

In the Matter of:
Investigative Hearing

WARD SCOTT COLE, ESQUIRE

February 15, 2019



1 BEFORE THE FLORIDA HOUSE OF REPRESENTATIVES
2 Public Integrity & Ethics Committee

3 IN RE:

4 Investigative Hearing on the
5 Unauthorized Use of Appropriated
6 Funds for Fixed Capital Outlay
7 Projects at the University of
8 Central Florida,

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Deposition of: WARD SCOTT COLE, ESQUIRE

Date Taken: February 15, 2019

Time: 7:59 a.m. - 9:38 a.m.

Location: UCF Communications & Marketing
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 Suite 301
 Orlando, Florida 32826

Reported By: Emily W. Andersen, RMR CRR FPR
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 Florida at Large

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2

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S T I P U L A T I O N S

It is hereby stipulated by and between counsel for the respective parties that the reading and signing of the deposition be waived.

1 THE REPORTER: Would you raise your right hand,
2 please.

3 THE WITNESS: (The witness complies.)

4 THE REPORTER: Do you solemnly swear that the
5 testimony you are about to give will be the truth,
6 the whole truth, and nothing but the truth so help
7 you God?

8 THE WITNESS: I do.

9 WARD SCOTT COLE, ESQUIRE,
10 having first been duly sworn, testified under oath as
11 follows:

12 DIRECT EXAMINATION

13 BY MS. MITZ:

14 Q. Good morning, Mr. Cole. Can you please state
15 your full name for the record?

16 A. Yes. It's Ward Scott Cole.

17 Q. Have you discussed this deposition with
18 anybody?

19 A. No.

20 Q. Okay. Have you reviewed anything in
21 preparation for this deposition?

22 A. Yes.

23 Q. Okay. What was that?

24 A. I reviewed the Burby report, all of the
25 documents attached to the report. That's pretty much

1 it.

2 Q. Okay. Have you had an opportunity to review
3 your interview notes from the Burby investigation?

4 A. I have.

5 Q. Okay. And did you also review notes of other
6 interviews?

7 A. Yes.

8 Q. Okay. Which ones?

9 A. I reviewed pretty much all the notes. They
10 were made a public record when we released them to the
11 Sentinel, so at that point I looked at them.

12 Q. Okay.

13 MR. RUBOTTOM: Excuse me. I'm sorry. When was
14 -- when did they release it?

15 THE WITNESS: It was probably -- we've got a
16 public records request about a week or so ago.

17 MR. RUBOTTOM: Okay. Well, I thought they were
18 like -- originally they just let out like
19 Whittaker's and somebody else's. So I wasn't clear
20 on how that release was going, because I've been
21 protecting them and not giving them to anybody.

22 THE WITNESS: There's two groups who have been
23 asking for them. 9 News has been asking for them
24 and --

25 MR. RUBOTTOM: Thank you.

1 BY MS. MITZ:

2 Q. Okay. How many times were you interviewed by
3 Mr. Burby?

4 A. Once.

5 Q. And everything you told him was true?

6 A. Absolutely.

7 Q. All right. Were you ever interviewed or asked
8 questions by anybody within UCF?

9 A. Asked questions? In connection to the
10 investigation?

11 Q. Yes.

12 A. No.

13 Q. All right. How long have you been a member of
14 The Florida Bar?

15 A. Gosh, since 1986 -- no, I'm sorry, 1987.

16 Q. Okay. And are you a member of any other bars?

17 A. No.

18 Q. And how long have you been with UCF?

19 A. Seventeen years.

20 Q. And have you been the general counsel the
21 entire time?

22 A. Yes.

23 Q. And what are your duties, generally?

24 A. So I am responsible for providing all legal
25 services to the university, advising the university

1 personnel on relevant legal matters.

2 I am responsible for managing the other
3 attorneys in the office. We pretty -- we pretty much
4 provide all the legal services other than those that we
5 refer to outside counsel.

6 **Q. Okay. So that would include advising the board**
7 **and the president?**

8 A. Yes. So I -- my client, under the Florida Bar
9 rules, is the institution, University of Central
10 Florida. I report -- my primary client is the board.
11 To the extent the board has delegated authority to the
12 president, I also advise the president of the university
13 as well.

14 **Q. Okay. And how many attorneys do you have in**
15 **your office?**

16 A. Twelve.

17 **Q. And are any dedicated to construction matters**
18 **and funding of those construction matters?**

19 A. Jordan Clark is dedicated to construction
20 matters. He is not involved in funding of construction
21 matters.

22 **Q. Did he have anything to do with the Colbourn**
23 **Hall renovation and/or the construction of Trevor**
24 **Colbourn Hall?**

25 A. His role would have been limited to reviewing

1 the construction contracts.

2 Q. And have you asked him whether anybody
3 approached him about questions about the appropriate
4 uses of E&G for those projects?

5 A. I have.

6 Q. And --

7 A. The answer was no, he was not approached.

8 Q. Do you routinely attend all of the committee
9 and board meetings?

10 A. Yes.

11 Q. And as a result of that, do you have a lot --
12 well, that and also advising the board, do you have a
13 lot of contact with the individual trustees?

14 A. Yes.

15 Q. And did you have any more with former chair
16 Marchena than the other trustees because of his role as
17 the chair?

18 A. Yes.

19 Q. And would you describe Mr. Marchena as an
20 engaged trustee?

21 A. Extremely.

22 Q. Did he ask a lot of questions?

23 A. Yes.

24 Q. And in your opinion, did his legal background,
25 being an attorney, assist him in his role as a trustee

1 and chairman?

2 A. Yes.

3 Q. Are you aware that he had served on other
4 boards prior to joining the UCF's board of trustees?

5 A. I know he was on the Valencia State College
6 board at one point. I don't know of any other boards he
7 may have served on.

8 Q. Okay. Did he appear to rely on his prior board
9 experience while serving on the UCF board of trustees?

10 A. I don't know that I could answer that because I
11 don't know what he did in connection with his other
12 boards.

13 Q. Okay. That's fair.

14 Did he appear to be someone who was shy about
15 asking questions?

16 A. Definitely not.

17 Q. And did he seem to understand everything?

18 A. Yeah. You know, it's -- he appeared to be, you
19 know, fairly knowledgeable. It's hard to tell if
20 someone actually understands something, but he was
21 engaged. He asked a lot of questions.

22 Q. Okay. Did Chair Marchena ever contact you for
23 any assistance, either in understanding something or
24 with any questions, basically, about agenda items?

25 A. Sure.

1 Q. Would it have been just a variety of things?

2 A. Yes.

3 Q. And did he do that routinely?

4 A. I wouldn't say routinely. The way that the
5 board operates, we have numerous committees and we have
6 a person assigned -- a staff member assigned to each
7 committee.

8 I'm assigned to the nominating/governance
9 committee. So if it was something related to that
10 committee, he would certainly call me about that. If it
11 was something related to finance and facilities, he
12 would typically call Bill Merck about that.

13 So mostly it would depend on who was staffing
14 the committee, but if he had a general concern, he would
15 certainly reach out to me.

16 Q. Okay. Did he ever come to you with any
17 complaints about staff?

18 A. I don't recall him coming to me specifically
19 with complaints about staff. He had certainly mentioned
20 to me on some occasions some unhappiness with staff,
21 yes.

22 Q. Do you recall who on staff he was unhappy with?

23 A. Yeah. He was concerned about the operations of
24 the facilities department. He was concerned that they
25 were not getting good prices on their construction.

1 He serves as general counsel for the Orlando
2 International Airport.

3 **Q. Right.**

4 A. And they -- I think they do mostly hard bids.
5 He was very concerned about the way we did design/builds
6 and that kind of stuff, and he felt like the facilities
7 department was not operated very well. So those -- a
8 lot of his concerns had to do with facilities, yeah.

9 **Q. And did that ultimately lead to an audit of**
10 **that department?**

11 A. Yeah. My understanding is an outside firm was
12 brought in to do an audit of facilities. I'm not sure
13 what the result -- well, I think they did a result. I'm
14 not sure what changes were made as a result of that, but
15 yes, that was his suggestion to do that.

16 **Q. Okay. Anything else come to mind about any**
17 **complaints or concerns about staff or departments?**

18 A. Not at the moment.

19 **Q. Okay. Has any other trustee ever come to you**
20 **with a complaint about staff, management or even other**
21 **trustees?**

22 A. Dave Walsh came to me quite often with various
23 concerns.

24 **Q. Okay. Can you tell us a little bit about that?**

25 A. He was particularly concerned about the role of

1 trustees versus the role of management. He had -- he
2 had a very suspicious view of the administration, sort
3 of it was us versus them.

4 And so he was concerned about -- I remember one
5 thing is that the evaluation -- the trustees do a
6 self-evaluation, and those evaluations will come into
7 the president's office and they would compile them. And
8 he was very upset that it went to the administration and
9 not directly to an outside firm or another trustee.

10 **Q. How long has he been on the board?**

11 A. Probably at least three years.

12 **Q. And so in an instance like that, when he's**
13 **complaining or venting his concerns, do you just talk to**
14 **him? Do you take it to someone else? What did you do**
15 **with that?**

16 A. In general, I would talk it through with him.
17 If he didn't seem satisfied and he wanted me to talk to
18 someone else, I was happy to do so.

19 For the most part, it just seemed like he
20 wanted to come in and kind of vent a little bit.

21 **Q. Okay. All right. So when Marcos Marchena was**
22 **the chair of finance and facilities, did he ever discuss**
23 **capital projects or the funding for those projects with**
24 **you?**

25 A. Well, we never discussed funding, I know that

1 for sure. We might have discussed the projects
2 themselves, sure.

3 Q. Okay. Do you recall having any discussions
4 about Colbourn Hall and/or Trevor Colbourn Hall?

5 A. No.

6 Q. And do you recall anything about the projects
7 that you may have discussed, the capital projects?

8 A. No. Most of them were generalized concerns
9 about the process for building buildings. No particular
10 building jumps out at me, but again, he was concerned
11 about the quality of the people and the services being
12 provided by facilities.

13 Q. Okay. Did you ever -- did Mr. Merck ever
14 discuss capital projects or their funding with you at
15 any time between 2013 and the present?

16 A. Probably the only facilities projects we would
17 have discussed would have been those that were built
18 with debt financing. That would have been an area he
19 would have been involved in.

20 I don't recall ever discussing any, you know,
21 internal funding or other funding other than when we had
22 a debt issuance.

23 Q. And do you recall having any discussions about
24 capital projects or their funding with either Dr. Hitt
25 or Dr. Whittaker?

1 A. No.

2 Q. Are you familiar at all with the university's
3 investment policy?

4 A. I know we have an investment policy. I recall
5 being at the board meeting when it was approved quite a
6 while ago. That's not -- that doesn't come to my
7 committee. That was -- fell within Bill Merck's
8 committee, but we would have regular updates from our
9 outside investment consultants, so I would be present
10 for those.

11 Q. So who at UCF would make the decisions about
12 the investments? Was it Bill Merck?

13 A. Yeah, that was all Bill Merck. And then if
14 there were major changes, like they wanted to reallocate
15 the portfolio or things like that, they would bring that
16 to the board.

17 But for the most part, it was all done
18 internally with Bill Merck, probably Tracy Clark, and
19 then the outside consultant.

20 Q. All right. Did you have an opportunity to
21 review the preliminary operational audit findings?

22 A. No. Well, so the preliminary, if that's the
23 one that was -- yes. So yes, I attended the exit
24 conference and reviewed that right before the exit
25 conference with the auditor general.

