

Highway 46 Holdings, LLC. vs. Michael and Jacqueline Myers
Non-Jury Trial

1 IN THE CIRCUIT COURT, NINTH
2 JUDICIAL CIRCUIT, IN AND FOR
ORANGE COUNTY, FLORIDA

3 CASE NO.: 08-CA-1466

4 HIGHWAY 46 HOLDINGS, LLC,
5
6 Plaintiff,
7
8 vs.
9
10 MICHAEL B. MYERS,
JACQUELINE M. MYERS,
SOUTHEAST COMMUNICATIONS,
COMPANY OF CENTRAL FLORIDA
DONALD J. HACHENBERGER,
GLENDA A. HACHENBERGER,
11 Defendants.
12 _____/

13 Volume I

14 PROCEEDINGS: NON JURY TRIAL

15 BEFORE: HONORABLE DONALD A. MYERS

16 DATE: MAY 27, 2017

17 TIME: 9:13 A.M. - 3:07 P.M.

18 PLACE: ORANGE COUNTY COURTHOUSE
425 NORTH ORANGE AVENUE
19 ORLANDO, FLORIDA 32801

20 STENOGRAPHICALLY
21 REPORTED BY: SHOSHANA KRAMER, RPR, CRR
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1 P R O C E E D I N G S

2 *****

3 THE COURT: This is in Case Number 2008 CA1466.
4 Counsel, please make appearances, please.

5 MR. CHASE: Sir, Damon Chase, with Chase
6 Freeman, along with Marc Jones from J. Marc Jones,
7 P.A., your Honor, on behalf of the plaintiffs, Don
8 Hachenberger and Highway 46 Holdings, LLC.

9 MR. BENITEZ: Gus Benitez on behalf of all the
10 defendants, Jackie Myers, Michael Myers and
11 Southeast.

12 MR. SHUKER: Good morning, your Honor. Scott
13 Shuker on behalf of Glenda Hachenberger.

14 THE COURT: Okay. Thank you. All right. In
15 reviewing what we have left to resolve, this is what
16 I reflect -- and if I'm incorrect, please let me
17 know. In the plaintiffs' second amended complaint
18 we have count for specific performance and a count
19 for declaratory judgment.

20 That is all that remains, correct?

21 MR. CHASE: Yes, sir.

22 THE COURT: And, Mr. Benitez, your third
23 amended counterclaims and cross-claims, we have
24 Count 5, which is the count for rescission,
25 revocation and cancellation. Count 13 and 14, those

1 are replevin counts, and Count 20, which is
2 declaratory relief.

3 Is that correct?

4 MR. BENITEZ: That's correct, your Honor.

5 THE COURT: Okay. And the plaintiff is
6 prepared to proceed on its counts?

7 MR. CHASE: Yes, sir.

8 THE COURT: And, Mr. Benitez, on your replevin
9 counts, they are obviously what is the subject of
10 most of the testimony, correct?

11 MR. BENITEZ: Excuse me?

12 THE COURT: The replevin counts are obviously
13 what is the subject for most of the testimony, is
14 that correct?

15 MR. BENITEZ: But it also includes the letter
16 agreements and the operating agreement, but, yes,
17 most of it will be the replevin. Yes, your Honor.

18 THE COURT: What other testimony do you
19 anticipate? What other counts do you have testimony
20 related to?

21 MR. BENITEZ: It would be Count 5 and Count 20,
22 your Honor, and -- but it's not going to be
23 significant. If the Court is indicating the
24 majority of the testimony would be the replevin,
25 going through the personal property, going through

1 the circumstances, identifying them and so on, and I
2 assume that that's going to be covered, because
3 they've got similar counts. So they're going to go
4 first, and I assume they're going to go through a
5 lot of that testimony.

6 THE COURT: Okay. All right. And for your
7 client, Mr. Shuker, you are here responding
8 primarily to?

9 MR. SHUKER: Primarily to rescission, your
10 Honor, Count 5. I didn't actually think there was
11 going to be evidence on it, but if there is, we'll
12 cross-examine.

13 Count 20 is essentially -- we're named, but
14 it's essentially duplicative of the replevin. You
15 can see in paragraph 285 of the third amended -- it
16 seeks a declaration regarding the rights of what
17 property was to be transferred in and who owns what.
18 Ms. Stone is really not a party to that, though
19 she's named. So we would really only be
20 participating in Count 5, the rescission, which I
21 think is moot based on your prior rulings.

22 MR. CHASE: Judge, I'm going to be able to
23 help. I'm making a motion for -- withdraw, because
24 he's going to -- he said he's going to have
25 testimony on rescission. I don't know -- I was

1 going to move for directed verdict on it, so we
2 can...

3 THE COURT: I don't think we can address it by
4 directed verdict. I think there's questions
5 raised -- I'm looking at Count 5 now. The essence
6 of Count 5, Mr. Benitez, is not rescission, correct,
7 it's cancellation, revocation?

8 MR. BENITEZ: Yes, your Honor.

9 THE COURT: Because I can't grant it. I still
10 I think I'm -- my hands are tied. I don't think
11 there's any way for me to grant a remedy of
12 rescission where I cannot restore the parties back
13 to the state that they were in prior to the actions
14 that were taken on that day.

15 Fair?

16 MR. BENITEZ: Yes, your Honor.

17 THE COURT: Okay. I mean -- I mean, we have a
18 developed piece of property. I can't give it back
19 to your clients as is.

20 Do you agree with that?

21 MR. BENITEZ: Yes, your Honor. If you're
22 talking about the property, of course. Yeah, that's
23 done.

24 THE COURT: Okay. So what's left is revocation
25 or cancellation, and that's by virtue, you contend,

1 of something that occurred on July the 8th?

2 MR. BENITEZ: Yes, your Honor.

3 THE COURT: Okay.

4 MR. CHASE: There's no evidence, and the --

5 THE COURT: He's going to present evidence.

6 MR. SHUKER: You've already ruled that that
7 evidence is inadmissible.

8 THE COURT: What is the July 8th evidence?

9 MR. SHUKER: It's the handwritten letter.

10 MR. CHASE: It's the handwritten letter that
11 the Court ruled is hearsay.

12 THE COURT: It may be hearsay, but that's a
13 different issue than the idea of cancellation.

14 MR. CHASE: Yes, sir.

15 THE COURT: Right? I mean, if it's a -- their
16 argument, it may be hearsay, but their effective --
17 their argument, it was notice of cancellation. In
18 that context it takes on a different character than
19 just pure hearsay evidence, and so I think it may be
20 admissible as a notice as the race of the statement
21 that the Court can consider for purposes of
22 revocation or cancellation.

23 MR. CHASE: Statement doesn't even revoke the
24 offer. I mean, it's --

25 THE COURT: That's a different issue. We'll

1 look at the substance of it at that point, but
2 that's -- but I think it's a different issue, so
3 I'll hear evidence on that issue. I'd like to -- if
4 we can get Mr. Shuker on his way. For some
5 reason -- can we handle that first?

6 MR. CHASE: That would take -- Mr. Carlin is
7 sick, like, really sick with -- like, very sick
8 yesterday. He's already come here twice now, and
9 it's -- I'd like to be able to get him up there
10 and --

11 THE COURT: We can get him on, but this is -- I
12 mean, is there anything other than the letter, the
13 evidence-wise that you contend the Court should
14 consider for this count other than what we've
15 already heard in the testimony?

16 MR. BENITEZ: It's principally the letter,
17 Judge, if that's the focus of this particular count.
18 That is that there was a cancellation at that point
19 in time, if in fact, there was going to be or if
20 they were going to try to execute the agreements.

21 THE COURT: Okay. Did your clients return the
22 money that day as well?

23 MR. BENITEZ: No, your Honor.

24 THE COURT: No?

25 MR. BENITEZ: No. No, because there's two

1 separate -- that's a point that I need to stress,
2 there's two separate transactions. They went into
3 the meeting thinking it was going to be about the
4 transfer of the property, the real property, where
5 the check is related, and there's already an
6 admission based on the pleadings of the parties with
7 respect to that.

8 That check was in relationship to that real
9 property and the expenses incurred in developing
10 that real property. So they went into the meeting
11 expecting to get that. They instead got that and
12 the letter agreement and the operating agreement,
13 and then they left the meeting having signed that
14 under the pretense that the letter agreement and
15 operating agreement were not enforceable. But as
16 far as they were concerned with respect to the land
17 itself, that was the intent of that meeting on
18 July 7th, '05.

19 So there's really two separate transactions. I
20 know Plaintiffs' Exhibit 1 is admitted into
21 evidence, and I had previously objected it being
22 admitted in that fashion, because it gave the
23 impression that, in fact, was the closing the
24 entire -- but it wasn't. The essence of the initial
25 closings that they intended to arrive there and

1 consummate was the closing with respect to the real
2 property, not the signing the letter agreement or
3 the operating agreement that had not been fully
4 negotiated and fully agreed to.

5 THE COURT: What's the \$288,000 for? You
6 contend it's for real estate?

7 MR. BENITEZ: That is --

8 THE COURT: Do you contend that it's for the
9 real estate?

10 MR. BENITEZ: The 288.

11 THE COURT: The \$288,000.

12 MR. CHASE: The letter agreement says what it's
13 for, says it's for the memorabilia.

14 THE COURT: Right, but I'm asking you, what do
15 you contend it was for?

16 MR. BENITEZ: If you could give me one second
17 just to make sure I'm correct, your Honor.

18 THE COURT: Ah-ha.

19 MR. BENITEZ: May I consult with my clients
20 briefly?

21 (Discussion held off the record.)

22 MR. BENITEZ: There were some admissions that
23 were conceded by the parties in this case that we --
24 we initially highlighted to the Court. I'm trying
25 to find it.

1 THE COURT: Mr. Benitez, this is a simple
2 question. What was the \$288,000 for?

3 MR. BENITEZ: That was for reimbursement of
4 part of the cost in developing the real property up
5 to that point in time with the permits, the fees and
6 all the work that had been done on the property.

7 So it is related to the property. It was not
8 related to the memorabilia, it was not related to
9 the petrobilia, it was not related to anything else
10 other than the property in that sense.

11 THE COURT: And your clients -- how is it that
12 you expect the Court to know that fact?

13 MR. BENITEZ: Well, I submit to the -- I was
14 looking for it. I don't have it here in front of me
15 right now, but I believe there's an admission that
16 has been -- the pleadings have admitted the fact
17 that the two hundred and eighty something thousand
18 dollars was related to those items, I believe. I
19 wanted to look at it before I quoted it specifically
20 to the Court, but I believe that that's the essence
21 of the admission.

22 THE COURT: And you think that's either in the
23 request -- either in the answer to the third amended
24 counterclaims or a request for admissions or a
25 pretrial statement admission?

1 MR. BENITEZ: No, your Honor. It's not a
2 pretrial statement admission. It's not a request
3 for admissions. It would be an admission in the
4 pleadings.

5 THE COURT: Okay. Go ahead and take a look for
6 that, please. I'm going to go ahead and address
7 some of these pretrials while you're doing that,
8 that, and then we can talk about it after the fact.

9 (Discussion held off the record.)

10 THE COURT: Let's go back on the record.

11 MR. BENITEZ: Yes, your Honor. And it's
12 paragraph 33, 34 and 160 of the third amended
13 complaint. In paragraph 33 -- and this is from the
14 pretrial statement, Judge, with reciting the
15 admission. Myers were given a check by Donaghy, and
16 Myers executed the deed conveying the real property
17 to Highway 46.

18 Paragraph 34, the check was for the sum of
19 \$288,974.83, which amount represented a portion of
20 Myers' equity and incurred expenses developing and
21 permitting the property.

22 And paragraph 160, Hachenberger paid the sum of
23 \$288,974.83, which amount was paid on July 7, 2005,
24 towards Myers' equity in the property and/or
25 expenses incurred in developing of the property as

1 of April of 2005.

2 So the point is, that whether we call this
3 count -- Count 5, rescission, revocation, or
4 cancellation, it doesn't have to do with the real
5 property, Judge, or with that money. It has to do
6 specifically for the letter agreement and operating
7 agreement.

8 So going back to your -- the Court's statement
9 earlier, I think that there is a possibility,
10 whether you call it a rescission, cancellation or
11 termination, there's a way of cancelling the letter
12 agreement and the operating agreement. That's what
13 we're seeking, the rescission, cancellation and
14 termination of the letter agreement and operating
15 agreement, which is distinct from the property
16 transaction. This doesn't mean Mr. Hachenberger
17 will lose any rights within the property, which is
18 what that money was for and the transfer of the
19 deed.

20 MR. CHASE: It's just not true, Judge. May I,
21 sir?

22 The letter agreement, first of all, the real
23 property memorabilia, all those assets are
24 inextricably intertwined into the agreement. You
25 can't cancel one, and then all the sudden go, I want

1 to cancel everything in this agreement except the
2 real property, which is what he's saying.

3 From the letter agreement, paragraph three is
4 acknowledging that we have this property, and then
5 it's defined the SR 46 property. That's the real
6 property. Paragraph five talks about the -- the
7 permits, assets and drawings. Paragraph six --
8 paragraph six talks about the petrobilia, Americana,
9 memorabilia.

10 Paragraph seven talks about the dealer license.
11 Paragraph eight talks about the 4COP, and then
12 paragraph nine sums up everything. Says, Michael
13 Myers and Jacqueline Myers individually and on
14 behalf of Southeast and Jano, hereby agree to
15 transfer all rights, title and interest in the
16 Gassey Jack's assets, the memorabilia assets, the
17 SR 46 property, the Southeast liquor license, the
18 Jano classic automobiles and Department of Motor
19 Vehicles license out of Highway 46 Holdings, LLC.
20 In addition, the parties agree that some of the
21 assets that will be contributed by the Myers will be
22 purchased by the company for \$300,000.

23 It just says some of the assets. So the
24 \$300,000 applies to all of those assets, just some
25 of them. It doesn't identify which ones.

1 Potentially, I'm giving all this stuff, including
2 the real property, including memorabilia and all
3 this stuff, I just want 300 grand cash back.

4 The next page talks about in the middle of the
5 page, paragraph 11, Hachenberger shall pay upon
6 execution of this agreement Mike Myers and Jackie
7 Myers the amount of \$288,000 and change, which is
8 made up of the \$300,000 payment referenced above --
9 the one that we just talked about -- less a
10 reduction of \$11,025.17.

11 The admission that he refers to, is an
12 admission that the money was paid -- I'm sorry.
13 It's -- there's -- on paragraph 34 it says the check
14 was for the sum of \$288,974.83, which amount
15 represented a portion of Myers' equity and incurred
16 expenses developing and permitting the property. It
17 did represent a portion of it. That's a true
18 statement.

19 It represents a portion of it, because that
20 check, that \$300,000 is a portion of all of the
21 assets from paragraph nine. So, it's a true
22 statement, and we admitted it. He gave him
23 \$288,000, and besides that, there's no way -- I
24 mean, there are multiple arguments why revocation --

25 THE COURT: Paragraph 160, which is also

1 admitted.

2 MR. CHASE: Yes, sir. Paragraph 160 says --
3 just says that he paid the money, right?

4 THE COURT: Paid the money toward --

5 MR. CHASE: The amount which was paid on
6 July 7, 2005, towards Myers' equity in the property
7 and/or the expenses incurred in developing the
8 property as of April of 2005.

9 It's money -- it's a portion of it. I mean, I
10 don't know, I suppose, technically, you could have
11 gone through and in every admission say, yes, that's
12 it, but it represented a portion of it, and then
13 this is over here, and we refer back to this, but
14 it's just -- he gave him a check for \$288,000. It's
15 one contract. It's not multiple contracts. There's
16 no -- there's no -- it's an enforceable contract.
17 There's no way -- there's -- you can't -- you can't
18 revoke it.

19 The testimony was that Donaghy handed it to
20 him, there's the offer, they signed it, that's the
21 acceptance. Their argument now is, the next day
22 they wrote a letter revoking it. You can't do that.
23 There's no cancellation provision in the contracts.
24 There's no -- there's no allowance in any way for
25 somebody to come in and just revoke the deal.

1 THE COURT: We will get to that in a minute.

2 MR. CHASE: In addition to that, there's
3 additional arguments.

4 THE COURT: We're going to get to argument in a
5 bit, but I'm focused now on what this check was paid
6 for, because I asked the question, was the check
7 returned? And the answer was, no, because it
8 relates to the property, not to the memorabilia,
9 petrobilia, and other assets.

10 Is that fair?

11 MR. BENITEZ: Yes, your Honor, that's --

12 MR. SHUKER: Your Honor, I just wanted to note
13 since it was marital funds, my client did not
14 admit to those paragraphs.

15 THE COURT REPORTER: My client did not?

16 MR. SHUKER: Admit for each of those, 33, 34,
17 160. They were without knowledge, and therefore,
18 denied. So there is no admission from the joint
19 property that that's what it's for.

20 THE COURT: Okay.

21 MR. BENITEZ: Just to point out, there is an
22 admission by Highway 46 Holdings, who received the
23 property and whose money it is, whether it's loaned
24 by Mr. Hachenberger or not, and the paragraphs are
25 unequivocal, the portion of Myers' equity refers to

1 the fact that it doesn't compensate him for the
2 entire equity. It doesn't say that a portion of the
3 288,000. Paragraph 160 is very clear. There hasn't
4 been any dispute or any disputed testimony with
5 respect to those paragraphs.

6 MR. CHASE: The evidence itself disputes it.
7 The best evidence of what that money will do --

8 THE COURT: Hang on. Hang on. There's a parol
9 evidence rule here, and there's an issue, because we
10 have a contract that says what it says, and then we
11 have admissions of allegations in the complaint that
12 relate to the same subject matter.

13 MR. CHASE: Yes, sir.

14 THE COURT: In the non-jury evidence that you
15 have -- may I see the letter, please, that was
16 marked for identification? Do you recall that the
17 exhibit letter was -- was it FF, or was it something
18 else?

19 MR. BENITEZ: I believe it's S.

20 THE COURT: These are the ones that were
21 received in evidence, but there's -- I'm sorry.
22 That's my fault. It may not be marked non-jury, but
23 there was something that was marked for
24 identification. It was a letter that was not
25 received in evidence.

1 MR. CHASE: It's handwritten. I believe it
2 might be A.

3 THE COURT: Several pages long.

4 MR. CHASE: It might be Defendants' A for
5 identification purposes.

6 MR. BENITEZ: May I approach the exhibits,
7 Judge, to pull it out?

8 THE COURT: The clerk's looking through it.
9 Thank you.

10 MR. BENITEZ: Oh, I'm sorry.

11 THE COURT: Okay. So what has been marked
12 Defense A for identification, is the letter that you
13 are relying upon for the cancellation of the
14 contract; is that correct? Revocation, rescission,
15 whatever you want to call it.

16 MR. BENITEZ: Yes, your Honor. That is one of
17 the pieces of evidence on behalf of Mr. Myers'
18 testimony supplementing that, but that's -- I've
19 identified that in my pleadings as to the specific
20 act that qualified the offer that was made by
21 Michael Myers and Jackie Myers on July 7, 2005.

22 THE COURT: Qualified. That's a new word.
23 So --

24 MR. BENITEZ: Okay. I apologize. I withdraw
25 that word, Judge.

1 THE COURT: Okay. So what is it about this
2 letter that you would argue -- and I do want -- I'm
3 sorry for Mr. Carlin.

4 MR. CHASE: I understand.

5 THE COURT: I apologize, but this makes sense
6 for us to resolve first, because if -- if indeed,
7 this is an effective cancellation, revocation,
8 whatever you want to call it, then that obviates the
9 need to go forward on the replevin issues, because
10 the property was never transferred.

11 There's no argument the property was
12 transferred; is that fair?

13 MR. BENITEZ: Yes, your Honor.

14 THE COURT: So I want to address argument with
15 respect to this letter first and this rescission,
16 revocation, cancellation argument.

17 So your ball.

18 MR. BENITEZ: Your Honor, the only other
19 evidence -- or besides Mr. Myers' testifying as to
20 the conversations that took place on July 7, 2005,
21 and the acts that took place afterwards, would
22 also -- it would be -- to bring to the Court's
23 attention, another exhibit the Court excluded, and
24 that would be an exhibit, the proposed letter
25 agreement of May, and I believe the testimony was

1 May 11th, but it wasn't certain, May 11th, 2005.

2 That's the one where Mr. Donaghy then on
3 July 7th handwrites those five items. The Court
4 instructed me to go ahead and delete all of that,
5 and just -- we have a little sliver of where that
6 handwritten portion is, and I want to try to offer
7 that into evidence again, because in that agreement,
8 there's indications that, in fact, verified my
9 client's position that the property was not
10 transferred, which is what the Court has just
11 alluded to, and specifically --

12 THE COURT: How does that letter, the draft,
13 and now your client's testimony, how does that come
14 in?

15 MR. BENITEZ: That would come in, Judge,
16 because our position is, that the letter agreement
17 specifically says that the memorabilia was going to
18 be transferred in the future, and it uses the word,
19 the parties agree to transfer, agree to transfer,
20 and if you look at the May 11, 2005 --

21 THE COURT: You didn't understand my question.

22 MR. BENITEZ: I'm sorry.

23 THE COURT: My question is, in essence, why
24 isn't your client's testimony and the prior draft
25 agreement parol evidence?

1 MR. BENITEZ: Because it goes to the ambiguity
2 within the letter agreement, because I read the
3 letter agreement and I understand it, and the way I
4 read the letter agreement, in particular,
5 paragraph nine, it says, they agreed to transfer,
6 which means they agreed to do something in the
7 future. They didn't say I transfer, and they didn't
8 use the words that were specifically used on the
9 May 11th, 2005, proposed letter agreement, which
10 says, hereby irrevocably transfer --

11 THE COURT: What's the ambiguity in the
12 July 7th letter agreement?

13 MR. BENITEZ: The ambiguity is created by the
14 position of the plaintiff.

15 THE COURT: No. No. No.

16 MR. BENITEZ: The position of the plaintiff.

17 THE COURT: Plain and unambiguous language in
18 the face of the letter agreement. That's the
19 Court's job. So where in the face of the letter
20 agreement is there an ambiguity? I don't care what
21 their position is. That's irrelevant, because
22 that's parol evidence, and I'm not going to consider
23 it from them, just as I'm not going to consider it
24 from you until you show me on the face of the
25 agreement an ambiguity. This would require you to

1 point to a paragraph and a sentence now.

2 MR. BENITEZ: Okay. And, Judge, I would point
3 to paragraph nine in the letter agreement, which
4 states Michael Myers and Jacqueline Myers,
5 individually and on behalf of Southeast, Jano,
6 hereby agree to transfer all rights and so on. And
7 then later on that in paragraph, Judge, it says --
8 and this is the second to the last full sentence. I
9 believe it starts out, the parties, and it says, the
10 parties will enter into a capital contribution
11 agreement that will detail the property transferred
12 and agreed upon value.

13 So basically, my interpretation of this
14 paragraph is that nothing was transferred, it was
15 going to be done in the future --

16 THE COURT: First of all, that's not what it
17 says. So let's deal with the letter. Show me where
18 the ambiguity is in the letter agreement, because it
19 doesn't say what you just said it says.

20 MR. BENITEZ: Okay. Well -- well, I'm not sure
21 what the Court is alluding to, but the phrase agree
22 to transfer to me means it's going to happen in the
23 future.

24 THE COURT: So you're referring now to the
25 first sentence of paragraph nine?

1 MR. BENITEZ: Yes, your Honor.

2 THE COURT: Okay.

3 MR. BENITEZ: And it says agree to transfer.

4 THE COURT: So where's the ambiguity?

5 MR. BENITEZ: Only if the Court reads it and
6 finds that it doesn't say that, is there an
7 ambiguity.

8 THE COURT: Only if you disagree with my
9 interpretation of the plain and unambiguous language
10 of the contract? Mr. Benitez, we're not
11 communicating, and I'm -- I'm not sure why, but the
12 burden is clear. The law says that you have to show
13 me what the ambiguity is. If I look at the language
14 and I don't think it's ambiguous, then we don't get
15 to parol evidence. If I think it's ambiguous,
16 meaning it could have more than one meaning, then we
17 get to parol evidence.

18 So what is the language you contend is
19 ambiguous?

20 MR. BENITEZ: And, Judge, and I apologize for
21 repeating myself, but that is the language that I
22 believe is ambiguous.

23 THE COURT: Hereby agree to transfer all right,
24 title and interest.

25 You think that's ambiguous because it could

1 mean what two things?

2 MR. BENITEZ: I personally do not believe it's
3 ambiguous.

4 THE COURT: Then it's not ambiguous. Okay. So
5 I have an unambiguous revision in the contract that
6 you say means that he agrees to do something but
7 doesn't do it by virtue of this document; is that
8 fair?

