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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

SC Court of Appeals

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

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Consolidated Cases For Trial

Case No.: 2010-CP-28-322

Case No. 2010-CP-28-323

SC Court of Appeals

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. IV

Vincent A. Sheheen, Esquire
Michael D. Wright, Esquire
Savage, Royall & Sheheen, LLP
Attorneys for Appellants/Respondents
Post Office Drawer 10
Camden, SC 29021
803-432-4391

Morris Ellison, Esquire
Jana B. Baker, Esquire
Will Cleveland, Esquire
David Collins, Esquire
Attorneys for Respondents/Appellants
Womble Carlyle Sandridge & Rice, PLLC
PO Box 999
Charleston, SC 29402
843-720-4617

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1 corporation's best interests that it is not to be divulged
2 under this agreement. Dr. Puchalski takes the position, and
3 I think reasonably, that matters concerning his personal
4 negotiations with his fellow shareholder about his terms of
5 employment and essentially the direction of the company at
6 the formative stage are private matters between the two of
7 them and are not to be shared outside the two of them.

8 Q. And that thought is not included in this confidentiality
9 agreement, is it?

10 A. I beg to differ.

11 MR. CLEVELAND: All right. That's all I of Professor
12 Freeman. Thank you, Your Honor.

13 THE COURT: Okay. Very well. Redirect.

14 MR. SHEHEEN: Yes, just very briefly.

15 REDIRECT EXAMINATION BY MR. SHEHEEN:

16 Q. You were -- you looked at exhibit, I believe it was
17 Plaintiff's Exhibit 34, the list. Your Honor has it in her
18 book, we all know what we're talking about.

19 THE COURT: I do, yes.

20 Q. Are you aware -- you said that Dr. Dyce as shareholder
21 would be entitled to look at those documents, is that right?

22 A. Right.

23 Q. Are you aware that Dr. Puchalski said, come look at
24 them?

25 A. Look, I already covered that in my prior testimony,

1 that's exactly what he says.

2 Q. Is that and he made the premises available.

3 A. In writing.

4 Q. In writing, and he made the premises available for them
5 to come look.

6 A. Yes.

7 Q. And were you aware that Dr. Puchalski in his testimony
8 on direct said that wasn't convenient for his people?

9 A. You mean Dr. Dyce?

10 Q. Dr. Dyce, I'm sorry, yes, are you aware that Dr. Dyce on
11 his direct, excuse me, his cross said that that wasn't
12 convenient for his lawyer because his lawyer was in
13 Philadelphia?

14 A. My understanding is that's his position.

15 Q. You looked at 3.7 in the shareholder agreement.

16 A. Yes.

17 Q. And I want you just to read -- I know the Court's looked
18 at it, but it would help to reframe it if you'd just read out
19 loud the sentence that says each shareholder shall use --
20 it's about midway down and you focused on it.

21 A. It's what I've been talking about the last ten minutes.

22 Q. Yes. You read a part of it. Just read the whole
23 sentence.

24 A. The whole sentence reads, quote, each shareholder shall
25 use information related to the business of the corporation to

1 advance the corporation's best interests and not to benefit
2 their personal interests, period, closed quote.

3 Q. And you were asked what evidence you had reviewed that
4 Dr. Dyce had shared information, excuse me, had used
5 information related to the business of the corporation to
6 benefit their own personal interests, there was a question
7 about that, what evidence had you seen and you related off a
8 few things. Have you read the manifesto of Gunnlaugsson
9 where he references confidential information?

10 A. Yes.

11 Q. You mentioned the fee schedule earlier.

12 A. Yes.

13 Q. And you've seen the -- that there was information to,
14 given to HMA, right?

15 A. Yes.

16 Q. You've read the complaint of Dr. Gunnlaugsson where
17 there's confidential information contained in it, right?

18 A. Dr. Gunnlaugsson's complaint, yes.

19 Q. You've seen the phone traffic, haven't you, that's been
20 introduced previously that spikes up when all this
21 controversy starts?

22 A. Yes.

23 Q. You've reviewed the deposition of Dr. Gunnlaugsson?

24 A. True.

25 Q. And do all those go into your opinion?

1 A. They do, they're in the opinion, yes, sir.

2 Q. And you've been made aware through testimony and your
3 discussions that Dr. Dyce took insurance contracts in his own
4 testimony for his own personal use.

5 A. Yes.

6 Q. If he took insurance contracts for his own personal use,
7 would that violate this provision?

8 A. If his own personal use includes laying the groundwork
9 for competing with SCENT.

10 Q. And that sentence says, each shareholder shall use
11 information related to the business of the corporation to
12 advance the corporation's best interests and not to benefit
13 their personal interests.

14 A. True.

15 Q. So is it a violation for Dr. Dyce to use that
16 information for his personal interests?

17 A. Yes.

18 Q. Is it your opinion that if Dr. Gunnlaugsson was adverse
19 to the company and Dr. Dyce knew that that it would be
20 acceptable to share confidential information with him?

21 A. It would not be acceptable.

22 MR. SHEHEEN: Pretty limited cross, so I'll make it a
23 limited redirect. Thank you, Your Honor.

24 THE COURT: Recross.

25 MR. CLEVELAND: May we excuse Professor Freeman?

1 THE COURT: I'm sure he would be delighted.

2 THE WITNESS: I was hoping you would say that, Your
3 Honor.

4 THE COURT: Very well.

5 (Judge and attorneys confer.)

6 (Trial of the case adjourned at 4:45 p.m.)

7 --- END OF TRANSCRIPT OF RECORD ---

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1 MR. SHEHEEN: Your Honor, I'd call Dr. Bob Puchalski to
2 the stand.

3 THE COURT: All right, yes, sir.

4 BOB PUCHALSKI, M.D.,
5 being first duly sworn, testified as follows:

6 THE COURT: Sir, if you'll come and be seated and then
7 state your full name for the record.

8 THE WITNESS: Bob Puchalski.

9 DIRECT EXAMINATION BY MR. SHEHEEN:

10 Q. Dr. Puchalski, could you tell the Judge, have you been
11 here for all week long pretty much?

12 A. Yes, sir.

13 Q. Okay. Last week I should say. Tell the Judge just a
14 little bit about yourself.

15 A. I am married to that beautiful woman over there. I have
16 four children. I'm originally from Connecticut, and I
17 currently reside in Waxhaw, North Carolina.

18 Q. And how old is your youngest child?

19 A. Claire-bear is two years old, soon to be three.

20 Q. Tell the Judge a little bit about you growing up, how
21 you ended up in medical school, how you ended up in Kershaw
22 county practicing.

23 A. Sure. I was born in Connecticut to two immigrants from
24 Poland, and I was born shortly after my mom arrived here to
25 United States of America. I grew up in a classic immigrant

1 household where work was by far and away the most important
2 commodity that we could have, and we ran a number of
3 businesses when I was a kid, the family that is, and it was
4 very much a family business in the sense of an immigrant
5 family running it. I decided to go to -- I was the first one
6 to go to college from my family, and I decided to go to
7 Cornell University. At the time I was trying to decide
8 between medicine and business, and I attended Cornell
9 University, and then after that I attended Wash U. in St.
10 Louis, where I met my wife, Amy, and then after graduating
11 from medical school we did residency training together at the
12 University of Pennsylvania, my wife at CHOP and me at the
13 University of Pennsylvania, and then we finished there and
14 moved to South Carolina.

15 Q. Had anyone in your family attended college before you?

16 A. No, I was the first.

17 Q. And is your wife also a physician?

18 A. She is indeed.

19 Q. What type of physician is she?

20 A. Amy is a -- Amy first of all is the smarter Dr.
21 Puchalski, and she is a pediatric ER physician, so she did a
22 pediatric fellowship for three years and then a three-year
23 fellowship in pediatric emergency medicine, both at CHOP.

24 Q. Is she active, is she working as a physician currently?

25 A. Yes, she is. She's just recently, very proud to brag

1 here a little bit, she's just recently got a very good job at
2 Levine Children's Hospital in Chicago -- I'm sorry, in
3 Charlotte.

4 Q. Prior to that was she working somewhere else?

5 A. She was. While we were living here for about ten years
6 she worked at the medical college of Georgia in Augusta,
7 Georgia.

8 Q. And so she was commuting then?

9 A. She was.

10 Q. And now you're commuting.

11 A. Now it's my turn. It's only fair.

12 Q. Tell the Judge how you two came to Camden and how -- why
13 you came here to establish a practice.

14 A. First and foremost, we were looking for a good
15 opportunity. We wanted to be in the south. Amy had attended
16 Duke University and had some exposure to the south, and then
17 we stumbled upon Camden. It was recruiting for
18 otolaryngologist and it looked as though it was the most
19 promising and fertile soil in terms of starting an
20 otolaryngology practice, and then when we came to visit
21 Camden, we were charmed by the town and its people, and so we
22 decided to live in Camden.

23 Q. Otolaryngology, explain to the Judge what that means and
24 how that relates to ENT, which is what us lay people talk
25 about.

1 A. Sure. I think generally otolaryngology and ENT are
2 fairly synonymous. Some people use the term
3 otorhinolaryngology, but if you break down the words, oto
4 means ear, rhino means nose, and laryngology, throat, and so
5 the reference to otorhinolaryngology is ear, nose and throat.

6 Q. When you said that Kershaw County seemed like it would
7 be a fertile place for you to come and establish practice,
8 what did you mean by that?

9 A. Well, I had just recently come out of a residency
10 training program that gave me the most current, up-to-date
11 training, and I felt as though I could leverage that training
12 the best in Camden, South Carolina than I could in some of
13 the other areas. There was certainly competition here in
14 Camden just like there were in other areas, but I felt as
15 though there was a greater potential, given the current type
16 of ENT practices that were in the midlands of South Carolina.

17 Q. Okay. And tell the Court how you got started here or
18 how you got the funds to do it, a little bit -- well,
19 actually, first let's do this, when was that that you came
20 here?

21 A. I started the practice in August of 2002. My first
22 patient was Gage. He was swinging on the handlebars or the
23 monkey bars at school, fell off, bit his tongue and hadn't
24 quite opened up yet the practice but saw him as the first
25 patient, so that was August of 2002.

1 Q. Okay. And what did you have to do to establish that
2 practice, where did the funds come from, where did you
3 establish an office, how did you go about doing that?

4 A. Well, the process for starting a practice of course
5 started much earlier than August of 2002, so during residency
6 I did moonlighting and set up things like a logo and set up
7 corporate documents and worked to try to set up protocols and
8 templates and had worked with the electronic medical records
9 company for about seven months prior to starting. We were
10 one of the first EMR practices in the area.

11 Q. What's that mean?

12 A. EMR is electronic medical record. At the time when I
13 started in 2002, less than two or three percent of practices
14 had adopted electronic medical records, and of course now
15 it's getting to be much more common, but back then it wasn't,
16 and so it was much more of a rugged transition, I would say,
17 so a lot of the work started beforehand. The funds came from
18 banks, also came from capital from my family. As I mentioned
19 earlier, we had a very deep family rooted approach to
20 business, and so my parents were nice enough to lend me some
21 money in order to go ahead and start buying equipment in
22 2002.

23 Q. And how many employees did you have?

24 A. Originally there were three, and they're still three
25 that we keep in touch with. There was an office manager,

1 there was somebody as a receptionist and there was somebody
2 who was a clinical person. One of the -- the nurse was
3 Elizabeth, someone that is now a resident in OB/GYN, and then
4 Vickie Bair was our office manager and Wendy was our
5 receptionist -- all fantastic people.

6 Q. And what was the name of the practice at that point?

7 A. We started the practice as Kershaw Ear Nose Throat and
8 Facial Plastic Surgery.

9 Q. And at some point did you change the name to what we've
10 been discussing here, which is South Carolina ENT Allergy and
11 Sleep Medicine?

12 A. Yes, through an intermediate name, but yes, it
13 transitioned over, and that represented the transition of the
14 practice itself to more of a regional practice.

15 Q. That first year was Amy, your wife, able to live here
16 with you?

17 A. No, she was not. She was still completing her third
18 year of fellowship at Children's Hospital of Philadelphia,
19 and I was here, busy implementing the plan for the new
20 practice, which afforded me a lot more time to go ahead and
21 spend to set up the practice and implement it, and it wasn't
22 unusual for me to be working, with no exaggeration however
23 really whatsoever, 18 hour days.

24 Q. And during the first couple years of your practice were
25 you able to take much time away? How much were you involved

1 in the practice?

2 A. Well, no, I was -- there's no one else to cover call, so
3 I took call every single night, and I took call from the
4 emergency room and then consults on the floor as well.
5 Initially that was one hospital, but it quickly grew to two
6 hospitals, and I covered both those emergency rooms and both
7 those floors, and I think I took a total of eight days total
8 in my first 26 months of practice, and the majority of those
9 days were studying for the boards for our specialty.

