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

2 (CONTINUED FROM VOLUME VII.)

3 \*\*\*\*\*

4 THE COURT: Good morning.

5 We're on the record.

6 Are we receiving testimony today?

7 MR. CHASE: Yes, sir.

8 THE COURT: Who will be beginning?

9 MR. CHASE: Nick Carlin.

10 THE COURT: Can you bring Mr. Carlin in the  
11 courtroom please so we can get him in efficiently.

12 MR. BENITEZ: And, your Honor, if I may, before  
13 the witness was brought in --

14 THE COURT: Yes, sir.

15 MR. BENITEZ: -- I was reviewing the Court  
16 ruling and with respect to the counts that will  
17 remain in this case, and it appears that on  
18 paragraph 265A, I have the claim that you allow us  
19 to pursue of removing Mike Myers as manager or  
20 member.

21 THE COURT: Yes, sir.

22 MR. BENITEZ: And also Section B by wrongfully  
23 terminating Mike Myers' salaried position.

24 It appears to me that based on the Court's  
25 ruling with respect to the letter agreement and the

1 operating agreement, I believe the Court's ruling at  
2 this point in time is that they are enforceable; is  
3 that correct?

4 THE COURT: That's correct.

5 MR. BENITEZ: So in that case, those would be a  
6 basis to -- or that will give them, Donald  
7 Hachenberger, it appears to me, the authority --

8 THE COURT: He had the authority. We discussed  
9 this yesterday. There's no question he had the  
10 authority in the terms of the letter agreement. The  
11 issue is, did he perform that duty consistent with  
12 his obligations under the statute?

13 MR. BENITEZ: Right.

14 THE COURT: In other words, he can't do it in  
15 bad faith just because he has the authority to do  
16 it. That's my understanding of the statute.

17 So that's why those claims were made.

18 MR. BENITEZ: Can I have a second with my  
19 client, then?

20 THE COURT: Yes.

21 MR. CHASE: Your Honor, I think the  
22 consideration is whether --

23 THE COURT: Your mike is not on.

24 MR. CHASE: Sorry. I think the consideration  
25 is whether or not to drop those first three. So the

1 Court understands why this discussion is taking  
2 place.

3 THE COURT: I mean, I think they're potentially  
4 viable claims. The question is whether you wish to  
5 drop them, that's up to you.

6 MR. BENITEZ: Yes, your Honor.

7 THE COURT: Microphone.

8 And, Mr. Benitez, I've noticed this throughout  
9 the trial, I haven't said anything, but you have  
10 your microphone on your right lapel, but you're  
11 constantly speaking to the left because that's where  
12 the jury is and that's where I am. It might help if  
13 you moved the microphone to the other side. I don't  
14 know, but it just might.

15 MR. BENITEZ: Does that sound better?

16 THE COURT: No.

17 MR. BENITEZ: Not really.

18 THE COURT: Come on up a little higher.

19 MR. BENITEZ: Does that sound better, no.

20 THE COURT: I don't know.

21 MR. BENITEZ: I'll try to go right, Judge.

22 THE COURT: Okay. I don't notice any personal  
23 difference.

24 MR. BENITEZ: How is that? Is that --

25 THE COURT: Just a little.

1 MR. BENITEZ: I'll speak louder.

2 How is that?

3 THE COURT: That'll help. Thank you.

4 MR. BENITEZ: Your Honor, my -- we were going  
5 to go ahead and drop the claims for the wrongful  
6 removal and the wrongful termination and not being  
7 allowed back into the business premises, your Honor.

8 THE COURT: Okay. So the claims number,  
9 paragraph 265A, B, and C, of the amended  
10 counterclaims you're withdrawing.

11 MR. BENITEZ: And my understanding is based on  
12 that withdrawal, Nick Carlin will not be taking the  
13 stand during the jury trial.

14 MR. CHASE: That's correct, sir. He still  
15 would be required or needed to testify with regard  
16 to the replevin, but that would be nonjury.

17 THE COURT: Okay.

18 MR. CHASE: But everything that he was getting  
19 ready to testify is no longer relevant.

20 THE COURT: All right.

21 MR. CHASE: May I.

22 MR. BENITEZ: Judge. If I may. Judge, I  
23 apologize, but this is kind of an important decision  
24 with the client and I want to make sure that he's  
25 fine with it, and if you don't mind giving me

1 five minutes.

2 THE COURT: I don't mind. Take a couple of  
3 minutes.

4 (Discussion held off the record.)

5 MR. BENITEZ: Yes, your Honor, we will do that.

6 The other comment that I had, Judge, and I  
7 do -- I acknowledge that you have previously ruled  
8 with respect to D. And D, it said by converting  
9 personal property and I think we got stuck, or one  
10 of the inferences was conversion of the personal  
11 property.

12 But -- and I believe that the Court initial --  
13 I'm not sure, initially indicated that that would be  
14 allowed, but not the U.S. mail because that had been  
15 dropped. And then the Court changed and said that  
16 that's not allowed.

17 I would like the Court --

18 THE COURT: That's not how that happened.

19 MR. BENITEZ: I'm sorry. But, anyways, I would  
20 like the Court to reconsider with respect to D,  
21 allowing us to present that to the jury. And that  
22 is the personal property that's been taken from the  
23 Myers, whether they had authority to take or not  
24 take it, and keep it.

25 I think that's pertinent even though the



1 conversion count failed because of the lack of  
2 damages. I think in this case, it shouldn't fail  
3 because that's a duty that he had, a duty of care  
4 that was breached.

5 THE COURT: That will be denied.

6 MR. BENITEZ: Okay.

7 THE COURT: All right.

8 MR. CHASE: May I release Mr. Carlin?

9 THE COURT: You may.

10 And then I want to talk about the rest of our  
11 day and the future here.

12 MR. CHASE: Yes, sir.

13 (Mr. Chase exiting.)

14 (Mr. Chase reentering.)

15 THE COURT: All right. How long -- how much  
16 longer do you anticipate with Mr. Hachenberger on  
17 the stand?

18 MR. CHASE: Not long, sir. I would say I'd  
19 probably give him, through mine, certainly less than  
20 an hour. We're going to go through -- now it's just  
21 the three claims that are left, and have him explain  
22 his side of that.

23 THE COURT: And then cross, with respect to  
24 that, an hour?

25 MR. BENITEZ: I would think so, your Honor.

1 THE COURT: Okay. Do you have any additional  
2 witnesses to call?

3 MR. CHASE: No, sir.

4 THE COURT: And then you have any witnesses in  
5 your case in rebuttal?

6 MR. BENITEZ: Yes, your Honor, I will.

7 THE COURT: Okay. How long would you  
8 anticipate that -- who would those witnesses be?

9 MR. BENITEZ: Mike Myers would be taking the  
10 stand, at the very least.

11 THE COURT: Okay. But focus -- now we're  
12 focusing down obviously much more narrowly so it  
13 would be somewhat limited, I would imagine.

14 MR. BENITEZ: Limited to the plaintiffs' case.

15 THE COURT: Turn your microphone on, thank you.

16 MR. BENITEZ: It would be limited to what's  
17 been developed by Mr. Chase.

18 MR. CHASE: Well --

19 THE COURT: In the defense, so you've already  
20 put on a case.

21 MR. BENITEZ: Right.

22 THE COURT: This is just now the defense of  
23 that and this is limited only to rebuttal evidence  
24 to that, so these are things that you did not and  
25 could not put on in your case in chief.

1 MR. BENITEZ: Right.

2 THE COURT: But only in rebuttal. So less than  
3 half an hour.

4 MR. BENITEZ: I'm not sure, Judge. I'd be  
5 guessing, Judge, but I would assume, between half an  
6 hour and an hour would be probably kind of the  
7 maximum.

8 MR. CHASE: I think it's appropriate that I  
9 need to have notice on what exactly he's going to  
10 rebut before the rebuttal, before -- you can't just  
11 say rebuttal witness and get up and ask him  
12 questions. What specifically is he going to rebut?

13 THE COURT: We'll hear the client's testimony  
14 and then we'll address the scope of the rebuttal,  
15 but not just yet.

16 You have nothing further, correct, Mr. Shuker?

17 MR. SHUKER: Correct.

18 THE COURT: What can we do to get Mr. Shuker  
19 and Mrs. Hachenberger on their way?

20 Can I simply tell the jury that together -- not  
21 yet, but at the conclusion of the case, before  
22 closings, that together with the jury, I've been  
23 hearing evidence related to other claims that are  
24 not for the jury's consideration.

25 That the Court has been able to hear that

1 evidence and that it is not necessary at this time  
2 for them to remain or to participate in the jury  
3 closings.

4 MR. CHASE: Yes, sir. No objections.

5 THE COURT: Objections to that?

6 MR. BENITEZ: I apologize, your Honor. What  
7 did you say?

8 THE COURT: I'm suggesting telling the jury  
9 that along with the jury, I've been hearing the  
10 evidence to decide certain claims that I must  
11 decide. I've now heard that evidence and it's not  
12 necessary for Mrs. Hachenberger to remain in the  
13 courtroom or for the Court to hear closing argument  
14 from them. And so I've released them from the  
15 courtroom.

16 Is that appropriate to let the jury know?

17 You may speak with your client about it and  
18 there's multiple considerations. One is, there's  
19 just no -- I mean they're playing no role here at  
20 all. I'll keep them here through the evidence. I  
21 think that's appropriate. But at the end of the  
22 evidence, prior to closings.

23 It's all a game for them to be here. We're  
24 misleading the jury in the sense that they really  
25 don't have any interest in the issues here any

1 longer, so I'm trying to figure out a neutral  
2 message to be able to give to the jurors. That's  
3 one consideration.

4 The second is, if I accept what Mr. Shuker has  
5 said as true, that there's a proposal for  
6 settlement, your clients are potentially paying for  
7 them to sit here, and that doesn't make any sense.

8 MR. BENITEZ: Your Honor, I don't -- I was just  
9 thinking about the way you were expressing it to the  
10 jury. I wasn't thinking about whether you should do  
11 it or not do it. If they decide not to be here,  
12 they don't have to be here.

13 THE COURT: Well, they don't have to be here,  
14 but you've asked them to stay because you didn't  
15 want your clients to be prejudiced. And I  
16 understand that.

17 But at the close of evidence, it certainly  
18 doesn't make sense any --

19 Please turn it either off or vibrate.

20 At the close of evidence, just doesn't make any  
21 sense for them to be here any longer.

22 MR. BENITEZ: Right.

23 THE COURT: Particularly when your clients are  
24 potentially paying for them to be here.

25 So I'd like you to give some thought to that so

1     that we can appropriately instruct the jury and not  
2     have to have them come back for closings.

3             If we stick on this schedule, what I'm hearing  
4     is that we will likely be done with evidence this  
5     morning. I think I will release the jury for the  
6     afternoon. We would do our charge conference.

7             And we would come back tomorrow morning for  
8     closings as opposed to Friday. It doesn't make  
9     sense to take off half a day today and a full day  
10    tomorrow.

11            So that's where I think we're headed at this  
12    point given the narrowing of the testimony.

13            MR. CHASE: Agreed, sir.

14            THE COURT: All right. And it depends,  
15    obviously, on the case in rebuttal and what evidence  
16    it is that you all intend to present in rebuttal.  
17    Rebuttal is going to be very narrowly focused.

18            Are you all set?

19            MR. CHASE: Yes, sir.

20            THE COURT: Mr. Hachenberger, can you take the  
21    stand, please.

22            Let's return the jury, please.

23            (Jury entering.)

24            THE COURT: Good morning.

25            Thank you.



1           **Q. Did Mr. Myers consider other names and**  
2 **concepts?**

3           A. Absolutely.

4           **Q. What other names and concepts did Mr. Myers**  
5 **consider?**

6           A. Mr. Myers had previously considered Shorty's,  
7 had previously considered Bubbalou's. During our  
8 discussions, he -- we both considered -- and it's a part  
9 of our contract, that we're --

10          **Q. Without telling me the extra stuff, what other**  
11 **names did Mr. Myers consider?**

12          A. Famous Dave's.

13          **Q. When did you decide to make a change from**  
14 **Gassey Jack's?**

15          A. It was being discussed and it was decided, as a  
16 part of the team that I had assembled, including QMG,  
17 that the name Gassey Jack's just didn't work for a  
18 restaurant.

19          **Q. Did you consult with the team about changing**  
20 **the name?**

21          A. Absolutely. They were a part of all of that  
22 decision process.

23          **Q. Ultimately, did you change the name?**

24          A. Yes, sir.

25          **Q. What did you change the name to?**



1           A.    We changed the name to Route 46 Entertainment  
2 District, and then there were individual names for each  
3 of the entities that operated within that framework.

4           **Q.    Is that -- what is your understanding is the**  
5 **concept, is the concept of having individual names for**  
6 **the different entities in there?**

7           A.    Would you restate that?

8           **Q.    That is a terrible question.**

9                   The allegation against you is changing the name  
10 and concept. What is -- what do you believe is being  
11 referred to by concept?

12          A.    I believe the concept that Mike wanted was,  
13 quote, Gassey Jack's. That everything was one entity,  
14 and he stated repeatedly everything was open all the  
15 time, you had one place, which meant you had to --

16          **Q.    I understand.**

17          A.    Okay.

18          **Q.    And so the change of concept then would be to**  
19 **have separate little areas; is that true?**

20          A.    The destination is Route 46 Entertainment  
21 District, which is the overall area. But someone coming  
22 there for a barbecue sandwich would go to the smokehouse  
23 at Route 46.

24                   Someone coming there for a private event, a  
25 wedding or something, would never go to the smokehouse,

1 maybe. But they would go to Monroe's for the wedding,  
2 or whatever.

3 And then someone who is accustomed to the bands  
4 and the partying atmosphere within the garage bar might  
5 only know the garage bar at Route 46.

6 **Q. Ultimately, the decision was yours to make**  
7 **those changes; is that correct?**

8 A. Absolutely, yes, sir.

9 **Q. Was your decision to change the name and**  
10 **concept grossly negligent?**

11 A. Not at all, not in the least.

12 **Q. Just listen to my question, just --**

13 MR. BENITEZ: Object to the form and -- excuse  
14 me. Object to conclusion.

15 THE COURT: Overruled.

16 **Q. The way you went about making that decision --**

17 THE COURT: Counsel, please.

18 (A conference was held at the bench outside of  
19 the hearing of the jury.)

20 THE COURT: Didn't you ask these precise  
21 questions of Mr. Myers?

22 MR. BENITEZ: No, your Honor. Mr. Chase did.  
23 Mr. Chase did.

24 I didn't object, obviously, because of the  
25 answer, but at this time, I object.

1           MR. CHASE: The reason why it's not a  
2 conclusion of law is because it's a jury instruction  
3 for them to determine what it is, whether it was --  
4 so it can't be a conclusion of law because the jury  
5 gets to decide whether or not the action was grossly  
6 negligent.

7           THE COURT: The issue is whether it calls for a  
8 legal conclusion. And in an ordinary trial context,  
9 we would not ask them was the defendant negligent.  
10 We would ask, did they do something a reasonable  
11 person would fail to do.

12           I'm going to sustain the objection as phrased  
13 and just -- you're going to need to rephrase it.

14           MR. CHASE: Okay.

15           (Bench conference concluded.)

16           THE COURT: I'm sorry. Ladies and gentlemen,  
17 the objection is sustained.

18 BY MR. CHASE:

19       **Q. Was there anything about that decision-making**  
20 **process with your team, that you believe was something**  
21 **out of the ordinary from a business decision?**

22       A. No, not at all.

23       **Q. Do you believe that it was something that a**  
24 **reasonable business person would do?**

25       A. Definitely, yes.

1           Q.    Did you take time to consider all of the  
2 options before you made that decision?

3           A.    Very definitely, yes, sir.

4           Q.    Did you consider multiple business options  
5 before you made that decision?

6           A.    Yes, sir.

7           Q.    Did you know was there anything unlawful about  
8 that decision?

9           A.    No.

10          Q.    Did you believe that you were making that  
11 decision in the best interest of the company?

12          A.    Positively, yes.

13          Q.    The next allegation against you is that you  
14 incurred unnecessary and unauthorized expenses.

15                Does the letter agreement and operating  
16 agreement authorize you to make decisions for the  
17 company?

18          A.    Yes, sir.

19          Q.    Does it authorize you to lend money to the  
20 company?

21          A.    Yes, sir.

22          Q.    Is there anything in the letter agreement and  
23 operating agreement that prohibits you from making  
24 decisions with regard to what to spend money on for the  
25 company?

1           A.     Absolutely nothing.

2           Q.     Is there any expense that you paid for the  
3 company that you believe was unnecessary?

4           A.     No, sir.

5           Q.     Is there any expense that you paid for the  
6 company that you believe was unauthorized?

7           A.     No, sir.

8           Q.     Were you the only one who you had to have  
9 authority to spend money for the company?

10          A.     It was my money, yes.

11          Q.     And Ms. Hachenberger's?

12          A.     I'm sorry. That's correct.

13          Q.     Did you have any personal interest in spending  
14 millions of dollars to correct the things that you  
15 testified about yesterday?

16          A.     Would you restate that for me?

17          Q.     Did you have any personal interest in spending  
18 millions of dollars to correct the things that you  
19 testified about yesterday?

20          A.     It was very personal to me that I was going to  
21 be spending that much money, yes.

22          Q.     But did you have -- did you personally gain  
23 from those expenditures?

24          A.     No, sir --

25          Q.     -- or was that for the company?

1           A.     Nope.

2           Q.     Were there other things that you could spend  
3     \$5 million on?

4           A.     Lots, yes.

5           Q.     The money that you as -- after construction,  
6     you have -- I believe you testified that you have loaned  
7     a little over -- or that you have loaned 5 --  
8     approximately \$5 million to the company to keep it  
9     going, correct?

10          A.     For operations, yes.

11          Q.     Was the payment of legal fees over the last  
12     nine years a necessary expense?

13          A.     Absolutely.

14          Q.     Was the payment of the rent for the storage  
15     facilities a necessary expense?

16          A.     Definitely, yes.

17          Q.     Can you think of a single thing that you had to  
18     contribute your money to pay that was unnecessary?

19          A.     No, sir.

20          Q.     Were there any frivolous expenditures?

21          A.     Not to the best of my knowledge, no.

22          Q.     The decisions you made with regard to incurring  
23     expenses for the company, were those something that you  
24     believed to be something that a reasonable business  
25     person would do?

1           A.     Definitely, yes.

2           Q.     If you didn't spend those things, would that  
3 company exist today?

4           A.     No, sir.

5           Q.     Did you incur those expenses to keep the  
6 company going?

7           A.     Definitely, yes.

8           Q.     Do you know if incurring any expenses would've  
9 been a violation of law?

10          A.     Not to the best of my knowledge, no.

11          Q.     Did you believe that you were incurring all  
12 those expenses for the best interest of the company?

13          A.     Positively, yes.

14          Q.     Let's go on to the allegation that you  
15 mismanaged the business.

16                 When you took over control of the business, did  
17 you hire managers to manage the business?

18          A.     Definitely, yes.

19          Q.     Did you hire general managers to manage the  
20 business?

21          A.     There was already a general manager in place,  
22 yes.

23          Q.     When you took over the business, was that the  
24 general manager that Mr. Myers had retained?

25          A.     Yes.

1           Q.     Was that Brad Nicks?

2           A.     Yes.

3           Q.     How long did you keep Brad Nicks as a general  
4 manager?

5           A.     I'm guessing, at least two more years, I think,  
6 in that range.

7           Q.     Did you believe at the time that he continued  
8 to manage the business, that he was an experienced  
9 manager?

10          A.     Definitely, yes.

11                 MR. BENITEZ:  Objection, leading.

12                 THE COURT:  Overruled.

13          Q.     And, ultimately, you have had other general  
14 manager -- or did you have occasion to have other  
15 general managers run the company?

16          A.     Yes, I have.

17          Q.     Were those general managers experienced in the  
18 restaurant business?

19          A.     Positively, yes.

20          Q.     At all times since June 26, 2007, have you been  
21 the managing member of the LLC, the Highway 46 Holdings,  
22 LLC?

23          A.     Yes, I have.

24          Q.     And all of the decisions that you made with  
25 regard to your responsibilities as managing member, do



1 you believe that those were done the same way a  
2 reasonably prudent business person would do?

3 A. Yes, sir, I do.

4 Q. Was there anything in any of those decisions  
5 that you made as a managing member of Highway 46  
6 Holdings, LLC that you believe was a violation of law?

7 A. No, sir.

8 Q. Was there anything with any of the decisions  
9 that you made as a managing member of Highway 46  
10 Holdings, LLC that you believe was careless?

11 A. No, sir.

12 Q. Was there anything -- any decisions that you  
13 made with regard to Highway 46 being a managing member  
14 of Highway 46 Holdings, LLC, that you didn't contemplate  
15 before making the decision of whether or not it was a  
16 good business decision?

17 A. That's correct.

18 Q. With regard to major decisions that you made as  
19 a managing member of Highway 46 Holdings, LLC at all  
20 times since your involvement with Highway 46 Holdings,  
21 LLC, did you consult with professionals?

22 A. All the time, yes. I still do.

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

24 THE COURT: You may.

25 BY MR. CHASE:

1           **Q.    Mr. Hachenberger, in all of your decisions that**  
2   **you've made as managing member of Highway 46 Holdings,**  
3   **LLC, which involved consulting with professionals, did**  
4   **you rely on the advice that you received from those**  
5   **professionals?**

6           A.    Very definitely, yeah.

7           MR. BENITEZ:  Objection, asked and answered.

8           THE COURT:  Overruled.

9           A.    Definitely, yes.

10          MR. CHASE:  Thank you, sir.

11          Tender the witness, Judge.

12          THE COURT:  Thank you.

13          Cross examination.

14                   CROSS EXAMINATION

15  BY MR. BENITEZ:

16          **Q.    In 2005, you were not the sole manager of**  
17   **Highway 46, correct?**

18          A.    I don't think that's accurate.

19          **Q.    Okay.  Were you the sole manager of Highway 46**  
20   **in 2005?**

21          A.    Yes, I believe I was.

22          **Q.    So Mike Myers was not a comanager with you in**  
23   **2005, when you initially formed Highway 46?**

24          A.    I don't believe so, no.  I'm not certain of  
25   that.

1           **Q.     And in 2006, both Mike Myers and you were**  
2 **comanagers, correct?**

3           A.     I'm not certain that's accurate.

4           **Q.     Okay. What is your testimony -- what's your**  
5 **answer, yes or no, was Mike Myers a comanager with you**  
6 **of Highway 46 in 2006?**

7           A.     I don't think that's accurate, no.

8           **Q.     And in 2007, until about October or November of**  
9 **2007, isn't a fact that Mike Myers and you were**  
10 **comanagers of Highway 46?**

11          A.     I don't agree with that, no.

12                 MR. BENITEZ: If I may, your Honor.

13                 THE COURT: You may.

14 BY MR. BENITEZ:

15          **Q.     In 2005, Mike Myers was doing -- was operating**  
16 **Highway 46, correct?**

17          A.     Mike Myers was the president of Highway 46,  
18 yes.

19          **Q.     And he was doing the day-to-day activities at**  
20 **Highway 46, correct?**

21          A.     A lot of them, yes.

22          **Q.     And you were not, correct?**

23          A.     That's not true. I was doing some.

24          **Q.     What were you doing in 2005?**

25          A.     We, Mike and I, would probably have meetings

1 two to three times a week if I was in town. And we  
2 would talk about items. He would show me things that  
3 were going on. Some decisions were made that I had some  
4 input, some that I made suggestions that he wouldn't  
5 adhere to.

6 But we had regular meetings to keep me informed  
7 and we were involved in all sorts of operating decisions  
8 at that point in time.

9 **Q. Okay. So your testimony to the jury would be**  
10 **that you were intimate -- or significantly involved in**  
11 **Highway 46 in 2005, correct?**

12 A. I just described my involvement.

13 **Q. Okay.**

14 A. Intimate was never a part of that. We had two  
15 to three meetings a week where we discussed items. He  
16 was the operating guy, as the president, would usually  
17 be in a corporate or in an entity like that, and it was  
18 his job to do the bulk of the items.

19 **Q. Okay. And so, then, on a regular basis, you**  
20 **were communicating with Mike Myers and making decisions**  
21 **for Highway 46; is that correct?**

22 A. Part of that is correct.

23 **Q. Okay. What part is not correct about that**  
24 **statement?**

25 A. The part about us making decisions and then him

1 doing it.

2 Q. Okay. So was he in charge of making the  
3 decisions?

4 A. We made decisions together when we could, and  
5 otherwise he did what he wanted.

6 Q. Okay. So he did whatever he wanted in 2005,  
7 with respect to Highway 46?

8 A. More often than I would have liked, yes.

9 Q. And how about 2006? Same thing for 2006?

10 A. That's accurate, yes.

11 Q. Okay. And how about for the majority of -- or  
12 half of 2007, up to June 27, 2007, did he do basically  
13 whatever he wanted to do?

14 A. Very much so, yes.

15 Q. Okay. So up to June of 27, 2007, Mike Myers  
16 was taking the lead and making the decisions for  
17 Highway 46. Would that be an accurate statement?

18 A. That wouldn't be the way I would characterize  
19 it, no.

20 Q. But you -- during that period of time, you  
21 disagreed with Mike Myers from time to time, correct?

22 A. Very often, yes.

23 Q. Okay. And whenever there was a disagreement,  
24 then Mike Myers would end up doing either what was  
25 agreed on or what he wanted to do, correct?

1           A.    One or the other, usually, yeah.

2           Q.    Okay.

3           A.    Or sometimes nothing.

4           Q.    Right.

5                   And at no time during that time, did you pull  
6 out the letter agreement or the operating agreement and  
7 say, I'm in charge, did you?

8           A.    I -- it would be impossible for me to say that  
9 I pulled it out, but it was referenced very often.

10          Q.    Okay. But you never exercised your rights  
11 under that letter agreement up to June 27, 2007,  
12 correct?

13          A.    Not true at all.

14          Q.    And you exercised your right under that letter  
15 agreement for the first time on June 26, 2007, when you  
16 had a meeting with Brad Nicks and the other employees --

17          A.    Definitely that's --

18          Q.    -- after telling --

19          A.    Excuse me.

20          Q.    May I finish?

21                   THE COURT: Let him finish, please.

22                   THE WITNESS: I'm sorry.

23          Q.    -- after telling them that you were not going  
24 to pursue the project earlier that morning?

25                   MR. CHASE: Objection, compound question, date,

1 meeting and what he told him.

2 THE COURT: Sustained.

3 Q. On June 26, 2007, you brought out the letter  
4 agreement and showed it to Brad Nicks, correct?

5 A. I believe I did on that date, yes.

6 Q. And you explained to Brad Nicks that you were  
7 in charge pursuant to that agreement, correct?

8 A. Yes, sir.

9 Q. You had not done that before with Brad Nicks,  
10 correct?

11 A. I'm not certain that that's an accurate  
12 statement.

13 Q. And you went through that letter agreement  
14 almost paragraph by paragraph with Brad Nicks, correct,  
15 on June 26, 2007?

16 A. I believe that's accurate, yes.

17 Q. And there were other people in that room at  
18 that time, correct?

19 A. That's correct.

20 Q. During this -- well, in -- the permits for  
21 building the projects were submitted to Seminole County  
22 for approval, correct?

23 A. Obviously, or the project would've been shut  
24 down. They were submitted.

25 MR. BENITEZ: Well, your Honor, not responsive.

1                   If he can be asked to answer yes or no.

2                   THE COURT: He's answered the question,  
3           counselor.

4                   MR. BENITEZ: Okay.

5                   THE COURT: Move on, please.

6 BY MR. BENITEZ:

7           **Q. Did you know that they had been approved by**  
8           **Seminole County?**

9           A. I was usually informed of all of those types of  
10       things, yes.

11          **Q. Okay. And you looked at the plans before they**  
12       **were submitted to the county, or not?**

13          A. I generally perused them and did know the  
14       general concept, yes.

15          **Q. So up to June 27, 2007, you had perused all the**  
16       **plans and specifications that were submitted to the**  
17       **county, Seminole County, correct?**

18          A. In general, yes.

19          **Q. And you approved those plans, correct?**

20          A. I did not have an approval process in place to  
21       do that. The county -- the county's the one that  
22       approved them.

23          **Q. Did you object to anything in those plans when**  
24       **you perused them?**

25          A. Yes. There were several things that I



1 discussed with Mike that I did not agree with.

2 Q. Okay. And did then Mike make a decision  
3 whether or not to take your suggestions on those  
4 objections?

5 A. Pretty much, yes.

6 Q. But you knew that the plans were eventually  
7 submitted to the county, and you started construction,  
8 correct?

9 A. I knew it, yes, sir.

10 Q. Okay. And you know that when you start  
11 construction, you have to have building permits,  
12 correct, with the county?

13 A. Yes, sir.

14 Q. And that they need to be approved and comply  
15 with the law, whatever that may be?

16 A. Yes, sir.

17 Q. And they have to be ADA accessible, the  
18 facility, correct?

19 A. Yes, sir.

20 Q. And they have to have a correct number of  
21 bathrooms, correct?

22 A. There are county regulations on all of those  
23 things, yes, sir.

24 Q. Okay. So you -- you're not suggesting that the  
25 county missed a possible violation of the county

1 ordinance or building code when they approved the  
2 building plans that Mike Myers submitted to the county,  
3 are you?

