESS: Right.
23 THE COURT: I understand. Okay.
24 Q. (By Mr. Madigan) Now, if we go to page

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1 6 of this change order. Does it include PR 28?
2 A. Yes.
3 Q. And does it include the sketches that
4 came with PR 28?
5 A. Yes.
6 Q. And in any of those sketches is there a
7 revised architectural floor plan?
8 A. No, there's not.
9 Q. Now, you had previously done vertical
10 work under the state's contract documents before
11 this project?
12 A. Yes.
13 Q. So you were -- you were familiar with
14 the state's article 8 provisions?
15 A. Yes.
16 Q. If we can go to Joint Exhibit B-62.
17 And if we could go to 8.3.4.
18 So based on those handwritten notes
19 that the -- the disputed items would be resolved
20 per the delay -- or the claim resolution process,
21 what was your understanding of how your request
22 for additional time were going to be resolved in
23 light of 8.3.4?
24 A. It would be resolved through the claim

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1 resolution process and -- and 8.3.4 that they were
2 agreeing to extend the time as was being signed on
3 that change order.
4 Q. Now, when Mr. -- when that change order
5 was returned to you, did Mr. Keith indicate to you
6 that TransAmerica had submitted correspondence to
7 cover itself for any field errors?
8 A. He didn't tell me that.
9 Q. If we can go to TA 511.
10 This is an e-mail in November --
11 November 16th, 2011. What's going on with the
12 recovery schedule and the casework?
13 MR. BECKER: I'm going to object to
14 having this exhibit in front of him. It's not
15 his. It's coming from TP Mechanical. And he's
16 not saying he has a memory problem with this, it's
17 not -- can't be offered to refresh his
18 recollection. It's hearsay.
19 THE COURT: Well, this is probably a
20 good time to take a break. Why don't we come back
21 to this after the break. I want to look at
22 something. We'll be in recess till five of 3:00.
23 You're still under oath. Don't discuss
24 your testimony.

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1 (A recess is taken.)
2 THE COURT: Okay. Back on the record
3 in TransAmerica Building Company, Inc. versus Ohio
4 School Facilities Commission, Case No. 2013-00349.
5 I think just before the break,
6 Mr. Becker, you had an objection to Exhibit TA
7 511; is that correct?
8 MR. BECKER: Right.
9 THE COURT: And the basis for the
10 objection was?
11 MR. BECKER: It's not his document.
12 It's hearsay. He hasn't said that he can't answer
13 from his own memory whatever questions will be
14 asked of him. It should not be displayed in front
15 of him to assist his testimony.
16 MR. MADIGAN: He's copied in on this
17 e-mail. This e-mail was retrieved from
18 TransAmerica's server, so even if it is hearsay,
19 it should come in under the business records rule.
20 THE COURT: Well, you'll have to lay a
21 foundation for that. Mr. Madigan --
22 MR. MADIGAN: Sure.
23 THE COURT: -- you can't testify. So
24 I'll sustain the objection, but you can go ahead

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1 and work on getting this in if you want to.
2 MR. MADIGAN: Sure.
3 Q. (By Mr. Madigan) Josh, in front of you
4 is Exhibit TA 511. Are you copied in on this
5 e-mail?
6 A. Yes, I am.
7 Q. And did this e-mail come from
8 TransAmerica's server?
9 A. Yes, it did. It has my name at the top
10 there.
11 Q. And in the typical -- in your typical
12 course of work, is it common that your e-mails
13 that you send relating to this project will get
14 stored on your server?
15 A. Yes.
16 Q. Do you have any reason to dispute the
17 accuracy of this e-mail?
18 A. No, I don't.
19 MR. BECKER: Objection. He has no
20 basis to say whether it's accurate or not. It's
21 not from him or TransAmerica.
22 MR. MADIGAN: But he was copied in on
23 it. If it's not accurate --
24 THE COURT: If I understood his

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1 testimony, because his name is in the upper
2 left-hand corner, he printed this e-mail off of
3 their server at TransAmerica. I think that's what
4 I heard him say.
5 Now, I notice that -- I mean, this is a
6 typical e-mail chain, so there could be a variety
7 of people on this, but I notice in the second
8 e-mail, I assume going in reverse chronological
9 order he's copied. In fact, it was not copied, it
10 was actually to him from Lend Lease, who's already
11 been established as an agent of the defendant
12 OSFC, so I'm going to allow it.
13 Q. (By Mr. Madigan) If you go to page 2.
14 There's mention of a recovery schedule three.
15 What's happening at this point in time as of
16 November 15th, 2011?
17 A. The project has fallen further behind.
18 There's another recovery schedule issued and
19 there's more changes even. In fact, here they're
20 discussing another PR.
21 Q. Is this being sent to all the prime
22 contractors?
23 A. It is.
24 Q. And --

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1 THE COURT: Mr. Madigan, I can't --
2 who's this from? Is this from Pat?
3 THE WITNESS: Patrick Pattilo.
4 THE COURT: I mean, the one at the top
5 is the one you were just talking about, right?
6 The -- at 1:26 p.m.? We're on page 2 of TA 511?
7 MR. MADIGAN: Correct.
8 THE COURT: Who's -- I think it's cut
9 off who it's from. Can you go back one page?
10 That's from Mike Kraner, K-R-A-N-E-R?
11 THE WITNESS: Yes.
12 THE COURT: With TP Mechanical?
13 THE WITNESS: Yeah.
14 THE COURT: All right.
15 A. Can I add to this?
16 Q. Well, let's go back to page 2.
17 THE COURT: Just maybe just tell us
18 what's going on here.
19 THE WITNESS: What's going on is at
20 that meeting, the casework was discussed. And the
21 reason I believe Mike Kraner is asking this is
22 because it was --
23 MR. BECKER: Objection. Excuse me,
24 it's still why Mike Kraner is asking a --

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1 THE COURT: Sustain. Sustained.
2 What was your understanding of what
3 Mike Kraner was trying to do?
4 THE WITNESS: My understanding is we
5 were at the meeting and it was discussed that the
6 casework schedule would be changing or make --
7 there was some doubt cast upon the current dates
8 on the casework. So when the schedule's issued,
9 it's natural to wonder is this -- are you -- did
10 you update the casework schedule? Is that shown
11 correctly? Has that been updated like we
12 discussed?
13 THE COURT: Okay.
14 Q. (By Mr. Madigan) So as of
15 November 16th, 2011, is the casework package still
16 in flux?
17 A. That's correct.
18 Q. If we can go to TA 515. We're into
19 November. What's going on with the heat in the
20 buildings?
21 MR. BECKER: Again, Your Honor, it's
22 not appropriate to put in front of him documents
23 he's not authored and let him testify. This is
24 hearsay.

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1 THE COURT: This was sent to him.
2 Where did this document come from?
3 MR. MADIGAN: This came from a public
4 records request from SHP.
5 THE COURT: Okay.
6 MR. BECKER: Well, but it still
7 contains an e-mail from Vaughn Industries, that's
8 hearsay.
9 THE COURT: Well, it was -- isn't this
10 a communication that was maintained by Joshua
11 Predovich in the ordinary course of its business
12 as the -- as the architect on this project?
13 MR. BECKER: Well, I mean, I don't know
14 how this witness could lay that foundation, but
15 that's irrelevant to the hearsay objection.
16 THE COURT: Well, I mean, was this
17 document used in a deposition?
18 MR. MADIGAN: This document was not.
19 THE COURT: Okay. Sustained.
20 MR. BECKER: I ask that the document be
21 removed.
22 THE COURT: Yes, it will be stricken.
23 Q. (By Mr. Madigan) In November 2011, was
24 the heat on in the buildings?

