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Division II
State of Washington
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

HAROLD LEE,

Plaintiff/Respondent,

V.

DWP GENERAL CONTRACTING, INC.,

Defendant/Appellant

BRIEF OF RESPONDENT

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I. Introduction

Defendant DWP General Contracting, Inc. appeals from a jury's verdict that included an award of lost profits to plaintiff Harold Lee in the amount of \$323,195. In reaching this verdict, the jury agreed with the opinion of plaintiff's expert economist. The defendant did not call an expert witness on damages, nor did defendant provide the jury with any evidence to support a different amount of lost profits. Instead, defendant's counsel asked the jury to adopt his calculation of lost profits, which the jury declined to do. Because the jury's verdict is supported by substantial evidence, the trial court did not err in denying defendant's motions for a new trial or a remittitur, and the court should reject this appeal.

The defendant's appeal raises two issues.

1. Motion for New Trial. The denial of a motion for a new trial is reviewed for an abuse of discretion. According to the Supreme Court, "[t]he credibility of witnesses and the weight to be given to the evidence are matters within the

province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.”¹ Here, plaintiff’s expert provided substantial evidence to support the jury’s award of lost profits. Did the trial court abuse its discretion when it denied defendant’s motion for a new trial?

2. Remittitur. Under the remittitur statute, RCW 4.76.030, “there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct....” Moreover, trial court orders “denying a remittitur are reviewed for abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent.”² Was the jury’s verdict so excessive that it shocks the judicial conscience or is unmistakably the result of passion or prejudice?

¹ *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937, (1994) (citation omitted).

² *Bunch v King County Dept. of Youth Serv.*, 155 Wn.2d 165, n. 6, 116 P.3d 381 (2005).

II. Statement of the Case

Plaintiff Dr. Harold Lee entered into a contract with defendant DWP General Contracting, Inc. (“DWP”) for the construction of a “28-unit apartment project with 2 additional Townhomes” in Vancouver, Washington.³ In the contract, DWP promised to complete the project within 180 days, by March of 2016.⁴ DWP broke this promise and did not complete the project until more than fourteen months later, in June of 2017. DWP breached the contract in other ways, for which the jury also awarded damages, but those breaches are not germane to this appeal.

Dr. Lee sued DWP for its various breaches of the contract.⁵ Dr. Lee sought several categories of damages, including damages for the profits he lost during the fourteen-month delay in the completion of the project.⁶

³ Ex. 4.

⁴ Ibid.

⁵ Clerk’s Papers (“CP”) 11-14.

⁶ Ibid.

The case proceed to a jury trial. Dr. Lee called as an expert witness an economist, Laura Markee of Markee Valuations LLC.⁷ Ms. Markee received a Bachelor of Arts in Economics from Wheaton College, as well as an MBA with a concentration in finance from University of Washington.⁸ She is a Chartered Financial Analyst, and she is also an accredited Senior Appraiser with the American Society of Appraisers.⁹

Ms. Markee prepared a written opinion of the damages caused by the construction delay, including Dr. Lee's lost profits.

Q. Okay. Let me hand you what's been marked Exhibit 64 and ask you if you recognize this document?

A. Yes, this is my opinion of the damages.

Q. Okay.

MR. TURNER: I'd like to offer Exhibit 64 into evidence, Your Honor.

MR. CARON: That doesn't -- objection, lack of foundation.

THE COURT: Overruled. I'll admit it.¹⁰

⁷ A transcript of Ms. Markee's entire trial testimony was attached to plaintiff's opposition to defendant's motion for a new trial/remittitur, which can be found at CP 95-144. For the court's convenience, a copy of this transcript is also appended to this brief. Citations will be to the page and line of this transcript.

⁸ Markee at 5:2-10.

⁹ Markee at 5:11-6:7

¹⁰ Markee at 7:15-23

In her report, Ms. Markee set forth her Lost Profits Calculation.¹¹ To calculate lost profits, Ms. Markee calculated the average rental income for a nine-month test period. She then adjusted the average rental income downward to reflect the fact that rental rates had increased over time. She then subtracted the average variable operating expenses for the same nine-month period, resulting in the average monthly lost profits. She then multiplied the average monthly lost profits by the fourteen months, the duration of the delay, to derive her unadjusted lost profit total.¹²

Ms. Markee then made two additional adjustments to this total. First, she reduced these lost profits to reflect the fact that the delay period was shorter for the two townhomes than it was for the rest of the project. Finally, she reduced the lost profits to reflect the fact that the property taxes increased once the

¹¹ For the court's convenience, a copy of Ms. Markee's report, Exhibit 64, is appended to this brief.

¹² Ex. 64, Schedule 2.

project was completed.¹³ This resulted in her final opinion of lost profits in the amount of \$323,195, which she expressed in the following table:¹⁴

Lost Profits Calculation

Rental Income	\$34,655	Average Results for Sept 2017-May 2018
Less: Rental Rate Adjustment	(1,531)	Rental rates were 4.4% higher in 2017 vs. 2016
Less: Variable Operating Expenses	<u>(7,696)</u>	Average variable expenses for Sept 2017-May 2018
Monthly Lost Profits	25,428	
Multiplied by: # of months of stabilized occupancy	<u>x 14</u>	Number of months delayed
Equals: Lost Profits	\$355,985	
Less: Adjustment for Townhouse Permitting Delay	(20,043)	See Schedule 4
Less: Property Tax Savings	<u>(12,747)</u>	See Schedule 5
Equals: Adjusted Lost Profits	\$323,195	

Defendant did not present the testimony of any expert witness in this regard. Instead, on cross-examination, counsel sought to discredit Ms. Markee's conclusion by suggesting that she had performed her analysis incorrectly. For example, counsel criticized Ms. Markee for not including the cost of any property taxes in her analysis. But Ms. Markee's analysis did

¹³ Ibid.

¹⁴ Ibid.

properly account for property taxes. On redirect, Ms. Markee explained again how she accounted for property taxes in her analysis and confirmed her opinion that she had done so correctly.

Q. Let's do these in reverse order while they're fresh in our mind. If you look at your Exhibit 64, which was your report that we've submitted today, did you make an adjustment for the property taxes that Dr. Lee didn't have to pay because he didn't have a finished building in March of 2016?

A. I did.

Q. Okay. And was that when you reduced the property tax savings of \$12,747?

A. Correct.

Q. Okay. And so if the building had been completed in March of -- all the buildings had been completed in March of 2016, he would have paid \$12,747 more -- sorry, I just (inaudibles) -- \$12,747 more in property taxes than he actually did; is that right?

A. That's correct.

Q. And so you took that amount off of your damage calculation; is that right?

A. That's correct.

Q. All right. And I think that that's shown here. You said less property tax savings?

A. Yes. That's where I made the adjustment.

Q. So you're comfortable that that adjustment fully reflects the impact of the change in property taxes between it being finished in March of 2016 versus June of 2017?

A. That's correct.¹⁵

¹⁵ Markee at 48:21-49:22

Similarly, on cross-examination, DWP's counsel suggested that Ms. Markee had failed to properly account for mortgage payments made on the permanent loan once the building was complete. Ms. Markee disagreed, however, with defense counsel's method of analysis and the proper treatment of mortgage payments. She explained and confirmed her opinion in this regard on redirect.

Q. So if you were trying to do some sort of analysis as Mr. Caron suggested, wouldn't you then have to take all of these interest amounts that he paid for [the construction loan] all of these months of the delay and add them back to the damages?

A. It seems like you would.¹⁶

At the same time, Ms. Markee pointed out that defense counsel was not comparing "apples to apples" because his analysis ignored the fact that Dr. Lee was paying construction loan interest before the project was completed.

Q. Is that -- well, let me ask you whether or not Mr. Caron's analysis assumes that there are no mortgage or interest payments before the building is built?

A. The calculation he did did not make any assumption to that.¹⁷

¹⁶ Markee at 54:10-15.

¹⁷ Markee at 55:1-5.

On re-cross, DWP's counsel tried once again to convince Ms. Markee to agree with his treatment of mortgage payments, but Ms. Markee declined to do so.

Q. Please explain to me, if you adopt my analysis, okay, if that analysis is the -- if you agree with me -- I know that you don't, but if you agree with me, it sounds like there's some things on Exhibit 12 that we need to take into consideration. Am I hearing that right?

A. Your analysis doesn't consider all the extra interest that he paid on the loan while the building was being built. It doesn't take that into account.¹⁸

Thus, at the conclusion of re-cross by DWP's counsel, Ms. Markee stuck by her expert opinion of \$323,195 in lost profits, and counsel admitted he simply had a "difference of opinion" with her.

Q. Okay. And you're still sticking by your 323,195, which is the lost profits?

A. Absolutely.

Q. And that's where you and I have a professional difference of opinion.

A. Okay.

Q. Right?

A. Yeah, (inaudibles).

Q. And we have a difference of opinion?

A. Correct.¹⁹

¹⁸ Markee at 58:4-12

¹⁹ Markee at 59:16-25

In its appeal, DWP simply ignores all of this evidence and asserts—contrary to this evidence—that Ms. Markee conceded that Dr. Lee “would have realized net profits of \$6,071.00 per month for fourteen months, or \$84,994.00 if the project had been completed when Dr. Lee claimed it should have been completed.”²⁰ As shown above, however, Ms. Markee never conceded that DWP’s counsel had correctly calculated the net profits lost due to the delay. Moreover, DWP never introduced a single exhibit or the testimony of any witness—expert or otherwise—to provide an alternative calculation of net profits. Instead, DWP placed all of its eggs in one basket by trying to browbeat Dr. Lee’s expert into agreeing to a different number than the one in her report, which she steadfastly refused to do.

At the conclusion of the evidence, the jury was properly instructed regarding the measure of damages for Dr. Lee’s

²⁰ Appellant’s Brief, p. 14.

breach of contract claim. Based on WPI 303.01 and 303.04, the jury was instructed as follows:

In calculating the plaintiff's actual damages, you should determine the sum of money that will put the plaintiff in as good a position as he would have been in if both plaintiff and defendant had performed all of their promises under the contract.

In this case, Harold Lee claims lost profits. Harold Lee's damages may include net profits if Harold Lee proves with reasonable certainty that net profits would have been earned, but were not earned because of the breach of DWP General Contracting, Inc.²¹

At the conclusion of the trial, the jury rendered its verdict, which included an award of \$323,195 for lost profits—the exact amount set forth by Ms. Markee in her report and in her testimony.²²

After the jury rendered its verdict, the defendant moved the court for a new trial under CR 59 or, in the alternative, for a remittitur under RCW 4.76.030. The court reviewed the briefing and held a lengthy hearing, after which the court

²¹ CP 77.

²² CP 81.

denied defendant's motions and allowed the jury's verdict to stand.²³ After entry of the judgment, Defendant timely filed this appeal.

III. Argument

A. The Trial Court Correctly Denied Defendant's Motion for a New Trial

1. Standard of Review

Defendant moved the trial court for a new trial under CR 59(a) (2), (5), (6), (7), (8), and (9). For purposes of this appeal, however, defendant has narrowed his grounds to CR 59(a) (6) and (7). Those two subsections provide that a motion for new trial "may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

²³ CP 164.

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;”

“Trial court decisions granting or denying motions for unconditional new trials are reviewed for abuse of discretion.”²⁴

Moreover, “[w]here sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial.”²⁵

When evaluating whether substantial evidence supports the jury's verdict, the reviewing court must view the evidence in the light most favorable to the nonmoving party.²⁶ In conducting this review of the evidence, the court does not reweigh it, draw its own inferences, or substitute its judgment for that of the jury. To do so, it has been observed, would be to invade the province of the trial court and of the jury:

[T]he power to grant a new trial under CR 59 is vested in the trial court, not in the appellate court. For this court to substitute its views

²⁴ *Bunch v King County Dept. of Youth Serv.*, 155 Wn.2d 165, n. 6, 116 P.3d 381 (2005), citing *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1977).

²⁵ *Ibid*, quoting *Palmer v. Jensen*, *supra*.

²⁶ *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997).

concerning the adequacy of damages for those of the jury would be to invade the province of the jury. For the court to substitute its discretion for that of the trial court in passing on a motion for new trial would be to usurp the function of that court.²⁷

The Supreme Court has also warned against usurping the proper role of the jury, going so far as to say the verdict must stand even if the reviewing court believes it to be wrong:

The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.²⁸

The Supreme Court has further warned the reviewing court not to substitute its judgment for the trial court regarding a motion for new trial based on a claim of excessive damages.

The appellate court does not engage in exactly the same review as the trial court because deference and weight are also given to the trial court's discretion in denying a new trial on a claim

²⁷ *Balandzich v. Demeroto*, 10 Wn. App. 718, 726, 519 P.2d 994 (1974) (citation omitted).

²⁸ *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937, (1994) (citation omitted)

of excessive damages. The verdict is strengthened by denial of a new trial by the trial court. While either the trial court or an appellate court has the power to reduce an award or order a new trial based on excessive damages, “appellate review is most narrow and restrained” and the appellate court “rarely exercises this power.”²⁹

Under this standard of review, if there is any substantial evidence, or any reasonable inference from the evidence, to support the jury’s verdict, it would have been an abuse of discretion for the trial court to grant defendant’s motion for a new trial. Moreover, deference should be given to the trial court’s determination that no new trial was warranted.

2. Plaintiff Presented More Than Substantial Evidence to Support the Award of Lost Profits

The Supreme Court has specified the burden a plaintiff must meet in order to recover an award of lost profits. “The modern view is that they are properly recoverable as damages when (1) they are within the contemplation of the parties at the

²⁹ *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054, 1070 (1993) (citations omitted).

time the contract was made, (2) they are the proximate result of defendant's breach, and (3) they are proven with reasonable certainty."³⁰ There is no argument that plaintiff has failed to meet the first two requirements. Instead, defendant only questions whether the jury's award of lost profits was supported by substantial evidence.

Dr. Lee hired an expert economist to provide an opinion regarding the amount of lost profits. This is consistent with the Supreme Court's observation in *Larsen*.

Respondents point out that a reasonable method of estimation of damages is often made with the aid of opinion evidence. Experts in the area are competent to pass judgment. So long as their opinions afford a reasonable basis for inference, there is departure from the realm of uncertainty and speculation. Expert testimony alone is a sufficient basis for an award for loss of profits.³¹

Ms. Markee was qualified to offer an expert opinion regarding lost profits, and defendant did not object to her

³⁰ *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 15, 390 P.2d 677 (1964) (citation omitted)

³¹ *Id.* at p. 17 (citation omitted).

qualifications.³² Ms. Markee explained her analysis clearly in her report and in her testimony. The figures she used in her report were supported by the operating history of the subject apartment complex once it was finally completed. Defendant did not object to Ms. Markee's analysis as novel or contrary to the method of analysis used by other experts in her field, and defendant did not move to exclude Ms. Markee's testimony on this basis.

In contrast to Dr. Lee, the defendant did not introduce any evidence of its own regarding the calculation of lost profits. The defendant did not call an economist, or any other type of expert, to testify. Instead, the defendant relied entirely on counsel's cross-examination of Ms. Markee. But counsel's questions and statements during cross examination, just like opening statement and closing argument, are not themselves evidence. And, as shown above, Ms. Markee never agreed that

³² Defendant did object to Ms. Markee's report coming into evidence based on a "lack of foundation," but this objection was overruled. Markee at 7:15-23.

defense counsel's calculation properly captured all of plaintiff's lost profits.

In this regard, this case is similar to the very recent Court of Appeals decision in *Elias v. City of Seattle*.³³ In that case, several employees sued for damages for wrongful employment practices. The employees presented the expert testimony of an economist to support their damage claims. The jury awarded substantial damages to the employees, and the city moved the trial court for a remittitur or, alternatively, a new trial. The trial court refused, and the city appealed.

The jury awarded one plaintiff, Elias, \$400,000 in economic damages, and it awarded another plaintiff, Proudfoot, \$182,000 in economic damages. Like DWP does here, the city challenged the sufficiency of the evidence to support the jury's damage awards, not its liability decisions. Like DWP, the city argued that the plaintiffs' expert economist "improperly

³³ Case No. 75848-9-I, February 20, 2018. This unpublished decision is being cited as nonbinding authority, under GR 14.1, to be accorded such persuasive value as the court deems appropriate.

calculated” the amount of past lost overtime. Similarly, the city disagreed with the economist’s future overtime calculations. Like DWP, the city “did not present any controverting expert testimony.”³⁴

The jury awarded Elias roughly half of the amount estimated by the plaintiffs’ expert. The Court of Appeals held that the “jury’s award was in the range of substantial evidence,” and the “trial court did not abuse its discretion by refusing to remit Elias’s economic damages award.”³⁵

The Court of Appeals reached the same conclusion with respect to Proudfoot. The city argued that Proudfoot had lost only \$10,700 in salary, which was far below the jury’s award of \$40,000. Proudfoot’s economist, however, testified that Proudfoot lost \$40,115 in salary. In addition, the expert testified that Proudfoot lost \$467,390 in past and future overtime earnings and future retirement benefits. The jury

³⁴ *Ibid.*

³⁵ *Ibid.*

awarded Proudfoot \$182,000 on that score. After reiterating that the city did not call its own expert, the court concluded:

Substantial evidence supports the jury's economic and noneconomic damages awards. The awards do not shock the conscience and were not the result of passion or prejudice. The City fails to show that the trial court abused its discretion when it denied both a remittitur and a new trial.³⁶

The same reasoning applies here. DWP's appeal presents nothing more than a defendant who disagreed with the opinion of economic damages by plaintiff's expert. Simply disagreeing with an expert's opinion—without more—is not sufficient to warrant a new trial or a remittitur. So long as the jury's verdict is within the range of the expert's opinion, it is supported by substantial evidence, and it should be upheld.

³⁶ *Ibid.*

3. Defense Counsel's Calculation of Lost Profits is Wrong

The renowned author H.L. Mencken once said: “For every complex problem there is an answer that is clear, simple, and wrong.” This quote sums up defense counsel’s calculation of lost profits; while it bears the hallmarks of simplicity and “common sense,” it remains incorrect in numerous ways.

Defendant’s chief complaint with Ms. Markee’s analysis seems to be that she did not deduct plaintiff’s full mortgage payment as an expense in calculating the lost profits. To support this complaint, defendant seems to argue that the law requires the deduction of all expenses when calculating lost profits. But this argument is contrary to prior decisions in Washington, none of which defendant mentions or addresses in its brief.

For example, a similar argument was made in *Coast Trading Co., Inc. v. Parmac, Inc.*³⁷ In that case, the plaintiff’s calculation resulted in a “loss of profit in excess of \$80,000.”

³⁷ 21 Wn. App. 896, 587 P.2d 1071 (1978)

The defendant argued that more overhead expenses should have been included in that calculation, resulting “in a profit loss of only \$7,811.”³⁸ The Court of Appeals agreed with the plaintiff that “overhead expenses or plant ‘burden’ should not have been deducted in computing [plaintiff’s] lost profit.”³⁹ Thus, not all overhead expenses need to be deducted in calculating lost profits.

To reach its decision, the Coast Trading court quoted extensively from a decision by the U.S. Court of Appeals for the Third Circuit.

[W]here the plaintiff’s overhead or fixed expenses are not affected by the defendant’s breach, no deduction should be made in calculating the profits which the plaintiff would have made had it not been for the breach. It is obvious that fixed expenses are an essential element in determining the net profits of any business and must, for accounting purposes, be allocated among each of the business’ sales activities. Nevertheless, . . . it does not follow that a proportionate share of

³⁸ *Id.* at 909.

³⁹ *Ibid.*

fixed expenses should be considered a cost factor in the computation of lost profits.⁴⁰

In addition, the Coast Trading court also quoted extensively from another decision by the Third Circuit Court of Appeals.

Although there is authority to the contrary, we feel that the better view is that normally, in a claim for lost profits, overhead should be treated as a part of gross profits and recoverable as damages, and should not be considered as part of the seller's costs. . . . (S)ince overhead is fixed and nonperformance of the contract produced no overhead cost savings, no deduction from profits should result.⁴¹

To the same effect is the decision in *Barnard v. Compugraphic Corp.*⁴² Once again, the issue was whether certain overhead expenses should have been included in the calculation of lost profits. On appeal, the defendant argued that the judge's lost profit calculation was excessive and not supported by the evidence because the it did not include the

⁴⁰ *Id.* at 910, quoting *Buono Sales, Inc. v. Chrysler Motors Corp.*, 449 F.2d 715, 719-20 (3d Cir. 1971)

⁴¹ *Ibid.*, quoting *Vitex Mfg. Corp., Ltd. v. Caribtex Corp.*, 377 F.2d 795, 798-99 (3d Cir. 1967).