4 A. I am not.

5 Q. Okay. So when you talk about all your changes  
6 in the building, like the bathrooms, those were changes  
7 made after the building permits were approved, correct?

8 A. Would you restate that question for me?

9 Q. The comments that you made about having to add  
10 bathrooms in the band section of the plans, those  
11 bath -- those changes to the bathrooms were made after  
12 the building plans were approved, correct?

13 A. Yes, because the plans were not accurate.

14 Q. Okay. But the -- what was there at the  
15 building -- on the building site on June 27th, 2007, was  
16 in compliance with the building plans, correct, at that  
17 time?

18 A. Would you restate that for me?

19 Q. On June 27, 2007, were whatever was built on  
20 the land was that in conformance with the building  
21 plans?

22 A. I think that's accurate, yes.

23 Q. So it was only after that that you went ahead  
24 and submitted new plans for bathrooms, correct?

25 A. That's accurate, yes.

1           **Q.    And you did that because you had made the**  
2 **decision you were going to rearrange the bathrooms,**  
3 **correct?**

4           A.    No, sir.

5           **Q.    Did you make that decision based on the fact**  
6 **that you were going to add bathrooms?**

7           A.    No, sir.

8           **Q.    Why did you make that decision?**

9           A.    I made that decision because the plans that  
10 were submitted were intentionally lower occupancy than  
11 what was going to happen. And there were numbers stated  
12 that were lower than what we were going to end up having  
13 in attendance.

14                   I believe the occupancy in the garage bar is  
15 listed at 90. It's a terrible day or night when we  
16 don't have 150 to 400 people there. But Mike wanted the  
17 numbers understated so he could mislead the county and  
18 not state accurate numbers.

19                   And when we discovered that, the team and I,  
20 including QMG, looked at the reality of it and said  
21 whether the county lets us get away with that or not, it  
22 would be stupid to try to put this together and make  
23 everybody stand in line at a restroom.

24                   We've all seen the lines at these restrooms  
25 when there aren't enough facilities. Let's fix it

1 before we open instead of waiting until after that  
2 happened.

3 That was my thought process.

4 Q. That was your -- and your thought processes  
5 along those lines occurred when?

6 A. The thought processes had been formulating  
7 probably starting about the first of the year in 2007.

8 Q. Okay. So and you had a discussion with Mike  
9 Myers during January of 2000 -- excuse me, you said  
10 2011?

11 A. '7.

12 Q. '7. In January of 2007, you had discussions  
13 with Mike about that, correct?

14 A. That was part of the reason we reached out for  
15 experts.

16 Q. But is your answer yes or no, did you have  
17 conversations with Mike Myers during January of 2007,  
18 regarding the bathrooms?

19 A. I do not know the answer to that.

20 Q. Did you have conversations with QMG in January  
21 of 2011, regarding the bathrooms?

22 A. I don't believe we had hired QMG at that point,  
23 no.

24 Q. When you hired QMG, did you have discussions  
25 with them about the bathroom?

1           A.     Absolutely.

2           Q.     Okay.  So you already knew that the bathrooms  
3     were an issue before you hired QMG, correct?

4           A.     I did not know that, no.

5           Q.     And when did you hire QMG?

6           A.     I'm sorry, I don't know the exact date of that,  
7     but I think it was in the spring sometime of '07, but  
8     I'm not certain.

9           Q.     Could it possibly be December of 2006?

10          A.     It could be, yeah.

11          Q.     Or January of 2007?

12          A.     It could have been.  I'm sorry, I don't know  
13     the answer.

14          Q.     But you definitely talked to Mike Myers about  
15     the bathrooms during that period of time, correct?

16          A.     Yes, sir.

17          Q.     Okay.  And then you guys decided to move  
18     forward the way the plans were, correct?

19          A.     No, sir.

20          Q.     Did you -- did you take any action -- did you  
21     bring out the letter agreement or the operating  
22     agreement and it says, Mike, we got to do it my way, we  
23     got to expand the bathrooms?

24          A.     Never said that to Mike.  The words you just  
25     used, anyway.

1           Q.    With respect to the garage bar, those changes  
2   that were made in the garage bar, those were made after  
3   Mike Myers left, correct? Or you fired him? Removed  
4   Mike Myers on June 27th, 2007?

5           A.    I'm sorry, I don't know the exact dates,  
6   whether it started before he left or after. But it was  
7   right in that same timeframe.

8           Q.    But did you have to make -- did you have to  
9   submit new building plans at that point?

10          A.    You bet. Yes.

11          Q.    And you had to undo everything that happened  
12   down in the garage bar, correct?

13          A.    No, sir.

14          Q.    Did you un -- did you remove all the millwork  
15   from the garage bar?

16          A.    Yes, sir.

17          Q.    And that was expensive -- expensive millwork,  
18   correct?

19          A.    Very definite, yes.

20          Q.    And you were present when it was initially  
21   installed, correct?

22          A.    No, sir.

23          Q.    Were you -- did you visit the site on or about  
24   the date that it was initially installed?

25          A.    No, sir.

1           **Q.    Did you -- do you know how long it took to**  
2 **install?**

3           A.    No, sir.

4           **Q.    Do you know when it was installed?**

5           A.    No, sir.

6           **Q.    Did you see it after it was installed?**

7           A.    Yes, sir.

8           **Q.    When did you first see the millwork in the**  
9 **garage bar?**

10          A.    I had been on a business trip and had come back  
11 to town, and the job was completed at that point.

12          **Q.    And you knew -- but prior to your trip, you**  
13 **knew that that was going to be done, correct?**

14          A.    No, sir.

15          **Q.    So you never saw it in the plans?**

16          A.    I might have, but it didn't register the  
17 result, the final result that was going to be, so,  
18 unreasonable.

19          **Q.    So -- but you had continuous meetings with Mike**  
20 **Myers on a weekly basis, correct?**

21          A.    You --

22          **Q.    During 2007?**

23          A.    Usually, yes.

24          **Q.    And also in 2006?**

25          A.    Yes, sir.

1           **Q.     And 2005, correct?**

2           A.     Correct.

3           **Q.     So you did know what was going on at Highway 46**  
4 **during that period of time, correct?**

5           A.     I knew what I thought was going on on a very  
6 regular basis, if I was in town, yes.

7           **Q.     And you are a person that takes charge.   Would**  
8 **that be accurate?**

9           A.     I'm not sure of your definition of that in this  
10 instance.

11          **Q.     You get your way, do you not, most of the time?**

12          A.     I wish I did.   No.

13          **Q.     Well, your business practice is to come into a**  
14 **business venture like this and take control, correct?**

15          A.     No, sir.

16          **Q.     And your practice is to go ahead and give you**  
17 **absolute control over the project, correct?**

18          A.     No, sir.

19          **Q.     You don't demand absolute control over the**  
20 **project?**

21          A.     I create an environment for the person who is  
22 going to be doing the bulk of the effort to have a lot  
23 of latitude, unless I determine that they abuse those  
24 powers.

25          **Q.     Okay.**



1           A.     And then I stop the direction with whatever  
2 action is appropriate. Just like I did in this case.

3           Q.     So when you had Mr. Donaghy make the offer to  
4 Mike Myers and Jackie Myers, you made it clear in those  
5 documents that you were going to be in absolute control,  
6 correct?

7           A.     I made it clear in those documents that I had  
8 the right to be in absolute control, but when they were  
9 created, I had hoped that Mike would be able to function  
10 in the capacity he was hired for and not require that I  
11 come in and terminate his employment.

12          Q.     And --

13          A.     But it didn't turn out that way.

14          Q.     And my question is: Those documents that you  
15 had Kevin Donaghy prepare gives you absolute control,  
16 correct? Yes or no.

17          A.     Yes, sir.

18          Q.     So according to those documents, in your mind,  
19 you have the authority to do anything you want at  
20 Highway 46, correct?

21          A.     Absolutely not.

22          Q.     Even if those documents say that you have  
23 absolute control, you don't have absolute control,  
24 correct?

25          A.     You are absolutely correct. Nobody has

1 absolute control because there are things that are  
2 beyond the law that should not be performed there.

3 Q. Right.

4 So and it's -- also, if something that is  
5 grossly negligent to do, running the business, that  
6 would not be within your authority to do, correct?

7 A. Would you restate that question.

8 Q. Yeah.

9 Something that's grossly negligent would not be  
10 something that you would be allowed to do even under  
11 those contracts that you had Jackie and Mike Myers sign?

12 A. That's correct.

13 Q. And you're not above the law either, so you  
14 cannot do something that's illegal just because the  
15 letter agreement says you can do whatever you want?

16 A. That's what I just said. Yes. Absolutely.

17 Q. And you still have to use due care in your  
18 management of the business, correct?

19 A. That's correct, yes.

20 Q. Regardless of what those agreements say,  
21 correct?

22 A. Yes.

23 Q. And in this case, when you exercised your right  
24 to go ahead and change the concept, you had to do that  
25 with due care, correct?

1           A.    Yes, sir.

2           Q.    You couldn't just do it just because you wanted  
3 to do it, correct?

4           A.    I might have had the right to do that, but  
5 that's not the way this decision was made.

6           Q.    But so you believe you have the right, without  
7 using due care, to go ahead and change a concept of a  
8 business venture that began almost two years prior and  
9 was under construction?

10          A.    I believe the contract gives me absolute  
11 control over changing the conceptual concept in that was  
12 signed, I believe that's true, yes.

13          Q.    So you don't have to use due care or  
14 consideration for Mike Myers or Jackie Myers when you  
15 make that decision; is that your position?

16          A.    I never said that, no.

17          Q.    Okay. You would agree with me that you still  
18 have to use due care in making that decision?

19          A.    Yes, sir.

20          Q.    And if you have already spent a significant  
21 amount of money developing that venture with that  
22 concept, Jack -- Gassey Jack's, would you not have to  
23 look at the cost of changing that concept before you  
24 could decide whether, in fact, it was reasonable or not  
25 reasonable to do?

1           A.     Probably, yes.

2           Q.     One of the considerations when you run a  
3 business is to run at a profit, correct?

4           A.     Yes, definitely.

5           Q.     Okay. So when you're looking to change the  
6 concept, you need to know where you're at in building  
7 the business, correct?

8           A.     That's correct.

9           Q.     So in June 27, 2007, you were in a position  
10 where the smokehouse was going to open within four  
11 weeks, correct?

12          A.     Not true.

13          Q.     You had already spent according to -- according  
14 to your numbers that you gave the jury yesterday, you  
15 had already spent in construction alone, according to  
16 your figures, \$8,434,500, correct?

17          A.     Yes, sir.

18          Q.     That's in -- by July 26, 2007, is the figure,  
19 correct?

20          A.     Yes, sir.

21          Q.     Now, the figures that you arrived at, that you  
22 testified to yesterday, you don't have a recollection --  
23 a personal recollection of the money spent, do you?

24          A.     No. I remember it very vividly, yes.

25          Q.     So you remember all the moneys that were spent,

1 correct?

2 A. I'm the one who writes the checks. Yes, sir.

3 Q. The figures that you took yesterday were  
4 taken -- did you get them from some source?

5 A. I have people -- I have a bookkeeper, I have a  
6 CPA.

7 Q. Did they give you the figures?

8 A. I asked them to compile the numbers. We sat  
9 down together and looked at them, and that's what was  
10 written on those pieces of paper.

11 Q. So you -- the figures that you testified to  
12 yesterday were not based on your own personal knowledge?

13 A. That's not true.

14 Q. Well, did you actually total up the numbers  
15 or --

16 A. I did.

17 Q. You did?

18 A. Yes, sir.

19 Q. Did -- I thought you just said that the CPA or  
20 somebody else gave you the figures?

21 A. No, sir. Those are your words, not mine.

22 Q. Okay. What did you do in preparing to testify  
23 with respect to the amount of money spent as of July 26,  
24 2007?

25 A. Got the bookkeeper, whose name is Mary Sue

1 Scott. I got the CPA, whose name is Bill Myer.  
2 The three of us -- I told them what I was looking for.  
3 The three of us got together, we put the numbers  
4 together that were accurate, and they were then recorded  
5 on that sheet of paper.

6 Q. Okay. So you got your information from Mary  
7 Sue Scott, who's your daughter -- your former  
8 daughter-in-law, correct?

9 A. Mary Sue Scott was married to my son at one  
10 point and is the mother of five -- three -- three of my  
11 grandchildren, that's correct.

12 Q. And then the CPA is who?

13 A. Bill Myer.

14 Q. You did not go back and get the -- go back and  
15 look at the source of the information, correct?

16 A. Not correct.

17 Q. You did go back and look at the source?

18 A. Yes, sir.

19 Q. And how did you do that?

20 A. I have a checkbook that I write checks in that  
21 has a ledger, and it has copies, and that was part of  
22 the materials that I brought to the meeting with me, so  
23 I could verify that the numbers that they produced off  
24 the books of the company matched the checks that I had  
25 written.

1           So, yes, that was the process. I was very  
2 involved in that.

3           **Q. So the numbers that you totaled up is all the**  
4 **checks that you had written up to July 26, 2007,**  
5 **correct?**

6           A. That is one of the sources for all that  
7 information, yes.

8           **Q. As soon as you got rid -- or as soon as you**  
9 **terminated Mike Myers, you started your vision of the**  
10 **project immediately, correct?**

11          A. First -- I terminated Mike Myers' employment.  
12 And then I gathered my team and we analyzed all the  
13 changes we thought were going to be required. And then  
14 we started on that path. Yes.

15          **Q. Okay. And when did you start on that path?**

16          A. Immediately.

17          **Q. That's -- now, your figure of 8,434,500, as of**  
18 **July 26, 2007, that included the figure spent on that**  
19 **date of \$385,000, correct.**

20          A. I'm not sure I understand your question.

21          **Q. Did that figure, that 7 -- the figure on**  
22 **8,434,500, did that figure include a payment you made**  
23 **into the business for construction costs of \$385,000?**

24          A. I'm assuming that if that's what's on the piece  
25 of paper in front of you, that that's the number, yes.

1           **Q.     Okay.   And then on July 3rd, you made a payment**  
2   **of \$735,000?**

3           A.     If that's the number that's on the piece of  
4   paper, yes.   I believe I remember that number.

5           **Q.     And your testimony is that all these entries**  
6   **from February 10, 2006, to -- or whenever, until**  
7   **7/26/2007, are all construction costs?**

8           A.     I would have to look at the paper to quote  
9   those numbers, but that sounds accurate, yes.

10          **Q.     So based on your numbers, you had already spent**  
11   **8,434,500 as of July 26th, 2007, correct?**

12          A.     If that's what's on that paper and that's what  
13   I testified to yesterday, that is correct, yes, sir.

14          **Q.     And I believe you also testified yesterday that**  
15   **you had spent \$1,849,546.80 in operating expenses.**

16                **Do you remember that figure?**

17          A.     I don't remember the exact numbers, but that  
18   sounds accurate.

19                There is an -- there's an operating loan  
20   account, in addition to the construction account.   Yes,  
21   in fact, there's several of them.

22          **Q.     Okay.   But that's operation expenses, correct?**

23          A.     I think that's the heading on that paper.  
24   Operations, yes.

25          **Q.     Do you know when those expenses were incurred?**



1           A.     Which expenses?

2           **Q.     The operating expenses of \$1,849,546.80?**

3           A.     I believe those numbers are recorded on the  
4 piece of paper that you're holding in your hand.

5           **Q.     Okay. Well --**

6                     MR. BENITEZ: May I approach the witness, your  
7 Honor.

8                     THE COURT: You may.

9           **Q.     I'm going to show you what has been marked as**  
10 **Plaintiffs' Exhibit M for identification.**

11                    **And just tell me what that million, eight**  
12 **hundred thousand is?**

13           A.     This million, eight hundred thousand?

14           **Q.     Yes, sir.**

15           A.     That would be -- that would be the operating  
16 line of credit payable to Don and Glenda Hachenberger  
17 from December 30th -- the first entry is 5/3 of '05,  
18 what would that be, June 3rd of '05, (sic) through 7/10  
19 of '07.

20           **Q.     What operating expenses were there during that**  
21 **period of time?**

22           A.     There would have been payroll for the staff.  
23 There would have been utilities. There would have been  
24 a list as long as my arm of items that would add up to  
25 being paid out of the category of operating expenses.

1 But labor for the management team, Brad Nicks was in  
2 there, Nick Carlin was in there, a long list of other  
3 people.

4 There would have been the utilities. There  
5 would have been expense accounts. There would have  
6 been -- there would have been -- I mean, I can't think  
7 of -- there's hundreds -- there are dozens, at least, of  
8 items that would make that up.

9 **Q. And then you spent additional costs of**  
10 **\$5,777,642.90?**

11 A. I need a better reference for what you're  
12 referring to.

13 **Q. Okay.**

14 MR. BENITEZ: I'm sorry, Judge, may I approach  
15 the witness again.

16 THE COURT: You may.

17 MR. BENITEZ: I'm giving the witness a  
18 Plaintiffs' Exhibit for identification. And may I  
19 point to the exhibit, Judge.

20 THE COURT: You may.

21 A. The number that you're pointing to is 5  
22 million --

23 **Q. No.**

24 A. I'm sorry.

25 MR. BENITEZ: May I ask him a question. I

1        didn't mean to point and have him read it. I was  
2        just --

3                THE COURT: It's the number you just read to  
4        him.

5                MR. BENITEZ: Yes, your Honor. I did.

6                THE COURT: Is there a problem with him  
7        repeating it?

8                MR. BENITEZ: Okay.

9                THE COURT: Just to make sure you're on the  
10       same page.

11               MR. BENITEZ: Yes, your Honor.

12 BY MR. BENITEZ:

**13        Q.    Go ahead.**

14        A.    The line item that you pointed to was the  
15        additional cost of \$5,777,642.90.

**16        Q.    And what was that for?**

17        A.    That was the total of the additional  
18        construction costs that were added after Mike Myers'  
19        employment was terminated.

**20        Q.    There's a figure of \$5,275,023.10. What was**  
**21        that amount for?**

22        A.    This is meant to represent the difference  
23        between the \$23,036,712.80 that Glenda and I put in to  
24        date, minus the \$17,761,689.70 that I believe was spent  
25        prior to this litigation beginning.

1           **Q.     Okay.**

2           A.     So since the litigation started, there have  
3     been \$5,275,023.10 spent since the litigation began in  
4     '08.

5           **Q.     And what was -- what did that expense consist**  
6     **of besides attorneys' fees?**

7           A.     It would have also included operating costs.  
8     It would be labor, utilities. All the same sorts of  
9     things. Because it would have included all categories  
10    of expense, including the operating expenses, warehouse  
11    expense. Lots of things like that.

12          **Q.     So the expenses of this litigation you are**  
13    **charging to Highway 46, correct?**

14          A.     Any costs that the corporation is defending  
15    charges that someone made against us, I believe, is a  
16    legitimate business expense and, therefore, should be  
17    paid for by the entity that's being sued, and that is  
18    Highway 46 Holdings.

19          **Q.     Okay. And you sued on behalf of Highway 46**  
20    **Holdings in this case, correct?**

21          A.     Highway 46 Holdings sued the Myers to enforce  
22    the provisions of the contract that they entered into,  
23    yes.

24          **Q.     It's my -- yeah, the answer is yes, correct?**

25          A.     Would you restate the question?

1           MR. BENITEZ: I'll withdraw it, Judge. He's  
2           answered the question.

3           **Q. So, you started this lawsuit, correct?**

4           A. Highway 46 Holdings started the lawsuit when  
5           the Myers did not perform under the terms of the  
6           agreement. And that seems to be the most legitimate  
7           approach, is to file a lawsuit.

8           MR. BENITEZ: Judge, I object. Nonresponsive.

9           A. And ask that the contract be enforced.

10          THE COURT: I'm sorry, you were talking at the  
11          same time, so I couldn't hear you.

12          MR. BENITEZ: Nonresponsive.

13          THE COURT: Overruled.

14          Go ahead.

15          **Q. So that \$5,275,023.10 that has been spent by**  
16          **Highway 46, according to you, includes all the conduct**  
17          **or all the actions or omissions that have been relayed**  
18          **to the jury during this trial regarding your involvement**  
19          **with Mike Myers or Jackie Myers, correct?**

20          A. Would you restate that question?

21          **Q. Yes.**

22                 **That figure, \$5,275,023.10 that you are**  
23          **charging to Highway 46, that has to do with all expenses**  
24          **other than the construction expense, the operating**  
25          **expense of a million 8 that we talked about before, the**

1 equity of \$1.3 million to pay off the mortgage on the  
2 property, and the \$400,000 in cash, that was a part of  
3 the paperwork on July 7, 2005, correct?

4 A. I lost the question in all those number. I'm  
5 sorry.

6 Q. Your attitude is that you're going to do  
7 whatever you want to do regardless of cost. Is that a  
8 fair statement?

9 A. I do not believe that's true, sir, no.

10 Q. And in this case, when you incur a cost on  
11 behalf of Highway 46, it is a cost that will be shared  
12 in one sense or another with Jackie Myers and Mike  
13 Myers, correct?

14 A. I operate under the terms of a letter agreement  
15 and an operating agreement, that I have authority to  
16 issue loans that I've accounted for in the paper that  
17 you have in front of you.

18 Q. And, in other words, all the money spent by you  
19 is a loan to Highway 46 Holdings?

20 A. I spent money every day for lots of other  
21 things besides the numbers that are on those sheets --

22 Q. But my question --

23 A. -- that I do not charge to Highway 46 Holdings.

24 Q. Okay.

25 A. So your statement is inaccurate.

1           Q.    Okay. Tell me why you would spend money for  
2 Highway 46 Holdings and not charge it to Highway 46  
3 Holdings?

4           A.    I didn't say that.

5           Q.    Give me an example of that occurring?

6           A.    I didn't say that.

7           Q.    Okay.

8           A.    I don't have an example.

9           Q.    So every -- all the money that you've spent  
10 regarding Highway 46 Holdings is documented in the  
11 testimony that you provided with respect to what you  
12 paid as of today, correct?

13          A.    Would you restate that question for me?

14          Q.    Yeah.

15                The testimony that you gave the jury yesterday  
16 and today regarding all your expenses on behalf of  
17 Highway 46, is all the money that you spent on  
18 Highway 46?

19          A.    I'm struggling with the definition of the  
20 statements that you are making, and I feel like you're  
21 trying to put words in my mouth that I don't agree with.

22                I would respectfully request you reask the  
23 question so I can understand it a little more clearly,  
24 please.

25          Q.    All the money that you spent related to

1 Highway 46, is that included in the amount of money that  
2 you relayed to the jury today and yesterday?

3 A. To the best of my knowledge, it's all contained  
4 in those numbers that I quoted, yes, sir, that's on  
5 paper that's in front of you.

6 Q. Okay. So you haven't spent any other money  
7 that's not accounted for, as far as you know, sitting  
8 here today?

9 A. I have spent a lot of money that's not  
10 accounted for that I did not charge to Highway 46.

11 Q. Okay. But you've got a letter -- you've got a  
12 credit -- a loan -- a credit line agreement with  
13 Highway 46, correct?

14 A. Yes, sir, I do.

15 Q. And if you spent any money on behalf of  
16 Highway 46, you get it reimbursed in the form of a loan  
17 with interest, correct?

18 A. Well, yes, that's accurate, yes.

19 Q. Okay. So why would you not account for the  
20 money that you allege to have spent on behalf of  
21 Highway 46?

22 THE COURT: Counsel, approach, please.

23 (A conference was held at the bench outside of  
24 the hearing of the jury.)

25 MR. CHASE: You didn't ask a question, you said



1 all the money you spent is that accounted here. No.  
2 What he's saying, I spend money all the time. That  
3 is the question, all the money that you spent on  
4 Highway 46 is accounted there.

5 MR. BENITEZ: I did.

6 THE COURT: No, you didn't. And that's the  
7 problem. That you're continually asking a question  
8 that is not accurate. He's answered the question  
9 multiple times: That every piece of money you spent  
10 on 46 is accounted for in the numbers that he's  
11 testified to. What is not accounted for there, is  
12 other money that he spends unrelated to Highway 46.  
13 That's all.

14 And -- but your question isn't accurate and  
15 that's creating a problem.

16 Am I getting feedback or something here?

17 He's being clear. It's your questions,  
18 Mr. Benitez, that are creating an issue.

19 MR. BENITEZ: Okay.

20 THE COURT: I think we can move on.

21 (Bench conference concluded.)

22 BY MR. BENITEZ:

23 Q. All the money that you spent on behalf of  
24 Highway 46, or related to Highway 46, you've accounted  
25 for in your testimony before the jury; is that true?

1           A.     That was not my testimony.

2           **Q.     In running the business, you have operated the**  
3 **business, correct?**

4           A.     I have been involved in the operation of the  
5 business, yes.

6           **Q.     Okay. When did you first operate the business,**  
7 **do you remember? Give the jury an idea, either a month**  
8 **and a year or a season or --**

9           A.     Beginning in June, the end of June in 2007, I  
10 terminated the employment of Mike Myers, who had been  
11 both operating the business. And that's when I believe  
12 I took over the, quote, operations of the business.

13          **Q.     Okay. But my question is -- and I -- it's**  
14 **probably my question this time. Let me ask it again.**

15                   **Did you do business as Highway 46 prior to Mike**  
16 **Myers leaving your employment?**

17          A.     Did I do business?

18          **Q.     Highway 46.**

19          A.     Highway 46 was formed, I believe, in the spring  
20 of '05, and it started operating as soon as it was  
21 formed. After the bank accounts were set up and the  
22 moneys were deposited, things started operating in the  
23 spring of 2005.

24          **Q.     Were you doing business in 2005 as Highway 46?**

25          A.     Would you define doing business, please.

1           **Q.    Yes.  Like setting up an event, catering an**  
2 **event, providing food or services to any third party for**  
3 **a profit or for -- of charge?**

4           A.    I believe that didn't begin until probably  
5 later.  Might have been in '07, but it could have been a  
6 little bit before that.  Because you need permits and  
7 you need restaurant licensing and things of that nature  
8 that I don't believe we had at that point.

9           **Q.    Okay.  Do you remember the Harley Davidson**  
10 **affair or event in 2007?**

11          A.    Yes, I do.

12          **Q.    Okay.  Was that a catering event?**

13          A.    No.

14          **Q.    What kind of an event was it?**

15          A.    We -- we set up a bar.  We had a -- we took a  
16 trailer, we set up a bar.  We may have cooked hotdogs or  
17 hamburgers or something.  But I think it was mostly  
18 involved with -- with the liquor aspect of it, as I  
19 recall.

20          **Q.    Okay.  Those are the kind of events I'm talking**  
21 **about.**

22                   **So did you have any other -- any other events**  
23 **up to the time that you terminated Mike Myers?**

24          A.    We had an event that the Re/Max -- Re/Max of  
25 Florida contracted with our company to prepare a meal

1 for brokers/owners in Lakeland, Florida.

2 **Q. Anything else prior to June 27, 2007?**

3 A. Those are the only two things that come to  
4 mind.

5 **Q. After June 27, 2007, what was your first event**  
6 **that you held?**

7 A. The first thing that I can recall is we opened  
8 the smokehouse in February of '08. And I don't recall  
9 any other events.

10 **Q. Okay. Has the smokehouse been open**  
11 **continuously from February 2008, to the present date?**

12 A. No, sir.

13 **Q. Can you tell the jury when it was closed and**  
14 **when it was opened again?**

15 A. It was closed -- the whole facility, Route 46  
16 Entertainment District, closed for operation in July of  
17 2012, and was closed for four years.

18 **Q. So it did not operate at all for four years --**  
19 **for those four years?**

20 A. Route --

21 MR. CHASE: Objection.

22 Judge, may we approach.

23 THE COURT: Approach, please.

24 (A conference was held at the bench outside of  
25 the hearing of the jury.)

1 MR. CHASE: I'm sorry, I got -- Mr. Shuker.

2 MR. SHUKER: The Court issued a directed  
3 verdict on that issue yesterday. The closing of the  
4 business, that's out.

5 MR. CHASE: That's outside the scope. So my  
6 objection would be outside the scope. And I would  
7 ask for a corrected instruction.

8 MR. BENITEZ: Closing of the business.

9 MR. SHUKER: The testimony we just heard --

10 MR. BENITEZ: No, this goes to the management  
11 of the business. It's not necessarily to the  
12 closing. We need to know when it's operating. I  
13 didn't --

14 MR. CHASE: I could see that.

15 THE COURT: Yeah, I think it's fair game.

16 MR. CHASE: I could see that.

17 So, Judge, and that was what I was concerned  
18 about when I talked about -- and I'm not -- I'm  
19 sorry. It seems like I'm ruling after -- I forgot  
20 to make an argument. Yesterday, when I argued for  
21 directed verdict of mismanagement, all of the  
22 allegations of mismanagement were those other things  
23 that were thrown out. So how could he then come in  
24 and say that as a general rule.

25 So if I have mismanagement as a collection of

1 all these individual things, all the individual  
2 things are gone, then what do you have left.

3 MR. BENITEZ: It's other issues --

4 THE COURT: That's fine.

5 MR. CHASE: All right.

6 (Bench conference concluded.)

7 THE COURT: Thank you.

8 You may proceed.

9 MR. BENITEZ: Thank you, your Honor.

10 May the court reporter read back the question.

11 THE COURT: Yes, sir. Unless the witness --

12 Madam Court Reporter, can you read the question  
13 back.

14 (The court reporter read back the requested  
15 portion.)

