

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN N. XEREAS,	.	
	.	
Plaintiff,	.	CA No. 12-0456 (DAR)
	.	
v.	.	
	.	Washington, D.C.
MARJORIE A. HEISS, et al.,	.	Wednesday, November 14, 2018
	.	9:42 a.m.
Defendants.	.	
.	Pages 997 through 1108

DAY 7
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE DEBORAH A. ROBINSON
UNITED STATES MAGISTRATE JUDGE

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Proceedings reported by stenotype shorthand.
Transcript produced by computer-aided transcription.

C O N T E N T S

Closing Argument by Plaintiff.....	1038
Closing Argument by Defense.....	1062
Rebuttal Argument by Plaintiff.....	1079
Rebuttal Argument by Defense.....	1082
Jury Instructions	1085

P R O C E E D I N G S

1
2 THE COURT: Good morning to all of you. My fervent
3 hope was that the parties would begin closing arguments at 9:30.
4 However, during my own preparation to deliver the instructions
5 in the manner that we discussed yesterday and in a fashion as
6 organized as possible, when I reached the instructions
7 concerning damages, I realized that neither of you -- neither
8 you, Ms. Glavich, nor you, Mr. O'Neil -- sought any guidance
9 concerning the Court's practices and preferences with respect to
10 argument regarding damages, either whether a specific amount
11 could be included in your closing argument, what resort you
12 would make to evidence with respect to damages that had been
13 offered, and other concerns that counsel often raise.

14 In an effort to prepare to address the unanswered question,
15 I reviewed the parties' separate itemizations of damages
16 included with your pretrial statements. Having done so, I
17 realize we must take a few minutes to address a concern that
18 neither side raised yesterday and the Court did not address,
19 not recognizing the concern until preparation for my role in the
20 instructions.

21 I would like for you to turn to your itemizations, please,
22 and I will address the plaintiff's itemization first. I'm
23 looking at page 18 of the plaintiff's final pretrial submission.
24 Do you have that, Ms. Glavich, Ms. McDonald?

25 MS. GLAVICH: Yes, we do.

1 THE COURT: Very well. Thank you very much. I should
2 ask, are we waiting on Mr. Richa?

3 MS. GLAVICH: No. He couldn't make it today.

4 THE COURT: Very well. Thank you very much. During
5 the Court's review, the -- during my review, I took -- I looked
6 at each item in turn. The first item is \$1,614,944, which
7 represents, according to the itemization, damages for "unjust
8 enrichment/breach of duty of good faith and fair dealing."
9 Those claims are no longer in the case. Do you agree,
10 Ms. Glavich? I shouldn't ask whether you agree. Do you
11 acknowledge that those claims are no longer in the case?

12 MS. GLAVICH: Yes.

13 THE COURT: Very well. Thank you very much. Although
14 the itemization of damages would not have been used for any
15 purpose -- the actual document would not have been used for any
16 purpose during closing arguments or otherwise, we recognize,
17 therefore, that no damages can be based upon claims that are no
18 longer in the case.

19 Going to the next entry, in the amount of \$45,000, at
20 least -- as to that, breach of contract is one claim to which
21 that amount is attributed. According to plaintiff, the \$45,000
22 relates to "guaranteed payments still owed to plaintiff for
23 services as GM of the LLC." May I ask you, Ms. Glavich or
24 Ms. McDonald, what evidence was offered during the trial
25 regarding any guaranteed payments? You'll have to come to the

1 podium.

2 MS. GLAVICH: Defendants testified that Mr. Xereas was
3 supposed to receive a salary of \$72,000, and he received, I
4 think \$26,000 is what he testified.

5 THE COURT: Mr. O'Neil, do you wish to respond?

6 MR. O'NEIL: Yes, Your Honor. Our evidence shows that
7 those payments weren't guaranteed; they were at the discretion
8 of the managing members.

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

10 The Court's recollection is that there was no evidence
11 adduced by plaintiff that there were any "guaranteed payments"
12 for anything, services as GM or anything else. As no evidence
13 was offered with respect to any guaranteed payments, no damages
14 can be awarded for such.

15 If we go to the next entry, \$106,680 for "breach of implied
16 duty of good faith and fair dealing/unjust enrichment," I assume
17 you acknowledge, Ms. Glavich and Ms. McDonald, that those claims
18 are no longer in the case. Am I correct?

19 MS. GLAVICH: We acknowledge those claims are no
20 longer in the case.

21 THE COURT: I cannot hear you. You'll have to come to
22 the podium.

23 MS. GLAVICH: We acknowledge that those claims are no
24 longer in the case.

25 THE COURT: Very well. So I assume that means you

1 also acknowledge that no damages can be recovered as claimed.
2 Is that correct? In other words, no portion of the \$106,680.

3 MS. GLAVICH: Correct. In the sense --

4 THE COURT: Very well. Thank you. Let's move on,
5 then. The next item is \$6 million for compensatory and treble
6 trademark damages. What evidence was offered by the plaintiff
7 regarding trademark damages of any type?

8 MS. GLAVICH: We offered evidence that the defendants
9 prevented Mr. Xereas from any future use of his trademark.

10 THE COURT: That wasn't my question. What evidence
11 was offered concerning damages? What evidence did the plaintiff
12 offer concerning damages, so-called trademark damages, whether
13 compensatory or treble?

14 MS. GLAVICH: May I confer for just a moment, Your
15 Honor?

16 THE COURT: Yes.

17 (Plaintiff counsel conferring.)

18 THE COURT: When I ask "what evidence was offered," my
19 expectation is that you identify the witness who offered such
20 evidence and what the testimony was. Ms. Glavich?

21 MS. GLAVICH: Part of Mr. Morrissey's testimony was
22 regarding the defendants' profits and the valuation of
23 Mr. Xereas's shares. We would like to offer that -- we believe
24 that was evidence of what the value of the trademark would have
25 been.

1 THE COURT: To what extent did Mr. Morrissey -- is
2 Mr. Morrissey the only witness that you suggest offered evidence
3 regarding trademark damages?

4 MS. GLAVICH: I believe Mr. Xereas also testified to
5 the goodwill and use of the trademark. He didn't put a dollar
6 figure on it, but he's not an expert in trademark.

7 THE COURT: Are you now suggesting that your failure
8 to offer evidence should be overlooked by the Court because
9 Mr. Xereas is not an expert in trademark?

10 MS. GLAVICH: No, that's not --

11 THE COURT: That appears to be what you just said.

12 MS. GLAVICH: That's not what I intended, Your Honor.

13 THE COURT: My question is what evidence was offered
14 with respect to trademark damages.

15 MS. GLAVICH: We believe we can use Mr. Morrissey's
16 testimony regarding the valuation of the shares.

17 THE COURT: To what testimony do you refer?

18 MS. GLAVICH: Mr. Morrissey's testimony?

19 THE COURT: To what portion of Mr. Morrissey's
20 testimony do you refer?

21 MS. GLAVICH: Mr. Morrissey testified as to the
22 valuation of the LLC shares and what Mr. Xereas's share or
23 portion -- valuation would be. The \$380,000 to \$800,000.

24 THE COURT: What is the nexus between the testimony to
25 which you just referred and trademark damages?

1 MS. GLAVICH: Trademark damages are plaintiff's actual
2 loss or defendants' profits. Plaintiff's actual loss in this
3 case is difficult to determine because defendants held onto the
4 trademark and prevented Mr. Xereas from --

5 THE COURT: That is an argument with respect to the
6 trademark claim. That was not my question. My question remains
7 what evidence did the plaintiff offer regarding trademark
8 damages.

9 MS. GLAVICH: We did not have an expert testify as to
10 the trademark damages.

11 THE COURT: Does that mean, then, that the state of
12 the record is that the plaintiff did not offer any evidence
13 regarding trademark damages?

14 MS. GLAVICH: We believe the jury --

15 THE COURT: That was not my question. My question is
16 not what the jury can do. My question is what evidence did the
17 plaintiff offer regarding trademark damages. You've already
18 acknowledged that Mr. Xereas did not testify regarding trademark
19 damages, and you also acknowledged that the plaintiff did not
20 call -- or did not engage at any point a trademark damages
21 expert. What evidence -- is that a concession that no evidence
22 was offered regarding trademark damages?

23 MS. GLAVICH: We believe Mr. Morrissey's testimony
24 goes to defendants' profits, which is a way of valuing the
25 trademark --

1 THE COURT: Did Mr. Morrissey purport to make a -- to
2 offer an opinion regarding trademark damages?

3 MS. GLAVICH: You excluded his opinion on trademark
4 damages, Your Honor.

5 THE COURT: Does that mean there's no evidence from
6 Mr. Morrissey regarding trademark damages?

7 MS. GLAVICH: Correct, because you --

8 THE COURT: Very well. Thank you. That means, then,
9 there being no evidence regarding trademark damages, there can
10 certainly be no reference to any figure such as \$6 million.

11 MS. MCDONALD: Your Honor, if I may --

12 THE COURT: I'm sorry. You wish further argument?

13 MS. MCDONALD: Yes, please, Your Honor.

14 THE COURT: So counsel is bifurcating the argument?
15 Is that what's happening?

16 MS. MCDONALD: Yes, please, Your Honor. I just wanted
17 to make the point that trademark damages can be measured by
18 actual loss, including profits or harm to reputation and
19 goodwill, and Mr. Xereas testified as to damage to the goodwill
20 of his trademark. Or it can be measured by defendants' profits
21 from defendants' use of the mark, and Mr. Morrissey testified as
22 to defendants' profits.

23 THE COURT: Are you suggesting that Mr. Morrissey --
24 have you mischaracterized Mr. Morrissey's testimony?

25 MS. MCDONALD: I don't believe so, Your Honor -- I

1 have not mischaracterized Mr. Morrissey's testimony.

2 THE COURT: Are you now suggesting that Mr. Morrissey
3 testified regarding profit arising from the use of the mark?

4 MS. MCDONALD: Well, Your Honor --

5 THE COURT: I have to ask that you answer the Court's
6 question so we have a clear record with respect to this issue.
7 As I said, I again apologize to all of you for not having raised
8 this yesterday. It was only in the night and in the early
9 morning hours as I continued my own preparation regarding
10 instructions that I realized that we had to address this issue
11 before your closing arguments.

12 MS. MCDONALD: Yes, Your Honor. It's in the record
13 that --

14 THE COURT: Now, will you take a moment, please, and
15 attempt to locate in the record where Mr. Morrissey referred to
16 profits as a result of the use of the trademark, which is what
17 you've just said.

18 MS. MCDONALD: I don't believe Mr. Morrissey
19 specifically testified as to -- if he used the word --

20 THE COURT: Well, then have you --

21 MS. MCDONALD: -- if he used the word "trademark."
22 Your Honor, if I may --

23 THE COURT: If he didn't specifically testify about
24 that, have you mischaracterized his testimony?

25 MS. MCDONALD: I don't believe I have, Your Honor.

1 It's in the record that --

2 THE COURT: Do you have his expert report?

3 MS. MCDONALD: I don't have his expert report with me
4 on hand, Your Honor, but it's in the record that defendants are
5 continuing to use the trademark on their licensing, and --

6 THE COURT: Ms. McDonald, I --

7 MS. MCDONALD: -- they can only operate because of the
8 trademark --

9 THE COURT: Ms. McDonald, I have to interrupt because
10 we cannot at this time have argument regarding the causes of
11 action. My question is very specific, and that is what is the
12 basis of your suggestion that Mr. Morrissey testified about
13 trademark damages.

14 MS. MCDONALD: Because, Your Honor, the defendants can
15 only operate because of the Riot Act trademark, Mr. Morrissey
16 testified as to their profits, their profits which result from
17 the use of the Riot Act trademark.

18 THE COURT: You may be seated.

19 MS. MCDONALD: Thank you.

20 THE COURT: Mr. O'Neil.

21 MR. O'NEIL: Your Honor, first, I apologize for not
22 bringing this up yesterday. I think it was probably on me and
23 an oversight. So I apologize to the Court for that.

24 Mr. Morrissey did not testify about the defendants'
25 profits. He valued the company, and he testified that that

1 valuation was not used in the calculation of any damages, which
2 was the basis for our attempts to keep it out of evidence.

3 Mr. Morrissey's trademark damages testimony was not
4 admissible. So I think it is a mischaracterization of the
5 record to say that Mr. Morrissey testified as to defendants'
6 profits as it relates to trademark infringement. Not only did
7 he not relate it to trademark infringement, he didn't even
8 identify defendants' profits, and his efforts to itemize
9 trademark damages were rejected by the Court.

10 So we believe, Your Honor, that there has been no testimony
11 or evidence submitted to the Court that would allow trademark
12 damages to go to the jury.

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

14 I have not addressed the remaining entries, 700,000 for
15 cybersquatting, 100,000 for fraudulent inducement, 106,680 for
16 breach of implied duty of good faith and fair dealing/unjust
17 enrichment. That is, of course, because those claims are no
18 longer in the case. I see there are also entries here for
19 attorney's fees. Under no circumstance may plaintiff argue that
20 fees are recoverable.

21 The reality, thus, is that as to the itemization of damages
22 with respect to the claims which remain in the case -- that is,
23 plaintiff's breach of contract claim and plaintiff's breach of
24 trademark, or trademark infringement claim, there is no evidence
25 of any -- the plaintiff -- plaintiff failed to offer evidence of

1 any damages.

2 For closing argument purposes, this means that you may not
3 refer -- and likely the Court would have ordered this in any
4 event -- you may not refer to any -- I'm not certain to what you
5 could refer other than Mr. Morrissey's testimony, but you may
6 not ask for damages in the amount that Mr. Morrissey -- the
7 amount about which Mr. Morrissey testified, which the Court
8 would likely have precluded in any event.

9 But as to the first four enumerated items, the first is out
10 because the claims are no longer in the case. As to the second,
11 plaintiff failed to offer evidence of any guaranteed payments.
12 As to the third, the claims are out. And as to the fourth,
13 plaintiff simply failed to offer evidence.

14 Now, let's turn to the --

15 MS. MCDONALD: Your Honor, could I have a point of
16 clarification? With respect to the \$45,000 breach of contract,
17 are we able to offer testimony with respect to -- or excuse
18 me -- offer argument with respect to Mr. Xereas's salary which
19 was not paid?

20 THE COURT: Why would you want to do that,
21 Ms. McDonald, since I just said that there is no evidence of any
22 guaranteed payments --

23 MS. MCDONALD: You're correct, Your --

24 THE COURT: -- that was offered by the plaintiff
25 during the trial?

1 MS. MCDONALD: We didn't offer evidence of guaranteed
2 payments; we offered evidence of a promised salary that was not
3 delivered upon.

4 THE COURT: What is it that you believe you should be
5 permitted to argue?

6 MS. MCDONALD: That Mr. Xereas was denied his full
7 salary, and the amount of that loss.

8 THE COURT: Thank you, Ms. McDonald.

9 MS. MCDONALD: Thank you, Your Honor.

10 Mr. O'Neil?

11 MR. O'NEIL: As I stated earlier, Your Honor,
12 Mr. Xereas's salary was at the discretion of the vote of the
13 managing members. So if it's not guaranteed -- and I don't
14 believe that's a breach of the contract that they're relying on
15 in their breach of contract claims in any event. But I don't
16 see any connection between this \$45,000 figure and their breach
17 of contract damages. They made a quantum meruit claim, Your
18 Honor, and it was -- judgment was granted to the defendants on
19 that claim.

20 THE COURT: Thank you. You may be seated.

21 The surviving breach of contract count is Count VIII.
22 Count VIII alleges a breach or breaches by the defendants of the
23 Amended Operating Agreement. My recollection regarding the
24 allegations with respect to the breach of the Amended Operating
25 Agreement is that plaintiff's allegations concerned the

1 scheduling of meetings without what the plaintiff regarded as
2 requisite notice, the failure to provide notice of an agenda,
3 and the preclusion of actions directed to preclude, or actions
4 undertaken by defendants with the purpose of precluding the
5 plaintiff from being able to fully participate -- and I'm
6 reading now so I should indicate that this is a quote, actions
7 which "resulted in plaintiff not being able to fully participate
8 in the day-to-day business of the LLC."

9 There does not appear to be any allegation germane to Count
10 VIII concerning an unpaid salary.

11 MS. MCDONALD: May I be heard, Your Honor?

12 THE COURT: Are you prepared to point to where the
13 allegation relating to Count VIII appears? That is all we can
14 consider at this point.