10 Q. When you say you took eight days, you took eight days
11 off?

12 A. Eight days off, yes.

13 Q. And tell the Judge what you have to do to build a
14 practice like this. For example it, how did you develop the
15 patient base?

16 A. Well, the first thing you have to do is you have to just
17 provide exceptional care, and so I provided exceptional care
18 to the patients of Kershaw County and the ones that were
19 referred, and that of course established a good reputation
20 with referring physicians, and patients referred more
21 patients, and referring physicians referred more physicians.
22 I was also, I was Johnny-on-the-spot, so I was always
23 available. I didn't care when you called me. You could call
24 me at 11:00 at night for a consult, you could call me at 6:00
25 in the morning, it didn't matter what I was doing or where I

1 was, I would see the consult, I would take care of your
2 patient, I would help manage your patient, and so
3 availability was important, and as much as I could I tried to
4 be as affable as possible, and so I tried to create a
5 relationship with referring physicians, so sometimes that
6 meant going to dinner with them, sometimes I'd give talks, I
7 gave talks at the community center here in Kershaw County,
8 same thing over in Darlington County in Hartsville. I gave
9 talks at restaurants. I would go out for social activities
10 with referring physicians, but I established relationships so
11 that they felt comfortable with me and felt as though they
12 could trust me to help care in their patients' management.

13 Q. Tell the Judge what kind of money you were making those
14 first few years.

15 A. Well, I was doing well. It was very clear that the
16 practice was going to be successful, much more successful
17 than I had thought it would be early on, but I chose to pay
18 down debt. I had the debt to my parents, I had the debt to
19 the bank, and so I chose to try to retire as much debt as I
20 could, so my salary or my take-home was obviously lower
21 because I was retiring debt. I was happy that within between
22 two and three years of starting the practice the initial
23 \$800,000 for the debt was reduced to zero.

24 Q. Are there any risks that you face when you open a
25 practice like this?

1 A. Absolutely.

2 Q. What would some of those be?

3 A. First was the financial risk, of course. You've got to
4 go ahead and borrow all this money so there's chances things
5 don't turn out the way you want them to turn out, and so
6 therefore you're on the hook for that money. There's also a
7 chance that you might not like a community. I'd never lived
8 in a small southern town so I wanted to make sure that was --
9 there was obviously a risk there. There was also risks in
10 personal guarantees that you give for equipment that you
11 purchase. There's risks in buying equipment or taking on
12 loans or taking on contracts. I think obligations is
13 probably the best way to say it so --

14 Q. Did you have to buy a good bit of equipment for this
15 practice?

16 A. Yes.

17 Q. Has that always been true?

18 A. Otolaryngology is a capital intense practice, and so to
19 give you an idea why, you might think -- so if you think
20 perhaps about a family practitioner, if you go in to see your
21 family practitioner, they have a table and they don't
22 necessarily have a scope in the room, they don't necessarily
23 have much more than tongue blades, maybe an otoscope,
24 stethoscope, but in otolaryngology practice we are much more
25 technology dependent, and so our chairs are mechanical

1 chairs. We have a variety of tools that we need in a variety
2 of circumstances, whether it be a microscope to go in and
3 take out foreign bodies of the ear, to go ahead and clean
4 eardrum, towers to be able to look and scopes to look at the
5 nose or look at the larynx fiberoptically, so we're much more
6 of a technology intense practice as a whole. We're also
7 proceduralists by definition and nature in most of what we
8 do, and so those procedures require equipment in order to do
9 that.

10 Q. Was there any competition here in the field when you
11 came to Kershaw County?

12 A. There was. There had been a group here for about 15
13 years that was actually practicing out of the same office
14 suite as I was when I came. That was a little awkward, but
15 that was the only office space we had, and it was -- you
16 know, I still tell the receptionist, Wendy, that I had at
17 that time that she was just -- I wanted to get her a flak
18 jacket once or some sort of bulletproof vest because she got
19 it a lot. But, yes, we opened up in the same office, and we
20 had to compete against this group. There was three of them
21 that were coming over, Drs. Warder, Paysinger and Thompson.
22 They made it very clear to me when I first arrived that they
23 would not share any call with me and that they weren't very
24 pleased with me being here in Camden from the business
25 perspective.

1 Q. You talked a little bit about referring doctors. I just
2 want you to tell the Judge why referring doctors are
3 important to a practice such as SCENT and your practice and
4 how you go about developing that relationship. You already
5 touched on it a little bit, but why is it important?

6 A. Well, otolaryngology, our field, is very much a
7 referral-based specialty, and so what you're seeing in the
8 insurance marketplace now, particularly over the last decade
9 and two decades, I would say, is that much more of specialty
10 access is driven through referrals, either by necessity or by
11 just common practice, and so it's very rare that you'll be
12 able to do direct to consumer marketing and be able to get
13 patients into a specialty practice any longer because so few
14 insurance companies actually allow that and, quite frankly,
15 most of your volume would come from a referring physician
16 anyway.

17 Q. Are relationships with the referring physicians
18 important to the success of a practice?

19 A. Every single time a patient comes in the exam room I try
20 to think of that referring physician as that patient, and I
21 try to think of the patient as a family member, and it's that
22 important, so you have to get communication back to them, you
23 have to maintain that relationship, and you have to provide
24 good service because the way things work in medicine,
25 particularly when you're competitive, it's about the last

1 patient you treated. You could have done fantastically for
2 years, but if for some reason, you know, things didn't work
3 out with a patient and they go back -- they'll go back and
4 tell the referring physician. That's just the way it works.

5 Q. All right. I want you to explain to the Judge any ideas
6 or strategies or innovations that you wanted to bring to this
7 practice as far as the services that were provided.

8 A. The ones that failed or the ones that were successful?

9 Q. Tell her about everything.

10 A. I think the three main categories for what we were able
11 to do in the practice and what I was able to implement in our
12 practice was first efficiency. We were able to do things
13 much more efficiently than the practice we competed against
14 here in Kershaw County, and we did that through electronic
15 medical records, we did that through scribes, so someone
16 would be typing on a computer as we went into the exam room.
17 That was unheard of at the time. And you would -- we'd be
18 able to spend more time with the patients and be able to
19 provide a higher level of care in a shorter period of time
20 through these efficiencies and a variety of others, and so
21 efficiency was certainly one important thing. Another was
22 enterprising, and so very early on it became apparent that
23 if -- if I could go ahead and just create different service
24 lines, so allergy, sleep medicine, hair transplant,
25 cosmetics, audiology services, DME sleep services, and have

1 them be related to our core service line of otolaryngology,
2 that I could get a sum that was greater than the parts, and
3 the reason for that was that by having these parallel service
4 lines or related service lines, if we could find
5 intersections between them, then we could go ahead and find
6 other avenues of business and revenue, so if there was
7 somebody that was coming in, for instance, that was a child,
8 and they were coming to get their tubes, and they were a
9 certain insurance class and that mom was maybe a certain age,
10 that mom was also likely to get a different service, perhaps
11 in our cosmetic department. If referring physicians were
12 sending over a lot of Medicare patients and we knew that,
13 then that's where you send your audiologists to market
14 because that's where those patients -- Medicare patients are
15 typically over 65. They're the ones that might need hearing
16 aids. And so you could go ahead and try to look for
17 opportunities through internal marketing and external
18 marketing to try to exploit these areas where these service
19 lines intersected, and it would dramatically improve revenue.
20 It would also help because otolaryngology is a very cyclical
21 practice, and so sometimes things are very busy in the
22 winter. That's when everyone's got colds, ear infections or
23 something else. But other times, for instance, in the fall
24 or in the summer, you don't have quite as much going on, but
25 if you could augment your primary service line with other

1 service lines like allergy or sleep medicine, allergy peaks
2 in the spring and in the fall, so that helps that time. And
3 if you could focus your resources and your marketing and your
4 referrals to kind of meet that, you could create more of an
5 even practice.

6 Q. Were there any other new ideas or innovative things that
7 you did in this practice? You mentioned two.

8 A. So the other one is contracts, and I was very bullish
9 about contracts with insurance companies, so rather than go
10 ahead and just take the contracts that were given to us
11 initially, I did something where I would negotiate with the
12 insurance companies on an annual basis, and what I did was
13 try to negotiate escalators that would go along with the
14 medical -- the MEI it's called, it's an index, and --
15 inflationary index, and so we would try to link our
16 reimbursements to the inevitable rise of our expenses, and I
17 would try to negotiate contract language as much as we would
18 rates, and so we would try to say -- we would try to impact
19 what the insurance companies were doing from the prior
20 authorization, utilization review perspective, at times from
21 a bundling perspective, but we tried to get what we could in
22 the contracts, based on my experiences in organized medicine,
23 speaking to other individuals, that would just far supersede
24 what other local practices would have, so we were able to get
25 very favorable insurance markets.

1 Q. Could you just give an example, something concrete the
2 Judge could understand?

3 A. Sure. So when we started having ancillaries, for
4 instance, a sleep lab or something that would compete with a
5 hospital like a CAT scanner, I would go to the insurance
6 companies and I would say, well, I understand from local
7 EOB's that have been shown to us from our patients that
8 you're paying \$2,500 for this sleep study at the hospital.
9 We're going to do it for 500, and if you can go ahead and
10 relieve some of the prior authorization issues and if we can
11 re-visit this in one year from the utilization review
12 perspective, then I would like to go ahead and work this out
13 so that these patients can go ahead and have it done for 500.
14 What you would see there is we would have people showing up
15 to try to get scans that we couldn't even scan because our
16 scanner wasn't capable of doing that part of the body, and so
17 we were able to do things that were very beneficial for the
18 practice. When it comes to getting rates, we would say
19 things like, okay, well, these are the rates that we feel we
20 can get. Here's what we've been able to -- this is where the
21 medical inflationary index has been over the last year, this
22 is what we'd like to go ahead and start with, and we'd like
23 to use this rate to benchmark it for two more years and
24 compound it, so we want a 2.7 percent or 3 percent increase
25 and compound it over two or three years, and so therefore we

1 wouldn't have to necessarily come back to the table every
2 year.

3 Q. Based on the things you had learned in your continuing
4 education and your familiarity with other practices, were you
5 guys doing things that weren't being done in other practices?

6 A. Oh, there's no doubt in my mind that we had -- very
7 early Kershaw ENT and Facial Plastic Surgery within its first
8 two or three years was one of the more if not the most
9 progressive new practices that we were talking about when I'd
10 go and speak to my colleagues and friends in private
11 practice.

12 Q. Was the practice growing?

13 A. It was.

14 Q. Okay. At some point did you see an opportunity to
15 expand outside of Kershaw County?

16 A. I did. There were, there was an opportunity in
17 Hartsville to expand. There was an otolaryngologist who was
18 there who had left the community. There was still one older
19 otolaryngologist there, and I started noticing that some of
20 our referrals were coming from Darlington County and
21 Hartsville, so when we started analyzing where folks were
22 coming from, we started recognizing some of them were coming
23 outside the county and they were coming from Hartsville, and
24 so it wasn't long before we were getting some phone calls
25 from referring physicians there saying how pleased they were

1 with the service that we had provided for the patients they
2 sent over, and so I embarked on the expansion into
3 Hartsville, which included getting office space and getting
4 equipment and getting a lease, and once again entering into
5 other contractual obligations for the long term.

6 Q. Were you renting the space at that point in Hartsville?

7 A. Yes, at that point we were renting space.

8 Q. How about the referring physicians, what did you do to
9 get them to start sending you patients?

10 A. I did the same thing that I did in Kershaw County,
11 became a member of the Country Club in Hartsville, I would go
12 out and go and do talks in Hartsville, I would take some
13 physicians out to eat to get them -- to get to know them, to
14 get to know what they were doing in practice, to get to know
15 their philosophies, to share my philosophies, and I
16 established some strong professional and personal
17 relationships with a number of physicians in Hartsville.

18 Q. Were you advertising?

19 A. Yes. Advertising was always a part of trying to get the
20 word out. You could be as good as you want to be and you can
21 only grow so quick by word of mouth, and so sometimes you
22 need to go out there and let folks know, and so we would
23 advertise in a variety of ways. Some of it was more subtle,
24 like I mentioned doing talks or promotional visits or lunches
25 or dinners, and others were more overt, advertising on

1 billboards or advertising in newspapers, and some of it was
2 just advertising your credentials and your availability, and
3 others were advertising for a particular service line if our
4 data suggested that that was a service line that we should
5 promote.

6 Q. And you were doing that both in Kershaw and in
7 Darlington Counties --

8 A. Yes.

9 Q. -- those types of activities?

10 A. Yes, I was.

11 Q. About what year is this that we're talking about now?

12 A. Went out to Hartsville in early 2004.

13 Q. At some point did you expand into Richland County?

14 A. Yes.

15 Q. When would that have been, about?

16 A. On or about late 2004, I think, because it was the same
17 year we went into Richland County and did the exact same
18 thing.

