

**REPORT OF INVESTIGATION**

**PRESENTED TO THE UNIVERSITY OF CENTRAL  
FLORIDA BOARD OF TRUSTEES**

**January 17, 2019**

**Bryan Cave Leighton Paisner LLP**

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## **I. BACKGROUND AND SCOPE OF INVESTIGATION**

### **A. Engagement of BCLP**

In August 2018, an operational audit by the Florida Auditor General (AG) found that Trevor Colbourn Hall (TCH), an academic building located on the campus of the University of Central Florida, had been constructed using ineligible state funds called Education and General (E&G) funds. On September 6, 2018, the University of Central Florida Board of Trustees (BOT) held an emergency meeting to address the matter. At that meeting, the BOT directed University officials to replenish the E&G funds used for TCH with eligible, non-appropriated funds. At a subsequent meeting held on September 20, 2018, the BOT voted to engage the law firm of Bryan Cave Leighton Paisner LLP (BCLP) to conduct an independent investigation into the University's inappropriate use of E&G funds for capital projects, including the construction of TCH.<sup>1</sup> Specifically, the BOT charged BCLP with answering the following questions:

- Was anyone besides the University's former Chief Financial Officer, William F. Merck II, involved in the decisions to utilize E&G funds for capital projects?
- Did anyone personally profit from this?
- Were there additional capital projects beyond those identified to date in which E&G funds were inappropriately utilized?
- Were there controls in place that failed to prevent or detect this activity or that were violated?
- What additional controls should be put in place to ensure that this does not happen again?

The BOT directed the Chair of its Audit and Compliance Committee, Beverly J. Seay, to oversee the investigation and provide interim reports to the full Board.<sup>2</sup> Following BCLP's engagement, the scope of the investigation was narrowed, and BCLP was directed to focus exclusively on TCH and not any other projects where E&G funds may have been used. We understand such projects may be the subject of future investigation, however.

The BCLP investigative team was led by R. Joseph Burby, a litigation partner in the firm's Atlanta office and leader of the firm's Higher Education Internal Investigations and Compliance team. Prior to joining BCLP, Burby was employed by the United States Department of Justice, serving as an Assistant U.S. Attorney in the U.S. Attorney's Office for the Northern District of Georgia. As a federal prosecutor, Burby investigated and prosecuted a wide range of fraud offenses and other financial crimes,

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<sup>1</sup> BCLP does not currently represent the BOT or the University in any other matters and has not provided any legal services to either in the last 20 years.

<sup>2</sup> On September 25, 2018, Trustee Seay executed an engagement letter on behalf of the BOT, formally retaining BCLP to conduct the independent investigation. (Exhibit 1).

including crimes involving government funds. Burby's practice at BCLP focuses on, among other things, conducting internal investigations for large, complex organizations and their boards, including colleges and universities.

## **B. Engagement of PwC**

BCLP engaged the firm of PricewaterhouseCoopers Advisory Services LLC (PwC) to assist it with the investigation and provide forensic accounting and other services. (Exhibit 2). The PwC team was led by Robert E. Gallagher, a CPA and a Certified Fraud Examiner with substantial experience conducting complex internal investigations involving accounting fraud and regulatory matters and the leader of the firm's Southeast Forensic Services practice group. PwC also has the largest higher education practice in the country, with over 1,500 higher education industry professionals in accounting and auditing, regulatory compliance and education advisory services, among others. Gallagher drew upon this wealth of higher education expertise as needed during the investigation. PwC has not previously provided any professional services to the BOT or the University.

## **C. Coordination with Other Investigation**

The University's use of E&G funds for TCH and other capital projects is the subject of a separate investigation by the Florida House of Representatives' Public Integrity and Ethics Committee. Additionally, the State University System of Florida Board of Governors (BOG) has requested documents and other information from the University related to this matter. The BOT directed BCLP to work cooperatively with the House Committee investigators and the BOG and share information. Accordingly, all documents collected by BCLP during the investigation were made available to the House Committee and the BOG. Documents produced by the University in response to requests from the House Committee and BOG were similarly shared with BCLP. The BOG Inspector General and Director of Compliance, Julie Leftheris, also participated in most of the witness interviews that were conducted by BCLP.

## **D. Scope of the Investigative Work**

### **1. General Overview**

BCLP conducted the independent investigation over a period of approximately three months, between late September and December 2018. As previously stated, our work was overseen by BOT Audit Chair Seay, to whom we provided regular updates and reports. BCLP and PwC interviewed over 40 witnesses during the investigation, many more than once. Most of these interviews were conducted in person, although some were done by phone. BCLP also requested extensive documents and other information from the University, including emails and detailed financial and accounting records, which were then reviewed and analyzed. The total number of documents collected and reviewed during the investigation is estimated to be in the tens of thousands.

## 2. Witnesses Interviewed

BCLP conducted over 56 interviews with 43 different witnesses, including current and former University leaders and employees, BOT members, representatives of the BOG, and others having information about the matters within the scope of the investigation.

University President (and former Provost) Dale Whittaker was interviewed, as was President Emeritus John C. Hitt, who served as President during the relevant period; Diane Chase, who served as Acting Provost between April and August, 2014; Vice President and General Counsel W. Scott Cole; Interim Chief Financial Officer and Associate Director of University Audit Kathy Mitchell; Chief of Staff to President Whittaker and Vice President for Communications and Marketing Grant J. Heston; Rick Schell, who served as Executive Vice President and Chief of Staff to former President Hitt during the relevant period; Associate Vice President for Debt Management John Pittman; and Chief Audit Executive Robert Taft.

Several key employees from the University's Finance & Accounting (F&A) department made themselves available for interviews, including Associate Provost for Budget, Planning and Administration and Associate Vice President for Finance Tracy Clark and Assistant Vice President and University Controller Christy Tant, who each gave multiple interviews. Other key F&A employees who gave interviews included Associate Controller Brad Hodum; Director of Finance and Accounting Phillip Henson; Director of Budget Initiatives Lynn Gonzalez; and Director of University Budget, Planning & Administration Donna Dubuc. F&A employees, and in particular Clark and Tant, were extremely cooperative throughout the investigation.

BCLP also interviewed a number of employees from the University's Facilities & Safety (Facilities) department, including Associate Vice President for Facilities and Safety Priscilla L. ("Lee") Kernek; Director of Facilities, Planning and Construction Bill Martin; Director of Downtown Campus Facilities Allen Bottorff; Associate Director, Business Office, Facilities and Safety Resource Management, Lashonda Brown-Neal; and Construction Specialist Gina Seabrook. BCLP requested a follow-up interview with Kernek, but her attorney indicated that she was unavailable, citing health reasons.<sup>3</sup>

Employees from the Provost's Office and Academic Affairs division who gave interviews included Tracy Clark (in her capacity as Associate Provost for Budget, Planning and Administration); Associate Provost and Chief of Staff for Academic Affairs

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<sup>3</sup> Following Kernek's interview on September 26, 2018, lead BCLP investigator Burby received a letter from Charles M. Greene, an attorney representing Kernek, who directed BCLP to have no further direct communications with her. (Exhibit 3). On November 26, 2018, Burby wrote to Greene and requested to interview Kernek again. (Exhibit 4). Greene responded on November 30, 2018, indicated that he was unavailable on the date Kernek had requested for the interview, and further questioned BCLP's authority to interview Kernek and her obligation to cooperate with the investigation. (Exhibit 5). Kernek's interview was eventually rescheduled for December 13; however, prior to that date, Kernek took a medical leave of absence from the University, and Greene advised Burby that she was unavailable to be interviewed as a result. On December 21, 2018, an Orlando Sentinel article noted that Kernek had spoken with the newspaper earlier that week. "UCF official: President Dale Whittaker, others involved in planning on Trevor Colbourn Hall", ORLANDO SENTINEL, December 21, 2018.

Ronnie Korosec; and Assistant to the Provost Dania Suarez. BCLP also interviewed F&A employee Lynn Gonzalez, who served as Associate Vice President for Academic Affairs during the relevant period.

Finally, BCLP interviewed all current BOT members who served on the Board at any time prior to August 2017, including Chairman Marcos Marchena and Vice Chair Robert Garvy (who previously served as Chair and Vice Chair of the Finance and Facilities Committee (FFC), respectively), as well as current FFC Chair Alex Martins and FFC members William Yeargin and David Walsh. BCLP also interviewed representatives of the Florida Board of Governors, including Vice Chancellor for Finance and Administration and Chief Financial Officer Tim Jones and Assistant Vice Chancellor for Finance and Facilities Chris Kinsley.

A complete list of the individuals interviewed by BCLP, and the dates of their interviews, is included at Appendix A.

### 3. Witnesses Not Interviewed

Two former University employees declined to be interviewed: former Vice President for Administration and Finance and Chief Financial Officer William F. Merck II (who served in those roles at all relevant times until on or about September 13, 2018), and former Associate Director for Academic Affairs Budget, Planning and Administration Megan Diehl. Former Provost Tony G. Waldrop (who served as Provost at all relevant times until April 1, 2014) failed to respond to repeated requests for an interview, including requests made in writing. BCLP did not have any ability to compel these individuals to provide interviews.

After repeated attempts to reach Merck by telephone and email were unsuccessful, on October 17, 2018, lead BCLP investigator Burby sent a letter to Merck's residence by Federal Express, formally requesting to interview him. (Exhibit 6). In response, Merck wrote Burby a letter dated November 17, 2018, in which he declined the requested interview. (Exhibit 7). Merck explained that he would feel obliged to have counsel with him if he was to participate in an interview, and that he was unwilling to incur that expense. Nevertheless, Merck has commented publicly regarding the decision to use E&G funds to construct TCH, including in an interview with the Orlando Sentinel in connection with the aforementioned December 21, 2018 article. According to the article, the interview took place at his attorney's office.

### 4. Documents Received and Considered

BCLP submitted numerous written document requests to the University, resulting in the receipt of thousands of documents. Individuals in the University's Office of the General Counsel and Compliance, Ethics and Risk Office coordinated the collection of documents in response to BCLP's requests. BCLP also requested documents and emails directly from some employees in connection with their

interviews. As previously stated, BCLP also received access to documents produced by the University to the other investigative team and to the BOG.<sup>4</sup>

With respect to emails, BCLP collected from the University the entire email accounts of Hitt, Whittaker, Kernek, Merck, Clark and Tant. These emails (totaling over 300 GB of data) were then loaded into an e-discovery document review platform, and BCLP and PwC developed search terms to apply to the emails in order to identify potentially relevant documents. These searches resulted in the identification of over 3,500 emails from the email accounts of the aforementioned individuals during the relevant period, each of which was reviewed. BCLP also requested emails directly from some employees, and the University also collected emails from employees in response to the document requests it received from BCLP, the BOG and the other investigative team and provided them to BCLP.

BCLP also collected and reviewed text messages. BCLP requested through Audit Chair Seay that five current employees, Hitt, Whittaker, Kernek, Clark and Tant, permit their mobile phones to be imaged by PwC forensics personnel so that the contents could be searched for relevant messages. Hitt and Whittaker complied with this request and their phones were imaged and searched using the search terms referenced above. Kernek, Clark and Tant declined the request but did agree to search their phones themselves for relevant messages and provide them to BCLP and PwC. The text messages from these individuals were then uploaded to the e-discovery document review platform and further searched and reviewed.

##### 5. Correspondence Received by BCLP

BCLP has received correspondence sent by or on behalf of three individuals involved in this matter: Merck, Hitt and Kernek. Merck, who declined to be interviewed by BCLP as noted above, sent a letter dated November 17, 2018 to lead BCLP investigator Burby. (Exhibit 7). Hitt also sent a letter to Burby that was received on December 10, 2018. (Exhibit 8). This letter followed his October 24, 2018 interview with BCLP. Finally, Kernek sent a letter to Interim Vice President for Administration and Finance Misty Shepherd on October 8, 2018, following Kernek's interview with BCLP and Shepherd's request for Kernek to produce certain documents, which was shared with BCLP. (Exhibit 9). BCLP has also received an unsigned letter dated January 7, 2019 from Kernek's attorney Charles M. Greene to the BOG, and a similar, signed letter dated January 8, 2019 from Greene to Burby enclosing various documents. (Exhibits 10 & 11). BCLP has reviewed and considered these letters, which are included in the investigation record.

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<sup>4</sup> Additionally, BCLP was given access to documents produced by the University in response to requests it received from the media and others under Florida's Sunshine Law.

## II. SUMMARY OF FINDINGS

This section contains a summary of the findings from the independent investigation and is not intended to serve as a substitute for the full report which follows.

The University receives E&G funds annually from the State of Florida through the General Appropriations Act. Under Florida law and BOG regulations, E&G funds may only be spent on certain types of operating activities, which do not include the construction of new facilities. We found that between 2013 and 2016, the University allocated \$38 million in E&G funds, including over \$37 million in E&G carryforward funds, towards a project which resulted in the construction of Trevor Colbourn Hall (TCH), a new academic facility. (Appendix B). TCH effectively replaced the smaller Colbourn Hall (Colbourn), a similar facility built in the 1970s which stood next to the site on which TCH was built. Of the \$38 million that was allocated to the project, a total of \$30.6 million in E&G funds was spent as of August 28, 2018. The vast majority of these funds were spent in fiscal year 2017-18 on the design and construction of TCH. (Appendix C).

The project was initially conceived as a renovation of Colbourn, which was expected to cost between \$5-8 million. In 2013, and when the construction account for the project was first set up and the first transfer of E&G funds occurred, there were no plans to construct a new building. Over the next three years, however, the plan evolved in several iterations. In the spring of 2014, concerns over rising renovation estimates and the need to relocate employees led to a proposal to construct a new building next to Colbourn, move Colbourn's occupants into that building, and then renovate Colbourn at some later date. The BOT approved the construction phase of this proposal, which was expected to cost \$21.3 million, but did not address funding and also decided to table any decision on Colbourn's fate. In 2015, a new plan emerged—to construct the new building and renovate Colbourn at the same time, at a combined cost of \$38 million. The FFC was informed about the project and its new price tag after the fact, but was not asked to formally approve it or the source of funds. In May, 2016, the plans changed for a final time, as it was decided to raze Colbourn rather than renovate it, and to increase the size of TCH using the funds that would have been spent on the Colbourn renovation. The decision to raze Colbourn was approved by the BOT in July, 2016. Since the estimated cost of the project was still \$38 million, no decision with respect to funding the new construction or demolition was put before the BOT. Construction on TCH began in May, 2017 and was completed in July, 2018. The demolition of Colbourn began in late 2018.

The key figure in all of the decisions outlined above was the University's former Vice President for Administration and Finance and Chief Financial Officer William J. "Bill" Merck II, who was asked to resign from his position effective immediately in September, 2018. Merck oversaw the University's Finance & Accounting (F&A) department, which is responsible for managing E&G funds received by the State and accounting for and reporting on the use of E&G funds. He simultaneously oversaw the University's Facilities and Safety (Facilities) department, which among other things is responsible for planning and overseeing the University's capital projects. This dual role

placed Merck in a position to make all of the important decisions with respect to the Colbourn/TCH project and its funding, and to direct employees of F&A and Facilities to carry out all necessary tasks.

When AG officials announced their audit findings regarding TCH at a meeting in August, 2018, Merck took full responsibility for the decision to use E&G funds to build TCH. Since then, he has consistently and openly acknowledged his role in the matter, though he declined to be interviewed by BCLP in connection with the investigation. He also has stated, after the fact, that he viewed the decision as necessary and justified because Colbourn presented an imminent health and safety risk to its occupants, and because there were no other options to fund the project. We find both of these claims to be rooted in legitimate concerns that Merck and other University officials faced at the time of the decisions. However, the evidence does not support a conclusion that Colbourn presented an imminent health or safety risk requiring emergency action, nor does it support the claim that there was no other alternative but to use E&G funds.

It is clear that Colbourn faced structural and other problems and that millions of dollars would have had to be spent to keep it operational in the long term. We have not found any persuasive evidence, however, that anyone believed the building to present an imminent health or safety risk, either in 2013 when the first E&G funds were transferred to the project or in 2016 when the last significant transfer took place. Engineering reports on the building identified many problem areas, some more critical than others, but none of the reports described any urgent health or safety risk. More significantly, Merck's words and actions at the time (and those of others involved in the project) did not indicate that there was any serious present threat to the health or safety of Colbourn's occupants. Instead, in statements to the BOT, the BOG and other University employees, Colbourn was consistently portrayed as being in need of serious repair but still safe and habitable. And Merck, along with Facilities employees working under him, consistently treated Colbourn as a low to medium priority project when seeking funding from other sources, most notably the state's Public Education Capital Outlay (PECO) program.

As for the claim that no other options existed, the University was undoubtedly in a difficult position with respect to funding for capital projects. PECO funding, an important component of state support for the University's capital projects, fell dramatically after the late 2000's financial crisis. The University developed a significant backlog of deferred maintenance and unfunded projects. We do not find it persuasive, however, that the University was left with no choice but to use E&G funds for TCH. Other funding options existed, including auxiliary funds, investment income and donations/foundation funding, none of which were subject to the same restrictions as E&G. And at Merck's direction, the University did in fact pursue other such projects, such as the construction of a new international student center at a cost of over \$16 million, using permissible funds that could have been applied towards TCH.