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1 A. No, not -- some units were running,
2 some were not. We had argued with Vaughn about
3 running the units. Vaughn didn't want to run the
4 units because they didn't want the units getting
5 dirty, even though they were supposed to run the
6 units, and so they were leaving them off. And so
7 as winter was coming closer and closer, they're
8 now getting pressure from not just us at this
9 point, from other people to turn the units on.
10 Q. Were the exterior doors installed at
11 this point in time?
12 A. No, they were not.
13 Q. Were there hardware issues still at
14 this point in time?
15 A. Yes, there was.
16 Q. Were there any other issues that took
17 place on this project with respect to having the
18 exterior doors installed?
19 A. Sure. The temporary plywood doors that
20 we installed months prior to this that were only
21 ever anticipated to be in use for a very short
22 time were still on the doors, so you've got a
23 condition of effectively a, you know, roughly
24 four-foot by seven-foot or greater maybe even

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1 five-by-seven hole in the building.
2 Q. Are you aware of any issues with the
3 doors in terms of getting them out to the site?
4 A. What I -- what I remember from that is
5 I was told at one point that directly --
6 MR. BECKER: Objection. I can't tell
7 if this is hearsay or not. He's got to lay a
8 foundation.
9 THE COURT: Yes. Lay a foundation if
10 you would, please, because I can't tell either.
11 THE WITNESS: Can I --
12 THE COURT: No, there's no question
13 pending.
14 Q. (By Mr. Madigan) Yeah. Let me ask
15 you: What did you observe on this project with
16 respect to the delivery of the doors?
17 A. I had direct communications with Chris
18 with Hall Aluminum.
19 MR. BECKER: Sorry, sir, I can't hear
20 you.
21 A. Am I allowed to speak to what that
22 conversation was?
23 MR. BECKER: I just can't hear you.
24 A. I had direct conversations about this

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1 matter with Chris from Hall Aluminum. Am I
2 allowed to speak to that conversation?
3 Q. (By Mr. Madigan) Let me ask you this:
4 What was your understanding with the delivery of
5 the doors to the project --
6 MR. BECKER: Objection.
7 Q. -- based on what you observed?
8 A. I know certain things because we were
9 coordinating the hardware with them, so I'm a
10 little puzzled what I'm allowed to speak to here.
11 Q. Well, were there any issues that you
12 observed getting the doors out to the site?
13 A. Yes.
14 Q. And what were those issues that you
15 observed?
16 A. The direct issue, the observable issue
17 was the fact the doors weren't there. But I -- I
18 have some insight to that as I -- I was in direct
19 communication with the other prime who was
20 supplying those doors.
21 Q. And what was your understanding as to
22 why the doors weren't there?
23 MR. BECKER: Objection. Calls for
24 hearsay. Lack of a sufficient foundation for him

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1 to answer that question.
2 THE COURT: Overruled.
3 A. The doors weren't there for two
4 reasons. One, the door hardware that we were
5 supplying and sending to them to install wasn't
6 working. And when I questioned him why, it was
7 only then that they were trying to fit the
8 hardware to the doors, I was told that the --
9 MR. BECKER: Objection. I can't -- I
10 have to make the objection, Your Honor, I can't
11 tell where this information is coming from.
12 THE COURT: I understand. Let's let
13 the -- let's let him answer the whole question,
14 there's not a jury here, and then I'll decide
15 whether to strike it.
16 MR. BECKER: Can he at least say I was
17 told by?
18 THE COURT: Yes.
19 A. I thought -- I was told by Chris at
20 Hall Aluminum.
21 MR. BECKER: Objection. Hearsay.
22 THE COURT: Okay. Overruled. Keep
23 going.
24 A. Okay. That the -- the reason that they

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1 were so late in putting the hardware on the doors
2 was because the plant had suffered damage due to
3 flooding that year.
4 Q. (By Mr. Madigan) So if we could go to
5 Joint Exhibit F-26, which is change order 26. And
6 if we could go down to the description and blow up
7 the description paragraph.
8 MR. BECKER: I'm sorry, can -- you went
9 too fast. Could I -- can this be identified as
10 what we're looking at here?
11 MR. MADIGAN: It's Joint Exhibit F-26,
12 which is change order 26.
13 MR. BECKER: Thank you.
14 THE COURT: The date?
15 MR. MADIGAN: The date of the change
16 order is November 29th, 2011.
17 THE COURT: Thank you.
18 Q. (By Mr. Madigan) What's the
19 description of this change order?
20 A. Additional cost to provide revisions to
21 fire separation walls between dorm sleeping units
22 as detailed in PR 18.
23 Q. And what does it provide for the reason
24 for this change order?

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1 A. A design clarification or correction.
2 Q. And when was this change order signed
3 by the OSFC?
4 A. December 14th, 2011.
5 Q. So was at least a portion of this work
6 completed before the OSFC signed this change
7 order?
8 A. Yes.
9 Q. If we can go to page 2.
10 THE COURT: Excuse me, Mr. Madigan, I
11 have a question. Why did you perform that work
12 without a change order?
13 THE WITNESS: Because we were directed
14 to. This is the work we were directed to.
15 THE COURT: Okay.
16 Q. (By Mr. Madigan) If we can go to page
17 2. Did you request additional time with this
18 change order?
19 A. Yes.
20 Q. How much time did you request?
21 A. Ten days per building.
22 Q. And did you include a note as well in
23 terms of how this change order was priced?
24 A. Yeah, there's a couple on here. It was

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1 priced on regular time, if done on overtime add
2 \$9,096. And there's also -- we provided
3 decisions, does not impact material availability
4 and lead time.
5 Q. And then do you have an additional
6 pricing sheet on page 3 as well where you're
7 requesting additional time?
8 A. Yes.
9 Q. And how much time were you requesting?
10 A. Five days per building.
11 Q. And then on page 4 is there an itemized
12 list as to what's included in the price?
13 A. Yes, there's the --
14 Q. If we can go to page 5. Was that list
15 modified by Lend Lease?
16 A. Yes. This had been priced I believe
17 approximately four times.
18 Q. And if we can go to page 9, does it
19 also include the PR, proposal request?
20 A. Yes.
21 Q. And does it also -- does it then
22 include some of the sketches that were included in
23 that?
24 A. Yes, it does.

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1 Q. Does it include any revised
2 architectural floor plans?
3 A. No, it does not.
4 Q. If we can go to page 18.
5 Are there any dimensions on this
6 sketch?
7 A. No, there are not.
8 THE COURT: Is this a typical -- is
9 this a sketch for a typical or is this specific?
10 THE WITNESS: No. This is typical that
11 this is just depicting --
12 THE COURT: Okay. All right. Thank
13 you.
14 When I say, "this," I'm referring to
15 page 18 of Joint Exhibit F-26.
16 MR. MADIGAN: Did -- if we could go
17 back to Joint Exhibit F-25.
18 MS. TACKETT: Which page?
19 MR. MADIGAN: First page.
20 MR. MADIGAN: If you can go to the
21 signature block all the way down.
22 Q. (By Mr. Madigan) Now, we just talked
23 about change order 25. What's the date that it's
24 signed?

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1 A. 12 -- let's see, change order 25 here
2 is signed December 16th, 2011.
3 Q. And this is the change order that
4 includes the notations that additional time to be
5 determined per delay claim resolution?
6 A. Correct.
7 Q. If we can go to Joint Exhibit F-26.
8 And if we could blow up the signature block there.
9 Was change order 25 signed after change
10 order 26?
11 A. Yes, it was.
12 Q. And in change order 26, you were
13 requesting additional time?
14 A. That's correct.
15 Q. If we can go to TA 519.
16 TA 519 is a proposal request No. 35.
17 What is the date of this proposal request?
18 A. December 5th, 2011.
19 Q. And what's this proposal request for?
20 A. It's for changes per recovery schedule
21 three, and it's specifically asking for changes of
22 cost associated from recovery schedule two to the
23 completion of the project on the sequence and date
24 set forth in the attached recovery schedule three.

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1 Q. If I could go to TA 1108.
2 And, Josh, I'm going to have you pull
3 the page 2. Does TA 1108, is that the recovery
4 schedule three?
5 A. I'm not sure I understand. I think
6 this is recovery schedule two.
7 Q. I'm sorry, you're -- yes, you're
8 correct.
9 So this pricing proposal was asking for
10 the change that was taking place from recovery
11 schedule two, which was issued in July to recovery
12 schedule three?
13 A. That's correct.
14 Q. And is TA 1108, is that recovery
15 schedule two that was issued in July?
16 A. Yes.
17 Q. And that was the one that was
18 incorporated into a change order?
19 A. That's correct.
20 Q. And was that the last schedule that was
21 incorporated into a change order that TransAmerica
22 signed?
23 A. Yes.
24 Q. And if I could just have you in your

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1 binder leave open page 2, and I want to show an --
2 I want to pull up an animation. It's animation TA
3 411-A.
4 THE COURT: Excuse me, Mr. Madigan,
5 before you start, you asked him to keep open his
6 binder. Are you talking about the exhibits that
7 he has in front of him?
8 MR. MADIGAN: Yes, the schedule.
9 THE COURT: He's at TA 1108, is that
10 what he's at?
11 MR. MADIGAN: Yes. I'm laying the
12 foundation for this animation.
13 THE COURT: Okay. Thank you.
14 Q. (By Mr. Madigan) I'm going to stop
15 this at the completion of this animation for
16 recovery schedule two and I'm going to ask -- have
17 you verify the dates. If we can stop it right
18 now.
19 On the top screen you can see it's
20 depicting recovery schedule two. What does the
21 animation show for completion of deaf seven?
22 A. Deaf seven -- I can't read it on my
23 screen to be honest with you.
24 Q. Can you come around to the monitor? Is