16 A. It closed in July of 2012, and it reopened in  
17 September of 2016. That's approximately four years,  
18 yes.

19 **Q. During those four years, the smokehouse was not**  
20 **opened, the saloon was not opened, the band area was not**  
21 **open, or Monroe, correct?**

22 A. That's accurate, yes.

23 **Q. Now, has all the facilities been open between**  
24 **September 2016, and today's date?**

25 A. No, sir.

1           **Q.    Okay.    Tell me when there was another break**  
2 **between September 2016, and today's date?**

3           A.    September 5th, we opened the smokehouse.    And  
4 it is operating continuously since we opened it.

5                   I believe in early December, we opened the  
6 garage bar, and it has operated on Thursday, Friday, and  
7 Saturday nights, since its opening.

8                   The saloon has not reopened as a stand-alone  
9 entity.

10                  Monroe's has not reopened as a stand-alone  
11 entity.

12                  But those spaces are used as often as possible  
13 for private events, weddings, business meetings, any  
14 type of thing that can generate revenue for the  
15 business.

16           **Q.    So it's available, but it's not a restaurant?**  
17 **Would that be accurate?**

18           A.    I would probably not use those terms, no.

19           **Q.    Okay.    It is not being used for people to sit**  
20 **down and order food out of a menu?**

21           A.    That's correct.

22           **Q.    And then, between June 2007, and July of**  
23 **2000 and -- excuse me.    Let rephrase.**

24                   You said you indicated the smokehouse opened in  
25 February of 2008?

1           A.    Yes, sir.

2           Q.    When did the rest -- and did that stay open  
3 continuously that time to September 20, 2016?

4           A.    No, sir.

5           Q.    When did that close down and reopen again?

6           A.    The whole venue closed, as I just stated, on --  
7 in July of 2012.

8           Q.    Okay. Okay. So the smokehouse then was  
9 continuously open between February 2008, to July 2012?

10          A.    Yes.

11          Q.    And was the -- when was the band area opened?

12          A.    I believe we opened it initially in sometime in  
13 the spring of '09, and I'm going to think it was April  
14 or May, or something in that regard.

15               And it operated until July of 2012, and then it  
16 reopened in early December of 2016, and has continued to  
17 operate on Thursday, Friday and Saturday, to present.

18          Q.    Okay. How about the garage bar?

19          A.    I thought you just asked about the garage bar.  
20 That was the answer I just gave you.

21          Q.    That was the band. Okay.

22          A.    The garage bar and the band area are all  
23 combined. That's one entity called the garage bar.

24          Q.    I see.

25               So the garage bar and the band would've



1 followed, would've opened in September of '09, until --

2 A. No.

3 Q. Excuse me?

4 A. I'm so sorry, I should have let you finish.

5 Q. Okay. I thought you indicated that it was  
6 September of '09, that they opened, the garage bar?

7 A. No, sir.

8 Q. No.

9 When did it open?

10 A. Garage bar opened, I believe, in the spring of  
11 '09, and it might have been April or May or something in  
12 that regard.

13 Q. I apologize.

14 A. No problem.

15 Q. And so, the dates that you just gave the jury,  
16 which -- and I'm just going to give them to you again  
17 just for you to correct them to make sure.

18 From spring of '09, to September 20th, of '12,  
19 the garage bar and the band area was open?

20 A. Yes. Parts of it.

21 Q. And then --

22 A. Parts of the week it was open, yes.

23 Q. And then it reopened in December of 2016?

24 A. That's correct.

25 Q. Okay. And then, what about the saloon, when

1 was it opened and when was it closed and when was it  
2 reopened?

3 A. The saloon and Monroe's kind of operate  
4 together. They were opened in, I believe, January of  
5 '09.

6 MR. CHASE: Your Honor, may we approach.

7 THE COURT: Yes, please.

8 (A conference was held at the bench outside of  
9 the hearing of the jury.)

10 MR. CHASE: All of this is beyond the scope.  
11 And he could have -- yes, maybe it goes to  
12 mismanagement. But he should have brought it up in  
13 his case of chief.

14 I never said anything about any of this closing  
15 or anything like that. That never came up in scope.  
16 It's clearly beyond the scope.

17 While it may be relevant for his management, he  
18 had to bring it up and he didn't. And I would  
19 ask -- I would object to it, and I would ask the  
20 jury to disregard it.

21 MR. BENITEZ: And I think it's relevant --  
22 well, I don't think he's arguing relevancy.

23 THE COURT: He's arguing scope.

24 MR. BENITEZ: But I think it's appropriate  
25 cross examination.

1           THE COURT: Is it in the scope of the direct  
2 examination?

3           MR. BENITEZ: Let me think. Yes, it is.

4           As a matter of fact, that's where I came from,  
5 is that sheet that he submitted with respect to all  
6 the operating expenses and so on. There has to be a  
7 background when they were opened and not opened.  
8 And I'm getting into those issues.

9           MR. CHASE: That was a good argument,  
10 counselor.

11          MR. BENITEZ: Well, I'm not --

12          MR. CHASE: It was good.

13          MR. BENITEZ: I'm not wasting time for the heck  
14 of it, Judge, I'm trying to do things to move the  
15 case along.

16          THE COURT: Well -- I understand, but I need  
17 you to listen to his answers the first time and  
18 let's not repeat the same testimony over and over.  
19 Because that's what you're doing. Because you  
20 didn't hear the answers the first time, we're having  
21 to all listen to it again.

22          MR. BENITEZ: Yeah, Judge, and the problem is  
23 when I wrote spring, I thought it came out in my  
24 handwriting as July, or whatever I said. That's the  
25 mistake. I just want to make sure.

1           THE COURT: It's not just one mistake. It's  
2   the entire thing we're now going through on the  
3   second time. So let's get it down and then let's  
4   move on.

5           Do you not know this --

6           MR. BENITEZ: What's that?

7           THE COURT: When the bar -- when all this stuff  
8   was opened and closed through discovery.

9           MR. BENITEZ: I'm trying to make sure that the  
10   jury gets it.

11          THE COURT: Do you not know this from  
12   discovery?

13          MR. BENITEZ: I have -- no, I don't know the  
14   specific dates, Judge.

15          THE COURT: You don't know when this operation  
16   was opened and closed from discovery in an  
17   eight-year-old case?

18          MR. BENITEZ: All the opens and closes, no,  
19   your Honor, I don't.

20          THE COURT: Then why is it relevant?

21          I mean, why does it matter if it wasn't worth  
22   discovery, why is it worth it now?

23          Get it down the first time and move on.

24          MR. BENITEZ: I will.

25          (Discussion held off the record.)

1 THE COURT: Folks, it's 10:30, we're going to  
2 make take a midmorning recess.

3 During this recess, all of the same cautions  
4 still apply. Please don't talk to each other about  
5 the case. No independent research. Don't post  
6 anything on social media.

7 Fifteen minutes. Okay. Thank you.

8 THE DEPUTY: Jurors, follow me.

9 (Jury exiting.)

10 THE COURT: Fifteen-minute recess.

11 (A recess was taken.)

12 THE COURT: All right. We're all set?

13 MR. CHASE: Yes, sir.

14 THE COURT: Return the jury, please.

15 (Jury entering.)

16 THE DEPUTY: Jury entering.

17 THE COURT: All right. Thank you.

18 You may be seated.

19 Mr. Benitez, you may resume.

20 MR. BENITEZ: Thank you, your Honor.

21 BY MR. BENITEZ:

22 Q. Mr. Hachenberger, we were at the saloon and  
23 Monroe opening on -- I believe you indicated, and this  
24 is just for reference -- January in 2009; is that  
25 correct?

1           A.     That's what I believe, yes.

2           **Q.     Okay. And can you tell us when it closed and**  
3 **reopened, if it did?**

4           A.     It ceased operations in -- excuse me, in July  
5 of 2012, just like the other venues at Route 46  
6 Entertainment District.

7           **Q.     Has either of those reopened?**

8           A.     Not as a stand-alone entity.

9           **Q.     What do you mean by that?**

10          A.     They're used for -- as often as we can, for  
11 private events, where we would have a business meeting  
12 that might include using a saloon as the bar, a wedding,  
13 or things of that nature, that whole area is utilized  
14 for those functions.

15          **Q.     Do you anticipate opening the saloon or the**  
16 **Monroe as stand-alone facilities any time soon?**

17          A.     I don't know exactly when that will happen. We  
18 would like to, yes.

19          **Q.     Okay. But -- now, you made money during the**  
20 **operation of all these business -- these venues, we'll**  
21 **call them, while they were open, correct?**

22          A.     I made money?

23          **Q.     No. I apologize.**

24                   **Highway 46 made money, correct?**

25          A.     Highway 46 was in the business of selling

1 products for profit. Yes.

2 Q. Okay. Do you know how much money they made?

3 A. I do not know exact numbers, no.

4 Q. Have you -- and you never told Mike Myers or  
5 Jackie Myers the amount of money they made, correct?

6 A. I don't think that's accurate. No.

7 Q. Okay. Did you tell Mike Myers how much money  
8 you made, made on the saloon and the Monroe facility,  
9 between January of '09, and July of 2012?

10 A. I think I previously stated that there were tax  
11 returns filed for some of those years, and I think  
12 that's where the indication of the income and expenses  
13 and everything would've been outlined.

14 Q. Okay. So other than the tax returns, you  
15 didn't give them a specific register or ledger for the  
16 saloon and the Monroe venues and what they made during  
17 January of 2009, and July of 2012?

18 A. No.

19 Q. The tax returns, you would agree with me, is on  
20 behalf of Highway 46, correct?

21 A. Yes.

22 Q. So the tax returns would not indicate what was  
23 made at the saloon, as opposed to the Monroe, as opposed  
24 to the garage bar, correct?

25 A. That's totally wrong.

1           **Q.    Okay.    Explain it to the jury.**

2           A.    Highway 46 Holdings, LLC owns the property and  
3   the buildings and the equipment that the business is  
4   operated from.

5                   Route 46 Entertainment District is a  
6   wholly-owned subsidiary, which does the day-to-day  
7   operation. It has -- it employs, people. It buys the  
8   food. It sells the food. It does things of that  
9   nature. So the operations are under a different LLC,  
10   but it's wholly owned by Highway 46 Holdings.

11                   So whatever the results of those sales would be  
12   are reported in the same tax return as Highway 46  
13   Holdings because it's a wholly-owned subsidiary.

14           **Q.    Okay.    So the tax return itself would not**  
15   **indicate the amount of money made on the Monroe**  
16   **restaurant while it was operating, correct?**

17                   MR. CHASE:   Objection, foundation.

18                   THE COURT:   Overruled.

19                   Go ahead.

20           A.    I'm not sure to what degree those numbers are  
21   broken down so I can't answer that question.

22           **Q.    Other than the tax returns, have you provided**  
23   **any other documents to Mike Myers or Jackie Myers since**  
24   **June 27, 2007, regarding any of the income from either**  
25   **Route 46 Entertainment District or Highway 46 Holdings?**



1           A.     Not to the best of my knowledge.

2           **Q.     You would agree with me that they are entitled**  
3 **to information about the business, correct, as members?**

4           MR. CHASE:   Objection, foundation.

5           THE COURT:   Sustained.

6           Lay a foundation.

7           MR. BENITEZ:   Yes, your Honor.

8           **Q.     Do you have an obligation as a manager of**  
9 **Highway 46 and as a manager of Route 46 Entertainment**  
10 **District, to provide financial information to the**  
11 **members of those entities?**

12          MR. CHASE:   Objection, legal conclusion.

13          THE COURT:   Overruled.

14          A.     Probably, yes.

15          **Q.     Have you done that?**

16          A.     No.

17          **Q.     You did not consult with the Myers prior to**  
18 **creating the entity Route 46 Entertainment District,**  
19 **correct?**

20          A.     Route 46 Entertainment District was established  
21 after Mike Myers' employment ended.

22          **Q.     So my question is:   Have you pro -- did you**  
23 **consult with Mike Myers or Jackie Myers prior to**  
24 **organizing the limited liability company by the name of**  
25 **Route 46 Entertainment District?**

1           A.    No, sir.

2           Q.    If Route 46 Entertainment District is the  
3 wholly-owned subsidiary of Highway 46 Holdings, would  
4 you agree with me that Jackie Myers and Mike Myers  
5 should've been informed of the creation of that entity?

6           MR. CHASE: Objection, foundation.

7           THE COURT: Sustained.

8           Q.    So Route 46 Entertainment would put on events  
9 and obtain income; is that correct?

10          A.    Yes, sir.

11          Q.    Okay. Now, you also indicated that you had  
12 included in your figures to the jury lawsuits and -- or  
13 attorneys' fees. Do you remember that?

14          A.    I do. Yes.

15          Q.    Okay. Did you have other -- you did have other  
16 lawsuits other than this lawsuit as Highway 46 Holdings,  
17 correct?

18          A.    I don't recall any off the top of my head. No,  
19 I don't think so.

20          THE COURT: Approach, please.

21                (A conference was held at the bench outside of  
22 the hearing of the jury.)

23          THE COURT: Where's this headed?

24          MR. BENITEZ: Two lawsuits that he's got. One  
25 against QMG. There was a lawsuit against QMG that

1     apparently is part of these moneys that he's talking  
2     about.

3             The other one was a lawsuit by APSAC (sic),  
4     which is the watchdog for like the radio, when you  
5     have a radio or a television in a bar, you have to  
6     pay money for the royalties and so on.

7             Those are the two lawsuits I know specifically  
8     about. I don't know if there's others.

9             THE COURT: And what's the relevance of this?

10            MR. BENITEZ: Goes to the sheet that he's  
11     presented with respect to attorneys' fees.

12            THE COURT: Right. But why does it matter? Is  
13     it an allegation of mismanagement to bring  
14     litigation for claims?

15            MR. BENITEZ: If there is an allegation --

16            THE COURT: Is there an allegation of  
17     mismanagement for bringing these claims?

18            MR. BENITEZ: No.

19            THE COURT: Then why is it relevant?

20            MR. BENITEZ: Because he brought it up with  
21     respect to attorneys' fees and I don't want the jury  
22     thinking this is the only lawsuit where the  
23     attorneys' fees have been incurred.

24            MR. CHASE: It's prejudicial.

25            THE COURT: I don't think it's relevant and I'm

1 struggling with -- we're not going to break those  
2 amounts out for the jury. They're not awarding  
3 damages.

4 MR. BENITEZ: They ought to know that it's not  
5 just this one lawsuit.

6 THE COURT: It doesn't matter. What difference  
7 does it make? They're not awarding any damages  
8 associated with -- so what difference does it make?

9 MR. BENITEZ: Other than informing the jury the  
10 testimony is clear, I don't see anything else.

11 THE COURT: Okay. But we're not going there.

12 (Bench conference concluded.)

13 BY MR. BENITEZ:

14 Q. Now, where the property sits, there's a vacant  
15 lot right next to it, to the west, correct?

16 A. Correct.

17 Q. And that is owned by you, correct?

18 A. Correct.

19 Q. And that was clear by Mike Myers and others  
20 working for Highway 46, correct?

21 MR. CHASE: Objection, foundation, speculation.  
22 What was the verb?

23 THE COURT: That was clear?

24 MR. BENITEZ: Clear, like --

25 MR. CHASE: I thought he said fear.

1 MR. BENITEZ: No. Clear.

2 THE COURT: Could you rephrase the question.

3 MR. BENITEZ: Yes, your Honor.

4 Q. When you brought that property -- I'll just  
5 make it clearer since the Court's comments.

6 When you bought that property right west of the  
7 facilities, Highway 46, was that after you already were  
8 in business with Mike Myers and Jackie Myers?

9 A. Yes, sir.

10 Q. And it was a -- it was a number of acres. How  
11 many acres were there?

12 A. Approximately five.

13 MR. CHASE: Objection, relevance.

14 THE COURT: Do you wish to be heard on  
15 relevance?

16 MR. BENITEZ: Yes, your Honor.

17 THE COURT: Okay, approach.

18 (A conference was held at the bench outside of  
19 the hearing of the jury.)

20 MR. BENITEZ: The relevancy would be that I was  
21 going to ask him, when clearing that property and  
22 prepping that property, those were charges made to  
23 Highway 46.

24 THE COURT: Did he buy it personally?

25 MR. BENITEZ: Yes. It's not Highway 46.

1 THE COURT: It's not Highway 46. Let's make  
2 that clear, and then I'm fine with that.

3 MR. BENITEZ: You're fine.

4 THE COURT: Yes. Just make it clear that it's  
5 not Highway 46, it's him personally.

6 MR. BENITEZ: Okay.

7 THE COURT: Sure.

8 (Bench conference concluded.)

9 BY MR. BENITEZ:

10 Q. Mr. Hachenberger, the property that I'm  
11 referring to that's west of Highway 46, and the business  
12 that we inspected on Friday, that is owned individually  
13 by you, correct?

14 A. That is owned by a LLC that I am the only  
15 member in.

16 Q. Okay. And when that property was clear -- and  
17 let me just make sure -- clear it up.

18 It has -- it is not owned by Highway 46  
19 Holdings, LLC, correct?

20 A. No. It is owned by an LLC that I am the only  
21 member of.

22 Q. And when that property was worked on, the  
23 charges that were incurred were put on Highway 46's  
24 balance sheet, or books?

25 A. I'm not sure that I could say that's accurate.

1           **Q.     Can you say whether that's inaccurate?**

2           A.     I couldn't say either way.   It's possible.

3           **Q.     With respect to any changes in Highway 46 or**  
4 **Route 46 Entertainment District after June 27, 2007, did**  
5 **you ever consult with Jackie or Mike Myers?**

6           MR. CHASE:   Objection, asked and answered.

7           MR. BENITEZ:   I'm opening it up, your Honor, to  
8 encompass --

9           THE COURT:   Overruled.

10          A.     No.

11          MR. BENITEZ:   May I have a second with my  
12 client, your Honor?

13          THE COURT:   You may.

14          MR. BENITEZ:   Nothing further, your Honor.

15          THE COURT:   Okay.   Thank you.

16          Anything, Mr. Shuker?

17          MR. SHUKER:   Yes, your Honor, briefly.

18                       CROSS EXAMINATION

19 BY MR. SHUKER:

20          **Q.     I had to see if it was morning or afternoon.**

21                       **Good morning, Mr. Hachenberger.**

22          A.     Good morning.

23          MR. SHUKER:   Your Honor, there's a tag here.

24          THE COURT:   Mr. Benitez, does that relate to an  
25 exhibit that you had?

1 I'm sorry, I didn't hear a response,  
2 Mr. Benitez.

3 MR. BENITEZ: Oh. I apologize, your Honor.  
4 Yes. Yes.

5 THE COURT: Does that relate to an exhibit?

6 MR. BENITEZ: Yes.

7 THE COURT: Did that come off of an exhibit?

8 MR. BENITEZ: Yes, it did. It's the one I had  
9 on the podium.

10 THE COURT: Okay. If you could hand it to the  
11 clerk, let her resecure that.

12 MR. SHUKER: May I inquire?

13 THE COURT: You may.

14 BY MR. SHUKER:

15 Q. Mr. Benitez asked you about some of the  
16 operations and post the termination of Mike Myers and  
17 what you did or didn't do, and I want to drill down on  
18 that a little.

19 Subsequent to Mr. Myers' firing, you've never  
20 taken a salary from Highway 46, have you?

21 A. No, sir, not a penny.

22 Q. Okay. And on the roughly \$25 million in loans,  
23 you've had no repayment of interest, correct?

24 A. No repayments of any kind.

25 Q. No repayments of principal, correct?



1           A.     Correct.

2           Q.     And so, the only thing you've done since you  
3     terminated Mr. Myers, for the reasons you've stated, is  
4     to lend almost 25 million to keep this property  
5     maintained and in good order; is that correct?

6           A.     That is correct.

7           Q.     And to the extent that you loaned funds to  
8     maintain this property, it benefits all the owners,  
9     including the Myers, correct?

10          A.     Definitely. Yes, sir.

11          Q.     And since you terminated Mr. Myers, you haven't  
12     taken any acts to impair that, your own loan, have you?

13          A.     No, sir.

14          Q.     And since you terminated Mr. Myers, you haven't  
15     taken any acts to impair their equity value, have you?

16          A.     No, sir.

17          Q.     And to the extent the property is well  
18     maintained and looks good and is not run down, their  
19     equity is enhanced?

20          A.     I believe that's true.

21          Q.     So the actions you've done by loaning your own  
22     money on what might right now be a dubious loan, has  
23     actually benefitted their ownership?

24          A.     Very definitely.

25                 MR. SHUKER: No further questions.

1 THE COURT: Redirect.

2 MR. CHASE: May it please the Court.

3 REDIRECT EXAMINATION

4 BY MR. CHASE:

5 Q. Going in reverse order --

6 THE COURT: Microphone, please.

7 MR. CHASE: Sorry, Judge.

8 Q. Going in reverse order.

9 Why did you buy the property that's next to the  
10 46 property?

11 A. The Route 46 Entertainment District as a  
12 complex has lots of different uses, and at times like  
13 New Year's Eve, can have in excess of a thousand people  
14 there. I think there's roughly 110 or 120 designated  
15 parking spaces on the original five acres.

16 Q. So could the additional property be used as  
17 overflow parking?

18 A. It is used all the time for overflow parking.

19 Q. It is used for overflow parking?

20 A. Yes, sir, it is.

21 Q. Which benefits Highway 46 Holdings, LLC?

22 A. That's correct.

23 And they have car shows that are held entirely  
24 out there.

25 Q. You were asked about consulting with the Myers.

1                   **What is -- can you describe to the jury your**  
2 **ability to have a conversation with Michael Myers?**

3                   MR. BENITEZ: Object.

4                   And request a side bar.

5                   THE COURT: Approach, please.

6                   (A conference was held at the bench outside of  
7 the hearing of the jury.)

8                   MR. BENITEZ: I don't know where he's going  
9 with this, but it's dangerous. He's now asking the  
10 witness to explain why he's limited in talking to --

11                  MR. CHASE: No.

12                  MR. BENITEZ: -- the Myers.

13                  THE COURT: Why? We've asked repeatedly about  
14 whether he's consulted with the Myers.

15                  MR. BENITEZ: Oh, okay. The reason for the  
16 side bar is how far are we going to go into the  
17 injunctions?

18                  MR. CHASE: Oh, I'm not -- I'm not going into  
19 the injunctions.

20                  MR. BENITEZ: Oh, you aren't?

21                  MR. CHASE: No, sir.

22                  THE COURT: You might want to redirect him a  
23 little bit so we don't go into that.

24                  MR. CHASE: Okay.

25                  (Bench conference concluded.)

1 BY MR. CHASE:

2 Q. Mr. Hachenberger, listen closely to my question  
3 so that we don't invite anything that I'm not asking  
4 for.

5 Let me ask it a different way: Do you feel  
6 that you have the ability to carry on a conversation  
7 with Michael Myers?

8 A. No, sir.

9 Q. How long have you felt that way?  
10 Just give me a date without any specific  
11 instance.

12 A. In the spring of 2007.

13 Q. Okay. You were asked about you believed that  
14 you had an obligation to disclose certain records of  
15 Highway 46.

16 Do you understand that obligation to be that if  
17 they requested that of you, that you would have to  
18 disclose it?

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

20 THE COURT: Overruled.

21 A. That would be my understanding, yes.

22 Q. You were asked about did they ever request  
23 information and you refused to disclose it?

24 A. No, sir.

25 Q. You were asked about income of Highway 46

1 Holdings, LLC.

2 Has Highway 46 LLC over any period of time ever  
3 made a profit?

4 A. No, sir.

5 Q. You were asked about that there was a time that  
6 it was closed for a little while.

7 Do you recall that?

8 A. I do.

9 Q. Why did you close it?

10 A. Three basic reasons: Glenda and I were in the  
11 midst of our divorce at that point in time.

12 Q. Yes, sir?

13 A. And it was difficult. Expensive. And  
14 everything else. This litigation was ongoing. And was  
15 difficult. And expensive.

16 Q. How was your health?

17 A. That was the third item. Is my health. That I  
18 was -- I've gained 150 pounds in the last five years,  
19 mostly due to stress.

20 Q. There was testimony when we first started this  
21 about that you've been having to borrow money to fund --  
22 do you recall that testimony?

23 A. I do.

24 Q. About the time that you closed, did you have  
25 the money in your bank account to keep paying, say, for

**1    the warehouse, rent?**

2            MR. BENITEZ: Object. It's beyond the cross  
3            examinations.

4            MR. CHASE: It's about the closing, sir.

5            THE COURT: It's about the closing?

6            MR. CHASE: No, not the closing -- not -- I'm  
7            sorry.

8            THE COURT: Approach. Approach.

9            MR. CHASE: Yes, sir.

10           (A conference was held at the bench outside of  
11           the hearing of the jury.)

12           MR. CHASE: The closing of the business. It's  
13           not why did he close the business.

14           MR. BENITEZ: What did you ask?

15           MR. CHASE: About the money. Did you have the  
16           money to keep paying those things?

17           THE COURT: I'll allow it.

18           Mr. Benitez, be careful when you walk up here,  
19           your shoulder is slipping under this.

20           (Bench conference concluded.)

21 BY MR. CHASE:

**22        Q.    Did you have the money to pay all the things,**  
**23    like rent, for the warehouse?**

24        A.    No, sir.

**25        Q.    At the time that you closed it, at the time of**

1 the closing --

2 A. No, sir.

3 Q. -- did you have to prioritize what things you  
4 could fund the money for?

5 A. Yes, sir.

6 Q. Was one of those things -- I think the  
7 testimony was you've always paid the rent on the  
8 warehouse for the memorabilia?

9 A. That's a fact, yes.

10 Q. If you didn't pay for that, what would happen?

11 A. There would be an eviction or a sale, or we'd  
12 lose the items that were involved in that facility.

13 Q. When you closed the district, did you still pay  
14 money to maintain it?

15 A. Yes, sir.

16 Q. Did you pay money to secure it?

17 A. Yes, sir.

18 Q. Did you have security personnel who would stay  
19 out there to make sure the things were okay?

20 A. Yes, sir.

21 Q. And then you said that you reopened it after a  
22 while?

23 A. We reopened the smokehouse in December of 2016.

24 Q. Was that after you started being able to borrow  
25 money to get it going again?

1           A.     That's correct. And I had the right personnel.

2           Q.     You had -- I think you testified -- you  
3 answered about the reimbursement of loans on  
4 Mr. Shuker's direct. You were asked about due care and  
5 things that were grossly negligent.

6                     Do you recall that?

7           A.     I do.

8           Q.     Currently, the claims that are -- the claims  
9 that you now have against you from Mr. Myers and  
10 Mrs. Myers, is your breach of the duty of care, correct,  
11 sir?

12          A.     Yes, sir.

13          Q.     And that talks about those three things that we  
14 discussed earlier, the mismanaging the business?

15          A.     Yes.

16          Q.     The changing the name and concept?

17                     Yes, sir?

18          A.     Yes, sir.

19          Q.     And then incurring unnecessary and unauthorized  
20 expenses?

21                     Yes, sir?

22          A.     Yes, sir.

23          Q.     And all the decisions that you've made with  
24 managing the business, were any of those decisions  
25 grossly negligent?



1           A.    Not at all, no, sir.

2           Q.    Did you consult with professionals in making  
3 those decisions?

4           A.    I did, yes.

5           Q.    And did you rely on those professionals'  
6 opinions?

7           A.    Absolutely.

8           Q.    With regard to changing the name and the  
9 concept from Gassey Jack's to Route 46 Entertainment  
10 District, was that decision grossly negligent?

11          A.    No, sir.

12               MR. BENITEZ:  Objection.  I believe this  
13 exceeds the -- this is asked and answered, Judge.

14               THE COURT:  Overruled.

15          Q.    Did you consult with professionals about  
16 changing the name?

17          A.    Yes, sir.

18          Q.    And did you rely on their advice?

19          A.    I did.

20          Q.    As far as the expenses that you incurred in  
21 maintaining the asset, keeping up the asset, any  
22 expenses incurred, when you would loan money to keep  
23 this business going and to maintain it, was that  
24 decision to loan the money grossly negligent?

25          A.    I didn't think it was, no, sir.

1           **Q. Did you consult with professionals about what**  
2 **you should do with regard to that?**

3           A. Yes, sir.

4           **Q. Did you rely on their opinions?**

5           A. Yes, sir.

6           MR. CHASE: Nothing further, Judge.

7           THE COURT: Thank you.

8           Any questions from our jury?

9           If you'll write that down, please, fold it,  
10 hand it to the deputy.

11          Counsel, approach, please.

12          (A conference was held at the bench outside of  
13 the hearing of the jury.)

14          MR. CHASE: It's a good question. I'm having a  
15 hard time focusing. I'm sorry, I don't have my  
16 glasses.

17          MR. SHUKER: Did the Entertainment District  
18 cause any costs other than just the -- and the  
19 answer is no.

20          MR. CHASE: That's correct.

21          MR. SHUKER: Yes, that's a good question.

22          MR. CHASE: No objection.

23          THE COURT: Any objection?

24          MR. BENITEZ: No, your Honor.

25          THE COURT: Okay. Thank you.

1 (Bench conference concluded.)

2 THE COURT: Mr. Hachenberger, I'm going to  
3 direct a question to you. And respond to the jury,  
4 please.

5 THE WITNESS: Yes, sir.

6 THE COURT: Was there any financial impact,  
7 aside from any potential filing fees to organize  
8 with the state, that resulted from the formation of  
9 Route 46 Entertainment District, that would not  
10 exist if operated under Highway 46 Holdings, LLC?