15 MS. MCDONALD: Yes, Your Honor. Paragraph 285, which
16 reads, "As a result of defendants' breaches of contracts, the
17 plaintiff has suffered damages caused by the breaches, including
18 but not limited to loss of salary, compensation, earnings, and
19 proceeds from the operation of the LLC."

20 THE COURT: Would you repeat the paragraph number,
21 please?

22 MS. MCDONALD: 285, Your Honor. It's on page 75.

23 THE COURT: What evidence did the plaintiff offer
24 concerning loss of salary? We'll take that one first.

25 MS. MCDONALD: Mr. Xereas testified with respect to

1 his agreed-upon salary and what he ultimately received.

2 Ms. Heiss also testified as to an agreed-upon salary, and I
3 believe Mr. Dawson did as well.

4 THE COURT: Do you acknowledge that even there the
5 plaintiff did not allege that there were any guaranteed
6 payments?

7 MS. MCDONALD: Yes, Your Honor. Guaranteed payments,
8 I believe, is a term of art that refers to payments made by
9 managing members. These were payments with respect to John's
10 salary as the general manager of Riot Act.

11 THE COURT: So which is it that you believe you should
12 be able to argue?

13 MS. MCDONALD: Salary, Your Honor. Not guaranteed
14 payments. We do not intend to offer anything with respect to
15 guaranteed payments.

16 THE COURT: What evidence did the plaintiff offer
17 regarding loss of "compensation"?

18 MS. MCDONALD: As I stated, Your Honor, Mr. Xereas
19 testified as to the amount that he was supposed to receive as
20 the general manager of the club and the amount that he actually
21 received.

22 THE COURT: Is that the same as salary?

23 MS. MCDONALD: Yes, Your Honor.

24 THE COURT: So is that redundant?

25 MS. MCDONALD: Yes, Your Honor. Well --

1 THE COURT: And the same question would apply to
2 earnings.

3 MS. MCDONALD: Earnings, Your Honor, would relate more
4 to the defendants' failure to maintain accurate books and
5 records and his losses as a --

6 THE COURT: Well, absolutely that will not be argued.
7 Very well. You may be seated.

8 MS. MCDONALD: Thank you, Your Honor.

9 THE COURT: Now if we turn to page 6 of the
10 defendants' statements and the itemization of damages which
11 appears there. The Court observes that as to the first item,
12 evidence was offered by the defendants in the form of testimony
13 of Mr. Dawson. As to 2, testimony by Mr. Dawson and others.
14 And 3, evidence in the form of an exhibit and testimony of
15 multiple witnesses. Do you wish to address any of my
16 observations, Ms. McDonald or Ms. Glavich?

17 MS. MCDONALD: I would offer only, Your Honor, that
18 this theory of damages is new and appeared for the first time in
19 the pretrial statement. It does not appear in the
20 counterclaims.

21 THE COURT: And therefore -- I'm sorry. What do you
22 contend is the consequence of that, inasmuch as the pretrial
23 statement as amended was never the subject of any objection by
24 the plaintiff? You agree that at no time the plaintiff objected
25 to the defendants' itemization of damages.

1 MS. MCDONALD: Well, I believe it's improper, Your
2 Honor, to essentially --

3 THE COURT: That is not --

4 MS. MCDONALD: -- amend your counterclaims by pretrial
5 statement.

6 THE COURT: Ms. McDonald, I have to insist that you
7 answer my question. Did the plaintiff object to the defendants'
8 itemization of damages?

9 MS. MCDONALD: I honestly don't recall, Your Honor.
10 But again, Your Honor, I would argue that it's improper to amend
11 their counterclaims.

12 THE COURT: I'm sorry, Ms. McDonald. You may be
13 seated.

14 MS. MCDONALD: Thank you.

15 THE COURT: No objection was made to the itemization
16 of damages at the time, after the Court's pretrial order, or at
17 any time since we commenced last Monday. The objection now is
18 simply untimely. But in any event, it is wholly unfounded.

19 Now, do all of you need a moment to prepare to address the
20 Court's determinations? Perhaps this pertains more to you,
21 Ms. Glavich, before you proceed with your closing argument?

22 MS. GLAVICH: Yes, we'd like a few minutes.

23 THE COURT: Can you suggest a time, please, so that we
24 can take a recess and also let the jurors know?

25 MS. GLAVICH: I think 10, 15 minutes should be fine.

1 THE COURT: Did you say 15 minutes?

2 MS. GLAVICH: Ten to 15 minutes should be fine, Your
3 Honor.

4 THE COURT: Very well.

5 MR. O'NEIL: Your Honor, may I raise a point?

6 THE COURT: Yes.

7 MR. O'NEIL: With the Court's acknowledgement that
8 there are no breach of contract damages and no trademark
9 damages, those being the -- the damages for breach of contract
10 being an essential element of the proof of that claim, I'm not
11 sure how either claim can go to the jury. I believe judgment
12 should be entered for the defendants as a matter of law, Your
13 Honor.

14 THE COURT: The remaining claims, of course -- the
15 remaining claims of plaintiff are breach of the Amended
16 Operating Agreement, breach of an oral contract with respect to
17 a promise to license the trademark, and of course trademark
18 infringement. Does your observation with respect to breach of
19 contract pertain to the alleged breach of the Amended Operating
20 Agreement, the alleged breach of an oral contract, or both?

21 MR. O'NEIL: I believe both, Your Honor. With respect
22 to the operating agreement, they have no proof of damages, and
23 with respect to the license agreement, they don't even have a
24 term requiring payment of any amount. So how could we have
25 breached that licensing agreement?

1 THE COURT: Let me ask you to focus on damages,
2 please.

3 MR. O'NEIL: Yes, Your Honor. I believe the lack of
4 damages under either theory of recovery means that there cannot
5 be a breach of contract, and therefore judgment on those
6 theories should be granted to the defendants.

7 THE COURT: Are we to regard this as a renewed Rule 50
8 motion in view of what the Court has just determined with
9 respect to evidence of damages?

10 MR. O'NEIL: Yes, Your Honor. I believe judgment as a
11 matter of law would be appropriate in this circumstance.

12 THE COURT: Very well. Thank you, Mr. O'Neil.

13 Ms. McDonald, are you prepared to respond now, or would you
14 like a moment to ponder the basis of the renewed motion?

15 MS. MCDONALD: Your Honor, I'm happy to take the time
16 if it's available.

17 THE COURT: I'm happy to take a brief recess.

18 MS. MCDONALD: Thank you, Your Honor.

19 THE COURT: I will simply ask as you prepare to
20 respond to bear in mind what the Court has determined regarding
21 the plaintiff's failure to offer evidence with respect to
22 trademark damages, and the plaintiff's failure to offer evidence
23 as claimed with respect to the alleged breaches of contract,
24 both the oral -- excuse me -- both the Amended Operating
25 Agreement and the agreement with respect to the trademark.

1 MS. MCDONALD: I will, Your Honor.

2 THE COURT: Very well. How much time would you like?

3 MS. MCDONALD: I'm happy to take the same 15 minutes
4 that Ms. Glavich asked for.

5 THE COURT: Very well. Why don't we take a 15-minute
6 recess now. I will ask Ms. Lesley to please advise the jurors
7 that we are still addressing matters which do not yet require
8 their attention, and they are also free to step to the cafeteria
9 or step outside for 15 minutes.

10 MS. MCDONALD: Thank you, Your Honor.

11 THE COURT: Not to leave the premises, but to step
12 outside. Thank you.

13 (Recess from 10:23 a.m. to 11:00 a.m.)

14 THE COURT: Now, the Court took a recess at
15 plaintiff's request in order for plaintiff to prepare to address
16 defendants' renewed motion for judgment as a matter of law. Are
17 you ready to proceed?

18 MS. MCDONALD: Yes, Your Honor.

19 THE COURT: Very well. You may proceed.

20 MS. MCDONALD: Thank you, Your Honor. While the Court
21 has ruled that plaintiff may not discuss itemized damages, this
22 does not mean that plaintiff has not shown damages at all.
23 There's the matter of the breach of contract. One of the
24 measures of damages results from the termination of Mr. Xereas
25 and his loss of salary.

1 Defendants have also argued that plaintiff's termination
2 resulted in a rebrand of the company and resulted in \$700,000
3 loss to the company. If Mr. Xereas had not been terminated,
4 that money would have been profit that Mr. Xereas would have
5 received.

6 There's also the matter of the trademark damages which can
7 be measured in three different ways: actual loss including
8 profits; actual loss including harm to reputation and goodwill;
9 or defendants' profits from defendants' use of mark.

10 With respect to goodwill, Mr. Xereas testified that the
11 Riot Act name was well-known for its charity events, and
12 Mr. Bayne and others testified as to fights at the business
13 after Mr. Xereas was no longer affiliated with it, thereby
14 damaging the goodwill of the mark.

15 We've also had evidence with respect to defendants' profits
16 while defendants were using the mark, and there is also the
17 matter of the injunctive relief sought with respect to the
18 trademark. Then there's the oral licensing agreement that was
19 revoked and resulted in continued infringement.

20 Your Honor, again, while we may not be permitted to discuss
21 itemized damages in front of the jury, I believe a reasonable
22 jury can determine that damages have been shown and come to a
23 dollar figure.

24 THE COURT: Thank you, Ms. McDonald.

25 MS. MCDONALD: Thank you, Your Honor.

1 THE COURT: I will hear your reply, Mr. O'Neil.

2 MR. O'NEIL: Your Honor, with respect to breach of
3 contract, if I understand their theory correctly, if he had not
4 been removed as a managing member, he would have been entitled
5 to some portion of the \$700,000, that actually Mr. Dawson
6 testified to was \$200,000, for rebranding.

7 His right to funds from the company only kicked in after
8 all of the Class B investors had been paid. And during the
9 entire time he worked there, it was not a profitable business.
10 So to posit that money the company borrowed to save the
11 investors' investment in the company should have somehow inured
12 to Mr. Xereas, there's a logical fallacy, Your Honor, that can't
13 be overcome.

14 With respect to the trademark, the goodwill that existed at
15 the time Mr. Xereas was removed as a managing member was
16 goodwill developed by the LLC. The use of whatever value Riot
17 Act had in goodwill was attributable to the company, not to
18 Mr. Xereas. So even if you posit that one or two incidents at
19 Penn Social could somehow be attributable to Riot Act's goodwill
20 because Riot Act appears on the liquor license, that goodwill
21 wasn't Mr. Xereas's to lose. It was the company's.

22 And I think the same reasoning that we discussed earlier as
23 to the oral licensing agreement still holds, Your Honor.
24 Whether it's an itemized damage or not, the uncontradicted
25 evidence in the record shows that that oral license agreement

1 didn't have any payment terms. So I'm not sure how they can
2 fashion any claim for damages from breach of the oral licensing
3 agreement.

4 With respect to injunctive relief, I don't believe that
5 they've presented evidence sufficient to show that there is any
6 commercial use of the trademark just because it sits on the
7 certificate of occupancy or the liquor license. And therefore,
8 there's no basis for an injunction. Essentially, you'd be
9 enjoining the company from doing something that the D.C.
10 government has already told them they can't do until this
11 litigation has resolved.

12 So, Your Honor, as a matter of law, we believe both the
13 breach of contract and the trademark infringement claims fail.
14 Thank you.

15 THE COURT: Ms. McDonald, the Court had not intended
16 to hear from you again. The motion was made by defendants. The
17 Court heard the plaintiff's opposition and the defendants'
18 reply. But since you are at the podium, if you wish to be
19 heard, you may.

20 MS. MCDONALD: Thank you very much, Your Honor.

21 Mr. Morrissey testified that the loans were unnecessary
22 that Mr. O'Neil referenced, and that the company was in fact
23 profitable. Mr. O'Neil mentioned the goodwill of the company,
24 said that it was ascribed to the LLC. However, the goodwill of
25 the Riot Act name predates the LLC. Mr. Xereas did quite a bit

1 to build up that good name of the Riot Act name.

2 The breach of the oral licensing agreement, defendants had
3 multiple options when choosing to infringe on the trademark.
4 They could rebrand or they could get a license, and they chose
5 to do neither. They chose to continue to infringe on the
6 trademark.

7 Also, with respect to the commercial use of the name, I
8 believe that's a matter of law that has not been supported by
9 Mr. O'Neil's arguments. The fact that the name remains on the
10 certificate of occupancy and the liquor license is in fact a
11 commercial use, and his remark that the D.C. government has
12 prohibited them from changing the name on the certificate of
13 occupancy and the liquor license -- and there's a third
14 document -- is not supported by the testimony. Thank you, Your
15 Honor.

16 THE COURT: Thank you, Ms. McDonald.

17 The Court made very detailed findings early this morning
18 with respect to the failure of plaintiff to offer evidence with
19 respect to trademark damages. I'm addressing that first. In
20 view of that finding, defendants, of course, renewed their
21 motion for judgment as a matter of law as to the trademark
22 claims.

23 The Court treats the infringement claims and the alleged
24 breach of an oral contract with respect to licensing of a
25 trademark for this purpose in conjunction with each other. The

1 Court in this circumstance simply has no alternative other than
2 to grant the amended motion as to those claims; that is, all
3 trademark infringement claims and the claim regarding breach of
4 an oral contract to license the trademark.

5 The Court incorporates the reasons offered by counsel for
6 defendants, and other than to refer to the Court's own ruling
7 with respect to damages, has no occasion to elaborate further.
8 The Court will deny the motion with respect to Count VIII, which
9 is the alleged breach of the Amended Operating Agreement.

10 The arguments of plaintiff's counsel with respect to
11 damages which could be awarded have been something of a -- have
12 been made in a manner that complicates the Court's role because
13 the theories concerning what such damages could conceivably be
14 continues to change. However, because the Court could -- the
15 jury could find at a minimum that Mr. Xereas was not paid a
16 salary and that constitutes a damage or one item of damages for
17 the alleged breach, the Court will deny the motion.

18 I am concerned that if we address in greater detail at this
19 point what the other damages could conceivably be, we will tax
20 the jury's attention. That means that the claim of the
21 plaintiff which will go forward is breach of the Amended
22 Operating Agreement and that none of the others, none of the
23 remaining claims will proceed.

24 What additional opportunity do you need, Ms. Glavich, to
25 make modifications in your closing argument?

1 MS. GLAVICH: If I could ask for five to 10 minutes, I
2 would very much appreciate it.

3 THE COURT: Very well. What we will do then is take
4 that brief recess and proceed. Mr. O'Neil?

5 MR. O'NEIL: Your Honor, could I ask for one point of
6 clarification?

7 THE COURT: Yes.

8 MR. O'NEIL: It was stated by the Court this morning
9 that the plaintiffs weren't to argue about Mr. Morrissey's
10 expert report about the invoices and reimbursements. And I just
11 want to confirm that my understanding is correct that you had
12 said that the plaintiffs wouldn't be arguing that. And in that
13 regard, Your Honor, I don't see any admissible use of
14 Mr. Morrissey's testimony and I don't think it should be
15 addressed in the closing.

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

17 Ms. McDonald?

18 MS. MCDONALD: Your Honor, that's not my recollection
19 of what was stated today.

20 THE COURT: What do you believe should occur,
21 Ms. McDonald?

22 MS. MCDONALD: May I have a moment, please, Your
23 Honor?

24 THE COURT: Yes.

25 (Plaintiff counsel conferring.)

1 MS. MCDONALD: Your Honor, plaintiffs will bifurcate
2 their argument again and Ms. Glavich will speak. Thank you.

3 THE COURT: Thank you, Ms. McDonald.

4 Ms. Glavich?

5 MS. GLAVICH: Thank you, Your Honor. Mr. Morrissey's
6 testimony goes to the reliability of the financial records.
7 Under the contract, defendants were supposed to keep full and
8 accurate records. Mr. Morrissey has had testimony that says
9 those records are not accurate. Defendants have stated that
10 they fired Mr. Xereas, they took away his roles and eventually
11 terminated him because they were concerned about the financial
12 condition of the company. But the things that they were relying
13 on were not accurate.

14 THE COURT: Let me stop you there since it appears
15 that this is a matter that will also require further discussion.
16 To what do you refer -- to what evidence do you refer through
17 your suggestion that Mr. Xereas was -- bear with me just one
18 moment so I can refer accurately to what you actually said.