We view it as more credible that Merck, and perhaps others, saw the University's E&G carryforward balance as a convenient solution to the problems created by the University's aging infrastructure and the decrease in available state funding. By transferring carryforward funds to the construction account—and \$37 million was

transferred to the account *before* any significant portion of it was actually spent—these funds no longer needed to be reported to the State as a carryforward balance. F&A officials instead were able to “report” the transfers as planned expenditures on deferred maintenance, even after it became clear that the project would involve new construction rather than repairs or renovation. (Appendix D). Moreover, by 2016, the project was considered internally to be “funded,” and University officials involved in the budgeting process could move on to other projects.

Merck declined to be interviewed by BCLP, which makes it difficult to fully assess his motivations. We found no evidence of any improper motive or that Merck stood to gain financially from any of his actions. While it is possible that Merck may have genuinely believed that he was acting in the best interest of the University, it is nonetheless clear that he understood the significance of the decision to use E&G funds for the TCH project, and that he took steps to conceal or downplay that significance. We found no evidence that Merck, or anyone acting at his direction, ever specifically told the BOT that the source of funding for TCH was E&G funds. More significantly, we found no evidence that Merck, or anyone acting at his direction, ever explained to the BOT that the funding of TCH was not permitted under BOG regulations and may lead to adverse consequences for the University. Merck clearly understood that state auditors might find the project to be in violation of the restrictions on the use of E&G funds. He told others close to the project that the project might result in an “audit comment,” but downplayed the significance of this. After the 2018 state audit uncovered the use of E&G funds for TCH, Merck acknowledged on several occasions that he could not have disclosed the relevant risks to the BOT, because he knew the BOT would not have gone forward with the project had he done so.

One of our tasks has been to determine what individuals, other than Merck, were involved in the decision to construct TCH and to use E&G funds for the project. Our findings as to this question are as follows:

Several employees in the University’s F&A department were involved in decisions or tasks relating to funding the project, particularly Associate Provost for Budget, Planning and Administration and Associate Vice President for Finance Tracy Clark and Assistant Vice President and University Controller Christina Tant. Clark and Tant attended meetings dating back to fiscal year 2012-13, led by Merck and Provost Tony Waldrop, in which the initial decision was made to use E&G funds for what was then a plan to renovate Colbourn. In later years, they attended numerous meetings discussing the project as it evolved into a new construction project. Clark and Tant charged with tracking E&G budget decisions made at these meetings and also the funding sources for capital projects, and documents they created or maintained clearly indicated that the University was funding the project with E&G funds. In later years, Clark’s duties included meeting with the Provost regarding budget issues and occasionally presenting to the BOT and other University leaders on various financial issues including funding for capital projects. Tant’s duties included directing the budget entries through which the \$38 million in E&G funds was transferred to the construction account for the project. Significantly, Clark and Tant were also involved in preparing budget reports submitted to the BOG which would have reflected the allocation of E&G carryforward funds, though these reports did not meaningfully explain that the E&G funds were being

used for the project and in fact mischaracterized the allocations as being for deferred maintenance. While they denied any intention to mislead the BOG, they should have understood that their actions had the effect of concealing the use of those funds for a construction project. Both Clark and Tant are finance professionals who recognized that E&G funds could not be used for new construction, but did not take their concerns to anyone outside of F&A. In Clark's case, she raised her concerns only with Merck, who downplayed them. Tant took her concerns to Clark, who explained it was Merck's decision and that worst case they would get an audit comment which Merck would handle. Clark also cited concern for her job security as a reason not to pursue her concerns any further. Neither Clark nor Tant seems to have fully appreciated at the time the seriousness of their actions.

Associate Vice President for Debt Management John Pittman had oversight responsibilities with respect to the E&G budget transfers for the Colbourn/TCH project. He was required to be notified of the transfers and was in fact notified except in one instance. Pittman viewed his role with respect to the transfers as ministerial, akin to a rubber stamp, and acknowledged that he would not have investigated any of the transfers for compliance with the BOG regulations or Florida law. Pittman, who reported directly to Merck, was not involved in the early decisions to use E&G funds for Colbourn or TCH. Later on, Merck assigned him responsibility for tracking the funding for capital projects, through which he came into regular contact with information showing that E&G was the source of funding for TCH. Pittman gave conflicting accounts of his own understanding of the relevant restrictions on the use of E&G. In his first interview, Pittman stated that he understood that E&G funds could not be used for new construction at all relevant times, but in a later interview, he denied having such knowledge until the state audit in 2018 and offered that explanation for why he was not concerned by information he received that showed E&G funds were being used for TCH.

Several employees in the Facilities department were involved in planning the construction of TCH, overseeing the project, and preparing reports on capital projects that are used in the annual budgeting process. Associate Vice President for Facilities Priscilla L. ("Lee") Kernek was closely involved in key decisions on the Colbourn/TCH project. We have found no evidence that Kernek was responsible for the initial decision to use E&G funds for the Colbourn project, and funding decisions are typically not made by Facilities personnel. As the project evolved, however, Kernek took on a larger role. She, along with Merck, developed the initial plans to construct a new building next to Colbourn, and later the plans to demolish Colbourn and use the funds earmarked for renovation towards increasing the size of TCH. Kernek attended meetings in which the use of E&G for the project was openly discussed and both created and received documents indicating the same. In her interview, she acknowledged understanding that at least some of the funds used for the project came from E&G, although she claimed to not understand the significance of this. Kernek, like others, was told by Merck at some point that the funding for TCH might draw an "audit comment" which he would handle. Like others, Kernek appears to have accepted this and also deferred to Merck and F&A regarding funding decisions, and did not challenge or question those decisions.

The Office of the Provost and Academic Affairs department were also involved in decisions relating to the project dating back to the initial decision to use E&G funds for

the Colbourn renovation during the 2012-13 fiscal year. At that time, Tony Waldrop served as Provost. Waldrop failed to respond to our request for an interview, but other witnesses confirmed that he, along with Lynn Gonzalez who served as the principal budget officer within Academic Affairs, participated in the meetings with Merck and F&A personnel where the decision to use E&G funds was first made. It is unclear whether Waldrop was involved in the decision to construct a new building, which was made around the same time he was departing the University, or what his understanding was with regard to the restrictions on E&G. Waldrop's immediate successor, Diane Chase, attended some meetings where the project was discussed during her short tenure as Acting Provost but does not appear to have had any meaningful involvement in the decision to use E&G funds to construct the new building, though she does appear to have approved (together with Merck) the transfer of \$9.3 million in E&G to the project in May, 2014. It was unclear whether she understood at the time that these funds were intended for renovation or new construction. Regardless, Chase denied being aware of any restrictions on the use of E&G funds, and we found no evidence to the contrary.

Dale Whittaker, the University's current President, became Provost in August, 2014. By that time, the BOT had already approved the construction of TCH, and a decision to commit \$10 million in E&G funds towards that project had already been made and the funds had already been transferred to the construction account. Whittaker signed a budget document less than two weeks after his tenure as Provost began in which he recommended for approval by President Hitt the allocation of an additional \$18 million in E&G funds towards the project, and that document was later used by F&A as justification to transfer that amount to the project in June, 2015. We do not believe that Whittaker could have fairly understood the significance of the document he signed in August, 2014, since he had just arrived at the University and funding decisions on capital projects are typically not made by the Provost.

As time passed, however, Whittaker developed at least some understanding of the University's strategies and decisions with respect to funding capital projects in light of the decline in PECO funding. We found evidence that as Provost, Whittaker took an interest in the backlog of unfunded capital projects, particularly those involving academic facilities, at one point calling a meeting with President Hitt, Merck and the CEO of the UCF Foundation in 2016 to discuss how to prioritize the University's planned capital projects. He also pushed for the formation of a Facilities Budget Committee in 2017, which he co-chaired along with Merck. We found that over time Whittaker was provided with information accurately showing that E&G funds were being used to pay for the construction of TCH. However, we also found evidence that during the same time, Whittaker received vague and arguably misleading information about the source of funding for TCH from Merck and others. Perhaps more importantly, Whittaker stated that he was not familiar with restrictions on the use of E&G funds, and we found no persuasive evidence to the contrary. Whittaker also stated that at the time, he was primarily focused on unfunded capital projects and making sure they were prioritized based on academic needs, and information about the funding source for funded projects like TCH would not have been important to him. Like others, Whittaker recalled hearing Merck state that the funding for TCH might lead to an "audit comment," which he said did not worry him because he was not familiar with state audits at the time and also because Merck downplayed the significance of this.

Whittaker also stated that he did not feel he was in a position to challenge Merck because he appeared to have the full confidence of the President, to whom he reported.

Finally, several key decisions were brought to the attention of President (now President Emeritus) John C. Hitt. Merck reported directly to Hitt, and therefore Hitt would have been in a position to overrule any decision or proposal by Merck. It appears that Hitt placed considerable trust in Merck, whom he hired and worked with for many years, and that he generally deferred to Merck in all matters relating to capital project funding including funding of the Colbourn/TCH project. Hitt signed two documents which were used as authorization by F&A to transfer a total of \$26 million in E&G funds to the construction account for the project. With regard to these documents, Hitt stated in his interview that he generally signed such documents without undertaking any meaningful review of them, and that he relied on and trusted Merck and other University officials to perform their duties in accordance with applicable regulations. As for meetings where the decision to use E&G funds for the project was discussed, we were struck by the difference between Hitt's comments in his interview, in which he could not recall any particulars about such meetings, and his subsequent letter to BCLP in which he broadly accepted responsibility for supporting the decision to build TCH and to demolish Colbourn using E&G funds, and recalled details about the decision that were not shared in the interview. On balance, we think it is likely that Hitt, like Whittaker, received some information about the source of funds for the project but that this information was unclear and inconsistent, and further that he did not have a full understanding of the significance of the decision to use E&G funds or the potential adverse consequences to the University. Nevertheless, it does appear that Hitt was advised of the possibility that the funding for TCH might lead to adverse an audit finding and that he directed Merck to go forward with the project anyway.

We found no evidence that any of the individuals discussed above—or any University employee for that matter—personally profited from the decision to use E&G funds to pay for the construction of TCH.

Finally, we were also tasked with investigating whether there were internal controls at the University that failed to prevent or detect the inappropriate use of E&G funds for TCH. As discussed more fully in Section IV of this Report, we found that certain internal controls were either absent or inadequately designed and as a result failed to prevent or detect the activity at issue. Specifically, we found deficiencies in the areas of written policies and procedures regarding the use of state appropriated funding, training and education on such policies and applicable laws and regulations, oversight and approval of significant decisions involving the use of appropriated funds, auditing for proper funding of capital projects, monitoring and reporting. We also found that the University, or at least its F&A department, failed to foster a culture that encouraged challenging senior members of the administration and whistleblower activity. Based on these control deficiencies, and in consultation with PwC, we have proposed certain enhancements to the University's internal controls for the BOT and University leadership to consider, which are set forth in Part IV of the Report.

### III. TIMELINE OF SIGNIFICANT EVENTS

#### A. Background and Early History (through June 2012)

##### 1. About E&G Funds and Their Use

Education and General (E&G) funds are public funds through which the State of Florida supports the operations of the twelve universities that make up the State University System of Florida (SUS). E&G funds are used to support various activities such as academic instruction, research, public service, plant operations and maintenance, student services, libraries and administrative support. E&G funds are appropriated annually by the Florida Legislature to each SUS institution following extensive consultation with the BOG, who in turn works with each institution to identify and assess its funding needs for the upcoming fiscal year. Relevant portions of the budgeting process for E&G funds will be discussed throughout this Report.

After E&G funds are distributed by the State, the institution is required to separately account for and track the use of such funds. The use of E&G funds is governed by regulations promulgated by the BOG pursuant to authority granted to it by Article 9, Section 7, of the Florida Constitution and Fla. Stat. §§ 1001.706 and 1011.40.<sup>5</sup> BOG Regulation 9.007(3)(a)(1) provides, in relevant part, that “[u]nless otherwise expressed by law, **E&G funds are to be used for E&G operating activities only**, such as, but not limited to, general instruction, research, public service, plant operations and maintenance, student services, libraries, administrative support, and other enrollment-related and stand-alone operations of the universities.” (Emphasis added). Subsection (3)(a)(3) of Regulation 9.007 further provides that “[n]o expenditure of funds, contract, or agreement of any nature shall be made that requires additional appropriation of state funds by the Legislature unless specifically authorized in advance by law or the General Appropriations Act.”<sup>6</sup>

Under Regulation 9.007, E&G funds cannot be used to construct new facilities, although E&G can be used for repair and maintenance of existing facilities. According to the BOG staff, E&G funds may be used on renovations and repairs, but only up to a limit of \$2 million. There is no regulation that explicitly sets forth this limit. According to the BOG’s staff, the limit arises from Fla. Stat. § 255.103(4), which imposes a \$2 million limit on a governmental entity’s authority to enter into a continuing contract for construction projects, and Fla. Stat. § 1013.74, which provides that a university may undertake construction or remodeling projects without the need for educational plant survey approval, up to a limit of \$1 million.

Other parts of Regulation 9.007 address the University’s obligations with regard to annual operating budgets. Specifically, the regulation requires the University to prepare an operating budget to be approved by the BOT, in accordance with instructions, guidelines and standard formats provided by the BOG. Regulation 9.007

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<sup>5</sup> The use of E&G and other appropriated funds is also subject to Fla. Stat. § 216.292.

<sup>6</sup> These restrictions apply specifically to E&G funds and not to other sources of funding that make up the University’s operating budget, such as student tuition and fees, auxiliary funds, investment earnings and interest, and donations.

also requires certain information to be reflected in the operating budget. Of particular relevance, the regulation requires every operating budget to include a budget entity called “Education & General,” which should report actual and estimated yearly operating revenues and expenditures for all E&G funds. The BOT adopts the University’s operating budget as prescribed by the regulations, and presents its ratified budget to the BOG for approval. Under BOG Regulation 4.013(2), the University’s budgets once approved “become the basis of operations during the fiscal year, subject to the rules and regulations formulated by the [BOG] providing for budget revisions and amendments.” Notably, pursuant to the regulations, the BOT “delegates to the President or his designee the authority to amend the initially approved operating budgets during the year.”

There is no available case law or Florida Attorney General opinions interpreting the BOG’s regulations during the relevant period, and the BOG does not publish any formal guidance. However, the BOG does regularly inform SUS member institutions of proposed amendments to the regulations. For example, the aforementioned provisions of Regulation 9.007 were circulated to SUS institutions on July 11, 2013, in a redline showing proposed amendments and soliciting comments from SUS chief financial officers, budget officers and general counsels. (Exhibit 12). Emails from the University confirmed that the redline was received and reviewed by the Finance and Accounting (F&A) department, and that F&A had no comments. (Exhibit 13). Ultimately, no comments or objections were raised by any SUS institution, and the BOG approved the proposed amendments on November 21, 2013.

The University maintains certain processes to prepare its operating budgets in compliance with the regulation. When E&G funds are received from the State, they are initially held in a “central reserve” account under the control of the F&A department, which is housed within the University’s Administration and Finance division. F&A employees are responsible for allocating E&G funds from the central reserve to various division, department and college-specific E&G accounts. These allocations are made through “budget transfers” which effectively authorize the division or department receiving the transfer to spend up to the amounts allocated.

In the case of the Colbourn Hall and TCH projects, F&A initiated four budget transfers between 2013 and 2016 to an account controlled by the University’s Facilities and Safety (Facilities) division, and Facilities employees were thereby authorized to spend the amounts transferred on the projects. The processes through which the relevant transfers were made, and through which money was eventually spent on the TCH construction and Colburn Hall demolition, are described in greater detail throughout this Report.

## 2. E&G Carryforward Funds

The vast majority of funds used by the University to pay for the construction of TCH were E&G “carryforward funds.” This term refers to E&G funds that were not spent during the fiscal year for which the funds were appropriated by the State. Under the regulations in place throughout the relevant period, SUS institutions were entitled to keep their E&G carryforward balances for use in later fiscal years. The use of E&G

carryforward funds, however, remains subject to the same restrictions as other E&G funds. Specifically, BOG Regulation 9.007(6) states that “[a]ny unexpended E&G appropriation carried forward to the fund balance in a new fiscal year shall be utilized in support of E&G operating activities only except where expressly allowed by law.”<sup>7</sup>

As discussed in greater detail throughout this Report, the University’s F&A department maintains detailed processes to account for and track the use of its E&G carryforward funds, and the tracking and reporting of these funds has become a significant part of the annual budgeting process. The University’s individual divisions and departments maintain separate E&G carryforward accounts to allow for accurate tracking of carryforward balances.

### 3. Colbourn Hall

Colbourn Hall (Colbourn) was a five-story, 84,000 square foot building located on the University’s main campus. Prior to its closure in August 2018 and subsequent demolition, it served as an academic facility which housed several University departments including English and History, the University Writing Center, the Graduate Student Center, and the University’s Africana Studies Program, Judaic Studies Program, Latin American, Caribbean and Latino Studies, and Women’s Studies Program. Colbourn opened in 1974 and underwent some minor renovations in the early 1990s. By the late 2000s, it was experiencing structural and other problems, some typical of a building of its age. While the extent of these problems and urgency they presented may be disputed, witnesses and contemporaneous documents consistently described Colbourn as in need of significant repairs during its final years.

