

Highway 46 Holdings, LLC. vs. Michael and Jacqueline Myers
APPEAL

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

3 CASE NO.: 08-CA-1466

4
5 HIGHWAY 46 HOLDINGS, LLC,
6

Plaintiff,

7
8 vs.

9 MICHAEL B. MYERS, JACQUELINE M. MYERS,
10 SOUTHEAST COMMUNICATIONS COMPANY OF
CENTRAL FLORIDA, INC., DONALD J.
HACHENBERGER and GLENDA A. HACHENBERGER,

11 Defendants.

12 _____/

13

14 VOLUME VII

15

16

17 TRIAL PROCEEDINGS
BEFORE:

HONORABLE DONALD A. MYERS

18 DATE:

TUESDAY, MARCH 21, 2017

19 TIME:

9:00 A.M. - 4:39 P.M.

20 PLACE:

ORANGE COUNTY COURTHOUSE
425 NORTH ORANGE AVENUE
COURTROOM 23A
ORLANDO, FLORIDA 32801

22 STENOGRAPHICALLY
23 REPORTED BY:

LAURA A. GREEN, RPR, CRR

24

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GLENDA STONE
MICHAEL MYERS
JACQUELINE MYERS

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1 PROCEEDINGS

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3 (Continued from Volume VI.)

4 THE COURT: Good morning, everybody.

5 MR. CHASE: May I approach, sir?

6 THE COURT: You may.

7 MR. CHASE: Sir, I'm handing the Court a binder
8 of the cases that have -- upon which the plaintiff
9 has relied on for motions for directed verdict. A
10 copy of those cases have been provided to
11 Mr. Benitez and Mr. Shuker, although they are not in
12 binder form. I tried and I brought binders, and I
13 brought -- I just ran out of time. But it goes with
14 the highlights, as well.

15 I was able to highlight the first for the
16 Court, which was the most important in mine -- and
17 then -- but as I go through the cases, if it is okay
18 with the Court to take a little bit -- to leave a
19 little bit of extra time for Mr. Benitez to catch up
20 to where we are in the cases, because it is going to
21 be hard for him to find it.

22 THE COURT: That is fine.

23 MR. CHASE: Sir, if it also pleases the Court,
24 I think -- because there are going to be several
25 motions.

1 THE COURT: I'd like to take them count by
2 count.

3 MR. CHASE: Yes, sir. The plaintiffs would
4 argue first, then perhaps Mr. Shuker, and then
5 Mr. Benitez, if that is a good order as we go
6 through each count?

7 THE COURT: That's fine.

8 MR. SHUKER: Your Honor, to that end, then, may
9 I approach?

10 THE COURT: You may.

11 MR. SHUKER: We filed this last night. I know
12 you said you didn't want writing, but my wife is
13 obsessive, and started and didn't stop. So that is
14 our directed verdict on all of our counts --

15 THE COURT: Thank you.

16 MR SHUKER: -- with -- the cases are behind it
17 with all the --

18 THE COURT: Thank you.

19 MR. BENITEZ: Judge, I just received that just
20 a second ago, and I see that it was filed again
21 today at -- and I need --

22 COURT REPORTER: Mr. Benitez, I can't hear you
23 very well.

24 MR. BENITEZ: You can't?

25 COURT REPORTER: No.

1 THE COURT: I am hearing him fine. You're
2 mike'd up?

3 MR. BENITEZ: I am.

4 COURT REPORTER: Okay. I just missed the last
5 part: I received that just a second ago, and --

6 MR. BENITEZ: And I noticed that it was filed
7 at 8:05 a.m. today. I haven't even had a chance to
8 review it.

9 THE COURT: Nor have I. We're all in the same
10 boat.

11 MR. BENITEZ: Yes, Your Honor.

12 THE COURT: Mr. Benitez, did you have any case
13 law prepared, or are you just going to kind of
14 respond as we go?

15 MR. BENITEZ: Yeah. I haven't had -- I haven't
16 been given a clue as to what they are going to argue
17 today. So I'm going to react to whatever they
18 present to the Court.

19 I did go ahead and type up -- or printed up the
20 Chapter 608. If I may approach the Bench, just in
21 case that becomes important. I'm sure it is going
22 to become very useful for the Court. And I
23 presented copies to the opposing --

24 THE COURT: Thank you.

25 MR. CHASE: Sir, if you look under -- may I

1 proceed, sir?

2 THE COURT: You may.

3 MR. CHASE: Of course, I note -- I'm certain
4 the Court is aware of it, but if you look under Tab
5 A citing 611 So.2d 69 -- it is a 4th DCA case from
6 1992. It's the bottom paragraph; for counsel, on
7 the first page: A directed verdict is appropriate
8 only where there is no evidence, or there are no
9 inferences which may be drawn from the evidence to
10 support the position of the party moved against.

11 Switching to Tab 8. Sir, this is the Mower
12 (ph) case. And for counsel, it is -- I'll cite to
13 Page 6 of that case. It is toward the bottom of the
14 page. The paragraph that begins, It is also
15 generally recognized --

16 THE COURT: Is that --

17 MR. CHASE: Do you want me to cite the case?
18 It is 121 Florida 654. That would be Ewing, a
19 Supreme Court case from 1935, with rehearing denied
20 in 1936.

21 Citing from Page 6 of that opinion: It is also
22 the generally recognized rule that parol evidence is
23 admissible to establish a contemporaneous oral
24 agreement which induced the execution of a written
25 contract. Though it may vary, change, or reform the

1 instrument, it is true that such rule requires the
2 agreement to be shown by evidence that is clear,
3 precise, and indubitable; that is, it shall be found
4 that the witnesses are credible, that they
5 distinctly remember the facts to which they testify,
6 and that they narrate the details exactly, and their
7 statements are true.

8 Recall from the beginning of the trial where I
9 read from Black's Law Dictionary the definition of
10 "indubitable" as meaning beyond a doubt. And I do
11 believe that the parol evidence acts as a -- I
12 think, to exclude everything that would include the
13 four first counts, which is the breach, fraud in the
14 inducement, intentional misrepresentation, and
15 negligence, as they are all based on the same -- the
16 same alleged oral agreement.

17 The next case I would cite is under C -- and
18 Mr. Benitez, this is about midway through. It is
19 probably going to take a while for you to find it.

20 THE COURT: Bottom left, Page 14 of 46.

21 MR. CHASE: Sir, citing from Johnson v. FPL.
22 This is an 11th Circuit Federal case, 162 F.3d 1290,
23 1998. It is citing Florida law. To quote from the
24 case: In Florida, evidence of a prior or
25 contemporaneous oral agreement is inadmissible to

1 vary or contradict the unambiguous language of a
2 valid contract. This rule applies when the parties
3 intend that a written contract incorporate their
4 final and complete agreement. One way to
5 demonstrate such intent is through the use of a
6 merger clause. In this case, a merger clause is
7 found in Section 22 of the 1987 contract entitled
8 "Entire Agreement" which states, This agreement
9 contains the entire agreement between Telestat and
10 JEJ. There are no other agreements or
11 understandings stated or implied except as are
12 contained herein. It is hereby further understood
13 that any changes, modifications, or alterations of
14 this agreement shall be in writing, and executed by
15 all parties hereto.

16 When a contract contains such a merger clause,
17 the agreement is deemed to be integrated such that
18 evidence of prior or contemporaneous agreements
19 shall not be admitted to contradict the terms of the
20 contract. There are, however, several exceptions to
21 the parol evidence rule that permit the introduction
22 of evidence of prior oral agreements, even though
23 the final written contract was intended to be
24 integrated.

25 We have two of these exceptions. Parol

1 evidence may be admitted, one, to show that the oral
2 agreement induced the signing of the written
3 contract; or two, to explain a latent ambiguity in
4 the written contract.

5 As for the first exception, Florida Courts
6 recognize an inducement exception to the parol
7 evidence rule, whereby parol evidence is admissible
8 to establish a contemporaneous oral agreement which
9 induced the execution of a written contract that
10 would vary, change or reform the instrument.

11 The party submitting parol evidence under the
12 inducement exception, however, carries a heavy
13 burden of proof. The inducement exception requires
14 the oral agreement to be shown by evidence that is
15 clear, precise, and indubitable; that shall be found
16 that the witnesses are credible; that they
17 distinctly remember the facts to which they testify;
18 and that they narrate the details exactly, and that
19 their statements are true.

20 As the trial judge noted in applying the
21 inducement exception, we do not believe that when
22 the existence of the contemporaneous oral agreement
23 rests solely on the credibility choice between two
24 witness, the proof of that court is clear, precise,
25 and indubitable.

1 Having reviewed the record, including
2 McNamara's testimony denying the existence of an
3 oral mileage guarantee, and Johnson's inconsistent
4 testimony regarding the substance of the alleged
5 guarantee, we agree with the district court that
6 JEJ's evidence concerning the oral mileage guarantee
7 was not clear, precise and indubitable. The
8 district court therefore correctly held that the
9 evidence was inadmissible.

10 Judge, in this case, that sums up a lot. Madam
11 Clerk, can I see Plaintiff's 1 in evidence? The
12 Johnson case begins talking about the merger clause.
13 And in this case, we have merger clauses in both
14 the -- in both the letter agreement and the
15 operating agreement. In fact, the merger clause in
16 the letter agreement has the additional issue of
17 reliance. The merger clause in the letter agreement
18 states, This letter agreement is governed by Florida
19 law. In any dispute, the prevailing party shall be
20 awarded all of its costs and attorney's fees. Each
21 party has had the right to be represented by counsel
22 of their choice and expense. The parties agree that
23 they shall not rely on oral or other representations
24 of the parties, except as are specifically set forth
25 in the articles of organization of the company, the

1 company's operating agreement, the capital
2 contribution agreement and this letter agreement.

3 The merger clause in the operating agreement
4 created disagreement, represents the entire
5 agreement and understanding of the parties. All
6 prior or concurrent agreements, understandings,
7 representations and warnings with regard to the
8 subject matter have been merged into this agreement
9 and are superseded entirely.

10 So we have two different merger clauses, one of
11 which has the reliance language in it, which I'll
12 come to in a second. The -- under the next -- the
13 next tab is D which has the elements of fraud in the
14 inducement. As I said, the argument about parol
15 evidence reaches to all of them, all of the first
16 four. The elements of fraud in the inducement is a
17 false statement concerning a material fact; to the
18 representers knowledge that the representation is
19 false and intentioned that the representation
20 induced another to act on; consequent injury by the
21 party acts on reliance on the representation. I'm
22 citing from code at 135 So.3d 527. Next up is
23 Butler, which --

24 MR. BENITEZ: What paragraph?

25 MR. CHASE: I'm sorry, Mr. Benitez. Hold on.

1 It is the middle of the second page. I apologize
2 for that. And then next up is Butler, which
3 Mr. Benitez, I'm going to the third page, bottom
4 paragraph. The same -- it is talking about the
5 difference between fraud in the inducement and
6 negligent misrepresentation.

7 The same reason does not apply, however, when
8 the party transmits false information, but is not
9 aware the falsehood arises to a negligent
10 misrepresentation. Although justified --

11 THE COURT: Slow down.

12 MR. CHASE: Sorry. As to negligent
13 misrepresentation claims, although justifiable
14 reliance on the misrepresentation is required as an
15 element of the claim, justifiable reliance on the
16 misrepresentation is not the same thing as the
17 failure to exercise due diligence.

18 And there is a discussion in this case. The
19 trial judge applied the due diligence standard, and
20 that is why they are bringing up the due diligence.
21 I point this case out because you have to have the
22 reliance on both the fraud in the inducement,
23 intentional misrepresentation, and negligent
24 misrepresentation.

25 Next up, we come to Billington v. Ginn-La Pine

1 Island. This is under Tab F. It is at 192 So.3d
2 77, 2016 case out of the 5th DCA. Mr. Benitez, I'm
3 on the fifth page of the opinion, the bottom
4 paragraph.

5 Quoting again: Accordingly, we hold that the
6 nonreliance clauses in this case negate the claim
7 for fraud in the inducement, because appellant
8 cannot recant his contractual promises that he did
9 not rely on extrinsic representations.

10 Judge, in this case, we have -- we have -- in
11 order for the parol evidence -- I think the
12 traditional view of parol evidence to exclude
13 negotiations and oral representations prior to a
14 contract, there is a lot of case law that says that
15 it has to contradict an express term.

16 I would say -- I would argue that because their
17 oral contract deals with this escrow agreement to
18 hold everything in escrow so that it is not
19 enforceable -- they are saying it was not
20 enforceable. That was the testimony over and over.
21 It was not enforceable. That directly contradicts
22 all of that.

23 Holding in escrow and saying it is not
24 enforceable -- their entire oral agreement that they
25 alleged is in direct contradiction of the express

1 terms of the -- both the letter agreement and the
2 operating agreement, which say it is effective July
3 7th, 2005. If it's -- to, to me, is a direct
4 contradiction.

5 Further, the cases that I've cited about the
6 admissibility citing Johnson (inaudible) the
7 reliance and -- that any representation, because of
8 the merger clauses, all of it is out. Even if the
9 Court found that it is not a direct contradiction of
10 those terms, of the letter agreement and operating
11 agreement, it is still an oral representation that
12 they are relying on to say this is fraud in the
13 inducement, or some sort of negligent
14 misrepresentation. And because of the merger
15 clauses, they lose on that.

16 I think I'm the only one doing parol evidence.
17 The last thing I have as to those four -- also,
18 there is no evidence of any damages as to what
19 exactly is their damages for this breach of this
20 escrow agreement?

21 So in order to have breach of the agreement,
22 fraud in the inducement, intentional
23 misrepresentation, negligent misrepresentation, all
24 of those have the elements with which I'm sure the
25 Court is familiar. And all of them -- the last one

1 is damages. What are their damages? What could the
2 jury possibly conclude, Here are your damages? Here
3 is -- what? What is it?

4 And so the -- that brings us to the statute of
5 frauds, which I believe Mr. Shuker is going to cover
6 under Tab G, is the statute that we printed out --
7 I'm not sure if he did it in his submission to the
8 Court, but I'll read the relevant parts. It says,
9 No action shall be brought upon any contract for the
10 sale of lands, tenements, or hereditaments, or of
11 any uncertain interest in or concerning them -- that
12 is the important part -- unless the agreement or
13 promise upon which such action shall be brought or
14 some notice or memorandum thereof shall be in
15 writing and signed by the parties and charged
16 therewith or by some other person by her or him
17 thereunto lawfully authorized.

18 Now, the testimony was -- so first, it would
19 say that the -- as to the agreement -- the alleged
20 agreement with Kevin Donaghy, it didn't concern real
21 property. There were deeds -- the deeds conveying
22 real property. There was money exchanged that
23 included money for real property. There were
24 payments that need to be made to pay off real
25 property. I think it would be a difficult argument

1 to say that that agreement to hold those documents
2 in escrow didn't concern real property. It
3 certainly concerned real property.

4 Then you further had the testimony, the
5 uncontradicted testimony by Kevin Donaghy, that he
6 was not authorized to do anything other than present
7 that offer, and then to accept whatever they did.
8 He was not authorized to negotiate on behalf of the
9 Hachenbergers. He wasn't authorized to enter into
10 any other extraneous agreements.

11 And so at the very end of it -- again, this is
12 the statute -- that it has to be signed. This
13 agreement not only has to be in writing, but it has
14 to be signed by somebody authorized to bind them,
15 and it doesn't have that. I would tender the
16 argument to Mr. Shuker.

17 THE COURT: Mr. Shuker?

18 MR. SHUKER: Good morning, Your Honor. May it
19 please the Court. Mr. Chase's argument also went to
20 Counts 2, 3, and 4, because there is some overlap.
21 Would you like me to restrict mine just to Count 1?

22 THE COURT: Let's go ahead and tackle them all,
23 but I'm going to come back with specific questions
24 on each count, because I want to focus on each one.
25 And then you can say, Same arguments, Judge, as to

1 that issue. Go ahead and address them.

2 MR. SHUKER: Thank you, Your Honor. As
3 reflected in our motion that we filed this morning,
4 as to Count 1, there are three arguments why we
5 request directed verdict. The first is the merger
6 clause, which is both in the letter agreement and
7 the operating agreement, and is clear and
8 unambiguous, and they were pointed out to you by
9 Mr. Chase. But they make it clear that nobody is
10 relying on misrepresentations or oral contracts.
11 The case we cited to you was Jenkins, which is 913
12 So.2d 43. That talks about the parol evidence rule
13 and the merger clause. I think Mr. Chase covered
14 that.

15 In terms of -- so the first is the merger
16 clause. The second is parol evidence then,
17 Your Honor. As Jenkins says, for the terms of a
18 voluntary contract are clear and unambiguous --

19 MR. BENITEZ: Excuse me. Your Honor, if the
20 Court's copy has been highlighted -- my copy has
21 not. I need a reference page.

22 MR. SHUKER: I'm sorry. It is not case pages,
23 but printed pages --

24 THE COURT: This is Schubot you are referring
25 to at this point?

1 MR. SHUKER: No; Jenkins, Your Honor. If you
2 look at the Westlaw pages, consecutive numbers, it
3 is 9 in the middle where it is indented. Where the
4 terms of the voluntary contract are clear and
5 unambiguous as here, the contracting parties are
6 bound by those terms, and a Court is powerless to
7 rewrite the contract to make it more reasonable or
8 advantageous for one of the contracting parties.

9 In terms of the statute of frauds, Your Honor,
10 in addition to the fact that it is clear under
11 725.01 that this touches upon and affects --
12 concerning real property, we think the testimony of
13 Mr. Myers that it was designed to go a year, or over
14 a year, which is also grounds for statute of frauds.
15 I asked him -- the question was: Okay, this was an
16 indefinite period of time? And Mr. Benitez
17 objected, overruled. Answer: Yes. The contract
18 was an indefinite period of time.

19 And then I said, question: So you believe that
20 it was possible that this could take well over a
21 year to get the amendments done, right? Answer:
22 Yes, sir.

23 So certainly, Mr. Myers contemplated that this
24 agreement was going to be over a year. But I was
25 asking that question in the context of in October of

1 '16, your meeting, it is 15 months from when you --
2 this oral escrow agreement took place, and you are
3 not panicked. And I said, That is because you
4 contemplated it would take over a year? Answer:
5 Yes.

6 So when the contract -- this oral contract has
7 an indeterminate period, but the belief is it could
8 take over a year, I think also the statute of frauds
9 applies. Even if you don't agree with that, the
10 real estate one certainly does.

11 Your Honor, as to Counts 2, 3, and 4, we have
12 four arguments. The first is that the parties could
13 not have relied. The second is the merger clause.
14 The third is inducement exception to parol evidence
15 does not apply. And the fourth, which is unique to
16 us, is that Mr. Donaghy was not our agent, and was
17 not authorized to make any statements regarding this
18 entire transaction, as evidenced by the testimony.

19 THE COURT: I'm sorry. You said there were
20 four arguments. The no-reliance provision --

21 MR. SHUKER: The merger clause, the inducement
22 to the exception regarding parol evidence does not
23 apply.

24 THE COURT: Thank you.

25 MR. SHUKER: And then Mr. Donaghy was not our

1 agent.

2 THE COURT: Go ahead.

3 MR. SHUKER: As to the first, Your Honor, in
4 terms of the reliance, I think the case law makes it
5 clear, as Mr. Chase was just saying, you can't have
6 reliance based on an oral representation when
7 something you signed subsequent to that
8 representation is directly contradictory.

9 So here, as to Mrs. Myers, she didn't say that
10 Mr. Donaghy said anything at all. She said they had
11 some concerns, he left, they came back and signed
12 it. So she made no reference as to this alleged
13 misrepresentation.

14 As to Mr. Myers's testimony, he said, Well, he
15 told me, I'll hold it in escrow, before I signed it.
16 But what he signed had the exact opposite. So he
17 can't be found to have relied justifiably on
18 something directly contradictory at that time.

19 And that case, Your Honor, is Schubot, which
20 is -- I'm sorry, Schubot, S-C-H-U-B-O-T. That is a
21 district court case of the Southern District Federal
22 but applying Florida law, 757 F. Supp. 1351. Again,
23 on page -- Westlaw, it is 5. It's Headnote 3:
24 Reliance upon oral representations, even if false,
25 is unreasonable if the party enters into a

1 subsequent agreement.

2 And this is a case -- you can see to the left
3 of that, Count 1 is fraud in the inducement. So we
4 are comparing apples to apples, both in the cause of
5 action and the facts.

6 And so what the Court -- district court goes on
7 to say is, Any reliance on the defendant's alleged
8 misrepresentation is unreasonable, because the
9 statements were not contained in the subsequent
10 written agreement.

11 Here, that is precisely what we have. If you
12 even believe that these statements were made --
13 remember, Mr. Donaghy says no such thing happened.
14 And Mrs. Myers says no such thing happened. But
15 Mr. Myers says, He told me, I'll hold it in escrow,
16 but then went and signed something directly
17 contrary.

18 Your Honor, the inducement exception to the
19 parol evidence rule -- and again, Mr. Chase is
20 entirely correct. The standard is it has to be
21 clear, precise, and indubitable. I think the fact
22 that Mr. Donaghy says it didn't happen, Mrs. Myers
23 was silent on these alleged representations -- it is
24 well out of the range of indubitable.

25 The case we cited to the Court and gave is a

1 subsequent case to Mr. Chase's, but it is still 11th
2 Circuit applying Florida law, 214 F.3d 1279. And at
3 the bottom of Page 3, Headnote 3, continuing to the
4 next page: However, the party submitting parol
5 evidence under this exception -- and this is the
6 inducement exception -- carries a heavy burden of
7 proof. The inducement exception requires the oral
8 agreement to be shown by evidence that it is clear,
9 precise, and indubitable; that it shall be found
10 that the witnesses are credible, that they
11 distinctly remember the facts to which they testify,
12 and that they narrate the details exactly, and that
13 their statements are true.

14 None of that happened. First of all, two of
15 the witnesses gave no testimony regarding these
16 statements. And then Mr. Myers's statement is
17 simply not credible.

18 Then following down to footnote 4 -- Mr. Chase
19 did not discuss this, but I think it is important.
20 This is what this case kind of expounded on. Under
21 Florida law -- Headnote 4: Under Florida law, the
22 inducement exception does not apply where the
23 alleged oral agreement relates to identical subject
24 matter embodied in the written agreement, and
25 directly contradicts an express provision in the

1 written agreement.

2 And you will see, Your Honor, beginning in our
3 memo on Page 11, Paragraph 27, we go through each of
4 the alleged items. Remember, there was the
5 handwritten notes that were allegedly part of this
6 agreement that was going to be held in escrow until
7 each of these terms was defined. Each of those
8 terms is in the operating or letter agreement, and
9 are inconsistent with what Mr. Myers wanted.

10 THE COURT: Can you pull that piece of evidence
11 for me, please? It was defense -- go ahead and
12 approach, please. What was the defense exhibit
13 number with the typed list?

14 MR. BENITEZ: You said the Number 5 and 6.
15 Five and 6, Your Honor.

16 THE COURT: Thank you.

17 THE COURT: That is the top of the page --

18 MR. SHUKER: That is it.

19 THE COURT: Thank you, ma'am.

20 MR. SHUKER: So Your Honor, each of these items
21 are contained in and contradicted by the document
22 they signed. So again, as said by the 11th Circuit,
23 the inducement exception does not apply where the
24 alleged oral agreement relates to the identical
25 subject matter embodied in the written agreement it

1 directly contradicts.

2 So you have number one that says -- the
3 employment agreement. I'm sorry, Your Honor. So we
4 addressed that only Page 12 of our memo that says,
5 The operating agreement specifically provides in
6 Paragraph 6 that Mr. Myers will be president, and
7 that Donald Hachenberger has the power to specify
8 the responsibilities of each officer. Paragraph 16
9 of the letter agreement states Mr. Myers will be
10 president of the company.

11 So saying that there is an employment agreement
12 directly contradicts. Death agreement. Paragraph
13 11 of the operating agreement deals with the death
14 agreement. That is not something that needs to be
15 addressed by itself. Again, I'm on Page 12 of our
16 memo.

17 Paragraph 10 of the operating agreement
18 specifically addresses the transfer of an interested
19 member. Famous Days Financials, Paragraphs 1, 19,
20 20, and 26 of the letter agreement specifically
21 address the potential affiliation with Famous Days,
22 another barbecue-themed restaurant. The operating
23 agreement, he wrote that on the list. We just
24 signed the operating agreement, so that -- you can't
25 have that as an issue to be done when it was just

1 signed.

2 The line of credit, Your Honor -- the operating
3 agreement in Paragraphs 6 and 7 gave Don
4 Hachenberger full authority to conduct any and all
5 business on behalf of the company, including the
6 arranging of financing and/or borrowing of money.
7 So again, this is not something that needs to be
8 worked out. And including these would contradict
9 the terms of the letter agreement and operating
10 agreement. The letter agreement, Paragraph 12,
11 states that any further contributions by the
12 Hachenbergers may be structured as loans.

13 And then as to the Myers's note, memorabilia
14 note which is the last thing on this letter
15 agreement in Paragraph 9, expressly provides the
16 Myerses will transfer as their capital contribution
17 to the company all right, title, and interest in the
18 Gassy Jack's assets, the memorabilia assets, the SR
19 46 property, Southeast liquor license, the Jano (ph)
20 classic automobiles, and the Department of Motor
21 Vehicles license to the company.

22 So each of these items would -- is already
23 contained in the two operative documents. And then
24 including them would be just to contradict what is
25 already there. And therefore, Your Honor, under the

1 11th Circuit case -- I can't pronounce that name,
2 Ungerleider -- those would be improper.

3 Your Honor, our final argument that is unique
4 to us, I think, regarding counts -- all of them, but
5 especially 2, 3, and 4 is the agency. Glenda's
6 testimony was clear and unequivocal. She never
7 talked to Kevin Donaghy regarding this. She never
8 engaged him personally. Didn't engage in a letter
9 with him. Mr. Donaghy said he never talked to
10 Ms. Stone about this agreement, never got authority
11 from her to make any offer or any negotiation, and
12 was never her attorney.

13 He did say that in general, he viewed himself
14 as looking out for her interests, but that was only
15 because they were married, which doesn't make
16 somebody -- if I go hire a lawyer -- if I hire
17 Mr. Chase to be my lawyer, he is not my spouse's
18 lawyer. And he also said, because marital funds
19 were being used. That does not make someone your
20 agent. And he never said he was Ms. Hachenberger's
21 or Ms. Stone's agent for purposes of this deal and
22 these negotiations.

23 He was an employee of Re/Max, and she was
24 part-owner of Re/Max. But agency doesn't extend
25 that far. So there is no evidence that even if you

1 accept Mr. Myers's testimony of what happened, that
2 Mr. Donaghy was there on her behalf.

3 So that is the final reason we would ask
4 directed verdict on 1 through 4. We'll come back
5 and hit rescission later, as it is its own kind of
6 unique item.

7 THE COURT: Thank you. Mr. Benitez?

8 MR. BENITEZ: Your Honor, this case is unique.
9 I think I can fairly say so. This is a case where
10 I've heard a lot of principles of law. And the
11 principles as cited from the cases may be correct.
12 But a lot of it does not apply in this case.

13 What we've got here is we've got a meeting
14 between Mike and Jackie Myers and Donaghy on July
15 7th, 2005. And they go in there to transfer the
16 property, the property that -- the real property,
17 the property that the four forms related to that
18 closing were prepared by another law firm.

19 They then go ahead, and after -- and you have
20 heard their presentation. Their presentation is
21 they have problems with the letter agreement and the
22 operating agreement. They didn't want to sign it.
23 And they asked Mr. Donaghy to go and step out of the
24 office, and type up a note directed at
25 Donald Hachenberger for things that needed to be

1 discussed before those agreements would be
2 finalized. He does that. He comes back and they
3 say, That is not good enough. The note doesn't say
4 much. Write it in your own handwriting, and he
5 writes those items.

6 The reason why I'm bringing that up in detail,
7 Judge, is because they appear to then say that these
8 are items that are contradicted by a written
9 agreement. First of all, the written agreement that
10 they are referring to is the letter agreement or
11 operating agreement. That would not have been
12 signed but for the agreement between Kevin Donaghy
13 on behalf of Glenda and Donald Hachenberger and the
14 Myerses to keep those items in escrow.

15 And what we've done is we've alleged that that
16 is a separate contract, totally separate. The
17 contract -- the material terms of that contract has
18 nothing to do with the terms of the letter agreement
19 or the operating agreement. It has to deal with
20 keeping those agreements in escrow, unsigned by
21 Donald or Glenda Hachenberger, so that other
22 discussions can take place, other agreements can be
23 raised, other agreements can be drafted, and that
24 letter agreement or operating agreement can be
25 modified and corrected. That was the testimony of

1 Mike Myers. It is on the record and it is for the
2 jury to decide what they believe, and how they
3 interpret the facts.

4 But the distinction has to be made at this
5 point that that is a totally separate agreement.
6 And the agreement then is completely consummated at
7 that point, because the agreement was that Mr. and
8 Mrs. Myers would be signing the letter agreement and
9 the operating agreement, would be giving it to
10 Kevin Donaghy, and that is all their obligation
11 under this oral agreement.

