

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY

S.C. Supreme Court

Court of Common Pleas

Marvin Dukes, III, Master in Equity

Case No. 2000-CP-07-524

Bill P. Passaloukas and Susie H. Passaloukas,  
Individually and as Shareholders Derivatively  
on Behalf of Zorba's, Inc.,.....Appellants,

v.

Cynthia Bensch, Gary Bensch and Zorba's, Inc.,.....Defendants,  
Of whom, Cynthia Bensch and Gary Bensch are the.....Respondents.

VOLUME I

SUPPLEMENTAL RECORD ON APPEAL

PAGES 1 - 465

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RESPONDENTS

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**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

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**APPEAL FROM BEAUFORT COUNTY**

Court of Common Pleas

Marvin Dukes, III, Master in Equity

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Case No. 2000-CP-07-524

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Bill P. Passaloukas and Susie H. Passaloukas,  
Individually and as Shareholders Derivatively  
On Behalf of Zorbas, Inc.....Appellants,

v.

Cynthia Bensch, Gary Bensch, Towne Center, LLC  
And Zorbas, Inc. of whom Cynthia Bensch and  
Gary Bensch are.....Respondents,

---

**INFORMAL BRIEF OF RESPONDANTS**

---

Cynthia M. Bensch  
1 Crabtree Lane  
Bluffton, South Carolina 29910  
1-843-757-2226  
Respondent, pro se

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**INFORMAL BRIEF**

**RE:**

**1. Jurisdiction  
A. Beaufort County**

**2. Issues for Review**

**Issue 1. Frivolous Lawsuit- Withholding Information- Erroneous Claims**

**Supporting Facts and Argument**

**Judge Thomas Kemmelin, Jr. response to Motion to Amend or Alter  
Testimony of Appellant (transcript) Accountant, Appellant's  
Counsel (transcript) , Mr. Fishers testimony (transcript ) Ex # 30  
Zorbas Lease p. 5-7) Exhibit #30, Def Ex. # 36 (p. 296 plaintiffs brief)  
Shareholders Agreement p. 4 (p. 289 Plaintiff's brief) Mr. Steinberg's  
deposition p. 16 L 10-19 P. 28 L 1-9 Mr. Warco accounting Pl. Ex. # 27**

**Issue 2. Bad Faith-Acted Arbitrarily**

**Supporting Facts and Argument.**

**Transcript testimony of Appellant, Minutes of Shareholders Meeting,  
(Def. ex. 19 p 488 Appellate brief)  
Plaintiff's Exhibit , Appellant's Transcript Brief,  
Shareholders Agreement (Art 1 1.3.11, Art. III 3.4, Art. 1V 4.2)**

**Issue 3. Inapplicable Case law**

**Supporting Facts and Argument**

**Appellants Brief-Laws cited  
Zorba's lease (p 6 11b) Shareholders' Agreement p 5 art. II 2.1, and  
2.4**

**Issue 4. Relief Requested**

**Respondents ask Court for relief on their claims for actual and punitive  
damages, trial coast and Attorney fees and any other relief the Court  
deems just and proper.**

*September 23, 2010*

*Matthew Benesh*  
*pro se*

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
) )  
COUNTY OF BEAUFORT ) CASE NO.: 2000-CP-07-524  
) )  
BILL P. PASSALOUKUS & )  
SUSIE H. PASSALOUKAS, )  
Individually and as )  
Shareholders Derivatively )  
On behalf of ZORBAS, INC.)  
) )  
Plaintiffs, )  
) )  
v. )  
) )  
CYNTHIA BENSCH, GARY )  
BENSCH and ZORBA'S, INC., )  
) )  
Defendants. )  
) )  
) )  
) )  
) )

---

Reference hearing held before the  
Honorable Marvin H. Dukes, III, in his  
chambers at the Beaufort County Courthouse,  
Second Floor, Beaufort, South Carolina,  
commencing on or about the day of 21<sup>st</sup> day of  
April, 2009, beginning at or about 9:30 a.m.

APPEARANCES:

For the Plaintiff: Frank Pape, Esquire  
Deming, Parker, Hoffman,  
Campbell & Daly, LLC  
4851 Jimmy Carter Blvd.  
Norcross, Georgia 30093-3641

For the Defendants: Mrs. Cynthia Bensch  
  
Hilton Head Island, SC 29938

Reported by: Joanne B. McDonald, CVR

# Mr Fishers Testimony

BY MRS. BENSCH: Peose

Q. Mr. Fisher, what was your position for a corporation known as Zorbas back in 1999?

A. I was hired as an independent bookkeeper.

COURT: If you could for the Court state your name, address, spell it?

MRS. BENSCH: Sorry? Oh, yes.

BY MRS. BENSCH:

Q. Please state your name.

A. Name is William G. Fisher.

MR. PAPE: Your address?

A. My address is 27 Doctor Mellichamp Drive, Suite 100, Bluffton, South Carolina and I am out of breath -- 29910.

Q. You should have parked closer. Mr. Fisher, how did you receive accounting information about Zorbas Corporation?

A. Well Bill, the manager or president kept all the source data. He kept the checkbooks and the payroll stubs and everything and then at the end of the month or bi-monthly if I would come by to check on things, he would give me the source data that I requested. Canceled checks, invoices, everything.

Q. Who was John Nicoli?

Q. Did you ever give Mr. Pape any documentation whatsoever in regards to the finances of this corporation?

MR. PAPE: I object to the relevance. I am not a party to this lawsuit.

MRS. BENSCH: Well, we are trying to find out where the documents have been.

COURT: Are you talking about the originals? He can answer, go ahead.

A. It was understood between both partners that --

MR. PAPE: I object. No foundation.

COURT: All right. Avoid what somebody else may have understood. If you could just directly answer the questions.

A. Both partners received a --

MR. PAPE: I object. Still no foundation.

MRS. BENSCH: Okay, Your Honor, I am asking him to testify so that we can get to the bottom of where the monies went and where the assets ended up and he is only person that had the records. He is the person who did the bookkeeping.

COURT: All right, well he can answer a direct question. You may ask him questions

Mr Fisher Testimony By Mrs Bensch (prose)

designed to lead to direct answers about exactly what he did or what he did not do. His assumptions on what others did or did not do are not relevant.

MRS. BENSCH: Okay.

BY MRS. BENSCH:

Q. Did you ever furnish Mr. Pape any financial records for the corporation?

A. Yes.

MR. PAPE: Your Honor, my objection is to the relevance. What he furnished me is irrelevant to this case.

COURT: Well, I will allow it.

BY MRS. BENSCH:

Q. What did you furnish him?

A. A compilation each month was given to both partners.

MR. PAPE: Well, Your Honor, that is not even responsive to the question.

COURT: The question had to do with Mr. Pape. What was the -- you can specifically go through who got what if he knows.

Q. Was there ever an occasion -- did you ever go to Mr. Pape's office?

A. Only at the end when I offered accounting services and  
I gave him --

MR. PAPE: Your Honor, they are  
attempting to make a witness out of me and I  
just think that's improper. I don't know  
where you are going with it, but --

MRS. BENSCH: No, I am not. I am just  
trying to say where the records are to figure  
out why we are where we are and who had what  
and who withheld what and who produced what.

MR. PAPE: Well, I think it is  
irrelevant, Your Honor. We've already got  
all the accounting records that we had that  
have already been identified. I mean the  
checkbook records which are identified as  
Plaintiffs' Exhibit No. 21. My client  
testified earlier today that he never saw any  
-- that he's looked for and never saw any  
payroll records. Now, we do have this  
Exhibit, Defendants' No. 14 which is some  
sort of list of payroll checks. I don't know  
what the relevance of --

MRS. BENSCH: The relevance is, Your  
Honor, this bookkeeper provided everything

Q. Did you ask him?

A. That would have been a part of the year-end accounting.

MR. PAPE: I object. He is speculating a hypothetical -- would have. I mean he either did or didn't do nothing.

MRS. BENSCH: Okay.

BY MRS. BENSCH:

Q. Did he give you the accounts payable to do a report for the month of December?

A. No.

Q. You didn't get records for the accounts payable --

MR. PAPE: Object. It is leading.

A. No.

Q. For December?

COURT: Try to ask -- not lead the question.

BY MRS. BENSCH:

Q. Did Mr. Passaloukas receive a salary from Zorbas?

A. I don't believe his name appeared -- no, on the payroll.

Q. Did Mr. Passaloukas receive -- reimburse himself for contributions or loans?

A. Yes.

MR. PAPE: I am sorry, I --

A. Absolutely not.

Q. You didn't tell him to pay himself loan reimbursements?

A. I had nothing to do with his capital account.

Q. Would there be any advantage to a person reimbursing himself as opposed to paying himself a salary?

A. There would be a tax advantage -- shall I go on?

Q. Yes.

A. He would be entitled to be repaid for any loans that he made the corporation tax free. If he took a salary, that would be taxable.

Q. In December of 1999 there was a shareholders meeting held for Zorbas Corporation. Were you present at that meeting?

A. Yes, I was.

Q. Can you tell me the purpose of the meeting? Do you remember any details after ten years?

A. I am going to have to be able to talk to answer that.

Q. Okay, please do.

A. The purpose was that --

MR. PAPE: Your Honor, he's got to establish a foundation for his knowledge. I mean I don't know if he is assuming things or whether he got information directly from the Benschs or --

Q. There was an attorney there, I don't remember how many.

A. Do you remember any of the issues discussed -- well first of all did the discussion of a mailbox key --

MR. PAPE: Object to the leading question.

BY MRS. BENSCH:

Q. Did the Benschs ask for a mailbox key?

MR. PAPE: Again, she is leading the witness.

COURT: I will allow it.

MR. PAPE: Some of it's harmless, Judge, but I still don't know when she is going to move into --

COURT: I understand.

A. Yes and more. Yes, they did.

Q. Okay, did the Benschs ask to be placed as signors on the bank account?

MR. PAPE: Objection to the leading questions. I mean if she is going to go through a whole list of --

BY MRS. BENSCH:

Q. Well then, would you just tell me what you heard at the meeting?

A. It was about Gary putting more money into the business.

Q. For what purpose?

A. Because the business was not cash flowing. It was insolvent.

Q. And did Mr. Bensch offer to put more money in?

A. He offered \$50,000.00.

Q. And was there a vote taken on that by the shareholders?

A. Not that I recall. I believe it was just rejected.

Q. Rejected by who?

A. The other side.

Q. The Passaloukases.

COURT: You have to make an audible, yes or no.

A. I am sorry?

COURT: You said uh huh. Ms. McDonald has to take everything down.

A. Oh, I am sorry, Ms. McDonald, I am sorry. I forgot you were over there.

Q. So --

COURT: You probably ought to go back to the question so he can answer.

BY MRS. BENSCH:

Q. Okay, so you are saying that the Passaloukases -- who rejected the offer?

MR. PAPE: Already asked and answered.

COURT: Right but he didn't answer audibly.

MR. PAPE: Go ahead, sorry.

A. Bill rejected the offer.

Q. Bill and Susie Passaloukas or just Bill?

A. And his attorney.

Q. Do you recall their objection?

A. I know what it was.

Q. What?

MR. PAPE: There's got to be some sort of a foundation. I don't know what his source of his knowledge is.

COURT: Let me ask you this, are you testifying from your memory of attending the meeting?

WITNESS: Yes, sir.

COURT: Go ahead.

BY MRS. BENSCH:

Q. If -- at the shareholders meeting when the Passaloukases rejected the cash input from the -- a loan from the Benschs, did the Benschs ask for stock?

A. Yes.

Q. Did the Passaloukases reject or accept that?

A. Rejected.

Q. And when you were trying -- did you prepare final accounting records for Zorbas, Inc.?

A. No.

Q. Why?

A. I offered accounting services but they were rejected by Frank Pape.

MR. PAPE: Your Honor, he is making me a witness in this case. I honestly don't have any memory after ten years. He could be confusing me with one of the many other lawyers who have been involved in this case.

COURT: Well the fact is whether or not he offered -- I don't know if that has any relevance in the case anyway. I guess the final accounting services are what I am supposed to do at this point, so whether or not this witness did or didn't do it, you know I don't know if it makes any difference. So, --

MR. PAPE: And of course I think it is irrelevant that any conversations he might have had with me, because I have only been involved in this -- with the Passaloukases after the lawsuit was filed. I was never

involved with them before the lawsuit was filed.

MR. PASSALOUKAS: I didn't know him before.

COURT: I don't think it has any relevance, but you can move on.

BY MRS. BENSCH:

Q. Mr. Fisher, how many accounts did Zorbas have?

A. Three.

Q. What were those three accounts?

A. They had a general operating account. They had a payroll account and they had a petty cash account.

Q. Okay, do you have any records of the payroll account?

A. Yes, I just gave you the check register.

Q. Okay, and what was the balance in that account on December 31<sup>st</sup>?

A. I could not determine that because Bill refused to turn over the bank statement for 12/31.

Q. But was the actual final number that you have for payroll account?

A. The bank statement is just a guess.

Q. Okay, were there -- where were the checks for that account? Well, first of all, how many sets of checks were on that payroll account?

MR. PAPE: Your Honor, we have already stipulated that the December rent wasn't paid so I mean I --

COURT: The December -- the November rent was paid at some point in December, but the December rent was never paid but your question was, was the rent paid in December, so the November rent was paid in December.

MRS. BENSCH: But the December rent was never paid, okay.

COURT: I just want to make sure I got the facts right.

BY MRS. BENSCH:

Q. Do you have any records indicating any liabilities owed by Zorbas by December 31<sup>st</sup>?

A. Just taxes is all I knew of.

Q. Taxes?

MR. PAPE: We've got to establish a foundation, Judge.

BY MRS. BENSCH:

Q. How would you determine that taxes were due? Were you -- you were the bookkeeper for the corporation?

A. These would have only been payroll taxes, is all I knew because my offer to do income taxes was rejected.

Q. Okay. Did you -- did the Benschs ask you to do any accounting for this -- to close out this corporation?

A. No, they did not.

Q. Did -- let's see, so the only liabilities you know of -  
- oh, that's right, you said you didn't get accounts payable  
for December so you wouldn't know?

A. The December work was not finished.

Q. Was never finished, okay. Were you paid your final fee from Zorbas, do you remember?

MR. PAPE: Object, Your Honor, on  
relevance.

COURT: Well, it would an expense of  
Zorbas.

MR. PAPE: Well, the statute of  
limitations have long since passed.

COURT: I will allow it, go ahead.

A. I am sorry, will you repeat the question?

Q. Did you have a balance due from Zorbas? Were you paid your final -- And were you paid for December?

A. Not by Zorbas.

Q. Who were you paid by?

A. Cynthia Bensch paid me.

Q. Okay, do you know that amount?

evidence that he's ever prepared -- in fact his testimony is that he didn't have all of the documents.

MRS. BENSCH: All right, I withdraw the question, Your Honor.

BY MRS. BENSCH:

Q. When was the last time you met with Mr. Passaloukas in regards to the Zorbas restaurant to get records or --

A. It was the day of the eviction or the day -- that day I believe, the day of the eviction I do believe.

Q. Will you tell the Court what happened on that day?

A. Yes. I went -- I had asked Bill previously for the payroll bank statement for 12/31 and I went back to ask a second time. I had no -- I was not aware that Bill had been evicted. I knocked on the front door of the restaurant and no one was there, so I walked around to the back alley and I saw Bill in the alley.

Q. And what was Bill doing in the alley?

A. Well, the first thing he said to me was I have been evicted.

Q. Oh, okay. Did you tell him that you needed --

MR. PAPE: I object to the leading question.

MRS. BENSCH: Oh, I am sorry.

BY MRS. BENSCH:

Q. Did you ask him any questions?

A. Yes.

Q. What did you ask him?

A. I asked him for the bank -- the normal source documents that I ask for every month in particular the payroll bank statement.

Q. And what did he say?

A. He said it was either in his truck, which he pointed to. I could see it was at the end of the alley and it was loaded with stuff or he said it was at his house and he would try to get it for me.

Q. So the payroll records were in his truck or at his house?

A. That's what he said.

Q. Did -- you said there were two separate sets of checks on that payroll account, one that you were given to print for employees?

A. Yes.

Q. And what was the other for?

A. That was for Bill to make deposits or withdrawals or transfers or do whatever he wanted to with it.

Q. Did you receive bank statements from that account?

A. No, not the statement itself, no. Not for December. I did for five months, but not for December. That's why I was at the restaurant looking for that stuff.

Q. In December of 1999, was Zorbas solvent or insolvent?

MR. PAPE: The question has been asked and answered.

COURT: I will allow it.

A. Insolvent.

Q. What were the balances on all of the accounts December 31<sup>st</sup>, 1999?

A. The reconciled balance of Palmetto State Bank, the operating account, was minus \$1400.23. The reconciled balance of the payroll account according to this bank reconciliation, which I will be glad to give you a copy of, was minus Sixteen hundred dollars thirty-three, I am sorry, minus \$1,633.94.

Q. And what account was that?

A. The payroll account. This is unreconciled but I did try to do a reconciliation without the statement and I have a list of what I considered uncleared checks and uncleared deposits plus I had a copy of the November statement.

Q. Mr. Pape, I am going to ask the witness to look at this check on 12/21, check no. 1221.

COURT: Check dated 12/21 or --

Q. With the contributions and loans of the shareholders, Mr. Fisher, were the Benschs obligated to contribute more money to this corporation?

MR. PAPE: Object. It is irrelevant. It  
calls for an opinion and there is no factual  
foundation that has been established.

COURT: All right. Sustained.

BY MRS. BENSCH:

Q. Did you witness any list or anything given to the Benschs at the shareholders meeting?

A. I don't recall any paperwork going back and forth. It was mostly conversation.

Q. When you asked -- did you ask Mr. Passaloukas any other questions the day that you saw him behind Zorbas?

A. No, I was only interested in doing the bookkeeping. I wanted the bank statement and the source documents.

Q. And his answer --

MR. PAPE: Object.

Q. What was his answer for not giving you the documents you asked for?

COURT: What's the objection?

MR. PAPE: Your Honor, I withdraw the objection.

A. Sorry, restate the question.

Q. What was his reason for not giving you the bookkeeping for this?

A. He admitted it was in his car or at his house and he didn't know which and he would try to find it.

Q. What did you take that statement to mean?

MR. PAPE: I object. It is irrelevant.

MRS. BENSCH: Okay.

BY MRS. BENSCH:

Q. Did you see at the shareholders meeting -- did you see the Benschs receive a mail box key?

A. No I did not.

Q. Okay, Your Honor, I have no further questions at the moment, but I do ask for re-cross or rebuttal.

COURT: Go ahead, sir.

MR. PAPE: Thank you, Your Honor.

BY MR. PAPE:

Q. Mr. Fisher,

COURT: Mr. Fisher, by the way if you need a break just let us know.

MR. FISHER: Thank you, Your Honor, I am under medical treatment and I may need some. Thank you.

BY MR. PAPE:

Q. What kind of medical treatment are you on, Mr. Fisher?

Q. Okay. And what did you tell to the Benschs?

A. Just what I just told -- said in this courtroom.

Q. Why did it occur to you to bring that subject up?

A. We were talking about the balance in the payroll account and I told the Benschs I could not reconcile the account because I wanted that bank statement and that's how it came up.

Q. And your encounter with Mr. Passaloukas on that Sunday or that other day that you are talking about, did he seem positive as to where the documents were that you were seeking?

A. He seemed to always be cooperative and it seemed to me that he was being cooperative, yes.

Q. And being cooperative he's likely to be as -- try to be as helpful as he can, right?

A. He said he would try to find it.

Q. And did he give you the impression that he absolutely knew where those documents were?

A. Yes, he said they were in his truck or in his house.

Q. He didn't say, I don't know where they are?

A. He said I don't know which, they are either in my truck or in my house, that's what he said.

*Pape's Cross of Mr Fisher*

Q. Well, if he had been evicted, is it possible that he would have told you that they also might still be in the restaurant?

A. He didn't say that. I could have got into the restaurant by contacting the other shareholder, that would not have been an issue. I needed it from Bill.

Q. All right, did you ever prevent Mr. and Mrs. Bensch from getting access to the accounting records that you had?

A. No, neither did I prevent you.

Q. Did -- had the Benschs wanted access to the records that you had, would they have been freely available to them to examine?

A. They would have been Mr. Pape, but sadly nobody ever asked the accountant.

Q. Okay and the Benschs never asked you at any time for your records?

A. Not once the lawyers got involved. Nobody talked to me about anything.

Q. And the lawyers didn't get involved until sometime mid-December, is that right?

A. When I gave you this engagement letter at your office, sir, can I look at the date? This was the last conversation that I had with you.

Q. Get me that letter.

A. I think I gave you a copy of it, sir. Can you copy it?  
This is our engagement letter. I do need that original  
back.

Q. Well this letter is not a letter that's addressed to  
me, is it?

A. It was hand-delivered to you sir with the cash receipts  
and disbursements journal at your office near Cherry Bekaert  
Holland's office. I didn't even know where your office was,  
but I found you and I delivered that cash receipts and  
disbursements journal with that engagement letter and I  
never heard from you again.

Q. Let's go ahead and have this marked as Plaintiffs'  
Exhibit.

A. I need a copy of that, sir.

COURT: Remind me sir and we will get  
you a copy.

A. Thank you.

BY MR. PAPE:

Q. And mark this as Plaintiffs' Exhibit No. 30 and this  
document is a letter that's dated February 17, 2000, is  
that right?

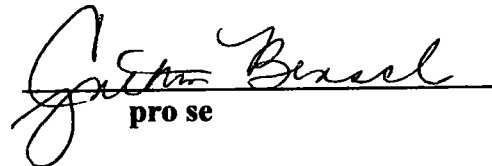
A. Yes.

(WHEREUPON, PLAINTIFFS'  
EXHIBIT NUMBER 30 WAS

**CERTIFICATE OF MAILING**

---

The undersigned hereby certifies that on September 23, 2010, she served the required (6) six copies of the Brief of Respondent upon the South Carolina Court of Appeals and one copy to Appellant's Counsel Frank. F. Pape, Jr. by depositing true and accurate copies thereof in the United States mail, sufficient postage prepaid, and addressed as follows:

  
pro se

**Frank F. Pape, Jr.**  
**P.O. Box 190009**  
**Atlanta, Georgia 31119**  
**Appellants' Attorney**

**The South Carolina Court of Appeal**  
**The Honorable Tanya Gee**  
**Clerk of South Carolina Court of Appeals**  
**P.O. Box 11629**  
**Columbia, S.C. 29211**

**Beaufort County Case No. 2000-CP-07-524**

**Re: Passaloukas, Bill v. Bensch, Cynthia**  
**Case tracking #: 2010161606**

indicating that it was delivered on or about that time, is that right, Mr. Fisher?

A. Yes, sir.

Q. Okay, all right.

A. I believe on that day.

Q. Did you also provide documents to Mr. and Mrs. Bensch, the same documents?

A. No. I told Gary on the phone that you needed to take care of your taxes and your year-end accounting no matter who owned or who was evicted or whatever, the IRS is not going to rest and this is -- I told him on the phone that I had delivered this letter and that you know, somebody whoever the shareholders are of this corporation, better do its taxes and the year-end accounting in case something like this happens.

Q. All right, did Mr. and Mrs. Bensch or Mr. Passaloukas ever respond to this engagement letter?

A. No, there were attorneys involved and --

Q. All right. But it would be -- you would have to have all the records in order to comply with this process that you wanted to comply with?

A. For an accrual base statement I would for cash. I would probably -- everything I needed by the bank statement. It depends on whether the corporation chose accrual or cash.

MARKED AND ENTERED INTO  
EVIDENCE.)

Q. It is addressed to Mr. Bill Passaloukas?

A. Yes, sir, it was addressed to him.

Q. P. O. Box 716?

A. But I hand-delivered it.

Q. You say this document was hand-delivered to me?

A. To your law firm, yes sir.

Q. To my law firm, okay. Where was my law firm located?

A. It was near Cherry Bekaert & Holland off I believe it is Arrow Road over there. I could walk to it today, but I can't tell you the exact road.

Q. All right.

A. It is right across the street from Cherry Bekaert & Holland's office. You were with a client. I waited.

Q. And you described this as a retainer agreement -- engagement letter?

A. It was an engagement letter for accounting services.

Q. All right. Your Honor, in all fairness to Mr. Fisher it's quite possible that on February 17, 2000, he delivered this to me and I don't want to make Mr. Fisher to be a witness that is not credible based upon any transactions he said he might have had with me, but I would note that this letter is dated February 17, 2000. Mr. Fisher seems to be

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**RESPONDANTS INFORMAL INITIAL BRIEF**

**RE:**

**1. Jurisdiction  
A. Beaufort County**

**2. Issues for Review**

**Issue 1. Frivolous Lawsuit- Withholding Information- Erroneous Claims**

**Supporting Facts and Argument**

**Judge Thomas Kemmelin, Jr. response to Motion to Amend or Alter  
Testimony of Appellant (transcript) Accountant, Appellant's  
Counsel (transcript) , Mr. Fishers testimony (transcript ) Ex # 30  
Zorbas Lease p. 5-7) Exhibit #30, Def Ex. # 36 (p. 296 plaintiffs brief)  
Shareholders Agreement p. 4 (p. 289 Plaintiff's brief) Mr. Steinberg's  
deposition p. 16 L 10-19 P. 28 L 1-9 Mr. Warco accounting Pl. Ex. # 27**

**Issue 2. Bad Faith-Tortuously Misleading**

**Supporting Facts and Argument.**

**Transcript testimony of Appellant, Minutes of Shareholders Meeting,  
(Def. ex. 19 p 488 Appellate brief)  
Plaintiff's Exhibits , Appellant's Transcript Brief, Court Transcript  
Shareholders Agreement (Art 1 1.3.11, Art. III 3.4, Art. IV 4.2)**

**Issue 3. Inapplicable Case law**

**Supporting Facts and Argument**

**Appellants Brief-Laws cited  
Zorba's lease (p 6 11b) Shareholders' Agreement p 5 art. II 2.1, and  
2.4**

**Issue 4. Relief Requested**

**Respondents ask Court for relief on their claims for actual and punitive  
damages, trial cost and Attorney fees and any other relief the Court  
deems just and proper**

October 12, 2010



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COURT: Good morning everyone. We are here on the record in Case 00-524. We have with us Mr. Pape and Mr. Clabaugh. This is a case that was originally heard by Judge Kemmerlin on an eviction with related damages and business dispute. It was appealed basically to the Appellate Court. As I understand it, the Appellate Court required a remand to determine certain issues that required an accounting. Before me last year was the issue of wrongful eviction on a summary judgment. As to the form of the accounting, I previously issued Orders on that. Mr. Pape had filed a Motion to Reconsider with regard to my ruling under there was no wrongful accounting. I have agreed to take that issue up.

MR. CLABAUGH: Wrongful eviction, Your Honor.

COURT: I'm sorry, what did I say?

MR. PAPE: Accounting.

COURT: Accounting, I am sorry. Wrongful eviction, thank you. Joanne probably fixed it anyway. And I will take

1 that up with today's hearing. Happy to hear  
2 any brief openings or any corrections to what  
3 we are doing from counsel.

4 MR. PAPE: Did you have --

5 MR. CLABAUGH: I will take it up with my  
6 argument.

7 MR. PAPE: Your Honor, we have been  
8 contending with this difficult language that  
9 the Court of Appeals used to reverse it and  
10 to send it back for a de novo review and an  
11 accounting and I know that is troublesome.  
12 It has always been -- well it has been my  
13 view that we have already made a record in  
14 the case and that we didn't need to have any  
15 more trial testimony or evidence offered  
16 except to deal with the troublesome  
17 accounting issues. But I also understand and  
18 appreciate the fact that when it was sent  
19 back down by the Court of Appeals everybody  
20 was assuming, including the Court of Appeals  
21 I guess, that Judge Kemmerlin would be  
22 hearing the case. In the meantime we have  
23 had a couple of Masters-In-Equity and Judge  
24 Kemmerlin is no longer available to us and we  
25

1 have asked you to hear this case. And at  
2 some point in time I think you have quite  
3 correctly concluded that in order to fully  
4 understand the case, you couldn't make a  
5 decision on a cold record -- that you needed  
6 to listen to the testimony and I assume  
7 therefore that -- that we are going to in  
8 effect have a de novo trial rather than a de  
9 novo review. Although I would be happy again  
10 to submit the record that we already have and  
11 just in order to expedite things allow the  
12 parties to just supplement the record and  
13 you'll be able to evaluate the witnesses from  
14 the record that we would supplement. And I  
15 don't know if you want to make a ruling or  
16 look for some guidance or wait until tomorrow  
17 afternoon to decide.

18  
19 COURT: I think we dealt with that issue  
20 early on and my thought was, of course, as  
21 you know, there is a common theme in  
22 Appellate Courts says the trial judge is in  
23 the best position to determine the  
24 credibility of the witnesses and I think what  
25 they mean is having a human being sitting

1 across from you there and as you correctly  
2 described a cold record it's difficult to do  
3 that. And my reading of the Order would  
4 require simply a new trial and of course we  
5 have scheduled enough time I think for that  
6 this week. At least I hope we have, so that  
7 was my thought. I would just hear it. We  
8 would have whatever the accounting is and we  
9 will go forward.

10 MR. PAPE: Well, I just wanted to be  
11 sure before we proceed that we all understood  
12 exactly how we we're proceeding. And you  
13 also ordered us to hire an accountant to  
14 perform some function and I am not sure  
15 exactly what the Court's view of that was  
16 whether or not the Court wanted us to dig  
17 through all the corporate, the financial  
18 records and have him make his own  
19 determination as to what's there. What my  
20 view of it -- and I have only done one case  
21 like this which required a lengthy accounting  
22 in which we actually did something close to  
23 that, but as I see it the accountant can't  
24 really decide what the facts are. I think we  
25

1 have got to present the facts and evidence  
2 and then ask the accountant to make -- then  
3 we will present facts at the conclusion of  
4 the case to him and let him make just the  
5 calculations. That's the way I see it. And  
6 you've probably seen a chart akin to this  
7 before in which I basically put on the record  
8 that -- that existed as of that date I had  
9 filled out all these numbers and I think Mr.  
10 Clabaugh understands that we believe that  
11 these are all of the assets that belonged to  
12 the corporation. And during the course of  
13 the trial we are going to identify the  
14 assets. Based upon the overview of the  
15 facts, you will determine whether or not it  
16 is an asset of the corporation or not and  
17 then we will value it and we will plug in a  
18 value for each one of these assets and I  
19 believe that those are all the assets that we  
20 are looking to bring back into the  
21 corporation. Basically it is just a quick  
22 review, we believe that there was a wrongful  
23 ejection, that they improperly locked Mr.  
24 and Mrs. Passaloukas out of the corporation,

1 that is Mr. and Mrs. Bensch, and when they  
2 did they took these assets with them. The  
3 proceeds of the sale of the restaurant to Mi  
4 Tierra's, equipment, furnishings and the  
5 restaurant itself. They sold that. The  
6 leasehold improvements which we would believe  
7 were conveyed to the corporation by the  
8 Benschs and you will look at the record. I  
9 mean, it is all -- it's fairly  
10 straightforward. These are all documented in  
11 the written agreements and then these other  
12 miscellaneous assets that we will identify.  
13 And then at the end of -- once we have  
14 identified those assets then we will identify  
15 the obligations of the corporation -- Mr. --  
16 the corporation owed a salary to Mr. Bensch,  
17 I mean Mr. Passaloukas of \$3,000 a month and  
18 there is interest on that. There will be  
19 attorney's fees for the prosecution of the  
20 suit under the common fund theory, under the  
21 close corporation statute which allows  
22 attorney fees in certain instances. There  
23 will be loans to be repaid to Mr. and Mrs.  
24 Bensch with interest on those loans to be  
25

1 repaid to the Passaloukas's with interest on  
2 that. And then there was also a minor claim  
3 that Mr. Passaloukas had to defend on -- with  
4 respect to the corporation. But that's  
5 basically the issue. We've got written  
6 agreements, shareholder's management  
7 agreements and things like that. We've got  
8 lease agreements and it's all spelled out  
9 fairly straightforward. I think at some  
10 point we will probably get bogged down in  
11 some of the details, some of the accounting  
12 issues but it's all pretty much mathematical  
13 and -- at the end of the day I think  
14 hopefully you will have enough for you to  
15 make a decision on it.  
16

17 COURT: Thank you very much. Mr.  
18 Clabaugh, can you tell me anything?

19 MR. CLABAUGH: Yes, Your Honor, may it  
20 please the Court. First of all, I would like  
21 to introduce my clients who are here with me.  
22 Cynthia Bensch and Gary Bensch sitting here.  
23 Your Honor, I've -- 38 years of practicing  
24 law I have always found out that almost every  
25 case there's a story line that goes through

1 the presentation of the evidence and  
2 everything and in looking at this case, the  
3 theme for this suit is this is the lawsuit  
4 that should never have been brought. Back in  
5 1999, the Passaloukas' contacted my client  
6 who had just built a shopping center in  
7 downtown Bluffton, about an eight-unit strip  
8 center. Contacted them about the possibility  
9 of putting in a Greek restaurant at that  
10 point in time. Mr. Passaloukas represented  
11 that he had restaurant experience. My client  
12 had no experience, but he had just completed  
13 the shell for this center. And the parties  
14 ended up entering into an agreement that they  
15 would each form a -- they would form a new  
16 corporation called Zorbas, Inc. They would  
17 both be 50% shareholders in that corporation.  
18 They also agreed that -- the building at this  
19 point in time was a shell. It had four walls  
20 that were uninsulated. It had a roof on it  
21 but no ceiling, had no electricity, no  
22 lights, no HVAC, nothing, it was just a  
23 shell. The parties entered into an agreement  
24 that each would put up approximately the same  
25

1 amount of money. Mr. Passaloukas was going  
2 to be responsible for purchasing all of the  
3 restaurant equipment and the FF&E for Zorbas.  
4 My client, through his development company  
5 was going to put up the money at cost, to do  
6 the up fit of the restaurant. The up fit  
7 meaning putting in all of the interior walls,  
8 putting in the toilets, putting in the air  
9 conditioning, putting in the electrical,  
10 doing every -- in essence everything that was  
11 needed before the equipment was installed.  
12 They entered in -- Zorbas was formed. They  
13 entered into a written lease agreement with  
14 Town -- for Town Center, LLC which is my  
15 clients, Gary and Cynthia Bensch. Provided  
16 for -- it was a two year lease with some  
17 options, provided for a monthly rental of a  
18 certain amount. Provided -- had standard  
19 language in it that in the event the rent was  
20 not paid, the tenant would have ten days in  
21 which to pay the rent. Otherwise, they would  
22 be evicted. The restaurant opened in August  
23 of 1999 with Mr. Passaloukas running it.  
24  
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MR. PAPE: Excuse me, Passaloukas.

1 MR. CLABAUGH: Okay, Passaloukas. The  
2 restaurant never made any money. There were  
3 problems between the shareholders over menu  
4 items and things like that which are of no  
5 particular consequence here. The November  
6 rent was significantly late. And then the  
7 December rent was not paid. It was due on  
8 the 15<sup>th</sup> of the month. When it wasn't paid my  
9 clients sent -- as the landlord, sent a  
10 certified letter to Mr. Passaloukas to Bill -  
11 - to the Plaintiff. Sent a letter to the  
12 Plaintiff saying they had ten days in which  
13 to cure. This was a certified letter which  
14 was received. Nothing was done. The rent  
15 wasn't paid. The Plaintiff did not go in and  
16 take out his personal items; did not seek to  
17 take anything out. He in effect, did  
18 nothing. On January 8<sup>th</sup> the -- my client  
19 along with the deputy sheriff, since the keys  
20 had not been turned into them, went to the  
21 premises with the locksmith, had the locks  
22 changed on the property. At that point in  
23 time, all of the corporation's equipment was  
24 still in the leased premises as was some of  
25

1 the personal items of the Plaintiff. Also at  
2 that point in time having been -- the  
3 corporation having been evicted, the  
4 corporation owed the landlord approximately  
5 \$49,000.00 for the rest of the two year  
6 lease. My client at that point in time wore  
7 two hats. He was a 50% shareholder of Zorbas  
8 so he had to do something with the assets of  
9 Zorbas and he also had a duty as the  
10 landlord. You will hear testimony -- What  
11 he did was, he contacted a restaurant supply  
12 place to come in and do an appraisal of the  
13 assets that were in the restaurant. That was  
14 in fact done and that will be introduced. He  
15 also had to deal with -- there were employees  
16 who had been given Zorbas' checks. The  
17 checks weren't any good, and there were  
18 suppliers that were not paid. What happened  
19 over the course of the next several weeks was  
20 they made good the checks to the employees.  
21 They paid --

22  
23  
24 COURT: They being, your clients?

25 MR. CLABAUGH: Yes. They paid the  
December and January rent to themselves as

landlord and they paid off the suppliers.

1 The testimony is going to be basically that  
2 with the appraisal -- of the appraisal of the  
3 equipment, with an insurance refund check,<sup>0</sup>  
4 and with a couple of other items, the  
5 corporation had assets at that point in time  
6 of in the neighborhood of \$16,000.00. There  
7 were corporate debts that were paid off  
8 totaling approximately \$20,000.00 so it is  
9 the Defendants' position that the corporation  
10 had a negative net worth at that point in  
11 time. Now, in their role as landlord to  
12 mitigate their damages, a month after the  
13 eviction, they formed a new corporation  
14 called Nicoli, LLC and they attempted to open  
15 up an Italian restaurant on that site. They  
16 did that for about four months and then they  
17 then sold the space and the equipment to  
18 somebody who was putting in a Mexican  
19 restaurant. Most of what I have said I  
20 believe is fairly undisputed. Where  
21 Plaintiff and Defendant come into a major  
22 dispute is after that. The major thrust of  
23 Plaintiffs' argument in this lawsuit is that  
24  
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1 much of the capital contributions went to  
2 turning the space within the four walls into  
3 premises that were suitable for a restaurant,  
4 and that when Zorbas went broke and was  
5 unable to pay its rent, so that the lease was  
6 terminated and the premises repossessed, the  
7 landlord had premises which were greatly  
8 improved through the capital contributions  
9 that had been made by the tenant. And that  
10 after the termination, the landlord, you know  
11 was the beneficiary of those things. And  
12 that is true, but it is the Defendants'  
13 position that when Zorbas went broke and the  
14 lease was terminated in accordance with the  
15 law, the capital improvements that had been  
16 made to the restaurant site, belonged to the  
17 landlord. Now the Defendant takes -- I am  
18 sorry, the Plaintiff takes what I believe to  
19 be a position for which I have found no  
20 support in the law --  
21  
22

23 MR. PAPE: Your Honor, he is starting to  
24 argue his case now and I think that goes  
25 beyond --

1 COURT: Well, I'll let him finish his  
2 opening and then we will get into it. We've  
3 got some time and I will be happy to hear any  
4 brief rebuttal before we begin if you want  
5 to.

6 MR. CLABAUGH: Well the Plaintiffs'  
7 position is that the monies that were spent  
8 constructing the interior walls, putting in  
9 the electrical work, the plumbing, installing  
10 ceilings, stucco, painting, carpentry work,  
11 tile installation and everything, all done to  
12 the landlord's building, somehow gives the  
13 tenant a right -- some sort of right to the  
14 cost of doing that work even after the tenant  
15 has in fact been evicted and that going  
16 forward if the landlord subsequently leases  
17 that space to somebody else or ultimately  
18 sells the building that the tenant whose been  
19 evicted somehow has a right to share in those  
20 proceeds. And that is the issue that brings  
21 the parties so far apart. The -- you know --  
22 quite frankly I think that in the earlier  
23 trial in this Judge Kemmerlin did everybody a  
24 disservice in that he stated what his  
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position was but then as he was want to do while he read his seed catalog he let everybody put in anything they wanted into the record stating that while you are trying it for the Court of Appeals, and it, you know he obviously lengthened those proceedings you know considerably. The Court of Appeals sent it back for a strict accounting. They -- their Order makes no mention about overturning Judge Kemmerlin's decision that the eviction was not wrongful, but they said that -- you know they said they didn't have enough information to determine what the corporation was worth, what its debts were, etc. And after the pretrial conference we had here earlier, you ordered the Plaintiff to go forward with an accounting. The accounting that was submitted which was the two page document on May 16, 2008, is nothing more than the line items that Mr. Pape makes reference to and that he had previously filled in the amounts on. My understanding is the accountant didn't do anything. I mean he never -- we were never contacted by him

1 for any records. My understanding is he  
2 didn't do any auditing. He didn't do  
3 anything other than take the figures that had  
4 been previously provided by Mr. Pape and put  
5 them on here. The -- you know in an effort  
6 to de-limit these proceedings and focus in on  
7 the issue which is what was the value of the  
8 -- in essence the issue is what was the  
9 value, if any, of the corporation on January  
10 8, 2000, when Zorbas was evicted. I think  
11 that's the issue that is before the Court and  
12 you know whatever the numbers are on or about  
13 that date. And we submit that the testimony  
14 here - well, one other thing. Mr. Pape had  
15 previously, in one of his discovery requests,  
16 asked for information about the landlord's  
17 subsequent tenants, subsequent leases for  
18 this property and the fact that they  
19 ultimately sold the shopping center in 2006.  
20 And Your Honor denied his Motion to Compel  
21 the presentation of those documents. I would  
22 like to hand up again -- we had previously  
23 filed a Motion in Limine, which was never  
24 ruled upon. I would like to hand up to the  
25

1 Court a Motion in Limine to limit the  
2 testimony to the -- in effect the value of  
3 Zorbas as of the time they were evicted and  
4 to exclude any testimony at all about what  
5 the landlord subsequently did with the  
6 property with other tenants.

7 COURT: I think I have to deal with the  
8 wrongful eviction issue first before we deal  
9 with this issue. So, let me just take this  
10 under advisement along with everything else.

11 MR. CLABAUGH: Well, we argued in brief  
12 the issue of the wrongful ejection and you  
13 know you previously had granted our Motion  
14 that the eviction was not wrongful.

15 COURT: And I may stick with that, but I  
16 -- as I -- we had the phone conference  
17 earlier I thought I would get a little bit of  
18 you know, putting all inferences on the side  
19 of the non-moving side, etc. You know, it  
20 was a Summary Judgment Motion I think that we  
21 had. I think perhaps Mr. Pape was correct at  
22 least I should hear a little bit more about  
23 it before I grant such a thing and so I  
24  
25

1 thought I might take up his, as we previously  
2 discussed his Motion to Reconsider.

3 MR. CLABAUGH: The Court of Appeals  
4 makes no reference to any problem with Judge  
5 Kemmerlin's determination that the ejection  
6 was not wrongful.

7 COURT: I have to get that Order out.

8 MR. CLABAUGH: You know, the lease I  
9 submit is very clear. I mean, it states that  
10 it is the duty of the tenant to pay rent and  
11 if the tenant does not pay rent, they have  
12 ten days to cure and if they don't cure they  
13 are evicted.

14 COURT: Well and -- which is why I ruled  
15 the way I did the first time. That was the  
16 way I read it as well. Mr. Pape pointed out  
17 that there may be something out there some  
18 inference that -- and I can't remember  
19 exactly what it was but he had some argument  
20 at the time that you know putting all  
21 inferences on the side of the Plaintiffs  
22 perhaps could defeat that, maybe not, I don't  
23 know. But why don't we go ahead and let's  
24 just make a record. We will get the  
25

1 testimony on and we will just deal with these  
2 issues as we can. So with regard to these --  
3 as I understand it, the restaurant was sold  
4 at some point to some other restaurant, but  
5 then the entire shopping center was sold. Is  
6 that correct?

7 MR. CLABAUGH: That's correct.

8 COURT: And I think what I ruled on  
9 before was the selling of the entire shopping  
10 center I can't imagine how that would have  
11 any relevance whatsoever. Did Judge  
12 Kemmerlin deal with the sale of the  
13 restaurant to the --

14 MR. PAPE: No, he did not.

15 MR. CLABAUGH: Well, he dealt with the  
16 leasing of the restaurant to the subsequent  
17 tenant. The sale didn't take place until six  
18 years later.

19 COURT: Six years later, okay, that's  
20 right. I think you all told me that at the  
21 time which is why. All right.

22 MR. PAPE: What Judge Kemmerlin  
23 essentially failed to do, which caused a  
24 concern with the Court of Appeals was he  
25

1 failed to identify any assets of the  
2 corporation or to value them and I think  
3 that's the accounting aspect. On January 8<sup>th</sup>  
4 there were assets belonging to the  
5 corporation, there was a restaurant which had  
6 at least \$37,500.00 worth of equipment and it  
7 was eventually sold on May 2, 2000, to Mi  
8 Tierra's and what the Court of Appeals said  
9 is that the accounting should detail the  
10 contributions by the parties, identify and  
11 value equipment, furnishings and other items  
12 in Zorbas at the time of the eviction and the  
13 disposal of any property belonging to Zorbas.  
14 That property was disposed of by the sale to  
15 Mi Tierra's on May 2, 2000 and any revenues  
16 from the disposal of Zorbas property. That  
17 property sold for \$75,000.00 on May 2, 2000,  
18 so that's one of the assets that we are going  
19 to attempt to put into the record --  
20 \$75,000.00 there plus interest at the legal  
21 rate on that so you are well over \$100,000.00  
22 with respect to that one asset.  
23  
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1 COURT: When did the six year -- this  
2 restaurant started in 1999, right, the one we  
3 are talking about.

4 MR. PAPE: August 15, 1999.

5 COURT: . It was a sale to Mi Tierra?

6 MR. PAPE: No. There was the eviction  
7 on January 8, 2000. The Benschers tried to  
8 operate an Italian restaurant there for three  
9 months between February and April of 2000.  
10 When that wasn't successful, they sold the  
11 same restaurant, the equipment, to Mi  
12 Tierra's on May 2, 2000 for \$75,000.00 and we  
13 believe that is an asset of the corporation.

14 COURT: All right, well let's do this.  
15 Let's go ahead and begin taking testimony. I  
16 will try to sort it all out rather than --  
17 did you have something else?

18 MR. CLABAUGH: Well, you know, it is the  
19 difference between a two day trial and a five  
20 day trial. I would like to hand up a case  
21 from the Court of Appeals. There is no  
22 dispute that the defendants plead the asset  
23 belonging to the corporation were the FF&E in  
24 the restaurant which were capable of being  
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removed without damaging the leasehold.

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Okay, and we are prepared to submit and discuss the value of that. The dispute we have over is, under the Plaintiff's theory the 2x4s inside the building, the insulation, the electrical wiring, the pipes, the toilet constitute assets that belonged to the corporation and in the case of Carson vs. Living World Outreach Ministry, it says "In disputes between landlord and tenant there is a general presumption that the tenant by annexing fixtures did so for his own benefit and not to enrich the freehold, and the law accordingly construes tenant's right to remove his annexations liberally except for removal which would materially injure the freehold." Now the tenant obviously can't take out the walls, the pipes, the electrical, the air conditioning and everything. Once those are affixed, --

COURT: Standard fixtured --

MR. CLABAUGH: They belong to --

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COURT: Let's do this. I still think I need to go ahead and begin getting testimony with regard to the value of these things.

MR. PAPE: Your Honor, just one and I apologize, but this is important and I don't want you to fix your mind on what he is saying and listen to his interpretation of the law. The fixture law in South Carolina has been confused. The Supreme Court of South Carolina has said in its decision it is very confused, but there is one thing that is clear about fixture law in South Carolina. Every one of those cases involves the question of whether or not the tenant can come in and rip those fixtures out. And in those cases the Court has said no he cannot. This is clearly a different case. This is a case where an undivided interest, an equitable interest has been conveyed in the real estate. Now rather than say, look we hereby convey a one-quarter interest to Zorbas, the tenant, an undivided interest as part of our contributions to the corporation, what it says is that we are hereby conveying

1 to the corporation the value of all of this -  
2 - of all of these leasehold improvements that  
3 we have put in there. This is a court in  
4 equity. Equity deems done what ought to be  
5 done. That's what they did. At the  
6 termination of this lease agreement and it  
7 was terminated clearly under the provision  
8 under which they terminated it. It says,  
9 that upon termination of this lease  
10 agreement, it shall be as if the lease had  
11 not existed. Therefore, if the lease doesn't  
12 exist, we fall back on the shareholders'  
13 management agreement of the same date. We  
14 have an equitable interest. They took that  
15 equitable interest out of the corporation and  
16 they got all of their money back, and I am  
17 going to estimate here roughly \$65,000 was  
18 contributed to the corporation by each party.  
19 When they terminated the lease, they got  
20 their share back. We want our share.

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23 COURT: The confusion becomes I am  
24 guessing, when you say "they" which they.

25 MR. PAPE: The Benschs.

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COURT: You have got a landlord "they"  
and you have got a corporate owner "they".  
And so --

MR. PAPE: No, we don't and that's where  
Judge Kemmerlin's Order was wrong. There is  
no corporate owner. In his opening statement  
he again repeated the same error that Town  
Center, LLC was the landlord. That is wrong  
and its --

MR. CLABAUGH: No, the Benschs are the  
landlord.

MR. PAPE: Well, you said Town Center  
again and that's what is causing Judge --

MR. CLABAUGH: No, I named the Center,  
but I said the Benschs were the landlord.  
But there is a -- the only document between  
the corporation and the landlord is a lease.

COURT: Which I will have to -- do you  
have an extra copy of it so I can look at  
while --

MR. PAPE: Judge, I am going to submit  
originals and I will have copies for the  
Court of each one, but I can hand it up right  
now.

COURT: Well, no keep it if you want.

MR. PAPE: Okay.

1  
2 COURT: Let's do this. Let's get  
3 started and I would like to hear whatever you  
4 would like to tell me, but I am guessing the  
5 valuation is what is important at this time  
6 so if you would call your first witness.

7  
8 MR. PAPE: Your Honor, before I call any  
9 witnesses, I do have a matter to take up with  
10 respect to a Request to Admit. I have served  
11 Request to Admit to the Defendants, three  
12 sets of them. The first one was dated  
13 February 11, 2007 and, by the way, the reason  
14 I wanted the Court to bring in its file  
15 because I filed these with the Court. The  
16 Second Request to Admit was a Request to  
17 Admit the Authenticity of Documents. That  
18 was served February 10, 2007 and then there's  
19 a Second Request to Admit Authenticity of the  
20 Documents. That was served on February 11,  
21 2007 also. Those are in the record. They  
22 never responded to those documents. That's  
23 18 months later. They have never responded  
24 to them and under the statute, Rule 36  
25

1 Request to Admit says that if they don't  
2 object or otherwise respond within 30 days  
3 those requests are deemed admitted and based  
4 upon that I would like to offer these Request  
5 to Admit and make them part of the record in  
6 this case.

7 COURT: Mr. Clabaugh?

8 MR. CLABAUGH: Your Honor, I think  
9 during that period of time, there were  
10 Motions pending on Summary Judgment and then  
11 Reconsideration, etc. and we have been  
12 waiting the Court's rulings on those Motions  
13 for Reconsideration.

14 COURT: What are the -- I haven't seen  
15 them but if there are certain documents, you  
16 all may agree on them anyway.

17 MR. PAPE: We have. Frank and I

18 MR. CLABAUGH: Many of them we have.

19 MR. PAPE: We have agreed on many of the  
20 underlying documents.

21 COURT: Rather than me dealing with --  
22 there are three sets of Requests. Two of  
23 them deal with authenticity of documents as I  
24 understand it.  
25

1 MR. PAPE: Right.

2 COURT: The first set deals with what  
3 exactly?

4 MR. PAPE: The first set --

5 MR. CLABAUGH: Your Honor, we have  
6 agreed on terms of authenticity, but deny  
7 that they are admissible under the Rules of  
8 Evidence because they -- you know for  
9 instance apply to the subsequent sales or  
10 subsequent leases.

11 MR. PAPE: I don't think most of this is  
12 going to be trouble or problematic, but I  
13 just want to get it on the record to be sure  
14 that there's no confusion about that and of  
15 course here are some of the Requests to Admit  
16 and they are in the record already that I  
17 have submitted to the Court. No. 1, on or  
18 about January of 2000, Defendants evicted the  
19 Plaintiff Zorbas, Inc. from occupancy of  
20 Suite 101 Town Center through the use of  
21 self-help through the use of Court process.  
22 I think that was in his opening statement and  
23 so I suspect that he doesn't disagree with  
24 that.  
25

1 MR. PAPE: I disagree with the  
2 characterization of it.

3 MR. CLABAUGH: Well, but it's all  
4 admitted. I mean, you can argue whatever you  
5 want to argue, but it's a fact that I have --  
6 that's admitted, as I understand it. No. 2  
7 the Plaintiffs contributed the sum of  
8 \$68,875.16 in cash or other in-kind assets to  
9 Zorbas. I have never seen anything in the  
10 record that disputes that.

11 MR. PAPE: Your Honor, Frank and I  
12 have agreed to stipulate to the value --  
13 how much each side has contributed so --

14 MR. CLABAUGH: So you are not  
15 denying that?

16 MR. PAPE: Well you know they --  
17 you don't need to sit and read them.  
18 They speak for themselves.

19 COURT: Yeah, let's go ahead. They  
20 are what they are. Let's just go ahead  
21 and put up a witness and start or we are  
22 going to turn into five days. So, as I  
23 understand it, what I am supposed to do  
24 is figure out the valuation and try to  
25

do the math as best I can with the  
accounting.