### 4. Initial Plans to Renovate Colbourn Hall and Secure Funding

University officials began to discuss options to address Colbourn’s advancing age and deteriorating condition, and to fund such a project, as early as 2009. That year, references to Colbourn began to appear on the University’s Capital Improvement Plan (CIP), a budget planning document that is intended to inform the BOG of capital projects the University plans to undertake during the next five fiscal years. The CIP was prepared by Facilities employees working under the supervision of Priscilla L. (“Lee”) Kernek, Associate Vice President for Facilities and Safety. Throughout the relevant period, Kernek reported to William F. (“Bill”) Merck II, Vice President for Administration and Finance, who oversaw both F&A and Facilities simultaneously.

One of the chief purposes of the CIP is to identify those projects for which the University intends to seek state funding through the Public Education Capital Outlay (PECO) program.<sup>8</sup> The PECO program is a fixed capital outlay program, funded

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<sup>7</sup> Interest earnings from investing current-year E&G funds are also considered E&G funds and subject to the same restrictions, under BOG Regulation 9.007(5), which states that “E&G interest earnings are not to be utilized for non-E&G related activities or for fixed capital outlay activities except where expressly allowed by law.”

<sup>8</sup> Fla. Stat. § 1013.01(16) defines “Public education capital outlay (PECO) funded projects” to include “renovation, remodeling, construction projects, and site improvements necessary to accommodate buildings, equipment, other structures, and special educational use areas that are built, installed, or established to serve primarily the educational instructional program of the...university board of trustees.”

through a gross receipt tax on utilities, including electricity, telecommunications and cable. Historically, PECO revenues have been used to secure the issuance of tax-exempt bonds, used to finance construction and maintenance projects for education facilities, including facilities at SUS member institutions. However, PECO revenues have not been bonded for many years, significantly reducing the amount of revenues available for capital projects. The process for obtaining PECO funds is competitive. To be eligible for PECO funds, a project must be added to the BOG's 3-year "PECO priority list," which is a key component of the BOG's annual Legislative Budget Request (LBR) to the Legislature. The Legislature then selects projects from the PECO priority list for inclusion in its annual appropriations bill.

The BOG compiles its PECO priority list by reviewing the CIPs submitted by each SUS institution and consulting with the institution to determine which projects should be included in the PECO priority list. Only a small fraction of projects listed on the CIP are included on the PECO priority list, and only a fraction of those projects ultimately end up in the final appropriations bill. A project's placement on the CIP, therefore, is highly indicative of the level of urgency that the University has assigned to a particular project.

Every year in July, the BOT reviews and approves the CIP to be submitted for the following fiscal year. The CIP is then submitted to the BOG, which spends several months compiling the PECO priority list in consultation with the SUS institutions. On July 23, 2009, Kernek prepared, and Merck submitted, the CIP for fiscal years 2010-11 through 2014-15 to the BOT for approval.<sup>9</sup> (Exhibit 14). The CIP listed "Colbourn Hall Renovation" and assigned it priority number 18 out of 40 potential PECO projects. The project was assigned an estimated cost of \$4,968,246, which the University anticipated incurring in the 2014-15 fiscal year. The BOT approved the 2010-11 CIP at its July 23, 2009 meeting, and the document was thereafter submitted to the BOG. (Exhibit 15). The Colbourn Hall project was not selected by the BOG for the PECO priority list, and therefore, no PECO funds were approved.

The CIPs submitted to the BOG the next two years continued to portray the Colbourn Hall Renovation as a relatively low-priority project which the University did not expect to undertake until later in the five-year period covered by the CIP. In the 2011-12 CIP, approved by the BOT on July 22, 2010, "Colbourn Hall Renovation" was listed as priority number 16 out of a total of 37 potential PECO projects, with the same estimated cost of \$4,968,246, to be incurred in FY2014-15. (Exhibits 16 & 17). In the 2012-13 CIP, approved by the BOT on July 21, 2011, the Colbourn project was listed as priority number 17 out of 59, with a revised cost estimate of \$5,807,816, again to be incurred in FY2014-15. (Exhibits 18 & 19). A fair interpretation of the placement of Colbourn in these CIPs is that Facilities did not expect to obtain PECO funding at this time, but nonetheless included Colbourn on the PECO list to inform the BOT and BOG of significant long-term projects that were under consideration and might be candidates for PECO funding in the future. Not surprisingly given their placement on the CIPs, the

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<sup>9</sup> We understand that generally before presenting a proposed CIP to the BOT, Kernek and/or Merck would review it with the President and Provost.

Colbourn project never made the BOG's PECO priority list during this time period and therefore was not considered for PECO funding by the Legislature.

While this was going on, Facilities continued to assess the physical condition of Colbourn Hall. In 2011 and 2012, Facilities obtained engineering studies from three firms—C.T. Hsu & Associates, P.A., Allan and Conrad, Inc. and The RAAD-Tannous Engineering Group, Inc. (Exhibits 20, 21 & 22). These reports raised various concerns regarding the building and recommended, among other things, redesigning and rebuilding the exterior brick wall system and reinforcing the steel support system. The reports did not portray these issues as presenting any urgent health or safety risk, and did not include estimated repair costs.

The few documents from this time period that refer to the Colbourn project consistently describe it as a renovation and repair project, and witnesses confirmed that the initial plan was to repair the building rather than construct a new building. The BOT was informed of these plans through the annual CIPs, but did not give any formal approval to undertake the renovation nor was it asked to do so. This further tends to suggest that the renovation was at this time seen as a long range project, not a high priority.

#### **B. 2012-13 Fiscal Year (July 2012 through June 2013)**

During the 2012-13 fiscal year, a decision was made to use E&G funds to finance the Colbourn Hall project (still only considered a renovation and repair project at the time). We discuss in this section how that decision came about.

As the fiscal year began, Colbourn remained on the University's list of capital projects under consideration, although the efforts to secure state funds took an unusual turn at this time. On July 26, 2012, the BOT approved the CIP for the fiscal years 2013-14 through 2017-18. (Exhibits 23 & 24). As in past years, the CIP was prepared by Kernek and submitted for BOT approval by Merck. For the fourth straight year, "Colbourn Hall Renovation" was among the projects listed in the CIP, now with a projected price tag of \$8.3 million. This time, however, it was removed entirely from the PECO list and instead was listed as the number three priority under the heading "Requests from Other State Sources." According to Chris Kinsley, the BOG's Assistant Vice Chancellor for Finance and Facilities, listing a project under this heading has the effect of informing the BOG that the University intends to pursue funding from other state sources as to which the BOG has no role. Unlike the PECO list, which the BOG considers important in compiling its PECO priority list, the "Other State Sources" serves only an informational purpose. There is no apparent explanation for removing the Colbourn Hall Renovation project from the PECO list at this time and moving it to the "Other State Sources" list. Documents from the period do not explain the move, and employees who were available to be interviewed could not explain it. Finally, BCLP has found no evidence that the University did, in fact, seek funding for the Colbourn project from other state sources at this time.

Whatever the reason for the omission of the Colbourn renovation from the PECO list, the effect was that the project was not considered for the BOG's PECO priority list for the 2012-13 year, and thus had no chance to receive PECO funding in the 2013

legislative session. Ultimately, it may have made no difference whether PECO funding was sought during the 2012-13 fiscal year or not, because the PECO program was under considerable strain at the time. After the late-2000s financial crisis, PECO appropriations dropped sharply on a statewide basis, from a high of over \$600 million for the 2007-08 fiscal year to just under \$38 million for the 2012-13 fiscal year. Merck and other University officials involved in the decision to use E&G funds have publicly noted their frustration with what they perceived to be a lack of state support for needed capital projects.

Following this, the University obtained additional reports on the condition of Colbourn, including a structural assessment and analysis from the RAAD-Tannous group and an asbestos study from AMEC Environment & Infrastructure, Inc. (Exhibits 25 & 26). The RAAD-Tannous report, dated December 3, 2012, states that it had conducted a “limited, visual assessment and analysis of the existing structural framing systems and exterior facade” of Colbourn for purposes of determining, among other things, “the structural adequacy of the existing construction.” The report recommended repairs to the building’s concrete masonry unit walls, brick facade, and structural steel, and that its exterior doors and windows and certain handrails be removed and replaced. The report did indicate that some repairs—such as the handrails—needed immediate attention, but did not indicate any urgency as to the vast majority of recommended repairs, and did not include a cost estimate.

During the same timeframe, a group of key individuals across multiple University divisions began to discuss the possibility of using E&G funds for the Colbourn renovation. This discussion began at least as early as February, 2013, and a clear decision to use E&G was reached by no later than June, 2013. The primary individuals involved in these discussions during FY2012-13 were Merck, Vanessa Fortier (Associate Vice President for Administrative Affairs, who retired in early 2013), Tracy Clark (Assistant Vice President for Finance and University Controller, who took over Fortier’s role upon her retirement) and Christy Tant (Senior Associate Controller) from Finance, and Provost Tony Waldrop, Lynn Gonzalez (Associate Vice President for Academic Affairs) and Megan Diehl (Assistant Director, Fiscal Administration) from Academic Affairs. The discussions occurred primarily in person, in meetings referred to internally as “budget chats.” These were regular meetings held in the Provost’s office, led by Merck and Provost Waldrop and attended by other Finance and Academic Affairs personnel, to discuss and plan for the financial needs of the University. No formal agendas or minutes from the budget chats exist, but decisions made in budget chat meetings regarding the expenditure of E&G funds were tracked by F&A employees on a spreadsheet referred to as the “E&G Commitments List.”<sup>10</sup> Further information about budget chat discussions was provided to BCLP through interviews with Clark, Tant, Gonzalez and other individuals who participated in them.

One of the regular purposes of budget chats would have been to discuss the use of the University’s E&G funds over the course of the year. It is likely in that context that the use of E&G funds for Colbourn first came up, as E&G funds are commonly used for building maintenance and repairs. A February 15, 2013 email from Gonzalez to other

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<sup>10</sup> The actual title of the document was “Planned E&G Budget Allocations.”

budget chat participants (including Merck, Waldrop, Fortier, Clark and Tant), responding to a question posed by Fortier as she was working through a mid-year report to the BOG on E&G carry forward funds, states with respect to the Colbourn renovation that “we are still planning to cover from E&G as far as I am aware.” (Exhibit 27). While this would seem to indicate that a decision had already been made, there is other evidence that it still remained an open question until June, 2013. For instance, a Facilities presentation from April, 2013 on the status of current and upcoming capital projects referred to the funding of the Colbourn renovation as an open question. (Exhibit 28).<sup>11</sup>

The best evidence of the timing of the decision to use E&G funds for Colbourn is its first appearance on the E&G Commitments List. This document was created by F&A employees and maintained at the time by Clark and Tant to keep track of decisions made during budget chats. Clark believed that the Colbourn project was added to the E&G Commitments List in January, 2013, but the first version of the document received by BCLP that clearly refers to the project (with the notation “New”) was circulated by Tant in May, 2013 and again prior to the June 11, 2013 budget chat. (Exhibits 29 & 30). In their interviews, Clark and Tant explained that Merck and the Provost (at the time, Waldrop) were regularly copied on emails circulating the E&G Commitments List and that among the budget chat participants, only they would have had the authority to approve the allocation of E&G to the Colbourn renovation.

The evidence reviewed by BCLP indicates that at the time the decision was made to use E&G funds for the Colbourn Hall project, it was strictly being considered as a renovation and repair project. Several participants in the budget chats indicated that they believed E&G funds were permitted to be spent on renovation and repair projects. In fact, E&G funds may be used for this purpose, but only up to a limit of \$2 million according to BOG staff. The budget chat participants who were available for an interview stated that they were unaware of the \$2 million limit.

The evidence also indicates that the decision to renovate Colbourn, and to use E&G funds for the project, was never presented to the BOT. That is not to say that the BOT was never informed about the project. As noted above, the project had been listed on CIPs presented to the BOT going back to 2009, which would have at least informed the BOT that the project was under consideration. But no document ever specifically informed the BOT that a decision had been made to go forward with the renovation or how the project would be funded. There also was no clear rule in place at that time at the University regarding what capital projects had to be approved by the BOT. Witnesses stated that there was a “general understanding” that major projects required BOT approval, but there was no dollar threshold distinguishing major projects from other projects. The University has since changed that process. In 2017, the BOT adopted a document entitled “Delegation of Authority to the President,” which requires all capital projects exceeding \$2 million and any material changes to such projects to be approved by the BOT. (Exhibit 31). Also in 2017, the FFC amended its charter to

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<sup>11</sup> The presentation notes state with regard to Colbourn: “Currently, No [sic] external funding from the state has been made available and leaves the question of how to pay for the project.”

require all proposed new construction and renovation projects expected to exceed \$2 million in cost to be approved by the FFC. (Exhibit 32).

### **C. 2013-14 Fiscal Year (July 2013 through June 2014)**

During the 2013-14 fiscal year, the first E&G funds—a total of \$10 million—were committed to the Colbourn project through budget transfers which effectively ceded control of these funds to the Facilities division. Also during this year, the plans to renovate Colbourn evolved into a plan to construct an entirely new building, Trevor Colbourn Hall (TCH), which was expected to increase the total costs to \$28 million. University officials decided that they would continue to budget E&G funds towards the project even after it became clear that it would involve the construction of a new building. The BOT approved the construction of TCH in May, 2014, but as discussed below, there is no evidence that the BOT was aware of the anticipated source of funding or that there was anything improper about the use of such funds.

#### **1. Summer 2013 Budget Planning**

On July 25, 2013, the BOT approved the CIP for fiscal years 2014-15 through 2018-19. (Exhibits 33 & 34). For the second consecutive year, the CIP listed the Colbourn Hall project—which at the time continued to be strictly a renovation project—under the heading “Requests From Other State Sources,” though BCLP found no evidence that funding was actually being sought from other state sources. The project was moved up to the #2 priority on the “Other State Sources” list. Its anticipated cost (\$8,276,053) remained the same, but the anticipated time frame was pushed back, with the majority of the costs expected to be incurred in FY2016-17 and the remaining costs to be incurred in FY2017-18. The CIP was submitted to the BOG on July 31, 2013 with the University’s Capital Outlay Plan. (Exhibit 35). Because Colbourn was omitted from the PECO list, it was not considered for PECO funds in the 2014 legislative session.

Meanwhile, the plans to allocate \$8 million of available E&G funds towards the Colbourn project continued to move forward, as evidenced by the project’s first appearance in the University’s “Allocation Document” in August, 2013. This was a spreadsheet formally titled “E&G Budget, Summary of Allocations and Reserve” that was prepared annually in the summer by F&A employees and submitted to the Provost and President for their review and signature. The Allocation Document sets forth the University’s plans to commit E&G funds during the current fiscal year. The document is significant in the University’s accounting processes. It may be used—and in this case was used—as written authorization to carry out budget transfers and other important accounting entries.

On or about August 13, 2013, the Allocation Document for FY2013-14 was presented to Provost Waldrop and President Hitt, who each signed it. (Exhibit 36). The Allocation Document for FY2013-2014 was a two-page document. On the second page, “Colburn Hall renovation [sic]” is listed under the heading “Non-recurring allocations from non-recurring funds” with an allocation of \$8 million. The document does not purport to explain the basis for the allocation, but it is clear from the documentary evidence and witness interviews that this item resulted from the budget chats from earlier in the year.

There was little available evidence regarding the actual review and signing of the Allocation Document for FY2013-14. Provost Waldrop did not respond to our interview request, and President Hitt in his interview stated that the Provost would typically present the document to him for signature and that he would sign it with little or no discussion or review. The document was apparently created by former Associate Vice President for Administrative Affairs Vanessa Fortier, who retired in early 2013. Lynn Gonzalez, who at the time was the Provost's chief advisor on budgetary issues, stated that she typically received a draft of the Allocation Document and would review it with the Provost, who then would sign the document and present it to the President for signature. In later years, it was Tracy Clark who reviewed the document with the Provost.

It is uncertain whether President Hitt or Provost Waldrop would have understood when signing the Allocation Document that it would be used as written authorization to transfer E&G funds for purposes of the Colbourn Hall project. The document itself prominently refers to the University's "E&G Budget" in its header, but otherwise does not refer to E&G, and was not accompanied by any further documents explaining its purpose. Clark and Tant stated in their interviews that it was clear to them, and likewise would have been clear to any senior employee in F&A, that any expenditure listed on this document referred to an expenditure of E&G funds. But it is less clear whether others outside of F&A who reviewed the Allocation Document understood this. President Hitt stated in his interview that he did not understand the purpose of the document at all and could not recall whether it mentioned Colbourn. He further stated that he had no memory of approving the expenditure of E&G funds on Colbourn.

