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IN THE MATTER OF:

UNIVERSITY OF CENTRAL FLORIDA'S USE OF
EDUCATION AND GENERAL FUNDS

MARCOS MARCHENA

DATE: February 18, 2019
PLACE: House Office Building
402 South Monroe Street
Tallahassee, Florida 32301
TIME: 2:58 p.m. - 5:33 p.m.
REPORTED BY: JUDY CHIN
RPR, CRR, FPR

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REPRESENTING: HOUSE OF REPRESENTATIVES

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1 Q Where are you employed?

2 A I'm employed at Marchena and Graham. It is a
3 law firm in Orlando.

4 Q What capacity?

5 A One of the partners.

6 Q And you represent clients, I am assuming?

7 A Yes, ma'am.

8 Q What areas of law do you typically practice?

9 A Real estate, business and airport law. We
10 also do a few other things, but those are the primary
11 areas where I practice.

12 Q I did do a little bit of research on your
13 website. I noticed that your bio reflected that you
14 have experience in the negotiation of complex commercial
15 transactions?

16 A Yes. That's part of the business in real
17 estate.

18 Q So acting as bond counsel would also be in
19 that realm?

20 A Yes. Although I don't do much of that
21 personally. I have and can, but one of my partners
22 primarily does that work.

23 Q Does the work that you just described involve
24 any specialized knowledge, training or education?

25 A Well, obviously it involves law school, and

1 then beyond that it's just been a matter of developing
2 experience in the practice.

3 Q Have you represented any governmental agencies
4 or entities?

5 A Yes.

6 Q Can you give us an idea of what sort of --

7 A I represented Orange County School Board in
8 real estate transactions. My firm, though not I
9 directly, represented the Property Appraiser of Orange
10 County for some time. We no longer do that. I've
11 served for some time as counsel to the Greater Orlando
12 Aviation Authority. And for the last probably I want to
13 say eight years I've served as outside general counsel.

14 Q Okay. So in representing I guess the Greater
15 Orlando Aviation Authority, would you have been
16 responsible and are you responsible for being familiar
17 with various state and federal statutes, regulations?

18 A I am.

19 Q And how long have you served as the general
20 counsel?

21 A I guessed a little bit. Maybe eight or ten
22 years. I don't think it is ten. Maybe eight.

23 Q And do you deal with contractors and
24 competitive bidding and those sorts of things?

25 A Yes.

1 Q Are you familiar with any legal restrictions
2 on the various kinds of airport revenues?

3 A Absolutely.

4 Q And does the Aviation Authority receive
5 federal funding?

6 A They receive very limited airport improvement
7 funds from time to time.

8 But they also are authorized by the federal
9 government to collect through the airlines what's called
10 passenger facility fees -- PFC, passenger facility
11 charges, which are charging on every one of the tickets
12 that we buy. And those funds have to be used for
13 specific purposes as well.

14 Q Does the aviation authority receive funds
15 designated for capital projects or buildings?

16 A Yes.

17 They also can receive funds specifically from
18 Florida DOT for specific projects.

19 Q And does the Aviation Authority have any
20 revenues restricted to operational uses?

21 A No, ma'am. I don't believe so.

22 Q Can you estimate what the approximate dollar
23 amount is of the largest capital project that the
24 airport in which you have been involved?

25 A The airport right now is carrying out the

1 construction of an additional terminal facility that
2 when completed will cost somewhere in the neighborhood
3 of \$2.1 billion, \$2.2 billion.

4 Q On that project were you tasked with
5 determining the source of funding and the
6 appropriateness of it?

7 A No, ma'am.

8 Q Did someone else do that?

9 A Yes.

10 Q Who was that?

11 A The finance department and the Aviation
12 Authority also utilizes an outside firm to assist the
13 finance department in making sure that the uses of the
14 funds are appropriate.

15 Q And is that information then provided to you?

16 A Not --

17 I mean, I'm --

18 There is an attorney --

19 Let me back up.

20 I oversee or work with a number of law firms.
21 There is another law firm in Orlando who has a
22 construction specialist that deals more directly with
23 that.

24 I'm generally aware of that, but I don't get
25 involved too directly in the issue of sources of funds.

1 It's not my area of focus.

2 Q Did you previously serve as the vice chairman
3 of the UCF Foundation, the board?

4 A Yes. For one year.

5 Q When was that?

6 A For one or two years.

7 It was before I came onto the Board of
8 Trustees. So it might have been 2009, 2010.

9 Q Okay. And in that capacity did you have to
10 get familiar with either statutes or BOG regulations?

11 A No.

12 Q And so what year did you join the UCF Board?

13 A 2011.

14 Q And which committees have you served on?

15 A I have served on the Facilities and Finance
16 Committee. I believe I served on the Labor and
17 Compensation Committee. At one time I think I served
18 also on the Nominating Committee.

19 Q Which committees did you chair?

20 A The Finance and Facilities Committee.

21 Q All right.

22 A That was I think starting in '14 -- early '14.

23 Q And when did you stop being the chair for that
24 committee?

25 A When I became chairman of the board in July of

1 '15.

2 Q Okay. All right. Would it be fair to say
3 that your experience, one as an attorney, and two with
4 prior board experience, and your experience as an
5 attorney representing governmental entities or agencies
6 has put you on notice that there may be restrictions on
7 certain classes of funds?

8 A Yes.

9 Q Did Bill Merck offer you any training or
10 orientation when you came onto the board?

11 A Bill Merck did not.

12 There was a board member orientation that was
13 conducted by a couple of folks in the president's
14 department. I also came to Tallahassee at one point and
15 received a general orientation from staff at the Board
16 of Governors.

17 Q So let's first talk about the orientation that
18 you received from the president's department.

19 Do you recall what was covered?

20 A (Witness shakes head).

21 Q How about the orientation given by the BOG
22 staff?

23 A No. Very, very limited in terms of my memory.

24 MR. RUBOTTOM: Let me ask some follow-ups.

25

1 BY MR. RUBOTTOM

2 Q Do you recall either one of those people
3 offering training -- groups offering training going into
4 the BOG regulations about funding restrictions or
5 appropriations or any of that?

6 A No, sir.

7 Q Do you think that is something that we could
8 beef up in Florida?

9 A Absolutely. Absolutely.

10 Any time a real problem like this develops
11 there are two things to do, one is to determine why and
12 how it happened and correct it; and the other one is to
13 take the necessary steps to try to make sure that it
14 doesn't happen again.

15 MR. RUBOTTOM: Thank you very much.

16 BY MS. MITZ

17 Q I thought I read somewhere that you had asked
18 for additional training or maybe that you had asked for
19 training to be provided to the Board at some point.

20 A After I became chairman, as the budget
21 processes occurred from year to year, I began to realize
22 that we as a board didn't really understand the budget
23 process, at least not in the detail that we should -- or
24 that I thought that we should. So I set up a retreat --
25 a board retreat, that we usually would do those on half

1 days, and focus just on one or two subjects. And we had
2 one of those sessions.

3 Q Did that happen in 2017? Does that sound
4 about right?

5 A It may have been in -- I don't think it was
6 '16. I'm sure it was '17. Because by then I was in
7 full mode of updating the delegation of authority to the
8 president to try to make sure that the board's authority
9 was beefed up and more clear than it had been before I
10 became chairman.

11 Q Do you recall what was discussed during that
12 retreat?

13 A Frankly my recollection of that retreat comes
14 from just snippets of what I saw in the Brian Cave
15 report. I remember there was a PowerPoint. We spent a
16 lot of time on process. Towards the end there was
17 discussion of the fact that funding for capital projects
18 had been diminishing, and that's sort of what I recall.

19 BY MR. RUBOTTOM

20 Q That had been an ongoing discussion for the
21 previous -- I mean since the recession? We listened to
22 board meetings that were related to the building and
23 that came up repeatedly.

24 A Sure. That was a general statement from time
25 to time. But it was specifically mentioned with a

1 number of slides showing the decline in PECO funding
2 so-and-so forth at that particular budget retreat.

3 Q We got the January 9th meeting here from the
4 BOG folks. Similar --

5 A Yeah. Yeah. Yeah.

6 Q -- the funding --

7 BY MS. MITZ

8 Q Was E&G ever defined for you at any training,
9 retreat?

10 A No, ma'am.

11 Q And were carryforward funds ever defined or
12 explained to you?

13 A No, ma'am.

14 In fact, I can tell you pointblank that I, and
15 I suspect most of the other trustees understood
16 carryforwards to be all of the funds that the university
17 had unspent this year carried forward to the next, not
18 specifically to E&G. That might have been something
19 that the internal finance staff understood, but
20 certainly not we on the board.

21 Q Okay. So when you heard Bill Merck or Tracy
22 Clark refer to carryforward in relation to the Trevor
23 Colbourn Hall building, what did you understand that to
24 mean?

25 A I understood all of the funds of the

1 university being carried -- that were carried forward
2 from one year to the next.

3 Q And so did you also understand that that was
4 appropriate funding that you could use for a building?

5 A Absolutely.

6 We don't know each other very well, but if you
7 look at my background you'll see I approach every
8 service and a public board from an honesty and integrity
9 standpoint. And if -- I fully expect the staff that is
10 bringing a matter forward to fully inform the board or a
11 committee if there's any issue with the funding.

12 So I completely expected -- and I think our
13 board was reasonable in expecting Bill Merck and his
14 staff to put directly in front of us if there was --
15 even what they considered to be a gray area.

16 By the way, there are a number of other
17 examples where staff would bring to me issues that they
18 thought maybe could be done, not in terms of an E&G
19 issue, but other issues, that they thought perhaps it
20 could be done but there was a gray area. And without
21 hesitation each time I said, no, if there's a gray area
22 in there we are not going to do it, either go figure it
23 out, talk to the BOG staff, otherwise we are not going
24 to do it.

25 Q Would those sort of discussions happen in

1 board meetings or like in preparation for board
2 meetings?

3 A The example I'm thinking of in particular
4 happened in preparation for a board meeting. This was
5 -- the most recent example that I can remember was in
6 early 2018.

7 If a lease -- the staff explained to me that
8 if a lease is an operational lease it can be approved by
9 the Board of Trustees without Board of Governor's
10 approval.

11 But if a lease is a capital lease, then it has
12 to have Board of Trustees' approval and Board of
13 Governors' approval.

14 Q Okay.

15 A They were looking to do a building, and it was
16 questionable whether it was considered an operational
17 lease or a capital lease.

18 Staff went so far as to get an opinion from a
19 CPA that said it was an operational lease. I asked to
20 see the opinion. I read the opinion. And I said this
21 is close to the line and we are not going to do this, go
22 talk to the Board of Governors' staff. That's just the
23 most recent example that I can remember.

24 BY MR. RUBOTTOM

25 Q Do you know if they talked to the Board of

1 Governors' staff?

2 A They did.

3 Q Was this a Kinsley thing?

4 A This was Kinsley. But I think they also spoke
5 with Vikki Shirley, as general counsel.

6 Q That's one of the things that we keep
7 struggling with, it's who they go to for answers.

8 A They spoke with both.

9 Q Okay.

10 BY MS. MITZ

11 Q Did they come back with the --

12 A They came back to me. The Board of Governors'
13 staff says that they think that you're right, that this
14 is a capital lease -- or too close to a capital lease.

15 So it was going to come to the Board of
16 Trustees and then go to the Board of Governors, which
17 was the appropriate set of steps.

18 BY MR. RUBOTTOM

19 Q To follow that. I keep learning -- or
20 learning new accounting concepts that I tried to stay
21 away from --

22 A Me too.

23 Q What is the dividing line on that issue? Is
24 it the length of the lease? Is it whether the lease
25 itself is intended to finance the purchase of the

1 building? What kind of standard is there on that?

2 A The crux is the latter, whether the lease is
3 really just intended to finance the purchase of the
4 building.

5 And there are three criteria that they look
6 at, and if I remember correctly, the third criteria
7 addressed whether the total amount of the lease payments
8 reduced to net present value were at least 90 percent of
9 the amount of the cost of the building.

