

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.,	.	Tuesday, November 13, 2018
	.	9:48 a.m.
Defendants.	.	
.	Pages 852 through 996

DAY 6
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE DEBORAH A. ROBINSON
UNITED STATES MAGISTRATE JUDGE

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1 P R O C E E D I N G S

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

7 THE COURT: Now, Counsel, good morning.

8 I apologize for the delay in getting started. I have my
9 supply of tea and cough drops, so I believe I'm ready to go.
10 Am I correct that the next order of business is the direct
11 examination of Mr. Bayne?

12 MR. O'NEIL: That's correct, Your Honor.

13 THE COURT: And Mr. Bayne is here?

14 MR. O'NEIL: He's in the hallway, Your Honor.

15 THE COURT: Very well. So you will conduct the direct
16 examination of Mr. Bayne, Mr. O'Neil?

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

18 THE COURT: You will cross, Mr. Richa?

19 MR. RICHA: We have a few preliminary matters. Do you
20 want us to bring it up now, or do you want us to postpone it?

21 THE COURT: Let me ask you to come to the podium,
22 please.

23 MR. RICHA: We have a few preliminary matters,
24 Your Honor. Do you want to hear them now?

25 THE COURT: Do they concern Mr. Bayne?

1 MR. RICHA: They do not concern Mr. Bayne.

2 (Plaintiff counsel conferring.)

3 THE COURT: If they do not concern Mr. Bayne, my
4 suggestion is that we proceed with the examination of Mr. Bayne.

5 MR. RICHA: There is one issue that would potentially
6 affect Mr. Bayne.

7 THE COURT: Very well.

8 MR. RICHA: With regard to the -- Your Honor brought
9 to our attention that we were going to take jury questions.
10 Upon further reflection over the weekend, Your Honor, because
11 we've rested our case and our witnesses are no longer available,
12 we feel it would prejudice us that our witnesses are not
13 available to answer questions.

14 So we just wanted to bring that to Your Honor's attention
15 and see if there's a possibility of possibly restricting the
16 questions to procedural questions in light of the fact that none
17 of our witnesses, other than Mr. Xereas, is actually available
18 to answer questions.

19 THE COURT: May I suggest that we wait until we
20 see what the questions are? It may be that there will be no
21 questions at all, in which case I won't have to reach the issue.
22 It could be that all of the questions are procedural, as the
23 questions previously directed in a somewhat unofficial manner
24 through Ms. Lesley were, and we were able to address them with
25 relative dispatch. So, until I know that there is a question,

1 I'm not certain what it is I could decide.

2 MR. RICHA: Okay. And just two other points, sort
3 of in the alternative to what I just brought to Your Honor's
4 attention. One, Your Honor, could we ask that all questions be
5 read on the record so that we're aware of what the questions are
6 that are being asked?

7 THE COURT: That is what I indicated I would do. I
8 would not let the questions be secret. Everyone would know what
9 they are. You would hear them. When I have done this in the
10 past, the questions have been read out of the presence of the
11 jury, and counsel have ample time to determine how to respond.

12 MR. RICHA: Okay.

13 THE COURT: How they wish the Court to respond.

14 MR. RICHA: And the last question, Your Honor.
15 With regard to those questions, if we have any objections to
16 the questions, how are those handled?

17 THE COURT: In the same manner. I thought I made
18 clear that the mere fact that a question is asked does not mean
19 that it would be incumbent upon counsel to ask that question of
20 a witness. It could be that the question would be inappropriate
21 on any number of grounds, and I'd simply advise the jurors that
22 we cannot ask their question.

23 MR. RICHA: Okay. Thank you.

24 THE COURT: Very well. Thank you.

25 MR. RICHA: Your Honor, Mr. Xereas is somewhere stuck

1 in security. He texted at 8:40 and said he was in security, so
2 he's been there for over an hour.

3 THE COURT: Do you want to wait for him?

4 MR. RICHA: Yeah. Is it possible --

5 THE COURT: There is nothing I am able to do to
6 assist. I think we all had some delays this morning. Do you
7 want me to wait?

8 MR. RICHA: If you don't mind, Your Honor, I can run
9 out and call him real quick. Is there a deputy or somebody that
10 we can send to get him if he's still standing there?

11 THE COURT: Mr. Richa, do you know whether he is on
12 the Third Street side or the John Marshall Place side?

13 MR. RICHA: I do not. I can try to find out.

14 THE COURT: Would you call, please, and find out, and
15 I will ask Ms. Lesley whether there's anything she can do to
16 assist.

17 MR. RICHA: Thank you, Your Honor. (Pause.)

18 He's on the Third Street side.

19 THE COURT: Very well. We will take a recess and ask
20 Ms. Lesley to intervene.

21 MR. RICHA: Thank you, Your Honor.

22 THE COURT: Very well. You may remain seated.

23 We will go off the record until Mr. Xereas is able to enter.

24 (Recess from 9:55 a.m. to 10:04 p.m.)

25 THE COURT: Members of the jury, good morning. Please

1 be seated. Thank you for waiting so patiently. I believe you
2 are generally aware that there were delays -- you may not have
3 experienced delays this morning getting into the building, but
4 it may have been obvious that there were long lines, and that is
5 part of what has occasioned our delay in getting started this
6 morning.

7 You, as members of a jury serving in a case on trial, had
8 some priority, actually, in getting through security that many
9 of the rest of us did not. So we thank you for being here on
10 time and taking your commitment seriously. We hope you had a
11 very good weekend and that you are now ready to resume.

12 Defendants are prepared at this time to call their next
13 witness. Mr. O'Neil.

14 MR. O'NEIL: Your Honor, defendants call our final
15 witness, Peter Bayne.

16 THE COURT: Good morning, sir. Let me ask you to
17 please step to the witness stand and then face the deputy clerk
18 of court to be sworn.

19 PETER BAYNE, WITNESS FOR THE DEFENSE, SWORN

20 DIRECT EXAMINATION

21 BY MR. O'NEIL:

22 Q. Could you state your name for the jury?

23 A. Peter Bayne.

24 Q. Mr. Bayne, where are you currently employed?

25 A. At Tin Shop.

1 Q. What is Tin Shop?

2 A. It's a bar and restaurant creation and management company.

3 Q. And you're partners in that business with Mr. Dawson?

4 A. That's correct.

5 Q. And you've worked for a number of Mr. Dawson's
6 establishments in the past. Is that correct?

7 A. That's correct.

8 Q. Where did you first work for one of Mr. Dawson's
9 establishments?

10 A. That would be Bedrock Billiards on Columbia Road in Adams
11 Morgan.

12 Q. And what did you do there when you started?

13 A. I was the general manager.

14 Q. Had you had management experience prior to that?

15 A. Before that, I was a manager at a bar in Cleveland Park.

16 Q. And how long did you work at Bedrock as the manager?

17 A. For about four years.

18 Q. And at a certain point, Mr. Dawson asked you if you wanted
19 to be an investor in Riot Act. Is that correct?

20 A. I actually approached him first. I've been in food and
21 beverage my whole life and had done really well as a general
22 manager there and was looking to make the next step in my
23 career, and so I asked him, you know, what can I get involved in?

24 Q. And that was your first time taking on an equity role in
25 one of his establishments?

1 A. That's correct.

2 Q. And, as I understand it, you paid \$100,000 as an investor
3 in the business?

4 A. I was the first investor in that business, yes, a hundred
5 thousand dollars.

6 Q. And that translated to a 1 percent share.

7 A. One percent for a hundred thousand dollars. Yes.

8 Q. Have you been paid back your \$100,000?

9 A. No, I have not.

10 Q. And, originally, the plan was that you would be paid back
11 within about a year. Correct?

12 A. That was what the payout scenario showed in the offering
13 memorandum to investors, yes.

14 Q. And at a certain point, you became the general manager at
15 Riot Act. Is that correct?

16 A. The business was having some issues, and I was actually
17 asked to come in and help. I was still running Bedrock
18 Billiards and also helping out at Riot Act, and at some point,
19 it was deemed that I needed to come over full-time.

20 Q. Do you remember approximately when that was?

21 A. I think it would have been -- the discussion to have me
22 come help happened the end of September. It was like seven or
23 eight years ago, and I think it was probably towards the end of
24 October or early November of that year that I came on in an
25 official capacity.

1 Q. And when you arrived at Riot Act, did you encounter certain
2 issues with the personnel working there?

3 A. Things seemed disorganized. There was definitely -- it
4 would appear to be sort of a divide between the staff, and there
5 was John's team and then others that were hired. And it did --
6 it seemed awkward, and it seemed -- it was unlike anything I'd
7 ever experienced before in a business.

8 Q. Did you notice some tension between those two camps within
9 the company?

10 A. It -- you know, there was moments of friendliness, and
11 that's absolutely the way it started. Everybody was trying to
12 make things work. We wanted to see this business succeed. But
13 there weren't roles that were clearly defined, and I think that
14 led to some confusion, especially in a brand-new business that
15 was complicated.

16 Q. And you had the understanding at that point in the fall
17 of 2011 that the company was losing money. Correct?

18 A. I was very concerned about my investment and -- yeah.
19 It was definitely losing money.

20 Q. And did you have occasion when you started in as manager
21 to try to get an understanding as to what John's brother, Ted
22 Xereas, what job he did at the company?

23 A. When I was brought on as general manager, I was trying to
24 get a lay of the land and understand what everybody was doing.
25 There was a lot of moving parts. So I did send an e-mail to

1 both John, Ted, and Michael Farfel to kind of just ask what
2 their roles were. Michael Farfel did respond, and he said
3 his role was comic liaison, which meant doing whatever the
4 comics needed, I guess. I wasn't really sure what that meant.
5 Ted never responded, but John responded and said that Ted was
6 helping him out in any capacity he might need.

7 Q. And they were both full-time employees?

8 A. They were on salary for \$36,000 each, I believe.

9 Q. So together they represented a \$72,000 salary commitment
10 by the company?

11 A. That's correct.

12 Q. And they weren't like waiters who only worked when they
13 were needed and were paid a tipped wage. Correct?

14 A. They did not wait tables. They did not receive any tips.
15 Their capacity in the showroom was helping seat people as they
16 arrived, and Michael Farfel would help take care of the comics
17 in the green room, bringing them beverages and food, and he
18 might have run to the airport and picked them up and such, you
19 know, tasks like that.

20 Q. And that was a full-time job?

21 A. You know -- I wouldn't hire that as salary or as a
22 full-time job.

23 Q. Were you present at the club when there was a dispute
24 between Ted Xereas and a customer?

25 A. I was not there at the time of the show, but I heard all

1 about it.

2 Q. Okay.

3 A. Yeah.

4 Q. You saw a review about the incident in Yelp?

5 A. The incident was started because at the time we were using
6 a lot of discount ticket brokerages --

7 MS. MCDONALD: Objection, Your Honor. This witness
8 just testified that --

9 THE COURT: Let me remind counsel to avoid speaking
10 objections, please. If you wish to come to the bench, you may.

11 MS. MCDONALD: Certainly, Your Honor.

12 (Bench conference.)

13 MS. MCDONALD: Your Honor, this witness just testified
14 he has no firsthand knowledge of the event, so his testimony
15 would either be hearsay or lack of foundation.

16 MR. O'NEIL: I was asking about the Yelp review, and
17 he was the general manager. Once he said he wasn't there, I
18 moved off of the incident. Now I'm talking about the Yelp review.

19 MS. MCDONALD: He was testifying as to the incident,
20 Your Honor. Also, the Yelp review is again hearsay.

21 THE COURT: Is the Yelp review hearsay, Mr. O'Neil?

22 MR. O'NEIL: I don't believe it is because we're not
23 offering it as truth of the matter asserted. We're offering
24 it because it was a concern to the company. As the general
25 manager, when you get reviews like that, whether they're true or

1 not, you have to address them.

2 THE COURT: So it's to show that because of the Yelp
3 review some action was taken?

4 MR. O'NEIL: It was one of the factors that went
5 into the decision to remove Ted Xereas and Mike Farfel.

6 THE COURT: Let me suggest, then, that you rephrase
7 your question so that you do not elicit the text of the Yelp
8 review, for example, and instead ask, "As a result of a negative
9 Yelp review, what did you do, or what action was taken?"

10 MR. O'NEIL: Okay.

11 THE COURT: Thank you.

12 (End of bench conference.)

13 BY MR. O'NEIL:

14 Q. Mr. Bayne, so in mid-December of 2011, you became aware of
15 a negative Yelp review. Is that correct?

16 A. It was an extremely long and detailed Yelp review about an
17 incident during a show.

18 Q. And as a result of that Yelp review being published, did
19 that play a factor in any of the decisions that the company made
20 going into January of 2012?

21 A. Yes, it did.

22 Q. What decision was that?

23 A. The decision was made that we should let go of Ted Xereas.

24 Q. And that same decision was made to let go of Mike Farfel?

25 A. We were facing extreme financial hardship and -- yes, that

1 decision was also made.

2 Q. Were you present when Mr. Ted Xereas and Mike Farfel,
3 when their employment was terminated?

4 A. Unfortunately, yes.

5 Q. Could you tell the jury a little bit about the meeting
6 you had with Ted and Mike at the time?

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

8 THE COURT: Yes.

9 (Bench conference.)

10 MS. MCDONALD: My concern, Your Honor, is that
11 Mr. O'Neil is going to attempt to elicit the testimony that he
12 attempted to elicit from Ms. Heiss with respect to the very
13 inflammatory word that was used, and I would offer that that's
14 more prejudicial than probative.

15 MR. O'NEIL: I don't think that question was designed
16 to elicit that testimony, Your Honor.

17 THE COURT: The objection appears -- to the extent
18 there is an objection, it appears premature. The witness on
19 the stand was present. There is certainly no impediment to his
20 answering questions about what he observed at the time.

21 And just so the record is clear, the Court did not sustain
22 an objection to the question of Ms. Heiss on the grounds that it
23 was inflammatory; the Court suggested that we all move on
24 because it was causing her obvious discomfort and there was no
25 purpose to be served by essentially forcing her to state

1 something or repeat something that she found so painful.

2 I did not sustain the objection on the ground that the answer
3 was inflammatory.

4 MS. MCDONALD: And does Your Honor suggest that I
5 object later to this line of questioning should they attempt to
6 elicit it?

7 THE COURT: I don't know what the objection is,
8 Ms. McDonald. What objection do you think there is?

9 MS. MCDONALD: That the testimony is more prejudicial
10 than probative, Your Honor.

11 THE COURT: That what is more prejudicial than
12 probative?

13 MS. MCDONALD: That Mr. O'Neil would be attempting to
14 elicit testimony with respect to the name that Ms. Heiss was
15 allegedly called.

16 THE COURT: The Court would overrule such an objection.

17 (End of bench conference.)

18 BY MR. O'NEIL:

19 Q. Mr. Bayne, so were you accompanied by Mr. Dawson that
20 morning?

21 A. Yes. Mr. Dawson and I met with John Xereas first to
22 discuss it.

23 Q. And what was the nature of that discussion?

24 A. The nature of that discussion was to discuss letting go of
25 Michael Farfel and Ted Xereas.

1 Q. And did John object to that proposal?

2 A. Yes. It was the beginning of a very heated exchange.

3 Q. And then at a certain point, you finished your discussions
4 with John Xereas and you went into the office with Ted and Mike
5 Farfel. Is that correct?

6 A. We were meeting downstairs in the showroom. John became
7 upset by the whole thing, went upstairs, and I believe he was
8 actually the one who told them that we were letting them go.
9 Then it erupted into mayhem, and I definitely felt like we were
10 on the verge of physical violence happening. It was scary, no
11 doubt.

12 Q. You felt yourself threatened?

13 A. There was all sorts of four-letter words being thrown out,
14 and I was getting screamed at in my face by Ted Xereas. It was
15 chaos and -- yes. I definitely felt threatened.

16 Q. And at a certain point, did you see any of the three --
17 John, Ted Xereas, or Mike Farfel -- go into the office and grab
18 some material?

19 A. They all went into the office. They collected their
20 things. John went through his desk, pulled out multiple stuff
21 from his drawers. Ted and Michael Farfel did that too, and then
22 they all stormed out.

23 Q. And they were screaming obscenities at you and your partner
24 and your -- and Marjorie --

25 A. In front of staff and employees that were there and --

1 yeah. It was pretty scary.

2 Q. During the time that you were general manager, did you
3 understand Dawn Henderson to be working as an independent
4 contractor for the company?

5 A. I did not. As an investor, I was keeping an eye on our
6 social media and seeing what was being posted, and I did notice
7 that there was a lot of responses to people on Twitter that were
8 in all caps and were abrasive. But when I came on board, she
9 was not there, and I didn't really know. I'd heard of Dawn but
10 had never been introduced that she was working there or had any
11 role -- my understanding was that she had been let go.

12 Q. And you had other employees at Riot Act handling social
13 media accounts. Correct?

14 A. That's correct.

15 Q. Who were they?

16 A. Lauren Zlotnik and Evan Rosenthal.

17 Q. What were Lauren's responsibilities?

18 A. Lauren was a recent graduate from Hampton, and she was
19 interested in getting into videography. She was working with
20 comics on shooting movie clips and creating digital content for
21 us that we could then use for advertising and marketing purposes.
22 I think part of the offering memorandum also discussed the
23 potential to be taking videos and being able to market and sell
24 them for profit to the company as well.

25 Evan was helping more in the marketing role in terms of

1 putting content out on Facebook and Twitter and working with
2 Lauren to shoot these films. They both had crossover within the
3 social media realm and interacting with comics and basically
4 putting together content to put out on social media channels.

5 Q. And in your view as general manager, these were the
6 employees with responsibility for the social media accounts.

7 Correct?

8 A. That's correct.

9 Q. And Lauren had specific responsibilities with respect to
10 the YouTube channel that the company had created. Correct?

11 A. She had skills at editing videos, both the video and the
12 audio of it, of doing shoots in general. You know, you can't
13 just go out on the street corner and shoot; you have to come up
14 with the ideas first. So she would do the staging and work with
15 the comics and content, shoot the film, edit it down, put it up
16 on the YouTube channel. It was pretty labor intensive.

17 Q. And it wasn't your understanding that the club had two
18 YouTube channels. Correct?

19 A. No. I did not know that we had two YouTube channels.

20 Q. So, as far as you knew, there was only one.

21 A. Yes.

22 Q. In January of 2012, we've heard testimony about the locks
23 being changed at the club. Did you participate in that?

24 A. From time to time, at all our businesses, we change the
25 locks for security reasons. In this instance, we'd just had an

1 insane outburst and people were scared, and it made sense at
2 that time to change the locks because we didn't know what was
3 going on.

4 Q. Was it your intent to lock John out of the business, make
5 sure he couldn't come back?

6 A. Absolutely not.

7 Q. And did you expect him, after he walked out with Mike
8 Farfel and Ted Xereas, to come back?

9 A. He was, according to the prospectus, the operating partner
10 who was the comedy club expert. I assumed that he was upset
11 about his college roommate and his younger brother being fired,
12 so -- but I assumed, given the scope of the business and the
13 depth of the problems we were in, that he would be back and help
14 after, you know, a clearer head would prevail.

15 Q. And in February and March of 2012, did you see John
16 performing any of his duties for the company?

17 A. There was e-mail exchanges between Geoff and Marjorie that
18 I was copied on, and occasionally there would be responses. He
19 did come back occasionally on weekends for show times to meet
20 with the comics, but in terms of during the week on a day-to-day
21 daily basis, he was not there.

22 Q. We also heard some testimony about expenses being submitted
23 to the company and those expense reports not being located. Was
24 one of the duties of the general manager to approve people's
25 expense requests?

1 A. I would have to see what the expense reports are, what
2 you're talking about, but yeah. In order to do any sort of
3 payout or write a check to reimburse somebody, you would have to
4 run that through somebody who had check-writing abilities, and
5 that would be myself.

6 Q. And one of the responsibilities of the general manager is
7 to determine that a requested expense is actually related to the
8 company. Correct?

9 A. Absolutely.

10 Q. And you wouldn't have paid out any expenses that were not
11 related to Riot Act or Riot Act's business. Correct?

12 A. I had a hundred thousand dollars involved in this business,
13 and I wanted to see the business be profitable. So I had no
14 intention of seeing money being spent unwisely at all.

15 Q. And that included expenses submitted by Mr. Dawson.
16 Correct?

17 A. Correct.

18 Q. As an investor whose money was on the line, you wouldn't
19 have just sat back and let Mr. Dawson take money out of the
20 business in the form of false expense reimbursement requests.
21 Correct?