9 MR. BENITEZ: Yes.

10 THE COURT: Okay.

11 MR. BENITEZ: But, Judge, I think the case law
12 is that if there's -- if there's two ways of reading
13 it, and if the Court -- even if it's the Court's
14 reading of it, if the Court disagrees with my
15 perception of what it says, and it can be read my
16 way or it could be read the Court's way, there's an
17 ambiguity that's created.

18 THE COURT: Great. So tell me what the two
19 meanings are.

20 MR. BENITEZ: Well, the interpretation is that
21 it was transferred by paragraph nine.

22 THE COURT: I -- sir, don't tell me what the
23 parol evidence is. Tell me what the ambiguity in
24 the agreement is. You're telling me it's
25 unambiguous, but you want me to find that it's

1 ambiguous and allow parol evidence.

2 MR. BENITEZ: Only if you find --

3 THE COURT: It doesn't matter what I find.

4 What matters is what the language says. Start with
5 the language.

6 What's the ambiguity?

7 MR. BENITEZ: Like I said before, I don't
8 believe it's ambiguous. I believe it says agreed to
9 transfer means something in the future, and they
10 provide for a capital contribution agreement to be
11 done in the future, identifying or transferring the
12 items and identifying them and giving them a value.
13 So my interpretation of paragraph nine is consistent
14 with our position, and I don't think it's ambiguous.

15 THE COURT: Okay. Great. Then I don't need to
16 hear any more argument because there's no parol
17 evidence coming in, if I accept your interpretation,
18 right?

19 MR. BENITEZ: If you accept my interpretation
20 that it wasn't transferred, and it was going to be
21 transferred in the future, then yes, your Honor, I
22 agree 100 percent.

23 THE COURT: Okay.

24 MR. CHASE: So the same contract says --
25 paragraph 27, Michael Myers and Jacqueline Myers

1 expressly understand the assets which they have
2 contributed to the company are at risk and the
3 operating agreement they signed at the same time,
4 there's the determination on the effective date, the
5 members have had on the effective date, which we've
6 established as July 7, 2005.

7 THE COURT: What paragraph are you referring
8 to?

9 MR. CHASE: This is paragraph four of the
10 operating agreement.

11 THE COURT: Okay.

12 MR. CHASE: The members have contributed the
13 property set forth in the capital contribution
14 agreement attached as Exhibit B.

15 On Exhibit B, the net equity of the real
16 property, and then there's a value, Michael Myers
17 and Jacqueline Myers. Michael Myers, the
18 memorabilia assets, the values to be determined.
19 And then it says, the parties will agree on the
20 liquidation value of the memorabilia assets within
21 180 days of closing or have the assets appraised.
22 The agreed upon or determined value will be the
23 unreturned capital contribution value, then it says,
24 Donald and Glenda Hachenberger and what they have
25 contributed.

1 The only thing that was decided was the value
2 of the memorabilia assets. The assets themselves
3 transferred and then you have --

4 THE COURT: What are the memorabilia assets?

5 MR. CHASE: They're identified on that CD that
6 is attached to --

7 THE COURT: That's some of it.

8 MR. CHASE: That's some of it. And then you
9 have the other -- you have the quitclaim, bill of
10 sale that had all of the personal assets. The
11 testimony's going to be there was a ton of
12 memorabilia assets on the 46 property on the date of
13 closing, that in addition to the things that were on
14 the CD.

15 The CD shows pictures of the memorabilia assets
16 on the 46 property and the Bobby Lee Point property.
17 The -- it doesn't show everything. And then you
18 have the action in conformity with it and the
19 acknowledgment two-and-a-half years later by
20 Mr. Myers when he said -- and I'm quoting it to you.
21 He knew exactly what he was doing. He said -- the
22 words and the testimony was, the operating agreement
23 gives you and Glenda \$5,000,000 buffer. That's the
24 1.3 plus the 3.6 million dollars, that's 4.9. The
25 inescapable inference there, that he's talking about

1 all of the stuff is their collateral.

2 THE COURT: That's parol evidence, right?

3 MR. CHASE: Sir?

4 THE COURT: That's parol evidence, is it not?

5 MR. CHASE: The 3.6 million?

6 THE COURT: Yeah.

7 MR. CHASE: The value of it?

8 THE COURT: Ah-ha.

9 MR. CHASE: I don't know how that's parol
10 evidence, sir.

11 THE COURT: Where is that in the agreement?

12 MR. CHASE: Sir?

13 THE COURT: Where is that in the agreement?

14 MR. CHASE: The value?

15 THE COURT: Yes.

16 MR. CHASE: It hasn't been -- the agreement
17 says they will value these items later.

18 THE COURT: Right. So it's parol evidence that
19 you want to use to interpret what memorabilia means.

20 MR. CHASE: No, sir, not at all. Not at all.
21 Parol evidence is --

22 THE COURT: Hang on. It is parol evidence that
23 you want me to use to interpret what was intended by
24 memorabilia, because now you want to say that
25 because they reached a value for some pool of

1 memorabilia down the road of 3.6 million dollars,
2 that memorabilia under the agreement must have
3 necessarily included everything that makes up that
4 3.6 million dollars.

5 MR. CHASE: I don't think that I was -- I don't
6 think I was saying that.

7 THE COURT: How else does that admission get
8 in?

9 MR. CHASE: The 3.6 million dollars?

10 THE COURT: Yes.

11 MR. CHASE: We brought that in and it was
12 relevant to establishing that he knew that there was
13 a contract, and that the contract transferred
14 certain assets. That's what relevant -- certainly
15 probative to that. It's a statement by a party
16 opponent -- an admission by a party opponent that is
17 probative and has no prejudicial value.

18 THE COURT: It's parol evidence that you want
19 me to use to interpret the agreement.

20 MR. CHASE: I don't even -- there's another
21 statement -- I don't quite follow the Court on that
22 one, but I will say there's another statement that
23 he made, and he admitted on the stand -- and this
24 was on July 13, 2007, so two years later, as agreed
25 in the agreement, we would agree to transfer the

1 LLC, the memorabilia used in the project and
2 detailing list of those items that establish a value
3 for the memorabilia assets transferred. If we
4 cannot agree to the value, we would get an outside
5 appraiser to establish value.

6 They clearly agreed there was a contract and
7 that it has not been revoked. This has not been
8 done -- talking about the value. We made a big
9 effort to inventory what we have so we could
10 transfer the items easily with a scanner, and when
11 we transfer to site. So the transfer them to the
12 site. I have continued to procure fun items for the
13 project and have made additional purchases ongoing
14 since our LLC agreement was established.

15 How is that two years later, how can they come
16 back and say, no, we revoked that agreement two
17 years ago?

18 THE COURT: How can you say those statements
19 are not parol evidence? It's reading from the
20 contract. It's not reading from the contract.

21 MR. CHASE: It's almost verbatim.

22 THE COURT: The contract is the contract.

23 MR. CHASE: I agree.

24 THE COURT: I interpret the contract, but what
25 he says after the fact in interpretation of the

1 contract, how is that not parol evidence?

2 MR. CHASE: I think -- I would say rather than
3 calling it parol evidence, per se, if it's an
4 interpretation, I don't think that it's relevant as
5 an interpretation of what the contract requires,
6 because the Court reads the contract and decides.

7 THE COURT: Right. That's the definition of
8 parol evidence.

9 MR. CHASE: I believe that parol evidence is
10 our -- actions taken up to the date of the contract,
11 and that to try to establish what was meant by the
12 contract, that -- but once you signed the contract,
13 everything that happened prior to the date of the
14 contract, all that's out is parol evidence.

15 I don't believe that you can have parol
16 evidence afterward. You can have people try to
17 testify about things that happened before or
18 afterward, but that's -- you can't go back in time.
19 Anything that occurs after the contract is maybe
20 objectionable for other grounds, such as hearsay,
21 which I believe that document is, and/or just --
22 whatever -- any various objectionable ways it can be
23 excluded. Parol evidence, though, is not something
24 that happens afterward unless you're talking about
25 something before.

1 THE COURT: So the parties can talk about after
2 the fact all they want --

3 MR. CHASE: No, sir.

4 THE COURT: -- how it is they interpret the
5 contract?

6 MR. CHASE: No. Sir, it's irrelevant because
7 if -- how they interpret the contract is irrelevant.
8 That's for the Court to decide.

9 THE COURT: Because it's parol evidence.
10 That's the point.

11 MR. CHASE: I think that. No, sir.

12 THE COURT: That's why we don't allow parol
13 evidence in.

14 MR. CHASE: I will say this to the Court. I
15 read a ton on parol evidence prior to this trial.
16 The parol evidence is everything up to the date of
17 the contract. The -- I think that their
18 interpretation of what the contract says is
19 irrelevant, because the Court interprets contracts,
20 and so it's not irrelevant because it's parol
21 evidence, but it's -- I don't know, it's -- I don't
22 see how it's that big of a deal.

23 THE COURT: Well, here's why it's a big deal.

24 MR. CHASE: Yes, sir.

25 THE COURT: Because the operating agreement

1 says that the parties will enter into a separate
2 capital contribution agreement.

3 MR. CHASE: Yes, sir.

4 THE COURT: They say it both in the body of the
5 operating agreement, and then in Exhibit B, which is
6 supposed to be the capital contribution agreement,
7 but it clearly is not.

8 MR. CHASE: Yes, sir. They contemplate --

9 THE COURT: Because it says on Exhibit B that a
10 separate capital contribution agreement has been
11 executed by the parties of even date herewith. So
12 Exhibit B is not the capital contribution agreement.

13 MR. CHASE: No, sir, because --

14 THE COURT: So where is the capital
15 contribution agreement?

16 MR. CHASE: The capital contribution agreement
17 relies on that Exhibit B where it says, the parties
18 will agree on a liquidation --

19 THE COURT REPORTER: I'm sorry. I lost you.
20 Will agree on?

21 MR. CHASE: A liquidation value of the
22 memorabilia assets within 180 days of closing, and
23 it goes on.

24 THE COURT: That's not what Exhibit B says.

25 MR. CHASE: I'm reading, sir.

1 THE COURT: No, sir. Exhibit B says in the
2 very first sentence --

3 MR. CHASE: Yes, sir.

4 THE COURT: -- a separate capital contribution
5 agreement has been executed by the parties even date
6 herewith.

7 MR. CHASE: Yes, sir.

8 THE COURT: Where's the capital contribution
9 agreement?

10 MR. CHASE: I've never seen it.

11 THE COURT: Okay. So why isn't that an
12 ambiguity? Why doesn't that create an ambiguity in
13 this agreement that the Court is then forced to
14 construe?

15 MR. CHASE: What would be the two different
16 terms -- or what are the two different ways to
17 interpret that? You have a separate capital
18 contribution agreement that has been executed by the
19 parties of even date herewith. There's no -- I
20 interpret that sentence to say A, and somebody else
21 interprets it to say B. That sentence says what it
22 says.

23 THE COURT: It says what it says.

24 MR. CHASE: It says what it says.

25 THE COURT: But the fact that it says what it

1 says, and what it says isn't true, and paragraph
2 A -- I'm sorry. 4A says, that on the effective date
3 the members have contributed the property or loans
4 set forth in the capital contribution agreement
5 attached as Exhibit B.

6 So now mustn't we say that we don't know what
7 the property or loans were that were contributed
8 without referring to other parts of the agreement
9 and parol evidence?

10 MR. CHASE: No, sir. The -- I don't see --
11 that's not -- parol evidence, you'd have to have an
12 ambiguity, where that is a term that is capable of
13 two different reasonable interpretations. You don't
14 have that. What you have is a sentence --

15 THE COURT: How do I interpret this to know
16 what was contributed?

17 MR. CHASE: This is -- this is a partial -- the
18 Exhibit B is a partial capital contribution
19 agreement. The fact that he wrote a separate
20 capital contribution agreement has been executed by
21 the parties of even date herewith, how is he not --
22 could he be referring to this? I don't know.

23 THE COURT: That wasn't executed.

24 MR. CHASE: This is -- I agree, sir, but this
25 is set outlining exactly what was transferred. It

1 says the memorabilia assets and then that had been
2 attempted to be identified, specifically in the
3 letter agreement, and all of those things where they
4 signed on the CD that had the pictures of everything
5 being transferred, and the understanding that
6 everything on the property as of July 7, 2005, they
7 didn't take the time to go through and list the
8 6,824 items because they needed to get a contract
9 done, because they needed to hurry up get everything
10 done to save on their thing.

11 It's -- so the assets, they identified them.
12 It's -- I don't see where you're talking about parol
13 evidence and being ambiguities, I don't see that. I
14 see where there's an issue for the Court to decide
15 what assets were transferred.

16 THE COURT: This says -- paragraph 4A says, on
17 the effective date the members have contributed the
18 property or loans set forth in the capital
19 contribution agreement.

20 MR. CHASE: Yes, sir.

21 THE COURT: There is no such agreement. That
22 is what is supposed to define what has been
23 contributed.

24 MR. CHASE: It's also defined -- I don't see
25 it -- it seems like the same thing over and over.

1 The letter agreement identifies that they have
2 memorabilia assets, that they have these permits,
3 they have these antique cars that gives titles to
4 them and all these other things, it gives the CD
5 that has pictures and says they have been
6 contributed. They had Michael Myers and Jackie
7 Myers have contributed.

8 Then you come to the operating agreement, and
9 it talks about the memorabilia assets, and it just
10 says -- it says that they have transferred the -- or
11 they get equity for their -- in the property of
12 1.3 million. It also transfers property, and then
13 it says memorabilia assets, and then the value is to
14 be determined.

15 And then you're right, Judge. It doesn't go
16 through and list specifically. If I buy Walmart,
17 and I say I'm buying all of the assets in Walmart, I
18 don't go through in my closing statement and list
19 every single asset in Walmart, but if there becomes
20 an issue down the road about what did you buy when
21 you bought all the assets in Walmart? I bought --
22 you know, we can talk about that. We can talk about
23 what assets conveyed, but that was the
24 determination, and that goes to the replevin count,
25 and their cover for it, their cover for the dec.

1 action.

2 Their dec. action, I submit, the replevin can't
3 lie either for legal reasons. The dec. action says
4 they are unsure about what property transferred.
5 That's everything. So what we would do today is, we
6 would come in and Nick Carlin would get on the stand
7 and testify about what Mike Myers said he
8 transferred, and Mike Myers said to Nick Carlin on
9 multiple occasions standing in the Church Street
10 warehouse with it completely packed with all the
11 stuff they have moved in, this is all the stuff I
12 have contributed to the company. This is my end of
13 the company. This is consistent with everything
14 that he had done, his course of dealings over the
15 next three years that was consistent with all of
16 that is what he contributed to the company. He said
17 it over and over.

18 So there's no problem with the contract, and
19 cap capital contribution agreement -- the capital
20 contribution agreement dealt with the value. The
21 reason why they haven't done value -- and there's no
22 time limitation on it. It was --

23 THE COURT: It didn't just deal with value.
24 That's not what the agreement says.

25 MR. CHASE: Then I disagree with you, Judge.

1 THE COURT: So then it's ambiguous.

2 MR. CHASE: No, sir. No, sir. I just -- I
3 don't see -- I don't see how the Court is reading
4 it --

5 THE COURT: Paragraph 4A defines what the
6 capital contribution agreement is, and it doesn't
7 say to determine value. It says, here's a list of
8 everything that we intend to put that has been
9 transferred. On the effective date the members have
10 contributed the property or loans set forth in the
11 capital contribution agreement. That's the purpose
12 of the capital contribution agreement, according to
13 the plain unambiguous language of paragraph 4A of
14 the operating agreement.

15 MR. CHASE: And in order to do that, they would
16 have to inventory everything, which they started
17 doing and then put a value on.

18 THE COURT: But they didn't decide to do that.
19 They said they're going to execute it on even date
20 herewith.

21 MR. CHASE: That didn't happen.

22 THE COURT: Right.

23 MR. CHASE: So is that a material breach that
24 they signed it knowing that it didn't happen?

25 THE COURT: No one's arguing material breach.

1 The question is, is that ambiguous?

2 MR. CHASE: No, sir. No, sir. I thought you
3 were done with the question.

4 THE COURT: Mr. Chase, I get you're fired up,
5 but taken it down a notch.

6 MR. CHASE: Yes, sir.

7 THE COURT: I'm reading the agreement, and the
8 agreement says, you were going to do it, and you
9 didn't do it. Sloppy? At best. So what's the
10 significance of it? That's the legal issue. And
11 what I'm concerned with, is that you have a vague
12 description throughout this agreement of memorabilia
13 assets. That's the only description that's used.
14 What may be the saving grace here ultimately, is
15 this bill of sale, and I don't know if it is or not,
16 because I don't know what it transferred. That's
17 what I have to take testimony as to.

18 The quitclaim bill of sale says that you are
19 transferring -- this is current, present tense
20 language. Transfers -- transferred the buildings
21 and other improvements and all personal property
22 located. And personal property is not capitalized,
23 so that's everything of personal nature.

24 MR. CHASE: Yes, sir.

25 THE COURT: Does that include motor vehicles?

1 No. Are motor vehicles motor vehicles personalty?
2 Are they?

3 MR. CHASE: I think -- I don't know the answer.

4 THE COURT: I said no. I'm asking the
5 question.

6 MR. CHASE: I believe in the context of that
7 contract, yes, but it's -- I think it's personal
8 property. I consider my car my personal property.

9 THE COURT: Okay.

10 MR. CHASE: The letter agreement has the
11 specific vehicles listed and says that they're being
12 transferred.

13 THE COURT: Where does it say that, being
14 transferred?

15 MR. CHASE: It says -- paragraph six, Michael
16 Myers and Jackie Myers are the sole owners of
17 substantial amounts of a certain unique petrobilia,
18 Americana memorabilia, antiques, classic
19 automobiles, collectively, the memorabilia assets.
20 And the paragraph nine, transfer, then they attach
21 as exhibits, on Exhibit B, the CD Rom. There are
22 pictures of automobiles on there.

23 THE COURT: Where is the language of transfer?

24 MR. CHASE: Paragraph nine says, Michael Myers
25 and Jackie Myers, individually and on behalf of

1 Southeast and Jano hereby agree to transfer all
2 rights, title and interest in the Gassey Jack's
3 assets, the memorabilia assets, the SR 46 property
4 and so on.

5 And that transfers it. That's not something in
6 the future, because if you read everything, the
7 paragraph 27 of that very same agreement, Michael
8 Myers and Jackie Myers --

9 THE COURT: Wait. You just jumped to a method
10 for the Court to interpret ambiguous language and
11 that is *pari materia*.

12 MR. CHASE: I don't think that's ambiguous. I
13 just don't see that as ambiguous at all.

14 THE COURT: So that's your starting point.
15 So we start with the language, and you contend it is
16 not ambiguous either, but you contend that it
17 effectuated a transfer?

18 MR. CHASE: Yes, sir, it absolutely did. And
19 there's -- again, if the -- the items are
20 identified. The CD Rom, it's Exhibit B.

21 THE COURT: Right. They agreed to transfer,
22 and so you may have an action for specific
23 performance, and indeed, you've brought one,
24 correct?

25 MR. CHASE: Yes, sir. Yes, sir.

1 THE COURT: But I'm not certain that it
2 effectuated a transfer. I read that, I think as
3 Mr. Benitez does. I agree to do something isn't
4 doing it.

5 MR. CHASE: Okay. Then -- that's pretty
6 standard contract language.

7 THE COURT: It's not. If you look at the bill
8 of sale, it doesn't say I agree to transfer the
9 attached items to you. It says I transferred them
10 to you. By a signing this, I have transferred them.

11 MR. CHASE: I don't think that's a reasonable
12 interpretation. The paragraph -- again,
13 paragraph 27 says that they contributed to the
14 company. That -- it's past tense, Michael Myers and
15 Jacqueline Myers express and understand that the
16 assets which they have contributed to the company --
17 they moved it over there. Mike Myers told everybody
18 these are the assets I have contributed. This is my
19 end of the deal. Don put in money, I put in these
20 assets.

21 THE COURT: Do you have an action for specific
22 performance?

23 MR. CHASE: Yes, sir.

24 THE COURT: And are you seeking the transfer of
25 all of these assets under the action for specific

1 performance?

2 MR. CHASE: I am seeking the liquor license and
3 the automobile titles. If the Court finds somehow
4 that that is ambiguous, I would move to amend the
5 pleadings to add a count for specific performance as
6 to the memorabilia assets. There's -- it's not -- I
7 would have to do that. The evidence would support
8 it. If that were the Court's finding, the evidence
9 supports that amendment as there's been no objection
10 to saying anything about these assets being the --
11 belonging to Highway 46.

12 And then again, the quitclaim bill of sale is
13 unambiguous. It's all unambiguous. If you read
14 this contract, there's no reasonable interpretation
15 would say that -- that they are not transferring
16 memorabilia assets. It's only the value, and even
17 Exhibit B to the operating agreement says that -- it
18 talks about everything that was transferred, and
19 then it just leaves out the value. It was the value
20 they needed to inventory things --

21 THE COURT: Are all of the things that are
22 contained on the disc, which is a part of the
23 contract, were they on the property at the time?

24 MR. CHASE: There were -- many of the things
25 were on the property. A lot of things were at the

1 Bobby Lee Point warehouse.

2 THE COURT: So were those transferred under the
3 quitclaim bill of sale?

4 MR. CHASE: Not in the quitclaim bill of sale,
5 but under the letter agreement, they did.

6 THE COURT: All right. Mr. Benitez, talk to me
7 for a minute about this letter. Why does this
8 letter have the effect of rescinding, cancelling or
9 revoking the contract? What's the language in this
10 letter that you believe effectuates that, and what's
11 the principle of law that allows your client to
12 unilaterally cancel a contract?

13 MR. BENITEZ: And we are talking about the
14 letter agreement and the operating agreement, which
15 is specifically what this count is about, Judge, and
16 the testimony would be and has been that the letter
17 agreement and the operating agreement were not a
18 done deal. They were nonbinding, they were
19 unenforceable, they were being held in escrow. At
20 that point --

21 THE COURT: If that's the case, there's nothing
22 to cancel.

23 MR. BENITEZ: No. No, but -- right, but again,
24 I'm in an oddball position, because I kind of have
25 to give the other side, too.

1 THE COURT: You don't have to give any other
2 sides. The Court's already determined as a matter
3 of law those are effective. That's already been
4 determined. That's the basis upon which the jury
5 heard the questions of a breach of duty of care and
6 a breach of the duty of good faith and fair dealing,
7 and the testimony and rulings which the Court made
8 during the course of the jury trial.

9 The letter agreement and the operating
10 agreement are in force and effect, and there is no
11 escrow agreement. It didn't happen. The Court's
12 determined for legal purposes that's the case. Your
13 arguments are preserved.

14 So what is the argument that this letter has
15 the effect of cancelling that -- and I'm using your
16 words, rescinding, cancelling or revoking, and what
17 is the legal principle that allows your client to do
18 that with binding effective contracts?

19 MR. BENITEZ: And the argument would be, Judge,
20 that based on the premise that they signed it
21 without qualification and the Hachenberger's had not
22 signed the agreement, it was, in essence, an offer.
23 I know we've heard testimony that they came to the
24 July 7th with an offer. I discount that totally. I
25 mean, I haven't heard that evidence prior to the

1 trial.

2 But anyway, regardless of that, my position
3 would be that my clients, by signing that agreement
4 can be considered to have made an offer to the
5 Hachenberger's, which they were -- in the worst
6 scenario for the Myers, they were free to accept.

7 THE COURT: So your argument is, they revoked
8 an offer?

9 MR. BENITEZ: Yes, your Honor.

10 THE COURT: Not a contract, so there's nothing
11 to rescind, as the legal definition of rescission
12 goes. You've referred to it as rescission,
13 revocation or cancellation. You, in essence, are
14 arguing they have revoked or canceled their offer to
15 contract?

16 MR. BENITEZ: Yes. They withdrew their offer
17 to contract. To use another word that we haven't
18 used yet, they withdrew the offer, so there was
19 nothing that the Hachenbergers could do. They could
20 not take the agreements and sign them, because on
21 July 8th, the very next day they basically said,
22 listen, if you don't -- if we don't work out all
23 these deals, we don't have a deal, which basically,
24 made that offer that they had made on July 7th
25 invalid or canceled or rescinded or withdrawn or

1 whatever you want to do, unless they made -- the
2 Hachenberger's then took the step, and then said,
3 okay. Let's work it out, and we'll get a deal done.

4 But they were at that position. They knew
5 that, in fact, it wasn't an offer. There wasn't an
6 offer on the table that they could just sign off and
7 agree to, because the Myers had withdrawn it with
8 the July 8th letter.