10 And basically when I looked at it, I looked at
11 it and said -- and saw that the discount rate to
12 determine net present value was somewhat arbitrary. And
13 I said, look, if you just shift that discount rate some
14 -- a little bit one way or another this could fall out
15 of that -- that's too close, I won't support that.

16 BY MR. RUBOTTOM

17 Q I had a really good question to follow up with
18 that and I can't remember what it was.

19 Let's move on. Thank you. That's very
20 helpful.

21 Is that an accounting standard or is there
22 some legal standard?

23 A It was an accounting standard that the CPA put
24 into the opinion.

25 Q Right. But I'm trying to get to whether it is

1 permissible or not. Is that an accounting concept or a
2 BOG regulation or --

3 A No. Strictly an accounting concept.

4 Well, let me back up.

5 I think the Board of Governors' regulation is
6 that if it is a capital lease it has to be approved by
7 them. Whether it is a capital lease is an accounting
8 determination.

9 BY MS. MITZ

10 Q So why did staff bring this to you to begin
11 with? Is it because you were the chairman of the board
12 at the time?

13 A Yes.

14 Q When you were chairing the Finance and
15 Facilities Committee, did Bill Merck meet with you
16 regularly to prepare for the meetings?

17 A Initially --

18 Well, actually, no, he did not.

19 I started asking tough questions in meetings.

20 Again, we don't know each other.

21 My focus was to make the board much more
22 responsible for the decisions of the university rather
23 than just approving staff's recommendations. So I would
24 ask tough questions. And I think Bill realized that
25 unless he briefed me in advance on some of the more

1 important issues that I was going to be calling them on
2 the carpet.

3 I constantly questioned, for example,
4 construction delivery methods. I know something about
5 construction. So I realized that the facility staff
6 liked to utilize construction management contracts.
7 Those are fine where you have a complex project where
8 construction management is important.

9 But simpler projects, there's a cost to the
10 university that can be avoided if you just design the
11 building, bid it out, and then have it constructed.
12 It's called design, bid, build.

13 So I would push back on the staff regarding
14 those issues. And over time Bill would call me and say,
15 hey, can we brief you on a couple of the items that are
16 going to be coming before the Finance Committee this
17 coming week?

18 I remember one time John Pittman called me and
19 said we are -- we have a BOT regulation that allows some
20 leases up to \$25,000, as long as they are operational
21 leases, and some of the staff thinks that's too
22 restrictive and we want to bring forward a regulation,
23 because even leasing a vehicle becomes too restricted if
24 a vehicle is \$45,000, so on and so forth, so we want to
25 bring a regulation forward that will change that to a

1 million dollars. I said, wow, wait a minute, John, this
2 is a big jump between 25 or 50 to a million, what is
3 staff looking to do between those numbers? He really
4 couldn't come up with any great examples. I said we are
5 not going to do that. If you want to bring forward a
6 change to the regulation to increase it to \$50,000 I'll
7 be happy to support it, but I'm not going to support a
8 regulation that takes it up to a million dollars; that
9 is taking the board's responsibility for oversight away,
10 and I'm simply not going to do that.

11 Q Do you remember when that happened? Do you
12 remember what year?

13 A I became --

14 I can't remember if I was chairman of the
15 board or chairman of the board of the Finance and
16 Facilities Committee. It might have been in '15 or so
17 when that occurred.

18 Q Okay. And do you recall how long you had been
19 chair of Finance and Facilities before Bill Merck got it
20 and knew that he had to start preparing you ahead of
21 time?

22 A Probably --

23 You know, since we only met once every month
24 and a half or so, I'd say probably it took him five or
25 six months to figure it out.

1 Q Okay. And did he prepare you once you became
2 chair of the full board or was it the same idea, like
3 only when issues were --

4 A Well, he would discuss matters with the
5 Finance and Facilities chairman, not with me, unless I
6 saw an issue when it was coming to the board and said,
7 wait a minute, I want to get briefed on this. And I
8 would get briefed -- I would ask for briefings on a
9 variety of subjects coming from various committees, from
10 different staff.

11 I generally made my request through the chief
12 of staff to the president. But with Bill a lot of times
13 I went directly to Bill Merck.

14 Q Okay.

15 A I would --

16 And, again, we don't know each other, but when
17 I became chairman of the board I talked to the prior two
18 board chairs and said give me a sense of the time
19 requirement that I'm going to have compared to a regular
20 board member. And they both said about three to one.
21 And over time I joked with them that they lied to me
22 because it was really five to seven times the amount of
23 time.

24 And if you looked at my background, I mean I
25 served on the Valencia Board, served on the Florida

1 Transportation Commission and chaired it. I put a lot
2 of time and a lot of effort into the public service that
3 I do.

4 Q Okay. Did Bill Merck ever tell you that using
5 certain funds on a capital project might result in an
6 audit hit or audit comments?

7 A Never.

8 And I told the investigator that I would be
9 happy to sign an affidavit or go under oath. And I
10 guess I'm under oath today.

11 MR. RUBOTTOM: You are today. Yes, sir.

12 THE WITNESS: He did not tell me that.

13 Had he even hinted at that I would have bulked
14 as I did any time they brought me anything that was
15 gray.

16 BY MR. RUBOTTOM

17 Q You just started talking a little bit about
18 the bidding in the facilities department.

19 A Yes.

20 Q Did you actually request -- we heard mention
21 that you may have requested an audit of the department
22 based on that.

23 A I did.

24 Q Do you remember what year that occurred?

25 A I think I finally pushed it through in late

1 2016.

2 I had started -- I had started talking with
3 Bill Merck and with John Hitt at different times about a
4 need for review -- I wasn't discussing back then an
5 operational audit -- but a need for review of
6 facilities. Since before I became chairman of the
7 Finance and Facilities Committee --

8 Q You were just a trustee?

9 A I was a trustee.

10 And I remember probably six or eight months
11 into being a trustee a -- I think it was a parking
12 garage project coming before the board or the committee,
13 I can't remember which, for review. And I asked what is
14 the construction delivery method for this? And Miss
15 Kernek said it's construction management. I said, gosh,
16 that's a simple project, I mean, it is regular walls,
17 there's not a whole lot of complexities, you know; what
18 is it that is so unusual about this project that
19 requires construction management? She went into a long
20 explanation which left me sort of, you know, thinking.

21 Fast forward. I don't know how many months
22 later but they brought forward construction of a
23 building that was basically the mirror image of another
24 building that they had just built before I came on the
25 board. I again asked what's the construction delivery

1 method. They again said construction management. Well,
2 we know what it costs, and how it just got built, why do
3 we need a construction management.

4 And I began to be concerned that facilities
5 didn't have the expertise in its staffing to be able to
6 use different construction delivery methods. And my
7 focus was try to maximize the use of funds for the
8 university.

9 So I started suggesting to Bill Merck, hey,
10 you ought to have somebody do a review of the Facilities
11 Department. And it sort of fell on deaf ears multiple
12 times until I eventually -- when I was board chair after
13 I was trying to really make sure that the board was
14 focused and properly receiving proper information, one
15 issue came up leading to a Finance and facilities
16 Committee regarding construction, and that's when I
17 actually said to the committee I suggest that an
18 operational audit be undertaken of the Facilities. And
19 that was -- it took forever, but it got done.

20 Q Do you recall was there a report done?

21 A There was indeed a report. It came back to
22 the committee. There were a number of action items that
23 were to be implemented. And I believe that the
24 consultant came back six months later and gave the
25 committee an updated report on how many of the action

1 items had been implemented and what other ones needed to
2 still be put in place.

3 Q And were your concerns I guess corroborated?
4 Did they determine that UCF's method was not the best
5 for UCF?

6 A Well, by then they had begun to do some
7 projects at my prodding with, you know, design bid
8 built. But they were still the smaller projects. I
9 thought they could be used for the bigger projects.
10 So they identified some improvements that
11 should be made.

12 Q Okay. And do you know if Facilities followed
13 up on those recommendations?

14 A My understanding that Facilities was doing
15 that.

16 I know at one point a number of people got
17 moved out and others got moved in because of a
18 determination that perhaps they needed higher quality,
19 more knowledgeable individuals as a result of those --
20 that report and those activities.

21 Q Okay. Have you brought forward any other
22 concerns about any other departments?

23 A Departments in general, no.

24 Again, because many of their departments --
25 for example, the academic departments don't really come

1 and report to the board other than general reports.

2 Q Right.

3 A But I certainly have identified over the years
4 matters that needed more attention, most of them in a
5 positive way.

6 For example, I worked really hard to get the
7 board to focus on and approve additional funding for the
8 development of more distance-learning courses and
9 adapted learning courses, which is sort of a mix-type
10 use.

11 And just by way of example I worked very hard
12 after I became chairman to secure the approvals of the
13 downtown campus because of the benefits that we saw were
14 going to occur to the students that would be moved to
15 that campus and the ability for more of those students
16 to be able to do internships because of the types of
17 businesses that would be located close to the Orlando
18 downtown campus. I worked hard in trying to get the
19 approvals for a hospital -- a teaching hospital to be
20 built adjacent to the medical school with no funds being
21 put up by the university and all funds being put up by a
22 private entity but with the university having an equity
23 interest -- not the university directly, but a DSO
24 having an equity interest in that entity and having a
25 much larger representation on the board of that entity

1 than the equity interest represented.

2 I don't know if you guys know, but I am the
3 first one in my family to have graduated from college,
4 so that focus of access to me has been very important
5 while at the same time trying to push up the quality of
6 the university.

7 So all of those have been items that I brought
8 forward at one time or another, either in private
9 meetings that then resulted in public discussions or in
10 public meetings that resulted in things being continued
11 to be moved forward.

12 Q Very good. Okay.

13 Have you brought forward any complaints about
14 any specific employee at any time?

15 A I have not ever brought a complaint about a
16 specific employee.

17 I did mention to Bill Merck at one time
18 because of the continued issues in Facilities that I did
19 not have great confidence in Lee Kernek's ability to
20 successfully manage that department.

21 Q Do you know if anything came from that?

22 A No.

23 MS. MITZ: Thank you.

24 BY MR. RUBOTTOM

25 Q A couple of follow-ups before I get into my

1 next line.

2 You talked about the delegation doctrine that
3 you worked on. I will say it is pretty obvious from the
4 public record that you took a lot of initiatives.

5 A Yes, sir.

6 Q Did President Hitt resist that work on the
7 delegation doctrine?

8 A Yes, sir.

9 Q What about --

10 A He didn't do it actively. It was more a
11 matter of slope plane.

12 No secret that, you know, the Board of
13 Trustees didn't exist before 2000. John Hitt had been
14 president from '92 or '93 to 2000 reporting directly to
15 the Board of Regents. You know, that relationship was
16 still developing, and here comes along this guy who
17 says, what do you mean you can approve, you know, all of
18 these contracts without board review and approval; wait
19 a minute, we need to change that.

20 And I wanted --

21 If you read that, it wasn't just about
22 limiting the president's authority with respect to
23 contracts --

24 I think there was a good policy behind the
25 changes that were made --

1 Q We are going to get into more details on that.
2 I was asking about Dr. Hitt's resistance.

3 A It was more passive resistance than active
4 resistance.

5 Q Was Rick Shell his chief of staff at that
6 time?

7 A He was.

8 Q Did you find him resisting --

9 A Rick was a very appropriate employee. If I
10 said, you know, I want this to come to the board on X
11 date, Dr. Shell would make sure that it happened. He
12 may have had an opinion as to what I was suggesting be
13 done. I never found him to be resisting anything that
14 the board was trying to do.

15 Q As you know Dr. Hitt refused to come down
16 here. We don't know -- it is a little harder by email
17 from Wisconsin.

18 A Yeah. Yeah.

19 Q But Mr. Shell is somebody that has been out of
20 the country.

21 Do you think that it would help us in our
22 investigation to interview Mr. Shell with respect to
23 some of those high-level decisions that are behind our
24 investigation?