19 Q. Did the same types of activities there to build the
20 practice?

21 A. Yes. We got some leased space, bought equipment. At
22 this point within -- by the end of 2004 I think we had
23 already had 15 -- equipment for 15 exam rooms.

24 Q. How does that compare to other average ENT practices
25 around the state or the region?

1 A. Well, our competitors in Kershaw County had two exam
2 rooms, and three of them came through and rotated -- now, to
3 be fair, they also had an office location in Columbia, and so
4 they were rotating through, and then the folks that we were
5 competing against in Hartsville the older physician there, he
6 had three exam rooms. But the technology outlay was just
7 overwhelming, and it needed to be for us to be competitive.
8 That was one of the intentions was to make sure that we were
9 a much better equipped practice and that we provided the
10 absolute standard of care, the goal was at this point, after
11 things had become so good in Kershaw County, I started
12 focusing on trying to turn it into a regional ENT practice
13 and hoping that we could get more of a geographic footprint,
14 get more of a market share and that it would help even more
15 in our negotiations with hospitals and insurance companies
16 for a variety of things from pay-for-call contracts to higher
17 reimbursement.

18 Q. And were you at this point making more -- strike that
19 question.

20 Was the practice generating more money than you would
21 have expected originally when you came to town?

22 A. Oh, heck yes. I'll tell you, my parents -- I remember
23 when I paid back my parents in the time that I paid them
24 back, there was -- it was just, I mean, it was a tearful
25 moment, but it was a pleasant, tearful moment but it was a --

1 they were very surprised and very proud that their son could
2 actually, you know, within a year come out and be able to pay
3 back this very significant loan, and it was definitely a note
4 of pride in the Puchalski family book.

5 Q. Are you familiar with average ENT salaries during your
6 career around the state and around the country?

7 A. Sure, I was. I have and always -- always have been
8 involved in organized medicine, both as a resident and since
9 coming out of residency, and I was on the board for our
10 academy, so every specialty has an academy board. Our board
11 is the Board of the American Academy of Otolaryngology, Head
12 and Neck Surgery, and as a resident I served on the board, I
13 was privileged to serve on the board and I was on -- I was
14 assigned to the socioeconomic committee, and that offered me
15 a, wow, what a great thing, data from around the country on
16 everything from overhead, number of audiologists per
17 physician, number of scopes per physician, everything you
18 could imagine was in the socioeconomic survey, and so I had a
19 lot of data.

20 Q. Have the physicians at SCENT been able to earn
21 significantly more than average ENT's around the region and
22 country?

23 A. No question.

24 Q. Is that because of the things you've described that have
25 been done in your practice?

1 A. Absolutely. So when you look at average ENT practices,
2 depending of course on a variety of other factors, age being
3 one of them, the traditional ENT practice is one that
4 generates most of its revenue from seeing patients in the
5 office, operating on them in the operating room and perhaps
6 doing some procedures in the office. That is the traditional
7 model. And our model, my model, was one which leveraged that
8 volume of patients into different service lines and into
9 ancillaries, and so instead of having to go get a CT scan at
10 the hospital and then coming back for another visit to review
11 the CT scan, how great would it be if you got the CT scanner,
12 jumped through all the hoops, had it in your office,
13 generated revenue off of it and improved the convenience.
14 It's a win, win, win. The patient pays \$500 instead of
15 \$2,000, the patient goes ahead and gets a CT right then and
16 there, and we review it right then and there, which is
17 wonderful from the convenience standpoint, and it's great.
18 And so if you have a practice that can do that, you can
19 generate much more revenue by virtue of having these
20 intersections between service lines, what I call
21 enterprising, and also having the ancillaries to be able to
22 develop it.

23 Q. You've used the word ancillaries a few times. What do
24 you mean by that?

25 A. So if you -- in 2002 the socioeconomic survey showed

1 that less than 30 percent of all otolaryngologists' practices
2 had anything to do with hearing aids. It was something that
3 was really just kind of coming about. But let's use that as
4 one ancillary. So if patients are coming in to see an
5 otolaryngologist about hearing loss and you determine it's
6 not ear wax, it's not fluid behind the eardrum, it's not some
7 other disease like -- and you determine there's not other
8 medical conditions, you determine it's just nerve loss
9 because of age, then you can go ahead and do what a
10 traditional practice is and send them off to an audiologist
11 or a hearing aid dispenser to go ahead and get a hearing aid,
12 or you can bring it in house. Bringing it in house, of
13 course, requires a capital outlay, requires training and
14 requires doing more than the traditional practice would do,
15 but it improves the convenience of the patient and it
16 improves revenue, and so that's one example of an ancillary.
17 Others would be allergy, CT scan, DME for sleep, that's CPAP
18 masks and other equipment, then cosmetics, hair
19 transplantation, cosmetics would be Botox and fillers, laser
20 hair removal, things of that sort.

21 Q. Okay. All right. Tell the Judge how things were going
22 with you and with the practice in these three counties, in
23 2004 I think is where we left off.

24 A. 2004, things were going great. At the time we had
25 just -- we had raised the practice to three providers at that

1 point, and it was myself and there was a PA and another
2 physician, and we were very busy. We were coming totally out
3 of debt, and things were very bright on the horizon.

4 Q. Were you traveling to all three locations?

5 A. Absolutely.

6 Q. And how many hours do you think you were working per
7 week at this point?

8 A. With no exaggeration, I was working between 14 and 18
9 hours every day, and I was taking call either every night or
10 every other night, once Dr. Westing came on board, so for the
11 first two years it was every night and then after that every
12 other.

13 Q. You mentioned that you had a doctor come on board for a
14 brief period of time. How long was he there?

15 A. He was there for about a year. He left for family
16 reasons to go back to Florida, where he was from. He's still
17 a very dear friend.

18 Q. While he was there were you contacted by another
19 physician?

20 A. I was contacted by Dr. Dyce.

21 Q. Tell the Judge a little bit about what was going on in
22 the practice and how that contact came about.

23 A. Well, at the time we had just -- I had just hired Dr.
24 Westing, this was somewhere in the summer of 2004, and things
25 were going well. Dr. Dyce had contacted me shortly after

1 hiring Dr. Westing and shared with me that he was having
2 struggles with his employer, Dr. Boucher, over a proposal
3 they had for him to become a shareholder in the practice that
4 he was currently practicing in.

5 Q. And where was that?

6 A. That was in Virginia, I think it was Loudoun County,
7 Virginia perhaps or somewhere in that area.

8 Q. Did he tell you what he was making at that time with Dr.
9 Boucher?

10 A. He did. He was frustrated. He was earning \$150,000 per
11 year. He was calling to ask for advice.

12 Q. What type of advice was he seeking from you?

13 A. He felt as though the process -- I mean, it's a very
14 typical story, actually. He felt as though the doctor who
15 owned the practice was overvaluing the practice, and he felt
16 it was a bit lower, he felt that there were some obstacles,
17 he felt as though the doctor wasn't being up front with him
18 about some things, it was very difficult for him to try to
19 get data that he was trying to find, and he was in a state of
20 consternation. He was anxious.

21 Q. And why did he call you?

22 A. So we were very good friends in residency, and I'm sorry
23 I didn't share that earlier, but residency in ENT, it's kind
24 of a small residency, it's only about four at Penn, and no
25 practice -- no residency is really bigger than four or five,

1 so it was a small cohort that would go through a residency in
2 our specialty, and Dr. Dyce and I were the closest of the
3 four that were going through, and we enjoyed a very personal
4 and social relationship in addition to the professional one
5 that we had as residents. We kept in touch afterwards, kept
6 tabs on one another to some degree, and so he called because
7 he knew that I had experience in opening a practice and that
8 I had some business acumen and that I was learning as I went,
9 and he trusted me to give him advice.

10 Q. And what happened from there?

11 A. Over the course of about three or four months it became
12 clear that things weren't going to work out with Dr. Dyce and
13 Dr. Boucher, and Dr. Dyce's phone calls became progressively
14 more frustrating, he seemed more frustrated with the process,
15 and so at some point our conversations switched over to
16 entertaining possible ways where Dr. Dyce could come to South
17 Carolina.

18 Q. Before he called you had you been looking to bring
19 another doctor on?

20 A. We had just hired Dr. Westing and so it was -- it would
21 not have been something that I -- I remember remarking that
22 it was unfortunate the timing had worked out that way because
23 I had heard from Dr. Dyce about these issues not long after
24 Dr. Westing started with us.

25 Q. Did your practice continue to grow?

1 A. It sure did.

2 Q. Let me ask you this: How long did Dr. Dyce stay before
3 the events we've talked about here today with SCENT, in
4 either an employee capacity or a shareholder employee
5 capacity, what was the total period of time?

6 A. So it was about five years.

7 Q. And how much in total did he actually receive in moneys
8 during that period of time from SCENT?

9 A. My estimation would be approximately \$4 million.

10 Q. Now, when he came on, was he hired as an employee?

11 A. Yes, he was.

12 Q. And who was handling the business operations of SCENT at
13 that point?

14 A. The same person that was handling them prior to anyone's
15 arrival. It was me.

16 Q. And were you the one negotiating with insurance
17 companies still?

18 A. Of course, yes.

19 Q. How about hospitals?

20 A. Yes.

21 Q. What, just briefly, you talked about the insurance
22 companies, what types of things would you be negotiating with
23 the hospitals?

24 A. The hospitals, we'd negotiate for pay-for-call contracts
25 is what I started doing, and the first one that I got was in

1 2004, and so I convened some members of the medical staff at
2 Kershaw County, and we talked about this possibility of
3 getting hospital call coverage contracts. In South Carolina,
4 as well as other states, there was something called a
5 disproportionate share. It was an amount that the hospitals
6 received for taking care of indigent patients. But in
7 organized medicine, as physicians, we felt as though as a
8 whole we were the ones providing the actual care in the
9 emergency rooms at 12:00 and 1:00 in the morning, and so we
10 felt as though we should be reimbursed for some of that
11 unassigned care because it was uninsured, and so we
12 negotiated contracts for call. That was the earliest
13 contracts I negotiated.

14 Q. Did you bring on another doctor after Dr. Dyce came on
15 and after Dr. Westing left?

16 A. Yes, so Dr. Dyce came on in February of '05, and then in
17 '06, in June of '06, we brought on Dr. Chad Gunnlaugsson.

18 Q. What was he making prior to coming on at SCENT?

19 A. With bonus he was making under \$200,000.

20 Q. How much did he make in his last 12-month period with
21 SCENT, are you aware?

22 A. Over \$1 million.

23 Q. Why were Dr. Dyce and Dr. Gunnlaugsson able to make so
24 much more money working at SCENT?

25 A. Because we were able to use the same things that I

1 talked about earlier, the efficiency, the enterprising, using
2 those other service lines and ancillaries, and we were able
3 to go ahead and place them within our insurance contracts in
4 order to generate much more revenue, so it was worthwhile for
5 me to spend a lot more money because I was able to earn a lot
6 more money off their work.

7 Q. All right. Did you hire another doctor at SCENT?

8 A. Yes. Dr. Vidrine came on board about a year later in
9 2008, so it was '06, '07, and '08 -- I'm sorry, '05, '06 and
10 '07.

11 Q. Did you know Dr. Vidrine when you hired him?

12 A. I did not. Dr. Vidrine was somebody that I recruited
13 through academy contacts in an academy meeting in September,
14 and he is somebody that was in a fellowship at the Boston
15 Children's Hospital, Harvard Medical School in Boston, and he
16 was going to go and do something else. I offered him \$5,000
17 a month during his fellowship years to make things more
18 comfortable for him without a contract in exchange for him
19 coming on board, and he did.

20 Q. And was he -- did he come on as an employee physician of
21 SCENT?

22 A. Yes, he did.

23 Q. How were things in -- so in 2008 did you have all --
24 were there four doctors there in 2008?

25 A. In 2008 there were four physicians.

1 Q. And how were things going?

2 A. Things were going great in 2008. We were -- we
3 continued to expand, our markets continued to bulge, we
4 started attracting patients from outside those markets. I
5 continued to negotiate better and better insurance contracts
6 for us. At that point I already had pay-for-call contracts
7 at three hospitals, all paying us to cover call, and we kept
8 working on more and more service lines and making them more
9 robust and more profitable.

10 Q. Who was managing the buildings, the employees, the
11 business side of it?

12 A. When I'm referring to we, I'm referring to me and the
13 staff, the administrative staff of South Carolina ENT, so we
14 were the ones managing -- I was managing the practice with
15 the help of staff.

16 Q. And how many employees did you have, approximately, at
17 that time?

18 A. In 2008, we were probably in the 40 range by then. It
19 was dramatic. We went from three to 40 in about six years, I
20 think that would be very accurate.

