

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.,	.	Friday, November 9, 2018
	.	9:42 a.m.
Defendants.	.	
. . . . .	.	Pages 748 through 851

DAY 5  
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: This is civil case, year 2012-456, John N. Xereas v. Marjorie A. Heiss, et al. Erin Glavich, Tony Richa, Amber McDonald for the plaintiff. William O'Neil and Miles Karson III for the defendants. This is a continuation of a jury trial.

THE COURT: Good morning to all of you.

I understand you needed some technical assistance this morning with the equipment but that you are now ready to proceed. Is that correct?

MR. O'NEIL: Well, can I raise one preliminary --

THE COURT: It sounds like you're hesitating. Let me ask you to come to the podium, please.

MR. O'NEIL: We're not going to play the Dawn Henderson deposition right now. We're going to put Marjorie Heiss on the stand. If there's going to be a break, we can discuss this then, but I have some concerns about the Dawn Henderson deposition. Defendants designated the portions of her testimony as per the schedule provided by the Court, and plaintiff did not.

When we discussed using Ms. Henderson's deposition in this case and we agreed, for the convenience of the witness, who's often ill, that we would use her videotaped testimony, it was only last week, I believe, or maybe late the week before that I received plaintiff's designations of her testimony.

1           So I had my video company take both designations and put  
2           them on one edited DVD, and that's what I'm prepared to play  
3           this morning. Subject to your ruling last night, we'll exclude  
4           -- it's right at the beginning in the first minute of her  
5           testimony, the testimony about the criminal conviction, so we'll  
6           exclude that.

7           We do have to skip over, because I don't want to  
8           accidentally play the testimony that you ruled on last night.  
9           All we're skipping over is her name. She states her name. So  
10          maybe we can just tell the jury who's testifying.

11          But I was informed last night at the conclusion of  
12          activities yesterday that plaintiffs have prepared their own DVD  
13          of just their designations, and they intend to play that. And  
14          we had had an e-mail --

15                THE COURT: When?

16                MR. O'NEIL: Well, I don't know. I don't know if they  
17                expect me to only --

18                THE COURT: I'll hear from the plaintiff, but we are  
19                now in the defendants' case. I'm not --

20                MR. O'NEIL: Well, we were going to play both parties'  
21                designations straight through. I was unable overnight to redo  
22                my DVD, even though I tried to contact the video company. So my  
23                preference would be to just play the DVD. And I notified them  
24                the way I had formatted it 10 days ago, and they said they  
25                didn't like it; but they never followed up with any suggestions

1 on how to address those concerns. So the version of the DVD  
2 that I have includes both parties' designations, and I'd prefer  
3 to just play that, Your Honor.

4 THE COURT: Is it your preference to do so now or to  
5 call Ms. Heiss now?

6 MR. O'NEIL: No, we're going to call Ms. Heiss, and  
7 then we'll play Ms. Henderson's deposition after.

8 THE COURT: Let me suggest, then, that since you are  
9 prepared to call Ms. Heiss now, you do that, and at a time that  
10 we are not taxing the jury, we can discuss the issue regarding  
11 the deposition.

12 MR. O'NEIL: Yes, Your Honor. Thank you.

13 THE COURT: I will note quickly while the jury is  
14 still out that when I asked the one-word question "when" with  
15 respect to what you indicated, Mr. O'Neil, was the plaintiff's  
16 intention to present excerpts of the deposition of  
17 Ms. Henderson, my question essentially arose from the reality  
18 that the plaintiff has rested.

19 MS. MCDONALD: Your Honor, may I be heard?

20 THE COURT: No. We're going to proceed with the  
21 testimony of Ms. Heiss, and, as I said, we will take this issue  
22 up separately when we are not delaying the jury.

23 (Jury in at 9:48 a.m.)

24 THE COURT: Members of the jury, good morning.  
25 Did you bring your coffee, water, everything you need for your

1 comfort? Very well. Thank you. Please be seated, and we will  
2 proceed. Mr. O'Neil, you may call your next witness.

3 MR. O'NEIL: Defendants call Marjorie Heiss.

4 THE COURT: Ms. Heiss, you may have a seat.

5 Members of the jury, you may recall that Ms. Heiss was sworn  
6 when she was called as a witness by the plaintiff. She will not  
7 be sworn again. However, her testimony remains under oath.

8 MARJORIE HEISS, WITNESS FOR THE DEFENSE, PREVIOUSLY SWORN

9 DIRECT EXAMINATION

10 BY MR. O'NEIL:

11 Q. Good morning, Ms. Heiss.

12 A. Good morning.

13 Q. Could you give us just a short summary of your work history  
14 after law school?

15 A. Well, after law school I moved to Chicago, worked for the  
16 firm McDermott, Will & Emory, and then I went to another firm,  
17 Goldberg Kohn. Then I went to work with one of their clients,  
18 J&B Realty, and then I got married and moved to Washington,  
19 D.C., worked for -- now I don't know what they call  
20 themselves -- a small firm.

21 And then I was taking some time off, was introduced --  
22 Geoff and his partner were looking for a lawyer that was just  
23 theirs, and I met them for lunch and liked them and started  
24 working for them that day. Didn't think I was going to stay,  
25 but worked for them for over 15 years. It's a great job.

1 Q. And the name of that company was what?

2 A. I'm sorry. I worked for Bedrock Management Company,  
3 which is the company that Geoff and another partner own.

4 Q. And you were a salaried employee at Bedrock?

5 A. Yes, I was.

6 Q. Did you also receive, as compensation from Bedrock,  
7 some equity portions in some of the deals they did?

8 A. Yes. Part of my financial arrangement was I drew a salary,  
9 but when we opened a project and I did all the setting up and  
10 negotiating, I would get, you know, some units in that project.

11 Q. And how was it you became involved in Riot Act?

12 A. I was just wrapping up with -- I had told Bedrock that I  
13 was planning on moving and doing another -- changing to do some  
14 other work that I was interested in doing and that I set them  
15 all up with new lawyers and I was -- so I was tying things up  
16 about the time when Geoff and John were talking.

17 And I was just in our office one night, and Geoff and John  
18 were there having a lively discussion with all these pictures.  
19 I sort of popped in, sat down, and talked with them, the two of  
20 them, and got into the conversation, and I was like, wow, that  
21 is a cool deal.

22 So later Geoff -- and it was. I mean, I was -- I said,  
23 man, that is one of the best that we've, you know, come up with.  
24 And he said, would you be interested in doing one last deal and  
25 joining us on this? And I said, Yeah. For this? Yes.



1 Q. And all told, how many years did you work with Bedrock?

2 A. I worked for them for just a little over 15 years.

3 Q. And was one of the first tasks the setting up of the LLC  
4 under D.C. law?

5 A. Yes, it is. It's always the thing I do first.

6 Q. And was that the first task where you confronted the issue  
7 of the name of the company?

8 A. Yes. John had expressed that he loved the name; he wanted  
9 the name. I had already done a quick search to find out -- this  
10 is how the conversation started -- to find out if the name was  
11 available, the trade name was available in D.C., and found there  
12 was another LLC using that name. And I told John, and he said,  
13 Oh, yeah, I was going to be doing a deal with someone else for a  
14 space on Wisconsin. We set that up, but we didn't go through  
15 with the deal.

16 So I said, Well -- he gave me the name of the lawyer, and  
17 I said, Well, I can arrange to dissolve that corporation or that  
18 LLC, and then we talked about, well, if we -- I said, you know,  
19 I understood that he had been using that name since 2005,  
20 because I think we'd gotten a pretty thorough history from him  
21 as to his business ventures using Riot Act.

22 And I said, What are your intentions about the name? I  
23 mean, I don't really feel comfortable using this name, especially  
24 naming the company that name if we don't own it. It would be a  
25 very difficult thing to sell to our investors. He said, No, no,

1 no, this is my contribution. I want to contribute it. This is  
2 my life dream. I'm so very excited. We were all very excited.  
3 And he said, No, no, no. I'm contributing the name.

4 And it came up again, you know, in a meeting with Geoff,  
5 and I said I'm setting up this LLC, which is a very simple  
6 matter initially, and I said -- he said, no, no, I'm very -- I'm  
7 excited, and I'm contributing this to the -- it's part of my  
8 contribution to the company. And I said okay. And we -- that's  
9 what I used.

10 Q. Would you have undertaken the negotiations with John's  
11 prior lawyer about dissolving the prior LLC if John had told  
12 you he owned the name and wanted to license it to the company?

13 A. Yes. I'm sorry?

14 Q. Would you have performed the legal work to have the prior  
15 company dissolved if John had told you, I own this and I'm going  
16 to license it to the company?

17 A. I did end up doing the legal work for it. Would I have  
18 done it? No. I would have been very uncomfortable about using  
19 the name at all because, you know, a trade name for a project  
20 like this is really important. And our investors, you know, it  
21 would be very hard to sell it to our investors that there was a  
22 name that the company did not own and could be taken away from  
23 us. And John was so clear about his intentions that, frankly,  
24 I didn't worry about it very much.

25 We named the company Riot Act, I did the offering

1 memorandum for Riot Act, and everything was represented that we  
2 were going to -- that this was the company's name and this was  
3 what the club was going to be called, and we made no other --  
4 you know, John never mentioned anything about, you know,  
5 licensing the name to us. We -- so we didn't. That's why  
6 there's no license agreement or no other arrangement with the  
7 trade name in the offering.

8 Q. Did John ever discuss a fee that he expected to be paid for  
9 using the name?

10 A. No. The times that we talked about it, he was very clear  
11 that he was contributing the name. He was very proud, as he  
12 should have been, of, you know, the goodwill and the recognition  
13 that name had, and so -- you know. And Geoff, actually, we had  
14 a conversation, and Geoff confirmed, you know, the name's going  
15 to be, you know -- your -- you know, where are you on the name?  
16 And he said, No, I'm contributing it.

17 Because I acknowledged that he had been using it since  
18 2005, and while he had not registered it with the trademark  
19 office, you still have a common-law right to claim that you have  
20 a trademark. So he -- you know, the issue kind of -- we talked  
21 about it at the beginning, and then it just -- we thought it was  
22 all clear, and it never came really up again.

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

24 MR. O'NEIL: May I approach the witness first to drop  
25 this off?

1 THE COURT: Yes, of course.

2 (Exhibit binder tendered to witness.)

3 (Bench conference.)

4 MS. MCDONALD: In plaintiff's motion *in limine* to  
5 exclude certain conversations with respect to Maria Xereas, this  
6 document was excluded.

7 MR. O'NEIL: Okay. I'll withdraw that. I won't  
8 present it to the witness. I'll move on to the next.

9 MS. MCDONALD: Thank you.

10 (End of bench conference.)

11 BY MR. O'NEIL:

12 Q. Ms. Heiss, could I ask you to turn to Defendants' Trial  
13 Exhibit 31?

14 A. Yes. I've got it.

15 Q. This document appears to be an e-mail exchange between you  
16 and Mr. John Xereas. Is that correct?

17 A. Yes, it is.

18 Q. And this was done in the normal course of business?

19 A. Yes, it was.

20 MR. O'NEIL: Your Honor, we'd like to move Defendants'  
21 Trial Exhibit 31 into evidence.

22 MS. MCDONALD: No objection, Your Honor.

23 THE COURT: Defendants' Exhibit 31 will be admitted  
24 without objection.

25

1 (Defendant Exhibit No. 31  
2 received into evidence.)

3 BY MR. O'NEIL:

4 Q. Now, Ms. Heiss, at the bottom of the first page of Exhibit  
5 31, there's an e-mail that you wrote to John. Could you read  
6 the first paragraph?

7 A. "Also, on the trademark names that you've already obtained,  
8 is the apparel line Riot Gear or Riot Act Gear?"

9 Q. Do you recall the context of this discussion?

10 A. Yes. John had told us that he had already set up domains  
11 and plans, like the club would sell T-shirts and things like that.

12 Q. So you were just confirming with him --

13 A. I was just trying to confirm that that was one of his and  
14 which names did we want to use.

15 Q. And at the top of the page, Mr. Xereas's response, he  
16 states, "Someone actually owns Riot Gear, but do not think they  
17 use it. Maybe once we get going, we can approach them about  
18 buying it. For now it's Riot Act Gear." Do you see that?

19 A. Yes, I do.

20 Q. And in this e-mail exchange, Mr. Xereas wasn't discussing  
21 his purchase of these trade names; he was talking about the  
22 company's purchase. Correct?

23 MS. MCDONALD: Objection, Your Honor. Calls for  
24 speculation.

25 MR. O'NEIL: I'll reword the question, Your Honor.

1 THE COURT: Would you rephrase your question, please.

2 BY MR. O'NEIL:

3 Q. What did you understand Mr. Xereas to be saying about his  
4 ownership versus the company's ownership of these trade names in  
5 the future?

6 A. My understanding was he would be looking to buy it for our  
7 company.

8 Q. Do you recall -- when was the first time that Mr. Xereas  
9 claimed that there was a license agreement between himself and  
10 the company?

11 A. The first I knew that he was making any claims about the  
12 name was when we received the cease and desist order -- or  
13 letter -- from his first lawyer.

14 Q. In February 2012?

15 A. In February 2012, yes.

16 Q. Were you surprised when you received the cease and desist  
17 letter?

18 A. Yes. I was very surprised.

19 Q. Did you have any other reaction?

20 A. Yeah. Concern about what this was going to do to the  
21 project. I mean, we had spent a lot of time and money promoting  
22 that name, and to suddenly have to stop using it would -- well,  
23 it would end the business at that point. And even phasing it  
24 out and, you know, building a new name would be expensive. We'd  
25 have lost a lot of the value, and it would be a difficult thing

1 to explain to our investors.

2 Q. I want to shift the focus a little bit to some of the  
3 legal tasks you undertook for the company, and one of those  
4 was drafting the operating agreement. Correct?

5 A. Yes. Initially -- and this was my common practice.  
6 When we decided on what the name was going to be, you file  
7 articles of organization and then prepare a simple operating  
8 agreement. Usually, it's very simple because we're going to  
9 amend it later on, once we've worked out all the business terms.

10 Q. And the first one was executed in May of 2010?

11 A. Yeah.

12 Q. About the same time the LLC was formed?

13 A. Yes. Yes.

14 Q. And you also drafted the Confidential Offering Memo that  
15 the jury has already seen. Correct?

16 A. Yes. I drafted the offering memorandum that we would give  
17 to our investors and that you submit to the SEC. Since it was  
18 only going to be presented to accredited investors, we qualified  
19 for a exemption from having to go through the whole process of  
20 having it approved by the SEC.

21 Q. And you also had outside counsel review that document?

22 A. I had outside securities and tax lawyers, and then just a  
23 general review by another law firm. I needed this to be perfect.

24 Q. And you didn't get paid any fee for drafting either one of  
25 those documents. Correct?

1 A. No. I didn't get paid for any of my legal work.  
2 That was my contribution for my equity in the business.

3 Q. And a Confidential Offering Memorandum such as the one  
4 that has been admitted into evidence here, that's a fairly  
5 complicated document and can be somewhat expensive to draft by  
6 outside counsel. Correct?

