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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

NOV 15 2016

SC Court of Appeals

DeAndrea G. Benjamin, Circuit Court Judge
Diane S. Goodstein, Circuit Court Judge

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Consolidated Cases For Trial

NOV 30 2016

SC Court of Appeals

Case No.: 2010-CP-28-322
Case No. 2010-CP-28-323

Jamie Curley, Plaintiff,

v.

SCENT Land Holdings, LLC, Amy Puchalski, and Robert Puchalski, Defendants
and Dr. Orville Dyce, Plaintiff,

v.

South Carolina ENT, Allergy & Sleep Medicine, P.A., Amy Puchalski, and Robert
Puchalski, Defendants

Of Whom Jamie Curley, and Dr. Orville Dyce are the Respondents/Appellants,

And

SCENT Land Holdings, LLC, Amy Puchalski and Robert Puchalski, South
Carolina ENT, Allergy & Sleep Medicine, P.A. are the Appellants/Respondents.

RECORD ON APPEAL VOL. III

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INDEX

ORDERS

Judge Benjamin's Form 4 Order(Dyce) of July 31, 2012.....	1
Judge Benjamin's Form 4 Order(Curley) of July 31, 2012.....	2
Judge Benjamin's Form 4 Order of February 1, 2013.....	3
Judge Few Order of August 21, 2013.....	4
Judge Goodstein Order of December 8, 2015.....	5
Judge Goodstein Order of February 24, 2016.....	53

PLEADINGS AND MOTIONS

Plaintiff Dr. Orville Dyce' Complaint in Case No. 2010-CP-28-0323 filed March 15, 2010.....	56
Answer of Defendant Dr. Puchalski to March 15, 2010-SCENT case dated April 20, 2010	66
Answer of Defendant South Carolina ENT, Allergy & Sleep Medicine, P.A.'s (SCENT) to March 15, 2010 Complaint- SCENT Case dated April 20, 2010.....	78
Plaintiff Jamie Curley's Complaint in Case No. 2010-CP-28-0322(SCENT Land Case) filed on March 15, 2010.....	86
Defendant Dr. Puchalski Answer to SCENT Land Case dated April 20, 2010.....	95
Defendant SCENT Land Holdings, LLC (SCENT Land) Answer in SCENT Land Case dated April 20, 2010.....	106
Defendant SCENT's Motion to Amend Answer to Add Counterclaims dated October 5, 2010.....	116
Defendant SCENT Land's Motion to Amend Answer to Add Counterclaims dated October 5, 2010.....	146
Plaintiff Dr. Orville Dyce's Amended Complaint in SCENT case with Exhibits filed on October 21, 2011	176
Plaintiff Jamie Curley's Amended Complaint in SCENT Land Case filed on October 21, 2011	219

Defendant SCENT's Answer to Amended Complaint and Counterclaims filed on November 8, 2011	226
Defendant SCENT Land's Answer to Amended Complaint and Counterclaims in SCENT Land Case filed on November 8, 2011	235
Defendant Dr. Puchalski Answer to Amended Complaint filed on November 14, 2011	241
Defendant Dr. Puchalski and Amy Puchalski Answer to SCENT Land Amended Complaint filed November 14, 2011	247
Plaintiff Dr. Orville Dyce's First Amended Complaint in SCENT Case with Exhibits filed on May 10, 2012	251
Defendant SCENT, Dr. Puchalski and Amy Puchalski Answer to First Amended Complaint and Counterclaims(Jury Trial Demanded) filed on June 4, 2012	299
Plaintiff's Notice of Motion and Motion for Summary Judgment in SCENT Land Case for dissolution of SCENT Land, filed on February 24, 2012	313
Plaintiff's Memorandum in Support of Motion for Summary Judgment in SCENT Land Case for dissolution of SCENT Land, filed on April 11, 2012	367
Defendant's Combined Memorandum in Opposition to Summary Judgment on Judicial Dissolution and Defendants' Counterclaims and Exhibits(with Affidavit of Dr. Puchalski in Support of) filed on April 11, 2012	427
Defendants' Motion to Alter or Amend filed on August 13, 2012	517
Plaintiffs' Motion to Alter or Amend filed on December 10, 2015	524
Defendants' Motion to Alter or Amend filed on December 17, 2015	534
Defendants' Motion Objecting to Appointment of Receiver	596

TRANSCRIPTS

Transcript of Record of Proceedings on Plaintiff's Motion for Summary Judgment for Dissolution of SCENT Land, dated April 16, 2012	603
Trial Transcript	745
Martin C. McWilliams	
Direct	745
Cross	753

Orville Dyce, M.D.	
Direct.....	754
Cross.....	927
Redirect.....	1042
Chad Gunnlaugsson, M.D.	
Direct.....	1061
Cross.....	1079
Tammy Szymanski	
Direct.....	1087
Cross.....	1088
Redirect.....	1097
Tammy Amerson Smith	
Direct.....	1098
Cross.....	1100
Lance Jones (Designated Deposition Testimony Read).....	1106
John Freeman	
Direct.....	1152
Cross.....	1238
Redirect.....	1248
Robert Puchalski, M.D.	
Direct.....	1253
Cross.....	1496
Redirect.....	1622
Recross.....	1650
Walter Long	
Direct.....	1658
Cross.....	1678
Redirect.....	1772
Recross.....	1792
Kimberly Koumas	
Direct.....	1798
Cross.....	1806
Austin Sheheen	
Direct.....	1807
Cross.....	1928
Redirect.....	2017
Recross.....	2039

Macy Vidrine, M.D.	
Direct.....	2044
Cross.....	2094
Redirect.....	2121
Marc Quigley	
Direct.....	2127
Cross.....	2197
Redirect.....	2247

EXHIBITS

Plaintiff's Exhibits

3-Shareholders Agreement between Bob Puchalski and Orville Dyce dated August 31, 2007.....	2293
4-Stock Purchase Agreement between Bob Puchalski and Orville Dyce dated August 31, 2007.....	2298
5-Email from Theresa Williams dated January 15, 2008 regarding Dyce's Buy-In.....	2307
6- Bill of Sale signed by Bob Puchalski Transferring 50,000 Shares to Orville Dyce dated August 31, 2007.....	2311
7-Shareholders Agreement by and Among South Carolina ENT Allergy and Sleep Medicine PA and its Shareholders, dated July 16, 2008, between SCENT and Orville Dyce.....	2312
8-Orville Dyce's Share Certificate dated July 16, 2008.....	2338
9-Stock Purchase Agreement between Orville Dyce and SCENT dated July 16, 2008.....	2340
10-Orville Dyce's Employment Agreement with SCENT dated June 1, 2008.....	2345
11-Draft Shareholders Agreement January 13, 2010.....	2362
12- Email from Ed White, Esquire, to Bruce Armin, Esquire, attaching the Draft 2010 Shareholders Agreement in redline form dated January 13, 2010.....	2399
15-Confidentiality Agreement between Bob Puchalski, Orville Dyce and SCENT dated May 2, 2010.....	2447
16-Operating Agreement of SCENT Land Holdings LLC dated September 30, 2009.....	2451
17-SCENT Land Holdings Articles of Organization dated September 5, 2008.....	2492
18-March 3, 2010 Email from Dr. Dyce to Dr. Puchalski.....	2494
19-March 3, 2010 Consent.....	2496
20-March 28, 2010 Consent.....	2498
21-The Consent of the Shareholders of SCENT-Bob Puchalski authorizes the Loan on November 1, 2009 dated March 31, 2010.....	2499
22-Management Directive dated March 30, 2010.....	2511
24-Email from Bruce Armin to Ed White dated December 23, 2009.....	2512
25-Email from Ed White to Bruce Armin regarding the draft 2010 Employment Agreements and Shareholders Agreement dated January 6, 2010.....	2514
26-Email from Bruce Armin to Ed White dated February 14, 2010.....	2517

30-Email from Bob Puchalski to Dr. Dyce dated February 27, 2010.....	2518
31-Email from Dr. Dyce to Dr. Puchalski dated March 3, 2010.....	2520
32-Email from Dr. Dyce to Theresa Williams dated March 3, 2010.....	2522
33-Email from Theresa Williams to Dr. Dyce dated March 3, 2010.....	2523
34-Email from Bob Puchalski to Orville Dyce dated March 3, 2010.....	2524
35-Email from Bob Puchalski to Dr. Dyce dated March 6, 2010.....	2525
37-Letter from James Lechman to Morris Ellison dated March 25, 2010.....	2527
39-Email from Bob Puchalski to Orville Dyce dated March 26, 2010.....	2533
53-Email from Bob Puchalski to Jamie Lechman dated March 21, 2010.....	2535
56-Email from William Cox to Bruce Armin dated December 22, 2009.....	2537
58-Email from Ed White to Bob Puchalski and Orville Dyce dated February 4, 2010.....	2539
59-Email from Bob Puchalski to Ed White dated March 5, 2010.....	2540
61-Email from Charlie Lucas to Bob Puchalski dated March 3, 2010.....	2541
62-Email from Tammy to Dr. Dyce outlining the benefits from switching to the medical protective from JUA and PCF insurance dated February 16, 2010.....	2542
63-Email from Ed White to Orville Dyce dated February 17, 2010.....	2544
64-Email from Bob White to Theresa Williams dated February 17, 2010.....	2546
65-Email from Ed White to Bruce Armin regarding medical malpractice policy and OD's request for same dated February 22, 2010.....	2548
66-Email from Bob Puchalski to Dr. Dyce dated February 23, 2010.....	2549
67-Report of medical procedures done by Dyce dated October 1, 2010 to February 4, 2011.....	2550
68-Carolina Pines Regional Medical Center document showing in-patient revenues and gross receipts profit dated October 10, 2010.....	2563
69-Orville Dyce to Phyllis Coakly re: medical equipment pickup dated October 9, 2010.....	2564
70-Articles of Organization of Dyce Medical Enterprises LLC dated August 17, 2010.....	2565
75-Tax Return of Orville Dyce and Jamie Curley dated December 31, 2007.....	2567
76-Joint Tax Return of Dyce and Curley dated December 31, 2008.....	2614
78-Tax Return of Jamie and Orville dated December 11, 2010.....	2677
79-Guarantees signed by Orville Dyce in regard to SCENT Land dated August 1, 2009, March 19, 2009; March 3, 2009, October 7, 2008.....	2760
80-Physician Employment Agreement between HMA and Dr. Dyce dated September 15, 2010.....	2775
81-Schedule showing how Bonus calculation-exhibit to HMA employment agreement dated October 8, 2010.....	2787
82-Employment package presented by Carolina Pines to Orville Dyce dated September 1, 2010.....	2794
83-Texts and calls between Dyce and Gunnlaugsson dated January 1, 2010.....	2795
84-Unsigned Affidavit of Orville Dyce dated May 10, 2010.....	2799
85-Unsigned Letter, dated from Bob Puchalski to Orville Dyce requesting that he comes back as an at will employee dated August 31, 2010.....	2801
86-Affidavit of Keiley Taylor dated April 26, 2010.....	2802
87-Letter from Chad Gunnlaugsson dated December 27, 2010.....	2803
90-Consent Order of Dismissal with Prejudice as to dismissal with all claims for the Chad Gunnlaugsson case dated December 21, 2012.....	2807

96-South Carolina ENT balance sheet dated April 30, 2010.....	2812
100- Executive Summary of Kurt McCall of the Medical Office Building- inspection is 15 Exchange Drive property dated March 1, 2012.....	2815
101-Deed from Amy Puchalski to SCENT Land Holdings LLC Hartsville property dated September 30, 2008.....	2862
102-Kurt McCall's Executive Summary for the Medical Office Building at 696 Medical Park Drive dated March 1, 2012.....	2866
103-Executive Summary of Kurt McCall for the 145 Park Central Columbia Office Building dated April 5, 2012.....	2919
104-Title to real estate Amy Puchalski is conveying to SCENT Land Holdings LLC.	2967
105-Map-non-compete area dated April 16, 2012.....	2970
106-Stock Share Certificate for Bob Puchalski dated July 16, 2008.....	2971
107-Stock Register of SCENT dated July 16, 2008.....	2973
108-Amended and Restated Articles of Incorporation for SCENT dated July 10, 2008.....	2974
109-The Freeman Report dated May 9, 2012.....	2982
111-August 31, 2010 Vidrine Shareholders Agreement.....	3044
113-The Amendment and Restated Operating Agreement of SCENT Land Holdings LLC dated August 31, 2010.....	3080
114-SCENT Land Holdings Tax Return dated December 31, 2009.....	3119
115-Email from Bob Puchalski to Dyce dated March 5, 2007.....	3169
118-Email from Bob Puchalski to Orville Dyce dated March 5, 2007.....	3170
119-Email from Orville Dyce to Austin Sheheen dated May 9, 2007.....	3173
120-Email from Bob Puchalski to Austin Sheheen dated March 11, 2007.....	3174
121-Email from Bob Puchalski to Austin Sheheen dated March 16, 2007.....	3175
124-SCENT K-1 distribution account recording distributions credited to Dr Dyce.....	3181
125-Letter from Austin Sheheen to Bob Puchalski and Orville Dyce regarding buy-in dated April 30, 2007.....	3183
127-Consent, signed by Orville Dyce and Bob Puchalski dated July 16, 2008.....	3186
131-Settlement Statement for 145 Park Central Drive with guaranty dated May 5, 2009.....	3188
132-Settlement of the Lugoff Properties dated March 3, 2009.....	3192
133-Mortgage for SCENT Land Holdings LLC dated July 6, 2009.....	3194
134-SCENT Land Holdings LLC Property Analysis and Debt dated May 9, 2010.....	3205
135-Lease Agreement, dated between SCENT Land Holdings LLC and SCENT dated March 4, 2010.....	3206
153-Email from Austin Sheheen to Robert Puchalski dated May 21, 2008.....	3214
154-Email from Bob Puchalski to Barbara Myers regarding the tax liability dated June 18, 2009.....	3216
156-Note dated October 7, 2008.....	3217
161-Transcription of the termination meeting dated March 10, 2010.....	3219
162-May 8, 2010 Consent.....	3223
163-Email from Bob Puchalski to Dr. Dyce dated June 8, 2010.....	3224
165-Transition Timeline dated May 10, 2010.....	3226
172-Email from Ed White to Gus Dixon dated March 2, 2010.....	3228
173-Email from Theresa Williams attaching notice of the special meeting of SCENT Land dated March 11, 2010.....	3229
174-Notice of Special Meeting of SCENT Land Holdings Agenda dated March 11, 2010.....	3230

175-Email from Bob Puchalski to Charlie Lucas dated March 16, 2010.....	3231
176-Email from Teresa Williams to Bob Puchalski-notice mandatory two stage capital to all the members dated March 17, 2009.....	3232
177-Decision of the employment appeal tribunal dated August 20, 2010.....	3233
178-Duplicate email Bob Puchalski to Orville Dyce dated August 31, 2010.....	3235
184-Call detail between Chad and Orville dated April 1, 2010.....	3236
187-Loan to Amy Puchalski from Dr. Vidrine dated September 1, 2010.....	3248
192-\$1.7 million loan with the settlement statement attached dated May 5, 2010.....	3252
195-Mortgage of real estate with SCENT Land Holdings, LLC dated August 1, 2010.....	3265
196-Promissory Note-SCENT Land Holdings, LLC dated March 16, 2010.....	3277
200-Construction contract for the Lugoff property dated September 22, 2009.....	3280
204-Email from Bob Puchalski to Austin Sheheen dated April 8, 2010.....	3293
213-Email between Bob Puchalski and Ed White dated June 3, 2010.....	3294
231-Email from Bob Puchalski and Tammy Szymanski dated February 25, 2010.....	3295
232-Preliminary evaluation of the cost of the buyout prepared by Dr. Wood dated May 9, 2012.....	3298
234-W-2s for Dr. Dyce dated December 31, 2011.....	3305
239-SCENT Land balance dated December 31, 2009.....	3309
240-SCENT Land balance sheet dated December 31, 2009.....	3310
248-General Ledger dated August 25, 2010.....	3312
250-SCENT Financial Records for 2009 and 2010.....	3643
253-2008 Form 1120S, US Income Tax Return for S Corporation for SCENT.....	3898
257-Ed White email to Bruce Arman dated March 17, 2010.....	3937
261-Articles of Incorporation for Kershaw Ear Nose and Throat dated November 5, 2004...	3941
264-Bob Puchalski email to Barbara Myers dated January 19, 2010.....	3943
265-Email from Bob Puchalski to Jamie and Tammy S. dated March 2, 2010.....	3944
270-Patient by Zip Code chart dated May 9, 2010.....	3945
271-Lost of patients and zip codes and address dated May 9, 2010.....	3961
283-Palmetto Bank records dated February 10, 2010.....	4029
286-Draft Operating Agreement of SCENT Land Holdings, LLC dated August 1, 2008.....	4484
289-Tape recording of termination meeting dated March 8, 2010.....(Audio CD)	
296-Richard Livingston Calculation and Damages Calculations dated November 18, 2013.....	4514
301-March 1, 2010 Unsigned Loan documents that Dr. Puchalski sent to Dr. Dyce.....	4526
304-SCENT Payroll Journal dated June 11, 2008.....	4558
320-Defendants' Answers to Plaintiff's Second Set of Interrogatories dated November 15, 2011.....	4688

Defendant's Exhibits

2-Email between Dyce/Puchalski/Austin Sheheen dated March 5, 2007.....	4692
3-Dr. Dyce Tax Return dated 2007.....	4694
8-Employment Agreement between Dyce and SC ENT dated June 1, 2008.....	4741
9-SCENT Employment Agreement with Dr. Gunnlaugsson dated June 1, 2008.....	4755
10-Covenant not to Compete between SCENT and Dr. Dyce dated June 1, 2008.....	4772
12-Email Dr. Puchalski to Austin Sheheen dated June 24, 2008.....	4775

13-Dr. Dyce Certificate of Stock with SCENT dated July 16, 2008.....	4776
25-Cheraw Referring Physicians dated 2009.....	4777
26-Hartsville Referring Physicians dated 2009.....	4782
27-Lugoff Referring Physicians dated 2009.....	4790
28-Secretary of State Filing for Southeastern Ear, Nose, Throat, Allergy, and Sleep Disorders Institute dated June 2, 2010.....	4826
29-Emails between NMRS, Brice Armon, Dyce and Puchalski re: Contracts dated December 2009- January 2010.....	4827
32-Letter from Charles Thompson to Ed White dated January 20 & 21, 2010.....	4831
34-Email Correspondence from Ed White to Dyce, Armon and Puchalski regarding negotiating new Shareholder Agreement dated February 4, 2010 – March 26, 2010.....	4835
35-Email regarding SCENT Land Holdings, LLC closing dated March 3, 2010.....	4859
37-Email from Walter Long to Dr. Puchalski dated February 17, 2010.....	4860
39-Email exchange between Ed White, Dr. Puchalski, & Dr. Dyce dated March 3, 2010.....	4862
40-Dr. Dyce Request of Information dated March 5, 2010.....	4864
41-Email from Theresa Williams to Jamie Curley regarding Review of Information dated March 1, 2010.....	4866
43-Email from Dr. Puchalski to Jamie Curley regarding closing dated March 2, 2010.....	4867
44-Email exchange between Dr. Puchalski, Dr. Dyce, Curley & Amy Puchalski regarding Access to Information & Confidentiality Agreement dated March 3, 2010.....	4869
45-Email exchange between Dr. Puchalski, Dr. Dyce, Curley & Amy Puchalski regarding Access to Information & Confidentiality Agreement dated March 3, 2010.....	4872
46-Email with SCENT Refi/Construction Loan Preliminary HUD to Dr. Dyce dated March 3, 2010.....	4874
47-Email from Dr. Dyce Requesting Information dated March 6, 2010.....	4875
49-Email exchange with Charlie Lucas dated March 8, 2010.....	4878
51-Email from Ed White to Armon dated February 17, 2010.....	4880
52-Email regarding Malpractice Insurance dated February 16, 2010.....	4882
54-Email from Puchalski to Theresa Williams and Dr. Dyce: Give Access to all Financial Information dated February 17, 2010.....	4884
56-Email from First Palmetto to Bruce Armon regarding Loan documents dated February 23, 2010.....	4886
57-Email Tammy Szymanski re: VGM Lease dated February 25, 2010.....	4887
58-Email Tammy Szymanski re: VGMFS Lease Documents dated March 1, 2010.....	4888
59-Email from Kieley to Dr. Dyce with documents dated March 1, 2010.....	4889
60-Email from Charlie Lucas to Dr. Puchalski regarding payment dated March 3, 2010.....	4891
63-Letter from Charles Thompson to Nelson Mullins dated March 22, 2010.....	4892
65-Email Gunnlaugsson to Mike Grabowski & Julie Dunn dated April 15, 2010.....	4894
66-Note in the amount of \$1,796,316.00 for SCENT Land Holdings and Guaranteed by Puchalski dated May 5, 2010.....	4895
67-Consent Resolution to Terminate Dr. Dyce dated March 3, 2010.....	4896
70-Dr. Gunnlaugsson Tax Return dated 2010.....	4898

71-Dr. Dyce unsigned Affidavit.....	4913
72-Dr. Gunnlaugsson “Manifesto” and Email dated December 21, 2009.....	4915
74-Average compensation chart for ENT’s.....	4921
78-Patients by Zip Codes.....	4922
84-Email Gunnlaugsson to Colliers Keenan dated May 3, 2010.....	4939
86-Email from Dr. Gunnlaugsson to Thompson re: arbitration dated January 4-7, 2010.....	4941
87-Email from Puchalski to Szmanski re: 11 Pocosin Ct. tax bill dated November 30, 2009.....	4943
88-Email from Bruce Armon to Ed White re: SCENT/Dr. Dyce dated February 14, 2010.....	4944
89-Email from Dr. Puchalski to Tammy Szymanski and Dr. Dyce dated August 20, 2009.....	4946
92-Email from Dr. Puchalski to Tammy S., Ed White, and Theresa Williams regarding Malpractice Insurance dated February 16, 2010.....	4947
93-Email from Dr. Puchalski to Tammy S. regarding Respironics Invoice dated February 22, 2010.....	4949
97-Report of All ICD-9 Procedures Performed by Dr. Dyce from October 1, 2010 to February 4, 2011.....	4952
99-Carolina Pines Regional Medical Center Pro Forma.....	4965
101-Hartsville ENT, LLC Certificate of Existence from Secretary of State dated August 24, 2010.....	4966
108-Dr. Dyce 2008 Income Tax Return.....	4967
109-Carolina Pines Regional Medical Center Contract with Dr. Dyce.....	4969
114-Email between Rebecca G. and Mike Grabowski regarding Dr. Dyce coming on as partner dated April 6, 2010.....	4970
115-Operating Agreement of SCENT Land Holdings LLC dated September 30, 2009.....	4971
117-Dr. Dyce Patient Transfer List.....	5011
122-Monthly collections for Hartsville/Cheraw.....	5025
123-Dr. Dyce Advertisement for Carolina Pines in Camden Chronicle.....	5028
124-Dr. Dyce Advertisement for Carolina Pines in The Link.....	5030
126-Worker’s Compensation Policy with Hartford dated August 27, 2009.....	5031
127-Charlie Lucas Construction Invoice dated March 1, 2010.....	5036
129-Letter to Ed White with Alternate Notice for Dr. Dyce’s Practice dated April 16, 2010.....	5040
130-Production of HMA calculations of patient volume/revenue dated September 26, 2013.....	5045
133-Phone call records between Dr. Dyce, Dr. Gunnlaugsson, & Charles Thompson.....	5047
134-Text records between Dr. Dyce, Dr. Gunnlaugsson, & Charles Thompson.....	5104
135-Phone Calls & Text Graphs.....	5177
136-Plaintiff’s Discovery Responses to Defendant’s Request for Appraisal dated August 15, 2012.....	5181
137-C.S. McCall & Co. Invoice dated April 30, 2012.....	5186
138)-McCall Appraisal of Hartsville Medical Office Building dated March 1, 2012.....	5189
139-C.S. McCall Appraisal of Lugoff Medical Office Building dated March 1, 2012.....	5245

140-C.S. McCall Appraisal of Richland County Land dated March 1, 2012.....	5276
141-The Honorable G. Thompson Cooper, Jr. Order from Dr. Gunnlauggson Trial.....	5300
142-Plaintiff's Responses to Defendant's Requests to Admit.....	5305
144-Medical Records Released to Dr. Dyce.....	5318
146-10 Random Samples of Patient Medical Records.....	5330
148-Email from Jamie Curley to Theresa Williams dated January 22, 2010.....	5604
154-Email with Notice of Special Meeting of SCENT Landholdings, LLC scheduled for April 19, 2010 dated April 16, 2010.....	5605
155-Notice of Special Meeting of SCENT Landholdings, LLC scheduled for April 19, 2010 dated April 16, 2010.....	5607
156-Email to SCENT Landholdings, LLC Members dated March 17, 2010.....	5608
157-Minutes from April 19, 2010 SCENT Landholdings, LLC Special Meeting.....	5609
159-Email to Charlie Lucas about Capital Call dated March 16, 2010.....	5611
163-Management Directive and Transition Timeline dated March 30, 2010.....	5612
165-Lease Agreement between SCENT Land & SCENT dated March 4, 2010.....	5617
166-Affidavit of Kim Koumas.....	5626
167-Dr. Gunnlauggson verified Complaint against SCENT.....	5628
169-Capital Buy-In after February 18, 2005 Employment Agreement with Dyce.....	5640
172-Email from Gus Dixon to Morris Ellison dated April 23, 2010.....	5642
173-Email from Charles Thompson to Vincent dated July 10, 2010.....	5644
175-Malpractice Insurance Document.....	5645
177-Curley Acknowledgement of Receipt of Confidential Information dated March 3, 2010.....	5646
178-Deposition of Lance Jones.....	5647
179-Deposition of Dr. Dyce, M.D.....	5717
180-Hartsville Referring Dr. Report 2008-2009.....	5940
181-Cheraw Referring Dr. Report 2008-2009.....	5942
182-PNE Referring Dr. Report 2008-2009.....	5943
183-West Wateree Referring Dr. Report 2008-2009.....	5947
190-Transcript of Dr. Gunnlaugsson Settlement Agreement.....	5950
191-Plaintiff's Amended Responses to Defendant's Request to Admit.....	5962
207-Transcripts of Dr. Dyce Tape Recorded Conversations.....	5968
209-Email from Tammy Szmanski regarding KCMC Lease dated April 27, 2010.....	6403
211-Dr. Dyce Patient Volume Chart.....	6404
212-Dr. Dyce Gain in Revenue Line Graph Chart.....	6405
213-Dr. Dyce Gain in Revenue Graph Chart.....	6406
214-Procedures by Patient Service Date—60 Day A/R.....	6407
216-Dr. Dyce 2011 Tax Return.....	6408
217-Dr. Dyce 2012 Tax Return.....	6459
218-SCENT Damages Demonstrative Exhibit.....	6500
220-Dr. Dyce Patient Volume Comparison at HMA.....	6505
223-Email from Dr. Puchalski to Dr. Dyce dated March 5, 2010.....	6506
224-Email from Dr. Puchalski to Curley regarding SCENT Land dated March 26, 2010.....	6508
226-Email from Tammy S. to Dr. Dyce regarding Malpractice Insurance dated February 25, 2010.....	6510
228-Hartsville-Cheraw Loss Spreadsheet by date of service 2010-2011.....	6515

231-Dr. Dyce Equipment Quote at Carolina Pines.....	6516
232-Dr. Gunnlaugsson Order to Return Confidential Information.....	6521
233-2008 Covenant Not to Compete Accompanying 2008 Employment Agreement as Exhibit A	6524
234-Email from Ed White to Marshall Allen regarding Patient Notification and Covenant Not to Compete dated April 16, 2010.....	6527
236-SCENT DEBT Chart.....	6532
237-Dr Puchalski Passport Excerpt.....	6533
238-SCENT & SCENT LAND Debt.....	6534
239-Amended Articles of Incorporation for SCENT Landholdings, LLC dated May 3, 2010.....	6535
240-\$300,000 Unsecured Loan to SCENT, PA with Maturity date of March 3, 2010 dated March 3, 2009.....	6537
243-Accounting for SCENT Landholdings as of May 9, 2010.....	6539
244-Accounting for SCENT, PA.....	6541
245-Purchase Price Calculation.....	6561
246-Funding of Dr. Dyce Buy-In March 2007-January 2008.....	6562
247-Funding for Dr. Dyce Buy-In March 2007-July 2008.....	6563
248-Summary of 2008 Excess Distributions.....	6564
249-Summary of 2009 Excess Distributions.....	6565
250-Summary of Disbursements for the Benefit of Amy Puchalski.....	6566
251-Schedule of Amounts Paid to Amy Puchalski.....	6567
253-Debt of SCENT, PA as of May 9, 2010.....	6568
254-Email between Austin Sheheen and Robert Puchalski, M.D. dated June 12, 2008.....	6569
255-Letter to Bruce Armon, Esquire and Dana Morris, Esquire dated April 30, 2007.....	6571
258-Full 60 Day A/R Procedures by Patient Service Date.....	6574
279-Documents in Possession of First Palmetto for SCENT Landholdings, LLC.....	6668
281-Summarized Methodologies to Determine Actual Accounts Receivable of SCENT as of May 9, 2010.....	6701
282-Accounting Standard Definition of Net Realizable Value.....	6702
283-Accounting Standard Definition of Receivable.....	6703
284-Accounting Standard Definition of Cash Equivalents.....	6725
285-Accounting Standard Definition of Cash Equivalents.....	6730
286- Purchase Price Calculation Utilizing Calculated Accounts Receivable.....	6732
287-Purchase Price Calculation Utilizing Accounts Receivable Booked in Accordance with the Corporation's Normal Accounting Methods.....	6733

OTHER MATERIALS AND DOCUMENTS

Appellants/Respondents Notice of Appeal.....	6734
Respondents/Appellants Notice of Cross-Appeal.....	6795
Certificate of Counsel.....	6854

1 MR. ELLISON: That's it. Thank you.

2 (Recess held.)

3 THE COURT: All right. Cross-examination.

4 MR. SHEHEEN: Thank you, Your Honor, may it please the
5 Court?

6 THE COURT: Yes, sir.

7 CROSS-EXAMINATION BY MR. SHEHEEN:

8 Q. Dr. Dyce, I'm Vincent Sheheen. You and I have met on
9 occasion before.

10 A. Yes, sir.

11 Q. Dr. Dyce, when you closed out your testimony, you
12 discussed with Mr. Ellison what you did the summer of 2010
13 when you had been released from SCENT. Do you recall that
14 discussion?

15 A. Yes, sir.

16 Q. Okay. And I believe you testified that you looked
17 around and in I believe you said some places out of state for
18 possible employment, is that right?

19 A. Yes, I did.

20 Q. Did you tell the Judge that you also went to Carolina
21 Pines HMA and talked to them about employing you?

22 A. I'm not sure why I would tell anyone that since that
23 never happened.

24 Q. Are you aware that Lance Jones, in his deposition, which
25 is Exhibit 178, said that you came to him. Are you aware of

1 that?

2 A. I'm aware that he said I came to him.

3 Q. And he said it was mid summer to late summer, are you
4 aware of that?

5 A. I don't remember what he said exactly.

6 Q. Do you disagree with that?

7 A. I don't remember when we discussed it.

8 Q. I want to show you documents that were obtained by your
9 attorney yesterday from HMA through subpoena that they shared
10 with us, your attorney --

11 And may I approach, Your Honor?

12 THE COURT: You may.

13 Q. That is a proposed order of equipment for an ear, nose
14 and throat practice by HMA for you, isn't it?

15 A. No, it's not.

16 Q. What is it?

17 A. When -- this was actually prepared by me, and when I
18 realized that Dr. Puchalski was not going to change his
19 course of action, I realized I had a number of options. One
20 is to start a practice for myself somewhere. Two was go and
21 work for someone else. And so what I began to do in my free
22 time just to pass the time was start saying, well, if I
23 started a practice for myself and I was going to get a
24 guarantee, how was I going to do it, what equipment was I
25 going to need, and I started calling different companies for

1 quotes on ENT equipment. This is not an HMA thing for
2 equipment for me.

3 Q. Who's that document from?

4 A. This is from Brian Paylor.

5 Q. Where's he located?

6 A. I don't know.

7 MR. SHEHEEN: May I approach, Your Honor?

8 THE WITNESS: Actually, this is not -- this is not
9 even -- this is not the document I was referring to. I'm
10 sorry.

11 Q. Do you see at the top where it says, ship to Carolina
12 Pines Medical Center, 1304 West Bobo Newsom Highway,
13 Hartsville, South Carolina, top left-hand corner?

14 A. Yes.

15 Q. And you see it says, sold to party address, Carolina
16 Pines Medical Center, and then it says attention Dr. Dyce?

17 A. Yes.

18 Q. And you see the document date over in the right-hand
19 corner is 6/21/2010?

20 A. Yes.

21 Q. So this was you talking with -- obviously communicating
22 with Carolina Pines about the purchase of medical equipment
23 for an ENT practice?

24 A. Actually, this probably wasn't actually. I did not get
25 any of this equipment, so I don't know where this equipment

1 went, it could have been to the operating room, but this was
2 not for my practice so, I'm sorry.

3 Q. Is your testimony that HMA just went out and did this on
4 their own?

5 A. They routinely buy equipment for their operating room.
6 I have nothing to do with this.

7 Q. Why is your name on it?

8 A. Probably because they thought I was still the ENT there.

9 Q. Dr. Dyce, I'm going to refer you to SCENT Defendant's
10 Exhibit 230, which is in front of you. Just hold it for a
11 minute, but first let me ask you about the secret
12 tape-recordings that you made.

13 A. Yes.

14 Q. You've admitted you secretly tape-recorded many hours of
15 conversations, right?

16 A. Yes.

17 Q. And I believe your explanation was, one, you
18 taped-recorded them because you didn't want anybody to say
19 they said anything they didn't say?

20 A. Yes.

21 Q. Why didn't you just tell people you were tape-recording
22 their conversations?

23 A. I needed to know what they were saying. I wanted them
24 to speak honestly, and so I tape-recorded them.

25 Q. Did you not want to give them a chance to know they were

1 being tape-recorded?

2 A. Well, I wanted to give them a chance to speak honestly
3 and for me to interpret it honestly.

4 Q. Would you agree with me that you could have told them
5 you were tape-recording their conversations, tape-recorded
6 their conversations and recorded exactly what they said so
7 that there wouldn't be any question about it if that was your
8 goal; you could have told them?

9 A. I could have told them.

10 Q. But you didn't.

11 A. No.

12 Q. And you tape recorded Dr. Puchalski; yes?

13 A. I tape-recorded Dr. Puchalski.

14 Q. And you tape-recorded other people who were in the room
15 during some meetings; is that right?

16 A. Whoever happened to be in the room, yes.

17 Q. And you tape-recorded conversations with, for example,
18 some staff who might have been in the room?

19 A. Who might have been in the room.

20 Q. Or Austin Sheheen, the accountant?

21 A. Yes.

22 Q. Did you ever tell any of them you were tape-recording
23 them?

24 A. No, I did not.

25 Q. In fact, one time Dr. Puchalski on a call asked if

1 anybody was tape-recording the conversations, didn't he?

2 A. Yes, he did.

3 Q. And your wife was a party to that communication and you
4 were and your wife said no, right?

5 A. My wife may have said no, yes.

6 Q. And you didn't say anything?

7 A. No.

8 Q. Why didn't you just say yes?

9 A. We wanted an honest conversation, just as Bob
10 tape-recorded me in the termination meeting. He didn't tell
11 me he was tape-recording me.

12 Q. There was a tape-recorder on the table in the meeting,
13 right?

14 A. I was not shown that tape-recorder.

15 Q. I want you to look at Defendant's Exhibit 230. This was
16 our request for production. There's a cover letter from me
17 and attached requests for production, and in that, No. 2, I
18 asked or SCENT asks for any and all documents, whether
19 written or recorded, electronic or tangible, however stored,
20 that relate in any way to this action. Do you see that, No.
21 2?

22 A. Yes, I do.

23 Q. By the cover letter this was sent April 1st, 2011. Do
24 you see that?

25 A. Yes, I do.

1 Q. Yet you did not turn over these secretly recorded
2 conversations until after a year and a half after that was
3 requested, right?

4 A. Okay. Yes, I believe so.

5 Q. Why didn't you turn them over within --

6 A. Because I didn't think it applied.

7 Q. They're recorded, right?

8 A. Yes, sir.

9 Q. And there are statements on those recordings, aren't
10 there?

11 A. Yes, sir.

12 Q. So why didn't you turn it over?

13 A. There was a lot of information going back and forth at
14 the time in order to produce different documents, and I
15 just -- this was among the many documents I got, and I just
16 didn't think it applied.

17 Q. I want you to look at defendants Exhibit 137, should be
18 the next one. The best way to do this, Doctor, is if you
19 just want to set down the one over to the right, there you
20 go, and then we're on 137. Should be the next one.

21 A. That's this one?

22 Q. It should say C.S. McCall & Company on the top, top
23 left?

24 A. Yes.

25 Q. Do you see that? Do you see this is an invoice from

1 C.S. McCall & Company?

2 A. It appears to be so.

3 Q. And are you aware that that's who you hired to appraise
4 during this litigation SCENT Land Holdings' assets?

5 A. I left it up to my attorneys.

6 Q. Turn to the next page. Do you see that's a check from
7 Jamie Dyce paying the bills?

8 A. Yes, sir.

9 Q. And I want you to turn to the next page. What's the
10 date on that?

11 A. August 13th, 2012.

12 Q. That's a letter from your lawyer to pay that bill, is
13 that right?

14 A. It appears so.

15 Q. Okay. And look on the front page again.

16 A. Yes.

17 Q. The invoice at the top is April 30th, 2012, do you see
18 that?

19 A. Yes.

20 Q. Now turn with me to 136, the next exhibit. Do you see
21 that? This is your lawyer's response to me. It says,
22 enclosed please find plaintiffs response to defendants fourth
23 set of requests for production. Do you see that?

24 A. Yes.

25 Q. What's the date on that letter?

1 A. August 15th, 2012.

2 Q. All right. I want you to turn to the next page of that
3 exhibit. The request was any appraisals or similar documents
4 of any property owned by SCENT or SCENT Land or estimates,
5 documents or comments used in preparation of such appraisals.
6 Do you see that?

7 A. Yes.

8 Q. All right. Read the response that you sent. It says,
9 the second sentence, without waiving our objection plaintiff
10 states --

11 A. I'm sorry, I'm sorry.

12 Q. I'm on the response to one, two sentences down.

13 A. All right. So where are we now?

14 Q. I'll read it, it says, without waiving our objections,
15 do you see that, plaintiff states there are currently no
16 written appraisals in her possession pertaining to real
17 property owned by SCENT Land.

18 A. Okay.

19 Q. All right. But the appraisal had been done. The
20 invoice had been sent April 30th.

21 MR. ELLISON: Objection, Your Honor. He has not laid
22 the foundation. The invoice had been sent, but he has not
23 established that the appraisal had been done.

24 MR. SHEHEEN: Your Honor, may I be heard on that?
25 There's the check on the next page written to C.S. McCall

1 paying the bill.

2 MR. ELLISON: That doesn't mean the appraisal had been
3 done because in fact, Your Honor, it hadn't.

4 MR. SHEHEEN: He can answer.

5 THE COURT: I'm with you. I understand.

6 MR. SHEHEEN: He can answer what he knows.

7 MR. ELLISON: I understand, but for him to put into
8 question something that's not in evidence I have a problem
9 with.

10 MR. SHEHEEN: I'm not putting it into evidence.

11 MR. ELLISON: I have no problem with that. He said the
12 appraisal had been done. In fact it had not.

13 THE COURT: I'm with you. He's cross-examining him, and
14 if he knows, he knows.

15 Q. Do you know why the bill was paid, the invoice had been
16 sent and yet we received a response saying there had been no
17 appraisal done, do you know?

18 A. I have no idea, sir.

19 Q. I want you to look at the Exhibit 221. This is a letter
20 from you and your attorneys to our firm discussing text
21 messages that were sent, text messages between you and other
22 former employees or employees of SCENT, do you see that?

23 A. Yes.

24 Q. Just like the question I asked you about the recorded
25 conversations, why did it take you two and a half years to

1 turn these over?

2 A. Those texts were up until present, up until -- some of
3 those folks work in my office. I mean, I could forward you
4 every text as I get them, but that's how they primarily
5 communicate with me.

6 Q. Some of the texts -- isn't it true that some of the
7 texts you sent us were texts that were years old?

8 A. Yes. I didn't think about checking my Facebook page
9 because I don't post anything on it. The texts -- the
10 employees, I had to remind myself of who the employees were,
11 and I just never thought about them. And then as I thought
12 about texts, I said, you know, it's not just the main folks,
13 maybe there are some other secondary folks that I said hi and
14 bye to, so I sent all those texts and you have them, so I was
15 trying to be complete.

16 Q. The next document I have up there is not an exhibit, but
17 it's an order of Judge Cooper dated September 13th, 2013 in
18 this case. Do you have it?

19 A. This is what I have next (indicating).

20 Q. I'm sorry. I'll share it with you. Turn that back
21 over. I'll read it to you. Tell me if you agree or not.

22 MR. SHEHEEN: Your Honor, it should be part of your
23 Court file. If you don't have the Court file, I'll provide
24 it to you.

25 THE COURT: It's somewhere in there.

1 Q. This was an order issued by Judge Cooper September 13th,
2 2013 after SCENT filed a motion to compel to force you to
3 turn over documents. The Court found that plaintiff's --
4 that's you -- answers to defendants' supplemental
5 interrogatories, requests to produce and requests to admit
6 dated July 2nd, 2013 are nonresponsive and not in compliance
7 with either the spirit or the letter of the South Carolina
8 Rules of Civil Procedure. The issue of relevance is
9 generally a matter for the Court. A party to whom
10 interrogatories are directed cannot rely on the phrase not
11 relevant to parse his answers, and then the Court goes on to
12 say, it appears to this Court that plaintiff's responses are
13 evasive and intended to conceal essential issues in this
14 case. Have you reviewed that order?

15 A. No, I haven't.

16 Q. Do you understand that Judge Cooper's saying that your
17 responses have been evasive and intended to conceal essential
18 issues in this case?

19 A. I'd have to discuss what it means with my attorneys.

20 Q. This order was not appealed to your knowledge, was it?

21 A. I don't know.

22 MR. SHEHEEN: Your Honor, may I approach?

23 THE COURT: Sure.

24 MR. SHEHEEN: Thank you.

25 Q. Were you aware that appraisals had been done -- that you

1 had obtained appraisals of SCENT Land?

2 A. I wasn't.

3 Q. Are you aware that when I filed a subpoena, there was a
4 motion to quash that subpoena filed by your side --

5 A. I'd have to review what happened.

6 Q. -- and I had to get an order from the Court to get a
7 copy of the appraisal?

8 A. I'd have to review what happened.

9 Q. Did you not want to turn the appraisals over because
10 they weren't favorable to your position?

11 A. Again, I'd have to review what happened. I don't even
12 remember the appraisals actually.

13 MR. SHEHEEN: I'm skipping some stuff, Your Honor. Beg
14 your indulgence.

15 THE COURT: Not a problem.

16 Q. I want you to look at Exhibit No. 22 -- excuse me, 225,
17 and there might be a page that I accidentally put in there.
18 225. Do you see this exhibit? It's an e-mail from Dr.
19 Puchalski to you. It says, hope you had a merry Christmas.
20 Theresa mentioned you need to speak to me about the SCENT
21 loan for syndication before signing it. The bank is trying
22 to finalize our Lugoff building loan, and they need
23 documentations for leases, loans, etc., do you see that?

24 A. Yes.

25 Q. Do you know what this is referring to?

1 A. I don't know for sure what it's referring to, but I can
2 tell you what I think it might be referring to.

3 Q. Okay. I guess let me ask you this way, is it true that
4 Dr. Puchalski would e-mail you and you all would go back and
5 forth sometimes about financial issues like the loan
6 syndication, like the building in Lugoff, those types of
7 things?

8 A. We communicated a lot by e-mail about a lot of things.

9 Q. Is it also true you've admitted that you didn't check
10 your e-mail a lot, right?

11 A. I didn't always have the opportunity to check my e-mail.

12 Q. All right. Let's look at --

13 We'll go through these rather rapidly, Your Honor,
14 because you can look at the e-mails later.

15 Let's look at Defense Exhibit 24 which will be the next
16 one. Do you see that? It should say -- it's a communication
17 between Ed White and Bruce Armon. This was December 23rd,
18 2009, do you see that?

19 A. Yes. I do.

20 Q. It looks like it's Bruce and Ed talking about comments
21 on the employment agreement. Would that have been the
22 proposed new employment agreements in 2010 -- 2009, 2010?

23 A. I believe so.

24 Q. So your lawyer and the lawyer for SCENT are talking
25 about the agreement and exchanging comments to each other, is

1 that right?

2 A. It appears that Ed White is just telling Bruce that the
3 documents aren't ready yet, right.

4 Q. Okay. It also says, Dr. Puchalski indicated he recently
5 scanned and sent the executed employment agreement and
6 shareholders agreement to Dr. Dyce and you may want to get
7 those from him, want to review them in advance, do you see
8 that?

9 A. I don't -- yes.

10 Q. All right. Let's look at 51.

11 THE COURT: Hold on.

12 MR. SHEHEEN: I'm sorry.

13 THE COURT: Let me ask you this question: Was your
14 question did you receive the executed documents from Dr.
15 Puchalski? Because that's not what that says.

16 MR. SHEHEEN: That wasn't my question. My question was
17 does this say that he sent -- that Dr. Puchalski said that he
18 recently scanned and sent the executed employment agreement
19 and shareholders agreement to Dr. Dyce in that second
20 paragraph.

21 THE COURT: It looks like he's just looking at them
22 because it says, I spoke with Bob Puchalski, and he's going
23 to get me his final comments on the employment agreement and
24 shareholders agreement by Monday.

25 MR. SHEHEEN: Right.

1 THE COURT: So it doesn't seem like there's anything
2 executed at that point.

3 MR. SHEHEEN: Really my question was just to elicit the
4 fact that there was communication between his lawyer and
5 SCENT about the shaping of these agreements.

6 THE COURT: Clearly, yes, got it. That I got it.

7 THE WITNESS: Not about the shaping of the agreements,
8 just about the agreements.

9 MR. SHEHEEN: I haven't asked a question.

10 THE COURT: Got it.

11 THE WITNESS: Sorry.

12 THE COURT: Okay.

13 Q. I want you to look at Defendant's Exhibit 138. This is
14 an executive summary of the -- I'm going to hand you
15 something different. I'm going to interpose. I'm going to
16 show you Defendant's Exhibit 138. This was the executive
17 summary of the appraisals we were just talking about. Do you
18 see it? When's it say the appraisals were done? What does
19 it say?

20 A. It says, medical office building, 696 Medical Park
21 Drive, Hartsville, Darlington County, May 9th, 2010.

22 Q. What was May 9th, 2010?

23 A. Date of value, May 9, 2010, date of inspection, March
24 1st, 2012.

25 Q. Okay.

1 A. Was there a question?

2 Q. I just asked you to read it to me. Thank you.

3 A. Can I --

4 Q. Thank you. All right. Will you go to Exhibit 51? This
5 appears to be an e-mail from Ed White to Bruce Armon, and by
6 the way, just to clarify, and I'm sure the Judge has caught
7 this already, but Bruce Armon is your lawyer personally, is
8 that right?

9 A. Yes.

10 Q. Was or is, is that right?

11 A. Yes, he was.

12 Q. Okay. And Bruce Armon had represented you for years,
13 right?

14 A. In certain matters.

15 Q. You've got to speak up a little bit, Dr. Dyce?

16 A. In certain matters, yes.

17 Q. He represented you when you were negotiating your
18 shareholders issues in Virginia, didn't he?

19 A. Yes, he did.

20 Q. Okay. And in this e-mail it appears that Ed White is
21 forwarding to Bruce Armon a bunch of comments that he has
22 about -- it's a lot of things. I don't want to go through
23 it. The Court can read it. But malpractice issues, proposed
24 management agreements, the new proposed shareholder
25 agreements and those types of things. So is it fair to say

1 that Ed White and Bruce Armon are communicating about the
2 issues contained in this agreement?

3 A. Not specifically, communicating, yes.

4 Q. We can go through it if you want to. They're
5 communicating about the management agreement, Carolina Pines,
6 right?

7 A. I'm sorry, communicating about what?

8 Q. A management agreement with Carolina Pines. It's about
9 midway through, says attached is a copy of the proposed
10 management agreement with Carolina Pines.

11 A. Yes.

12 Q. And then the next paragraph says, as far as your
13 questions on the contents, I will try to get you my
14 assessment of what happens if new agreements are not signed;
15 and, two, what provisions in the current agreements would
16 offer protections for your interests, blah, blah, blah, blah,
17 blah, right?

18 A. Yes.

19 Q. Okay.

20 THE COURT: Just so I'm clear, in other words, it
21 appears that Mr. White is still communicating directly with
22 Dr. Dyce. He's just copying his communications directly with
23 Dr. Dyce to Mr. Armon, and that's the purpose -- that's what
24 this shows is that while Mr. White is still communicating
25 directly with Dr. Dyce, he's copying it to Mr. Armon.