9 THE COURT: What part of the July 8th letter
10 does that?

11 MR. BENITEZ: Judge, I'd like to make one point
12 real quick, and that is, the Court had made some
13 comments earlier -- or I think Mr. Chase, also about
14 the untrustworthiness of the letter --

15 THE COURT: You know, I'm sorry, but I keep
16 asking questions, and I don't get answers.

17 MR. BENITEZ: I apologize.

18 THE COURT: I am your trier of fact. I am the
19 decider of the law. I would be concerned about what
20 I'm concerned about, and then tell me whatever else
21 you want to tell me.

22 MR. BENITEZ: Okay. Yes, your Honor. The
23 letter agreement does not come out and use those
24 words, but the reading of the letter agreement
25 clearly articulates that fact, the fact that we

1 don't have a deal. That this is not an offer. That
2 if you consider this an offer, the signing of these
3 contracts that Hachenbergers had not signed on
4 July 7th or 8th, that we're making it clear that
5 there's no offer on the table.

6 The offer is, basically, let's get all these
7 things worked out, and then we'll have an offer.
8 There isn't anything magical in the letter, Judge,
9 just to answer your question clearly. There's
10 nothing magical in the letter that says like a
11 lawyer would saying, I hereby rescind, terminate or
12 withdraw the offer. They don't even specifically
13 allude to some of the agreements or some of the
14 issues. They just basically generally -- generally,
15 just basically make it known that, hey, if you think
16 we had an offer, if you think we made you an offer
17 here, it is not an offer that you can accept, and if
18 you accept it, we're not -- we are not keeping it on
19 the table. And that's our legal theory with respect
20 to Count 5, Judge.

21 THE COURT: You have some case law with respect
22 to that?

23 MR. BENITEZ: No, your Honor, I do not at this
24 time.

25 MR. CHASE: I need to correct my statements a

1 minute ago, Judge, if I may. The -- we would not
2 have to amend. The memorabilia assets is part of
3 what is being claimed under specific performance.

4 MR. SHUKER: Your Honor, while we're on this
5 subject.

6 THE COURT: Yes.

7 MR. SHUKER: Thank you, your Honor. And again,
8 I'm addressing just Count 5. I think Count 20 goes
9 along with the replevin, and that's not our issue.
10 I think Mr. Benitez just clarified that now he's not
11 seeking to either rescind or cancel, because that
12 would mean that it's a contract, and he's telling
13 you that this July 8th letter should be considered
14 as a revocation of the offer. So that's his legal
15 theory for 5. That's what I heard him say.

16 I think there are two problems with that. The
17 first is, you've already found as a matter of law in
18 the directed verdict that the offer was the contract
19 presented by Mr. Donaghy, and it was then accepted
20 by the signature. So I think that argument by him
21 is simply inconsistent with the law of the case.
22 You can't now have a new offer by them. So since
23 you found that that was the offer, and they accepted
24 it, it's too late. Revocation is not a legal
25 concept that applies.

1 Even if somehow your prior ruling, your Honor,
2 is that it is not binding, and so then you would
3 consider they are signing as the offer. It's the
4 first day of contract law, an offer remains
5 binding -- open until withdrawn. That letter does
6 not say withdrawn.

7 That letter says some things they'd like to do,
8 but it never withdraws that offer. And then in
9 August and October it was signed, and the parties
10 acted according to it for two years, and there was
11 also the supreme court case, your Honor, as part of
12 rescission that applies to all of these concepts,
13 and it is Avva, A-V-V-A, BC/BC versus Amiel,
14 A-M-I-E-L. It is -- sorry. I said supreme court.
15 It's Third District, 25 So.2d 7.

16 May I approach, your Honor?

17 THE COURT: You may.

18 MR. SHUKER: And, your Honor, the --

19 MR. BENITEZ: May I have a copy?

20 MR. SHUKER: This is a rescission case, but the
21 same ideas would apply for these equitable parts,
22 and so I'm looking at head notes five and six, and
23 the second sentence begins: As this Court long ago
24 confirmed, when a party seeking rescission has
25 discovered grounds for rescinding agreement and

1 either remains silent when he should speak or in any
2 manner recognizes the contract is binding upon him,
3 ratifies or accepts the benefits thereof, he will be
4 held to have waived the right to rescind.

5 That same statement can be held to revoking or
6 cancelling. It's the same legal concept. They
7 can't get their real property paid off. They can't
8 have a building built and otherwise take a salary
9 for two years and act entirely consistent with this
10 contract remaining silent on their eight points, and
11 then once terminated say, oh, you remember that
12 letter that there's no proof of delivery, that meant
13 I revoked that offer. It's just simply inequitable.

14 So our point, your Honor, is, A, it was already
15 accepted. B, even if you consider their signing of
16 that an offer, it was accepted before they revoked.
17 And then C, if somehow that was an attempted
18 revocation, your Honor, they've waived their ability
19 to do it by everything they did thereafter, by
20 accepting the benefits of the entire bargain.

21 THE COURT: Thank you. Last word, Mr. Benitez?

22 MR. BENITEZ: Yes, your Honor. With respect to
23 the letter agreement, I don't have it right in front
24 of me, but I believe the letter agreement indicates
25 that he was willing to put the party back in the

1 position, return the money and so on.

2 With respect to the issue of the property, we
3 have to keep in mind that there were two separate
4 transactions, one is not being affected by Count 5.
5 Count 5 is just limited to the letter agreement and
6 the operating agreement. If that is rescinded or
7 that's canceled or that's -- it goes away, the
8 parties remain in the same position. If he hasn't
9 been hurt and he's put the money in, he's got the
10 lien or it's just a loan. There's loan provisions
11 and so on. So I don't think that that's necessarily
12 the consideration.

13 The consideration at this point is, that my
14 client with -- immediately within 24 hours provided
15 this letter clarifying exactly what had occurred on
16 July 7th, which is consistent with there being no
17 deal, no offer that can be accepted by the
18 Hachenberger's. And whether we call it the letter
19 agreement, operating agreement, even though they
20 were signed by them on July 7th, they didn't get
21 signed by the Hachenbergers and didn't become
22 effective until September.

23 Yes, the letter agreement and the operating
24 agreement say it's effective July 5th, but it
25 doesn't become effective until the other party

1 signed, because Mr. Shuker was saying, well, the
2 classical case of an offer and acceptance, you make
3 an offer, and if it's accepted, it's a done deal.
4 Well, that's not quite right. If you make an offer
5 just because, you're saying you're making an offer
6 by doing the proposed agreement, and you convince
7 somebody to sign the proposed agreement, that's not
8 a done deal at that point.

9 If there was an oral agreement, and you take it
10 and you agree to it, maybe you can enforce an oral
11 agreement upon offer and acceptance. But in this
12 case, there are written documents, and the light
13 most favorable to the plaintiff, those documents
14 were presented for the first time on July 7th, they
15 were left in a room according to them for two hours
16 to review them, and they were asked to sign it, and
17 there was conversations by my clients indicating
18 what happened, which is consistent with the July 8th
19 letter.

20 So to stand here and say that just because we
21 called now that offer that Donaghy talked about
22 something that the Myers could come in there and
23 sign and then consummate, that's not true. That
24 agreement was not consummated, was not executed by
25 all the parties until the last party signed in

1 October -- and I believe it was October 8, 2005. So
2 there wasn't any binding agreement at that point in
3 time.

4 So my client -- my client's decision is,
5 basically all his testimony, all his conduct,
6 including the July 8th letter to indicate that this
7 was not a done deal. There wasn't a mutual meeting
8 of the minds, and call it an offer, call it whatever
9 you want, but as of July 8th, within 24 hours, the
10 Hachenbergers knew that there wasn't a deal unless
11 other things happened.

12 THE COURT: Right. So that's partly what's
13 confusing me here, is that your clients don't refer
14 to it as an offer.

15 MR. BENITEZ: You mean my clients don't refer
16 to --

17 THE COURT: To what they've signed as an offer.
18 They never did.

19 MR. BENITEZ: But it could be interpreted that
20 way because --

21 THE COURT: Not according to their letter.
22 According to their letter, it's just a draft.

23 MR. BENITEZ: Right. Right.

24 THE COURT: It was never an offer.

25 MR. BENITEZ: I know, and they're not lawyers

1 and not educated in the legal world.

2 THE COURT: Doesn't matter whether they are or
3 not. The question is, does this have a legal effect
4 that they wanted it to have. When they don't
5 understand it to be an offer, it can't be a
6 revocation of the offer.

7 MR. BENITEZ: I submit to the Court it could
8 be.

9 THE COURT: Where -- I read this entire letter
10 now. Where in this letter is anything that would
11 lead anybody to believe that this was a revocation
12 of an offer? It never -- it's only talked about in
13 terms of this is a draft agreement that we signed, a
14 draft closing statement, apparently, although they
15 took money pursuant to the closing statement. But
16 where -- how can I ever draw out of this some sort
17 of a revocation?

18 MR. BENITEZ: I believe you can draw it out
19 from the words, and what was said, and also the fact
20 that they didn't call it an offer, is just because
21 they're not lawyers --

22 THE COURT: It doesn't matter whether they --
23 they don't treat it as an offer. Whether they call
24 it an offer or not, they don't treat it as an offer.

25 MR. BENITEZ: I submit to the Court they do.

1 THE COURT: Where?

2 MR. BENITEZ: They do that in the letter, and
3 they do that through their testimony, and they do
4 that through the fact that nothing was done until
5 June 26, 2007, when it was pulled out and read to
6 Brad Nicks and the other people at Highway 46.

7 And, Judge, the Count 5 is based on the
8 assumption that us lawyers consider what they did
9 that day by signing the letter agreement and the
10 operating agreement, an offer to the Hachenbergers.
11 In other words, they could sign it, and they were
12 free to sign it. It was not a done deal.

13 So their July 8th letter makes it unequivocal
14 that, in fact, it's not a done deal. It reaffirms
15 their testimony with respect to that meeting with
16 respect to the letter agreement and the operating
17 agreement, and then it basically lets them know,
18 hey, listen. If we don't have a deal, that's fine.
19 We'll go back to where we were, and that's -- the
20 letter. That's their words that they used.

21 It was not a lawyer writing that, it wasn't
22 script, it wasn't specifically identifying anything
23 in particular, it was their statements, and it
24 conveyed a meaning that, in fact, if there was -- if
25 anybody, in hindsight, would consider it an offer,

1 it expired, it terminated, it was withdrawn, it was
2 rescinded on that day.

3 THE COURT: And so if we were sitting here with
4 Mr. Hachenberger having signed it that same
5 afternoon?

6 MR. BENITEZ: Totally different. Absolutely,
7 totally different. Then I would not have that
8 argument, and then you would have a lot of parol
9 evidence exclusion, because of anything that came
10 afterwards, the documents would tell you, and there
11 might have been a lawsuit within a week or two
12 weeks. Who knows.

13 THE COURT: And what about your clients' course
14 of conduct after this, where they just truck on down
15 the road, and he accepts paychecks at \$75,000 a year
16 and later at \$125,000 a year? He's operating and
17 building and doing all of these things to the
18 detriment of Don Hachenberger, who's putting money
19 in after money in after money in. What about that
20 course of conduct? Does that not indicate that he
21 never intended to revoke anything?

22 MR. BENITEZ: No. That indicates he thought
23 they were working in good faith. They had a very
24 good relationship. I think Jackie Myers even
25 testified -- or someone testified that everything

1 was going well, they got along beautifully, it was
2 like an addition to the family.

3 THE COURT: So as long as it was to his favor
4 and his detriment, he was fine with it?

5 MR. BENITEZ: No, because the evidence is also
6 that Mr. Hachenberger had control. He controlled
7 the attorney. The attorney now left in September of
8 2005. He didn't get another attorney. Every time
9 they talked they were basically saying -- he was
10 basically saying, Mr. Hachenberger, let's leave it,
11 let's wait until we see what we've got, I'll bring
12 another lawyer, we'll clean it up, and so on, and
13 that went on for about two years.

14 Yes, in hindsight that seems to be kind of
15 weird that a grown businessman, well educated
16 businessman, experienced businessman would do that.
17 But this didn't happen one sided, Judge. It wasn't
18 just Mr. Myers. It was Mr. Hachenberger who left
19 this done.

20 THE COURT: How has Mr. Hachenberger left
21 anything done? He signed the agreement.

22 MR. BENITEZ: And he never provided the
23 agreement to the Myers, Myers never saw the
24 agreement until they got served with --

25 THE COURT: They got a copy of it at closing.

1 MR. BENITEZ: They got a copy of the signed by
2 them agreements.

3 THE COURT: Right. So they have it.

4 MR. BENITEZ: Right. And that's what -- like I
5 said, that's a factual issue, but that's -- their
6 position is, they went along waiting and waiting to
7 get this done, and it's normal, Judge, to wait until
8 the inventory and deciding what the project looks
9 like and deciding what personal property is going to
10 be used in the project. Because we're talking --

11 THE COURT: It's normal to wait to do that? So
12 the statute of frauds is an issue.

13 MR. BENITEZ: No.

14 THE COURT: That's what you're saying.

15 MR. BENITEZ: No, it's not. No, I'm not
16 suggesting that what they did is normal.

17 THE COURT: You just said it's normal for them
18 to wait to do all of this documentation, until they
19 have identified the property that's going to be in
20 the project and all of these things. That took over
21 two years here, and they never, in your view,
22 memorialized any of that in writing. Or what they
23 have memorialized in writing, you contend should
24 have been completed in less than a year. That was
25 your argument to me during trial. It just --

1 MR. BENITEZ: Judge, no. No -- but I'm trying
2 to articulate it, if I may. It's not inconsistent
3 with what I'm trying to convey to the Court. They
4 had course of dealing, and they dealt with that
5 course of dealing. I'm not saying that it's normal
6 to go ahead and wait for anything or to wait to
7 decide these agreements two years after the fact.
8 That is not normal.

9 It was expected by the Myers that they were
10 going to get this done in a few weeks, at the latest
11 within a month or two. That didn't get done because
12 Donaghy got fired and because Mr. Hachenberger
13 didn't put another attorney on it, and it never
14 got --

15 THE COURT: And because your client never
16 brought it up. Your client never went and hired a
17 lawyer for a \$5,000,000 investment.

18 MR. BENITEZ: That was --

19 THE COURT: Five million dollars you invested
20 without a lawyer.

21 MR. BENITEZ: That was certainly a mistake.

22 THE COURT: But you keep on pointing the finger
23 at other places. Your client's got to accept
24 responsibility for that. Bottom line, we've heard
25 the testimony about this letter. It does come

1 bearing currently and candidly, you know, the
2 questions about its trustworthiness under these
3 circumstances. There's been nobody to testify that
4 this was ever received, nobody. The only testimony
5 is from your client -- and I can't recall if he
6 testified or if he proffered it, I accept either
7 one, that it was delivered to some secretary at the
8 Re/Max Realty Group. That's not effective for the
9 purposes for which you now argue.

10 In any event, the language of the letter is not
11 sufficient. If indeed -- and I don't think it was.
12 I've interpreted this to be a contract. When they
13 signed it, it was a contract, and there is no
14 cancellation provision or revocation provision. But
15 even if it were an offer that they made, which they
16 don't consider it to be in this letter, they
17 considered it to be a draft, that's not consistent
18 with it being an offer. They didn't use the
19 language. They didn't even talk about it in those
20 terms. Layperson or not, they didn't construe it to
21 be something that was revocable. They construed it
22 to be a draft consistent with the explicit, plain,
23 unambiguous language of their letter. Therefore,
24 there's nothing to rescind, revoke or cancel. I
25 can't consider it as such.

1 So judgment for the plaintiff on that count.

2 MR. CHASE: Thank you, sir.

3 MR. SHUKER: Your Honor, may we be excused for
4 Count 20? We're not going to offer evidence or
5 argument.

6 THE COURT: You may.

7 MR. SHUKER: Would you like us to prepare the
8 Count 5 as well?

9 THE COURT: Yes, for your client.

10 MR. SHUKER: Thank you.

11 THE COURT: Let's look at the agreement,
12 because I only want to take testimony consistent
13 with the Court's interpretation of the agreement. I
14 read the letter agreement, paragraph nine as an
15 agreement to transfer. It is not a transfer. So
16 under the letter agreement, it's not an ambiguous,
17 there's no transfer of anything that occurred by
18 virtue of the letter agreement itself. That's the
19 Court's declaration.

20 So to the extent that's a request from either
21 side for declaratory relief, I'm finding
22 paragraph nine to be nothing more than an agreement
23 to transfer in the future.

24 However, there's a count for specific
25 performance. That means all of the memorabilia that

1 was intended to be transferred pursuant to the
2 letter agreement, should have been transferred. It
3 has not, as I understand the evidence, and
4 therefore, the door is wide open to whatever
5 evidence there is for the transfer of memorabilia as
6 defined by the operating -- excuse me. By the
7 letter agreement.

8 In addition, there was an actual transfer of
9 all of the personalty that existed on the property
10 as of the date of the quitclaim bill of sale. So
11 what I'm looking for evidence to is, what existed on
12 the property. That's the first category. Those are
13 things that were transferred. There's effective
14 language of transfer inside of the quitclaim bill of
15 sale. Two, all of the things that are on the disc
16 -- the Court finds as a separate category. There
17 may be overlap, but all the things that were on the
18 disc are memorabilia that were intended to be
19 transferred. That's transferred. Whether it was on
20 the property or not pursuant to the Court's right or
21 obligation under the pleadings for specific
22 performance, it's clear that the intent was to
23 transfer all of the things that were on the disc.
24 So whether actually on the property or not, that
25 stuff, the Court is going to declare needs to be

1 transferred consistent with specific performance.

2 All of the automobiles that are identified in
3 Exhibit D and Exhibit C part two were intended to be
4 transferred. If they haven't been transferred, they
5 need to be transferred, specific performance. I
6 don't need to hear evidence as to those things.
7 That's clear from the terms of the agreement. The
8 capital contribution agreement was not attached. I
9 don't find that to be an issue for the Court's
10 consideration, because there are effective
11 provisions of transfer and intent to transfer
12 otherwise. So I think what I'm looking for is,
13 evidence to know what was on the property under the
14 quitclaim bill of sale, what the disc contained and
15 the vehicles that are clear in the terms of the
16 letter agreement should have been transferred if
17 they haven't been, and then a third category, which
18 is memorabilia that was intended to be transferred
19 for specific performance purposes.

20 MR. CHASE: Yes, sir.

21 THE COURT: Okay. Now, the replevin action can
22 only deal with things that are not covered by those
23 three categories of stuff. So if there are things
24 that were not on the property that have since made
25 their way on the property but were never intended to

1 the transferred under the terms of the agreement,
2 then that goes back. That's replevin, unless you
3 tell me there's some legal basis for that not to
4 happen.

5 MR. CHASE: No, sir. I think we've said all
6 along that he's offered his family stuff. He's
7 offered for him to have that stuff back.

8 THE COURT: But the category is broader than
9 just family stuff.

10 MR. CHASE: I understand that, sir.

11 THE COURT: All right.

12 MR. CHASE: There is -- there will be -- the
13 testimony's going to be that these things, like
14 building supplies and things like that, they did
15 come in later, but Highway 46 paid for them, and
16 then there's some of them -- because it's being
17 alleged replevin, that -- and you have to have a
18 right to ownership of those things, and a lot of the
19 things that he testified, the extension cords,
20 ladders, the Pella windows, things like that, the
21 testimony's going to be that he stole them, all of
22 them, a lot of testimony.

23 Nick Carlin was his assistant, personal
24 assistant --

25 THE COURT: I want to hear the testimony.

1 MR. CHASE: Yes, sir.

2 THE COURT: All right.

3 MR. CHASE: I know.

4 THE COURT: So we're clear where we're headed?

5 MR. BENITEZ: Judge, I've got a question.

6 THE COURT: Go ahead.

7 MR. BENITEZ: You've indicated that, for

8 instance, the motor vehicles indicated in

9 Plaintiffs' Exhibit 1 should be transferred.

10 THE COURT: Not Plaintiffs' 1, but -- yes. I'm

11 sorry. Yes, they are a part of Plaintiffs' 1, yes.

12 MR. BENITEZ: And it's Exhibit C.

13 THE COURT: C and D.

14 MR. BENITEZ: And part 2 or whatever.

15 THE COURT: Right.

16 MR. BENITEZ: Judge, some of those vehicles

17 don't belong to the Myers, meaning don't belong to

18 Mike or Jackie Myers exclusively. They belong to

19 their son. That was not part of this deal and was

20 not to be included in the deal.

21 THE COURT: Does your client not represent in

22 the terms of the agreement that he had title to

23 them, that he was authorized to transfer them?

24 MR. BENITEZ: They were surprised to that

25 agreement and those set of documents, so my

1 assumption -- we'll let him testify, but his
2 testimony will be what it is. I can proffer that
3 his son will come in and say he didn't know anything
4 about that, and he didn't give any permission. As a
5 matter of fact, that's consistent with the Myers not
6 having a done deal on July 7th, so these issues
7 never really got on the table.

8 THE COURT: Isn't there a provision in the
9 agreement that says he has title or he has the right
10 to transfer these things?

11 MR. CHASE: Yes, sir, I believe that it does.

12 THE COURT: Where is that?

13 MR. CHASE: It's in the quitclaim bill of sale
14 and also on paragraph six, Michael Myers and Jackie
15 Myers are the sole owners of a substantial amount
16 that includes the automobiles that are attached on
17 the Exhibit B and Exhibit C, which were identified.

18 THE COURT: So what does the Court do? He
19 makes the representation he's the sole owner.

20 MR. CHASE: I think that --

21 THE COURT: But he's not it turns out.

22 MR. CHASE: Yes, sir. I believe that the
23 Court's remedy is that -- I do believe that it would
24 be a problem to order -- you can't order Sean Myers
25 to sign the title. He's not a party. The -- I'm

1 citing the Court to National Industrial Bank of
2 Miami V. Forbes at 270 So.2d 426. This is a Fourth
3 DCA case. It was specific performance. Should the
4 trial Court find that it is impossible to grant the
5 equitable relief requested, then in the event the
6 trial Court shall be authorized to conduct an
7 evidentiary hearing for the purpose of ascertaining
8 and awarding damages incidental to the main relief
9 sought.

10 Essentially -- and I put that in the binder.
11 It's the last case in the binder, and the reason why
12 it's there, because we knew we were going to have a
13 problem with the 4COP license, because while we
14 weren't certain that the Myers had sold the 4COP
15 license, I think it has come out in testimony that
16 they have, which means that we've got to have an
17 evidentiary hearing as to the value of that, and I
18 would submit to the value of the Sean Myers' cars as
19 well, sir.

20 MR. BENITEZ: And, Judge, with respect to that
21 statement, that's outside the pleadings. That
22 hasn't been pled, and I don't think they can, at
23 this late stage amend their pleadings to add Count 4
24 damages. There's no count for damages. They
25 specifically asked just to have the Myers comply

1 with the agreement.

2 MR. CHASE: That's what this case says. It's
3 specific performance. If you can't do specific
4 performance for whatever reason, then you set an
5 evidentiary hearing to figure out what the damages
6 would be. That's what the case says.

7 THE COURT: You have case law to the contrary?

8 MR. BENITEZ: No, your Honor. This was just
9 brought up right now. I haven't had a chance -- I
10 don't even have his case in front of me.

11 THE COURT: It's in the notebook that was given
12 to you earlier.

13 MR. BENITEZ: What notebook, Judge?

14 THE COURT: Mr. Chase gave us both notebooks
15 with the case law.

16 MR. BENITEZ: Okay. I just read the case,
17 Judge, and my arguments are the same. I think
18 that's outside the pleading. We've been very strict
19 with respect to the pleadings in this case, and
20 there's no request for damages.

21 So with respect, Judge, just to bring another
22 point with respect to the DVD, you indicated you
23 made a finding that the DVD -- whatever's on the DVD
24 is part of the deal, but the DVD -- there's
25 testimony that that was a promotional DVD, and some

1 of those items didn't exist or weren't part of the
2 deal weren't included. As a matter of fact, they
3 have photographs of some vehicles in there that are
4 not included in the list.

5 THE COURT: But the contract says, Michael
6 Myers and Jacqueline Myers are the sole owners of
7 substantial amounts of certain petrobilia, Americana
8 memorabilia, antiques, classic automobiles, quote,
9 the memorabilia assets, end quote, some of which are
10 represented on the attached CD, hereby, and in
11 paragraph nine, agree to transfer all rights to the
12 memorabilia assets.

13 So again, if specific performance is
14 impossible, we're going to be talking about damages,
15 but they're obligated to transfer the stuff.