21 Q. How were things going as far as the relationships
22 between the doctors?

23 A. The relationships between the doctors was very good at
24 that point. Everybody was appreciating the fact that they
25 were earning more money, they were happy to be part of such a

1 progressive practice. It's like any other team, when you're
2 winning, you like to be part of it, and we were winning, we
3 were winning in all the markets, and so in Camden it didn't
4 take long, within the first year, for those folks to leave.
5 In Hartsville, took about another year, maybe a year and a
6 half for that competitor to leave. In northeast Columbia, it
7 took about a year for that competitor to leave. And so we
8 very quickly found ourselves controlling these markets with
9 no competition, and that of course was even better.

10 Q. Okay. Let's look at a few documents. At some point did
11 Dr. Dyce become an owner or shareholder of the practice?

12 A. Yes, he did.

13 Q. Let's look at a few of these documents. Your Honor --

14 MR. WRIGHT: If I may approach.

15 THE COURT: You may.

16 MR. SHEHEEN: And, Your Honor, you can either use this
17 or, for these first exhibits, the book that Will put together
18 last week contains many of them as well so whatever is
19 easiest for you.

20 THE COURT: Okay.

21 MR. SHEHEEN: Let's look at Plaintiff's Exhibit 4 which,
22 Your Honor, is in both the books.

23 Q. On ours it should be behind Tab A, Dr. Puchalski, if
24 you'll look behind Tab A. I'm looking for a stock purchase
25 agreement. Do you see that?

1 A. I am there, yes.

2 Q. And that's Plaintiff's Exhibit 4. I want you to tell
3 the Judge what this is.

4 A. Judge, this is an agreement that was drafted somewhere
5 in the summer of 2007, and it was an agreement that was
6 signed by Dr. Dyce and myself at that time in anticipation of
7 trying to make him a shareholder or owner in South Carolina
8 ENT.

9 Q. And what happened with this agreement?

10 A. Well, we found out that we could not do what we wanted
11 to do in this contract. If you look at the first page of the
12 contract, Your Honor, you'll see that under Item No. 2 it
13 says, the parties specifically agree that such purchase of
14 stock does not include the accounts receivable based on the
15 date of service prior to March 2007 and any cash in the
16 corporation's bank accounts or certificates of deposit prior
17 to March 2007. Such assets will remain the property of the
18 seller.

19 MR. CLEVELAND: I'm sorry, what Exhibit are you looking
20 at?

21 MR. SHEHEEN: 4, Plaintiff's Exhibit 4.

22 Q. So what was the problem there?

23 A. Well, the problem was that we had gone along with the
24 assumption that we would be able to have a way of getting
25 more money to me than to Dr. Dyce to overcome what was

1 approximately \$800,000 worth of accounts receivable and cash
2 that was in the account at the time that Dr. Dyce was first
3 eligible to come in as a shareholder in February of 2007, and
4 we very quickly found out that we could not do that, that
5 that was something that was not allowed, and we therefore did
6 not consummate this agreement.

7 Q. Why wasn't it allowed?

8 A. Well, because what was not realized at that time and now
9 we seem to talk about a lot is this Subchapter S language
10 that basically requires that the distributions in an earning
11 period be even or at least proportional to the amount of
12 ownership in a corporation, and so there was no way to draw
13 that money out disproportionately under the rules, and so
14 this approach needed to be abandoned, and that's exactly what
15 we did. There was never a transfer of any money, and the
16 agreement wasn't consummated. Instead we went very quickly
17 to try to find a different way of doing it.

18 Q. Let me ask you this, was Dr. Dyce's attorney involved in
19 discussions at this point?

20 A. Oh, sure, yes.

21 Q. And what was his name?

22 A. Dr. Dyce's attorney was Bruce Armon. He was someone
23 that Dr. Dyce was involved with with Dr. Boucher in Virginia,
24 and Bruce Armon's name would be heard around the practice
25 very consistently over the five years that Dr. Dyce was with

1 South Carolina ENT.

2 Q. Look at Plaintiff's Exhibit 6 which should be behind
3 your next tab. Plaintiff's Exhibit 6, it says bill of sale
4 at the top.

5 A. I have it.

6 Q. Tell the Judge what the intent -- tell the Judge what
7 this is.

8 A. Your Honor, this is a bill of sale that accompanied the
9 same agreement that you saw earlier. It's one that's signed
10 by myself, and if I could direct your attention to Item 2,
11 you will see very similar language to the stock purchase
12 agreement where the parties contemplate obviously some way of
13 trying to get this very large sum of money back out to Dr.
14 Puchalski.

15 Q. And it also says that \$50,000 would be paid. Do you see
16 that?

17 A. That is under Item 1. I do see that.

18 Q. Was \$50,000 paid at that time?

19 A. No, it was not. We abandoned this approach after
20 recognizing that it was not workable.

21 Q. Tell the Judge why the parties contemplated or excluded
22 the accounts receivable prior to March 2007 and all cash in
23 the corporation's bank accounts or certificates of deposits,
24 what was the idea behind that?

25 A. Well, so when there's a practice, you know, you have to

1 go ahead and look at the components, and in February of 2007
2 when Dr. Dyce first became eligible for being a shareholder,
3 Your Honor, we had a certain amount of money in the bank
4 account, let's say that was 2 or \$300,000, and that obviously
5 belonged to the old owner and -- but you couldn't draw it out
6 because it was operational capital that you needed to pay
7 salaries with and other things. And then you also had the
8 accounts receivable. Obviously, if the date of service for
9 the accounts receivable were prior to the potential date of
10 entry, then those service -- the money from those services
11 belonged with the old owner. And so the parties contemplated
12 that, just like many other practices, we were going to
13 contend -- you can contend with this in one of two ways, you
14 can go and go to the bank and get a loan and say, okay,
15 there's 200, \$300,000 worth of working capital, and so I'm
16 going to go get a loan for the same amount, and I'm going to
17 go ahead and get a loan to buy off your AR based on a variety
18 of different models and algorithms, or you can go ahead and
19 do it this way. You're trying to find some way to get that
20 money back to the people who rightfully have it, so the
21 previous shareholders. And so what we had theorized was that
22 we were looking for a way of doing this in accordance with
23 Dr. Dyce's attorney's methodology, and we had come to a
24 proverbial dead end. We could no longer continue on the path
25 that we were trying to continue on because it was unworkable,

1 and it was very widely known that we had to abandon.

2 Q. Do you recall that there was a 2005 employment agreement
3 when Dr. Dyce came to work at SCENT?

4 A. I do indeed.

5 Q. And I'm not going to show it to you. I just want to ask
6 you, did the 2005 employment agreement contemplate things
7 like what you discussed in 2007?

8 A. The 2005 agreement was very clear. It was a very
9 traditional buy in, go to the bank, get the money, pay the
10 person who owns the practice for a portion of the practice,
11 and that was the case with individuals that were coming on
12 board as employed physicians, you would have the opportunity
13 to come on in two years, of course provided the match was
14 there, but you'd have to go to the bank and you'd have to get
15 money like a traditional practice would have to go and make
16 it work.

17 Q. Did Dr. Dyce want to go to the bank and borrow money to
18 buy into the practice?

19 A. Oh, no, he did not want to do that.

20 Q. Was there another suggestion made by Dr. Dyce or his
21 lawyer?

22 A. Yes. The challenge -- and to be fair, Your Honor, you
23 mentioned once about depreciation, so equipment will
24 depreciate over time, but if you go out and you buy 15 exam
25 rooms of equipment and you're really putting everything up

1 front in terms of capital and you're paying down your debt,
2 what you end up with is a high value of equipment, and so
3 it's a higher buy-in because you have more stuff, and the
4 2005 agreement contemplated that you would buy in for the
5 depreciated value of the assets that at the time were valued
6 for something pretty high and I think then also accounts
7 receivable, the cash in the bank, and there was also a
8 provision there about any advertising or any accounts
9 payable, or prepaid expenses I should say, that the practice
10 may have incurred would also have to be paid by the incoming
11 party.

12 Q. So instead of going to get a loan and buying in, what
13 did Dr. Dyce and his lawyer suggest that they do to try to
14 allow him to become a shareholder?

15 MR. CLEVELAND: I'm going to have to object to that as
16 being hearsay.

17 THE COURT: As to the lawyer or as to Dr. Dyce?

18 MR. CLEVELAND: As to the lawyer.

19 THE COURT: As to the lawyer.

20 MR. SHEHEEN: It's not for the truth of the matter
21 asserted, it's what they suggested to do not some fact I'm
22 trying to establish that was truth.

23 THE COURT: Let me ask you this question --

24 MR. SHEHEEN: Yes, ma'am.

25 THE COURT: -- is your position that the attorney is his

1 agent --

2 MR. SHEHEEN: Yes, ma'am.

3 THE COURT: -- and so speaks for him?

4 What about that? And therefore is non-hearsay because
5 it would be a statement by his agent.

6 MR. CLEVELAND: We think you're probably right about
7 that. I'll withdraw the objection. Thank you.

8 MR. SHEHEEN: Thank you.

9 Q. First of all let me just lay a little groundwork, make
10 it a little cleaner. Would you have conversations with Dr.
11 Dyce and his lawyer?

12 A. At what time?

13 Q. In 2007, 2008?

14 A. I would have conversations with Dr. Dyce, and we would
15 copy e-mails between the three parties, yes.

16 Q. And what did Dr. Dyce and his lawyer suggest instead of
17 having him go get a loan and buying in as a way to try to
18 allow him to become a shareholder?

19 A. What they suggested was a path whereby we would
20 intentionally delay entry as a shareholder in lieu of coming
21 up with the same amount of money net to Puchalski as would
22 happen if Dr. Dyce got a loan and came in through traditional
23 buy-in in February of 2007.

24 Q. Did the parties, when you were having these discussions
25 from 2005 forward, did the parties anticipate that there

1 would be a covenant not to compete included in the documents
2 when they were agreed to?

3 A. Yes, both in word and also in the contract it was clear
4 that we weren't going to be paying you these very premium
5 sums and give you access to what was a remarkably successful
6 practice without the ability to prevent you from taking all
7 this information and using it against the practice.

8 Q. And in 2007 when you guys were trying to figure out how
9 to do it and you had this 2007 stock purchase agreement, was
10 there an attempt to put a covenant not to compete in that as
11 well?

12 A. There was a --

13 Q. It's Exhibit 4 if you need to refer to it. It was your
14 first exhibit.

15 A. There was a covenant not to compete in the stock
16 purchase agreement. I don't know what section it is, but I
17 will find it for you.

18 Q. If you look at paragraph 14, is that what you're
19 referring to?

20 A. Yes, paragraph 14. It talks about a covenant that in
21 many ways is more restrictive than the covenant that we are
22 talking about in the 2008 agreements that are currently at
23 play here.

24 Q. All right. So since this process didn't work, the 2007
25 that you discussed here, what did you and Dr. Dyce agree that

1 you were going to do?

2 A. First I asked him to go ahead and pay that amount and
3 get a loan for just the accounts receivable and the bank
4 account so we could just go ahead and continue with this road
5 and try to get through the dead end, but as you might expect,
6 Dr. Dyce wasn't willing to do that either. He'd have to go
7 get a loan at that point for about \$800,000, and he did not
8 wish to do that, so we looked for a way to go ahead and use
9 the same process for the accounts receivable and the cash
10 that we kind of were using for the other as well, and so
11 basically the agreement would be that we would just
12 intentionally defer the time at which he became an owner
13 until such time as the net proceeds that came to Dr.
14 Puchalski equaled the net proceeds that would have come to
15 Dr. Puchalski in a traditional buy-in per the 2005 agreement
16 with both accounts receivable -- I'm sorry, with accounts
17 receivable, the bank accounts, prepaids and also the
18 depreciated value of the assets, which we agreed instead of
19 using depreciated value of the assets to use a percentage of
20 the overall revenues of the practice to equal that -- we
21 benchmarked it. We basically said, how much is the
22 depreciated value of the assets, it's X amount, we're going
23 to benchmark that to our revenue now. What percentage is
24 that, it's 25 percent. Okay, so that's what we're going to
25 use, 25 percent of the revenues. We just benchmarked it at

1 the time.

2 Q. So what was the goal here, what were you trying to
3 accomplish?

4 A. Well, Dr. Dyce was concerned about debt. He was
5 concerned about signing on to personal guarantees, he was
6 concerned about incurring debt from a bank, and he also was
7 concerned that in a practice with a lot of equipment that he
8 might be buying in for a less depreciated value than future
9 people would be buying into the amount, assuming that no new
10 equipment came on board. Now, it turns out that plenty more
11 new equipment came on board, but had it not, he was concerned
12 about getting a worse deal.

13 Q. And what were you supposed to get out of it?

14 A. What I was supposed to get, as sold, was the exact same
15 amount net that I would have received had, in February or
16 early March of 2007, Dr. Dyce had gone and got a loan for all
17 the amounts and paid me.