1  
2 MR. PAPE: No, I understand but  
3 those Requests to Admit I take are  
4 deemed a part of the record and that  
5 they are admitted?

6 MR. PAPE: No, I didn't say they  
7 were admitted. I said we had had  
8 Motions pending we were waiting on  
9 rulings on.  
10

11 COURT: I don't know what's in  
12 them. I don't think we can get around  
13 the mandate of the Appellate Court by  
14 Requests to Admit. Again, I don't know  
15 what's in them. It sounded like the  
16 first several of them you didn't  
17 necessarily disagree with. Are any of  
18 them substantive?  
19

20 MR. PAPE: Well, yes sir. I think  
21 we need to make them part of the record  
22 and I think in order for you to make the  
23 correct decision you need to take them  
24 into consideration.  
25

1 COURT: Well let's go off the  
2 record for a second and you all share  
3 them and look at them and tell me which  
4 ones are an issue and which ones aren't.

5 MR. CLABAUGH: I mean, for instance  
6 Your Honor, in response to his Request  
7 for Authenticity, we filed a response  
8 pursuant to Rule 36: "We admit the  
9 documents submitted pursuant to  
10 paragraphs 1 and 2 are in fact copies of  
11 documents previously submitted into  
12 evidence at the earlier trial. While  
13 admitting the authenticity of said  
14 documents, we reserve the right to  
15 object to their introduction based upon  
16 Rules of Evidence."

17 MR. PAPE: So far all I have heard  
18 is that you are admitting these things.  
19 I think what the Judge may have asked  
20 was that he wants to know which ones you  
21 don't admit and why.

22 COURT: There are document issues  
23 where the authenticity of the documents  
24  
25

1 across the board is admitted, is that  
2 correct?

3 MR. CLABAUGH: We don't have a  
4 document issue in this case.

5 MR. PAPE: No, I don't think we  
6 have --

7 COURT: We might have a relevance  
8 issue with regard to the documents but  
9 we don't have an authenticity --

10 MR. CLABAUGH: Right.

11 COURT: So that's out. No reason  
12 to discuss this. As I understand it  
13 again, I haven't read these but Mr. Pape  
14 has a certain Request to Admit that his  
15 position is -- are deemed admitted that  
16 my fixed numbers or values or something  
17 like that, is that correct?

18 MR. PAPE: In part and I think it  
19 would be appropriate and probably  
20 necessary for you to make the correct  
21 decision on the facts to be aware of  
22 what these admissions are.

23 COURT: And I guess my problem is  
24 this. Assume for the moment that you  
25

1 have a Request to Admit that says that  
2 you admit that the stove was worth  
3 \$5,000.00 or something --

4 MR. PAPE: Yeah, I don't get into  
5 that kind of detail -- these are  
6 broader.

7 COURT: I understand. But they --  
8 fixed numbers to do what the Court asked  
9 me to do based upon.

10 MR. PAPE: Yes.

11 COURT: And of course what I am  
12 supposed to do is listen to the  
13 accounting and then determine what those  
14 numbers are and whether or not I can at  
15 this point, in this sort of strange  
16 legal limbo through the appeal used the  
17 fairly technical tool of a Request to  
18 Admit to trump the testimony that I am  
19 supposed to hear, I don't know if that  
20 is even appropriate. I understand why  
21 you did it. I am not saying what you  
22 said was inappropriate. I am saying  
23 that the use of them as I am thinking  
24 you were suggesting I do which is don't  
25

1 listen to the testimony, read this  
2 Request to Admit which is deemed  
3 admitted that says that the value was  
4 \$68,000.00 or whatever the number was  
5 without the testimony which is what I  
6 think is what you are asking me to do.  
7 Is that correct?

8 MR. PAPE: Well, yes, I think the  
9 purpose of the Request to Admit is to  
10 simplify the issues for trial and for  
11 example with respect to one of these  
12 numbers that I have just laid out there  
13 the Plaintiffs contributed the sum of  
14 \$68,875.16 in cash or other in-kind  
15 assets to Zorbas, I didn't hear him deny  
16 that and in fact that is one of the  
17 exhibits that he's already admitted that  
18 he's --

19  
20 MR. CLABAUGH: We have agreed to  
21 stipulate to.

22 MR. PAPE: He's agreed.

23 COURT: All right, rather than to  
24 go through all that, why don't we figure  
25 what is stipulated to and again I think

1 we are kind of getting a little behind  
2 on time. If we can put a witness up and  
3 then if you would like to ask them the  
4 questions, is it -- and you all can just  
5 give me a record of what is stipulated  
6 to, I am happy to write it down and take  
7 that as -- nothing would make me happier  
8 than not to have to deal with competing  
9 numbers.

10 MR. PAPE: I know and I know you  
11 want to get to the accounting, but this  
12 is a substantial part of the accounting  
13 and under the law they are deemed  
14 admitted, and I think you've got to have  
15 that information and --

17 COURT: I just heard that some of  
18 it is stipulated anyway. Can you all --  
19 I guess what I would like to do is let's  
20 go off the record for five minutes. You  
21 all both look at it and see which parts  
22 of the Request to Admit are stipulated  
23 that we don't need to worry about  
24 anyway.  
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MR. CLABAUGH: Judge do you have,  
you know do you have a copy of the  
transcript of record?

COURT: It's in that right there.

MR. CLABAUGH: Mr. Pape and I can  
tell you which of the things that we are  
- those documents.

MR. PAPE: Your Honor, I don't --  
I'm sorry I don't think he's addressing  
your question. This is the document  
that is before you, this Request to  
Admit.

COURT: Here's my question. As I  
understand it in that Request to Admit  
certain values are fixed. Certain  
issues that might be before the Court  
today are, in Mr. Pape's position  
already determined by the admission  
under the Rules or not. I don't know.  
I mean, the first thing he mentioned you  
said well, we stipulated to that. So  
that's not an issue. The parts that are  
not stipulated to are what are of  
interest to me. If you all could look

1 at those for a second and even though no  
2 answer was given to the Request to  
3 Admit, if you do not stipulate to those,  
4 let's see if we can -- rather than  
5 verbally reading them and then having  
6 half of them be stipulations and sort of  
7 wasting time doing that, again we have a  
8 good bit of time but if you all could  
9 look at it.

10 MR. PAPE: Judge, the purpose of  
11 this Request to Admit is to try to  
12 expedite the trial.

13 COURT: I appreciate that -- I am  
14 trying to -- I am afraid at this point I  
15 might be doing the reverse so I thought  
16 maybe we could just take a second --

17 MR. CLABAUGH: What's the date on  
18 there Frank I can't read it?

19 MR. PAPE: The date is February 11,  
20 2007.

21 MR. CLABAUGH: Frank, can I mark on  
22 magic marker the ones that we have  
23 admitted?  
24  
25

1 MR. PAPE: Well let me - that's it.  
2 Do you not have a copy of it there  
3 somewhere?

4 MR. CLABAUGH: Well, I have got a  
5 copy and I have my copy marked. I was  
6 going to show you --

7 MR. PAPE: Go right ahead. Just I  
8 mean they are clean now. As an aside,  
9 Judge, when we took this up to the Court  
10 of Appeals we asked for the original  
11 records and Judge Kemmerlin's office  
12 told us that they had lost the original  
13 documents and I think that's the  
14 original documents right here.

15 MR. CLABAUGH: Frank, I don't have  
16 - I am just looking -- I have your  
17 Second Request to Admit Authenticity,  
18 but I don't have this First Request.

19 MR. PAPE: Well, they were served  
20 on you and they were filed with the  
21 Court and I can't find a copy --

22 MR. CLABAUGH: All I am saying is I  
23 don't have it. It's not in --  
24  
25

1 MR. PAPE: Here's the copy that I  
2 filed with the Court, Judge. That's the  
3 Court's original.

4 MR. CLABAUGH: I have got a  
5 Plaintiff's Request to Admit  
6 Authenticity of Documents, and I have  
7 got Plaintiff's Second Request to Admit  
8 Authenticity of Documents, I have got  
9 your Request for Production. I don't  
10 have that document.

11 MR. PAPE: Sorry, it was served on  
12 you.

13 COURT: Well let's do this. Are  
14 these coming out of the Court file?

15 MR. PAPE: Yes, sir.

16 COURT: Let me give you these back  
17 just because I don't want to take too  
18 many things out of the Court file.

19 MR. PAPE: I understand. So we  
20 don't get those confused, let me put  
21 these in the chair.

22 MR. CLABAUGH: Your Honor, I have  
23 never seen this document.

24 MR. PAPE: It was served on you.  
25

1 COURT: Let's do this, let's go  
2 back on the record for a second. We  
3 were briefly off the record. We were  
4 trying to determine something with  
5 regard to some Requests to Admit and  
6 there is some question about whether or  
7 not Mr. Clabaugh received them. As I  
8 understand it, a portion of your Request  
9 to Admit have to do with some of the  
10 issues that are before this Court  
11 addressed in the previous Order. So  
12 what I am going to do is since, even if  
13 those had been received and Mr. Clabaugh  
14 acknowledged receipt of them, I might  
15 still have an issue with them since I  
16 think that was not what the Court of  
17 Appeals wanted me to do. I think they  
18 wanted me or whoever was sitting in this  
19 chair to review the accounting and try  
20 to do whatever they could in that  
21 regard. So, let's go ahead and begin  
22 this trial with regard to the  
23 accounting, so if you would call your  
24 first witness, let's get started.  
25

1 Q. And before I start asking you any specific details I  
2 want to kind of give the Judge a little overview of who the  
3 parties are. You and Mr. and Mrs. -- you and Mrs. Bensch  
4 entered into this Shareholders Sgreement with the  
5 Passaloukases to operate this restaurant, is that correct?

6 A. That is correct.

7 Q. All right, as individuals, is that correct?

8 MR. CLAGAUGH: Your Honor, I - you know  
9 -- I recognize he is calling the -- my client  
10 as his first witness, but unless he is  
11 determined to be an adverse witness, I  
12 suggest -- submit he can't lead the witness.

13 MR. PAPE: I am permitted to lead,  
14 Your Honor.

15 COURT: I think he can lead under  
16 the rules.

17 MR. CLABAUGH: Without him being  
18 declared a hostile witness?

19 COURT: Well, I will declare him a  
20 hostile witness. He is on the other  
21 side of the pleadings. I mean is there  
22 any question but that he is an adverse  
23 or hostile witness?  
24  
25

1 MR. CLABAUGH: Yeah, I don't think  
2 that makes a -- the fact that he is on  
3 the other side doesn't make him a  
4 hostile witness.

5 MR. PAPE: Your Honor, I had  
6 thought that the Court had eliminated  
7 that requirement that we would first  
8 declare him as a hostile witness. He is  
9 obviously a hostile witness.

10 COURT: I think I could probably  
11 find that he is not on the side of Mr.  
12 Pape's client with regard to this  
13 particular issue so I am not trouble by  
14 the leading in this case.

15 MR. CLABAUGH: And much of it  
16 doesn't really go to the substantive  
17 issues that are in contest anyway Judge  
18 so, but --

19  
20 BY MR. PAPE:

21 Q. At all times throughout these negotiations and  
22 transactions with Zorbas and with Mr. and Mrs.  
23 Passaloukas up until April 7, 2006 you and Mrs. Bensch  
24 personally owned the premises that are the subject of  
25 this lawsuit and restaurant, is that correct?

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A. No, I don't believe that is correct.

Q. Who owned the premises at 101 Town Center when you entered into the agreement with Mr. & Mrs. -- with Zorbas?

A. We had set up a corporation of Town Center, LLC to own the assets that are at that location. However, I believe the documents were not proper -- were not perhaps filed or completed at the exact time that perhaps we signed the lease. So it was intended to be a lease with Town Center, LLC and Zorbas. It may have ended up, since we signed it as being something more personal than that. I am not positive other than I believe it is -- that the lease was with Zorbas, Inc. but in fact it ended up being personal. I think it ended up being personal because the corporation was not completed at that point in time so it probably was a personal -- I was actually leasing to Zorbas on my personal capacity, but subsequent to that it ended up being Town Center, LLC.

Q. Did Town Center, LLC ever take ownership of that property?

A. Yes.

Q. Have you ever seen a deed or written a deed into Town Center, LLC?

1 A. Well, when we sold it, it was sold as Town Center,  
2 LLC.

3 Q. It would -- you and Mrs. Bensch gave a deed  
4 personally to the buyer of that property when you sold  
5 it, did you not?

6 A. Not that I am aware of. It was Town Center. We  
7 paid taxes as Town Center.

8 Q. Your Honor -- and Mr. Bensch let me give you a  
9 copy of Plaintiff's Second Request to Defendants to  
10 Admit Authenticity of Documents. It is dated February  
11 11, 2007. I request to admit No. 1 and I will read it  
12 into the record.

13 MR. CLABAUGH: Your Honor, first of  
14 all, this document is not something that  
15 would have been submitted to the  
16 witness.

17 COURT: Can you show him the deed,  
18 Mr. Pape? I am guessing there is a deed  
19 out there somewhere.

20 MR. PAPE: Yes.

21 BY MR. PAPE:

22 Q. Do you recognize that deed that is attached as  
23 Plaintiff's Exhibit A to the Request to Admit?  
24  
25

1 A. This deed has my name on it and Town Center, LLC,  
right here.

2 Q. Isn't that the purchaser? What the deed says is  
3 that, "Know all men by these presents that Gary M.  
4 Bensch and Cynthia M. Bensch hereafter the Grantors ,  
5 the estate of aforesaid for and in the consideration  
6 sum of \$2,150,000.00 to us in hand paid at and before  
7 the sealing of these presents by Bluffton Town Center,  
8 LLC and Bluffton Town Center II, LLC --

9 A. That's two different companies.

10 Q. But that's the buyer, right?

11 A. No, sir. This is the buyer. That's the seller.

12 Q. Look at --

13 A. Town Center, LLC is our corporation and --

14 Q. Bluffton Town Center is your corporation? You  
15 have any documents to show that you own Bluffton Town  
16 Center, LLC.

17 A. Oh, good point. Bluffton Town Center, LLC.

18 Q. And look at the signature page. It is dated April  
19 7, 2006, is that right?

20 A. Yes.

21 Q. And it is signed by Gary M. Bensch and Cynthia M.  
22 Bensch, is that correct?

23 A. That's correct.

24

25

1 Q. Okay. Is it signed by a corporation?

2 A. Not that I see, so I am -- so I would have to  
3 concur that the General Warranty Deed was conveyed by  
4 us personally.

5 Q. Do you ever -- and so would you again concur that  
6 Town Center, LLC never did own the property?

7 A. I am not sure quite frankly. I can't believe it,  
8 but I am not sure.

9 Q. Town Center, LLC in fact was just a management  
10 company that you and Mrs. Bensch set up in order to  
11 manage the property, isn't that correct?

12 A. Well, it certainly did that.

13 Q. Okay, but it didn't own the property?

14 A. Perhaps not.

15 Q. Okay. Let me hand you what I have marked as  
16 Plaintiffs' Exhibit No. 1 and I will give a copy to the  
17 Judge and a copy to Mr. Bensch.

18 A. This is the lease of Zorbas.

19  
20 MR. CLABAUGH: Your Honor, this is one  
21 of the documents to which we have stipulated.

22 COURT: Okay.

23 BY MR. PAPE:

24 Q. And the Landlord says Cynthia and Gary Bensch, is  
25 that correct?

1 A. It does.

2 Q. Okay, and the Tenant is Zorbas, Inc., is that also  
3 correct?

4 A. Yes, it does.

5 Q. Okay. All right, now you have again, I will show  
6 you this little chart and I think it will be helpful to  
7 us -- a little time line so the Judge will understand  
8 but before we go into details of all this. Take a look  
9 at this chart. You began dealing with Mr. and Mrs.  
10 Passaloukas in January of 1999 for the purpose of  
11 forming some sort of partnership with the Bensch  
12 corporation in order to operate a business at Suite 101  
13 Town Center, is that correct?

14 A. Well, we leased.

15 Q. When did you begin your discussions with them to -

16 -

17 A. Actually several months earlier.

18 Q. Several months earlier than when?

19 A. Then January or February of 1999.

20 Q. Oh, January or February of '99.

21 A. That was a year in advance of the lease, right?

22 Q. Well the -- you signed the lease on August 15, is  
23 that correct?  
24

25 A. 1999.

Q. Right.

1 A. Okay, I guess that would be about right.

2 Q. So that's when you began your discussions with  
3 them about forming some sort of venture in order to  
4 operate this restaurant, in January or February of '99,  
5 is that correct?

6 A. I'm not sure if that's the time we actually --  
7 that's our second meeting or our first meeting. I  
8 don't know, can't remember that.

9 Q. And on March 22 '99 the -- Mr. Passaloukas paid  
10 you the sum of \$4,770.00 as the first months rent, last  
11 months rent and a \$1,000.00 security deposit, is that  
12 correct?

13 A. No, sir, that's not correct.

14 Q. You recall him giving you any money at all about  
15 that time?

16 A. I recall him giving me a check for \$1,000 and then  
17 I believe he gave me a check for the first month's rent  
18 which was \$1,800.00 at the time. I don't recall if he  
19 paid at that time the last month's rent, but --

20 Q. I would like to offer Plaintiff's Exhibit No. 2.

21 MR. CLABAUGH: That's also one to  
22 which we have stipulated.

23 COURT: Thank you.  
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MR. CLABAUGH: I would like to pass  
a copy of Plaintiff's Exhibit 2 up to  
the Court.

BY MR. CLABAUGH:

Q. Let me ask you to examine Plaintiff's Exhibit No.  
2 Mr. Bensch. Look at line 2.

MR. CLABAUGH: Do you have an extra  
copy of that or a copy for me Frank?

MR. PAPE: Yes, sure.

BY MR. PAPE:

Q. Doesn't that show a check payable to Gary Bensch,  
check number 145 in the sum of \$4,770 on March 22,  
1999?

A. Yes, it does show that.

Q. Okay, does that refresh your memory now as to when  
you received the first month's rent, last month's rent  
and a security deposit?

A. Yes, I believe it does.

Q. So we are agreed that this second line on March  
22, 1999 he paid you \$4,770.00 now. At that time the  
rate -- the first month's deposit was \$1,000 is that  
correct?

A. No that was the security deposit.

1 think the stipulated document is -- that  
2 we have stipulated is some \$61,000.

3 MR. PAPE: No, I am asking what he  
4 was claiming at that time.

5 COURT: I will allow it. This is  
6 when the first dispute came up?

7 MR. PAPE: Yes, sir. I am trying  
8 to identify what the disputes between  
9 the parties were.

10 BY MR. PAPE:

11 Q. Do you remember that?

12 A. In December 1st of '99 I am not aware of any legal  
13 disputes that we had then, except the payment on the  
14 rent was not paid.

15 COURT: Mr. Pape, is there a  
16 separate lease document that has to do  
17 with the first month's rent, last  
18 months' rent and deposit?

19 MR. PAPE: No.

20 COURT: Because this March 22, '99  
21 this is well after that.

22 MR. PAPE: And part of our  
23 accounting is dealing with that issue as  
24  
25

1 to why they went from this rent to --  
2 and raised the rent later.

3 COURT: I am just making sure there  
4 is not a lease I am missing.

5 MR. PAPE: No written lease. There  
6 was an oral agreement, that's all we  
7 have -- have now.

8 COURT: Back on the record in Case  
9 No. 00-524 after taking a brief recess.  
10 I met with the attorneys where they  
11 discussed the possibility of settlement.  
12 It appears there is none. We are back  
13 on the record.

14 BY MR. PAPE:

15 Q. Thank you, Your Honor. Mr. Bensch I believe when  
16 finished up, we were going through this timeline and  
17 the December 1<sup>st</sup> demand for rent and December 15<sup>th</sup>  
18 shareholders meeting.

19 A. I think that's where we were.

20 Q. And we were trying to figure out what the disputes  
21 were between the Bensch and the Passaloukases and I  
22 had suggested to you and had asked you whether or not  
23 at that point in time you were claiming that the  
24 Bensch had contributed about \$80,000 toward the  
25

corporation in terms of leasehold improvements, is that what you remember, is that what your claim was?

1  
2 A. I think one of the things I was stumped with on  
3 that earlier was this date right here of December 15<sup>th</sup>  
4 was the shareholders meeting. That was a meeting that  
5 I called in November. November 10<sup>th</sup> I believe and the  
6 actual meeting should have been five days later which  
7 should have put it about November 15<sup>th</sup> and that's why I  
8 was still stuck up there when you were asking --

9  
10 Q. So you believe the meeting was --

11 A. I think that's 30 days off. I just looked at one  
12 of the documents earlier 'cause I needed -- probably to  
13 mention to the Court and to the Judge that I suffered a  
14 stroke in 1999 that leaves my memory of sequential  
15 things, dates greatly diminished in my memory bank. I  
16 have a lot of difficulty pulling out and précising  
17 time-tables. So all -- most of what we are dealing  
18 with here unfortunately is difficult for me to pull up.  
19 That's the reason -- anything you have that you can put  
20 in front of me that I can look at to refresh my memory  
21 of what I have seen before, I would be glad to  
22 facilitate this process.

23  
24 Q. Okay. So you had this stroke in what time of the  
25 year in 1999?

1 A. Earlier part of '99 it was.

2 Q. January '99?

3 A. I just said the earlier part; it was the earlier  
4 part.

5 Q. It would have been before you entered into these  
6 agreements with Mr. Passaloukas?

7 A. Yes, it was.

8 Q. All right, so you believe that the shareholders  
9 meeting occurred on November 15, 1999?

10 A. I looked at my -- the document that I had sent out  
11 according to Mr. Hale. It has my signature on it and  
12 it says November 10<sup>th</sup> and it was held five days later, I  
13 believe.

14 Q. All right, were you the Secretary of the  
15 corporation?

16 A. No, I was not. I asked Mr. Hale to prepare it and  
17 I'd sign it as a shareholder.

18 Q. Let me ask you if you can identify this document.

19 A. Right off the bat, it says December 15, '99.

20 Q. Is that the Minutes for a shareholders meeting for  
21 Zorbas, Inc.?

22 A. It's what it appears to be.

23 Q. At the Law Offices of James Hale, Bluffton, South  
24 Carolina?  
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A. Yes.

Q. Does it list who was present?

A. Yes.

Q. Do you recognize that document?

A. No, I am afraid I don't.

Q. Go ahead and mark this as --

A. Whatever the date was, I am not disputing it, just from my memory and from what I have seen earlier.

Q. So does this document refresh your memory to make you believe that the meeting was December 15<sup>th</sup>?

A. I never saw that document before. I do have the complete recording of that entire meeting and the date is given on that. I could check it from there, but does it really matter at this point?

Q. Well, how many shareholders meetings do you think there were?

A. Just one.

Q. Just one shareholders meeting?

A. Yes.

Q. Your Honor, again, I would like to point out Plaintiff's Request for Admissions to Defendant dated February 11, 2007. The Defendants Mr. and Mrs. Bensch were asked to admit at a meeting with directors and/or shareholders of Zorbas, Inc. which took place on

1 December 15<sup>th</sup>, 1999. The Defendants Bensch demanded  
2 they be given additional shares of stock of Zorbas,  
3 Inc. as a result of their claims that they contributed  
4 \$84,000 to Zorbas, Inc. and that the Plaintiffs had  
5 contributed only \$50,000 to Zorbas, Inc. and just  
6 deemed admitted under operation of law.

7 MR. CLABAUGH: Your Honor, this is  
8 the document I previously stated I had  
9 never received.

10 COURT: Yeah, I think that is a  
11 correct statement. I think that was the  
12 one Mr. Clabaugh reviewed his records  
13 and as an officer of the Court he is  
14 telling us he didn't receive them. Of  
15 course, as you know a Request to Admit  
16 not responding, is clearly a harsh  
17 sanction, so I don't think I am going to  
18 deem those admitted for purposes of this  
19 trial. However, as I understand it,  
20 many of the items in there are  
21 stipulated. With regard to that  
22 particular First Request to Admit, I  
23 don't think we are - I think I have  
24 ruled on that one. I am not going to  
25

count those as deemed admitted unless they are stipulated.

1  
2 MR. PAPE: Well, Your Honor, let me  
3 just state for the record, as an officer  
4 of the Court also, that my Certificate  
5 of Service is attached to it and I  
6 certified to the Court that I placed  
7 those in the mail on that day addressed  
8 to Frank H. Clabaugh, Esq., 111  
9 Executive Center, P. O. Box 6131, Hilton  
10 Head Island, South Carolina 29938. It  
11 contains my signature dated February 11,  
12 2007.  
13

14 COURT: Yes, sir, and I don't think  
15 my ruling challenges that in the  
16 slightest, but we have all put things in  
17 the mail that -- and they don't make it,  
18 and so things like this -- I have been  
19 tasked with figuring out the accounting  
20 issues. I think it probably will not  
21 follow the instructions of the Appellate  
22 Court to do anything other than what I  
23 have chosen to do.  
24  
25

1 MR. CLABAUGH: Your Honor, I think  
2 I -- the reason I may not have got it,  
3 he has the zip code of 29938 and the zip  
4 code there is 29928. I don't know if  
5 that placed -- had anything to do with  
6 it or not, but --

7 MR. PAPE: Let me point out that P.  
8 O. Box 6131 requires a 29938 zip code.

9 MR. CLABAUGH: You've got two  
10 different addresses on there. You've  
11 got 111 Executive Center which is 29928  
12 and you've got P. O. Box 6131 which is  
13 29938.

14 MR. PAPE: Your Honor, I don't want  
15 to belabor, and I -- with all respect,  
16 but all my documents that I have ever  
17 sent to Mr. Clabaugh were sent to the  
18 same address, using the same zip code  
19 and none of them have ever been returned  
20 to me including Plaintiffs' Request for  
21 Admissions to Defendants. It was never  
22 returned.  
23

24 COURT: Let me say this -- I  
25 believe both of you. But with that

1 being said, you know, again, a default  
2 on a Request to Admit is a fairly harsh  
3 sanction. We have got how many years of  
4 litigation, eight years of litigation  
5 here. You know, based on everything I  
6 have seen, it doesn't appear that non-  
7 stipulated items would -- that this  
8 would have occurred. I think Mr.  
9 Clabaugh pulled out a summary he had of  
10 all the various documents he had  
11 received, and this wasn't on it so --

12 MR. CLABAUGH: It's a list of all  
13 pleadings tabbed and indexed.

14 COURT: Okay, so let's move on.  
15 Your exception is noted - and comments  
16 Mr. Pape.

17 MR. PAPE: Okay. So you don't --  
18 let me just mark this as Plaintiffs'  
19 Exhibit 3 for identification.  
20

21 BY MR. PAPE:

22 Q. You don't know what Plaintiffs' Exhibit 3 is then?  
23 You've never seen it before?

24 A. Well, I am reading it and it says Minutes of  
25 Shareholders Meeting for Zorbas, Inc. and if it was

1 December 15, 1999, Mr. Pape I certainly will agree that  
2 it was, if, in fact, it was.

3 Q. This suggested it was right?

4 A. Yes, that definitely says it was.

5 Q. All right, Your Honor, I would offer this  
6 Plaintiffs' Exhibit 3 for identification. He has not  
7 been able to authenticate it, but it seems to have  
8 refreshed his memory somewhat.

9 COURT: Mr. Clabaugh, you -- is  
10 that an authentic document as far as you  
11 are concerned?

12 MR. PAPE: Here's a copy of it.

13 MR. CLAUBAUGH: Do we know who  
14 prepared this?

15 MR. PAPE: No, I don't. I mean I  
16 just -- I assumed Mr. Bensch might of --

17 A. I didn't prepare it.

18 MR. CLAUBAUGH: Your Honor, if the  
19 Court -- as Mr. Bensch said, we have a -  
20 - a tape recording was made of that  
21 entire meeting. If the Court thinks it  
22 is relevant, we would be glad to enter  
23 that into evidence.

24 A. It states the date.  
25

MR. CLABAUGH: Gary --

COURT: Let your lawyer --

1  
2 MR. CLABAUGH: I guess I would  
3 object to the document on two grounds at  
4 this point at least. We don't know who  
5 prepared it and two, on the grounds of  
6 relevance. I don't --

7  
8 COURT: Just have it marked for  
9 identification at this point. I was  
10 just trying to short circuit the  
11 admission process. If you said  
12 absolutely this is -- we could move  
13 ahead with it, but that's obviously not  
14 the case, so and that's why -- I was  
15 just trying to speed things up.

16 BY MR. PAPE:

17 Q. And the purpose of having you identify this  
18 document is that it says that one of the resolutions  
19 that was offered was that the corporation issued  
20 additional stock in proportion to the parties'  
21 investments to wit 80 over \$130,000 to the Benschés and  
22 50 over \$130,000 to the Passaloukases. Do you remember  
23 any discussions at that meeting whereby you wanted to  
24 be issued more stock?  
25

1 MR. CLABAUGH: Your Honor,

2 COURT: Do you have an objection?

3 MR. CLABAUGH: I do. The -- I  
4 think it was a compound question in  
5 terms of -- it was asking him about  
6 those numbers and then he was asking him  
7 the second question about whether or not  
8 there was any discussion about  
9 additional stock.

10 COURT: Okay, sustained. Can you  
11 break it up into two questions?

12 MR. PAPE: Yes.

13  
14 BY MR. PAPE:

15 Q. Did you all have any discussion about your  
16 requiring to be -- demand that you be issued additional  
17 stock in proportion to your greater contributions to  
18 the corporation?

19 A. No, sir. That was not the way that was brought  
20 up. I do recall that was discussed. And it is on the  
21 tape I am sure. I remember that it was obvious at that  
22 meeting that Zorbas -- it was obvious to me that Zorbas  
23 was not going to survive as it was going and we were  
24 unable to have any resolutions at that meeting. They  
25 stonewalled me in every case. And when it was

1 discussed, I think Mr. Passaloukas asked us if we would  
2 be willing to put up more money or somebody asked us,  
3 and we said we would be willing to put up a small  
4 amount of money to help the corporation get going, but  
5 we would want to -- since we had already spent more  
6 money than Passaloukas on the up-fitting, that we would  
7 want to have additional shares of interest in the  
8 corporation for our further investment and we were  
9 immediately told that would not be possible.

10 O. Okay, well you insisted that you had contributed  
11 \$82,000 worth of leasehold improvements to the  
12 restaurant?  
13

14 MR. CLABAUGH: Your Honor, I don't  
15 think -- excuse me --

16 COURT: Everybody at once -- do you  
17 have an objection?

18 MR. CLABAUGH: I do, I don't think  
19 that was the witnesses' testimony.

20 COURT: Well, I don't know if he  
21 has answered it yet. He's asking his  
22 questions and --  
23

24 A. I don't ever recall this number. I don't think I  
25 have ever sent his sheet. I don't know who produced --

1 MR. CLABAUGH: The parties have  
2 stipulated as to the amount that each  
3 side invested in the company, Your  
4 Honor.

5 COURT: No, I understand. I think  
6 Mr. Pape's argument is that he was  
7 insisting on a higher amount than  
8 actually what there was and I don't know  
9 because he pretty much hasn't answered  
10 the question yet, so -- he can ask the  
11 question.  
12

13 BY MR. PAPE:

14 Q. Weren't you insisting that you had put in at least  
15 \$80,000 to \$84,000.00 into the rest -- into the  
16 leasehold improvements and well go ahead and answer  
17 that question.

18 A. Well I don't recall that number, Mr. Pape, but I  
19 do recall a number somewhat less than that, but it was  
20 in the -- seventy, eight thousand range, but I don't  
21 ever recall -- I don't think we ever presented that we  
22 had more than \$80,000 in it and this said \$80,000 and  
23 he says even 50 and he had more than 50 in it, so I  
24 don't know who prepared this or why.  
25

1 Q. Do you remember giving your deposition in this  
2 case on the 21<sup>st</sup> of September, 2001?

3 A. I remember being deposed by you, yes, sir.

4 Q. May I ask you to examine Page 158 of the  
5 deposition beginning at line number 4 I will read my  
6 question and what I want you to do is read your answer.  
7 I don't want you to amplify your answer or anything,  
8 just go ahead and read it as it is written.

9 "By Mr. Pape: Now you have just testified that you  
10 have contributed in excess of \$80,000 to Zorbas, is  
11 that correct? Mr. Bensch what did you say?

12 A. I said that is correct."

13 Q. Look at Page 137 -- I mean --

14 A. I what?

15 Q. 137 yes. Now turn over a couple of more pages.  
16 Beginning at Page 19 I asked you, "Let us go through  
17 this account because I want to be sure and you are  
18 saying you put some money into it, is that correct?"  
19 And what did you say? Line 23, what did you say in  
20 response to that?  
21

22 A. "I said into this account?"

23 Q. And then I said, "Into this account." And what  
24 was your further response?  
25

1 A. "Are you confusing the small amount of money that  
2 was put into this account to start Zorbas and the  
3 \$82,000 that I put into Zorbas?"

4 Q. Yes. So at the time you gave your deposition in  
5 September, 2001, you insisted that you had put 80 to  
6 \$82,000 into the restaurant, is that correct?

7 A. That is correct according to this.

8 MR. CLABAUGH: Your Honor, if I  
9 may. The parties entered into a  
10 stipulation. Each side is due -- how  
11 much each side had contributed. The  
12 stipulated document was entered into  
13 evidence at the original trial had total  
14 expenditures of \$79,000 of which Mr.  
15 Pape disputed \$9,345.00. I think, given  
16 the fact that this document has been  
17 stipulated to, there is no need for  
18 testimony concerning it.

19  
20 MR. PAPE: Your Honor, I will go  
21 ahead and offer Plaintiff's Exhibit No.  
22 4 which is the document he was just  
23 referring to.  
24

25 BY MR. PAPE:

Q. What is Plaintiff's Exhibit No. 4, Mr. Bensch?

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COURT: He has moved on beyond what you have objected to anyway, so I don't think a ruling is needed on your objection.

BY MR. PAPE:

A. This looks like a document that we produced to show our contributions perhaps to -- our contributions to Zorbas.

Q. And this document has been stipulated to.

MR. CLABAUGH: That's correct.

Q. And Plaintiff's Exhibit No. 4, Mr. Bensch, represents all the money you put into the corporation, is that correct?

A. I believe it is.

COURT: All right, I understand that the parties have -- with regard to the first thing the Appellate Court wanted the accountings of detailed contributions by the parties. So I understand that that question has been answered such as I do not have to determine anything with regard to that?

MR. PAPE: Correct.

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COURT: All right and that number and this is thereabout - if I can verify the actual number.

MR. PAPE: It's \$61,695.09 plus \$1300 if you look at the top of the document.

COURT: That's what the Benschers put in?

MR. PAPE: Yes.

COURT: What did the Passaloukas' put in?

MR. PAPE: If you look at Plaintiff's Exhibit No. 2, midway of the second page --

COURT: \$68,875.16?

MR. PAPE: Correct. And the Passaloukases -- below that are the reimbursements that were made to the Passaloukases-- \$9,500 was reimbursed to them.

COURT: All right, so the net then again with regard to the first question of the Appellate Court, I should fill in

1 the blanks with \$61,995.09 plus \$1300  
2 for the Benschers.

3 MR. CLABAUGH: Correct.

4 COURT: And \$59,375.16 for the  
5 Passaloukases.

6 MR. PAPE: Well they originally  
7 contributed the \$68,875 --

8 MR. CLABAUGH: They got \$9,000  
9 back.

10 MR. PAPE: They just got \$9,000  
11 back during the course of the operation  
12 of the restaurant.

13 MR. PAPE: You are going to find  
14 out that the Benschers have also been  
15 reimbursed some also.

16 COURT: All right. These are  
17 stipulated numbers?

18 MR. PAPE: Yes sir.

19 MR. CLABAUGH: So the Passaloukases  
20 number is \$59,375.16.

21 COURT: I thought it was \$68,875.16  
22 and then they got some money back?

23 MR. CLABAUGH: They got \$9,000 --  
24 the amount -- the net owed Passaloukas  
25

1 shown on the bottom of the document is  
2 \$59,375.16.

3 MR. CLABAUGH: The first issue is  
4 what they contributed and of course  
5 they've had some reimbursements. The  
6 Bensches have also had some  
7 reimbursements and we will get into  
8 those details?

9 MR. PAPE: Does the Court have a  
10 copy of that?

11 MR. CLABAUGH: Yes.

12 COURT: Okay, I think I understand  
13 it enough to move forward so --  
14

15 BY MR. PAPE:

16 Q. So there was an issue as to how much you had  
17 contributed versus how much the Passaloukas' had  
18 contributed, is that correct?

19 A. Yes, apparently you were striking things off of  
20 our list that we didn't have any invoices for even  
21 though we had a check for it, \$9,000.

22 Q. All right. And it was your claim that because you  
23 had contributed or you had believed that you had  
24 contributed more than they had, that you were entitled  
25 to more shares of the corporation, is that correct?

1 A. No, sir. Our shares were clear at that point in  
2 time. We were both 50/50 partners.

3 Q. Okay. You recognize this document? First of all,  
4 let me ask you who was Michael Mogil?

5 A. Michael Mogil was the attorney we used to  
6 represent us.

7 Q. During these negotiations or --

8 A. With the Zorbas, yes.

9 Q. Okay. You recognize this letter?

10 A. Yes, I do recognize it.

11 Q. And that's a letter that Mr. Mogil sent to Jim  
12 Hale on December 8<sup>th</sup>, 1999, correct?

13 A. Yes.

14 Q. Okay.

15  
16 MR. CLABAUGH: Do you have a copy  
17 of it?

18 MR. PAPE: Yes. I would like to  
19 mark this as Plaintiffs' Exhibit No. 5  
20 and I tender that.

21 MR. CLABAUGH: No objection. What  
22 number is that?

23  
24 BY MR. PAPE:

25 Q. And who was Mr. Hale now?

1 A. Mr. Hale was Mr. Passaloukas' friend who did the  
2 corporate papers.

3 Q. He was in fact the attorney for the corporation,  
4 Zorbas, Inc., is that correct?

5 A. That's what I said.

6 Q. Okay, no, you said he was a friend. He was the  
7 attorney for the corporation, is that correct?

8 A. Well, he was his friend.

9 Q. And in Mr. Mogil's letter down to paragraph 2 he  
10 is demanding that the corporation issue the initial  
11 stock set forth in the pre-incorporation agreement and  
12 additional stock in direct proportion to the financial  
13 investments made into the corporation to date. Is that  
14 what he said?  
15

16 MR. CLABAUGH: Your Honor, the  
17 letter speaks for itself.

18 MR. PAPE: Your Honor, I think I am  
19 entitled to educate you with what  
20 important points there are in the letter  
21 and I think Mr. -- this is a direct  
22 contradiction to what Mr. Bensch was  
23 saying earlier that there was no demand  
24 about being additional -- issuing  
25 additional stock.

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MR. CLABAUGH: Not at all, Your Honor. The witness said they offered to put more money in but they wanted stock for it and that the other side refused to give them more stock.

COURT: Well, I will allow it. In the time we've talked about it, he probably could have gone ahead and gotten it in. I am still trying to understand this line of questioning with regard to what I am supposed to do for the Appellate Court, but I will allow it. Go ahead and just try to keep it brief if you can.

BY MR. PAPE:

Q. Mr. Mogil has demanded that you be issued additional stock in direct proportion to your financial investments made into the corporation, is that correct? Look on Page 1.

MR. CLABAUGH: Your Honor, the letter says what it says.

COURT: Well I'll let him answer the question.

MR. PAPE:

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Q. You see that or not?

A. It appears that he is making numerous requests in this document. No. 2 it says that the corporation issue the initial stocks set forth in the pre-incorporation agreements which no one ever got their certificates apparently, and additional stock in direct proportion to the financial investment made into the corporation to date. In other words, I read this to say and any other contributions were being made in there would be in direct proportion to the financial investment made into the corporation today. That's how I read it.

Q. And look at No. 5 on the next page. It says that, "Your demand was that Bill Passaloukas make a full accounting for all monies including cash monies withdrawn by him or his family from the bank accounts, cash receipts in the corporation whether they be characterized by him as salary, expense reimbursement, loan reimbursement or fees", is that correct?

A. That is correct.

Q. Okay.

A. I never got any accounting from Bill.

1 Q. And one of the things you were both -- you and he  
2 were concerned about is that both of you sit down and  
3 do a complete thorough accounting as to what your  
4 contributions were, is that correct?

5 A. Say again --- when?

6 Q. During that Shareholders' Meeting of December 15<sup>th</sup>.

7 A. Mr. Passaloukas was asked -- requested to bring  
8 with him to that meeting a budget for Zorbas and he  
9 didn't do that.

10 Q. But before you all could issue stock, both of you  
11 had to do a complete accounting for another as to what  
12 your contributions were, is that correct?

13 A. No, I don't recall that at all.

14 Q. Okay.

15 A. The initial stock offering, we had more stock than  
16 each of us were to get. None of us ever got any stock  
17 certificates. And if more money was put into the  
18 corporation, we felt it needed to be stipulated that  
19 additional monies meant additional stock.

20 Q. All right, and look at finally the last paragraph  
21 of this letter. It says and I quote, "Additionally  
22 please disburse the rent check that Mr. Griffis claims  
23 has been paid to your office. The Benschés are not  
24 recognizing any rent credits for the water heater  
25

1 because that issue was resolved months ago and the cost  
2 for that equipment had been allocated by contract to  
3 Bill Passaloukas. Moreover, the Benschas as landlords  
4 are not waiving any fees." Is that the way it reads?

5 A. That is exactly what it says.

6 Q. All right, let me point your attention  
7 specifically to these words "The Benschas are not  
8 recognizing any rent credits for the water heater." Do  
9 you understand that?

10 A. I think I do.

11 Q. The Passaloukases had said look, you had the  
12 obligation to install the water heater in the premises  
13 and you  
14

15 A. Which I did.

16 Q -- which you did. And we need a credit for that  
17 water heater which the Passaloukases had paid for,  
18 right?

19 A. Well, I paid for the first water heater. Mr.  
20 Passaloukas paid for the second water heater, which was  
21 part of his responsibility. That was the understanding  
22 that the rest of the kitchen part of the restaurant.  
23 He didn't tell me anything about a fancy water heater  
24 that had to go in there.  
25

Q. Look at Plaintiffs' Exhibit No. 2.

1 A. Right.

2 Q. Look at the entry dated July 7, 1999 refers to a  
3 payment to Benchmark in the sum of \$1,833.32 for a hot  
4 water heater. Is that correct?

5 A. I think that is correct.

6 Q. Okay, so what he was wanting you to do was  
7 reimburse him for that water heater that he had paid  
8 for, is that correct?

9 A. I don't know what he was asking, but those were  
10 two totally different items and the rent was not paid.  
11 That was a different hat.

12 MR. CLABAUGH: Your Honor, given  
13 the stipulation between the parties as  
14 to the contributions, I fail to see the  
15 relevance of this testimony.

16 MR. PAPE: Your Honor, I will tie  
17 it up.

18 COURT: All right, well hurry up  
19 and again, during the brief lull, I was  
20 looking at the next time we would be  
21 able to finish this if we don't finish  
22 this in this time allotted, and it is  
23 April 20<sup>th</sup>, April 21<sup>st</sup> and 22<sup>nd</sup>, just so  
24 you'll know.  
25

MR. PAPE: I understand.

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BY MR. PAPE:

Q. But if you read Mr. Mogil's letter, he is saying that they are not going to allow any credits for the water heater, is that correct?

A. He was not entitled to any credits to the water heater --

Q. Okay.

A. -- as I said before.

Q. Plaintiffs' Exhibit No. 6 is the Articles of Incorporation?

A. Yes.

Q. I tender that, Your Honor.

COURT: Mr. Clabaugh.

MR. CLABAUGH: We have agreed to stipulate to that Your Honor.

BY MR. PAPE:

Q. Plaintiff's Exhibit 7 is the Shareholders' Management Agreement, is that correct, Mr. Bensch?

A. Yes it is.

MR. CLABAUGH: We have stipulated to that Your Honor.

BY MR. PAPE:

1 Q. Now let's turn Mr. Bensch to Exhibit A that is  
2 attached to Plaintiff's Exhibit No. 7, the  
3 Shareholders' Management Agreement. And that page --

4 A. Page?

5 Q. The very last page.

6 A. Very last page, okay, sir.

7 Q. You see that?

8 A. Yes, sir.

9 Q. That page is actually just a typewritten form of  
10 an agreement that you and Mr. Passaloukas had reached  
11 back in January or February of 1999, is that correct?

12 A. That is correct.

13 Q. Okay. Says Bensch's responsibilities. Look at  
14 No. 3 read that. What does it say your  
15 responsibilities are?  
16

17 A. Install all required electrical, plumbing and  
18 mechanical systems.

19 Q. Okay, a hot water heater is normally a plumbing  
20 requirement, right?

21 A. We did install the water heater and plumbing.

22 Q. So that was your responsibility?

23 A. The one we put - yes, and we fulfilled it.

24 Q. So if he had advanced the sum of \$1833.32 as shown  
25 by Plaintiffs' Exhibit No. 2 for a hot water heater,

1 you have the obligation to reimburse him that money,  
2 didn't you?

3 A. I did not, sir, because that is covered under  
4 Passaloukas' responsibilities. It says clearly that he  
5 is to furnish and install kitchen appliances and  
6 systems and that is a kitchen appliance here. It was a  
7 major commercial hot water heater for the kitchen and  
8 it was required by the County code. Mr. Passaloukas  
9 did not know about it until we got turned down for  
10 inspection and then he asked me to change it out.

11 Q. You have testified that you have been in the  
12 construction business for 30 years, is that correct?  
13

14 A. Yes.

15 Q. Who do you call when you ask to install a hot  
16 water heater? You call an electrician, or a painter,  
17 or roofer? Who do you call? A plumber, don't you?

18 A. It was specifications, Mr. Pape. It was not  
19 specified to by Mr. Passaloukas. We put in a large  
20 electric water heater and what was required by law for  
21 a restaurant, which Mr. Passaloukas was not aware of,  
22 nor was I, as to what hot water heater would be  
23 required to get the restaurant approved. It had a 140  
24 or 60 degree type temperature that was required for a  
25 restaurant; hotter than for a bathroom.

1 Q. When you undertook this agreement back in January  
2 or February, you told him that I am going to install  
3 all required plumbing and material --

4 MR. CLABAUGH: Your Honor, the  
5 document speaks for itself. He is  
6 arguing now.

7 COURT: I will let him answer  
8 the question, but the document does  
9 speak for itself, but he can answer  
10 the question.

11 A. I thought I did.

12 Q. Okay. A water heater is part of the plumbing  
13 system, isn't it?  
14

15 MR. CLABAUGH: Asked and  
16 answered, Your Honor.

17 MR. BENSCH: It is part of the  
18 kitchen in this particular case.

19 COURT: Yes, it's been  
20 answered.

21 BY MR. PAPE:  
22

23 Q. Now the lease agreement, which has already been  
24 admitted, calls for rents in the sum of \$2,461.00 a  
25 month, is that correct?

A. The second lease agreement?

1 Q. That was Exhibit No. 1.

2 A. Yes, sir. That's the lease.

3 Q. That's not what the agreement had been on March 22  
4 of '99, was it?

5 A. No, it was a little less than that. Six Hundred  
6 Dollars less, I believe.

7 Q. It's actually \$561.00 a month more than what you  
8 all originally agreed on, right?

9 A. Probably so, yes, sir.

10 Q. The reason you added the additional \$561.00 a  
11 month was to recover some advancements that you had  
12 made, is that correct?  
13

14 A. The -- before we could open, we found out that a  
15 grease trap was requiring and that a \$9900 or 98, a  
16 \$9900.00 payment had to be paid to the Beaufort Jasper  
17 Water for a restaurant, and when I asked Bill about the  
18 cost, he said he could not pay those costs even though  
19 they were relevant to the kitchen and the restaurant  
20 which he was supposed to do and so I said, well, the  
21 only way I could think of doing it is if I end up  
22 paying for it is to raise the rent enough to cover the  
23 expenses of those two or three items that -- because I  
24 spent \$2,000 changing out the water heater. And raise  
25

1 the rent enough to cover my cost over the next two --  
2 primarily my cost over the next two years.

3 Q. All right. So he paid --

4 A. That's the way I remember it.

5 Q. He paid the sum of \$576.00 extra each month in  
6 order for you to reimburse costs that you had advanced  
7 for the grease trap and the water sewer permit and the  
8 hot water heater, is that correct?

9 A. No, the hot water heater labor. I think Mr.  
10 Passaloukas actually paid us back for the water heater  
11 itself.

12 Q. Well, he paid you \$1833.32 for the water heater,  
13 is that right?

14 A. I believe that was the cost of the water heater.

15 Q. Okay, so he's already paid you \$1833.32.

16 A. Right.

17 Q. Then you charged him another \$576.00 a month to  
18 recover costs which he has already paid for for the hot  
19 water heater, is that correct?

20 A. No, I just stated, sir, that was just the cost of  
21 the water heater. There was another \$1900 or \$2,000  
22 that belonged with the labor of installing that. That  
23 was a major task to tear that -- the old one out of the  
24 ceiling, build a major platform up there and put a new  
25

1 gas water heater and run gas lines to it. It was a big  
2 deal. And it had to be done like right now --

3 Q. Yes, sir.

4 A. -- before we opened. And Mr. Passaloukas  
5 obviously was out of money, so was I, in fact, but I  
6 had to cover it.

7 Q. All right, so you recaptured that every month.  
8 The grease trap is part of the plumbing system, isn't  
9 it?

10 A. It's part of the restaurant only. Not required  
11 for any other units, any of my other units.

12 Q. Who did you call to install the grease trap, a  
13 plumber or an electrician?

14 A. Neither one. It was a septic tank company, a  
15 grease trap. The Beaufort Jasper Water would not let  
16 us -- our sewage ran directly into the sewer from this  
17 unit and they said with a restaurant you have to  
18 intercept the sewage and run it through -- straight out  
19 of the kitchen into a special tank which Bill was  
20 supposed to handle and he did not and could not.

21 Q. Do you have anything in writing that shows that  
22 Mr. Passaloukas was responsible for the water heater or  
23 the grease trap or the water and sewer assessment fee  
24 that Beaufort Jasper Water authority required?  
25

1 A. We had discussed it earlier in the -- only to the  
2 matter that he was to handle all the expenses relevant  
3 to handling a restaurant in that facility, not a  
4 business.

5 Q. But the only written document you've got is this  
6 Shareholder's Management Agreement, Exhibit 7 --

7 A. On the back.

8 Q. Which says that the Bensch's responsibilities are  
9 to include installation of all required electrical,  
10 plumbing, mechanical systems, isn't that right? That's  
11 the only thing you've got in writing?

12 A. Yeah, that's probably true.

13 Q. Okay. It's hard for me to come up with a  
14 paragraph number here. Well, there is a subparagraph  
15 right at the end of the section that defines plumbing.  
16 You might be able to find that on your system there.  
17 "Plumbing includes the installation, replacement,  
18 alteration and repair of all plumbing including solar  
19 water heating when performed solely within property  
20 lines and not on public easements or rights of way  
21 except to make connections to water meters or sewer  
22 taps as laid out by the utility owner and the  
23 installation, alteration, and repair of all piping  
24 fixtures and appliances related to water supply  
25

1 including pressure vessels and tanks and excluding  
2 municipal or related water supply systems, venting and  
3 sanitary drainage systems for all fluid and semi-fluid  
4 and organic waste, roof meters, water conditioning  
5 equipment, piping and equipment for swimming pools and  
6 installation of a system of pipes, fittings, fixtures,  
7 drains and also all necessary component parts of the  
8 premises are in a building to supply water to buildings  
9 and to convey sewage or other waste products from  
10 buildings."

11           And I offer that to define what we believe was the  
12 scope of work that was allocated to Mr. and Mrs.  
13 Bensch. If it makes any difference, the Beaufort  
14 County ordinance talks about -- Code Section 98-63  
15 Definition, says. "A grease trap means a device  
16 designed to install to separate and retain particular  
17 waste from sewage and typically utilized in the waste  
18 water plumbing systems of food and services  
19 establishments -- directly ties this to a plumbing  
20 element and then it goes on. I've got other  
21 authorities --  
22  
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24                           MR. CLABAUGH: Your Honor, counsel  
25 is first of all engaging an argument at  
this point.

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COURT: I have let you get a little astray in questioning Mr. Bensch and again I'm trying to move you all along as best I can. I wasn't kidding. The first time I've really got some time is that April date.

MR. PAPE: I understand.

COURT: And all day tomorrow, which is fine and maybe you'll finish it. But if you don't I have that April date.

BY MR. PAPE:

Q. Now we got to the lockout and --

MR. CLABAUGH: I would object to the term "lockout". I think the proper term in this case is eviction.

COURT: Well, your objection is noted. Mr. Pape, I suppose, can call it a lockout if he wants.

MR. PAPE: Do you have a copy of that 28<sup>th</sup> demand letter?

MR. CLABAUGH: Yes.

MR. PAPE: My tabs are just not functioning.

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MR. CLABAUGH: What number is that going to be, Frank?

MR. PAPE: It is number 8.

