

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN N. XEREAS,	.	
	.	
Plaintiff,	.	CA No. 12-0456 (DAR)
	.	
v.	.	
	.	Washington, D.C.
MARJORIE A. HEISS, et al.,	.	Wednesday, November 7, 2018
	.	9:30 a.m.
Defendants.	.	
.	Pages 372 through 580

DAY 3
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE DEBORAH A. ROBINSON
UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

THE DEPUTY CLERK: Civil case 12-456, John N. Xereas v. Marjorie A. Heiss, et al. Erin Glavich, Tony Richa, Amber McDonald for the plaintiff; William O'Neil, Miles Karson III for the defendants. This is a continuation of a jury trial.

THE COURT: Good morning to all of you. Are you ready to proceed, Ms. McDonald, with your examination of Ms. Heiss?

MS. MCDONALD: I am, Your Honor. I do believe there's one small --

THE COURT: Let me ask you to use the microphone at the podium, please. I can hear you, but I want to be certain that we have an accurate recording.

MS. MCDONALD: Absolutely, Your Honor. There are a few preliminary matters. I'm happy to defer them until the lunch hour, but I did think we should address the voir dire of Mr. Morrissey. Both parties have agreed that it could proceed at noon if that's all right with Your Honor.

THE COURT: We will address that when we take our midmorning recess.

MS. MCDONALD: Thank you, Your Honor.

THE COURT: Are there any preliminary matters concerning the examination of Ms. Heiss as an adverse witness?

MS. MCDONALD: No, Your Honor.

THE COURT: Thank you, Ms. McDonald. Is it still the case that you, Mr. O'Neil, wish to defer your examination?

1 MR. O'NEIL: Yes, Your Honor.

2 THE COURT: Thank you. Very well. We will ask the
3 jury to come in. (Jury in at 9:32 a.m.)

4 Good morning, members of the jury.

5 MS. MCDONALD: The plaintiff will call Marjorie Heiss.

6 THE COURT: Ms. Heiss, good morning. I will ask you
7 to please face the deputy clerk to be sworn and then take the
8 witness stand. Thank you.

9 MARJORIE HEISS, WITNESS FOR THE PLAINTIFF, SWORN

10 DIRECT EXAMINATION

11 BY MS. MCDONALD:

12 Q. Good morning, Ms. Heiss.

13 A. Good morning.

14 Q. You are a party in this case. Correct?

15 A. Yes.

16 Q. You are represented by Mr. O'Neil and Mr. Karson?

17 A. Yes, I am.

18 Q. And Penn Social is paying your legal bills?

19 A. Yes, they are.

20 Q. I'd like to discuss a little bit about your background.
21 You're a graduate of the University of Michigan?

22 A. Yes, I am.

23 Q. And a graduate of the University of Michigan Law School?

24 A. Yes, I am.

25 Q. You're a D.C. attorney.

1 A. Yes, I am.

2 Q. And you were admitted to the D.C. Bar in 1993?

3 A. Yes, I was.

4 Q. You met Mr. Dawson in 1996. Is that correct?

5 A. 1995 -- late '95, early '96. Yeah.

6 Q. And that is when you went to work as general counsel for
7 Bedrock Management?

8 A. Yes, I did.

9 Q. Bedrock Management is a company co-owned by Mr. Dawson?

10 A. Co-owned, yes, with another partner.

11 Q. And its purpose is to manage other businesses owned by
12 Mr. Dawson.

13 A. Mr. Dawson and other investors and other partners.

14 They are not just a management company. The company builds and
15 designs and opens and then operates the bars and restaurants.

16 Q. Thank you. While you were at Bedrock, your responsibilities
17 included setting up businesses?

18 A. Yes, it did.

19 Q. And negotiating leases?

20 A. Yes.

21 Q. Drafting contracts?

22 A. Yes.

23 Q. And negotiating contracts?

24 A. Yes.

25 Q. You're also responsible for personnel policies and

1 procedures?

2 A. Yes.

3 Q. And if the business ran into legal problems, you would
4 address those as well.

5 A. Yes, I did.

6 Q. You worked for Bedrock for approximately 15 years?

7 A. Yes, I did.

8 Q. And during that time, you became a part owner of several
9 Bedrock businesses.

10 A. Yes, I did.

11 Q. And Defendant Dawson was a co-owner in each of those
12 businesses.

13 A. Yes, he was.

14 Q. Let's move on to the creation of the Riot Act Comedy Club.
15 You first learned about the space that was ultimately rented by
16 Riot Act a few years before the Riot Act project. Correct?

17 A. That's correct.

18 Q. And you had visited the space before?

19 A. Yes, we had.

20 Q. You had visited it with Mr. Dawson.

21 A. Yes.

22 Q. But you didn't know what to do with a space that large?

23 A. Right. The landlord had -- we'd had a meeting at their
24 offices, brought us down and asked Mr. Dawson's partner Mark
25 Handwerger and Geoff, and they were interested in the space.

1 And they looked at the space, and it was a great space; but they
2 didn't have any use for it since it was so large and already set
3 up to be a theater.

4 Q. And then you were introduced to John Xereas in 2010?

5 A. Yes, I was.

6 Q. And Mr. Dawson and John agreed to go into business together?

7 A. That's my understanding.

8 Q. And Mr. Dawson suggested that you be a partner in that
9 business.

10 A. Yes, he did.

11 Q. You were also to be a managing member?

12 A. Yes, I was.

13 Q. And the LLC's attorney.

14 A. Yes.

15 Q. As part of your duties as the LLC's attorney, you drafted
16 the operating agreement?

17 A. Yes, I did.

18 MS. MCDONALD: Your Honor, at this time I'm going
19 to refer to Plaintiff's Exhibit 104, which has already been
20 admitted.

21 THE COURT: Yes, Ms. McDonald.

22 MS. MCDONALD: May the record reflect I'm giving a
23 copy to defendant?

24 THE COURT: Yes.

25 MS. MCDONALD: May I approach, Your Honor?

1 THE COURT: Yes.

2 (Document tendered to witness.)

3 THE WITNESS: Thank you.

4 BY MS. MCDONALD:

5 Q. Ms. Heiss, I've handed you a copy of what's been marked as
6 Plaintiff's Exhibit 104. Do you see that designation at the
7 bottom?

8 A. Yes, I do.

9 Q. You recognize this document. Correct?

10 A. Yes, I do.

11 Q. It's the Member-Managed Operating Agreement of Riot Act DC,
12 LLC. Is that correct?

13 A. That's correct.

14 Q. It's the original operating agreement for Riot Act DC?

15 A. It was.

16 Q. And an operating agreement, for the jury's benefit, is
17 an agreement that governs the business partnership. Correct?

18 A. That's correct.

19 Q. And you prepared the operating agreement?

20 A. I did.

21 Q. When you drafted the operating agreement, you knew
22 you were going to have an ownership interest in Riot Act.
23 Is that correct?

24 A. That's correct. Yes.

25 Q. And when you drafted the document, you knew you were going

1 to be a managing member of the business. Is that correct?

2 A. That's correct.

3 THE COURT: Ms. Heiss, may I ask you to please pull
4 that microphone a little bit closer, please?

5 THE WITNESS: Yes. Is this better?

6 THE COURT: Yes. Thank you.

7 BY MS. MCDONALD:

8 Q. When you drafted the agreement, you were also still working
9 with Mr. Dawson at Bedrock Management. Is that correct?

10 A. Yes, I was. I was actually winding down my -- I was going
11 to be moving on, so I was winding down what I was working on for
12 Bedrock, yes.

13 Q. Winding down, but still an active employee of Bedrock?

14 A. Yes.

15 Q. And you were a still a partial owner in several Dawson
16 businesses. Correct?

17 A. Yes. That's correct.

18 Q. The original operating agreement does not contain a
19 conflict-of-interest provision, does it?

20 A. No, it doesn't.

21 Q. And as a lawyer, are you familiar with the ethics rules
22 regarding conflicts of interest?

23 A. I believe I am.

24 Q. You knew John was not a lawyer.

25 A. Yes, I did.

1 Q. And the operating agreement does not contain a provision
2 advising the parties to obtain their own independent counsel.

3 A. No, it does not.

4 Q. The original operating agreement does not contain a clause
5 regarding the licensing of the Riot Act name.

6 A. No, it does not.

7 Q. The operating agreement also does not contain a clause
8 transferring ownership of the Riot Act name.

9 A. No, it does not.

10 MS. MCDONALD: Your Honor, I'm now going to refer to
11 Plaintiff's Exhibit 105, which has previously been admitted.

12 THE COURT: Thank you.

13 MS. MCDONALD: May the record reflect I'm handing a
14 copy to defendants?

15 THE COURT: Yes, of course.

16 MS. MCDONALD: May I approach?

17 THE COURT: Yes, you may. Thank you.

18 THE WITNESS: Thank you.

19 BY MS. MCDONALD:

20 Q. Ms. Heiss, I've handed you a copy of what's been admitted
21 as Plaintiff's Exhibit 105. Do you see that designation at the
22 bottom?

23 A. I do, yes.

24 Q. Do you recognize this document?

25 A. Yes, I do.

1 Q. It's the Amended and Restated Operating Agreement of Riot
2 Act DC, LLC. Correct?

3 A. Yes, it is.

4 Q. And you agree that's the document that currently governs
5 the Riot Act partnership?

6 A. Yes, it does.

7 Q. You prepared the Amended Operating Agreement?

8 A. Yes, I did.

9 Q. And when you drafted the Amended Operating Agreement,
10 you had an ownership interest in Riot Act.

11 A. Yes, I did.

12 Q. When you drafted the Amended Operating Agreement, you were
13 a managing member of Riot Act.

14 A. Yes, I was.

15 Q. The Amended Operating Agreement does not contain a
16 conflict-of-interest provision.

17 A. No.

18 MR. O'NEIL: Objection.

19 (Bench conference.)

20 MR. O'NEIL: I've let them talk about the conflict-of-
21 interest idea before, but I don't see the relevance of this.

22 THE COURT: Very well. That was the second time there
23 was a question. The question to which you objected was -- by my
24 recollection, the second question concerned conflicts.

25 MR. O'NEIL: Correct.

1 THE COURT: May I ask you, Ms. McDonald, to which
2 remaining claim is that relevant?

3 MS. MCDONALD: Sure, Your Honor. I guess to the
4 contract claim, we're talking about the entering into the
5 contract and the process by which the parties entered into
6 the contract. I think it's highly relevant.

7 THE COURT: To which claim do you refer?

8 MS. MCDONALD: The breach of contract claim. I'm
9 sorry. I don't know the count number.

10 THE COURT: If you are speaking of Count V --

11 MS. MCDONALD: I believe so, Your Honor.

12 THE COURT: May I ask you, please, where the plaintiff
13 pled any breach arising from the absence of a conflict-of-
14 interest provision?

15 MS. MCDONALD: I don't believe we did, Your Honor,
16 but it does go to the contract itself and the terms under which
17 the parties entered the contract, the terms and circumstances.

18 THE COURT: Would you like to go get your copy of the
19 complaint?

20 MS. MCDONALD: Sure.

21 (Counsel retrieving document.)

22 THE COURT: Now, Ms. McDonald.

23 MS. MCDONALD: Your Honor, paragraph 45 discusses
24 the conflicts of interest that arose from Ms. Heiss's legal
25 representation.

1 THE COURT: We're looking at Count V of the complaint,
2 which is one of the surviving counts.

3 MS. MCDONALD: It incorporates the allegations that
4 were in paragraph 267.

5 MR. O'NEIL: Well, I don't think it relates to the
6 breach of contract at all. In fact, it's presuming that -- from
7 every time they've raised this topic, the presumption is that
8 there's a conflict, but they haven't introduced any evidence
9 establishing that Ms. Heiss was representing Mr. Xereas.

10 THE COURT: Do you intend to offer such evidence?

11 MS. MCDONALD: That she was representing Mr. Xereas?
12 She drafted a contract on behalf of --

13 THE COURT: Do you intend to offer evidence
14 regarding any ethical requirement -- perhaps my question
15 is twofold. Do you intend to offer any evidence concerning
16 conflicts of interest to the extent that that is an ethical
17 requirement and whether or not in this circumstance such
18 requirement would have applied?

19 As it stands now, the jury may well be left with the
20 inference that there is a conflict of interest or a provision
21 which would have operated in this circumstance. There's no
22 evidence of that.

23 MS. MCDONALD: Well, Your Honor, I think I've laid
24 substantial foundation that Ms. Heiss had diverging interests
25 representing Mr. Dawson in his businesses, representing her own

1 interest as an employee of the business --

2 THE COURT: Do you plan to offer evidence concerning
3 what ethical obligation Ms. Heiss had?

4 MS. MCDONALD: Not beyond what I have already asked,
5 Your Honor.

6 MR. O'NEIL: Your Honor, I've requested --

7 THE COURT: The Court will sustain the objection,
8 and, indeed, I believe I should also state that, as of this
9 moment, there is no evidence concerning any lawyer's
10 professional responsibility with respect to conflicts.

11 MS. MCDONALD: Well, I strongly disagree with that,
12 Your Honor. I've laid quite a foundation of Ms. Heiss's
13 diverging interest --

14 THE COURT: Well, there is no evidence of it. That
15 is the Court's concern. You indicated just a moment ago that
16 you do not intend to offer evidence concerning what Ms. Heiss's
17 ethical responsibilities actually were.

18 MR. O'NEIL: Your Honor, we would posit that an
19 attorney drafting documents for a company in which she's a
20 partial owner is not a conflict of interest.

21 THE COURT: Well, I assume that's what you would say,
22 but there's no evidence; and until there's some evidence, I
23 think I must instruct the jury that at this time there is no
24 evidence concerning -- I will simply say "a lawyer's professional
25 responsibility as it concerns possible conflicts of interest."

1 Very well. Let's continue.

2 (End of bench conference.)

3 THE COURT: Now, members of the jury, at this time I
4 will instruct you that, as of this moment, there is no evidence
5 with respect to a lawyer's professional responsibilities as
6 those professional responsibilities concern potential conflicts
7 of interest. Thus, the Court will sustain the objection and ask
8 that you please disregard the response concerning a lawyer's --
9 any response that may have been given concerning a lawyer's
10 professional responsibilities. Thank you.

11 Please continue, Ms. McDonald.

12 BY MS. MCDONALD:

13 Q. Ms. Heiss, we were discussing the Amended Operating
14 Agreement before we broke. That's the document that currently
15 governs the Riot Act partnership?

16 A. Yes, it is.

17 Q. The amended operating agreement does not contain a
18 provision -- I'll move on from that. The Amended Operating
19 Agreement provides that each member must provide \$100,000 to
20 the LLC?

21 A. That's correct.

22 Q. The Amended Operating Agreement does not contain a clause
23 saying that John will contribute the Riot Act trademark to the
24 LLC.

25 A. No, it does not. He told us that verbally.

1 Q. So it's your testimony that, as the attorney for the LLC,
2 you were told that he would contribute the trademark, but you
3 never drafted a document to reflect that?

4 A. When we first were setting up and I was writing the
5 original operating agreement, John wanted it to be named "Riot
6 Act, LLC." I searched for it. There was already one filed, and
7 he remembered that he was working on a deal for a space on
8 Wisconsin that they had drafted. And so I --

9 Q. Ms. Heiss, I'm sorry to interrupt, but could you please
10 address my question? Is it your testimony that, as the attorney
11 for the LLC, you never drafted a provision --

12 A. No, I did not.

13 Q. -- or any agreement whatsoever that transferred the
14 ownership of the Riot Act name from John Xereas to the LLC?

15 A. I apologize. Yes, I did. I did not.

16 Q. Thank you.

17 MS. MCDONALD: Your Honor, I'm now going to turn to
18 Plaintiff's Exhibit 106, which has previously been admitted.

19 THE COURT: Thank you.

20 MS. MCDONALD: May the record reflect I'm giving a
21 copy to opposing counsel?

22 THE COURT: Yes. Thank you.

23 MS. MCDONALD: May I approach, Your Honor?

24 THE COURT: Yes, you may. Thank you.

25 THE WITNESS: Thank you.

1 BY MS. MCDONALD:

2 Q. Ms. Heiss, I've handed you a copy of Plaintiff's Exhibit
3 106. You recognize this document. Correct?

4 A. Yes, I do.

5 Q. It's the Confidential Offering Memorandum of the LLC?

6 A. Yes, it is.

7 Q. And you drafted the offering memorandum?

8 A. Yes, I did.

9 Q. It was intended to be provided to potential investors?

10 A. Yes, it was.

11 Q. And it was in fact provided --

12 A. It was in fact.

13 Q. You wanted the offering memorandum to be as accurate as
14 possible. Correct?

15 A. That's what I attempted to do. Correct.

16 Q. And you did due diligence regarding the facts in the
17 memorandum?

18 A. Yes, I did.

19 Q. And you understand that Mr. Dawson also did due diligence
20 about the facts in the memorandum?

21 A. That was my understanding, yes.

22 Q. You understood that he spoke to people about John?

23 A. That was my understanding, yes.

24 Q. And having worked with Mr. Dawson for 15 years, you trusted
25 his opinions?

1 A. I did.

2 Q. Ms. Heiss, I'm going to direct your attention to page 10
3 of the memorandum, under "Management"?

4 A. Mm-hmm.

5 Q. It reads: "For the past 20 years John Xereas has managed
6 comedy clubs and promoted sponsored comedy shows by, among
7 others, headline greats such as Dave Chappelle, Lewis Black,
8 Bob Saget, George Lopez, Jon Stewart, Ellen DeGeneres, Wanda
9 Sykes, Dick Gregory, Caroline Rhea, and Ray Romano."

10 Did I read that correctly?

11 A. Yes, you did.

12 Q. That sentence was consistent with your understanding of
13 John's experience?

14 A. That is.

15 Q. I'd like to now direct your attention to page 11, first
16 full paragraph, second sentence.

17 A. Mm-hmm.

18 Q. "In 2005, John launched his business venture known as Riot
19 Act Entertainment. The success and acclaim of that business has
20 led to the establishment of the company and the development of
21 its business plan." Did I read that correctly?

22 A. Yes, you did.

23 Q. You were not involved with Riot Act in 2005, were you?

24 A. No, I was not.

25 Q. And, to your knowledge, Mr. Dawson was not involved with --

1 A. No, he was not.

2 Q. Neither of you was involved until 2010?

3 A. I'm -- excuse me. I didn't hear the question.

4 Q. You were not involved in the Riot Act business until 2010?

5 A. That's correct.

6 Q. And that was well after the name had been established.

7 Correct?

8 A. Yes, it has. It was.

9 Q. Thank you. The Confidential Offering Memorandum does not
10 contain a clause regarding the licensing of the Riot Act name,
11 does it?

12 A. No, it does not.

13 Q. And it does not contain a clause transferring ownership of
14 the Riot Act name, does it?

15 A. No, it does not.

16 Q. I'd like to direct your attention to the bottom of page 30,
17 the "Conflict of Interest" section, reading from the bottom:

18 "The managing members will only devote so much of their
19 time to the business and affairs of the company as in the
20 judgment of the managing members is reasonably necessary to
21 promote and maintain adequately the interests of the company.
22 Since the managing members may also hold other professional
23 positions and undertake other activities, they may have
24 conflicts of interest in allocating time, services, and
25 functions among the company and any other existing or future

1 ventures with which the managing members, individually or
2 collectively, are engaged." Did I read that correctly?

3 A. Yes, you did.

4 Q. You continued to own interest in other businesses when
5 you were involved in Riot Act. Correct?

6 A. Yes, I was.

7 Q. And Defendant Dawson continued to operate several bars?

8 A. Yes, he did.

9 Q. He also took extended vacations?

10 A. I -- sometimes. Yeah.

11 MS. MCDONALD: Your Honor, I'm going to refer to
12 Plaintiff's Exhibit 137. May the record reflect I'm giving a
13 copy to opposing counsel.

14 THE COURT: Thank you.

15 MS. MCDONALD: May I approach the witness?

16 THE COURT: Yes, you may.

17 THE WITNESS: Thank you.

18 MR. O'NEIL: Objection, Your Honor.

19 THE COURT: Counsel, you may approach.

20 (Bench conference.)

21 MR. O'NEIL: Object to the relevance of this. I don't
22 think this e-mail has anything to do with Riot Act, the Riot Act
23 business.

24 THE COURT: May I borrow the exhibit? Thank you.

25 MS. MCDONALD: It mentions Riot Act several times,

1 Your Honor, and it discusses Defendant Dawson's commitment to --

2 THE COURT: Just one moment. Let me read it, please.

3 MR. O'NEIL: It also discusses Mr. Handwerger, who --

4 MS. MCDONALD: I don't intend to address that part of
5 the document. It discusses Mr. Dawson's failure to attend to
6 the business.

7 THE COURT: What does that have to do with the alleged
8 breach?

9 MS. MCDONALD: Certainly, Your Honor. I'm dealing
10 with the conflict-of-interest provision, the time that members
11 are required to devote to the business, and I'm intending to
12 show that Mr. Dawson was held to a different standard than
13 Mr. Xereas when he was fired improperly.

14 THE COURT: The Court will sustain the objection.

15 (End of bench conference.)

16 THE COURT: Now, please continue.

17 MS. MCDONALD: Thank you, Your Honor.

18 BY MS. MCDONALD:

19 Q. Before we broke, you mentioned that Mr. Dawson would take
20 extended vacations from time to time?

21 A. He would go up to his house periodically over the summer
22 in Maine.

23 Q. Did you ever express frustration at Mr. Dawson's absence
24 from the Riot Act business?

25 A. Only if he didn't get something to me that I requested him

1 to get to me. I was drafting documents and stuff. I'd ask him
2 for numbers and things like that, and if he didn't get them to
3 me on time, I'd get pissed sometimes.

4 Q. Thank you. Did Mr. Dawson ever miss appointments with you?

5 A. Occasionally, yes.

6 THE COURT: Counsel, let me ask you to return, please.

7 (Bench conference.)

8 THE COURT: There is nothing in Count V, which is the
9 breach of contract claim, concerning any alleged -- the failure
10 by Mr. Dawson to attend to the affairs of Riot Act.

11 MS. MCDONALD: Your Honor, it's standard conduct of
12 the parties. It also pertains to plaintiff's defense in the
13 counterclaims. They're saying that the Riot Act company failed
14 because of him, but Mr. Dawson was absent.

15 MR. O'NEIL: Your Honor, I don't believe our
16 counterclaim alleges that Riot Act failed because of Mr. Xereas.
17 It alleges breach of contract, breach of the duty of good faith.

18 MS. MCDONALD: Are you going to attempt to show
19 damages that John is responsible for the rebranding of Riot Act?

20 MR. O'NEIL: Yes. It is an element. But there's
21 nothing in the complaint, Your Honor, that alleges that
22 Mr. Dawson -- that there was a different standard applied to
23 Mr. Dawson and Mr. Xereas. This is the first time we've ever
24 heard of it.

25 MS. MCDONALD: There's nothing in the complaint that

1 says John is responsible in your counterclaims. It says that
2 John isn't responsible for the rebranding either, but that's
3 what you're going to claim.

4 THE COURT: To what claim are you referring? I have
5 the counterclaims here in front of me.

6 MS. MCDONALD: Defendants are attempting to show that
7 John is responsible --

8 THE COURT: No. My question is to what counterclaim
9 does this pertain.

10 MS. MCDONALD: Breach of contract.

11 THE COURT: The Court is concerned that, even if we
12 assume for the moment that at some point Ms. Heiss spoke to
13 Mr. Dawson concerning his duties, there is no allegation to
14 which that would be relevant.

15 MS. MCDONALD: Certainly, Your Honor, it's relevant to
16 our counterclaim defense where the defendants are attempting to
17 show that Mr. Xereas sabotaged the business when Mr. Dawson was
18 not a present partner, not participating --

19 THE COURT: Where is that alleged? Are you speaking
20 of your answer to the counterclaim?

21 MS. MCDONALD: It's their theory that Mr. Dawson [sic]
22 destroyed the business and he's responsible --

23 MR. O'NEIL: That Mr. Xereas.

24 MS. MCDONALD: Excuse me. That Mr. Xereas destroyed
25 the business and he's responsible for the rebranding expenses.

1 Am I correct?

2 MR. O'NEIL: It's an element of our damages, the cost
3 that the company incurred to rebrand after he had breached the
4 contract.

5 MS. MCDONALD: And our defense is that Mr. Xereas was
6 not the responsible party --

7 THE COURT: Where is that pled? That is my only
8 question.

9 MS. MCDONALD: Well, we wouldn't have pled it.
10 It's in their counterclaims.

11 THE COURT: Did you file an answer to their
12 counterclaim?

13 MS. MCDONALD: It wasn't in their counterclaim, but
14 it's a part of their case now. It's been their theory since
15 their opening.

16 THE COURT: Well, the Court holds both sides to
17 the same standard. We're limited to what has been pled in
18 the complaint and the counterclaim.

19 MS. MCDONALD: Then, Your Honor --

20 THE COURT: And this is not the time to expand the
21 theories of what went wrong in the business.

22 MS. MCDONALD: Then, Your Honor, I request that you
23 advise defendants that they can't proceed with that theory.

24 THE COURT: At this point, there's nothing pending to
25 which that ruling would pertain. Let's continue.

1 (End of bench conference.)

2 MS. MCDONALD: Sorry, Ms. Heiss. I don't recall your
3 last answer.

4 BY MS. MCDONALD:

5 Q. Did Defendant Dawson miss appointments with you?

6 A. A couple a times over the 15 years. Not usually.

7 Q. So we know you drafted the operating agreement and the
8 offering memorandum for Riot Act. I'd like to discuss some
9 of your other responsibilities for Riot Act at this time.

10 A. Okay.

11 Q. You negotiated contracts?

12 A. Yes, I did.

13 Q. You drafted contracts?

14 A. Yes, I did.

15 Q. You set up bank accounts?

16 A. Yes, I did.

17 Q. You set up a bank account at PNC Bank?

18 A. Yes, I did.

19 Q. And you set up a bank account at Georgetown Bank?

20 A. I did not set that up. When we set up the PNC account,
21 John, Geoff, and I all came and did it together; and I believe
22 Geoff set up the one at Georgetown. I wasn't involved in that
23 one.

24 Q. You had check-writing permission?

25 A. Yes, I did.

1 Q. You generally did not participate in the day-to-day
2 operations of the club.

3 A. Not usually.

4 Q. You did not create a policy regarding e-mail accounts.

5 A. No. I've never done that.

6 Q. You did not create a policy regarding privacy.

7 MR. O'NEIL: Objection, Your Honor.

8 THE WITNESS: I don't understand.

9 MS. MCDONALD: I can clarify, Your Honor.

10 BY MS. MCDONALD:

11 Q. You did not create a policy --

12 THE COURT: Are you prepared to move on? Did you
13 withdraw the question?

14 MS. MCDONALD: I can rephrase, Your Honor.

15 THE COURT: Very well. Let me ask you to rephrase it,
16 please.

17 BY MS. MCDONALD:

18 Q. You did not create a policy involving e-mail privacy.

19 A. No, I did not.

20 Q. You did not create a policy regarding computer use.

21 A. No, I did not.

22 Q. Let's move on to discussing the Riot Act build-out. The
23 build-out went over budget. Is that correct?

24 A. I was not handling the finances. I think it went slightly
25 over budget, but we were on a pretty tight budget. Geoff, he

1 sets a very tight budget.

2 Q. Are you referring to Geoff McNabola or Geoff Dawson?

3 A. Pardon?

4 Q. Geoff Dawson sets a tight budget?

5 A. Yeah. The way he would budget it was very efficient so
6 that we didn't put too much money into the build-out. But it
7 was not -- it almost always went a little bit over because he
8 was very conservative.

9 Q. Mr. Dawson oversaw the build-out project?

10 A. Yes, he did.

11 Q. And Mr. Dawson made the decision to hire Geoff McNabola
12 to conduct the build-out?

13 A. Yes, he did. He'd been doing our -- he'd been doing all
14 of our projects. He was our general contractor.

15 Q. He was the general contractor for Bedrock Management?

16 A. Yeah. He did most of our projects, yes.

17 Q. And Mr. McNabola was given authority to write checks on
18 behalf of Riot Act?

19 A. Yes, he was, during the time that he would be doing the
20 construction.

21 Q. And his check-writing authority was also overseen by
22 Mr. Dawson.

23 A. Yes, it was.

24 Q. Riot Act opened for business in August of 2011. Is that
25 correct?

1 A. That's correct.

2 Q. And you began to receive a salary?

3 A. Yes. I believe so.

4 Q. It was about five or six thousand dollars a month?

5 A. That's my recollection, yeah.

6 Q. And Mr. Xereas also began to receive a salary?

7 A. Yes, he did.

8 Q. It was about the same, five or six thousand dollars a month?

9 A. I think so.

10 Q. In fact, Mr. Xereas was supposed to receive \$72,000 a year.

11 Is that correct?

12 A. We didn't have any agreement on salaries.

13 Q. Are you aware that he only ever received \$26,000?

14 A. I'm sorry?

15 Q. Are you aware that he only received \$26,000?

16 A. No. I did not handle the finances, and I don't know how
17 much he received.

18 Q. Because you weren't handling the finances personally, you
19 would submit credit card bills to Riot Act for reimbursement?