22 MS. MCDONALD: Objection, Your Honor. Leading.

23 THE COURT: May I ask you to rephrase your question,
24 please, Mr. O'Neil.

25

1 BY MR. O'NEIL:

2 Q. Would you have applied the same standards for approval of
3 expense requests to Mr. Dawson?

4 A. A hundred percent.

5 Q. And you did that, didn't you?

6 A. Absolutely. It was my life savings on the line.

7 Q. And there were times as the general manager you used your
8 personal credit cards to pay for orders or shipments to the
9 business. Is that correct?

10 A. When John cleared out his desk, he also took the company
11 credit card, which was an American Express. That was gone.
12 One of the responsibilities that we had when booking comics was
13 also to give them a place to stay while they, you know, were in
14 Washington, D.C.

15 In order to book hotels -- we had a relationship going with
16 Kimpton, where they were giving us a discount. They would only
17 take credit cards. I had to take out a personal line of credit
18 and use that card and would reimburse myself for those hotel
19 purchases.

20 Q. Similarly, with invoices for purchases by the company,
21 would you be the one who reviewed and paid those invoices as
22 they came in?

23 A. You mean for like weekly deliveries, supplies and stuff
24 like that?

25 Q. One company we've heard a little bit about is Adams-Burch.

1 A. Yes. So that's a major distribution company in this
2 region. We purchase from them at all of our businesses.
3 They're huge. They supply everything from cocktail napkins and
4 straws, to forks and knives, dishwashing detergents, carpet
5 cleaner, quite a bit. So myself personally could not be there
6 every single day to check in orders. We were getting two, three
7 order days a week, you know, being food, beer, wine, liquor,
8 supplies, whatever it may be, you know, even air filters for the
9 HVAC. Everything came through.

10 We had managers beside myself who were trusted. For
11 example, a kitchen manager would get the paper invoice, look at
12 the delivery, check off the boxes, and would submit that and we
13 would write a check for it. So I did not personally check in
14 everything, but we had trusted managers on staff, and every
15 delivery would come through the loading dock, down the elevator,
16 would get stacked up, a manager would check off everything on
17 the invoice, and we'd stock it.

18 Q. And after the invoices were paid, were they put in some
19 sort of filing system?

20 A. Yep. Each invoice would go into a file for that particular
21 company. So there would be a folder for -- I don't know. We
22 had a lot of vendors, probably 30 different vendors at some
23 point, you know. We had about 40 invoices coming through on a
24 weekly basis. So, yeah, they would all get filed.

25 Q. And after they got filed, what happened to them?

1 A. They would go in a filing cabinet. After filing cabinets
2 filled up and we had to make room, usually we would just keep
3 the year's -- in the bar and restaurant business, you are
4 required to have two years worth of beer and liquor invoices on
5 hand. There's no other requirements about pieces of paper.
6 Those would get put in bankers boxes and put in storage
7 somewhere. We just simply didn't have the space in the office
8 to keep them all in filing cabinets, so they would get moved
9 into various closets and storage areas.

10 Q. Would you ever have paid an invoice to a third party
11 if there was no delivery associated with that invoice?

12 A. Absolutely not.

13 Q. Did you have any responsibility for the company's
14 QuickBooks account?

15 A. We had accountants that mostly maintained the QuickBooks
16 accounts. At the end of the month, there was a process by which
17 we would submit a Quicken file that was basically all of the
18 checks written for the month, and then there would be an Excel
19 sheet which would have all of the daily sales reports from the
20 bar that was printed out from the point-of-sale system.

21 That would be manually entered and sent off to the
22 accountant, who would then take that data, enter it into
23 QuickBooks, reconcile it with the checking accounts -- I forget
24 which bank it was in at the time, but yes.

25 Q. And if there were problems with that reconciliation, those

1 would be brought to your attention?

2 A. Yeah. So if there were issues, at that point, then the
3 accountant would send an e-mail back and say we have a
4 discrepancy with this or that, or let's take a look at that.
5 And once we -- you know, that didn't happen every month, but now
6 and again there was an issue. And who knows what it could be
7 for, but it was always figured out, and then from that we would
8 create our accounting statements.

9 Q. And we also heard some testimony about ATM withdrawals that
10 it was alleged had limited backup. As general manager, was one
11 of your responsibilities the ATM accounts that the company had?

12 A. Yes. So I set up the ATM accounts there. We added two
13 machines because we were on two floors. So we had an ATM
14 added -- maybe it was -- no. There was one upstairs already,
15 and we added a second one downstairs. And one thing I was told
16 by the ATM guy who initially sold us the first one --

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

18 MR. O'NEIL: It's not offered for the truth, Your Honor.

19 THE COURT: Thank you. Would you like to approach?

20 (Bench conference.)

21 MR. O'NEIL: Your Honor, I'll move on. I don't know
22 what the answer to his question is, but I'll redirect the
23 witness to the accounts. I don't really care what the ATM guy
24 said.

25 THE COURT: That's what I thought. Thank you.

1 (End of bench conference.)

2 BY MR. O'NEIL:

3 Q. Mr. Bayne, I want to focus on the ATM accounts that
4 the company had at the bank. How did that process work?

5 A. We set up separate accounts so that the cash at the ATM
6 wasn't commingled with the operating account. This was
7 recommended as best practice by the ATM salesman.

8 This way, when the ATM accounts were set up, we withdrew
9 however much -- I don't remember what it was -- to set it up in
10 \$20 bills, deposit that into the ATM account. That money would
11 then be withdrawn in cash, put into the ATM machine.

12 As customers came in, they put in their bank card, they'd
13 take out a hundred bucks, \$103, three dollars being the service
14 charge and \$100 that the customer took to spend in the business,
15 hopefully, would then be deposited into the ATM checking account.
16 And that way, it was all separate, and apparently that's what
17 the IRS likes.

18 Q. And you yourself had to physically fill up these machines
19 with cash on a fairly regular basis?

20 A. About every two weeks, I'd say.

21 Q. And that process was you'd go to the bank and make a
22 large withdrawal from this ATM account in cash. Correct?

23 A. And then deposit it into the ATM machines, yes.

24 Q. Take that back to the club --

25 A. Take it back to the club.

1 Q. -- open up the ATM and put the money in. Correct?

2 A. That's correct.

3 Q. And every two weeks, there was this large withdrawal from
4 the ATM accounts to feed the ATMs on premises. Correct?

5 A. And it's pretty easy to see that the deposits usually
6 were pretty close in line with the withdrawals, yeah.

7 Q. And you were working for Riot Act when the decision was
8 made to rebrand to Penn Social. Correct?

9 A. Yeah. We came to realize that the business model did not
10 work in that space and that, if we had any intention of saving
11 the investors' money, we needed to make a change.

12 MR. O'NEIL: Your Honor, may I approach the witness
13 with the exhibits?

14 THE COURT: Yes, you may.

15 BY MR. O'NEIL:

16 Q. I'd ask, if you could, Mr. Bayne, to turn to Defendants'
17 Trial Exhibit 41.

18 A. It's after the 41? Okay.

19 Q. Yeah. After the 41.

20 A. The Rebranding of Riot Act Comedy Theater?

21 Q. Yes. Do you recognize that document?

22 (Witness reviewing document.)

23 A. I do recognize this.

24 Q. And as an investor in Riot Act, do you recall receiving
25 this from Mr. Dawson?

1 A. I do.

2 MR. O'NEIL: Your Honor, we'd like to move Defendants'
3 Trial Exhibit 41 into evidence.

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

5 MS. MCDONALD: Without objection, Your Honor.

6 THE COURT: Defendants' Exhibit 41 will be admitted
7 without objection.

8 (Defendant Exhibit No. 41
9 received into evidence.)

10 BY MR. O'NEIL:

11 Q. So this, in effect, was Mr. Dawson's explanation to
12 the investors of the plan that the company had landed upon
13 to rebrand the store as Penn Social. Do you recall that?

14 A. Absolutely. Yeah.

15 Q. And as part of this memorandum, Mr. Dawson summarized
16 the expected renovation estimates to transform from Riot Act,
17 a comedy club, to Penn Social, more of an entertainment
18 establishment along the lines of Bedrock Billiards or Buffalo
19 Billiards. Correct?

20 A. That's correct.

21 Q. Do you see on the top of the page, Mr. Dawson states that
22 "I have rounded the \$157,800 renovation estimate up to \$200,000
23 to give us a buffer." Do you see that, sir?

24 A. Yes, sir.

25 Q. And on the next page, there's a section entitled "Investor

1 Impact." Do you see that?

2 A. Yes.

3 Q. Could you read the first two sentences of the paragraph
4 that begins, "Under this revised payout scenario"?

5 A. "Under this revised payout scenario, the investing
6 partners, Class B Members, would be repaid 100 percent of their
7 investment principal first, as the original plan stated. Once
8 this is done, the Class B Members will receive a larger share of
9 the initial annual profits, thus ensuring a better return on
10 investment if we pay out less than \$2 million annually."

11 Q. So, in effect, Mr. Dawson was stating there that they were
12 revising the repayment schedule to make it more advantageous for
13 the investors. Correct?

14 A. As I recall, there were a lot of angry investors at the time.

15 Q. Including yourself. Correct?

16 A. Including myself.

17 Q. And hand in hand with giving an advantage to the Class B
18 investors, Mr. Dawson was disadvantaging his own rate of return
19 on the investment. Correct?

20 A. That is correct.

21 Q. I'd ask, Mr. Bayne, if you could turn to Defendants' Trial
22 Exhibit 42, which I understand is already admitted into
23 evidence. This was a March 22nd, 2012, letter from John Xereas
24 to Mr. Emile Wolsky. Do you see that?

25 A. Yes.

1 Q. Do you know who Emile Wolsky is?

2 A. I've met him once or twice in the past.

3 Q. Was he a Class B investor in Riot Act?

4 A. He is a fellow investor in Riot Act, yes.

5 Q. The third paragraph of the letter states, "In January 2012,
6 Ms. Heiss and Mr. Dawson, my co-managing members, without cause,
7 stripped me of all of my management authority and duties and
8 hired a manager and assistant manager." Do you see that?

9 A. Yes.

10 Q. It's not true that in January '12 Riot Act, for the first
11 time, hired a manager and assistant manager, is it?

12 A. No.

13 Q. You'd been serving in that position already for several
14 months.

15 A. That's correct.

16 Q. And there were persons who predated your service as general
17 manager of the club. Correct?

18 A. There was. Yes.

19 Q. The next paragraph down states, "Subsequently, Ms. Heiss
20 and Mr. Dawson changed the club's locks and security codes with
21 the purpose of preventing me from having access to the club."
22 Do you see that?

23 A. Yes.

24 Q. Is that a truthful statement?

25 A. No.

1 Q. Were the locks changed in order to keep John out of the
2 club?

3 A. No.

4 Q. Did you ever reach out personally to Mr. Xereas with
5 questions about the club's operations during this period of
6 late January 2012?

7 A. All communication was running through Ms. Heiss to John.

8 Q. Okay. But at that time, there were a lot of questions.
9 Correct?

10 A. Absolutely.

11 Q. Comics were appearing at the club, and you didn't know
12 they were scheduled to appear that night?

13 MS. MCDONALD: Objection, Your Honor. Leading.

14 BY MR. O'NEIL:

15 Q. Maybe, Mr. Bayne, you could describe for the jury some of
16 the chaos that was at the club during --

17 A. It was extremely difficult --

18 THE COURT: Mr. O'Neil is rephrasing the question.
19 Thank you.

20 THE WITNESS: Yes. It was very difficult. We had a
21 basic idea of who was booked, but we had no idea how much they
22 were to be paid, what the details of the contract was, if there
23 was a contract, when they were arriving, if we had to pay for a
24 hotel room, if we had to pick them up from the airport.

25 So, basically, we had to call up the agents of each artist

1 and say, hi, what's the details? We just want to touch base.
2 And we're trying not to tip our hands that we have no idea
3 what's going on, because we don't want to get taken advantage
4 of. So it was extraordinarily difficult.

5 BY MR. O'NEIL:

6 Q. And you said you didn't find written contracts with these
7 performers at the club?

8 A. Oh, no. No. In fact, in one incident, we found out after
9 the fact that there was a sellout bonus for one of the comics,
10 which came out to several thousand dollars. It was even more
11 unfortunate because, at the time, there was a company called
12 Groupon and Living Social, of which there had been multiple
13 ticket deals made, and this was a particularly famous comic --
14 well, mildly famous comic -- who was on a show called Last Comic
15 Standing. He had a decent following. Everybody saved up their
16 Groupon tickets and showed up all at once for this.

17 It was, in his eyes, a sellout for all five shows. In our
18 eyes, it was a 50 percent off plus two free beers. So a pretty
19 big loss for us. And then, at the end of the day, he said, I
20 also have a sellout bonus, and we had no idea what he was
21 talking about. So we had to get in touch and figure out what
22 was going on and reached an arrangement with him and paid him a
23 sellout bonus.

24 Q. And in this period of time after John left the business,
25 did you participate in the efforts to book comics for the club?

1 A. Yes. We had to. Myself and another investor named John
2 Sullivan, he represented about \$600,000 of the investment. He
3 was living in L.A., worked in the entertainment industry, and so
4 he was familiar with the industry and had contacts. He flew to
5 D.C.; and he and I worked together to book comics, and we found
6 it to be very difficult.

7 Q. What were some of those difficulties that you encountered?

8 A. Well, the big problem was that John had put out on social
9 media that he was suing his business partners and suing the
10 company, and therefore every booking agent was -- knew about
11 this. So that was the first question they asked.

12 And at one point, I remember in particular we were trying
13 to get some larger acts because, you know, we had 13,000 square
14 feet. We needed something more than local comics. We were
15 attempting to book a comic by the name of Wyatt Cenac. He was
16 a performer on *The Daily Show with Jon Stewart*.

17 We figured, you know, he'd been on TV, he'd have a pretty
18 big draw, this might be something we need. He usually performs
19 in Virginia at another rival comedy club, and normally comics
20 sort of have loyalty to the clubs they perform at. They can
21 build a following there, and so as they return year after year,
22 it works out well for them.

23 So we wanted to bring him over to Riot Act. His listing
24 price was like \$7,000 for the weekend. We went up 2,000 to
25 9,000. His agent kept saying, no, he wants 11,000, 13,000.

1 Still no. \$15,000. We just threw it out there. It was totally
2 overpaying for him, but at this point, we had to figure out what
3 the heck was going on. Still no. So we said, you know, what's
4 it going to take?

5 THE COURT: Is there an objection, Ms. McDonald?

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

7 THE COURT: Yes.

8 (Bench conference.)

9 THE COURT: Ms. McDonald, if you have an objection,
10 you're free to make it. I always ask you to approach the bench.
11 What I observed was you essentially stood and threw your hands
12 up in frustration. I cannot permit any counsel to do that.

13 MS. MCDONALD: I apologize, Your Honor. That was my
14 intention. I was standing to object and was realizing it was
15 potentially premature, so I sat back down.

16 THE COURT: What's your objection?

17 MS. MCDONALD: Your Honor, the witness is testifying
18 as to hearsay conversations he had with a comic. The comic is
19 not here to testify.

20 THE COURT: Mr. O'Neil?

21 MR. O'NEIL: Your Honor, I believe he's a participant
22 in the conversation, and he can describe for the jury what he
23 learned from the conversation. That's the real import of the
24 question, what their place in the marketplace was at this point
25 in time.

1 MS. MCDONALD: Sounds to me, Your Honor, like it's
2 being offered for the truth of the matter asserted by a nonparty
3 who's not here to testify.

4 MR. O'NEIL: Mr. Bayne will be subject to cross-
5 examination, and they can explore that topic if they want to.

6 THE COURT: The objection is overruled.

7 Counsel, one moment. About how much more time will your
8 direct require?

9 MR. O'NEIL: I think I have about 20 minutes.

10 THE COURT: We should probably, after you complete
11 this line of inquiry, take our morning recess. We did get off
12 to a late start, but I still would like to keep our general
13 schedule so that the jury has a midmorning break, then return
14 and going to lunch.

15 MR. O'NEIL: Okay. Thank you.

16 (End of bench conference.)

17 BY MR. O'NEIL:

18 Q. Mr. Bayne, you were discussing your conversations with
19 representatives of Mr. -- of the comic.

20 A. So his agent pointed us to John's LinkedIn page, which
21 announced this lawsuit, and said that Wyatt Cenac will not work
22 at Riot Act. At that point, we knew we were in trouble, because
23 we offered the guy \$15,000 for one weekend's worth of work, and
24 now comics are not taking money. What do we do next?

25 Q. Mr. Bayne, could you turn to Defendants' Trial Exhibit 44?

1 Do you recognize this document?

2 (Witness reviewing document.)

3 A. Yeah. This is our Twitter account.

4 Q. Okay. And one of your jobs as general manager was to
5 monitor the social media accounts of the company?

6 A. Absolutely.

7 Q. And do you recall seeing this particular statement?

8 A. This is, you know, something that happened that was another
9 day of alarm bells going off and was just very frustrating.
10 Somehow John's statement was released on our Riot Act Comedy
11 Twitter account, which basically announced to everybody
12 following us that we were, you know, facing the end of the
13 business, essentially. He's suing his partners. And we
14 actually, you know, got customer interaction based on that too.
15 So the damage was done quickly.

16 Q. And you recall seeing these screenshots of the Riot Act
17 Comedy Twitter account --

18 A. Oh, yeah. I mean, it was every -- everybody was on alert
19 about it. Everybody who was in a management position or
20 marketing or anything, everybody who was an employee saw it.
21 It was definitely brought to my attention several ways.

22 MR. O'NEIL: Your Honor, we'd like to move the
23 admission of Defendants' Trial Exhibit 44 into evidence.

24 THE COURT: Ms. McDonald?

25 MS. MCDONALD: I would object, Your Honor.

1 THE COURT: You may approach.

2 (Bench conference.)

3 MS. MCDONALD: Your Honor, again, there's hearsay
4 present in this document, and also we would offer that it's
5 prejudicial because it's not a complete document. It cuts off
6 the text so it's impossible to know what Mr. Xereas allegedly
7 put in this tweet.

8 THE COURT: May I see it, please?

9 MR. O'NEIL: I'm only focusing, Your Honor, on the
10 first sentence in Mr. Xereas's tweet.

11 MS. MCDONALD: But that's an incomplete tweet.

12 MR. O'NEIL: Again, subject to cross-examination.

13 MS. MCDONALD: That doesn't alleviate the rules of
14 evidence.

15 THE COURT: Am I correct that the question you intend
16 to ask, Mr. O'Neil, is whether this is a screenshot on a given
17 day which shows content posted by Mr. Xereas?

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

19 THE COURT: Is there some reason that the question
20 cannot be asked and then we simply move on? How can that
21 possibly be objectionable?

22 MS. MCDONALD: I object to admission of the document,
23 Your Honor, which doesn't contain the full tweet, as prejudicial.
24 It also contains hearsay.

25 MR. O'NEIL: We're not going to elicit any testimony

1 about anybody else's tweet, just Mr. Xereas's.

2 THE COURT: The objection is overruled.

3 (End of bench conference.)

4 THE COURT: Defendants' Exhibit 44 will be admitted
5 over objection.

6 (Defendant Exhibit No. 44
7 received into evidence.)

8 BY MR. O'NEIL:

9 Q. And the tweet, Mr. Bayne, that you were talking about,
10 on the lower half of the page where it says "Riot Act Comedy"?

11 A. Yes.

12 Q. The tweet says, "I am currently pursuing legal action
13 against my former partners regarding ownership and future use
14 of the Riot Act trademark." Do you see that?

15 A. Yes.

16 Q. And this is the tweet that Mr. Xereas posted on Riot Act
17 Comedy's Twitter page. Is that correct?

18 A. That's --

19 MS. MCDONALD: Objection, Your Honor. Lack of
20 foundation.

21 THE COURT: Let me ask you to rephrase your question,
22 please.

23 BY MR. O'NEIL:

24 Q. Was there anyone else suing Riot Act over the trademark at
25 the time other than Mr. Xereas?

1 A. No.

2 Q. And this tweet on March 22, 2012, Mr. Xereas had already
3 filed a lawsuit against the company. Correct?

4 A. Yes.

5 Q. So when you saw this tweet, you understood it to be coming
6 from Mr. Xereas.

7 A. It is also verbatim what was on his personal LinkedIn page.

8 Q. Thank you.

9 MR. O'NEIL: Your Honor, now would be a good time to
10 break if you'd like.

11 THE COURT: Thank you.

12 Members of the jury, in an effort to adhere to the schedule
13 that I promised, we will take our morning recess at this point.
14 I will excuse you for about 20 minutes. We will then resume and
15 go until lunchtime. Thank you very much. I believe 15 minutes
16 will be sufficient. Thank you.