1 MR. RUBOTTOM: Excuse me. When was that? That
2 was August, wasn't it?

3 THE WITNESS: That was probably August, because
4 everything hit the fan in September.

5 MR. RUBOTTOM: Well, the formal preliminary
6 findings were issued November 27th. That's when
7 they were put in writing and that was when the
8 30-day clock started on the response.

9 THE WITNESS: Yes. I would have reviewed that
10 as well.

11 My first contact was right before that exit
12 conference with the auditor general.

13 BY MS. MITZ:

14 **Q. Did you or anybody in your office assist in**
15 **preparing the written response to the preliminary**
16 **findings?**

17 A. We participated in the response that related to
18 our office. There was a comment about our agreements
19 with outside counsel, so we prepared that response.

20 **Q. So you didn't participate in any of the**
21 **drafting of the response concerning the finding about**
22 **Trevor Colbourn Hall?**

23 A. No, I did not.

24 **Q. Do you know who helped or who actually prepared**
25 **that response?**

1 A. So, I guess the short answer is no. I don't
2 know. I could probably guess, but no, I don't know who
3 actually did it.

4 **Q. What would be your guess?**

5 A. Well, I assume the audit folks who were working
6 with the auditor general were actively involved in that.

7 **Q. The people from -- is it university audit?**

8 A. Yes, university audit.

9 **Q. All right. Excuse me. So as part of your job
10 as general counsel, have you become familiar with the
11 BOG regulations?**

12 A. Yes.

13 **Q. And how did you do that? Did you just take it
14 upon yourself to read them? Did you rely on someone
15 else to brief you? Was there training?**

16 A. In general, I've read, I'm sure, at various
17 points in time, all the BOG regulations.

18 **Q. Does UCF provide any sort of training on those
19 regulations?**

20 A. No, not that I'm aware of.

21 Now, let me back up. Our office doesn't. It
22 may well be that within the various units who are
23 effected by a BOG regulation may provide training to
24 their employees, but in terms of our office, no, we have
25 not.

1 Q. All right. And so what typically happens when
2 the BOG announces they are going to be amending a
3 regulation and then they seek a comment and they give
4 universities so much time to respond? What happens in
5 your office when you get that notification?

6 A. Yeah. So we'll look at it. If it's something
7 that addresses our area, then we'll comment on it. If
8 it's seems designed for another unit of the university,
9 they'll take the lead and do the comments on it.

10 Q. Are there times when you guys don't comment or
11 do you routinely submit comments?

12 A. No, there's definitely times we do not comment
13 at all.

14 Q. All right. So how did you become aware of
15 regulation 9.007?

16 A. I believe they sent out a notice to the VPs for
17 administration, the general counsels, and probably one
18 of the other groups. They typically send them out by
19 e-mail and say they are either going to pass a new reg
20 or revise an existing reg, and send an e-mail out to all
21 the groups.

22 Q. Okay. So what I think you're referring to is
23 an e-mail that the State University System sent out back
24 in July of 2013. Does that sound about right to you?

25 A. Yes, that sounds about right.

1 Q. All right. And so that rule was amended;
2 correct?

3 A. Yes.

4 Q. Okay. So from that point to the present, did
5 anybody come to you and ask you about the appropriate
6 uses of E&G or, more specifically, could they use E&G
7 for construction purposes?

8 (Telephonic interruption.)

9 THE WITNESS: Sorry. No, they did not.

10 MR. RUBOTTOM: I should probably silence mine
11 so nobody calls me.

12 THE WITNESS: Yeah. I forgot about that.

13 BY MS. MITZ:

14 Q. And if you had to communicate, say, to someone
15 in administration, the president, his office, about a
16 change that would affect their office, how would you do
17 that? Would you do it verbally? Would you do it in
18 writing, like an e-mail, a memo? How would you
19 communicate that?

20 A. Probably all of the above. It would just
21 depend on what it was and who I thought might be
22 affected by it, and it might an be an e-mail to the head
23 of an unit or if it was a significant change, we might
24 do a memo. It would just really depend on the
25 circumstance.

1 Q. Do you have any recollection of whether
2 anything like that was done with Regulation 9.007 back
3 in 2013?

4 A. My recollection is we did not comment at all on
5 it, and we did not send out any response to -- any sort
6 of guidance or anything. I think we saw that one as
7 falling squarely within finance and -- finance and
8 accounting.

9 MR. RUBOTTOM: Carine, let me just follow up.

10 MS. MITZ: Sure.

11 MR. RUBOTTOM: I just want to clarify. I think
12 we saw an e-mail where Kathy sent you one of those
13 2013 e-mails, maybe back in September.

14 THE WITNESS: All right.

15 MR. RUBOTTOM: Before that, did you have any
16 recollection of that 2013 exchange with the BOG
17 about the amendments to that regulation?

18 THE WITNESS: No.

19 MR. RUBOTTOM: Okay. Thank you.

20 MS. MITZ: Okay. Don, do you want to ask about
21 the next regulation?

22 MR. RUBOTTOM: Yes. Do you want to ask about
23 that document just to confirm or I can do it.

24 MS. MITZ: Sure.

25 THE WITNESS: Here, if you've got the Seay

1 notes.

2 DIRECT EXAMINATION

3 BY MR. RUBOTTOM:

4 Q. Our first exhibit here is a July 11, 2013,
5 e-mail that was sent to all you guys that kind of
6 highlighted the amendments they were working on that
7 year.

8 A. Yeah. It looks familiar.

9 (Exhibit No. 1 was marked for identification.)

10 BY MR. RUBOTTOM:

11 Q. And I take your testimony before to say that
12 you did not recall those things when all this started
13 being investigated.

14 What would your response have been to that kind
15 of -- that's a pretty comprehensive set of amendments.

16 A. Yeah.

17 Q. Would you have just waited for other
18 departments to ask any questions they might have or
19 would you have communicated with the president's office
20 about something like that or --

21 A. Yeah. I would have waited for any of the
22 departments to approach us if they had any questions
23 about any legal issues related to that. We didn't
24 typically weigh in unless it had to do with -- directly
25 with legal issues. So these are more budget issues and

1 stuff.

2 Q. Did you recall in that time period published
3 incidents about the Turnbull Center at FSU or
4 universities using interest on E&G for non-E&G purposes?
5 Do you recall those -- those hubbubs?

6 A. I remember the hubbub about Turnbull Hall, yes.
7 I don't know how I became aware of it, but yes, I was
8 aware of it.

9 Q. Well, it's our understanding that those changes
10 were --

11 A. Were a result of that?

12 Q. -- a result, some of those changes.

13 A. Oh, that I didn't know.

14 Q. Okay. And that's kind of what we've been
15 curious about is just how the university has managed
16 legal responsibilities.

17 A. Right.

18 Q. So we've been informed that UCF has a
19 compliance office --

20 A. Correct.

21 Q. -- that has a notification service --

22 A. Uh-huh.

23 Q. -- that people subscribe to if they are
24 interested, I guess, in certain subject matters?

25 A. Uh-huh.

1 Q. Would that service communicate these kinds of
2 changes to folks or would that be more on the ethics
3 side?

4 A. That would be more on the ethics side.

5 We have a rule listserv that when we -- a
6 regulation listserv, so that when we issue proposed
7 regulations, anyone can sign up for that and that gives
8 them information about it, gives them the opportunity to
9 respond.

10 I'm not familiar with the compliance office
11 sending out this type of thing. They send out their
12 compliance and ethics issues, but not this in
13 particular.

14 Q. Since this came up in late summer, has the
15 university -- has administration done any thinking about
16 how to better inform staff about regulations and
17 changes?

18 A. Absolutely.

19 Q. What kind of deficiencies have you all
20 recognized and what kind of steps are you thinking about
21 going forward?

22 A. Yeah.

23 Q. And I'm not trying to nail you that this is
24 actually the policy. I'm just trying to understand what
25 the thinking has been.

1 A. Sure, sure. So the plan going forward is we
2 are hiring a new vice president for accountability and
3 ethics. That will be the person over the compliance
4 office. And we're going to beef up their staff so that
5 they will take a more active role in distributing things
6 like this, because that really is more of a compliance
7 function to do that type of thing. When things like
8 this come out, they would inform people to ensure
9 compliance. So that's our biggest change.

10 We're also adding an enterprise risk management
11 officer to that office, and moving some other units
12 underneath them.

13 **Q. One of the things that concerns me is the role
14 of the staff with the various board committees, and I
15 understand Mr. Merck was the vice president responsible
16 to work with finance and facilities.**

17 A. Correct.

18 **Q. He had administrative jurisdiction over both of
19 those topics.**

20 But if, say, Mr. Merck -- Mr. Marchena, when he
21 was chair of that committee, if he had a legal question
22 about some proposal --

23 A. Yeah.

24 **Q. -- would he have just consulted with Merck
25 about that?**

1 A. No, no. He would have come to me if it was a
2 legal issue.

3 Q. He would have come to you?

4 A. Absolutely.

5 Q. Did he -- did Merck ever come to you about
6 questions that -- that trustees were raising with him or
7 did he -- yes. Just let me just leave the question at
8 that.

9 A. Yes.

10 Q. Did he ever come to you about funding
11 questions?

12 A. No.

13 Q. We noticed there's some 2008, 2010 audits where
14 there's discussions of --

15 MR. RUBOTTOM: Carine, were you going to get
16 into this in detail later?

17 MS. MITZ: Yes, but if you want, you can.

18 BY MR. RUBOTTOM:

19 Q. I just wanted the relationship between you and
20 Merck in responding to those kinds of things.

21 A. Uh-huh.

22 Q. It looked to me like the issue about the loan
23 to the athletics --

24 A. Yes.

25 Q. -- was something that you at least worked on a

1 legal response to?

2 A. I did, yeah.

3 Q. That is -- would that have been that Merck came
4 to you or the president came to you about trying to put
5 up a good defense to this audit finding or were you
6 involved in that loan from the beginning and had that --
7 had developed that legal opinion when the loan was made?

8 A. I know that both audit and Merck came to me to
9 respond to that audit issue.

10 Q. Excuse me. When you say audit --

11 A. Yeah.

12 Q. -- is that your audit staff?

13 A. No, that in particular was the auditor general
14 on the loans to the DSO.

15 Q. So the auditor general came to you?

16 A. No. The auditor general always works through
17 our internal audit.

18 Q. Yes.

19 A. So they work through them. And then our
20 internal audit, if it was something they believed needed
21 a legal response, they would come to me.

22 I would then go to Bill Merck and say, Bill, I
23 need to understand more about this so we can develop a
24 credible response to this.

25 That particular one, I did disagree with the

1 auditor general.

2 Q. We've read that, yes.

3 A. So I helped -- in fact, I was probably the
4 primary person who drafted that response.

5 Q. I'm trying to stay away from asking about your
6 legal opinions today, so I'll leave that.

7 But so the person who would have come to you
8 other than Merck would have been -- I don't think Taft
9 was in that, the head --

10 A. No.

11 Q. But whoever was the head of that audit
12 department would have come to you?

13 A. Exactly.

14 Q. So what I'm trying to get clear, the audit
15 department is the one working with the president's
16 office on responses to state audits?

17 A. Yes.

18 Q. That's their -- they have that staffing role on
19 those issues. And only if the audit department or the
20 area of the university involved has a question, would
21 they come to you --

22 A. That's correct.

23 Q. -- in the audit response stage?

24 A. Typically, what they would do is they would get
25 notice of these issues. They would call a meeting with

1 any unit that they thought would be helpful in
2 responding to those comments.

3 Q. Okay.

4 A. And I would, many times, be involved with that.
5 They would say, okay, well, this touches on some legal
6 issues, so let's bring the general counsel's office in.