11 THE WITNESS: Could you read that one more  
12 time.

13 THE COURT: Was there any financial impact,  
14 aside from any potential filing fees to organize  
15 with the state, that resulted from the formation of  
16 Route 46 Entertainment District, that would not  
17 exist if operated under Highway 46 Holdings, LLC?

18 THE WITNESS: No, there wasn't. Not any  
19 significant thing that I recall, no.

20 THE COURT: Follow up, Mr. Chase?

21 MR. CHASE: No, sir.

22 THE COURT: Follow up, Mr. Shuker?

23 MR. SHUKER: No, your Honor.

24 THE COURT: Mr. Benitez?

25 MR. BENITEZ: No, your Honor.

1 THE COURT: Thank you.

2 We have an additional question.

3 THE COURT: Approach, please.

4 (A conference was held at the bench outside of  
5 the hearing of the jury.)

6 MR. CHASE: It's a long one.

7 MR. BENITEZ: I would obviously have an  
8 objection to.

9 THE COURT: Which one?

10 MR. BENITEZ: To the first one.

11 THE COURT: Any objection to the others?

12 MR. CHASE: No objection.

13 THE COURT: I'll sustain the objection. I  
14 don't think that's appropriate.

15 And there's a second question over here in  
16 regards on this that relates to the same question, I  
17 think.

18 MR. BENITEZ: Yeah, I don't have any problem  
19 with the CPA.

20 THE COURT: The CPA.

21 MR. CHASE: No, sir.

22 THE COURT: Okay.

23 (Bench conference concluded.)

24 THE COURT: Members of the jury, I instructed  
25 you at the time of giving you this process for

1 asking questions, that your questions are subject to  
2 the same rules of evidence as the lawyers' are.

3 In this case, I cannot ask a couple of these  
4 questions because of the rules of evidence. You're  
5 not to infer anything from that, other than  
6 procedurally they're just not proper questions.

7 There is a question -- two questions here that  
8 I can ask.

9 Sir, what is a CPA and what does a CPA do?

10 THE WITNESS: CPA is called a certified public  
11 accountant. They are licensed and regulated by a  
12 society that they kind of have to do everything just  
13 right or they get slapped around.

14 THE COURT: Any follow up, Mr. Chase?

15 MR. CHASE: I would say that there was a second  
16 part of it. I think you answered the first part,  
17 but the second part is, what do they do.

18 THE WITNESS: I'm sorry. Typically there are  
19 accountants that do the day-to-day things. A  
20 certified public accountant would come in after them  
21 and analyze what they did, and just make sure it was  
22 done accurately so that they could submit it with  
23 their name on it.

24 It's kind of a checks and balances that is part  
25 of the accounting kind of hierarchy, if you will.

1 MR. CHASE: No, sir, nothing further.  
2 MR. SHUKER: No, sir.  
3 THE COURT: Mr. Benitez.  
4 MR. BENITEZ: No, your Honor.  
5 THE COURT: Okay. Thank you.  
6 Any further questions?  
7 Thank you, sir, you may step down.  
8 THE WITNESS: Thank you.  
9 THE COURT: Mr. Chase, call your next witness.  
10 MR. CHASE: Sir, we rest.  
11 THE COURT: Thank you.  
12 Folks, we need to take just a brief recess so I  
13 can discuss with counsel our status and we will  
14 resume, I'm sure, in about five minutes or so.  
15 All the same cautions.  
16 THE DEPUTY: Jurors, follow me.  
17 (Jury exiting.)  
18 THE COURT: Thanks.  
19 You may step down, sir.  
20 Do we have rebuttal, Mr. Benitez?  
21 MR. BENITEZ: Yes, your Honor, I do.  
22 THE COURT: What are the topics that you intend  
23 to elicit testimony concerning?  
24 MR. BENITEZ: It would be Mr. Hachenberger's  
25 testimony. Also --

1           THE COURT: No, sir, that's not sufficient.  
2           That's not sufficient. You're going to need to  
3           identify specifically the topics that you intend to  
4           offer rebuttal testimony directed toward him.

5           MR. BENITEZ: Okay. I would rebut -- I would  
6           submit Mike Myers' testimony with respect to the  
7           moneys that have been spent.

8           Judge, could I have a second -- I didn't know I  
9           was going to get it. Could I have a second to  
10          figure it out?

11          THE COURT: Yes.

12          Go ahead.

13          (Discussion held off the record.)

14          THE COURT: Mr. Benitez.

15          MR. BENITEZ: The areas of inquiry --

16          THE COURT: Microphone.

17          MR. BENITEZ: The areas of inquiries would be  
18          the building permit. The bathrooms. Meetings with  
19          Donald Hachenberger. What he did with the property  
20          next door. How was the work next door charged.

21          THE COURT: How does your client now know that?

22          MR. BENITEZ: Excuse me?

23          THE COURT: How does your client know that?

24          THE WITNESS: It was charge against my --

25          THE COURT: How does your client know that?

1           MR. BENITEZ: Because he was doing the  
2 operations. This is during the time prior to June  
3 of 2007.

4           THE COURT: Okay.

5           MR. BENITEZ: It wouldn't have happened --  
6 afterwards he doesn't know anything.

7           THE COURT: Right.

8           MR. BENITEZ: Well, he knows something, but not  
9 that.

10          THE COURT: Firsthand knowledge.

11          MR. BENITEZ: Right. As to other matters, but  
12 not that.

13          THE COURT: Okay. What else?

14          MR. BENITEZ: He will testify with respect to  
15 how he got along with the people working on the  
16 project, again, up to June 27th.

17          THE COURT: No, sir, that's not rebuttal.  
18 Next.

19          MR. BENITEZ: Conversations between, I think --  
20 I think Donald Hachenberger had testified that he  
21 couldn't have conversation with Mike Myers. I would  
22 probably ask him about that.

23          THE COURT: Wasn't that covered extensively in  
24 direct and on the case in chief?

25          MR. BENITEZ: I'm not sure I can say



1 extensively, Judge, but I wanted to -- it's been  
2 brought up now by his testimony.

3 THE COURT: That's part of your case in chief.  
4 So, next.

5 MR. BENITEZ: So I'm not allowed to get into  
6 that area?

7 THE COURT: That's not rebuttal.

8 This isn't a tit for tat. That's not the  
9 purpose of rebuttal.

10 MR. BENITEZ: Exhibit account, and I may ask  
11 questions with respect to this.

12 THE COURT: What's your client's personal  
13 knowledge of that?

14 MR. BENITEZ: He just saw it, I believe  
15 yesterday, for the first time ever.

16 THE COURT: Right. And it's not in evidence.

17 MR. BENITEZ: Okay.

18 THE COURT: So what is your client's personal  
19 knowledge about it?

20 MR. BENITEZ: He would only have personal  
21 knowledge of what was spent or not spent during the  
22 time that he was in the facility.

23 THE COURT: Okay.

24 MR. BENITEZ: But -- excuse me.

25 THE COURT: Why is this evidence rebuttal?

1           MR. BENITEZ: If the -- if the basis is for him  
2 to have personal knowledge of this exhibit, he has  
3 no rebuttal to this exhibit other than having viewed  
4 it for the first time yesterday, or heard about it  
5 for the first time yesterday.

6           THE COURT: Okay. Mr. Benitez, you've been --  
7 you've pressed all of the witnesses very hard to  
8 respond to your questions. I'm going to press you  
9 to respond to mine.

10           Why is this rebuttal? His testimony about  
11 expenses on the property. Why is that rebuttal?

12           MR. BENITEZ: Because my client --

13           THE COURT: You have a -- let me -- let's  
14 approach it this way. You have a claim for  
15 mismanagement and spending unauthorized funds,  
16 right?

17           MR. BENITEZ: Right.

18           THE COURT: Okay. And your client has  
19 testified about those things in your case in chief  
20 because he bears the burden of proof on those  
21 things. So why is this rebuttal?

22           MR. BENITEZ: Because the funds after  
23 June 27th, '07, were not authorized by Mike Myers.

24           THE COURT: So how can Mike Myers testify other  
25 than to say I had no input as to expenses after that

1 day?

2 MR. BENITEZ: I believe that would be probably  
3 the extent of his testimony.

4 THE COURT: He may testify to that in rebuttal,  
5 although I think you covered it extensively. But  
6 I'll allow to you ask that one question.

7 But he has no personal knowledge of the  
8 expenses that are on that sheet. It would -- he  
9 can't comment on them except to say I didn't know  
10 anything about them or I didn't authorize them.

11 MR. BENITEZ: May I ask him that question?

12 THE COURT: Yes, yes.

13 MR. BENITEZ: Okay. Yeah.

14 THE COURT: Okay.

15 MR. BENITEZ: With respect to Route 46 Enter --  
16 I'll get used to it about five minutes after  
17 trial finishes.

18 THE COURT: After we're done.

19 MR. BENITEZ: Judge, with respect to Route 46  
20 Entertainment, I think there was testimony with  
21 respect to conversations that Donald Hachenberger  
22 may have had with Mike Myers regarding that.

23 Mike Myers will be testifying that there was no  
24 such conversations.

25 THE COURT: Okay. That's one question. I'll

1 allow that.

2 Go ahead.

3 Sir, you heard testimony that there was  
4 conversation between you and Mr. Hachenberger about  
5 Highway 46 Entertainment.

6 Is that true? Yes or no.

7 The question is done. That's rebuttal.

8 What else is there? Related to that sheet?

9 MR. BENITEZ: Did you approve the organization  
10 of or the --

11 THE COURT: If there was no conversation about  
12 it, he certainly didn't approve it.

13 MR. BENITEZ: But can I ask that in front of  
14 the jury so the jury understands that?

15 THE COURT: If you think that's necessary, I'll  
16 allow you to ask that second question.

17 MR. BENITEZ: Judge, okay.

18 THE COURT: Next area.

19 MR. BENITEZ: Have you received any moneys from  
20 Route 46 Entertainment District?

21 I did not ask him about Route 46  
22 Entertainment --

23 THE COURT: We've had conversations about  
24 Route 46 during the course of this case. You had an  
25 opportunity in your case in chief to ask these

1 questions.

2 I'm being liberal for giving you the  
3 opportunity during rebuttal that you could have and  
4 should have covered during your case in chief if you  
5 believe they are relevant.

6 MR. BENITEZ: With respect to this -- --

7 THE COURT: Let me ask this question.

8 What does that go to? What -- about claim?  
9 About whether he's received -- we all know the  
10 answer is no. But what does it go to, what claim?

11 MR. BENITEZ: To the mismanagement of the  
12 business and to --

13 THE COURT: How is it mismanagement? He's not  
14 entitled to any money under the terms of the  
15 operating agreement. So how is it mismanagement not  
16 to pay him money?

17 MR. BENITEZ: Well, I'm not -- I thought the  
18 letter agreement and the operating agreement say  
19 that he's entitled to certain moneys.

20 THE COURT: No, sir. The letter agreement and  
21 the operating agreement say he's not entitled to any  
22 money until after repayment of the debt.

23 MR. BENITEZ: Okay. Well, that's accurate,  
24 but -- okay. We're saying the same thing, Judge,  
25 because he eventually will be entitled to some money

1 after. If there's a distribution, he will be  
2 entitled to --

3 THE COURT: There are no distributions from  
4 that company to him. There would be distributions  
5 to Highway 46 because it's a wholly-owned  
6 subsidiary.

7 MR. BENITEZ: I'm also asking him to testify  
8 with respect to whether he considers it gross  
9 negligence not to be given information about the  
10 company, not to be informed about the --

11 THE COURT: No. Isn't that the basis of your  
12 claims?

13 MR. BENITEZ: It is.

14 THE COURT: Then that should have been covered  
15 in your case in chief. It's not rebuttal.

16 Next.

17 MR. BENITEZ: Well, I'm just reacting to him  
18 having testified to the gross negligence.

19 THE COURT: No, sir. You opened the door for  
20 that on your cross examination, why those questions  
21 came in. But that's your case in chief. That's not  
22 rebuttal.

23 MR. BENITEZ: I think that's about it, Judge.

24 THE COURT: So I will allow you to cover -- any  
25 objection to the building permit or bathrooms issues

1       that have been testified to by Mr. Hachenberger?

2           MR. CHASE: Judge, can I just get a few things  
3       on the record as part of -- I think I need to and I  
4       think it'll help the Court.

5           Rebuttal testimony is, the Court has discretion  
6       to do it, it is normally proper subject, but it has  
7       to be evidenced that it's not -- it's -- evidence  
8       that is merely cumulative of evidence introduced  
9       during the case in chief may be excluded.

10          There is -- the case is cited -- I'm reading  
11       out of Earhart's (phonetic). The case is cited as  
12       Rose V. Madden 629 So.2d 234: The term rebuttal  
13       denotes evidence introduced by plaintiff to meet new  
14       facts brought out in his opponent's case in chief.

15          The citing --

16          THE COURT: Mr. Chase, I'm way ahead of you.  
17       Okay.

18          MR. CHASE: Okay. It's -- the Court has -- you  
19       definitely don't get reversed for allowing rebuttal  
20       testimony. It's only for refusing. But it -- I'm  
21       going to be probably making a lot of objections, as  
22       its cumulative, because it sounds like everything I  
23       just heard is all cumulative.

24          THE COURT: I don't agree with that. I think  
25       there are specific things that your client brought

1 up in his testimony that we've heard for the first  
2 time.

3 For example, this business about, you know,  
4 intentionally lowering the numbers or estimates for  
5 folks on site, on the building plan submissions.

6 That's never come in. And this is the first  
7 time. And that's a part of the defense to  
8 mismanagement claims. I think that's fair game.

9 As to the meetings with Donald Hachenberger,  
10 we're not going to rehash all of that testimony.  
11 We're just not going to do it. I'm going to allow  
12 you to ask one or two questions to summarize their  
13 ability to communicate, but that's it.

14 As to the property next door, that issue was --  
15 first came up during the course of  
16 Mr. Hachenberger's examination. I'll allow you to  
17 get into that.

18 And then the expenses for the work next door  
19 that was apparently incurred during the time  
20 Mr. Myers was there, is fair game.

21 THE COURT: Okay.

22 MR. CHASE: Yes, sir. Thank you, sir.

23 THE COURT: All right. Let's return the jury,  
24 please.

25 THE DEPUTY: Jury's entering.



1 (Jury entering.)

2 THE COURT: All right. Thank you.

3 You may be seated.

4 Members of the jury, I need to ask -- I think  
5 from Mrs. Hachenberger, any additional evidence or  
6 testimony in response to the counterclaims?

7 MR. SHUKER: No, your Honor.

8 THE COURT: Okay. Thank you.

9 You've addressed them.

10 MR. SHUKER: Yes.

11 THE COURT: Thank you.

12 All right. Now, both parties then responding  
13 to the counterclaims that have been brought have  
14 finished the presentation of their evidence and  
15 rested.

16 We are now in the case of rebuttal by  
17 Mr. and Mrs. Myers with respect to the counterclaims  
18 that have been brought.

19 So, Mr. Benitez, call your first witness,  
20 please.

21 MR. BENITEZ: I would call Mike Myers to the  
22 stand.

23 THE COURT: Microphones.

24 Microphone, please.

25 MR. BENITEZ: Sorry.

1 THE COURT: Thank you.

2 Mr. Myers, can you come and take the stand,  
3 please.

4 MR. BENITEZ: Yes, sir.

5 THE COURT: Mr. Myers, you were previously  
6 sworn, still under oath, sir.

7 THE WITNESS: Yes, your Honor.

8 THE COURT: Thank you.

9 Mr. Benitez.

10 REBUTTAL EXAMINATION

11 BY MR. BENITEZ:

12 Q. You heard the testimony of Donald Hachenberger  
13 just a second ago, correct?

14 A. Yes, sir.

15 Q. And there was talk about some building plans  
16 having been submitted?

17 A. Yes.

18 Q. Do you recall that?

19 With respect to the bathroom in particular, and  
20 referring your attention to the bathrooms, was the  
21 bathrooms -- was there any discussion between you and  
22 Donald Hachenberger regarding the bathrooms prior to  
23 your dismissal on June 27th, 2007?

24 A. No, sir.

25 Q. Were the plans approved by Seminole County?

1           A.     Yes, they were.

2           **Q.     Did you underestimate the capacity in any area**  
3 **of your plans?**

4           A.     Absolutely not.

5           **Q.     Did you intentionally mean to misadvise the**  
6 **county in any respect with respect to the capacity of**  
7 **the area being considered on the plans?**

8           A.     No.    That has to have a strong review with the  
9 Department of Regulation.

10          **Q.     Okay.   But you haven't -- that hasn't -- that**  
11 **didn't happen, correct?**

12          A.     Before they review --

13                 MR. CHASE:   Objection, nonresponsive.

14                 THE COURT:   Sir, respond to the question as  
15 asked, please.

16          A.     No, sir.

17                 MR. BENITEZ:   Judge, I apologize.   I think it  
18 was my fault in the question.

19 BY MR. BENITEZ:

20          **Q.     Did anybody from Seminole County raise an issue**  
21 **with the capacity of the garage bar and the stage?**

22                 MR. CHASE:   Objection, cumulative.

23          A.     No, sir.

24                 THE COURT:   Overruled.

25                 Go ahead.

1           A.     No, sir.

2           **Q.     The property next door that Mr. Donald**  
3 **Hachenberger has testified he purchased through another**  
4 **one of his companies, did you ever work on that**  
5 **property?**

6           A.     I was the operator. I cleared it, cut the  
7 trees down, did all the grading, all the rolling, all  
8 the compacting, all the finished gradations, grassy  
9 area.

10          **Q.     Did other people from Highway 46 work on that**  
11 **property?**

12          A.     My staff helped me in some occasion. Sometimes  
13 they were not available. Most of that work was done on  
14 weekends and Saturdays and Sundays.

15          **Q.     And was that moneys charged to Highway 46**  
16 **Holdings?**

17          A.     Most of it went to my personal reimbursements.  
18 The fuel for the bulldozers and the tractors and so  
19 forth was just charged and went through it as a  
20 submittal for me to be reimbursed.

21          **Q.     To Highway 46?**

22          A.     That's correct.

23          **Q.     Now, with respect to Plaintiffs' Exhibit M for**  
24 **identification --**

25                 MR. BENITEZ: And if I may approach the witness

1 and show him the document.

2 THE COURT: Approach, please.

3 (A conference was held at the bench outside of  
4 the hearing of the jury.)

5 MR. BENITEZ: I thought you indicated I could  
6 ask him one or two questions on that, why he hasn't  
7 seen it before.

8 THE COURT: It's not coming in evidence. Jury  
9 hasn't seen it before.

10 MR. BENITEZ: No, but it's been referred to, so  
11 I'd like the jury to know that he hasn't seen it  
12 before.

13 MR. CHASE: Objection, relevance.

14 MR. BENITEZ: I thought you allowed it --

15 THE COURT: One second. Why is that relevant?  
16 I didn't allow you to do that. But why is it  
17 relevant?

18 I had marked down expenses associated with the  
19 property, which he's now testified to. What else is  
20 it about that?

21 Mr. Hachenberger, first of all, has testified  
22 that was prepared just recently, he sat down with  
23 it.

24 Is there any question he hasn't seen it?

25 MR. BENITEZ: That's true, your Honor.

1           THE COURT: And the jury is not going to see  
2   it, so.

3           MR. BENITEZ: Judge, could I get one of my  
4   notes for a second real quick just to solve  
5   another --

6           THE COURT: Sure.

7           MR. BENITEZ: The other area that you gave me  
8   was meeting with Donald Hachenberger.

9           THE COURT: You can ask a couple summary  
10   questions because he's spoken at length about it.

11          MR. BENITEZ: That's why I'm real cautious, I  
12   want to find out exactly I can ask him with respect  
13   to that.

14          THE COURT: What do you think is relevant at  
15   this point for rebuttal?

16          MR. BENITEZ: That --

17          MR. CHASE: I think we're --

18          MR. BENITEZ: That they had continuous meetings  
19   throughout the time that he was there.

20          THE COURT: That's already been testified to.

21          MR. BENITEZ: Yeah, that's why I wanted to  
22   pause and talk to you before I --

23           I wrote it down.

24          THE COURT: You raised a question,  
25   Mr. Hachenberger testified that their communication

1 broke down in the spring of '07. That was his  
2 testimony.

3 Now, if you want to confirm that fact or  
4 disconfirm it, not confirm it, whatever, you may do  
5 so. But that's the extent of what the issue is at  
6 this point.

7 MR. BENITEZ: That's it, right. I don't even  
8 know where to go with that, so I'm not going  
9 anywhere.

10 THE COURT: Okay. All right.

11 MR. CHASE: I just don't think it's rebuttal.

12 MR. BENITEZ: Right. And I don't want to step  
13 on your toe, Judge.

14 THE COURT: You're not stepping on my toes.  
15 I'm extremely patient, today. I'm extremely  
16 patient.

17 (Bench conference concluded.)

18 MR. BENITEZ: Nothing further, your Honor.

19 THE COURT: Thank you.

20 Cross?

21 MR. CHASE: No, sir.

22 THE COURT: Cross.

23 MR. SHUKER: No, sir.

24 THE COURT: Thank you.

25 Any questions from our jury with respect to

1     those issues?

2             Thank you, sir. You may step down.

3             THE WITNESS: Thank you.

4             MR. BENITEZ: Judge, I need to ask you to do  
5     that -- can have I have a quick side bar real quick.

6             THE COURT: You may.

7             (A conference was held at the bench outside of  
8     the hearing of the jury.)

9             MR. BENITEZ: Jackie Myers has indicated to me  
10    that -- I didn't bring it up to the Court before.  
11    Jackie Myers has indicated to me that she tried to  
12    contact Donald Hachenberger a number of times but he  
13    wouldn't return her call.

14            And that would be pertinent with respect to the  
15    communication. Because it's come across like they  
16    were not available to me and I couldn't talk to them  
17    and that kind of stuff.

18            So I would want to put Jackie on the stand just  
19    to say that.

20            THE COURT: To say what?

21            MR. BENITEZ: That she tried to communicate  
22    with Donald Hachenberger.

23            THE COURT: During what time period?

24            MR. BENITEZ: That was after June 27, 2007.

25            THE COURT: Relative to what?



1 MR. BENITEZ: To these issues.

2 MR. CHASE: He didn't testify anything about  
3 communicating with Jackie Myers, he said Michael  
4 Myers.

5 THE COURT: Right.

6 MR. BENITEZ: Okay. Well, that's why I'm  
7 bringing it up because I've been asked to put her on  
8 the stand to say that.

9 THE COURT: I don't think that's rebuttal. I  
10 would preclude that.

11 (Bench conference concluded.)

12 THE COURT: Call your next witness in rebuttal.

13 MR. BENITEZ: I don't have any other witness,  
14 your Honor.

15 I will rest.

16 THE COURT: Okay. Thank you very much.  
17 Any case in rebuttal?

18 MR. SHUKER: No, your Honor. Thank you.

19 THE COURT: Thank you very much.

20 I'm sorry, we're going to have to have one more  
21 bench conference and this one's all on me. Thank  
22 you.

23 Approach.

24 (A conference was held at the bench outside of  
25 the hearing of the jury.)

1           THE COURT: I'm going to let them go, but we  
2 tell them to be back here at -- well, let me ask.  
3 How long for closing?

4           MR. CHASE: No more than an hour.

5           THE COURT: Essentially the two claims, and  
6 your claim.

7           I'll give you an hour, I'm not concerned about  
8 an hour.

9           MR. CHASE: No, I could do it.

10          MR. BENITEZ: I think it's drastically shorter  
11 than I initially envisioned.

12          MR. CHASE: Except the three claims encompass  
13 so much and it's -- I can see -- I can see my first  
14 closing or -- because I get the sandwich, as I  
15 understand it.

16          MR. BENITEZ: Well -- yeah.

17          You go first, I go second. And then -- well,  
18 he goes second.

19          MR. CHASE: And then -- he's gone, he won't be  
20 here.

21          MR. BENITEZ: You me and then.

22          THE COURT: Well, let me ask you. Do you want  
23 him here to close?

24          MR. BENITEZ: I don't care. No.

25          MR. CHASE: You want to argue against two

1 folks?

2 MR. BENITEZ: No. That's what I mean, I don't  
3 need him there.

4 MR. CHASE: I can see my first time being 15 or  
5 20 minutes. The next time -- the next time -- is  
6 that a question?

7 THE COURT: No. This is what I intend to tell  
8 the jury. But I want to get your thoughts on it  
9 before we do that.

10 MR. CHASE: My first time being 15 or  
11 20 minutes. The second time it just depends on what  
12 he says in his closing for my rebuttal.

13 THE COURT: It's rebuttal so it's going to be  
14 focused on whatever he says, and I'm going to hold  
15 you to it.

16 MR. BENITEZ: In this case, it's kind of open  
17 because he's going to be reacting to me, too. So  
18 the way I understand it, Judge, he's going to go  
19 first, I'm going to go second, and he's going to go  
20 third. And I'm going to go fourth.

21 MR. CHASE: No.

22 THE COURT: That's correct. He gets rebuttal  
23 on his counterclaims. Only on the counterclaims.

24 MR. BENITEZ: Right.

25 THE COURT: And only rebuttal.

1           So, again, it just continues to narrow down.

2           MR. BENITEZ: Right.

3           THE COURT: Here's the issue. We can talk  
4 about mechanism here in a minute. Okay. Timing is  
5 my question.

6           We're probably going to end up with a set of  
7 instructions that could be read in no longer than  
8 half an hour.

9           If we bring them back here at 9, I take a half  
10 hour to read. Mine is 9:30. You each take an hour,  
11 that's 11:30, with a break in the middle, close to  
12 noon.

13          Does that sound like an appropriate timeline?

14          MR. BENITEZ: Yes.

15          MR. CHASE: Sure.

16          THE COURT: Then that's what I am going to do.

17          Now, here's what I had proposed to say with  
18 respect to your client.

19          Members of the jury, the Court has been  
20 listening to and considering the evidence and  
21 testimony along with you. There are certain claims  
22 in this case that the Court is responsible for  
23 deciding.

24          The Court has determined that it is not  
25 necessary for Mrs. Hachenberger or her counsel to

1 continue to attend or participate in the trial, and  
2 I've excused them from appearing from this point  
3 forward.

4 MR. CHASE: No objection.

5 MR. SHUKER: That's fine.

6 THE COURT: I'm open to suggestions.

7 This is just my first draft.

8 MR. BENITEZ: I'm having a problem, Judge, with  
9 the responsibility of the handling certain claims  
10 and then determined that it is not necessary for  
11 Mrs. Hachenberger to be here.

12 Kind of implies almost like she's fine, which  
13 she is, I mean, but I'm wondering if there's a  
14 better way of saying it without using the word  
15 determined.

16 THE COURT: I can say it is not necessary for  
17 her to, or her counsel to, attend. I don't have to  
18 say the Court has determined.

19 MR. BENITEZ: Can we do the Court has indicated  
20 she not need attend and she's decided not to attend,  
21 it's her decision not to attend.

22 MR. SHUKER: Okay, I'll close.

23 MR. CHASE: Truth is tough sometimes.

24 THE COURT: I don't think you can do a closing,  
25 you don't have any claims in this issue any longer.

1 Sorry. Respectfully.

2 MR. SHUKER: Okay. You're trying to make it  
3 like we're just deciding to leave because we don't  
4 care, that's an inference.

5 THE COURT: That's not an accurate  
6 representation.

7 MR. SHUKER: And that puts his case --

8 MR. CHASE: It does.

9 MR. BENITEZ: Judge, I don't have a problem  
10 with giving them any instruction. I'm just telling  
11 you --

12 THE COURT: Then tell me what you want to tell  
13 them.

14 MR. CHASE: The Court has determined. Why  
15 don't we go with the truth. Isn't that what verdict  
16 means?

17 MR. BENITEZ: No. Why don't we go with the  
18 truth they don't want to be here and we're saying  
19 it's okay.

20 THE COURT: No. They have no legal claims  
21 against them any longer. They have no purpose for  
22 them to be here.

23 Would you like me to tell me that? That the  
24 Court has entered judgment in Ms. Hachenberger's  
25 favor?

1 I'm trying to be neutral.

2 MR. BENITEZ: That's what I'm --

3 THE COURT: So, if your problem is it with the  
4 Court has determined, I can strike that and say it  
5 is not necessary for Mrs. Hachenberger or her  
6 counsel --

7 MR. BENITEZ: That would be a lot better.

8 MR. SHUKER: That's fine.

9 MR. CHASE: That's fine.

10 MR. BENITEZ: And can we -- can we just do  
11 that, that the Court has -- that it's not necessary  
12 for Ms. Hachenberger or counsel to be present,  
13 instead of all this.

14 THE COURT: Got to tell them something about  
15 why.

16 MR. BENITEZ: Yeah.

17 THE COURT: What's the prejudice to your client  
18 for wanting to know what's it about?

19 MR. BENITEZ: Because it makes this -- it's  
20 almost like they're -- their mentality should be  
21 they're the trier of facts. And what's happened  
22 here, and what's been submitted as evidence is what  
23 they're dealing with.

24 I don't want to give them a suggest that  
25 there's something else going on or that you're going

1 to second-guess them in a decision possibly. Or  
2 that you're making a decision may be inconsistent  
3 with their decision.