It is also unclear whether it would have been significant to either Hitt or Waldrop had they understood that by inclusion on the Allocation Document it meant that Colbourn was an E&G project. The key witnesses outside of F&A, including Waldrop's budget advisor Gonzalez, stated that they generally were unaware of any relevant restrictions on the use of E&G funds. Gonzalez stated that she understood that E&G funds could be used for renovations and was unaware of any cap on the use of E&G funds for this purpose. Hitt also stated that he was unclear on the specific rules for the use of E&G funds. In addition, some people involved in the Colbourn project, including Hitt himself, may have been operating under the impression that the President had unfettered authority to make changes to the E&G budget, which would have included the authority to use \$8 million in E&G funds for this project. Two months before the Allocation Document was signed, on May 23, 2013, Merck and Kernek submitted the Capital Outlay Budget for FY2013-14. (Exhibit 37). This, unlike the Allocation Document, is required by statute (Fla. Stat. § 1013.61), and must be approved by the BOT.<sup>12</sup> The Capital Outlay Budget lists all capital projects for which funding has been approved for the forthcoming fiscal year. The FY2013-14 Capital Outlay Budget approved by the BOT in May, 2013 did not list Colbourn. The cover memo to the BOT, however, stated that it sought approval of the Capital Outlay Budget and Board

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<sup>12</sup> Pursuant to Fla. Stat. § 1013.61, the Capital Outlay Budget must "designate the proposed capital outlay expenditures by project for the year from all fund sources." The statute provides that the BOT may not expend funds on any project not included in the budget or amendments thereto.

authorization for the President “to make necessary adjustments” during the fiscal year. The BOT did, in fact, grant this authority at its May 23, 2013 regular meeting. (Exhibit 38). It is possible that Hitt, Merck and others understood that this authority allowed Hitt to add Colbourn as a capital project in the Allocation Document without seeking further authorization from the BOT.

What is clear is that the BOT, and by extension the BOG, could not have known of the decision to allocate E&G funds to the Colbourn project in August, 2013, because the official Capital Outlay Budget in May made no mention of the project, and the subsequent Allocation Document was an internal working document not shared with the BOT (or BOG).

The only other significant document from this period that would have reflected the decision to use E&G funds, and that was circulated externally, was the University’s Fund Balance Composition Report (FBCR). For reasons explained below, this document could not reasonably have apprised the BOG of the fact that E&G funds were being used for the Colbourn project. The FBCR is a document that the University is required to provide to the BOG every August as part of the Operating Budget materials, although it is not reviewed or approved by the BOT beforehand. The FBCR, which is formally titled “Operating Budget—Beginning Fund Balance Composition,” is designed to inform the BOG of the University’s planned use of its E&G carryforward balance during the upcoming fiscal year. The document follows a standard form and reports the University’s E&G carryforward balance at the beginning of the year and the date of the report, followed by its predicted use of the balance broken down into two categories: (1) Restricted/Contractual Obligations and (2) Commitments. The Commitments category is further broken down into over 25 subcategories whose names reflect various permitted uses of E&G funds, such as “Campus Security-Safety Issues,” “Building Maintenance and Repairs,” and “Financial Aid.” As E&G funds cannot be used for new construction projects, there is no subcategory for new construction listed on the FBCR form.

On August 19, 2013, the University submitted its FBCR for FY2013-14 to the BOG. (Exhibit 39). By this time, it was clear that a total of \$8 million in E&G carryforward funds had already been allocated to the Colbourn renovation project according to the Allocation Document signed by the President and Provost. That commitment therefore had to be disclosed in the FBCR, and it was, although in a manner that did not reasonably inform the BOG of the substance of the commitment. Instead, the FBCR included the \$8,000,000 Colbourn commitment as part of a single entry of \$15,147,799 for “Deferred Maintenance.”

Notably, the Deferred Maintenance subcategory did not require any itemization or further detail, although other subcategories did require itemization. For instance, had the project been identified as “Other Facilities Requirements,” further detail would have been required. Christy Tant, who oversaw the F&A team that put together the FBCR, explained in her interview that she consulted with Tracy Clark about the form and they determined that Deferred Maintenance was the most appropriate subcategory in which to include the Colbourn project commitment. Indeed, at this time, that may have been correct, since the Colbourn project was being discussed as strictly a

renovation and repair project. This does not explain, however, why F&A continued to list the project under Deferred Maintenance in future years, after it had become clear that the project had evolved into a new construction project. In fact, over the next two fiscal years, the University's FBCRs would continue to describe commitments of E&G carryforward funds to the project—a total of \$28 million in additional funds—as Deferred Maintenance, with no breakdown or further description that would have revealed to the BOG that such funds were being used for this project. In their interviews, Clark and Tant denied that they had any intention to conceal the expenditure of E&G funds on the project or to mislead the BOG about the University's deferred maintenance costs. However, they also acknowledged that they could have asked the BOG staff about how to report the planned expenditures on the form and elected not to do so.

## 2. Initial Budget Transfer of E&G Funds

The decision to allocate E&G funds as set forth in the Allocation Document does not, by itself, result in the transfer or expenditure of any funds. The actual transfers were carried out by F&A personnel at the direction of Merck.

The first such transfer, a budget entry in the amount of \$700,000, was set in motion in July, 2013 and finalized in August, 2013. The University uses “budget transfers” as a way to authorize spending by its various divisions and departments. These transfers are entered on the “Budget Ledger,” which is used to track funding allocations, and they have the effect of authorizing the recipient division or department to spend up to the budgeted amount. On July 25, 2013, Kernek sent an email to Merck requesting an advance of \$700,000 to kick off the testing, planning and design stages for the Colbourn renovation. Merck in turn sent an email to Tracy Clark directing her to “take the necessary actions.” (Exhibit 40). This transfer required accounting employees to create a new project ID and set up a new “construction account” with a unique project ID, which was done the next day.

On August 22, 2013, Christy Tant sent an email to UCF's Budget Office requesting the budget transfer of \$700,000 in unallocated E&G funds from the central reserve to the Colbourn account.<sup>13</sup> (Exhibit 41). Since the entry was transferring funds from the central reserve, housed within the Administration and Finance division, it required the notification of John Pittman (Associate Vice President for Debt Management), the Budget Officer for the division who also reported to Merck. Pittman was notified of the transfer on August 26, 2013. (Exhibit 42). Pittman stated that he understood his role in the budget transfer process to be largely perfunctory. Tant copied Provost Waldrop on her August 22 email and also referenced the Allocation document as written authorization to transfer up to \$8 million to the Colbourn construction account. Pittman stated that he would not have done any further investigation beyond this. Though the budget transfer request form clearly indicated that E&G funds were being transferred, Pittman apparently did not view it as his role to confirm whether the

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<sup>13</sup> Unlike the three transfers that will follow, this transfer did not involve carryforward funds. Instead, the E&G funds transferred were appropriated for the current fiscal year and held in reserve at the beginning of the fiscal year. At the time of the transfer, the funds were considered to be unallocated; i.e., they had not yet been allocated for any other purpose.

request complied with applicable regulations. (Exhibit 43). University records indicate that the budget transfer was finalized on August 26, 2013. (Exhibit 44). Facilities employees were thereafter free to spend the \$700,000 without the need for further authorization by F&A or any other division or department.

### 3. Decision to Build TCH

Sometime during early 2014, the initial plans to renovate Colbourn evolved into a plan to also construct a new building—which would become Trevor Colbourn Hall—adjacent to the existing structure on the University's campus. The idea of constructing a new building was originally conceived by Kernek and Merck, and was approved by the FFC in April, 2014 and by the BOT in May, 2014. There is no evidence that funding sources were discussed with the FFC or BOT in connection with this approval. Merck, along with Clark, Tant and other members of the budget chat group (now called the “Budget Operations Group”) continued to discuss using E&G funds for the Colbourn project notwithstanding that it had now become a new construction project, and an additional \$2 million (on top of the existing \$8 million) was committed to the project by the end of FY2013-14.

The decision to construct a new building was likely motivated by concerns about the rising estimated costs of repair, together with the need to relocate faculty and employees (approximately 200 in number) during the renovation. As previously indicated, the estimated cost of the Colbourn renovation rose from approximately \$5 million in 2009 to approximately \$8 million in 2013. In February, 2014, the University obtained a new structural analysis of Colbourn from a consortium led by the architecture firm SchenkelShultz. (Exhibit 45). The SchenkelShultz group conducted a selective demolition of a portion of the building's exterior skin and found that “the building skin has been constructed using improper materials and construction techniques. Specifically, there is no vapor barrier on the entire building skin, there is no waterproofing membrane on the middle portion of the building, [and] there is no building insulation at all...” The report concluded that these deficiencies would need to be addressed “to ensure the proper waterproofing and indoor air quality within the building.” The SchenkelShultz report estimated the cost of the exterior repairs at \$5,817,500 and identified other “critical” or “potentially critical” repair needs with an estimated cost of approximately \$380,000. The report also identified numerous repairs that would be needed over the next ten years given the age of the building. In all, the total costs of the repairs identified in the SchenkelShultz report were approximately \$14.5 million. The report also noted that under the 2010 Florida Building Code, any renovations costing over 50 percent of the market value of the property would have to be made to comply with the current code.

Merck and Kernek developed multiple options for Colbourn which they presented to the FFC at its April 3, 2014 meeting. (Exhibits 46 & 47). One option considered was to rent temporary office space for Colbourn employees for a period of 14 months to allow for all renovations, both critical and recommended. This option had an estimated total cost of approximately \$19.1 million. The other options involved building a new facility adjacent to Colbourn (either at the exact same size of 83,000 square feet or at a smaller size which would reflect current needs), and either demolishing Colbourn or

performing the renovations identified as “critical” at a later time. These options ranged in projected cost from \$21.3 million to \$30 million.

FFC meetings are typically recorded and the April 3, 2014 meeting was, but for unknown reasons the recording abruptly cuts off before the portion of the meeting in which the Colbourn project was discussed. For this reason, it cannot be determined with certainty what, if anything, Merck and Kernek said during the meeting about potential funding sources for the various options, although witnesses interviewed by BCLP did not recall any such discussion. The minutes and documents purportedly reviewed at the meeting reflect only that Merck and Kernek recommended “Option 3B,” in which the University would build a new, 75,000 square foot facility adjacent to Colbourn Hall, then move Colbourn’s faculty and employees to the new building once it was completed. (Exhibit 48). Under this option, Colbourn would not be demolished but rather would be available to be used as “swing space” for future renovations. Option 3B contemplated a 2-phase process in which Phase 1 would be the construction of the new building, and Phase 2 would involve undertaking the more critical renovations of Colbourn so that it could be used in the future. Phase 1 was estimated to cost \$21,140,626 while Phase 2 was estimated to cost \$6,801,389. The meeting minutes indicate that the FFC unanimously approved the recommended option. (Exhibit 48).

This option was then presented to the BOT at its May 22, 2014 meeting. (Exhibit 49). Prior to the full Board meeting that day, a meeting of the FFC was held. (Exhibits 50 & 51). In addition to the FFC’s members (FFC Chair Marcos Marchena, FFC Vice Chair Robert Garvy, Alex Martins, Reid Oetjen and Jim Atchison (by telephone), Trustees Olga Calvet and Weston Bayes attended. That meeting featured a discussion, lasting approximately ten minutes, in which Merck and President Hitt discussed their frustrations with what they viewed as diminishing state support for facility maintenance and capital projects. During this discussion, Merck commented on the plans for funding the Colbourn project:<sup>14</sup>

MERCK	Um, can I interrupt just for a second? Those, those are all critical works that we’re, we’re continuing to work with, um, the state to try to get some support for things that they have traditionally funded for us. Um, in other areas we’re having to take some of our own money to deal with some of these issues that we have just like in the Colbourn Hall for an example. That one, that building is, uh, really needs to be redone completely and so in the absence of state funds we’re using money out of our own budget to literally replace that building.
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<sup>14</sup> The University maintains audio recordings of FFC and BOT meetings and made these recordings available to BCLP for review. BCLP is not aware of any certified transcripts of these meetings. In its investigation, BCLP reviewed the audio recordings and had transcripts of relevant portions of certain meetings prepared by Epiq, an e-discovery provider. These transcripts were reviewed for accuracy by BCLP attorneys.

(Exhibit 52). Board members we interviewed who attended this meeting did not understand Merck's comments to mean that E&G funds were being used for Colbourn.

Prior to the full Board meeting, Merck prepared and submitted a Proposed Board Action seeking “[a]pproval to proceed in the renovation process for Colbourn Hall.” (Exhibit 53). This was supported by a three-paragraph background memo stating the purpose of the proposal:

Constructed 40 years ago, Colbourn Hall suffers from issues common to older buildings. In addition, the original HVAC system is still in operation. Renovating the building in phases is not practical, as it would necessitate the university provide temporary housing for almost 200 faculty members, department offices, the Graduate Student Center, and the University Writing Center.

The preferred renovation option is to build a new, approximately 75,000 square-foot building adjacent to the current building for the employees and departments housed in Colbourn Hall. Possibilities for the existing Colbourn Hall are contingent upon funding and will be considered at a future date.

The cost of the new building is estimated at \$21.3 million. In the absence of PECO funding and considering the need to move forward expeditiously, construction costs will be paid from UCF nonrecurring funds.

The recording and transcript of the meeting indicate that the relevant discussion was brief and led by Merck and FFC Chair Marchena:

MARCHENA	That's true. Uh, the, the first item we have, uh, for, for action, uh, Madam Chairman, is the Colbourn Hall renovation. Uh, Mr. Merck, came, uh, to the committee with Lee Kernek and, uh, they recommended or discussed several options, the, uh, recommended option, uh, that we're here to present to you today is to build a new 75,000 square foot building adjacent to the current building. Uh, when it is complete, of course, we'll, uh, move the employees and departments housed in Colbourn Hall into that new building, and then revisit what possibilities there are with respect to Colbourn, the existing Colbourn building at that, at that time.
MERCK	Right, right.
MARCHENA	Um, you have anything to add to that, Bill?
MERCK	Only again that you, we talked this morning about no, uh, money coming from the state right now for construction, so we're basically having to take this out of our hide as well.
MARCHENA	But, but ...
MERCK	And it's something we need to do so ...

MARCHENA	But, but they have assured us we, we have identified the funding to be able to accomplish that, right? So I would uh, move, uh, the Board to approve moving forward with the Colbourn Hall renovation as described.
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(Exhibit 54). The BOT unanimously approved the proposal to go forward with the construction of the new building (i.e., Phase 1 of the two-phase Option 3B), and to table discussion of the renovation of Colbourn to a later time. (Exhibit 55).

As discussed more fully below, at the time of the May, 2014 BOT meeting, Merck and other key University officials were continuing in their plans to use E&G carryforward funds to finance the Colbourn project. The significance of this fact—i.e., that the project was being funded with state money that could not be used for construction projects—was never disclosed to either the FFC or the BOT. Instead, references to the manner in which the project would be funded were conspicuously vague. For instance, the Proposed Board Action described the funding source as “UCF non-recurring funds,” a general term that could be used to describe a wide range of both state and non-state funds, including funds permissible for construction use. During the FFC portion of the meeting, Merck simply stated that the University was “having to take some of our own money” to finance the project, and during the full BOT meeting, he similarly said that “we’re basically having to take this out of our hide as well.”

Two other developments from the May, 2014 meeting likewise demonstrate that the BOT was not made aware of the plans to fund the project with E&G funds, let alone the significance of this decision. First, at the same meeting, the BOT was called upon to approve the University’s Capital Outlay Budget for 2014-15. (Exhibit 56). The proposed budget, submitted by Merck, did not list either Colbourn Hall or the new construction project, indicating that no money was expected to be committed to the project during FY2014-15. On the same day, the BOT also approved the University’s Operating Budget, which included a report of actual E&G spend during the current fiscal year through March 31. (Exhibits 57 & 55). This report was compiled from data maintained by the University’s accounting systems, which by this time had recorded the transfer of \$700,000 from the central reserve to the Colbourn construction account. The report, however, is summary in nature and does not itemize any individual transfers, and therefore the \$700,000 transfer to the project was not visible to BOT members.

4. Continuing Discussions Regarding Funding/Second Transfer of E&G Funds

Meanwhile, funding for the Colbourn project continued to be a point of discussion during the 2013-14 fiscal year. Kernek’s handwritten notes<sup>15</sup> indicate that a

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<sup>15</sup> Following Kernek’s interview on September 26, 2018, BCLP asked Kernek to provide her original handwritten notes of various meetings and conversations during the relevant period which she had referenced during her interview. Kernek declined to provide the original notes and instead provided copies. These copies were very difficult to decipher, and BCLP did not have the benefit of a second interview with Kernek after she produced the notes to question her about them, as discussed earlier. Kernek’s unavailability hampered BCLP’s ability to understand the copies of her handwritten notes that

meeting occurred in February, 2014, involving Kernek, Merck, Hitt and Waldrop to discuss funding for the project. (Exhibit 58). According to her notes, it was reported at that meeting that \$10 million of the estimated cost of the project remained unfunded, which would indicate that the total estimated cost had by then increased to \$18 million, likely as a result of the SchenkelShultz report. Kernek's notes further indicate that Clark and Gonzalez were looking into possible sources of additional money. None of the other participants were able to confirm this meeting occurred, either because they declined to be interviewed or could not recall it, nor could the meeting be found on the participants' calendars. Documents from 2014, however, confirm that the internal cost estimate for the project was raised to \$18 million, consistent with Kernek's notes.

Funding was also discussed during meetings of the Budget Operations Group. The participants at this time included the members of the former budget chat group, including Merck, Clark, Tant, Gonzalez and Waldrop until his departure from the University in April, 2014.<sup>16</sup> On or about April 29, 2014, the Budget Operations Group decided to raise the current year E&G commitment to the Colbourn project from \$8 million to \$10 million. (Exhibit 59). The next day, Tant sent an email to the Budget Office requesting a transfer of \$9,300,000 "from the university's E&G carry forward reserve" to the Colbourn project account, stating that this amount had been approved at a recent meeting with "the Provost and Mr. Merck." (Exhibits 60 & 61). At this time, the Provost position was filled by Acting Provost Diane Chase, who served on an interim basis from April 1 to August 1, 2014.<sup>17</sup> Tant copied Chase on her email. Chase stated in her interview that she could recall attending some budget chat meetings, and recalled hearing about the plans to construct a new building next to Colbourn Hall, but could not specifically recall anything about the meeting referenced in Tant's email or the decision to commit more E&G funds to the project. Chase further stated that she was unfamiliar with any applicable restrictions on the use of E&G funds.