⁴² 35 Wn. App. 414, 667 P.2d 117 (1983)

plaintiff's labor costs. The Court of Appeals rejected that argument:

Nor do we agree that in computing their lost profits the Barnards were required to deduct their employees' labor costs. Both the Barnards and their accountant testified no additional labor would have been required to do the jobs which were lost because of the EditWriter's malfunctions. Thus, employee costs were a fixed expense, unaffected by defendant's breach, and need not have been deducted in calculating profits.⁴³

The same analysis applies here. In order to build the project, Dr. Lee obtained a construction loan of roughly \$3.2 million.⁴⁴ Once the project was completed, the remaining balance on the construction loan was converted to a mortgage, which bore the same interest rate as the construction loan.⁴⁵ Thus, this is not a case where the owner had no debt on the apartment complex before the construction was complete. In other words, whether the project was completed or not, Dr. Lee still had to pay interest to the bank for the money he had

⁴³ *Id.* at 418, citing *Coast Trading Co., supra.*

⁴⁴ Ex. 64, Schedule 6.

⁴⁵ Ex. 64, Schedule 1.

borrowed. This overhead expense did not increase as a result of the project being completed. Thus, under the authorities cited above, there is no basis for deducting the interest expense in calculating the plaintiff's lost profits.

Dr. Markee's decision not to deduct the mortgage payments is also supported by the economic literature. In "The Comprehensive Guide to Economic Damages," the difference between accounting profit and economic profit was explained:

In assessing profitability, one should also keep in mind the difference between accounting profit and economic profit. Accounting allows for the income statement to reflect the cost of borrowed capital in the form of interest expense. It does not, however, record the opportunity cost of equity capital. Because accounting measures do not reflect the opportunity cost of equity capital but do reflect the interest costs of debt, differences in capital structures can result in different measures of return even if the profit is the same.⁴⁶

Defendant's demand to deduct the full mortgage payment is also incorrect because the mortgage payment has two components, interest and repayment of principal. Only the

⁴⁶ *The Comprehensive Guide to Economic Damages*, Nancy J. Fannon and Jonathan M. Dunitz, 5th Ed., Vol. 1, p. 850

former could be deemed a true expense, as the repayment of principal will positively affect the owner's balance sheet as it reduces the loan amount, thereby increasing the owner's equity in the building.

Defense counsel's other criticisms of Ms. Markee's calculation are similarly misplaced. For instance, defendant complains that Ms. Markee should have deducted all property taxes to calculate the profits lost as a result of the delay. But Dr. Lee was paying property taxes before the construction was completed, just as he did after completion. Ms. Markee focused on the variable additional property taxes owed as a result of the completion of the project, and she deducted these additional property taxes in calculating the profits lost during the delay.

The same is true for property insurance. Defendant complains that Ms. Markee "argued that the whole of property taxes and insurance should not be deducted because they were 'fixed expenses.'"⁴⁷ But this complaint misrepresents

⁴⁷ Appellant's Brief, p. 23.

Ms. Markee's calculation. As shown on Schedule 3 of her report, Ms. Markee did deduct expenses for property insurance in calculating her average monthly variable costs.⁴⁸ The only adjustment Ms. Markee made was to the flood insurance premium of \$511 per month, which Dr. Lee paid before the completion just as he did after the completion. Thus, it was a fixed expense unaffected by the completion of the project that had to be paid regardless of when the project was completed.

In sum, this appeal boils down to nothing more than a "difference of opinion" between plaintiff's expert economist and defendant's counsel. This fact is best encapsulated by the following exchange between the two:

16 Q. Okay. And you're still sticking by your

17 323,195, which is the lost profits?

18 A. Absolutely.

19 Q. And that's where you and I have a professional

20 difference of opinion.

21 A. Okay.

22 Q. Right?

23 A. Yeah, (inaudibles).

24 Q. And we have a difference of opinion?

25 A. Correct.⁴⁹

⁴⁸ Ex. 64.

⁴⁹ Markee at 59:16-25

Because a difference of opinion between the plaintiff's expert and defense counsel is not a sufficient basis for striking a jury's verdict and ordering a new trial, the trial court did not err in denying defendant's motion for a new trial.

B. The Trial Court Correctly Denied Defendant's Motion for a Remittitur

RCW 4.76.030 governs DWP's request for a remittitur.

It provides, in pertinent part:

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be *so excessive or inadequate as unmistakably to indicate* that the amount thereof must have been *the result of passion or prejudice*, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict,... and *there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct* and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were *so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.*

“Trial court orders denying a remittitur are reviewed for abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent.”⁵⁰

The Elias court succinctly summarized the reviewing court’s approach in reviewing the denial of a remittitur.

We review the trial court's denial of a remittitur for abuse of discretion. We will not reduce the jury’s damages award unless it is not supported by substantial evidence in the record, shocks the conscience of the court, or is the result of passion or prejudice. We do not review the jury’s decisions about witness credibility or the weight to be given evidence. “We strongly presume the jury's verdict is correct.” “A trial court's denial of a remittitur strengthens the verdict.”⁵¹

As would be expected, the showing needed to obtain a remittitur from the trial court is extremely high, even higher than the showing needed for new trial; a new trial still protects the plaintiff’s constitutional right to a jury trial, whereas a

⁵⁰ *Bunch v. King County Dept. of Youth Serv.*, *supra*, at 172-173.

⁵¹ *Elias v. City of Seattle*, *supra*, p. 3-4 (citations omitted).

remittitur severely impinges on that right. As the Court of Appeals has observed:

The right of trial by jury on a legal claim is inviolate. CONST. art. I, § 21. The jury verdict must be upheld unless the court finds from the record that the damages are outside the range of substantial evidence in the record, shock the conscience of the court, or appear to have been arrived at as the result of passion or prejudice. Regardless of the court's assessment of the damages, it may not, after a fair trial, substitute its conclusions for that of the jury on the amount of damages.⁵²

Because of this constitutional consideration, the trial court's discretion is limited when it comes to issuing a remittitur. "The trial court has no discretion if the verdict is within the range of credible evidence."⁵³ Accordingly, a remittitur is warranted only when the jury's verdict is so beyond the range of evidence as to clearly be the result of passion or prejudice by the jury. As the Supreme Court has put it: "Before passion or prejudice can justify reduction of a jury

⁵² *Green v. McAllister*, 103 Wn. App. 452, 463, 14 P.3d 795 (2000)

⁵³ *Ibid.* (citation and internal quotations omitted)

verdict, it must be of such manifest clarity as to make it *unmistakable*.”⁵⁴

As demonstrated above, the jury’s verdict regarding lost profits was within the range of the evidence presented at trial—the jury awarded the exact amount that plaintiff’s expert stated in her opinion. Not only is there substantial evidence to support this award, there is nothing about the award that unmistakably indicates it was the result of passion or prejudice, nor should this award shock the judicial conscience. Accordingly, it would have been reversible error for the trial court to have issued a remittitur.

This case is similar to the case of *Green v. McAllister*, in which the plaintiff prevailed on a breach of contract claim that was tried to a jury.⁵⁵ The damages were established by expert opinions regarding how much the plaintiff would have earned

⁵⁴ *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wash.2d 831, 836, 699 P.2d 1230 (1985)

⁵⁵ *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795 (2000)

in developer fees if certain real estate development projects had been completed. The jury awarded damages of \$785,000.

Like DWP, the defendant moved for a new trial or a remittitur on the contract claim arguing, *inter alia*, that the evidence did not support the jury's damages award. The trial court "found that the trial had been fair, and that the jury's damage award was not the result of passion or prejudice."⁵⁶ Nevertheless, the trial court reduced the jury's damage award to \$205,000.

The Court of Appeals reversed that decision, finding it was an abuse of the trial court's discretion, because the damage award was within the range of the evidence: "The remittitur then deprived Green of his constitutional right to a trial by jury. The record contains ample evidence to support the jury's damage award. The verdict must be reinstated."⁵⁷

The same would be true here. DWP received a fair trial. The expert testimony was properly admitted, with no objection

⁵⁶ Ibid.

⁵⁷ *Id.* at 803 (citation omitted)

by DWP. The jury was properly instructed regarding the assessment of damages, including lost profits. The jury's verdict was within the range of the evidence, and it would be an abuse of discretion—and a violation of Dr. Lee's constitutional right to a trial by jury—for the court to alter the jury's damage award in any way. Accordingly, the court should deny DWP's request for a remittitur.

IV. Conclusion

For the foregoing reasons, Respondent Dr. Harold Lee respectfully requests that the court reject this appeal and allow the jury's verdict to stand.

Respectfully submitted August 15, 2019

s/ Steven E. Turner

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Dr. Harold Lee

Appendix A: Full Transcript of Laura Markee's Trial Testimony

IN THE SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

HAROLD LEE, an individual,)
 Plaintiff,)
 v.) Case No: 18-2-00142-4
 DWP GENERAL CONTRACTING,)
 INC., a Washington)
 corporation,)
 Defendant.)

EXCERPTS OF TRIAL

TAKEN BEFORE: THE HONORABLE DANIEL L. STAHNKE

DATES TAKEN: February 13, 2019 and
 February 14, 2019
 PLACE: Clark County Superior Court
 Vancouver, Washington

Transcribed by: Teresa L. Rider, CRR, RPR, CCR

1 (Testimony of Laura Markee on 2.13.19.)
 2 MR. TURNER: At this time, Your Honor, we'd
 3 like to call Ms. Laura Markee.
 4 THE COURT: Okay. Come forward and bring your
 5 purse up with you. Bring your purse up with you. We
 6 don't know who comes in and out that door.
 7 Right up here.
 8 THE WITNESS: Put it over here or --
 9 THE COURT: That's safe enough.
 10 THE WITNESS: All right.
 11 THE COURT: Raise your right hand. Do you
 12 swear or affirm the testimony you're about to give will
 13 the truth and the whole truth?
 14 THE WITNESS: I do.
 15 THE COURT: Have a seat. State your name and
 16 spell your last name.
 17 THE WITNESS: My name is Laura Markee,
 18 M-A-R-K-E-E.
 19 THE COURT: Thank you.
 20 Mr. Turner.
 21 MR. TURNER: Thank you, Your Honor.
 22 LAURA MARKEE,
 23 DIRECT EXAMINATION
 24 BY MR. TURNER:
 25 Q. Good afternoon, Ms. Markee. How are you

APPEARANCES

FOR PLAINTIFF: Mr. Steven Turner
 FOR DEFENDANT: Mr. Gideon Caron

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Examination:	D	X	RD	RX
Markee	3	28	48,60	55,75

EXHIBITS

No.	Admitted
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 Mr. Caron: 97

Defense motion: 76

1 currently employed?
 2 A. I have my own company. I'm a business
 3 appraiser and a financial damages expert. My company is
 4 Markee Valuations.
 5 Q. Okay. And how long have you been involved --
 6 have you been an expert in evaluating damage -- business
 7 damages?
 8 A. I have been an expert -- the first time I
 9 testified was in 2005. And I do a couple of cases a
 10 year every year since then.
 11 Q. Okay. I'm going to hand you a copy of your CV.
 12 MR. TURNER: Let me just have it marked by the
 13 clerk first.
 14 BY MR. TURNER:
 15 Q. Ms. Markee, I'm handing you a copy of Exhibit
 16 63 and ask you if you recognize this document?
 17 A. Yes, I do.
 18 Q. And what is it?
 19 A. It's my resume.
 20 Q. Okay.
 21 MR. TURNER: I'd like to offer Exhibit 63 into
 22 evidence, Your Honor.
 23 MR. CARON: No objection.
 24 THE COURT: 63 is admitted.
 25 (Exhibit 63 admitted.)

5

1 BY MR. TURNER:
2 Q. I just want to quickly go through here some of
3 your qualifications. Did you graduate from college?
4 A. I did. I have a Bachelor of Arts in economics
5 from Wheaton College.
6 Q. Did you study -- did you get a graduate degree?
7 A. I did. I have an MBA with a concentration in
8 finance from the University of Washington.
9 Q. And when did you receive that MBA?
10 A. That was in 1993.
11 Q. Okay. Do you have any professional
12 credentials?
13 A. I do. I am a chartered financial analyst or a
14 CFA. And that is a designation that is normally awarded
15 to stock analysts or portfolio managers. It's a lot of
16 investment theory, portfolio theory, understanding the
17 markets. It's also a credential that people that do
18 business valuation often have. And then I'm also an
19 accredited senior appraiser or an ASA with the American
20 Society of Appraisers. I got that designation in 2003
21 after I had been doing business valuations full-time for
22 five years. I had to take four different courses and
23 pass those and take an ethics test and then submit some
24 reports for peer review.
25 Q. Okay. And do you have any professional

6

1 memberships?
2 A. Yes. I'm a member of the American Society of
3 Appraisers. I'm a member of the CFA Institute. I'm
4 also a member of the Portland chapter of the American
5 Society of Appraisers. And I am also a board member
6 with the Estate Planning Council of Southwest
7 Washington.
8 Q. Thank you.
9 And how long have you been the principal of
10 Markee Valuations for?
11 A. I started my company in 2004. For a period of
12 time, I had a business partner and we were working out
13 of Portland. But since 2012, I have been working solo
14 practitioner in Vancouver only. And now I have three
15 full-time employees that work for me.
16 Q. Thank you.
17 And what were you hired to do in this case?
18 A. I was hired to determine what were the
19 financial damages that Dr. Lee incurred as a result of
20 the delay in construction.
21 Q. All right. And what kind of materials did you
22 review to come up with your analysis?
23 A. Well, I looked at the court filings in this
24 matter. I looked at the financial performance of the
25 apartment complex once -- once it was up and going. I

7

1 reviewed loan documents. I reviewed information from a
2 real estate -- a commercial real estate appraiser and
3 looked at what the interest rate environment was. And I
4 think that's almost everything.
5 Q. Okay. And did you produce a report with your
6 results of your analysis?
7 A. Well, I -- I produced some schedules with
8 explanation. I don't know if I would call it a report,
9 but, yes, I have an opinion of what the financial
10 damages are.
11 Q. Okay.
12 MR. TURNER: Let me have this marked next in
13 order as Exhibit 64.
14 BY MR. TURNER:
15 Q. Okay. Let me hand you what's been marked
16 Exhibit 64 and ask you if you recognize this document?
17 A. Yes, this is my opinion of the damages.
18 Q. Okay.
19 MR. TURNER: I'd like to offer Exhibit 64 into
20 evidence, Your Honor.
21 MR. CARON: That doesn't -- objection, lack of
22 foundation.
23 THE COURT: Overruled. I'll admit it.
24 MR. TURNER: Thank you, Your Honor.
25 (Exhibit 64 admitted.)

8

1 BY MR. TURNER:
2 Q. I have, I think, some, if not all, of the
3 pages. How many pages are in your report -- in your
4 schedules, I should say?
5 MR. CARON: Can I sit over there during this?
6 Thank you.
7 THE WITNESS: There --
8 THE COURT: You could move it back some if that
9 would help Guideon.
10 MR. TURNER: Okay. That would be --
11 MR. CARON: Well, (inaudible) --
12 THE COURT: Okay.
13 MR. CARON: That's okay. I (inaudibles).
14 BY MR. TURNER:
15 Q. And you can refer -- this is just blow-ups with
16 some things made larger.
17 A. Okay.
18 Q. But if you could just briefly look at your
19 report and tell me how many schedules there are in that.
20 A. I have seven schedules.
21 Q. Seven schedules. Okay.
22 All right. So let me ask you some questions,
23 then, about some of the assumptions that you used to do
24 your analysis. On Schedule 1, which is the first page
25 of your report, in the middle it says Leverage Park

9

1 Apartments contract signed July 15, 2015, and then it
2 says something about when the project should be
3 complete. Can you read that for us.
4 A. Contractor shall commence construction by
5 August 1, 2015, or one week from loan closing.
6 Substantial completion of the work shall be no later
7 than 180 days after start date.
8 Q. Okay. And, then, did you take note of when
9 the -- did you find out when the construction loan
10 closed?
11 A. Yes. It closed on September 15, 2015.
12 Q. And one week after that would be what?
13 A. September 22, 2015.
14 Q. Okay. So what did you come up with, then, as
15 your date that the project should have been completed?
16 A. I just -- I rounded it to the end of the next
17 month, so 180 days at the end of the month would have
18 been March 31, 2016.
19 Q. And that gives kind of credit for the last
20 eight or nine days of September, as well?
21 A. Correct.
22 Q. Okay. So then you wrote actual completion date
23 of June 13, 2017. Do you remember where you got that
24 from?
25 A. That's the date that the Certificate of

10

1 Occupancy was issued.
2 Q. The last ones?
3 A. Correct.
4 Q. All right. And let's see here. Then you did
5 your analysis. This first page kind of summarizes the
6 whole analysis and then the rest of the schedules kind
7 of go through some of the intermediate steps; is that
8 correct?
9 A. That's correct.
10 Q. Okay. So let's look at the top line for
11 damages. Based on your experience as a damages expert,
12 what did you come up with as the damages suffered by Dr.
13 Lee as a result of the delay?
14 A. The total was \$436,912.
15 Q. And were there two components of that?
16 A. Yes, there were. There were lost profits and
17 then there was also a calculation of the additional
18 interest that was paid on the construction loan.
19 Q. All right. And let's turn to page 2 because
20 that's -- Schedule 2 is where you calculated lost rental
21 income?
22 A. Correct.
23 Q. All right. So I want you to walk us through
24 briefly this calculation. It says here lost profits
25 calculation. The first line is rental income of

11

1 \$34,655. Where did you get that from?
2 A. I -- I got that from the -- the operating
3 reports that were issued by the property management
4 company.
5 Q. Do you remember --
6 A. And that figure is summarized on the next
7 schedule, Schedule 3.
8 Q. All right. Which is oriented sideways. So
9 Schedule 3, did I get it in here? I think I'm in the
10 wrong place.
11 Is this what Schedule 3 looks like?
12 A. That is correct.
13 Q. All right. And these numbers -- I'm not going
14 to get into each number here, but I'll just ask you
15 about the methodology that you used to come up with the
16 average results. So what's the period of time that you
17 used to come up with the average monthly rent for this
18 complex?
19 A. So I was -- I was provided with financial
20 statements from the time at which the Certificate of
21 Occupancy was issued up through the end of -- which was
22 on June 13, 2017 -- all the way up to the end of May --
23 May 31, 2018, so I'm looking at a nine-month period.
24 Q. Okay. And if we look at this table here, does
25 it show the average, you know, rental income which would

12

1 essentially be the revenues for an average month for
2 this test period?
3 A. Yes. And I know it's hard to see Schedule 3,
4 but the revenue includes not just rent but there is a
5 parking fee, maybe a pet fee, some -- and offset by some
6 concessions, that type of thing. And all the way over
7 on the right-hand side there is the average. But I felt
8 like in order to get a good picture of what we were
9 looking at, if they got the Certificate of Occupancy on
10 June 13, yeah, they could have rented the units for part
11 of June. And then in July and August, I felt like those
12 three months were really kind of a startup period and
13 not representative of what they would look like going
14 forward, so I didn't include those three years in the
15 average.
16 Q. Those three months?
17 A. I mean those three months in the average. I
18 just included the period from September 2017 until May
19 of 2018.
20 Q. All right. And so the average for that period,
21 the total revenues, if you will, from the apartment
22 complex were what?
23 A. The average was \$34,655.
24 Q. Okay. And, now, we're going to flip back to
25 Schedule 2. Let's see how this works.

1 Did you then make any reductions from that
2 amount to your analysis?
3 A. Well, I felt -- I felt like when we were
4 looking at the rental income for that period of time --
5 and, remember, we're -- we're considering that the whole
6 project was delayed, so if it had been done on time,
7 that rental income would have been received a year
8 earlier or so in 2016, so I felt like to do this
9 accurately, it was appropriate to talk to a real estate
10 appraiser and find out what the differential in rent was
11 between -- in Vancouver between 2016 and 2017. And
12 based on his analysis, he determined rents went up by
13 4.4 percent from 2016 to 2017. So we want to go back in
14 time and look at the rents for that period, so we need
15 to reduce the 2017 rents to a 2016 level, so I reduced
16 that figure by 4.4 percent.

17 Q. And then you -- the next reduction, it says
18 less variable operating expenses. Could you explain
19 what you mean by variable operating expenses as compared
20 to total operating expenses.

21 A. So when you're looking at lost profits, you
22 want to look at -- you know, there's expenses you have
23 to pay regardless of what's going on with revenue. And
24 in a -- in a business, those would be a lot of different
25 expenses. But in this kind of situation, you're

1 probably going to have to pay property taxes regardless
2 of whether or not the project is done or not. And then
3 you're going to have to pay some sort of insurance, some
4 sort of flood insurance or other kind of insurance
5 during the time that the building is being built. So,
6 you know, those expenses belong in there regardless. So
7 we want to look at, you know, what is the incremental
8 loss, the revenue minus variable expenses, so that's why
9 I made an adjustment for those.