4 I just want to make -- Judge, I don't have a  
5 problem with that, with you advising them that they  
6 no longer have to be here. I just want to make it  
7 neutral so that they can not imply that you're going  
8 to make a decision that may affect whatever. Or  
9 that you've already made a decision that has  
10 affected it to imply that they're not here.

11 So if we can make it a little bit less --

12 THE COURT: Tell me what to say. I don't --  
13 I'm not going to simply tell them the Court --  
14 you've told me not to say that, that it is no longer  
15 necessary for Mrs. Hachenberger or her counsel to be  
16 here.

17 They are entitled to know, because you argued  
18 in your opening statement claims against  
19 Mrs. Hachenberger, the Court has decided those  
20 adversely.

21 MR. BENITEZ: Right.

22 THE COURT: Are they not entitled to know that?  
23 I could say -- how about this. Here you go.

24 MR. BENITEZ: Thank you.

25 You can, can I --



1           THE COURT: I could say. As to the claims that  
2 remain, and I've excused them, I would say, instead,  
3 members of the jury, Mrs. Hachenberger and her  
4 counsel will not be appearing further. It's not  
5 necessary for them to continue to attend or  
6 participate in the trial as to the claims that were  
7 made. And I've excused them from appearing from  
8 this point forward. And not do the first part.  
9 Just say that the claims that remain for your  
10 decision.

11           MR. BENITEZ: I would -- well, does the Court  
12 feel comfortable reading the second paragraph alone?

13           THE COURT: Again, I -- that's what I'm  
14 proposing, is I'm not going to read the first part.

15           MR. BENITEZ: If you read the original  
16 paragraph about these things --

17           THE COURT: So just read that the Court has  
18 determined it's not necessary for Ms. Hachenberger  
19 or her counsel to continue to attend or participate  
20 in trial, and I've excused them from appearing  
21 further.

22           MR. BENITEZ: Right.

23           MR. CHASE: Judge, he brought you around in  
24 circles. What his original complaint was, we all  
25 said no, that's not good, (inaudible) they got to be

1 told.

2 He's seriously just brought you completely  
3 around. That was the first thing that he said, was  
4 let's do that, and we all said no.

5 MR. BENITEZ: No.

6 THE COURT: He said to take out this and just  
7 say this and he didn't want this.

8 MR. CHASE: That's still where he is. He said,  
9 can we start here.

10 THE COURT: Now we're saying the Court has  
11 determined -- I didn't say that. Yeah, I've  
12 determined that they no longer need to appear.

13 MR. CHASE: I don't think it's worth fighting  
14 over it. And I think the record's better if he  
15 agrees to it. It's just not that big of a deal.

16 THE COURT: All right. I won't add the  
17 additional language, and I'll read just that  
18 portion.

19 MR. CHASE: Yes, your Honor.

20 (Bench conference concluded.)

21 THE COURT: All right. Members of the jury,  
22 it's shortly before noon, and I have an instruction  
23 to read to you, and then further instructions for  
24 you.

25 In this case, the Court has determined that it

1 is not necessary for Mrs. Hachenberger or her  
2 counsel to continue to attend or participate in the  
3 trial. And I will be excusing them from appearing  
4 from this point forward in the case.

5 We have reached the conclusion of the evidence  
6 and we are now prepared to move into instructions on  
7 the law and closing arguments. In order, however,  
8 to be prepared for those things, it does take us  
9 some time.

10 I think the best mechanism for us to accomplish  
11 that is for us to recess for this afternoon and have  
12 you come back tomorrow morning at 9 o'clock, at  
13 which point the Court will instruct you on the law,  
14 you will receive closing arguments, and then you  
15 would begin your deliberations in the middle of the  
16 day, as opposed to at the end of the day, which is  
17 how we'd likely proceed.

18 We are well ahead of the schedule that we had  
19 anticipated during jury selection.

20 And I'm very grateful for your time, for your  
21 patience, for your flexibility with essentially  
22 moving this process in order for us, again, to  
23 continue to make the best presentation to you in the  
24 most effective and most efficient presentations so  
25 that everyone can benefit from this time.

1           So I am going to release you from this time.

2           Now, having said that, you've heard all of the  
3 evidence at this point, but you have not heard the  
4 Court's instructions on the law as to how to  
5 evaluate that evidence. Nor have you heard the  
6 attorneys' final presentations, which will help you  
7 to analyze and assist in that process.

8           So you're to continue to keep an open mind, not  
9 to evaluate the evidence, not to begin the  
10 deliberative process in your own mind, and most  
11 certainly not together with others as you take this  
12 time off this afternoon.

13          So, please, continue to follow the Court's  
14 instructions. Don't speak to each other or anybody  
15 else about the jury case, presuming about the case  
16 or about your jury service.

17          Please don't conduct any independent research  
18 on the people, places or issues involved.

19          Don't post anything on any social media or  
20 other websites.

21          Continue to tell folks the Judge has instructed  
22 me I cannot speak to you. And that is an obligation  
23 that you will have a choice to be relieved from, if  
24 you choose to, once deliberations are done, the  
25 verdict is rendered, and the Court has released from

1 your service. But this is not that time. You are  
2 still in jury service and bound by those Court  
3 orders.

4 Any questions?

5 Okay. If you would, just leave your notebooks  
6 on the chairs there.

7 We'll see you back tomorrow morning at  
8 9 o'clock ready to go.

9 THE DEPUTY: Jurors follow me.

10 (Jury exiting.)

11 THE COURT: Thank you.

12 You may be seated.

13 Mr. Shuker, at this time I am going to release  
14 you all from your participation in trial and request  
15 that you prepare appropriate judgments based upon  
16 the Court's directed verdicts in the case.

17 Run those by Mr. Benitez, and then submit them  
18 to the Court. If there's an issue, schedule a time  
19 at ex-parte to come together, and I'll be happy to  
20 consider to evaluate the appropriate form at that  
21 time.

22 MR. SHUKER: We will do so, your Honor.

23 THE COURT: Okay.

24 MR. SHUKER: I think there's the one  
25 housekeeping. Now that the evidence is closed.

1     There's Counts 5 and 20, rescission and kind of a  
2     dec. action.

3             How do you want to schedule oral argument on  
4     those?

5             I'm happy to come back next week and not bog  
6     down your process or --

7             THE COURT: No. My preference and, candidly,  
8     what I intended to do, is that once this case is to  
9     the jury, we're going to resume receipt of evidence  
10    with respect to those actions. That's what we had  
11    all talked about and that's what I intend to do.

12            If you'd like to then schedule to be back here  
13    tomorrow afternoon with respect to those counts, I  
14    would then expect that we would be taking evidence  
15    and moving forward on those while the jury is  
16    deliberating.

17            MR. CHASE: It's the -- I've got Nick Carlin --  
18    Nick Carlin took off work today and he has to be  
19    able to have some time. And I said that we would  
20    need him back for that, specifically for the  
21    replevin. He's got a ton of information that you  
22    need to hear. And it's --

23            THE COURT: I have an expectation of counsel  
24    with respect to the replevin counts based upon the  
25    Court's ruling at this point, that I am certain that

1     you will be able to resolve 90 plus percent of those  
2     issues.

3             There's no questions as to the Court's  
4     interpretation at this point of the contract  
5     documents and what the testimony is with respect to  
6     the scope of materials that are subject to the  
7     replevin count. There may be some small  
8     misunderstandings or disagreements about that and  
9     I'll be happy to hear factual testimony on it if it  
10    can't be resolved.

11            And I -- listen, Mr. Benitez, Mr. Myers, I  
12    understand you disagree with me. That's your  
13    absolute right. You have a different interpretation  
14    of the evidence than I do. But the Court has ruled.

15            You are now the appellant in an appeal, if  
16    that's what you choose to do. Where over 65 percent  
17    of those cases are decided in favor of the appellee.  
18    It's an uphill battle.

19            So you can choose to continue to fight on those  
20    issues and perhaps be on appeal relative to them, or  
21    you can strike bargains and take control of these  
22    issues yourself. But the Court's interpretation of  
23    these agreements I don't think is at great issue at  
24    this point.

25            MR. CHASE: No, sir.

1           THE COURT: And whether it's necessary for the  
2 Court to sit and evaluate each item, and whether you  
3 want the Court to be in that position, or whether  
4 you want to take control of that position,  
5 whether -- what makes more sense in the context of  
6 this, I'm -- I did not anticipate, in all candor,  
7 that following our conversation off the record  
8 yesterday, that there would be a settlement this  
9 morning.

10           I get it. I think I understand quite well  
11 precisely what is going on here.

12           MR. BENITEZ: Well, Judge, if I may.

13           We made offers that were pending until this  
14 morning, and we're in a position that my clients are  
15 not in the mindset that you believe they are.  
16 They're willing to go ahead.

17           I think the Court's suggested along the lines  
18 of the replevin, that whatever remaining -- whatever  
19 is being used stay with Highway 46.

20           MR. CHASE: Objection. He's talking about  
21 settlement conversations.

22           THE COURT: These are settlement conversations  
23 and the specifics are not appropriate for the Court  
24 to hear.

25           The issue is this: In every context in which



1 settlement is at issue, it is a choice by the  
2 parties. The choice is whether you leave it up to a  
3 fact finder to make decisions, or whether you choose  
4 to take control of the decision-making process.

5 Understanding that every settlement -- a good  
6 settlement, everybody walks away unhappy. At least  
7 a little bit unhappy. That's the nature of a good  
8 settlement. You give something you didn't want to  
9 give. You get something maybe you hadn't expected  
10 to get.

11 This issue of the replevin is a very fact  
12 intensive determination because it's going to come  
13 down to what was on site.

14 MR. CHASE: And that's Nick Carlin.

15 THE COURT: And -- to some degree. It's Mike  
16 Myers, to some degree. It's Jackie Myers, to some  
17 degree. It's -- the point is, it's fact intensive.

18 Those facts could break for you, they could  
19 break against you, or they could fall somewhere in  
20 between. And I'm simply suggesting to you, that it  
21 is not, in my estimation, necessary for you to go  
22 through that process as to everything.

23 Now, are there a couple of items that you might  
24 disagree about that have significant value and happy  
25 to consider those on a case-by-case basis, but does

1     it make sense.

2           MR. BENITEZ:   And, Judge --

3           THE COURT:   May I have a conversation with you  
4     all off the record.   Would you all be comfortable  
5     with that?

6           MR. CHASE:   Of course, Judge.

7           MR. BENITEZ:   Yes.

8           THE COURT:   Okay.   Off the record.

9           (Discussion held off the record.)

10          THE COURT:   Let's go back on the record and  
11     let's address issues.

12          MR. SHUKER:   In terms of the two counts against  
13     us, 5 and 20, that are heard by you, I think 5 is  
14     just legal argument in terms of rescission, and the  
15     other one is as well.

16          But when we get to those, I'm not going to call  
17     Ms.   Hachenberger so can she be excused for the  
18     balance.

19          THE COURT:   Is she necessary to anything, from  
20     your perspective?   And, if so, now will be the time  
21     to address it.

22          MR. BENITEZ:   When are you anticipating doing  
23     this, your Honor?

24          THE COURT:   In a perfect world, we send the  
25     jury out and call your first witness.   I know that's

1 not realistically happening. I think I'm going to  
2 give you closing arguments, and I'm going to give  
3 you -- we'll take lunch time, anyway.

4 How -- I mean, what do you all think about  
5 Friday morning? You see you got an issue with  
6 Mr. Carlin getting back.

7 MR. CHASE: Yes, sir. It just -- that would  
8 be -- yes, sir. Because I asked him -- he took off  
9 the whole day to come in today, then wasn't called.  
10 And I told him that we need this narrow, and then he  
11 said, I just need some notice.

12 I was thinking -- I thought you had said that  
13 we were going to do this, like it was going to  
14 even -- maybe even a few weeks from now.

15 THE COURT: No, no.

16 MR. CHASE: Then I misunderstood.

17 I can let him know Friday morning.

18 THE COURT: Let me give you this, all terms we  
19 could start Monday morning.

20 MR. BENITEZ: That would be perfect.

21 MR. CHASE: Then we've got the time.

22 THE COURT: Can we do it in one day?

23 MR. CHASE: He's going to come in and testify  
24 about there was all that memorabilia there. That  
25 Mike Myers told him that there was all the

1 memorabilia on the property, on the 46 property.  
2 That all that -- that there's a ton of memorabilia.  
3 That he's the one with Mike Myers moved the stuff  
4 over to Church Street.

5 Mike Myers told him, this is the stuff that I'm  
6 contributing to the project. Mike Myers described  
7 the deal to him, described we have to inventory so  
8 that we know the value, all of the things.

9 I mean, Nick Carlin's got a ton of testimony  
10 and it's all -- he was our star witness.

11 THE COURT: Isn't -- if you all can't resolve  
12 the replevin claim amongst yourselves, that sounds  
13 like more than a day of testimony.

14 MR. CHASE: No way. It would be --

15 MR. BENITEZ: Judge --

16 MR. CHASE: For that -- I mean, to get into all  
17 of the negative things that I mentioned yesterday  
18 that he could have done, but now are irrelevant  
19 because of those first, A, B and C being gone.

20 THE COURT: Right.

21 MR. CHASE: I'm just sticking with that. I  
22 think it's going to be -- maybe my part would be  
23 within an hour.

24 THE COURT: Okay. To identify specific items.

25 MR. CHASE: No. It wouldn't be identifying

1 specific items. He would be able to testify as  
2 to -- there's nobody I think ever's going to be able  
3 to walk in here. Nor is the Court ever going to  
4 give his time to go, that one, that one, that one.

5 THE COURT: I think Mr. Myers could.

6 MR. CHASE: Okay. There's 6800 items.

7 THE COURT: Listen. I'm not excited about it,  
8 I'm just asking the questions.

9 MR. CHASE: Okay.

10 THE COURT: Let me tell you a story.

11 Off the record.

12 (Discussion held off the record.)

13 THE COURT: It's 12:30. Let's be back here at  
14 2 o'clock and we're going to do the charge  
15 conference.

16 MR. CHASE: Can Glenda be released?

17 THE COURT: Yes.

18 MR. SHUKER: Thank you.

19 THE COURT: What you're telling me is, you  
20 didn't intend for her to testify. I haven't heard  
21 anybody say she needs to testify?

22 MR. SHUKER: Great. And we won't be back for  
23 the charge conference. You don't need us.

24 THE COURT: That's fine.

25 Thank you. We'll see you all back at

1 2 o'clock.

2 MR. CHASE: Thank you.

3 (A recess was taken.)

4 THE DEPUTY: Everyone, please rise.

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

6 All right. Ready to proceed with the charge  
7 conference?

8 MR. CHASE: Yes, sir.

9 As we go through it, may I be seated, sir?

10 THE COURT: You may be. You may be at ease.  
11 This is a more informal time than when I have the  
12 jury. And if you'd like to take your jackets off,  
13 you're welcome.

14 MR. CHASE: I do have to -- Mr. Jones and I do  
15 need to renew my motions for directed verdict as to  
16 letters I, L, and O, of Counts 18 and 19. Those are  
17 the -- my understanding -- the only remaining things  
18 that are pending before the jury.

19 That would be the mismanagement of the  
20 business, changing the name and concept, and  
21 incurring unnecessary and unauthorized expenses.

22 My arguments -- I would adopt and incorporate  
23 my arguments earlier with special attention that  
24 there are just no damages. There's no damages.

25 I don't understand what the remedy is. It's

1 the -- I don't -- I understand that they've made  
2 this allegation, but there's no way that the jury  
3 could come back with any damages for any one of  
4 those three things. It's a -- without having to be  
5 speculative.

6 Plus the contract is unambiguous and gives him  
7 control to do all the things that he did. So I just  
8 don't see how that's something that the jury could  
9 come back with an adverse ruling.

10 Respectfully, sir.

11 MR. BENITEZ: Judge, I believe the Court has  
12 already heard all the arguments previously. There's  
13 nothing but additional evidence at this time, so I  
14 would rely on the previous arguments that have been  
15 made.

16 THE COURT: May I ask, Mr. Benitez -- well, I  
17 don't think I can ask that.

18 I would -- same ruling as previously, I will  
19 deny the motion for directed verdict.

20 MR. CHASE: Thank you, sir.

21 THE COURT: Whose office prepared the draft set  
22 of instructions?

23 MR. CHASE: Mr. Jones.

24 THE COURT: Okay. So, Mr. Jones, you are  
25 charged with doing the final set as well.

1 MR. SHUKER: I can do that.

2 THE COURT: And it's -- it would be especially  
3 helpful for you to ask any questions that you have  
4 as we go through so I can make sure that you're  
5 prepared to do this.

6 MR. SHUKER: Certainly.

7 THE COURT: One of the -- I guess is a starting  
8 place what I'd like to do and what I think the rules  
9 require us to do, obviously, is to give the jury a  
10 set of instructions. They're going to have in their  
11 hands a copy of the law as it relates to each of the  
12 claims that the Court's going to be giving them.

13 So as you prepare these, Court's preferred  
14 format would be simply jury instructions. Don't  
15 even need a case style or anything like that. Just  
16 simply the title, jury instructions. And then we  
17 start running text with the jury instructions. Not  
18 one per page, but just running text.

19 They should have no titles. They should have  
20 no jury instruction numbers. To the extent that  
21 there are subtitles necessary, sometimes they are  
22 for shifting gears, that's appropriate, but no  
23 titles of the instructions.

24 So, for example, if you will look at the  
25 standard instruction, 401.1, which is an



1 introduction. It says, 401.1 introduction. Neither  
2 of those would go to the standards set of  
3 instructions. It would simply begin: Members of  
4 the jury, you've now heard and received all the  
5 evidence in the case.

6 No page numbers are necessary. So, again, just  
7 rolling instructions. No page numbers. That helps  
8 us if we have to insert a page. We're not concerned  
9 with pagination any longer.

10 Okay. The instructions would begin with 401.1.

11 Any objections from the plaintiff?

12 MR. CHASE: We need to get there, Judge. Just  
13 a second.

14 MR. BENITEZ: Judge, are you going based on the  
15 last one that was submitted to you or --

16 THE COURT: I'm actually starting with the  
17 standard jury instructions.

18 MR. BENITEZ: Oh, standard.

19 THE COURT: I don't see 401.1 in the set that  
20 was given to me, so --

21 MR. SHUKER: I have what was submitted.

22 MR. CHASE: The 401.1 is the standard  
23 beginning. I have no objection, Judge.

24 THE COURT: Any objection?

25 MR. BENITEZ: If it's -- I don't even know what

1     it is, but if it's standard, I don't have any  
2     objection.

3           THE COURT: Just to refresh your memory, it  
4     reads as follows: Members of the jury, you've now  
5     heard and received all the evidence in this case.  
6     I'm now going to tell you about the rules of law  
7     that you must use in reaching your verdict.

8           There's a parenthetical, which we would not  
9     give because that deals with the law that we would  
10    have given to them at the front. We decided not to  
11    do that. It says, then, when I finish telling you  
12    about the rules of law, the attorneys will present  
13    their final arguments and you'll then retire to  
14    deliberate.

15          So it's a standard introduction.

16          MR. BENITEZ: Yes, sir.

17          MR. CHASE: Yes, sir.

18          THE COURT: 401.1.

19          401.2 is the summary of claims.

20          This is one that needs to be fleshed out just a  
21    little bit by the lawyers.

22          You do have 401. You have it as 409.2.

23          MR. CHASE: And should be 401.

24          THE COURT: But I think if we use the  
25    Form 401.2, it's all the same. 401.2 and 409.2, the

1 form is the same.

2 This is the instruction that begins: The  
3 claims and defenses in this case are as follows:

4 MR. CHASE: Yes, sir.

5 THE COURT: 401.2 is a negligence context.

6 401. -- 409.2 that you've cited is negligent  
7 misrepresentation or fraud. Neither of them  
8 directly apply, but you want to use that format.

9 And then I would suggest to you that it would  
10 begin: The plaintiff claims that the defendant  
11 Michael Myers converted the property. And then go  
12 into the standard instruction for conversion.

13 And then, the defendant denies that claim in  
14 the defense's piece of this. And there are no  
15 affirmative defenses raised to that; is that  
16 correct?

17 MR. CHASE: No, sir. And they didn't deny it.

18 THE COURT: You haven't moved for directed  
19 verdict on it either.

20 MR. CHASE: Not going to.

21 THE COURT: Do you deny the conversion? Are  
22 you going to argue it didn't happen?

23 MR. BENITEZ: Yes, your Honor, I am.

24 As a matter of fact, at this time I would like  
25 to move for directed verdict on plaintiffs'

1 pleadings in this case because there's no evidence  
2 of the conversion.

3 THE COURT: Well, we're past that. But even if  
4 that motion were before me I, would deny it. I  
5 think that there's prima facie evidence of the  
6 elements.

7 But it is your intent to deny that claim.

8 MR. BENITEZ: Yes, your Honor.

9 THE COURT: So defendant denies this claim.  
10 His pleadings is denied.

11 MR. CHASE: Yes, sir.

12 THE COURT: And so, and these would be names at  
13 this point. So Highway 46 Holdings claims that the  
14 defendant Michael Myers converted property or money  
15 or whatever it is that you contend.

16 MR. CHASE: Yes, sir.

17 Madam Court Reporter, we're going to need this  
18 right away, the draft.

19 THE COURT: And then, consistent with the  
20 standard, the defendant denies that claim. And then  
21 we don't have a comparative. There's no issues  
22 there.

23 And there is a -- there's the standard  
24 instruction.

25 401.24 is not a standard instruction. It's a

1 standard instruction, but it's not a standard  
2 written instruction. The instruction says, the  
3 general counterclaims, cross-claims and third-party  
4 claims should follow the same pattern of issues.

5 So you'll lay out in 401.2 all of the claims  
6 and defenses first. That's the threshold place that  
7 it gets laid out.

8 So after the plaintiffs' claim for conversion  
9 and the denial, then the defendants, Michael and  
10 Jackie Myers, Jacqueline -- excuse me, I think it is  
11 in the pleadings -- claim that, and then summarize  
12 their claim, which is essentially that Highway 46  
13 Holdings and Donald Hachenberger violated their duty  
14 of care.

15 Are these --

16 MR. SHUKER: I think it's just Donald  
17 Hachenberger.

18 MR. CHASE: Just Donald Hachenberger.

19 THE COURT: Just Donald Hachenberger.

20 MR. CHASE: Yes.

21 THE COURT: So claims that Donald Hachenberger  
22 violated his duty of care and violated of good faith  
23 and fair dealing.

24 MR. CHASE: By --

25 THE COURT: By some very brief summary.

1 MR. CHASE: A, B, C. Yes, sir, the -- yes,  
2 sir. I'm -- by mismanaging the business. I'm fine  
3 going by the pleadings, by mismanaging the business,  
4 by changing the name and concept of the business, by  
5 incurring unnecessary and unauthorized expenses.

6 THE COURT: Right. Which caused them harm.

7 MR. CHASE: Yes, sir.

8 THE COURT: Okay. And then Donald Hachenberger  
9 denies the claim.

10 And are there affirmative defenses here?

11 MR. CHASE: Yes, sir, I'm -- yes, sir, I'm  
12 sorry. I don't know off the top of my head. The  
13 judgment rule is out.

14 One second, Judge. Business judgment rule and  
15 express terms. Express terms of the contract.

16 THE COURT: That's a simple denial.

17 MR. CHASE: Yes, sir.

18 THE COURT: Neither of those are affirmative  
19 defenses. We've established previously that  
20 Mr. Benitez for his clients carries the burden and  
21 that your clients simply denies those allegations.

22 Business judgment rule is something you can  
23 talk about. I'm not saying you can't talk about or  
24 even use the words business judgment, but it's got  
25 to be in the context of denying that he was grossly

1 negligent, reckless, or criminal in his behavior.

2 MR. BENITEZ: And, Judge, that doesn't mean  
3 that he's allowed to use the phrase business  
4 judgment ruling.

5 THE COURT: There's no rule.

6 MR. BENITEZ: Just business judgment, period.

7 THE COURT: Right. Used his best business  
8 judgment. Used business judgment with consultation.  
9 Whatever the arguments are. You're welcome to do  
10 that. But we're not going to define for the jury a  
11 business judgment rule.

12 MR. CHASE: There's an instruction, isn't  
13 there?

14 THE COURT: Is there a standard instruction on  
15 the business judgment rule that applies to LLCs?

16 MR. CHASE: I think that what -- what we  
17 encompassed was the language in the statute. All we  
18 wanted to use is that language in the statute that  
19 we discussed earlier.

20 THE COURT: And that's all coming in. We're  
21 going to talk about that in a minute.

22 MR. CHASE: Okay. And that's what I'm --

23 THE COURT: No, we're just in the summary of  
24 claims portion of the instruction.

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

1 THE COURT: All right. And next would come the  
2 burden of proof.

3 All these claims are greater weight of the  
4 evidence, right?

5 MR. CHASE: Yes, sir.

6 THE COURT: So 401.3, no objection.

7 MR. CHASE: No objection.

8 THE COURT: No objection, Mr. Ben --

9 MR. BENITEZ: No objection.

10 THE COURT: Do we have a definition of gross  
11 negligence?

12 MR. BENITEZ: I don't think one has been  
13 submitted, your Honor.

14 THE COURT: Should I give the jury one?

15 I mean, ordinarily we would define negligence  
16 for them. Are we going to define gross negligence?

17 MR. BENITEZ: And that's why originally I had a  
18 jury instruction with respect to negligence, but  
19 that went to the negligent misrepresentation. Maybe  
20 we can use that.

21 MR. CHASE: No.

22 MR. BENITEZ: Or not define it at all.

23 MR. CHASE: No. It needs to be defined.

24 THE COURT: I think the jury needs to  
25 understand what the standard is for gross



1 negligence. And there's plenty of case law --

2 MR. CHASE: We'll find --

3 THE COURT: -- that talks about what gross  
4 negligence is, that talks about what recklessness  
5 is, the terms that you all want to use and are  
6 consistent with the statute.

7 MR. CHASE: Mr. Jones will find that. And,  
8 your Honor and Mr. Benitez will have it in hand.

9 THE COURT: What I wanted -- what I want to  
10 avoid is coming back here at 9 o'clock tomorrow  
11 morning ending up with instructions and having to  
12 change them and having Mr. Jones run around with  
13 a -- like a chicken with his head cut off producing  
14 instructions.

15 So I would venture to say that the case law is  
16 clear as to how those terms are defined, and you all  
17 ought to be able to reach agreement.

18 It is 2:15. I expect we're going to be done  
19 here at this place by 3 o'clock. I'm hopeful that  
20 maybe you can get some of these issues to a head  
21 before 5.

22 If you are not able to agree on something  
23 before 5, I want you to call me. I'll be in  
24 chambers and I'll be happy to address the issue.

25 If it's after 5, I'm going to give counsel my

1 cell phone number, and I want to try to resolve  
2 issues ahead of tomorrow. If it's at all possible.  
3 Okay.

4 So we're going to need a definition for gross  
5 negligence.

6 MR. CHASE: As we're sitting here. Judge,  
7 perhaps maybe we can come to a quick one. I'm sure  
8 Black's Law Dictionary -- I mean maybe -- maybe  
9 it'll be okay. It's worth a try.

10 I'm sorry, Judge, if I see something, I'll read  
11 it back.

12 THE COURT: So we're still in the definitional  
13 portion. We'll have a definition of the burden of  
14 proof. We'll have a definition of gross negligence.  
15 Excuse me.

16 MR. CHASE: I have a proposed Black's Law  
17 Dictionary. Says: The intentional failure to  
18 perform a manifest duty and reckless disregard of  
19 consequences as affecting the life or property of  
20 another.

21 I would have no objection to that definition  
22 for gross negligence.

23 MR. BENITEZ: I would have a problem with that.  
24 It's mixing -- and I just heard it because he just  
25 recited it. I don't have anything in front of me.

1 But it uses the word intentional, which, again, it's  
2 different than gross negligence.

3 Judge, I think -- I'm trying to get into  
4 West -- or Lexis to try to get into the jury  
5 instructions. I thought that there was -- I'm not  
6 representing to the Court that there is, but there  
7 may be a gross negligence instruction somewhere in  
8 there.

9 MR. CHASE: The gross -- citing the supreme  
10 court.

11 Judge, this is something that I shouldn't take  
12 the Court's time. We'll try to work on it, I'm  
13 going to continue to look for it.

14 THE COURT: He'll continue to look.

15 I actually served on the standard jury  
16 instruction committee for civil. I'm not aware of  
17 an instruction for gross negligence. That does not  
18 mean that it is not there. It just means that it  
19 hasn't come up in the two years that I've been  
20 sitting on the committee as an issue.

21 MR. CHASE: I do have this case that says gross  
22 negligence, on the other hand, is defined as -- it's  
23 a long case. But the -- the little blurb that you  
24 get when it comes up, it says, on the other hand,  
25 gross negligence is defined as. And then it stops.

1           So I'm looking for that. It's a really long  
2 case. And it's a supreme court case. That one's  
3 pretty good.

4           MR. BENITEZ: I just looked at the table of  
5 content for the jury instructions. I didn't see one  
6 there, your Honor.

7           MR. CHASE: Gross negligence, on the other  
8 hand, is defined as an act or omission that a  
9 reasonably prudent person would know is likely to  
10 result in injury to another.