On April 30, 2014, the Budget Office processed a transfer of \$9,300,000 from the E&G account to Facilities for the Colbourn construction project, as instructed by Tant's email. (Exhibit 44). Her email asked that Pittman be notified of the transfer request, and Pittman was in fact notified by email on the same day. (Exhibit 62). As discussed earlier, Pittman did not view it as his role to determine whether the request complied with Florida law or the BOG's regulations. He also gave conflicting accounts of his own understanding of the relevant restrictions on the use of E&G. In his first interview in September, 2018, Pittman stated that he understood that E&G funds could not be used for construction projects at all relevant times, but in a December, 2018 follow-up interview, he denied having such knowledge until the AG audit in 2018.

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she provided. While Kernek provided a purported translation of her relevant notes for two years (2014 and 2015) shortly after her interview, no further translations were received from her, despite a request for them from her supervisor. On January 8, 2019, her attorney, Charles M. Greene, purported to summarize certain of her notes in a letter to lead BCLP investigator Burby. (Exhibit 11).

<sup>16</sup> Vanessa Fortier had left UCF in or around March, 2013, and Tracy Clark was promoted to fill her position.

<sup>17</sup> Prior to this, Chase had served as Executive Vice Provost and reported to Waldrop.

Thus, at the close of FY2013-14, a total of \$10 million had been transferred to the Colbourn construction account and was no longer under the control of F&A, though only a small percentage of these funds (\$150,396) had actually been spent on the project. (Appendix C).

#### **D. 2014-15 Fiscal Year (July 2014 through June 2015)**

During the 2014-15 fiscal year, F&A committed an additional \$18 million in E&G funds to the Colbourn project, which by now was understood by all involved to be a new construction project. This brought the total of committed funds to \$28 million by June, 2015.

##### **1. Budget Planning/Requests for PECO Funding**

By the summer of 2014, a clear understanding had developed among Merck, Kernek and others involved in the Colbourn project through their participation in the Budget Operations Group and other meetings, that if the project did not obtain state funds through the PECO program or otherwise, they would proceed to use E&G funds for it, \$10 million of which had already been transferred to the construction account set up for the project. During FY2014-15, Merck and Kernek stepped up their efforts to obtain PECO funding somewhat, but these efforts still fell short of conveying any particular urgency.

In the University's CIP/PECO list for the five fiscal years starting 2015-16, approved by the BOT on July 31, 2014, "Colbourn Hall Renovation" appeared on the PECO list, this time as priority number 3, with a projected cost of \$19.5 million. (Exhibits 63 & 64). The list indicated a need for the first \$2 million in FY2015-16, with the rest the following year. Also on the list, for the first time, was "Trevor Colbourn Hall," listed as priority #6 with a projected cost of \$26.2 million, all of it falling in FY2015-16. It is unclear why both projects were listed or why those particular figures were given.

As explained earlier, the CIP/PECO list is the first step in the process of seeking PECO funds from the State. After the list is submitted to the BOG, there is a period of consultation in which the BOG works with the University to whittle down its list in order to create a short list of projects to submit to the Legislature. In October, 2014, the BOG held its annual "Facilities Workshop," which provides SUS member institutions with an opportunity to pitch their highest priority projects. Here, for the first time, the University (with Kernek presenting on its behalf) included the Colbourn Hall renovation as one of five projects in its pitch. (Exhibit 65). Kernek's PowerPoint presentation noted the waterproofing issues with Colbourn identified in the SchenkelShultz report, structural defects and the need to replace systems that were "nearing the end of their lifespan," and also highlighted the findings of an economic impact study. As to the urgency of the situation, the PowerPoint said only that "[p]roject delay could adversely affect health safety issues in the use of the existing building." The TCH construction project was not featured in the presentation to the BOG.

Neither project made the short list submitted by the BOG to the Legislature for its 2015 session, nor did they make the short list the following year. Ultimately, this may

not have mattered. None of the projects listed on the University's PECO list for either year were funded; the only University project to obtain state funds in either year was a partnership with the Department of Defense that the University had not listed as a PECO project.

During this time, Kernek and Merck consulted with Chris Kinsley, the BOG's Assistant Vice Chancellor for Finance and Facilities, who served as the BOG's liaison to SUS member institutions for matters involving capital projects. Kernek informed Kinsley of the reports of the building's worsening condition, and also that the University had decided to construct a new building (TCH) rather than renovate Colbourn. Kinsley grew concerned that PECO funding would not be available for the project and wondered what the University's plan was if it did not get PECO funds. When he raised these concerns with Merck and Kernek, Merck told him that they had figured out a way to pay for the building using their "own funding." Kinsley stated that he interpreted this comment to mean that the University was using non-appropriated funds it either generated or received, such as auxiliary funds or donations, and that Merck's comment therefore satisfied his concerns.

Meanwhile, documents generated during the University's annual budget review and planning processes began to reflect—and sometimes refer to—the existence of the Colbourn renovation and TCH construction projects and the use of E&G funds towards those projects. For instance, funds already spent on early planning and design activities would have been included within documents attached to the University's FY2014-15 Operating Budget, approved by the BOT on May 22, 2014 and submitted to the BOG on August 18, 2014.<sup>18</sup> (Exhibits 57, 55, & 66). As previously discussed, this document is not designed to itemize expenditures, and therefore the actual spend was not visible on this or future versions of the Operating Budget. Similarly, the FBCR for FY2014-15, submitted to the BOG on August 19, 2014, included \$18,000,000 that was committed to the Colbourn and TCH projects in its predicted spend of \$20,155,861 for Deferred Maintenance. (Exhibit 67). Neither the FBCR nor any of the supporting documentation specifically identified either project. Other documents, such as the aforementioned CIP/PECO list, mentioned the two projects but not the fact that E&G funding was being used for them. To the contrary, the CIP indicated that PECO funds were being requested for the projects and that they were currently unfunded.

There was one document, however, that mentioned the TCH project and identified its funding source as E&G. This was the "BOB-2" form, a short spreadsheet submitted to the BOG as a companion to the CIP/PECO list, which is designed to identify the University's future needs for state funding to operate and maintain academic-related facilities that may be constructed using non-state funds.<sup>19</sup> The BOB-2

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<sup>18</sup> The Operating Budget is a high level report, approved annually by the BOT in May as part of the budgeting process required by statute. Included in the Operating Budget package provided to the Board is, among other things, the University's E&G spend as of March 31.

<sup>19</sup> The document is formally titled, "Fixed Capital Outlay Projects That May Require Legislative Authorization and General Revenue Funds to Operate and Maintain." Pursuant to Fla. Stat. § 1013.78, no university shall construct facilities for which the State will be asked for operating funds unless there has been prior approval for construction granted by the Legislature. The BOB-2 form is used to provide notice of those projects for which the University is seeking prior approval.

for FY2015-16 was put together by Gina Seabrook, a Construction Specialist in Kernek's Facilities division, and was submitted to the BOT on July 31, 2014, together with the CIP/PECO list. (Exhibit 63). It listed TCH as one of eight projects that may require legislative authorization and general revenue funds to operate and maintain. In the third column from the right, the project's funding source was listed as being E&G.

The BOB-2 was not discussed in any detail at the BOT's July 31, 2014 meeting, where it was approved for submission to the BOG. (Exhibit 68). The BOB-2 was submitted in the same form to the BOG with the University's FY2015-16 Fixed Capital Outlay Plan on the same day (Exhibit 69), and then later submitted by the BOG to the Legislature.<sup>20</sup> On its face, the document identifies TCH as a project funded by E&G, but it does not purport to discuss the significance of that fact. Nor is it likely that the significance would have been apparent to the BOT or any of its members at that time. In interviews, BOT members generally stated that they were not aware of any relevant restrictions on the use of E&G funds towards construction projects. BOT members further stated that they were unfamiliar with the BOB-2 form and likely would not have reviewed it specifically during the process of approving the CIP/PECO list. BOG staff likewise stated that they would not have specifically reviewed the BOB-2 form when it was submitted and that they did not notice that it indicated E&G as the funding source for TCH.

## 2. Decision to Build TCH and Renovate Colbourn Simultaneously

Plans for the Colbourn/TCH project continued to evolve in FY2014-15. On August 5, 2014, the FFC approved a minor amendment to the Campus Master Plan to construct TCH. (Exhibit 71).<sup>21</sup> The Proposed Committee Action was prepared by Scott Cole, the University's General Counsel, and was supported in part by a legal analysis of whether the amendment could be treated as a minor amendment not subject to certain statutory conditions for approval. (Exhibit 72). Notably, this appears to have been the only time in which the General Counsel's Office was involved in the Colbourn/TCH project, and its involvement here was limited to facilitating the amendment. Cole stated in his interview that he was not consulted about funding for the project, and materials from the August 5, 2014 FFC meeting do not indicate any discussion regarding funding.

On or about August 11, 2014, the FY2014-15 Allocation Document was signed by President Hitt and new Provost Whittaker.<sup>22</sup> (Exhibit 73). The document approved the allocation of \$18 million from the E&G budget for FY2014-15 to "Colbourn Hall

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<sup>20</sup> The BOG's Facilities Committee approved the BOB-2 at its January 21-22, 2015 meeting. (Exhibit 70). The supporting materials attached to the Proposed Committee Action clearly indicate that TCH was included in the LBR and that its funding source was identified as E&G. TCH was subsequently approved for future state funding of its operating costs, as requested on the FY2015-16 BOB-2, in the General Appropriations Act passed on June 23, 2015.

<sup>21</sup> The Campus Master Plan is required by statute, must include, among other things, specific land uses, general location of structures, plans for future land use, and capital improvements, and may be amended, with only certain amendments requiring review and approval. Fla. Stat. §§ 1013.30(3) & (9).

<sup>22</sup> Whittaker started as Provost on August 1, 2014. He joined the University from Purdue University, where he had served as the Vice Provost for Academic Affairs since 2010. He was also a professor of agricultural and biological engineering.

Renovations”. The \$18 million figure was arrived at during meetings of the Budget Operations Group and referenced in the E&G Commitments List beginning in April, 2014. (Exhibit 74). President Hitt stated in his interview that he would have signed this document without reviewing it. Provost Whittaker, who had just joined the University as its Provost less than two weeks earlier, stated that he was likely briefed on the document before signing it but assumed that it had been fully vetted before his arrival, and had little if any discussion about it and none specifically that he recalled about the Colbourn/TCH project.

On October 27, 2014, Facilities gave a presentation to President Hitt and other University officials for the purpose of updating them on the status of various capital projects. (Exhibit 75). The presentation included a brief discussion of TCH, noting its anticipated location and stating that the date of construction and contractors were still unknown. As to funding, the presentation simply stated that the projected cost was \$25 million and that it would be “University funded—internal sources and PECO listed.”

On January 13, 2015, the Budget Operations Group met to discuss the status of various capital projects, including TCH. (Exhibit 76). Merck attended this meeting, as did Whittaker, who was now attending these meetings as his predecessors as Provost had done. At this meeting, F&A employees discussed the E&G Commitments List as well as a new document they had created, called the "Capital Projects Funding Update," intended to track all current capital projects and how they were going to be funded. The January 7, 2015 version of the document, which was circulated at the January 13 meeting and forwarded to Whittaker’s budget officer afterwards, indicated that under the “Current Funding Plan,” TCH would be funded by \$23 million in E&G funds, while Colbourn would be funded by \$5 million of E&G. (Exhibit 77). Under the “Proposed Funding Plan” in the same document, an additional \$10 million of E&G would go to Colbourn.

As this document indicates, the project was now developing into a plan to simultaneously build new TCH and renovate old Colbourn, connecting the two buildings so that they would share HVAC and other systems, at a total cost of \$38 million. This was a significant departure from the plan discussed at the BOT meeting in May, 2014 to construct TCH for \$21 million and table discussion of the fate of Colbourn. It is unclear what precipitated this change of direction. BCLP did not find evidence of any significant new reports or building analyses from this time period. Emails from the period and witness interviews indicate that the stated justification was to save costs.

Sometime in January, 2015, Merck and Kernek met with Whittaker to get his support for the new plan and its \$38 million budget, and to enlist Hitt’s support as well. Whittaker stated in his interview that he was persuaded that the plan would save the University money and therefore was a good idea. Regarding funding, he recalled being told by Merck that the University could fund the project internally, and that at the time, the source of funding would not have been as important to him as academic considerations, such as the impact that the project would have on faculty currently working in Colbourn. On January 20, 2015, Whittaker met with President Hitt, and Hitt approved moving forward with the new plan. According to Whittaker, funding for the

project did not come up during their discussion. In his interview, Hitt stated that he did not recall this meeting.

Immediately following the January 20, 2015 meeting, Merck wrote an email to Kernek, on which he copied Whittaker and Clark, summarizing the meeting from Whittaker's perspective. (Exhibit 78). Merck wrote:

Lee: In a meeting today with the president, Dale Whittaker said the president approved moving forward with the renovation of Colbourn Hall in conjunction with the construction of Trevor Colbourn Hall. He told the president that combining the projects would add about \$10 million to the \$28 million we had originally set aside in budget for the new construction. This additional amount to the budget is a combination of the savings identified in the original budget for the new building plus the renovation cost for the old, helped by combining of the two projects. Original estimates were \$28 million for Trevor Colbourn, and \$20 million for Colbourn renovation. The new budget is \$23 million for Trevor Colbourn and \$15 million for Colbourn, for a total of \$38 million for both. Bill

Both Whittaker and Hitt were presented with this email during their interviews. Whittaker stated that the email summarized the meeting accurately. Hitt stated that he could not recall any details of the meeting, and also that it was unlikely that the topic of funding would have come up in such a meeting without Merck. In a post-interview letter to BCLP, Hitt acknowledged being involved in the decision to move forward with the TCH project. (Exhibit 8). He further acknowledged that he was aware that E&G funds were being used for the project, stating that this was openly discussed and known to everyone closely involved in the decision. In his letter, Hitt stated that the condition of the building and the lack of PECO funding made it necessary to use E&G funds, and that he believed his approval of the project to be correct and within the law. It was unclear from the letter whether Hitt was referring to the specific decision under consideration in January, 2015 or more generally about the various decisions over time (both before and after this meeting) that led to the construction of TCH and demolition of Colbourn. Notably, these statements conflicted with Hitt's interview, in which he stated that he had little memory of the Colbourn/TCH projects and no memory at all of the decision to use E&G funds, although he accepted responsibility for the decision.<sup>23</sup>

Following the January 20, 2015 meeting, it is clear that a decision had been made in favor of moving forward with the combined project at an expected cost of \$38 million, but at this point, only \$28 million had been committed and only \$10 million had actually been transferred to the project account, very little of which had actually been spent.

### 3. Statements to the FFC Regarding the Combined Project

On April 22, 2015, Kernek gave a presentation to the FFC in which she informed the FFC of the plan to complete the two projects together at a cost of \$38 million.

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<sup>23</sup> In his letter, Hitt stated that he was "unprepared" for the interview. (Exhibit 8). However, he was advised of the purpose of the interview when it was requested, and it was scheduled over a week in advance.

(Exhibits 79 & 80). The meeting was also attended by Merck and Clark.<sup>24</sup> This appears to have been the first time the FFC was advised of the new plan, and Kernek apologized to the FFC for not having informed it of the plan sooner. In the ensuing discussion, FFC Chairman Marchena inquired about the source of the additional \$10 million that would be needed to complete the project:

MARCHENA	Remember [ <i>coughs</i> ] when we made the decision to move forward with building the new building and how that was going to be funded. I don't recall the an-, and I remember at that time we said we would come back and revisit what we were gonna do with the old building. Did that come back to us?
KERNEK	I don't remember that it was supposed to come back to you. But, um, yes it di-, yes it was. We were gonna talk about whether we were going to demolish the old building. You're right. We were talking about whether or not we were going to demolish the old building and we did not bring that back to this group.
UNIDENTIFIED SPEAKER	Well, let's talk about it now.
KERNEK	Let's talk about it [ <i>laughs</i> ] because we did not bring it back here.
MERCK	Yeah, apologize for that. Kinda got into it. Um, what we, we'd looked at from the very beginning, I think we had this conversation in this group was should we demolish the old building or try to renovate it. And, that was kind of up in the air. We need the space, desperately, as we're growing, particularly if adding th-, the net new faculty that we're planning to hire, t-, to bring on. So when the design team came up with an opportunity to actually renovate the old building and try, and tie it in mechanically and everything else with the new Tre-, Trevor. And the price drops something like \$10 million over doing the two mill-, two buildings individually. And not tying them together, as far as the estimates were concerned. We, um, decided we needed to move forward on it. And so, I apologize if we should've brought it to you. Since... [ <i>simultaneous speaking</i> ]
MARCHENA	You said you were going to. [ <i>simultaneous speaking</i> ]
MERCK	...We did and we didn't'. So, I'll take that one on as a hit. I'm sorry we didn't do that, as we said we would.

<sup>24</sup> In March, 2015, Clark was promoted again to Associate Provost for Budget, Planning and Administration and Associate Vice President for Finance. In her new role, she reported to both Merck and Whittaker.