18 Q. Okay. Who benefited from this arrangement?

19 A. There's no question only one party benefited from this
20 arrangement and that was Dr. Dyce.

21 Q. Explain to the Judge why he benefited from that
22 arrangement.

23 A. Well, Your Honor, there was no difference under this
24 proposal in terms of the revenue, net revenue coming to
25 Puchalski because that was the way it was set up, as equal,

1 but if you start thinking about the opportunity loss, there's
2 obviously something you can do with the money that you get in
3 March 1st of 2007 in a lump sum, and between there and this,
4 you know, July 16th, 2008 date you can -- you have
5 opportunity loss there. You can actually invest that in the
6 stock market, for instance, or even in a certificate of
7 deposit or anything else, but you can generate revenue, the
8 money can work for you, so it was an opportunity loss, so
9 that's the disadvantage to my side. On Dr. Dyce's side the
10 advantage was not only did he not have to take on debt, not
11 only did he not have to go ahead and take on liabilities, tax
12 liability, for instance, not only didn't he have to sign
13 personal guarantees but he didn't have to pay interest on the
14 note that he would have gotten from the bank at whatever rate
15 that happened to be.

16 Q. Okay. When he eventually did come into the practice as
17 a shareholder -- well, strike that question. Is your
18 practice structured as a shared practice or an
19 eat-what-you-kill practice?

20 A. I think that's very important, Your Honor, and it will
21 become important later as well, I think, but it's important
22 for Your Honor to recognize that this was a shared practice,
23 so most practices are eat-what-you-kill, and I never really
24 understood that, I thought it was kind of gruff, but it's the
25 term that's used, and it basically describes a practice where

1 an individual professional is paid based on what income they
2 generate for the entity. In our practice it was a shared
3 practice and so that was something Dr. Dyce felt very
4 strongly about, so it was one where the parties contemplated
5 that afterwards that distributions and profits would be
6 shared as opposed to driven off of productivity, and I think
7 it's important to note as well, Your Honor, that so much of
8 the revenue in the practice was off this passive ancillary
9 income. That's the difference between a traditional ENT
10 practice and our progressive practice and this practice that
11 I created is that there was a significant amount of ancillary
12 revenue, and that ancillary passive revenue and enterprise
13 revenue was what was being used in order to recruit and
14 retain physicians at a much higher rate than what they would
15 be otherwise.

16 Q. I want you to turn to Plaintiff's Exhibit 108 which is
17 behind Tab E in your book, I believe. It should say amended
18 and restated articles of incorporation, Plaintiff's Exhibit
19 108, also in Will's book.

20 A. I am there.

21 Q. What are these?

22 A. These are the amended and restated articles of
23 incorporation for South Carolina ENT.

24 Q. Okay. And we've talked about this before. I don't want
25 to spend a huge amount of time on it, but I wanted to ask you

1 why some things are in here. Go to H on page 3.

2 We've talked about this before, Your Honor. I won't
3 have him read it.

4 This is where it vests you with certain powers. Why was
5 this in here?

6 A. This was placed there because it reasonably and
7 legitimately described the powers that the managing
8 shareholder, myself, Dr. Puchalski, had within the practice
9 prior to and beyond this point.

10 Q. Okay. I want you to look, a couple pages after that is
11 the certificate accompanying the amended and restated
12 articles of incorporation. Do you see that? It's in the
13 same exhibit just a couple pages later.

14 A. I have that.

15 Q. In 3, it says (a), (b) and then there's 3, it describes
16 your practice, do you see that, or the purpose of your
17 business?

18 A. Yes, I do.

19 Q. Why don't you just read that first sentence?

20 A. The corporation's purpose shall be limited to rendering
21 services in connection with the practice of otolaryngology
22 medical services and all other services ancillary to such
23 services which are permitted or authorized by the licensing
24 authority of South Carolina applicable to the medical
25 profession.

1 Q. Is that an accurate statement of the services that you
2 guys were providing?

3 A. Yes, it was.

4 Q. Okay. Let's go through a little bit of the shareholders
5 agreement.

6 And, Your Honor, I didn't include it in this book
7 because I know you've been working off of your own. It's
8 Plaintiff's Exhibit 7.

9 Let me give you, Dr. Puchalski --

10 May I approach the witness, Your Honor?

11 THE COURT: Of course.

12 Q. This is the shareholders agreement; is that right?

13 A. I have it, yes.

14 Q. Plaintiff's Exhibit 7, Your Honor. Thank you. Okay. I
15 want to look at a few things directly here so you can discuss
16 them. First of all, tell the Judge how this agreement and
17 the employment agreement that we've looked at came to be.

18 A. Your Honor, what we did was at some point it became
19 clear that plan B was approaching plan A, that net revenue,
20 net revenue, and that became -- that looked like it was going
21 to happen in the summer of 2008, and so at the time we had
22 a -- Dr. Gunnlaugsson was coming in in 2008, a new
23 shareholder contract -- sorry, new employment agreement in
24 June of 2008, and so we began the process by which we were
25 going to redo the employment agreements, and we were going to

1 hopefully get the shareholders agreement all done at the same
2 time, and this was what happened, and so first we completed
3 Dr. Gunnlaugsson's employment agreement. Then we made
4 revisions to that. We had the employment agreements for Dr.
5 Dyce and Dr. Puchalski at that point and the shareholders
6 agreement done, we executed them, those three agreements,
7 July 16th or thereabouts in 2008.

8 Q. Okay. Look at the employment agreement, excuse me, I'm
9 sorry, the shareholder agreement, I apologize, and let's look
10 at page 2 of the shareholder agreement. This is the
11 definitional section. There's little numbers of the
12 agreement itself down at the bottom. Do you see that?

13 A. I have it.

14 Q. There's a definition for employment agreement. Do you
15 see that?

16 A. I do.

17 Q. What's that referring to?

18 A. That's referring to the medical treatment agreement that
19 we executed contemporaneously with the shareholders
20 agreement.

21 Q. I want you to look on, I want you to look at page 7.

22 A. I'm there.

23 Q. Do you see where it talks about founding shareholder
24 protection provisions?

25 A. I do.

1 Q. On the second page of that 3.92 it refers to Robert
2 Puchalski's employment agreement. Do you see that?

3 A. I do see that.

4 Q. What's it referring to?

5 A. It's referring to the employment agreements that were
6 signed contemporaneously with this shareholders agreement.

7 Q. Look down at 3.10. Do you see where it says east campus
8 protection provisions?

9 A. I do.

10 Q. And why was the east campus protection provisions
11 included in this document?

12 A. In order to accommodate Dr. Dyce.

13 Q. See where it refers to the physician's employment
14 agreement there in 3.10 --

15 A. I do.

16 Q. -- on the fourth line?

17 What was it referring to?

18 A. It was referring to the employment agreement that was
19 contemporaneously executed with this shareholders agreement.

20 In fact, every time that there is a reference to an
21 employment agreement it's referring to the employment
22 agreements executed by Dr. Puchalski and Dyce
23 contemporaneously with this shareholders agreement.

24 Q. Okay. I want you to look at Section 8.1. We've all
25 looked at this before. Are you familiar with it?

1 A. I am.

2 Q. I want you to read -- well, read the first sentence. I
3 guess it is just one sentence. Read it, please.

4 A. All other agreements dated prior to the date of this
5 agreement are hereby superseded in their entirety by the
6 terms and conditions of this agreement provided, however,
7 that this agreement shall not be deemed to supersede the
8 terms and conditions of the employment agreements executed
9 simultaneously with this agreement.

10 Q. Okay. What was it referring to when it mentioned
11 employment agreements there?

12 MR. CLEVELAND: Objection, Your Honor. I believe this
13 is an unambiguous term, it clearly states it, parole evidence
14 is inadmissible to try to change or vary the terms, and I
15 object to it.

16 MR. SHEHEEN: Your Honor, I asked him what it's
17 referring to. I'm not changing the terms. I'm asking what
18 it's referring to.

19 THE COURT: I think that the objection is is that and
20 the concern is that if he says anything different than what
21 is stated there, then that's parole evidence. In other
22 words, it speaks for itself. In other words, what it's
23 referring to is that all other agreements which were signed
24 earlier than this agreement are superseded except the
25 employment agreements which would be those agreements signed

1 simultaneously, meaning concurrently with this agreement.

2 MR. SHEHEEN: And that's what I'm asking.

3 THE COURT: Right, and I think the objection is if he
4 says anything different from that, then that's parole --
5 would then be parole evidence, which is inadmissible unless
6 the terms of the agreement are considered to be ambiguous.

7 MR. SHEHEEN: Well, Your Honor, you do have to interpret
8 what simultaneously means in this document.

9 THE COURT: Well, yes, I understand it's normal and
10 customary usage of simultaneous means concurrent, at the same
11 time, concurrent.

12 --MR. SHEHEEN: Does Your Honor want me to go about it a
13 different way?

14 THE COURT: Yes.

15 Q. All right. Were there employment agreements signed --
16 well, let's look at them. It will help us to do that.

17 THE COURT: Yes.

18 MR. SHEHEEN: I think it's Tab 3, Your Honor, and then
19 you also have it in the book.

20 MR. CLEVELAND: I'm sorry, Vincent. What are you on?

21 MR. SHEHEEN: I'm just looking. I'm going to the
22 employment agreement.

23 Q. Could you look at the employment agreement in the book
24 there?

25 A. Yes, sir. Which tab is that?

1 Q. It is Plaintiff's Exhibit -- excuse me one minute?

2 MR. CLEVELAND: 10.

3 Q. 10, Plaintiff's Exhibit 10.

4 A. I've got it.

5 MR. SHEHEEN: Beg the Court's indulgence.

6 THE COURT: Sure.

7 Q. Got it?

8 A. I have it. Thank you, sorry.

9 Q. Okay. What are you looking at?

10 A. This is the employment agreement signed by Dr. Dyce in
11 the summer of 2008.

12 Q. Okay. Let's look at, do you see the front page there's
13 some wherefores, whereases, do you see that?

14 A. I do see those.

15 Q. Look at the fourth one. Read it to the Court.

16 A. Whereas the group and its physician shareholders have
17 entered into that certain amended and restated shareholders
18 agreement by and among South Carolina ENT Allergy and Sleep
19 Medicine, P.A., and its shareholders dated June 1st, 2008.

20 Q. Okay. Are you aware of any shareholder agreements dated
21 June 1st, 2008?

22 A. There are none, sir.

23 Q. When was the shareholder agreement dated?

24 A. July 16th, 2008, sir.

25 Q. Okay. I want you to read the first paragraph there

1 where it says this agreement.

2 A. This agreement is entered into effective as of the 1st
3 day of June, 2008 by and between South Carolina ENT Allergy
4 and Sleep Medicine and Orville Dyce.

5 Q. Okay. When was this agreement supposed to become
6 effective?

7 A. June 1st, 2008.

8 Q. When was it actually signed?

9 A. July 16th, 2008.

10 Q. Why is it dated June 1st, 2008 on the back page where
11 you guys signed it, page 14?

12 A. Quite frankly, Your Honor, we didn't realize that -- we
13 didn't realize that you could date something different than
14 what the effective date of the agreement was, and June 1st
15 was there because it was consist with the fact that we raised
16 salaries in anticipation of an agreement.

17 MR. CLEVELAND: Objection. This is parole evidence as
18 well.

19 MR. SHEHEEN: Your Honor, it's not parole evidence.
20 This is not changing the terms of the agreement. I asked him
21 when they actually signed it, not what dates are on there.
22 I'm not saying the date's wrong. I'm asking when they
23 actually signed it. That's just a fact.

24 THE COURT: The one that I have is not signed.

25 MR. SHEHEEN: The employment agreement?

1 THE COURT: Yes. What's in my notebook is not signed.

2 MR. CLEVELAND: Your Honor, I think if you look on page
3 14.

4 THE COURT: Yes, okay, you're right.

5 MR. CLEVELAND: It's the exhibit --

6 THE COURT: Keep going to the end of the exhibit, yes.

7 MR. SHEHEEN: If Your Honor will remember, I have the
8 covenant as a separate exhibit.

9 THE COURT: Exactly.

10 MR. SHEHEEN: Apologize.

11 THE COURT: Yes. All right. I'll overrule the
12 objection as to the date that it's signed, and that will be a
13 topic for cross-examination.

14 MR. SHEHEEN: Thank you.

15 Q. How do you know that -- how do you recall that you
16 didn't sign it on June the 1st?

17 A. I'm 100 percent positive because I was in Thailand and
18 Malaysia enjoying a two-week anniversary trip with my bride
19 for our ten-year anniversary.