10 Q. Would you agree that if you had a loan on this
11 property, you're going to have to pay interest on that
12 loan whether it's being rented or not?

13 A. Yes, I -- you -- the -- the financing and
14 the -- and the loan payments are going to happen
15 regardless of whether or not you have revenues or not.

16 Q. So that wouldn't be a variable operating
17 expense, in your estimation?

18 A. No, it wouldn't.

19 Q. Okay. And then you get to a monthly lost
20 profit figure of how much?

21 A. \$25,428.

22 Q. All right. And, then, how many months did you
23 multiply that by?

24 A. There were -- there were 14 months from the
25 time the project was supposed to be done at the end of

1 March of 2016 until the time it was actually done in
2 June of 2017, slightly more than 14 months, but I just
3 kind of rounded it down to 14 since the occupancy
4 certificate was issued in the middle of the month.

5 Q. Okay. And that came up with a total of how
6 much?

7 A. \$355,985.

8 Q. All right. And then you have two other
9 reductions, if you will. Can you explain what the first
10 reduction is for.

11 A. Yes. After -- you know, at some point in this
12 process, I found out that the two townhouses had --
13 there was a delay in the permitting, so since they
14 didn't have the permit when the construction started,
15 they couldn't have been done, you know, when we thought
16 they were -- you know, during that six-month period.
17 So, in fact, those permits were issued on May 31, 2016,
18 so I felt it was appropriate to recognize if those were
19 built in six months, then the townhouses only could have
20 been -- you know, that's basically nine months later
21 than they should have been, so we need to reduce the
22 damages for the fact that they couldn't rent those
23 townhouses during that period. So in order to do that,
24 I -- I have the rental -- I have a rental, so I know
25 what those units were supposed to be rented for --

1 Q. And let me -- is this a calculation performed
2 in Schedule 4?

3 A. Schedule 4, yes.

4 Q. Okay. So is that what Schedule 4 looks like?

5 A. Yes.

6 Q. All right.

7 A. So from -- so there's two townhouses and from
8 the real estate appraiser, these units could have been
9 rented for \$1420 a month from April through June of 2016
10 and then for \$1435 a month from July to December of
11 2016. So, on average, they would have been \$1430 a
12 month or two of 'em, 2860, so that is -- that is one
13 month of revenue minus the variable expenses. In order
14 to calculate that, I just used the average from the
15 prior Schedule 3 where I calculated that the variable
16 expenses are 22.1 percent of revenue, so I applied that
17 same percentage to the townhouse to come up -- to come
18 up with \$2,227 per month. To recognize that the permit
19 was nine months delayed, we need to multiply that figure
20 by nine months and came up with a value of \$20,043.

21 Q. Okay.

22 A. So that \$20,000 needs to be reduced -- the
23 damages need to be reduced by that to recognize the
24 delay in the permitting.

25 Q. And that's shown on Schedule 2 where it says

17

1 less adjustment per townhouse permitting delay, \$20,043?

2 A. Yes.

3 Q. Okay. And then you made another adjustment

4 downward to the damage estimate. Can you explain that

5 one, please.

6 A. So I -- I just a couple of minutes ago said

7 that property taxes are normally a fixed expense and

8 they normally are a fixed expense. But in a situation

9 like this where you're building, you know, a \$3 million

10 structure, they aren't actually. They're actually

11 slightly variable. So I was looking at what -- what

12 ended up happening was that --

13 Should we go to the schedules?

14 Q. Oh, sure. And let me just ask you a quick

15 question. Why -- you know, in kind of the big picture,

16 why are the property taxes variable when you're going

17 from basically dirt to a \$3 million apartment complex?

18 A. Well, the -- the property assessor is going to

19 determine the value of the property based on, you know,

20 what you're doing there and the permits that you're

21 pulling and -- and the structure that you're building.

22 So -- so we know that there are four different tax lots

23 and, you know, before the construction began, the

24 property taxes were \$1935 --

25 Q. Okay. And this is -- this is on Schedule 5.

18

1 All right. This is what Schedule 5 looks like?

2 A. Correct.

3 Q. Okay. So just briefly explain how you came up

4 with the reduction for property tax savings that you

5 took off of the total lost rent.

6 A. Okay. At the top of the schedule, I have the

7 four different parcels and what their assessed values

8 were as of 2015 -- that's the year the construction

9 started -- 2016, 2017, 2018. And then I also have what

10 they paid in property taxes for 2016, 2017, 2018. And

11 so keeping in mind that the construction started in

12 October of 2015, assessments are only made as of January

13 1 of each year, but obviously the assessor doesn't

14 actually go out there on January 1. Sometimes they go

15 out; sometimes they don't. And we know that the

16 assessor did not go out between the time the

17 construction started and January 1 of 2016 because the

18 assessed values did not change from one year to the

19 next.

20 And, then, so had the project been done within

21 that 180-day period, we also know what they assessed the

22 value at at the end and they would have paid property

23 taxes on the full value, the \$3.36 million value. But

24 in reality -- so in reality, as of January 1, 2017, the

25 project was not done and the assessors determined that

19

1 the value of it was \$2.2 million, so they were only

2 taxed on \$2.2 million. Whereas if it had been done,

3 they would have been taxed on \$3.36 million. So because

4 of the delay, they paid a lower amount of property taxes

5 in 2017.

6 Q. And do you know what that was?

7 A. By the time you get to 2018, the project's

8 done, the taxes are the same, so it's just that one year

9 where they paid less in property taxes.

10 Q. And how much less did they pay that one year?

11 A. \$12,747.

12 Q. Okay. And so let me just see if I can

13 summarize what you're saying. You're saying if the

14 project had been completed in 180 days, then it's more

15 likely than not they would have paid or you think they

16 would have paid an extra \$12,747 in property taxes in

17 2017. But because it was not -- the construction was

18 not complete until the middle of 2017, they didn't

19 actually pay those extra property taxes in 2017?

20 A. Correct.

21 Q. Okay. And the amount was \$12,747, so you

22 knocked that savings off of the net damages that Dr. Lee

23 suffered as a result of the delay there; is that right?

24 A. That is correct.

25 Q. Okay. And so is that how you came up with your

20

1 lost profits figure of \$323,195?

2 A. That is correct.

3 Q. Okay. Let's move, then, to the other figure on

4 page 1, which is the additional interest on construction

5 loan. And that you reference Schedule 6 for; is that

6 right?

7 A. Yes.

8 Q. Okay. Oh, that's Schedule 7. I think we

9 got -- oops, I don't think I have it in here. I think I

10 know where Schedule 6 is. It's the one that has no

11 schedule on it.

12 Is this generally what Schedule 6 looks like?

13 A. Yes.

14 Q. Okay. It's blocked out on here. Maybe I'll

15 just write Schedule 6 up here.

16 Okay. So walk us through, if you would, how

17 you went about evaluating the additional interest on the

18 construction loan.

19 A. Well, the first thing I did was to look at the

20 loan documents provided and to calculate how much was

21 paid in interest on the construction loan over the

22 period from September of 27 -- or September of 2015

23 until August of 2017. In August of 2017, they converted

24 to a fixed rate loan, so just during that period. And

25 the total interest paid during that period was \$192,246.

21

1 So the next question is, well, what -- how much
2 interest would they have paid if the project had been
3 complete in the 180-day period? So the thing that's
4 kind of tricky about it is you have to kind of figure
5 out, you know, you have this much time and you borrowed,
6 you know, \$3 million over this much time and now we're
7 going to condense it down to six months. So we kind of
8 have to assume that as the project went through a
9 certain percentage of completion that the borrowings
10 would follow the same pattern as what actually happened.
11 You can't assume they were going to borrow it all, the
12 \$3.2 million, on the first day because that would be an
13 erroneous assumption and also contrary to what a bank
14 would do. So showing that as they went through the
15 stages of completion, the borrowings followed, but
16 condensing it down to a shorter period of time.

17 Q. Okay. And is that what's kind of shown on
18 Schedule 7 graphically?

19 A. Yes.

20 Q. Okay. So I guess I do 7.

21 So what is the top chart showing on Schedule 7?

22 A. So the top chart is showing day-by-day and
23 dollar-by-dollar how much was borrowed over the time of
24 the project --

25 Q. Okay.

22

1 A. -- for that period.

2 Q. It's month-by-month, I guess, here.

3 A. Well, I --

4 Q. Oh, did you just -- I'm sorry.

5 A. Well, I did have day-by-day, but the graph
6 shows month-by-month.

7 Q. Oh, so you actually have day-by-day?

8 A. Uh-huh, I do, yes.

9 Q. Oh, okay.

10 A. Yeah.

11 Q. But the graph is graphed month-by-month?

12 A. Correct.

13 Q. Okay. Thank you for that.

14 And, then, what is this middle chart supposed
15 to show?

16 A. So on the middle chart, I'm trying to show how
17 much -- what percent of the borrowing happened compared
18 to the percent of the completion time. So you can -- I
19 have kind of numbered -- as go you across, you kind of
20 see in the middle there the 66.5 percent. So at that
21 point, they had borrowed 66.5 percent, but they were 50
22 percent of delay through the project and so trying to
23 get that ratio the same throughout the construction
24 period.

25 Q. Okay. And, then, what is this bottom chart

23

1 meant to show?

2 A. So applying that ratio of percent borrowings to
3 percent completion, condense it down to a six-month
4 period. And I wanted to show -- the graph to show that
5 the trend is about the same on all three of them. So
6 you can see that not assuming that more borrowings or
7 less borrowings happened than would have in that same
8 pattern on a shorter period of time.

9 Q. And so we took the borrowing over 20 months and
10 we squeezed it down to about six months?

11 A. Correct.

12 Q. And, then, is the bottom chart here basically
13 the assumed rate of the construction loan borrowing that
14 we used to calculate the construction loan interest --

15 A. Correct.

16 Q. -- that would have been paid if it had been
17 finished in six months?

18 A. Correct.

19 Q. All right.

20 A. Yeah.

21 Q. And then you came up with a number for that
22 amount. And what was the amount that we estimate would
23 have been paid if the same pattern of borrowing had gone
24 through the project if it had been completed in six
25 months?

24

1 A. \$78,530.

2 Q. Okay.

3 A. You know, and could I say one more thing?

4 Q. Yeah.

5 A. It's also important to understand what was
6 going on during this environment was an increase in the
7 interest rate environment, so --

8 MR. CARON: Objection, relevance.

9 THE COURT: Overruled.

10 BY MR. TURNER:

11 Q. Go on.

12 A. So understanding what -- what prime rate was or
13 what the interest rate was on the construction loan was
14 the key to understanding what would have been paid in
15 one period versus another.

16 Q. And let me -- I think I'll ask a question to
17 maybe explain why that mattered. Was the construction
18 loan interest rate fixed throughout the entire
19 construction loan or did it go up as time went on?

20 A. It was a floating rate and so -- and it was, I
21 believe, tied to prime. And prime increased a tiny bit
22 at the end of 2015. It increased once in 2016. But in
23 2017, it went up about, I think, almost a percentage
24 point between the beginning of the year and August, so
25 that's a factor in the computation of the interest.

25

1 Q. Okay. Thank you.
2 And so what, then -- is it the difference
3 between the -- I guess it says it right up here. Where
4 it says calculation of additional interest on
5 construction loan, can you read what it says under that
6 that's on the top of Schedule 6.
7 A. Okay. Right.
8 Q. Yeah.
9 A. Had the project been completed on March 31,
10 2016, rather than on June 13, 2017, the borrower would
11 have paid \$113,717 less in interest on the construction
12 loan.
13 Q. And so the lost profit calculation of \$323,195
14 and the additional construction loan interest of
15 \$113,717 is how you come up with your total damages of
16 \$436,912?
17 A. Correct.
18 Q. Okay.
19 MR. TURNER: I think that's all the questions
20 that I have.
21 Oh, let me ask a couple of other quick
22 questions. I'm sorry, Your Honor.
23 BY MR. TURNER:
24 Q. Let's talk about the decision of whether or not
25 to subtract out payments on either the construction loan

26

1 or the term loan in doing your calculations. Can you
2 explain to the jury why it would be improper to take
3 that into account to calculate damages for someone who
4 suffered a financial loss.
5 A. Yes. So when we're -- when we're looking at
6 financial damages, we want to look at a third-party,
7 what would happen to -- you know, what was done to the
8 borrower in a situation and we want to figure out what
9 that damage was. And you can kind of think of it in a
10 couple of different scenarios. Just imagine one
11 situation where the borrower just so happens to have
12 \$3.3 million in the bank so they decided, hey, I don't
13 have -- I'm going to build an apartment building. So
14 that borrower isn't going to have any interest or any --
15 any debt payment.
16 Q. Excuse me, Ms. Markee. You're saying borrower.
17 Do you mean the plaintiff or the --
18 A. The plaintiff.
19 Q. Okay. Sorry.
20 A. Dr. Lee.
21 Q. Dr. Lee. Okay.
22 A. Okay. Dr. Lee isn't going to -- if he had \$3.2
23 million, he is not going to have any loan payments or
24 any interest to pay at all. So if you want to calculate
25 the damages in that situation, obviously you wouldn't

27

1 have that loan and interest payment because they
2 wouldn't exist.
3 And then let's imagine that you have -- that he
4 decided to make a not great decision and get a pay-day
5 loan to finance this thing. And in reality, once he's
6 paid off the interest rate on that and the principal
7 payments, he wasn't going to have any profit at all.
8 You know, from the perspective of what happened to him
9 as a result of the delays, it's not a different
10 scenario. But if you start to think about his own
11 personal decisions about his own financing, then you're
12 going to get a different answer. And that's why you
13 don't want to take into account the debt and the
14 payments and that kind of thing. You just want to look
15 at what happened to him, not what did he do as a result
16 of it.
17 Q. I see. Let me give you a hypothetical and see
18 if this is kind of what you're talking about. If you
19 own a house and somebody drives a car through your
20 living room and it causes \$100,000 of damage to your
21 house, let's assume one person has \$100,000 and they
22 just pay \$100,000 and get it fixed. And there's another
23 person and they don't have any insurance, I guess, okay.
24 And another person doesn't have a \$100,000, they have to
25 borrow \$100,000 to get it fixed. Have you suffered

28

1 \$100,000 in damages?
2 A. Yes. I mean, that's -- that's why you don't
3 want to take into account the debt piece of it.
4 Q. Okay.
5 MR. TURNER: That's all the questions I have.
6 Thank you.
7 THE COURT: Mr. Caron.
8 MR. TURNER: Did you want me to move this?
9 MR. CARON: Yes, please.
10 CROSS-EXAMINATION
11 BY MR. CARON:
12 Q. Nice to see you again, Ms. Markee.
13 A. Good to see you, as well.
14 Q. Okay. So where do I start?
15 You were hired by Mr. Turner in this case quite
16 some months ago, correct?
17 A. Correct.
18 Q. And you are charging how much?
19 A. My -- my hourly rate is \$250 an hour.
20 Q. Okay. And you wrote a report that we discussed
21 at your deposition a few weeks ago, right?
22 A. I did, yes.
23 Q. Okay. And that's different than the report
24 that you just testified about, right?
25 A. That is correct.

29

1 Q. Okay.

2 MR. CARON: So I'd like to have -- go ahead and

3 mark the report that you testified about at your

4 deposition.

5 BY MR. CARON:

6 Q. I'm handing you what's been marked as Exhibit

7 65 and ask if you can identify is this your original

8 report?

9 A. Yes.

10 Q. Okay.

11 MR. CARON: I move to admit.

12 MR. TURNER: No objection, Your Honor.

13 THE COURT: Admit.

14 (Exhibit 65 admitted.)

15 BY MR. CARON:

16 Q. Now, this report that's 65 was revised after I

17 took your deposition on January 25, just recently,

18 right?

19 A. That's correct.

20 Q. Okay. And essentially you're knocking \$100,000

21 off, is that right, of your total damages?

22 A. Yeah, a little bit over 100,000.

23 Q. Okay. I must be worth my fee. A little humor

24 here.

25 Okay. So one of the things you told us in your

30

1 original report and you testified about in your

2 deposition was that there was an increased rate on the

3 permanent loan, the \$3.2 million permanent loan; is that

4 right?

5 A. In my original analysis, I calculated the extra

6 interest that Dr. Lee was going to pay on the permanent

7 loan as a result of the fact that had he locked in to

8 the loan earlier and, you know, in the spring of 2016

9 that the interest rate on the FHLB 5-year loan is the

10 benchmark that the bank uses and it was .5 percent lower

11 in the spring of 2016 than it was in August of 2017

12 primarily due to the increase in the interest rate

13 environment like I talked about.

14 Q. Okay. So that's -- so that was the basis of

15 you originally saying that there was -- I think you

16 called it an additional interest on the fixed rates --

17 excuse me -- the fixed rate amortizing loan of about

18 \$82,000, right?

19 A. That's correct.

20 Q. Okay. And the loan information you got to

21 base -- you know, the information about the loan that

22 Dr. Lee had, you got that from Mr. Turner, right?

23 A. I got some of the information from Mr. Turner

24 and I also had discussed -- I discussed the project with

25 the banker, Jeff Tainer, at Bank of the Pacific.

31

1 Q. Okay. But when you originally came up with

2 your analysis regarding this extra interest on the

3 permanent loan, you didn't have the commitment letter

4 which showed that there was going to be a floor of 4 3/4

5 percent, right?

6 A. That's right. Jeff Tainer provided that after

7 my deposition.

8 Q. Okay. That's my point. Mr. Turner, who was

9 your source of information when you prepared this

10 exhibit that you testified about in your deposition, he

11 didn't give you that commitment letter, did he?

12 A. My understanding is that Jeff Tainer had

13 forgotten about it until after the deposition occurred.

14 Q. Okay. Have you -- and that's based on what?

15 A. Well, I called -- I called the banker. I

16 called Jeff Tainer after the deposition to ask him about

17 whether or not my assumption was correct and he told me

18 that it was correct. But then I understand that

19 something kind of flipped some switch in his brain and

20 he realized that there had been this commitment letter

21 and that the floor of the 4.75 existed.

22 Q. Okay. So you're saying that wasn't in the

23 plaintiff's own documents as far as a commitment letter

24 way back in May of 2015 that the plaintiff and his

25 lawyer would have had?

32

1 MR. TURNER: Objection, Your Honor. I mean,

2 that assumes facts that are not in evidence.

3 THE COURT: Sustained.

4 BY MR. CARON:

5 Q. Well, let me ask you this: Do you know whether

6 the plaintiff had that or not, that commitment letter?

7 A. I -- I don't -- I don't know for a fact.

8 Q. All right. Normally borrowers get commitment

9 letters, that would be your experience, right?

10 A. Correct.

11 Q. Okay. And as you saw the commitment letter in

12 this case, you backed off that part of your opinion

13 completely, right?

14 A. Well, I -- you know, it made it obvious to me

15 that that calculation was inaccurate, so --

16 Q. That's right --

17 A. -- it needed to be removed, yeah.

18 Q. Okay. Thank you. I appreciate that.

19 In your initial report and in your deposition,

20 you refused to recognize the property tax as an item of

21 expenses to even be considered in coming to net profit,

22 right? We discussed that in your deposition.

23 A. We did, yeah.

24 Q. Do you remember that?

25 And you would not give me an inch on that,

33

1 right?

2 A. It's a -- it's a little bit of an odd -- I

3 mean, normally, property taxes are something that's a

4 steady thing, so I was kind of from that perspective.

5 But, I mean, you raised a good point and that caused me

6 to go back and to study the property tax statements and

7 to adjust the analysis for that.

8 Q. So you now acknowledge that the period of

9 completion of the whole project, including the

10 townhomes, is extended now from, as I understand it,

11 from March 31, 2016, to January 1, 2017, a nine-months

12 difference; is that right?

13 A. I understand that the townhouses were not

14 permitted until May 31 of 2016 and that the lost profit

15 analysis should be adjusted for that fact.

16 Q. Okay.

17 A. That's something I was unaware of at the time

18 of my deposition.

19 Q. All right. So if we adjust it for that fact

20 and we now go to January 1, 2017, which I believe is

21 what you now indicate should be the starting date of

22 lost profit --

23 A. That's what I assumed for the townhouse

24 analysis.

25 Q. Well, why wouldn't you assume that -- do you

34

1 have any reason to believe that they would have been

2 able to come online on a staggered basis?