1 it clearer there? Yeah. If you could just --
 2 just leave it right there -- no, it's -- your --
 3 not that -- it's not the schedule -- blow up the
 4 top -- go all the way down. There you go.
 5 THE COURT: You might be able to work
 6 from his seat on this. Probably make it a little
 7 easier.
 8 THE WITNESS: Yeah, I can see it.
 9 THE COURT: If you can.
 10 A. Yep. Okay. Yep.
 11 Q. (By Mr. Madigan) So based on the
 12 animation, what's the completion of deaf seven?
 13 A. The 8th of December 2011.
 14 Q. And does that match what's on recovery
 15 schedule two, which is TA 1108?
 16 A. Yes, it does.
 17 Q. Based on animation, what's the --
 18 what's the completion of deaf three?
 19 A. December 19th, 2011.
 20 Q. And does that match with what's on
 21 recovery schedule two?
 22 A. Yes, it does.
 23 Q. Do the remaining completion dates
 24 that's shown in the animation reflect what's in

1 recovery schedule two?
 2 A. Yes, they do.
 3 Q. So if we could -- if we could back up
 4 the animation and play it from the start.
 5 So is it fair to say this -- this
 6 pricing request is asking for the change from
 7 recovery schedule two to the -- to recovery
 8 schedule three?
 9 A. That's correct.
 10 Q. Now, did the schedules continue to
 11 change throughout the course of this project after
 12 recovery schedule two was issued?
 13 A. Yes.
 14 Q. And does -- does this animation reflect
 15 how the schedules were changing?
 16 A. You mean in terms of sequence --
 17 Q. In terms of both sequence and the
 18 duration being extended?
 19 A. Yes. Yes, it does.
 20 Q. If we could go to TA 1410-A.
 21 And we'll -- this is the same
 22 animation, but of the blind site. And does this
 23 animation accurately reflect the changes from
 24 recovery schedule two to subsequent schedules that

1 were issued by Lend Lease?
 2 A. Yes, I believe it does.
 3 Q. And does this animation reflect the
 4 change in sequence and change in duration that's
 5 being reflected on the Lend Lease schedules after
 6 recovery schedule -- recovery schedule two?
 7 A. Yes.
 8 Q. So on December 5th, TransAmerica
 9 received a pricing request for recovery schedule
 10 three. If we could pull up TA 520. The next day,
 11 what did TransAmerica receive?
 12 A. A notice of nonconformance and
 13 liquidated damages.
 14 Q. And what was that assessment of
 15 liquidated -- what was the schedule that the
 16 liquidated damages were being assessed on?
 17 A. It was per recovery schedule three.
 18 Q. As of that point in time, had you
 19 signed recovery schedule three?
 20 A. I don't believe so. I mean -- you mean
 21 signed as like a --
 22 Q. I'm sorry, as a change order?
 23 A. Not as --
 24 Q. Had -- let me rephrase that.

1 As of the time that Lend Lease issued
 2 this December 6th letter, was recovery schedule
 3 three incorporated into a signed change order?
 4 A. No.
 5 Q. Was recovery schedule three ever
 6 incorporated into a signed change order?
 7 A. No.
 8 Q. The -- if we could blow -- if we could
 9 blow up the activity.
 10 The activity that TransAmerica is being
 11 assessed liquidated damages is roof and window
 12 enclosure. Was another prime contractor involved
 13 with the completion of this activity?
 14 A. Yes.
 15 Q. And who was that other prime
 16 contractor?
 17 A. Hall Aluminum.
 18 Q. Now, you received a PR for recovery
 19 schedule three. Did you end up submitting pricing
 20 information?
 21 A. Yes, I believe I did.
 22 Q. Can we go to TA 525.
 23 Could you explain the pricing
 24 information that you provided to Lend Lease in

1 response to the PR for recovery schedule three?
 2 A. Yeah. I guess in general I broke it
 3 down into different categories. And I -- and
 4 indicated it was per PR 35 extended general
 5 conditions, additional weather days, current
 6 ongoing delays and then casework as well.
 7 Q. You note uncontrolled air impacting
 8 floor wood trim and final paint, wood doors and
 9 hardware. What's going on as of January 2011 and
 10 the conditions inside the dorms?
 11 A. The -- let's see, as I have noted here,
 12 the -- the flooring and subsequent activities
 13 can't proceed due to high moisture content and low
 14 slab temperatures. We are -- on this project, we
 15 did quite a bit of testing on the slabs. As
 16 required you're -- you know, the manufacturer --
 17 to get the manufacturer's warranty requires
 18 certain parameters and -- and we didn't have them
 19 met.
 20 Q. On page 2, paragraph three. Was
 21 TransAmerica comfortable with the time that was
 22 shown in recovery schedule three?
 23 A. No. I said that we need more time than
 24 shown on this schedule. And I detailed -- I

1 detailed what I was asking for for some subsequent
 2 activities. I'm assuming you don't want me to
 3 read the whole thing?
 4 Q. As of this point in time, who was the
 5 superintendent for TransAmerica?
 6 A. In --
 7 Q. Well, let me ask it to you this way --
 8 A. Yeah.
 9 Q. -- was there a transition from Brad
 10 Miller to Bruce Bowman?
 11 A. Yes.
 12 Q. And when did that transition take
 13 place?
 14 A. I believe as of early January here
 15 Bruce would have been out on site.
 16 Q. And how long had Bruce been with
 17 TransAmerica?
 18 A. A very long time.
 19 THE COURT: Last name?
 20 THE WITNESS: Bowman.
 21 THE COURT: As it sounds?
 22 THE WITNESS: Yeah, B-O-W-M-A-N.
 23 Q. (By Mr. Madigan) Why was Mr. Miller no
 24 longer the superintendent?

1 A. The -- really a lot of issues. I guess
 2 maybe not a lot, but the main -- the main reason
 3 was I viewed his time there as not terribly
 4 effective. Some of that I think was dictated by
 5 what was going on on the project. And Lend Lease
 6 was increasingly -- would require -- would require
 7 my participation or would almost maybe not
 8 formally refuse to work with them, but Jim Smith
 9 and Brad Miller, Jim did not want to work with
 10 Brad.
 11 Q. If we can go to TA 528.
 12 Did Mr. Keith respond to your pricing
 13 request?
 14 A. He did and --
 15 Q. And if we go to page 3. What was the
 16 direction that Mr. Keith gave to you with respect
 17 to PR 35?
 18 A. Please review and revise your request
 19 for PR 35 accordingly.
 20 Q. So as of this point in time, the
 21 pricing for PR 35 is still ongoing?
 22 A. Correct.
 23 Q. And at this point in time, has there --
 24 let me scratch that. If we can go to TA 530.

1 This is proposal request No. 37. And the date of
 2 this is January 17th, 2012. What's this pricing
 3 request for?
 4 A. It's -- it's for more changes having to
 5 do with the doors and the door hardware and how
 6 it's starting to tie in to fire alarm and, you
 7 know, these other changes.
 8 Q. Is this preventing the doors from being
 9 installed?
 10 A. Yes.
 11 Q. And was the fire alarm part of the
 12 campus-wide packages?
 13 A. Yes, it was.
 14 Q. If we can go to TA 532. Now, how did
 15 PR 37 affect your work if it didn't -- if you
 16 didn't have the doors?
 17 A. There -- there were panels -- there --
 18 the -- the whole issue with the dimensions up
 19 there, there's panels that need to be provided
 20 with the stuff that -- that I don't think they
 21 know what those are yet. And so I'm trying to
 22 build chases that are -- themselves are additional
 23 work to house these panels.
 24 Q. If we can go to TA 539.

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1 THE COURT: Excuse me, Mr. Wilhelm?
2 THE WITNESS: Yes.
3 THE COURT: Are you saying you didn't
4 have the directions or --
5 THE WITNESS: The chases aren't in the
6 bid documents.
7 THE COURT: Okay.
8 THE WITNESS: So what happens is as
9 this issue progresses, they -- they start, okay,
10 we're going to need to tie this into the fire
11 alarm, we're going to -- and the whole thing just
12 kind of keeps growing. And somebody brings up the
13 fact that these are controlled or worked in, and
14 I'm not terribly sure of how all that ends up
15 working, but it needs tied in to the control
16 panels that go in the entryways. And I think some
17 of this has to do with the special needs and the
18 uses of the buildings, so this is -- might be a
19 little different than normal.
20 So when I hear that, I asked, okay,
21 what -- what size are these panels? You know,
22 because that's going to tell you how big this
23 chase needs to be so that this panel can be
24 mounted in this chase. Because it was coming in

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1 with the power supply units because this door had
2 to be power operated and all this other stuff, so
3 I'm pointing out that there have been some generic
4 sketches floating around.
5 And so what I'm trying to do here is
6 I'm saying -- again, that second sentence of the
7 first item there, my understanding is these
8 dimensions are not final or are they? Are we to
9 use these dimensions? And what I'm asking is the
10 sketches I've seen, have you incorporated the
11 panels and all this other stuff that's been added
12 in there? Is that what you want?
13 THE COURT: And how did those sketches
14 come to you? I mean, is it in response to an RFI
15 or is it -- I mean, how do you -- where's the
16 stuff come from?
17 THE WITNESS: It comes from they issued
18 that original PR.
19 THE COURT: Okay.
20 THE WITNESS: And then everybody's
21 talking about it in a meeting. And, frankly,
22 there's things being brought up that I don't think
23 they thought about. And so it -- right there in
24 that meeting --

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1 MR. BECKER: I'm going to object and
2 move to strike. Things they didn't think about?
3 He can't testify about that.
4 THE COURT: No. I'm going to overrule
5 it. I'm asking his general impression and
6 understanding about these panels and, you know,
7 how -- why they were an issue. Just keep going.
8 THE WITNESS: So in that same meeting,
9 the thing starts growing, you know, I pointed out
10 that the whole reason there's a chase is I said
11 where are you going to put these -- these conduit?
12 Because the area of the building you're talking
13 about is almost all wood because of all the studs
14 and jack studs and all that. It's a bump out by
15 the time you have the corner framing and the door
16 framing and all this stuff, there's no place to
17 put all that stuff. So now you're in a chase.
18 And then you've got the fire alarm
19 panel, you've got the -- I'm going to call it the
20 communication panel, whatever, and you've got to
21 make sure those things are now going to fit in
22 what it is you're going to do, yeah.
23 THE COURT: Okay. I understand a
24 little better, thanks.