7 A. Yes. I probably spent about four months drafting it.  
8 John provided me with his first plan that he had written and  
9 talked with Geoff about. I tried to incorporate as much of the  
10 information as he provided. And we couldn't use outside counsel  
11 other than a review because, literally, it can cost \$150,000 at  
12 a law firm to have them do something like this.

13 Q. Did Mr. Xereas ever request, either in the Operating  
14 Agreement or in the Confidential Offering Memorandum, that a  
15 statement be included that he was the owner of the trademark and  
16 the company was going to license the name from him for a fee?

17 A. No. We had already -- it was very clear. It had been  
18 talked about several times. He was contributing the name to the  
19 business like I was contributing -- mine was, you know, work, my  
20 legal work that I was going to do for the company, and he -- so  
21 he never asked that that be added.

22 We never even discussed it in connection with -- we did a  
23 lot of constant reviewing together to make sure I was getting  
24 his information correct and what terms we wanted for the deal.  
25 So, no, that never came up.



1 Q. Do you think it would have been a material item to inform  
2 investors that the company was licensing the name rather than  
3 owned it?

4 A. It would be extremely material and would be a matter that,  
5 depending on whatever the terms were, it would be of concern  
6 because we had accredited investors. There's a description  
7 provided by the SEC, and you have to be basically a  
8 sophisticated -- you have to answer a questionnaire, and you  
9 have to be a sophisticated investor.

10 So that's why you can get an exemption to going through the  
11 whole SEC process. SEC is the Security and Exchange Commission.  
12 So any one of our investors, who were all very sophisticated,  
13 would understand the implications of -- if it was possible for  
14 the name to be taken from the business.

15 Q. There's been some suggestion by plaintiffs here that he  
16 didn't have the opportunity to review or question the operating  
17 agreement when it was amended and executed in November of 2010.

18 MS. MCDONALD: Objection, Your Honor. There's no  
19 foundation for this question. There's been no testimony to that  
20 effect.

21 MR. O'NEIL: I'll reword the question, Your Honor.

22 BY MR. O'NEIL:

23 Q. Ms. Heiss, could you explain for the jury the circumstances  
24 of the parties signing the November 1, 2010, Amended Operating  
25 Agreement?

1 A. Yes. Well, I regularly sent to both John and Geoff the  
2 drafts I was preparing of the Amended Operating Agreement, and  
3 the reason we prepared the Amended Operating Agreement is that  
4 I incorporate all the terms of the operating agreement -- I  
5 mean, I'm sorry -- of our offering memorandum into the agreement  
6 that would -- so that would govern our actions, you know, and  
7 those -- you know, the rights and responsibilities of our  
8 investors. And I've forgotten the rest of your question.

9 Q. I was asking if you could explain the circumstances of the  
10 parties signing it.

11 A. Oh. Yes. So I regularly sent drafts and asked for  
12 people's review, bugged them a lot of times for them to get back  
13 to me on the review. It's not the most interesting thing to  
14 read. And so the night before, we had planned a date that we  
15 were going to all meet at Bedrock Management offices and sign  
16 all the documents so then I could take all the documents, the  
17 offering memorandum and all the exhibits, to our printer and  
18 have it printed and bound.

19 So the night before we had planned the next day to all  
20 meet, the evening before, John called me and told me that his  
21 uncle and his uncle's lawyer, Irv Liptz, had just reviewed it,  
22 and they were very concerned. I guess this was the first they  
23 learned of the three-way equal split of the major part of the  
24 equity and the voting rights, and they were very concerned about  
25 that.

1           And I said, Well, John, this has been how we set it up even  
2     in the first operating agreement. So why am I hearing about  
3     this now? And we can't sign this up, we can't do this deal if  
4     you're not on board with this. And so if there's a problem, I  
5     need to know. We're not going to go forward until we are  
6     comfortable with this.

7           And we had a conversation, and he said, well, by setting it  
8     up that way, the way it was written -- and you can see it in the  
9     exhibits -- is that the three managing members -- me, John, and  
10    Geoff -- would all have equal voting rights regardless of what  
11    our number of shares or percentage of shares we had.

12          So it meant that, for example -- and he said, "What would  
13    stop you and Geoff from voting against me all the time?" And I  
14    said, "Nothing. Just as there's nothing that would stop you and  
15    Geoff from voting against me or you and I voting against Geoff."

16          And we talked about it for a while, and I said, If you have  
17    concerns about this, we're not going to go forward with this  
18    right now. They have to be worked out. So we'll put off  
19    preparing the offering to go to the printer and be distributed  
20    to prospective investors. And he -- after we talked, he said,  
21    No, no, I'm fine with it. And so I said, You sure? And he said  
22    Yeah.

23          So we all met the next day. We kind of all signed the  
24    documents together because, you know, like the Amended Operating  
25    Agreement was an exhibit to the Offering Memorandum that set

1 terms of what the sale to them as investors would entail.

2 So we signed all those documents, and then I took them to the  
3 printer and had it printed and bound, and we were ready to go.

4 Q. Was the Confidential Offering Memorandum numbered?

5 A. Yes. The SEC requires that when you're selling shares  
6 under the exception to the process of having the SEC review it,  
7 review the offering, and you are only selling to accredited or  
8 very sophisticated investors, you had to keep track of everyone  
9 that you presented, you know, the offering memorandum to.

10 So each one, I think we had 30 -- we had already made a  
11 list of who we were thinking of sending it to, so I think we had  
12 about 30 of them printed. And each page, each front page, had a  
13 number. And then I had in my office, you know, a sheet so that  
14 anyone who wanted -- you know, Geoff was going to meet with  
15 someone, he had to go sign and indicate which number offering  
16 memorandum he was taking and who he was going to be presenting  
17 it to. That's required by the SEC so we can keep track and know  
18 who we solicited investment from.

19 Q. And as you recall, did John provide the Confidential  
20 Offering Memorandum to any potential investors?

21 A. No, he did not. There was nothing to indicate -- he never  
22 mentioned it to me that he was going to, even though he'd  
23 indicated earlier that he did have people that he was going to  
24 present it to, and he didn't take any of the actual offering  
25 booklets.

1 Q. Okay. Now, during the course of this trial, while you've  
2 been sitting here listening to the testimony, you've heard  
3 people make reference to conflicts of interest. Did you hear  
4 that?

5 A. Yes, I have.

6 Q. You never acted as Mr. Xereas's lawyer. Correct?

7 A. No.

8 MS. MCDONALD: Your Honor, may we approach?

9 THE COURT: Yes.

10 (Bench conference.)

11 THE COURT: What could the objection possibly be  
12 since the plaintiff asked any number of questions during the  
13 examination of Mr. Xereas regarding whether or not he was ever  
14 advised that he had a right to seek outside counsel?

15 MS. MCDONALD: Plaintiff was actually precluded from  
16 that line of questioning and asking whether -- with respect to  
17 the conflict of interest.

18 MR. O'NEIL: I think the issue's before them, and  
19 there was certainly testimony on the subject. The jury heard  
20 it, and I should be allowed --

21 THE COURT: There is indeed such testimony. My  
22 recollection now is had there been an objection to the question,  
23 I likely would have sustained it because I do not know what  
24 issue there could be in this case --

25 MS. MCDONALD: You did sustain it, Your Honor --

1 THE COURT: -- concerning a conflict of interest  
2 since there's no indication that Ms. Heiss acted as Mr. Xereas's  
3 counsel. So for all of those reasons, the objection is overruled.

4 (End of bench conference.)

5 BY MR. O'NEIL:

6 Q. Ms. Heiss, you've heard the phrase "conflict of interest"  
7 raised in this courtroom. Correct?

8 A. Yes, I have.

9 Q. Did you ever act as Mr. Xereas's attorney?

10 A. No, I did not. Not personally, no. I was the attorney  
11 solely for the LLC.

12 Q. And did you tell Mr. Xereas that?

13 A. Yes, I did. It was my practice. I had to always even  
14 sometimes remind Geoff and his partner. When we did every deal,  
15 we did a stand-alone separate company, and I would, you know,  
16 even have to remind them sometimes that, you know, I'm not  
17 acting as your attorney personally; I'm acting for the company.  
18 So if they wanted to do something, I'd say, no, you can't do it.

19 So in this case, I did say to John, I think you should -- I  
20 recommend that you have everything reviewed by your own counsel  
21 because I am not -- you know, I want to make clear that I am not  
22 representing you personally, but simply I'm representing the  
23 interest of Riot Act DC, LLC.

24 Q. And in your experience, is there anything improper about  
25 you owning some shares in the company and acting as the

1 company's counsel?

2 A. That's proper and very common business practice. A lot  
3 of companies encourage it.

4 Q. And you stated earlier, Mr. Xereas at one point told you  
5 an outside counsel working for him on his behalf had reviewed  
6 certain of these documents. Correct?

7 A. He did.

8 Q. What was your day-to-day role in the Riot Act theater prior  
9 to January of 2012?

10 A. Oh, in 2011?

11 Q. Yeah. Prior to -- yeah, in 2011.

12 A. My part is usually the first part. I set up the company,  
13 I prepare the offering memorandum, I negotiate like the lease  
14 and any other contracts we need in order to establish the  
15 company. And that was supposed to be -- and then going forward,  
16 I would help with -- I would help with any legal problems that  
17 came up. Sometimes, you know, a patron would get injured.  
18 They would, you know, file -- sue us, you know, and I'd handle  
19 getting outside counsel and handling and resolving those  
20 problems or other problems that occurred that were legal in  
21 nature.

22 I also did the permits, licensing, and that would be part  
23 of what I would do up front as part of -- you know, the lawyer's  
24 work comes -- the big part of it comes up front with -- I'm the  
25 one who sets everything up and gets us ready to -- ready to

1 start either getting investors, or if we weren't taking on  
2 investors, getting the -- you know, signing the lease and  
3 getting the construction started.

4 The other thing I would do is every manager would -- I  
5 think I worked on 22 projects with Geoff at Bedrock Management,  
6 and every manager of the stores -- and we had very good  
7 managers -- would have to present to me -- they'd have to  
8 prepare and present their employee manual setting forth how  
9 they were going to be running the "store" as we called them, and  
10 what their rules and -- you know, and it could vary from store  
11 to store because, you know, depending on what the store was --

12 I mean, if it was a pool hall, sometimes, you know, they'd  
13 have different needs, you know, in terms of how they wanted  
14 their employees to act. And then they had to deliver it to me,  
15 and I would review it and make sure that it was legally sound.

16 And when John was going to prepare one for Riot Act and I  
17 gave him -- we had some really good ones that we had developed  
18 over the years that would be employee manuals, and I gave him a  
19 few of those so he could review it and know what kind of  
20 employee manual we sort of expected or generally used for our  
21 companies and our projects.

22 And I also -- and this is the part where everyone thought  
23 I was a bit of an annoying stickler, is that I reviewed every  
24 contract. I mean every store. I don't care if it was just for  
25 the people who provided our glassware, Ecolab, any vendor. They



1 had to send me the contract, and I had to review it and sign off  
2 on it before they could sign it. Every single -- even if it was  
3 just one page, you know, because -- you know, I would note  
4 things in it that I might want to amend, and I really did it --  
5 you know, mentally, it helped me.

6 It was easier for me just to quickly review them and get  
7 back to them with any changes I wanted than it was for me to fix  
8 problems later on if there were provisions in there that, if I  
9 hadn't reviewed it, would cause problems for us.

10 Q. And I believe Mr. Xereas testified in this matter that he  
11 had tasked you with writing the company's manuals.

12 A. Yeah. He had testified to that, but I wouldn't even know  
13 how to -- he's our operating partner, and I'm the lawyer. I  
14 wouldn't even know what -- you know, he determines how he wants  
15 to operate the business, what the responsibilities and rules  
16 were for the employees, and I don't do that work.

17 And so we always had -- every manager would prepare one,  
18 and then they gave it to me and I would review it and make sure  
19 that it was legally sound. And so that was something that every  
20 manager or operating partner would do, and he knew that he was  
21 going to do it because he'd agreed to it, we'd discussed it, and  
22 I gave him some really good examples so he could use it to draft  
23 one and just asked that he give it to me to review it when he  
24 was done.

25 Q. You talked about reviewing contracts that the individual

1 stores would enter into. Do you recall a copier contract that  
2 related to Riot Act?

3 MS. MCDONALD: Objection, Your Honor. Relevance.

4 THE COURT: Overruled.

5 THE WITNESS: Yes. I -- unfortunately, my requirement  
6 and request to review all contracts before they're signed was  
7 not done, didn't work out with John. I got very few contracts  
8 ever from him to review. And one of the early contracts that he  
9 had signed as part of -- you know, he had signed because we  
10 needed a big copier, you know, for our business, and he had  
11 signed -- when I did see it, because we were hemorrhaging, you  
12 know -- you know, we were really running out of money, and we  
13 sat down and were reviewing salaries, how many employees we  
14 actually needed or could cut, and I started, and that's when I  
15 first saw that he had a -- basically a rental agreement for our  
16 copier.

17 And looking at the numbers and saying, by the time this  
18 whole term has run for leasing this copier, we'll have paid like  
19 -- I think it was like \$35,000 for it. And I said it would have  
20 just been cheaper, even if we needed a really good one, to spend  
21 ten to fifteen thousand dollars up front rather than enter into  
22 a long-term lease that over time would be extremely costly to  
23 the business.

24 BY MR. O'NEIL:

25 Q. Even before the club opened, did your relationship with

1 Mr. Xereas become more difficult?

2 A. Yes, it did. When I met John, I really liked him a lot.  
3 As he mentioned, we talked on the phone a lot about plans.  
4 We were very excited. And, really, it seemed to me that the  
5 turning point with John was that conversation we had when he  
6 called me the night before we were supposed to sign everything  
7 up for the offering memorandum and I would take it to the  
8 printer and that his uncle and his uncle's lawyer had reviewed  
9 it and his concerns about, you know, the voting arrangement  
10 among the managing members. And he agreed to it, but from that  
11 point on, our really friendly, supportive relationship started  
12 to deteriorate, and I wasn't sure why.

13 Q. Ms. Heiss, could you turn to Defendants' Trial Exhibit 16?

14 A. This is an e-mail from Geoff Dawson to John. It's dated  
15 June 28, 2011, which would have been in the middle of our  
16 build-out of the space.

17 Q. I don't mean to correct you. I believe it's from John to  
18 Geoff. Is that correct?

19 A. Oh, I'm sorry.

20 Q. Do you see that?

21 A. Am I --

22 Q. Sixteen?

23 A. I'm sorry. I saw Geoff's name. Yes. It was to Geoff from  
24 John. I apologize.

25 MR. O'NEIL: Your Honor, we'd like to move for the

1 admission of Defendants' Trial Exhibit 16 into evidence.