19 (Pause.)

20 Ms. Glavich, to what extent is your statement that "they
21 fired Mr. Xereas, took away his roles, and eventually terminated
22 him because they were concerned about the financial condition of
23 the company" an accurate characterization of the evidence? So
24 please make note of that question.

25 The second question is as follows: What is the basis of

1 your contention that the defendants relied upon the information
2 which was the subject of Mr. Morrissey's testimony? The
3 predicate for that question, of course, is your statement that,
4 "But the things that they were relying on were not accurate."

5 That suggests, although I would have had no occasion to
6 believe this before, that you intend to argue that the
7 information on which Ms. Heiss and Mr. Dawson relied was not
8 accurate simply because Mr. Morrissey later said something
9 different. Did you make note of both questions?

10 MS. GLAVICH: Yes.

11 THE COURT: Very well. Let me ask you to answer the
12 first one first, please.

13 MS. GLAVICH: I think it may help for me to answer the
14 second one first? The basis for my contention is that
15 Mr. Dawson --

16 THE COURT: Is this the answer to the first question?

17 MS. GLAVICH: Second question.

18 THE COURT: Let me ask you to answer the first
19 question first, please.

20 MS. GLAVICH: Okay. The first question was how
21 accurate -- I apologize. May I have the question again?

22 THE REPORTER: "Ms. Glavich, to what extent is your
23 statement that 'they fired Mr. Xereas, took away his roles, and
24 eventually terminated him because they were concerned about the
25 financial condition of the company' an accurate characterization

1 of the evidence?"

2 MS. GLAVICH: Both Mr. Dawson and Defendant Heiss
3 stated that the reason they removed Mr. Xereas from his roles
4 was because they were concerned about his financial decisions
5 and the financial viability of the company.

6 THE COURT: I recall that my question was to what
7 extent is that an accurate summary of their testimony. When I
8 say "their" I'm speaking of Mr. Dawson and Ms. Heiss.

9 MS. GLAVICH: They testified that they were concerned
10 about the condition of the company. I'm sorry, Your Honor.
11 Perhaps I'm not understanding your question.

12 THE COURT: Is it your suggestion that that was the
13 only reason offered for the actions that were taken?

14 MS. GLAVICH: For Mr. Xereas's termination?

15 THE COURT: I'm asking you the questions.

16 MS. GLAVICH: I'm sorry. I'm just trying to
17 understand what I need to address.

18 THE COURT: Okay. If you believe you've completed
19 your answer to the first question, you may turn to the second
20 one.

21 MS. GLAVICH: Your second question was what is the
22 basis for your contentions that what defendant relied on was not
23 accurate? And what we are arguing is that defendants testified
24 that they were concerned about the financial condition, and
25 Defendant Dawson went through the profit and loss statements

1 indicating that the company was not doing well. He testified
2 that Mr. Xereas was making decisions that he thought was not
3 financially sound. That was the reason that the defendants had
4 the January 19th meeting and the January 26th meeting in which
5 they removed Mr. Xereas from his various managerial duties.

6 And Mr. Morrissey had testified that those numbers, the
7 profit and loss numbers, come from the QuickBooks, and the
8 numbers in the QuickBooks was the subject of Mr. Morrissey's
9 testimony, and he was stating that those amounts in the
10 QuickBooks are not accurate or reliable because they do not meet
11 the industry standards of what is an ordinary and necessary
12 expense, and there is monies that were paid out that should not
13 have been paid out.

14 THE COURT: So what evidence is there that Mr. Dawson
15 and Ms. Heiss could conceivably have relied upon Mr. Morrissey's
16 calculations? I ask this question because you said, as a
17 portion of one of your questions, that the information that the
18 defendants relied upon was inaccurate. The only basis for such
19 an argument would appear to be the fact that Mr. Morrissey
20 reached an opinion which you suggest is at odds with the
21 testimony of the defendants. Am I correct?

22 MS. GLAVICH: You are correct, but I think there was a
23 mistake on my part in my word choice.

24 THE COURT: So I am correct that that was the argument
25 you intended to make?

1 MS. GLAVICH: There's a poor word choice in there.
2 When I say inaccurate, that was Mr. Morrissey's opinion, that
3 those documents were inaccurate. Defendants were taking them as
4 accurate in their decisions. The connection comes in that there
5 is a provision of the contract that requires them to keep full
6 and accurate books, which they were not doing, and in that
7 failure --

8 THE COURT: Do we agree that that is not an issue for
9 the jury?

10 MS. GLAVICH: We believe it is, but we understand that
11 Your Honor does not.

12 THE COURT: Since I've ruled that it's not, do you
13 agree that it's not an issue for the jury?

14 MS. GLAVICH: Yes.

15 THE COURT: Do you acknowledge that --

16 MS. GLAVICH: Yes.

17 THE COURT: -- it's not an issue for the jury?

18 MS. GLAVICH: Yes.

19 THE COURT: So what is it that you believe you should
20 be permitted to argue with respect to Mr. Morrissey's opinions?

21 MS. GLAVICH: It goes to the --

22 THE COURT: My question is, what is it that you
23 believe you should be permitted to argue.

24 MS. GLAVICH: That Mr. Morrissey had the opinion that
25 the books and records were not accurate, that there was funds

1 that were not ordinary and necessary under the standards. It
2 goes to the defendants' --

3 THE COURT: And to what -- what is the nexus between
4 the assertion or the contention you just offered and the
5 remaining claim?

6 MS. GLAVICH: The termination of Mr. Xereas, the
7 breach of contract of his termination. Defendants are defending
8 themselves by saying they are operating in the best interests of
9 the company. But Mr. Morrissey's opinion shows that the basis
10 on which they're making these decisions was incorrect, that had
11 they -- and I understand this is not an issue for the jury --
12 had those books been correct, then there would be no reason for
13 them to remove Mr. Xereas, for them to remove him from his
14 roles. And they used those roles as a way to remove him under
15 section 6.5 of the contract.

16 THE COURT: On what basis could the Court permit you
17 to argue that the records on which -- records and other
18 information on which the defendants relied was, in your word,
19 incorrect, or not correct?

20 I'm looking at your statement, Ms. Glavich, and it reads as
21 follows: "Had those books been correct, then there would be no
22 reason for them to remove Mr. Xereas." My question focuses upon
23 the beginning of that phrase, that first clause, "Had those
24 books been correct." On what basis could the Court possibly
25 permit you to argue that the books were not correct?

1 MS. GLAVICH: That's what Mr. Morrissey's opinion is.

2 THE COURT: Thank you, Ms. Glavich.

3 Mr. O'Neil?

4 MR. O'NEIL: Two points, Your Honor. With respect to
5 the representation just made to the Court that Mr. Dawson and
6 Ms. Heiss testified that Mr. Xereas was removed because of the
7 financial condition of the company is not just unsupported in
8 the record, I believe it's potentially sanctionable
9 misinterpretation --

10 THE COURT: Well, that was the Court's first question
11 to counsel, of course.

12 MR. O'NEIL: Well, I don't think we need to go back to
13 Mr. Dawson or Ms. Heiss's testimony. You can simply look at
14 Defendants' Trial Exhibit 28, which is the transcript of the
15 March 19, 2012, meeting, where 15 grounds for Mr. Xereas's
16 removal was --

17 THE COURT: The Court is well aware. My expectation
18 was that counsel would have acknowledged that a reason has been
19 hypothesized which does not represent the full state of the
20 evidence.

21 MR. O'NEIL: I would agree with that, Your Honor, but
22 I would also point out as a second item for the Court to
23 consider, I believe most if not all of Mr. Morrissey's testimony
24 about problems with the financial records of the company
25 postdate March 19, 2012. In fact, I think the bulk of it was

1 2013, 2014. So the idea that his conclusions were the basis or
2 had any role in Mr. Xereas's removal a year or two earlier is
3 nonsensical, Your Honor, to be as generous as possible.

4 THE COURT: You may be seated. Thank you.

5 I will hear your reply, Ms. Glavich.

6 MS. GLAVICH: Your Honor, the testimony of defendants
7 includes discussions of how the company was bleeding money.

8 THE COURT: Okay. Ms. Glavich, I'm going to
9 interrupt. I am well aware that plaintiff's counsel have
10 developed the hypothesis that the decisions which are the
11 subject of this lawsuit were undertaken because, in your words,
12 the defendants relied upon "books" which were not "correct."
13 However, that is wildly inconsistent with the evidence -- that
14 limited snippet is wildly inconsistent with the evidence that
15 was adduced during the course of the trial. Perhaps the reason
16 for relying upon such a hypothesis is that the plaintiff
17 offered, over objection, the opinions of Mr. Morrissey,
18 including his opinion regarding the accuracy of the books
19 maintained by the defendants.

20 However, there is no issue before the jury concerning the
21 accuracy of the books maintained by the defendants, and in any
22 event, it cannot be said that Mr. Morrissey's determination
23 regarding the records was considered by the defendants since
24 that would be logistically impossible given the chronology.

25 I am reluctant at this time to preclude you from making any

1 reference at all to Mr. Morrissey's opinion. However, I am
2 unable to determine to what his opinion is relevant at this
3 point. I am mindful that I am the one who made the decision to
4 permit him to testify, but in view of the remaining claims, I
5 simply do not know what the relevance of his opinions are.

6 You have not, in my efforts to extract an answer, pointed
7 to any relevance to any remaining claim, and instead resort to
8 the argument that Mr. Morrissey said the books -- the "books"
9 were not "correct." However, that is not an issue for the jury
10 to decide.

11 I certainly cannot permit an argument that the only reason
12 that Mr. Xereas was removed was because of a concern about the
13 financial viability of the company since that is not true. Not
14 accurate. Excuse me. Not consistent with the evidence. So I'm
15 growing increasingly concerned about what it is that the
16 plaintiff intends to present by way of a closing argument.

17 I am going to suggest that you -- although I may change my
18 mind before we start, I am going to suggest that you may refer,
19 if you wish to, to what Mr. Morrissey actually said, other than
20 as to the matter that I have repeatedly indicated is not a
21 matter of concern for the jury, but that the inferences --
22 because all of the inferences you have shared with me are not
23 supported -- or not consistent with the evidence -- it's not
24 simply a matter of whether reasonable minds could disagree, but
25 there is no factual predicate for the inferences at all -- I

1 cannot permit you to argue them.

2 Now, it is nearly noon. We can do one of two things. If
3 you believe you can proceed with your closing argument
4 essentially now, because as of yesterday you indicated you would
5 like 45 minutes, and conclude it by 12:30, we can do that.
6 Alternatively, I think it would be a better use of the jury's
7 time, a more efficient use of the jury's time to excuse them now
8 and ask them to be back by one o'clock.

9 You and Ms. McDonald may discuss those alternatives.

10 MS. GLAVICH: The excusing the jury now and coming
11 back at 1:00 and starting at 1:00 would be best.

12 THE COURT: You would prefer to return at 1:00.

13 MS. GLAVICH: Yes.

14 THE COURT: Very well. Thank you very much. Is there
15 anything further you wish to address, Ms. Glavich, concerning
16 closing argument?

17 MS. GLAVICH: No, Your Honor.

18 MR. O'NEIL: Your Honor, if I could ask for a
19 clarification. It sounds like there's no connection between
20 Mr. Morrissey's testimony and any of the claims that they're
21 asserting, but you're allowing them to argue Mr. Morrissey's
22 opinions in their closing argument. And I'm not sure how I
23 could --

24 THE COURT: I have suggested that the plaintiff
25 refrain from suggesting that there are any inferences to be

1 drawn and to refrain from any interpretation. As I candidly
2 shared with all of you, I am alarmed by the apparent -- by the
3 inference which it now is clear would have been made that
4 somehow Mr. Morrissey's opinion regarding the accuracy of the
5 books means that the books were incorrect and that the
6 defendants fabricated reasons for -- or that defendants'
7 reasons -- the reasons offered by defendants regarding the
8 financial condition of the business were pretextual or
9 fraudulent or inaccurate in some sense.

10 I still do not know -- and I'm leaving it to counsel to
11 make certain that the edits are appropriate. I do not know what
12 resort counsel intends to make to Mr. Morrissey's testimony. I
13 am reluctant to preclude all references to it, but I cannot
14 allow argument regarding inferences to be drawn from the
15 testimony.

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

17 THE COURT: As I said, the Court may well revisit
18 that. I believe you should have an opportunity, Ms. Glavich, to
19 attempt to make appropriate edits and revisions to the closing
20 argument, and you may well decide yourself to eliminate any
21 references to Mr. Morrissey. But I have made as clear as any
22 court possibly could that you may not argue inferences because
23 at this point you have not identified any inferences that would
24 be appropriate for the jury to make.

25 MS. GLAVICH: Understood, Your Honor.

1 THE COURT: Is there anything else to consider before
2 we recess? Do you still -- Mr. O'Neil.

3 MR. O'NEIL: I was just going to say no.

4 THE COURT: Do you still believe you will need 45
5 minutes, Ms. Glavich?

6 MS. GLAVICH: Probably not 45 minutes, Your Honor, but
7 somewhere around half hour to 45. But closer to a half hour.

8 THE COURT: May I ask, then, whether you believe with
9 a 15-minute recess you can begin at 12:00 and conclude at 12:30?
10 If not, we will recess now and begin at 1:00.

11 MS. GLAVICH: I'd prefer to begin at 1:00 just to make
12 sure my outline and my argument does not infringe on any of your
13 rulings.

14 THE COURT: Very well. Thank you very much. It will
15 also be incumbent upon counsel to refrain from references to
16 exhibits which relate to the two counts as to which the Court
17 has granted the renewed motion for judgment as a matter of law.
18 Before any exhibits go to the jury, it will be necessary for you
19 to meet and confer to determine what exhibits should be
20 withdrawn, and to consult with Ms. Lesley so that the necessary
21 adjustments in the record will be made and that you will be
22 aware of any further instructions regarding what must be done so
23 that the exhibits can be displayed on the monitor in the jury
24 room.

25 Very well. We will recess at this time.

1 (Recess from 11:43 a.m. to 1:02 p.m.)

2 THE COURT: We're back on the record. I have a single
3 matter to address before we proceed with closing arguments.

4 During the recess, the Court continued to give consideration to
5 the issue of what relevant testimony -- perhaps I should say
6 what testimony relevant to the plaintiff's breach of contract
7 claim Mr. Morrissey offered. And after pondering this question
8 for over an hour, the Court's answer is that there was none.

9 Thus, I must grant the defendants' motion to strike
10 Mr. Morrissey's testimony. I am not going to make any reference
11 to that at this very moment. I believe the time to address that
12 is during the instructions.

13 Are you ready to proceed, Ms. Glavich?

14 MS. GLAVICH: I am.

15 THE COURT: Ms. Glavich, that means it will be
16 incumbent upon you to make no reference at all to Mr. Morrissey.

17 MS. GLAVICH: Understood. We had decided to remove
18 him anyways.

19 THE COURT: When you indicated you decided to remove
20 the references, do you mean before the Court determined to
21 strike Mr. Morrissey?

22 MS. GLAVICH: Yes, Your Honor.

23 THE COURT: Or to strike Mr. Morrissey's testimony.
24 Excuse me.

25 MS. GLAVICH: Yes. During the break, we decided we

1 would not mention Mr. Morrissey.

2 THE COURT: Very well. Thank you very much. Is there
3 anything else that anyone wishes to address before we proceed?

4 MS. GLAVICH: No, Your Honor.

5 THE COURT: Mr. O'Neil?

6 MR. O'NEIL: No, Your Honor.

7 THE COURT: The Court generally discourages objections
8 during closing argument. Given the length of time we have spent
9 during preparations for the argument, I should have no occasion
10 to call counsel to the bench.

11 Very well. Thank you.

12 (Jury in at 1:06 p.m.)

13 THE COURT: Good afternoon, members of the jury. You
14 may be seated. I begin by thanking you, as I have done on many
15 occasions in the past, for your patience and for your continued
16 attention. Ms. Glavich will now present her closing argument on
17 behalf of the plaintiff.