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1 Q. (By Mr. Madigan) So if we can go to TA
2 539.
3 This is a letter, it says it's
4 February 7th, 2011, but when, in fact, was this
5 letter issued?
6 A. It was issued in February 7th, 2012.
7 Q. Why -- why can you say that?
8 A. Because of the, you know -- the 8.1.1
9 and just the items mentioned in it.
10 Q. You can see in 8.1.1 it talks about on
11 January 27th, 2012?
12 A. Yes.
13 Q. In that first paragraph, was
14 TransAmerica providing notice with respect to
15 liquidated damages?
16 A. Yes, we are.
17 Q. As of this point in time, were you
18 still -- the pricing for recovery schedule three
19 was still in flux?
20 A. That's correct.
21 Q. What prompted you to send this letter?
22 A. It would be receiving the report from
23 CPS, which is the testing agency, that there were
24 conflicting reports previously regarding the

1 moisture content.
 2 MR. BECKER: Objection. Move to
 3 strike. Hearsay.
 4 THE COURT: Overruled.
 5 Q. (By Mr. Madigan) You're talking about
 6 moisture content in the floors?
 7 A. Yes.
 8 Q. Is that, at least in part, caused by
 9 the building's being -- the doors not being
 10 installed in the dorms?
 11 A. Yes.
 12 Q. On page 2 what were you -- what were
 13 you requesting in paragraph 8.1.2.5?
 14 A. TA recommends or recommended that the
 15 owner, Lend Lease -- owner slash Lend Lease
 16 provide conditioned air and/or approved alternate
 17 methods -- alternate materials where possible
 18 depending on manufacturer's requirements, and we
 19 had given options for that.
 20 Additionally, TA requests that an
 21 extension request be granted and that a realistic
 22 recovery schedule be issued that all the prime
 23 contractors are in agreement with and can work
 24 towards. Should TA's extension request be denied

1 or ignored, TA will be forced to constructively
 2 accelerate its activities, which further increases
 3 cost impact for the delays.
 4 Q. In -- if we could pull up TA 542.
 5 Did Mr. Keith respond to your notice,
 6 article 8 notice letter?
 7 A. He did.
 8 Q. And he notes a variety of different
 9 items. He talks at B1 about wood trim completed.
 10 He's saying, wood trim completed by your update as
 11 of February 1st, 2012. And he says, TA has not
 12 completed -- what's going on with respect to the
 13 wood trim in B1?
 14 A. The wood trim goes on top of the
 15 flooring, so when you can't install the flooring,
 16 you can't install the wood trim.
 17 Q. Do you have the same -- what's going on
 18 with the ceramic tile?
 19 A. It would be the same condition.
 20 Q. The casework packages, is this
 21 affecting TransAmerica at this point in time?
 22 A. Yes. Like I said early on in the
 23 project, you can't complete wood trim, painting.
 24 There's a whole list of finish activities that are

1 impacted by the late casework as well. And all of
 2 these things would be on that list.
 3 Q. If we can go to TA 543. And we've
 4 previously looked at this letter, but I want to
 5 ask you: You were in attendance at this meeting
 6 that prompted this letter from Mr. Koniewich?
 7 A. Yes.
 8 Q. What went on in this meeting?
 9 A. It -- it was like a -- I've said
 10 several times, the -- the atmosphere on the job
 11 was -- was poor at best and probably best
 12 described as toxic. And it got worse as the
 13 project went on. There was a -- I went out to
 14 find out -- there was a meeting out in blind dorm
 15 three that was called, and I found out about it
 16 late and hurried over there to find the guys, our
 17 guys out there getting yelled at by Lend Lease.
 18 And I stepped in and then the attention turned on
 19 me and it just, to put it bluntly, there was a lot
 20 yelling, a lot of swearing, a lot of
 21 unprofessional conduct. There was at one point I
 22 wasn't quite sure if I was being swung at by
 23 Mr. Smith.
 24 MR. BECKER: Objection. Your Honor,

1 that's just speculation and it's also not relevant
 2 to the claim in this case.
 3 THE COURT: Overruled.
 4 MR. BECKER: I don't think --
 5 THE COURT: Mr. Becker, I think it's
 6 relevant to what I'm thinking about and I want to
 7 hear it.
 8 A. And it was -- it was just a -- it went
 9 on for 20 minutes. I was -- I was -- the part of
 10 it that upset me probably the most was that if I
 11 had done even a little bit of what was directed at
 12 me, I have no doubt in my mind that I would have
 13 been removed from that project. So there was just
 14 an -- just an absolute double standard of conduct
 15 that occurred out there.
 16 MR. BECKER: Objection. Speculation.
 17 THE COURT: Overruled.
 18 Q. (By Mr. Madigan) Now, you've been
 19 involved with a number of projects, a lot under
 20 the state's delivery system. Had you ever
 21 experienced anything like this before?
 22 A. No.
 23 Q. If we could go to TA 545.
 24 So now we're into the middle of

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1 February. What's going on with the baffles?
2 A. This is February 2012? Oh, okay. This
3 is referring to the -- okay. This is the
4 bulkheads that were built and changed. Now we
5 were to hang these baffles, which would -- would
6 hang so that the light from the skylights or the
7 upper dorm windows wouldn't have a direct path
8 into the rooms. And with the changes to the
9 bulkheads and all the other changes, the -- the
10 layout of the baffles needed to be revised.
11 Q. And this revision, this is taking place
12 on February 17th, 2012. Is this after the
13 completion dates that we previously looked at in
14 recovery schedule two?
15 A. Yes, it is.
16 Q. If we can go to TA 551.
17 Was a recovery schedule four issued on
18 this project?
19 A. Yes, there was.
20 Q. And did TA provide input into that
21 recovery schedule?
22 A. Yes, we did.
23 Q. If we can go to page 2.
24 In terms of the estimated general

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1 conditions extension, how many days was TA
2 requesting?
3 A. As of this, 86 days.
4 Q. And was TransAmerica also requesting
5 that a realistic recovery schedule be issued?
6 A. Yes, we were.
7 Q. And on page 3, did TA also indicate or
8 also discuss the liquidated damages?
9 A. Yes, we did. We continued to let them
10 know that we believe that liquidated damages are
11 being improperly withheld.
12 Q. If we can go to TA 554. And if we
13 could go to page 2. And if we could go, focus on
14 the e-mail from Mr. Keith on February 29th, 2012.
15 A. What -- Mike, what --
16 Q. It's TA 554.
17 A. Okay.
18 Q. Page 2.
19 A. Okay.
20 Q. We're at the Clay Keith e-mail from
21 February 29th, 2012.
22 A. Okay.
23 Q. What's going on with the hardware at
24 this point in time?