1 MR. SHEHEEN: Who was involved at this point
2 representing Dr. Dyce's individual interests, yes.

3 THE COURT: Okay.

4 Q. Let's look at Defendant's Exhibit 54. It says, Robert
5 Puchalski at the top left. This is an e-mail at the very
6 bottom from Theresa Williams to Bob Puchalski, and they cc
7 you, right?

8 A. Yes.

9 Q. And it says, Dr. Dyce has requested the following, do
10 you see that?

11 A. Yes.

12 Q. And then the e-mail above it is Dr. Puchalski's
13 response, and he cc's you on that, right?

14 A. Yes.

15 Q. And he says, let's make all these available to him
16 tonight and answer any and all of his questions. I would not
17 feel comfortable sending anything out of the practice without
18 adequate confidentiality protections. Do you see that?

19 A. Yes.

20 Q. This was February 17, right?

21 A. Yes.

22 Q. So Bob was telling you in this e-mail that he was -- by
23 cc'ing you he was saying, let's give Dr. Dyce these things,
24 but I don't want him taking them from the premises, is that
25 right?

1 A. Yes, which is not what we wanted.

2 Q. Dr. Dyce, he also offered to make available to you to
3 bring somebody on premises to review all these documents,
4 didn't he?

5 A. Yes.

6 Q. And you didn't do that, did you?

7 A. No, we didn't. It would take a lot to review the
8 documents, and you would need someone there for days,
9 actually weeks or months, which was what we've done to try to
10 get through the documents, so I'm not sure how bringing
11 someone on premises would help.

12 Q. Let's look at the next one, 2477 -- excuse me, Exhibit
13 55 down at the bottom. This is Ed and Bruce and you and you
14 say, Ed, I do not have copies of my own policy. All my
15 documents are at the office. I don't receive these at my
16 home address. Is that right?

17 A. Yes.

18 Q. What did you mean by, I don't receive these at my home
19 address?

20 A. Give me a minute.

21 Looks like I'm referring to the malpractice policy.

22 Q. You said referring to the medical malpractice?

23 A. It looks like it's referring to the medical malpractice
24 policy.

25 Q. All right. You can flip to the next one. The next one

1 is Exhibit 226. Do you see that?

2 A. Yes.

3 Q. Now, you can take the time to flip through it. I'm
4 going to represent to you this looks like it's a discussion
5 about Med Pro with a bunch of information attached to it.
6 Would that be the malpractice policy that you all were
7 discussing?

8 A. Yes. This is what I received from SCENT about the
9 malpractice policy.

10 Q. And you still wouldn't sign for the new malpractice
11 policy, is that right?

12 A. Yes.

13 Q. What other information did you want about the
14 malpractice?

15 A. When I called the malpractice carrier, these were not
16 the numbers I was told from JUA/PCF, so I was wondering why I
17 was being fed misinformation.

18 Q. Did you say that anywhere on these e-mails?

19 A. I believe I mentioned it to them. I don't know if I
20 sent an e-mail about it.

21 Q. Exhibit 59, do you see Exhibit 59, Dr. Dyce?

22 A. Is that this (indicating).

23 Q. It says Robert Puchalski at the top left.

24 A. Yes.

25 Q. It's an e-mail, appears to be from Keiley. Who is

1 Keiley?

2 A. One of Dr. Puchalski's many assistants.

3 Q. And did she work for SCENT?

4 A. She was paid by SCENT. She worked for Dr. Puchalski.

5 Q. What do you mean by that?

6 A. She booked him plane tickets. She did errands for him.

7 She took care of car and other stuff and then was paid

8 through SCENT but she did have a place at SCENT.

9 Q. Did she work for SCENT?

10 A. Yes.

11 Q. Did she do work for SCENT?

12 A. And Dr. Puchalski.

13 Q. Did she do work for SCENT?

14 A. Yes, she did.

15 Q. Okay. So it says here, this is an e-mail to you, and it

16 says, here are the documents you were unable to read last

17 week. The password is scent. You will need to open these

18 documents using a desktop computer as opposed to using your

19 iPhone. And then it goes on a little bit more. The date of

20 this is March 1st, do you see that?

21 A. Yes.

22 Q. Then there's attachments. It looks like it's a bunch of

23 closing documents on the next page. Do you see that?

24 A. I don't know what they are.

25 MR. SHEHEEN: Okay. Your Honor, I think really 44

1 pretty much relates to the last one, so we can just skip over
2 to the next one.

3 THE COURT: All right.

4 Q. No. 45 is an e-mail. It is to you and Jamie Curley. Do
5 you see down at the bottom it's from Theresa. This is
6 Exhibit 45. Do you see that? Dr. Dyce, just FYI, the
7 Exhibit numbers are down here (indicating).

8 A. I don't have the exhibit numbers.

9 Q. Oh, I'm sorry.

10 THE COURT: Mine don't either.

11 MR. SHEHEEN: I'm sorry.

12 THE COURT: That's okay. Here you go. Here's a pen.

13 So now I'm confused and lost track of where we are.

14 What number's this one.

15 MR. SHEHEEN: Did it say Robert Puchalski in the top
16 left?

17 THE COURT: It does.

18 MR. SHEHEEN: That is 44. First sentence is Theresa
19 will be sending over a receipt with --

20 THE WITNESS: That one's 45.

21 THE COURT: 44. 44?

22 MR. SHEHEEN: Yes, ma'am.

23 THE COURT: Now, 45.

24 MR. SHEHEEN: Yes, ma'am.

25 Q. Down at the bottom, Dr. Dyce, it says, I have the SCENT

1 Land Holdings financial documents for your review, have them
2 prepared for you to take once Jamie has signed the sign-out
3 form. I will attach another copy of the sign-out form. Do
4 you see that?

5 A. Where?

6 Q. Down at the bottom it says, Dear Dr. Dyce or Dr. Dyce.

7 A. Where it says thank you for your e-mail?

8 Q. Hold up the document. That one (indicating).

9 A. So this is not 44.

10 Q. That one's 44 and I'm on 45.

11 THE COURT: It's two pages.

12 MR. SHEHEEN: Yes, ma'am. Lot of documents.

13 THE COURT: Yes.

14 Q. So do you see that, the reference I have to SCENT Land
15 Holdings financial documents for your review?

16 A. Yes.

17 Q. Do you know if you all ever came and picked up those
18 documents?

19 A. I believe we did.

20 Q. Thank you. Have you ever purchased a house, Dr. Dyce?

21 A. Have I ever purchased a house?

22 Q. Yes.

23 A. Yes.

24 Q. And did you have a loan closing for the house when you
25 purchased it or did you buy it in cash?

1 A. I had loan closings.

2 Q. Did you review the documents when you closed on your
3 house, the loan closing documents, the day of the closing,
4 weeks in advance, a day before?

5 A. I've done both.

6 Q. The next exhibit looks like that (indicating) and it's
7 Exhibit 46. At the top left it says, Robert Puchalski. Are
8 you with me, Doctor?

9 A. Yes.

10 Q. Do you see on that one it says it's -- it says, dear Dr.
11 Dyce, please find attached the loan documents I received
12 today from our attorney. Thanks, Theresa. Do you see that?

13 A. Yes.

14 Q. It looks like she forwarded you these loan documents the
15 day that she received them.

16 A. She forwarded me the e-mail. I don't know if the loan
17 documents were attached. We got a number of e-mails over the
18 course of this period with nothing attached. So I got this
19 e-mail. I don't know what was attached to it.

20 Q. The next one, Exhibit 47, at the top again it says
21 Robert Puchalski on the left. That's it. I want you to turn
22 to the second page of that one, second page, down at the
23 bottom it says Charlie, do you see that?

24 A. Yes, at the bottom.

25 Q. I'm sorry?

1 A. Yes, I see it at the bottom.

2 Q. Charlie is the builder, right?

3 A. I assume.

4 Q. It says, Charlie, I assure you that we're doing
5 everything in our power to facilitate the closing today.

6 Your workmanship has been exceptional, and I appreciate all
7 your patience with us. And that was from Dr. Puchalski to
8 Charlie, right?

9 A. Yes.

10 Q. And below that or on the next page is the e-mail from
11 Charlie to Dr. Puchalski, and all this was forwarded to you.
12 You can see that in the e-mail above it.

13 A. Yes.

14 Q. This was Charlie Lucas saying, we are just giving you
15 our concerns over the delays on the last two invoices which
16 can and has on some accounts caused burdens on our vendors
17 and subcontractors. Do you see that?

18 A. Yes.

19 Q. You knew that the builder was anxious to be paid and
20 letting SCENT know that.

21 A. That's what Dr. Puchalski was telling me.

22 Q. But you also saw that Charlie Lucas said it himself.

23 A. Yes, but in the -- in doing business with SCENT as part
24 of SCENT I know we would often have people send letters in
25 support of our position, so I'm not sure if that's a

1 legitimate letter from Charlie Lucas himself or if Dr.
2 Puchalski said specifically send the letter, just like he
3 said there's a mechanic's lien when there wasn't, so like I
4 said, I don't know that that's -- yes, it says from Charlie
5 Lucas, but there could be a whole lot more to that than just
6 that e-mail.

7 Q. So you're saying that you think that Charlie Lucas
8 didn't send that e-mail?

9 A. No, that's not what I'm saying at all. I'm saying on a
10 number of occasions when we were dealing with hospitals or
11 other entities to advance our position we would have someone
12 send a letter in support of our position or an e-mail in
13 support of our position so that we can take that to the party
14 we're dealing with and say, hey, look at this letter or
15 e-mail. We've done that before, we've continually done that,
16 and that's what this e-mail here seemed like.

17 Q. I'm not asking about -- I understand you've said that
18 and I understand that.

19 A. My answer is there's an e-mail there from Charlie Lucas,
20 the backdrop of which I don't know. That's my answer.

21 Q. You got an e-mail forwarded to you from Charlie Lucas
22 saying that he wanted his money, right?

23 A. That's what the e-mail said.

24 Q. Okay. We can skip over the next one.

25 THE COURT: Skip over 48?

1 MR. SHEHEEN: Yes, ma'am. And we're going to 62. It
2 looks like this (indicating). It's a letter of Nelson
3 Mullins.

4 THE COURT: What date?

5 MR. SHEHEEN: March 17th, 2010.

6 THE COURT: Okay. That's going to be 49.

7 MR. SHEHEEN: This is 62.

8 THE COURT: It's not written on there anywhere.

9 MR. SHEHEEN: I know. I'm sorry. In the books it's 62,
10 and I don't want to get you off of what's in the books.

11 THE WITNESS: So just ignore this one before that?

12 MR. SHEHEEN: Right.

13 THE COURT: All right.

14 Q. This is a letter to -- Ed White to Bruce Armon, do you
15 see that?

16 A. Dear Bruce, Ed White, yes, sir.

17 Q. This is dated March 17th, do you see that?

18 A. Yes, sir.

19 Q. I want you to look down at the last paragraph on the
20 first page, okay, and I'll just read it, just saves a little
21 time if I read it, if you'll follow along. It says, to allay
22 any concerns Dr. Dyce may have about the financial records of
23 the company Dr. Puchalski offered to split the costs of an
24 audit of the company by an independent accounting firm. Dr.
25 Puchalski also offered to meet with Dr. Dyce and the

1 company's accountants to address any concerns Dr. Dyce may
2 have with the financial records of the company. Dr. Dyce has
3 yet to respond to either of the alternatives. And then
4 there's lots more in this letter, and the Judge can read it
5 and you can as well, but what I wanted to ask you was, do you
6 recall there being an offer of an independent accounting firm
7 coming in to look over things?

8 A. I recall a number of offers, I don't recall the specific
9 e-mails, but every one of them involved Bob overseeing the
10 accounting or Austin Sheheen or his office overseeing the
11 accounting or Theresa Williams overseeing the accounting or
12 someone of Dr. Puchalski's choice overseeing the accounting
13 which would defeat the whole purpose of an objective
14 accounting.

15 Q. That's why I asked you -- this one says an independent
16 accounting firm, and that's why I asked you, do you recall
17 there being the offer of having an independent accounting
18 firm come in to review things to allay your concerns?

19 A. I recall.

20 Q. Why didn't you say, great, let's go do that?

21 A. Because I already had a purpose for getting independent
22 folks who were objective to come in and review it, I already
23 had the folks all ready to look at it.

24 Q. Okay. The next one is Exhibit 61. It says Robert
25 Puchalski at the top.

1 A. Okay.

2 MR. SHEHEEN: And just so that the Court will
3 understand, Judge, you know how there was the other e-mail
4 where there was a chain and there was Dr. Dyce asking
5 questions, this is similar to that, and the Court will just
6 have to kind of look at it a little bit to understand it.

7 Q. But, Dr. Dyce, just to set the stage, do you recognize
8 that the beginning of the paragraph is you, and then there's
9 Dr. Puchalski responding to you, and the type looks slightly
10 different on my copy after some stars. Do you see that?

11 A. No. The first line is from Robert Puchalski to Jamie
12 Curley. Is that what you have?

13 MR. SHEHEEN: May I approach the witness, Your Honor?
14 Thank you. No. I'll hand mine to you, Doctor.

15 THE COURT: And this is number?

16 MR. SHEHEEN: 61.

17 THE COURT: It says confidential on the bottom?

18 MR. SHEHEEN: Yes, ma'am.

19 THE COURT: Got it.

20 Q. My question is is this you and Dr. Puchalski going back
21 and forth with questions that you give and responses that he
22 then gives? Not asking if you like the responses, I'm just
23 asking is it you --

24 A. I believe these are back and forth between me and Dr.
25 Puchalski.

1 MR. SHEHEEN: Thank you. Your Honor, the next exhibit
2 you can skip over. I'm going to do that through another
3 witness. It looked like -- it says Robert Puchalski at the
4 top. Yes, just flip that one over.

5 THE WITNESS: They all say Robert Puchalski at the top.

6 MR. SHEHEEN: Many of them do.

7 THE COURT: What's the next one?

8 MR. SHEHEEN: The one that says, Robert Puchalski, and
9 then it says Friday, March 26, we're skipping over that.

10 THE COURT: Okay.

11 Q. Dr. Dyce, do you recall in your deposition I asked you
12 what documents it was that you wanted and you told me you
13 didn't know, do you recall that?

14 A. I don't recall that.

15 Q. Tell me what documents you don't have that you think
16 should have been provided to you?

17 A. To this day?

18 Q. Yes, sir.

19 A. Well, I never got the credit card, all the credit card
20 records, I still haven't received the various versions of the
21 shareholder agreement, and I still haven't received -- I
22 forgot one or two other things. I can't remember them
23 offhand.

24 Q. You're aware that your accountant went to the accountant
25 of SCENT and spent, I believe, over a day going through

1 thousands of records. Are you aware of that?

2 A. I don't remember.

3 Q. Are you aware that your accountant went to the main
4 office of SCENT and that we made available to him the things
5 that he wanted to look at?

6 A. I don't remember. It's been a while.

7 Q. And I believe you testified today that you had received
8 copies of proposed -- the proposed new shareholder
9 agreements, is that your testimony, that you did or did not
10 receive some copies of proposed shareholder agreements?

11 A. What was listed as a 2010 shareholder agreement?

12 Q. Yes, sir.

13 A. Yes, we eventually received copies of those.

14 Q. I'm not talking about after litigation. I'm asking you
15 prior to litigation.

16 A. Yes.

17 Q. You received copies?

18 A. Yes.

19 Q. Do you recall in your deposition in the Dr. Gunnlaugsson
20 case I asked you, when they drafted those agreements, did
21 they actually provide you with a copy of those drafts, or
22 they only gave them to Dr. Puchalski, and you said I was
23 never provided any of the drafts?

24 A. Yes.

25 Q. Why do you say that?

1 A. Because I don't believe I was provided any of the
2 drafts.

3 Q. Were you provided drafts of employment agreements and
4 shareholder agreements or were you not?

5 A. I received a shareholder agreement to sign. It was
6 supposed to be a finalized version, there was no negotiation
7 on it, and I was supposed to receive that and sign it. The
8 drafts 1 through 30 or 10 through 30 or 10 through 25,
9 whatever the numbers were, I didn't receive those drafts, and
10 that's what I'm referring to, so I'm sorry if I was unclear
11 of what I meant.

12 Q. You didn't sign that agreement because you didn't like
13 the terms, right? 2010 agreement.

14 A. I didn't -- it was an unsignable document.

15 Q. I'm trying to make this not real hard. So you didn't
16 sign it, right?

17 A. I did not sign it.

18 Q. And you didn't sign it because you didn't like the
19 terms.

20 A. It was an unsignable document.

21 Q. Did you like the terms of the 2010 agreement?

22 A. I didn't even consider the terms of the 2010 agreement.

23 Q. Why didn't you sign it?

24 A. Because it was an untenable, unsignable document.

25 Q. Because you didn't like the terms, correct?

1 A. The terms were not -- they were not real terms. It was
2 not a real agreement.

3 Q. You didn't sign it, so it wasn't an agreement, right?
4 The only agreements that were signed or the controlling
5 agreements in this case are the 2008 shareholder agreement
6 and the 2008 employment agreement, right?

7 A. And the articles of incorporation.

8 Q. Which ones?

9 A. SCENT's, whichever ones were in effect.

10 Q. And the reason there's no 2010 agreement is because you
11 wouldn't sign it, right?

12 A. Yes.

13 Q. And you wouldn't sign it because you didn't like the
14 terms and you weren't going to agree to the terms, right?

15 MR. ELLISON: Your Honor, this is the fourth time he's
16 asked same question.

17 THE WITNESS: I met with Ed White --

18 THE COURT: I think he said they were untenable.

19 MR. ELLISON: He said the same answer three times.

20 THE COURT: I think what he said is it's untenable. I
21 know what untenable means, I didn't like them.

22 Q. And you were free not to sign the agreement, right?

23 A. No, I wasn't.

24 Q. So you had to sign the agreement?

25 A. Or get terminated.

1 Q. And you understood, didn't you, that the bank was
2 requiring that you sign as a guarantor to close on the
3 building, you understood that?

4 A. I understood that I was no longer going to guarantee
5 anything until I had a chance to review documents to ensure
6 that the practice viability, financially, was there and that
7 there was nothing nefarious or improper going on in the
8 practice, that's what I understood.

9 Q. That wasn't my question. You've testified to that
10 already. My question was you understood the bank was
11 requiring that you sign the guarantee for SCENT Land to close
12 the loan for this building, correct?

13 A. And I'm explaining to you what I understood. I didn't
14 speak with any bank individuals at this time, and I
15 understood I wasn't going to sign off on anything until I
16 reviewed the documents. I did not speak to the bank. I only
17 spoke to Dr. Puchalski, and he had been withholding sweeps,
18 saying we didn't have the money. Austin was saying we had
19 the money and was surprised it hadn't been disbursed. And I
20 said, wait a minute, I'm not signing onto anything until I
21 can get a chance to review the ledgers and everything else.

22 Q. You can answer my question no, you can answer it yes,
23 you can answer it I don't know, and then you can explain, but
24 I just want you to answer the question.

25 A. I understood I had the right to not guarantee anything,

1 that's all I'm saying. I'm not saying anything with the bank
2 or with anyone else. I had the right to not guarantee
3 anything else.

4 Q. My question is did you know that the bank, to close the
5 loan while you were -- at that time was going to require you
6 to guarantee it?

7 A. I don't know if I knew that at that time.

8 Q. Okay. Thank you. You knew that the lease on the
9 current facility was running out, right?

10 A. I did.

11 Q. You knew that Jamie had to sign as a member of SCENT
12 Land for them to be able to close on it, right?

13 A. I don't know what she had to do, but I knew she wasn't
14 going to agree to anything either.

15 Q. So you don't know whether she had to close?

16 A. I don't know what she had to do or not do.

17 Q. You were told that from SCENT though?

18 A. From SCENT, Dr. Puchalski and Ed White.

19 Q. I want you to look at the next exhibit which I hope
20 looks like this (indicating). It says Dr. Puchalski at the
21 top. It says from Charlie Lucas to Theresa Williams. Do you
22 see that?

23 MR. CLEVELAND: What number is it?

24 MR. SHEHEEN: I apologize. 49.

25 Q. This e-mail is sent from Charlie Lucas, and you'll see

1 on the second page that you're cc'd. It says, to Charlie
2 Lucas, cc, Dr. Dyce, Jamie, Amy Puchalski, and there's a
3 little message from Dr. Puchalski, but at the bottom on the
4 second page there's a message from Charlie Lucas. Do you see
5 that? That's what we talked about a little earlier, right?
6 Looks like it's a copy of that same e-mail.

7 A. Okay.

8 Q. On the first page there's another message from Charlie,
9 about midway through it says, Theresa, did you talk with Dr.
10 Puchalski yesterday afternoon? Our company and some of the
11 subcontractors' suppliers' cash flow is negative. Do you see
12 that?

13 A. Yes.

14 Q. All right. Do you think that that might have been a
15 plant message too from Charlie, or do you feel like that was
16 a real one?

17 A. I don't know. As a show of good faith, I agreed to let
18 us release \$100,000 in anticipation that we could get this
19 matter resolved. I don't know what these e-mails were about.
20 I wanted to move forward. I agreed to advance it, and
21 instead I was terminated.

22 Q. All right. I want to you look at the next exhibit which
23 is Exhibit 92. It says Dr. Puchalski at the top. It's sent
24 to Tammy Szymanski, date's February 16, 2010.

25 MR. ELLISON: What exhibit is this?

1 MR. SHEHEEN: 92.

2 Q. Do you see that, Dr. Dyce?

3 A. Yes.

4 Q. It says February 16th. This is a discussion -- is it
5 fair to say it's a discussion between you and Tammy about the
6 medical malpractice, and there's information on the back
7 referencing, for example, that suits can't be settled without
8 the consent of the physician, which you referred to before.
9 Is it fair to say this is information that you requested
10 about the malpractice insurance?

11 A. This is a request for information, is that what you're
12 asking me?

13 Q. No. I said aren't they providing you with information.
14 Look on the second page. It's giving you information, right?
15 Below I have outlined the benefits of switching to the
16 Medical Protective from JUA and PCF which I presented during
17 the board meeting.

18 A. Do you see where I said, could I be able to see the
19 contracts for myself? So it's where I requested the
20 information because at this time there was a lot of
21 information being fed to me that wasn't necessarily true, and
22 it turned out the malpractice agreement was not lower with
23 the new company, based on what I found out. So yes, it does,
24 in the middle of the page it says, would I be able to see the
25 contracts from each company for myself.

1 Q. Do you see at the top where Dr. Puchalski says, not
2 sure, are there written policies he could view; could you
3 give him the reps to speak with directly?

4 A. Yes, and that's what I did.

5 Q. So nobody was trying to hide information about the
6 malpractice quotes from you, were they?

7 A. Well, there's an e-mail that includes malpractice quotes
8 which was different from what I found when I called the
9 JUA/PFC. So I don't know if it was intentional or we didn't
10 do due diligence, but either way, it was incorrect and higher
11 than the quote they told me.

12 Q. My question, though, is nobody was trying to hide any
13 information from you about medical malpractice; they said
14 give him the number to call the rep, right?

15 A. I am not going to say that because they actually gave me
16 incorrect information, so if you want to ask -- I'm not
17 saying what their intent was with this e-mail, but the
18 information they relayed to me was incorrect.

19 Q. Let's look at the next one which is Exhibit 93. It says
20 Puchalski at the top. The date's February 22nd, 2010.

21 A. This is 93?

22 Q. Yes, sir.

23 A. It says Puchalski --

24 Q. The date is February 22nd, 2010. Do you see that?

25 A. Yes.

1 Q. This is communications between Tammy Szymanski, Dr.
2 Puchalski, some guy named Darren Grazier who's at VGMFS
3 lease, do you see that?

4 A. Yes.

5 Q. This is discussing leasing equipment, do you recall
6 that?

7 A. Not completely, no.

8 Q. Look at the bottom. This is from Tammy Szymanski to Dr.
9 Puchalski. I received statement of account today from
10 Respironics showing a past due of \$34,492. I do get calls
11 three or four times per week. Are we moving forward with
12 this? I've been getting calls from them to finalize the
13 lease documents, but I've not received those back from Dr.
14 Dyce, parentheses, he has to review, do you see that?

15 A. Yes.

16 Q. They provided you with the lease documents related to
17 this transaction with Respironics, right?

18 A. The lease documents? Do you have the lease documents
19 that were attached or that they said they provided me with?

20 Q. I'm asking you, do you recall getting copies of the
21 lease documents that Tammy's talking about, saying that she
22 gave them to you?

23 A. I know, and as I said before, I didn't really recall
24 this e-mail, so I can't recall if I got lease documents with
25 it, so that's why I said if you could show me, maybe it would

1 jog my memory, but I can't recall anything about this.

2 Q. Okay. If you can't recall, you can't recall. Thank
3 you.

4 A. Yes.

5 Q. Do you recall that you refused to sign for new equipment
6 leases?

7 A. I recall that, again, as I mentioned earlier, I was
8 being bombarded with a lot of things to sign which seemed to
9 be a way to get money out of the practice into these little
10 side ventures that potentially Dr. Puchalski could access for
11 extra financing, so I recall too that Somnus was to be funded
12 by SCENT -- funded by SCENT at a time when Dr. Puchalski had
13 been withholding my distributions. So he's asking me to sign
14 on to loans for construction and accruing essentially over \$2
15 million in debt, signing on to loans for equipment for
16 companies to -- like to Somnus, where we're buying equipment
17 for them, signing on to all this new debt, when in reality he
18 is not disbursing the funds like he's supposed to by our
19 agreement. And my thing was, I don't know that we're
20 financially viable enough -- one of my things was, I don't
21 know we're financially viable enough to take on this kind of
22 debt, which as you mentioned before, brought it to the brink
23 of bankruptcy, or whatever your term was before, so I'm not
24 agreeing to sign on to debt if I can't even review the
25 documents in a meaningful way.

1 Q. My question was did you recall refusing to sign on to
2 these lease agreements?

3 A. I refused to sign on to anything that would commit us to
4 any more funds. It wasn't just lease agreements. Anything
5 that committed us to any more outlay of capital that we
6 didn't have, and I wanted to know why we didn't have it.

7 Q. You weren't going to sign anything.

8 A. I didn't say I wasn't going to sign them. I wanted to
9 review the documents I've said that repeatedly, even in my
10 e-mail, I'm willing to sign on to anything, just give me an
11 opportunity to adequately review the documents.

12 Q. I asked you if you recall reviewing the lease agreement
13 documents and you can't recall.

14 A. I can't recall, but I know I refused to sign a number of
15 things at that time.

16 Q. If you had gotten the lease documents why wouldn't you
17 sign them if they made sense?

18 A. I'm not sure they made sense.

19 Q. Dr. Dyce, you were making \$1.7 million that year?

20 A. 2009 I was credited with making 1.7, I believe.

21 Q. Do you agree with me, and in your prior deposition
22 testimony you agreed with me, that prior to you beginning to
23 request these many documents you -- Dr. Dyce was running the
24 practice, business side; is that correct?

25 A. You said Dr. Dyce was running it.

1 Q. Excuse me, Dr. Puchalski, I apologize.

2 A. Dr. Puchalski was running the day-to-day portion of the
3 practice, major decisions had -- were -- all the physicians
4 agreed upon those.

5 Q. He was doing the hiring, right?

6 A. Actually, Theresa Williams was doing the hiring.

7 Q. Who oversaw Theresa Williams, Dr. Puchalski, right?

8 A. Dr. Puchalski, yes.

9 Q. And he was doing the firing, right?

10 A. Theresa Williams was doing the firing.

11 Q. And who oversaw Theresa Williams?

12 A. Dr. Puchalski.

13 Q. And you were, I think by your own admission, more
14 interested in practicing medicine than the business; is that
15 right?

16 A. Yes. I was very interested in practicing medicine, and
17 for this reason Dr. Puchalski had anywhere from two to four
18 half days off to manage the affairs of the business in
19 accordance with our shareholders agreement and to the benefit
20 of the practice and the shareholders.

21 Q. He didn't have two days off. He had two days where he
22 was managing the business, right?

23 A. He was in Kiawah a lot. I guess he could manage from
24 Kiawah. My fault, I'm sorry.

25 Q. It bothered you that he wasn't in the patient rooms or

1 the OR rooms as much as you were?

2 A. It actually didn't that much.

3 Q. It didn't bother you?

4 A. No.

5 Q. Okay.

6 A. It didn't really.

7 MR. SHEHEEN: Your Honor, we can skip over the next one.

8 Q. Dr. Dyce, during this time in January and February you
9 and Dr. Gunnlaugsson were talking to each other about things
10 that you didn't like about Dr. Puchalski and the things that
11 you didn't like about SCENT, weren't you?

12 A. Dr. Gunnlaugsson and I were talking about a lot of
13 things during that time, both good and bad, as we always do,
14 as myself and Dr. Puchalski did, as myself and Vidrine --
15 well, not so much Vidrine but as Vidrine and Gunnlaugsson and
16 Gunnlaugsson and Puchalski.

17 Q. Are you telling me that things were just the same as
18 they had been in the years past with --

19 A. No.

20 Q. So you and Dr. Gunnlaugsson were talking about things
21 that you were upset about. I mean, you've mentioned some of
22 them today, right? There's things you didn't like about what
23 Dr. Puchalski was doing you didn't think was right.

24 A. Yes, but I don't know how much of that I mentioned to
25 Dr. Gunnlaugsson.

1 Q. Let's look at Exhibit No. 71 which is the next one that
2 says affidavit at the top.

3 A. This (indicating)?

4 Q. Yes, sir. Are you aware that this affidavit -- well,
5 you are aware because you talked about it before -- that this
6 affidavit was prepared by Gunnlaugsson's lawyer and
7 Gunnlaugsson and it was presented to you in February, around
8 February of 2010, wasn't it?

9 A. I don't know when it was presented to me, but he did
10 send it to me.

11 Q. And you know because you told me that it was prepared by
12 the lawyer for Gunnlaugsson.

13 A. It was a while back. I don't remember when he sent it
14 to me. I don't know -- I'm not saying I didn't say that.
15 I'm just saying I didn't prep for when this was prepared.

16 Q. Okay. Well, let's look at it briefly. This has your
17 name on it to sign, doesn't it?

18 A. It does.

19 Q. It does. And it was given to you by Chad Gunnlaugsson.

20 A. It was.

21 Q. And at the top it says, Gunnlaugsson versus SCENT,
22 doesn't it?

23 A. It does.

24 Q. And this is before Chad -- you weren't surprised Chad
25 Gunnlaugsson sued SCENT because you knew that Chad

1 Gunnlaugsson was anticipating suing SCENT back in February
2 2010.

3 A. Actually, I did not.

4 Q. You got an affidavit that is styled as a lawsuit, right?

5 A. Listen, before this whole debacle that went down with
6 the practice I'd never been involved in a lawsuit. Maybe Dr.
7 Puchalski, who had been involved in lawsuits, would
8 automatically recognize this as a lawsuit. I had never been
9 involved in a lawsuit. I hope to never be involved in one
10 again. This, I don't automatically say oh, this is a
11 lawsuit.

12 Q. What did you think it was?

13 A. Well, I'll tell you what Chad told me it was. He
14 thought he was going to be fired, and when he thought he was
15 going to be fired, he presented this to me and said, hey,
16 will you vouch for the fact that I'm a shareholder.

17 Q. This is about the same time your text messages and your
18 phone calls go through the roof with Chad Gunnlaugsson, isn't
19 it?

20 A. I don't know. I know we'd been talking all along.

21 Q. You know what, I want you to look at the fourth
22 paragraph here. He wanted you to sign this and say that Dr.
23 Gunnlaugsson has completed all payments and actions necessary
24 to receive his shares and should be in fact a shareholder of
25 SCENT. Do you see that?

1 A. Yes, I do.

2 Q. Then the next sentence says, this understanding is based
3 on my access to records of SCENT, my knowledge of the
4 payments for shares made by Dr. Gunnlaugsson and my knowledge
5 that SCENT contractually agreed to issue shares to Dr.
6 Gunnlaugsson and that Dr. Gunnlaugsson has fully performed
7 his part of that agreement, do you see that?

8 A. Yes, I do.

9 Q. Dr. Gunnlaugsson, his lawyer, put in here things that
10 were confidential information of SCENT, didn't they, he talks
11 about your access to the records of SCENT?

12 A. What? I'm sorry. It talks about your access -- I'm not
13 sure what you're asking.

14 Q. He prepared this for you and as he prepared it he says
15 that you're basing this on your, Orville Dyce's, access to
16 the records of SCENT, that's what it says, right?

17 A. Okay.

18 Q. All right. Look at seven. This is Dr. Gunnlaugsson,
19 his lawyer, putting this down for you to sign. On Tuesday,
20 February 2nd, Dr. Puchalski called a meeting of the
21 shareholders. At this meeting he made a motion to terminate
22 Dr. Gunnlaugsson's employment. Only way he knew there was a
23 meeting of the shareholders on February 2nd was because you
24 told him, right?

25 A. I actually don't even remember the meeting.

1 Q. Then look at number nine.

2 A. I don't even remember the motion to terminate Dr.

3 Gunnlaugsson so I don't --

4 Q. Look at No. 9. Dr. Gunnlaugsson and I have significant

5 disagreements and concerns with Dr. Puchalski concerning the

6 management of the practice. I myself have grave concerns

7 over the proposed shareholder agreement which through my

8 attorney I have expressed to SCENT. Dr. Dyce, Dr.

9 Gunnlaugsson wasn't supposed to have access to the

10 shareholder agreement.

11 A. He didn't from my end.

12 Q. Well, he gave you this affidavit saying that you --

13 A. I don't think it says I gave him --

14 Q. -- had concerns.

15 A. He knew I had concerns. He knew there were no --

16 Q. Because you're sharing confidential information with him

17 about the shareholder agreements that he wasn't supposed to

18 have, isn't that right?

19 A. No, it's not.

20 Q. How did he know that you had concerns then?

21 A. We talked about it. He said that Bob told him there was

22 a new shareholder agreement that there were some

23 disagreements about in multiple meetings. Bob Puchalski

24 himself did that.

25 Q. Are you saying that Bob was sharing confidential

1 information with Chad Gunnlaugsson?

2 A. Bob was the one that showed him all the agreements. We
3 negotiated the 2008 shareholder agreement with Chad
4 Gunnlaugsson. That was Dr. Bob Puchalski. It was not
5 Orville Dyce. I did not have access to Ed White. I don't
6 know what Bob and him talked about. As you can see, even Dr.
7 Gunnlaugsson's own contracts I didn't see before it being put
8 up today, so maybe you should talk to Dr. Bob Puchalski, but
9 I had no reason to share any of those documents with him.

10 Q. Dr. Dyce, we've talked previously about the text
11 messages and the phone calls that spiked between you and Dr.
12 Gunnlaugsson, are you aware of that?

13 A. Yes, we have.

14 Q. And I have shown you charts before, right?

15 A. You showed me charts of some things, yes.

16 Q. And these were charts that I told you were made off
17 of -- you were using the cell phone that was SCENT's cell
18 phone, right?

19 A. I had SCENT's cell phone, yes.

20 Q. You were using it -- were you using it to tape-record
21 these conversations?

22 A. No, sir.

23 Q. You were using it to call Chad Gunnlaugsson, right?

24 A. I spoke to Chad Gunnlaugsson a lot.

25 Q. You really didn't talk to him very much until December

1 and January and through this whole -- these issues, right?

2 Look at the calls down at the bottom of the chart. I mean,
3 you're not just talking about some patient for four months.

4 A. Can I talk about what we were talking about? There was
5 an objection to what we were talking about.

6 MR. ELLISON: He's opened it.

7 THE WITNESS: There was a lot of discussion at that
8 time. A number of things were talked about including that
9 patient who needed not one but two subsequent surgeries when
10 Dr. Puchalski did not check on that patient over the
11 holidays. There are a number of, as I said, mandible
12 fractures and patient care issues that we discussed, as he
13 was the only other person around that could help me with some
14 of these issues. Dr. Gunnlaugsson -- and I was asked by
15 SCENT, i.e., Puchalski and Ed White, to go speak to Dr.
16 Gunnlaugsson, and I reiterated he was not intent on leaving.
17 When they asked me, I gave them an honest answer, he was not
18 trying to leave. We also talked about just Bob's erratic
19 behavior at that time. The nurses were saying that Bob was
20 riding around being suspicious.

21 MR. SHEHEEN: I asked them if they were discussing --

22 MR. ELLISON: He asked what they talked about.

23 THE COURT: Hold on, whoa. The question was did your
24 conversations increase and what was the topic of the
25 conversations. I think the door's been opened.

1 MR. ELLISON: Absolutely, Your Honor.

2 THE COURT: You may proceed.

3 THE WITNESS: We talked about Bob's erratic behavior.

4 He was no longer seeing patients. He would hole up in his

5 office, talking to who knows, whoever. We talked about the

6 lack of -- why Dr. Gunnlaugsson hadn't been admitted as a

7 shareholder. We talked -- Bob let him know there was a

8 shareholder agreement in the works that we couldn't agree on.

9 Chad explained a concern that he was going to be terminated,

10 so these are the sort of things we talked about. We didn't

11 need to talk about the shareholders agreement. It could have

12 been the elephant in the room. We would have never seen it

13 because Bob was acting so erratically at that time that there

14 were millions of other things going on.

15 Q. You just said you were discussing the fact that Dr.

16 Gunnlaugsson didn't like what was in the shareholders

17 agreement or that you didn't like what was in the

18 shareholders agreement?

19 A. I didn't like what was in the shareholders agreement.

20 Q. You weren't supposed to be talking with Dr. Gunnlaugsson

21 about the shareholders agreement because it was confidential.

22 A. I didn't realize I couldn't say I don't like what's in

23 the shareholders agreement.

24 Q. That's all you did on these calls?

25 A. That's all I can remember doing. And no -- I can rehash

1 the things we talked about besides. That wasn't the only
2 thing I told him.

3 Q. I was asking you about that specific thing.

4 A. No, I didn't need to show him the shareholder agreement.

5 MR. SHEHEEN: The next two exhibits, Your Honor, are
6 just the call logs that support the charts. I don't see any
7 need to go through those. I'll just flip those over, sorry,
8 133 and 134.

9 I want you to look at No. 86 which says Chad
10 Gunnlaugsson, Chuck Thompson at the top and just so the Court
11 will understand --

12 MR. ELLISON: Which one are we talking about?

13 MR. SHEHEEN: 86. It says at the top, SCENT served from
14 Chad Gunnlaugsson, Thursday, January 27, 2010. It says, once
15 again you have put my mind at --

16 THE COURT: These two look very much alike.

17 MR. SHEHEEN: 86.

18 THE COURT: Got it.

19 MR. SHEHEEN: Your Honor, just for your information, and
20 the other side knows this as well, these e-mails and the
21 affidavit were retrieved from SCENT's computer. In the
22 Gunnlaugsson case there was a motion to suppress them for
23 attorney-client privilege purposes. That was not granted
24 because they used SCENT's computer, so they were determined
25 not to be attorney client privileged, just giving you some

1 background on it. That was in the Gunnlaugsson case.

2 THE COURT: Okay.

3 Q. This e-mail is between Chad Gunnlaugsson and his lawyer,
4 do you see that?

5 A. Yes.

6 Q. Okay. I want you to turn to the second page, do you see
7 that?

8 A. Yes.

9 Q. It says, I know Orville's lawyer was trying to contact
10 you. This is January 7th, 2010, do you see that?

11 A. Where.

12 Q. Top of the page, second page, I know Orville's lawyer
13 was trying to contact you.

14 A. Top of the page -- oh, yes, sorry, yes. Yes.

15 Q. Then down toward the bottom, 86, the second page, it
16 says, Chuck, here's the name and e-mail of Dr. Dyce's
17 attorney in Philadelphia, Bruce Armon, and then it's his
18 e-mail address, and then it says I will try to get his phone
19 number from Dr. Dyce also, right?

20 A. Yes, it does.

21 Q. On your direct you testified that the lawyers weren't
22 talking to each other -- I don't want to put words in your
23 mouth. You tell me. But I heard you say that there was no
24 lawyers working together on y'all's side until after the
25 lawsuits were filed?

1 A. This doesn't say they were working together.

2 Q. Did you say that on direct?

3 A. My attorney did not work together, and I repeat it --

4 Q. So you gave Dr. Gunnlaugsson your lawyer's e-mail and
5 address.

6 A. He asked me for it.

7 Q. And you gave it to him.

8 A. Yes.

9 Q. And you just thought that he just wanted to know it or
10 that he was going to have his lawyer contact him?

11 A. I don't remember what I was thinking at the time. I
12 didn't realize that was off limits.

13 Q. I'm not saying it was off limits. I'm trying to
14 establish -- strike that. Excuse me.

15 So on the top of the page Chad says, I know Orville's
16 lawyer is trying to contact you, says that, doesn't it?

17 A. That's what it says.

18 Q. That's because you told him that, didn't you?

19 A. That is not what I told him. I don't remember telling
20 him that. I don't know why my attorney would need to contact
21 Chad Gunnlaugsson.

22 Q. Maybe because you all were working together to make sure
23 that you could take over or stymie SCENT.

24 A. I know you'd love to believe that. Bob even came to me
25 and said he doesn't believe that's true. Now I guess you

1 need some offset of damages or something, but that is simply
2 not true. That is simply not true. My attorney was simply
3 negotiating an agreement and trying to get a fair agreement.
4 There was no litigation involved. There was nothing else
5 involved.

6 Q. Was your lawyer licensed to practice in South Carolina?

7 A. I don't know where my lawyer's licensed to practice.

8 Q. Do you realize that in those calls going back and forth
9 that you would talk to Chad and then Chad would talk to his
10 lawyer and then Chad would call you back and then you all
11 would talk some more, do you realize that?

12 A. I did not realize that. I'm not sure that's true.

13 Q. Okay. Let's look at the next one. It's Exhibit 72. It
14 says at the top, again, SCENT server, some kind of
15 administrative group thing, do you see that, Dr. Dyce?

16 A. Yes.

17 MR. SHEHEEN: We call this for shorthand the
18 Gunnlaugsson manifesto, and if you look to the attachment,
19 you can see this was around December 28th, 2009, and if you
20 look at the attachment, again, Your Honor --

21 THE COURT: This is Exhibit?

22 MR. SHEHEEN: 72.

23 THE COURT: Thank you.

24 MR. SHEHEEN: Again, Your Honor, these were some of the
25 documents retrieved from SCENT's computer system that we

1 discussed earlier.

2 Q. This is Dr. Gunnlaugsson's manifesto, who you had been
3 talking to we know, right, on cell phones and texts?

4 A. Yes, I communicated with Dr. Gunnlaugsson.

5 Q. Okay. And he says in here, for example, up at the top
6 in the first paragraph, second sentence, this is December
7 27th, 2009, currently Drs. Puchalski and Dyce are
8 shareholders of the S corporation designated SCENT, do you
9 see that?

10 A. Where are you?

11 Q. Second sentence in the first paragraph, starts with
12 currently.

13 THE COURT: You've got to go to the next page.

14 THE WITNESS: Okay.

15 MR. SHEHEEN: I'm sorry. Yes.

16 THE COURT: See right there it says currently
17 (indicating).

18 THE WITNESS: Yes.

19 Q. Okay. And then in paragraph 1 there it says, a markedly
20 enlarged buy-in formula based on the net revenues of the
21 practice as described in Section 4.5 of the shareholder
22 agreement, this was agreed upon by Dr. Dyce and Puchalski
23 during the inclusion of Dr. Dyce in the partnership tracks.
24 He successfully completed this in 2008. Do you see that?

25 A. Yes.

1 Q. He knew those things because you told him those things,
2 right?

3 A. Actually, this proves he didn't get that from me because
4 I never agreed to that markedly bought up price, so if he had
5 gotten that information from me, I would have said I did not
6 agree to that.

7 Q. I'm glad you brought that up, Dr. Dyce, because I've
8 heard you allege now that you were a shareholder in, I think
9 you said in 2007, but I'm not exactly sure because I don't
10 think you've given us a date. When do you claim you were a
11 shareholder?

12 A. I believe I became a shareholder as early as February of
13 2007 but, again, it's more of a legal question because the
14 documents are conflicting on when I became a shareholder, but
15 I believe the first distribution of a K-1, my understanding,
16 and I could be incorrect on this because I'm not a tax
17 person, is that if you start getting distributions, you are a
18 shareholder.

19 Q. You never got a K-1 --

20 A. I did.

21 Q. Let me finish the question because otherwise that's not
22 an accurate question. You never got a K-1 in 2007, did you?

23 A. I did.

24 Q. You understand that a K-1 is actually a tax document,
25 right?

1 A. I understand a K-1 is a distribution. I don't know what
2 the term is or the legal wranglings or whatever it's called.

3 Q. You understand if you're a shareholder, when you file
4 your taxes, you file as a shareholder, right?

5 A. I understand when I file my taxes I file as a
6 shareholder, yes.

7 Q. In 2007 you did not file as a shareholder, right?

8 A. I was advised to file my taxes as a shareholder as per
9 Austin Sheheen.

10 Q. If you could just answer the question and then you can
11 explain. In 2007 you didn't file as a shareholder?

12 A. I didn't make the decision about how to file my taxes is
13 what I'm saying. I'm not a tax person. I trusted my
14 accountant to file the proper tax returns and do it
15 appropriately. That was Austin Sheheen. So I did not say,
16 no, don't file me as this or do file me as that. I just
17 said, these are the numbers, this is what we're doing, make
18 me a tax return that I'm in compliance with the law.

19 Q. Okay. Do you know whether you filed a tax return in
20 2007 as a shareholder or not?

21 A. I don't know what the designation on my tax return was.

22 Q. If you don't know, you can tell me you don't know.

23 A. I just said I don't know.

24 Q. Would it surprise you for me to tell you that in 2007
25 you didn't file as a shareholder?

1 A. I would have to check. I don't know.

2 Q. Okay. I want you to look at No. 3, okay? It says, the
3 shareholder agreement contained clauses specific to only
4 Robert Puchalski as designated in Section 3.9 of the
5 shareholders agreement. Is he talking about the 2010
6 proposed shareholder agreement to your knowledge, do you
7 know?

8 A. You would have to ask Dr. Gunnlaugsson what he's talking
9 about.

10 Q. Okay. Fair enough. Look on the next page, 72.

11 A. The next page?

12 Q. I'm sorry, the next page of 72. There's no real number
13 on it. There's a full paragraph that starts, from June 1st
14 2008 to April 30th, 2009 I completed the buy-in formula, do
15 you see all that?

16 A. Yes, yes, sir.

17 Q. I want you to look at 3 down there, about midway through
18 he says -- it starts out, for example, okay, do you see that?

19 A. Yes, sir.

20 Q. It says, for example Dyce agreed to pay Dr. Puchalski
21 the taxable amount of the money that Dr. Puchalski absorbed
22 during Dr. Dyce's buy-in period. This would be approximately
23 equal to 40 percent taxable rate at the 620,000, quote,
24 buy-in in my case, do you see that?

25 A. Yes, sir.

1 Q. Let's finish this document and then I'll ask you a
2 question about it. On page 72.

3 A. Page 72?

4 Q. I'm sorry, again, I apologize, the next page of 72.

5 A. Yes, sir.

6 Q. See where it says one down there?

7 A. Yes, sir.

8 Q. He's talking about information between Ed White and
9 things that Dr. Puchalski supposedly put forward that were
10 contained in the 2010 agreement there. Dr. Puchalski
11 maintained the office of managing shareholder and president
12 of the S Corp. based solely on the gross revenues of the
13 practice increasing and not by voting rights of the
14 shareholders. Dr. Puchalski would get an additional 4
15 percent of the sweep revenues each month. Those were things
16 that were in the 2010 agreement that were given to you,
17 aren't they?

18 A. I don't remember what was in the 2010 agreement.

19 Q. And you know Dr. Puchalski didn't give him the 2010
20 agreement he gave you, right?

21 A. I'm not sure of that. I believe Dr. Puchalski did show
22 us something in 2009. I don't remember what it was.

23 Q. So Dr. Puchalski gives out copies of the agreements for
24 people to look at, is that what you're saying?

25 A. Dr. Puchalski does actually divulge a fair amount of

1 information in those meetings because it was supposed to be a
2 meeting among shareholders, and I'm not implying that Dr.
3 Gunnlaugsson was one, but there were a number of those
4 meetings where Dr. Gunnlaugsson was there.

5 Q. Dr. Dyce, there are a lot of things in that manifesto of
6 Dr. Gunnlaugsson that were confidential information of SCENT,
7 aren't there?