7 Q. So I'm trying to understand if that process
8 happened this summer with respect to the funding sources
9 for the construction project.

10 A. It did not.

11 Q. Do you have any understanding of why that
12 process didn't happen that way?

13 A. No. I think you would have to talk to the
14 audit folks about that.

15 Yeah, I don't know why they didn't come to us
16 and ask for us to help respond to that. It may be that
17 Bill Merck admitted early on he knew it was wrong, so
18 there really wasn't a legal issue to be discussed.

19 Q. Well, the e-mails we have seen between the
20 audit staff and Merck staff are pretty consistent with
21 the defense that he's been making all along about the
22 emergency, et cetera.

23 Of course, he's come up with some interesting
24 legal arguments to support that since then.

25 A. Yeah, which weren't his, I'm sure.

1 Q. But these catastrophes you foresee five years
2 in advance.

3 A. The calamity.

4 Q. The calamity. That's a pretty interesting
5 loophole.

6 So have you talked to Taft about that, why they
7 didn't come to you in the summer?

8 A. No. I was curious about that as well. I would
9 have thought, because of the magnitude of it. So that
10 would be a good question for him, yeah.

11 Q. Have you discussed that -- that process issue
12 with President Whittaker or his staff?

13 A. I don't believe we have.

14 Q. Okay. Just a couple little follow-up
15 questions.

16 Does your office work with grant recipients,
17 particularly federal grant recipients to help them stay
18 in compliance with federal requirements that are tied to
19 their funds?

20 A. No. So the office of research in the various
21 colleges have people that manage grants.

22 The office of research also has a contracts
23 office that is separate from the general counsel's
24 office, and they review those types of contracts.

25 Q. Do they have attorneys that -- that are

1 **assigned to those offices?**

2 A. So in addition to the contracts people who do
3 the negotiations and the most of the drafting or review
4 of contracts, once all that process is completed, then
5 it goes to the general counsel's office for final
6 review.

7 So I have three lawyers in the office of
8 research whose job is to take those almost complete
9 contracts as negotiated by the contract managers and
10 make whatever additional changes need to be made, and
11 ultimately give it a legal approval.

12 **Q. But those would be legal approval, not as to**
13 **the substance of the contract?**

14 A. Right.

15 **Q. But that the university performs and**
16 **procurement?**

17 A. It's state law, you know, indemnification
18 issues, you know, that kind of thing.

19 **Q. Full faith and credit?**

20 A. Full faith and credit. So we'll be looking at
21 the legal issues. Our office would not be negotiating
22 the substantive terms of those contracts. That would
23 all be done within the office of research.

24 **Q. So if there was a federal regulation about not**
25 **misusing the federal funds between the time they are**

1 received and the time that they are expended on the
2 contracted issue, your staff wouldn't initiate any --

3 A. No.

4 Q. -- analysis of those types of response; that
5 would only come up if somebody asked?

6 A. Yeah, there's -- there is a compliance officer
7 within the office of research. That would be the point
8 person for dealing with any of those issues.

9 That person has a dotted line relationship up
10 to the university compliance officer, so if it was
11 something he felt went beyond his ability to deal with
12 or if he felt pressure that he couldn't adequately
13 address it because of issues within the office of
14 research, he can go to the chief compliance officer to
15 help him deal with that.

16 Q. Okay. Back to the audit findings this year.

17 A. Yeah.

18 Q. Have you done any independent research or
19 analysis on the issues raised, other than the one issue
20 that you said was in your department?

21 A. You know, I went back and looked at the statute
22 again on use of E&G funds. It's been a few years since
23 I looked at it.

24 Q. Is that the statute that Bryan Cave cited?

25 A. Yeah.

1 Q. 219 -- 216.292?

2 A. No, I was really looking at a 1000 -- 1.74
3 something, the one that talks about the use of E&G funds
4 for facilities. I went back and looked at that statute,
5 and I was a little confused because my recollection was
6 E&G -- use of E&G for capital projects was limited to
7 \$1 million per statute, and I keep hearing \$2 million,
8 and I don't know where that comes from. I'm very
9 confused by that.

10 But I wasn't going to make a big deal about
11 that in the midst of all this. But as a lawyer, I see
12 \$1 million and --

13 Q. Okay.

14 A. -- there you go.

15 Q. So I think I can cut my next part short. We've
16 been looking at 216.292 that Bryan Cave cited which was
17 a general law about appropriations, and two different
18 provisions there that talk about fixed capital outlay
19 and limitations on appropriations.

20 And there's a reg 14.025 that addresses fixed
21 capital outlay planning and budgeting. There's a
22 statute, 1013.61 relating to fixed capital outlay
23 budgets.

24 Have you reviewed that one since the audit came
25 out?

1 A. Do you have that with you?

2 Q. I have it.

3 A. You can pull it up?

4 Q. Yes.

5 A. Off the top of my head, when you threw out the
6 numbers, I mean, I --

7 Q. Well, I mean, I'm just kind of doing word
8 search through some of this stuff.

9 So this is --

10 A. Yes, I've seen that statute.

11 Q. One of the audits -- one of the issues that
12 they raised in the Trevor Colbourn was the fixed capital
13 outlay budget. Have you reviewed that since the audit
14 finding came out?

15 A. Yeah. I'm sure I looked at this since it all
16 started. I went through all the statutes, just to see.

17 Q. Has the president's office or Kathy Mitchell,
18 since she stepped in, asked for any advice on the
19 application of this statute or the relevant regs to the
20 fixed capital outlay budgeting process?

21 A. She hasn't asked for legal advice. I know she
22 is aware of that, and I know that they are working on
23 changing the way that they present some of those items.

24 Q. Okay. Thank you.

25 A. Uh-huh.

1 Q. But just in the general operations as the
2 budget process was committing these funds to these
3 projects, there wasn't any interaction with legal
4 counsel on the proper application of the law to those
5 funds or the proper use of those funds?

6 A. None whatsoever.

7 Q. Okay. Has -- and we talked to Tina yesterday
8 and she indicated that departments do come to audit for
9 some of those kinds of questions.

10 Is that your understanding how that might
11 normally -- if somebody in Tracy Clark's or Christy
12 Tant's position or Lee Kernek's or Merck's, they might
13 go to audit for some of those questions about what will
14 be -- you know, what -- what stays aboveboard and
15 doesn't?

16 A. Yeah. Often audit serves in that role.

17 Q. Okay. Are you familiar with the operating
18 budgets that the board adopts every year, just the
19 process of the capital outlay budget that's adopted the
20 same time every year?

21 A. So I know from my attendance at board meetings
22 that it comes up every year for the board. I'm not
23 involved in any way in the preparation of those budgets,
24 but I'm aware of their being presented for approval.

25 Q. Is it your understanding that those motions

1 themselves actually delegate to the president full
2 authority to change those budgets?

3 A. Yes.

4 Q. Is that something that you've been conscious of
5 all along?

6 A. I believe -- so we have a conflict, if I
7 remember, between our regulation and the delegation of
8 authority and maybe the statute about how all that works
9 about who has authority to revise it.

10 One of those provides for the president to have
11 the authority to change line items.

12 Q. When you say our regulation, are you talking
13 about the BOG or the university?

14 A. No, UCF regulation.

15 Q. But you would agree the UCF regulations are
16 subject to --

17 A. State law and BOG. There's a priority.

18 Q. -- state constitution, state law, BOG
19 regulation?

20 A. UCF regulation.

21 Q. And in some places, BOG regulation might be in
22 the position of the legislature because of the
23 constitutional provision.

24 A. Right, correct.

25 Q. And so UCF regulations could never contradict

1 any of those other laws?

2 A. Absolutely, absolutely, no.

3 Q. So have you ever talked to the president or a
4 trustee about that kind of a broad delegation that I've
5 seen in those motions, every one I've looked at?

6 A. No.

7 Q. And nobody like Walsh or a similarly studious
8 trustee has questioned that delegation?

9 A. No. I'm not aware of any trustee --

10 Q. Okay.

11 A. -- doing that.

12 Q. When Marchena was with finance and facilities,
13 did he ever ask about any proposed building project, how
14 it fit in the university's plan or how -- I think you've
15 said they never asked about funding sources?

16 A. Right.

17 Q. But anything about a proposed project that his
18 committee was getting ready to approve?

19 A. Sure. I don't know if I can give you a
20 specific example, but Chairman Marchena was probably our
21 most diligent trustee in asking questions, especially in
22 facilities.

23 So a lot of his questions were based upon why
24 is this just coming to us now, you know. We don't have
25 enough information here, that type of thing.

1 So yeah, he would question staff, mostly Bill
2 Merck. He would question Bill Merck very hard on
3 issues.

4 Q. It's our understanding after he got in that
5 role, at some point he insisted that Merck give him
6 advance briefings about the agenda items. Is it your
7 understanding those briefings occurred regularly?

8 A. I don't know.

9 Q. Would you have expected, if they had those
10 briefings, would you have expected Marchena to push in
11 and get the answers that -- and make sure Merck answered
12 all his questions before the meeting occurred?

13 A. If Marcos had questions, I'm sure he would
14 press for answers, yes.

15 Q. Well, as you know, we're -- I can't remember
16 where we're at.

17 As you know, we're desperate to find out what
18 happened in, I think, the April, 2014 committee meeting
19 where Trevor Colbourn Hall was first approved.

20 We've listened to the audio of the full board
21 meeting the following month; questions about funding
22 sources came up. Staff used words like "carryforward"
23 and "internal" any time this issue came up.

24 But we would anticipate that a similar
25 discussion had happened in the April meeting,

1 particularly with Marchena chairing that meeting.

2 A. Is April the one where the tape cut off?

3 Q. April is the one where the tape cut off.

4 A. Yeah.

5 Q. Were you at that meeting?

6 A. You know, I'm sure I was. I was at most
7 meetings. Now, I don't sit, you know, the entire time
8 at the meetings. I will step out and consult with
9 people on various matters and everything, so I could not
10 tell you I was there at that moment when that was
11 discussed, but I'm regularly at the meetings, yeah.

12 Q. Do you have any recollection of discussing --
13 discussions of funding sources in any finance and
14 facilities committee meeting in the last five or six
15 years --

16 A. No.

17 Q. -- when a project was up for approval?

18 A. None.

19 Q. And I'm not sure if I asked this before, so
20 forgive me if I'm reasking the same question.

21 But if Marchena was working with Merck -- if
22 Marchena or any member of the finance and facilities
23 committee was working with Merck to get answers and they
24 -- and they had a legal question, did they ever -- do
25 you recall them ever coming to your office for legal

1 questions about finance and facilities?

2 A. No.

3 Q. Did you consider Mr. Merck to have a full grasp
4 of the laws and regulations affecting his area, both in
5 finance and facilities?

6 A. Yes. He was there for 22 years, so absolutely.

7 Q. Did you ever, before this summer, have any
8 concern about him not being forthcoming with trustees or
9 with the president?

10 A. Yes.

11 Q. What did those concerns arise from?

12 A. From numerous interactions he would have with
13 board of trustee members where he would appear at
14 meetings and, to my view, was not particularly prepared
15 for those meetings. He would often dish off to one of
16 his associate vice presidents and kind of come in for
17 color commentary. I sensed that he was pretty
18 disengaged.

19 Q. Always, the last five or six years?

20 A. Yeah, often.

21 Q. Did any trustees ever discuss that style with
22 you?

23 A. Oh, yeah. Chairman Marchena expressed his
24 frustration with Bill Merck and his sort of lack of
25 transparency with the board members.

1 Q. And can you describe one or two incidents where
2 he discussed that with you? Do you recall the dates and
3 any specifics?