MARCHENA	Um, [coughs] so where's the additional money coming from?
MERCK	Tracy?
CLARK	Yeah, carryforward funds is what we're using for Colbourn and Trevor Colbourn.
MERCK	Can you explain carryforward just a little bit?
CLARK	So, um, note, a-, as this group knows, there has been carryforward funds over the last 5-7 years that, um, as we've been conservative and, um, we've operated, uh, leanly, we've, we've, um, sort of accumulated. So those are the funds that when, um, this building became such as issue, we looked to that to pay for it.

(Exhibit 81).

Clark's statement was technically accurate; the University was, in fact, committing carry forward funds to the project. As explained earlier, the term "carryforward funds" is often used to refer to E&G funds that are not spent or committed during the fiscal year in which they were appropriated by the State, and are thereafter retained by the University. According to Clark and other F&A personnel we interviewed, the term "carryforward funds" is synonymous with E&G. However, employees outside of F&A advised us the term can also refer to non-E&G funds that are not spent or committed during the fiscal year. BOT members who were in attendance at this meeting stated in their interviews that they did not understand the significance of the term "carryforward funds" or that the term referred specifically to E&G funds. Moreover, as discussed earlier, BOT members were generally unaware of the restrictions on the use of E&G funds. In her interview, Clark stated that the meaning of the term "carryforward funds" was clear to her and that she believed it would be clear to the members of the FFC as well.

Based on BCLP's review of available audio recordings of FFC and BOT meetings from April 3, 2014 to September 6, 2018, the April 22, 2015 FFC meeting was the *only* instance in which "carryforward funds" were directly identified by any University official as the funding source of the Colbourn/TCH project, and we found no instance in which "E&G funds" were identified as the funding source. F&A and Facilities officials speaking before the FFC or BOT would more typically describe the funding in a more oblique fashion, such as Merck's comments which came shortly after Clark spoke:

MERCK	I'll add something to this, too, and that is we, and, and prior to the recession, buildings like this were taken care of through PECO funding. And it's been on the list for PECO funding, but that's dried up. And so we're having to do these kinds of things, as Tracy said, with carryforward money, with interest earnings, and a whole bunch of other things that
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	we're able to pull together to keep these things going because we cannot just sit on our hands and wait for PECO money to come back.
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(Exhibit 81).

More importantly, in its review of audio recordings of FFC and BOT meetings and related documents shared with the FFC and BOT, BCLP found no evidence that BOT members were informed of any risks associated with the manner of funding chosen for the Colbourn/TCH project, or any negative consequences that might follow from the decision to use E&G funds. There is significant evidence, on the other hand, that several University officials were aware of these risks. Merck, in his letter to BCLP, acknowledged that he was aware of the restrictions against using E&G to fund a project such as TCH, though he denied that the University's actions violated any law or regulation. (Exhibit 7). As discussed below, Merck shared concerns about potential negative consequences with some University officials, but did not share the same concerns with the BOT. Clark and Tant, both of whom are accounting and finance professionals, acknowledged being generally aware of the restrictions on the use of E&G funds and that they had specific concerns about the propriety of using E&G to fund the TCH project.

Clark and Tant both told BCLP that at some point after the BOT voted to approve constructing a new facility, TCH, and put the Colbourn renovation on hold, they personally questioned the continued use of E&G funds for the project. According to Clark, she told Merck this was an inappropriate use of E&G funds, but he responded that they did not have any other alternative and that he would "take the audit comment." Clark explained that she understood Merck to be referring to the fact that a future audit by the Florida Auditor General might identify the misuse of the funds, which they would be required to correct. Merck acted like this was not a serious matter, however, and Clark said she was also reluctant to challenge his decision, given his position and tenure at the University. As Clark bluntly put it, "My career would not survive." Tant reported that she also questioned the use of E&G funds around this time. She recounted a conversation she had with Clark in which she asked Clark if they were allowed to use E&G funds now that the project had changed from renovation to new construction. According to Tant, in response, Clark confirmed they were not allowed to use the funds, but indicated it was Merck's decision to make and had also been discussed with the Board, and that worst case they would get an audit comment. Similar to how Merck had assuaged Clark's concerns, Clark made Tant feel as though this was not a serious matter. Both Clark and Tant indicated in their interviews that they were unaware of the specific regulation or law that restricts the use of E&G funds for new construction. Rather, they said it was just something they had learned on the job.<sup>25</sup>

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<sup>25</sup> As noted in the background section on E&G funds, the BOG has not published any guidance regarding BOG Regulation 9.007, but it did circulate a redline showing amendments to the regulation directly to SUS finance officers, including Clark, in July, 2013 for purposes of obtaining comments. Clark's emails indicate that she received the redline and reviewed it with F&A colleagues, who had no comment. (Exhibit 13).

Other officials outside of F&A recalled similar comments from Merck. Kernek's handwritten notes indicate she attended a May 20, 2015 meeting with Merck and President Hitt. (Exhibit 82). According to Kernek's translation of her notes, Merck remarked during the meeting that it was "not looking likely will get money from state for Colbourn; may have to pull from CF balances; may take audit ding, but can't let it wait, and state after us on CF; pres agrees we have to do, no choice." (Exhibit 83). Kernek and Hitt could not recall anything specific about this meeting, or whether there were others present, but Whittaker and Clark both recalled a similar meeting they attended with Hitt and Merck, and possibly the same meeting, in which Merck indicated that the funds used for TCH could draw an audit comment, and Hitt indicated they had no choice but to proceed. And Merck's letter to BCLP itself acknowledged that he "felt and advised others that we would likely take an 'audit hit' and have to later explain our use of the funds." (Exhibit 7).

Kernek stated in her interview that she did not inquire further about what Merck meant by an "audit comment," but instead took it to mean that it would not be a big deal. Hitt stated in his post-interview letter that he was told by Merck that "we might receive a comment from auditors," but that this did not change his belief that the University was taking the right course of action. (Exhibit 8).

For his part, Whittaker stated that he did not attach any particular significance to the possibility of an "audit comment," as he was not familiar with State AG audits at the time, having been at the University less than a year, and that Merck minimized the significance of the potential negative consequences, saying he would be able to handle an audit comment. He also stated that he did not feel he was in a position to question Merck's comment because Merck reported to Hitt, and he deferred to Hitt's trust in Merck. Whittaker stated that he was not familiar with restrictions on the use of E&G funds and would not have understood at the time that there was anything wrong with the manner in which the project was funded beyond what Merck said. Whittaker's emails indicate that he was apprised about E&G restrictions on one occasion in December, 2014, in a context unrelated to capital projects, but there is no evidence that he was ever advised about the restrictions on the use of E&G for new construction. (Exhibit 84).<sup>26</sup>

F&A personnel who were interviewed stated that the discussions surrounding the use of E&G funds were open and that this openness contributed to their sense that there was nothing improper (and certainly nothing illegal) about the use of E&G funds for the project. The same openness, however, is less evident in meetings of the FFC and BOT during this time. During these meetings and in documents presented to the FFC and BOT, Merck and others used various unspecific terms and descriptions when referring to the source of funds for the Colbourn/TCH project, such as "University funds", "non-recurring funds", and "internal funds." On May 21, 2015, the day after the meeting in

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<sup>26</sup> As the Exhibit indicates, Whittaker was copied on an email from Merck to Clark, in which Merck commented on an email Clark had sent to another employee regarding a request to transfer E&G funds to the UCF Foundation to establish endowments. It is unclear if Whittaker read the email--we found no evidence he responded to it--but even if he did, Clark's email did not address whether E&G funds could be used for construction or say anything at all about the Colbourn/TCH project.

which Kernek's notes indicate a comment by Merck that it was unlikely the University would get state funding for Colbourn, the BOT met to approve the FY2015-16 Capital Outlay Budget. (Exhibit 85). In the proposed budget, both Colbourn and TCH are listed in a section titled "Projects Funded by PECO," even though the University had merely requested PECO funding and was actually funding the project with E&G funds. At no time were BOT members informed of the possibility of an audit comment or that state auditors might take the view that the University was using an impermissible source of funding for the project.

#### 4. Transfer of Additional \$18 Million

On June 19, 2015, Tant sent an email to the UCF Budget Office requesting a budget transfer of \$18 million in E&G carryforward funds from the central reserve to Facilities for the Colbourn/TCH construction projects. (Exhibit 86). She copied Whittaker on the email as well as Clark. Tant supported the request by referencing the Allocation Document signed by Hitt and Whitaker in August, 2014, which had authorized a commitment of \$18 million to Colbourn Hall Renovation during the 2014-2015 fiscal year. Notably, at this point in time, the construction account was nowhere near having been depleted, and there was not an immediate need for funding to meet any construction-related expenses. Tant explained in her interview that the transfer was likely requested at that time to avoid having to report the funds as a carryforward balance in the next fiscal year. Tant said she would have made this transfer request at the direction of Merck and/or Clark. This transfer, like the prior two, required the notification of John Pittman in the Budget Office, and records reflect that Pittman was notified on June 19, 2015. (Exhibit 87).

### **E. 2015-16 Fiscal Year (July 2015 through June 2016)**

During the 2015-16 fiscal year, another \$10 million in E&G funds was committed to the Colbourn/TCH project, bringing the total commitment to \$38 million. Plans for the project changed once again, as Facilities officials decided that Colbourn should be demolished rather than renovated, and that the size of TCH should be increased. Finance and Facilities officials continued to provide vague and inconsistent information regarding the source of funding for the project.

#### 1. Summer 2015 Budget Planning

On June 29, 2015, the BOT approved the CIP for fiscal years 2016-17 through 2020-21. (Exhibits 88 & 89). The Colbourn renovation and TCH projects appeared once again on the PECO list, in the same priority positions (#3 and #6, respectively) as the year before. Interestingly, both projects also appeared in the Requests from Other State Sources section, though once again there is no evidence that funds were actually sought from other sources. According to Gina Seabrook who prepared the CIP, Kernek told her to list the projects in both places, explaining that they weren't sure where the funding would come from. The BOB-2 accompanying the CIP/PECO list no longer listed TCH, likely because the facility had by then already been approved for future state funding of its operating costs. The CIP/PECO list was submitted to the BOG as part of the University's FY2016-17 Capital Outlay Plan on June 30, 2015. (Exhibit 90). Neither

Colbourn nor TCH made the BOG's PECO priority list that fall, and as a result neither project was approved for funding in the 2016 General Appropriations Act.

F&A also submitted an FBCR for FY2015-16 to the BOG that included an additional \$10 million in planned spending for the Colbourn and TCH projects (on top of \$28 million that had already been committed the prior two years). (Exhibit 91). Like the prior two years, this amount was included in the total for Deferred Maintenance, and the FBCR form did not call for any further breakdown of that figure such that the planned spending on the projects could not have been deciphered.

## 2. Continuing Discussions Regarding Funding for the Project

There appears to have been very little discussion regarding the decision to commit an additional \$10 million in E&G funds to the CH/TCH project, which seems to have been a *fait accompli* after the first \$28 million had been committed in prior years and after Hitt had approved the increased budget for the project in his January 2015 meeting with Whittaker. Much of the discussion regarding capital project funding during FY2015-16 seemed to have shifted away from Colbourn and TCH (which were considered to be fully funded even though \$10 million still needed to be transferred) and towards how to fund other projects under consideration.

Several witnesses indicated that the University had a mounting list of unfunded capital projects as of 2015 as a result of the dearth of PECO funds. To track these projects and related funding decisions, members of the Budget Operations Group were relying heavily on a working document titled "Capital Projects Funding Update" which was created and maintained by Clark and Tant in or around January, 2015. (Exhibit 76). This document purported to set forth the University's current funding plan, identifying all unfunded projects first, followed by the funded projects and their funding source. Funded projects all fell within one of three categories of funding: Interest & Other, Auxiliary or E&G.<sup>27</sup>

A version of the Capital Projects Funding Update dated March 22, 2016 indicates that by that time, the Colbourn and TCH projects (which were still being identified as two distinct projects) were both fully funded, at a combined \$38 million. (Exhibit 94). It also clearly identifies E&G as the funding source for the projects. The same document indicates that there were numerous unfunded projects at the time, and over a dozen other projects that, like Colbourn and TCH, were considered by F&A to be funded. It also indicates that funding sources other than E&G were available to fund these projects. For instance, \$29.8 million in auxiliary funds—more than enough to cover the stated cost of the TCH construction project—were being committed to other construction projects, including the UCF Global project (a \$16 million center for

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<sup>27</sup> In October 2015, Merck reassigned responsibility for this document to John Pittman. (Exhibit 92). Pittman maintained the document until June 2016, when Clark and Tant took back control of it. Meanwhile, Kernek and Facilities maintained a similar tracking document which was periodically shared with F&A and Pittman. (Exhibit 93).

international students) and an Academic Building for the downtown campus.<sup>28</sup> Another \$53 million—more than enough to cover *both* Colbourn and TCH—was available from “Interest & Other” funds, and being directed to the UCF Global project and the UCF Interdisciplinary Research Building.

During this time, University officials were providing confusing and sometimes incorrect information about the real source of funding for the Colbourn and TCH projects. For instance, during the discussion of the FY2016-17 CIP at the June 29, 2015 BOT meeting, Kernek stated at one point that “every bit of the money that UCF has committed to [Colbourn and TCH] has been from state funds.” (Exhibit 95). This was objectively true, since E&G was the source, but Kernek did not explain what state funds she was talking about. Considering that her comments came while discussing the CIP, which stated that the University would be *applying* for state funds (from the PECO program or other state sources), and that the projects were currently unfunded, her comments were not likely understood by anyone at the time to mean that E&G funds were being used for the projects. Additionally, Kernek’s Facilities department was continuing to represent in its periodic updates on the status of capital projects, including a presentation on April 29, 2016 to President Hitt and other University officials, that the projects were “University funded—internal sources.” (Exhibit 96). The presentation described the funding for the UCF Global project in the same way, even though the source of funds for that project was auxiliary funds, not E&G funds.

There is little evidence of what was being told to Hitt and Whittaker at this time. As explained in prior sections, documents received (and in some cases signed) by Hitt and Whittaker clearly indicated that E&G funds were being used for the projects, although the significance of this fact may not have been made clear to them or understood. And in at least one instance, discussed below, Merck may have affirmatively misrepresented to them the source of funding for the projects.

On March 22, 2016, Whittaker called a meeting with Hitt, which Merck and Mike Morsberger, CEO of the UCF Foundation, also attended, in an effort to better understand the University's growing list of unfunded capital projects and develop a process for deciding how to prioritize them.<sup>29</sup> In advance of the meeting, at Whittaker's request, Clark and Tant updated the Capital Projects Funding Update document, and it was circulated to and reviewed by attendees at the meeting. (Exhibit 94). As previously discussed, the document clearly indicated that the Colbourn and TCH projects were fully funded, at a combined \$38 million, with E&G funds. However, nearly two dozen other projects were also listed on the document, which divided the projects between funded and unfunded, and identified the funding sources as Auxiliary, Interest & Other or E&G.

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<sup>28</sup> Construction of the UCF Global building was completed in April 2016 at a total cost of \$16.6 million. We were advised by University officials that the project was paid for almost entirely using investment gains from auxiliary funds.

<sup>29</sup> The invitation identified the topic of the meeting as, "An initial discussion to determine a sequence of building priorities at the university." (Exhibit 97).

Notes from the March 22, 2016 meeting do not indicate any specific discussion about the Colbourn or TCH projects.<sup>30</sup> Attendees from that meeting who were available for an interview could not recall any such discussion. This may have been because the focus of the meeting was on unfunded projects, and Colbourn and TCH were considered to be fully funded. The meeting notes indicate that some questions were asked of Merck regarding the use of E&G funds for projects involving academic space (which would include Colbourn and TCH), and that the response he gave may have caused attendees to believe that Colbourn and TCH were being internally funded with interest earnings or other non-state funds rather than with E&G. Specifically, a synopsis of the meeting written by William Self, who attended as a Provost Fellow, includes the notation: “[q]uestion about E&G column on academic space—not E&G money (from other sources).” (Exhibit 99). Self also noted on his copy of the Capital Projects Funding Update that the funding for Colbourn and TCH should be moved from E&G to the “Interest & Other” column, which would have been appropriate if the projects were funded internally rather than through E&G. (Exhibit 100). Self was interviewed but recalled little about the meeting beyond what was indicated in his synopsis.

On May 13, 2016, Whittaker gave a short presentation titled “Funding” to the BOT during a BOT retreat. (Exhibit 101). Whittaker's presentation was not recorded, but BCLP was provided with the PowerPoint he used, which includes no mention of either the Colbourn or TCH projects or how they were being funded. Prior to the retreat, Whittaker's staff sought and obtained information from Facilities about the source of funds for total capital project expenditures cited in the presentation. Whittaker's staff received a spreadsheet of projects which included TCH and indicated that its funding source was “UCF Internal Funding.” (Exhibit 102). It was unclear whether the spreadsheet or information from it was shared with Whittaker.

The Capital Projects Funding Update document continued to be widely shared with other University personnel during this period, and it continued to state that E&G was the funding source for the Colbourn/TCH project. A June 27, 2016 email from Christy Tant circulated a copy of the document to a group of F&A and Facilities employees, along with the Vice Provost for IT and the Associate Vice President for University Services.<sup>31</sup> (Exhibit 103).