20 Q. And over the weekend did you actually go and find the
21 copy of your passport stamp?

22 A. I did indeed.

23 MR. SHEHEEN: And, Your Honor, we have it. It's a new
24 exhibit, so we haven't agreed to it yet, so I just wanted to
25 make sure --

1 Q. And that is located at Tab R in your book. Could you
2 tell the Judge what you're referring to there?

3 A. In the lower portion of this passport it will say June
4 6th, 2009, and then June 7th is the one for Thailand.

5 Q. And was that 2008 or was that 2009?

6 A. Actually, I think the triangular ones are Malaysia and I
7 think the square one is Thailand.

8 Q. And so this is when you were going to different
9 countries during that week?

10 A. Right, so -- that's right.

11 MR. SHEHEEN: Your Honor, I'd offer that as Defendant's
12 Exhibit 237.

13 MR. CLEVELAND: Again, we object, Your Honor, to parole
14 evidence coming in to vary what appears to be an unambiguous
15 and dated signature block where they filled in the date of
16 June 1st, so I object to it.

17 MR. SHEHEEN: Your Honor, this is not -- this is only
18 evidence that he was in Malaysia and where ever else he was
19 on that date.

20 THE COURT: Can I ask you, this is what you're offering
21 is just this page right here?

22 MR. SHEHEEN: Yes, ma'am.

23 THE COURT: I gotcha. And your objection is that it's
24 parole, that this is parole evidence.

25 MR. CLEVELAND: Yes, Your Honor. As I understand it

1 it's being offered as evidence that the signature block
2 doesn't mean what it says.

3 THE COURT: Right, I understand, I understand, and I'll
4 let you all brief that, whether or not the signature block
5 constitutes -- whether or not in order for him to tell me
6 that the date that's reflected is not -- on the signature
7 line is not the date it was in fact signed, whether or not
8 that goes to the credibility or whether or not that goes to
9 parole evidence, changing the terms of the agreement. I'm
10 going to let you all brief that for me. Do you have any
11 other objections to this document that's offered to me?

12 MR. CLEVELAND: Let me confer with my --

13 THE COURT: Yes, okay.

14 MR. CLEVELAND: Your Honor, we also have a problem with
15 it just being a portion of it.

16 THE COURT: Sustained. It's called best evidence.
17 Thank you.

18 Q. Did you bring your passport?

19 A. I did indeed.

20 Q. Okay. Would you --

21 THE COURT: Let counsel see it, and while we do that
22 we'll take a break.

23 MR. SHEHEEN: Thank you, Your Honor.

24 (Recess held.)

25 (Defendants Exhibit 237 marked for identification.)

1 MR. SHEHEEN: Your Honor, I was offering Defendant's
2 Exhibit 237 which is going to be the full passport booklet
3 that I've shared with opposing counsel.

4 THE COURT: All right.

5 MR. SHEHEEN: So I would offer that into evidence.

6 THE COURT: All right.

7 Q. Dr. Puchalski, we've been talking about the shareholders
8 agreement and the employment agreement. Were these two
9 documents supposed to work together?

10 A. Yes. That was the intent of the parties and that was
11 what we contemplated.

12 Q. Okay. I want us to now look back at Section 8.1 of the
13 shareholder agreement. Okay. I'm sorry, that's Exhibit 7,
14 Plaintiff's Exhibit 7.

15 A. I'm there.

16 Q. Are you there?

17 A. Yes.

18 Q. 8.1, and I asked you previously when it said -- when it
19 referred to the employment agreements, do you see that, in
20 8.1?

21 Actually let me ask you this way, was there an
22 employment agreement executed simultaneously with the
23 shareholder agreement?

24 A. Yes, there were two.

25 Q. All right. And is one of them the employment agreement

1 of Orville Dyce that we just looked at?

2 A. Yes.

3 Q. All right. Let's look a little bit more at the
4 shareholder agreement. I want you to look at section -- let
5 me just preface it by saying this, there have been some
6 questions about what happened during the period of time after
7 Dr. Dyce was separated from the practice, okay, so the next
8 line of questions are going to deal with that period of time.
9 Let's look at the shareholder agreement, Section 4.5, and I'm
10 going to, with counsel's indulgence, going to just lead you
11 so we don't have to read the whole thing. Does this set out
12 the purchase price in section 4.5?

13 A. It does.

14 Q. Does section 4.64 discuss set-off?

15 A. It does.

16 Q. And does section 4.61 set off a payment schedule as well
17 toward the end?

18 A. Yes, it does.

19 Q. Talks about paying it off in equal installments over 60
20 months; is that right?

21 A. Yes, sir.

22 Q. Is there anything that you're aware of in the
23 shareholder agreement that says that if the departing
24 shareholder owes more in a set-off than the value of the
25 buyout formula that you have to do anything, you being SCENT?

1 A. There's no such thing in the shareholders agreement that
2 says that.

3 Q. Okay. All right. Let's look at what happened. Tell
4 the Judge in the weeks following the March 3rd termination --
5 well, let me do it this way, was there a meeting on March 3rd
6 with Dr. Dyce?

7 A. There was a meeting on March 10th with Dr. Dyce.

8 Q. March 10th, excuse me, was there a meeting on March
9 10th?

10 A. Yes, there was.

11 Q. Is that the meeting where he was terminated and he
12 received the document the Court's already seen that says
13 terminated without cause?

14 A. Yes, along with the first management directive.

15 Q. Along with what?

16 A. With the first management directive.

17 Q. Speak up just a little bit.

18 A. I'm sorry.

19 Q. And we'll go through the management directives in a
20 minute, but let's first talk about what happened. Did
21 anything happen following that with Dr. Dyce?

22 A. Yes.

23 Q. What?

24 A. Well, he sued us.

25 Q. Okay. And what was your understanding of what he was

1 asking for in that lawsuit?

2 A. He had -- he was asking for the Court to arrive at
3 conclusions regarding what each party deserved, and he had
4 made allegations in that complaint that I was oppressive and
5 that there was some financial mismanagement.

6 MR. SHEHEEN: For the Court's edification, that
7 complaint is in Tab F. That's the original complaint.

8 Q. You can turn to it too, Tab F, not in that book but in
9 the book we handed up earlier. Tab F. Do you recall the
10 date that was filed, Dr. Puchalski, Tab F. Did you find it?

11 A. I'm sorry, I have something different in Tab F and I'm
12 going to go check around it.

13 THE COURT: Got to go earlier. There's several F's,
14 actually.

15 Q. I'm sorry, first Tab F, very beginning of the book.

16 A. Thank you. Sorry.

17 Q. Have you got it?

18 A. Yes, sir, I'm there.

19 Q. Okay. And about what date do you guys -- was that filed
20 or did you receive it?

21 A. It was shortly after the March 10th.

22 Q. Look on page 7.

23 A. It says March 12th, 2010 that it was filed.

24 Q. Did you get it sometime around there to the best of your
25 recollection?

1 A. I actually got it at my house on a Sunday delivered
2 personally to the home instead of the attorneys.

3 Q. Okay.

4 A. On that Sunday following March 12th.

5 Q. Okay. Were you surprised to get that?

6 A. I was very surprised get it at home, yes. I had
7 attorneys representing me in my role as managing shareholder
8 at SCENT, and Dr. Dyce and his attorneys were aware of that,
9 and instead my son answered the door to this complaint.

10 Q. Okay. Did Dr. Dyce ask you to arbitrate that dispute at
11 all?

12 A. No, he did not, although it was his obligation under the
13 agreements that we had in place.

14 Q. Why did SCENT want to have an arbitration provision in
15 the agreement?

16 A. Because when you file a lawsuit, particularly if you
17 file a lawsuit here in a smaller town in Camden, that word
18 gets out pretty quickly, and if you use words like financial
19 mismanagement or oppressive, those words quickly spread
20 through the community, as I've learned.

21 Q. And did Dr. Dyce say anything to you at this point about
22 the buyout process?

23 A. Dr. Dyce did not say anything to us other than the fact
24 that he was clearly by way of this lawsuit taking this into
25 the courts.

1 Q. Did you learn of anything else during this period of
2 time that Dr. Dyce was doing?

3 A. Which period of time was that?

4 Q. After the March 10th, meeting.

5 A. Yes. There were a number of other things that we've
6 learned during that period of time. Shortly after this
7 complaint I learned that Dr. Dyce surreptitiously asked for
8 and received the insurance contracts that I had negotiated
9 for SCENT with a variety of insurers.

10 Q. Tell the Court why those insurance contracts are
11 important.

12 A. Well, Your Honor, like I mentioned earlier, those are
13 the contracts we created over the years. They had financial
14 data in them but also language that was both confidential but
15 also proprietary and it would be the -- analogous, if my
16 house is burning and I had to go get something and I had time
17 not to injure myself or anyone else, I would get the pictures
18 or maybe Claire's blanket. If the practice was burning and I
19 had the same scenario, I would get the insurance contracts.
20 That is the most important piece of paper that you can have
21 in a contract because it memorializes the relationship you
22 have with your payers.

23 Q. And what types of agreements would you have worked out
24 that are in here, is there any -- strike that question.

25 The agreements that you had, what would they establish

1 for the practice?

2 A. They would detail the relationship between the practice
3 and 40 some odd insurers that we contracted with.

4 Q. Would those be unique agreements to SCENT?

5 A. They would indeed.

6 Q. What good would they be to another physician?

7 A. There's only one reason why you'd have those contracts
8 and that is to be able to either negotiate with the knowledge
9 of their existence or to be able to coopt them in some way,
10 shape or form in the local market.

11 Q. Did you confront Dr. Dyce about him taking those
12 contracts?

13 A. I did.

14 Q. And what did he say?

15 A. Dr. Dyce did not have an answer for that.

16 THE COURT: I'm sorry?

17 THE WITNESS: Dr. Dyce did not have an answer for why he
18 did it, just that he did it.

19 Q. All right. Did you receive anything else over the next
20 few weeks?

21 A. We received --

22 Q. And if you could just speak up just a little bit?

23 A. Yes, I'm sorry, we also received a lawsuit from Dr.
24 Gunnlaugsson.

25 Q. Okay. And that's at Tab M, I think we've already seen

1 it before, and was there anything in that lawsuit that caused
2 you concern about Dr. Dyce? It's Defendant's Exhibit 167.

3 A. We were very surprised by this lawsuit, and there was
4 plenty to be concerned about on this day in the practice, and
5 as far as the language goes there were some --

6 Q. It's at M.

7 A. Yes, I've got it. There were some elements of this
8 complaint in the preamble and the body of the lawsuit that
9 made it clear to me as reading it that there was information
10 that Dr. Gunnlaugsson had that was not given to him by me.

11 Q. Could you look at paragraph 24?

12 A. I'm there.

13 Q. The information contained in there, did you give that to
14 Dr. Gunnlaugsson?

15 A. Absolutely not.

16 Q. And who else would have known about the managerial
17 rights that were being discussed between you and Dr. Dyce?

18 A. Only Dr. Dyce and I. Bruce Armon perhaps at that point
19 and corporate counsel as well.

20 Q. Look at 25. It refers to -- that says that you're
21 trying to provide additional significant compensation in the
22 event that he voluntarily or involuntarily leaves SCENT, do
23 you see that?

24 A. 25, power grab?

25 Q. Yes.

1 A. Yes.

2 Q. Who else would have known those facts besides you?

3 A. Only Dr. Dyce, Bruce Armon and Ed White, and I certainly
4 would never refer to the contract as a power grab to Dr.
5 Gunnlaugsson.

6 Q. There's also discussions in 28 and 29 about interactions
7 with you and Dr. Dyce and Dr. Dyce's separation. Did you
8 tell Dr. Gunnlaugsson those things?

9 A. No, sir, I did not tell Dr. Dyce (sic) the contents of
10 28 and 29. He could have only received those from Dr. Dyce.

11 Q. Did you receive anything else in those, those weeks, did
12 you receive any letters from --

13 A. I'm sorry, I misspoke. I did not tell Dr. Gunnlaugsson
14 about those contents. He could have only gotten those from
15 Dr. Dyce.

16 Q. All right. I want you to tell the Court, did you get
17 any other letters or correspondence from Dr. Dyce or his
18 attorneys during those weeks?

19 A. Yes. On or about April 19th we received a letter from
20 Mr. Marshall Allen who represented Dr. Dyce along with some
21 surrounding e-mails that made it clear that he was breaching
22 his covenant not to compete and --

23 Q. All right. I want you to look at Exhibit --

24 A. -- that he was repudiating the covenant.

25 Q. I want you to look at Defendant's Exhibit 129 which is

1 behind Tab G. Do you have that up there, the first Tab G?

2 A. I have it.

3 Q. And is that a letter to your lawyer or SCENT's lawyer
4 from the lawyer for Dr. Dyce?

5 A. Yes, it is.

6 Q. Okay. I want to you look on the second page of that
7 letter in the top paragraph.

8 A. I'm there.

9 Q. Do you see where it talks about the covenant not to
10 compete? I'll read it just to save a little time, the third
11 sentence that says, the references in your most recent e-mail
12 to me to intentionally leaving out an address in order to
13 attempt to enforce a noncompetition provision which we
14 believe is unenforceable. What did that tell you?

15 A. It told me very clearly that the, and told SCENT very
16 clearly that Dr. Dyce and his attorneys had -- were
17 repudiating the covenant and were breaching their contract
18 and that they had absolutely no intent whatsoever of
19 fulfilling the obligation and agreement that Dr. Dyce and I
20 had when we signed the agreement.