12 Then Kevin Donaghy is going to keep it in
13 escrow. In fact, he did keep it in escrow. He kept
14 it in escrow in July, August, and September, until
15 he was -- he resigned from the Re/Max of Florida.
16 At that time, the agreements were then showing up in
17 the agreements that were in his office.
18 Donald Hachenberger, Glenda Hachenberger went ahead
19 and took them, and at some point in time, they
20 signed them.

21 But the point that I make with respect to the
22 statute of frauds in particular is that that
23 agreement was fully consummated. At least, it was
24 consummated on the part of the Myerses. They had no
25 further obligation. Their obligation was to sign

1 them and give them to Kevin Donaghy.

2 Kevin Donaghy's obligation under this oral
3 agreement was, I'm going to keep it in my
4 possession. I'm not going to give it to
5 Donald Hachenberger -- Donald or Glenda Hachenberger
6 until everything else has been resolved.

7 So it is adding credibility to that, Judge. It
8 is not only Mike Myers's and Jackie Myers's
9 testimony, but it is also the fact you have got
10 unequivocal testimony that it doesn't get signed in
11 July of 2005. It doesn't get signed in August of
12 2005. It doesn't get signed by Donald Hachenberger
13 until the last week of September of 2005, after
14 Kevin Donaghy has been out of the picture for at
15 least three or four weeks. Then Glenda signs it,
16 and the testimony appears to be that she was mailed
17 the items up in Colorado, and then she mailed them
18 back.

19 But that is all consistent with Mike Myers's
20 and Jackie Myers's testimony of what happened at
21 that meeting. But the important part is that under
22 the statute of frauds -- statute of frauds counts
23 apply to where the parties have fully performed
24 under the contract. I submit to the Court that
25 that's black-letter law. In this case --

1 THE COURT: Tell me, what was the agreement
2 with respect to the property, the real estate?

3 MR. BENITEZ: With respect to the real estate?

4 THE COURT: Yes.

5 MR. BENITEZ: With respect to the real estate
6 property, where the documents were prepared by the
7 other law firm and given to Don to get them
8 signed --

9 THE COURT: What was the agreement?

10 MR. BENITEZ: That was the agreement. The
11 agreement was to go ahead and convey the property.

12 THE COURT: So that wasn't to be held in
13 escrow?

14 MR. BENITEZ: That was not going to be held in
15 escrow. No.

16 THE COURT: Nobody has testified to that.
17 There is no testimony that says it was okay to
18 release the deeds. Who testified to that?

19 MR. BENITEZ: I don't recall right -- standing
20 right here, Judge.

21 THE COURT: Give me any piece of testimony that
22 the Court can rely on with respect to the transfer
23 of the property.

24 MR. BENITEZ: Well, let me -- remember when we
25 had a previous count in this case, and that is that

1 they breached the agreement by going ahead and not
2 paying for the property? Because the agreement with
3 respect to the property was that they were going to
4 go ahead and convey it, and they were going to be
5 reimbursed in development costs.

6 And a third component was going to be there was
7 going to be an appraisal done. Because the
8 appraisal they relied on initially, \$2.9 million had
9 been done two or three years before. This was at
10 the time that the market was hot. So they all knew
11 what the property was worth. So we had an initial
12 claim of breach after contract with respect to that.
13 And also, we had equitable liens and --

14 THE COURT: You are not answering my question.

15 MR. BENITEZ: Yes, sir.

16 THE COURT: My question, Mr. Benitez: What are
17 the terms of the agreement that your client contends
18 were reached as part of this oral escrow agreement
19 as related to the transfer of the real estate?

20 MR. BENITEZ: No, Your Honor. I think he
21 testified to -- that he knew that the property was
22 going to be deeded over. And that way, the permits
23 could be saved, and the bank would be satisfied. So
24 I don't believe I -- now that you brought this up, I
25 agree there doesn't appear to be any specific

1 testimony with respect to this oral agreement
2 applying to the land.

3 THE COURT: So did it or did it not apply? You
4 signed these documents, sir. But you know, we
5 aren't comfortable these accurately represent what
6 our agreement should be. You are going to hold them
7 in escrow. Which ones were agreed to be held in
8 escrow? Because the only testimony is that,
9 Everything we signed -- from Mr. Myers -- was going
10 to be held in escrow for an indefinite period of
11 time.

12 MR. BENITEZ: I submit to the Court that is not
13 his testimony. He did use the phrase "indefinite
14 period of time." That was during cross-examination.
15 But his testimony was, while I was questioning him,
16 if I remember correctly -- I don't have the verbatim
17 transcript -- was that this was going to be done in
18 the next few weeks or the next few months.

19 THE COURT: That didn't happen.

20 MR. BENITEZ: Oh, no. There is no question
21 that didn't happen, if you are asking me that.

22 THE COURT: It didn't.

23 MR. BENITEZ: But the intentions of the parties
24 at the time that they entered into that oral
25 agreement was it was going to be done within a few

1 weeks or a few months, certainly not beyond a year.

2 That was the testimony of Mike Myers.

3 THE COURT: I don't think so, but okay.

4 MR. BENITEZ: Okay.

5 THE COURT: So was the special warranty deed to
6 be held in escrow?

7 MR. BENITEZ: No, Your Honor.

8 THE COURT: What is the evidence of that?

9 MR. BENITEZ: Because it wasn't held in escrow.

10 THE COURT: None of it was held in escrow.
11 Does that mean none of it was intended to be held in
12 escrow? That is not a fair conclusion. What is the
13 evidence -- what is the testimony that says that the
14 deed was to be held in escrow, or was not to be held
15 in escrow?

16 MR. BENITEZ: I have to go back and look at the
17 testimony. I thought that Mike Myers indicated and
18 the testimony was and the evidence up to that is
19 that there has been no objection with respect to the
20 deed being conveyed or being recorded. And there is
21 no objection with respect to the \$283,000 that was
22 given to Mike Myers.

23 THE COURT: 288,000.

24 MR. BENITEZ: 288,000. I stand corrected,

25 Your Honor. There is no question about that.

1 Mike Myers had indicated that there was going to be
2 an adjustment with respect to the appraisal, and we
3 got into a dispute about whether the 2.9 appraisal
4 was admissible. The Court ruled it wasn't
5 admissible. That testimony, I believe, was covered,
6 Your Honor.

7 THE COURT: I didn't hear it. I didn't hear
8 any testimony about which of these documents that
9 were signed would be held in escrow.

10 So your client's testimony right now is,
11 Everything we signed was to be held in escrow, but
12 we get our check. We get to take our money and go.

13 THE COURT: Well, I don't think you heard any
14 testimony that the warranty deed that is recorded,
15 that everybody can see that was recorded, had to be
16 held in escrow.

17 THE COURT: When was it recorded?

18 MR. BENITEZ: I think -- I don't remember. I
19 remember the testimony being -- it might have been
20 in July, or it might have been later. I'm not sure
21 who testified to it. Exhibit 1 would indicate when
22 it was recorded.

23 THE COURT: It was recorded August the 18th.

24 MR. BENITEZ: There you go.

25 THE COURT: So they just held onto it for a

1 while?

2 MR. BENITEZ: Excuse me, Your Honor?

3 THE COURT: So it was just held onto for some
4 time?

5 MR. BENITEZ: It might have been held on,
6 because Donald Hachenberger knew that it wasn't a
7 done deal. So he didn't instruct Donaghy --

8 THE COURT: My point precisely. What were the
9 terms of the deal? Your client bears the burden of
10 proof through parol evidence on this fraud in the
11 inducement claim to a very high standard, according
12 to the case law.

13 How can it be said that he has met that, when
14 there are terms that are -- there is no testimony.
15 And in fact, your client didn't narrate the
16 testimony, as is required by the case law. You
17 narrated it, and got him to simply agree with it.

18 Your questioning went through the allegations
19 of your complaint: And basically, didn't
20 Kevin Donaghy say X, Y, and Z to you? Yes. You
21 narrated the testimony. None of that came out of
22 Mr. Myers's mouth. And certainly, none of it came
23 out of Mrs. Myers's mouth.

24 MR. BENITEZ: Judge, all that goes to the
25 weight of the evidence.

1 THE COURT: But isn't this a weight
2 consideration? I mean, that is -- isn't it?

3 MR. BENITEZ: No. I totally disagree. No.
4 The Court is not to go ahead and have any trial -- a
5 jury trial and decide whether the evidence is
6 sufficient or not. We've got the trier of fact
7 sitting over there, which is going to be the jury.
8 They are going to decide whether there is
9 sufficient -- there may be a need for a jury
10 instruction with respect to that. And the jury
11 instruction would say --

12 THE COURT: Where is the case law that tells me
13 that?

14 MR. BENITEZ: I don't -- I haven't seen any
15 case law that says to the judge, on a motion for
16 directed verdict, based on the fact -- based on the
17 testimony of the party that has the burden of proof
18 having at least testified to those issues, that the
19 Court has the right to go ahead and weigh the
20 evidence to decide whether there is enough or not
21 enough to prove his case. We're not here to have
22 to --

23 THE COURT: Johnson Enterprises of Jacksonville
24 versus FPL Group, the case cited by both the
25 plaintiffs and counter-defendants.

1 MR. BENITEZ: Which one is it, Your Honor?

2 THE COURT: Johnson Enterprises of
3 Jacksonville, Inc., versus FPL Group, Inc.

4 MR. BENITEZ: Yes, Your Honor.

5 THE COURT: The paragraph beginning at the
6 bottom of Page 14. The page numbers are in the
7 lower left-hand corner, Page 14 to 46.

8 MR. BENITEZ: Judge, I don't have the page
9 number, but I think I'm there. It is cut off in my
10 copy.

11 THE COURT: All right. So it is the paragraph
12 that begins, As for the first exception?

13 MR. BENITEZ: I have that.

14 THE COURT: So read that down. That is the
15 statement of the law. Turn over to the next page,
16 the first paragraph: Having reviewed the record,
17 including McNamara's testimony denying the existence
18 of an oral mileage guarantee, and Johnson's
19 inconsistent testimony regarding the substance of
20 the alleged guarantee, we agree with the District
21 Court that JEJ's evidence concerning the oral
22 mileage guarantee was not clear, precise, and
23 indubitable. The District Court therefore correctly
24 held that the evidence was inadmissible under the
25 inducement exception to the parol evidence rule.

1 If the Court is charged with making that
2 decision, weighing the evidence, that is what
3 happened here in Johnson. The Court heard the
4 testimony, weighed it, and then determined that the
5 parol evidence was not admissible.

6 So if I determine, on the basis of the evidence
7 that I've heard, that the parol evidence was not
8 admissible, was not properly admissible for the
9 jury, you then have no evidence supporting the fraud
10 in the inducement claim, and directed verdict would
11 be appropriate.

12 I'm not determining the directed verdict on the
13 basis of this determination. I'm determining the
14 admissibility of that evidence that the jury has
15 already heard. But now based upon all of the
16 evidence that I have heard, which in this case, at
17 this moment, is your client -- let me go back to
18 Mallard versus Ewing, the Florida Supreme Court
19 case: The evidence should be clear, precise, and
20 indubitable. It shall be found that the witnesses
21 are credible, that they distinctly remember the
22 facts to which they testify, and that they narrate
23 the details exactly, and that their statements are
24 true . That is -- is that not a Court
25 determination?

1 MR. BENITEZ: I'm not familiar enough with
2 those cases to make the distinctions that I should
3 be making, like for instance, at what stage of the
4 proceedings those rulings were made, and what
5 evidence was before the Court.

6 I submit to the Court that the Court has made
7 numerous rulings with respect to parol evidence
8 throughout this trial. It has narrowly taken our
9 case from that size to this size, based on the parol
10 evidence. We have walked a very fine line during
11 this trial, at the instructions and orders of this
12 Court to just put enough evidence in that didn't
13 violate parol evidence.

14 You have already made those rulings. I haven't
15 heard Mr. Chase or Mr. Shuker right now -- we argued
16 parol evidence admissibility. So what -- where
17 we're at right now --

18 THE COURT: That was Mr. Chase's argument.
19 That was his entire argument this morning.

20 MR. BENITEZ: But that would be inappropriate
21 at this point in time, because the evidence is
22 already in front of the jury. So a question of
23 whether the jury should have heard that or not
24 should have already been determined. That makes it
25 apples and oranges.

1 Right now, we're deciding whether there is
2 enough evidence to establish our claim. I submit to
3 the Court that with respect to the oral agreement --
4 going back to the oral agreement, because we cannot
5 lose sight of what we've got here.

6 We've got an oral -- the discussion has gone
7 from the statute of frauds in the one year to now
8 the parol evidence. With respect to this agreement
9 that we're talking about, the oral agreement, it was
10 fully performed. That takes it out of the statute
11 of frauds.

12 Second of all, we don't submit to the Court
13 that it is part of a -- that it can be excluded just
14 because there might have been -- or they can argue
15 during closing that there is some connection to the
16 land. If there is, we can give the jury an
17 instruction with respect to them making that
18 determination, as the finders of fact.

19 But in this case -- and the Court has brought
20 up the fact that there is no direct evidence taking
21 the deed -- the plaintiffs have said it is the --
22 but like I said, the testimony with respect to the
23 escrow agreement in particular was -- the testimony
24 was clearly directed at the letter agreement and the
25 operating agreement.

1 THE COURT: That is just not true.

2 MR. BENITEZ: Well --

3 THE COURT: There was no distinction made in
4 the testimony.

5 MR. BENITEZ: Like I said, I'm at a
6 disadvantage here, because the Court is recalling
7 that. I'm not going to contest that. But I don't
8 have the access right now at this moment to this
9 testimony.

10 THE COURT: But this is directed verdict. This
11 is what we do in every trial, Mr. Benitez. And the
12 burden is on your shoulders to come forward with
13 record evidence from which a jury could make a
14 determination.

15 I heard -- Mr. Shuker is an officer of the
16 court. Is there testimony in this case that
17 apportioned out any of the documents in this case
18 that are part of Plaintiff's Exhibit 1, as
19 consistent with Mr. Benitez's theory that these are
20 to be held in escrow -- that some were and some
21 weren't?

22 MR. SHUKER: In fact, it is the opposite. I
23 have the rough draft of his testimony, and he says,
24 answer: Jackie and I (inaudible) refused to sign
25 anything.

1 Question by Mr. Benitez: Okay. And that
2 included the deed?

3 Answer: It included everything. Yes.

4 And then when Kevin told you that he would hold
5 this in escrow, did you decide to do something?

6 Answer: We discussed all of these things that
7 are listed in the agreement.

8 Okay. And then was there a decision made as to
9 those items in the list?

10 Answer: Kevin Donaghy, at that time, advised
11 us that, I'm your attorney as well as the
12 Hachenbergers' attorney, that I represent Highway 46
13 Holdings, that the LLC had been set up as a 50/50
14 partnership, and that nothing could be done unless
15 you are happy with the agreements. When the
16 Hachenbergers return, we will get back together and
17 work out any questions or details. That is not
18 specific as to --

19 THE COURT: Whose testimony was that of?

20 MR. SHUKER: Mr. Myers, put forth by
21 Mr. Benitez.

22 THE COURT: Mr. Chase, any testimony, as an
23 officer of the court, that you recall along that
24 line?

25 MR. CHASE: No, sir, I do not.

1 THE COURT: I think that is problematic. I
2 think it ultimately goes to the standard. But let's
3 move past that one and let's talk about these other
4 issues.

5 What about the Billington case? Billington is
6 the 5th DCA's most recent case. This is not the
7 first trial or issue that I've had an opportunity to
8 address Billington. Because the 5th DCA has come
9 out and drawn some very clear lines in interpreting
10 the Supreme Court case law as relates to the merger
11 doctrine, nonreliance, and waiver provisions in
12 contracts, and the effectiveness of those things to
13 deal with claims like a fraud in the inducement
14 claim.

15 MR. BENITEZ: Yes, Your Honor. I'm familiar
16 with that case. I'm familiar with the distinction
17 by the 5th DCA with respect to merger clauses and
18 reliance clauses, and so on. As Mr. Chase was
19 talking -- we've got a reliance clause, basically,
20 and merger clause in the operating agreement, if I'm
21 not mistaken.

22 THE COURT: Fair.

23 MR. BENITEZ: And those -- I have got to,
24 again, make the distinction in this case, Judge. We
25 are not talking about trying to -- we are not

1 talking about trying to set aside the agreement, the
2 letter agreement or the operating agreement, based
3 on a difference of terms. We're not doing that.

4 We're challenging the enforceability of the
5 letter agreement and the operating agreement, based
6 on the fact that they should never have been
7 released from escrow. So we -- when we talk about,
8 look at the list and say, well, hey, I did an
9 operating agreement here. My list says operating
10 agreement, or I did financials, or I did --
11 Thomas Smith and those little notes, Judge -- the
12 importance the Court has to remember is our oral
13 agreement, the oral agreement they entered into,
14 does not say we were going to change this or that in
15 the letter agreement or operating agreement.

16 What their position is, is yes, there were
17 corrections that may have to be made, or
18 modifications. But that wasn't a subject matter of
19 the oral agreement. The oral agreement was, Keep it
20 in escrow. If not, I'm not signing it. If not, I'm
21 walking out the door, and we will get back together
22 some other day.

23 So the -- when you have an agreement such as a
24 letter agreement with, say, a reliance clause, you
25 are making a statement that to agree to these terms,

1 I'm not relying on anything else. And in this case,
2 this is a unique case. Because we've got an
3 agreement before then, an oral agreement, that
4 Mike Myers's signature would never appear on that
5 document, the letter agreement or operating
6 agreement, unless that oral agreement was in place.
7 And we submit to the Court that oral agreement was
8 in place.

9 Then he went ahead and physically signed the
10 contract, everybody in that room knowing that they
11 weren't going to be held enforceable or binding as
12 to the Myerses.

13 So when you get into the case law making a
14 distinction that, well, once you have got a reliance
15 clause or merger clause, you can't change the terms,
16 that is fine. I'm not changing the terms.

17 THE COURT: Aren't you changing the very first
18 term of the letter agreement?

19 MR. BENITEZ: Which is what?

20 THE COURT: This letter agreement is entered
21 into by and between Donald J. Hachenberger,
22 Glenda A. Hachenberger, Michael Myers, and
23 Jacqueline Myers effective July 7, 2005. Now your
24 client wants to say, No, we had an oral agreement
25 that said it was not effective July 7, 2005 .

1 MR. BENITEZ: Your Honor, on July 7, 2005,
2 unquestionably, that agreement was not effective.
3 Unquestionably, Glenda Hachenberger had not signed
4 it. Unquestionably, Donald Hachenberger had not
5 signed it. And regardless of what that agreement
6 says -- and that is a standard clause in most
7 agreements, an effective date, and you put in the
8 date normally of the last pen that signs. In this
9 case, it was gone ahead and typed in.

10 But absolutely not. That agreement was not
11 effective. I don't care how many times we read it.
12 It wasn't effective July 5th, 2007, because
13 Donald Hachenberger and Glenda Hachenberger didn't
14 sign it that day. So us lawyers looking at this,
15 yeah, we can read the effective date. But no, this
16 is not an effective date. This is a date where
17 Michael Myers and Jackie Myers signed this agreement
18 to be held in escrow, pursuant to an oral agreement
19 between Kevin Donaghy, who represented the
20 Hachenbergers.

21 THE COURT: To be effective when?

22 MR. BENITEZ: To be effective when it was
23 released from escrow and signed by Donald and
24 Glenda Hachenberger, which one of them occurred. It
25 was released from escrow -- well, actually --

1 THE COURT: So that is contrary to the express
2 term of the agreement, which says it is effective
3 July 7th. I mean, you just, like, flip-flopped
4 right back into the exact inconsistency of the
5 proposed oral agreement that you want to argue,
6 which is absolutely perfectly inconsistent with the
7 terms of the express agreement that was signed by
8 the parties.

9 And then it goes on to contain a nonreliance
10 provision: shall not rely on any oral or other
11 representations of a party except or as specifically
12 set forth in these documents.

13 MR. BENITEZ: But Judge, nobody but the Myerses
14 signed the contract on July 7th, 2005. There was no
15 contract. We all know that it -- like the
16 Hachenbergers made an offer --

17 THE COURT: Offer, acceptance, consideration,
18 money.

19 MR. BENITEZ: And where is the signatures?

20 THE COURT: Offer, acceptance, consideration.

21 MR. BENITEZ: And if you stop at that point --

22 THE COURT: Where in the analysis is a
23 signature required?

24 MR. BENITEZ: Because it is.

25 THE COURT: There was an offer that was

1 extended by the Hachenbergers. Your clients
2 accepted it by signing the documents. They received
3 money as consideration for the agreement. Why isn't
4 there a contract?

5 MR. BENITEZ: Because at that point in time,
6 the Hachenbergers had not signed the contract. If I
7 could just take a step --

8 THE COURT: Is it a statute of frauds argument?

9 MR. BENITEZ: No, Judge.

10 THE COURT: Okay. Then what is the argument?

11 MR. BENITEZ: The argument is that in your
12 example, there is an oral agreement, let's say.

13 THE COURT: What is the oral agreement?

14 MR. BENITEZ: Well, I'll go back to my same
15 position, Judge. No. There is not a -- a letter
16 agreement was not consummated, was not executed.

17 THE COURT: Let's address it this way. I'm not
18 going to listen to the same argument. Do you have a
19 case that says that?

20 MR. BENITEZ: No, Your Honor.

21 THE COURT: Okay. The last couple arguments
22 that were made -- we've addressed the merger and
23 nonreliance. We've addressed the parol evidence.
24 We've addressed the statute of frauds.

25 How about Donaghy not an agent? Donaghy is not

1 an agent of Glenda Hachenberger.

2 MR. BENITEZ: Mr. Donaghy testified that he was
3 the agent of Glenda and Donald Hachenberger.

4 THE COURT: He never said that.

5 MR. BENITEZ: Well, he said he -- he used the
6 word "represented."

7 THE COURT: What did he say?

8 MR. BENITEZ: He said that, I consider myself
9 being a -- or representing Glenda and
10 Donald Hachenberger, when I was asking her about the
11 letter agreement July 7th, 2005.

12 THE COURT: That is never what he said. What
13 he said was he considers himself representing the
14 interests of the Hachenbergers. That was the quote
15 that he said: "the interests of the Hachenbergers."

16 And when pressed, had he ever received any
17 authorization from Glenda Stone, slash,
18 Hachenberger -- I'm sorry. I'll refer to you as
19 "Hachenberger" for the moment, please. Did he ever
20 receive any authority from Mrs. Hachenberger?

21 MR. BENITEZ: I believe -- and again, I don't
22 have the benefit of the transcript. I just have the
23 benefit of my recollection. But I believe I asked
24 Mrs. Hachenberger about that, and I believe her
25 testimony is something that the jury can consider,

1 and find that Glenda Hachenberger was being
2 represented by Kevin Donaghy.

3 On top of that, all the facts as presented by
4 Mike Myers, and in particular with respect to the
5 representation of Kevin Donaghy that he was
6 representing Glenda and Donald Hachenberger, is
7 evidence before the Court. Based on the facts and
8 the way this transaction went -- happened, I think
9 the jury can very well conclude that, in fact,
10 Glenda Hachenberger was represented by
11 Kevin Donaghy.

12 THE COURT: Response, Mr. Chase?

13 MR. CHASE: No, sir.

14 MR. SHUKER: Just briefly, Your Honor, because
15 I looked at exactly what Mr. Donaghy said. You are
16 correct. He said, I always considered myself
17 representing the interests of Don and Glenda. And I
18 said, You assumed you represented those interests
19 because they were married and it was marital funds?

20 Yes.

21 You never actually spoke to Glenda about this
22 deal?

23 No.

24 So it goes without saying, Glenda never
25 authorized you to make any representations as to

1 this deal?

2 She never did.

3 And she never authorized you to do any
4 negotiations?

5 No.

6 And Glenda was entirely consistent. She said
7 she had never hired Mr. Donaghy to represent her on
8 this deal.

9 THE COURT: Thank you. All right. What I'm
10 prepared to do with respect to these issues -- then
11 we have others, I know, to address. First, I'd like
12 to take just a brief recess if we could. I want to
13 clarify my thought process. And then I want to talk
14 about my rulings with respect to these issues. And
15 then let's walk through the complaint, and see which
16 counts this affects or impacts, and what is
17 remaining at that point. Then we'll address
18 additional argument as to those others. We'll take
19 a five-minute recess.

20 (Brief recess.)

21 THE COURT: All right. The Court has had the
22 opportunity to hear the testimony of Mr. Myers,
23 Mrs. Myers, and Mr. Donaghy who were all present at
24 the meeting that occurred on July the 7th of 2005.

25 The Court has drawn some lines throughout the

1 course of testimony, in an attempt to limit the
2 testimony heard by the jury to that which is legally
3 relevant and properly admissible, predicated upon
4 the theories of the case the Court believes are
5 viable legal theories.

6 Pursuant to the Supreme Court's holding in
7 Mallard versus Ewing at 164 So. 674, the standard
8 for the admissibility of parol evidence concerning a
9 contemporaneous oral agreement which induced the
10 execution of a written contract, the Court looks at
11 that evidence to determine whether the testimony is
12 clear, precise, and indubitable.

13 Under the Mallard standard, the Court is
14 required to make findings that the witnesses are
15 credible; that they distinctly remember the facts to
16 which they testify, and that they narrate the
17 details exactly, and that their statements are true.

18 Perhaps in a perfect world, the Court would
19 have heard the testimony from these witnesses
20 outside the presence of the jury initially, to be
21 able to evaluate whether that testimony should have
22 been heard by the jury at all. But the practical
23 considerations associated with the prosecution of
24 this now eight-year-old case, the difficulties of
25 getting to the -- on last Monday, the beginning of

1 trial -- because of the difficulties associated with
2 the pretrial compliance in preparation of those
3 issues to have a case ready for trial, precluded
4 that from happening.

5 Nevertheless, the Court has heard that evidence
6 now, has had the opportunity to observe the
7 witnesses, to evaluate the credibility and the
8 substance of their testimony. In this context, the
9 Court's determination of whether this testimony is,
10 indeed -- it should have been admissible depends
11 upon a credibility choice between witnesses.

12 The credibility of Mr. Myers with the testimony
13 that he gave concerning this issue, which was not,
14 by the way, confirmed in a narrative, clear,
15 precise, and indubitable fashion by the testimony of
16 Mrs. Myers, came out in a completely different
17 fashion; and which was directly contradicted by
18 Mr. Donaghy, who said that he would have no
19 authority to accomplish these things. His authority
20 had been defined by the clients, and that was simply
21 to extend this offer. He had no authority to hold
22 this offer in escrow, to make any changes to the
23 offer. He was the go-between, but not the client,
24 in making those determinations.

25 I don't find the testimony to be clear, precise

1 and indubitable. I find it ultimately depended upon
2 a credibility choice. I don't find the testimony to
3 have been narrated with exact detail, and cannot
4 find that the statements alleged by the Myerses are
5 true.

6 As a consequence, I am striking that testimony
7 of parol evidence as it relates to the alleged
8 escrow agreement, the agreement to hold the closing
9 documents in escrow. Of particular importance, I
10 find no specific testimony about any differentiation
11 among the various documents that were signed by the
12 Myerses at that time, which -- it specifically
13 excluded from this alleged oral agreement documents
14 related to the interest directly in the real
15 property.

16 That is significant to the Court, because there
17 was an exchange of money for that interest, pursuant
18 to the terms of the document. It doesn't make
19 sense. It is not indubitable that the parties would
20 have agreed not to transfer the real estate, but
21 instead for you to go ahead and take the money,
22 Mr. Myers. That just doesn't make any sense.

23 And so it cuts against the idea that that was
24 the terms of the agreement. Yet there has been no
25 testimony that there was any separate agreement as

1 relates to the special warranty deed for the
2 transfer of the property.

3 In the absence of the parol evidence which has
4 been stricken by the Court pursuant to that
5 standard, the Court finds that there is no evidence
6 from which a jury could make a determination that
7 there was a separate oral agreement to hold these
8 documents in escrow.

9 Without so finding, because I don't think it is
10 necessary -- having made that ruling, I do have
11 concerns about the statute of frauds issues.
12 Because it clearly was the intent, in the package of
13 documents, to transfer an interest in real property.
14 But candidly, I -- you know, there is part
15 performance. I think it might be sufficient to get
16 past the statute of frauds as relates to the
17 transfer of real property. There was a special
18 warranty that was signed. There is some written
19 evidence of that.

20 What is lacking is written evidence of what
21 Mr. Benitez has characterized as an entirely wholly
22 separate agreement to hold those things in escrow.
23 And I find no written -- no separate written
24 evidence of that agreement that would be sufficient
25 to overcome the statute of frauds.

1 I would also be expressly concerned about the
2 length of time that it may have taken to perform
3 this agreement if, indeed, it was longer than a year
4 as has been testified to. Then that I think might
5 implicate the statute of frauds, but I don't reach
6 it because again, I don't think I have to.

7 I also believe that -- setting aside the parol
8 evidence issue, that the nonreliance provisions and
9 the merger provisions of the document would be
10 sufficient to foreclose the claim in this context of
11 the alleged oral escrow agreement.