18 Good afternoon. Please proceed.

19 MS. GLAVICH: Thank you, Your Honor.

20 CLOSING ARGUMENT BY COUNSEL FOR PLAINTIFF

21 MS. GLAVICH: May it please the Court, members of the
22 jury. The Riot Act saga. Over the last week, you have heard
23 tell of dreams, of potential, of promises, and you have heard
24 the story of the tragedy when that falls apart. And it sounds
25 like a story. There's characters. There's drama. For

1 Mr. Xereas, it was real.

2 But we're not quite done yet. We have that final chapter.
3 And this is where you come in. We're asking you to help us
4 write the final chapter of the Riot Act saga. Now, we're not
5 going to let you hang out to dry and just send you back with a
6 pen and a piece of paper. The judge will provide the law, and
7 that's going to be your structure. And you have the tools to do
8 the rest.

9 You've listened to the testimony and seen the documents.
10 You'll have the tools, the evidence, the facts to make that
11 answer, to write the final chapter.

12 Mr. Xereas is here today because of an agreement, an
13 agreement between equal partners. And those equal partners put
14 down their intentions into a contract. And you've seen this
15 contract a lot. This is Plaintiff's Exhibit 105, which is
16 called the Amended and Restated Operating Agreement of Riot Act
17 DC, LLC. And you will have this in your deliberations to
18 review. I encourage you to read it.

19 Everybody agrees that this exists. The question that we
20 have is did somebody breach it. Again, the judge will give you
21 the law on what that means. But in simple terms, it means that
22 somebody didn't follow the terms of the agreement.

23 There's two specific provisions I'd like to point your
24 attention to. The first is 6.4. And you'll have this, so
25 you'll have a chance to read it at your leisure. But 6.4 is

1 called compensation of the managing members.

2 It reads: "Each of the managing members shall be entitled
3 to receive from the company a reasonable, market-based salary as
4 compensation for the performance of his or her management
5 responsibilities. Any consideration to be paid as salaries by
6 the company to the managing members shall be determined by the
7 managing members in their reasonable discretion."

8 Over the last couple days, you've heard testimony from
9 defendants and from John that there was a discussion about a
10 salary to be paid to John. You heard -- John has told you about
11 all the work that he put in to getting the club ready, the hours
12 he spent, the things he did. And there's a discussion of paying
13 him \$72,000 a year. And John has also testified that he has
14 received just a fraction of that, only \$26,000.

15 The next section I'd like to refer you to is section 6.3,
16 removal of the managing members. And this is quite a lengthy
17 paragraph, so I won't read the whole thing. But again, you'll
18 have it and I encourage you to look it over.

19 The first sentence is where I'm going to focus. This first
20 sentence talks about the conditions for termination as a
21 managing member. And there are three, only three. One is death
22 and disability -- not an issue here. The second one -- I'm
23 doing these out of order, as you'll see. The second one is
24 fraud or willful misconduct or a felony crime involving
25 embezzlement, larceny, or a crime of moral turpitude. It's not

1 at issue here.

2 The third one, which is actually listed first in the
3 paragraph, is "if at any time one or more of the managing
4 members cease to devote such time and effort to the business and
5 affairs of the company as is reasonably necessary to promote and
6 maintain adequately the interests of the company."

7 It's this one, this one that's at issue. We know what
8 defendants are going to say. Defendants are going to say that
9 Mr. Xereas wasn't at the club in February and March of 2012, and
10 because he wasn't there he was not devoting such time and effort
11 as is reasonably necessary -- I'm paraphrasing there -- and so
12 they terminated him.

13 But before we get to February and March, we have get to
14 January, January 2012, which you heard a lot about over the last
15 week. As you know, as you've heard, on January 17, Ted Xereas
16 and Mike Farfel, two employees of the club, were fired. And
17 John was upset. John was upset and said some things, some bad
18 things. And he cooled off. He took a day, and he cooled off.

19 And on January 19th he's back at work. As you heard
20 Mr. Hawkins say yesterday, at their pre meeting, he looked at
21 them all and said, Riot Act -- that's why we're here. To do our
22 job. To be a comedy theater. And yet on that same day the
23 defendants held a surprise managing member meeting. They did
24 this without notice, which is required in this agreement in
25 section 10.6. They did it without telling him the purpose of

1 it, which is required in 10.6.

2 And at that meeting, they took away John's ability to use
3 the company funds and to make contracts. Remember, Mr. Xereas
4 testified at this time he was in charge of getting comics for
5 the comedy theater, paying comics, arranging for comics. The
6 defendants took that away.

7 And you've also heard about January 26th, the meeting that
8 happened a few days later. Mr. Xereas was not present at this
9 meeting. At this meeting, without John there, defendants took
10 further action, removing John from his managerial duties,
11 removing from access to his e-mail, the one that he had started
12 in 2005, giving his operational duties to Defendant Heiss, and
13 changing the locks on the doors.

14 Now, members of the jury, you will have Plaintiff's Exhibit
15 98, which is the meetings of managing members for Riot Act DC,
16 LLC, and on the second page are the meeting minutes for January
17 26. And you'll have a chance to peruse this when you're
18 deliberating, but I want to draw your attention to a few
19 particular parts.

20 In paragraph 1, or Section 1, it says, "John Xereas is no
21 longer authorized to be an administrator or manager of any
22 accounts pertaining to computer systems, e-mail, databases, or
23 online websites, videos, or media associated with Riot Act DC,
24 LLC, including Facebook, YouTube and Twitter, and shall have no
25 authorized access to these accounts, and henceforth Marjorie

1 Heiss shall be designated administrator or manager on all online
2 accounts of the LLC and shall approve all access by any employee
3 or third party, including naming other parties as
4 co-administrators or co-managers of any such accounts."

5 Paragraph 3. I want to draw your attention to the second
6 section that says, "John Xereas's authority to book acts for the
7 club and bind it contractually with respect to such acts, handle
8 arrangements and media events for the talent, and arrange
9 advertising for the club has been revoked; and henceforth, John
10 Xereas shall not have any authority to take any action on behalf
11 of the LLC without the approval of the managing members acting
12 as a group."

13 And in Section 5, "The keys to the exterior and office
14 doors and pass codes to the security system will be changed, and
15 the operating manager shall be the only managing member to have
16 the new keys and pass codes and shall distribute them to
17 employees as she deems necessary and appropriate. Other
18 managing members shall always have access to the club during
19 normal business hours, and if they wish to have access to the
20 club after normal business hours, the operating manager shall
21 make arrangements for them to have such after-hours access."

22 So that's where John Xereas was following January 26, at a
23 meeting where he was not given enough notice, where he could not
24 attend, where all of these management duties were taken away, he
25 was barred from his e-mail, and more than that, to computer

1 systems, e-mail, databases, or online websites, videos, or
2 media.

3 Despite this, as you heard yesterday from Mr. Hawkins, John
4 Xereas still showed up in February and March. On March 19th,
5 defendants held managing member meeting at which John Xereas was
6 informed the defendants voted -- maybe they didn't vote that
7 day, but John Xereas was informed -- I believe they voted two
8 days later -- that he was terminated as a managing member. And
9 the reason he was terminated was because he violated section 6.5
10 of the contract.

11 6.5 is duties of the managing members. I'm just going to
12 read the first sentence. "The managing members shall devote
13 such time and effort to the business and affairs of the company
14 as in the judgment of the managing members is reasonably
15 necessary to promote and maintain adequately the interests of
16 the company." That's what defendants allege Mr. Xereas
17 violated.

18 The question: What is reasonably necessary? What time and
19 effort is reasonably necessary? What time is reasonable? What
20 effort is reasonable? In light of what defendants did in
21 January where they took away his roles, they took away his
22 managerial roles, they took away his e-mail, they said he
23 couldn't access any computer system or database, he's not
24 allowed to talk to comics per their attorneys' demand, what is
25 reasonable in light of what is left?

1 As part of the judge's instructions, she will provide an
2 instruction on something called impossibility. Impossibility is
3 where one party makes performance of a contract impossible.
4 Seems pretty straightforward. And that's what defendants did
5 here. They made it impossible for Mr. Xereas to meet section
6 6.5. They set an impossible standard.

7 Because they did that, because they terminated him, they
8 set him up with an impossible standard and then terminated him
9 because of that impossible standard, they violated the contract.
10 Section 6.3.

11 Members of the jury, we ask you to find for plaintiff.
12 Find for plaintiff that defendants unjustly terminated him as a
13 managing member. They had three bases for doing so under
14 section 6.3. And the only one that was applicable, "such time
15 and effort as is reasonably necessary," they made it impossible
16 for him to do it.

17 That's Mr. Xereas's side as the plaintiff. I'm now going
18 to address the counterclaims. This is where defendants are now
19 plaintiffs, where they now bear the burden of proof.

20 Defendants have, I believe it's six different counts. The
21 first one is going to sound familiar. The first one they're
22 claiming is breach of contract by John of section 6.5 of the
23 operating agreement. This is what we just discussed. They made
24 it impossible. I'm not going to go into every detail of it, but
25 as in January, they terminated him slowly, over a succession of

1 meetings, removed his roles, and then in March terminated him.
2 After they removed him from his roles, he still showed up. They
3 removed more roles, he still showed up. They made it impossible
4 for him to meet the terms of the contract, of 6.5.

5 So I'd also like to touch on harm. Defendants are also
6 alleging that violation of this contract provision, 6.5,
7 regarding the time and effort reasonably necessary, defendants
8 say that John's failure to make that time and effort caused them
9 to have to rebrand their club and caused them to have to spend
10 money defending this lawsuit.

11 There's a problem there. How does your hours -- how many
12 hours you're spending at the club force somebody to rebrand,
13 force somebody to make a decision to go from a comedy bar to a
14 game bar?

15 When you deliberate and you're thinking about the harm from
16 John's apparently not spending enough time at the club, look at
17 Defendants' Trial Exhibit 41. It's the rebranding of the Riot
18 Act Comedy Theater to Penn Social.

19 The pages aren't numbered, but on the third page there's
20 listed a \$700,000 loan. Above that, there's some estimates for
21 what they need to spend to rebrand. A new bar and walk-in
22 cooler is \$45,000. Two ping-pong tables, \$1,500. Three used
23 pool tables, \$4,500. And six shuffleboards, \$30,000.

24 How is Mr. Xereas's showing up for work, putting in the
25 time and effort that is reasonably necessary, how is that tied

1 to \$30,000 worth of shuffleboards? How is he financially
2 responsible for \$30,000 worth of shuffleboards when defendants
3 reduced his roles and he still showed up?

4 Defendants are also claiming that this entire litigation,
5 the whole cost that they have had to spend for this litigation
6 comes out of the breach of contract of Mr. Xereas for the time
7 and effort that he spent at the club.

8 John asserted his property rights. He had a legitimate
9 belief that he owned the trademark. He asserted his property
10 rights. Now, the business incurred these funds because the
11 business members decided to indemnify themselves. That's a
12 business choice. Again, what's the connection between John
13 showing up for work and their decision to indemnify themselves
14 in a litigation? There's no connection.

15 Defendants' second claim is breach of duty of good faith
16 and fair dealing. And again, the judge will give instructions
17 as to what these words mean. The defendants have five grounds
18 that they're saying John Xereas did and that they deserve money
19 for. They're saying he abandoned the business. They're saying
20 he actively pressured comics into not performing. They're
21 saying that John participated in a scheme to take down Riot
22 Act's social media. They argue that him asserting his property
23 rights over the trademark caused them harm. And finally, they
24 say that he made disparaging statements and that those
25 statements caused them harm.

1 Going back to the abandonment claim, this is very similar
2 to the breach of contract in 6.5. He didn't abandon. He didn't
3 abandon the business. They demoted him, they diminished him,
4 they removed him from his roles, but he did not abandon. And
5 you've heard evidence from John, you've heard from Mr. Hawkins,
6 you've heard from Al Goodwin way back last week, people that
7 were at the club that saw him there, you heard from Sedrick
8 Muhammed, he didn't abandon it.

9 The second allegation they've made is that he actively
10 pressured comics not to perform. You heard from two comics, Al
11 Goodwin and Mr. Hawkins. And both of them testified that John
12 never told them not to perform. The only other comic that was
13 mentioned was a Mr. Wyatt Cenac. Mr. Cenac saw a public
14 statement on John Xereas's personal LinkedIn page and he decided
15 not to perform. There's been no evidence presented that that
16 was anything but Mr. Cenac's individual decision. There's been
17 no evidence that John pressured anyone.

18 The third issue that defendants are bringing up, third
19 claim, is that John participated in a scheme to take down Riot
20 Act's social media sites. But we heard from the person who did
21 it. This is Dawn Henderson. You watched her video deposition
22 testimony, and you will have the transcript of that in with you.
23 And while she says that she did it in multiple places, we can
24 turn to the very last page.

25 Question: Did John Xereas ever ask you to delete any

1 YouTube pages associated with Riot Act?

2 Answer: Never.

3 Question: Did he ever ask you to change the password to
4 any Twitter accounts associated with Riot Act?

5 Answer: Never.

6 Question: Did he ever ask you to hide the Facebook fan
7 page associated with Riot Act?

8 Answer: Never.

9 And we don't have just Ms. Henderson's testimony. John
10 also testified that he didn't know about it until several months
11 later in March, and that he told defendants that it was Dawn
12 Henderson. And defendants also sued Dawn Henderson. But they
13 had to dismiss it because of the statute of limitations. There
14 has been no evidence that John was involved in the sabotage of
15 the Riot Act social media sites.

16 The fourth issue that defendants bring up that they say was
17 a breach of the duty of good faith and fair dealing, was that
18 John asserted his property rights. John has a legitimate basis
19 for believing he owns the trademark. Plaintiff's Exhibit 18,
20 which you will have, is the registration from the U.S. Patent
21 and Trademark Office. As was testified about a lot, there's no
22 written agreement transferring ownership of the trademark from
23 John to defendants. It's not in the operating agreement.
24 There's no separate agreement. And John has been using this
25 since 2005, well before defendants were involved. He had a

1 legitimate basis for believing that he could assert his property
2 rights.

3 The fifth issue that defendants bring up is he made
4 statements disparaging the company. And defendants used
5 Defendant Trial Exhibit 44, which again you will have. It's
6 very small. This, they say, is a Riot Act Twitter account. And
7 there is an entry on March 21, 2012, that says in part -- and we
8 can only see a portion of it -- "I am currently pursuing legal
9 action against my former partners regarding the ownership and
10 future use of the Riot Act trademark under which," and then it
11 trails off. We can't see what's after that.

12 That's a statement of fact. That's all it is. It's a
13 statement of fact. It's John Xereas using his free-speech
14 rights to state a fact. And if you look further down, he's
15 using this as an opportunity to provide his e-mail address
16 because he's been locked out of his other one. He provides his
17 e-mail address saying, if you have been trying to reach me
18 there, you can reach me here.

19 And what's further, he did this on his LinkedIn page.
20 Neither John nor Mr. Bayne could testify that John put this
21 himself on the Twitter page. This is what John wrote on his
22 personal LinkedIn.

23 For those five areas -- the abandonment, the pressuring
24 comics, the social media sabotage, contending he owns the Riot
25 Act trademark, his property, and making disparaging statements,

1 statements that are statements of fact -- defendants say that
2 those five things caused them harm, caused them harm that
3 required them to rebrand, and therefore John is liable, again,
4 for that \$700,000, for \$30,000 for shuffleboards, and litigation
5 costs.

6 The question is what is the nexus between those things? Is
7 there any nexus? No. He didn't do any of the things they
8 allege he did. He didn't abandon. He didn't do the social
9 media. He had legitimate rights to assert his property rights.
10 How does doing those things require a rebrand from a comedy
11 theater to a game bar where you have to buy ping-pong tables?
12 How is John responsible for that decision? How's John
13 responsible for their decisions in litigation? These are their
14 business decisions. They're not connected to what John did, or
15 alleged to have done.

16 Defendants' third claim is tortious interference with
17 existing business and contractual relationships. It's a lot.
18 It's a lot to say.

19 For this you need a specific contractual relationship, and
20 the action has to cause a breach of that contractual
21 relationship or cause performance not to happen in that
22 relationship. And this is not a relationship between John and
23 defendants; this is a relationship that John had to interfere
24 with defendants' relationship of someone else, of a connection
25 between defendants and a third party.

1 We haven't heard about a contract that John interfered
2 with. We haven't heard of a comic who canceled. We haven't
3 heard of a vendor who didn't want to show up, that they had a
4 contractual relationship with, and that person decided, I'm not
5 going to do it because of what John did. Because we don't know
6 what relationship was interfered with, there can be no damages.