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1 A. They're -- well, on page 2, Clay is
2 directing this at myself and Chris Schwartz with
3 Hall Aluminum. Basically -- well, he says, please
4 explain to me how we are still having hardware
5 issues on doors that were originally scheduled to
6 start installing in August of last year, to
7 summarize.
8 And then I respond to it, this, again,
9 was in my view another attempt at blaming
10 TransAmerica for a problem that wasn't ours. In
11 fact, we had worked pretty hard to try to prevent
12 it. And I let him know that. I said, you're
13 clearly trying to pass off the design
14 responsibility. These problems were found by the
15 contractors in August of 2012 or 2011.
16 TransAmerica continues to try to resolve the
17 problems, however, functional -- the function and
18 end use have changed. I will follow up with a
19 detailed response below. And I also noted that
20 ironically, you're responding to an e-mail
21 detailing our latest meeting where TA documented
22 and published the minutes and summary. And I told
23 him that's something he was specifically asked to
24 do and he didn't even attend the meeting

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1 completely.
2 Q. If we could go back to an exhibit we
3 just looked at, it's TA 551 -- TA 551, page 1.
4 In this -- in this letter you're
5 discussing the casework?
6 A. Uh-huh.
7 Q. And in -- attached to this letter, did
8 you provide an earlier e-mail that you sent back
9 in April of 2011 discussing your concerns about
10 the casework?
11 A. Yes, I did.
12 Q. If we go to page 8.
13 And that's the -- that's the e-mail
14 that you were referencing in your -- the first
15 page of this February 22nd, 2012 letter?
16 A. That's correct.
17 Q. If we can go to TA 555. Is this
18 another article 8 letter?
19 A. Yes, it is.
20 Q. And very briefly, you identify seven
21 items. What's --
22 A. They --
23 Q. What was the purpose of this letter?
24 A. To be on the record as far as

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1 environmental conditions, lack of exterior
2 aluminum doors, lack of complete information to
3 locate numerous additional access panels. I
4 mentioned the PRs, lack of information required to
5 finish the fire department chases, excuse me, lack
6 of existing -- damage to existing finishes and
7 extension of time based on casework and proper
8 handling of pay applications.
9 Q. And the pay applications you were
10 referencing were January and February?
11 A. Yes.
12 Q. Now, if we could go to TA 557.
13 This is also -- this is also a letter
14 from you dated March 1st, 2012. Were -- were
15 these letters attached to a single document -- or
16 let me rephrase that.
17 Were these letters sent at the same
18 time?
19 A. Yes. And these are kind of chapters I
20 guess.
21 Q. And in this chapter, you're referring
22 to the exterior doors?
23 A. That's correct.
24 Q. So you're providing notice with respect

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1 to the delays for the exterior doors?
2 A. That's correct.
3 Q. If we can go to TA 556.
4 On March 1st, 2012, did TransAmerica
5 provide article 8 notice with respect to damage to
6 existing finishes?
7 A. Yes, we did.
8 Q. And if we can go to page 2.
9 Did you include photos?
10 A. Yes, we did, quite a few.
11 Q. If we can go to page 4.
12 It's not oriented correctly, but what's
13 the significance of this photo? And maybe if you
14 want, you can come around and point.
15 A. Yeah, okay. I think we're showing --
16 there's a couple things in this picture.
17 There's -- there's -- there's a -- this light
18 rough out has been relocated and that's the old
19 that you see now on the wall. And I think we're
20 also capturing the damage along the wall from the
21 casework. There's some more pictures of both
22 those conditions as well.
23 Q. If we can go to page 5.
24 A. Here's where there's been some plumbing

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1 relocated likely, and just, you know, things
2 are -- things are moving around in the buildings
3 late in the deal because of the -- all the
4 changes.
5 Q. Go to page 6.
6 A. Again, that's -- that's damage around
7 this fixture to our walls.
8 Q. Page 7?
9 A. Okay. Here's a good example of what
10 that other photo was showing as well. You've got
11 -- the back of the wall has been damaged from the
12 installation of the countertop. So at the end
13 wall, there's an open likely new box been
14 installed there. You can see the -- there's blue
15 tape on the -- on the piece of board down here
16 because they probably -- that piece of board was
17 laid there, painted and then painter's tape used
18 to keep the board from chipping when you cut it to
19 fit.
20 Q. If we go to page 8.
21 A. Again, you know, the -- these things
22 got installed and then rough out electric or other
23 things got moved after the fact.
24 Q. And page 9 of -- I'm sorry, let's go to

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1 page 10.
2 A. And that -- that's another -- another
3 condition of rough out electric in relation to
4 casework that's now damaged. And when we sent
5 these pictures, this is representative of -- of
6 again 12 dorms. It's not one building, it's 12
7 dorms that --
8 Q. And part of your March 1st, 2012
9 article 8 notice submission, if we go to page 11,
10 did you also request an extension of time for the
11 casework schedule?
12 A. Yes, we did.
13 Q. If we could go to TA 559.
14 This is Lend Lease's response to your
15 input for recovery schedule four?
16 A. It is.
17 Q. And at this point in time, what's TA
18 being directed to do?
19 A. We're being told to submit a full
20 recovery schedule. And that takes into account
21 all aspects of project, including work prior to
22 casework. And then they're telling us that due to
23 the delay before casework, it is also extending
24 the duration of work and ultimately project

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1 completion.

2 Q. In that -- in that same paragraph,

3 Mr. Keith says, the delays experienced on site

4 prior to casework are now causing other trades to

5 do work after the casework is installed that could

6 have been completed before casework. Do you

7 believe that the delays experienced on site prior

8 to the casework were caused by TransAmerica?

9 A. No, I do not.

10 Q. On page 2, Mr. Keith says, what's --

11 what's the direction given for Mr. Keith with

12 respect to recovery schedule four?

13 A. There's a short page to that. I'm

14 sorry, I turned the page. Okay. Please provide

15 the information requested per the specifications

16 so that the full recovery schedule can be

17 evaluated.

18 Q. And was Madison Dowlen with the OSFC

19 copied in on this letter?

20 A. Yes, he was.

21 Q. Now, if we could go to TA 563.

22 On March 8, 2012, what did TransAmerica

23 do?

24 A. We provided our certified claim and

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1 further substantiation of it.

2 Q. And how much was the -- was the amount

3 being claimed as of March 8th, 2012?

4 A. 2,170,800.75.

5 Q. When TransAmerica submitted this

6 certified claim, was it aware of the discussions

7 between Lend Lease and SHP regarding the design

8 documents?

9 A. No.

10 Q. When TransAmerica submitted its

11 certified claim in March of -- as of March 8th,

12 2012, was it aware of where the plan approval

13 process stood with this project?

14 A. No, we were not.

15 Q. If we can go to TA 564.

16 Is this another pricing proposal for PR

17 37?

18 A. Yes, it is.

19 Q. And what's the date of this pricing

20 proposal?

21 A. March 12th, 2012.

22 Q. If we can go to TA 565.

23 THE COURT: Excuse me, I don't want to

24 get lost here, Mr. Madigan. Did I see a TA 530

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1 that is a PR 37? Could we pull that out?

2 MR. MADIGAN: We were just on TA 564,

3 which was --

4 THE COURT: I understand.

5 MR. MADIGAN: Which was PR 37.

6 THE COURT: I want to see TA 530 first.

7 It's dated January 17th. Okay. So let's take a

8 look at --

9 MR. MADIGAN: TA 564?

10 THE COURT: -- TA 564. And I have a

11 question.

12 Mr. Wilhelm, this is -- is this a -- is

13 this a revised PR 37?

14 THE WITNESS: Yes.

15 THE COURT: Okay.

16 THE WITNESS: Yes. They indicate

17 revised at several items in --

18 THE COURT: Yeah. I just didn't want

19 to get confused. I understand now. Thank you.

20 Q. (By Mr. Madigan) If we go to TA 565.

21 As of March of 2012, what's going on

22 with respect to -- what's happening with this

23 issue of defective work?

24 A. We had consistently heard out on site

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1 criticisms of our carpentry workmanship in terms

2 of level and square, plumb, level and square. And

3 I finally -- I guess in a project meeting it came

4 up and it was heated. And I said you know what,

5 we'll bring levels and squares and let's all walk

6 through these buildings and we'll all go through

7 them together and let's -- let's see what's wrong.

8 Well, we went through, as I noted here,

9 based on our review and meeting in blind five

10 today, we'll meet with Josh with SHP on Wednesday

11 at deaf seven. We had walked the one site to

12 review buildings on the deaf site, so we did on

13 the other site, as we did today. TA will bring

14 two, 32-inch levels and a framing square. As we

15 found today, TA expects the walls to be in

16 conformance with the specifications on the letter

17 attached.

18 What happened is when we went through

19 and tested the way you're supposed to as it's

20 outlined in the framing manuals that's referenced

21 in the spec, there wasn't anything wrong.

22 Q. And what happened to this issue after

23 this walkthrough that was supposed to take place

24 on Wednesday with SHP?