8 A. There are a lot of things in that manifesto that Dr.
9 Gunnlaugsson claims. I do not know where he got the
10 information, but there are a number of what I would deem
11 inaccuracies if he had asked me, such as me agreeing to the
12 extra 40 percent. I did not find out about the extra 40
13 percent until I was -- had independent accountants look back
14 at my tax returns and realize that I'd been inappropriately
15 listed as a 40 percent shareholder in SCENT just so Dr.
16 Puchalski could get more distributions from SCENT, and that
17 was the first time I realized that these things were going
18 on. And this was after I'd filed my tax returns so
19 according -- if he had asked me, I would have said no, I
20 never agreed to those things, so this is almost proof
21 positive that I never told him these things. These are
22 coming directly out of the mouth of Bob Puchalski. He was
23 the one that would have said this because even in subsequent
24 e-mails to Austin that's in part of the exhibits he says, Dr.
25 Dyce agrees to this to pay these taxes. I never agreed to

1 that.

2 Q. Dr. Dyce, are you aware that you were disbursed more
3 money in 2009 than Dr. Puchalski?

4 A. I don't believe that.

5 Q. Let's look at the next Exhibit, 167, this is the
6 complaint, it's the complaint, verified complaint of Chad
7 Gunnlaugsson, and I'll read it slowly. On allegation 24 I'm
8 going to look at and 28, Your Honor, and Dr. Dyce. 24 is on
9 information and belief the new shareholders agreement shifted
10 additional managerial rights to Puchalski and provided for
11 significant monetary compensation to him and provided for
12 certain additional compensation to Puchalski in the event he
13 voluntarily left SCENT, do you see that? 24.

14 A. Okay.

15 Q. Dr. Gunnlaugsson knew what was in those confidential
16 draft shareholder agreements, didn't he?

17 A. I would defer to Dr. Gunnlaugsson what he knew.

18 Q. Okay. And in 28 he says, because Dyce refused to agree
19 to the new shareholders agreement and because of
20 disagreements over Puchalski's management of SCENT's finances
21 Puchalski terminated his employment. You told Dr.
22 Gunnlaugsson that you refused to agree to the new
23 shareholders agreement and that there were disagreements with
24 you two shareholders over the management of SCENT's finances,
25 you told him these things, didn't you?

1 A. I'm sorry, when was this?

2 Q. No. 28.

3 A. When was this document?

4 Q. This was filed April 23rd, 2010.

5 A. So this document was filed after I filed a lawsuit for
6 an accounting, so I don't know that I told him that I had --

7 I expected that there were some misappropriation of funds
8 there. Secondly, as I mentioned before, I did tell Dr.

9 Gunnlaugsson that I wasn't in agreement with the shareholder
10 agreement, the new shareholder agreement as it was, so I did
11 say that, I've already said that, but I did not tell him what
12 was in that agreement. And he knew that because Dr.

13 Puchalski also said that we were trying to work out a new
14 shareholder agreement, so it wasn't just me as a shareholder
15 telling him. Dr. Puchalski as a shareholder was telling him
16 this as well.

17 Q. Look at the next exhibit, 99, it's a Carolina Pines
18 Regional Medical Center -- okay?

19 A. Yes.

20 Q. It says Carolina Pines Regional Medical Center at the
21 top.

22 MR. ELLISON: 199?

23 MR. SHEHEEN: 99.

24 Q. This says Carolina Regional Pines Medical Center, do you
25 see that, it says that at the top? It's a pro forma. Do you

1 see the date -- excuse me, this is a pro forma that's
2 prepared for you to come work for Carolina Pines, right?

3 A. I actually don't know what it is.

4 Q. I want you to look at -- there's stars at the bottom and
5 there's a little three, and it's real small, and I apologize,
6 would you read that to the Court?

7 A. Which one?

8 Q. There's stars at the bottom, do you see that, little
9 footnoty things and there's three little stars, do you see
10 that? It says SCENT --

11 A. Oh, SCENT currently sees a very low percentage of
12 self-pay business.

13 Q. You understand some of the most confidential information
14 of a medical practice is its payer mix, right, you understand
15 that?

16 A. Okay. I understand that information is shared quite
17 regularly, actually.

18 Q. So you're saying it's not confidential?

19 A. No, I didn't realize it was confidential because that's
20 one of the first things, when someone moves to an area, they
21 look at the payer mix, what percentage Medicaid, Medicare,
22 private pay, I mean, those are common things that you can
23 find out very easily what it's like, so I didn't realize that
24 was confidential, but I'll defer to you on that. Maybe this
25 is a misconception on my part.

1 Q. You know that SCENT would never reveal its payer mix to
2 a competitor, you know that, Dr. Dyce.

3 A. Okay.

4 Q. And you told Carolina Pines what SCENT's payer mix was.
5 You told them that they had a very low percentage of self-pay
6 business, and they used that when they came up with your pro
7 forma to hire you.

8 A. Actually, I did not tell them that. I don't know how
9 they got that information. They could have gleaned it from
10 the -- from the payer mix of the people that we did surgery
11 on there, but I never told -- I don't even know what -- to
12 this day I have no idea what SCENT's payer mix is.

13 Q. So we've got -- you do agree you went and took records
14 from SCENT about their contracts with insurers, with
15 carriers, didn't you?

16 A. Yes, I did have insurance contracts.

17 Q. You took those for your own purposes, didn't you?

18 A. Yes.

19 Q. And you also saw the first documents I handed you were
20 in June of 2010 and they were with your name on them and
21 Hartsville HMA buying equipment for an ENT practice, weren't
22 they?

23 A. I don't know what they were buying the equipment for,
24 but this is often equipment that you can use in an ENT
25 practice. None of this stuff is in my office, and it says

1 sold, so I assume this was not for my office because if it
2 had been purchased for my office, it would be in my office.
3 We do have new Storz equipment in the operating room. Maybe
4 that's where they bought it for. I don't know. This is all
5 speculation on my part. I have no idea what this is.

6 Q. In fact, there are more records which you've seen before
7 that I asked you about in your deposition where you continue
8 to talk to Hartsville HMA about how to structure your
9 practice and how you are going to purchase equipment,
10 correct, you've seen records?

11 A. That was from August, September, October, well after the
12 60-day period when Bob never paid me and I was forced to get
13 a job.

14 Q. After these records we just looked at today.

15 A. These aren't records of mine.

16 Q. They have your name on them, don't they, Dr. Dyce?

17 A. Just because it has my name on it doesn't mean it's
18 mine. If I pull up South Carolina ENT, my name still comes
19 up. I'm not affiliated with that practice anymore.

20 Q. And you guys also ended up working out with HMA that you
21 would own the durable medical equipment business and you
22 would lease your equipment to HMA, didn't you?

23 A. I don't own durable medical equipment. I just have just
24 regular ENT equipment.

25 Q. I apologize. You would own the ENT equipment and you

1 would lease it to HMA.

2 A. Yes, I did.

3 Q. And you get money for that.

4 A. Yes, I do.

5 Q. Do you realize that you're deducting on your medical
6 equipment company your attorney fees for this litigation?

7 A. I'd have to check with my accountant.

8 Q. Does your medical equipment company have anything to do
9 with this case?

10 A. I'd have to check with my accountant.

11 Q. I'm not asking you about any accounting. I'm asking
12 you --

13 A. You're asking me for an accounting. I don't know what
14 the tax returns say, so I can't answer that. I know I lease
15 equipment to Carolina Pines, much in the way SCENT and Bob
16 Puchalski leased a building to Carolina Pines and got a huge
17 payout to Carolina Pines for leaving in a settlement
18 agreement, I understand that, so he's leasing a building for
19 10 to \$12,000 a month so he's continually getting paid. I am
20 leasing equipment for which I get paid I think \$800 a month.

21 Q. Okay. My question is, I understand all that, my
22 question is is your medical equipment company involved --
23 it's not named as a defendant in this litigation or plaintiff
24 in this litigation, is it?

25 A. I'd have to check.

1 Q. Okay. Do you recall in your deposition I asked you how
2 much money you made in 2012, do you recall that?

3 A. I recall you asking me some questions about how much I
4 made.

5 Q. Do you recall you weren't able to tell me?

6 A. Yes.

7 Q. And but the truth is you're making -- you made about a
8 million, a little over a million dollars, right?

9 A. I don't remember what I made. It might have been around
10 there, 800 to -- depends on -- it might have been. I don't
11 know. I haven't looked at it recently.

12 Q. Dr. Dyce --

13 A. Yes, sir.

14 Q. -- when I asked you how much you made in 2012, why
15 didn't you just -- I asked you if you could just ballpark it.
16 Why didn't you just tell me around a million dollars?

17 A. Because I don't know. It's not something I keep track
18 of.

19 Q. So do you recall that I said could it be more than 100,
20 and you said yes, and I said could it be more than 200, and
21 you said yes, and we got up to about 400, do you recall that?

22 A. I don't recall the specifics of the conversation.

23 Q. We'll come back to it. I want you to look, please, at
24 the next exhibit, which is 109, and it looks like that,
25 Carolina Pines (indicating).

1 A. This, redacted (indicating)?

2 Q. Yes, sir.

3 A. Okay.

4 Q. This is the cover of your employment package for final
5 approval.

6 A. Yes.

7 Q. This is when you went to work for Carolina Pines, do you
8 see that, and you're getting a big bonus to go there, aren't
9 you, \$75,000?

10 A. It looks like it.

11 Q. Sign on bonus, \$25,000, and commencement, which means
12 you got another 50 when you started, right?

13 A. Looks like after I started. I don't think it was when I
14 started.

15 Q. And you got that because Carolina Pines knew, their pro
16 forma, and you knew that this practice was going to pull
17 hundreds of patients from SCENT to you, right?

18 A. Actually, I got that because I was negotiating with a
19 number of other places, and I put those offers on the table,
20 and I said, literally, I'm going to take the best offer that
21 provides for my family. And Carolina -- that was not
22 Carolina Pines initial offer and they upped the ante after
23 they found out that potentially I could leave because they
24 saw the opportunity to hire a well trained otolaryngologist.

25 Q. You had to bargain with them, didn't you?

1 A. What?

2 Q. You had to bargain with them, didn't you? HMA.

3 A. I negotiate every -- I try to -- especially after this,
4 I negotiate every contract I can.

5 Q. You've negotiated every contract since you started
6 practicing.

7 A. No, I did not. The ones I didn't negotiate got me in
8 trouble.

9 Q. You left Virginia because you didn't like the
10 negotiations in Virginia, didn't you?

11 A. No, I left Virginia because I had an opportunity to join
12 a friend and build a really great practice. In Virginia I
13 had a one-year buy-in, and the offer on the table was to cap
14 out around 600, but they hadn't even started allergy yet, so
15 it could be a lot more, so the Virginia opportunity was a
16 fantastic one. Actually, when we were looking, we even
17 looked back at that opportunity again.

18 Q. Let's look at exhibit -- we're going to skip the next
19 two, Your Honor -- and we're going to go to Exhibit 64, which
20 is a letter from Nelson Mullins to a Mr. Morris Ellison, and
21 in this letter in the fourth paragraph is repeated something
22 that had been offered to you before, right, which is to
23 mediate this dispute and try to work out a resolution, that's
24 been offered to you before, right?

25 A. There were e-mails where the suggestion of mediation

1 came up.

2 Q. But you never took them up on that, did you?

3 A. If you notice the date on these documents, they're
4 before we got any of the requested information, so I'm not
5 sure what we were mediating, were we mediating my
6 termination, were we mediating looking at whether I had the
7 opportunity to look at the documents or not, I'm not sure
8 what the mediation would involve at that point.

9 Q. You can say no and then you can explain, but you didn't
10 take them up on an offer to mediate, right?

11 A. There was no real offer to mediate. It was just thrown
12 out there.

13 Q. Okay. And the next sentence says, as the company has
14 consistently stated, it is hoping to provide Dr. Dyce
15 appropriate information so long as adequate protections are
16 in place to protect the confidential nature of the
17 information. You guys had been talking about that for a
18 while, is it fair to say?

19 A. I'm sorry?

20 Q. Is it fair to say that there had been back and forth
21 between your lawyers and theirs for a while saying that SCENT
22 wanted adequate protections placed -- put in place before you
23 took documents off premises.

24 A. Only after I started requesting the documents.

25 Q. Okay. I want you to turn to the next page, the last

1 paragraph that says, in this regard it has come to the
2 company's attention that Dr. Dyce recently requested and
3 obtained in a questionable fashion copies of the company's
4 contracts with insurance companies concerning reimbursement
5 of physician services including rates of reimbursement
6 negotiated by the company. Those are the insurance
7 agreements that you took and you took them off the premises,
8 right?

9 A. Yes, I did.

10 Q. You understand that violated the confidentiality
11 provisions of your agreement with SCENT, don't you?

12 A. I don't understand it did, actually.

13 Q. You took those for your own purposes, not for SCENT's
14 purposes, right?

15 A. Do you have a copy of the confidentiality agreement so I
16 can review it?

17 Q. We can go through it later. It's in your shareholder
18 agreement.

19 A. You asked me if it violated it.

20 Q. You can say no to that or you can say yes or I don't
21 know.

22 A. Is this the confidentiality agreement?

23 Q. No, I was referring to the confidentiality agreements in
24 your shareholders agreement.

25 A. That's what it says, 3.7, shareholders agreement,

1 confidentiality, where it says not disclose information, but
2 it doesn't say that I can't look at it myself.

3 Q. Were you using -- you said earlier that you took it for
4 your own purposes. That was your sworn testimony.

5 A. Yes.

6 Q. Okay. Do you understand that you weren't supposed to
7 use corporate confidential information for your own purposes,
8 it was only supposed to be used for SCENT's purposes?

9 A. Well, I wanted to look at the shareholder agreement to
10 see -- sorry, the, what is it, the insurance contracts just
11 to see what an insurance contract even looked like.

12 Q. The insurance contracts don't have anything to do with
13 the shareholder agreement, do they, Dr. Dyce?

14 A. Well, you said the confidentiality agreements in the
15 shareholder agreement.

16 Q. I said you took -- you've admitted that you took
17 confidential insurance contracts for your own purposes.

18 A. Yes, and you said that was in violation of the
19 shareholder agreement.

20 Q. I asked you if it was, right.

21 A. And I said no because this doesn't say anything about
22 that. Did I answer your question? I hope I did.

23 Q. Thank you.

24 A. Okay.

25 Q. I'm going to quote to you from the shareholders

1 MR. ELLISON: I'm sorry, what number?

2 MR. SHEHEEN: 131.

3 Q. Dr. Dyce, you have -- you've signed contracts -- you've
4 signed medical practice contracts before.

5 A. Yes.

6 Q. This is one you had with Virginia before you came to
7 SCENT, is that right?

8 A. I can't find that.

9 Q. You haven't found it yet?

10 THE COURT: Me either. I with you.

11 MR. SHEHEEN: There should have been a map, and then
12 you're flipping over that.

13 THE COURT: Here's what we're going to do, what we're
14 going to do is we're going to stop because, number one, we've
15 been going at it for quite some time without an afternoon
16 break, and I know he's tired, and I'm tired. And I'm going
17 to ask that if you all want us to be flipping through these
18 documents, this six-inch stack of documents, that you at
19 least give the Court, if not the witness, the consideration
20 of putting the correct numbers on them, so I'm going to ask
21 you to please do that.

22 MR. SHEHEEN: I apologize, Your Honor.

23 THE COURT: Well, you know. I want you to look at the
24 stack here that I have been through, and it's -- there's
25 enough to keep up with, and when you want to say, gee, I want

1 you to flip through the next three and then pick up that one,
2 and then this has an exhibit number on it that says 65, but
3 it's really not 65, it's really 187, it becomes wearisome,
4 and I haven't even been answering questions, and I'm
5 exhausted just by trying to keep up with the documents. So I
6 think that it's only considerate that you all properly
7 identify the documents, both mine and the witness's. You get
8 yours because I'm going to get mine, so I want you to do the
9 witness as well, and so I'd like for somebody to do that.
10 And I would like to see counsel in chambers.

11 Thank you so much. We're going to start in the morning
12 at 9:30. And you have to remember not to talk about your
13 testimony. You can talk about any other thing, but you
14 cannot discuss your testimony. You're still on the witness
15 stand.

16 (Trial of the case adjourned at 4:53 p.m.)

17 (Trial of the case resumed on 11/21/13 at 10:00 a.m.)

18 (Defendant's Exhibit 231 premarked for identification.)

19 THE COURT: Your witness, Mr. Sheheen,
20 cross-examination.

21 MR. SHEHEEN: Thank you, Your Honor. Just for
22 housekeeping purposes, as we proceed today I want to tell you
23 what we have for you to be able to keep up.

24 THE COURT: Great, yes.

25 MR. SHEHEEN: I have a book that I put in front of you.

1 There's one in front of Dr. Dyce, the small book, smaller
2 book to the right, and that will have some exhibits that I'll
3 use during various cross-examinations today, and I'll try to
4 keep you with them. If you get confused, or Dr. Dyce, if you
5 get confused, please stop me.

6 THE COURT: Fantastic. You are so kind to do that for
7 me. Thank you.

8 MR. SHEHEEN: There's another book, Your Honor, and Your
9 Honor's aware, we have all the exhibits in I think three --
10 I've been trying to keep you out of those, but there's one
11 book, Book 3, that also should be in front of you.

12 THE COURT: Yes.

13 MR. SHEHEEN: That's the tape-recorded conversations.
14 We're going to go through some of those. I have tabbed those
15 for your convenience, and I'll try to reference you to the
16 tabs.

17 THE COURT: I see. Fantastic. Thank you so much. So
18 you slept none at all last night, and I'm so sorry.

19 MR. SHEHEEN: Mr. Wright did a lot of this, Your Honor.

20 THE COURT: Yay, Mr. Wright.

21 MR. SHEHEEN: Your Honor, I also want to introduce Dr.
22 Macy Vidrine, who's here on behalf of the defense today.

23 THE COURT: Great. Great. All right.

24 MR. SHEHEEN: Thank you. Dr. Dyce, good morning.

25 THE WITNESS: Good morning.

1 MR. SHEHEEN: One other housekeeping item, Your Honor.
2 There was a document that is behind Tab A.

3 THE COURT: Yes.

4 MR. SHEHEEN: Which is SCENT's Defense Exhibit 231 that
5 I discussed with Dr. Dyce yesterday, but it actually wasn't
6 introduced into evidence because it had just been produced, I
7 think, yesterday morning.

8 THE COURT: Okay. Yes.

9 MR. SHEHEEN: We're going to move that into evidence
10 without objection. I've discussed it with plaintiff's
11 counsel.

12 MR. ELLISON: Yes, Your Honor, that's correct.

13 THE COURT: Thank you, great, yes.

14 MR. ELLISON: Your Honor, one other housekeeping thing,
15 since Mr. Sheheen's doing them. Mr. Cleveland last night, at
16 the Court's request, did another short packet of the
17 documents that were introduced earlier. These are in
18 numerical order.

19 THE COURT: Thank you so much. Great.

20 MR. SHEHEEN: Judge, the last thing that I can do, there
21 were a number of documents we went through yesterday.

22 THE COURT: Yes.

23 MR. SHEHEEN: That as Your Honor so eloquently put it
24 were a little bit difficult to follow. We can put those in a
25 notebook that's marked Defense Exhibits from Dr. Dyce, if

1 that would help, so you have them for the future, if that
2 helps you refer to them.

3 THE COURT: That might be helpful at some point between
4 now and then, and we'll figure out when then is, but we've
5 sort of done them, and I have got them, so we'll continue on
6 and maybe do that at some point in the future. That would be
7 great.

8 MR. SHEHEEN: Thank you.

9 Q. Dr. Dyce, thank you for your patience. Dr. Dyce, you
10 also have a book, there's a small book, and we're going to go
11 through some exhibits with you, and then we're going to go
12 through the big book, okay?

13 A. Yes, sir.

14 Q. Thank you. Dr. Dyce, if you would turn to Defendant's
15 Exhibit 131, which is behind Tab C in the little book. Are
16 you there?

17 A. Yes, sir.

18 Q. Do you recognize this document?

19 A. I believe I do, sir.

20 Q. Is this your employment agreement with, and I believe
21 you pronounced it Boucher?

22 A. Yes, sir.

23 Q. I'm not going to spend a lot of time on it. I just
24 wanted to touch on two points. If you turn to the fifth page
25 of that, there's little numbers there on the bottom. You

1 tell me when you're there. Are you there?

2 A. Yes, sir.

3 Q. Would you agree with me that there was a nondisclosure
4 of confidential information provision in this contract?

5 A. Yes, sir.

6 Q. If you turn to page 7 with me, at the bottom, would you
7 agree with me there was a covenant not to compete contained
8 within this contract?

9 A. Yes, sir.

10 Q. Okay. And I'm assuming, you tell me, that you read this
11 contract before you signed it.

12 A. Yes, I did, sir.

13 Q. And that you agreed to its terms and that you understood
14 them.

15 A. I believe I did, sir.

16 Q. Okay. And on the next page, if you'd just flip the
17 page, I'm going to represent to you that this covenant was
18 for a period of two years, do you see that?

19 A. Yes, sir.

20 Q. And there was an agreed upon damages amount in this
21 covenant as well.

22 A. Okay.

23 Q. Do you agree with that?

24 A. I haven't reviewed this contract's entirety but, I mean,
25 I can sit and read the whole thing to make sure that I agree

1 with it, but I'm just going by the few parts you show me.

2 Q. Okay. Based on the parts you see, would you agree with
3 that?

4 A. I believe so, yes.

5 Q. The reason I'm asking you this is it's fair to say,
6 isn't it, that you had experience with covenants not to
7 compete. You had signed them previously.

8 A. Yes, sir.

9 Q. Okay. Dr. Dyce, we talked a little bit about your
10 income yesterday. I don't want to spend too much time on it
11 except in how it relates to this case. In 2011, and these
12 are behind Tab D if you want to look at them, it appears that
13 you made around \$700,000, do you agree with that?

14 A. I believe so.

15 Q. Okay. And in 2008, which is behind Tab E, you made,
16 excuse me -- 2012, which is behind Tab E, you made a little
17 over a million dollars, do you agree with that?

18 A. That's what the tax return says.

19 Q. Do you agree with that?

20 A. I agree with the tax return.

21 Q. Okay. And you -- I think previously agreed that you
22 made around -- over \$1.5 million in 2008 with SCENT.

23 A. Yes, I believe I did say something -- I think it was
24 1.7.

25 Q. Okay. And do you agree that -- I know you disagree

1 about the amount that you and Dr. Puchalski earned in that
2 year, but do you agree that they were roughly proportional?

3 A. No, sir.

4 Q. Okay. Tell me how close they were.

5 A. I'm not sure. I don't think I ever saw the final
6 numbers, maybe the accountants did, but I'm not sure, but I
7 know when we were doing our taxes, as I said, there were
8 \$50,000 checks that were being attributed to us that were not
9 there. What we were being asked to pay taxes on, based on
10 the tax returns that Mr. Sheheen prepared, there were
11 multiple \$15,000 or more checks that apparently were
12 attributed to us that were not there, so I can't reconcile
13 all these discrepancies between checks that I was supposed to
14 have received but never received but was being asked to pay
15 taxes on it, based on the tax return that your uncle, Mr.
16 Sheheen, did, and I don't know what he prepared with Dr.
17 Puchalski and whether that was correct, so I can't answer
18 that they were proportional, but I know that mine was
19 incorrect.

20 Q. Okay. But did you say that you agree that you earned
21 about 1.7 million?

22 A. That's what our final tax return said.

23 Q. Do you agree with that or not?

24 A. I believe I agree with it.

25 Q. Okay. How much do you believe Dr. Puchalski --

1 A. I have no idea, sir.

2 Q. Okay. And you're aware that during the year that you
3 earned that income a significant amount of debt was incurred
4 by SCENT, aren't you? We talked about this earlier.

5 A. I'm aware that after I left SCENT Dr. Puchalski
6 accumulated a lot of debt by refinancing all of the
7 equipment, all the land and then listed it on the books as
8 debt and now is trying to say that I paid for it based on
9 documents we got from Palmetto Bank which states in 2011 he
10 took out all the loans against it, and that's when we
11 accumulated the debt. Actually, in every document he'd given
12 me to that point he'd said this was a very low debt
13 environment, that was his representation to me. If you're
14 telling me that's incorrect and he told me something
15 incorrectly, then that's on Dr. Puchalski and you. It's not
16 on me. My understanding is we were a very low debt
17 environment.

18 Q. Are you testifying that you're not aware there was \$1.5
19 million of debt in SCENT prior to your departure?

20 A. What I'm testifying to is I was aware we had some debt.
21 I don't know the exact amount.

22 Q. So you're aware there was some debt.

23 A. But later represented to me that we were \$5 million plus
24 in debt by you and Dr. Puchalski after I'd left.

25 Q. All right. I'm not talking about after you left, okay.

1 I'm talking about before you left. Do you agree that there
2 was some debt prior to your departure from SCENT, is that
3 right?

4 A. I believe there was probably some debt. Again, I did
5 not have all the documents to review what amount of debt and
6 what things were outstanding. As you remember, I asked for a
7 lot of the documents and could not get them.

8 Q. There's obviously a lot of disagreement about that, but
9 you testified to that previously. So there was some debt
10 before you left. You were making \$1.7 million. You're now
11 making a little over \$1 million. Do you feel no obligation
12 to pay any of the debt that was incurred prior to your
13 departure?

14 A. That's a very good question. A couple things come into
15 play there as far as obligations go.

16 Q. If you'd answer yes or no and then you can explain.

17 A. It's not a yes or no question, and I have to answer the
18 question that you asked, and I'm willing to answer it, but
19 it's not a yes or no question.

20 Q. You can't say yes or no, is that what you're saying?

21 A. I'm telling you my line of thinking. If you don't want
22 me to tell you, I don't have to.

23 Q. I want you to say yes or no and then explain yourself.

24 A. Well, when we made our agreements with SCENT, when I
25 made my agreements with SCENT and Dr. Puchalski, it was a

1 very low debt practice. There was not a lot of debt. As
2 such, debt was never introduced into the formula for buying
3 in and buying out for shareholders. As a result, there is
4 no -- to my knowledge there is no provision in the current
5 agreement for debt. Now, in subsequent agreements I've seen
6 where Dr. Puchalski attempted to introduce provisions for
7 liabilities and debts, but when I agreed, there was no debt
8 in there. So are you saying you want me to retroactively
9 agree to debt that was not in the original agreement? Well,
10 if it was not in the original agreement, I'm just trying to
11 abide by the agreement. Dr. Puchalski is the one that has
12 not abided by this same agreement. I mean, if you want me to
13 go ahead and sign the 2010 agreement and then say, yes, I'm
14 agreeing to take on the debt, that's a whole different story.

15 Q. Actually, what I want you to do is answer the question.
16 I'm just asking you, Orville Dyce, not on the agreement --
17 and you can say no or you can say yes or you can say I don't
18 know. Do you, Orville Dyce, feel no obligation to pay the
19 debt or parts of the debt that were incurred prior to your
20 departure from SCENT?

21 A. Based on our agreements that were in place that dictated
22 our relationship, I do not have an obligation to pay that
23 debt.

24 Q. And that doesn't bother you at all?

25 A. I'm basing it on an agreement, I mean --

1 Q. And --

2 A. I mean, if you want me to tell you it makes me cry at
3 night, it doesn't make me cry at night, no, if you're asking
4 me if I'm bothered at all.

5 Q. That's not what I asked you.

6 A. You asked if it bothered me.

7 Q. I asked if you felt obligated.

8 A. And I answered the question.

9 Q. You've answered the question.

10 A. Yes.

11 THE COURT: Okay. He did. He said it didn't bother
12 him. Go ahead.

13 MR. SHEHEEN: Let's go to Exhibit 207, and that's in the
14 big book in front of you, Judge and Dr. Dyce, that's the big
15 book in front of you. Judge, I'm going to try to move
16 through these without dwelling a lot. There is a lot in
17 these tape-recorded phone calls, and you have them all, but
18 I'm not going to obviously have him read them all because you
19 can read them yourself if you so choose.

20 Q. Dr. Dyce, just to set the stage, we've talked
21 previously, I don't want to re-tread too much ground, you
22 secretly tape-recorded conversations between you and a number
23 of people, correct?

24 A. Yes, I did.

25 Q. And under Tab 1 is a conversation, if you would turn to

1 it, and then I'm going to refer -- I'm sorry, it's Exhibit
2 207.

3 MR. CLEVELAND: Just so the record's clear, if you could
4 say whether it's Plaintiff's Exhibit, Defendant's Exhibit,
5 and what number it is.

6 THE COURT: Defendant's Exhibit 207 is what I have.

7 Q. Right. The first document that I'm looking at that you
8 have there, it says at the top, not to leave practice, do you
9 see that?

10 A. Yes, sir.

11 Q. Turn to page 18 of that document. There's page numbers
12 at the bottom. Are you with me?

13 A. Yes, sir.

14 Q. About two thirds or about half way down there's some
15 dialogue, and then it says, Puchalski, and it says you
16 probably wanted, blank, stuff. Why don't you just -- I'll
17 read that one, to save a little time, you follow along with
18 me, okay? You probably wanted, blank, stuff. You, blank,
19 were doing that. I'm not going to let this ruin our
20 friendship, and I'm not going to go ahead and be a slave to
21 the practice either, so there's no way, blank, putting myself
22 in your shoes and I, blank. You said what's that. And then
23 Dr. Puchalski said, I think there's a way to do this. I've
24 looked at the numbers, and there's a way to do this that
25 would actually maybe work out. It would work out. It would

1 work out for you, I think, very well. I think there would be
2 some quality of life, blank, but I think financially it would
3 work out very well for you. I really do. I think it would
4 work out excellently. Okay, and I'm going to ask you some
5 questions, but I just want you to have reviewed these when I
6 ask you?

7 THE COURT: And where there are blanks it means it's
8 unintelligible, right?

9 MR. SHEHEEN: Yes, ma'am. And you heard that it could
10 be unintelligible, basically.

11 THE COURT: Yes.

12 Q. Turn the page with me to 19, and down at the bottom it
13 says, and we keep, blank, could stay with the practice in
14 Hartsville and just be, blank, you could, blank, which is an
15 idea, you know, wouldn't, blank, it would be in any kind of
16 timeframe, but it would be done in a timeframe that would
17 have to be done before, blank, a resolution would have to be
18 there. All right, Dr. Dyce -- and there's some more dialogue
19 on the next page, and the Judge can read through that, and I
20 would recommend the Judge does read through that at some
21 point. You referred earlier to a conversation with Dr.
22 Puchalski where you said that he said that he might separate
23 the practices or that you might -- he might split them and
24 you would take Hartsville. That was on your direct. Do you
25 recall mentioning that?

1 A. Yes, sir.

2 Q. Is this the conversation you're referring to?

3 A. I don't know. I'd have to look through the whole thing
4 and look at the date.

5 Q. You produced these, right?

6 A. Okay.

7 Q. You provided them. Okay. Do you see on page 19 what I
8 just read to you where he was talking about you could stay in
9 the practice with Hartsville down at the bottom of 19?

10 A. I see where that's written, yes, sir.

11 Q. Does that jog your recollection as to that conversation
12 you had with him?

13 A. I really didn't review these tapes, and I would have to
14 again look at the entire thing.

15 Q. Okay. So tell the Judge again why you made these tapes.

16 A. Because in discussions with Dr. Puchalski about the
17 landholding agreement he threatened, when we couldn't come to
18 an agreement, he threatened to say that I was never on any of
19 the leases, I was never on any of the titles or loans, and so
20 he was just going to say I never bought into them, and so
21 then I thought that, well, if he is correct, there is no
22 evidence of anything I've bought into in the practice so
23 unless I have the tapes and I have -- because I don't want to
24 tell him -- I don't want to accuse him of saying or doing
25 something that he didn't do, so it's for my protection as

1 well as for his so that we were both in the same
2 understanding of what was going on in the practice.

3 Q. Dr. Dyce, do you find it curious that the only alleged
4 threat that you say he made was one on a conversation that
5 wasn't tape-recorded?

6 A. Well, not if that conversation is the one that prompted
7 the tape recordings. I wouldn't have known to start
8 tape-recording it -- listen, up until this point I trusted
9 him. I mean, up until this point we had a pretty good
10 relationship. It's when he started doing these things that
11 the relationship began to break down and continued to break
12 down to where it is now.

13 Q. Dr. Dyce, there is hours and hours and hours of tapes
14 that you made, and in them there are no threats to you, are
15 there?

16 A. I have not reviewed the tapes. I don't know what the
17 threats are and I don't know what you define as threats.

18 Q. Dr. Dyce, under his proposal that you began to discuss
19 there and that you referred to earlier for you to take the
20 Hartsville practice you would have had to take part of the
21 debt that went with the Hartsville practice, wouldn't you?

22 A. This says we're talking about an agreement. We've never
23 agreed on what I would take versus what he would take, you
24 know, so I'm not sure where we're going with this. This is
25 something he came up in his little head, and you're inferring

1 from that that he was going to saddle me with debt. I don't
2 know what the agreement would, should or could have been.

3 It's purely hypothetical. We never got to that point.

4 Q. So the way it ended up, you have the Hartsville
5 practice, you have the patients from the Hartsville practice,
6 you have the referring patients from the Hartsville practice,
7 but you have none of the debt. Would you agree with me on
8 that?

9 A. No.

10 Q. Let's look at the next one which is under Tab 2.

11 MR. CLEVELAND: I'm sorry, we don't have the tabs.

12 MR. SHEHEEN: Provider meeting January 19th, 2010.

13 MR. CLEVELAND: If you'll just give me the exhibit
14 number, we have the exhibits.

15 MR. SHEHEEN: It's one big exhibit. The calls are one
16 big exhibit.

17 MR. CLEVELAND: Does it have a defendant's exhibit
18 number?

19 MR. SHEHEEN: Yes.

20 MR. CLEVELAND: Can you tell me what that is? I'm
21 sorry, 207. Does it have a page number? I've got 207.

22 MR. SHEHEEN: It's entitled provider meeting January
23 19th, 2010, and it's page 15.

24 MR. CLEVELAND: Thank you.

25 THE COURT: Can I ask this question?

1 MR. SHEHEEN: Yes, ma'am.

2 THE COURT: The one that we are looking at, that we just
3 finished looking at.

4 MR. SHEHEEN: Yes, ma'am.

5 THE COURT: Did you have a way to identify a date of
6 this recording? You may not have had that.

7 MR. SHEHEEN: Your Honor, Dr. Dyce turned these over to
8 us in production, and so all I can do is ask him.

9 THE COURT: That's what I'm saying, you may not have had
10 a way to determine a date.

11 MR. SHEHEEN: Dr. Puchalski in his testimony -- if Dr.
12 Dyce is unable or refuses to provide when he thinks it
13 occurred, Dr. Puchalski in his testimony will be able to give
14 some frame of reference to it, but I can't do that through
15 this witness.

16 THE COURT: I understand. That was the purpose.

17 MR. SHEHEEN: I'm sorry.

18 THE COURT: Not a problem at all.

19 MR. SHEHEEN: This one you can because Dr. Dyce entitled
20 it provider meeting January -- the next one I'm discussing.

21 THE COURT: The next one, not the first one.

22 MR. SHEHEEN: Right, because he entitled it provider
23 meeting January 19th, 2010.

24 THE COURT: Since I've got it, let me just tell you the
25 reason why because I think you should know because I'm

1 looking at page 20.

2 MR. SHEHEEN: Yes, ma'am.

3 THE COURT: And there's some conversations on page 20
4 that says, I see this as being the one that's most fair
5 compared to a buyout, and then it goes on to say it was --
6 let's see, I mean better than a forced buyout, better to be
7 amicable buyout, it wouldn't suit me, you know, and then it
8 goes on, as far as a forced buyout as far as you know a
9 buyout over time, that's the reason that I was pondering
10 because, as I understand what you all have told me to this
11 date, there was this -- there was an awful lot of upset, I'll
12 call it, concern, prior to that March the 3rd meeting, bank's
13 closing in.

14 MR. SHEHEEN: Yes, ma'am.

15 THE COURT: Contract -- lots of issues going on. Then
16 we have this meeting.

17 MR. SHEHEEN: Yes, ma'am.

18 THE COURT: But then beyond that there were still, as I
19 understand it, a number of conversations, now how do we move
20 forward, in other words, they didn't quit talking to each
21 other. There was a long period of time, apparently, that
22 they continued to.

23 MR. SHEHEEN: Up until August of 2010, I believe.

24 THE COURT: Is that when it was? I knew there was a
25 long period of time they continued to have a conversation,

1 and so I just wondered sort of where in the -- and you don't
2 know.

3 MR. SHEHEEN: Well, I don't --

4 THE COURT: From this witness.

5 MR. SHEHEEN: I can't tell you. I think I know this was
6 quite before all that, actually.

7 THE COURT: And you feel like your client may very well
8 be able to elucidate.

9 MR. SHEHEEN: Yes, ma'am.

10 THE COURT: Got it. This is Defendant's Exhibit 207,
11 page 16.

12 MR. SHEHEEN: Yes, ma'am.

13 MR. CLEVELAND: Your Honor, I hate to keep popping up.
14 Let me just tell you our problem. This is a several-hundred
15 page exhibit, Defendant's 207. It's a series of pages that
16 go from 1 to 15, 1 to 20, so saying page 15 doesn't tell us
17 what page we're looking at, and I apologize. I just want to
18 be able to look at the exhibit while he's examining Dr. Dyce.

19 THE COURT: Sure, of course you do. That's okay. We're
20 going to do this together. We're all going to do this
21 together. So I know that this is -- tell me how you have it
22 organized. Is it organized pursuant to conversations?

23 MR. CLEVELAND: It's organized the way the defendants
24 organized it. I have no problem with the organization, it's
25 just nothing separates -- nothing tells you when something

1 starts.

2 MR. SHEHEEN: We just put them in there the way they
3 were produced to us.

4 THE COURT: I understand.

5 MR. SHEHEEN: So it's the next batch, if that helps you.

6 MR. CLEVELAND: No, because I don't have the batch that
7 you and the Judge and Orville went through.

8 MR. SHEHEEN: They all start over with a new page 1, the
9 way they were produced to us. I don't mind him looking over
10 the shoulder of the witness.

11 MR. CLEVELAND: If you would just do your best to tell
12 me where you're going, and I'll do my best to keep up.

13 MR. SHEHEEN: This is the provider meeting, January 19,
14 2010.

15 MR. CLEVELAND: I've got that first page.

16 MR. SHEHEEN: Great. And the way these are produced is
17 how we tried to keep them in.

18 THE COURT: Go to page 16 under that conversation, just
19 that one conversation, go to page 16 and tell me what's at
20 the top of the page and see what happens.

21 MR. CLEVELAND: Requested from Ed.

22 THE COURT: Bingo. Okay. We found a way to do it.

23 Q. Down at the bottom, I'm just going to read it.

24 A. I'm sorry.

25 Q. Tab 2, Dr. Dyce, page 16.

1 THE COURT: Tell me when you get there.

2 THE WITNESS: I am there.

3 THE COURT: At the very top it says, requested from Ed,
4 do you see that?

5 THE WITNESS: Requested from Ed, yes, ma'am.

6 THE COURT: We're all literally on the same page.

7 Q. Thank you. At the bottom, I'm just going to read it and
8 then we'll turn back to 15, okay? It says, Puchalski, yes,
9 Odie, in the future what I want to do is this, I want there
10 to be four, blank, once a month, blank, to be you and me and
11 then you and me and Chad, of course we'll have executive
12 session after this, but we'll have to, blank, and during
13 that, blank, we can go through finances and strategy and try
14 to get them through this. Obviously we're not going to be
15 able to go through any more Wednesday morning.

16 All right. Now, I want you to turn to 15, page 15.

17 A. A page earlier.

18 Q. Yes.

19 THE COURT: Right.

20 Q. At the top it says stronger, and then read, Dr. Dyce,
21 your second comment, not your first but your second.

22 A. Well, the only time I really get the chance -- is that
23 it?

24 Q. Yes.

25 A. -- to talk to Bruce is in the evenings, and I'll call

1 after hours or I'll e-mail him, so I can e-mail him again
2 tonight and say, you know, we have kind of a timeline on,
3 blank. I think Ed sent him a whole bunch of stuff, probably
4 even more than what he'd asked for, and he just started
5 reviewing it last week, so I think that is -- that all is
6 tying into why he's taking so long.

7 Q. And then Puchalski says, I, blank, sent him but Ed
8 should have sent him the contracts, blank. And then you
9 said?

10 A. So you said Ed sent him a bunch of stuff, he said a
11 bunch of the contracts probably some of the ones we already
12 had and some other ones, so Ed, he's just, you know, yes, I
13 hate it too because it's just more money, but so I'm trying
14 to get him, blank, but he's not yet.

15 MR. SHEHEEN: And then there's more on that page. I
16 want you to turn to tab -- your Tab 3. And, Will, it says at
17 the top, attempts to justify actions. It should be the next
18 one?

19 MR. CLEVELAND: Thank you.

20 THE COURT: Page 1 of that, right?

21 MR. SHEHEEN: Yes, ma'am.

22 THE COURT: Okay.

23 Q. I'll just read it, Dr. Dyce. It says, down about half
24 way Bob says, the 1500 charts or so. And you said, nope,
25 they always sign off on my charts. I've told them to just go

1 ahead and sign off on them. Are you required to sign off on
2 your charts as a doctor?

3 A. I was doing whatever was established in the practice,
4 sir.

5 Q. Is Dr. Puchalski telling you that you have 1500 charts
6 that you haven't signed off on?

7 A. It could be. I'm not sure.

8 Q. I want to you look on page 2 down toward the bottom, the
9 second Bob comment from the bottom, I'll read it, it says,
10 um, he also wanted to share with me that under no
11 circumstances were you to talk to Chad or attorneys, weren't
12 talking or anything else, is that still your position, that
13 over the last few months that you have, blank. And you said,
14 I haven't talked to Chad about anything. I talk to Chad
15 periodically, not about this stuff. And Bob said, no
16 attempts by your attorney to talk to Chad's attorney or Chad.
17 And you said, not that I know about, not that I know about.

18 Dr. Dyce, do you recall yesterday that I showed you the
19 e-mails of Dr. Gunnlaugsson where he said to his attorney,
20 early, and I believe it was January or February, that your
21 lawyer should be getting in touch with him or that he should
22 expect a call from your lawyer, and then he provided your
23 lawyer's contact information, do you recall that?

24 A. I recall that.

25 Q. And you realize that this comment in this tape-recorded

1 conversation was after that?

2 A. Okay. I don't know when the date on this was but okay.
3 Actually, this looks like this was from April.

4 Q. Which is after January or February, right?

5 A. Yes. And you were saying that -- I'm sorry, what was
6 your question?

7 Q. My question was do you recall yesterday that we looked
8 at an e-mail of Dr. Gunnlaugsson's where he was telling his
9 lawyer your lawyer's address and that he should be expecting
10 a call from your lawyer and that type of thing in early
11 January?

12 A. Okay.

13 Q. Let's turn to -- we'll skip the next one. The next one
14 I want to look at is your Tab 5 and it's entitled audio file
15 001A037.

16 MR. CLEVELAND: How many pages did you skip to get where
17 you are now?

18 THE COURT: Probably about 20 so. Just grab a chunk and
19 take your time.

20 MR. CLEVELAND: Thank you.

21 THE COURT: You've got that one? Okay. Great. Do you
22 want us to start on page 1 of this or do we want to go
23 somewhere else.

24 MR. SHEHEEN: We're going to go to page 3, Your Honor.

25 THE COURT: Okay. So in that we're going to go to page

1 3, the top says, no, blank, one late night.

2 MR. SHEHEEN: Yes, ma'am. The Court can read this, but
3 I just want to, through the witness, focus on some pieces.

4 THE COURT: Sure, of course.

5 Q. About midway down, Dr. Dyce, Dr. Puchalski says, good,
6 well, I was hoping that maybe on Wednesday you and I could go
7 through the contract after the board meeting, does that
8 sound. And you said, well, I want to go through it with
9 Bruce first because it doesn't make sense for me to go
10 through it and then have to go through it with him, so let me
11 kind of bring up the points he, blank, and then we kind of do
12 that.

13 A. I'm sorry -- oh, okay.

14 Q. Take your time. Do you see where I was just reading?

15 A. Yes, sir.

16 Q. In a previous e-mail we talked that there was an e-mail
17 that said that you told Dr. Puchalski that SCENT's lawyer has
18 sent lots of stuff to your lawyer, do you recall that?

19 A. Yes, sir.

20 Q. Okay. And in this one clearly you're talking about
21 again contract negotiations, right?

22 A. Yes, sir.

23 Q. All right. Dr. Dyce, clearly you guys were negotiating
24 this contract, don't you agree? It's in these recordings.

25 A. No, we weren't negotiating the contracts. The meetings

1 involved Bob going through piece by piece and trying to just
2 each part of the contract and why he deserved it, and that's
3 what it was, that's all it was, that's all it ever was.
4 Every time we tried to sit down to negotiate, Bob would say,
5 no, no, no, listen to me, I'll write a little black line in
6 the corner, and this is why I think I deserve this, this is
7 why I think I deserve this, this is why I think I deserve
8 this. That was the extent of the negotiations.

9 Q. How come that's not in the tape-recordings?

10 A. There's a lot of things not in the tape-recordings.

11 Q. Okay.

12 A. Actually, in this tape-recording what you see is Bob
13 trying to filter again the information only through him, you
14 know, and that's very clear. Like, no, no, no, I don't want
15 you to go through your attorney. Let me go through it with
16 you first kind of thing, and we're going back and forth, so
17 it's right in line with what I've said, that every
18 information has to be filtered through Bob or an agent of
19 Bob, who's actually supposed to be an agent of the practice
20 but who's working only for Bob Puchalski, whether it's
21 attorneys or whether it's accountants or anyone else.

22 Q. You didn't like that he was trying to negotiate it
23 directly with you in that conversation?

24 A. No, I didn't like that I was only able to get his
25 perspective alone of the contract rather than get objective

1 advisement. As you can recall, the 2008 contract for me was
2 a disaster, and I was trying to avoid the same thing from
3 occurring again. This 2010 made the 2008 look completely
4 fair, and I realized that, and I realized that I needed
5 professional help because if it was left up to Bob, he was
6 always go to negotiate contracts that only favored him.
7 After 2000 -- after our initial agreements in 2007, every
8 single opportunity he had to work with an attorney to come up
9 with a contract somehow allowed him more distributions, more
10 favors, more slant towards his perspective and not to the
11 benefit of the shareholders, to the point where his actions
12 destroyed the practice or tried to destroy the practice.

13 Q. Let's look at Tab 6. It says "Jamie kicked out" at the
14 top, and so we skipped a fair number of pages, 10, 15 pages.

15 THE COURT: Yes, exactly, the rest of that.

16 MR. CLEVELAND: Thank you.

17 THE COURT: What page in "Jamie kicked out" can we go
18 to?

19 MR. SHEHEEN: Your Honor, it seems awkward, but the way
20 it was produced, there's a page 15, at the top it says Bob
21 and then Orville -- excuse me, 16, about midway, page 16.

22 THE COURT: "We are, I don't care what happens" is on
23 the top?

24 MR. SHEHEEN: Yes, ma'am, right.

25 THE COURT: You're going to go through several pages

1 that have no numbering, and then the numbers pick up, so in
2 your hand probably pick up about 20 pages, and that will put
3 you in the numbered pages. See that, Will?

4 MR. CLEVELAND: Does it say "bargaining for his
5 contract" at the top?

6 THE COURT: It starts with "Jamie kicked out", the
7 "Jamie kicked out portion".

8 MR. CLEVELAND: I've got that.

9 THE COURT: Now pick up about 20 pages, looks like about
10 20.

11 MR. CLEVELAND: Yes, I'm here.

12 THE COURT: Then you'll be at page 16 because about the
13 first, I don't know, eight pages or so don't have numbers,
14 and then the numbers begin with page 1, and then you're going
15 to go to page 16.

16 MR. CLEVELAND: Does that start "we are, I don't care"?

17 THE COURT: You've got it.

18 MR. SHEHEEN: Yes, sir.

19 MR. ELLISON: Judge, I apologize. We're a little
20 mystified because Mr. Cleveland's trying to follow along
21 because he's got their book, but when we produced the tapes,
22 they were Bates numbered.

23 THE COURT: This one has a Bates number and the Bates
24 number is WCSR7425. It still has the Bates numbers on it.

25 MR. SHEHEEN: Your Honor, the ones in the big book --

1 MR. ELLISON: Do your copies have the Bates numbers?

2 THE COURT: Yes, mine does.

3 MR. SHEHEEN: The copies I'm going off of have your --
4 are you talking about right there -- your Bates number, but
5 for the exhibits they don't because the exhibits to the trial
6 have the trial exhibits on them, which makes sense.

7 MR. ELLISON: But I think we can use the Bates numbers.

8 MR. SHEHEEN: You don't have to worry about that, but
9 they can follow along with that.

10 THE COURT: I'm with you because mine have Bates numbers
11 too.

12 MR. SHEHEEN: So it's 1392, the page that starts with
13 "we are, I don't care what happens", about half way down it
14 says, "while Orville".

15 THE COURT: Let me just say, for the record, what you
16 just said, "we are, I don't care what happens", that
17 wasn't -- that's in the conversation. That wasn't you.

18 MR. SHEHEEN: No. I care what happens. Thank you.

19 THE COURT: I just want the record to reflect you're
20 directing them, rather than you Vincent Sheheen saying I
21 don't care what happens. It. That was not you, that's
22 what's in the recording.