### 3. Decision to Raze Colbourn

Late in the 2015-16 fiscal year, the University discontinued its plans to renovate Colbourn, deciding to demolish the building instead and increase the size TCH by over 60,000 square feet. Kernek recommended this option, citing rising construction costs and the opportunity to increase the size of TCH while remaining within the \$38 million budget. During a May 19, 2016 meeting, Kernek, Merck and Whittaker agreed on this

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<sup>30</sup> Whittaker took notes on his copy of the Capital Projects Funding Update document. (Exhibit 98). Another attendee, William Self, also took notes during the meeting which he summarized in an email he sent to Whittaker the next day. (Exhibit 99). Self, a University faculty member, was serving as a Provost Fellow at the time and shadowing Whittaker. He is now a member of the BOT.

<sup>31</sup> It was around this same time that Tant and Clark took back control of the Capital Projects Funding Update document from Pittman.

course of action. (Exhibit 104). According to Whittaker, this option was attractive to him because it would relieve the University of the need to stage faculty members who would have been displaced by the combined renovation/construction project. The topic of funding does not appear to have come up during the May 19 meeting. According to emails, Merck was tasked with informing Hitt of the revised plan.

The decision to demolish Colbourn and build a larger TCH was not made public for several weeks. For reasons that are unclear, it is not reflected in the University's FY2016-17 Capital Outlay Budget which was approved by the BOT on May 31, 2016. (Exhibit 105). Instead, the Capital Outlay Budget listed both projects in much the same way as prior budget reports had done. (The document also listed both projects under the header "Projects Funded by PECO," even though neither project was funded by PECO, and failed to state that the projects were actually being funded by E&G). On June 23, 2016, Whittaker sent an email to the University's academic leadership, informing them of the decision to abandon the "two-building solution" in favor of constructing a larger TCH and demolishing Colbourn. (Exhibit 106). He reported that the University would seek approval for the new plan from the BOT and that Colbourn would not be demolished until TCH was completed, estimated to be in Fall 2018. His email did not address funding for the project.

On June 27, 2016, the FFC approved the decision to raze Colbourn. (Exhibit 107). Kernek explained the reasoning for the decision in a Proposed Committee Action memo and also in a presentation she gave during the meeting. (Exhibits 108 & 109). Both of these documents repeat concerns from prior reports regarding the building's advanced age and structural issues identified by engineers. Kernek's memo stressed that the decision to demolish was prompted by financial concerns; specifically, that the cost of renovation was too high to justify given the building's overall value. None of the documents presented to the FFC portrayed the building as unsafe or presenting any immediate health-related concerns. To that point, Kernek stated that while some occupants of the building had reported "life safety concerns" about the building, these concerns had been investigated and the building was deemed to be safe for occupancy for at least the next two years. (Exhibit 110). Kernek described the building's air quality as "fine" and its quality of life as "adequate....hopefully a little better than adequate for the next two years as people occupy the building."<sup>32</sup> (Exhibit 110). Later in the meeting, a question was asked regarding funding for TCH and whether the BOT needed to approve the increased cost of the building. Kernek stated that the new construction and demolition option would not cause an increase in the overall budget because the \$15 million slated for the Colbourn renovation could now be applied towards the TCH construction project, and therefore no approval was necessary. FFC members indicated their agreement with this assessment.

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<sup>32</sup> Merck made similar comments in an email to Trustee David Walsh on July 26, 2016, discussing the proposal to raze Colbourn Hall which the BOT would consider at its meeting two days later. (Exhibit 111). Responding to a question from Walsh, Merck wrote: "The Colbourn Hall project is one that is timing-related. The building is in bad shape, not unsafe, but its remaining useful time is limited."

## **F. 2016-17 Fiscal Year (July 2016 through June 2017)**

During the 2016-17 fiscal year, F&A initiated a fourth transfer of E&G funds to the Colbourn/TCH construction project account, raising the total amount transferred to \$38 million. Discussions regarding the TCH construction and Colbourn demolition project began to focus on the design of the building and the construction schedule, rather than funding for the project.

### **1. Fourth Transfer of E&G Funds**

On July 6, 2016, Tant directed the Budget Office to execute a budget transfer of \$10 million from the central E&G reserve to the Colbourn construction account. (Exhibit 112). This time she did not copy Whittaker on the email or request that Pittman be notified. Nor did she reference any specific authorization for the transfer or include any supporting documentation. As previously discussed, the Allocation Document for FY2015-16 did not mention the project. (Exhibit 113). While Hitt had apparently approved a \$38 million budget for the project, that approval had been given at a meeting which occurred 18 months earlier, when the project under consideration involved renovating Colbourn Hall, not demolishing it. Nevertheless, in support of the transfer, Tant provided BCLP with an email she received from Clark following the January, 2015 meeting, directing her to commit \$10 million more to the project. (Exhibit 114). Neither Tant nor Clark was able to explain what precipitated the transfer at this particular time. As with the last transfer, the construction account was nowhere near having been depleted, and there was not an immediate need for funding to meet any construction-related expenses.

Tant's request specifically asked the transfer to be effective June 6, 2016, *one month earlier*. This meant that the funds transferred were actually carryforward funds in the FY2015-16 E&G budget. The apparent reason for the request to backdate the transfer was to avoid having to report a large carryforward balance for FY2015-16 to the BOG and the State. Tant indicated that this would have been done at the direction of Merck or Clark. Clark stated in her interview that she believed the backdating was appropriate because the decision to commit the additional \$10 million had been made during FY2015-16, although the meeting where Hitt approved the \$38 million budget for the project was actually in FY2014-2015. Budget Office records do not indicate whether John Pittman was notified of this request.

### **2. Summer 2016 Budget Planning**

On July 28, 2016, the BOT approved the CIP for fiscal years 2017-18 through 2021-22. (Exhibits 115 & 116). The CIP for the first time identified the TCH construction and Colbourn demolition as a single project which it listed under PECO projects as priority #5. This indicates that the project was now actually moving down on the University's list of priorities for PECO funding, and indeed, the project was not considered for PECO funding in the 2017 General Appropriations Act. Based on the falling priority given to the project in the CIP, and statements by Merck and others expressing frustration with the lack of availability of PECO funds, it appears there was no realistic expectation that PECO funds would be received. The project was also listed again on the BOB-2 (which once again identified the funding source as E&G) because of

its new, increased size and higher estimated operating cost.<sup>33</sup> (Exhibit 115). Consistent with prior years, the BOB-2 was not specifically discussed at the BOT meeting. (Exhibit 117). The CIP and BOB-2 were then submitted to the BOG with the University's 2017-18 Capital Outlay Plan. (Exhibit 118).

3. Further Discussions Regarding TCH Construction and Colbourn Hall Demolition

The BOT formally approved the decision to raze Colbourn at its July 28, 2016 meeting, based on the recommendation of Kernek approved by the FFC at its June 27, 2016 meeting. (Exhibit 116). The discussion of the proposal was very brief and did not include any mention of the prior plans regarding Colbourn and TCH, or the \$38 million budget. (Exhibit 117).

It is apparent that at this point, funding for the project had all but ceased to be a discussion point since the decisions authorizing Facilities to spend up to \$38 million had already been made. The TCH project does not appear in the FY2016-17 Allocation Document which President Hitt and Provost Whittaker signed on August 31, 2016. (Exhibit 119). Going forward, most substantive discussions about the project were led by Facilities personnel and dealt primarily with the progress of site planning, design and construction. To the extent funding came up in these discussions, references to the project funding were passing in nature and similarly vague to prior comments made by Facilities and Finance personnel.

On February 22, 2017, the UCF Facilities Budget Committee (FBC) held its first meeting. Formed at the suggestion of Whittaker and Clark, the mission of the FBC was to develop recommendations regarding the prioritization of major capital projects based on input from across the University. The FBC was co-chaired by Whittaker and Merck. At this first meeting, Whittaker, Merck and Clark gave a presentation about the purpose of the committee and the facilities-related budget challenges facing the University. The meeting was not recorded, but BCLP was provided with the PowerPoint presentation that was used. (Exhibit 120). The PowerPoint did not indicate that E&G funds were being used to pay for the construction of TCH or indeed make any reference to the TCH project, and Whittaker and Clark confirmed there was no such discussion. BCLP reviewed minutes of subsequent FBC meetings (which also were not recorded) and found no evidence that the source of funds used for TCH was ever specifically discussed at any such meetings, although CIPs were reviewed that listed TCH and indicated PECO funds were being sought for the project.

On February 27, 2017, the University issued the Trevor Colbourn Hall Building Program, an 80-page report detailing the project's history and objectives. (Exhibit 121). The document was signed by Hitt, Whittaker, Merck and Kernek, among others. Its purpose was to document the University's reasons for undertaking the project, as well as the project's compliance with the Campus Master Plan, applicable building and other codes, and other design standards, and to detail how the building would be used. The report was prepared entirely by Facilities, with no input from F&A. The report does not

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<sup>33</sup> The Legislature approved TCH, at its updated size, for future state funding of operating costs in the 2017 General Appropriations Act.

purport to discuss funding for the project in any detail. The document makes two passing references to funding, which are inconsistent with one another. On page 26, it references the FY2017-18 BOB-2 which the BOT approved in July, 2016, noting that the BOB-2 cited E&G as the funding source. On page 57, meanwhile, a chart purporting to identify “Funding Sources” for the project indicates that all \$38 million for the project came from “University Sources.” In their interviews, Hitt and Whittaker stated that they did not review the document carefully and could not recall seeing either reference to funding. The document was not presented to the BOT, and no Board members we interviewed were familiar with it. Nor was it shared with the BOG staff.

On March 3, 2017, the BOT convened a Budget Retreat intended to serve as an educational seminar for Board members about the University's budget process. President Hitt and Provost Whittaker attended, as did other University officials who gave presentations. Merck and Clark gave a presentation titled “Budget Overview and Allocation Process,” while Kernek gave a presentation titled “Capital Budgets and Deferred Maintenance.” The presentations were not recorded, but BCLP was provided with the PowerPoint presentations used at the retreat, Clark’s presentation notes, and some of Kernek’s presentation notes. (Exhibits 122, 123 & 124). Neither the slides nor any of the presentation notes indicate that E&G funds were being used to pay for the construction of TCH. Hitt and Merck have stated in letters to BCLP that Clark directly referred to the use of E&G carryforward funds to build TCH during her presentation, but these claims were not corroborated by the aforementioned documents or any other attendee. In her interview, Clark denied that she or anyone else made any reference to the use of E&G funds to pay for any new construction projects (including TCH) at the retreat, and Hitt and Whittaker similarly stated in their interviews that they could not recall any such reference. Kernek’s presentation notes indicate that she either stated or intended to state that the University had adopted a broad strategy to use E&G carryforward funds to reduce its mounting deferred maintenance costs, and that this strategy had been successful in defraying some of these costs. (Exhibit 124). Nothing in Kernek’s notes, however, indicates that she spoke or intended to speak directly about the use of E&G funds to build TCH.

#### 4. Construction Begins

On May 1, 2017, the University received a Notice to Proceed for TCH, and construction began soon thereafter. Of the \$38 million committed to the project, very little had actually been spent to this point. (Appendix C).

The \$10 million transfer made effective June 2016 was the final budget transfer needed from the central reserve to fund the TCH project. From this point forward, Facilities did not require any more budget transfers from the central reserve E&G account for the construction of TCH. However, Facilities requested additional E&G funding from other departments related to specific, minor projects. Between June 29, 2017 and August 23, 2018, F&A (at the direction of Facilities) recorded five entries totaling \$546,787 to transfer funds from other departments’ E&G accounts to the TCH construction account. (Appendix B). The largest of these transfers (\$450,000) related specifically to fund structural improvements to support a “PV rooftop system” and active chilled beams and came from the Utilities department’s E&G account. Other smaller

transfers funded projects such as room renovations and phone installations benefitting specific departments (e.g., the College of Arts and Humanities).

## **G. 2017-18 and 2018-19 Fiscal Years (July 2017 through June 2019)**

### **1. Appearance of TCH Project in Budget Documents**

The TCH project and Colbourn demolition were again listed as PECO projects in the FY2018-19 CIP, approved by the BOT on July 20, 2017 and submitted to the BOG with the University's Capital Outlay Plan. (Exhibits 125, 126 & 127). The project was listed as the #6 priority, indicating that it was still not a top priority on the University's PECO "wish list." As in prior years, the CIP was accompanied by a BOB-2 form that listed TCH and stated that its funding source was E&G. (Exhibit 125). As in prior years, this does not appear to have been discussed with or noticed by either the BOT or the BOG. The project did not make the BOG's PECO priority list and did not receive any funds in the 2018 General Appropriations Act, although the Act once again approved TCH for funding of annual operating costs following its construction.

TCH was not listed in the FY2019-20 CIP, which was approved by the Board on July 19, 2018 and submitted to the BOG thereafter. (Exhibits 128 & 129). However, the project was again listed on the BOB-2 form, and again indicated that E&G was the funding source. (Exhibit 128).

### **2. Auditor General Audit & Exit Conference**

In April 2018, the Florida Auditor General (AG) commenced an operational audit of the University for the calendar year 2017. (Exhibit 130). This type of audit, conducted every few years, varies in scope but generally focuses on whether University processes and administrative activities are being conducted in compliance with applicable state laws and regulations. During the audit, AG officials requested from the University, among other things, information concerning the source of funds for a number of capital projects, including the construction of TCH. University officials complied with this request, which revealed to the auditors that E&G carryforward funds were used to pay for TCH.

On August 7, 2018, AG officials held an Exit Conference with University officials to share their preliminary findings from the audit. (Exhibit 131). AG officials identified seven items that were likely to be included in the final audit report, one of which was "Construction Funding." In discussing that item, AG officials shared their finding that TCH was constructed using E&G carryforward funds, which are only permitted to be used for operating activities and not new construction. According to numerous witnesses we interviewed who attended this meeting, Merck immediately responded by taking full responsibility for the decision. Merck stated that he authorized the use of E&G and was willing to "take the audit comment," and further justified his decision by calling Colbourn a "sick building," citing the need to move its faculty and other occupants out.

The next day, Robert Taft, the University's Chief Auditor, sent an email to the BOT informing them of the Exit Conference and preliminary audit findings. (Exhibit

132). This appears to have been when the BOT first learned that there was any controversy involving the source of funds for TCH. President Whittaker<sup>34</sup> was copied on the email and indicated in his interview that this was also when he first learned that auditors had raised a concern about the issue (he had not attended the Exit Conference or otherwise been involved in the audit).

### 3. Post-Audit Statements by Merck

The AG reported its discovery that E&G carryforward funds had been used to pay for the construction of TCH to the BOG, and over the next month, the issue received increasing attention and scrutiny, culminating in an emergency meeting of the BOT on September 6, 2018. (Exhibit 133). At that meeting, the BOT directed University officials to replenish the E&G carryforward funds used for TCH with non-appropriated funds. (Exhibit 134). Also at the meeting, President Whittaker informed the BOT that Merck had accepted full responsibility for the decision to use E&G funds and would be retiring at the end of the year. President Whittaker and BOT Chairman Marchena subsequently addressed the TCH funding issue at a BOG meeting on September 12, 2018. At the meeting, BOG members expressed concern about Merck's continued employment at the University under the circumstances. The following day, Whittaker requested Merck's immediate resignation.

During the time period between the AG Exit Conference on August 7, 2018 and his departure from the University on or about September 13, 2018, Merck made a number of statements about the decision to use E&G carryforward funds to pay for the construction of TCH and what he told the BOT about the source of funds for the project. These statements, discussed below, conflict with Merck's November, 2018 letter to BCLP, in which he claims that the source of the funds for Colbourn and TCH was fully disclosed and openly discussed with his superiors, the BOT, the BOG and other University officials outside of F&A. (Exhibit 7).

On August 10, Trustee David Walsh met with Merck and other F&A personnel at Merck's office to prepare for an FFC meeting on August 15. Walsh was going to be chairing the meeting in place of Alex Martins, the Committee Chair, who had a conflict. According to Walsh, at the end of the meeting, Merck commented on the recently completed AG audit and specifically the finding regarding the improper funding of TCH. Merck indicated he was taking responsibility for the matter but referred to himself as the "fall guy." However, he did not identify any other University officials involved in the funding decision. He also indicated to Walsh that he could not tell the BOT at the time about the actual source of funds for TCH "because of their role."

On August 22, President Whittaker convened a meeting of various University officials including Merck to discuss the AG audit. After the meeting, a smaller group, consisting of Whittaker, Grant Heston (Chief of Staff and Vice President of Communications), Scott Cole and Janet Owen (Vice President of Government Relations), met separately to continue discussing the matter. They called Merck into the meeting and asked him to explain what happened with TCH. According to witnesses,

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<sup>34</sup> President Hitt retired effective June 30, 2018 and was succeeded as President by Whittaker on July 1, 2018.

Merck's first words were, "This is on me." Merck then proceeded to defend his actions as being necessary due to the poor condition of Colbourn. When asked why he had described the funds to be used for TCH in such vague terms at the May 2014 BOT meeting, Merck indicated that he knew if he was more specific, the Board would not have approved the project. Nevertheless, Merck indicated he thought he had done the right thing. Merck did not indicate that anyone else was involved in the funding decision other than himself.