7 The similar goes for their next claim, tortious
8 interference with a prospective business relationship. We heard
9 again about Wyatt Cenac. We heard that Mr. Cenac saw a post on
10 John's personal LinkedIn, and because of that post, he didn't
11 want to perform.

12 John exercised his free-speech rights, posted on his
13 personal page. And again, we've heard no evidence that this is
14 anything but Mr. Cenac's personal decision, individual decision.
15 There's been no evidence that John pressured him, there's been
16 no evidence that he communicated with him. He made a statement,
17 and somebody else read it. And defendants want John to pay for
18 it. They want John to pay for somebody else's decisions. They
19 want John to pay for the consequences they experienced because
20 they fired John.

21 John did not interfere. Because he did not interfere,
22 there are no damages.

23 Their next claim -- and I promise we're getting done
24 soon -- is breach of fiduciary duty. And they put up the same
25 five factors as they did for duty of good faith and fair

1 dealing. The judge will provide more information about what it
2 means for breach of fiduciary duty. But the five reasons and
3 the failure that they -- of any evidence to show that John did
4 anything wrong apply.

5 There's no abandonment. He didn't pressure any comics not
6 to perform. He didn't participate in any scheme to sabotage the
7 social media of Riot Act. He has a legitimate basis for
8 asserting his property rights. And his statements on his
9 personal LinkedIn were fact and it was just letting people know
10 where to get hold of him. It's not disparaging.

11 Because defendants have not established that John did
12 anything wrong, there's no damages that can come from that.
13 There's no way to connect their decision to rebrand, the
14 litigation, there's nothing to connect that since John didn't do
15 anything wrong. Again, those were business decisions, business
16 decisions they made.

17 The last claim is conversion. This is the issue about the
18 computer. And the thing is you've heard testimony about two
19 different computers. Defendant Heiss testified about a very
20 specific event: going to the Apple store, getting a
21 top-of-the-line laptop, or \$5,000 laptop I should say, so that
22 John could work at home or at the office.

23 Now, we're not disputing that John has a computer. He
24 testified to that, and he testified that he would give it back.
25 What we're concerned about is the price tag. Defendants want

1 you to attach a \$5,000 price tag that was on a laptop to the
2 desktop that he has. Two different computers.

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

5 MS. GLAVICH: Yes, Your Honor.

6 (Bench conference.)

7 THE COURT: There have been any number of occasions I
8 had contemplated asking you to come to the bench, but the last
9 statement that you made left me with no choice. Plaintiff
10 conceded yesterday that we're talking about one computer. So I
11 cannot permit you to say there were two different computers.

12 MS. GLAVICH: I don't think we conceded it yesterday.

13 THE COURT: I don't want to have any further argument.
14 I want you to correct yourself and indicate that plaintiff
15 acknowledges there was one computer. It was conceded that these
16 are one computer. Later defendants' counsel obtained leave to
17 amend the complaint to delete the word "laptop" --

18 MS. GLAVICH: I'm not going to say any more about it.

19 THE COURT: Yesterday it was conceded that there is
20 one computer. So would you correct yourself, please.

21 I'd also note that you began at 1:07. It is now nearly two
22 o'clock. That means you have left yourself -- if you finish in
23 the next minute or two, seven minutes for your rebuttal. I
24 cannot permit you to go past 2:07. But make the correction
25 first.

1 MS. GLAVICH: Okay.

2 (End of bench conference.)

3 MS. GLAVICH: I have a little correction.

4 The computer, the laptop and the desktop have been determined
5 to be the same computer.

6 Members of the jury, on defendants' counterclaims, the
7 claims of breach of contract, duty of good faith and fair
8 dealing, tortious interference of contracts, prospective
9 business relationships, a breach of fiduciary duty, defendants
10 have not met their burden.

11 They have a burden to establish by the preponderance of the
12 evidence that John took the wrong actions and that his wrong
13 actions caused them harm, caused them to rebrand, caused them to
14 have to spend I don't know how much in litigation. But they
15 haven't met that burden. They haven't met that burden because
16 they haven't pointed to wrongs that John did. They haven't
17 connected John's actions to their choices. They have not met
18 their burden of proof.

19 Last week when we just started, you heard the analogy that
20 Mr. Xereas is the kid who took his ball and went home. But you
21 know now that it wasn't that simple. You know now that a game
22 was rigged. The defendants weren't playing by the same rules.
23 And that under defendants' rules, under their requirements, he
24 just couldn't succeed.

25 Your Honor.

1 THE COURT: Thank you very much, Ms. Glavich.

2 Members of the jury, you have been sitting for close to an
3 hour. Because it is likely that the next argument will consume
4 45 minutes or so, I believe this is a good time for all of us to
5 take a stretch break. If you can, I will ask you to confine
6 your recess to no more than 10 minutes. If you need a few more
7 minutes than that, just let Ms. Lesley know, please. Thank you
8 so much.

9 (Jury out at 2:01 p.m.)

10 THE COURT: Is there anything any of you would like to
11 address before we also take 10 minutes?

12 MS. GLAVICH: No, Your Honor.

13 THE COURT: Mr. O'Neil?

14 MR. O'NEIL: Your Honor, as you noted, you don't like
15 objections during closing arguments, and I complied with that
16 request. But I think there were several misstatements in that
17 argument --

18 THE COURT: There were.

19 MR. O'NEIL: -- that need correction to the jury.

20 THE COURT: Which ones?

21 MR. O'NEIL: Can I grab my notes real quick?

22 THE COURT: Yes. As I indicated, it was at the point
23 of the most egregious one that I called counsel to the bench.
24 So that correction has been made, albeit grudgingly.

25 MR. O'NEIL: I would argue incompletely.

1 THE COURT: And incompletely. That is correct.

2 MR. O'NEIL: I think I stopped writing them down after
3 a certain point, Your Honor, but I thought several times when
4 they were reading the Amended Operating Agreement, they
5 misstated the language contained in the agreement. Most
6 specifically, the indemnification agreement contained in the --

7 THE COURT: Do you have a copy of it, any of you?

8 (Document tendered to the Court.)

9 MR. O'NEIL: At the bottom of the page there, Your
10 Honor. And they've argued this several times during the course
11 of the trial. They said it was discretionary language in the
12 contract. However, as I read it, it says the company "shall"
13 indemnify managing members.

14 THE COURT: Is that a correction you'd like to make
15 yourself, Ms. Glavich?

16 MS. GLAVICH: Just a moment. I'm looking for the
17 provision.

18 THE COURT: It's the bottom of page 23. I assume that
19 is the document from which you were reading? Am I correct?

20 MS. GLAVICH: I didn't read the indemnification
21 provision, but I certainly can.

22 THE COURT: Did you not refer to the indemnification
23 agreement as a provision that was discretionary?

24 MS. GLAVICH: The indemnification --

25 THE COURT: Answer my question, please, Ms. Glavich.

1 I asked the question because the word "shall" is there in black
2 and white on the second line.

3 MS. GLAVICH: Yes, Your Honor. I misspoke during
4 my --

5 THE COURT: Very well. Then I will give you the
6 opportunity to state to the jurors that you misspoke and that
7 the indemnification clause has the word "shall."

8 MS. GLAVICH: Your Honor, may I read the entire
9 indemnification --

10 THE COURT: No.

11 MS. GLAVICH: There is a part of the indemnification
12 which is, the managing members -- it says shall but they also
13 identify other parties. If I can make that --

14 THE COURT: The answer to the question is no.

15 MS. GLAVICH: Yes, Your Honor.

16 THE COURT: Now, what is the next concern? Maybe both
17 of you can stay at the podium, please, so that we can do this
18 quickly.

19 MR. O'NEIL: Your Honor, I'll leave it at that. I
20 don't have complete enough notes to identify other instances,
21 though. I had the gut reaction at least two times, but I can
22 address it in my closing if you'd prefer.

23 THE COURT: One of the Court's concerns had to do with
24 6.4, compensation of the managing members. I believe you read
25 one sentence, the first sentence, Ms. Glavich, and not the

1 second.

2 MS. GLAVICH: I read the second, Your Honor.

3 THE COURT: Is there anything further, Mr. O'Neil?

4 MR. O'NEIL: No, Your Honor.

5 THE COURT: Very well. I will require when the jury
6 comes back that you state, Ms. Glavich, that you spoke in error
7 with respect to the indemnification provision. And then you
8 will begin, Mr. O'Neil.

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

10 THE COURT: Very well. Let's all take our 10 minutes.

11 (Recess from 2:08 p.m. to 2:24 p.m.)

12 THE COURT: Now, Ms. Glavich, we already addressed the
13 correction that you must make concerning the word "shall," which
14 is in the indemnification clause, which entirely undermined --
15 on the basis of which I noted that your argument was entirely
16 inconsistent with the evidence.

17 I did not revisit the correction with respect to the
18 computer. Your effort to correct it was incomplete and largely
19 devoid of any context. My expectation was that you would state,
20 as was evident from the conclusion of plaintiff's representations
21 yesterday, that it is acknowledged that there is only one
22 computer at issue. So that is what I expect that you will say.

23 MS. GLAVICH: For the computer claim?

24 THE COURT: Let me ask you to use the podium
25 microphone, please.

1 MS. GLAVICH: Mr. O'Neil's notes are there. That's
2 the only reason why I didn't come up.

3 MR. O'NEIL: I'll get them. Nothing secret.

4 MS. GLAVICH: Just want to confirm you want me to
5 revisit the computer, and the --

6 THE COURT: I want you to state that there's no
7 confusion about what computer is at issue. There is only a
8 single computer at issue.

9 MS. GLAVICH: Okay.

10 THE COURT: Do you understand?

11 MS. GLAVICH: Yes. I will say there's only one --

12 THE COURT: Very well. And the next matter that
13 requires correction, I realized, has to do with the computer.
14 You stated, or argued, Ms. Glavich, that Mr. Xereas has offered
15 to return the computer. There is no such evidence that was ever
16 offered during the course of these proceedings, and I absolutely
17 cannot permit that argument to stand uncorrected.

18 Yesterday Mr. Richa, when he was present, made a proposal
19 which I would consider in the nature of a settlement proposal,
20 to tender a check for the fair market value of the computer.
21 That is not the same as a proposal to return the computer. In
22 any event, the Court would regard that as a settlement
23 discussion, which should not be a matter of record in any event.
24 It is certainly not an issue for the jury to consider.

25 So in addition to stating that there is no confusion

1 regarding what computer is at issue, you will have to state that
2 you misspoke when you said that Mr. Xereas offered to return the
3 computer.

4 MS. GLAVICH: Your Honor, Mr. Xereas, in his
5 testimony, did state that he would return the computer. When
6 Mr. O'Neil was asking him on cross --

7 THE COURT: Has it been returned as of this moment?

8 MS. GLAVICH: It has not been returned, but he offered
9 to return it in his testimony.

10 THE COURT: Has it been returned as of this moment?

11 MS. GLAVICH: No, not as of this moment. No.

12 THE COURT: Then would you prefer to state that the
13 computer has not been returned as of this moment?

14 MS. GLAVICH: Yes, I can state that.

15 THE COURT: Very well. The computer has not been
16 returned. You need not state "as of this moment."

17 MS. GLAVICH: Okay.

18 THE COURT: And will you, then, be ready to proceed,
19 Mr. O'Neil?

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

21 THE COURT: Very well. We'll ask Ms. Lesley to please
22 see whether the jurors are ready.

23 (Jury in at 2:29 p.m.)

24 THE COURT: Members of the jury, thank you so much.
25 Please be seated. Ms. Glavich will address you briefly to make

1 two corrections, one which has two parts, and then Mr. O'Neil
2 will proceed with the closing argument on behalf of the
3 defendants.

4 Ms. Glavich, please proceed.

5 MS. GLAVICH: Thank you, Your Honor.

6 The two-part correction is on the computer and the
7 conversion claim. There is no confusion of the computer that is
8 at issue, and the computer has not been returned.

9 And then on the indemnification, Section 7.1 of the
10 contract, it states that the company shall indemnify and hold
11 harmless the managing members.

12 THE COURT: Thank you very much, Ms. Glavich.

13 MS. GLAVICH: Thank you.

14 THE COURT: Mr. O'Neil, please proceed.

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

16 CLOSING ARGUMENT BY COUNSEL FOR DEFENSE

17 MR. O'NEIL: Last Monday I stood here and I told you
18 that the image that the defense had kind of coalesced around,
19 that kind of summarized this lawsuit, was of Mr. Xereas as a --
20 someone who gets frustrated in the middle of the game, grabs his
21 ball and goes home. Now that you've heard all of the evidence,
22 you've seen the documents, you've heard the testimony, I should
23 amend that statement to say he's more like a petulant child who,
24 screaming obscenities as he walks off the court, takes his ball
25 and goes home. I think that's a more accurate statement based

1 on what we've heard here these last seven days.

2 One thing is very clear. With respect to Mr. Xereas's
3 claim against the defendants, his breach of contract claim,
4 there was no breach of contract by the defendants. Mr. Xereas
5 pointed to two provisions of the contract that he claims were
6 breaches, and I'm just going to show it on the board. This is
7 from Plaintiff's Exhibit 105.

8 Section 6.4 is what they were referring to, compensation of
9 the managing members. And they claim that we breached the
10 contract when we didn't pay him the full \$72,000 annual salary
11 that he says was agreed upon.

12 We don't disagree that we had set his salary at \$72,000,
13 and we began paying him that on a monthly basis. What we
14 disagree with is that our stopping those payments was a breach
15 of this contractual provision. You'll see in the section of the
16 agreement that was not necessarily highlighted by plaintiff,
17 "Any consideration to be paid as salaries by the company to the
18 managing members shall be determined by the managing members in
19 their reasonable discretion."

20 What makes that important is the undisputed facts before
21 you that from the day this company, the club, opened its doors,
22 it was losing money. In the first two months it lost nearly a
23 hundred thousand dollars. It broke even briefly for two months,
24 bringing it back almost to level, but then by December and
25 January it was again in the red.

1 The managing members of this company each put \$100,000 into
2 the business, and for that they received 26 percent of the
3 company. The investors, such as Peter Bayne who you heard from
4 yesterday, they put in \$100,000 also, generally. Some put in
5 different amounts. But a hundred thousand dollars would get you
6 1 percent of the company.

7 So it's a pretty good deal to be a managing member of this
8 company. The tradeoff is that you get paid last. You heard
9 Mr. Dawson testify extensively about his concerns about the
10 investors in the company. I don't think you heard about the
11 investors at all from plaintiff. But they're the people who
12 entrusted the managing members, all three managing members, with
13 their money, and trusted them to turn that investment into a
14 worthwhile one.

15 Mr. Dawson had the responsibility to those investors that
16 he brought into the company to make sure their interests were
17 looked after. And when the company's losing money, it's not
18 paying its investors. You heard Mr. Dawson early, in September,
19 October, he was getting calls from concerned investors when they
20 found out, instead of making \$168,000 the first month, they had
21 lost a considerable amount of money. Instead of that curve
22 going up, the curve was going down.

23 You don't have the luxury in a start-up business like this
24 to lose money for a year and hope things turn around. The
25 projections that we showed you that were sold to the investors

1 told them that they would be making money from day one, and they
2 weren't. For that reason, it would only be reasonable for the
3 managing members to decide that they couldn't afford to pay
4 themselves money when their investors were staring at a loss
5 ranging from -- some investors put in up to \$400,000, others
6 \$100,000. But they're looking at that money crumbling away.

7 So, the managing members made the reasonable decision to
8 stop Mr. Xereas's compensation. Oh, and they made the same
9 decision to stop Ms. Heiss's compensation. Now, Mr. Dawson had
10 never asked for nor received a monthly salary. But he was
11 devoting much less of his time on a day-to-day basis. Without a
12 doubt, John was the operating member, and as things progressed,
13 Marjorie got more and more involved. So both of them requested
14 a salary and were granted it during a period that the company
15 could afford it.

16 But it is clearly not a breach of contract for the managing
17 members, in their reasonable discretion, to decide a company
18 that's losing money, a company that is putting at risk their
19 investors' money, would decide to stop making payments. There
20 is nothing about those payments to the managing members that was
21 guaranteed or set to be \$72,000 a year no matter what.