16 MR. BENITEZ: And, Judge, my argument would
17 be -- and I think the Court alluded to it sort of a
18 few moments ago, and that is, that the term as used
19 in the letter agreement with respect to memorabilia
20 is ambiguous. So there would be a need for some
21 testimony with respect to what was included or not
22 included.

23 THE COURT: What's the ambiguity with respect
24 to memorabilia?

25 MR. BENITEZ: The items actually included.

1 THE COURT: Okay. But that ambiguity, the
2 scope of those things does not extend to what's on
3 the CD, because they said the CD represented assets
4 that were going to be transferred. There's no --
5 there is no ambiguity about that. So while
6 memorabilia needs to be further defined, certainly
7 agree, it does not include a discussion about what's
8 represented on that CD.

9 The intent was here's the CD. Here's some of
10 the assets that were transferred. But everything on
11 there is what we're transferring. That's what the
12 agreement says.

13 MR. BENITEZ: I would just --

14 THE COURT: If you can point me to some
15 language that dis -- other than paragraph six and
16 paragraph nine in the agreement, but he says he's
17 going to transfer.

18 MR. BENITEZ: Well, he -- yes, he says he's
19 going to transfer it, but then you get to paragraph
20 nine, and it was going to be transferred in the
21 future, and it wasn't transferred then, but the
22 Court is now finding that it was transferred on
23 July 7, 2005 --

24 THE COURT: I am not finding it was
25 transferred.

1 MR. BENITEZ: Maybe I misunderstood, your
2 Honor.

3 THE COURT: The Court's ruling is that what is
4 covered by the quitclaim bill of sale was actually
5 transferred on that date. There is an agreement to
6 transfer, which the Court will enforce by specific
7 performance of other memorabilia assets. That
8 includes to the extent that it was not on the
9 property, those things that are listed on the CD,
10 because the CD indicates -- paragraph six of
11 paragraph nine, indicates that the assets on the CD
12 are to be transferred. That's my ruling.

13 MR. CHASE: Thank you, sir. May -- before we
14 get into the testimony, I have a binder for the
15 Court that -- where we printed out, among other
16 things the pictures from the CD, and they had
17 thumbnails, and I'm gonna give you one. The reason
18 why I want to explain it is, because there's
19 difficulty pulling stuff off the thumb drive that we
20 had, and so on one of the sections, section four,
21 the Court has color pictures, and that some of them
22 are repeated.

23 It's not all -- we couldn't get all the
24 pictures. We only got a portion of them, and a lot
25 of them are repeated several times, but then this is

1 from the inventory, but we couldn't get -- we got
2 thrown out of Staples. So we have black and white
3 pictures for everybody else. The Court has the
4 color ones, but it's only a portion of the ones that
5 are in the inventory, but we do the inventory -- the
6 total inventory of assets that are memorialized in
7 Church Street.

8 THE COURT: But I want to be clear, I'm not
9 going to listen item to item --

10 MR. CHASE: No, sir.

11 THE COURT: -- to the items that were on the
12 CD, except to the extent that they were not on the
13 property.

14 MR. CHASE: I understand completely, sir.

15 THE COURT: All right. Approach.

16 MR. BENITEZ: Judge, can I?

17 THE COURT: Yes.

18 MR. BENITEZ: I got it.

19 THE COURT: Good. All right. Two-minute
20 restroom break, and then we'll resume.

21 MR. BENITEZ: Thank you, your Honor.

22 (A recess was taken.)

23 THE COURT: One last question before we get
24 going. Mr. Benitez, is there some reason they're
25 not entitled to specific performance given the

1 Court's holding? I get that you disagree with me.
2 Is there a legal reason that they're not entitled to
3 specific performance generally, understanding it may
4 not be able to be accomplished with some of the
5 stuff?

6 MR. BENITEZ: With respect to the -- it was my
7 understanding until now, today, that their specific
8 performance was just the liquor license. That was
9 expressed to me all through the trial, and as a
10 matter of fact, I stood up at one point in the trial
11 and indicated to the Court how could specific
12 performance be available if, in fact, she doesn't
13 have the liquor license, if the Judge will recall.

14 So I'm kind of surprised -- I will assume that
15 they're not entitled to specific performance.
16 Again, I would argue with respect to the liquor
17 license, so judgment should be entered for the
18 defense in that case. With respect to the assets, I
19 mean, that brings us a brand new issue, not because
20 it's not in the pleadings, Judge, because it is
21 referenced in the pleadings, but because it hasn't
22 been brought up, and it hasn't been teed up for
23 trial.

24 It wasn't -- it wasn't part of what was going
25 to be tried before the Court at this time. So that

1 throws me in a little bit of a spin, because now I
2 would assume they will have to establish what items
3 need to be specifically transferred and what was
4 included and on so. If they -- I'm just kind of
5 thinking out loud to answer your question, Judge,
6 and now -- and I don't -- I really don't find an
7 argument to make that if the Court finds that a
8 certain item within the power of the Myers to
9 transfer what's included in the agreement, that
10 think may be entitled to specific performance with
11 respect to those items.

12 THE COURT: All right. We'll proceed then.
13 Call your first witness.

14 MR. CHASE: We'll call Nick Carlin.

15 THE COURT: Mr. Carlin, step up here, please.
16 Sir, if you would just pause there and raise your
17 right hand. Face the clerk to be sworn.

18 THE CLERK: Do you swear or affirm the
19 testimony you shall give shall be the truth, the
20 whole truth and nothing but the truth, so help you
21 G-d?

22 THE WITNESS: Yes, I do.

23 NICK CARLIN,
24 having been called as a witness by the plaintiffs, was
25 duly sworn and testified as follows:

1 THE COURT: Have a seat. Watch your step on
2 the way up. The seat doesn't move except it spins.

3 Will you hand me the documents there?

4 THE WITNESS: Yes, sir.

5 THE COURT: Thank you.

6 DIRECT EXAMINATION

7 BY MR. CHASE:

8 **Q. Good morning, Mr. Carlin.**

9 A. Good morning.

10 **Q. Can you please spell your last name for the**
11 **record?**

12 A. C-A-R-L-I-N.

13 **Q. Do you know Mr. Michael Myers?**

14 A. Yes, I do.

15 **Q. How do you know Mr. Michael Myers?**

16 A. He was my previous employer.

17 **Q. Can you give the Court about what timeframe**
18 **this was?**

19 A. I started working for him mid-2005.

20 **Q. What did you do for -- what kind of work did**
21 **you do for Mr. Myers?**

22 A. Anything and everything. I was his -- his
23 right-hand man.

24 **Q. Did you do any work with regard to any**
25 **warehouses?**

1 A. Yes, I did.

2 **Q. Do you recall specifically what you did with**
3 **regard to warehouses?**

4 A. I helped him put together the Gassey Jack's
5 warehouse.

6 **Q. Was that on Church Street?**

7 A. That's the Church Street one, yes.

8 **Q. And what sort of things were necessary to prep**
9 **that warehouse?**

10 A. We built all the steel framing for it, prepared
11 all of the memorabilia that was going to go inside.

12 **Q. Did you have occasion in mid-July -- or**
13 **mid-2005 to see various pieces of memorabilia?**

14 A. Yes, I did.

15 **Q. And where would that memorabilia have been**
16 **located?**

17 A. Before it was in the warehouse that we moved it
18 to or?

19 **Q. Before.**

20 A. Before it was in -- there were a couple of
21 warehouses. Bobby Lee Point, which was Mike Good's
22 warehouse.

23 **Q. Yes, sir.**

24 A. Also on State Road 46, which was Mr. Myers'
25 business.

1 **Q. Is that the same land where the Highway 46 --**
2 **or the Route 46 Entertainment District is now sitting?**

3 A. Yes.

4 **Q. It is the same land?**

5 A. Yes.

6 **Q. What was on that land, specifically on July 7,**
7 **2005?**

8 A. He had all his automobiles, memorabilia, signs,
9 big signs.

10 **Q. Were there tools?**

11 A. There was tools, yes.

12 **Q. Was there personal property?**

13 A. There was personal property there as well, yes.

14 **Q. Were there existing structures?**

15 A. Yes, there was.

16 **Q. Were there trailers?**

17 A. Yes, there was.

18 **Q. And there was -- you said -- I believe what**
19 **you -- after July 7, 2005, did you begin transferring**
20 **memorabilia and items or memorabilia to the Church**
21 **Street warehouse?**

22 A. Before -- before July we transferred some
23 stuff. It was ongoing from when I came on to the
24 project, to that point and thereafter during
25 construction. It was ongoing. We were moving probably

1 from -- from the restaurant location on State Road 46,
2 and also the other warehouses from Mike's house, filling
3 up the warehouse, is what we were doing.

4 **Q. But ultimately, was everything moved to the**
5 **Church Street warehouse?**

6 A. For the most part. I mean, there was stuff
7 that was left at the other warehouses and also Mike's
8 house.

9 **Q. Do you know Donald Hachenberger?**

10 A. Yes, sir.

11 **Q. Do you recall when you met Donald Hachenberger?**

12 A. I believe it was late 2005.

13 **Q. Could it have been September?**

14 A. Could be September, yes.

15 **Q. Do you recall what you were doing when you met**
16 **Donald Hachenberger?**

17 A. The first time I met him we were at the
18 warehouse on Church Street. Mike, Tom, myself were
19 there, and that was the first meeting he came in and
20 introduced himself.

21 **Q. Did Mr. Myers ever tell you what his**
22 **relationship was with Don Hachenberger?**

23 A. Yes, he did. They were business partners.

24 **Q. Did he explain to you the nature of the**
25 **business?**

1 A. That he was the business partner for the
2 restaurant.

3 **Q. Was that the restaurant that ultimately became**
4 **Route 46 Entertainment District?**

5 A. Yes, that's correct.

6 **Q. Did you have conversations with Mr. Myers where**
7 **he told you what his contribution was --**

8 A. Yes.

9 **Q. -- to that partnership?**

10 A. Yes, he did.

11 **Q. What did Mr. Myers say?**

12 A. That all the memorabilia and the land was
13 his -- his half of the business.

14 **Q. And what was Don Hachenberger's?**

15 A. He was the financier, cash.

16 **Q. When Mr. Myers said all the memorabilia, what**
17 **did you understand that to mean?**

18 A. Everything that we were putting in the
19 warehouse, all the memorabilia that he had, everything
20 that we had been working on.

21 **Q. Did he say anything about the memorabilia being**
22 **collateral for the money that Mr. Mac Hachenberger put**
23 **in?**

24 A. Yes, he did.

25 **Q. Michael Myers said that?**

1 A. Yes, he did.

2 Q. Did you begin doing an inventory on the
3 memorabilia?

4 A. Yes, we did.

5 Q. Did Michael Myers ever tell you the purpose for
6 doing an inventory on the memorabilia?

7 A. That was to get an exact amount of money that
8 was his half of the business, dollar amount on it.

9 Q. Did he say anything about Don Hachenberger
10 wanting to insure it?

11 A. Not that I recall.

12 Q. Were there memorabilia assets that did not go
13 to the Church Street warehouse?

14 A. Yes.

15 Q. What can you tell the Court about certain
16 memorabilia assets that did not go to the Church Street
17 warehouse?

18 A. There was items that were left at warehouses.
19 There was items left that were left at the Myers'
20 residence.

21 Q. Did Mr. Myers ever instruct you to take
22 property from the warehouses to his house?

23 A. Yes, he did.

24 Q. Do you remember what some of those items were?

25 A. Signs.

1 Q. Was this -- these times, was this occurring
2 after July 7, 2005?

3 A. Yes, it was. It was also items for the
4 restaurant.

5 Q. He had told you they were items for the
6 restaurant --

7 A. Yes.

8 Q. -- but then he had you take them to his house?

9 A. Yes.

10 Q. Do you remember other items other than signs?

11 A. Well, let me clarify this. I was saying there
12 were other items used for the restaurant that were
13 brought to his house.

14 Q. Can you name some of those items?

15 A. Grills, freezer boxes, smokers, trailers.

16 Q. Do you remember having your deposition taken --

17 A. Yes, I do.

18 Q. -- a long time ago?

19 A. A long time ago, yes.

20 Q. Can the -- I'm going to show you something.
21 Read it to yourself and see if it helps refresh your
22 recollection as to anything else.

23 MR. BENITEZ: Objection, your Honor.

24 THE COURT: Sustained.

25 Q. Do you know anything about a music player?

1 A. Yes. A piano?

2 **Q. Yes, sir. Was that taken to his house?**

3 A. Yes, it was.

4 **Q. Do you know anything about gas pumps?**

5 A. Yes.

6 **Q. Were those taken to his house?**

7 A. We would pick up gas pumps from Cocoa Beach,
8 from all over. A lot of times it would go to his house.

9 **Q. Who would pay for those?**

10 A. Who would pay for them?

11 **Q. Yes, sir.**

12 A. Mike would.

13 **Q. Did he ever get reimbursements for them?**

14 A. Yes.

15 **Q. How would you know what reimbursements he would**
16 **get?**

17 MR. BENITEZ: Objection, relevance.

18 THE COURT: Overruled. Go ahead.

19 **Q. How would -- how did you know what**
20 **reimbursements he would get?**

21 A. I would deliver a lot of his reimbursements.

22 **Q. So you had personal knowledge of that?**

23 A. I did.

24 **Q. When -- all the things that I ask you today,**
25 **the -- we need to be careful. If you learned about it**

1 from somebody else, I don't want you to say anything
2 about it, but if you have personal knowledge of it,
3 those are the things we want answers for.

4 A. Yes, sir.

5 Q. Do you know anything about Coke machines?

6 A. Yes, sir.

7 Q. Were any of those taken to his house?

8 A. I'm sure. I can't be 100 percent, but there
9 was a lot of stuff going to his house.

10 Q. Was their memorabilia from the warehouse, from
11 the Church Street warehouse that was inventoried, but
12 that was not -- I'm sorry, not inventoried but was sold?

13 A. Yes.

14 Q. And what sort of things were at the Church
15 Street warehouse that were sold?

16 A. We would sell stuff that we had multiples of,
17 some that weren't in the best condition, anything that
18 Mike had deemed necessary.

19 Q. Did you sell any signs?

20 A. Yes, we did.

21 Q. Were those signs that came from the Route 46
22 property?

23 A. Yeah. We sold a couple big 72-inch Texaco
24 signs that were at the property that we had multiples.

25 Q. How did you sell those?

1 A. It was eBay and then picked up at the
2 Local 7-Eleven down the street.

3 **Q. Did you personally sell the items on eBay?**

4 A. Yes, I did.

5 **Q. At Mr. Myers' request?**

6 A. Yes, sir.

7 **Q. Did he tell you why he didn't sell them on eBay**
8 **himself?**

9 A. He didn't sell them on eBay himself from what
10 he told me was, his account was blocked.

11 **Q. His account was blocked?**

12 A. So we used my account. Correct.

13 **Q. Did he tell you why his account was blocked?**

14 MR. BENITEZ: Objection, relevancy.

15 THE COURT: Overruled.

16 **Q. On eBay?**

17 THE COURT: Go ahead and answer.

18 THE WITNESS: Sorry.

19 THE COURT: That's all right.

20 THE WITNESS: Yeah. From making bad bids and
21 bad transactions.

22 THE COURT: That's irrelevant. I'm striking
23 that and not considering it.

24 MR. CHASE: Yes, sir.

25 BY MR. CHASE:

1 **Q. Did he sell any Hot Rod stuff?**

2 A. We tried to sell some Hot Rod stuff, yes.

3 **Q. During this time were you paid by 46 --**

4 **Highway 46?**

5 A. I was paid by Highway 46. I was being paid
6 by -- from Mike Myers and Associates, and Mike would
7 first pay me cash when I first started.

8 **Q. At what point -- did you ever get paid by Mike**

9 **Myers and Associates and Highway 46 at the same time?**

10 A. No.

11 **Q. At what point did you begin being paid by**

12 **Highway 46?**

13 A. I believe it was the end of 2005.

14 **Q. During the time that you were being paid by**

15 **Highway 46, did you work on any personal property of**

16 **Mr. Myers?**

17 A. Yes, I did.

18 **Q. What exactly did you work on?**

19 A. Anything Mike asked me to do, his property, his
20 mom's property.

21 **Q. Did you work on his roof?**

22 MR. BENITEZ: Objection, relevancy.

23 MR. CHASE: Going to -- because the supplies --

24 THE COURT: Okay. One at a time. Just a

25 second.

1 Relevancy?

2 MR. CHASE: The supplies -- he put a roof on
3 the -- on Mr. Myers' property using supplies that
4 was purchased -- that he purchased from Highway 46,
5 and those are supplies that are in --

6 MR. BENITEZ: I apologize. Could we have these
7 discussions outside the presence of the witness.

8 MR. CHASE: I'm just going straight from his
9 depo.

10 THE COURT: I don't understand what the
11 relevance is, though.

12 MR. CHASE: The relevance is, part of the
13 assets that are in there that he's claiming as his
14 personalty. When he got up and saying this is my
15 personal property, all that stuff at Bobby Lee Point
16 were all supplies. They were supplies that were
17 purchased by Highway 46 and it's -- and -- in
18 addition to those, that Highway 46 --

19 THE COURT: What -- in pursuit of which claim?

20 MR. CHASE: The specific performance, and the
21 replevin.

22 THE COURT: So you want the roofing materials
23 back that he used?

24 MR. CHASE: No, sir.

25 THE COURT: Okay.

1 MR. CHASE: No, sir. I think the specific --
2 replevin is a -- or specific performance is that you
3 have to do equity. What his actions were in
4 removing property and then coming up and saying
5 that, you know, hey, this material or this building
6 material is mine, that belongs to me, when actually,
7 Highway 46 paid for a ton -- paid for a roof on his
8 house, and they -- and all of that material that he
9 took over there was things that he delivered to the
10 house paid for by Highway 46.

11 THE COURT: So it's inequitable conduct, is
12 that what you said?

13 MR. CHASE: Yes, sir. I'll withdraw it, Judge.

14 THE COURT: No, sir. Hang on. I'm just
15 thinking.

16 MR. CHASE: And it's to determine --

17 THE COURT: Go ahead.

18 MR. CHASE: His testimony is going to be that
19 the supplies -- or I anticipate that his testimony
20 is going to be --

21 THE COURT: I'll allow it. Go ahead.

22 BY MR. CHASE:

23 **Q. Did -- Mr. Carlin, did you work on Mr. Myers'**
24 **roof, his personal roof?**

25 A. Yes. It was his boathouse roof.

1 Q. And did you use supplies for that work that you
2 did?

3 A. Yes, he did.

4 Q. Was that purchased by Highway 46?

5 A. Yes, it was.

6 Q. Do you know if Mr. Myers ever reimbursed
7 Highway 46 for the supplies that was used for his roof?

8 A. Not to my knowledge.

9 Q. And that was because you had seen what he would
10 ask for -- for re -- or his reimbursement reports?

11 A. That's correct.

12 Q. Are the tools located at the Church Street
13 warehouse?

14 A. Yes.

15 Q. And do you know how Michael Myers came into
16 possession of those tools?

17 A. Tools that we purchased or?

18 Q. Were there tools in the warehouse that Michael
19 Myers did not purchase?

20 A. Yes.

21 Q. And how did he come into possession of them?

22 A. We gathered tools from the job site. We would
23 bring them back to the warehouse.

24 Q. When did you do that?

25 A. At the end of the evenings. We worked long

1 days.

2 Q. Are those tools that the other contractors
3 would leave on the job site?

4 A. That's correct.

5 Q. And what would Mr. Myers tell you to do with
6 those tools?

7 A. Put them in the back of his truck.

8 Q. Did you understand at that time that Mr. Myers
9 was stealing those tools?

10 MR. BENITEZ: Objection, leading.

11 THE COURT: Sustained. Rephrase.

12 Q. Did you think that Mr. Myers had a right to
13 take those tools?

14 MR. BENITEZ: Objection, leading.

15 THE COURT: Overruled.

16 Go ahead, sir.

17 A. Yes, I did. Being that he was co-owner, one
18 way or the other, he was paid for it. That's why I did
19 it.

20 Q. So the -- because -- would the contractors --
21 did you have personal knowledge -- would they say --
22 what would they say when they would show up and their
23 ladder's gone, for instance?

24 MR. BENITEZ: Objection, speculation.

25 MR. CHASE: He was there.

1 THE COURT: As to what they would say.

2 MR. BENITEZ: Hearsay. Hearsay.

3 MR. CHASE: If they had the question, the
4 question's not hearsay. Like, where's my ladder?
5 And what would Mr. Myers say?

6 THE COURT: I don't know what he's going to
7 testify to. He's going to testify to something
8 these people said, correct?

9 MR. CHASE: If he testifies to a -- hearsay is
10 a statement. The question is not a statement.

11 THE COURT: Do I know he's going to testify to
12 a question, Counsel?

13 MR. CHASE: No, sir.

14 THE COURT: All I said was I don't know what
15 he's going to testify to.

16 MR. CHASE: Oh, I'm sorry. I didn't hear that
17 part, Judge.

18 THE COURT: Okay.

19 Go ahead, sir. Go ahead, sir. Respond to the
20 question.

21 THE WITNESS: They would ask me if I knew where
22 the tools were, and I would say -- either I did or
23 talk to Mike.

24 BY MR. CHASE:

25 Q. Do you have any knowledge that they -- that

1 Highway 46 would reimburse them for the tools that they
2 lost?

3 A. No.

4 Q. Would the tools include ladders?

5 A. Yes.

6 Q. Extension cords?

7 A. Extension cords, nail guns, hammers, small
8 tools, several ladders.

9 Q. Do you know anything about the Pella windows
10 that are in the Bobby Lee Point warehouse?

11 A. Yes.

12 Q. How did the Pella windows at the Bobby Lee
13 Point warehouse get in?

14 A. We had purchased a lot of windows, Pella
15 windows from -- from Pella.

16 Q. When you say we, does that mean Highway 46?

17 A. That's correct. Mike, before -- Highway 46 had
18 Pella windows as well, though. Bobby Lee Point
19 warehouse had lots of Pella windows in it.

20 Q. Do you know who Mr. Meachem is?

21 A. Yes.

22 Q. Who was Mr. Meachem?

23 A. He was the general manager at the Pella windows
24 store.

25 Q. Was he a friend of Mr. Myers?

1 A. Yes. Mike had done a lot of business with
2 Mr. Meachem over the years.

3 **Q. Did Mr. Myers take -- how would you guys**
4 **collect windows when Highway 46 Holdings would purchase**
5 **them from Pella?**

6 A. We would take the trailers down to the Pella
7 store in Longwood, and they would be pretagged with --

8 **Q. The windows would be pretagged?**

9 A. The windows would be pretagged. And we would
10 go in and Mike would select them and we would take them.

11 **Q. Did Mr. Myers ever take windows that he was not**
12 **supposed to take?**

13 A. I can't recall that Mike ever took any windows
14 that he wasn't supposed to take, but I took windows that
15 were not supposed to be taken.

16 **Q. How did that occur?**

17 A. He would take a tag and take it off another
18 window and then retag it, and then tell me to take that
19 one.

20 **Q. So if you picked up a window and put it on the**
21 **truck that had tags on it, he would then take the tag**
22 **off of that window that's just on the truck, and take it**
23 **back and put it on another window out in the yard, and**
24 **then tell you to grab that one, too, and take it?**

25 A. Yes, that's correct.

1 MR. BENITEZ: Objection, leading.

2 THE COURT: Sustained. Rephrase.

3 Q. Did he take tags off of windows that you had
4 loaded up in the truck?

5 A. Yes, he did.

6 Q. And what would he do with those tags?

7 A. Retag other items.

8 Q. Were those other items out in the yard at
9 Pella?

10 A. They would be in the -- there was a special
11 room inside Pella that was damaged, overstock, anything
12 and everything.

13 Q. And then when he would -- or when he would tag
14 an additional item, what would he do? Would he ask --
15 what would he ask --

16 A. He would ask myself, of course, and then Tom
17 was there as well, and then we would both move windows.

18 Q. Did you ever do any work on any trailers?

19 A. Any work on any trailers?

20 Q. Yes, sir.

21 A. I mean, I did all the work on all the trailers.

22 Q. There's a trailer for a smoker?

23 A. For the smoker, yes.

24 Q. Did Highway 46 Holdings set up those trailers
25 for the smokers?

1 A. They paid for all the hardware installed.

2 **Q. Did Mr. Myers take those trailers to his house?**

3 A. Yes.

4 **Q. Was that about the time that he was terminated?**

5 A. Yes.

6 **Q. Did Highway 46 Holdings --**

7 THE COURT: Sir, what does that mean,
8 Highway 46 paid for all the hardware on the
9 trailers? What does that mean?

10 THE WITNESS: They have storage boxes that you
11 would keep for -- the smokers are attached to the
12 trailer, and then you have the storage box that you
13 would put the wood in, extension cords, all of that
14 nature, so it had storage.