2 THE COURT: Ms. McDonald.

3 MS. MCDONALD: I believe there's a foundation problem  
4 with admitting this document with this witness, Your Honor.  
5 She's not involved in the e-mail exchange at all.

6 MR. O'NEIL: She's discussed extensively in the  
7 document, Your Honor.

8 THE COURT: May I ask the two of you to approach.

9 (Bench conference.)

10 THE COURT: Ms. McDonald.

11 MS. MCDONALD: Yes, Your Honor. This witness did not  
12 receive this e-mail. She did not send this e-mail. I believe  
13 there's a foundation problem with admitting it.

14 MR. O'NEIL: It's an e-mail between two partners in  
15 the company on company e-mail accounts.

16 MS. MCDONALD: Ms. Heiss was not a party to the e-mail.

17 THE COURT: At what point, if any, did you object?

18 MS. MCDONALD: I did not object, Your Honor, to the  
19 document --

20 THE COURT: Well, then that's the end of the matter.

21 MS. MCDONALD: There's still a foundation issue with  
22 this particular --

23 THE COURT: Did you object on that ground?

24 MS. MCDONALD: I couldn't have known that they would  
25 bring in this document with Ms. Heiss. It's a document between

1 Mr. Xereas and Mr. --

2 THE COURT: Is that not on the list? I'm looking  
3 quickly for the --

4 MS. MCDONALD: No, Your Honor. Foundation is not on  
5 my list because I couldn't have known that they would attempt to  
6 bring in this document with this particular witness for which  
7 there is no foundation.

8 THE COURT: Mr. O'Neil?

9 MR. O'NEIL: The document between two of three  
10 partners in the business, Ms. Heiss being the third one, is  
11 an extensive list of complaints by Mr. Xereas about Ms. Heiss  
12 and --

13 MS. MCDONALD: And it should come in through Mr. Xereas.

14 THE COURT: Let me hear from Mr. O'Neil, please,  
15 Ms. McDonald.

16 MR. O'NEIL: It's a company e-mail, and she's a  
17 partner in the company. I think she can establish the  
18 foundation for the document.

19 MS. MCDONALD: It's not a hearsay objection,  
20 Your Honor, with respect to being a company e-mail. She's not  
21 a party to the e-mail. It's a foundation objection.

22 THE COURT: The objection is overruled.

23 (End of bench conference.)

24 MR. O'NEIL: Your Honor, the document is admitted?

25 THE COURT: Yes. Defendants' Exhibit 16 is admitted

1 over objection.

2 (Defendant Exhibit No. 16

3 received into evidence.)

4 BY MR. O'NEIL:

5 Q. Ms. Heiss, this e-mail from John to Geoff, you didn't see  
6 it at the time. Correct?

7 A. No. I did not see it until this was produced during  
8 discovery in connection with this litigation.

9 Q. Could you read the second paragraph, please?

10 A. "I loathe Marjorie and everything she is. I do not want  
11 to be in business with her and certainly do not want to be a  
12 partner with her in anything. She is everything that I have  
13 been trying to get away from. I do not want to see her or be  
14 in the same room with her."

15 Q. Did Mr. Xereas ever express those sentiments to you  
16 directly?

17 A. No. I was shocked and dismayed when I did read this.  
18 And frankly, I didn't know -- I knew that our friendship that  
19 seemed to have been building at the beginning of the process  
20 had cooled off, but when I would see him at the club when I came  
21 down occasionally, he was always friendly and polite, you know.  
22 He'd give me a little, you know, hi, hug, and a little -- you  
23 know. But that is -- so I had no idea he felt that way about  
24 me. I had no idea.

25 Q. So when he complains that you're two-faced, is that irony?

1 MS. MCDONALD: Objection, Your Honor.

2 MR. O'NEIL: I'll withdraw the question.

3 BY MR. O'NEIL:

4 Q. Later on in the same document, Mr. Xereas states, "She,"  
5 referring to you, "is delusional and self-glorifying. The press  
6 release is a joke. So is the fact that she works so hard and  
7 her legal costs are \$500,000. Another lie." Do you see that?

8 A. Yes, I do.

9 Q. Do you know what he's referring to with respect to the  
10 press release?

11 A. Yes. Oh, okay.

12 Q. I'll --

13 A. I'm sorry. Where was "the press release is a joke"?  
14 What paragraph was that? I'm sorry. Oh, okay. "She is  
15 delusional and self-glorifying, and the press release is a joke."

16 The issue with the press release is we were going to hire a  
17 public relations, PR firm, to help us launch the business. And  
18 Geoff knew a company, Bulldog Productions or something -- all I  
19 remember is Bulldog -- run by Matt Hagan.

20 And he introduced -- we had a meeting. John and I and  
21 Geoff met with Matt, and we all liked him and told him that we  
22 wanted -- he was going to deliver to us one of his standard  
23 contracts for us to review, and we were going to hire him.

24 And then a day or so later, John let -- I think Geoff, and  
25 then I heard about it, that he actually had a friend whose name

1 was Hillary -- and I have forgotten the name of the company she  
2 was with -- who he said was very connected to the comedy scene  
3 in D.C., and he really thought he'd rather use her.

4 And I said fine, and I let Geoff -- you know, Geoff called  
5 Matt and said we've decided, you know, that we're making some  
6 different arrangements. And I said go ahead, and she sent a  
7 contract to me, and -- to him. He gave it to me. It was one  
8 page, I think. It was very short.

9 I read it, and I said -- I sent him an e-mail back. So  
10 somewhere in there, there's an e-mail where I said -- and this  
11 was early. This was like, I don't know, January, February when  
12 we were initially hiring someone to do our PR.

13 And he -- and I reviewed it in a couple of days, because  
14 that's just what I did. You know, for all our other business,  
15 submit everything to me, I promise I'll be quick about it. And  
16 it was pretty short contract that didn't have any objectionable  
17 provisions in it. So I said, looks good, you know, go ahead.  
18 Go ahead with her. Sign it.

19 And what happened after that is -- I didn't meet her, and  
20 that was okay. That was John's -- John was handling, you know,  
21 the operations and the PR. And at one point I'd been working  
22 with the city getting all our permits, and they had -- the  
23 mayor's office had indicated to me that, well, now it was -- it  
24 was a couple months before opening, that was in August, and they  
25 said, well, we would -- you know, can you give us your press



1 release?

2 They were actually willing to, you know, try to help, you  
3 know, pass it out, let people know that this would be opening in  
4 the city. They were very excited about it too. And so I called  
5 John, and I said, do we have a press -- you know, could you give  
6 me a copy of the press release, which I thought was already  
7 prepared. And he said, well, I don't have a press release. And  
8 I said, but we hired someone a few months ago.

9 And I explained to him about it was the city that wanted to  
10 see this. We hadn't -- they were the first ones to bring it up  
11 to me. And so I -- you know, he said, well, you didn't meet  
12 Hillary. I said I didn't need to meet Hillary. He said, you  
13 never reviewed the contract. I said, yes, I did, and I actually  
14 sent him -- re-forwarded to him my e-mail to him that said,  
15 yeah, it's a go, this is fine, sign it, and go forward with her.

16 So he said, okay, well, I really want you to meet her. And  
17 I said okay. So like the next day -- because I said we need  
18 this soon because I want to take advantage of the city's  
19 interest in helping us promote the business.

20 And so I met with her, I think it was on a Monday, and we  
21 talked at the bagel shop next to, you know, where Riot Act was  
22 being built out. And I talked to her, and just -- you know,  
23 said we needed -- I explained to her that we were going to need  
24 a press release fairly early, you know, soon, because of this  
25 great opportunity to have the city, you know, out there working

1 for us.

2 And she said, well, she couldn't have one ready until the  
3 end of the week. And I said, okay, if you can get it done  
4 sooner, that would be better. Press releases aren't usually  
5 very long. And -- but, you know, I was like, okay. I mean, I  
6 didn't know what else she had on her plate at work. She might  
7 have been really busy.

8 And that Friday I did get a press release, and I thought  
9 it was very poor quality. And I called Geoff and said, have you  
10 looked at this? I think he was driving. I said, no, you look  
11 at it now because we need to, you know, discuss this. I think  
12 I made him pull over in his car.

13 He reviewed it, and I said, this is completely inadequate.  
14 I mean, we need something -- it doesn't -- it was very  
15 inadequate. And Geoff even -- I mean, John even later said it  
16 wasn't, you know, very good. Because Geoff said, yeah, let's go  
17 ahead and see if we can get Matt Hagan back, Bulldog Productions.

18 So I called Matt back and said, you know, we -- the new PR  
19 firm that we had decided to go with after we had talked to you  
20 isn't really working out for us; would you be available to take  
21 over? And he said, sure, of course, we'd love to.

22 So I called back Geoff and told him about the conversation  
23 and that Matt was available. So he -- he said, okay, well, then  
24 why don't we make the change, and you call Hillary and let her  
25 know that we are not going to go forward using her.

1           And so I did, that afternoon. We didn't have the most  
2     pleasant conversation, but, you know, we terminated it, which  
3     was consistent -- we were allowed to under the terms of that  
4     very short and simple contract. And John became furious when he  
5     heard this. So we scheduled a meeting at Bedrock where we were  
6     meeting because the Riot Act space was still being built out.  
7     And I said -- he screamed at me. He was really, you know -- he  
8     was -- he was just outraged.

9           And, you know, Geoff said, look, Marjorie and I, you know,  
10    made this decision quickly on the fly because we did need to get  
11    a press release out, and he agreed it wasn't adequate, and so I  
12    made the call to Hillary and I called Matt Hagan back and he had  
13    to us a fabulous press release on Monday, or maybe he sent it  
14    over the weekend so we could look at it.

15          And he sent it to all the parties, sent it to John, Geoff,  
16    and I to review. And it was very good, and we decided to  
17    continue to use him. And actually, John, late the next week,  
18    said, I was very angry at you and Geoff for making this decision  
19    without consulting me, which I don't -- I just wanted to move on  
20    it very quickly.

21          I probably should have called John and said this is what  
22    we're thinking of doing or want to do, but I don't even know if  
23    I made the call. I just called Geoff and said we've got to get  
24    this taken care of quickly. But then John said the next day --  
25    or the next week after he had reviewed it, and he actually had

1 carefully reviewed it and given some good comments to Matt Hagan  
2 for the press release.

3 And he said, yeah, this was probably -- you know, he was  
4 upset with how it was handled, and, okay, it may not have been  
5 the best way I should have handled it, or Geoff and I should  
6 have handled it, but he said it was the right decision.

7 So we went forward with Bulldog Productions, and they did a  
8 great job for us. And they worked mostly with John because he  
9 was the one -- he was our operating partner. I was happy to  
10 help out or chip in, you know, with anything at that point, you  
11 know, even if it wasn't legal --

12 Q. Such as the paint color on the walls?

13 A. Oh, paint color, yeah. It is a little bit of an obsession  
14 of mine, even for my own homes. But we were trying to decide,  
15 you know, what we were going to -- Geoff had said I'll leave the  
16 color to you. We're going to use a gray.

17 So I studied the different grays, and I picked one. John  
18 said that our sound and lighting person who, you know, has to do  
19 all the lighting for the, you know, on the stage, and he had --  
20 he wanted some input on what color gray it was going to be that  
21 would work best for lighting. I said okay, brought all my chips  
22 in. Talked with Mick. I think his name was Mick Aildasani.  
23 And we went with his gray for the stage, and it worked out  
24 really well. So, you know, I did stuff like that.

25 Q. Could I ask you to turn to Trial Exhibit 74, please, and at

1 the bottom of the page there, there appears to be an e-mail from  
2 Matt Hagan, who you were just discussing, to you, John, and  
3 Geoff. Do you see that?

4 A. Yes, I do.

5 Q. Okay.

6 MR. O'NEIL: Your Honor, we'd like to move the entry  
7 of Defendants' Trial Exhibit 74 into evidence.

8 THE COURT: Ms. McDonald?

9 MS. MCDONALD: Relevance and foundation, Your Honor.

10 THE COURT: You may approach.

11 (Bench conference.)

12 MS. MCDONALD: Your Honor, I fail to see how this  
13 entire line of questioning about the PR company has to do with  
14 any of their claims. Again, they also have a foundation problem  
15 in that what I believe they're about to ask Ms. Heiss about is  
16 an e-mail exchange between Mr. Dawson and Mr. Xereas.

17 THE COURT: Mr. O'Neil?

18 MR. O'NEIL: She was on the original e-mail that John  
19 then forwards to Mr. Dawson with comments and which Mr. Dawson  
20 then replies to, the three partners in the company talking about  
21 company business on company e-mail.

22 THE COURT: May I see a copy, please?

23 MR. O'NEIL: And the deterioration of the relationship  
24 between Ms. Heiss and Mr. Xereas is one of the factors that  
25 brought us here today.

1 MS. MCDONALD: There are many issues that we would  
2 like to get into that led to the deterioration of that  
3 relationship that we haven't been permitted to explore.

4 THE COURT: The Court can perceive no basis for either  
5 objection. Thus, Defendants' Exhibit 74 will be admitted over  
6 objection. After you ask a few questions regarding 74, I will  
7 suggest that we give the jury a brief midmorning recess.

8 MR. O'NEIL: That would be a good idea, Your Honor.

9 THE COURT: Thank you.

10 (End of bench conference.)

11 BY MR. O'NEIL:

12 Q. Ms. Heiss, the e-mail from Matt Hagan refers to a *Washington*  
13 *Business Journal* article. Do you remember that article?

14 A. Yes, I do.

15 Q. So the first e-mail from Matt to you, John, and Geoff was  
16 talking about the *Washington Business Journal* article that  
17 addressed Riot Act's grand-opening plans. Do you see that?

18 A. Yes, I do.

19 Q. And then John forwards that e-mail to Geoff, in the middle  
20 of the page?

21 A. Yes. Yes, he did.

22 Q. That same day, about an hour and a half later?

23 A. Yeah.

24 Q. Could you read the first line of that e-mail?

25 A. "Good thing I am the face of the place. Revolting.

1 Really."

2 Q. How about the next paragraph?

3 A. "Any new press" --

4 Q. I'm sorry. Where it starts "Matt needs."

5 A. Oh, finish the paragraph? "Matt needs to be informed this  
6 morning that Marjorie has nothing to do with the day-to-day  
7 operations, does not know anything about comedy or what it  
8 really takes to run one of your businesses. If they are  
9 planning an event, especially with comics, he needs to talk or  
10 do it through me."

11 Q. Do you remember whether Mr. Xereas was invited to the  
12 meeting with the reporter from the *Washington Business Journal*?

13 A. Yes. We -- Matt had arranged for us to have an interview  
14 with the *Washington Business Journal*, which some of you may be  
15 familiar with, and we were to meet them at Riot Act's just, you  
16 know, close-to-finished space.