12 The nonreliance provision that is a part of the
13 letter agreement is clear that the parties had
14 agreed that they shall not rely on oral or other
15 representation of the parties. Yet that is
16 precisely what the Myerses want to do.

17 When they come into the courtroom on this claim
18 for an alleged oral escrow agreement, they want to
19 rely on oral or other representations of the
20 parties, in this case, Mr. Donaghy, as the alleged
21 agent of both Mr. and Mrs. Hachenberger. And those
22 representations that they seek to rely upon directly
23 conflict with the provisions of the letter
24 agreement.

25 Nowhere in the letter agreement does it

1 indicate that the agreement would not be effective
2 until signed by all parties. Indeed, it indicates
3 that it's effective on July 7th of 2005. That is
4 directly rebutted -- rebutting the alleged oral
5 escrow agreement.

6 And so on the basis of the Billington case and
7 the cases that it interprets, I believe that there
8 is no basis to enforce any sort of oral or other
9 representations of the party. And of course,
10 combined with the merger agreement, which while I
11 don't believe is effective to necessarily negate the
12 claims, in combination with the nonreliance
13 provisions -- under the thought process of
14 Billington, I think it supports the Court's
15 conclusion in that regard.

16 The Court need not reach the issue of agency,
17 having made those findings, because I don't find an
18 enforceable oral agreement.

19 MR. BENITEZ: Judge, if I may.

20 THE COURT: Yes.

21 MR. BENITEZ: Like I expressed to the Court
22 earlier today, I hadn't received these documents or
23 these case law or the memo prior to this morning. I
24 was looking at Mallard versus Ewing, which is what
25 the Court relied on. I wanted to bring to the

1 Court's attention -- I understand from the Court the
2 Court also received this case law this morning.

3 THE COURT: No. We all received this case law
4 back on day one. This was with the precise case
5 Mr. Chase argued on day one of this trial, and the
6 case is eight years old.

7 MR. BENITEZ: Okay. I apologize, Your Honor.
8 I didn't remember that. But with respect to Mallard
9 versus Ewing, it appears, in looking at the case --
10 the Court has indicated it was a Supreme Court case,
11 but it was back in 1935 when there really wasn't
12 what we consider to be a Supreme Court today. It
13 was divided up into different divisions.

14 Second of all, it appears to be, from looking
15 at it, a mortgage foreclosure kind of case. It
16 appears to have gone to a master, and then reviewed
17 by a circuit judge, which is -- so my point is,
18 which is the point that I made earlier, I believe --
19 I may be not as articulate -- that those are factual
20 determinations by the trier of fact. And in that
21 case, either the general master or the circuit judge
22 reviewing the report would have been the trier of
23 fact. In this case, the trier of fact would be the
24 jury.

25 So I submit to the Court that there is enough

1 evidence to go to the jury on all those issues that
2 the Court has now disallowed. The evidence, like
3 I've stated before --

4 THE COURT: I'm not going to hear re-argument.
5 Is there anything else?

6 MR. BENITEZ: I wanted to bring that up to the
7 Court's attention, hoping the Court would reconsider
8 its ruling.

9 THE COURT: Thank you. That will be denied.
10 Now, let's look at the practical impact of those as
11 relates to the allegations in the complaint, and
12 counts of the complaint.

13 So Count 1 is a breach of contract, and that is
14 the alleged breach of oral escrow agreement; is that
15 correct?

16 MR. CHASE: Yes, sir.

17 THE COURT: The Court will enter directed
18 verdict as to Count 1. Count 2 is fraud in the
19 inducement, which relates to the same specific
20 allegations; is that correct?

21 MR. CHASE: Yes, sir.

22 MR. SHUKER: Yes, sir.

23 THE COURT: Mr. Benitez, I'm waiting to hear
24 from you, as well.

25 MR. BENITEZ: Yes, Your Honor. I'm waiting to

1 turn the page to read it, just to make sure I
2 haven't missed anything.

3 THE COURT: I understand.

4 MR. BENITEZ: Yes, Your Honor.

5 THE COURT: So as to Count 2, the Court would
6 grant directed verdict.

7 Count 3, intentional misrepresentations. Do
8 these relate to the same issues?

9 MR. CHASE: Yes, Your Honor.

10 MR. SHUKER: Yes, Your Honor.

11 MR. BENITEZ: Yes, Your Honor.

12 THE COURT: The Court would grant directed
13 verdict as to Count 3. Count 4 are negligent
14 misrepresentations. Same matters?

15 MR. CHASE: Yes, Your Honor.

16 MR. SHUKER: Yes, Your Honor.

17 THE COURT: The Court would grant directed
18 verdict as to Count 4. Count 5 is a count for
19 rescission, revocation, or cancellation.

20 MR. SHUKER: Your Honor -- I'm sorry.

21 THE COURT: Go ahead.

22 MR. SHUKER: I have a case -- an argument on
23 that, if you want to hear it.

24 THE COURT: Unique and separate issues,
25 correct?

1 MR. CHASE: They are differentiated. It is
2 basically the same thing, but it's -- the property
3 has been improved. \$25 million has been spent.
4 There is no way we can restore status quo, so
5 rescission is unavailable.

6 MR. BENITEZ: Your Honor, I believe this
7 particular count is going to be held by the Court --
8 reserved by the Court as a non-jury issue.

9 THE COURT: I apologize. Let's move past that
10 one. Thank you. Next I have wrongful removal of
11 Mr. Myers as comanager, Count 10.

12 MR. CHASE: There is no cause of action for
13 wrongful removal of a manager. There are no
14 elements to it, and there are no damages. Plus,
15 there is a contract that specifically gives
16 Don Hachenberger the authority to do what he did.

17 THE COURT: Mr. Benitez, what is the basis for
18 the cause of action?

19 MR. BENITEZ: The removal would be based on the
20 fact that there was no letter agreement or operating
21 agreement. And therefore, you go back to the
22 Chapter 608, which indicates that the comanagers
23 have to operate jointly. That means they both have
24 to agree, and also, it has to obtain members'
25 approval.

1 So in this case, the role of Mike Myers as a
2 comanager was not authorized, based on the fact that
3 there was no letter agreement or operating
4 agreement, which obviously is inconsistent with what
5 the Court has now done, by dismissing the previous
6 claims.

7 THE COURT: Okay. The Court will grant
8 directed verdict then as to Count 10, having found
9 that there was a valid letter agreement and
10 operating agreement between the parties that
11 authorized Mr. Hachenberger to take the actions that
12 he did. Count 11?

13 MR. CHASE: Wrongful termination, sir. If you
14 look under Tab H in the binder, this is the Metro
15 Dade case found at 798 So.2d 836 citing,
16 Additionally, there is no action in Florida for the
17 common law tort of wrongful termination.

18 The next case, I believe under I, is Gibbs v.
19 H.J. Heinz, 536 So.2d 370: An employment contract
20 which is indefinite as to term of employment is
21 terminable at the will of either party without
22 cause.

23 The only way -- the only wrongful termination
24 that is allowed for in Florida is discrimination.
25 There has been no evidence of discrimination. There

1 is no cause of action for wrongfully terminating
2 somebody under a contract at will.

3 There was no evidence of an employment
4 contract. The only evidence is a letter agreement
5 and operating agreement, which gives
6 Donald Hachenberger full authority to do what he
7 did. So there is just no cause of action for
8 wrongful termination under that.

9 THE COURT: Mr. Benitez?

10 MR. BENITEZ: Same argument, Your Honor.

11 THE COURT: Same ruling. Having found a valid
12 letter agreement and operating agreement, the Court
13 enters directed verdict as to Count 11.

14 Count 12, wrongful removal or denial of access.

15 MR. CHASE: It is not a cause of action. There
16 are no elements to that cause of action, and there
17 are no damages. There is a contract, an express
18 contract that gives Donald Hachenberger the
19 authority to do what he did. Plus, there are court
20 orders that say that is the way it is.

21 MR. BENITEZ: I disagree, Your Honor, with
22 respect to Count 12. I think Mike Myers -- there is
23 nothing in the letter agreement or operating
24 agreement that gives Donald Hachenberger or anybody
25 else authority to go ahead and keep the Myerses out

1 of the premises. There is just absolutely no
2 authority that I know of.

3 The only way that that could be possibly
4 envisioned would be -- is if -- I couldn't even see
5 a majority of the members excluding one member from
6 the business premises -- bless you.

7 THE COURT: What is the basis of the cause of
8 action? The first complaint was it doesn't state a
9 cause of action.

10 MR. BENITEZ: What?

11 THE COURT: What is the basis for a cause of
12 action for this? What is the law that says there is
13 a cause of action for wrongful removal or denial of
14 access?

15 MR. BENITEZ: I haven't been able to find a
16 case on point, Judge, with respect to that. The
17 argument that I presented to the Court said this
18 case -- Mike Myers and Jackie Myers have certain
19 rights and obligations as members of a limited
20 liability company.

21 And the only way that they can exclude them
22 from it would be if there is some kind of an
23 agreement, or some authority. There is no agreement
24 or authority on the part of Highway 46 to exclude
25 the Myerses from coming on the premises. And this

1 may be tied in with the other counts with respect to
2 duties owed to the members. And maybe more
3 applicable -- I think I have -- with respect to
4 that, as far as --

5 THE COURT: The duty of care and good faith and
6 fair dealing?

7 MR. BENITEZ: Duty of care and duty of good
8 faith and fair dealing.

9 Just to focus the Court on this, the reason it
10 was pled this way was just to make sure the Court
11 addressed it individually. And our argument would
12 be that I have found no authority to give
13 Donald Hachenberger, as manager of Highway 46
14 Holdings -- to exclude the Myerses from the business
15 premises, or the business itself.

16 THE COURT: Doesn't the business owner have a
17 right to determine who comes and goes on the
18 property? Isn't that one of the rights of business
19 owners?

20 MR. BENITEZ: Yes, Your Honor. Mike Myers and
21 Jackie Myers are business owners of the particular
22 property. That is my point exactly.

23 THE COURT: Except that under the terms of the
24 letter agreement and operating agreement, they gave
25 control of that decision-making to Mr. Hachenberger.

1 MR. BENITEZ: Well, I didn't see -- that is the
2 point, that I didn't see anything in the letter
3 agreement or the operating agreement that gives him
4 that authority. If the Court finds that is within
5 the confines of the letter agreement and the
6 operating agreement -- what it does, the letter
7 agreement and the operating agreement allows
8 Hachenberger to operate the business, and allows him
9 to be the manager, and to make decisions.

10 And my suggestion to the Court -- my position
11 and my client's position is there is nothing that
12 specifically authorizes him to keep Mike Myers and
13 Jackie Myers away from the business.

14 THE COURT: I think that is fairly within the
15 terms of Paragraph 17 of the letter agreement. But
16 more importantly, I don't think there is a cause of
17 action for it. So I'll deny it on that basis, and
18 grant directed verdict on Count 12.

19 MR. CHASE: Yes, sir. Next up is conversion,
20 Count 15. If I could direct the Court's attention
21 to Tab J in the binder, citing City of Cars, 526
22 So.2d 119. And a couple pages in concerning what is
23 conversion: Any act of a person in asserting a
24 right of dominion over a chattel which is
25 inconsistent with the right of the owner, and

1 deprives the owner of the right of possession to
2 which the owner is entitled to, may constitute a
3 conversion, whether the act is accomplished with or
4 without any specific wrongful mental intent.

5 Also Belford under the next tab is 243 So.2d
6 646: An action in tort is inappropriate where the
7 basis of the suit is a contract, either express or
8 implied. Belford is dealing with the conversion
9 action.

10 Also under the next tab, Tab L, is Page v.
11 Matthews, 386 So.2d 815, second page: The general
12 rule as enunciated in Lilly is that damages for
13 conversion are limited to the reasonable value of
14 the property when converted. Damages are based on
15 the fair market value of the property at the time of
16 conversion, plus legal interest to the date of the
17 verdict.

18 Judge, in this case, there is a contract that
19 says that the property is to be transferred. It
20 identifies the property. The testimony was the
21 memorabilia and everything was on the property. It
22 went to the warehouses. It is in the warehouses.
23 It was personal property there. There was a bill of
24 sale for that. The owner of that property is
25 Highway 46 Holdings, LLC. So therefore, there

1 cannot be a conversion, because Highway 46 Holdings,
2 LLC, owns it.

3 There is -- the second issue is with regard to
4 the -- the existence of the contract. If we look at
5 the -- this case is a contract case. It is a breach
6 of contract case. Conversion is thrown in as --
7 essentially to say, because I don't agree with the
8 contract, therefore there is conversion. But the
9 Court has found that there is a contract, and so it
10 is improper for conversion to be considered.

11 THE COURT: Let's talk about the contract for a
12 minute. Direct me inside of the letter agreement,
13 the operating agreement, or the special -- the
14 quitclaim, I'll say, to the transfer of personalty,
15 memorabilia, petrobilia, and the other items that
16 are claimed to be converted. Show me where those
17 provisions are.

18 MR. CHASE: Yes, sir. In the letter agreement
19 where it begins on the Paragraph 2 of the letter
20 agreement -- the Myers's contributions, first up, is
21 the real property. If we can go to the next page:
22 Michael Myers and Jacqueline Myers are the sole
23 owners of drawings, licenses, plans, permits, and
24 other intellectual property, and those are referred
25 to as the Gassy Jack's assets.

1 The next paragraph is 6: Michael Myers and
2 Jacqueline Myers are the sole owners of substantial
3 amounts of certain unique petrobilia, Americana
4 memorabilia, antiques, classic automobiles, and
5 those are referred to as a memorabilia assets, some
6 of which are represented on the attached CD, Exhibit
7 B, and particularly including the automobiles listed
8 on Exhibit C. All of that is in evidence, and it is
9 pictures of all the memorabilia, and you have the
10 cars that are specifically listed out.

11 THE COURT: It is the CD pictures ultimately,
12 right?

13 MR. CHASE: The CD shows pictures of a lot of
14 memorabilia. It is not all of it. It says that,
15 "some of which are depicted."

16 THE COURT: Right. So where is it ever
17 categorized the other memorabilia and petrobilia
18 that is owned by the Myerses that was intended to be
19 transferred by virtue of the provisions of this
20 agreement?

21 MR. CHASE: As in identified, like, each item?

22 THE COURT: Yes.

23 MR. CHASE: It talks about everything that was
24 on the property. And there was testimony that there
25 was a storage container on the property with a lot

1 of memorabilia.

2 THE COURT: No. The testimony was that the
3 storage trailer on the property had construction
4 equipment.

5 MR. CHASE: I may have -- my memory may be
6 different. My understanding was there was testimony
7 that there was --

8 THE COURT: Let me cut to the chase here, no
9 pun intended.

10 MR. CHASE: That is all right.

11 THE COURT: I agree that there are contractual
12 provisions that address some of this memorabilia,
13 and testimony that might support specific pieces of
14 the memorabilia which were subject to being
15 transferred. But that is contained on the CD
16 photographs, and on the list of vehicles that are
17 attached to the letter agreement.

18 There is a whole other category of this
19 memorabilia and petrobilia that isn't ever
20 specifically identified, and that there is at least
21 a dispute about which, whether it was on the
22 property at the time of the transfer or not.

23 MR. CHASE: I think that is coming to the
24 replevin. Ultimately, at the end of my conversion
25 argument, I would say that this claim is for

1 replevin. To kind of move beyond that part, there
2 is personal property that belongs to the Myerses
3 that they need to get back. There is no question
4 about that.

5 One of the very first things that
6 Mr. Hachenberger is going to be testifying today to
7 is, I think they should have this back, this back,
8 this back, and this back. These are the things that
9 he is offering. The testimony will be that, I have
10 offered these things to them over and over, but
11 instead of taking these things, tell me what you
12 want back, and I'll give it back.

13 We want everything back. It's all out. And
14 Mr. Hachenberger says, I don't agree that you get
15 everything back.

16 So he is going to testify as to what he
17 believes the personal property is. That is subject
18 to replevin. To the extent that ultimately, to try
19 before the Court the replevin actions -- if the
20 Court believes there are certain parts of
21 memorabilia that should also go back, that is for
22 the Court.

23 There is no way conversion can go to the jury,
24 respectfully, because there is no way to identify
25 the damages. Getting beyond the other issues --

1 THE COURT: I'm not to damages yet. I get
2 that. But isn't there at least a factual dispute --

3 MR. CHASE: Yes, sir. Agreed.

4 THE COURT: -- that some of this property might
5 have been converted, versus being covered by the
6 agreement?

7 MR. CHASE: I absolutely agree with that. But
8 again, if we're looking at the -- and then there are
9 a couple other provisions in here that talk about
10 what all it conveys. But I don't think there is any
11 legitimate argument that there is not an issue that
12 needs to be determined by a finder of fact as to
13 specifically what memorabilia.

14 THE COURT: Thank you. Let me ask -- I'm sure
15 you agree with that; is that fair, Mr. Benitez? I
16 can't grant directed verdict on that piece of the
17 conversion claim that relates to specific property,
18 because there is a dispute, a factual dispute, about
19 what was there?

20 Even if I accept the operating agreement, which
21 I know you dispute -- but assume it is in now. Even
22 assuming that, I'm sure you agree I cannot grant a
23 directed verdict against your client as to
24 conversion as relates to what it is that was
25 allegedly converted?

1 MR. BENITEZ: Yes, Your Honor.

2 THE COURT: Now let's talk about the damages
3 issue. What evidence is there of damages for me or
4 for this jury to be able to attribute a value -- the
5 first claim is for conversion of the Myers's
6 property. What evidence is there of value,
7 competent evidence?

8 MR. BENITEZ: We stipulate \$3.6 million of the
9 property at issue. That is the amount of damages
10 that I will be requesting from the jury.

11 THE COURT: Okay.

12 MR. BENITEZ: The issue, Judge, is we haven't
13 been allowed to go into the letter agreement by the
14 Court. But the question is going to be -- our
15 position is there shouldn't have been any transfer
16 of any property under the letter agreement, even if
17 the letter agreement was valid. And that is because
18 of what Mr. Chase just said.

19 It says it will be transferred, as opposed to
20 the previous letter agreement that the Court did not
21 allow to be introduced into evidence, which talked
22 about, hereby irrevocably transfers all rights to
23 this memorabilia. And that was taken out from the
24 draft and inserted and said, will be transferred.
25 So our position is our damages is 3.6, as has been

1 stipulated by the parties.

2 THE COURT: What about your client's testimony
3 that memorabilia represents \$3.8 million of that
4 number?

5 MR. BENITEZ: That is an unfortunate event
6 after the stipulation, Your Honor. I'm not going to
7 argue that, based on my representation with
8 Mr. Chase and the Court with respect to the
9 stipulation. So I'm going to ignore that testimony.

10 But our position at this point is that we did
11 stipulate to the \$3.6 million, and that is the
12 damages that I will be seeking.

13 MR. CHASE: Sir, \$3.6 million included
14 everything there. They had two counts of conversion
15 where they divide their claims up. There is their
16 personal property. There is the memorabilia assets.
17 And then there are the assets that are owned by
18 Mr. Myers and Sean Myers. That is identified
19 separately in a separate count of conversion.

20 And because there is no testimony as to what
21 value of what went where, there is no way that the
22 jury can reconcile that. This is the replevin
23 claim.

24 MR. BENITEZ: Judge, I attempted to put on
25 evidence, and at one point the Court indicated that

1 was not appropriate based on standard of value, the
2 replacement. I proposed to the jury that my client
3 would be prepared to testify with respect to a
4 resale value, or the value for that item in its
5 condition at the time of the taking. That wasn't
6 allowed.

7 But I submit to you that the stipulation was
8 unequivocal that the items that we're contesting
9 today in this court was \$3.6 million. And that is
10 why I left it alone at that point in time, based on
11 the ruling of the Court and the stipulation by the
12 parties.

13 THE COURT: The Court's ruling was based upon
14 your client's own testimony. The way that he
15 calculated the value of those things was not
16 predicated upon fair market value, but instead
17 predicated on his purchase price, which is through
18 relevant evidence. It is not admissible to
19 establish the value of those items.

20 And then you attempted to come back and have
21 him go through that entire list, and try to now
22 offer, for the first time, brand new opinions about
23 the value of those things, based on a methodology
24 that he had not applied. And he was apparently
25 going to apply it on the fly, on the stand, correct?

1 The Court concluded that.

2 MR. BENITEZ: Judge, he was competent to do
3 that. He is very knowledgeable on those items. He
4 can take each item individually, and give you the
5 price as of the date of the taking. He was prepared
6 to do that.

7 MR. CHASE: His case is concluded. There is
8 additional argument cited from Belford. It is at
9 the bottom of the same page I was reading a moment
10 ago: The rule of damages applicable to an unlawful
11 conversion of personal property is that if the
12 defendant has an equitable interest in the property,
13 recovery against him is limited to the actual net
14 amount of the plaintiff's interest, although the
15 possession is wrongfully assumed or retained.

16 Judge, there is no testimony for the jury to
17 parse out anything. There is no question of fact
18 about that certain assets were absolutely
19 transferred. There is no question of fact about
20 that trucks were transferred. There is no question
21 about the -- the assets that were specifically
22 identified. There is no question of fact as to
23 whether or not the items on the CD were transferred.

24 Those items on the CD were absolutely
25 transferred . There is no question. And so there

1 is no value that breaks that out so that -- the jury
2 would have to be left with, well, how much are all
3 those trucks worth? How much is all that stuff on
4 the CD worth? So if we accept the \$3.6 million for
5 everything, but they clearly transferred these other
6 things --

7 THE COURT: I got you.

8 MR. BENITEZ: Judge, if I may reply. In this
9 case -- we've done this case up to now with the
10 counts that were alleged, and that have now been
11 dismissed. Obviously, the case drastically changes
12 when it is boiling down with an assumption that the
13 letter agreement and operating agreement is in
14 effect and viable and enforceable, which is contrary
15 to the testimony.

16 So we have been put in a real bad position.
17 Because our position would have been, Judge, we were
18 expecting that -- with respect to the initial four
19 counts, that in fact, the jury would find that there
20 is no letter agreement or operating agreement. So
21 if they found that, all the property would then be
22 returned, and we would start anew.

23 Now the entire playing field has been changed
24 for us. Because the playing field now, after the
25 evidence has been submitted to the jury, and the

1 jury has heard the testimony -- now we find that the
2 Court is now deciding that the letter agreement and
3 the operating agreement are effective. And that is
4 a totally different position than we've taken, than
5 anybody has -- or that anybody has addressed up to
6 this point in time in front of this jury. So that
7 is extremely difficult to react to from this point
8 forward.

9 The points that the Court are making with
10 respect to the damages highlight that. I felt
11 comfortable with a stipulation of 3.6 back to the
12 personal property, knowing that the jury was going
13 to decide whether the letter agreement or the
14 operating agreement were enforceable. But now that
15 that has been taken away from the jury --

16 THE COURT: None of that changes the fact,
17 Mr. Benitez, that you pled this in two separate
18 counts. You pled it, number one, for return of
19 personal property; number two, for return of
20 memorabilia. The jury has to be asked separate
21 questions as to each of those counts. What is the
22 value of the personal property?

23 MR. BENITEZ: Judge, I actually did not. I
24 actually alleged that in one count. I have got a
25 count for replevin where I want the property back,

1 and a count for conversion. I think the distinction
2 I made with respect to those counts was the property
3 that was Mike Myers's and others', and the property
4 that was Mike Myers's and Jackie Myers's, the
5 Myerses' together.

6 MR. CHASE: Two counts of replevin, Judge.

7 THE COURT: We're not talking about replevin.
8 We're talking about conversion.

9 MR. CHASE: Two counts of conversion, Judge.

10 MR. BENITEZ: Two counts of conversion, Judge.
11 But again, the conversion is not memorabilia and
12 personal property. My conversion counts includes
13 memorabilia and personal property of the Myerses,
14 one count; and personal property and memorabilia of
15 Mike Myers and Sean Myers, another count.

16 MR. CHASE: And there has been --

17 MR. BENITEZ: I should say not Mike Myers and
18 Sean Myers; just Mike Myers alone.

19 THE COURT: Where is the definition of the
20 personal property in your complaint?

21 MR. CHASE: It is on the page -- it is the
22 paragraph -- there are two separate -- the one for
23 just the capitalized personal property, Judge, is at
24 Paragraph 205, and refers to memorabilia. The
25 memorabilia that is identified in A through P -- I'm

1 sorry, no, sir -- A through H of the first count of
2 replevin. There was an additional issue about that,
3 that an exhibit wasn't attached to the third amended
4 complaint.

5 THE COURT: I'm looking at Paragraph 205 which
6 defines, capital P, personal property. And those
7 are counts -- or this is defined as a number of
8 exhibits describing memorabilia and certain personal
9 property on Exhibits N and O.

10 So are you representing to the Court,
11 Mr. Benitez, that Paragraph 205 defining personal
12 property represents everything?

13 MR. BENITEZ: No. My Paragraph 205 very
14 clearly states, includes but are not limited to the
15 following. And then it provides the list.

16 THE COURT: You didn't listen to my question.

17 MR. BENITEZ: Okay.

18 THE COURT: Are you suggesting that Paragraph
19 205 defines personal property as all of those things
20 that are listed, both memorabilia and personal
21 property?

22 MR. BENITEZ: Yes, Your Honor. That is -- yes.

23 THE COURT: That is a different answer.

24 MR. BENITEZ: Yeah. The personal property with
25 a capital P and --

1 THE COURT: Right.

2 MR. BENITEZ: Yes.

3 MR. CHASE: No.

4 MR. BENITEZ: Personal property with a capital
5 P, and a capital P for -- on both letters -- or both
6 words includes all the property, including
7 memorabilia and personal property unrelated to
8 memorabilia or petrobilia.

9 THE COURT: So for example, if I were to look
10 at Exhibit 10 to the complaint, that is going to be
11 personal property that is not memorabilia or
12 petrobilia?

13 MR. BENITEZ: That is -- that is -- that is the
14 way it is written. Yes, Your Honor.

15 THE COURT: So Mr. Chase, how is it that does
16 not include the personal property?

17 MR. CHASE: It doesn't include the cars, for
18 instance. If you go to -- because there is another
19 on the next count of replevin, personal property.
20 There is personal property with the MM, which is
21 defined at Paragraph 220. Then this is property
22 that was owned by Mr. Myers and Sean Myers. If you
23 go to the conversion, the first count of
24 conversion --

25 THE COURT: On Page 33?

1 MR. CHASE: Right, personal property. The next
2 one was the U.S. mail, which you dropped. And I
3 think I was wrong about that.

4 THE COURT: So 15 and 16 are the personal
5 property.

6 MR. CHASE: The cars are culled out from that
7 definition. Do you follow what I'm saying, Judge?
8 There is a separate definition for the automobiles
9 under this document.

10 And so when he says even if you did accept the
11 fact that the, capital P, personal property included
12 the lower case p, personal property, then it still
13 does not include the automobiles, because they are
14 under a separate definition. They are defined under
15 Paragraph 220.

16 THE COURT: Yet your stipulation, you contend,
17 includes the cars?

18 MR. CHASE: Yes, sir. Everything there
19 absolutely includes the cars. That is \$3.6 million.
20 There is no way that the jury -- there is nothing --

21 THE COURT: I got you. Any argument,
22 Mr. Benitez?

23 MR. BENITEZ: Our stipulation was the
24 memorabilia, the personal property, and the issue
25 that we were seeking to recover or get damages for

1 was the 3.6. We were not talking about anything
2 having to do with any property that may be owned by
3 Highway 46.

4 If there is property that is of Highway 46 in
5 any of those warehouses -- it was the assumption
6 that 3.6 was the value of the property at issue in
7 this case that we were contending is our property.

8 THE COURT: I just asked to see a copy of the
9 written stipulation. For the record, the
10 stipulation reads as follows: Strictly as relates
11 to Case No. 2008-CA-1466 in the Circuit Court in and
12 for Orange County, the parties stipulate as follows:
13 The total value of all memorabilia, petrobilia,
14 antique autos, and personal property currently in
15 possession of Highway 46 Holdings, LLC, located on
16 State Road 46 in Sanford, the Church Street
17 warehouse, and Bobby Lee Point warehouse is \$3.6
18 million. Accordingly, the Court finds that it is
19 responsible to enforce the stipulation of the
20 parties.

21 It includes the automobiles. And therefore,
22 having determined that the letter agreement and
23 operating agreement are effective and effectively
24 transfer those things, and the other closing
25 documents effectively transfer those things, there

1 is no way for the jury to determine the value -- the
2 damages of these conversion claims. The Court
3 grants directed verdict as to the conversion claims.

4 MR. CHASE: Thank you, sir. It was my
5 understanding, Judge -- I believe Count 16 is the
6 conversion of the U.S. mail. But that one, I
7 thought, was dropped.

8 THE COURT: That was Count 17.

9 MR. CHASE: Okay. And the same argument for
10 conversion. So I wasn't wrong. I was right when I
11 said -- Judge, I just missed it. The Count 16 is
12 the conversion of the autos. So he did plead it
13 separately. There was one count. Count 15 is
14 conversion of the personal property, capital P.