BY MR. PAPE:

Q. Now let me ask you to identify Plaintiffs' Exhibit No. 8, Mr. Bensch.

A. This is a notice I sent to Zorbas Restaurant entitled "Notice of Default of Lease".

Q. And that had some attachments to it, what are those?

A. The attachment is the -- where Bill Passaloukas signed for it at the bottom.

Q. Okay. And the next attachment?

A. Probably the return envelope.

Q. Okay.

A. I would assume, my address.

Q. Do you know what day you put this in the mail?

A. No, sir, I don't.

Q. Okay. And it appears if we can interpret this correctly, that Mr. Passaloukas must have received it actually on December 31, 1999, is that correct?

A. Yes, that looks like when he received it.

Q. Okay, it is placed in a box, which says article number, but it appears to be a date. So you don't know

1 if you received it -- you put it in the mail on  
2 December 28<sup>th</sup> or December 29<sup>th</sup> or December 30<sup>th</sup>, do you?

3 A. At this time, not, but normally it is put in  
4 immediately, so I would assume it was sent on the 28<sup>th</sup>.

5 Q. But he didn't receive it until December 31<sup>st</sup>, did  
6 he?

7 MR. CLABAUGH: Objection, Your  
8 Honor, we have no way of knowing  
9 when he received it.

10 COURT: Well, he's already  
11 sort of answered. He already said  
12 it looks like it was from 12/31  
13 from the card and I can see the  
14 card.  
15

16 MR. CLABAUGH: This is a copy  
17 of it, I guess. I don't know if it  
18 has been changed.

19 BY MR. PAPE:

20 Q. Okay, well on December -- you didn't -- you didn't  
21 speak to Mr. Passaloukas after that date did you?  
22

23 A. I am sorry, sir, I didn't hear you.

24 Q. Did you hear from Mr. Passaloukas after that date?

25 A. Ever or -- I don't know.

1 COURT: I was going to allow Mr.  
2 Pape, as we discussed off the record but  
3 he can certainly make whatever record he  
4 would like with regard to this before I  
5 rule. And I guess the confusing part for  
6 me perhaps which confused Judge  
7 Kemmerlin as well is, Mr. Pape you keep  
8 referring to, and I don't know how else  
9 to do it quite frankly, but referring to  
10 Mr. Bensch as you. Mr. Bensch as I  
11 understand this trial, wore two hats.  
12 In the eviction portion, correct me if I  
13 am wrong, but he was wearing the hat as  
14 the landlord. And maybe I am  
15 misunderstanding this, but he was the --  
16 the portion where you talked about  
17 earlier about the stock and how much  
18 stock he was holding as a stockholder of  
19 Zorbas, the eviction, as I understand  
20 it, was when Mr. and Mrs. Bensch as  
21 landlords evicted a corporation known as  
22 Zorbas, Inc.

23  
24  
25 MR. PAPE: And that's what we are  
talking about. That's true. What it --

1 it's difficult for me to separate  
2 because I don't think it makes any  
3 difference as to which hat they are on.  
4 They still personally had obligations  
5 whether it be under one agreement or  
6 whether it be under another agreement  
7 and all those agreements are related to  
8 the same subject and that's the  
9 premises.

10 COURT: Okay, and I guess what I am  
11 getting at is I am going to be asked --  
12 or have been asked to determine whether  
13 or not the eviction was wrongful or not.

14 MR. CLABAUGH: Right.

15 COURT: The eviction that occurred  
16 was where the Benschers, wearing their  
17 hats as landlords, evicted a corporation  
18 known as Zorbas.

19 MR. CLABAUGH: Right.

20 COURT: And the question is, was it  
21 wrongful to do so? Had Zorbas violated  
22 the terms of the lease such that  
23 eviction was allowable under the lease?  
24 So, again, I don't have the answer to  
25

1 it, since we got crossed over here, but  
2 if you could as you are referring to  
3 you, if it's possible to throw in as  
4 landlord or as a stockholder or --

5 MR. PAPE: Judge, I don't think it  
6 -- it is hard for me to do it because I  
7 don't think it makes any difference.  
8 They are acting in their own capacity.  
9 I mean its not like there's on the one  
10 hand there's a corporation they are  
11 acting on behalf and on the other hand  
12 they are acting on behalf of a different  
13 corporation. They are acting in their  
14 personal individual capacities not  
15 through a corporate capacity. As  
16 landlords they owned the property  
17 individually and as shareholders they  
18 have individual and personal  
19 responsibilities as shareholders and I  
20 think those -- any grievances that the  
21 Passaloukases might have towards them  
22 with respect to -- for example, not  
23 reimbursing them or giving them credit  
24 for the \$1800 that they gave to the  
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Benschers with respect to the hot water heater and things like, I don't think it makes any difference.

MR. CLABAUGH: For the record, Your Honor, we think that is the difference. That's -- the devil is in the details. The Benschers throughout this wore two hats; one as shareholders as a South Carolina corporation, and in their individual capacities as the owners of real estate who leased it to a corporation.

COURT: And I think I have heard enough to understand your positions. As we get toward the issue of wrongful eviction, I want to make sure we are referring to the right "you". We are talking about you -- I don't want to limit you in the way you are asking the question.

MR. PAPE: I understand, with all due respect, Judge, I am probably going to continue to make the same mistake, but I think the Court is just going to

1 Q. You personally handed -- did you put it in Susie  
2 Passaloukas' hand or Bill Passaloukas' hand?

3 A. I believe I did -- delivered it directly to Bill,  
4 but I am positive at this point in time.

5 Q. Do you recall any conversations that you might  
6 have had with Mr. Passaloukas when you think you might  
7 have personally delivered it to him?

8 A. I -- the only thing I can remember is the last  
9 conversation I think I had was with Bill was perhaps  
10 the day I handed him that letter, which he said, you  
11 would throw out your partner out of this restaurant?  
12 And I said Bill, you must pay the rent or you will be  
13 evicted. That's exactly what this states. He said,  
14 well, get out of here; I don't want to see you anymore.

15 Q. Are you possibly confusing that with the demand  
16 letter that you sent to him on December 1<sup>st</sup>?

17  
18 MR. CLABAUGH: Your Honor --

19 MR. PAPE:

20 Q. I mean on -- yeah, December 1<sup>st</sup>?

21 A. I don't believe so.

22 Q. Okay. Now after the lockout, did you hear  
23 anything further from Mr. and Mrs. Passaloukas before  
24 you began operating Nicoli's?  
25

1 A. I do not recall any contact with them. I believe  
2 the Sheriff stayed behind that morning to inform Mr.  
3 Passaloukas not to enter the property and he was told  
4 not to return to the restaurant, that he had been  
5 properly evicted.

6 Q. But you don't know whether or not the Sheriff had  
7 that conversation with him or not?

8 A. I was told by the Sheriff that -- .

9 MR. PAPE: That's hearsay, object.

10 MR. CLABAUGH: Your Honor, he asked  
11 the question.

12 COURT: He asked the question, but  
13 it's not offered for its truth I guess,  
14 I don't know, but anyway let's move on.

15 BY MR. PAPE:

16 Q. All right, then you operated the restaurant for  
17 about three months through the end of April, 2000, is  
18 that correct?  
19

20 A. We started the restaurant I think the 1<sup>st</sup> of  
21 February and operated it until it was sold.  
22

23 Q. And you sold it to Mi Tierra's on May 2, 2000?

24 A. I believe that is correct.

25 Q. Okay, when did you start negotiating the sale of  
the restaurant with Mi Tierra's?

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MR. CLABAUGH: Your Honor, I object to any testimony at all concerning what the landlord subsequently did with the restaurant after the eviction.

COURT: Well, I will allow it as I understand the Appellate Court or - gotta figure out how these things were disposed of and I suppose --

MR. CLABAUGH: Well, I have no objection to how they disposed of the equipment, but a subsequent lease I submit is irrelevant to this issue.

COURT: Well insofar as I am guessing your clients are not seeking rent beyond January, I think that's probably true. I think what is relevant is the fact that they sold certain assets.

MR. CLABAUGH: I have no objection to questioning what was done with the assets, but in terms of subsequent leases or anything, you know, since there is no claim for additional rent, I think it's irrelevant.

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COURT: I tend to agree. Mr. Pape,  
do you have any --

MR. PAPE: Your Honor, I am only  
offering the agreement for the sale of  
the business. I haven't really got to  
the point where we get into subsequent  
lease agreements and I understand your  
views about that. I am going to tender  
it anyway, but as of right now I am just  
going to address the --

COURT: Okay, sounds like the  
objection is premature then anyways, Mr.  
Clabaugh, but certainly the sale of it  
is not objectionable.

BY MR. PAPE:

Q. So you sold the restaurant or entered into the  
contract of sale on May 2, 2000, is that correct?

A. I sold Nicoli's Restaurant to Mi Tierra's.

Q. I will hand you Plaintiffs' Exhibit No. 9, what is  
that?

A. Agreement to Purchase and Sale of Business Assets.

Q. All right. I offer that as --

MR. CLABAUGH: Let me see that.

MR. PAPE: That's a copy of it.

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MR. CLABAUGH: Your Honor, this is a Sale Agreement between Mi Tierra's and Nicoli's, LLC.

COURT: The agreement that I guess we discussed earlier was the agreement from the Benschers to -- is there another agreement out there?

MR. PAPE: No, this is it.

MR. CLABAUGH: The Benschers subsequently, after Zorbas, was evicted and by way of mitigation of damages opened up Nicoli's and they ran it for three months. They added equipment, made changes, what have you, and after that period of time they then sold what was there to Mi Tierra.

MR. PAPE: Which was more successful than --

MR. CLABAUGH: I submit that the only -- in terms of the sale of equipment, the only testimony would be relevant would be the sale of the Zorbas equipment to Nicoli's.

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MR. PAPE: Your Honor, I think he's improperly instructing his client.

COURT: Well, yeah, just make the objection if you would, but this is again when we get into the "you" situation because if the Exhibit is to be believed, Mr. Bensch didn't own the equipment that was sold to Mi Tierra's.

MR. PAPE: I understand. I will bring all that together.

BY MR. PAPE:

Q. Mr. Bensch, who is Nicoli's?

A. Nicoli's, LLC is a LLC corporation that Cynthia and I started strictly to try to salvage the restaurant operation there.

Q. So on January 8, 2000, you and Mrs. Bensch as landlords had found certain assets in the premises where you had evicted Zorbas, is that correct?

A. That's correct.

Q. And there was equipment and furnishings in there, is that correct?

A. That is correct including some personal items.

1 Q. So you had begun those negotiations -- at what  
2 point in time did you begin the negotiations to sell  
3 the restaurant itself as opposed to the shopping  
4 center?

5 A. Probably a month before I sold it.

6 Q. So about April 2, 2000 you would have begun  
7 negotiations with them?

8 A. That would probably be accurate.

9 Q. When was the sales price of \$75,000 first  
10 discussed?

11 A. Probably two weeks before it was consummated.  
12 They originally wanted to buy it for \$25,000.00.

13 Q. Okay, but you were demanding \$75,000 or more even?

14 MR. CLABAUGH: Your Honor, I would  
15 again object. I think the conversation  
16 needs to be related to the equipment  
17 itself. The witness has testified that  
18 there were changes that were made to the  
19 restaurant. They were selling an  
20 ongoing restaurant, etc. The issue that  
21 I think the Court of Appeals sent back  
22 specifically related to putting a value  
23 on equipment.  
24  
25

1 COURT: If you could narrow your  
2 questions, Mr. Pape. I guess I am  
3 looking at the accounting detail. The  
4 contributions of the parties; we have  
5 that. The identity and value of  
6 equipment, furnishings and other items  
7 of Zorbas at the time of the eviction.  
8 All right, I don't know if I have got  
9 enough to figure that out yet. We have  
10 moved on to disposing of property  
11 belonging to Zorbas, which is where I  
12 think you are now, but I don't know  
13 exactly what that is. I mean, I will  
14 let you try your case in whatever order  
15 you want, but I am just trying to follow  
16 the instructions sent to me from  
17 Columbia.  
18

19 MR. PAPE: I understand.

20 BY MR. PAPE:

21 Q. All right, on the date you made the sale of the  
22 business assets to Mi Tierra's is Plaintiffs' Exhibit  
23 No. 9, what additional restaurant equipment had you put  
24 in there?  
25

1 A. We had changed the restaurant around by adding  
2 various things of decorations. We tried to have it  
3 look more Mediterranean and Italian looking than Greek,  
4 but I think the only real item that I could think of in  
5 the kitchen, I think we had to purchase a new stove and  
6 I think we probably even, I am not sure but maybe  
7 traded the other one in, I am not positive about that.  
8 But the \$75,000 figure did not come clear as being a  
9 negotiated price until the scope of what Mi Tierra's  
10 wanted was clear. They wanted me to operate -- to be  
11 the general contractor to convert that one building  
12 restaurant into --

13  
14 MR. PAPE: Irrelevant, Your Honor.

15 A. And to do all the work.

16 COURT: One second. What is your -

17 -

18 MR. PAPE: The testimony is  
19 irrelevant. He is going on to a  
20 different agreement.

21 COURT: Just answer the question.

22 MR. CLABAUGH: Well the agreement  
23 on its face, makes reference to both  
24 units 101 and 102.  
25

A. And I had to add additional parking.

1 Q. Mr. Bensch, had you not installed -- made those  
2 leasehold improvements of some 63, \$64,000, what would  
3 have been your monthly return on that property, rental  
4 value?

5 MR. CLABAUGH: Objection, Your  
6 Honor. Excuse me, objection, Your  
7 Honor. Who are we talking about when he  
8 says you?

9 MR. PAPE: As landlord.

10 A. Nicoli's paid \$2500.00 a month.

11 Q. All right, but without the leasehold improvements,  
12 what was the rental value?  
13

14 MR. CLABAUGH: The rental value to  
15 whom and when?

16 MR. PAPE: To the landlord.

17 A. Would you rephrase the question please, Mr. Pape?

18 BY MR. PAPE:

19 Q. During the period of time between January and  
20 August 15<sup>th</sup> you -- meaning you as Landlord I assume made  
21 certain leasehold improvements and as I understand it  
22 from Plaintiffs' Exhibit No. 4 you installed about  
23 \$61,000 -- \$64,000 maybe \$63,000 worth of leasehold  
24 improvements, is that correct?  
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MR. CLABAUGH: Your Honor,  
objection. First of all he is using the  
term "you" again. Zorbas pursuant to  
their lease contracted for the up-fit of  
the restaurant and spent certain amounts  
of money to up-fit the restaurant and  
they would have had the use of that over  
the two years of their lease when they  
were properly evicted, the -- if we are  
talking about the up-fit, the toilets,  
the floor, the ceilings, the walls  
belonged to the Landlord. The tenant  
had no ongoing interest in those things.  
They signed the Lease that said with  
those up-fits they were prepared to pay  
\$2400 a month. That's the value of the  
Lease.

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COURT: Before I even rule on your objection, I am still trying to understand the question. What was the question again, Mr. Pape?

MR. PAPE: The question related to the leasehold improvements that he had constructed between January and August 15<sup>th</sup> and get him to confirm again that he had made constructed improvements there on the premises in Suite 101 of about \$63,000. I am asking him if that is correct and then -- that was when the objection came along.

COURT: When you say "he" again, what confuses me, you all looked at this case for nine years, I am just figuring it out, but "he" is -- Your question is, did Zorbas make \$63,000 more or less worth of improvements to Suite 101?

MR. PAPE: No sir. My question was whether or not Mr. and Mrs. Bensch, they are the ones who came here and offered Plaintiff's Exhibit #4 which says they

1 contributed this amount of money to  
2 construct those improvements there.

3 COURT: So you are asking whether  
4 or not, again, I am not trying to ask  
5 the question for you, I am just trying  
6 to understand it so I will understand  
7 the answer, whether or not Mr. and Mrs.  
8 Bensch as the landlords spent \$63,000  
9 making improvements to the leased  
10 premises?

11 MR. CLABAUGH: And I would --

12 MR. PAPE: Well, they have  
13 presented this Plaintiffs' Exhibit #4 as  
14 shareholders. They are saying that they  
15 are entitled to an equity in the  
16 corporation as shareholders because they  
17 made all of these improvements to the  
18 premises.  
19

20 COURT: And I thought that was a  
21 stipulated situation?  
22

23 MR. PAPE: Yes, it is but I mean --  
24 your question -- you are trying to  
25 entangle this issue but unwind it by  
saying that perhaps trying to figure out

1 whether or not they made these  
2 contributions as landlords. They made  
3 these contributions --

4 COURT: I was trying to understand  
5 your question.

6 MR. PAPE: Okay. Well, my question  
7 was, first of all for him to confirm  
8 that he and Mrs. Bensch made these  
9 improvements to the leased premises that  
10 cost about \$63,000.

11 MR. CLABAUGH: And I object, Your  
12 Honor. That is -- in their capacity as  
13 shareholders, that is the amount of  
14 money they put up for the corporation to  
15 do the up-fit of the restaurant.

16 COURT: Let me make sure I  
17 understand what happened here and maybe  
18 this will attempt to prove some of this  
19 as what you are trying to get me to  
20 understand, Mr. Pape. Mr. Bensch owns a  
21 construction company or something --

22 MR. CLABAUGH: Benchmark  
23 Construction.  
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COURT: Benchmark Construction,  
also owned the leased premises. Through  
the agreement between the Passaloukases  
and the Benschers as shareholders, Mr.  
Bensch, through his company, Benchmark,  
did \$63,000 more or less worth of up-fit  
to the leased premises. Is that -- and  
that's --

MR. CLABAUGH: That's correct.

MR. PAPE: Benchmark is not a  
shareholder of the corporation.

COURT: Right.

MR. PAPE: Maybe Benchmark needs to  
come in and complain that hey, Benchmark  
contributed all these improvements  
therefore, we want our share of the  
corporation, but Benchmark is not in  
here saying, look we claim an interest  
in Zorbas because we, Benchmark,  
contributed -- did all of this work to  
increase the value of the premises.  
It's the Benschers --

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COURT: Is there any question but that Benchmark did the work, I thought that was a stipulated item?

MR. PAPE: No, no, that's not a stipulated item. For all we know, Mr. Bensch did it himself. That's not stipulated that's --

COURT: I mean whether Mr. Bensch did it or whether he paid Benchmark to do it, the \$63,000 you are talking about there in the improvements didn't come from the Passaloukases, is that correct? Is that the stipulation? Again, I am not trying to -- I am trying to understand this.

MR. PAPE: No, the Benschs are here today saying, look we contributed all these things --

COURT: Okay.

MR. PAPE: And therefore we are entitled to an equity in the corporation. Benchmark is not coming along today saying, hey, we Benchmark made all these improvements and that

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Benchmark is entitled to an equity in the corporation.

COURT: Let me ask you this. Earlier you all stipulated that the Benschers have put in \$61,695.09 plus \$1,300.00.

MR. PAPE: Correct.

COURT: Where did that money that you have stipulated the Benschers spent go?

MR. CLABAUGH: It did the up-fit.

MR. PAPE: Well, they're saying that they put all that money to make the leasehold improvements.

COURT: Okay, but is it stipulated or not stipulated?

MR. PAPE: It's stipulated that the Benschers put all this money into making the leasehold improvements on property they owned.

COURT: Okay, all right.

MR. PAPE: They're not -- none of these invoices suggest that these were contributions by Benchmark. They're

1 claiming that they made these  
2 contributions.

3 COURT: Benchmark is not a party  
4 here.

5 MR. PAPE: No it's not a party  
6 here. They have never complained or  
7 claimed that Benchmark is entitled to  
8 any equity in this corporation by virtue  
9 of these contributions that are set  
10 forth in Plaintiffs' Exhibit No. 4. The  
11 Benschers personally are claiming  
12 entitlement to the equity in the  
13 corporation by virtue of those leasehold  
14 improvements that they made.

15  
16 COURT: Okay, I understand that. I  
17 am just trying to understand the  
18 Benchmark issue. Are you saying that  
19 the wrong party is here?

20 MR. PAPE: I am saying -- if you  
21 are suggesting that --

22 COURT: I am not suggesting  
23 anything. I am just trying to --

24 MR. PAPE: Okay, well, I am trying  
25 to figure out where the confusion lies

1 and I think the confusion lies in the  
2 fact that you all are wanting to say the  
3 Bensch's are wearing one hat in one  
4 situation and they are wearing another  
5 hat in another situation, but the fact  
6 is they are the ones that are claiming  
7 entitlement to these improvements on  
8 property that they own. Now if they  
9 went out and hired subcontractors they  
10 might have done to say install the  
11 plumbing and things like that, that  
12 plumbing company is not coming in for  
13 example, coming in here and saying we  
14 are entitled to a share of this money.  
15 They are saying that they spent all this  
16 money on these leasehold improvements  
17 and they are entitled to an equity of  
18 the corporation. And all I am getting  
19 at is that there's a rental value to an  
20 unimproved unit 101 and then there's  
21 another rental value to an improved unit  
22 101 and that goes to the heart of this  
23 issue that Mr. Clabaugh and I have been  
24 trying to sort out with you since this  
25

1 morning as to whether or not there's  
2 some sort of -- this agreement that you  
3 now have before you and we have talked  
4 about that.

5 COURT: Well, so as I understand  
6 your question to Mr. Bensch, I don't  
7 know if we even got to the point where  
8 you felt you could answer it or not, or  
9 even answered it was, what's the  
10 difference in the value of a green space  
11 basically and a finished space?  
12

13 MR. PAPE: That will be my follow  
14 up question, but I was just trying to  
15 lay the foundation and Mr. Clabaugh was  
16 -- objected a couple of times.

17 COURT: All right.

18 MR. CLABAUGH: And I would. I  
19 would object to the relevance. You know  
20 -- what does that have to do with  
21 placing a value on the equipment as of  
22 January 8<sup>th</sup> whenever the corporation was  
23 even --  
24  
25

1 COURT: I can't think of any, but I  
2 will allow Mr. Bensch to answer the  
3 question if he can.

4 MR. PAPE: Just as an aside, Your  
5 Honor, this issue was before the Court  
6 of Appeals and they reserved a ruling on  
7 that issue until they had an opportunity  
8 to understand the accounting side of it  
9 and so -- I mean to them the Court of  
10 Appeals could have decided that question  
11 real easily and just said, no, Mr. Pape,  
12 that is not an issue -- that your theory  
13 of the law is wrong in this case and  
14 they could have knocked that out easily.  
15 They just want the accounting done so  
16 they can then --

17  
18 COURT: But they were specific in  
19 what they asked for and they didn't say  
20 the differential in rentals based on the  
21 up fit. Couldn't they have easily said  
22 that?

23  
24 MR. PAPE: Yes, they could have  
25 easily have said that, but what they did  
more broadly is to say we've got to

1 first identify the assets and the value  
2 and that issue as to the additional  
3 rental value unimproved versus improved,  
4 that was squarely before them in the  
5 appeal.

6 COURT: Well, anyway -- Mr. Bensch  
7 you may answer the question if you can  
8 answer.

9 A. I am not sure I have any idea what that question  
10 was.

11 COURT: Okay.

12 BY MR. PAPE:

13 Q. I will try to rephrase the question. It may not  
14 be the identical one, but the -- you are claiming an  
15 entitlement to the corporation -- in the corporation  
16 Zorbas based upon the contributions that you and Mrs.  
17 Bensch made, is that correct?  
18

19 MR. CLABAUGH: Wait a minute. Can  
20 you rephrase -- can you repeat that  
21 question again?  
22

23 A. I am not sure what you said.

24 Q. You and Mrs. Bensch are entitled --- are claiming  
25 an entitlement in the equity of Zorbas based upon the  
contributions that you made, is that correct?

MR. CLABAUGH: Hold on.

1 A. I own 50% of it.

2 MR. CLABAUGH: I think it has been  
3 stipulated that each side owns 50% of  
4 the stock in Zorbas.  
5

6 COURT: I think that's true and it  
7 is stipulated.

8 MR. PAPE: Well, it's true but it's  
9 based upon the contributions that he  
10 made, is that correct, Mr. Bensch?

11 A. No, it's not. Never was.

12 COURT: All right, well, he's  
13 answered that question. Go on, please,  
14 if you would.  
15

16 A. It is not, never was. We anticipated to only  
17 spend \$30,000 a piece.

18 Q. What contributions did you and Mrs. Bensch make to  
19 the corporation?

20 MR. CLABAUGH: Again, it's been  
21 stipulated as to what both parties made.  
22 We have got dollar amounts -- I don't  
23 understand why --  
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COURT: Yeah, sustained. Go on, I thought you were going to get back to the question of the space.

MR. PAPE: Well --

BY MR. PAPE:

Q. Before -- you contributed leasehold improvements to the corporation, right, Mr. Bensch?

MR. CLABAUGH: Who is "you"?

BY MR. PAPE:

Q. You and Mrs. Bensch.

MR. CLABAUGH: Objection, the corporation did the -- pursuant to its lease did the up-fit of the restaurant.

COURT: And I think he's asked and answered anyway, over your objection earlier, but I agree with the relevance objection.

MR. PAPE: So he's not required to answer the question?

COURT: Your question is you keep referring to "he" or "you" and first of all I understand this is a confusing case, but it would be more confusing for me to read the transcript at some point

1 responsibility for doing the up-fit of  
2 the restaurant.

3 MR. PAPE: He's testifying --  
4 that's never been the evidence in this  
5 record. Not in the depositions, not in  
6 the trial, this is the first time I've  
7 heard it.

8 COURT: I will tell you what. I  
9 will allow Mr. Bensch to answer your  
10 question, so go ahead Mr. Pape and ask  
11 the question.

12 BY MR. PAPE:

13 Q. Mr. Bensch, you and Mrs. Bensch never put any cash  
14 money into this corporation, is that correct?

15 A. We put in the items listed here primarily through  
16 Benchmark for the up-fitting that we agreed to do.

17 Q. Answer my question, please, if you understand it.  
18 You and Mrs. Bensch never put any cash money into the  
19 corporation, is that correct?

20 A. No, that's not correct because we paid --

21 MR. CLABAUGH: Your Honor, counsel  
22 said that there's nothing -- that this  
23 was a new theory. I would call Court's  
24 attention to Paragraph 9 of the --  
25

1 MR. PAPE: Your Honor, he's --

2 MR. CLABAUGH: -- of the lease  
3 which --

4 COURT: I will tell you what --  
5 let's go off the record for a second.

6 MR. PAPE: He's covering his  
7 client.

8 COURT: All right, we will take a  
9 break.

10 BY MR. PAPE:

11 Q. Mr. Bensch, we were trying to establish the  
12 difference between the value -- the rental value of the  
13 premises Suite 101 with the leasehold improvements and  
14 without the leasehold improvements. So with the  
15 leasehold improvements, or without the leasehold  
16 improvements, the premises wouldn't have had a value of  
17 more than 12 to \$1500 a month, is that correct?  
18

19 MR. CLABAUGH: Your Honor, note my  
20 continuing objection on the grounds of  
21 relevancy.  
22

23 COURT: So noted. I will allow the  
24 witness to answer if he knows the  
25 answer.

1 A. I would expect it would be worth \$12.50 to \$14.00  
2 a foot as were some of my other leases, which were just  
3 shell leases.

4 Q. All right, well for a period of time you rented  
5 the adjacent unit, unit 102 for \$12.50 a square foot,  
6 is that right?

7 MR. CLABAUGH: Your Honor, again I  
8 would object to what additional other  
9 units leased for is irrelevant to this  
10 issue.

11 COURT: I tend to agree, but I will  
12 go ahead and allow him to make a record,  
13 so your continuing objection is noted.

14 BY Mr. PAPE:

15 Q. Is that correct?

16 A. The unit on the far end of the building end units  
17 bring more than center units, so end units were  
18 generally higher, so the unit next to it was a  
19 secondary unit and it rented for less but it was also  
20 the first lease I had out there which we gave them a  
21 discount because it was the very first lease we did in  
22 the whole shopping center.

23 Q. But it was \$12.50 a square foot?

24 A. That sounds about right, yeah.

1 Q. And you remember when you testified at deposition  
2 in this case where you testified that the rental value  
3 of this particular unit wouldn't have been more than  
4 \$1200 to \$1500 a month? Do you remember testifying to  
5 that?

6 A. No, but I -- thinking clearly right at the moment  
7 I am sure it would have brought \$12.50 to \$14.00 a  
8 foot, same as --

9 Q. Back in 1999, 2000, and 2002 and 2003?

10 A. Yes, sir. I think they are paying more than that  
11 now.

12 Q. Well let me remind you of your deposition --

13 MR. CLABAUGH: Again, Your Honor,  
14 I object on the grounds that what does  
15 that have to do with the value of the  
16 equipment as of the time of the eviction  
17 in this particular unit. There were  
18 eight different units in there.

19 COURT: I will allow him to  
20 continue on in an attempt to make a  
21 record. I am still trying to get to the  
22 items that the Appellate Court wanted me  
23 to listen to. Maybe this will be tied  
24 in somehow with one of them.  
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MR. PAPE: Do you have a copy of  
that deposition of September exhibit?

BY MR. PAPE:

Q. Again, you remember giving your deposition back in  
September, 2001?

A. I do.

MR. CLABAUGH: Your Honor, what  
time do you anticipate going to today?

COURT: Probably 5 just because  
they have to provide courthouse security  
for the whole place just for us to be  
here.

BY MR. PAPE:

Q. You gave your deposition on October 23, 2001, is  
that correct?

A. I think it is, yes.

Q. And let me ask you to look at Page 51, lines 4-8  
and I will read the question you just --

MR. CLABAUGH: What date was that  
deposition, Frank?

MR. PAPE: October 23<sup>rd</sup> I believe.

MR. CLABAUGH: Was there one done  
in September? I have got --

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MR. PAPE: Well let's go -- yeah, I made a mistake. I misidentified it. We have two Exhibits 9 in the record now, I believe. One of them is the Agreement of Purchase and Sale of Business Assets, which we have marked as Plaintiffs' Exhibit 9 and then we have an eviction notice, which is Plaintiffs' Exhibit 9.

Joanne can you tell me, isn't it correct that the Agreement of Purchase and Sale of Business Assets should be Exhibit 10?

COURT REPORTER: Yes, that's what I have. The eviction notice is 9 and the Sales Agreement is 10.

MR. CLABAUGH: What's this again, now?

MR. PAPE: The Agreement of Purchase and Sale of Business Assets dated May 2, 2000, from Nicoli's to Mi Tierra's is actually Exhibit No. 10.

MR. CLABAUGH: Okay, what is Number 9?

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MR. PAPE: No. 9 is the eviction notice.

MR. CLABAUGH: Oh, okay, they are reversed?

BY MR. PAPE:

Q. I am going to hand you what has now been marked as Plaintiffs' Exhibit Number 11.

MR. CLABAUGH: Which one is that Frank?

MR. PAPE: That's a document entitled Written Consent in Lieu of an Organizational Meeting for Zorbas, Inc.

MR. CLABAUGH: Okay.

MR. PAPE: And I believe we have stipulated to this.

MR. CLABAUGH: That's correct.

COURT: This number would be 11?

MR. PAPE: And this will be No. 11.

BY MR. PAPE:

Q. Is that one of the Shareholder Agreements that the Bensch and the Passaloukases signed, Mr. Bensch?

A. Yes, it is.

1 Q. All right, turn to Page 4 and let me first ask you  
2 what it says about capital contributions to the -- by  
3 the shareholders to the corporation.

4 MR. CLABAUGH: Your Honor, again  
5 that document speaks for itself and I  
6 don't think he needs the witnesses to  
7 read it into the record.

8 COURT: Can you point out, Mr.  
9 Pape, what you are looking at here and  
10 what's that on Page 4?

11 MR. PAPE: Page 4 and this -- well  
12 we gotta begin at the bottom of Page 3,  
13 "Issuance of Stock."  
14

15 BY MR. PAPE:

16 Q. Mr. Bensch, if you will, follow along with me. It  
17 says, "The following is a listing of shareholders" --

18 MR. CLABAUGH: I think the Judge -  
19 Your Honor, turn a couple pages, there  
20 is a couple of pages marked three. I  
21 think that --

22 MR. PAPE: Or two.

23 MR. CLABAUGH: Yeah.  
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COURT: I have got Page 1, Page 2,  
which one --

MR. CLABAUGH: It goes to Page 5  
and then it is Page 3 again.

MR. PAPE: That's not what I have.

COURT: Okay, that's the way this  
one does. Page 3 --

MR. CLABAUGH: That's the way it  
was in the transcript of record.

COURT: How many pages from the  
back is the page you are on?

MR. PAPE: My document has nine  
pages total, Your Honor. Oh, I see what  
the problem is. I am looking at Exhibit  
A, which is attached to the main  
document. And Mr. Clabaugh is correct,  
it goes from Page 5 then to Page 3.

COURT: Is the first page 4 or the  
second page 4?

MR. PAPE: It's the first Page 3.

COURT: First Page 3.

MR. PAPE: Yes, I mean it is the  
second Page 3. I am sorry. It is

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Exhibit A, Organizational Minutes and  
Consent. Thank you, Mr. Clabaugh.

BY MR. PAPE:

Q. Did you find that, Mr. Bensch?

A. First Page 3?

Q. The second Page 3.

A. Second Page 3.

Q. Subparagraph E.

A. At the bottom; "Issuance of Stock."

Q. And this provision lists all the shareholders, the  
amount of stock being issued and other contributions,  
is that correct?

A. Yes.

Q. All right, and it says under the top left-hand or  
right hand column on Page 4, the following page,  
"Consideration Paid."

A. Correct.

Q. And by the shareholders Bill Passaloukas and Susie  
Passaloukas, it says \$30,000, is that correct?

A. That's correct.

Q. And by Gary Bensch and Cynthia Bensch as joint  
tenants and rights of survivorship, it says  
consideration paid \$30,000, is that correct?

A. That's correct.

BY MR. PAPE:

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Q. \$561.00 a month, is that correct?

A. The additional rent that was agreed upon?

Q. Yes, sir.

A. I believe that is correct.

Q. All right, and so you and Mrs. Bensch were refunded \$561.00 times four months, is that correct?

A. Yes.

Q. Okay, so and the other contribution you were refunded was when Zorbas, Inc. paid you -- reimbursed you for some insurance, is that correct?

MR. CLABAUGH: I believe we stipulated to that, but I don't believe that's where the -- Zorbas didn't do it; it was Kinghorn Insurance.

MR. PAPE: Right.

BY MR. PAPE:

Q. Let's look at your list of contributions.

MR. CLABAUGH: Frank, if you want to put it in there, it's not in the documentation.

MR. PAPE: I'll get it, thank you.

BY MR. PAPE:

1 Q. On your Plaintiffs' Exhibit No. 4 let's look at  
2 the next to last page where you contributed the sum of  
3 \$2,151.00 to Kinghorn Insurance. Do you understand  
4 that?

5 A. Yes.

6 Q. All right, and you bought first that sum of  
7 \$2,151.00 is that correct?

8 A. That's correct.

9 MR. CLABAUGH: Your Honor, we will  
10 be glad to stipulate that the refund  
11 that was paid, the \$400 --

12 MR. PAPE: Frank, I haven't gotten  
13 to that issue yet.

14 Mr. CLABAUGH: Oh, I am sorry.

15 MR. PAPE: I mean, this is the same  
16 effort I am going through with respect  
17 to Plaintiffs' Exhibit No. 2 the  
18 Passaloukases were refunded some of  
19 their contributions, you all had not set  
20 forth those out in your statement and I  
21 just wanted the Judge to understand that  
22 the Bensches have been refunded this.  
23 Can I go on?  
24  
25

MR. CLABAUGH: Sure.

MR. PAPE: Oh, okay.

1 BY MR. PAPE:

2 Q. So these are your refunds, \$561.00 x 4 that's  
3 \$2,151.00 for the insurance and then you were also  
4 refunded a sum of \$1,833.32 for a hot water heater. Is  
5 that correct?  
6

7 MR. CLABAUGH: I'm sorry, what was  
8 the question? I'm sorry, I wasn't  
9 paying attention.

10 BY MR. PAPE:

11 Q. In addition.

12 A. Yes.

13 Q. You were refunded this \$1,833.32?

14 A. Yes.

15 Q. So if we total all of this up, you received  
16 refunds of \$6,288.32. Have you all had a chance to add  
17 those figures up so we can move on if you all will  
18 stipulate that that's the amount of the refund.  
19 Somebody have a calculator.  
20

21 MR. CLABAUGH: Whatever it is, it  
22 is.  
23

24 MR. PAPE: If you want to examine  
25 that, and there's a calculator, to check  
on the contributions of Plaintiffs'

1 Q. Well you have corrected that, thank you. Now, Mr.  
2 Bensch after you all ejected Zorbas, there was an  
3 insurance policy that we just referred to that was  
4 still in place, is that correct?

5 A. Yes.

6 Q. All right, and for a period of time you operated  
7 the restaurant under force of that policy, is that  
8 correct?

9 A. I can't say yes or no to that. I am not sure; I  
10 did not handle that.

11 Q. Was it Mrs. Bensch who handled that?

12 A. I believe so.

13 Q. Now going back to this Plaintiff's Exhibit No. 11  
14 the Written Consent, look at Page 5, Subparagraph F  
15 which refers to Shareholder Loans. Are you familiar  
16 with those provisions?  
17

18 A. I am familiar with them, yes.

19 Q. And it says under Subparagraph F-1 it says the  
20 following is a listing of the shareholders, the amount  
21 and the terms and security being provided for loans  
22 being made by the shareholders to the corporation.  
23

24 MR. CLABAUGH: Your Honor, we are  
25 back to the same thing, the document  
speaks for itself.

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anyone will be able to pull this document up as an exhibit and the social security number so at least for these if you all would cross off the social security number. This is probably already in anyway.

MR. PAPE: Monique, if you would remind me at the end of the trial to go ahead through these documents and redact those social security numbers.

MR. CLABAUGH: Don't do it now.

BY MR. PAPE:

Q. Now, when you and Mr. Passaloukas got together in January or early, I believe you said, in 1999 to discuss the construction leasehold improvements, you told him that these leasehold improvements would be commenced right away and you believed you could get them completed within a month, is that correct?

A. Oh, I don't think I told him that, but we certainly didn't expect it quite to go as long as it did, however, but we had permits to get and then we got turned down with the first inspection of Bill's kitchen.

1 Q. Okay, when was that? When did you get turned down  
2 on the inspection of his kitchen?

3 A. That's how we found out about the hot water  
4 heater.

5 Q. I asked when?

6 A. I don't know, sir.

7 Q. But it was anticipated when you went into this  
8 agreement that you would be up and running sometime  
9 during the spring time, right?

10 MR. CLABAUGH: Your Honor,  
11 objection again on the grounds of  
12 relevance.

13 COURT: What is the relevance, Mr.  
14 Pape.

15 MR. PAPE: Well, the relevance goes  
16 to the equities of the situation that  
17 the Bensch's' delays in completing the  
18 construction of the improvements led to  
19 some of the financial difficulties that  
20 they ultimately found themselves in.  
21 That if the leasehold improvements had  
22 been completed in the springtime, as I  
23 think the testimony is going to be, they  
24 would have been up and running for the  
25

1 season and not having waited until  
2 August 15<sup>th</sup>.

3 COURT: Is it your theory that the  
4 Benschés intentionally delayed the  
5 completion to gain some sort of  
6 advantage?

7 MR. PAPE: I don't have a theory  
8 about that. It's a fact -- whether it's  
9 a fact, I don't know. I can't define  
10 what their intentions were.

11 MR. CLABAUGH: Your Honor, --

12 COURT: I mean, do you have any  
13 evidence of any intentional delay which  
14 would or was it simply that it took a  
15 little longer?  
16

17 MR. CLABAUGH: Your Honor, the  
18 plans -- Mr. Passaloukas did the plans  
19 for the restaurant and then departed for  
20 Greece. It turned out that the building  
21 inspector --  
22

23 MR. PAPE: He's testifying.

24 COURT: We don't really need to get  
25 into the testimony. I think it is  
probably irrelevant, Mr. Pape, unless

1 your theory is that the Benschs somehow  
2 - the Benches did it on purpose for  
3 purposes of getting some pertinent  
4 advantages of the partnership as a  
5 landlord, but I think you were about to  
6 tell me or maybe you told me a minute  
7 ago, you didn't really have any evidence  
8 as to that.

9 MR. PAPE: No, as far as  
10 intentional -- but I mean there might be  
11 some inferences. I think I read a case  
12 not too long ago that sometimes you get  
13 -- infer facts from other facts and  
14 that's where the matter comes --- where  
15 you get the heart of the matter in  
16 proving these sorts of intentions.

17 COURT: I know, but I would rather  
18 not go on a fishing expedition for  
19 inferences, if that's not really your  
20 case anyway.

21 MR. PAPE: Well, I will wait for  
22 Mr. Passaloukas to put up that sort of  
23 testimony. I may be finished, but I  
24 will see.  
25

BY MR. PAPE:

1 Q. Let me ask you a question about the value of the  
2 leasehold improvements on January 8, 2000. Had the  
3 leasehold improvements diminished in value between the  
4 time you installed those leasehold improvements or were  
5 they worth about the same amount of money?  
6

7 MR. CLABAUGH: Your Honor, again, I  
8 would object in terms of the -- and this  
9 goes to the heart of the case, I  
10 understand. But in terms of what the  
11 value of leasehold improvements made to  
12 a tenants' property, what they are worth  
13 after eviction is irrelevant and  
14 immaterial.  
15

16 COURT: That may be, but I will  
17 still allow him to make a record on it.  
18 You may answer the question, Mr. Bensch.

19 BY MR. PAPE:

20 A. I would say they would be worth less.

21 Q. How much less?

22 A. That would be a guess. Do you want me to guess?

23 Q. No, do you remember giving your deposition in this  
24 case?  
25

A. I do.

1 became somewhat inoperational and imperfect. The  
2 listed -- but they were done right to the start with,  
3 otherwise it would have been fixed earlier." I have no  
4 idea what that means.

5 Q. Okay and my next question was "Were they still as  
6 valuable?" And what was your answer?

7 A. "Well", is the first word --

8 Q. Just go ahead

9 A. "They were used and the damage" --

10 Q. If you don't mind, start over. I want to be sure  
11 the record is clear about this. Just go ahead and read  
12 the words the way they were read without adding any  
13 embellishment.

14 A. I did. "Well, they were used and the damage to  
15 the front, the door was working perfectly when I put it  
16 in. It wasn't damaged. It wasn't messed up until  
17 Bill's people pulled an oven through it -- pulled an  
18 oven, a huge oven, through the front door and broke the  
19 hinges.

20 Q. Then I asked you the question "That is what you  
21 are claiming?" And then your answer was?

22 A. "Well, he knows it. He helped push it through the  
23 door. He watched them push it through the door."  
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COURT: I would -- Mr. Pape, if you would, ask him questions. If his answer does not comport with his prior answers, I am happy to have you impeach him on his deposition. But just having him read the prior deposition --

MR. PAPE: Okay.

COURT: -- I think is improper.

BY MR. PAPE:

Q. You remember me asking you then -- I asked you the question "So they were not as valuable in January of 2000 as they were in August of 1999 and what was your answer?"

A. My answer is today --

Q. No, what was your answer then?

A. "To some degree, yes, a small amount."

Q. And then I asked you "How small of an amount?" And what was your answer?

A. "Well, the carpet showed some wear, the front door was damaged, the rear door was damaged by servicing it. So they needed some general maintenance at that point in time and probably had damage to the assets to the tune of two, three hundred worth of maintenance."

1 Q. Three hundred dollars worth of maintenance, is  
2 what you answered then?

3 A. That's what it says.

4 Q. And so then I asked you "So if you -- it initially  
5 cost you \$75,000 to install those leasehold  
6 improvements, the value as of January, 2000 would have  
7 been \$74,700.00?" And what was your answer?

8 A. "I would say no more than \$500.00 worth of --

9 Q. -- deterioration in value, correct?" And then you  
10 said I would -- didn't you answer that at that time  
11 that I would say because it still would have that --

12 MR. CLABAUGH: Judge, again.

13 COURT: Mr. Pape, if you don't mind  
14 asking the questions and then again if  
15 his answers do not comport with the  
16 prior testimony, --

17 BY MR. PAPE:

18 Q. You said at that time at your deposition that if  
19 the leasehold improvements were worth \$75,000 when you  
20 installed them, they were still worth at least  
21 \$74,500.00, is that correct?

22 A. Are you still reading?

23 Q. No, I am asking you a question.  
24  
25

1 Q. And as of January, 2000 the leasehold improvements  
2 were worth no more or it depreciated no more than  
3 \$500.00 in value?

4 MR. CLABAUGH: Asked and answered.

5 COURT: Well, I will let him answer  
6 it, but I think it has been asked and  
7 answered several times, but you may  
8 answer Mr. Bensch.

9 MR. BENSCH: Am I going to guess  
10 again or make a statement of what I  
11 thought it was worth back then?

12 BY MR. PAPE:

13 Q. Well you are in the construction business, is that  
14 correct?

15 A. I also suffered a stroke and I am not able to  
16 think clearly.

17 Q. All right, and back in October, 2001 you testified  
18 that the leasehold improvements had diminished in value  
19 no more than \$500.00, is that correct?

20 A. That's what I thought at the moment, back then. I  
21 had a stroke within a year or two of that statement. I  
22 am a little better off now.

23 Q. Well, you told me that you had the stroke in early  
24 1999, is that correct?

1 A. And I have been improving since about 1993 -- I  
2 mean 2003.

3 Q. You didn't say on the record at that time that you  
4 were suffering from any disabilities, did you?

5 MR. CLABAUGH: Your Honor, --

6 A. I believe I did, yes.

7 BY MR. PAPE:

8 Q. Was Mrs. Bensch suffering from any disability,  
9 mental disability at that time?

10 MR. CLABAUGH: Objection, Your

11 Honor.

12 COURT: I will allow him to answer.

13 A. No.

14 Q. Okay, and she was present at that deposition when  
15 you gave that answer?

16 A. Yes.

17 Q. Do you recall this was a joint deposition of both  
18 yourself and Mrs. Bensch, is that correct?

19 A. That's correct.

20 Q. All right, so at one point in time I asked her  
21 some questions from time to time, is that correct?

22 A. Yes, sir.

23 Q. And I would ask you questions from time to time?

24 A. That is correct.

1 MR. CLABAUGH: I would assume these  
2 were two separate questions?

3 MR. PAPE: No.

4 COURT: I never heard of --

5 MR. CLABAUGH: I have never heard  
6 of two parties --

7 MR. PAPE: Well they had requested  
8 it and I wanted to accommodate it and if  
9 you will take a look at the deposition,  
10 the deposition of Cynthia Bensch and  
11 Gary Bensch --

12 MR. CLABAUGH: Simultaneously? I  
13 have never heard of such a thing.

14 MR. PAPE: Well, it is what we did.

15 COURT: I can't think of a Rule  
16 that prohibits it, I guess.

17 MR. CLABAUGH: And they were both  
18 under oath at the same time?

19 MR. PAPE: Yes.

20 MR. CLABAUGH: Where is that? I  
21 want to see that.

22 COURT: Joanne, have you ever done  
23 a joint deposition?

24 COURT REPORTER: Never.

BY MR. PAPE:

1 Q. Look at Page 30. After you said that you would  
2 say that it is an accurate statement, i.e. that the  
3 improvements had diminished in value of no more than  
4 \$500,000. I then addressed Mrs. Bensch, is that  
5 correct?  
6

7 MR. CLABAUGH: Your Honor, wait a  
8 minute. I think I object to this. I am  
9 looking -- I have never heard of such a  
10 thing and it doesn't look like --

11 MR. PAPE: Well, take a look at it.  
12 This is the original deposition.  
13

14 MR. CLABAUGH: But it looks like it  
15 is all Mr. Bensch --

16 MR. PAPE: Well, it's mostly but --

17 MR. CLABAUGH: Through 160 pages --

18 MR. PAPE: In this one instance I  
19 addressed the question to her and on  
20 Page 4 it says, "Cynthia Bensch and Gary  
21 Bensch, having been produced and first  
22 duly sworn as witnesses, testified as  
23 follows."  
24

25 COURT: Mr. Pape, are you going to  
ask Mr. Bensch to testify as to what

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Mrs. Bensch testified to at her deposition?

MR. PAPE: Well, he was there and -

COURT: I think that is improper examination. Certainly you can call Mrs. Bensch and ask her if she comes up with an answer different than what she testified to, I think it would be appropriate to --

MR. PAPE: All right. Let me look through my notes and see if I have anything else.

BY MR. PAPE:

Q. At the earlier trial of the case, Mr. Bensch -- let me ask -- strike that and I will ask it a different way. When you all took over possession of the premises, you found a cash bag, is that correct?

A. That's correct.

Q. Okay. And there was \$404.00 in cash in it, is that correct?

A. I believe that's correct.

Q. And there were some stale checks in it? Or checks in it that subsequently went stale, is that correct?

1 A. I believe that is correct.

2 Q. All right. And the next Exhibit is what, 13 I  
3 believe?

4 COURT REPORTER: 13.

5 MR. CLABAUGH: May I see a copy of  
6 it?

7 MR. PAPE:

8 Q. If you will, identify Plaintiffs' Exhibit 13 and  
9 tell me whether or not that -- first of all, it is a  
10 note of your attorney, Brent Kiker at that time that  
11 says he has received the sum of \$404.00 for escrow  
12 account of Kiker and Douds, P.A. for the benefit of the  
13 Clerk of Court regarding Passaloukas vs. Bensch,  
14 January 31, 2002. Is that right?

15 A. That's correct.

16 Q. So your attorney Brent Kiker took possession of  
17 the \$404.00 in cash?

18 A. We turned it over to the Court as soon as it was  
19 asked about.

20 Q. But actually Mr. Kiker took the money to hold it  
21 in escrow. Do you agree with that?

22 A. I am not really sure. It's indicated here.  
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1 Q. And you agree that that -- you agree that that's  
2 what happened on that day and that that's his signature  
3 on the document?

4 A. I don't recognize his signature.

5 MR. PAPE: Your Honor, if he'll  
6 just stipulate to this, we can move on  
7 to some other things. I hate to argue  
8 or spend too much time -

9 COURT: No, thank you. What  
10 happened to the \$404.00, do you know?

11 MR. CLABAUGH: It was split.

12 MR. PAPE: No, Mr. Kiker still has  
13 it as far as I know.

14 MR. CLABAUGH: No, Judge Kemmerlin  
15 divided it up and gave each party  
16 \$202.00 at the trial.

17 MR. BENSCH: You got \$202.00 of it.

18 MR. PAPE: That's news to me and  
19 you want --

20 MR. CLABAUGH: Ask your client.

21 MR. PASSALOUKAS: I don't remember  
22 that. I don't remember getting any  
23 money.

24 MR. BENSCH: Oh yeah.

1 MR. PASSALOUKAS: I don't remember  
2 getting any money. I thought it was in  
3 escrow.

4 MR. BENSCH: It's stated in Judge  
5 Kemmerlin's --

6 MR. CLABAUGH: I don't have any  
7 objection to the first page -- I  
8 certainly --

9 MR. BENSCH: He divvied it up.  
10 Right here at this table. He gave him  
11 half and gave my attorney half.

12 MR. PASSALOUKAS: Put it in a bag  
13 or something and was going shopping.

14 MR. BENSCH: This was your green  
15 bag.

16 MR. PAPE: Your Honor, this is  
17 previously in the earlier record and I  
18 think if you will probably look through  
19 the court records, you will find this  
20 document which is Plaintiffs' Exhibit 11  
21 all the originals including --  
22

23 MR. CLABAUGH: Now, I have no  
24 objection -- I have no objection to the  
25

1 first page. I object to all the rest of  
2 it.

3 BY MR. PAPE:

4 Q. Now, you found a cash bag which not only contained  
5 \$404.00 in cash but several other documents, is that  
6 correct?

7 A. Seems like there were some checks, but I don't --  
8 I remember the cash was in there and we just -- I said  
9 keep it exactly in there and close it up and we turned  
10 it over to --

11 Q. Okay, well there was \$404.00 in there?

12 A. That is correct. I recall it was \$400 and a few  
13 dollars.

14 Q. Okay, I am not going to go into the other issues.  
15 He has admitted it was there and my client is going to  
16 testify that he never got it.

17  
18 MR. CLABAUGH: I think it is in  
19 Judge Kemmerlin's Order.

20 MR. BENSCH: It was given --

21 MR. PAPE: I mean if it is, it is  
22 and I don't have any complaint about  
23 that, but anyway it is so small I won't  
24

25 --

1 MR. PASSALOUKAS: Can't do nothing  
2 to get it.

3 MR. PAPE: I won't go into that.

4 COURT: So it was never --- it was  
5 just cash the whole time?

6 MR. PAPE: Yes, there was \$404 cash  
7 and there were stale checks totaling  
8 about ninety something dollars, that's  
9 all.

10 COURT: Gotcha. You just mentioned  
11 an escrow account at the law firm or  
12 something but apparently never made it  
13 there. It just stayed in the bag,  
14 right?