3 A. I -- I just assumed that when the apartment

4 building was complete and there's a Certificate of

5 Occupancy that it could be rented --

6 Q. Do you have any --

7 A. -- at that time.

8 Q. I'm sorry. I didn't mean to interrupt you.

9 Do you have any basis to -- do you have any

10 understanding in this case that it was feasible or

11 possible to start renting on a staggered basis here, in

12 other words, a building before the townhouses

13 were complete?

14 A. I just -- I thought it was a reasonable

15 assumption to assume that when an apartment building has

16 a Certificate of Occupancy, they could be rented. And

17 we understand, as well, that they're on different tax

18 lots, so I don't know if that makes any difference,

19 but --

20 Q. Would it be a guess on your part or an

21 assumption?

22 A. I think it's a reasonable assumption.

23 Q. Okay. But an assumption nonetheless?

24 A. It's -- it's a reasonable assumption, yes.

25 Q. Okay. Are you a developer?

35

1 A. I am not a developer.

2 Q. Okay. So as I kind of understand, you're now,

3 (inaudibles) -- you're -- you're taking a figure of the

4 total amount of rent and what they get for garages and

5 things like that and then taking out some things like

6 administrative repairs and then you're essentially

7 saying that assumes the net income, right? I mean, is

8 that -- is that kind of how you're approaching this?

9 A. Well, you said I took out administrative

10 repairs and --

11 Q. Administrative operating repairs, landscaping,

12 property insurance, those are the things you deducted?

13 A. Yes.

14 Q. Okay. And then -- and then that gets to this

15 net operating income?

16 A. That's what I call lost profit.

17 Q. Well, that's not what you called it in your

18 first report, is it? The first report, you didn't use

19 the term net profit, did you, ma'am? You used the term

20 net operating income.

21 A. Well, I was --

22 Q. Isn't that true?

23 A. Well, it was -- it was a different calculation

24 in the first report because --

25 Q. Okay. I just want to make sure that I'm

36

1 accurately indicating what you indicated in your first

2 report on the chart there.

3 A. My calculation was different in the first one

4 and I called it net operating income.

5 Q. Okay. And the difference, as I read it, is the

6 \$511 in flood insurance. Am I missing something?

7 A. Well, in -- in the first one, I deducted

8 property taxes to come up with total operating expenses

9 and then I -- then I called that net operating income.

10 In the second one, I don't have property taxes in here

11 at all, so it's a different calculation.

12 Q. Well, you told me in deposition, didn't you,

13 that you should ignore property taxes all together;

14 isn't that true, ma'am?

15 A. I -- I -- well, I can't remember exactly what I

16 said in the deposition.

17 Q. Okay. That's fine.

18 Let's just do some math together.

19 MR. CARON: My turn to use the chart.

20 MR. TURNER: Yes.

21 MR. CARON: Well, actually, you know what? I

22 don't even think I need that. Famous last words, right?

23 BY MR. CARON:

24 Q. I think what you told us is that \$34,655 is the

25 average monthly rent, right? I'm just looking at your

1 chart.
 2 A. That's what I calculated.
 3 Q. Yeah. So let's put that number here.
 4 Okay. And then I think you said something
 5 about there being \$1,531 as a deduction for the fact
 6 that rents increased during this period. Did I get that
 7 math right, ma'am? Is that right?
 8 A. Yes.
 9 Q. Okay. And then I think you said there were
 10 \$8,208 of expenses if we include the property tax,
 11 (inaudible) the flying charts?
 12 A. Right.
 13 Q. Okay. And if we take the property tax which
 14 was -- I think you indicated about \$23,000 a year in
 15 2017 -- it's actually \$25,573 -- by my calculation,
 16 that's \$3,131 a month. Does that sound correct to you?
 17 I think you put that on your revised report on
 18 page -- on Schedule 5. Do you see 2017 taxes?
 19 A. Right, \$25,573.
 20 Q. Right. And so I'll represent to you that a
 21 12th of that is 2131. Do you need to check that?
 22 A. Okay.
 23 Q. Okay. On a monthly basis, divided by 12.
 24 Okay. And how much was the permanent loan --
 25 how much was the cost that was being paid -- I think you

1 is correct. That's not the right way to do financial
 2 damages, however.
 3 Q. Well, you're an expert on financial damages,
 4 but the jury's going to be instructed by the Court on
 5 the appropriate measure of damage to consider. So if --
 6 so I don't know what the judge is going to do or not do,
 7 but if they're instructed that they have to put Dr. Lee
 8 in the position that he would have been but for the
 9 breach, that puts him in that position; isn't that true,
 10 ma'am?
 11 A. It -- that's right. If you -- if you deduct
 12 the debt payment, it does.
 13 Q. I am. But -- okay. But deducting -- the debt
 14 payment was a reality and is a reality for Dr. Lee,
 15 isn't it? This is not somebody who paid cash?
 16 A. That is true.
 17 Q. Thank you. Thank you for that.
 18 And, of course, if he did pay cash, there
 19 wouldn't be -- you know, if he had just taken \$3.2
 20 million to build a place, of course, he wouldn't have
 21 any debt. You know, he might have a lost time value of
 22 money, but he wouldn't have the, you know, the
 23 construction interest? He would just be paying cash, so
 24 that would be out the window, too. But that's not what
 25 we have.

1 have that in your original report -- on a monthly basis?
 2 And I'll help you out. It's schedule 7.
 3 A. The payment is \$16,714.10.
 4 Q. Okay. \$16,714. Obviously forget the 10 cents.
 5 By my calculation, that shows \$6,071 monthly.
 6 Now, if we are asked to put Dr. Lee in the position that
 7 he would have been but for the breach of contract that
 8 the plaintiff is alleging, wouldn't this be the amount
 9 monthly that reflects the amount that would put him in
 10 that position, ma'am? Dr. Lee, not some hypothetical
 11 other person.
 12 A. I mean, if -- if you want to calculate -- if
 13 you want to include the debt payments in that
 14 calculation, then that's what you end up with, but I
 15 think I have already explained why that would not be the
 16 right way to do it.
 17 Q. Well, this is his cash flow, right?
 18 A. That's what he would have -- that's what he
 19 would have had.
 20 Q. That's what he would have had -- that's what he
 21 would have had if my client had built the building on
 22 the time that my client allegedly promised, right? He
 23 would get \$6,071 per month, right, net? Isn't that
 24 true? I mean, just, that's a yes or no, ma'am.
 25 A. It -- I mean, based on your calculations, that

1 A. Right.
 2 Q. Right. Okay. Thank you.
 3 A. I mean --
 4 Q. All right. So let's talk about that other
 5 (inaudible).
 6 What you did on the -- what you did, as I
 7 understand it, on the \$113,000 that you're alleging on
 8 the increased interest due to the delay, right --
 9 A. Correct.
 10 Q. -- or the increase on the construction loan,
 11 right, is that you -- that represents increased interest
 12 in having that loan out until August of 2017 instead of
 13 June of 2016? Did I say that right?
 14 A. That's correct.
 15 Q. Okay. And that's how you did that whole
 16 calculation as shown on that chart which was -- excuse
 17 me -- exhibit -- Schedule 7 of your report?
 18 A. Correct.
 19 Q. Okay. But you now concede that even without a
 20 breach on the part of my client, the but for -- what you
 21 call the but for construction interest expense would
 22 have needed to go 66 days after (inaudible) completion
 23 in February of 2017, right?
 24 A. I'm not -- I'm not sure where you're getting
 25 February of 2017.

41

1 Q. Well, I think that my understanding of how you
2 did the calculation of 66 days past the -- you
3 calculated 66 days past the completion point?
4 A. Correct.
5 Q. Right?
6 A. Correct.
7 Q. Right?
8 A. That's how long it took to lock into the loan.
9 Q. That's how long it took. So what you did in
10 the calculation that you prepared is you go -- the
11 \$192,000 that was actually paid was during that whole
12 period and then you calculate this but for of 78,000 in
13 your report, going 66 days beyond the presumed occupancy
14 of 3.31.16?
15 A. Correct.
16 Q. So you're now conceding that -- well, first of
17 all, you know this loan is just one loan, right? It's
18 not multiple loans?
19 A. I do -- I do know that.
20 Q. Okay. Now, so if we know that it's just one
21 loan, you couldn't have rolled it into a construction
22 loan until the whole thing was ready, right, until
23 that -- and now you're conceding, based on the fact that
24 there was a delay in permit on the townhomes, that the
25 earliest you would have been able to perform -- that he

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1 would have been able to perform even in the absence of a
2 breach would have been -- I believe you said December of
3 2016. And then if you add 66 days to that or -- excuse
4 me -- November 30th of 2016, you add 66 days to that,
5 you get to the end of January of 2017; is that correct?
6 And you haven't done the math on that? You
7 haven't done that calculation of what the but for
8 interest would be if this loan was extended to 66 days
9 beyond what you consider to be the appropriate
10 completion based on that later permit, right? You just
11 didn't do any calculation?
12 A. Well, I -- I mean, I guess -- I guess the first
13 thing is I didn't know to do the calculation. I didn't
14 know that the permitting was going to be considered one
15 party's fault or another, so I didn't know to do that.
16 I did a preliminary calculation on this after I talked
17 to Mr. Turner last night, so I have an estimate of what
18 it would be, but --
19 Q. Okay. Well, let me -- let's just -- when I
20 deposed you the other day, when you submitted your
21 reports that were provided to us in discovery, none of
22 that calculation had been done, correct?
23 A. Well, that's correct. I -- I -- no one told me
24 about the delay in the townhouses until after the
25 deposition. I was not aware of that fact.

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1 Q. I'm not accusing you.
2 A. Okay. I just -- I'm just saying that's right,
3 none of the calculations have been done because I wasn't
4 aware of that --
5 Q. Right.
6 A. -- so --
7 Q. Right. And so now that -- now that we know
8 that there was this period of time to complete the
9 townhomes and that's why you have adjusted -- you know,
10 you have already taken that into consideration adjusting
11 that with respect to your claim on the gross -- or your
12 claim on the profits, right?
13 A. Yes.
14 Q. But you didn't adjust that with respect to this
15 interest issue?
16 A. That's correct.
17 Q. Okay. And since you didn't adjust it, you
18 can't stand by these numbers since you -- right? You
19 can't stand by the numbers in your report with respect
20 to the calculation of additional interest on the
21 construction loan because now we know they're
22 inaccurate, right?
23 A. Right. If you -- if you can't -- if you
24 can't --
25 Q. (Inaudibles) --

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1 A. -- if you can't calculate interest over the
2 whole period, then it's overstated, that's correct.
3 Correct.
4 Q. And certainly it takes somebody to do very
5 complicated math to try to compress now because you did
6 some pretty fancy math, it seems to me. I don't mean
7 that in a derogatory way, but you had to look at
8 compressing, I think you said, the loans and the draws
9 that took place over, you know, a whole number of months
10 to the six-month period. That's how you got to the
11 \$92,000 figure -- or excuse me, I apologize -- the
12 \$78,000 figure, right?
13 A. Right. But that -- that actually -- it isn't
14 that complicated to figure it out because the 78,000
15 calculation is conducted the same way as it was before.
16 The only difference is you're going to assume a higher
17 interest rate because the six months doesn't start in
18 2015, it starts at the end of 2016. And then on the
19 actual interest they paid, you subtract out what they --
20 you know, what's included in that \$192,000 from the
21 beginning of the loan in 2015 until, you know, until
22 that December/January time frame of '16-'17. So it's --
23 it's not that complicated to do that.
24 Q. Okay. Are you able today to give a reasonable
25 estimate to the jury on what the correct number would be

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1 on that or not?

2 A. Well, yes, I --

3 Q. What is that?

4 A. I calculated it -- although, I will say it's

5 slightly overstated because of the 66-day period that

6 you're -- that you're talking about. So if you just

7 assumed that the loan interest should have started on

8 December 1, 2016, and went until August, that 192,000

9 becomes 115,000 on the schedule -- on Schedule 6. The

10 hundred -- the 192,246 becomes about 115,000 and the

11 78,000 becomes just a little bit more than 79,000 and

12 change, so the difference between the two is around

13 36,000.

14 Q. Okay. So when you say the difference between

15 the two is approximately 36,000, I want to make sure I'm

16 following because I've got to admit I get a little lost.

17 What is -- where does 36,000 get plugged into

18 your Schedule 6?

19 A. Okay. So before our damages were 113,000 and

20 that's the difference between what they actually paid

21 and what they should have paid. 192,000 minus 78,000

22 equals 113,000 rounded. So now the actual interest for

23 a shorter period of time isn't 192 anymore, it's 115.

24 So it's 115,000 minus 79,000 equals -- I believe that's

25 36,000.

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1 Q. Okay. So your best estimate for the jury,

2 then, in terms of the element of additional interest on

3 the construction loan would be 36,000 instead of

4 approximately 113,000?

5 A. That's correct.

6 Q. Okay. And if we accepted -- I know you've

7 gotten resistance to my number for the reasons you

8 stated, but if you accepted this number of 6,071 as the

9 monthly lost profit amount, the way you would approach

10 that -- and I appreciate you have your differences on

11 that, but the way you would approach it so we could just

12 be talking apples and apples, would be you would take

13 that number in your mind and multiply it by 14 and then

14 deduct out whatever the -- I guess you'd have to do an

15 adjustment of some sort for the townhomes in your way of

16 thinking?

17 A. Well, I mean, the property tax way that you've

18 done it is completely incorrect, so --

19 Q. Excuse me?

20 A. The property tax deduction that you have there

21 isn't correct either, but if we accept --

22 Q. The property tax deduction? I just took the

23 total property tax and I divided by 12.

24 A. So you took -- you took the total property tax

25 for 2017, the 25,000. That's a property tax that was

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1 assessed on Dr. Lee on a property that couldn't be

2 rented, so he already had to pay 25,000 during a period

3 of time when it wasn't done and he couldn't rent it.

4 And then the next year when it was done, the property

5 taxes aren't 25,000 anymore, they're 36,000.

6 Q. Okay.

7 A. So do you understand, like, he already has a

8 fixed expense? He already has to pay the property taxes

9 regardless of the fact of whether he's renting it or

10 whether it's not. I, you know, acknowledged in my

11 analysis that the property taxes went up when it was

12 finished. But for some reason, in your calculation,

13 you're deducting out property taxes based on an

14 unfinished project.

15 Q. No, I'm -- I'm assuming just -- I just want to

16 share with you the way I did it so that you don't have

17 any issues with it. What I did is to say, okay, let's

18 put him in the position he would have been had my client

19 not breached the contract. In other words, you know,

20 that's the claim, that my client breached their contract

21 by not giving him a product by a certain date, right?

22 That's what you're here testifying about, the damages

23 associated with that. And the product -- I mean, isn't

24 that why you were hired?

25 A. Yes, I -- I mean --

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1 Q. Okay. You were hired to give an analysis of

2 what damages were incurred by Dr. Lee. And if we're

3 going to put Dr. Lee in the position that he would have

4 been, then he would have had a building that would

5 obviously have those higher taxes, right, because you've

6 already acknowledged that taxes go up when you have a

7 Certificate of Occupancy. At that time, he would be

8 bearing those property taxes.

9 We've already talked about the interest that --

10 the finance charges he would be bearing, but the

11 property taxes are also something that he would be

12 bearing, right?

13 A. That's correct.

14 Q. Thank you.

15 MR. CARON: Did we admit -- yes.

16 Okay. Thank you. I have nothing further.

17 THE COURT: Mr. Turner.

18 MR. TURNER: Thank you, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. TURNER:

21 Q. Let's do these in reverse order while they're

22 fresh in our mind. If you look at your Exhibit 64,

23 which was your report that we've submitted today, did

24 you make an adjustment for the property taxes that Dr.

25 Lee didn't have to pay because he didn't have a finished

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1 building in March of 2016?
2 A. I did.
3 Q. Okay. And was that when you reduced the
4 property tax savings of \$12,747?
5 A. Correct.
6 Q. Okay. And so if the building had been
7 completed in March of -- all the buildings had been
8 completed in March of 2016, he would have paid \$12,747
9 more -- sorry, I just (inaudibles) -- \$12,747 more in
10 property taxes than he actually did; is that right?
11 A. That's correct.
12 Q. And so you took that amount off of your damage
13 calculation; is that right?
14 A. That's correct.
15 Q. All right. And I think that that's shown here.
16 You said less property tax savings?
17 A. Yes. That's where I made the adjustment.
18 Q. So you're comfortable that that adjustment
19 fully reflects the impact of the change in property
20 taxes between it being finished in March of 2016 versus
21 June of 2017?
22 A. That's correct.
23 Q. All right.
24 A. And, I mean, can we just talk about damages in
25 general? You want to talk about -- you know, there's

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1 one scenario that should have happened --
2 MR. CARON: I'm sorry, I must object --
3 THE COURT: Just a minute. Just a minute.
4 This needs to be a question-and-answer form of
5 narrative. And the jury will be instructed on how to
6 measure damages when we get to jury instructions.
7 THE WITNESS: Okay.
8 THE COURT: We don't need any commentary.
9 Go ahead.
10 MR. TURNER: Thank you, Your Honor.
11 BY MR. TURNER:
12 Q. So the problem with the way that Mr. Caron has
13 tried to deal with the property taxes is what, simply
14 put?
15 A. It doesn't recognize that he was going to incur
16 that expense regardless.
17 Q. Okay. And let me ask you if I can --
18 MR. TURNER: Does this stand up okay? I don't
19 know. We'll find out. Or maybe I'll just hold it. I
20 don't want it to fall over.
21 BY MR. TURNER:
22 Q. Mr. Caron thought that you should also reduce
23 any rental income by \$16,714 in mortgage payments. Do
24 you remember that?
25 A. Yes.

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1 Q. Now, that represents principal and interest,
2 correct?
3 A. Correct.
4 Q. Do you have to treat the -- should you treat
5 the principal repayment the same as the interest in
6 trying to figure out this cost?
7 A. If you were going to calculate cash flow, you
8 would only look at interest.
9 Q. Right. But what if you were calculating lost
10 profits or profits?
11 A. Well, like I said earlier, I don't think that
12 debt payments belong in that calculation.
13 Q. Okay. But even if you did believe it, would we
14 consider treating -- or maybe there's no way to answer
15 this question because you wouldn't think it was the
16 right method. But is there any scenario where you would
17 only take out the interest payments because that's what
18 you're paying for the cost of the money versus the
19 principal payments is what you're basically paying back
20 to yourself?
21 A. Right.
22 Q. So you wouldn't use the gross mortgage payment?
23 You would use only the amount that's going towards
24 interest?
25 A. Correct.