15 THE COURT: Which includes the memorabilia and
16 personalty. And then Count 16 --

17 MR. CHASE: Is the automobiles.

18 THE COURT: Same ruling, same basis.

19 MR. CHASE: Judge, next up is the duty of care.
20 These are -- the duty of care, if we could look to
21 Tab M in the binder. It's -- this is quoting from
22 608.4225, coming down to -- I think it would be 13B.
23 The duty of care is limited to refraining from
24 engaging in grossly negligent or reckless conduct,
25 intentional misconduct, or a knowing violation of

1 law. So that is our standard.

2 C: Each manager and managing member shall
3 discharge the duties to the limited liability
4 company and its members under this chapter, or under
5 the articles of organization or operating agreement,
6 and exercise any rights consistent with the
7 obligation of good faith and fair dealing.

8 E: A manager or managing member may lend money
9 to and transact other business with the limited
10 liability company. As to each loan or transaction,
11 the rights or obligations of the manager or managing
12 member are the same as those of the person who is
13 not a member, subject to the other applicable law.

14 On the next page down at the bottom, Sub 5: A
15 manager or managing member is not liable for any
16 action taken as a manager or managing member, or any
17 failure to take any action if the manager or
18 managing member performed the duties of the
19 manager's or managing member's position in
20 compliance with this section.

21 Judge, there are 15 different allegations for a
22 breach of duty and breach of duty of good faith.
23 They are the same 15 for each one. I believe they
24 are so closely aligned that we can take care of both
25 the breach of duty of care, statutory care, and good

1 faith at the same time for each allegation, if that
2 pleases the Court, sir.

3 THE COURT: You may proceed.

4 MR. CHASE: The first one is removing
5 Michael Myers as a manager. The contract documents
6 allow him to do that. The testimony was there was
7 reasoning behind doing that; and that because of
8 difference of opinions and the -- the cost of the
9 buildout under -- when Mr. Myers was running things
10 was exceeding, by a couple million dollars, what was
11 budgeted.

12 There is no damages for removing him. So I
13 don't believe that he could go forward on removing
14 Michael Myers as a manager.

15 THE COURT: Continue.

16 MR. CHASE: Okay. The next one is terminating
17 Michael Myers's employment. The same arguments that
18 we had before about there is no contract. There is
19 no discrimination. There is no cause of action for
20 that. There is nothing inconsistent with the
21 statute or the operating agreement and letter
22 agreement that occurred there. And there is
23 testimony as to the reasoning.

24 Then third is not allowing Michael Myers on the
25 property. It is -- it is the same argument that we

1 had before when we discussed that as a cause of
2 action.

3 The fourth is converting U.S. mail. It was my
4 understanding that that had been dropped. But even
5 if it hadn't, there was no evidence adduced about
6 anything that had anything to do with converting any
7 U.S. mail, and there are certainly no damages.

8 The fifth is failure to safeguard the personal
9 property, with a lower p. There was testimony about
10 some of the memorabilia assets being damaged, but I
11 don't recall any testimony about the lower case p,
12 personal property. So they failed to have any
13 evidence of damages about that.

14 And even if the Court did accept that in this
15 case, the way that it is pled it is not the capital
16 P, personal property, the memorabilia. There is no
17 damages as to what the cost was of that. If you put
18 a screw through a frame around a picture, what are
19 the damages? There is no testimony whatsoever. So
20 there is no way -- what could the jury come back --
21 what is the remedy?

22 Failure to pay real estate taxes. I don't
23 recall any evidence on that, nor are there any
24 damages.

25 The next is -- Number 7 is failure to collect

1 and pay sales tax. I don't recall any evidence on
2 that, nor are there any damages.

3 Number 8 is failing to pay wages and salaries
4 owed to employees. I don't recall any evidence on
5 that. And there is certainly no damages.

6 Mismanaging the business. The contract gives
7 Mr. Hachenberger the right to do everything that he
8 deems fit for the company, with the exception --
9 there is a very narrow exception, the changing of
10 distributions, when there is no allegation that he
11 did that. But in order to mismanage the business
12 under this statute, which is the duty of care and
13 the good faith, it would have had to have been
14 grossly negligent, reckless, or intentional
15 misconduct, or a violation of law.

16 There is nothing that could go to the jury that
17 could rise to that level. Plus, there was no
18 evidence that was introduced that wasn't one of
19 these other things that was alleged. And each of
20 these things by themselves don't add up -- should
21 not even be considered by the jury. I'll come back
22 once we get to the end of this list.

23 Number 10, closing the business. There was no
24 evidence of closing the business, and certainly no
25 damages.

1 Number 11 is failing to file federal tax
2 returns. There was some evidence that the tax
3 returns are behind, but there are no damages. There
4 have been no damages alleged.

5 Number 12 is changing the name and concept.
6 There are no damages. Further, changing -- that is
7 just -- there is no way that that could be grossly
8 negligent. Changing the name from "Gassy Jack's"
9 for a restaurant to what it is now is certainly not
10 gross misconduct.

11 Number 13 is hiring what is alleged in the
12 complaint to be Kay Wertz (ph), who was to do
13 unnecessary work. There was no evidence of that,
14 and no damages. There was evidence that Kay Wertz
15 and Liz Best (ph) were hired through their company.
16 But there was no evidence that anything they did was
17 unnecessary, nor any money spent.

18 Number 14 is releasing the operating agreement
19 and letter agreement. I believe that that has
20 already been ruled on by the Court.

21 Number 15, incurring unnecessary and
22 unauthorized expenses. There are no damages. There
23 could be an argument that he spent so much money on
24 this, and so it is unnecessary and -- there could be
25 argument. But it hasn't been really broken down as

1 to how much of that -- and what would be the
2 damages?

3 There was testimony that on June 26th, 2007,
4 that it was already over budget \$8 million or so,
5 and Mr. Hachenberger said, All right, I'm not going
6 to spend any extra money. So when Mr. Hachenberger
7 came in and took over on June 26th, 2007, if he
8 would have said, We're \$2 million over budget, I'm
9 not going to spend any more money, I'm going
10 dissolve the company -- if he had dissolved the
11 company on that day, the Myerses wouldn't have
12 gotten anything.

13 THE COURT: What is the evidence of that?

14 MR. CHASE: The evidence was the Myerses had
15 put in \$5 million. Their 1.3 contribution was
16 outlined in the contract, plus the total value of
17 the memorabilia is \$3.6 million. That is a total of
18 \$4.9 million.

19 THE COURT: What is the value of the improved
20 property at that point?

21 MR. CHASE: It is far in excess of \$4.9
22 million. Or it is not going to be -- even if it is
23 not, the contract -- I'm sorry, Judge. The contract
24 says that Don Hachenberger gets paid back first
25 everything that he has loaned.

1 So no matter what -- if the property would have
2 been -- if the property would have been \$3 million,
3 then Don Hachenberger would have gotten all \$3
4 million and --

5 THE COURT: And if it was a \$10 million
6 property or --

7 MR. CHASE: If they had gotten \$10 million,
8 then they could have split that up. Was it
9 unnecessary -- so there was no argument, nothing
10 before the jury that Don Hachenberger should have
11 closed down the restaurant. There is no argument to
12 that, so there can be no damages.

13 So in other words, Mr. Benitez would have to
14 walk up in front of the jury and say, What he should
15 have done was close down the business. If he would
16 have closed down the business, and it was worth \$10
17 million -- which we don't know, so it is speculative
18 damages, because there is no evidence what the
19 improvements were with the land -- then the Myerses
20 would have gotten at least maybe another million
21 back, because they would have shared the \$2 million
22 in excess of what -- the \$8 million spent.

23 But that is -- that is speculative damages, for
24 one. Plus, it improperly poses to the jury a
25 scenario where they have, what if this happened,

1 when there has been no testimony about that? So
2 there would have to be that.

3 Damages can't be speculative. They have to be
4 reasonably certain. So there are no damages as to
5 spending unnecessary money. If anything, the only
6 testimony was that the Myerses came out \$10 million
7 to the good, because of all the money that
8 Don Hachenberger and Mrs. Hachenberger continued to
9 put into that project. So how could there possibly
10 be damages? He has kept it open. He maintained --

11 THE COURT: How are they \$10 million to the
12 good?

13 MR. CHASE: Because it is \$10 million they
14 didn't have to pay.

15 THE COURT: But it is all debt.

16 MR. CHASE: It is debt to Donald Hachenberger.
17 But they still have the asset for exactly what they
18 contracted for and put into the project. They paid
19 a total of \$4.9 million, is what they put into it.
20 It is worth whatever it is, and so they still have
21 it.

22 They wanted a certain thing built. It was
23 built. There are some modifications to what the
24 original plan was. But when you look at those
25 pictures, the Hachenbergers came in -- and when he

1 took over, for legitimate reasons, and made changes
2 like adding bathrooms and handicap access and things
3 like that, changing the way that the smokehouse --
4 those are legitimate business purposes. That is not
5 wasteful and unnecessary. Those are things that
6 needed to be done.

7 THE COURT: I just think -- I do think those
8 are jury questions. I think ultimately, the jury is
9 in the best position to evaluate the purpose behind
10 those decisions.

11 Now, I can't tell you that I disagree with your
12 position on it, but that is not the issue. I mean,
13 it doesn't make sense to me that somebody who has
14 apparently had the success that Mr. Hachenberger has
15 had in business would say, I want to spend \$25
16 million so I can acquire \$3.6 million worth of
17 memorabilia. That just doesn't make any sense. If
18 he wanted the memorabilia, I assume he would have
19 written a check, and gotten the memorabilia.

20 But I do think there are business judgment
21 questions about how much debt has been accumulated
22 for the purpose of this business that is fair game.
23 I do question, though, what the damages are. I'll
24 have to hear from Mr. Benitez on that.

25 MR. CHASE: Yes, sir.

1 THE COURT: Mr. Benitez, let's talk through
2 each of these allegations. There are some that I
3 don't have -- I don't think are worthy of directed
4 verdict. I think you survive directed verdict on
5 some of these issues. But then we have to address
6 the damages issues. We'll get to that.

7 I don't think that, notwithstanding Paragraph
8 17 of the letter agreement that grants
9 Mr. Hachenberger the right to appoint and control,
10 ultimately excuses him from necessarily not
11 exercising -- I'm going to use these words, and I
12 know that is not what the statute used -- to use
13 good business judgment in all of that
14 decision-making. I still think he is bound by the
15 good faith and fair dealing requirements of the
16 statute. And I think ultimately, those are jury
17 questions.

18 I can't -- I don't think I can properly
19 evaluate, at this stage of the process, gross
20 negligence, recklessness, disregard, all the things
21 that the statute uses. So for example, let's look
22 at Paragraph 265 of your complaint. By removing
23 Mike Myers as a managing member -- he had the right
24 to do it.

25 MR. BENITEZ: Judge, you have already ruled the

1 letter agreement is enforceable.

2 THE COURT: But that doesn't excuse him. I
3 mean, he can do it. Does it give him unfettered
4 discretion, bad-faith discretion?

5 MR. CHASE: No, sir.

6 THE COURT: I don't think it does. I think it
7 is still fair game, notwithstanding the letter
8 agreement. I think it is a topic of discussion for
9 the jury.

10 A is okay. B is okay, in my mind. C is okay.
11 D, U.S. mail, is out, right?

12 MR. BENITEZ: Yes, Your Honor.

13 THE COURT: Okay. So I don't need argument
14 about that. The Court ruled, as a matter of law,
15 that there is no conversion. I can't allow that to
16 go to the jury. That one comes out, D.

17 What is the evidence of failing to safeguard
18 and maintain the personal property?

19 MR. BENITEZ: The upkeep of the property while
20 it was there, like for instance, the fire truck that
21 was out on the Church Street property, and the Coke
22 bottle. They have just been sitting out there; wear
23 and tear.

24 THE COURT: This is little p, personal
25 property, not capital P, personal property. So this

1 is personalty, not memorabilia.

2 MR. BENITEZ: I'm just thinking -- because you
3 just brought that up. By converting the personal
4 property, taking the property -- for instance, the
5 Bobby Lee warehouse, Judge -- you walked in there.
6 There is not much memorabilia there.

7 THE COURT: Right.

8 MR. BENITEZ: I'm not sure there was any there,
9 but I didn't take a good look like the jury did, or
10 like you did. So I'll let you decide.

11 THE COURT: But where is the failing to
12 safeguard and maintain? We're on Paragraph E.

13 MR. BENITEZ: I'm sorry. I was looking at the
14 wrong paragraph, Judge. You went past that.

15 THE COURT: I did.

16 MR. BENITEZ: Okay. If you are -- I don't know
17 if I meant just exclusively personal property in
18 this particular line, Judge. I thought I was
19 probably referring to all the property of the
20 Myerses' there, which included memorabilia and
21 petrobilia.

22 I would agree that most of the personal
23 property, except for the instances that I would -- I
24 think there was some talk -- I think the John Deere
25 tractor, for instance, and some of the trailers that

1 were out there in poor condition -- that would be
2 the ones that I was referring to.

3 THE COURT: What is the evidence of damages?
4 How is the jury to quantify that damage?

5 MR. BENITEZ: With respect to that in
6 particular, I would let them just decide that, based
7 on their examination of the property, or the
8 pictures that they have got.

9 THE COURT: Okay. That is rank speculation.
10 There has got to be some basis for them to determine
11 a value of the damage associated with that. There
12 has got to be some testimony. You can't say, Look
13 at this -- I'm not including the Coke bottle, but I
14 think it is a good example. Look at this Coke
15 bottle. What was it worth then? What is it worth
16 now?

17 There has to be some evidence of damages. In
18 the absence of that, I can't allow the question to
19 go to the jury. So granted as to E.

20 What evidence is there of failure to pay real
21 estate taxes?

22 MR. BENITEZ: Your Honor, there isn't any
23 evidence, Judge. It is a fact, but it isn't in
24 evidence.

25 THE COURT: Granted as to F. Collecting and

1 failing to pay sales taxes?

2 MR. BENITEZ: None.

3 THE COURT: Granted as to G. H?

4 MR. BENITEZ: None.

5 THE COURT: Granted as to H. I? I'm going to
6 allow that one to go to the jury. Closing the
7 businesses? Which businesses were closed?

8 MR. BENITEZ: They were closed for a period of
9 time. But I believe the testimony that I heard
10 during the trial was that it was open.

11 THE COURT: Okay. So no evidence of J, so that
12 is out. Failing to file federal tax returns?

13 MR. BENITEZ: No.

14 THE COURT: K is out. L, I'll allow. M?

15 MR. BENITEZ: No evidence.

16 THE COURT: M is out.

17 MR. BENITEZ: Before the Court --

18 THE COURT: All right. So what I'm going to
19 allow is A, B, C, I, L, and O.

20 MR. BENITEZ: Judge, I think you missed on that
21 one. I'll let you -- earlier in the personal
22 property --

23 THE COURT: I ruled as a matter of law there is
24 no conversion of personal property, because you
25 can't prove damages consistent with rendering a

1 directed verdict on conversion claims. You can't be
2 found to have converted something that you can't
3 prove damages for.

4 MR. BENITEZ: I apologize. I thought the
5 stipulation --

6 THE COURT: No. We go back into that same
7 analysis we had on the two conversion claims you
8 brought. You brought one for, capital P, personal
9 property; a separate one for autos. The autos, the
10 Court has determined, were legitimately transferred
11 under the terms of the letter and operating
12 agreement.

13 There is no way for this jury to ascertain the
14 value of those autos, and therefore no way to
15 determine what the actual loss was under a
16 conversion theory for personal property, capital P.

17 MR. BENITEZ: Judge, are you finding that those
18 autos were actually transferred? Because they are
19 not -- those autos that are listed are not
20 consistent with the evidence before the Court, like
21 for instance, Plaintiff's Exhibit 1. The list in
22 Plaintiff's Exhibit 1 does not match that list.

23 THE COURT: Doesn't match what list?

24 MR. BENITEZ: The list in my conversion claim
25 or count.

1 THE COURT: Right. But -- no. See, that is
2 the problem. Yes, I am finding some autos were
3 effectively transferred. That alone prevents the
4 jury from taking that \$3.6 million number, and
5 trying to ascertain what part of it relates to the
6 other property, and what part relates to transferred
7 autos.

8 I read your stipulation in evidence. It
9 included autos. But if some of that was
10 legitimately there, how do they know what percentage
11 or what part of \$3.6 million was attributable to
12 each component that you have pled? There is no way
13 to effectively get to that.

14 MR. BENITEZ: Would I be able to supplement the
15 record with that testimony, Judge, now based on your
16 ruling? The way your ruling is right now, it is
17 allowing us to go into a letter agreement, and
18 specify exactly what is included and what isn't
19 included.

20 THE COURT: No. Respectfully, you didn't even
21 meet -- assuming I hadn't ruled that way, you didn't
22 meet the evidentiary requirements of those two
23 counts for conversion.

24 MR. BENITEZ: I would have, if you hadn't ruled
25 that the letter agreement transferred --

1 THE COURT: No.

2 MR. BENITEZ: -- because they would have been
3 included.

4 THE COURT: No. That is not accurate. You
5 would have had two counts then, describing \$3.6
6 million. How does the jury attribute that amount to
7 the first part, and an amount to the second part?

8 MR. BENITEZ: That would be done by doing a
9 jury verdict form that includes just the personal --
10 all of it as one amount.

11 THE COURT: That is not how you pled it.

12 MR. BENITEZ: Well, Judge, in front of the
13 jury, it did not have to come out disjointed. It
14 could have been as one question. And I believe -- I
15 don't remember specifically.

16 THE COURT: Okay. Mr. Benitez, I'm not
17 revisiting the ruling. We've spent now two hours
18 and 15 minutes on these issues, and I've already
19 been down that road, and ruled very explicitly as to
20 those two counts why it is we didn't do that.

21 If you are moving to reopen the evidence, the
22 motion is denied, because it simply is too late in
23 the game. And there was nothing that precluded you
24 from offering that evidence early on, as you
25 attempted to offer evidence to distinguish between

1 personal property and memorabilia.

2 You knew you had proof issues. You attempted
3 to deal with that, and failed, understandably. It
4 is not your fault. I understand what happened. I'm
5 just saying that the evidence did not meet the
6 requirements. And it is just too late in the game
7 to do that.

8 So A, B, C, I, L, and O, the Court is allowing
9 you to argue to a jury. Count 19?

10 MR. CHASE: Sir, I believe it is the same
11 thing, Judge.

12 THE COURT: Same ruling. That will go to the
13 jury.

14 MR. CHASE: Sir, as to the count for --
15 nothing, sir.

16 THE COURT: Okay. This should narrow the scope
17 of proof that is necessary now in your case,
18 correct?

19 MR. CHASE: Yes, sir.

20 THE COURT: What I'd like you to do -- we're
21 going to take 15 minutes and let's adjust. And I'm
22 going to bring the jury back in at 11:30.

23 Is there anything else further for you or your
24 client?

25 MR. SHUKER: Yes, Your Honor. May I be heard?

1 THE COURT: You may.

2 MR. SHUKER: All the counts as to us are gone
3 except for 5 and 20. Those are both your decisions.
4 We had contemplated that we would also argue on
5 involuntary dismissal, which is the right term of
6 art for -- though since it is your decision -- but I
7 know the jury is sitting there waiting for 15
8 minutes. I'm just balancing that versus
9 Mrs. Hachenberger having to continue to pay us for
10 evidence that won't be relevant to your decision.
11 There isn't any new evidence on Counts 5 and 20.
12 But if you think that is overly prejudicial to the
13 jury for us not to be there, I'm very respectful of
14 that. It may not be all that much longer, just
15 tomorrow. So --

16 THE COURT: My concern -- what is your thought,
17 Mr. Benitez?

18 MR. BENITEZ: I think that would probably be
19 prejudicial to our side based on the fact they are
20 suggesting that they not continue in the trial.

21 THE COURT: That is what I'm hearing.

22 MR. BENITEZ: And I'm baffled by that because
23 remember we're going to have a second phase to this
24 trial which is non-jury, and Glenda Hachenberger is
25 a party to that process in particular . Those are

1 declaratory judgments that have been filed by the
2 plaintiff and by the defense. They need to be
3 heard. So I'm not sure why he is suggesting that
4 she is not a proper party to stay in the room.

5 THE COURT: Because what we're going to do --
6 what he is suggesting is what we're going to do at
7 this point is jury related. Her jury claims are
8 gone, so she would prefer not to continue to pay her
9 lawyers to be here. I understand that, but I don't
10 have any way to effectively deal with that.

11 MR. SHUKER: It is fine, Your Honor. We'll
12 wait to the end.

13 THE COURT: All right. We'll resume at 11:30.

14 MR. CHASE: Thank you, Your Honor.

15 (Brief recess.)

16 THE COURT: You may be seated. Are you set to
17 go?

18 MR. CHASE: Yes, sir. I advised the Court that
19 Mr. Hachenberger was going to start getting into
20 like those specific pieces of personal property, and
21 I don't think that is going to happen now. Instead
22 he is going to talk about before the jury some of
23 the changes that were made, the disagreements in the
24 changes.

25 Also, I got ahold of Mr. Mike Kassa who is our

1 rebuttal deputy and asked him to be here after
2 lunch. So Don Hachenberger certainly wouldn't be
3 done by that time. Mr. Kassa said he would try to
4 be here by 1:30. So I would like to take him out of
5 order. Also he doesn't know about walking in so if
6 somebody walks in, I'm not going to be able --

7 THE COURT: My deputies are in tune with that.

8 MR. CHASE: Yes, sir. I have Don Hachenberger,
9 I have Bill Beier who will testify -- I will decide
10 whether or not we need him to testify. We have Nick
11 Carlin but Nick Carlin is not available until
12 tomorrow morning, so I'm just telling the Court what
13 I know.

14 THE COURT: Thank you. Let's return the jury,
15 please.

16 (Jury in.)

17 THE COURT: Thank you. You may be seated.
18 Good morning and welcome back, ladies and gentlemen.
19 We ran a little longer than I had anticipated. I
20 was overly optimistic and I apologize for that this
21 morning. Because of calendars or scheduling
22 concerns, we're going to go right up until noon. We
23 are going to recess for lunch at that point. We'll
24 come back at 1:30 and continue with testimony at
25 that time.

1 MR. CHASE: Sir, counter-defendants would call
2 Donald Hachenberger.

3 THE COURT: Mr. Hachenberger, if you would take
4 the stand.

5 MR. CHASE: May it please the Court.

6 DONALD HACHENBERGER, having been previously
7 duly sworn, testified under oath as follows:

8 DIRECT EXAMINATION

9 BY MR. CHASE:

10 Q. Mr. Hachenberger, you realize you are still under
11 oath?

12 A. I do.

13 Q. There has been a lot of testimony about some of
14 the disagreements you have had with Mr. Myers leading up
15 to June 26, 2007.

16 A. Yes.

17 Q. And what I'd like to do is go through some of the
18 changes with you, if we may.

19 A. Yes.

20 Q. I'm going to show you -- there are some photos in
21 Defendant's Exhibit 2 in evidence that include -- maybe I
22 can do it without taking these out.

23 MR. CHASE: Your Honor, can the jury see that?

24 THE COURT: Are they on the screens at this
25 point? Yes. Thank you.

1 BY MR. CHASE:

2 Q. I'm showing you a document numbered 2223 dated
3 July 24th, 2007. This is one of the pictures we were
4 looking at earlier. Do you recognize that, sir?

5 A. Yes, I do.

6 Q. There was testimony about some changes to the
7 smokehouse. Do you recall that?

8 A. Yes, sir.

9 Q. Can you describe to the jury what you recall about
10 the changes to the smokehouse, and if -- were there any
11 changes to the entrance, which would be here?

12 A. Yes, there was.

13 Q. And can you describe the changes to the entrance?

14 A. When you originally went into the smokehouse,
15 there was two doorjambs. The door was originally put on
16 the furthest -- towards the steps of the doorjambs.

17 Q. Let me ask you this. Did that door -- you mean
18 the first wall you come to when you walk up?

19 A. When you walk up the steps across the porch, and
20 then the entrance to the smokehouse.

21 Q. And did that door open out?

22 A. It did open out. It still opens out, but it was
23 on the furthest doorjamb to the steps, which meant when
24 you opened it, people had to back up. And if there were
25 people behind you, they were balancing on the steps that

1 were behind them.

2 **Q. And were there any changes made to that door?**

3 A. We moved the door into the second doorjamb,
4 further into that little mud room.

5 **Q. Yes, sir.**

6 A. So when you open the door, it opened against a
7 wall. Nobody had to back up. You didn't have a safety
8 issue with guests trying to come into the restaurant.

9 **Q. Does that door still open out?**

10 A. It does.

11 **Q. And that is the door that the -- after the comfort**
12 **break that the jury first went into when entering for the**
13 **tour?**

14 A. That's correct.

15 **Q. And then when you came into that room, sir, what**
16 **was the first room before the changes? What would you be**
17 **walking into?**

18 A. To the bar.

19 **Q. So if you showed -- okay. And did you ultimately**
20 **change that?**

21 A. We did.

22 **Q. And how did you change it?**

23 A. The bar was in the front and the -- I'm going to
24 call it the POS, the point of sale area that now is in the
25 front was where the bar is now. So we just reversed

1 those. Because the way it was, if you came in through
2 that door, you went through the bar, through the
3 restaurant, out an open --

4 **Q. Hold on a second. I'll ask you questions about**
5 **it.**

6 MR. CHASE: Judge, we're going to use this as a
7 demonstrative exhibit. Madam Clerk, what would be
8 my next letter? I guess I need to give it to you --
9 for identification purposes.

10 THE CLERK: L.

11 MR. CHASE: Letter L?

12 THE CLERK: L. Yes.

13 MR. CHASE: If it please the Court, Mr. Jones
14 prepared the exhibit tag.

15 THE COURT: Thank you.

16 BY MR. CHASE:

17 **Q. Mr. Hachenberger, do you see the document that is**
18 **on the screen right now?**

19 A. Yes.

20 **Q. What is that?**

21 A. That is a conceptual drawing of the smokehouse.

22 **Q. Was that the way it used to be?**

23 A. That is the way it was designed, yes, originally.

24 **Q. And so this is where you come up the stairs --**

25 A. Yes, sir.

1 Q. -- where you just testified? And those are the
2 door issues?

3 A. Yeah. There is only one door.

4 Q. I understand.

5 A. Now, yes.

6 Q. So this is then. This is not now?

7 A. Correct.

8 Q. Because this is what you changed; is that my
9 understanding?

10 A. In the construction process, this was what was
11 conceptualized. Yes.

12 Q. Okay. So I think that when you were talking --
13 when you were describing earlier you had come into -- this
14 was a bar?

15 A. Yes.

16 Q. Okay. And then what would happen at that point?

17 A. Then you would walk from the bar -- up on this
18 drawing is north.

19 Q. Okay.

20 A. And so as you went north, you would come through
21 the bar and into the dining room.

22 Q. Is that right here?

23 A. That's correct.

24 Q. And what is this right here?

25 A. That, in its original design, was a wall that had

1 several sets of doors in it to go outside to a patio; I'm
2 going to say a covered patio.

3 **Q. And what is -- what is this right here?**

4 A. Those are the -- the first one is the men's
5 restroom and the second one is the women's restroom.

6 **Q. That one being the first one, sir?**

7 A. The men's.

8 **Q. And that one?**

9 A. The women's.

10 **Q. And what was this break right here?**

11 A. That was the area that the food was delivered from
12 the kitchen to the dining room.

13 **Q. And when I was discussing with Mr. Myers these
14 changes, I incorrectly said that the door from the kitchen
15 was here. Do you recall that?**

16 A. Yes.

17 **Q. So I was incorrect. It is actually here?**

18 A. That is where it was designed.

19 **Q. And then so if you came in through the dining
20 room, how would you -- how would you end up going
21 somewhere to order food?**

22 A. You would go through the bar, through the dining
23 room, out the doors.

24 **Q. These doors?**

25 A. That's correct.

1 Q. Yes, sir. Is this inside or outside?

2 A. That is a covered patio.

3 Q. Is that air conditioned?

4 A. No; outside.

5 Q. Okay. Then what would you do?

6 A. Then you would turn right into here and go into
7 that POS area.

8 Q. "POS" means?

9 A. Point of sale area.

10 Q. Is that like a counter?

11 A. It is what -- when the tour was held, the first
12 room they came into is what we now call the point of sale
13 area.

14 Q. So this -- was this moved over here?

15 A. No. We actually left the bar there and we used it
16 for a counter.

17 Q. So you just changed the machines?

18 A. Pretty much.

19 Q. Did you put all the stuff in the bar into here?

20 A. Yes, sir.

21 Q. And then took the stuff in the point of sale area
22 over to here?

23 A. Generally, yes.

24 Q. Okay. Once you -- in the previous design, after
25 you made your -- made your order, you ordered your

1 **barbecue sandwich, what would you do then?**

2 A. You would then go back outside.

3 **Q. Through this door?**

4 A. Yes.

5 **Q. Yes, sir.**

6 A. And then you either came back inside the dining
7 room --

8 **Q. Okay. If you wanted to eat in the air**
9 **conditioning, you would come back in and sit down at a**
10 **table?**

11 A. Correct.

12 **Q. Okay. If you were sitting at this table and**
13 **somebody opened the door of the bathroom -- what is this**
14 **right here?**

15 A. That is the urinal.

16 **Q. Would you be able to see somebody at the urinal if**
17 **somebody opened the door?**

18 A. Directly. Yes.

19 **Q. Okay. And you made changes to stop that?**

20 A. Yes, sir, we have.

21 **Q. Okay. Did you change anything with regard to this**
22 **being outside?**

23 A. Yes, sir.

24 **Q. What did you do?**

25 A. We removed the wall, put a beam across the top. I

1 think the original dining room had -- seated about 30.
2 Might have been a few more. We removed that wall that the
3 doors were in. We created a new wall and made all of that
4 in the air conditioned area.