15 MR. PAPE: I mean if -- if you  
16 would permit one of us to call Brent  
17 Kiker and ask him if he is still holding  
18 that \$400 --

19 COURT: If it is important to you  
20 all, but it sounds like it. Whatever  
21 you all want to do.

22 Mr. BENSCH: No doubt he does not  
23 have it, 100%, Mr. Pape.  
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MR. PAPE: Well, I respect your view of it, but I don't have any memory of it and I don't have any recollection of Judge Kemmerlin's Order addressing that.

COURT: Who ended up with the bag?

MR. BENSCH: Well, it was --

MRS. BENSCH: The Judge.

MR. PAPE: You got the empty bag, but --

MR. BENSCH: No, I don't have it now, do I? Who does have it?

MR. CLABAUGH: We will look and see. My understanding is that Judge Kemmerlin said it wasn't fighting over it and he just divided it up. But we will see if we can substantiate that.

MR. PAPE: Okay. All right, I don't have any further questions at this time.

COURT: All right, well let's recess until tomorrow morning. What time is good for --

MR. PAPE: 9:00.

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MR. CLABAUGH: 9:00 is fine. I would ask Mr. Pape if he can tell me who he is anticipating calling tomorrow so I know whether or not to make arrangements to have any of our witnesses here, or I need to tell them they need to come in April.

MR. PAPE: Well, I am not -- I am anticipating calling Mr. and Mrs. Passaloukas. I mean I am -- I assume you have some cross-examination or maybe you want us to move on with our witnesses and then --

MR. CLABAUGH: Yeah.

MR. PAPE: Okay. So I will put up my clients tomorrow morning?

MR. CLABAUGH: You are not having the accountant?

MR. PAPE: Well, Your Honor, here's what I would like to request is that we save the accountant until you have decided what assets belonged in the pot and the value of those assets.

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COURT: Do you mean use the  
accountant just like a spread sheet?

MR. PAPE: Yes.

COURT: I could probably do that.  
I mean here's what I would love to hear  
either tomorrow or some point in April  
and that's the things the Court was  
interested in. I understand you all  
aren't going to agree on what the value  
of equipment and furnishings and other  
items at the time of the eviction were  
or at least if I could have side by side  
two sheets that so I can figure it out.

MR. PAPE: Your Honor, you know, I  
think we have substantially put --  
identified the assets. I mean we have a  
few more to identify tomorrow, but we  
have substantially identified the assets  
as well as the value. We believe the  
proceeds of the sale to Mi Tierra's  
belongs right there, \$75,000 and  
interest on those proceeds. I mean some  
of these other things are less  
important.

1 COURT: All right, you can add,  
2 just -- your case has just started; you  
3 are not finished. But at the end of it  
4 I would love to be able to easily figure  
5 out how do my own spreadsheet with or  
6 without an accounting and have something  
7 to substantiate --

8 MR. CLABAUGH: It is my  
9 understanding tomorrow you are just  
10 going to be calling the Passaloukas?

11 MR. PAPE: And I have got the  
12 deposition of Bob Steinberg.

13 MR. CLABAUGH: Okay, so you are not  
14 going to be calling Mr. Hale or --

15 MR. PAPE: Well, I don't know if I  
16 am going to need him or not. I mean  
17 some of these witnesses is going to  
18 depend on the rest of the -- I mean  
19 there might be a need to call them, I  
20 don't know. I mean if -- but I just  
21 can't tell you how it's going to work  
22 out.  
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MR. CLABAUGH: Your Honor, you know -- I submit Plaintiff has to put up his entire case.

COURT: Well, he does, I don't think he is suggesting he doesn't. You just want to know what his entire case is at this point, but -- were there interrogatories that were responded to with what -- who the witnesses were?

MR. CLABAUGH: Yes.

MR. PAPE: Yes.

COURT: Okay, well who's on the list?

MR. CLABAUGH: Well, Mr. Hale was on the list.

MR. PAPE: Judge, in your original Pretrial Order, you ordered both parties to submit two weeks prior to the trial a list of witnesses that we were going to use. In the telephone conference that he had going back a month ago, I guess it was, at that time you again reiterated that and you asked us to exchange those lists. I gave Mr.

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Clabaugh my list. I have never received a list from him.

COURT: Well does your list have Mr. Hale on it?

MR. PAPE: Yes, it does.

COURT: Okay. Well that of course doesn't mean he has to use Mr. Hale.

MR. CLABAUGH: I am just trying to decide who we want to have here tomorrow.

MR. PAPE: You had two today.

MR. CLABAUGH: I submit -- yeah and we had two people that were here today. I submit to that if he's going you know his accountant, I mean that's the heart of the testimony. I submit he needs to put his accounting testimony in.

COURT: Well, he can try his case anyway he wants. If he feels he has put up enough, I am not going to force him to put an accountant up. I think -- working back to the strict accounting, but however you all want to do it.

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MR. CLABAUGH: Well what I mean is  
if he doesn't put his accountant up then  
--

MR. PAPE: Your Honor, to me it is  
a strict accounting when I produce  
evidence that there were \$30,000 worth  
of lease -- of kitchen equipment and  
furnishings that my client put in -- all  
that has been admitted, that those  
assets were taken over by the Benschs  
with respect to a corporation they  
owned, Nicoli's and they sold those same  
assets to Mi Tierra's for \$75,000.00. I  
--

COURT: I understand your case. I  
am sorry, I didn't mean to create an  
opening to argue the -- to do a closing  
argument.

MR. PAPE: No, no that's all right.

COURT: But it's your -- its your  
Plaintiff and I am you know whatever  
witnesses you would like to have that's  
--

1 MR. CLABAUGH: My concern is the  
2 Court of Appeals said a strict  
3 accounting. Your Honor ordered that he  
4 had -- Plaintiff had the burden of proof  
5 to get an accountant to put together --

6 MR. PAPE: No, it didn't say that.

7 COURT: Well anyway, why don't we  
8 do this, rather than argue about it at  
9 this hour. We know this isn't going to  
10 finish tomorrow. We know when it  
11 hopefully will finish which is in April  
12 so we have plenty of time to figure  
13 these things out. So whether or not he  
14 can get to the accountant is  
15 questionable.  
16

17 MR. CLABAUGH: Okay, well then I  
18 would assume that we will put up no  
19 testimony tomorrow and we will commence  
20 our case in April.  
21

22 MR. PAPE: I don't think that's a  
23 proper assumption. I think I can have  
24 my clients' testimony finished within an  
25 hour.

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COURT: Well, I will tell you what. Certainly when he is finished with his testimony, we will give you all the time you need to get your witnesses here. As I understand many are coming from Hilton Head or all of them?

MR. CLABAUGH: Yeah.

MR. PAPE: But my question, Judge, all my accountant is going to do is put this stuff on an excel spread sheet and add up the figures. Now, if you are telling me that you can do that on your excel spread sheet then that's fine with me. For example, if we have got \$75,000 value from the sale of the equipment and furnishings to Mi Tierra's then you can run interest at 8 ¾% on that from the date of the sale May 2, 1999 or 2000.

MR. CLABAUGH: The problem is Judge with this testimony there is nothing new being put in the record that wasn't in the record that went up to the Court of Appeals. Nothing.

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COURT: I share your concern, although I can't find a definition of strict accounting in the law. That is what's so strange about the whole thing, because I have googled and West Law'd and Black's Law Dictionary and done everything looking for strict accounting and I will be darned if I can find exactly what they meant by it but --

MR. PAPE: Judge, can I comment on that just one second?

COURT: Of course.

MR. PAPE: In the cases that I have read from South Carolina, what the Code has continually said is that -- is that in order to prove a fiduciary to prove his case by way of a strict accounting, he just can't say I did these things or I spent these things. He's got to have invoices and checks.

COURT: No, I agree, but I can't find a definition of it. You got a definition of a strict accounting?

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MR. PAPE: Well, invoices and checks. It doesn't require us to go out and hire an accountant to look over or pour over books if we can present these things simple and straightforward to the Court.

COURT: Well, to get back to what Mr. Clabaugh was saying, didn't you have these things in front of Judge Kemmerlin?

MR. CLABAUGH: Yes.

MR. PAPE: Yes, we did.

COURT: But then why on earth did the Court say it wasn't enough?

MR. PAPE: I don't know. Former counsel of the Bensches and I talked about that. Both of us scratched our heads and we even went up there and both parties begged the Court of Appeals to go ahead and make the decision and not to send it back, but they sent it back for the reason I believe that Judge Kemmerlin had not -- gone through the process of identifying the assets and

1 valuing those assets and determine how  
2 they should be shared between the  
3 parties. I don't think it was our fault  
4 that we didn't put in the evidence. I  
5 think it was the problem that the Court  
6 did not engage in that process and  
7 perform its functions. With all  
8 difference to Judge Kemmerlin, I mean,  
9 you know and of course we may end up the  
10 same place we were before but I think  
11 you are going to sit down in your  
12 chambers and you are going to ask  
13 yourself was that -- is that \$75,000 a  
14 proper asst that belongs to Zorbas and  
15 if it was, you know should Zorbas then  
16 get interest on that up from the date of  
17 the sale up until the time of trial and  
18 so far what I've heard is that yes it  
19 is. Those were the same assets that  
20 were in there on January 8<sup>th</sup> are the same  
21 assets they sold on May 2<sup>nd</sup>.

24 COURT: Well let's do this. Again,  
25 I don't want to get into an argument,  
but for purposes of tomorrow, I am

1 assuming the Plaintiffs' case will go at  
2 least until lunch.

3 MR. PAPE: Right.

4 COURT: Is that a fair assessment?  
5 We can stop about lunch time and so  
6 Frank if your people at that point maybe  
7 on for one hour one and a half hours  
8 notice to get here. We will be very  
9 flexible to allowing --

10 MR. CLABAUGH: Of course, I have to  
11 put my clients on and I imagine their  
12 testimony will take -- may well take the  
13 balance of --

14 COURT: I don't think we are going  
15 to get to anyone tomorrow other than the  
16 people in the room. Based on the fact  
17 that we spent obviously a good bit of  
18 the day doing other than examining the  
19 witness, but yeah you still gotta do  
20 your case, Mr. and Mrs. Bensch, and at  
21 least one of your clients.

22 MR. PAPE: Well I have a deposition  
23 of my expert witness on the valuation of  
24 the restaurant.  
25

1 MR. CLABAUGH: Judge, Frank has a  
2 deposition of Mr. Bob Steinberg that we  
3 took last week. I am going to object to  
4 any of his testimony. You know,  
5 unfortunately this is the type of  
6 situation you know normally in a jury  
7 trial, the Judge can take a look at the  
8 deposition -- can look at the testimony  
9 and make a decision whether or not to  
10 exclude it or not. I understand here,  
11 while I object to it, in order for you  
12 to be able to make a ruling on my  
13 objection in terms of its admissibility,  
14 you have to go ahead and read the  
15 deposition first and then I have to ask  
16 to unring the bell. But --

18 COURT: That happens a lot in here.

19 MR. CLABAUGH: Mr. Steinberg was  
20 called upon to give an evaluation of the  
21 business as it was sold to Mi Tierra.  
22

23 MR. PAPE: Well, why don't we let  
24 the deposition read for itself.  
25

1 COURT: Why don't we -- since it is  
2 5:00 something, why don't we deal with  
3 that tomorrow.

4 MR. CLABAUGH: Well my suggestion  
5 was going to be that we give you --  
6 Frank that you give it to the Judge and  
7 if you want to look at it. It's only 15  
8 pages. It is very short.

9 COURT: But, I mean, can I do that  
10 first thing in the morning?

11 MR. CLABAUGH: Sure. I can't  
12 believe you wouldn't want this for the  
13 evening.

14 COURT: I have to pick up my  
15 daughter from dance, that's --

16 MR. PAPE: There it is, it is on  
17 your desk.

18 COURT: Put it right here and I am  
19 going to lock this room.

20 MR. CLABAUGH: Your Honor, I would  
21 point out on the issue of accounting, in  
22 your Order you said that the Court of  
23 Appeals after reviewing and finding an  
24 insufficient order to strict accounting  
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and that the Plaintiff should undertake  
this accounting immediately. The  
accounting shall be performed by an  
accountant and shall include . . . .

COURT: I remember, but this case  
isn't closed yet, so I am I am in hopes  
it brings a turn around, so -

(WHEREUPON, THE  
HEARING WAS  
ADJOURNED.)

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MR. CLABAUGH: Your Honor, I have a continuing objection to anything -- subsequent leases after the eviction.

COURT: This was not the sale, this was the lease, is that correct?

MR. PAPE: That's correct.

COURT: Was this already in evidence? I can't remember.

MR. CLABAUGH: No.

MR. PAPE: No.

MR. CLABAUGH: You know we agreed that the sale could go in but not -- you know the subsequent lease.

COURT: I - it was described as Exhibit 14. I didn't think we got that high yesterday. Where did we -- you mean 14 in the deposition or --

MR. PAPE: No, this is Exhibit 14 in this record we are making Your Honor. We had got as high as Plaintiffs' Exhibit 13.

MR. CLABAUGH: He is seeking to introduce it for the first time.

COURT: Oh I see.

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MR. CLABAUGH: I had no objection -  
I did have an objection but I understood  
the Court's ruling with regard to the  
sale of the equipment, but I do object  
to subsequent leases.

COURT: Yeah and I sustain that.

MR. PAPE: Your Honor, for the  
record if you don't mind.

COURT: You are going to proffer  
them?

MR. PAPE: Yes.

BY MR. PAPE:

Q. What is Plaintiffs' Exhibit No. 14?

A. It's a Town Center commercial lease.

Q. Okay. And that's a lease agreement with Mi  
Tierra's for Unit 101, is that correct?

A. With an addendum for Unit 102.

Q. All right, but the lease itself is for Unit 101,  
right?

A. Yes.

Q. And the addendum for 102 is just an offer -- a  
right of first refusal to rent Unit 102 is that  
correct, an addendum to lease?

1 A. It's also included on the first page of the leased  
2 premises.

3 Q. But -- the first page of the leased premises only  
4 refers to the addendum is that correct?

5 A. Well this lease was contingent on that addendum.

6 Q. Well, the lease speaks for itself and then once  
7 that lease expired, did you enter into another  
8 subsequent lease agreement with respect to Unit 101  
9 with Mi Tierra's in April of 2005?

10 MR. CLABAUGH: Same objection, Your  
11 Honor.

12 COURT: Sustained, but I will let  
13 him proffer.  
14

15 BY MR. PAPE:

16 Q. And I hand you Plaintiff's Exhibit 15 and ask you  
17 if that is the lease agreement.

18 A. There was another -- let's see this one -- '05.  
19 Well, this is based on two units because the rent  
20 became \$4200.00.

21 Q. And what part was allocated for Unit 101?

22 A. It wasn't allocated.

23 Q. Isn't there a handwritten allocation on the back?

24 A. There's some notes. I don't know what they  
25 pertain to.

1 Q. Are those your handwritten notes?

2 A. No.

3 Q. Doesn't it say that \$2543.00 is allocated to Unit  
4 101?

5 MR. CLABAUGH: Your Honor, the  
6 witness said that - it's not her notes  
7 and she doesn't know who did it.

8 COURT: Sustained.

9 BY MR. PAPE:

10 Q. Let me ask you to identify Plaintiffs' Exhibit 16.  
11 You've seen that before, have you not?

12 A. This morning.

13 Q. And this is -- represents an accounting of the  
14 total rents that Mi Tierra's -- that Gary and Cynthia  
15 Bensch received from Mi Tierra's for the lease of Unit  
16 101 from May 2, 2000 through April 7, 2006 is that  
17 correct?  
18

19 MR. CLABAUGH: Your Honor,  
20 objection on two grounds. First of all,  
21 what subsequent tenants may have paid  
22 pursuant to their lease is irrelevant to  
23 this suit. Furthermore, this Court is  
24 already aware the lease agreement  
25 between -- with Zorbas was a two year

1 lease with negotiable rights of renewal.  
2 Counsel is seeking to introduce  
3 documents for leases from another tenant  
4 not only for the first two years, but  
5 for four additional years.

6 MR. PAPE: Well, Your Honor has  
7 already ruled on that. I am just making  
8 a proffer for the benefit of the Court  
9 of Appeals, Judge.

10 COURT: I agree with your  
11 objection. I sustain it, but I will  
12 allow Mr. Pape to continue on a little  
13 longer just to make himself a record for  
14 the Appellate Court on this.

15 MR. CLABAUGH: I have no problem  
16 with that, Your Honor.

17  
18 BY MR. PAPE:

19 Q. And these are the total rents during that period  
20 of time that you received from Mi Tierra's for Unit  
21 101?

22 A. Well, you haven't really stipulated that -- this  
23 is too general. It doesn't really address this  
24 information.  
25

1 Q. Well, didn't you receive the document just a  
2 minute ago and tell me that it was accurate?

3 A. Yes, I did.

4 Q. Okay, and so it is an accurate statement of the  
5 rents that you received right?

6 A. Does that say for Unit 101 and 102, what is that  
7 document say?

8 Q. It says Unit 101.

9 A. Where does it say that?

10 Q. Well, it is for Unit 101. Didn't you understand  
11 when you received it; it was for Unit 101?

12 A. Well, actually we didn't do the math on the next  
13 years and they don't concur with the math if you  
14 multiply it,  $12 \times \$4200$  of this lease. I don't think  
15 the math is correct.

17 Q. Whose language -- whose handwriting is this?

18 A. I don't know.

19 Q. You don't know, but would you concur then that it  
20 at least represents except for the last -- the sixth  
21 year it represents rents that were received by Mi  
22 Tierra's through all five years?

24 A. Were received by Mi Tierra's?

25 Q. Received by the Benschers from Mi Tierra's?

A. No.

1 Q. I am sorry, I thought you had told me before we  
2 went on the record that this was correct and what are  
3 you saying is incorrect about it?

4 A. That document doesn't have what it's for. It  
5 says, "Rents received from Mi Tierra's", but it doesn't  
6 say for what space.

7 Q. All right, well let me ask you then.

8 A. This lease includes two spaces.

9 Q. I understand. Well, let's look at just the first  
10 lease for the first year. What rents did you receive  
11 for the first year from Mi Tierra's? Is this figure  
12 correct for the first year for Unit 101, Twenty One  
13 Thousand One -- I mean \$29,130.00?

14 A. Yes.

15 Q. That's correct? So the first figure of \$29,130.00  
16 for the first year is correct for Unit 101, is that  
17 correct?  
18

19 A. That's correct.

20 Q. All right, how about the second year the figure of  
21 \$31,736.64 for Unit 101, is that correct?  
22

23 A. Mr. Pape, within the first year September 2<sup>nd</sup>  
24 another lease was signed. This is a negotiated renewal  
25 of that lease that starts in May of 2000 --

Q. 2000?

1 A. But it goes to -- this is 2000 but it includes  
2 Unit 101 and 102 because the rent changes according to  
3 the amendment.  
4 Q. Well let's look at it. What it says here, Ms.  
5 Bensch, is that the first year of the rents are  
6 \$1850.00 for the first two months, and then for the  
7 following ten months its \$2543.00 for Unit 101, is that  
8 correct?  
9 A. Could you give me a minute?  
10 Q. Yea, sure.  
11 A. Thank you.  
12 Q. If you want to take time, I have a calculator  
13 here.  
14 A. Okay.  
15 Q. I thought we had done this.  
16 A. This is the first document Unit 14, but we are  
17 talking about 15.  
18 Q. No, no, no, I am only talking about the second  
19 year of the lease agreement. Let's look -- look  
20 strictly at Plaintiffs' Exhibit No. 14.  
21 A. Yes.  
22 Q. And now you have already admitted that with  
23 respect to the lease for Plaintiffs' Exhibit 14 you and  
24  
25

1 Gary Bensch received from Mi Tierra's the sum of  
2 \$29,130, is that correct?

3 A. That's correct.

4 Q. And then in the second year the rents went up 9%,  
5 is that correct?

6 A. Sir, it's not truthful for me to say I only  
7 received that amount of money from Mi Tierra's because  
8 in September of 2000 we combined those units, and we  
9 had -- you don't have a copy of that interim lease  
10 which says it was all changed. All this was changed.  
11 This document here starts in '05 to '10, but there was  
12 an interim lease with Mi Tierra's.

13 Q. Was there another lease other than those two?

14 A. Yes.

15 Q. Do you have it with you?

16 A. No, I don't. Did you request it?

17 Q. I requested all of them, yes ma'am.

18 A. I don't know.

19 Q. For the second -- for the first year Mi Tierra's  
20 was operating under this lease, Plaintiffs' Exhibit 14?

21 A. That was the first document we ever signed with  
22 them in May of 2000 when they purchased Nicoli's from  
23 us.  
24  
25

1 Q. All right, and this is a lease agreement for a  
2 term of five years, correct?

3 A. It was.

4 Q. From May, 2000

5 A. With the addendum for '02. '02 became available  
6 in September of 2000 and all that was changed.

7 Q. But this is an agreement with respect to Unit 101,  
8 is that correct?

9 A. Right.

10 Q. Did the rents with respect to Unit 101 ever  
11 change?

12 A. Yes. It was combined with Unit 102.

13 Q. But you don't have any --

14 A. This document stipulates to that, but you skipped  
15 five years. This starts in '05 and goes to '10. There  
16 was another lease with Mi Tierra's.

17 Q. Did - you're saying then that you and Gary Bensch  
18 and Mi Tierra's abandoned this lease?

19 A. No, sir. We renegotiated the lease agreement of  
20 the parties.

21 Q. Well, did you receive any less than \$31,736.44 for  
22 the same year?

23 A. With the combination of Unit 101 and Unit 102 and  
24 the covered patio space, we received more.

1 Q. You received more?

2 A. Yes.

3 Q. But Unit 101 you received at least \$31,736.44?

4 A. It was never pro-rated that way. It was never  
5 stipulated that way.

6 Q. And for the third year from May 2, 2002 to May 1,  
7 2003 according to this lease you were to have received  
8 \$33,006.11, is that correct?

9 A. But that lease was not in effect in the third  
10 year.

11 Q. Please answer my question and then you can comment  
12 on it. But under this lease you were to have received  
13 at least \$33,006.11 for Unit 101 is that correct?

14 A. This lease was not in existence in the third year.

15 Q. Which lease was not in existence?

16 A. This lease.

17 Q. I understand what you are saying. Under this  
18 lease you would have received \$33,006.11 is that  
19 correct?  
20

21 A. Mr. Pape I don't know how else to say this lease  
22 was not in existence after September of 2000.

23 Q. And in the fourth year you would have received  
24 \$34,326.35 is that correct?  
25

1 A. If this had been a fact or an obligation or an  
2 agreement between us and Mi Tierra those figures I  
3 believe are accurate but that -- this was not the  
4 agreement we had legally been bound by.

5 Q. So can we agree that under this lease agreement  
6 these are the correct figures for the rents during  
7 those periods of time up through May 1, 2005, is that  
8 correct?

9 A. No sir.

10 MR. CLABAUGH: If that lease had  
11 been in effect.

12 A. If it had been in effect, but it was not in  
13 effect.

14 BY MR. PAPE:

15 Q. But if it was in effect, then those numbers are  
16 correct, correct?

17 A. Well, I don't know what would have been going on  
18 in the third year of my life that might have altered  
19 it, so I can't say that would have absolutely been  
20 going -- Gary and I were binding Mi Tierra to in three  
21 years after it was terminated when it was terminated.

22 Q. Where are those lease agreements now that you  
23 changed with Mi Tierra's?

24 A. It was renegotiated.

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Q. Where are they located now?

A. I don't have a copy of it right now.

Q. Where are they located?

A. I don't know.

Q. I mean apparently this trial is going to be adjourned until April. Will you agree to provide us with copies of those lease agreements?

A. Sure, I am sure Mi Tierra's has a copy of the interim lease.

Q. Okay. All right, but again assuming that this lease 14 was in effect then the figures in Plaintiffs' Exhibit 16 are correct?

A. No, you said, assuming this is in effect. I said it was not in effect.

Q. Well, but I am asking you to assume that it was in effect.

MR. CLABAUGH: Let's make it easy.

We will stipulate that if that lease were in effect then that's the correct arithmetical computation --

MR. PAPE: On Plaintiffs' Exhibit

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MR. CLABAUGH: -- up through the fifth year. My understanding is that it had been sold for the sixth year.

COURT: So, my understanding of the stipulation, the math is correct. However, the lease was not in place.

MR. CLABAUGH: Correct.

MR. PAPE: It was modified in some respect.

COURT: Okay.

BY MR. PAPE:

Q. Now you sold the whole shopping center on April 7, 2006, is that correct?

MR. CLABAUGH: Your Honor, again I would impose an objection on the grounds of relevancy.

COURT: Yeah, I don't even see a theory under which they would matter.

MR. PAPE: Let me proffer the evidence Judge if I may.

COURT: I will let you proffer the sales price and go ahead.

BY MR. PAPE:

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MR. CLABAUGH: What number is that  
going to be, Frank?

MR. PAPE: 17.

BY MR. PAPE:

A. Okay.

Q. Is that your signature on that document?

A. Yes.

Q. Is that Gary Bensch's signature on that document?

A. Yes.

Q. And that represents a resolution of Nicoli's Café,  
LLC?

A. Yes.

MR. CLABAUGH: No objection.

BY MR. PAPE:

Q. And basically if I can paraphrase it, it says that  
Nicoli's, Gary Bensch and Cynthia Bensch as members  
hereby resolve to hold in trust the assets of Zorbas,  
is that correct?

A. Correct.

MR. CLABAUGH: The document speaks  
for itself.

COURT: This is now Plaintiffs'  
what number?

MR. CLABAUGH: 17 Your Honor.

BY MR. PAPE:

1 Q. Now, Mr. Bensch testified to having some sort of a  
2 stroke, is that correct?

3 A. Yes.  
4

5 Q. When did he have his stroke?

6 A. The spring of '99 I believe.

7 Q. In the spring of '99 and I think he testified that  
8 as a result of that stroke it has affected his memory?

9 A. Yes.

10 Q. Have you noticed it affected his memory?

11 A. Yes.

12 Q. So when you suggested when he was giving his  
13 depositions at his earlier times that his testimony was  
14 affected by that stroke?

15 A. I didn't suggest that.

16 Q. Well, was his memory at -- during his testimony of  
17 his depositions affected by that stroke?

18 A. I have no way of knowing that.

19 Q. Okay, well let me ask you if you remember giving a  
20 joint deposition, didn't you?

21 A. Yes.

22 Q. And you gave your deposition on October 23, 2001  
23 is that correct?

24 A. Yes.  
25

1 A. This is a document to Zorbas at the Passaloukas'  
2 P. O. Box for a policy.

3 MR. CLABAUGH: Cynthia, please  
4 speak up.

5 A. Oh, I am sorry. This is a -- yeah, it appears to  
6 be an insurance invoice for Zorbas at P. O. Box 1667.

7 Q. And this refers to an insurance policy that Zorbas  
8 -- that originally you and Gary Bensch had paid for but  
9 for which you were reimbursed by Zorbas, is that  
10 correct?

11 A. Mr. Passaloukas called Kinghorn to acquire the  
12 insurance for Zorbas and he was unable to communicate  
13 with the agent and he called me and asked me to call  
14 them. We also had insurance with Kinghorn and so I did  
15 and so therefore I said I will issue my check and  
16 Zorbas can reimburse us.

17 Q. And that sum that was paid for the insurance was  
18 \$2,150.00 I believe?

19 A. Yes.

20 Q. All right. I am sorry, \$2121.00, correct?

21 A. Yes.

22 Q. Okay, and you advanced that money to Kinghorn and  
23 then Zorbas reimbursed you and Mr. Bensch for it?

24 A. Correct.

1 Q. So the policy was actually owned by Zorbas, is  
2 that correct?

3 A. That's correct.

4 Q. But when you all evicted Zorbas, the Kinghorn  
5 Insurance policy stayed in effect, is that correct?

6 A. Yes, it did.

7 Q. All right. And not only did it stay in effect as  
8 represented by this document on August -- on June 28<sup>th</sup>  
9 you all then terminated the policy, is that correct?

10 A. The agent called me about another policy that we  
11 had --

12 Q. Okay.

13 A. -- and reminded or asked me if I wanted to  
14 continue the Zorbas policy and I said what Zorbas  
15 policy? I had totally forgotten about it and she said  
16 that that's still in effect and that was the first I  
17 knew about it and so I said - well, terminate it today.  
18 Mr. Passaloukas should have terminated it in January,  
19 because it would have only been a four month premium  
20 and we could have all been reimbursed about \$800 a  
21 piece.  
22  
23

24 Q. But as a result of that transaction, you and Gary  
25 Bensch received \$481.00 upon termination of that  
insurance policy?

1 is just -- Defendants' Exhibit No. 1 is  
2 Defendants' claim of the Zorbas assets.

3 MR. PAPE: It is a  
4 mischaracterization of what we are  
5 claiming.

6 MR. CLABAUGH: You are the  
7 Plaintiff; I am the Defendant.

8 MR. PAPE: Oh, well, then he is  
9 leading the witness. I don't think --

10 COURT: It's cross-examination.

11 BY MR. CLABAUGH:

12 Q. The \$481.00 that you received, is that listed as  
13 an asset of Zorbas?  
14

15 A. Yes, it was.

16 Q. And had Mr. Passaloukas cancelled the policy when  
17 Zorbas was closed, would that number have been even  
18 greater?

19 A. Yes.

20 Q. I have no further questions of this witness.

21 MR. PAPE: Thank you, I don't have  
22 any further questions.  
23

24 MR. CLABAUGH: I move Defendants'  
25 Number 1 into evidence, Your Honor.

1 Q. Cynthia, whose responsibility was it to get  
2 insurance on the Zorbas' assets?

3 A. Mr. Passaloukas'.

4 Q. And he was unable to do so?

5 A. True.

6 Q. And so you went ahead and got the policy and  
7 Zorbas reimbursed you, is that correct?

8 A. Correct.

9 Q. Okay. Mr. Pape asked you if you got the refund of  
10 the \$481.00, is that correct?

11 A. That's correct.

12 Q. Okay. And is that been -- Joanne can you mark  
13 this as Plaintiffs or Defendants' Exhibit No. 1?  
14

15 COURT: You will need to substitute  
16 in standard size --

17 MR. CLABAUGH: Yeah, let me --  
18 let's mark -- I knew the Court wouldn't  
19 want to take those home so --

20 COURT: It's okay with me, it's the  
21 people across the hall who would have to  
22 scan it are the ones who get upset.

23 MR. CLABAUGH: Put this up on the  
24 board just -- Defendants' Exhibit No. 1  
25

1 A. '99. The reason I remember that because we were  
2 talking to them about Susie's mother passing away. She  
3 passed just before Christmas and it was close to that time,  
4 just after New Year's I think. Probably the first week of  
5 January.

6 Q. And when did you meet -- did you have a meeting with  
7 Mr. and Mrs. Bensch someplace?

8 A. At their house.

9 Q. And who approached who about this restaurant business?

10 A. We did. We had a dream for a little Greek restaurant  
11 for a long time and we saw that empty building there and we  
12 was asking the next door tenants who owns the building,  
13 there was a number there or they gave us the number. I  
14 can't remember, but we called them. I think I talked to  
15 Santiago and we made an appointment to go to see them at  
16 their house in Windmill Harbor. And I am not sure if it was  
17 that same evening or the next day, but they invite me and  
18 Susie there and we met with Cynthia and saw Gary later and  
19 we talked about the idea of having a little Greek restaurant  
20 there and that was the beginning.

21 Q. At that first meeting, did you all start talking about  
22 the responsibilities of either party what you might and  
23 Susie might put into the -- contribute to the business and  
24 what the Bensch might contribute to the business?  
25

1 food and all that. I am not sure it was the first meeting  
 2 or the second, but basically that was the idea that when we  
 3 was talking the first time and I remember his words when I  
 4 asked him how long it can take him to finish this building  
 5 and he exactly his words, "I can get my crews in and I can  
 6 finish this building in one month if I want to." I say that  
 7 is great. I was thinking about a month or two and then we  
 8 will have something.

9 Q. And was there an expectation as of a date that it would  
 10 be open and ready and operational?

11 A. There was not a date but you know we was hoping that  
 12 everything would be open in spring. We had talked about  
 13 having a little patio on the side and have people outside  
 14 eating so that when we need all that. So - and --

15 Q. Let me ask you to identify what's been presented into  
 16 evidence as Plaintiffs' Exhibit 7. Are you familiar with  
 17 that document?  
 18

19 A. Yes.

20 Q. And on the back of it there's an Exhibit A. Are you  
 21 familiar with that provision?  
 22

23 A. Yes.

24 Q. And now does Exhibit A reflect the agreements that you  
 25 and the Bensches and Susie had when you confirmed your  
 arrangements back in the early days of this project?

1 A. Yeah, that's very much what we talked about.

2 Q. And does -- look at that. Does it describe Bensch's  
3 responsibilities?

4 A. Right.

5 Q. And are those the responsibilities that he represented  
6 to you that he would undertake in this venture?

7 A. Right.

8 Q. And look at Passaloukas' responsibilities. Are those  
9 the responsibilities that you and Mrs. Passaloukas were to  
10 undertake?

11 A. Yeah, very much.

12 Q. And down at the bottom there's a provision for  
13 salaries, is that correct?

14 A. Right.

15 Q. And what salary?

16 A. I was supposed to get about \$36,000 per year paid  
17 weekly bi-weekly whatever.

18 Q. And that was the agreement?

19 A. That was the agreement.

20 Q. Okay.

21 A. That's for my time and working around the place.

22 Q. Did that agreement ever change or was it ever modified  
23 in any way?

24 A. No.

1 Q. Okay, now at some point in time you all started the  
2 process, is that correct?

3 A. Yes.

4 Q. And you recall paying the first month's rent, the last  
5 month's rent and security deposit to Mr. Bensch?

6 A. Yes.

7 Q. Let me ask you to examine Plaintiffs' Exhibit 2 and  
8 look up at the top line a second and see if that helps you  
9 remember how much was paid and when it was paid.

10 A. That's correct. March there 22nd, \$4770, the rents and  
11 deposit.

12 Q. Does that indicate that the restaurant was eminently  
13 ready to open up for use?  
14

15 MR. CLABAUGH: Objection, Your Honor.

16 BY MR. PAPE:

17 Q. Why did you pay that rent deposit, first and last  
18 month's rent on March 22<sup>nd</sup>?

19 A. Because he was -- well he had told me to pay the rent  
20 when the place was close to be ready, so we was paying that  
21 with the plan that he was getting ready to finish it.

22 Q. All right, now when -- how much were the rents agreed  
23 at that time?  
24

25 A. It was 18 something if I remember correctly. \$1800.

Q. \$1885, does that refresh your memory?

1 A. Yes.

2 MR. CLABAUGH: I -

3 MR. PAPE: It's all in the record.

4 I mean I don't think its improper leading. I  
5 am entitled to refresh his memory.

6 BY MR. PAPE:

7 A. But I did not have a stroke, but I cannot remember  
8 those numbers after so long, sir.

9 Q. All right, now what started to happen with respect to  
10 the progress of the restaurant?

11 A. Well, his first problem was that he was supposed to  
12 hire his crew to -- his crews to come there and finish this  
13 place quickly.  
14

15 MR. CLABAUGH: Your Honor, I object.

16 This is not a lawsuit over a dispute between  
17 the shareholders of a corporation with claims  
18 against each other. This is an action  
19 involving the eviction and the value of the  
20 equipment. The inner personal problems that  
21 the shareholders may have had, I submit is  
22 irrelevant. He is also talking about events  
23 that took place prior to the time that the  
24 restaurant even opened.  
25

COURT: Mr. Pape?

1 MR. PAPE: Your Honor, this is material  
2 consideration that was given, there were  
3 promises made and I think that these are the  
4 mitigating factors for failure to pay that  
5 rent in December. Had the restaurant opened  
6 in time, cash flow problems wouldn't have  
7 been as serious and I think those -- under  
8 the Keriotikus case I think the Court is  
9 required to look at a number of different  
10 factors. Now I can't say that any one  
11 element of this testimony is going to be that  
12 material, but I think the cumulative effect  
13 is going to be such that it will have --  
14 should have an impact upon your weighing  
15 those Keriotikus factors.  
16

17 MR. CLABAUGH: Your Honor, this is  
18 equivalent to the analogy that you gave  
19 during one of our discussions where the  
20 disputes between the shareholders has nothing  
21 to do with the fact that the corporation of  
22 which they are a part did not pay rent to the  
23 landlord.  
24

25 COURT: I tend to agree. Is there a  
cause of action that relates specifically to

1 the inner-personal problems of the  
2 shareholders?

3 MR. PAPE: Well, Your Honor, I don't see  
4 this as he has testified to any inner-  
5 personal problems. He is testifying as to  
6 the performance with respect to the  
7 agreements in Plaintiffs' Exhibit 7, Exhibit  
8 A attached hereto. I mean the testimony from  
9 both parties is that they entered into this  
10 agreement here that is attached as Exhibit A  
11 in early 1999.

12 COURT: And that agreement is the  
13 original Zorbas' operating agreement or the  
14 lease?

15 MR. PAPE: Yes.

16 COURT: That's the Zorbas' operating  
17 agreement?

18 MR. PAPE: That's the original agreement  
19 that they had entered and --

20 COURT: That agreement is between the  
21 Benschers, the shareholders, and the  
22 Passaloukases, as the shareholders, is that  
23 correct?

24 MR. PAPE: Correct.  
25

1 COURT: Okay, not the Bensch, the  
landlords?

2 MR. PAPE: Well it's between the  
3 shareholders correct, but I am still puzzled  
4 by why we have to put on two different hats  
5 because the Bensch as shareholders were also  
6 acting as owners of the premises to build out  
7 that premises to make the improvements in  
8 their capacity as owners. Now, the owners  
9 are indeed the landlords.  
10

11 COURT: But I mean that agreement could  
12 very easily had Gary Bensch, 50% owner of  
13 Zorbas and landlord, but it didn't. It  
14 specifically stated that it was an agreement  
15 between the Passaloukases as 50% owners of  
16 Zorbas and the Bensch as 50% owners of  
17 Zorbas. Nowhere in there that I have seen  
18 does it refer to the Bensch as landlord.  
19 They are not signing it as the landlords.  
20 They were signing it as shareholders, is that  
21 correct?  
22

23 MR. PAPE: They were landlords who were  
24 entering into this agreement. It's part and  
25 parcel. They owned the leasehold improvement

1 -- they installed the leasehold improvements  
2 into their property. You can't separate them  
3 out and make the distinction between  
4 landlords and shareholders under these  
5 agreements. They were operating in both  
6 aspects of --

7 COURT: Well, I wouldn't be able to  
8 separate them if the documents were vague,  
9 but the documents are not vague. That's a  
10 Zorbas operating agreement --

11 MR. PAPE: We agree to disagree on that  
12 and I think I finally understand your point  
13 but I don't see the legal or the factual  
14 basis of it because the testimony is that  
15 they went to the Benschers because the  
16 Benschers were the owners of that vacant spot.  
17 They were the landlords. This is a  
18 shareholder person who Bensch would have  
19 become a shareholder who went to the Benschers  
20 because they were landlords and they owned  
21 the unimproved facility and the strongest  
22 inference is that because they had the --  
23 they owned the land and because they had the  
24 ability to make the improvements and enter  
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into a lease agreement, that was the basis on which they entered into the shareholders management agreement. The Benschers as landlords constructed those leasehold improvements. Those leasehold improvements were the obligation in this shareholders management agreement.

MR. CLABAUGH: Your Honor, the Benschers as landlords didn't construct those improvements. Those were constructed by the Benschers as shareholders. They provided the money to Benchmark Construction which constructed --

COURT: I agree Mr. Clabaugh with your assessment of it. I mean there are two separate agreements. There is a shareholder agreement, an operating agreement and then there's a lease.

MR. PAPE: And they are both signed the same day.

COURT: But under your theory there should be not two agreements, there should be one agreement.

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MR. PAPE: And under South Carolina law you've got to read all of these agreements as one. I will have to get the language from the case law, I mean, it's --

COURT: I will tell you we have gotten off track here. This had to do with the question you asked, Mr. Clabaugh objected, and you all are arguing the merits of the objection, but what was the question again, I am sorry.

MR. CLABAUGH: Request the reporter to read the question back.

COURT: Joanne, do you remember the question, go back a few pages now.

A. It was about the timing of the building -- the timing, it was very critical to me. To them they was very wealthy, I think they were very comfortable. To me I had a house that was paid for. I put it down to borrow the money to build this restaurant and according to them it was supposed to be building --

MR. CLABAUGH: Your Honor, you know --

COURT: I am going to allow him to make a record. I mean again at this time we may

1 be trying this for the Appellate Court but I  
2 will allow Mr. Pape to make a record of it.

3 MR. PAPE: Thank you, Your Honor.

4 MR. CLABAUGH: Does the -- excuse me,  
5 does the record have to -- does the proffer  
6 have to be made on the record? Can't it be  
7 submitted in writing by Mr. Pape? Quite  
8 frankly. I object to the time and expense it  
9 takes for him to submit a proffer on things  
10 which we think are clearly extraneous.

11 COURT: Well, I am guessing this point  
12 won't go on too long. You've practically  
13 made it at this point that there was a delay  
14 that you blame on the Bensches and so I think  
15 if he finishes his answer we will be, from my  
16 understanding, we will be done with that  
17 proffer, is that correct?

18 MR. PAPE: Yes, yes.

19 COURT: Okay, we will allow him to  
20 finish his answer.

21  
22  
23 A. That was some of the main arguments in the beginning  
24 because he was taking so long. I said Gary you promised me  
25 that you were going to bring your crews. He brought some  
crews there for some major things but then he tried to do a

1 lot of stuff alone, tried to save money or whatever his  
2 plan.

3 Q. What did you then find yourself having to do in order  
4 to get the job done in a more timely manner?

5 A. Well I was putting more money from my pocket everyday  
6 with no income. I had to put my money in it to start -- to  
7 start the restaurant. I was expecting about two months,  
8 maybe three we would have the doors open and start to have  
9 some income. The place even August we open up and we were  
10 still fixing the place.

11 Q. All right, and what were you -- Mr. Bensch had the  
12 obligations I understand from the agreement to construct the  
13 leasehold improvements.  
14

15 A. Right.

16 Q. What were you doing in that respect?

17 A. Every day, me and my whole family help him build this  
18 building. My kids -- and I feel very guilty I brought my  
19 kids there to help me, but anyway. Me and my whole family  
20 we was there, we tried to help him every which way we could  
21 to finish his job, his work that he was supposed to have  
22 bring his crews there, because I did not have a choice. I  
23 had to try to open the doors somehow.  
24

25 Q. How much labor did you -- which family was over there  
doing all this work?

1 Q. And also a copy of the lawsuit -- showing the lawsuit.  
2 I would like to offer Plaintiffs' Exhibit 19.

3 MR. CLABAUGH: I object, Your Honor on  
4 several grounds. What's this lawsuit you are  
5 talking about?

6 MR. PAPE: Well, it is attached to ---  
7 he just testified to it and its attached to  
8 the --

9 MR. CLABAUGH: Your Honor, first of all  
10 Your Honor, there are no invoices or anything  
11 attached to any of these bills. There's just  
12 a list. The - with checks. The -- have no  
13 way of knowing what it was for or anything  
14 else.  
15

16 A. Yes, it's here somewhere. I saw it. What Campbell had  
17 done.

18 MR. PAPE: Your Honor --

19 COURT: Let him finish his objection and  
20 --

21 MR. CLABAUGH: Well the second part, Mr.  
22 Pape has attached a copy of a -- it looks  
23 like a Magistrate's Court case against Zorbas  
24 and Bill Passaloukas. We know nothing about  
25 this.

1 COURT: Whose the Plaintiff?

2 MR. CLABAUGH: Campbell Electric, Isaac  
3 Campbell. It's only for \$183.00, but you  
4 know --

5 MR. PAPE: And the invoice also says its  
6 --- he was there because there was a problem  
7 with the circuits, the sign lights and he  
8 charged \$126.00 for labor and materials to  
9 deal with all those issues that Mr.  
10 Passaloukas has testified that were Mr.  
11 Bensch's responsibility.

12 MR. CLABAUGH: Your Honor --

13 COURT: I have a question and see if I  
14 am misunderstanding this. When we started  
15 this, I was told that there was a stipulation  
16 that with regard to contributions and it  
17 sounds like this is testimony with regard to  
18 contributions.

19 MR. PAPE: Yes, sir.

20 COURT: I won't go through the numbers  
21 again, but you all both gave me numbers that  
22 were stipulated contributions.

23 MR. CLABAUGH: That's correct.  
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MR. PAPE: That's right, but these are payments from Zorbas now. These are not contributions. These are payments that Zorbas made for the construction or the completion of leasehold improvements that were the responsibility of Mr. and Mrs. Bensch and that's what his testimony has been. We have got checks and if you -- I mean they are kind of small but if you read what they are for it talks about for caulking and for wood trim and things like that.

MR. CLABAUGH: Your Honor, this invoice is attached, it says it is a service call. It talks about light bulbs. This is the end of December during the operation of the restaurant.

A. It was not a service call.

MR. CLABAUGH: That's what the invoice says.

MR. PAPE: Well, there were repair issues and this was a brand new restaurant, Your Honor, and I think there is a warranty that the builder of these improvements is obligated to honor.

COURT: And the builder was who?

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MR. PAPE: The owner is Mr. Bensch and he has already testified that he is a builder. I mean he is the landlord. He is wearing all these hats.

COURT: So this you seek to add to the list of expenses that the landlord owed back to Zorbas?

MR. PAPE: Yes, as a set off against the rent.

COURT: All right and can you tie this in with some sort of a demand from Zorbas to the landlord?

MR. PAPE: Yes, Mr. Bensch, I mean Mr. Passaloukas just testified that he spoke with Mr. Bensch about all of these things and Mr. Bensch instructed him to go out and do these things and he would reimburse him.

MR, CLABAUGH: Your Honor --

MR. PAPE: And his testimony was that he never reimbursed him.

MR. CLABAUGH: There was no such testimony at all. Mr. Pape has now put it on the record.

MR. PAPE: No, there is testimony.

1 COURT: Let's do this. As I understand  
2 the objection, it had to do with the exhibit,  
3 because the exhibit had many line -- I  
4 haven't seen it yet, but many line items of  
5 things and only one was discussed.  
6

7 MR. CLABAUGH: There's only one invoice.

8 COURT: Okay, there's an invoice but a  
9 whole lot of -- I have been handed  
10 Plaintiffs' No. 19 payments from Zorbas  
11 account for items that should have been paid  
12 by the Benschs and there are multiple items.  
13

14 A. That's stuff when we was building he was building that.  
15 I was working with him, I would go to get the -- we stopped  
16 right here.

17 COURT: Hold on one second for me Mr.  
18 Passaloukas. Well I would sustain the  
19 objection with regard to the exhibit unless  
20 you would like -- this is -- I mean we heard  
21 about the light and everything but there are  
22 checks in this exhibit that go to Island  
23 Packet for advertising, Savannah Morning  
24 News.  
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MR. PAPE: Your Honor, we've got -- I mean obviously these are statements from the bank and they list these checks in that small format, but the checks that are relevant are listed on the front of the document.

COURT: Well then can you change the document to the relevant portion.

MR. PAPE: Well I think we have done as much as we can. The relevant portion is on the first page of the document. The list there and then you have to look at the attachments to find the back up.

MR. CLABAUGH: There are no invoices in support of anything.

MR. PAPE: Don't need any invoices.

COURT: No, he can just testify with no paperwork at all. I mean you can certainly cross-examine him as to what he's got or doesn't have. With the spirit of just allowing it all in and letting someone else sort it out, I will overrule your objection and allow No. 19 in and you can certainly cross-examine him as to what it is.

BY MR. PAPE:

1 Q. Well, I mean, Mr. Passaloukas, let me ask you to look  
2 at the item of check 1001 dated July 12, 1999 payable to  
3 Home Depot. What was that check for?

4 A. That was for wood trim for restaurant interiors.

5 Q. And why did Zorbas pay that money to Home Depot?

6 A. I was helping him that day. He needed that and I went  
7 to Home Depot to get it and he told me -- I had asked him I  
8 said everything I get, I just write down and you  
9 reimbursement later and he said yes. So I paid for that  
10 with that check for his trim.

11 Q. In the sum of \$223.81?

12 A. Right.

13 Q. And is that -- a copy of that check attached to  
14 Plaintiffs' Exhibit 19?

15 A. Yes.

16 Q. And what page is it on?

17 A. It is 1001 on Page 287. I can circle it if you want me  
18 to.

19 Q. You want to circle it, go ahead and circle it. Let's  
20 go to the next item, the Grayco. Explain that to the Judge  
21 and the circumstances of what it was for and why you paid  
22 for it.

23 A. We was working on the floors and he needed some  
24 caulking. There's some stuff that I went to finish some of  
25

1 his stuff but most of it I was working with him when he  
2 needed the stuff and I went to get four tubes of caulking.

3 Q. And what was those four tubes of caulking for?

4 A. That was for floors. I can't remember exactly what we  
5 did, but we sealed something around the floors.

6 Q. And was that a leasehold improvement?

7 A. Yes.

8 Q. Okay and is the check attached to that document?

9 A. Yeah.

10 Q. Go ahead and circle the check. All right now the next  
11 item check 1004, explain that to the Judge.

12 A. I went to get sheet rock so we can -- we was running  
13 out of, he did not order enough and I was running out of  
14 sheet rock so I went to get to get some sheet rock to finish  
15 his walls. That was I can't remember how many sheets, maybe  
16 one or two, 1004.

17 Q. And is the check attached?

18 A. Yes.

19 Q. Go ahead and circle that check.

20 A. 1004, Page 288.

21 Q. All right, let's go to the next item.

22 A. The next item was Home Depot.

23 Q. What check number was that?

24 A. That was 1005.  
25

1 Q. And what was that for?

2 A. That was counter top permanent installation.

3 Q. What do you mean countertop permanent installation?

4 A. He told me he was going to finish all the countertops  
5 and I can't remember what that meant but it was for the  
6 countertops, something we bought.

7 Q. Was that a leasehold improvement?

8 A. Yes.

9 Q. Is that check attached to the document?

10 A. Yes.

11 Q. Go ahead and find the check and circle it.

12 A. 1005 right here. The next check is for Campbell  
13 Electric.

14 Q. What check number is that?

15 A. 1008, \$135.18.

16 Q. And what work was that for?

17 A. I am not sure. I think it was for the -- most of the  
18 stuff it was for what he did over there for the sign and  
19 tried to get lights straight --  
20

21 MR. CLABAUGH: Your Honor, he is

22 guessing. He said he doesn't know what it's  
23 for.  
24

25 A. No, I am not guessing. I am just saying that when we  
opened up the place --

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COURT: Mr. Passaloukas -- don't

A. Lights that was not working --

COURT: Mr. Passaloukas hold on one second.

A. I'm sorry.

COURT: He objected to the testimony because of speculation and he had a comment on the objection.

MR. PAPE: Your Honor --

BY MR. PAPE:

Q. Mr. Passaloukas what was check 1008 for? Do you recall what it was for?

A. All the work that Campbell did --

MR. CLABAUGH: He said he did not know what it was for Your Honor.

MR. PAPE: He is testifying.

A. Campbell was supposed to do all the electrical in the building and he sent him there to do all that stuff. We had problems. He came back and forth even after we opened and he was finished and correcting things and I thought all the electrical was his responsibility.

Q. And you circled that item?

A. I have.

Q. What was the next check?

1 A. 1080. All that was coming back and work on the lights  
2 and the sign.

3 Q. All right, and what was that for? Read the notes.

4 A. 280 --

5 Q. 1080.

6 A. 1080 on Page 309.

7 Q. All right what was that work for and what was the  
8 amount?

9 A. All that was for the lights and electrical, he came  
10 many times to correct things.

11 Q. Okay.

12 A. And he did not want to pay and I did not have a choice  
13 but --

14 Q. All right and let's go to the next item. What was --  
15 the Judge wants to know, Your Honor, do you not have a copy  
16 of this Exhibit?  
17

18 COURT: No.

19 MR. PAPE: That would be helpful. Wait  
20 a minute, let me get the Judge a copy of the  
21 Exhibit. I apologize I thought we had handed  
22 that up.  
23

24 A. That's when I got tired of paying Campbell and I say  
25 this is it. I say well he ordered the electrical go to get

1 him, he is supposed to take care of you. All that stuff was  
2 supposed to be done by him.

3 Q. Let's go to the next item, 1082. Explain to the Judge  
4 first what that's for.

5 A. That was to Grayco Hardware for hardware to Zorbas on 9  
6 of September.

7 Q. And what kind of hardware was that?

8 A. I don't remember. I will have to look. All that stuff  
9 was for work even November I was fixing things that he had  
10 fixed and they were breaking up and I had to go back and try  
11 to correct them and try to finish stuff he never finished.

12 Q. All right, go circle those checks on that.

13 A. It might be on the check here. That's on Page 309,  
14 1082. Grayco Hardware Store.

15 Q. And what was the next one?

16 A. Grayco Hardware Store for more hardware to Zorbas. 9.

17 Q. Again, do you remember what kind of hardware was  
18 needed?

19 A. It was lots of little things. He had promised he was  
20 going to finish all the shelves, all the trim. I was going  
21 back and forth and buy fasteners and the wood everything I  
22 need to finish. I was cooking and finish building at the  
23 same time even in November.