4 A. It would have been in connection with other
5 things we talked about. He would say, "I'm getting very
6 frustrated with Bill and his lack of preparation for
7 meetings."

8 Q. Did he ever ask you for advice about how to get
9 -- how to dig in deeper and get better answers than he
10 was getting?

11 A. No. Marcos was pretty independent. I think he
12 was going to do that himself.

13 Q. Do you know if he ever went to audit staff or
14 the president's office or -- or Clark or Kernek to try
15 to get answers that Marchena [sic] wasn't providing him?

16 A. I don't know the answer to that. I am not
17 aware of it.

18 Q. Okay. Did the president's office ever express
19 any concerns, similar concerns about Merck?

20 A. No.

21 Q. How long was Rick Schell the chief of staff?

22 A. Let's see. He took over for Beth Barns. It
23 probably must have been maybe five years, four years.

24 Q. Do you know if he had much interaction with
25 Merck?

1 A. No.

2 **Q. Okay.**

3 A. So, no, I don't know if he did, but I'm not
4 aware of much interaction between the two of them.

5 **Q. What I've been hearing you say, and you can
6 correct me, is that the various departments were
7 responsible for their own understanding of the
8 regulations and laws that governed their areas, and you
9 would have expected them to have a good working
10 knowledge or seek help if they needed it?**

11 A. If they had any questions -- you know, one of
12 the things, I'll just tell you as a general statement.

13 One of the things that I constantly have done,
14 you know, in 27 years at UF and at here, is I remind
15 people all the time at every level that if you have any
16 issue whatsoever about whether something is legal or not
17 or wrong or right, you come to the general counsel's
18 office. Because if you come to us and we tell you it's
19 okay, even if we're wrong, you're good, because you can
20 -- nobody can say that you did something intentionally
21 if you ask for the lawyers's advice and they told you it
22 was okay.

23 That is a constant refrain that I have had in
24 my entire career. So there is no way that anyone did
25 not know that that was an option for them.

1 Q. Would you agree with this statement: That the
2 trustees have not understood their budgetary
3 responsibility respecting fixed capital outlay?

4 A. I would say that they have not had any depth of
5 understanding with respect to how all of that process
6 works.

7 Q. Who, in your mind, would be responsible to
8 bring trustees up to speed to fulfill their
9 responsibilities?

10 A. Bill Merck.

11 Q. Do you consider the BOG as having any
12 responsibility in that area or the governor's office who
13 appoint them?

14 A. Well, not with respect to educating our
15 trustees. I think that's a responsibility of staff.

16 I mean, I think that's one way that the board
17 of trustees appropriately exercises its fiduciary duty
18 is to rely upon the experts on staff to advise them of
19 these issues. I don't think it's their independent duty
20 as voluntary trustees to know things to the level of
21 staff, and it's reasonable for them to rely upon staff
22 to advise them.

23 Q. Okay. Has -- I mean, I know they've had their
24 hands full, but has Dr. Whittaker done anything since
25 August to try to make sure that the trustees are better

1 **informed?**

2 A. So Dr. Whittaker himself, no. He has tried
3 very hard to be removed from this entire situation
4 during this investigation. So I would say no, he has
5 not done anything.

6 People like Kathy Mitchell and Misty Shepherd,
7 General Caslen, they are all working now on new
8 processes for better informing trustees, having new
9 policies and education programs for staff within finance
10 and facilities. So all of that is under way.

11 I wouldn't think Dr. Whittaker would be
12 involved in that.

13 **Q. Has he given any direction to the vice**
14 **presidents to get more engaged on that level?**

15 A. Yeah.

16 **Q. And you just said staff is responsible to --**

17 A. They are.

18 **Q. -- inform the trustees?**

19 A. Correct.

20 **Q. Has he issued any kind of directive to the vice**
21 **presidents to advance that purpose?**

22 A. So, he brought in AGB to the vice presidents to
23 help us better communicate with trustees.

24 **Q. Who is AGB?**

25 A. Association of Governing Boards. It's a

1 non-profit group that advises trustees and universities
2 on best practices and governance.

3 Q. Were you at the December board meeting where
4 they discussed E&G carryforward commitments this last
5 December?

6 A. Oh, yeah, yeah.

7 Q. Did the trustees appear to understand the
8 question that was being -- that was being put before
9 them that day?

10 A. Well, yeah.

11 Q. What they were being asked to approve?

12 A. I think so, yeah.

13 Q. Are you aware of any efforts by Merck's team
14 last summer to begin a refunding process for the -- for
15 the Trevor Colbourn Hall funds that the auditor had been
16 questioning?

17 A. Of Merck's office?

18 Q. Yes.

19 A. No. I think Bill Merck's idea was that at some
20 point, if they got PECO money or even had other
21 appropriate money like auxiliary, that he would
22 ultimately replace that E&G funding.

23 I heard that after the fact. I thought it was
24 kind of silly to think you would get PECO to replace
25 something you've already built. I don't think the

1 legislature is going to let you do that.

2 But I think in his mind he thought that
3 ultimately he would replace that money.

4 Q. We saw a video of a BOG PECO workshop in
5 October of 2017.

6 A. Yeah.

7 Q. And Merck and Whittaker were both there
8 interacting with, I think, Governor Huizenga was maybe
9 chairing that meeting?

10 A. Okay.

11 Q. Chris Kinsley was engaged. And they were
12 talking about the research building, Research I. When
13 we first saw it, we thought they were talking about
14 Trevor Colbourn Hall.

15 A. Okay.

16 Q. And Merck made the statement that -- that,
17 yeah, this building is going to be completed in two
18 months, but we funded it with internal loans, and if we
19 can pay back those loans, we can do these other good
20 research things with those funds.

21 A. Yeah.

22 Q. Are you familiar -- are you aware that he's got
23 all kinds of internal loans out there on the books of
24 the university?

25 A. I am not. I've heard him use that phrase, and

1 I think what he means is that he might move money from
2 one auxiliary to another. And the plan would be to go,
3 you know, replace that auxiliary money back to the
4 original auxiliary. I think that's what he means by
5 internal loans.

6 Q. Well, I mean, PECO funds wouldn't be auxiliary
7 funds if they were received.

8 A. No, no, no.

9 Q. So what he's saying is I'm going to refund
10 auxiliaries. That's what I'm hearing.

11 A. Yeah.

12 Q. Is that what it sounded like to you, that he
13 would take PECO funds and repay the construction costs?

14 A. Yeah, I think that's what his plan was, and I
15 think everybody thought that was really odd.

16 MR. RUBOTTOM: And back -- well, Carine, are we
17 going to get to -- I've gotten off track a little
18 bit.

19 BY MR. RUBOTTOM:

20 Q. Did you -- I think the audit, the finance and
21 facilities audit that Chairman Marchena asked for --

22 A. Uh-huh.

23 Q. -- the company was Hill, and they issued a
24 report.

25 A. Right.

1 Q. Did you review that report? Were you asked to
2 by anybody?

3 A. I don't think I was asked to. I am pretty sure
4 I looked at it, yeah.

5 Q. Did you -- were you aware of Merck's response
6 to those recommendations?

7 A. No.

8 Q. Do you have any idea if he was resistant to
9 those recommendations?

10 A. I don't know.

11 Q. Okay. We saw an internal budget proposal that
12 he made to respond to that with a request for about
13 1.2 million in additional funding. Part of that would
14 come from repayments by doing faster work for some other
15 departments, but a total of about 1.2 million recurring
16 operating to his facilities department. Are you
17 familiar with that proposal?

18 A. I'm not.

19 Q. I was just trying to figure out if that -- in
20 your mind, if that would have been an honest request or
21 kind of, well, I'll show you, here's your reform,
22 Mr. Chair?

23 A. Yeah, I don't know. I know there was a lot of
24 tension there.

25 Q. When you talk about debt issues, I've tried to

1 stay away from really knowing what the state bond
2 advisor does and all these processes, but it's my
3 general understanding that debt issues are revenue
4 based, and there is no full faith and credit.

5 So when your office is engaged with debt -- and
6 I understand why there would be more lawyers involved
7 with a debt issue --

8 A. Right.

9 Q. -- than an internally funded project.

10 A. Correct.

11 Q. But when you reduce -- when you do review
12 debt -- proposals for debt, and I want to talk about --
13 I don't want to talk about athletics or land purchases
14 that I think can be done. I'm just -- these revenue
15 deals for housing projects or a bookstore or one of
16 these revenue generating auxiliaries.

17 A. Right.

18 Q. Do you review it for the kinds of financial
19 commitments and representations that are made in those
20 that I would assume would go into a prospectus or
21 something before somebody sold bonds?

22 A. Exactly right. So those issuances are governed
23 by 1010.62 of the Florida statutes and the board of
24 governors debt management guidelines.

25 So my job -- well, first of all, I have to give

1 a legal -- an official legal opinion as part of a loan
2 package saying that everything is -- that UCF can do it
3 legally, right, in the whole transaction. So I am very
4 engaged in that process or one of my lawyers is because
5 we're issuing an opinion.

6 We make sure that the debt is secured
7 appropriately, which means by those funds -- so type of
8 funds that are listed in 1010.62. We make sure we
9 review the prospectus to make sure there are no
10 statements that are not fully accurate. Those are our
11 typical legal roles. So we do all of that.

12 We also bring in outside bond counsel, so
13 they're doing all of the technical bond work. But we're
14 looking for representing the university's interest,
15 don't agree to anything we can't agree to, make sure
16 everything sent to investors is accurate, and make sure
17 the funds that are allowed to be used per statute are
18 the ones being used.

19 **Q. So the bond advisor would focus on securities**
20 **laws and state and federal securities law requirements?**

21 A. Exactly, yeah.

22 **Q. No failure to disclose a material fact, those**
23 **kind of issues?**

24 A. Right, exactly.

25 **Q. But when you say that everything -- everything**

1 -- that all representations are accurate --

2 A. Yeah.

3 Q. -- are there financial representations made in
4 those -- in those documents, and do you review the
5 accuracy of those financial representations?

6 A. The only represent it -- no.

7 So the bond documents would not say, you know,
8 this bond is secured by student fees or athletic fees.
9 It wouldn't go -- because the bondholders don't care.
10 They want to know the university is obligated to make
11 the payment.

12 But Bill Merck would be very involved in those.
13 And you know, I would explain to Bill, okay, here's what
14 we can secure these with. Our bond counsel would be
15 involved and Bill would say, yes, we have sufficient
16 funds from those, you know, sources to be able to
17 support this bond issue.

18 Q. So -- and this is pure speculation, okay. But
19 suppose that those auxiliaries that he's citing had
20 loaned their money out to other activities and the money
21 wasn't there --

22 A. Yeah.

23 Q. -- and he made that representation, would he be
24 the one that would be misrepresenting the bond buyers?

25 A. Yeah. These are all revenue projects, right,

1 so you bring in a private firm.

2 Let's say it's a housing project. You bring in
3 a private firm and they do an analysis, a demand for
4 housing, so we know we can expect, you know, 98 percent
5 occupancy. We know what we're going to charge, so we
6 know what the revenue coming in will be.

7 **Q. Right.**

8 A. So the primary source of repayment are those
9 revenues that would be generated.

10 **Q. I understand that.**

11 A. Right. And so -- but we can also secure them
12 under the BOG guidelines with some other auxiliaries and
13 stuff. And so those have to be there to pay, in the
14 event we had 50 percent occupancy, right, we would have
15 to have something to back that up. So it was Bill's job
16 to make sure we had sufficient funds to do that.