17 And we were all invited. We were all coming. And then  
18 when John didn't -- you know, we were sort of waiting on John,  
19 and we tried to contact him and said, you know, when do you  
20 think you'll be here? The reporter and photographers are  
21 already here. And he said, I'm not coming.

22 I can't remember -- to be honest with you, I can't remember  
23 if we couldn't reach him or if he just said I'm not coming. I  
24 think Geoff was trying to, you know, call him, text him, e-mail  
25 him, the usual ways of -- and so he never came.

1           He did not, as far as I know, give any reason, but he just  
2       didn't show up for the interview. So Geoff and I had to do it  
3       on our own. And it's true. Neither one of us knew much about  
4       the comedy business. It was actually key for us to have John  
5       there because he was the centerpiece of the article. He was our  
6       operating partner. He was the one who had experience.

7       Q. And at the top of the page, Mr. Dawson's reply to  
8       Mr. Xereas, do you see that?

9       A. Okay. Yes.

10      Q. And in that e-mail response, Mr. Dawson says, "Also, if you  
11      had attended the meeting with the biz journal reporter, I think  
12      the article would have been quite different. They were working  
13      with what they were presented." Do you see that?

14      A. Yes, I do.

15      Q. And that's consistent with what you just stated, that  
16      Mr. Xereas was invited to the meeting with the reporter but  
17      didn't show up. Correct?

18      A. Correct.

19      Q. The second paragraph down, Mr. Dawson states to Mr. Xereas,  
20      "I'm losing faith in this project, and I need you to pull it  
21      together and let go with the attitude. Of course, if you're  
22      spoiling for a fight, you'll certainly get it from Marjorie.  
23      I think you are far smarter than that. Look past the opening  
24      and just have faith in the project. We are too close."

25           Do you recall conversations with Mr. Dawson where he



1 expressed this same sentiment to you?

2 A. That he -- I'm sorry. Could we clarify that we had --  
3 we're losing faith?

4 Q. Yes.

5 A. Yes. We did discuss that. We were concerned about how  
6 our relationship with John was deteriorating and how he was  
7 proceeding to set up the business -- and a lot of it had to  
8 do -- yeah, it was sort of equally to do with -- obviously,  
9 John was very unhappy working with me and having me part of the  
10 partnership.

11 And I think we were very concerned about the manner and  
12 speed at which John was planning -- you know, we're going to be  
13 opening soon. This is, what, 4th of July weekend? And we were  
14 opening at the beginning of August, and a lot of stuff was left  
15 to do, and it wasn't getting done.

16 So we had several conversations about that. And a few  
17 things I had to just jump in that I wouldn't normally do and  
18 I really had no idea, but I -- you know, Geoff kind of gave me  
19 some guidance to take care of some of the things that needed to  
20 be, you know, done before we opened.

21 MR. O'NEIL: Your Honor, now might be a good time for  
22 a break.

23 THE COURT: Very well. Members of the jury, we will  
24 take our midmorning recess at this time. I will ask that you  
25 leave your materials on your seats, please, and accompany

1 Ms. Lesley. We'll take 15 minutes. Thank you.

2 (Jury out at 10:56 a.m.)

3 THE COURT: We will all take 15 minutes. Thank you.

4 (Recess from 10:55 a.m. to 11:18 a.m.)

5 THE COURT: Ms. Heiss, I will ask you to please return  
6 to the witness stand. Thank you.

7 Mr. O'Neil, how much additional time do you believe you'll  
8 need?

9 MR. O'NEIL: We're going to try to pick up the pace,  
10 Your Honor, but I think 45 minutes.

11 THE COURT: Very well. At that point we will then  
12 break for lunch. Is it you, Ms. McDonald, who will cross-examine?

13 MS. MCDONALD: Yes, Your Honor.

14 THE COURT: Very well. You will begin your cross-  
15 examination after lunch. Thank you.

16 (The witness resumes the stand.)

17 (Jury in at 11:19 a.m.)

18 THE COURT: Thank you, members of the jury. You may  
19 be seated. Mr. O'Neil, you may resume your direct examination  
20 of Ms. Heiss.

21 MR. O'NEIL: Thank you, Your Honor.

22 BY MR. O'NEIL:

23 Q. Ms. Heiss, I'd ask you to turn to Exhibit 17.

24 A. I'm there.

25 Q. This appears to be an e-mail exchange between you and John

1 Xereas.

2 A. That's correct, yes.

3 MR. O'NEIL: Your Honor, at this point we move for  
4 admission of Defendants' Trial Exhibit 17.

5 THE COURT: Is that without objection, Ms. McDonald?

6 MS. MCDONALD: May I have a moment, Your Honor?

7 THE COURT: Yes.

8 (Counsel reviewing document.)

9 MS. MCDONALD: Your Honor, I would object to relevance  
10 at this time.

11 THE COURT: Counsel, you may approach.

12 (Bench conference.)

13 THE COURT: What is the relevance objection,  
14 Ms. McDonald?

15 MS. MCDONALD: I just don't see how it relates to the  
16 claims, Your Honor.

17 MR. O'NEIL: I'm attempting to just conclude the line  
18 of questioning about the deterioration of the relationship  
19 between the parties.

20 MS. MCDONALD: It doesn't relate to the claims.

21 THE COURT: You're saying the claims?

22 MS. MCDONALD: The counterclaim.

23 MR. O'NEIL: Their claim and our claim --

24 THE COURT: Why is that not relevant?

25 MS. MCDONALD: I don't see how it relates to the

1 counterclaims, Your Honor.

2 THE COURT: Are the defendants precluded from putting  
3 on a defense of your claims?

4 MS. MCDONALD: Well, I don't see how it relates to  
5 our --

6 THE COURT: Your argument seems to be that the exhibit  
7 is not relevant to the counterclaims --

8 MS. MCDONALD: Or the claims, Your Honor. I don't see  
9 the relevance of this document at all.

10 THE COURT: May I see the exhibit, please?

11 MR. O'NEIL: We're being accused of bad faith, breach  
12 of duty under the contract. We think it's relevant to that.

13 Ms. Heiss is trying to repair the relationship with Mr. Xereas.

14 MS. MCDONALD: The relationship is not a part of the  
15 claim.

16 THE COURT: The objection is overruled.

17 (End of bench conference.)

18 THE COURT: Defendants' Exhibit 17 is admitted over  
19 objection.

20 (Defendant Exhibit No. 17

21 received into evidence.)

22 MR. O'NEIL: Thank you, Your Honor.

23 BY MR. O'NEIL:

24 Q. Do you see at the bottom of the page, Ms. Heiss, your  
25 e-mail to John?

1 A. Yes, I do.

2 Q. Was this basically an effort to repair the relationship  
3 with Mr. Xereas after the earlier exchange?

4 A. Yes, it was.

5 Q. And how did Mr. Xereas react? At the top of the page.

6 A. He reacted positively, you know, to my overture. I was  
7 very unhappy that things had deteriorated, and he seemed willing  
8 to work with me to fix it. I wanted to.

9 Q. There's been some testimony regarding Mr. Ray Ritchey.  
10 Do you recall that? Well, let me ask a different question.  
11 Do you know Ray Ritchey?

12 A. Yes, I do.

13 Q. Who was he with respect to Riot Act?

14 A. He was -- he's one of the principals of Boston Properties,  
15 who is our landlord.

16 Q. Okay. And did there come a time in the fall of 2011 when  
17 Mr. Ritchey, representing the landlord, reached out to you?

18 A. Yes, there was.

19 Q. What were those circumstances?

20 A. I had known Mr. Ritchey for a while because we had leased a  
21 lot of space from him over the years, and he called me and he  
22 would -- I don't remember every conversation, but he would call  
23 me on my cell and say, I'm standing out in front of Riot Act and  
24 I'm seeing this. I think you need to get down here and look  
25 into this.

1 Q. He had concerns about things that were going on at the club?

2 A. Yeah.

3 Q. While it was still a comedy club. Correct?

4 A. Well, yeah. We had started out, and he was especially  
5 concerned because he could see these things from the front door.

6 Q. And you weren't there on a day-to-day basis --

7 A. No.

8 Q. -- so he was reaching out to you to address the concerns he  
9 had. Correct?

10 A. Yes, he was.

11 Q. And he had to do this on more than one occasion?

12 A. Yes, he did.

13 Q. Do you have any estimate about how many times Mr. Ritchey  
14 called you down?

15 A. At most, three or four times.

16 Q. Do you recall any of the concerns that he expressed to you?

17 A. Well, the one I remembered the best is that he -- he was  
18 standing, and he said I'm standing in front --

19 MS. MCDONALD: Objection, Your Honor. Hearsay.

20 THE COURT: You may approach.

21 (Bench conference.)

22 THE COURT: Yes.

23 MS. MCDONALD: Yes, Your Honor. Ms. Heiss is about to  
24 testify as to what Ray Ritchey told her. It's an out-of-court  
25 statement offered for the truth of the matter.

1 MR. O'NEIL: I'm not necessarily offering it for the  
2 truth but --

3 THE COURT: That was to be my question to you. For  
4 what purpose are you offering it?

5 MR. O'NEIL: To give some understanding as to what  
6 Ms. Heiss was being told by the landlord of the property and  
7 the concerns that that landlord was raising.

8 MS. MCDONALD: It certainly sounds like that's to the  
9 truth of the matter. The landlord's concerns are being offered  
10 for the truth.

11 THE COURT: Can you ask a more specific, even if  
12 leading, question, Mr. O'Neil, so that it is clear that you are  
13 eliciting information communicated to Ms. Heiss, the basis of  
14 which provided the basis for any action taken by Ms. Heiss.

15 MR. O'NEIL: Okay. I'll try that.

16 THE COURT: Very well.

17 (End of bench conference.)

18 BY MR. O'NEIL:

19 Q. Ms. Heiss, do you recall anything specific that Mr. Ritchey  
20 said to you about his concerns at Riot Act?

21 MS. MCDONALD: Objection, Your Honor.

22 THE COURT: The objection is overruled.

23 THE WITNESS: I remember this because it was the first  
24 time he just said, Marjorie, I'm standing in front of the front  
25 doors out on the sidewalk, and the show was going to be starting

1 soon, and there are a lot of people, you know, behind the desk,  
2 the ticket counter, and people are just shoving cash into their  
3 pockets. He said, it looks a little chaotic, I'm not sure  
4 what's going on. I think it would be good if you'd come down  
5 here and look into this.

6 BY MR. O'NEIL:

7 Q. And then that's what you did?

8 A. That's what I did.

9 Q. And every time Mr. Ritchey called you, you'd respond by  
10 going down and checking out to make sure --

11 A. Yes, I did.

12 Q. -- nothing untoward was going on?

13 There's also been testimony here that Dawn Henderson, after  
14 September 21st when her employment -- her day-to-day employee  
15 status was terminated, that she became an independent  
16 contractor. Is that consistent with your recollection?

17 A. That was my understanding. We were trying to cut costs,  
18 and I think we were going to try to keep that limited. But,  
19 yeah, that was my understanding.

20 Q. And Riot Act had other employees, Mr. Rosenthal and  
21 Ms. Zlotnik, who were handling social media?

22 A. Right. And we had asked them to sort of take over so we  
23 could minimize how much we had to pay out to third parties.

24 Q. But was it your understanding that Ms. Henderson was also  
25 still working?



1 A. Well, I thought she was -- that she wasn't going to be  
2 because also she had a few health problems and was in the  
3 hospital. So -- and I never saw her working again, so I assumed  
4 that Evan and Lauren were doing it all.

5 Q. Can I ask you to turn to Exhibit 19?

6 A. Yes.

7 Q. Do you recognize this document?

8 A. Yes, I do. It's an e-mail I wrote to John, copying Geoff  
9 Dawson and Peter Bayne.

10 Q. And the subject of it is Talent Contracts?

11 A. Yes, it is.

12 MR. O'NEIL: Your Honor, we'd move the admission of  
13 Defendants' Trial Exhibit 19 into evidence.

14 MS. MCDONALD: No objection, Your Honor.

15 THE COURT: Defendants' Exhibit 19 will be admitted  
16 without objection.

17 (Defendant Exhibit No. 19  
18 received into evidence.)

19 BY MR. O'NEIL:

20 Q. Ms. Heiss, in your e-mail to Mr. Xereas, you state, "As  
21 we've discussed at numerous meetings, you have agreed to provide  
22 me with the fully executed contracts with the comedians who have  
23 performed or will be performing at Riot Act. As we agreed, I  
24 will file all the original documents in our legal files."

25 Do you see that?

1 A. Yes, I do.

2 Q. And was it your -- to your knowledge, had Mr. Xereas been  
3 providing you copies of signed contracts?

4 A. No. He had not been providing me with any copies.

5 Q. And you had requested them on numerous occasions?

6 A. I requested them frequently, yes.

7 Q. And you went to outside counsel to discuss this, and  
8 outside counsel reiterated your point that it was important  
9 to have signed contracts with the performers?

10 MS. MCDONALD: Objection, Your Honor. Mr. O'Neil is  
11 testifying. This question is leading.

12 THE COURT: Overruled.

13 THE WITNESS: Yes. I did seek -- you know, there  
14 seemed to be some pushback on getting the contracts. I wanted  
15 to make sure I was not being overly, you know, zealous. And so  
16 I talked to -- I talked to outside counsel, and they said, no,  
17 no, you really should have contracts. You're right.

18 BY MR. O'NEIL:

19 Q. And you had other concerns about Mr. Xereas's management  
20 of the comedy club. Correct?

21 A. Correct.

22 Q. Did one of those concerns arise from cash payments to  
23 performers?

24 A. Yes, it did.

25 Q. Was there a specific cash payment that stood out to you?

1 A. Yes. It was a cash payment made to Paul Mooney, who's a  
2 very well-known comedian.

3 Q. Do you know how much he was paid in cash?

4 A. I believe it was \$11,000. That's my recollection.  
5 11,000 in cash.

6 Q. And was there a written contract with Mr. Mooney?

7 A. No. We had no written contract, and I found out about this  
8 later. But we -- there was no contract. I asked John for it.  
9 I said we can't be making cash payments, especially without  
10 contracts, so that we can identify where that money went to.  
11 And he said that he would start doing contracts, and I said, and  
12 I don't think we should be paying large sums like that in cash.

13 Q. And did he tell you on more than one occasion when you  
14 requested signed contracts that he would be providing them to  
15 you?

16 A. Yeah. The regular response was, I'll have them to -- I'll  
17 have them in your box. I didn't have an office at Riot Act, but  
18 I had a box there. He goes, I'll have them in your box by the  
19 end of the week. They're at home. And I said okay.

20 Q. Did they ever appear?

21 A. No. Never.

22 Q. Was there another concern that you learned about Mr. Xereas  
23 having bills to the business sent to his home?

24 A. Yes. We learned that instead of having bills sent to the  
25 business, addressed to the business at our address so that we

1 could show that those were bona fide expenses, they were going  
2 to his apartment. I'm not sure why he set it up that way.