11           And that's in -- I hate that -- it's -- it's in  
12 a supreme court case. It's in the flip notes of it.  
13 It's in 630 So.2d 537, Eller V Shova, S-H-O-V-A.  
14 And then, at the very bottom of that opinion where  
15 it's talking about culpable negligence through case  
16 law, reckless indifference, of human life.

17           Gross negligence, on the other hand, is a  
18 conscious -- it does say, gross negligence on the  
19 other hand is defined as an act or omission that a  
20 reasonably prudent person would know is likely to  
21 result in injury to another.

22           I don't believe that -- I'm reading from a  
23 supreme court case, but I think gross negligence is  
24 a little more extreme than that. It's a higher  
25 burden, or higher standard, whatever you want to

1 call it.

2 This court has defined -- and here's another  
3 one, another supreme court case, this court has  
4 defined gross negligence as -- this court has -- and  
5 unrelated -- this court has defined gross negligence  
6 as the want of slight care.

7 I don't know what that means.

8 THE COURT: Okay. And the punitive damages  
9 statute, there's a definition for gross negligence.  
10 And I'm reading out of a case that I don't have the  
11 statute in front of me. I'll get there in just a  
12 second.

13 The case says, gross negligence was defined to  
14 mean that the defendant's conduct was so reckless or  
15 wanting in care that it constituted a conscious  
16 disregard, indifference to the life, safety or  
17 rights of the persons exposed to such conduct.  
18 768.72 is the statute.

19 MR. CHASE: Judge, that's my understanding of  
20 gross negligence going back to law school. It's a  
21 pretty big standard.

22 THE COURT: We know it's higher than the  
23 violation of ordinary duty of care. It's got to be  
24 something more than that.

25 So this statute, I think, is a starting place

1 for your conversations. You may look at other law  
2 and decide that it needs to be revised. But that's  
3 a starting place, I'll suggest to you.

4 The other terms that are utilized in the  
5 statute are so the duty of care says in the statute,  
6 says that the duty of care is limited to refraining  
7 from engaging in grossly negligent or reckless  
8 conduct. You know, combining those two, intentional  
9 misconduct, or a knowing violation of the law.

10 So I don't think those other terms necessarily  
11 require definition.

12 Do you have a thought about that, Mr. Benitez?

13 MR. BENITEZ: My only thought is, if you're  
14 going to put all the terms in there, you might as  
15 well give at least a definition. Like, for  
16 instance, violation of law, which the Court has  
17 indicated probably doesn't need much explanation.  
18 And I kind of agree. But at least maybe do --  
19 something like knowing violation of law is that he  
20 knew that he was violating the law at the time.

21 THE COURT: Is there an allegation he did  
22 anything criminal in this case?

23 MR. CHASE: No, sir. Certainly not pled or  
24 argued.

25 THE COURT: I know there were questions asked

1     about it, but I just didn't -- I didn't hear any  
2     evidence of --

3             MR. CHASE: I just asked a question because  
4     that's what's in the statute. Citing Bailey v.  
5     St. Louis, 196 So.3d.

6             THE COURT: That's the case I pulled that out  
7     of.

8             MR. CHASE: Yes, sir.

9             THE COURT: That's the reference to the statute  
10    or the citation.

11            MR. CHASE: Gross negligence was defined that  
12    the defendant's conduct was so reckless or wanton in  
13    care that it constituted a conscious disregard or  
14    indifference to life, safety or rights of a person  
15    exposed to such conduct.

16            And it cites that 768.72. I would submit  
17    that's the proper definition.

18            THE COURT: Again, I think that's a great  
19    starting point for your conversation. I'll let you  
20    try to work that out. If there's an issue -- any  
21    alleged violations of law.

22            MR. BENITEZ: Violations that would come to  
23    mind would be related to the other provision of 608,  
24    which is that you have to act in good faith and  
25    dealing.

1 THE COURT: That's not a violation of the law.

2 MR. BENITEZ: It isn't?

3 THE COURT: No.

4 MR. BENITEZ: That isn't the law that they have  
5 to comply with.

6 THE COURT: No. You can't bootstrap it like  
7 that. No. It's criminal conduct. That's what the  
8 standard is referring to. A violation of law in  
9 that context is criminal conduct.

10 Is there any allegation of criminal conduct in  
11 this case?

12 MR. BENITEZ: The allegation that comes to mind  
13 that would fit under that description would be when  
14 he was taking the door money and pocketing it, which  
15 is the testimony of Brad Nicks.

16 THE COURT: That's not the testimony of Brad  
17 Nicks. But, respectfully, what Brad Nicks said is  
18 that he took the money, but didn't give it to him to  
19 deposit.

20 That's the testimony of Brad Nicks.

21 MR. BENITEZ: And -- right. And Brad Nicks  
22 also indicated --

23 THE COURT: You want to infer from that that he  
24 pocketed it?

25 MR. BENITEZ: Right.



1           THE COURT: No, I'm not. Right. Because  
2     that's not what you said.

3           MR. BENITEZ: Right.

4           THE COURT: That's not the testimony. That's  
5     the inference from the testimony. And there is a  
6     distinction between the two.

7           MR. BENITEZ: And but Brad Nicks also testified  
8     that he would have been the one that would have  
9     collected the money and then deposited the money in  
10    the account. And then he didn't do that.

11          THE COURT: So where did the money go?

12          MR. BENITEZ: Donald Hachenberger took it.

13          THE COURT: You don't know. You infer that he  
14    took it. Respectfully.

15          I understand why you want to infer that. But  
16    there are a hundred other things that could have  
17    happened with the money. That could become petty  
18    cash for the next day. I don't know. Nobody asked  
19    a witness that question. But that is a possible  
20    inference.

21          I'm just suggesting -- we're here -- sitting  
22    here and formally talking about jury instructions.  
23    Take off the advocacy hats for just a minute and  
24    let's not talk about inferences. Let's talk about  
25    what the facts are that had been disclosed.

1           Okay. I think a definition of gross negligence  
2     will satisfy that.

3           We're not going to define common everyday  
4     terms. The instructions don't do that.

5           MR. BENITEZ: Judge, would you mind defining  
6     intentional or reckless?

7           MR. CHASE: The intentional is defined in the  
8     same place -- in that same place.

9           Intentional misconduct was defined by our  
10    legislature to mean that the defendant had actual  
11    knowledge of the wantonness of the conduct and the  
12    high probability that injury or damage to the  
13    claimant would result. And despite that knowledge,  
14    intentionally pursued that course of conduct,  
15    resulting in injury or damage.

16          Judge, I would -- I would -- I move to have  
17    both of those -- for those definitions used from  
18    this case, from the -- that those are the best  
19    definitions we can get. That's the legislature  
20    being quoted by the appellate courts saying these  
21    are the definitions.

22          THE COURT: And what portion of that -- I mean,  
23    intentional misconduct, that's not the words of the  
24    statute we're dealing with.

25          MR. CHASE: I think it is.

1 THE COURT: No, sir.

2 MR. CHASE: I think it's gross negligence or  
3 recklessness, intentional misconduct, or violation  
4 of law.

5 And so, Judge, I would ask for both of those --  
6 I'm sorry, sir.

7 THE COURT: You're correct. I apologize.

8 MR. CHASE: No.

9 THE COURT: Thoughts?

10 MR. CHASE: Do you have it up?

11 MR. BENITEZ: Yeah, I have it.

12 I think that with a little adjustment -- it's  
13 got to be adjusted a little bit.

14 MR. CHASE: Like --

15 THE COURT: Okay. I think y' all can make  
16 minor adjustments. But I think the intent is -- I  
17 mean, those are the two terms that are utilized by  
18 the statute. They do both fit the context.

19 I just don't think, for example, that we have  
20 evidence of conduct that constituted a conscious  
21 disregard or indifference to the life of others.

22 MR. CHASE: I totally agree.

23 THE COURT: Okay. So that's a minor  
24 adjustment --

25 MR. CHASE: Okay.

1           THE COURT:  -- that might be made to the  
2   definition that would more closely align itself with  
3   the facts.

4           MR. CHASE:  So the property of others.

5           THE COURT:  This is clearly a case about the  
6   property of others.

7           MR. CHASE:  Okay.  That -- do we have no  
8   objection with that minor adjustment?

9           THE COURT:  And I think it can be to the  
10   property or rights of a person exposed to such  
11   conduct.

12          MR. CHASE:  No objection.

13          MR. BENITEZ:  Agree.

14          THE COURT:  Okay.  All right.  That's what  
15   it'll say.

16          And then, for intentional misconduct.  The  
17   definition here says, means that the defendant had  
18   actual knowledge of the wrongfulness of the conduct  
19   and the high probability that injury or damage to  
20   the claimant could result, and would result.  And  
21   despite that knowledge, intentionally pursued that  
22   course of conduct, resulting in injury or damage.

23          Thoughts on that piece?

24          Mr. Benitez.

25          MR. BENITEZ:  The same comments that with

1     respect to gross negligence, with minor adjustments,  
2     I think --

3             THE COURT:   Well, what minor adjustments?  
4     Because this one doesn't talk about life.

5             MR. BENITEZ:   It talks -- okay.

6             THE COURT:   This one just talks about resulting  
7     in injury or damage.

8             MR. CHASE:   No objection.

9             MR. BENITEZ:   Fine.

10            THE COURT:   Okay.   So those will be the two  
11    definitions we'll use for those terms.

12            MR. BENITEZ:   And then, Judge, how about  
13    reckless, or considering that, just blank --

14            THE COURT:   You know that the -- here's the  
15    issue.   Gross negligence refers to conduct that's so  
16    reckless or wanting in care, do we want to then  
17    define reckless.

18            MR. BENITEZ:   Because a jury can find reckless  
19    without having found gross negligence.

20            THE COURT:   Okay.   You got a definition for  
21    reckless?

22            In your Black's.

23            MR. BENITEZ:   Thank you.

24            MR. CHASE:   Reckless, not recking.   I'm reading  
25    from Black's Law Dictionary.   Not recking,

1 R-E-C-K-I-N-G, careless, heedless, inattentive,  
2 indifferent to consequences, according to  
3 circumstances. It may mean desperately heedless,  
4 wanton or willful. Or it may mean only careless,  
5 inattentive or negligence.

6 For conduct to be reckless, it must be such as  
7 to immense disregard of or indifference to  
8 consequences under circumstances involving danger to  
9 life or safety to others. Although no harm was  
10 intended.

11 And then that cites a case from Kansas. And  
12 this goes into -- in the context of an event, one,  
13 in the context of that definition as it appears in  
14 the statute, it seems to -- the legislature seems to  
15 kind of lump that with gross negligence. But it  
16 does say grossly negligent or reckless conduct.

17 And then, because you're talking about when you  
18 juxtaposed grossly negligent or reckless conduct,  
19 that would lead the reader to believe that it's more  
20 than just careless. As the -- as Black's Law  
21 Dictionary describes that.

22 Depending, according to the circumstances, it  
23 would mean, the dis -- the indifference to  
24 consequences and circumstances involving danger to  
25 life or safety to others.

1           And I will look for a case, Judge. Juxtapose,  
2   Court defined reckless. These cases are clear that  
3   reckless conduct is not measured by whether a  
4   reasonably prudent man -- this is about the reckless  
5   publication or something -- whether a reasonably  
6   prudent man would've published or would have  
7   investigated before publishing.

8           There must be sufficient evidence to permit the  
9   conclusion that the defendant, in fact, entertained  
10   serious doubts as to the truth of his publication.  
11   Publishing with such doubt shows reckless disregard  
12   for truth or falsity that demonstrates actual  
13   malice.

14          THE COURT: Medical malpractice act defines  
15   reckless disregard, Section 768.13, Sub 2, Sub 3.  
16   Sub 3. And it defines it as follows. It says: For  
17   purposes of this paragraph, reckless disregard as it  
18   applies to a given health care provider rendering  
19   emergency medical services shall be conduct which a  
20   health care provider knew or should've known at the  
21   time such services were rendered would be likely to  
22   result in injury so as to affect the life or health  
23   of another.

24          MR. CHASE: I would be good with reckless is  
25   defined as conduct by the defendant, that the

1 defendant knew or should've known was likely to  
2 cause damage to the claimant.

3 THE COURT: Thoughts?

4 MR. BENITEZ: I'm also looking at the provision  
5 you're quoting, Judge, and I really don't have any  
6 problem tweaking that into this case.

7 I think that's a little different than what  
8 Mr. Chase said. But using your statute, the way you  
9 looked at it, I think tweaking it would be  
10 appropriate.

11 THE COURT: So let's tweak it and let's get it  
12 done.

13 MR. CHASE: Yes, sir.

14 THE COURT: So the statute reads: Which a  
15 health care provider show -- reckless disregard  
16 means: Conduct which -- reckless means -- conduct  
17 which, defendant knew, counter defendant, but the  
18 counter defendant knew or should have -- let's just  
19 put names in. Which Mr. Hachenberger knew or should  
20 have known at the time of such conduct would be  
21 likely to result in injury or harm.

22 That would be consistent with the prior  
23 instruction that we did on the intentional  
24 misconduct. So it kind of tracks that same  
25 language, but sets forth the standard.



1 MR. CHASE: No objection.

2 MR. BENITEZ: No objection.

3 THE COURT: Okay. All right. I think those  
4 are the key definitions.

5 If we come back to any others, just let me  
6 know. This is the section where those definitions  
7 would go.

8 MR. CHASE: Thank you, Judge.

9 THE COURT: Now --

10 MR. BENITEZ: And, Judge, with respect to  
11 definition, since we've got good faith and fair  
12 dealing, shouldn't those be included in the  
13 definition or should we include them at a later  
14 date.

15 THE COURT: No. That's a great point. This is  
16 the place where those definitions would come in.

17 MR. BENITEZ: Okay.

18 THE COURT: So do we have good definitions of  
19 good faith and fair dealings?

20 MR. CHASE: I thought we did.

21 Didn't we have those in there? There was the  
22 big long statutory definitions that -- I'm not used  
23 to sitting down and talking.

24 Where it was under the duty of loyalty and the  
25 right -- it's like --

1           In the absence of a definition under the  
2     statutory good faith, fair dealing, then you're --  
3     the implied covenant of good faith and fair dealing.

4           THE COURT: Let me just make a comment on the  
5     record. In one of the instructions that you all  
6     provided, which is the violation of the obligation  
7     of good faith and fair dealing instruction.

8           MR. CHASE: Yes, sir.

9           THE COURT: There's a quote to a case, Houri,  
10    H-O-U-R-I, versus Boaziz, B-O-A-Z-I-Z, at 196 so.3d  
11    383. And there's a reference to that case in the  
12    footnote to the instruction in which it was said  
13    that, quote: While the agreements entered by the  
14    parties could not eliminate a general duty of good  
15    faith, comma, see Section 608.24, 45, parenthesis,  
16    SIC, end parenthesis, Florida Statute 2004, comma.  
17    They could and did otherwise dictate the nature of  
18    their relationship and the obligations each owed to  
19    the others.

20           This is what I was trying to enunciate. I hope  
21    that I did it clearly. And why it is that I believe  
22    that the counts survive for the two statutory  
23    claims.

24           That, notwithstanding that the agreement gives  
25    sole and exclusive authority to Mr. Hachenberger, it

1 is still layered with the duty of good faith and  
2 fair dealing, and the duty to carry out obligations  
3 consistent with the agreement.

4 That case, I think, supports that proposition.

5 All right. Definitions of good faith and fair  
6 dealing.

7 MR. CHASE: While everybody's looking, Black's  
8 Law Dictionary, good faith is an intangible and  
9 abstract quality with no technical meaning or  
10 statutory definition.

11 Shocker.

12 And it encompasses, among other things, an  
13 honest belief, the absence of malice, and the  
14 absence of design to defraud or to seek an  
15 unconscionable advantage in an individual's personal  
16 good faith, his concept of his own mind and inner  
17 spirit. And, therefore, may not conclusively be  
18 determined by his protestations alone.

19 That cites to New York case, honesty of  
20 intention and freedom from knowledge and  
21 circumstances which ought to put the holder upon  
22 inquiry, and honest intention to be abstain from  
23 taking any unconscientious advantage of another,  
24 even through technicalities of law, together with  
25 absence -- it's -- I do like, however, good faith

1 encompasses, among other things, a duty of honesty,  
2 the absence of malice, and the absence of a design  
3 to defraud or to seek an unconscionable advantage.

4 I don't -- that's not a bad definition.

5 UCC has a definition, says, Mr. Jones --

6 That one wasn't bad.

7 UCC, good faith is defined as honesty in fact  
8 in the conduct or transaction. And concern, could  
9 mean -- it's also defined as honesty and fact when  
10 the observance of reasonable commercial standards of  
11 fair dealing in the trade. That one's not bad.

12 Either one, I think, good faith is honesty.  
13 Honesty and fact in the conduct or transaction  
14 concerned is one possibility.

15 And another one, honesty and fact in the  
16 observance of reasonable commercial standards of  
17 fair dealing and the trade. That one I think is  
18 better suited because it's talking about  
19 mismanagement of the business and the changing of  
20 the name.

21 THE COURT: What's the statutory section?

22 MR. CHASE: Sir, this is UCC. It's  
23 Section 205, duty of good faith and fair dealing.  
24 It's citing to -- I can't read that.

25 Go ahead. I'm sorry, Judge.

1           MR. SHUKER: I've got UCC Section 2-103,  
2   Subsection 1, Subsection B.

3           THE COURT: Mr. Benitez, did I walk away with  
4   your pen?

5           MR. BENITEZ: You did. But I don't mind.

6           THE COURT: No, no. Please come here.

7           MR. BENITEZ: And I wasn't about to say  
8   anything.

9           THE COURT: No. Please come here.

10          MR. BENITEZ: You can have that pen. You can  
11   have all my other pens in the office.

12          THE COURT: I just realized that's not a pen  
13   that belongs to me.

14          MR. BENITEZ: You may use it.

15          THE COURT: Thank you. I have pens.

16          MR. CHASE: May Mr. Hachenberger be excused  
17   from the room for a minute? He's got some issues.

18          THE COURT: Both clients, there's no reason for  
19   you to be here. We're doing legal argument. You're  
20   welcome to remain, but you're not required to be  
21   here.

22          This is not a proceeding that either of you  
23   would be required. This is just like legal  
24   arguments. It's like a hearing.

25          MR. BENITEZ: Parties may leave?

1 THE COURT: You're welcome to. Absolutely.

2 MR. BENITEZ: Judge, do you mind me making a  
3 call?

4 One of the things I've been searching for is my  
5 password for Lexis, because I wiped it out and I  
6 have it memorized. So if I don't get somebody to  
7 tell me --

8 THE COURT: Let's take a couple of minutes.  
9 You make that call. I'm going to do a little bit of  
10 research while we're looking.

11 (A recess was taken.)

12 THE COURT: Let's go back on the record. I  
13 apologize.

14 So the definition I was citing, I think  
15 Mr. Chase had cited originally, 671, is found in  
16 671.230 --

17 MR. CHASE: 201, sir.

18 THE COURT: Yes. Thank you. 671.201,  
19 Subsection 20. Good faith, except as otherwise  
20 provided in this code, means honesty in fact and the  
21 observance of reasonable commercial standards of  
22 fair dealing.

23 So you're in agreement with that definition?

24 MR. CHASE: Absolutely, sir.

25 MR. BENITEZ: I am not.

1 THE COURT: Okay.

2 MR. BENITEZ: I like the proposal that the  
3 Court indicated with respect to Speedway Super  
4 America, LLC, 966 So.2d 1. And I believe, if I'm  
5 not mistaken, the Court was indicating something  
6 along the lines of the sentence that says: Where  
7 the terms of the contract -- because we are dealing  
8 with a contract in this case -- affords a party  
9 substantial discretion, which is part of the good  
10 faith and fair dealing -- to promote that party's  
11 interest, the duty to act in good faith.

12 Nevertheless, it limits the party's ability to  
13 act capriciously, to contravene the reasonable  
14 contractual expectations of the other party. I  
15 think that's more accurate in a contractual setting  
16 like this, as opposed to --

17 THE COURT: What it doesn't do, though, and  
18 what I think we have to do from that, is to define  
19 good faith and fair dealing. It just says what you  
20 can't do.

21 MR. CHASE: I object wholeheartedly to that.  
22 That's not a -- it's not even presented as a  
23 definition of good faith. It's -- it doesn't apply  
24 to this. Where the terms of the contract give  
25 substantial discretion to promote that party's

1 self-interest. We don't have a contract that  
2 promotes a party's -- or provides a party discretion  
3 to promote his self-interest.

4 THE COURT: It does.

5 MR. CHASE: I don't see that at all.

6 THE COURT: It allows him to loan money to  
7 himself, to the entity, add interest -- I mean it  
8 has a number of --

9 MR. CHASE: But that's not what's been alleged  
10 to be an issue. And it's just not a definition.  
11 That's just -- that's -- if anything, that's a dicta  
12 in a case. It's not a definition.

13 MR. CHASE: Meanwhile, the legislature -- I'm  
14 sorry, Judge, if you're indicating you would like me  
15 to hold up.

16 THE COURT: I would.

17 MR. CHASE: Yes, sir, I'll stop.

18 THE COURT: I agree it's not a definition.  
19 We're not in disagreement about that fact.

20 What I think the case does, and it's not on  
21 point, I agree to that. This is speaking to the  
22 implied duty of good faith and fair dealing inherent  
23 in every contract.

24 That's different than the duty that you were  
25 speaking of. Although I think they are comparable.



1 I think that the law interprets them similarly.

2 What this says is a quote from the case of Cox  
3 versus CSX Intermodal, Inc., at 732 So.2d 1092, a  
4 Florida First DCA case, in 1999. And the quote is:  
5 That the implied covenant of good faith and fair  
6 dealing is designed to protect the contracting  
7 parties' reasonable expectations.

8 If we look at the definition of good faith, I  
9 think it's -- I think it actually matches. Because  
10 the definition of good faith in the statutory  
11 section that we're talking about says it means  
12 honesty in fact and the observance of reasonable  
13 commercial standards.

14 And that's what that case is saying, that you  
15 can't arbitrarily ignore the reasonable expectations  
16 arising out of that contract. So --

17 MR. CHASE: May I be heard?

18 THE COURT: Hang on.

19 MR. CHASE: Yes, sir.

20 THE COURT: I don't disagree with you that the  
21 statute is a good definition. That's where I'm  
22 coming around to.

23 MR. CHASE: Yes, sir.

24 THE COURT: And so what I -- the question I  
25 have for Mr. Benitez is: What's the -- what is the

1 concern with that statutory definition? Because I  
2 think it parallels the case.

3 It is -- it's the flip side that I --  
4 settlement conversations said we have to get to out  
5 of the case. We'd have to flip that and turn that  
6 into a definition. I think this is the definition.

7 THE COURT: And so, the definition I think for  
8 purpose of our instruction would read: Good faith  
9 means honesty in fact and the observance of  
10 reasonable commercial standards of fair dealing.

11 MR. CHASE: No objection.

12 THE COURT: Sometimes you're winning and  
13 wanting to talk.

14 MR. CHASE: The term is, don't sell it if it's  
15 already sold. Just be quiet.

16 MR. BENITEZ: Your Honor, the reason I believe  
17 that the -- that your initial proposal is more  
18 accurate than this --

19 THE COURT: I didn't have an initial proposal.

20 MR. BENITEZ: Well -- anyways, the other  
21 language that I have cited is more appropriate than  
22 this seems to be.

23 The statute says each manager and managing  
24 member shall discharge the duties that accompany and  
25 its member under this chapter under the articles of

1 organization and operating agreements. So they're  
2 referring specifically to a contract.

3 THE COURT: Those are the duties under those  
4 agreements.

5 MR. BENITEZ: Right. And exercise any rights  
6 consistent -- and had exercised those rights  
7 consistent with the obligation of faith and fair  
8 dealing.

9 So I think just telling them that -- and I --  
10 that it means honesty in fact doesn't fit what I  
11 just read in the statute.

12 THE COURT: It does. It means that he has an  
13 obligation to be honest to -- in fact, to the  
14 members.

15 MR. BENITEZ: But the statute would've said  
16 that. Instead it says it's got to deal fairly and  
17 in good faith with respect to those contracts.  
18 Here, it's almost like --

19 THE COURT: You don't think that he has an  
20 obligation to be honest?

21 MR. BENITEZ: Yes. I do.

22 THE COURT: Okay.

23 MR. BENITEZ: But it goes beyond that is what  
24 I'm getting at.

25 When you're looking at the UCC, it's more of a

1 contractual occurrence under the UCC. What I'm  
2 talking about is under this statute that we're  
3 pursuing, is the statute is telling us you have to  
4 exercise good faith and fair dealing with the  
5 implementation of your obligations or your duties or  
6 your rights under the operating agreement.

7 THE COURT: Right. But all we're doing is  
8 defining terms. You have to take that definition  
9 and then apply it to this statute.

10 MR. BENITEZ: But I think it would be more  
11 accurate.

12 THE COURT: Here's how we're going to handle  
13 this. Write a definition that you propose.

14 MR. BENITEZ: Your Honor, this is what I would  
15 propose.

16 THE COURT: Okay.

17 MR. BENITEZ: The charge, and, quote, good  
18 faith, end of quote, means --

19 The term good faith means that where the terms  
20 of a contract afford a party substantial discretion,  
21 the duty to act in good faith means that the party  
22 can -- the party cannot act capriciously to  
23 contravene the reasonable expectation of the other  
24 party in the exercise of that discretion.

25 Can I read it again.

1 THE COURT: Please.

2 MR. BENITEZ: This time I'll try to do it  
3 without --

4 THE COURT: And you have -- you have good faith  
5 means twice.

6 MR. BENITEZ: Yeah, that's why --

7 THE COURT: Can we just get to the definition  
8 of good faith. Because the rest of that is  
9 argument.

10 MR. BENITEZ: Where the term of a contract  
11 afforded the party substantial discretion, the duty  
12 to act in good faith means that the party cannot act  
13 capriciously to contravene the reasonable  
14 expectation of the other party in the exercise of  
15 that discretion.

16 And that -- what I did is, I kind of used that  
17 part of 966 So.2d one case and kind of adjusted it  
18 to this case, just to define the term.

19 THE COURT: But doesn't that define the breach?  
20 In other words, that doesn't say what the standard  
21 is. It says what you can't do.

22 MR. BENITEZ: Well, not sure --

23 Say that again, Judge.

24 THE COURT: Rather than defining what the  
25 standard is, doesn't your proposed definition say

1     what conduct does not meet good faith?

2             In other words, if you act capriciously, you  
3     are not acting in good faith.

4             THE COURT:   Okay.   Well, what is good faith.

5             MR. BENITEZ:   That's why we've got to tie it up  
6     at the end with the exercise and at the start with  
7     exercising discretion.

8             So the good faith is where you have the ability  
9     to use some discretion, that discretion has to be  
10    used in good faith and not overriding any reasonable  
11    expectations of the party.

12            THE COURT:   So good faith is acting consistent  
13    with reasonable expectations of the parties?

14            MR. BENITEZ:   Yes.   That's the whole essence of  
15    good faith and fair dealing and specifically with,  
16    respectfully, to the implied covenant of good faith  
17    and fair dealing.

18            And this statute specifically refers to  
19    contracts.   So it's not a UCC provision, it's a  
20    contractual setting.

21            So I believe that we need to tie it up.   And  
22    it's -- basically, the way I understand the motion,  
23    is that when you have discretion and the contract is  
24    not -- well, when you have discretion under a  
25    contract, you can't act in bad faith and frustrate

1 the reasonable expectations of the parties.

2 THE COURT: Right. That's not a definition of  
3 good faith.

4 MR. CHASE: He didn't sue for the implied --  
5 breach of the implied covenant, good faith and fair  
6 dealing. That's different.

7 THE COURT: Let me propose a suggestion --

8 MR. CHASE: Yes. Sir.

9 THE COURT: -- that I think implies all of  
10 this.

11 Good faith means honesty in fact and the  
12 observance of reasonable expectations of business  
13 standard of fair dealing.

14 MR. BENITEZ: Judge, the problem I have with  
15 that is, the reasonable expectations of the parties  
16 within the confine of the agreement that from which  
17 they have their authority, in this case, and the  
18 statute specifically refers to the operating  
19 agreement. So it's --

20 THE COURT: That's argument. We're defining  
21 the term good faith. You're going to take good  
22 faith and apply it to the contracts in your  
23 argument. We're not defining good faith in the  
24 context of the agreements. That's your argument.

25 I'm going to instruct them on the duty and I'm

1 going to read this statute to them. That's how  
2 we're going to do that.

3 And I'm going to read them the section that  
4 says: Each manager and managing member shall  
5 discharge the duties of the LLC and its members  
6 under this chapter or under the articles of  
7 organization or operating agreement, and exercise  
8 any rights consistent with the obligation of good  
9 faith and fair dealing.

10 Good faith means honesty in fact and the  
11 observance of reasonable expectations and business  
12 standards of fair dealing.

13 MR. BENITEZ: Okay. And I disagree with the  
14 honesty in fact. That's not part of --

15 THE COURT: Is that the core of this, is that  
16 you disagree with honesty and fact?

17 MR. BENITEZ: Yes. Because it throws a jury  
18 off. They are supposed to be analyzing whether, in  
19 fact, he's abused his discretion.

20 THE COURT: I started it with the very first  
21 question I asked you was: Do you agree that he has  
22 the duty to be honest.

23 Your answer was, yes.

24 Now you don't want me to tell the jury that he  
25 has a duty to be honest.



1           MR. BENITEZ: He has a duty to be honest,  
2     separate and apart from the good faith and fair  
3     dealing.