17 **Q. Okay. Well, let me let Carine go and ask you**
18 **some things about -- well, no. I'll go ahead and do**
19 **this.**

20 You're listed -- it's our understanding that
21 after Dr. Whittaker came in as provost, after a few
22 months he established -- kind of reestablished a
23 university budget committee, and it's my understanding
24 it's made up of vice presidents.

25 Did you participate in that university budget

1 committee? Were you a member of that?

2 A. I was a member of the -- yes, the budget
3 committee. I was a fairly late add to that, but yes.

4 Q. It's a big university budget committee.

5 A. Yes.

6 Q. And you were also a member of the facilities
7 budget committee that, my understanding is, started up a
8 little later, maybe early 2017?

9 A. Yeah. Again, I was added later to that one. I
10 was not one of the original members.

11 Q. Okay. Were you -- did you participate in the
12 September 15, 2017, meeting of that committee?

13 A. I would have to see some documents from that
14 date to know.

15 Q. Okay. Who chaired the facilities budget
16 committee?

17 A. I believe it was Bill Merck and Dale Whittaker,
18 but it was run pretty much by Tracy.

19 Q. And she was reporting to both men at that time;
20 right?

21 A. That's right.

22 Q. So you, as a member of that committee, would
23 you try to be figuring out which principal she was
24 speaking on or was this a pretty well-melded group?

25 A. Yeah.

1 Q. They were both responsible for this.

2 A. Yeah.

3 Q. What was your role on that committee?

4 A. I was the same as anybody else. The idea was
5 to determine priorities for the expenditures of whatever
6 remaining funds we had left.

7 Q. Okay.

8 A. So it was a prioritization project.

9 Q. Is that committee still functioning right now?

10 A. It hasn't met in awhile, I think.

11 Q. It hasn't met since Merck left?

12 A. I don't think so. No, I know they haven't.

13 Q. If they were going to meet -- was there any
14 meeting with the new -- with the new provost after
15 Whittaker became president?

16 A. I am pretty sure there was at least one meeting
17 with Elizabeth, maybe two. That would be the most.

18 I think, as of like September when all this
19 started, we haven't met since then.

20 Q. Okay. Did you attend the February, 2017,
21 retreat on facilities that that group held?

22 A. No, no.

23 Q. Did the use of E&G carryforward for capital
24 projects come up at any meeting of the facilities budget
25 committee to your recollection?

1 A. No.

2 Q. Okay. Do you recall a five-year internal
3 capital plan reviewed at the September meeting?

4 A. I don't recall it. If you could show it to me,
5 I would be happy to look at it.

6 Q. I can. I can pull it up here.

7 And thank you very much for your patience this
8 morning.

9 A. Of course.

10 Q. I'm glad we told Ronnie that we would run over
11 a little bit.

12 Okay. I'm going to blow this up a little bit,
13 but I'll let you see the heading here.

14 A. Okay.

15 Q. So that's the facilities projects, five-year
16 internal capital plan.

17 A. Uh-huh.

18 Q. Okay. And so a lot of these buildings we've
19 been hearing about lately are on that, on that plan.

20 A. Uh-huh.

21 Q. Okay. And so -- I'm not very good with these
22 things.

23 So these talk about -- about when they expect
24 to expend the bulk of the funds for each project, total
25 project -- these are budgets, because they're not done

1 yet.

2 A. Uh-huh.

3 Q. And then it shows total external and total
4 internal funding --

5 A. Uh-huh.

6 Q. -- for that project, and then any shortfall to
7 date.

8 So this would be the funds they're looking for
9 to complete these priority lists.

10 A. Okay.

11 Q. Do you remember that document being discussed
12 in a facilities budget committee?

13 A. I don't remember this particular document.
14 That doesn't mean it wasn't in the materials that were,
15 you know, in there, but --

16 Q. But you would ordinarily review the materials
17 before a meeting like that and ask any questions?

18 A. Yeah, absolutely.

19 Q. Okay. Would you have ever -- when you see, I
20 think the total down here is a 172 million of internal
21 funds.

22 A. Yeah.

23 Q. It's a 10 page deal.

24 They've got a total of 172 million of internal
25 funds, only 90 million of external.

1 Would you ever ask questions about, now, what
2 internal funds are these?

3 A. No.

4 Q. Okay.

5 A. No.

6 Q. Would you, just as a vice president, have a
7 concern about where are we going to find \$400 million in
8 the next five years for capital projects?

9 A. No, because we knew we had way, way, way more
10 needs than we had money.

11 So this was -- again, the role of the committee
12 was to prioritize. So we would sit around the room and
13 people would make a case for why this needed to be a
14 higher priority than that, and that was really the
15 nature of our work.

16 Q. And then it's our understanding that those
17 kinds of discussions, whether it was a staff group
18 before this committee was formed or this committee
19 thereafter, would lead into the recommendations to the
20 board on the five-year capital improvement plan as part
21 of the budgeting process and the BOG request --

22 A. Yes.

23 Q. -- et cetera?

24 A. Tracy and Christy would summarize the -- what
25 happened at the meeting, and then my understanding is

1 they would then send that out.

2 Q. Once this committee started, are you aware of
3 any alterations of priorities that might have been
4 established by this group? I mean, they talked about
5 voting members of this group.

6 A. Yes.

7 Q. Are you aware of any reprioritization done by
8 Merck and his staff that would have conflicted with the
9 committee's priorities?

10 A. No, I'm not aware of any. It certainly could
11 have happened. We were an advisory committee, so I
12 assume if they wanted to do that, they could do that.

13 Q. And I can't remember. Did you say you were on
14 the bigger, the university budget committee?

15 A. I was.

16 Q. Would that -- it's my understanding that
17 committee would take these recommendations and work on
18 them some more, in fact, going to sources of funds. Do
19 you recall those -- those discussions?

20 A. The only sources of funds we talked about, that
21 I recall, is it was either nonrecurring or recurring.
22 That was how they were divided up.

23 Q. Would it surprise you to know that this -- this
24 document that's presented, an equivalent document
25 presented to the university budget committee would

1 actually break up the internal funds with bonds, E&G
2 carryforward, auxiliary funds -- I can't remember if
3 there was another. Would that surprise you --

4 A. It would surprise me.

5 Q. -- to hear that?

6 A. It would surprise me.

7 Q. And if you had seen those kind of documents,
8 you wouldn't have thought anything about it?

9 A. No. I mean, I'm assuming that when they
10 presented these things and they said here's the money we
11 have to spend on them, that they were monies that we
12 could use, you know.

13 Q. What's your understanding of -- of the term
14 carryforward funds? Do you have a working knowledge of
15 what that entails?

16 A. My -- from my perspective, carryforward was
17 anything we had left over at the end of the year, which
18 would include E&G. It would include auxiliaries, donor
19 funds, interest earnings. You know, it would include
20 anything we had left over at the end of the year that
21 was not spent.

22 Q. Okay. Are you aware of any commingling of
23 interest earnings from E&G and other types of funds?

24 A. No. I wouldn't be involved in that detail, no.

25 Q. Did you have any concern about where those

1 internal funds were coming from?

2 A. Never.

3 Q. Okay. When were you first advised of the audit
4 questions that started, I think, in April?

5 A. Yeah. I was advised -- I believe it was about
6 a week before that exit conference, and I am pretty sure
7 Kathy Mitchell told me about it.

8 Q. At that time, and I understand that there
9 wasn't a great concern until this conference call with
10 Marshall Criser?

11 A. I wouldn't characterize it that way.

12 Q. I want to know what, before the uproar
13 started --

14 A. Yeah.

15 Q. -- what was your level of concern about --
16 about that issue?

17 A. So the conversation with me was that we've got
18 this audit comment involving Trevor Colbourn Hall. I
19 said okay.

20 And we've got an audit exit conference coming
21 up. So I thought, okay, well, I'll go to the exit
22 conference. I'll see what this is all about.

23 And that's when Bill Merck came in. And you
24 know, they said, well, you used E&G funds.

25 And he was like, yep, that's on me. I did it.

1 I'll take the hit, you know.

2 And that was -- I was stunned at that meeting.

3 Q. If, before this came up last summer, someone
4 had mentioned using E&G funds for a construction
5 project, let's say more than \$2 million so we're not
6 worried about all those supposed limitations.

7 A. Okay, yeah. I would have said absolutely not.

8 Q. You would have been very concerned about that?

9 A. Yeah.

10 Q. Even though you don't really recall the 2013
11 changes to the regulation, and you didn't consider that
12 in your domain; you consider that Merck's
13 responsibility?

14 A. So I knew that you couldn't use operating funds
15 on capital projects.

16 Q. Okay.

17 A. And I knew the statute said it was \$1 million.
18 Had someone come to me and said we're going to spend
19 \$38 million of E&G funds, I would have said you cannot
20 do that.

21 And had it been Bill, I would have said, Bill,
22 you can't do it.

23 If Bill says, I'm going to do it anyway, I
24 would have gone to President Hitt.

25 And if President Hitt said, well, it's a sick

1 building and we have to do it, I would have gone to the
2 board.

3 And that's my obligation as a lawyer. I can't
4 allow people to knowingly violate the law.

5 **Q. So would it be your opinion that everyone that**
6 **knew that E&G funds were being spent that way would have**
7 **had an obligation to communicate that to the board?**

8 A. Absolutely. I don't think -- I don't think the
9 obligation of the CFO or anybody who presents in front
10 of the board is to provide clues that there might be a
11 violation of the law, right, like doing little phrases
12 like "internal funding."

13 They have an affirmative obligation to tell the
14 board what we are proposing to do will violate the law.
15 Otherwise, the board cannot make an informed decision.

16 So, yeah. And I'll tell you, from day -- from
17 once this happened, there was no doubt in my mind that
18 Bill Merck intentionally misled the board, intentionally
19 misled -- I think he misled Dale, and I know he
20 purposely avoided our office because he knew what he was
21 doing was wrong.

22 And he knew if he brought it to me, I would
23 have told him no and I would have taken it to the board.

24 **Q. Okay. What were your steps after that exit**
25 **interview? Was Dr. Whittaker in that exit interview?**

1 A. He was not.

2 Q. Was Mr. Heston?

3 A. Yeah, Grant was.

4 Q. I think I heard Mr. Marchena say that's the
5 first one he missed.

6 A. Yeah.

7 Q. Did he mean as board chair or did he regularly
8 go to exit interviews as long as he was on the board?

9 A. He was in a couple, yeah. I remember him at a
10 couple.

11 Q. Are trustees invited to those?

12 A. Yeah, anybody is invited, yeah.

13 Q. I mean, my understanding is those issues aren't
14 published until after that in any way, until after that
15 exit interview.

16 A. Yeah. I remember him at another one, but they
17 probably involved facilities issues; that would have
18 been why he was there.

19 Q. How is that invitation put out to the trustees?
20 I mean, I don't -- the auditor doesn't invite all the
21 trustees, do they?

22 A. No. It would have gone most likely -- well,
23 probably from internal audit. Robert has a tendency to
24 copy the whole world on these things, so I think it's
25 very possible.

1 Q. We'll ask him about that.

2 A. Yeah.

3 Q. So what were your steps after that exit
4 interview?

5 A. So in the next week or so, we had several
6 meetings with Bill Merck, Dale, and me and Grant Heston
7 and Janet Owen to figure out, you know, excuse my
8 French, what the hell happened here?

9 And Bill was very lackadaisical about the whole
10 thing. He was like, "It's a hundred percent on me. I
11 did it. I'm prepared to take the consequences."
12 Although I don't think he ever got how serious this was.