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1 A. That second walkthrough didn't occur
2 and it never was brought up again.
3 Q. If we can go to TA 566.
4 Now, after submitting its -- its first
5 certified claim in early March 2012, did
6 TransAmerica submit additional article 8 notices
7 after that?
8 A. Yes, we did.
9 Q. What is this article 8 notice for?
10 A. It's specifically regarding finishes,
11 flooring, finish paint, final cleaning, baffles,
12 doors, hardware and appliances and, again,
13 referred to as finishes.
14 Q. If we could go to TA 575. And if we
15 could go to the page 3.
16 THE COURT: I need to see who it's from
17 and to and the date, please.
18 MR. MADIGAN: Go back to the page 2.
19 Q. (By Mr. Madigan) You can see here it's
20 authored by Mr. Keith. If we could go to page 3.
21 Now, Mr. Keith says, the pricing per PR
22 40 is acceptable for the work that needs to be
23 completed. What's going on with PR 40?
24 A. It is a pricing request for repairs at

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1 under-cabinet lighting.
2 MR. BECKER: I'm sorry, I didn't hear
3 the end of that. Under cabinet what?
4 THE WITNESS: Lighting.
5 MR. BECKER: Lighting.
6 Q. (By Mr. Madigan) Now, were there a
7 number of discrete issues on this project that you
8 looked at?
9 A. Yes.
10 Q. If we could pull up Exhibit 1430.
11 And did you look at the cost to address
12 those discrete items?
13 A. Yes, we did.
14 Q. If you could, Tamara, if you could
15 maybe blow up that.
16 A. What we -- what we did is we took --
17 and, again, this is noted as a partial list. And
18 what this is trying to answer is how does -- how
19 does what seem like small things become such
20 large --
21 MR. BECKER: I'm sorry, Your Honor, can
22 I have a clarification? Was this attached to the
23 e-mail we were just talking about, 575?
24 THE COURT: No. It's a separate

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1 Exhibit TA 1430.
2 MR. BECKER: This is 1430?
3 THE COURT: Yes.
4 MR. BECKER: Okay. This is subject to
5 the motion in limine that we had filed to prevent
6 any consideration of this particular exhibit. You
7 need to lay a foundation regardless of whether we
8 have a motion in limine. I would object to any
9 further discussion about this until a foundation
10 is laid.
11 THE COURT: I think he was working on
12 that. He was trying to explain what this is and
13 why he was preparing it.
14 MR. BECKER: No. No. He's going right
15 into what it is and what it says. I want to know
16 when it was prepared and by whom.
17 THE COURT: All right.
18 Mr. Madigan?
19 Q. (By Mr. Madigan) After you had
20 received responses to TransAmerica's public
21 records request and you're evaluating the project
22 record, did you go back and did you identify
23 discrete issues that were changing on this
24 project?

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1 A. Yes, I did.
2 Q. And did you quantify those discrete
3 issues?
4 A. Yes.
5 Q. And who assisted you in that
6 quantification?
7 A. Don McCarthy.
8 Q. Did you observe these discrete issues
9 out on the -- out on the project?
10 A. Yes. What this comes from is -- is a
11 theme that I felt had gone under appreciated
12 through the course of the project is the scale of
13 12 dorms. You know, a lot of times, especially
14 when I was arguing change orders with Clay or just
15 other issues that came up, somebody says, well
16 that's one -- that's one stud, come on, it's one
17 stud or it's a couple hours or it's this or that.
18 Well, what happens on this job is it's
19 12 dorm buildings. So when you -- when you have a
20 thousand dollar issue, it's \$12,000. It's not a
21 thousand dollar issue, it's 12,000. And so, you
22 know, every -- that -- I continually felt that was
23 a problem.
24 So I took what I felt were -- were

1 pretty easily defensible items, it's not an
2 exhaustive list, it's not everything, it's the
3 ones that I think if you talk to almost any
4 carpenter out there or something like that, they
5 would all be aware of. And I said, look, if you
6 just take and put a reasonable number of man hours
7 to them and put some efficiency because you're
8 doing this stuff, you know, over and over, you're
9 going back to do it and things like that, this is
10 how some of these small items turn into a lot of
11 money on a job where there's 12 buildings.

12 Q. Is one of these items --

13 MR. BECKER: Excuse me. I have an
14 objection at this point in time. All right, so if
15 that's the foundation, I still don't know when
16 this was prepared. I think I can fairly represent
17 that it was not submitted at the article 8, it was
18 not submitted through any expert report. In fact,
19 the first time that we saw this is when it was
20 submitted in the package of, I think they've been
21 calling them animations of demonstrative-type
22 evidence. I think it's fair to say that's the
23 first time we saw this was -- which was just a few
24 weeks ago. This is -- this should have been

1 disclosed. It is an opinion-type document. I
2 don't know if he's the only one that contributed
3 to it. It sounded a little bit to me like Don
4 McCarthy has already contributed to this.

5 In any event, this is an opinion
6 document that puts, for example, inefficiency
7 factors against average crew size and average
8 hours to arrive at I guess an impacted amount of
9 hours that they then attribute a dollar figure to,
10 an hourly dollar figure to and then a total dollar
11 figure on top of that.

12 Again, there are multiple reasons why
13 this should not be considered, and starting with
14 the fact that it wasn't part of their article 8
15 claim. It's not -- it's been no part of the
16 discovery in this case, it's been no part of the
17 expert disclosures in this case, you know, you
18 just don't get to offer opinion-type exhibits at
19 the last minute.

20 THE COURT: Mr. Madigan?

21 MR. MADIGAN: In terms of this being a
22 last minute disclosure, that's simply not the
23 case. This was included in our interrogatory
24 responses back in 2013. Now, if the state just

1 realized that, that's not our problem.

2 THE COURT: Wait a minute, other than
3 the color coding?

4 MR. MADIGAN: Correct.

5 THE COURT: Okay. So are you telling
6 me that the color coding, why is that added?

7 MR. MADIGAN: Just to show as a
8 demonstrative, you know, taking the different
9 issues and just putting it next to dormitories to
10 give you some context as to how often do these
11 issues occur from dormitory to dormitory.

12 But in terms of this number and the
13 identification of discrete issues, that was all
14 made known to the OSFC back in -- back in the fall
15 of 2013 in our interrogatory responses. It's also
16 referenced in Mr. McCarthy's report. He indicates
17 that he's reviewed discrete issues with
18 TransAmerica and he's -- and that those discrete
19 issues are in excess of \$600,000. So all we've
20 done here is we've provided some color coding.

21 But in terms of the topic that I'm
22 talking about with Mr. Wilhelm here in terms of
23 identifying discrete issues that have changed,
24 this has all been disclosed to the OSFC.

1 MR. BECKER: Well, that's simply not
2 true. I mean -- and by the way, if I'm wrong, and
3 Mr. Madigan can show me that this particular
4 exhibit in this format with these columns, average
5 crew size, average hours, the factor of
6 inefficiency appears to be the same throughout and
7 then totalled up to the average revised hours and
8 then an hourly rate attributed to each of those
9 hours for a total amount of dollars, if he'll show
10 me where I can find that exhibit in either
11 discovery that's been produced -- this exhibit as
12 we're looking at it here, not the pieces and parts
13 that may have gone into the compilation, if he can
14 show me where that's been produced in discovery or
15 as part of an expert report, I'll withdraw the
16 objection.

17 MR. MADIGAN: We included it with our
18 motion in limine. If we can pull it up, I can
19 find it for you.

20 THE COURT: Well, it seems to me that
21 this -- you know, I looked at that and I -- you
22 know, I think I tried to indicate in my motion in
23 limine rulings that I just, you know, first time
24 I've ever seen a motion in limine on a bench

1 trial, so, you know, we used to -- if I would have
2 filed something like in California, the judge
3 would have kicked me out of court.

4 I mean, we just weren't allowed to file
5 in limine motions in bench trials. I realize
6 things are a little different in Ohio, although I
7 did find a couple of Supreme Court cases that seem
8 to agree with me.

9 So I assume the reason you filed all
10 that was so that I could study the issue. Perhaps
11 I didn't study it enough. I'm wondering if -- you
12 know, I realize that this is an important part of
13 your case. I may have to -- I'm not going to
14 allow it in right now. If -- if you are able to
15 elicit testimony that includes all of this
16 information without using this and using whatever
17 it is you have furnished to the OSFC in discovery,
18 or have included in an expert report, then perhaps
19 this could be used to augment that just for my
20 sake in understanding it. But certainly if it
21 wasn't produced as I'm looking at it as Mr. Becker
22 indicates in discovery or in an expert report,
23 it's not coming in.

24 MR. GREGORY: And, Your Honor, perhaps

1 MR. BECKER: Unless Mr. Madigan is
2 going to take -- you know, unless he's going to
3 conclude his examination in essentially
4 20 minutes, I recommend that we adjourn for the
5 week.

6 MR. MADIGAN: I'm not going to be able
7 to conclude in 20 minutes.

8 THE COURT: I didn't think so.
9 Mr. Gregory?

10 MR. GREGORY: That's fine if that's the
11 Court's pleasure. I'm not just suggesting --
12 20 minutes is 20 minutes. It's -- and it's
13 important stuff. I'm not all for abandoning trial
14 time that's available while we still have it
15 because there's pressure on everybody to conclude
16 this case in a timely fashion.

17 THE COURT: That's true. I should tell
18 you, and I hesitated in this, but I do have some
19 back-up time at the end of this trial if we need
20 it, just so you know. We're not bumping up
21 against the deadline that we thought. I wasn't
22 going to say anything to anybody, but maybe I
23 ought to let you know that.

24 MR. BECKER: I would be surprised if

1 you'll give us a minute or two to find the
2 paperwork to show you what --

3 THE COURT: If you want to.

4 MR. GREGORY: -- happened.

5 THE COURT: But I may have to study
6 this a bit to --

7 MR. GREGORY: Fair enough. As I
8 understand Mr. Madigan's explanation, though, all
9 this was provided with the exception of the
10 colored dots, okay? So I think if that be true,
11 we ought to find that piece of paper, and we ought
12 to make that available so you consider that as
13 part of this overall thinking on this issue.