20 A. I did that at one point.

21 Q. And there was a company policy regarding reimbursements?

22 A. Yes. You needed to attach all of the invoices, and I would
23 put a memo together that I attached to the invoices saying what
24 they were for.

25 Q. And that policy applied to cash reimbursements as well?

1 A. Yes.

2 Q. You discussed maintenance of the company records with an
3 accountant. Correct?

4 A. I'm sorry?

5 Q. You discussed how to maintain company records with an
6 accountant. Correct?

7 A. Yes, our accountant.

8 Q. And the accountant advised you as to what the company's
9 legal obligations were with respect to records?

10 A. Yes.

11 Q. And your general rule for company financial records was
12 to maintain everything?

13 A. Yes.

14 Q. Let's jump ahead to January 17, 2012.

15 A. Okay. Yes.

16 Q. You're familiar with that day?

17 A. I do remember that day.

18 Q. It's the day that you and Mr. Dawson decided to fire
19 Mike Farfel and John's brother, Ted Xereas. Is that correct?

20 A. That's correct.

21 Q. And shortly after that time, Ted was blocked from logging
22 into his e-mail address.

23 A. I did not have anything to do with handling the e-mails,
24 so I can't really speak to that.

25 Q. But you reviewed Ted's e-mails after he was locked out.

1 Correct?

2 A. I did not -- at some point after the litigation started,
3 I did. I received them. But, no, I didn't at the time.

4 Q. But you did eventually review Ted's e-mails?

5 A. Yes.

6 Q. Maria Xereas, John's mother, was also blocked from logging
7 into her e-mail address at that time. Is that correct?

8 A. That's my understanding.

9 Q. And you're aware that Maria's address was used for personal
10 matters including communication with doctors and lawyers?

11 A. I did not know that.

12 Q. But you know now because you reviewed Maria's e-mails.

13 Correct?

14 MR. O'NEIL: Objection, Your Honor.

15 THE COURT: Sustained.

16 MS. MCDONALD: Your Honor, may I approach?

17 THE COURT: Yes.

18 (Bench conference.)

19 MS. MCDONALD: We have a cybersquatting claim.

20 MR. O'NEIL: It's not based on reading e-mails.

21 It's based on allegation of taking control of websites.

22 MS. MCDONALD: And this is control. They were able
23 to access e-mails.

24 MR. O'NEIL: She said she read it as part of this
25 litigation.

1 THE COURT: Okay. I have Count XIX in front of me.
2 That is the cybersquatting count. There is simply no relevance
3 to the question. The objection the sustained.

4 MS. MCDONALD: Thank you, Your Honor.

5 (End of bench conference.)

6 BY MS. MCDONALD:

7 Q. After Ted and Maria Xereas were locked out of their e-mail
8 accounts, John sent an e-mail demanding that the e-mails be
9 returned to him. Correct?

10 A. I believe so. Yes.

11 Q. He also reasserted his ownership to the Riot Act trademark?

12 A. That's what he claimed, yes.

13 Q. And following the firing of his brother and mother, John
14 continued to perform work for the club. Correct?

15 MR. O'NEIL: Objection.

16 THE COURT: Overruled.

17 THE WITNESS: I'm sorry; could I have the question
18 again?

19 MS. MCDONALD: Absolutely.

20 BY MS. MCDONALD:

21 Q. Following the firing of his brother and friend and after
22 his mother was locked out of her e-mails, John continued to
23 perform work for the club.

24 A. Only for about a week or so.

25 Q. Well, let's talk about that week.

1 A. Okay.

2 Q. Two days after firing John's brother and Mike Farfel on
3 January 19, 2012, there was another -- there was a meeting of
4 the managing members. Correct?

5 A. Yes. I believe there -- I believe there was.

6 Q. And that meeting was held at Riot Act?

7 A. I don't recall where we had it. I believe so. That's
8 where we'd have most of our meetings.

9 Q. At that January 19th meeting, you and Defendant Dawson
10 voted to limit John's ability to take certain actions. Correct?

11 A. That's correct.

12 Q. Specifically, he was prohibited from using LLC funds
13 without permission.

14 A. Correct.

15 Q. And he was prohibited from entering into any contracts
16 without permission.

17 A. Correct.

18 Q. On January 26th, there was another meeting of the managing
19 members. Correct?

20 A. Yes.

21 Q. Proper notice was not provided for this meeting.

22 A. It was a shorter notice period because the business was
23 in such a disarray and in crisis that we called it much more
24 quickly, but we made every attempt to reach him every way: by
25 e-mail, phone, dropped off copies requesting his attendance.

1 Q. John was not able to attend that meeting. Correct?

2 A. That's what he said, and he did not attend.

3 Q. At that meeting, you and Defendant Dawson resolved to
4 remove John from his managing duties?

5 A. Yes, we did.

6 Q. John could no longer book acts for the club?

7 A. That's correct.

8 Q. John could no longer arrange advertising for shows.

9 A. Yes. That's my recollection.

10 Q. And you assumed his role and responsibilities?

11 A. I and some other people, staff, assumed his responsibilities.
12 Yes, we did.

13 Q. The building keys and security codes were also changed at
14 that time?

15 A. I wasn't involved. I don't know.

16 Q. Were you aware that John's e-mail account was suspended on
17 or around that same day?

18 A. Which day would be that be? I'm sorry.

19 Q. Around January 26th of 2012.

20 A. I don't recall which day -- or I wasn't really involved
21 with the e-mails.

22 Q. Then, on March 22, 2012, you and Mr. Dawson voted to remove
23 plaintiff as a managing member of Riot Act.

24 A. Yes. I believe we did. Yeah, that date.

25 Q. However, John maintained his ownership interest?

1 A. Yes, he did.

2 Q. In February of 2012, Riot Act received a cease and desist
3 letter from an attorney for John. Is that correct?

4 A. I'm sorry. What date?

5 Q. February of 2012.

6 A. Yes, we did.

7 Q. And the letter directed the LLC to cease and desist using
8 the Riot Act trademark?

9 A. Yes, it did.

10 Q. And to be clear, that was in 2012?

11 A. Yes, it was.

12 Q. So I'd like to discuss use of the Riot Act trademark today.

13 A. Okay.

14 Q. Riot Act rebranded under the name "Penn Social." Correct?

15 A. Yes, it was.

16 Q. However, the "Riot Act" name continues to be listed on
17 various business documents.

18 A. I'm sorry. Could you...

19 Q. The "Riot Act" name continues to be listed on various
20 Penn Social business documents.

21 A. It is listed on two, the occupancy and for the liquor
22 license. We were unable to change the name.

23 MS. MCDONALD: Your Honor, may I approach?

24 THE COURT: Yes.

25 (Bench conference.)

1 MS. MCDONALD: Your Honor, the subject of one of
2 our motions *in limine* was with respect to whether or not the
3 defendants could testify regarding whether or not they were
4 permitted to change the Riot Act name. You granted that motion
5 *in limine* and said they could use that for impeachment purposes
6 only. I would like the testimony stricken. She said that they
7 were not permitted to change the name.

8 THE COURT: Mr. O'Neil.

9 MR. O'NEIL: I believe Mr. Xereas testified that the
10 name was being used on the liquor license, and so it opened up
11 that area of inquiry.

12 MS. MCDONALD: It absolutely did not open that door,
13 Your Honor. We've never asked with respect to whether or not
14 they were permitted to change the name. Your Honor ruled that
15 they could not state that.

16 MR. O'NEIL: I think the argument and testimony that
17 we're continuing to use the name as some sort of trademark
18 infringement that Mr. Xereas made on the stand allows us to
19 respond to that.

20 MS. MCDONALD: Those facts were before Your Honor with
21 the motion *in limine*, and it was ruled that they could not use
22 the excuse that it was unsupported by any documentary evidence
23 that they were not permitted to change the name.

24 THE COURT: Well, the defendants did not, but you did.
25 Isn't that correct?

1 MS. MCDONALD: We moved -- we had a motion *in limine*.

2 THE COURT: No. I'm speaking of opening the door to
3 this area of inquiry.

4 MS. MCDONALD: I'm asking about the current Riot Act
5 use. I didn't ask whether or not they were permitted to
6 continue to use the name by ABRA.

7 MR. O'NEIL: Their motion *in limine* went to whether
8 there were located, in ABRA files, an effort by us to change the
9 name. And they said they couldn't them so that we couldn't --

10 MS. MCDONALD: And you produced nothing.

11 MR. O'NEIL: -- we couldn't put in testimony about
12 proceedings before ABRA to change the name unless it was on
13 impeachment. But the fact that Mr. Xereas stood on the stand
14 and is claiming that we're continuing to use this trademark on
15 our official documents issued by the D.C. government should be
16 sufficient to open the door for us to explain why.

17 MS. MCDONALD: That's not impeachment, Your Honor,
18 and that was Your Honor's ruling.

19 THE COURT: I have no occasion to strike the testimony.
20 This is an area of inquiry that was opened by the plaintiff.
21 Let's continue.

22 (End of bench conference.)

23 BY MS. MCDONALD:

24 Q. So, Ms. Heiss, you stated that the Riot Act name appears on
25 Penn Social's liquor license and its certificate of occupancy?

1 A. Yes, it does.

2 Q. Thank you. Following Mr. Xereas's removal and the
3 rebranding of Riot Act to Penn Social, you sold your shares
4 to Riot Act?

5 A. That's correct.

6 Q. And Mr. Dawson paid you \$250,000 for those shares?

7 A. Yes, he did.

8 Q. But no independent valuation was performed for those shares.

9 A. No.

10 Q. You currently own 1 percent of Penn Social?

11 A. Yes, I do.

12 Q. And you plan to sell that 1 percent following this lawsuit?

13 A. I don't know.

14 Q. Do you plan to sell it to Defendant Dawson for a hundred
15 dollars.

16 A. Yeah. If he wants to buy it from me for a hundred, sure.

17 Q. Thank you.

18 MS. MCDONALD: I have nothing further at this time,
19 Your Honor.

20 THE COURT: Thank you very much, Ms. McDonald.

21 Counsel, may I ask you to approach, please, regarding our
22 schedule.

23 (Bench conference.)

24 THE COURT: Who is your next witness?

25 MS. MCDONALD: Defendant Dawson.

1 MR. O'NEIL: Terrence Hawkins was next on the list.

2 MS. MCDONALD: Mr. Hawkins is not available right now,
3 so we're going to call Mr. Dawson.

4 MR. O'NEIL: Do you intend to call Mr. Hawkins later?

5 MS. MCDONALD: Yes.

6 MR. O'NEIL: Okay.

7 THE COURT: Perhaps this is a good time to take a
8 brief recess. If we do, if the jury comes back in 15 minutes or
9 so, do you think you would be able to complete the examination
10 by lunchtime?

11 MS. MCDONALD: Yes, Your Honor.

12 THE COURT: Very well.

13 MR. O'NEIL: Your Honor, could I request that you give
14 a short comment to the jury so they're not under the impression
15 that I'm refusing to ask questions of Ms. Heiss at this time?
16 Could we just say that defendants are deferring their questioning?

17 THE COURT: Yes. I believe I said that at the outset,
18 but I can say that when they step out.

19 MR. O'NEIL: Okay.

20 THE COURT: Thank you.

21 (End of bench conference.)

22 THE COURT: Now, members of the jury, at this time
23 we will take our brief midmorning recess. We will take about
24 20 minutes and then continue until lunchtime.

25 The defendants, by Mr. O'Neil and Mr. Karson, have decided

1 to defer their questions of Ms. Heiss and Mr. Dawson, which they
2 are permitted to do under the rules. So that is why there is no
3 cross-examination right now of Ms. Heiss.

4 So Mr. O'Neil and Mr. Karson will have the opportunity to
5 examine Ms. Heiss and Mr. Dawson later in these proceedings.
6 Thank you very much. I will ask you to please accompany the
7 deputy clerk, we'll take 20 minutes, and then resume and
8 continue until lunchtime. Thank you.

9 (Jury out at 10:23 a.m.)

10 THE COURT: Ms. Heiss, you may step down and return
11 to your seat at the table.

12 (The witness steps down.)

13 THE COURT: Counsel, Mr. Xereas, Ms. Heiss,
14 Mr. Dawson, you all may be excused for 20 minutes.

15 (Recess from 10:23 a.m. to 10:46 a.m.)

16 THE COURT: Now, Ms. McDonald, are you ready to
17 proceed?

18 MS. MCDONALD: Yes, Your Honor.

19 THE COURT: About how much time do you need for your
20 examination of Mr. Dawson?

21 MS. MCDONALD: About 25 minutes, Your Honor.

22 THE COURT: And who will be your next witness?

23 MS. MCDONALD: Our next witness will be Defendant
24 Dawson.

25 THE COURT: I'm sorry?

1 MS. MCDONALD: Defendant Dawson.

2 THE COURT: Who will follow Mr. Dawson?

3 MS. MCDONALD: We had proposed to conduct the voir
4 dire of Mr. Morrissey.

5 THE COURT: The Court cannot do that at noon, in
6 fairness to the jurors, so we will proceed with that voir
7 dire after the jury is excused for the day, after Mr. Dawson,
8 who will be next.

9 MS. MCDONALD: Mr. Morrissey would be our next
10 witness, Your Honor.

11 THE COURT: Are you suggesting that Mr. Morrissey
12 is your final witness?

13 MS. MCDONALD: No, Your Honor.

14 THE COURT: In other words, do you intend to call
15 Ms. Vaughn, Ms. Thompson, Mr. Farfel, Mr. Muhammed?

16 MS. MCDONALD: We will call Ms. Vaughn and Ms. Thompson
17 depending on your ruling with respect to Mr. Morrissey, and as
18 to the others...

19 MR. RICHA: Ms. Vaughn and Ms. Thompson will only be
20 called depending on your ruling, but Mr. Hawkins perhaps might
21 testify. Mr. Farfel will not be testifying.

22 THE COURT: Am I correct, then, that the plaintiff
23 withdraws Mr. Farfel?

24 MR. RICHA: Correct.

25 THE COURT: What about Mr. Muhammed?

1 MR. RICHA: Mr. Muhammed had a re-election yesterday,
2 and so I've had a little bit -- I've spoken to him, but we've
3 had a little bit of trouble reaching him the last couple of days
4 because of the re-election. So I'm not certain yet. We're
5 still waiting to hear from him.

6 There's a possibility, Your Honor, we were going to reserve
7 Mr. Hawkins as a rebuttal witness. However, for now I'd like to
8 keep him on the list, and we're still waiting -- there was an
9 obligation he had today, and we're still waiting to hear from
10 him. He was here yesterday.

11 THE COURT: Am I correct that none of the witnesses
12 are in the courtroom?

13 MR. RICHA: Correct.

14 THE COURT: Very well. Thank you.

15 MR. RICHA: Thank you.

16 THE COURT: We will ask the deputy clerk to please
17 escort the jury back into the courtroom.

18 (Jury in at 10:52 a.m.)

19 THE COURT: Members of the jury, thank you very much.
20 Please be seated.

21 Now, Ms. McDonald, you may call your next witness, the
22 plaintiff's next witness.

23 MS. MCDONALD: Plaintiff calls Defendant Geoff Dawson.

24 THE COURT: Mr. Dawson, let me ask you to please face
25 the deputy clerk to be sworn and have a seat.

1 GEOFFREY DAWSON, WITNESS FOR THE PLAINTIFF, SWORN

2 DIRECT EXAMINATION

3 BY MS. MCDONALD:

4 Q. Good morning, Mr. Dawson.

5 A. Good morning, Ms. McDonald.

6 Q. Are you a defendant in this litigation?

7 A. Yes, I am.

8 Q. And you have a counterclaim against Plaintiff John Xereas?

9 A. Yes, I do.

10 Q. You're represented by Mr. O'Neil and Mr. Karson?

11 A. That's correct.

12 Q. And Penn Social is paying your legal bills.

13 A. Yes, it is.

14 Q. I'd like to discuss a little bit about your background.
15 You founded Bedrock Management in 1992?

16 A. I believe so. Yeah.

17 Q. And you established Bedrock Management to manage several
18 bars you own.

19 A. I did.

20 Q. About 20 or so bars?

21 A. At -- well, not all at the same time, but yes.

22 Q. You hired Ms. Heiss to work for Bedrock Management in
23 approximately 1993, 1994?

24 A. Yes. That sounds right.

25 Q. And you hired her to perform legal services for Bedrock

1 Management?

2 A. That's correct.

3 Q. And the underlying bars you owned?

4 A. Yes.

5 Q. Ms. Heiss worked for you for more than 15 years?

6 A. That's correct.

7 Q. She also became an investor in some of your businesses.

8 A. She did.

9 Q. I'd like to jump ahead to 2010. Your real estate agent
10 introduced you to John Xereas. Correct?

11 A. Not my agent, but I was introduced through a real estate
12 agent, yes.

13 Q. Through a real estate agent? And that agent was interested
14 in leasing space to you?

15 A. You'll have to be more specific. I'm sorry.

16 Q. The real estate agent was interested in leasing the space
17 to you that ultimately became Penn Social/Riot Act.

18 A. The real estate agent was a friend of John's who he worked
19 with in the comedy industry, and John was looking for a place
20 and thought we might be a good potential partnership.

21 Q. Who is Ray Ritchey?

22 A. Ray Ritchey is one of the heads of Boston Properties.

23 Q. Did he introduce you to Mr. Xereas?

24 A. No, he didn't. Not to my knowledge.

25 Q. When you met Mr. Xereas, you learned about his experience

1 in the comedy industry. Correct?

2 A. Repeat that, please?

3 Q. When you met John, you learned about his experience in
4 the comedy industry.

5 A. Yes, I did.

6 Q. And you learned that John had worked at the Improv?

7 A. I did.

8 Q. You learned that he worked his way up from a nonmanagerial
9 position to becoming a minority partner?

10 A. That's correct.

11 Q. He was also the general manager of the Improv?

12 A. That's what I understand, yes.

13 Q. And you learned that John had previously been the owner
14 of a comedy club.

15 A. Yes.

16 Q. That comedy club was named "Riot Act"?

17 A. That's correct.

18 Q. Ultimately, you and John decided to go into business
19 together.

20 A. Yes, we did.

21 Q. And you later suggested that Defendant Heiss join the
22 partnership?

23 A. Yes, I did.

24 Q. You wanted Ms. Heiss to join the partnership so you could
25 control it. Correct?

1 A. That's not correct, no.

2 Q. Mr. Dawson, you've submitted several declarations in this
3 litigation. Correct?

4 A. Correct.

5 Q. Do you recall a May 4th, 2018, declaration?

6 A. Not off the top of my head, I don't.

7 MS. MCDONALD: Your Honor, I propose to mark this
8 exhibit as Plaintiff's 307.

9 THE COURT: Do you have a copy for the Court?

10 MS. MCDONALD: I apologize. I do not have a copy for
11 the Court at this time unless Mr. O'Neil would permit me to show
12 him the document.

13 THE COURT: Do you have a copy for Mr. O'Neil?

14 MS. MCDONALD: I only have three copies, Your Honor.

15 THE COURT: Is one of them Mr. O'Neil's?

16 MS. MCDONALD: One was intended for Mr. O'Neil, yes.

17 THE COURT: Very well. Would you first show it to
18 counsel, please? (Counsel complies.)

19 MS. MCDONALD: Would the Court like a copy?

20 THE COURT: Yes, please. Thank you.

21 MS. MCDONALD: May I approach, Your Honor?

22 THE COURT: Just one moment.

23 (Court reviewing document.)

24 THE COURT: You may approach.

25 MS. MCDONALD: Thank you, Your Honor.

1 (Document tendered to witness.)

2 THE WITNESS: Thank you.

3 BY MS. MCDONALD:

4 Q. Mr. Dawson, do you recognize this document?

5 A. It says it's a Declaration of Geoffrey Dawson.

6 Q. And is that your signature on page 5?

7 A. Yes, it is.

8 Q. Dated May 4, 2018, on page 5?

9 A. Correct.

10 Q. And you made this declaration under penalty of perjury.

11 Correct?

12 A. I did.

13 Q. I'd like to direct your attention to paragraph 3 of the
14 declaration on page 1.

15 A. Okay.

16 Q. "Ms. Heiss has acted as counsel on several of my projects
17 in the past and was brought in to Riot Act so that the two of us
18 together would be able to control the decisions of the LLC."

19 Did I read that correctly?

20 A. You did.

21 Q. Thank you. Eventually, you, John, and Ms. Heiss entered
22 into an operating agreement. Correct?

23 A. That's correct.

24 Q. The operating agreement governed the business partnership?

25 A. Yes.

1 Q. The original operating agreement does not contain a clause
2 regarding the licensing of the Riot Act name.

3 A. No, it doesn't.

4 Q. It also does not contain a clause regarding the transfer of
5 the ownership of the Riot Act name.

6 A. No, it doesn't.

7 Q. The operating agreement was later amended?

8 A. Correct.

9 Q. The Amended Operating Agreement is the agreement that
10 currently governs the partnership. Correct?

11 A. I believe so, yes.

12 Q. And the Amended Operating Agreement does not contain a
13 clause regarding the licensing of the Riot Act name.

14 A. No, it doesn't.

15 Q. It also does not contain a clause regarding the transfer
16 of the Riot Act name.

17 A. No, it doesn't.

18 Q. In fact, there's no document transferring ownership of
19 the Riot Act name. Correct?

20 A. Not that I'm aware of.

21 MS. MCDONALD: Your Honor, I'll now be referring to
22 Plaintiff's Exhibit 106, which has already been admitted.

23 May I approach?

24 THE COURT: Yes, you may.

25 (Document tendered to witness.)

1 THE WITNESS: Thank you.

2 BY MS. MCDONALD:

3 Q. You recognize this document, Mr. Dawson?

4 A. Yes, I do. It's our Confidential Offering Memorandum.

5 Q. And this document was intended to be provided to potential
6 investors?

7 A. Yes, it was.

8 Q. And it ultimately was provided to potential investors?

9 A. Yes, it was.

10 Q. You wanted to make this document as accurate as possible.
11 Correct?

12 A. Yes, we did.

13 Q. And you conducted due diligence of the statements contained
14 in the document?

15 A. Yes, we did.

16 Q. I'd like to direct your attention to page 5 under
17 "Experienced Management Team."

18 A. I'm with you.

19 Q. It reads: "John Xereas has excelled at managing comedy
20 clubs and promoting top-drawer comedians and entertainment
21 events in the D.C. area for over 20 years, developing and
22 cementing relationships with some of the most respected comics
23 and talent agencies in the country." Did I read that correctly?

24 A. Yes, you did.

25 Q. I'd next like to direct your attention to page 11.

1 In the second paragraph, second sentence, it reads:

2 "In 2005 John launched his venture known as Riot Act
3 Entertainment. The success and acclaim of that business has
4 led to the establishment of the company and the development
5 of this business plan." Did I read that correctly?

6 A. Yes, you did.

7 Q. You were not involved in Riot Act in 2005. Correct?

8 A. No, I wasn't.

9 Q. You were not involved until 2010?

10 A. That's correct.

11 Q. And that was after the Riot Act brand had been established?

12 A. That's correct.

13 Q. I'd next like to direct your attention to page 30, the
14 bottom of the page, "Conflicts of Interest."

15 The sentence there begins: "The managing members will only
16 devote so much of their time to the business and affairs of the
17 company as in the judgment of the managing members is reasonably
18 necessary to promote and maintain adequately the interests of
19 the company. Since the managing members may also hold other
20 professional positions and undertake other activities, they may
21 have conflicts of interests in allocating time, services, and
22 functions among the company and any other existing or future
23 ventures which the managing members, individually or collectively,
24 are engaged." Did I read that correctly?

25 A. Yes, you did.

1 Q. Thank you. You did not devote 100 percent of your time to
2 the Riot Act business, did you?

3 A. No, I didn't.

4 Q. And you continued to manage your other business interests?

5 A. Yes, I did.

6 Q. Let's move on to the build-out of Riot Act. The build-out
7 went over budget. Correct?

8 A. Yes, it did.

9 Q. And the construction project was headed by Geoff McNabola?

10 A. He was our agent, our building agent, yes.

11 Q. And you made the decision to hire Geoff McNabola?

12 A. Yes, I did.

13 Q. He had had construction projects for multiple businesses
14 you owned?

15 A. Yes, he had.

16 Q. You didn't have a written agreement with Mr. McNabola,
17 did you?

18 A. Not that I remember.

19 Q. And Mr. McNabola was given authority to write checks from
20 a Riot Act account?

21 A. Yes, he was.

22 Q. Riot Act ultimately opened for business in August of 2011?

23 A. That's correct.

24 Q. And by October the company was earning a profit?

25 A. It had earned a profit in October, I think. It had not

1 earned a profit in August or September.

2 Q. But by October --

3 A. It eked out a little bit of money by October, yeah, I think
4 seventeen grand.

5 Q. And then by November it earned more than \$67,000?

6 A. Yes, it did.

7 Q. A month and a half later, on January 17th, you and
8 Ms. Heiss made a decision to fire Mike Farfel and Ted Xereas?

9 A. Yes, we did.

10 Q. At that time, Ted Xereas was blocked from accessing his
11 e-mail account?

12 A. I believe so. Yep.

13 Q. And employees reviewed Ted's e-mails?

14 A. I don't know that.

15 Q. Maria was also blocked from -- excuse me. Maria Xereas,
16 the plaintiff's mother, was also blocked from accessing her
17 long-standing e-mail account.

18 A. I believe so.

19 Q. Are you aware that her account was used for personal
20 matters including communications with doctors and lawyers?

21 A. That's what I've heard today, yes.

22 Q. Maria didn't authorize review of her e-mails, did she?

23 A. Not to my knowledge.

24 Q. Two days after firing John's brother and Mike Farfel on
25 January 19, 2012, there was a meeting of the managing members.

1 A. Correct.

2 Q. And that meeting was held at Riot Act?

3 A. I believe so, yes.

4 Q. And John was present.

5 A. At -- yes. I believe so.

6 Q. So, to be perfectly clear, John was at Riot Act two
7 days after the firing of his brother and friend?

8 A. Yes.

9 Q. At that meeting, you and Ms. Heiss voted to prevent
10 John from using LLC funds without permission. Correct?

11 A. I believe so, yes.

12 Q. You also prohibited him from entering into contracts
13 without permission?

14 A. I believe so.

15 Q. On January 26th, you and Ms. Heiss held another meeting.
16 Correct?

17 A. I'm sure we did, yes.

18 Q. At that meeting, you and Ms. Heiss resolved to remove
19 John from his management duties?

20 A. Yes, we did.

21 Q. John could no longer book acts for the club?

22 A. Correct.

23 Q. He could no longer arrange advertising for shows?

24 A. That's correct.

25 Q. The building keys and security codes were changed at that

1 time?

2 A. They were changed at some time around then, yes.

3 Q. And sometime around then, John's access to his e-mail
4 account was suspended.

5 A. I believe so.

6 Q. Following the suspension of John's access to his e-mail
7 account, you began reviewing his e-mails. Correct?

8 A. I did not begin reviewing his e-mails.

9 Q. Did you ever review John's e-mails?

10 A. I don't know that I did.

11 MR. O'NEIL: Your Honor, may I approach?

12 THE COURT: Yes.

13 (Bench conference.)

14 MR. O'NEIL: I don't see the relevance of any
15 questioning about people reviewing work e-mail accounts.
16 She's eliciting the exact same testimony that she elicited
17 from Ms. Heiss.

18 MS. MCDONALD: It has been established, Your Honor,
19 that their work e-mails were a cybersquatting claim. He's
20 admitted in his RFAs that he reviewed the e-mail accounts.

21 MR. O'NEIL: The cybersquatting count, as I see it, as
22 I read the cybersquatting claim, it doesn't have anything to do
23 with e-mail accounts. I thought it was with respect to domain
24 names and the similarity --

25 MS. MCDONALD: The Riot Act e-mail account --

1 MR. O'NEIL: -- Riot Act trademark.

2 THE COURT: Do you have the complaint in front of you,
3 Ms. McDonald?

4 MS. MCDONALD: I don't have it with me, Your Honor.

5 THE COURT: Would you like to go get it?

6 MS. MCDONALD: No, Your Honor. I'll move on.

7 THE COURT: I have it in front of me, and there is
8 nothing in Count XIX --

9 MS. MCDONALD: Again, Your Honor, it's incorporated
10 by reference.

11 THE COURT: Just one moment, Ms. McDonald -- even
12 remotely alleging -- alleged cybersquatting, the reading of
13 e-mails is simply not what is alleged. And the mere fact that
14 there is language in the complaint indicating all of the
15 allegations are incorporated does not change the parameters
16 of the counts that are alleged. So, for those reasons, the
17 objection is sustained.

18 (End of bench conference.)

19 THE COURT: Please continue.

20 BY MS. MCDONALD:

21 Q. Mr. Dawson, I believe we were discussing the January 26,
22 2012, managing member meeting.

23 A. Yes, we were.

24 Q. There was improper notice for that meeting. Correct?

25 A. That's what I've heard today.

1 Q. You don't know independently of today?

2 A. I'm sorry?

3 Q. You don't know independently of today whether improper
4 notice was provided?

5 A. I don't know. I'm not a lawyer, so improper notice is
6 something I've learned about in the course of this process.

7 Q. Are you aware of the requirements that member meetings, as
8 contained in the Amended Operating Agreement, must be noticed 15
9 days prior?