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1 Q. Under this kind of methodology, if it had to be
2 (inaudible) yet?
3 A. I agree.
4 Q. Okay. The other thing is does this reflect the
5 fact at all that Dr. Lee still had substantial interest
6 payments due while the buildings weren't built?
7 A. No. That -- that just is attempting to put him
8 in that same situation that he would have been in if the
9 loan was -- if everything was done, so it doesn't
10 recognize the delay, the interest, the extra he had to
11 pay because of the delay.
12 Q. Right. So I want to see if we can get a little
13 quantity on that.
14 MR. TURNER: And I'm asking for Exhibit 12, I
15 believe. Yep.
16 BY MR. TURNER:
17 Q. Okay. Exhibit 12 is the transaction history
18 statement for the loan to Dr. Lee from Bank of the
19 Pacific. Do you see that?
20 A. I do.
21 Q. And you've seen that document before? It's
22 part of your analysis?
23 A. I have studied it quite a bit.
24 Q. Okay. So let's look at this document and see
25 how much we would have to add back to Dr. Lee's damages

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1 because of all the extra construction loan interest that
2 he's paying if we were to use this methodology where we
3 were going to take out the total mortgage payment as Mr.
4 Caron suggested. Do you see on the first page there's
5 an interest payment there on August 23, 2017? And it's
6 in columns -- oh, you know how to read this.
7 A. Uh-huh.
8 Q. Do you see the interest payment on August 23,
9 2017?
10 A. \$8,524.
11 Q. Let's see --
12 A. Is that what you meant?
13 Q. -- if we're looking at the same thing.
14 A. Oh, interest. I'm sorry.
15 Q. Yeah, interest.
16 A. \$11,752.
17 Q. Okay. And that's before the loan converted to
18 the term loan, right?
19 A. Correct.
20 Q. So if you were using Mr. Caron's method of
21 analysis, you'd have to add that back to Dr. Lee's
22 damages as part of being an apples-to-apples comparison?
23 A. Correct.
24 Q. Okay. Let's look at the next page. What was
25 the interest that he paid on August 1, 2017, for the

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1 construction loan?
2 A. \$14,874.54.
3 Q. And, then, how much did he pay in interest on
4 June 26, 2017?
5 A. \$14,309.
6 Q. And how much did he pay on June 1, 2017?
7 A. \$13,853.
8 Q. And so on and so on and so on, right?
9 A. Yes.
10 Q. So if you were trying to do some sort of
11 analysis as Mr. Caron suggested, wouldn't you then have
12 to take all of these interest amounts that he paid for
13 all of these months of the delay and add them back to
14 the damages?
15 A. It seems like you would.
16 Q. All right. So even under that methodology,
17 that's not a good -- because he's not really comparing
18 apples to apples. He's assuming that before the
19 building was built, you have no mortgage and interest
20 payments and then as soon as the building is built, you
21 have \$16,000 in mortgage and interest payments; is that
22 right?
23 MR. CARON: Leading, Your Honor.
24 THE COURT: Leading, sustained.
25 BY MR. TURNER:

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1 Q. Is that -- well, let me ask you whether or not
2 Mr. Caron's analysis assumes that there are no mortgage
3 or interest payments before the building is built?
4 A. The calculation he did did not make any
5 assumption to that.
6 Q. Okay.
7 MR. TURNER: That's all the questions that I
8 have. Thank you.
9 THE COURT: Mr. Caron.
10 MR. CARON: Thank you.
11 RECROSS-EXAMINATION
12 BY MR. CARON:
13 Q. Okay. Now I'm officially confused, Ms. Markee.
14 None of this business about the interest that he paid --
15 he had a \$100,000 built-in interest, right, in the
16 construction loan?
17 A. He had a -- I'm sorry. What?
18 Q. There was \$100,000 set aside in the
19 construction loan for interest, right?
20 A. I don't recall that.
21 Q. You don't know that. Okay.
22 So do you have Exhibit 12 there that Mr. Turner
23 was just --
24 A. I do.
25 Q. Okay. So I guess I'm a little bit confused as

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1 to what is your claim that he was paying that he
2 otherwise wouldn't have had to pay in terms of interest?
3 Are you claiming that, under my analysis, there was some
4 additional interest that he had to pay, some additional
5 loss that you didn't take into consideration when you
6 have already talked about the difference between the
7 interest that he paid versus the interest that he would
8 have paid if this thing had come in on time?
9 A. I'm having a hard time following you.
10 Q. Well, I'm having a hard time following you.
11 You had already -- you've given your report. You had
12 your deposition -- we took your deposition. You've
13 given another report and now you're coming up with a new
14 measure of damage.
15 A. My measure of damage is my opinion that I
16 issued.
17 Q. I know that.
18 A. So it's not a new --
19 Q. I know it's not --
20 A. It's not a new. It's a revision based on
21 information I was provided after the deposition.
22 Q. I know, but now it seems to me, if I'm
23 following -- and this is what, frankly, I'm getting lost
24 on, is there some other measure of damage that -- that
25 you think is different than what you've testified to in

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1 your report?

2 A. This is my opinion of damage.

3 Q. Okay. So nothing that Mr. Turner just said in

4 terms of what's on Exhibit 12 changes that one way or

5 the other?

6 A. The point of it is that the calculation the way

7 that you did it doesn't take into account everything.

8 Q. Okay. Well, then, I need -- you know, I'm

9 stupid. Just explain that to me.

10 A. Well, I don't agree with the premise of your

11 calculation and I don't agree that it's the right way to

12 calculate damage. The way that I believe that damages

13 should be calculated is the way that I did it.

14 Q. I appreciate that and the judge will instruct

15 the jury on damages, but I'm just trying to figure out

16 from you if we want Dr. Lee in the position that he

17 would have been if my client, you know, didn't breach,

18 which is the claim, and that's why, you know, I think

19 you agree that my analysis did put him in that position,

20 but are you saying there's something now that we need to

21 consider about what's on Exhibit 12 to change that?

22 MR. TURNER: Objection, Your Honor. I don't

23 know what the question is. It seems compound. There's

24 about five statements and I'm not sure if he's asking

25 her to agree with all of those statements or if there's

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1 simply a question at the end.

2 THE COURT: Restate your question.

3 BY MR. CARON:

4 Q. Please explain to me, if you adopt my analysis,

5 okay, if that analysis is the -- if you agree with me --

6 I know that you don't, but if you agree with me, it

7 sounds like there's some things on Exhibit 12 that we

8 need to take into consideration. Am I hearing that

9 right?

10 A. Your analysis doesn't consider all the extra

11 interest that he paid on the loan while the building was

12 being built. It doesn't take that into account.

13 Q. Okay. But your analysis was that -- that you

14 just told us was -- if I understood you, was that there

15 was \$36,000 of additional interest charges that were

16 related to the delay, correct?

17 A. That's what I had testified to.

18 Q. Okay. And so does anything in Exhibit 12

19 change that?

20 A. That would need to be added. These are the

21 amounts that we're talking about.

22 Q. Okay. But it's 36,000?

23 A. Correct.

24 Q. Okay. Yeah, I --

25 A. Which is not -- which is not in your

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1 calculation.

2 Q. Oh, yeah. Oh, I'm sorry. I thought I -- I

3 thought I asked you -- and we'll just be clear on this.

4 My understanding now is that you're revising your report

5 to instead of using the figure which is on -- in

6 exhibit -- ma'am, do you mind if --

7 THE COURT: It's 64.

8 MR. CARON: Sorry?

9 THE COURT: 64.

10 MR. CARON: 64. Thank you.

11 BY MR. CARON:

12 Q. In 64 that the jury will have with them, you're

13 telling them that your opinion is to replace the 113,717

14 with 36?

15 A. Correct.

16 Q. Okay. And you're still sticking by your

17 323,195, which is the lost profits?

18 A. Absolutely.

19 Q. And that's where you and I have a professional

20 difference of opinion.

21 A. Okay.

22 Q. Right?

23 A. Yeah, (inaudibles).

24 Q. And we have a difference of opinion?

25 A. Correct.

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1 Q. Yeah. But we don't have a difference of

2 opinion, you know, if we accept that there has been a

3 breach that the 36 -- I mean, you agree to knock down

4 that 113,717 to 36, right?

5 A. Correct.

6 Q. Okay. And that's what the exercise that Mr.

7 Turner was asking you to consider what was in Exhibit

8 12, that's included in that 36 figure?

9 A. Correct.

10 MR. CARON: Thank you. I have nothing further.

11 THE COURT: Mr. Turner.

12 MR. TURNER: Yes. Let me see if I can clear up

13 the confusion.

14 REDIRECT EXAMINATION

15 BY MR. TURNER:

16 Q. In your analysis, did you treat lost profits

17 separately from additional interest in coming up with

18 your damage estimate?

19 A. I did.

20 Q. Okay.

21 A. I did.

22 Q. In Mr. Caron's analysis where he wants to put

23 the mortgage payment back in to figure out lost profits,

24 is he treating the lost profits separately from the

25 interest payments or is he combining the two?

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1 A. Combining it.
2 Q. And so if you're going to combine the two into
3 your lost profit calculation, you would then have to
4 bring in all of the additional interest that Dr. Lee
5 paid while he was waiting -- all the interest that he
6 had paid while waiting for the building to be complete
7 in order to figure out an apples-to-apples comparison of
8 the but for of how much profit would he have received
9 versus how much profit he (inaudibles)?
10 MR. CARON: Object to the form, leading.
11 THE COURT: We've gone over and over this.
12 Go ahead. Answer that question. I don't know
13 how many times --
14 THE WITNESS: You're right. You're right.
15 I'm -- it's just -- I'm having a hard time tracking with
16 the calculation, but you're right. If you're going to
17 put the interest expense and like he wants to do the
18 mortgage into that calculation, you're combining it all.
19 So -- so that if you went over and looked at the
20 interest expense, you wouldn't look at what he would
21 have paid because he's not going to pay it because it is
22 done. It's in there already.
23 BY MR. TURNER:
24 Q. Right.
25 A. And then so --

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1 Q. Okay. And let me ask you another question
2 about this \$36,000 figure. The \$36,000 figure for
3 additional construction loan interest assumes that even
4 if the four apartment buildings had been done in March
5 of 2016, but we still have to wait for the townhomes to
6 be finished, that \$36,000 figure assumes that it
7 wouldn't have been possible for Dr. Lee to take the four
8 apartment buildings that had been done, convert that to
9 a term loan and just keep a construction loan on the two
10 townhomes that still needed to be finished; isn't that
11 true?
12 A. That's the assumption. They would all have to
13 be converted to a fixed rate loan at the same time.
14 Q. In other words, he couldn't separate it and
15 say, okay, now that these four apartment buildings are
16 done, I've got my Certificates of Occupancy, I'm renting
17 these apartments, I'm ready to convert this to a term
18 loan because there's no more construction on these
19 buildings?
20 MR. CARON: And I -- and I have to object. It
21 calls for speculation. It's beyond this witness' --
22 THE COURT: Sustained. It calls for
23 speculation.
24 MR. TURNER: Well, I don't -- I don't think it
25 calls for speculation because the whole idea is to try

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1 to figure out what would have happened in different
2 scenarios and the argument is --
3 THE COURT: This is not the witness for that.
4 MR. TURNER: Well, okay. I guess --
5 THE COURT: Ladies and gentlemen, fold up your
6 notebooks and step back to the jury room for a second.
7 MR. TURNER: Okay.
8 (Jury left courtroom.)
9 THE COURT: Based on that disrespect for law,
10 I'm half tempted to call a mistrial and send you guys on
11 your way and you can redo this again another three days.
12 Totally uncalled for.
13 MR. TURNER: I'm sorry, Your Honor.
14 THE COURT: Totally inappropriate. If you
15 think I'm going to let you run this courtroom, you are
16 sadly mistaken. Nor would I let you, Mr. Caron.
17 This witness has no idea whether they could
18 have been parsed out or not parsed out, relet, occupancy
19 permits would have been granted on one building or
20 another building. There's no way she can answer your
21 questions. To keep browbeating her about that question
22 is not fair to her or to the jury or to the parties.
23 She's done the best that she can with the information
24 she's got. And quite frankly, I'm not sure she's got
25 all the best information.

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1 And at the risk of saying too much that'll go
2 on a tape and it'll go up Court of Appeals, I'll reserve
3 any other further comments about these topics.
4 Jury, please.
5 Okay. Let's go on a recess. Let's go take a
6 rest room break and be back out in five minutes.
7 (Recess taken.)
8 THE COURT: Thank's. Have a seat. And ready
9 for the jury, Kim, please.
10 And you've got your next one here?
11 MR. TURNER: Well, actually, I'm going to -- I
12 just want the witness -- I want to just check the list
13 to make sure my exhibits are in.
14 THE COURT: So no Gunther?
15 MR. TURNER: No, no, I don't believe Gunther.
16 I never (inaudibles) --
17 (Jury returned to courtroom.)
18 THE COURT: Thank you. Have a seat.
19 Next question.
20 MR. TURNER: I have no further questions, Your
21 Honor.
22 THE COURT: Mr. Caron?
23 MR. CARON: No questions.
24 THE COURT: Any questions from the jury?
25 One question.

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1 (Jury questions.)
 2 THE COURT: Okay. Ladies and gentlemen, step
 3 back in the jury room for just a minute while we go over
 4 the question.
 5 (Jury left courtroom.)
 6 THE COURT: Thank you. Have a seat.
 7 Well, the question from the juror: Was Dr.
 8 Lee's insurance responsibilities taken into account?
 9 MR. TURNER: I have no objection to that.
 10 MR. CARON: No objection.
 11 THE COURT: Fair question.
 12 No. 2: How many months did the townhouse
 13 permits delay the loan conversion?
 14 I don't even know if she can answer that.
 15 MR. TURNER: Yeah, I think that's the area of
 16 speculation we were just talking about.
 17 THE COURT: And you don't have any information
 18 on whether the loan conversion was delayed by the
 19 townhouses?
 20 THE WITNESS: No, I don't.
 21 THE COURT: Mr. Caron? I suppose she could
 22 answer she doesn't know.
 23 MR. TURNER: Yeah, that's true.
 24 MR. CARON: Yes.
 25 THE COURT: All right.

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1 MR. CARON: All right. Yes.
 2 MR. TURNER: Because it is argument obviously.
 3 I mean, that's their position. But as you have
 4 mentioned, this witness is not the right witness to ask
 5 that to.
 6 THE COURT: Yes. Okay. So 3-A and B: A is
 7 what were 2015 property taxes?
 8 MR. TURNER: So she has that.
 9 THE WITNESS: It's on my schedule.
 10 THE COURT: She can answer that.
 11 MR. TURNER: Okay.
 12 THE COURT: And B, were these taken into
 13 account?
 14 Obviously yes.
 15 Okay. So I'll ask all --
 16 MR. TURNER: Okay.
 17 THE COURT: -- four questions, 1, 2, 3, A and
 18 B.
 19 And you're not calling Gunther or you're not
 20 calling Chris Bauman?
 21 MR. TURNER: Right. Bauman would have been
 22 fairly cumulative of Mr. Wilson and I think Mr. Gunther
 23 would, as well. And I know that we want to obviously
 24 get this case resolved by Friday, so I'm not going to
 25 call --

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1 THE COURT: So plaintiff's going to after you
 2 --
 3 MR. TURNER: Right.
 4 THE COURT: -- confirm the exhibits --
 5 MR. TURNER: Right.
 6 THE COURT: -- plaintiff's going to rest --
 7 MR. TURNER: Yes.
 8 THE COURT: -- as soon as she's done?
 9 MR. TURNER: Yes.
 10 THE COURT: And then do you need any pretrial
 11 or do you want to go right into calling your client? I
 12 think he's the only witness, right?
 13 MR. CARON: Well, I have a couple of other
 14 witnesses.
 15 THE COURT: Oh, do you?
 16 MR. CARON: I have Gunther and Wes Spright on
 17 my list.
 18 MR. TURNER: I think the judge is asking about
 19 today.
 20 MR. CARON: Oh, I'm sorry, Judge. I apologize.
 21 I thought you meant am I calling --
 22 MR. TURNER: No, no, no, no.
 23 MR. CARON: Oh, right.
 24 MR. TURNER: Just today.
 25 MR. CARON: Oh, right, right, right. That's

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1 right, yes. It would just be Dennis.
 2 THE COURT: Today?
 3 MR. CARON: Yeah, if they rest, yes.
 4 THE COURT: Okay.
 5 MR. CARON: And I'm going to be giving some
 6 thought tonight as to whether I'm going to call other
 7 witnesses or not so, you know --
 8 MR. TURNER: It may just be Dennis, but --
 9 THE COURT: But my question was are there any
 10 mid-trial motions you anticipate --
 11 MR. CARON: Oh, yes, I'll have --
 12 THE COURT: -- floating --
 13 MR. CARON: I'll definitely have --
 14 THE COURT: And how much -- how much time do we
 15 need for that?
 16 MR. CARON: Well, I think that probably 20
 17 minutes.
 18 THE COURT: So if I release the jury today, you
 19 can start up with Mr. Pavlina at 8:30 in the morning?
 20 MR. CARON: I can.
 21 THE COURT: Or we can just have the jury sit in
 22 the jury room for a half an hour. Knowing the way this
 23 case goes, probably 45 minutes to an hour.
 24 MR. CARON: Yeah, I mean, I'm interested, as
 25 the Court is, in getting the case done and so that would

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1 be good.

2 THE COURT: Is there a way that we can start

3 early tomorrow, reserve your mid-trial motions, get

4 Pavlina on the stand and come in and 8:30 or 8:00, the

5 bunch of us, and have them come in at 9:00 or 9:30?

6 MR. TURNER: That would be fine with me, Your

7 Honor.

8 MR. CARON: Yeah. And, actually, and along the

9 same token, would that be a good time -- I mean, I've

10 got my jury instructions done. Would that be a good

11 time to also talk about instructions?

12 THE COURT: Yes and no. I mean, it depends on

13 how many witnesses and how many witnesses you call.

14 MR. CARON: Yeah. It's very possible that I'll

15 only call Dennis, but I think Dennis might be a while.

16 THE COURT: It could be -- will he be

17 three-quarters of the day?

18 MR. CARON: I won't be three-quarters of the

19 day with him.

20 THE COURT: How much time did you anticipate

21 Dr. Lee?

22 MR. CARON: Well --

23 THE COURT: The two of you, because it was a

24 day?

25 MR. CARON: It was a day.

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1 I suspect -- I think it will be faster. I

2 mean, let me put it this way --

3 THE COURT: Here's what I'd like to do.

4 MR. CARON: Okay.

5 THE COURT: I throw you the offer to give you

6 some insight and then I just --

7 MR. CARON: I know.

8 THE COURT: -- tell you what we're going to do.

9 MR. CARON: I know.

10 THE COURT: I'm going to ask the questions.

11 You guys have follow-up. That's going to take us to

12 about 4:00 or 4:10. I'm going to release the jury for

13 the day. I'm going to have them come back at 9:30

14 tomorrow morning. You're going to reserve -- plaintiff

15 will rest after she's done. You're going to reserve on

16 your mid-trial motions until tomorrow morning at 8:30.

17 I'll have the jury back at 9:30. We'll start with Mr.

18 Pavlina at 9:30 prompt and then we'll break for lunch.

19 And if we have to work on jury instructions over lunch,

20 we can certainly do that. So bring a sandwich in a bag

21 or something just to make it happen.

22 MR. CARON: Okay.

23 THE COURT: And then whatever happens with

24 Pavlina is okay with me.

25 MR. CARON: Judge, just a question on the

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1 schedule. Do you have docket on Friday morning or are

2 you -- you do?

3 THE COURT: Yeah, we're going to go Friday

4 afternoon if we need it.

5 MR. CARON: Yeah.

6 THE COURT: There's no reason the jury can't

7 deliberate while I'm doing docket.

8 MR. CARON: Right.

9 MR. TURNER: So it's possible we'll give the

10 jury the case tomorrow at the end of the day or it's

11 possible they'll get it the first thing when they come

12 in on Friday?

13 THE COURT: No.

14 MR. TURNER: Okay.

15 THE COURT: Friday afternoon.

16 MR. TURNER: That's what I mean, when they come

17 in on Friday.

18 THE COURT: You'll do closing. I'll do jury

19 instructions and closing and then they'll get the

20 case -- it might be Friday afternoon.

21 MR. TURNER: Right, right.

22 THE COURT: I would prefer tomorrow.

23 MR. CARON: Yeah, so would we --

24 THE COURT: (Inaudible) for us.

25 MR. TURNER: Okay.

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1 MR. CARON: Because Monday is a holiday.

2 THE COURT: Yes.

3 MR. TURNER: Yes. We don't want it to go past

4 Friday.

5 THE COURT: Yeah, but if they don't get it

6 until late Friday --

7 MR. TURNER: No, no, you're right. I mean --

8 yes, you're right. I think that we should try to get it

9 to them by the end of the day tomorrow and we'll do that

10 (inaudibles).

11 THE COURT: So where you guys can all agree on

12 things that should or shouldn't come in, do so.

13 MR. TURNER: Yeah, even as far as exhibits

14 presented?