22 The managing member investors were in line to make a lot of
23 money should this company be profitable. If it was making a
24 million dollars a year, they'd each be getting \$260,000 or more.
25 So that's why you become a managing member in an organization

1 like this. The reward is down the road. But your first
2 obligation is to your investors. Once they get their money
3 back, then you can see the results of your labor. But to claim
4 that it's a breach of contract for us to make that reasonable
5 decision is simply unfounded.

6 The second breach of contract that they've highlighted, or
7 alleged, is a breach in his removal as a managing member. And
8 they pointed you to section 6.3 of the agreement. Again, I
9 believe plaintiffs misspoke in their closing argument when they
10 stated that the only clause of this contract that is at issue is
11 clause No. 1, which states that, "If at any time one or more of
12 the managing members, one, cease to devote such time and effort
13 to the business and affairs of the company as is reasonably
14 necessary to promote and maintain adequately the interests of
15 the company." They said that was the only one.

16 Actually, when you look at Exhibit 28, which are the
17 meeting minutes from the March 19, 2012, meeting of the managing
18 members, you'll see that they told Mr. Xereas at that meeting
19 that they were proceeding under sections 1 and 3, alleging that
20 he had committed willful misconduct in the eyes of the company.

21 I think, if you look at Exhibit 28, it's fairly clear that
22 the company was justified in taking the actions that it took.
23 Beginning on page 4 -- actually, beginning on page 5,
24 Mr. Conlon, the attorney for the company, began speaking, and
25 after stating that they were proceeding under sections 1 and 3

1 of section 6.3, began to list the many reasons that the company
2 was taking the action that it was taking.

3 Remember this is a full two months after the initial
4 confrontation between the partners when Mr. Xereas grabbed his
5 materials out of the office and stormed out, screaming words
6 that Ms. Dawson wouldn't even repeat on the witness stand. But
7 I think we all know what was said. But the importance of
8 Exhibit 28 is that it lays out I think 15 total bases for the
9 company to remove Mr. Xereas as a managing member.

10 I think at times during the course of the trial here and
11 during the course of this litigation, it's been suggested that
12 by removing him as a managing member they took away his interest
13 in the company. And obviously, that's not true. He's still a
14 26.67 percent owner of the company to this day. And if the
15 company started making money and paid back all its investors,
16 he'd be getting checks the same as Ms. Heiss and Mr. Dawson. It
17 was the same until Ms. Heiss sold the majority of her shares to
18 Mr. Dawson. But assuming the original percentage ownership,
19 they'd all be getting paid the same.

20 So just a brief rundown of the reasons that Mr. Conlon
21 stated. The very first one, Mr. Xereas misrepresented to the
22 other managing members of Riot Act that he was contributing any
23 rights he had in the trade name and trademark Riot Act and its
24 derivatives. See that? That was the number one issue.

25 Clearly, by the time Mr. Conlon gets to -- 9 has several

1 subparts, 10 has several subparts. 11, 12. I commend you to
2 read this document, because it neatly summarizes all of the
3 things that you've heard here today throughout the course of
4 this trial, all of Mr. Xereas's actions, where he chose to put
5 his own interests ahead of the company's and ahead of the
6 investors'.

7 So clearly the breach of contract actions are not well
8 supported, and in our view, judgment should be granted to the
9 defendants on those counts.

10 We're relying on you to make the questions of fact, to make
11 the determination of what the facts are. The parties here have
12 been arguing about it for six years, about what the true facts
13 are. And you heard plaintiff's counsel tell you that he was
14 asserting his right in the trademark and therefore his actions
15 were legitimate. But that's what we need you to determine.

16 You heard Ms. Heiss and Mr. Dawson testify that they sat
17 down with Mr. Xereas very early in the process and questioned
18 him about his intentions with the trademark. Mr. Dawson even
19 brought it up in one of the first e-mail exchanges they had when
20 they were talking about the company. He said he wanted to be
21 open and honest in his communications, he thought that's the
22 best way a partnership worked, and he asked Mr. Xereas directly,
23 what is it you want to do with the trademark?

24 You heard them both testify that he said he wanted to
25 contribute the name to the company. And then the issue

1 disappears. There are no more e-mails about contributing the
2 trademark. Do we wish there had been an executed contract with
3 Mr. Xereas? We sure do. Because we didn't know he'd go back on
4 his word. But it's clearly the case that the contemporaneous
5 documents that you've seen confirm the defendants' version of
6 the story, and there's nothing there to support plaintiff's
7 story.

8 Instead, eight months later you start seeing e-mails about
9 a potential license. And that's when the company was already
10 running into difficult times. Tension between the partners had
11 already arisen. Based on plaintiff's closing argument, you
12 would think that this case started on January 17, 2012. They
13 made no mention of anything before. But what we saw in the
14 documents, and if you think about the chronology, was a slow
15 dissolution of the trust that's required to be someone's
16 business partner in a venture of this type.

17 From the early complaints that Mr. Xereas made about
18 Ms. Heiss, some in extreme and highly unusual language that you
19 would see in a company e-mail, to Mr. Xereas's difficulties in
20 paying his required \$100,000 contribution. You see that over
21 time and how the parties reacted to it. All of those things
22 lead up to January of 2012. You can't isolate those events by
23 themselves.

24 But as you look at Exhibit 28, you'll see -- we're
25 convinced that you'll see there was ample grounds for the

1 company to remove Mr. Xereas as a managing member, and that
2 action cannot stand as a breach of contract. In fact, it was
3 complying with the requirements of the contract that the parties
4 entered that he be removed.

5 Mr. Xereas focused on what he calls contradictory evidence
6 that he was actually continuing to work for the company. Your
7 job is to determine if that testimony is credible. Your job is
8 to look at what they actually said. Mr. Hawkins took the stand
9 yesterday and said, oh, he was at the club. Actually, Mr. Bayne
10 had said the same thing earlier in the morning. John would come
11 in and introduce himself to the clients. He wasn't locked out.
12 He could come by and see people, people he knew in the business.
13 We didn't keep him out of the club for that reason. But was he
14 doing work? Clearly, the record supports the conclusion that he
15 was not.

16 Yes, some of his powers had been restricted. He didn't
17 have authority on his own anymore to sign contracts. He had to
18 work with the managing members. But that didn't mean he was
19 kicked out, kicked out of his e-mail. I think plaintiff's
20 counsel pointed you to a document that said he was restricted in
21 his access to the Twitter accounts, the Facebook accounts. But
22 look closely at that document. What he was restricted -- the
23 status that was restricted was his status as an administrator of
24 those accounts. It doesn't say he can't be -- he can't use his
25 company e-mail. It says he's not going to be an administrator

1 of those e-mail accounts or social media accounts.

2 And the reason for that is that the company had just been
3 attacked by one of his close compatriots. He didn't tell us
4 that at first. But you saw Ms. Henderson's testimony, actually
5 her videotaped testimony, where she acknowledged doing it, she
6 acknowledged talking to John right before she did it. She
7 acknowledged she did it the day after Mr. Xereas's brother had
8 been fired. So it was a very reasonable action to take, when
9 the company is under attack, to require the partners to work
10 together to respond to those things.

11 Mr. Xereas was asked by his partners to help them fix the
12 social media problems, to find out what had happened, to assist
13 the expert that they had hired to try to fix the problems, and
14 he just shrugged his shoulders. I think it's very illuminating
15 if you read the January 19th meeting minutes. I think that's
16 our Trial Exhibit 26. It's a short document. Seven or eight
17 pages. Mr. Xereas doesn't say much. He shrugs. Scowls.
18 Claims he has to get back to work. He doesn't seem to have any
19 of the urgency that his partners have while the company's under
20 attack. But he doesn't do much to help them either.

21 And by the 26th, the next meeting, where again his powers
22 are curtailed to some degree, he started to come to the job less
23 frequently, he didn't attend the meeting, although he had had
24 notice of it. He deemed it not important enough, I suppose.
25 And the minutes of that meeting are important as well and will

1 give you a good taste of where the relationship stood at the
2 time.

3 All that said, the actions that took place in March of
4 2012, after his lawyer had issued a cease and desist letter,
5 after he had filed suit in D.C. Superior Court naming the
6 company and his partners as defendants, all of that taken
7 together is a basis for you to decide that it was reasonable for
8 them to conclude that under sections 1 and 3 of the contract
9 provision, that they were justified in removing him as a
10 managing member.

11 I want to talk briefly about our counterclaims. The first
12 counterclaim asserted against Mr. Xereas is based on his breach
13 of section 6.5 of the contract, stating the duties of a managing
14 member. Again, this is Exhibit 3, Defendants' Trial Exhibit 3.
15 And similar to the removal provision, it requires the managing
16 members to devote "such time and effort to the business and
17 affairs of the company as in the judgment of the managing
18 members is reasonably necessary to promote and maintain
19 adequately the interests of the company."

20 Clearly, the proof that the removal was valid also proves
21 that he was breaching this provision of the contract. It's the
22 same evidence. I won't bore you by going over it again. But
23 clearly Mr. Xereas was violating the terms of the contract.

24 And you heard a little bit from Mr. Xereas's counsel about
25 our damages that we've asserted in this case. And there's three

1 categories that we've set out. And you heard Mr. Dawson testify
2 about them.

3 The first was the money that the company spent in that
4 chaotic period between January and June of 2012, when it was
5 trying to keep the business going, when it was trying to protect
6 the investors' interest, and it was spending money bringing in
7 other people to find comics to perform, and scrambling to
8 address the needs of the business once Mr. Xereas walked out.
9 Mr. Dawson testified that he estimated the cost of that to be
10 about \$50,000.

11 You heard about the rebranding exercise that they went
12 through in July. And what Mr. Dawson testified to was that the
13 entire rebranding process cost about \$200,000 for new equipment,
14 new materials that were needed to convert from the comedy club
15 to the bar it is today.

16 You heard counsel for plaintiff refer to a \$700,000 sum.
17 That \$500,000 difference was the amount that Mr. Dawson had put
18 into the company in the last -- over the last six months, eight
19 months, to keep it alive, money secured by his personal home.
20 So all told, the company had to get a credit line of about
21 \$700,000, but only \$200,000 of that was attributable to the
22 rebranding.

23 And we believe Mr. Xereas, as a result of his actions, as a
24 result of the breach of contract, is responsible for some if not
25 all of that amount. Again, that's for you to decide. You have

1 all the facts. You can weigh everyone's credibility, the people
2 who have come before you, and decide for yourselves what those
3 facts are.

4 It was also clear from Mr. Bayne's testimony yesterday --
5 well, hold on. I skipped over the most important one. The
6 third element of our damages, as Mr. Dawson testified, the
7 \$1 million in indemnity costs that the company has incurred.

8 Now, you've heard sometimes the plaintiff's counsel
9 mischaracterized this indemnification provision as just an
10 effort to get attorney's fees, and I think that that's
11 inaccurate. Yes, the indemnification does apply to attorney's
12 fees, but it applies to more than just that.

13 If you look at Section 7.1 of the agreement -- this is
14 carrying over from the prior page -- it says it protects the
15 managing members and their affiliates and their agents,
16 officers, directors, from any claim, loss, expense, liability,
17 action, or damage resulting from any act or omission by or on
18 behalf of the indemnity in his capacity as a managing member.

19 So, yes, it pays attorney's fees, but it pays liability, it
20 pays the claims that are asserted against you if they're
21 asserted successfully. So, by Mr. Xereas's suit, he's required
22 the company to incur up to a million dollars in costs, by
23 Mr. Dawson's estimate, under this provision of the contract.

24 Counsel for plaintiff tells you that he was just asserting
25 his rights. But again, that's where you come in. You've heard

1 Mr. Dawson and Ms. Heiss testify that they sat down with
2 plaintiff at the very beginning of this process of creating the
3 company, and he clearly told them he was providing them with the
4 rights to use the Riot Act name. It was his idea. He wanted to
5 do it. He was proud of the name. He wanted it on the company.
6 He never mentioned anything about compensation.

7 If you find that fact to be true, if you believe that event
8 as described by Ms. Heiss and Mr. Dawson actually occurred, then
9 this lawsuit was not an assertion of his property rights. It
10 was an effort to attack the company.

11 Another factor that can go into your determination about
12 whether that's true or not is look at the circumstances around
13 what he said was the license and his obtaining the trademark.
14 They showed you the trademark that was granted by the Patent and
15 Trademark Office in January of 2012.

16 They didn't show you the application. We showed you the
17 application, and on it in two different places Mr. Xereas made
18 very important decisions. The first one is it asks you where
19 your place of employment was. And rather than putting down Riot
20 Act, he put down his home address. He even admitted on the
21 stand that he did that so that correspondence about that
22 application would not be sent to the company.

23 Secondly, he told the Patent and Trademark Office that
24 nobody else, no other corporation, had any right to use that
25 trademark. By his own theory of the case, that is not true.

1 There's a term for when you obtain a trademark through dishonest
2 means. It's defrauding the trademark office.

3 That fact -- that series of facts should also be considered
4 by you in judging what you determine the real facts are about
5 the early meeting between the managing members, where two of
6 them, experienced business people, and a lawyer, experienced
7 lawyer, were told that he was giving the company whatever rights
8 he had in that trademark to them as his contribution. Just the
9 way Marjorie contributed her legal skills. You've seen some of
10 the documents she drafted, some of the -- the offering
11 memorandum. These were not simple documents. They're
12 complicated. And she's got a wealth of experience that allowed
13 her to do that. She didn't get paid for that work, and there
14 was no written agreement that she do that. It was just
15 understood that each of the partners was making a contribution.

16 Similarly, Geoff Dawson, who has many years experience
17 building up bars, he contributed those skills. It wasn't
18 written down. They didn't need a contract to mark that.

19 So the point that plaintiffs have made over and over again,
20 that, well, they didn't write it down so it couldn't be true, I
21 think you have to look at the entire facts around this
22 trademark, around these conversations, around the parties'
23 obligations, and determine for yourself what's true. That's
24 your job as the trier of fact.

25 Our other counterclaims allege that Mr. Xereas interfered

1 with existing business relationships and interfered with
2 prospective relationships. You heard Mr. Bayne testify
3 yesterday that he was having a problem keeping employees in the
4 spring of 2012 because of Mr. Xereas's actions. Some quit
5 outright, some he tried to convince to come around. Some were
6 getting nasty text messages. Some were being followed in their
7 cars. Some were being accosted on the street. It was not a
8 happy place to work. And every time he did that, he was
9 interfering with the company's relationship with that employee.

10 And every time he publicized his lawsuit in the comedy
11 community, through whatever means, he was making sure comics
12 knew about the dispute. We never doubted that he was the one
13 who had relationships with comics. That's why he was brought
14 into the partnership. You heard both Ms. Heiss and Mr. Dawson
15 testify that they didn't know anything about comedy and didn't
16 want that job. That's why Mr. Xereas was there.

17 But by poisoning the well, you heard Mr. Bayne testify,
18 they couldn't get people to work there for any price. And
19 that's the interference with prospective business and
20 contractual relationships.

21 We state a claim for breach of fiduciary duty. It's our
22 view that as a managing member of the company and as the
23 operating partner of the company, he had a fiduciary
24 relationship to his partners and to his investors to put the
25 interest of the company first. I think we've highlighted

1 incident after incident where Mr. Xereas didn't do that.
2 Whether it was the cease and desist letter, whether it was the
3 lawsuit itself, whether it was the social media postings, all of
4 those actions he was putting his interest ahead of his
5 fiduciaries'.

6 You've heard us talk about the challenge to the liquor
7 license, the challenge to the certificate of occupancy, the
8 letters and complaints to government officials, all of which
9 were putting his interests ahead of the company's. So we think
10 if you look at the overall evidence you'll see instance after
11 instance where he's breaching his fiduciary duty to those he
12 owed such a duty.

13 Finally, and most irritatingly, if that can be a word, we
14 come to the computer. I have never argued that we wanted \$5,000
15 from Mr. Xereas for the computer that's now eight years old. We
16 first filed our counterclaims in this lawsuit in 2014, four
17 years ago, and we asked for the computer back.

18 It's still at Mr. Xereas's house. His feigned ignorance of
19 what we were talking about has been going on for four years, and
20 it's gone on during this trial. But now it's up to you as the
21 trier of fact to put a stop to it. We'd like our computer back.
22 He took it. He knows he took it. I don't want the present
23 value of an eight-year-old Apple computer. We want our computer
24 back. And we would ask that you make the necessary finding to
25 make that happen.