5 **Q. Did you believe those to be necessary changes?**

6 A. Absolutely.

7 **Q. Did you consult with anybody about that?**

8 A. Absolutely. Yes, sir.

9 **Q. Who did you consult with?**

10 A. The -- the agency that was selected to work with
11 us was called QMG, Quantified Marketing Group. They were
12 primary in with a lot of the new direction with the
13 experience and everything that they had to just raise
14 issues that they saw.

15 MR. BENITEZ: Objection, nonresponsive.

16 THE COURT: Sustained. Just direct him,
17 please.

18 BY MR. CHASE:

19 **Q. How did you come to retain QMG?**

20 A. We interviewed I think three to five agencies,
21 asked them to make a -- it is called an RFP, request for
22 proposal.

23 **Q. And then did Mr. Myers evaluate those proposals?**

24 **Let me ask you another question for the predicate.**

25 **Did you receive proposals from different**

1 **companies?**

2 A. Yes, we did.

3 **Q. Did you and Mr. Myers evaluate those proposals?**

4 A. Yes. Yes.

5 **Q. And ultimately, QMG was chosen?**

6 A. That's correct.

7 **Q. On decisions such as this, did you rely on QMG's**
8 **advice on the changes to make?**

9 A. I relied on them and our team to arrive at
10 decisions. Yes.

11 **Q. I may have asked it before. I apologize if I did.**
12 **Have you ever been a restaurateur?**

13 A. No. I have eaten in a lot of restaurants, but
14 I've never run one before.

15 **Q. Okay. Going back to this. So as it is now -- and**
16 **the jury all walked through and they saw the different**
17 **changes. Is it possible to leave out this back way?**

18 A. It is today, and it was during this concept. Yes.

19 **Q. Okay. Mr. Hachenberger, when the jury entered**
20 **into the smokehouse, did they come out right around here?**

21 A. Yes, sir.

22 **Q. And then walked over this way?**

23 A. Yes.

24 **Q. Okay. When they got to right in here, can you**
25 **tell me about any changes or any disagreements you had**

1 **with Mr. Myers about that area over there?**

2 MR. BENITEZ: Objection, compound.

3 THE COURT: Sustained. Rephrase it.

4 BY MR. CHASE:

5 **Q. Did you have any questions -- did you have any**
6 **disagreements with Mr. Myers about that area over there?**

7 A. Yeah. That would be called the garage bar. Tons
8 of disagreements. Yes.

9 **Q. Can you tell me -- describe to the jury one such**
10 **change -- or disagreement.**

11 A. Okay. The garage bar is where the stage area is.
12 And on that stage, we have concerts. And for instance, on
13 New Year's Eve, we'll have up to a thousand people in
14 attendance there. And there were no bathrooms provided
15 for the men or the women. Zero bathrooms provided.

16 **Q. Where was the closest bathroom?**

17 A. Closest bathroom would have been what I'm going to
18 describe as the one-holers at the smokehouse, a single
19 person in each of those, men and women. The other
20 bathroom --

21 **Q. When you say a single holer, what do you mean by**
22 **that?**

23 A. One person at a time. I'm from a farm and we had
24 outhouses and we called them --

25 **Q. Answer just the question.**

1 A. Yes, sir.

2 **Q. Were there any other bathrooms on the complex?**

3 A. The only other bathrooms would have been the ones
4 that the jurors used when they made their comfort stop.

5 **Q. Were those the ones that were -- where were those?**

6 A. In the hallway close to the boardroom and the club
7 room.

8 **Q. What reason, if any, did you prefer that the folks**
9 **who were out here listening to the band -- that you would**
10 **not want them to use those bathrooms?**

11 A. Two problems. Number one, our plan included the
12 fact that there were different hours of operation. The
13 garage bar is the late night, goes until 2:00 in the
14 morning. And Monroe's closed earlier and the saloon
15 closed earlier. And if you had those as the only
16 bathrooms, you would have had to have kept people there to
17 watch out for the partiers that were at the garage bar
18 wandering around these other open areas.

19 **Q. So there was a security issue?**

20 A. Very much so.

21 **Q. Was there any other issue with I think you said**
22 **the partiers using those bathrooms?**

23 A. Well, again, they are not as careful in their
24 usage of restrooms. There seems to be more damage from
25 people just wanting to hit a wall or something like that,

1 tearing doors off the hinges and things like that; and the
2 security of the theft of all the memorabilia that was
3 scattered throughout those buildings.

4 **Q. So ultimately, did you consult with QMG about it?**

5 A. Absolutely. That was part of it. Yes.

6 **Q. And what, if anything, did QMG recommend?**

7 A. That we segregate the venues into the garage bar
8 as a separate entity, and then make accommodations for it
9 to stand on its own, stand alone as it was being operated
10 during those hours.

11 **Q. Did that include constructing additional**
12 **bathrooms?**

13 A. Absolutely, yes. Necessary.

14 **Q. Is that something that after June 26th, 2007, when**
15 **you assumed control of the project -- is that something**
16 **that you changed, that you did add bathrooms?**

17 A. Yes.

18 **Q. Where are those bathrooms, the new ones?**

19 A. On the exterior of the wall --

20 **Q. Of which one?**

21 A. Well --

22 **Q. Try touching that thing, but watch out.**

23 A. Do you think I can do it?

24 **Q. I think you can.**

25 A. Hit that?

1 **Q. Yes, sir. I think you have got to press hard on**
2 **that one.**

3 A. This wall right here right now is where the
4 bathroom entrances are, and they take up a portion of the
5 rest of this where those two garage doors are. That is
6 one bathroom. And the entrances are on the outside wall
7 close to the tree. And then back under the -- let's clear
8 that. I'll clear it.

9 **Q. Go ahead. Start over.**

10 A. The second set of bathrooms is in this area. And
11 you enter from the overhang of the garage bar.

12 **Q. Okay. On Friday and Saturday nights, do you have**
13 **pretty big crowds out there?**

14 A. We try our best to get as big a crowd as we can
15 get.

16 **Q. Have you had any complaints about a lack of**
17 **bathrooms?**

18 A. We haven't since we realigned those bathrooms, or
19 built the bathrooms, no.

20 **Q. Okay. You were just testifying about bathrooms in**
21 **this area and this area here, which I believe there was --**
22 **that hadn't necessarily -- or did that necessarily change**
23 **the original design of this building?**

24 A. Very definitely. Yes.

25 **Q. And what was that -- what was that building --**

1 **what was the original purpose of that building?**

2 A. I think there was testimony that it was for an
3 auction area.

4 **Q. Was that your understanding, was that it was an**
5 **auction area?**

6 A. I had never heard that term before.

7 **Q. Okay. What about the interior -- can you still --**
8 **if you wanted to have an auction, is there still -- let me**
9 **strike that, what I just said.**

10 **Is there still a concrete, I don't know, platform**
11 **here?**

12 A. Yes. It is called the backstage.

13 **Q. And are both of those doors still there?**

14 A. No.

15 **Q. Just one?**

16 A. No. Those two double-wide doors were removed, and
17 a smaller door to accommodate just the load-in for the
18 bands is in the area of the left door there.

19 **Q. Right there?**

20 A. Yeah, sort of in that area. Yes.

21 **Q. Is there any reason why you would not be able to**
22 **do an auction there right now?**

23 A. None whatsoever.

24 **Q. Can you think of any reason why you would need two**
25 **larger overhead doors?**

1 A. I can't, no.

2 THE COURT: Folks, it is noon. We're going to
3 go ahead and take our lunch recess. I know you were
4 just here for half an hour. We've all been working
5 all morning and this is the only way to get any
6 courtroom staff out to be able to eat lunch. We're
7 going to be in recess until 1:30.

8 During this time, all the same cautions still
9 apply. Please don't talk to each other or anyone
10 else face to face or electronically about anything
11 having to do with the case or your jury service.
12 Don't post anything on any social media or other
13 websites. Don't conduct any independent research.
14 And forgive us if we run into you out in the
15 community and don't speak with you. We just want to
16 avoid the appearance of any sort of improper
17 communications. So we'll be in recess until 1:30.
18 Thank you.

19 (Jury out.)

20 THE COURT: Counsel, we'll see you back at
21 1:30.

22 (Lunch recess.)

23 THE COURT: Please proceed.

24 MR. CHASE: Mike Kassa is here and ready to go.
25 And also we've asked Mr. Bill Beier to come in to be

1 here as close to 2:00 as possible. I'm hoping by
2 the time we get done with Mr. Kassa, Mr. Beier will
3 be here and we'll recall Mr. Hachenberger.

4 THE COURT: Bring Mr. Kassa in, please.

5 MR. BENITEZ: Judge, before you do, while we
6 were doing the argument on directed verdict, I think
7 you asked me one time with respect to the value --
8 or personal property in the warehouse. I had
9 forgotten, Judge, that we had Exhibit 4 for the
10 defense which is \$50,696.75 of purchased items that
11 are in the warehouse. So that is a piece of
12 evidence with respect to the damages. So for the
13 discussion as to no identifiable damages other than
14 3.6 million, I think that would satisfy our burden
15 because it establishes damages for a conversion
16 count and for damages of items being kept.

17 THE COURT: And for what else?

18 MR. BENITEZ: And items -- for items that are
19 being kept against our -- against our wishes.

20 THE COURT: Conversion?

21 MR. BENITEZ: Conversion.

22 THE COURT: Response?

23 MR. CHASE: Your Honor, you still have to parse
24 it out. It is the same thing with the trucks or
25 anything else. Then you have got another issue that

1 I did argue when that exhibit came in. It is
2 purchase value. The Court made the argument --
3 which is a good one -- that it was purchased at an
4 auction, which I understand that is generally market
5 value. But it still -- the purchase price is not
6 the price and it is not the time of the actual
7 conversion. So it's still -- you can't use that.

8 There is no way -- I guess I suppose that they
9 could, and if they want to -- we would even do this,
10 because they have to elect remedies; that if their
11 conversion count is that \$56,000, and then if they
12 want to say, All right, that was converted and there
13 is our damages for conversion and then that is it,
14 so there is no replevin, no conversion, it is just
15 that \$56,000, then sure. They can have that. We'll
16 do everything to either return those items through
17 replevin, or give them what ultimately would be a
18 setoff.

19 THE COURT: They don't have to elect the
20 remedies right now. I think you-all figured that
21 out. They can wait and see if they get a verdict
22 for this amount in conversion. But this would be
23 the total of your conversion claim.

24 MR. BENITEZ: Judge, I -- that is fine. That
25 is better than nothing. But Judge, he is making

1 arguments it is already in evidence, and any
2 arguments that he made are totally irrelevant.

3 THE COURT: I understand. This is evidence of
4 fair market value. It is reasonably close in time.
5 It is not certainly that date. That is your burden
6 ultimately. So you are going to have to somehow
7 convince -- start with me.

8 Why is this the evidence of the value of those
9 items on the date of the conversion?

10 MR. BENITEZ: Because that is -- that is a
11 piece of evidence that has been submitted into
12 evidence with respect to the value of the property
13 and what it costs, and I think that is reasonably
14 evidence --

15 THE COURT: Not what it costs. That is not the
16 standard. The standard is fair market value. And I
17 have now probably initiated the argument, and I
18 apologize to counsel. I hate when I do that.
19 Sometimes I jump in with a thought.

20 I agree it could be a fair -- some reflection
21 of fair market value. But there has been no
22 relationship of this list now through the testimony,
23 which I thought there was going to be, to the date
24 of the conversion. So this is dated back in April
25 and May of 2007. The conversion occurred in June.

1 So what is the evidence? There is a fairly
2 recent case out there in the context of a deficiency
3 action in which the Court concluded that evidence,
4 even just a couple months away from --

5 MR. SHUKER: It was two months. I know the
6 case.

7 THE COURT: Two months, yeah, away from the
8 date of the foreclosure sale was not relevant -- was
9 not probative of the value of the property on the
10 date of the sale. That is this case. Isn't that
11 what these are?

12 MR. BENITEZ: Yes, Your Honor. Like I said,
13 we're back -- I just wanted to bring to the Court's
14 attention that we do have some evidence of damage,
15 whether it is credible or not credible, whether the
16 jury will accept it or not. We also have the 3.6
17 million that has been stipulated.

18 THE COURT: Okay. Same ruling. Do you have
19 the witness ready?

20 MR. CHASE: Yes, sir.

21 THE COURT: Let's bring him in the courtroom to
22 be prepared to step forward. Have a seat there,
23 sir, please. We'll call you up in a moment. Let's
24 return the jury, please.

25 (Jury in.)

1 THE COURT: All right. Thank you. You may be
2 seated. Ladies and gentlemen, as I've again shared
3 with you in the past, sometimes we take a break in
4 the middle of the testimony of a witness to
5 facilitate the presentation of other testimony due
6 to a witness's scheduling or other concerns. We're
7 about to do that. Call your next witness.

8 MR. CHASE: Sir, we call Mike Kassa.

9 THE COURT: Mr. Kassa, if you would step
10 forward, please. Mr. Kassa, if you will step over
11 here behind the court reporter, please. Just pause
12 there and raise your right hand and face the clerk
13 to be sworn.

14 THE CLERK: Do you swear or affirm the
15 testimony you shall give shall be the truth, the
16 whole truth and nothing but the truth?

17 THE WITNESS: Yes, I do.

18 THE COURT: Thank you, sir. Come right around
19 the rail there. Watch your step as you step up.
20 The seat will spin but not move backward or forward.
21 Just adjust that microphone where it is comfortable.
22 Thank you. You may proceed.

23 MICHAEL KASSA, having been first duly sworn,
24 testified under oath as follows:

25 DIRECT EXAMINATION

1 BY MR. CHASE:

2 Q. Good afternoon, Mr. Kassa. Could you please spell
3 your last name for the record?

4 A. K-A-S-S-A.

5 Q. I'm going to take you back to June of 2007. How
6 were you employed in June of 2007?

7 A. I was working with the Seminole County Sheriff's
8 Office.

9 Q. Were you a deputy for the Seminole County
10 Sheriff's Office?

11 A. Yes, sir.

12 Q. Were you familiar with the Highway 46 Holdings,
13 LLC, District project that was going on out in Sanford?

14 A. Yes, sir.

15 THE COURT: Mr. Chase, is your microphone on?

16 MR. CHASE: I don't think it was.

17 BY MR. CHASE:

18 Q. And if I could further direct your attention to
19 sometime around June 26th, 2007, or June 27th, 2007,
20 somewhere around there.

21 Did you have an occasion to experience an unusual
22 situation with Mr. Michael Myers?

23 MR. BENITEZ: Object to the form, leading.

24 THE COURT: Overruled.

25 THE WITNESS: Yes, I did.

1 BY MR. CHASE:

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

3 A. I was at the location on official business. The
4 purpose was to keep the site security in order.

5 Q. When you say "the location," is that the -- the
6 property where they were doing the construction, where
7 Highway 46 Holdings was doing the construction?

8 A. Yes.

9 Q. Go ahead.

10 A. I observed Mr. Myers essentially behaving in a
11 very aggressive manner toward other individuals.

12 Q. At this time, were you in your deputy's uniform?

13 A. Yes, I was.

14 Q. And you had the belt on with the gun?

15 A. Yes, sir.

16 Q. You said that you -- what happened next after you
17 saw Mr. Myers behaving --

18 A. I observed for a short period of time, and then
19 decided that I needed to step in to prevent the situation
20 from escalating further.

21 Q. And what happened after that?

22 A. I gave Mr. Myers several commands, if you will, to
23 calm down, quit being aggressive toward other individuals.
24 He was behaving in a threatening manner and he was not
25 complying.

1 **Q. When you say noncompliant, can you expand on that**
2 **a little bit?**

3 A. He refused to listen to any of the recommendations
4 that I gave him, and his physical demeanor continued.

5 **Q. When you say "his physical demeanor," can you**
6 **describe that a little bit?**

7 A. He appeared to be very agitated. His physical
8 actions were threatening toward other individuals.
9 Verbally he was threatening toward other individuals, and
10 I attempted to put a stop to it.

11 **Q. Do you remember how many other folks were there?**

12 A. There was a fair amount of individuals there.

13 **Q. Was this inside or outside?**

14 A. Outside.

15 **Q. Okay. What happened next?**

16 A. To prevent the situation from escalating further,
17 I told him initially that if he didn't calm down, that he
18 would be placed under arrest. He did not calm down.

19 **Q. And what happened next?**

20 A. I -- to prevent it from escalating, I placed him
21 in handcuffs.

22 **Q. After you placed him in handcuffs, did he calm**
23 **down?**

24 A. He eventually did.

25 **Q. From the time that you first saw Mr. Myers acting**

1 in an aggressive behavior until the time you ultimately
2 put him in handcuffs, how much time would you say
3 transpired?

4 A. I'm guessing maybe 10 or 15 minutes.

5 Q. Was that 10 or 15 minutes of time that you were
6 discussing with him -- let me ask it a different way.

7 Were you discussing with him trying to get him to
8 calm down that entire 10 or 15 minutes?

9 A. I would say pretty much the majority of that, yes.

10 Q. Placing someone in handcuffs, is that something
11 that deputies typically do?

12 A. It can often be the case to assure scene security.

13 Q. Is that how you were trained to do that?

14 A. Yes, sir.

15 Q. Did you place Mr. Myers under arrest?

16 A. Not at that time.

17 Q. Is there a reason why you didn't place him under
18 arrest?

19 A. Given the situation and out of respect for
20 Mr. Myers and the business relationship that was occurring
21 between him and Mr. Hachenberger, I wanted to give him
22 every benefit of the doubt before placing him under
23 arrest. Had it been a different situation, I would have.

24 Q. And then ultimately, Mr. Myers -- did he calm
25 down?

1 A. Ultimately, I released him. Yes.

2 **Q. And you took the handcuffs off him?**

3 A. Yes, sir.

4 **Q. What happened next?**

5 A. They continued about whatever business that they
6 were handling at the time, and I just maintained a
7 presence.

8 MR. CHASE: Tender the witness, Judge.

9 THE COURT: Cross-examination?

10 MR. BENITEZ: Yes, Your Honor.

11 THE COURT: Microphones, Counsel.

12 MR. BENITEZ: Yes, Your Honor. I'd like with
13 permission of the Court to mark Defense Exhibit NN
14 for identification.

15 CROSS-EXAMINATION

16 BY MR. BENITEZ:

17 **Q. Are you a deputy now?**

18 MR. CHASE: Objection, relevance.

19 THE COURT: Overruled. Go ahead and answer.

20 THE WITNESS: No, I'm not.

21 BY MR. BENITEZ:

22 **Q. The incident that you just recalled to the jury,**
23 **you said that that occurred on June 26, 2007?**

24 A. I can't be certain of the exact date.

25 **Q. Okay. Isn't it -- you only placed Mr. Myers in**

1 **handcuffs in your lifetime once, correct?**

2 A. Correct.

3 MR. BENITEZ: Judge, at this time, I would like
4 to have marked as Defense Exhibit NN for
5 identification if I may.

6 THE COURT: Madam Clerk, if you could mark
7 that, please.

8 (Defense Exhibit NN marked for identification.)

9 MR. CHASE: Judge, may we approach?

10 THE COURT: You may.

11 (At Bench:)

12 MR. CHASE: That is the incident where they
13 both got arrested. It is a different date. He
14 didn't say June 27th. He said June 26th or June
15 27th. He is going to try now (inaudible) hearsay
16 document. He is trying to open up this --

17 THE COURT: I would suggest that --

18 MR. CHASE: -- 2008 which is a different
19 incident where both of them went to jail but they
20 weren't charged.

21 THE COURT: And that's -- I apologize. Are you
22 finished?

23 MR. CHASE: Yes.

24 THE COURT: If you want to ask him, Isn't it
25 true that you also handcuffed him on January 8th,

1 2008, that is okay. You can ask him that. But if
2 you are going to get into what Don Hachenberger did
3 and all that, that's not --

4 MR. BENITEZ: Judge, first of all, that is
5 incorrect, what Mr. Chase just said. I just asked
6 the witness, How many times have you placed him in
7 handcuffs? He said once. The incident where they
8 both get arrested has nothing to do with this.

9 If the Court will simply read Exhibit NN, it
10 will simply show where he is handcuffed and
11 unhandcuffed, and this is the incident that he is
12 referring to. Mr. Chase is the one that put out the
13 date of June 26th which threw my client into a
14 frenzy, because he didn't know what he was talking
15 about. And clearing it up with the deputy that in
16 fact this is the only time he got him handcuffed or
17 non-handcuffed -- the other incident that Mr. Chase
18 is referring to, they were both handcuffed. They
19 were put in the back of the squad car and they were
20 booked. There were two different incidents. I'm
21 not talking about that one. I'm talking about the
22 one that he just testified to and is recited in
23 this.

24 THE COURT: January 16, '08 or '07? I don't
25 know which one of those dates it is.

1 MR. BENITEZ: It's '08.

2 MR. CHASE: Mr. Myers testified that it was
3 right after the termination -- it was right
4 around --

5 MR. BENITEZ: No, he did not.

6 THE COURT: Hang on.

7 MR. BENITEZ: Okay. If he did, he was
8 mistaken, Judge.

9 THE COURT: Let's go back a little for
10 fundamentals. You want to impeach him with this?

11 MR. BENITEZ: No, Your Honor.

12 THE COURT: What are you going to do with it?

13 MR. BENITEZ: Probably I was going to refresh
14 his recollection.

15 THE COURT: He testified that he doesn't
16 remember anything.

17 MR. BENITEZ: Because I've been stopped before
18 that. I haven't gotten to that point. I wanted to
19 have it with me. I'm going to ask him about the
20 dates.

21 THE COURT: You want to open the door to this
22 incident, as well?

23 MR. BENITEZ: Judge, this is the incident he --
24 if the Judge would just read this report, this is
25 what he has just testified to, except he is

1 incorrect.

2 THE COURT: As to the date? That is what this
3 is all about?

4 MR. BENITEZ: No. He is incorrect as to a lot
5 of things in this report.

6 THE COURT: So you want to use it to do what?

7 MR. BENITEZ: I want to use it to impeach him
8 and to also refresh his recollection.

9 THE COURT: Is this under oath?

10 MR. BENITEZ: If I may, Judge, it is not. The
11 copy I have is not under oath.

12 THE COURT: Okay. So what are you going to
13 impeach him with?

14 MR. BENITEZ: I'm going to refresh his
15 recollection.

16 THE COURT: He hasn't testified that he doesn't
17 remember anything.

18 MR. BENITEZ: I was just having it marked and I
19 was going to ask him some more questions.

20 THE COURT: You are not going to parade this
21 around in front of the jury, because it can't be
22 used for impeachment. So you can set this over at
23 your counsel table. You can proceed with your
24 examination. If he wants to say that he is unsure
25 about the date beyond what you have talked about

1 thus far, I suppose you could offer this to him to
2 see if there were a report of an incident, and would
3 that refresh his recollection as to the date that it
4 occurred. Beyond that, I just don't know why it is
5 a big deal.

6 MR. BENITEZ: It is a big deal because his
7 testimony is inconsistent with this report.

8 THE COURT: Mr. Benitez, you cannot impeach him
9 with this report. It is not a sworn statement of
10 the nonparty.

11 MR. BENITEZ: I understand. I want to use it
12 to -- I'm going to use it to refresh his
13 recollection when he needs refreshing of his
14 recollection. I'm going to ask him if that would
15 help him, to review his report that he did on that
16 date.

17 THE COURT: So you can refresh his
18 recollection?

19 MR. BENITEZ: Right.

20 THE COURT: And that is important why?

21 MR. BENITEZ: Because once his recollection is
22 refreshed, I would assume he is going to tell the
23 truth on the stand and realize that he made certain
24 mistakes.

25 THE COURT: You better be very careful.

1 MR. BENITEZ: Yes, Your Honor.

2 (Open court:)

3 MR. BENITEZ: Your Honor, can I have a sidebar
4 real quick?

5 THE COURT: Yes.

6 (At Bench:)

7 MR. BENITEZ: You told me not to parade that in
8 front of the jury. Can I at least take it to the
9 podium so I can be looking at it? And I'll put it
10 in my legal pad so it is not noticeable.

11 THE COURT: Yes. Yes. Do not parade it in
12 front of the jury.

13 (Open court:)

14 BY MR. BENITEZ:

15 **Q. Mr. Kassa, as a result of your encounter with Mike**
16 **Myers on that date, whatever that date may be, did you**
17 **write a report?**

18 MR. CHASE: Objection, relevance.

19 THE COURT: Overruled.

20 THE WITNESS: I don't recall.

21 MR. BENITEZ: Your Honor, if I may -- no.

22 BY MR. BENITEZ:

23 **Q. And if you did write a report, would that refresh**
24 **your memory with respect to what happened that day?**

25 MR. CHASE: Objection, improper impeachment.

1 THE COURT: Sustained.

2 BY MR. BENITEZ:

3 Q. Do you remember -- the incident that you referred
4 to, did it occur on January 16, 2008?

5 A. I'm sorry. I -- I can't recall specifically
6 without some reference. It has been 10 years.

7 Q. Okay. Would that reference be to your police
8 report?

9 A. I'm sorry?

10 Q. Would that reference be to a report that you might
11 have done that day?

12 A. It could be.

13 Q. Okay.

14 MR. BENITEZ: May I approach the witness, Your
15 Honor?

16 THE COURT: Members of the Jury, I'm going to
17 ask you to step out of the room for just a moment.
18 We need to have a conversation to address an issue.
19 All the same cautions still apply.

20 (Jury out.)

21 THE COURT: Mr. Benitez, I cautioned you to be
22 careful about the use of that paper.

23 MR. BENITEZ: I --

24 THE COURT: You have violated my instructions.

25 You sat right here and asked him a question that was

1 absolutely unrelated to his testimony, but
2 consistent with what you want to use this report
3 for. You asked him would it refresh his
4 recollection about what happened that day if he were
5 able to refer to the report that is in your hands.
6 He has not testified to any deficiencies in his
7 memory about what occurred that day.

8 MR. BENITEZ: Judge, I was referring to the
9 date --

10 THE COURT: You didn't refer to the date.

11 MR. BENITEZ: I'm referring to the date.

12 THE COURT: Madam Court Reporter, could you
13 read back those questions and answers, please?

14 (Requested material was read.)

15 MR. BENITEZ: That was before the -- Ms. Court
16 Reporter, what were the first two questions that
17 were after the sidebar?

18 (Requested material was read.)

19 MR. BENITEZ: I don't know. Judge, I -- I
20 apologize. I don't -- I don't even know -- I
21 trained the -- the questions with respect to the
22 date.

23 THE COURT: No, you did not. That is exactly
24 the problem and exactly what I'm exasperated about.
25 Because coming out of the sidebar where I told you

1 to be careful about how to use that thing, you come
2 up here when he has not said the first thing about
3 not being able to remember what occurred that date,
4 and put your theory on the question.

5 MR. BENITEZ: Judge, I -- I have taken great
6 care to have sidebars with the Court to understand
7 exactly what I cannot or can do. It is -- and I've
8 done the best I could. I don't understand -- I
9 thought that the last questions were directly with
10 the date, and that is all I was referencing. I -- I
11 am -- it is -- it has been very frustrating to try
12 to make sure that I walk the fine line, and I have
13 been overly cautious.

14 THE COURT: How was that overly cautious?

15 MR. BENITEZ: Judge, can I read it back one
16 more time?

17 COURT REPORTER: I can read it back.

18 THE COURT: Let me refresh your recollection.
19 You came to the Bench at Mr. Chase's insistence that
20 we address the use of this report that you have. I
21 asked you whether you intended to use it for
22 impeachment. You said, No, I'm going to use it to
23 refresh his recollection. I responded that he had
24 not testified to any improper or incomplete
25 recollection about the events of that day. You went

1 on then to say, Well, this is -- in essence, I'm
2 going to use it to impeach him. That was your
3 words.

4 The Court expressed frustration because you had
5 just told me that you weren't, but now you wanted to
6 use it to show that he had told a different story in
7 the report. That is impeachment. The Court
8 expressed that that was not permissible because it
9 was not a sworn statement. Do you disagree with
10 that proposition?

11 MR. BENITEZ: Judge, the only --

12 THE COURT: Respond to the question. Do you
13 disagree with that proposition, that you have a
14 statement that is not sworn? You told me it wasn't
15 sworn.