15 THE COURT: No.

16 MR. TURNER: Oh.

17 THE COURT: As far as anticipated testimony.

18 And if there's any speed bumps that I'm not aware of,

19 let's talk about those tomorrow morning --

20 MR. TURNER: All right.

21 THE COURT: -- just to speed up the argument if

22 you anticipate an objection coming from him. You guys

23 are seasoned lawyers. You know what you can get in,

24 what you can't get in, so --

25 MR. TURNER: Well, we, I think, both can --

1 well, I don't -- right now, in my mind, I can't think of
 2 anything that -- unless he starts going crazy with Mr.
 3 Pavlina, that as long as it's relevant to his topic that
 4 he wouldn't be able to testify about.
 5 THE COURT: Okay. So let's get this done
 6 first. Let's get the jury out here.
 7 Kim, can we have the jury, please. Then we'll
 8 talk more because we can even talk about our mid-trial
 9 motions after she's done.
 10 MR. TURNER: Yes.
 11 THE COURT: If I release the jury, we can do it
 12 this afternoon and we can start up at 8:30 with Mr.
 13 Pavlina.
 14 MR. CARON: Great. Yes.
 15 THE COURT: How come I missed that part?
 16 (Jury returned to courtroom.)
 17 THE COURT: Thanks. Have a seat.
 18 Question from the jury for this witness: Was
 19 Dr. Lee's insurance responsibilities taken into account?
 20 THE WITNESS: Yes, it was. I -- I
 21 considered -- I considered the portion of the insurance
 22 that was fixed, the flood insurance, he was going to pay
 23 that regardless. And then I considered the portion of
 24 the interest -- of the insurance was variable based on
 25 the property -- the apartment building property being

1 property had been done, he would have paid property
 2 taxes on the full assessed value, but he didn't. He
 3 only paid it on \$2.2 million, so he paid \$12,000 less in
 4 property taxes than he would have. But in 2018, under
 5 both scenarios, the project's done, there's no
 6 differential to take into account.
 7 THE COURT: Questions?
 8 MR. TURNER: No, I have no questions.
 9 THE COURT: Questions?
 10 RECROSS-EXAMINATION
 11 BY MR. CARON:
 12 Q. I know you can't -- you said you can't answer
 13 the question of how much delay there was on the loan
 14 conversion, but you know it's one loan, not separate
 15 loans?
 16 A. I'm aware of that, yes.
 17 Q. Okay. And the conversion occurs when the
 18 project's completely done?
 19 A. That's my understanding.
 20 Q. Okay.
 21 MR. CARON: Thank you.
 22 THE COURT: You may step down. Thank you very
 23 much.
 24 (End of testimony.)
 25

1 complete and people being in there. Your insurance
 2 would go up for that, and so I considered both of those
 3 aspects of insurance.
 4 THE COURT: How many months did the townhouse
 5 permits delay the loan conversion?
 6 THE WITNESS: I'm not able to answer that
 7 question. I don't know the answer to that.
 8 THE COURT: What were the 2015 property taxes?
 9 THE WITNESS: The 2015 property taxes -- well,
 10 I -- I have Schedule 5. I have assessed value for '15
 11 and the assessed value for '15 and '16 was the same.
 12 The property taxes in '16 were \$1,935. I assume it
 13 would have been the same for 2015.
 14 THE COURT: Were these taken into account?
 15 THE WITNESS: So when I considered property
 16 taxes, I considered the one scenario, what did happen,
 17 and then I considered the scenario what would have
 18 happened. So in 2015, regardless of whether there was a
 19 delay in construction or not, they would have been the
 20 same. In 2016, they were the same because there
 21 wasn't -- there wasn't a property tax person out there
 22 to do a new assessment between the time when the
 23 construction started and when, you know, when they do
 24 the assessment as of January 1, 2016. So there's no
 25 change in '15, no change in '16. But in '17, if the

1 (Defendant's motion for directed verdict.)
 2 THE COURT: Okay.
 3 MR. CARON: So on behalf of plaintiff (sic), we
 4 would move for a directed verdict on a number of
 5 different grounds.
 6 I think that the first ground is that there's
 7 been, as a matter of law, a waiver of the right to
 8 insist that the project be completed on time. I'm --
 9 I'm really moving on the lost profits claim specifically
 10 which relates to delay. I think that there's just
 11 overwhelming evidence that the deadline in the contract
 12 was waived by silence and by the actions of Dr. Lee when
 13 it came to the October 2016 contract which -- which
 14 recited the addendum that he signed that recited that
 15 the project was only 60 percent complete yet he stayed
 16 silent at that point after the contract had been
 17 terminated.
 18 I think that the lost profit claim related to
 19 delay then would have been waived by his actions and not
 20 speaking up at that point, not ever requesting a
 21 schedule and essentially staying silent.
 22 I think, in the alternative, I think, as a
 23 matter of law, he'd been estopped from claiming damages
 24 because he's taken action which we relied on in going
 25 back to work in October of 2016. I don't think anybody

1 could concede that if Mr. -- excuse me -- if Dr. Lee
2 contended there was a breach at that point that anybody
3 would have gone back to work at that point. So it
4 was -- I think the only way to interpret that is that
5 the time limitation was waived. So those are my -- and
6 that applies to the claims for lost profit.

7 I think that the claims for utilities, for the
8 alarm monitoring are -- and, frankly, for the -- for the
9 costs of the electric are, you know, properly before the
10 jury.

11 I think with respect to the lost rent, I --
12 well, I -- I think that the -- well, I don't move on
13 that. I think that's going to be just a matter of
14 (inaudible) an instruction. You know, I think that --
15 so -- separately. So I'm just really making my motion
16 based on these affirmative defenses that you have
17 raised.

18 MR. TURNER: Thank you, Your Honor.

19 So obviously Your Honor is familiar with the
20 standard on a motion of this nature. All reasonable
21 inferences from the facts have to be drawn in favor of
22 my client. And it sounds like there's two things that
23 Dr. Lee did that are constituting either the waiver or
24 estoppel. One is being silent. Silence is not conduct
25 unless it's in response to something else.

1 There's no obligation to tell the defendant -- I don't
2 know how often it would have to be. Would it have to be
3 once a week? Once a month? Once every two months? How
4 often does Dr. Lee have to keep on saying you're in
5 default in order for him to have not waived it?

6 So the idea of waiver is a knowing and
7 intentional relinquishment of a right. Well, how did
8 Dr. Lee intentionally relinquish his right simply by not
9 telling Dennis, which is something that he already knew
10 or he didn't believe that he was in breach, but that's
11 kind of neither here nor there? We all know the project
12 wasn't completed within six months. So I think it would
13 be an error of law to find waiver; that a party has
14 waived his right to sue for breach of contract because
15 he didn't tell the defendant that they breached the
16 contract. I don't think that's a requirement in order
17 to bring a claim for breach of contract.

18 It is neither a requirement of the contract and
19 it is not a requirement under the law that requires a
20 plaintiff who's going to sue for breach of contract that
21 the other side has actually breached. And you have to
22 assume that they breached in order to even have this
23 discussion.

24 So we assume that it was a breach, how has Dr.
25 Lee intentionally and knowingly relinquished his right

1 So if someone comes to my house and says, I'm
2 going to mow your lawn if you give me \$20. I don't say
3 anything. They start mowing. They finish the mowing.
4 They come back and they say, I'd like my \$20 now. Well,
5 that would have been an opportunity for me to speak up
6 because if I don't say anything, it's like I'm
7 assenting. And especially if he starts mowing right in
8 front of me and I don't say stop. Okay.

9 In this situation, you have a contract that has
10 a deadline. There's no obligation in the contract --
11 some contracts have it -- for a party who thinks the
12 other side has breached the contract to notify them of
13 that fact. There's no obligation in the contract for
14 Dr. Lee to do that. Sometimes you know that there's
15 contracts that have notice and an opportunity to cure,
16 10 days, five days, what have you. That doesn't exist
17 in this contract. So he has no contractual obligation
18 to say, you're in default. You're either in default or
19 you're not in default.

20 So I guess the question is does he have some
21 legal obligation outside of the contract to say you're
22 in default? And I don't know where that would come
23 from. There are many breach of contract cases where the
24 breach is alleged in a complaint. And the defendant
25 might be, oh, I didn't know you thought I'd breached it.

1 to seek damages for that breach simply by, as Counsel
2 says, remaining silent? It's not like he's remaining
3 silent in the face of a question like: Are you going to
4 waive your claim for default or anything?

5 Now, so that's -- that's one type of conduct, I
6 guess, the silence which sometimes you're right, silence
7 can be conduct if it's in the face of something else.
8 You put it into a context of a situation and that
9 silence can be seen somehow as assent.

10 Now, in order for silence to be assent, it has
11 to be clear what the person is asking you to assent to.
12 Mr. Pavlina never said to Dr. Lee, I want you to waive
13 this right. Please assent to it. He never said that.
14 No discussion at all about extending that deadline.

15 So I don't believe that it would be proper to
16 dismiss a breach of contract claim and say that a
17 plaintiff has waived it because they didn't tell the
18 defendant that they breached the contract. It's not a
19 requirement at all.

20 The other action that Dr. Lee took is he signed
21 the agreed-upon procedures and that somehow that was a
22 waiver. The agreed-upon procedures states that the
23 contract time is unchanged and that the date of
24 substantial completion is unchanged. How does signing a
25 contract that says that there is no change in the

<p style="text-align: right;">81</p> <p>1 contract time constitute as a waiver of the right to 2 claim that there was a contract time? It's almost 3 perverse. If the contract had said that the contract 4 time was changed or nullified or void or anything like 5 that and Dr. Lee signed it, you might have an argument. 6 But that's exactly contrary to what the facts are. 7 THE COURT: Well, Ryan -- Ryan gave us a little 8 bit of insight on that, didn't he? 9 MR. TURNER: Uh-huh. Well, he gave an 10 insight -- 11 THE COURT: He said it was terminated. 12 MR. TURNER: Right. So, well, terminated. He 13 said this, but he's not a lawyer. 14 THE COURT: No, I know. 15 MR. TURNER: The contract was not terminated. 16 It wasn't terminated meaning -- 17 THE COURT: I thought he told Pavlina -- 18 MR. TURNER: No, no. But it still existed. It 19 might have been that somebody stopped performing, but 20 there's still a contract and there's still a right to 21 sue for damages for that contract. 22 THE COURT: I'm not on his side, by the way. 23 I'm just -- I'm challenging my own thinking on that. 24 MR. TURNER: Right, right. No, it's good to 25 think it through obviously. But the point is is that if</p>	<p style="text-align: right;">83</p> <p>1 MR. TURNER: The owner/developer the right. 2 THE COURT: Yes. 3 MR. TURNER: Yeah. That didn't happen. 4 THE COURT: So it can be a unilateral decision 5 to terminate? 6 MR. TURNER: Well, because of a default. 7 THE COURT: Right. 8 MR. TURNER: Right, right, right, right. 9 Without a default, I don't think you can just say, hey, 10 you know what? Forget it. 11 THE COURT: Well, it's -- yeah, and it's commit 12 a breach of this contract is the language it says. 13 MR. TURNER: Okay. Breach. Well -- 14 THE COURT: And the allegation -- 15 MR. TURNER: -- the header, I think, is default 16 by contract. 17 THE COURT: But in the body it says -- 18 MR. TURNER: Yes. 19 THE COURT: -- or should the contract or 20 otherwise commit a breach of this contract -- 21 MR. TURNER: Right. 22 THE COURT: -- then the owner/developer may, in 23 addition to all other rights and remedies at law and 24 equity and under this contract -- or it should say 25 contract -- terminate the contract.</p>
<p style="text-align: right;">82</p> <p>1 a party decides to stop performing under a contract, 2 that doesn't necessarily terminate the contract. 3 Contracts could be terminated usually by agreement of 4 the parties, right? They say, we've had this deal. 5 It's been going on for five years. It's not working for 6 me anymore. Let's call an end to this. We're not going 7 to be bound by this contract anymore. One side cannot 8 unilaterally terminate this contract. There's no 9 provision in the contract for that. 10 THE COURT: Well, did it say anything about 11 that? 12 MR. TURNER: About termination? No, it's 13 interesting because I think one of the things that Mr. 14 Pavlina asked Mr. Wilson to add to the agreed-upon 15 procedures was something for termination where he would 16 be allowed to terminate if he didn't get paid within a 17 certain period of time. 18 MR. CARON: I don't think that's in the record. 19 MR. TURNER: No. Well, it might not be. That 20 is something that Mr. Wilson told me, but it might not 21 have come out through testimony. So thank you for 22 clarifying that. 23 But -- so -- so put that comment aside. 24 THE COURT: Well, Paragraph 13 does give the 25 owner/developer the right to terminate.</p>	<p style="text-align: right;">84</p> <p>1 MR. TURNER: Right. 2 THE COURT: So -- 3 MR. TURNER: After five days of recognized 4 (inaudible) -- 5 THE COURT: So Dr. Lee knew of the breach -- 6 MR. TURNER: Uh-huh. 7 THE COURT: -- back in March of 2016. 8 MR. TURNER: Okay. 9 THE COURT: He didn't do anything expressly 10 affirmatively. I'm not sure how the jury would consider 11 the waiver. I mean, a waiver is an intentional and 12 voluntary relinquishment of a known right -- 13 MR. TURNER: Yeah. 14 THE COURT: -- where such conduct as warrants 15 an inference of the relinquishment of such right. 16 MR. TURNER: Yeah. 17 THE COURT: Dr. Lee -- the argument's going to 18 be had to the jury. I don't think I can do it as a 19 matter of law, Mr. Caron. 20 MR. TURNER: Okay. 21 THE COURT: I'm not getting -- I'm not going 22 down that road. I'm just talking through it. 23 MR. TURNER: Okay. 24 THE COURT: I think, as a matter of law, it 25 would be difficult for me to stand in the jury's shoes</p>

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1 and say whether or not Dr. Lee --

2 MR. TURNER: The only reasonable inference

3 could be that he meant to waive it.

4 THE COURT: Yes.

5 MR. TURNER: Yes.

6 THE COURT: The jury may very well find that he

7 he gave an inference of his relinquishment of that right

8 to claim a breach. That's supported in addition to just

9 the length of time that it went on. But then he is

10 signing in October of 2016 an addendum or a change order

11 which, quite frankly, sadly, it just wasn't very

12 accurate. I mean, it's -- to put unchanged into the

13 timeline didn't match the reality of the situation.

14 MR. TURNER: Well, no -- but let me -- let

15 me -- let me see if I can -- let's assume that this

16 issue was out on the table.

17 THE COURT: Uh-huh. I wish it was.

18 MR. TURNER: Everybody is thinking about it and

19 talking about it.

20 THE COURT: I wish it was.

21 MR. TURNER: Right. And all we're talking

22 about is 180 days.

23 THE COURT: Uh-huh.

24 MR. TURNER: And Mr. Pavlina says, I want that

25 deadline extended. Okay.

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1 THE COURT: Uh-huh.

2 MR. TURNER: And Dr. Lee says, I'm not willing

3 to extend that deadline.

4 THE COURT: Then they terminate, they step

5 aside.

6 MR. TURNER: Wait a minute. That doesn't

7 terminate the contract. Simply refusing to extend the

8 deadline doesn't terminate the contract.

9 THE COURT: Let me ask you this question --

10 MR. TURNER: Yes.

11 THE COURT: Let me ask you this question: I've

12 been thinking about this --

13 MR. TURNER: Yeah.

14 THE COURT: Is a waiver a remedy to a contract?

15 MR. TURNER: It's a defense.

16 THE COURT: It's a defense. But is it a

17 waiver -- is a waiver an election of a remedy?

18 MR. TURNER: No, I don't think so.

19 THE COURT: You choose waiver or you choose

20 modification.

21 MR. TURNER: No. I think election of

22 remedies -- the idea of election of remedies is you can

23 either sue for this --

24 THE COURT: Go to arbitration or go here?

25 MR. TURNER: No. I think that's more

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1 procedural. I think the substance of election of remedy

2 would be I'm going to sue for damages based on this

3 theory or I'm going to sue for damages based on that

4 theory. And at some point usually in a case, you may

5 need to elect your remedy because the two theories are

6 inherently inconsistent.

7 THE COURT: Right, right.

8 MR. TURNER: So if he was saying, oh, I want to

9 sue -- you know, I don't know how it would apply to this

10 case because I don't see how it would be, but if you had

11 a situation where plaintiff had to choose between do you

12 want a remedy based on this theory of the case or do you

13 want it based on this theory of the case? And

14 eventually when they become mutually exclusive,

15 oftentimes the Court will require plaintiff to elect one

16 or the other because you can't have both. And sometimes

17 what's happened is someone has elected one remedy and

18 they've elected that remedy to the point where it's so

19 far that it would be prejudicial to elect a different

20 remedy.

21 So I don't think that election of remedies

22 would apply here. I think that the waiver argument

23 would have to be the only reasonable inference -- and I

24 think you've already said that you're not going to do it

25 on this -- but the argument would be for a jury, look at

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1 Dr. Lee's conduct and can you infer from that conduct

2 that he meant to extend the deadline? Because that's

3 what it would involve, a knowing and intentional

4 relinquishment of a known right. So that's going to be

5 for the jury to decide.

6 And I don't think there's much more benefit,

7 unless Your Honor has other questions, about continuing

8 to discuss that.

9 THE COURT: Give you a chance.

10 MR. CARON: Okay.

11 THE COURT: You've been very good. Quiet.

12 Go ahead.

13 MR. CARON: It's hard for me.

14 So I think you have to focus on the walkout

15 because that's a very important step in the process.

16 The walkout was -- would have given rise to a breach of

17 contract for sure claim because my client's walking out.

18 I mean, he has a -- he has a job to perform, which is to

19 build this building, and when he is 60 percent complete,

20 he -- he quits. Now, at that point, Dr. Lee could have

21 sued him, right?

22 THE COURT: Yeah.

23 MR. CARON: But what the parties do -- and the

24 evidence, I think, is undisputed on this point -- is

25 they come to an agreement on getting back together.

1 Now, the question, I think --
 2 THE COURT: A pretty poor one, yeah.
 3 MR. CARON: Well, it's a poor one, but I think
 4 that the only reasonable inference from the -- from the
 5 evidence is but for the agreed-upon procedures and but
 6 for Wilson stepping up and being -- you know, being the
 7 mediator -- for want of a better word -- Dennis would
 8 have been out and Dr. Lee would have been out. There
 9 would have been a lawsuit, you know, two years ago
 10 instead of now.
 11 THE COURT: Yeah.
 12 MR. CARON: I would have been younger and
 13 better looking.
 14 THE COURT: I get it. I get it, yeah. You're
 15 right.
 16 MR. CARON: Okay. So the question is this: Is
 17 it this point because the parties are now settling on
 18 this walkout under a new procedure, is -- is -- so
 19 here's the thing. When you at -- when you analyze it
 20 down, I'm looking at my estoppel part of my brief and it
 21 says, a statement or act inconsistent with a claim
 22 afterwards asserted.
 23 Now, this -- the act is entering into the
 24 agreed-upon procedures change order. That's
 25 completely -- which recites, as you know, I know it is

1 MR. CARON: Well, but, again, see, what's the
 2 evidence you heard? The evidence you heard in that
 3 respect was from Dr. Lee. And when we asked --
 4 THE COURT: Well, we'll hear from Mr. Pavlina.
 5 MR. CARON: Well, I know, but I'm making a
 6 motion now at this point, you know.
 7 THE COURT: Right.
 8 MR. CARON: My point is is the only -- the
 9 evidence you have as to what his understanding at the
 10 time that he signed, not when he had the benefit of
 11 lawyers later, but at the time he signed, Dr. Lee
 12 testified that he was due a Certificate of Occupancy
 13 whenever the project gets completed. Not you're in
 14 default. I mean, that's the problem. And that's the
 15 problem, I think, with the --
 16 THE COURT: I don't know -- I don't think he
 17 testified ever that he didn't consider him in default.
 18 MR. CARON: Your Honor, I read from --
 19 THE COURT: I don't recall that.
 20 MR. CARON: Yeah, I read from his deposition.
 21 I can read from it now if you like, but I can represent
 22 to you that the question was -- because we put that
 23 up --
 24 THE COURT: Uh-huh.
 25 MR. CARON: -- but the question was at the time

1 kind of boring now, 60 percent complete. To now take
 2 the position that the default had already occurred and
 3 to lure him back is -- I think he's estopped from doing
 4 that because -- because if Dr. -- it's not Dr. Lee.
 5 Sorry -- if Dennis Pavlina would have -- he gets lured
 6 back to complete the job. If he was told --
 7 THE COURT: Or get sued.
 8 MR. CARON: Fine. Now he gets it -- now he
 9 gets it --
 10 THE COURT: He comes back. I don't -- it's --
 11 MR. CARON: What I mean by lured back --
 12 THE COURT: He's lured back maybe by his own
 13 common sense.
 14 MR. CARON: Well, my -- my point is --
 15 THE COURT: He wasn't lured back to extend the
 16 time.
 17 MR. CARON: Well, there's -- he was -- even Mr.
 18 Wilson understood that, you know, because he didn't have
 19 the benefit of the contract, that that was a meaningless
 20 act and it's an impossible act.
 21 THE COURT: Well, it --
 22 MR. CARON: I mean, the parties can't be in --
 23 THE COURT: It was meaningless from his
 24 perspective, but it should shouldn't have been
 25 meaningless to these two.