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

18 THE COURT: Now, Counsel, Mr. Bayne, you may also take
19 15 minutes. So step down, please.

20 THE WITNESS: Thank you.

21 THE COURT: Thank you.

22 (The witness steps down.)

23 THE COURT: We're off the record. Thank you.

24 (Recess from 10:56 a.m. to 11:16 a.m.)

25 THE COURT: Give Ms. Lesley one moment. All but one

1 of the jurors have come back.

2 Mr. Bayne, you may return to your seat. Thank you.

3 THE WITNESS: Thank you.

4 (The witness resumes the stand.)

5 (Jury in at 11:18 a.m.)

6 THE COURT: Members of the jury, thank you.

7 Mr. O'Neil will resume his direct examination of Mr. Bayne.

8 BY MR. O'NEIL:

9 Q. Mr. Bayne, just briefly, when we broke, we were talking
10 about Mr. Xereas's efforts to publicize the dispute and the
11 litigation between him and his other partners in the business.
12 Do you recall an article appearing in 2012 in the *Washington*
13 *City Paper*?

14 A. Yes. There was an article in the paper.

15 Q. Was that another example of Mr. Xereas's --

16 A. Another statement to the public much like this.

17 Q. And was the club's side of the dispute represented in that
18 *Washington City Paper* article, or was it just Mr. Xereas's?

19 A. It was -- the author had only spoken with him.

20 Q. In that spring of 2012, there were some other incidents.
21 Do you recall a time when a group of Mr. Xereas's friends
22 appeared at the club requesting their employee files?

23 A. I received a phone call at 8:30 in the morning from an
24 employee of ours who was running the box office named Paul
25 Schorsch. He told me that four of the former employees --

1 Michael Farfel, Ted Xereas, Dawn, and Mick Aildasani -- were at
2 the club, at his desk, demanding their employee files be handed
3 over to them, by D.C. law, something along those lines.

4 It was 8:30 in the morning. Got myself together, raced
5 down there, called up Geoff and Marjorie to let them know to get
6 in touch with the lawyers and figure out if that was indeed such
7 a law. When I arrived, it was a very tense situation. They
8 were all very angry --

9 MS. MCDONALD: Objection, Your Honor.

10 THE WITNESS: -- and Paul was --

11 THE COURT: The objection is overruled.

12 THE WITNESS: Our employee who was running the box
13 office, Paul Schorsch, was extremely rattled, to say the least.

14 BY MR. O'NEIL:

15 Q. Did you have a sense that there was some threat of physical
16 altercation at the time?

17 A. He was very concerned. He called me three times before
18 I got there. He asked if we should call the police multiple
19 times. I told him I was on my way and that I would assess the
20 situation. So I think by virtue of him asking if he should call
21 the police, he was definitely concerned for his safety.

22 Q. And do you recall how that incident resolved?

23 A. Eventually, I heard back from our attorneys. They were
24 not familiar with any such law like that. They said to have the
25 four of them write down -- put down their request in writing and

1 to submit it to me, and eventually they did do that and left.
2 The whole thing took about three hours.

3 Q. Okay. And do you recall other incidents where employees
4 of the company, after Mr. Xereas had left, received messages
5 intended to rattle them or intimidate them?

6 A. Yes. That did happen to Mr. Schorsch again.

7 Q. I'd ask if you could turn to Defendants' Trial Exhibit 46,
8 and maybe turn to the second page. It appears to be, just below
9 the heading, an e-mail message from you to Geoffrey Dawson.
10 Do you see that?

11 A. That's correct.

12 Q. And this was sent on your riotactcomedy.com e-mail address?

13 A. I had taken a picture of this text exchange and e-mailed it
14 to Geoff.

15 MR. O'NEIL: Your Honor, at this time defendants offer
16 Defendants' Trial Exhibit 46 into evidence.

17 MS. MCDONALD: We object, Your Honor.

18 THE COURT: You may approach.

19 (Bench conference.)

20 THE COURT: What's the objection, Ms. McDonald?

21 MS. MCDONALD: Relevance, Your Honor. Also the texts
22 are more prejudicial than probative.

23 MR. O'NEIL: It's prejudicial because it's an example
24 of terrible behavior.

25 MS. MCDONALD: Then it's offered as character

1 evidence. I would object on those grounds as well.

2 THE COURT: You said it was offered as character
3 evidence?

4 MS. MCDONALD: He said it's consistent with the
5 plaintiff's terrible behavior, Your Honor? I don't see the
6 relevance of this document.

7 MR. O'NEIL: It's a business record of the company.

8 MS. MCDONALD: It is absolutely not a business record,
9 Your Honor. It's a screenshot of a text.

10 MR. O'NEIL: Embedded in an e-mail.

11 THE COURT: The objection is overruled.

12 (End of bench conference.)

13 THE COURT: Defendants' Exhibit 46 will be admitted
14 over objection.

15 (Defendant Exhibit No. 46
16 received into evidence.)

17 BY MR. O'NEIL:

18 Q. The contrast isn't good, but -- well, first I'm showing
19 you the e-mail. Here's the e-mail header, from Peter Bayne to
20 Geoffrey Dawson. There's a better picture of the screenshot.

21 Mr. Bayne, you testified that an employee --

22 THE COURT: Just so the record is clear, is it page 2
23 of Exhibit 46 that is now displayed?

24 MR. O'NEIL: This is page 3, Your Honor.

25 THE COURT: Page 3. Excuse me.

1 BY MR. O'NEIL:

2 Q. Mr. Bayne, you testified that an employee, Paul -- did
3 you say "Shorb"?

4 A. Schorsch.

5 Q. -- Schorsch, showed you this screenshot of a text from
6 John to him? Correct?

7 A. He showed me the text exchange, and with my phone I took
8 a screenshot of it.

9 Q. And sent it to Mr. Dawson?

10 A. And e-mailed it to Mr. Dawson, yes.

11 Q. And this is consistent with what you had heard from other
12 employees about intimidating tactics by Mr. Xereas, trying to
13 instigate trouble within the employees who remained at the club.
14 Correct?

15 MS. MCDONALD: Objection, Your Honor. Leading.

16 THE COURT: The objection is overruled.

17 THE WITNESS: That's correct.

18 BY MR. O'NEIL:

19 Q. Could you read the first balloon, I guess?

20 A. Sure. One of three?

21 Q. Yes.

22 A. "You are truly an ungrateful turd. Be ashamed. Stop
23 telling people you were there for me when they ask just to
24 validate your own lack of morals or values."

25 Q. And Mr. Schorsch was originally a friend of Mr. Xereas's

1 when he was hired at the club. Is that correct?

2 A. I believe they had worked together at DC Improv, and he's
3 a comic.

4 Q. And Mr. Schorsch, along with several other employees, they
5 didn't all quit when Mr. Xereas left the company. Correct?

6 A. That's correct.

7 Q. And at the top of page 3 of Exhibit 46 is an e-mail from
8 Geoffrey Dawson to Marjorie Heiss and Mike Conlon. Correct?

9 A. Yes.

10 Q. Could you read what Mr. Dawson said?

11 A. "This was sent by John X. to Paul, our box office manager.
12 Just a taste of our esteemed partner's style."

13 Q. Were there other employees of the company during this time
14 period who reported unpleasant interactions with Mr. Xereas?

15 A. Yes.

16 Q. Do you have any examples that come to mind?

17 A. Absolutely.

18 MS. MCDONALD: Objection, Your Honor. Lack of
19 foundation.

20 THE COURT: Would you rephrase your question, please,
21 Mr. O'Neil, so that it is clear your question concerns matters
22 as to which Mr. Bayne has knowledge.

23 MR. O'NEIL: Okay.

24 BY MR. O'NEIL:

25 Q. Mr. Bayne, you came to learn from other employees that

1 Mr. Xereas was having unpleasant interchanges with these other
2 employees from time to time. Correct?

3 A. I personally witnessed one such incident.

4 Q. What did you personally witness?

5 A. We had -- the business was facing economic hardship, and
6 it was very difficult to hold on to staff. So I was spending a
7 significant amount of time reassuring staff that they would be
8 keeping their jobs, that we'd be staying open and such.

9 One such staff member was our head waiter named Rob Hess.
10 I exited the club with him because these discussions we didn't
11 really want to have around other employees. It's sensitive.
12 So we went for a walk to get some fresh air.

13 We exited the club and walked right down E Street towards
14 the FBI building, and my phone kept ringing. Eventually, I
15 figured, what could be next? It was our head of security,
16 Melvin Ward, calling to inform me that --

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

18 THE COURT: The objection is overruled.

19 THE WITNESS: Telling me to be careful because John
20 Xereas was in his car tailing us, behind me. I turned around,
21 saw John in his black BMW. He screamed something out the window
22 at the both of us, did a u-turn rapidly, drove back to the club,
23 where I had walked back speedily and found him yelling at our
24 general contractor, Geoff McNabola. And then he reversed and
25 took off and disappeared.

1 He had followed us for about two blocks in his car, which
2 was -- shakes you when you realize that you were crossing the
3 street and you're getting followed by a car by somebody who was
4 clearly upset.

5 BY MR. O'NEIL:

6 Q. And did you ever have any encounters with John or
7 Ted Xereas when you were out with your family?

8 A. On several occasions. I'd be out with my family and some
9 friends at restaurants, and Ted would stand outside the window
10 waving at me. Would not leave. At one point, I was outside my
11 apartment taking my infant son and toddler with my wife out of
12 the car, and John was standing across the street staring at me
13 menacingly, in a very unsettling manner, outside my home.

14 There were lots of incidences like that, including another
15 one with Ted when I was leaving Eagle Bank. As soon as I walked
16 out the door, he popped out, and started screaming at me that I
17 was a thief and a liar, screaming down 7th Street like that.
18 He also videotaped me in the Metro walking up the escalator
19 leaving, saying that my day was coming.

20 Q. Did these incidents get to the point where you considered
21 getting a restraining order for your own safety?

22 A. That's correct.

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

24 THE COURT: Yes. Of course.

25 (Bench conference.)

1 MS. MCDONALD: Your Honor, I object to this line
2 of questioning as it pertains to Ted Xereas and not Mr. John
3 Xereas. It's not relevant to any of our claims, their defenses,
4 counterclaims.

5 MR. O'NEIL: There's certainly been plenty of
6 testimony about John's activities, but Ted Xereas was an
7 employee, and his dismissal is at the center of this case,
8 Your Honor.

9 MS. MCDONALD: Ted Xereas is not John Xereas,
10 Your Honor. It's irrelevant.

11 MR. O'NEIL: Your Honor, we've alleged a conspiracy
12 to damage the company. One of the types of damages they were
13 attempting to do was intimidating employees. We've had plenty
14 of testimony on that already. I think when the manager of the
15 club --

16 THE COURT: To which counterclaim do you refer?

17 MR. O'NEIL: Interference with existing contractual
18 relationships, Your Honor. I believe it's our second or third.
19 We've also alleged a conspiracy.

20 THE COURT: Do you acknowledge that in the counts
21 where the conspiracy is alleged, the only other person named was
22 Dawn Henderson?

23 MR. O'NEIL: Yes, Your Honor. I don't have it in
24 front of me, but I don't doubt it.

25 THE COURT: To what count does this testimony involve?

1 MR. O'NEIL: Well, I think, despite the fact that
2 other members of the conspiracy weren't named, Your Honor, the
3 fact that we alleged that Mr. Xereas was acting in concert with
4 others, including Dawn Henderson, is sufficient.

5 THE COURT: The Court will sustain the objection.

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

7 MS. MCDONALD: Thank you.

8 (End of bench conference.)

9 THE COURT: The objection is sustained.

10 BY MR. O'NEIL:

11 Q. Mr. Bayne, just briefly, we've heard some testimony during
12 the trial here in the courtroom about the operations of Penn
13 Social after it converted from Riot Act and certain noise
14 complaints or other types of evidence. As the general manager
15 of the store, the location, did you think that the noise
16 complaints that were encountered were of a different kind than
17 other bars that you had worked in?

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

19 THE COURT: Yes.

20 (Bench conference.)

21 MS. MCDONALD: Mr. O'Neil objected to and I was
22 precluded from eliciting testimony regarding noise complaints
23 and other actions that occurred at Penn Social after it
24 converted from Riot Act.

25 THE COURT: What is your objection to the question?

1 MS. MCDONALD: Relevance. Just as the Court found it
2 was irrelevant then, it's irrelevant now.

3 MR. O'NEIL: That's true, but there's evidence in the
4 record. I'm not building --

5 MS. MCDONALD: It's not in the record, so I was
6 precluded.

7 MR. O'NEIL: I believe they did elicit testimony that
8 we eventually objected to and they moved on, but I think there
9 is -- it wasn't stricken, and I believe there is some testimony
10 in the record about the noise complaints from neighbors. I just
11 wanted to ask one or two questions of Mr. Bayne about that.

12 THE COURT: The objection is overruled.

13 (End of bench conference.)

14 BY MR. O'NEIL:

15 Q. Do you recall the question, Mr. Bayne?

16 A. Yes. I would say, at all of our bars we received noise
17 complaints from time to time from neighbors. It's the nature
18 of the business. This incident in particular I believe you're
19 referencing involved Howard homecoming weekend, and there was a
20 promoter who had put a party on and said it was at Penn Social,
21 unbeknownst to us, and we had what I would describe as a horde
22 of people show up. We did our best to control the situation and
23 worked with the neighbors afterwards to make sure that never
24 happened again.

25 MR. O'NEIL: Thank you, Mr. Bayne.

1 I have nothing further, Your Honor.

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

3 Counsel, you may cross-examine.

4 MS. GLAVICH: Thank you, Your Honor.

5 THE COURT: Ms. Glavich, thank you.

6 MS. GLAVICH: Thank you, Your Honor. I'm just going
7 to mic myself up so people can hear me.

8 CROSS-EXAMINATION

9 BY MS. GLAVICH:

10 Q. Good morning, Mr. Bayne.

11 A. Good morning.

12 Q. Mr. Bayne, you've known Mr. Dawson since about 2007.

13 Is that correct?

14 A. That's correct.

15 Q. And he hired you to come work at Riot Act?

16 A. That's correct.

17 Q. And outside of Riot Act/Penn Social, do you own any shares
18 in any companies that are owned or part owned by Mr. Dawson?

19 A. Yes. We're business partners together, so we do have
20 ownership shared amongst several businesses.

21 Q. About how many businesses?

22 A. Just in the bar and restaurant world? One, two, three,
23 four, five -- five. And then we are co-owners of Tin Shop.

24 Q. And Tin Shop is the design and management company?

25 A. Mm-hmm. Yes.

1 Q. Thank you. And Penn Social is one of Tin Shop's clients.
2 Is that correct?

3 A. That is correct. Tin Shop manages Penn Social. Yes.

4 Q. And Penn Social pays Tin Shop about \$5,000 a month for
5 management?

6 A. Normally, we charge our businesses 5 percent of sales
7 each month, but with Penn Social we're doing 5,000 a month.

8 Q. And you said you were an investor in Riot Act, now Penn
9 Social?

10 A. \$100,000 for 1 percent of Riot Act, now Penn Social.

11 Q. And you said that was your life savings?

12 A. That's correct.

13 Q. I'd like to refer to Plaintiff's Exhibit 85.

14 MS. GLAVICH: I'm going to hand a copy to Mr. O'Neil.
15 May I approach the witness, Your Honor?

16 THE COURT: Yes, you may.

17 MS. GLAVICH: Thank you.

18 BY MS. GLAVICH:

19 Q. Now, Mr. Bayne, looking at Plaintiff's Exhibit 85, do you
20 recognize this e-mail?

21 A. Give me a second to read it, please?

22 Q. Sure thing.

23 (Witness reviewing document.)

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

25 THE COURT: Yes.

1 (Bench conference.)

2 THE COURT: Mr. O'Neil.

3 MR. O'NEIL: The objection, Your Honor, is relevance.
4 We did ask Mr. Bayne about the list of complaints generally
5 because they had made evidentiary statements before, but that
6 doesn't make it any more relevant now to bring up other
7 incidents, licensing issues. So I don't see the relevance as
8 to that.

9 THE COURT: May I see the exhibit? Thank you.

10 (Court reviewing document.)

11 MS. GLAVICH: Your Honor, it also goes directly to
12 his testimony that he has invested his life savings.

13 THE COURT: To what is this exhibit relevant?

14 MS. GLAVICH: It goes to the fact that he has invested
15 his life savings. He has a financial interest in the
16 organization that's being sued as a defendant.

17 THE COURT: I think you've already established that,
18 haven't you?

19 MS. GLAVICH: I have.

20 THE COURT: Well, let me suggest, then, that the
21 exhibit does not -- the exhibit is not at all probative of what
22 interest, if any, Mr. Bayne has. He's already testified about
23 his interest.

24 MS. GLAVICH: It goes to show that -- the sentence
25 before talks about the lack of licensing and --

1 THE COURT: For example, I see one reference here to
2 his life savings. He's already said that was his life savings.

3 MS. GLAVICH: Yes, Your Honor. It goes to his
4 credibility, that he has invested this much, they were operating
5 without approval of the alcohol board, he's concerned about his
6 life savings.

7 THE COURT: Let me suggest, then, that you simply ask
8 the questions about what his concern was regarding the current
9 state of affairs. The exhibit itself I could not admit on,
10 among other grounds, relevance grounds. You may simply ask the
11 questions. I can sustain the objection, or you can withdraw it
12 and simply ask him questions.

13 MS. GLAVICH: I can ask the question --

14 THE COURT: I'm going to sustain the objection to 85
15 being admitted. You may still ask your questions, however.

16 MS. GLAVICH: Okay. Thank you.

17 (End of bench conference.)

18 THE COURT: The objection to the exhibit is sustained.
19 You may proceed with your questions.

20 MS. GLAVICH: Thank you.

21 BY MS. GLAVICH:

22 Q. Mr. Bayne, in the second paragraph, do you see that on
23 Exhibit 85?

24 A. Yes.

25 Q. You express concern about losing your life savings.

1 Why is that?

2 A. I think in the context of this e-mail, I was trying to
3 convey to my managers that we needed to make sure that we were
4 keeping things outside as quiet and as neighbor-friendly as
5 possible. And I knew that our liquor license was under threat
6 because the ABC board had received a letter from John Xereas,
7 and I was worried that if we were not to get our liquor license
8 renewed, we would not be able to open for business and the
9 business would fail.

10 Q. Were you concerned about a substantial change you made
11 without the board's approval?

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

13 THE COURT: You may approach.

14 (Bench conference.)

15 MR. O'NEIL: We were talking about noise, and now
16 we're talking about the ABRA license renewal process --

17 THE COURT: The witness has already indicated what
18 the impact on the business will be if there were no license.
19 The manner in which a license is renewed or complaints affecting
20 it is simply of no relevance. And the greater concern, this
21 witness would have no knowledge of that other than, say,
22 anecdotally.

23 In any event, it is of no moment what he thinks about how
24 the D.C. government operates. The relevant question has already
25 been answered, in other words, that he had a concern that

1 without a license, the business would not be viable. So my
2 suggestion is that you move on, please.

3 MS. GLAVICH: Will do.

4 (End of bench conference.)

5 MS. GLAVICH: We're done with that one. You can put
6 that one to the side.

7 BY MS. GLAVICH:

8 Q. Now, Mr. Bayne, you submitted three declarations in this
9 litigation. Correct?

10 A. I did?

11 Q. Yes.

12 A. I believe so. I don't -- do you have dates to help me jog
13 my memory and what they are?

14 Q. I have them for you so you can look at them.

15 MS. GLAVICH: I'm going to hand a copy to defense
16 counsel.

17 THE COURT: Thank you.

18 MS. GLAVICH: May I approach the witness, Your Honor?

19 THE COURT: Yes, you may.

20 MS. GLAVICH: Three different declarations.

21 (Witness reviewing documents.)

22 THE COURT: Ms. Glavich, although at this point it
23 appears you have presented the exhibits for the limited purpose
24 of refreshing or permitting Mr. Bayne to refresh his
25 recollection, may I ask you to identify the numbers, please, of

1 the exhibits that you just presented?

2 MS. GLAVICH: They've not been marked as exhibits yet,
3 so they're only to refresh his recollection. So they would be
4 310, 311, and 312.

5 THE COURT: Thank you.

6 (Plaintiff Exhibit Nos. 310, 311,
7 312 marked for identification.)

8 (Witness reviewing documents.)