13 And you know, we started, you know, probing
14 with him, Well, Bill, did you know this the whole time
15 and that kind of stuff. And he really -- he wasn't
16 willing to talk about anybody else who was involved. He
17 kept coming back to, you know, this is on me.

18 He said in one of those meetings -- we had
19 several -- that he didn't tell the board because he knew
20 that they wouldn't approve it if he told them.

21 And I specifically remember him telling me that
22 he would do it again because he was doing the right
23 thing.

24 Q. I'm assuming that raised a lot of concerns for
25 you, and I would assume for the president?

1 A. Absolutely.

2 Q. Were there steps taken at that point to review
3 all similar transfers to see what other funds might have
4 been --

5 A. Yeah. We were in the process of developing a
6 plan to do further investigation internally. Then we
7 had the call with the chancellor.

8 Q. Can you describe that? I'm not really sure
9 about what date that happened, and I'm even confused on
10 when we got information, because I've only seen things
11 in writing in early September.

12 A. Yeah. There was something really big
13 happening. I would have to look at -- do you remember
14 the date of the audit exit?

15 Q. I don't know the date of the exit interview,
16 honestly.

17 A. Because I remember there was something big we
18 were finishing up, and we basically went a week until we
19 could really totally focus on it. And then we were
20 talking about okay, what are we going to do?

21 Dale decided that he was going to require Bill
22 to resign, and Bill said I'm ready to retire.

23 And he said, can I have until the end of the
24 year? And Dale initially said yes.

25 Q. And this was before the conversation with

1 Criser?

2 A. Yes. And then we had the conversation with
3 Criser and Vikki Shirley and everything, and needless to
4 say they were very upset. And that's when we decided we
5 would bring this in -- bring an outside person in.

6 Q. Do you know if in that area of time if
7 Dr. Whittaker had conversations with Tracy Clark about
8 the matter?

9 A. I don't know. Not with me present.

10 Q. But you do know she had been reporting to him
11 as provost for a number of years?

12 A. Yeah, yeah. I wouldn't be surprised if he did,
13 but I don't know.

14 I had a conversation with Tracy and she
15 admitted she knew it was wrong and she started crying
16 and --

17 Q. Was that in -- was that in September when Kathy
18 was involved or -- I think we're going to have questions
19 about that in a minute, so just hold that.

20 I'm trying to see what was done before the
21 Criser call.

22 And then who was on the Criser call?

23 A. It was me and Janet and Dale, and I think
24 Grant.

25 Q. Okay.

1 A. We were sort of the team that was trying to
2 help.

3 **Q. And nobody from finance and facilities?**

4 A. No, no -- well, no, no, Bill Merck was on the
5 call, yeah, yeah. Bill Merck was on the call, because I
6 remember Marshall basically said, what the hell were you
7 doing?

8 Bill said the same thing, you know. I thought
9 I was doing the right thing, you know. Still didn't get
10 it.

11 **Q. Before that call --**

12 A. Yeah.

13 **Q. -- had there been any attempt to find other
14 transfers besides that 38 million?**

15 A. Not that I -- we were focused on Trevor
16 Colbourn.

17 **Q. At that point, were you aware of any refunding
18 efforts that Merck may have instituted?**

19 A. No.

20 **Q. Would it surprise you to learn that in July,
21 the capital improvement plan that was put before the
22 board included a notation about Trevor Colbourn Hall
23 with a CF auxiliary as a funding source?**

24 A. Well, I don't remember that being on there.

25 **Q. Would it surprise you to learn that was done in**

1 July?

2 A. So carryforward auxiliary, is that it?

3 Q. That's what I interpret it to mean.

4 A. Well, I assumed that it was all being funded by
5 auxiliary. When I saw internal fund, I assumed it was
6 auxiliary.

7 Q. Are you aware of -- are you aware of this BOB-2
8 form that Merck has cited?

9 A. I am.

10 Q. Are you aware of the use of that form?

11 A. Yeah. I think that's the form that -- and I
12 learned this post this. I believe that's the form that
13 you list the buildings that you're later going to seek
14 PO&M for. Is that right?

15 Q. And PO&M means plant operations and
16 maintenance?

17 A. Plant operations and maintenance, yes.

18 Q. And that's a kind of -- that's a class of
19 operating funds?

20 A. Correct.

21 Q. Are you aware of the legislative consequence of
22 those requests?

23 A. I assume that they look at those to decide if
24 they're going to issue PO&M, but I really don't.

25 Q. Have you ever reviewed the general

1 appropriation act and its relation to each of the
2 universities?

3 A. I'm sure I have, but not in a long time.

4 Q. Okay. But one of the things that we've
5 emphasized in our reports is that the result of that is
6 the general appropriation act says, the following
7 universities are authorized to build the following
8 projects with non-appropriated funds.

9 A. Yes, I'm aware of that.

10 Q. Did you remember that notation in the audit --

11 A. Yes.

12 Q. -- that discussed that issue?

13 A. Yes, I do.

14 Q. And that's the legal result of whatever that
15 request means.

16 A. Okay.

17 Q. You can build this with non-appropriated funds.

18 A. Yeah, okay. I'm with you.

19 Q. Would you interpret that as a prohibition on
20 building it with E&G funds?

21 A. Sure, absolutely.

22 Q. And in fact, that building was approved in
23 similar fashion in '15, '17 and '18.

24 A. Uh-huh.

25 Q. We've actually got questions with Kinsley why

1 we keep putting the same building on the BOB-2 over and
2 over again.

3 A. Yeah.

4 Q. But again, as a curiosity, that they would have
5 included that building again for the following capital
6 improvement plan when the building was going to be
7 completed in August?

8 A. It doesn't make any sense.

9 Q. So it just makes us wonder if there were some
10 plans to repay what might be characterized as an
11 internal loan. Would that be consistent with Merck's --

12 A. Yeah.

13 Q. -- your understanding of his working style?

14 A. Yeah. Yes, it would be.

15 Q. But did he say anything to Dr. Whittaker
16 between the exit interview and the Criser meeting? Are
17 you aware of he or Tracy or anybody making
18 representations, we've already found the funds to repay
19 this and we're going to be able to report that we've
20 made it whole?

21 A. I am not aware of any conversation like that.

22 Q. So between then and the Criser call, there was
23 no directive to research other transfers?

24 A. No.

25 Q. Do you think Dr. Whittaker understood the

1 **seriousness of it and who would have helped him to**
2 **understand -- before the Criser call, who would have**
3 **helped him to understand?**

4 A. No, I don't think he did. This was way outside
5 his area. I think he understood it was serious, because
6 he was being treated very seriously by the auditor
7 general.

8 So I think at that point he understood. And no
9 question, after the conversation with Criser and group,
10 he understood it was very serious.

11 **Q. Given the fact that the president has a broad**
12 **delegation on budget --**

13 A. Yeah.

14 **Q. -- why do you say that the sources of funding**
15 **for multi-million dollar projects is outside his area?**

16 A. So, Dale -- if you look at how Dale came up
17 through the system, he is an agricultural engineer,
18 faculty member, went up through as provost, and then
19 became, you know, just recently president.

20 He would never have been exposed to any
21 financial type things at all. If you know faculty
22 members, that is not their strength. Just like I don't
23 know anything about agricultural engineering, he doesn't
24 know anything about finance.

25 So I don't believe that he had the background

1 to understand the significance of this, what this was.

2 **Q. You mean at the time he became president or**
3 **when he came here as provost?**

4 A. Oh, as provost, yeah. He would have had no
5 background whatsoever in dealing with any of these type
6 of things.

7 **Q. What do you think Tracy was advising him on**
8 **during those -- that period of time she was dual**
9 **reporting to Whittaker and Merck?**

10 A. I don't think she was advising him on that. I
11 think she brought it to the attention of Bill Merck, and
12 I think Bill Merck basically told her to be quiet.

13 **Q. You think she brought what?**

14 A. I think she brought it to Bill.

15 **Q. The concern?**

16 A. The concern about E&G. There is no question
17 she knew it was wrong and she told Bill. And according
18 to Tracy, Bill told her, you know, be quiet.

19 **Q. Do you know if they withheld that information**
20 **from Dr. Hitt or do you have reason to believe that?**

21 A. Well, Bill and Dr. Hitt were very close. They
22 had a very different relationship than Dale had with
23 Dr. Hitt or Dale had with Bill. They worked together a
24 long time.

25 Knowing the way he worked with -- Dr. Hitt was

1 not a detail guy at all. He flew at 30,000 feet, and I
2 am sure that Bill would have told him some story about
3 it being wrong. Now, whether he told him it violated
4 statute or it was even E&G, I don't know. But Bill
5 would have told him it was wrong.

6 But if Bill said we had to do it, I can see
7 John saying, okay, well, if you have to do it, then do
8 it. That was the -- that was the way they operate.

9 Could I veer off for one second on that?

10 **Q. Sure.**

11 A. When the board of trustees came into power,
12 John Hitt and Bill Merck had been at the institution
13 close to a decade.

14 **Q. I understand.**

15 A. And John Hitt was very resentful of the board
16 of trustees. They were impinging upon his authority,
17 and so I don't believe that he or Bill ever understood
18 or accepted the fact that they were the governing board.
19 And they felt that this was their decision to make and
20 not the board's.

21 Of course, the flaw in that was, one, it
22 wasn't. And two, they brought it to the board. So when
23 you bring it to the board, by God, you've got to give
24 them full information, and that's where the real failure
25 was here.

1 Q. Have you developed that view since last summer
2 or were you observing those -- would you have those
3 concerns all along?

4 A. Absolutely all along.

5 Q. Did you ever share those concerns --

6 A. I did.

7 Q. -- with the trustees?

8 A. Oh, yeah. Oh, sure. And they -- I think they
9 shared the same concerns.

10 I shared them with John. I often had to say,
11 John, we need to take this to the board.

12 Q. Does it surprise you that he's unwilling to
13 come and answer for the decisions?

14 A. It disappoints me greatly.

15 Q. Okay. Has the audit department, since -- let's
16 say since the Criser conversation, has the audit
17 department -- was Taft in on that call?

18 A. No.

19 Q. Okay. Has the audit department been directed
20 to do anything with respect to the E&G carryforward
21 investigation internally?

22 A. I believe they've been involved. Kathy
23 Mitchell has been driving that investigation. I know
24 she has to go work with the remaining people in finance
25 and accounting to do that.

1 I don't know to the extent that she has brought
2 in Robert's group to assist her with that. I just
3 don't.

4 Q. Has she sought your assistance --

5 A. Yes.

6 Q. -- in the investigation?

7 What kind of help have you offered her or have
8 you -- has she solicited from you?

9 A. Yeah, yeah. Mostly, when she gathered
10 information, you know, how do we want to present it?
11 And I'll say, well, let's make sure we disclose this and
12 disclose that. So I'll -- I'm more in the sort of
13 making sure we're providing full information to the
14 board.

15 Q. To the board?

16 A. Yeah.

17 Q. Okay. Have you heard Mr. Heston give any
18 advice about managing the issues?

19 A. Well, Grant's job is the communications guy.
20 So yeah, he's been working really hard to try to salvage
21 the reputation of the university, yes.

22 Q. Do you believe Dr. Whittaker has been
23 transparent during the investigation, say, beginning
24 with the September 6th meeting and moving forward?

25 A. I do. Well, transparent. He has removed

1 himself entirely from the time that that investigation
2 started. He completely backed out. He had nothing to
3 do, no communications or anything with regard to the
4 investigation.