24 Q. And did you circle that one yet?  
25

1 A. That was Grayco Hardware store 1082 on Page 309, 1083.

2 Q. All right, what's the next one?

3 A. Home Depot, 1112.

4 Q. Okay. And you have circled that one?

5 A. On Page 313.

6 Q. All right. And then the next one is what?

7 A. Home Depot 1192.

8 Q. And what was that for?

9 A. September's hardware. Whatever I have done on  
10 September, I don't remember.

11 Q. But was for it leasehold improvements?

12 A. Of course.

13 Q. Okay.

14 A. Everything was for leasehold improvements.

15 Q. Everything on Page -- on Exhibit 19 was for leasehold  
16 improvements you said. All right, I don't have any further  
17 questions.  
18

19 A. Grayco Hardware store, there's one more 1232.

20 MR. CLABAUGH: I take it you mean you  
21 have no further questions on this document?

22 MR. PAPE: Yes.

23 MR. CLABAUGH: Not that you are done  
24 with the witness?  
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MR. PAPE: No, no, no, I am not done with the witness yet.

MR. CLABAUGH: May I have that Exhibit please?

A. I remember I had to buy paint two or three times.

MR. CLABAUGH: No, just that particular exhibit.

COURT: Is that No. 19?

MR. CLABAUGH: 19. I don't have it.

MR. PAPE: You should have it. I put it right there.

A. I finished that floor in the kitchen that was done in part, near built.

Q. All right, yesterday Mr. Bensch testified --

MR. CLABAUGH: Your Honor, wait a minute, Your Honor, I had objected to the attachment of the Complaint.

COURT: I didn't even hear any testimony on that Complaint.

MR. CLABAUGH: I didn't either.

COURT: If the Exhibit is a lot of different things added together, I mean one part the part that I looked is five or six of these things occurred prior to the lease even

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being signed. So it's hard to rule on your objection since it is a conglomeration of things there. I will sustain your objection with regard to the Complaint itself. I don't know what that was about.

MR. PAPE: Well, he testified Your Honor

--

MR. CLABAUGH: 19 should then just be the cover sheet and the copies of the checks, is that correct?

COURT: Right.

MR. PAPE: There's an invoice.

MR. CLABAUGH: And one invoice for 60. Why don't you staple that together and then give it back to me if you would.

COURT: I can certainly infer at some point Campbell's didn't get paid and got upset and filed a lawsuit, but that's not necessarily on the record.

MR. PAPE: I don't have a -- do we have a staple gun somewhere?

MR. CLABAUGH: Wait a minute, my client has one. May I have the exhibit?

MR. PAPE: Oh.

1 MR. CLABAUGH: Check and make sure you a  
2 have the same checks.

3 MR. PAPE: So that Exhibit 19, Your  
4 Honor, is tendered as modified.

5 COURT: Okay.

6 MR. PAPE: And I assume there is no  
7 objection with the modifications?

8 MR. CLABAUGH: Well, we had an objection  
9 on the grounds that there were no invoices or  
10 anything attached to them. You said that  
11 went to the weight.

12 COURT: Overruled.

13  
14 BY MR. PAPE:

15 Q. Mr. Bensch -- I mean Mr. Passaloukas, yesterday Mr.  
16 Bensch testified that one of the reasons for the delay in  
17 the opening of the restaurant was a trip that you had made  
18 to Greece. Tell the Judge about that.

19 A. That's not correct. I went to -- I was planning to  
20 make a trip to go to Greece before we opened. I need to get  
21 stuff that I could not find in the United States and that  
22 was not just decoration or what they talked about. I  
23 brought dry food, I brought suitcases full of stuff. It was  
24 dry food, it was Greek wine, it was Greek coffee cups, all  
25 very delicate and we try to have a high-class restaurant. I

1 went to get the best and it was some decorations. It was  
2 some beautiful little statutes that they ended up destroying  
3 when they were delivering the stuff to me after closing, the  
4 most of them. It was lots of stuff, it was not just  
5 decorations and I was planning to make a trip to Greece. My  
6 mother -- she was having an operation and I -- it was  
7 January or February.

8 Q. When was the trip?

9 A. I think it was -- I can't remember, it was January or  
10 February. It was early after we met him because we hadn't  
11 start to working on the restaurant yet so I wanted to get  
12 done with the trip, bring the stuff back so I was try to  
13 combine the trip and save time and money.

14 Q. Did it interfere in any way with the construction of  
15 the leasehold improvements?

16 A. Not at all. The business it was not -- he didn't even  
17 start. He didn't even start. I kept calling him, when you  
18 going to start, when you going to start. The place it was  
19 sitting there close. He was trying to finish some other  
20 business. I was waiting for him. Well, my mother had an  
21 operation I said I am going to make this trip to Greece. I  
22 went up --

23 Q. Are you talking about the -- but you talking about the  
24 trip in early January or February?  
25

1 A. Right. It was early January I think when I did the  
2 trip and I left for about a week and I went over there and  
3 my mother had operation in the meantime and I went all the  
4 business I wanted to do about the restaurant. I went to get  
5 different kind of recipes and --

6 Q. Well you've already testified about -- you've already  
7 testified to that though, right?

8 A. Yes.

9 Q. Okay, what were the other -- were there any other  
10 specific reasons related to the performance on Mr. Bensch's  
11 performance of the construction that caused delays?  
12

13 A. Not from me.

14 Q. But related to his performance. Things that he failed  
15 to do that caused delays in the opening?

16 A. He was waiting for permits, I think that was one of the  
17 main problems. I don't know, he had some problem with the  
18 permits, building permits and I don't know what was his  
19 other problem. He tried to finish some other jobs. I think  
20 he was working on his house or something and in the meantime  
21 I already had borrowed my money and I was getting ready and  
22 I was buying equipment and already had started to spend  
23 money and I --  
24

25 Q. Were there problems with the health department  
concerning the construction?

1 A. It was later after he -- after he already had -- we was  
2 almost ready to open up. The health department came, they  
3 didn't -- he had bought a small little heater. I can't  
4 remember exactly --

5 Q. A hot water heater?

6 A. Hot water heater to install and I had told him, I say  
7 this is not enough for a restaurant. He's a builder; he had  
8 built restaurants before. He knows, it was his  
9 responsibility to put us a commercial hot water heater, all  
10 the plumbing it was his responsibility and he start to  
11 telling me that it was my responsibility and I wouldn't pay  
12 for the big hot water heater and we was getting ready to  
13 open and he made me pay for it. I had to do something we  
14 wanted to open up and then the other problem --

15 Q. Let me ask you with respect to the hot water heater.  
16 Look at Plaintiffs' Exhibit 2 and does there show a payment  
17 that you made to the Bensches with respect to the hot water  
18 heater?  
19

20 A. Yes.

21 Q. And which item is that, just read to the Judge which  
22 item it is.  
23

24 A. Item 11, no that's --

25 Q. Just check, what's the check number?

A. 210.

1 Q. And who is it payable to?

2 A. To Benchmark.

3 Q. And who is Benchmark:

4 A. Gary and Cynthia Bensch as far as I know.

5 Q. Okay, and the reference there is for the hot water  
6 heater?

7 A. Right.

8 Q. And what's the amount?

9 A. \$1833.32.

10 Q. All right, has that \$1833.32 ever been reimbursed to  
11 you or Zorbas by the Bensches?

12 A. No. I have asked him to reimburse, they denied it. I  
13 did not even want to pay but I did not have the choice. I  
14 wanted to open up the doors to start to have some income and  
15 they was denying to finish the plumbing. This is part of  
16 the plumbing. According to him, he was supposed to have  
17 finished all the plumbing and he knew he was building a  
18 restaurant. He knew that the restaurant don't have a small  
19 hot water heater, it has to have a big one. He knew all  
20 that, he is a builder.

21 Q. All right. Let me ask you --

22 A. The same thing with the grease trap. That's another  
23 thing that hold us from opening and with the health  
24 department. He knew the building needed to have a grease  
25

1 trap. Again, he is a builder. He knew about the permit for  
2 the water. All that was his responsibility and he come to  
3 me and he say I will not pay that. I say, well, Gary I  
4 don't want to pay it either. I say --

5 MR. CLABAUGH: Your Honor --

6 MR. PAPE: Well that's all right, Mr.  
7 Passaloukas, just --

8 MR. CLABAUGH: I move to strike all of  
9 this testimony. All the stuff he knew, he  
10 knew, its all speculation on his part.

11 COURT: Well, let's go ahead and try to  
12 stay away from what someone else knew.  
13

14 BY MR. PAPE:

15 Q. Did you have any conversations with Mr. Bensch  
16 concerning these, what you believed was his obligations?

17 A. Of course. Of course, all that was in the agreement  
18 that he was going to take care of all the plumbing, all the  
19 electrical, finish the building for a restaurant. He was  
20 not finishing the building for a barber shop. He was  
21 finishing the building for a restaurant.  
22

23 Q. All right.

24 A. He knew that from the beginning.

25 Q. All right, and now subsequently when you signed the  
lease on August 15<sup>th</sup>, the rents had increased, right?

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A. Right.

Q. From the original \$1835.00. Why were the rents increased?

A. Well I was against about that, but he increased them because the -- he told me he want to get reimbursed for the grease trap and the water permit and a couple of other things --

Q. And the hot water heater?

A. Yes. And --

MR. CLABAUGH: Your Honor --

MR. PAPE: It's already in the record.

COURT: Here's the part that I am -- I don't know what the objection is, but we have a lease, is there some kind of a wrongful inducement cause of action forcing him to sign the lease not that that makes it right. The things you are all talking about were prior to the lease that was signed on --

MR. PAPE: That's right.

MR. CLABAUGH: And they are merged into the lease.

COURT: That's my understanding of it.

MR. PAPE: And I understand that, but the purpose for the additional rents has

1 already been testified by Mr. Bensch. He  
2 said he got the additional rents to recover  
3 his contributions for the hot water heater,  
4 the grease trap and the water and sewer.

5 COURT: But I don't know what the  
6 additional rents are. There's one lease  
7 document that is \$2900 a month, right?

8 MR. PAPE: It's \$2400 and some odd  
9 dollars.

10 COURT: Whatever it is, but I mean it is  
11 what it is. When they signed it, you are  
12 talking about additional and as far as I know  
13 there's no --

14 MR. PAPE: There's no additional rents -  
15 - the additional above and beyond the  
16 original agreed rents of \$1895.00 and the  
17 testimony is already on the record he got an  
18 additional \$561.00 a month to recover his  
19 investments for the hot water heater.  
20

21 MR. CLABAUGH: He is getting exactly  
22 what the signed --  
23

24 COURT: Well, let Mr. Pape finish.

25 MR. PAPE: The grease trap and the water  
sewer application.

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COURT: I mean I understand his calculation of how the rental was calculated ultimately in the document that they executed. All right and then there was a lease between Zorbas and the Bensches that had a fixed amount that was like every landlord and tenant I suppose calculated in some form or fashion and then it is that lease that you have sued for wrongful eviction.

MR. PAPE: That's right. Of course, we are not trying to modify any of the terms of that lease. We are -- all we are trying to do is show that he recovered his capital contributions, that is the Bensches recovered those capital contributions at the rate of \$561.00 a month. That was the reason for those - the increase above and beyond the \$1885.00.

MR. CLABAUGH: The lease is what it is.

COURT: I tend to agree, but I will allow Mr. Pape to make a record because the last time the Court said maybe there should have been despite the exhaustive record I

1                                   guess there should have been something else  
2                                   to prevent a remand. Go ahead.

3 BY MR. PAPE:

4 Q. Okay, so let me see if I can focus myself.

5 A. I did not want that increase of the rent to go up.

6 Q. I understand.

7 A. I was getting ready to open the doors and he was  
8 holding me hostage. I will not do this - he raised the  
9 rent. I had to do it.

10 Q. Why did you do it?

11 A. Because I --

12                                   MR. CLABAUGH: Your Honor the lease --

13  
14 A. I had to open up the doors to have some income on that  
15 place and the building was not still finished. The grease  
16 trap was not there and he was threatening me that if we  
17 don't raise the rent, he will not put the grease trap in, so  
18 I say go for it Gary I got to open up the doors. I have to  
19 do something. There was always -- it was still -- I had  
20 everything I had in it.

21  
22 Q. By that time how much money have you calculated that  
23 you had already put into the restaurant?

24                                   MR. CLABAUGH: Your Honor, the exhibit  
25                                   speaks for itself. We have stipulated as to  
                                 the amounts.

1 COURT: Is that the same stipulated  
2 amount?

3 MR. PAPE: The same stipulated amount.

4 A. I had close to 65, I can't remember the number. That's  
5 a drawing of the restaurant. I did all of that. In the  
6 beginning we had to go to an architect cause I am not an  
7 architect and -- we had to bring architect approval of  
8 that.

9 Q. Okay, let me ask you to identify this next exhibit.

10 MR. CLABAUGH: I have no objection to  
11 Plaintiffs' No. 20 Your Honor.

12 BY MR. PAPE:

13 Q. Ask you to identify Plaintiffs' Exhibit #21, what is  
14 that?  
15

16 A. That's a statement from Zorbas from the Palmetto State  
17 Bank.

18 COURT: That would be 21?

19 MR. CLABAUGH: I haven't seen them.

20 MR. PAPE: It's the bank statements.

21 MR. CLABAUGH: Your Honor, given the  
22 stipulation, I see no -- no point in entering  
23 copies of the checks.  
24

25 COURT: Is there anything different in  
here Mr. Pape than what you all have --

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MR. PAPE: Yes, sir. There's plenty of evidence in there that we want to have reference to.

COURT: All right, is it itemized in some form or fashion somewhere?

MR. PAPE: In some places in further exhibits, we'll --

COURT: I guess my question -- I think see why the Court wanted a strict accounting and perhaps why Judge Kemmerlin divided the baby, because there's not a -- is there going to be at some point someone going to present me with an itemized spreadsheet or something that gives me a list of all these various things because it sounds like what we are getting ready to do is go through more lists that aren't on these first lists.

MR. PAPE: Your Honor, it's not going to be that complicated. This is foundational.

COURT: All right.

MR. PAPE: And the evidence that we are going to cull from Plaintiffs' Exhibit 21 is going to be really easy to understand and calculate. It won't require an accountant.

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MR. CLABAUGH: I think in that case they need to call it out first and --

COURT: Let me do this. I don't know what it's going to be other than I have been handed a document that appears to be the bank statements of Zorbas. That would seem to be completely relevant in an issue where we are dissolving and determining all these things so certainly I will allow it, but what I am hoping for at some point is some easy method of calculating and determining what the claims of the parties are so that I can compare the things that are not agreed to and maybe that's not going to happen, but anyway --

MR. CLABAUGH: Well, to the extent he's seeking to change or go behind the stipulated amounts, I would object to it as well.

MR. PAPE: And we are not.

COURT: I don't know if he is or not. He's offered 21 which is the bank statement, but I think that's probably all relevant. So, --

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MR. CLABAUGH: Can you get a copy for me, so I can look at it?

MR. PAPE: It's right in there.

MR. CLABAUGH: Which one was it in here?

MR. PAPE: It begins at Page 279.

BY MR. PAPE:

Q. Mr. Passaloukas, Plaintiffs' Exhibit No. 21 is a copy of all statements and check images from the inception of Zorbas' bank account at Palmetto State Bank up through December or January --

A. The beginning of January.

Q. To the beginning of January, 2000, is that correct?

A. Yes.

Q. Okay. Now we have culled from Plaintiffs' Exhibit No. 21 several items, is that right? Let me ask you to look at this next Exhibit which I will mark as Plaintiffs' Exhibit 22.

MR. CLABAUGH: Do I have a copy?

MR. PAPE: No.

A. Yeah, that's the total --

MR. CLABAUGH: Your Honor, I haven't seen this document and don't have a copy of it.

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COURT: Let Mr. Clabaugh look at it first.

MR. CLABAUGH: I guess I don't know what this is so --

MR. PAPE: Well he's got to testify to it.

COURT: Well --

BY MR. PAPE:

Q. I will ask you questions and you just answer them. What's the first page of Plaintiffs' Exhibit No. 22?

A. Is the total credits the deposit --

Q. Well, what is it? Is it a page from --

MR. CLABAUGH: Your Honor, I would ask Mr. Pape not to lead.

COURT: Try not to lead so much.

BY MR. PAPE:

Q. What is it?

A. It is the statement from Palmetto State Bank.

Q. Is it one page of which statement?

A. From August statement from the Palmetto State Bank that shows how much we -- how much Zorbas made in August.

Q. The receipts in August?

A. Exactly.

Q. And have you circled that amount?

1 A. Correct.

2 Q. And what is that amount?

3 A. It's \$16,641.47.

4 Q. All right, go to the next page and tell me what the  
5 next page is.

6 A. It is the same thing for the month of December -- for  
7 September.

8 Q. And have you circled on there a number?

9 A. Yes.

10 Q. And what is that number?

11 A. That is \$26,636.17.

12 Q. And what does that represent?

13 A. That represents the sales that we did or the deposits  
14 to the bank.

15 Q. All right, in September?

16 A. In September.

17 Q. All right, go to the next page and tell me about that  
18 one.

19 A. That was for October. I circled that \$26,625.02.

20 Q. And what is that number that you just cited?

21 A. That's all the credits. All the cash receipts, all the  
22 money we made from Zorbas.

23 Q. Okay.

24 A. The deposits.

1 Q. Okay, and go to the next page and tell us what that  
2 represents.

3 A. The same thing for November. \$21,007.40.

4 Q. All right, and what does that \$21,000.00 number  
5 represent?

6 A. All the sales; All the deposits.

7 Q. All right, and then go to the final page and tell the  
8 Judge what that is.

9 A. That's for December. \$17,630.31.

10 Q. And have you circled that number?

11 A. I did.

12 Q. And what does that number represent?

13 A. That's all the credits, all the deposits.

14 Q. Now go back to the first page there a couple of  
15 addition tapes, is that right? What does that show or  
16 determine?  
17

18 A. That's the total credits.

19 Q. Total credits, what do you mean by total credits?

20 A. The total deposits in the Palmetto State Bank.

21 Q. For the period from August --

22 A. From the time we opened up to --

23 Q. To the end of December?

24 A. End of December actually I do not know if there was  
25 anything from January here.

Q. But there's nothing from January?  
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A. No.  
2  
Q. And what's that total amount of those receipts?  
3  
A. \$108,540.37.  
4  
Q. All right, now in order to determine what the sales  
5 were do we have to reduce that number by anything?  
6  
A. Yes, that was -- I had put from my pocket just money to  
7 keep the business going.  
8  
Q. And how much during that period of time from August  
9 through December had you put in to the business?  
10  
A. Since Mr. Bensch did not want to put anymore \$21,500,  
11 21 thousand and a half.  
12  
Q. Okay. Now let me ask you this question. In order to  
13 determine what your gross sales were of the business, do we  
14 have to reduce --  
15  
A. Subtract this from the \$108,000 --  
16  
Q. And have you done that?  
17  
A. That would leave 97 -- what is that?  
18  
Q. Let me run a tape for you. What are the two figures  
19 you are trying to figure up?  
20  
A. That would be \$97,540.  
21  
Q. What were the gross deposits?  
22  
A. \$97,540.00, is that correct?  
23  
Q. No, what were the gross deposits?  
24  
A. \$97,540.00, is that correct?  
25  
Q. No, what were the gross deposits?

1 A. No, I mean 88 I am sorry.

2 Q. What are the gross deposits?

3 A. \$108,543.07 minus 21,500.00.

4 Q. And when you subtract your contributions from the gross  
5 deposits, what is that?

6 A. \$87,040.37.

7 Q. All right, and with everybody's permission I will  
8 attach that tape to the exhibit and Your Honor, I would  
9 offer Plaintiffs' Exhibit 22.

10 MR. CLABAUGH: And I object Your Honor.

11 The amount of sales that Zorbas took in at  
12 the cash register has absolutely no relevance  
13 to the issues in this lawsuit.

14 COURT: I was trying to figure that out.  
15 I was guessing it was going to be tied  
16 together.

17 MR. PAPE: It will be. In my deposition  
18 of the expert witness, I gave him some  
19 numbers and asked him to appraise the value  
20 of the business based upon those numbers.

21 COURT: Okay, so this is foundation for  
22 the deposition?

23 MR. PAPE: Yes, sir.  
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COURT: Are you going to have any -- I don't know how much more of this, are you going to have any objections to the deposition?

MR. CLABAUGH: Yes.

COURT: Okay, well then I will allow him to lay whatever foundation he would like to.

MR. CLABAUGH: Mark it for identification only?

MR. PAPE: Well, I think it is fact.

COURT: I will allow it in. It's an Exhibit as a mathematical calculation as a monetary working Zorbas that fell apart which we are trying to sort out.

MR. CLABAUGH: But it has nothing, Your Honor, -- I understand, but it has nothing to do -- you know whether the corporation sold enough Greek food, whether it was \$100.00 or \$100,000 --

COURT: Well standing alone, I agree with you, it would have no bearing. But then I was guessing the expenses are going to be put with it to come up with whatever the net is and that starts to becomes something that

1 introducing checks showing over the course of  
2 the life of the restaurant how much they paid  
3 for food and supplies I submit is again  
4 irrelevant. It can't go to prove anything  
5 that is at issue.

6 COURT: You can certainly cross-examine  
7 him as to the exact, you know, however you  
8 would like to cross-examine him. I mean, I  
9 will allow it. It appears to be duplicate  
10 checks are the ones that are on the bank  
11 statement I have already got, but --

12 MR. CLABAUGH: Well, and we objected to  
13 that as well again on the grounds of  
14 relevance.

15 COURT: I will allow it in. I  
16 understand. Your exception is noted.

17 MR. PAPE: Your Honor, his testimony was  
18 that on the day they were evicted he  
19 estimated there was \$6,000.00 worth of  
20 consumable products --

21 COURT: I understand the purpose of the  
22 Exhibit.

23 MR. PAPE: And the purpose of the --  
24 okay.

1 MR. CLABAUGH: Well, the Exhibit doesn't  
2 support that. I mean you had no way of  
3 knowing --

4 COURT: Well you are welcome to cross-  
5 examine him as to the exhibit. I understand  
6 your concern. Also, I understand Mr. Pape's  
7 need to make a record for --

8 MR. CLABAUGH: Number what -- what  
9 number is that?

10 COURT: 23 I think.

11 MR. PAPE: 23, yes Your Honor.

12 MR. CLABAUGH: We aren't even going to  
13 finish this witness today.

14 COURT: Imagine how the scanner is going  
15 to feel across the hall when they start  
16 scanning all this stuff.

17 MR. CLABAUGH: Well, I am just concerned  
18 about the cost of paying for it all on  
19 appeal.

20 MR. PAPE: Your Honor, you know, and I  
21 appreciate your good humor and I admire Mr.  
22 Clabaugh, he's a great lawyer, but you know  
23 my client gets one day in Court.  
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COURT: I understand that. I am not - I didn't mean --

MR. PAPE: No, no

COURT: I was just joking about the scanner across the hall.

MR. PAPE: And I certainly -- no, no I didn't take offense and never have to anything you have said, but I just want to remind everybody that, you know, my client gets one day in Court and even if Your Honor rules against us, I have got to give it my best shot because you might wake up one night at midnight not being able to sleep and something will click in and you'll say, you know, what were they saying about that and I have got to make that record that you can review.

COURT: I don't fault you for doing that.

MR. CLABAUGH: And I hate to keep objecting, but I have to make my objections for the record.

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COURT: I think my rulings have been consistent that you do need to make that record.

MR. PAPE: I understand and I appreciate you taking my comments and continued good humor as you always have.

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MR. PAPE: We are unable to do that. They testified at the previous trial that it was worthless, they had to throw it out and Mr. Passaloukas testified at the trial it was about \$5,900.00 worth of stuff. He has testified today he thinks it is about \$6,000 so I don't know.

COURT: Okay, well I just didn't know if there had been an effort made to try to come up with a number there everybody could stipulate to.

MR. PAPE: Well, I mean we have been discussing these numbers for a long time.

MR. CLABAUGH: Are you introducing this?

MR. PAPE: Yes, I am introducing this.

MR. CLABAUGH: Your Honor, does the Judge, do you have a copy of it?

COURT: I don't.

MR. PAPE: Did I not, okay.

MR. CLABAUGH: Your Honor, I have never seen this document before. It wasn't produced.

MR. PAPE: Your Honor --

COURT: Well let him finish up.

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MR. CLABAUGH: It wasn't produced during the course of the trial. The witness has testified that it may have been prepared as early as December of 2000 --

MR. PAPE: No, 1999.

MR. CLABAUGH: Okay, 1999. There's no date on the document. You know, again, it hasn't been produced, wasn't produced during the course of the first trial, it hasn't been produced during any discovery here. I submit it is a totally self-serving document and that not having been produced, it is not admissible.

MR. PAPE: Your Honor, all these documents were available to the previous four lawyers in this case and nothing was kept from the Benschers.

MR. CLABAUGH: This document doesn't appear in the record anywhere.

A. I was in Mr. Hale's office when we had that meeting.

COURT: Let me ask you this, Mr. Pape, was this previously testified as to the \$6,000.00 worth of consumables.

MR. PAPE: Yes.

1 COURT: Most of the rest of this is an  
2 estimate of -- this is a question, an  
3 estimate of your client for instance as to  
4 how much the two deep fryers are worth, that  
5 kind of thing? I mean there -- one was  
6 stainless steel fire extinguisher \$500.00.  
7 Is that a -- is that based on an appraisal  
8 somewhere or as I understand it, this was  
9 made for the shareholders' meeting.

10 MR. PAPE: Right.

11 COURT: Okay.

12 MR. PAPE: And that's what he testified  
13 to, but most of this stuff is really going to  
14 be irrelevant. We are not trying to offer  
15 this to prove the value of any equipment or  
16 the prices paid. The prices paid for kitchen  
17 equipment and furnishings is set forth in  
18 Plaintiffs' Exhibit 22.

19 COURT: Won't this just confuse me?

20 MR. CLABAUGH: Your Honor, if he wishes  
21 to submit his estimate on the inventory, I've  
22 got no problem with that.

23 MR. PAPE: That's fine. We will --  
24  
25

1 COURT: I even wrote it down \$6,000.00  
2 but the rest of it, isn't it already covered  
3 in some of the other spreadsheets I thought.

4 MR. PAPE: Yea, they are. I just wanted  
5 to offer a complete document so I could avoid  
6 an objection that it wasn't complete because  
7 it began with Page 6. But we only really  
8 need it for the purpose of Page 6 and the  
9 following pages.

10 COURT: And that's what he testified to  
11 is that he lost certain items in his  
12 estimation are worth about \$6,000.00 of  
13 consumables.

14 MR. PAPE: That's right, and if you add  
15 up this inventory on the Plaintiffs' Exhibit  
16 24, it adds up to precisely \$6,000.00 and I  
17 will be glad to do a tape of that.

18 COURT: Why don't we remove the first  
19 part and certainly your client can testify as  
20 to his estimate of the inventory at the time  
21 of the eviction.

22 MR. CLABAUGH: Got no problem with that.

23 COURT: That's the last three pages --  
24 four pages, is that correct?  
25

1 Q. Tell me what the document is, Plaintiffs' Exhibit.

2 A. Bill Passaloukas' expenses --

3 Q. Well, don't read it, just tell the Judge what it is.

4 A. For March, April, May, it's stuff we paid for for the  
5 restaurant.

6 Q. Does it give dates and expenses?

7 A. Give date and expenses.

8 Q. And what it was for?

9 A. All the stuff we paid for the restaurant from all the  
10 way to April to January.

11 Q. And what had you estimated, based upon these  
12 calculations, you and Susie Passaloukas had contributed?

13 A. The total?

14 Q. Yes, the total.

15 A. I thought it was about \$60,000. I don't remember the  
16 numbers.

17 Q. Okay.

18 A. Actually about 70 what I have here.

19 Q. Okay, and was that prepared to deal with those issues -  
20 - the shareholder issues that the Bensches and Passaloukases  
21 were disputing at the December 15<sup>th</sup> meeting?  
22

23 A. I'm sorry?  
24

25 MR. CLABAUGH: Ask him why it was  
prepared.

BY MR. PAPE:

1 Q. Why was it prepared?

2 A. Why was this prepared? For the shareholder --  
3 requested for shareholder meeting.  
4

5 Q. Who had requested it?

6 A. Gary and Cynthia Bensch.

7 Q. All right. And was that presented to the shareholders'  
8 meeting?

9 A. Yes.

10 Q. Okay, I would offer Plaintiffs' Exhibit No. 25, Your  
11 Honor.  
12

13 MR. CLABAUGH: Your Honor, my  
14 understanding is on the stipulation it lists  
15 everything that he claims they have  
16 contributed and paid for. This document we  
17 have never seen before and I submit that  
18 given the stipulation, there is no need for  
19 this.  
20

21 COURT: Let me look at the stipulation.  
22 The stipulation sheet is Exhibit No. 2, is  
23 that correct?

24 MR. PAPE: Correct.

25 COURT: All right, so --

1 MR. PAPE: And Your Honor, the  
2 stipulation No. 2 says that the Plaintiffs  
3 contributed \$68,875.16 that's after an  
4 extensive audit by all the parties involved  
5 in this lawsuit and the part of this  
6 Plaintiffs' Exhibit 25 was to show how close  
7 Mr. Passaloukas was with respect to his  
8 expenses and how careful he was to keep an  
9 account. His item Plaintiffs' Exhibit 25  
10 itemization shows an amount of roughly  
11 \$70,000.00.

12 COURT: So I mean this document is not  
13 offered for its accuracy, it's offered for -  
14 well, I would rather not have a document  
15 that's not offered for its accuracy. I mean  
16 we've got to --

17 MR. PAPE: It's not being offered for to  
18 contradict Plaintiffs' Exhibit No. 2. It's  
19 just being offered to show what efforts he  
20 was making in order to satisfy these  
21 difficult accounting issues that they were  
22 wrangling with at the shareholders' meeting  
23 on December 15.  
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1 COURT: But I mean doesn't all this go  
2 away in light of the stipulation. I mean  
3 there's been a problem or two now in order to  
4 come up with a number that is stipulated  
5 meaning an amount at least everyone's happy  
6 with the number as the asserted -- or already  
7 stipulated contributions. So doesn't this  
8 Exhibit when I am looking at it months from  
9 now and can't remember why I have two  
10 different numbers offered by Mr. Passaloukas,  
11 just confuse the record. That's my thought.  
12 I would -- you know -- again, if you want to  
13 offer it, but I am going to be faced with two  
14 different documents that have two completely  
15 different numbers.  
16

17 MR. PAPE: Well, I understand --

18 COURT: Two completely different numbers  
19 and one is the stipulated one and the one is  
20 asserted not to be accurate, but put in  
21 anyway.  
22

23 MR. PAPE: What it's being offered for  
24 is to show the efforts that he was making to  
25 try to resolve these issues that had arisen  
at the December 15<sup>th</sup> meeting.

1 COURT: Let's do this. He is certainly  
2 willing to testify. I think he has this on  
3 the record, that he's made extensive efforts  
4 to write these things down and come up with  
5 something that would make the Benschers happy  
6 and ultimately we have come up with a  
7 stipulation. But I have to sustain the  
8 objection with regard to an expense sheet  
9 that contradicts the stipulated expenditures  
10 just because I think it would completely  
11 confuse the record. But you have got your  
12 testimony on with regard to his efforts which  
13 I think --  
14

15 MR. CLABAUGH: Thank you, Your Honor.

16 BY MR. PAPE:

17 Q. And Mr. Passaloukas, you did prepare documents showing  
18 your contributions in a detail format for the purpose of  
19 trying to resolve those issues that arose at the December  
20 15<sup>th</sup> meeting?

21 A. Yes.

22 Q. All right, now the December 15<sup>th</sup> meeting, describe to  
23 the Judge what issues did arise.

24 A. Well the main issues --  
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MR. CLABAUGH: Your Honor, I have a continuing objection on the grounds of relevance. These are issues you know there were only the shareholders present at these meetings. Their -- you know what their internal disputes are are irrelevant in terms of whether or not they failed to pay the rent and what the value of the assets are.

COURT: Understand your objection, but I am not sure what the testimony is going to be happened at that shareholders' meeting yet, so I will allow it.

BY MR. PAPE:

Q. What issues arose at the shareholders meeting on December 15<sup>th</sup>?

A. Well, the main reason was I tried to get Gary to finish this building that we were suffering every day. And he mentioned a couple of times that we did not have the money. We did have the money, I got second mortgage from my house, we had the money to carry on with that restaurant for another year or more. We was tried to get Gary to finish that restaurant, the building that he started and that's the main reason we had put the rent in the escrow. I was trying to see if that can make him finish it and he promised us in

1 that meeting, that he going to finish all the stuff that was  
2 wrong with the building, the leaky roof, the floor, and many  
3 other major things, the smell in the bathroom.

4 Q. Well let me ask you to identify Plaintiffs' Exhibit No.  
5 26, what is that?

6 A. This is a list of items to be finished and/or repaired.  
7 That what we presented in the meeting, we was asking Gary to  
8 finish --

9 Q. Did you present Plaintiffs' Exhibit to the Bensches at  
10 the meeting?

11 A. Right.

12 Q. All right, I tender Plaintiffs' Exhibit 26.

13  
14 COURT: Mr. Clabaugh?

15 YOUR HONOR: His testimony was this was  
16 at a shareholders' meeting on December 15<sup>th</sup>.  
17 I note that the document is dated 10/16/99.

18 COURT: When you cross-examine then --

19 COURT: Other than that, no objection,  
20 Your Honor. What number is that?

21 MR. PAPE: 26

22 COURT REPORTER: Actually your 25 was  
23 taken out so I can void it.

24 MR. PAPE: Well, did I voluntarily  
25 remove it?

BY MR. PAPE:

1 Q. Who sued you and what was the suit all about?

2 A. Well, when they took over, they took everything we had  
3 and we really we had some of the debts that was not paid.  
4 It was not because we could not pay it, but because they  
5 closed us down. But like every business, always you pay  
6 bills. But some of that stuff went back to me, I think one  
7 of them if I remember correctly, was Nicholas Altherio, he  
8 sued me for some --

10 Q. Nicholas L. Altherio was an employee of Zorbas?

11 A. He was an employee.

12 Q. All right, did you personally employ Mr. Altherio?

13 A. Yes I did, Zorbas.

14 Q. Zorbas, okay. So he sued you for money that was owed  
15 by Zorbas, is that correct?

17 A. It was a couple of weeks and I told him I say well,  
18 since Gary took over I don't have any control. You get your  
19 money from them. All my money was in the restaurant; all my  
20 food that was there. So he ended up suing me. He said Gary  
21 will not pay him anything. He ended up suing me.

22 Q. And so did you have personally incurred expenses of  
23 litigating that?

24 A. Yes.

25 Q. All right and what is Plaintiffs' Exhibit 26 then?

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MR. CLABAUGH: Your Honor, there's been no -- I haven't seen any evidence of a lawsuit being filed. This is a bill from Mr. Pape's office.

MR. PAPE: He's just testified to it.

COURT: Now, these are the stipulated expenditures for Zorbas?

MR. PAPE: No.

COURT: All right, then, aren't we going outside of the stipulation?

MR. PAPE: No, Your Honor, the stipulation, Plaintiffs' Exhibit 2 is for the contributions that Mr. Passaloukas made directly to Zorbas in terms of cash and supplying of equipment and furnishings. That's what that stipulation is about. He's incurred here additional money after the restaurant he was evicted from the premises to defend claims made that rightfully Zorbas' claims against Zorbas and I think as a shareholder and as an officer he would be entitled to indemnification from Zorbas for defending those claims.

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COURT: Is that one of the causes of action in the lawsuit?

MR. PAPE: Yes.

MR. CLABAUGH: No. Not post-termination. Furthermore, we haven't seen any evidence of a lawsuit.

MR. PAPE: Well, he has just testified to it and it was at issue at the last trial -

MR. CLABAUGH: I assume if we have got a bill there must be documents, court documents, showing that there was a lawsuit or disposition or what have you. And absent that, I would object to it.

COURT: Does it reference the case number on the lawsuit?

MR. PAPE: It references the lawsuit. It says, suit by L. Atherio vs. Passaloukas and Zorbas, Inc.

MR. CLABAUGH: I assume they have got the burden of proving that there was a lawsuit and that there --

MR. PAPE: Well, I mean all we've got --

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COURT: So this individual sued Zorbas, Inc. as well as Mr. Passaloukas?

MR. PAPE: Yes.

MR. CLABAUGH: I think the testimony was he sued Mr. Passaloukas.

COURT: Well, that's what I heard, but then I heard someone read the caption. The bill was still there so --

MR. CLBAUGH: It doesn't say. And the client is listed as Bill and Susie Passaloukas.

COURT: I am happy to -- first let's do this. Before I rule, I would be interested to see whether or not there was a lawsuit against Zorbas, but it's ten of or so, I think we haven't really taken a break this morning, have we? So, I don't think we are going to wrap this up before lunch, so why don't we deal with this issue after lunch. Why don't we try to break until about 1:15 if that suits everybody and I will go ahead and lock this so we can all leave everything the way it is --

1 MR. CLABAUGH: Before we go, do you have  
any idea how much longer you are going to be?

2 MR. PAPE: Oh, ten to fifteen minutes,  
3 but I mean you are going to have lots of  
4 cross-examination I guess.

5 MR. CLABAUGH: Well, if that's the case,  
6 why don't we finish with this witness and  
7 then break if it's going to be ten or fifteen  
8 minutes.

9 MR. PAPE: Well, but you're going to not  
10 start your cross-examination?

11 MR. CLABAUGH: And then I'll start my  
12 cross when we get back.

13 COURT: Well, I don't have a whole lot  
14 of confidence that it will really be ten to  
15 fifteen minutes.

16 MR. PAPE: Well I've got to go to the  
17 bathroom. I have been drinking all this  
18 water.

19 COURT: Let's do this.

20 MR. CLABAUGH: I think if we get back  
21 together and you know if we have to get back  
22 together again, the Plaintiff should -- at  
23 lunch time should have to cook a real Greek  
24  
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1 meal for us all to demonstrate the true  
2 ethnicity of his background.

3 MR. PAPE: Frank have you seen  
4 Plaintiffs' Exhibit 3? Was that the one that  
5 we --

6 MR. CLABAUGH: It was here earlier. I  
7 remember because I asked you what it was and  
8 it had not been admitted. Let me look.

9 MR. PAPE: It had been ID'd?

10 MR. CLABAUGH: Yeah. I don't think I  
11 have it, but let me look. I have --

12 MR. PAPE: It shouldn't have moved off  
13 of -- Your Honor, the reason I am looking for  
14 it is because during our lunch break I  
15 believe I got an agreement from Mr. Clabaugh  
16 and his clients that that is an authentic  
17 document.  
18

19 COURT: And the document was what  
20 document?  
21

22 MR. PAPE: It's document #3, it is the  
23 minutes of the meeting of December 15, 1999.

24 COURT: Okay, and so we are just looking  
25 for a copy of it to put in as an Exhibit?

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MR. CLABAUGH: We will be, it should be here, but when Mr. Mogil testifies when we get back together he has several documents from that meeting including that one.

MR. PAPE: That he can authenticate?

MR. CLABAUGH: Yeah.

MR. PAPE: But nevertheless, we --

COURT: So if we can't find it at this moment, I am assuming this is the December 15<sup>th</sup> --

MR. CLABAUGH: Yes.

MR. PAPE: Yes.

MR. CLABAUGH: Why don't we do this, Your Honor, it was submitted before but since my clients hadn't seen it, we objected to it. Why don't we go on the record and state that it can be admitted and then we will -- we will --

COURT: Mr. Pape, that suit you?

MR. PAPE: Yes, sir.

COURT: We haven't seen it so we will find it. So it would not be in the prior court file I guess if you hadn't seen it?

MR. PAPE: No.

1 COURT: So, no, we need to dig through  
2 that stack. Perhaps what we could do is get  
3 Mr. Mogil to fax it back over here and once  
4 he --

5 MR. CLABAUGH: He's actually going to --  
6 since we weren't getting to him, I had asked  
7 him to make me a complete copy of his file  
8 and submit it to me, so when he does that I  
9 will be glad to fax it over.

10 COURT: He may be in Staples or  
11 somewhere.

12 MR. CLABAUGH: No, well I don't know.  
13 He said he had a busy afternoon, I don't  
14 know.

15 COURT: Well anyway I was going to see  
16 if maybe Heather could track him down and get  
17 him to fax one just so we can keep it all in  
18 order.

19 MR. PAPE: Well, there are several  
20 copies around, Your Honor, and I am sure we  
21 will find it somewhere.

22 COURT: Okay. All right, well once it  
23 appears I understand it is stipulated as  
24 authentic.  
25

1 MR. CLABAUGH: I -- there's a place for  
2 date of delivery on that document and it's  
3 blank.

4 COURT: So your objection is that it  
5 calls for speculation?

6 MR. CLABAUGH: Well, he testified that  
7 he got the certified letter, but there's  
8 nothing on this document --

9 MR. PAPE: Well, he testified that he  
10 got it the last day of December and the form  
11 speaks for itself. I mean it is a little  
12 vague but it does seem to express the  
13 intention.  
14

15 BY MR. PAPE:

16 Q. Did you ever receive that letter through any other  
17 means?

18 A. No.

19 Q. Did Mr. Bensch or Mrs. Bensch ever hand-deliver it to  
20 you?

21 A. No.

22 Q. All right, once you received that letter -- I think  
23 everybody has agreed that Sunday the 8<sup>th</sup> of January, the 8<sup>th</sup>  
24 of January was a Sunday, is that -- we have all agreed to  
25 that?

1 MR. CLABAUGH: I don't think there's  
2 been any, it may have been but I don't know.

3 MR. PAPE: I believe there was some  
4 testimony.

5 COURT: Well, why don't we take a minute  
6 and look at the calendar and see if you all  
7 can stipulate to that.

8 MR. PASSALOUKAS: It was a Sunday  
9 because it was closed.

10 COURT: January 8<sup>th</sup> was a Friday, 1999.  
11 No, that would be 2000 though wouldn't it. I  
12 am going to the wrong year.

13 MR. PASSALOUKAS: Yeah, it was 2000.

14 COURT: It was a Saturday.

15 MR. PAPE: Here's my calendar.

16 COURT: Does your say different? Yours  
17 says Saturday, right. 8<sup>th</sup> a Saturday.

18  
19 BY MR. PAPE:

20 Q. Do you recall whether or not January 8<sup>th</sup> was on a  
21 Saturday or Sunday?

22 A. I thought it was a Sunday because we was closed and I  
23 went over there to prepare some food for the next day and  
24 then I saw those papers in the window.  
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MR. CLABAUGH: Wait a minute, I thought the Court just said January 8<sup>th</sup> was a Saturday?

MR. PAPE: That's right and I have confirmed that. That's what my calendar says.

COURT: It was a Saturday. I think his testimony was that he went there on Sunday and saw the papers.

A. Saturday we was open, so when we left at night it was not -- nothing was there. So Sunday when they changed the locks and they put those papers in the windows. It seems like we went about Sunday noon to prepare some food and it was -- we saw those papers in the window and we went back home.

COURT: Just to clarify the question that was earlier, at least according to my cell phone's calendar and I think Mr. Pape's cell phone calendar 1/8/00 was a Saturday.

BY MR. PAPE:

Q. All right, if Saturday was the 8<sup>th</sup> then you received this on the 31<sup>st</sup> on Monday. Is that to the best of your memory?

A. Right.

1 Q. Okay. I am so sorry, Saturday the 8<sup>th</sup>, the third  
2 Wednesday or Friday would be --

3 A. Second Thursday probably then --

4 MR. CLABAUGH: Your Honor, we can all  
5 look at a calendar.

6 MR. PAPE: Yeah, I am sorry. I was  
7 trying to short circuit -- I've had a --

8 COURT: I can announce what the dates  
9 are if that's of interest. The 31<sup>st</sup> again, I  
10 am relying on my Samsung cell phone calendar  
11 for December of 1999 the 31<sup>st</sup> according to  
12 this was a Friday and then you move of course  
13 into 2000 and the 8<sup>th</sup> appears as a Saturday.  
14

15 MR. PAPE: That's still not working out,  
16 I am not an artist. Anyway the 31<sup>st</sup> was a  
17 Friday?

18 COURT: That's according to my cell  
19 phone. I think yours --

20 MR. PAPE: Yeah, I think that's right.

21 BY MR. PAPE:

22 Q. So were you open for business on the 31<sup>st</sup>?

23 A. Yes.

24 Q. And were you open for business then on Saturday the 1<sup>st</sup>  
25 of January?

1 there were certain funds owed to the  
2 corporation that may or may not have been  
3 paid. I guess I haven't gotten complete  
4 testimony on that.

5 MR. CLABAUGH: I don't think there's  
6 been any testimony of funds that were due to  
7 the corporation.

8 MR. PAPE: Well, yes, these offsets that  
9 we have talked about for the leasehold  
10 improvements and the \$1833.00 for the hot  
11 water heater.

12 COURT: Well actually that wasn't what I  
13 was thinking of, but anyway, the question --  
14 and as I understand the testimony so far, and  
15 correct me if I am wrong, the November  
16 payment when we approached this date was  
17 placed in escrow with an attorney and it has  
18 not been paid as we come up on the dates we  
19 are talking about here, is that right?  
20

21 MR. PAPE: The testimony I think, Your  
22 Honor, has been that at the shareholders'  
23 meeting when he got a promise from Mr. Bensch  
24 to correct these problems, defects with the  
25

1 Q. What's our next Exhibit, 27 or 28?

2 COURT REPORTER: I've got 26.

3 MR. PAPE: So, can I number this one 26?

4 COURT REPORTER: Yes.

5 COURT: While you are doing that, is the  
6 date of eviction a stipulated date, the 8<sup>th</sup>?

7 MR. CLABAUGH: Yes.

8 MR. PAPE: Yes.

9 BY MR. PAPE:

10 Q. Mr. Passaloukas, I hand you what's been marked as 26,  
11 Plaintiffs' Exhibit 26, tell the Judge what it is.

12 A. It is items still missing.

13 Q. What is that list?

14 A. That's some of our personal stuff that was there.  
15 Stuff we had brought from the house that we was using for  
16 the restaurant.

17 Q. Was any of that stuff ever returned to you?

18 A. Some stuff was returned. Some stuff we never got it  
19 back. Some stuff it was broken and damaged, I don't  
20 remember what --

21 Q. Tell the Judge what items if you can remember at this  
22 late date, what items were still and are still missing.

23 A. Well, according to this paper here we went through our  
24 stuff. There's a bunch of stuff missing and all the stuff  
25

1 that say is not missing, they gave to us back. They gave us  
2 back the spices and the scale and all that stuff. You want  
3 me to --

4 Q. I want you to describe to the Judge what is still  
5 missing and your estimated value.

6 A. Some CD's we had Greek cassette tapes some missing.

7 Q. Why don't you go -- they are all numbered, right? Why  
8 don't you identify the number and describe what's still  
9 missing.

10 A. #1 there was some CDs and cassette tapes.

11 Q. How many?

12 A. I don't know. I don't remember, but I no it was not  
13 what we had. We had many boxes and we got a few.

14 Q. Number 2?

15 A. Number 2, keepsake \$20.00 bill that had been in our  
16 money clip. That was our first twenty dollar bill.

17 Q. All right, what was the value of that?

18 A. Well, it was our first twenty dollar bill. I would  
19 imagine it was worth you know \$20.00 but to us it was our  
20 first Zorbas' twenty dollar bill.

21 Q. All right, item 3 what is it?

22  
23  
24 MR. CLABAUGH: Your Honor, I would  
25 request he ask him which one is missing. Let  
him answer the questions.

1 A. Well it is marked here. It is all marked here.

2 COURT: Let me ask you this, Mr. Pape.  
3 Is the list - 'cause I was reading the last  
4 paragraph here. Is it my understanding the  
5 witness is testifying to the things that they  
6 did not get?

7 MR. PAPE: Yes, that's all he is  
8 testifying to. He has testified that some  
9 items he finally got and that other items he  
10 still has not recovered as of today.

11 COURT: Is that correct, Mr. Passaloukas?

12 MR. PASSALOUKAS: Yes. First we thought  
13 all our stuff it was missing and then looking  
14 around careful we found some of the stuff  
15 that what we put not missing, not missing.

16 MR. CLABAUGH: And we are talking about  
17 missing as of today?

18 MR. PAPE: Yes, as of today. They are  
19 still missing and all I want you to do Mr.  
20 Passaloukas is go through the list, identify  
21 the number on the list if it is still missing  
22 and tell the Judge what the value is.

23 A. All right, number 3 it is a lid to Susie's dutch oven,  
24 I don't know how much that is worth. Number 4 a container  
25

1 blades and press to some kind of food processor Susie had.  
2 That was missing.

3 Q. Talk about the value now before you go on.

4 A. I don't know the value -- 50 bucks, 60 bucks.

5 Q. All right, number 5.

6 A. Number 5 large glass lasagna pan Susie had. That was  
7 missing. Value of I don't know \$30.00, \$20.00 whatever.

8 Q. And number 6, is that still missing?

9 A. Rolling pin.

10 Q. What's the value of that?

11 A. Twenty, fifteen, twenty dollars, I don't know.

12 Q. Go to the next one.

13 A. Number 9, French fry tongs.

14 Q. What's the value of that?

15 A. I don't know, five bucks, ten bucks.

16 Q. Okay, number 10?

17 A. Ten, CD player.

18  
19 MR. CLABAUGH: Your Honor, again let --

20 I would like the witness to do it, not Mr.  
21 Pape to prompt him.

22  
23 COURT: Well, he is just telling him to  
24 move on to the next item, so --

25 MR. CLABAUGH: Well the question was  
asked which ones are missing and I would -- I

1 think he needs to tell us which ones are  
2 missing.

3 COURT: Well I agree with that. Mr.  
4 Passaloukas just move forward with the items  
5 that are missing if you would.

6 A. Number 10 CD player probably a couple of hundred  
7 dollars. Number 11, tape player another two hundred.  
8 Number 12 it was three or four Greek cookbooks, value of  
9 that \$100.00. I don't know if we can find those again, they  
10 came from Greece. Number 14 small creamer. It was not very  
11 expensive; it was given by Susie's mother. Number 15  
12 cordless telephone, ten bucks, I don't know. 16 it was two  
13 or three muffin pans, another \$15.00 I would say. 17 three  
14 thin wooden trays. I don't know, twenty dollars. 18  
15 statute of my Mercury, alloy metal that was I brought that  
16 from Greece I don't know, that was probably \$100.00. Silver  
17 bud vase I don't know the value of that.

19 Q. What was the item made out of silver or do you know?

20 A. I don't know if it was real silver. It was very  
21 special.

22 Q. The value of that?

23 A. Value, a hundred bucks, I don't know. No. 20 wooden  
24 toothpick box.  
25

MR. CLABAUGH: It says it's not missing.

1 A. Not missing, I am sorry. No. 21 several decorative  
2 candles. Value of \$20.00, \$15.00 I don't know, I am just  
3 guessing. 22, bag of plastic flowers, value of \$20.00. 23,  
4 set of plastic balls, ball and leads, value of ten to twenty  
5 dollars.

6 Q. Well, if you can testify what it's worth, testify with  
7 a reasonable degree of certainty. If you don't know, just  
8 say you don't know.

9 A. Yeah, about twenty dollars. No. 24 silver statute of  
10 Achilles. That was -- that came from Greece, I don't know.

11 Q. Okay.

12 A. That was probably four or five hundred dollars though.

13 Q. How much?

14 A. Four or five hundred dollars, I don't know how much it  
15 was worth. No. 2 -- No. 25 wood pictures of Greek Gods,  
16 male and female, that stuff I had brought from Greece.  
17 Maybe \$50.00. 26, Greek plates and the base of it, worth  
18 maybe \$100.00. 27, 28 yellow white paint type bucket,  
19 \$20.00. Clay type vase, 29, that was clay type vase  
20 probably another \$20.00. Number 30, desk, many papers,  
21 files, computers, software. That was my kids' desk. I  
22 don't know what price you can put on that. It was a \$200.00  
23 desk, not a big deal, but it was my kids' desk. No. 31  
24 wires to stereo system, I guess all that stuff is still in  
25

1 the ceiling over there because we had -- I don't know what  
2 that installation and all we paid, \$1,000 or so.

3 Q. Well, let me ask you this about that. Do you remember  
4 on the last day of the trial, Mr. Bensch brought something  
5 back, what was that that he brought you?

6 A. He brought a thing that is receiver, but all that we  
7 had paid Radio Shack or somebody to come over there and  
8 install. He put speakers on the ceiling, speakers on the  
9 patio with the wires and we had the control to adjust all  
10 that stuff. So I think what they brought us, they brought  
11 us here the receiver and of course those speakers are still  
12 there on the ceiling.

13 Q. Was that receiver useful without the rest of the  
14 system?

15 A. I haven't used it --- whatever.

16 Q. Does it have any value without the rest of the system?

17 A. I am sure it had some value, but it was all one thing  
18 together.

19 Q. Well what was the value of the rest of the system that  
20 he never returned?

21 A. I don't know, I think we paid probably \$12-1500.00 for  
22 the whole thing and installation, so --

23  
24  
25 MR. CLABAUGH: Your Honor, we're talking  
here now about personal items or are we

1 talking about a stereo system that's built  
2 into or that belongs to Zorbas?