9 THE WITNESS: This is part of it as well?

10 MS. GLAVICH: It's just to identify which motion it
11 was attached to. It's not part of the declaration.

12 (Witness reviewing document.)

13 BY MS. GLAVICH:

14 Q. Mr. Bayne, you've had time to review these declarations?

15 A. Yes.

16 Q. Do you remember submitting them?

17 A. I -- yes.

18 Q. And you signed each of these under the penalty of perjury.

19 Correct?

20 A. Yes.

21 Q. So I'd like to look first at what has been marked as
22 Exhibit 310.

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

24 (Bench conference.)

25 THE COURT: Ms. Glavich, is there a prior inconsistent

1 statement that you intend to use for impeachment purposes?

2 MS. GLAVICH: No, no. He makes it --

3 THE COURT: What are you doing here with the
4 declaration?

5 MS. GLAVICH: He said he wasn't sure about the
6 declarations, so I'm using them to refresh his memory.
7 Just asking about the -- he made the statement about the
8 reimbursement of the expenses, and so I'm going to ask
9 questions about that.

10 THE COURT: The declarations can't come in -- I do
11 not know for what purpose you would admit the declarations.

12 MS. GLAVICH: I'm not seeking to admit the
13 declarations themselves.

14 THE COURT: My initial impression was that you were
15 preparing to impeach Mr. Bayne with a prior statement.

16 MS. GLAVICH: No.

17 THE COURT: So that is not what you intend to do?

18 MS. GLAVICH: No.

19 THE COURT: What, then, is the purpose of resort to
20 the declarations?

21 MS. GLAVICH: He testified earlier -- he testified
22 earlier regarding invoices and the existence of the invoices,
23 and he then submitted a declaration that says all of my expenses
24 are appropriate. So my follow-up question is where are the
25 invoices. He didn't attach the invoices to the declaration.

1 I could do so without the statements.

2 MR. O'NEIL: I don't see the relevance of this at all,
3 Your Honor. They should have -- in the reply to our briefing,
4 if they had seen a problem with the scope of the declaration,
5 they should have brought it up then.

6 MS. GLAVICH: It's not a scope of the declaration.
7 Your Honor, they put it at issue. They said that all of the
8 receipts are in Penn Social. He said that. I'm allowed to ask.

9 MR. O'NEIL: I'm not sure Mr. Morrissey's testimony is
10 relevant anymore, Your Honor, given your orders on Friday.

11 MS. GLAVICH: How is it not relevant?

12 MR. O'NEIL: What claim does it support?

13 MS. GLAVICH: Breach of contract.

14 MR. O'NEIL: What breach of contract?

15 MS. GLAVICH: The operating agreement.

16 MR. O'NEIL: What element of the operating agreement
17 is it relevant to?

18 MS. GLAVICH: 8.2, and it goes to the reason why they
19 terminated him. Defendants have stated that they --

20 (Reading from document, inaudible.)

21 All I'm asking here is -- they have put existence of the
22 invoices at issue. All I'm asking is, where are they?

23 THE COURT: The Court has no alternative other than
24 to sustain the objection, partly for the reasons that form the
25 basis of the objection, but perhaps more globally because of the

1 Court's concern that this method of examination is not proper
2 under any rule of evidence which could conceivably apply in this
3 circumstance.

4 MR. O'NEIL: Like you, Your Honor, I was waiting for
5 some question about impeachment, but as I read the declaration,
6 there isn't any.

7 THE COURT: Well, that is what occasioned my first
8 request that counsel approach. I thought it was the case that
9 you were preparing, Ms. Glavich, to impeach Mr. Bayne with a
10 prior inconsistent statement, but you've indicated that that is
11 not what you intend to do. Is that still the case?

12 MS. GLAVICH: That's still the case. I can move on.

13 THE COURT: As of right now?

14 MS. GLAVICH: Well, I don't know what he's going to
15 say, but my plan was to ask him --

16 THE COURT: Are you suggesting that --

17 MS. GLAVICH: I can move on.

18 THE COURT: Well, just one moment. You certainly know
19 what he said on direct.

20 MS. GLAVICH: Yes.

21 THE COURT: So do you believe that there is a prior
22 inconsistent statement in any of the three declarations? You
23 said you don't know what he's going to say, I guess assuming
24 meaning in response to that question, but you do know what he
25 said on direct.

1 MS. GLAVICH: Yes.

2 THE COURT: Is there a prior inconsistent statement
3 that you believe is proper impeachment with respect to his
4 direct testimony?

5 MS. GLAVICH: No.

6 THE COURT: I mean, this would be the time to know
7 if that's what you intend to do. Did you say no?

8 MS. GLAVICH: I did.

9 THE COURT: Very well. May I ask you, please, to take
10 the declarations back and then proceed with your questions of
11 the witness.

12 MS. GLAVICH: Okay.

13 THE COURT: Thank you.

14 (End of bench conference.)

15 BY MS. GLAVICH:

16 Q. Mr. Bayne, earlier you testified that you had approved
17 reimbursements for the company. Correct?

18 A. That's correct.

19 Q. And earlier you testified that the invoices were stored at
20 Riot Act. Correct?

21 A. All invoice -- or which invoices? For the reimbursements
22 or for just alcohol and food, or...

23 Q. The reimbursements.

24 A. The reimbursements? To my knowledge, they were all stored
25 at the store, yes.

1 Q. And earlier you testified there was a requirement of
2 keeping invoices for two years. Whose requirement is that?

3 A. That's ABRA, ABC board, and that was strictly for beer,
4 liquor, and wine orders.

5 Q. And ABC is Alcohol...

6 A. Alcohol Beverage Control. ABRA's the something Beverage
7 Regulatory Authority.

8 Q. That's not an IRS requirement?

9 A. Excuse me?

10 Q. It's not an IRS requirement?

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

12 THE COURT: Sustained.

13 BY MS. GLAVICH:

14 Q. Mr. Bayne, are you an accountant?

15 A. No.

16 Q. Are you a CPA?

17 A. No.

18 Q. Earlier you testified about the invoices for everything
19 was stored at Riot Act. Is that correct?

20 A. Over the course of the years, we had attorneys in and out
21 of there looking at documents, moving boxes around, but every
22 paper invoice that came into the store stayed there unless it
23 was removed by an attorney or moved to -- I don't know. Talking
24 about a lot of documents.

25 Q. Is two days enough to review all of those documents?

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

2 THE COURT: Sustained.

3 BY MS. GLAVICH:

4 Q. Were all of those documents provided to plaintiff when he
5 asked for them?

6 MR. O'NEIL: Your Honor --

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

9 (Bench conference.)

10 MR. O'NEIL: Sounds like we're getting into a motion
11 to compel.

12 THE COURT: There is no motion to compel pending, and
13 even if there were, it would not be an appropriate question for
14 a witness. What was the purpose of that question, Ms. Glavich?

15 MS. GLAVICH: Mr. O'Neil has put directly at issue
16 that there are all of these invoices out there; we just haven't
17 found them.

18 THE COURT: When has that issue been raised?

19 MS. GLAVICH: That's been raised before, last week.

20 THE COURT: I believe I'm going to have to give the
21 jury a curative instruction at this point, because you've just
22 raised the inference that documents have been withheld, that
23 there is no motion to compel in which this issue was ever
24 raised, and the time to raise it is not during cross-examination
25 of this witness.

1 MS. GLAVICH: I can withdraw the question, Your Honor.

2 THE COURT: What is your next question, Ms. Glavich?

3 MS. GLAVICH: I'm moving on to a new section.

4 THE COURT: Moving on to?

5 MS. GLAVICH: A new section. I don't have my outline
6 with me, but I have a few other questions. I can withdraw the
7 question.

8 MR. O'NEIL: I agree with Your Honor that a curative
9 instruction is appropriate. They've brought this topic up two
10 or three times, I've objected to the relevance each time, and
11 you've sustained those objections and they keep bringing it up.

12 THE COURT: Very well. I will give the instruction,
13 and then you must move on.

14 MS. GLAVICH: Yes.

15 (End of bench conference.)

16 THE COURT: Members of the jury, I'm interrupting the
17 examination to instruct you that there is no issue in the case
18 regarding any withheld documents. So to the extent that that
19 was an inference that might have been raised by the last question,
20 I ask you to disregard it, please.

21 MS. GLAVICH: Thank you, Your Honor.

22 BY MS. GLAVICH:

23 Q. Mr. Bayne, you testified earlier that when you arrived at
24 Riot Act, when you were first hired on, that the company was in
25 a bit of disarray. Correct?

1 A. I had been informed that the prior GM had been fired and he
2 was pursuing suit against the company, and I was asked to come
3 help while maintaining to continue to do my other job. So, yeah.

4 Q. Who is Peter Genis?

5 A. Peter Genis is an accountant, or was an accountant for
6 Bedrock Companies, and I believe he did some accounting work
7 for Riot Act/Penn Social for -- I'm not sure what the period
8 of time was.

9 Q. Did Mr. Genis ever express frustration with you for the
10 state of the Riot Act books?

11 MR. O'NEIL: Objection.

12 THE COURT: The objection is sustained.

13 MS. GLAVICH: I'd like to refer to Plaintiff's
14 Exhibit 11. I believe this document has already been admitted.
15 I'm going to hand a copy to defense counsel. May I approach?

16 THE COURT: Yes, you may.

17 MS. GLAVICH: Thank you.

18 THE WITNESS: Thank you.

19 MS. GLAVICH: You're welcome.

20 MR. O'NEIL: Same objection, Your Honor.

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

22 (Bench conference.)

23 MR. O'NEIL: You just ruled that the prior question
24 was irrelevant. This is just a confirmatory e-mail of the
25 same --

1 THE COURT: At this point, I have one of two options.
2 I can take a recess, we can recess early for lunch so that you
3 and your co-counsel, Ms. Glavich, will have an opportunity to
4 determine how it is you wish to proceed, if at all, with cross.
5 Or we can continue this way, meaning that there will likely be
6 multiple curative instructions that I must give because your
7 inquiry concerns matters as to which I've already said there is
8 no relevance.

9 MS. GLAVICH: I can move on.

10 THE COURT: I do not know whether this is deliberate
11 or an oversight, or what is occasioning questions that are
12 clearly -- that are so clearly those as to which the Court has
13 already ruled. I'm not certain what to do, quite frankly, as I
14 said. Perhaps there was not sufficient time for you and your
15 co-counsel to prepare for cross-examination.

16 As Mr. O'Neil ended, I did not offer a recess, even for 10
17 minutes. Perhaps I should have, but you indicated you were
18 ready, so I did not. What is it that you want me to do?

19 MS. GLAVICH: Your Honor, the reason why I brought the
20 exhibit back out is I didn't understand your ruling to be about
21 relevance; I thought it was more of a foundation issue. The
22 defendants have testified -- Mr. Bayne has testified about the
23 disarray of the company, and yet this e-mail demonstrates that
24 that disarray did not disappear with John. They're trying to
25 blame Mr. Xereas, and this e-mail demonstrates that it's still

1 going on; it's not his fault.

2 MR. O'NEIL: The time period in which he's talking
3 about is before Mr. Xereas left the company, and I don't believe
4 any of our counterclaims make an allegation that Mr. Xereas was
5 liable for the state of the company --

6 MS. GLAVICH: It's why the defendants fired him.

7 THE COURT: Do you want to continue until lunchtime,
8 or should we recess now? When I say lunchtime, I should be more
9 specific. Until about 12:30. Or do you prefer that we recess
10 now?

11 MS. GLAVICH: I can move on, Your Honor.

12 THE COURT: Very well. Thank you.

13 (End of bench conference.)

14 BY MS. GLAVICH:

15 Q. Mr. Bayne, can you turn to Defendants' Exhibit 42, please?

16 A. This is the one that begins, "Dear Fellow Investor"?

17 Q. Yes. What's the date of this letter?

18 A. March 22, 2012.

19 Q. And March 22nd is after the March 19th meeting in
20 which John Xereas was terminated as a managing member?

21 A. If that was the date. I wasn't there. I'm not a
22 managing member, just an investor.

23 Q. And you understand Mr. Xereas to be a fellow investor?

24 A. He's one of the managing members and the operator, along
25 with Mr. Dawson and Mrs. Heiss.

1 Q. Do you understand him to be an investor as well?

2 A. And an investor, yes.

3 Q. Thank you. You can put that one to the side, and can you
4 turn to Defendants' Trial Exhibit 41? This is the Penn Social
5 Rebranding of the Riot Act Comedy Theater?

6 A. Okay.

7 Q. And what did you testify this is?

8 A. Can you jog my memory there? This is what you said, the
9 rebranding. This is a document that Mr. Dawson sent to all of
10 the investors.

11 Q. Can you turn to -- it's the third page where it says
12 "Renovation Estimates."

13 A. Okay.

14 Q. You see it?

15 A. Yes.

16 Q. And the third one down, it says, "Six shuffleboards,
17 \$30,000." Correct?

18 A. That's what it says, yes.

19 Q. Did Riot Act Comedy Theater have shuffleboards?

20 A. Did Penn Social have shuffleboards, or did Riot Act
21 Comedy Theater?

22 Q. The comedy theater.

23 A. No, it did not.

24 Q. And the one below that where it says two ping-pong tables
25 for \$1,500.

1 A. Yes, I see that.

2 Q. And did Riot Act Comedy Theater have ping-pong tables?

3 A. Just tables and chairs.

4 Q. So the same thing would apply for the three used pool
5 tables for \$4,500?

6 A. That's correct.

7 Q. And so the games listed, is that due to the new theme
8 of Penn Social versus Riot Act?

9 A. Which games are you referring to?

10 Q. The shuffleboard, ping-pong tables, and pool tables.

11 A. We were still doing live entertainment and added in some
12 games as well.

13 Q. I want to turn to Defendants' Trial Exhibit 44, please.

14 A. This is the Twitter page?

15 Q. Yes.

16 A. Okay.

17 Q. Now I am looking at the second half of the page where it
18 says "Riot Act Comedy. I am currently pursuing legal action."

19 A. Yes.

20 Q. And can you read the date of that tweet?

21 A. Looks like it was 3:22 a.m., March 21, 2012.

22 Q. And that was after the March -- that's after March 19.
23 Correct?

24 A. To the best of my knowledge, yeah.

25 Q. So it's after the March 19th meeting in which John Xereas

1 is terminated as a managing member?

2 THE COURT: The objection is sustained. Let me ask
3 you to come to the bench, please, counsel.

4 (Bench conference.)

5 THE COURT: Barely two minutes ago, Mr. Bayne said he
6 did not know the date that Mr. Xereas was removed as a managing
7 member. On what basis could you conceivably ask that question?

8 MS. GLAVICH: I apologize, Your Honor.

9 THE COURT: Very well. I think we should go ahead and
10 recess now for lunch so that you and your co-counsel will have a
11 better opportunity to organize the cross-examination. We simply
12 cannot continue in this fashion.

13 (End of bench conference.)

14 THE COURT: Members of the jury, at this time we are
15 going to recess for lunch. You will have an extra 10 minutes or
16 so. It's 20 minutes after 12:00. So if you return by 12:25, we
17 should be able to start -- excuse me -- 1:25. We'll start
18 promptly at 1:30. Thank you very much.

19 I will remind you, as I always do, that during the recess
20 you may not discuss the case with anyone or permit anyone to
21 discuss it with you. Ms. Lesley will collect your notepads and
22 return them to you when we resume in the afternoon. Thank you
23 so much.

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

25 THE COURT: Mr. Bayne, you may step down. Because I

1 must speak with counsel for a moment before I excuse all of
2 them, I'm going to ask you to wait outside, please.

3 THE WITNESS: Sure.

4 (The witness steps down.)

5 THE COURT: I will also instruct you, sir, that
6 because you are still being examined, cross-examination has not
7 been completed, and Mr. O'Neil, I imagine, on behalf of the
8 defendants, will want to undertake some redirect examination,
9 I'm going to direct you to refrain from any communication with
10 any counsel during the recess.

11 THE WITNESS: Not a problem.

12 THE COURT: You probably would appreciate that.

13 (Laughter.)

14 Very well. Thank you. You may step out.

15 (Witness exits.)

16 THE COURT: I do not know the extent to which all of
17 you were able to hear the various bench conferences during the
18 course of the cross-examination. I want the record to be clear
19 that I decided the best course of action was to recess early so
20 that counsel for plaintiffs would have a better opportunity to
21 confer and determine what relevant questions, in the scope of
22 direct examination and otherwise appropriate under the rules of
23 evidence, would be undertaken.

24 I am very troubled by what is either a deliberate effort to
25 interject totally irrelevant matters, such as whether documents

1 were withheld from production during discovery, into the
2 cross-examination or to suggest that there might be -- at least
3 suggest to the jury that there might be impeachment by prior
4 inconsistent statements in the declarations, which of course did
5 not occur, or to include in a question facts as to which the
6 witness has already indicated he has no knowledge at all, such
7 as what may have been the last question, which had as a part of
8 it, "So this was after" -- and I apologize.

9 I have the realtime here, so I could look back. I don't
10 think this needs to be verbatim. But the question included a
11 reference to the date on which Mr. Xereas was removed as a
12 managing member, and Mr. Bayne already said he didn't know when
13 that was.

14 So it will be incumbent upon you during this period to
15 determine how you wish to proceed. I do not believe we can
16 continue in this fashion. I simply cannot call counsel to the
17 bench after every question and give a curative instruction.
18 We simply cannot proceed in this fashion.

19 Is one hour sufficient for this purpose, Ms. Glavich,
20 Ms. McDonald, Mr. Richa? Ms. Glavich?

21 MS. GLAVICH: Yes, Your Honor.

22 THE COURT: Very well, then. I expect when we resume
23 that the cross will proceed in accordance with the customary
24 rules, the customary protocols, and perhaps more broadly, the
25 applicable rules of evidence. Is there anything else anyone

1 wishes to address before we recess? Ms. Glavich?

2 MS. GLAVICH: No, Your Honor.

3 THE COURT: Mr. O'Neil?

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

5 THE COURT: Very well. We'll resume at 1:30.

6 (Recess from 12:27 p.m. to 1:46 p.m.)

7 THE COURT: Now we're back on the record. Is there
8 anything anyone wishes to address before the jury returns?

9 Two of you rose at the same time, Mr. Richa and
10 Ms. Glavich. But since you were first to reach the podium,
11 Mr. Richa --

12 MR. RICHA: Yes, Your Honor.

13 THE COURT: -- I'll hear from you first.

14 MR. RICHA: I just wanted to let you know that the
15 plaintiff intends to make a Rule 50 motion after the defendants
16 rest, but I just wanted to let you know without the jury here.

17 THE COURT: Very well. The defendants haven't rested
18 yet.

19 MR. RICHA: I just wasn't sure if I could say it in
20 front of the jury, so I just wanted to let you know ahead of
21 time just in case.

22 THE COURT: I will be certain -- we will excuse the
23 jury so that you can proceed with the motion.

24 MR. RICHA: Thank you, Your Honor.

25 THE COURT: Ms. Glavich, is there anything you wish to

1 address before the jury returns?

2 MS. GLAVICH: Yes. Plaintiffs have no further
3 questions for Mr. Bayne.

4 THE COURT: Very well. I will -- where is Mr. Bayne?

5 THE WITNESS: Right here.

6 THE COURT: Ah, there you are. While we're waiting,
7 while I address these few issues with counsel, you may return to
8 the stand.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: Thank you, Mr. Bayne.

11 (The witness resumes the stand.)

12 THE COURT: And you may state that in the presence of
13 the jury. Thank you. Will you have redirect?

14 MR. O'NEIL: I don't think so, Your Honor.

15 Just as a housekeeping matter, do you have the transcript
16 of the Dawn Henderson testimony? It was exchanged between
17 counsel yesterday. We could mark it as Defendants' Exhibit 76
18 at this time unless you want to do it in the presence of the
19 jury. I don't really have a witness sponsoring it, but I think
20 it was agreed by the parties this is how --

21 THE COURT: That is correct. I will ask you, as you
22 just did, to simply hand it to the deputy clerk. Thank you.

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

24 (Defendant Exhibit No. 76
25 marked for identification.)

1 MR. RICHA: If I may, Your Honor, I just wanted to
2 bring to your attention, we had two witnesses that we reserved
3 as rebuttal witnesses. There's one witness that we intend to
4 call today as a rebuttal witness, Terrance Hawkins.

5 THE COURT: Is he here?

6 MR. RICHA: Yes, Your Honor.

7 MR. O'NEIL: Your Honor, should we be heard now on the
8 potential relevance of Mr. Hawkins' testimony, or do you want to
9 reserve that issue? I don't think he has any relevance.