4           THE COURT: Where is that found?

5           MR. BENITEZ: Excuse me?

6           THE COURT: Where is that found in the statute?  
7     Separate and apart from good faith and fair dealing?

8           MR. BENITEZ: In the statute it doesn't say  
9     that he has to be truthful in fact.

10          The fact that you're putting in a jury  
11     instruction and describing good faith, I can hear  
12     the arguments from Mr. Chase. Mr. Chase, saying,  
13     well, isn't it true, isn't it true what exactly he  
14     did, he said this, this and this. And this is true.

15          And almost obliterating any argument I may have  
16     with respect to good faith and fair dealing.  
17     Because a jury is going to look at this instruction  
18     and say, yes, good faith is honesty and fact.

19          THE COURT: And? And? You're not going to  
20     argue the and?

21          MR. BENITEZ: Yeah, I'm going to argue the and.

22          THE COURT: Right. So they're not entitled to  
23     honesty and fact because you don't like it. Or is  
24     honesty in fact a part of good faith.

25          That's the issue. That's why I began the

1 conversation as I did and why I'm frustrated now.

2 Because, again, you have shifted positions in the  
3 middle of an argument, notwithstanding some very  
4 direct questioning, Mr. Benitez.

5 These -- if I operate -- if my duty is to  
6 operate in good faith with you, I can't imagine that  
7 there's a person in this room that believes that I  
8 can lie. It's inherent in the duty of good faith.

9 You disagree, Mr. Chase?

10 MR. CHASE: No, sir.

11 THE COURT: Okay. If I lie, how could I be  
12 operating in good faith?

13 MR. BENITEZ: Right.

14 THE COURT: That was not rhetorical.

15 MR. BENITEZ: My problem with your definition,  
16 the way you propose it, is that it doesn't clarify  
17 the discretion part of the instruction.

18 THE COURT: What discretion part?

19 We are defining good faith.

20 MR. BENITEZ: Let me go back to the statute,  
21 because I got to change screens and get it.

22 THE COURT: The statute or the case?

23 MR. BENITEZ: No, the statute, 671.201, where  
24 you pulled the definition from.

25 THE COURT: Okay.

1 MR. CHASE: Right here.

2 MR. BENITEZ: If you use this definition,  
3 Judge, the first question I would have, if I was a  
4 juror: What is the commercial standards of fair  
5 dealing, what does that mean?

6 THE COURT: I took out commercial standards and  
7 fair dealing. That's what I just told you. I  
8 modified it to be reasonable expectations and  
9 business standards of fair dealing.

10 That's what you've all been talking about  
11 throughout this case, are the business standards of  
12 fair dealing.

13 MR. BENITEZ: May I have you read again what  
14 you said, Judge, while looking at the statute.

15 THE COURT: Good faith means: Honesty in fact  
16 and the observance of reasonable expectation and  
17 business standards of fair dealing.

18 Do you disagree with a part of this? What is  
19 that?

20 MR. CHASE: I do, the expectations. I think  
21 reasonable business standards, there's been so much  
22 evidence that's been presented to the jury about all  
23 of the -- what they expected to happen and about  
24 what they thought -- what was thought the contract  
25 means and the agreements meant and all that.

1           So they have -- and the jury is not going to  
2   understand why they were presented all that  
3   testimony about the Myers' expectations and about  
4   all of that.

5           And so, you'd throw in expectations into that,  
6   then they're going to think that's what they were  
7   talking about. And that's not -- the reasonable  
8   business standards, I'm very good with that, and  
9   that sums it up.

10          I appreciate what the Court's trying to do.  
11   And I'm not trying to complicate it further, but  
12   that expectation does -- that throws a curve at the  
13   jury, because it -- just for what the reasons I  
14   said. It explains to the jury why they heard all  
15   that testimony about the Myers' expectations of the  
16   agreement.

17          MR. BENITEZ: And my problem with the way  
18   you've read it, Judge, getting beyond the honesty  
19   portion of it, is. Again, I think there should be  
20   some indication that -- and I'm not using the words  
21   that I would put in the instruction. I'm just using  
22   these words that are going to come out of my mouth  
23   as a description of my thoughts to the Court.

24          My thoughts are, in this jury instruction, you  
25   got to let the jury know that the fact that he has

1 discretion -- unquestionably, I'm going to stand up  
2 there and say, he's got the discretion based on this  
3 agreement.

4 But he can not exercise them to frustrate the  
5 expectations of the parties.

6 MR. CHASE: He's reading them.

7 MR. BENITEZ: So I wanted to be able to  
8 incorporate that within the meaning of good faith.

9 THE COURT: It's not in the meaning of good  
10 faith.

11 MR. BENITEZ: Or fair dealing.

12 THE COURT: It's not in the meaning of good  
13 faith and fair dealing. What you're arguing is not  
14 relevant to the definition of good faith and fair  
15 dealing.

16 You want to argue a standard in the breach, by  
17 the way, of the definition of good faith, which is  
18 not appropriate.

19 MR. CHASE: Agreed.

20 THE COURT: So you draft an instruction. You  
21 draft an instruction. I will select one in the  
22 morning. Okay. I think that's all I can do.

23 And it needs to have case citation for me. And  
24 we need to have two sets of instructions prepared to  
25 go. If you're -- I said earlier my preference was

1 running instructions, but because of this issue and  
2 others that we may confront here in a moment, if you  
3 want to do one instruction per page, no page  
4 numbers, then, and agree on a type set.

5 MR. CHASE: Times New Roman 14-foot or 14  
6 point --

7 THE COURT: Fine.

8 MR. BENITEZ: Whatever he wants. I'll do.

9 THE COURT: Times New Roman, 14 point  
10 double-spaced.

11 MR. CHASE: Yes, your Honor.

12 MR. BENITEZ: Times Roman.

13 THE COURT: Times New Roman.

14 MR. CHASE: Times New Roman, it's --

15 THE COURT: That's the font, 14 point,  
16 double-space.

17 And then I'll -- I'll rule. And I'll insert  
18 one.

19 MR. BENITEZ: Judge, will you do -- will you  
20 basically pick from one or the other. Or will  
21 you --

22 THE COURT: Isn't that what you're -- I mean,  
23 you all are forcing me into choosing between an  
24 instruction because, number one, neither of you  
25 proposed any of this in your proposed instructions

1 for this case.

2 MR. SHUKER: Right.

3 THE COURT: We are now in a charge conference,  
4 neither of you has a set of instructions for me to  
5 consider, other than what you gave me at the  
6 beginning of this case:

7 We are going to start closing arguments  
8 tomorrow morning after I charge this jury. They  
9 will have under the law a set of the instructions in  
10 their hand. You leave me no choice if you cannot  
11 agree on an instruction, to choose one.

12 Any other definitions -- that was a good one to  
13 call to attention.

14 Any other definitions, Mr. Benitez, that you  
15 can think of that we might need?

16 MR. BENITEZ: No, your Honor.

17 THE COURT: Okay. Our next would be -- our  
18 next is a statement of the issues.

19 The comparable standard instruction is 401.18,  
20 I believe. So this is the issues on plaintiffs'  
21 claim. And so it would begin: The issue you must  
22 decide on Donald Hachenberger's claim against the  
23 Myers is, and then the description of a conversion  
24 claim.

25 And then 401.21: If the greater weight of the

1 evidence does not support plaintiffs' claim, the  
2 verdict should be for the defendant.

3 If, however, the greater weight of the evidence  
4 supports the claim, then your verdict shall be for  
5 the plaintiff, in the total amount of his damages.

6 It's actually 401.23.

7 MR. CHASE: So there's no confusion, we've got  
8 401.21 is what we submitted, the burden of proof on  
9 a claim.

10 THE COURT: Where are you in the set of  
11 instructions?

12 MR. CHASE: That will be page --

13 THE COURT: They're not numbered.

14 MR. CHASE: Oh. These are just standard -- I'm  
15 sorry, I apologize, Judge. I thought he had what we  
16 submitted to you.

17 THE COURT: Okay. No, you don't have any of  
18 this.

19 All right. And then we repeat that set of  
20 instructions for the Myers' claims against  
21 Mr. Hachenberger, just reversed, right.

22 So the issue you must decide on the Myers'  
23 claim against Donald Hachenberger is whether  
24 Mr. Hachenberger -- the first issue you must decide  
25 is whether he violated his --



1 MR. CHASE: Duty of care.

2 THE COURT: Duty of care.

3 And then. Second, whether he violated his duty  
4 of good faith and fair dealing. And if so, whether  
5 that was a cause of a loss, injury or damage to the  
6 defendant -- to the Myers.

7 Get rid of plaintiffs and defendants and  
8 counterclaims, all throughout this. It's just going  
9 to be confusing.

10 A recitation of the statute at that point would  
11 make sense because that's what sets forth the  
12 standards.

13 And then back up to 401.21 and 23.

14 Does that make sense, Mr. Benitez?

15 MR. BENITEZ: Yes, your Honor.

16 THE COURT: I think what we're down to in  
17 reading statute -- and correct me if I'm wrong -- is  
18 to read to them 608.4225.

19 MR. CHASE: Yes, sir.

20 THE COURT: The general standards.

21 Is there any other portion of the statute,  
22 Mr. Benitez, on your claims that you feel should be  
23 read to the jury?

24 MR. BENITEZ: No, your Honor.

25 THE COURT: Is all of this statute appropriate

1 to read to the jury?

2 MR. BENITEZ: No, your Honor.

3 THE COURT: Or just portions?

4 MR. BENITEZ: I don't believe so. But if they  
5 want to -- I don't believe so.

6 THE COURT: For example, there's no issue about  
7 duty of loyalty, which is sub-A.

8 MR. CHASE: No, sir, I don't think -- I don't  
9 think that we need A, 1, 2, or 3, because 1, 2 and 3  
10 flow from that.

11 So, if we do 608.4225, then skip down one.

12 THE COURT: Can I -- let me just propose this.

13 The introductory paragraph, for example of one,  
14 says, subject to these statutes, each manager and  
15 managing member shall owe duty of loyalty and a duty  
16 of care to the limited liability company.

17 Is there an issue of striking through and not  
18 including duty of loyalty as a part of that  
19 instruction?

20 MR. CHASE: No, sir.

21 THE COURT: As a part of the statute.

22 MR. CHASE: No, sir.

23 THE COURT: Mr. Benitez.

24 MR. BENITEZ: It is not a specific allegation  
25 that I have made throughout these processes. It's

1 kind of a side issue. They have wanted to include  
2 that since day one.

3 I don't have any problems in including it and I  
4 would ask the Court to just include it based on the  
5 fact that we're reading from the statute. And  
6 that's one of the duties that applies.

7 But, no, I don't have any specific allegations  
8 right now with respect to a violation of a loyalty  
9 directly. So, that's my position.

10 Whatever the Court decides to do is fine.

11 THE COURT: Look, I don't care.

12 MR. CHASE: I don't think that -- they're  
13 already hearing enough. I would object to the  
14 reading of irrelevant statutes to it.

15 608.4225, sub 1, sub A is completely  
16 irrelevant. Sub 1, sub B is what becomes relevant.  
17 I believe B and C are relevant. B, C and E are  
18 relevant. And then sub 5 is relevant.

19 THE COURT: B, C and what?

20 MR. CHASE: B, C and E, as in Edward.

21 THE COURT: Is D not relevant?

22 MR. CHASE: Yes, D is relevant.

23 It's just not something -- I was looking at  
24 what I underlined for motions in relief.

25 B, C, D, E, F is not relevant. Sub 2 is

1 relevant. Sub 3 is relevant. Sub 4 is confusing.

2 And sub 5 is relevant.

3 I would omit sub 4.

4 THE COURT: Okay. Here's what I'm going to ask  
5 then, Mr. Benitez, and -- is there any provision of  
6 subsection A that you believe is relevant to the  
7 issues in this suit?

8 MR. BENITEZ: No, your Honor.

9 THE COURT: Court's going to strike A 1, 2, 3.  
10 We agree B is relevant, correct?

11 MR. CHASE: Yes, sir.

12 MR. BENITEZ: Yes, your Honor.

13 THE COURT: C is relevant.

14 MR. CHASE: Yes, sir.

15 MR. BENITEZ: Yes, your Honor.

16 THE COURT: D is relevant.

17 MR. CHASE: Yes, sir.

18 MR. BENITEZ: Yes, your Honor.

19 THE COURT: E is relevant.

20 MR. CHASE: Yes, sir.

21 MR. BENITEZ: Yes, your Honor.

22 THE COURT: F is relevant.

23 MR. CHASE: Yes.

24 THE COURT: Is it?

25 MR. CHASE: Oh. I'm sorry. That's the one

1     that we said no, sir. That's the winding up of the  
2     business. It's not relevant.

3             THE COURT: Mr. Benitez.

4             MR. BENITEZ: I don't believe it's relevant.

5             THE COURT: Okay. Strike F. In 2, 2 A.

6             MR. CHASE: Yes.

7             THE COURT: Mr. Benitez.

8             MR. BENITEZ: Oh. I'm sorry. Yes, your Honor.

9             THE COURT: Thank you.

10            2 B.

11            MR. CHASE: Yes, sir, relevant.

12            MR. BENITEZ: Yes, your Honor.

13            THE COURT: C.

14            MR. CHASE: Yes, relevant.

15            THE COURT: How's that relevant?

16            MR. CHASE: A committee of managers, members or  
17     managing members, of which the effective manager or  
18     managing member is not a participant. The manager  
19     or managing member reasonably believes the committee  
20     merits confidence.

21            He talked over and over about his team and that  
22     he would rely on the team.

23            THE COURT: But they're not managers and  
24     they're not members.

25            MR. CHASE: Okay. Let that one go.

1 THE COURT: Do you agree, Mr. Benitez?  
2 MR. BENITEZ: Yes, your Honor.  
3 THE COURT: Okay. Three.  
4 MR. CHASE: Yes, sir, it's irrelevant.  
5 THE COURT: I'm sorry?  
6 MR. CHASE: Yes, Judge.  
7 THE COURT: Mr. Benitez.  
8 MR. BENITEZ: I think part of it is not  
9 relevant, but social, economic.  
10 I don't have any objections to it, Judge.  
11 THE COURT: Okay. Four.  
12 MR. BENITEZ: Four.  
13 MR. CHASE: Four is not relevant. It's  
14 confusing.  
15 MR. BENITEZ: No. I think 4 is very relevant,  
16 your Honor.  
17 MR. CHASE: A member, manager or managing  
18 member --  
19 THE COURT: Let me just read quietly, please.  
20 MR. CHASE: Yes, sir.  
21 THE COURT: That's relevant.  
22 MR. CHASE: Yes, sir.  
23 THE COURT: Subsection 5.  
24 MR. CHASE: Relevant.  
25 MR. BENITEZ: No objection.

1           THE COURT: Okay. So what the instructions  
2   should say is: The relevant portions of  
3   Section 608.4225 read as follows. And then include  
4   those subsections that we have deemed relevant,  
5   excluding those subsections that are irrelevant, and  
6   in paragraph one: Each manager and managing member  
7   shall owe a duty of care to the limited liability  
8   company.

9           So we're going to take out duty of loyalty.  
10   It's just not an issue in the case:

11           Okay.

12           Other than that, I think we're left with  
13   standard instructions.

14           MR. CHASE: Yes, sir.

15           THE COURT: Beginning with 601.1, which is: In  
16   deciding this case, it's your duty as jurors to  
17   decide the issues and only those issues.

18           601.2, about witnesses. We have no experts so  
19   there should be no instruction on the expert portion  
20   of that.

21           I think 601.4 applies here, which is the  
22   multiple claims, numerous parties --

23           MR. SHUKER: We had that previously.

24           THE COURT: -- instruction.

25           So lets include that. That's a standard

1 instruction. That just says they should consider  
2 and decide, and will consider and decide several  
3 distinct claims.

4 And although they have been tried together,  
5 each is separate from the others. And each party is  
6 entitled to have you separately consider each claim  
7 as it affects that party.

8 Does that make sense?

9 MR. BENITEZ: No objection.

10 THE COURT: And then 700, closing instructions.

11 MR. BENITEZ: No objection.

12 THE COURT: Now, I want to go back and look at  
13 the preliminary set that you all said to see if  
14 there's anything else that we've missed that needs  
15 to be included.

16 MR. CHASE: We need an instruction, Judge, that  
17 the contract's enforceable.

18 And the operating agreement letter are  
19 enforceable.

20 There is --

21 All of the violations and duty of care and  
22 violations of the good faith, it goes -- it says  
23 operating agreement. And right now there's an issue  
24 about whether or not that's enforceable.

25 MR. CHASE: And they made it an issue.



1           THE COURT: Is there a proposed instruction in  
2   what you've given to me previously that addresses  
3   that issue?

4           MR. CHASE: No, sir, we didn't -- didn't know  
5   what we would be faced with at this stage of the  
6   game.

7           I would go back to the Judge's instruction --  
8   proposed instruction with regard to the release of  
9   Glenda Hachenberger. That there are things for the  
10   Court to decide and things for the jury to decide.  
11   And the jury -- and the Judge has determined that  
12   the letter agreement and operating agreement are  
13   enforceable contracts.

14          MR. BENITEZ: And, just for the record, while  
15   the Court's reviewing it, I disagree and I object to  
16   that.

17          That would be like making a determination to  
18   the jury -- and I think the arguments are going to  
19   be made and the lawyers are going to be restricted  
20   based on what the Court has done, and what it will  
21   be anticipated what the Court will do in subsequent  
22   proceedings.

23          And that's not to mean that we're going to sit  
24   up there and make a misstatement of fact. But I  
25   think for the Court to articulate that to the jury

1 would be very highly prejudicial at this time. And  
2 then we have to -- I don't think it's necessary.

3 I think we could avoid it by the Court  
4 instructing the attorneys that the arguments will  
5 not be directed at the enforceability of the  
6 contract.

7 MR. CHASE: I have to argue the enforceability  
8 of the contract. And I shouldn't have to argue it.

9 THE COURT: Okay. This issue is addressed in  
10 the standard instructions. And it's in  
11 instruction 401.13, which are preemptive charges.  
12 This would fall in the natural flow of those  
13 instructions by that number.

14 And I think a note on use for 401.13 A is  
15 instructive. This particular instruction relates to  
16 the duty to use reasonable care. That's not  
17 applicable to our case. I get that.

18 This instruction reads that the Court has  
19 determined and now instructs that the circumstances  
20 at the time and place of this incident involved in  
21 this case were such that the defendant had a duty to  
22 use reasonable care for the claimant's safety.

23 The note on use reads: This preemptive  
24 instruction is not for use routinely, but only when  
25 the reasonable care standard was contested before

1 the jury, as by an instruction 401.14 issue now to  
2 be withdrawn as a matter of law.

3 In that event, this instruction properly  
4 emphasizes reasonable care as embodied in the  
5 instruction.

6 I think that's the circumstance we have. There  
7 was a challenge that was being made based on fraud  
8 in the inducement and enforceability of an oral  
9 agreement to hold documents in escrow.

10 The Court has -- as a consequence to that,  
11 there was an argument to the jury, through the  
12 evidence and through opening statements, that these  
13 agreements were not enforceable.

14 They need to understand -- and I'm not going to  
15 tell them what the specifics of that were, but they  
16 need to understand that the Court has determined and  
17 now instructs them that the letter agreement and  
18 operating agreement are enforceable contracts  
19 between the parties to this action.

20 MR. CHASE: Yes, sir. We'll follow that.

21 THE COURT: So 401.13 -- and that's over  
22 objection. I understand. Your objection is  
23 preserved.

24 But it will read: The Court has determined and  
25 now instructs you that the letter agreement -- that

1 the agreements between the parties are enforceable.  
2 Simply say that. That the agreements between the  
3 parties are enforceable.

4 There are a number of agreements -- it's not  
5 just the letter agreement and the operating  
6 agreement. There are deeds, there are bills of  
7 sale, there are other things. And so I think it  
8 would capture that all in the term agreements. That  
9 that accurately states the Court's determination  
10 with respect to the claims.

11 Yes.

12 MR. CHASE: They allege that there was a  
13 different agreement, and they said in opening  
14 statement that there was a different agreement.  
15 They alleged in their -- so then the jury is then  
16 confused as to what agreement.

17 The escrow agreement is enforceable? I'm  
18 sorry, Judge.

19 THE COURT: No, don't be sorry.

20 MR. CHASE: I'm fine with -- because of --  
21 because of what we're dealing with, what I have to  
22 argue to them with regards to the breach of care,  
23 the letter agreement and the operating agreement  
24 sums it up.

25 Those other agreements that are attached and

1 incorporated therein are parts of those agreements  
2 attached as exhibits.

3 If the Court were to go with its initial  
4 inclination using the terms the letter agreement and  
5 the operating agreement are enforceable, I think  
6 that that would -- I'm fine with that.

7 MR. BENITEZ: I think it's appropriate to just  
8 do it generally, as the Court has suggested.  
9 Isolating, specifically referred to two documents I  
10 think will be unduly prejudicial.

11 THE COURT: I have concern about the confusion,  
12 though, I think that's a fair argument. So letter  
13 agreement and operating agreement.

14 MR. BENITEZ: Thank you.

15 MR. SHUKER: Real quick, your Honor, where  
16 would you suggest that be placed in the order? I  
17 mean, is that --

18 THE COURT: Wherever 401.13 falls in the  
19 sequence.

20 MR. SHUKER: Got you.

21 THE COURT: That's the normal spot for it.

22 The other issue -- and I don't -- is damages  
23 for each of you. And there needs to be some sort of  
24 a damages instruction.

25 Do you have proposed damages instructions?

1 MR. CHASE: I thought we did.

2 THE COURT: Something that defines the measure  
3 of damages. For example, for a conversion claim?

4 On a measure of damages, Mr. Benitez, for your  
5 claims is there an instruction here?

6 MR. BENITEZ: I thought we worked on one and I  
7 thought it was here, but I'll wait until Mr. Jones  
8 finds it.

9 THE COURT: Yeah, there's a damages instruction  
10 here.

11 MR. CHASE: There it is.

12 THE COURT: I don't have issues with that.

13 MR. BENITEZ: Yeah, 409-13.

14 THE COURT: Yes, exactly.

15 MR. BENITEZ: Yeah, I have no problem.

16 THE COURT: Okay. So let's make sure that  
17 that's included in the appropriate place as well.

18 All right. I want to go through these other  
19 instructions and make sure we're not missing  
20 something. So there's an instruction for statutory  
21 duty of loyalty limited scope.

22 Is that relevant any longer?

23 MR. CHASE: No, sir.

24 MR. BENITEZ: I didn't hear that, your Honor.

25 THE COURT: Statutory duty of loyalty limited

1 scope.

2 MR. CHASE: No, sir.

3 MR. BENITEZ: No, I don't believe that's --

4 THE COURT: Managing member right to rely on  
5 attorneys.

6 MR. CHASE: Yes, sir.

7 MR. SHUKER: I believe that's -- your Honor. I  
8 believe that's going to be included when we give the  
9 statutory 608 language in there.

10 THE COURT: Agreed.

11 MR. CHASE: Yes, sir.

12 THE COURT: Okay. Liability of members,  
13 managing members and managers.

14 Is that included in the statutory definition?

15 MR. SHUKER: I don't believe it is because I  
16 think we're going to do 608.4225. And I believe  
17 that's a different section of 608.

18 THE COURT: I don't have a statutory reference  
19 on that copy.

20 MR. SHUKER: That came from Mr. Shuker.

21 Give me one second.

22 MR. BENITEZ: That was Mr. Shuker who threw  
23 that in. That was 608.422. I believe, your Honor,  
24 it's entitled management of limited liability  
25 company. Is that along the lines of the -

1 MR. SHUKER: It's -- I think it's 608.4228.

2 MR. BENITEZ: 4228. Yeah, Mr. Jones -- your  
3 Honor, 4228.

4 THE COURT: When was the LLC statute revised?

5 MR. BENITEZ: I believe, your Honor, from  
6 memory, it's 2012.

7 THE COURT: Okay.

8 MR. BENITEZ: I believe. I'm not for sure,  
9 your Honor.

10 THE COURT: Well, here's the definition of  
11 reckless.

12 MR. CHASE: Yes, Judge.

13 THE COURT: Recklessness.

14 MR. CHASE: I like that and that's more  
15 closely -- I think that's perfect.

16 Judge, can we use that definition?

17 THE COURT: Mr. Benitez.

18 MR. BENITEZ: No objection. That's part of the  
19 statute.

20 THE COURT: Makes sense.

21 MR. BENITEZ: I can't object.

22 THE COURT: Right. So let's include that for  
23 reckless.

24 MR. CHASE: For the record, we're referring to?

25 THE COURT: 608.4228 sub 2.



1 MR. CHASE: Yes, sir.

2 Judge, I think that there are --

3 THE COURT: This opens a whole other can of  
4 worms.

5 MR. CHASE: I understand sir, because of when  
6 it was enacted.

7 THE COURT: Well, the one I'm looking at was  
8 enacted prior to the cause of action here.

9 That's the beauty of working in the courthouse,  
10 we pull a statute book and it's a 2010.

11 That's facetious, for the record. Sometimes  
12 that doesn't come across well.

13 MR. CHASE: We can pull up, actually, the --  
14 Judge, what I'm reading from is a 2007, 608.4228 and  
15 2007.

16 THE COURT: That has to be modified. The last  
17 modification was 2002.

18 MR. CHASE: So let's run with that. That was  
19 in the original proposal.

20 THE COURT: Mr. Benitez.

21 MR. BENITEZ: Your Honor, what part of this  
22 section do they want?

23 THE COURT: Which part do you want? Parts or  
24 all, 608.4228?

25 MR. CHASE: I like all of it.

1           THE COURT: Do we have any allegations of  
2 violations of criminal law?

3           MR. CHASE: It's part of the statute that he's  
4 suing under, says criminal law.

5           THE COURT: I know it does. There's no --  
6 nobody's alleging that --

7           MR. CHASE: Okay. Then I'm fine with taking  
8 that.

9           THE COURT: You're not taking any distributions  
10 under subsection 3.

11          MR. CHASE: No, sir, we can take that out.

12          THE COURT: There's no allegations under sub 4.

13          MR. CHASE: Agreed.

14          THE COURT: No allegations under sub 5.

15          This is not a proceeding by or in the right of  
16 someone other than the limited liability company or  
17 a member.

18          MR. CHASE: Take all those out and just leave  
19 in --

20          THE COURT: All that's left is improper  
21 personal benefit.

22          MR. CHASE: I don't like that.

23          Why don't we just stick with the definition of  
24 reckless on the side of that, supplant that for what  
25 we had previously decided. And then lose 608.4228.

1 MR. BENITEZ: No objection to losing the  
2 reckless. No objection.

3 THE COURT: And you don't care about the  
4 statute either?

5 MR. BENITEZ: No.

6 THE COURT: Okay. So that's out.

7 Limitation of liability of managers and  
8 managing members. That's the instruction that we  
9 were just looking at. Agency of members and  
10 managers or managing members, 608.421.

11 MR. CHASE: We don't need that. That was  
12 Donaghy.

13 THE COURT: Agreed.

14 MR. BENITEZ: I believe it was, your Honor.

15 MR. CHASE: That was Shuker and Donaghy.

16 THE COURT: Factors for determining liability  
17 of a principal for agents, acts or omissions.

18 MR. CHASE: Same thing.

19 THE COURT: All right. Now I'm back to the  
20 instructions starting with the substantive law.

21 So conversion is the first one. We're going to  
22 incorporate that.

23 MR. CHASE: Yes, sir.

24 THE COURT: Next is breach of contract, escrow.  
25 That's out.

1 MR. CHASE: Yes, sir.

2 THE COURT: By the Court's ruling.

3 Fraudulent inducement, escrow. That's out.

4 Intentional misrep, negligent misrep are both  
5 out.

6 Wrongful removal as a comanager, out.

7 Wrongful termination of Michael Myers, out.

8 Wrongful removal, denial of access, out.

9 Next is violation of duty of care of a manager.  
10 This is what we're going to read the entire statute  
11 for. This appears to be a subpart of it.

12 Is there a reason to do both?

13 Mr. Benitez.

14 MR. BENITEZ: Is this not the elements of the  
15 cause of action, or is it something else, Judge?

16 THE COURT: As it's listed, it looks like  
17 elements.

18 MR. BENITEZ: Elements, okay.

19 MR. CHASE: I like reading the statute.

20 MR. BENITEZ: I think this will be appropriate.  
21 The statute goes beyond that. And it's -- I think  
22 you normally set out the elements of the cause of  
23 action.

24 THE COURT: So in the --

25 MR. SHUKER: Your Honor, I have a suggestion.

1 THE COURT: Yes.

2 MR. SHUKER: We have already agreed to this  
3 format in the jury instruction. What I would  
4 suggest is putting that -- those elements there in  
5 the 401.18 section.

6 THE COURT: Right.

7 MR. SHUKER: And then, after that would be our  
8 excerpts from the statute 608.4225. So it would  
9 have the instruction with the elements, as is  
10 claimed, and then followed up with the statutory  
11 instructions.

12 MR. CHASE: I would add to that the breach of  
13 duty of care and then the breach of good faith, and  
14 then throw in the statute.