1 you entered into an -- I can find it for you if you
 2 like, but in his deposition testimony which he affirmed
 3 on the stand was at the time you signed that, what was
 4 your understanding as to when Dennis owed you the C of
 5 O? And the answer was whenever project gets completed.
 6 And then we got into, well, you knew it was 60
 7 percent complete? And he goes, well, I didn't know if
 8 it was 60 or 70. And we got into that whole -- but he
 9 said if Northwest Monitoring said it was 60, it's 60.
 10 THE COURT: Mr. Caron --
 11 MR. CARON: I can --
 12 THE COURT: -- I really respect your abilities,
 13 but I think you're talking about from my perspective and
 14 I am not going to be making this decision. It's going
 15 to be those people.
 16 MR. CARON: Okay.
 17 THE COURT: But the fact that he was asked a
 18 question when were you going to get your Certificate of
 19 Occupancy was when he completed the job really didn't
 20 have anything to do with the timeline that he had to
 21 finish it from my perspective.
 22 MR. CARON: I understand.
 23 THE COURT: There's this timeline that neither
 24 one of them -- on the evidence that I got so far, there
 25 is this timeline that maybe Dr. Lee was quite in tune

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1 with what was happening there and Mr. Pavlina wasn't,
2 but that thing's underlined. They both signed it.
3 Everybody understood that the timelines in the contract
4 are not modified.
5 The only way in my mind that it can be modified
6 is by a waiver. And we've already talked about what
7 that's going to take. And I'm not going to -- the jury
8 may very well find a waiver. I don't know. It depends
9 on how well you guys argue your case.
10 MR. TURNER: And it's interesting, Your Honor,
11 because if you want to look at the contract, it says it
12 can only be modified by a writing signed by both
13 parties. So -- but that's just argument for the jury
14 that will come up later. An oral waiver shouldn't be
15 able to do it under the terms of this contract.
16 MR. CARON: I assume that --
17 MR. TURNER: And I don't think we're really
18 looking at an oral waiver because it is not an oral
19 waiver. It's silence, which is not -- which is not a
20 (inaudible).
21 THE COURT: Well, I still have a lot of
22 questions, too.
23 MR. TURNER: Yeah.
24 THE COURT: I mean, it's part of what slows me
25 down on this decision is that -- and I'm not sure how --

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1 we'll hear more evidence from the builder here pretty
2 quickly.
3 MR. TURNER: Right.
4 THE COURT: This whole concept of the project
5 as one could not have been completed within the 180 days
6 because they didn't have the permits for --
7 MR. TURNER: Well, that's an argument, as well.
8 That's --
9 THE COURT: -- for the townhomes.
10 MR. TURNER: Right.
11 THE COURT: And so if it's all one loan and
12 it's all one contract and it's all one structure, one
13 building -- if you want to call it one building -- it's
14 one project, impossibility creeps in.
15 MR. TURNER: It's an all-or-nothing situation,
16 right. But I think that the contract deals with it
17 because it talks about reasonable extensions based upon
18 what it is that's causing the delay. So if you have
19 something that slows you down for five days, for
20 instance, does that mean that now you get to your
21 extension? But that's all neither here nor there.
22 Do I need to make any additional record on
23 this, Your Honor, or --
24 THE COURT: I don't think so. I'm denying your
25 motion for a directed verdict. I believe that there is

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1 evidence in the record in a light most favorable to the
2 plaintiff or the non-moving party, the reasonable
3 inferences could sustain a verdict for Dr. Lee and I
4 would say that reasonable inferences could sustain a
5 verdict for Mr. Pavlina, DWP.
6 MR. CARON: And, finally, Judge, and I don't
7 know if this is going to be -- and I'll sort of propose,
8 but this -- I would move to prevent -- since this is
9 going to be an area of only expert opinion, to prevent
10 plaintiff from arguing that there's any additional
11 interest on the construction loan above 36,000. In
12 other words, I think she's conceded on the stand, but I
13 heard some -- so I'm moving to strike any claim for the
14 113,717 based on the testimony. I don't think there's
15 any way the jury could ever -- and I would ask that the
16 defendant -- excuse me -- the plaintiff be instructed
17 accordingly.
18 THE COURT: I'm not going to instruct you to
19 argue anything but what her written report states. The
20 rest of it is testimony and the jury can take her
21 testimony for whatever it's worth.
22 MR. CARON: Well, but the point is that the
23 written report was denied here on the stand. She went
24 from 113 to 36.
25 THE COURT: Yes, she did.

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1 MR. CARON: And there's no evidence now to
2 support the 113. There's no evidence to support that
3 because she agreed that that was a mistake.
4 THE COURT: Well, except for Dr. Lee's
5 testimony that he paid a bunch of interest.
6 MR. CARON: He never testified as to what it
7 was and what it would have been otherwise.
8 THE COURT: Yeah.
9 Motion denied.
10 MR. TURNER: Okay. Then I won't bother.
11 Okay. Thank you, Your Honor.
12 THE COURT: What else you got?
13 MR. CARON: I'm not going to try again.
14 (Inaudibles.)
15 THE COURT: Well, I -- I want to touch all
16 bases.
17 MR. CARON: Okay.
18 (End of motion.)
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1 (Closing arguments on 2.14.19.)
 2 THE COURT: Mr. Caron.
 3 MR. CARON: Thank you, Judge.
 4 Good afternoon, everybody -- this is
 5 (inaudible) -- Your Honor, Mr. Turner.
 6 So I want to -- you know a lot about this case
 7 because you've heard it now for three and a half days
 8 and you've -- I don't want to belabor things, but I
 9 think we can agree that this contract is not the best
 10 piece of work ever written, right? If it was, we
 11 probably wouldn't be here. There's -- there's
 12 attachments that aren't attached. You have to really
 13 try to figure out, okay, what was the intent of the
 14 parties.
 15 That's one of the jury instructions that you
 16 have, which is Jury Instruction No. 7 that Judge Stahnke
 17 gave you is -- is you have to view the contract as a
 18 whole and then consider the facts and circumstances
 19 leading up to the formation of the contract, the
 20 subsequent acts of the parties to the contract and the
 21 reasonableness of the prospective interpretations of it
 22 by the parties. That's one of the instructions. You
 23 will have that with you.
 24 So let's just talk about this issue you've
 25 heard so much about on this electrical plan. What was

1 something that was going to be in Pavlina's scope of
 2 work. And so, you know, again, you're going to look at
 3 the contract. You're going to make your determinations,
 4 but you're going to look at the contract in terms, I
 5 suggest, that the jury instruction tells you in terms of
 6 what was specifically the surrounding circumstances, the
 7 facts leading up to the contract and the reasonable --
 8 and the subsequent acts of the parties.
 9 The subsequent acts of the parties or with
 10 respect to, again, the electrical contract, Dr. Lee,
 11 please approve this. Okay. That's what happened,
 12 right? I mean, we've seen this. He -- you know,
 13 Pavlina sends it up to Dr. Lee saying will you approve
 14 it. He doesn't say, no, I don't approve it. He's
 15 thanks him for that information.
 16 Why would he send that on to Dr. Lee asking for
 17 his approval if that was in the scope of the contract as
 18 he understood it, because you wouldn't send it on. Just
 19 like, you know, for the framers and the roofers and the
 20 people who pour the concrete, Pavlina just pays it. He
 21 doesn't have to ask for permission.
 22 And then he does what the banker recommends.
 23 You saw the email from the banker where the banker says
 24 put in a change order. Okay. And he puts in a change
 25 order and Dr. Lee refuses to sign it. And meanwhile,

1 the intention of the parties vis-a-vis the electrical
 2 plan? And, you know, I think that you've got to
 3 certainly understand that my client's intent was
 4 clearly that the electrical plan wouldn't include work
 5 with Cascade Electric is what was ultimately on that
 6 bill.
 7 Now, is that a reasonable interpretation for
 8 Mr. Pavlina inasmuch as the job cost report had 45,000
 9 on that specific line item? That's a question that you
 10 have to, you know, you have to think about and answer.
 11 But we know that even before Mr. Pavlina signed, he sent
 12 that email out that we talked about a little bit earlier
 13 today that's one of the exhibits where he's telling
 14 Chris -- or he's asking Chris is there an electrical
 15 plan, Chris Bauman. And then, you know, he says, no,
 16 it's not in my scope. You know, so they're -- so he's
 17 already saying -- that's before he signs -- the
 18 electrical plan is not in his scope. You'll see that.
 19 And -- and Dr. Lee knew that. He certainly
 20 knew because he had a copy of that email. And then they
 21 want to turn around and say, oh, this contract which
 22 does say you're going to complete the whole project, it
 23 says what it says, includes something that wasn't in the
 24 anticipation of the parties. So with respect to the
 25 electric, it was clearly stated that that wasn't

1 we're without power and we don't get power until a year
 2 into this thing.
 3 So Mr. Turner is absolutely right. There is a
 4 180-day provision that says that, but there's also that
 5 same provision -- it's Paragraph 21 of the contract --
 6 that talks about extensions of time for acts and neglect
 7 of the owner. So if you determine that the owner should
 8 have picked up the electric and that that's a major
 9 cause of about a year's delay, you can't blame Dennis
 10 Pavlina for that. That doesn't make any sense. That's
 11 not consistent with how this contract works.
 12 And, again, I mean, I think they've conceded,
 13 of course, that there wasn't even a permit, you know.
 14 And you've heard this many times, that there wasn't a
 15 permit until May with respect to the townhomes, so the
 16 project as a whole couldn't have been completed. Even
 17 as Ms. Markee, their expert, admitted until -- I think
 18 she says November of 2016, which is just a matter of
 19 after you lease out for occupancy would give you about
 20 five months until that Certificate of Occupancy --
 21 excuse me -- Certificate of Occupancy, you know, gets
 22 issued.
 23 The -- I'll touch on this issue of waiver which
 24 really relates to this issue of silence. If you think
 25 you're harmed, you say something. You know, Mr. Turner

1 says, well, how many times do you have to say it? You
2 know, do I have to say it every day? Well, he never
3 said it once. I mean, you know, the evidence is that --
4 and each party has a duty to work with the other. I
5 mean, that's one of the things that the parties have a
6 duty to do. They have a duty to work with each other.
7 And so if you think you're harmed, you got to say
8 something.

9 And, you know, you heard Dr. Lee testify that,
10 you know, he had a calendar. 180 days came and he
11 knew -- you know, he knew and he doesn't go to Dennis
12 and say, Dennis, hey, where is my thing? You know,
13 where's my -- where's my completed construction? I
14 mean, that would be a little weird since the permits
15 hadn't even been issued, but he never does it. I mean,
16 this is the thing that is amazing.

17 And when does he do it? He does it in response
18 to Mr. Pavlina filing the lien for \$99,000 for the
19 retainage. That's when it happens. And I think we can
20 reasonably assume, since we never heard anything or
21 since Dennis Pavlina never heard anything before, that
22 if Mr. Pavlina had not said I want my retainage, there
23 never would be this. We would not be here. I mean, I
24 think that's a clear cause and effect.

25 And, you know -- you know the old expression --

1 I'm not a football player as you can probably tell, but
2 I've heard they say, you know, the best defense is a
3 good offense or something. I think that's what they
4 say. But that's what happened. That's exactly what
5 happened.

6 We are now asserting a claim for \$99,000.
7 We're standing up for our rights to collect money that
8 was due under the contract and, lo and behold, you know,
9 we're hit with this lawsuit asking for -- I mean, the
10 number is changing. I think, you know, it was -- it's
11 gone -- it's gone down as we've sort of worked at some
12 of their numbers, but it's a pretty large claim they're
13 making.

14 And is it right and is it fair and is it just
15 to sit on your rights, to say nothing -- and actually
16 worse if you think about it, because why would Dennis
17 Pavlina have come back to work in October after the
18 walkout that he thinks was justified obviously due to
19 the payment -- the nonpayment of the electrical if he
20 thought he was setting himself up for a default, for a,
21 you know, a breach of contract claim? That makes really
22 no sense.

23 And if there was a time for Dr. Lee when you --
24 when you ask the question, well, when should he have
25 spoken? I mean, that was the time he needed to say

1 you're -- you know, this contract, you have to finish by
2 a certain date or else. But he doesn't and he never
3 says anything. And we think that if you look at that in
4 terms of our defenses for waiver and estoppel that that
5 should apply.

6 Now, I'm here to tell you that doesn't apply to
7 the utilities claim because the utilities claim is the
8 utilities claim. And I think the only issue there was
9 was there a delay, right, was there delay, but we're not
10 claiming waiver with respect to the utilities claim
11 that's been put up here.

12 Okay. Let's talk a little bit about damages
13 because while we think that there was no breach of
14 contract and we're -- and we would ask you to -- on the
15 verdict form, you're asked a couple of questions, you
16 know. Did defendant breach contract with plaintiff?
17 We -- we don't think we did for the reasons I've
18 mentioned. But, you know, I recognize that you're
19 deciding this, not me.

20 So then you get the question of damages. And I
21 want to start by actually talking about that electric
22 claim because, again, we think you would conclude that
23 that wasn't in the scope of the work for the reasons
24 I've mentioned and once you look at the job cost report,
25 which while it wasn't attached, he certainly knew about

1 it. He actually sent out that same job cost report as
2 one of the -- which, you know, indicates what the
3 electric was. But nonetheless, there is this \$81,703
4 claim.

5 You might remember that Dr. Lee initially
6 testified that I paid that bill. That was his initial
7 testimony. And then on cross and some later questioning
8 we were able to show him that actually that bill came
9 out of the construction loan. That was part of that
10 reserve in the construction loan because, you know, they
11 build in an extra hundred-or-some-thousand dollars for
12 things that might go over what the original budget was.

13 And why am I -- why does that matter? Because
14 money is money, right? But this is what's weird about
15 it. It's true. I mean, I don't have any reason to
16 dispute that Dr. Lee is still on the loan now, but
17 something very significant happened in August of 2017,
18 right? We went from -- well, actually, excuse me. On
19 May 30, 2017, the property was deeded over from Dr. Lee
20 personally to Family LLC, his corporation. And we heard
21 that. What Dr. Lee admitted on the stand was that all
22 the payments to the bank for the permanent loan -- the
23 permanent loan went into effect in August -- all those
24 payments have been made by Family LLC, Family Properties
25 LLC. In other words, Dr. Lee, while still technically

1 on the note, hasn't suffered anything because he doesn't
 2 own the building any longer. He hasn't suffered any --
 3 you know, it's a separate entity. And while he's still
 4 on the note, so he's legally obligated on that note,
 5 he -- he hasn't made a payment. So is that \$81,000
 6 damage which is proximately caused -- excuse me -- the
 7 defendant's breach of contract proximately caused those
 8 damages to plaintiff? And I think that's something --
 9 again, if you think that that's an awardable amount. In
 10 other words, if you don't think that that amount was in
 11 fact intended to be in the agreement to begin with,
 12 intended to be -- excuse me -- if you exclude it based
 13 on the fact that it wasn't in the job cost report, okay,
 14 so you'll have to make that determination. So that's --
 15 that's with respect to the utilities.

16 On the alarm monitoring, I -- I don't ever
 17 remember there being evidence, members of the jury, that
 18 the alarm monitoring was ever in the scope. I don't
 19 think they've presented anything that that is -- that it
 20 was part of the plans.

21 I mean, you know, we had Mr. Wilson talk about
 22 the plans. I don't remember that they submitted any
 23 evidence to say that the alarm monitoring system was
 24 part of any plan. I may be mistaken, but we went
 25 through I don't know how many hundreds of plan documents

1 and all this stuff. And it's not a large amount of
 2 money in the whole scheme of things, it's \$3,550, but
 3 you know, you're -- you may find that in there, but I
 4 don't think there was any evidence that that was, you
 5 know, presented. But, again, it's -- if you find that
 6 that was damage, that was damage.

7 And, now -- and the construction loan interest
 8 calculation of \$36,472, that's what, you know, their --
 9 that's, you know, what they're claiming, if you
 10 determine -- again, if you determine that there should
 11 be none because there really wasn't a default on our
 12 part because there was a waiver, okay, then you don't
 13 determine -- you know, you don't award it. But if you
 14 determine that there was a breach, then 36,000 on the
 15 construction loan interest is what Ms. Markee testified
 16 about.

17 Okay. So now we have the fun, which is the
 18 profit claim. And that's where -- and I like Ms.
 19 Markee, but I just think that that was not an accurate
 20 way to think about profit certainly in a legal sense.
 21 She's an appraiser and she talked -- in her first
 22 version, she talked about net operating income and then
 23 she changed that in the revised. You can see that as
 24 you look at her reports. Okay.

25 The bottom line is this: The Court has

1 instructed you, I mean, Instruction No. 11, that in
 2 calculating damages, you determine the sum of money that
 3 will put the plaintiff -- that's Dr. Lee -- in as good a
 4 position as he would have have been if both the
 5 plaintiff and defendant had performed all their
 6 obligations under the contract.

7 So, again, we know and it's undisputed that
 8 he's going to be -- that this was transferred again from
 9 a construction loan to a permanent loan and that
 10 permanent loan, it's undisputed, had \$16,712 a month in
 11 charges. That's what it is. So if this thing had come
 12 online when they wanted this to come online, right, in
 13 March or whatever date -- I don't care -- whatever the
 14 date you think it should have come online, the measure
 15 of damages is the rent less the expenses. And that's --
 16 that's the net loss.

17 And, you know, when I went through this formula
 18 with Ms. Markee, I came straight off her schedules. I
 19 didn't dispute any of her numbers. I just went right
 20 off her schedules. And, you know, we -- we -- we have
 21 the average gross rents. I just accepted her numbers.
 22 She didn't provide any rent rolls, but I accepted her
 23 numbers. And we took out the fact that the rents had
 24 increased over that period of time. Remember there was
 25 that evidence that they went up just because rents in

1 Vancouver are going up. So that was a deduction. And
 2 then these were what she called variable expenses. And
 3 this was 1/12 of the property tax. And this is the
 4 undisputed amount. In fact, it's in one of her
 5 schedules. That is the finance charge. In other words,
 6 that's what the permanent loan charges are. And so that
 7 is the net amount, that is the net profit as defined
 8 under the jury instructions.

9 And, you know, Mr. Turner said, well, I didn't
 10 bring in (inaudible) numbers. I -- quite honestly, I
 11 don't think I needed to because this is pretty simple
 12 math when you come right down to it. What is net
 13 profit? It is your income less your expenses and that's
 14 what this number reflects. So where I have a big beef
 15 with -- although, I like Ms. Markee, she's a very nice
 16 woman, I just have a big beef with this idea that you're
 17 just going to ignore completely --

18 You know, if -- this is the interesting thing,
 19 right? An argument could be made that if I just go and
 20 spend \$3.2 million and I just take it out of my back
 21 pocket and go out and buy a building, okay, then Ms.
 22 Markee's right. But that's not what occurred. And the
 23 idea is not to put some hypothetical person in the
 24 position they would have been. It's this plan. What is
 25 it that -- what puts plaintiff in the position that he

1 would have been if there had been no breach by Mr.
 2 Pavlina? That's the number. It's not \$25,000, which is
 3 what she says. And you're going to have her report to
 4 see how she does it, but it's not -- it's just simply
 5 not 25,000. That is, again, an area I think where a
 6 little clear-headed thinking, which, again, it is -- it
 7 is different if you would have put -- you know, this is
 8 a different case if Dr. Lee had just paid that money, it
 9 would be different. But then, again, you wouldn't have
 10 any interest claim either. So what originally was the
 11 \$113,000 interest claim and now she's lowering that
 12 because there's less time, right, you wouldn't have that
 13 because it would just be money out of your back pocket.
 14 But at any rate, we don't have this hypothetical
 15 situation, somebody who is paying cash because Dr. Lee
 16 didn't pay cash.

17 And his expectation all along was to transfer
 18 this from a construction loan to a permanent loan. And,
 19 in fact, those are the -- the payments, the 16,714,
 20 which represent what he pays every month.

21 Now, there was some question that Mr. Turner
 22 asked Ms. Markee about whether it should just be
 23 interest and not principal. And I am not sure I really
 24 frankly understood that. But I'm going to point out
 25 that one -- the exhibit -- I think it's 64 --

1 MR. CARON: Do you have those exhibits?
 2 THE CLERK: (Inaudibles).
 3 MR. CARON: Yeah, 65. And it's on Schedule 7.
 4 That shows the actual principal and interest on this
 5 construction loan. Okay. And as any of you who work
 6 with loans might know, almost all of the initial
 7 payments are interest anyway. But if that argument
 8 appeals to you and I am not sure I really even
 9 understood it, to be honest with you, but you can -- you
 10 can do a calculation if you wanted to of the interest
 11 because it shows, for example, the first payment 16,714,
 12 15,824 of that is interest, \$889.44 is principal.
 13 You'll have this back in the jury room because that
 14 is -- if you think it should only be interest for that.

15 Again, this was the actual cash flow and this
 16 is the actual cash flow. And so we ask you to think
 17 very carefully about whether the analysis that Ms.
 18 Markee did is correct. And what I did is I took the
 19 period of time from -- the five-month period of time.
 20 Again, we're not suggesting that you award damages at
 21 all, but if you do this math and you do it for five
 22 months, which is the period of time from when the -- you
 23 know, you're going to decide what you're going to
 24 decide, but if you do it for five months, which is the
 25 period of time that Ms. Markee was kind of looking at

1 this from the completion of the entire project if there
 2 had not been a default, okay, in other words, using
 3 the -- the presumed completion of the townhomes as a
 4 date, that's the number you would get to. If you think
 5 it's 14, then, you know -- but that is the net profit as
 6 the jury instruction indicates.