3 Q. And was he paying these bills?

4 A. He fell into arrears a couple of times, and that's  
5 actually, I think, how we found out that they were not coming  
6 to -- they contacted us at Riot Act, like utilities and other  
7 providers, and that's when we learned that they were going to  
8 John's apartment, not to Riot Act.

9 Q. Do you recall if the *Washington Post* was one of those  
10 vendors?

11 A. I do not recall that.

12 Q. I ask you to turn to Defendants' Exhibit 69. Do you have  
13 it there?

14 A. I have it here, yes.

15 Q. That appears to be an e-mail from Mr. Dawson to Mr. Xereas  
16 and to you. Correct?

17 A. Correct.

18 Q. On October 3, 2011?

19 A. Correct.

20 MR. O'NEIL: Your Honor, we'd move for the admission  
21 of Defendants' Trial Exhibit 69.

22 THE COURT: Ms. McDonald?

23 MS. MCDONALD: No objection, Your Honor.

24 THE COURT: Thank you, Ms. McDonald. Defendants'  
25 Exhibit 69 will be admitted without objection.

(Defendant Exhibit No. 69  
received into evidence.)

BY MR. O'NEIL:

Q. We heard some testimony earlier in the case about scheduling of meetings. Is it your understanding that oftentimes meetings between the three of you would be held informally or on an impromptu basis?

A. Yes. When you're building and running a business together, you have regular meetings that are just, you know, when we were all together and needed to discuss something, we would just say we need to meet.

Q. You didn't operate on a general understanding that you had to call a meeting and wait 15 days before you'd discuss something, would you?

A. No. No one requested that.

Q. You couldn't operate a business like that --

A. You couldn't run a business that way.

Q. In Mr. Dawson's e-mail to which you were a recipient, Mr. Dawson stated in the first paragraph, "I texted you several times yesterday and left a voice mail midday in hopes that we could talk. I also e-mailed you late last night to try to set up a meeting today. I received no response, and I'm concerned because, as you know, we have some urgent issues to discuss regarding Riot Act." Do you see that?

A. Yes, I do.

1 Q. Was that a fairly common problem with Mr. Xereas, trying to  
2 get in touch with him and him not returning calls or e-mails?

3 A. Yes, it was. It was.

4 Q. It made it more difficult to schedule meetings that way?

5 A. It became very difficult, because we did want his input or  
6 needed his input.

7 Q. And at the bottom of the e-mail, Mr. Dawson states, "John,  
8 it's very important that we meet today for as long as necessary,  
9 and again tomorrow if needed, and the next day and the next.

10 Marjorie has indicated that she is available at noon today, and

11 I am as well. Please let me know if you are free to meet then.

12 I know that we can make significant and positive progress, but  
13 that will not happen if we do not communicate with one another."

14 Do you see that?

15 A. Yes, I do.

16 Q. And that's consistent with --

17 A. Yes, it is.

18 Q. -- your testimony about difficulty in getting ahold of  
19 Mr. Xereas at times?

20 A. Yes, it is.

21 Q. Do you recall an incident at Riot Act in December of 2011  
22 that resulted in a Yelp review that was of concern to the  
23 company?

24 A. Yes, I do.

25 Q. And were you there?

1 A. I was there.

2 Q. Can you describe for the jury what happened?

3 A. It was during a show, and --

4 MS. MCDONALD: Your Honor, I object to the relevance  
5 of this line of questioning.

6 MR. O'NEIL: Mr. Xereas testified on this exact topic.

7 THE COURT: Overruled.

8 THE WITNESS: I was at the club that night during a  
9 show, and it came to my attention -- someone came and got me --  
10 that Ted Xereas, John's brother, who was acting as a server, had  
11 gotten into some kind of dispute with some customers. And so  
12 I -- you know, maybe you should go, you know, walk over and see  
13 what -- what's going on.

14 John was not there that night, which is why I was the one  
15 sort of snagged to go look at it, go see what was going on.  
16 And, yeah, they were arguing. It was also during a show. So  
17 I suggested we go out, right outside the show room, there was a  
18 bar area, and talk about it there.

19 And then Ted, and I think Mike Farfel was there, was just  
20 yelling, you know, at -- at the patrons. And it was getting  
21 really heated. And I mean, it looked to me like there was going  
22 to be a fight. And so --

23 BY MR. O'NEIL:

24 Q. And Ted's a fairly large person?

25 A. He's a big guy. The other guy wasn't quite as big, but

1 he -- you know -- bigger than me. I didn't really -- at that  
2 time I did not think Ted would hit me, so I just kind of stepped  
3 into the middle of it and said, Ted, everyone, calm down. I  
4 said, why don't I just, you know, go upstairs. They'd indicated  
5 that they just wanted their money back and leave.

6 And so I said, okay. If that's how you feel, then we  
7 will -- I'll go upstairs with you and get your money refunded,  
8 and I'm very sorry. We'll give you, you know, a voucher to come  
9 back. We're sorry that this -- we hope this incident won't  
10 discourage you from coming again. And that's what we did. I  
11 mean, Ted and some of the other servers were not happy with my  
12 approach, but I insisted on it.

13 Q. And that resulted in the customer or someone related to the  
14 customer --

15 A. Yeah, the customer wrote --

16 Q. -- posting comments on Yelp?

17 A. Yeah. A long Yelp review resulted from that event.

18 Q. Could you turn to Defendants' Trial Exhibit 40?

19 A. Yeah.

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

21 THE COURT: Yes.

22 (Bench conference.)

23 THE COURT: What's your objection?

24 MS. MCDONALD: Well, Your Honor, this is an online  
25 review that is clearly hearsay, and also we did not stipulate to



1 the authenticity of this document. So I would object to any  
2 questions.

3 THE COURT: Mr. O'Neil?

4 MR. O'NEIL: The only objection I see in plaintiff's  
5 objections is this was one of the documents that was improperly  
6 identified, and we subsequently provided a copy of this document  
7 to Ms. McDonald's office.

8 MS. MCDONALD: And then we filed our amended  
9 objections in which we made additional objections, having seen  
10 the document, because we couldn't previously make objections  
11 having not known what it was.

12 THE COURT: I'm sorry. I'm not certain I understand  
13 the objection, Ms. McDonald. Is it relevance?

14 MS. MCDONALD: Hearsay, Your Honor. I would also  
15 object to relevance, but it's certainly hearsay. It's an online  
16 review from an unidentified customer who's not here to testify.

17 THE COURT: To what extent was evidence regarding this  
18 review introduced by the plaintiff?

19 MS. MCDONALD: I don't believe we did anything with  
20 the review, Your Honor.

21 MR. O'NEIL: I thought there was reference made to a  
22 Yelp article or concerns over the -- but I'm not getting daily  
23 transcripts, Your Honor, so I can't tell you for sure one way or  
24 the other.

25 THE COURT: For what purpose do you wish to offer

1 this, Mr. O'Neil?

2 MR. O'NEIL: Simply confirmatory of Ms. Heiss's  
3 testimony, and also makes clear that the complaints -- the  
4 incident that she just testified about was made public in a  
5 way that was detrimental to the company.

6 MS. MCDONALD: To confirm Ms. Heiss's testimony  
7 certainly sounds like the truth of the matter asserted to me.

8 MR. O'NEIL: We're just showing the jury that there  
9 was a negative posting on Yelp.

10 MS. MCDONALD: Ms. Heiss testified to that fact.  
11 They don't need to see the hearsay review.

12 MR. O'NEIL: I think when you confirm the witness's  
13 testimony with documents, it carries more weight.

14 THE COURT: The Court will sustain the objection to  
15 Defendants' Trial Exhibit 40. Ms. Heiss has testified to what  
16 she observed, what actions she took, and I believe at least at  
17 this point, that is all that is appropriate.

18 MR. O'NEIL: Thank you, Your Honor.

19 THE COURT: Should that circumstance change in any  
20 way, we can revisit the issue again.

21 (End of bench conference.)

22 THE COURT: The objection to the admission of  
23 Defendants' Exhibit 40 is sustained.

24 BY MR. O'NEIL:

25 Q. Ms. Heiss, when the negative review on Yelp appeared, was

1 that a concern to the company?

2 A. Yes, it was.

3 Q. What actions did you take or did the company take to  
4 address that concern?

5 A. We sat down and talked to Ted Xereas, who'd been involved  
6 in that event, and talked to some of our other employees that  
7 they needed to be more polite with, you know, our customers.

8 Q. Did you think their behavior was unprofessional?

9 A. Yes. You know, the sort of -- it's a cliché, but the  
10 client's always right in our -- you know. Their job was to make  
11 the customers happy.

12 Q. Did John Xereas have any comments about Ted's behavior?

13 A. Not to me, no.

14 Q. Okay. The next month, in January, you were present at Riot  
15 Act when Ted and Mike Farfel, their employment was terminated.  
16 Correct?

17 A. Correct.

18 Q. Could you explain to the jury what happened that day?

19 A. We had decided, as part of our cost -- you know,  
20 cost-cutting measures, the business was underwater, that we were  
21 going to terminate Ted and -- Ted Xereas and Mike Farfel, who  
22 was a college roommate and good friend of John's.

23 And I was not at the actual meeting when that occurred,  
24 and -- but -- because I thought my presence there might inflame  
25 things further. John heard about it. So I was on premises, but

1 I was off somewhere else. I knew what was going on. But John  
2 heard about it, I understand went into the office. There was a  
3 lot of yelling going on, but I wasn't actually in the office, so  
4 I can't say what was happening.

5 But it was over fairly quickly, and when they all came out  
6 and I walked over to the office, they started screaming horrible  
7 obscenities to me and continued to do that. And we had  
8 customers in the premises. And what he was saying to me, they  
9 were just -- all three of them, but particularly John, just  
10 screaming horrible things to me.

11 Q. Do you recall specifically what he said?

12 MS. MCDONALD: Objection, Your Honor. Relevance.

13 THE COURT: Overruled.

14 THE WITNESS: It --

15 THE COURT: Let me ask you to approach, counsel.

16 (Bench conference.)

17 THE COURT: To ensure that I understand the context,  
18 am I correct that the obscenities, the invectives, were directed  
19 at Ms. Heiss while everyone was on the premises of Riot Act and  
20 patrons were also?

21 MS. MCDONALD: That's according to her testimony,  
22 Your Honor, but I would also offer that this testimony is  
23 prejudicial more than probative. She's already offered that he  
24 called her obscenities. I don't think we need to get into the  
25 exact obscenities, Your Honor.

1 MR. O'NEIL: I believe it is probative, Your Honor.  
2 This is the key incident that --

3 THE COURT: Let me ask you to rephrase your question,  
4 please, Mr. O'Neil, so that it is directed to what Mr. John  
5 Xereas said rather than his brother or his college roommate.

6 MR. O'NEIL: I will. I will tailor the question in  
7 that way, Your Honor.

8 THE COURT: Thank you.

9 (End of bench conference.)

10 BY MR. O'NEIL:

11 Q. Ms. Heiss, focusing only on what John Xereas said to you  
12 as he came out of that meeting, are you comfortable telling the  
13 jury what he said?

14 A. Not really, unless Your Honor thinks I should. It was very  
15 offensive.

16 Q. Did it have a strong effect on you?

17 A. Yes, it did. It was very upsetting. I don't even know if  
18 anyone had ever called me that before.

19 Q. Maybe you could tell the jury what it is without actually  
20 saying the whole word?

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

22 THE COURT: Yes.

23 (Bench conference.)

24 MS. MCDONALD: Your Honor, this is also irrelevant and  
25 highly prejudicial. This doesn't relate to their claims in any

1 way, shape, or form.

2 THE COURT: The rule suggests that the standard --  
3 there's no rule of evidence that precludes the admission of  
4 testimony because it is prejudicial. Presumably, that's the  
5 reason each side offers evidence, to persuade the jury to find  
6 in its favor. The test is whether -- the tests include, among  
7 other things, whether the jury would be misled or confused, or,  
8 perhaps more broadly, whether any probative value is --

9 MS. MCDONALD: If I may, Your Honor, I don't see any  
10 probative value in offering the exact word that was stated when  
11 she's already testified that he called her obscenities and she's  
12 not comfortable saying this particular obscenity.

13 THE COURT: What is your understanding of what  
14 Mr. Xereas, Mr. John Xereas said?

15 MR. O'NEIL: I believe he got in her face, and he  
16 screamed at her that she was a "fucking cunt."

17 THE COURT: Was this in the club during club  
18 operations?

19 MR. O'NEIL: I believe Ms. Heiss testified there were  
20 customers there, but I could clarify that if you want,  
21 Your Honor.

22 MS. MCDONALD: Your Honor, I'm sorry, but I don't see  
23 the relevance of the fact that there are customers there.  
24 She --

25 THE COURT: The relevance is that because of the

1 nature of the counterclaims, to read it broadly, efforts to  
2 undermine the operation of the club, I think it would be relevant.

3 MS. MCDONALD: Well, Your Honor --

4 THE COURT: If no one was there except the parties,  
5 perhaps it isn't.

6 MS. MCDONALD: Then may I cross on the fact that  
7 Ms. Heiss flashed her breasts in the presence of comedians --

8 THE COURT: No.

9 MS. MCDONALD: -- and members of the public?

10 THE COURT: No.

11 MR. O'NEIL: That's a misrepresentation, Your Honor.

12 MS. MCDONALD: She admitted to it, though.

13 THE COURT: The Court has already addressed this.  
14 Let me suggest that we move on, since there is no purpose to be  
15 served by making Ms. Heiss uncomfortable.

16 MR. O'NEIL: Can she just say "f'ing C word"?

17 THE COURT: Can she be asked whether there were  
18 patrons in the club?

19 MR. O'NEIL: Yes.

20 THE COURT: During the club's normal operations, who  
21 were present when this happened.

22 MR. O'NEIL: Okay.

23 THE COURT: What is your understanding of the answer?

24 MR. O'NEIL: I thought she just said --

25 MS. MCDONALD: She just testified, actually,

1 Your Honor, that there were patrons --

2 THE COURT: May I suggest, then, that we move on.

3 MR. O'NEIL: Yes, Your Honor. Thank you.

4 (End of bench conference.)

5 BY MR. O'NEIL:

6 Q. So after Mr. Xereas yelled these obscenities at you, what  
7 happened next?

8 A. He and -- you know, Ted and Mike Farfel had been dismissed,  
9 and he stormed out with them. And frankly, I don't remember  
10 when I saw him again.

11 Q. Did he go into his office area before he left the --

12 A. Yes, he did. They went back to the office, I guess took  
13 computers and their personal belongings and I don't know what  
14 else, and got their jackets on and left, continuing to yell at  
15 me.

16 Q. And just to clarify, you stated earlier that John Xereas  
17 was dismissed. He wasn't the subject of this employment action.  
18 Correct?