3 MR. PAPE: We are talking about personal  
4 items.

5 MR. CLABAUGH: Well speakers built into  
6 the walls aren't personal items.

7 COURT: Let's do this. Let's stick to -  
8 we are going down this list. It says wires  
9 to stereo system. We got little appeal to  
10 the DSL. Is there a value on wires to stereo  
11 system?

12 A. I don't know what this wire -- it might be wires  
13 connecting or --

14 Q. Go on with the next one.

15 A. 32, two photos notebooks of Greek photos, the value on  
16 this could be \$200.00 but we lost the pictures. I don't  
17 know how much the value to put on stuff. 33 there was one  
18 book of Greek pictures and text \$50.00. 34, three pamphlets  
19 from Greece \$20.00. 35, sapphire and diamond ring what's  
20 the value on that \$200.00. 36 almost full bottle of  
21 Dilantin Susie's medicine.

22 Q. How much was that worth?

23 A. \$100.00. No. 37, -- it's not a joke. This is our  
24 life, we lost everything we had plus our house.  
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MR. BENSCH: She has seizures and not have any medicine for a month and he can't afford it for a month.

MR. CLABAUGH: Your Honor, I think --

COURT: Everybody calm down. Go ahead if you would please, Mr. Passaloukas. We've got a \$100.00 on the Dilantin.

A. Stools one was bought and one we brought from our house worth \$20.00. Chair with cushion \$20.00. Number 39, brown rectangle screen \$20.00. Numbmer 40, grating -- we got that grating not missing. We got that. 42, was a steamer \$20.00. 45, the mixer \$50.00. 44, knives I don't know how many there were. I would say another \$50.00. 45, frying pans another 30-40 dollars.

COURT: Mr. Pape there was a range on a lot of these. It's hard to come up with a total.

MR. PAPE: I understand.

COURT: I tried to write them all down, but I am not sure the total of that.

MR. PAPE: I understand the problem, Judge.

BY MR. PAPE:

1 Q. Mr. Passaloukas, what has been the effect on you and  
2 Mrs. Passaloukas as a result of these acts of Mr. and Mrs.  
3 Bensch?

4 MR. CLABAUGH: Your Honor, again, I  
5 would object. This is a shareholders' action  
6 and what the effect of two individuals, Mr.  
7 and Mrs. Bensch, or what the effect of the  
8 eviction had on the Passaloukas' family is  
9 irrelevant.

10 COURT: I understand Mr. Clabaugh's  
11 objection to be to questions with regard to  
12 the effects on the Passaloukas' family and  
13 individuals as the result of the eviction. I  
14 did rule on summary judgment motion that the  
15 eviction was not wrongful, but Mr. Pape had  
16 moved for reconsideration and I agreed with  
17 you that I would reconsider take that issue  
18 up with reference to the testimony, so that  
19 issue really is not decided with finality.

20 MR. CLABAUGH: But that issue goes to  
21 whether the corporation, whether it was wrong  
22 as to the corporation.

23 COURT: I understand. The lawsuit, as I  
24 understand it, is the corporation and a  
25

1 derivative action by the shareholders on  
2 behalf of the corporation against the Benschs  
3 as the landlords for wrongful eviction and  
4 the damages therefrom. Is that right, Mr.  
5 Pape?

6 MR. PAPE: That's one of the causes of  
7 action. The third cause of action is a  
8 claim, an individual claim for wrongful  
9 conversion and misappropriation of corporate  
10 assets and opportunities, that were  
11 individual to them under Code Section 33-18-  
12 400 and we pled that as a result of  
13 misappropriation and conversion that the  
14 Plaintiffs have been damaged inasmuch as they  
15 have lost wages and converted -- they have  
16 lost their share of the return of profits  
17 from the restaurant operations and assets and  
18 the proceeds thereof. They have lost the  
19 monies they are owed by the corporation for  
20 loans which they have made to the corporation  
21 and they have lost their equity in the  
22 corporation. They have also incurred threats  
23 of claims and lawsuits made by creditors and  
24 the employees of the corporation which has  
25

1 cost them money, great emotional distress and  
2 embarrassment.

3 COURT: All right, I think everything on  
4 that list is fair game for examination.  
5 Where Mr. Passaloukas was going with the  
6 effects on the family, elicits comments some  
7 comments not necessarily in response to the  
8 question. I heard the Passaloukas' had lost  
9 their home as a result of this. I don't know  
10 if that is necessarily appropriate. The  
11 testimony that was, if it's not on that list  
12 - I mean, I think the question is, what  
13 direct losses they might have suffered, not  
14 necessarily indirect losses. So, with regard  
15 to everything else on your list, I am happy  
16 to hear whatever testimony you would like to  
17 put in.

18 MR. PAPE: Your Honor, I think with  
19 respect to the conversion of any property was  
20 personal to them. I think we would be  
21 entitled to present all of the losses  
22 including emotional distress, loss of  
23 opportunities, that the losses they have  
24 incurred with respect to his home. I think  
25

1 he has already testified that they have had a  
2 mortgage - and at this point in time I ask  
3 that he be allowed to make his statement on  
4 those points.

5 COURT: I think what you want me to hear  
6 has already been said. Anyway, I think I  
7 will allow his testimony as to the loss of  
8 the home, the rest of it was pretty much  
9 everything you listed in the Complaint except  
10 for the loss of the home as I understand it.

11 MR. CLABAUGH: Your Honor, there's been  
12 no -- there's been no evidence introduced at  
13 all about a mortgage, a loss of a home or  
14 anything else.

15 MR. PAPE: Well, I have asked him what  
16 has been the effect? And I think he should  
17 be allowed to say what effect has been on  
18 him. If the Judge thinks it's not a natural  
19 part of damages or misappropriation or  
20 conversion then --

21 MR. CLABAUGH: There's been no evidence  
22 introduced of any mortgage, any loss of --

23 COURT: You can put in whatever --  
24  
25

1 MR. CLABAUGH: I understand, but until at  
2 least the foundation is laid, I submit --

3 COURT: Well, his question was what  
4 which I acknowledge is a very broad question,  
5 but what effect did this eviction have on --  
6 I can't remember at this point whether he  
7 said your family or you, but I think that's a  
8 fair question and if we get too far off  
9 afield, you know, feel free to object again.  
10 I understand that this entire line of  
11 questioning is subject to your objection and  
12 your objection is overruled so go ahead if  
13 you will please, Mr. Pape.  
14

15 BY MR. PAPE:

16 Q. Mr. Passaloukas, what has been the effect on you and  
17 your family with respect to this eviction?

18 A. Well, we are destroyed. You know, I did not need this.  
19 We had our house paid for, our cars paid for before we start  
20 this restaurant. Then we saw this building and it was for  
21 rent and we got to meet them, Gary and Cynthia, and we  
22 talked about this restaurant and we put our house down  
23 because we did not have the cash and put our house down.  
24

25 Q. What do you mean you put your house down?

1 Q. Okay, I have no further questions.

2 COURT: Frank, would you like to take a  
3 break before you begin or --

4 MR. CLABAUGH: No, Your Honor, I think  
5 we are ready.

6 BY MR. CLABAUGH:

7 Q. Mr. Paskaloukas, my name is Frank Clabaugh.

8 A. Very simple my name not "k", two s's, Passaloukas.

9 Q. Passaloukas.

10 A. That's it.

11 Q. Okay. And I represent the Defendants in this action.  
12 May I have this marked as -- I don't know what the first  
13 number is. Is that 2? Pardon?

14 COURT REPORTER: 2.

15 MR. PAPE: Do you have a copy for me?

16 MR. CLABAUGH: No, I don't. I think  
17 that is part of the larger exhibit you  
18 entered with all the bank statements.

19 BY MR. CLABAUGH:

20 Q. Mr. Passaloukas, I am going to show you what we have  
21 marked as Defendants' Exhibit No. 2 and ask you if you can  
22 identify that.

23 A. That's a bank statement from Palmetto Bank.

24 Q. And for what month?

1 A. March of 2000.

2 Q. Let me see. Would you look on Page 3 of that statement  
3 at the very bottom you see where I am -- at the very bottom  
4 of that page?

5 A. Yes.

6 Q. You testified in response to a question a few moments  
7 ago as to whether or not you could have paid the December  
8 rent that was due and I believe you testified that you  
9 could, is that correct?

10 A. Yes.

11 Q. Does that bank statement show what the bank balance of  
12 Zorbas was on January 7<sup>th</sup>?

13 A. No.

14  
15 MR. PAPE: You mean January 7<sup>th</sup> of 2000?

16 MR. CLABAUGH: Yes.

17 BY MR. CLABAUGH:

18 Q. At the very bottom of that page.

19 A. No.

20 Q. Let me have it back.

21 A. I was plugging the account like I always plugged with  
22 money since they was not helping from the beginning.

23 Q. Doesn't that Exhibit on the very bottom show that --  
24 the bank balance on the 7<sup>th</sup> had a minus \$396.00 figure?

25 A. That looks like \$361.96.

1 Q. Minus?

2 A. Minus.

3 Q. Okay, so the bank -- Zorbas' bank balance on that date  
4 was in the red, is that correct?

5 A. Well, not if I had deposited the money they took from  
6 there.

7 Q. I am asking you to tell me what the --

8 A. I told you, yes, I told you they had kept my deposit,  
9 they closed me out with my deposit.

10 Q. This is before -- the day before the eviction took  
11 place. So there was not money in the account to pay the  
12 rent?  
13

14 MR. PAPE: Wait a minute. What are you  
15 talking about? The day before -- this is a  
16 statement that's March 31<sup>st</sup>, 2000.

17 MR. CLABAUGH: I am saying as of the  
18 date shown there, January 7<sup>th</sup>.

19 A. If you look on the deposit -- if you look on the  
20 deposit I was supporting Zorbas from the beginning. I had  
21 put twenty one and a half thousand dollars in it to keep it  
22 up and I was planning to keep it up.

23 Q. Mr. Passaloukas, does the bank statement show you had -  
24 - Zorbas had a negative bank balance on that date?  
25

A. I told you, yes.

1 Q. Correct. Thank you. Now a few moments ago you were  
2 testifying as to items that were missing Plaintiffs' No. 26.  
3 Would you look at that please? That's it and the one you  
4 have in front of you.

5 A. Okay.

6 Q. Is it your testimony that every one of those items that  
7 you testified to a moment ago have not been returned to you?

8 A. Yes.

9 Q. After the eviction, didn't you go to the restaurant and  
10 hadn't the Bensches given you several boxes of equipment?

11 A. After the eviction I never went to the restaurant.

12 Q. You never -- never got any of these back in boxes?

13 A. I got me some boxes, not from the restaurant.

14  
15 MR. BENSCH: Next door.

16 Q. Okay, next door.

17 A. Not next door either.

18 Q. My point is you picked up --

19 A. At Mogil's office.

20 Q. Okay, you picked up boxes that had some of this stuff  
21 in it, didn't you?

22 A. Yes.

23 Q. Okay, and with regards to the valuations of these  
24 things, do you have any documentation at all supporting any  
25 of these valuations?

1 A. Some I have.

2 Q. Do you have any here?

3 A. Some is in -- what I paid in Greece. Some I don't, some  
4 it was -- it came from my family. Some came from Susie's  
5 family.

6 Q. My point is, sir, as we sit here today so that the  
7 Court has a way of evaluating your testimony, do you have  
8 any documentation supporting any of the claims for how much  
9 any of these individual things were worth as of January 8,  
10 2000?

11 A. Not all of them. As I say, some of them are here what  
12 I paid in Greece. The most of the stuff it came from my  
13 house, I don't want to keep all the receipts for what I have  
14 in my house.  
15

16 Q. Am I to assume that is a, no? You don't have any  
17 records here?

18 A. Exactly, that's a no.

19 Q. Okay. Now going back to the beginning of your  
20 testimony, would you please look at Plaintiffs' Exhibit No.  
21 7 and I am going to refer you I believe you should have it  
22 in your stack there, it is the Shareholders' Management  
23 Agreement. And I am talking about the last page. When did  
24 you first contact the Bensches about a Greek restaurant in  
25 Bluffton?

1 A. I don't remember what was my first proposal. The first  
2 time I met them it was there that day.

3 Q. Okay, but what was your first proposal?

4 A. I don't remember if we -- I knew that I needed -- we  
5 was thinking for a -- you know the place would be good for a  
6 Greek restaurant and of course we knew the restaurant it was  
7 not -- it was not built as a restaurant and there was no way  
8 for me to be able to afford to build it, to rent it like  
9 this and for me to finish it as a restaurant. No, it was  
10 never a question for me to run it alone. I always wanted --  
11 we talked about being partners that day. Him to finish the  
12 building and me to build the kitchen and run it.

13 Q. Okay, so you only had one proposal with them then?

14 A. Yeah.

15 Q. Okay. Now when you first talked to them did the  
16 Bensches tell you that they didn't have any experience, any  
17 restaurant experience?  
18

19 A. Not particularly. I knew that they did not have much  
20 experience in restaurants. I think he told me the kind of  
21 story that he backed up somebody in the south end with a  
22 restaurant at one time and it did not go well. He end up --  
23 I don't know why, I can't remember the situation.

24 Q. Okay, to your knowledge did -- the Bensches never ran a  
25 restaurant, did they?

1 A. Not as far as I know.

2 Q. Okay, and you told them that you had that experience,  
3 didn't you?

4 A. What I told them -- I never told them I was an expert  
5 or anything. I told them that yeah I know the Greek  
6 cuisine, that my dream. We worked a couple of restaurants  
7 before. We run a couple of restaurants before. That's all  
8 I told them. I didn't tell them I was an experienced  
9 restaurant builder -- a restaurant --

10 Q. You didn't tell them though that your previous  
11 restaurant experience had been 25 years before?

12 A. I did tell them that. Of course, I did tell them that.  
13 I told them we had a -- the restaurant was not 25 years ago,  
14 but it was -- yeah, it probably was. In Seneca, South  
15 Carolina we had a couple of restaurants, we ran it and it  
16 was fair and we never got rich, we never got broke. But --  
17 and I did -- we both me and my wife and we both worked in  
18 restaurants and I did not want just a restaurant. I wanted  
19 a nice quality restaurant with authentic Greek food like I  
20 say before and homemade stuff and basically the idea of the  
21 restaurant it was to have junk, but --

22 Q. Well, your previous restaurant experience, how far  
23 before 1999 was it?  
24  
25

1 A. I can't remember exactly, probably was late 70's, early  
2 80's.

3 Q. Okay, now how did you first become aware of the space  
4 where Zorbas was subsequently --

5 A. We were driving up there and we saw it was for rent,  
6 for lease or rent.

7 Q. Well had you seen it before? I mean -- when did you  
8 first become aware of that space?

9 A. We was driving outside, I think it was maybe that same  
10 week I think. Because we asked one of their tenants about  
11 calling the place and they told us that they was thinking to  
12 build a restaurant there so I say that seems a good  
13 opportunity. We will need to meet them and I called Cynthia  
14 and they invited us to their house and we had that talk.

15 Q. This was a new center, wasn't it?

16 A. I am sorry?

17 Q. This was a new -- a new center?

18 A. New --

19 Q. Recently been built?

20 A. I would say there was a couple of -- was a couple of  
21 tenants there, two or three.

22 MR. CLABAUGH: Can I have this marked as  
23 Plaintiffs' Exhibit No. 3? I am sorry,  
24 Defendants' 3?  
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MR. PAPE: Your Honor, that document has never been produced to us.

MR. CLABAUGH: It's just a photograph of the center, Your Honor.

MR. PAPE: If it's a photograph of the center as it looked at that time, it's fine, but if it's not, I would object to it.

BY MR. CLABAUGH:

Q. Do you recognize what's depicted in Exhibit No. 3?

A. It looked like our restaurant there.

Q. Okay, and it shows Zorbas at one end of the center?

A. No, I don't know if that's the sign or if somebody had print that.

MR. PAPE: Judge, if you look at the top, it looks like somebody's done a little photocopying.

A. No, that's not our sign.

COURT: Right. Well if -- sustained. Leave it out. I mean, I don't know how a picture helps me anyway.

A. I mean it looks like the shopping center and it look like our restaurant. I don't know what else.

1 Q. Okay, but anyway, you saw this space and when you saw  
2 this space what was the condition of the space where Zorbas  
3 subsequently went?

4 A. It was a warehouse full of Gary's stuff. It had some  
5 of his construction machinery, material and stuff he was  
6 storing there.

7 Q. Okay, there were -- were there four walls?

8 A. It had I think he had some windows.

9 Q. Okay, well I will get there. Were there four walls?

10 A. Four walls? What do you mean walls? It had the  
11 outside walls, inside --

12 Q. That's what I mean. There were four outside walls on  
13 each side?

14 A. Well it was -- it was the framing, not the walls done.  
15 It was the framing.

16 Q. Okay, there was no insulation, there was no sheetrock?

17 A. No insulation outside.

18 Q. Okay, and there was a roof on it?

19 A. There was a roof on it.

20 Q. But there was no ceiling?

21 A. Exactly.

22 Q. Okay. And there was no heating and air conditioning?

23 A. Correct.

24 Q. And there was no plumbing?

1 A. No plumbing.

2 Q. No insulation?

3 A. Correct.

4 Q. Just a bare frame?

5 A. Right.

6 Q. Okay. Now, what did you tell the Bensches that you  
7 wanted to be able to do with that space?

8 A. I told them it would be nice if we can have a little  
9 Greek restaurant there.

10 Q. Okay. Did you come up with the design for your Greek  
11 restaurant?

12 A. Yes, I did.

13 Q. Okay. And did you come up with the design -- well when  
14 did you come up with the design for the restaurant?

15 A. I believe maybe the next meeting at their house. I  
16 brought them roughly drawings I had make -- I had made.

17 Q. Okay.

18 A. I been to school many years ago, I know how to do that  
19 and I draw some of the plans roughly without even to have  
20 the exact dimension but it was close and they saw it. They  
21 saw basically what -- what I was thinking.

22 Q. Okay, so you designed how you wanted the inside to look  
23 like?  
24  
25

1 A. Roughly in the beginning. Then things changed because  
2 we had to figure where the kitchen and how we were going to  
3 do it. But I got an idea.

4 Q. Okay. And did you have some experience in doing this?

5 A. On doing what?

6 Q. Well, putting together what you wanted the inside of  
7 your restaurant to look like?

8 A. No. We worked in a couple of restaurants and we had a  
9 couple of restaurants before.

10 Q. Well, how were you able to design -- I guess my  
11 question is how were you able to come up with a design?

12 A. It's all -- it's all about the building. I mean the  
13 way the building was already there. The shell, so we tried  
14 to make it work. The bathrooms they was halfway built and  
15 the kitchen had to be on the back, so it make a little  
16 common sense where the dining room was going to be and I was  
17 -- tried to -- I don't know if it was then or later I  
18 designed a little office on the back and the working cooler  
19 I think all that stuff came later and I was asking for a  
20 little patio on the side. I said it would be nice to have  
21 people eating out there.  
22

23 Q. Okay, before you actually designed the restaurant, did  
24 you and the -- did you all decide you were going to form the  
25 corporation?

1 A. No. I -- no I am not very good with all these  
2 legalities. Basically we talked about being partners. I  
3 did not even know that they have what's the Town Center and  
4 all that. I knew Gary and Cynthia Bensch and they knew Bill  
5 and Susie.

6 Q. Okay.

7 A. And we discussed about be partners and we made this  
8 little paper here.

9 Q. Okay.

10 A. And it shows the responsibility of each one.

11 Q. Okay. You are talking about Exhibit A?

12 A. Exhibit A.

13 Q. Okay, and my understanding was that according to this  
14 you were going to furnish and install the kitchen appliances  
15 and systems?  
16

17 A. Exactly.

18 Q. Okay, and you were going to furnish architect sealed  
19 plans for the restaurant construction?  
20

21 A. Exactly.

22 Q. Okay and you were going to manage the restaurant?

23 A. Exactly.

24 Q. Okay. And you were going to furnish the tables and  
25 chairs?

A. Right.

1 Q. Okay, you were going to get the licenses?

2 A. Right, the license to run the restaurant, yes.

3 Q. Okay. And you were going to pay for the food supplies?

4 A. Yes.

5 Q. Okay, and you were going to be responsible for paying  
6 the rent to the landlord?

7 A. Yes.

8 Q. Okay, now and the Benschs' as their contribution, they  
9 were going to do the - well, they were going to get the  
10 building permits, they were going to do the completion of  
11 the existing building?

12 A. Okay, yes.

13 Q. And that was going to be done pursuant to your plans?

14 A. Well some of the -- yeah, but he knows how to build the  
15 wall so --

16 Q. Okay, but I mean --

17 A. How to build the floors and the carpet. Yeah, it was  
18 according to the plan we made.

19 Q. Okay, and they were going to do the electrical,  
20 plumbing, mechanical systems, HVAC?

21 A. Exactly.

22 Q. Okay, and they were going to construct the walls, the  
23 flooring, the ceiling tiles, lighting fixtures, bathroom  
24  
25

1 fixtures, insulation. That was -- Mr. Bensch's portion was  
2 to build out the restaurant, right?

3 A. Now, that you said that, he had problems because he was  
4 going to put tile in the kitchen and he never did.

5 Q. Now, did the two of you talk upfront about how much it  
6 was going to cost each of you to do these things?

7 A. Not exactly. We thought we can put about \$50,000 a  
8 piece and I don't remember the numbers we had talked, but  
9 whatever it is, it is. We had -- we was talking about  
10 building a Greek restaurant and we was -- we was hoping it  
11 would be successful and get our money out of it and have a  
12 good place to make a living and share the profits and be  
13 friends and have a glass of wine together and enjoy it.

14 Q. Okay, now during your testimony you said that the  
15 opening of the restaurant had been delayed because of Mr.  
16 Bensch, is that correct?  
17

18 A. That's what I said.

19 Q. When did you do your drawings for the restaurant?

20 A. The drawings I started to do it I think in January  
21 maybe. The rough drawings I did so I had an idea what we --  
22 about what we had to do. He told me he was going to get the  
23 permit to start to work on the building. There was a lot of  
24 stuff he could do on the building if he had the permit.  
25

1 Q. Now don't get ahead of me now. I am asking -- the  
2 question was when did you do your drawings?

3 A. I don't remember when we completed, but I know we had  
4 some rough drawings in the beginning. Then I made them I  
5 don't know exactly the dates. Then I draw them by scale and  
6 Beaufort County wanted an architect to sign it, so we had to  
7 go through an architect.

8 Q. Okay, so you did the drawings and gave them to Mr.  
9 Bensch to take to get the building permit?

10 A. Yes.

11 Q. Okay, and they wouldn't give you a building permit,  
12 would they? They said this was a commercial building and  
13 you had to have plans done by an architect?

14 A. That's correct.

15 Q. Okay, and this was about the time you went to Greece,  
16 wasn't it?

17 A. I think I went to Greece for about a week or so ten  
18 days; that was in February, maybe.

19 Q. Okay.

20 A. I don't remember exactly.

21 Q. When did you contract with an architect to do the  
22 drawings?

23 A. I don't remember.  
24  
25

1 Q. Would you please look at Exhibit No. 20? Your Honor,  
2 do you have copies of all these?

3 COURT: Exhibit 20 -- is that the  
4 Passaloukas' contribution?

5 MR. CLABAUGH: Yes, it's the plans for  
6 the restaurant.

7 COURT: Plans for the restaurant, I have  
8 it.

9 BY MR. CLABAUGH:

10 Q. After the Town wouldn't use your plans, you contracted  
11 with the Venable Group, Inc.?

12 A. Yes.

13 Q. Okay, and Exhibit No. 20 is that the plans that they  
14 did?

15 A. It looks like --

16 Q. Well take your time and make sure.

17 A. Yea. It looks like.

18 Q. And on the front of that, does it show then when these  
19 plans were approved by the Building Department? On their  
20 stamp in the lower right-hand corner?

21 A. I can't see anything without my glasses. I can't read  
22 that -- I need a magnifying glass. I can't see it. I know  
23 it was -- maybe we got those in March, I would say.  
24  
25

1 Q. Well, if you look at the date I believe it says May 12,  
2 1999.

3 A. I can't see those. It is hard to see.

4 MR. PAPE: Do you want me to read it for  
5 you?

6 A. I don't know if you can read it, I cannot read it.

7 MR. PAPE: Do you have a bigger copy?

8 MR. CLABAUGH: Is it clearer on the  
9 Court's copy?

10 A. I see something, May the 1<sup>st</sup>. 05/01/99.

11 COURT: Would you all like me to read  
12 what's on my copy, Mr. Pape?

13 MR. PAPE: Yes

14 MR. CLABAUGH: Yes.

15 COURT: This has first we have the  
16 Parcel Number. District 600, Map 39, Parcel  
17 14, Permit No. 99983, date 5-12-99. Is that  
18 what you all have?  
19

20 MR. CLABAUGH: Yes.

21 COURT: Flood zone C.

22 BY MR. CLABAUGH:

23 Q. So does that refresh your recollection that it was May  
24 12, 1999 whenever --  
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A. If that's what it says, that's it.

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COURT: If you all would like to use  
this copy.

MR. PAPE: That's fine.

BY MR. CLABAUGH:

Q. It's true, is it not Mr. Passaloukas, that until the building permit is issued by the County or the Town, a contractor can't start construction?

A. I don't know about all these legalities. He had problems. He can start inside and try to build the building long before that.

Q. But the plans weren't done and approved until May 12<sup>th</sup>.

MR. PAPE: Object, that's not what the testimony -- the testimony is, is that the plans weren't approved until the 12<sup>th</sup>. Your question was the testimony is that they weren't done.

BY MR. CLABAUGH:

Q. Well, you were having these plans done. When were they completed, Mr. Passaloukas?

A. I don't know when it was completed. Legally it was his responsibility to do all that. I was --

Q. No, I believe under Exhibit A you were responsible for the plans.

A. I was tried to help him out.

1 Q. You were responsible for furnishing architect sealed  
2 plans.

3 A. That's -- where you saw that?

4 Q. Under Passaloukas' responsibilities No. 2.

5 A. Okay, if that's what it says but I thought I was tried  
6 to help by doing all this stuff. I spent lots of time  
7 without never got paid and --

8 Q. Well, what does paragraph number 2 say?

9 A. Hire architect, sealed plans for restaurant  
10 construction. Yes, you are right.

11 Q. And let me ask you this. You did the plans. Did you  
12 do any specifications for the restaurant?

13 A. Like what?

14 Q. Well, specification -- do you know what specifications  
15 are?

16 A. I think I understand.

17 Q. Okay, in addition to providing the plans, did you  
18 provide any specifications?

19 A. Specifications about the equipments or -- I don't  
20 understand really what --

21 Q. About the electrical, the heating and air conditioning,  
22 any of those things?

23 A. No, that was done by the architect. He did all the  
24 electrical --

1 Q. No, if you will look -- I don't believe there is any  
2 electrical plans or anything.

3 MR. PASSALOUKAS: Yes, there's  
4 electrical.

5 MR. BENSCH: Yes, there is.

6 Q. Is there anything -- did the architect do any  
7 specifications?

8 A. I think somebody did over there, yes, because I am not  
9 an electrician so --

10 Q. Did they specify -- when I say specifications,  
11 specifying you know for instance where the heating and air  
12 conditioning goes, where the water heater goes, what type of  
13 water heater, any of those things?

14 A. I don't know. Whatever is there, I am not an  
15 electrician. Whatever was done by them and --

16 Q. I believe you testified earlier that Mr. Bensch had  
17 experience building restaurants? Was that your testimony?

18 A. As far as I remembered, he told me he had built a  
19 restaurant before so he -- or he had business with somebody  
20 with a restaurant on the South end.

21 Q. You don't know whether he's ever built a restaurant, do  
22 you?

23  
24  
25

1 A. I am just telling you what he told us. As such, he's a  
2 builder he should know that in a restaurant he should go in  
3 the right stuff.

4 Q. So because he's a builder he should know what  
5 specifications might be required for a restaurant, is that  
6 your testimony?

7 A. That what I am thinking that he should know that it  
8 would take a bigger heater than the little unit that they  
9 use for an antique shop and --

10 Q. The -- again if you would look at your -- look at the  
11 plans for the restaurant on Page -- I think its probably  
12 Page 2, for instance if these plans are given to a builder,  
13 is there anything in these plans that tell the builder for  
14 instance what sort of flooring goes in the dining room?  
15

16 A. We had talked about that. They was supposed to put  
17 carpet.

18 Q. Is there anything in the plans that show in the kitchen  
19 whether or not it's supposed to be painted, whether it's  
20 supposed to be tiled?  
21

22 A. We had talked about that. He was supposed to put tile  
23 on there.

24 Q. Is there anything in the -- on any of the plans that  
25 you gave that tell what color tile is supposed to be in the  
restrooms?

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MR. PAPE: You talking about the plans you have before him now, or are you talking about some other set?

MR. CLABAUGH: I am talking about the plans that he had done for Zorbas.

A. The plans was verbal and the mistake I made to trust him. That's all I did. So they had told me they were going to put a good quality carpet and a tile in the kitchen and I asked them that they will do that.

Q. So your testimony is that you didn't have any specifications -- any written specifications?

A. Me?

Q. Yes.

A. Why should I have the specifications -- again he was the one who was building it.

Q. Because you are the one that was supposed to furnish the plans.

A. He's the one who was building the building.

MR. PAPE: Aren't we talking about two different sets of documents, plans versus specifications?

MR. CLABAUGH: No, they usually go together.

MR. PAPE: In your opinion.

MR. CLABAUGH: The --

1 A. What are you an expert on those buildings or are you an  
2 architect?

3  
4 MR. PAPE: Mr. Passaloukas.

5 COURT: Just answer the questions.

6 A. Sorry.

7 BY MR. CLABAUGH:

8 Q. Now, so after the building permit was issued in May, it  
9 took Mr. Bensch, how long did it take him then to complete  
10 the building?

11 A. It was not complete in January when we left. We was  
12 still fixing it.

13 Q. When was the certificate of occupancy issued?

14 A. We opened up the 15<sup>th</sup>.

15 Q. Okay, and you had to have a certificate of occupancy to  
16 open on the 15<sup>th</sup>, didn't you?

17 A. I guess.

18 Q. And it had to have passed the inspections and  
19 everything in order to open?

20 A. Yes.

21 Q. Okay.

22 A. I think the fire marshal came maybe the day before we  
23 opened.  
24  
25

1 Q. Now, so the two of you had an agreement. Each one was  
2 going to do the things that were listed on Exhibit A that we  
3 made reference to. When was -- when did you decide to  
4 incorporate?

5 A. Well, we had talked about incorporating, we were just  
6 so busy. I was so busy -- actually we had opened up, I  
7 remember and we started to do all the paper work in his  
8 office and I had to run because I was cooking that day. So,  
9 we had the decision incorporated before we opened up and we  
10 had talked about it and James Hale was preparing all the  
11 papers and we ended up getting together the day after we  
12 opened up.  
13

14 Q. Well, your incorporation was done long before you  
15 opened up, wasn't it?

16 A. I just told you what I remember.

17 Q. Okay, take a look if you would at Plaintiff's Exhibit  
18 No. 6, the Articles of Incorporation. Do you recognize  
19 Article - I am sorry, do you recognize Plaintiffs' Exhibit  
20 No. 6?  
21

22 A. Yes, I think.

23 Q. Well, just so I am sure, look on Page 3 and tell me if  
24 that's your signature there?

25 A. Yes, it is.

1 Q. Okay, and these are the Articles of Incorporation for  
2 Zorbas, aren't they?

3 A. Looks like.

4 Q. Okay, and what is the date that the corporation became  
5 effective? Look on the first page where there's a stamp  
6 from the Secretary of State.

7 A. September 23, '01.

8 Q. No, up at the top right hand corner.

9 A. April 16, '99.

10 Q. Okay, so does that refresh your recollection as to  
11 that's when Zorbas, Inc. became a corporation?

12 A. I don't remember. I was so busy building the  
13 restaurant. Hale was doing the papers, I was running back  
14 and forth, so I don't know if I went over there, I signed  
15 the paper. I did not even have time to read them.

16 Q. Well, Mr. Passaloukas, the building of the restaurant  
17 didn't start until after the building permit was issued in  
18 May.

19 A. I was working on his building I told you from March, I  
20 was emptying the stock he had stored in that building. Me  
21 and my wife and --

22 Q. So what you are saying is you moved stuff out of the  
23 empty space?

24 A. Exactly.

1 Q. Okay.

2 A. I was loading his little trailer and he was taking it  
3 somewhere else.

4 Q. You agree with me, do you not, that on April 16<sup>th</sup> you  
5 and Mr. Bensch became shareholders of Zorbas?

6 A. I guess if that paper says so we got --

7 Mr. PAPE: Your Honor, that calls for a  
8 legal conclusion based upon all the evidence  
9 that is in the record. I am not sure he is  
10 able to testify as to the legal conclusion.

11 COURT: The document speaks for itself.

12 A. It has been so long ago, I can't remember.

13 BY MR. CLABAUGH:

14 Q. Now once the -- my understanding is that on or about  
15 August the 15<sup>th</sup> of 1999, you and Mr. Bensch signed several  
16 papers, is that correct?  
17

18 A. I don't remember the date.

19 Q. Okay, look at Plaintiffs' Exhibit No. 7, Plaintiffs'  
20 Exhibit No. 1, and Frank what is the exhibit number for the  
21 other document that was signed that day in lieu of --  
22

23 MR. PAPE: No. 11. 7, 11 and --

24 MR. CLABAUGH: And 1.

25 MR. PAPE: And 1.

A. I have a 7 here but I don't see the date.

1 Q. That's okay, the date has already been stipulated to.  
2 I just wanted you to have those three documents in front of  
3 you.

4 MR. PAPE: There's 11 and 7 and you are  
5 looking for?

6 MR. CLABAUGH: 1. It's the lease  
7 agreement. That should be it.

8 BY MR. CLABAUGH:

9 Q. Mr. Passaloukas, the -- pursuant to Exhibit A on  
10 Plaintiffs' No. 7, that's the document that we were talking  
11 about earlier that talks about what each -- what you were  
12 going to do and what Mr. Bensch was going to do. That all  
13 had been agreed to in January or February, is that correct?  
14 When the two of you --

15 A. Yeah, basically yes, in January or whenever we wrote  
16 that --

17 Q. And did you actually write that up at that time?

18 A. I can't remember who wrote that. I might have wrote it  
19 and he did some correction and I did not have a printer so  
20 they must have did all that.

21 Q. Okay, but it was written up about that time -- near the  
22 time that you agreed to the things you were going to do, is  
23 that correct?  
24

25 A. Right.

1 Q. And at that time did either of you know how much money  
2 each of you was going to have to contribute to do the things  
3 that you were supposed to do?

4 MR. PAPE: It's already been asked and  
5 answered.

6 A. I can't remember the numbers.

7 COURT: Hold on one second.

8 MR. PAPE: It's already been asked and  
9 answered on cross-examination.

10 COURT: The question --

11 MR. PAPE: As to whether or not there  
12 had been an agreement with respect to how  
13 much each of them were going to contribute.

14 MR. CLABAUGH: That wasn't the question.

15 COURT: The question was did you know --

16 MR. CLABAUGH: How much you would  
17 eventually have to contribute.

18 COURT: I think that's a little bit  
19 different question so go ahead and you  
20 answer, Mr. Passaloukas.

21 A. No, eventually we didn't know so we was guessing what  
22 we were going to put in it and we wanted to be successful  
23 and to at one point of course we were expecting to keep  
24 going to be a successful restaurant.  
25

1 Q. Okay, and since you were going to be 50/50 you expected  
2 what you each would be contributing would be fairly close?

3 A. Exactly.

4 MR. PAPE: Object. The documents speak  
5 for themselves as to what their obligations  
6 were.

7 COURT: I will allow him to answer. Go  
8 ahead Mr. Passaloukas.

9 A. I don't remember the numbers, what we put in. I know I  
10 put over \$50,000 for the equipment plus I was keep putting -

11 -  
12  
13 Q. My point is, if the two of you were going to be 50/50  
14 shareholders of Zorbas, you didn't expect to put in a lot  
15 more money than Mr. Bensch did, did you?

16 A. Me to put more money?

17 Q. Yeah, you didn't expect to put more money than him in,  
18 did you?

19 A. I don't know, not really.

20 Q. Okay, and you didn't expect him to put in a lot more  
21 money than you did for the same --

22  
23 A. Well, he was not the one that was doing the work. He  
24 was supposed to be my back up man and you know very well  
25 what that means, when I need him, when I need his help, when  
I need his money to help with the restaurant, that when I

1 need him. I didn't need him to come there and cook or tell  
2 me what the menus going to be. I knew all that what it had  
3 to be and what had to be done. But that was the main  
4 understanding why they would become our partners to help us  
5 with our money.

6 Q. Okay, but if you were --

7 A. That was it.

8 Q. If you were putting in \$60,000, --

9 A. Yeah.

10 Q. -- you expected him to put in at least that amount,  
11 didn't you?

12 A. In the beginning what we was -- whatever we put, we  
13 put. I don't know what -- we didn't know -- I didn't know  
14 how much he was spending for the building. He didn't know  
15 how much I was spending until the shareholders' meeting and  
16 then we showed each other how much we had put in.

17 Q. Okay, and you had ended up putting in approximately the  
18 same?  
19

20 A. Close, I don't know.

21 Q. Okay.

22 A. Whatever the numbers there.

23 Q. Now, by August 15<sup>th</sup> you had already done what you were  
24 supposed to do. You had the plans done; you had bought the  
25

1 equipment. You basically had done what you were supposed to  
2 do in order to get the restaurant open, is that correct?

3 A. Yeah, I had done before that. I had done the equipment  
4 and everything. I was ready to open and we still fixing it.

5 Q. Okay, and by the date that the restaurant opened, by  
6 the same token, Mr. Bensch he had also he had done the up  
7 fitting of the restaurant, hadn't he?

8 A. No, he was not complete.

9 Q. My point was it was complete to the point where you  
10 were able to open the restaurant?

11 A. We opened up, but it was not complete.

12 Q. Okay, so by August 15<sup>th</sup> this had all -- you both,  
13 basically both of you had spent most of your money?

14 A. Spent both of our money?

15 Q. Well you had bought everything you were supposed to  
16 buy? You bought the equipment and --

17 A. I wouldn't put it like that, open up a restaurant I was  
18 keep putting money and I was keep buying more equipment and  
19 I was buying more food and food I would decide I would need  
20 and what more I would need.

21 Q. Let me say this, had you spent the majority of your  
22 money that you were required to spend?

23 A. No, we had -- we never had a limit on it.

24 Q. You never had a limit, okay.

1 A. Well, whatever we had wrote down in the papers, I guess  
2 to me wouldn't be a limit. I wanted to become a successful  
3 restaurant and that one reason I got my second mortgage  
4 because I wanted to keep going because I wanted to be  
5 successful.

6 Q. Now, if you would look at Plaintiffs' Exhibit No. 7  
7 again, this was a document drawn up by -- who was it drawn  
8 up by?

9 A. I think James Hale.

10 Q. He was the corporate attorney?

11 A. Yes, sir.

12 Q. Okay, and you also have I think Exhibit No. 11 there.  
13 Is that correct?

14 A. Yes, sir.

15 Q. Okay and that's done on the same date?

16 A. I don't know if it was done the same date.

17 Q. Okay, I think there's been testimony that it was done  
18 on that date. Now, that document talks about how much  
19 monies each side was going to contribute, doesn't it?

20 A. It looks like it.

21 Q. It says you are each going to do \$30,000?

22 A. Yes.

23 Q. Okay, by the time this document was put together in  
24 August, you all had already done everything, hadn't you?  
25

1 A. Well, we had put I would say more than that.

2 Q. Yeah, you each had put up a bunch more than that.

3 A. Yes.

4 Q. Okay, so this document doesn't reflect what you had  
5 already done?

6 MR. PAPE: Object, Your Honor. It  
7 speaks for itself.

8 COURT: Well the document speaks for  
9 itself, but he is not asking him to interpret  
10 the document, but he is asking him what  
11 actually what had happened, as I understand  
12 the question; correct?

13 MR. CLABAUGH: That's correct.

14 COURT: Overruled, so you may answer the  
15 question.  
16

17 A. Whatever the document means. I am not a lawyer and I  
18 don't know exactly what it meant.

19 Q. No, I am not asking you what it means, I simply saying  
20 that as of this date both of you had already spent more  
21 money than doing the things that you were supposed to do.  
22

23 MR. PAPE: Your Honor, we already have  
24 that in the record in the Exhibits that  
25 reflect their contributions. It gives the  
dates also.

MR. CLABAUGH: Okay, then that's fine.

COURT: Okay.

BY MR. CLABAUGH:

Q. Now on that same date you also -- you both signed Plaintiffs' Exhibit No. 1, didn't you, which is the lease?

A. I guess we did; I can't remember. I remember we went to sign some papers and I had to run back into the kitchen to cook. That's all I remember, so I trust --

Q. Now you agree with me that this is a two year lease?

A. Whatever it says.

Q. Under Item No. 2 on Page 1.

A. Item 2 on Page 1?

Q. Paragraph No. 2 on Page 1.

A. I have the wrong thing.

Q. Yeah, you are looking at the incorporation papers rather than the lease.

A. No. 1.

Q. Paragraph No. 2.

A. Right, it says two years.

Q. Okay, two years. And does the lease say how much money you are supposed to pay each month in rent? On Page 2 under "Rent."

A. It says monthly installments of \$2461.00.

1 Q. Okay, and this is how much Zorbas was supposed to pay  
2 to the landlord, is that correct?

3 A. That what - that's what Gary wanted to charge us, yeah.

4 Q. Okay, and the landlords are Gary and Cynthia Bensch?

5 A. Uh-huh.

6 Q. Is that a "yes"?

7 A. Yes.

8 Q. Okay, and at the time -- at the time that you signed  
9 this as President of Zorbas, was it Zorbas' intention to pay  
10 the rent to the landlord?

11 A. Sure.

12 Q. And you understood that as a condition of staying in  
13 that space you had to pay the rent?

14 A. Right.

15 Q. And when I say you, I am talking about Zorbas.

16 A. Yes.

17 Q. Okay. And that rent was to be paid on or before the  
18 15<sup>th</sup> of the month, is that correct?

19 A. Yes, sir.

20 Q. Okay. The -- and did you understand what would happen  
21 if Zorbas didn't pay the rent?

22 A. I guess I understood, yes.

23 Q. Okay and what did you understand?  
24  
25

1 Q. Okay, in fact the rent wasn't paid until I believe it  
2 was during the shareholders' meeting on December 15<sup>th</sup>. Is  
3 that correct?

4 A. Yeah.

5 Q. Okay, so the November rent was a month late?

6 A. No, the rent was not late. The rent was -- it was  
7 there, the money was there. We had a talk and argument with  
8 Gary about finishing his work and I had talked to my lawyer  
9 and he suggested for me to put the rent in escrow until Gary  
10 finished the work. He never did so he called for a meeting  
11 --

12 Q. Mr. Passaloukas, is there anything in your lease  
13 agreement that says you can pay the rent in escrow?

14 A. I don't know. That's what I was suggesting by my  
15 lawyer and I thought it was a legal thing to do until he  
16 finished his obligations.

17 Q. Well your lawyer is not here. To your knowledge, is  
18 there anything in Zorbas' Lease Agreement that says that if  
19 we are unhappy with something, we can put the money in  
20 escrow and not pay it to the landlord?  
21

22 A. I don't know. I haven't read it and --

23 Q. You have not read Zorbas' lease?

24 A. I guess there's nothing there.  
25

1 Q. The -- and then the December rent it would have been  
2 due on or about December 15, is that correct?

3 A. Yes.

4 Q. Okay, and was that rent paid?

5 A. That rent, no it was not paid.

6 Q. That rent was never paid by Zorbas or --- you never  
7 wrote a check for that, did you, for Zorbas?

8 A. No, I never wrote one.

9 Q. And there is nothing in the lease that says if you  
10 don't pay the rent you can still stay, is there?

11 A. Ask my partner. Talk to my partner --

12 Q. I get to ask you at this point. There's nothing in the  
13 lease that says that if you don't pay your rent, you can  
14 still stay?  
15

16 A. No.

17 Q. Okay.

18 A. It says, my partner gets to stay.

19 MR. PAPE: Just answer the questions.

20 BY MR. CLABAUGH:

21 Q. Now when you didn't -- when Zorbas didn't pay the rent  
22 for November, did the landlord send you a letter?  
23

24 A. Please tell me the question again.

25 Q. When Zorbas didn't pay the November rent on time, did  
the landlord send a letter to Zorbas?

1 A. I don't recall. I think he asked for the money and we  
2 was keep arguing back and forth about things and the work  
3 that he was supposed to do and his responsibilities and then  
4 he called for the meeting.

5 MR. CLABAUGH: What's the next number?

6 COURT REPORTER: 4

7 A. If I remember correctly.

8 Q. Mr. Passaloukas I am going to show you what we have  
9 marked as Defendants' Exhibit No. 4 and ask you if you  
10 recognize that?

11 A. I don't remember. I might have seen it, I can't  
12 remember.

13 Q. Okay, well can you tell me, first of all, who is it  
14 addressed to?

15 A. Gary Bensch to Zorbas Restaurant.

16 Q. I am sorry?

17 A. Zorbas Restaurant, Bill Passaloukas, P. O. Box 1667.

18 Q. And was that the post office box for Zorbas?

19 A. Yes.

20 Q. And what is the subject of that letter?

21 A. It is telling me that we are late and we should pay  
22 late payment, late penalty and total due immediately  
23 \$2689.05. Also we continue to be very concerned.  
24  
25

1 Q. Okay. Now my understanding is you don't know whether  
2 you received that letter or not?

3 A. I can't remember.

4 Q. Okay, but you knew that the rent had not been paid?

5 A. Yes.

6 Q. Okay, did you have any conversations with the landlord  
7 about the rent not being paid?

8 A. I think we talked about it, I think we argued about the  
9 things to be done and I had told him that he needs to finish  
10 the place or we don't want to give him any more money. I  
11 don't know; something had to be done. I can't remember  
12 exactly the conversation. I know we had argued and not just  
13 that, but he was supposed to put money and help us and he  
14 never did. So, that's when my lawyer suggested put the  
15 check in escrow until we had the meeting.  
16

17 Q. The -- now you testified previously about the  
18 shareholders' meeting that took place on December 15<sup>th</sup>. Do  
19 you remember that?

20 A. I think so.

21 Q. That was a meeting that had been called -- had been  
22 asked for by the Bensches, isn't that correct?  
23

24 A. I think so.

25 Q. Do you know why -- what the purpose was of the calling  
of that meeting?

1 A. They wanted me out; they wanted the restaurant. They  
2 wanted to change the menu and they wanted to start an  
3 Italian restaurant.

4 Q. Well, were they concerned about the fact that Zorbas  
5 was not doing well?

6 A. I don't know what they were concerned. That was their  
7 thinking.

8 Q. Were they interested -- up to that point in time and up  
9 till Zorbas ended, you were each 50/50 shareholders, is that  
10 correct?

11 A. That's right.

12 Q. Okay, were they concerned about the fact that since you  
13 were each 50/50 shareholders there was no way to in effect  
14 break a tie? If the two of you disagreed about something,  
15 and if you wouldn't give way and they wouldn't give way,  
16 there was no way to work through the problem?

17 A. I don't really understand the question.

18 Q. Pardon?

19 A. I don't really understand your question.

20 Q. Okay, at that shareholders' meeting were they proposing  
21 adding additional members to the Board of Directors? Didn't  
22 they want to increase the Directors to I believe it was  
23 seven people?  
24  
25

1 A. I don't know what all this legality means or what they  
2 was proposing. I don't even remember.

3 Q. Okay, do you recall conversations -- you wanted them to  
4 put up more money to help the restaurant, didn't you?

5 A. Exactly. That was their obligation.

6 Q. Okay, and do you recall them stating that they would  
7 put up additional money, but they wanted additional shares  
8 in stock?

9 A. Yea, I should get more stocks as I was doing more work  
10 in that place, but that was their thinking, yes.

11 Q. They offered to put up more money but in turn they  
12 wanted more shares of stock? And you were not willing to do  
13 that?

14 A. Of course not. That's all I wanted my partners to back  
15 me up. Why should I? I was putting more work. The only  
16 thing would come up they would come and eat my food.

17 Q. Now after -- at that Board meeting, nothing was  
18 accomplished, was it?

19 A. I don't remember what we accomplished.

20 Q. Pardon?

21 A. I don't think we accomplished too much. The only thing  
22 I think we accomplished that he promised he was going to  
23 finish the building. I mean we was going -- it was so hard  
24  
25

1 to work and try to carry on business on that building that -

2 Q. Who all attended that meeting, do you recall?

3 A. I am sorry.

4 Q. Do you recall who all attended that Board of Director's  
5 meeting?

6 A. I think it was Cynthia and Gary. I think it was me and  
7 my wife Susie. I think it was Tony Griffis.

8 Q. Tony Griffis was your attorney, correct?

9 A. My attorney. I think it was Mogil.

10 Q. Mike Mogil was the Benschs' attorney.

11 A. And I think it was their son-in-law or somebody. I  
12 can't remember who else.

13 Q. And was the corporate attorney there?

14 A. I think so. Hale was there.

15 Q. Who was that?

16 A. Jim Hale.

17 Q. And was the corporate accountant there? Mr. Fisher as  
18 well?

19 A. He was there.

20 Q. Okay. Now in December you testified the rent was not  
21 paid, is that correct?

22 A. Yes.

1 Q. And I think you previously identified Plaintiffs'  
2 Exhibit No. 8 -- do you have that there?

3 A. What's the question?

4 Q. Well, let me digress a moment. You understand that one  
5 of your responsibilities as the manager of Zorbas that you  
6 were supposed to prepare monthly budgets for Zorbas?

7 A. No.

8 Q. Pardon?

9 A. No. Gary had put Bill Fisher as our accountant and he  
10 was instructed to come and help me with the budgets. I was  
11 there cooking and fixing his building and was very busy with  
12 all that. Bill Fisher was supposed to do all that and help  
13 me with the budgets. I did not have -- I barely had time to  
14 go do my deposits and the paperwork I needed to do.  
15

16 Q. You agree with me that the documents provide that you  
17 were to prepare the budget?

18 A. I don't know. I don't remember any -- but what I  
19 remember Bill Fisher was supposed to help me with that and  
20 instruct me what we have to do with the budgets. He had all  
21 the records; he had all the numbers.  
22

23 Q. Would you look at the Shareholders' Management  
24 Agreement, that's No. 7?

25 A. Yes.

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MR. PAPE: Your Honor, I hate to interrupt the Court but I have got to do a bathroom break.

COURT: All right.

MR. CLABAUGH: Let's take a little break.

MR. PAPE: Your Honor, may I make a request? My accountant is on stand by and since it is apparent that this case is going to go over into April, and I am not sure his figures are going to any good until we get this thing finally resolved in April, can I just release him and --

COURT: Absolutely. Yeah, I think what I was going to do, are you finished with Mr. Bensch?

MR. CLABAUGH: Maybe not.

COURT: All right. Well what I was hoping to do was wrap about 4:30 and then talk with you all for awhile.

MR. CLABAUGH: Okay.

COURT: And yeah, I think based on that the accountant probably we will not get to

1 Q. That's entitled "Additional Contributions, Loans and  
2 Shareholder Guarantees".

3 A. Yes.

4 Q. Have you ever read that?

5 A. I don't remember. I told you I didn't have much time.

6 Q. Okay.

7 A. When I came to sign all that stuff I had to run to cook  
8 and fix things.

9 Q. Okay, would you agree with me that that paragraph is  
10 language that is about contributions, loans?

11 A. If that is what it say, that what it say. My English -  
12 --  
13

14 MR. PAPE: And I object. The document  
15 speaks for itself.

16 MR. CLABAUGH: I agree.

17 BY MR. CLABAUGH:

18 Q. Now after the December rent was not paid on time, I  
19 believe you testified you did receive a letter from the  
20 landlords?

21 A. Yes, I did.

22 Q. And do you recall when you got that letter having an  
23 angry discussion with Mr. Bensch about the fact that he was  
24 not doing what he was supposed to as your partner and you  
25 wanted him out of the restaurant?

1 A. No, that's not correct.

2 MR. PAPE: I object, Your Honor. It's  
3 irrelevant.

4 A. When I received that letter --

5 COURT: Hold on one second.

6 MR. PAPE: It's irrelevant.

7 COURT: The discussions - This is  
8 subsequent to the letter that was signed for  
9 or appeared as the date of 12/31/00, that  
10 letter? Is that the letter you are talking  
11 about?

12 MR. CLABAUGH: I am talking about that  
13 letter.

14 COURT: Are you talking about  
15 shareholder and/or landlord tenant  
16 discussions as a result of the letter. Is  
17 that the question?