25 A It's difficult for me to say.

1 I do know that Rick spent a lot of time
2 administering things rather than in any decision-making
3 capacity.

4 Q Was it your impression he was the kind of
5 chief of staff who was knowledgeable about everything
6 that the boss was doing and ready to execute when
7 decisions were made? Would he, for instance, sit in on
8 a meeting between Merck and Hitt or were --

9 A No. My understanding he did not sit in on
10 those meetings.

11 Q The president would come out and tell him what
12 was wanted?

13 A Go do this, go do that.

14 Q That's helpful. I appreciate that.

15 I am curious about the source of the
16 initiative that you did know. It sounds like you had
17 that sense when you came on the board and certainly
18 chairing the committee.

19 You were a BOG appointee, correct?

20 A Yes, sir.

21 Q Was that initiative somewhat motivated by the
22 BOG expressing expectations or desire that you be that
23 kind of trustee or is that your personal style?

24 A A little bit of both.

25 Q Um-hum.

1 A Based upon my normal service on boards, I like
2 to have, you know, clarity on responsibilities -- and
3 limitations or responsibilities.

4 But what finally said to me you got to do
5 this, Governor Scott had a university -- it wasn't a
6 retreat, it was some type of conference. I believe it
7 was in Orlando -- that was trying to focus the
8 universities on job creation, employment, so on and so
9 forth. And one of the Board of Governors' members gave
10 a presentation, Alan Levine --

11 Q Yes. I know him.

12 A -- gave a presentation. And in his
13 presentation he highlighted the fact that, hey, you
14 know, what authority is delegated to the president is
15 delegated by the Board of Trustees.

16 So I went back and I said to Scott Cole I need
17 to see the delegation of authority from the board. And
18 I got a copy of the delegation of authority from the
19 board and I started reading it. I found it confusing
20 and somewhat ambiguous. I began right away to work on
21 how is it that I improve this.

22 Now, there were some things that we could not
23 change because by statute the president was given the
24 responsibilities --

25 Q Exactly.

1 A -- but I spent a lot of time working on that.
2 I asked the Governance Committee to spend time working
3 on that. There was a lot of back and forth.

4 The Board of Governors also decided that they
5 wanted to take a look at the delegation of authority as
6 a whole. And I served on a committee of chairs with
7 other chairs as well as -- I think it was Ned Longback
8 who was vice chair of the board at the time, to try to
9 develop not a delegation of authority but sort of what
10 things ought to be covered in the delegation of
11 authority.

12 Two of the things that are in the delegation
13 of authority of UCF, that I don't know if it made it
14 into the others, but I certainly recommended to that
15 group it should be included was the fact that the
16 president should not be able to fire, demote or
17 adversely impact the compensation of either the general
18 counsel or the head of internal audit. Because I
19 consider those two positions to be reporting to the
20 board. They work with the president but they report to
21 the board.

22 Q Yes.

23 A So I was constantly trying to take steps to
24 implement the necessary safeguards to make sure that the
25 board's governance was appropriate.

1 Q Thank you.

2 That word governance is something that -- I
3 have not been part of the education world but I have
4 been here a long time and the word governance has been
5 often spoken of since Governor Bush's initiative. I
6 think Mr. Levine was one of his staffers or appointees
7 for various things as a younger man.

8 And one of the things that I think that we are
9 exploring in this investigation and that I know our
10 chairs are trying to get to the bottom of -- because
11 they don't have the time that Carine and I have to
12 devote to the details -- but maybe a lack of actual
13 governance that's going on between the legislature and
14 the presidents.

15 So we are going to get into some details that
16 you might not be aware, but I hope you see they are
17 consistent with the things you are talking about with
18 respect to the delegation doctrine.

19 I believe you said earlier you became chair of
20 Finance and Facilities in early '14.

21 A That's my understanding.

22 Q At that time what was your understanding of
23 the various forms or sources of funding for capital
24 projects, and throughout your chairmanship what was your
25 understanding?

1 A I didn't know that there was a restriction on
2 --

3 Q I am not getting into that.
4 What did you think the sources of capital
5 funding --

6 A I know that, for example, that there were
7 funds that came from the state, there was tuition, and
8 there were ancillary or auxiliary funds -- auxiliary
9 funds which come from transportation, health --

10 Q Right.

11 A -- other types of fees.

12 And I remember one of the times that a project
13 to be funded by university funds came before us I asked
14 Bill Merck what is this? And he stood in front of me --

15 By the way, that memory was prompted by
16 something that I read in the report of Brian Cave.

17 -- he stood in front of me with his fingers
18 about a half inch from his thumb and he said the
19 university takes a small management fee from all of the
20 ancillary funds or auxiliary funds. I think he said it
21 was 3 or 4 percent. And he said -- and he moved his
22 hand like this (indicating) and said when you're talking
23 a small slice of a large amount of money it throws off a
24 lot of funds every year.

25 So my understanding going forward was that

1 when we were doing university-funded projects that's
2 where those funds generally were coming from, that
3 coupled with investment returns and interest.

4 Q Those are all valuable answers and relevant to
5 our investigation.

6 But just more basic, and I know there has been
7 workshops that do this, we usually hear in answer to
8 that question, PECO is for capital outlay -- takes
9 capital outlay. We know donations for those purposes
10 can be used that way. We know about the CITF capital,
11 whatever, trust fund, student-related fee that I guess
12 we bond, or whatever. And we know about bonding of
13 various revenue bonds. That usually is the scope, the
14 zone when you see that.

15 Are you aware that the master plan --

16 I guess you should know the board approves a
17 new master plan every five years.

18 A Yes.

19 Q Are you aware the master plan that it
20 addresses sources of funding for capital projects?

21 A Yes. I know it is addressed in the master
22 plan.

23 Q Are you aware that the master plan doesn't
24 address those kind of university funds or carryforward
25 funds or anything other than this kind of category of

1 classic capital funding?

2 A No, I didn't know that that was not included
3 in the master plan.

4 Q Weren't you on the Valencia State College
5 Board?

6 A I was.

7 Q Were you --

8 In that role did you hear about -- I can't
9 remember what they call it, FundOne, FundSeven, but a
10 similar operational capital duality?

11 A No. And I don't know if that was the same --
12 done the same way back then.

13 But I was on the Valencia board from '99 to
14 2004, so it is ancient history.

15 Q Well, that's fine. I think --

16 I hope it is obvious that the House -- the
17 leadership in the House is interested in all these
18 issues throughout the system. And this has been an
19 investigation -- a committee to focus in on one
20 institution but the lessons are applicable everywhere.

21 A Absolutely.

22 I guarantee you that as a result of what UCF
23 has gone through all, not only UCF, but all of our
24 sister institutions are going through the process of
25 making sure that everyone, including trustees, are much

1 more informed and educated about the details of the
2 funding.

3 Q I know that's one of the Speaker's goals for
4 sure. We have done our own survey of this committee of
5 all institutions.

6 You would be surprised how many list
7 university, internal, carryforward, or whatever. So we
8 are trying to get more information on those.

9 You don't recall that.

10 But would it surprise you that no form of
11 carryforward is mentioned in that planning document as a
12 funding source?

13 A It would not surprise me.

14 Q Okay. Are you conscious or have you ever been
15 aware of the legal requirement that every capital
16 project has to be consistent with the master plan?

17 A I'm familiar with the requirement that in
18 order for a project to be constructed it must appear on
19 the master plan.

20 Q Okay. Well, you might not recall, but it
21 really is a land-use planning document.

22 A Um-hum.

23 Q It substitutes for the regular land-use
24 planning laws. You might have a similar carve-out at
25 the airport. I don't know.

1 But it plays a very broad role. Funding is
2 not a key role in that. But it is mentioned in the
3 statute and mentioned in the regulation.

4 So we went to look at the planning documents
5 to try to understand -- and I think we were finding out
6 things that the auditor mentioned independently which I
7 think are relevant to where we are going. We will be
8 talking about a couple of those things.

9 You mentioned the investment earnings. You
10 were chair of the Finance and Facilities Committee. It
11 is my understanding that the committee reviews the
12 investment policy and reviews changes.

13 A Um-hum.

14 Q And I know that Trustee Seay has been doing
15 some work on the investment portfolio a little bit.

16 During that time did you have any sense of
17 what Department's money was in that? Because when
18 people talk about investment earnings, the regulation is
19 very clear that earnings on E&G has to be E&G use.

20 So were you -- did you feel like the committee
21 understood whose money was in there and how those
22 allegations were changing from month to month?

23 A Our focus was on making sure that the
24 investments were within whatever policies needed to be
25 in, because we know that the state doesn't allow funds

1 to be invested in certain items, so we bring in the
2 financial advisor as well as the finance people each
3 quarter to show us how those were performing and to make
4 sure that the allocations were appropriate and
5 maximizing the returns. We were not focused on which
6 funds happened to be -- were these state funds versus
7 not state funds, because it was not an item that we were
8 attuned to, if you will.

9 Q You might recall in the September 20th board
10 meeting I think that the staff presented you all a
11 refunding plan that went into more detail than had been
12 mentioned previous to that. There was actually
13 documents produced during that timeframe. I can't
14 remember if they were put before you. It showed kind of
15 allocations of investment gains over a certain period of
16 time where they were trying to show that the gains
17 assigned to Trevor Colbourn Hall had not come from E&G
18 or any restricted funds.

19 What's frustrating about that list is it shows
20 about half of the total investment portfolio as being
21 other funds. I think I've seen a 15,000 row spreadsheet
22 that supposedly sets out the various ownership shares in
23 this fund.

24 Did you have concerns about whose money that
25 was, whether or not it was E&G or federal? Did you have

1 concerns about whose earnings were being swept in to try
2 to cover this deficiency?

3 A My direction to the staff at the time was
4 let's identify appropriate funds to be able to replenish
5 the restricted funds that were spent.

6 And obviously we had put an interim CFO and VP
7 of administration to work in those positions, so I know
8 that they were peddling as hard as they could at the
9 time.

10 Q Right.

11 A But I did not -- I'm not a CPA, so I didn't
12 have the education or the knowhow to be able to look at
13 those --

14 Q Right.

15 A -- thousands of accounts other than to look at
16 them and say does this meet the legal requirements.

17 Q Right.

18 A And our direction to them at the time, you
19 know, was let's make -- let's move quickly; whatever is
20 wrong, we need to fix.

21 Q Right.

22 A And, in fact, there were one or two board
23 members that said, wait a minute, don't move so fast. I
24 said, no, no, no, we want to move fast if it's wrong, it
25 can't be wrong, we need to fix it.

1 And then subsequently that same staff figured
2 out, hey, there were some funds that were not spent that
3 were budgeted that also need to be correct.

4 So first they took care of the spent, then
5 they went back to address the budgeted.

6 Q Back to the investment --

7 I am not trying to go into the decisions of
8 the refunding. I'm just trying to ask you with
9 \$600 million invested, significant earnings through most
10 times, I think the fourth quarter this year was pretty
11 bad, this last year, but does that raise for you -- do
12 you think that's another area of funds that maybe the
13 board hasn't engaged in the budgeting process of how we
14 are using this, what are the proper allocations of those
15 earnings and how should those earnings be used?

16 A So two things: The board was very focused on
17 the investment returns from those and were they being
18 successful and were there any managers that were not
19 performing that needed to be pulled out.

20 Q I assume also the security of the
21 investments --

22 A And the security of the investment.

23 Q -- the classification, the different pools?

24 A Until the issue came that up raised to our
25 level that, hey, some of these funds can't be used for

1 some of these other items. We were not focused on that
2 side of the allocation.

3 I'm confident that now the Finance and
4 Facilities Committee will be focused on that allocation.

5 Q Yeah.

6 A In fact, Trustee Seay came forward with a
7 report showing how the investments were liquidated in
8 order to make sure that the replenishing of the funds
9 was actually performed in cash and not just in
10 allocation.

11 Following up -- and obviously I am not on the
12 board any more, but I'm sure the board will continue to
13 follow up on auditing to make sure that the interest
14 from E&G was properly utilized.

15 Q Yes, sir. I think she told me that she has a
16 major project on that.

17 But what we just --

18 Number one, it appears that there's only been
19 a couple of liquidations over the ten or nine years that
20 those funds have been invested that way.