19 A. No.

20 Q. It was only limited to Ted and Mike Farfel?

21 A. He just happened to leave with them at that time.

22 Q. Were there patrons in the club at the time?

23 A. Yes. We had quite a few people there at the bar. The main  
24 bar area was upstairs.

25 Q. But there wasn't a show going on at the time?



1 A. There was not a show going on at the time, no.

2 Q. And we've heard testimony that Mr. Xereas didn't come in  
3 the next day. Is that correct?

4 A. That's correct.

5 Q. And that was unusual because there were shows at the venue  
6 that night?

7 A. Yes. He would always come in previously when there was a  
8 show. He was there.

9 Q. And then the next day he did come in, and you had the  
10 first of the management meetings that we've talked about here.  
11 Correct?

12 A. Yes.

13 Q. And certain restrictions were placed on John Xereas's  
14 check-writing power or entering into contract -- was that the  
15 19th or was that later?

16 A. I think at that time we only curtailed his right to write  
17 checks without a secondary check or -- a secondary signature on  
18 the check. But I think it was -- we were expecting him to  
19 continue to be booking comics, and I asked if I could review  
20 the, you know --

21 Q. If you could...

22 A. We would really -- we want contracts, and I want to see them.

23 Q. Signed contracts.

24 A. Signed contracts by the comics.

25 Q. And then there was a second meeting that we've heard about

1 on January 26th where further restrictions were placed on  
2 Mr. Xereas's powers. Correct?

3 A. That's correct.

4 Q. He was no longer going to be in charge of booking comics.  
5 Correct?

6 A. That's correct.

7 Q. Did you at any time during that January 26th meeting  
8 terminate all of his responsibilities or all of the activities  
9 he undertook as part of his work as an equity owner at the club?

10 A. No. I think we just removed him at that time from -- just  
11 removed him at that time from -- you know, hiring comics.

12 Q. And you didn't cut off access to his e-mails at that point?

13 A. Not to my knowledge.

14 Q. There's been some testimony too about locks being changed  
15 on the doors at the club. Do you recall that?

16 A. Yes, I do.

17 Q. Could you explain to the jury a little bit about why that  
18 was done?

19 A. We did that sometime in the weeks following that event, but  
20 it wasn't simply to lock John out. There were other problems of  
21 people coming in after hours. So we wanted to get control of  
22 who had keys, and so we had everything changed.

23 Q. You had made the determination that there were a lot of  
24 keys being held by a lot of --

25 A. Yeah. And we didn't know who had all of them.

1 Q. And you thought that people were coming in in the middle  
2 of the night and using the space for their own purposes?

3 A. Yes. They even -- the employees in question even had told  
4 us that they were doing it sometime before, and I said, no, we  
5 don't want people coming in when the club is closed.

6 Q. And your understanding was that they were continuing --

7 A. They continued. They continued, and then we decided we  
8 just had to change all the locks and keep a very good record of  
9 who had keys.

10 Q. And if Mr. Xereas had come into the club, would you have  
11 given him a key to the venue?

12 A. Yeah. He was one of the owners.

13 Q. Did he ever request a key and you refuse?

14 A. No, he did not, to my knowledge.

15 Q. I'd ask you to turn to Exhibit 15.

16 A. Fifteen?

17 Q. Exhibit 15 appears to be an e-mail from you to John Xereas  
18 on February 2, 2012. Do you see that?

19 A. Yes, it is.

20 MR. O'NEIL: Your Honor, we'd move for the admission  
21 of Defendants' Trial Exhibit 15 into evidence.

22 MS. MCDONALD: No objection, Your Honor.

23 THE COURT: Thank you, Ms. McDonald. Defendants'  
24 Exhibit 15 will be admitted without objection.

25

1 (Defendant Exhibit No. 15  
2 received into evidence.)

3 BY MR. O'NEIL:

4 Q. So this e-mail dated February 2 was being sent to  
5 johnx@riotactentertainment.com. Is that one of his e-mail  
6 addresses?

7 A. That was one of his e-mail addresses, yes.

8 Q. And could you read the text of your e-mail?

9 A. I said, "John, since you have not come by Riot Act and  
10 picked up the materials in your box there, I am attaching a copy  
11 of the minutes of the managers meeting on January 26 that we  
12 have in a sealed envelope in your box at Riot Act. It's been in  
13 your box at Riot Act for almost a week."

14 Q. And is that consistent with your recollection that, after  
15 the meeting on January 26th, for the next week you didn't see  
16 John?

17 A. That was -- I didn't see John. That's my understanding.

18 Q. Did you see John at all in February?

19 A. No, I did not.

20 Q. And you spent a good bit of February on location at Riot  
21 Act. Correct?

22 A. Yeah. At that point, I took over -- had to take over the  
23 duties, which I was not, you know, adequately trained for, to  
24 start hiring some of the comics to keep, you know, the club  
25 running. And then we brought in one of our investors who was

1 involved who lived out on the West Coast but who's an actor  
2 and who was, you know -- who was familiar with, you know, the  
3 theater business and comics, and asked him to come and help us  
4 book them and I would just assist him. He was good at it.

5 Q. I would ask you to turn to Exhibit 73. My apologies. It's  
6 all the way in the back. It appears to be an e-mail from you to  
7 John Xereas -- or an e-mail exchange at the top dated January  
8 24, 2012. Do you see that?

9 A. Yes, I do.

10 Q. And this appears to be an e-mail exchange where you're  
11 trying to get information from Mr. Xereas about what acts are  
12 scheduled to perform and the details of those acts?

13 A. Yes. Since he didn't leave -- you know, he hadn't come  
14 back, he did not leave any contracts or any schedule or any term  
15 of who was going to be performing, what the terms were of  
16 their -- you know, what we were paying them, so I was trying  
17 to -- we were scrambling, trying to get that information so that  
18 we could keep the club operating.

19 MR. O'NEIL: Your Honor, we'd move the admission of  
20 Defendants' Trial Exhibit 73 into evidence.

21 THE COURT: Ms. McDonald?

22 MS. MCDONALD: No objection.

23 THE COURT: Defendants' Exhibit 73 will be admitted  
24 without objection.  
25

(Defendant Exhibit No. 73  
received into evidence.)

BY MR. O'NEIL:

Q. And you see in the first paragraph of your e-mail to John Xereas on January 24th, you said, "I was just trying to get the necessary information that you had failed to provide to anyone at Riot Act." Do you see that?

A. Yes, I do.

Q. And if you turn to, at the bottom of the second page, your first e-mail, it just says "John" there, but if you turn to page 3 --

A. Yes. I see it.

Q. This was your request to John for information on what was going on. Is that correct?

A. That's correct.

Q. Who was scheduled to perform and the details of those arrangements?

A. Yes. That's correct.

Q. And in the second paragraph, you state, "Also, you've given me only an unsigned copy of the contract with Josh Blue." Do you see that?

A. Yes, I do.

Q. Again, consistent with what you've testified to here today, earlier, that was a common practice for Mr. Xereas, to have unsigned copies of contracts?

1 A. I didn't even see contracts, but he did indicate that there  
2 was one for Josh Blue. I found it in his office, but it wasn't  
3 signed.

4 Q. And the date of your e-mail that we're looking at was  
5 Saturday, January 21st?

6 A. I'm sorry?

7 Q. On page 2, there's a date. Yeah, the previous page.

8 A. Oh, okay.

9 Q. At the bottom where your e-mail starts.

10 A. Okay, yes.

11 Q. And, sorry, turning back to the third page, you state there  
12 under the paragraph, "Fourth"?

13 A. Okay. The one that begins "Fourth"?

14 Q. Yes. You state, "as of yet, neither Lauren nor Evan's  
15 access to Facebook has been restored." Do you see that?

16 A. Yes, I do.

17 Q. You go on to say, "At our managing member meeting on  
18 Thursday evening, Geoff and I asked you to assist in restoring  
19 their access to Facebook so they can handle that part of their  
20 jobs. Yesterday I also sent you an e-mail reminding you of that  
21 request and have not received any response from you."

22 Is that consistent with your recollection that after the  
23 social media sites of the club were sabotaged, that Mr. Xereas  
24 didn't assist in restoring that?

25 A. That's true, after even many, many requests that he help

1 us.

2 Q. And I believe, during Mr. Xereas's testimony, he stated  
3 that the social media sites were only down for a day or two.  
4 Was that consistent with your recollection?

5 A. No. They were -- it was down for some time.

6 Q. In fact, the company had to hire a forensics expert to  
7 try to determine what had happened. Is that correct?

8 A. That's true.

9 Q. Spent a substantial amount of money on that pursuit?

10 A. Yes, we did.

11 Q. I want to -- would you turn to Trial Exhibit 14? Do you  
12 have that in front of you?

13 A. Yes, I do.

14 Q. It appears to be an e-mail from you to John Xereas on  
15 January 19?

16 A. Yes, it is.

17 MR. O'NEIL: Your Honor, we'd offer Defendants' Trial  
18 Exhibit 14 into evidence.

19 THE COURT: Is that without objection?

20 MS. MCDONALD: Without objection, Your Honor.

21 THE COURT: Defendants' Exhibit 14 will be admitted  
22 without objection.

23 (Defendant Exhibit No. 14  
24 received into evidence.)  
25



1 BY MR. O'NEIL:

2 Q. The subject of the e-mail is "Riot Act's Electronic Media  
3 Damage." Do you see that?

4 A. Yes, I do.

5 Q. And you were writing this to Mr. Xereas within 24 hours of  
6 the social media going down. Correct?

7 A. Correct.

8 Q. And in the e-mail you summarize what happened to the  
9 Facebook, Twitter, YouTube, e-mail accounts over the last  
10 24 hours?

11 A. Yes, I did.

12 Q. A paragraph just below the middle of the page starts,  
13 "Because of the extent of these actions, they do not appear to  
14 be random or coincidental, but the work of a hacker or other  
15 person who's trying to attack our business. Obviously, these  
16 actions are very harmful to our business, especially given that  
17 Josh Blue, a national headliner, begins his performance at Riot  
18 Act tonight." Do you see that?

19 A. Yes, I do.

20 Q. Do you know if Mr. Xereas reacted to this e-mail?

21 A. No. I don't recall getting any response from him to this  
22 particular e-mail.

23 Q. And at the bottom of the page there, you state, "I know  
24 that you're upset that Ted, Mike, and your mom no longer have  
25 access to their Riot Act e-mail accounts. Geoff and I have both

1 asked to discuss this matter with you. To date, you have  
2 refused to meet or talk with either of us. Geoff and I would  
3 still like to discuss this matter with you in the hope of coming  
4 to a mutually acceptable resolution." Do you see that?

5 A. Yes, I do.

6 Q. And did Mr. Xereas respond to your request to discuss the  
7 matters?

8 A. No. He did not.

9 Q. Could you turn to Defendants' Trial Exhibit 28?

10 A. Yes. I'm there.

11 Q. Do you recognize that document?

12 A. Yes. It is the transcript of a members meeting held on  
13 March 19, 2012.

14 Q. And where was this meeting held?

15 A. It was held in my home, in our dining room.

16 Q. And Mr. Xereas was in attendance?

17 A. Yes, he was.

18 Q. And he was there with counsel?

19 A. Yes, he was.

20 MR. O'NEIL: Your Honor, we would offer Defendants'  
21 Trial Exhibit 28 into evidence.

22 THE COURT: Ms. McDonald?

23 MS. MCDONALD: No objection, Your Honor.

24 THE COURT: Defendants' Exhibit 28 will be admitted  
25 without objection.

1 (Defendant Exhibit No. 28  
2 received into evidence.)

3 BY MR. O'NEIL:

4 Q. And, Ms. Heiss, could you just confirm my understanding  
5 that this transcript memorializes the reasons that your  
6 attorney, Mr. Conlon, stated at the meeting for Mr. Xereas's  
7 removal as a managing member. Is that correct?

8 A. That's correct.

9 Q. It cited the provisions in the operating agreement that  
10 provided the basis for that action?

11 A. Yes, it did.

12 Q. And it went through the factual predicate for all of the  
13 concerns and reasons that you and Geoff were proposing that  
14 Mr. Xereas be removed as a managing member?

15 A. Yes. We'd discussed all of those at the meeting.

16 Q. And Mr. Xereas had a chance to respond to those at the  
17 meeting?

18 A. Yes, he did.

19 Q. And, in fact, at the conclusion of the meeting, you  
20 provided Mr. Xereas additional time.

21 A. Yes. We said --

22 Q. If he -- based on his request.

23 A. Yes. He said he was not prepared to answer right then,  
24 respond right then, and so we said, okay, we'll give you some  
25 additional time to think about this, and we can meet again.

1 Q. And after that meeting, did you and Mr. Dawson hold the  
2 vote to remove Mr. Xereas as a managing member?

3 A. Yes, we did.

4 Q. And did he lose any of his equity in the company when you  
5 held that vote?

6 A. No, he did not.

7 Q. Essentially, all he lost was his vote.

8 A. Yes, he did.

9 Q. And he still, according to the company, owned 26.67 percent  
10 of the business?

11 A. Yes, he did.

12 Q. There's only one other topic I wanted to talk to you about,  
13 and that is defendants' counterclaim against Mr. Xereas for the  
14 return of his Apple computer. Are you familiar with that?

15 A. Yes, I am.

16 Q. Could you tell us what transpired when the computer was  
17 purchased by the company?

18 A. Yes. John told me that -- he told us that he was having  
19 repeated problems with the -- with his computer at home; it was  
20 an older one. So we said, no, we'll get you a new computer to  
21 use for the business. And John and I went down to the Apple  
22 store in Georgetown, and we picked out -- and basically my  
23 recollection is it was a laptop so that he could go bring it  
24 home when he needed to work on it, a fully loaded black laptop,  
25 a Pro -- well, it doesn't matter -- which I paid for on my

1 credit card, and I was reimbursed by the company.

2 Q. Do you know approximately how much you spent on that  
3 computer?

4 A. Fully loaded, you know, with all of the programs we needed  
5 to buy, close to \$5,000.

6 Q. And do you know, has Mr. Xereas returned that computer to  
7 the company?

8 A. No. He has not.

9 Q. Did he ever provide reasons to you why he hasn't returned  
10 it?

11 A. No. He has not.

12 MR. O'NEIL: That's all I have, Your Honor.

13 THE COURT: Thank you very much, Mr. O'Neil.

14 Now, members of the jury, at this time I will excuse you  
15 for lunch. It is 12:15. I will ask you to endeavor to be back,  
16 please, by 1:20 so that we can be prepared to resume --  
17 actually, I'll make that 1:25, so that we can be prepared to  
18 resume by 1:30. When we do, what will happen next is that  
19 Ms. McDonald, on behalf of the plaintiff, will cross-examine  
20 Ms. Heiss. Thank you.

21 (Jury out at 12:15 p.m.)

22 THE COURT: You may step down, Ms. Heiss.

23 (The witness steps down.)

24 THE COURT: Everyone, enjoy your lunch. We will  
25 resume at 1:30.

1 (Recess from 12:16 p.m. to 1:42 p.m.)