23 MR. SHEHEEN: Thank you, Your Honor. I do care.

24 Q. About half way down, a little further Orville says,
25 while, while, don't we rewrite the whole contract, let's sit

1 down, let me sit down with Ed, since Ed has no, let me talk
2 to Bruce, and then we'll see what we want, how about that.
3 Bob says, okay, it can go onto your schedule. If you,
4 something, there that I don't recognize that you don't want
5 to share with me that I haven't said, even if it with you,
6 you don't want to share it with me, that's fine.

7 All right, then I want to turn to page 31 of that.

8 MR. CLEVELAND: And would you give the SCENT Bates
9 number?

10 MR. SHEHEEN: 1407.

11 MR. CLEVELAND: Thank you.

12 Q. Dr. Dyce, do you see there on page 31, about a little
13 bit less than half way down Bob says, and you're certainly
14 not sharing it with G. Do you see that?

15 A. Yes, sir.

16 Q. Who's G?

17 A. I assume Dr. Gunnlaugsson.

18 Q. And what's your response?

19 A. I'm not sharing anything with G.

20 Q. Turn to page 33. Are you there?

21 A. Yes, sir. Sorry.

22 Q. The first big paragraph from Bob at the last two
23 sentences it says, so basically termination without a cause
24 comes out, any questions about taking termination for cause
25 out. And you say what?

1 A. I said, no, I'm going to run it all by Bruce so I'm not,
2 and blank.

3 Q. Then Bob says, can I try a dialogue with you, or is that
4 just hopeless, do you see that?

5 A. Yes. And afterwards it says, Bruce informs that I don't
6 know why you'd ever sign this contract, quote, unquote.

7 Q. Turn to page 51. Up at the top portion, maybe four Bobs
8 down.

9 THE COURT: Want to give the Bates number?

10 MR. SHEHEEN: 1427.

11 MR. CLEVELAND: I don't have Bates numbers. I just want
12 the record to be as clear as it can be what we're doing here.

13 Q. So about a quarter of the way down, Dr. Dyce, you say, I
14 say we stop building, I say we shut it all down. Do you see
15 that?

16 A. Yes, sir.

17 Q. And then Bob says, but then the costs are still going to
18 roll in that we can't cover. Look at the e-mail. What do we
19 do to cover that cost? And you respond how?

20 A. I'm sorry, what page are we on?

21 Q. 51.

22 A. It says, I'm being pressured to sign a contract or to
23 sign for land on a contract that I never even wanted
24 renegotiated, and I feel like this is where the browbeating
25 comes in. I mean, at what point --

1 Q. Read a couple lines up from that where it says -- Bob
2 says, what do we do to cover the cost. And then you say?

3 A. I say we shut it down until we get this contract signed
4 or this contract figured out, so until we get the contract
5 signed we stop disbursing funds to anything.

6 Q. Okay. And then, Dr. Dyce, you mentioned -- I'm still on
7 51. I'm sorry. You mentioned yesterday a little bit about
8 the loan that was given to SCENT to buy the shares of the HMA
9 syndication. Do you remember your discussion with Mr.
10 Ellison about that?

11 A. Yes.

12 Q. And you said that you -- I believe you said that you
13 would approve the loan but that you would not approve the
14 loan from Dr. Puchalski or his wife.

15 A. Yes, sir.

16 Q. Okay. And, in fact, you raise that in this
17 conversation, I believe, if you look toward the bottom. I
18 don't know that we need to read it out loud, but you talk
19 about that, and you and Bob go back and forth. And he says,
20 I told you about it in a providers meeting. You say, you
21 didn't tell me that in the providers meeting. And then Dr.
22 Puchalski says -- he says on the next page, if you turn it,
23 he says, would it make, I'm happy, and you say, no, I mean
24 it's just some minor point, and you say, I'm happy to
25 refinance, and you say, no, no, no it's just some minor

1 point. Do you see that?

2 A. Yes, sir.

3 Q. And then go down to the bottom. You say, why don't we
4 go and ask Chad and Macy. They were there for the same
5 meeting. I was there. I'm not dumb. I'm dumb but I'm not
6 that dumb. And then if you go to the next page.

7 A. Next page.

8 Q. Yes, sir, 53, let's just go to the bottom, close to the
9 bottom. Dr. Puchalski says, essentially, hey, if you think
10 this is some sweetheart deal, you can have it, do you see
11 that?

12 A. Yes, sir.

13 Q. Do you recall that?

14 A. Wait, wait, what, sorry, I'm sorry, I blanked for a
15 second.

16 Q. At the bottom of the page he says and I summarized --

17 A. On page 53?

18 Q. Yes, sir. He says, I'm going to give you the exact same
19 terms. You say, I don't want any terms. He says the exact
20 same terms, and you can take over the loan. You say, I don't
21 want anything yet, I don't know what I want yet, I'm looking
22 through all this stuff. He says, same thing, I'll give you
23 the exact same terms, you take it, you think it's such a
24 great interest rate until you recognize that it's on your
25 margin account, you're going to have to pay 6.5, he says --

1 And then there's some back and forth, and the Judge can
2 read the rest. Dr. Puchalski is saying to you, if you
3 don't -- if you think I have some sweetheart deal, you can
4 take it over and you can have it. Do you remember that
5 conversation?

6 A. I vaguely remember that conversation.

7 Q. You have testified under oath that there were a lot of
8 bad things that Dr. Puchalski -- yesterday -- a lot of bad
9 things Dr. Puchalski said to you in conversations. Do you
10 recall some of those things? You mentioned the threat. He
11 tried to strong-arm you, didn't treat you right, that kind of
12 stuff.

13 A. You'd have to specify what you're referring to, sir.

14 Q. Let me ask you. Is your testimony here that he
15 threatened you?

16 A. He said because we couldn't agree on a contract he was
17 going to separate me from the practice. I perceived that as
18 a threat.

19 Q. Anything else he ever said to you that you took as
20 intimidation or threats or strong-arming?

21 A. I'm going to make this termination final unless you come
22 back to the table and sign this contract.

23 Q. He told you that?

24 A. Well, he terminated me, and he and Ed White said,
25 listen, until you work it out, work out the contract, that's

1 how you get back to the table.

2 Q. Anything else, any other strong-arming things that he
3 said to you?

4 A. I'm going to kick your wife out of the landholdings
5 agreement until you basically comply with my demands.

6 Q. He said that to you?

7 A. I'm not a tape recorder. I can't say it in his words,
8 but we have the documents that back this up.

9 Q. Prior to March of 2010 did he make any threats, did he
10 strong-arm you in any way, did he intimidate you in any way?

11 A. Well, when we had the conversation where he threatened
12 to separate me from the practice unless I gave him back a
13 \$50,000 check in his hand, I perceived that as a threat.

14 Q. Was that tape-recorded?

15 A. I think that was referring to that first conversation
16 you had. I don't know if the tape-recording captured it. I
17 believe, but I'm not sure. I'd have to review it. I haven't
18 had a chance to review these documents.

19 Q. You've had these documents for a long time, right?

20 A. I did not -- I have not reviewed every single document
21 for this case. I've reviewed sort of the relevant ones with
22 the breaches of the contract -- the various contracts and
23 agreements.

24 MR. SHEHEEN: We're nearing the end, Your Honor. Thank
25 you for your patience.

1 THE COURT: While you have a break in the action,
2 counsel, can you all just approach for just a second?

3 (Judge and counsel confer.)

4 Q. Dr. Dyce, earlier you stated that the 2008 contract was
5 a disaster. Do you recall that testimony?

6 A. Yes, sir.

7 Q. And you made \$1.7 million under that contract, is that
8 right?

9 A. Yes, sir.

10 Q. And were you not satisfied with \$1.7 million?

11 A. I'm sorry, sir. I don't only use money to define
12 whether I'm successful or not or whether a contract is a good
13 contract or not. One that was -- when I was instructed by Ed
14 to go ahead and sign the contract, he told me that it was for
15 my protection as well as Dr. Puchalski's protection and that
16 often the managing original shareholder can run into problems
17 later, and that's why we needed special protections. I
18 thought Ed was acting on behalf of the corporation and all
19 shareholders involved, turns out he wasn't, and so as a
20 result it is a disaster because it allowed Dr. Puchalski to
21 terminate without cause this shareholder who was one of the
22 top, busier physicians in the practice, and as you yourself
23 stated brought him to the -- brought the practice to the
24 brink of disaster, so on a number of levels it was a
25 disaster. It's not just judged by how much money everyone

1 makes.

2 Q. Were you satisfied financially making \$1.7 million in
3 2008?

4 A. That's not where I get my satisfaction from, sir.

5 Q. I'm asking you, financially, did you want more money,
6 Dr. Dyce? This can be hard or easy. Did you think you
7 deserved to make more money in 2008, or are you satisfied you
8 made an amount --

9 A. I think as a general rule physicians deserve to make
10 more money for what they do, but I did not -- it never once
11 entered my mind that, oh, I should be making more, if that's
12 what you are asking, when I got my paychecks.

13 Q. Dr. Dyce, you were making \$150,000 when you came to
14 SCENT, weren't you?

15 A. The previous contract I was under said I was making
16 \$150,000, yes.

17 Q. After three and a half years at SCENT you were making
18 over a million dollars, weren't you?

19 A. After three and a half years of SCENT -- after two years
20 of SCENT I was credited with earning over a million dollars,
21 yes.

22 Q. And you're earning over a million dollars now.

23 A. I am earning, I think it's around a million dollars,
24 yes, sir.

25 Q. And you're doing that servicing many patients that SCENT

1 used to service in Hartsville, correct?

2 A. I service a good number of patients, some of them were
3 serviced by SCENT, many of them have told me they would never
4 go back to the place once I left. A number of them are old
5 patients that were seen for a different problem that have
6 come in for new problems. A number of them were from out of
7 town, so I service a lot of --

8 Q. My question was servicing a number of patients from
9 SCENT, right?

10 A. Not from SCENT, sir.

11 Q. They formerly were serviced by SCENT.

12 A. There are a lot of patients all over the place.

13 MR. ELLISON: I would just ask that Mr. Sheheen let him
14 answer the question. He keeps interrupting him in the middle
15 of the answer. That's what's creating confusion for the
16 court reporter because they get into a dialogue with Mr.
17 Sheheen trying to talk over Dr. Dyce. Let him finish and
18 then Mr. Sheheen's certainly able to go back and ask
19 additional questions.

20 THE COURT: I understand, and I think this will help.
21 This will help. Dr. Dyce, when you're asked a yes or no
22 question, if you can answer it yes or no, answer it yes or
23 no. Now, having said that, you get to explain your answer.

24 THE WITNESS: Okay.

25 THE COURT: What's happening is that if you're asked a

1 yes or no question and then you go into the explanation
2 before you answered yes or no, lawyers, their heads just
3 start spinning around. So if you can answer yes or no,
4 sometimes you cannot, but if you can answer yes or no, if you
5 can answer that and then explain, that's absolutely
6 appropriate, okay.

7 THE WITNESS: Yes, ma'am.

8 THE COURT: Thank you so much.

9 THE WITNESS: You're welcome.

10 THE COURT: You may proceed.

11 Q. Dr. Dyce, did you realize there was a gap of two or
12 three months in the recorded phone calls that you taped in
13 the fall of 2009?

14 A. I'm sorry?

15 Q. Did you realize there's a gap in the fall of 2009 in the
16 recorded phone calls that you made, in other words, there's
17 two or three months where you didn't make any recorded phone
18 calls, did you realize that?

19 A. I did not realize that.

20 Q. Dr. Dyce, before we just had that little colloquy, we
21 were talking about the fact that you're now making over a
22 million dollars, whether you were satisfied. You don't have
23 any debt associated with your practice, right, because you
24 work for HMA.

25 A. I do not own a practice, sir, if that's what you're

1 asking me.

2 Q. Do you have any debt associated with you practicing
3 medicine?

4 A. I've paid off my debt, sir.

5 Q. Did you have any debt associated with practicing
6 medicine? I'm asking this question.

7 A. Yes, I did, sir.

8 Q. Tell me how you incurred debt in your practice.

9 A. I had to purchase my own equipment.

10 Q. Did you then lease that equipment to HMA?

11 A. Yes, I did, sir.

12 Q. And then HMA paid you?

13 A. Yes, sir.

14 Q. Did you have any other debt associated with the
15 practice?

16 A. Not that I can think of offhand.

17 Q. So would you agree with me that financially you're in a
18 much better position now with no debt and making over a
19 million dollars with HMA than you would have been if the
20 practice had been separated, for example, and you had taken
21 the SCENT practice in Hartsville?

22 A. No, sir.

23 Q. Would you agree with me that you're in a much better
24 financial position than Dr. Puchalski or Macy Vidrine or the
25 other owners of SCENT who are making less than you with

1 millions of dollars in debt?

2 A. No, sir.

3 MR. SHEHEEN: No further questions, Your Honor. Thank
4 you.

5 THE COURT: All right. Redirect.

6 MR. ELLISON: Two minutes, Your Honor.

7 (Brief pause.)

8 REDIRECT EXAMINATION BY MR. ELLISON:

9 Q. Dr. Dyce, there's been some discussion about insurance
10 policies that you took.

11 A. Yes, sir.

12 Q. Do you remember that? Did you take copies of the
13 insurance policies for the purpose of doing anything adverse
14 to SCENT?

15 A. No, sir, I was simply trying to learn it -- as a
16 shareholder and as an owner of SCENT, I simply wanted to
17 learn more about what exactly we were involved in and how
18 insurance contracts worked and what they looked like because
19 I'd never seen one.

20 Q. I'm sorry?

21 A. As I don't recall ever seeing one or having to go
22 through one.

23 Q. Did you view those actions as being adverse to SCENT?

24 A. They were not, sir.

25 Q. Now, in response to some of Mr. Sheheen's questions

1 yesterday you talked about your legal representation in the
2 context of the different sets of documents that were
3 executed.

4 A. Yes, sir.

5 Q. So let's go through them, not by putting them up on the
6 screen but just by talking about the time of the various
7 items.

8 And, Judge, I'm going to try to limit the number of
9 documents I use here. There's been too much fumbling around
10 with it. I'd like to avoid that.

11 The first set of documents that you signed in 2005 --

12 A. Yes, sir.

13 Q. -- did you work with counsel?

14 A. Yes, I did, sir.

15 Q. Who did you work with?

16 A. Mr. Bruce Armon.

17 Q. Now, the 2007 documents, the employment agreement, the
18 shareholders agreement and the stock purchase agreement, did
19 you work with Mr. Armon on those?

20 A. I believe I worked with Mr. Armon somewhat on the 2007
21 agreements, I just don't remember which ones.

22 Q. The 2008 agreements, did you work with -- which are the
23 shareholder agreement and the employment agreement that we've
24 been talking a lot about, did you work with Mr. Armon?

25 A. No. I was a shareholder so I believed I was being

1 represented as a shareholder by corporate counsel.

2 Q. And the 2010 draft documents, did you work with Mr.
3 Armon on those?

4 A. We tried to but --

5 Q. Now, we talked about getting documents and getting
6 accountings and this sort of thing. Do you remember when you
7 filed the initial lawsuit, this suit initially?

8 A. Yes, yes, sir.

9 Q. Was that on or around March 15th, 2015, after you'd been
10 terminated?

11 A. Yes, sir, it was.

12 Q. Do you remember what you asked for?

13 A. I simply asked for an accounting of the practice and
14 what -- where distributions were going, what the ledgers
15 looked like and the like, it wasn't --

16 Q. Did you ask for documents, books and records?

17 A. I did as well.

18 Q. Did you seek monetary damages against SCENT or Dr.
19 Puchalski?

20 A. I did not.

21 Q. And the first time anybody sought damages against
22 anybody, when was that?

23 MR. SHEHEEN: Your Honor, I'm pretty sure I didn't raise
24 this on my cross.

25 MR. ELLISON: He did raise it with regard to access to

1 books and records and damages and claims going back and
2 forth.

3 MR. SHEHEEN: I don't mind giving him some leeway.

4 MR. ELLISON: This isn't going to take very long.

5 THE COURT: Interestingly, if I remember these responses
6 from before --

7 MR. ELLISON: Then I'll leave it alone.

8 THE COURT: I really do remember the responses.

9 MR. ELLISON: Judge, I'm happy to leave it alone.

10 THE COURT: But I do want to hear, I kind of want to
11 hear, not that you asked for it so much as did you get it. I
12 really am curious about that. Do you see the difference, Mr.
13 Ellison?

14 MR. ELLISON: I do, and I'll go that way.

15 THE COURT: That I don't know. And, yes, we have talked
16 excruciatingly about them, but I still don't know -- and I
17 know that you all have got tons of documents, but what I
18 don't know, since the issue of accounting has been raised, I
19 really do want to know to what extent the discovery has
20 provided those documents. I would like to know that.

21 MR. ELLISON: Okay.

22 THE COURT: Am I clear?

23 MR. ELLISON: Yes, Your Honor, absolutely.

24 THE COURT: Because I don't know that at this point.
25 You all do. I don't.

1 MR. ELLISON: Let me take it in the reverse order.

2 THE COURT: Yes.

3 Q. Dr. Dyce, did you ever get the accounting from SCENT --
4 from SCENT?

5 A. Sort of.

6 Q. When?

7 A. I think we ended up having -- needing a hearing to get
8 it, and I believe some of it -- a lot of it came piecemeal
9 and in varied forms. It wasn't in easily identifiable forms.
10 For example, I think in early, I want to believe it was
11 summer, we got two boxes full of paper documents which were
12 jumbled in different order with no rhyme or reason to them.
13 And they said, here, these are the documents. And so we had
14 to spend a fair amount of time and effort going through the
15 documents, trying to match up pages and account to account.
16 And I remember distinctly among those documents a number of
17 critical pages, which we found out later when we got more
18 documents, were missing such as May 10th, I believe, a
19 distribution of the day after I left Dr. Puchalski took out I
20 think between 500 and \$750,000 and distributed it to himself
21 from the practice. It was a combined amount in two or three
22 checks. That page was conveniently left out of the documents
23 we were provided, and so we would have to ask for more
24 documents and more documents to sort of put it all together,
25 and sort of that's where -- how we got some of the documents.

1 I think as late as September 2011 we were still attempting to
2 get documents. We still don't have all the -- when we look
3 at the company ledgers of the credit card statements that
4 were being reimbursed, we got a list of those credit card
5 numbers. We still never got all those credit card
6 statements. And I believe we know there was a huge disparity
7 in the credit cards balances. For Dr. Dyce over a period,
8 and I believe, and don't quote this, haven't looked at this
9 recently, a little under \$10,000 over three years. In the
10 same period I believe Dr. Puchalski runs \$200,000. So these
11 are sort of the disparities we were trying to make sense of
12 when we were getting the documents, and these were given to
13 us in a very piecemeal fashion, and to this day we have not
14 gotten all the credit card statements that we had.

15 Q. Did you get a copy of the --

16 I don't want to go through everything, Your Honor, but
17 I'm trying to respond to your --

18 THE COURT: I appreciate that because these are the
19 questions in my mind when you start asking did you get the
20 ledgers. These are things that are in my head.

21 MR. ELLISON: That's exactly where I'm going.

22 Q. Did you get -- the general ledger, did you get that
23 before the confidentiality agreement was signed after you
24 were terminated?

25 A. No, I did not, no.

1 Q. Did you get it afterwards?

2 A. I believe I got it sometime afterwards.

3 Q. Did you get copies of the checks prior to when you were
4 terminated?

5 A. No, I did not.

6 Q. Did you get copies of all the checks afterwards?

7 A. They told me I got copies of all the checks, but there's
8 some checks that were still missing that I never got.

9 Q. Did it take going through discovery to get copies of the
10 tax returns?

11 A. And rulings, yes, sir.

12 MR. ELLISON: Hold on one second. Judge, I'm just
13 trying to respond to you.

14 THE COURT: Mr. Ellison, I know I'm kind of causing this
15 and Mr. Cleveland's helping.

16 MR. ELLISON: Your Honor, I think one way to do this is
17 to go to Plaintiff's Exhibit 34 which you have a copy of.

18 THE COURT: Yes.

19 MR. ELLISON: And I think that we went through this
20 yesterday. These are some of the things that were requested
21 by Dr. Dyce on March 3rd, okay, and just skipping to get it
22 in context, Dr. Dyce wrote, I'm just publishing, Theresa, am
23 I to understand Jamie is to come to the closing in ten
24 minutes, review the following while there and then sign for
25 the loan, and these are some of the things that were being

1 requested.

2 THE COURT: And then there's a response to that that
3 said the documents are going to be provided but you're not --
4 you'll only need ten minutes to look at it because it's 12
5 pages.

6 MR. ELLISON: Right.

7 THE COURT: And I just remember that e-mail. Let me
8 tell you, let me not be mysterious about the reason that I'm
9 asking this. Because there is a cause of action for an
10 accounting, I've got to make a determination whether there
11 has been or not an accounting, and if not why not and what
12 needs to occur for there to be an accounting, understanding
13 there's a suit for damages and breach and all the other
14 things, but given that I need what I need when you leave me,
15 when you all leave me and leave this with me, one of the
16 questions that will be is whether or not an accounting has
17 existed, and so that's the reason why I'm actually pushing
18 you to tell me that information. And so when you show me
19 this list of things, I know that it was requested, I know
20 that then there was an e-mail that said in response, these
21 documents are going to be provided, you will only need ten
22 minutes to look at these documents because there are only 12
23 pieces of paper. That cannot be.

24 MR. ELLISON: Judge, I understand.

25 THE COURT: And then there's the response back from Dr.

1 Dyce where he says, ten minutes to look at this.

2 MR. ELLISON: Right.

3 THE COURT: Which brings me back to you, Mr. Ellison, to
4 tell me, so what have we got. So we're going to go back here
5 and then we'll talk about it.

6 MR. ELLISON: Right. I'm doing exactly, Your Honor,
7 what you asked me to do. I think Dr. Dyce has already told
8 you he's not gotten the accounting.

9 THE COURT: Some of it, yes, but I need to know the
10 specifics.

11 MR. ELLISON: And that's what I'm going to.

12 Q. Prior to engaging in this lawsuit did you get copies of
13 all the bank statements and the canceled checks?

14 A. I don't believe I did, no, sir.

15 Q. Have you gotten them since then?

16 A. I believe I have gotten some documents, those documents,
17 yes.

18 Q. Prior to engaging in the lawsuit did you, or excuse me,
19 prior to engaging in discovery did you get electronic copies
20 in Excel of the check register?

21 A. No, I did not, sir.

22 Q. Have you gotten them now?

23 A. I believe we have gotten them, sir.

24 Q. No. 3 was an electronic copy of the general ledger year
25 by year. Did you get that prior to engaging in discovery?

1 A. I don't believe I did, sir.

2 Q. Have you gotten it since then?

3 A. I believe we have, sir.

4 Q. I think you've talked about not getting copies of all
5 the credit cards, so I won't go through that. Have you
6 gotten copies of some of the records of the credit cards?

7 A. Some of the records of the credit cards, yes, sir.

8 Q. Have you gotten -- did you get copies of SCENT's tax
9 returns prior to engaging in discovery?

10 A. No, we did not, sir.

11 Q. Have you gotten them now?

12 A. I believe we have, sir.

13 Q. And then the last item on this list was access to all
14 supporting documentation at a location controlled by SCENT
15 related to disbursements. Did you get that access prior to
16 engaging in discovery?

17 A. No, we did not get access, sir.

18 Q. So I think we talked about books and records, so let's
19 talk about accounting.

20 THE COURT: So the answer is how about now on the last
21 one.

22 Q. After discovery did you get access to the documentation,
23 if you know?

24 A. I don't know, I don't know offhand.

25 MR. ELLISON: Judge this is not everything that we asked

1 for in discovery. I'm just taking it from the e-mail in
2 terms of what was requested prior.

3 Q. Dr. Dyce, has SCENT ever given you an accounting, showed
4 how the money flowed back and forth. Not whether you had it
5 done. Has SCENT ever provided it to you?

6 A. No, sir.

7 MR. ELLISON: Does that take care of, Judge, your
8 questions?

9 THE COURT: Oh, yes.

10 Q. Have you engaged your own accountant to do an accounting
11 based on the information provided?

12 A. Yes, sir, I had to.

13 Q. Is that Richard Livingston?

14 A. That's Richard Livingston and his firm.

15 MR. ELLISON: Are we good, Your Honor?

16 THE COURT: That is exactly the information I was
17 looking for. Thank you so much.

18 MR. ELLISON: You're welcome.

19 Q. Dr. Dyce, after you were terminated, did Dr. Puchalski
20 or anyone on behalf of SCENT ever offer you any money or
21 anything for your shares?

22 A. No, they did not, sir.

23 Q. Prior to the counterclaims being put before the Court in
24 October 2010 did Dr. Puchalski or anyone at SCENT ever say
25 that they believed you owed SCENT money?

1 A. No, sir.

2 THE COURT: Ask that question one more time.

3 MR. ELLISON: Prior to the filing of the counterclaims.

4 THE COURT: Which was when?

5 MR. ELLISON: October, well, they filed a motion to
6 amend and the draft complaint was attached to it, Your Honor.

7 THE COURT: Yes.

8 MR. ELLISON: In October 2010.

9 THE COURT: October 2010, okay.

10 Q. Prior to that date, and I don't expect Dr. Dyce to
11 remember the date, but I do think you remember the
12 counterclaims. Prior to that time, seeing a copy of those
13 proposed counterclaims, had Dr. Puchalski or anybody at SCENT
14 ever said that they believed you owed SCENT money?

15 A. I don't believe so, sir.

16 Q. Let's go to Defendant's Exhibit 71. Dr. Dyce, this is
17 the document that Mr. Sheheen asked you questions about, the
18 draft affidavit that was prepared by Mr. Thompson.

19 A. Yes, sir.

20 Q. Did you provide Mr. Thompson with any information
21 regarding some of the allegations contained in this
22 affidavit?

23 A. No, I did not, sir.

24 Q. To the best of your knowledge did you provide any
25 information with regard to the allegations contained in this

1 affidavit to Dr. Gunnlaugsson?

2 A. I did not, sir.

3 Q. Did you sign the affidavit?

4 A. No, sir.

5 Q. It was a draft, was it not?

6 A. I assume.

7 Q. And you didn't sign it?

8 A. I did not sign it, sir.

9 Q. I think you talked about with Mr. Sheheen why you didn't
10 sign it, but if the Court wants we can go back into that.

11 Dr. Dyce, why did you not sign the affidavit?

12 A. One, because Chad never asked me to sign it. And, two,
13 I would have had to have an attorney look at it and make sure
14 it was correct, and there was just no reason to sign it.

15 Q. Were there errors in the information contained?

16 A. It's not information that I would have agreed with as it
17 was stated on that document.

18 Q. Now, let's go to an e-mail dated January 13th, 2010
19 which you talked about on your direct from Ed White to Bruce
20 Armon that shows that Dr. Puchalski got a copy and you got a
21 copy.

22 A. Okay.

23 Q. To the best of your knowledge is this the first time you
24 saw a draft of the proposed revised shareholder agreement and
25 employment agreement?

1 A. No, not quite. That's when I was -- first time I was
2 given a draft. I believe in a meeting a lot earlier, maybe
3 in the late summer, fall, Bob explained there was a new
4 contract. He had it on his computer, and he sort of scrolled
5 through some of the provisions of it, but I never received a
6 draft of it.

7 Q. You never received a draft?

8 A. No, never received a draft to review for my review.

9 Q. Is this the first time you received a copy of the draft?

10 A. If I'm remembering that e-mail correctly, that would
11 have been the first time if that had the shareholders
12 agreement attached.

13 Q. And you didn't have a copy of any of the prior drafts I
14 think you said.

15 A. No, sir.

16 Q. This was on January 13, 2010.

17 A. Yes, sir.

18 Q. Let's go back to December 28th, 2009. This is
19 Defendant's 72. This is what Mr. Sheheen referred to as the
20 Gunnlaugsson manifesto. What's the date on the e-mail
21 transmitting the Gunnlaugsson manifesto?

22 A. Appears to be December 27th, 2009.

23 Q. And at that point in time did you have copies of the
24 draft employment agreement or the draft shareholders
25 agreement?

1 A. I did not.

2 Q. Now, you were talking with or you were talking with Mr.
3 Sheheen about threats and that sort of thing.

4 A. Yes.

5 Q. And I don't want to go through a laundry list but Dr.
6 Puchalski and SCENT began withholding distributions in
7 November-December 2009, did he not?

8 MR. SHEHEEN: Your Honor, I'm going to object to leading
9 questions.

10 MR. ELLISON: Okay.

11 THE COURT: Overruled.

12 THE WITNESS: Dr. Puchalski began unilaterally
13 withholding profit distributions to shareholders starting
14 around October-November 2009.

15 Q. Did you view that as a threat?

16 A. Well, yes, when he said I'm not going to disburse it
17 until you sign the documents.

18 Q. And when you say these documents, what do you mean?

19 A. The shareholder and -- shareholder and the employment
20 agreement, the proposed 2010 agreements.

21 Q. I think you said -- had you received a copy of those
22 documents?

23 A. No, not yet.

24 Q. So to make sure I've got the timing right, when did he
25 begin withholding the distributions?

1 A. Around October or November 2009, coming into our busiest
2 period of the year.

3 Q. When did you first receive copies of the draft
4 agreements?

5 A. I believe it was January 2010.

6 Q. Now, you talked yesterday about sitting in on various
7 meetings with SCENT, do you remember that?

8 A. Yes, sir.

9 Q. Can you describe for the Court again kind of the
10 meetings you sat in on?

11 A. We only had a few meetings, some were one-on-one
12 meetings with Dr. Puchalski at various times of the night and
13 in the morning. Those were just one-on-one. And then there
14 were what's called these weekly Wednesday morning meetings
15 where we'd meet, I believe, between 5:30 and 6:00 or 6:30 in
16 Camden, where we'd review all events going on with the
17 practice and any issues meant to be dealt with, whether it be
18 insurance companies, hospitals or whatever else. And then
19 once a month we would have what's called provider meetings
20 where the providers, meaning the physicians and the --

21 Q. You need to speak up just a little bit.

22 A. -- where the physicians and the PA's or nurse
23 practitioners would meet once a month on Fridays. There were
24 some directors meetings also on Thursdays, but those
25 initially were attended by physicians, but then after some

1 time only Dr. Puchalski represented the physicians. And
2 occasionally we'd have a meeting after the providers meeting
3 just for the physicians.

4 Q. So in broad strokes, I think you've described three
5 general types of meetings that were being held. The first
6 were the practice meetings.

7 MR. SHEHEEN: Your Honor, I'm going to object. I didn't
8 go through any of this meeting stuff on my cross. If he's
9 going somewhere that's related to the cross, I understand,
10 but we've just spent five minutes talking about meetings I
11 didn't ask any questions about, so I'd object at this point.

12 THE COURT: He says he can tie that up.

13 MR. ELLISON: Oh, I'm going to.

14 THE COURT: Tie it up.

15 MR. ELLISON: I've got less than three minutes on this
16 and then I'm done.

17 Q. So you had practice meetings, is that right?

18 A. Yes, sir.

19 Q. You had director meetings, is that right?

20 A. Yes.

21 Q. And you had provider meetings.

22 A. Yes, sir.

23 Q. And at some of these meetings information --
24 confidential practice information was distributed to the
25 people who were at the meetings, is that right?

1 A. Absolutely.

2 Q. And then when the meetings were over --

3 MR. SHEHEEN: Your Honor, I'd object to leading
4 questions.

5 Q. -- were you allowed to keep copies?

6 MR. SHEHEEN: Your Honor, I object.

7 THE COURT: Were you allowed to keep copies?

8 Q. Were you allowed to keep copies?

9 A. I don't believe so.

10 Q. So did you have access to the information that was
11 provided at these meetings after the meetings were over?

12 A. Only Bob Puchalski, Theresa Williams and whoever Bob had
13 running around for him at that time had access.

14 Q. And who did you say attended these meetings?

15 A. All the physicians. It depends on which meeting you're
16 referring to.

17 Q. Okay. Who attended the practice group meetings?

18 A. The physicians and the PA's or nurse practitioners would
19 have attended the weekly meetings. The provider meetings
20 were attended by the providers, meaning the healthcare
21 providers, the physicians and the nurse practitioners. And
22 then occasionally we'd have, to discuss the numbers, we would
23 also have a meeting of just the physicians/shareholders after
24 those meetings to discuss the practice numbers and all that.

25 Q. And there were also director meetings. Who attended

1 those meetings?

2 A. Those were the directors of each department, the allergy
3 department --

4 Q. Did the physicians attend all of these meetings where
5 confidential information was given out and then taken back?

6 A. Pretty much because even when we were going over the
7 buy-in sheets before people had completed their buy-in, all
8 the physicians were allowed to sort of see the process and
9 watch what was going on.

10 Q. So did Dr. Gunnlaugsson attend these meetings?

11 A. Yes, he did.

12 Q. So as part of these meetings did Dr. Gunnlaugsson have
13 information, confidential information being distributed at
14 these meetings?

15 A. There was a lot of information being distributed that he
16 would have been -- he would have had access to.

17 Q. And who was providing this information?

18 A. Dr. Puchalski and Theresa Williams.

19 MR. ELLISON: Your Honor, I'm done.

20 THE COURT: Recross.

21 MR. SHEHEEN: Beg the Court's indulgence.

22 THE COURT: Sure. And if you need to take a break, now
23 wouldn't be a bad time to take a short break if you need to
24 do that. Would you like to do that?

25 MR. SHEHEEN: Sure, if you're going to do it anyway.

1 THE COURT: It really is a good time, and since this is
2 the other party, it probably is a good time for you to have a
3 moment to be sure you're done.

4 MR. SHEHEEN: Thank you, Your Honor.

5 THE COURT: All right. We'll take about 15.

6 (Recess held.)

7 MR. SHEHEEN: I have nothing further for the witness.

8 THE COURT: You may come down and come back to your
9 table.

10 MR. SHEHEEN: Thank you, Your Honor. Sometimes we save
11 time by taking a break.

12 THE COURT: Absolutely. All right. Yes, sir, call your
13 next witness, please.

14 MR. ELLISON: Your Honor, we'd like to call Dr.
15 Gunnlaugsson to the stand.

16 THE COURT: Okay.

17 CHAD GUNNLAUGSSON,
18 being first duly sworn, testified as follows:

19 DIRECT EXAMINATION BY MR. ELLISON:

20 Q. Dr. Gunnlaugsson, state your name for the record,
21 please.

22 A. Excuse me?

23 Q. Could you state your full name for the record?

24 A. Chad Bjorn Gunnlaugsson.

25 Q. Dr. Gunnlaugsson, I want to go into a little bit of your

1 agreement, but at that point Dr. Puchalski had made it very
2 clear to me that there was a hold up in the practice and I
3 would not be getting my shares until he and Dyce came to
4 agreement on a new shareholders agreement.

5 Q. Before your litigation commenced in April 2010 did you
6 ever see a copy of a proposed amended shareholders agreement?

7 A. No, I did not.

8 Q. Were the terms of that agreement ever discussed with
9 you?

10 A. Yes, by Dr. Puchalski.

11 Q. And we're getting a little ahead of the story, but when
12 did that occur?

13 A. Oh, during the months of really mainly January, February
14 and March of 2010.

15 Q. And what did Dr. Puchalski tell you?

16 A. Dr. Puchalski stated that as the founding member of
17 SCENT he felt that he should remain the executive forever.
18 He felt that should have certain privileges related to it,
19 such as covering his entertainment expenses, his travel and
20 automobile, extra compensation, things to that such.

21 Q. And when was the first time you can recall seeing an
22 actual copy of this proposed amended shareholders agreement?

23 A. It wasn't until I began the discovery process in June of
24 2010 once I had left the practice.

25 Q. Did Dr. Dyce ever provide you with copies of insurance

1 contracts?

2 A. Never.

3 Q. You said there were some patient issues in late
4 2009-2010 that you discussed with Dr. Dyce, can you describe
5 those for the Court, please?

6 A. Dr. Dyce had a fairly -- did a fairly complex surgery on
7 a patient right around Christmas of 2009. He was not on call
8 for that Christmas weekend, nor was I. During that time that
9 patient was not rounded on by Dr. Puchalski, he was seen by a
10 physician's assistant, and that patient ended up having a
11 significant, near disastrous wound complication. I ended up
12 seeing the patient a week later on rounds about a week later
13 when it was my turn to round, and I immediately scheduled
14 that patient for emergent surgery to help repair the defect
15 and then had to go back and do a second reconstructive
16 surgery later which Dr. Dyce assisted me with.

17 Q. Did you have any discussions with Dr. Dyce about that
18 patient?

19 A. Several.

20 Q. Can you describe those discussions for the Court,
21 please?

22 A. The first thing you say is, what the heck happened here,
23 how is a patient not -- who's had a major head and neck
24 cancer operation who is sick is not rounded on and cared to,
25 how is the dressing not changed during the five days that

1 he's in the hospital, how do I walk into a clinic bed six
2 days after procedure, be the first one to take off the
3 dressing and see a gaping wound in the neck. There were many
4 conversations. That was a scary time. He could have died
5 from what we call a carotid blowout where the saliva, which
6 is now leaking into his neck, can erode into the carotid
7 artery. And I immediately, I believe later that day or
8 within the next few days took him to the emergency room and
9 did what's called a pectoralis flap, where I covered at least
10 80 percent of the defect with muscle to prevent another
11 complication, and then I had to go back and do it on the
12 other side on another Wednesday, not my time, with Dr. Dyce
13 and do another procedure, and that gentleman did end up
14 leaving the hospital.

15 Q. Were there other things that you were talking about with
16 Dr. Dyce during the time period of December 2009 through
17 January 2010?

18 A. Yes, at times I'd come to Dyce and say, what's going on,
19 where are my shares, and he would just simply say, there's
20 lots of issues, I can't talk to you about them. It was a
21 scary time. You have to understand that from the day those
22 profit sweeps stopped in November there wasn't a day that I
23 felt safe in that practice. The profit sweeps stopped. The
24 one year buy in that was one year for Dr. Vidrine, that was
25 one year for Dr. Dyce is now 17 months for me with no hope.

1 I had never once contacted a lawyer in my entire time in that
2 practice, but in November I reached out to Molly Cherry at
3 Nexsen Pruet.

4 MR. SHEHEEN: Your Honor, I would object. We're getting
5 far afield of the question and far afield of the relevance to
6 the case, so I'm objecting.

7 MR. ELLISON: He's saying what they talked about.

8 THE COURT: Just come on back. I know that so much of
9 this is personal too, but the issue of course has to do with
10 any sharing of confidential information.

11 MR. ELLISON: That's what I'm trying to get at. We're
12 also dealing with the exhibit that they were talking about
13 with Dr. Dyce showing that the volume of text messages and
14 phone calls went up.

15 THE COURT: Exactly.

16 MR. ELLISON: And so I'm trying to --

17 THE COURT: And you can certainly talk about that as it
18 relates between this witness and Dr. Dyce.

19 MR. ELLISON: That's exactly what I'm trying to do.

20 THE COURT: I know that, I know that, and the objection
21 is, as I would anticipate, because it is personal to this
22 witness, that it would go into his own individual
23 difficulties, and I understand that, just we've got to come
24 back.

25 MR. ELLISON: I'm trying as much as I can.

1 THE COURT: I know.

2 Q. Dr. Gunnlaugsson, during this time period did you and
3 Dr. Dyce also talk about the sleep boards?

4 A. All the time. We took those in November, and that's a
5 big part of studying together when both of us are taking an
6 exam.

7 Q. Did you talk about any insurance issues other than the
8 one patient that you talked about that you remember?

9 A. No.

10 Q. Did Dr. Dyce during this time period ever share any
11 confidential information regarding the practice with you?

12 A. Never.

13 Q. Were you looking to leave the practice during this time
14 period?

15 A. No.

16 Q. What happened at the, I guess it's the provider meeting
17 that occurred in late January 2010. What happened in that?

18 A. In late January 2010 in a meeting with everyone present
19 Dr. Puchalski --

20 Q. When you say everyone, who was present?

21 A. Macy Vidrine, Dr. Puchalski, Dr. Dyce, myself, Theresa
22 Williams. In the executive session for the partners Dr.
23 Puchalski said, Dr. Gunnlaugsson, you are at the precipice of
24 getting your shares. Mind you, in my mind, they're now six
25 months overdue.

1 MR. SHEHEEN: Your Honor, I'm going to object again.
2 We're getting to things that don't have anything to do with
3 this case.

4 THE COURT: Thank you. I'm going to let him go a little
5 longer because of the time period.

6 THE WITNESS: He said that the only thing preventing me
7 from me receiving my shares was a disagreement and
8 contractual issue between him and Dr. Dyce.

9 Q. Did Dr. Dyce ever describe the disagreement that he had
10 with Dr. Puchalski?

11 A. No, he did not.

12 Q. Did Dr. Puchalski during this time period, late January
13 2010 describe the disagreement with Dr. Dyce?

14 A. Yes. He told me that they -- that he wanted a new
15 shareholders agreement in place.

16 Q. Did Dr. Puchalski later discuss the specifics of the
17 disagreement?

18 A. Of the shareholders agreement issues?

19 Q. Yes.

20 A. Yes, he told me exactly what provisions he wanted.

21 Q. Can you describe for the Court what those provisions
22 were as described to you by Dr. Puchalski?

23 A. In loose terms, increased executive compensation, paying
24 for automobiles, paying for entertainment expenses, CEO for
25 life, an executive buyout, the a/k/a golden parachute that

1 you hear about, and my answer to those things was always, I'm
2 not signing that.

3 Q. When did Dr. Puchalski discuss these things with you?

4 A. Between late January 2010 and really right up until
5 April 20th, 2010.

6 Q. And did Dr. Dyce ever discuss any of these particulars
7 with you?

8 A. No. That all came from Dr. Puchalski.

9 Q. Now, during the period of January until let's say March
10 1st, 2010 were you looking to leave SCENT?

11 A. No.

12 Q. Did you have any concerns about being terminated?

13 A. Every day.

14 Q. Can you describe those concerns for the Court, please?

15 A. When you have paid more money than everyone else --

16 MR. SHEHEEN: Your Honor, I'm going to object. It's
17 interesting, but it's not relevant to the case what he was
18 concerned -- whether he thought -- it was relevant to his
19 case, but it's not relevant to this case.

20 THE COURT: What fact that is in issue does this
21 testimony make more probable or less probable?

22 MR. ELLISON: I'm sorry?

23 THE COURT: What fact which is in issue does this
24 testimony make more probable or less probable.

25 MR. ELLISON: The alleged coordination between lawyers,

1 the affidavit, draft affidavit that Mr. Sheheen introduced
2 yesterday provided to Dr. Dyce, what was going.

3 THE COURT: Overruled, you may proceed.

4 MR. ELLISON: Thank you.

5 Q. Go ahead, Dr. Gunnlaugsson.

6 A. As I stated, I had to go home every night to my wife and
7 say, I'm worried that I'm going to get a pink slip. This is
8 a scary time. In February there was really the first
9 shareholder meeting that I was not even made aware of. I
10 know that Orville and Bob had been having meetings, but there
11 was to be a meeting where they were going to discuss
12 shareholder issues, and I was so nervous that I was going to
13 be fired that I actually asked my attorney to make
14 preparations in the event that I was fired, how can I stay on
15 board and serve my patients and stay on the job and make a
16 salary. I have no other outs. My state license is only good
17 for this state. If you leave a practice, you're really out
18 of a job for six to eight months with credentialing and all
19 those other things.

20 MR. ELLISON: Your Honor, I've called up on the screen
21 Defendant's 71.

22 THE COURT: Okay.

23 Q. Can you see that one, Dr. Gunnlaugsson?

24 A. I can.

25 Q. Can you identify that for the Court?

1 A. That is an affidavit that at my request my attorney,
2 Chuck Thompson, wrote for me in the event that I was fired.

3 Q. And during what period of time was this affidavit
4 written?

5 A. Early February 2010.

6 Q. To the best of your knowledge did -- and who did you
7 give the affidavit to?

8 A. I e-mailed it to Dr. Dyce.

9 Q. And did he ever sign the affidavit?

10 A. No.

11 Q. Now, there's some information in here regarding the
12 practice that Mr. Sheheen says is confidential, we can go
13 through the specific paragraphs if the Court wants, but who
14 provided you with the information regarding the practice
15 contained in this affidavit?

16 A. Dr. Puchalski. At this point I had been in these
17 partnership meeting and executive sessions for over two
18 years.

19 Q. Did Dr. Dyce provide you with any of the -- to the best
20 of your knowledge did Dr. Dyce provide you with any of the
21 information that would be alleged to involve the practice in
22 this affidavit?

23 A. No, he did not.

24 Q. During the time period of February 2010 until March
25 10th, 2010, February 1st to March 10th, did you have any

1 discussions with regard to any issues involving the real
2 estate holdings associated with the practice?

3 A. No, I did not.

4 Q. Did Dr. Dyce ever talk to you about any loans involving
5 SCENT Land or SCENT?

6 A. No, he did not.

7 Q. Did you have any knowledge that there was ever -- during
8 that time period, January 31st until March 10th, that there
9 were problems with any potential loans involving SCENT Land?

10 A. The only thing I was told is that Dr. Puchalski stated
11 that there were mechanic's liens against the practice.

12 Q. Who said that there were mechanic's liens against the
13 practice?

14 A. Dr. Puchalski.

15 Q. Do you recall when he said that?

16 A. Yes. He said it in a provider meeting or in the
17 executive session of the provider meeting.

18 Q. Let's go to March 10, 2010. Are you now aware that
19 that's the date that Dr. Dyce was allegedly terminated?

20 A. It's one of the saddest days of my life.

21 Q. I'm sorry?

22 A. I'm very aware of it.

23 Q. On March 10, 2010 were you aware of it?

24 A. On March 10th?

25 Q. Yes.

1 A. Not until I got home.

2 Q. What happened at the practice involving you and Ed White
3 and Dr. Puchalski on March 10th, 2010?

4 A. On Wednesday, March 10th, after my clinic I was pulled
5 into an office, and at a four seated table, Ed White, Dr.
6 Puchalski and Theresa Williams were present, and Bob
7 Puchalski sat me down and said, there are things going on in
8 the practice, and I can't do anything with your status and
9 your complaints for the next 60 days, but in 60 days I'll
10 give you the new shareholders agreement, and I looked at him
11 and said, where are my shares, not a new agreement, where are
12 my shares.

13 Q. Did you ask any questions as to why he was saying 60
14 days?

15 A. I had no idea at that point.

16 Q. So you said that you got home that night and that's when
17 you found out that Dr. Dyce had been terminated.

18 A. That is correct.

19 Q. How did you find out?

20 A. My wife was on the phone with Jamie Dyce and my wife was
21 crying.

22 Q. Why was your wife crying?

23 A. Because our friend Orville had just been terminated.

24 You don't even believe that these things can happen.

25 Q. Were you told why Dr. Dyce was terminated?

1 A. No.

2 Q. Did you wonder why?

3 A. Yes.

4 Q. So did you ask Dr. Dyce why?

5 A. I didn't talk to Dr. Dyce. The only conversation was
6 between my wife and his wife.

7 Q. To the best of your knowledge did Ms. Curley tell your
8 wife why her husband had been terminated?

9 A. No, she just said Orville got fired, and then there's
10 really -- there's silence, there's -- there's hysteria,
11 there's sadness. You know at that point things have been set
12 in motion that are going to be very, very bad.

13 Q. So did you have a meeting with Dr. Puchalski later on
14 that month to discuss the situation involving the practice?

15 A. Yes, within a week.

16 Q. I'm sorry?

17 A. Within a week.

18 Q. What was discussed at that meeting?

19 A. I was brought into his office again. Dr. Vidrine was
20 present at that meeting. And we were given a letter from Dr.
21 Puchalski and his lawyers to, actually, you that said -- it
22 was a letter to Dr. Dyce and it said, Dr. Dyce, please be
23 aware that you've been terminated, please be aware that the
24 noncompete's in full effect, please be aware that all the
25 patient charts are ours, and you can't have access to your

1 Sheheen was pointing out yesterday. This is not a great
2 copy. And I'm going to paragraph 24 which is on page 5. I'm
3 going to go through a couple of paragraphs. Dr.

4 Gunnlaugsson, looking at paragraph 24.

5 A. Yes, sir.

6 Q. And I'm reading right now. It says, on information and
7 belief the new shareholders agreement shifted additional
8 managerial rights to Puchalski and provided for significant
9 new monetary compensation to him and provided for certain
10 additional compensation to Puchalski in the event he
11 voluntarily or involuntarily left SCENT. Do you see that?

12 A. Yes, sir.

13 Q. Who provided you with the information that that
14 paragraph -- that that allegation is based on?

15 A. Dr. Puchalski.

16 Q. Did Dr. Dyce ever provide you with any information
17 relating to that allegation?

18 A. No. That allegation was already existing in a June 2009
19 agreement where he had already tried to do that once, and he
20 had told me what his plans were prior to that. It was all
21 Dr. Puchalski.