15 THE COURT: So --

16 THE WITNESS: So the actual boxes, the smokers
17 were paid for, the boxes were paid for. I believe
18 one trailer Mike did pay for, though, that had the
19 biggest smoker on it.

20 BY MR. CHASE:

21 **Q. But Highway 46 paid for the smoker?**

22 A. Correct.

23 **Q. Did Highway 46 Holdings buy any gas cans?**

24 A. Yes.

25 **Q. Did Michael Myers take those?**

1 A. He has several gas cans, yes. But we would
2 have an enormous amount of gas cans, a lot of properties
3 to cut.

4 **Q. Did Highway 46 Holdings pay for a freezer?**

5 A. Yes.

6 **Q. Did Michael Myers take the freezer to his**
7 **house?**

8 A. Yes, he did.

9 **Q. Did Highway 46 Holdings buy televisions?**

10 A. Yes.

11 **Q. Flat screen televisions?**

12 A. Yes, we did.

13 **Q. Did Michael Myers take flat screen televisions**
14 **to his house?**

15 A. Some, yes.

16 MR. CHASE: May I have a moment, Judge?

17 **Q. Mr. Carlin I'm going to show you --**

18 MR. BENITEZ: Can we have that marked since --

19 MR. CHASE: Yeah, you're right. Okay.

20 Madam Clerk, will you mark that, our next
21 letter for identification.

22 THE COURT: What's that?

23 MR. CHASE: It's N, as in Nancy for
24 identification.

25 BY MR. CHASE:

1 **Q. Mr. Carlin, do you recognize this document**
2 **that's been marked N for identification purposes?**

3 MR. CHASE: Judge, I believe, Mr. Benitez, is
4 stipulating in it, so do I have to --

5 MR. BENITEZ: No, I haven't. I asked Mr. Chase
6 to lay a foundation.

7 MR. CHASE: Okay, I'm sorry.

8 **Q. Do you recognize that document?**

9 A. Yes, I do.

10 **Q. And what is that document?**

11 A. This is part of the in -- I don't know if it's
12 all of it, but this is part of the inventory that we --
13 we were to go in the warehouse, all the items that were
14 Mr. Myers' collateral.

15 **Q. Did you work personally with Mr. Myers in**
16 **working on the inventory?**

17 A. Yes, I did.

18 MR. CHASE: Any objection?

19 Judge, I would move it in as Plaintiffs' --
20 what's my next number?

21 THE CLERK: Three, NJ, I guess.

22 THE COURT: Move it in as Plaintiffs' NJ-3.

23 MR. CHASE: Thank you.

24 (Plaintiffs' Exhibit N for identification was
25 admitted in evidence as Plaintiffs' Exhibit NJ-3.)

1 THE COURT: Sir, when was that prepared?

2 THE WITNESS: We started on that in -- as soon
3 as I started working for the company for Mike.

4 THE COURT: And when was it completed?

5 THE WITNESS: We actually never completed it in
6 its entirety until after the restaurant was -- was
7 built.

8 THE COURT: Is this what I have --

9 MR. CHASE: It's dated -- sir?

10 THE COURT: Is this what I have in Tab 2?

11 MR. CHASE: Yes, sir, and it's dated
12 December 15th, or December '05. There's a date on
13 it.

14 And do you know what number our inventory --
15 it's already in evidence.

16 I believe it's a thumb drive, Madam Clerk, I
17 believe.

18 MR. SHUKER: Two. I believe it's two.

19 MR. CHASE: Our inventory that we moved into
20 evidence, I think that -- you remember, 2? 2?

21 THE COURT: NJ-2.

22 MR. CHASE: I believe this is regular 2.

23 THE COURT: Okay. May I see that, please?

24 MR. CHASE: No, sir. The thumb drive, that's a
25 different one. I believe it's our 4, if I remember

1 correctly.

2 THE COURT: There's a thumb drive in evidence
3 marked as 2.

4 MR. CHASE: That's -- that's the disc -- or no.
5 That's -- that's right. I'm sorry. The disc came
6 in. It is 2. The inventory's 2. The disc is a
7 part of Plaintiffs' Exhibit 1.

8 THE CLERK: The disc is 1. That was 2.

9 THE COURT: The disc is a part of
10 Plaintiffs' 1. That is 2.

11 MR. CHASE: Yes, sir. And I need to show him
12 the actual -- this is a printout, Judge. This is a
13 printout of that, of part of what's on that thumb
14 drive.

15 THE COURT: Part of --

16 MR. CHASE: The rest of it is pictures.

17 THE COURT: Okay.

18 MR. CHASE: And that was the pictures that we
19 couldn't print all of them out, but the Court has
20 some of them.

21 BY MR. CHASE:

22 Q. Do you recognize that document, Mr. Carlin?

23 A. Yes, I do.

24 Q. And what is that document?

25 A. This is the -- the inventory, I believe. This

1 is the -- the one that was done in conjunction with the
2 original one.

3 Q. What is the first -- they're numbered. Can you
4 publish what is the first item? What is the number one
5 item?

6 A. The number one item is a 1940 Coca Cola, repro
7 flange sign --

8 THE COURT REPORTER: Coca Cola? I just
9 couldn't hear you.

10 THE WITNESS: 1940 Coca Cola repro, flange the
11 B 30, that's its location. What type of --

12 Q. That's all right.

13 A. Okay.

14 Q. On Plaintiffs' Exhibit 3-NJ, where it's
15 numbered number 1, is that the same item?

16 A. Yes, it is.

17 Q. And is number 2 the same item as on --

18 A. Stirling roof pro, yes, it is.

19 Q. And at the back of Plaintiffs' Exhibit 3-NJ,
20 there's a total of -- can you see that?

21 A. Sixteen ninety-eight.

22 Q. Sixteen ninety-eight. And is there a 1,698 on
23 Plaintiffs' Exhibit 2?

24 A. Yes, sir.

25 Q. And are they the same item?

1 A. Yes, sir.

2 **Q. Is it fair to say the first 1,698 items on**
3 **Plaintiffs' Exhibit 2 are the same 1,698 items that are**
4 **on Plaintiffs' Exhibit 3-NJ?**

5 A. Yes. There should be a picture, also, of each
6 one of those items. We took pictures for each item.

7 **Q. And so when you -- and you were involved in**
8 **the -- were you involved in completing the inventory?**

9 A. Yes.

10 **Q. And I believe you testified that you took**
11 **pictures?**

12 A. Yes, we did.

13 **Q. Of each item?**

14 A. Yes, we did. If we could, yes.

15 MR. CHASE: Judge, can I see -- so I can show
16 the witness -- the color -- just one of the color
17 pictures? All we have are in black and white?

18 **Q. And I'm just going to ask, Mr. Carlin, are**
19 **these pictures examples of the pictures you took of the**
20 **inventory?**

21 A. Yes.

22 **Q. And these are the tags on the pictures.**
23 **Are those tags that you guys would put on**
24 **there?**

25 A. Yes, sir.

1 MR. CHASE: Your Honor.

2 THE COURT: Just a second.

3 Q. Did Mr. Myers represent to you that all or --
4 let me ask it a different way.

5 Did that inventory complete all of the items of
6 memorabilia that were in the warehouse?

7 A. The final inventory?

8 Q. Yes, sir.

9 A. To the best of my knowledge, it did, yes.

10 Q. And did Mr. Myers represent to you that all of
11 those items that were in the warehouse were his
12 contribution to the company?

13 A. Yes, they were.

14 MR. CHASE: Tender the witness, Judge.

15 Actually I -- I've got a couple extra
16 questions.

17 THE COURT: Go ahead.

18 BY MR. CHASE:

19 Q. Specifically, can you remember -- I'm going to
20 show you some pictures that are contained on Plaintiffs'
21 Exhibit 1 in evidence. Do you -- and ask you if you see
22 any of these pictures that appear to be taken from the
23 46 property?

24 MR. BENITEZ: Objection, your Honor. I don't
25 see Plaintiffs' Exhibit 1 before the witness. Is

1 this something else other than Plaintiffs' Exhibit
2 1?

3 MR. CHASE: It's on the CD. These are pictures
4 that were printed out from the CD, Judge.

5 THE COURT: That's part of Plaintiffs' 1?

6 MR. CHASE: Yes, sir.

7 MR. BENITEZ: You mean Plaintiffs' 1 has this
8 CD, but you.

9 MR. CHASE: I'm showing you him the pictures
10 that are printed out from Plaintiffs' Exhibit 1.

11 MR. BENITEZ: Is that here somewhere?

12 MR. CHASE: Yes, sir. It's -- I am sorry,
13 Mr. Benitez. This is a list that's on 1. Those are
14 in the thumbnail.

15 BY MR. CHASE:

16 **Q. Do you see any of these pictures that look like**
17 **property that was on -- or actually, can you -- you want**
18 **to just flip through those and stop if you see something**
19 **that was on the Route 46 property as of July 7, 2005?**

20 A. Yeah. These are from the 46 property.

21 MR. BENITEZ: Judge, I didn't hear him. What
22 did he say?

23 THE COURT: He said --

24 A. Yes, these are from the 46 property. These are
25 the Texaco signs I was referencing earlier. This is

1 inside the cabin. These are automobiles that were part
2 of the business that were at --

3 THE COURT: So the question was asked of you,
4 do you see property depicted in these photographs
5 that was on the Highway 46 property as of July 7,
6 2005?

7 THE WITNESS: Yes, sir.

8 THE COURT: Okay.

9 THE WITNESS: Yes.

10 THE COURT: And now you're describing that
11 property?

12 THE WITNESS: Yes.

13 BY MR. CHASE:

14 Q. So the larger picture, were these automobile on
15 the property?

16 MR. BENITEZ: Your Honor, can I come up?

17 THE COURT: Yeah. I don't know what he's
18 talking about either, so to me, it's not helpful.

19 MR. CHASE: It's going to be hard to -- the
20 photographs of the -- all right. Let's start from
21 the beginning.

22 Q. Is any of that --

23 A. Sir, this is the property.

24 Q. That's Route 46 property?

25 A. Correct.

1 MR. CHASE: Judge --

2 THE COURT: Okay.

3 A. That was the existing building. This is the
4 property.

5 Q. The next picture is the existing building, sir?

6 A. This is actually the property because you can
7 tell by the flooring.

8 Q. So you know that's on Route 46 property?

9 A. That's on Route 46 property.

10 Q. So --

11 A. This is in the warehouse.

12 Q. Bobby Lee Point or 46 property?

13 A. That is Bobby Lee Point.

14 Q. Okay.

15 A. On property. Same picture. On property.

16 Q. You are talking about the black and white tile
17 floor --

18 A. Yes.

19 Q. -- is on property?

20 A. Same picture. On property. This is in the
21 warehouse.

22 MR. CHASE: Actually, it occurs to me, Judge,
23 you've already ruled that everything on that disc
24 goes anyway, so I don't -- I'm trying to -- you said
25 you want testimony about what was exactly on the

1 property, and --

2 THE COURT: That's not what I said. I said
3 what I was finding was, that it was -- is -- is
4 plain and unambiguous from the terms of the
5 agreement that what is contained on the CD was
6 intended to be transferred.

7 MR. CHASE: Right.

8 THE COURT: Some may have been on the property,
9 some may not have been. To the extent that it's
10 there, it's not that it was on property, it's not a
11 subject of replevin. To the extent that it was not
12 there, it may be the subject of specific
13 performance.

14 MR. CHASE: I understood that part, and I guess
15 I clearly -- and also, I understood you said I
16 wanted to focus on these three things in the
17 testimony, what exactly was on the property and
18 that's what -- and I was starting to go down that,
19 but you've already ruled on this, so I don't have to
20 prove that this was in there, and I got partially
21 into it, and I think --

22 THE COURT: No, sir. I don't know if it was on
23 the property, so to the extent that you want a
24 judgment for specific performance --

25 MR. CHASE: Already got it on these. I'm

1 sorry, Judge. I think we're saying the same thing.
2 I think.

3 THE COURT: We may be, but I don't know,
4 because I didn't get to finish, and I'm entitled to
5 finish.

6 MR. CHASE: Yes, sir.

7 THE COURT: Just as you are when you're
8 speaking.

9 MR. CHASE: Yes, sir.

10 THE COURT: I don't know what you envision the
11 form of the final judgment to look like in this
12 case. I envision it to contain either specific
13 categories of property that would accurately
14 describe and completely describe what it is that's
15 the subject of either specific performance, a
16 declaration of ownership by your client or subject
17 of replevin appropriately for the Myers. I have to
18 have enough specifics to identify them.

19 In other words, I could not say, unless you
20 tell me it's the case, and the testimony tells me
21 it's the case, that everything that's on the CD was
22 on the property, and therefore, I declare it to be
23 owned by Highway 46, LLC. If that's not the case,
24 then I need to know specifically which items you
25 contend should be the subject of specific

1 performance so that I could order those items to be
2 transferred.

3 But if you have a different way that you
4 envision the judgment, I'd like to hear it.

5 MR. CHASE: Okay. My understanding was --
6 was -- it's -- there was property that was on the
7 Route 46 property. The -- some of which is on the
8 CD, but you said the CD goes anyway, because that's
9 part of the deal, so you're getting that stuff.

10 THE COURT: You're getting it, but you're
11 either getting it by declaration of ownership or an
12 order of specific performance that it needs to be
13 transferred.

14 MR. CHASE: Okay.

15 THE COURT: But I can't just say --

16 MR. CHASE: I see that.

17 THE COURT: To the extent that you haven't
18 already done so, transfer it, then how I do enforce
19 it? I don't have a way of enforcing it. This is
20 why I'm a little frustrated that we're here. Okay.
21 Because you have a list, I would expect that you
22 would have already had the list marked up to say
23 this is the stuff that was on the property, this is
24 what we believe has not been transferred and needs
25 to be transferred out of the 6,800 items, plus autos

1 if they're separate.

2 MR. CHASE: We believe that the 6,824 items
3 were transferred on July 7, 2005. I think the Court
4 is reluctant to make that finding. Instead, the
5 Court has opined that that's something that would
6 need to be specifically performed, because the
7 contracts are, in fact, enforceable.

8 So we've moved in the evidence, into evidence
9 that was already in the inventory, which lists the
10 6,824 things, and that one's really easy if the
11 Court were to grant specific performance as to those
12 items, if that was what was being transferred.
13 Among that -- among that, there is no way anybody's
14 going to be able to testify with any certainty which
15 of those items was on the property. It's
16 impossible.

17 THE COURT: Which ones do you have out of the
18 6,824 items?

19 MR. CHASE: We have all of them.

20 THE COURT: You have all of them?

21 MR. CHASE: They're all at Church Street
22 warehouse.

23 THE COURT: So you don't need Mr. Myers to
24 transfer any of those things to you?

25 MR. CHASE: I think -- again, because I believe

1 that Mr. Myers did transfer those on July --

2 THE COURT: I've already ruled he didn't. So
3 go with me.

4 MR. CHASE: I'm with you. So there's nothing
5 further for him to do. The Court can find under the
6 declaration Count 20, when Mr. Benitez is requesting
7 the Court to specify what problem -- what property
8 was conveyed, the Court could say, those 6,824
9 items. In addition to that, there were things that
10 were on the Route 46 property which included those
11 that are trailers, and we have -- there's pictures
12 of trailers, but I don't know a better way -- and
13 again, I don't know a better way of identifying
14 things like that.

15 You've got the same problem with the Bobby Lee
16 Point warehouse. There's a pile of wood. So how do
17 you identify that and in the form of a final
18 judgment? And Mr. Hachenberger's --

19 THE COURT: Let me ask the question this way,
20 because I'm not feeling like we're communicating.

21 To the extent that it's on the property, and
22 it's a part of the 6,800 plus items, I could simply
23 declare ownership in Highway 46 Holdings, unless
24 there are vehicles which require a transfer by title
25 in which case it would be necessary, I believe, if

1 the Court's going to grant specific performance of
2 those things, to order Mr. Myers to sign title on X,
3 Y, Z vehicles.

4 Is there any property that you are claiming a
5 right to other than the liquor license, which is not
6 on your property at this point, either on the 46
7 property or in one of the warehouses?

8 MR. CHASE: Yes, sir.

9 THE COURT: Is that part of the 6,800 items?

10 MR. CHASE: The vehicles, Mr. Hachenberger?

11 MR. HACHENBERGER: No.

12 MR. CHASE: Those would be vehicles that were
13 tendered pursuant to the Court's previous orders
14 that Mr. Myers is storing now. When --

15 THE COURT: I get you. So there really is no
16 specific performance with respect to the memorabilia
17 with the exception of the autos.

18 MR. CHASE: That is correct, yes, sir, from our
19 point. But there is -- the question with specific
20 performance, yes, there is a need to declare what
21 property was conveyed. A lot of the things that
22 they have claimed were Mr. Myers' personal property
23 are not Mr. Myers' personal property, and so some of
24 that stuff was on Route 46, and -- but it's really
25 hard because of the way --

1 THE COURT: But it's not listed in the 6,800
2 items?

3 MR. CHASE: No, sir.

4 THE COURT: Okay. All right. That's the stuff
5 that I'm concerned with now that's on the property.

6 MR. CHASE: I --

7 THE COURT: So that's one thing I need to know,
8 what personalty is on the property that is not
9 included in your 6,800 hundred items with
10 specificity, because I can't just order extension
11 cords.

12 MR. CHASE: I agree.

13 THE COURT: Right. So what you're describing
14 to me is not a part of the photographs that are on
15 the CD. It's not a part of your list of 6,800, so
16 that's -- let's move with that.

17 MR. CHASE: I agree.

18 THE COURT: Right after lunch. Okay.

19 We'll be in recess until 1:30.

20 Mr. Carlin, you may step down. Thank you. I
21 apologize that you're yanked back and forth, but we
22 appreciate your patience.

23 (A recess was taken.)

24 THE DEPUTY: Everyone please rise.

25 THE COURT: Thanks. You may be seated.

1 (Discussion held off the record.)

2 THE COURT: Question on the record, please.

3 MR. CHASE: Yes, sir.

4 THE COURT: Are all of the items that were on
5 the disc contained in the 6,800 item inventory?

6 MR. CHASE: No, sir. There are some cars --
7 there are some vehicles that didn't make it.

8 THE COURT: Okay. All right.

9 MR. CHASE: There are a handful of vehicles,
10 and in going forward, it's a -- coming into to
11 today, I didn't believe -- I believed that the
12 documents transferred, and so the burden was on
13 Mr. Benitez to specifically identify for his
14 replevin counts all of the different pieces of
15 personal property and all that. I didn't have that
16 burden. I know that that is a burden that
17 Mr. Benitez cannot meet, and so -- but then things
18 changed today.

19 I don't have a list, and I don't believe that I
20 could -- I don't believe that with testimony or
21 anything else, I can give the Court a specific list
22 of exactly what was on that property on July 7,
23 2005. I mean, there could be testimony about, I
24 believe that certain trailers and things like that,
25 but as far as exactly what was there, I don't think

1 it would be credible from any source, whether it's
2 Mr. Myers or Don or whoever. I don't believe that
3 that's even possible.

4 So -- and I'm -- what I can do is, I can show
5 evidence intended to prove that all of the
6 memorabilia that was there, and all of the
7 memorabilia at Bobby Lee Point was part of the deal.
8 And the pictures that are on the disc are about half
9 and half pictures from 46 property and from Bobby
10 Lee Point, clearly indicating that memorabilia from
11 Bobby Lee Point and 46 were part of the deal.

12 Also, had the testimony from Mr. Carlin about
13 Mr. Myers on comments, and what we would submit was
14 the intention was, our inventory, that's the
15 memorabilia that was transferred, and so that 6,824
16 items, that is the memorabilia that was transferred.

17 Yes, there are items of personal property that
18 Mr. Myers has there, but the problem with Mr. Myers'
19 list is, it's extremely vague and includes -- it
20 just -- there's no way that you could go through and
21 look at that, and Mr. Hachenberger's tried, has gone
22 over it several times to say, all right, this thing,
23 he could have this thing I believe is okay, this
24 thing.

25 For instance, there's the -- the snap-on tools.

1 There were snap-on tools, he's positive, that were
2 on Route 46 property on July 7, 2005, but he's also
3 pretty sure that additional snap-on tools were
4 brought on later. So which ones? So that creates
5 the problem. So I believe if we were to go forward,
6 that -- and listen to the testimony, I think that I
7 could lay a very good case that all those 6,824
8 items were part of the transaction or they need to
9 be part of the transaction, and the Court can do
10 that through its declaration. It can say there's
11 not a specific performance asset, because there's
12 nothing that needs to be done on the part of the
13 Myers, with the exception of the automobiles and the
14 4COP.

15 The automobiles, there are -- they are
16 specifically identified with their titles, and there
17 are pictures, and then there are pictures of some
18 additional automobiles that were not in that list,
19 and so the Court would need to -- we would encourage
20 the Court to grant specific performance as to those
21 vehicles.

22 As to the personal property, it -- it's
23 almost -- I think it's impossible for either side --
24 I didn't really -- it didn't bother me before,
25 because the burden was on Mr. Benitez, and I thought

1 you just can't do it. So -- and Mr. Hachenberger
2 was going to get up and testify that Mr. Myers can
3 have whatever family things he's wanting to take,
4 his grandma's picture and things like that. But it
5 has to be -- they have to identify it more
6 specifically. I think, perhaps -- and a vehicle for
7 the Court would be if the Court could go up to
8 everything except the personal property and rule on
9 however it's going to rule on everything, reserve as
10 to the personal property, send these people to
11 mediation, and then as to just the personal
12 property, and then, and then once we got into --
13 because there's -- there's a ton. And there's -- I
14 mean, it's thousands of items.

15 THE COURT: But this is the day of reckoning,
16 folks.

17 MR. CHASE: I hear you. I'm -- so I'm just
18 saying, okay, if the Court needs me to present
19 evidence as to what specific pieces of personal
20 property, not memorabilia, I can't meet that burden.
21 I don't have the ability to do it. I wasn't ready
22 for it. It wasn't -- it's not something that I
23 foresaw, and it's -- I think it's impossible to do
24 it anyway.

25 It would have to be a simpler -- like an

1 inventory list, like the memorabilia inventory list
2 that took two years to do -- longer than two years.
3 And so it would have to be something like that, and
4 then once you make that inventory list of all those
5 screwdrivers and extension cords, then you'd have to
6 come in and say, all right, this was here, this
7 wasn't. Nobody really knows. And so that's why I
8 think that if we can rule on everything else and
9 then all that's left is the personal property, send
10 the parties to mediation on that, and the mediation,
11 perhaps, could take place out in the warehouse, we
12 can walk around. Mr. Hachenberger is saying over
13 and over again, yeah, you can take that, take that,
14 take that, and that would happen. But the thing is,
15 it has to be a scenario where he can specifically
16 identify it.

17 If he just says all of -- like he said the very
18 first item on his list is Myers' book, like what
19 book? And it's -- what book are we talking about?
20 There's a lot of books out there, and some of them
21 are antique, like memorabilia-type books. And so
22 it's, like, what book is he talking about? And so
23 that might be something that's simple, that if we
24 did get out there and Mr. Myers said that book, and
25 if that's book right there, Mr. Hachenberger could

1 say take it, and then that way that part's resolved.

2 And so again, if we just went through --

3 perhaps, got through everything else, went through

4 and then went out there with that list that

5 Mr. Myers prepared of personal property, and we walk

6 around the warehouse, and we try to mediate that

7 list and it's a -- that's the only way I know how to

8 do this. I don't think either party can give the

9 Court a specific list of personal property. We've

10 done it with the memorabilia respectfully, sir.

11 THE COURT: Mr. Benitez, you have any response

12 to that? I'm not sure what to do with that,

13 candidly.

14 MR. BENITEZ: Judge -- sorry. Can you hear me?

15 THE COURT: Yes, thank you.

16 MR. BENITEZ: Judge, he's making some valid

17 points with respect to burden shifting and so on,

18 and that's something that just happened today.

19 We've also talked -- I tried -- I have tried as far

20 as I can to get into the warehouse to do some kind

21 of envision. I think that's beneficial to the

22 parties to actually be forced to go through the

23 items and separate them, because if not, it's the

24 Court's responsibility to do that, and we're here to

25 get that determination.

1 THE COURT: It's only my responsibility to do
2 it with what you all prove.

3 MR. BENITEZ: Right.

4 THE COURT: And if you don't prove it, there's
5 no issue for me.

6 MR. CHASE: That's where -- when I came in
7 today, I knew that there was no way that he could
8 prove that part of his case, but then all of the
9 sudden, now I'm with the burden as well.