16 MR. BENITEZ: No. It is not sworn.

17 THE COURT: Do you agree you cannot use it for
18 impeachment purposes?

19 MR. BENITEZ: Your Honor, I believe that I can,
20 but not in the form that you are suggesting.

21 THE COURT: Under what rule?

22 MR. BENITEZ: No, I cannot admit it into
23 evidence.

24 THE COURT: Under what rule?

25 MR. BENITEZ: I would do it by refreshing his

1 recollection, thereby correcting the witness from
2 his prior statement to his new statement. Because I
3 would assume that if I had refreshed the officer's
4 recollection, that he would then adopt his new
5 statement. That would be an impeachment to his
6 previous statement, the statement with respect to
7 the date and what exactly occurred at that time.

8 So that is what I meant by "impeachment." I
9 did not mean by "impeachment" that I was going to
10 offer it into evidence. I'm not going to offer it
11 into evidence. I'm going to use it with this
12 witness in the form of a recollection for the
13 purposes of impeachment. That is what I meant.

14 I don't -- I don't see any way that I could
15 have gotten it admitted at that point in time, so it
16 wasn't an admission or admitting an exhibit into
17 evidence to impeach. It was a form of impeachment
18 of this witness.

19 This witness just testified to certain facts
20 that are inconsistent with that report. I would
21 assume that if the witness is given an opportunity
22 to review it, he would correct those statements.
23 That is what I meant by "impeachment."

24 THE COURT: He has to testify first, because
25 you want to refresh his recollection, that he does

1 have a lack of memory of the events that occurred
2 that day. Has he testified so?

3 MR. BENITEZ: To an extent he has testified
4 that he doesn't have recollection. He doesn't
5 recall having written a report and he doesn't recall
6 the exact date. So in that sense he has got a lack
7 of recollection.

8 But I was in the process of just starting this
9 and just asking him by the date. That is all I was
10 doing. I was --

11 THE COURT: You didn't do that. That is what
12 started this problem. You injected your theory that
13 somehow he wasn't remembering the facts correctly on
14 the record in your question to the witness, not just
15 about the date. So we are back full circle to where
16 this conversation started, shifting sands.

17 MR. BENITEZ: Judge, but I -- my sands aren't
18 shifting. This has been my position all along. I
19 don't want to admit it into evidence. I intend to
20 use it in the form of refreshing his recollection so
21 the testimony can be accurate.

22 THE COURT: Lay the predicate now.

23 MR. BENITEZ: Yes, Your Honor.

24 BY MR. BENITEZ:

25 **Q. Mr. Kassa, do you recall the incident that you**

1 just described to the jury?

2 A. Yes.

3 Q. Okay. Did you -- do you recall whether you did a
4 report or not?

5 A. I do not.

6 Q. Excuse me?

7 A. I do not.

8 Q. Would it refresh your recollection if I showed
9 you -- and I would -- not this one.

10 THE COURT: Lay the predicate.

11 BY MR. BENITEZ:

12 Q. And if I showed you the report, would that refresh
13 your recollection?

14 A. It may.

15 Q. And with respect to the incident, have you taken
16 any notes of the incident other than your police report,
17 if you did one? Have you taken any individual notes? Did
18 you take any notes as a result of your encounter with Mike
19 Myers?

20 A. I don't believe so.

21 Q. Okay. So any notes that you would have taken
22 would have been taken and used to compose your incident
23 report, correct?

24 A. That would typically be the case, yes.

25 Q. So have you refreshed -- have you reviewed any

1 notes that you might have made prior to today's date
2 regarding this incident, prior to testifying today?

3 A. No.

4 Q. Have you reviewed your incident report from the
5 sheriff's office prior to today?

6 A. I don't know if you are asking me if there is an
7 incident report or if I reviewed it, because I don't know
8 that there is.

9 Q. Okay. So then you haven't reviewed one recently?

10 A. I have not reviewed anything. No.

11 Q. Okay. So if I showed you Defense Exhibit NN --
12 let me show you Exhibit NN.

13 THE COURT: For what purpose, Counsel?

14 MR. BENITEZ: And then I will show it to him.

15 THE COURT: For what purpose, Counsel?

16 MR. BENITEZ: To refresh his recollection.

17 THE COURT: As to what?

18 MR. BENITEZ: As to the fact that, one, he did
19 a report regarding this incident at this point,
20 because that is all we've been able to establish.

21 THE COURT: That is it. That's right.

22 MR. BENITEZ: So we do a report. Then I would
23 walk back up here.

24 THE COURT: Walk up and show him the report.

25 MR. BENITEZ: Okay.

1 BY MR. BENITEZ:

2 Q. Do you recognize that as your incident report
3 for --

4 THE COURT: No, sir. He is refreshing his
5 recollection.

6 MR. BENITEZ: I apologize, Your Honor.

7 THE COURT: Do you recognize that, sir? Do you
8 need your glasses?

9 THE WITNESS: I do, and I don't have them.

10 MR. CHASE: Sir, may I approach?

11 THE COURT: You may.

12 THE WITNESS: Thank you.

13 BY MR. BENITEZ:

14 Q. Have you reviewed Defense Exhibit NN for
15 identification?

16 A. Yes.

17 Q. And does that refresh your recollection of the
18 incident?

19 THE COURT: Sir, no. That is exactly what you
20 want, but no. He has not testified to a lack of
21 memory about the incident. Second time,
22 Mr. Benitez.

23 BY MR. BENITEZ:

24 Q. Does that refresh your memory as to the date of
25 the incident?

1 MR. BENITEZ: No, sir. What did you hand him
2 the report for? You asked him the question, Would
3 it refresh your recollection as to whether you
4 prepared a report or not? That is the question.

5 BY MR. BENITEZ:

6 **Q. Does that refresh your -- does Exhibit NN refresh**
7 **your memory with respect to whether or not you did a**
8 **report on that day?**

9 A. Yes, sir.

10 THE COURT: What is your refreshed
11 recollection?

12 THE WITNESS: That I did, in fact, write a
13 report.

14 THE COURT: Okay. Next question.

15 BY MR. BENITEZ:

16 **Q. And has your memory been refreshed with respect to**
17 **the incident?**

18 THE COURT: No, sir.

19 MR. BENITEZ: Well, I --

20 BY MR. BENITEZ:

21 **Q. Do you know the date of the incident?**

22 A. I would believe it to be the date of the report.

23 **Q. Okay. And let me show you --**

24 THE COURT: What is that date, sir? If you
25 know, what is that date? You are going to need

1 those glasses.

2 THE WITNESS: The report is dated January 16,
3 2007.

4 BY MR. BENITEZ:

5 **Q. Okay. And --**

6 THE COURT: He is going to need the glasses.
7 What is the date of the report, sir?

8 THE WITNESS: January 16th, 2007.

9 THE COURT: Use the glasses, please.

10 THE WITNESS: Yes.

11 THE COURT: I don't know about this date, sir.

12 THE WITNESS: I'm sorry. I'm looking at the
13 narrative. The report is dated January 16th, 2008.

14 THE COURT: Next question.

15 BY MR. BENITEZ:

16 **Q. Did that --**

17 MR. BENITEZ: Well, I assume that has refreshed
18 his recollection with respect to the date.

19 THE COURT: It has.

20 BY MR. BENITEZ:

21 **Q. Does -- has your memory when -- been refreshed --**
22 **or you indicated that you were on site and you saw Mike**
23 **Myers do certain things that alerted you to him; is that**
24 **correct?**

25 A. I stated that --

1 MR. CHASE: Judge, am I allowed to object?

2 THE COURT: Yes.

3 MR. CHASE: I will object, improper
4 impeachment.

5 THE COURT: The objection is sustained. He has
6 not testified to a lack of memory.

7 BY MR. BENITEZ:

8 **Q. Sir, isn't it a fact that on January 16, 2008, at**
9 **about 12:13 hours you received a call for services of a**
10 **disturbance?**

11 A. Based on the report, that's correct.

12 **Q. I mean --**

13 THE COURT: Mr. Benitez, I just don't
14 appreciate what you are trying to get to with the
15 nature of the questions that you are asking. They
16 are impermissible. You are using a report that is
17 hearsay and putting it in front of the jury. And I
18 don't know any clearer way to explain it.

19 We have now come full circle again to where I
20 was at the Bench, which is your use of this -- the
21 only things that he has testified that he cannot
22 remember are whether he did a report, and the date
23 that the incident occurred. You have now refreshed
24 his recollection of that.

25 Is that significant -- is the date significant

1 to the facts as in the grand scheme of things that
2 the jury is to hear? Does that matter? If you
3 think it does, I want you to refresh his
4 recollection in front of the jury about that fact.
5 But until he testifies that he does not have an
6 accurate memory of what occurred, you cannot use it
7 to refresh his recollection or to impeach him.

8 MR. BENITEZ: Judge, what I'm trying to do
9 is -- he has given a version of what he recollects
10 that is inconsistent with the report. I'm going to
11 go line by line in the report and ask him, Did that
12 happen?

13 THE COURT: So you are going to publish the
14 report?

15 MR. BENITEZ: No.

16 THE COURT: Yes, you are, because you are going
17 line by line reading it in front of the jury. That
18 is publishing.

19 MR. BENITEZ: But Judge, they are not going to
20 know necessarily that I'm going through the report
21 until I get out from behind the podium and walk over
22 there to let him see it.

23 THE COURT: After you have refreshed his
24 recollection as to the date, they will know that you
25 are in possession of a report.

1 MR. BENITEZ: Judge, he has testified almost
2 totally different than his report.

3 THE COURT: So you want to impeach him. We're
4 back full circle again.

5 MR. BENITEZ: Right, impeach him by having him
6 recollect what he wrote.

7 THE COURT: No, sir.

8 MR. BENITEZ: No?

9 THE COURT: No, sir.

10 MR. BENITEZ: Okay.

11 THE COURT: Have you got a case on that? I'm
12 open to case law. I've been open to case law this
13 entire trial, Mr. Benitez.

14 MR. BENITEZ: I didn't know this was going to
15 come up.

16 THE COURT: Mr. Benitez, I'm sorry.
17 Respectfully, the Court is growing weary of, I
18 didn't know this was going to happen, or, I wasn't
19 prepared for this.

20 This case is eight years in the making. This
21 witness has been disclosed for at least a day, I
22 think two, in response to the issues that you
23 elicited in testimony from your client and from an
24 independent witness, Mr. Nicks. And here we are.

25 MR. BENITEZ: I never thought it was going to

1 be a problem to refresh this man's recollection.
2 But I never even thought of it before today, Judge,
3 before this happened. Because I never thought he
4 would get on the stand and say something totally
5 different than what was in his report.

6 I assume he would have tracked at least his
7 report so the report would not have been
8 significant. But in this case, I'm faced with a
9 witness that his story doesn't match his own report
10 from 2008. And I'm trying to get him to refresh his
11 recollection so he can accurately recite his
12 testimony to the jury. And that is all I'm trying
13 to do.

14 It is a form of impeachment, because he has
15 already made a statement as to what happened that is
16 inconsistent with his incident report. But it is
17 just a matter of just refreshing his recollection.
18 I'm sure the witness will go ahead and adopt his
19 prior testimony. That will then be before the jury.
20 If not, just because the incident report is not
21 under oath, I don't intend to elicit it or move it
22 into evidence.

23 THE COURT: You are going to publish the entire
24 thing in front of the jury by reading from it.

25 MR. BENITEZ: I read -- I read the date and I

1 read -- I might have read the first sentence
2 asking -- if I was asking a question. Without the
3 jury really looking at me necessarily as opposed to
4 the witness, and with a podium that doesn't show
5 that, with the permission of the Court to have it up
6 here --

7 THE COURT: There is a reason that the rule
8 requires that the witness testify that he does not
9 have a present recollection. You are not complying
10 with 90.613. So what rule of the evidence code do
11 you intend to offer this line of questioning under?

12 MR. BENITEZ: It would be that rule -- that
13 rule of evidence, Judge, just to refresh the
14 witness's testimony. I don't see any other way.

15 THE COURT: When a witness testifies that he or
16 she has no present recollection or memory of a fact,
17 counsel may show the witness a writing or other
18 object to attempt to refresh the witness's
19 recollection, because the witness has demonstrated a
20 need to have his or her memory refreshed. That is
21 the prerequisite.

22 There is no demonstrated need. You cannot use
23 it in that form or fashion. And if you ask another
24 question related to the substance of that report
25 without proper foundation or predicate for it, I'm

1 going to stop this trial and we're going to talk
2 about an appropriate sanction.

3 I have cautioned you previously. You have
4 disobeyed my order. It is clear to me, candidly,
5 that I don't think you intend to comply with the
6 Court's order by virtue of the proffer that we've
7 now made here where you intend to continue to
8 attempt to elicit this testimony, in contravention
9 to the rules of evidence and in contravention to the
10 Court's order. We're just not going to do it.

11 MR. BENITEZ: I just want clarification so I
12 know what not to do. You do not want me to use
13 Defense Exhibit NN during my questioning of this
14 witness, correct?

15 THE COURT: No, sir. I have not said that. I
16 don't know where you get that from, Mr. Benitez.

17 MR. BENITEZ: Then --

18 THE COURT: If you need to refresh his
19 recollection as to the date, if that is significant
20 to you, you may use the report to refresh his
21 recollection as to the date, and now apparently to
22 the fact that he prepared a report.

23 MR. BENITEZ: In order to avoid what the Court
24 perceives to be possibly improper, can I just -- now
25 that he has been refreshed outside the presence of

1 the jury, can I just ask him whether -- can I do it
2 without showing the exhibit, since the Court wants
3 me to --

4 THE COURT: I don't care. That is a proper
5 purpose for the use of the exhibit, Mr. Benitez. I
6 am not here to prevent you from doing things that
7 are proper. You can choose strategically how you
8 choose to do that. I'm not here to try your case
9 for you. But you are not going to parade it around
10 and ask questions about impeachment relative to
11 statements made earlier to statements made today
12 until there is an appropriate foundation laid for
13 impeachment.

14 MR. BENITEZ: And can I use the exhibit myself
15 to read from it to myself, and then to formulate a
16 question and ask him a question from me?

17 THE COURT: About what?

18 MR. BENITEZ: About anything, like for
19 instance --

20 THE COURT: About the substance of what
21 occurred that day?

22 MR. BENITEZ: Yes.

23 THE COURT: For what purpose?

24 MR. BENITEZ: To cross-examine the witness as
25 to the truth of the matter.

1 THE COURT: So you want to impeach him with his
2 prior statement.

3 MR. BENITEZ: No, no. I'm saying are you
4 allowing me to make -- to ask the witness a
5 statement like, Isn't it a fact that you were
6 already on site -- or isn't it a fact that you were
7 not on site when Mike -- when you were called to the
8 incident involving Mike Myers?

9 THE COURT: And then how do you intend to do
10 anything with that statement?

11 MR. BENITEZ: I'm hoping that he will say that
12 that's correct and correct himself.

13 THE COURT: No. You are not going to use the
14 substance of the document in an attempt to impeach
15 him without laying a proper foundation for doing so.

16 MR. BENITEZ: Okay. With respect to that in
17 particular, can I ask the witness --

18 THE COURT: Mr. Benitez, I don't understand
19 this process that we're engaged in. I don't coach
20 other lawyers through how to try a case. Why am I
21 coaching you?

22 MR. BENITEZ: It is not a matter of coaching,
23 Judge. I just want to make sure I follow your
24 instructions to a T. I don't want to deviate the
25 slightest.

1 THE COURT: I have told you clearly what you
2 may use the report for, and anything else that you
3 can lay an appropriate foundation for. Okay. You
4 are the lawyer. Do it. Let's go. Bring the jury
5 back in.

6 (Jury in.)

7 THE COURT: Thank you. You may be seated. You
8 may proceed, Counsel.

9 BY MR. BENITEZ:

10 **Q. Did -- the incident that you referred to, did that**
11 **take place -- do you remember the year that that took**
12 **place in?**

13 A. I believe it was 2007.

14 **Q. Okay. Do you remember if you wrote an incident**
15 **report back in --**

16 MR. CHASE: Objection, relevance.

17 THE COURT: Sustained. Lay the foundation,
18 Counsel.

19 MR. BENITEZ: Yes, Your Honor.

20 BY MR. BENITEZ:

21 **Q. If you wrote -- if you had written an incident**
22 **report back in -- at the time of the incident with**
23 **Mr. Mike Myers, would that report contain the date in**
24 **which the incident occurred?**

25 A. It should.

1 Q. Okay. And if you viewed that report, would that
2 refresh your memory with respect to the date?

3 A. It would.

4 Q. And you don't have any independent recollection of
5 that date as you sit here today, correct?

6 A. I'm sorry?

7 Q. You don't have any independent recollection of
8 that date as you sit here today, correct?

9 A. Independent recollection? No. It has been 10
10 years.

11 MR. BENITEZ: May I approach the witness, Your
12 Honor?

13 THE COURT: You may.

14 BY MR. BENITEZ:

15 Q. And sir, I want to show you what has been marked
16 for identification as Exhibit NN. Can you please review
17 it? And there is no question pending. Don't say
18 anything. May I have the exhibit?

19 A. I have a --

20 THE COURT: Don't say anything, sir. Are you
21 complete with the exhibit? Are you finished with
22 the exhibit, sir?

23 THE WITNESS: Yes.

24 THE COURT: Just hand it to Counsel, please.

25 BY MR. BENITEZ:

1 **Q. Having reviewed Defense Exhibit NN, has your**
2 **memory been refreshed?**

3 A. No.

4 MR. CHASE: As to what?

5 MR. BENITEZ: As to the date.

6 THE WITNESS: No, it has not.

7 BY MR. BENITEZ:

8 **Q. Do you have -- you have already testified in front**
9 **of the jury with respect to you being on site at the time**
10 **that you noticed Mike Myers, correct?**

11 MR. CHASE: Objection. Your Honor, may we
12 approach?

13 THE COURT: Approach, please.

14 (At Bench:)

15 MR. CHASE: And there he goes.

16 THE COURT: What was the question, please?

17 MR. CHASE: You just testified about being on
18 site in the manner -- he said one of the things he
19 wanted to impeach him with was that he was called
20 there, and that was the predicate question for the
21 next question.

22 MR. BENITEZ: No.

23 THE COURT: I don't know that until he asks the
24 next question. That is fine.

25 MR. BENITEZ: Am I okay?

1 THE COURT: So far, although he did not testify
2 to a lack of memory.

3 MR. BENITEZ: I can't -- Judge, I can't use
4 that, so I can't --

5 THE COURT: Not for impeachment. I'm not
6 saying you can't use it for impeachment. I'm
7 saying, Counsel, if you believe you are going to use
8 it for impeachment, you are going to have to lay the
9 appropriate predicate and tell me what the rule of
10 evidence is that you are proceeding under.

11 (Open court:)

12 MR. BENITEZ: May I, with the permission of the
13 Court, have the court reporter read back the
14 question, please?

15 COURT REPORTER: Sure.

16 (Requested material was read.)

17 THE WITNESS: Yes.

18 BY MR. BENITEZ:

19 **Q. And do you have an independent recollection of**
20 **that fact?**

21 A. I'm sorry?

22 **Q. Do you have an independent recollection of that**
23 **fact at this time?**

24 A. Referring to?

25 **Q. Your statement that Mike -- that you were on site**

1 at the time that you noticed Mike Myers and became
2 involved with Mike Myers.

3 A. I recall that. Yes.

4 MR. BENITEZ: If I may have a second, Your
5 Honor.

6 THE COURT: You may.

7 BY MR. BENITEZ:

8 Q. Isn't it a fact, sir, that you were not on site at
9 the time?

10 MR. CHASE: Objection, improper impeachment.

11 Sir, it's --

12 THE COURT: Finish the question, please.

13 BY MR. BENITEZ:

14 Q. Isn't it a fact that on January 16, 2008, is when
15 you came in contact with Mr. Mike Myers?

16 MR. CHASE: Objection, improper impeachment.

17 THE COURT: Overruled. Go ahead.

18 BY MR. BENITEZ:

19 Q. Is that correct?

20 A. I have concerns about the date.

21 Q. Okay. But you only -- but you have only been in
22 contact with Mike Myers once, when you actually handcuffed
23 him and then released him, correct?

24 MR. CHASE: Asked and answered, Judge.

25 THE COURT: Sustained.

1 BY MR. BENITEZ:

2 Q. Isn't it a fact that you got -- you were off site
3 at the time that you got a call to respond to Highway 46
4 Holdings, LLC, on January 16, 2008?

5 MR. CHASE: Objection, improper impeachment.

6 THE COURT: Approach, Counsel.

7 (At Bench:)

8 MR. BENITEZ: I am not using that report,
9 Judge. I'm using my client's testimony.

10 THE COURT: Your client knows he was off site.

11 MR. BENITEZ: Yes, he does, Judge. He has had
12 the report for 10 years.

13 THE COURT: That is his knowledge based on
14 hearsay. Does he have personal knowledge of the
15 fact?

16 MR. BENITEZ: He has personal knowledge that he
17 wasn't on site, that he responded while -- and Brad
18 Nicks also testified that a deputy came from off
19 site. That testimony is already before the jury.

20 MR. CHASE: It is straight out of the report.
21 He is just going down the report. He just won't
22 stop.

23 MR. BENITEZ: I will throw away the report,
24 Judge. I know what happened so I want to be able to
25 cross-examine with the testimony.

1 THE COURT: You are cross-examining with facts
2 at this point that are in evidence from your client
3 and from Brad Nicks only, right? Is that what you
4 are saying?

5 MR. BENITEZ: Brad Nicks testified --

6 THE COURT: Is that what you are saying, yes or
7 no?

8 MR. BENITEZ: Yes. I'm not sure how much
9 detail my client got into -- yeah, my client also --
10 my client and Brad Nicks.

11 THE COURT: So yes?

12 MR. BENITEZ: Yes. But Judge, I've got to find
13 out where I'm standing here, because I'm ready to
14 sit down and not do anything with this witness, and
15 that is not fair to my client. I know -- I have
16 evidence of what happened that day. This witness --

17 THE COURT: Do you know how to use it? Then
18 use it the way that the rules allow you to, and
19 let's move on.

20 (Open court:)

21 BY MR. BENITEZ:

22 Q. You work for -- excuse me. Back in 2007, you
23 worked for Donald Hachenberger, correct?

24 A. I worked for the Seminole County Sheriff's Office.

25 Q. Okay. Did you work from time to time for

1 **Donald Hachenberger?**

2 A. That is not correct.

3 **Q. So you haven't worked off duty for Donald**
4 **Hachenberger?**

5 A. Sir, the way that any off-duty --

6 MR. BENITEZ: I'm going to object to his
7 response, Judge, and ask the Court to instruct him
8 to answer yes or no.

9 THE COURT: Sir, did you work directly for
10 Donald Hachenberger? That is the question.

11 THE WITNESS: No, sir.

12 BY MR. BENITEZ:

13 **Q. Did you work directly with Highway 46 Holdings,**
14 **LLC?**

15 A. No, sir.

16 **Q. When you are saying directly, are you saying that**
17 **you were working off duty at Highway 46 Holdings, LLC, but**
18 **you were indirectly working as a deputy sheriff at the**
19 **time?**

20 MR. CHASE: Misstates evidence. He didn't say
21 "working."

22 THE COURT: Overruled. He is asking the
23 question. Is that what you are saying, sir?

24 THE WITNESS: One more time, please.

25 BY MR. BENITEZ:

1 **Q. Let me do it better. Tell me what you mean by not**
2 **working for Highway 46 Holdings, LLC.**

3 A. Any vendor has an opportunity to contract with the
4 sheriff's office for security personnel, which would be
5 deputies in an off-duty capacity. The deputies at that
6 time are working for the agency. The vendor is contracted
7 with the sheriff's office. The deputies are paid by the
8 sheriff's office. I was working for the sheriff's office.

9 **Q. Okay. But not for a function with the sheriff's**
10 **office at that time? You were working off duty, correct?**

11 A. Incorrect.

12 **Q. Okay.**

13 A. My off-duty security detail is for the sheriff's
14 office on behalf of whomever requests that service.

15 **Q. Okay. So what were your functions when you**
16 **were -- when you were working for Highway 46 Holdings**
17 **through the office? What were your duties?**

18 A. To provide on-site security services.

19 **Q. And what does that mean?**

20 A. That means to protect the property as well as to
21 prevent any incidents of violence and anything of that
22 nature.

23 **Q. How often -- back in 2007, how often would you**
24 **work at Highway 46 Holdings, LLC?**

25 A. It varied from week to week depending on the needs

1 of the vendor.

2 Q. Okay. After this incident that we've been
3 referring to where you handcuffed and then unhandcuffed
4 Mike Myers, were you allowed to do any additional off-duty
5 work for Highway 46 Holdings?

6 A. Yes.

7 Q. For how long after that?

8 A. I don't recall. Years.

9 Q. So you continued doing work for Highway 46
10 Holdings for years after 2007?

11 A. Yes.

12 Q. And when did you stop doing work for Highway 46
13 Holdings, LLC?

14 A. I believe it was when they ceased business.

15 Q. And when was that?

16 A. Active business. I don't recall.

17 Q. Do you have a year?

18 A. Specifically -- I would only be guessing at this
19 point.

20 Q. Okay. When you came in contact with Mike Myers on
21 that date that you referenced where you handcuffed him and
22 unhandcuffed him, was anybody else there with Mike Myers
23 at that time?

24 A. There were many people on scene. I don't know
25 specifically.

1 **Q. I'm asking specifically, was Mike Myers talking to**
2 **anyone in particular?**

3 A. I can't say that I can answer your question
4 specifically. There were multiple individuals present at
5 the time.

6 **Q. Multiple individuals present? Do you mean people**
7 **that were visiting the site?**

8 A. There were employees. There were staff members of
9 Highway 46 Holdings.

10 **Q. Okay.**

11 A. There was myself. There was a variety of
12 different people.

13 **Q. And was Donald Hachenberger there?**

14 A. Yes.

15 **Q. Was he there at the time that you noticed Mike**
16 **Myers for the first time?**

17 A. I don't recall specifically when I first saw
18 Mr. Hachenberger. It was through the course of that
19 incident.

20 **Q. So you don't know if he was with you at the time**
21 **that you first observed -- observed Mike Myers?**

22 A. I believe he was in the area. Nobody was
23 necessarily with me.

24 **Q. Okay. Your testimony is you, out of wherever you**
25 **were staying, reacted and approached Mike Myers, correct?**

1 A. I reacted based on my training. Yes.

2 **Q. And when you approached Mike Myers, was he by**
3 **himself walking a certain direction or standing still or**
4 **what?**

5 A. He was moving about that general area on foot.

6 **Q. Okay. By himself?**

7 A. I can't say who each of the individuals that were
8 in and around that area were. There were many I didn't
9 recognize.

10 **Q. But I want to find out who was with him. Was**
11 **anybody with him?**

12 MR. CHASE: Objection, asked and answered.

13 THE WITNESS: I can't answer that.

14 THE COURT: Overruled.

15 BY MR. BENITEZ:

16 **Q. Who was in charge of the complex when you were**
17 **there?**

18 MR. CHASE: Objection, foundation.

19 THE COURT: Sustained.

20 BY MR. BENITEZ:

21 **Q. On the date that you handcuffed and then**
22 **unhandcuffed Mike Myers, who was in charge of the complex?**

23 MR. CHASE: Objection, foundation.

24 THE COURT: Sustained.

25 BY MR. BENITEZ:

1 **Q. Who was the head person of Highway 46 Holdings,**
2 **LLC?**

3 MR. CHASE: Objection, foundation.

4 THE COURT: Just a second, Counsel.

5 MR. CHASE: Sorry, sir.

6 BY MR. BENITEZ:

7 **Q. At the time that you approached Mike Myers on that**
8 **date --**

9 MR. CHASE: Objection, foundation.

10 THE COURT: Sustained.

11 BY MR. BENITEZ:

12 **Q. Do you know the employees at Highway 46 Holdings,**
13 **LLC?**

14 A. I was familiar with some of them, not all.

15 **Q. Okay. And who were you familiar with?**

16 A. Several private security individuals, several of
17 the -- what I would call restaurant staff. There was a
18 manager I believe on scene by the name of Brad. I don't
19 recall the last name.

20 **Q. Brad. What was -- you don't know his last name?**

21 A. I don't recall his last name; and Mr. Hachenberger
22 and a couple of the wait staff, but I don't recall their
23 names. I recognize them visually.

24 **Q. Okay. So you would recognize Mr. Hachenberger,**
25 **correct?**

1 A. Yes, sir.

2 Q. And Brad whatever his last name is, you would
3 recognize him?

4 A. Yes, sir.

5 Q. Does the name "Brad Nicks" sound familiar?

6 A. Yes.

7 Q. And who else would you recognize on that day, the
8 day that you handcuffed and then released Mr. Mike Myers
9 that works for Highway 46 Holdings, LLC?

10 A. A security individual by the name of Mr. Namath
11 (ph), I believe it was.

12 Q. Anybody else?

13 A. I don't recall offhand.

14 Q. Was the security person present at the time that
15 you approached Mike Myers on the date that he was
16 handcuffed and unhandcuffed?

17 A. Yes.

18 Q. He was present with you or -- or in the area?

19 A. He was on site.

20 Q. Did he have -- where was he in relationship to
21 Mike Myers?

22 A. Mr. Myers was near an area of the complex that was
23 a live entertainment venue, and the security individual
24 was near the parking area of the facility.