22 Q. Let's look at paragraph 25, just go through a couple of
23 these. Paragraph 25 says, the new shareholders agreement
24 constitutes a power grab by Puchalski in an effort to provide
25 himself with additional significant compensation in the event

1 that he voluntarily or involuntarily leaves SCENT. Who
2 provided you with the information that forms the basis of
3 this paragraph?

4 A. Dr. Puchalski.

5 Q. Did Dr. Dyce provide you with any information in that
6 context?

7 A. No, he did not.

8 Q. Let's go to paragraph 26.

9 We're not going to do every paragraph of the complaint,
10 Your Honor.

11 It says, Puchalski has no legal or contractual right to
12 insist upon a new shareholders agreement or to withhold
13 shares from Dr. Gunnlaugsson.

14 Other than conferences with your lawyer, who provided
15 you with the information relating to this paragraph?

16 A. Dr. Puchalski.

17 Q. Did Dr. Dyce ever provide you with any information
18 regarding these allegations?

19 A. No, sir.

20 Q. We're almost done. Let's go to 27. It says, Dyce has
21 declined to agree to any new shareholders agreement, has no
22 obligation to do so, and this is the only reason Puchalski is
23 refusing to issue shares to Dr. Gunnlaugsson and is refusing
24 to recognize Dr. Gunnlaugsson as a shareholder. Do you see
25 that?

1 A. Yes, sir.

2 Q. Who provided you with the information that Dr. Dyce had
3 declined to sign the shareholders agreement?

4 A. Dr. Puchalski told me that.

5 Q. Did Dr. Dyce tell you that?

6 A. No.

7 Q. Who provided you with the other information that you
8 used to make this allegation?

9 A. Dr. Puchalski.

10 Q. Did Dr. Dyce ever provide you with any of the
11 information leading to the allegations in this paragraph?

12 A. No, he did not.

13 Q. One more, paragraph 28. It says, because Dyce refused
14 to agree to the new shareholders agreement because of
15 disagreements over Puchalski's management of SCENT's finances
16 Puchalski terminated his employment. This termination
17 violated the provisions of the existing shareholders
18 agreement.

19 Did Dr. Dyce ever tell you about his disagreements over
20 Puchalski's management of SCENT's finances?

21 A. No.

22 Q. Who did?

23 A. Dr. Puchalski.

24 Q. What did Dr. Puchalski tell you?

25 A. Dr. Puchalski told me that Dr. Dyce and his attorneys

1 had lots of questions about the practice and were holding the
2 practice hostage.

3 Q. So did Dr. Dyce ever provide you with any information
4 that supported the allegations in this paragraph of the
5 complaint?

6 A. No, sir.

7 Q. Who provided you with that information?

8 A. Dr. Puchalski.

9 Q. Dr. Gunnlaugsson, to the best of your knowledge did you
10 ever provide any confidential information to Dr. Dyce?

11 A. No, sir.

12 Q. To the best of your knowledge did he ever provide any
13 confidential information to you?

14 A. No, sir.

15 Q. To the best of your knowledge did he ever share any
16 harmful e-mails with you, harmful to the practice?

17 A. No.

18 Q. To the best of your knowledge did you ever share any
19 harmful e-mails to the practice with him?

20 A. Is the affidavit harmful, because that's the only e-mail
21 that I can recall ever sharing with him, so I guess my answer
22 is no.

23 Q. Did Dr. Dyce ever provide you with a copy of the draft
24 shareholder agreements?

25 A. No, he did not.

1 Q. Did Dr. Dyce provide you with a copy of the draft 2009
2 shareholders agreement?

3 A. No.

4 Q. Who provided that to you?

5 A. Dr. Puchalski.

6 Q. Did you ever have a coordinated legal strategy prior to
7 the institution of this litigation --

8 A. No.

9 Q. -- with Dr. Dyce?

10 A. No.

11 Q. Did Dr. Dyce ever share in any insurance contracts with
12 you?

13 A. No.

14 MR. ELLISON: Your Honor, I have nothing else.

15 THE COURT: Counsel, let me see you just a second.

16 (Judge and attorneys confer.)

17 Q. Dr. Gunnlaugsson, I'm not quite through. I thought I
18 was. Not quite. Can you describe for the Court what the
19 atmosphere of the practice was like prior to June 1st, 2008?

20 A. It was good.

21 Q. When you say good, that's a relative term. What do you
22 mean by good?

23 A. We were three young physicians trying to build a
24 practice at multiple locations. It was an exciting time.

25 Q. When did the atmosphere in the practice change or start

1 A. Yes, sir.

2 MR. SHEHEEN: Your Honor, it's been asked and answered.

3 THE COURT: Sustained.

4 MR. ELLISON: That's fine, Judge. I'm done.

5 THE COURT: Very well. It's time for lunch. We're
6 going to start back at 2:30. During the lunch you cannot
7 talk about your testimony. You can talk about anything else,
8 but you cannot talk about your testimony.

9 MR. ELLISON: Judge, can we approach for a minute?

10 (Judge and attorneys confer.)

11 (Lunch recess held.)

12 THE COURT: Okay. Cross-examination.

13 MR. SHEHEEN: Thank you, Your Honor.

14 CROSS-EXAMINATION BY MR. SHEHEEN:

15 Q. Dr. Gunnlaugsson, I'm Vincent Sheheen. We've met
16 before.

17 A. Yes, sir.

18 Q. It's good to see you. I just have a few questions for
19 you, Dr. Gunnlaugsson. Dr. Gunnlaugsson, during your direct
20 testimony you mentioned, I believe, that on April 22nd you
21 had a meeting with Dr. Puchalski, is that right?

22 A. That is correct.

23 Q. If you would just make sure I get my question out,
24 sometimes I talk slow and people want to answer before I ask
25 it, I apologize, but so April 22nd you met with Dr.

1 Puchalski?

2 A. Yes, I did.

3 Q. And I believe you said that it was, I don't want to put
4 words in your mouth, but essentially a meeting where whatever
5 he said to you you didn't agree with and you left.

6 A. I left the next day.

7 Q. And then you filed a lawsuit the next day.

8 A. That's correct.

9 Q. But Dr. Gunnlaugsson, in fact, you had requested April
10 23rd off as a vacation day weeks before, didn't you?

11 A. That's correct.

12 Q. Because you knew you were going to file a suit April
13 23rd?

14 A. I figured that would be the point of no return. That
15 April 22nd conversation was really a last chance for me to
16 see how Dr. Puchalski was going to behave and act, and I
17 thought it would -- I had planned that day would be a
18 possible outset for the lawsuit, and once I met with him I
19 had no doubt we were going to have to do what we did.

20 Q. Dr. Gunnlaugsson, you knew before that you were filing a
21 lawsuit because you took off that day three weeks in advance
22 so you wouldn't be there when it got served, right?

23 A. Yes. May I explain, Your Honor?

24 THE COURT: Yes, you may explain.

25 THE WITNESS: You don't file a lawsuit in 12 hours.

1 There's a lot of preparation that goes into it. With the
2 number of things that I had seen, I had made preparations to
3 file a lawsuit, I had taken that day off thinking that that
4 might be the last day and indeed that was the last day.

5 Q. And Dr. Gunnlaugsson, that meeting that you've talked
6 about so dramatically that you knew you had to file the
7 lawsuit the next day, you had already created your company to
8 compete against SCENT prior to that, hadn't you?

9 A. I'd filed an LLC I believe around April 9th or April
10 19th, thinking that the inevitable was going to happen.

11 Q. Well, Dr. Gunnlaugsson, you weren't just thinking the
12 inevitable was going to happen. You were planning on
13 leaving, weren't you? You spent great amounts of time
14 planning the departure on April 22nd, including multiple
15 e-mails back and forth with the company that was setting up
16 your competing practice, right?

17 A. Yes. After hours I spent quite a bit of time, all of
18 this after Dr. Dyce was fired, preparing for either my, what
19 I thought, I would be fired or that I would have to leave the
20 practice. I did all of this after hours on my own time on my
21 own dollar, and I believe I hired Resource One around March
22 25th of 2010.

23 Q. Dr. Gunnlaugsson, there's a little book in front of you,
24 a black book. The Judge has one in front of her as well.
25 And I'm going to refer to just a couple exhibits in it, and I

1 want you to turn to Tab M which contains Defendant's Exhibit
2 65. It says at the top Julie Dunn, do you see that?

3 A. Yes, sir.

4 Q. You've seen this e-mail before, right? We've talked
5 about it before.

6 A. I'm sure I've seen it before. I just have to read it.
7 It's been quite a while.

8 Q. I want to direct you to the fourth paragraph where you
9 tell Mike Grabowski while you're working at SCENT, I get paid
10 on Monday and this will at least secure one extra paycheck
11 before any possible suspicions are raised, do you see that?

12 A. Yes, sir.

13 Q. You were taking as much money out of SCENT as you could
14 before you quit and started your competing practice, right?

15 A. No, sir. I was earning the income that I was producing
16 while working for SCENT before I was leaving.

17 Q. Why didn't you just tell him, hey, I'm leaving I want my
18 paycheck? Instead you kept it secret so you could make sure
19 you got that paycheck and then went up and set up your
20 competing practice, right?

21 A. Yes, sir. And if I may explain, if you look at the
22 history of the practice, that was probably a really
23 intelligent decision because if you go up to Dr. Puchalski
24 and say, I don't agree with you, you can be fired, and you
25 can bet the paychecks stop at that time, and I didn't want

1 that to happen to me.

2 Q. Dr. Gunnlaugsson, excuse me, you discussed the fact that
3 you had, I think you called it -- some exams in November that
4 you were taking with Dr. Dyce. What was that?

5 A. That would be the sleep medicine boards.

6 Q. Right, so you weren't trained in sleep medicine when you
7 came to SCENT, were you?

8 A. Not board fellowship trained.

9 Q. And they paid for you to attend that and paid for you to
10 take the class, right?

11 A. The corporation did, of which I also contributed moneys
12 to.

13 Q. SCENT.

14 A. SCENT, yes, sir.

15 Q. And you said that that was one of the things that caused
16 the spike in your calls, is that right, and your texts?

17 A. Yes, probably a very minor one, but we did have
18 discussions over that time.

19 Q. That's not what caused your spike because you took those
20 in November and your spikes started seriously in December,
21 didn't they?

22 A. December and January, once the profits sweeps stopped
23 there was probably a spike as well as the patient in
24 December.

25 Q. Because that's what you all were talking about, profit

1 sweeps and things that you weren't happy about with Dr.

2 Puchalski, right?

3 A. We didn't discuss them. I would simply call Orville and

4 say, where are the profit sweeps and where are my shares.

5 They weren't long discussions. I was upset. I was scared.

6 Q. Are you aware that Dr. Dyce has already testified that

7 you guys would talk about the things you didn't like Dr.

8 Puchalski was doing in the management of the practice?

9 A. No, I'm unaware of that.

10 Q. Are you denying that's what you were doing because

11 that's what you denied on direct when you went through what

12 you were talking about. Do you still deny it?

13 A. Yes, I don't have any recollection of Dr. Dyce and I

14 getting on the phone and complaining about Dr. Puchalski.

15 Q. Would it surprise you to know that the night that you

16 sent that e-mail with the affidavit to Dr. Dyce that you had

17 a long conversation on the phone with Dr. Dyce, would that

18 surprise you?

19 A. No.

20 Q. Why don't you tell us what that phone conversation was

21 about when that affidavit went to him?

22 A. Sir, I have no idea. That was three years ago.

23 Q. Okay. Would it surprise you that on the call log that

24 you would call Dr. Dyce, you all would talk, then you would

25 call your attorney, and then you and Dr. Dyce would talk

1 again, would that surprise you?

2 A. No.

3 Q. And you're still testifying that you weren't discussing
4 with Dr. Dyce any legal matters at SCENT or any coordination
5 of the legal strategy?

6 A. No. I'd be calling and complaining about what went on
7 in those meetings, how my shares are refused to be given to
8 me, why, after one year for Orville Dyce, why am I not
9 getting my shares. These are reasonable responses when there
10 are two shareholders and one of them is unilaterally keeping
11 you from making the step that a previous shareholder did and
12 is not going to show you the time of day, which was Dr.
13 Puchalski, you're going to want to reach out to the other guy
14 who has that vote, who has that say.

15 Q. Are you sure you weren't telling Dr. Dyce whatever it
16 was your lawyer told you?

17 A. No, not at all.

18 Q. You would just call him back after the phone call with
19 your lawyer.

20 A. Absolutely. These were about the share issues that we
21 put in the letters and all the other subsequent information.
22 These were serious legal issues.

23 Q. And you stole hundreds of documents from SCENT, didn't
24 you, confidential documents?

25 A. No, sir. There were e-mails that I downloaded from my

1 personal e-mail, from my corporate e-mail account to my
2 personal account that I wanted to have as evidence later
3 should I be fired or should I leave the practice.

4 Q. Dr. Gunnlaugsson, you had to return hundreds of pages of
5 information that you stole from SCENT because Judge Cooper
6 ordered you to -- Judge Barber ordered you to do that May
7 24th, 2010, didn't you?

8 A. Which included an allergy manual, sir.

9 Q. If you can answer yes or no?

10 A. The answer is yes, sir. While in my time at SCENT I was
11 privy to a great deal of confidential information, some of
12 these things I produced such as allergy manual, such as
13 testing sheets, these are things that -- I was basically
14 ordered by Judge Barber to remove anything in my hands that
15 was SCENT proprietary information, and I did that.

16 MR. ELLISON: Your Honor, Mr. Sheheen during direct
17 examination objected to my talking about anything involving
18 that other litigation.

19 THE COURT: Yes.

20 MR. ELLISON: If he wants to open it up, that's okay
21 with me, but what's good for the goose is good for the
22 gander. Just like he doesn't think it's appropriate, it's
23 not appropriate for him if it's inappropriate for me.

24 MR. SHEHEEN: Your Honor, it dealt with records, that's
25 why I brought it up, and also credibility, not what was going

1 A. Once this individual was contacted and we were told that
2 there was a hard copy on a computer just sitting there in an
3 office at SCENT's office and that the file indeed existed, my
4 attorney contacted them, and within a week my buy-in folder,
5 Dr. Dyce's buy-in folder turned up. It was at another
6 hearing then about a week after that where we requested
7 another buy-in sheet for Macy Vidrine.

8 Q. I'm not interested in what anybody said. Was that
9 buy-in sheet for Dr. Vidrine, was that eventually produced?

10 A. It was.

11 MR. ELLISON: That's it, Your Honor.

12 THE COURT: Okay. That's all the redirect?

13 MR. ELLISON: That's all the redirect.

14 THE COURT: Recross.

15 MR. SHEHEEN: Nothing, Your Honor. Thank you.

16 THE COURT: Is this witness free to leave?

17 (No response.)

18 THE COURT: You're free to go.

19 All right. Call your next witness.

20 MR. CLEVELAND: Call Richard Livingston, Your Honor.

21 (Examination of Richard Livingston contained in separate
22 volume.)

23 TAMMY SZYMANSKI,

24 being first duly sworn, testified as follows:

25 THE COURT: Thank you. Your witness.

1 MR. SHEHEEN: On the basis that she's not authorized to
2 say things that I think she's going to say she said.

3 THE COURT: I think that goes to the weight and not to
4 the admissibility. She's a managing agent it appears to me.
5 Go ahead.

6 MR. SHEHEEN: I'll just have a running objection.

7 THE COURT: Yes, absolutely.

8 Q. Can you describe the conversation, please?

9 A. Sure. She said, when we terminated Dr. Dyce, and I
10 stopped her, and I said, what do you mean terminated, you
11 said that he quit, and she said we lied, he was terminated,
12 and I said why was he terminated, she said because he didn't
13 want to get on board with the building in Lugoff.

14 Q. Was there any conversation with Ms. Williams as to
15 whether he had been terminated for cause or not for cause?

16 A. No.

17 MR. ELLISON: I think that's it, Ms. Szymanski. Answer
18 any questions Mr. Sheheen may have.

19 THE COURT: Cross-examination.

20 MR. SHEHEEN: Thank you.

21 THE COURT: Yes.

22 CROSS-EXAMINATION BY MR. SHEHEEN:

23 Q. Ms. Szymanski, I'm Vincent Sheheen. We met under
24 similarly wonderful circumstances previously.

25 A. Yes.

1 Q. I hope that one day we can meet in better circumstances.
2 I'm sorry you're here. I'm sorry you were subpoenaed. I'm
3 sorry you had to come back twice.

4 A. I appreciate it.

5 Q. And I'm sorry you're here so late.

6 MR. SHEHEEN: I think this might move quicker if I can
7 get a little leeway if I can give her a copy of her
8 deposition.

9 THE COURT: Sure.

10 Q. Ms. Szymanski when we met the first time we were taking
11 your deposition, right?

12 A. Yes.

13 Q. And I'm just going to ask you some questions, and I can
14 refer you to your deposition if we need to as we go forward,
15 but do you recall I asked you if you ever had any problems
16 with your employment while you were at SCENT?

17 A. Yes.

18 Q. And you said no, correct?

19 A. Correct.

20 Q. And then we talked a little bit about why you said it
21 was a negative atmosphere.

22 A. Yes.

23 Q. And you said it was because 90 percent of the staff was
24 unhappy.

25 A. Yes.

1 Q. And you said that after Dyce left, right?

2 A. Yes, it began after Dyce left.

3 Q. And I said what do you mean, and you said, well, with
4 money being as tight as it was the first thing that happened,
5 employees lost 10 percent of their pay.

6 A. Yes.

7 Q. And then I said anything else, and you said, well, there
8 was quite a bit of turnover.

9 A. Yes.

10 Q. That's what you meant by it was a negative?

11 A. Yes.

12 Q. You didn't have any problems with Dr. Puchalski while
13 you worked there, did you?

14 A. No, I didn't.

15 MR. SHEHEEN: May I approach the witness again?

16 THE COURT: You may.

17 MR. SHEHEEN: Your Honor, there's a little small
18 notebook called trial notebook four.

19 THE COURT: Got it.

20 MR. SHEHEEN: Just a couple exhibits we'll look at.

21 Q. Ms. Szymanski, you had a problem at some point with
22 getting Dr. Dyce to sign documents, right? We talked about
23 that in your deposition.

24 A. Yes.

25 Q. And you didn't know why he wasn't signing them.

1 A. Correct.

2 Q. You have the book there, and if you would look behind
3 Tab P, you'll see an exhibit that is marked Defendant's
4 Exhibit 226.

5 A. Yes.

6 Q. And was this one of those you were trying to get the
7 malpractice insurance signed, Dr. Dyce wouldn't sign it, you
8 told Dr. Puchalski and you had been communicating with Dr.
9 Dyce about it, right?

10 A. Yes.

11 Q. And if you'll look at the next one, Q, Exhibit 92, this
12 would have been trying -- this is again the malpractice
13 insurance, having trouble with him signing that, is that
14 right?

15 A. Yes.

16 Q. And again, you didn't know why.

17 A. Correct, I didn't.

18 Q. That wasn't part of what you did.

19 A. No.

20 Q. And then if you look at the next one, 93, this is a
21 Respironics invoice, same problem, he's not signing documents
22 and returning them to you, is that right?

23 A. Correct.

24 Q. What was Respironics, was that equipment?

25 A. Yes.

1 Q. SCENT was trying to lease or purchase new equipment?

2 A. Yes.

3 Q. And then look at the next one which is exhibit -- SCENT
4 Exhibit 209.

5 A. Okay.

6 Q. This one is interesting. This is you telling Dr.
7 Puchalski and Theresa Williams that I believe that they're
8 going to be kicked out of the SCENT office space, it's 63010,
9 is that what you're telling them?

10 A. Let me read it.

11 Yes, correct.

12 Q. There was some pressure going on at the practice about
13 moving out of the lease space, right?

14 A. Yes.

15 Q. Look at the next one, under Tab T, it's SCENT Exhibit
16 Defendant's 87. Do you see that?

17 A. Yes.

18 Q. This is you to Robert Puchalski. Looks like you got a
19 bill to Pocasin Court in Amy Puchalski's name and you were
20 asking him should that be sent by SCENT or Amy and he said?

21 A. To forward it to Amy, yes.

22 Q. You were asked if there were any problems about personal
23 charges by Dr. Puchalski?

24 A. Yes.

25 Q. You said in your deposition you don't think Dr.

1 Puchalski was trying to take money from SCENT, right?

2 A. I don't think so, no.

3 Q. You testified your understanding was the CPA firm was
4 tasked with going through any expenses, right?

5 A. Yes.

6 Q. They were supposed to tell you and/or Dr. Puchalski if
7 any didn't qualify.

8 A. Yes.

9 Q. And when they said something wasn't appropriate that Dr.
10 Puchalski would say do whatever they say.

11 A. Right, yes.

12 Q. Your testimony, I believe, was that the Sheheen, Hancock
13 and Godwin firm to your experience was very responsible
14 toward that.

15 A. I believe so.

16 Q. And your working experience with them was what?

17 A. Professional and very good.

18 Q. Okay. I think your asked questions about Amy Puchalski.

19 A. I may have been.

20 Q. Just now.

21 A. Just now, I don't think so.

22 Q. Well, I'll ask you.

23 A. Okay.

24 Q. Because I swear I thought that they did, but it's late
25 in the afternoon. Was Amy Puchalski sometimes paid from

1 SCENT?

2 A. Yes.

3 Q. Okay. And was that moneys that had been earned by Dr.
4 Puchalski?

5 A. I believe so.

6 Q. You have no awareness or no knowledge that Amy Puchalski
7 was taking moneys that were not -- that her family was not
8 entitled to.

9 A. I was not aware of anything like that, no.

10 Q. You didn't think she was trying to steal money from
11 SCENT.

12 A. No.

13 Q. You didn't think she was trying to take anything she or
14 her husband were not entitled to.

15 A. No.

16 Q. Did Dr. Puchalski tell you why sometimes she would do
17 it, whether it was for convenience or --

18 A. No. It was just an assumption on my part that it was
19 for tax reasons but nobody ever said.

20 Q. You talked about when Dr. Dyce asked for these records
21 that you discussed.

22 A. Yes.

23 Q. I don't want to go into those, but I want to ask you,
24 did he ever ask you for any other human resources records,
25 financial records, bookkeeping records, anything else at any

1 other time?

2 A. No.

3 Q. Were you aware that Dr. Dyce stole some insurance
4 contracts from SCENT?

5 MR. ELLISON: Objection, Your Honor.

6 THE COURT: Sustained.

7 Q. Were you -- can I rephrase the question?

8 THE COURT: Sure.

9 Q. Were you aware that Dr. Dyce took some insurance
10 contracts from SCENT for personal use?

11 A. No.

12 Q. Were you aware that Dr. Dyce took a financial binder
13 from SCENT --

14 A. No.

15 Q. -- off the premises?

16 Beg the Court's indulgence for a minute.

17 THE COURT: Yes.

18 Q. You were aware that there was a loan from SCENT to SCENT
19 Land Holdings to help with construction of the building,
20 weren't you?

21 A. Yes.

22 Q. You were told that's what the money was for.

23 A. Yes.

24 Q. If Dr. Puchalski took a business trip, would that be
25 considered a business expense?

1 A. Yes.

2 Q. Is the same true if it was Dr. Dyce?

3 A. Yes.

4 Q. And anybody else at the practice?

5 A. Yes.

6 Q. Would they sometimes go to get I think they're called
7 CME's?

8 A. Yes.

9 Q. CME's are continuing medical education?

10 A. Yes.

11 Q. They were in some nice places sometimes, weren't they?

12 A. Oh, yes.

13 Q. Sometimes they were in I think New York.

14 A. Yes.

15 Q. And sometimes they were over seas even, does that sound
16 familiar?

17 A. That I'm not sure of but...

18 Q. Okay. You never saw Dr. Puchalski change the ledger or
19 anything like that, did you?

20 A. No.

21 Q. And Sheheen, Hancock and Godwin, did they review the
22 ledger?

23 A. Yes.

24 Q. And if they told you all something needed to be done
25 there, did you do it?

1 A. Yes.

2 Q. And did Dr. Puchalski agree to whatever they said was
3 appropriate?

4 A. Yes.

5 MR. SHEHEEN: That's all I have. Thank you, Your Honor.
6 Thank you so much for being here.

7 THE COURT: Redirect?

8 MR. ELLISON: Very little bit.

9 REDIRECT EXAMINATION BY MR. ELLISON:

10 Q. At the end of the year were there issues with regard to
11 moneys that had been paid to Dr. Puchalski that were
12 allegedly for expense reimbursements and questions as to
13 whether they were really his or whether they were SCENT's?

14 A. More in the beginning, 2008.

15 Q. At the beginning of the year?

16 A. No, in 2008, that's where most of the questions came in,
17 2009 a little bit, but once I started doing the bookkeeping
18 on a regular basis that really was very limited.

19 Q. Was there movement back and forth as to whether it was a
20 personal expense or whether it was a business expense?

21 A. Yes.

22 Q. Did you have to do that with any of the other doctors?

23 A. No.

24 MR. ELLISON: Nothing further, Your Honor.

25 THE COURT: Recross.

1 MR. SHEHEEN: Nothing further.

2 THE COURT: You're free to go. Thank you. That's it
3 for today.

4 (Trial of the case adjourned at 6:06 p.m.)

5 (Trial of the case resumed on 11/22/13 at 10:00 a.m.)

6 THE COURT: Call your next witness.

7 MS. BAKER: Your Honor, we would like to call Tammy
8 Amerson.

9 TAMMY AMERSON SMITH,
10 being first duly sworn, testified as follows:

11 CLERK OF COURT: State your full name for the record.

12 THE WITNESS: Tammy Smith.

13 DIRECT EXAMINATION BY MS. BAKER:

14 Q. Good morning, Mrs. Smith.

15 A. Good morning.

16 Q. Mrs. Smith did you recently get married?

17 A. I did, I got married on Friday.

18 Q. Congratulations.

19 THE COURT: Like last Friday?

20 THE WITNESS: Last Friday.

21 THE COURT: Like this is your first anniversary, a week?

22 THE WITNESS: Yes, a week.

23 Q. Mrs. Smith, where do you currently work?

24 A. HMA Hartsville.

25 Q. And so is Hartsville HMA your current employer?

1 insurance benefits?

2 A. I did, but I got a phone call that they were going to
3 drop my hours to about 14 hours a week and I would not be
4 able to have benefits then.

5 Q. And is that the reason why you left SCENT?

6 A. Yes, it is.

7 Q. And as far as you know, did SCENT consider you to be a
8 good employee?

9 A. Yes.

10 Q. And before you left SCENT was Dr. Dyce popular with the
11 patients?

12 A. Yes.

13 Q. Now, let's talk about your leaving SCENT and going to
14 work for HMA. You just explained to the Court that your main
15 reason was you needed health insurance, correct?

16 A. Correct.

17 Q. Now, how did you find out about a position with HMA?

18 A. After I received a phone call cutting my hours to 14
19 hours a week, I went home that night and went online and
20 Carolina Pines and the position was posted online.

21 Q. What did you find out about the position when you looked
22 online?

23 A. That there was a position opening for office coordinator
24 at Dr. Dyce's office.

25 Q. And you found that out just by the website?

1 A. Yes.

2 Q. And when did you begin to work for HMA?

3 A. The 25th of October 2011.

4 Q. And just to be clear, when you were online you applied
5 for the position with HMA, correct?

6 A. Yes, I did.

7 Q. Did Dr. Dyce recruit you?

8 A. No.

9 Q. Did you apply for a position with Dr. Dyce?

10 A. With his office, yes.

11 Q. But with HMA though, correct?

12 A. With HMA, through HMA.

13 Q. And did you speak with Dr. Dyce at all about this job
14 position?

15 A. No.

16 MS. BAKER: No further questions.

17 THE WITNESS: Thank you.

18 THE COURT: Cross-examination.

19 MR. SHEHEEN: Thank you, Your Honor.

20 CROSS-EXAMINATION BY MR. SHEHEEN:

21 Q. I'm all screwed up now because I was ready for Ms.
22 Amerson and now I've got Ms. Smith.

23 A. Yes, sir.

24 Q. How are you doing, Ms. Smith?

25 A. I'm good. How are you?

1 Q. Very good. Good to see you. Thank you for being here.
2 Happy anniversary.

3 A. Thank you.

4 Q. What a wonderful way to spend your honeymoon.

5 A. Absolutely.

6 Q. Thank you for being here. You and I met once before --
7 I believe once before. I'm Vincent Sheheen, and I represent
8 SCENT and some other defendants.

9 A. Yes.

10 Q. It's good to see you again and congratulations.

11 A. Thank you.

12 Q. I just have a few questions as well, and I appreciate
13 you being here also.

14 Ms. Smith, you remember I took your deposition?

15 A. Yes.

16 Q. And if we need to refer to it, I have a copy for you and
17 a copy for the Court as well.

18 A. Okay.

19 Q. And I'll just put it up in front of you in case we do
20 need to refer to it, okay?

21 A. Okay.

22 Q. But we may not need to.

23 MR. SHEHEEN: May I approach, Your Honor?

24 THE COURT: Of course.

25 MR. SHEHEEN: Thank you.

1 Q. Ms. Amerson, you testified -- well, let me ask you this,
2 do you work under Dr. Dyce right now, you schedule him, that
3 kind of thing?

4 A. Yes.

5 Q. And before that you worked for SCENT?

6 A. Correct.

7 Q. And you were familiar with some of their operations?

8 A. Correct.

9 Q. And you worked primarily in the Hartsville and Cheraw
10 offices?

11 A. Yes.

12 Q. There was a Hartsville office and then there was a
13 Cheraw office; Cheraw is about 20 minutes away from
14 Hartsville, is it fair to say?

15 A. About 40.

16 Q. 40. And there was kind of a link between those two
17 offices, you would help do stuff in Cheraw as well?

18 A. Yes.

19 Q. And SCENT -- we talked about this previously, but SCENT
20 marketed itself aggressively, didn't it?

21 A. Yes.

22 Q. It would do billboards, right?

23 A. Yes.

24 Q. And it aggressively marketed itself in Hartsville and
25 Cheraw, right?

1 A. Correct.

2 Q. In fact, I think we talked about that they would
3 actually sponsor lunches for referring physicians in those
4 areas.

5 A. Yes.

6 Q. And the goal there was to get those physicians to refer
7 to the doctors of SCENT, right?

8 A. Correct.

9 Q. And at some point a really nice building was built in
10 Hartsville for SCENT, is that right?

11 A. Yes.

12 Q. And you and I discussed that, and Dr. Dyce was
13 supportive of building that building in Hartsville, right?

14 A. Yes.

15 Q. And new equipment was purchased for that building,
16 right, like CT scanners and things like that?

17 A. Yes.

18 Q. If you'll just let me finish asking the question, you're
19 doing fine, it's just that she's writing it down and
20 sometimes it's hard.

21 A. Okay.

22 Q. And to the best of your knowledge the patient load there
23 at that time justified purchasing that equipment, right?

24 A. Yes.

25 Q. And I believe you testified that you had a good

1 relationship with Dr. Puchalski as well?

2 A. I did.

3 Q. And I think we talked a little bit about the fact that
4 there was a nurse practitioner named Stephanie Tetterton?

5 A. Yes.

6 Q. You recall Stephanie?

7 A. Yes.

8 Q. She worked in the Hartsville office sometimes as well?

9 A. Yes.

10 Q. And she would do procedures and see patients, that kind
11 of thing, is that right?

12 A. Yes.

13 Q. And Dr. Dyce was -- now I'm still at the time that he
14 was at SCENT. He was popular in the SCENT Hartsville office,
15 right?

16 A. Yes.

17 Q. And Stephanie was popular as well with patients?

18 A. Yes.

19 Q. And now at your -- where you work now and working with
20 Dr. Dyce, he sees many of the patients that were formerly
21 seen at SCENT, right?

22 A. We do see, yes, a lot of Hartsville SCENT patients.

23 MR. SHEHEEN: Beg the Court's indulgence one minute,
24 please.

25 THE COURT: Certainly.

1 Q. Ms. Smith, to the best of your knowledge, did Dr.
2 Puchalski manage the SCENT practice?

3 A. Yes.

4 Q. The business side of the practice, he handled that?

5 A. Yes.

6 Q. And would he come to Hartsville a day or half a day --
7 prior to Dr. Dyce leaving would he come to Hartsville a day
8 or a half a day or something like that to also work?

9 A. Yes.

10 Q. Were you able to get more hours when you went to work at
11 HMA?

12 A. Yes, yes, absolutely.

13 MR. SHEHEEN: I think that's all the questions I have,
14 Your Honor. Thank you.

15 THE COURT: All right. Redirect.

16 MS. BAKER: We don't have any further questions, Your
17 Honor. Ms. Smith is under a trial subpoena.

18 THE COURT: Is she free to leave?

19 MS. BAKER: She's free to leave from our end.

20 THE COURT: Any objection?

21 MR. SHEHEEN: No, ma'am.

22 THE COURT: Thank you. Call your next witness, please.

23 MR. CLEVELAND: Your Honor, we would like to publish a
24 few of the excerpts of the deposition of Lance Jones.

25 THE COURT: Lance Jones?

1 MR. CLEVELAND: Yes, Your Honor. He was the head of HMA
2 and now he lives in Tennessee or someplace.

3 THE COURT: Sure.

4 MR. CLEVELAND: We have coordinated with Mr. Wright. We
5 designated with him what we wanted to read, so we're just
6 going to read in order.

7 THE COURT: That's great.

8 MS. BAKER: Your Honor, we're going to mark as
9 Plaintiff's 299 the plaintiff's designations and the
10 defendant's designations as one.

11 THE COURT: Great.

12 (Plaintiff's Exhibit 299 marked for identification.)

13 MS. BAKER: May it please the Court.

14 THE COURT: Yes, ma'am.

15 LANCE JONES,
16 deposition testimony read as follows:

17 Q. Mr. Jones, you've been sworn, could you state your name
18 and speak loudly for the record?

19 MR. CLEVELAND: I apologize. I thought we were starting
20 on page 7 at line 19.

21 MS. BAKER: Page 4, line 20 through 23.

22 MR. CLEVELAND: Yes, indeed.

23 A. Yes, Lance Warren Jones.

24 Q. Mr. Jones, where do you currently work?

25 A. Knoxville, Tennessee.

1 Q. And who do you work for?

2 A. Health Management.

3 Q. And how long have you worked for Health Management?

4 A. Coming up, four and a half years.

5 Q. And what is your position?

6 A. I'm CEO of the Turkey Creek Medical Center.

7 Q. And what other jobs have you held for Health Management?

8 A. CEO of Carolina Pines.

9 Q. Okay. And I think I call Health Management HMA. Is
10 that the same entity?

11 A. Yes, it is.

12 Q. Okay. So if I refer to it as HMA you'll know what I'm
13 talking about?

14 A. Yes.

15 Q. Great. You mentioned that you worked, I believe you
16 said as CEO for Carolina Pines in Hartsville, is that right?

17 A. Yup, that's correct.

18 Q. And is that a hospital that is owned or affiliated with
19 HMA?

20 A. Yes.

21 Q. What is the exact relationship?

22 A. Health Management owns that facility.

23 Q. Okay. And at some point -- oh, well let me ask you
24 this, how long were you the CEO at Carolina Pines?

25 A. I was there for approximately two years.

1 Q. Okay. And during that time did you interact at all with
2 South Carolina ENT, also known as SCENT?

3 A. Yes.

4 Q. And did you interact with Dr. Puchalski? Do you know
5 who I'm talking to -- talking about?

6 A. Yes.

7 Q. And did you interact with Dr. Dyce?

8 A. Yes.

9 Q. Okay. Now, at some point Dr. Dyce no longer worked with
10 SCENT as we've discussed and at some point he went to work
11 with HMA, is that right?

12 A. Right.

13 Q. Sure. I'll make it a little more specific, I left it
14 general just in case you wanted to kind of talk about it
15 generally, but when did you -- were you involved in that
16 decision to employ Mr. -- Dr. Dyce?

17 A. Yes, I was.

18 Q. All right. When did that -- when did you first discuss
19 employing Dr. Dyce?

20 A. Sort of recall that timeframe a couple of years ago.
21 Dr. Dyce had left his employment with the SCENT group, and I
22 was made aware through members of the medical staff that he
23 was exploring opportunities outside of the market. The
24 medical staff there were adamant that they wanted to retain
25 ENT services from someone that lived locally, so I would

1 anticipate it was in the -- at some point in the summer of
2 the 2000 -- what would have been in 2010.

3 Q. Okay. And who was it that first approached you about
4 it. I'm sorry?

5 A. Dr. Areephanthu.

6 Q. Okay. And do you recall -- tell me what Dr. Areephanthu
7 told you or said to you.

8 A. I -- I don't recall the exact conversation but to the
9 effect that Orville was exploring leaving the market. He's
10 exploring opportunities in the -- in the -- in the northeast
11 there, the Washington through Boston market and that we want
12 to hold -- we want to keep him in the market.

13 Q. And what kind of doctor was Dr. Aree --

14 A. Areephanthu.

15 Q. Yes, sir.

16 A. Yes, he was a primary care physician.

17 Q. Okay. And you mentioned, I believe, that he said that
18 he wanted to have somebody live in the area, stay in the area
19 or something like that?

20 A. That was something important to a great number of the
21 physicians with the medical group there. They all felt that
22 physicians residing locally provided them with coverage and
23 support that was stronger than physicians that were
24 commuting.

25 Q. All right. And when you say the medical group, was that

1 an actual entity?

2 A. The Hartsville Medical Group is an entity of employed
3 physicians, that's correct.

4 Q. And they're employed by whom?

5 A. There are a subsidiary there of Health Management.

6 Q. Okay. So Health Management owns the company that
7 employees those physicians?

8 A. They do.

9 Q. Okay. All right. Tell me when you first spoke to Dr.
10 Dyce -- approximately when you first spoke to Dr. Dyce about
11 coming to work at HMA.

12 A. I would say it was probably mid summer, late summer
13 timeframe when he first indicated that he had an interest in
14 exploring an opportunity with Health Management.

15 Q. Did he come to you?

16 A. Yes.

17 Q. Okay. And just did he come to your office?

18 A. I don't recall where we met.

19 Q. Okay. And did he tell you anything about SCENT or his
20 relationship with SCENT at that point?

21 A. I -- I don't recall the exact conversation.

22 Q. Okay. Well, what do you recall if anything?

23 A. I -- I was aware that he had left the SCENT practice but
24 that's -- that's about the -- probably the extent of my
25 recollection.

1 Q. Okay. Did you ever talk with him about SCENT or his
2 experience at SCENT?

3 A. No, I -- I really didn't.

4 Q. Okay. Did he ever talk to you, did he ever say anything
5 to you about it?

6 A. Oh, he was always very respectful not to talk about the
7 SCENT practice.

8 Q. Do you recognize this document and can you turn to the
9 back it will help you?

10 A. Yes, I do recognize it.

11 Q. Okay. Is this an agreement that you entered in -- when
12 I say you I mean HMA -- entered into with Orville Dyce?

13 A. That's correct.

14 Q. Okay. Is that standard in your -- in your industry that
15 you include covenants not to compete with doctors that --
16 that are hired by HMA?

17 A. It -- this was the standard template that the home
18 office legal counsel provided for employment contracts.

19 Q. Okay. And to your knowledge was this provision in
20 those -- in that standard template?

21 A. Yes, this is the standard template, Mr. Sheheen.

22 Q. Okay. I see in there it says you -- and I'll just read
23 it to save some time. It says you won't practice your
24 medical specialty or otherwise compete with the practice's
25 operation directly or indirectly within a radius of 30 miles

1 of the practice locations where you worked for a period of 12
2 months after this agreement expires or is terminated, do you
3 see that?

4 A. Yes, yes, sir.

5 Q. Do you believe that a 30-mile restriction was
6 reasonable?

7 A. Again, that was something that our -- working with our
8 home office that the physician practice group would typically
9 put together.

10 Q. Okay. Let's see who signed -- is it -- whose signature
11 is at the back of this? Is that yours or somebody else's?
12 It says president and chief executive officer.

13 A. Yes, that -- that is mine.

14 Q. Okay. So back to page 6.7, the 30-mile radius, is that
15 what the company believed was reasonable?

16 A. Yes. Typically what we looked at there was the Florence
17 marketplace as a competitive element so that's -- that's
18 correct to your question.

19 Q. Okay. And then it said a period of 12 months. Did the
20 company believe that 12 months was reasonable?

21 A. The other documents that I have seen for other
22 employment relationships also had 12 months as a restricted
23 time.

24 Q. And did -- is that -- did the company put that in there
25 because the company believes those are reasonable terms?

1 A. Yes.

2 Q. Okay. I want you to turn to page 44.

3 A. That's your Bates stamp 44?

4 Q. Yes, sir, I'm sorry.

5 A. Okay. I'm there.

6 Q. Okay. There's a provision called 6.2, do you see that,
7 called confidentiality?

8 A. Yes.

9 Q. Why is confidentiality important to the company in these
10 employment agreements?

11 A. It -- I'm -- I'm not an attorney, but in regards to all
12 items being confidential, which discussions that we have and
13 are protected and exclusive with individual physicians as we
14 look to employ them it -- it could create quite a degree of
15 unrest amongst other members of the medical staff if
16 physicians are talking about their contracts publicly,
17 particularly in employment relationships.

18 Q. Okay. And that provision also says -- it also says in
19 the second sentence, moreover, unless otherwise permitted by
20 law, neither you, that would be the employee, nor we will use
21 or disclose certain confidentiality -- confidentiality,
22 proprietary, nonpublic, financial and other information
23 concerning patients, so was there other information that's
24 supposed to be maintained confidential that a -- that a
25 doctor that works for you is exposed to?

1 MR. CLEVELAND: Would you tell me -- I've got it
2 stopping there and my not responding.

3 MS. BAKER: That's exactly right.

4 MR. CLEVELAND: Okay.
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1 Q. But tell me how you knew that Dr. Dyce had a covenant
2 not to compete with SCENT.

3 A. Dr. Puchalski had indicated that.

4 Q. Okay. And did he indicate that to you directly?

5 A. Oh, from Dr. Puchalski, yes.

6 Q. Okay. Tell me about that conversation.

7 A. I -- I have to -- I mean, I -- I remember Dr. Puchalski
8 indicating that there was a covenant in his agreement with
9 Dr. Dyce and my response that he would have to work that out
10 with Dr. Dyce.

11 Q. Okay. Were you involved in --

12 A. No.

13 Q. Okay. Did you discuss the covenant with Dr. Dyce?

14 A. No.

15 Q. Okay. Did Dr. Dyce ask HMA for protection for any legal
16 fees he might incur if the covenant with SCENT was enforced?

17 A. Dr. Dyce had indicated that he was anticipating legal
18 expenses, correct.

19 Q. Did he ask HMA to help him cover those legal expenses?

20 A. What was -- what was discussed and when we looked at the
21 offer you have an outline when typically recruiting a
22 physician to the market versus retaining someone that you
23 would have various -- part of our recruitment package would
24 include fees such as sign-on bonuses, student loan
25 repayments, relocation, recruiters' fees, etc. When the

1 agreement was put together, there was only sign-on bonuses
2 and/or commencement bonuses that were offered, and Dr. Dyce
3 had indicated that he anticipated some legal expenses, and
4 this was part of, when we looked at a total compensation
5 package that was put together -- that was put together --
6 that the home office had gone ahead and approved.

7 Q. All right. So let me understand that. Are you saying
8 that because Dr. Dyce said that he anticipated legal expenses
9 that that went into figuring out the amount that he would be
10 paid based on the different portions you just discussed?

11 A. Yes. In essence we as a company would have a -- a
12 portion of dollars that would be allocated to the court of
13 recruiting, and depending on how a particular physician
14 needed those moneys apportioned, and we would work with the
15 physician to try and meet his or her needs.

16 Q. All right. And in this case specifically with Dr. Dyce
17 was that a consideration, the fact that he was -- told you
18 that he may face legal fees?

19 A. Yes.

20 Q. Okay.

21 A. We had no recruiter's fee and no relocation that would
22 be associated with this, so the company certainly felt
23 comfortable heading down that track in regards to -- in
24 regards to use the dollars as commitment bonuses or a sign-on
25 bonus.

1 Q. Okay. So in other words the commitment bonus or the
2 sign-on bonus was in part to help defray his legal fees?

3 A. Well, those are bonuses that are for his discretion for
4 him to use how he saw appropriate.

5 Q. Okay. But you -- you took into consideration -- the
6 company took into consideration the fact that he said he was
7 likely to face legal fees?

8 A. Yes.

9 Q. Okay. Did he tell you if he had been offered other jobs
10 outside of South Carolina during this time?

11 A. I -- I don't recall Dr. Dyce telling me personally. I
12 do recall, again, conversations from Dr. Areephanthu that Dr.
13 Dyce was in discussions -- negotiations with other entities
14 outside the market.

15 Q. Okay. What would you expect they would take into
16 consideration with a doctor who works for these people?

17 A. Yes, yes, I would.

18 Q. Okay. Were you aware that at least two of the employees
19 that worked with Dr. Dyce had formally worked with SCENT?

20 A. No.

21 Q. Were you aware that scores of the patients that were
22 seen by Dr. Dyce once he came to work for HMA had formerly
23 been patients of SCENT?

24 A. I wouldn't have any idea where the patients had come
25 from.

1 Q. Okay. Would that surprise you?

2 A. I don't know. It's -- it's not typically something that
3 the CEO would find himself involved in or herself involved
4 in, the terms of where the patients had come from.

5 Q. What made hiring Dr. Dyce attractive to HMA?

6 A. They -- the medical staff felt strongly that retaining a
7 known entity in the market was important, and Dr. Dyce
8 resided in the Hartsville marketplace, and from a hospital
9 perspective there was certainly -- made to ensure that we had
10 stability obviously the -- the concerns as to what was
11 occurring in the market was instability as well and -- and
12 ultimately our obligation to provide services 24/7 to the
13 community.

14 Q. Is that net revenue number in your -- let me rephrase
15 the question. Is that net revenue number, in your experience
16 recruiting physicians, a high number, a low number or an
17 average number for a new physician coming into the --

18 A. If -- it really depends on the specialty. For a
19 neurosurgeon or an orthopedist not necessarily but certainly
20 in comparison to a family practitioner, yes.

21 Q. Do you believe that Dr. Dyce's relationships he had
22 built in the Hartsville area in previous years benefited him
23 when he went to work for HMA?

24 A. Yes.

25 Q. Did you know that SCENT had marketed Dr. Dyce in the

1 Hartsville area and in the Cheraw area for a number of years
2 prior to him working for HMA?

3 A. No, I wasn't aware of that.

4 Q. Did you know that SCENT paid for his certifications in
5 sleep and allergy?

6 A. No.

7 Q. Did he provide you with any copies of insurance
8 contracts that he took from SCENT?

9 A. No.

10 Q. Did he tell you he took some insurance contracts from
11 SCENT?

12 A. No.

13 Q. Did Dr. Dyce ever talk to you about the potential --
14 about potentially going to work with Dr. Gunnlaugsson?

15 A. No, not to me.

16 Q. Yes, sir. Thank you. Did you talk to any other doctors
17 about Dr. Dyce?

18 A. Two, two other physicians, Dr. Chapman and Dr. Harless
19 had had conversations with me in regards to retaining Orville
20 in the market.

21 Q. And was it -- would this have been during the time that
22 Dr. Dyce had left SCENT but not gone to work for HMA yet?

23 A. Yes.

24 Q. The first thing I want to get straight in my mind is the
25 timing of Dr. Dyce's going to work for the hospital in

1 Hartsville. If I understand you correctly, you said that Dr.
2 Dyce had already left the hospital, is that right -- not the
3 hospital, had already left SCENT, is that right?

4 A. Right.

5 Q. And then you were approached by members of the medical
6 staff at the hospital about the possibility of or really
7 their insistence that you try to retain Dr. Dyce in the
8 Hartsville market, is that right?

9 A. Dr. Areephanthu was the first one to approach me.

10 Q. But there are two other doctors whose names you gave as
11 well you also indicated had approached you and telling you
12 basically that they felt it was important to try to keep Dr.
13 Dyce from going to the northeast and convince him to stay in
14 the Hartsville market.

15 A. That's right, Dr. Harless and Dr. Chapman.

16 Q. Okay. So it's the -- it was the medical staff not Dr.
17 Dyce who approached you about work -- Dr. Dyce working for
18 the hospital after he had left SCENT, is that right?

19 A. Correct.

20 Q. Okay. And I -- as I recall, you said that this occurred
21 in the mid to late summer of 2010, is that right?

22 A. That would be right.

23 Q. All right. The last sentence says that the noncompete
24 would not be enforceable in the event that a physician was
25 terminated without cause, is that right?

1 A. Right.

2 Q. So if the hospital had terminated Dr. Dyce without
3 cause, there would be no noncompete, is that right?

4 A. That's correct.

5 Q. All right. Now, Mr. Sheheen asked you a couple of
6 questions about whether the hospital enforced noncompetes,
7 didn't enforce noncompetes and that sort of thing. Are you
8 familiar with a Dr. Long?