10 THE COURT: I'm confident Mr. Myers feels like
11 he can testify very specifically as to every item on
12 this list that he believes was there and wasn't
13 there.

14 MR. CHASE: Okay.

15 THE COURT: You may question the credibility of
16 that.

17 MR. CHASE: Yes, sir.

18 THE COURT: But if it's the unrebutted
19 testimony, I'm not sure what it is that I'm supposed
20 to do with that.

21 MR. BENITEZ: The only thing that I would
22 suggest to the Court as a possible temporary
23 solution and possible solution to this case --
24 things have changed a little bit today once we got
25 the ruling from the Court with respect to paragraph

1 nine, and I don't think it's insignificant. I think
2 it was significant, because they have for nine years
3 refused to accept the reading of paragraph nine that
4 the Court has now adopted. I think that has given
5 us a little bit of a position to go back -- or
6 motivation, I should say, and go back and try to get
7 into the warehouse, try to look at this property,
8 try to do what we should have already done, which is
9 basically scrutinize it, divide it up. We suggest
10 even going through and tagging what property really
11 is at issue to see if we can reach a resolution.

12 In fact, he's mentioned mediation in his
13 presentation to the Court. Hopefully, the ruling of
14 the Court today has shifted the mentality that we
15 have totally lost in this case, and that, in fact,
16 we've got some basis for our arguments, and it may
17 give us a basis from which to try to resolve this to
18 everybody's satisfaction. As the Court has shared
19 with everybody, and everybody's shared with each
20 other, this is a case that's crying out to be
21 resolved, not to be perpetuated for five, ten more
22 years on appeal and a whole other process. We even
23 considered throwing it off to the next trial docket.

24 I would suggest that this may be a good reason
25 to kick it off to the next trial docket with

1 specific directions that both sides, the plaintiff
2 and the defense at this point, have to go in there
3 and have to itemize these exhibits and have to
4 itemize these property, and in the process we will
5 make a good attempt at resolving this case in some
6 fashion or at least being able to present it to the
7 Court in a little bit more convenient manner for the
8 Judge to then exercise its discretion and its ruling
9 and decide the case. I'm just throwing that out for
10 what it's worth, your Honor.

11 MR. CHASE: Not the memorabilia. The -- we've
12 got -- the only thing that the -- the only thing
13 that shouldn't be at issue when we leave this
14 courtroom today -- or even tomorrow, if that did
15 happen. The only thing that should be left -- well,
16 there's the personal property. There are the
17 additional issues from earlier orders that say wait
18 'til after the conclusion of the case to bring back
19 before the Court, but as to this property, there's
20 enough evidence for the Court to make the
21 determination that we've asked the Court to do.
22 That's the declaratory relief and the specific
23 performance as to the --

24 THE COURT: I can't do that on what I have.
25 I'm going to need to hear the rest of the evidence.

1 If that's where you want to leave today, I have to
2 hear the rest of the evidence, because I think it's
3 very likely that I'm going to hear evidence that
4 says, this item was not brought on property till
5 afterwards, and it was never my intent to include
6 this in the contribution to Highway 46. I needed
7 storage, and everybody understood it was okay if I
8 stored some stuff there.

9 Is that what I'm going to hear?

10 MR. BENITEZ: Yes, your Honor.

11 THE COURT: That's not surprise. I've heard
12 that all along. It's the undertone of what's gone
13 on here. I can sit here, I can weigh the evidence,
14 I can weigh that, I can maybe be in a position at
15 the end of today to reach a decision about that, but
16 your witness' testimony so far is down the path of,
17 he said everything was what he was contributing.
18 That's a line of testimony, but it's not all the
19 testimony, and I need to hear all of it. But I --
20 I'm going to go back to where I was before the
21 verdict in this case. There's a question nagging at
22 me, Mr. Chase, okay.

23 MR. CHASE: Yes, sir.

24 THE COURT: The question is this:

25 Why would Mr. Myers contribute all of his

1 memorabilia -- or substantially all -- I assume he's
2 got some stuff in his house -- substantially all of
3 it, which was more than was needed to outfit the
4 restaurant?

5 MR. CHASE: For the collateral and to rotate it
6 in and out. The testimony that -- the testimony
7 was, one, for collateral. When he came -- the --

8 THE COURT: It wasn't collateral. There's no
9 discussion about it being collateral.

10 MR. CHASE: There is.

11 THE COURT: It turned into collateral.

12 MR. CHASE: No, sir. There is -- in the
13 documents it says collateral.

14 THE COURT: In the documents it turned into
15 collateral. I understand that. But, from what I
16 can gauge, I'm not sure that that's consistent with
17 the intent of the parties. This wasn't a deal where
18 Mr. Hachenberger testified he was looking for and
19 needed to have another million dollars worth of
20 collateral. He may need it now. There may be good
21 reasons for him to exercise that right now, but on
22 the front end I'm not clear that that was ever the
23 intent, was that he would -- that Mr. Myers would
24 come -- and it may be that -- it may be the
25 documents say it.

1 I'm not -- again, I'm not judging the case on
2 this issue, but it just didn't make sense to me in
3 the context of how this negotiation went early on
4 and the ultimate deal that was reached, that
5 Mr. Hachenberger was looking for more collateral.
6 What my sense was, is he was looking to outfit the
7 restaurant, the complex. That has happened.
8 Certainly, I can see wanting to rotate cars to do
9 some other things. This doesn't offend me.

10 But you know, 500 Coke bottles in cases, unless
11 it's pure collateral, if that's all it was, was
12 Mr. Hachenberger said, I want your contribution to
13 be \$5,000,000. You come up with that collateral
14 however that is.

15 MR. CHASE: Recall the testimony about doing
16 auctions off the bat and auctioning off memorabilia.

17 THE COURT: I didn't hear that. I heard doing
18 auctions off the bat. I didn't hear you guys
19 auctioning this stuff.

20 Where did that testimony come from?

21 MR. CHASE: I believe that testimony was there.
22 We can go back, and I'll try to find it for the
23 Court. But I believe that the testimony was that
24 there would be auctions with the Highway 46 stuff
25 and have other people also come in and auction off

1 their stuff. I --

2 THE COURT: I may have missed it, but I don't
3 recall it.

4 MR. CHASE: I believe -- and there have been
5 many times where I was certain something was said at
6 the trial -- and I can go back and I look into that
7 court -- the transcript, and it's not there, but it
8 seems like when there was that discussion about the
9 auction area, the comment was made, and I believe it
10 was by Mr. Myers, we were going to auction off
11 Highway 46 stuff as well as have other people come
12 in and auction off their stuff as well, and we would
13 hold auctions off that back area. And I will look
14 for the transcript if that's an issue.

15 And again, I don't think that the Court is --
16 should be looking at the intent --

17 THE COURT: I'm not. I told you I'm not
18 judging. I just told you it's a nagging question.

19 MR. CHASE: I understand.

20 THE COURT: Because I've been confronted more
21 than once by the DCA.

22 MR. CHASE: Okay.

23 THE COURT: In a casual conversation about an
24 opinion once it's final, what about this? And it's
25 one of those things that we as people ask. That

1 human piece of this that says, does that make sense
2 to me? Because in the end, I don't throw away my
3 common sense either.

4 MR. CHASE: Of course.

5 THE COURT: And so I've been trying to
6 understand what that would have been. It's not a
7 basis -- I think you all understand at this point,
8 I'm judging this based on the contracts. I mean,
9 this is not my personal opinions. It's what I think
10 the contract says, and it's plain and unambiguous.
11 You don't like it in one piece, and you don't like
12 it in others, and I get it, but that's how I read
13 it.

14 MR. CHASE: If you looks at -- I think that
15 if -- with the understanding the Court has that
16 question in his mind, because I use the Court --
17 it's mine -- I apologize if that's offensive. I
18 believe I feel confident that I could -- I could
19 explain to you any concerns about that by just
20 looking at the evidence, even the evidence that's
21 already in. I think I can do that. I think the
22 documents can do that.

23 Certainly the pictures -- the pictures are --
24 they went around, they had memorabilia, in two
25 different areas. The bulk of all of that

1 memorabilia is in the Church Street warehouse, was
2 in Bobby Lee point, a couple of warehouses, and then
3 on the property there at 46. And when they went,
4 they took these pictures. Mike Myers took these
5 pictures for the -- to put on that CD and say this
6 is my stuff. He just walked around and started
7 taking pictures of all the memorabilia, and they put
8 it on a CD, and if you go through all the pictures,
9 that's a ton of memorabilia and cars and trucks that
10 is clearly part of it, and the document itself says,
11 some of which is depicted in the CD, meaning I
12 didn't get a picture of everything, but I've got a
13 lot of stuff, and to entice somebody to invest
14 millions and millions of dollars, you've got to have
15 something.

16 What were the Myers putting on the -- putting
17 on the table? If he said that his budget was
18 \$6,000,000 that he was going to have to pay out, why
19 would he be 50 percent partners if he's laying out
20 \$6,000,000, and all they did was lay out 1.3, which
21 is their equity --

22 THE COURT: Because he's given first priority.
23 He's going to get paid back first with interest. I
24 mean, you ask why would there be unequal
25 contributions, this is equity. This is debt. And

1 it's not fair to compare the two as equal when
2 there's a first priority for repayment of debt.
3 That's why. In my mind, it may not be an equal
4 contribution.

5 MR. CHASE: It wasn't.

6 THE COURT: I get it. I get it. But is it --
7 is it 2.9 million of stuff or 2.6 million of stuff
8 or 3.6 million of stuff, and would that have been an
9 appreciable difference in looking at this stuff?
10 Because remember, nobody valued it. The valuation
11 hadn't been done. And so to say, well, he wanted
12 more. More of what? He may have had his more
13 already. Nobody knows, because they never went
14 through the process of evaluating what this stuff
15 was worth.

16 MR. CHASE: Recall the testimony as well of
17 Mr. Myers that he intended to continue --
18 contribute, adding assets to the company, to the
19 project. He testified to that.

20 THE COURT: But he did it ultimately with
21 Highway 46 money. He went out and bought stuff,
22 then he got reimbursed for it.

23 MR. BENITEZ: And, Judge, going back -- I mean,
24 if we're arguing all kinds of issues with respect to
25 the DVD, the DVD was taken on or about in the year

1 of 2000 or so or thereabouts, and we're talking
2 2005. Actually, those shots were of Bobby Lee back
3 in 2000, early 2000, and some of the shots were in
4 the 1990's, in late 1990's, and those were just
5 promotional -- that was just a promotional video
6 that Donaghy said, hey, give me something to stick
7 in here, and that's basically all of it. So we're
8 going to be qualifying all of that.

9 THE COURT: I'm not listening to it. If I
10 haven't been very clear about the CD, I don't know
11 how to be any clearer. Your client transferred all
12 of the stuff that's pictured on the CD. I don't
13 care if he took it in 1985. It doesn't make a
14 difference. The document says, this is part of the
15 memorabilia assets that he agrees to transfer.

16 MR. BENITEZ: Well --

17 THE COURT: I understand what you're saying.
18 The CD reflects a different reality, but it doesn't
19 matter. The contract says, I'm transferring all
20 that stuff.

21 MR. BENITEZ: Okay. Judge, for instance, one
22 picture of a car that Myers never owned, it was a
23 promotional picture --

24 THE COURT: That's a problem for him.

25 MR. BENITEZ: -- type of things. That doesn't

1 exist.

2 THE COURT: That's a problem for him. That's a
3 problem for him.

4 MR. BENITEZ: So --

5 THE COURT: These are the same problems I tried
6 to get you all to see pre-verdict.

7 MR. BENITEZ: Right. No, and we're aware of
8 all the problems, Judge, in this case. We're aware
9 of our situation.

10 THE COURT: I'm not sure you all -- I'm not
11 sure you all are, and that's what I've been
12 really -- I thought about this case all weekend, and
13 I thought why in the world would this case not
14 settle? And all I can think is, because nobody --
15 careful how I say this. A client deserves to
16 understand all of the possibilities that could
17 happen in a case, and that means, if the judge
18 disagrees with us on the interpretation of the
19 contract, here's what the outcome could be. And
20 understanding the worst case outcome should lead
21 somebody to reasonable settlement prospects.

22 So all I can imagine is, either they were
23 explained what the worst case scenario could be, but
24 refused to accept it, or that they didn't understand
25 the worst case scenario.

1 MR. BENITEZ: Judge, with respect to my
2 clients, they were advised of the worst case
3 scenario, they understood it, but, Judge, what I'm
4 trying to relate to the Court is, that my clients
5 are in that position that you're describing, and
6 that is a position where they know that there's one
7 of two ways, we could either resolve it, or we're in
8 for it until the in the long drive, and they want to
9 get it resolved. So -- and I know that --

10 THE COURT: Every day we go down this path,
11 though, the Court is making rulings that are going
12 to make it more and more difficult to resolve the
13 case on favorable terms for either of you. And
14 favorable I use loosely, because again, I still
15 don't think there's a win-win here. I mean, I don't
16 think there's a genuine, everybody walks away
17 winners. I think there's a win-win inside of the
18 constraints we have now, but that window closes
19 every time the Court makes a ruling for one side or
20 the other.

21 And, Mr. Chase, I understand you disagree, but
22 I look at the plain language of that agreement, and
23 that is an agreement to do something that hadn't
24 happened by virtue of the terms of the document, but
25 nevertheless, it's an agreement to do something, and

1 that's what specific performance is about. It is
2 about compelling parties to do what they agreed to
3 do and haven't done in the terms of the agreement.

4 So while it may not result in an absolute win
5 as it relates to simple enforcement of the contract,
6 it's still made up in the same place.

7 MR. BENITEZ: Can I -- and my suggestion to the
8 Court is, that based on your recent rulings today, I
9 think there's room, hopefully -- because hopefully,
10 it's opened up the plaintiff to consider certain
11 things that maybe if we could just get into those
12 warehouses, identify those memorabilia, personal
13 property, and the autos and so on, who knows. I
14 submit to the Court that there's going to be a high
15 probability that we're going to get it resolved. If
16 not, what we're going to do is, we're going to be
17 able to streamline the presentation next time around
18 so that the Court then can play Solomon and decide
19 which way the ruling will go. That's my suggestion.

20 MR. CHASE: That's --

21 MR. BENITEZ: My suggestion comes on the heels
22 of Mr. Chase saying he's not in a position to meet
23 his burden, and I'm making that suggestion, Judge,
24 because I have been the longest standing attorney in
25 this case. I have been there from the start, and

1 I'm not here necessarily trying to do anything at
2 all to extend the life of this case, and I see the
3 benefits of both parties walking away with nobody
4 winning at this point and both of them losing.

5 THE COURT: I can tell you, I don't feel very
6 Solomonic. I appreciate the comparison. I pray for
7 wisdom every day, but this isn't the case -- I think
8 I jokingly told you a story about a divorce case.
9 This isn't that kind of case where the Court has
10 equitable powers to decide who gets what. This case
11 is about enforcement of the contract, and yes, we
12 are here in equitable remedies, but the remedies are
13 only defined by the terms of the contract ultimately
14 and what the parties agree to do.

15 And I could decide -- candidly, I have very
16 little discretion beyond evaluating witness
17 credibility to determine what was there, what was
18 intended to be transferred by virtue of the language
19 in the contract and the parties' actions and
20 conduct, and ultimately, to enter a very specific
21 final judgment that identifies property, because
22 otherwise, you all just walk away and argue over
23 what I meant.

24 MR. BENITEZ: Right.

25 THE COURT: That's of no help.

1 You want to finish with Mr. Carlin's testimony
2 today?

3 MR. CHASE: Yes, your Honor. I don't have any
4 further questions of were Mr. Carlin.

5 THE COURT: You want to cross-examine
6 Mr. Carlin today?

7 MR. BENITEZ: As opposed to?

8 THE COURT: As opposed to pushing it off 'til
9 sometime after you.

10 All are done with this work you want done.

11 MR. BENITEZ: I would rather reserve. I would
12 rather reserve to the next time, because I think --
13 I really, really hope that we don't have to come
14 back. Really, really hope.

15 MR. CHASE: I think for the benefit of
16 Mr. Carlin, that he's going to be cross-examined, it
17 should be today, rather than having him be called
18 back. We're here -- he's got to take off of work to
19 come and testify.

20 THE COURT: I hear you. I hear you. Let's
21 finish up Mr. Carlin, but after that, I'm inclined
22 to probably delay. Give you some time.

23 Mr. Carlin, if you'll take the stand, please.

24 You're under oath, sir. You're fine. Thank
25 you.

1 CROSS-EXAMINATION

2 BY MR. BENITEZ:

3 Q. Mr. Carlin, you were hired by Mr. Mike Myers,
4 correct?

5 A. Yes, sir.

6 Q. And you were hired as a laborer, correct?

7 A. That's correct, yes.

8 Q. And you indicated your employment began in
9 2005?

10 A. That's correct.

11 Q. And do you remember the month that your
12 employment began?

13 A. I don't recall.

14 Q. And your employment consisted of doing -- just
15 doing anything that Mike may have asked you to do,
16 correct?

17 A. That's correct.

18 Q. And that would be delivering stuff?

19 A. Yes.

20 Q. Picking up stuff?

21 A. Yes.

22 Q. Doing manual labor?

23 A. Yes.

24 Q. You were fired by Mike Myers, correct, in 2005?

25 A. No.

1 Q. And you were fired because you overstated the
2 time that you were clocking in?

3 A. No.

4 Q. And then you were rehired because you have a
5 relationship with Tommy Smith's son?

6 A. I was never fired, no.

7 Q. Do you have a relationship with Tommy Smith's
8 son?

9 A. Yes, I do.

10 Q. And now you indicated to the Court that you did
11 some work for Mike Myers individually, correct?

12 A. Yes.

13 Q. And that was while you were working at
14 Highway 46?

15 A. Yes.

16 Q. And you indicated that that occurred for a
17 period of time, but then it stopped?

18 A. No.

19 Q. Okay. He continued to pay you for stuff that
20 you did for him individually, correct?

21 A. No.

22 Q. Did he pay you in 2005 for stuff that he -- you
23 did for him individually?

24 A. Before Highway 46 took over, yes.

25 Q. I apologize. I didn't hear that.

1 A. Before Highway 46 took over, yes.

2 Q. So after Highway 46 you never got paid by Mike
3 Myers for doing work for Mike Myers?

4 A. No.

5 Q. So you didn't get paid in 2005 after you got
6 hired by Highway 46?

7 A. Not that I recall.

8 Q. And nothing in 2006 or 2007?

9 A. The eBay business, he paid me out of his
10 account, I believe a couple of times, but that was about
11 it.

12 Q. Say that again.

13 A. His eBay business. Our eBay business.

14 THE COURT: Hold that microphone over there a
15 little bit.

16 THE WITNESS: There might be some checks that
17 he wrote from Mike Myers and Associates.

18 Q. Okay. That's who you worked for, correct?

19 A. I worked for Highway 46 Holdings.

20 Q. Did you work for Mike Myers and Associates,
21 also?

22 A. There could be some checks from him. I just
23 don't recall what it was for.

24 Q. Okay. So --

25 MR. BENITEZ: Judge, if I may approach the

1 clerk and have an exhibit marked?

2 THE COURT: You may.

3 MR. BENITEZ: I believe it's going to be
4 Exhibit TT. And, Judge, unbeknownst, my client
5 wrote in the back of one of the pages, if I may
6 substitute it real quick before I add it on.

7 THE COURT: You may.

8 That's an off the record conversation.

9 (Discussion held off the record.)

10 THE COURT: Do you have a substitute page now
11 or do you have to do something?

12 MR. BENITEZ: I don't have to substitute it
13 now, Judge, if that's okay.

14 THE COURT: No. No. My question was, you said
15 you were going to substitute a page, do you have a
16 page to substitute in, or do you need to photocopy
17 something later?

18 MR. BENITEZ: Judge, it's a -- I have to
19 just --

20 THE COURT: It's not coming into evidence,
21 right?

22 MR. BENITEZ: No.

23 THE COURT: Okay. Then just mark it and --

24 MR. BENITEZ: Okay. Thank you, your Honor. If
25 I may give it to your clerk?

1 THE COURT: Yes, thank you. For

2 identification, it's being marked as TT.

3 BY MR. BENITEZ:

4 Q. Mr. Carlin, you were working for Highway 46 in
5 August of 2005, correct?

6 A. That is correct, yes.

7 Q. Okay. And do you remember getting a check for
8 \$325 from Mike Myers and Associates, Inc. for labor
9 work?

10 A. That would be correct.

11 Q. Okay. What work did you do?

12 A. I don't recall what was done. I know when I
13 was first getting paid, though, I didn't start receiving
14 checks from Highway 46 right way, and so Mike was still
15 paying me through Mike Myers and Associates.

16 Q. But this was on August 11, 2005, correct?

17 A. Right.

18 Q. How about August 24, 2005, were you paid \$550?

19 A. I don't recall. I mean, maybe. If you have a
20 check, sure.

21 Q. Okay. Would it refresh your memory if I showed
22 you the check?

23 A. Sure.

24 MR. BENITEZ: May I approach the witness, your
25 Honor?

1 THE COURT: You may.

2 A. If it says Nick Carlin on it.

3 MR. BENITEZ: And may I point you to the check,
4 your Honor?

5 A. Was there duplicate payments from Highway 46?

6 **Q. I'm just asking you to look at the checks.**

7 A. Okay. So these are the checks to -- he started
8 paying me before Highway 46 started paying me.

9 **Q. So when did Highway 46 start paying you?**

10 A. I have records at home. If you want to see my
11 records, I'd have to look them up.

12 **Q. Okay. How about April 5, 2007, would that have**
13 **been after you started getting paid by Highway 46?**

14 A. Yes.

15 **Q. And do you remember being paid \$154 for**
16 **miscellaneous labor?**

17 A. I do not remember that, no.

18 MR. BENITEZ: Let me -- if I may approach the
19 witness?

20 THE COURT: You may.

21 **Q. Let me show you Exhibit 10.**

22 **Do you remember that check?**

23 A. Sure. It has my name on it.

24 MR. BENITEZ: And may I stay here and ask him a
25 few questions, Judge?

1 THE COURT: Yes.

2 Q. And on March 12, 2007, were you paid \$845.13 by
3 Mike Myers and Associates, Inc.?

4 A. Again, I don't know what they're for, though.
5 I can't remember that long ago.

6 Q. Right. Does that refresh your memory that you
7 were paid?

8 A. Well, they have my name on them, so they were
9 paid to me, yes.

10 Q. And then on April 5th, '07, \$154 for
11 miscellaneous labor, also; do you remember that?

12 A. It's N-I-C-K, but, yeah.

13 Q. Do you remember that, sir?

14 A. I don't remember it, no, but I see the check,
15 so...

16 Q. How about on April 8, 2007, \$177; do you
17 remember that check?

18 A. I don't remember it, but again, I see that my
19 name's on it, so, yes.

20 Q. Let me go back and show you the \$845 and \$13
21 [sic] made payable on March 12th, '07, and I'll have you
22 look at the back of the check; is that your signature?

23 A. It is.

24 Q. Okay. And on the check for April 5th, '07, of
25 \$154, was that your signature?

1 A. And my bank account.

2 **Q. And your bank account. And it's the original**
3 **check, correct? Is that yes?**

4 A. It looks that way, yes.

5 MR. CHASE: Your Honor, can we have that
6 redacted, his bank account information. It's an
7 exhibit that's now for identification purposes, and
8 it needs to have his account number redacted.

9 MR. BENITEZ: Yes, your Honor.

10 THE COURT: Any objection?

11 MR. BENITEZ: No. Oh, no, your Honor.

12 THE COURT: That's fine. It will be redacted.

13 MR. CHASE: Thanks.

14 BY MR. BENITEZ:

15 **Q. And on March 1st, 2006, do you remember**
16 **receiving a check for \$1,200 from Mike Myers and**
17 **Associates, Inc.?**

18 A. Again, I don't remember receiving it, but --

19 THE COURT: What's the date again, please,
20 Counsel?

21 MR. BENITEZ: It's March 1st, 2006.

22 THE COURT: Thank you.

23 MR. BENITEZ: For \$1,200.

24 **Q. And do you see your signature on the back, your**
25 **endorsement?**

1 A. Let me just say, though, I did purchase a lot
2 of things for the company that he would reimburse me
3 back, so if I went to Sam's club or anything like that.