21 One of them was for the global building which
22 seems to have been a pet of Mr. Merck. He called us six
23 or eight weeks ago and had this wide-ranging
24 conversation. First we let him talk. But we were -- he
25 was talking about this project and how he funded it with

1 auxiliary funds.

2 I noticed -- we were looking through some
3 board meetings getting ready for this deposition -- and
4 I don't remember which it was, and I'm not trying to
5 cross-examine you on that, but I want to ask you do you
6 recall where he liquidated some investment earnings and
7 used that cash for the global project? Because it was
8 fully disclosed in the board meeting as auxiliary
9 investment earnings. I just didn't know if you recalled
10 that.

11 A I don't have independent recollection of that
12 one particular meeting.

13 Q Okay. Okay. But it may be -- would you agree
14 it may be an area that the board needs to be more
15 engaged in the budgeting of those, not just the
16 supervision, but the budgeting of the earnings?

17 A Yes.

18 I think the board was doing a very good job of
19 tracking investments and making sure that the returns to
20 the university were good and that the downside risk to
21 the university was protected.

22 I agree that the board and boards need to do a
23 better job now that I understand the difference in the
24 allocation of those investments in how those investments
25 will be spent.

1 Q One of the things that I think we learned as a
2 general principle without understanding the details is
3 that the finance department kept that money invested but
4 they kept re-allocating shares to make cash available
5 for different people or, you know, one department, or
6 subdepartment would buyout, you know, basically the --
7 trading shares internally to make cash available for the
8 needs. So it almost looks like it is all reserve funds
9 or it is sufficient. But the accounting of those funds
10 just appear to be a nightmare.

11 Do you think that's something that the board
12 ought to be getting clarity on and maybe trying to raise
13 those to a different level to where there's transparency
14 on whose money is being shifted around?

15 A I take that as the same question that you
16 asked me right before.

17 Q Okay.

18 A I think the board needs to have information,
19 clarity and take action on how those funds will be
20 spent.

21 If I may, I think it's important to
22 distinguish between the board seeing the allocation of
23 those funds and the budgeting of those funds and the
24 details of doing those transfers and liquidations and so
25 on and so forth. That is clearly a staff function.

1 Q I understand.

2 A And what we haven't gotten into and we may or
3 we may not is there are a set of functions that are
4 clearly within the responsibility of the staff, within
5 the governance of board and staff that you will not be
6 able to have the board go deeply enough into those
7 management activities simply because, number one, it is
8 not their expertise; and number two, it is the
9 allocation of time would basically require that it
10 become their full-time job.

11 Q Right.

12 A So what's important to have is people with
13 honesty and integrity in those positions.

14 And what upset me the most throughout this
15 whole matter has been that Bill Merck chose not to be
16 truthful with the committee or the board.

17 And in every other arena I worked in, either
18 as a board member or as an attorney it is reasonable for
19 the board to be able to rely on the honesty and
20 truthfulness and completeness of the information that
21 staff brings before it as opposed to obscure and talking
22 half truths and, you know, reference auxiliary funds
23 when they are using something else or talk about
24 carryforwards when he knows very well that to most board
25 members that just meant money going from one year to the

1 next.

2 Q Right.

3 A I had multiple community people come to me
4 while the investigation was going on -- after Bill Merck
5 started saying, gosh, the building was in horrible shape
6 and life safety, and it needed to be done, I had a
7 number of people come to me and say, you know, look, the
8 building needed to be replaced, it was in terrible
9 shape, you know, you guys have got to go easy on Merck
10 and the others.

11 I was not persuaded. To a person I said,
12 absolutely not, staff has an obligation to be truthful
13 with the board and not to keep any information from the
14 board that would impact their decision.

15 In fact, the report says that after this issue
16 came up Bill Merck told multiple people I didn't tell
17 the board because I knew they would have said no.

18 That has been my nature in this board and any
19 other board in which I have served.

20 Q I understand all that. Thank you.

21 But can you --

22 What you described to somebody that maybe
23 shouldn't also have had the delegation he had to manage
24 \$600 million with or without consultants and properly
25 vetted fund managers, and we are talking 30 or 40 people

1 like that. The school board is in that business. It
2 makes me pause.

3 I don't know if you read the investment policy
4 statute, but it really -- there's all these
5 restrictions. Any other thing?

6 So you have this individual recommending an
7 investment policy to board members who may or may not
8 have somebody with Mr. Garvey's experience sitting in
9 the room ask.

10 Can you see how that -- from a governance,
11 just protecting the public funds that those can get kind
12 of scary from this 100-foot level?

13 A Some clarity certainly is warranted in
14 connection with what the statute allows.

15 Q Thank you for being extensive with that. It
16 slowed us down a little bit. I appreciate it, because I
17 think there is a lot of information there that's helpful
18 to the committee.

19 Did you see the budgets put before the board
20 as coming from the CFO?

21 A Yes, sir.

22 Q Okay. Did you consider from the CFO because
23 that was an officer presenting to the committee and the
24 board --

25 A Yes, sir.

1 We seldom had John Hitt address the budget to
2 the committee or the board. John was generally in the
3 room but it was clear that his budget and finance
4 individual was Bill Merck and he was the one that
5 responded to all the questions.

6 Q Did you consider the president and/or his
7 office as having approval authority on the budgets that
8 were presented to the board for the board's approval?

9 A Yes, sir.

10 Q Okay. In your conversation --

11 These premeeting conversations with Merck from
12 time to time, did you ever ask about the president's
13 views on any budget issue that you were interested in?

14 A I did. And of course the answer each time was
15 that it would not be in the budget if the president was
16 not supportive of it.

17 Q But you had an opportunity to verify that with
18 the president?

19 Sometimes in the meetings where --

20 A Or I had conversations with him from time to
21 time.

22 Q Okay.

23 A Yes.

24 Q What about particular new construction
25 projects, did you ever ask Merck about the president's

1 commitment to those items?

2 A Each time that a new significant project would
3 come up the discussion started with, you know, talked to
4 Dr. Hitt, we think this is a good project, and here is
5 why.

6 Q It would be accurate to say that in those
7 board discussions the CFO was representing the entire
8 administration?

9 A Yes.

10 Q Does that work similarly with the Aviation
11 Authority? Do you attend their meetings?

12 A I attend all their meetings.

13 The difference is that the CEO at the Aviation
14 Authority is a CPA, so he is very cautious of what the
15 CFO brings forward.

16 Q Do you know whether or not whether Merck is a
17 CPA?

18 A I don't.

19 Q I'll let Carine --

20 We have some questions about board meetings.

21 What time is it right now?

22 MS. MITZ: 4:08.

23 MR. RUBOTTOM: Let's keep going and see what
24 we can get done in the next hour.

25 If somebody needs a break, let us know.

1 BY MS. MITZ

2 Q Since August or September of last year, have
3 you listened to any of the audio recordings of the
4 pertinent meetings?

5 A No.

6 Q I would like to take an opportunity to just
7 kind of restate some of the things that Mr. Merck said
8 in these meetings about funding in general to get an
9 idea if you recall it and maybe what you thought about
10 it when you heard the comments.

11 On April 22, 2015 at the Finance and
12 Facilities meeting there was a discussion about
13 combining the Colbourn Hall renovation along with the
14 new construction of Trevor Colbourn Hall. And Mr. Merck
15 told the committee at that time because the state had
16 stopped PECO funding and the CITF fees were not enough
17 that they had to get, quote, creative. And he also told
18 the board that they, meaning the Finance Department had
19 put together funding that, quote, wasn't typical by any
20 stretch. And then he also said that being a large
21 university they had large-cash balances to use and they
22 would use those until the state could help.

23 Do you recall him saying those things?

24 A If it's on the tape, I don't question it.

25 Q Okay.

1 A I don't have an independent recollection of
2 those comments.

3 Q The that meeting, in April of '15, you would
4 have been the chair, right?

5 A That's correct.

6 Q The recording doesn't reflect that you or any
7 trustee had any questions after he made those comments.

8 Did those things sound right to you, we don't
9 have the monies, we are going to have to get creative,
10 we put together funding that wasn't typical? Were those
11 things that would have been red flags?

12 A Those were things that we had heard previously
13 with respect to other projects and were an indication
14 that we are continuing to use university funds,
15 auxiliaries, the management fee of auxiliaries, the
16 investment generation, the interest.

17 Each trustee that serves on that committee, if
18 you talk to them, will tell you what I'm going to tell
19 you. They absolutely expected that if there was any
20 issue with the funding, regardless of how creative that
21 Bill Merck would have -- had an obligation to tell us
22 there's a potential problem.

23 The other reason why creative, if that's a
24 word that he used, was not -- would not have been a red
25 flag or unusual to us, long before I was a trustee the

1 university built the Convocation Center, which is an
2 arena that's used for graduation, basketball, with
3 residential and so on and so forth. I don't know the
4 details, but my understanding is it was a very unusual
5 financing that was done within the law and within the
6 regulations.

7 Q Okay.

8 A So we were used to seeing Bill Merck find
9 creative ways to get things done within the rules. It
10 was not a red flag saying, hey, this guy is potentially
11 doing something wrong.

12 Q Thank you for that explanation.

13 Okay. So I think it is also at that
14 meeting -- later on in the meeting when I think you
15 asked the question where the additional money was coming
16 from, and Mr. Merck had Tracy Clark replied. She said
17 carryforward funds are what we are using for Colbourn
18 Hall and Trevor Colbourn Hall. Mr. Merck asked her to
19 elaborate. She told the board they had accumulated
20 carryforward funds over the last several years and
21 that's what they were using.

22 Had you ever heard that before, that capital
23 project was being funded with carryforward funds?

24 A Yes.

25 Q Do you recall which project --

1 A No.

2 Q -- or what year?

3 A I don't. I just heard --

4 Again, my general understanding was that
5 carryforwards were all funds being carried forward,
6 unless Merck or Miss Clark had said, and by the way, we
7 are concerned about our ability to use those funds.
8 There was no reason for the committee to believe there
9 was anything amiss.

10 Q Okay.

11 BY MR. RUBOTTOM

12 Q Let me try to characterize your answer and you
13 tell me if I'm right or not.

14 So when you heard them say carryforward in
15 these various meetings, you had the broad general view
16 of the term, and you presumed or assumed that they were
17 meaning carryforward funds of the proper flavor or
18 color, the proper source and not -- you assumed they
19 couldn't possibly mean an improper source?

20 A I'm used to working with staff that is
21 meticulous about the right sources of funds.

22 And until this issue came up I had no reason
23 to believe that Bill Merck would choose to use
24 restricted funds and hide it from the committee.

25 I don't have any independent recollection, but

1 there was one meeting, I don't remember if it was that
2 one in April or the one in '14 where they came to the
3 committee again talking about a change in the project,
4 you know, the project needing to get bigger in some
5 fashion. And I asked the question to Bill Merck, do we
6 have the funding to do that?

7 Well, I think the investigator asked me when I
8 was being interviewed, well, did you think to ask do we
9 have the right funding to do that? I said, no.

10 Do we have the funding to do that by
11 implication means the right funding. I am not asking
12 him do we have the wrong funding to do that; right?

13 Q Yeah. Yeah. Okay.

14 BY MS. MITZ

15 Q I think you happen to have your packet open to
16 the same page.

17 This is what I would like you to take a look
18 at. This is from the Brian Cave exhibits. It is an
19 excerpt of a transcript of May 22nd, 2014.

20 If you could just take a look at that and get
21 familiar with it. I just have two questions for you.

22 A Hang on.

23 Yes.

24 Q Okay. When he says, quote, We "talked this
25 morning about no -- hugh -- money coming from the state

1 right now for construction so we are basically having to
2 take this out of our hide as well," what discussion was
3 he referring to that morning?

4 A I don't remember if that item was briefly
5 mentioned at the Facilities Committee meeting.

6 Because the way the board meetings are held,
7 the morning are committee meetings, and a number of
8 committees meet one after another one. And then at
9 1:00 o'clock the board meeting begins. So there was
10 probably a brief discussion regarding that.