9 A. Dr. Long, yes, that name does ring a bell, yes.

10 Q. Okay. And are you familiar with a Dr. Ropp?

11 A. Yes.

12 Q. All right. Now, those are two physicians who left the
13 hospital, correct?

14 A. They did.

15 Q. And they actually went into practice within 30 miles of
16 the hospital's location, did they not?

17 A. They did.

18 Q. Okay. I -- I understand, and it's, as I understand --
19 it's been a little while but -- and I -- I don't want to get
20 into what Dr. Long and Dr. Ropp left, to get to why Dr. Long
21 and Dr. Ropp left, that sort of thing, but the bottom line is
22 that the hospital chose not to try to enforce the noncompete
23 with those two physicians as well as with the other
24 physicians; is that correct?

25 A. I can't tell you in terms of other physicians but in

1 terms of those two physicians, yes, that's correct.

2 Q. Okay. Now let's look at the noncompete in a little bit
3 more detail. Do you see where it talks about that, it talks
4 about competition, and hold on for a second, in the very
5 first line it talks about this is the -- let me back up.
6 This is the noncompete that you are most familiar with, is it
7 not?

8 A. That's right.

9 Q. And you see on the first line where it says that the
10 noncompete prohibits the practicing of your medical
11 specialty, do you see that?

12 A. Yes.

13 Q. Do you recall ever seeing a noncompete that prohibited a
14 physician from practicing any medicine whatsoever regardless
15 of specialty?

16 A. No. This is the -- again, this is the standard template
17 that our attorneys provide us from the home office.

18 Q. Okay. So you've never seen that you can recall another
19 noncompete which says that a physician can't practice any
20 form of medicine, have you?

21 A. No, no, I have not.

22 MS. BAKER: I'm going to start on page 63, the bottom,
23 with the beginning of the question.

24 Q. And Dr. Dyce is looking at other -- you knew that Dr.
25 Dyce was looking at other locations in the northeast, right?

1 A. Right.

2 Q. And you were negotiating to try to retain Dr. Dyce in
3 the market in Hartsville, right?

4 A. I -- correct. After he approached me of his interest to
5 stay in the market, yes.

6 Q. And that approach took place after you had been
7 approached by the members of your medical staff, correct?

8 A. That's correct.

9 Q. All right. So what Exhibit 4 really represents in many
10 respects is, to use what might not be a particularly good
11 word, it's a negotiation?

12 A. Yes.

13 Q. And you're negotiating for what the hospital wants to do
14 in order to retain the physician that's been requested by
15 your medical staff from the hospital's standpoint, right?

16 A. Correct.

17 Q. Lance, Vincent Sheheen, one last clarifying question,
18 you were asked by Mr. Ellison about the doctors that
19 approached you about retaining Dr. Dyce, but I want to ask
20 you so I understand did -- when you first had discussions
21 with Dr. Dyce personally about him coming to work for HMA,
22 did he initiate the conversation or did you?

23 A. He did.

24 Q. Okay. Thank you. All right. And just -- just recross,
25 I want to get the timing right, Dr. Dyce had left SCENT in

1 May 2010, is that your understanding, Lance?

2 A. Yes.

3 Q. And then physicians on staff, at least three of whom
4 we've named, approached you about hiring Dr. Dyce, is that
5 right?

6 A. Yes.

7 MS. BAKER: Your Honor, that completes designations from
8 Lance Jones's deposition.

9 THE COURT: Thank you so much. Excellent job. Call
10 your next witness.

11 MR. CLEVELAND: Your Honor, the plaintiff rests.

12 THE COURT: Very well. All right. Do you all want to
13 make motions, or are you ready to rock and roll?

14 MR. SHEHEEN: Your Honor, I'd be happy to make motions.

15 THE COURT: Okay.

16 MR. SHEHEEN: Your Honor, first we'd make a directed
17 verdict on all cause of actions in both cases. And then I
18 want to talk specifically about some of the causes if you'll
19 allow me.

20 THE COURT: Okay.

21 MR. SHEHEEN: Your Honor, there were multiple causes of
22 action. These two cases have been combined together,
23 obviously. There's multiple causes of action in the Dyce
24 case, so I'll address those first, and the ones I want to
25 specifically talk about are, number one, the accounting

1 requests. The testimony from Dr. Dyce yesterday, I believe,
2 or the day before, you'll recall there was a little sheet on
3 the board and the Court went through what they got. My
4 recollection of that, and the Court will of course use her
5 recollection, was that of those items -- and they were quite
6 lengthy, the last one was like everything under the -- in the
7 sink and under the moon -- had been provided. There was some
8 reservation about a few credit card receipts or something
9 like that, but that was it. You'll recall the testimony of
10 the accountant who was hired by the plaintiffs, and I asked
11 him, did you have as much access as you needed in the CPA's
12 office. He said yes. He said he spent, I believe, a whole
13 solid day. I said did you actually go to the premises of the
14 corporate office and were records made available to you, and
15 he said yes. We talked about that. And, you know, the irony
16 of that, Judge, which I have to point out is that is exactly
17 what had been offered to Dr. Dyce in the fall and the winter
18 of 2009 and 2010 was to come on the premises, go to the
19 accounting office and look through everything. If you'll
20 recall, I asked Dr. Dyce that question, and he said it wasn't
21 convenient for my -- I think he said lawyer, I don't recall
22 exactly what he said, but he said it wasn't convenient,
23 that's why he didn't take it up. That's what was offered
24 then. That's what has been done. SCENT has provided all of
25 the records, the corporate records that have been requested,

1 the financial records, and that is what an accounting is, an
2 accounting of the records to the -- so we'd ask for a
3 directed verdict on that issue.

4 Your Honor, there was a claim for, there's a claim
5 against Dr. Puchalski individually, and we would ask for a
6 directed verdict on that. The evidence put forth in the case
7 of the plaintiff has always been, and you've heard it, is
8 that he's been acting in his capacity as the managing
9 shareholder or the president of SCENT. They have not
10 presented any evidence -- any evidence related to Dr. Dyce's
11 buyout when he left, any of those things, where he wasn't
12 acting in that capacity. Furthermore, there's an indemnity
13 provision in the articles of incorporation that Your Honor's
14 aware of. Furthermore, it's clear that Dr. Puchalski, in his
15 capacity as managing shareholder of SCENT he was relying on
16 counsel as they moved forward, and Your Honor's familiar with
17 the business judgment rule that gives essentially a
18 heightened standard for them to be able to move past him in
19 that capacity as the manager of SCENT. So we ask for him
20 individually to be -- a directed verdict on him individually.

21 Your Honor, the issues I have to take them up because
22 there are so many of them. There has been a claim -- well,
23 there hasn't been a claim, and that's what's a little bit
24 difficult here -- relating to the 2007 shareholder agreement.
25 There's been some evidence put in, but there's never been a

1 claim that he's owed moneys under that. There were some
2 calculations done by the accountant, but if you look in the
3 complaint, you'll see that there's a breach of the 2008
4 shareholders agreement claim, there's a breach of contract
5 covered by fraudulent act claim that refers to the 2008
6 shareholders agreement, but there's never been a claim and
7 there was not an actual claim made by Dr. Dyce on the stand
8 for that. Furthermore, the controlling document has been
9 agreed from the stand on the shareholder issue to be the
10 document that was executed in 2008, and within that document
11 there is specific language that says that it supersedes and
12 replaces any prior agreements, etc., etc. And we discussed
13 that briefly yesterday, and I pointed Your Honor to that
14 section, which I can do again, but I know you've kept up with
15 it. So for those two grounds and primarily the ground that
16 the 2008 agreement is the controlling agreement and
17 superseded everything clearly, we would ask a directed
18 verdict on any claims from the 2007 that weren't alleged in
19 the complaint but that we've heard some discussion about
20 during the trial.

21 Your Honor, there is also a claim for breach of contract
22 of the company by a fraudulent act. There's been no
23 fraudulent acts that I have -- there's been no testimony
24 about fraudulent acts. There's a claim for unpaid wages
25 statute. The only thing I've heard from the stand -- I

1 shouldn't say I. The only thing the Court has heard on
2 testimony has really been issues relating to shareholder
3 moneys, not wages, and we know that Dr. Dyce was a
4 shareholder at the time, so that claim of course we're asking
5 for a directed verdict on as well. There was a claim for
6 damages pursuant to South Carolina Code 33-18-410 A9, and I'm
7 happy to hand to the Court a copy of the complaint if you
8 don't have it. I don't know if you have it or not. I don't
9 believe there's been any evidence presented or any discussion
10 of that, and we should get a directed verdict on that.

11 There's been -- there is an odd claim in their complaint
12 for constructive trust. I believe this relates generally to
13 Amy Puchalski, so we're moving that Amy Puchalski be
14 dismissed as an individual defendant, number one. She should
15 have never been joined in the case. The only testimony has
16 been she was receiving funds that were allocated to Bob
17 Puchalski. That's it. If you look at the expert's report,
18 he's got this list of Amy Puchalski moneys, and then you'll
19 see that that's actually, even in his report, charged up to
20 Dr. Puchalski. Amy Puchalski does not need to be an
21 individual defendant in this case. There's been no
22 allegation of any wrongdoing on her behalf. There's been no
23 evidence of any wrongdoing on her behalf. She simply got
24 funds that were due her husband, and there is nothing wrong
25 with that, Your Honor. So we would ask the constructive

1 trust claim needs to be dismissed as well as Amy Puchalski
2 individually.

3 There's also a conversion claim, and Your Honor's well
4 aware of the elements of conversion. They haven't been
5 proved and they haven't been presented as fact. Your Honor,
6 we're also asking for a directed verdict on the claim for the
7 post-termination profits that has been made. It's odd --
8 it's like a double recovery they're seeking. I'm sure the
9 Court caught that in the expert's testimony. They want to be
10 paid out as of May -- of his termination date, and yet they
11 want to also get profits after that, so they're asking for a
12 double recovery that doesn't make any sense. And, secondly,
13 under the contract he's clearly no longer a shareholder once
14 he is terminated, and we talked about the portions of that
15 previously. The real issue before the Court is what was he
16 owed when he left and is there an offset that applies that
17 would recover that. That's the issue relating to the
18 shareholder status, so we're asking for directed verdict on
19 post-termination profits if the Court follows what I'm
20 saying.

21 THE COURT: Mm-hmm.

22 MR. SHEHEEN: And, Your Honor, the last specific thing I
23 want to talk about -- and again, I'm asking for a directed
24 verdict on all causes of action, just to protect the
25 record -- is the position we're in with SCENT Land, and it is

1 interesting. The Court was not presented with any evidence
2 in the plaintiff's case. Let me backtrack just a little bit.
3 There were two things I asked for in the complaint of SCENT
4 Land, for judicial dissolution and judicial supervision of
5 the winding up of SCENT Land Holdings, okay.

6 THE COURT: It's my understanding that the dissolution
7 has been ordered by summary judgment, yes?

8 MR. SHEHEEN: That's correct.

9 THE COURT: Okay. What happened with the judicial
10 supervision?

11 MR. SHEHEEN: It appears to have been abandoned because
12 there was nothing put before the Court. There are specific
13 criteria.

14 THE COURT: Is it contained in the order? Is it Judge
15 Benjamin?

16 MR. SHEHEEN: Judge Benjamin. It was a very limited
17 ruling. It was a Form 4 and it -- I'm happy to hand it up.
18 Would the Court like a copy of it?

19 THE COURT: You can read it to me.

20 MR. SHEHEEN: Okay. I'll read it. Your Honor, just for
21 a little bit of background, there was an allegation under a
22 particular statute that we owed -- that we sent, SCENT, owed
23 a purchase agreement to her upon her departure, okay. That's
24 what the grounds were. And our argument was we didn't for a
25 variety of reasons that were briefed. Judge Benjamin granted

1 summary judgment. Plaintiffs' motion for summary judgement
2 against SCENT Land seeking dissolution of the company is
3 granted solely on the grounds that the company failed to
4 deliver her a purchase agreement as required by South
5 Carolina Code Section 33-44-702. Okay. That's all the order
6 said. So the second claim in here was for judicial
7 supervision, and to do that even under the complaint it
8 quotes the code section. It says that if there's an
9 application and if there is good cause made and shown to the
10 Court, and then there's other things that are asked for.
11 They're asking for a receiver to be appointed. That you
12 determine who the bona fide creditors of SCENT Land Holding
13 are and their respective rights. Other things within there.
14 There was no testimony put before you, no evidence put before
15 you, there's no mention of the claim for the supervision, for
16 having judicial supervision of the winding up of SCENT Land
17 Holdings, which is a separate request, and so we're asking
18 for a directed verdict on that. And that's it, and I'm sorry
19 to have taken so much time.

20 THE COURT: Let me ask you this question, let's talk
21 about the relationship between the 2007 and the 2008
22 occurrences and agreements.

23 MR. SHEHEEN: Okay.

24 THE COURT: Because that's sort of one of the areas, and
25 of course I'm going to want to hear from the plaintiffs about

1 this as well.

2 MR. SHEHEEN: Sure.

3 THE COURT: Because there were certain activities that
4 were put in place in '07, inferentially, pursuant to the '07
5 agreement which would be the crediting of the monthly sweeps
6 and the biweekly moneys, the 21,000 and then those moneys.
7 How does the defendant characterize that activity in '07?

8 MR. SHEHEEN: Your Honor --

9 THE COURT: Two things -- and let me just -- here's the
10 rest of the sausage. I gave you three-quarters of the
11 sausage. Let me give you the rest of it because there are
12 two things that go through my head about that. The first
13 thing is that there wasn't a K-1 issued.

14 MR. SHEHEEN: No.

15 THE COURT: And I don't understand that. I don't
16 understand that. And, secondly, I don't understand -- and so
17 at that point where my mind goes is that, well, then there's
18 just an issue about whether or not that amount of money was
19 in fact to be credited as a buy-in provision because there
20 was no K-1 issued.

21 MR. SHEHEEN: Right.

22 THE COURT: But what flies in the face of that is this
23 business about, well, I got taxed on your contributions in
24 2007, and therefore you're responsible for the taxable
25 consequence to me because I got taxed, and you've got to pay

1 my income, you've got to do that, and that absolutely flies
2 in the face of that -- of those moneys not being a buy-in, as
3 I see it, and those two events fly in the face of the 2008
4 agreement, and it's really those events that I'm trying to
5 put into context. I'm trying to put that into legal context,
6 and I guess it's there that I'm having difficulty, what is
7 that, because I've got a 2008 agreement that abrogates 2007
8 completely.

9 MR. SHEHEEN: Makes it pretty easy.

10 THE COURT: However, 2007 happened. It happened. And
11 what do I do with that? I mean, I've got -- it happened. It
12 happened in two ways. The moneys were -- my task would be a
13 whole heck of a lot easier if, in fact, there was just 2008,
14 no K-1, and Dr. Puchalski paid income tax, end of discussion.
15 My problem is if, in fact, Dr. Dyce paid or reimbursed an
16 income tax event for Dr. Puchalski as a result of Dr.
17 Puchalski's receipt of the biweekly payments of \$21,000 and
18 the -- I love that term monthly sweeps. I don't know, it
19 sounds like Publisher's Clearinghouse or something. I love
20 that term.

21 MR. SHEHEEN: Kind of was.

22 THE COURT: But that fact, if in fact it occurred, and
23 it seems to me everybody basically agrees that that occurred,
24 there can be some -- you had wonderful discussions about what
25 that was mathematically, but if it occurred, that means to me

1 that 2007 has to be explained in some way because, I mean,
2 why would -- I mean, it just has to be explained in some way.
3 So it's those transactions that really, I think, have got to
4 be dealt with by the Court, and it may just be at this point
5 all that needs to be done is that the motions be denied at
6 this moment and I just keep trucking because I don't know
7 that I need an explanation or even want an explanation at
8 this point, to be honest with you.

9 In terms of the accounting, yes, they got it, but I
10 don't know what else arises out of it. I mean, it may be
11 that, yes, they were entitled to it and, guess what, they got
12 it, end of discussion. So there's no question in my mind but
13 that they were entitled to it, that the doctor was entitled
14 to an accounting because there's no question but that at some
15 point he became a shareholder and he was entitled to an
16 accounting. Whether or not he received it is a horse of a
17 different color, and I'm not prepared to handle that until
18 the end of the case. So with regards to the accounting at
19 this point I would deny it just because he was entitled to it
20 and he may not have received it all. Now, so that's the
21 first one.

22 The second one, the second cause of action would be the
23 claim against Dr. Puchalski individually, and I'm going to
24 hear from them about that in just a second. And with regards
25 to the unpaid wages, I want to hear obviously from the

1 plaintiff about that because depending on how 2007 gets
2 handled, then I have a sneaking suspicion I'm going to hear
3 from them that that's where the claim for unpaid wages comes
4 in is 2007 as well as the constructive trust and the
5 conversion with regards to '07, but I'm going to hear from
6 them about that in just a moment. So let me hear from them
7 about it and then I'll make a determination.

8 MR. SHEHEEN: Thank you, Your Honor.

9 MR. CLEVELAND: I can very quickly respond, Your Honor.
10 You're talking about the wage payment?

11 THE COURT: All of it. The accounting don't worry
12 about.

13 MR. CLEVELAND: Let me address the wage claim because
14 that's the easy one.

15 THE COURT: Yes.

16 MR. CLEVELAND: Our accountants discovered that Dr. Dyce
17 had not received some call pay that he was entitled to. Once
18 we were able to get the subsequent records within the last --
19 very recently discovered that that was caught up, and so that
20 claim, the wage payment claim should be dismissed. We'll
21 withdraw it.

22 THE COURT: Okay. Got it.

23 MR. CLEVELAND: What can I address on the other issues
24 that would be helpful?

25 THE COURT: You understand I think from my conversation,

1 it seems to me that conversion and constructive trust, that
2 those causes of action are really caught up in what happened
3 in '07 as opposed to this contract in '08, yes?

4 MR. CLEVELAND: I'm not sure. I think that under the
5 '07 and/or the '08 contract they were both equal
6 shareholders, and our claim is largely, other than the
7 redemption part of the case, is that as coequal shareholders
8 under the law they are required to be compensated equal
9 distributions and they weren't.

10 THE COURT: Except '08 changes the date. I mean, '08
11 changes -- stands the world on its head. That's the '07.
12 '07 is pretty straightforward. '05 is the most
13 straightforward. Then '07 is straightforward. And then '08
14 is like (indicating).

15 MR. CLEVELAND: If the Court is suggesting that perhaps
16 Dr. Dyce doesn't become a shareholder until '08, is that
17 what's --

18 THE COURT: What is so troubling -- here's what's
19 troubling about that, here's what's troubling about that for
20 me is that '07 says, you're a shareholder, and this is when
21 you're a shareholder, moneys are withheld, but there's no K-1
22 given and that just -- you know, at that point I'm like --
23 it's at that point that I heard the testimony about '07 and
24 the money's going and there's no K-1, that I really began to
25 think, what the in the world -- what is going on. And then I

1 hear that there's the charge-up, and then I'm really, whoa,
2 what is going on, okay, and why, and what is going on. And
3 then '08 -- and I have not heard from the defense -- and then
4 '08 adds a whole other overlay of, huh? Because the dates
5 are changed, but the dates are agreed to be changed, and it's
6 like -- it almost has a feel, after the plaintiff's case of,
7 okay, we'll rewrite history, and I'm going to agree to it.
8 It's a restatement of what has already occurred, and it's
9 okay with me. And so from a perspective of really your
10 conversion claim which is, what, which is your equity claim,
11 your equitable claim, as well as constructive trust, I mean,
12 you know, I think that they're in existence to try to put
13 some context to what happened in '07 as opposed to what
14 happened in '08.

15 MR. CLEVELAND: Well, we tried to streamline the case
16 and simplify these legal issues because I agree with you that
17 were it the case that we were making a claim that there were
18 moneys taken away from us or not paid in '07, then we would
19 have to wrestle with the issue, well, are we a shareholder in
20 '07 or not, and it would be important whether we were or not.
21 But what we did was we looked at everything and thought,
22 well, if we pick the date of February 1st of '08 when he's
23 incontestably bought in, and under the '07 bill of sale he
24 has paid the money under the bill of sale that acknowledges
25 that he's a shareholder, and from that point forward we do

1 have damages in '08, there is no contest that he's a
2 shareholder in '08. The question may be what month is he a
3 shareholder. I don't think that the July '08 shareholders
4 agreement affects it at all because imagine if he hadn't been
5 terminated and then we come to 2010, and imagine that he
6 didn't object to the new shareholder agreement, and so they
7 would have changed the terms in 2010 and would go forward.
8 There would be no dispute, I don't think, that between '08
9 and '10 that he's a shareholder, and I'm not sure --

10 THE COURT: We don't know that.

11 MR. CLEVELAND: We don't know that.

12 THE COURT: That is one thing we don't have to grapple
13 with.

14 MR. CLEVELAND: That's right, but I think it's -- the
15 documents I think establish that by no later than January
16 31st, '08 he's a shareholder. You've got all the '07
17 documents.

18 THE COURT: Yes.

19 MR. CLEVELAND: And I think it may be as simple as this,
20 Your Honor, that the legal issue on the '07 documents is, do
21 the documents make him a shareholder as of the date of the
22 documents, or do they make him a shareholder as of the date
23 that he finishes buying in. And if you think it's the date,
24 well then maybe he was a shareholder in '07. That's actually
25 what our experts say. But if you think it's when the buy-in

1 occurs, then that's January 31st.

2 THE COURT: When it's concluded.

3 MR. CLEVELAND: When it's concluded, and so rather than
4 mess up the case --

5 THE COURT: You're leaving it in '08.

6 MR. CLEVELAND: We're leaving it in '08.

7 THE COURT: That explains no K-1 in '07.

8 MR. CLEVELAND: Right. It doesn't matter.

9 THE COURT: I got it. Now talk to me about the
10 individual liability. What is that claim really at the end
11 of the day -- talk to me about that.

12 MR. CLEVELAND: It's fiduciary duties. Dr. Puchalski as
13 the manager and controller, he made a promise to Dr. Dyce
14 when he terminated him, that he was going to redeem him, and
15 he said one of the reasons that I'm terminating you is
16 because your conduct has caused mechanic's liens to be filed
17 on our property. One of the exhibits in evidence are the
18 records from the Kershaw county -- I can find the exhibit if
19 you want to see it -- that there was never a mechanic's lien
20 filed at any time. It was just a lie, just a lie to try and
21 misrepresent why he was terminated and make him seem -- cast
22 him in a bad light. And Professor McWilliams, in addition to
23 all that, said that these changes that he was trying to put
24 in the shareholders agreement was bad faith for him to be
25 doing that. Given the agreement that they had, to insist

1 that nothing could go forward until Dr. Dyce signed this
2 agreement without changing any of the terms. We think that's
3 bad faith.

4 THE COURT: Let me ask you this question: There is
5 the -- both the immunity as well as the indemnification in
6 the articles of incorporation. It would be your position
7 that these particular acts of which you speak are ultra
8 vires, yes?

9 MR. CLEVELAND: Yes, yes.

10 THE COURT: Got it. I got it.

11 MR. CLEVELAND: With respect to Mrs. Puchalski --

12 THE COURT: Yes.

13 MR. CLEVELAND: -- Mr. Sheheen misstated our evidence
14 slightly, not too much but slightly. The \$2 million of money
15 that she took or was paid, I'm not claiming that she took it,
16 but that was distributed to her, that's -- much of that is
17 SCENT money that under the evidence in the case belongs to
18 Dr. Dyce, and she now has possession of it rather than Dr.
19 Puchalski, so she is an appropriate defendant if that money
20 shouldn't have been paid to her because he didn't deserve it,
21 then she's got to give it back. And, secondly, there's
22 about --

23 THE COURT: Let me ask you this, and I ask this question
24 really because I don't know. I don't know that the
25 evidence -- is Mrs. Puchalski Dr. Puchalski or Mrs.

1 Puchalski?

2 MR. CLEVELAND: She is a doctor. I only call her that
3 to differentiate. I mean no disrespect.

4 THE COURT: No, no, no, I actually asked for a reason.
5 She is a medical doctor.

6 MR. CLEVELAND: That's my understanding.

7 THE COURT: Okay. Because the reason I ask, quite
8 frankly, is because part of the moneys that go to her for
9 things like call, well, obviously if you are not a medical
10 doctor, you cannot be paid for having done call, if you will,
11 and that's another issue. That's the reason I asked for
12 that.

13 MR. CLEVELAND: I don't think there's any contention,
14 maybe Vincent can correct me, that Mrs. Puchalski actually
15 provided services for any of that money.

16 THE COURT: Okay.

17 MR. CLEVELAND: I don't think there's that contention.
18 And I'd like to remind the Court that in addition to the \$2
19 million, most of which was money that we concede would have
20 gone to her husband but went to her and she's got it --

21 THE COURT: I understand. You're just tracing it to
22 her.

23 MR. CLEVELAND: -- but there is about \$62,000 that was
24 not money that he was entitled to that went straight to her
25 for which there's no offsetting distribution to Dr. Dyce, so

1 there's no defense to her having gotten that.

2 What else?

3 THE COURT: Got it. I've got it.

4 MR. CLEVELAND: Thank you.

5 THE COURT: That's the constructive trust. That's the
6 conversion.

7 MR. CLEVELAND: Right.

8 THE COURT: I've got it.

9 MR. CLEVELAND: Thank you.

10 MR. SHEHEEN: I haven't argued a lot of that because you
11 said you might not want to hear it, but I'm happy to reply to
12 anything that you want me to. First of all, I don't think
13 it's particularly important, but there was a question about a
14 mechanic's lien, and there is a letter from the gentleman we
15 talked about who was the builder that references a lien,
16 which is where the discussion of a lien comes from. There
17 was not a mechanic's lien ever filed. I went and checked as
18 well to see because when I got involved in the case, there
19 was this discussion of there being a mechanic's lien but
20 there's a letter that you'll see, and you'll hear testimony
21 on that, of what the interpretation was of that. They
22 thought it was a mechanic's lien. I just want to clear up,
23 nobody's lying about that, and that's why I state it to you.
24 Your Honor, I want to briefly touch on the question you
25 asked, and I understand -- I think you understand you don't

1 want me to talk about it a long time. You asked me -- well,
2 let me put it this way, what was going on in 2007 and then in
3 2008 and the pay and the biweeklies and the sweeps.

4 THE COURT: I think they concede. Here's where I think
5 they are: I think that where the plaintiffs are is forget
6 about 2007. We are taking the position that he became a
7 shareholder in 2008. The only question is whether or not
8 it's February or July, and I think what Mr. Cleveland was
9 telling me was forget about, don't worry about 2007 because
10 we're not worried about it.

11 MR. SHEHEEN: Well, Your Honor, I will do two things
12 related to that. I'll tell you -- you have asked first do I
13 look at it legally, I heard you say that, or legally what
14 does that mean, that's what you said. I want to make two
15 points on that. Number one, in their complaint their claim
16 is for a breach of the 2008 shareholder agreement, the one
17 that was signed. That's what's in their complaint.

18 THE COURT: And Mr. Cleveland is right there with you.

19 MR. SHEHEEN: That's July of 2008. I think Mr.
20 Cleveland is saying February of 2008. Their claim is on the
21 July -- they reference it, that's their claim.

22 THE COURT: Right.

23 MR. SHEHEEN: And that's what's in the complaint.

24 THE COURT: Got it.

25 MR. SHEHEEN: And there's a reason for that and they

1 don't like it now because the 2008 agreement supersedes all
2 other agreements, which is why you don't have to go to the
3 other things that happened, but I understand that we're
4 discussing it. But I want the Court to understand this as we
5 move forward: There's three types of pay these people were
6 getting, and I don't think that's really been clarified yet,
7 but you'll understand if you plug it in after I mention it,
8 hopefully. There was their base pay.

9 THE COURT: Right.

10 MR. SHEHEEN: Everybody knows what that was and how it
11 worked. When they got on the shareholder track agreement --

12 THE COURT: Yes.

13 MR. SHEHEEN: -- they began to get biweekly pay, which
14 was increased pay, and that's what it was. It was increased
15 pay and it was W-2, and that's why there were no K-1's
16 related to it.

17 THE COURT: Okay.

18 MR. SHEHEEN: Are you with me? And that's different
19 than sweeps, and that's what I don't think has really -- what
20 sweeps have been were moneys after those W-2's were all paid,
21 the base pay -- and there was other pay floating around too,
22 there was the call pay we discussed, and each doctor had a
23 little separate income coming from things they were doing and
24 what have you. But the three main ones were the base pay,
25 the biweeklies, which were W-2 pay -- and you know, Your

1 Honor, an owner of a company can pay somebody whatever they
2 want to, within the parameters of any agreements they have,
3 and they can increase the pay, and that's what happened here.
4 And the sweeps are what would happen after those were paid
5 only if there was money because if they were paying debt with
6 it --

7 THE COURT: Yes, I understand.

8 MR. SHEHEEN: -- there weren't any sweeps. And if they
9 were paying for a building --

10 THE COURT: That's the profits, those are the K-1's.

11 MR. SHEHEEN: That's exactly right.

12 THE COURT: Got it.

13 MR. SHEHEEN: Once they became a shareholder, then the
14 base pay was the W-2 pay and everything else --

15 THE COURT: Was a K-1.

16 MR. SHEHEEN: -- was a K-1.

17 THE COURT: Got it.

18 MR. SHEHEEN: All right. I hope that helps a little
19 bit.

20 THE COURT: Yes, it does help a lot.

21 MR. SHEHEEN: The only thing I also want to go back to,
22 just to protect the record, I want to make sure the Court
23 knows that I was also asking for directed verdict on all
24 causes of action in the case, and that included the damages
25 pursuant to the South Carolina code section I referenced,

1 breach of contract accompanied by a fraudulent act, you
2 discussed the others, and then we had the land company
3 issue --

4 THE COURT: Got it.

5 MR. SHEHEEN: -- that I raised.

6 THE COURT: Got it.

7 MR. SHEHEEN: If I can give the Court anything else, I'm
8 happy to.

9 THE COURT: Here's where we are, there is a cause of
10 action which was withdrawn.

11 MR. SHEHEEN: Yes, ma'am.

12 THE COURT: And that is --

13 MR. SHEHEEN: The wage claim.

14 THE COURT: The wage claim, gone. At this point I think
15 the constructive trust is in, conversion is in, I think the
16 accounting is in, I think the suit against Ms. Dr. Puchalski,
17 and I apologize, I do not know her first name.

18 MR. SHEHEEN: Amy.

19 THE COURT: Amy.

20 MR. SHEHEEN: Can I address that just one minute?

21 THE COURT: Sure.

22 MR. SHEHEEN: I think it's important. There was the
23 moneys that were Dr. Puchalski's that she got.

24 THE COURT: Right.

25 MR. SHEHEEN: Which is nothing short of if it was

1 directly deposited into their joint account or it was
2 directly deposited in her account from the company, so I
3 don't understand the argument that somehow because she got
4 money that was her husband's, therefore she should be a party
5 to the action. It was her husband's money. He's the
6 appropriate party to the action.

7 THE COURT: It's just tracing.

8 MR. SHEHEEN: If he wrote a check to the wife, you can't
9 trace it to her, and that's effectively what happened.

10 THE COURT: But what is occurring, based on the
11 accountant now -- we're half way -- this is half time.

12 MR. SHEHEEN: Yes, ma'am.

13 THE COURT: The accountant has indicated that there were
14 funds that should have been distributed to Dr. Dyce that
15 were, in fact, checks written and distributed to Dr. Amy
16 Puchalski. It's those that are at this point that are being
17 traced. That's why it remains.

18 MR. SHEHEEN: You can look at that exhibit, but the way
19 I read that exhibit and heard that testimony, he had two
20 sheets on purpose one were the funds she was cut which were
21 Dr. Puchalski's paychecks, and those matched up to Dr. Dyce,
22 I believe. You can look back and see.

23 THE COURT: Yes, they did.

24 MR. SHEHEEN: And then there was a sheet of what they
25 were I think saying were like personal charges.

1 THE COURT: Yes, there were.

2 MR. SHEHEEN: And those were charged against Dr.
3 Puchalski's income on his K-1.

4 THE COURT: Yes.

5 MR. SHEHEEN: And he testified to that.

6 THE COURT: Yes.

7 MR. SHEHEEN: And in his calculations they were included
8 in what he allocated to Dr. Puchalski as he showed it was
9 uneven.

10 THE COURT: Right.

11 MR. SHEHEEN: And those moneys she never -- those were
12 charges. Those were not money she received.

13 THE COURT: That's not what he testified to. What he
14 testified to is that those were checks that actually went to
15 her. Now, they may have been credited back to him for tax
16 purposes, but the moneys went to her. The checks were
17 written to her, and what had happened from an accounting
18 standpoint is the checks that were written to her for tax
19 purposes were brought back and then credited to him from a
20 tax standpoint, but the checks themselves were written to
21 her, which means that the money, the green stuff, went to
22 her. This is, for tracing purposes, it is the position at
23 this time --

24 MR. SHEHEEN: I understand.

25 THE COURT: -- it is the position of the plaintiff that

1 those moneys are -- you got my money because I didn't get a
2 proper distribution, you got some of it, I want it, so that
3 that's where the conversion comes in and that's where the
4 constructive trust comes in, that's mine, and therefore in
5 terms of tracing the money, they've got to join her as a
6 party for tracing purposes, so that's why at this point --

7 MR. SHEHEEN: Right, I understand.

8 THE COURT: -- she would remain as a party at this point
9 because of the tracing and because of conversion. I mean, I
10 get that, but you're right, even though the moneys went to
11 her, they were credited to him for tax purposes on a K-1
12 which means it just went on the joint tax return, but they
13 don't care about his taxes. They care about the moneys and
14 where they went. They're just following the money is where
15 we are. Now, regards to the, if you will, the ultra vires
16 allegations, they're good at this point. There was testimony
17 that there was a telephone call that was received, I think by
18 Dr. Gunnlaugsson I want to say, that there was a mechanic's
19 lien that had been filed. Clearly Dr. Dyce testified
20 regarding his being told that there was a mechanic's lien
21 that had been filed, and at this point that issue just is in
22 at this point.

23 MR. SHEHEEN: First of all, we don't dispute that he
24 said it because he thought it. Our position is going to be
25 it wasn't ultra vires because he was acting in the capacity

1 and we'll renew that when we get to it.

2 THE COURT: Exactly.

3 MR. SHEHEEN: Right, I understand.

4 THE COURT: The supervision business, what about the
5 supervision vis-à-vis Judge Benjamin's order, that's like --
6 that's not still in the case, right?

7 MR. SHEHEEN: Say that again.

8 MR. CLEVELAND: It's in the case. And I sure wish my
9 partner were here to respond to this, but let me do the best
10 we can. It's my understanding we have a judicial
11 dissolution, judicially ordered dissolution of an LLC, and
12 it's my understanding of the law that the Court has broad
13 discretion in how to dissolve, one is to order a liquidation,
14 another would be to order other relief.

15 THE COURT: Yes.

16 MR. CLEVELAND: And there's evidence in the case as to
17 what the value is. The appraisals of the assets are in
18 evidence. Mr. Livingston testified as to what the
19 liabilities were as of the time he left. There is other
20 evidence in the record as to the value that I can find and
21 present to you, and so at the end of the case we're going to
22 be submitting to you a number of alternatives that we, since
23 it's been dissolved, what you can do. One would be to order
24 court ordered liquidation and liquidate the whole thing, but
25 they didn't liquidate, when it was dissolved, and so we think

1 probably other remedies would probably be appropriate rather
2 than that.

3 THE COURT: I understand. And Judge Benjamin's order is
4 on a Form 4, does it say anything like a more formal order to
5 follow, no?

6 MR. SHEHEEN: No, ma'am, and I did not hear anything in
7 the plaintiff's case relating to why there needed to be a
8 judicial supervision at dissolution.

9 MR. CLEVELAND: We already won that.

10 THE COURT: I understand. So if there's a judicial --
11 and this is just on the land company.

12 MR. SHEHEEN: Yes, ma'am.

13 THE COURT: If there's a judicial dissolution which is
14 ordered --

15 MR. SHEHEEN: Two separate claims.

16 THE COURT: We'll talk about that. We will take a
17 five-minute comfort break, and you all come in chambers and
18 we'll chat about that.

19 MR. SHEHEEN: Your Honor, just to protect the record,
20 the ones you didn't grant for directed verdict you denied or
21 we're going to come back and take them up?

22 THE COURT: I thought I did good. Did I miss one?

23 MR. SHEHEEN: Mr. Wright tells me there was a breach of
24 contract with a fraudulent act claim.

25 THE COURT: Oh, yes, that's in right now. That's in

1 right now. It's in right now because of the lien business.

2 MR. SHEHEEN: Thank you.

3 THE COURT: What else, any other ones?

4 MR. SHEHEEN: I believe that's it.

5 (Lunch recess held.)

6 THE COURT: Mr. Sheheen, are you ready to proceed?

7 MR. SHEHEEN: Yes, ma'am, Your Honor.

8 THE COURT: Are the plaintiffs ready to proceed?

9 MS. BAKER: Yes, we are, Your Honor.

10 MR. CLEVELAND: We are, Your Honor.

11 THE COURT: Call your first witness, please.

12 MR. SHEHEEN: May I approach, Your Honor?

13 THE COURT: Absolutely.

14 MR. SHEHEEN: Your Honor, we compiled some of the
15 documents we'll go through with Professor Freeman so that you
16 can look at them.

17 JOHN FREEMAN,
18 being first duly sworn, testified as follows:

19 DIRECT EXAMINATION ON VOIR DIRE BY MR. SHEHEEN:

20 Q. Professor Freeman, would you please state your name and
21 address for the record?

22 A. I'm John Freeman. I live at 2329 Wilmot, W-I-L-M-O-T,
23 Avenue, Columbia, South Carolina 29205.

24 Q. And why are you here today?

25 A. I'm here to testify as an expert witness in this case.

1 I'm here to give my opinions concerning the -- as a
2 professional in the corporate governance field, business
3 entity management field to give my opinions concerning the
4 conduct of Dr. Dyce and other participants in the business
5 entities that are at the heart of this case.

6 Q. Would you please state your record of experience that
7 you believe qualifies you to testify as an expert in such
8 matters?

9 A. Well, yes, I taught -- you know, I sat here while
10 Professor McWilliams testified. I was one of those involved
11 in hiring Professor McWilliams at the law school. I noticed
12 that he taught the bar review course for several years, or 10
13 or 15 years. I taught it for over 20. Agency, partnership,
14 corporations, also taught professional responsibility. I
15 have addressed the South Carolina legislature on issues of
16 governance and in particular issues of standards of conduct
17 for officers and directors and shareholders. When the
18 corporate code was most recently amended in 1989, I, like
19 Professor McWilliams, was an official reporter for portions
20 of the code. My particular portions dealt with shareholders'
21 rights and obligations and officers' and directors' rights
22 and obligations including such matters as business judgment
23 rule and indemnity of those individuals. I've testified in
24 various cases as to the conduct of executives and business
25 entities and standards of behavior, and I've written about

1 the duties that are owed by people entrusted with
2 responsibility when it comes to management issues and, as far
3 as I know, I've never failed to be qualified as an expert in
4 a case such as this.

5 MR. SHEHEEN: Thank you very much, Professor Freeman.
6 Your Honor, we would submit Professor John Freeman as an
7 expert in the field of duties owed by shareholders, managers,
8 officers and directors of South Carolina business entities of
9 the type that have been involved in this lawsuit and are
10 involved in this lawsuit.

11 THE COURT: Anything other than duties owed?

12 MR. SHEHEEN: We would offer him as an expert in the
13 duties owed and the standards --

14 THE WITNESS: Of conduct.

15 MR. SHEHEEN: -- of conduct.

16 THE COURT: Anything else?

17 MR. SHEHEEN: Corporate governance, Your Honor.

18 THE COURT: Okay. Mr. Cleveland, Ms. Baker, is there
19 any voir dire?

20 MR. CLEVELAND: No, Your Honor. The plaintiffs
21 acknowledge that Professor Freeman is well qualified in these
22 areas. The plaintiffs object to Professor Freeman testifying
23 as to duties owed or standards of conduct or corporate
24 governance, those being legal matters that are within the
25 purview of the Court to decide, not a witness to testify to.

1 THE COURT: I understand. What I would do then in those
2 regards is just hold those because discussions regarding
3 fiduciary duties are certainly an area I think that can be
4 testified to as an expert. The ultimate decision of whether
5 or not fiduciary duties were breached or not, that would be
6 for me clearly, but I certainly think he could talk about
7 those. I may even have a couple of questions myself with
8 regards to that. And I think and with regards to the
9 corporate governance I may have some questions too with
10 regards to that, and I wanted -- that's why I kept pushing
11 because one of the issues that we -- and I don't mind sharing
12 this, but one of the issues that we were discussing and I
13 have really been contemplating -- again, you're watching the
14 sausage being made -- is the relationship between the
15 performance of contract A and the complete performance of
16 contract A and then a rewriting of history after contract A
17 has been complied with and certain rights commensurate with
18 contract A are in place and completed, what then happens when
19 contract B comes into being and re-writes history, and I
20 guess that's corporate governance.

21 MR. SHEHEEN: Sure. And, Your Honor, just as we've
22 given each other a little bit -- I think what we're going to
23 say over time here is, so you'll understand where we're going
24 with this, is that contract A, which I think you're saying is
25 the '05 agreement.

1 THE COURT: '07.

2 MR. SHEHEEN: Okay. We'll go forward. I think what
3 we're going to lay out is the intentions of the parties from
4 the beginning were fulfilled and they were fulfilled in July
5 of 2008.

6 THE COURT: That's the piece of this that kind of stands
7 me a little bit on my head because of this position of the
8 plaintiff that all matters were complied with in February, so
9 what do we do, are we a shareholder February until July and
10 then we're no longer a shareholder? I don't know. You can
11 contract whatever you want to contract. So that's one of the
12 issues that I'm grappling with, so that's why I pushed you to
13 get corporate governance.

14 MR. SHEHEEN: Thank you, Your Honor.

15 MR. CLEVELAND: Let me state for the record that,
16 whereas I agree that Professor Freeman would be a wonderful
17 resource on all those issues you've talked about, I don't
18 believe that it's appropriate for him to be retained by one
19 party to be advising the Court on those legal issues, and so
20 I would object. I think if there were a need to refer to an
21 expert in the area, it ought to be somebody that the Court
22 retains as an independent expert.

23 THE COURT: I agree with that absolutely and completely,
24 yes.

25 MR. CLEVELAND: Thank you.

1 THE COURT: But I sort of did the same thing with
2 Professor McWilliams.

3 MR. SHEHEEN: Your Honor, Professor McWilliams had wide
4 latitude to testify. He was given wide latitude to testify.

5 THE COURT: Yes.

6 MR. SHEHEEN: And we would expect the same.

7 MR. CLEVELAND: I don't want to argue with counsel, but
8 counsel was very successful keeping Professor McWilliams from
9 testifying about legal conclusions.

10 THE COURT: Yes, and I would expect the same to be true.

11 MR. CLEVELAND: Thank you.

12 THE COURT: Exactly, as I said to you, although it's
13 tempting, not appropriate. Okay.

14 MR. SHEHEEN: I'm not sure if you made a finding that he
15 was qualified.

16 THE COURT: I did. Voir dire?

17 MR. CLEVELAND: No. Again, I've stipulated to his
18 qualifications.

19 THE COURT: Your objection wouldn't be beyond what
20 you've already stated, as I understand it.

21 MR. CLEVELAND: Excuse me, Your Honor?

22 THE COURT: Let me say this, obviously there are some
23 objections, and I think that -- you know, you can go about
24 qualifying an expert. Obviously Professor Freeman is an
25 expert in corporate law, if you will, and the relationships

1 for corporate entities just as Professor McWilliams was.
2 There were some areas, though, that we got into with
3 Professor McWilliams that wasn't appropriate for him to
4 testify regarding. There may be objections along that line
5 as well. So while in general he is an expert in those fields
6 and would be qualified in those fields, I think what I'm more
7 comfortable in giving your objection is that if you will
8 object when those questions are asked, and then I'll be able
9 to make a more exquisite determination at that time.

10 MR. CLEVELAND: Thank you, Your Honor.

11 THE COURT: Yes. Thank you, Mr. Cleveland. Okay.

12 MR. SHEHEEN: Thank you, Your Honor.

13 THE COURT: Yes.

14 DIRECT EXAMINATION BY MR. SHEHEEN:

15 Q. Professor Freeman, what did you do to prepare yourself
16 to testify here today?

17 A. I did the sort of thing that an expert in this position
18 would do which is to say I familiarized myself with the facts
19 and, among other things, I read deposition testimony on the
20 part of Dr. Dyce both in the Gunnlaugsson case and in this
21 case, read Dr. Gunnlaugsson's testimony in his case. I read
22 Dr. Puchalski's testimony. I've considered an affidavit, a
23 factual affidavit that Dr. Puchalski rendered. I have read
24 Dr. Vidrine's testimony which has been taken. I have looked
25 at, and reviewed the corporate documents, the pleadings in

1 this case, done research, and that's the meat of it. There's
2 a vast number of documents, and I didn't memorize them all,
3 but that's a good start.

4 Q. Professor Freeman, did you hear some testimony in the
5 courtroom in this case as this week went by, did you hear --

6 A. Oh, yes, well, okay, I've been in this courtroom for a
7 couple days listening to testimony. I heard the opening
8 arguments, all of which I've taken into account, as well as
9 conferred with counsel, conferred with Dr. Puchalski, Dr.
10 Vidrine, gathering information as best I could.

11 Q. And what do you consider to be the key operative
12 documents concerning the relationships between Dr. Dyce and
13 SCENT and Dr. Puchalski?

14 A. I consider for my purposes the key documents to be the
15 articles of incorporation, to be the 2008 shareholders
16 agreement, the 2008 employment agreement, those are to me
17 central documents, and I consider them key. There are other
18 documents that I consider important, but those are to me the
19 most important.

20 Q. Okay. And are there certain provisions in those
21 documents that you consider important to framing the opinions
22 that you hold that you'll elucidate?

23 A. Sure.

24 Q. And tell me why there are certain provisions that do
25 seem important?

1 A. Well, in any document it's a lot of English language,
2 and all words aren't the same, all the sentences aren't
3 equally important, some stand out, some to me have special
4 significance, and I'd like to maybe take some of these
5 documents and explain what I consider significant about them.

6 MR. CLEVELAND: Objection, Your Honor. I think it's
7 improper for the witness to discuss, I assume, what's legally
8 significant about a document. That's the legal conclusion
9 that the Court is going to be required to make and it's, I
10 don't think, appropriate for the witness to go through and
11 just talk about what he thinks is important.

12 THE WITNESS: By significant I meant significant for
13 purposes of my opinions in this case.

14 MR. SHEHEEN: Your Honor, there's no way for him to talk
15 about his opinions without talking about the things that he
16 thinks are important in forming his opinions.

17 THE COURT: We haven't gotten there yet. In other
18 words, I think what Mr. Cleveland is saying at this point,
19 it's difficult to just jump in and say this word is more
20 important than that word when you haven't begun the opinion,
21 and I would sustain the objection insofar as that's concerned
22 because those words that are more important than other words
23 would be associated with the opinion, so we'll hear that when
24 we get to the opinion.

25 MR. SHEHEEN: So let's go to the documents.

1 THE COURT: Yes, absolutely.

2 Q. Professor Freeman, I want you to look at Plaintiff's --
3 and I want to give time for opposing counsel to look at the
4 documents -- Plaintiff's Exhibit 261 and Plaintiff's Exhibit
5 108 which I will say are the articles of incorporation, and
6 they're behind Tabs A and B, Your Honor.

7 THE COURT: Got them.

8 Q. Let's look at the original articles first.

9 A. Yes, sir.

10 Q. Would you agree that it is a statutory close
11 corporation?

12 A. Yes, it is a statutory close corporation.

13 Q. Tell me why that's important for your opinions.

14 A. I take that into account because it's a special
15 provision that we have in the code basically to deal with
16 smaller businesses and businesses that oftentimes don't
17 follow rigorously corporate formalities, and they have
18 special default settings by statute, and they also have a
19 very valuable provision that is an anti-piercing provision
20 that basically recognizes that because it's well known that
21 these types of enterprises may not always dot their i's and
22 cross their t's, have meetings, motions, great paper records
23 and so forth, that the failure to follow regular corporate
24 formalities is not a basis for piercing, and that's right in
25 the statute, and that is something that you get when you're a

1 statutory close corporation as this one was.

2 Q. Are there any other points that are important that you
3 consider the fact it's a statutory close corporation, are
4 there other things that you considered in this document?

5 A. Yes.

6 MR. CLEVELAND: Objection, Your Honor. I think the
7 question what does Professor Freeman think is important, one,
8 it's not relevant to this case, what Professor Freeman thinks
9 is important, with all due respect, and the question allows
10 him just to start talking about the documents without any
11 anchor to the requirement of relevance and that it be
12 admissible. It's an open-ended question that I think
13 requires an objection and a rephrasing so that when he asks
14 the question we can determine whether the question calls for
15 a response that meets the rules of evidence.