18 MR. CLABAUGH: No -- I am -- yes, yes.

19 COURT: You may answer the question.

20 A. That letter was delivered by the mailman.

21 Q. Wasn't it also delivered to the restaurant on Saturday  
22 and didn't you and Mr. Bensch then have a heated discussion  
23 about when you said he wasn't providing you the back up that  
24  
25

1 he was supposed to and you couldn't believe he would evict -

2 -

3 A. No, no.

4 Q. Pardon?

5 A. That's a lie, no. When I had the discussion we had  
6 with Gary was in a meeting we had much earlier but it was --  
7 he did not brought any papers or anything like that. We sat  
8 down and talked about the problems, and he told me that he  
9 was willing to put some money, but change the -- he was  
10 going to help with some money if we changed the menu and put  
11 hamburgers and hot dogs and Italian food. And I got angry  
12 because he was hollering to my wife and he pointed the  
13 finger to her and he told her she should not be in the  
14 restaurant. And I got angry and yes, I cussed him out.

15  
16 Q. Do you recall testifying about this letter during the  
17 course of the first trial?

18 A. About what letter?

19 Q. About the December 28<sup>th</sup> letter?

20 A. I told you -- that letter came by the postman. Nobody  
21 ever delivered that.

22  
23 Q. That wasn't my question. My question is, do you  
24 remember --

25 A. No, I don't.

1 Q. Mr. Pape, can you show your client the transcript from  
2 the January 31, 2002 hearing?

3 MR. PAPE: Identify the page for me. I  
4 think I have got the right one.

5 MR. CLABAUGH: Page 85.

6 MR. PAPE: Is this the right one?

7 MR. CLABAUGH: Yes.

8 BY MR. CLABAUGH:

9 Q. Mr. Passaloukas -- Passaloukas, I am sorry. Would you  
10 please look at the very bottom of that page -- when I asked  
11 -- or I am sorry, when the question was asked, "At the time  
12 you met him in December, what was he telling you about the  
13 payment of rent? Was he telling you anything about what  
14 action he was going to take if you did not pay the rent?"

15 A. "I don't remember."

16 Q. Okay. And then, "Did you receive this document from him  
17 any time?"

18 A. All right.

19 Q. No, down below.

20 A. I don't remember.

21 Q. No after my -- after that question.

22 A. Did you ever receive --

23 Q. No, that's the question. What was the answer?  
24  
25

1 A. "Actually, I do remember something that he told me that  
2 if I don't pay this money, he is going -- he want me out."

3 Q. Okay, and then would you turn the page to Page 87,  
4 please?

5 A. That was not the same paper we talked about here. Okay.

6 Q. Question: "Did you ever receive a document from Mr. and  
7 Mrs. Bensch saying that you were going to be ejected from  
8 the premises if you didn't pay the rent?"

9 A. Where is that?

10 Q. About two-thirds of the way down beginning on line 17  
11 is the question and the answer is on line 20.

12 A. "I believe I did."

13 Q. Okay, "And then what action, if any, did you take in  
14 response to that document that you received from the  
15 Bensch's?"

16 A. "I believe it was somewhere in December."

17 Q. No, the question is on line 23. "What action, if any,  
18 did you take in response to the document that you received  
19 from Mr. and Mrs. Bensch?"

20 A. In December, all right.

21 Q. And your answer is on the next page on line 1.

22 A. "I don't think I took any action because we had talked  
23 about getting together and have a meeting and try to solve  
24 the problems with all the stuff that was wrong with the  
25

1 Q. So you are saying he told you rather than writing  
2 yourself a check for salary, instead you should pay yourself  
3 back and call it a repayment of loans?

4 A. Exactly. Before we start to make any money or getting  
5 paid for anything else, he said you need to start to get  
6 some of your -- to some of your loans back.

7 Q. Some of the monies for your capital contributions?

8 A. Right.

9 Q. Okay. And he said to take that rather than salary?

10 A. Right. He knew it -- he was the one that was doing the  
11 books and everything it was there.

12 Q. Okay. But you got that money?

13 A. And they had control over that through the computers.

14 Q. You got that money back, right?

15 A. I did --- whatever is in the books, I did.

16 Q. And it's true, is it not, that you kept the books and  
17 the checking account for Zorbas?

18 A. I did not kept the books. The books -- Gil Fisher had  
19 all that.

20 Q. The checking account. Did my clients have signatory  
21 authority on the checking account?

22 A. No. They haven't asked -- it was not necessary for  
23 them to have since they was not buying the groceries and pay  
24 anything else.  
25

1 Q. So you determined who got paid?

2 A. I'm sorry.

3 Q. You determined who got paid?

4 A. Me and Susie and Nick Altherio, we had the right to  
5 sign checks.

6 Q. Okay and Nick Altherio, is the person who was the  
7 assistant manager?

8 A. Yeah, whatever, the helper.

9 Q. Okay, so he, you and your and wife controlled the  
10 checkbook?

11 A. And of course Gil Fisher would do all the payroll and  
12 all that.

13 Q. But my clients couldn't sign checks?

14 A. Your clients never had -- it was no reason for them to  
15 sign.

16 Q. They couldn't pay themselves back any money?

17 A. No, they haven't asked me for any -- to be in the book  
18 till the end.

19 Q. The --

20 A. Why they would try to get money when there was no  
21 profits yet.

22 Q. You had one other -- another employee at the  
23 restaurant. It was John Nicoli. Is that correct?

24 A. That's correct.

1 Q. Who was he?

2 A. He was a cook that was suggested by the Bensches to  
3 hire. He was working at that time at Belfair.

4 Q. As the Manager of Zorbas, was it your responsibility to  
5 get insurance for the business?

6 A. I don't know whose responsibility it was, I guess. We  
7 had to have insurance yes.

8 Q. And did you contact Kinghorn and attempt to get  
9 insurance for Zorbas?

10 A. I cannot remember. I think Cynthia offered to talk to  
11 them about it. I think she was more familiar with them and  
12 since I was working I was very busy and Cynthia did not have  
13 much to do, so we told her to go ahead and do it.

14 Q. Didn't you ask her to do it because you had trouble  
15 doing it?

16 A. She offered to do it. What troubles do I have to do  
17 it? I was very busy, that's for sure.

18 Q. After Zorbas was evicted, did you take any steps to  
19 cancel the insurance?  
20

21 A. What for? I did not have the restaurant anymore. I  
22 was not there.  
23

24 Q. You were still the President of the corporation, were  
25 you not?

1 A. I don't know what I was anymore. They stoled  
2 everything from us. Why should I worry. I wanted my  
3 restaurant back. I wanted my business back and I wanted my  
4 money back.

5 Q. I believe you testified that after the eviction, you  
6 didn't do anything, is that correct?

7 A. I went to my lawyer I told you. That what I ---

8 Q. Did you do anything to contest the eviction?

9 A. The eviction?

10 Q. Yes.

11 A. My lawyers told me that -- I talked to Mr. Pape and he  
12 suggested that he could get me back in the restaurant.

13 Q. Did you have your lawyer do anything?

14 A. That's when I went to Mr. Pape.

15 Q. No, I am not talking about this lawsuit filed three  
16 months later.

17 A. No, we --

18 Q. Did you do anything about the eviction?

19 A. No.

20 Q. Okay. Did you --

21 A. He suggested that it was illegal and to see a good  
22 lawyer and --

23 MR. PAPE: Object, that is a  
24 conversation between --  
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COURT: Sustained. Don't tell anything  
your previous lawyer said.

BY MR. CLABAUGH:

Q. You did not go to the Magistrate to contest the  
eviction, did you?

A. No.

Q. Okay. You did not contact my clients and ask to be  
able to remove anything, did you?

A. I told you I contacted my lawyer. He told me --

MR. PAPE: Object. Bill --

BY MR. CLABAUGH:

Q. I am asking what you did. You made no effort to  
recover any of your personal possessions at that time, did  
you?

A. Sorry?

Q. You did not contact the landlord and say look I've got  
--

A. I told you what I did.

COURT: Let him finish the questions.

Go ahead, Mr. Clabaugh.

BY MR. CLABAUGH:

Q. After the eviction --

A. After the eviction, no.

1 Q. Okay, so you made no effort to get your personal  
2 possessions at that time?

3 MR. PAPE: There's already a record on  
4 that point. He testified earlier that he  
5 picked up a box from Mike Mogil's office and  
6 I think Mike Mogil was the Bensches'  
7 attorney.

8 MR. CLABAUGH: That was some time later.  
9 I am asking what -- trying to ascertain --

10 BY MR. CLABAUGH:

11 Q. Do you contend you were wrongfully evicted?

12 A. I'm sorry?

13 Q. Do you contend that Zorbas was wrongfully evicted?

14 A. Absolutely.

15 Q. Even though Zorbas didn't pay the rent?

16 A. Absolutely.

17 Q. Even though Zorbas didn't have money in the account at  
18 that time to pay the rent?

19 A. I had the account to keep Zorbas money.

20 Q. I am not talking about you personally. I am talking  
21 about the corporation.

22 A. We opened that account, the Zorbas, and we did not have  
23 money in the bank. Who kept -- who stocked the money in the  
24 bank. I had to put my money in.  
25

1 Q. The -- so the corporation took no steps to reverse the  
2 eviction?

3 A. I'm sorry?

4 Q. The corporation didn't take any steps at that time to  
5 contest the eviction?

6 A. I told you I went to my lawyer and he told me to hire a  
7 lawyer --

8 MR. PAPE: Object.

9 Q. I'm sorry. You didn't do anything, did you? You  
10 didn't take any legal action?

11 A. I told you what I did. That was my legal action; go  
12 see my lawyer.

13 Q. Okay. And during the time it was open, Zorbas never  
14 made a profit did it?

15 A. How could it make a profit when I was still paying to  
16 try to build it. I think we did very well and you see our  
17 records how much we made. Not too many restaurants make  
18 profit until the second year.

19 Q. I am looking for the transcript of record that I had.  
20 I may have left it in the office. Excuse me just a moment.  
21 I took it with me to lunch.

22 COURT: Frank, you still got the short  
23 one?

24 MR. CLABAUGH: Pardon me?  
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COURT: Frank?

MR. PAPE: Yes, I do.

COURT: Keep it; I just want to keep that file together.

MR. PAPE: Yes. I don't need it until he --

COURT: Is that two volumes?

MR. PAPE: The other volume is --

COURT: Just help me keep an eye on it.

MR. PAPE: Okay.

MR. CLABAUGH: Can I have this marked as No. 5?

BY MR. CLABAUGH:

Q. Mr. Passaloukas, the equipment that you bought to start Zorbas, my understanding is that some of it was new equipment and some of it was used equipment?

A. Yes.

Q. And I am going to hand you what we have marked as Plaintiffs' Exhibit No. 5.

MR. PAPE: Well, we already have a document in the record that reflects all the purchases that he made so I would object to the repetitious nature of the document that you have offered.

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COURT: Is it identical to the first one?

MR. CLABAUGH: Your Honor, no. Your Honor, we have stipulated this is all the monies expended by the Plaintiffs. This purports to be a listing just of the restaurant equipment. I want to ask him some questions about it.

COURT: Okay and the first Exhibit was offered by the Plaintiff and this is yours?

MR. CLABAUGH: That's correct.

COURT: All right, I will allow it.

BY MR. CLABAUGH:

Q. Mr. Passaloukas, I am going to hand you what we have marked as Defendants' Exhibit No. 5 and I will tell you that that has been taken off of Plaintiffs' Exhibit No. 2 which purports to be a list of all of your expenditures. And my question is, does that appear to be a complete listing of the equipment that you bought for Zorbas restaurant?

A. I don't know.

Q. Well I would like you to examine -- take a look.

MR. PAPE: Well, allow him some time to

1 A. I found it. \$500, \$1300.00, \$3,000, 5745.60, 600.00,  
2 650.00, 703.50, 300.00, that's license, 650.00, 703.50, --

3 MR. PAPE: Your Honor, I was working  
4 with my client, but I am afraid he needs to  
5 help himself. I think he --

6 COURT: I think he is just adding, so we  
7 will give him a moment.

8 A. Yeah, I think something is missing -- that 700, 350.00  
9 I found one here is not here. See that --

10 MR. PAPE: I understand. I can't --

11 MR. CLABAUGH: Go through the list and  
12 then we will ask you if anything is missing.

13 A. I did go through the list. There is some things  
14 missing, I am saying.

15 COURT: Well, here's a question perhaps  
16 to short circuit this a little bit. Mr.  
17 Clabaugh, using Plaintiffs' 2 is it possible  
18 perhaps to highlight -- as I understand it  
19 everything on the Exhibit that you just  
20 handed Mr. Passaloukas is on Plaintiffs' 2.  
21 Is that correct?

22 MR. CLABAUGH: Yes. And what I was  
23 trying to get to was --  
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COURT: You are trying to get to the hard goods as opposed to the operating -- the initial start-up.

MR. CLABAUGH: That and I wanted him to be able to on that to mark which equipment had been purchased new and which was used and then also which was installed into the -- for instance the hood system being installed into the roof and everything as opposed to which equipment could simply be rolled out. And I thought it would be easier to do it on a separate document than trying to mark up --

COURT: Okay, now that I look at it, Plaintiffs' Exhibit 2 has things, for instance, kitchen equipment so I guess it is hard to tell what's in there. I don't know what kitchen equipment is in there so, yes, proceed once Mr. Passaloukas has had a fair opportunity to look at it.

A. Well, there's some things missing that are not -- some things that are here they are not here, so do you want me to proceed to whatever you have here?

1 A. I don't remember. Operating company. I don't know. I  
2 would say it was part of the hood because they installed  
3 lots of stainless there, the Fraser Company, if I remember  
4 correctly.

5 MR. CLABAUGH: Frank, while he is  
6 looking at, what would you think of stopping  
7 his testimony and the -- you have Bob  
8 Steinberg's deposition. I think it might be  
9 helpful that you go ahead and present it  
10 because depending upon how the Judge rules,  
11 that might determine who else we may --

12 A. Here's another thing, a big number \$8.90 number 22.

13 Q. \$8.90?

14 A. Yes. Frank, help me here, please. 330 after that --

15 MR. PAPE: You mind if I assist him?

16 MR. CLABAUGH: No.

17 A. 330, 1,000 then after that I have 8.90 and then I have  
18 another 1,000, so the 8.90 I am missing, but there's 1,000  
19 there, I have another 1,000. I have three 1,000s there. So  
20 1,000 is missing, correct?  
21

22 MR. CLABAUGH: No, one says, operating  
23 funds.  
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25 A. You are right. 1336 is there. Is it correct? Is that  
considered, the advertising?

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prefer to not use this deposition at all and bring him in in April.

COURT: Sure, live witnesses are always preferable. Do you have an objection to that?

MR. CLABAUGH: Well, I have an objection to the testimony and it is going to obviously depend on whether it is admitted or not admitted as to whether or not we have to have an expert.

COURT: Well, as I understand what the Appellate Court wanted to do was have testimony with regard to valuation, assets, where they went, etc. and assuming this expert is going to give me some sort of valuation guidance, if that is --

MR. PAPE: Yes.

MR. CLABAUGH: I don't think so at all.

MR. PAPE: Well, I mean that's his opinion but I mean --

COURT: How can I rule on that without hearing --

MR. CLABAUGH: We took it de bene esse for purposes of it being admitted this way.

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COURT: Is that -- and again I haven't had this situation come up ever. Does that -- is there some rule that says that would preclude the parties or the person offering the witness from presenting that witness live in lieu of testimony?

MR. CLABAUGH: I wouldn't think so.

COURT: I wouldn't think so either and --

MR. CLABAUGH: I can't in good conscience pick that argument.

COURT: So, I mean, isn't he then entitled to produce that witness live in April?

MR. CLABAUGH: I think he can.

COURT: Now, I understand you may point out after his testimony object and have the whole thing stricken as irrelevant, but I can't make that call now.

MR. CLABAUGH: He has some health issues that in the event something happens, you've got the deposition so --

COURT: Well if you all would like to stop for the day, for the month, for the

1 year, that would suit me fine, because I  
2 would like to just speak with the both of  
3 you.

4 MR. CLABAUGH: I would like to ask the  
5 witness one more question about this Exhibit  
6 then.

7 BY MR. CLABAUGH:

8 Q. Mr. Passaloukas, one other thing. I would like to give  
9 you a different color highlighter and can you tell us -- I  
10 need to know which of these pieces of equipment are built in  
11 and what I mean by that is my understanding is for instance  
12 the hood system is -- it's got a hole in the roof and it's  
13 built in. The walk in cooler I believe may have been  
14 incorporated into the building and any other pieces that  
15 have walls - you know you built walls around or something  
16 that are built in. And if you could just take this blue  
17 highlighter and maybe just make a dot by them so that we  
18 know which pieces --

19  
20 A. Everything is possible to come apart so I - you can  
21 take them off the building. If you want to sell the walk-in  
22 cooler, you can take the hood apart.

23  
24 Q. Okay, well then let me ask the question this way. The  
25 walk-in cooler, is that a free standing unit that for  
instance on rollers that can be just wheeled out?

1 A. No, we brought it in -- we put it there in one piece.

2 It was a one piece came.

3 Q. Is it built in to the building?

4 A. No, we brought it there; it was one piece. It is  
5 actually outside of the building. I don't know what they  
6 have done now, but we brought it in one piece from --

7 Q. Is there a hole in the wall?

8 A. There is a hole in the wall and opens inside.

9 Q. Okay, there is a hole in the wall to get into this  
10 freezer?

11 A. Exactly. We put it on cement blocks if I remember  
12 correctly and we opened the hole in the wall so the door can  
13 open side. It is fiberglass plastic kind of big box.

14 Q. So in order to take it out you would then have to fill  
15 the hole in the wall?

16 A. Yes. Or put nothing.

17 Q. The hood system, how is that installed?

18 A. Everything can come out except there is going to be a  
19 hole there for the chimney.

20 Q. There's going to be a hole in the roof?

21 A. Yeah.

22 Q. Okay.

23 A. Of course. That goes out. You can close it; you can  
24 leave it open.

1 Q. Were there any other equipment that for instance a wall  
was built around?

2 A. Not that I remember. Everything else is moveable.

3 Q. Wasn't there a deli case that was put in then a wall  
4 built around it?

5 A. No. We had a wall behind it but it was a deli case  
6 with -- actually with wheels you can move it. We bought  
7 that cooler from another restaurant.

8 Q. One final question for today -- Once you got the notice  
9 that you had ten days in which to either pay the rent or  
10 vacate the premises, why didn't you make arrangements to  
11 take out any personal affects or any equipment that you  
12 thought you could take out?

13  
14  
15 MR. PAPE: Object to the  
16 characterization of the document. There is  
17 nothing in the document that says he's got  
18 ten days. It gives him a deadline I believe.

19 COURT: Well, he could ask the question.

20 BY MR. CLABAUGH:

21 Q. If you knew -- if the landlord was threatening to evict  
22 you, why didn't you go in and remove anything you wanted?

23 A. I was not expecting my partner to do that.

24 Q. You keep referring to him as your partner. I am  
25 talking about your landlord.

1 A. He was my partner, wasn't he? If the landlord was my  
partner, wasn't he?

2 Q. Is that the reason you didn't take steps as the  
3 President of Zorbas to go in and remove items?  
4

5 A. Of course, why would I have to take anything out?

6 Q. Okay, Your Honor I would move that we recess to the  
7 deposition at this time.

8 COURT: Well it's more than a  
9 deposition, but I will --

10 MR. CLABAUGH: Oh I am sorry. I am  
11 brain dead.

12 COURT: I think now is probably a good  
13 stopping point, so here's what I am going to  
14 do. I am going to -- if I can take that  
15 court file back, I am going to refile the  
16 court file across the hall, rubberband and  
17 put the court file with the exhibits. Joanne  
18 can you keep the original. I am going to  
19 give the original Steinberg sealed  
20 depositions back to Mr. Pape.  
21

22 MR. CLABAUGH: Mr. Steinberg will be  
23 delighted to find out that he's got to come  
24 over here.  
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COURT: If I can talk to the lawyers for  
a minute. First things first, if I could get  
that --

(WHEREUPON, the  
trial was adjourned  
until April, 2009.)

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THE COURT: Good morning,  
everyone. We're here on case  
CP-07-524. This is a continuation of  
part one of this trial which we had  
back in September of 2008. As I recall,  
the Plaintiff's case was still ongoing  
and we'll continue today; is that  
correct, sir?

MR. PAPE: Yes, sir.

THE COURT: Okay; happy to hear  
from you.

MR. PAPE: Your Honor, when he  
left Mr. Passaloukas was on  
cross-examination by Defendant's  
counsel, Frank Clabaugh. I don't know  
if they have any more cross-examination  
of him or not.

MRS. BENSCH: We do, Your Honor.

THE COURT: You can come on up  
Mr. Passaloukas. Since this is going to  
be a different record than the prior  
one, during the intervening months and  
prior to this trial Mr. Clabaugh moved  
by consent of all parties to be released

1 BENSCH - PASSALOUKAS (EXAMINATION)

2 Q Okay; did you know the Bensches were  
3 owners of the shopping center when you called  
4 them?

5 A Yeah.

6 Q What was your conversation about when  
7 you met with them at their house?

8 A We told you that we going -- we like to  
9 open up a restaurant and was looking to open --  
10 we was thinking to open a little Greek  
11 restaurant and we talked to you about your unit,  
12 and we talked about roughly rents and ideas and  
13 all of that stuff.

14 Q At that first meeting, did you ask the  
15 Bensches to pay for the up-fitting and  
16 everything of the restaurant to finance the  
17 whole proposition for you?

18 MR. PAPE: Your Honor, I need to  
19 object. We've already covered all of  
20 this information at the prior hearing.  
21 And unless she's trying to develop a  
22 different point all of this has already  
23 been in the record. Both Mr. And  
24 Mrs. Bensch have already testified to  
25 it. Mr. Passaloukas has testified to

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1           **BENSCH - PASSALOUKAS (EXAMINATION)**

2           it. I recognize that perhaps that you  
3           might also need it to refresh your  
4           memory, for many reasons you might want  
5           to hear it, but my objection is that all  
6           of this has been gone into.

7                   **MRS. BENSCH:** The purpose of it is,  
8           is to understand why the shareholders  
9           came to agreement they did and what each  
10          ones fiduciary responsibilities were.

11                   **THE COURT:** Okay; I'm going to  
12          allow some of this since so much time  
13          has gone past. But let me take  
14          something up off the record real quick.

15                           (Whereupon, an off-the-record  
16                           discussion was held.)

17                   **THE COURT:** We're back on the  
18          record in 00-CP-07-524. With us on the  
19          telephone, the Bensch's former  
20          attorney, Mr. Clabaugh is here now. And  
21          I was attempting to get something  
22          straight for the record. I have one  
23          caption that list both Zorba's  
24          Incorporated and Towne Center, LLC as  
25          parties.

1           BENSCH - PASSALOUKAS (EXAMINATION)

2           I am aware that a corporation or an LLC  
3           is required to have legal representation  
4           by an attorney in South Carolina. And  
5           since Mr. Clabaugh, who was the  
6           Bensch's attorney, was relieved I  
7           wanted to make sure we weren't  
8           proceeding with the Bensch  
9           representing -- anyway, some problem  
10          that would have a corporation  
11          represented by either a non-attorney or  
12          not representing in the case like this.

13                 As I understand it, first of all,  
14                 after review of the records and  
15                 discussing the matter with both Mr.  
16                 Clabaugh and Mr. Pape, Zorba's  
17                 Incorporated never filed an answer and  
18                 is in default. Is that correct,  
19                 Mr. Pape?

20                         MR. PAPE: Yes, correct.

21                         THE COURT: Is that your  
22                         understanding as well, Mr. Clabaugh?

23                         MR. Clabaugh: Your Honor, I honestly  
24                         don't know. I mean, the case has  
25                         proceeded all the way through the Court

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-374-

1           BENSCH - PASSALOUKAS (EXAMINATION)

2           of Appeals.

3           THE COURT: Well, let me ask you  
4           this; you represented the Bensches I  
5           understand and not Zorba's; is that  
6           right?

7           MR. Clabaugh: I always assumed they  
8           were in fact one in the same.

9           THE COURT: Well, for purposes --

10          MRS. BENSCH: You know, we filed  
11          no answer because -- in the Court of  
12          Appeals decision how is this treated?

13          MR. PAPE: It makes no reference  
14          to Zorba's, Inc. Except it is the  
15          entity over which the parties are  
16          fighting. And I think that's basically  
17          the status of the corporation where  
18          there is a shareholders dispute, a  
19          derivative action.

20          MRS. BENSCH: We were the only  
21          shareholders.

22          THE COURT: I guess what I was  
23          getting at, there was no answer filed on  
24          behalf of Zorba's. Does anyone have any  
25          information to the contrary?

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2                   MR. PAPE: No. I never seen an  
3                   answer filed on behalf of Zorba's.

4                   MRS. BENSCH: It just had four  
5                   shareholders, Your Honor, and that was  
6                   us.

7                   THE COURT: And also Towne Center,  
8                   LLC is a defendant on at least one of  
9                   these captions. As I understand it,  
10                  after the case was returned from the  
11                  Court of Appeals there was a Motion to  
12                  Amend which was granted. Towne Center  
13                  was added. Towne Center at that point  
14                  had counsel, then counsel was relieved.  
15                  At some point, I guess, prior to the  
16                  counsel being relieved, Towne Center  
17                  moved to dismiss. That was granted  
18                  insofar as the legal claims against  
19                  Towne Center were in fact dismissed  
20                  leaving the equitable claims.

21                  As I understand it, the Bensches  
22                  have represented that Towne Center, LLC  
23                  did not own the shopping center at all  
24                  times relevant to this action, meaning  
25                  the times that Zorba's was in there.

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1           **BENSCH - PASSALOUKAS (EXAMINATION)**

2           understanding that we had there.

3           Q     Who was Mr. Hale?

4           A     Mr. Hale.

5           Q     Yes?

6           A     He was a corporate lawyer.

7           Q     Who retained him?

8           A     I'm sorry.

9           Q     Did you retain him or did Mr. Bensch  
10          retain him?

11          A     Mr. Bensch suggested to go to Mr. Hale.

12          Q     He wasn't your attorney prior to this?

13          A     No, he was not.

14          Q     Never?

15          A     Never.

16          Q     You never met the man before Mr. Bensch  
17          introduced you to him?

18          A     I met him.

19                 MR. PAPE: Your Honor, I object.

20          BY MRS. BENSCH:

21          Q     We're moving on?

22                 So you drew up a resolution  
23          partnership.

24                 MR. PAPE: Mrs. Bensch, I'll be

25                 glad to help you with exhibits. If you

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2                    can identify, I got the Court's exhibits  
3                    right here.

4                    MRS. BENSCH: I'd like the exhibit  
5                    for the Shareholder's Agreement.

6                    MR. PAPE: Exhibit Number 7?

7                    MRS. BENSCH: Uh-huh.

8           BY MRS. BENSCH:

9                    Q     Mr. Passaloukas, would you take a look  
10                   at that. So you and Mr. Bensch, and all four  
11                   parties, you and your wife, Mr. And Mrs. Bensch,  
12                   signed this agreement; the Shareholders  
13                   Management Agreement?

14                   A     If our signatures are here I guess we  
15                   signed it.

16                   Q     Would you look at page seven of that  
17                   agreement?

18                             Would you read item 34 under access  
19                   to records?

20                   A     You want me to read it out loud or just  
21                   to read it.

22                   Q     Please?

23                   A     Each shareholder of the corporation  
24                   shall have full and unencumbered access to  
25                   records, files, books, or any other documents

1 BENSCH - PASSALOUKAS (EXAMINATION)

2 maintained on behalf of the corporation. No  
3 shareholder shall engage in an act which in  
4 anyway abridges any other shareholders right to  
5 such access.

6 Q On Exhibit 1, that's 64, I'm sorry --  
7 the lease itself between the Bensches and  
8 Zorba's, Inc. That document right there?

9 A Am I suppose to be looking at it.

10 Q Yes?

11 Is that your information under  
12 Zorba's, Inc. Where you initialed "BP"  
13 beside the name BP? It says Zorba's, Inc.  
14 BP.

15 A I guess it's mine.

16 Q Okay; and you had your address at 27  
17 Able Street and that was struck through. And  
18 then your address was P.O. Box 1667, Bluffton?

19 A I guess.

20 Q You guess?

21 A I guess. I cannot remember after so  
22 many years.

23 Q Is that your P.O. Box?

24 A Not anymore.

25 Q Was that your P.O. Box?

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           A     I guess. I can't remember after so  
3           many years. If that's what it says, that's what  
4           it was.

5           Q     Okay; so you had that P.O. Box when you  
6           entered into this lease?

7           A     I guess I did.

8           Q     Who opened the checking accounts for  
9           Zorba's?

10          A     I did.

11          Q     And how many accounts where there?

12          A     How many accounts.

13          Q     Yes; was there a general account?

14          A     One account.

15          Q     Was there a payroll account?

16          A     There was a payroll account.

17          Q     Was there a petty cash account?

18          A     I can't understand your question.

19          Q     How many bank accounts --

20          A     In the bank there was only two  
21          accounts; one for the payroll and one for the --  
22          I can't remember how it was set this thing after  
23          so many years.

24          Q     So there was only two accounts?

25          A     Yes.

1           BENSCH - PASSALOUKAS (EXAMINATION)

2           Q     What address did you give the bank for

3           --

4           A     I cannot remember after so many years.

5                     MRS. BENSCH: Can we pull the bank

6                     statements? I believe at the last one

7                     we were reviewing them.

8           BY MRS. BENSCH:

9           Q     What is the address on the bank  
10           statement?

11           A     P.O. Box 1667.

12           Q     So you had the bank sending the bank  
13           statements to your P.O. Box; your personal P.O.  
14           Box?

15           A     Whatever is there, is there.

16           Q     Okay?

17           A     I don't know. I don't remember whose  
18           P.O. Box that was. And we opened one later for  
19           the business. We were run like crazy to open up  
20           the door, so I don't even know.

21           Q     So there was another P.O. Box?

22           A     I'm sorry.

23           Q     There was another P.O. Box?

24           A     We opened one later for the business, I  
25           think.

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           Q     And what was the number of that  
3           account?

4           A     I cannot remember.

5           Q     Do you have proof that you ever opened  
6           up another P.O. Box for the corporation?

7           A     No, I don't have anything. Everything  
8           is there in the papers.

9           Q     Who signed on those accounts at the  
10          bank? Who was the signatores for checks on  
11          them?

12          A     Me and Susie, and later on it was, I  
13          believe, Nick.

14          Q     Nick Eletheriou?

15          A     Eletheriou.

16          Q     Where did you have the credit cards  
17          send; the bills for the credit cards, the  
18          invoices, and all of that for the credit cards?

19          A     Which credit carts.

20          Q     When you opened the restaurant?

21          A     I used personal credit cards.

22          Q     I'm talking about when customers  
23          charged things at the restaurant; American  
24          Express, Discover, whatever, where was all that  
25          information sent to?

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           A     I can't remember. Whatever is in the  
3           books.

4           Q     Was it sent to your P.O. Box maybe?

5           A     Whatever is in the books. I can't  
6           remember after so many years.

7           Q     Did you receive any of this information  
8           at your personal home; do you remember?

9           A     No, I don't remember.

10          Q     So you don't know if you got mail for  
11          this corporation at your home or your personal  
12          P.O. Box?

13          A     I don't think I got anything at my  
14          home.

15          Q     Okay; so it all went to your P.O. Box?  
16                   Were Mr. And Mrs. Bensch -- were  
17          they signatores on any of these bank  
18          accounts?

19          A     No.

20          Q     Okay; so Mr. Bensch just let you  
21          control the deposits and the checks completely?

22          A     That's right.

23          Q     Okay; what was the --

24          A     Mr. Bensch put me as a monitor, so I  
25          thought that was my job, to do any deposits and

1           BENSCH - PASSALOUKAS (EXAMINATION)

2           all of that stuff.

3           Q     On the lease itself, Exhibit 2621, that  
4           lease right in front of you; would you look at  
5           the second page where it says "base rent". And  
6           it says the initial installment of \$5,992 is due  
7           in payable on the 15th of August, correct?

8           A     If that's what it says, that's correct.

9           Q     Above that does it actually say \$2,461  
10          is due in payable on the first day of each month  
11          in advance?

12          A     That's what it says.

13          Q     So the rent actually per the lease was  
14          due on the first of each month?

15          A     I don't remember if it was the first or  
16          it was -- I guess if that's what it says.

17          Q     The lease says it was technically the  
18          first?

19          A     If that's what it says, then it is  
20          whatever it says.

21          Q     On page four of that lease, under  
22          insurance, does it say the tenant, Zorba's,  
23          shall maintain in forth at its own expense  
24          insurance naming the landlord as additional  
25          insured?

1           BENSCH - PASSALOUKAS (EXAMINATION)

2           A     Whatever it says.

3           Q     Now, the tenant was Zorba's?

4           A     The tenant was Zorba's, yes.

5           Q     Okay; and we've already agreed that the  
6           Benches actually procured the insurance policy  
7           and you reimbursed them or Zorba's reimbursed  
8           them?

9           A     I think that's correct.

10          Q     Okay; and under Section 9, equipment  
11          and furnishing, Section A, would you read that  
12          to the Court, please?

13          A     Tenants have installed all place in or  
14          attached to the lease premises at its own  
15          expense all subsequent furnishing and other  
16          tangible personal property as may be necessary  
17          or desirable in connection with its use of the  
18          lease premises.

19          Q     So this is basically an understanding  
20          of the tenant and the landlord that if anything  
21          that's needed for this restaurant to operate  
22          will be installed by the tenant, correct?

23                   MR. PAPE: Your Honor, I object.

24                   The language speaks for itself.

25                   THE COURT: It does. I don't

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2                   recall anyone saying there was any  
3                   ambiguity in the contract.

4                   If you can move on from that,  
5                   Mrs. Bensch.

6           BY MRS. BENSCH:

7                   Q     Okay; on page five, item E, under  
8                   default. Would you read that out loud, please?

9                   A     If the tenant does not make payment of  
10                  any installment of rent, or any other sum to be  
11                  paid by tenant, hereunder within five days of  
12                  the due date.

13                  Q     And that is one of the conditions of  
14                  the default under the lease, right?

15                  A     If that's what it says, that's what it  
16                  says.

17                  Q     So the landlord's remedy under default  
18                  is to cancel and terminate this lease if not  
19                  less than ten days prior to notice to the  
20                  tenant. And on the date specified to such  
21                  notice the tenant shall then quit and surrender  
22                  the premises to the landlord, but the tenant  
23                  shall remain liable as herein provided under  
24                  such cancellation and termination. The landlord  
25                  may at any time hereafter, thereafter, resume

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1           **BENSCH - PASSALOUKAS (EXAMINATION)**  
2           possession by the lease premises by any lawful  
3           means with or without legal process and remove  
4           the tenant and it's effect and hold the lease  
5           premises as if the lease had never been made,  
6           correct?

7           A     That's what it says.

8           Q     On Section A of the Shareholders  
9           Agreement, Exhibit 247 --

10           MR. PAPE: It's Plaintiff's Exhibit  
11           Number 7, right, Mrs. Bensch?

12           MRS. BENSCH: Correct.

13           THE WITNESS: Which page?

14           BY MRS. BENSCH:

15           Q     I'm sorry. The last page, the  
16           agreement between the Bensches and the  
17           Passaloukases. The Bensches responsibilities are  
18           spelled out that they are to acquire a permit,  
19           acquire the Bluffton building permit, as well as  
20           the county, completion of the existing shell  
21           building, the installation of all required  
22           electrical, plumbing, mechanical that is, HVAC,  
23           furnish and construct walls, ceilings tiles,  
24           lights, fixtures and ceilings, installation  
25           windows, doors, painting, trim, as per approved

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           plan provided by the architect. Bensch's are to  
3           provide a sign on exterior of the restaurant and  
4           provide the county certificate of occupancy and  
5           the Fire Marshall approval.

6                        Mr. Passaloukas, your  
7           responsibilities were to furnish and install  
8           all kitchen appliances and the system,  
9           furnish the architect seal plans for the  
10          restaurant; number 3 the restaurant  
11          management was to include the hiring all  
12          restaurant management to include hiring and  
13          dismissal of the employees, to purchase and  
14          maintain all the food, beverages, and  
15          supplies, and miscellaneous supplies,  
16          furnish tables and chairs, mall furnishings  
17          for the restaurant, maintain all food  
18          service and supply in ordering from  
19          restaurant, cash flow; 7, Passaloukas is to  
20          provide all state and federal retail food  
21          and beverage licenses; 8, to provide all  
22          utility accounts and telephone service; 9 to  
23          pay for initial food supplies. And the  
24          accountant was to be Gill Fisher that was  
25          agreed upon also, right? It says at the

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 bottom of the page --

3 THE COURT: Wait we need an answer.

4 THE WITNESS: Yes.

5 BY MRS. BENSCH:

6 Q Mr. Passaloukas will received a gross  
7 salary of \$36,000 paid on a weekly or biweekly  
8 basis by an accountant. After gross sales  
9 receipts are tallied monthly and company  
10 expenses are paid by the accountant and the  
11 balance of net profits will then be divided  
12 between the owners. Owners will digress as part  
13 of the ownership agreement until such time a  
14 buyout may occur; and you agreed to all of that,  
15 correct?

16 A Yeah.

17 MRS. BENSCH: Do we have any of the  
18 pleadings already as an exhibit?

19 Your Honor, you'll be able to  
20 follow along easily.

21 MR. PAPE: Plaintiff's Exhibit 20  
22 may be what you are referring to.

23 MRS. BENSCH: Right; I am thank  
24 you. Plaintiff's Exhibit 20.

25 BY MRS. BENSCH:

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 Q Mr. Passaloukas, when you met with  
3 Mr. Bensch your agreement was to be manager  
4 because you had been in the restaurant business  
5 before, correct?

6 A Yeah.

7 Q You knew all about the restaurant  
8 business?

9 A I didn't know all about it. I knew  
10 some restaurant, yeah.

11 MR. PAPE: Your honor --

12 BY MRS. BENSCH:

13 Q But you knew enough to be manager?

14 THE COURT: Wait a minute.

15 MR. PAPE: I do have an objection.

16 All of this was covered at the last  
17 trial and I don't want to be here all  
18 week and have if come back to from  
19 Atlanta. I don't mean to be  
20 impertinent, but all of this is in the  
21 record already.

22 MRS. BENSCH: I'm going to keep  
23 this narrowed, Your Honor, but this is  
24 just some background to show again how  
25 the Shareholder's Agreement was not

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           fulfilled or the lease.

3           THE COURT: Rather than asking if  
4           he understood what the agreement was,  
5           if you could perhaps get to those  
6           questions --

7           MRS. BENSCH: He signed it.

8           THE COURT: -- that might speed  
9           things along.

10          MRS. BENSCH: Speed them along;  
11          okay.

12          BY MRS. BENSCH:

13          Q     In the plans that you presented to  
14          Benchmark Builders and Mr. Bensch to construct,  
15          what is on the floor of the dinning room per the  
16          plans here?

17          MR. BENSCH: According to the  
18          plans.

19          THE WITNESS: What is on the floor  
20          in existing?

21          BY MRS. BENSCH:

22          Q     Yes?

23          A     It says existing concrete.

24          Q     So that's what was agreed to be --

25          A     No. No. No. It was concrete when it

1 BENSCH - PASSALOUKAS (EXAMINATION)

2 was a sale. What we agreed -- we agreed that  
3 you're going to put a nice expensive carpet,  
4 quality commercial carpet.

5 Q Okay?

6 A That's what was agreed.

7 Q That was agreed by where? What  
8 document says that about the carpet?

9 A I don't know what you're talking about.  
10 I know we talked many times. You went to Home  
11 Depot and you got that. You remember all of  
12 that stuff.

13 Q Okay?

14 A I don't remember anymore.

15 Q Well, I guess --

16 A You purchased that carpet, that cheap  
17 carpet that you put there -- that you installed;  
18 you and him.

19 Q But the plans don't call for carpet,  
20 right; the plans that you gave Mr. Bensch to  
21 build this --

22 A I don't know.

23 Q -- did not call for anything but  
24 existing concrete, right?

25 A That's existing concrete, that's what

1 BENSCH - PASSALOUKAS (EXAMINATION)

2 was there.

3 Q But it doesn't say it was a carpeted  
4 area?

5 A It was supposed to be a carpet area.

6 Q But that's not the plans you him gave,  
7 right?

8 Let me ask you, right here, what  
9 was back here in this area?

10 A When we went over there the first time  
11 it was concrete. You put carpet in. It was  
12 your decision to put carpet, not mine.

13 Q Okay?

14 A I was against that if you remember  
15 because we work --

16 Q You just wanted a concrete floor in a  
17 restaurant; okay?

18 And what was installed here in the  
19 restaurant?

20 A You put carpet there. It was your  
21 decision.

22 Q I'm sorry, were there cabinets or  
23 anything there?

24 A I do not remember. I know we had racks  
25 there, we had cabinets, I don't remember

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           anymore. It was a big counter top. I believe  
3           we had the drinks there, fountain drinks, we had  
4           maybe wine cooler, or I don't remember anymore  
5           what was there.

6           Q     So Mr. Bensch had all that installed?

7           A     No.

8           Q     He installed the cabinets, or provided  
9           cabinets and the top and all of that?

10          A     Some I believe. I have to get -- I  
11          don't think he -- and I helped him install most  
12          of it in there. I helped him even finish the  
13          sale if you remember. For five months I worked  
14          there for free if you remember, helping you  
15          finish that sale.

16          Q     So according to your agreement you  
17          were, as the tenant, you were going to install  
18          whatever was necessary for this restaurant, if  
19          it was shelving or whatever all the equipment?

20          A     No. Just the equipment. The rest was  
21          supposed to be done by him.

22          Q     Right; but all the equipment you were  
23          responsible to install?

24          A     The equipment.

25          Q     Over here this says this is a gas cook

1 BENSCH - PASSALOUKAS (EXAMINATION)

2 top and warming surface?

3 A Uh-huh.

4 Q All right; so that's installed with gas  
5 lines that are separate; is that right? That  
6 stove was a gas stove?

7 A I think. I cannot remember.

8 Q You don't know if you had a gas stove  
9 or not?

10 A I think.

11 Q What does that say right there? I'm  
12 looking upside down?

13 A Automatic gas set up route for exhaust  
14 hood.

15 Q So this was pretty much installed in  
16 this unit, right? It was fixed -- trade  
17 fixtures, right; common law fixtures because it  
18 was installed, right?

19 MR. PAPE: Your Honor, I object to  
20 the use of the legal language, common  
21 law fixtures and all of that. That's a  
22 legal conclusion --

23 MRS. BENSCH: Well, it's installed  
24 in the wall.

25 MR. PAPE: -- it's an opinion.

1           BENSCH - PASSALOUKAS (EXAMINATION)

2           There's no foundation. I'm not exactly  
3           sure what the question is.

4           THE COURT: Well, let me get back  
5           to sort of the issue at hand. Will you  
6           explain to me why it matters what was  
7           installed? As I understand it this was  
8           a business gone bad.

9           MRS. BENSCH: Because ultimately  
10          the assets that were there, some were  
11          fixed and some were trade fixtures,  
12          Your Honor. And so we're trying to  
13          determine even if the final value of  
14          the appraised fixture and the equipment  
15          what was actually removable by the  
16          tenant.

17          MR. PAPE: Your honor --

18          THE COURT: Go ahead, sir.

19          MR. PAPE: This is not a fight.  
20          There's a long line of cases that  
21          identifies what kind of fixtures are  
22          removable by the tenant and what kind  
23          aren't removable. Those cases have no  
24          application here. These fixtures were  
25          left in the place. The fixtures as

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           well as the lease holding improvements,  
3           whether they were removable or not were  
4           left in the place and they were in --  
5           the restaurant was sold to somebody for  
6           \$75,000.

7           We're not fighting here today over  
8           whether or not there was a particular  
9           fixture that was removable. These were  
10          contributions by shareholders, roughly  
11          \$60,000 by Mr. Passaloukas and roughly  
12          \$60,000 by Mr. Bensch. By wrongfully  
13          evicting these people at that moment Mr.  
14          Bensch and Mrs. Bensch took back all  
15          their contributions of \$60,000.  
16          Mr. Passaloukas never got their money  
17          back.

18                 MRS. BENSCH: I object, Your Honor.

19                 MR. PAPE: So whether or not these  
20          leasehold improvements or the fixtures  
21          were removable, they got their money  
22          back when they locked that door, that  
23          \$60,000 they invested in leasehold  
24          improvements; whether they were  
25          removable items or not.

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2                   THE COURT: Well, let me refresh my  
3                   memory. It's been a while. Judge  
4                   Kemmerlin found there was no wrongful  
5                   conviction; is that correct?

6                   MR. PAPE: That's correct.

7                   MRS. BENSCH: Correct.

8                   MR. PAPE: But I think he was  
9                   wrong about that.

10                  MRS. BENSCH: In summary judgment  
11                  you agreed.

12                  THE COURT: I think I took a motion  
13                  to reconsider under advisement that  
14                  until the end of the trial as I vaguely  
15                  recall. But the eviction was Zorba's  
16                  being evicted by the Bensches.

17                  MR. PAPE: Right.

18                  THE COURT: So the complexity here  
19                  is we have mixed up parties, or Zorba's  
20                  perhaps, a corporation being evicted  
21                  might have people completely far removed  
22                  from the ownership of it. In this case  
23                  they didn't, but it's a two hat  
24                  complication. It's always been a  
25                  problem for this case. So some

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           individuals were a company that owned a  
3           shopping center evicted a corporation.

4           MR. PAPE: Well, the Bensches owned  
5           the shopping center.

6           THE COURT: I know, but for  
7           purposes of sorting all this out, it  
8           doesn't matter who owns it. Mr. And  
9           Mrs. Smith own a shopping centered --  
10          Smith Co. Owns a shopping center -- they  
11          evicted Zorba's, right?

12          MR. PAPE: Yes.

13          THE COURT: So Zorba's would have  
14          whatever rights and obligations with  
15          regard to Smith Co. That they would  
16          have with the Bensches. It's no  
17          different, right --

18          MR. PAPE: Yes, sir.

19          THE COURT: -- when the Benches are  
20          wearing their landlord hat. So if  
21          there's no wrongful eviction -- assume  
22          for the moment there is, again, not  
23          saying -- I'm going to reread the whole  
24          thing which is going to take a while.  
25          But assume for the moment Judge

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1           **BENSCH - PASSALOUKAS (EXAMINATION)**

2           Kemmerlin was correct and my initial  
3           thought was correct, then the case  
4           really becomes what was left of Zorba's  
5           as a corporation and how it was divided  
6           up; is that right?

7           MR. PAPE: That's essential on all  
8           the issues in this case, Your Honor.

9           MRS. BENSCH: That's correct.

10          THE COURT: And what was left of  
11          Zorba's, the fixtures would have  
12          belonged to our fictitious Smith Co.;  
13          is that right?

14          MR. PAPE: Well, here's what  
15          happens in this case is that whether or  
16          not the eviction was wrongful, the  
17          Bensch's got their contributions back.  
18          Their contributions were the lease  
19          holding improvements. Wrongful or not  
20          wrongful they got their \$60,000  
21          contribution back.

22          THE COURT: Only because they  
23          happen to be Smith Co.

24          MR. PAPE: That's right.

25          THE COURT: But for purposes of

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 this case, don't we have to treat the  
3 Bensch's, the land owners, different  
4 than the Bensch's the share holders?

5 MRS. BENSCH: Yes, Your Honor.

6 MR. PAPE: But I don't really think  
7 it matters. You know it might be  
8 helpful for you to peg things in the  
9 right places, but as shareholders they  
10 got their money, their contributions  
11 back, every nickel of it. And the  
12 testimony in the case is those  
13 contributions had not diminished more  
14 than \$500 on the day of the eviction.  
15 So they got all of their value back from  
16 the corporation, whether they got it as  
17 landlord or as shareholders. But the  
18 interesting thing in this case is they  
19 were both the owners of the property as  
20 well as the shareholders, but in either  
21 case they got their contribution back.

22 Let me give you the simplest  
23 hypothetical, suppose the Bensch's and  
24 the Passaloukases had put \$60,000 cash  
25 into an account held by Zorba's --

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 MRS. BENSCH: Your Honor, I object.

3 This is totally hypothetical.

4 THE COURT: This isn't testimony.

5 I'm just allowing him to me explain to

6 me why we're going in the direction we

7 seem to be going.

8 MRS. BENSCH: It's just an

9 irrelevant hypothetical because the

10 facts don't apply that he's trying to

11 apply.

12 THE COURT: Let him finish.

13 MR. PAPE: But suppose they had

14 each put \$60,000 in the checking

15 account. You got \$120,000 in the

16 checking account and after a few weeks

17 they decided they couldn't get along,

18 that they wanted to go their ways, their

19 50/50 shareholders. The Bensch's would

20 get their \$60,000. The equitable thing

21 would be for them to get half of that

22 \$120,000 back. Passaloukas would get

23 their \$120,000 back.

24 In this case though what we have is

25 the Bensch's share their contributions

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           which were these leasehold improvements.  
3           By locking these doors, they  
4           automatically got their \$60,000 worth of  
5           lease holding improvements back. Their  
6           account is now at zero. Then the  
7           question is, how does Passaloukas get  
8           his money, \$60,000 back?

9           THE COURT: But I mean, any time a  
10          business goes bad -- in the history of  
11          businesses gone bad has anyone ever got  
12          what they put in?

13          MR. BENSCH: No.

14          MR. PAPE: Yes, if there are  
15          assets there. And what I'm saying not  
16          only did the lease -- the Bensches get  
17          their \$60,000 back, their account goes  
18          to zero. The restaurant had a worth of  
19          \$75,000 which is to be divided. Now,  
20          the Bensches have already got their  
21          \$60,000 contribution back. That  
22          \$75,000 should be distributed equitably  
23          and Mr. And Ms. Passaloukas should  
24          get -- because their account has been  
25          reduced to zero, they should get their

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           money back.

3                   MRS. BENSCH: Your Honor, City of  
4           Greenville vs. Washington Baseball  
5           League in says in addition to a  
6           provision of a lease, a lessee shall  
7           make improvements of a certain  
8           character is ordinarily construed as  
9           precluding the lessee from removing the  
10          improvements at the end of the lease.  
11          It is presumed that such a provision is  
12          intended to benefit the lessor.

13                   As Mr. Passaloukas said they drew  
14          up an agreement that he was totally in  
15          control of being the manager, making  
16          this business work, doing whatever he  
17          wanted to do, hiring, firing, buying the  
18          food, meeting with the accountant,  
19          producing everything, total control.  
20          The Bensches didn't even ask to be  
21          signators on the checking account, get  
22          copies of it from the bank, anything.  
23          At the end of the day, Mr. Passaloukas  
24          was solely responsible to make the  
25          business work. I mean, I believe all

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           the parties went into the business to  
3           make money. This was an investment. As  
4           he stated we didn't know each other  
5           before. We weren't family. So the only  
6           reason the Bensch's went into this was  
7           because -- not knowing these people and  
8           just taking his word that he could  
9           manage a restaurant and make it produce  
10          a profit. Mr. Bensch was willing to put  
11          an investment in here because he was the  
12          landlord and he knew ultimately he would  
13          be somewhat protected from a loss.  
14          That's why it was so important for  
15          Mr. Passaloukas to work with the  
16          Bensch's to understand what to do if  
17          this company is not making a profit,  
18          then what next, but instead, he  
19          stonewalled the Bensch's, didn't try to  
20          work with them and that's what we'll  
21          ultimately prove in this case.

22                   THE COURT: Here's my questions,  
23           Zorba's Incorporated, for sake of  
24           argument, failed to comply with the  
25           lease with the Bensch's, the land

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           owners, and an eviction occurred. And  
3           let's call the Bensch, the landlords,  
4           Smith Co. For the sake of trying to keep  
5           it all straight. So in that case Smith  
6           Co.'s obligation would be not to take  
7           Zorba's trade fixtures or personal items  
8           and that sort of thing, unless, of  
9           course, there was an action with regard  
10          to seizing all of that, but there  
11          wasn't.

12                 MR. PAPE: Right; there wasn't.

13                 THE COURT: So the trade fixtures,  
14           the personal items, all the non fixture  
15           items under the case law, there's a lot  
16           of them, had some value. So there's  
17           assets conceivably.

18                 MR. PAPE: Well, they sold the  
19           restaurant through a chain of events for  
20           \$75,000. And my business evaluation  
21           expert is going to be here at 1 o'clock  
22           and he's going to testify that it's  
23           worth \$75,000 in the hands of Zorba's on  
24           the date of the eviction.

25                 THE COURT: But that includes the

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           real estate and the fixtures?

3           MR. PAPE: No, that doesn't include  
4           the real estate. It includes the value  
5           of the restaurant.

6           THE COURT: I guess here's my  
7           questions though --

8           MR. PAPE: But it does include the  
9           restaurant equipment, the tables, and  
10          all the furnishing and everything that  
11          Mr. Passaloukas contributed and the  
12          Bill of Sale -- the Sales Agreement  
13          that we have shows that in that  
14          transaction the Bensches allocated  
15          \$37,500 for the equipment, furnishing,  
16          and fixtures, removable fixtures, plus  
17          \$37,500 in goodwill.

18          THE COURT: So \$37,500 somewhere  
19          is on a number including the removable  
20          items? Not the stove and all that?