10 MR. O'NEIL: Objection, Your Honor.

11 THE COURT: Overruled.

12 THE WITNESS: Yeah. I've heard that today, yes.

13 BY MS. MCDONALD:

14 Q. So January 26th -- we'll move on to February of 2012 at
15 this point. Riot Act received a cease and desist letter from
16 an attorney for John. Correct?

17 A. I believe so.

18 Q. That letter directed the LLC to cease all use of the
19 Riot Act trademark?

20 A. Yes. I believe so.

21 Q. However, the company continued to use the Riot Act
22 trademark after the cease and desist letter. Correct?

23 A. Yes, it did.

24 Q. It used the trademark in connection with goods and
25 services?

1 A. Yes, it did.

2 Q. It used the trademark in e-mails.

3 A. Yes, it did.

4 Q. It used the trademark in advertisements?

5 A. Yes, it did.

6 Q. Both mailed and on television?

7 A. Maybe. Sure.

8 Q. Used the trademark in commerce.

9 A. Yes, it did.

10 Q. The LLC decided to rebrand sometime after the summer of
11 2012. Is that correct?

12 A. We were in the process of rebranding in the summer of 2012.

13 Q. Ultimately, Penn Social opened in the Riot Act space?

14 A. Yes, it did.

15 Q. Penn Social has several licenses?

16 A. Yes, it does.

17 Q. And when licenses are renewed, you're responsible for
18 making those renewals. Correct?

19 A. Ultimately, yes.

20 Q. Penn Social has a certificate of occupancy?

21 A. Yes, it does.

22 Q. And the Riot Act name appears on Penn Social's certificate
23 of occupancy.

24 A. Yes, it does.

25 Q. Penn Social has a business license.

1 A. Yes, it does.

2 Q. And the Riot Act name appears on Penn Social's business
3 license.

4 A. That's correct.

5 Q. The business license is maintained on the wall of the bar?

6 A. Yes, it is.

7 Q. In public view?

8 A. Yes, it is.

9 Q. Penn Social has a liquor license?

10 A. It does.

11 Q. And the Riot Act name appears on Penn Social's liquor
12 license.

13 A. Yes, it does.

14 Q. And that license is also maintained on the wall of the bar.

15 A. Yes, it is.

16 Q. I'd like to discuss a bit more about the business following
17 John's removal.

18 A. Okay.

19 Q. The business received numerous noise complaints after
20 John's removal. Correct?

21 A. We did receive noise complaints.

22 Q. There were also fights on the premises?

23 MR. O'NEIL: Objection, Your Honor.

24 THE COURT: Sustained.

25 MS. MCDONALD: Your Honor, may I approach?

1 THE COURT: Yes.

2 (Bench conference.)

3 THE COURT: Ms. McDonald, to which remaining claim
4 does that --

5 MS. MCDONALD: In defense of defendants' counterclaims.
6 Also, Your Honor, your memorandum opinion --

7 THE COURT: Which counterclaim?

8 MS. MCDONALD: Their theory that Mr. Xereas destroyed
9 the club and --

10 THE COURT: Where is that alleged?

11 MR. O'NEIL: We were listening to testimony about what
12 happened after it became Penn Social. We're not introducing
13 testimony of any valuation of Penn Social, nor do we make any
14 counterclaim as to that.

15 THE COURT: Since there's no issue --

16 MS. MCDONALD: Well --

17 THE COURT: -- concerning any matter regarding --

18 MS. MCDONALD: Your Honor --

19 THE COURT: -- Penn Social, I must sustain the
20 objection.

21 MS. MCDONALD: Your Honor, if I may, it also goes to
22 the trademark issue and the damage to plaintiff's trademark.
23 The defendants have put at issue whether Mr. Xereas contacted
24 agencies about getting his name back, and this goes to his
25 concern about the use of his trademark, which was on the wall

1 of Penn Social.

2 THE COURT: Objection sustained.

3 (End of bench conference.)

4 THE COURT: The objection is sustained.

5 BY MS. MCDONALD:

6 Q. Let's discuss the management of Riot Act/Penn Social.

7 Vince Coletti was a manager at Penn Social?

8 A. Yes, he was.

9 Q. And you hired him?

10 THE COURT: May I ask counsel to return, please?

11 (Bench conference.)

12 THE COURT: To what is this relevant, Ms. McDonald?

13 MS. MCDONALD: This goes to plaintiff's trademark
14 damages.

15 MR. O'NEIL: I don't think their expert sponsored
16 any testimony about diminution in value of the trademark, nor
17 is that acceptable trademark damages in this circuit.

18 MS. MCDONALD: It also goes, Your Honor, to the fact
19 that the defendants have raised the issue that Mr. Xereas
20 reached out to various administrative agencies in an attempt to
21 save his trademark while the defendants were doing damage to it.

22 MR. O'NEIL: There's no relevance to Mr. Coletti to
23 any of that. They tried to introduce evidence that Mr. Coletti
24 said something that people have complained about his being
25 discriminatory, and I think not only is there no relevance to

1 it, but it's prejudicial.

2 MS. MCDONALD: It's not prejudicial, Your Honor --

3 THE COURT: To what claim do you refer, Ms. McDonald?

4 MS. MCDONALD: It's part of John's defense --

5 THE COURT: No. Which claim by number? I have the
6 counterclaim in front of me --

7 MS. MCDONALD: But perhaps --

8 THE COURT: -- and based on --

9 MS. MCDONALD: -- Mr. --

10 THE COURT: -- what you have said, it is not clear.
11 It was Mr. O'Neil who objected on relevance grounds. I believe
12 it's therefore incumbent upon you to indicate to which claim or
13 which count this is of any conceivable relevance.

14 MS. MCDONALD: Well, perhaps Mr. O'Neil can clarify
15 what count it goes to.

16 THE COURT: Well, that is not what I asked. I asked
17 you, as the person who propounded the question, to what count
18 the answer would be relevant. Would you like to go back and get
19 your counterclaim?

20 MS. MCDONALD: No, Your Honor. It goes to their
21 breach of contract claim where they say John violated the
22 operating agreement by taking action against the LLC, and
23 this goes to show why it was necessary for John to take action
24 against the LLC.

25 MR. O'NEIL: Because an employee filed an EEOC

1 complaint?

2 THE COURT: Where is that alleged?

3 MS. MCDONALD: Mr. Dawson hired his friends --

4 THE COURT: My question, Ms. McDonald, is where that
5 is alleged.

6 MS. MCDONALD: I know, Your Honor, but they opened
7 the door in their --

8 THE COURT: Well, can you get your counterclaim,
9 please, so you can inform as to what count you believe the
10 testimony is relevant?

11 (Plaintiff counsel conferring.)

12 MS. MCDONALD: Your Honor, Ms. Glavich has gone to
13 try to retrieve a copy for me.

14 THE COURT: Can we continue, then, while she does that?

15 MS. MCDONALD: Yes. I believe so, Your Honor.

16 THE COURT: Very well. Thank you.

17 (End of bench conference.)

18 THE COURT: Now, Ms. McDonald, please continue.

19 BY MS. MCDONALD:

20 Q. Penn Social pays a management company, Tin Shop. Correct?

21 A. It does currently, yes.

22 Q. And Penn Social has five managers on staff?

23 A. No, it doesn't.

24 Q. Four?

25 A. Now there are -- depends on your definition of "manager,"

1 but there are three people managing now, and there are some
2 people who part-time close the bar at night.

3 Q. Tin Shop is your management company?

4 A. Yes, it is.

5 Q. There's no written management agreement between Tin Shop
6 and Penn Social. Correct?

7 A. No, there's not.

8 Q. And Tin Shop does not issue an invoice for its services?

9 A. I don't believe so.

10 Q. Yet Penn Social pays Tin Shop \$10,000 a month?

11 A. Yes, it does.

12 Q. You negotiated that fee on behalf of Penn Social?

13 A. Yes, I did.

14 Q. And you negotiated that fee on behalf of Tin Shop?

15 THE COURT: Counsel, let me ask you to approach, please.

16 (Bench conference.)

17 THE COURT: I assume the objection is relevance.

18 Ms. McDonald?

19 MS. MCDONALD: The defendants have argued that John
20 is responsible for the failure of the company. They argued that
21 (inaudible) performance of the finances --

22 THE REPORTER: I can't hear you.

23 MS. MCDONALD: The club failed and rebranded. They're
24 alleging the club failed and rebranded because of John when
25 actually --

1 THE COURT: Where is this alleged in the counterclaims?

2 MS. MCDONALD: I'll check with Ms. Glavich and see if
3 she has the counterclaim.

4 THE COURT: Thank you.

5 (Plaintiff counsel conferring.)

6 MS. MCDONALD: Your Honor, I'll move on from this.

7 THE COURT: Very well. Thank you very much.

8 (End of bench conference.)

9 THE COURT: Now please continue.

10 BY MS. MCDONALD:

11 Q. The LLC uses QuickBooks for its accounting and taxes.
12 Correct?

13 A. It has, yes.

14 Q. And Cindy Vaughn is the company's bookkeeper?

15 A. She was our full-time bookkeeper, yes.

16 Q. She would enter the company's data into QuickBooks?

17 A. Yes.

18 Q. And you would review QuickBooks to ensure its accuracy?

19 A. Yes.

20 Q. When a vendor or supplier submits an invoice, you maintain
21 those in your office?

22 A. Yes.

23 Q. And you have two offices, one at home and one at Tin Shop?

24 A. Well, I don't maintain them in my office. They're
25 maintained at Penn Social. At each business, the invoice is

1 maintained there.

2 Q. Have Penn Social staff ever expressed concern to you that
3 invoices are missing?

4 MR. O'NEIL: Objection, Your Honor. May we approach?

5 THE COURT: Yes.

6 (Bench conference.)

7 MR. O'NEIL: I believe the objection is relevance in
8 that this is what Mr. Morrissey's expert report deals with, and
9 we haven't been able to determine whether that's admissible yet.

10 MS. MCDONALD: We're laying foundation for
11 Mr. Morrissey, Your Honor.

12 THE COURT: Before determining whether Mr. Morrissey
13 is going to be able to testify, the Court will sustain the
14 objection and ask that you move on, please.

15 MS. MCDONALD: Thank you, Your Honor.

16 (End of bench conference.)

17 BY MS. MCDONALD:

18 Q. You've previously loaned the company money. Correct?

19 A. Yes, I have.

20 Q. And you negotiated the terms of that loan on behalf of the
21 company?

22 A. Yes, I did.

23 Q. And you negotiated the terms of that loan on behalf of
24 yourself. Correct?

25 A. Yes, I did.

1 Q. Following the removal of Mr. Xereas, you purchased
2 Ms. Heiss's shares of Riot Act. Correct?

3 A. That's correct.

4 Q. You paid \$250,000 for 25.33 percent?

5 A. Yes.

6 Q. And no independent valuation was performed?

7 A. No.

8 Q. The sale made you the majority shareholder?

9 A. Yes, it did.

10 Q. And gave you control of the business?

11 A. Yes, it did.

12 Q. Thank you.

13 MS. MCDONALD: I have nothing further at this time,
14 Your Honor.

15 THE COURT: Thank you very much, Ms. McDonald.

16 Counsel, may I ask you to approach quickly regarding our
17 schedule?

18 (Bench conference.)

19 THE COURT: Ms. McDonald, who will be the next
20 witness? It's not quite 11:30, and I would like to continue
21 until about 12:15. Is there another witness that you are
22 prepared to call, Mr. Richa or Ms. McDonald?

23 MR. RICHA: Terrence Hawkins and Mick Aldasani for
24 witnesses.

25 THE COURT: What is it you wish to do?

1 MR. RICHA: We wish to reserve them as rebuttal
2 witnesses.

3 THE COURT: Does that mean you've completed your case?

4 MR. RICHA: No. We still have Mr. Morrissey.

5 THE COURT: Is he here now?

6 MR. RICHA: He is here now, and depending on your
7 ruling on Mr. Morrissey, we may or may not call...

8 THE COURT: Because we are -- because the examination
9 of Mr. Dawson did not take as much time as I contemplated,
10 perhaps we can address Mr. Morrissey between now and 12:15. At
11 12:15 we have to break for lunch. That's 45 minutes.

12 MR. RICHA: If we need more time, would we be able to
13 pick up?

14 THE COURT: We'll have to continue in the afternoon.
15 If we do anything otherwise, the court reporter, the deputy
16 courtroom clerk, my law clerk, and I will not have had the
17 chance to eat lunch. You may find yourself with a grumpy and
18 irritable judge if I don't eat lunch.

19 (Laughter.)

20 MR. RICHA: Please eat.

21 THE COURT: All right. I will excuse the jury now.
22 That means they will get more time than usual. Is Mr. Morrissey
23 here?

24 MR. RICHA: He is.

25 THE COURT: Very well. Thank you.

1 MR. RICHA: Thank you, Your Honor.

2 (End of bench conference.)

3 THE COURT: Mr. Dawson, thank you. You may step down.

4 THE WITNESS: Thank you very much.

5 (The witness steps down.)

6 THE COURT: Now, members of the jury, we will recess
7 early for lunch today while the Court addresses matters with the
8 lawyers. It's 11:30. I'm going to ask that you come back by
9 1:15, which will give you an opportunity to step outside the
10 building if you like, get some lunch and get back so that we
11 can continue through the afternoon. Thank you very much.

12 I will simply remind you that during the recess you are not
13 to discuss the case with anyone or permit anyone to discuss it
14 with you. (Jury out at 11:31 a.m.)

15 THE COURT: Thank you. How do you believe we should
16 proceed with regard to the voir dire? Is this something that
17 you have discussed?

18 MR. RICHA: You mean between counsel?

19 MR. O'NEIL: We haven't discussed the details yet.

20 THE COURT: Could you do that now, please? One
21 possibility is that since it is the defendants who seek to
22 exclude him on the various grounds that were set forth in the
23 motion, the defendants' counsel would examine first in order to
24 set the parameters for the basis of the objection, and then is
25 it you, Mr. Richa, who will examine Mr. Morrissey?

1 MR. RICHA: No. It will be Ms. Glavich.

2 THE COURT: Ms. Glavich. Although I am perfectly
3 amenable to a procedure in which you would go first, Ms. Glavich.

4 (Counsel conferring.)

5 MR. RICHA: Can you give us a couple moments,
6 Your Honor?

7 THE COURT: Yes. I am inclined to think that since
8 defendants are the movants, it would be the defendants who would
9 go first, but if you have some other proposal, I will certainly
10 hear it.

11 MR. RICHA: Thank you, Your Honor.

12 MS. GLAVICH: Thank you, Your Honor.

13 THE COURT: Very well. We will go off the record for
14 a couple of minutes.

15 (Counsel conferring.)

16 MR. RICHA: Your Honor, Mr. Morrissey is ready.
17 We have no objection to defendants going forward.

18 THE COURT: Very well. Thank you very much. That is
19 what we will do. Just bear with us, please, until the deputy
20 clerk returns. So you will examine, Mr. O'Neil?

21 MR. O'NEIL: Yes, Your Honor.

22 THE COURT: And will it be you, Ms. McDonald?

23 MS. MCDONALD: Ms. Glavich, Your Honor.

24 THE COURT: Thank you.
25

1 JAMES MORRISSEY, WITNESS FOR THE PLAINTIFF, SWORN

2 VOIR DIRE DIRECT EXAMINATION

3 BY MR. O'NEIL:

4 Q. Mr. Morrissey, we're here to discuss your expert report
5 that was submitted in this action. As I understand it, your
6 expert report dealt with three different areas: unsupported
7 expenses, reimbursements, and invoices at the company; a
8 valuation of the company; and trademark damages. Is that
9 correct?

10 A. Correct.

11 Q. I'd like to focus first on the unsupported expenses. As
12 I understand your process, the first step was to take data from
13 the company's QuickBooks general ledger on expense reimbursements
14 to certain individuals, ATM withdrawals, and invoices to third
15 parties. Correct?

16 A. Yes.

17 Q. And with respect to, I believe, both the expenses and the
18 third-party invoices, once you had a list of amounts paid by the
19 company, you and your team then conducted a search of Penn
20 Social's records to obtain backup documents. Correct?

21 A. Yes. There was a general search to find backup information.

22 Q. And that search included both to find the document and
23 then, if the document was found, to determine from that document
24 whether on its face it could show its relationship to Penn
25 Social. Correct?

1 A. Yes, is it an ordinary and necessary business expense
2 for that type of business.

3 Q. And so your process was dividing the amount spent into
4 those that were supported by a record and could establish the
5 business reason for the expense versus those that were
6 unsupported for either one of those two reasons. Is that
7 correct?

8 A. Well, there's also a third category, which is where the
9 plaintiff identified an item that lacked documentation and,
10 based on his knowledge and understanding, treated that as
11 though it were properly documented.

12 Q. And what happened to those expenses?

13 A. That was excluded from the list of unsupported because
14 he had personal knowledge that it was appropriate.

15 Q. So it was the plaintiff himself who first went through
16 the general ledger and excluded some expenses, but then brought
17 others that he didn't know what the purpose was, he brought
18 those to your attention.

19 A. Right.

20 Q. And then from that subset, you identified ones that were
21 supported by documentation and unsupported by documentation.
22 Correct?

23 A. Right.

24 MR. O'NEIL: Your Honor, may I approach?

25 THE COURT: Yes.

1 MR. O'NEIL: Your Honor, do you want to have this
2 document in front of you?

3 THE COURT: I believe we should mark it as -- can we
4 call it Defendant's Motion In Limine Exhibit?

5 MR. O'NEIL: Yes, Your Honor. That's fine.

6 THE COURT: Is that without objection, Ms. Glavich?

7 MS. GLAVICH: Without objection.

8 THE COURT: Thank you.

9 BY MR. O'NEIL:

10 Q. Mr. Morrissey, I've handed you Table 5 from your expert
11 report, the Summary of Damages. Do you see that?

12 A. Yes.

13 Q. Okay. And the first two -- I'm looking at the description,
14 the various categories of expenses that you generated. The
15 first two are insufficient expense reimbursement to members
16 excluding Mr. Dawson, and the second is insufficient expense
17 reimbursement documentation for Mr. Dawson himself. Correct?

18 A. Correct.

19 Q. And those were handled under the same process. The expense
20 reimbursements that were supported by documentation were set
21 aside if the business reason could be discerned from the
22 document, and those that were unsupported totaled up to these
23 two numbers. Correct?

24 A. Correct.

25 Q. Similarly, the improper ATM withdrawals, if you didn't find

1 documentation and couldn't establish the business reason for the
2 ATM withdrawals, that was the \$1.2 million figure. Correct?

3 A. Well, the \$1.2 million is cash withdrawals. Withdrawals
4 of cash.

5 Q. That were unsupported. The business reason was unsupported?
6 Is it a total of --

7 A. Well, in this particular case, the withdrawal of cash,
8 the individual withdrawals never appeared on the books of the
9 company, at least the books that we were given, and that was
10 \$1.26 million taken out of the company; and we did not see
11 journal entries to support that nor an explanation as to why
12 that was ordinary and necessary to operate the business.

13 Q. Well, when you say you didn't see journal entries, these
14 withdrawals were noted in the QuickBooks general ledger. Correct?

15 A. Not the 1.246 million.

16 Q. So where did the withdrawal information come from?

17 A. That information came from the subpoenaed bank statements.

18 Q. Okay. And then the 3.12 is Improper Documentation of
19 Third-Party Disbursements. Correct?

20 A. Yes.

21 Q. And that followed the same process. It was either
22 supported or unsupported.

23 A. The 3.128 is -- \$3,128,000, roughly -- was unsupported
24 expenditures paid to third parties. So we found a journal
25 entry, but we couldn't find paperwork to explain the nature and

1 extent of the payment made and whether it was ordinary and
2 necessary for the business.

3 Q. So then the next step in your calculation of damages was
4 to apply Mr. Xereas's 26.67 percent owner share to each of these
5 owners. Is that correct?

6 A. Right. That's the next column over.

7 Q. And there was nothing in between those two steps. There
8 was no analysis done to determine if, in some other way, other
9 than an invoice you located during your search of Penn Social
10 records, that there was another way that those documents could
11 be -- or those expenses could be substantiated and justified.

12 A. We requested the invoices. It is the duty, I believe, of
13 the managing members to produce those. If you're writing a
14 check, you should have paperwork to back it up. That's an
15 industry standard, to have documentation to define what is being
16 paid, who is being paid, and to have sufficient corroborating
17 information to establish that it's ordinary and necessary.
18 That is lacking, and --

19 Q. That's how they ended up in the "unsupported" bucket of
20 dollars.

21 A. It is the responsibility of management to maintain such
22 records.

23 Q. Right. And if you didn't find the records, that's how
24 they ended up in the bucket of unsupported expenditures?

25 A. Not only did we not find the records, but we requested

1 missing documentation. So the documentation could have been
2 obtained through the vendors because they sent the bill. This
3 company paid the bill; they have the invoice record; ask them
4 for the record.

5 It's the same thing we did with the bank. We subpoenaed
6 the bank records because the company didn't have bank records,
7 certain kinds of bank records. There were some, but not all.

8 THE COURT: Could we back up just one moment?
9 I heard you, Mr. Morrissey, refer to the pronouns "them"
10 and "they." It is not entirely clear to whom you refer.
11 Could you clarify, please?

12 THE WITNESS: Could you give me the context?

13 THE COURT: You said, "I asked them."

14 THE WITNESS: In our request, it was a request of
15 the --

16 THE COURT: And who is "our"?

17 THE WITNESS: Counsel. Through counsel. We are
18 looking at the books and records. We are trying to find
19 supporting paperwork that goes with the payment. Would be an
20 invoice, receipt; would show a description of the item, where it
21 was delivered, and that information is typically available in
22 the accounting records. If the, in this case, Penn Social
23 management was not able to find it in their records, they could
24 contact the vendor.

25 THE COURT: When you use the term "our," to whom do

1 you refer? You said "counsel," as I recall, but which counsel?

2 THE WITNESS: I made our -- Vu Forensics prepare our
3 report. We submitted it to counsel and suggested that the
4 missing information be obtained through the vendors, or at least
5 the management team of Penn Social make an effort to obtain the
6 information in any way they can.

7 THE COURT: Who is "our"?

8 THE WITNESS: I am working with Vu Forensics.
9 The two of us, we went over the books and records.

10 THE COURT: Okay. Earlier, I believe you indicated
11 that "our" meant counsel. Now it appears you refer to Ms. Vu in
12 terms of the use of "our."

13 THE WITNESS: May I back up?

14 THE COURT: Yes.

15 THE WITNESS: The process was that -- my process and
16 Cindy Vu, we had a team. We went in and did an attempt to
17 collect information by visiting the site, and we were presented
18 with several boxes of invoices and accounting records.

19 We then, Cindy and I, went through the process of
20 photocopying as much of that as we could by use of a scanner,
21 and we then tried to bring information back to analyze it.
22 That was an on-site visit. We found missing information and
23 identified which payments were not supported for the material we
24 had, and we presented the list that's summarized on this page 22.

25 THE COURT: Thank you. Mr. O'Neil, please continue.

1 BY MR. O'NEIL:

2 Q. And my focus, Mr. Morrissey, is the step between when
3 you totaled up all of the unsupported expenditures and you
4 calculated Mr. Xereas's damages. The way you did that was
5 simply multiply the unsupported expenditures by 26.67 percent.
6 Is that correct?

7 A. That is the calculation that is here. We also considered
8 whether there were other extenuating circumstances, and it is
9 our view that, given the nature of what was excluded, this
10 amount of money would have been available in the bank accounts
11 of the company and could have been distributed to the owners,
12 with the plaintiff being one of those owners. That's what the
13 purpose of that column was.

14 Q. Okay.

15 MR. O'NEIL: Your Honor, I'd like to show the witness
16 Exhibit 5 from his expert report. Just -- I'm not going to
17 question him extensively about it; I just want to look at a
18 couple of different totals.

19 THE COURT: Very well. You may.

20 BY MR. O'NEIL:

21 Q. Mr. Morrissey, looking at the exhibit from your expert
22 report, do you see on the first page you begin to summarize
23 invoices from Adams-Burch?

24 A. Yes. I see that.

25 Q. And those are nearly weekly, or roughly weekly, invoices

1 for about a two-year period.

2 A. That is correct.

3 Q. And the total amount that you say was unsupported by
4 Penn Social's accounting records, other than their QuickBooks
5 accounting records, was \$153,468. You see that?

6 A. This report shows 153,408.

7 Q. 408. Can't read my own handwriting. My apologies.

8 A. No worries.

9 Q. Were you aware that Adams-Burch submitted a declaration
10 in this matter?

11 A. I heard that there was one.

12 Q. Have you seen it before?

13 A. No, I have not.

14 MR. O'NEIL: Your Honor, do you mind if I allow
15 the witness to review the declaration that was filed?

16 THE COURT: No. Is it marked?

17 MR. O'NEIL: No, it is not.

18 THE COURT: Let us mark it first. I believe we can
19 mark it as Motion In Limine Exhibit 2.

20 (Motion in Limine Exhibit No. 2
21 marked for identification.)

22 BY MR. O'NEIL:

23 Q. Mr. Morrissey, I'd like you to have the opportunity to
24 review the declaration from an Adams-Burch employee who states
25 that when they searched their system, they found records of each

1 and every one of those invoices and corresponding purchases and
2 deliveries to Penn Social.

3 (Witness reviewing exhibit.)

4 A. Well, I see paragraph 3 that says that --

5 MS. MCDONALD: Your Honor, I object to this line of
6 questioning as hearsay, that we're not going to be permitted to
7 cross-examine this declarant.

8 THE COURT: The objection is overruled.

9 THE WITNESS: The paragraph identified as No. 3,
10 it says that Ms. Isaacs says, "I searched our records and
11 information about the payments and found the documentation in
12 our files of deliveries to Penn Social and invoices to Penn
13 Social for each of those listed entries."

14 THE COURT: May I interrupt just one moment? Is this
15 the first time you've seen the declaration, Ms. McDonald?

16 MS. MCDONALD: No, it is not, Your Honor. It was
17 attached.

18 THE COURT: When did you receive it?

19 MS. MCDONALD: I believe it was attached to
20 defendants' summary judgment motion.

21 MR. O'NEIL: I believe it was our opposition to
22 plaintiff's motion for summary judgment.

23 MS. MCDONALD: It was filed at the close of discovery,
24 Your Honor.

25 THE COURT: In other words, that would have been

1 months ago?

2 MR. O'NEIL: Yeah. There is an ECF marking on that
3 document, Your Honor.

4 THE COURT: Very well.

5 BY MR. O'NEIL:

6 Q. Mr. Morrissey, does that change your conclusion with
7 respect to the Adams-Burch amounts that you included in your
8 unsupported total?

9 A. No.

10 Q. You still believe that those are unsupported expenses
11 incurred by the business?

12 A. The industry standard is to have an invoice for each one
13 showing a description, the date, the delivery -- typically,
14 there's a truck driver for Adams-Burch, whatever, signing the
15 paperwork. There are signatures on the date, and description,
16 cost, etc., should all be on there, not just a piece of paper
17 that says everything's fine.

18 Q. I thought you said we could go back to the vendors and get
19 information from them that would establish that in fact the
20 expense was incurred and it related to the Penn Social business.

21 A. I believe I was refer --

22 Q. Is that not sufficient?

23 A. I believe I was referring to invoices. If there's a
24 payment, there should be a piece of paper to support that.

25 There should be a description of the items contained; they add

1 up to an invoice amount, a delivery charge, a signature by the
2 drivers, recipient at the Penn Social facility. That's the
3 typical industry standard presentation of an invoice, not
4 somebody signing a piece of paper telling me that it's okay.
5 You have to validate the information. You can't --

6 Q. Included in your unsupported bucket of monies were monies
7 paid to Arent Fox. Is that correct?

8 A. Correct.

9 Q. And another law firm, Clinton Peed?

10 A. I remember that, yes.

11 Q. And, in fact, my law firm, the O'Neil Group. Correct?

12 A. Yes.

13 Q. And you saw bills for each of those law firms. Correct?

14 A. No. I didn't see the bills. I understand they were
15 redacted or --

16 Q. So invoices before they were produced to you were redacted
17 of attorney-client or attorney-work product?

18 A. Yes.

19 Q. And therefore you found those to be unsupported and
20 unrelated to Riot Act?

21 A. I found that they were not supported. I don't know the
22 content. I can't arrive at a --

23 Q. And then 26 percent of those expenses, the legal fees that
24 they've paid in this litigation, were then counted as damages to
25 Mr. Xereas. Right?

1 A. That is correct.

2 Q. Another category of damages that you found -- another part
3 of your expert report was a valuation of the company. Correct?

4 A. Yes.

5 Q. And that had no relation to the actual issues in this
6 litigation. Correct? That was done for settlement purposes?

7 A. The contents of the report are very applicable to this
8 matter. It identified the history, background of the company,
9 how the entity was formed. It gave a brief history of operations.
10 It identified expenses that were perhaps unsupported. There's
11 significant content there relevant to this matter.

12 Q. But the actual valuation of the business is not any part
13 of the damages calculation that you're sponsoring. Correct?

14 A. The conclusion is not being used as a damage at this time
15 is my understanding.

16 Q. Okay. And the third part of your expert report addressed
17 trademark damages. Correct?

18 A. Yes. There's an infringement and what's related to that.

19 Q. Okay. And that was essentially a licensing lost-
20 opportunity calculation?

21 A. It's an economic damages calculation.

22 Q. But you did no calculation of plaintiff's lost profits.
23 Correct?

24 A. The calculation was for economic damages using what's
25 typically called the but-for or the with-and-without or the

1 impaired-and-unimpaired model.