16 THE COURT: I understand. I would qualifiedly admit it
17 for this reason, and I'm taking it as we go through these
18 documents that there are certain portions that are being
19 illuminated at this point so that I can mark them, and then
20 when the opinions are rendered, go back to those provisions,
21 that's the way that I'm taking it, so they would be
22 conditionally admitted at this point, and if they're proven
23 not to be relevant at that point, then I would exclude the
24 testimony, but I would conditionally admit it at this point,
25 as I'm allowed to do, because what I'm taking it to be is

1 just going through these documents and looking at different
2 provisions so that I can hold those and then go back and
3 refer to it and put the opinion in context much like
4 Professor McWilliams did as well, but at this point they
5 would be conditionally admitted, being tied up at the end.

6 MR. SHEHEEN: Thank you, Your Honor. And, Your Honor,
7 just to clarify, I'm not asking him are these things -- I'm
8 asking are these important to your opinions, tell the Court
9 what --

10 THE COURT: I'm taking it that way. There are a couple
11 ways you could go about it. You could go factually first and
12 then come back to the documents, or you can go through the
13 documents, talk about the different provisions of the
14 documents that we'll be focusing on and then go to the facts.
15 You can do it either way, but just doing it this way they
16 have to be conditionally admitted because they have to be
17 tied up with a factual basis. That's the reason for Mr.
18 Cleveland's objection at this point. I am allowed to
19 conditionally admit it waiting, under the rules of evidence,
20 waiting for them to be tied up, and he is appropriate to
21 object at this point. I am conditionally admitting the
22 evidence at this point, looking for it to be tied up at the
23 end.

24 MR. SHEHEEN: Thank you, Your Honor.

25 Q. Okay. Professor Freeman, we're still on Plaintiff's

1 Exhibit 261.

2 A. Right.

3 Q. Which was I believe the original articles of
4 incorporation.

5 A. Yes.

6 Q. All right. Are there any other provisions in here that
7 you are using as you developed your opinion?

8 A. Yes, and let me express one opinion right at the outset
9 so maybe this will be set with more focus. I sat while
10 Professor McWilliams described this enterprise, SCENT, as
11 basically a partnership where there were two directors and
12 they had the ability -- they managed the business, and Dr.
13 Dyce was an equal manager and he was entitled to and to be
14 treated as a codirector essentially approving everything, and
15 my view is different.

16 MR. CLEVELAND: Objection. I don't think it's
17 appropriate for one witness to be trying to compare the
18 testimony of another witness, particularly two experts.

19 THE COURT: You're concerned about the pitting of the
20 witness, and so your objection is the pitting of the witness?

21 MR. CLEVELAND: Yes.

22 THE COURT: I understand. And you're exactly right. We
23 can't pit witnesses. But let me say this, I'm taking this
24 testimony -- because I remember that, and what I did when
25 Professor McWilliams went into that is I went back to and

1 looked at a form of corporate entity under South Carolina law
2 which is called a licensed limited partnership, which is a
3 different entity -- it has characteristics of both a
4 partnership and of a corporation, it has to be registered
5 with the Secretary of State, you have to have certain
6 insurance requirements -- and pondered that myself. So we're
7 not going to pit witnesses, but I am taking that to talk
8 about whether or not they were partners. There is an entity
9 under South Carolina law that does allow, if you will, a
10 hybrid partnership and corporate entity. As the testimony,
11 again, as the testimony ended up really at the end of the
12 case the question, as I saw it, rather than one of control
13 was one of information.

14 MR. CLEVELAND: Thank you.

15 THE COURT: Mm-hmm.

16 MR. SHEHEEN: Your Honor, just because I want to
17 clarify, my position is there is absolutely nothing wrong
18 with Professor Freeman testifying where he may disagree with
19 opinions that were given by Professor Freeman.

20 THE COURT: It's called pitting witnesses. You can't
21 pit witnesses, but I get what he's doing.

22 MR. SHEHEEN: It's important for him to be able to say
23 what his conclusions are.

24 THE COURT: Exactly, and I got that.

25 MR. SHEHEEN: Trying to figure out where I left off

1 before the objection.

2 THE COURT: He just wanted that opinion to be
3 established, that he did not see this as in any way, shape or
4 form a partnership by virtue of fact it was a closed
5 corporation.

6 Q. Are there any other provisions in 261, this would be the
7 original articles, that you found important to inform your
8 opinion?

9 A. Let me be clear on what my opinion is. My opinion is
10 that this business operation was set up as a statutory close
11 corporation, that it did do away with the board of directors,
12 so it moved to a different level. I disagree with the
13 idea -- in one sense it's true that shareholders of a
14 statutory close corporation without a board of directors can
15 function as partners, but I strongly believe that it's
16 incorrect, based on what I've seen, to also follow that and
17 say that these partners are jointly then invested in
18 management, responsible for management, to be consulted in
19 management, etc., because that's not the way it works and
20 that's not the way this company works. And I was here when
21 the Court pointed out, and it's quite true, if you look at
22 Exhibit 261, Item 7, the board of directors is done away
23 with. That's fine. You can do that, and what you're really
24 kind of saying then is we want more informality. But then
25 that is followed up by Item 9B, and an opinion I hold is that

1 Bob Puchalski is the founder of this business, he was the
2 driving force in this business, and for all intents and
3 purposes for all times relevant in this case he was the
4 manager. He was the main man in this business. It wasn't
5 Dr. Dyce. It wasn't Dr. Gunnlaugsson. It wasn't Dr.
6 Vidrine. It wasn't a combination of all of the above, it was
7 Bob Puchalski was pulling the cart, and we see that because
8 9B expressly vests him with, quote, all authority to transact
9 the business and so forth of any kind. Not just buying paper
10 clips, erasers for pencils but of any kind and so forth and
11 so on. And that's the bedrock -- this is the bedrock
12 document. From day one Bob Puchalski is driving the bus.
13 That's my opinion.

14 Q. Let's look at the next exhibit. It would be Exhibit 108
15 which would be the amended and restated articles of
16 incorporation.

17 A. Yes, sir.

18 Q. Are there any provisions relating to your opinion,
19 you've already given opinions, are there any provisions in
20 this document that informed you in arriving at the
21 conclusions that you've already expressed?

22 A. Okay. Another conclusion I draw is that the scope of
23 this business is broader than just the practice of, in
24 looking at Item Exhibit 108, 3, otolaryngology -- is that a
25 reasonable way of saying it? The noncompete talks about

1 medicine, and there's an argument in this case that that's
2 overbroad because the articles are limited to that word,
3 otolaryngology.

4 THE COURT: Can we say ENT?

5 THE WITNESS: Otolaryngology.

6 Q. Okay. Please go ahead.

7 A. But of course the articles say otolaryngology medical
8 services and all other services ancillary to such services
9 which are permitted or authorized by the licensing authority
10 of South Carolina, so there's a lot of breadth to that
11 because there's a lot of medicine that can be ancillary as
12 well --

13 MR. CLEVELAND: Objection.

14 THE WITNESS: -- and I point that out.

15 MR. CLEVELAND: On a number of grounds. First, I object
16 to the form. Mr. Sheheen's question was were there any other
17 provisions of this document that informed the opinion you
18 just gave, and Professor Freeman, rather than answering that,
19 is now telling us about other opinions he's got, so it's not
20 responsive, and I object to that manner of his testifying,
21 that he just, when asked one question, decides just to wax
22 eloquently on other issues. Secondly, he's been admitted for
23 the purposes of duties owed and standards and corporate
24 governance, and he's now talking about the noncompete and
25 talking about the breadth of ENT kind of the whatever,

1 otolaryngology, and so I think that's not what he was
2 admitted for and is beyond the scope of his admission and I
3 object.

4 THE COURT: Thank you for that. I don't think it is --
5 again, I think it can be conditionally admitted because I
6 still think he's pointing to the different provisions that he
7 finds to be relevant to his opinion, although I have got to
8 ask you all a question because I have, since this case
9 started on Tuesday I have struggled with this particular
10 document, and I'm finally going to give it up. Please tell
11 me the date that this document was filed. I keep thinking
12 I'm going to get a document that I can read, and I cannot
13 read -- I can read June and that's it, and I think that might
14 have some relevance.

15 THE WITNESS: June 12, '08.

16 MR. CLEVELAND: If you look in the book that we gave
17 you.

18 THE COURT: That was the first place I looked, and
19 that's where I thought I got the closest.

20 THE WITNESS: Your Honor, at the very bottom of 108 at
21 the very bottom here it says filed 6/12/2008.

22 THE COURT: I just wanted to be sure that's what it was.

23 MR. SHEHEEN: In the top left you can't see it very
24 well, the stamp from Secretary of State Hammond, but the bar
25 code at the bottom where you pay the filing fees, you can

1 read it.

2 THE COURT: I read that one, but I just wanted to be
3 sure it was consistent.

4 MR. SHEHEEN: I can't read it either.

5 THE COURT: So it's June the 12th, 2008?

6 MR. CLEVELAND: That's what the plaintiff thinks.

7 THE COURT: That's because of the bottom part -- okay.
8 Well I'm going to presume, everybody's presuming that it is
9 what's on the bottom. Don't we love it that paying the money
10 is what we rely on more than the stamped filing? All right.

11 MR. SHEHEEN: Thank you, Your Honor.

12 Q. Are there any other provisions in Plaintiff's Exhibit
13 108 that you think are important to forming the opinions that
14 you formed in this case?

15 A. Yes, there are. Four is of some importance and that is,
16 again, Bob Puchalski is the registered agent, which is
17 indicative of him playing a lead role in this business. Item
18 8, page 108, the corporation elects not to have a board of
19 directors. That is consistent with what we saw earlier.
20 It's being preserved here. And as well the shareholders are
21 given the permission to delegate to the managing shareholder
22 different responsibilities, which in fact happened. All
23 through this time I hold the opinion that Bob Puchalski was
24 pulling the wagon. Subchapter S election is discussed here
25 and has been discussed at length, and I have the opinion

1 which I hold as -- which informs my opinions, and I want to
2 state what the opinion is and explain how it informs my
3 opinions.

4 Q. Do you have any other opinions you've formed which you
5 want to share with the Court?

6 A. At this point, yes, that the subchapter S election was
7 never blown, that that's a red herring.

8 MR. CLEVELAND: Objection, Your Honor.

9 THE COURT: Okay.

10 MR. CLEVELAND: And again, he was not offered as a tax
11 expert, and Subchapter S election being, quote, blown is an
12 issue for a tax lawyer or the IRS, and so I don't
13 understand -- I do object to the qualifications of Professor
14 Freeman on tax issues and testifying about whether something
15 qualifies under the tax code of the Internal Revenue Service.

16 MR. SHEHEEN: Your Honor, I'm pretty sure that Professor
17 McWilliams testified about this issue, but I don't have 100
18 percent recollection, but I remember him testifying about the
19 Sub S election and things related to it.

20 THE COURT: I would overrule the objection for this
21 purpose, because Professor Freeman is testifying that based
22 upon his review of the evidence, if you will, in this case
23 that he finds no evidence in this case that there was a
24 violation of the Subchapter S election provision within the
25 terms of the agreement based on his review of the

1 depositions, the documents, the testimony given that based on
2 what he has reviewed, based on his corporate knowledge that
3 he sees no evidence that this provision was ever violated.

4 MR. SHEHEEN: Thank you, Your Honor.

5 THE COURT: And I take it to be no more, no less.

6 THE WITNESS: May I explain my answer?

7 Q. Would you continue your answer, please?

8 A. The argument as I understand it in this case as to
9 Subchapter S is that somehow this company had two different
10 classes of stock because supposedly distributions were
11 treated differently for withdrawing shareholders as opposed
12 to other shareholders. I reject that view. There's only one
13 class of stock. That particular provision pertains to a
14 special circumstance in that one class of stock which has a
15 certain payout arrangement to keep the person who is being
16 paid out from getting distributions after the terminating
17 event, and that to me is clearly not a separate class.
18 Everybody is treated equally as to that if you fall into that
19 category, and I just consider that to be a red herring, and
20 that's my opinion. I also have an opinion as to Item E on
21 page 3 of these new articles, and that is that this immunity
22 provision does not apply.

23 Q. Could you explain that to the Court?

24 A. It doesn't apply to the parties because it seeks to
25 incorporate, to the extent permitted under 33-2-102 E,

1 certain protections, however this corporation doesn't
2 qualify, and so that becomes a moot point. As a matter of
3 fact it does not qualify because it doesn't fall into that
4 category.

5 MR. CLEVELAND: I want to avoid interrupting Professor
6 Freeman because it doesn't help the record, but I object.
7 That's a classic legal conclusion that he's just testified to
8 that he concludes that on this issue the document has to be
9 interpreted in a particular way. That's the Court's
10 province, not Professor Freeman's.

11 THE COURT: I understand. I think what he's talking
12 about is that this corporation, based on his view of the
13 factual and the testimony and what he understands about this
14 qualification that the immunity doesn't apply because by
15 statute it only applies to corporations that meet certain
16 requirements with the SEC that have a certain value that are
17 traded at a certain level and that this is just not what this
18 corporation is. Only reason I know that is because I went
19 and looked at it myself because I raised that issue of the
20 immunity myself, and so I went and looked at that, and I
21 think what he's saying is that's not this kind of
22 corporation, so that I don't know if you remember but I was
23 talking about immunity on Tuesday, whether or not the
24 shareholders and/or the managing shareholders had immunity
25 under it, and they don't because this kind of corporation is

1 not the kind of corporation that is contemplated by 33-2-102.
2 You've got to reach a certain level. I don't think it's of
3 any moment, actually. I think it's a red herring too.

4 THE WITNESS: So anyhow, it's my testimony the facts
5 don't fit.

6 Q. Professor --

7 A. Yes, sir.

8 Q. -- are there any other provisions in this document that
9 are important to any of the opinions that you have rendered?

10 A. Yes. There may be issues as to indemnification. The
11 Court is well able to make determinations as to
12 indemnification under the code. I have had experience with
13 indemnification issues. It was part of the code when I
14 worked on it. I've been involved in indemnification issues
15 as a lawyer, and I have yet to see somebody start a lawsuit
16 and be eligible for corporate indemnification. The statute
17 really talks about executives who have been indicted or sued
18 being entitled to receive indemnification, but that entire
19 matter is for the Court, and I'm just not going to say more
20 than I've said.

21 Q. Let me ask you, are there any facts that you've observed
22 that are relevant to the determination of indemnification?

23 A. Well, yes, a fact is whether or not you've been wholly
24 successful on the merits or otherwise, and that remains to be
25 seen. We don't have any ruling yet as to who's successful or

1 who isn't. I think my testimony will be clear to the Court
2 by the time I'm off the stand as to whether I think Mr. Dyce
3 has been wholly successful, but again, that's a ruling for
4 the Court to make, and it's also a ruling as to Dr.
5 Puchalski's right of indemnification. I will say that our
6 indemnification provisions, which I have worked on and taught
7 for many years, in South Carolina are intentionally,
8 deliberately set to be very, very liberal to protect
9 executives called into court to be able to defend themselves.

10 Q. All right. I think you also mentioned a -- are there
11 any other provisions in here that are relevant to any of the
12 opinions that you have formed?

13 A. Yes. To buttress an opinion I've given already and may
14 give again about Dr. Puchalski being the man driving the bus
15 here, you see, H preserves his control powers carried forward
16 from the previous articles. And, again, that informs this
17 concept that this is really a partnership and everybody's
18 equal and Dr. Dyce gets a say so in everything and Dr. Dyce
19 runs it as much as Dr. Puchalski. Not at all. And in a
20 partnership you may have a power to control which partners
21 do, but that doesn't mean that you exercise that, you can
22 delegate, and that's exactly what's going on in these
23 articles, and I call that to the Court's attention.

24 Q. Okay. Plaintiff's Exhibit 07, excuse me, 07 is the
25 shareholders agreement.

1 A. Yes, sir.

2 Q. And I'm also going to hand you, because I don't think
3 it's in the record yet, the signed copy of the covenant not
4 to compete just so we'll have it in the record. I believe,
5 Your Honor, this is Defendant's Exhibit 233 without
6 objection, and if I may approach, I'll hand the Court a copy
7 too.

8 (Defendant's Exhibit 233 marked for identification.)

9 THE COURT: Sure.

10 MR. SHEHEEN: Thank you.

11 THE COURT: We don't have this already?

12 MR. SHEHEEN: No. We had a discussion in chambers.

13 THE COURT: We did. Okay.

14 MR. SHEHEEN: I just want to make sure that the signed
15 version is in the record, Your Honor, because I know there
16 was an unsigned version in the record.

17 THE COURT: Yesterday we talked about how they looked
18 different.

19 MR. SHEHEEN: Yes, ma'am.

20 THE COURT: This is Defendant's 233.

21 MR. SHEHEEN: Yes.

22 THE COURT: 233, that's right.

23 Q. Let's right now talk about not the covenant and not the
24 employment agreement but the shareholder agreement, which is
25 Plaintiff's Exhibit 7.

1 A. Yes, sir.

2 Q. Are there any provisions of this shareholder agreement,
3 the 2008 shareholder agreement, that are relevant to
4 conclusions that you have drawn in this case?

5 A. Yes.

6 MR. CLEVELAND: Same objection, Your Honor.

7 THE COURT: Yes, I understand.

8 THE WITNESS: Yes. I've already spoken about my views
9 on the what I consider to be the Subchapter S red herring.
10 If you look at page 6 of the document, in the middle you see
11 a definition of departing shareholders and that's basically
12 somebody, quote, transferring shares.

13 Q. Which section are you in? I'm sorry.

14 A. In the lower right-hand corner, can you see the page
15 number 6, 7.006?

16 Q. Let me look over your shoulder real quick. If you'll
17 use the section number, we'll all be able to find it.

18 A. The section number is 2.1, which is definitions, and
19 then if you go to the second page of the definitions, you see
20 a definition of, quote, departing shareholders, and that
21 would be a shareholder who was transferring.

22 Q. Okay.

23 A. Fair enough. And to button down what I was saying
24 before about Subchapter S, if you go to page 12 of the
25 document.

1 Q. What section again?

2 A. 12 at the very bottom.

3 Q. Right, but they're different.

4 A. I know. This is section 4.5.

5 Q. Thank you.

6 A. Notwithstanding anything in this agreement, a departing
7 shareholder, that would be the one who is leaving, isn't
8 entitled to distributions. Now, that's not all the
9 shareholders. It's just people, basically, who have for
10 whatever reason embarked on a path that's going to cause them
11 to cease to be shareholders. And they, having done that and
12 having accepted a different mechanism for payment, they give
13 up their right to have the other parties who are left behind
14 working for them indefinitely and sharing in the profits when
15 these people have taken a different path, and so that's --
16 that's why I consider this Subchapter S thing to be a red
17 herring. That's more evidence. It's a completely isolated,
18 distinct, understandable fact situation. Now, on page 3, the
19 next page, you see managing shareholders, again, the theme
20 being --

21 Q. What section are you in? I'm sorry.

22 A. This is carried over from the definitions. If you would
23 look at -- it says at the top, managing shareholder, the
24 third page of the agreement.

25 Q. Okay. So back to 2 -- the definitions.

1 A. Yes, managing shareholders shall mean the president.

2 Well, and we know who ended up being the president, and that

3 was Dr. Puchalski, and Dr. Puchalski is the driving force

4 here, and this is a constant theme in this matter. Further

5 down on that same page, remaining shareholders. That fits

6 back into this Subchapter S mishmash because you have

7 remaining shareholders and departing shareholders, and the

8 remaining shareholders are the ones who are sticking around.

9 The departing shareholders are the ones who are selling out

10 based on certain terms, at least under this document. And,

11 again, that's not uncommon, that when you decide you're going

12 to leave and a price is struck, then you leave, and you don't

13 continue to share profits because you've made your decision,

14 okay.

15 Q. Okay. Any other provisions in this agreement that

16 you --

17 A. Sure. On the next page, 3.32 Roman 4 deals with

18 dismissal without cause.

19 Q. Okay.

20 A. And I believe I heard Mr. Cleveland stipulate that he

21 was dismissed without cause in his opening statement, so

22 there's that. There's an issue as to whether it was for

23 cause too but, you know, clearly that's a provision that is

24 going to be important and is important to my decision making.

25 Informal action by shareholders, the next section, 3.33, you

1 have that but, again, my opinion and view is that very often
2 in your close corporations action is taken reasonably and
3 properly by consensus, by hallway meetings, maybe a short
4 phone call without any real formalities. The president is
5 listed as an officer, and the president is called the
6 managing shareholder, and that's, again, very consistent with
7 what I've said all along. And then toward the bottom on
8 Section 3.4.4 more articulation about what the president's
9 rights are, and he is in general to supervise what's going
10 on, quote, subject to the control of the shareholders, and
11 there may be a vast delegation of control in my estimation
12 not just based on these documents but also based on the way
13 the business was being run.

14 Q. Okay. Are there any other provisions that are important
15 to your conclusions?

16 A. Yes, 3.7, duty of confidentiality, the shareholders are
17 barred and agree that they're barred from passing on
18 information in a potentially anticompetitive way. You have
19 on section 3.9 what are called founding shareholder
20 protection provisions covering Dr. Puchalski. And then 3.10
21 deals with special protections concerning the noncompete that
22 would favor Dr. Dyce, and I call attention to this because I
23 don't think it was in any former agreement, and to the extent
24 that there's an issue as to whether or not something
25 factually happened that conferred some right to Dr. Dyce or

1 benefit to Dr. Dyce in '08 that was new and could possibly
2 serve as consideration, this is a new right that he has, a
3 new protection that he has as far as I am able to determine.

4 MR. CLEVELAND: Objection, Your Honor, for the same
5 grounds as stated earlier about. One, qualifications. I
6 don't think Professor Freeman is qualified to talk about
7 noncompetition agreements. He wasn't admitted to talk about
8 noncompetition agreements, and I have to renew my objection
9 to the rolling testimony through these documents as being
10 inappropriate. It should be limited to opinions on matters
11 that don't call for a legal conclusion. All of the opinions
12 so far have been it's my conclusion that because of this you
13 get this legal result, because of this you get this legal
14 result, and that's the purview of the Court, not an expert
15 witness, thank you.

16 THE COURT: Thank you so much.

17 MR. SHEHEEN: And, Your Honor --

18 THE COURT: Yes.

19 MR. SHEHEEN: -- Professor McWilliams clearly testified
20 about consideration and whatnot. I recall that testimony
21 clearly. And he is giving his opinions as to the factual
22 matters that he's determined in his expert capacity, and I
23 will continue to ask questions.

24 THE WITNESS: And I was speaking about noncompete there
25 for the reason that it goes to the issue of duties and

1 whether you have -- duties and rights of shareholders and
2 proper governance, and part of proper governance is to obey
3 your contractual --

4 THE COURT: I'm still just accumulating that these are
5 the provisions that will be the underpinning of the opinions.

6 MR. SHEHEEN: Thank you.

7 THE COURT: That's where I am with it. And again, at
8 this point they are conditionally admitted at this point.

9 Q. Thank you, Your Honor. Just while we're on the note,
10 have you reviewed or has it come to your attention in review
11 of the documents or the testimony that there was also
12 increased pay as a result of --

13 A. That's what I understand is that that was an additional
14 benefit factually received by Dr. Dyce in connection with
15 this 2008 agreement which imposes for the first time the
16 noncompete that was discussed and mentioned and referred to
17 in the 2005 earlier agreement. All that's coming to fruition
18 here. Section 3.13, again, managing shareholder given
19 considerable authority, the right to hire/fire folks. There
20 is a limit on expenditures, need to consult and have
21 agreement by the majority of the shareholders with the
22 exception of recurring ordinary, that is in here.

23 Q. Professor Freeman, in your experience with these types
24 of companies how are those decisions made, are there official
25 board meetings, do they do it informally, in your expert

1 opinion what have you seen?

2 A. I've seen everything. I've seen it ignored. I've seen
3 it informally where people know what's going on and they know
4 that a company car has to be bought. Nobody's thinking back
5 to this \$10,000 limitation. And I've seen -- I've seen it
6 where it's acted upon.

7 Q. Okay.

8 A. One reason I mentioned about the lack of formality that
9 you typically see in a close corporation, because oftentimes
10 it's kind of doing things by consensus and it's normal, okay.
11 Compulsory, 4.4 deals with a redemption of stock, compulsory
12 redemption, of which there's been a great amount of
13 discussion already, and a buyout formula in 4.6 which there's
14 been discussion about. I note that but I also note toward
15 the bottom 4.64 dealing with setoff, which raises a question
16 of how on earth you get your numbers right where there are
17 setoff rights where there are disputes, and inevitably you're
18 going to have this take a while to the extent everybody is
19 not on the same page and cannot compromise to begin with, but
20 anyhow, it's in the agreement this formula and this time
21 schedule and I noted it. I noted again the covenants
22 regarding Subchapter S further on in the document. I noted
23 on page 19, Section 8.8, the parties' agreement that this is
24 their entire agreement with respect to the subject matter
25 covered. I did not see a full merger clause, but that's

1 trending in the merger clause.

2 Q. Professor Freeman, let me direct you to 8.1 and ask you
3 if you were able to review that.

4 A. Oh, okay, there it is. Superseded -- prior agreements
5 are superseded and folded into this document, so it
6 becomes --

7 Q. Have you seen that type of language in your experience
8 with companies like this previously with documents?

9 A. You often see language of that sort in major contracts,
10 yes.

11 Q. Okay.

12 A. Similar. And then in 8.10 something that I considered
13 important, and it meshes with the legend at the top of the
14 document, and that is arbitration is the way that you're
15 supposed to resolve disputes, and we see this increasingly
16 now in all kinds of documents. You buy a set of new tires,
17 practically, or cable television or dental floss, and you're
18 going to get some kind of arbitration provision and -- but I
19 want to say this, for this type of -- there's a reason for
20 this, particularly when you're dealing with professional
21 people and particularly when you're dealing with medical care
22 providers and very logical and very reasonable and that is it
23 keeps your dirty laundry from being hung out in a public
24 forum and newspaper reporters showing up, making a spectacle
25 out of you. There's a reason why it's in here, and both

1 parties agreed to this.

2 MR. CLEVELAND: Objection, Your Honor.

3 THE COURT: Why?

4 MR. CLEVELAND: There's no relevance to this testimony.
5 There's no dispute here about arbitration. Neither side is
6 making a claim that has anything to do with arbitration, and
7 I appreciate that Professor Freeman is chastising us, I
8 guess, for not arbitrating the case, but it's not relevant
9 that he thinks that, and so I object to it.

10 MR. SHEHEEN: Maybe I could follow up with a question.

11 THE COURT: Okay. I sort of wondered that myself. I
12 was glad I didn't have to deal with the issue, to be honest
13 with you, but I did notice it was there. Yes.

14 Q. Thank you. If the point there is to avoid public
15 exposure of the issues that are a problem, once the lawsuit's
16 filed is it then defeated?

17 A. Well, you've got the toothpaste out of the tube, and now
18 you're going to have to spend money to fight to get it to
19 arbitration once it's in Court to begin with. I take the
20 arbitration versus go to court fork in the road to be
21 significant for my opinions because it was Dr. Dyce, who had
22 a contractual provision calling for arbitration, who didn't
23 adhere to that contract opinion -- contract provision and who
24 instead, contrary to the contract provision, within days
25 after being discharged threw all of this into court, suing

1 Dr. Puchalski, making charges of misconduct against Dr.
2 Puchalski, seeking an accounting, which is a very major type
3 of lawsuit, not the same as just debits and credits and X's
4 and O's and simple math but getting to the bottom of all the
5 affairs of the business. Suddenly it's in a completely
6 different forum where you'd have to fight your way out of it,
7 and in this contract here that's the only option. In the
8 employment contract executed at the same time --

9 MR. CLEVELAND: Your Honor, I waited until the end of
10 that before I stood up to give my objection. Again, there's
11 no claim in the case by either side that the other side did
12 something wrong by keeping the case in Court, and so I
13 believe that his testimony on this issue is irrelevant and
14 I'd move to have it struck.

15 THE COURT: I understand.

16 MR. SHEHEEN: Our claim is obviously we didn't move to
17 enforce arbitration.

18 THE COURT: Right.

19 MR. SHEHEEN: But that doesn't mean that he didn't
20 breach the contract by filing the lawsuit and violating what
21 is a provision in here. The question of breach is ultimately
22 up to you. I think what the professor is opining is that in
23 his expert opinion there is a reason why arbitration
24 provisions are contained in these agreements in close
25 corporations, in these types of corporations, and once the

1 lawsuit's filed that reason has been destroyed.

2 THE COURT: Okay. Now let me ask you this question, has
3 the failure to arbitrate been raised in the pleadings?

4 MR. SHEHEEN: There was a -- in the answer?

5 THE COURT: Yes, that thing.

6 MR. SHEHEEN: Yes, and this was before my time, but it
7 was raised there in one of the answers.

8 THE COURT: As a breach or a we're not supposed to be
9 here.

10 MR. SHEHEEN: There's a lot of general languages about
11 the breach. Just for example -- well there's a lot of
12 general language about the breach of contract. No, it did
13 not say you breached the contract by failing to --

14 THE COURT: As a result.

15 MR. SHEHEEN: Right, but if I can get the answer --

16 THE COURT: That's Mr. Cleveland's point is that if it's
17 not raised as an issue in the case --

18 MR. SHEHEEN: Maybe we could look.

19 THE COURT: -- I still got a job.

20 MR. SHEHEEN: We'll go through the answer, so maybe you
21 can just hold that and we'll look at the answer.

22 THE COURT: Okay. That's fine. Yes.

23 Q. Okay. Professor Freeman, is there anything else in the
24 shareholders agreement that you find relevant to forming your
25 opinions?

1 A. I'll say no and wait.

2 THE COURT: And hold on one second. Counsel, can I see
3 you all? I've got to see you just a second. It actually has
4 to do with this exhibit.

5 (Judge and attorneys confer.)

6 Q. Okay. Professor Freeman, are there any other provisions
7 in this agreement that are relevant to your opinions?

8 A. No, not at this time is my answer.

9 THE COURT: I've got the same objection with the same
10 conditional admissibility.

11 MR. SHEHEEN: Sure.

12 Q. Let's look at the employment agreement, okay?

13 A. Yes, sir.

14 Q. And let's look at the shareholder agreement. Are you
15 aware that the -- in your review of the depositions and the
16 testimony are you aware that the covenant not to compete,
17 which I've also provided you, was attached to the employment
18 agreement?

19 A. Yes, sir.

20 Q. And are you aware it was referenced in the employment
21 agreement?

22 A. Yes, sir.

23 Q. Are you aware -- is it your understanding that there was
24 increased compensation as a result of the employment
25 agreement?

1 A. Yes.

2 Q. And what provisions in the employment agreement are --
3 are there any provisions in the employment agreement that are
4 relevant to the conclusions which you've reached in this
5 case?

6 A. Yes.

7 MR. CLEVELAND: Same objection I made on that question
8 before, Your Honor.

9 MR. SHEHEEN: It's the same question.

10 Q. What provisions are you focusing on as you make your
11 determination?

12 A. Starting with the caption which calls for arbitration
13 again.

14 Q. Okay.

15 A. I then go down to the second whereas clause on the first
16 page, physician has entered into a separate covenant not to
17 compete with the group which is an essential element of this
18 contractual --

19 Q. What provision are you on? I'm sorry.

20 A. The second whereas clause.

21 Q. Okay.

22 A. So that introduces us to the concept of there being at
23 this time a noncompete, much talked about in this case. We
24 then go on to 2.3 talks about termination, and that gives us
25 discussion of termination with cause or without cause as well

1 as a provision covering payout following 2.4. I see that and
2 I, you know, considered that to be significant.

3 Q. Okay. Anything else?

4 A. Yes. Further discussion of the covenant not to compete
5 in 3.9 as well as non-solicitation, basically to protect the
6 practice from being attacked competitively, and those are
7 relevant, and I have taken them into account, as with 5.1,
8 confidentiality, again, consistent with the idea of
9 protecting the interests of the practice and tying that down
10 to a contractual provision. Then 6.1 deals with the entire
11 agreement and specifies that the shareholder agreement may
12 modify this agreement.

13 Q. Okay. And where is that?

14 A. This would be 6.1.

15 Q. Okay.

16 A. And in the event that there's any conflict the
17 shareholder agreement controls.

18 Q. Well, the Court has raised an issue that I think we
19 ought to address head on, okay?

20 A. Yes, sir.

21 Q. I want you to look at the date of the, of this
22 agreement.

23 A. June 1?

24 Q. Yes, 2010.

25 A. Got it.

1 Q. And then I want you to look at the date of the
2 shareholder agreement.

3 A. July 16.

4 Q. Okay. Now, I want you to look with me at the section in
5 the shareholder agreement that references the employment
6 agreement, but it says it was executed simultaneously with
7 this agreement. Do you know, after reviewing -- is it your
8 understanding that the shareholder agreement was referring to
9 this employment agreement?

10 MR. CLEVELAND: Objection.

11 THE WITNESS: I don't follow your --

12 MR. CLEVELAND: Objection.

13 THE COURT: Sustained.

14 THE WITNESS: I don't follow your question, sir.

15 MR. SHEHEEN: Okay. Maybe he's just not the right
16 witness to ask.

17 THE COURT: Might not be.

18 Q. Okay. Let's just keep going through. We'll go back to
19 the -- let's go back to the employment agreement?

20 A. Yes, sir.

21 Q. Any other provisions that you find relevant to your
22 decisions?

23 A. There's a provision -- I think Mark McWilliams talked
24 about this in his testimony. 6.9 deals with expenses, and
25 it's interesting because this particular provision dealing

1 with expenses talks about if you bring an action in court or
2 in arbitration.

3 Q. Okay.

4 A. But it also says that the shareholders agreement
5 controls. The shareholders agreement has got a one-way
6 avenue for redress, which is to bring an arbitration, which
7 was not done in this case and it controls according to the
8 intent of the parties.

9 MR. CLEVELAND: Objection, that's a legal conclusion.

10 THE COURT: Yes.

11 MR. SHEHEEN: Withdrawn.

12 THE WITNESS: It says it controls.

13 MR. CLEVELAND: I object again.

14 MR. SHEHEEN: I think it was the intent of the parties.

15 THE COURT: Yes. That would be a determination, yes.

16 MR. CLEVELAND: Thank you.

17 Q. Any other provisions that inform your opinions?

18 A. Of course the noncompete itself.

19 Q. Okay. Let's look at the 2005 agreement that's been
20 referenced. It was Plaintiff's Exhibit 2.

21 A. Yes, sir.

22 Q. All right. Did you review this as part of your
23 evaluation?

24 A. Yes, sir.

25 Q. Does any of it inform your opinions that you have

1 reached?

2 A. Yes. I've already referred to it, and that would be the
3 provision on page 9 of Exhibit 2 that in my own words, when
4 you become a shareholder, you're going to have to enter into
5 a noncompete. That's part of the deal -- part of the deal of
6 coming aboard this company.

7 Q. All right. Anything else within this agreement that
8 went into your conclusions that you will talk about that
9 you've reached?

10 A. No. I just hold the opinion that that -- that that
11 promise was then fulfilled later on when in fact shares were
12 issued, shareholders agreement was signed and the noncompete
13 was effective.

14 Q. All right. Professor Freeman, are there other documents
15 that you've reviewed that you believe are relevant to this
16 discussion? Did you review the original complaint and
17 answer?

18 A. Yes, I did.

19 Q. Tell the Court how that informs your decisions and any
20 conclusions you've reached as reviewing these documents that
21 we've discussed.

22 MR. CLEVELAND: Same objection as to the form of the
23 question.

24 THE COURT: I understand. Conditionally. You're about
25 to get to the end of it, the conditional part of it, but yes,

1 just conditionally admitted.

2 MR. SHEHEEN: I'm trying not to lead him, so I'm just
3 asking the question.

4 THE WITNESS: The answer to your question is yes.

5 Q. How does the complaint play into your conclusions?

6 A. I take into account several things. Dr. Dyce was
7 separated I believe on 3/10/2010. I believe that the
8 complaint was filed on the 12th or thereabouts, which is two
9 days later, and served around the 21st of March and I take --
10 to me that's significant because one of the issues in this
11 case is whether or not Dr. Puchalski and SCENT failed by not
12 getting an accounting to Dr. Dyce under the shareholder
13 agreement, and my view is that he's thrown everything into
14 court and thrown everything into court contrary to the
15 requirements of the shareholders agreement because it's
16 supposed to be in arbitration, but anyhow, that's what he
17 did. He made his choice. And in making his choice he asked
18 for an accounting, and an accounting in a business type
19 setting like this, again, is not just X's and O's and debits
20 and credits. It's get to the bottom of things, get
21 everything in court, let everybody vent, let everybody point
22 their fingers, let everybody accuse and then get it all, get
23 all the numbers here, get all the disputes resolved, draw a
24 line and figure out who owes whom.

25 MR. CLEVELAND: Objection.

1 THE WITNESS: That is my understanding of what an
2 accounting is in a business setting.

3 MR. CLEVELAND: Objection.

4 THE COURT: Yes, sir.

5 MR. CLEVELAND: Professor Freeman's descriptions and
6 opinions about the court process are not the subject of his
7 expertise. I think it's inappropriate and I object to his
8 line of testimony that he just gave and his characterizations
9 of the legal process.

10 THE COURT: Very well, noted.

11 Q. How does him filing the complaint affect the corporate
12 governance of SCENT at that time under the shareholder
13 agreement?

14 A. Well, it first of all creates an adversary relationship.
15 One way of looking at it is and these -- accountings are
16 standard in partnerships. Partners can't sue each other
17 without bringing an accounting proceeding. That's a
18 requirement, and that's typically the first shot that's
19 fired. But here what you would see is double tracking.
20 Under the agreement there's one setup, and Dr. Puchalski is
21 being sued here, charged with misconduct, and an accounting
22 is being sought in Court, and of course he has to defend
23 himself, and here we are. This is the same outgrowth of that
24 decision that was made. So in a sense what I see is from a
25 business standpoint a shareholder who has contract rights has

1 decided to take, for whatever reason, has decided to take a
2 different path, and having made that decision and stuck with
3 it, here we are, I mean, that's --

4 MR. CLEVELAND: I object to this characterization of Dr.
5 Dyce's motives by this witness. I think that's improper and
6 objectionable.

7 MR. SHEHEEN: Your Honor, I don't think he talked about
8 motives. He just said once you choose your remedy, there you
9 are, and that affects the obligations and the way that the
10 corporation can then respond. In other words, the
11 corporation at that point has to defend the lawsuit.

12 THE COURT: Okay.

13 Q. And was an answer filed?

14 A. Do you want me to talk about the complaint or do you
15 want me to talk about an answer?

16 Q. I'm sorry. Go ahead and finish with the complaint,
17 please. How else did the complaint affect the governance and
18 the obligations of SCENT and the parties?

19 MR. CLEVELAND: Objection, also on the grounds I've
20 previously asserted but as to relevance as well.

21 MR. SHEHEEN: This is directly relevant.

22 THE COURT: First of all, I don't think I understand the
23 question, so ask the question again.

24 MR. SHEHEEN: Let me take the courtesy that was extended
25 to opposing counsel when he was talking to his expert witness

1 yesterday, perhaps, to kind of lay the groundwork if that
2 would be okay.

3 MR. CLEVELAND: I'm happy for you to tell the Court your
4 contentions if that's what we're talking about.

5 MR. SHEHEEN: Right.

6 THE COURT: Yes.

7 MR. SHEHEEN: Okay. Judge, there has been a question
8 raised as to what should have happened within the 60 days
9 after Dr. Dyce was terminated.

10 THE COURT: Right.

11 MR. SHEHEEN: And one of our -- there's a number of
12 contentions about what happened during that 60 days, but one
13 of our contentions is that the filing of a summons and
14 complaint affected the obligations and the ability of SCENT
15 to then continue down the road that would have occurred under
16 the shareholders agreement. There was a lawsuit filed, and
17 that affects the ability of SCENT and the requirement of
18 SCENT -- we've pled estoppel in this case. We've said that
19 Dr. Dyce could have continued with the remedies that were
20 there under the contract but instead he chose to file a
21 lawsuit, which meant then we had to file an answer. In this
22 lawsuit he asked the Court to inquire into the matters and
23 things and determine the rights of the parties. At that
24 point he's asking the Court to make those decisions, not
25 SCENT. He's estopped from saying that we're supposed to have

1 done something within that 60 days. There's other things
2 that happened in that days that we've talked about
3 previously. He preemptively violates the covenant not to
4 compete. We know he was setting up the practice. One of the
5 things he does is files a summons and complaint asking for a
6 full blown determination of the rights of the parties.

7 THE COURT: So here comes reflective listening, so I
8 gather what then the question is is does the filing of a
9 summons and complaint for an accounting abrogate the
10 responsibilities to comply with the agreement.

11 MR. SHEHEEN: Or alter the responsibilities under the
12 agreement, yes.

13 THE COURT: Wouldn't alter it, it would abrogate it
14 because we're here.

15 MR. SHEHEEN: We are here.

16 THE COURT: And we're years past the 60 days.

17 MR. SHEHEEN: Right.

18 THE COURT: So does the filing of a summons and
19 complaint under the theory of governance of a corporation
20 excuse or abrogate the obligation of a corporation to follow
21 the terms of a buyback provision.

22 MR. SHEHEEN: Yes, ma'am.

23 THE COURT: Okay. That's where we're going.

24 MR. CLEVELAND: I would object to going there. I don't
25 think that's ever been raised as an issue in the case before

1 now, and if that's so I think that it's not relevant to any
2 issues that we're litigating before the Court.

3 THE COURT: Let me tell you what I think it has to do
4 with, and you tell me that I caused this sticky wicket
5 because I may have caused the sticky wicket, and that is my
6 question being when there is a breach of an agreement, what
7 is the effect of the breach of the agreement on a covenant
8 not to execute, so maybe I -- I mean, I don't think I caused
9 that. I think you're in that too.

10 MR. CLEVELAND: That's a fundamental part of our case.

11 THE COURT: Okay. So then in terms of corporate
12 governance then I think why isn't that then relevant?

13 MR. CLEVELAND: Because in order for it to be relevant
14 the defendants would have to have raised as an issue in the
15 pleadings, we have not paid you because you brought a
16 lawsuit, and then we would determine whether that's a viable
17 defense, but that's not in this case. Nobody's ever said
18 that.

19 MR. SHEHEEN: He raised it as an issue. They have not
20 raised exactly -- if you read their complaint, it's not
21 exactly what they say, but we raised many defenses including
22 that we didn't breach it, that they were estopped from
23 asserting these things, and we certainly have to be able to
24 present a defense to what they're alleging, and that's what
25 we're doing.

1 THE COURT: What Mr. Cleveland is saying, though, is
2 it's not raised in the pleadings. Is it not raised in the
3 pleadings?

4 MR. SHEHEEN: Is what not raised in the pleadings, the
5 filing of the summons and complaint?

6 THE COURT: Yes.

7 MR. SHEHEEN: Yes, we raised in the pleadings --

8 THE COURT: The reason that you haven't been paid is you
9 sued us for accounting and we've been real busy.

10 MR. SHEHEEN: I'd like to look at the pleadings when I
11 answer.

12 THE COURT: Sure.

13 MR. SHEHEEN: Again, there was two answers, one
14 personally by Dr. Puchalski and one by the company.

15 THE COURT: I understand. Either one will work.

16 MR. SHEHEEN: We denied all the allegations including
17 the allegations they made, so that would certainly do it.

18 THE COURT: Okay. Yes, because they say you breached it
19 by not paying within the 60 days.

20 MR. SHEHEEN: We denied that, and now we're proving why
21 we didn't breach it.

22 THE COURT: Okay. I think it's raised.

23 Q. Okay. Could you continue with your answer?

24 MR. CLEVELAND: Well, they denied that they didn't
25 breach, but they never raised as an issue that the reason

1 that they didn't breach it is because we brought a lawsuit to
2 get what we couldn't get voluntarily from the company.

3 THE COURT: I know.

4 MR. SHEHEEN: It's not an affirmative defense, Your
5 Honor.

6 THE COURT: Yes. You may proceed.

7 MR. SHEHEEN: Thank you. Your Honor, we'd also -- just
8 to inform the Court, we also allege they failed to satisfy
9 all conditions precedent to us performing that, that it's
10 barred by the doctrine of unclean hands, that they're just
11 barred by their own conduct, so there's lots of things that
12 would cover that besides the fact that we just denied it.

13 MR. CLEVELAND: In response to those allegations we
14 served contention interrogatories saying tell us what serves
15 as the basis for these allegations you're making, and they
16 never suggested that filing the complaint somehow constituted
17 an act that forfeited the rights to be redeemed.

18 THE WITNESS: Is there a question before me?

19 MR. CLEVELAND: I think I'm waiting for the Judge.

20 THE COURT: Let me hear a question again. I think
21 that's cross-examination, but let me hear your question.

22 MR. SHEHEEN: Let me resurrect my question, Your Honor.

23 THE COURT: Sure.

24 Q. Maybe I need to backtrack to do it so we don't get lost.
25 How does the filing of the complaint affect the corporate

1 obligations and responsibilities of SCENT?

2 MR. CLEVELAND: Objection.

3 THE COURT: Under what? I'm going to sustain that for
4 foundation. Under what?

5 MR. SHEHEEN: Under the shareholder agreement.

6 THE COURT: Under the shareholder agreement.

7 MR. SHEHEEN: Yes, ma'am, under the shareholder
8 agreement.

9 THE COURT: All right.

10 THE WITNESS: In my opinion it affects it this way: The
11 shareholders agreement calls for a buyout read in tandem with
12 the employment agreement, and it puts certain strictures on
13 the timeliness of the windup. At the same time the
14 beneficiary of that provision has taken a completely
15 different path to reach the exact same objective that would
16 be reached under the contract by affording a buyout at a
17 certain price because under an accounting proceeding of the
18 type that's brought here that is exactly where you go. That
19 is exactly what you seek, and that is exactly where you're
20 headed and exactly what you're going to get, so it strikes me
21 as a logical point, first off, that the hurry up and get a
22 number approach, which becomes pretty much mission impossible
23 when setoffs have to be factored in anyhow, is excused, or at
24 least in a reasonable businessperson's eyes can be seen as
25 being excused by the option taken here by Dr. Puchalski (sic)

1 to basically throw all these issues into court and all the
2 numbers into court and all the behavior into court and let a
3 judge decide who gets what as to his dealings. And in
4 support of that I note that you couldn't resolve the issue of
5 what to pay him without having a resolution of the issue of
6 whether or not Bob Puchalski has committed wrongs to the
7 extent that Dr. Dyce is accusing Puchalski or would accuse
8 Puchalski of that, and that's exactly what he does in this
9 proceeding. He accuses Dr. Puchalski of having acted
10 oppressively and unfairly prejudicially, having mismanaged
11 corporate affairs, having wrongfully excluded the plaintiff
12 from property and information and basically having mismanaged
13 the company to Dr. Dyce's detriment. And so a forum has been
14 chosen, not the forum that's listed in the shareholder
15 agreement but a different forum, to get to the bottom of
16 everything. And in my view it becomes relevant later then
17 that you have issues like estoppel and waiver raised in
18 defense, the issue of whether or not Dr. Dyce's conduct has
19 been wrongful itself, which is alleged here, along with a
20 waiver and estoppel. These things come to the fore as well,
21 and just from a governance standpoint, it would be very
22 difficult to say, yes, we are obligated to give to Dr. Dyce
23 two different bites out of the apple just because he wants it
24 that way. In essence there's an issue in my mind whether as
25 a shareholder he has turned his back on his contract and gone

1 in a different direction, and if he did, there may be
2 consequences for Your Honor to consider.

3 Q. At the point the complaint is filed is the -- is SCENT
4 obligated to then file an answer?

5 A. Yes.

6 Q. Okay. And in this case was an answer filed?

7 A. By both SCENT and Dr. Puchalski.

8 Q. And does that inform your opinions?

9 A. Yes.

10 Q. How so?

11 A. Well, first of all, as I mentioned, these answers raise
12 back to Dr. Dyce issues as to his behavior such as the eighth
13 defense, plaintiffs claims are barred because of plaintiff's
14 own conduct; the fourth defense plaintiffs claims are barred
15 by the doctrine of laches, waiver and estoppel. But on top
16 of that you've got the entity and Dr. Puchalski having been
17 accused of misconduct and particularly personal misconduct on
18 the part of Dr. Puchalski. And then discovery takes over.
19 You've got the principle of compulsory counterclaims out
20 there, and it's just a natural course of events in litigation
21 that things get bigger and roll on with a lawsuit. And I
22 take this into account in judging Dr. Puchalski's decision to
23 turn the attention to either litigating or settling the
24 litigation as opposed to trying, on a different track, give
25 Dr. Dyce that which he has already been decided to seek in

1 court.

2 Q. It's been talked about a little bit in court, but during
3 your review of the evidence and the documents and the
4 testimony you've heard did you see where there were offers to
5 mediate the case or hire Dr. Dyce back in some capacity until
6 it was worked out or offers to somehow --

7 A. Yes, I've seen that information.

8 MR. CLEVELAND: Your Honor, objection. I don't know
9 what relevance it has that Professor Freeman may have seen
10 e-mails. Just to ask him to comment on the evidence in the
11 case I think is improper, it's irrelevant, it's outside the
12 scope of what he was admitted to talk about.