21 MR. CLEVELAND: Objection, Your Honor, Dr. Puchalski's
22 impression or interpretation of what's said there I think is
23 irrelevant. It's not relevant to any issue.

24 THE COURT: You're talking about it goes to the state of
25 mind of someone -- it's going to someone else's state of

1 mind?

2 MR. CLEVELAND: Yes.

3 THE COURT: Insofar as someone else's intent or state of
4 mind it would be sustained.

5 MR. SHEHEEN: I'm asking him what it meant to him, what
6 he took from that letter, Your Honor, so I'll ask it that
7 way.

8 Q. What did you take from this letter?

9 MR. CLEVELAND: Objection, Your Honor. That was the --
10 he's coming at it the same way, I believe, that Dr.
11 Puchalski's interpretation or what it means to him where the
12 words are clear on their face is irrelevant.

13 MR. SHEHEEN: Your Honor --

14 THE COURT. The document would speak for itself, if you
15 want to ask what did you do as a result of the agreement,
16 what did you do, but, you know --

17 MR. SHEHEEN: The point here is there are certain steps
18 he took or didn't take based on the correspondence he got.

19 THE COURT: Sure. As a result what did you do.

20 MR. SHEHEEN: His understanding of it. Okay. Let me
21 look at one other exhibit and then I'll ask him that
22 question.

23 THE COURT: Sure.

24 Q. Exhibit 234, Dr. Puchalski, which is behind Tab H, and
25 it's the third page, and was this an e-mail that was sent

1 between your lawyers and Dr. Dyce's lawyers?

2 A. Yes, it was.

3 Q. And in this e-mail does -- about four paragraphs, down
4 does he reference that Dr. Dyce is trying -- is asking you to
5 list his home address in Hartsville as his new practice
6 location?

7 A. Yes, sir, 410 Woodland Drive.

8 Q. And is that in Hartsville?

9 A. Yes, it is, or 401 Woodland Drive.

10 Q. You've already discussed -- strike that question.

11 Was there anything else that informed your, Dr.
12 Puchalski's, conclusions about Dr. Dyce's activities in
13 relation to the covenant that happened during this period of
14 time?

15 A. Yes. In addition to what we've already discussed, in
16 June of 2010 I received information by way of my --

17 MR. CLEVELAND: Objection, sounds like hearsay is
18 coming.

19 THE COURT: It sounds like it but -- yes.

20 Q. Don't tell me anything someone else told you.

21 THE COURT: Thank you.

22 Q. Let's look at it this way, did you serve on the board of
23 HMA?

24 A. I did. I served on the board for HMA during this period
25 of 2010. All of 2010, actually.

1 Q. And did you observe anything while you were on the board
2 of HMA?

3 A. Yes, I did.

4 Q. What did you observe?

5 A. I observed that they were setting up office space for
6 Dr. Dyce in Hartsville.

7 Q. And when was that?

8 MR. CLEVELAND: Objection. I object. There's no
9 foundation for the conclusion that he's just offered in
10 response to that question.

11 MR. SHEHEEN: He can cross him on it.

12 MR. CLEVELAND: He said how he knows that. If he knows
13 it because he's alleging someone told him that, then it's
14 hearsay. If it's some other basis, we haven't heard it, so I
15 object to him offering that conclusion with no foundation.

16 MR. SHEHEEN: I asked him what he observed. I can ask
17 more questions about it.

18 Maybe if I asked him what he observed, Your Honor, would
19 that help?

20 THE COURT: Yes. I mean, he's on the board. He's on
21 the board of this particular -- the HMA.

22 MR. SHEHEEN: Yes, ma'am.

23 THE COURT: He is a participant in this entity and, I
24 mean, I'm really contemplating do I need any more. I mean,
25 he is a member of this board, and as a member of the board he

1 observed the board doing certain things, this entity doing
2 certain things.

3 MR. SHEHEEN: Let me make it more specific because I
4 don't want to mislead the court.

5 THE COURT: Okay.

6 Q. What did you observe?

7 A. Just to be clear, I was on the board for HMA at Carolina
8 Pines Regional Medical Center, not on the HMA board in
9 Naples.

10 Q. You were on the board of the hospital subsidiary that is
11 in Hartsville; is that right?

12 A. That's right.

13 Q. And it's owned by a big corporation somewhere else.

14 A. That's right.

15 Q. What did you see with your eyes?

16 A. I saw that they were setting up an office space for Dr.
17 Dyce to practice in Hartsville.

18 Q. And when, approximately, was this?

19 MR. CLEVELAND: Again he's offered a conclusion, not
20 what he observed. I mean, I'm objecting to hearsay. I think
21 he ought to explain how he could reach that conclusion. In
22 other words, if there was a sign that said Dr. Dyce office
23 space, then that would be the case, but I -- like so many of
24 these other conclusions that he's offered, it needs a
25 foundation, so I object to it.

1 MR. SHEHEEN: Your Honor, I'll ask some more questions
2 about it, but he's just testifying about what he saw. I'm
3 going to ask physically what did you see.

4 THE COURT: Physically what did he see, well, he's on
5 the board.

6 MR. SHEHEEN: Right.

7 THE COURT: He's on the board and he's observed the
8 board -- well, let me say this, I'm a little bit concerned
9 that he says I'm on the board and I saw what they were doing.
10 I don't know who they is. That's got me a little concerned,
11 so maybe go back a little bit and tighten it up a little bit.

12 Q. When you would go to board meetings --

13 A. Yes, sir.

14 Q. -- would you physically be there?

15 A. Yes, I would.

16 Q. Would you walk through the hospital?

17 A. Yes.

18 Q. Would you observe what was going on around you?

19 A. Yes.

20 Q. Did you see any rooms being retrofitted or fixed up or
21 changed?

22 A. Yes.

23 Q. Did you see any that were being changed or retrofitted
24 for ENT purposes?

25 A. Yes.

1 Q. Who was the ENT in Hartsville at that time?

2 A. Dr. Dyce, outside of us.

3 Q. Were they fixing it up for you?

4 A. No.

5 Q. I want to show you Exhibit 231 which is at Tab I, and
6 it's already been introduced previously, Your Honor, with Dr.
7 Dyce's testimony. Exhibit 231. And, Your Honor, I think
8 that actually 234, which we were just at, had not been
9 introduced because we gave it to the plaintiffs a few days
10 ago, so I want to move to introduce 234. That was the letter
11 from the lawyer -- that was communications between Ed White
12 and Marshall, it was the e-mail correspondence, I'm sorry.

13 THE COURT: It's exhibit what now?

14 MR. SHEHEEN: 234 was what I was moving into evidence.
15 We're now moving to 231.

16 MR. CLEVELAND: What tab?

17 MR. SHEHEEN: 234 was at Tab H. It was the e-mail, H.

18 MR. CLEVELAND: No objection.

19 MR. SHEHEEN: Thank you.

20 THE COURT: Okay.

21 MR. SHEHEEN: Thank you. We'll move that into evidence.

22 Q. So now we're at 231 which is at Tab I, and were you here
23 when I asked Dr. Dyce about this?

24 A. I was.

25 Q. And you'll recall that this was documents that had been

1 subpoenaed recently by plaintiff's counsel that we received
2 sometime last week?

3 A. I do understand that.

4 Q. All right. And if you'll recall, Dr. Dyce testified
5 that maybe this was for the emergency room or something like
6 that, I believe?

7 A. I believe he testified that it was for the operating
8 room.

9 Q. All right. I want you to tell the Judge what this is.

10 A. Your Honor, these are -- this is equipment that you
11 would buy for an office, and if I could direct your attention
12 to the third page of this exhibit, and this is demonstrative
13 of why it's for the office, but there's frankly much more
14 documentation that also supports office equipment. If,
15 perhaps, Your Honor would just read down with me, it says
16 flexible scopes.

17 Q. What would those be used in?

18 A. In the office.

19 Q. What type of office?

20 A. In an ENT office.

21 Q. Okay. What else?

22 A. A fridge, we use that for allergy extract. Exam chairs,
23 three exam chairs, \$4500 apiece, you use those in an office.
24 You don't use exam chairs in an operating room.

25 Q. Okay. What else?

1 A. Allergy table, we don't do allergy in the operating
2 room. Microscope, we do use a microscope in the operating
3 room, but it's much more expensive than the microscope that's
4 listed here. It's an office scope, and I know that because
5 I've set up plenty of ENT offices.

6 Q. Okay.

7 A. Instrument packs, autoclave, you do use autoclaves in
8 the operating room, but those autoclaves aren't 5,000 bucks.
9 They're way more expensive and much, much larger. So these
10 are all office equipment, a scale, computers, fax, scanner,
11 copy machine, front desk, nursing chairs, video tower, which
12 I might add is 17,242 -- 274. If you look back to the
13 exhibit before that Dr. Dyce said, oh, this is Storz, this
14 has got to be for the operating room, if I could just direct
15 Your Honor's attention to the fact --

16 MR. CLEVELAND: I'm going to object to his repeating
17 testimony from Dr. Dyce. One, he's getting it wrong, and I
18 think that's inappropriate to be trying to repeat what
19 another witness has said.

20 THE COURT: For the pitting witness part of it, pitting
21 the witnesses, is that what you're saying?

22 MR. CLEVELAND: Yes, that's exactly right.

23 THE COURT: If he can just testify based on his belief,
24 knowledge.

25 Q. Just don't mention Dr. Dyce, just tell us whether those

1 things would be in an operating room or whether they'd be in
2 an ENT office and the relationship?

3 A. If I may just continue my thought that, Your Honor, if
4 you notice that the first two pages which say Storz on them
5 and they say Carolina Pines Medical Center on them and they
6 say attention Dr. Dyce and they are dated 6/21/2010, and then
7 if you go and look on the second page, you'll notice that
8 this equipment is \$17,274, I'm sorry, yes, \$74, and then if I
9 could direct your attention to the third page where
10 approximately three-quarters of the way down it says video
11 tower, my testimony is that this equipment here is a video
12 tower, and it's for the exact same amount, \$17,274. This is
13 an office video tower. Rigid scopes, 1,850, two of them,
14 EndoCaddy's, these are things that you go ahead and sterilize
15 flexible scopes with in the office. They are not used in the
16 operating room. We autoclave those scopes if we have to
17 sterilize them in the operating room. This is something that
18 would go in an office. Stroboscopy, this is an office based
19 procedure that we do to evaluate someone's larynx, voice box,
20 light source, light cables, staples, staplers. You don't
21 need that under a physician in an operating room. Stools,
22 chairs, a medicine cabinet, a bookshelf, audio booth for
23 \$100,000, but it includes vestibular equipment, and all this
24 audio equipment is only to be used in an outpatient ENT
25 office. It would not be used in a hospital setting, much

1 less the operating room.

2 Q. All right.

3 A. Otoscopes.

4 Q. I'm sure you could go through every piece of equipment.

5 We'll spare the Court that. I want you to look back at the

6 first page, okay. Now, let me ask you, have you ordered

7 equipment or sought proposals for equipment for ENT offices?

8 A. On numerous occasions.

9 Q. Do you have experience with that?

10 A. Yes.

11 Q. Do you understand what these documents mean and reflect?

12 A. Yes, I do.

13 Q. Do you see where it says attention Dr. Dyce?

14 A. I do indeed.

15 Q. Why would, on documents such as these, when you're

16 setting up an office, why do they put the person's name

17 there?

18 A. Because that's how they label the account and they know

19 which physician is associated with the product.

20 Q. Okay. Did you file an answer in your -- actually, did

21 you file an answer individually and did SCENT file an answer

22 through attorneys?

23 A. Yes to both.

24 Q. Okay. In your answers did you ask for certain things as

25 well?

1 A. Yes to both, yes, both.

2 Q. And they're reflected in the answers; is that right?

3 A. Yes.

4 MR. SHEHEEN: And those are I believe also at -- behind
5 the complaints that were included, Your Honor.

6 Q. Did you learn anything -- well, let me ask you this
7 question --

8 A. And that was in April --

9 Q. Yes, in April, okay.

10 A. -- of 2010 that would apply.

11 Q. Why didn't you begin to pay Dr. Dyce a buyout, you being
12 SCENT?

13 A. As the managing shareholder for SCENT I had an
14 obligation, a fiduciary duty, to SCENT, its 60 employees and
15 the patients that it served, and it was very clear through
16 Dr. Dyce's actions and the actions of his counsel that he had
17 no intent on fulfilling the obligations in the agreements and
18 that his intention was to compete against SCENT in
19 Hartsville. It made no sense to me as the managing
20 shareholder for SCENT to fund him or a competitor in order to
21 further hurt the practice.

22 Q. Did you believe that SCENT had a setoff under the
23 contract because of Dr. Dyce's actions?

24 A. Yes, indeed.

25 Q. And did you believe that the setoff would exceed

1 anything that was owed to Dr. Dyce?