2 Q. But my question was you didn't calculate Mr. Xereas's
3 actual lost profits from any business he operated during the
4 period of infringement. Is that correct?

5 A. That question cannot be answered because you're having a
6 prospective statement and calling it actual. This is a but for
7 a certain chain of events should have happened; they didn't
8 happen; what's the difference. So you're calling what could
9 have happened actual. Those two words can't go together.
10 It's inconsistent.

11 Q. Well, I believe you're saying what could have happened.
12 I'm saying simply that you did not calculate Mr. Xereas's lost
13 profits during the period of infringement. Is that correct?

14 A. The lost profits were calculated within the but-for model
15 or the impaired-and-unimpaired model.

16 Q. You did no calculation of defendants' ill-gotten profits
17 during the period of infringement. Isn't that correct?

18 A. That was outside of the scope of my analysis.

19 Q. Well, that's my question. You didn't do it. Correct?

20 A. That is correct. I did not calculate the ill-gotten gains,
21 if any.

22 Q. And you didn't conduct a full audit of Penn Social as part
23 of your retention. Is that correct?

24 A. I was not engaged to conduct a full audit.

25 Q. And you didn't interview any personnel to get clarification

1 on certain items?

2 A. We attempted to -- Cindy Vu and I, when we were on site in
3 2015, attempted to follow up with the staff there on questions,
4 and we were directed to speak with counsel who was on site who
5 declined to respond.

6 Q. But that would be a normal part of an audit process.
7 Correct?

8 A. We were not conducting an audit, and I don't know if an
9 audit could be done here.

10 Q. Okay.

11 A. We were conducting an investigation, an analysis into
12 identifying what is a supportable and not supportable expense,
13 and also the damages from using the trade name.

14 MR. O'NEIL: I have no further questions, Your Honor.

15 THE COURT: Thank you, Mr. O'Neil.

16 Ms. Glavich.

17 VOIR DIRE CROSS-EXAMINATION

18 BY MS. GLAVICH:

19 Q. Good morning, Mr. Morrissey.

20 A. Good morning.

21 Q. Mr. Morrissey, what is your profession?

22 A. My profession is that of valuing businesses and assisting
23 investors raising capital.

24 Q. And how long have you been doing business valuations?

25 A. I first started around 1982.

1 Q. And how long have you been helping businesses find
2 investors?

3 A. Probably the last 10 years of that time.

4 Q. You were also a CPA. Correct?

5 A. Yes. In Pennsylvania, I was a CPA.

6 Q. And how long were you a CPA?

7 A. I believe that was four to six years.

8 Q. You belong to professional associations. Correct?

9 A. Yes, I do.

10 Q. Which ones?

11 THE COURT: Ms. Glavich, I can hear you, but I
12 think it would be helpful if you could speak a bit more loudly,
13 please.

14 MS. GLAVICH: Will do. I have a soft voice.

15 BY MS. GLAVICH:

16 Q. So we were saying what professional associations are you
17 involved in.

18 A. I am involved in the National Center for Employee Ownership
19 and also the Exit Planning Association.

20 Q. And were you involved in any associations related to a CPA?

21 A. Yes.

22 MR. O'NEIL: Objection, Your Honor. Our motion to
23 strike didn't go to Mr. Morrissey's background or qualifications.

24 THE COURT: The Court is aware. Nonetheless, I will
25 permit these background questions.

1 MS. GLAVICH: Thank you, Your Honor.

2 BY MS. GLAVICH:

3 Q. So, Mr. Morrissey, you were saying professional associations
4 related to being a CPA?

5 A. Yes. I am active as an instructor, or I was. I'm not
6 currently active as an instructor, but I have been at least 10
7 years as an instructor for the American Institute of CPAs and
8 also for the Center for Continuing Professional Education
9 involving teaching certified public accountants and other
10 accounting professionals in valuation and corporate finance and
11 accounting topics.

12 Q. Can you give me an approximate number of how many courses
13 you've taught?

14 A. I've somewhat lost count, but there's at least 25 of them.

15 Q. You've also written a book. Correct?

16 A. Yes, I did.

17 Q. What's the book?

18 A. The book is *Research and Analysis: Critical Techniques in*
19 *the Business Valuation Engagement*, and the purpose of the book
20 was to identify how to collect information and apply it to the
21 business valuation engagement, particularly when the usual
22 source that the accountant or valuation person would apply is
23 not available or not applicable.

24 Q. And what is that book used for?

25 A. The book was used for training accountants in the proper

1 methods for valuing a business.

2 Q. And do you have any experience that requires you to examine
3 a company's finances?

4 A. Yes. In my early days as an accountant, I worked for a
5 certified public accounting firm, and we conducted -- or I
6 conducted audits under their direction.

7 Q. Do you examine a company's finances when you're doing a
8 business valuation?

9 A. Yes, we do. It's a different type of exam. It's not an
10 audit. The purpose of the analysis is to identify the history
11 and background of the company, what are the operations, the
12 nature of them, and also to inquire about the outlook for the
13 company.

14 Q. When you say the outlook of the company, what do you mean?

15 A. The expected sales, expenses and profits, assets,
16 liabilities, and shareholders' equity, or some equity measure.

17 Q. When you're doing business valuations, do you ever do that
18 for the purpose of selling a company?

19 A. Yes. Buying, selling.

20 Q. And when you're looking at doing a business valuation for
21 selling a company, do you look at the company's finances then?

22 A. Always.

23 Q. Have you ever done a valuation of intellectual property?

24 A. Yes, I have.

25 Q. What kinds?

1 A. Patents, trademarks, assembled workforce, know-how,
2 business processes, business methods, trade dress, copyright,
3 licensing, engineering drawings. I think that should be enough.

4 Q. Okay. Looking at trademarks, so you have done valuations
5 of a trademark before?

6 A. Yes, I have.

7 Q. How many times?

8 A. Probably 10 or 15.

9 Q. In your professional experience, have you had occasion to
10 apply IRS law and regulations?

11 A. Yes.

12 Q. In your professional experience, if a business's articles
13 or governing contract, operating agreement, requires certain
14 accounting principles, have you ever used a company's own
15 contracts to evaluate a company's financial situation?

16 A. Yes. You're supposed to review the operating agreement
17 because the business is supposed to conduct itself within that
18 agreement, and it's the relationship between and among the
19 different members or stockholders.

20 Q. I'm going to focus on the trademark section of your report
21 briefly. What were the conclusions that you came to with regard
22 to the trademark valuation?

23 A. The trademark valuation conclusion was \$2 million.

24 Q. And where did you get that number?

25 A. The first step was to look at the operations of the

1 business history and background. We collected information, then
2 made an assessment of if there were the possibility of economic
3 damages, then identified what methodology would be best fitting
4 that set of facts and circumstances. We applied the method, and
5 I arrived at the conclusion of \$2 million, and the calculations
6 appear in the report.

7 Q. Were there facts and circumstances particular to this case
8 that made you determine what type of methodology you were going
9 to use to value the trademark?

10 A. Yes.

11 Q. What were those?

12 A. One of the items that we considered was the nature of
13 the formation of the entity, the role of Mr. Dawson as an
14 experienced investor, partnering of sense with John Xereas, who
15 applied the -- or introduced or brought to the business the
16 comedy club theme, and then the relationship that that had with
17 the investors and then the operation of it. I then looked and
18 determined that it would make sense that that arrangement of an
19 experienced investor and a theme being brought to an experienced
20 restaurant operator could be applied in the future.

21 Q. Did the fact that defendants were still using the Riot Act
22 name play into your decision to use that type of methodology?

23 A. Yes.

24 Q. And why?

25 A. The reason is that the name "Riot Act" is connected with

1 the plaintiff's business operations, of operating his own comedy
2 club, and it was that background and that collection of
3 experience that was applied to the initial Riot Act operation.
4 And the impact of that is that, once he left the business, he
5 could have applied that same bundle of experiences and found
6 another investor.

7 However, with somebody else using the name, an investor is
8 not going to enter into a new business when there's litigation
9 and use of the name existing somewhere else. That's not -- they
10 would look at that and say, I want a clean opportunity; I'll go
11 somewhere else.

12 THE COURT: May I ask you, Ms. Glavich, to elicit the
13 basis of that opinion, please.

14 MS. GLAVICH: That was exactly my question.

15 BY MS. GLAVICH:

16 Q. And, Mr. Morrissey, do you have experience that would lead
17 you to that opinion?

18 THE COURT: My question is what is the basis of the
19 opinion concerning what another investor would or would not do.

20 MS. GLAVICH: Correct. Yes, Your Honor.

21 THE COURT: Would you ask that question, please?

22 MS. GLAVICH: Yes.

23 BY MS. GLAVICH:

24 Q. Mr. Morrissey, what is the basis for the opinion that an
25 investor would not invest in Riot Act while the defendants are

1 using the trade name?

2 A. That is based on my experience working with other
3 investments, a pharmaceutical company, a neurophysiologist
4 franchise type operation. There is extensive search done to
5 make sure there's clear title and it's unimpeded by any previous
6 business arrangements.

7 Q. And you have done this personally?

8 A. I don't do the work. The work -- the businesses I have
9 worked for, they typically contract that out to do a search.
10 And a lot of money is being paid, and I assume it's a very
11 thorough search. That's a requirement.

12 Q. But in your finding investors for other companies, that is
13 a step that is taken or has been taken?

14 A. Yes. I cannot recall one event where there was not a
15 background search and check to make sure everything connected
16 to the new investment where the new investors have clear and
17 unimpeded access to whatever they're trying to sell or offer.

18 Q. Thank you. And, Mr. Morrissey, your choice of doing the
19 royalty type trademark valuation, is that something that's
20 typically done for trademarks?

21 A. That's one of the methods. There's an impairment model
22 that is typically used if there's like Coke versus Pepsi. But
23 this is an economic-damages case, and the infringement was part
24 of a bundle of assets. It wasn't the only one. It's like the
25 Coke name and the Coke bottle, the colors of Coke. It's a

1 collection of those. In this case, we had a name and the
2 business model of bringing the comedy club theme to a bar-
3 and-restaurant operation.

4 Q. Mr. O'Neil asked you about profits. Did you calculate
5 defendants' profits? Scratch that. I'm going to try that again.

6 As part of your report, the scope of your report the
7 plaintiffs asked you to prepare, were you asked to prepare a
8 report on the disgorgement of defendants' profits for using the
9 trademark?

10 A. That wasn't part of the analysis within the valuation
11 model that I applied, because it's a -- they had a business
12 arrangement, and the arrangement was terminated.

13 Q. So you were focused on what Mr. Xereas's damage would be
14 had he had full use of his trademark.

15 A. Correct. In a normal -- as it would typically be used in
16 that line of business.

17 Q. Okay. I'd like to turn to the business expenses and the
18 valuation of the business.

19 THE COURT: Before you do that, Ms. Glavich, let me
20 point out, please, that it is approximately 20 minutes after
21 12:00. My expectation was that we would go until about 12:15 so
22 that we, like the jury, would have the opportunity to have lunch.

23 I do not know how much additional time you need. I do not
24 know how much additional time you need, Mr. O'Neil. I do not
25 want to cut anyone short. I believe what we should do is stop

1 at this point and resume after we excuse the jury for the day.

2 MS. GLAVICH: I believe Mr. Morrissey's our next
3 witness. Mr. Morrissey is our next witness.

4 THE COURT: I'm sorry?

5 MS. GLAVICH: Mr. Morrissey is our next witness.

6 THE COURT: I am aware of that. My hope was that we
7 would be able to proceed with the voir dire yesterday. That was
8 my request of counsel, because yesterday I excused the jury
9 early in recognition of election day, but we were all still here
10 and available to proceed. We simply cannot run over lunch.

11 MS. GLAVICH: Yes, Your Honor.

12 THE COURT: So we will stop and resume the voir dire
13 after the jury is excused for the day. I do not want to delay
14 the jury by proceeding with the voir dire after the jurors come
15 back from lunch. I am already concerned that we are taxing the
16 jurors' patience.

17 I promised the jurors during voir dire that I expected the
18 trial to take two weeks. Plaintiff's counsel assured me that
19 the plaintiff's case would take two days. We are now in day
20 three. I have not sought to put any time limits on you, but we
21 must make sure that we use the jurors' time efficiently.

22 MS. GLAVICH: Yes, Your Honor.

23 THE COURT: So who do you plan to call next?

24 MS. GLAVICH: May I confer for just a moment?

25 THE COURT: Yes.

1 (Plaintiff counsel conferring.)

2 THE COURT: Mr. Morrissey, thank you. You may step
3 down.

4 THE WITNESS: Thank you, Your Honor.

5 (The witness steps down.)

6 THE COURT: Ms. Glavich?

7 MS. GLAVICH: Yes, Your Honor. What we propose is
8 that since Mr. Morrissey is our next witness and we had proposed
9 having Ms. Cindy Vaughn and Ms. Sharon Thompson, kind of
10 depending on your rulings about the finances that seemed to be
11 at the issue of this motion *in limine*, we propose that if you
12 would like -- if you'd like us to wait on Cindy Vaughn and
13 Sharon Thompson due to this issue, we would allow the defendants
14 to start their case-in-chief, finish the voir dire, and then
15 bring on Mr. Morrissey in rebuttal.

16 THE COURT: Mr. O'Neil?

17 MR. O'NEIL: Well, I deferred in direct examinations
18 of my two clients because I wanted to present my case in one
19 cohesive story to the jury, and now they're suggesting that I
20 put either Mr. Dawson or Ms. Heiss on the stand and have them
21 subject to cross-examination, and then their expert witness come
22 forward? I think that's highly unusual, Your Honor.

23 THE COURT: How much additional time do you believe
24 you need, Ms. Glavich, for your examination of Mr. Morrissey?

25 MS. GLAVICH: I can try and do it quickly, Your Honor.

1 Ten minutes? Fifteen minutes?

2 THE COURT: Very well. After we come back from lunch,
3 we will resume the examination of Mr. Morrissey, and the Court
4 will rule.

5 MS. GLAVICH: Thank you, Your Honor.

6 THE COURT: Thank you. Very well. We will recess at
7 this time. I will ask you to return in an hour, please.

8 (Recess from 12:24 p.m. to 1:28 p.m.)

9 THE COURT: I believe we are ready to resume.
10 Mr. Morrissey, thank you.

11 (The witness resumes the stand.)

12 BY MS. GLAVICH:

13 Q. Mr. Morrissey, we're going to focus on the business-
14 expenses portion of your expert report and your opinion.
15 For your opinion on the business expenses, what facts did you
16 rely on?

17 A. The business expenses in connection with the damages model
18 or the business expenses in connection with the insufficient
19 documentation.

20 Q. And how were those facts gathered?

21 A. Are you addressing the insufficient documentation of
22 expenses or the damages model?

23 Q. The insufficient documentation.

24 A. Okay. The way that information was gathered was by
25 identifying transactions within the QuickBooks general ledger

1 and then matching the, if we could, the receipts and invoices
2 that we gathered during our on-site visit in addition to
3 information provided by the defendants subsequent to that visit.

4 Q. And when you were deciding which expenditures lacked
5 supporting documentation, how did you make that determination?

6 A. In this list that we have in front of us today, the
7 question was whether there was documentation to back it up.
8 If there was perhaps partial information, we then excluded that.
9 So if there's a missing document, the item was included in the
10 list.

11 Q. Why was the missing documentation important to your
12 decision?

13 A. It's an industry standard to have the invoice that
14 supported the payment within the records of the company.

15 Q. If a record does not have supporting documentation, in
16 your experience, what does that mean?

17 A. That typically means that perhaps it wasn't approved by
18 management or there's a weak link between that payment and the
19 ordinary-and-necessary character that payment should have as an
20 industry standard for appearing on the books and records.

21 Q. I'm sorry. The phrase is ordinary...

22 A. "Ordinary and necessary" is the typical expression.

23 Q. If a payment is not ordinary and necessary, what does
24 that mean?

25 A. That would indicate that it wasn't an element of the

1 operations of the business if it were looked at by a third
2 party. So it may be classified as a personal expenditure, but
3 it would not be expected to be incurred by, let's say, a buyer
4 of the company.

5 Q. In your experience doing business valuations, what does
6 that mean to you if you see an expenditure that does not have
7 documentation?

8 A. If it lacks documentation, that's an indicator that the
9 item is most likely of a personal nature, not related to the
10 business, and that a buyer of the company could expect to
11 receive funds, essentially, in the future because that expense
12 wouldn't occur in the future.

13 Q. In your experience doing accounting as a CPA, would you
14 come to a similar conclusion?

15 A. Yes.

16 Q. So when you say that the fund doesn't have supporting
17 documentation, does that mean that that money should still be
18 in the business's accounts?

19 A. Yes.

20 Q. And in your report, you talked about a 26 and two-third
21 percent. What is that?

22 A. That is the ownership share of Mr. Xereas. And, typically,
23 the way that would be applied is that, at the end of the year,
24 roughly speaking -- there's some other payments and priorities
25 etc., but essentially, 26 and two-thirds percent of the cash-

1 distributable income would be paid out to Mr. Xereas.

2 Q. Okay. So if there is money that doesn't have
3 documentation, should have been in the pot that belongs to the
4 company, that money then should have been paid to owners and
5 shareholders. Correct?

6 A. Yes. It should eventually be shared with the owners, the
7 other owners.

8 Q. In your experience doing business valuations, when a
9 company doesn't have supporting documentation and -- sorry.
10 When a business doesn't have supporting documentation, how would
11 you account for that money?

12 A. Well, I would identify that in grouping it and then add
13 that back as an extra asset of the company on a control basis.

14 Q. So if you were doing a business valuation to sell a
15 business or to get investors, that money would be considered
16 belonging to the company.

17 A. Belonging to the company. It would be excess.

18 Q. Okay.

19 A. A non-operating asset, so to speak.

20 Q. And in that line, if there's money -- or if there's an
21 expense with no documentation, in your experience doing business
22 valuations, how does that missing money play into whether a
23 company should incur debts or loans such like that?

24 A. Well, typically, if they have excess expenses that are not
25 ordinary and necessary and there's debts on the books, that

1 would indicate that the debt payment is -- or the outstanding
2 obligation is overstated to the extent of the undocumented
3 expenditures, invoices.

4 Q. Would it be fair to say that if there's no documentation
5 for a payment, that money should have been in the company's
6 accounts and therefore a loan may not be necessary?

7 A. That's correct.

8 Q. Thank you.

9 MS. GLAVICH: No further questions, Your Honor.

10 THE COURT: Thank you, Ms. Glavich.

11 Mr. O'Neil?

12 MR. O'NEIL: Just two questions, Your Honor.

13 VOIR DIRE REDIRECT EXAMINATION

14 BY MR. O'NEIL:

15 Q. Mr. Morrissey, with respect to your trademark licensing
16 model, you did not rely on any actual trademark licensing
17 agreements that Mr. Xereas had entered into for the Riot Act
18 trademark. Is that correct?

19 A. I wasn't aware of an agreement that existed.

20 Q. And if you weren't aware of it, you didn't rely on it in
21 your model. Correct?

22 A. Right.

23 MR. O'NEIL: I overestimated, Your Honor. That's just
24 one question. Thank you.

25 THE COURT: I will permit you very brief argument.

1 I will share with you that my principal concern is the third
2 opinion. In other words, the valuation -- I'm reading from page
3 2 of the motion *in limine* -- "valuation of a hypothetical
4 trademark license Mr. Xereas claims based upon his trademarks in
5 the term 'Riot Act.'" That is my principal concern.

6 You are the movant, Mr. O'Neil, so I believe I should hear
7 from you first.

8 MR. O'NEIL: Yes, Your Honor. The basis of our motion
9 with respect to his trademark damages model is the fact that the
10 *Foxtrap* case in this circuit is the controlling authority on
11 damages for trademark infringement. Under that authority, there
12 are two types of damages allowed in this circuit for trademark
13 infringement. They are the infringer's ill-gotten profits or
14 the trademark owner's lost profits. Mr. Morrissey's opinions
15 here don't consider either of those things and instead build a
16 hypothetical model.

17 And even in those circuits where a hypothetical model of
18 a future stream of license payments has been allowed -- and I
19 think, primarily, I believe it's the Eleventh Circuit -- they've
20 required that that model be based on some actual experience.
21 Here, there is no actual experience. There's no set fee in the
22 hypothetical license that Mr. Xereas pled in this action, and
23 there's no evidence that he ever entered into any licensing
24 agreement with anyone for the term "Riot Act."

25 So in that respect, Your Honor, we believe the damage

1 calculation is completely hypothetical even if it were to be
2 allowed in this circuit. So, for that reason, Your Honor, we
3 don't think the evidence developed by Mr. Morrissey is admissible.

4 THE COURT: Thank you, Mr. O'Neil.

5 Ms. Glavich. May I ask that you also focus on the third
6 opinion.

7 MS. GLAVICH: Yes, Your Honor. I think Mr. O'Neil
8 misstates what the standard is. It's defendants' profits or
9 the trademark owner's actual loss, and here Mr. Xereas is
10 prevented from actually going out and using the trademark.
11 Mr. Morrissey has explained why, and he has a legitimate basis
12 for that opinion.

13 Courts regularly accept hypotheticals so long as there is a
14 reasonable basis and a reliable method on which they're applied.
15 So what we're facing is not defendants' profits. We're looking
16 at, if Mr. Xereas had had the opportunity, what his damages --
17 what he's being prevented from achieving.

18 THE COURT: Thank you very much, Ms. Glavich.

19 The Court had already given significant consideration to
20 the motion *in limine* and the supporting and opposing documents.
21 Now that the Court has heard the testimony in the nature of voir
22 dire, the Court will deny the motion as to the first two
23 opinions but grant the motion as to the third.

24 The Court does so largely for the reasons offered by
25 counsel for the defendants. More specifically, there is no

1 evidence from which the Court would be able to determine that
2 any methodology was applied to this valuation, and in this
3 circumstance, the Court regards the opinion as largely
4 speculative and one which would not aid the jury nor otherwise
5 be consistent with *Daubert*.

6 Now, is there anything further before the jury returns?
7 Is it you, Ms. Glavich, who will examine Mr. Morrissey when
8 the jury comes back?

9 MS. GLAVICH: Yes, Your Honor.

10 THE COURT: Thank you.

11 MS. GLAVICH: There is, I think, one issue I'd like to
12 address. Is the expert report that I will be using --

13 THE COURT: The report is not evidence. Mr. Morrissey
14 is here, and you may ask him questions concerning the opinions
15 that he reached and how he reached them.

16 MS. GLAVICH: I was going to use some tables that he
17 had developed as demonstratives. So I was wondering how would
18 you like me to handle those as demonstratives.

19 THE COURT: I'm not certain I recognize the
20 distinction you are making. Mr. O'Neil, I will hear from you.

21 MR. O'NEIL: I believe the expert report shouldn't be
22 admissible on the record and shown to the jury. I haven't seen
23 any of the demonstratives they say they're going to be using,
24 but taking Ms. Glavich at her word that they're the exhibits
25 from the expert report, it's no different from the words.

1 The numbers are no different than the words.

2 THE COURT: Well, certainly, we can expect that the
3 exhibits will come in, but the opinions that are expressed as to
4 what I will call items 1 and 2 will, of course, be in the form
5 of testimony and not the report. Is that what you intend?

6 MS. GLAVICH: Yes, Your Honor. I don't intend the
7 actual report.

8 THE COURT: Very well. Thank you.

9 May we ask the jury to return?

10 MS. GLAVICH: Yes. And, sorry, one scheduling issue.
11 We'd like to call one witness prior to Mr. Morrissey?

12 THE COURT: And who is that?

13 MS. GLAVICH: Mr. Sedrick Muhammed.

14 THE COURT: Very well. Mr. Morrissey, I will ask you
15 to step down, sir. Were you directed to a waiting room in the
16 hallway when you came earlier?

17 THE WITNESS: I was in a meeting room a couple doors
18 down.

19 THE COURT: Thank you very much. I will ask you to
20 please return there until it is time for your testimony. Thank
21 you very much. (The witness steps down.)

22 MR. O'NEIL: Your Honor, could I be heard?

23 THE COURT: Yes. Give us one moment to ask the deputy
24 clerk to ask the jurors to wait, please.

25 (Deputy clerk complies.)

1 THE COURT: Mr. O'Neil.

2 MR. O'NEIL: Other than the fact that I was just
3 informed of the change in schedule, I have general concerns of
4 the relevancy of Mr. Muhammed's testimony. He was, as described
5 by the plaintiffs, a patron at the club, and he's an elected
6 official in Washington, but I'm not sure how he has any
7 information about the breach of contract, the trademark, or the
8 unjust enrichment claims that remain.

9 THE COURT: Thank you, Mr. O'Neil. Did we say it was
10 Mr. Richa who had intended to examine Mr. Muhammed?

11 MS. MCDONALD: That's correct, Your Honor. And he's
12 probably the best one to address this point. However, I will
13 say with respect to the scheduling issue, we also just found out
14 that Mr. Muhammed would be available now, so I also apologize to
15 Mr. O'Neil for the late notice.

16 THE COURT: Thank you, Ms. McDonald. If you don't
17 mind, would you please ask Mr. Richa to come in but ask
18 Mr. Muhammed to wait?

19 MS. MCDONALD: Yes, Your Honor.

20 THE COURT: Thank you, since he should not be present
21 while we have this discussion concerning the relevance of his
22 testimony. Thank you.

23 (Counsel exits courtroom, reenters.)

24 THE COURT: Very well. Mr. Richa.

25 MR. RICHA: Yes. My understanding, Your Honor, was

1 there was a question with regard to the relevancy --

2 THE COURT: That is correct. That issue was raised by
3 Mr. O'Neil.

4 MR. RICHA: Okay. The first point, Your Honor, is
5 that Mr. Muhammed has been on all of our disclosure statements.
6 They've had ample opportunity to depose Mr. Muhammed if they
7 wanted to. There's no surprise at all, and they're not
8 prejudiced at all by his testimony.

9 THE COURT: I will just interject to note that the
10 argument raised by defendants is not that defendants are
11 surprised that they would be prejudiced; the argument is that
12 there is no relevance.

13 MR. RICHA: Okay.

14 THE COURT: That is what I would like you to address,
15 please.

16 MR. RICHA: Sure, Your Honor.

17 THE COURT: And just so you know, I'm looking at the
18 monitor because I have the summary of anticipated testimony that
19 counsel for Mr. Xereas provided.

20 MR. RICHA: Okay. The scope --

21 THE COURT: And it reads, of course, "A guest at the
22 club, Mr. Muhammed will be presented to testify regarding the
23 comedy theater, the parties' actions there as he observed them,
24 and plaintiff's trademark and breach of good faith and fair
25 dealing claims."

1 MR. RICHA: So, first of all, it would be a short
2 examination, limited in scope. Number one, defendants' claim
3 that Mr. Xereas stopped coming to the club after the firings of
4 January 17, Mr. Muhammed was a regular patron of the club, often
5 was there a couple times a week, and he would be testifying that
6 he saw Mr. Xereas working at the club during the time period
7 that defendants claim he was not. So the first thing is the
8 defense to that counterclaim.

9 THE COURT: Is that the testimony that you intend to
10 elicit?

11 MR. RICHA: That's part of it, Your Honor. Yes.

12 THE COURT: What is the rest of it?

13 MR. RICHA: Being a regular patron of the club, he
14 observed Mr. Xereas interacting with staff and comics, and he
15 also observed the other employees of the club interacting and
16 doing their duties at the club. So he would be talking about
17 that and generally his experience at the club, which would go
18 towards the trademark value of Riot Act.

19 THE COURT: To what issue is the experience of
20 patrons at the club relevant?

21 MR. RICHA: Not of other patrons. His experience and
22 his observations, being a regular there, in terms of what he's
23 observed in terms of Mr. Xereas's management of the club as well
24 as his interaction -- Mr. Xereas's interactions with various
25 staff and comics. There's allegations that Mr. Xereas

1 mismanaged the club and whatnot, and he was a regular there and
2 observed Mr. Xereas on a regular basis.

3 THE COURT: What is your understanding of the dates
4 on which Mr. Muhammed saw Mr. Xereas in the club?

5 MR. RICHA: He saw him continue to work after
6 the firings on January 17th of plaintiff's brother and of
7 Mr. Farfel, and Mr. Xereas discussed those firings with him.
8 So he would be testifying that after January 17th he continued
9 to attend the club, and he continued to see Mr. Xereas working
10 at the club.

11 He didn't stop attending the club until Mr. Xereas was
12 actually removed as a managing member. That period of time is
13 relevant because they claim he was not working during those time
14 periods, and that's the basis of his removal according to the
15 defendants.

16 THE COURT: I have one more question, Mr. Richa.
17 What is the basis of Mr. Muhammed's testimony or anticipated
18 testimony concerning plaintiff's trademark? I'm reading again
19 from the statement, the summary of anticipated testimony,
20 "Plaintiff's trademark and breach of good faith and fair
21 dealing."

22 MR. RICHA: How does his testimony relate to those
23 two causes of action?

24 THE COURT: What is the basis of his testimony?

25 MR. RICHA: His experience while at the club and his

1 observations while at the club. As I said, he attended the club
2 a few times a week, so he was a regular patron of the club.