25 Q. And how many feet would that security person be

1 **from Mike Myers?**

2 A. Seventy feet maybe.

3 **Q. And did the security person that -- did he have**
4 **anything to do with you approaching Mike Myers?**

5 A. He provided me some information about what had
6 been occurring prior to my witnessing.

7 **Q. So he gave you some information regarding Mike**
8 **Myers?**

9 A. Regarding the incident.

10 **Q. What incident?**

11 A. The disturbance.

12 **Q. What disturbance?**

13 A. The one that I described at the beginning of my
14 testimony.

15 **Q. Okay. Can you describe it again?**

16 MR. CHASE: Objection, asked and answered.

17 THE COURT: Go ahead.

18 THE WITNESS: That there was a situation that
19 was escalating. There were concerns for safety
20 because of the threatening behavior of Mr. Myers at
21 the time verbally, and his physical demeanor. I
22 witnessed that myself for a period of time, and
23 ultimately approached him.

24 BY MR. BENITEZ:

25 **Q. For how long a period of time did you witness**

1 **that?**

2 A. I would say 10, 15 minutes.

3 **Q. So while this conduct was going on for 10 or 15**
4 **minutes, you were just simply watching?**

5 A. I was observing the situation to determine what
6 appropriate action would be needed, if any.

7 **Q. Did anybody talk to you during those 10 or 15**
8 **minutes?**

9 A. I don't believe, besides the security personnel,
10 anybody else spoke to me.

11 **Q. The security personnel was 70 feet away from Mike**
12 **Myers in the parking area?**

13 A. I'm only estimating.

14 **Q. Okay. But you were on the other side of Mike**
15 **Myers, correct?**

16 A. I'm sorry?

17 **Q. Were you standing on the other side of Mike Myers?**

18 A. No, sir. I was in the parking area as well.

19 **Q. So were you standing next to each other?**

20 A. I was -- can you identify who you are asking me --
21 who I was standing next to?

22 **Q. Security, Namath.**

23 A. We -- yes. We did make contact and he spoke to
24 me.

25 **Q. Okay. So you were making contact with him and**

1 talking to him for about 10 or 15 minutes before you
2 approached Mike Myers?

3 A. No, sir. That is not what I stated.

4 Q. Okay. What is it that you stated?

5 A. I stated I received information from the security
6 person about what had been occurring. I observed the
7 situation for a period of time. And then based on my
8 observations, I approached Mr. Myers.

9 Q. Okay. Now, was Mr. Hachenberger there talking to
10 Mike Myers right as soon as you were approaching Mike
11 Myers?

12 A. I can't be certain that he was actually speaking
13 to Mr. Hachenberger at that time.

14 Q. Was Mr. Hachenberger on site at that time?

15 A. Yes, sir.

16 Q. Was he next to you at that time?

17 A. No.

18 Q. Where was he?

19 A. If I recall correctly, he was near the general
20 area of the live entertainment.

21 Q. And who is "he" that you are referring to?

22 A. Mr. Hachenberger as well as the majority of the
23 other individuals that were on site.

24 Q. I thought you had mentioned that that's where Mike
25 Myers was located.

1 A. That's correct.

2 **Q. So Mike Myers was next to Mr. Hachenberger?**

3 A. They were in the same general vicinity.

4 **Q. Were they talking to each other?**

5 A. I don't -- I recall observing Mr. Myers yelling,
6 using words that were threatening in nature. His physical
7 demeanor was threatening in nature. He was very
8 aggressive in general. As I observed him for a period of
9 time, it appeared to be escalating. That is when I made
10 contact with Mr. Myers.

11 **Q. Who was Mike Myers shouting at?**

12 A. I'm not sure I know. Anybody that was in the
13 area, from what I could see.

14 **Q. So anybody in the area, he was shouting to?**

15 A. He was very upset.

16 **Q. Okay. You don't remember what he was saying?**

17 A. Verbatim, sir, no, I don't.

18 **Q. And was he shouting at -- was anybody -- withdraw
19 that.**

20 **Was anybody talking to him when you approached
21 him?**

22 A. There were several other individuals trying to
23 calm him down as well.

24 **Q. And who are those individuals?**

25 A. I don't know.

1 Q. Did Mr. Hachenberger direct you to place Mike
2 Myers in handcuffs?

3 A. No, sir.

4 Q. Did Mr. Hachenberger advise you that he wanted
5 Mike Myers out of the property?

6 A. Yes, sir.

7 Q. Did Donald Hachenberger instruct you to issue a
8 trespass warning to Mike Myers?

9 A. Yes, sir.

10 Q. And Mike Myers was handcuffed for approximately 15
11 to 30 minutes?

12 A. I never stated that.

13 Q. What -- how long did you have Mike Myers
14 handcuffed?

15 A. It was a relatively short period of time.

16 Q. Can you tell the jury how long?

17 A. I would estimate under 10 minutes.

18 Q. And during that time, Donald Hachenberger is there
19 with you and Mike Myers, correct?

20 A. Yes, sir.

21 Q. And Brad Nicks, did you see him that day?

22 A. Yes, sir.

23 MR. CHASE: Objection, asked and answered.

24 THE COURT: We've covered this.

25 MR. BENITEZ: Excuse me, Your Honor?

1 THE COURT: I said, "We've covered this."

2 MR. BENITEZ: May I have a second with my
3 client?

4 THE COURT: You may.

5 MR. BENITEZ: Nothing further, Your Honor.

6 THE COURT: Counsel, approach.

7 (At Bench:)

8 THE COURT: I want to clear up something I may
9 have said that I think may have been an incorrect
10 statement of the law. And you are welcome to adjust
11 as you wish.

12 I may have said something to the effect that
13 because this was not a sworn statement, it could not
14 be used for impeachment purposes. That is not
15 accurate. Unsworn statements can be used if
16 properly authenticated for impeachment purposes. I
17 want to be clear about that.

18 So if that changes how you wish to use the
19 document -- I'm telling you because I don't want you
20 to walk out of here without the opportunity.

21 MR. BENITEZ: Judge, I'm paranoid to the hilt
22 with respect to how to do this. In 40 years of
23 doing this, I'm not sure I know anything now. I
24 don't want to offend the Court and I don't want to
25 do anything --

1 THE COURT: I'm telling you now and giving you
2 the opportunity to fix anything you want to fix.

3 MR. BENITEZ: I want to do it right. Can I
4 cite -- can I refer to it in --

5 THE COURT: I can't tell you how to do it,
6 Counsel. You have to do it. I'm back to where I
7 began which is if you believe there is a way to do
8 it under the rules, use the rule. Tell me the rule.
9 Tell me the basis that you want to use this to do
10 that with. This business of my telling you how to
11 do this is stopping.

12 MR. BENITEZ: Probably what -- I ended up doing
13 it the way I thought I should do it. But I just
14 want to make sure at this point, having been
15 cautioned by the Court and indicated that the Court
16 was concerned about even holding sanctions against
17 me for doing this stuff -- I want to make sure I
18 don't step on the Court's foot.

19 THE COURT: For disobeying my orders, that's
20 correct.

21 MR. BENITEZ: I don't mean to disobey.

22 THE COURT: It is intentional. You can't
23 continue to disobey and say, Well, Judge, I'm sorry,
24 Judge, I'm sorry I did that but it is unintentional.
25 That just doesn't fly and it is not credible. Even

1 if you weren't (inaudible) you want to use it, use
2 it. I'm just telling you, you do it pursuant to the
3 rule. Tell me what the rule is and you do it
4 appropriately. That is all, okay?

5 MR. BENITEZ: Judge, will you consider allowing
6 it to be admitted into evidence?

7 THE COURT: No. There is no circumstance that
8 I'm aware of unless you tell me there is a basis for
9 the admission of that into evidence.

10 MR. BENITEZ: Okay. Can I --

11 THE COURT: Can you tell me a basis for that?

12 MR. BENITEZ: Not right now, I can't; just --
13 just to impeach his testimony because it is totally
14 different from the affidavit.

15 THE COURT: It is an unsworn statement. How is
16 it admissible?

17 MR. BENITEZ: I withdraw that, Judge. With
18 respect to impeaching him with that unsworn
19 statement, can I refer -- because you have
20 instructed me not to refer --

21 THE COURT: No. What I've told you is don't do
22 it without laying the appropriate foundation. That
23 is what I've told you multiple times now.

24 MR. BENITEZ: Can I read from the sworn
25 statement if I lay the proper foundation?

1 THE COURT: I'm not here to coach you through
2 your examination. If you believe that you have an
3 appropriate methodology for doing it, I'm opening
4 the door for you to do that. But I'm not going to
5 coach you through it.

6 (Open court:)

7 THE COURT: Any further questions?

8 MR. BENITEZ: Yes, Your Honor. One second,
9 Your Honor. Nothing further, Your Honor.

10 THE COURT: Any cross, Mr. Shuker?

11 MR. SHUKER: No, thank you.

12 THE COURT: Thank you. Redirect?

13 MR. CHASE: Nothing further, Judge.

14 THE COURT: Any questions from our jury? If
15 you will just write that down, don't show it to
16 anybody, fold it up and hand it to the deputy,
17 please. Counsel, if you will approach, please.

18 (At Bench:)

19 THE COURT: The question is, When working for a
20 vendor that obtained your services through the
21 sheriff's office, do you have the same capacity to
22 behave as if you were working directly for the
23 sheriff's office? Any objections?

24 MR. CHASE: No.

25 MR. BENITEZ: No.

1 (Open court:)

2 THE COURT: Mr. Kassa, I'm going to direct the
3 question to you. If you will respond to the jury,
4 please.

5 When working for a vendor that obtained your
6 services through the sheriff's office, do you have
7 the same capacity to behave as if you were working
8 directly for the sheriff's office?

9 THE WITNESS: Yes, we do. In fact, that is an
10 obligation. We are working as a law enforcement
11 officer any time we're working in an off-duty
12 capacity for the sheriff's office.

13 THE COURT: Thank you, sir. Follow-up,
14 Mr. Chase?

15 MR. CHASE: No, Your Honor.

16 THE COURT: Mr. Benitez?

17 MR. BENITEZ: No, Your Honor.

18 THE COURT: Mr. Shuker?

19 MR. SHUKER: No, Your Honor.

20 THE COURT: Thank you, sir. You may step down.
21 Call your next witness, please.

22 MR. CHASE: Bill Beier.

23 THE COURT: Mr. Benitez, do you have that
24 exhibit for identification?

25 MR. BENITEZ: Yes, sir, I do.

1 THE COURT: Would you give that to the clerk,
2 please? Good afternoon, sir. I need you to pause
3 right there for just one moment. Raise your right
4 hand and face our clerk to be sworn.

5 THE CLERK: Do you swear or affirm the
6 testimony you shall give shall be the truth, the
7 whole truth and nothing but the truth?

8 THE WITNESS: I do.

9 THE COURT: Thank you, sir. If you will take
10 the witness stand. Watch your step up. That chair
11 spins but does not slide. Adjust the microphone so
12 it is comfortable.

13 MR. CHASE: May it please the Court.

14 THE COURT: You may proceed.

15 WILLIAM BEIER, having been first duly sworn,
16 testified under oath as follows:

17 DIRECT EXAMINATION

18 BY MR. CHASE:

19 **Q. Good afternoon, Mr. Beier.**

20 A. Good afternoon.

21 **Q. Could you please spell your last name for the**
22 **record, sir?**

23 A. B-E-I-E-R.

24 **Q. What do you do for a living, sir?**

25 A. I'm a CPA.

1 Q. How long have you known Don Hachenberger?

2 A. I have known Don Hachenberger for about 29 years.

3 Q. And since the time that you have known

4 Mr. Hachenberger, have you had occasion to work as a CPA
5 on any of his various businesses?

6 A. Yes, I have.

7 Q. Sir, do you -- are you involved with the financial
8 reporting for Highway 46 Holdings, LLC?

9 A. I am.

10 Q. And as such, do you have access to the financial
11 records of Highway 46 Holdings, LLC?

12 A. I do.

13 Q. Are you familiar with the -- a list of
14 reimbursements that were made to Mike Myers in the years
15 2005, 2006 and 2007?

16 MR. BENITEZ: Objection.

17 THE WITNESS: Yes.

18 MR. BENITEZ: Foundation and hearsay.

19 THE COURT: Approach, please.

20 (At Bench:)

21 MR. BENITEZ: This was not an expert witness,
22 and apparently he is about to testify back to some
23 records -- or this hearsay, and the records have not
24 been produced to me, have not been part of the
25 exhibit list, have never been shown to me, I

1 anticipate, because I haven't seen it unless
2 Mr. Chase can represent otherwise. And there is not
3 a proper foundation at this point.

4 MR. CHASE: I'm not going to enter them into
5 evidence. They are business records. We've talked
6 about it but we agreed that we're not going to have
7 any issues with authenticity. They are business
8 records. It is simply he reviews the financial
9 records. He is familiar with the documents. He has
10 reviewed the reports.

11 THE COURT: What is he going to testify to?

12 MR. CHASE: He is going to testify about the
13 reimbursements that I asked Mr. Myers about and he
14 said, No, I don't remember that, I don't remember,
15 and that is all. That is it. Do the records
16 reflect that Michael Myers was reimbursed X on that
17 date? And then I'll go to the next one and the next
18 one and that is it. There is no opinion testimony
19 so it is not an expert witness.

20 MR. BENITEZ: And Judge, if that is the case --
21 first of all, with respect to authenticity and so
22 on, this is with respect to exhibits that were
23 produced that we got a chance to look at and take a
24 look at, keep copies and so on. These records, I've
25 never, ever seen. If I look at his file right now,

1 that would be the first time I've ever seen them.

2 Second of all, with respect to relevancy, his
3 only claim is with respect to the David Chauvin
4 reimbursement which we didn't even touch on during
5 our case-in-chief if the Court recalls, not even
6 touch, not even one word as to that, which is now --
7 that doesn't give him a right to come back and open
8 up the door.

9 He asked about the reimbursement. He got an
10 answer. And reimbursements were rather -- were
11 rather not relevant, really, and not materially --
12 not material fact.

13 THE COURT: The main issue that you are calling
14 him for is to testify to the contents of a business
15 record?

16 MR. CHASE: No, sir. It is the specific
17 reimbursements. I'm not moving the records in.

18 THE COURT: I understand you are not moving the
19 records in. But what is the source of the data that
20 he is testifying to?

21 MR. CHASE: Business records, financial records
22 kept for the company for which he is a CPA.

23 THE COURT: I understand. The records have not
24 been produced during discovery?

25 MR. CHASE: That's correct.

1 THE COURT: The records would be the best
2 source of information. Otherwise, what he is going
3 to testify to is hearsay.

4 MR. CHASE: Okay.

5 THE COURT: So the objection is sustained.

6 MR. CHASE: Okay. Thank you, Judge.

7 (Open court:)

8 BY MR. CHASE:

9 **Q. Mr. Beier, your afternoon just opened up, sir. I**
10 **have no further questions.**

11 THE COURT: Cross?

12 MR. BENITEZ: No cross, Your Honor.

13 THE COURT: As to his name or relationship
14 with --

15 MR. BENITEZ: No, Your Honor.

16 THE COURT: Mr. Shuker?

17 MR. SHUKER: No, Your Honor.

18 THE COURT: It is just about 3:00. Let's go
19 ahead and take our midafternoon recess. We'll be in
20 recess for 15 minutes. During this time, all the
21 same cautions apply. Thank you.

22 (Brief recess.)

23 THE COURT: Are we ready to resume with
24 Mr. Hachenberger?

25 MR. CHASE: Yes, sir.

1 THE COURT: Mr. Hachenberger, take the stand,
2 please.

3 MR. CHASE: Judge, I believe we'll be calling
4 Nick Carlin in the morning. He is going to take a
5 while, probably could even be -- with the
6 cross-examination, that could be all day. I can't
7 see it being more than a day. So I think the charge
8 conference, we're going to need significant time,
9 for whatever that is worth.

10 THE COURT: We're down to very few counts at
11 this point. I don't see the charge conference
12 taking a significant amount of time.

13 MR. CHASE: With the verdict form and reducing
14 it and coming up with that -- okay. Just --

15 THE COURT: I'm optimistic. I agree it will
16 take us at least a couple hours. But thank you for
17 the insight.

18 MR. CHASE: Yes, sir.

19 THE COURT: Return the jury, please.

20 (Jury in.)

21 THE COURT: Thank you. You may be seated.
22 We're going to resume at this time the testimony of
23 Mr. Hachenberger. Counsel, you may inquire.

24 MR. CHASE: Thank you, Judge.

25 DIRECT EXAMINATION CONTINUED

1 BY MR. CHASE:

2 Q. Mr. Hachenberger, before lunch today we were
3 talking about the changes made to the Route
4 Entertainment -- Route 46 Entertainment District. I
5 believe we were looking at -- we were looking at this
6 exhibit.

7 MR. CHASE: Judge, can the jury see that?

8 THE COURT: Yes, sir.

9 BY MR. CHASE:

10 Q. Mr. Hachenberger, we were discussing these two
11 doors and the changes in particular to this part of the
12 building right here. Do you recall that?

13 A. I do. Yes.

14 Q. Were there any other changes with regard to this
15 area right here that were -- that you had to change after
16 Mr. Myers left?

17 A. Yes.

18 Q. Can you describe that for the jury, please?

19 A. When we added the bathrooms on this side right
20 here, in order to allow for handicap access, we had to
21 have -- we extended a -- a walkway and we had to put in a
22 handicap elevator.

23 Q. Anything else, sir?

24 A. We removed some over -- all these garage doors,
25 both the front and the back, were electric open and all

1 that stuff. We changed some of that around because we
2 basically just have bands that use that center area in
3 that -- and that stage area right now.

4 **Q. Anything else in that area, sir?**

5 A. That is all that I can recall.

6 **Q. If we -- so then we talked about this?**

7 A. Yes, sir.

8 **Q. And then we go inside the garage bar. There was**
9 **some testimony about some changes inside the garage bar.**
10 **Do you recall that testimony?**

11 A. I do.

12 **Q. What disagreements did you have with Mr. Myers**
13 **regarding the garage bar?**

14 A. We had a huge disagreement over the decor and I'm
15 going to call it brand identification of that garage bar.
16 The name --

17 **Q. Let me stop you. When you say "we," was it QMG --**
18 **what was the marketing company?**

19 A. The marketing company was QMG.

20 **Q. QMG. Were you including QMG when you said "we"?**

21 A. No. Mr. Myers and I --

22 **Q. Okay.**

23 A. -- specifically had a difference of opinion there.

24 **Q. Yes, sir.**

25 A. He had spent I don't know how much money having

1 slate put on the floor.

2 Q. Slate put on the floor?

3 A. Slate as in rock, very expensive rock, stones.

4 Q. Is slate typical to a garage?

5 A. Not in any garage I've ever had.

6 Q. Okay. So you had a difference of opinion with
7 Mr. Myers about the slate being put down and what else?

8 A. He had decorated the actual physical bar with the
9 same exact oak wood cabinets in the back bar, bar area,
10 bar top so that it looked identical to what was in the
11 saloon.

12 Q. And so when we went out there -- we came in
13 somewhere around here; is that correct?

14 A. Somewhere generally in that area.

15 Q. And then to the right -- what was immediately to
16 the right as you walked in that door?

17 A. We had the disc jockey booth.

18 Q. Yes, sir. What --

19 A. And we have a simulated --

20 Q. Simulated --

21 A. Simulated lift with a hotrod on top of it.

22 Q. Yes, sir. And then straight across, is that the
23 bar that you are talking about?

24 A. That's correct.

25 Q. And when you mentioned the saloon bar, is that

1 **that long saloon bar that was somewhere right in here?**

2 A. Maybe a little further south even. It is kind of
3 directly back from the auto display area.

4 **Q. Like in here?**

5 A. Somewhere in that range, yes.

6 **Q. Okay. And what were your discussions with**
7 **Mr. Myers regarding having put the same type of bar in the**
8 **garage as was in the saloon?**

9 A. I told him --

10 **Q. Without specifics like what you told him, but just**
11 **generally the discussions. Was there disagreement over**
12 **it?**

13 A. There was definitely disagreement over the look
14 being the same as the saloon.

15 **Q. Did it seem to you that -- would Mr. Myers concede**
16 **on any of these points?**

17 A. Never.

18 **Q. On the things that we're talking about, you would**
19 **ask him -- or would you ask him if he would concede to the**
20 **changes?**

21 A. Yes, I would.

22 **Q. And he did not?**

23 A. Absolutely not.

24 **Q. Okay. And ultimately, did you change the garage**
25 **bar?**

1 A. Yes, I did.

2 Q. Did you change the slate floor?

3 A. Took the slate floor up for two reasons. Number
4 one, it -- the application of it was faulty, and they
5 were -- the slate was popping up.

6 Q. Who put down the slate?

7 A. A subcontractor that Mike hired.

8 Q. Okay. And was there an ability to get the
9 subcontractor to come back and fix it?

10 A. Nope. Nobody had the arrangement except a verbal
11 arrangement with Mike.

12 Q. They didn't have a written contract?

13 A. No, sir.

14 Q. So you had no warranties on the work that was
15 done?

16 A. No warranties.

17 MR. BENITEZ: Objection, leading.

18 THE COURT: Sustained.

19 BY MR. CHASE:

20 Q. Was there anything else different about the garage
21 bar?

22 A. We changed the back bar and the front bar, and put
23 the cabinets up that hold the automobile memorabilia and
24 parts and things of that nature.

25 Q. On Friday and Saturday nights, what's -- what is

1 **one of the busier areas of the District?**

2 A. Depends on the time of day.

3 **Q. On Friday or Saturday night.**

4 A. Friday or Saturday night, the smokehouse is very
5 busy but it closes at 9:00. And the garage bar then takes
6 over, and that is where the action is.

7 **Q. Is the garage bar popular?**

8 A. We wish it was more popular, but yes, it is
9 popular.

10 **Q. If you were to characterize -- I think the**
11 **testimony was that you had different venues for different**
12 **things. There was the smokehouse for like barbecue**
13 **sandwiches, I think has been some testimony.**

14 A. Yes.

15 **Q. And at some point there was reference to this area**
16 **being Monroe's that was an upper-scale dining; not high**
17 **end, but upper scale anyway, dining, sir?**

18 A. Yes.

19 MR. BENITEZ: Objection, leading.

20 THE COURT: Sustained. This is direct
21 examination, Counsel.

22 MR. CHASE: Yes, sir.

23 BY MR. CHASE:

24 **Q. Would you have -- were there different types of**
25 **clientele that would use the different venues?**

1 A. Very definitely. There's different price ranges.
2 There's lots of different reasons for different venues.

3 **Q. The folks -- the clientele who used the garage bar**
4 **and are listening to bands, are they on the scale of being**
5 **rowdy or not so rowdy? Would they be more rowdy or less**
6 **rowdy than folks that say would be using the saloon?**

7 A. It depends on the time of night. The later the
8 night goes, the more lubricated they get, the more rowdy
9 they get. But it is definitely a difference. The saloon
10 is more of a date night kind of sophisticated warm and
11 cozy feel. The garage bar is for rock and roll and people
12 partying and having a good time.

13 **Q. What is the garage bar made out of right now?**

14 A. The garage bar is a concrete floor, easy to clean.

15 **Q. The garage -- I guess I was referring to the bar,**
16 **where you sit.**

17 A. The actual bar?

18 **Q. Yes, sir.**

19 A. It is actually concrete also. It is a poured
20 concrete-over-block foundation there, or lower area.

21 **Q. Does the concrete bar hold up better to the**
22 **rowdier clientele than say a nice finished oak?**

23 A. You know, there have been people known to dance on
24 that bar.

25 **Q. Sir, the -- okay. As we keep on going this**

1 direction towards Monroe's from the garage bar, what would
2 be the next change that you recall?

3 A. In the east end of the garage bar we also changed
4 some windows and made for a VIP area in there.

5 Q. Are you referring to this area here?

6 A. Pretty much so, yes.

7 Q. Did Mike Myers agree that should be done?

8 A. I think that took place afterwards. I don't think
9 he was a part of that decision.

10 Q. Okay. As we keep moving south, what would be the
11 next thing?

12 A. Next would be our club room.

13 Q. What was the club room?

14 A. The club room is a -- it would be off the hallway
15 that we walked heading south on, and it is used for
16 special events for meetings. We do rehearsal dinners. We
17 do bachelorette parties, bachelor parties, smaller groups
18 of people because it is adjacent to the garage bar. So
19 they can have a private room that opens to the garage bar,
20 and they can then do whatever level of mixing they want
21 from that standpoint.

22 Q. Was that a change that was made after Mr. Myers
23 left?

24 A. I believe, yes.

25 Q. What else can you think of, the next thing that

1 **you -- if we continue our tour south --**

2 A. Probably in the saloon. The --

3 **Q. What was changed in the saloon?**

4 A. The first thing you notice when you come in is the
5 saloon doors.

6 **Q. Yes, sir.**

7 A. They swing which Mr. Myers was dead set against
8 that.

9 **Q. Why was he dead set against -- did he tell you why**
10 **he was dead set against the swinging saloon doors?**

11 A. Every difference to what his original concept was,
12 he resisted because it didn't fit his, quote --

13 MR. BENITEZ: Objection --

14 THE COURT: Just a second.

15 MR. BENITEZ: -- nonresponsive.

16 THE COURT: Sustained. Direct him to -- that
17 is where you want him, but it is not responsive.

18 BY MR. CHASE:

19 **Q. Did he tell you specifically why he didn't like**
20 **the saloon -- swinging saloon doors?**

21 A. Yes.

22 **Q. What was his reason?**

23 A. It didn't match his dream.

24 **Q. Was that a common response to your inquiries**
25 **regarding changes?**

1 A. All the time. Yes.

2 **Q. As we keep on moving through our tour, what was**
3 **the next thing that you recall?**

4 A. In the south end of the -- south end of the
5 saloon, there were windows in between the booths in the
6 saloon and the Monroe's restaurant. So if you were eating
7 in one, you were watching -- somebody was watching you out
8 the window of the other, no matter which one you were in.
9 And it -- and it was the recommendation of our group,
10 including --

11 MR. BENITEZ: Objection, hearsay.

12 THE COURT: Overruled. Go ahead.

13 THE WITNESS: Including QMG; that people were
14 looking for a little more privacy than what they
15 afforded. So we removed those windows and put some
16 shadow boxes in there.

17 BY MR. CHASE:

18 **Q. As we keep on moving south past the saloon, were**
19 **there any changes to Monroe's?**

20 A. Yes. There were two specific changes -- probably
21 three specific changes. One was that the windows that
22 looked out at the vacant lot on the west were removed.

23 **Q. So those would be -- would this be the west back**
24 **here?**

25 A. Yes, sir.

1 Q. So there -- is there a fireplace right in here?

2 A. Yes, sir, that's correct, to the --

3 Q. So the windows would have been to the south of the
4 fireplace?

5 A. Yes, sir.

6 Q. And they looked out into the vacant lot?

7 A. Yes.

8 Q. You removed those?

9 A. Yes. We replaced them.

10 Q. Was that a point of contention between you and
11 Mr. Myers?

12 A. Very definitely so.

13 Q. You said there were three things. What was the
14 second?

15 A. The other things were the big garage doors that
16 were on the south right next to Highway 46. They were
17 originally installed with a mechanism so they could
18 operate.

19 Q. Yes, sir.

20 A. And it was the opinion of our group, including
21 QMG, that nobody wanted to sit there and listen to the
22 road traffic of Highway 46 as they were enjoying a meal.

23 Q. All right. So did Mr. Myers -- was that a point
24 of contention with Mr. Myers?

25 A. I'm not sure that came up during that time period

1 when he was an employee.

2 **Q. I didn't ask the question about why you felt it**
3 **was necessary to take out the windows just because they**
4 **looked out on the vacant lot. Was there a reason why you**
5 **wanted to take those out?**

6 A. Very definitely. We do a lot of weddings and
7 things of that nature.

8 **Q. Yes, sir.**

9 A. And if there were windows that you had to cover
10 because -- to be clear, the wedding hall is a pretty plain
11 backdrop. So we didn't believe there was any advantage to
12 having windows there, and that was a group decision.

13 **Q. There was a third thing you mentioned.**

14 A. The third thing was we -- at the front -- I'm
15 going to say that is the east end of Monroe's.
16 Originally, there was no way that we could close off that
17 room. It had no doors so that it was just always open.

18 **Q. The front of Monroe's was always open?**

19 A. Correct. There is a set of doors there now. And
20 originally, there was no doors.

21 **Q. What were the hours of operation planned to be**
22 **when Mr. Myers was -- for what ultimately would be**
23 **Monroe's, did Mr. Myers have a plan for what hours it**
24 **would be open?**

25 A. Mr. Myers's original concept was everything is

1 open all the time, including Monroe's and the saloon and
2 the garage bar and the smokehouse and everything.