1 I thank you all very much for your time. I know this has
2 lasted longer than I think most of us expected. And you've made
3 a great sacrifice to help us here today and we appreciate it
4 very much. Thank you.

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

6 Counsel, may I ask you to approach quickly, please?

7 (Bench conference.)

8 THE COURT: Thank you. Are you ready to proceed with
9 your rebuttal, or would you like another brief recess?

10 MS. GLAVICH: I can do it now. It's not going to be
11 long.

12 THE COURT: Well, the time you have left is seven
13 minutes.

14 MS. GLAVICH: Yes.

15 THE COURT: Very well. You may proceed, then, and
16 you, Mr. O'Neil, by my count, still have 25 minutes?

17 MR. O'NEIL: Most likely, Your Honor, I'll waive that.
18 But I reserve the right to listen to her rebuttal.

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

20 (End of bench conference.)

21 THE COURT: Members of the jury, Ms. Glavich will now
22 proceed with her rebuttal.

23 REBUTTAL ARGUMENT BY COUNSEL FOR PLAINTIFF

24 MS. GLAVICH: Members of the jury, I'm just going to
25 keep this very brief. We've been here for a long time, and you

1 are at the door, almost. We still have the instructions so that
2 will be a bit. The one issue I really wanted to address was the
3 trademark. The only thing I wanted to point out was the
4 agreement. The contract. The ownership.

5 John Xereas has been using that since 2005, and as
6 Mr. O'Neil pointed out, these are experienced business people.
7 Mr. Dawson has opened numerous bars. Ms. Heiss is a lawyer.
8 Where is the agreement transferring ownership?

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

11 (Bench conference.)

12 THE COURT: Ms. Glavich, isn't that one of the very
13 claims that -- as to which I granted the defendants' motion for
14 judgment as a matter of law this morning?

15 MS. GLAVICH: Mr. O'Neil -- I tried to stay away from
16 it. Mr. O'Neil has made it part of his defense that Mr. Xereas
17 doesn't have a right to assert it, and therefore he's breached
18 duties to the -- of the company. That's all I was going to say,
19 where is the agreement, and then I was done. I'm done after
20 this.

21 THE COURT: Are you, in phrasing the question that
22 way, are you suggesting that there is a claim with respect to
23 the proposed oral agreement to license the trademark?

24 MS. GLAVICH: I'm not getting into the oral license --
25 no, no. I'm not getting into the infringement, I'm not getting

1 into the oral license. All I'm saying, Mr. O'Neil has put at
2 issue --

3 THE COURT: I want to know what you are doing.

4 MS. GLAVICH: Mr. O'Neil has asserted that the
5 company -- that any time Mr. Xereas is asserting --

6 THE COURT: Can you please let me ask -- I must
7 require of you that you answer my question and that you do so
8 quickly. What is the argument that you -- what is the rest of
9 the argument that you were prepared to make? I interrupted your
10 argument because it appeared that you were preparing to suggest
11 that there is a claim in the case that is no longer there.

12 MS. GLAVICH: Your Honor, I was actually done. When
13 you stopped me I was done. I wasn't planning on going any
14 further.

15 THE COURT: Well, you weren't done because I
16 interrupted you. Do you want to strike the first part of the
17 sentence and move on?

18 MS. GLAVICH: I think I ended -- I can look at this
19 exactly, but I think I ended on where's the agreement and my
20 plan was to maybe touch on Mr. Xereas making public statements,
21 but that was -- I was not going to go any further into that
22 because I know the trademark was off the table.

23 THE COURT: May I ask you to move on, please.

24 MS. GLAVICH: Will do.

25 (End of bench conference.)

1 MS. GLAVICH: Last point. Mr. Xereas made public
2 statements. He made public statements about what was happening
3 in his life. Defendants, they fired him. All he's doing is
4 making public statements. Private statements. About himself.

5 Thank you, members of the jury, for being willing to serve.
6 We appreciate all your effort. We appreciate your patience.
7 Thank you.

8 Your Honor.

9 THE COURT: Thank you very much, Ms. Glavich.
10 Mr. O'Neil, you may proceed with your rebuttal.

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

12 REBUTTAL ARGUMENT BY COUNSEL FOR DEFENSE

13 MR. O'NEIL: I think it's pretty clear from the record
14 here that we didn't fire him. He was removed as a managing
15 member for his actions. And for them to stand here and just say
16 he was making private statements, private statements published
17 on LinkedIn, republished on the company's Twitter feed,
18 Mr. Xereas knew exactly what he was doing.

19 He knew exactly who he was reaching out to. He was
20 reaching out to the people that follow him. And you know who
21 follows people who hire comics? Comics. He wasn't walking
22 through the park talking to his friends. He knew exactly what
23 he was doing. And that's the basis for our counterclaims for
24 the damage that he caused to the company. Thank you very much.

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

1 Members of the jury, the closing arguments have now been
2 concluded. The next step is that I will give you the
3 instructions which will guide you during your deliberations.

4 We will take a brief recess before I do so. That is
5 because the giving of instructions generally requires that we
6 all be at our most refreshed and attentive because the giving of
7 instructions could take as long as another 45 minutes.

8 I do not want you to be concerned that it is necessary to
9 take verbatim notes about the instructions, that is because you
10 will receive a written copy of them shortly after you begin your
11 deliberations. Nonetheless, I want to ensure that you are at
12 your most refreshed and attentive so that we can proceed without
13 the need, unless there's some urgency about doing so, to take a
14 break during the instructions.

15 So let's take about 10 minutes and then we will continue.
16 In fact, let's say 15 minutes so that everybody is ready to
17 resume. Thank you.

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

19 THE COURT: Counsel, I will note before we recess that
20 in my ongoing review of the instructions, it occurred to me that
21 since the parties agree that the contract at issue, both with
22 regard to Mr. Xereas's claim of breach of contract and the
23 defendants' claim of breach of contract, is the Amended
24 Operating Agreement, because you are in agreement that that is
25 so, I realized that the Court can omit the more specific

1 instructions regarding contract formation, for example. There
2 is simply no need to give those at this point since there is no
3 issue concerning the existence of any oral contract. Is that
4 without objection? Ms. Glavich?

5 MS. GLAVICH: Without objection.

6 THE COURT: Mr. O'Neil?

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

8 THE COURT: Very well. Thank you very much. Is there
9 anything else regarding instructions that anyone believes should
10 be raised before I begin to give them?

11 MR. O'NEIL: No, Your Honor.

12 MS. GLAVICH: No, Your Honor.

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

14 (Recess from 3:15 p.m. to 3:34 p.m.)

15 THE COURT: I believe I'm ready. I have my tea and my
16 emergency cough drop. Are there any matters that you wish to
17 discuss before the jury comes in, Ms. Glavich or Ms. McDonald?

18 MS. GLAVICH: No, Your Honor.

19 THE COURT: Mr. O'Neil?

20 MR. O'NEIL: No, Your Honor.

21 THE COURT: Thank you.

22 (Jury in at 3:36 p.m.)

23 THE COURT: Members of the jury, thank you. Please be
24 seated. I am ready to begin.

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JURY INSTRUCTIONS

THE COURT: The first series of instructions concern the evidence in the case. Some of these instructions may sound familiar from the ones that I gave you at the outset.

Evidence in the Case

First, you are instructed that you may consider only the evidence admitted in the case. The evidence consists of the sworn testimony of witnesses and exhibits admitted into evidence.

Statements and arguments of the lawyers are not evidence. They are intended only to help you to understand the evidence from that party's perspective. Likewise, the questions the lawyers asked the witnesses are not evidence.

If counsel described the evidence you have heard differently from the way you remember it, it is your memory that should control during your deliberations. You must rely on your recollection of the testimony and any notes you may have taken during the trial.

Direct and Circumstantial Evidence

There are two types of evidence from which you may determine what the facts are in this case: direct evidence and circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness's testimony is direct evidence. On the other hand, evidence of facts from which reasonable conclusions may be drawn is circumstantial

1 evidence.

2 I will offer an example. Assume a person looked out a
3 window and saw that snow was falling. If he later testified in
4 court about what he had seen, his testimony would be direct
5 evidence that snow was falling at the time he saw it happen.
6 Assume, however, that he looked out a window and saw no snow on
7 the ground, and then went to sleep and saw snow on the ground
8 after he woke up. His testimony about what he had seen would be
9 circumstantial evidence that it had snowed while he was asleep.

10 The law says that both direct and circumstantial evidence
11 are acceptable as a means of proving a fact. The law does not
12 favor one form of evidence over another. It is for you to
13 decide how much weight to give to any particular evidence,
14 whether it is direct or circumstantial. You are permitted to
15 give equal weight to both. In reaching a verdict in this case,
16 you should consider all of the evidence presented, both direct
17 and circumstantial.

18 Burden of Proof

19 The party who makes a claim or counterclaim has the burden
20 of proving it. This burden of proof means that the party
21 asserting the claim must prove every element of it by a
22 preponderance of the evidence.

23 To establish an element by a preponderance of the evidence,
24 the party must show that the evidence produces in your mind the
25 belief that the thing in question is more likely true than not

1 true. The party need not prove any element beyond a reasonable
2 doubt, the standard of proof in criminal cases, or to an
3 absolute or mathematical certainty.

4 If you believe that the evidence is evenly balanced on an
5 issue as to which the Plaintiff has the burden of proof as to
6 his claim, or that the evidence is evenly balanced on an issue
7 as to which the Defendants have the burden of proof with respect
8 to their counterclaims, then your finding on that issue must be
9 for the opposing side.

10 In arriving at your verdict, you should consider only the
11 evidence in the case. That said, in determining whether a party
12 has carried its burden, you are permitted to draw from the facts
13 that have been proven such reasonable inferences as you believe
14 are justified in light of your experience and common sense.
15 However, you may not rely on speculation or guesswork.

16 You must consider all the evidence bearing on each claim
17 and counterclaim, regardless of who produced it. A party is
18 entitled to benefit from all evidence that favors that party,
19 whether that party or the adversary produced it. You should not
20 give more or less weight to evidence just because it happened to
21 be produced by one side or the other.

22 Inadmissible or Stricken Evidence

23 You will recall that the lawyers in this case often
24 objected when the other side asked a question, made an argument,
25 or offered an exhibit into evidence that the objecting lawyer

1 believed was not proper. Objections are not evidence. You must
2 not hold such objections against the lawyer who made them or the
3 party he or she represents. It is the lawyer's responsibility
4 to object to evidence that he or she believes is not admissible.

5 If, during the course of the trial, I sustained an
6 objection to a lawyer's question, then you must ignore the
7 question and must not guess about what the answer would have
8 been had I allowed it. If, after a witness answered a question,
9 I ruled that the answer should be stricken, then, of course, you
10 must ignore both the question and the answer.

11 Likewise, if I sustained an objection to an exhibit and the
12 exhibit was not admitted, then you should not speculate about
13 the contents of the exhibit or permit that circumstance to play
14 any role in your deliberations.

15 Credibility of Witnesses

16 In deciding what the facts are, you must weigh the
17 testimony of all of the witnesses who have appeared before you.
18 You are the sole judges of the credibility of the witnesses. In
19 other words, you alone determine whether to believe any witness
20 and to what extent any witness should be believed.

21 Judging a witness's credibility means evaluating whether
22 the witness has testified truthfully and also whether the
23 witness accurately observed, recalled, and described the matters
24 about which he or she testified. You may consider anything that
25 in your judgment affects the credibility of the witness.

1 For example, you may consider the witness's age, demeanor,
2 capacity to observe and recollect facts, and any other facts and
3 circumstances bearing on credibility. You may consider whether
4 the witness has any motive for not telling the truth, any
5 interest in the outcome of the case, or any friendship or
6 animosity toward other persons involved in this case. You may
7 consider the plausibility or implausibility of the testimony of
8 a witness. You may also consider whether the witness's
9 testimony has been contradicted or supported by other evidence.

10 Number of Witnesses and Exhibits

11 The relative weight of the evidence on a particular issue
12 is not determined by the number of witnesses testifying for
13 either side or the number of exhibits on either side. It
14 depends on the quality, and not the quantity, of the evidence.
15 It is up to you to decide whether to credit the testimony of a
16 smaller number of witnesses or a smaller number of exhibits on
17 one side, or the testimony of a greater number of witnesses or a
18 greater number of exhibits on the other side.

19 Depositions as Evidence

20 As you know, a deposition is the testimony of a person
21 taken before trial. When a deposition is taken, the witness is
22 placed under oath and swears to tell the truth, and lawyers for
23 each party may ask questions. A court reporter is present and
24 records the questions and answers.

25 During the trial, you heard deposition testimony, and as I

1 indicated, you will receive a copy of the transcript of the
2 testimony since you brought to our attention that portions of
3 the video at various points were not entirely audible. You are
4 instructed that you should give the deposition testimony the
5 same consideration you give any other testimony. You should not
6 give it more weight or less weight just because the witness did
7 not appear in court.

8 Impeachment by Prior Inconsistent Statement

9 You may recall a reference to prior testimony which was
10 inconsistent with a witness's testimony here in the courtroom.
11 It is for you to decide whether any witness made a prior
12 statement and, if one or more was made, whether the prior
13 statement was inconsistent with the witness's testimony here in
14 the courtroom. If you find that any prior statement is
15 inconsistent with the witness's testimony here in court, then
16 you may consider such inconsistency in evaluating the
17 credibility of the witness.

18 Multiple Defendants

19 As you know, in this case there are multiple defendants. A
20 single plaintiff, multiple defendants. There is more than one
21 defendant in this lawsuit. Each defendant deserves fair
22 consideration of his or her own separate defense. Accordingly,
23 your finding one defendant liable or not liable should have no
24 effect on your decision about the liability of any other
25 defendant. The instructions I give you govern the case as to

1 each defendant.

2 If you find that no defendant is liable to the Plaintiff,
3 then your verdict should be in favor of all Defendants against
4 the Plaintiff. If you find that not all of the Defendants are
5 liable to the Plaintiff, then your verdict should be in favor of
6 the Plaintiff and against only those Defendants you found
7 liable.

8 Counterclaims

9 In addition to the claim by the Plaintiff in which the
10 Plaintiff alleges a breach of the Amended Operating Agreement,
11 the Defendants, of course, have pled counterclaims. Defendants
12 also plead breach of the Amended Operating Agreement. So you're
13 instructed that the sole claim for your consideration at this
14 time brought by the Plaintiff is breach of the Amended Operating
15 Agreement.

16 Breach of Contract

17 The parties agree that the Amended Operating Agreement is
18 a contract.

19 The Defendants' further counterclaims are for breach of the
20 duty of good faith and fair dealing, tortious interference with
21 Defendants' existing business relationships, tortious
22 interference with Defendants' prospective business
23 relationships, breach of fiduciary duty, and conversion.

24 I see that you are taking notes concerning the claims. I
25 do not want you to be alarmed if you realize that you did not

1 write all of that down verbatim, because you will receive, when
2 you begin your deliberations, a verdict form which will have a
3 statement concerning each claim. I simply want to provide you
4 with that information now as we go forward with the
5 instructions.

6 Plaintiff is required to prove each element of his claim by
7 a preponderance of the evidence. Defendants are required to
8 prove each element of their counterclaims by a preponderance of
9 the evidence.

10 I will turn now to the instructions concerning the
11 governing law with respect to contracts.

12 Contracts

13 First, a contract is an agreement between two or more
14 parties to do or not to do something. As I indicated, the
15 parties in this case agree that the Amended Operating Agreement
16 is the contract which is at issue. You must consider the
17 contract as a whole. In other words, you must not ignore any
18 section of the contract or give undue weight to one section over
19 another.

20 Terms of a Contract

21 In determining the terms of a contract, you should first
22 consider what a reasonable person in the position of the parties
23 would have believed was the meaning of the words. Next, you may
24 consider the circumstances that existed at the time that the
25 contract was made, including the apparent purpose of the parties

1 in entering into the contract, the history of the negotiations
2 leading up to the contract, and the statements of the parties
3 about their understanding of the contract.

4 Contract Interpretation

5 To determine the meaning of a contract, you must first look
6 at the words and phrases which actually appear in the document.
7 To determine the meaning of any words or phrases which are in
8 dispute, you may consider the conduct of the parties in relation
9 to those disputed words or terms. You should give great weight
10 to how the parties acted with respect to the disputed contract
11 provision. You should also consider other evidence presented to
12 you about the meaning of the provisions.