3 THE COURT: Are you able to direct Mr. Muhammed to a
4 date or dates on which he saw Mr. Xereas?

5 MR. RICHA: Not specific dates, but he's aware -- the
6 reason he's aware that Mr. Xereas was still working at the club
7 after the firings is because those individuals were no longer
8 there and he knew that they were fired.

9 THE COURT: Very well. Thank you, Mr. Richa.

10 MR. RICHA: Thank you.

11 THE COURT: The Court will permit you to inquire,
12 Mr. Richa, of Mr. Muhammed concerning if not the dates, then --
13 and when I say the time, I mean a time after the discharge of
14 Mr. Xereas' brother and Mr. Farfel -- that he, Mr. Muhammed, saw
15 Mr. Xereas.

16 I cannot permit testimony from Mr. Muhammed concerning
17 "the parties' actions" and certainly not "plaintiff's trademark
18 and breach of good faith and fair dealing" claims.

19 Is Mr. Muhammed in the hall?

20 MR. RICHA: He is. I just want to make sure I
21 understand Your Honor so I don't overstep the bounds of what
22 you just stated. Is he permitted to testify with regard to his
23 observations regarding plaintiff's interactions with various
24 staff and his management, of what he observed in terms of
25 interactions with comics, interactions with staff? We're not,

1 obviously, touching any of the allegations --

2 THE COURT: I believe the answer to that question
3 was no. That testimony was not included on the summary of
4 anticipated testimony.

5 MR. RICHA: Well, it does say conduct of the --

6 THE COURT: It says here "the parties' actions."
7 There is nothing here in this amended pretrial statement or
8 supplement to the pretrial statement to indicate that the
9 plaintiff's intention was to elicit testimony about Mr. Xereas'
10 interaction with patrons or talent.

11 MR. RICHA: Generally speaking, we did say "parties'
12 actions," so we would argue that that's covered under that
13 description.

14 THE COURT: As I indicated, there has been testimony
15 -- or perhaps I should say there is an issue; indeed, it was a
16 part of the defendants' opening statement -- that Mr. Muhammed
17 left at some point. If you wish to elicit from Mr. Muhammed
18 that he saw Mr. Xereas after the discharge of his brother and
19 his friend, you may do so.

20 MR. RICHA: Okay.

21 THE COURT: As to everything else, there is no apparent
22 basis of any knowledge, and no such issues were included in the
23 pretrial statement in the summary of anticipated testimony.

24 MR. RICHA: Thank you, Your Honor.

25 THE COURT: Is Mr. Muhammed in the hall?

1 MR. RICHA: Yes.

2 THE COURT: Very well. Thank you. So you may ask a
3 leading question to direct his attention to the time which is
4 relevant.

5 MR. RICHA: Okay.

6 (Jury in at 1:58 p.m.)

7 THE COURT: Members of the jury, thank you for bearing
8 with us. Be assured that we value your time. We apologize for
9 the brief delay in getting started this afternoon. Please be
10 seated. Mr. Richa.

11 MR. RICHA: Your Honor, the plaintiff calls Sedrick
12 Muhammed. (Witness enters.)

13 THE COURT: Good afternoon, sir. Let me ask you to
14 step forward. Thank you very much. Please face the deputy
15 clerk of court to be sworn and then have a seat on the witness
16 stand. Thank you very much.

17 SEDRICK MUHAMMED, WITNESS FOR THE PLAINTIFF, SWORN

18 DIRECT EXAMINATION

19 BY MR. RICHA:

20 Q. Good afternoon, Mr. Muhammed.

21 A. Good afternoon.

22 Q. We will be very brief. First, let's get some background
23 on you. Can you please state your name for the record?

24 A. Sedrick Muhammed.

25 Q. And what's your educational background?

1 A. High school graduate.

2 Q. What is your current employment?

3 A. Director of Constituent Services for Councilmember Gray.

4 Q. Did you also work for Mayor Gray?

5 A. Yes.

6 Q. When did you work for Mayor Gray?

7 A. While he was mayor from 2011 through '15.

8 Q. And are you also the ANC Commissioner?

9 A. Yes.

10 Q. When did you first meet Mr. John Xereas?

11 A. It may have been -- I don't know the exact date, but it
12 may have been a year or two prior to the club opening, I think.

13 Q. And did you attend the Riot Act Theater?

14 A. Oh, yes.

15 Q. And how often did you attend the Riot Act Theater?

16 A. I was there a lot. Whenever I had a free evening, I would
17 be there maybe once, twice a week. It was like a good getaway,
18 you know, from all of the stress throughout the day. I was just
19 happy to be there and accept the invitation.

20 Q. And on January 17, 2012, plaintiff's brother, Ted Xereas,
21 and Mike Farfel were fired from the Riot Act Comedy Theater.
22 After that date, did you see John at the club continuing to work
23 at the club?

24 A. Yes.

25 Q. And did you see him multiple times at the club after

1 January 17, 2012?

2 A. I don't know how many times I was there in that specific
3 time frame, but I do remember one night when I was there that
4 I believe he told me that his brother and Farf were no longer
5 there.

6 MR. RICHA: Nothing further, Your Honor.

7 THE COURT: Thank you very much, Mr. Richa.

8 Mr. O'Neil?

9 CROSS-EXAMINATION

10 BY MR. O'NEIL:

11 Q. Mr. Muhammed, would you say you're a close personal friend
12 of Mr. Xereas?

13 A. Yes. We don't hang out on a regular basis, but I say that
14 in the sense that I think a lot of people would say they know me
15 and I think I may know a lot of people; but it's rare, from my
16 vantage point, that I can pick up the phone and call somebody or
17 text somebody and/or receive a call and he doesn't want anything.

18 I get a lot of phone calls and texts from people as if the
19 house is on fire or the world is coming to an end and "I need"
20 "I want." And he's not like that.

21 Q. And you said you met him around 2009 and you've been good
22 friends since then?

23 A. Yes. I wouldn't say necessarily 2009. I don't remember
24 what year the club opened, but I do remember meeting him before
25 the club opened.

1 Q. Okay. And with respect to your testimony about Mr. Xereas
2 being in the club after January 17th, do you recall seeing him
3 at the club at all in February of 2012?

4 A. I don't remember what year the club closed or when he left
5 the club. So, I mean, the month and the date I'm not really
6 familiar exactly --

7 Q. So you don't have any recall --

8 A. -- be more specific --

9 Q. You can't testify --

10 THE COURT: Just one moment. I believe Mr. Muhammed
11 was still completing his answer.

12 MR. O'NEIL: My apologies.

13 THE COURT: Did you complete your answer, sir?

14 THE WITNESS: I think so.

15 THE COURT: Very well. Now please ask your next
16 question.

17 BY MR. O'NEIL:

18 Q. So you can't tell us specifically that Mr. Xereas
19 was working at the club in February 2012. Is that right?

20 A. Can you give me a time frame of when the club actually
21 closed? I mean, it was six years ago, and I couldn't tell you.

22 Q. Sure. Well, the events -- the firing of Ted Xereas and
23 Mike Farfel was January of 2012.

24 A. Oh. Yeah, I was there after. I don't know how many times,
25 but I know John was there because I believe he told me that his

1 brother and Farf were no longer there.

2 Q. You said after January 17th, when they were terminated, you
3 saw him there?

4 A. Yes.

5 Q. Did you see him there when --

6 A. Mm-hmm.

7 Q. "After" is a long time. After in January or after in
8 February?

9 A. I have no clue.

10 Q. How about in --

11 A. January, February, March. I don't know what month it was,
12 but I do know he was there because he told me that his brother
13 was no longer there. And what was interesting to me, I didn't
14 realize -- I mean, I was just there to have a good time, but I
15 didn't realize there were multiple people, multiple owners.

16 When he told me his brother was no longer there, his eyes
17 were watery, and I thought that was kind of strange. And Farf
18 and that sunshine that him and them brought to the club wasn't
19 there. And, again, I don't have a diary, so to speak, but I
20 don't know if it was February, March, if it was February 9th,
21 10th. I couldn't go that far in detail.

22 Q. Okay. And you said in your testimony that you accepted the
23 invitation. Did you have a standing invitation from Mr. Xereas
24 to come into the club?

25 A. It was nothing formal. I think it was from, how I saw it,

1 just a friendly invitation, nothing formal. No e-mail, no text.
2 Just if I'm free, come on by.

3 Q. Did you have to buy tickets for admission?

4 A. I remember buying -- I had some type of ticket. It was
5 black and white, something like that. You know, the security
6 guard checks your ID, and I bought food and stuff like that.

7 Q. Do you know the defendant, Mr. Geoffrey Dawson?

8 A. No.

9 Q. As ANC Commissioner, one of your jobs is to vote on
10 approval or disapproval of liquor licenses. Is that correct?

11 A. Yes.

12 MS. MCDONALD: Objection, Your Honor.

13 THE COURT: Counsel, you may approach.

14 (Bench conference.)

15 THE COURT: What is your objection, Ms. McDonald?

16 MS. MCDONALD: I believe it's outside the scope of
17 direct, which was very limited; and secondly, I don't know to
18 which claim this goes.

19 MR. O'NEIL: The question is designed to reveal some
20 personal animosity between the witness and Mr. Dawson and that
21 the witness voted against Mr. Dawson's liquor license
22 application at other establishments.

23 THE COURT: Did that happen?

24 MR. O'NEIL: Yes.

25 THE COURT: What is the basis for your suggestion that

1 he did?

2 MR. O'NEIL: Mr. Dawson told me. It's a very limited
3 inquiry, one or two questions, Your Honor.

4 THE COURT: Your suggestion is that Mr. Dawson told
5 you that Mr. Muhammed voted against the renewal of the liquor
6 license.

7 MR. O'NEIL: The liquor license at a different
8 establishment, yes.

9 THE COURT: Not at Penn Social.

10 MR. O'NEIL: No.

11 THE COURT: And to what would that be relevant?

12 MR. O'NEIL: I think it reveals some suspected
13 personal animosity between the witness and Mr. Dawson.

14 THE COURT: The Court will sustain the objection.

15 (End of bench conference.)

16 MR. O'NEIL: Thank you, Mr. Muhammed. I have nothing
17 further.

18 THE WITNESS: Yes, sir.

19 THE COURT: Do you have redirect, Mr. Richa?

20 MR. RICHA: I have nothing further, Your Honor.

21 THE COURT: Thank you, Mr. Richa.

22 Mr. Muhammed, thank you. You may step down. You are
23 excused.

24 THE WITNESS: Okay. Thank you.

25 THE COURT: Thank you.

1 (The witness steps down.)

2 THE COURT: Now, Ms. Glavich, you may call plaintiff's
3 next witness.

4 MS. GLAVICH: Yes, Your Honor. We call Jim Morrissey.

5 THE COURT: Would one of you please step into the hall
6 and ask him to come in? Thank you very much.

7 (Witness enters.)

8 Good afternoon, sir. May I ask you to please face the
9 deputy clerk to be sworn. Thank you.

10 JAMES MORRISSEY, WITNESS FOR THE PLAINTIFF, SWORN

11 DIRECT EXAMINATION

12 BY MS. GLAVICH:

13 Q. Good afternoon, Mr. Morrissey.

14 A. Good afternoon.

15 Q. Please introduce yourself to the jury.

16 A. Yes. My name is Jim Morrissey.

17 THE COURT: Ms. Glavich, at least two, possibly three
18 jurors have indicated that they cannot hear you.

19 MS. GLAVICH: I'll have to mic myself up, Your Honor.

20 (Pause.) Is this better? Okay.

21 THE COURT: Thank you.

22 BY MS. GLAVICH:

23 Q. Mr. Morrissey, what is your profession?

24 A. My profession is business valuation and accounting.

25 Q. And how long have you been doing business valuation?

1 A. I've been doing the analysis since 1981.

2 Q. And what does business valuation entail?

3 A. Well, typically, we're examining the history and background
4 and books of a company, and we're determining what's the value
5 of the company and what would somebody sell the company for, or
6 buy the company or buy a percentage interest in it, or buy an
7 element in the company, product line or service.

8 Q. What is your educational background starting with undergrad?

9 A. I have an undergraduate degree in political science with a
10 minor in economics and math from East Stroudsburg University.

11 Q. Did you go to graduate school?

12 A. Yes. I went to Indiana University and have an MBA in
13 accounting.

14 Q. What kinds of jobs have you held since you got your MBA?

15 A. The jobs have been in the accounting management area as
16 an assistant controller, an interim controller, as a chief
17 financial officer, auditor, and most of it has been completing
18 business valuations and assisting in raising debtor equity.

19 Q. When you say "assisting and raising debtor equity," what
20 do you mean by that?

21 A. What I mean is a business owner would seek funds to expand
22 the business; and if it's debt, they typically find a lending
23 institution to provide a loan, or they may have new investors
24 come in and essentially contribute equity to the business,
25 they're buying more stock.

1 Q. You worked as a CPA. Correct?

2 A. I have a CPA license. I don't have an active license.

3 I'm an inactive CPA. I practiced when I was in Pennsylvania.

4 Q. How long did you practice as a CPA?

5 A. About four years there.

6 Q. And what does it take to become a CPA?

7 A. You gotta sit for a three-day exam that consists of
8 accounting theory, accounting practice, which is doing problems.
9 Auditing and law are the main sections.

10 Q. Is this a license from a state?

11 A. It is a state-issued license with a national exam.
12 It's a uniform exam across the country.

13 Q. Do you belong to any professional organizations?

14 A. Yes. I'm active with the American CPA's Center for
15 Employee Ownership, and the Exit Planning Association.

16 Q. Have you ever held any leadership position in those
17 organizations?

18 A. I was a discussion leader, which is not an officer position,
19 but some time ago I was a president of a chapter of a National
20 Association of Accountants in Philadelphia.

21 Q. You were an instructor with AICPA. Correct?

22 A. Yes.

23 Q. And what kind of courses did you teach?

24 A. They were in two categories. One is in accounting in
25 finance topics; the other one is in business valuation.

1 The accounting and finance topics were budgeting, payables,
2 receivables, accounting best practices, financial statement
3 analysis; and the business valuation ones were on how to value
4 the stock or equity of a company or intangible assets of a
5 company.

6 Q. If you could give a ballpark number of how many courses
7 you've taught?

8 A. I've lost count. It's a number of courses, different
9 courses, maybe 25, and the number of times, probably over a
10 hundred.

11 Q. You've written a book as well, haven't you?

12 A. Yes. I wrote a book for the American Institute of CPAs,
13 and the title was *Research and Analysis: Critical Techniques*
14 *in the Business Valuation Engagement*.

15 Q. When we're talking about a book, are we talking about a
16 small book, or is this more of a textbook?

17 A. Well, it was a book for a course. It was four to six
18 hundred pages, depending on whether you had the instructor
19 version or not.

20 Q. And what was this book used for?

21 A. It was used to assist certified public accountants to learn
22 business valuation and what to do when their typical source of
23 information isn't available or doesn't work. This was how do
24 you take research to the second level to support your opinion.

25 MS. GLAVICH: Your Honor, I'd like to admit into

1 evidence Mr. Morrissey's curriculum vitae and list of
2 presentations?

3 THE COURT: How is that marked?

4 MS. GLAVICH: We do not have an exhibit number for
5 it yet. I believe this would be 308. Would you like them as
6 separate exhibits or one together?

7 THE COURT: I believe the exhibits should be separate.

8 MS. GLAVICH: Okay. I'd like the record to show that
9 I'm handing a copy to defense counsel.

10 MR. O'NEIL: Your Honor, can I be heard?

11 THE COURT: You may approach.

12 (Bench conference.)

13 MR. O'NEIL: These documents weren't even on the
14 exhibit list. I'm seeing them for the first time.

15 MS. GLAVICH: They're his qualifications. They have
16 an abbreviated CV as part of his report.

17 THE COURT: What's your response to Mr. O'Neil's
18 contention that he's never seen the documents?

19 MS. GLAVICH: We received them late last night.

20 THE COURT: Is that an acknowledgement that he hasn't
21 seen the documents?

22 MS. GLAVICH: Yes, Your Honor.

23 THE COURT: How, then, could I permit them to be used
24 as evidence since my ruling was that all exhibits be exchanged
25 by -- I don't want to go back through the ECF record, but I set

1 a date for the exchange of exhibits.

2 MS. GLAVICH: I understand, Your Honor.

3 THE COURT: And you acknowledge this one was not
4 exchanged. Is that right?

5 MS. GLAVICH: Yes, Your Honor.

6 THE COURT: On what basis should I admit it, then?

7 MS. GLAVICH: There's no prejudicial --

8 THE COURT: I'm sorry. I cannot hear you.

9 MS. GLAVICH: I'm sorry. It's his curriculum vitae
10 and list of presentations he has listed in his expert report
11 which defendants received, at this point, years ago. It has
12 listed his qualifications.

13 THE COURT: The objection is sustained. The Court
14 notes in any event that there is no prejudice to the plaintiff
15 since Mr. Morrissey has testified regarding his education, his
16 experience, his membership in organizations, and the rest of the
17 information which would be included on an individual's
18 curriculum vitae. Since you seem to concede, Ms. Glavich, that
19 the exhibits were never produced to the defendants, I cannot
20 admit them now. I cannot permit you to use them now.

21 MS. GLAVICH: Okay.

22 THE COURT: Very well. Let's continue.

23 MS. GLAVICH: I'm sorry. I just have one additional
24 question while we're here. When I finish his qualification and
25 ask the Court to permit him as an expert, would you like me to

1 do that?

2 THE COURT: Yes. But bear in mind, please, that the
3 third opinion is the one that is stricken, so I assume you will
4 say "an expert in the field of" and then refer to the first two
5 opinions.

6 MS. GLAVICH: Okay.

7 THE COURT: In other words, you cannot say he's an
8 expert in trademark licenses.

9 MS. GLAVICH: Right.

10 THE COURT: Hold on just one moment. I think
11 the courtroom deputy is indicating you cannot be heard.

12 Not the exhibits. If I said something different, I
13 apologize. I granted the motion as to the third opinion and
14 denied it as to the first two. Thank you very much.

15 MS. GLAVICH: Okay. So he's permitted to testify as
16 to business finances and to --

17 THE COURT: He cannot testify concerning his valuation
18 of a hypothetical trademark license Mr. Xereas claims.

19 MS. GLAVICH: Okay.

20 THE COURT: So when you ask that he be qualified as
21 an expert, you must confine it to the first two opinions.

22 MS. GLAVICH: Okay.

23 THE COURT: Very well. Thank you.

24 MS. GLAVICH: Thank you.

25 (End of bench conference.)

1 THE COURT: Now, please continue.

2 MS. GLAVICH: Thank you, Your Honor.

3 BY MS. GLAVICH:

4 Q. So, Mr. Morrissey, we were talking about your book and
5 the classes that you've taught. In your current business doing
6 business valuation, what kind of clients do you have?

7 A. They're basically all businesses. Well, there's one
8 individual right now, but they're 95 percent or some type of a
9 business.

10 Q. Could you give us a ballpark number for how many valuations
11 you've done?

12 A. I would say over 300. Three to five hundred.

13 Q. What are some of the examples -- can you give us maybe two
14 or three examples of valuations that you've done for a business?

15 A. Well, one would -- this year I worked on a bank for an
16 employee stock ownership plan. The bank has 22 branches, a
17 billion in assets, and the question is what is a minority
18 interest value, say 3 percent, of the bank stock worth, and
19 that is then shared with the employees.

20 So I'm reporting that conclusion to the bank's trustees of
21 the employee stock ownership plan, and they report that to the
22 Department of Labor, which happens to be across the street from
23 here. That's why I brought that up.

24 All right. Another one would be a business that is
25 somewhat related to this, a business in the medical field,

1 and they are developing a new product line and are licensing
2 their trademark trade name and business practices to other
3 physicians.

4 Q. Thank you. Have you ever been hired for litigation?

5 A. Yes.

6 Q. What kinds?

7 A. Breach of contract, economic damages, and valuation of debt
8 and equity.

9 Q. Do you have a side that you work with, one side more than
10 the other, plaintiffs, defendants?

11 A. No. Whatever happens. I don't pick a side. They come
12 to me.

13 Q. And in this litigation, you're being paid. Correct?

14 A. Yes.

15 Q. And what is your -- what are you getting paid?

16 A. I'm basically being paid an hourly rate for my time.

17 Q. And is this your typical hourly rate?

18 A. Well, I'm working with a company called Vu Forensics,
19 so it's the typical billing rate under Vu.

20 MS. GLAVICH: Your Honor, at this time I tender this
21 witness as an expert on doing the business valuation of Riot Act
22 and on the valuation of Mr. Xereas's shares.

23 THE COURT: Mr. O'Neil?

24 MR. O'NEIL: No objection, Your Honor.

25 THE COURT: Thank you, Mr. O'Neil. The Court will

1 receive Mr. Morrissey as an expert in the areas of business
2 valuation and valuation of an individual's interest in an LLC.

3 Members of the jury, you will receive more detailed
4 instructions later after all of the evidence is in. I will
5 instruct you at this point, however, that the rules that govern
6 the trial permit an individual to offer his or her opinion in a
7 circumstance in which the Court has qualified him or her to do
8 so. It is still up to you to determine how much of the
9 testimony in the nature of an opinion to believe. That is
10 still your function. Now, Ms. Glavich.

11 MS. GLAVICH: Thank you, Your Honor.

12 BY MS. GLAVICH:

13 Q. So, Mr. Morrissey, thank you for bearing with me as I get
14 my notes straight. Mr. Morrissey, what were you hired to do in
15 this case?

16 A. Well, there were several functions. You're referring to
17 the valuation side of the entity, or are we going to talk about
18 the undocumented invoices?

19 Q. Let's talk about the business expense side of the --

20 MR. O'NEIL: Objection, Your Honor.

21 THE COURT: Counsel, let me ask you to return, please.

22 (Bench conference.)

23 THE COURT: Can you narrow your question, Ms. Glavich,
24 so you do not run afoul of the Court's ruling excluding any
25 expression of opinion regarding the valuation of the

1 hypothetical --

2 MS. GLAVICH: I will.

3 THE COURT: Very well. Thank you.

4 MR. O'NEIL: Your Honor, I thought she just introduced
5 him as an expert in business valuation, which is the second
6 opinion, correct? Is he also offered as an expert in missing
7 invoices?

8 THE COURT: What is your intention, Ms. Glavich?

9 MS. GLAVICH: I thought that when we had come up here
10 to discuss how to introduce properly, Your Honor said to avoid
11 the third portion, which was the trademark. So the first one
12 was the business valuation, and the business valuation is in
13 part related to the missing invoices.

14 MR. O'NEIL: Not according to his expert report.
15 It seemed to be two different areas of inquiry. He valued the
16 business based on two data points: the sale of shares to
17 Ms. Heiss and a bank loan that Mr. Dawson applied for. I don't
18 think the question of missing invoices had anything to do with it.

19 MS. GLAVICH: I was just trying to adhere to the
20 ruling on the motion *in limine*. I can rephrase my -- I'm
21 submitting him to talk about the -- I'm not sure what you would
22 call it, the business --

23 MR. O'NEIL: The hypothetical missing invoices?

24 MS. GLAVICH: They're not hypothetical. You don't
25 have them.

1 MR. O'NEIL: I didn't find them.

2 MS. GLAVICH: That's not our responsibility.

3 THE COURT: Let's backtrack for one moment. What is
4 your recollection -- and I'm looking over here at the realtime
5 record that our court reporter has graciously made available.
6 What is your recollection of the area of expertise as to which
7 you moved for him to be qualified?

8 MS. GLAVICH: So the first half was regarding -- it's
9 essentially regarding the reimbursements and the money that
10 belonged to the company that Mr. Morrissey is saying Mr. Xereas
11 should receive 26.67 percent of. That's the one half that we
12 discussed during the motion *in limine*.

13 And then the second one that you allowed in was his
14 valuation of the shares, which was a separate issue. Those are
15 what I thought I was admitting him under, those names. I can
16 change the name of how I admit him?

17 MR. O'NEIL: I just didn't hear Ms. Glavich offer him
18 as an expert in the first area.

19 THE COURT: In other words, business valuation.
20 Is that right?

21 MS. GLAVICH: That's how I called it. If I need to
22 change the name of it, I can.

23 THE COURT: Can the two of you agree upon --

24 MR. O'NEIL: Okay. I'm sorry.

25 THE COURT: -- a phrasing while you're here at the

1 bench?

2 MR. O'NEIL: That's fine. Business evaluation and
3 business valuation? I was not hearing the --

4 MS. GLAVICH: I guess shares, like valuation of the
5 shares and how distinguishing the --

6 THE COURT: Okay. I found the reference. It reads,
7 "Your Honor, at this time I tender this witness as an expert on
8 doing the business valuation of Riot Act and on the valuation of
9 Mr. Xereas' shares."

10 MS. GLAVICH: Yeah, I can kind of see -- they're kind
11 of -- they both take funds... How to make it clear? The first
12 one, basically, is I'm talking about the invoices and the
13 missing reimbursements and things like that. That's getting to
14 valuation of funds that should be paid under his 26.67 shares
15 of value --

16 THE COURT: I edited your request because, as phrased,
17 you suggested that Mr. Morrissey is "an expert in the valuation
18 of Mr. Xereas' shares," and I believe that would be a virtual
19 impossibility. That is why I rephrased your request as "an
20 expert in business valuation and valuation of an individual's
21 shares in an LLC" or other business entity. He can't possibly
22 be an expert in Mr. Xereas' shares. Would you agree?

23 MS. GLAVICH: I guess -- well, he's testifying as to
24 what the value would be of Mr. Xereas' shares in that second
25 part of the report based on the sales of --

1 MR. O'NEIL: It's the testimony about the first part
2 of the report that I'm objecting to, because I'm not sure that
3 you're offering him as an expert in that area.

4 THE COURT: As I said -- and I'm scrolling again.
5 Ms. Glavich, you moved that Mr. Morrissey be treated as an
6 expert in two areas, and I'm quoting, "business valuation of
7 Riot Act, and two, the valuation of Mr. Xereas' shares."

8 I believe that I have made a mistake because I did not
9 require clarification of you. What I said was that "the Court
10 will receive Mr. Morrissey as an expert in the areas of business
11 valuation and the valuation of an individual's shares in an LLC."
12 He cannot possibly be an expert as to Mr. Xereas. He's rendering
13 an opinion as to Mr. Xereas. So, with that having been said,
14 can we continue?

15 MR. O'NEIL: So what is he an expert in with respect
16 to the first part of his opinion?

17 THE COURT: Business valuation.

18 MR. O'NEIL: If it's Your Honor's intention, and I
19 believe it is, that he be allowed to testify about these missing
20 invoices, I guess I don't care what the name is, I still object
21 to that. It's not meeting the requirements of Rule 702 of
22 *Daubert*, but I understand your ruling. The labels applied to
23 it were confusing to me. It sounded like he was only being
24 offered --

25 THE COURT: As I said, I edited the request because

1 I cannot possibly receive Mr. Morrissey as an expert in the
2 valuation of Mr. Xereas' shares.

3 MS. GLAVICH: Would it be -- we were offering
4 Mr. Morrissey's opinion for economic damages. He's not really
5 an expert in economic damages. Does that clarify...

6 MR. O'NEIL: I object to that more. He's totaling
7 up missing invoices and saying 26 percent of them are due to
8 Mr. Xereas. That's not a breach of contract as far as I can
9 tell. The breach of contract at issue in this case is his
10 removal as a managing member, and he's going to offer an opinion
11 on missing invoices to vendors at the company.

12 THE COURT: I thought the issue we resolved when we
13 took our extended recess. I'm concerned now that we are
14 delaying the jury. What do you intend to ask next, Ms. Glavich?

15 MS. GLAVICH: I was going to focus on the expenses in
16 Riot Act's -- in the LLC -- the expenses that the Riot Act --
17 that the LLC has claimed are part of ordinary and necessary
18 business, and Mr. Morrissey will testify that they lack the
19 documentation to support that they're therefore not necessary
20 and ordinary business expenses.

21 It goes to what we discussed in the motion *in limine* where
22 he is looking at, under his experiences in doing business
23 valuations, they are not ordinary and necessary business
24 expenses; that's funds that belong to the company. The company
25 should have either paid it on loans, not take out loans, or paid

1 that money out to shareholders.

2 THE COURT: Mr. O'Neil?

3 MR. O'NEIL: If I understand your order on the motion
4 *in limine*, you're allowing him to testify about the missing
5 invoices?

6 THE COURT: What is it that you intend to elicit about
7 missing invoices?

8 MS. GLAVICH: It goes to Mr. Xereas's --

9 THE COURT: No, I asked what do you intend to elicit
10 from Mr. Morrissey about missing invoices.

11 MS. GLAVICH: Our plan was to have him discuss looking
12 through the records. He did a search for the missing invoices.
13 In his opinion, when they don't have the proper documentation,
14 that means that's money that should have been in the company
15 accounts; the company accounts he then applies the 26.67 percent.

16 THE COURT: I find myself in a bit of a quandary here.
17 I'm very concerned that we are taxing the attention of the jury.
18 My hope was that by addressing this question during the recess,
19 which of course extended 30 minutes beyond what we contemplated,
20 that there would be no further questions of this type.