4 **Q. But I wasn't asking you -- I was just asking**
5 **you if your signature was on the back as an endorsement?**

6 A. Yes, sir, that is my signature.

7 **Q. And how about February 3rd, 2006, \$500, do you**
8 **remember getting paid that by Mike Myers and Associates,**
9 **Inc.?**

10 A. Yes.

11 **Q. And your endorsement is on the back of that**
12 **check?**

13 A. Yes.

14 **Q. And how about on November 22, 2006, \$850; do**
15 **you remember that check?**

16 A. Again, I don't remember any of the checks, but
17 long time ago.

18 **Q. Okay. Does that -- and is your signature on**
19 **the back?**

20 A. Yes.

21 **Q. Your endorsement?**

22 **And on September 16, 2005, did you receive a**
23 **check from Mike Myers and Associates, Inc. for \$510?**

24 A. Again, I don't know what they're for. It
25 doesn't say what they're for.

1 Q. And is that your endorsement on the back of the
2 check?

3 A. Looks like that's an odd signature, but yeah, I
4 would say it's mine.

5 Q. How about February 28, 2006, \$1,500; do you
6 remember that, getting paid that by Mike Myers and
7 Associates, Inc.?

8 A. Again, now I don't remember it, but...

9 Q. And is that -- does that appear to be your
10 signature on the back, your endorsement?

11 A. I can't see it. You have to take it off.

12 Q. See it now?

13 A. No. Your finger's covering it. No, I can't
14 see anything.

15 Q. Could you see it now, sir?

16 A. Yes.

17 Q. Is it your signature?

18 A. Yes, it is.

19 Q. And on June 12, 2006, do you remember receiving
20 a check from Mike Myers and Associates, Inc. for \$600?

21 A. Yes.

22 Q. And is that your endorsed signature on the
23 back?

24 A. Yes, it is.

25 Q. How about in June 16, 2006, do you remember

1 receiving \$250 from Mike Myers and Associates, Inc.?

2 A. I see it's in my name.

3 Q. And is that your endorsed signature on the
4 back?

5 A. Yes.

6 Q. And, Mr. Carlin, you would have received some
7 other checks, also, during 2005, 2006, and 2007 from
8 Mike Myers for work for him?

9 A. As you can clearly see, yes, reimbursements.

10 Q. Okay. And I think you testified during your
11 direct examination that -- well, let me put it this way:

12 Do you have -- were you in a capacity at
13 Highway 46 in 2005 to know anything that was going on
14 between Mike Myers and Donald Hachenberger?

15 A. To my capacity, yeah, it was the three of us.
16 It was Mike Myers, Tom Smith and myself.

17 Q. How about Donald Hachenberger?

18 A. When --

19 Q. When did you meet Donald Hachenberger?

20 A. Once he came aboard at the end of '05.

21 Q. So he didn't come aboard during the summer of
22 '05?

23 A. Could be the summer.

24 Q. Okay. Well, do you remember when he came
25 aboard?

1 A. I don't remember the exact dates, no. It was
2 over ten years ago.

3 Q. But all your dealings were with Mike Myers,
4 correct?

5 A. Initially, correct.

6 Q. Initially, meaning, in 2007, when Mike Myers
7 gets fired your dealings become rather direct with
8 Mr. Hachenberger?

9 A. I knew Mr. Hachenberger before that point in
10 2007. I thought we were discussing 2005.

11 Q. Okay. Let me ask it again. When -- well, in
12 2007 when Mike Myers gets fired, you start doing more
13 work directly for Donald Hachenberger, correct?

14 A. Directly for Donald Hachenberger?

15 Q. Yes.

16 A. I was still working for the company, so it was
17 what the company was asking me to do.

18 Q. You have -- you weren't assigned the task of
19 keeping books for Highway 46, were you?

20 A. No.

21 Q. You weren't assigned for cutting checks for
22 Highway 46, were you?

23 A. No.

24 Q. You weren't charged with any financial
25 obligations of the company, Highway 46, were you?

1 A. I was Mike's right-hand man leading up to that
2 point with delivery, books, checks, reimbursements,
3 petty cash, credit cards.

4 **Q. Doing labor for Mike Myers, correct?**

5 A. Going to the corporate office and getting
6 cuts -- checks cut and of that nature, so I did have --
7 in regards to that, yes.

8 **Q. You would go up to the corporate office and**
9 **pick up checks for Mike, correct?**

10 A. Correct.

11 **Q. Is that correct?**

12 A. Correct.

13 **Q. But you would not be the one who would process**
14 **those checks?**

15 A. No. He would always make me make sure there
16 were two signature on that, and stuff like that, but I
17 didn't have to process it. He would call it in, I would
18 pick it up.

19 **Q. And the checks had to have two signatures?**

20 A. Initially, yes.

21 **Q. When did that change?**

22 A. I don't recall.

23 **Q. Did it change in 2007?**

24 A. I don't recall.

25 **Q. Did it change before 2007?**

1 A. I don't recall.

2 MR. BENITEZ: Now, with respect to the DVD, do
3 you have that exhibit?

4 MR. CHASE: You want to use it, the pictures?

5 MR. BENITEZ: Yeah.

6 MR. CHASE: Yes. You've got the book.

7 MR. BENITEZ: That's not the exhibit. That's
8 not the exhibit. I should be using the exhibit.

9 MR. CHASE: Okay. Yeah, you're right. It
10 should be up there.

11 MR. BENITEZ: I'm looking at the
12 exhibit that -- he was looking the at the DVD and
13 other things.

14 THE COURT: The photographs?

15 MR. CHASE: Yes, your Honor.

16 MR. BENITEZ: Yes, your Honor.

17 MR. CHASE: I don't know -- that's actually the
18 DVD or CD. It's up there. But what I had was the
19 pictures that are on the CD.

20 THE COURT: He was only referring to his
21 notebook.

22 MR. BENITEZ: I see. I see.

23 MR. CHASE: And you have those.

24 BY MR. BENITEZ:

25 **Q. Do you remember the pictures that Mr. Chase was**

1 **showing you?**

2 A. Yes, sir.

3 **Q. You didn't take those pictures, correct?**

4 A. No, sir.

5 **Q. And have you seen those pictures before today?**

6 A. Yes, sir.

7 **Q. When did you see the pictures for the first**
8 **time?**

9 A. When I came on to the project in '05.

10 **Q. Did you -- were you --**

11 A. The very first picture that's in that book is
12 the advertisement of Highway 46.

13 MR. BENITEZ: May I approach the witness, your
14 Honor?

15 THE COURT: You may.

16 **Q. Is this the picture you're referring to?**

17 A. No -- well, I have seen that one before, yes.

18 **Q. No. I'm just trying to identify the picture**
19 **that you just said was the first picture on this book?**

20 A. That one right there.

21 **Q. This one?**

22 A. That's the one. I didn't see the other one.
23 Yes.

24 **Q. Now, back in 2005 -- and again, do you remember**
25 **at all whether you started with Highway 46 in the**

1 **spring, the summer, or the fall?**

2 A. When Highway 46 took over, I can't recall it to
3 the exact date when it was.

4 Q. Okay. I'm not sure I understood that. You
5 said when Highway 46 took over. I'm just talking about
6 when you were hired by Mike Myers.

7 When were you hired by Mike Myers? Was it in
8 the spring, the summer or the fall?

9 A. I believe it was late spring.

10 Q. And you worked -- you worked for Mike Myers
11 with cap and gowns, also, correct?

12 A. I helped him. That was part of the stuff that
13 was in the Bobby Lee Point warehouse, and also his
14 property.

15 Q. But the cap and gowns were -- you were working
16 that out of the warehouse or the building that was on
17 the property, correct?

18 A. Yes. We moved them quite a bit, yes.

19 Q. Say that again.

20 A. We moved them quite a bit, yes.

21 Q. But did you do work with rings and so on?

22 A. Yes.

23 Q. And that was during the spring and the summer
24 of 2005, correct?

25 A. I believe it was later in the year. I think it

1 was towards the end of 2005.

2 Q. 2005?

3 A. Yeah.

4 Q. That you were doing rings and cap and gowns?

5 A. I believe so, yes.

6 Q. Okay. Did you take any notes of what was on
7 the property in -- during the summer of 2005?

8 A. We were taking inventory of stuff that was on
9 the property. That whole list would say what was on the
10 property, where the location was -- and yes.

11 Q. What inventory list?

12 A. The inventory list that is established that
13 shows the location.

14 Q. And I'm talking about the -- at the time that
15 you got hired in the spring of 2005, were you already
16 doing an inventory in the spring of 2005?

17 A. We started doing inventory -- I came on, we
18 started building the warehouse, we built all the steel,
19 and we started moving everything into the warehouse from
20 Bobby Lee Point, Mike's house, and from the property at
21 46. At that point, we did start doing the inventory,
22 yes. I don't know the exact date again. It was a long
23 time ago, but...

24 Q. Did you -- during that period of time, did you
25 take notes of what was on the property, meaning on State

1 **Road 46?**

2 A. I didn't take personal notes, no.

3 **Q. Did you take any notes after that, like between**
4 **then and today regarding what was on the property on**
5 **State Road 46?**

6 A. No.

7 **Q. You indicated to me you didn't remember what**
8 **these checks were for that I talked to you about,**
9 **correct?**

10 A. Correct.

11 **Q. Do you remember, sitting here today what was on**
12 **the property in May of 2005, on the property on**
13 **Highway 46?**

14 A. I could remember some items, yes.

15 **Q. How about on May of 2006, do you remember what**
16 **was on the property on State Road 46?**

17 A. I can't recall exactly if it was in May of
18 2006, but I remember some stuff that was on the property
19 and stuff that had been there for a long time.

20 **Q. And what was there on May of 2006?**

21 A. White Texaco sign boards.

22 **Q. And where were they located?**

23 A. On the side of the property towards BJ's
24 Wholesale Club.

25 **Q. And what else was located on the property?**

1 A. That's all I can remember right now.

2 **Q. What about in August of 2005, do you remember**
3 **what was on the property, the State Road 46?**

4 A. I can't recall.

5 **Q. How about July of 2005?**

6 A. I just know vehicles were on there, the big
7 Coke can was on there -- coke bottle, rather --

8 THE COURT REPORTER: The what?

9 THE WITNESS: Coke bottle. It's a big
10 fiberglass Coke bottle.

11 **Q. Nothing else?**

12 A. I mean, if I wanted to think hard about it, I
13 would be here all day, but I'm sure I could come up
14 with -- the building was still there, the smoker room
15 was there, the smokehouse was there, the fire truck was
16 there at that point. It hadn't been moved yet. A lot
17 of the Buicks were both there.

18 **Q. Mr. Carlin, I asked you what was there on the**
19 **property in August of 2005, and you said you didn't**
20 **remember, and now you're specifically remembering**
21 **something that was there in July of 2005?**

22 MR. CHASE: Let him finish answering the
23 question.

24 A. Again, I said I'm not sure about the dates. It
25 was sometime in 2005. I'm not sure exactly what the

1 dates were.

2 THE COURT: One second, sir. You can finish
3 your answer as to what was there.

4 **Q. Did you finish your answer?**

5 A. Yes.

6 **Q. So you're really not sure of the date, the**
7 **month of the property that you're describing being**
8 **located on the property, correct?**

9 A. Right. Again, that's a long time ago. So --

10 **Q. And you knew -- sorry. I apologize.**

11 A. That was a long time ago.

12 **Q. Right. So when you sit here, you're not**
13 **recollecting and having a picture in your mind of**
14 **exactly what was on the property on a particular day in**
15 **the summer of 2005, are you?**

16 A. Well, that's what I just did with the Coke
17 bottle, the cars. That's what I was doing, was painting
18 a picture in my mind what I do remember. I just don't
19 know the exact date.

20 **Q. That's what mean. It could have been in**
21 **September of 2005, correct?**

22 A. Correct.

23 **Q. It could have been in May of 2005, correct?**

24 A. Correct.

25 **Q. It could have been in April of 2005, correct?**

1 A. Correct.

2 Q. So you don't have any specific recollection of
3 any property in particular being on State Road 46, the
4 real property on any particular day in 2005; would that
5 be a fair statement?

6 A. There's no written note or record, correct,
7 that I have, no.

8 MR. BENITEZ: Nothing further, your Honor.

9 THE COURT: Any redirect?

10 MR. CHASE: No, sir.

11 THE COURT: Okay. Thank you, sir. You may
12 step down.

13 THE WITNESS: Thank you, Judge.

14 THE COURT: You're free to go. Thank you.

15 THE WITNESS: Thank you.

16 THE COURT: What do you all envision needs to
17 happen on the property at this point? Who needs to
18 be there, what timeframe do you need to accomplish
19 it in order to go through what's there for your
20 respective positions?

21 MR. BENITEZ: Judge, may I start? I would like
22 to have Mike Myers and Jackie Myers and -- well,
23 Jackie Myers and Sean Myers with me and with
24 Mr. Chase and whoever else they want. I'd rather
25 not have Mr. Hachenberger there, just to make it

1 easy and go through the property to invent -- in a
2 sense, to use a phrase for just descriptive terms,
3 just to inventory the property, and that way we
4 can -- I suggest that even tagging it or doing
5 something so that we can isolate so we can kind of
6 start narrowing the focus of really what's at issue,
7 if anything.

8 THE COURT: When you talk about property,
9 you're talking about the two warehouse?

10 MR. BENITEZ: Yes, your Honor, the two -- I'm
11 not talking about the buildings right now, Judge.
12 That -- in my mind, that's -- that's different. I'm
13 talking about just the warehouse, to be able to
14 identify what's there. I think the main house,
15 that's something that we can handle some other way.

16 THE COURT: We're going to handle it. We're
17 not going to continue to stretch this out. We're
18 going to handle it and you come back and we're going
19 to be done. If you haven't resolved it yourselves,
20 we're going to come back, and we're going to be
21 done. I'm concerned about doing this anyway, but I
22 can see where it might make sense.

23 So do you need to see the trailers?

24 MR. BENITEZ: Yes, your Honor. What I'd like
25 to do is see -- now that you put it that way, I'd

1 like to see everything. It shouldn't take long in
2 the house, but -- to identify. I would suggest --
3 and a lot of that stuff I can do in the main house.
4 Because it's not in layers, I can just take
5 photographs and then go back to the office or go
6 back with Mr. Myers and then identify the property.
7 I can do that.

8 With the warehouse, it's a little different,
9 because sometimes they're in boxes or something, so
10 it may have to be taken out. I see that being a
11 little bit of a process, maybe a few days there
12 doing that, and getting that sorted out, and that
13 would be Bobby Lee and the Church Street property.

14 And then the trailers, that should be
15 relatively easy by just getting there and looking at
16 them, identifying them, so everybody knows that
17 they're there, because there's things that have been
18 moved around.

19 MR. CHASE: There's no way that that's going to
20 narrow issues. It's going to -- the issues are
21 going to expand tenfold, and it's -- that's what I
22 was -- I was recommending that we go ahead and try
23 as much as we can. I think that we can try
24 everything except the personal property. If the
25 Court sends us out there to essentially -- it's --

1 essentially, they're going to do -- they're going to
2 want to do a whole new inventory, an entirely new
3 inventory, and go in and start doing -- you can't do
4 that in two or three days. It takes years.

5 And if we go through all of that memorabilia,
6 it's -- I can see that the problem -- the personal
7 property, and that's -- and again, I always thought
8 that that's -- it was going to be a problem for
9 Mr. Benitez, but it wasn't my problem till today.
10 So it's -- and I understand -- and it's -- I accept
11 the burden, and I accept the Court's accommodation
12 to let us go ahead and let us do what we have to do,
13 but I would certainly like it restricted to the
14 personal property.

15 THE COURT: Where is the personal property
16 located? Is it mixed in with the warehouse with the
17 other stuff?

18 MR. CHASE: It's everything's at the warehouse.

19 MR. BENITEZ: Yes, your Honor. It's kind of
20 convoluted. Some of it is more separated than
21 others, but it's all over the place, like the canoes
22 in the back, the air handlers on the left-hand side
23 of the back of the Church Street property, you got
24 boxes, you got air compressors and on so.

25 My intentions would be, Judge, to identify for

1 the Court specifically what we're fighting about so
2 that we can explain to the Court, this is Sean's
3 property, this is Myers' personal property, this is
4 memorabilia. There are personal collections of the
5 Myers that have nothing to do with that. They were
6 just being kept there because Mike's office was in
7 Church Street, and he was working out of that
8 location. And identify to the point where we've got
9 set targets that we can shoot at.

10 THE COURT: Well, is all the memorabilia on the
11 list?

12 MR. BENITEZ: No. This list?

13 THE COURT: Ah-ha.

14 MR. BENITEZ: No, absolutely not.

15 THE COURT: The 6,800-item list does not
16 include all the memorabilia?

17 MR. BENITEZ: No. That's the problem we got in
18 the case. We got our list, they got their list, I
19 got Sean's list, I got Jackie's list. They're not
20 all there. We need to identify them, and hopefully,
21 we can agree. What I was hoping -- and that's the
22 reason we talked about it last Friday, getting
23 together is, that I was hoping we can tag it down to
24 the point of not necessarily a presentation in
25 court, but a settlement presentation. Just say,

1 hey, listen, we take this, you take that, we move
2 on. That kind of stuff.

3 I think it's not going to be a waste of time,
4 not based on the Court's ruling now, not based on
5 the parties' history.

6 THE COURT: I'm concerned that you don't
7 understand my ruling, to be honest, Mr. Benitez. I
8 mean, I'm very concerned, because you seem to want
9 to make an issue of the memorabilia.

10 MR. BENITEZ: Yeah, and I don't have to. I
11 understand, Judge, but I also want to resolve this,
12 so I'm taking this as a -- like I said, I think I
13 understand you correctly, and I think I'm -- I'm
14 getting a much different position today than I was
15 yesterday, but --

16 MR. CHASE: Sir --

17 THE COURT: Is there memorabilia in the
18 warehouse that's not on the inventory?

19 MR. BENITEZ: No, sir.

20 MR. CHASE: No, sir. I do not believe so.

21 THE COURT: Is every item numbered somehow
22 that's in the warehouse?

23 MR. CHASE: It should be -- no, it's not.

24 THE COURT: So when you go there, it's going to
25 be a challenge to match up looking at some item and

1 finding it on that list of 6,800 items?

2 MR. CHASE: Well, the -- no, sir. That
3 actually should go pretty quickly, because the
4 item -- all the items should have a tag on them,
5 shouldn't they?

6 THE COURT: That's what I just asked.

7 MR. CHASE: Yes, they have a tag -- I'm
8 sorry -- and then the tag should be in numerical
9 order as to the list. So, like, if the tag says
10 7,017, you ought to be able to go right to the list
11 on 7,017 and find it.

12 THE COURT: So let me ask again:

13 You've given me a list of 6,800 plus items.

14 MR. CHASE: Yes, sir.

15 THE COURT: If I go to the warehouse, and I
16 pull an item, is that item numbered to match up to
17 the inventory --

18 MR. CHASE: Yes.

19 THE COURT: -- in some fashion?

20 MR. CHASE: Yes, sir.

21 THE COURT: You answered no to the question
22 earlier, Mr. Hachenberger shook his head no, and I
23 want to understand where we miscommunicated about
24 that.

25 MR. CHASE: I think --

1 THE COURT: Because --

2 MR. CHASE: I understood the question to be, is
3 everything in the warehouse on that list, and no,
4 there are things on -- that are at the warehouse
5 that haven't been inventoried and that are not on
6 the list.

7 THE COURT: And are they memorabilia?

8 MR. CHASE: Yes, sir. Is that correct?

9 MR. HACHENBERGER: I'm sorry. I was looking at
10 the list instead of listening.

11 MR. CHASE: Are there items of memorabilia at
12 the warehouse that are not on your list?

13 MR. HACHENBERGER: No.

14 THE COURT: Okay. If I walk in the warehouse
15 and I pull an item out of the shelf, that is
16 memorabilia, not something else, not personalty,
17 it's memorabilia, it's going to be marked with a
18 number. If it's not marked with a number, what is
19 it? It's personalty, is that in essence, what we're
20 saying?

21 MR. CHASE: I think that that would -- I would
22 be open to that definition.

23 THE COURT: Because I think this is a pretty
24 quick issue if all the memorabilia is marked,
25 because then it's a matter of -- there's no lengthy

1 conversation. I contend Item 6,222 belongs to me
2 personally, put a yellow sticky on -- we don't even
3 have to put a yellow sticky on it. We just mark it
4 on the inventory.

5 MR. CHASE: Yes, sir.

6 THE COURT: And you should be able to go
7 through the inventory -- I agree it's not
8 100 percent descriptive. But isn't it possible for
9 your clients to go through the inventory before they
10 ever go to the warehouse, and at least identify some
11 category of things they contend is not included for
12 some reason?

13 MR. BENITEZ: I'm sure we can do that, your
14 Honor.

15 THE COURT: Mr. Myers, is that possible?

16 MR. MYERS: Your Honor, we're talking about so
17 many -- so many things.

18 THE COURT: Mr. Myers, my question is a simple
19 one. Can you look at the list and at least begin to
20 narrow down what you contend was not inventory that
21 was never intended to be transferred?

22 MR. MYERS: Yes.

23 THE COURT: You can do that?

24 MR. BENITEZ: Yeah. And, Judge --

25 THE COURT: And then put question marks beside,

1 I'm not sure what this description means, so maybe
2 this one, maybe not; is that possible?

3 MR. MYERS: Yes, sir.

4 THE COURT: I'm not looking for a yes, sir. I
5 just want to know is it true. I draw assumptions
6 from this, okay. So all I can do -- because I don't
7 know it as well as you know it.

8 My question is, can you take a look at this
9 list of 6,800 items and say, that's Mom's freezer, I
10 never intended for Mom's freezer to be a part of
11 what going on here. Can you do that or not?

12 MR. MYERS: I think I can. You know, as far as
13 so many of things I've seen through our evidence is
14 that there -- the descriptive of the items are very,
15 very poor. They're not complete.

16 THE COURT: That's my question.

17 MR. MYERS: Yes.

18 THE COURT: Are they so poor that you can't
19 make a preliminary shot at it, or are you able to
20 do -- to get probably 90 percent of what you're
21 concerned with on that list?

22 MR. CHASE: There's a corresponding picture to
23 each one of those items that's on the thumb drive
24 that Mr. Benitez has. So you look on the list,
25 freezer -- probably doesn't say Mom's freezer. So

1 freezer, but he knows what Mom's freezer looks like,
2 so then you take that corresponding picture in
3 there, look at the picture, so this one's Mom's. So
4 you can do everything you need to do with regard to
5 the 6,824 items just by looking at that list.

6 THE COURT: And I'm not suggesting Mom's
7 freezer wasn't included. Don't take that as a
8 ruling.

9 MR. CHASE: He wants Mom's freezer to go back.

10 THE COURT: Okay, all right. Next question.
11 Are some portion of the 6,800 items on the Route 46
12 Entertainment District property?

13 MR. MYERS: Yes.

14 THE COURT: Is there any way to know which ones
15 are?

16 MR. HACHENBERGER: Yes, sir.

17 THE COURT: How is that?

18 MR. HACHENBERGER: If you look at Section 3,
19 there's an identifying number 00001.

20 THE COURT: Yes, sir.

21 MR. HACHENBERGER: And then a description, and
22 then the next entry, this one says, B38, that will
23 be the rack and the shelf that it's on.

24 THE COURT: In the warehouse?

25 MR. HACHENBERGER: In the warehouse, except on

1 number two, it says the cabin, the cabin, so that
2 would identify it in the smokehouse. And so there's
3 pretty good descriptions, and I didn't personally do
4 this, but I have a lot of confidence in the people
5 who did, that it would be pretty easy to go right to
6 the spot. That's what the intent was.

7 THE COURT: And have you looked at the thumb
8 drive, Mr. Benitez, to see the photographs that line
9 up with these? Because there's some issue printing
10 some of those photograph.

11 MR. CHASE: They show up. When you plug them
12 in your computer, they show up, but the -- it was a
13 battle.

14 THE COURT: I'm just going to put it in my
15 computer. Go ahead.

16 MR. HACHENBERGER: Could I explain the problem
17 with the print?

18 THE COURT: Yes.

19 MR. HACHENBERGER: They could produce them, but
20 there were multiple copies of some, and they were
21 not in a numeric order, and I said, those don't do
22 us any good, because we would have to search
23 174 pages to find Item 12.

24 THE COURT: When you plug the USB into my
25 computer, I get a message that says there might be a

1 problem with some files on this device or disc.
2 This could happen if you remove the device or disc
3 before all files have been written to it. And I
4 have two choices. I can scan and fix, which is
5 recommended, or I can continue without scanning.

6 MR. CHASE: I would -- I'd be concerned about
7 it.

8 THE COURT: I am, but this is your evidence.

9 MR. CHASE: Mr. Jones was able to pull it up on
10 his, and he's got it.

11 MR. JONES: I copied that disc onto my laptop.

12 MR. CHASE: So it opened for him.

13 MR. JONES: I copied the folder, so I don't
14 know what's happened to it since then.

15 THE COURT: I just continued without fixing
16 anything, and what I come up with, is a list of
17 photographs, not all of which have the same numbers
18 as the numbers that you've attributed on your
19 spreadsheet. So for example, I have, numbers 00 --
20 proceeding zero, one, two, three, four, five, six,
21 seven, eight, twenty-one.