On the afternoon of September 5, a meeting was held to prepare for the emergency BOT meeting the following day. The participants were Whittaker, Merck, Cole and Heston. During this meeting, Merck was asked what he would tell the BOT if given the opportunity. Merck again took full responsibility for the decision to use E&G funds to pay for TCH, explained that it was necessary because Colbourn was a "sick building," and said he would do it again. Merck also admitted to being deliberately vague about the source of funds for TCH when he described them as "UCF non-recurring funds" to the BOT in May 2014. According to Whittaker and Heston, Merck indicated that if he had given the Board the full picture about what funds were being used, i.e., appropriated E&G funds, the Board would not have approved it.

Trustee John Lord reported a conversation he had with Merck following a meeting they both attended on September 11 related to the University's College of Medicine. According to Lord, Merck approached him after the meeting and asked to speak with him alone. They went into a separate room and Merck proceeded to explain why he had authorized the use of E&G funds for the construction of THC. Merck referenced allegedly horrific conditions in Colbourn and said that professionals had told him the building was unsafe and should not have any students or faculty in it. Merck indicated that he made the decision to use the funds as a result, and that it was the right decision. He did not indicate that anyone else was involved in the decision.

Finally, John Pittman informed BCLP of a conversation he had with Merck shortly after the BOG meeting on September 12. The conversation took place in Merck's office, and only the two of them were present for it. According to Pittman, Merck explained why he had felt it was necessary to use E&G funds for TCH (due to the condition of Colbourn) and indicated he would do the same thing over again. Merck also indicated that he had not told the BOT about the source of the funds for TCH because if he had, they would not have approved it.

#### 4. Construction of TCH is Completed

In late July 2018, TCH was completed and in August the occupants of Colbourn moved into the facility along with other faculty and staff. Shortly after this, Colbourn was closed and demolition of the building began later in the year.

As of August 28, 2018, the University had spent a total of \$30.6 million in E&G funds on the construction of TCH. (Appendix C).

#### IV. INTERNAL CONTROLS ANALYSIS AND RECOMMENDATIONS

As part of its charge, BCLP was asked to investigate whether there were internal controls that failed to prevent or detect the improper use of E&G funds for capital projects, and address what additional controls should be put in place to reasonably ensure that E&G funds will not be similarly misused in the future.

Through our interviews and review of the documents collected, and through consultation with PwC, we obtained an understanding of the relevant processes and internal controls in place at the University during the relevant period. We also asked individuals about their understanding of the rules or restrictions regarding the use of E&G funds for capital projects. Based on this work, we found that certain internal controls were either absent or inadequately designed and as a result failed to prevent or detect the inappropriate use of E&G funds to construct TCH. Specifically, we found deficiencies in the areas of written policies and procedures, training and education, oversight, auditing, monitoring and reporting. We also found that the University, or at least its F&A division, failed to foster a culture that encouraged challenging senior members of the administration and whistleblower activity.

**Policies and Procedures.** The Financial Policies and Procedures used by F&A do not address relevant restrictions on the use of state appropriated funding and do not document any policies or procedures designed to ensure that state appropriated funds (including but not limited to E&G funds) are being allocated for permitted uses only. With no documented policies and procedures, F&A personnel regularly created and used ad hoc reports to keep track of the use of E&G funds.

**Training and Education.** There was no effort to educate employees (including but not limited to F&A and Facilities employees) about the relevant restrictions on the use of state appropriated funding. In addition, during the relevant period, BOT members and the University's top officials did not receive any kind of formal or informal training regarding relevant BOG regulations on the use of E&G funds. As a result, it is likely that even if BOT members and top University officials had been clearly told from the beginning that E&G was the source of funding for TCH, the significance of this fact would have been lost on most if not all of them.

**Oversight.** Policies designed to ensure independent oversight and approval of significant decisions relating to the funding of TCH were either nonexistent or not followed. In many cases, there was not a clear segregation of duties or a useful system of checks and balances in place. For instance, though the nature of the project changed at several points, BOT approval was sought on only two occasions—the decision to construct TCH at a cost of \$21.3 million and the decision to raze Colbourn. Additionally, the reporting structure in effect at the time, in which Merck had oversight over both F&A and Facilities, gave Merck wide latitude to commit millions of dollars of E&G funds to the project.

**Monitoring and Reporting.** The information presented to the BOT and BOG regarding the funding of the Colbourn and TCH projects was regularly insufficient, inconsistent and vague. Though the University prepared and the BOT approved all

budget reports required by Florida law and BOG regulations during the relevant period, these reports alone were not designed to convey the information that would have been needed by the BOT and BOG to determine that funds were being used improperly.

F&A did generate quarterly comparative variance analyses showing significant year-to-year changes in E&G transfers to construction accounts and submitted these reports to higher levels within the F&A department. However, those were the same individuals who either made the decision to use E&G funds for TCH or did not see it as their responsibility to challenge the decision and/or feared it may impact their employment with the University. In addition, there is no evidence that the University explored the use of technological solutions such as automated flagging of certain types of transfers of E&G funds.

**Auditing.** The University's compliance and internal audit function did not identify the risk that E&G funds could be used for inappropriate purposes in conducting risk assessments and developing its annual audit plan. As a result, the University did not conduct internal audits of the sources of funds used for capital projects.

**Culture.** F&A employees who were aware of the use of E&G funds to build TCH as well as the relevant restrictions on the use of such funds failed to bring that information to the attention of the BOG, the office of the University's general counsel or its internal auditors, the compliance, ethics and risk office or anyone else. At least one senior employee cited a concern that she would have risked her job security if she had done so. While the University did receive some anonymous tips regarding the use of E&G for the TCH project, these tips came *after* the AG's preliminary audit findings were announced. This is indicative of a culture during the period in question that did not sufficiently encourage whistleblower activity as a means to ensure compliance with applicable laws and regulations.

Based on the control deficiencies identified above, and in consultation with PwC, we have proposed certain enhancements to the University's internal controls for the BOT and University leadership to consider. As an initial note, we understand that the University addressed some of the issues identified above prior to the AG's 2018 operational audit (but after the key decisions with respect to funding TCH had been made). Specifically, in 2017 the BOT adopted its Delegation of Authority document, and the FFC amended its Charter, to require approval of any new construction or renovation project that will exceed \$2 million in construction costs. We further note that, since the AG audit, the President has engaged the Association of Governing Boards to assist with developing policies and procedures that ensure staff provide the BOT with clear, accurate and comprehensive information to fulfill the Board's fiduciary responsibility. The University has also retained Accenture as an outside consultant to review and make recommendations about the structure of UCF's Division of Administration and Finance (which includes the F&A and Facilities Departments) to ensure proper checks and balances in the distribution of significant responsibilities. These efforts may result in more comprehensive recommendations than ours.

We recommend the following enhancements:

- The University should require F&A to consult with the University's office of general counsel, the compliance, ethics and risk office, its internal auditors, and the BOG as appropriate, to develop specific written policies and procedures designed to reasonably ensure the proper use of state-appropriated E&G funding. These policies and procedures should, at a minimum, clearly identify those persons and/or bodies within the University with responsibility to approve and oversee expenditures of E&G.
- The policies and procedures should also describe the documentation necessary to support certain funding-related requests (such as budget transfer requests above a certain dollar threshold) and provide clear instructions to employees charged with responsibility to approve such requests.
- The policies and procedures should also provide for regular audit by the University's internal auditor.
- The University should require all newly hired F&A and Facilities department employees, and other employees with budgetary responsibilities, to undergo education and training regarding the proper use of state-appropriated funds, the relevant state statutes, regulations and BOG guidance, and should provide for regular training and education of all such employees regarding these matters. The University should also implement periodic education and training on the key concepts regarding the budgeting process and the appropriation of state funds for members of the BOT and University leaders.
- The University should consider the need for improved training and communications regarding its whistleblower program designed to increase awareness of the program and encourage employees to report known or suspected violations of law, regulation or University policy.
- The University should develop, as a supplement to the budgeting documents and reports required to be submitted to the BOT and/or BOG by Florida law and BOG regulations, a clear and consistent reporting package to be presented to the BOT on a periodic basis designed to appropriately inform the Board regarding the funding of capital projects.
- We understand that in September, 2018, the Board adopted a policy requiring UCF's President, Provost, Chief Financial Officer and General Counsel to certify to the Board that the funding source is one that is legally available for the project. We agree with this policy, but note that these individuals need to be provided with sufficient information to support their certifications and ensure that the process is meaningful.

- The University should explore ways in which technology could be used to enhance its internal controls, such as automated workflows within the budget and general ledger systems that flag transactions which may constitute a violation of BOG regulations and/or state law concerning the use of state appropriated funds.
- Finally, the University should make permanent its decision to reorganize the position of Vice President for Administration and Finance so that it no longer has simultaneous oversight of F&A and Facilities.

# **APPENDIX**

## **A**

### List of Witnesses Interviewed

Interviewee	Date(s) of Interview	Position
Binder, Maureen	1/04/2019	Associate Vice President and Chief Human Resources Officer
Bottorff, Allen	10/3/2018	Director Facilities, Planning & Construction, UCF Downtown
Bradley, Ken	11/15/2018	Member, Board of Trustees
Brown-Neal, LaShanda	10/4/2018	Associate Director, Business Office, Facilities & Safety Resource Management
Carloss, Angie	9/27/2018	Executive Assistant to the Office of the Vice President
Chase, Diane	11/9/2018	Former Executive Vice-Provost and acting Provost
Cherepow, Sandra	10/4/2018	Former Assistant to John Hitt
Clark, Tracy	9/27/2018 10/25/2018 12/6/2018	Associate Provost for Budget, Planning, and Administration and Associate Vice President for Finance
Cole, Scott	9/26/2018	Vice President and General Counsel
Conte, Joseph	11/16/2018	Member, Board of Trustees
DuBuc, Donna	10/3/2018	Director, University Budget, Planning & Administration
Garvy, Robert	11/16/2018	Vice Chairman, Board of Trustees
Gonzalez, Lynn	10/4/2018	Associate Vice Provost for Academic Budget and Personnel Administration
Henson, Phillip	10/3/2018	Director, Finance and Accounting
Heston, Grant	12/6/2018	Vice President of Communications & Marketing and Chief of Staff to President Whittaker
Hitt, John	10/25/2018	President Emeritus
Hodum, Brad	10/3/2018	Associate Controller, Finance & Accounting
Hutson, Susan	11/16/2018	Assistant Director of Planning for Facilities, Planning, & Construction
Jones, Tim	10/18/2018	Vice Chancellor, Finance/Administration, and Chief Financial Officer, Board of Governors
Kernek, Lee	9/26/2018	Associate Vice President for Facilities, Planning, and Construction
Kinsley, Chris	10/2/2018 11/15/2018 11/16/2018 11/29/2018 12/20/2018	Finance and Facilities Assistant Vice Chancellor, Board of Governors
Korosec, Ronnie	12/13/2018	Associate Provost for Operations and Chief of Staff for Academic Affairs
Lord, John	12/5/2018	Member, Board of Trustees
Maier, Tina	1/3/2019	Associate Director, University Audit
Marchena, Marcos	11/14/2018 12/6/2018	Chairman, Board of Trustees
Martin, Bill	10/3/2018	Director, Facilities Planning & Construction
Martins, Alex	11/14/2018	Member, Board of Trustees

### List of Witnesses Interviewed

Interviewee	Date(s) of Interview	Position
Mitchell, Kathy	9/26/2018 10/24/2018	Associate Director, University Audit, and Interim Chief Financial Officer
Morsberger, Mike	12/5/2018	Vice President for Advancement and CEO, UCF Foundation
Nelson, Meghan	10/4/2018	Coordinator, Accounting & Financial Reporting
Owen, Janet	12/10/2018	Vice President for Government Relations and Associate General Counsel
Pittman, John	9/26/2018 12/7/2018	Associate Vice President for Debt Management
Schell, Rick	10/3/2018	Vice President and Chief of Staff for President Hitt
Seabrook, Gina	10/4/2018 11/14/2018 11/15/2018	Construction Specialist, Facilities & Safety Resource Management
Seay, Beverly	12/5/2018	Member, Board of Trustees
Self, William	12/11/2018	Member, Board of Trustees
Sprouls, John	11/15/2018	Member, Board of Trustees
Suarez, Dania	10/4/2018	Former Assistant to Provost Dale Whittaker
Taft, Robert	12/5/2018	Chief Audit Executive, University Audit
Tant, Christina	9/27/2018 12/6/2018	Assistant VP, University Controller, Budget, Finance & Accounting
Walsh, David	9/25/2018 12/6/2018	Member, Board of Trustees
Whittaker, Dale	12/7/2018	President of UCF
Yeargin, Bill	11/15/2018	Member, Board of Trustees

# **APPENDIX**

## **B**

**Summary of E&G Funds Transferred for Colbourn Hall  
Renovation/Trevor Colbourn Hall**

<b>Ledger</b>	<b>Fiscal Year</b>	<b>Date</b>	<b>Sum Amount*</b>	<b>Original Fund Source</b>	<b>Transfer Final Destination Account</b>
Budget Ledger	2013-2014	8/26/2013	(\$700,000)	E&G Unallocated (Central Reserve)	Facilities Special Projects E&G
General Ledger	2013-2014	8/26/2013	\$700,000	Facilities Special Projects E&G	UCF569-COLBOURN HALL RENOVATIO
Budget Ledger	2013-2014	4/30/2014	(\$9,300,000)	E&G Carryforward (Central Reserve)	Facilities E&G Carryforward
General Ledger	2013-2014	5/1/2014	\$9,300,000	Facilities E&G Carryforward	UCF569-COLBOURN HALL RENOVATIO
Budget Ledger	2014-2015	6/19/2015	(\$18,000,000)	E&G Carryforward (Central Reserve)	Facilities E&G Carryforward
General Ledger	2015-2016	7/16/2015	\$4,841,689	Facilities E&G Carryforward	UCF569-COLBOURN HALL RENOVATIO
General Ledger	2015-2016	7/16/2015	\$13,158,311	Facilities E&G Carryforward	UCF574-TREVOR COLBOURN HALL
Budget Ledger	2015-2016	6/6/2016 <i>(effective date)</i> 7/7/16 <i>(entered date)</i>	(\$10,000,000)	E&G Carryforward (Central Reserve)	Facilities E&G Carryforward
General Ledger	2015-2016	6/6/2016 <i>(effective date)</i> 7/7/16 <i>(entered date)</i>	\$10,000,000	Facilities E&G Carryforward	UCF574-TREVOR COLBOURN HALL
General Ledger	2016-2017	6/29/2017	\$450,000	Utilities Energy Savings E&G	UCF574-TREVOR COLBOURN HALL
General Ledger	2017-2018	3/14/2018	\$39,830	Undergraduate Studies Carryforward E&G	UCF574-TREVOR COLBOURN HALL
General Ledger	2017-2018	6/22/2018	\$49,907	UCF IT Operations E&G	UCF574-TREVOR COLBOURN HALL
General Ledger	2018-2019	7/19/2018	\$4,550	College of Arts and Humanities Carryforward E&G	UCF574-TREVOR COLBOURN HALL
General Ledger	2018-2019	8/23/2018	\$2,500	Undergraduate Studies Carryforward E&G	UCF574-TREVOR COLBOURN HALL

\*For purposes of this table, negative numbers (in parentheses) represent budget funding transfers from the University's "central reserve" to Facilities. Positive numbers represent cash transfers into the construction accounts.

# **APPENDIX**

## **C**

**Summary of Colbourn Hall/Trevor Colburn Hall Construction Spend by Category and  
Fiscal Year as of November 27, 2018**

	<b>Fiscal Year (July 1 through June 30)</b>						
<b>Category</b>	<b>2013-14</b>	<b>2014-15</b>	<b>2015-16</b>	<b>2016-17</b>	<b>2017-18</b>	<b>2018-19</b>	<b>Total</b>
Construction	\$50,432	\$2,679		\$8,041	\$25,255,563	\$4,084,529	<b>\$29,401,244</b>
Design	\$99,964	\$13,651	\$304,546	\$1,080,357	\$874,120	\$110,475	<b>\$2,483,113</b>
Furniture Fixtures & Equipment					\$35,687	\$1,736,518	<b>\$1,772,205</b>
Permits & Inspections				\$6,719	\$75,514	\$810	<b>\$83,043</b>
<b>Total</b>	\$150,396	\$16,330	\$304,546	\$1,095,117	\$26,240,884	\$5,932,332	<b>\$33,739,605</b>

# **APPENDIX**

## **D**

**Summary of Colbourn Hall Renovation/Trevor Colbourn Hall (collectively “TCH”)  
Transfers Within Fund Balance Composition Reports**

<b>Fiscal Year</b>	<b>FBCR Report Date</b>	<b>Total Deferred Maintenance reported on FBCR</b>	<b>TCH Portion of Deferred Maintenance</b>	<b>Cumulative amounts transferred to TCH by end of FY</b>
2011-12	8/17/11	\$0	\$0	\$0
2012-13	8/17/12	\$4,000,000	\$0	\$0
2013-14	8/19/13	\$15,147,799	\$8,000,000	\$10,000,000
2014-15	8/19/14	\$20,155,861	\$18,000,000	\$28,000,000
2015-16	8/18/15	\$12,748,599	\$10,000,000	\$38,000,000
2016-17	8/18/16	\$2,957,828	\$0	\$38,000,000
2017-18	8/21/17	\$2,855,114	\$0	\$38,000,000