11 Q Okay. So the lines following Mr. Merck's
12 comments --

13 Can I just take a look at this real quick?

14 A Yes.

15 Q So you say --

16 So Merck is talking, and then you say, "But
17 they have assured us we have identified the funding to
18 be able to accomplish that, right? So I would move to
19 the board -- to approve moving forward with the Colbourn
20 Hall renovation."

21 A This is one of the situations where a lot of
22 times you think reading something is not going to prompt
23 a witness. In this case it actually brought a memory to
24 mind.

25 Q Okay.

1 A I did not -- I didn't see this I don't believe
2 when I was interviewed by the investigator. And when I
3 read it in the report it clicked.

4 What this transcript doesn't show is the board
5 is sitting in a U, and there is a table in front of the
6 board. And for these items Bill Merck and potentially
7 Tracy Clark and/or Lee Kernek are sitting at that table,
8 and what this doesn't show is that when I say, "But they
9 have assured us we have identified the funding to be
10 able to accomplish that, right," then I looked at Bill
11 Merck, and he nodded in the affirmative --

12 Q I --

13 A -- at that time in order to confirm to the
14 board that, yes, we have the right funding.

15 BY MR. RUBOTTOM

16 Q Thank you. Because that helps on the audio.
17 It looks like you were -- you were representing on his
18 behalf. But you are telling us that you were
19 challenging him and he gave an affirmative nod.

20 A That's correct.

21 Q He was acknowledging to you that the funding
22 was proper?

23 A That's correct.

24 MR. RUBOTTOM: Are we going to put this in?

25 MS. MITZ: I would like to mark that.

1 MR. RUBOTTOM: We don't want all of this
2 paper. We want this one. I think that's a pretty
3 critical matter.

4 (Exhibit No. 1 marked for
5 identification.)

6 BY MR. RUBOTTOM

7 Q These are details that the Brian Cave
8 investigation was unable to draw out.

9 A Of course.

10 Q That's one reason we keep digging. We know
11 there were some questions not asked. We appreciate your
12 patience.

13 I would like to show you the 2014, '15
14 university operating budget that went before the full
15 board on May 22, 2015. If you can take a look at that,
16 particularly the attachment.

17 MR. RUBOTTOM: Can I go ahead --

18 MS. MITZ: Yes.

19 MR. RUBOTTOM: I think I meant to.

20 MS. MITZ: Yeah.

21 BY MR. RUBOTTOM

22 Q Okay. So would you acquaint yourself with
23 Attachment D.

24 A Okay.

25 Q Can you say for the record what the heading --

1 A It says, "University Central Florida Summary
2 of 2013-14 Expenditures as of March 31, 2014, 75 percent
3 of the year."

4 Q And, again, we are exploring and trying to
5 develop a record on some of the budget practices and
6 maybe some deficiencies that are in the category that
7 you and I talked about earlier.

8 Does the first line reference E&G for that?

9 A Yes, sir.

10 Q Okay. What does the footnote one --

11 A "2013, '14 operating budget includes
12 carryforward funds for which spending authority was
13 approved in a previous year."

14 Q Okay. Would this tell you -- an outside
15 observer coming in and looking at the details there is a
16 possibility that carryforward means E&G in this
17 budgetary context?

18 A If I were looking back at a record then I can
19 see how it would do that. I had no reason to think
20 about at the time whether carryforwards in particular
21 meant E&G or all funds.

22 Q I understand.

23 A It wasn't pertinent to any decision we were
24 making at the time.

25 Q I understand. I don't know if you recall me

1 --

2 When you first walked up to my conversation
3 with Dr. Whittaker on the 9th I was addressing this very
4 question --

5 A Okay.

6 Q Because the reason why it comes up a lot more
7 in staff is that the BOG regulation does not require the
8 board to budget the carryforward funds. And so these
9 have been accumulating funds in all the universities
10 that the administrations are spending. They only have
11 to report the expenditures.

12 The way I read that footnote, they are telling
13 you that this expenditure for the first three-quarters
14 includes some of that kind of money. They mention that
15 the board has previously approved that money in a
16 previous operating budget.

17 We can talk about that in a minute, the kind
18 of approval.

19 But staff is working with this carryforward
20 number every day, all day. And the same thing is going
21 on at the BOG --

22 A Um-hum.

23 Q -- and so would it surprise you to know that
24 UCF staff both in the audit department and in the
25 accounting department, accounting and finance people

1 that there are staff of either -- that carryforward
2 always means E&G or the broader view you described, I
3 think Mr. Taft described that view, would it surprise
4 you to know even the audit staff there are people that
5 just automatically carryforward means E&G --

6 A It wouldn't surprise me to learn there are
7 different opinions.

8 Q I think --

9 THE COURT REPORTER: Excuse me.

10 MR. RUBOTTOM: He is supposed to be
11 testifying, not me.

12 Okay. Thank you.

13 BY MR. RUBOTTOM

14 Q So I want to put this budget in as Exhibit 2.
15 (Exhibit No. 2 marked for
16 identification.)

17 BY MR. RUBOTTOM

18 Q Yeah. I do want you to read the last
19 sentence.

20 This is my understanding of kind of the
21 substance of your motion you approved.

22 The last sentence of that paragraph on the
23 front page --

24 A "This request includes approval to amend the
25 budget if the actual allocation differs."

1 Q That seems like a pretty broad delegation --

2 A It is. And if you go to 2017 --

3 Is it 2017?

4 There was a budget that came before us. I
5 don't remember if it was CIP or if it was the general
6 budget where as we were modifying the delegation of
7 authority I caught this language --

8 Q We will look at it in a minute. I think you
9 will see broader language there.

10 A -- where I say, wait a minute, wait a minute,
11 this delegation of authority doesn't mean anything if
12 after we approve a budget the president can change it
13 however he wants.

14 So we started modifying those motions to limit
15 the president's ability to move money around within the
16 specific parameters of what had been approved.

17 Now, again, I don't remember if it was the
18 general project, the general budget or capital
19 improvement budget, but we started doing that --

20 Q Okay.

21 A -- again, at my urging.

22 Q Okay. What I want to show you now is -- this
23 is the same day, actually. This is the committee
24 meeting. Apparently they put different documents in
25 front of you for the committee and the full board on the

1 budget.

2 I want you to look at --

3 Yeah. Just starting inside on page two. Does
4 that page include an explanation of terms?

5 MS. MITZ: No --

6 BY MR. RUBOTTOM

7 Q I'm sorry. The second-to-last page is where
8 it is. I thought it was right here. Go on past the
9 charts.

10 Right. Yes, sir.

11 Does that include an explanation of terms?

12 A It does.

13 Q Okay.

14 A It has about six or seven terms.

15 Q Okay. Do you see the definition of education,
16 in general?

17 A Yes, sir.

18 Q And you see the definition of auxiliary?

19 A May I read the two?

20 Q Yes, sir. Please.

21 A Yes, sir.

22 Q Okay. So do you recall that those were a part
23 of the committee package each year at budget time?

24 A If they were in the packet, I'm sure they
25 were. I don't have independent recollection.

1 Q Does that appear to you to be a good working
2 definition of those terms for the work that you had to
3 do as the board when you are looking at the budget of
4 auxiliary enterprises and E&G?

5 A I would find the definitions to be more
6 complete if they included the restrictions of the use of
7 the funds.

8 Q I think that's a common refrain that we hear.
9 We heard that from staff. We heard that from Mr. Merck.
10 You as an attorney -- I think if you think
11 back to the discussions from the BOG level about
12 delegations you understand the universities only have
13 the authority that the constitution and laws give them.

14 A That's right.

15 Q Unlike the state legislature, universities are
16 delegates of state powers, and those delegations are the
17 constitution and the statutes. And so it's the same
18 issue raised with the regulation.

19 Have you read Regulation 9.007 since it came
20 up --

21 A Um-hum.

22 Q -- and it has much more detail. People are
23 saying what's prohibited. It looks to me like it is one
24 of those *inclusio unius, exclusio alterius*, in the idea
25 that you are only delegated to do what you are

1 authorized to do.

2 Do you think that maybe people have been
3 poorly trained to think there needs to be a prohibition
4 to restrict them?

5 A I don't know that it is poor training to be
6 clearer in the limitations of authority.

7 I think that just as I tried to be much
8 clearer in the delegation of authority to the president,
9 the clearer the authorities are the better and less
10 problems will arise.

11 Q If it was the legislature's view that the
12 delegations are limited by the words on the page and
13 there is no other authority given, how do you think that
14 interpretation could be best communicated throughout the
15 system -- with the BOG be equipped to write guidance
16 documents to say these questions have come up in the
17 past and it has always been the legal interpretation
18 those things are prohibited?

19 I know the IRS does letter rulings --

20 A Absolutely.

21 Q Do you think there could be that kind of
22 guidance?

23 A Yes.

24 Q But you do understand if you have people out
25 being creative and they think there is no prohibition, I

1 can do it, then it is difficult for the legislature to
2 see --

3 A It is --

4 Q -- specific delegation?

5 THE COURT REPORTER: I'm sorry --

6 THE WITNESS: There is always room for
7 interpretation. The more examples that are given,
8 the more parameters that are created, the more
9 training that is done, the clearer all this will
10 become.

11 BY MR. RUBOTTOM

12 Q This is just one more, and I think this issue
13 may have come up in the past.

14 At the June 27th meeting of the committee,
15 2016, it is our understanding that Mr. Merck told the
16 committee when the state isn't providing PECO funds that
17 the staff tries to figure out other ways to make it
18 happen, including internal sources.

19 Do you remember times where they used internal
20 sources as that catchall term?

21 A Yes. I don't remember that particular
22 meeting, but I remember that term being used.

23 Q What did you assume that term referred to when
24 it was used?

25 A Back to Merck's finger and thumb, the

1 management fee on auxiliary, the investment returns, the
2 interest, et cetera.

3 Q Okay. Thank you very much. Okay.

4 As a trustee you had been delegated from the
5 BOG the responsibility of financial management. Do you
6 think you asked enough questions concerning funding for
7 capital projects at UCF?

8 A I wish you would have had an opportunity to
9 sit in on some of the meetings that I attended over the
10 years, that I participated in over the years.

11 I have prided myself in being a very engaged
12 board member. I have asked staff more questions than
13 almost any other trustee on this board and perhaps many,
14 many other boards. I'm not a CPA. I'm not a financial
15 individual. I ask questions about do we have the
16 funding to do this.

17 Bob Garvey asked a lot of questions about
18 budgeting and investing and proper funding to the point
19 where each trustee brings to the table their own set of
20 strengths --

21 Q Exactly.

22 A -- and weaknesses, of course.

23 And I think I have tried very hard to exercise
24 due diligence over the matters that have come before the
25 board.

1 And I want to be clear here, if Bill Merck had
2 not chosen to keep information from the board this would
3 not have occurred.

4 There were no questions that we could ask
5 reasonably short of cross examining him, which I don't
6 think is expected by a board member, that would have
7 gotten us the information that we needed to be able to
8 stop this particular action.

9 Q Thank you.

10 Now, let's go and look at --

11 Did you --

12 We talked about the delegations. It is your
13 testimony that you began to address those. You
14 addressed it in one of the budget meetings. You
15 addressed it generally on your \$2 million limit, or
16 whatever it was that you did in 2017 --

17 A Yes, sir. Yes, sir.

18 Q Did you consider the audit -- the discussion
19 and the audit finding about the capital outlay projects?
20 Have you given any thought to that since the information
21 was put out?

22 A You are talking about the audit finding in
23 this particular --

24 Q The Trevor Colbourn Hall audit fund, one of
25 the things they mentioned is capital outlay budgets.

1 Have you given any thought to that about the
2 discussion by the auditor?

3 A I have given some follow-up to just about each
4 one of the items.

5 I do have the auditor's report here if we need
6 to refer to that.

7 Q Okay. Well, if you recall the discussion. I
8 just want to reference it generally.

9 Have you --

10 Had the board done anything since that audit
11 finding to begin to clarify the capital outlay budget
12 concerns that were raised?