5 We didn't talk about the investigation.

6 MR. RUBOTTOM: Okay. Carine, I think I'm ready
7 for your --

8 MS. MITZ: Okay. I've got 10 minutes.

9 MR. RUBOTTOM: I'm sorry.

10 THE WITNESS: I'll speak fast.

11 MS. MITZ: Me, too.

12 CONTINUED DIRECT EXAMINATION

13 BY MS. MITZ:

14 Q. So when it came time for you to find, affirm,
15 and ultimately fund Bryan Cave, did anybody help you
16 make that decision or was that you and only you?

17 A. Me and only me.

18 Q. Okay. Do you know why Bryan Cave was asked to
19 not look into any other projects for which E&G may have
20 been used when that was part of their initial charge?

21 A. So my understanding from conversations with Bev
22 and others was that we had a target deadline to report
23 back to the board of governors; I believe it was the
24 January meeting, February meeting.

25 Anyway, that was the hard deadline. And it was

1 Burby's opinion that he could not finish a comprehensive
2 investigation and meet that target.

3 So the decision was made by the board to limit
4 it to Trevor Colbourn Hall to get to the board of
5 governors.

6 He continues to be on retainer, and we can
7 continue to do things internally to investigate it. But
8 in fact, during this period that he was doing the
9 investigation, Kathy Mitchell and her group were the
10 ones who actually found all the other projects and
11 brought them to the attention of the board and reversed
12 the charges or reversed the funding.

13 **Q. So it was the board that decided to remove that**
14 **question? Because I don't remember hearing that**
15 **addressed at any board meeting.**

16 A. Yeah. So I don't know if they took an official
17 action on it, but I know Bev Seay, in conversations with
18 Joey Burby about, you know, here's our deadline, can you
19 get it done? And he said he couldn't.

20 Then she said, okay, well, let's knock out
21 Trevor Colbourn Hall first, and then we can -- depending
22 on what's found, we can continue a larger investigation.

23 **Q. Okay. So it may have just been her decision?**

24 A. It could have been, yeah.

25 **Q. Gotcha, okay. All right. So I want to go back**

1 to you started to touch upon a discussion that you had
2 with Tracy Clark, and I believe Christy Tant and Kathy
3 Mitchell were present --

4 A. Yeah.

5 Q. -- sometime in early to mid September?

6 A. Yeah.

7 Q. Okay. And you started to mention that, I
8 think, Ms. Clark began crying?

9 A. Yeah.

10 Q. Can you tell me what happened in that meeting
11 and what upset her to the point of her crying?

12 A. So they were already meeting on something else
13 in my conference room when I walked in. And I don't
14 remember the exact words, but I kind of just asked
15 Tracy, you know, Why?

16 And she just started getting very upset and
17 cried. And I think I said I'm sorry and left the room.
18 But she was really upset.

19 Q. Do you recall her telling you that what --
20 okay.

21 Do you recall them discussing all the other
22 projects for which E&G had been used when you walked
23 into the room?

24 A. They may have been discussing it when I walked
25 in. I was only in for a few minutes, so that may well

1 have been what they were talking about. It would have
2 made sense, because Kathy was looking for those projects
3 at that time.

4 Q. Okay. Do you recall in your presence
5 Ms. Clark, while she was crying, saying President
6 Whittaker was aware that E&G had been used on all the
7 other projects that have since come out and, you know,
8 that we now know about?

9 A. No, I don't recall that. I think I would have
10 remembered that.

11 Q. Okay. And was there anybody else there at that
12 meeting besides Mitchell, Clark, Tant and yourself?

13 A. I don't think so.

14 Q. Just one second here.

15 Okay. So there's been a lot made in the media
16 about the fact that you were given drafts of the final
17 report from Bryan Cave.

18 A. Uh-huh.

19 Q. I would like to explore that a little bit with
20 you.

21 So as a result of a public records request, we
22 then got copies of, it looks like, four versions or four
23 drafts of the agreement, and then an additional copy
24 that had handwriting on it, which I believe was probably
25 your handwriting.

1 A. Yes.

2 Q. Can you tell me -- well, first of all, how did
3 it come to you reviewing them? Were you asked to do
4 that or did Mr. Burby just do it or how did that come
5 about?

6 A. Yeah, Trustee Seay. Mr. Burby had told Trustee
7 Seay that he had a draft available for review. He
8 wanted her to review it.

9 She asked me to review it. She told me,
10 listen, I'm not a lawyer. You're the lawyer for me for
11 the board. I would like you to take a look at it.

12 I agreed to do it. I told her, honestly, I'm
13 not going to make any substantive changes to it, but
14 I'll check statutes and anything that's just wrong, you
15 know, references were wrong or whatever, names were
16 wrong.

17 And I did that. I reviewed one draft, only;
18 that first draft. That was the only draft I reviewed.
19 It was posted upon a separate website, because I never
20 had access to the site that you guys had access to.
21 I've never had access to that site.

22 He posted it on a site so I could look at it.
23 I printed out a copy. I hand wrote my changes. I
24 called Joey. I went through, on the phone, with my
25 changes. He took notes of my changes.

1 And I sent my changes to you, and the board of
2 governors has them, and I understand Joey also sent his
3 side of the conversation. I'm sure they match up
4 perfectly. The changes are what they were. They were
5 very non-substantive changes, didn't mark out anybody's
6 name or try to change any conclusions.

7 So, yeah, I reviewed one draft at the direction
8 of Trustee Seay as her attorney.

9 MR. RUBOTTOM: I'm sorry. Let me just ask a
10 couple of follow-ups. I'm sorry.

11 Did you consider directing Bev to Vikki Shirley
12 instead, in light of the nature of the investigation
13 and the cooperation with the IG?

14 THE WITNESS: No, because, one, I had been
15 cleared in the report, which I -- Bev told me that I
16 had been cleared, which I knew because I wasn't
17 involved.

18 Two, the board of governors themselves had some
19 comments in the report. There were some statements
20 about the board of governors' actions. So I don't
21 see her as being any less, you know, involved in it
22 than myself as counsel for the board of trustees.

23 MR. RUBOTTOM: Did you suggest that Bev let
24 Julie -- the inspector general know that you were
25 reviewing drafts?

1 THE WITNESS: No. We didn't mention it either
2 way. She asked me to do it, and I said I'm fine, be
3 happy to do.

4 MR. RUBOTTOM: Fine. I'm sorry, Carine.

5 BY MS. MITZ:

6 Q. Okay. So I'm following what you're saying, but
7 what I still don't quite understand is why we were
8 provided with four different versions, I guess. They
9 don't have any handwriting on them. They're just PDFs.
10 I think those came from UCF.

11 Do you recall --

12 A. They came from Burby. They didn't come from
13 UCF.

14 Q. Okay.

15 A. They went directly from Burby.

16 Q. I see. Okay.

17 A. So I only received --

18 Q. So the one that you worked on, that was the
19 one?

20 A. Correct, yes. So the request was for all the
21 drafts, but I was only sent one, and that's the one you
22 see with my handwriting.

23 Then he sent all the drafts in response to a
24 public records request, and that's what that is.

25 Q. All right. It all makes sense now. Very good.

1 MS. MITZ: I don't have anything further, Don.
2 We've got three minutes.

3 CONTINUED DIRECT EXAMINATION

4 BY MR. RUBOTTOM:

5 Q. You -- you said you accessed it on one of these
6 cloud drives, the one you accessed?

7 A. Yeah.

8 Q. Were all four available to you?

9 A. No.

10 Q. And you only accessed the one?

11 A. Just the one.

12 Q. How did he let you know that it was available
13 to you?

14 A. He called me.

15 Q. He didn't send you an e-mail with a link or
16 anything?

17 A. He might have -- you know what, he might have
18 texted me and told me. Typically, yeah, it would have
19 to have been a link, so he might have texted me and said
20 it's up, with a link.

21 I think I provided text messages to somebody.

22 MS. MITZ: Yeah, we have some.

23 THE WITNESS: So it may have been. It may have
24 been a text message, yeah.

25 BY MR. RUBOTTOM:

1 Q. Okay. I'm going to show you an e-mail, and
2 this is a copy of one from the 19th from Tracy and
3 Christy, but it forwards an e-mail from Kathy that was
4 sent to you and Clark and Heston and Dr. Whittaker.

5 A. Yeah.

6 Q. And ask if you recall that September 18th
7 e-mail?

8 A. Yes, I do.

9 Q. There was a board meeting on the 20th where the
10 14.3 -- I think the number is now 13.8 -- that had been
11 spent was discussed.

12 A. Uh-huh.

13 Q. Those projects and the amounts spent were
14 discussed?

15 A. Uh-huh.

16 Q. Who was responsible -- you said Dr. Whittaker
17 had checked out -- I mean, had distanced himself?

18 A. Right.

19 Q. Who was -- who, in your mind, was responsible
20 to communicate the other \$32 plus million in transfers
21 to the board?

22 A. Are you talking about the transfers that were
23 never spent?

24 Q. Exactly.

25 A. Right, and then reversed. I think probably

1 Kathy.

2 Q. When do you think she disclosed that to the
3 board?

4 A. I think it was later that that was disclosed,
5 probably not until fairly recently.

6 Q. Was there any discussion among the group of
7 people on that e-mail about when to disclose that?

8 A. No. My best guess is that she -- we were all
9 focused on finding mis-expenditures of E&G funds and I
10 think probably she just didn't think it was what they
11 were looking for.

12 Q. Did you have any discussion with Marchena about
13 those funds between that date and the time that the --
14 that the preliminary audit was published on
15 November 27th?

16 A. I don't believe I did.

17 Q. Okay. Any other trustee?

18 A. No.

19 Q. Dr. Whittaker?

20 A. No.

21 MR. RUBOTTOM: I'm going to mark this one as 2
22 and this one as 1, so thank you.

23 (Exhibit No. 2 was marked for identification.)

24 BY MR. RUBOTTOM:

25 Q. You made a presentation to the board. I

1 believe it was on the 6th -- the 6th of September.

2 A. Okay, yes.

3 Q. First big board meeting, you made a
4 presentation with background information?

5 A. Yes.

6 Q. These are the pages pulled off the board
7 website that include your Exhibit A, detailed timeline.
8 I believe it's -- this is the board agenda from
9 September 6th. It also includes the Exhibit B, the
10 listing of expenditures.

11 A. Right.

12 Q. But on the detailed timeline, the very last --
13 the presentation, this is a report that you made, I
14 believe, to the board?

15 A. It is.

16 Q. That last paragraph, would you read that out
17 loud? And then I've got a couple of questions about it.

18 A. "The plan for restoring E&G funds that were
19 spent on the construction and furnishing of Trevor
20 Colbourn Hall in cash totalling 38 million has been
21 returned to E&G and replaced with cash and accumulated
22 investment gains from auxiliary and concession funds.
23 In August, 2018, the E&G carryforward was returned and
24 the current sources of funding are 36.7 million
25 auxiliary funds, \$950K concession funds, \$600K a PO&M

1 for demolition of old building, and \$320K E&G funds for
2 project management services provided by Facilities
3 Planning."

4 Q. Who gave you that information?

5 A. I'm guessing I got that from Kathy.

6 Q. Okay.

7 A. I would not have gathered that myself.

8 Q. Was it your understanding that the -- that the
9 investment gains there had been -- had been realized and
10 liquidated and turned into cash?

11 At that time, was that your understanding when
12 you presented that, that those investment gains had been
13 liquidated and in cash form returned to E&G accounts?

14 A. Yeah. So at this time, I didn't know either
15 way. You know, they presented this as what happened.

16 Of course, I understand later that there is
17 this issue about it being unrealized, and then later it
18 was sold and realized.

19 Q. Well, the words on this report say "accumulated
20 investment gains."

21 A. Right.

22 Q. So would you consider that to be an ambiguous
23 statement then, as to whether --

24 A. Yeah. I mean, my assumption would have been
25 that they were sold and liquidated, yeah. I mean, I

1 think that's a reasonable interpretation.