21 MR. O'NEIL: Well, consistent with that, Your Honor --

22 THE COURT: I am at something of a loss as to what to
23 do at this point.

24 MR. O'NEIL: I'll withdraw the objection, Your Honor.

25 THE COURT: And you will address the matter in cross?

1 MR. O'NEIL: With one of my witnesses.

2 THE COURT: Very well. So you may not elicit any
3 references to valuations of trademark.

4 MS. GLAVICH: Yes, Your Honor.

5 MR. O'NEIL: That's fine. Thank you, Your Honor.

6 THE COURT: Very well.

7 (End of bench conference.)

8 THE COURT: You may continue.

9 MS. GLAVICH: Thank you.

10 BY MS. GLAVICH:

11 Q. Mr. Morrissey, you conducted a review of the finances of
12 Riot Act, the LLC. Correct?

13 A. Yes. We reviewed -- I reviewed, in addition to firm, the
14 books and records of the company.

15 THE COURT: May I ask you to clarify to whom you refer
16 to by the word "we"?

17 THE WITNESS: Yes. That's Cindy Vu of Vu Forensics.
18 We worked together as a team, analyzing the books and records.

19 MS. GLAVICH: Thank you, Mr. Morrissey.

20 BY MS. GLAVICH:

21 Q. And what was your opinion coming out of this review?

22 A. The findings was that we found a significant number of
23 transactions that did not have supporting documentation, and
24 that means documentation that's normally expected, standard in
25 the industry.

1 Q. And when they don't have that documentation, what does that
2 mean?

3 A. That typically means that the payment or the transaction
4 is not considered ordinary and necessary for the business.

5 Q. And if it's not ordinary and necessary --

6 A. It shouldn't be on the books. It's not a transaction
7 related to that business is the usual conclusion.

8 Q. Okay. And what did you look at to reach that conclusion?

9 A. Well, we looked at the -- or I primarily focused on
10 identifying the accounting records. There is a system used
11 called QuickBooks. It's widely used, probably the largest in
12 the country, if not the planet.

13 It is a computerized system of bookkeeping that simplifies
14 the bookkeeping reconciliation process and takes information
15 from, for example, bank statements and credit cards, and then
16 it'll load it into a work paper that you can then perform other
17 procedures on and then use that as a basis for journal entries.
18 So it's a simplifying tool. It doesn't add information; it
19 simplifies the processing of it.

20 The end product of that is what's called the general
21 ledger, and the general ledger shows the different financial
22 transactions in the company on a date-by-date basis.

23 Q. Thank you. And so you looked at the QuickBooks itself?

24 A. Yes. We had access to their database.

25 Q. And did you look at anything else?

1 A. Yes. The next thing was to look at books and records that
2 we found on site. Cindy Vu and I were on site -- I believe it
3 was for a day and a half -- and the purpose was to make either
4 photocopies or scans of their business records that we found on
5 site that were presented to us. We didn't go through the
6 building looking for them. We were given access to certain
7 boxes of information.

8 Q. Why were you looking at paper and boxes of information?

9 A. We made a request for the -- Vu Forensics, through way of
10 counsel, made a request for supporting documentations for the
11 entries that existed in QuickBooks.

12 For example, a payment to a glass manufacturing or sales
13 company, there'd be an invoice -- we'll make the number up -- a
14 thousand dollars, and do we know that is ordinary and necessary
15 for the business? So we would then ask for the invoice for that
16 payment.

17 Q. If you have the QuickBooks and the general ledger, why do
18 you need the invoices?

19 A. The QuickBooks is merely an entry, an indication of what
20 the amount is. It does not tell you what were the line items or
21 the items that were purchased in connection with that, the date
22 that the services or products were delivered, the address of the
23 delivery, who at the company accepted the good, who was the
24 driver who delivered the good.

25 Usually, those kinds of details are on an invoice and the

1 shipping documents. There's typically what's called a voucher
2 packet, and the voucher packet has multiple documents --
3 receiving information and distribution information -- that
4 identifies the payment and how it should be accounted for and
5 whether it's ordinary and necessary for the business. That
6 could be determined by looking at what's called the voucher
7 packet.

8 Q. You keep using the phrase "ordinary and necessary."
9 Where is that coming from?

10 A. That is an industry expression. It's also found in the IRS
11 -- the question is always: Is the expense connected to the
12 business? And the typical expression in the industry is, Is it
13 ordinary and necessary?

14 If that's deemed ordinary and necessary -- it's a matter of
15 judgment -- then it's an appropriate expense for the business;
16 it goes on the books of the business. Then, after all the
17 payments are made, if it's like an LLC, like this company is,
18 you'd look and see how much money is in the bank account.

19 Given what the demands are over the next three months, six
20 months, or whatever, you make a determination of that and the
21 tax consequences of a distribution to the owners. That's the
22 end product of all this.

23 Q. Okay. Stepping back just a moment, when you had the
24 QuickBooks, what did you do with it for this case?

25 A. What we did -- what I did with it was I looked at the

1 different line items and attempted to match up the invoices that
2 were available to those line items and assessed whether there
3 was adequate documentation.

4 Q. How did you decide what was adequate documentation?

5 A. There are two ways of looking at it. One way was, even
6 if they didn't have a document, the plaintiff may have had
7 personal knowledge and said that amount looks about right; the
8 date looks about right. So we strike that from the analysis.
9 That's a good expense.

10 There may be another one where there's no documentation at
11 all; we have no knowledge of it. We would ask the plaintiff if
12 the plaintiff has knowledge. So we don't have direct information,
13 and we would look and see if there's paperwork. We do have a
14 list of millions of dollars, essentially, of transactions where
15 there's no documentation at all.

16 Q. When you say "we have a list" --

17 A. I, through Vu Forensics, developed an exhibit in the
18 report, in the Vu Forensics report, that identifies the
19 different payments, the amount, the date, and what account
20 it was charged to, and that came from QuickBooks.

21 Q. So these documents that you have determined lack
22 insufficient documentation, are you basing this on any
23 particular standards?

24 A. Well, the industry standard is to see a description of the
25 item, the delivery location, and then you should apply the --

1 whoever's doing the analysis -- an auditor, a regulator, etc. --
2 would that be typically used in that type of business.

3 For example, if you had a construction firm and a
4 restaurant, you'd have different purchases and then is the
5 amount appropriate for the business that they have. Is it just
6 for that business, or maybe they're taking stuff home or
7 reselling it? You don't know. But the question is is it
8 reasonable, ordinary, and necessary.

9 Q. And what does it mean that something is not ordinary and
10 necessary?

11 A. That raises a red flag. And then what I would do is apply
12 additional procedures, ask may I see the documentation; please
13 contact a vendor see if they can provide the documentation.
14 There's other sources if it's not on site. My experience in
15 other matters is that the management can obtain the
16 documentation from the vendor.

17 Q. And when you say it's a red flag, are you basing that
18 on your experience as a CPA doing business valuations?

19 A. It's my experience doing business valuations, and I've also
20 served as a finance director, chief financial officer on an
21 interim basis; and those are the same policies that apply either
22 in valuation or as a financial officer.

23 Q. So why is it a red flag?

24 A. Because the amount or the description is not consistent
25 with the business. It's too much. It looks too high. And it

1 could be appropriate even though I think it looks high. You
2 make an inquiry: Can I see the invoices to back this up?

3 And there may be some extenuating circumstances, but it's
4 conspicuous because it's on the invoice; and you have a
5 discussion with management as to why it's so high, and usually
6 there's a story to go with it. In this case, we didn't have the
7 documentation, so I couldn't make further inquiry.

8 Q. "In this case," you mean --

9 A. In this particular matter.

10 Q. So in your experience in doing business valuation, when you
11 get a red flag, you talk to the company, and they come back and
12 they say "no invoices," in your experience, what does that mean?

13 A. That would indicate to me that the expense was not
14 connected to the business, because if it were connected, the
15 vendor provides the paperwork. It becomes obvious that it's
16 proper.

17 Q. And if it's not proper, doing a business valuation, what
18 would you do with that type of expense?

19 A. That would indicate that the payment was not connected to
20 the business or was too high for the business, and then that
21 would be treated as an add-back to the business value. It's an
22 "other" asset, a non-operating asset, cash that's not reported,
23 excess cash of the business.

24 Q. Would it be fair to say that that money or that expense
25 should have been money in the company's accounts, their kind of

1 pot of money?

2 A. Yes. Almost always, when you have an expense that's
3 undocumented, the amount of that expense should not have left
4 the company, because it's not ordinary and not necessary, and
5 the funds should have been left in the bank. But they were paid
6 out to some party, and it was not typically related to the
7 business. It's not ordinary, and it's not necessary.

8 Q. Okay. So when you're doing a business valuation, you get
9 a red flag, you ask for an invoice, they say no invoices, how
10 does that play into your valuation of the company?

11 A. That would indicate to me that the company has internal
12 control documentation problems that would indicate that the
13 business is more risky than a normally operated business, that
14 typically if someone's buying the company, they're going to
15 replace the management team.

16 That would be -- the red flag would indicate that there's
17 bad accounting and bad bookkeeping, and there's a management
18 issue. If we identify the excess payments, the amounts should
19 have been in the bank account. That would indicate that the
20 owners could have received a higher distribution because of
21 excess money in the accounts, bank account.

22 Q. I believe you said that you had helped companies look
23 for lenders. As part of that process, are you looking at the
24 company's financial situation and whether they need to take out
25 a loan?

1 A. Yes. That's part of the analysis and also preparing --
2 typically, you have to prepare a business plan and present it to
3 the bank to demonstrate your capacity to pay back the loan and
4 that it's a well-run business. The bank looks at a couple of
5 officers -- at least one, depending on the size of the loan --
6 and interviews the chief financial officer and the president,
7 the CEO, etc., to understand the nature of the business.

8 Q. And in that process, would you or somebody doing a business
9 valuation be looking for these red flags in a company's finances?

10 A. Yes.

11 Q. And do the same process of looking for the invoices,
12 the supporting documentation, and whether it's ordinary and
13 necessary?

14 A. Right. And if that's my client, I would encourage them,
15 implore them, to find that paperwork. You gotta get it.

16 Q. And does that play into a decision to either get a loan
17 or determine the size of the loan?

18 A. That would have an impact in the amount of the loan. The
19 bank typically would see -- the banks have sent in auditors to
20 review the books and records of companies before granting a
21 loan, depending on the nature of the loan and the business.

22 Q. So I kind of want to go back to this case specifically.
23 You testified that you had QuickBooks, that you were looking for
24 invoices, and that you matched up invoices to -- or you were
25 looking to match up invoices to particular lines on the general

1 ledger. Am I right on that?

2 A. That's correct. Typically, it's a payment of some sort.

3 Q. Did you put those into different types of categories?

4 A. Yes. I had categories. One was undocumented contributions
5 or withdrawals of cash. We had -- or I identified employee
6 reimbursements, third-party payments, credit cards that did not
7 have documentation to support the payments.

8 MS. GLAVICH: Your Honor, I'd like to introduce
9 Plaintiff's Exhibit 308 -- or 310 I guess? 310.

10 THE COURT: Would the two of you like a moment to
11 confer with the deputy clerk?

12 MS. GLAVICH: Yes, please.

13 MR. O'NEIL: Your Honor, I have an objection.

14 (Bench conference.)

15 MR. O'NEIL: It's the same objection I made before,
16 Your Honor. They marked 306 trial exhibits, and now they're
17 adding new exhibits.

18 MS. GLAVICH: Your Honor, this is the issue he raised
19 earlier. This is part of the expert opinion, the tables from
20 the expert opinion. And the reason why --

21 THE COURT: Is it a new exhibit or not?

22 MS. GLAVICH: It's part of the -- we have the expert
23 opinion as an exhibit --

24 THE COURT: Please answer the Court's question.
25 Do you acknowledge that the exhibit, whatever it is, was not

1 on the exhibit list?

2 MS. GLAVICH: The amended expert report is on the
3 exhibit list.

4 THE COURT: Did you say it is?

5 MS. GLAVICH: It is.

6 MR. O'NEIL: They have 306 exhibits, and now they're
7 asking that this be marked as 308.

8 MS. GLAVICH: May I explain?

9 THE COURT: Yes.

10 MS. GLAVICH: The amended expert report is an exhibit.
11 This is a table from that expert report. I'm not trying to
12 admit the expert report itself. It's just a table, just a
13 demonstrative that shows the different categories and the
14 amounts and the reason of the --

15 THE COURT: You have marked as an exhibit --

16 MS. GLAVICH: The amended report is itself an exhibit.

17 MR. O'NEIL: I have no objection to the use of it as
18 a demonstrative. I don't think it should be admitted into
19 evidence.

20 THE COURT: Can we proceed, then, for another 10
21 minutes or so with that understanding when we take our recess?

22 MS. GLAVICH: We'll just use it as a demonstrative?

23 THE COURT: It will not be admitted into evidence.

24 MS. GLAVICH: Okay. And just so you know, I'm doing
25 it this way because it's got the other stuff on it.

1 THE COURT: Very well.

2 MR. O'NEIL: You just created that document.

3 MS. GLAVICH: It's the same thing. I just didn't want
4 to put it up because it has the various numbers --

5 THE COURT: Did you just write on the exhibit?

6 MS. GLAVICH: No, no, not. This is my copy. I've
7 been marking on it myself. This is what I wanted to show the
8 jury. (Indicating.) The reason why I made this, this exact same
9 area I didn't want to show the claim that's been dismissed by
10 Your Honor.

11 THE COURT: At the moment, you may not show it to the
12 jury. The witness may describe it as something he generated,
13 but I cannot admit it.

14 MS. GLAVICH: I'm sorry?

15 THE COURT: I cannot admit it into evidence.

16 MS. GLAVICH: It's an exhibit to the expert report,
17 which is a marked exhibit.

18 THE COURT: Okay. Can you ask --

19 MR. O'NEIL: Which has not been admitted into evidence.

20 THE COURT: Can you ask a few more questions, please,
21 and then we'll take a brief recess? Thank you.

22 (End of bench conference.)

23 BY MS. GLAVICH:

24 Q. So before we took our little break, you were talking about
25 the different categories. Can you tell me what those categories

1 were?

2 A. Yes. There was one category on excessive or undocumented
3 withdrawals of cash, another category of -- two categories,
4 actually -- one on employee expenses that were not documented.
5 Mr. Dawson, a defendant, is not technically an employee, but he
6 had expenses. So there's a separate category for that. There
7 is third-party reimbursements, which means a payment to an
8 outside vendor. Then there were other categories for credit
9 cards that were expenditures that were not documented that were
10 company credit cards, and then payments to credit cards that
11 were somebody else's credit card, not a company credit card.

12 Q. And all these categories are based on the general ledger?

13 A. Based on entries in the general ledger or information
14 gleaned from bank statements that were subpoenaed.

15 Q. And is it your opinion that the --

16 THE COURT: Let me ask you to rephrase your question,
17 please, so that it is not expressed in a leading form.

18 MS. GLAVICH: Yes, Your Honor.

19 BY MS. GLAVICH:

20 Q. What is your opinion regarding these categories of funds?

21 A. Well, I have a -- page 22 of my report, I have the numbers
22 identified as to the conclusions. I don't have that with me at
23 this time. I'd like to refer to that if you feel that's
24 appropriate.

25 MS. GLAVICH: Your Honor, may I provide the expert

1 report to refresh the witness's memory?

2 THE COURT: Perhaps this is a suitable time to take
3 our brief afternoon recess.

4 I will excuse you, members of the jury, for 15 minutes, and
5 we will continue thereafter. Thank you so much.

6 (Jury out at 3:05 p.m.)

7 THE COURT: Mr. Morrissey, you may step down and take
8 the 10 to 15 minutes.

9 THE WITNESS: Thank you.

10 THE COURT: Thank you.

11 (The witness exits the courtroom.)

12 THE COURT: Ms. Glavich.

13 MS. GLAVICH: What I'm trying to do, Your Honor, is
14 I'm not trying to pull the wool over anybody's eyes or surprise
15 them. What I'd like to do is to admit the exhibits to the
16 amended expert report which has been marked as an exhibit itself.

17 We had a discussion earlier which said the report itself is
18 not coming in, so I'm trying to figure out do I need to --
19 because the report itself is not coming in, do we just do
20 portions under that exhibit number, or would you like new
21 exhibit numbers for those tables?

22 THE COURT: What is the last exhibit number that you
23 used?

24 MS. GLAVICH: So we had 308 and 309 were the CV and
25 list of presentations, but those we're not going to use. So I

1 guess we would use 308 again, or we would use 310 if we use a
2 new number.

3 THE COURT: So am I correct that what you would like
4 to do is to mark the exhibits to the amended expert report
5 separately?

6 MS. GLAVICH: Yes.

7 THE COURT: Do you intend to move them into evidence?

8 MS. GLAVICH: Not the whole exhibit. There's some
9 that we -- I guess there are summary tables that we would like
10 to move into evidence.

11 THE COURT: Thank you, Ms. Glavich. Mr. O'Neil?

12 MR. O'NEIL: Your Honor, my understanding is that
13 you've ruled that the expert report is not admissible into
14 evidence. It doesn't make it any more admissible to pull single
15 pages out of it and put a new number on it.

16 THE COURT: Thank you, Mr. O'Neil.

17 Ms. Glavich, on what authority do you rely for the
18 proposition that, where the expert is here and has been permitted
19 to testify as to two of the three topics, that the report or
20 exhibits to it are independently admissible? Is there some
21 reason you can't simply ask him questions about what he did?

22 MS. GLAVICH: I can. I guess part of the thing is he
23 asked -- it's a lot of numbers is the big question, and he may
24 not remember all the particular numbers.

25 THE COURT: Can we not address that if that occurs?

1 In other words, if he says -- he, Mr. Morrissey, says as to any
2 question, "I don't remember," can you not show him the exhibit
3 to refresh his recollection?

4 MS. GLAVICH: I believe that's what we were doing just
5 as we took a break, that I would -- I wouldn't move the exhibit
6 to be entered into evidence, just to provide for him to refresh
7 his recollection.

8 THE COURT: Do we agree that the exhibits can be
9 utilized by Mr. Morrissey to refresh his recollection, if his
10 recollection is exhausted as to any matter, but that the
11 exhibits would not be admitted? Can we agree to that?

12 MR. O'NEIL: Yes, Your Honor. I think, as I stated
13 at the bench, I don't have an objection to their using
14 demonstrative exhibits. Of course, they've never shown any
15 of them to me or revealed what they planned to use, but my
16 objection that the documents not be admitted into evidence.
17 He can testify to them. If it makes the testimony go faster to
18 put the numbers in front of him, I have no objection to that as
19 a demonstrative exhibit, Your Honor.

20 THE COURT: And what is your position regarding the
21 admission of those items?

22 MR. O'NEIL: I don't think they should be admitted
23 into evidence.

24 THE COURT: So you would like, as Ms. Glavich would
25 like, for the exhibits to be made available to Mr. Morrissey so

1 that we will not have to go through the rubric of asking whether
2 there is something that would refresh his recollection?

3 MR. O'NEIL: Yes, Your Honor.

4 THE COURT: Very well. Let's do that.

5 Ms. Glavich, I believe they should be marked just so we
6 have a record of what is being displayed. So if you would
7 please remain and speak briefly with the deputy clerk so you
8 can do that, then we will continue.

9 MS. GLAVICH: Thank you.

10 THE COURT: The rest of you may take a few minutes,
11 and then we'll resume.

12 (Recess from 3:11 p.m. to 3:25 p.m.)

13 THE COURT: The deputy clerk of court has made a
14 suggestion. Because the amended expert report and exhibits now
15 appear on the list as Exhibit 300, we will collectively mark the
16 exhibits as 300.5, to use the convention that you offered
17 earlier, with the understanding that 300.5 will be available to
18 Mr. Morrissey so that it will not be necessary to offer selected
19 items to refresh his recollection should his recollection be
20 exhausted in any way. Is that acceptable to everyone?

21 Ms. Glavich?

22 MS. GLAVICH: Yes, Your Honor.

23 THE COURT: Mr. O'Neil?

24 MR. O'NEIL: Without objection, Your Honor.

25 THE COURT: Very well. Thank you.

1 Mr. Morrissey, you may come back to the witness stand and
2 have a seat. Thank you.

3 (The witness resumes the stand.)

4 (Deputy clerk conferring with the Court.)

5 THE COURT: Counsel, would the two of you take a
6 moment and speak with the deputy clerk, please?

7 (Counsel comply.)

8 THE COURT: An alternative, of course, is that we can
9 resume with the understanding that after the jury is excused for
10 the day, we will follow the deputy clerk's instructions so that
11 we don't unduly tax the jury's attention.

12 (Counsel conferring with deputy clerk.)

13 THE COURT: Are you able to determine, Mr. O'Neil,
14 what it is that Ms. Glavich is holding?

15 MR. O'NEIL: Yes. It's the amended expert report.

16 THE COURT: Where are the exhibits?

17 Very well. Would you separate the exhibits, please.

18 MS. GLAVICH: Your Honor, we're planning on using the
19 exhibits, but there's one table in the report itself that's a
20 summary that may be more -- it may be easier for Mr. Morrissey
21 to read off of instead of flipping through each exhibit, and if
22 it's just to refresh his recollection, then could we just admit
23 the whole thing -- not admit it, but just give him the whole
24 thing to review?

25 THE COURT: Is that without objection, Mr. O'Neil?

1 MR. O'NEIL: Without objection, Your Honor.

2 THE COURT: Very well. As I said, it would be
3 incumbent upon you, Ms. Glavich, to stay after we recess to
4 follow the deputy clerk's instructions.

5 MS. GLAVICH: Yes, Your Honor.

6 THE COURT: Very well. Ms. Lesley is going to escort
7 the jury back into the courtroom.

8 (Jury in at 3:332 p.m.)

9 THE COURT: Members of the jury, thank you very much.
10 Ms. Glavich.

11 MS. GLAVICH: Thank you, Your Honor.

12 BY MS. GLAVICH:

13 Q. Mr. Morrissey, before we took the break, we were talking
14 about the different categories, and I believe you said you
15 didn't have the report in front of you?

16 A. That's correct.

17 MS. GLAVICH: I'd like to provide the witness with
18 Plaintiff's Trial Exhibit 300 to refresh his recollection.
19 May I approach?

20 THE COURT: You may.

21 (Document tendered to witness.)

22 THE WITNESS: Thank you.

23 THE COURT: Members of the jury, the exhibit that was
24 just provided to Mr. Morrissey was provided largely for your
25 convenience. He will refer to it should it develop that there

1 are figures or other information that he does not immediately
2 recall with specificity and use it for -- use the report and
3 the exhibits for that purpose only. Your evaluation of his
4 testimony will be based on just that, the testimony from the
5 witness stand.

6 Now, please continue, Ms. Glavich.

7 MS. GLAVICH: Thank you, Your Honor.

8 BY MS. GLAVICH:

9 Q. Mr. Morrissey, is there a table in your expert report that
10 would refresh your recollection?

11 A. Yes. The table is on page 22. It's Table 5.

12 Q. Can you state the first category that you have listed there?

13 A. Yes. The first category is Insufficient Expense
14 Reimbursement Documentation, applicable to the staff and members
15 excluding Mr. Dawson.

16 Q. And what kind of expenses go in that category?

17 A. These are employee expenses, typically for travel, out-of-
18 pockets. Some were stated to be for an exam. Just various
19 expenses typically in the course of a business.

20 Q. And why is it called Insufficient Expense Reimbursement
21 Documentation?

22 A. It's insufficient because a payment was made or a
23 spreadsheet that indicated there were different line items
24 in it and there was not a receipt to support the payment.

25 Q. And did you look for a receipt?

1 A. I requested the receipt. Normally, it's an industry
2 practice that when there's a payment made, attached to that
3 are all the receipts for the employee connected to that expense
4 reimbursement; and in this case, the papers were missing.

5 Q. And what was the total amount that goes in that category?

6 A. \$176,809.

7 Q. And what does that number mean?

8 A. What that means is that the \$176,809 was paid to staff,
9 excluding Mr. Dawson, and that amount of money could have
10 remained in the bank account; and if it was in the bank account,
11 it could have been distributed eventually to the different
12 owners.

13 Q. And what is the second category?

14 A. The second category is Insufficient Expense Reimbursement
15 Documentation, and this applies to Mr. Dawson.

16 Q. So is this similar to the first category, just relating to
17 Mr. Dawson?

18 A. Yes, it is. Well, one is employees and staff, and the
19 second one is specifically for Mr. Dawson.

20 Q. And do you have any examples of what would fall in that
21 category?

22 A. Well, there were payments to a vendor, a payment to a
23 company like Stone. There was an expense related to patio
24 furniture, for example. Those are just line items that appear
25 from time to time. Parking fees.

1 Q. Was there an expense related to Tin Shop?

2 A. Yes. There was Tin Shop expenses, a couple of line items.
3 In fact, there was one for \$50,000. The Tin Shop payment was
4 made, and it wasn't -- there's no documentation for it, and it's
5 a related-party transaction.

6 Q. What is the total amount that is related to that category?

7 A. The total is \$171,453.

8 Q. And what does that amount represent?

9 A. That amount represents what was not ordinary and necessary
10 for the business, because it lacked documentation. The amount
11 could have stayed in the bank account, and if it were in the
12 bank account, eventually it would have been distributed to the
13 owners.

14 Q. What's the third category?

15 A. The third category is Improper Accounting for Cash
16 Withdrawals, and that amount is \$1,246,492. In this category,
17 we had -- or I found ATM withdrawals. The account was
18 identified as ATM, Automatic Teller Machine. And in the books,
19 there are perhaps a half a dozen entries that are correcting
20 errors or noting an unusual transaction.

21 The number of transactions here are several dozen that
22 exceed \$1.2 million, and it's not in the books. The information
23 was found by subpoenaing the bank statements. In the bank
24 statement, it would show, as an example, like an \$8,000 cash
25 withdrawal; but you go to the books and records, and there's no

1 record of the 8,000 coming out. Made a request for documentation
2 to support all of the ATM withdrawals, none was provided.

3 It's my understanding there was testimony that the money
4 was used for tips. However, when I did the on-site inspection,
5 we pulled, Cindy Vu and I, and we made copies of what's called
6 the End of Day Report. The End of Day Report lists the receipts
7 of the business from different categories: cash, Visa card,
8 Discover card, MasterCard, etc. And then there's a line item
9 that's called Net Cash, and that is the cash received minus the
10 tips that are paid out. So the Net Cash means the amount of
11 money after tips.

12 And in every case for the documents that we pulled, the End
13 of Day Reports, every one had a cash deposit being made, which
14 means that at no time was the money being used for paying a tip,
15 because there's sufficient tips coming in. And we made -- Cindy
16 Vu and I made as many copies of End of Day Reports as we could.
17 However, we were restricted to a day and a half on site, and we
18 pulled --

19 MR. O'NEIL: Objection, Your Honor.

20 THE COURT: Sustained.

21 BY MS. GLAVICH:

22 Q. So this would be a red flag for you?

23 A. A very big red flag. This is \$1.24 million that is not on
24 the books of the company, that could have stayed on the books
25 and could have been paid to the owners.

1 MR. O'NEIL: Objection, Your Honor.

2 THE COURT: Sustained. The answer is nonresponsive
3 and will be stricken.

4 BY MS. GLAVICH:

5 Q. Can we go to the fourth category? What is that?

6 A. Improper Documentation of Third-Party Disbursements.

7 Q. And what does that mean?

8 A. These are payments recorded in the books and records of
9 the company where a receipt or an invoice or some other piece
10 of paperwork would indicate that the expense is ordinary and
11 necessary for the business, and these were either lacking
12 documents completely or had some other piece of paper that
13 didn't speak to the issue of whether it's an ordinary or
14 necessary business expense.

15 Q. Do you have an example?

16 A. An example of this would be a payment to an employee --
17 rather, a contractor for installing a wall or something like
18 that. It would simply say the name of the contractor and the
19 total amount, but there's no statement as to what it was for.

20 Q. Why does that raise a red flag for you?

21 MR. O'NEIL: Objection.

22 THE COURT: Would you like to approach?

23 (Bench conference.)

24 MR. O'NEIL: I didn't hear him say it raised a red
25 flag. That's putting words in his mouth.

1 MS. GLAVICH: This is in his paper. These are terms
2 he uses in his experience, one of which is "raises a red flag."
3 He's already laid the foundation of what a "red flag" means.

4 THE COURT: Objection is sustained.

5 BY MS. GLAVICH:

6 Q. What's the total that you have associated with the
7 Improper Documentation of Third-Party Disbursements?

8 A. The total amount is \$3,128,502.

9 Q. And what does that number mean to you?

10 A. That number means that the payments made from the bank
11 account of \$3,128,502 was not supported because of the lack
12 of the existence of documentation. That would indicate,
13 essentially, that it was an expense that was not ordinary and
14 necessary for the business and that the amount could have
15 remained in the bank account, and, as such, eventually it could
16 have been distributed to the owners.

17 Q. And what is the fifth out of sixth category? We're almost
18 done.

19 A. Number 5 is Unsubstantiated Charges to LLC Credit Cards.
20 That means that these are credit cards under the name of the
21 company, and that's the purpose of that line item.