13 A The items that we have taken with respect to
14 going forward -- action on going forward include a much
15 more detailed agenda item as opposed to these summary
16 fashion agenda items --

17 Q Yes, sir.

18 A -- that includes a section that has to
19 identify the fiscal impact of the approval to the
20 university, the source of funds for the university, and
21 any restrictions that exist on the use of those funds.

22 Instead of second action, instead of waiting
23 until a project has been finished to then have it
24 audited either by internal audit or by the state auditor
25 general, the board implemented a policy that immediately

1 after the board approves a project and before the
2 project begins, internal audit has to verify that the
3 source of funds that was presented to the board is the
4 source of funds that's going to be utilized, number one;
5 and number two that it is an appropriate source of
6 funds.

7 Q Okay.

8 A They also have the ability to check, do spot
9 checks during the project, and of course they continue
10 to have after-the-fact audit.

11 We separated responsibilities between the CFO
12 and the VP of administration to make sure that --

13 I think part of the problem was the fact that
14 facilities reported directly to the CFO. So you had
15 within the same department or the same silo the people
16 who wanted the money for the project and the people who
17 were allocating the money for the project. So we
18 separated those responsibilities.

19 So I don't know that that answers directly
20 your question.

21 Q We can get back to it.

22 We will look at a couple capital outlay
23 budgets. I wanted to get on the same factual page.

24 I forgot to mark Exhibit 3, May 22, university
25 operating budget information that was presented to the

1 committee on that day.

2 (Exhibit No. 3 marked for
3 identification.)

4 BY MR. RUBOTTOM

5 Q So this is going to be our Exhibit 4. This is
6 a capital outlay budget for the '16, '17 fiscal year.

7 I don't know if you have gone back and
8 reviewed any of these.

9 (Exhibit No. 4 marked for
10 identification.)

11 BY MR. RUBOTTOM

12 Q Do you recognize that? That was approved by
13 the full board I think on May 31st, 2016.

14 A I don't recognize it in particular, but I'm
15 sure it was presented to us.

16 Q On the front page, does that have the
17 president's signature on it?

18 A No.

19 MS. MITZ: Authorization at the bottom.

20 MR. RUBOTTOM: Where?

21 MS. MITZ: The background information
22 paragraph, that last sentence gives the president
23 the authority.

24 MR. RUBOTTOM: Yeah. This is the delegation
25 issue. Yeah. That might be the one that you

1 recall. Yeah. That last sentence.

2 BY MR. RUBOTTOM

3 Q Does that look like unbridled authority to
4 you?

5 A It does.

6 Q Let's look --

7 A Remember, I said it wasn't until '17, once we
8 had adopted modified delegation of authority that I
9 caught this and said, wait a minute --

10 Q I understand.

11 A -- if we are now giving the president limited
12 authority in the general delegation, then these
13 provisions have to be changed.

14 Q And I appreciate that you caught that and
15 talked about it.

16 Actually, I don't think this document was ever
17 referred to by anybody, any project. We can't find
18 anybody that worked there and understood what this
19 document was for.

20 A Okay.

21 Q I think it was just one of those they do it
22 every year. We found it interesting early on. I was
23 encouraged to see the auditor had the same concern.

24 For instance, here is Colbourn Hall
25 renovation, and Trevor Colbourn Hall, both projects on

1 there separately. This is the '16, '17 fiscal year.

2 The funded -- shows zero funded for those
3 projects for that fiscal year, does it not?

4 A Yes, sir.

5 Q And that was actually the year when, in fact,
6 you all adopted this probably the same day you voted to
7 demolish Colbourn Hall.

8 But it is probably reasonable to have a zero
9 there.

10 But this is the fiscal year that the Colbourn
11 Hall construction was begun. So the capital budget
12 adopted by the board had zero funds --

13 A Well, but here in the front, there is a
14 sentence that says, "The attached university central
15 Florida 2016, 2017 capital outlay budget lists the
16 projects approved during the legislative session and by
17 the Governor."

18 Q Um-hum.

19 A So I am assuming that that wasn't something
20 that was --

21 Q Well, that was the staff understanding of the
22 document. We will look at a statute in a second that
23 will help you understand why we have been concerned
24 about this all fall. I think you have picked up on some
25 of the problems.

1 But, again, the initial response of the audit
2 didn't really address it. I think Dr. Whittaker filed a
3 supplemental response since then that goes a little
4 deeper.

5 A Um-hum.

6 Q But that's '16, '17. I will mark that as
7 Exhibit 4.

8 We will run through a couple more of these
9 just to --

10 So Exhibit 5 is the '17, '18. So this is May
11 of 2017. It continued to have that broad delegation.

12 (Exhibit No. 5 marked for
13 identification.)

14 THE WITNESS: Did you look at the minutes?

15 MS. MITZ: We don't have them.

16 MR. RUBOTTOM: We will look at them.

17 THE WITNESS: If you would.

18 Again, I can't recall if it was the general
19 budget or these.

20 BY MR. RUBOTTOM

21 Q Right. Okay.

22 A But we -- I began to raise an issue regarding
23 those.

24 Q Okay. But, again, I think Colbourn renovation
25 is gone here now. But --

1 Yeah. They got the demolition and the main
2 project as one.

3 But, again, the building was already underway
4 --

5 It was getting ready to have ground broken.
6 Certainly most of the construction was going to happen
7 in that fiscal year.

8 And, again, the board funded budget was zero
9 for that. And it doesn't show any other sources of
10 funds for that project.

11 I know there is some lists where a building
12 might show up on sources as a wish list on a capital
13 improvement plan.

14 This is the budget for the year for capital
15 projects and there is basically no money and no source
16 from which money was actually being taken.

17 BY MS. MITZ

18 Q Do you recall how staff was presenting this to
19 you and why they would -- like how they justified all
20 zeros?

21 A I'm sorry. I don't. I don't have a memory of
22 that particular document.

23 BY MR. RUBOTTOM

24 Q I think --

25 If you will read the first sentence, which

1 adds a little more flavor to what you read on the other
2 one a while ago. This does cite the statute. Must
3 adopt annual capital outlay projects that designates
4 proposed expenditures by project.

5 A Yeah.

6 Q Clearly the university was not including those
7 University funded projects --

8 A That second sentence that I read from the
9 Exhibit 4 is also in here.

10 Q Yes, sir.

11 A Anticipated to be approved during the
12 legislative session.

13 Q Sure. That's the staff's gloss on the
14 statute.

15 I start with the statute --

16 A Yeah.

17 Q And it was interesting to listen to the staff
18 describe their understanding of their document, because
19 I think that second sentence is a fair representation.
20 So that's Exhibit 5.

21 This is the next year, when the building was
22 almost done, but it was still under work -- underway.
23 I will mark it as 6.

24 (Exhibit No. 6 marked for
25 identification.)

1 BY MR. RUBOTTOM

2 Q I think you changed the delegation statement
3 here. But it still has the same content in the budget
4 itself.

5 A Where is that --

6 Q Delegation language is here.

7 A Okay.

8 Q Okay.

9 A Yeah.

10 Q Okay.

11 A Yes.

12 Q That would limit activities.

13 But, again, we have Trevor Colbourn with zero
14 funded, when the building was probably three-fourths
15 finished. There was more to be spent in July and August
16 before that --

17 I don't know if they finished paying all the
18 bills or not.

19 But in this current fiscal year there were
20 expenditures for that and there's no budget funded. I
21 doubt you got a \$2 million -- I doubt they brought you a
22 \$2 million expenditure brought back to the board while
23 the building was being completed this year.

24 So, again, it is a curiosity. I think the
25 auditor hit on it. I can understand why the board

1 didn't see it.

2 But you would agree that's a deficient use of
3 a --

4 Well, let's look at the statute real quick.

5 Here is the statute. I will mark it as 7.

6 (Exhibit No. 7 marked for
7 identification.)

8 BY MR. RUBOTTOM

9 Q It is a very simple statute.

10 A Is this a higher education statute? At the
11 end it talks about each district school board.

12 Q I know it does.

13 For background it will be interesting to know
14 that when the legislature recodified the statutes they
15 brought a few statutes in to all of the boards because
16 there is this unified view of the role of these boards.

17 I don't know about this one, but some of them
18 may have been school district laws. But then when the
19 legislature applied similar laws to all the colleges and
20 universities, this is the kind of statute that may have
21 resulted. It is a clear statute. It is clear that the
22 statute applies to all of the boards.

23 And you would agree if this applies to
24 university boards that this capital outlay budget has
25 been deficient because it doesn't show all sources of

1 funds and all projects?

2 A If it applies, yes, sir.

3 Q But what made sense to me, and I don't want to
4 know if it made sense to you, and that's Exhibit 7, the
5 statute, this looks like the legislature expects a
6 capital budget every year for all capital outlay
7 expenditures.

8 We don't even know yet if other universities
9 have been doing it. It is one of our early discoveries.

10 You would agree that's something that we can
11 work on reforming --

12 A Absolutely.

13 Q -- and getting it up to speed?

14 A Yes, sir.

15 Q Thank you. Would it surprise you to know that
16 Mr. Merck took no interest in this document whatsoever?
17 I mean, he expressed -- when he called us two months
18 ago, he expressed complete -- "no, staff did that." And
19 when we talked to staff, they said, "no, he didn't care
20 about that."

21 A I don't want to express an opinion on what
22 Mr. Merck thought or didn't think.

23 Q Thank you.

24 Now, to the delegation policy that you adopted
25 October 27, 2017.

1 Was that your initiative?

2 A Yes, sir.

3 Q Who did you work with on that before you
4 presented it to the board?

5 A I did a pretty good amount of work on it
6 myself. Scott Cole the general counsel did a pretty
7 good amount of work on it. I think I considered two or
8 three different variations.

9 And when I was comfortable, presented it -- I
10 asked Scott to, you know, send it to Dr. Hitt and have
11 him look at it. I think Dr. Hitt sat on it for a while.

12 And then Scott came back to me and said Dr.
13 Hitt has some concerns. We went back and forth a little
14 bit.

15 I had a breakfast meeting with Dr. Hitt at one
16 time where we discussed it head on. And his comment to
17 me was, Marcos, you are taking my legs out from under me
18 with that delegation. I said, I don't know, that's just
19 good policy, we need to have clarity between what the
20 board will review and approve and what the president
21 will have authority to do on his or her own.

22 He ended up being concerned about a particular
23 matter that perhaps had to do with -- I think perhaps
24 the salary in one of the athletic arenas. And
25 afterwards I told him I would look at that.

1 I then told Scott Cole to go ahead and send it
2 to the chairman of the Governance Committee as an item
3 that I recommended for their review and discussion. I
4 certainly wasn't saying, you know, I approve it and
5 therefore it shall be.

6 And there was at least one meeting at which
7 this was extensively discussed. People had an
8 opportunity to think about it, consider it.

9 It came back at another meeting to that same
10 committee. The committee ended up recommending
11 approval, and then it eventually went to the board.

12 Q I didn't get this clarification earlier. This
13 Governance Committee is a governance committee of the
14 Board of Trustees?

15 A Yes.

16 Q There is so much governing going on it is hard
17 to keep it straight.

18 A Yes. I'm trying to remember the full name of
19 the committee, Nominating and Governance --

20 Q Okay. Thank you.

21 I think we discussed why that was a good idea.

22 Four days after the board approved that
23 approximately \$20 million was transferred from E&G to
24 the construction. I don't know if you have seen the
25 dates on those various transfers.

1 A No.

2 Q But \$20 million for three downtown related
3 capital outlay projects.

4 Did you realize at the time that this
5 delegation would allow the president to allocate and
6 transfer E&G funds into capital accounts?

7 A We did not --

8 As you can see, not having fully understood
9 the restrictions on the various accounts, we did not
10 address individual fund accounts within the
11 delegation --

12 Q Right.

13 A -- so I would not have known that.

14 Q Okay. But as long as such transactions were
15 legal, it wasn't your intention to tie up the moving of
16 funds? It was just that contracts to spend them --

17 A That's correct.

18 Q Not the preparatory shifting of funds?

19 A Yes.

20 Q Thank you. That helps a lot.

21 Do you think that they were in a rush to do
22 that with your initiative on delegation or do you think
23 that's just happenstance? That was the last big
24 transfer. I think there was something in five figures
25 later on.