13 MR. SHEHEEN: Your Honor, he was talking about his
14 opinions of obligations to try to resolve the dispute
15 somehow, and I simply asked him if he had heard, seen or in
16 particular has reviewed those facts, and he can say no or
17 yes.

18 THE COURT: It goes to corporate governance.

19 MR. SHEHEEN: Yes, ma'am, what their obligation is.

20 THE COURT: As to corporate governance I'll allow it.

21 MR. SHEHEEN: Thank you.

22 Q. Okay. Professor Freeman --

23 A. Yes, sir.

24 Q. -- let's look at, and I want to give counsel the time to
25 look at this, Defendant's Exhibit 129.

1 A. Yes, sir.

2 MR. SHEHEEN: Let me let counsel have a minute to look
3 at it.

4 MR. CLEVELAND: Thank you.

5 Q. Okay. This is a letter. Could you tell the date to the
6 Court?

7 A. April 16, 2010.

8 MR. SHEHEEN: It's behind H in your book.

9 Q. Could you say that date again?

10 A. April 16, 2010, 129.

11 Q. And did you review this record as part of your review of
12 the documents and testimony in this case?

13 A. Yes, sir.

14 Q. Did it go into helping you form your opinions?

15 A. Yes.

16 Q. And just describe to the Court briefly what it is.

17 A. It's a letter from Dr. Dyce's counsel to a lawyer at
18 Nelson Mullins criticizing communications by SCENT to Dr.
19 Dyce's patients, demanding changes in that and then making
20 certain other statements.

21 Q. And does it discuss the covenant not to compete in that
22 letter?

23 A. Yes, on the second page at the top.

24 Q. Could you read a little bit of it?

25 A. The references -- this is first paragraph, third

1 sentence -- the references in your most recent e-mail to me
2 to intentionally leaving out an address in order to attempt
3 to enforce a noncompetition provision which we believe is
4 unenforceable --

5 Q. Okay. Could you stop right there for a minute?

6 A. Yes.

7 Q. This is within the 60-day time period we were discussing
8 earlier?

9 A. Yes, sir.

10 Q. Okay. And what is being told to SCENT in that paragraph
11 there, that sentence? How did you interpret that as you
12 reached your conclusions?

13 A. I think a reasonable interpretation is it's sort of the
14 first robin in spring that we intend to compete or at least
15 we are certainly of a mind that we're free to compete if we
16 want to compete and that it's -- I take it further in the
17 context of we want our clients to know where we are, our
18 patients to know where we are so they can reach us.

19 Q. Do you know where Dr. Dyce was at that time?

20 A. Hartsville, I believe.

21 Q. Thank you. In your preparation did you review certain
22 secret tape recordings made by Dr. Dyce?

23 A. I did.

24 Q. Describe how those go into your opinions about the
25 proper role of corporate governance?

1 A. I take the tape recording into account this way: Dr.
2 Dyce is an educated man, he's a professional man, he's
3 represented by counsel. I believe even in 2007 he was
4 represented by counsel in negotiating with Dr. Puchalski.

5 Q. Everybody was represented by counsel during what we're
6 discussing, this time period, weren't they, from your review?

7 A. That's the way it looks to me. In any event -- he as a
8 general rule in my experience professional people don't
9 surreptitiously tape-record.

10 MR. CLEVELAND: Objection. I object on the grounds of
11 relevance that Professor Freeman's experience about what
12 people do or don't do is not relevant for the consideration
13 of the Court. If you've got some standard, statute,
14 regulation, I still think it would be inadmissible because
15 then he'd be testifying about the ultimate issue in the case,
16 but what he's doing now just opining about what he thinks is
17 appropriate conduct without establishing some basis for it,
18 laying a foundation, I believe is inappropriate and I object
19 to it.

20 MR. SHEHEEN: Your Honor --

21 THE COURT: I'm with you.

22 It seems to me that what he's saying is that based on
23 his experience and knowledge that it's atypical for educated
24 people who are either currently represented or have been
25 represented to tape-record one another.

1 MR. SHEHEEN: Let me maybe change the question.

2 THE COURT: Sure.

3 Q. Are you experienced in your level -- in your expertise
4 in corporate governance have you been involved with
5 shareholders, managers, presidents as they interact with each
6 other in that setting?

7 A. Sure.

8 Q. And do you use that experience as you determine the
9 appropriate corporate governance and how -- the obligations
10 owed to each other?

11 A. Yes, in terms of normal behavior and whether something
12 is in the mainstream or out of line, I take my background
13 into account in making those judgments.

14 Q. Regarding that expertise what's your experience of
15 people tape-recording others in those situations?

16 MR. CLEVELAND: Same objection, Your Honor. For
17 Professor Freeman to talk about what he thinks is in the
18 mainstream is well outside what he was offered to be, which
19 is an expert in corporate governance, not somebody who's
20 opining about the mores of contemporary society.

21 THE COURT: I'm taking it as corporate governance.

22 MR. CLEVELAND: It's the mainstream part of it that I
23 think is --

24 THE COURT: I understand, I'm with you, corporate
25 governance.

1 MR. SHEHEEN: In the context of corporate governance.

2 Q. And also does that relate to fiduciary duties owed to
3 each other?

4 A. Yes, it relates to the way people interact and trust and
5 confidence between them.

6 Q. Were you surprised to see it happening, given your
7 experience?

8 MR. CLEVELAND: Objection. Whether Professor Freeman
9 was surprised or not is not relevant.

10 THE COURT: I agree. I'll sustain that. I mean, I
11 think he's indicated that's outside the norm.

12 MR. SHEHEEN: Okay. Great.

13 Q. Anything else that that informs you related to corporate
14 governance and what was going on at SCENT?

15 A. Sure. There's been a lot of discussion about lack of
16 access to information.

17 Q. Let's talk about that.

18 A. Okay. Well, we know that Dr. Dyce has complained
19 mightily, may still be complaining, about not getting all the
20 books and records to which he is entitled, and Dr. Puchalski
21 has been criticized at considerable length for being --
22 ruling with an iron fists, being uncaring, being
23 unsympathetic, being dismissive and kind of bringing all this
24 down on himself by his recalcitrance and his own kind of, for
25 want of a better word, my impression, domineering view of

1 things. In fact, there was some talk about a dictator, and
2 for that reason I took into account some of the -- of course
3 I have talked to Dr. Puchalski, and I have read a lot of
4 testimony, and there's an exhibit, Exhibit 34 which to me is
5 a significant exhibit, and this is -- was talked about in
6 court when I was here before, and it was actually up on the
7 screen.

8 Q. That's the exhibit where there was the six things --

9 A. Yes, the listing. This is right -- it's important to me
10 in evaluating governance and in evaluating behavior from a
11 factual, experiential standpoint to take this into context.
12 Where are we in March of 2010.

13 MR. SHEHEEN: Your Honor, it's at I in your book, just
14 so you know.

15 Q. Okay. Go ahead.

16 A. Where are we, okay, and where we are is the economy is
17 cratering, particularly the commercial real estate market is
18 falling apart, basically at its depth.

19 MR. CLEVELAND: Objection, objection.

20 THE WITNESS: May I finish my answer?

21 MR. CLEVELAND: Just a minute. Professor Freeman is now
22 commenting about the state of the economy, the state of the
23 real estate market. He's not qualified to talk about all
24 that. He's not been offered as an expert to talk about all
25 that. And to give his opinions that that somehow matters in

1 what was going on I think is absolutely inappropriate. I
2 object.

3 THE COURT: Very well.

4 MR. SHEHEEN: Your Honor --

5 THE COURT: Overruled. Go ahead.

6 Q. Thank you. Go ahead.

7 A. To continue my answer, things are bad. They're bad for
8 people who have big construction projects. They're bad for
9 people who have contractors out there. They're bad for
10 lenders who are starting to put pressure down the line, and
11 the record that I have reviewed shows that a lien was being
12 threatened by the builder, that cash was drying up, that Dr.
13 Puchalski was between a rock and a hard place. He had this
14 building that had to be finished and he had a lease that was
15 expiring, and so he had to get the money to get this built,
16 and getting the money meant getting bank loans closed. Now,
17 this is SCENT Land, but of course Jamie Curley, Dr. Dyce's
18 wife, is instrumental in that. And then you have, with all
19 this kind of trauma going on, Dr. Dyce and Jamie Curley
20 unwilling to kind of step up and help solve the problem of
21 getting this building built and an argument and a refrain
22 that keeps resonating in this case is, well, we wanted
23 information, and you just stiffed us. You just were
24 uncaring. And I look at this. When it was on the screen,
25 you know, I drank it in, and this is a very, very broad

1 request by Dr. Dyce for information -- copies of all bank
2 statements, electronic Excel spreadsheets, and it goes down
3 to access to all supporting documentation on file at or at a
4 location controlled by SCENT relating to disbursements made
5 since inception to the present. In other words, we want to
6 see every scrap of paper that concerns every single outlay of
7 any sort for this business from the time the articles were
8 filed to today and you might -- if you got a discovery
9 request like this, you might object to it and say, it's
10 overbroad, and I have known lawyers to do that, but look at
11 what the answer is up above from Dr. Puchalski, who
12 supposedly is uncaring, dismissive, etc., quote, Orville,
13 you're welcome to review this information, and I will answer
14 any questions; in other words, I'll work with you on this.
15 We'll get there.

16 MR. CLEVELAND: Objection, Your Honor, objection, Your
17 Honor. Professor Freeman's now restating what the exhibit
18 says and putting it into some form -- this is just pure
19 argument to the Court as to what these exhibits mean. I
20 think that's objectionable and inadmissible.

21 THE COURT: It says what it says. I mean, it certainly
22 says what it says.

23 MR. SHEHEEN: It does.

24 THE COURT: All right.

25 Q. And, Professor Freeman, how does this, what you're

1 reading here, how does it inform your conclusions related to
2 this issue?

3 A. Well, it informs my conclusions because it is a response
4 to any effort to demonize Bob Puchalski in his defense and is
5 favorable to him in my opinion.

6 Q. You've been involved in corporate governance, you talked
7 about that, you've been involved in individuals and their
8 interactions in corporate governance. How common in that
9 realm, in that real-world realm that you've been involved in,
10 would a request like this be?

11 MR. CLEVELAND: Objection. Whether it's common or not
12 is not relevant to any issue before the Court.

13 MR. SHEHEEN: This is directly going to corporate
14 governance and what can be expected in these types of
15 situations between shareholders, and it's directly related to
16 what we're talking about.

17 THE COURT: Okay. He can respond to it.

18 THE WITNESS: I have not seen such a broad request,
19 particularly in the context of requiring truckloads of data
20 like this, as a condition precedent to closing a vitally
21 needed, extremely important, crucial real estate loan so that
22 the practice after June of 2010 has a place for its patients.

23 Q. And you said you reviewed the transcripts of the
24 telephone conversations as well?

25 A. Yes.

1 Q. Were there any interactions between them related to
2 information in those transcripts?

3 A. Yes.

4 Q. Okay.

5 A. And I want to be more specific. There were interactions
6 where that it appeared to me Dr. Puchalski was willing to
7 indulge Dr. Dyce, was not dismissive, uncaring, mean in any
8 sense.

9 Q. Let's talk a little -- you mentioned SCENT Land,
10 Professor Freeman.

11 A. Yes.

12 Q. And that Jamie Curley, I believe you said you recognized
13 that she was a member of SCENT Land. Based on your review of
14 the evidence and the documents and your experience in how
15 these different companies operate, did it appear that Jamie
16 Curley was acting through Orville Dyce in regards to SCENT
17 Land?

18 A. I would say it slightly differently. It appeared to me
19 that they were working in tandem in their treatment of this
20 SCENT Land financing emergency and the refusal to cooperate
21 which I believe caused five closings to be canceled.

22 Q. And, Professor Freeman, let's discuss the various
23 manifestations of adverse behavior on Dr. Dyce's part. Did
24 you note in reviewing the facts any instances where Dr. Dyce
25 hindered business operations at SCENT?

1 A. Well, the SCENT Land thing is crucial. That to me is
2 just like a Mount Everest of importance because, you know, if
3 you have a medical practice, you've got patients coming, they
4 need a place, you're losing your lease, the place needs to be
5 finished. And it seems that Dr. Puchalski was very, very
6 focused if not fixated on getting that done. You can
7 understand why, given the exigencies of the time.

8 Q. And did your analysis -- beg the Court's indulgence one
9 moment.

10 THE COURT: Mm-hmm.

11 Q. Were there any other manifestations of adverse behavior
12 on Dr. Dyce that are relevant to your conclusions?

13 A. Yes. There's some evidence of sharing information with
14 Dr. Gunnlaugsson where Dr. Gunnlaugsson and his attorneys
15 seem to be being fed information stemming from Orville Dyce.

16 MR. CLEVELAND: Objection. I think he needs to lay a
17 foundation if he's going to make that accusation, so I object
18 to it.

19 THE COURT: Okay. Are you going to lay a foundation?

20 MR. SHEHEEN: Sure.

21 Q. Did you review the deposition of Dr. Gunnlaugsson in
22 this case?

23 A. I did.

24 Q. Did you rely in part on it in making your
25 determinations?

1 A. I did, specifically on information.

2 MR. SHEHEEN: May I approach, Your Honor?

3 THE COURT: Sure.

4 Q. I've given you an excerpt of some of the deposition
5 testimony of Dr. Gunnlaugsson. What in there did you rely on
6 in making your conclusions?

7 A. Okay. Can I give background first of all of what we're
8 looking at.

9 Q. Please, yes.

10 A. This is Dr. Gunnlaugsson's deposition in his own case
11 after Dr. Dyce's deposition in that case, and the questioning
12 is in the context of the affidavit, which I believe is in the
13 record and been talked about that was prepared by Chuck
14 Thompson and given to Dr. Dyce, and I read these pages and
15 take these pages into account because the pages deal with
16 communications between the parties, and evidently there's
17 been testimony that --

18 MR. CLEVELAND: Your Honor, I need to object. I'm going
19 to object to this. This is hearsay. It is not admissible in
20 this Court. He couldn't say what he thinks Dr. Gunnlaugsson
21 said, so I object to any attribution to Dr. Gunnlaugsson of
22 anything he may have said or repeating anything Dr.
23 Gunnlaugsson said as hearsay. It doesn't help it may have
24 been from a deposition.

25 MR. SHEHEEN: Your Honor, of course he's an expert. He

1 can testify about things that form the basis of an opinion,
2 and that's what he's doing. That's black letter law.

3 THE COURT: Yes, certainly depositions are certainly the
4 kind of information that experts use when testifying, and
5 it's a little bit unusual because, I mean, I've heard about
6 the affidavit and I have heard about -- I've heard from Dr.
7 Gunnlaugsson and, I mean, I've heard about the affidavit,
8 seen the affidavit, heard about it, and so it may be more
9 appropriate for cross-examination. Typically, normally,
10 while there can be inadmissible testimony that can be used by
11 an expert in forming the opinion that the underlying
12 inadmissible evidence can't come in through the expert where
13 it couldn't come in otherwise, that's one of the differences,
14 but it doesn't mean that the expert cannot use inadmissible
15 evidence. I guess that's where I'm a little bit concerned,
16 but the affidavit's in. It's an exhibit.

17 MR. SHEHEEN: They put in Dr. Gunnlaugsson's allegations
18 about what he talked to Dr. Dyce about and what he didn't
19 talk to Dr. Dyce about.

20 THE COURT: It's already in.

21 MR. SHEHEEN: This relates directly to that.

22 THE COURT: That's right, but whether or not the -- and
23 the deposition is hearsay, it's actually double hearsay, but
24 he can certainly -- but Professor Freeman can certainly use
25 the deposition to form an opinion.

1 MR. SHEHEEN: Yes, ma'am, that's what we're doing.

2 THE COURT: If he wants to talk about the affidavit,
3 I've reviewed his testimony and I believe there was an
4 exchange of information based on the affidavit.

5 MR. SHEHEEN: I'm sorry.

6 THE COURT: What he can't do is specifically talk about
7 parts coming from -- the inadmissible evidence cannot come in
8 through the expert but he can certainly use it in forming his
9 opinion.

10 Q. After reviewing Dr. Gunnlaugsson's testimony in that did
11 you come to certain conclusions?

12 A. Yes, relevant to this proceeding, yes, sir.

13 Q. Relevant to this proceeding that dealt with the exchange
14 of information between Dyce and Gunnlaugsson?

15 A. Yes.

16 Q. Could you tell the Court those opinions?

17 A. Yes, my understanding of the state of the evidence to
18 this point is that there's testimony to the effect --

19 MR. CLEVELAND: Objection.

20 MR. SHEHEEN: This is restating --

21 MR. CLEVELAND: He was asked what his opinions were, and
22 now he's about to say what testimony was, and you just ruled
23 that inadmissible, so I object.

24 THE WITNESS: In this proceeding.

25 THE COURT: In this proceeding.

1 THE WITNESS: I'm talking about in this proceeding my
2 understanding, and I haven't been here for all of it, is that
3 there's been testimony to the effect that essentially Dr.
4 Dyce and Dr. Gunnlaugsson were not exchanging confidential
5 information, were not collaborating, that Dr. Dyce wasn't
6 leaking any information of a proprietary nature to Dr.
7 Gunnlaugsson, and my understanding is Dr. Gunnlaugsson was
8 very firm on that point when he was in this chair yesterday.
9 I beg to differ based on my understanding of the facts and
10 the record of this matter going back to the Gunnlaugsson
11 case. I think that that is incorrect.

12 MR. CLEVELAND: Objection. I think this is pitting a
13 witness again. We have one witness coming and saying another
14 witness didn't tell the truth. If he knows facts he's aware
15 of, he can testify to those facts. I object to his opinions
16 because I think they all go to legal conclusions, but he's
17 not a fact witness, so I don't think it's appropriate for him
18 to be doing that either, so I object.

19 THE COURT: I'm with you. And the opinion is?

20 Q. And the opinion is?

21 A. The opinion is that Dr. Dyce and Dr. Gunnlaugsson have
22 got an obligation to speak accurately and truthfully
23 concerning their behavior at SCENT, SCENT deserves that, they
24 deserve that. I believe that it is inaccurate to say that
25 there was not a considerable exchange of information between

1 Dr. Dyce and Dr. Gunnlaugsson concerning proprietary
2 information at SCENT while Dr. Dyce was employed and while
3 Dr. Gunnlaugsson was employed informing Dr. Gunnlaugsson, who
4 was soon to go into competition with his operation in the
5 same building as SCENT in short order.

6 Q. Thank you.

7 A. I just have a different view, based on my investigation
8 and understanding and analysis, than the one that seems to be
9 featured in this case.

10 Q. All right. Were there any other manifestations that you
11 saw where Dr. Dyce hindered the business operations of SCENT?

12 A. Well, apparently a fee schedule -- do you have Exhibit
13 81 -- gets leaked out and used, and I believe it was used by
14 Dr. Gunnlaugsson.

15 Q. That would be --

16 A. 81.

17 Q. Exhibit 81, Defendant's Exhibit 81.

18 And, Your Honor, for your purpose that would be behind

19 M.

20 THE COURT: Okay.

21 MR. CLEVELAND: I don't understand the relevance of this
22 to Dr. Dyce. Unless there is some, I would object.

23 THE COURT: I don't know what this is.

24 MR. SHEHEEN: Let me lay a foundation.

25 THE COURT: Yes.

1 Q. Is it your understanding after reviewing the evidence
2 and the documents there were certain fee schedules that SCENT
3 used to charge by?

4 A. Yes.

5 Q. Okay. And is it your understanding that's what this
6 document represents?

7 A. Yes.

8 Q. Is it your understanding that the fee schedule here was
9 used by Dr. Gunnlaugsson is the same as SCENT's?

10 A. Yes.

11 Q. And is it your opinion based on what you've reviewed
12 that he got this from Dr. Dyce?

13 A. My understanding --

14 MR. CLEVELAND: I think he needs to do a little more
15 than just say he has an opinion. There has to be some basis
16 for it.

17 Q. What's your basis for that opinion?

18 A. He had to get it from somewhere and Dr. Puchalski says
19 he didn't give it to Dr. Gunnlaugsson.

20 Q. Is this the type of confidential information that would
21 be kept in a corporation such as this to your knowledge?

22 A. Yes, sir.

23 MR. CLEVELAND: Your Honor, I think that's entirely
24 inappropriate for Professor Freeman to say, well, must have
25 gotten it from somewhere, therefore I'm going to assume that

1 it came from Dr. Dyce, not one of the other employees, not
2 something that Dr. Gunnlaugsson might have been able to get
3 while he was there as an employee.

4 THE COURT: I understand. I'm with you.

5 MR. SHEHEEN: Those are factual disputes.

6 THE COURT: I understand.

7 MR. SHEHEEN: Yes, ma'am.

8 Q. All right. Is there anything else, Professor Freeman?

9 A. Yes, sir. If you look at SCENT Defendant's Exhibit No.
10 99.

11 MR. SHEHEEN: Okay. That's behind P, Your Honor.

12 THE COURT: Okay.

13 Q. It's a little blurry. Could you tell the Court what
14 that is?

15 A. If you look at the footnotes, this is a Carolina Pines
16 spreadsheet on -- financial spreadsheet, and it refers to
17 SCENT pricing -- actually, kind of the market segment served
18 by SCENT. At the bottom it says, SCENT currently sees a very
19 low percentage of self-pay business, the kind of proprietary
20 information that would be unusual to find.

21 MR. CLEVELAND: Objection. Now Professor Freeman is
22 testifying about the availability of medical market
23 information in the marketplace, and I object that he has no
24 professed qualifications as to the availability of that
25 information and this exhibit --

1 THE COURT: I understand. Foundation.

2 Q. Have you reviewed the evidence and the testimony in this
3 case?

4 A. Yes, I have.

5 Q. And have you talked to folks at SCENT about their
6 information?

7 A. What kind of information? I have a lot of information.

8 Q. Whether or not this would be considered confidential
9 information.

10 A. Yes, I did.

11 Q. Based on those discussions and based on your observation
12 of the testimony and the documents in the case is it your
13 opinion that this is the type of information that would be
14 considered confidential in a corporate setting?

15 A. Yes, sir. That's why I get my understanding from, from
16 SCENT people.

17 Q. And clearly this is obtained on this document by
18 Carolina Pines, right?

19 A. It's their document as far as I can tell.

20 MR. CLEVELAND: I object that there's no foundation that
21 Dr. Dyce had anything to do with providing that information.
22 I think that ought to be struck.

23 THE COURT: I don't know if he can link it up. I
24 certainly agree with you where you are now.

25 Q. Does Dr. Dyce work for -- is this a pro forma for Dr.

1 Dyce from Carolina Pines?

2 A. My understanding is that that is what it is.

3 Q. Okay. And it's prepared for him going to work there,
4 right?

5 MR. CLEVELAND: Objection. I don't know how Professor
6 Freeman knows how the document was prepared or who prepared
7 it or what it was for.

8 THE COURT: That would be foundational, wouldn't it,
9 yes.

10 MR. SHEHEEN: Your Honor, it was testimony in Orville
11 Dyce's questioning about what this was.

12 THE COURT: Yes, right.

13 MR. SHEHEEN: And he heard it.

14 THE COURT: You've just got to do that. I know he's
15 been coming and going, so that's part of the foundation, did
16 you hear him talk about it.

17 Q. Did you hear him talk about this on direct examination?

18 A. Dr. Dyce talk about this?

19 Q. Yes.

20 A. You know, I may have. I had a really hard time
21 following some of the documents on the screen.

22 Q. Okay. Assume --

23 A. And I'm not sure that I was here if it was cross. I
24 don't know.

25 Q. Assume that this document -- assume that the information

1 obtained by Carolina Pines was given by Dr. Dyce. Would that
2 be a breach of his fiduciary obligations?

3 A. It links Dr. Dyce to the construction of the document
4 which refers to proprietary SCENT information. It connects
5 those dots, yes, sir.

6 Q. Would that be a breach of his obligation?

7 A. If he divulged confidential SCENT information to
8 Carolina Pines, it would be a breach.

9 Q. Okay. Anything else?

10 A. If you look at 114.

11 Q. Let's make an assumption on that one just to move along,
12 Professor Freeman.

13 A. Okay.

14 Q. 114 is the e-mail that says from Mike Grabowski talking
15 to Dr. Gunnlaugsson, we talked about it yesterday, that said
16 if Dr. Dyce comes in early as a partner, I guess it would
17 make the answer easy. Assuming that Dr. Dyce had talked with
18 Dr. Gunnlaugsson about coming in as a partner, would that
19 show their --

20 A. Interaction, yes, sir.

21 Q. Okay. How does that relate to your ultimate
22 conclusions?

23 A. There's an issue as to whether or not information is
24 being shared and whether they are working in a way adverse to
25 SCENT's best interests and if -- that particular operation at

1 that time was working to set up a competing practice for Dr.
2 Gunnlaugsson.

3 Q. Okay. Professor Freeman, let's talk about -- you
4 mentioned the closings and the relationship between SCENT and
5 SCENT Land. You mentioned the five failed closings. What is
6 your opinion of how that went down and how that affects your
7 conclusions in this case?

8 MR. CLEVELAND: Objection, it's not relevant what
9 Professor Freeman thinks about how it went down.

10 MR. SHEHEEN: Let me rephrase the question.

11 THE COURT: Okay.

12 Q. Professor Freeman, what impact did the five failed
13 closings have on your conclusions in this case?

14 MR. CLEVELAND: Objection. Objection. Professor
15 Freeman is now being asked to testify about the business
16 financial, I assume, effects that actually occurred as
17 opposed to corporate governance or the other things he was
18 admitted to testify about, so I object to his qualifications
19 on this.

20 MR. SHEHEEN: Everything I'm asking him is in
21 relationship to the corporate governance and the other things
22 that he was qualified as an expert to, and I'm asking him
23 that in this context, what did these five failed closings,
24 how did they impact your opinion in that field, that's my
25 question.

1 THE COURT: I didn't know that there were five failed --
2 first of all, I didn't know there were five failed closings,
3 and I don't know why there were five failed closings.

4 MR. SHEHEEN: Do you want me to ask that question?

5 THE COURT: I guess, right, because, I mean, for
6 foundational purposes, I don't know that there are five
7 failed closings, and I don't know that -- I guess I gather
8 what you're sayings is that the plaintiff had -- the
9 plaintiff caused the five failed closings, is that what you
10 are saying?

11 MR. SHEHEEN: Yes, ma'am, yes, Your Honor.

12 THE COURT: I don't know any of that. Should I know any
13 of that?

14 MR. SHEHEEN: I'll lay the foundation.

15 Q. Did you review how many closings failed in this case?

16 A. Yes.

17 Q. How many?

18 A. My understanding is there were five.

19 Q. In your review did it appear that Dr. Puchalski and
20 SCENT were trying to get these closings finalized so that
21 they could move out of the leased premises?

22 A. Yes.

23 Q. And in your review did you find that the leased premises
24 was about to end and that they would not have a place to
25 practice with SCENT?

1 MR. CLEVELAND: Your Honor, I'd have to object as
2 leading.

3 THE COURT: Well, yes, okay, you are leading.

4 MR. SHEHEEN: Yes, ma'am.

5 THE COURT: I know all that but -- and it was expiring
6 in June.

7 MR. SHEHEEN: Right.

8 THE COURT: I know that.

9 Q. How many closings were there that were failed?

10 A. My understanding is five.

11 Q. What caused the failures based on your review of the
12 file?

13 A. The refusal of Jamie Curley and Orville Dyce to consent
14 to go ahead and sign the closing documents, participate in
15 the extension of the loan, and my understanding is that the
16 justification for that reticence was the claim that Robert
17 Puchalski had wrongfully deprived Dr. Dyce and his wife of
18 crucial information and would not be forthcoming and Dr. Dyce
19 drew a line in the sand, as I understand it, and basically
20 said, we're not going to go ahead without this information.
21 The time was short, the pressure was great, and I believe
22 that that reluctance ended up being a major contributing fact
23 to the termination of Orville Dyce.

24 Q. In your review of the documents and the testimony and
25 the depositions did you notice a change in Dr. Dyce from 2008

1 into 2009 and '10 in his interactions with the company?

2 MR. CLEVELAND: Objection. For Professor Freeman now
3 gleaned from e-mails how Dr. Dyce was interacting with the
4 company I think is beyond the scope of any expertise he may
5 have.

6 MR. SHEHEEN: Your Honor, to ask these questions -- he
7 wants me to lay a foundation, which means I have to ask him
8 about the facts he's observing, and that's what I just did.

9 THE COURT: Here's my concern --

10 MR. SHEHEEN: Yes, ma'am.

11 THE COURT: -- my problem with the question is because
12 of the generality with the company. What does that mean?
13 You know, that in and of itself, unfortunately, is very
14 general because I've heard from Dr. Gunnlaugsson and I have
15 heard from a number of employees who obviously held to this
16 day this particular doctor in high esteem and liked him very
17 much. I think that the question is was there a difference in
18 the relationship between he and the managing shareholder. I
19 mean, isn't that really the question?

20 MR. SHEHEEN: Well, I think at the end of the day the
21 question is Dyce's, I think you said interaction,
22 relationship, I would say interaction with the company and --

23 THE COURT: Okay.

24 MR. SHEHEEN: -- did it change and what was the result
25 to the company because of the way --

1 THE COURT: Interaction with the company?

2 MR. SHEHEEN: You said relationship with Puchalski,
3 SCENT, excuse me, SCENT.

4 THE COURT: Okay.

5 MR. SHEHEEN: I'll ask it the way you just framed it.

6 THE COURT: No, I just think I need to know what you're
7 talking about because I have heard from a number of different
8 people.

9 MR. SHEHEEN: Let me break it into people.

10 THE COURT: I've heard from a number of different people
11 involved with the company, and so far everybody didn't have a
12 problem with him, liked him very much, thought he was a
13 workhorse, you know, thought that when he changed there was a
14 tremendous difference in the atmosphere. Now, whether or not
15 it was because there was less money because he was a
16 workhorse or for something else, I've got to make that
17 determination, but I haven't heard anything negative about
18 his interaction because apparently the patients liked him,
19 employees liked him.

20 MR. SHEHEEN: I'm talking about in the realm of
21 corporate governance, not in the realm of patients and
22 interaction, in the realm of corporate governance, how did he
23 interact with the corporate governance over time.

24 THE WITNESS: Well, let's focus on the time period late
25 2009 and into 2010 when the crunch is coming. My observation

1 and opinion is that Dr. Dyce had gotten lawyered up --

2 MR. CLEVELAND: Objection. I think that's, when he says
3 all lawyered up --

4 THE WITNESS: I didn't say all lawyered up.

5 MR. CLEVELAND: This is closing argument, not
6 appropriate testimony from an expert.

7 THE COURT: Right.

8 MR. CLEVELAND: So I object to it.

9 THE COURT: Okay. Overruled.

10 THE WITNESS: That he had counsel, that counsel was
11 giving him advice, that he was tape-recording a lot and that
12 friction existed which only seems to have gotten worse, that
13 the bond of trust and confidence and respect that had
14 formerly existed between Dr. Dyce and Dr. Puchalski was
15 becoming frayed, that Dr. Gunnlaugsson too was becoming
16 extremely weary, that economic pressures in this rapidly
17 expanded and highly successful practice were mounting and the
18 atmosphere was getting ready to boil over, and that as Dr.
19 Dyce became more and more insistent, whether or not, I don't
20 know, at a lawyer's suggestion or CPA's, that financial data
21 be accumulated and the amounts of needed data multiplied, you
22 can understand somebody in Dr. Puchalski's position, who
23 built the practice, a successful practice and is working hard
24 too day in and day out and has these financial obligations
25 which must be met, becoming increasing exasperated and

1 frustrated, and it was a meltdown and that's what gives us
2 this trial here.

3 Q. In your review of the record, and I won't dwell on this
4 because I think the Court has already got this point, but
5 just very briefly, in your review of the records up until the
6 fall of 2009 did you see where Dr. Dyce was requesting much
7 information or who was running the show?

8 A. I believe that I've seen some evidence that he had
9 counsel as early as 2007 because I think that there was a
10 reconfiguration of the partner buy-in, partially with the
11 insistence, according to Dr. Puchalski of his Philadelphia
12 lawyer who continued to represent him but things seemed to be
13 going fairly smoothly right into the fall of 2008 and then,
14 as I say, the bonds started to get frayed, and ultimately
15 there was an explosion.

16 Q. I want you to assume that Dr. Dyce intentionally misled
17 Dr. Puchalski into providing higher distributions to both
18 shareholders in 2009 with the assurance that he would
19 negotiate a new contract that would take into consideration
20 debt. Would that be appropriate conduct if it wasn't, within
21 the corporate sphere, if it wasn't followed through with?

22 A. No.

23 Q. Professor Freeman, please tell the Court -- you've given
24 some conclusions today in your expert opinion. Tell the
25 Court your ultimate conclusions in this case.

1 A. My conclusion --

2 MR. CLEVELAND: Objection to the form. It's not
3 relevant what Professor Freeman's ultimate conclusions are.
4 We don't know what's coming, can't evaluate whether it's
5 relevant or -- so I object.

6 MR. SHEHEEN: Because I'm not leading him. I'm asking
7 him what his --

8 Q. What are your conclusions based on your review and your
9 expert opinions in this case?

10 A. My conclusions which I would frame in terms of being
11 opinions.

12 Q. Yes, excuse me, opinions. I apologize. Counsel's
13 correct?

14 THE COURT: I've heard a bunch of them. Do you have
15 additional ones?

16 THE WITNESS: I just want to make sure that when you go
17 back and are determining whether there was an opinion to
18 match up with testimony that you actually do have one.

19 THE COURT: Right.

20 THE WITNESS: But I believe that -- I hold the opinion
21 that this is a most unfortunate proceeding. Nobody wants to
22 see friendships collapse, particularly when there's plenty of
23 money to go around, and yet that's what happened here, and we
24 have to deal with the aftermath, and my view of it is that
25 Dr. Puchalski, taking into account what I've seen in the

1 record, makes a very good point that he was working as hard
2 as he could, without getting into any attorney-client
3 matters, with counsel at his elbow, as he's navigating this
4 practice into tough and through a tough economic year and
5 with the possibility of Obama Care, whatever that may be down
6 the road, a lot of pressure on him. And I believe that there
7 is evidence in the record of Dr. Puchalski's proper behavior,
8 reasonable behavior, and that he made what you would call in
9 business governance area sound business judgments or
10 reasonable business judgments. I know that I heard Dr. Dyce
11 say, and it wasn't the first time I had seen the testimony,
12 that he was exasperated when he saw the wish list of perks
13 that Dr. Puchalski was -- had listed in a proposed agreement
14 and, you know, I take that into account. I can imagine Dr.
15 Dyce, making a lot of money, million seven is what I
16 understood he said that he made in '09, scratching his head
17 and saying, you know, how's this guy entitled to that. At
18 the same time, he, Dr. Dyce, has an obligation to negotiate
19 in good faith, to work reasonably and constructively, and
20 that's negotiation. That wasn't any cram-down deal. So to
21 fault Dr. Puchalski for dreaming big or asking for some very
22 nice perks is not the same thing as being able to say he
23 stole money or has acted as a thief or something. I think
24 his behavior has been in complete good faith. Dr. Dyce, my
25 understanding is, by all indications seems to be a very good

1 doctor, and Dr. Puchalski still considers him to be a very
2 good man and regrets that we're here with this lawsuit. I
3 believe that there's evidence in the record that Dr. Dyce
4 failed in his handling of his departure, failed in his
5 dealings with Dr. Gunnlaugsson and ill served SCENT.

6 MR. CLEVELAND: Objection. The fact that there may be
7 evidence in the record, for Professor Freeman -- he's not
8 even giving opinions now. He's just saying there's some
9 evidence. That's what lawyers do when they close. That's
10 not what experts do when they swear that their opinions meet
11 a standard, a standard according to the standards in the
12 profession in which they practice to a reasonable degree of
13 certainty, and none of Professor Freeman's opinions have been
14 offered at that standard, and I would ask that they all be
15 struck, and I object to them on that basis.

16 THE COURT: Very well. Thank you. Yes.

17 Q. The opinions you've voiced in this case thus far --

18 MR. CLEVELAND: Objection, leading.

19 Q. -- are they expressed to a reasonable degree of
20 professional certainty as an expert --

21 MR. CLEVELAND: Objection.

22 Q. -- as you've been qualified?

23 THE COURT: Overruled.

24 THE WITNESS: Yes, they are and they have been, and I'm
25 under oath, and they are what I believe. To amplify, I

1 believe if the argument -- if the sworn testimony in this
2 courtroom is that Dr. Dyce and Dr. Gunnlaugsson didn't
3 collaborate on confidential information while Dr. Dyce was
4 employed by SCENT, information that he should not have been
5 divulging, I believe that that is incorrect. I believe that
6 there's evidence that he was working to establish a competing
7 practice in Hartsville and he did so, and I believe that it's
8 for the Court to determine whether or not the noncompete was
9 violated, whether it was supported by adequate consideration,
10 etc., whether it's reasonable and all that. I'm not going to
11 tell the Court how I think the Court should rule, and I'll
12 just leave it at that.

13 Q. In your opinion did Dr. Puchalski -- was he remaining
14 inside his role as an officer of SCENT as he interacted and
15 made decisions related to Dr. Dyce?

16 A. Yes, I believe he was functioning on behalf of SCENT
17 when he did those things.

18 Q. And in your opinion did SCENT abide by its requirements
19 under the shareholder agreement as Dr. Dyce departed?

20 MR. CLEVELAND: Objection, leading.

21 MR. SHEHEEN: He can say yes, he can say no.

22 THE COURT: Overruled.

23 THE WITNESS: I believe that the behavior of SCENT was
24 under the circumstances presented, taking into account all of
25 the parties' behavior, all of the timing of matters, all of

1 the actions that were taken, understandable and not worthy of
2 criticism.

3 Q. Do you believe --

4 A. And proper.

5 Q. I'm sorry. Thank you. Is it your opinion, based on the
6 standards we've already discussed that Dr. Puchalski and
7 SCENT made appropriate business judgments based on the facts
8 as they were presented to them?

9 A. Yes.

10 Q. Do you have any other opinions in this case?

11 A. No, but I may have some on cross.

12 Q. I'm sure you will.

13 THE COURT: We're going to take a break.

14 MR. SHEHEEN: Thank you, Your Honor.

15 THE COURT: Ten minutes.

16 (Recess held.)

17 THE COURT: All right. Cross-examination.

18 MR. CLEVELAND: May it please the Court.

19 MR. SHEHEEN: Your Honor, I want to introduce Amy
20 Puchalski, who has been in court.

21 THE COURT: Okay. Thank you.

22 MR. SHEHEEN: Thank you.

23 CROSS-EXAMINATION BY MR. CLEVELAND:

24 Q. Professor Freeman, as you know, I'm Will Cleveland,
25 known each other a long time. Welcome to Kershaw County.

1 A. Thank you, sir.

2 Q. Professor Freeman, let's look at Exhibit 34 that you
3 talked about with Mr. Sheheen. Can you blow up that?
4 Professor Freeman, this is the list of things that Dr. Dyce
5 had requested from SCENT, do you understand that to be the
6 case?

7 A. Yes.

8 Q. Was Dr. Dyce entitled to get copies of bank statements
9 and canceled checks?

10 A. I believe that he's entitled to everything on the list.

11 Q. Was he entitled to the check register?

12 A. If it's on the list, yes.

13 Q. Was he entitled to the credit card statements?

14 A. Yes.

15 Q. And the general ledger?

16 A. Yes.

17 Q. The tax returns?

18 A. I believe so.

19 Q. Wasn't Dr. Dyce entitled to any financial information
20 that he wanted from SCENT, given his position in the company?

21 A. I believe he was entitled to see it, yes, sir.

22 Q. Now, let's turn to the July 2008 shareholders agreement
23 that you said was one of the key documents, it's Plaintiff's
24 Exhibit 7, and don't put it up just yet. Let me ask a
25 preliminary question. Do you have it?

1 A. I have it here.

2 Q. Okay. Do you agree that Exhibit 7 is the agreement that
3 controls the governance of SCENT as of the 2008, 2009, 2010
4 timeframe up until it was amended in late 2010?

5 A. I will agree that it's one of the documents. You know,
6 we've heard about the articles which trump this. There's a
7 shareholders agreement -- excuse me, an employment agreement
8 that may also in some part be relevant, but this would be an
9 important document, yes, sir.

10 Q. And would you agree that this document expresses the
11 agreement between the two equal shareholders as to what the
12 policy is on at least some matters within the corporation?

13 A. I would agree that it expresses their intent, a meeting
14 of the minds at that time as to the matters that are covered,
15 yes, sir.

16 Q. All right. Would you put up Section 3.7? Would you
17 turn to page 11 of Exhibit 7, and let's talk about the
18 confidentiality provision. Isn't it true that paragraph 3.7
19 of Exhibit 7 constitutes Dr. Dyce and Dr. Puchalski's
20 agreement as to what the policy of SCENT is on
21 confidentiality that would apply in 2009 and 2010 until the
22 agreement is later modified or amended?

23 A. It's a declaration of their intent concerning
24 confidentiality.

25 Q. Do you know of any other overriding statement of what

1 the company's policy is on confidentiality other than section
2 3.7?

3 A. 3.7 is an articulation of the company's policy. There
4 may or may not be common law principles or provisions that
5 would supplement that.

6 Q. My question is are you aware of any other agreement
7 between Dr. Dyce and Dr. Puchalski that modifies or affects
8 the statement that they agreed to in the shareholders
9 agreement in paragraph 3.7 concerning confidentiality.

10 A. No, not without going through the employment agreement
11 to see if that's has any impact at all, which I have not
12 done.

13 Q. Let's highlight the first four lines of 3.7. Professor
14 Freeman, the first four lines say, in part, the shareholders
15 shall not disclose any information relating to the
16 corporation regarding the corporation's operations, records,
17 patients or procedures to any persons other than employees of
18 the corporation, federal and State regulatory agencies,
19 third-party reimbursement agencies, etc. Now, you've told me
20 that this is the only statement you know of in which Dr. Dyce
21 and Dr. Puchalski agreed on what the policy of SCENT is on
22 confidentiality.

23 MR. SHEHEEN: Your Honor, I object. He said without
24 looking through the employment agreement.

25 MR. CLEVELAND: Yes, without looking at the employment

1 agreement, fair point.

2 THE WITNESS: Yes.

3 Q. Okay. Do you agree that Dr. Puchalski would not have
4 had the unilateral right to change this policy if he thought
5 it ought to be changed without getting Dr. Dyce's approval?

6 A. Subject to what's referred to as emergency authority,
7 yes.

8 Q. And so isn't it true that Dr. Dyce had the express
9 permission to share confidential information with the other
10 employees of the corporation?

11 MR. SHEHEEN: Your Honor, could he look at the whole
12 provision?

13 MR. CLEVELAND: He's got it in front of him.

14 THE COURT: Sure. He has it, I think. He can have mine
15 too.

16 THE WITNESS: It says you can't disclose to these other
17 people. It doesn't say you can disclose anything you want at
18 any time to anybody so long as these persons are employees.

19 Q. Does the confidentiality agreement prohibit Dr. Dyce
20 from disclosing confidential information to other employees
21 of the company?

22 A. I have to read the whole provision now, not just the
23 first four lines.

24 It can be read that way.

25 Q. Professor Freeman, knowing you, I know to take that as a

1 concession and leave it at that. Thank you.

2 A. I mean it can be.

3 Q. My next question --

4 A. I want to explain my answer, it can be --

5 MR. SHEHEEN: Your Honor, he has the right to explain
6 his answer.

7 MR. CLEVELAND: He had finished, and I'd like to move on
8 with my examination if I may, Your Honor.

9 THE COURT: If he needs to explain his answer and he
10 says he needs to explain his answer, that's fine.

11 MR. CLEVELAND: He didn't say that until I commented,
12 trying to be affable.

13 THE WITNESS: I think you misunderstood what I was
14 saying.

15 MR. CLEVELAND: I object to this Your Honor.

16 THE WITNESS: You said is there any other provision in
17 here that would bar, what I understood you to say --

18 Q. Yes.

19 A. -- disclosure to an employee, and I said it can be read
20 that way.

21 Q. That's all right. Let's make sure. Do you agree that
22 under the confidentiality provision as stated in 3.7 there's
23 no prohibition on Dr. Dyce sharing confidential information
24 with the corporation's employees?

25 A. I disagree, and I want to explain my answer.

1 Q. Okay.

2 A. Modifying this first four lines which you have on the
3 screen.

4 Q. Let's put up the whole thing so we can see.

5 A. Okay. Good.

6 Q. Okay.

7 A. There is a provision that says, each shareholder shall
8 use information related to the business of the corporation to
9 advance the corporation's best interests and not to benefit
10 their personal interests. If, for example, you had two
11 employees who had decided that they were going to set up a
12 competing business operation to the detriment of the company
13 and one of them had access to confidential information and
14 shared that and divulged that with a fellow shareholder for
15 purposes of advancing their interests and to the detriment of
16 the corporation, that would run afoul of that provision right
17 there. It's not permitted, in my estimation that behavior
18 would not be permitted by 3.7. It would be forbidden by 3.7.

19 Q. Do you agree that you know of no evidence that Dr. Dyce
20 assisted Dr. Gunnlaugsson in the establishment of a competing
21 practice?

22 A. I won't agree to that.

23 Q. What evidence are you aware of that Dr. Dyce assisted
24 Dr. Gunnlaugsson in the establishment of a competing
25 practice?

1 A. The pricing information that Dr. Gunnlaugsson had had to
2 come from somewhere. Dr. Puchalski takes the position that
3 he was not responsible for divulging. He is in a better
4 position to know than I am, and I believe he points to Dr.
5 Dyce as a source of that information. Likewise, it's very
6 clear to me that when the rift occurred and deepened and
7 widened in the timeframe say February-March of 2010 that they
8 actually were sharing information about proprietary
9 management matters, Dr. Dyce was, with Dr. Gunnlaugsson.

10 Q. What information are you referring to?

11 A. The information that I reviewed in preparing for this.

12 Q. No, what did they share, what do you allege that he
13 shared?

14 A. Information, for example, concerning the dispute that he
15 was having with Dr. Puchalski concerning the new
16 shareholder -- proposed shareholders agreement.

17 Q. Do you believe that this paragraph prevents Dr. Dyce
18 from talking with Dr. Gunnlaugsson about the new terms that
19 Dr. Puchalski wanted to impose on the company?

20 A. I believe that that was confidential information.

21 Q. Do you think that this agreement precludes Dr. Dyce upon
22 receiving the draft shareholders agreement from talking with
23 Dr. Gunnlaugsson, another employee, about those terms?

24 A. Yes.

25 Q. Why?

1 A. Because I believe at that point it's a confidential
2 matter between the two shareholders. It concerns Dr.
3 Puchalski's role in the company prior to the entry into the
4 company of Dr. Gunnlaugsson as a shareholder, with that being
5 a disputed issue, of course, that Dr. Puchalski expected that
6 to be confidential and it was not held confidential.

7 Q. I want to you assume for the purposes of my question
8 that Dr. Dyce in no way aided Dr. Gunnlaugsson in setting up
9 a competing practice. Will you accept that stipulation?

10 A. Okay.

11 Q. With that in mind, do you agree that the confidentiality
12 agreement does not prohibit Dr. Dyce from talking about the
13 new shareholder agreement with Dr. Gunnlaugsson because he's
14 an employee with whom Dr. Dyce is allowed to discuss
15 confidential matters?

16 A. Well, that's your --

17 Q. I want a yes or no, do you agree with that or not?

18 A. No, and I want to explain my answer. Your leap of faith
19 is that do you agree that he's allowed to discuss it because
20 he's allowed to discuss it. Well, where do you draw the
21 line? Dr. Puchalski didn't think he was allowed to discuss
22 it. He considered that a matter between the two shareholders
23 who at that time were the two directors of the company. You
24 had secretaries, you had others in the company who were
25 employees. Were they entitled to all this information too?

1 Why do you draw the line the way you have? My view is Dr.
2 Puchalski considered it confidential between him and Dr.
3 Dyce. I can see that it's sensitive information because it
4 concerns the various negotiating positions of the parties at
5 the time, and I can understand why Dr. Puchalski doesn't want
6 that being talked about outside of the two of them and that's
7 my answer.

8 Q. Yes, sir, but you told me earlier that Dr. Puchalski
9 does not have the unilateral right to change the policy of
10 the company with regard to confidential information and you
11 told me earlier that this policy can be read to mean that the
12 people subject to it can talk among themselves, in other
13 words, to other employees, about confidential information,
14 and so that's why I draw the line there, because that's what
15 the agreement says, doesn't it?

16 MR. SHEHEEN: Your Honor, I'm just going to object
17 because I think he restated his testimony improperly. There
18 was a little confusion at the beginning of this line of
19 questioning. He did not say that you could interpret it to
20 say that, in fact he said the opposite, and that's why he
21 wanted to explain his answer. That's my only objection to
22 the question.

23 THE COURT: Okay.

24 THE WITNESS: My view is that if the information is used
25 in a way that reasonably does not advance the interest of the