22 Q. And how do you determine which amounts should go in that
23 category?

24 A. Looked at the QuickBooks general ledger. The general
25 ledger identified payments made to credit card companies, and

1 then attempted to find or requested the supporting invoices
2 for the payment. The invoices were not made available, and
3 that indicated that it was an unsupported expense and that it
4 was not ordinary and necessary for the business.

5 Q. And what's the total that goes in that category?

6 A. The total is \$893,201.

7 Q. And the sixth category?

8 A. The sixth category is Unsubstantiated Payments to Non-LLC
9 Credit Cards. What this means is that the company made a
10 payment to a credit card, but the credit card was not in the
11 name of the company. It could have been to a person or some
12 other entity, but it wasn't the company's credit card. It was
13 some other person or business's credit card.

14 Q. Do you have any examples of what would fall under that
15 category?

16 A. Well, there were payments to an Amex credit card that
17 wasn't a company credit card, for example.

18 Q. Do you remember the amount of it?

19 A. I'd have to look it up in the report.

20 Q. What is the total that is associated with that sixth
21 category?

22 A. The last category is \$307,189.

23 Q. And what does that amount mean to you?

24 A. That represents an amount that is a payment made from the
25 company or a series of payments from a company, the payments did

1 not have an invoice or some other description connected to it,
2 and that would then indicate that it was not an ordinary and
3 necessary business expense.

4 Q. Do you have on that table a total of what those expenses
5 would be?

6 A. Yes. The total for the categories that I provided is
7 \$5,923,646.

8 Q. And that's money that should have been in the accounts of --

9 A. Should have been in the bank account, and it was paid to --
10 paid out of the bank account. And if it's in the bank account,
11 it could have been distributed to the owners.

12 Q. Now, as part of your report and your opinion, did you apply
13 a 26 and two-thirds percent share owned by Mr. Xereas to that
14 number?

15 A. Yes.

16 Q. And why did you do that?

17 A. Mr. Xereas owns 26.67, or 26 and two-thirds, percentage
18 of the ownership, and under the operating agreement he would be
19 entitled to receive that percentage of the distributions, which
20 is cash coming out of the business.

21 Q. So, earlier, when you were talking about that's money that
22 should have been in the accounts for each --

23 THE COURT: I ask you to ask a non-leading question,
24 please.

25 MS. GLAVICH: Sure.

1 BY MS. GLAVICH:

2 Q. Earlier, when you were describing each of the totals
3 associated with each category, you had -- and correct me if
4 I'm wrong -- you had stated that it's money that should have
5 belonged to the company and would have been -- perhaps would
6 have been sent to owners. Would Mr. Xereas be considered an
7 owner in your evaluation?

8 A. Yes.

9 Q. And what is that 26 and two-thirds percent of the
10 \$5,923,646?

11 A. The 26.67, or 26 and two-thirds, percentage of the total
12 is \$1,579,836.

13 Q. I'd like to shift gears a little bit and talk about in
14 your report you also provide an opinion on valuation of an
15 individual's -- or valuation of shares in the business. Correct?

16 A. Yes. There is a valuation I performed of Mr. Xereas's
17 26.67 percent interest.

18 Q. And what was your opinion of that?

19 A. May I refer to the exhibit?

20 Q. Yes.

21 (Witness reviewing document.)

22 A. There were two numbers. One was based on 4 million in
23 sales, and another one was based on 7 million in sales. The
24 4 million in sales total value was \$380,000, and the 7 million
25 in sales was \$800,000, and that's after consideration of a debt

1 that was due. However, in this case we're identifying that the
2 debt wasn't necessary. So that was \$710,000 of unnecessary debt.

3 Q. And why do you have two different numbers?

4 A. Because I found two different indicators of sales. The
5 first indicator, which is the 4 million number, was a rough
6 approximation of the last several years of sales. I didn't see
7 a trend. Some years were up a little bit, some were down, and
8 on a forward-looking basis, 4 million was an appropriate
9 expectation of an investor as average expected sales in the
10 future.

11 Q. And the 7 million?

12 A. The \$7 million came from an insurance record. In the
13 course of copying documents that existed, when I completed the
14 on-site inspection and data gathering, I found a folder inside
15 that was identified as a company called Weaver Bros., which is
16 an insurance brokerage firm. Inside of that, there was a work
17 paper that identified different bars or venues owned by
18 Mr. Dawson, and at the bottom of the sheet, it had Penn Social
19 and had \$8 million in sales next to it.

20 So this is a piece of paper that was submitted for --
21 rather 7 million, I'm sorry -- 7 million on the paper. And the
22 document was submitted to the insurance company for rates or for
23 paying bills, etc., and I saw no correspondence that corrected
24 it or -- you know, we made a mistake, we got overcharged, can
25 you give us a refund. Nothing to indicate that the \$7 million

1 was wrong.

2 Secondly, in the business plan that was used to find
3 investors, the \$7 million approximated the high range of
4 expected sales, and the \$4 million was close to the bottom range
5 of sales. So I had multiple indicators that the 7 was -- could
6 be relied upon as an indicator. I found no other work papers
7 after that. I just found this one.

8 Q. So I'm going to take a step back for a moment, and can
9 you tell us how a valuation of ownership of shares occurs?

10 A. Yes. The typical process is to visit the company, to
11 interview management, to collect information on the history and
12 background of the company, look at the financial statements and
13 the tax returns, and you try to determine what was a reasonable
14 expectation of an investor as to sales and earnings of the
15 business. We'd also look at -- I would look at assets as well.
16 So those are the big three considerations.

17 In this matter, there is a lot of questions about expenses,
18 as I explained a few minutes ago. So rather than look at it
19 from a sales minus expenses, I had to look at it from a sales
20 level because the other information was not sufficient, and it
21 was actually inconsistent. So I moved to a sales analysis.

22 Q. Is the sales analysis a method that is regularly used in
23 the industry?

24 A. Yes. It is regularly used. There's valuation multiples
25 maintained on that, transaction databases that identify the

1 relationship between a sale of a company, its sales, and the
2 sale price of the business.

3 Q. Did you say "transaction database"?

4 A. Yes. I can purchase access to a database of transactions
5 of restaurants and bars and identify of that collection, which
6 could be several hundred, which ones are most meaningful for the
7 subject company.

8 So we would look at the size of sales, because a company
9 with \$200,000 in sales would have a very different cost
10 structure than one with \$20 million, for example. So in this
11 case, we have 4 million and 7 million in sales, just looking at
12 sales, let's say, between 5 and 10 million, that would eliminate
13 almost two-thirds of the transactions.

14 So you try to narrow it down by the type of business,
15 the size of it, the location, because the cost structure in
16 California is different than it is on the East Coast. So you'd
17 eliminate by state. Wisconsin has a different cost structure
18 than here.

19 Q. So that's what you would do in general, and is that what
20 you did in this case?

21 A. In general and in this case. The facts to consider would
22 be different, but the questions raised would be almost identical.

23 Q. What is the purpose of these types of valuations?

24 A. The purpose of this would be if someone were to buy the
25 entire business or buy an interest in the business which is less

1 than the whole, 10 percent of the stock or member interest or
2 ownership, whatever expression you want to use, it could be a
3 partnership, the entity structure usually doesn't have much of a
4 bearing on the value. There's some issues as to whether it's a
5 C Corporation or an S Corporation in taxes, but those are a few
6 percentage points, not major.

7 Q. So in your experience doing business valuations, these
8 types of valuations of ownership of shares, are they used --
9 how are they used in your experience?

10 A. In my experience, they would be used to buy or sell that
11 interest that could be used for estate-tax planning purposes,
12 a divorce settlement. There's a number of purposes that the
13 analysis serves.

14 Q. And so you had mentioned that you relied on the sales
15 number, the 4 million and the 7 million. What else did you
16 rely on to get your determination?

17 A. Well, in addition to the sales, the next factor identified
18 was cash that was on hand at the business. I added that back
19 and then subtracted off interest-bearing debt, and the interest-
20 bearing debt amount was \$710,000.

21 Q. And is that the standard practice when doing these types
22 of valuations?

23 A. It is the standard for the valuation given the multiple
24 that I had. The multiple was based on invested capital, which
25 is the equity of the business plus the debt, because if a new

1 owner were to buy the business, the debt would change.

2 So one of the things we do to eliminate the complexity of
3 figuring out the differences in debt, we simply add the debt to
4 the equity, and that simplifies the analysis in the value of the
5 business: what was the price to that relative to sales. So that
6 would have been standard for that valuation multiple.

7 Q. Did you rely on anything else to get to your valuation?

8 A. Well, the other things were the percentage ownership, the
9 operating agreement, if there's restrictions. This is a 26
10 percent interest, 26 and two-thirds percent interest, and the
11 exercise is that there are multiple -- let's not use multiple.
12 There are several different valuation percentages to sales for
13 this. The one I selected was 53 percent, and there's a range of
14 those, from lower numbers to higher numbers.

15 Because of the size of the company, the growth pattern,
16 I was in the middle to upper range but not at the top of the
17 range. Because the business grew rapidly, it had very good
18 margins. It didn't have the best margins, didn't have the
19 highest growth, so I can't use the high multiple. I have to
20 use something away from the high multiple, but clearly higher
21 than the median or the middle number.

22 Q. And you mentioned something earlier about this included
23 debt that shouldn't be there? Sorry if I'm mischaracterizing.

24 A. Yes. When this report was prepared, it was prepared prior
25 to pulling the documentation from the on-site visit. So at that

1 time, I didn't know that it was possible to have excess debt on
2 the books of the company. At that time, the debt was identified
3 as \$710,000, and I subtracted it because I thought at that time
4 it was a valid debt.

5 Q. So if that's not a valid debt, then that \$380,000 or
6 \$800,000 number would be slightly higher?

7 A. Yes, it would be.

8 Q. Do you have a calculation for that?

9 A. I have a calculator. I didn't do the calculation. This
10 was a -- this was presented earlier, and it was included as an
11 exhibit. That's why. I mean, I could do the math if you want.

12 MS. GLAVICH: I have no further questions at this
13 time, Your Honor.

14 THE COURT: Thank you very much, Ms. Glavich.

15 Mr. O'Neil, you may cross-examine.

16 MR. O'NEIL: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. O'NEIL:

19 Q. Mr. Morrissey, good afternoon.

20 A. Good afternoon, Mr. O'Neil.

21 Q. I just have a few questions for you.

22 A. Certainly.

23 Q. Let's start with what you were just talking about,
24 the valuation of the company. So, as I understand it, your
25 valuation of Mr. Xereas's shares of 26 percent of the company

1 would be between \$380,000 and \$800,000. Is that correct?

2 A. Right. That's correct.

3 Q. What was the value of the company at the end of January
4 2012 when he walked out?

5 MS. MCDONALD: Objection, Your Honor.

6 THE COURT: Is there an objection?

7 MS. MCDONALD: Yes, Your Honor.

8 THE COURT: You may approach.

9 (Bench conference.)

10 THE COURT: What is the objection?

11 MS. GLAVICH: Your Honor, the statement that the
12 defendant walked out assumes facts not in evidence. There's
13 no foundation for that statement.

14 THE COURT: Didn't the plaintiff say he walked out
15 after the events of, let's say January 17th, and not return
16 until the 19th?

17 MS. GLAVICH: I believe he left for a day or a day
18 and a half. He didn't abandon the club as implied.

19 THE COURT: I believe that's a question for the jury.
20 The Court will overrule the objection.

21 (End of bench conference.)

22 THE COURT: The objection is overruled.

23 BY MR. O'NEIL:

24 Q. Do you have a valuation of the company at the end of
25 January 2012 when Mr. Xereas walked out?

1 A. No.

2 Q. And if that company, in January of 2012, in the first --
3 since August, six months of its operation, had only broken even
4 in two of those months and in total was in the red, how would
5 you value a company in that situation?

6 A. Well, I would -- given what I know right now, I would try
7 to find to what extent the excess expenditures should be added
8 back to the losses to identify what the amount of money was the
9 company was really making.

10 Q. And so these so-called excess expenditures, the ones that
11 you've detailed here, go through 2015. Correct?

12 A. They go through 2016.

13 Q. 2016? So those are five, six years of data, and so
14 they're not exactly applicable to the only one year of data in
15 two thousand -- well, part of 2010 and 2011. Am I correct?

16 A. It could be partially applicable. We would have to go
17 through the data and tie it back.

18 Q. Would you agree with me that the value of the company in
19 January 2012, after it hadn't made a profit during its entire
20 period of operations, was significantly less than the value
21 you've stated?

22 MS. MCDONALD: Objection, Your Honor.

23 THE COURT: Overruled.

24 THE WITNESS: I am saying that I do not know if
25 the company made money or lost money because of the excess

1 expenditures and undocumented cash withdrawals, so I can't
2 answer that question. You're assuming that it's a loss that
3 I'd have to do the analysis, so I can't answer your question
4 as it's stated.

5 BY MR. O'NEIL:

6 Q. And your value of the company was as of 2016?

7 A. Let me just confirm that.

8 (Witness reviewing document.)

9 The answer is not where I typically put it, so I have to
10 look here. This was the time frame, was 2014.

11 Q. 2014. So between January 2012 and 2014, when you valued
12 the company, Mr. Xereas wasn't working there. Is that correct?

13 Is that your understanding?

14 A. That is my understanding.

15 Q. That he was barely working at all. Is that also your
16 understanding?

17 MS. MCDONALD: Objection, Your Honor. May we approach?

18 THE COURT: Yes.

19 (Bench conference.)

20 MS. MCDONALD: I don't believe this witness has any
21 basis to know how much Mr. Xereas was working, and I disagree
22 with Mr. O'Neil's characterization of Mr. Xereas on his work
23 history.

24 MR. O'NEIL: I believe that's what he testified to,
25 Your Honor.

1 MS. MCDONALD: He wasn't here for that testimony.
2 He would have no basis to perform an expert analysis.

3 MR. O'NEIL: I wasn't asking this witness how much
4 Mr. Xereas had been working.

5 MS. MCDONALD: That's exactly your question.

6 THE COURT: The objection's overruled.

7 (End of bench conference.)

8 BY MR. O'NEIL:

9 Q. My question was Mr. Xereas, from 2012 to 2014, when you
10 valued the company at between \$380,000 and \$800,000, has done
11 pretty well for himself, hasn't he?

12 A. I can't answer that question the way it's stated.

13 Q. Okay. Well, he wasn't working for the club. Correct?

14 A. That is correct.

15 Q. So I guess I should say Mr. Dawson has done pretty well
16 for Mr. Xereas. Do you agree with that statement?

17 A. He made an investment in the company, so he put in money.
18 He gave him a 26.67 interest --

19 THE COURT: May I ask you, before you continue, to
20 identify more specifically the pronouns that you just used?
21 For example, "he."

22 THE WITNESS: Mr. Xereas made an investment in
23 the business, which then translated into a 26 and two-thirds
24 percentage interest in it. It's an investment in the business.
25

1 BY MR. O'NEIL:

2 Q. In your valuation of the company, that's not reflected
3 in any of the damages that you've calculated in this case.
4 Is that correct?

5 A. That's correct.

6 Q. I'd like to turn to those numbers now, if I could.
7 The first two categories you said were insufficient expense
8 reimbursement documentation, and you mentioned a couple of large
9 items, but you also mentioned some items like people getting
10 their parking fees reimbursed. Do you recall that?

11 A. Yes.

12 Q. And there were a substantial number of parking expenses
13 in Mr. Dawson's record of unsubstantiated expenses. Is that
14 correct?

15 A. Correct.

16 Q. And what type of documentation would a parking meter
17 provide you that would satisfy your test to establish that
18 the parking was related to the work at Riot Act?

19 A. Typically, there's a little slip of paper, and on the back
20 of the paper you'd put down your business purpose. You know,
21 meeting with so-and-so to discuss so-and-so.

22 Q. Have you ever parked at a parking meter in Washington?

23 A. If that piece of paper does not exist, you can write a note
24 and say, I was parked there for so many hours, I had a meeting
25 with a certain person, and we discussed this business purpose.

1 And that analysis is also done with a luncheon meeting or some
2 other expenditure, what's the business purpose.

3 Q. Would you agree with me, in the normal standard business
4 practices at most companies, if you submit an expense for
5 parking and you say it was parking and the company is satisfied
6 with that, that that can be a legitimate expense?

7 A. The issue is, is it ordinary and necessary for the
8 business, trying to determine that. Typically, that answer is
9 on the back of the slip or somewhere, "meeting with so-and-so."

10 Q. It could also be the decision of the person making the
11 expense reimbursement that it's a legitimate expense?

12 A. That would be typically acceptable, but we have an issue
13 here between two owners of what is ordinary and necessary, and
14 lacking documentation would indicate that it's not an ordinary
15 and necessary expense. There's nothing to speak to that issue.

16 Q. Lacking a certain specific type of documentation that
17 you're requiring. Correct?

18 A. It's the industry practice to demonstrate that the expense
19 was ordinary and necessary. No paperwork is not consistent with
20 that standard.

21 Q. You stated a couple times there was no paperwork. Isn't
22 it more accurate to say that you didn't find the paperwork?

23 A. It is the responsibility of management to provide the
24 documentation or to make sure the documentation exists.

25 THE COURT: The Court will strike that response as

1 nonresponsive. Please repeat your question, Mr. O'Neil.

2 MR. O'NEIL: I'm sorry. Can I ask the court reporter
3 to repeat? I wouldn't want to rephrase it incorrectly.

4 THE REPORTER: "Question: You stated a couple times
5 there was no paperwork. Isn't it more accurate to say that you
6 didn't find the paperwork?"

7 THE WITNESS: I did not find the paperwork.
8 I requested it, and it was not provided.

9 BY MR. O'NEIL:

10 Q. You requested it in the course of this litigation. This
11 wasn't an audit team that was hired by Penn Social to come in,
12 do an audit, look through the books, talk to the people who were
13 involved in the expenses. This was all done through litigation.
14 Is that correct?

15 A. Correct.

16 Q. Would you say that's an ideal format for doing an audit
17 of a company?

18 A. Is your question: Is there better ways of doing it?

19 Q. I'll withdraw the question. So you would have to make a
20 request to Mr. Xereas's lawyers, and Mr. Xereas's lawyers would
21 have to make a request to Mr. Dawson's lawyers, and then
22 Mr. Dawson's lawyers would have to makes a request to the
23 company. Correct?

24 A. That's my understanding.

25 Q. And it's possible that at every step of that way, the

1 parties could disagree or fight.

2 A. That's a possibility. That's correct.

3 MS. MCDONALD: Objection, Your Honor.

4 THE COURT: You may approach.

5 (Bench conference.)

6 THE COURT: Is the objection on relevance grounds?

7 MS. MCDONALD: Relevance and lack of foundation,
8 Your Honor.

9 THE COURT: The objection's overruled.

10 (End of bench conference.)

11 BY MR. O'NEIL:

12 Q. You can answer the question. It's possible that the
13 parties could disagree during the litigation about requests
14 that were made, whether answers to requests were sufficient.
15 Is that correct?

16 A. Yes.

17 Q. Do you know if Mr. Xereas's lawyers ever filed, for
18 example, a motion to compel against the defendants in this
19 case to obtain more documents?

20 A. That's a technical term. I'm not familiar with the term.

21 Q. So you're not familiar that that occurred in this case.

22 A. I explained to counsel that information or documentation
23 did not exist on certain items. I provided a list of those
24 items. It's my understanding that that information was passed
25 on, essentially, through your offices.

1 Q. Okay. I wanted to talk a little bit about the cash
2 withdrawals. You recall your testimony on that?

3 A. Yes.

4 Q. You said there was \$1.2 million in undocumented cash
5 withdrawals. Is that correct?

6 A. Yes.

7 Q. Were you aware when you wrote your study that there were
8 two ATMs at Penn Social?

9 A. I didn't know that there were two ATMs.

10 MS. MCDONALD: Objection, Your Honor. There's no
11 foundation for this.

12 THE COURT: The objection's overruled.

13 THE WITNESS: There was one bank account we found.
14 Maybe there were two bank accounts and I didn't find the second
15 bank account. I don't know.

16 BY MR. O'NEIL:

17 Q. The bank account labeled "ATM Account"?

18 A. Yes.

19 Q. And did a substantial number of these undocumented cash
20 withdrawals come from that account?

21 A. Yes.

22 Q. And do you know whether it's common in business for a
23 business that has an ATM on its premises to set up a separate
24 account at the bank so that they can load cash into the ATM?

25 A. Yes.

1 Q. And as the customers at the store or at the bar use
2 the ATM, money flows back into that account. Correct?

3 A. Yes.

4 Q. Did you balance out the flows back into the account from
5 the flows out?

6 A. There was no document -- there was journal entries in the
7 books and records, and the withdrawals were not on the accounting
8 books and records. The balances shown in the accounting records
9 were inconsistent with the bank statements.

10 Q. I want to turn briefly to the Improper Documentation of
11 Third-Party Disbursements. That was one of your categories.
12 Correct?

13 A. Yes.

14 Q. And I believe in your report, you've identified through the
15 company's QuickBooks accounts various vendors, as you labeled
16 them, who you said payments were made to these vendors but that
17 the supporting documentation was insufficient.

18 A. Or nonexistent. Most of them were nonexistent.

19 Q. You didn't see them?

20 A. I did not see them.

21 Q. You can't offer an opinion as to whether they exist or not.
22 You just didn't see them.

23 A. I made a request for them, and I did not see them as a
24 result of the request.

25 Q. And one of the -- some of the companies that were

1 identified in your report were 3DG Architecture, \$67,000 in
2 payments to that company. Do you recall that?

3 A. May I refresh my memory on this?

4 Q. Sure. Sure. It's Exhibit 5-1.

5 A. Thank you. (Witness reviewing document.)

6 Yes. I found it.

7 Q. What inquiries did you make to determine whether the
8 company had hired 3DG Architecture?

9 A. I didn't make an inquiry. I requested that the invoices
10 for these payments be provided.

11 Q. And you didn't see them.

12 A. That is correct.

13 Q. So you didn't make a determination that in fact they didn't
14 hire 3DG Architecture?

15 A. I don't know about that. I did not see documentation to
16 indicate whether they hired them or not.

17 Q. Another company that you identified was Adams-Burch.

18 A. Yes.

19 Q. And they seem to be selling cups, glassware -- mostly
20 glassware, it appears.

21 A. That's my understanding.

22 Q. Are you familiar with that company?

23 A. Yes.

24 Q. It's a supplier to restaurants and bars?

25 A. Yes, I am.

1 Q. So you wouldn't conclude that it's unusual for a bar
2 to have orders from a vendor that services bars. Correct?

3 A. That is correct. Adams-Burch would be an expected or an
4 acceptable vendor.

5 Q. And if Adams-Burch came into this courtroom and said that
6 all \$153 --

7 MS. MCDONALD: Objection, Your Honor.

8 MR. O'NEIL: It's a hypothetical, Your Honor.

9 THE COURT: Overruled.

10 MS. MCDONALD: May I approach, Your Honor?

11 THE COURT: Yes.

12 (Bench conference.)

13 MS. MCDONALD: Your Honor, Mr. O'Neil is offering
14 hearsay.

15 MR. O'NEIL: I haven't offered any --

16 THE COURT: He has not offered hearsay.

17 MS. MCDONALD: He's testifying as to what --

18 THE COURT: He is not testifying. He's asking a
19 hypothetical question.

20 MS. MCDONALD: And there's no foundation for this
21 question.

22 MR. O'NEIL: Well, we all know that's not true.

23 THE COURT: The objection is overruled.

24 (End of bench conference.)
25

1 BY MR. O'NEIL:

2 Q. Mr. Morrissey, if an employee from Adams-Burch came in and
3 told the jury that all the money that you've identified that's
4 undocumented were in fact orders that were placed by Penn
5 Social, deliveries made by Adams-Burch, and payments made by
6 Penn Social to Adams-Burch for those orders, would that be
7 acceptable for you to conclude those are legitimate expenses?

8 A. No, because I would have to look at the documentation and
9 determine that myself.

10 Q. So the person's review of their documentation isn't
11 sufficient. It has to pass this test that you constructed for
12 this purpose, and it has to have this specific documentation
13 that says this specific thing. Otherwise, it's money out the
14 door. Is that right?

15 A. I'm not saying that. I'm saying that for me to determine
16 if the \$153,408 was ordinary and necessary, I'd want to see
17 the invoices. I don't think it's unreasonable to look at the
18 invoices.

19 Q. You're saying it's a loss to the company, and you're giving
20 26.67 percent of that money to Mr. Xereas because it doesn't
21 pass your test, not whether, in the real world, it's a real
22 expense incurred by the company and paid. Isn't that accurate?

23 A. In the real world of the industry, the standard expectation
24 or requirement for making payments, you should have an invoice
25 to back up the payment. Having someone come here and say, yes,

1 it's okay, I'd like to see how -- I don't know the nature of
2 the examination that they did. How did they arrive at the
3 conclusion? Could I see their work papers? Could I see their
4 report?

5 Q. And you didn't do any of that as part of this report.
6 Correct?

7 A. It hasn't been presented. I don't think they even did an
8 order. I saw a letter --

9 Q. You never did talk to anyone at Adams-Burch to find out if
10 those expenses were legitimate or not.

11 A. I did not. I made a request through management.

12 Q. So, in fact, you didn't even make a determination that
13 the expenses aren't legitimate. They're just not supported.
14 Is that correct?

15 A. You got the thing backwards. Because they're not supported,
16 they're not ordinary and necessary. One, you gotta get the
17 order right.

18 Q. Well, there are multiple other vendors on this list of what
19 you've determined or what you've labeled Unsupported Third-Party
20 Disbursements: Chef's Warehouse, Dish Network, District Trivia,
21 District Karaoke, Ecolab. You didn't talk to any of these
22 vendors to determine whether the expenses shown on this report
23 are legitimate or not. Isn't that correct?

24 A. I did not talk to the vendors. I made the information
25 request to management.

1 Q. So it's entirely possible that all of the expenses, all
2 \$3.128 million, were legitimate business expenses incurred by
3 Penn Social during the course of their business. You're not
4 here telling us that they aren't legitimate; you're just saying
5 they're not documented.

6 A. I am saying that it is not documented; this does not meet
7 the industry standard for an ordinary and necessary business
8 expense. All they gotta do is send us the invoices, and I'll
9 take a look at them. It's that simple.

10 MR. O'NEIL: Nothing further, Your Honor.

11 THE COURT: Thank you, Mr. O'Neil.

12 Ms. Glavich, do you have redirect?

13 MS. GLAVICH: Just a few questions.

14 THE COURT: Yes. Please proceed.

15 REDIRECT EXAMINATION

16 BY MS. GLAVICH:

17 Q. Mr. Morrissey, did defendants' counsel today show you any
18 invoices?

19 A. Not today.

20 Q. And defendants' counsel also took your deposition after
21 they received your report. Correct?

22 A. That is correct.

23 Q. Did they show you any invoices during your deposition?

24 A. I don't recall any new invoices being presented at that time.

25 Q. Mr. Morrissey, were you aware that in counsel's back-

1 and-forth, there were deficiency letters sent about defendants'
2 productions?

3 MR. O'NEIL: Objection.

4 THE COURT: Sustained.

5 BY MS. GLAVICH:

6 Q. In your experience doing business valuations and accounting,
7 is it standard practice to have statements in place of invoices?

8 A. No, because the statement doesn't show that it's an
9 ordinary and necessary expense. You don't know what line item,
10 the quantity. You can't make that determination.

11 Q. And, again, when you're saying standard industry practice,
12 what is that based on?

13 A. It is typically based on an IRS expression, which is
14 "ordinary and necessary," and it's been melded into the
15 operating policies of businesses; and that applies to auditing,
16 financial statements, and just general business analysis.

17 Q. Turning to the valuation section of the shares, is there a
18 reason why you chose 2014?

19 A. I chose that year because I had two sales numbers. I had
20 a \$7 million sales amount, and I developed the \$4 million sales
21 amount. The other years I didn't -- I was not able to find the
22 insurance worksheet for subsequent years. And I understand that
23 counsel made a request for that information to the management.

24 MR. O'NEIL: Objection, Your Honor.

25 THE COURT: Sustained.

1 BY MS. GLAVICH:

2 Q. Is it your understanding that Mr. Xereas is still an owner
3 of 26 and two-thirds percent?

4 A. Yes.

5 MS. GLAVICH: No further questions, Your Honor.

6 THE COURT: Thank you very much, Ms. Glavich.

7 Mr. Morrissey, thank you very much. You may step down,
8 sir, and you are excused.

9 THE WITNESS: Thank you, Your Honor.

10 (The witness steps down.)

11 THE COURT: Counsel, may I ask you to approach,
12 please, regarding our schedule.

13 (Bench conference.)

14 THE COURT: Thank you. Who will be the plaintiff's
15 next witness?

16 MR. RICHA: Can we have a few moments? We need to
17 confer about a couple of issues. I think we're going to -- for
18 sure we're going to reserve Mr. Hawkins, and some other
19 witnesses, we're not calling them. Farfel is already off our
20 call list.

21 THE COURT: Mr. Richa, when you say you will reserve
22 Mr. Hawkins, what do you mean?

23 MR. RICHA: I mean that, depending on the testimony
24 they elicit in their case-in-chief, we may call --

25 THE COURT: Does that mean you're resting?

1 MR. RICHA: Once we make sure we've got all our
2 exhibits in, yes.

3 (End of bench conference.)