10 THE COURT: I will ask the parties to address the
11 issue now so that we don't bring the jury in only to send them
12 back out.

13 Although, on the other hand, since you have no interest in
14 this discussion, Mr. Bayne, perhaps we will have the jury come
15 in; you will indicate, Ms. Glavich, that you have no further
16 questions; you, Mr. O'Neil, will indicate that you have no
17 redirect. I will then excuse you and the jury so that I can
18 hear your more extensive discussion concerning Mr. Hawkins.

19 Very well. We'll ask them to come in. Thank you.

20 May I ask whether the person who just took a seat is the
21 witness you expect to call?

22 MS. GLAVICH: No, Your Honor.

23 THE COURT: Thank you.

24 (Jury in at 1:53 p.m.)

25 THE COURT: Now, members of the jury, good afternoon.

1 I apologize for the delay in resuming. You will recall that
2 when we recessed, Ms. Glavich, on behalf of plaintiff, had begun
3 her cross-examination of Mr. Bayne.

4 Ms. Glavich.

5 MS. GLAVICH: Plaintiffs have no further questions
6 for Mr. Bayne.

7 THE COURT: Thank you, Ms. Glavich.

8 Mr. O'Neil, do you have redirect examination?

9 MR. O'NEIL: No, we don't, Your Honor.

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

11 Mr. Bayne, at this time the Court will excuse you.
12 You may step down.

13 THE WITNESS: Thank you so much.

14 THE COURT: If you have belongings in the courtroom,
15 please retrieve them.

16 THE WITNESS: Thank you.

17 (The witness steps down.)

18 THE COURT: Mr. O'Neil.

19 MR. O'NEIL: Defense rests, Your Honor.

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

21 Members of the jury, I know you'll wonder why I'm excusing
22 you since you just came into the courtroom. The defendant has
23 rested, and there are issues I must discuss with both counsel in
24 this circumstance before we do anything further. Rather than
25 require that you sit in place during what could be an extensive

1 bench conference, I think you would have more enjoyment of the
2 time if I again excuse you.

3 I will ask that you remain on this floor. I don't think
4 we'll need more than five or 10 minutes. If it appears that
5 it will take longer than that, I will ask the deputy clerk to
6 please let you know so that if you'd like to step downstairs,
7 for example, or go elsewhere in the building, you'll have that
8 opportunity. Thank you.

9 (Jury out at 1:56 p.m.)

10 THE COURT: Now, Mr. Richa, is it you who will argue
11 the motion?

12 MR. RICHA: Yes, Your Honor.

13 THE COURT: Very well. Are you ready to proceed?

14 MR. RICHA: Yes, Your Honor.

15 Plaintiff moves under Rule 50 for a -- file a motion for
16 directed verdict for judgment as a matter of law with regard to
17 all counts of the defendants' counterclaims. I'm going to go
18 through them, Your Honor, and I've tried to group them in a way
19 that I thought would make the most sense so that I'm not
20 repeating arguments. So I'm going to--

21 THE COURT: That's never stopped lawyers before.
22 You may proceed.

23 MR. RICHA: I'm going to start with Counts IV, V,
24 and VI of defendants' counterclaims, which are the tortious
25 interference with contractual relationships with Facebook,

1 Twitter, and YouTube. So those were separated into three
2 separate counts. They're all the same. They're all tortious
3 interference with contractual relationships with the various
4 social media providers.

5 And just generally, Your Honor, the defendants'
6 counterclaims we believe to be frivolous, and we believe most
7 of them, or at least all of them, should be disposed of at this
8 juncture. With regard to the tortious interference with
9 contractual relationship counts, the elements are that a legal
10 contract existed, that the defendants had knowledge of the
11 contract, that defendants' -- counter-defendants would
12 intentionally procure the contract's breach, and fourthly, that
13 damages resulted from the defendants' actions.

14 Of course, we don't dispute that a legal contract existed
15 and that Mr. Xereas had knowledge of the contract. However, we
16 don't believe that there's been evidence that has been presented
17 by the defendants with regard to the third element and the
18 fourth element, which are the procurement of the breach of
19 contract by Mr. Xereas, and then lastly the damages that
20 resulted from the breach.

21 Defendants attempt to blame Mr. Xereas for this, what they
22 deem social media sabotage, and even at the time they filed the
23 claims, Your Honor, they knew that Ms. Henderson was responsible
24 for the social media being taken offline.

25 Ms. Henderson testified that she was the one responsible

1 for taking down the social media sites. Ms. Heiss testified
2 that Ms. Henderson told her that she took down the social media
3 sites. The evidence has been presented that Mr. Xereas told the
4 defendants that Ms. Henderson took down the social media sites.

5 The only thing they've really presented as far as testimony
6 with regard to the social media sites is Mr. Dawson himself
7 testified that he found it suspicious that the social media
8 sites were taken down on the same day that plaintiff's brother
9 and plaintiff's friend were fired from the club, which also
10 leaves out the fact that Ms. Henderson, who was the person who
11 testified that she took down the social media sites, also had
12 her e-mails locked out that same day.

13 So one would also stand to reason that Ms. Henderson had a
14 motive, and she's also testified she was owed money at the time.
15 So on the same day that defendants disabled her e-mail accounts
16 and she was owed money, she's testified that she was responsible
17 for the social media sabotage.

18 THE COURT: I'm interrupting you for just a moment
19 because I would like to speak with the deputy clerk, please.
20 I believe that the deputy clerk should advise the jurors that
21 our recess will be -- or their recess will be until 2:30.

22 I grossly underestimated the time by stating that we would
23 need five to 10 minutes, but I realize that you have made an
24 effort to prepare to address each count in the first instance
25 by categories, and I do not want to cut you off or rush you.

1 I want to hear your full argument, I want to hear the
2 defendants' full response, and of course we still have the issue
3 concerning the remaining witness. So just so the jury won't sit
4 idly, I'm going to ask Ms. Lesley to tell them 2:30.

5 MR. RICHA: Thank you, Your Honor.

6 THE COURT: That way, if anybody needs to run to the
7 cafeteria or step outside, they've got plenty of time.

8 MR. RICHA: Thank you.

9 THE COURT: Now, please continue.

10 MR. RICHA: As I was saying, Your Honor, the evidence
11 that's been presented, Ms. Henderson has taken responsibility
12 for the social media issue, and Mr. Dawson's conspiracy theories
13 regarding plaintiff's involvement are not enough for a
14 reasonable jury to find that Mr. Xereas was indeed responsible
15 for the social media sabotage. So, based on the argument I've
16 just proffered, we believe that that's enough to dismiss that
17 count.

18 However, if for some reason Your Honor disagrees with me,
19 with regard to the fourth element, which is damages, there's
20 been no evidence with regard to damages that have been incurred
21 by defendants as a result of this alleged social media sabotage.
22 The social media was down for a very short period of time.

23 Mr. Robinson, defendants' witness, testified that the
24 ticketing system, which is the mechanism by which the company
25 generates its revenue, was not affected by the social media

1 sabotage. So losing the social media for a matter of days is
2 not going to affect the business in terms of finances, and
3 there's been no evidence presented with regard to any damages
4 sustained with regard to the social media.

5 There was one reference, Your Honor, with regard to the
6 defendants' hiring a investigator of some sort. There's been
7 no invoice presented as evidence, there's no line item on the
8 ledger showing that an investigator was hired; and needless to
9 say, even if they did hire an investigator, that has nothing to
10 do with regard to damages that resulted as a result of
11 Mr. Xereas's actions.

12 So, for those reasons, we believe Counts -- that no
13 reasonable jury could find for defendants on Counts IV, V, and
14 VI, and we believe IV, V, and VI should be dismissed for those
15 reasons.

16 And then the next, Count No. III and Count No. VII of
17 defendants' counterclaims, those are also tortious interference
18 counts. So the first one is tortious interference with existing
19 business and contractual relationships, which is exactly the
20 same count that I just addressed. However, this is a general
21 allegation, not specific to the social media.

22 The second is Count No. VII, which is tortious interference
23 with prospective business relationships, the only difference
24 being, Your Honor, that the second count, the prospective
25 business relationships, requires the existence of a valid

1 business relationship or expectancy as compared to an actual
2 contract.

3 They state in their complaint, Your Honor, the company and
4 the Riot Act club had contractual and business relationships
5 with customers, talent managers, agents, comics, vendors, other
6 members of the comedy industry, and other people in connection
7 with operating the business.

8 A tortious interference claim does require the establishment
9 of a specific contractual relationship, Your Honor, and basically
10 the way -- if we were to do it the way defendants would like us
11 to do it, any customer that went into the doors of Riot Act
12 would be considered a prospective business relationship. They
13 have not identified any specific business relationships other
14 than the ones I just addressed with regard to the social media,
15 which were pled separately.

16 THE COURT: If we put customers aside, what is
17 your argument with respect to the -- I'm looking right now
18 at paragraph 64 -- the other categories of individuals,
19 for example, talent managers, agents, comics, vendors, other
20 members of the comedy industry.

21 MR. RICHA: With regard to the first count, Count
22 No. III, they have not pled any specific relationship. They
23 have not said that there was a contractual relationship with
24 Party X, Person B, and that there does need to be a specific
25 relationship pled.

1 As a matter of fact, Your Honor, in the *Rockwell Med.,*
2 *Incorporated v. Yocum* case, the court stated that defendants
3 have to point to a specific contractual relationship that was
4 thwarted as a result of plaintiff's conduct. They have not
5 pointed to a single specific contractual relationship.

6 THE COURT: Do you have the citation?

7 MR. RICHA: That's 630 F.App'x 499. So without a
8 specific contractual relationship that anybody has testified to,
9 we believe Count III would need to be dismissed for that reason.

10 And following that same sort of argument, Your Honor, on
11 Count VII, the tortious interference with prospective business
12 relationships, that also requires some level of specificity, not
13 as much as Count No. III, but it still does require a level of
14 specificity that has not been met by defendants.

15 And the court stated in *Guttenberg v. Emery*, 41 F.Supp.3d
16 61 at page 73, the first element, which is the existence of a
17 valid business relationship or expectancy, the court held in the
18 *Guttenberg* case that that first element requires rather specific
19 business opportunities or contracts. And, again, they have not
20 listed any specific relationships.

21 As a matter of fact, Your Honor, in this case, there was a
22 tortious interference count that was pled by the plaintiffs, and
23 the plaintiffs' complaint used very similar language as the
24 defendants used in their counterclaims; and the court dismissed
25 plaintiffs' tortious interference claims, and they found that

1 plaintiff failed to state a claim for tortious interference
2 because he only generally alleged that defendants interfered
3 with his, quote, "'long standing business relationships' and his
4 'ability to maintain contracts and relationships, and continue
5 doing business' with 'current and prospective customers and
6 industry players.'" So, for the same reason plaintiffs' count
7 was dismissed, we believe it's appropriate to dismiss Count VII
8 for the same reason.

9 THE COURT: I assume you acknowledge that the court
10 must assess the two claims independently.

11 MR. RICHA: Yes, Your Honor. I understand --

12 THE COURT: In other words, the mere fact that the
13 court dismissed one does not necessarily mean that the court
14 must grant a Rule 50 motion as to another.

15 MR. RICHA: Understood. But the law that was
16 applicable, we would argue, is still applicable. They have
17 not -- they have failed to identify any specific relationships
18 with the required specificity for both of those counts, for
19 Count III and Count VII, as I said, other than they do identify
20 it with regard to the social media sites, which were IV, V, and
21 VI. But we would argue that those should be dismissed for the
22 reasons I've already stated.

23 And similarly, Your Honor, the reason I grouped these
24 together is the same arguments that I made for the social media
25 counts, which were Counts IV, V, and VI, we would make the same

1 arguments here, that there's been no evidence that Mr. Xereas
2 was responsible for the social media sabotage, that
3 Ms. Henderson has taken responsibility for it, that Ms. Heiss
4 has admitted that Ms. Henderson told her about it and so on and
5 so forth. So we would incorporate those same arguments here as
6 well.

7 The other item that Mr. O'Neil might bring up was there was
8 some testimony that Mr. Xereas pressured some individuals to not
9 perform at the club. However, there's been no evidence provided.
10 There's not a single comic that came and testified to that
11 effect. We've called comics. There's been no evidence on
12 cross-examination that anybody was told not to perform, and they
13 have provided no evidence whatsoever with regard to that claim.
14 So, for those reasons, again, we don't believe a reasonable jury
15 would find for the defendants with regard to those counts.

16 And then, finally, the last factual item that defendants
17 might bring up under this count, Your Honor, is that Mr. Xereas
18 contended that he personally owned the Riot Act trademark and
19 domain names and he threatened legal action. I feel the need to
20 address it, although I think it's a little bit of a nonsensical
21 argument, Your Honor.

22 Asserting somebody's legal rights is not a breach of a
23 duty of good -- I'm sorry -- is not a breach here. And using
24 defendants' logic, no business partner can take any action
25 against a business partner, and that basically that other

1 business partner would have no recourse.

2 But notwithstanding those arguments, Your Honor, the final
3 element, we're back to the damages argument. There's been no
4 damages. So, first of all, they didn't plead any party with
5 required specificity under these counts, and then they -- they
6 assert no damages. They talk about a forensic expert they
7 hired. No invoice was provided. There's nothing on the ledger
8 showing that a forensic expert was paid. So even if Your Honor
9 disagrees with the first arguments we made, based on the fact
10 that there's been no damages pled, we believe those counts
11 should be dismissed.

12 And then moving on, Your Honor -- and I grouped Count VIII
13 and Count IX together because those are just the conspiracy
14 charges with regard to the tortious interference counts. Count
15 VIII is conspiracy to tortiously interfere with existing
16 contractual relationships, and Count IX is conspiracy to
17 tortiously interfere with prospective business relationships.
18 And, again, we don't believe a reasonable jury could find for
19 defendants on the underlying claims, so we would argue that the
20 conspiracy claims fail for the same reason.

21 In the *Nyambal v. AlliedBarton Security Services, LLC* case,
22 which is 2016 U.S. District Lexis 8749 at page 13, the court
23 held that civil conspiracy is not an independent tort, but only
24 a means for establishing vicarious liability for an underlying
25 tort. And in the same case, quoting the *Nanko Shipping USA v.*

1 Alcoa case, the court held that if the underlying tort claim
2 fails, a conspiracy claim based on such a tort also fails.
3 So we believe we've made sufficient arguments to dismiss the
4 underlying cause of action, and for the same reason, those two
5 conspiracy counts should be dismissed.

6 Moving on to Count No. 1 in defendants' counterclaims,
7 which is breach of contract. Elements, obviously, for breach
8 of contract is that there's a valid contract, that there's an
9 obligation of duty arising out of that contract, there's a
10 breach of that duty, and then damages caused by the breach.

11 Again, one and two are met. We agree that there's a valid
12 contract, and there's an obligation and duties that arise out
13 of that contract. However, we don't believe that defendants
14 produced evidence regarding a breach of that duty and that there
15 were any damages caused by that breach.

16 And the section that's cited is 6.5 of the operating
17 agreement, which states that "The managing members shall devote
18 the time and energy necessary to promote and maintain adequately
19 the interests of the company." Defendants argue that plaintiff
20 violated that provision of the operating agreement by abandoning
21 the business and refusing to regularly perform his duties.

22 However, Your Honor, Mr. Xereas has testified that he was
23 at the business and continued working at the business after the
24 date in question. Mr. Sedrick Muhammed testified that he was at
25 the business and saw Mr. Xereas working at the business after

1 the date in question. We have entered e-mails into evidence
2 that show that Mr. Xereas was working during the time period
3 in question, and defendants' own testimony with regard to the
4 actions they took evidence the fact that Mr. Xereas was at the
5 place of business when they held these impromptu manager
6 meetings.

7 Eventually, on January 26th, the defendants have testified
8 that they locked Mr. Xereas out of his e-mail accounts, changed
9 the locks of the club, removed his management powers, assigned
10 those powers to Defendant Heiss, and then had a lawyer send
11 Mr. Xereas a letter telling him not to perform certain duties
12 because those duties were now assigned to Ms. Heiss.

13 So the evidence shows, Your Honor, that after the 26th,
14 they rendered Mr. Xereas unable to perform any duties, and then
15 subsequently removed him for not doing exactly what they told
16 him not to do. Given those facts, Your Honor, we don't believe
17 a reasonable jury could find for the defendants, and therefore a
18 directed verdict is appropriate.

19 And, again, Your Honor, even if you disagree with me on
20 those premises, we would argue that there's no evidence of
21 damages. Defendants did testify that they had to scramble and
22 get things together, but scrambling and getting things together,
23 having to get things together does not a damage claim make.
24 There's been no evidence with regard to any financial damages
25 incurred by the defendants as a result of this alleged breach.

1 So, for those reasons, we believe a reasonable jury could
2 not find for the defendants and that Count No. I of defendants'
3 counterclaim should be dismissed.

4 Moving on to Count No. II of the counterclaims, which is
5 breach of duty of good faith and fair dealing, the elements
6 there is that defendant owed plaintiff a fiduciary duty, that
7 defendant breached that duty, and thirdly, to the extent that
8 plaintiff seeks compensatory damages, that the breach proximately
9 caused an injury.

10 In this case, Your Honor, the Court held that, and I quote,
11 "Breach of implied duty of good faith and fair dealing is not an
12 independent cause of action when the allegations are identical
13 to other claims for relief under an established cause of action."

14 The allegations under the breach of duty of good faith and
15 fair dealing that defendants make they would have recourse under
16 breach of contract, although, as I just argued, we think the
17 breach of contract claim should be dismissed nonetheless.

18 But, for example, the 6.5 breach that I discussed with
19 regard to plaintiff using reasonable time and energy to devote
20 to the business would not be able to be asserted under breach
21 of duty of good faith and fair dealing since it's a separate
22 contractual provision.

23 A lot of these arguments I've already addressed, which
24 is why I tried to structure it this way, Your Honor. As far
25 as abandoning the business, I've already touched on what the

1 evidence so far has shown and the defendants' inability to meet
2 the elements that they're required to meet in order for the
3 claim to survive. And then a lot of these other actions as far
4 as pressuring comics, participating in an alleged scheme with
5 regard to social media, they have separate breach of contract
6 remedies available to them.

7 And, finally, they state that plaintiff made disparaging
8 statements about defendants on social media, to the press, to
9 people in the comedy industry. Again, there's been -- the only
10 thing that they've presented is -- through the testimony today
11 was the social media post where Mr. Xereas was letting investors
12 know that there was a lawsuit, and we would argue that's not
13 disparaging. That's him simply letting investors in the same
14 company that he is an investor in and know what's going on with
15 regard to their investment.

16 And, again, as is the pattern, there's no damages, Your
17 Honor. There's no damages that have been pled. There's been no
18 evidence that's been offered into evidence that ties the alleged
19 wrongdoing of the plaintiff to specific damages that were
20 incurred by the defendants as a result of that breach.

21 THE COURT: May I interrupt just one moment --

22 MR. RICHA: Of course, Your Honor.

23 THE COURT: -- to ask a question concerning something
24 you just stated? You characterized Mr. Xereas as an investor
25 in the club. On what is that characterization based?

1 MR. RICHA: Well, he's a managing member, and he
2 invested money into the operation. So he's -- there's two tiers
3 of membership, Class A and Class B. Class A would be the
4 managing members, and Class B would be all the other investors
5 who are not -- who don't have management authority. So as a
6 pool, they all make up -- they're all members/investors, of
7 course, with the parties here having management authority, which
8 the other Class B members do not have.

9 THE COURT: You may continue.

10 MR. RICHA: And then moving on, Your Honor, to Count X
11 of defendants' counterclaims, which is the breach of fiduciary
12 duty of loyalty and care, the elements there is that Mr. Xereas
13 owed defendants a fiduciary duty, that Mr. Xereas breached the
14 duty, and that the breach proximately caused injury.

15 Again, we don't dispute that there's a fiduciary duty owed,
16 but there's been no evidence to support the fact that Mr. Xereas
17 breached that duty or that there were damages that resulted or
18 that were causally related to that breach.

19 And Your Honor, during the summary judgment phase of this
20 case, stated that -- and I understand it's not necessarily
21 dispositive, but I think it's worth noting that Your Honor
22 stated that the Court need not delve into the intricacies of the
23 plaintiff's relationship with defendants Dawson and Heiss since
24 it is clear that a special confidential relationship
25 transcending an ordinary business transaction did not take

1 place.

2 Let me correct my previous statement if I may. So based
3 on that representation, we would say that there was no fiduciary
4 duty owed above and beyond the ordinary contractual relationship
5 that existed, and then we go back to address the merits.