14 THE COURT: Right. And I think -- and
15 I think you certainly can use what's been
16 provided, assuming it's been marked as -- or
17 listed as an exhibit in your -- in your, you know,
18 exhibit list or if it's attached to an expert
19 report or whatever. I do remember seeing
20 something that was furnished, but it looks
21 similar, but not the same. I mean, obviously this
22 is -- the color coding is not there, but anyway.
23 Let's take five minutes or 10 if necessary and
24 pull together what we need, Mr. Becker.

1 20 minutes on a Friday of Memorial Day weekend is
2 really going to matter. And, frankly, if
3 20 minutes here or there starts to matter, then I
4 think we can make certain adjustments possibly,
5 including starting at 8:30 in the morning. I'm
6 not suggesting that needs to be done now, I don't
7 think we're at a point where anybody really has a
8 good feeling about whether we're jammed up or
9 looking at essentially two more weeks and so I --
10 you know, I hardly see how adjourning now is going
11 to be a big problem for us in this trial. If we
12 have a big problem, it's not going to be --

13 THE COURT: Excuse me, Mr. Becker, are
14 we recording? I'm seeing a blank screen here.

15 THE BAILIFF: It's -- I was going to
16 pause it for a second to see. I don't know why --

17 THE COURT: We've got a court reporter,
18 so we have a record. That's what matters.

19 THE BAILIFF: Yeah, all of a sudden it
20 turned blue. That's what I was trying to figure
21 out. This light's telling me it's recording, so I
22 don't know why the camera is doing that.

23 THE COURT: Let me see if I can --
24 okay. I'm going to restart it, okay? And see

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1 what happens. It's trying. Technical
2 difficulties. Maybe that's a good reason to, you
3 know, recess until Tuesday at 9:00. I want to do
4 my best to get this right for you, Mr. Becker,
5 because I understand your points. And in fairness
6 to the plaintiffs, if they can, you know, provide
7 a reason that -- to let this come in, so be it.
8 MR. GREGORY: Your Honor, in the -- you
9 can already tell I'm not the lawyer most familiar
10 with the details in this case.
11 THE COURT: I've sort of figured that
12 out by now, Mr. Gregory.
13 MR. GREGORY: Yet in the last minute
14 and a half we have it right now in the form it is
15 there with the exception of the dots. It's in --
16 it's referenced in the interrogatories, it was
17 provided in the mediation.
18 THE COURT: Put it on the screen, let's
19 see.
20 MR. GREGORY: We have it all. Only
21 thing that's changed were the dots. They just
22 weren't aware of it. That's all. That it existed
23 for a long time.
24 MR. KASAI: You've got to press

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1 something on the side, Mike.
2 THE COURT: You need to get somebody to
3 look at the cameras or the software or whatever's
4 going on.
5 THE BAILIFF: Yeah, I'm trying to get
6 an e-mail out right now actually.
7 THE COURT: Okay. Has this ever
8 happened before?
9 THE BAILIFF: Nope, this is a first for
10 me.
11 THE COURT: It seems like it should be
12 pretty straightforward. Almost looks like a
13 connection.
14 MR. MADIGAN: In the interrogatories --
15 THE COURT: It's probably a button I
16 pushed.
17 MR. MADIGAN: TransAmerica submitted
18 its responses to the OSFC's second set of
19 interrogatories and this is -- interrogatories
20 were --
21 THE COURT: Okay. I see that. Signed
22 by Mr. Koniewich.
23 MR. MADIGAN: Mr. Koniewich. For
24 interrogatory No. 2, it states -- it says, state

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1 all facts, identify all witnesses and produce all
2 documents that support the defenses asserted in
3 paragraph 5 of your answer. That the OSFC is
4 barred from recovery by reason of its own breach
5 of warranty and contributory negligence.
6 If you go further, you can see for
7 additional support see TransAmerica's March 8th,
8 2012 certified claim, November 7th, 2012
9 supplemental claim and the supporting
10 documentation referenced in its claim PowerPoint,
11 which was attached to TransAmerica's responses to
12 the OSFC's first set of interrogatories, which
13 this was given to them in the first set of
14 interrogatories. And when you go to the claim
15 PowerPoint, you can see there's the chart that we
16 were looking at, except for the colored dots, and
17 the total you can see is \$603,392.71.
18 THE COURT: Mr. Becker, you want to
19 take a couple minutes with this?
20 MR. BECKER: Yeah, if I could look at
21 what Mike has.
22 (A recess is taken.)
23 THE COURT: We're back on the record in
24 TransAmerica Building Company versus Ohio School

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1 Facilities Commission, Case No. 2013-00349.
2 Mr. Madigan and Mr. Becker are
3 addressing the admissibility of Exhibit TA 1430.
4 Mr. Becker, you have an objection that
5 this wasn't produced during discovery and that
6 it's a mystery to you. The first time you've seen
7 it was, I don't know, a couple weeks ago. And,
8 Mr. Madigan, you contend that it was produced
9 during discovery in response to interrogatories
10 and requests for production, right?
11 MR. MADIGAN: Correct.
12 THE COURT: So, Mr. Madigan, why don't
13 you respond to Mr. Becker first or continue your
14 response.
15 MR. MADIGAN: Sure. The itemization of
16 discrete changes in the costs was provided in
17 response to the OSFC's interrogatories. This was
18 TransAmerica's response to the OSFC's first set of
19 interrogatories. And in particular, it was
20 provided in response to interrogatory No. 2, where
21 it says, produce your written claim in this case.
22 TransAmerica responded: See
23 TransAmerica's March 8th, 2012 certified claim,
24 November 7th, 2012 supplemental claim and the

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1 supporting documentation referenced in the claim
2 PowerPoint, which are both attached to these
3 responses. That claim PowerPoint included this.
4 THE COURT: Okay. Those discrete
5 changes of approximately \$600,000 are also
6 referenced in Mr. McCarthy's March -- or I'm
7 sorry, January 17th, 2014 report as you can see
8 here.
9 MR. BECKER: Are you done?
10 THE COURT: Now, is -- can I -- can you
11 hand me a hard copy of TA 1430 and a hard copy of
12 Exhibit B? Or I can just at least look at those
13 two together?
14 Mr. Becker?
15 MR. BECKER: So I have a question here
16 for Mr. Madigan. The claimed PowerPoint that you
17 referenced in discovery responses was what?
18 MR. MADIGAN: It's what's attached as
19 Exhibit B.
20 MR. BECKER: And when was this claimed
21 PowerPoint presented?
22 MR. MADIGAN: It says just -- which are
23 both attached to these responses. So at the time
24 of these responses, that claimed PowerPoint was

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1 provided to you.
2 MR. BECKER: And if -- I think we have
3 the same understanding that this in either version
4 Exhibit B as produced in discovery or Exhibit 1430
5 as produced just a few weeks before trial was not
6 part of Mr. McCarthy's report. And so with that,
7 I accept Mr. Madigan's representations, we don't
8 have our discovery responses here, that this
9 version, Exhibit B, was part of their discovery
10 responses. So I will withdraw that part of the
11 objection that said it wasn't produced in
12 discovery. I stand behind the objection in that
13 it wasn't produced as part of the article 8 claim
14 by TransAmerica.
15 THE COURT: Which I think we've already
16 admitted.
17 MR. BECKER: Right, they've already
18 admitted.
19 And then secondly, I stand by the
20 objection that this is still in the nature of an
21 expert opinion, so whether it's produced in
22 discovery or not, if you're going to have somebody
23 testify about this document, it is an opinion
24 document. It obviously requires some expertise,

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1 and so it should have been disclosed as part of
2 the expert opinion disclosure, certainly should
3 have been disclosed in the format that we see
4 here. I think there's an understanding and
5 agreement that this particular exhibit now color
6 coded back to the individual dorms was never
7 produced to us until just a few weeks ago.
8 THE COURT: Okay. I don't think I need
9 to hear anymore. I don't believe that -- well, at
10 least I haven't heard testimony from Mr. Wilhelm
11 yet that is in the nature of expert testimony. At
12 least to date in this trial, I don't know anybody
13 in this courtroom that has more knowledge of this
14 project than he did -- then he does or understands
15 the problems that TransAmerica faced for which
16 they're seeking damages. I think he's without --
17 without the use of expert knowledge, he can simply
18 testify as to the method that he used even if he
19 was working with Mr. McCarthy to prepare Exhibit B
20 to the discovery, which is also Exhibit TA 1430,
21 except for the color coding.
22 Now, if you have an objection to using
23 1430, I personally think it will make the trial go
24 faster, but -- and I'm not going to listen to any

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1 testimony from Mr. McCarthy about Exhibit 1430 if
2 it's not in his report. So -- but I do think
3 Mr. Wilhelm can certainly describe how he
4 attempted to put together -- I mean, this is a --
5 this is a man who's been asked to furnish pricing
6 on various change orders throughout the project,
7 has been asked to provide pricing in article 8
8 claims, and he's prepared this to help prove their
9 damages in this lawsuit.
10 Now, whether it's going to be
11 admissible in support of an article 8 claim
12 remains to be seen. But I think at this juncture
13 he can certainly testify whichever one you want.
14 Mr. Becker, if you want to make it long and drawn
15 out, we can do without the color coding, because I
16 won't understand it, but if you --
17 MR. BECKER: With that lead up --
18 THE COURT: And that's perfectly fine,
19 I understand. However you want to reserve your
20 position. I assume you object to both of them,
21 right?
22 MR. BECKER: No. Well, yes, I still
23 have the same objection to both of them.
24 THE COURT: Exactly.