2 THE COURT: Are we ready for the jury?

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

4 MS. MCDONALD: Your Honor, we're ready to proceed, and  
5 I didn't know if you wanted to address the Dawn Henderson matter  
6 now?

7 THE COURT: No.

8 Ms. Heiss, let me ask you to return, please.

9 (The witness resumes the stand.)

10 THE COURT: What is your estimate for your  
11 cross-examination, Ms. McDonald?

12 MS. MCDONALD: I don't think it'll take more than  
13 30 minutes, half an hour, Your Honor.

14 THE COURT: Very well.

15 (Jury in at 1:45 p.m.)

16 THE COURT: Thank you, members of the jury. Please be  
17 seated. Ms. McDonald will now proceed with her cross-examination  
18 of Ms. Heiss.

19 MS. MCDONALD: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MS. MCDONALD:

22 Q. Good afternoon, Ms. Heiss.

23 A. Good afternoon.

24 Q. On direct examination, you testified you didn't feel  
25 comfortable proceeding with the LLC if it didn't own the

1 trademark. Correct?

2 (Pause.)

3 You didn't feel comfortable proceeding with the business if  
4 it didn't own the trademark?

5 A. Yes.

6 Q. And you're the LLC's lawyer?

7 A. Yes, I am.

8 Q. Yet you never drafted a licensing agreement for the Riot  
9 Act trademark.

10 A. No. I thought the issue was settled and that it was  
11 property of the LLC.

12 Q. So you never drafted a licensing agreement for the Riot Act  
13 trademark?

14 A. We never discussed licensing it. He was contributing it to  
15 the partnership, the name and his rights to it.

16 Q. Could you please address my question, Ms. Heiss? You never  
17 drafted a license agreement for the Riot Act trademark. Correct?

18 A. No. I did not.

19 Q. You never drafted an agreement transferring ownership of  
20 the Riot Act trademark. Correct?

21 A. No. I did not. You're correct.

22 Q. The Amended Operating Agreement provides that each member  
23 must contribute \$100,000 to the LLC.

24 A. That's correct.

25 Q. And John Xereas contributed \$100,000?

1 A. Eventually, yes.

2 Q. There is no clause in the operating agreement or the  
3 Amended Operating Agreement saying that he will contribute the  
4 trademark. Correct?

5 A. Could you restate that? I'm sorry.

6 Q. There's no clause in the Amended Operating Agreement  
7 stating that John Xereas will contribute the Riot Act trademark.

8 A. No, there is not.

9 Q. You also testified that you saw no conflict in being an LLC  
10 owner and being a managing member and the LLC's lawyer. Is that  
11 correct?

12 A. That's correct.

13 Q. The original operating agreement does not contain a  
14 conflict-of-interest provision. Correct?

15 A. Correct.

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

18 A. Correct, other than the one we have at the end that's  
19 directed to our investors.

20 Q. But there's nothing with respect to --

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

22 THE COURT: You may approach.

23 (Bench conference.)

24 MR. O'NEIL: I believe we addressed the conflict of  
25 interest question yesterday, and it was found to be irrelevant



1 to any of the causes of actions.

2 MS. MCDONALD: It was addressed this morning,  
3 Your Honor. I'm following up with Ms. Heiss's testimony that  
4 was elicited by Mr. O'Neil.

5 THE COURT: The objection is sustained.

6 (End of bench conference.)

7 BY MS. MCDONALD:

8 Q. Ms. Heiss, we'll move on from that. This morning you  
9 testified that you'd not received payment for your legal work.  
10 Correct?

11 A. Correct.

12 Q. However, you did receive a salary while working at Riot  
13 Act. Correct?

14 A. For a period of time, yes.

15 Q. You received five or six thousand dollars a month?

16 A. Yes. I believe that was the amount.

17 Q. You also testified that John never provided you with  
18 contracts for comedians. Correct?

19 A. He left -- I think they were five short unsigned ones that  
20 were in the box after he walked out.

21 I'm sorry. No. During the time that John was there, he  
22 never provided any contracts for the comedians. The only  
23 contracts I ever saw were when he left, he left in my box about  
24 five unsigned contracts like one for Josh Blue.

25 MS. MCDONALD: I'm going to refer now, Your Honor, to

1 Plaintiff's Exhibit 87.

2 THE COURT: Of course.

3 MS. MCDONALD: May the record reflect I'm providing a  
4 copy to Mr. O'Neil. May I approach?

5 THE COURT: Yes.

6 (Document tendered to witness.)

7 THE WITNESS: Thank you.

8 BY MS. MCDONALD:

9 Q. Ms. Heiss, I've handed you a copy of what's been marked as  
10 Plaintiff's Exhibit 87. Do you see that designation on that  
11 document?

12 A. Yes.

13 Q. And this is an e-mail from John Xereas to you and Geoffrey  
14 Dawson. Correct?

15 A. That's correct.

16 Q. And this e-mail has several attachments. Correct?  
17 Indicates at the top that it has several attachments?

18 A. Yes.

19 Q. And the attachments to this e-mail are contracts?

20 A. A contract, yes.

21 MS. MCDONALD: Your Honor, I'd like to move  
22 Plaintiff's Exhibit 87 into evidence.

23 MR. O'NEIL: Without objection, Your Honor.

24 THE COURT: Thank you, Mr. O'Neil. Plaintiff's  
25 Exhibit 87 will be admitted without objection.

1 (Plaintiff Exhibit No. 87

2 received into evidence.)

3 BY MS. MCDONALD:

4 Q. Ms. Heiss, I'd like to direct your attention to the bottom  
5 of the page -- rather, closer to the bottom, which reads,  
6 "Attached, please find the contract and rider regarding Nick's  
7 engagement at Riot Act Comedy Theater." Did I read that  
8 correctly?

9 A. Yes, you did.

10 Q. Now I'd like to direct your attention to the top of  
11 the e-mail where Mr. Xereas forwarded that contract to you.

12 A. Yeah, the very first paragraph?

13 Q. Yes. And that reads, "Here is a contract for a bigger act  
14 from a larger agency. Nick currently has his own Showtime  
15 special, was on Sopranos, etc., pretty well known. Talked them  
16 down from 7.5K to 6.25K and sweetened his sellout bonus a  
17 little. You will see I always have provision for everyone to  
18 come in the night before their first show to do prep that  
19 morning. Works out to almost the same deal as Dawn and Jim if  
20 we do sell them all out. Also will bring in a drinking crowd."

21 Did I read that correctly?

22 A. Yes, you did.

23 Q. Thank you.

24 MS. MCDONALD: Your Honor, I'm now going to refer to  
25 Plaintiff's Exhibit 280.

1 THE COURT: You may.

2 MS. MCDONALD: May the record reflect that I'm  
3 providing Mr. O'Neil with a copy?

4 THE COURT: Yes.

5 MS. MCDONALD: May I approach?

6 THE COURT: Yes, of course.

7 THE WITNESS: Thanks.

8 BY MS. MCDONALD:

9 Q. Ms. Heiss, this exhibit has been marked as Plaintiff's 280.  
10 Do you see that designation in the bottom right-hand corner?

11 A. Yes, I do.

12 Q. And do you recognize this as an e-mail from John Xereas  
13 to you and Geoff Dawson?

14 A. Yes. I think it's -- it starts with GD and MS. Yes.  
15 It looks like it is.

16 Q. And this e-mail refers to John forwarding you a contract  
17 for Jim Florentine. Is that correct?

18 A. Yeah. Can I read it really quickly?

19 Q. Please.

20 (Witness reviewing document.)

21 A. I've read it. Yes.

22 Q. And this is a e-mail that Mr. Xereas forwarded you  
23 containing a contract and rider for Jim Florentine?

24 A. It doesn't indicate that there are any attachments, and I  
25 don't recall ever seeing them.

1 Q. Unfortunately, it doesn't appear that it's the full e-mail.  
2 There's no header.

3 A. There's no header.

4 Q. However, it does state that you will find the contract  
5 rider attached, does it not?

6 A. It says that, yes.

7 MS. MCDONALD: Your Honor, I move to admit Plaintiff's  
8 280 into evidence.

9 MR. O'NEIL: Without objection, Your Honor.

10 THE COURT: Plaintiff's Exhibit 280 will be admitted  
11 without objection.

12 (Plaintiff Exhibit No. 280  
13 received into evidence.)

14 BY MS. MCDONALD:

15 Q. Ms. Heiss, Mr. Xereas's e-mail to you and Geoff Dawson at  
16 the top reads, "Wanted to get you over a couple of examples" --

17 THE COURT: Just a moment. I want to make certain  
18 everyone can see.

19 JUROR: The writing is very small.

20 THE COURT: That's why I asked. Just wait until the  
21 adjustment is made, Ms. McDonald, and then you may continue.

22 MS. MCDONALD: Is that any better? Okay.

23 THE COURT: Can everyone see now? Very well.

24 MS. MCDONALD: Thank you, Your Honor.  
25

1 BY MS. MCDONALD:

2 Q. At the top of the e-mail, Ms. Heiss, it says, "GD and MH,  
3 wanted to get you over a couple of examples of some contracts I  
4 have for some of our upcoming acts. Below and attached you will  
5 find contract rider for Jim Florentine and Don Jamieson. This  
6 is from a smaller agency and a very simple contract."

7 Did I read that correctly?

8 A. Yes, you did, but I never saw it, received it.

9 Q. Thank you, Ms. Heiss. I'd like to move on now to managing  
10 member meetings.

11 A. Mm-hmm.

12 Q. I believe you testified on direct that certain managing  
13 member meetings were held without notice. Is that correct?

14 A. Well, our day-to-day business meetings, just normal course  
15 of business, making decisions about what we were doing that day,  
16 that week, we did not provide notice.

17 Q. And what about formal managing member meetings? Were those  
18 also held without notice?

19 A. No, they were not. We attempted to give notice to John for  
20 every meeting.

21 Q. Are you aware that the -- well, excuse me one moment.

22 I'm going to refer to Plaintiff's Exhibit 105, which has  
23 already been admitted. It's the Amended and Restated Operating  
24 Agreement of Riot Act DC, LLC.

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

1 THE COURT: Yes, of course.

2 THE WITNESS: Thanks.

3 BY MS. MCDONALD:

4 Q. Ms. Heiss, I'd like to direct your attention to Section  
5 10.6. It's on page 28 of the document.

6 A. Thank you. Yes. I see it.

7 Q. It's the section entitled "Meetings"?

8 A. Mm-hmm.

9 Q. The last sentence of that paragraph reads, "Meetings shall  
10 not be held sooner than 15 days, no longer than 60 days from  
11 notice to the members thereof." Were meetings ever held without  
12 15 days' notice?

13 A. No. We -- the meetings that we had in January and  
14 February, we had shorter notice because the club was in chaos  
15 and we really couldn't wait 15 days, and we didn't think it was  
16 in our best interest or our investors' best interest to feel  
17 bound by that. I made that decision.

18 Q. You didn't feel bound by the operating agreement of the  
19 Riot Act DC LLC?

20 A. Under the circumstances, I thought we couldn't wait 15 days.

21 Q. Does that paragraph provide for an exception to that rule  
22 provided?

23 A. No, it doesn't.

24 Q. I'd like to discuss the January 19th, 2012, meeting that  
25 occurred two days after Ted Xereas and Mike Farfel were fired.

1 A. Mm-hmm.

2 Q. You testified earlier, at that meeting, John was prevented  
3 from using LLC funds without permission?

4 A. That's correct.

5 Q. You also testified that that was the only action taken at  
6 that meeting. Is that correct?

7 A. No, it wasn't. But I would need to see it. There was, I  
8 think, a number of items that we restricted.

9 MS. MCDONALD: Your Honor, I'd like to refer now to  
10 Plaintiff's Exhibit 98. May the record reflect I'm providing a  
11 copy to opposing counsel?

12 THE COURT: Of course.

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

14 THE COURT: Yes, you may.

15 BY MS. MCDONALD:

16 Q. Ms. Heiss, I've handed you what's been marked as  
17 Plaintiff's Exhibit 98. Do you see that designation in the  
18 bottom right-hand corner?

19 A. Yes.

20 Q. And I apologize. It's a very lengthy packet of documents,  
21 but do you see on the first page that it contains the minutes  
22 and resolutions from the managing member meeting of January 19,  
23 2012?

24 A. Yes, I do.

25 MS. MCDONALD: Your Honor, I move to admit Plaintiff's



1 Exhibit 98.

2 MR. O'NEIL: No objection, Your Honor.

3 THE COURT: Plaintiff's Exhibit 98 will be admitted  
4 without objection.

5 MS. MCDONALD: Thank you, Your Honor.

6 (Plaintiff Exhibit No. 98  
7 received into evidence.)

8 BY MS. MCDONALD:

9 Q. So you already testified that Mr. Xereas was prevented from  
10 using LLC funds without permission. I'd like to direct your  
11 attention to paragraph 2.

12 A. Yeah. Okay.

13 Q. And that paragraph would restrict Mr. Xereas from entering  
14 into any contracts or agreements on behalf of the company  
15 without first obtaining the written confirmation of the other  
16 managing members. Is that correct?

17 A. That's correct.

18 Q. And that resolution was adopted?

19 A. Yes, it was.

20 Q. On January 26, 2012, there was another meeting of the  
21 managing members. Correct?

22 A. Correct.

23 Q. And 15 days' notice was not provided for that meeting?

24 A. No, it was not.

25 Q. I'd like to direct your attention to page -- the second

1 page of the exhibit that I've handed you.

2 A. I'm there.

3 Q. I'd like to direct your attention to the final paragraph  
4 of the first page, and that paragraph states that John is no  
5 longer permitted to book acts for the club. Correct?

6 A. Correct.

7 Q. That paragraph states that John may no longer handle  
8 arrangements for comics. Correct?

9 A. Correct.

10 Q. He may not handle media events?

11 A. Correct.

12 Q. And he may not arrange advertising.

13 A. Correct.

14 Q. That same meeting, you assumed his role as operating  
15 manager. Correct?

16 A. I did.

17 Q. You earlier testified that at that meeting the locks were  
18 changed. Or excuse me. Following that meeting, the locks were  
19 changed. Is that correct?

20 A. I don't remember exactly when the locks were changed.  
21 I don't recall. I thought it was -- I really don't recall  
22 when they actually got changed.

23 Q. May I direct your attention to the next page, please,  
24 Ms. Heiss?

25 A. Okay.

1 Q. Number 5 on that page.

2 A. Mm-hmm.

3 Q. And that paragraph reads, "The keys to the exterior and  
4 office doors and pass codes to the security system will be  
5 changed, and the operating manager shall be the only managing  
6 member to have the new keys and pass codes and shall distribute  
7 them to employees as she deems necessary and appropriate."

8 Did I read that correctly?

9 A. Yes, you did.

10 Q. And you were the operating manager?

11 A. I was.

12 Q. "Other managing members shall always have access to the  
13 club during normal business hours, and if they wish to have  
14 access to the club after normal business hours, the operating  
15 manager shall make arrangements for them to have such  
16 after-hours access." Did I read that correctly?