6 It's the same arguments I've already made, Your Honor,
7 about abandoning the business and what the evidence shows
8 regarding that. The scheme with regard to the social media,
9 I've already addressed that. Pressuring individuals not to
10 perform at the club, I've already addressed that, and also
11 asserting his ownership in the Riot Act trademark, which I've
12 already addressed.

13 So, for all those reasons, we don't believe the second
14 element is fulfilled and that no reasonable jury could find for
15 the defendants with regard to Count X.

16 However, again, if Your Honor disagrees with me, we're back
17 to the damage argument. They have not provided any evidence
18 with regard to any damages, specific damages, that they incurred
19 as a result of plaintiff's actions or tied those damages to
20 plaintiff's actions, and for that reason, Count X should be
21 dismissed.

22 We're almost done, Your Honor. Count XI is the
23 violation of the Computer Fraud and Abuse Act. Under Section
24 1030(a)(2)(C) of the Computer Fraud and Abuse Act, it states
25 that it's unlawful to intentionally access a computer without

1 authorization or to exceed authorized access and thereby obtain
2 information from any protected computer.

3 The evidence shows that Mr. Xereas had authorized access at
4 the time, as did Ms. Henderson. The two of them had authorized
5 access. So he could not have exceeded his authorized access
6 since he had that authorized access, and the access was not
7 unauthorized and certainly did not exceed authorized access.
8 So, for that reason, we don't -- the defendants don't meet the
9 elements of the statute, and a reasonable jury would not be able
10 to find for the defendants.

11 Defendants presented no facts or evidence that Mr. Xereas
12 accessed a computer that he did not have authorization to
13 access. Defendants presented no facts that plaintiff obtained
14 information from any "protected computer." Lastly, defendants
15 have presented no facts that they suffered any injury as a
16 result of the alleged actions of the plaintiff, and that goes
17 back to the same argument I made with regard to damages as it
18 relates to the alleged social media sabotage.

19 And again, finally, Your Honor, if you disagree with us
20 with regard to everything I just stated, again, there's been no
21 damages pled to show that plaintiff's actions resulted in
22 defendants incurring any damages.

23 Finally, No. XII is conspiracy to violate the statute that
24 I just addressed, conspiracy to violate the Computer Fraud and
25 Abuse Act, and for the same argument I made with regard to the

1 tortious interference conspiracy counts, since the underlying
2 claim with regard to the Computer Fraud and Abuse Act fails,
3 then we would argue that the conspiracy claims also fail for
4 the same reasons.

5 And finally, the last one, Your Honor, is No. XIII, is
6 conversion. And the only point on that one is the defendants --
7 the counterclaim discusses a laptop computer, and the evidence
8 here that's been presented discusses a laptop computer.

9 However, there's no evidence that Mr. Xereas has a laptop
10 computer. He testified to a desktop computer. So based on the
11 fact that the pleadings are not sufficiently pled correctly, we
12 would argue that XIII should be dismissed as well.

13 Nothing further, Your Honor, on that.

14 THE COURT: Am I correct in my assumption, Mr. Richa,
15 that you acknowledge that Mr. Xereas's own testimony is that
16 to this day he maintains the computer purchased for his use in
17 connection with the club's operations?

18 MR. RICHA: Yes, Your Honor. And in the alternative,
19 if you're not inclined --

20 THE COURT: Are you suggesting that the only infirmity
21 as to Count XIII is that the computer is described as a laptop?

22 MR. RICHA: Correct, Your Honor. And in the
23 alternative, Your Honor, if you're not inclined to dismiss that
24 count for that reason, we would be willing to stipulate or make
25 a payment to defendants for the fair market value of said

1 computer.

2 THE COURT: When?

3 MR. RICHA: We have some printouts currently that we
4 could share and we --

5 THE COURT: I'm sorry?

6 MR. RICHA: We could do it today, Your Honor.

7 THE COURT: What are you calling "fair market value"?

8 MR. RICHA: We have some printouts off the Internet
9 of same exact model and what it was selling for. I mean, the
10 computer was purchased a long time ago, so it's obviously not
11 worth the same price it was at the time it was purchased.

12 THE COURT: Is this something you've discussed with
13 Mr. O'Neil?

14 MR. RICHA: I have not yet, Your Honor, no.

15 THE COURT: Thank you, Mr. Richa.

16 MR. RICHA: Thank you, Your Honor.

17 MR. O'NEIL: Thank you, Your Honor. Just briefly.
18 There's been ample evidence submitted into the record about the
19 damages defendants have suffered as the result of Mr. Xereas's
20 actions: approximately a million dollars that the company
21 incurred pursuant to the indemnity obligation that it entered
22 into when the contract was signed; Mr. Dawson testified about
23 \$50,000 in cost that the company incurred during the time that
24 Mr. Xereas walked out on the company and they still tried to
25 operate it as a comedy club; and about \$200,000 -- both

1 Mr. Dawson and Mr. Bayne sponsored an exhibit today that
2 estimated the cost of rebranding the company as a result of
3 getting out of the comedy business at \$200,000. So I think all
4 of those damages are relevant and probative of the claims made
5 by defendants in their counterclaims.

6 While I'm tempted to take them in the same order as
7 Mr. Richa, clearly, on the breach of contract, Your Honor,
8 there's been ample evidence entered into the record that
9 Mr. Xereas did not dedicate the required time and resources
10 pursuant to paragraph 6.5 of the contract. In fact, a finding
11 to that effect was the reason for his removal as a managing
12 member.

13 But if you look at Defendants' Exhibit 28, there's page
14 after page of recitations of the evidence that defendants are
15 relying upon to conclude that Mr. Xereas breached the contract.
16 So I think, clearly, there are questions of fact underlying
17 those claims that need to be resolved by the jury.

18 In fact, an underlying question of fact that kind of goes
19 to all of these counts is whether in fact Mr. Xereas contributed
20 whatever trademark rights he had in the term "Riot Act" to the
21 company at its origin. Both Ms. Heiss and Mr. Dawson testified
22 that on numerous occasions he was asked and double-checked and
23 confirmed that it was his intention to contribute whatever
24 rights he had to the term "Riot Act." And if the jury makes a
25 finding in that respect, Your Honor, then I think such a finding

1 would be relevant to all of the counterclaims, particularly the
2 breach of contract, the breach of fiduciary duty, the good faith
3 and fair dealing counts, and potentially also the conspiracy
4 counts.

5 With respect to the tortious interference, Your Honor,
6 they focus on the fact that Ms. Henderson admitted to performing
7 the acts that took down the social media. What they leave out
8 is that she acknowledged that she had a conversation with
9 Mr. Xereas on the phone shortly before that, that the activities
10 were done shortly after Mr. Xereas stormed out of the club,
11 yelling obscenities at his partners.

12 So I think there's a question of fact there for the jury.
13 There's enough circumstantial evidence there to present it to
14 the jury and let them decide whether they believe the facts
15 support a conclusion that Mr. Xereas was involved with
16 Ms. Henderson in doing this or ordering it. The jury could make
17 the determination that Ms. Henderson wouldn't act on her own but
18 is much more likely to act on plaintiff's instruction. So I
19 think there's sufficient evidence submitted into the record,
20 Your Honor, to allow that question to go to the jury.

21 The same is true of the tortious interference -- well,
22 those are the tortious interference. The conspiracy, there was
23 evidence put in this morning about comics saying that, because
24 of Mr. Xereas's efforts to publicize his dispute with his
25 partners, that comics refused to perform at the club no matter

1 what the cost. Mr. Bayne testified specifically about Wyatt
2 Cenac and the problems they had in negotiating a deal with him.
3 So there's ample evidence in the record to allow those claims to
4 go to the jury.

5 And the conversion claim, Your Honor, I think is very
6 straightforward, as your questions revealed. They've never said
7 anything to us about giving us the present value of the computer
8 six years into the litigation. Why don't they give us the
9 present value of the computer when he took it?

10 This idea that the counterclaim says "laptop" computer is
11 a ruse that he's been relying upon for eight years. So, you
12 know, if I need to make a motion to amend my counterclaim to
13 remove the word "laptop," I guess I could submit that to the
14 Court before the case goes to the jury.

15 But we think there's ample evidence that the jury could
16 conclude that Mr. Xereas wrongly took property of the company
17 and refused to return it. Simply because eight years has passed
18 and it's worth less than it was when we bought it shouldn't be
19 determinative. We don't really need or want the check; we want
20 the computer back. So I think under plaintiff's own arguments,
21 there's ample evidence to go forward with the conversion claim.

22 Finally, on the Computer Fraud and Abuse Act, again,
23 there's a jury question as to whether Ms. Henderson had any
24 authorization to go on any of the company sites. The testimony
25 is that she was terminated on September 21st. She makes a

1 twisted and confused argument that she was somehow an independent
2 contractor who never turned in her time and was never paid. So
3 I think there is questions of fact for the jury there that needs
4 to be determined before we can address the Computer Fraud and
5 Abuse Act.

6 Again, acting in conspiracy, clearly there's questions
7 whether she had any authorized access to the social media sites.
8 The social media sites are computers under the act. If the jury
9 determines that she wasn't an employee or independent contractor
10 at the time, then clearly she exceeded her authorization.

11 So we think, Your Honor, on all of the counts of the
12 counterclaim, we've put in substantial evidence that supports at
13 least those claims going to the jury for factual determinations.

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

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

16 THE COURT: Mr. Richa, do you wish a reply?

17 MR. RICHA: Very briefly, Your Honor. Just three
18 points that Mr. O'Neil made.

19 One is this reliance the defendants are making on this
20 indemnity clause and them incurring legal fees. Incurring legal
21 fees to defend yourself from wrongful actions that you took does
22 not make a claim for damages. We're here because we have claims
23 that have survived summary judgment, and clearly we have basis
24 for those claims. So their incurring of attorney's fees does
25 not create damages under any of the causes of action that they

1 pled in their counterclaims.

2 Secondly, with regard to not working after a certain date,
3 assuming arguendo that everything defendants state is true,
4 there's been testimony that allegedly this comedy model did
5 not work in the space. Multiple people on the defendants'
6 case-in-chief testified that the comedy model did not work in
7 the space, so clearly they had to incur some costs with regard
8 to rebrand and changing that model.

9 However, to then turn around and try to pin the costs for
10 that rebrand and try to draw some nexus of causation between
11 plaintiff's wrongdoing and the damages incurred by the
12 defendants is completely disingenuous.

13 And finally, Your Honor, with regard to the tortious
14 interference claim, again, Mr. O'Neil focused on the fact that
15 we were focused on the fact that Ms. Henderson testified that
16 she was responsible for the social media.

17 But beyond that, Your Honor, since she has testified that
18 she's responsible for it, then the defendants are basically left
19 with a conspiracy claim because they're essentially arguing that
20 Mr. Xereas conspired with the person who testified that they
21 were responsible for the action, and a conspiracy claim cannot
22 rest on conspiracy theories. Like there needs to be an
23 actual -- the elements for a conspiracy claim is that there was
24 some meeting of the minds, and those minds or conglomerate of
25 minds took some action in furtherance of a common scheme.

1 There's been no testimony that Mr. Xereas conspired with
2 Ms. Henderson, that they had any conversations, that they
3 discussed this scheme. And even if they did discuss it, they
4 would have had to present evidence that Mr. Xereas and
5 Ms. Henderson took actions in furtherance of that scheme, and
6 none of that has been presented by defendants.

7 So, for all those reasons, we continue to assert that all
8 of their claims should be dismissed.

9 THE COURT: Thank you very much, Mr. Richa.

10 We will take a brief recess so that I can review the
11 authorities that you cited, Mr. Richa.

12 MR. RICHA: Thank you, Your Honor.

13 THE COURT: I will suggest we plan to reconvene at
14 3:00. I will ask Ms. Lesley to please advise the jurors that
15 they may have another 20 minutes. You may remain seated.

16 (Recess from 2:37 p.m. to 3:20 p.m.)

17 THE COURT: We're back on the record. After very
18 careful consideration of the motion for judgment made by counsel
19 for plaintiff and, of course, the opposition thereto by counsel
20 for the defendants, the Court has considered your arguments,
21 reviewed the authorities that you cited and now rules as
22 follows:

23 The motion is granted as to Counts IV, V, VI, VIII, IX, XI,
24 and XII. However, the motion is denied as to Counts I, II, III,
25 VII, X, and finally XIII.

1 As to Counts I, II, III, VII, X, and XIII, the Court finds
2 that there is abundant evidence in the record from which a
3 reasonable jury could find in favor of the defendants.

4 Our next order of business is that I will hear from you
5 first, Mr. O'Neil, then from you, Mr. Richa, if it is indeed you
6 who will address the question regarding -- and maybe I should
7 hear from you first, Mr. Richa, concerning your request to call
8 Mr. Hawkins.

9 MR. RICHA: Yes, Your Honor. Is the question just as
10 to the relevancy of his testimony?

11 THE COURT: Yes.

12 MR. RICHA: Mr. Hawkins --

13 THE COURT: Perhaps you can describe generally what
14 it is you intend to elicit.

15 MR. RICHA: Sure, Your Honor. Mr. Hawkins was an
16 employee of the defendant LLC, so he has some knowledge
17 regarding the parties, and Mr. Hawkins will testify that
18 Mr. Xereas continued to work during the time period when
19 defendants claim that he did not work. So there will be a
20 defense to that counterclaim.

21 THE COURT: Will he be able to refer to dates?

22 MR. RICHA: To some extent, yes, including a specific
23 meeting during the time period during which defendants state
24 that plaintiff was taking actions to hurt the company.
25 Mr. Hawkins was actually present at a meeting wherein Mr. Xereas

1 sort of rallied the troops and spoke about the Riot Act business
2 and told everybody to continue working hard and so on and so
3 forth.

4 Additionally, he's also a stand-up comedian, and defendants
5 allege that Mr. Xereas told various standup comics not to
6 perform, and he would testify that Mr. Xereas never told him
7 that and never encouraged that.

8 THE COURT: I assume you would ask a direct question
9 concerning whether Mr. Xereas told him.

10 MR. RICHA: Yes, Your Honor.

11 THE COURT: In other words, Mr. Hawkins, as opposed
12 to whether Mr. Xereas told other people.

13 MR. RICHA: Yes, Your Honor.

14 THE COURT: Very well.

15 MR. RICHA: Thank you.

16 THE COURT: Mr. O'Neil.

17 MR. O'NEIL: Your Honor, if Mr. Hawkins can testify
18 as to Mr. Xereas's work in February and March where we've
19 presented evidence that he wasn't working, their last witness
20 just got up and said he worked after his brother got fired. And
21 there's plenty of evidence, even evidence presented by us, that,
22 yes, he did respond to a few e-mails in January, and, yes, he
23 did pick up the phone a couple times when calls were made. But
24 that ended, we've always said, seven to 10 days after the events
25 in question about the 19th with the first management meeting.

1 So if he's just going to come in and say, I was there in
2 January and I saw John there, then there's no additional
3 relevance to his testimony.

4 THE COURT: I assumed you meant February, beginning
5 in February, Mr. Richa?

6 MR. RICHA: I'm not certain that Mr. Hawkins recalls
7 specific dates, Your Honor, but --

8 THE COURT: I think we need to clarify that before we
9 have the jury come in. The reason I say that is if your stated
10 purpose for wishing to call Mr. Hawkins as a rebuttal witness
11 is to show that Mr. Xereas continued to work since there is no
12 dispute that Mr. Xereas -- or perhaps I should say, since the
13 only dispute concerning whether or not Mr. Xereas was working
14 would be for a period -- and I cannot fix a date, I will simply
15 say beginning in February. If Mr. Hawkins can't pin down a time
16 period, or if what he recalls clearly happened in January, then
17 it would appear that there would be no relevance to his
18 testimony. Would you agree?

19 MR. RICHA: No, Your Honor. Actually, for two
20 reasons. One, I believe --

21 THE COURT: For what period of time was Mr. Hawkins
22 employed?

23 MR. RICHA: Until -- definitely after Mr. Xereas was
24 removed as a managing member.

25 THE COURT: So beginning from the opening of the club?

1 MR. RICHA: Yes. Yes. He was hired two weeks,
2 I believe, before the soft opening of the club.

3 The other point, Your Honor, part of it is the fact that
4 he continued to work during those time periods, but also --

5 THE COURT: It will also be incumbent -- I apologize
6 for continuing to interrupt you. I just do not want us to lose
7 sight of this. The term "work" has been subject to varying
8 interpretations by all of you throughout these proceedings.
9 So I think the best way to determine when Mr. Hawkins saw
10 Mr. Xereas and what Mr. Xereas was doing is to ask Mr. Hawkins
11 to come in so he can testify --

12 MR. RICHA: Thank you, Your Honor.

13 THE COURT: -- out of the presence of the jury.

14 MR. RICHA: Oh. If I may add one thing then, Your
15 Honor? In addition to the work issue, defendants' allegation --

16 THE COURT: In other words, the issue is was
17 Mr. Xereas present or in what activities was he engaged while
18 he was present, what did Mr. Hawkins see Mr. Xereas do.

19 MR. RICHA: If I may also interject one point, Your
20 Honor? A lot of the defendants' counterclaims are based on
21 Mr. Xereas taking actions to hurt the company. A very important
22 point to Mr. Hawkins' testimony is the fact that he was present
23 during meetings that Mr. Xereas held where he encouraged
24 everybody to continue working hard. He talked about the Riot
25 Act trademark. He can testify --

1 THE COURT: At what time?

2 MR. RICHA: That meeting in particular was January
3 19th. But we think that's very relevant, Your Honor, because
4 it was two days after the firings at a time when Mr. Xereas was
5 probably at his most emotional, and at that point he was still
6 protecting the Riot Act trademark.

7 THE COURT: Let's ask Mr. Hawkins to come in, because
8 I imagine the two of you will continue to dispute what it is
9 Mr. Hawkins actually observed.

10 MR. RICHA: Okay.

11 (Counsel retrieves witness.)

12 THE COURT: Good afternoon, sir.

13 THE WITNESS: How are you?

14 THE COURT: Fine, thank you. Please step forward
15 to the witness chair. Thank you. And before you take a seat,
16 I will ask you to face the deputy clerk of court to be sworn.
17 Thank you.

18 TERRANCE HAWKINS, REBUTTAL WITNESS FOR PLAINTIFF, SWORN

19 MR. RICHA: Your Honor, you just want me to elicit
20 testimony with regard to that specific point we discussed.
21 Correct?

22 THE COURT: Yes.

23 VOIR DIRE DIRECT EXAMINATION

24 BY MR. RICHA:

25 Q. Good morning, Mr. Hawkins. Can you tell us during what

1 time period -- let me back up. On January 19th, Ted Xereas and
2 Michael Farfel were fired from the club. Are you aware of that?

3 A. Yes.

4 Q. Did you see Mr. Xereas continue to show up at the club and
5 perform his normal work duties after that date?

6 A. Yes.

7 Q. Did you see Mr. Xereas continue to show up at the club and
8 perform his work duties in February of 2012?

9 A. Yes.

10 Q. Did you see --

11 MR. RICHA: Nothing further, Your Honor.

12 THE COURT: Did you intend to ask about March?

13 MR. RICHA: I thought, assuming he testified about
14 February, that would be sufficient.

15 THE COURT: You may ask about March.

16 MR. RICHA: Okay.

17 BY MR. RICHA:

18 Q. Did you see Mr. Xereas show up at the club and perform work
19 duties in March of 2012?

20 A. Yes.

21 MR. RICHA: Nothing further, Your Honor.

22 THE COURT: Thank you, Mr. Richa. Mr. O'Neil?

23 VOIR DIRE CROSS-EXAMINATION

24 BY MR. O'NEIL:

25 Q. Thank you, Mr. Hawkins. You were an employee of the club

1 in February of 2012?

2 A. Yes.

3 Q. And what was your job?

4 A. I was the head guy at the theater, the theater entrance.
5 I was the main host.

6 Q. Greeting people as they came in?

7 A. Yes.

8 Q. And when you say you saw Mr. Xereas at the club, what was
9 he doing?

10 A. He would be helping people get seated, running around
11 making sure everything was done, what I saw him do every other
12 day that he was at the club.

13 Q. And this was in February of 2012?

14 A. Yes.

15 Q. And in March?

16 A. Yes.

17 Q. Did you see him there in April?

18 A. I wasn't there in April. I got let go in March.

19 Q. What day in March did you get let go?

20 A. I can't recall the exact day.

21 MR. O'NEIL: I have nothing further at this point,
22 Your Honor.

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

24 Are we ready for the jury?

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

1 THE COURT: Sir, you may stay where you are.

2 Thank you.

3 (Jury in at 3:34 p.m.)