22 MR. CHASE: Yes, sir.

23 THE COURT: Twenty-three, 26, 27.

24 MR. HACHENBERGER: That's accurate. That's in
25 accordance with this list.

1 THE COURT: So where's the photograph of item
2 number nine.

3 MR. HACHENBERGER: I'm not positive, your
4 Honor, but I believe in the -- these were assigned
5 based upon a barcode, and there may have been some
6 barcodes. They were just learning how to use the
7 system at that point, and I'm betting they destroyed
8 some numbers in that process so that they -- I think
9 you'll find they get more consistent as we go a
10 little further when they get better at it.

11 MR. CHASE: They are also described, and this
12 would be helpful for those earlier ones. The first
13 1,600 are identical to the inventory that was
14 prepared by Mr. Myers, and it probably has a better
15 description, and because Mr. Myers was the one
16 dictating this is exactly what that was, if he
17 compared that, he would be able -- probably have a
18 better idea.

19 THE COURT: Well, then the numbers go on the
20 photographs past the numbers on the inventory.

21 MR. HACHENBERGER: It goes beyond 6,000?

22 THE COURT: Beyond 6,870. I have photographs
23 6,871, 72, 73, 75, 75, all the way to 6,883.

24 MR. HACHENBERGER: I can't explain that, sir.

25 THE COURT: And so for example, 6,883 looks

1 like roller skates to me, metal roller skates.

2 MR. MYERS: Could be, sir.

3 THE COURT: Is that possible?

4 MR. MYERS: Yes, sir.

5 MR. HACHENBERGER: And it could be we missed
6 one page in that also. We had Staples doing that
7 for us, also.

8 MR. CHASE: Well, he's looking at the thumb
9 drive.

10 THE COURT: Yeah, I'm looking at the thumb
11 drive.

12 MR. CHASE: So 6,883, and do you have 6,883 on
13 your --

14 MR. HACHENBERGER: I have 6,870.

15 MR. CHASE: What is 6,870?

16 MR. HACHENBERGER: Light post.

17 MR. CHASE: It appears there's some extra stuff
18 on there that didn't make it to the inventory list.
19 Oh, you're talking about -- well, he's looking at
20 the -- what is the inventory list -- look at it on
21 the thumb drive.

22 THE COURT: So do you have the -- on your group
23 of photos there, Mr. Jones, are you able to get to
24 the end of the photographs?

25 MR. JONES: Yes, sir.

1 THE COURT: Do you have the roller skates?

2 MR. JONES: I do, 6,883.

3 THE COURT: Right.

4 MR. CHASE: Mr. Hachenberger is saying is,
5 possibly we printed out together -- the list that's
6 in your folder, that the last page didn't print, and
7 so -- which would say why it stops -- why your
8 folder stops at 670. And so Mr. Jones is going
9 -- does your stop at 670, too?

10 MR. JONES: It does stop at 6,870.

11 MR. CHASE: So that's an issue.

12 THE COURT: Is the list itself there on the
13 thumb drive?

14 MR. CHASE: Yes, sir.

15 MR. JONES: I pulled mine off of that thumb
16 drive. It's titled export, 031909.

17 THE COURT: This says 6,870 as well. You have
18 a copy of the thumb drive, correct?

19 MR. BENITEZ: Yes, your Honor, I do.

20 THE COURT: I want your client to go through
21 the thumb drive with the photos and the inventoried
22 list, and see if you can identify what for some
23 reason you contend should not be a part of the
24 memorabilia that was transferred at the time of this
25 signing of the agreement. That's the starting

1 place. We're not going to go into the inventory and
2 pull everything off the shelves and go through that
3 whole process again.

4 Then I want you all to coordinate a time to go
5 to the warehouse to look for things that don't show
6 up on the inventory list. If there's any
7 memorabilia -- and that should be quickly
8 determined, because you can pull something off the
9 shelf and look if it's got a number on it, it's on
10 the inventory.

11 Then while you're there, I want you to address
12 the personal property issue, what it is that you
13 contend was not on the premises at the time that the
14 bill of sale was signed. You can go through both
15 warehouses with that same goal, but you should have
16 already done the memorabilia, is my point.

17 It should be a rare thing that you see that you
18 say, wait, that's not on the list, let's pull it off
19 and confirm whether it's got an inventory tag on it
20 or not, and whether that inventory tag matches up
21 with the inventory. And visit the trailers, all --
22 so both warehouses and the trailers that are out
23 there on the lot behind. Two days, two ten-hour
24 days at most to accomplish that.

25 MR. CHASE: Yes, sir.

1 THE COURT: Let's talk about who needs to be
2 there. You all -- the three of you can go.

3 You want to be there?

4 MR. CHASE: Of course.

5 THE COURT: Mr. Jones?

6 MR. JONES: Sure.

7 THE COURT: Mr. Hachenberger, you want to be
8 there?

9 MR. HACHENBERGER: Yes, sir.

10 MR. CHASE: And a deputy sheriff.

11 THE COURT: And a deputy sheriff.

12 MR. CHASE: At his expense.

13 THE COURT: That's right. Normal conditions.
14 Mr. Hachenberger has a right to be there. He's
15 going to be there. I understand --

16 MR. BENITEZ: Judge, I may -- this is -- this
17 is for Mike, having this done. It is -- it affects
18 the environment for Mr. Hachenberger to be present.

19 THE COURT: Possession is nine-tenths of the
20 law.

21 MR. BENITEZ: I know, but, Judge, there's
22 really no purpose for him to be there, and there's
23 going to be no discussion. It's going to be Mike
24 Myers looking at this property and verifying the
25 property.

1 THE COURT: That's fine. He can be there.

2 MR. CHASE: I've got to do the same thing. I
3 mean, what he's got to do, I've got to do to.

4 THE COURT: All right. So when you're doing
5 it, he's got to look at Mr. Hachenberger and go,
6 what about this. And --

7 MR. CHASE: I'm hoping.

8 THE COURT: -- you're going to have to tag this
9 stuff in some form or fashion so that it can be
10 specifically identified by the Court in the event
11 you're unsuccessful resolving the issues.

12 MR. CHASE: I'm hoping with both of them there
13 we can say that's Mom's freezer, take it.

14 THE COURT: I would love for the two of you --
15 I would love for the two of you to be able to do
16 that.

17 MR. CHASE: Does the Court -- can we have --
18 while we're on the record, there's an injunction
19 nobody can remove anything. If we do come across
20 Myers' book, this is the book I was talking about,
21 and Don says take it, can he just take it?

22 MR. MYERS: No.

23 MR. CHASE: Okay.

24 MR. BENITEZ: I think that's going to create
25 more problems.

1 THE COURT: What's the problem? Why not put
2 this stuff back in his hands?

3 MR. MYERS: We're talking about two different
4 things, your Honor. We're -- this conversation is
5 going to, I'm going to take a pickup truck out and
6 pick up Mom and personal possessions. We're not
7 going to do that. We're talking about thousands of
8 items that are family -- and collectibles that have
9 nothing ever done. Our whole -- we worked for
10 25 years for all of this property. We did not
11 assign it, we've never done a contribution
12 agreement. None of this has ever been decided.

13 THE COURT: So, Mr. Myers, you still don't
14 understand the Court's rulings, and what I'm hearing
15 from you is, absolutely no ability to reach
16 reasonable agreements to try to resolve this
17 contrary to what your lawyer's telling me.

18 MR. MYERS: I'm just trying to understand, your
19 Honor.

20 THE COURT: I'm not sure you are.

21 MR. MYERS: I'm not. I'm telling you that I
22 don't.

23 MR. BENITEZ: And, Judge, if I may, when we go
24 on the visit, Jackie cannot take any more time off.
25 His son, their son has some property there. May his

1 son come with us? So it would be Mike Myers --

2 THE COURT: Is he an impediment?

3 MR. CHASE: He's not a party.

4 THE COURT: Is he an impediment?

5 MR. CHASE: He's not a party.

6 THE COURT: I understand, but is he an
7 impediment or is he reasonable?

8 MR. CHASE: It's my understanding that he would
9 be an impediment. Again, that would stir up --
10 because now all of the sudden, it's going to be Sean
11 Myers going there and saying, oh, man, all this
12 stuff is mine. And there's another suit in Seminole
13 County with Sean Myers suing for replevin of his
14 stuff, his stuff that his dad gave away.

15 MR. BENITEZ: But his stuff is there. So to
16 resolve this with finality, resolve this with
17 Seminole County, it makes perfectly sense.

18 THE COURT: Who's representing him in Seminole
19 County?

20 MR. BENITEZ: I am, your Honor, and he would
21 be -- it would be no problem, and it would be an
22 efficient way of doing it. I mean, I can't imagine
23 that they have a problem with that. I mean, Sean
24 would -- his property's there.

25 THE COURT: You know, I don't understand,

1 Mr. Myers, the desire during this trial to put on
2 testimony about the mental anguish from not being
3 able to have personal items returned, and offer now
4 to give you personal items back, and an
5 unwillingness to take possession of at least some of
6 them.

7 MR. MYERS: Your Honor, I think that you just
8 don't understand the voluminous nature, and in fact,
9 the physical nature it's going take to do this.
10 When you talk about two 10-hour days, it is just --
11 I have worked with this for 30 years. I know the
12 stuff, every single thing in the warehouse.

13 THE COURT: We're not going through the
14 memorabilia. Do you understand that? You are going
15 through the memorabilia on the list with the
16 photographs. You are not going through 6,800 items
17 of memorabilia on site.

18 MR. MYERS: I understand. I did not
19 understand, but now the way you said that, now I do
20 understand that.

21 THE COURT: So what we're talking about are
22 personal items, photographs that were depicted in
23 the articles or items that were admitted into
24 evidence that are clearly yours that you wanted to
25 claim mental anguish for.

1 Would you not want to put your hands on those
2 things and take them home?

3 MR. MYERS: I do, sir.

4 THE COURT: There may be more than you can fit
5 in a pickup truck. I get it. But some of those
6 things, wouldn't you like to put your hands on them
7 and walk home with them after nine years?

8 MR. MYERS: I would, your Honor. At the same
9 time, I want to -- if I take anything, I'd like
10 to -- if it hasn't already been destroyed, I'd like
11 to make sure that I get it home and it's not
12 destroyed.

13 MR. BENITEZ: And, Judge, I think --

14 MR. MYERS: Glassware, all kinds of -- you
15 know, when you talk about antique frames and
16 photographs, you know, realize that we spent years
17 accumulating these things, and you don't just throw
18 them in the back of a pickup truck. You've got to
19 wrap them and secure them.

20 THE COURT: So, Mr. Myers, what exactly do you
21 think happens after today with those things that you
22 want to make sure they weren't damaged or destroyed
23 or some piece of them nicked or whatever? What are
24 you hoping is going to happen after today after all
25 of the Court's rulings with respect to those things?

1 MR. MYERS: I am hoping, your Honor, that the
2 Court is going to rule that those do not belong to
3 Highway 46 Holdings.

4 THE COURT: They don't belong to him. He's
5 going to give them to you. There's no ruling
6 necessary. He wants to hand you certain items of
7 personal property.

8 What is it that you're hanging onto here,
9 Mr. Benitez?

10 MR. MYERS: I'm trying to understand the
11 voluminous nature of it of what's --

12 MR. BENITEZ: Judge, to translate what he's
13 trying to articulate and put it in practical
14 terms --

15 THE COURT: Ah-ha.

16 MR. BENITEZ: If we're there for a limited
17 period of time, whatever limitations that the Court
18 imposes to look at this stuff, we don't want to be
19 distracted by saying -- by Mr. Chase coming up and
20 saying, here, take the air compressor, oh, you're
21 not going to take the air compressor. And then stop
22 everything and figure out a way of getting the air
23 compressor into a pickup truck, and then if we don't
24 have enough room --

25 THE COURT: Mr. Chase, tag it.

1 MR. CHASE: Yes, sir.

2 THE COURT: Next one --

3 MR. CHASE: That's it.

4 THE COURT: It's that simple. It's that
5 simple. No thank you, Mr. Chase, tag it, we'll get
6 it later.

7 MR. CHASE: There you go. Happy to do that.

8 MR. BENITEZ: No, that's not a problem, but I
9 think he got -- his comments are having to have a
10 pickup truck and then having to load it up and take
11 it away right then.

12 THE COURT: I'm sorry, but if somebody had
13 something of mine for nine years that meant
14 something to me -- I'm not talking about an air
15 compressor. I'm talking about a photograph of my
16 grandmother I couldn't display in my house because
17 it sat in a warehouse for nine years under the
18 Court's injunction, I want to take it home.

19 Is there one or two items like that that are of
20 that value to you, or not?

21 MR. MYERS: Your Honor, there's 150 pictures of
22 my grandmother and her letters that she wrote me in
23 college and all types of those things. We're not
24 talking about walking in and picking this up and
25 picking this up and getting in the truck. We're

1 talking about --

2 THE COURT: Are there one or two teem items
3 that you just want to say, man, I want to walk out
4 of here with this in my hands?

5 MR. MYERS: Yes, your Honor.

6 THE COURT: That's all we're talking about. If
7 the volume is such that you can't deal with it,
8 that's fine. I don't think anybody here is going to
9 say -- if it's agreed to give it to you, that we
10 can't tag it, and then we can send a moving company
11 to pick it up if that's how you choose to deal with
12 it. I just don't -- it's not the value I'm
13 concerned with. It's what you claimed to be a
14 genuine mental anguish in not being able to access
15 something for nine years. That's all.

16 MR. MYERS: There's a lot there, yeah.

17 THE COURT: Is there something -- I've asked
18 the question, and I can't get an answer.

19 MR. MYERS: We will, your Honor.

20 THE COURT: Here's the thing, if there's
21 something that's offered to you, and you want to
22 take it, yes, you have my permission to do so.

23 MR. CHASE: Thank you, Judge.

24 THE COURT: If you want to tag it and come back
25 and get it later, they say please take this, and you

1 say, I just can't take this right now, I need you to
2 pack it up, whatever, tag it and move on.

3 MR. CHASE: Thank you, Judge.

4 THE COURT: So the answer is yes to your
5 question. If you find something that belongs to
6 him, you clearly just don't want it, give it to him,
7 please. Let's make that happen with -- tag it if
8 you can, and we'll make arrangements for him to get
9 it and pick up to get it back.

10 My response is that I can't deal with the
11 Seminole County case, and I'm sorry, I just don't
12 think that -- this is complex enough that adding
13 Sean Myers to the mix, I think only potentially
14 causes problems, and I'm not saying
15 personality-wise. He may be a delightful young man,
16 I don't know. I'm just saying if we're trying to
17 resolve his claims at the same time, I don't know
18 the magnitude of that, and I just can't get involved
19 so...

20 MR. CHASE: Thank you, sir.

21 THE COURT: No for Sean Myers, otherwise
22 everybody else can be there. Two 10-hour days needs
23 to happen. I'm not going to put you on this next
24 trial docket, because you heard the pretrials for
25 that this morning, but you're going to be on the

1 next pretrial docket. If we're unable to get it
2 resolved, we're coming back here in an evidentiary
3 hearing, and we'll get the rest of this resolved.

4 MR. CHASE: Yes, sir.

5 THE COURT: What else is going to be helpful to
6 you to go forward? I understand I'm not ruling on
7 the -- on everything related to the memorabilia.

8 MR. CHASE: I understand. I think that -- it
9 just -- today was a curve, and so I just -- we have
10 to deal with it, and I think that this is the best
11 way to deal with it. There's no other way. Neither
12 one of us can prove the case at this point. Again,
13 it was to my advantage before, but now I'm suffering
14 with the same fallibility.

15 We go out and we figure out what exactly is
16 personal property, and then that way it can be
17 identified to the Court.

18 THE COURT: How many pieces of personal
19 property are we talking about? Are we talking about
20 the same number, 6,800 pieces of personal property?

21 MR. BENITEZ: I don't have a count, your Honor.

22 THE COURT: I'm just ballparking. Are we
23 talking about a lot?

24 MR. BENITEZ: We're talking a lot.

25 MR. CHASE: It may be that we can -- maybe if

1 we can get out -- if we can't agree on anything
2 else, maybe we agree to put, like, certain personal
3 property in categories where there's all these tools
4 over here, and here's all the paint cans that he
5 has, right, and all that stuff, so then when we come
6 back, we have the picture of there's all the tools,
7 We think they should get all the tools. Here's all
8 the whatever. We think Don Hachenberger should get
9 that, and that's almost -- I see it -- it's almost
10 like equitable distribution.

11 THE COURT: But it's not to be clear.

12 MR. CHASE: Right.

13 THE COURT: I don't look at this like equitable
14 distribution.

15 MR. CHASE: I understand.

16 THE COURT: I hear you, and I think if I could
17 look at it that way, you all would settle it,
18 because you're not going to like what I would do
19 with it, but that's not what this is. This is a
20 contract that provides for certain things, and
21 either they go or they don't go. And I've given you
22 my interpretation of the contract at this point
23 sufficient to, I hope, give you guidance on this
24 issue.

25 MR. JONES: What was admitted for

1 identification as FF, Defendants' FF, he identified
2 500 items as personal property, 500.

3 THE COURT: Okay. So that's the magnitude you
4 think of what you're dealing with, is that correct,
5 your FF, is a comprehensive list?

6 MR. BENITEZ: No, your Honor.

7 THE COURT: Okay.

8 MR. CHASE: We'll try.

9 THE COURT: All right. At a minimum, you're
10 either going to need to categorize this stuff and
11 photograph it, or you're going to have to itemize
12 it, because in order for me to effectively address
13 the replevin claim as well as the -- the specific
14 performance claim, I'm going to have to be able to
15 identify the pieces of property.

16 MR. CHASE: Yes, sir.

17 THE COURT: And you know, what you all tried to
18 shield the jury from, somebody's got to do it, so
19 either you do or I do it, but it has to happen.
20 There's got to be an itemization. I'd walk around
21 with a Dictaphone and just start going. You know,
22 if it's going to turn into an itemization, as
23 specifically as you can describe the stuff, but
24 categorizing it would be far better in terms of the
25 Court's ability to resolve these issues, and the

1 lines to draw for categorization -- you may not
2 agree on the categorization, but the lines to draw
3 from the Court's perspective are what was on the
4 property at the time the quitclaim bill of sale was
5 executed in terms of the personal property, and what
6 was after required and paid for by Mike Myers, or
7 paid by Highway 46, and what is genuinely personal.

8 Again, I don't think Mr. Hachenberger cares
9 about anything that's genuinely personal.

10 MR. CHASE: No problem at all. There's a lot,
11 and I think we'll do exactly what the Court said.
12 There will be things -- we'll tag it, that's --
13 whatever the different color tags, and then we'll
14 arrange, I think with the Court's permission -- we
15 have the two ten-hour days to do what we have to do,
16 but I would also ask on the record if after we tag
17 those pieces of personal items, we arrange for
18 another visit where Mr. Myers could come out with
19 the same people, but also with a professional moving
20 company to move his stuff, to bring his stuff home.

21 Do we have that permission, sir?

22 MR. BENITEZ: If it happens, I would like to
23 have that permission, too, but --

24 THE COURT: Okay. That's fine.

25 MR. CHASE: I'm certain that Don Hachenberger

1 is going to say, I believe you should have that.

2 THE COURT: Well, I can tell you one thing that
3 would save a whole lot of time, Mr. Hachenberger, is
4 for you to go out there ahead of time and to mark
5 everything that there's no dispute about, and then
6 you're not sorting through stuff for all of those
7 things. We can narrow it down then what you have to
8 look at, that's not marked already.

9 MR. CHASE: We will do that tomorrow, with the
10 Court's permission.

11 THE COURT: Go ahead, talk.

12 MR. HACHENBERGER: The injunction has
13 prohibited me from being in there, but I'm getting
14 your permission to do that?

15 THE COURT: Has precluded you from going into
16 the warehouse?

17 MR. HACHENBERGER: Yes, sir.

18 MR. CHASE: Both of them --

19 MR. HACHENBERGER: I haven't been in the
20 warehouse, they haven't been in the warehouse.

21 THE COURT: You have any objection to him going
22 in there and pre-marking things?

23 MR. CHASE: With me.

24 THE COURT: You can go, Mr. Benitez, if you
25 want to go. This isn't a secret. I'm just trying

1 to expedite what I think is coming down the pipe
2 here, which is Mr. Hachenberger's saying, here's 200
3 items that I don't dispute, these clearly were
4 yours, they're personal, I don't want them, and you
5 need to have them, let's move those on.

6 So you haven't been in the warehouse since we
7 went on that site visit?

8 MR. CHASE: That's correct.

9 MR. HACHENBERGER: Since '08.

10 MR. CHASE: The only times they've -- they've
11 been, I think, a total of maybe ten times since '08,
12 and it's always been with -- I think with the Court
13 order, or --

14 MR. HACHENBERGER: There was -- there had
15 been -- it's always been by agreement.

16 MR. CHASE: By agreement, and it's with all the
17 lawyers and everybody.

18 THE COURT: Okay. Are you agreeable to going
19 with -- if you want to go with him, you are welcome
20 to. Are you agreeable to him doing that?

21 MR. BENITEZ: I would like to go or send
22 somebody with him.

23 THE COURT: I think that's perfectly
24 appropriate.

25 MR. CHASE: Sure.

1 THE COURT: Absolutely.

2 MR. CHASE: Not Sean Myers. You.

3 MR. BENITEZ: You see, Judge. I don't think
4 like that. That never entered my mind.

5 MR. CHASE: I considered it lighthearted, but
6 if I missed it, I'm sorry. I meant it lighthearted.
7 I know that this is serious, but it's...

8 THE COURT: All right. Okay. So I'll get you
9 a notice out and get you all on the next -- on that
10 next trial docket. And then in the meantime, how
11 quickly do you all think you can accomplish these
12 two days?

13 MR. BENITEZ: I think we should do it rather
14 quickly.

15 MR. CHASE: I've got nothing but time. Sorry.

16 MR. JONES: I have to check my calendar.

17 MR. CHASE: I can do it this week.

18 THE COURT: Can you accomplish that this week,
19 you think?

20 MR. BENITEZ: No. Why you were -- my clients
21 are exhausted. They've indicated that to me so --

22 THE COURT: I'm sorry?

23 MR. BENITEZ: My clients are exhausted from the
24 trial, so I would like to arrange -- I'll talk to
25 Mr. Chase. If we have any problems, we'll come back

1 before Thursday --

2 THE COURT: Well, here is what I want, I want
3 it done, and I want a status property report. So
4 what I'd like to do is, in the next ten business
5 days, sometime between now and a week Friday, let's
6 make this happen. And the following week, I want
7 lawyers here at ex-parte, and I want a status
8 report.

9 MR. BENITEZ: Judge, could you make that
10 20 days and then come back on the case after that?

11 THE COURT: No, sir. Look, it took us nine
12 years to get here. Let's not have it take another
13 nine to go get this finished up. Let's just go and
14 get it done. If not, you'd be here presenting
15 evidence, and -- you'd be here tomorrow. I know
16 tomorrow's free.

17 MR. BENITEZ: Can we do -- we don't have to do
18 the back-to-back dates. Can he do a one day and
19 then a few days afterwards?

20 THE COURT: Whatever you all coordinate. Just
21 get it done within the next ten days. In the
22 meantime, your clients need to be there with the USB
23 drive and the list to determine what's at issue, if
24 anything, and I expect that to be almost nominal.

25 Okay. All right. Thank you.

1 MR. CHASE: Thank you, sir.

2 (TIME NOTED: 3:07 P.M.)

3 (CONTINUED IN NJ VOLUME II.)

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1 CERTIFICATE OF REPORTER

2 STATE OF FLORIDA)
3)
4 COUNTY OF ORANGE)

5
6 I, SHOSHANA KRAMER, RPR, CRR, Notary Public,
7 State of Florida, I was authorized to and did
8 stenographically report the foregoing proceedings; and
9 that the transcript, pages 4 through 193, is a true and
10 accurate record of my stenographic notes.

11
12 I FURTHER CERTIFY that I am not a relative, or
13 employee, or attorney, or counsel of any of the parties,
14 nor am I a relative or employee of any of the parties'
15 attorney or counsel connected with the action, nor am I
16 financially interested in the action.

17 Dated this 20TH day of SEPTEMBER, 2018.

18

19

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21 Shoshana Kramer
SHOSHANA KRAMER, RPR, CRR

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