1 A I don't know. I don't want to hazard a guess.

2 MR. RUBOTTOM: Yeah. Okay.

3 I'll let Carine go for the next session.

4 Where are we?

5 MS. MITZ: Almost 5:00 o'clock.

6 MR. RUBOTTOM: We are getting closer to the
7 end. We might be able to wrap up in 30 minutes.

8 (Discussion off the record.)

9 BY MS. MITZ

10 Q On September 18th of last year President
11 Whittaker was informed about the \$20 million transfer
12 that we just talked about that just occurred a few days
13 after the delegation of authority was adopted as well as
14 another \$12 million in prior transfers all of which had
15 been transferred or programmed to be used but hadn't yet
16 been spent. When did President Whittaker tell you about
17 that?

18 A When you say September of '18 --

19 Q Yes.

20 A I don't recall exactly when he would have
21 informed me about that.

22 Q Do you recall that he did inform you about
23 that?

24 A Which \$20 million --

25 MR. RUBOTTOM: The total extra 32 that wasn't

1 spent.

2 THE WITNESS: The budgeted but unspent?

3 BY MS. MITZ

4 Q Correct.

5 A I don't recall when I was informed about that.

6 I recall that when the Trevor Colbourn Hall
7 issue came up, and I realized this is not just a
8 mistake, this is an improper allocation, use of these
9 funds, Bill Merck was gone so we put these two new
10 people on there. My first direction was we need to find
11 out if we've spent any other funds in a similar fashion.

12 So in addition to the -- the staff went to
13 work. This new staff went to work trying to figure out
14 what had happened.

15 So they identified I think it was another
16 13-plus million dollars. I said get it out, we are not
17 hiding anything, let's go to the board so the board will
18 direct staff to transfer these funds back into E&G.

19 It wasn't until sometime after that that
20 someone came to me, I don't remember if it was Whittaker
21 or who it was, and said we've also identified some funds
22 that were budgeted but unspent, to which I said
23 obviously we are not going to spend those and we are
24 going to put those back.

25 So I did not view those having to be put back

1 as big of an issue because the funds were there, they
2 were not getting spent, nobody for a second was going to
3 think about spending those funds. So I was still much
4 more focused on making sure anything spent had been
5 replaced.

6 Q Okay. Do you recall whether President
7 Whittaker advised you at any time before November of
8 2018 that 85-million-plus had been transferred from E&G
9 to construction under President Hitt and presumably with
10 CFO Merck's participation?

11 A Before November?

12 Q Correct.

13 A I don't recall.

14 Q Do you have any thoughts or can you say
15 whether Mr. Merck deceived just the board or if he
16 deceived some of the employees who were working for him?

17 A All I can tell you is what I've read in the
18 Brian Cave report.

19 I steered very clear of discussing this issue
20 other than with Dr. Whittaker to take the corrective
21 actions that needed to be taken, and Scott Cole to make
22 sure that the corrective actions were being taken while
23 the investigation was going on. So beyond what the
24 investigation says I don't know if he deceived other
25 employees.

1 Q Okay. That's fair.

2 I think you were asked about this email during
3 your Brian Cave investigation. But I would like to ask
4 about it, too.

5 A Okay.

6 Q This is an email --

7 If you look towards the back, the original
8 email I think was an email from Robert Taft notifying
9 the trustees of the audit findings.

10 A Sure.

11 Q I mean to cut to the chase. It seemed like
12 your response initially was more focused on the finding
13 regarding President Hitt's contractor compensation, and
14 maybe another finding. You didn't see in this email
15 chain to address Trevor Colbourn Hall.

16 Can you explain why that didn't seem to be an
17 issue at the time of your emails?

18 A I was absolutely convinced that there was a
19 simple mistake, explanation for that that would be
20 easily explained.

21 And it wasn't until I got a phone call from
22 either -- I think it was President Whittaker who said we
23 are looking into this issue, we think this may be a real
24 significant issue. I said beyond just an error? He
25 said, yes. It wasn't until then. So I completely

1 anticipated that that was a simple mistake.

2 Q Okay. Do you recall how long after you
3 received the email about the audit findings that you had
4 that phone call with President Whittaker, or discussion?

5 A It was within a day or two.

6 Q Okay.

7 A It was within a day or two.

8 This was Friday, according to this email. I
9 would have expected that by Monday Dr. Whittaker was
10 calling me.

11 BY MR. RUBOTTOM

12 Q Do you know if his call to you was after the
13 call with Marcia Krizer? That seems to be with staff it
14 became a crisis --

15 A I don't recall if it was --

16 Q -- if it was before or after --

17 A I don't recall before or after.

18 Q Did you have --

19 MR. RUBOTTOM: I'm sorry. We are going to
20 mark that as Exhibit 8.

21 (Exhibit No. 8 marked for
22 identification.)

23 BY MS. MITZ

24 Q Did you have any participation at the decision
25 to hire the outside firm to conduct the investigation

1 into Trevor Colbourn Hall?

2 A Only at the board meeting.

3 Q Okay.

4 A I met the Brian Cave attorney about an hour
5 before the board meeting for the first time.

6 I had asked Scott Cole to try to find a law
7 firm, number one, that had not done business with UCF
8 before; number two, that had experience in these arenas
9 and was highly regarded.

10 And when I was walking in for the meeting that
11 morning, I walked in, met this gentleman. I said, so
12 you know since I chaired the Finance and Facilities
13 Committee for a number of meetings I'm going to ask
14 Trustee Seay, who is the chair of the Audit Committee, I
15 am going to ask the board to designate her to interface
16 with you. That was the first time I met him.

17 Q Okay. I was surprised to read when we got the
18 Brian Cave report, I think on the first or second page,
19 that part of their charge to look into other projects
20 had been removed.

21 Did you have any involvement in that decision?

22 A When I was at the second -- the second time
23 that they interviewed me they said as we were finishing,
24 they said we have been talking with Trustee Seay about
25 focusing on Trevor Colbourn Hall, because otherwise

1 there is no way we are going to get this done in a
2 reasonable period of time, we want to make sure that's
3 okay. And I said, that's okay.

4 I was wanting to get to an understanding of
5 what happened in Trevor Colbourn Hall as quickly as we
6 could. Frankly, this was the second time they
7 interviewed me -- I think was early December, because it
8 was towards the end of their interviews. And for me
9 that was already a really long time to not know what had
10 happened. So I was trying to get to the end as quickly
11 as possible.

12 Q All right. So I would like to talk to you a
13 little bit about what happened on the December 12th
14 meeting. I believe it is in that meeting when the
15 carryforward summary that was due to the BOG was
16 discussed and there was \$40 million allocated to the
17 Constellation Scholarship and \$20 million to deferred
18 maintenance.

19 How did that come about? I understand from
20 deposing witnesses that you and President Whittaker and
21 maybe another member of administration talked about
22 that. Initially the cost for the scholarship was lower,
23 and then you decided from 20 million to 25 million to
24 40 million. Does that sound correct?

25 A I didn't have a conversation with anyone other

1 than Dr. Whittaker about that.

2 He was having conversations with -- he
3 indicated to me that Provost Elizabeth Dooley was
4 looking at what would be a good use for those funds.

5 And in her department they had identified the
6 use for scholarships because of what it would do to
7 first-year retention, four-year graduation rate,
8 reduction of debt by graduating students. And they had
9 initially suggested or proposed \$25 million.

10 I had a regular standing meeting with Dr.
11 Whittaker when he -- where he discussed that with me.
12 And I said is that figure enough to have a real impact?
13 And he said let me go back and take a look at it.

14 He called me sometime later and said we have
15 decided that a better allocation would be \$40 million.

16 Q Okay. And so that was a decision that you
17 guys arrived at and then you presented it to the board
18 as part of the package that was going to the BOG, but
19 not necessarily for approval of the allocation to the
20 scholarship fund.

21 A Yes.

22 Q Okay. Have you since learned that that is
23 something that requires board approval?

24 A Yes.

25 Q Okay.

1 A And the idea at the time was that Dr. Dooley
2 in a committee of staff, faculty, and students that she
3 had put together was going to better define how those
4 \$40 million were going to be allocated towards the type
5 of students, whether it was going to be one-year
6 scholarships, four-year scholarships for some students,
7 et cetera, and they were going to bring that plan back
8 to the board for approval.

9 Q Okay.

10 BY MR. RUBOTTOM

11 Q Let me follow-up. Where would your delegation
12 doctrine have kicked in in that whole development
13 process?

14 A Not until the expenditure would have been --
15 would have kicked in. Right?

16 Because an allocation, but is not being spent
17 --

18 I'm just going off the top of my head. I'm
19 not suggesting that the delegation is perfect. But
20 that's where I think it would have kicked in.

21 Q Well, let me tell you -- let me ask you about
22 something.

23 To my knowledge this is the first time that
24 boards have been asked to vote on these fund composition
25 reports.

1 These are reports that administration has been
2 filing with the BOG every August and sometimes they do
3 these updates.

4 A And they presented them to the board.

5 Q And those had very funny labels and tags.

6 A Okay.

7 Q That \$40 million was represented on that form
8 as an expenditure. Now, I think I understand the logic
9 behind that.

10 But does that surprise you that that kind of
11 an idea would be presented as an expenditure?

12 A I would have thought it would have been
13 presented as a commitment --

14 Q Yes, sir.

15 A -- not an expenditure.

16 Q One would --

17 We have been surveying all the universities on
18 how they characterize these things. That's just one of
19 the issues that has come up.

20 A Certainly.

21 Q But you chaired that board meeting, and that
22 document was in front of you, and it said -- I think it
23 said expenditures and encumbrances. There is clearly no
24 contract out there.

25 But it just didn't occur to you that that's an

1 odd representation of that particular number?

2 A No. Because of the procedure that we
3 discussed --

4 I was more focused on the procedure that would
5 be utilized to identify how the funds would be spent.

6 Q I understand you may not have ever reviewed a
7 document like that before.

8 But to your knowledge who put together that
9 document, would that have been Kathy Mitchell or Tracy
10 Clark? Do you have an idea?

11 A I would have expected that it would have been
12 perhaps led by Kathy Mitchell and with the assistance of
13 Tracy Clark, but also with input from other departments.
14 That covered a lot of different areas, if I recall
15 correctly.

16 Q Right. But understand this is a concern that
17 we are asking -- the BOG created this form. They do
18 give them some guidance.

19 Apparently transfers from E&G including these
20 capital transfers -- capital project transfers are
21 reported in the E&G budget reporting as expenditures
22 that are transfers and distributions even though they
23 are still sitting in the university accounts for months.

24 Does that seem a little unusual to you?

25 A I guess it depends on what is a real -- what

1 has been contracted for versus what has been allocated
2 as a commitment for a future expenditure.

3 Q Right. Okay. Well, thank you.

4 I don't need you to verify all of my
5 observations, but I do think it would be interesting to
6 you.

7 Okay. I'm sorry.

8 BY MS. MITZ

9 Q So the January 24th, '19 board meeting, you
10 mentioned -- and I think it was approved -- a form that
11 you would have staff use from that point on.

12 You mentioned that it had come from your prior
13 experience I think with another board.

14 A Yeah.

15 Q Which board are we talking about now?

16 A That is the -- I mentioned it earlier today.
17 The agenda memorandum format.

18 Q Which board did you bring that from?

19 A It's used at the airport.

20 Q Does it require a lot more specificity than
21 UCF had?

22 A Absolutely.

23 Q When was the first time that you saw that form
24 at the Aviation Authority? Years ago?

25 A Years ago.

1 Q Okay. You talked a lot today about how you
2 felt that you were not getting enough information and
3 you were pushing for more especially with Merck.

4 Why didn't you make that suggestion with using
5 that form a year, two, three years earlier?

6 A Different types of institutions, different
7 approaches to doing things.

8 You know, I generally don't come onto a board
9 and turn things upside down. Staff has a method of
10 doing things and you begin to analyze is this the right
11 way to do it, is there a better way to do it, and it
12 takes time to develop that understanding. So no other
13 reason than that.