4 THE COURT: Members of the jury, thank you again for
5 bearing with us. You have been patient throughout these delays.
6 You may have a seat. As you know, the defendants rested their
7 case. The plaintiff will now call the plaintiff's final
8 witness. The plaintiff is permitted to do so under the rules.
9 You may regard the witness as what we sometimes call a rebuttal
10 witness. To save time for you, the witness is already on the
11 witness stand and Mr. Richa is ready to proceed.

12 MR. RICHA: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. RICHA:

15 Q. Good afternoon, Mr. Hawkins.

16 THE COURT: And I should also note -- thank you for
17 reminding me, Ms. Lesley -- the witness has already been sworn.

18 BY MR. RICHA:

19 Q. We're going to start with some background information,
20 Mr. Hawkins. First, please state your name for the Court.

21 A. Terrance Corey Hawkins.

22 Q. Can you tell us a little bit about your educational
23 background?

24 A. I have two and a half years of college, up to two and a
25 half years of college.

1 Q. And what did you do after college?

2 A. Went into the United States Marine Corps.

3 Q. And how long were you enlisted with the U.S. Marine Corps?

4 A. Nine years.

5 Q. Thank you for your service. What is your current
6 employment?

7 A. I am a current working stand-up comic and actor.

8 Q. And when did you first meet Mr. Xereas?

9 A. Maybe a few weeks before the club opened.

10 Q. And by "the club," you're talking about the Riot Act --

11 A. Riot Act Comedy Theater.

12 Q. And were you eventually hired to work for Riot Act Comedy
13 Theater?

14 A. Yes.

15 Q. And what was your position with Riot Act Comedy Theater?

16 A. I was a main host, like the theater maître d'.

17 Q. And during the course of your employment, did you have a
18 chance to observe Mr. Xereas acting in his capacity as a manager
19 of the club?

20 A. Yes.

21 Q. And can you tell us a little bit about your impressions
22 regarding Mr. Xereas as a manager?

23 A. He was good as a manager. His relationship with everybody
24 that worked for him was very easy to approach, easy to talk to.
25 When it came down to work, he worked more as a worker bee than a

1 manager because he was running around getting drinks, seating
2 people, greeting people, making sure that the comics that came
3 in were taken care of. He was just all over the place, sweating.

4 Q. How did Mr. Xereas interact with other staff and comedians?

5 A. Everything was on the up-and-up. It was like very
6 cheerful, good. It was always, like, good to see him, good to
7 be around him.

8 Q. Did you ever observe Mr. Xereas acting or speaking
9 unprofessionally or inappropriately?

10 A. No.

11 Q. Who is Matt Morinello?

12 A. Matt Morinello was the food and beverage, I guess, like --
13 something like the head person in charge of like the servers.
14 So I would call him like the general manager of the servers.

15 Q. And did you have an opportunity to observe Mr. Morinello
16 acting in his capacity as an employee of Riot Act Comedy Theater?

17 A. Yeah.

18 Q. And what can you tell the jury about Mr. Morinello?

19 A. He -- he was a little standoffish, a little arrogant.
20 Kind of like real snappy. Would talk down to you. Very
21 condescending in his speaking.

22 Q. Were you still working for Riot Act Comedy Theater when Ted
23 Xereas and Michael Farfel were terminated?

24 A. Yes. It kind of caught me by surprise that they were even
25 terminated. The night prior to them being terminated, we were

1 only operation from --

2 THE COURT: Mr. Hawkins, let me ask you to wait,
3 please, until Mr. Richa asks his next question.

4 THE WITNESS: Yes, ma'am.

5 THE COURT: Thank you.

6 BY MR. RICHA:

7 Q. You testified that you were surprised. Why were you
8 surprised?

9 A. Because of the way that things were going at the club.
10 When Riot Act opened, it was like a breath of fresh air to the
11 comedy world in Washington, D.C. Me being a standup comic,
12 working at a comedy club, it was amazing because we had great
13 acts coming in, we had a full house almost --

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

16 (Bench conference.)

17 THE COURT: We're far afield -- we're straying far
18 afield from the limited area of inquiry which you said -- that
19 you, Mr. Richa, said would be the subject of Mr. Hawkins'
20 testimony. I anticipated an objection on at least two prior
21 lines of questioning. There was none, and I did not call you
22 to the bench.

23 The first was Mr. Hawkins' impressions of Mr. Xereas'
24 management style. That was not a purpose for which you
25 indicated Mr. Hawkins would be called.

1 The second, which is of no conceivable relevance, is
2 Mr. Hawkins' impressions of Mr. Matt Morinello. But, again, in
3 hopes that you were moving along to whether or not Mr. Hawkins
4 saw Mr. Xereas in February, I did not want to delay the matter,
5 but we're now running far afield of the area.

6 I cannot permit Mr. Hawkins to simply offer a narrative
7 account of what he thought of the club, what he thought of
8 Mr. Xereas, what he thought of Mr. Morinello. We just cannot --
9 I cannot allow that.

10 MR. RICHA: If I may, Your Honor, to the contrary, I
11 thought it was rebuttal because there was testimony about those
12 things on the other side.

13 THE COURT: You thought it was proper rebuttal to ask
14 Mr. Hawkins what he thought of Matt Morinello?

15 MR. RICHA: Yeah, I did, because there was testimony
16 on their end. But I was getting to that -- that was actually my
17 very next question.

18 THE COURT: Let me ask you to please move to the
19 relevant period.

20 MR. RICHA: I will. Okay.

21 THE COURT: Indeed, the testimony about whether --
22 Mr. Hawkins' testimony concerning whether he was surprised that
23 Mr. Xereas' brother and college roommate were fired, this was
24 not what you said would be elicited.

25 MR. RICHA: Okay.

1 MR. O'NEIL: Your Honor, I'm being forced to object
2 constantly, and it's a concern. I know you've noted other
3 areas. My concern in front of the jury is that I'm being forced
4 to object to every question they ask because they never ask any
5 relevant questions.

6 THE COURT: Are you prepared to get directly to the
7 point, Mr. Richa?

8 MR. RICHA: Yes.

9 THE COURT: If not, I'll have to call everyone back.

10 MR. RICHA: I will, Your Honor.

11 (End of bench conference.)

12 BY MR. RICHA:

13 Q. I was starting to ask you, Mr. Hawkins, about January 17th,
14 which is when Ted Xereas and Michael Farfel were terminated from
15 Riot Act. After they were terminated, did you see John continue
16 to come to the club and perform his work duties?

17 A. Yes.

18 Q. And did you see him perform his -- when was the first time
19 you saw Mr. Xereas after the January 17th firings?

20 A. The same day when we came to work. That was on a Tuesday.
21 The club was closed on a Monday. We had a show that night, two
22 sold-out shows, and then the next day we all came to work; and
23 when we came to work, that was when Ted was let go.

24 Q. Okay. The first time you saw Mr. Xereas after the firings,
25 were you present at a meeting that Mr. Xereas had with the

1 staff?

2 A. It was not -- it was a meeting, but it was like the
3 pre-shift that we do every day before we start. And it was --
4 I saw him there.

5 Q. And what was discussed at that meeting?

6 A. This is Riot Act, we're still going to act as Riot Act
7 no matter what goes on, who's here, who's not here. This is
8 Riot Act and our job is to put on good shows and take care of
9 all the customers that come in.

10 Q. Did you see Mr. Xereas continue to show up at the club
11 and work in February of 2012?

12 A. Yes.

13 Q. Did you see Mr. Xereas continue to show up at the club
14 and work in March of 2012?

15 A. Yes.

16 Q. Did Mr. Xereas at any time tell you not to perform at
17 Riot Act?

18 A. No.

19 MR. RICHA: I have nothing further, Your Honor.

20 THE COURT: Thank you very much, Mr. Richa.

21 Mr. O'Neil, you may cross-examine.

22 CROSS-EXAMINATION

23 BY MR. O'NEIL:

24 Q. Thank you, Mr. Hawkins. You said your job at Riot Act
25 was at the door, kind of a maître d', greeting customers?

1 A. Yes.

2 Q. During February of 2012, did you see John Xereas book any
3 comics to perform at the club?

4 A. I don't understand the question. Did I see him book any
5 comics?

6 Q. Yes.

7 A. Comics were coming to the club, so all of the comics that
8 were coming to the club were coming to the club because of John.
9 He was the one that had --

10 Q. My question was did you see him book any comics to perform
11 at the club -- during February of 2012, did you see him book any
12 comics for future dates?

13 A. I don't know how to answer that question because that's --
14 I didn't see him book anybody in October, but all of the comics
15 that came to the comedy club were there because of John. John
16 was the one that had the relationship with every comic that came
17 there, from Dick Gregory to Paul Mooney --

18 MR. O'NEIL: I'll ask to strike the answer, Your Honor.

19 THE COURT: Let me ask you to ask your next question,
20 please.

21 BY MR. O'NEIL:

22 Q. Mr. Hawkins, did you see John Xereas in February execute
23 any contracts with comedians or their agents for future
24 performances at the club?

25 A. I don't know how to answer that question.

1 Q. Well, if that was part of his job, did you see him doing
2 that part of his job?

3 A. When I would see John working, it would be downstairs
4 during the show time. If that was to be taking place, that
5 would be during the time before I would have got to work.

6 Q. So you didn't see it? You don't know if he booked any
7 comics in February?

8 A. I would say -- my answer to that would be, if there was a
9 comic that came to the club, came to Riot Act Comedy Theater at
10 any time, it was because of John. Now, I didn't see him write
11 any contracts or make any phone calls, no. But me knowing John
12 and his affiliation with the comedy club, if there was a comic
13 that came there, it was because of him.

14 Q. Do you know if anybody else ever booked comics at the club?

15 A. I received a call after I was let go by Peter Bayne to get
16 me to come to the club.

17 Q. Did you agree to perform there?

18 A. Under the conditions that he was offering me, no.

19 Q. And you said you also saw John at the club while it was
20 open in February-March of 2012. Does that mean he wasn't locked
21 out?

22 A. What do you mean, locked out?

23 Q. I mean was he given access to the club?

24 A. We all had access to the club.

25 Q. Okay. What were the circumstances of you leaving Riot Act?

1 A. I was called by Peter Bayne, and he said that what I did
2 in the showroom wasn't acceptable and I was no longer employed
3 there.

4 Q. Do you know what he was referring to when he said what you
5 were doing in the showroom?

6 A. Yeah.

7 Q. What was it?

8 A. I was in a stage play, and the theater normally opened at
9 four o'clock. I got there around 3:00, 3:15, and I approached
10 Ms. Heiss and asked her could I use the showroom prior to the
11 showroom opening; I have a play rehearsal. I just wanted to go
12 up and use the stage and run lines, and she agreed to allow me
13 to do that.

14 Once we started to run lines and do that -- I can't
15 remember his name; I know he's John -- I don't know, John,
16 gray-haired guy, came in, and he was in the back of the
17 showroom. He stood there for maybe three to five minutes,
18 caught some dialogue, and then he left.

19 Then, after we finished our rehearsal, I was approached by
20 Peter Bayne, and then he was like, man, you shouldn't have done
21 that. And I was like, done what? You should have, like,
22 cleared that with somebody. And I said I spoke with Marjorie,
23 so it was cleared. And that was it. I worked that day.

24 The next day I was due to come in, and I was called on
25 the phone by Peter Bayne, and he pretty much let me go over the

1 telephone. He didn't even let me come into work.

2 Q. And your employment was terminated at that point?

3 A. At that time.

4 MR. O'NEIL: Thank you, Your Honor. No further
5 questions.

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

7 Mr. Richa, do you have redirect?

8 MR. RICHA: I nothing further, Your Honor.

9 THE COURT: Thank you, Mr. Richa.

10 Mr. Hawkins, thank you so much. You may step down and be
11 excused.

12 THE WITNESS: Thank you.

13 THE COURT: Thank you.

14 (The witness steps down.)

15 THE COURT: Members of the jury, I'm going to ask you
16 to adjourn to the deliberation room for a few minutes until I
17 can give you further instructions about when we will begin
18 tomorrow morning.

19 (Jury out at 3:51 p.m.)

20 THE COURT: Thank you. Counsel, will you be ready to
21 close in the morning?

22 MS. GLAVICH: Yes, Your Honor.

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

24 THE COURT: Who will close on behalf of the plaintiff?

25 MS. GLAVICH: I will, Your Honor.

1 THE COURT: Let me ask you to come to the podium,
2 please, Ms. Glavich. Thank you.

3 MR. O'NEIL: Do you want both of us, Your Honor?

4 THE COURT: One at a time. Ms. Glavich, how much time
5 do you believe you will require?

6 MS. GLAVICH: Well, we'd like to reserve rebuttal for
7 afterwards, so I guess it would be about an hour or so total
8 with rebuttal.

9 THE COURT: How do you expect to allocate the hour?
10 In other words, what portion of it do you wish to reserve?

11 MS. GLAVICH: Probably just reserve 15 minutes, and
12 it may not take an hour.

13 THE COURT: So you ask for 45 minutes for your
14 closing. Is that correct?

15 MS. GLAVICH: Yes.

16 THE COURT: Thank you.

17 MS. GLAVICH: Thank you.

18 THE COURT: Mr. O'Neil.

19 MR. O'NEIL: Your Honor, I believe our closing will
20 be about the same as our opening, which I think was about 45
21 minutes. Maybe 45 minutes to an hour.

22 THE COURT: How do you suggest we address the reality
23 that each side has, in theory, an opportunity for rebuttal?
24 Ms. Glavich asked to reserve 15 minutes. Do you want 15 minutes
25 after her 15 minutes?

1 MR. O'NEIL: I think I would only want 10 minutes,
2 Your Honor, and that might be subject to waiving it at the time.

3 THE COURT: Very well. In which case, I should have
4 asked you, just so our record is clear, that plaintiff was
5 permitted to call a rebuttal witness. Is there any other
6 witness that the defendants intend to call with respect to their
7 counterclaims?

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

9 THE COURT: Thank you. Will the two of you be ready
10 to begin at 9:30?

11 MS. GLAVICH: Yes, Your Honor.

12 MR. O'NEIL: Are we going to discuss jury instructions
13 this afternoon, Your Honor?

14 THE COURT: We are. It's going to be a very brief
15 discussion, but we're going to discuss them.

16 MR. O'NEIL: Okay.

17 THE COURT: The first item was to know whether we
18 should excuse the jury now. I believe we should excuse the jury
19 now with instructions to return at their customary time since
20 you said you will be ready for closing in the morning.

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

22 (Jury in at 3:56 p.m.)

23 THE COURT: Now, members of the jury, you don't even
24 have to sit down if you don't want to. We are excusing you now
25 for the evening. I will again invite you to be here as early as

1 9:00, require that you be here by 9:20, and promise you that
2 we'll be ready to go by 9:30.

3 What will occur in the morning is that counsel will present
4 to you their closing arguments. Each side will have an
5 opportunity to do so. Each side will also be permitted to save
6 a brief period of time for rebuttal.

7 I believe by the time those arguments have been completed,
8 it will be time to break for lunch. As soon as you return from
9 lunch, you will hear my instructions concerning the law which
10 will guide you in your deliberations, and then you will retire
11 to begin your deliberations.

12 So you have now heard all of the testimony that will be
13 presented -- maybe you should have a seat.

14 (Laughter)

15 You've heard all the testimony that you're going to hear.
16 You will receive one additional exhibit, and I discussed that
17 with you last week. It is the transcript of the deposition of
18 Ms. Henderson. Counsel graciously agreed to prepare that
19 because you indicated that you had some difficulty hearing it.
20 So that will now be available for your use during your
21 deliberations.

22 I did not ask Ms. Lesley whether she received other
23 questions from you concerning any of our procedures, any
24 logistical issues. I'm going to suggest that if you have
25 questions that you would like to give her concerning procedures,

1 that you just give her a note or let her know before you go.
2 Once you've done that, you are excused for the evening.

3 Although you have now heard all of the evidence, all of the
4 testimony, you're aware of all of the exhibits, you still have
5 not reached the point where you will begin your deliberations.
6 So I must again remind you that you may not discuss the case,
7 even among yourselves, until you actually begin your
8 deliberations. Do not permit anyone to discuss the case with
9 you, and, of course, you must continue to refrain from
10 undertaking any research on your own about any of the issues
11 that have been presented.

12 Thank you so much. Ms. Lesley will take your notepads.
13 And as I said, if there are any concerns regarding our schedule
14 that you'd like to share with her, please do that. Thank you.
15 Have a good evening.

16 (Jury out at 3:59 p.m.)

17 THE COURT: All right. Do you have your blue books?
18 You don't. That means, then, that the discussion will really be
19 brief. So let me ask you to be prepared to make notes of what I
20 am now ready to indicate.

21 From the standardized civil jury instructions, the
22 so-called blue book, I will begin with Chapter 1.

23 (Deputy clerk conferring with the Court.)

24 THE COURT: We seem to have missing pages in our
25 Chapter 1. We will find them, I assure you. Rather than hold

1 you up now, we will go on to Chapter 2, weighing the evidence.

2 I will, of course, give 2.02, evidence in the case; 2.03, direct
3 and circumstantial evidence; 2.04, burden of proof.

4 I will not give 2.05 because I have not taken judicial
5 notice -- or did not take judicial notice of any fact.

6 I will give 2.06, which of course concerns inadmissible and
7 stricken evidence. Because the parties did not reach any
8 stipulations, I will not give 2.07. I will not give 2.08 since
9 I did not admit any evidence for a limited purpose only, nor
10 will I give 2.09 since I did not admit evidence against one
11 party only.

12 I will give 2.10, credibility of the witnesses; 2.11,
13 number of witnesses and exhibits; 2.12, expert opinion; 2.13,
14 deposition as evidence.

15 2.14 concerns impeachment by a prior inconsistent
16 statement. I do not recall any instance during the trial in
17 which a witness was impeached by a prior inconsistent statement.
18 If I am -- actually, there may have been instances in which a
19 witness was impeached by a prior inconsistent statement. But
20 let me hear from you, please, to determine what your
21 recollections are and whether the instruction should be given.
22 Who wishes to go first? Ms. McDonald.

23 MS. MCDONALD: Thank you, Your Honor. I believe there
24 were two instances. I can't think of the second one at the
25 moment, however. Mr. Dawson was asked on direct whether he

1 brought on Ms. Heiss to control the LLC. He denied that and was
2 impeached with his declaration.

3 THE COURT: Very well. Thank you, Ms. McDonald.

4 MS. MCDONALD: Thank you.

5 THE COURT: Mr. O'Neil?

6 MR. O'NEIL: Your Honor, I think in that instance the
7 impeachment was incomplete as far as I'm concerned. The
8 attempted impeachment was later explained by Mr. Dawson, and I
9 don't believe the instruction's necessary.

10 THE COURT: Do you believe there is any instance in
11 which you impeached a witness with a prior inconsistent
12 statement?

13 MR. O'NEIL: I don't believe so, Your Honor.

14 THE COURT: I'm going to suggest that after we recess
15 that you, Ms. McDonald, attempt to locate the transcript
16 reference where such impeachment by a prior inconsistent
17 statement appears. To some extent what you argued is not
18 consistent with my recollection, but it would be incumbent upon
19 you to demonstrate -- you and your co-counsel -- to demonstrate
20 that a witness was impeached by a prior inconsistent statement.

21 To the extent that that is the only statement at issue,
22 it's necessary to find the cite. I will not give the
23 instruction unless the record reflects that a witness was
24 actually impeached by a prior inconsistent statement.

25 2.15 is not applicable. 2.16 is not applicable. Nor is

1 2.17. 2.18 is failure to produce witness or other evidence. Is
2 there any request for 2.18?

3 MR. RICHA: No, Your Honor. I think we both had left
4 it off our respective jury instructions.

5 THE COURT: Mr. O'Neil?

6 MR. O'NEIL: That's correct, Your Honor.

7 THE COURT: Very well. That completes Chapter 2.

8 Turning now to Chapter 3. I will give 3.01, instructions
9 to be considered as a whole.

10 3.02, selection of a foreperson. I am not certain why this
11 instruction is included in Chapter 3, but that is where it is so
12 that is where I will give it.

13 3.03, duty to deliberate.

14 3.04, 3.05, 3.07. I may move all of those instructions to
15 the end of the instructions, which is where I believe they are
16 more appropriately read. But they are Chapter 3, and we're
17 going in sequence.

18 MR. RICHA: Your Honor, can I ask you to read the
19 heading for each one? Because our numbering is a little bit
20 off. 3.04, is that the deliberation instruction? Beginning of
21 deliberations?