1 MR. BECKER: I will say this, and I'll
2 think about it over the weekend, but I will -- I
3 appreciate what you're saying, and believe me, we
4 all want this to move along as efficiently as we
5 can make it. I think to the extent that they want
6 to use this again as illustrative evidence to help
7 you understand the testimony, I may be willing to
8 consider that. But if they want to ultimately
9 admit that, I probably won't. But let me have the
10 weekend to think about it and we'll come back on
11 Tuesday and you'll have my response to your
12 question.

13 THE COURT: I think that's -- I think
14 I'm going to agree with Mr. Becker on that. I
15 think it's the best way to approach this. And I
16 think plaintiff can take the weekend too and think
17 about how they want to present this with or
18 without the color coding, and maybe develop a plan
19 that way -- because I'm going to defer to
20 Mr. Becker given the fact that this was -- this
21 specific TA 1430 was never produced, even though
22 the underlying document was produced it was never
23 produced with the color coding and it was not
24 included with Mr. McCarthy's report, which I

1 assume is true, right, Mr. Madigan?

2 MR. MADIGAN: It was not attached to
3 Mr. McCarthy's report, but he does reference it in
4 his report.

5 THE COURT: He references \$600,000?

6 MR. MADIGAN: Right.

7 THE COURT: I understand that.

8 MR. MADIGAN: Okay.

9 THE COURT: And that may just go to the
10 issue of weight and so forth. But the point is
11 that was not included in his report. Either one
12 of those documents.

13 MR. GREGORY: Because he was not
14 providing the opinion. He's going to provide the
15 opinion as to things in the reports. Mr. Wilhelm
16 is here to talk about the 600,000.

17 THE COURT: I understand that.

18 MR. GREGORY: So nothing has changed
19 between the time of the report or our position
20 here today except for some color coding, Your
21 Honor.

22 THE COURT: I understand, Mr. Gregory.
23 And I -- that's exactly what I'm thinking. And
24 that's why I'm inclined to let it come in and let

1 him testify about it, but not as an expert. And I
2 don't think he needs to. He is -- knows more
3 about this job than he wants to probably.

4 So can you continue with another line
5 of questioning or if this throws you off your
6 pace, we can break. You know, we've got --

7 MR. MADIGAN: Yeah, I'm going to be
8 transitioning into a different topic, so now is
9 probably a good time.

10 THE COURT: Yeah. Probably be more
11 useful to come right back to this.

12 MR. BECKER: Well, since we're talking
13 about next week, what are we looking at?

14 THE COURT: Well, we're not going
15 Monday, we know that, right? So 9:00 on Tuesday
16 morning is fine. That's what, our second week?
17 What is the forecast, Mr. Madigan, Mr. Gregory, in
18 terms of next week? Do you see, you know, that
19 will have given you basically eight trial days
20 instead of ten to put your case on if you were to
21 finish it by Friday.

22 MR. GREGORY: Right. So we're
23 basically on course with our original projection,
24 but in view of our compressed schedule on this

1 trial, we're a little behind.

2 THE COURT: Okay.

3 MR. GREGORY: But we're still in the
4 neighborhood. Obviously the length of a cross for
5 someone like Mr. Wilhelm we don't know that, but
6 that may vary, but we're in the neighborhood. But
7 we're slightly behind would be my projection.

8 THE COURT: Well, as I said a few
9 minutes ago reluctantly, we have more time if we
10 need it, none of us want it unnecessarily, so
11 we'll try to -- you know, I'll try to keep the
12 breaks short and the lunches, you know, to an hour
13 and we'll try to go to 5:00 every day and move it
14 along as best we can.

15 I might suggest this: You know, it
16 might speed things up a little bit with some of
17 these documents if -- if you can simply get them
18 authenticated and move on because I'm going to
19 read them. I'm going to read till I bleed in
20 this, I have no doubt about it, I can see that.

21 And it's not, you know, every -- all
22 the lawyers in this room are used to that in these
23 kinds of cases so this is nothing new, but I'm
24 going to read this stuff and I'm going to read it

1 carefully. So if you think there's a need for
2 context, and there has been, and I appreciate it,
3 and of course it's caused me to ask a few
4 questions from time to time, but that's fine, but
5 if you're just wanting to get, you know --

6 MR. MADIGAN: Just the documents in?

7 THE COURT: -- a document into the
8 record through this witness or through whatever
9 witness, just get it in because that's all you
10 need to do. I'm going to read it. And you're
11 going to have -- I assume one side or the other is
12 going to ask for findings and conclusions in this?

13 MR. BECKER: We expect that you will
14 issue a decision that will incorporate that
15 absolutely.

16 THE COURT: Well, see, then I'm going
17 to allow you to make closing arguments if that's
18 what you want, which I think would be helpful,
19 because I want to know what you think is important
20 about each side of the case. But I'm going to ask
21 you to probably prepare proposed findings and
22 conclusions as well in the form of a post-trial
23 brief, so I'll know what you think is important
24 and I don't miss something.

1 So in other words, my point is, once
2 all the evidence has come in in terms of testimony
3 and once we've sorted through whatever's going to
4 be admitted in terms of the documents, you're
5 going to be able to use all that to argue your
6 case both orally and in writing.

7 MR. GREGORY: Well, what's the Court's
8 thinking of how that procedure is impacted by the
9 30-day requirement under the statute?

10 THE COURT: It's not. I've already
11 checked on that. That 30 days doesn't start to
12 run until the last brief is filed, and the briefs
13 will be due on the certain date. Insofar as I've
14 seen on the theory that I tell my wife, briefs are
15 never done, they're only due. They'll never be
16 filed until the last day. So whatever day I come
17 up with that the briefs are due, that's probably
18 going to start 30 days running. And I will be
19 working in the meantime reading a lot, but then --
20 because I'll hear what you have to say, I'll
21 distill that, and then I'm sure you can put some
22 point of clarity on some specific things that are
23 important to you in some arguments that you might
24 have thought about even afterwards that you want

1 in this brief. And it might be helpful to the
2 judge because God forbid there might be some
3 objections to my decision, you know?

4 MR. GREGORY: Heaven forbid.

5 MR. BECKER: And we're prepared to
6 consider a stipulation to give you additional time
7 to decide the matter beyond the 30 days.

8 THE COURT: I really -- you know, I
9 think both of you know me well enough to know I
10 really want to get this right regardless of where
11 it goes. I just want to be as right as I can get
12 it, so I hope that's why I'm here.

13 MR. BECKER: I think we just need to
14 know who they're calling on Tuesday.

15 MR. MADIGAN: After Josh it will be Jim
16 Deering, a carpenter.

17 THE COURT: Okay.

18 MR. MADIGAN: And following Mr. Deering
19 is the -- Mr. Josh Predovich with SHP.

20 THE COURT: And I'm sorry, Jim Deering
21 with?

22 MR. MADIGAN: He was the carpentry
23 foreman.

24 THE COURT: Right.

1 MR. MADIGAN: Deering Carpentry,
2 TransAmerica.

3 THE COURT: Right.

4 MR. MADIGAN: And we'll be calling
5 Mr. Predovich with SHP.

6 THE COURT: Happy Memorial Day. We're
7 in recess.

8 -----

9 Thereupon, the foregoing proceedings
10 concluded at 4:54 p.m.

11 -----

1 State of Ohio : C E R T I F I C A T E
County of Franklin: SS

2
3 I, Mary Bradley, RPR, a Notary Public in and
4 for the State of Ohio, do hereby certify that I
5 reported the aforementioned proceedings; that the
6 foregoing is a true record of the proceedings.

7
8 I do further certify I am not a relative,
9 employee or attorney of any of the parties hereto,
10 and further I am not a relative or employee of any
11 attorney or counsel employed by the parties hereto,
12 or financially interested in the action.

13
14 IN WITNESS WHEREOF, I have hereunto set my
15 hand and affixed my seal of office at Columbus,
16 Ohio, on October 20, 2015.

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Mary Bradley, Notary Public - State of Ohio
My commission expires September 19, 2019.

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