7 I thank you very much for your service. I know
 8 it's been a long week. And on behalf of Dennis Pavlina,
 9 I thank you very much.

10 Mr. Turner gets the last word because he has
 11 the burden of proof, but I am done. Thank you for your
 12 attention. And that's it.

13 THE COURT: Mr. Turner?

14 MR. TURNER: Thank you, Your Honor.

15 Just three or four brief points. I know it's
 16 late in the day, so I do this at my peril.

17 I just want to make sure, the judge hasn't
 18 instructed you to adopt defendant's measure of damages
 19 or plaintiff's measure of damages. I think that you may
 20 have been somewhat -- or it could have been
 21 misunderstood that what Mr. Caron was telling you is
 22 that the judge has already instructed you that this is
 23 the proper measure of damages and that's not the case.

24 The problem with this calculation by Mr.
 25 Gideon -- Mr. Caron -- excuse me -- is that it's not an

1 apples-to-apples comparison because he's saying, well,
 2 look, once you get it done, you had these mortgage
 3 payments of \$16,000 a month and that's -- but before you
 4 had it done, you'll see in Exhibit 12, the transaction
 5 history, Exhibit No. 12, before it was done, he was
 6 paying \$13,000 a month in interest. So the difference
 7 is quite not that big. But so even if you were using
 8 that analysis, you'd still have to make sure you're
 9 comparing apples to apples and you have to add back into
 10 the damages the total amount of interest that was being
 11 paid while waiting for it to be finished.

12 So the one scenario was that it's finished on
 13 the March 31 date and, at that point, you start paying
 14 your construction -- I mean, your mortgage payments.
 15 Great. But if it's not, then you have to wait another
 16 14 months. There is a whole other 14 months of interest
 17 that you're paying and that you're going to pay anyway,
 18 I guess is what I'm saying. There's a difference
 19 between the fixed costs and variable costs and when
 20 you're trying to figure out what the loss or profits is
 21 because of one particular change, if your fixed costs
 22 are the same no matter what, you don't really include
 23 'em in the calculation because it's the same whether the
 24 person performed or not. And that's why she used the
 25 variable approach. It's not total income minus total

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1 revenues. It's total variable income -- I'm not sure
 2 there was income yet from people living there -- minus
 3 variable expenses, how much more did you have in
 4 expenses because people are living there. That's the
 5 calculation or the basis for that analysis.
 6 The alarm monitoring. Mr. Wilson did say that
 7 it was included. He said it on the stand and he said it
 8 in his initial decision memo which is one of the
 9 exhibits that you'll get. And it doesn't make any sense
 10 why the alarm system itself would be included, but not
 11 the system to monitor it. It doesn't do you very much
 12 good if the alarms are going off and it's not being
 13 monitored by anybody. You can't -- I mean, that would
 14 be another exclusion that would be quite remarkable. So
 15 that answers that question.
 16 Payments are being made by Family, so now
 17 there's a shift. It's not that the reason Dr. Lee isn't
 18 proximately caused by making the payments to Cascade is
 19 because now Family is the borrower because, as I pointed
 20 out, there's no evidence of that. And the only evidence
 21 is that Dr. Lee is the borrower. Now, it's that he's
 22 now proximately caused because it's Family that's
 23 actually making the payments back. So in my
 24 hypothetical, I said you borrowed money for the \$100,000
 25 worth of damage and you still had the damage.

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1 Now, instead of that, let's assume that the
 2 contractor does the work and you don't have the money,
 3 so they send the bill to your mother or your father or
 4 your sister and they make the payments. Does that mean
 5 you didn't suffer the damage? No, you suffered the
 6 damage and now you're just indebted to your father or
 7 your mother or your sister. So it's not a question of
 8 how the payment is made or who makes the payment, it is
 9 the fact that the payment was made and it came out of
 10 Dr. Lee's pocket rather than DWP's contract price.
 11 Very briefly, the other argument was made that
 12 this delay damage claim was caused by the filing of the
 13 lien; that there's no merit to it, it's simply an act of
 14 revenge. We never thought we had any delay damage
 15 claims. We still don't think we had a delay damage
 16 claims, but if that guy's going to put a lien on our
 17 property, then we're going to come after him for the
 18 delay damages. And I will let you assess Dr. Lee and
 19 decide whether you think that his motivation in this
 20 case is revenge, that he is a vengeful person and this
 21 is all just to get revenge.
 22 There's no evidence that the lien caused the
 23 claim for delay damages. The claim for delay damages
 24 was always there and we will never know whether it would
 25 have been filed if there had been no lien or not.

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1 That's a world that doesn't exist. The lien was filed,
 2 the lien was paid. These damages are the same whether
 3 that event happened or not.
 4 And I think that's all that I have. Thank you
 5 so much.
 6 THE COURT: Thank you very much.
 7 (End of closing.)
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1 CERTIFICATE
 2
 3
 4 State of Washington)
 5 : ss.
 6 County of Clark)
 7
 8 I, Teresa L. Rider, a Certified Court
 9 Reporter for Washington, hereby certify that pursuant to
 10 the Washington Administrative Code 308-14-135, I
 11 reported in stenotypy from a DVD all testimony adduced
 12 and other oral proceedings had in the foregoing matter;
 13 that thereafter my notes were reduced to typewriting
 14 under my direction; and the foregoing transcript, pages
 15 3 to 115, both inclusive, constitutes a full, true and
 16 correct record of such testimony adduced and oral
 17 proceedings had and of the whole thereof.
 18 Witness my hand at Vancouver, Washington,
 19 this 1st day of March 2019.
 20
 21
 22
 23
 24
 25

Teresa L. Rider, C.C.R.
 Certified Court Reporter No. 2119
 in and for the State of Washington
 residing at Vancouver, Washington

My CCR certification
 Expires 12/3/19

Appendix B: Exhibit 64

Financial Damages

REVISED as of February 6, 2019

The prior financial damages schedules have been revised to account for the following:

1. A letter dated May 4, 2015 from Jeff Tainer, Commercial Banking Officer at Bank of the Pacific, to Harold Lee re: the expected future terms of a term loan on the construction project. The letter notes that the future interest rate will be the 5-year FHLB rate plus 2.5% subject to a rate floor of 4.75%. I was previously unaware of this letter and the provisions of the floor rate. I therefore adjusted the analysis to exclude additional interest expense on the future fixed rate loan.
2. Recognition of the variability of property tax expense in the construction project.
3. Recognition of the delay in permitting the townhouses.
4. Recognition of the fixed expense portion of insurance, as the borrower had to pay flood insurance throughout the construction period even before the building was complete.

Leverich Park Apartments - Contract Signed: 7/15/15

Language: "Contractor shall commence construction by 8/1/15 or one week from loan closing. Substantial completion of the work shall be no later than 180 days after start date".

Construction Loan Close Date: 9/15/15; By 10/5/15, requests for first draw was made.

Projected Completion Date: 3/31/16

Actual Completion Date: 6/13/17

Assumptions:

- * Project would have been completed on 3/31/16
- * In the third full month of operations, the apartments would have reached stabilized capacity
- * Draws on loan would have followed pattern of actual draws

Damages Include	
Lost Profits	\$323,195 See Schedule 2
Calculation of Additional Interest on Construction loan	<u>\$113,717</u> See Schedule 6
Total Damages	\$436,912

Lost Rental Income **\$323,195**

Had the Apartments been complete on 3/31/16, it would have reached stabilized capacity three months later, in July 2016, which leaves 23 months of operations at stabilized capacity through May 2018.

However, in reality the apartments were completed in June 2017 and reached stabilized capacity in September 2017. Based on the foregoing, there was only 9 months of stabilized capacity through May 2018. Actual operating results are presented in Schedule 3.

The calculated lost profits must be adjusted for delays in permitting the townhouses and in reduced property taxes as explained in Schedules 4 and 5.

Lost Profits Calculation:

Rental Income	\$34,655	Average results for Sept 2017-May 2018
Less: Rental Rate Adjustment	(1,531)	Rental rates were 4.4% higher in 2017 vs. 2016
Less: Variable Operating Expenses	(7,696)	Average variable expenses for Sept 2017-May 2018
Monthly Lost Profits	25,428	
Multiplied by: # of months of stabilized occupancy	x 14	Number of months delayed
Equals: Lost Profits	\$355,985	
Less: Adjustment for Townhouse Permitting Delay	(20,043)	See Schedule 4
Less: Property Tax Savings	(12,747)	See Schedule 5
Equals: Adjusted Lost Profits	\$323,195	

Lee v. DWP General Contracting, Inc.

Schedule 3

Actual Operating Performance

	Certificate Complete 6/13/2017	Start-Up Period			Stabilized Occupancy									Average 9/2017 - 5/2018
		Jun-17	Jul-17	Aug-17	Sep-17	Oct-17	Nov-17	Dec-17	Jan-18	Feb-18	Mar-18	Apr-18	May-18	
Pet Fee		600	1,200	700	500	-	-	-	200	-	-	-	-	78
Allocations to Reserve											(500)	(500)	(500)	
Rent		1,414	15,621	28,485	33,738	34,049	32,885	34,135	34,385	33,770	34,147	33,462	34,325	33,877
Concessions		-	-	-	-	(1,031)	(2,000)	(1,025)	(1,250)	(1,550)	(1,250)	(1,250)	(1,250)	(1,178)
Pet Rent		-	14	48	70	80	80	90	100	100	100	100	100	91
Move In		3,000	4,500	600	300	-	-	300	-	-	-	300	-	100
Utility Charge Back		-	-	-	2,324	-	2,299	-	2,220	-	-	2,216	2,630	1,299
Garage/Carport/Parking Fee		-	90	297	400	400	600	600	600	600	600	600	600	556
Total Rental Income		5,014	21,425	30,130	37,332	33,497	33,864	34,100	36,255	32,920	33,097	34,928	35,905	34,655
Administrative		194	632	6,018	2,932	4,024	1,163	1,167	1,128	1,178	1,578	1,126	1,527	1,758
Operating/Maintenance		1,088	1,557	7,250	1,219	1,352	586	1,733	1,622	750	2,680	2,482	2,647	1,675
Repairs		-	-	-	-	-	-	-	-	-	357	-	-	40
Landscaping		-	-	4,087	1,081	-	1,302	1,467	539	542	-	5,925	433	1,254
Unit Turnover		-	206	-	280	185	202	35	-	313	49	1,216	78	262
Utilities		-	87	2,658	2,939	963	2,740	960	980	3,708	14	2,820	2,838	1,996
Property Insurance		-	-	2,617	2,822	2,070	2,070	655	655	1,311	-	-	1,428	1,223
Flood Insurance ^a		(511)	(511)	(511)	(511)	(511)	(511)	(511)	(511)	(511)	(511)	(511)	(511)	(511)
Variable Operating Expenses		770	1,971	22,119	10,761	8,083	7,552	5,506	4,413	7,290	4,166	13,057	8,439	7,696
- as a % of Total Rental Income		15.4%	9.2%	73.4%	28.8%	24.1%	22.3%	16.1%	12.2%	22.1%	12.6%	37.4%	23.5%	22.1%
Lost Profits		4,243	19,454	8,011	26,571	25,415	26,311	28,594	31,842	25,631	28,932	21,871	27,465	26,959

Notes:

a. Flood Insurance, which was \$12,274 for the 24 months in 2015 and 2016 or \$511 per month, is a fixed expense and therefore must be removed from monthly variable expenses which includes all property insurance expense.

Adjustment for Delay in Townhouse Permitting

The lost profit analysis assumes project start date of 10/1/15 and completion date of 3/31/16.

However, townhouses were not permitted until 5/31/16.

Therefore, if construction had started the day after, on 6/1/16, it would not have been complete until 12/1/16.

Consistent with actual results where townhouses were rented the first month after certificate of occupancy issued, units assumed to be available to rent and rented on 1/1/17.

The lost profits analysis reflects 14 months of lost profits for all units.

In reality, there were only 5 months of lost profits for the townhouses.

Lost profits are therefore adjusted for this 9 month difference.

Townhouse Monthly Rental Income	\$2,860 ^a
Less: Variable expenses	<u>633 ^b</u>
Townhouse Monthly Profits	2,227
 Multiply by: Number of Months	 × <u>9</u>
Adjustment for delay in Townhouse Permitting	\$20,043

Notes:

a. The townhouse units would have been rented for \$1,420/month for April-June 2016 and \$1,435/month during July-Dec 2016, or \$1,430 on average for each during the nine month period.

Source: Leverich Rent Loss Analysis from Jackson Group, NW

b. Variable expenses calculated at 22.1% of rental income (see Schedule 3)

Property Tax Savings

Parcel #	Address	Assessed Values				Property Taxes		
		2015	2016	2017	2018	2016	2017	2018
APN 12259000		\$44,500	\$44,500	\$202,293	\$202,293	\$535	\$2,309	\$2,410
APN 12442001	4600 NE Leverich Ct. A	16,300	16,300	23,522	23,522	198	272	284
APN 12448002	4705 NE Leverich Park Way	63,100	63,100	1,979,651	3,097,397	757	22,566	36,850
APN 100468000	4706 NE Leverich Parkway	37,000	37,000	37,000	37,000	445	426	444
Total		\$160,900	\$160,900	\$2,242,466	\$3,360,212	\$1,935	\$25,573	\$39,988
<i>Tax as a % of assessed value</i>						<i>1.2025%</i>	<i>1.1404%</i>	<i>1.1900%</i>

If construction on the property had been finished on time on 3/31/16, the property assessment on 1/1/17 would have reflected the completed project amount of \$3.4 million and property taxes would have been calculated on this amount.

In reality, the assessed value on 1/1/17 reflected a \$2.2 million value because of the delay in construction.

Based on the foregoing, property taxes saved were as follows:

	Actual	But For	Property Tax Savings
2017	\$25,573	\$38,320	\$12,747

There is no impact to the analysis after 2017 as in both scenarios, the project is complete prior to the 1/1/18 assessment and there is no differential in property taxes.

Financial Damages

Calculation of Additional Interest on Construction Loan **\$113,717**

Had the project been completed on 3/31/16, rather than 6/13/17, the borrower would have paid \$113,717 less in interest on the construction loan.

Actual Interest Paid **192,246**

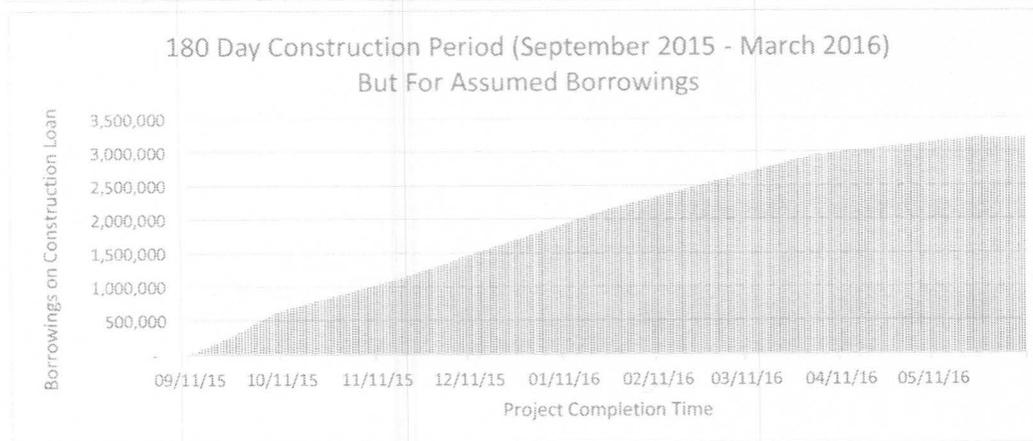
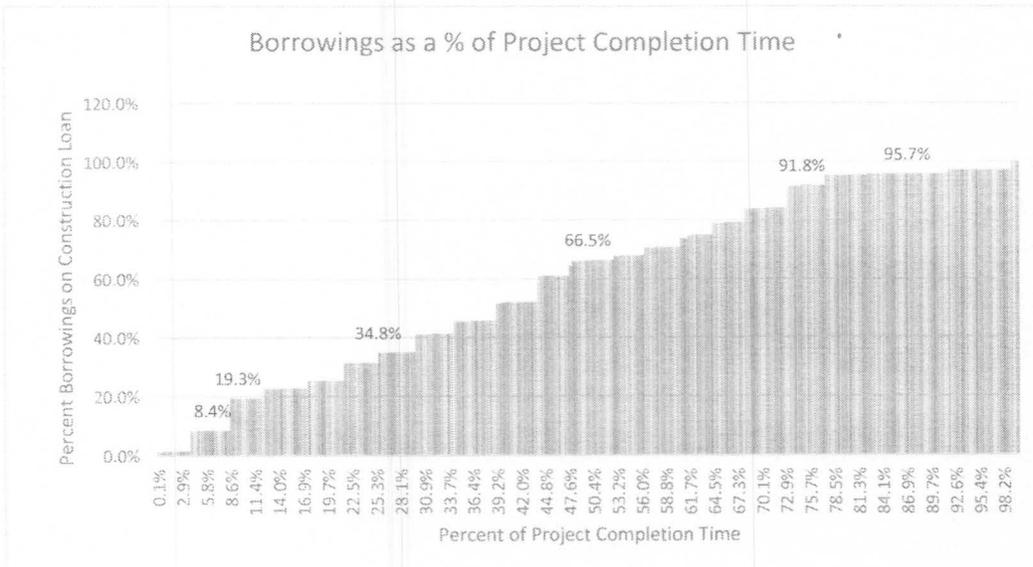
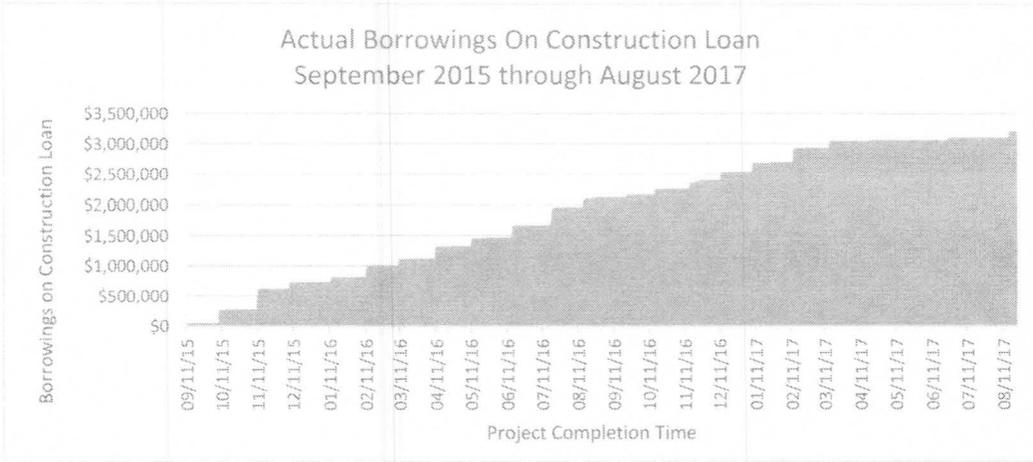
From the loan documents, the amount of construction interest was calculated at \$192,246.

"But for" Interest Expense **78,530**

To compute the amount of interest that the borrower should have paid, certain assumptions about borrowings needed to be made. In Schedule 7, the actual borrowings on the construction loan are presented. The pattern of borrowings shows what percent of the total \$3.2 million was borrowed as a percent of the total construction period. This trend of borrowings was applied to the 180 day construction period and interest expense was calculated based on that trend at the actual rates during that time period. Schedule 7 presents the patterns of borrowing.

Since it took the borrower 66 days from the time the certificate of occupancy was filed to the point where change in terms were agreed to, the assumption was that it would have taken the same amount of time had the project been finished on 3/31/16. Therefore, interest expense was calculated on the construction loan from 9/11/15 through 6/5/16. The total interest expense was equal to \$78,530 .

Pattern of Borrowings



CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Brief of**

Respondent on:

Gideon Caron
Caron, Colven, Robison & Shafton, PS
900 Washington Street, Suite 1000
Vancouver, WA 98660

by the following indicated method or methods:

- E-mail.**
- Facsimile communication device.**
- First-class mail, postage prepaid.**
- Hand-delivery.**
- Overnight courier, delivery prepaid.**

DATED this 15th day of August, 2019

s/ Steven E. Turner

Steven E. Turner, WSBA No. 33840
Attorney for Plaintiff/Respondent

STEVEN TURNER LAW PLLC

August 15, 2019 - 6:05 PM

Transmittal Information

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Appellate Court Case Number: 53290-5
Appellate Court Case Title: Harold Lee, Respondent v. DWP General Contracting, Inc., Appellant
Superior Court Case Number: 18-2-00142-4

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