22 THE COURT: 3.01, instructions to be considered as a
23 whole. 3.02, selection of a foreperson. 3.03, unanimity and
24 duty to deliberate. 3.04, beginning of deliberations. 3.05,
25 communications between Court and jury. 3.07, delivering the

1 verdict.

2 I deliberately skipped 3.06 because that is the instruction
3 that a court might well read when a jury, it appears, has been
4 unable to reach an agreement.

5 Chapter 4.

6 4.03 concerns multiple defendants.

7 4.04, counterclaims.

8 Does anyone wish to address 4.05, which reads, "One party
9 in this case is a corporation. A corporation can act only
10 through individuals as its agents or employees. In general, if
11 any agent or employee of a corporation acts or makes statements
12 while acting within the scope of his or her authority as an
13 agent or within the scope of his or her duties as an employee,
14 then under the law those acts and statements are of the
15 corporation."

16 I'm not certain that is necessary. I'm a little concerned
17 that none of you appeared ready to discuss instructions, which
18 would be the next obvious step for us.

19 Does anyone request 4.05?

20 MR. RICHA: We had it in our initial jury
21 instructions, Your Honor, but we have no objection to not
22 including it.

23 THE COURT: Do you have a request for it, Mr. O'Neil?

24 MR. O'NEIL: No, Your Honor. We did not include it in
25 our proposed jury instructions.

1 THE COURT: I do not believe there is any need for it.
2 Or for 4.06. So from Chapter 4, I will give only 4.03, multiple
3 defendants, and 4.04, counterclaims.

4 Next we go to Chapter 11, contracts.

5 I will give 11.01; 11.02, contract formation.

6 11.03 is offer.

7 11.04 is acceptance.

8 11.05, consideration.

9 Do you wish to address any of those three, Mr. Richa?

10 MR. RICHA: What is 11.01, Your Honor?

11 THE COURT: You said 11.01?

12 MR. RICHA: Yes, Your Honor.

13 THE COURT: "A contract is an agreement between two or
14 more parties to do or not do something."

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

16 THE COURT: Do you wish to address 11.03, 11.04, and
17 11.05?

18 MR. O'NEIL: I believe they are potentially relevant
19 if plaintiff is arguing that there was an oral license
20 agreement.

21 THE COURT: Very well. I will include 11.03, 04, 05.

22 11.06 does not appear to be relevant. "Past acts not
23 consideration." There's no such issue here, so I will omit
24 11.06.

25 I will give 11.07, intent to be bound.

1 11.08, certainty.

2 11.09, express and implied contracts.

3 I must give 11.10, oral contracts, since it appears that is
4 plaintiff's allegation with respect to licensing.

5 11.11 is not relevant.

6 I will give 11.12, contract to be considered as a whole.

7 11.13, terms of a contract.

8 11.14, contract interpretation, course of performance.

9 There appears to be no occasion to give 11.15 or 11.16.

10 11.17 is breach of contract, which I will of course give.

11 Are you in agreement that there is no need for 11.18,
12 anticipatory breach?

13 MR. RICHA: Correct, Your Honor.

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

15 THE COURT: May I ask you to address 11.19, excuse
16 from performance, which reads: "If you find by a preponderance
17 of the evidence that" -- and I will simply state "one party made
18 the other party's performance impossible or substantially
19 contributed to preventing that party's performance, then that
20 party is excused from performing under the contract. If the
21 conduct merely made the performance more difficult and not
22 impossible, then the conduct is not an excuse from performance."

23 Does anyone request that?

24 MR. RICHA: We think it should be included, Your
25 Honor.

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

2 THE COURT: Very well. I'll give 11.19.

3 I do not believe there is any basis for giving 11.20,
4 prevention of a condition.

5 Consistent with your request, Mr. Richa, I will give 11.21,
6 impossibility.

7 11.23 has the caption "modification," but that does not
8 appear necessary here since I think the parties are in agreement
9 that the written contract that was breached was the amended
10 operating agreement. Am I correct, Mr. Richa?

11 MR. RICHA: Yes, Your Honor.

12 THE COURT: And Mr. O'Neil?

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

14 THE COURT: There is no issue of substantial
15 performance. There is no issue of waiver of novation. Does
16 anyone want to define novation? All right. We'll move on.

17 There's no issue of mistake.

18 Let me ask you to address 11.28, fraud in the inducement.

19 MR. RICHA: It wasn't one of the counts we pled.

20 THE COURT: So we're in agreement, then, that we
21 should skip 11.28.

22 11.29 is undue influence, which is also inapplicable. As
23 is duress.

24 That leads us to damages, which is 11.31.

25 11.32.

1 11.33 is quantum meruit.

2 MR. RICHA: What was 11.32, Your Honor?

3 THE COURT: Estoppel.

4 MR. O'NEIL: Your Honor, as to quantum meruit, I
5 believe that claim was already dismissed.

6 THE COURT: I just wanted to give everyone a chance to
7 comment. That was the final Chapter 11 instruction.

8 Chapter 25 includes 25.01, tortious interference with
9 contractual relationship. And 25.03, conversion.

10 From the Modern Federal Jury Instructions, Matthew Bender,
11 we located instructions for trademark infringement. Would you
12 like to take a moment and look at the Matthew Bender
13 instructions, counsel?

14 MR. RICHA: Yes, Your Honor.

15 THE COURT: I can take a brief recess if you'd like to
16 share the volume from the library.

17 MR. RICHA: Okay. Are there other ones in that volume
18 that we need to look at or just --

19 THE COURT: In the blue book, no.

20 MR. RICHA: Okay. Thank you.

21 THE COURT: Okay. Ms. Lesley is handing it over so
22 everyone can share, and while you do that, we'll take a brief
23 recess.

24 (Recess from 4:38 p.m. to 5:01 p.m.)

25 THE COURT: All right. I believe we are finished. Am

1 I correct?

2 MR. RICHA: I didn't hear you, Your Honor. I'm sorry.

3 THE COURT: I said I believe we are finished. I asked
4 all of you to take a look at the trademark infringement
5 instructions. I assume you have done that.

6 MR. O'NEIL: Yes, Your Honor. Is it your intention to
7 use all of these instructions?

8 THE COURT: No. Would someone return the volume,
9 please?

10 I believe it is appropriate to give 86A-1, definition.

11 86A-2 what the owner of the trademark may do.

12 86A-4, which specifically concerns the ability of the owner
13 to enter into an agreement to license the trademark.

14 86A.02 is infringement. I'll hear from you first,
15 Mr. Richa.

16 MR. RICHA: Can you repeat the last one after 86A-4?

17 THE COURT: 86A-9 is liability. I believe those are
18 the only ones that are relevant. I will hand the book back to
19 you.

20 MR. RICHA: Your Honor, on 86A-9, there's a footnote.

21 THE COURT: I don't intend to read the footnotes.

22 MR. RICHA: We don't believe it's a minor point. It's
23 about burden of proof, and there's a note that talks about
24 inclusion in the jury instruction, and I think it's applicable
25 to this case, that it can be included, and we believe it should

1 be included.

2 THE COURT: Would you come to the podium, Mr. O'Neil,
3 so that the two of you will be looking at the same thing. And
4 then tell me your request, Mr. Richa, please.

5 MR. RICHA: If I may just state it for the record,
6 Your Honor? The comment on the bottom of page 86A-14, the
7 comment --

8 THE COURT: Would you identify the instruction by
9 number, please?

10 MR. RICHA: Oh, yes. I'm sorry.

11 THE COURT: I've indicated that I intend to give
12 86A-1, 86A-2, 86A-4, 86A.02, 86A-9.

13 MR. O'NEIL: I'm sorry, Your Honor. 86.02?

14 MR. RICHA: A.02. Which one is that, Your Honor?

15 THE COURT: Well, the two of you have my book so I
16 can't answer the question.

17 (Laughter)

18 MR. RICHA: We don't see it.

19 MR. O'NEIL: In this section.

20 MR. RICHA: Oh, okay.

21 MR. O'NEIL: So in 86A.02, instruction 86A-9.

22 MR. RICHA: Okay. Got it. So in 86A-9, Your Honor --
23 and it wasn't a footnote; it was a comment -- it states that
24 "this instruction states the elements of a claim for trademark
25 infringement is established by case law," and then it states:

1 "As explained in the comment to instruction 86A-7, registration
2 of the trademark shifts the burden of proof to the defendant to
3 prove that the mark is invalid. Thus in the case of registered
4 trademark, this instruction may require alteration to reflect
5 that shift of the burden of proof."

6 So given the fact that we do have a registered trademark,
7 pursuant to that comment, we believe there should be --

8 THE COURT: Well, we don't have any issue here
9 concerning the validity of the trademark, do we?

10 MR. O'NEIL: I believe, Your Honor, we had pled as an
11 affirmative defense abandonment and fraud on the Patent and
12 Trademark Office, and then I think there's a lack of evidence in
13 Mr. Xereas's use of the trademark in the three years prior to
14 2010.

15 MR. RICHA: And based on what Mr. O'Neil just said,
16 all the more reason, Your Honor, that we believe that that
17 instruction should be altered in accordance with the comment.

18 MR. O'NEIL: What is the date of registration? It's
19 like March of 2012?

20 MR. RICHA: January 2012.

21 MR. O'NEIL: January 2012. So prior to January 2012
22 it was not a registered trademark, and we would argue, Your
23 Honor, that trademark invalidity and abandonment, 86A-17 and
24 86A-20 are both relevant instructions given our affirmative
25 defenses.

1 THE COURT: Let me suggest that you discuss this
2 overnight, please, and attempt to reach some consensus.

3 MR. RICHA: Okay. Your Honor --

4 THE COURT: We cannot take any more time this evening.
5 That seems to be the only remaining dispute. I have as to the
6 surviving counterclaims, the defendants' proposed instructions,
7 which I will read.

8 MR. O'NEIL: Your Honor, we also had a mitigation of
9 damages affirmative defense, and we submitted a proposed
10 instruction.

11 THE COURT: We have those proposed instructions.

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

13 (Deputy clerk conferring with the Court.)

14 THE COURT: Part of why we must recess quickly is that
15 all of you have a lot of work to do. The deputy clerk just
16 reminded me that, as she actually reminded you during the
17 pretrial, or advised you during the pretrial conference, that
18 she requires the exhibits that will be displayed on the monitor
19 on the format that she asked you to utilize.

20 (Deputy clerk conferring with the Court.)

21 THE COURT: So we must recess so you can confer with
22 Ms. Lesley about what it is that you must have ready by 9 :30.

23 MR. RICHA: Your Honor, may I --

24 THE COURT: Mr. Richa.

25 MR. RICHA: -- very quickly. We also believe

1 instruction 86A-3 and 86A-6 are also applicable.

2 THE COURT: Will all of you confer, please? That is
3 another task that you must accomplish tonight. My intention
4 when I give the instructions regarding the specific claims and
5 counterclaims is actually to begin with the trademark
6 infringement claim, proceed next to breach of contract, and then
7 go in order of the remaining counterclaims.

8 This is a matter that the parties should be able to
9 resolve. We simply cannot take any more time this evening to
10 discuss this. I'm very disappointed that everyone wasn't ready
11 to do so this afternoon. I'm not in a position to respond
12 immediately to your question because the two of you have the
13 only copy of the book in which the instructions appear. So
14 because I did not seek to memorize the instructions, I don't
15 know what 86A-3 even is or why I would give it. And the same
16 applies to 86A-6. So there's no reason that the parties can't
17 agree on an instruction, or series of instructions.

18 MR. RICHA: Yes, Your Honor.

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

20 MR. RICHA: I just want -- and this I'm sure we can
21 work out too, but Chapter 12 of the standard jury instructions,
22 we had a few in our jury instructions that were not addressed by
23 Your Honor. So is that something we should also discuss?

24 THE COURT: Are they in the standard instructions?

25 MR. RICHA: They're in the standard instructions,

1 damage -- about damages, burden of proof, multiple defendants.
2 We would ask for 12-1 through 12-5, Your Honor.

3 THE COURT: So is everyone in agreement that I should
4 give 12.01? No one has 12.01.

5 MR. O'NEIL: We had not included those in our proposed
6 instructions, Your Honor, but...

7 THE COURT: 12.01 is damages jury to award.

8 MR. O'NEIL: I have no objection to that, Your Honor.

9 THE COURT: 12.02, extent of damages. And I will have
10 to edit these as I go because, as written, the instruction
11 presupposes that it is the plaintiff who is claiming damages.
12 And of course here it is both plaintiff and defendants.

13 12.03. What else do you request?

14 MR. RICHA: 12.04 and 12.05.

15 MR. O'NEIL: Again, we had not included those, Your
16 Honor. I'm not convinced that they're necessary.

17 THE COURT: I have no occasion to give 12.04. There
18 are indeed multiple defendants, but given the identities of the
19 defendants, there is no reason to introduce this language
20 concerning the size of the verdict as if one defendant and
21 not -- in other words, should the jury find for the plaintiff,
22 there is no reason to suggest that the verdict would apply to
23 one defendant and not the others.

24 MR. RICHA: 12.05 I'm assuming would fall under that
25 same analysis.

1 THE COURT: Do you wish to be heard?

2 MR. O'NEIL: We have the same objection, Your Honor.

3 THE COURT: I believe in this context 12.05 simply
4 causes confusion, or is likely to cause confusion. I will give
5 12.07, duty to mitigate, which I assume each side wants. Am I
6 correct?

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

8 MR. RICHA: That's fine, Your Honor.

9 THE COURT: Very well. That takes care of Chapter 12.

10 MR. RICHA: And you said 12.01, 2, and 3 are included.
11 Correct?

12 THE COURT: Yes.

13 MR. RICHA: Thank you, Your Honor.

14 THE COURT: Okay. Another task which requires your
15 attention, which is why I feel some urgency about recessing, is
16 that no one has presented a proper verdict sheet or verdict form
17 at this point. I believe the last one I received was in excess
18 of 40 pages.

19 MR. O'NEIL: Your Honor, I believe we submitted one
20 last night as an exhibit to our proposed jury instructions,
21 which we could, given your ruling on the directed verdict
22 against defendants, could make it shorter. But we were down to
23 seven pages.

24 THE COURT: Well, this is certainly a starting point.
25 It will still be necessary to address the -- to edit the form

1 further with regard to the -- to reflect the Court's ruling on
2 the counterclaims.

3 MR. O'NEIL: Yes, Your Honor. I can do that tonight
4 and submit it.

5 THE COURT: Very well. Could all of you plan to
6 confer so that the verdict form represents a consensus form?

7 MR. RICHA: Your Honor, we had received Mr. O'Neil's
8 filing yesterday, and we actually prepared a red-line of his
9 verdict forms. So should we wait until he files his and then
10 file another --

11 THE COURT: No. You should plan to agree tonight. I
12 do not want to see the red-lines. I don't want to see two
13 separate verdict forms. All of you are experienced litigators.
14 You know what a verdict form looks like or what it should
15 include. Under no circumstances should it be 40 pages. In --
16 at least in this -- in a case of this nature, with claims which
17 are readily identifiable and can be condensed, it appears given
18 the version filed by the defendants reduced to five or six or
19 seven pages.

20 MR. RICHA: Okay. Thank you, Your Honor.

21 THE COURT: Now, I will leave you with the question
22 which was communicated to the deputy clerk. Only a single
23 question. Not in the form of a note by the deputy clerk. I'm
24 sorry, not in the form of a note by a juror but rather
25 information communicated verbally. The gist of the concern is

1 whether or not a transcript of the proceedings will be available
2 should there be any matter that requires clarification.

3 Generally, the answer to that question is no and that the
4 jurors should rely on their recollections. Should a question be
5 presented during the deliberations for an opportunity to hear an
6 answer to a certain question, I believe we could accommodate
7 such a request.

8 MR. O'NEIL: We have no objection to that process,
9 Your Honor.

10 THE COURT: Is there anything else before we recess,
11 Ms. Glavich?

12 MS. GLAVICH: Just one quick -- do you have any
13 courtroom rules about either exhibits or demonstratives during
14 closing arguments?

15 THE COURT: What is it that you wish to do?

16 MS. GLAVICH: I had a PowerPoint is what I'm thinking
17 of.

18 THE COURT: The parties are free to use the exhibits
19 which are in evidence. That means that you may not use exhibits
20 which were stricken for any purpose. And I must caution the
21 parties that we simply cannot have references to stricken
22 evidence, to argument of facts which are not in evidence. We
23 cannot tolerate references to claims that the Court has
24 dismissed or as to which the Court has granted summary judgment.
25 Is there another question you have, Ms. Glavich?

1 MS. GLAVICH: No. That's it, Your Honor.

2 THE COURT: Very well. Thank you.

3 MS. GLAVICH: Thank you.

4 THE COURT: Do you have any concerns, Mr. O'Neil?

5 MR. O'NEIL: Yes, Your Honor. I think anything shown
6 to the jury during closing should be either admitted evidence or
7 a demonstrative that was used during trial. I mean --

8 THE COURT: That is what I sought to indicate.

9 MR. O'NEIL: Okay.

10 THE COURT: If the exhibit was admitted, then, yes,
11 the parties may refer to it. Counsel may refer to such exhibits
12 in their closing. I'm a bit concerned about the reference to a
13 PowerPoint because I do not know entirely what you mean,
14 Ms. Glavich, in other words, whether you have created an exhibit
15 that defendants have not seen. Is that what you mean?

16 MS. GLAVICH: What I --

17 THE COURT: Let me ask you to come back to the podium,
18 please.

19 MS. GLAVICH: Yes, Your Honor. I was just wondering.
20 I know some courts allow in closing arguments to make a
21 PowerPoint in which you use the exhibits and you may have a
22 title sheet between them or something like that.

23 THE COURT: What else is on the PowerPoint besides an
24 exhibit or series of exhibits?

25 MS. GLAVICH: It would be a slide with maybe a title

1 that explains what the exhibit is, or it may have what the claim
2 is. Some courts allow them. I'm just asking. If that's not
3 allowed here, that's fine. I'm happy to not do it. I just
4 wanted to ask.

5 THE COURT: I believe the time to offer a created
6 exhibit has passed unless you plan to share it with Mr. O'Neil
7 immediately.

8 MS. GLAVICH: No. I just wanted to know for tomorrow.

9 THE COURT: I'm sorry. I didn't hear your question.

10 MS. GLAVICH: I just wanted to know for closing
11 arguments what was allowed in your courtroom.

12 THE COURT: As I said, I'm not certain I know what it
13 is that you intend.

14 MS. GLAVICH: What I had originally contemplated was,
15 instead of using the ELMO, having the exhibits that were used --
16 admitted in the trial as part of a PowerPoint, using selections
17 with the source, but I'm happy to not do that if that's going to
18 cause confusion or problems.

19 THE COURT: Does the PowerPoint include what I will
20 call text introduced by you?

21 MS. GLAVICH: I can -- I would -- I guess that was
22 part of the question, but I'm understanding that that is not
23 allowed and I will not do that.

24 THE COURT: I can't say that it is not allowed ever,
25 but the problem is that Mr. O'Neil has not seen it. Have you

1 shared it with him?

2 MS. GLAVICH: No. No, not yet.

3 THE COURT: If you have not shared it with him, on
4 what basis would you expect to use this created exhibit in your
5 closing argument tomorrow morning?

6 MS. GLAVICH: I suppose that was my question, whether
7 there was such a rule -- a timeline that required me to share it
8 with Mr. O'Neil.

9 THE COURT: We're speaking partly of common courtesy.
10 You want to use something that you have not shown to opposing
11 counsel. I'm not certain under what theory you believe that
12 would be appropriate.

13 MS. GLAVICH: I suppose that's why I wanted to ask the
14 question, Your Honor, before we get to tomorrow.

15 THE COURT: Well, under what theory would that be
16 appropriate?

17 MS. GLAVICH: It's a matter of when --

18 THE COURT: It's now nearly 5:30. We will resume at
19 9:30. Counsel have hours of work ahead, as I've indicated,
20 which is why I've been struggling to recess for a while so that
21 you can all get to work. But I do not know under what theory,
22 and you have not identified any theory you would seek to use an
23 exhibit that you have not shown to the other side.

24 MS. GLAVICH: I'll withdraw the request, Your Honor.

25 THE COURT: Very well. Thank you.

1 Anything, Mr. O'Neil? Anything further?

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

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

4 We will recess at this time. I will again remind you that
5 Ms. Lesley requires your attention. So please make yourselves
6 available to her. We will be off the record, however.

7 Thank you. Everyone have a good evening.

8 (Proceedings adjourned at 5:28 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