3 **Q. What time in the morning would be opening time for**
4 **the District?**

5 A. I think it would have been typically 11:00 in the
6 morning.

7 **Q. And what time would typically be closing time?**

8 A. When the garage bar closed at 2:00.

9 **Q. Did you agree that everything should be open all**
10 **the time?**

11 A. Absolutely not.

12 **Q. Did you have that discussion with Mr. Myers?**

13 A. Repeatedly, yes, sir.

14 **Q. Did Mr. Myers concede that maybe that wasn't the**
15 **best idea?**

16 A. No.

17 **Q. Why did you believe that it wasn't the best idea**
18 **to keep everything open all the time?**

19 A. Our team, our management team at QMG, had issues
20 with, number one, the security aspect; that if the -- if
21 the garage bar is open and the partiers are going on there
22 and Monroe's were closed, as a business closed, you had a
23 big, open space with no supervision, no security, unless
24 you physically stationed a person there. And so we needed
25 to have some doors. Otherwise, you know, someone could be

1 taken up there and who knows what happens.

2 Same thing with the saloon. We needed to be able
3 to close it off. And we had to add the doors so that when
4 we closed off the rest of that building, we -- the only
5 thing open for people in the late-night hours is the
6 garage bar.

7 **Q. So did you have to make changes to the building to**
8 **be able to close it off?**

9 A. Yes, sir.

10 **Q. Do you remember, was there -- what is back here?**

11 A. That whole wall is kitchen.

12 **Q. Were there any changes made to the kitchen?**

13 A. Some changes, yes.

14 **Q. Do you recall Mr. Nicks talking about this gate?**

15 A. Yes, sir.

16 **Q. That is the front gate?**

17 A. Yes, sir.

18 **Q. Is that gate open right now?**

19 A. I hope not. My orders are no.

20 **Q. Did you have conversations with Mr. Myers about**
21 **that front gate?**

22 A. We did. Yes.

23 **Q. Why do you believe the front gate should not be**
24 **open?**

25 A. It is my opinion and the opinion of other people

1 that --

2 **Q. Just your opinion. Just your opinion.**

3 MR. BENITEZ: Objection, nonresponsive.

4 THE COURT: Just a second. Overruled as to
5 nonresponsive.

6 MR. BENITEZ: Hearsay.

7 THE COURT: Overruled. Go ahead.

8 THE WITNESS: It is my opinion and it is shared
9 by the management team that the building -- this
10 whole building from Monroe's going all the way north
11 through the -- through the -- to the -- starting at
12 the south end by 46 and going all the way back
13 through the garage bar, if that building would have
14 been shifted to the north about 30 feet --

15 BY MR. CHASE:

16 **Q. This way?**

17 A. Yes, that --

18 **Q. Is the building too close to the road?**

19 A. That's correct, to effectively handle traffic in
20 and out of that front gate.

21 **Q. Have you ever had issues with -- there is that
22 area where -- let me ask it this way.**

23 **When we came out of Monroe's, there was some gas
24 pumps there with some old cars parked there.**

25 A. We call that the portico. Yes.

1 **Q. What was the intention to use that for?**

2 A. In the original concept, it was going to be a
3 drop-off point for people coming to the restaurants or the
4 bars. And people -- if it was inclement weather or
5 something of that nature, you would be able to drive
6 through there and drop people off.

7 **Q. Have you ever had an issue with the use of that**
8 **for that purpose?**

9 A. We have.

10 **Q. Can you describe that to the jury?**

11 A. Specifically, we had a wedding one time that
12 somebody tried to drive a limousine through there and got
13 stuck. They couldn't maneuver it. And we had to bring in
14 two tow trucks and lift the whole limousine up from both
15 ends to move it around far enough to be able to get it out
16 of there. And we've had other issues also.

17 **Q. Was that Mr. Myers's design of that particular**
18 **part of the building?**

19 A. It was on his watch that it was designed that way.
20 Yes.

21 **Q. Was it Mr. Myers's decision to place the building**
22 **that close to the road?**

23 A. Yes.

24 **Q. Do you believe the inability to use the front gate**
25 **affects the business?**

1 A. I'm told that. Yes.

2 **Q. In order to fix that, would that require moving**
3 **the building back?**

4 A. Not possible.

5 **Q. What other changes do you remember, if any?**

6 A. I think that is the bulk of the changes. But then
7 each change you make -- it's like a Rubik's Cube. You
8 have to make two other moves to accommodate that. In the
9 smokehouse area, extending the wall to include the rest of
10 the dining room inside required us to change the decks
11 outside, the handicap ramps and all those types of things.
12 That was another big expense. I think that is pretty
13 much --

14 **Q. Did you -- did you fund all of these changes?**

15 A. Yes, sir. Glenda and I did.

16 **Q. Did the Myerses ever contribute money to help**
17 **change it?**

18 A. No, sir.

19 **Q. How much did you budget for the buildout? What**
20 **was supposed to be -- how much did you fund for the**
21 **buildout?**

22 A. The original estimation was in the range of five
23 to \$6 million.

24 **Q. On June 27th -- on June 26th, 2007, how much had**
25 **you invested just in the construction?**

1 A. Something just about \$8 million just in the
2 construction.

3 **Q. Was it over \$8 million?**

4 A. It was over -- yes.

5 **Q. Do you remember the exact number?**

6 A. I don't. I have notes on it, but I don't recall.

7 **Q. If you were to look at your notes, would that help**
8 **you remember the exact number?**

9 A. Yes, sir.

10 MR. BENITEZ: May I see that first, Your Honor?

11 And it should be marked for identification.

12 THE COURT: Madam Clerk, how is that marked,
13 please?

14 THE CLERK: M.

15 MR. CHASE: Plaintiff's M for identification.

16 Can you staple it? Nope. I have a clamp.

17 MR. BENITEZ: Judge, if I may have a sidebar.

18 THE COURT: Approach.

19 (At Bench:)

20 MR. BENITEZ: Exhibit --

21 THE COURT: One second. Okay.

22 MR. BENITEZ: Plaintiff's Exhibit M for
23 identification, I have never seen these before.

24 MR. CHASE: He is just --

25 THE COURT: Just a second, please.

1 MR. BENITEZ: I haven't seen this before today.
2 And I understand that he is now going to be shown
3 these documents.

4 THE COURT: Correct.

5 MR. BENITEZ: And he is going to testify from
6 these documents.

7 THE COURT: No, sir, he is not.

8 MR. BENITEZ: Okay. Well, I would object for
9 not having seen them before. It appears that he is
10 going to use them during trial.

11 THE COURT: He is going to use them to refresh
12 his recollection. He testified that he does not
13 have a present recollection of the total number that
14 he had spent as --

15 MR. CHASE: Of June 26th, the exact number. He
16 knows the approximate numbers. These are the ones
17 that are taken from these documents. He is going to
18 give exact numbers. He is not going to remember
19 them.

20 MR. BENITEZ: Is that his handwriting?

21 MR. CHASE: No, sir. I did do that with him.

22 THE COURT: It does not have to be his own
23 writing to refresh his recollection.

24 MR. BENITEZ: I object to this exhibit, Your
25 Honor, based on the fact that I haven't seen it

1 before and based on the fact that it is hearsay. He
2 is going to be testifying from this document.

3 THE COURT: He is not testifying from that
4 document. Trust me. I'm not going to let him
5 testify from the document.

6 MR. BENITEZ: Okay.

7 THE COURT: He can refresh his recollection.
8 And if his recollection is refreshed, he may
9 testify. Overruled.

10 (Open court:)

11 THE COURT: You may approach.

12 MR. CHASE: Thank you, sir.

13 BY MR. CHASE:

14 **Q. The question was, what was the exact dollar amount**
15 **that you had invested in construction as of June 26th,**
16 **2007? Do you recall that exact dollar amount?**

17 MR. BENITEZ: Objection, improper foundation
18 and predicate.

19 THE COURT: Sustained.

20 MR. CHASE: Okay.

21 BY MR. CHASE:

22 **Q. Does that document help refresh your recollection**
23 **as to the exact dollar amount that you spent --**

24 A. Yes, sir.

25 **Q. -- on construction as of June 26th, 2007?**

1 A. Yes, sir.

2 Q. What was that amount? Don't -- do not read from
3 the document.

4 THE COURT: Sir, just flip the document over.

5 THE WITNESS: 8,434,000 and I forgot the
6 change.

7 BY MR. CHASE:

8 Q. Eight million 434. That was just construction?

9 A. That's correct.

10 Q. All of that was spent on Mr. Myers's watch?

11 A. Yes, sir.

12 Q. Did you also, during that time that Mr. Myers was
13 in charge, contribute money for operating expenses?

14 A. Yes, sir.

15 Q. Do you recall how much you spent, or about how
16 much?

17 A. About \$2 million.

18 Q. Do you recall the exact number --

19 A. I don't.

20 Q. -- that you had spent as of that date?

21 A. I don't.

22 Q. Can you take a look at that document and see if it
23 helps refresh your recollection, and read it to yourself?

24 Does that document help refresh your recollection
25 as to the exact dollar amount that you spent on operating

1 capital for Highway 46 Holdings --

2 A. Yes, sir.

3 Q. -- as of June 26th, 2007?

4 A. 1,854,500 and something.

5 Q. Did those two numbers include the money that you
6 spent at closing?

7 A. No, sir.

8 Q. How much did you spend at closing?

9 A. We --

10 Q. How much did you pay for the equity in the land?

11 A. \$1,300,000.

12 Q. Did you also make a cash payment?

13 A. Yes, sir.

14 Q. How much was that?

15 A. I think it was \$400,000.

16 Q. So on June 26th, 2007, was the total amount that
17 you had contributed to Highway 46 Holdings, LLC, just
18 under \$12 million?

19 A. That's correct. Yes.

20 Q. Is \$12 million about twice -- is that two times \$6
21 million?

22 MR. BENITEZ: Objection.

23 THE WITNESS: Yes.

24 BY MR. CHASE:

25 Q. Is the -- was that one of the reasons that you

1 removed Michael Myers as a manager?

2 MR. BENITEZ: Objection, leading.

3 THE COURT: Overruled.

4 THE WITNESS: Very definitely.

5 BY MR. CHASE:

6 Q. You answered the question.

7 A. Yes.

8 Q. The changes that you talked about, how long did
9 that take to complete all those changes?

10 A. I believe the end of construction was sometime in
11 2009, so almost two years.

12 Q. Did you have to contribute more money for
13 construction to fix the things that you believed were
14 wrong?

15 A. Very definitely. Yes, sir.

16 Q. How much did you -- how much additional money
17 after June 26th, 2007, did you spend on construction?

18 A. More than \$5 million.

19 Q. Do you remember the exact number?

20 A. I don't.

21 Q. Would your notes help refresh your recollection?

22 A. They would.

23 Q. Would you take a look at them and read it to
24 yourself?

25 Do your notes refresh your recollection as to how

1 much additional money you spent on construction after June
2 26th, 2007?

3 A. Yes, sir.

4 Q. How much is that?

5 A. \$5,777,290.92, I think.

6 Q. If you add that to the 12 million that you had
7 spent on Highway 46 Holdings, LLC, as of June 26, 2007,
8 how much does that come to?

9 A. Approximately 18 million.

10 Q. As we sit here today, what is the total amount of
11 money you have contributed to Highway 46 Holdings, LLC?

12 A. In the range of 23 million.

13 Q. You had testified earlier that it was somewhere
14 around 25 million. Do you recall that?

15 A. I do recall that.

16 Q. Were you mistaken?

17 A. I was inaccurate. Yes.

18 Q. Do you know the exact number right now?

19 A. I have it in my notes.

20 Q. If you refer to your notes, would that help
21 refresh -- do you remember what that number is?

22 A. I don't remember exactly, no.

23 Q. If you referred to your notes, would that help
24 refresh your recollection, sir?

25 A. Yes, sir.

1 Q. Would you refer to your notes and read it to
2 yourself?

3 Did that help refresh your recollection as to the
4 total amount of money as we sit here today that you
5 contributed -- you and Mrs. Hachenberger contributed to
6 Highway 46 Holdings, LLC?

7 A. Yes.

8 Q. What is that number, sir?

9 A. 23,023,000 and something. I forgot the rest of
10 it.

11 Q. Approximately \$23,023,000, sir?

12 A. More than 23 million. Yes.

13 Q. So after the construction was done, you continued
14 to contribute money. Was that for operating?

15 A. Yes, operating.

16 Q. Would that be about \$5 million?

17 A. It would. Yes.

18 Q. What sort of expenses have you incurred that have
19 run up that number?

20 A. There has been a huge amount invested in the
21 litigation and associated things --

22 Q. Without going too much into that, is that the
23 instant litigation that we're talking about?

24 A. Yes, sir.

25 Q. And this case has been going on for how long?

1 A. Since '08 so that is nine years.

2 Q. What other big expenses did you have that ran up
3 that number?

4 A. I have costs associated with the storage of the
5 memorabilia in the warehouses that we visited on Friday.

6 Q. At all times since July 7th, 2005, have you funded
7 the storage for the memorabilia in those warehouses?

8 A. That's correct.

9 Q. Have the Myerses ever contributed a dime to help
10 you with that?

11 A. No, sir.

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

13 THE COURT: You may.

14 MR. CHASE: May we approach, Judge?

15 THE COURT: You may.

16 (At Bench:)

17 MR. CHASE: Here is what we've got. We've got

18 this not allowing on the property, the reason he is

19 violent -- he has exhibited violence, he steals

20 stuff -- that is really, really prejudicial, the

21 reason why he doesn't allow him on the property.

22 The reason why he videotapes him is because he

23 steals stuff. Because when they started, he would

24 grab things and try to take it and leave with it.

25 It is incredibly prejudicial and there is no damages

1 there.

2 This is one of the -- the first three -- you
3 said out of the breach of duty or good faith and the
4 breach of duty of care. I've got removing him -- I
5 can handle terminating. I can handle the management
6 and I can handle all the other stuff. That one is
7 incredibly prejudicial. There is a reason for it
8 and it is so prejudicial. The stories will be bad.

9 THE COURT: And --

10 MR. BENITEZ: And if he is going to get into --
11 Mr. Chase wasn't around when the taping started. He
12 came way after, years after. I don't remember
13 any -- I don't remember a solitary allegation of
14 Mike Myers taking anything from the warehouse. The
15 inspections were always with Donald Hachenberger
16 there, with a crew there, even in the best of times,
17 even when there wasn't -- prior to the fight in the
18 deposition, prior to that. So I have never heard
19 any of these allegations before.

20 MR. CHASE: He has got a bunch of them. By
21 example, he has got it on tape and --

22 THE COURT: It is on tape?

23 MR. CHASE: He says he does. I never looked at
24 the tapes. I don't think that we should get into
25 it. And then you get up to the point where he is

1 not the only one who is not allowing -- the Court
2 won't allow him there.

3 So how do you get into that? I'm not asking
4 you how to try my case. I guess what I'm saying is
5 there are no damages. There has been no testimony
6 of any damages that he has. There is no way --
7 there is no remedy under your breach of duty of
8 care, breach of good faith -- I don't understand
9 these either. There is no damages. I can get maybe
10 terminating his employment, but it's -- there is no
11 damages, and yet the prejudice is so bad.

12 THE COURT: Can I just ask, what do you want me
13 to do?

14 MR. CHASE: I want -- how about let's let the
15 Court decide that and the jury not decide that. So
16 you keep it --

17 THE COURT: Which one is it?

18 MR. CHASE: It is the not allowing him on the
19 property.

20 THE COURT: Duty of good faith and fair
21 dealing, and you had listed the various allegations
22 we went through this morning. This is one of those.

23 MR. BENITEZ: Yeah. But I thought that this is
24 more directed because there is an injunction in
25 place and we weren't going to go there, so to speak.

1 But this more has to do with the business premises
2 itself. It's not -- do you understand what I'm
3 saying?

4 The distinction is he is talking about
5 supposedly there is him taping, which I've never
6 heard of even in the (inaudible) allegation in this
7 case. But that has to do with in the warehouses.
8 And that is when I'm taping, he is taping, they are
9 taping --

10 THE COURT: There is an injunction that
11 prevents your client from coming on the business
12 premises, correct? Haven't we already addressed --
13 wasn't your ultimate concern was that he was
14 trespassed from the property? Isn't that sort of
15 the cutoff?

16 MR. BENITEZ: That has been the clean cutoff.

17 MR. CHASE: Still if he is going to get up --
18 because he is going to say that he hasn't been
19 allowed back for all this time, all these -- he has
20 only been allowed to see his stuff 10 times and
21 things like that. That is prejudicial to my guy
22 without explaining why.

23 THE COURT: He is not allowed back there
24 because he was trespassed by your client.

25 MR. CHASE: But there is also an order of the

1 Court that says he can't come back. So why doesn't
2 he get to say that?

3 THE COURT: Why does it matter if your client
4 trespassed?

5 MR. CHASE: He is violent and attacks me,
6 continues to attack me, he steals things and attacks
7 me.

8 THE COURT: There is no allegation of theft or
9 physical violence.

10 MR. CHASE: Oh, yes, there was.

11 THE COURT: At the time that he was trespassed?

12 MR. CHASE: No, but he was being violent, yes,
13 and that he was taking things. If you let him
14 testify as of the date that he did that, the
15 testimony is going to be -- and I know it is going
16 to be because he would take stuff.

17 THE COURT: We're not going there.

18 MR. CHASE: I know. That's what I'm saying.

19 MR. BENITEZ: I think cut it off at the
20 trespass, at that point in time. He hasn't come
21 back.

22 THE COURT: He has no right to be back after he
23 was trespassed. Your client removed him from the
24 property and said that he is not allowed to be here,
25 he is off. That didn't change.

1 MR. CHASE: There is a -- I'm disagreeing.

2 THE COURT: Why did it change?

3 MR. CHASE: I'm sorry. The trespass changed --

4 THE COURT: Beginning of January 2008, he was
5 trespassed.

6 MR. CHASE: I think it was June. I'm not sure
7 about that.

8 THE COURT: The date of the report --

9 MR. CHASE: I saw that.

10 THE COURT: It could be January 2008. From
11 that date forward, your client said, You are not
12 welcome on my property.

13 MR. CHASE: That is a fact.

14 THE COURT: Okay.

15 MR. CHASE: And there is a reason. Why doesn't
16 he get to testify about the reason?

17 THE COURT: He did.

18 MR. CHASE: That is not the only reason.

19 MR. BENITEZ: At that point, it is.

20 THE COURT: At that point in time. Had there
21 been other incidents, then why wasn't he previously
22 trespassed or why wasn't (inaudible) sought or
23 anything else?

24 MR. CHASE: You can ask him that on
25 cross-examination. I guess he gets to testify about

1 the things that were going on that led him up to the
2 point where he would trespass his partner from the
3 property. It wasn't just a whim.

4 MR. BENITEZ: He got him off the property even
5 before the trespass. But the trespass was the last
6 act, and then soon thereafter is when the injunction
7 gets in place, because they get in the fight out
8 there and they both get arrested.

9 MR. CHASE: The thing is -- what the closing
10 argument would be to the jury is he hasn't let him
11 out there in all of this time, and it hasn't been
12 his decision to let him out there all this time.
13 What if he changed his mind six months later when
14 all this cooled off?

15 And then it says damages. However they are
16 going to come up with damages, then it is not
17 allowing him there for the last 12 years as opposed
18 to six months. This is something that should go to
19 the Court. This should go to the Court.

20 THE COURT: Thank you, sir. Here is my
21 perspective. As of the trespass date, whatever the
22 reasons were that led up to the trespass and his
23 decision to remove him from the property, I think
24 that is all fair game, so anything up to that point.

25 Anything after that, I think it's unfairly

1 prejudicial to get into those issues in front of the
2 jury. There is no reason the Court can't consider
3 them. The problem is this is a legal claim. It is
4 not an equitable claim. I can't be a factfinder and
5 somehow contribute to that.

6 MR. CHASE: He can agree to it.

7 THE COURT: Can't you --

8 MR. SHUKER: Did you have a business
9 justification for seeking the trespass?

10 MR. CHASE: He is going to -- the thing is it
11 would be -- why can't I ask him then, Why did you
12 continue? Because it has been 12 years.

13 I'm telling you it is bad. That is an appeal
14 for both of us. Either way it is bad. Let's agree
15 to let the judge hear that one little claim on that
16 issue.

17 THE COURT: What are the damages?

18 MR. BENITEZ: Refusal to permit him to be on
19 the property.

20 THE COURT: That is out.

21 MR. BENITEZ: Not being able to come back,
22 basically, not being -- access to the property and
23 so on.

24 THE COURT: Isn't that the same as employment
25 damages though?

1 MR. BENITEZ: In a sense. But if he wants to
2 carve that out -- if I could talk to the client,
3 that may --

4 THE COURT: What do you mean "carve out"?

5 MR. CHASE: It is not going anywhere. We just
6 add that to the things that the judge decides. You
7 have 15 minutes, now six -- that are going to the
8 jury on the breach of duty and breach of good faith.
9 That one is so bad and so complex that it is just
10 going to screw us up. Either way it is going to
11 screw us up.

12 If he determines it, we're fine. It is too
13 prejudicial in front of the jury because it
14 necessarily would involve -- you want to argue, and
15 I don't blame you, that, man, he hasn't been able to
16 be there for 12 years. There has got to be some
17 sort of damage for that. But all of that can't rest
18 on him. I get some contribution from the Court that
19 said no --

20 MR. BENITEZ: Are you willing to hear it,
21 Judge?

22 THE COURT: What I'm hearing, I'm hearing. The
23 question is, what can I do with it?

24 MR. BENITEZ: I think Mr. Chase is suggesting
25 we give you the jurisdiction and the right to

1 adjudicate it. That is part of the --

2 THE COURT: In essence, you would be asking me
3 to determine whether his refusal to permit access to
4 the property is a violation of his responsibilities
5 under the statute, and if so, if I find yes, then to
6 do what with it?

7 MR. BENITEZ: Damages.

8 THE COURT: To award damages that I think are
9 attributable separate and apart from what I think
10 the jury may award for other issues?

11 MR. BENITEZ: Of course. But I would have to
12 check with my client of course.

13 THE COURT: I understand. I imagine where that
14 is going then.

15 MR. BENITEZ: I mean, Judge, I think the way --
16 getting back to my initial position. I think the
17 way we've indicated cutting it off as to a trespass
18 warning is exactly right.

19 THE COURT: But it doesn't address the reasons
20 for keeping him off the property for the rest of the
21 years, and that is a concern.

22 MR. BENITEZ: And then I guess the option would
23 be -- I think what you are asking for is just an
24 explanation.

25 THE COURT: Let me send the jury back to the

1 room for five minutes, okay?

2 (Open court:)

3 THE COURT: Not too often, but occasionally I'm
4 described as the eternal optimist in hoping that we
5 would be able to move right back into testimony, but
6 I see there is more conversation I need to have with
7 counsel. This is my responsibility. You should
8 never look at counsel and attribute any fault to
9 them. This is the Court's responsibility to try to
10 get any information necessary to make good, sound
11 decisions.

12 We're going to take a brief recess. I'll send
13 you back to the room to relax at least five minutes
14 and I'll call you back. Thank you.

15 (Jury out.)

16 THE COURT: Take a minute and speak with your
17 client about that idea to give context to it. In
18 Paragraph 265, Sub C: The defendant has alleged
19 that Mr. Hachenberger breached his duty of care owed
20 to the Myerses by engaging in grossly negligent or
21 reckless conduct, intentional misconduct or knowing
22 violation of law, including but not limited to by
23 not allowing the Myerses back onto the business
24 premises.

25 And so the issue as the Court perceives it at

1 this point is that there came a time when Mr. and
2 Mrs. Myers were not permitted back on the property.
3 There has been some discussion about when exactly
4 that occurred, but it certainly would be as of the
5 trespass warrant.

6 In order not to mislead the jury, the question
7 is, do we have to have some explanation as to why
8 there has been a continued refusal to allow the
9 Myerses back on the premises? If we open that door,
10 it has been represented to the Court that there are
11 a number of instances, many of which could
12 potentially be very inflammatory and unfairly --
13 potentially unfairly prejudicial, but which are
14 necessary to explain the continued refusal to allow
15 the Myerses back on the property.

16 And as I understand the proposal, it would be
17 to say that we let the jury decide all of the other
18 questions of fact that are part of that paragraph,
19 and perhaps ascribe to the Court the ability to be
20 the factfinder as to this piece, and fact-find as to
21 whether this, indeed, is a breach of the duty of
22 care under the statute, and if so, what damages flow
23 from that, thereby avoiding the need to have the
24 jury hear that evidence and it being presented to
25 the Court for its consideration.

1 So take a minute and speak with your client
2 about whether that proposal makes sense. If not,
3 then I have to confront the issue and how it is we
4 present this evidence to the jury.

5 MR. CHASE: To clarify, Judge, you mentioned
6 the breach of duty of care which is Count 18. It is
7 the same question for Count 19 because it is the
8 same for denial of access.

9 THE COURT: Correct. It is incorporated into
10 19 as well.

11 MR. BENITEZ: Judge, as I understand it, the
12 alternative would be to advise the jury that there
13 was a Court order in place after the trespass
14 warning where the property could not be touched? Is
15 that --

16 THE COURT: That could be, A, part of the
17 remedy. But if that is the case, what does that do
18 to damages, where it's no longer Mr. Hachenberger's
19 decision to refuse entrance to the property? It is
20 now pursuant to a Court order. I don't think you
21 can recover damages pursuant to that.

22 So either -- it may be that we just have to cut
23 off the claim as of a certain date, and we tell the
24 jury that it's cut off as of this date, but you are
25 not to consider any claim relative to the inability

1 to access the property past a certain time. I don't
2 know. I'm just thinking out loud here.

3 MR. CHASE: The testimony would still be I
4 think highly prejudicial. It shouldn't be something
5 that the jury hears. They are going to weigh
6 whatever that testimony is as to why the
7 Hachenbergers said, Mr. and Mrs. Myers, we don't
8 want you on the property anymore.

9 It is going to -- it is going to affect all the
10 claims and it is just -- I'm trying -- I'm just
11 trying to be open to the Court and fair -- it is
12 fair. So that is why I brought it up. I could have
13 just elicited the testimony. It is relevant. It is
14 highly probative. But it is also highly
15 prejudicial.

16 THE COURT: There is a 403 process in this
17 though and I think there is a legal question. And
18 the legal question is, what is the impact of the
19 injunction? Because if the injunction cuts off the
20 damages -- because it is no longer Mr. Hachenberger,
21 right?

22 MR. CHASE: That's correct.

23 THE COURT: You can't argue that after the date
24 of the injunction that Mr. Hachenberger continued to
25 exercise poor business judgment resulting in your

1 client's inability to access the property, because
2 that is not true. He had no judgment at that point.
3 It was up to the Court. I'm pointing at me, but the
4 Court generically. So it seems to me this claim is,
5 at best -- for a minimal time period, at best.

6 MR. BENITEZ: Judge, can I ask something of
7 Mr. Chase?

8 THE COURT: Yes.

9 MR. BENITEZ: If we do that and put it in a
10 non-jury bracket, would that relieve having to put
11 on Nick Carlin?

12 MR. CHASE: No. Nick Carlin is going to go
13 through the A and B -- all the rest -- every one of
14 them, I, L and O. Maybe not O. But Nick Carlin
15 definitely -- I mean, I don't even see where.

16 Nick Carlin has anything to do with that,
17 although that stuff that Nick Carlin would say has
18 to do with that. It's -- that is a terrible one.
19 Just drop it. There is no damages there. Just drop
20 it.

21 THE COURT: That is a conversation for you-all
22 to have, not for me to rule on.

23 MR. BENITEZ: Understood. May I step outside,
24 Your Honor?

25 THE COURT: Yes, you may.

1 (Brief recess.)

2 THE COURT: Mr. Hachenberger, you may step
3 down. All right. Let's return the jury, please.

4 (Jury in.)

5 THE COURT: Thank you. You may be seated.
6 Members of the Jury, thank you for your patience
7 with us. I think we've worked through a number of
8 issues and our position is again to continue to move
9 forward. Now however, it is 4:37 and it probably
10 doesn't make sense to press back into any more
11 testimony, so we're going to break for the evening
12 recess. We're going to resume tomorrow morning at
13 9:00. At that time, we'll continue with the
14 testimony that is being presented.

15 I want to thank you-all. I do a fair amount of
16 mission work and the number one thing they tell us
17 in mission work is to be flexible. I think that is
18 appropriate here in the courtroom as well. You want
19 to be flexible. Your attitude has been wonderful
20 and your work ethic has been wonderful. I'm
21 grateful for that. Thank you.

22 So we will resume tomorrow morning at 9:00.
23 All the same cautions do apply. Here we are in week
24 two and I'm sure you have got lots of questions.
25 Please continue with, The Judge told us we are not

1 permitted to talk about this case. You can't do it
2 face to face and you can't do it electronically.
3 You can't do it on social media or other websites.

4 Thank you very much for continuing to obey the
5 rules and orders in that regard. We'll see you
6 tomorrow morning at 9:00. Thanks.

7 (Jury out.)

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

9 (Proceedings adjourned at 4:39 p.m.)

10 (Continued in Volume VIII.)

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COURT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF ORANGE)

I, Laura A. Green, Registered Professional Reporter and Certified Realtime Reporter, certify that I was authorized and did stenographically report the foregoing proceedings, and that the transcript is a true and complete record of my stenographic notes.

DATED this 20th day of September, 2018.

Laura A. Green

Laura A. Green, RPR, CRR
Notary Public - State of Florida

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