17 A. Yes, you did.

18 Q. Thank you. Ms. Heiss, there was a time when Riot Act  
19 lost access to its social media sites. Is that correct?

20 A. That's correct.

21 Q. And after that access was lost, you sent John an e-mail.

22 A. I believe I did, yes.

23 Q. I'd like to refer your attention to Defendants' Exhibit 73  
24 in your book.

25 A. Thirty-seven?

1 Q. Seventy-three.

2 A. Oh.

3 Q. On the last page of the exhibit, there's a paragraph that  
4 begins "Fourth."

5 A. Mm-hmm.

6 Q. And within that paragraph, there is a sentence that reads,  
7 "Yesterday I also sent you an e-mail reminding you of that  
8 request and have not received any response from you."

9 Does that sentence relate to the social media sites?

10 A. Yes. We requested his help.

11 Q. I'd like to direct your attention to page 2 of the exhibit.  
12 There is a reply e-mail from Mr. Xereas. Do you see that?  
13 January 21, 2012.

14 A. Oh, yes. I see it.

15 Q. And he wrote in part to you, "I did not see that e-mail  
16 yesterday, and as I stated, I did not remove, change anything  
17 with sites, nor do I know how. My password has also been  
18 changed." Did I read that correctly?

19 A. I'm sorry. I'm not seeing it. I was on the wrong -- which  
20 paragraph?

21 Q. It is the fourth paragraph of Mr. Xereas's e-mail, his  
22 January 21st, 2012, e-mail.

23 A. Okay. Oh, I see it. Okay. I'll look here.

24 Q. I'll read it again.

25 A. Yeah, please.

1 Q. "I did not see that e-mail yesterday, and as I stated, I  
2 did not remove, change anything with sites, nor do I know how.  
3 My password has also been changed." Did I read that correctly?

4 A. Yes.

5 Q. Sometime after Riot Act lost access to its social media,  
6 you ran into Dawn Henderson. Is that correct?

7 A. That is correct.

8 Q. Ms. Henderson was, at one time, a Riot Act employee?

9 A. Correct.

10 Q. And she handled Riot Act social media?

11 A. Correct.

12 Q. When you ran into Dawn Henderson, she told you that she had  
13 locked Riot Act out of its social media accounts. Correct?

14 A. Correct.

15 Q. And you filed suit against Dawn Henderson for these actions?

16 A. We did originally, yes.

17 Q. And she moved to dismiss because the statute of limitations  
18 had run?

19 A. I don't recall that.

20 Q. But you ultimately dropped your lawsuit against her.

21 A. I do know we did that, yes.

22 MS. MCDONALD: Thank you, Ms. Heiss.

23 Those are all my questions.

24 THE WITNESS: Okay.

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

1 Mr. O'Neil, do you have redirect?

2 MR. O'NEIL: No questions.

3 THE COURT: Ms. Heiss, you may return to your seat at  
4 the table.

5 (The witness steps down.)

6 THE COURT: Members of the jury, while we discuss the  
7 remainder of our schedule for the afternoon, you may adjourn to  
8 the deliberation room. I believe we will be ready to resume in  
9 about 15 minutes. Thank you.

10 (Jury out at 2:08 p.m.)

11 THE COURT: Now, Counsel, perhaps this is a suitable  
12 time to turn our attention to the deposition of Ms. Henderson.  
13 I am not certain that I understand the nature of the parties'  
14 disputes. If it is the case the defendants have included the  
15 plaintiff's excerpts, I do not know what objection there could  
16 be by the plaintiff. If it is your request, Ms. McDonald, that  
17 Mr. O'Neil play only defendants' excerpts, I suppose we can do  
18 that. May I ask you what is the concern, please?

19 MS. MCDONALD: Your Honor, plaintiff is fine with  
20 Mr. O'Neil playing just his DVD of the transcript -- excuse  
21 me -- of the deposition so long as he plays both parties'  
22 selections and so long as the agreed-upon part that Your Honor  
23 ruled was inadmissible is excluded. I don't believe there's any  
24 other dispute.

25 THE COURT: So is there a time at which you intend to

1 play your excerpts?

2 MS. MCDONALD: No, Your Honor. Mr. O'Neil will play  
3 both parties' excerpts.

4 THE COURT: Very well. Can we proceed, then? About  
5 how long is it, Mr. O'Neil?

6 MR. O'NEIL: I believe it's about 40 minutes,  
7 Your Honor.

8 THE COURT: Very well. Let's take about 10 minutes,  
9 and then we will continue.

10 (Recess from 2:11 p.m. to 2:20 p.m.)

11 THE COURT: Thank you. Is everyone ready? I will  
12 indicate that the defendants' next witness is Dawn Henderson,  
13 that Ms. Henderson is not available, but with the agreement of  
14 the parties, portions of her deposition will be presented. Is  
15 that satisfactory to everyone?

16 (Parties concur.)

17 Very well. Thank you.

18 (Jury in at 2:22 p.m.)

19 THE COURT: Please be seated.

20 Members of the jury, the defendants' next witness is Dawn  
21 Henderson. Ms. Henderson is not available. The parties have  
22 agreed that portions of her deposition may be presented to you,  
23 and that is what will occur next.

24 I want to be certain before you begin, Mr. O'Neil, that  
25 everyone can see. If anyone would like to move to get closer to

1 the monitor on your right, that is perfectly fine. If you're  
2 able to see from where you're seated, then certainly you may  
3 remain there.

4 Can everyone see? Very well. Thank you.

5 DAWN HENDERSON, WITNESS FOR THE DEFENSE, DEPOSITION TESTIMONY

6 (Video played from 2:23 p.m. to 3:10 p.m.)

7 THE COURT: Now, members of the jury, that completes  
8 the testimony of Ms. Henderson. The Court will strike the last  
9 question and answer as it is not relevant.

10 JUROR: Can I ask something?

11 THE COURT: Let me suggest this: If all of you could  
12 go back into the jury room for a brief recess, you can give your  
13 question to Ms. Lesley.

14 (Jury out at 3:10 p.m.)

15 THE COURT: Before we do anything further, let's find  
16 out what the question is.

17 (Deputy clerk exits, reenters. Conferring with Court.)

18 THE COURT: The question concerned how to evaluate the  
19 objections that were made during the deposition. I believe what  
20 I should do is instruct the jurors that the Rules of Civil  
21 Procedure generally require that at a deposition a question be  
22 answered over objection, and that for their evaluation of the  
23 testimony, they should disregard the objection.

24 Is that reasonable?

25 MS. MCDONALD: Yes, Your Honor.



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

2 THE COURT: Next, because multiple lawyers were  
3 speaking at the same time -- no surprise there -- they could not  
4 hear, at least one juror said that the answer was not audible.  
5 I am not sure what to do about that other than to require that  
6 the deposition be presented a second time.

7 Finally, the jurors want to know what to do when they have  
8 questions. I did not discuss with you before we started any  
9 preference that you have for permitting the jurors to propose  
10 more substantive questions during the course of the trial.

11 I can give you an opportunity to discuss that after we  
12 recess for the day, which we are going to do relatively soon,  
13 and determine what agreement there might be about that question.  
14 Or, alternatively, since the questions thus far have been of a  
15 more procedural nature, we could simply proceed as we are doing.  
16 But I think it's only the first two questions that I can answer  
17 at this time. Is that reasonable?

18 MR. O'NEIL: Your Honor, I wanted to address the point  
19 of playing the entire deposition again. Could we substitute a  
20 transcript of the identified portions of the testimony?

21 THE COURT: Would that be without objection,  
22 Ms. McDonald?

23 MS. MCDONALD: A transcript of the selected testimony  
24 would be without objection, Your Honor.

25 THE COURT: That is what I will tell them.

1           MR. O'NEIL: We'll prepare that and have it for you  
2 on Tuesday morning if that's okay.

3           THE COURT: Thank you. You will mark that transcript  
4 as an exhibit, Mr. O'Neil. Am I correct?

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

6           THE COURT: Very well. Thank you.

7           Mr. O'Neil, I assume you will ensure that the last question  
8 is not included in the transcript.

9           MR. O'NEIL: Your Honor, it actually started the DVD  
10 over again, and I didn't know it was going to do that. So my  
11 apologies. So, yes, we will not include that.

12           THE COURT: Very well. Thank you. No juror raised a  
13 concern about even knowing what the last question was. Their  
14 concerns are the ones that I shared with you.

15           Just for our general scheduling, may I ask you, Mr. O'Neil,  
16 who you intend to call next on Tuesday morning?

17           MR. O'NEIL: Well, we have Peter Bayne out in the hall  
18 right now. We could put him on, and I believe we could finish  
19 his direct.

20           THE COURT: How long do you believe the direct will be?

21           MR. O'NEIL: Thirty to 45 minutes.

22           THE COURT: In order that we don't break up the direct  
23 and cross, particularly in view of the fact that there is an  
24 intervening three-day weekend, I believe that should await our  
25 proceedings on Tuesday. Is there anyone who will be of much

1 shorter duration?

2 MR. O'NEIL: For defendants?

3 THE COURT: Yes.

4 MR. O'NEIL: No. Mr. Bayne is our last witness,  
5 Your Honor.

6 THE COURT: Do you intend to call Mr. Xereas?

7 MR. O'NEIL: No.

8 THE COURT: So after you call Mr. Bayne, you will rest.

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

10 THE COURT: What does the plaintiff intend to do next?  
11 Mr. Richa?

12 MR. RICHA: We will be calling, Your Honor, one or two  
13 rebuttal witnesses, but they will be short witnesses.

14 THE COURT: Do you believe that testimony will be  
15 completed if defendants rest on Tuesday?

16 MR. RICHA: Absolutely, Your Honor. Thank you.

17 THE COURT: I believe, after I answer those questions,  
18 we should recess for the weekend. You may have noticed that I  
19 have been coughing and downing cough drops. I am ashamed  
20 because, as Justice Ginsburg went back to work today after being  
21 discharged from the hospital after she fractured three ribs, I  
22 will simply state that she is a cyborg and I am not.

23 (Laughter.)

24 Tell them to come back in.

25 (Jury in at 3:27 p.m.)

1 THE COURT: Thank you, members of the jury.

2 I will address your questions at this point. I understand  
3 that someone had a concern regarding why, during the deposition  
4 of Ms. Henderson, Ms. Henderson answered questions even though  
5 there was an objection. I will simply state that the Rules of  
6 Civil Procedure generally require that at a deposition an answer  
7 be given over objection. What you heard is what the parties  
8 agreed that you should hear.

9 The second concern is that some of you were not able to  
10 hear all of Ms. Henderson's answers. The parties have agreed  
11 to present you with a transcript of the portion of the deposition  
12 that was presented to you so that you will be able to read the  
13 questions and answers. That is not available at this time.  
14 It will be available for you at the time you begin your  
15 deliberations.

16 Another concern that I understand was raised is one that  
17 requires some consideration by the lawyers, and that is what to  
18 do about more substantive questions that you have. I've asked  
19 the lawyers to consider how to resolve that concern. At the end  
20 of the case, I will give you specific instructions regarding the  
21 claims that exist. Those instructions will guide you during  
22 your deliberations.

23 However, I believe it is incumbent upon all of us to think  
24 about what to do as you have questions going forward, so the  
25 lawyers have agreed to talk about that, and we will have a

1 protocol in place on Tuesday morning.

2 In order to ensure that the lawyers have an opportunity to  
3 discuss these matters, ensure that a transcript is prepared, and  
4 otherwise be ready to proceed first thing Tuesday morning, I  
5 will excuse you at this point, giving you a bit of a head start  
6 on the long weekend. You are again invited to come back as  
7 early as nine o'clock on Tuesday morning. Refreshments will  
8 again be available. You must return by 9:20, and we will again  
9 endeavor to start promptly at 9:30.

10 Thank you so very much. I will remind you again that,  
11 during this long weekend, you are not to discuss the case with  
12 anyone or permit anyone to discuss it with you, nor may you  
13 undertake any research on social media or otherwise to get  
14 information about anything that has been discussed here in the  
15 courtroom. That is because your decision must be based on the  
16 evidence that is offered during the trial and nothing else.

17 Thank you so very much. Everyone have a good weekend.

18 (Jury out at 3:31 p.m.)

19 THE COURT: I would like for all of you to remain to  
20 discuss the question regarding asking questions. There are  
21 judges of the court who permit the jurors to propose questions,  
22 and indeed I have done so in the past. I did not raise that  
23 with all of you, largely because of my concern that with the  
24 number of witnesses you intended to call and the number of  
25 exhibits, that the trial of the case could be unduly protracted.

1           The judges who have permitted jurors to ask questions do  
2       so by permitting the jurors to write their question on an index  
3       card, for example, and provide it to the Court. After I have  
4       it, after the judge has it, the judge will share it with counsel.

5           The question may concern a matter that is clearly  
6       inadmissible, in which case I wouldn't ask the question. The  
7       question may lead one of you to think, oh, my goodness, I should  
8       have asked that question, and you would be permitted to follow  
9       up. So the mere fact that a juror asks a question does not  
10      necessarily mean that the Court would permit it.

11          So I will ask that you please discuss how you wish to  
12      respond to that concern.

13          Mr. Richa?

14               MR. RICHA: Your Honor, I think we're fine with what  
15      just happened; they submit the question to you, and then you  
16      propose it to us and then go from there.

17               THE COURT: So do you believe that the jurors should  
18      continue to direct their questions to the deputy clerk or that  
19      the questions should be presented in writing on an index card?

20               MR. RICHA: I assume presented on an index card and  
21      then --

22               THE COURT: Very well. Are you in agreement,  
23      Mr. O'Neil?

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

25               MR. RICHA: Thank you.

1           THE COURT: Very well. When Ms. Lesley returns, I  
2 will ask that she please ensure that there is a supply of index  
3 cards available on Tuesday morning. And as I said, I would not  
4 ask any question before I share it with all of you to determine  
5 your contentions regarding whether the question is proper.

6           (Deputy clerk conferring with Court.)

7           I am not certain what that means about questions concerning  
8 witnesses who have already testified. Since the parties are  
9 here, perhaps your agreement would include an agreement that if  
10 there is a relevant question to be asked of a party, you would  
11 ask it. I don't want to go too far ahead, because we haven't  
12 heard a single question yet. It may be that there will be no  
13 questions.

14          Is there anything else that we can resolve this afternoon?

15          MR. RICHA: We have nothing, Your Honor.

16          THE COURT: Mr. O'Neil?

17          MR. O'NEIL: Not that I know of, Your Honor.

18          THE COURT: Thank you very much. You may all be  
19 excused. I wish all of you a pleasant weekend. I will ask you  
20 to be here Tuesday morning by 9:15 so that we can begin promptly  
21 at 9:30. Thank you so much.

22          (Proceedings adjourned at 3:36 p.m.)  
23  
24  
25

\* \* \* \* \*

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