2 Q. I don't remember. I think it was the 20th
3 where they had that listing of those funds --

4 A. Yeah.

5 Q. -- more detailed.

6 And that's the time that the word "unrealized
7 gains" entered into the conversation?

8 A. Yeah. You know --

9 Q. Did you have concerns about that at that time?

10 A. I did, I did, because I remember asking Kathy
11 about that. And -- so thank you, because I do remember.
12 Yeah, I assumed those were sold.

13 And then the unrealized thing came back, and I
14 remember sitting with Kathy, and I said, I don't really
15 understand what that means.

16 And she said, well, this is all just an
17 accounting thing. So the money is there. It covers,
18 you know, the amount that, you know, was inappropriately
19 transferred. And so, you know, it's just an accounting
20 thing, rather than selling the investment and incurring
21 the charges, right then.

22 You know, I thought it was a little odd, but
23 she was assured. She said, you know, we have a lot of
24 money and there's a lot of float, and it's not like
25 that's the only money we have, right. So if the

1 investment goes down, we just replace it with additional
2 monies. So it's always allocated to that account.

3 So that was the explanation to me.

4 Q. Do you think she understood the risks of that
5 kind of accounting maneuver?

6 A. I think she assumed that there was more than
7 enough money to be available to cover any market risk.
8 I think that was her theory.

9 Q. Have you looked at the 15,000 row accounting
10 that I think Christy put together, I can't remember, and
11 delivered to -- I can't remember, I think probably to
12 Julie, listing, basically, all the holdings in
13 investment accounts?

14 A. I'm sure I've seen that at some point, yeah.

15 Q. Are you aware there's negative balances? There
16 are departments or subdepartments or whatever that have
17 negative balances in that fund?

18 A. Are you talking about the auxiliary funds?

19 Q. I'm talking about the investment funds, the
20 total holdings in the \$600 million of investments as
21 of --

22 A. No.

23 Q. -- last fall.

24 A. No. I don't even know how that happens.

25 Q. Are you aware that there had been discussions

1 about spending unrealized gains in recent years?

2 A. I don't know how you spend unrealized gains.

3 Q. Well, I think Kathy described to you how they
4 think that they could.

5 A. Well, what she described to me was having funds
6 available for an account. That's different than
7 spending. To me, you have to liquidate in order to
8 actually spend the funds.

9 Q. Well, that was my impression.

10 A. Yeah.

11 Q. And I asked Bev Seay about that after the
12 meeting. It didn't even give her pause, that issue.

13 A. No. Bev has very strong views on that.

14 Q. When did she raise that issue with you?

15 A. Who, Bev?

16 Q. Yes.

17 A. Oh, probably the first time it came up. In
18 fact, it may have been -- well, I think we probably
19 learned about it at about the same time. And Bev was
20 very unhappy with that.

21 And so I went down and I talked to Kathy, and
22 that was her explanation. I think she stuck with that
23 for awhile.

24 And then I think we just kept saying, Kathy, I
25 believe that you believe this, and that maybe as an

1 accountant that makes a lot of sense to you, but I said
2 perception is not good on this. So I think we just need
3 to liquidate it.

4 **Q. Before the holidays, did you ever discuss that**
5 **issue with Trustee Garvy?**

6 A. Garvy. I don't recall if I did or not.

7 **Q. Would he be a trustee that would have a good**
8 **working knowledge of that kind of issue?**

9 A. Absolutely.

10 **Q. Is that --**

11 A. Absolutely.

12 **Q. Do you remember discussing with Marchena or any**
13 **trustees this unrealized gains issue?**

14 A. No. It was mostly with Bev Seay, and she was
15 very adamant about it.

16 So we ultimately convinced Kathy, we need to
17 sell this, Kathy.

18 **Q. In the meantime, the markets were falling?**

19 A. Right. That's right, that's right.

20 Now, of course, everything was totally
21 reimbursed, right, the account. We took that into play.
22 And she was successful in getting the investment firm to
23 waive any fees. You know, there's always a fee
24 associated with selling that kind of investment. They
25 waived all those. That may well have covered any loss

1 in the market.

2 Q. Okay.

3 A. But, yeah, listen. It was odd and we fixed it.

4 MR. RUBOTTOM: Okay. Thank you. Ronnie is
5 probably here, but Carine, do you want to do the
6 close out?

7 MS. MITZ: Oh, yes. Mr. Cole, we were just
8 asking people not to discuss this deposition while
9 our investigation continues.

10 THE WITNESS: Of course.

11 MS. MITZ: So we'd ask that you agree to not
12 discuss anything we asked, the answers that you gave
13 until we're done. So do you agree to do that?

14 THE WITNESS: Of course.

15 MS. MITZ: All right. Thank you.

16 THE WITNESS: Nice to meet you.

17 MR. RUBOTTOM: Likewise. Have a great day.

18 (Discussion off the record.)

19 THE WITNESS: I'll waive.

20 (Exhibit No. 3 was marked for identification.)

21 (The deposition was concluded at 9:38 a.m.)

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CERTIFICATE OF OATH

STATE OF FLORIDA:
COUNTY OF ORANGE:

I, Emily W. Andersen, RMR CRR FPR, Stenograph
Shorthand Reporter, certify that WARD SCOTT COLE,
ESQUIRE personally appeared before me on
February 15, 2019 and was duly sworn.

WITNESS my hand and official seal this 17th day of
February, 2019.

Identification:
Produced Identification
Florida Driver's License

Emily W. Andersen

EMILY W. ANDERSEN,
Notary Public State of Florida
Commission No. GG 258112
Expires October 14, 2022

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CERTIFICATE OF REPORTER

STATE OF FLORIDA:
COUNTY OF ORANGE:

I, Emily W. Andersen, RMR CRR FPR, Stenograph Shorthand Reporter, certify that I was authorized to and did stenographically report the foregoing deposition of WARD SCOTT COLE, ESQUIRE; that the review of the transcript was requested; and that the foregoing Pages, 4 through 90, inclusive, are a true and complete record of my stenograph notes.

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

DATED this 17th day of February, 2019.

Emily W. Andersen

Emily W. Andersen, RMR CRR FPR
Stenograph Shorthand Reporter

<p style="text-align: center;">Exhibits</p> <hr/> <p>021519_S. Cole_ Exhibit 01 3:11 20:9</p> <p>021519_S. Cole_ Exhibit 02 3:13 83:23</p> <p>021519_S. Cole_ Exhibit 03 3:14 90:20</p> <hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$1 31:7,12 59:17</p> <p>\$2 31:7 59:5</p> <p>\$32 82:20</p> <p>\$320K 85:1</p> <p>\$38 59:19</p> <p>\$400 55:7</p> <p>\$600 87:20</p> <p>\$600K 84:25</p> <p>\$950K 84:25</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 20:9 83:22</p> <p>1.2 46:13,15</p> <p>1.74 31:2</p> <p>10 54:23 74:8</p> <p>1000 31:2</p> <p>1010.62 47:23 48:8</p> <p>1013.61 31:22</p> <p>11 20:4</p> <p>13.8 82:10</p> <p>14.025 31:20</p> <p>14.3 82:10</p> <p>15 51:12 67:23</p> <p>15,000 87:9</p> <p>17 67:23</p>	<p>172 54:20,24</p> <p>18 67:23</p> <p>18th 82:6</p> <p>1986 6:15</p> <p>1987 6:15</p> <p>19th 82:2</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 83:21,23</p> <p>2008 24:13</p> <p>2010 24:13</p> <p>2013 13:15 17:24 19:3,13,16 20:4 59:10</p> <p>2014 36:18</p> <p>2017 44:5 51:8,12 52:20</p> <p>2018 84:23</p> <p>20th 82:9 86:2</p> <p>216.292 31:1,16</p> <p>219 31:1</p> <p>22 38:6</p> <p>27 40:14</p> <p>27th 15:6 83:15</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 90:20</p> <p>30,000 71:1</p> <p>30-day 15:8</p> <p>36.7 84:24</p> <p>38 65:14 84:20</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>50 50:14</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6th 73:24 84:1,9</p>	<p style="text-align: center;">9</p> <hr/> <p>9 5:23</p> <p>9.007 17:15 19:2</p> <p>90 54:25</p> <p>98 50:4</p> <p>9:38 90:21</p> <hr/> <p style="text-align: center;">A</p> <hr/> <p>a.m. 90:21</p> <p>ability 30:11</p> <p>aboveboard 33:14</p> <p>absolutely 6:6 22:18 24:4 35:2 38:6 54:18 59:7 60:8 63:1 67:21 72:4 89:9,11</p> <p>accepted 71:18</p> <p>access 78:20,21</p> <p>accessed 81:5,6,10</p> <p>account 87:2 88:6 89:21</p> <p>accountability 23:2</p> <p>accountant 89:1</p> <p>accounting 19:8 72:25 86:17,19 87:5, 9</p> <p>accounts 85:13 87:13</p> <p>accumulated 84:21 85:19</p> <p>accuracy 49:5</p> <p>accurate 48:10,16 49:1</p> <p>act 67:1,6</p> <p>action 75:17</p> <p>actions 79:20</p> <p>active 23:5</p> <p>actively 16:6</p> <p>activities 49:20</p>	<p>adamant 89:15</p> <p>add 51:3</p> <p>added 51:9</p> <p>adding 23:10</p> <p>addition 29:2</p> <p>additional 29:10 46:13 77:23 87:1</p> <p>address 30:13</p> <p>addressed 75:15</p> <p>addresses 17:7 31:20</p> <p>adequately 30:12</p> <p>administration 12:2,8 17:17 18:15 22:15</p> <p>administrative 23:18</p> <p>admitted 27:17 64:15</p> <p>adopted 33:19</p> <p>adopts 33:18</p> <p>advance 28:2 36:6 42:21</p> <p>advice 32:18,21 39:8 40:21 73:18</p> <p>advise 7:12 41:18,22</p> <p>advised 58:3,5</p> <p>advises 43:1</p> <p>advising 6:25 7:6 8:12 70:7,10</p> <p>advisor 47:2 48:19</p> <p>advisory 56:11</p> <p>affect 18:16</p> <p>affected 18:22</p> <p>affecting 38:4</p> <p>affirm 74:14</p> <p>affirmative 60:13</p> <p>AGB 42:22,24</p> <p>agenda 9:24 36:6 84:8</p>	<p>agree 34:15 41:1 48:15 90:11,13</p> <p>agreed 78:12</p> <p>agreement 77:23</p> <p>agreements 15:18</p> <p>agricultural 69:17, 23</p> <p>ahead 50:18</p> <p>Airport 11:2</p> <p>allocated 87:2</p> <p>allowed 48:17</p> <p>alterations 56:3</p> <p>ambiguous 85:22</p> <p>amended 18:1</p> <p>amending 17:2</p> <p>amendments 19:17 20:6,15</p> <p>amount 86:18</p> <p>amounts 82:13</p> <p>analysis 30:4,19 50:3</p> <p>and/or 7:23 13:4</p> <p>announces 17:2</p> <p>answers 36:11,14 37:23 39:9,15 90:12</p> <p>anticipate 36:24</p> <p>anybody's 79:5</p> <p>appeared 9:18</p> <p>application 32:19 33:4</p> <p>appoint 41:13</p> <p>approach 20:22</p> <p>approached 8:3,7</p> <p>appropriately 41:17 48:7</p> <p>appropriation 67:1,6</p> <p>appropriations 31:17,19</p> <p>approval 29:11,12</p>
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