21          MR. PAPE: Yes.

22          MRS. BENSCH: That was four months  
23          later and that was another restaurant  
24          called Nicolai's. That was not Zorba's.

25          THE COURT: But it was the same

1           BENSCH - PASSALOUKAS (EXAMINATION)

2                   stuff that was in the restaurant; is  
3                   that right?

4                   MRS. BENSCH: For the most part it  
5                   was.

6                   THE COURT: Okay; I'm not trying  
7                   to pin anyone down. This is not  
8                   testimony. I'm trying to understand  
9                   this in my mind, perhaps see if there's  
10                   a way we can short circuit some of  
11                   those and I can hear what I need to  
12                   hear.

13                   So, Frank Pape your opinion is that  
14                   the things that were non-fixtures in the  
15                   restaurant that might even be something  
16                   everybody agrees on --

17                   MR. PAPE: The stuff.

18                   THE COURT: -- the stuff, the  
19                   trade fixtures, the removable items,  
20                   the things in there were \$37,500 worth  
21                   of stuff --

22                   MR. PAPE: Right.

23                   THE COURT: -- is that correct?

24                   MR. PAPE: Yes.

25                   THE COURT: Conceivably, has

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           Zorba's and Smith Co. Agreed to end the  
3           lease without a whole lot of debate  
4           Zorba's could have removed \$37,500  
5           without a lawsuit against Smith Co. In a  
6           perfect world?

7                   MR. PAPE: Exactly.

8                   THE COURT: These were non-screwed  
9           in items or fixtures that were worth  
10          \$37,500?

11                   MR. PAPE: But they could have  
12          also sat down over a period of a few  
13          days at that time and say hey, the  
14          restaurant is worth \$75,000 why don't  
15          we go ahead and sell it for \$75,000..  
16          They had no restaurant to sell if they  
17          didn't have the fixtures and the  
18          furnishings that Mr. Passaloukas  
19          contributed. They had absolutely  
20          nothing to sell.

21                   MRS. BENSCH: Your Honor, that's  
22          completely ignoring the fact that the  
23          tenant defaulted on the lease to the  
24          landlord.

25                   THE COURT: I remember seeing

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           that. So we got \$37,500 worth of stuff  
3           and then the corporation owed certain  
4           money to different people?

5           MRS. BENSCH: Correct.

6           THE COURT: Assets or --

7           MR. PAPE: No liabilities.

8           MRS. BENSCH: There were a bunch  
9           of liabilities.

10          THE COURT: There was a liability  
11          to Mr. Passaloukas?

12          MR. PAPE: Well, yes, of course.

13          MRS. BENSCH: There were taxes,  
14          employees, rent.

15          MR. BENSCH: There was a list of  
16          liabilities.

17          THE COURT: All right; assume the  
18          eviction were not wrongful and the lease  
19          had simply ended and Zorba's was asked  
20          to remove their things, that was \$37,500  
21          worth of things; all right; and then  
22          over to settle, to balance the books, to  
23          settle out the ends of Zorba's they  
24          would need to conceivably take that  
25          \$37,500 worth of assets and reduce it by

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2                   whatever was owned to various parties.

3                   MRS. BENSCH: Correct.

4                   THE COURT: Including I think Mr.  
5                   Passaloukas was suppose to get \$3,000 a  
6                   month, the landlord was suppose to get  
7                   -- how much was the landlord suppose to  
8                   get?

9                   MRS. BENSCH: 24 something.

10                  THE COURT: Whatever it was -- the  
11                  taxes, insurance, power bills, whatever  
12                  it was, had the receiver taken control  
13                  of it, that's what would have happened?

14                  MR. PAPE: Yes. Well, or the  
15                  receiver had the option of running an ad  
16                  in the paper to sell the restaurant.

17                  THE COURT: How? Zorba's can't go  
18                  back in -- this is a hypothetical.

19                  MR. PAPE: I understand.

20                  THE COURT: If the landlord -- if  
21                  Smith Co. Were the landlord -- we're  
22                  going to have to separate them, which I  
23                  think we almost have to -- then the  
24                  receiver would have no power against  
25                  Smith Co., right?

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2                   MRS. BENSCH: Correct.

3                   THE COURT: I mean, correct me if  
4 I'm wrong, but I'm trying to see how a  
5 receiver would have power against the  
6 third party if the terms were properly  
7 ended with the lease.

8                   MRS. BENSCH: Your Honor, that  
9 would really change the laws in South  
10 Carolina if we allowed that.

11                  THE COURT: Again, I'm thinking  
12 out loud here. Sometimes I think  
13 wrong.

14                  MR. PAPE: Well, I'll agree with  
15 that, Judge, except for the fact that  
16 the Bensch's had fiduciary obligations.  
17 They wore two hats, as fiduciary  
18 shareholders; they had an obligation to  
19 do whatever was in the best interest of  
20 this corporation. They did sell the  
21 restaurant for \$75,000. The business  
22 evaluation expert is going to testify  
23 that they sold it for \$75,000 and in  
24 this case we think the eviction was  
25 wrongful for two reasons; they did not

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           provide the notice that was required by  
3           the lease agreement, and South Carolina  
4           law is clear on that point, they  
5           construed those things strictly liable.  
6           Strictly the Bensch had drafted that  
7           lease. It's construed against them,  
8           that they didn't provide ten days  
9           notice. Plus as shareholders, they did  
10          not fund the corporation with the  
11          \$20,000 cash that they had the  
12          obligation to fund. Their failure to  
13          put that \$20,000 in cash led to cash  
14          flow problems --

15                 MRS. BENSCH: Your Honor, all I --

16                 MR. PAPE: -- led to cash flow  
17          problems which caused this lack of  
18          money in the corporation by the end of  
19          December of 1999 into the date of the  
20          eviction. So their default in putting  
21          that \$20,000 in resulted in this  
22          inability to pay them as landlords.

23                 Now, you also got to look at that  
24          Carositis (phonetic) case which says  
25          that the Court has to look at a variety

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1           **BENSCH - PASSALOUKAS (EXAMINATION)**

2           of factors before it can determine that  
3           an eviction is proper. And in this  
4           case, there were a whole series of  
5           events. They had had this December  
6           meeting where they had discussed the  
7           Bensch's failure to make repairs. Mr.  
8           Passaloukas had already testified about  
9           that.

10                   As a result of that December 15th  
11           meeting, the Bensch's had agreed to make  
12           the repairs, but by the date of the  
13           eviction a lot of the repairs still had  
14           not been made. Mr. Passaloukas has  
15           already testified that he tried to reach  
16           Mr. Bensch.

17                   **MRS. BESNCH:** Sir, he's trying to  
18           try the whole case right now. He's just  
19           making statements that we haven't had a  
20           chance to prove.

21                   **THE COURT:** I don't even know -- if  
22           this thing had been ruled on already, I  
23           don't even know if it's for me to take  
24           it up. I'm going to have to read it all  
25           and figure it all out.

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2                       But back to the hypotheticals, I'll  
3           assume for the moment that the place was  
4           worth \$37,500, and I can't remember  
5           because I've tried a hundred things  
6           since then, but what were the  
7           liabilities of the corporation at that  
8           point? The biggies were the rent and  
9           the salary, right?

10                   MR. PAPE: Yes.

11                   THE COURT: Tell me what's the  
12           total number.

13                   MRS. BENSCH: It was approximately  
14           \$20,000.

15                   THE COURT: I'm just trying to --

16                   MR. PAPE: And none of this is in  
17           evidence. By the way, the liabilities  
18           that they're looking at there's no  
19           evidence that they ever paid any of  
20           these things.

21                   MR. BENSCH: Sure there is.

22                   MR. PAPE: Statues of limitations  
23           has long expired on these things.

24                   THE COURT: Well, I haven't heard  
25           their case yet. And that's why I was

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           kind of hoping you would all sit down,  
3           do a little informal discovery and see  
4           whether they can produce receipts,  
5           maybe they can't. But, you know, even  
6           if they can't I suppose you can testify  
7           to it and cross examine.

8           MR. PAPE: Your Honor, the only  
9           obligations Zorba's owed which we  
10          brought suit on was the salary.

11          MRS. BENSCH: Your Honor, we have  
12          witnesses regarding that.

13          THE COURT: Did it owe some rent  
14          too?

15          MRS. BENSCH: Yes. It owed  
16          withholding taxes, it owed the  
17          accountant, it owed vendors.

18          THE COURT: Do you have an extra  
19          copy of that for Mr. Pape?

20          THE COURT: Yes.

21          MR. PAPE: I've seen this already,  
22          Your Honor. They've never produced any  
23          evidence of payment, no invoices, or  
24          anything for these things.

25          THE COURT: Let's do this; let's

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1 BENSCH - STEINBERG (EXAMINATION)

2 Q Okay; and that was the value of that  
3 restaurant as of January 8th, 2000?

4 A Correct.

5 MR. PAPE: I don't have any further  
6 questions, Your Honor.

7 THE COURT: Mrs. Bensch.

8 EXAMINATION

9 BY MRS. BENSCH:

10 Q Did you say you did go inside the  
11 restaurant?

12 A I went in the restaurant and walked  
13 around.

14 Q You went in the kitchen?

15 A I walked around.

16 Q Did you go the kitchen?

17 A We're talking -- I don't remember, so I  
18 can't give you an answer on that.

19 Q So you really don't know what was in  
20 the kitchen?

21 A I know that it was opened in Hilton  
22 Head Island under code. It had everything that  
23 was supposed to be in it, the hood system and  
24 everything. I'm very familiar with the --  
25 without even seeing it I can tell you 99 percent

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1 BENSCH - STEINBERG (EXAMINATION)

2 of what would be in there.

3 Q But you're just assuming. It could  
4 have just been two hot dog rollers in there and  
5 you don't really know. You've never saw the  
6 kitchen?

7 A That's not true because it was occupied  
8 --

9 Q You saw the kitchen?

10 A -- it was open for business.

11 Q You saw the kitchen?

12 A No, I said I don't remember. But it  
13 was open for business at the time Hilton Head  
14 gave you a business licenses and food and  
15 beverage gave the license to open. That means  
16 all of the necessary aspects of the equipment  
17 that was suppose to be utilized in a restaurant  
18 of that type had to be in that kitchen.

19 Q Is the exact same equipment in a pizza  
20 restaurant that it's in a Greek fine dining  
21 restaurant?

22 A Probably 50, 60 percent would be the  
23 same. The hood system is the main unit and the  
24 most expensive unit in the restaurant facility.

25 Q Now, where was the hood system?

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1           BENSCH - STEINBERG (EXAMINATION)

2           A     The hood system is up against the wall,  
3           ceiling height, over and above the sprinkling  
4           system.

5           Q     Is some of it on the roof? Was it on  
6           the roof in that restaurant?

7           A     Should be inside.

8           Q     So you don't know?

9           MR. PAPE: Your Honor, I object.

10          THE WITNESS: I don't know anybody  
11          who has a hood system on the roof.

12          THE COURT: Hold on. Let him  
13          state his objection.

14          MR. PAPE: I object. If she's got  
15          some evidence that's going to refute  
16          and support the inferences of the  
17          questions that she's asking that's one  
18          thing, but we've already had testimony  
19          that's laid a foundation in this case  
20          that \$26,000 worth of equipment  
21          26-\$27,000 of furniture, fixtures,  
22          equipment were already in there and I  
23          don't know that --

24          THE COURT: Well, I think she's  
25          entitled to cross examine him as to how

1 BENSCH - STEINBERG (EXAMINATION)

2 he came up with this number, what he saw  
3 or didn't see.

4 BY MRS. BENSCH:

5 Q So a hood system also has a vent system  
6 through the roof and all of that in restaurant  
7 normally?

8 A The hood system is on the upper part of  
9 a wall and the ceiling in most situations.  
10 Adjacent to that is a sprinkling system and then  
11 it goes out through the roof, through vents, or  
12 through, I guess, you can call it a chimney or  
13 whatever so it escapes out of the building.

14 Q So there's some sort of vent system on  
15 the roof as well that's all attached?

16 A Yes. The actual hood system has to be  
17 inside the restaurant.

18 Q But the vent system would actually have  
19 to penetrate the roof --

20 A Yeah.

21 Q -- to vent out?

22 A To release the fumes or whatever.

23 Q And it could leak; a hood system could  
24 leak -- I mean, a vent system could leak, right?

25 MR. PAPE: Your Honor, this is

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1           BENSCH - STEINBERG (EXAMINATION)

2           Q     In other words, you're either talking  
3           about selling a business that has a small lease,  
4           short lease, whatever's left on it, or are you  
5           talking about just selling equipment in a  
6           building with no lease? I mean, they're not  
7           exactly the same thing?

8           A     No, that's not true.

9           Q     Okay; it's the same value whether you  
10          go into a restaurant with no lease and said  
11          here's the equipment, table, and chairs and it's  
12          worth 75,000 --

13          A     What I said is in any sale there's a  
14          contingency that the purchaser has to be able to  
15          get a lease from the landlord.

16          Q     Okay?

17          A     Or either the existing one with the  
18          extension or a new lease.

19          Q     But if the tenant can't -- or if the  
20          seller can't actually say that there is a lease,  
21          or they know they can get one doesn't it change  
22          the value?

23          A     No.

24          Q     It's actually 75-75 no matter --

25          A     That's correct because the deal is not

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1           BENSCH - STEINBERG (EXAMINATION)

2                   furnishings.

3                   THE COURT: That's already an  
4                   exhibit in the trial?

5                   MRS. BENSCH: Yes.

6           BY MRS. BENSCH:

7                   Q     Could you look at that, Mr. Steinberg?

8                   THE COURT: Just for the record,  
9                   what number is it?

10                  MR. PAPE: Your Honor, I've never  
11                  seen this document before. They've  
12                  never produced it.

13                  MRS. BENSCH: Well, we never had  
14                  to testify with an expert witness on  
15                  what the value -- what was actually  
16                  given for the goodwill. And he's  
17                  assuming -- Mr. Pape assumed that it  
18                  was nothing but just what was in  
19                  Zorba's and that's not true.

20                  THE COURT: There's a sticker on  
21                  that.

22                  MR. PAPE: Judge, that document  
23                  has never been authenticated.

24                  MRS. BENSCH: I'd like to submit  
25                  this for an exhibit.

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1           BENSCH - STEINBERG (EXAMINATION)

2                   MR. PAPE: You have to have  
3                   somebody authenticated it, Your Honor.

4                   THE COURT: What is this; a  
5                   contract between Mr. Bensch?

6                   MRS. BENSCH: Mr. Bensch and the  
7                   purchaser of Nicolai's.

8                   THE COURT: Let Mr. Pape look at  
9                   it.

10                  MR. PAPE: Your Honor, it's not a  
11                  contract at all.

12                  MR. BENSCH: Yes, it is.

13                  MRS. BENSCH: Just a minute.

14                  MR. PAPE: The contract between  
15                  the Bensch and Mi Terra is already an  
16                  exhibit. Nobody has signed that.  
17                  Nobody has authenticated it.

18                  THE COURT: I'll tell you what,  
19                  for purposes of this witness certainly  
20                  I'll allow Mrs. Bensch to ask him  
21                  whether any of these things would have  
22                  made a difference.

23                  MR. PAPE: But she's not  
24                  submitting it or authenticating.

25                  MRS. BENSCH: There is Plaintiff's

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1           **BENSCH - STEINBERG (EXAMINATION)**

2                   Exhibit 13 which is a lease from Gary  
3                   and Cynthia Bensch to Mi Terra's in  
4                   Bluffton. And it has an attached  
5                   addendum.

6                   THE COURT: Is that the same  
7                   thing?

8                   MRS. BENSCH: No.

9           **BY MRS. BENSCH:**

10                   Q     That is upon written notice that the  
11                   landlord in Suite 102 is available and offered  
12                   to the tenant for the lease shall have 30 days  
13                   to accept the offer, immediately accept upon  
14                   accepting should lease it to the tenants?

15                             So the lease and the purchase for  
16                   Nicolai's for Mi Terra's four months later  
17                   was that the landlord would also lease them  
18                   the space next door when it became a  
19                   building and add a patio.

20                   THE COURT: Let me -- we need to  
21                   get back to cross examining this  
22                   witness.

23                             Let me ask you really quick, if you  
24                   don't mind me interrupting your cross  
25                   examination, because I'm trying to

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1           BENSCH - STEINBERG (EXAMINATION)

2           understand your testimony here and Mrs.  
3           Bensch sort of asked the question, but  
4           are you saying that the remaining -- you  
5           sold 150 restaurants; is that correct?

6           THE WITNESS: Approximately.

7           THE COURT: And you're here today  
8           in your capacity as an expert in  
9           determining the value of a restaurant?

10          THE WITNESS: Correct.

11          THE COURT: And are you saying that  
12          all things being equal, a restaurant at  
13          the very end of its lease with no  
14          possibility of renewing that lease is  
15          worth the same as an identical  
16          restaurant with 10 years on its lease?

17          THE WITNESS: That's not what I  
18          said.

19          THE COURT: Okay; I thought that's  
20          what you said.

21          THE WITNESS: No. You added with  
22          no possibly of getting the lease. And  
23          as I said, a deal will never consummate  
24          unless a lease is acquired whether it's

25          --

1           BENSCH - STEINBERG (EXAMINATION)

2           THE WITNESS: Again, I will repeat, if  
3           the landlord doesn't want a restaurant  
4           in there, wants to gut the place or  
5           whatever, the value of the equipment is  
6           going to be to a used equipment seller  
7           that's probably going to go in and  
8           probably give you -- I don't know -- 20  
9           cents on the dollar or whatever. But  
10          you're not selling a business; you're  
11          just liquidating the equipment.

12          THE COURT: Okay; I'm just trying  
13          to understand my questions.

14          THE WITNESS: Let me continue one  
15          more thing.

16          THE COURT: All right.

17          THE WITNESS: Again, if the  
18          facility is going to be utilized as a  
19          restaurant and the landlord is going to  
20          give the individual an extension on a  
21          lease or a new lease, you also have to  
22          remember there's a lot of money  
23          invested in improvements. It's not  
24          just the equipment that you can pick up  
25          and take out the door.

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1           BENSCH - STEINBERG (EXAMINATION)

2                   Now, if you are going to be out of  
3           business and the place is going to  
4           close, there's no value to that. But  
5           for an existing facility, that's going  
6           to be utilized for a restaurant -- I  
7           don't care if it's Chinese, Greek,  
8           Mexican -- I don't care what it is, the  
9           value is predicated on furniture,  
10          fixtures, equipment, and leasehold  
11          improvements.

12                   THE COURT: And the balance of the  
13          lease, right; or not? I mean, for  
14          instance would all things being equal?  
15          Would a restaurant that had two years  
16          left on its lease be worth the same as  
17          the one that had 10 years left on its  
18          lease?

19                   THE WITNESS: Well, the person  
20          that's going to buy is not going to buy  
21          it with two years left on the lease.  
22          The contingency in the contract that is  
23          going to be presented is going to say  
24          that I can get an extension from the  
25          landlord on the existing lease.

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1           BENSCH - STEINBERG (EXAMINATION)

2           become Mi Terra's.

3           THE COURT: You are asking that to  
4           be marked as Defense --

5           MRS. BENSCH: Yes. Also the plans.

6           MR. PAPE: Your Honor, this goes  
7           into her case. I don't think she's  
8           wants to ask this witness.

9           THE COURT: You're asking this  
10          witness or --

11          MRS. BENSCH: No. I'm sorry.

12          BY MRS. BENSCH:

13           Q     Mr. Steinberg, were you aware that in  
14           the value that you're placing on this restaurant  
15           that there were going to be substantial changes  
16           made to it?

17           A     It had nothing to do with me looking at  
18           the value at that particular time.

19           Q     So you don't know what they were going  
20           to do with it; tear it town, expand it,  
21           whatever?

22           A     Didn't matter.

23           Q     Did you value the patio?

24           A     That's part of leasehold improvements.

25           Q     But, again, without a lease there's no

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1 BENSCH - STEINBERG (EXAMINATION)

2 value?

3 A I related that many times during this  
4 conversation.

5 Q When you normally go in you said you've  
6 done this so many times, and you value  
7 equipment, do you call in an appraiser?

8 A Do I call in an appraiser.

9 Q If you're going to sell equipment do  
10 you actually hire a professional, an expert, to  
11 come appraise what's in there for your seller?

12 A No.

13 Q You do it yourself?

14 A That's right. I do not have to call  
15 in -- besides selling businesses for 30 years  
16 I've also been a landlord with many tenants that  
17 were food and beverage.

18 Q You know what --

19 A I'm pretty close on what it cost to do.

20 Q So if somebody had purchased used  
21 equipment and used it some more you're saying  
22 that's worth maybe 10, 20 cents on the dollar?

23 A If somebody took the equipment out of  
24 the facility --

25 Q Yes?

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1 BENSCH - STEINBERG (EXAMINATION)

2 A -- and sold it to --

3 Q Joe Blow?

4 A -- Mr. Joe whatever, that sells used  
5 equipment; if you get 20 cents to a dollar I  
6 guess that's about what it would be.

7 Q Okay; did you ever see a list of what  
8 was in the restaurant? Did anybody ever show  
9 you a list of what was in that restaurant?

10 A Probably, but I don't remember, so I  
11 can't answer that. You know, we're talking a  
12 long time ago.

13 Q Right; so to your knowledge you've  
14 never seen what was actually in there?

15 Were you aware that the person that  
16 bought Nicolai's -- because actually the  
17 restaurant name was changed -- had actually  
18 offered to buy the whole shopping center?

19 A Had offered to buy the shopping center.

20 Q The whole shopping center and ended up  
21 just buying the restaurant?

22 A I wasn't aware of that.

23 Q And what was the name of the restaurant  
24 you were looking at?

25 A At that time.

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1 BENSCH - STEINBERG (EXAMINATION)

2 Q Yes?

3 A I think it was Mi Terra's. I don't  
4 remember, okay.

5 Q You never actually saw Zorba's in  
6 operation?

7 A It might have been, but, again, we're  
8 talking almost ten years ago.

9 Q You don't even know if you were looking  
10 at Mi Terra's or Zorba's when you walked through  
11 the restaurant?

12 A Well, if the restaurant at that time  
13 was called Zorba's then I was looking at  
14 Zorba's.

15 Q But you don't know what you were  
16 looking at; which one?

17 A At this particular time I'm not sure.  
18 At that time I was positive.

19 Q You said you looked around the  
20 restaurant, what was on the floor at the  
21 restaurant that you looked at; can you remember  
22 that?

23 A No. I don't remember that.

24 Q Carpet, tile, or whatever?

25 A I don't remember.

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1           BENSCH - STEINBERG (EXAMINATION)

2           Q     Do you know how any tables and chairs  
3           you had valued approximately that were in there;  
4           how many seating capacity?

5           A     I think it was in the 40s, I think.

6           Q     Okay; and you've stated that you have  
7           testified for Mr. Pape before and you've given  
8           him an appraisal on a restaurant before; is that  
9           the same restaurant you're talking about?

10          A     No. I was asked if I had evaluations  
11          for other restaurants.

12          Q     Yes. But also have you done any other  
13          for Mr. Pape other than this one?

14          A     I'm don't -- I'm not sure.

15          Q     Do you remember when Mr. Pape called  
16          you? Do you remember the year that it would  
17          have been approximately?

18          A     I think it was back in 2000.

19          Q     Back in 2000; okay?

20                 MRS. BENSCH: I'd like to offer  
21                 this exhibit of this picture, Your  
22                 Honor.

23                 THE COURT: Show it to Mr. Pape  
24                 before we have it marked.

25                 Do we already have some Defense

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1           BENSCH - STEINBERG (EXAMINATION)

2                   exhibits from last time?

3                   MR. PAPE: We have four exhibits.

4                   Your Honor, I don't mind her  
5                   tendering, but I don't know if Mr.  
6                   Steinberg can authenticate the document.  
7                   I don't know what it is.

8                   THE COURT: Mark it as Defense  
9                   Exhibit 5.

10                  MR. PAPE: Well, actually if I  
11                  remember Your Honor, you admitted four  
12                  Defense exhibits. I think there was a  
13                  fifth exhibit that was tendered, but it  
14                  was not admitted. So they might want  
15                  to mark these six.

16                  THE COURT: All right; go ahead.  
17                  You can offer them collectively.

18                               (Whereupon, Defense Exhibit  
19                               Number 6 was marked for  
20                               identification.)

21                  THE COURT: So we have these  
22                  marked.

23                  MR. PAPE: May I review all of  
24                  these first?

25                  MRS. BENSCH: Absolutely.

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1           BENSCH - STEINBERG (EXAMINATION)

2                   MR. PAPE: Your Honor, they've  
3           never showed me any of these documents.

4                   MRS. BENSCH: These were all Mi  
5           Terra's, that's why. They were never  
6           relative to Zorba's, but he's  
7           appraising a restaurant and I just want  
8           to know was it this one or that one.  
9           That's all I'm trying to establish.

10                   MR. PAPE: He can't authenticate  
11           the documents because -- and if he can  
12           then they're not admissible anyway, but  
13           if they want to --

14                   MRS. BENSCH: No, it's not so much  
15           that, Your Honor. I just want him to  
16           say did he see that restaurant or  
17           another restaurant.

18                   THE COURT: He can't remember which  
19           restaurant, so I think it's proper. You  
20           can ask him.

21           BY MRS. BENSCH:

22                   Q     Is that the restaurant that you were  
23           at?

24                   THE COURT: As I understand it the  
25           witness is being shown a picture of Mi

1 BENSCH - STEINBERG (EXAMINATION)

2 Terra; is that correct?

3 MRS. BENSCH: Yes.

4 THE WITNESS: I mean, this was a  
5 long time ago.

6 BY MRS. BENSCH:

7 Q Right; but you don't remember --

8 A I don't know if it was called Mi  
9 Terra's or the other name.

10 Q Do you know if the outside looked like  
11 that?

12 A I don't remember the statutes in the  
13 doorway.

14 Q Yeah that could have been added?

15 A I really don't remember.

16 Q Do you remember this; the bar that was  
17 in there?

18 A See a lot of the, I guess, we can call  
19 it the accessories and things like that, a lot  
20 of the accessories I don't remember them.

21 Q So you really don't remember ever  
22 seeing that before, or you could have and you  
23 can't remember?

24 A I could have. I'm not going to --

25 Q So you could have been looking at Mi

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1 BENSCH - STEINBERG (EXAMINATION)

2 Terra's or Zorba's you just can't tell?

3 THE COURT: I think you've  
4 established that.

5 BY MRS. BENSCH:

6 Q Were there columns in the restaurant  
7 when you walked in?

8 A I don't think so, but I'm not sure.

9 Q Did you include the value of a patio in  
10 your estimate of \$75,000?

11 MR. PAPE: You've already asked  
12 that question.

13 THE COURT: I think he said yes.

14 THE WITNESS: That's part of the  
15 leasehold improvements.

16 MRS. BENSCH: Your Honor, this is  
17 just a back and white -- this is all we  
18 have left over through all the taxes  
19 and attorneys and everybody of the  
20 outside of the patio that existed from  
21 Zorba's. So I'd like to submit this as  
22 an exhibit and ask the witness if he's  
23 ever seen this.

24 THE COURT: Mark it.

25 MR. PAPE: Your Honor, we don't

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1           BENSCH - STEINBERG (EXAMINATION)

2           have the ability to authenticate this  
3           photograph as to time, place, who took  
4           it, or anything else. It's true of  
5           these other photographs now --

6           THE COURT: We'll do it as Defense  
7           7 for identification.

8           The witness can either say he's  
9           seen it or not.

10                           (Whereupon, Defense Exhibit  
11                           Number 7 was marked for  
12                           identification.)

13           BY MRS. BENSCH:

14           Q     Was that on the side of the building?

15           THE COURT: If you remember.

16           BY MRS. BENSCH:

17           Q     If you remember?

18           A     There were tables and chairs on the  
19           patio. As far as the style and design --

20           Q     You draw a blank?

21           A     -- I can't remember.

22           Q     Okay; that's fine?

23           A     And I don't think anybody else can  
24           remember all of the time -- all the places I've  
25           looked at.

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1 PAPE - STEINBERG (EXAMINATION)

2 different ways. Again, that's an absolute must  
3 that there is a renewal option in a short term  
4 lease.

5 Q You're familiar with the rental market  
6 of commercial properties on Hilton Head Island;  
7 aren't you?

8 A Well, I've owned a center for 20 years,  
9 yes.

10 Q Would it be reasonable to expect a  
11 landlord to turn down a lease for a restaurant  
12 that was -- whose rent for 1600 square feet and  
13 a 308 square feet patio were roughly \$2,400 a  
14 month?

15 A Of 60 -- is that gross or triple net.

16 Q It was gross. Well, let me look at the  
17 terms of the lease?

18 MRS. BENSCH: It was triple net,  
19 Your Honor.

20 BY MR. PAPE:

21 Q Here are the terms of the lease;  
22 \$2,461?

23 A That's \$15 a foot.

24 Q Tenant to pay a \$100 ground maintenance  
25 fee monthly with rent. All costs and expenses

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1 PAPE - STEINBERG (EXAMINATION)

2 operating, repairing, heating, cooling,  
3 lighting, cleaning, painting, stripping,  
4 polishing, trash removal, and security,  
5 insurance including approximate appropriate  
6 liability insurance, injury, death, property  
7 damage; all water and sewer usage fees,  
8 water-sewer fees for use of bill, tenant in  
9 unit?

10 A Was this in 2000.

11 Q This was in 2000, yes?

12 A Okay; in 2000 --

13 Q And utilities?

14 A In 2000 that was in line.

15 Q That was. So a reasonable landlord  
16 would have accepted?

17 A Yes. Its \$15 as square foot, triple  
18 net, which back in 2000 was doable.

19 Q Would landlord have been acting  
20 unreasonably if all the things being the same if  
21 he turned down a lease like that?

22 MRS. BENSCH: Your Honor, I object.

23 THE COURT: To? What's the nature  
24 of the objection?

25 MRS. BENSCH: The nature of the

1 BENSCH - PASSALOUKAS (EXAMINATION)

2 Robert Steinberg concluded at

3 1:50 p.m.)

4 MR. PAPE: Your Honor, we were in  
5 the middle of cross-examination of Mr.  
6 Passaloukas.

7 THE COURT: Right; Mr. Passaloukas,  
8 you are still under oath. You can come  
9 back around.

10 EXAMINATION

11 BY MRS. BENSCH:

12 Q Mr. Passaloukas, Exhibit 2 -- well,  
13 this says Plaintiff's Exhibit 5, but up here it  
14 says number 2?

15 MRS. BENSCH: So Frank, what are we  
16 calling this; two or five?

17 MR. PAPE: The only exhibits in  
18 the file are here.

19 MRS. BENSCH: Can we just get  
20 Mr. Passaloukas' contributions to date,  
21 Exhibit 5?

22 THE COURT: If you can't find a  
23 duplicate of that we'll just use that  
24 one. If not, we can make a copy of it  
25 and make it a new exhibit.

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 MR. PAPE: Well, it's actually  
3 Plaintiff's Exhibit Number 2.

4 THE COURT: It's already there.  
5 Well let's call it Plaintiff's 2 for  
6 purposes of these questions.

7 MRS. BENSCH: Your Honor, I'd just  
8 like to establish the actual equipment  
9 that we're talking about in this  
10 restaurant per Mr. Passaloukas.

11 THE COURT: Take your time.

12 MR. PAPE: Your Honor, Mr.  
13 Clabaugh examined him extensively about  
14 that and there's a Defendant's Exhibit  
15 Number --

16 MRS. BENSCH: Five?

17 MR. PAPE: Your Honor, if I  
18 remember right this is the exhibit that  
19 the Court did not admit and  
20 Mr. Clabaugh was examining him. He's  
21 gone page after page of testimony on  
22 this exhibit already. And they had  
23 determined at the end of the date --  
24 and I'll show it to the Court -- that  
25 the value of the equipment that he

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2                   brought used was 27,184.02.

3                   I don't mind the Court entering  
4                   that exhibit. For some reason it was  
5                   never admitted.

6                   THE COURT: It must have just been  
7                   a mistake. I'm looking at all 403 pages  
8                   of the transcript here on my computer;  
9                   hard to figure it out. So this was  
10                  Defense Exhibit 5 which we believe  
11                  probably should have been admitted, but  
12                  wasn't?

13                  MR. PAPE: I don't know why it  
14                  wasn't. I don't have any objection to  
15                  its admission because Mr. Passaloukas  
16                  has already testified extensively that  
17                  that was the cost of the equipment that  
18                  he furnished to the restaurant.

19                  THE COURT: All right; well, to the  
20                  extend it hasn't been admitted admit  
21                  Defendant's Exhibit Number 5 here, which  
22                  is caption Passaloukas equipment  
23                  purchase for Zorba's Restaurant Court of  
24                  Appeals record; apparently it's already  
25                  in Court of Appeals, pages 269 and 267

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           it says.

3                   MR. PAPE: That's not part of any  
4           record before, but I don't mind.

5                   THE COURT: Well, anyway, it is  
6           what it is. Don't give it any special  
7           weight because it says that on top.

8           BY MRS. BENSCH:

9                   Q     And looking at that document,  
10          Mr. Passaloukas, and I'm going to try to make it  
11          easier --

12                   MRS. BENSCH: And Frank, you can  
13          look at it and sort of stop. I'll just  
14          put a red dot by each this we're going  
15          to call equipment. And I think you'll  
16          find it exactly these numbers here. I'm  
17          just trying to establish that this is  
18          all the equipment that was in the  
19          restaurant.

20                   MR. PAPE: Well, he's already  
21          testified to that and it's already  
22          admitted.

23                   THE COURT: We'll take a look at  
24          that, Mrs. Bensch. Did all the parties  
25          stipulate that what's on that list is

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 the equipment in the restaurant?

3 BY MRS. BENSCH:

4 Q Mr. Passaloukas, the value of the  
5 equipment that you actually put in Zorba's was  
6 \$27,184.02?

7 MR. PAPE: Well, not the value.  
8 That was what he paid to buy that  
9 equipment.

10 MRS. BENSCH: Right.

11 THE COURT: Is that a stipulation  
12 then?

13 MRS. BENSCH: Your Honor, I'm  
14 saying this is all the equipment that  
15 Mr. Passaloukas ever bought and put in  
16 this restaurant.

17 THE COURT: I think what Mr. Pape  
18 is saying is that they agree with that.

19 MR. PAPE: Yes, but not the value.  
20 That's what he paid for it.

21 THE COURT: That's what he paid  
22 for it; okay. So the parties agree and  
23 acknowledge that Defendant's Exhibit 5  
24 constitutes stipulation of the parties  
25 as to the amounts paid by

1 BENSCH - PASSALOUKAS (EXAMINATION)

2 Mr. Passaloukas for the equipment on  
3 that list which was in the restaurant;  
4 is that right?

5 MR. PAPE: Yes.

6 THE COURT: Okay.

7 BY MRS. BENSCH:

8 Q Mr. Passaloukas, were you sent a notice  
9 or was your attorney noticed, Mr. Hale noticed,  
10 that the shareholders wanted to have a meeting  
11 in regard to this restaurant in December, I  
12 believe, was when it actually happened; December  
13 the 8th in Mr. Hale's office?

14 A I don't remember. Whatever is in the  
15 records.

16 MR. PAPE: If you have a document  
17 you can show him.

18 BY MRS. BENSCH:

19 Q Did you ever attend a shareholders  
20 meeting at Mr. Hale's office?

21 A Yes, we did.

22 Q Did you ever request one?

23 A I don't remember who requested. I know  
24 we had one.

25 Q You don't know if you requested a

1 BENSCH - PASSALOUKAS (EXAMINATION)

2 shareholders meeting?

3 A I don't remember --

4 MR. PAPE: Your Honor, I object.

5 THE WITNESS: -- it's been that  
6 long.

7 THE COURT: Don't talk over one  
8 another. It will never make it on the  
9 record.

10 THE WITNESS: I know we had one. I  
11 don't know who requested it; if it was  
12 me or him.

13 THE COURT: Hold on. Let Mr. Pape  
14 state his objection, whatever it might  
15 be.

16 MR. PAPE: Your Honor, I would just  
17 object. He already said he didn't know  
18 and now she appears to be --

19 BY MRS. BENSCH:

20 Q Who signed this letter to Mr. Hale?

21 MR. PAPE: Your Honor, I object to  
22 the question. It assumes that that's an  
23 authentic document --

24 THE WITNESS: Who signed this?

25 THE COURT: Hold on, Mr.

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 Passaloukas.

3 MR. PAPE: It assumes it's been  
4 authenticated by somebody.

5 BY MRS. BENSCH:

6 Q Let me ask you then. We'll back it way  
7 up. To have a shareholders meeting how does  
8 that happen, Mr. Passaloukas?

9 MR. PAPE: Your Honor, I object.  
10 It's irrelevant.

11 THE COURT: Well, I don't know if  
12 it is or not.

13 BY MRS. BENSCH:

14 Q How did y'all agree to have a  
15 shareholders meeting, sir?

16 MR. PAPE: Your Honor it's --

17 MRS. BENSCH: It's very relevant,  
18 Mr. Pape.

19 THE COURT: Mr. Pape, go ahead;  
20 what's your objection?

21 MR. PAPE: It's irrelevant. She  
22 needs to be asking -- I know what her  
23 point is, but she needs to be asking  
24 about the particular shareholders  
25 meeting that they had. Not ever other

1           BENSCH - PASSALOUKAS   (EXAMINATION)

2           shareholders meeting that might have  
3           been had.  It's just too broad and open  
4           ended.

5                        MRS. BENSCH:  Your Honor, the  
6           Plaintiff has said that the Defendants  
7           have done absolutely nothing to help  
8           this corporation and this testimony and  
9           the answers to these questions will  
10          show what the Bensches did to try to  
11          meet with the other shareholders to --  
12          how to figure out how to help this  
13          restaurant.

14                       THE COURT:  Okay.

15                       MR. PAPE:  Your Honor, they can  
16          offer that testimony in their case.  
17          But what she's asking him if he  
18          recognizes this document; I think that  
19          was her intent, but that needs to be  
20          her question to him.  And if he can't  
21          recognize it then she should go on to  
22          something else.

23                       THE COURT:  Okay; I agree with it.  
24          The line of questioning with regard to  
25          the corporation itself I think is

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 probably relevant.

3 BY MRS. BENSCH:

4 Q You stated, Mr. Passaloukas, that you  
5 have problems with the restaurant Mr. Bensch  
6 refused to fix because like Your Honor we have  
7 to do a little clarification here; are you  
8 talking about Mr. Bensch the landlord or are you  
9 talking about Mr. Bensch your partner, the other  
10 shareholder?

11 Who did you send that notice to?

12 A I thought it was one person, Gary  
13 Bensch.

14 Q No. You have a landlord --

15 MR. PAPE: Your Honor, now she's  
16 arguing and I object.

17 THE COURT: It's sustained. If you  
18 know the answer, fine. If not --

19 THE WITNESS: I only know one  
20 person, Gary Bensch. He was my  
21 landlord and my partner. And he was  
22 the one -- he had promised to fix  
23 things in the restaurant and it was not  
24 done.

25 BY MRS. BENSCH:

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 Q Well, my question is how did you serve  
3 him or give him the letter, this Exhibit 63, for  
4 the problems that you wanted fixed?

5 MR. PAPE: Is there an exhibit that  
6 you're referring to?

7 MRS. BENSCH: Yes, Exhibit 63.

8 MR. PAPE: Well, we only have 26  
9 Plaintiff's Exhibits. Let's see if  
10 there's an exhibit upon them. And,  
11 Your Honor, I apologize and I know  
12 Mrs. Bensch is trying as hard as she  
13 can to do the right thing, but I don't  
14 see that document.

15 MRS. BENSCH: Didn't your client  
16 say that he asked Mr. Bensch or gave  
17 him some notice to fix a bunch of  
18 things he didn't fix?

19 MR. PAPE: I think so, but we need  
20 to find the document on the record.  
21 Again, if you'll permit me, let me see  
22 if I can find it.

23 Mrs. Bensch, I think you're  
24 referring to Plaintiff's Exhibit Number  
25 25.

1 BENSCH - PASSALOUKAS (EXAMINATION)

2 on here; what does that date mean?

3 A That says 10/16.

4 Q But Mr. Bensch didn't get it until  
5 12/15 you just testified, right?

6 A I just testified I don't remember when.  
7 Don't put words in my mouth.

8 Q I thought you said you gave it to him  
9 at the shareholder's meeting?

10 A I say if I remember correctly we had  
11 some lease in the shareholder's meeting. I know  
12 we talked about these things over and over for  
13 four months and here they were not fixed and we  
14 end up --

15 Q Now, Mr. Passaloukas, is this list of  
16 items that you wanted repaired? Is this for the  
17 landlord to repair?

18 A For the landlord and my partner, again.

19 Q Sir, their responsibilities are not the  
20 same?

21 A I only knew one person, Cynthia, and  
22 you know that.

23 Q Mr. Passaloukas, the landlord --

24 MR. PAPE: Your Honor, he's already  
25 answered the question and I think its --

1           BENSCH - PASSALOUKAS (EXAMINATION)

2           BY MRS. BENSCH:

3           Q     Okay; let's go down the list. The side  
4           patio windows, side door, back door, all leaks  
5           to be fixed, and all doors to open properly. In  
6           order to be fixed you state all these items need  
7           some kind of canopy for protection from rain and  
8           future problems and rotting?

9           A     Uh-huh.

10          Q     Who did you want to add canopies to  
11          that building?

12          A     What you say.

13          Q     Did you want the landlord to add  
14          canopies to the building?

15          A     I wanted Gary Bensch to do that.

16          Q     You want the shareholders to do that?

17          A     I wanted Gary Bensch to do that,  
18          whoever he was at that time.

19          Q     If you -- again, I think we all want to  
20          throw the Bensches in one big pot and think they  
21          all have the same responsibilities, but they  
22          don't?

23                     In the plans for the restaurant and  
24          the kitchen equipment that we looked at  
25          earlier, did you ever change anything out

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 from the time the restaurant opened? Was it  
3 the same refrigerator, the same prep table?

4 A I don't remember after that long.

5 Q You just can't remember if you ever  
6 changed anything out?

7 A I don't remember.

8 Q Is it possible that you changed out a  
9 broken refrigerator?

10 A I cannot remember.

11 Q So you asked for the front door to be  
12 fixed properly; was your building inspected from  
13 time-to-time by DHEC?

14 A Yes.

15 MRS. BENSCH: Your Honor, I'd like  
16 to submit an inspection report for  
17 Zorba's Restaurant dated 9/30 that says  
18 no violations, no problem whatsoever  
19 with that restaurant.

20 MR. PAPE: Your Honor, again, it's  
21 a matter of authenticity. She can ask  
22 if he recognizes the document in order  
23 to be authenticated.

24 THE COURT: Ask him if he's  
25 familiar with it or has seen it.

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 BY MRS. BENSCH:

3 Q Is that your signature at the bottom?

4 A Yes.

5 Q So you have seen it before?

6 A Uh-huh.

7 Q And there's no violations that the door  
8 is not closing or anything that would cause the  
9 restaurant not to be operating properly?

10 MRS. BENSCH: I'd like to submit  
11 also a fire department inspection, Your  
12 Honor.

13 THE COURT: When you say -- the  
14 first document, you want to submit that  
15 we need to have it marked and give it a  
16 number.

17 MRS. BENSCH: Okay; I'm sorry.  
18 (Whereupon, Defendant's Exhibit  
19 Number 8 was marked for  
20 identification.)

21 BY MRS. BENSCH:

22 Q Here's a document from the fire  
23 department in regards to violations, etc. Is  
24 that your signature on that page?

25 A Uh-huh, that's mine.

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2                   MRS. BENSCH: Could we mark that;  
3           introduce that as an exhibit?

4                   MR. PAPE: Your Honor, I do have a  
5           problem with the admission of these  
6           documents. She's only asked him if  
7           those are his signatures. She hasn't  
8           asked him to authenticate the  
9           documents. I don't know whether or not  
10          he can.

11                   MRS. BENSCH: I'm sorry.

12          BY MRS. BENSCH:

13                   Q     Would you authenticate that that's the  
14          fire Marshall you met with?

15                   THE COURT: Hold on, let Mr. Pape  
16          finish.

17                   MR. PAPE: I don't know whose  
18          hands these documents may have ever  
19          been, or whether they've been  
20          manufactured or anything else. It may  
21          look like his signature, but unless he  
22          or somebody else is willing to say  
23          these are the documents that were  
24          prepared by a certain official with the  
25          Beaufort County Health Department,

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1           BENSCH - PASSALOUKAS (EXAMINATION)

2           etc., then I don't think they are  
3           properly authenticated.

4           THE COURT: Let me ask you this to  
5           shorten things up, Mrs. Bensch; is your  
6           point to have the witness say that  
7           there weren't any violations with the  
8           City or fire code or anything that shut  
9           the business down during the --

10          MRS. BENSCH: Well, sir, he used  
11          that as part of his reason to not pay  
12          rent even though he had no right to  
13          cure through this method. But he's  
14          stating that's what he used the reason  
15          why he didn't pay the rent which we  
16          tried to clear up at the shareholder's  
17          meeting.

18          MR. PAPE: Your Honor --

19          MRS. BENSCH: And he says he gave  
20          him a list of these things to be fixed.

21          THE COURT: I understand that.  
22          But your question has to do with  
23          Government entities shutting the  
24          business down or allowing the business  
25          to remain open.

1           BENSCH - PASSALOUKAS (EXAMINATION)

2                   MRS. BENSCH: We are just sort of  
3                   verifying that somebody else said there  
4                   were problems too.

5                   THE COURT: If he has seen these  
6                   documents if he's familiar with the  
7                   circumstances and then --

8                   MR. PAPE: Otherwise, the  
9                   documents are all hearsay. They are  
10                  business records that aren't --

11                  MRS. BENSCH: Well, they can be  
12                  from the county.

13                  THE COURT: They are business  
14                  records I would assume of Zorba's.  
15                  There's an inspect report left from  
16                  Zorba's.

17                  MR. PAPE: Well, somebody would  
18                  have to authenticate them. I mean, if  
19                  it looks like his signature that's all  
20                  he's testifying to.

21           BY MRS. BENSCH:

22                   Q     Who does it say that's for at the top  
23                   that? What's the name of that restaurant?

24                   A     It says from Zorba's.

25                   THE COURT: Okay; I'll allow it.

1 BENSCH - PASSALOUKAS (EXAMINATION)

2 MR. PAPE: Over my objection?

3 THE COURT: Yes.

4 BY MRS. BENSCH:

5 Q The next item you mentioned carpet in  
6 the dinning room to be fixed properly. Now,  
7 according to the plans that you submitted here  
8 and the Bensches contributions I don't know what  
9 carpets you're talking about?

10 A You know very well which carpets,  
11 Cynthia.

12 THE COURT: The question should be  
13 can you point to anything that says  
14 carpet rather than what your question  
15 was.

16 MRS. BENSCH: Okay; I'm sorry.

17 BY MRS. BENSCH:

18 Q Can you point to anything on there that  
19 says there's carpet in that restaurant?

20 MR. PAPE: Well, she's already  
21 asked him that question and we've been  
22 over it.

23 THE COURT: I think we started  
24 with that question today.

25 THE WITNESS: I'm sure you remember

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 you were supposed to put title down, but  
3 you went and bought that cheap carpet  
4 from Home Depot, Cynthia.

5 BY MRS. BENSCH:

6 Q In the Benches' contribution carpet was  
7 stricken. We weren't given credit for \$51,000  
8 for the carpet, the --

9 MR. PAPE: Your Honor, I object.

10 She's testifying again.

11 THE COURT: You'll have an  
12 opportunity to testify. Just go ahead  
13 and ask Mr. Passaloukas questions right  
14 now if you would, please.

15 MRS. BENSCH: So we are submitting  
16 this as Exhibit 9.

17 (Whereupon, Defendant's Exhibit  
18 Number 9 was marked for  
19 identification.)

20 BY MRS. BENSCH:

21 Q You stated that you wanted Mr. Bensch  
22 to add a side door closure. Is there a side  
23 door closure on the plans and specifications you  
24 gave him?

25 A You don't put side door closures on the

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 plans when you make those things. You are  
3 supposed to have those things. It's common  
4 sense. You're in the restaurant those things  
5 are suppose to close by itself, its part of the  
6 rules. He should know. He had a few  
7 restaurants before.

8 Q Sir, the builder never had a restaurant  
9 before. The builder, you're saying when you  
10 gave him plans and specifications isn't that  
11 actually what he's supposed to build?

12 A What's your question.

13 Q Where would the side door closure be  
14 specified on these plans that Mr. Bensch did not  
15 put in?

16 A I already answered. I said those  
17 things are common sense.

18 Q They're not on the plans?

19 A You don't put those on the plans.

20 Q Yes?

21 A If you want to ask an architect you  
22 will learn.

23 Q Okay; there's no side door closure on  
24 the plans that you gave Mr. Bensch for Zorba's?

25 A No, it's not one there.

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-460-

1 BENSCH - PASSALOUKAS (EXAMINATION)

2 Q You've mentioned the patio to be fixed  
3 properly; what patio?

4 A The patio that he installed. It was  
5 like a grand cannon.

6 Q Did he give you a bill for that that  
7 patio?

8 A Yes, he did.

9 Q How much was that bill?

10 A I don't remember.

11 Q Was it maybe \$3,200?

12 A And I don't want to pay for his work.

13 Q About \$3,200?

14 A I don't remember.

15 MRS. BENSCH: We'll show that  
16 later, Your Honor, the billed paid by  
17 the Bensch.

18 BY MRS. BENSCH:

19 Q But you wanted it fixed?

20 A I wanted the patio. That was the plan  
21 for from the beginning. I was supposed to have  
22 the patio before August.

23 Q Will you show me the patio  
24 specifications he was suppose to build?

25 A It was in the other plans. I don't

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 know what's -- that's a reason we build this  
3 door here; to the patio.

4 Q Right; but where are the specifications  
5 for the patio?

6 A Specifications.

7 Q Where are the plans --

8 A He was supposed to build that.

9 Q Build what?

10 A The patio;.

11 Q What patio?

12 A To the patio.

13 THE COURT: Argumentative.

14 THE WITNESS: We made a door there  
15 for that.

16 BY MRS. BENSCH:

17 Q Okay; we made a door, but we never told  
18 Mr. Bensch where the patio is suppose to be, but  
19 we're not paying the rent because the patio is  
20 not fixed?

21 Okay; men's bathroom, paint job to  
22 be finished on the baseboard or something;  
23 that was another reason for not paying the  
24 rent.

25 Problems with standing water at the back of

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 the building; are you talking about the  
3 roads behind the building?

4 A I was talking about the hole he made  
5 when he was working back there. And he promised  
6 he was going to come and repave it and put more  
7 dirt and more gravel, so we don't have water  
8 there standing right in front of our back door  
9 when we were getting deliveries.

10 Q So --

11 A That was never fixed.

12 Q And you are aware pervious surfaces  
13 that this County demands with roads, etc., and  
14 areas around buildings. Are you aware there is  
15 a code? I mean, when they give you a building  
16 permit you can only have so much previous. So  
17 he can't just add --

18 A I don't know what those words mean,  
19 Cynthia. You know. You are the lawyer.

20 Q Mr. Passaloukas, did you have a problem  
21 with the roof leaking?

22 A Yes.

23 Q Did you have a vent installed on the  
24 leak -- I mean, on the roof of that building of  
25 that restaurant? Did the vent go through the

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1 BENSCH - PASSALOUKAS (EXAMINATION)

2 roof?

3 A Yes.

4 Q Will you look into your lease of Towne  
5 Center; and look at page four of your lease?

6 MR. PAPE: It's Plaintiff's Exhibit  
7 1.

8 THE WITNESS: Where do you want me  
9 to look?

10 BY MRS. BENSCH:

11 Q I'm sorry; page four, 9A?

12 A You want me to read that out loud.

13 Q Please?

14 MR. PAPE: Your Honor, I object.

15 THE COURT: One at a time for the  
16 court reporter.

17 What's the objection?

18 MR. PAPE: She's already asked him  
19 the same question. He's already read  
20 this into the record one time today.

21 MRS. BENSCH: Okay.

22 THE COURT: What was it? I don't  
23 remember.

24 MRS. BENSCH: It basically says  
25 the tenant shall install and place all

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1           **BENSCH - PASSALOUKAS (EXAMINATION)**

2           these things and attached etc. It's one  
3           expense, all the equipment.

4           **THE COURT:** We've read that today?

5           **MR. PAPE:** Yes, we have.

6           **THE COURT:** The lease speaks for  
7           itself.

8           **MRS. BENSCH:** And then on  
9           additional rent, under items I1 is says  
10          all costs and expenses of operating and  
11          repairing, heating, cooling, lighting,  
12          cleaning, painting, and stripping, etc,  
13          trash removal, security and maintained  
14          by the tenant.

15          **THE COURT:** Okay; I mean, if we've  
16          already been over that.

17          **THE WITNESS:** Can I say something?

18          **MR. PAPE:** No.

19          **MRS. BENSCH:** I'm trying to have  
20          the Court understand when  
21          Mr. Passaloukas gave this list of things  
22          to be done to the shareholders at the  
23          shareholder's meeting --

24          **THE COURT:** This isn't really time  
25          for argument. I understand. You are