13 Next I will define the term "breach of contract."

14 Breach of Contract

15 Under the law, if one party, without legal excuse, fails to
16 fully perform a duty owed under a contract, then that party has
17 breached the contract. If you find that Plaintiff breached the
18 contract with Defendants, then the opposing side is liable for
19 damages. And again, I note that each side alleges a breach of
20 the Amended Operating Agreement.

21 To repeat, the definition is: If one party, without legal
22 excuse, fails to fully perform a duty owed under a contract,
23 then that party has breached the contract.

24 There are two types of breach of contract. One is called a
25 "material breach" or "total breach" of the contract. If one

1 party breached the contract by failing to perform a contractual
2 duty so important that it affects the central purpose of the
3 contract, then that party has committed a material or total
4 breach of the contract.

5 The other type of breach of contract is called a "simple"
6 or "partial" breach. If you find that a party received
7 substantially what was bargained for, then the breach would be
8 characterized as a simple breach.

9 Excuse From Performance

10 If you find by a preponderance of the evidence that
11 performance was rendered impossible, or substantially
12 contributed to preventing performance, then the party may be
13 excused from performing under the contract. If, instead, you
14 find that performance was simply rendered more difficult but not
15 impossible, then there is no excuse from performance.

16 We will now proceed to the definition of "Impossibility."

17 Impossibility

18 Generally, a person is not excused from performing his or
19 her duties under a contract even if performance has become more
20 difficult or expensive than expected at the time the contract
21 was made. However, a person is excused from his or her failure
22 to perform a contract if performance is impossible.

23 A party claiming that performance is impossible must prove
24 it. To do so, the party claiming that performance is impossible
25 must prove, by a preponderance of the evidence:

1 (1) that performance was absolutely impossible or would
2 have involved extreme and unreasonable difficulty, expense,
3 injury, or loss;

4 (2) the circumstances which made performance impossible
5 were not reasonably foreseeable at the time the contract was
6 made;

7 (3) the party claiming impossibility did not assume the
8 risk that the circumstance making performance impossible would
9 occur; and

10 (4) the party claiming impossibility did not cause the
11 circumstance making performance impossible.

12 If you find that all of these elements have been proved by
13 a preponderance of the evidence, then you may find that
14 performance was impossible.

15 I will proceed next to the discussion of breach of contract
16 damages.

17 Breach of Contract Damages

18 The measure of damages for a breach of contract is that
19 amount of money necessary to place the injured party in the same
20 economic position he or they would have been in if the contract
21 had not been breached. To calculate the damages, it is
22 necessary to first determine what benefit would have been
23 received in the absence of a breach. Next, consider the
24 incidental and consequential damages. Finally, subtract from
25 that any money which was saved, if any, as a result of not

1 having to complete the contract.

2 Incidental damages include any costs incurred while making
3 reasonable efforts to avoid losses, whether the efforts to avoid
4 losses were successful or not. Consequential damages include
5 damages resulting from the breach, such as injury to persons or
6 property. Any award of damages is intended to compensate the
7 injured party for the breach of the opposing party. You may not
8 award damages for present or future harms which are speculative
9 or remote, or which are based solely on conjecture or guesswork.

10 The next series of instructions concerns Defendants'
11 counterclaim of breach of the duty of good faith.

12 Breach of Duty of Good Faith

13 Defendants allege that Plaintiff breached his covenant of
14 good faith and fair dealing. In the District of Columbia, all
15 contracts contain an implied duty of good faith and fair dealing,
16 which means that no party to the contract shall do anything
17 which will have the effect of destroying or injuring the rights
18 of the other parties to receive the fruits of the contract.
19 If a party to a contract evades the spirit of the contract,
20 willfully renders imperfect performance, or interferes with
21 performance by another party, he or she may be liable for breach
22 of the implied covenant of good faith and fair dealing.

23 To state a claim for breach of the implied covenant of good
24 faith and fair dealing, a party must prove that the other side
25 has taken steps or refused to take steps which ultimately had

1 the effect of destroying or injuring the right to receive the
2 fruits of the contract.

3 In addition, like a breach of contract claim, a claim for
4 breach of the covenant of good faith and fair dealing requires
5 proof of damages. Thus, in this instance, if Defendants prove
6 all elements of this claim by a preponderance of the evidence,
7 or satisfy you that they have done so, then Plaintiff is liable
8 for the resulting damages.

9 Next I will turn to Defendants' counterclaim in which
10 breach of fiduciary duty is alleged.

11 Breach of Fiduciary Duty

12 To state a claim for breach of fiduciary duty under
13 District of Columbia law, the Defendants must allege facts
14 sufficient to establish the following:

- 15 (1) Plaintiff owed Defendants a fiduciary duty,
16 (2) Plaintiff breached that duty, and
17 (3) to the extent Defendants seek damages, the breach
18 proximately caused an injury.

19 If Defendants have satisfied you that they have proven the
20 elements of the claim by a preponderance of the evidence, then
21 Plaintiff is liable for the resulting damages. If, instead, you
22 find that Defendants have failed to prove any element of the
23 breach of fiduciary duty claim, then your verdict on that claim
24 must be for the Plaintiff.

25 I will turn next to conversion.

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Conversion

Defendant Penn Social, LLC, seeks to recover damages from Plaintiff for the alleged conversion of its personal property. Conversion can occur when one party wrongfully takes possession of the other person's property, or wrongfully exercises control over the property. The conversion claimed here was a computer purchased by the LLC and retained by Plaintiff after he stopped his daily activities on behalf of the LLC.

You must consider whether the evidence establishes the following elements:

(1) that the LLC owned or had a right to control the personal property;

(2) that Plaintiff intentionally and substantially interfered with Defendants' property interest in a manner that amounted to depriving the LLC of that property;

(3) that Defendant LLC did not consent to Plaintiff's taking and retaining the computer and refusing to return it when asked to do so; and finally,

(4) that the LLC requested the return of the property but that Plaintiff refused to do so.

If Defendants satisfy you that they have proven all of these elements by a preponderance of the evidence, then your verdict must be for the Defendants, and Plaintiff is liable for the resulting damages. If you find that Defendants have failed to prove any element of the conversion claim, then your verdict

1 as to that claim must be for the Plaintiff.

2 I have given a number of instructions concerning damages as
3 to the specific claims. The next series of instructions I will
4 ask you to consider as umbrella instructions. In other words,
5 they cover all of the very specific ones that I have given.

6 Damages

7 The determination regarding an award of damages is the
8 province of the jury. In other words, it is up to you to decide
9 the extent of any damages that have been proven and what the
10 appropriate measure of compensation is for those damages.

11 I will add to that the instruction that the harm which
12 results in any damage must be either a direct or reasonably
13 probable consequence of the alleged wrongful conduct. The party
14 seeking damages still bears the burden of proving them by a
15 preponderance of the evidence. Thus, any award of damages must
16 be based on a just and reasonable estimate derived from the
17 evidence admitted in the case.

18 Reasonable certainty with respect to an award of damages
19 does not require exact or mathematically precise proof of
20 damages, or that future damages are absolutely certain to occur.
21 Thus, you may not award damages that are speculative, based on
22 guesswork, or dependent upon merely remote possibilities and not
23 reasonably certain to occur.

24 Procedural Instructions

25 My final instructions concern what you will do next. Thus,

1 before you are excused to deliberate, there are a few final
2 matters.

3 First, during your deliberations, you must consider the
4 instructions that I have given you as a whole. All of the
5 instructions are important. Thus, you may not ignore any
6 instruction or treat any single instruction or part of an
7 instruction differently than the others.

8 Your first order of business when you retire to the
9 deliberation room will be to identify who among you will serve
10 as foreperson, to preside over your deliberations, and to serve
11 as your spokesperson here in court. Your selection of a
12 foreperson should be with an eye toward identification of the
13 person among you that you believe is most likely to encourage
14 civility and mutual respect, to invite each juror to express his
15 or her views, and promote full and fair consideration of the
16 evidence.

17 The verdict that you return must represent the considered
18 judgment of each member of the jury. In order to return a
19 verdict, your decision must be unanimous. That means that each
20 of you must agree.

21 Each of you has a duty to consult with your fellow jurors
22 in an attempt to reach a unanimous verdict. You must decide the
23 case for yourself. However, you should not surrender your
24 honest beliefs about the effect or weight of evidence simply to
25 return a verdict or solely because of what a number of other

1 jurors may think.

2 However, you should seriously consider the views of your
3 fellow jurors, just as you expect them to seriously consider
4 your own views, and you should not hesitate to change an opinion
5 if you are persuaded, by listening to your fellow jurors, that
6 that is the appropriate thing to do. Thus, you are not
7 advocates for your own position, but neutral judges of the
8 facts.

9 So you will make an important contribution to the
10 administration of justice by arriving at a verdict in this case.
11 During your deliberations, therefore, your purpose should not be
12 to support your own opinion, but to determine the facts.

13 It may not be useful for a juror at the start of
14 deliberations to announce a determination to stand for a
15 particular verdict. If that occurs, it is often the case that
16 other jurors may hesitate to express their own views, and the
17 process of deliberations is derailed.

18 During your communications with the Court -- and you will
19 have occasion to communicate not only to ask any questions that
20 may arise during your deliberations, but to address logistical
21 issues such as our start time or end time or any other concerns
22 that you have -- you must do so in writing.

23 You will be given a supply of note paper to use for that
24 purpose. The note must be signed by the foreperson. There will
25 be a deputy marshal outside the deliberation room during your

1 deliberations, and the procedure that you will utilize is that
2 you will give the deputy marshal the note. The deputy marshal
3 will provide the note to the Court. I will share the note with
4 counsel and the parties, and then we'll prepare to address your
5 question.

6 With respect to a verdict, it is only when you have reached
7 a unanimous verdict that you should let me know that you have
8 done so. I ask that you refrain from sharing with me any
9 information concerning what you were thinking or how you were
10 divided before you reach a verdict.

11 If not this evening, then in the morning you will receive a
12 copy -- a transcript, essentially -- of the instructions that I
13 have just given. You will also receive the verdict sheet which
14 will guide you during your efforts to address each of the
15 remaining claims.

16 We join in thanking you for your attention thus far. I'm
17 certain that your attention, your care, your patience, your
18 determination to reach a verdict, will continue as you continue
19 your deliberations.

20 At this time I will excuse you to accompany Ms. Lesley.
21 Thank you so much. And I will ask Ms. Lesley to inquire of you
22 how late you would like to stay this evening. We're very close
23 to the time that we would ordinarily recess. If you are able to
24 at least take a few minutes and agree upon the identification of
25 a foreperson, I would encourage you to do that. But if there is

1 a time that all of you agree you absolutely should leave, then
2 let Ms. Lesley know, please.

3 Your notebooks will be available for your use during the
4 deliberations, so please take them with you. Thank you.

5 (Jury out at 4:25 p.m.)

6 THE COURT: Thank you for your patience. Has anyone
7 edited the verdict sheet to remove trademark infringement?
8 Ms. McDonald?

9 MS. MCDONALD: Yes, thank you, Your Honor. Plaintiff
10 undertook to edit the verdict sheet removing Plaintiff's
11 trademark infringement claim as well as two of Defendants'
12 affirmative defenses, and the Defendants have agreed to this
13 form.

14 THE COURT: Did you share the edits with Mr. O'Neil?

15 MS. MCDONALD: Yes, Your Honor.

16 THE COURT: Does the edited form represent the
17 consensus of the two of you?

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

19 THE COURT: May I ask you to please hand it to
20 Mr. Munoz.

21 MS. MCDONALD: Yes, Your Honor.

22 (Document tendered to law clerk.)

23 (Court conferring.)

24 THE COURT: May I assume that a copy either has been
25 retained or can be generated?

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

2 THE COURT: Very well. May Ms. Lesley take this
3 verdict sheet to the jurors?

4 MS. MCDONALD: Yes, Your Honor.

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

6 THE COURT: Very well. Thank you. I will ask that
7 she please do so now. Thank you.

8 (Deputy clerk conferring with the Court.)

9 THE COURT: It appears that the jurors indicated that
10 they would like to come tomorrow as early as 9:00, which is of
11 course acceptable. I hesitated -- you may have sensed that
12 before I said "which is acceptable." There is still the
13 possibility that there will be a delayed opening as a result of
14 the weather. I have no further information. I am inclined to
15 think that a delayed opening will not be needed since, as of the
16 last time we checked, only rain was in the forecast. But I
17 believe all of you know to heed the court's website and the
18 announcement that is on all local media outlets if there is a
19 delayed opening.

20 Give us one moment until Ms. Lesley returns so we can
21 determine what other issues we might need to address this
22 evening.

23 (Deputy clerk reenters, conferring with the Court.)

24 THE COURT: The jurors indicated that they would like
25 to stay until 5:00, and of course they are free to do so. My

1 suggestion is that we go off the record at this point, I will
2 ask that you wait until Ms. Lesley comes back so that you can
3 resolve any remaining questions about exhibits.

4 It occurs to me that we have had no discussion on the
5 record concerning exhibits that were withdrawn. Is that
6 something we should memorialize on the record?

7 MS. MCDONALD: We can, Your Honor, if you would like.
8 The parties are in agreement as to what exhibits should be
9 removed. I'm happy to read those.

10 THE COURT: If you're prepared to do that now,
11 Ms. McDonald, I'll ask you to please proceed.

12 MS. MCDONALD: I am, Your Honor. Defendants' Exhibits
13 31, 32, 47, 48, and 53, and then Plaintiff's Exhibits 21, 22,
14 67, 74, 294.5, and 294.6 are the agreed-upon exhibits that
15 should be removed.

16 THE COURT: Very well. Thank you very much,
17 Ms. McDonald.

18 MS. MCDONALD: Thank you, Your Honor.

19 THE COURT: Are you satisfied, Mr. O'Neil, that the
20 exhibits which were just enumerated by Ms. McDonald represent
21 the full extent of what has been withdrawn?

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

23 THE COURT: Very well. We'll ensure that the record
24 reflects that the exhibits you just enumerated, Ms. McDonald,
25 were withdrawn pursuant to the agreement of the parties.

1 I believe it is still necessary for you to make yourselves
2 available to Ms. Lesley in case she has questions of you with
3 respect to what will be available for the jurors, if not later
4 today, then tomorrow. Bear with me just one moment while I
5 confer with her.

6 (Court conferring.)

7 So I will ask that you remain briefly to make yourselves
8 available to Ms. Lesley. One of the matters that she will
9 discuss with you is the form of acknowledgement commonly used in
10 the court which requires counsel's signatures. So she will
11 direct your attention to that. In other words, counsel's
12 acknowledgement that you have viewed the exhibits and made the
13 determination that what is being made available to the jurors is
14 what was actually admitted.

15 Is there anything else we should discuss on the record?
16 Ms. Glavich or Ms. McDonald?

17 MS. MCDONALD: Nothing here, Your Honor.

18 THE COURT: Mr. O'Neil.

19 MR. O'NEIL: No, Your Honor.

20 THE COURT: Very well. Thank you very much. I will
21 ask you to, as I said, to heed the announcements regarding
22 delayed openings. If there is a delayed opening, unfortunately,
23 we must all observe it.

24 (Deputy clerk conferring with the Court.)

25 I will also ask you to ensure that Ms. Lesley has your

1 current contact information. I was under the assumption that it
2 was counsel's responsibility to watch the court's home page or
3 to monitor the local media outlets, but Ms. Lesley indicates
4 that should she receive word of a delayed opening, and if she
5 does, that would occur before any update of the home page and
6 before any announcement on any local media, she will reach out
7 to you and of course to members of the jury.

8 Very well. I thank all of you very much. I look forward
9 to seeing you in the morning. Is it your expectation to be here
10 throughout the day, counsel? I don't know whether that was what
11 you intended to do or whether you prefer to be on call. Do you
12 have a preference, Ms. Glavich and Ms. McDonald?

13 My suggestion is that everybody get here in the morning by
14 9:30, even if later in the day we make contingency plans for you
15 to be excused to get lunch and to be on call.

16 MS. GLAVICH: I can be here, Your Honor.

17 MR. O'NEIL: Yes. That suggestion's fine with us,
18 Your Honor.

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

20 (Proceedings adjourned at 4:41 p.m.)
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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Bryan A. Wayne
BRYAN A. WAYNE