15 THE COURT: What are your thoughts on that,  
16 Mr. Benitez?

17 MR. BENITEZ: I think they're talking about  
18 just placement within the jury instructions.

19 THE COURT: Well, they're agreeing to both.

20 MR. SHUKER: Correct.

21 THE COURT: And now we're just talking about  
22 placement.

23 MR. BENITEZ: I don't see any problem.

24 THE COURT: I think that makes sense. So you  
25 can get your elements, as you've listed here, and

1       then we read the statute.

2           All right. Then we have affirmative defenses  
3       to breach of contract, statute of frauds. That's a  
4       nonissue. To conversion. Consent.

5           This is your affirmative defense. Consent.

6           MR. CHASE: That was -- I don't think that was  
7       his affirmative defense, sir.

8           THE COURT: It was yours.

9           MR. CHASE: Yeah, but now it's no longer  
10       relevant.

11          THE COURT: Okay. Contract dispute. That's  
12       out.

13          Ownership, that's out there. All those?

14          All right. Then we had the business judgment  
15       rule. But, again, I think that's incorporated in  
16       the statute, so I don't think it's an affirmative  
17       defense.

18          Next is the affirmative defense on the  
19       obligation of violation of good faith and fair  
20       dealing express terms.

21          But this deals with the implied covenant of  
22       good faith and fair dealing and contract -- inferred  
23       contract.

24          MR. CHASE: That is true.

25          THE COURT: That's out.

1 MR. CHASE: Yes, sir.

2 MR. BENITEZ: And, Judge, I thought you were  
3 going to get to -- you're going to get to the  
4 elements of good faith and fair dealings as a  
5 violation of the statute, right?

6 THE COURT: We are. They've already agreed  
7 both of those are coming in as you all typed them  
8 out.

9 MR. BENITEZ: Oh, no. I thought he was just  
10 talking about the duty of care with the respect to  
11 the obligation of good faith and fair dealing.

12 MR. SHUKER: He was talking both of them.

13 MR. BENITEZ: Well, I didn't understand that.

14 THE COURT: Is this your proposed instruction?

15 MR. BENITEZ: No, I don't believe so.

16 What we did is we decided to go ahead --

17 MR. CHASE: We took it out.

18 MR. BENITEZ: They've taken out what I was  
19 going to suggest to the Court to take out, so I  
20 thought we did that.

21 MR. SHUKER: You and I, right before trial at  
22 the eve of trial, we did that.

23 MR. BENITEZ: It's only three elements.

24 MR. SHUKER: Correct, like I said, in --

25 THE COURT: You're off the record.

1 (Discussion held off the record.)

2 THE COURT: Okay. So we're good?

3 MR. CHASE: Yes, sir.

4 THE COURT: Hold -- I'm on to the affirmative  
5 defense, mutual mistake of fact.

6 MR. CHASE: It's out.

7 MR. BENITEZ: It's out.

8 THE COURT: Unilateral mistake of fact doesn't  
9 apply.

10 Undue influence does not apply.

11 Fraud does not apply.

12 And then we're back into the standards and the  
13 set which you all have. Okay.

14 So I think we're good.

15 Now we're going to need to talk about the  
16 verdict form.

17 MR. CHASE: Yes, sir. Should be easy.

18 THE COURT: So I'm starting on page 1 of 47  
19 that I have here.

20 Everybody have that in front of them?

21 MR. BENITEZ: I do.

22 MR. CHASE: Yes, sir.

23 THE COURT: Okay. Any objections to questions  
24 one or two?

25 Mr. Benitez.



1 MR. BENITEZ: I do, to number two. I don't  
2 think it's relevant anymore.

3 But with respect to one --

4 THE COURT: I'm sorry. I apologize. One A or  
5 one B is what I meant to say.

6 No. It's one and one A for some reason, but --

7 MR. BENITEZ: No, I don't have any.

8 THE COURT: Okay. So one and one A is -- I  
9 would start off -- all right, breach of contract,  
10 claimed escrow, all those questions come out.

11 Myers' fraudulent inducement claim, escrow,  
12 comes out.

13 Myers' intentional misrep comes out.

14 Myers' negligent misrep comes out.

15 Myers' rescission. That's -- is this one of  
16 those fact questions you were looking for the jury  
17 to decide?

18 MR. BENITEZ: Yes, your Honor.

19 What page are you on, Judge?

20 THE COURT: On page 11.

21 MR. CHASE: That letter was excluded. So that  
22 should come out.

23 THE COURT: Okay. That comes out.

24 All right. The claim for writ of replevin,  
25 which we would not say in front of the jury, but --

1     what there is relevant for the jury to decide.

2           MR. CHASE:   That was -- I mean, that was  
3     something Mr. Benitez wanted, all fact questions  
4     decided by the jury.  That's something the jury  
5     can't decide.  It's just too much.

6           I don't think it needs to be there.

7           THE COURT:  I don't think -- what is your  
8     thought?

9           MR. BENITEZ:  At this point, after everything  
10    has occurred, it may be -- I don't know if this is  
11    what the Court was going to allude to.  It may be  
12    appropriate to just handle that as part of the  
13    nonjury trial, unless the Court would like these  
14    answered by the jury.

15          THE COURT:  The challenge is this:  That the  
16    nature of the evidence that has come in, I don't  
17    think fairly allows the jury to determine what  
18    memorabilia or what personal property was owned by  
19    whom.

20          MR. CHASE:  Agreed.

21          THE COURT:  As a consequence of all this.  
22    Because there are pieces under the agreement that  
23    the Court's now determined is enforceable, that are  
24    going to be -- that there will be an ownership  
25    interest determined under it.

1           There are others that are not. And we haven't  
2 drawn those lines for the jurors.

3           MR. BENITEZ: And in this question we don't  
4 draw that line either.

5           MR. CHASE: I think --

6           MR. BENITEZ: We deal with them all as one  
7 unit.

8           THE COURT: Yeah, I don't think.

9           MR. BENITEZ: So that's why I'm suggesting to  
10 the Court that this be an issue that we try as part  
11 of the nonjury trial.

12          MR. CHASE: I think we kind of did that by  
13 implied consent throughout the trial. By just  
14 saying that let's -- let's deal with replevin  
15 nonjury.

16          THE COURT: That's fine.

17          So the claims for the replevin, we're just  
18 going to take it off the verdict form.

19          I'm not saying that the Court doesn't need to  
20 determine it, but we we're just agreeing that the  
21 jury is not in a position to handle that.

22          MR. CHASE: Understood, Judge.

23          MR. BENITEZ: Before agreeing, we agree that  
24 the Court is going to handle that in the nonjury  
25 portion of the trial.

1 THE COURT: That's correct, that's what I'm  
2 trying to say is, we're not disposing of the issue,  
3 we're deferring it for the court to resolve.

4 MR. BENITEZ: Right.

5 THE COURT: Myers' conversion claim against  
6 Highway 46 is gone.

7 Against Donald Hachenberger is gone. Against  
8 Highway 46. And against Hachenberger, all gone.  
9 All right.

10 Starting now on page 17.

11 MR. SHUKER: Number 17.

12 THE COURT: Is this how we're going to handle  
13 this?

14 MR. CHASE: I hope not.

15 That's the way we were going to handle it when  
16 it was -- when it was 30 different individual  
17 claims, 15, and the breach of duty here. And 15.  
18 And the breach of good faith, we no longer have  
19 that.

20 THE COURT: Correct.

21 MR. CHASE: Now, essentially, we have six  
22 claims.

23 Three, the same three. It's the same three  
24 claims and how they play.

25 THE COURT: But are you wanting individual

1 verdict questions as to each of the three, or do we  
2 want a single question, which is: Did he violate  
3 the duty of good faith and fair dealing. Did he  
4 violate the duty of care.

5 MR. CHASE: I don't like that at all.  
6 Because -- I mean, it has to be -- he's left with  
7 mismanagement, unnecessary and unauthorized expenses  
8 and is the third that we didn't talk about.

9 THE COURT: So you want lots of opportunities  
10 for them to potentially say --

11 MR. CHASE: No, sir. But I don't want them to  
12 get back there and say that, well, when he removed  
13 him as a manager, that was wrong.

14 MR. SHUKER: And, your Honor, it's kind of --  
15 because of the way that was pled under the violation  
16 of duty of care, he had all these separate things,  
17 which each one of them is a separate violation. So  
18 we had to handle it the way it was pled.

19 What happens if he finds he violated the duty  
20 of care on A and C, but not B?

21 THE COURT: Then he's responsible for violating  
22 his duty of care. A, B, or C.

23 MR. CHASE: I think that -- I just -- in just  
24 looking at it, we have eliminated 12 of those 15  
25 things that were alleged to be violations. And so,

1     now we're left with three. So we don't mention what  
2     the three are.

3             And then the jury, they get back there and they  
4     start talking and they say, well, wait a minute, I  
5     heard -- what about the fact that he hasn't paid  
6     taxes in the last couple of years. Isn't that a  
7     violation of his duty of care.

8             And if they look at it that he violated his  
9     duty of care, yeah, he didn't pay his income taxes,  
10    or he didn't file taxes. And so there has to be a  
11    breakout.

12            I would be okay to join them, to say that,  
13    first, how about this: Do you find that Don  
14    Hachenberger --

15            THE COURT: Okay. I don't -- hang on. I got  
16    in the middle of something maybe I didn't belong in  
17    the middle of.

18            Have you all agreed to the forms of these  
19    questions?

20            MR. CHASE: Well, it's different now because  
21    we're not dealing with so many.

22            THE COURT: Did you all agree to the forms of  
23    these questions?

24            MR. CHASE: Yes, sir. Yes, sir, we did.

25            THE COURT: Mr. Benitez, do you agree?

1 MR. BENITEZ: Yes, your Honor.

2 THE COURT: And would you like these broken up  
3 questions?

4 MR. BENITEZ: If he wants them broken up. I  
5 don't think it's necessary. I agree with the Court,  
6 normally it's not broken up. And the fact that we  
7 have taken --

8 THE COURT: It's kind of like asking -- I'm  
9 sorry to interrupt, but it's kind of like asking,  
10 was the defendant negligent and was that negligence  
11 a legal cause of loss or damage. That's the  
12 question we would ask.

13 It's kind of like asking, was the defendant  
14 negligent in failing to brake in time. Was the  
15 defendant negligent in veering to avoid the  
16 accident. Was the defendant negligent in this, was  
17 the defendant negligent in that.

18 And I'm not insensitive to where we are posture  
19 wise, that the jury's heard a lot of evidence  
20 related to claims that's not going forward. And,  
21 candidly, I need to say something about that,  
22 somehow that they may find that some of the evidence  
23 they've heard does not pertain to the claims they're  
24 being asked to decide.

25 But -- I just, but if you've all agreed to the

1 form of the question, I am totally fine.

2 MR. CHASE: No, sir, I think it should be:

3 One, did he breach his duty of care. Yes or no.

4 If he did, what are his damages.

5 I don't know what that is.

6 And did he breach his duty of good faith. Yes

7 or no.

8 If he did, what are his damages.

9 THE COURT: What's your thought on that,  
10 Mr. Benitez?

11 MR. CHASE: And then argument, but we can't get  
12 squirrely in argument. And we do need some sort of  
13 instruction from the Court that says, you heard a  
14 lot of opening statements and evidence from the  
15 witnesses pertaining to a variety of claims that are  
16 no longer before you. Something of that nature.  
17 So, listen --

18 THE COURT: Is there not a standard instruction  
19 for that?

20 I have to believe this issue comes up in trial  
21 all the time where you start out with claims and  
22 some of them just don't go forward.

23 MR. BENITEZ: I think it's worked out with the  
24 jury verdict form and the instruction. But I would  
25 be cautious to put anything in front of the jury



1     like that, like Mr. Chase is suggesting.

2             I think if he wants to have it piecemeal, I  
3     mean, nobody -- if you look at it from the point of  
4     view of the jury, they haven't had the benefit of us  
5     arguing hours and hours about A, B, C, D. So they  
6     don't have a clue as to A, B, C, D.

7             And. Like you pointed out, Judge, that's what  
8     I was going to point out. In a case, you don't say  
9     well, did he trip to the right and fell on his left  
10    hand, and then went to the hospital at Florida  
11    South.

12            THE COURT: But am I hearing you all are in  
13    agreement at this point that Mr. Chase is offering a  
14    single question, plus a second question for damages  
15    if necessary.

16            You agree with that?

17            MR. BENITEZ: I don't have any problem with  
18    that.

19            THE COURT: Okay. So single question: Did --

20            MR. CHASE: Don Hachenberger breach his duty of  
21    care.

22            THE COURT: Right. You have it here. The  
23    basis in 17 C is the basic question.

24            MR. SHUKER: 17 C, 17 D, and 17 E.

25            MR. CHASE: So it would be three: Did he cause

1 damages to the Myers. And if so, how much.

2 THE COURT: Well, I think it's four questions  
3 in total. Right? Did he breach the duty of care.  
4 If so, what are the damages. Did he breach the duty  
5 of good faith and fair dealing. If so, what are the  
6 damages.

7 MR. CHASE: I had it as six questions.

8 So like E, causation, did he -- his breach of  
9 duty of care cause him damages. Did he breach the  
10 duty of care.

11 THE COURT: Right.

12 MR. CHASE: Did that cause the Myers' damages.  
13 If so, how much.

14 MR. BENITEZ: Did he breach the duty of care.

15 And the next question -- that would be six in  
16 total.

17 The next question would be damage as to that  
18 one. And then the next one would be by filing the  
19 duty of good faith and fair dealing. And if he did,  
20 if so, what's the damages.

21 THE COURT: That's four questions. You just  
22 said there were six.

23 MR. BENITEZ: Well, no. You have the  
24 plaintiffs -- you have the plaintiffs' two, plus my  
25 four, the entire verdict form.

1           MR. CHASE: He's talking about the entire  
2 verdict form.

3           THE COURT: Okay. I think there's got to be a  
4 causation element. Doesn't have to be a separate  
5 question, though.

6           I think, if so, what were the damages caused by  
7 the breach of duty of good faith and fair dealing.

8           MR. BENITEZ: How did you put it in the -- you  
9 mean --

10          MR. CHASE: I don't want to suggest that it was  
11 caused.

12          THE COURT: No, it's an if-so. If the answer  
13 to the first one is no, then they don't get to it.

14          MR. SHUKER: So 17 E would read: What were the  
15 damages caused by Donald Hachenberger's --

16          THE COURT: What's the damage -- what were the  
17 damages attributable to, or what damages were caused  
18 by, finding question 17-1. I think is how you have  
19 it here.

20          MR. BENITEZ: I think the way --

21          MR. CHASE: It's right in there. The way it is  
22 right now. How much were the damages Donald  
23 Hachenberger caused to the Myers by his actions.

24          And question whatever --

25          THE COURT: Right. That's all I'm suggesting.

1 MR. CHASE: Right then we've already agreed to  
2 it.

3 MR. BENITEZ: That's the second question.

4 THE COURT: Right.

5 So two questions each. Two on the conversion.

6 MR. CHASE: Yes, sir.

7 THE COURT: Two on the breach of duty and good  
8 faith and fair dealing.

9 And two on the duty of care.

10 MR. CHASE: And we're going to get please an  
11 instruction, right, about the same time, is the  
12 instruction on the enforceability of the letter  
13 agreement, operating agreement, instructing that  
14 the -- I think, again, going back -- and that's the  
15 perfect time for it, saying there was some things  
16 that the Court was to determine, some things for the  
17 jury to determine.

18 They may have heard evidence as it relates to  
19 other issues. The only issues before the jury at  
20 this point and on the -- and I'd like the  
21 instructions to say -- I'm thinking about it.

22 Mismanagement -- it's everything.

23 Mismanagement is such a catchall. Why break it  
24 apart. Why not just say that.

25 THE COURT: I'm sorry. Are you speaking to me?

1           MR. CHASE: No, sir. I'm -- like Mr. Benitez,  
2 my mouth is just saying things. It's -- as I'm  
3 thinking. I think it's -- and I'm sorry, I  
4 shouldn't say these things in jest.

5           What the -- I believe we have the instructions  
6 set up such that if there were an instruction to the  
7 jury, not to be -- or what I just said about the  
8 Court having decided things and that they may have  
9 heard evidence as it pertains to other things, they  
10 should disregard that.

11          And then in closing argument, I think counsel  
12 needs to be very careful not to argue that things  
13 that have been now excluded would be breaches of  
14 that duty, such as it would be inappropriate to  
15 argue that Don Hachenberger failed to safeguard  
16 personal property of the Myers, for instance. And  
17 it's because that's been excluded.

18          That's my concern. That's why something --  
19 what the Judge is going to tell you what the issues  
20 are. And so that's where my whole concern is coming  
21 from.

22          And that's why the whole concern about the  
23 verdict form to eliminate that concern about hearing  
24 a closing argument, and you heard the testimony, you  
25 saw the pictures of the screw holes through the --

1 through the picture frames.

2 And, you know, and then all of the sudden,  
3 that's equated to a breach of his duty to protect  
4 the stuff. And, hence, that's -- that claim is  
5 gone.

6 THE COURT: But where do we ever advise him  
7 that he has a duty of that?

8 MR. CHASE: That was an allegation. That's one  
9 of the allegations.

10 THE COURT: I understand. But they don't know  
11 that and you're not going to argue that.

12 MR. CHASE: That's what I mean. It's just  
13 like -- the argument needs to be restricted to  
14 mismanagement, unnecessary and unauthorized  
15 expenses -- and what is the third one. Changing  
16 concept.

17 THE COURT: I think Mr. Benitez agreed with  
18 that.

19 MR. BENITEZ: Judge --

20 THE COURT: Right?

21 MR. BENITEZ: I agree that those are the  
22 issues.

23 Judge, instead of doing any kind of an  
24 instruction from the bench, I would oppose all that  
25 and I would object. I would go back.

1           And if they're that concerned about those  
2   issues in particular, then I would go back and  
3   suggest to the court and to Mr. Chase to go back and  
4   make the verdict form just those same two questions,  
5   for each of those items. Those three items or four  
6   items.

7           And that way everybody can refer to the verdict  
8   form and say these are the issues. And the jury  
9   doesn't get confused and maintains a line on the  
10   real issues. And that way nobody, in the middle of  
11   arguments, sidesteps there and calls out for an  
12   objection.

13          I think --

14          THE COURT: You want to argue this?

15          MR. CHASE: No, sir. I think we've moved on  
16   past that. We've come to an agreement on the  
17   verdict form and now we're discussing -- my  
18   understanding was, we came to an agreement on that.  
19   Now we're discussing an instruction to the jury to  
20   clarify why they've heard a lot of evidence about  
21   things that now they're not deciding.

22          MR. BENITEZ: And I'm going to object to that,  
23   Judge, and there's -- I am recommending to the  
24   Court, based on Mr. Chase's position and request to  
25   the Court, to just go back and make those verdict

1 forms specific to those allegations that remain in  
2 the case.

3 That way, everybody's focused on those  
4 allegations and so is the jury.

5 MR. CHASE: They would still need more than  
6 that. I would still request that instruction. Even  
7 if we broke out the verdict form. Because there was  
8 allegations of conversion. There was an opening  
9 statement of conversion and that's gone.

10 MR. BENITEZ: Well, that safeguard, Judge, if  
11 we have specific verdict forms, we know when the  
12 jury returns the verdict, they considered  
13 mismanagement, they considered change of concept,  
14 they considered unauthorized expenses. And that way  
15 there's no equivocation of what the jury considered.

16 MR. CHASE: Except that they --

17 MR. BENITEZ: But for the Court to sit there  
18 and then dictate something that puts me -- depending  
19 on how it flows -- and may put one party or the  
20 other at a disadvantage, because it's almost like  
21 something on the side.

22 So I think the most --

23 THE COURT: Well, the Court all the time though  
24 informs the jury, is that they have directed a  
25 verdict as to certain issues.



1 MR. BENITEZ: I understand, Judge.

2 THE COURT: That's what's happened here.

3 How is this different than those circumstances.

4 How are you any more prejudiced in this case by the

5 Court informing the jury that it has directed a

6 verdict -- and that's not the words I would use,

7 but, the words are contained in this preliminary

8 issues instruction.

9 This is the place that the supreme court has

10 said this is the appropriate way to advise the jury

11 that certain issues are no longer for their

12 consideration.

13 MR. BENITEZ: And at that point I would ask the

14 Court to read those four issues out and say those

15 are the remaining issues.

16 Just put it in front of the jury so they know

17 exactly the issues. That way there's no deviation,

18 either by Mr. Chase or myself.

19 So if the Court is going to instruct them as to

20 something, at that location, I would say, okay, and

21 your remaining issues with respect to the duty of

22 care and the violation of -- the obligation of good

23 faith are mismanagement of the business.

24 THE COURT: Okay. And I'm not opposed to doing

25 that. We'll talk about it. But I'm not opposed to

1     it.

2             What I'm concerned about, though, isn't what  
3     we're giving to them. It's an indication that  
4     that's all we're giving to them.

5             MR. BENITEZ: Right.

6             THE COURT: That they may have heard evidence  
7     on a number of issues. But these are the only  
8     claims for your resolution today.

9             MR. BENITEZ: Right. As long as they're  
10    specified --

11            MR. CHASE: Because --

12            MR. BENITEZ: -- either in the verdict form  
13    or -- I think it's ideal in your instructions to  
14    just tell them these are the issues that are going  
15    to be argued at this point, basically. Not in those  
16    words, but --

17            MR. CHASE: I think they get that, too.

18            The problem that I have, Judge, is so juror  
19    number 2 goes back into the room to deliberate and  
20    says she's really, really upset with the fact that  
21    Don Hachenberger still has Mr. Myers' picture of his  
22    grandmother.

23            And so, to me, that's mismanagement.

24            Madam Clerk is nodding her head she doesn't  
25    like it.

1           That has to be explained, that's not a decision  
2   for them to make.

3           THE COURT: I don't think my clerk's expressing  
4   any opinion about the merit.

5           MR. CHASE: I'm sorry, I didn't mean it.

6           THE COURT: I know, but I want to make it  
7   clear.

8           MR. CHASE: I apologize.

9           THE COURT: My clerk's not expressing her  
10   opinion with respect to the evidence or the thoughts  
11   on that. That's not what's happening, sir.

12          MR. CHASE: I got it. It's late in the day and  
13   I'm arguing something.

14          That's what I see happening. And I can see  
15   that very -- that is a -- anybody could see that  
16   happening. Because now, that issue that they heard  
17   evidence on, so now they just think, what, that just  
18   goes away.

19          And so the jurors sit back there and thinking I  
20   need to fix that. How can I fix that. Well, here,  
21   that's mismanagement. You took his grandmother's  
22   picture. The jury has to know that that evidence  
23   they heard is not something that they're to  
24   consider.

25          THE COURT: But I can't identify each fact.

1 MR. CHASE: I agree with that.

2 THE COURT: So what is it that you want me to  
3 tell them?

4 MR. CHASE: You say that there are claims that  
5 the Court has decided that just exactly and, again,  
6 this isn't -- this comes up. I've been in other  
7 trials where that's taking place and -- I'm sorry, I  
8 can't remember off the top of my head the exact  
9 instructions that were used.

10 But it's not unusual for the Court to say this  
11 is no longer before you. This -- the Court has  
12 decided or whatever the Court says. And I  
13 apologize. I don't know off the top of my head.

14 THE COURT: No, I think if we had given them  
15 the list of claims upfront, I could tell them these  
16 claims are no longer before you for consideration.  
17 These are the claims that are before you for  
18 consideration.

19 We haven't done that.

20 So I think what I am in favor of doing --  
21 because I do generally agree with the idea that the  
22 jury shouldn't be allowed to take the universe of  
23 evidence that they've now heard and apply it to the  
24 claims that are before them. They should only be  
25 applying the evidence that pertains to those claims.

1           How to draw those lines at this stage is  
2     difficult. But I'm kind of back to where I started  
3     with an earlier instruction that I proposed today.

4           Members of the jury, the Court's been listening  
5     to and considering the evidence and testimony along  
6     with you. There are certain claims in this case  
7     that the Court is responsible for deciding.

8           You are responsible for deciding the following  
9     claims:

10          MR. CHASE: Yes, agreed. Sir.

11          MR. BENITEZ: And then -- that's fine, I  
12     thought we had that discussion previously. Yeah.

13          THE COURT: Okay.

14          MR. BENITEZ: That's it.

15          THE COURT: So language needs to be included  
16     ahead of the statement of issues.

17          MR. CHASE: Right at the same place where the  
18     big contract enforceability would be. That's in  
19     the --

20          THE COURT: Preliminary.

21          MR. BENITEZ: But, Judge, with that, you're  
22     going to specify those three areas that remain,  
23     correct? Or not?

24          MR. CHASE: I'm fine with that.

25          THE COURT: You want me to?

1 MR. CHASE: I'm fine with it. Yes, sir.

2 THE COURT: Okay, then they need to be added --

3 MR. CHASE: The conversion.

4 THE COURT: They need to be added then to where  
5 they would be in the -- it'll be the preliminary  
6 statement of issues, which is the contract issue and  
7 now this issue. And then the statement of issues,  
8 which is 401.21, I think it was.

9 And when we talk about the claims, the claims  
10 are, the claim for breach or for --

11 MR. BENITEZ: Duty of care.

12 THE COURT: Breach of the duty of care, based  
13 upon these three things. A claim for violation of  
14 the duty of good faith and fair dealing, based on  
15 these three things.

16 Okay?

17 MR. BENITEZ: Yes, your Honor.

18 THE COURT: Agreed?

19 MR. BENITEZ: Yes, sir.

20 THE COURT: All right. I can't think of  
21 another issue we haven't covered.

22 Is there anything?

23 MR. CHASE: No, sir.

24 MR. BENITEZ: No. Your Honor.

25 THE COURT: You're going to get back and I

1 expect you're going to have disagreements. If  
2 that's the case, as I said previously with the other  
3 instruction, bring me something I can slip in, your  
4 version of it.

5 MR. BENITEZ: Okay. And then, so I should --

6 THE COURT: I'm going to have you guys approach  
7 me in a minute. I'll give you my cell phone number.

8 MR. CHASE: Certainly. I can say now, ours is  
9 going to be the language from the statute,  
10 exchanging commercial -- exchanging business for  
11 commercial. That's our proposal.

12 And I think that he wrote one so you have that  
13 before you now. You don't? No.

14 MR. BENITEZ: No.

15 THE COURT: No.

16 MR. CHASE: I understand.

17 THE COURT: Take it and give me your best  
18 status.

19 MR. BENITEZ: And so, can we have a little bit  
20 of a deadline as to those things so we can exchange  
21 them.

22 THE COURT: Sure. I'll be up until 7 o'clock  
23 tonight. Call me before then.

24 MR. BENITEZ: So you're up about an hour before  
25 I am.

1           THE COURT: No. I'm going to make the decision  
2     in the morning. You're going to give me each of  
3     your proposed versions. I'm going to look at them.  
4     I'm going to decide which one more accurately states  
5     the law. And that's what I'm going to insert.

6           MR. BENITEZ: And with respect to the typed  
7     instructions --

8           MR. SHUKER: As soon as I get home, I'm going  
9     to be on it. I got to eat, I got kids. I'll give  
10    it to you in a reasonable time.

11          MR. BENITEZ: No. We need to check them.

12          Mr. Chase.

13          MR. SHUKER: It'll be in a reasonable time,  
14    just like the last time I did it.

15          THE COURT: Mr. Jones, come here, you can take  
16    this statement from me.

17          This is what I showed everybody earlier that we  
18    read in the context of the excusal of  
19    Mrs. Hachenberger. This is the first sentence.

20          I will see you all back here at 9 o'clock  
21    tomorrow morning.

22          MR. CHASE: Yes, sir.

23          THE COURT: Counsel, approach, and I'll get  
24    that number to you.

25          (Discussion held off the record.)



1           MR. CHASE: Your Honor, Mr. Benitez, it's my  
2 understanding we would ask the Court, Mr. Benitez  
3 and I, in the event that we can agree on a one-time  
4 visit to the Church Street and Bobby Lee Point  
5 warehouses no later than Friday, that as long as we  
6 can agree on how to do it, the Court is okay with us  
7 doing that, but if we can't agree in writing through  
8 e-mail, then it doesn't happen.

9           MR. BENITEZ: Yes, your Honor, that's fine.

10          THE COURT: Okay, the Court gives permission  
11 for that, assuming counsel can agree on the terms.

12          MR. CHASE: Thank you, sir.

13          MR. BENITEZ: Thank you, your Honor.

14          THE COURT: All right, thank you, all, we're in  
15 reassess, we'll see you tomorrow morning.

16          MR. BENITEZ: Thank you for your time, your  
17 Honor.

18                (TIME NOTED: 4:50 P.M.)

19                (CONTINUED IN VOLUME IX.)

20

21

22

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25

1 CERTIFICATE OF REPORTER

2

3

4 STATE OF FLORIDA )

)

5 COUNTY OF ORANGE )

6

7 I, SHOSHANA KRAMER, Notary Public, State of  
8 Florida, I was authorized to and did stenographically  
9 report the foregoing proceedings; and that the  
10 transcript, pages 1485 through 1714, is a true and  
11 accurate record of my stenographic notes.

12

13 I FURTHER CERTIFY that I am not a relative, or  
14 employee, or attorney, or counsel of any of the parties,  
15 nor am I a relative or employee of any of the parties'  
16 attorney or counsel connected with the action, nor am I  
17 financially interested in the action.

18 Dated this 20TH day of SEPTEMBER, 2018.

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*Shoshana Kramer*

SHOSHANA KRAMER, RPR, CRR

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