14 Q Okay. So also at that meeting Trustee Walsh
15 moved to extend the Brian Cave investigation. I guess
16 he did that previously and you guys addressed it at that
17 meeting.

18 Can you summarize your position and why you
19 ultimately voted against the motion to extend the
20 investigation?

21 A Certainly. I understood the motion to mean
22 extending the legal investigation into what had happened
23 at Trevor Colbourn Hall. He had raised issues such as,
24 you know, who was -- how did the state auditor decide to
25 -- you know, was it a whistleblower, were there

1 kickbacks from a contractor to any --

2 And when you looked at the investigation, the
3 supporting documentation, there was no -- it was clear
4 as to how or why the inspector general had decided to
5 include this in their audit, it is just a big project
6 that had been done and they wanted to understand that;
7 and number two, there was no indication whatsoever that
8 anyone had stolen any money here.

9 We had already spent like \$700,000 -- I don't
10 know the final number, \$750,000 in this legal
11 investigation. I thought it was far more productive for
12 us to focus on auditing what had transpired on those
13 other arenas. The same players had been involved, the
14 same timeframe had been involved, the same type of
15 transactions, it was obvious from the work that Trustee
16 Seay had done. So I didn't think a legal investigation
17 was required into those issues. I thought an audit of
18 those issues would be a better approach.

19 Q Okay. As part of his -- Trustee Walsh's
20 argument I guess to expand the investigation, he also
21 addressed the possible role of the General Counsel's
22 Office. He asked the board to look into that office
23 because he opined that they had been involved in all
24 sorts of things in giving legal advice to various
25 people.

1 Do you think in that regard he raised a valid
2 concern?

3 A If he understood the role that the general
4 counsel had played at UCF and perhaps other entities
5 where -- at least with respect to finance, my
6 understanding was that the General Counsel's Office
7 would have respond to questions but not get involved as
8 a volunteer or uninvited, if you will. We changed that
9 now.

10 So looking at what happened then I didn't
11 think would be useful because of the way that the system
12 was being utilized.

13 We have now changed the system. I think if
14 something like this were to happen again, clearly you
15 would look into the general counsel's role.

16 Q If Mr. Cole had knowledge that E&G had been
17 used for capital projects, do you think he would have
18 had a responsibility to tell the board about it?

19 A If he had knowledge and he knew that it was in
20 violation of the restrictions?

21 Q Correct.

22 A Absolutely.

23 Q Okay.

24 BY MR. RUBOTTOM

25 Q Let me ask if you think he had a duty to the

1 board and to the university especially when he is on the
2 circulation of the draft regulations from the BOG, do
3 you think he has a responsibility to know that even
4 though that might be an administrative silo of the
5 CFO -- so when he heard about that, he would have had at
6 least a duty of inquiry to determine that?

7 A I think that if the system were -- that we
8 have in place had been in place, the answer would be
9 yes. The system that was in place at the time I can't
10 give you the same answer.

11 Q Can you describe that new system? We haven't
12 heard anything about that.

13 A Well, now, in addition to the agenda
14 memorandum that specifically identifies the fiscal
15 impact to the university, where the sources come from,
16 and any restrictions of the use of those sources, each
17 project comes with a certification from the president,
18 the general counsel and the CFO that certifies to the
19 board that the proposed funds to be utilized for this
20 particular project are consistent with the laws and the
21 regulations that apply.

22 And I recommended that by the way to -- or I
23 mentioned that to the Board of Governors early on in
24 this process. And Chair Longback asked all the
25 universities to adopt that same procedure.

1 Q Do you think it would be beneficial to engage
2 the general counsel in training the finance staff and be
3 sure that all of our general counsels and their staff
4 throughout the system have training from the BOG as to
5 which laws --

6 I mean, I don't find very many. It is about
7 an hour's work for a lawyer to read through these
8 things.

9 A Yes, sir, I think it would be helpful to the
10 general counsels to be involved in that process.

11 Q Let me ask you a hard question.

12 You worked with Scott Cole. He has been
13 general counsel for some time. Do you think if that
14 certification had been in place and let's presume that
15 Dr. Hitt knew it was questionable but directed that the
16 expenditure happen anyway, do you think that Scott Cole
17 would refuse to sign that kind of certification with Dr.
18 Hitt and Mr. Merck?

19 A I do.

20 Q Okay. Thank you.

21 BY MS. MITZ

22 Q So since this all came out in say September of
23 last year, have you counseled or offered any advice to
24 President Whittaker about how to handle this matter
25 publicly?

1 A Publicly?

2 Q Yes.

3 A No.

4 BY MR. RUBOTTOM

5 Q How to handle it publicly or advise publicly?

6 MS. MITZ: Okay.

7 BY MS. MITZ

8 Q Have you counseled him on how to present the
9 facts of what occurred to say the BOG or to the media?

10 A I haven't counseled.

11 But we certainly have had preparations with
12 his staff --

13 Q Sure.

14 A -- that were preparations for me as well. I
15 needed to understand the facts fully.

16 Q Sure.

17 A It wasn't me counseling him so much as
18 preparation sessions.

19 Q Got it. To get the facts?

20 A Yes.

21 Q Got it. Okay.

22 Are you aware of anybody advising him to
23 withhold any information, by him I mean the president,
24 either from the Board of Trustees or from the BOG?

25 A No.

1 Q Have you had any contact with Dr. Hitt since
2 he resigned?

3 A I saw Dr. Hitt at the groundbreaking for the
4 teaching hospital back in late October, and it was in
5 the morning, and he told me that day he was going to be
6 interviewed by the investigator. I saw him that night
7 because I was one of the presentors of a recognition to
8 him for being a champion in diversity in athletics, and
9 that's the last that I interacted with him.

10 Q So no conversations about his involvement in
11 this matter?

12 A None.

13 Q Okay. Would you be surprised to hear that he
14 hasn't been completely cooperative with this
15 investigation?

16 A Not terribly surprised because I know that he
17 wasn't doing all that well.

18 Q Medically?

19 A Yeah.

20 Q Got it. Okay. Great.

21 I don't have any more questions.

22 BY MR. RUBOTTOM

23 Q I got a couple of follow-ups.

24 You said you gave direction to somebody to
25 identify other E&G funds. Did you give that direction

1 to the president?

2 A To the president.

3 Q Okay.

4 A To the president. There may have been others
5 in the room, but my direction was to the president.

6 Q Where can we get a copy of the form that you
7 were talking about? It is not in the meeting materials.

8 A Is that the agenda memorandum?

9 Q Yes, sir. I guess it is kind of a format or
10 something.

11 A Yeah. It was --

12 But, I mean, I gave it to each board member as
13 a sheet of paper. And my understanding is that it was
14 attached to the minutes of the meeting on the 24th.

15 Q Again, we haven't looked at minutes so much.

16 A lot of these meetings were --

17 A On January 24th, when the board took up each
18 of my recommendations, my understanding is that the
19 minutes had a copy of that form attached.

20 Q When you talked to Dr. Hitt about that he was
21 going to be interviewed, did he express any remorse or
22 sadness about the circumstance that had come up?

23 A He did not.

24 Q Were you concerned about the divergence
25 between his interview -- the apparent interview

1 testimony based on what the Brian Cave people say and
2 the letter that he sent subsequently?

3 A Absolutely I was. I even, you know, stated
4 publicly that I didn't find the letter very credible.
5 It didn't sound like Dr. Hitt.

6 Q So do you think it's possible somebody in
7 Orlando wrote that for him?

8 A I think it's very possible that someone wrote
9 that for him.

10 Q It didn't read like Dr. Hitt's writing?

11 A It did not read like Dr. Hitt. Dr. Hitt --
12 The statements didn't sound like Dr. Hitt.
13 The fact that he misspelled Whittaker in one place, it's
14 not something that Dr. Hitt would have done. It did not
15 read like Dr. Hitt.

16 Q Leaving out the general counsel, do you think
17 Dr. Hitt and Bill Merck would have signed that
18 certification for this project?

19 A That's a tough question.

20 I think --

21 I don't believe they would have. I think
22 faced with the reality of having to put their signature
23 on a piece of paper to which they could not, you know
24 shade in any way, I think the likelihood is that perhaps
25 they would not.

1 Q And this is the only time we expect to be able
2 to have you under oath and interview you.

3 A Yes, sir.

4 Q And so I just want to ask you a probably more
5 difficult question. I think it is on the meeting of the
6 19th. I cannot remember.

7 But it sounded to us listening to the board
8 meeting that you kind of fronted your presentation on
9 the Brian Cave report with an emphasis on your own
10 exoneration and the board's exoneration.

11 Can you explain why that was upfront for you?

12 A Actually, it was upfront because it was short
13 and I wanted to get it out of the way.

14 Q Okay.

15 A And then I had to get to all of the discipline
16 that I was recommending as well as the corrective steps.
17 So it didn't make sense to end with that but start with
18 that.

19 It was important to me because if you've read
20 about me I have spent all of my practice and even my
21 civic life very much relying on my integrity and my
22 honesty. The thought that someone would claim that I
23 had not acted with integrity was simply abhorring to me.
24 So it was important if that was a finding that the board
25 was not aware that we had done something that this staff

1 had done something that shouldn't be done. I needed to
2 state that. The reason I was upfront is the reason I
3 gave earlier.

4 Q Did you think that there was specific
5 allegations that members of the board had acted without
6 integrity?

7 A No, I did not.

8 But, you know, in any of these circumstances
9 with --

10 When Bill Merck sent in a letter saying that
11 he had discussed it with all these people, including
12 boards of trustee members, had mentioned me by name,
13 then I considered there is an allegation regarding me by
14 the guy who is really at fault for all of this --

15 Q So it is in response to the Merck letter --

16 A -- and the guy that has failed or refused to
17 participate in the investigation. So I wanted to make
18 sure that that was absolutely clear.

19 Q So it was in response to the public statements
20 that Mr. Merck had made?

21 A Yes, sir.

22 MR. RUBOTTOM: Thank you. I appreciate that.

23 I think we are through.

24 One thing that's come up to witnesses that
25 have been in some of these depositions if they had

1 counsel, they wanted it on the record, and I would
2 like to tell you that we agree that this deposition
3 has not involved full cross-examination and we
4 understand that might limit its use in judicial
5 proceedings.

6 Anything else?

7 MS. MITZ: We have just been asking everybody
8 to agree to not discuss the deposition, the
9 questions asked and answers given until we conclude
10 our investigation. We would ask that of you as
11 well.

12 THE WITNESS: That's fine.

13 THE COURT REPORTER: Do you want this
14 transcribed?

15 MR. RUBOTTOM: Yes.

16 MS. MITZ: No rush.

17 THE WITNESS: I'll read.

18 (Thereupon, the deposition was adjourned at
19 5:33 p.m.)

CERTIFICATE OF OATH

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STATE OF FLORIDA)
COUNTY OF LEON)

I, the undersigned authority, certify that
said designated witness personally appeared before me
and was duly sworn.

WITNESS my hand and official seal this 21ST
day of February, 2019.



JUDY CHIN, RPR, CRR
#GG 098477
Expiration: 5/25/21
1-800-934-9090
850-878-2221

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, JUDY CHIN, Registered Professional Reporter, certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages numbered 1 through 106 are a true and correct record of the aforesaid proceedings.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 21st day of February, 2019.



JUDY CHIN, RPR, CRR
Notary Public
#GG 098477
Expiration: 5/25/21

ERRATA SHEET

I have read the transcript of my deposition, pages 1 through 106, and hereby subscribe to same, including any corrections and/or amendments listed below.

Date: MARCOS R. MARCHENA

8	Page/Line	Correction/Amendment	Reason for Change
9	_____	_____	_____
10	_____	_____	_____
11	_____	_____	_____
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6 February 21, 2019

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16 Re: Marcos R. Marchena

17 Dear Ms. Mitz:

18
19 Please have your witness read his copy of your
20 electronic transcript, noting corrections/changes on the
21 errata sheet, or date and sign the errata sheet within
22 the next 30 days or before the final trial in this
23 matter, whichever comes first.

24
25 

JUDY CHIN, RPR, CRR

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