4 THE COURT: Members of the jury, while I have a brief
5 discussion with counsel concerning our schedule, I will excuse
6 you to go to the jury room. I don't think we'll be very long as
7 part of this discussion, and the likelihood is I will excuse you
8 after a few minutes. Thank you.

9 (Jury out at 4:32 p.m.)

10 THE COURT: Thank you. You may take a moment to
11 confer. I'm not sure there's any meaningful testimony you can
12 take in the next few minutes. Perhaps this is a good time to
13 excuse the jury for the day while you remain and speak with
14 Ms. Lesley with about the exhibits.

15 MR. RICHA: May we have just a few minutes,
16 Your Honor, to talk it over?

17 THE COURT: Yes. Of course.

18 (Counsel conferring.)

19 THE COURT: Mr. Richa? My question really is whether
20 the plaintiff intends to call other witnesses. I note that on
21 the list of witnesses, there are two individuals you have not
22 called who you said you may call depending on the Court's ruling
23 on the motion *in limine*. Those two are Cindy Vaughn and Sharon
24 Thompson.

25 MR. RICHA: We're not calling them.

1 THE COURT: Do you intend to call them?

2 MR. RICHA: No.

3 THE COURT: So that is your decision, to withdraw them?

4 MR. RICHA: Correct, Your Honor.

5 THE COURT: Does that mean that the plaintiff rests?

6 MR. RICHA: We have a question for you, Your Honor.

7 During --

8 THE COURT: I'm sorry. I see the name Terrence
9 Hawkins also.

10 MR. RICHA: Right. So Terrence Hawkins and Mick
11 Aldasani we wanted to reserve for rebuttal witnesses depending
12 on their case-in-chief.

13 THE COURT: You do not intend to call Mr. Hawkins now?

14 MR. RICHA: No, Your Honor.

15 THE COURT: Okay. Does that mean, then, that
16 plaintiff rests?

17 MR. RICHA: One question for you before we get to that
18 point, if I may?

19 THE COURT: Yes.

20 MR. RICHA: Mr. O'Neil, in his cross of Mr. Morrissey,
21 was asking questions regarding documents and whether documents
22 were provided and how they were obtained and so on and so forth.

23 In the direct examination of Mr. Xereas, I had attempted to
24 solicit some testimony regarding his five-year quest to try to
25 obtain financial records from the defendants to which they

1 refused to provide documents; finally they provided documents.
2 This was an issue that was brought to your attention earlier.
3 At that point, you had requested that I don't ask Mr. Xereas
4 that line of questioning.

5 Now, at this point, would you like us to recall Mr. Xereas
6 so that I can obtain some testimony from him that addresses some
7 of the points made by --

8 THE COURT: What is it that you intend to ask?

9 MR. RICHA: Ask him about all the requests that he
10 made to the company for records, the denial of those records.
11 He made requests in writing, he made requests verbally, he made
12 requests through us, this team of attorneys, he made requests
13 through a previous team of attorneys, and multiple deficiency
14 letters were sent to defendants' counsel where items were
15 specifically listed and itemized. Those letters were ignored.

16 At times, they would provide productions -- buckets of
17 productions. We had to issue countless third-party subpoenas
18 to financial institutions to obtain those records, and we did
19 everything we could to obtain those records given the fact that
20 defendants refused to provide all of the records that they were
21 legally required --

22 THE COURT: To what period of time do you refer?

23 MR. RICHA: What period of time that we were
24 requesting the records?

25 THE COURT: And what records? Let me interrupt before

1 you answer. I believe we should bring the jury in and excuse
2 the jury for today.

3 MR. RICHA: Sure, Your Honor.

4 THE COURT: We will all take a brief recess. I need
5 not advise them this evening that it may be the case that the
6 plaintiff rests, since right now there's a pending request to
7 recall Mr. Xereas and I have not ruled on it. I will simply
8 excuse them.

9 MR. RICHA: Understood.

10 THE COURT: Does that meet with everyone's agreement?

11 MR. RICHA: Yes, Your Honor.

12 THE COURT: Very well. Thank you.

13 (Jury in at 4:42 p.m.)

14 THE COURT: Members of the jury, thank you very much.
15 We are going to excuse you for the evening at this point. I
16 will ask you to please be here by 9:20 so we can begin promptly
17 at 9:30. Everyone have a good evening.

18 I will ask you to bear in mind that during the recess you
19 are not to discuss the case with anyone or permit anyone to
20 discuss it with you. Thank you so much.

21 (Jury out at 4:43 p.m.)

22 THE COURT: Now, Mr. Richa, we can take a few minutes
23 so you can state more specifically what it is you wish to ask
24 Mr. Xereas.

25 MR. RICHA: So, in answer to your question about when

1 he first requested the records, it was September of 2011, which
2 was one month after the doors opened on the club. So the
3 testimony I was initially attempting to elicit was all the
4 requests that he made for the documents, the fact that the
5 defendants did not provide those documents, the fact that those
6 documents were requested through multiple law firms, they were
7 never provided by the defendants, and we eventually were forced
8 to issue third-party subpoenas to obtain the documents that we
9 could, but of course we can't issue third-party subpoenas to
10 every vendor of a business this size.

11 THE COURT: Are you suggesting that Mr. Xereas made
12 the request himself or that the request was made through counsel?

13 MR. RICHA: Both, Your Honor.

14 THE COURT: Mr. O'Neil?

15 MR. O'NEIL: Your Honor, I think earlier in the case
16 there was an objection -- well, I don't recall if there was an
17 objection or not, but if there was discussion about documents,
18 I believe it related to one of the causes of action pled by
19 Mr. Xereas for which judgment was granted in the summary
20 judgment/dismissal order about the duties of the corporation to
21 provide documents per his request.

22 I don't think that relates in any way to my correcting
23 their expert witness who kept saying documents don't exist when
24 in reality he just didn't know. He hadn't seen them or didn't
25 know they existed. So it's a very different point.

1 Any requests that were made during the course of this
2 litigation and that were subject to motions practice has all
3 been resolved, and the time to resolve those has passed long
4 ago, Your Honor. So if we're bringing discovery disputes into
5 a jury trial, I think that's highly inappropriate.

6 THE COURT: Thank you, Mr. O'Neil. Mr. Richa.

7 MR. RICHA: It's not just a discovery dispute,
8 Your Honor. He's an owner -- was and is an owner of the
9 company; and he's entitled to those books and records, and he
10 requested those books and records multiple times.

11 THE COURT: To what extent does Mr. Xereas' request
12 for books and records relate to a claim which is no longer in
13 the case?

14 MR. RICHA: It relates to Mr. O'Neil's point on
15 cross-examination that the invoices were not found or were
16 not attempted to be located. We did everything we could do
17 to obtain those documents. Mr. Xereas has done everything he
18 could possibly do to obtain those documents.

19 THE COURT: Okay. My question was to what extent must
20 the Court find that the allegations that Mr. Xereas requested
21 books and records relates to a claim which is no longer in the
22 case.

23 MR. RICHA: Well, it relates to the breach of contract
24 claim, which is a part of the case because the operating agreement
25 requires them to provide books and records to all members of the

1 LLC.

2 THE COURT: Where in Count V, which is the breach of
3 contract claim, it does such an allegation appear?

4 MR. RICHA: I believe there is a reference in the
5 complaint to section -- I believe it's 8.1 of the operating
6 agreement, which is the duty for the company to provide --

7 THE COURT: Speaking of Count V, which is the breach
8 of contract claim.

9 MR. RICHA: Right. I'm referencing where in the
10 operating agreement the clause is. I don't have the complaint
11 in front of me, but I believe there's a reference to -- I know
12 for a fact there's a reference to Section 8.1, which is rights
13 to books and records, and our breach of contract claim is still
14 in this case. I can cite to it if you give me a moment. But we
15 state explicitly in the complaint, Your Honor, that defendants
16 violated Section 8.1 by not allowing Mr. Xereas access to those
17 books and records, and that's a strict breach of contract.

18 THE COURT: My question to you is whether it is true
19 that the allegation related to a count that is no longer in the
20 case.

21 MR. RICHA: I'm not certain I fully understand the
22 question. The point I'm trying to make is that it is related
23 to a count that is still in the case, which is the breach of
24 contract count.

25 THE COURT: Which count?

1 MR. RICHA: The breach of contract count.

2 THE COURT: You're speaking of Count V?

3 MR. RICHA: I don't have the complaint in front of me.

4 THE COURT: Very well. Take a look at your complaint,
5 please.

6 MR. RICHA: While I'm looking, Your Honor, I want
7 to make the point that the reason I'm bringing this to your
8 attention is Mr. O'Neil opened the door on this by questioning
9 the foundation of Mr. Morrissey's testimony. He questioned the
10 foundation of Mr. Morrissey's testimony regarding the documents.

11 THE COURT: Isn't that proper cross-examination?

12 MR. RICHA: But I think it would be proper to allow us
13 to rebut that point and present evidence that goes directly to
14 the counts that are still in the complaint.

15 THE COURT: Would you look at Count XXII, please?

16 MR. RICHA: Yes, Your Honor.

17 THE COURT: Do you acknowledge that that is the count
18 in which the plaintiff alleged that the defendants failed to
19 comply with their legal obligation to account to plaintiff?

20 MR. RICHA: Well, this was an action for accounting
21 that was dismissed, and, yes, I do agree that it was dismissed.
22 But I would refer you, if I may -- can I pull the complaint up
23 on my laptop? Because I can go directly to what you're asking
24 me.

25 THE COURT: Yes.

1 MR. RICHA: Thank you.

2 MR. O'NEIL: May I briefly address the Court,
3 Your Honor? Very briefly.

4 THE COURT: Can you look -- well, I will hear from
5 you, Mr. O'Neil, and then we'll take the recess so that
6 Mr. Richa can focus on the laptop.

7 MR. O'NEIL: I think, Your Honor, you focused on
8 Count XXII, which was the accounting claim, but there was also
9 a Count XXIV, a violation of Section 29-804 of the D.C. Code,
10 regarding defendants providing specific documents.

11 Mr. Richa stood up here and said that they'd repeatedly
12 asked for things and they were never provided anything. They
13 were provided hundreds of thousands of documents, just 70,000
14 e-mails and electronic records alone. They were invited into
15 Penn Social and given complete run of the store. They've been
16 mischaracterizing that throughout the entire litigation.

17 No matter what we gave them, they wanted more. If we
18 didn't have canceled checks, they'd send repeated letters asking
19 for the canceled checks after we'd told them we didn't have
20 them. So I just want to clarify the record. When they are
21 stating that we're not producing documents, almost every
22 document that's been shown a witness here, Your Honor, was
23 produced by us in this litigation. Thank you.

24 THE COURT: Well, why don't we take a brief recess,
25 and then you will have an opportunity to continue your reading,

1 Mr. Richa.

2 MR. RICHA: Sure, Your Honor. May I address what he
3 just said, please?

4 THE COURT: Yes.

5 MR. RICHA: It's absolutely untrue. We've -- they
6 have provided some documents, and I don't know what number of
7 documents they've provided, but just because they've provided
8 documents, that doesn't excuse them for their failure to provide
9 documents that they're legally required to maintain by federal
10 law, state law, and by operation of the operating agreement.

11 And Mr. O'Neil knows that to be untrue because I sent him
12 multiple deficiency letters wherein I listed specifically the
13 documents we were requesting and told him ahead of time that
14 if they did not provide those documents, we would be seeking
15 damages with regard to the documents that were not provided.
16 So that's simply untrue. That's it, Your Honor.

17 THE COURT: Very well. Thank you, Mr. Richa. We will
18 take the brief recess so that you can continue your reading.

19 MR. RICHA: Thank you.

20 THE COURT: Thank you. Everyone may remain seated.

21 (Recess from 4:53 to 5:03 p.m.)

22 THE COURT: Mr. Richa.

23 MR. RICHA: So, Your Honor, again, the reason we're
24 bringing this to your attention is because Mr. O'Neil has cast
25 doubt on Mr. Morrissey by virtue of what happened between the

1 attorneys and the document issue.

2 Paragraph 196 of the complaint references the 8.1 section
3 of the operating agreement they referenced a few moments ago,
4 and I agree with you that the accounting count was dismissed.
5 We're not requesting an accounting. We're stating that there's
6 a breach of contract violation by virtue of the fact that they
7 have not provided those documents.

8 THE COURT: Where is that alleged in the remaining
9 breach of contract count, which is Count V?

10 MR. RICHA: So, as I mentioned yesterday when we were
11 before you, we incorporate the allegations preceding the count
12 into the count because many of the wrongdoings of the defendants
13 would have applied to multiple counts. If we reasserted them
14 under each count, we would have had a 150-page complaint.

15 THE COURT: You do not suggest, do you, that the Court
16 should consider allegations made with respect to matters to
17 which the Court had granted summary judgment or dismissed the
18 count, are you --

19 MR. RICHA: No, I'm not.

20 THE COURT: -- merely by stating that the prior
21 allegations are incorporated?

22 MR. RICHA: No, Your Honor, not at all. I'm saying
23 that the accounting count that you pointed to earlier has been
24 dismissed, and we're not arguing it under that count. We're
25 stating that it's a breach of contract issue, that they had a

1 duty to account, and Mr. Xereas, as an owner, had a duty to
2 those records.

3 They failed to provide those records to him directly.
4 They failed to provide those records after he obtained counsel
5 and requested them through counsel. They failed to provide
6 those records when we requested them through discovery. They
7 failed to provide them when I personally sent multiple deficiency
8 letters to Mr. O'Neil warning him that their failure to provide
9 those documents would result in us seeking damages for those
10 missing, unsubstantiated expenses.

11 They had every opportunity to provide the documents, and
12 then Mr. O'Neil wants to get up here on cross-examination and
13 throw doubt to the fact that there were issues between the
14 attorneys that precluded Mr. Morrissey from seeing documents;
15 and that's simply untrue, and we believe we should have an
16 opportunity to rebut that, Your Honor.

17 THE COURT: If the Court followed your suggestion,
18 would that not mean that a discovery dispute would be presented
19 to the jury?

20 MR. RICHA: I don't think --

21 THE COURT: I mean, I assume you agree that a jury
22 cannot resolve a discovery dispute.

23 MR. RICHA: No, but I do believe that after Mr. O'Neil
24 opens the door, as he did in cross-examination, that we should
25 be permitted to discuss the course of dealings with regard to

1 the request for documents and their failure to provide same.

2 THE COURT: Am I correct in my recollection that the
3 plaintiff never filed, for example, a motion for an adverse
4 inference as a sanction?

5 MR. RICHA: We --

6 THE COURT: It seems to be what you are requesting.

7 MR. RICHA: No. We actually did contemplate that
8 at one point, but we did not do that. We're not asking for
9 an adverse inference. We're asking simply to be able to present
10 evidence that we did everything that we possibly could do --

11 THE COURT: Who is "we"?

12 MR. RICHA: I'm sorry, that Mr. Xereas did everything
13 he could do, on his own and through his counsel, to obtain these
14 documents, and at every turn they refused to provide us with the
15 documents we requested. We were forced to issue third-party
16 subpoenas, which Mr. Xereas did. We obtained every possible
17 document that we could from every financial institution from
18 which we could acquire those documents.

19 There's absolutely no way, and the burden is not on us as
20 plaintiffs, to issue third-party subpoenas to every vendor over
21 the course of six years that these people paid, for which they
22 provided no invoice or receipt. That does not make sense,
23 Your Honor, and we should not be punished for that.

24 THE COURT: What is the basis for your argument that
25 you are being punished?

1 MR. RICHA: Because Mr. O'Neil was allowed to cast
2 doubt with regard to whether these documents were obtained.
3 He even asked the witness at one point, "Isn't it true that you
4 didn't look at these documents because you couldn't find them?"
5 I mean, that's not what happened, and Mr. O'Neil knows that's
6 not true.

7 THE COURT: Did the witness not answer the question?

8 MR. RICHA: The witness answered the question, but
9 Mr. O'Neil actually asked the witness about a motion to compel
10 on cross. He asked him specifically about are you familiar with
11 a motion to compel, and the witness answered I'm not a lawyer;
12 I don't understand what a motion to compel is.

13 So why is he permitted to bring up discovery but we're not
14 permitted to bring up the fact that we attempted to obtain it
15 through discovery only after Mr. Xereas had requested it
16 countless times? He's an owner of the company. He's entitled
17 to these records. They never provided them. The burden is not
18 on us. We did everything we could to acquire the records. The
19 burden is on them to provide the records.

20 THE COURT: Thank you, Mr. Richa.

21 MR. RICHA: Thank you.

22 THE COURT: Mr. O'Neil.

23 MR. O'NEIL: Your Honor, in my cross-examination
24 of their expert witness, when he testified that certain
25 documents didn't exist, I simply corrected him to say that he

1 hadn't seen them. If they had wanted to file a motion to
2 compel to get us to produce documents, they should have done
3 that during discovery. That ended over a year ago.

4 Now, we produced -- the insinuation that we didn't
5 cooperate in discovery is a little far-fetched, Your Honor.
6 We, including law firms prior to the time I took over the case,
7 produced -- maybe not hundreds of thousands of documents, but
8 close to a hundred thousand documents.

9 And at one point -- the problem here is this case changes
10 every six months. Mr. Xereas's theories change. When we first
11 did the document production at Penn Social, it wasn't our
12 understanding they wanted to see every invoice from vendors.
13 They wanted to see our accounting records. We mirror-copied
14 our QuickBooks accounts and provided it to them on hard drive.

15 So the refrain from Mr. Richa that we didn't produce
16 documents when we had to hire an outside consultant to help us
17 produce the electronic documents, when we invited them into Penn
18 Social, when the lawyers before me invited them in and provided
19 boxes of documents, searching Mr. Dawson's other locations --

20 You know, we're not required to produce documents in the
21 possession of other parties. He's complaining about issuing
22 subpoenas to our insurance broker, but those aren't in our
23 possession. We produced the ones we had.

24 I don't see how Mr. Xereas can justify my questions of his
25 expert when his expert was providing the opinion that certain

1 documents don't exist and I was just pointing out the plainly
2 obvious fact that he can't say whether they exist or not; he
3 just hasn't seen them.

4 And maybe they were thrown out years ago; maybe they were
5 misfiled. I don't know. We conducted many, many searches
6 during the course of this litigation. But I just don't think we
7 need to take testimony from the plaintiff about his request for
8 document production in this matter. The two counts, the
9 accounting counts, and Count XXIV associated with the D.C.
10 statute, were both decided already, Your Honor.

11 THE COURT: Thank you, Mr. O'Neil. Mr. Richa.

12 MR. RICHA: Your Honor, a couple points.

13 One, Mr. O'Neil brings up and asks specifically a question
14 about a motion to compel and then comes up and says we shouldn't
15 be permitted to present testimony about it. But with regard to
16 the motion to compel issue that he brought up -- and we can
17 present it if you would like -- we were going to file a motion
18 to compel. Mr. O'Neil represented, as he just did before you,
19 that they gave us everything they had. That's what he told us,
20 and that's what he just told you.

21 So after he told us that they provided us with everything
22 they had, we decided not to file a motion to compel and pursue
23 damages for their failure to maintain and produce documents that
24 they are required to maintain and produce, in the ordinary
25 course of business, to all members of the LLC, not just the

1 managing members. All members of the LLC are entitled to those.

2 You mentioned a few times that the request for accounting
3 count was dismissed. We are not at all -- we respect your
4 opinion, and we're not at all trying to reassert or remake that
5 claim under that count. Again, it's a breach of contract issue.
6 It's a violation of 8.1 of the operating agreement that they did
7 not provide those documents.

8 And also, the breach of good faith and fair dealing under
9 D.C. statute specifically makes reference to books and records
10 and the fact that they had to produce those books and records,
11 and that count is still in the operative complaint.

12 So under those two counts, all testimony regarding our
13 efforts -- and "our" meaning Mr. Xereas and his counsel -- to
14 acquire those records, particularly in light of Mr. O'Neil's
15 cross-examination, are absolutely relevant. They're relevant to
16 the counts, and they're relevant to rebut what he brought up on
17 cross-examination. If he did not bring that up on cross-
18 examination, we would have probably rested, and we would not be
19 having this conversation.

20 THE COURT: Thank you, Mr. Richa.

21 MR. O'NEIL: Your Honor, may I?

22 THE COURT: It appears that the plaintiff seeks to
23 introduce what is, at bottom, a discovery dispute to the jury.
24 Simply put, that is not a matter as to which the jury can make a
25 finding. The counts of the amended complaint, where a failure

1 to produce or maintain books and records were pled, are no longer
2 in the case. There is no allegation with respect to the breach
3 of contract claim to which this testimony would be relevant.

4 Without intruding in any way on the parties' litigation
5 strategy, it is certainly the case that plaintiff could have
6 moved for sanctions of some type, including, for example, an
7 adverse inference as a sanction with respect to this matter.
8 But plaintiff did not do so. This is simply not occasion to
9 introduce what is, in essence, a discovery dispute to a jury.
10 Moreover, the Court finds that the cross-examination of
11 Mr. Morrissey was proper cross-examination, and nothing that
12 was asked occasioned recalling Mr. Xereas.

13 We must bear in mind, of course, Mr. Morrissey is an expert
14 witness, meaning he will offer and has offered his opinion or
15 opinions regarding certain matters. An invitation to permit you
16 to recall Mr. Xereas would essentially permit Mr. Xereas to
17 offer expert testimony to undermine Mr. Morrissey's testimony.
18 We simply cannot do that.

19 MR. RICHA: Can I approach, Your Honor?

20 THE COURT: Well, that is the Court's ruling regarding
21 that issue. What is it that the plaintiff intends to do in the
22 morning? Will you rest, or is there another witness you intend
23 to call?

24 MR. RICHA: May I make a -- may I bring something to
25 your attention prior to answering that question, Your Honor?

1 THE COURT: May you...

2 MR. RICHA: Can I bring up something before I answer
3 your question, Your Honor?

4 THE COURT: Yes.

5 MR. RICHA: Can we make an oral motion now for adverse
6 inference with regard to their failure to provide documents?

7 THE COURT: No.

8 MR. RICHA: Okay. Are we able to ask for a
9 stipulation --

10 THE COURT: The reason, of course, is that discovery
11 has long since closed.

12 MR. RICHA: Okay. Last thing. Mr. O'Neil just stood
13 before you and said they provided everything they have, which
14 was exactly what Mr. O'Neil represented to me in writing, that
15 they provided all the documents they have. Can we ask for a
16 stipulation that they produced everything that they had in their
17 possession in response to our discovery?

18 THE COURT: That is something the two of you can
19 discuss this evening.

20 MR. RICHA: Okay. Thank you, Your Honor.

21 THE COURT: Now, I will ask you, Ms. Glavich, to
22 remain to speak to Ms. Lesley concerning the marking of -- I
23 will call it the exhibit, and you will, of course, follow her
24 protocol. I'm speaking of the exhibits to the amended expert
25 report.

1 MS. GLAVICH: Yes, Your Honor.

2 THE COURT: Thank you very much.

3 Is there anything further before we recess?

4 MS. MCDONALD: Your Honor, there is the matter of
5 Plaintiff's Exhibit 144, which was illegible. We now have a
6 legible copy but would like to offer the original exhibit as a
7 demonstrative.

8 THE COURT: Mr. O'Neil?

9 MR. O'NEIL: I haven't seen it, Your Honor.

10 (Document provided to counsel.)

11 MR. O'NEIL: Without objection, Your Honor.

12 THE COURT: Very well. Thank you. The deputy clerk
13 will note that Plaintiff's Exhibit 144 will be admitted without
14 objection, the clear copy of it.

15 MS. MCDONALD: Thank you, Your Honor.

16 THE COURT: Thank you.

17 (Plaintiff Exhibit No. 144
18 received into evidence.)

19 THE COURT: So is it the plaintiff's intention to rest
20 in the morning?

21 MR. RICHA: Yes, Your Honor.

22 THE COURT: Very well. Thank you, Mr. Richa.

23 And you will be prepared to proceed, Mr. O'Neil?

24 MR. O'NEIL: Yes, Your Honor.

25 THE COURT: Do you know who your first witness will be?

1 MR. O'NEIL: Mr. Dawson.

2 THE COURT: Very well. Thank you very much. Bear
3 with me, please, while I speak with the deputy clerk.

4 (Court conferring.)

5 THE COURT: Is there anything further before we recess?

6 MR. O'NEIL: Your Honor, just I believe the defendants
7 plan to file a motion for a directed verdict. Would you want us
8 to wait to do that in the morning? Do you need it in writing,
9 or can we just set it as a preliminary matter in the morning?

10 THE COURT: May I suggest that you offer the broad
11 parameters of it now? I generally do not require that such a
12 motion be made in writing, but if you outline the general
13 parameters now, that will give the plaintiff an opportunity to
14 respond.

15 MR. O'NEIL: Your Honor, with respect to the breach
16 of contract claim, there's been no evidence submitted by the
17 plaintiff that he continued to work during the February-March
18 period up until the time he was removed as a managing member for
19 both his failure to devote his time to the company and for his
20 willful misconduct, which include both his issuing a cease and
21 desist letter over a trademark license that clearly does not
22 exist, and his filing of a lawsuit in the Superior Court
23 accusing his partners of all sorts of misdeeds.

24 With respect to the license, the breach of contract for
25 failure to pay under the license, as outlined in your memorandum

1 opinion on the summary judgment motions, clearly, Your Honor,
2 there's no evidence that the verbal -- alleged verbal license
3 contained any terms regarding price, duration, cancelation, or
4 any other terms. In fact, as Mr. Xereas testified, it was an
5 agreement to discuss an agreement in the future. So we believe
6 that on that basis alone, Mr. Xereas's testimony establishes
7 that no such contract for a license existed, and there can't be
8 any breach of that contract.

9 THE COURT: You may continue.

10 MR. O'NEIL: With respect to the unjust enrichment
11 count, again, your memorandum opinion on the summary judgment
12 motions said that the issue with respect to unjust enrichment
13 was the failure to pay for the use of Mr. Xereas's trademark.

14 Again, there's no evidence of an enforceable agreement with
15 respect to that issue. Again, there was no agreement on the fee
16 to be paid. There was no agreement on the time it was going to
17 last, no agreement as to how it would terminate. Even Mr. Xereas
18 has testified about suggesting that there were some items with
19 respect to those. But we believe, without any evidence of a
20 fee, Your Honor, you can't have a contract.

21 Again, as I stated with the breach of contract, it was
22 clear from Mr. Xereas's testimony that he was talking about an
23 agreement to talk in the future about a potential license.

24 THE COURT: Just so the record is clear, would you
25 identify the counts to which your argument pertains, please?

1 MR. O'NEIL: Yes, Your Honor. The breach of contract
2 and the covenant of good faith was in Count V.

3 THE COURT: Very well. You move for judgment as to
4 Count V. You may continue.

5 MR. O'NEIL: Court's indulgence, Your Honor.

6 The breach of contract and the breach of the duty of good
7 faith refer to counts V, VII, and VIII, Your Honor, for which
8 summary judgment was denied. The unjust enrichment claim was
9 Count XVIII, I believe.

10 Lastly, Your Honor, we move for judgment on the trademark
11 claim because the plaintiff has failed to produce any evidence
12 of a commercial use of the trademark in question. The only use
13 that they've discussed and presented evidence on is the printing
14 of the Riot Act name on official government documents that are
15 on display at Penn Social.

16 THE COURT: So are you speaking of Count XIX?

17 MR. O'NEIL: I think the trademark was one, all of
18 the Lanham Act exclaims.

19 THE COURT: I ask this question because I want
20 Mr. Richa, Ms. Glavich, and Ms. McDonald, to be able to respond
21 specifically to each one.

22 MR. O'NEIL: Yes, Your Honor. Four Lanham Act claims
23 that survive summary judgment. The Lanham Act claims that
24 survive summary judgment were counts I, II, III, and the
25 cybersquatting claim at Count XIX.

1 With respect to the trademark, Your Honor, plaintiff has
2 presented no evidence for the jury that there is a commercial
3 use of the trademark. It's as if somebody wrote "Riot Act" on
4 the bathroom wall of an establishment and he's claiming a
5 trademark violation.

6 They're not using the -- there's no evidence presented
7 that they're using the trademark to promote the business, in
8 advertising of the business, or in any other way. It's simply
9 stated on a document hung on the back of the wall of the bar.
10 So we don't believe that that rises to the level of a commercial
11 use.

12 Secondly, there's no evidence that the defendants'
13 actions went beyond the terms of plaintiff's purported license.
14 Therefore, there can be no trademark violation. If there was no
15 agreement containing any terms about when Mr. Xereas could pull
16 the trademark, then there can't be any trademark violation,
17 Your Honor. Thank you.

18 THE COURT: Thank you, Mr. O'Neil. I will ask
19 plaintiff's counsel to prepare to respond to the motion in the
20 morning.

21 MS. MCDONALD: Thank you, Your Honor.

22 THE COURT: Thank you.

23 Is there anything else before we recess?

24 MR. O'NEIL: No, Your Honor.

25 MR. RICHA: No, Your Honor.

1 THE COURT: Very well. I thank all of you very much.

2 Ms. Glavich, I do need to ask you to stay to speak with

3 Ms. Lesley.

4 MS. GLAVICH: Yes, Your Honor.

5 THE COURT: Thank you.

6 (Proceedings adjourned at 5:27 p.m.)

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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify
that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

Bryan A. Wayne
BRYAN A. WAYNE