2 A. Every calculation looked as though it would exceed
3 anything owed to Dr. Dyce.

4 Q. Okay. Did you learn anything else in those weeks about
5 Dr. Dyce and his activities with Dr. Gunnlaugsson?

6 A. Yes.

7 Q. What did you learn?

8 MR. CLEVELAND: Objection, Your Honor.

9 MR. SHEHEEN: Don't tell me anything anybody told you.
10 Does that help?

11 MR. CLEVELAND: Well, I've objected -- there needs to be
12 a foundation as to how he learned it before he just starts --

13 THE COURT: You know what, I missed completely the
14 question because I'm sort of glad you objected. I was making
15 a note based on what he just said.

16 MR. SHEHEEN: That means I'm moving too fast.

17 THE COURT: No. It just took me too long to make the
18 note. Tell me what the question is.

19 MR. SHEHEEN: I'll withdraw it and ask it another way to
20 try to move along a little bit.

21 THE COURT: Okay.

22 Q. Did you find anything on SCENT's computers related to
23 Dr. Dyce and Dr. Gunnlaugsson?

24 A. Yes. After the lawsuit we looked through a number of
25 things. One was the call logs and office phone logs on our

1 corporate phones, and the other was corporate e-mail accounts
2 and the exchange server, and we found a number of very
3 concerning items on the server.

4 Q. Did you find the affidavit that we've discussed before
5 that's Defendant's Exhibit 71?

6 A. Yes, we found e-mails that surround that affidavit and
7 the affidavit between Dr. Dyce and Dr. Gunnlaugsson.

8 Q. And did that cause you concern?

9 A. Yes, it did.

10 Q. And did you find the manifesto of Dr. Gunnlaugsson that
11 we've discussed before which is Defendant's Exhibit 72?

12 A. We did, as well as surrounding e-mails.

13 Q. Tell the Judge why those two documents caused you
14 concern about Dr. Dyce.

15 A. So, Your Honor, the reason that I was concerned about
16 that as the managing shareholder of SCENT was that the
17 affidavit came out in an e-mail form to Dr. Dyce and was
18 created somewhere around February 1st, based on our
19 evaluation of the server and our searching on the document,
20 and so on February 2nd we had a board meeting with Dr. Dyce
21 and Dr. Dyce had numerous phone calls with Dr. Gunnlaugsson
22 the night of that e-mail and that affidavit, and then when
23 you read the affidavit, it was very clear that this was a
24 lawsuit that was being prepared between Dr. Gunnlaugsson and
25 SCENT and that I was listed as -- in my role or capacity as

1 managing shareholder of SCENT, and this was clear in the
2 upper left-hand corner with the plaintiff and defendant
3 label.

4 Q. Was there what you considered to be confidential
5 information within that affidavit?

6 A. Absolutely.

7 Q. Had you shared that with Dr. Gunnlaugsson?

8 A. Of course not.

9 Q. Who else knew that information?

10 A. Dr. Dyce.

11 Q. Anybody else?

12 A. Some of the information his attorney and my -- yes, no
13 one else outside of Dr. Dyce or any counsel that he shared it
14 with.

15 Q. And how about in the manifesto, was there information
16 that you considered to be confidential for SCENT under the
17 agreement?

18 A. Yes.

19 Q. And had you shared that information with Dr.
20 Gunnlaugsson?

21 A. No.

22 Q. Was Dr. Dyce the other person who was aware of that
23 information?

24 A. Yes. There was some generic information in the
25 manifesto that was common knowledge, but there were items in

1 the manifesto that were clearly information that Dr.

2 Gunnlaugsson would not have received from me or from SCENT.

3 Q. Did you believe that Dr. Gunnlaugsson was adverse to the
4 practice?

5 A. Yes. We became aware of Dr. Gunnlaugsson becoming
6 adverse to the practice in January but not to this extent,
7 and I believe that it was Dr. Dyce's obligation and his
8 fiduciary duty to report that to us.

9 MR. CLEVELAND: Objection. This witness is not
10 qualified to give an opinion on fiduciary duties. Mr.
11 Freeman enlightened us on those.

12 MR. SHEHEEN: Your Honor, he's just giving a lay opinion
13 of what he believes.

14 THE COURT: Okay.

15 MR. SHEHEEN: For what it's worth.

16 THE COURT: Just duty, I'll take it as just being his
17 duty, he believed it was his duty.

18 MR. SHEHEEN: Thank you.

19 THE COURT: Yes.

20 Q. Okay. Let's move on, let's look at the termination of
21 Dr. Dyce, the separation of Dr. Dyce. Okay. I want you to
22 look at Defendant's Exhibit 67 which is at J in your book
23 there, the first J. I want to you tell the Judge what this
24 is.

25 A. This is the consent dated March 3rd, 2010, which

1 terminates Dr. Dyce.

2 Q. I want to -- and I'll try to do this just to, if counsel
3 will give me a little leeway, point you in the direction. I
4 want you to look at the third whereas where it says, the
5 managing shareholder believes the other shareholder has acted
6 against the best interests of the company and has made it
7 clear, both personally and through counsel, that he will make
8 the operating of the company more difficult in order to exert
9 leverage regarding his personal negotiations with the
10 company. We'll talk about this in a little more detail, but
11 what did SCENT mean by that?

12 A. What the practice meant by that was that it was very
13 clear, both -- Dr. Dyce and his counsel were being as
14 disruptive as one could possibly be and very
15 passive-aggressive at this point, and so both through his
16 counsel and through his intentional obstructing of practice
17 operations Dr. Dyce was making it clear that he was not going
18 to allow the practice to continue running unless something
19 happened his way.

20 Q. And we'll go into more detail in that later on. I want
21 to go through this document first. Let's look at where it
22 says, whereas the managing shareholder believes the other
23 shareholder is also preventing the closing of the loan
24 regarding the partially constructed building for the company
25 by SCENT Land Holding. Is that what we've already heard

1 during the trial, the issue about the need to close on the
2 building in Lugoff?

3 A. Yes.

4 Q. Okay. And we'll talk about that in a little more detail
5 later as well. I want you to look at the next one. It says,
6 whereas this has resulted in the filing of a mechanic's lien
7 regarding the building and is damaging the company's ability.
8 Tell the Court why that was put in there, please.

9 A. Because it was clear that the -- as a result of Dr.
10 Dyce's actions we were having issues financially with banks.
11 We were also suffering from reputation as well, both in the
12 local community and also within the business community.

13 Q. Why did you have anything about a lien, mechanic's lien?

14 A. We received a notice from Pyramid Construction, Charlie
15 Lucas, saying a conditional release of lien, mechanic's lien,
16 and I assumed that meant that we had a lien and that we had
17 to pay that huge sum of money in order to release the lien.

18 Q. Why didn't you -- this says it's a termination without
19 cause; is that right?

20 A. Yes.

21 Q. Why didn't you terminate him with cause based on those
22 reasons, why didn't SCENT do that at this point?

23 A. I think it's clear in this resolution but also in the
24 e-mail that was sent out the same day that the intent here
25 was just to save the practice. We wanted to save the

1 practice. We didn't want to cause any harm to anyone insofar
2 as we just needed to save the practice, and we wanted to see
3 if there was some way that we could achieve saving the
4 practice and still be able to come to some terms with Dr.
5 Dyce.

6 Q. I want you to turn to the last page, signature page of
7 this document, and read the second further resolved, just
8 read it to yourself and tell me why SCENT included that?

9 A. That was included because SCENT wished to make it clear
10 to Dr. Dyce that its intentions were to try to pursue a
11 course of mediation during the 60-day period that was allowed
12 for with a not for cause termination.

13 Q. And in that one you talk about the possibility of
14 engaging in mediation and rescinding the termination; is that
15 right?

16 A. Yes, that's right.

17 Q. And what was your goal there?

18 A. Our goal was to save the company and still be able to
19 come to some sort of meaningful terms with Dr. Dyce whereby
20 he could continue to practice as a physician without the
21 ability to do what he was doing.

22 Q. All right. I want you to look next at Tab K, which is
23 Defendant's Exhibit 163. Do you see that?

24 A. Yes.

25 Q. And what is that?

1 A. That is a management directive.

2 Q. And it's dated what at the bottom?

3 A. 3/30/2010.

4 Q. Was there another management directive issued at some
5 point?

6 A. The first management directive was issued at the time of
7 Dr. Dyce's termination on March 10th, 2010, and this one was
8 approximately 20 days later.

9 Q. Let's flip through about 3 pages in the same tab here,
10 and there's another headline that says management directive.

11 A. I see it.

12 Q. Is that the one you're referring to?

13 A. Yes.

14 Q. Let's look at that one first, if the Court's with me,
15 and then we'll go back to the earlier one. They're all in
16 the same tab. What did you instruct Dr. Dyce in this
17 management directive?

18 A. There were a number of items, the first dealt with
19 confidentiality, and the two confidentiality clauses that
20 existed at the time were repeated, and then after that he was
21 asked to comply with the provisions of his employment and
22 shareholders agreement, and then it talks about items during
23 the 60-day transition period, and it clearly says that he's
24 asked -- directed not to disparage or harm the company or the
25 practice.

1 Q. Turn the page, look at the last sentence of this.

2 A. Yes.

3 Q. What's it say there?

4 A. In accordance with Section 2.2C of your employment
5 agreement failure to comply with this directive may be
6 grounds for your immediate termination for cause.

7 Q. What does 2.2C in the employment agreement say, just
8 generally?

9 A. Generally, 2.2C states that a physician employee may be
10 terminated for cause in an immediate basis for failure to
11 meet a management directive if that management directive
12 states that failure to comply will result in immediate
13 termination or termination.

14 Q. In that section of the contract, employment agreement,
15 is there any 30-day notice or anything?

16 A. No. That's grouped with things like death, disability,
17 loss of licensure, loss of hospital privileges. These are
18 obvious things that would precipitate an immediate action
19 because they would prevent a physician from executing his
20 duties or her duties.

21 Q. Okay. Let's turn back to the beginning of this tab here
22 for the second management directive. Anything of relevance
23 in there that you want to mention to the Court? This would
24 be the one that was 3/30/10?

25 A. It once again talks about the fact that this is a

1 management directive under section 2.2C, as we just
2 previously mentioned, and it asks Dr. Dyce to comply with the
3 provisions of his shareholders agreement and his employment
4 agreement. It asks him to participate in recruitment of
5 other healthcare providers, it asks him not to make any
6 disparaging remarks about the company or the practice or any
7 of its personnel. It talks about the covenant not to compete
8 in the third paragraph from the bottom, and then it also is
9 one of the many times when Dr. Dyce is asked where he intends
10 to practice after May 9th, and then it ends in the same
11 manner, that this is -- this would be immediate termination
12 under section 2.2C of the employment agreement.

13 Q. Okay. And then you had a schedule attached of things
14 that were supposed to occur; is that right?

15 A. Yes, sir.

16 Q. I want to you look at the last -- second to the last
17 paragraph, it says you have not yet told me where you intend
18 to practice after May 9, 2010. I would appreciate you
19 letting me know as soon as possible. Why did you ask that
20 question?

21 A. I asked that question because we had, we wanted to know
22 what his intentions were with respect to meeting his
23 obligations under the shareholder and employment agreement.

24 Q. Let's look at Defendant's Exhibit 68, and it's under the
25 L tab.

1 A. I've got it.

2 Q. All right. Why did this get generated?

3 A. This was generated as a termination for cause.

4 Q. Why did SCENT terminate Dr. Dyce for cause?

5 A. Terminated him for a number of reasons, the most salient
6 of which is his breach of the confidentiality clauses in the
7 management directives.

8 Q. Were those contained in the management directives?

9 A. Yes, they were.

10 Q. And how did he breach those?

11 A. Well, in a number of ways. We've already spoken about
12 the Gunnlaugsson agreement. We've also spoken about -- I'm
13 sorry, the Gunnlaugsson complaint. We've also spoken about
14 the fact that we had identified information in the manifesto
15 and the affidavit and surrounding server information. We
16 also spoke about the fact that Dr. Dyce took from the
17 practice those important insurance records. We also spoke to
18 the fact that -- well, we haven't, but in those records it
19 was clear that Dr. Dyce -- phone logs, that Dr. Dyce was also
20 communicating with Dr. Gunnlaugsson numerous times interlaced
21 and interspersed with Dr. Gunnlaugsson's attorney, Chuck
22 Thompson during that period, and then also after Dr.
23 Gunnlaugsson had his lawsuit, we not only looked at the
24 server, not only did we look at the phone logs, but I also
25 asked as much and as many people as I could about what was

1 going on, and at that point I also heard from Dr. Vidrine who
2 shared a number of things that I believe he'll be giving --

3 MR. CLEVELAND: Objection to anything Dr. Vidrine may
4 have said.

5 THE COURT: Sure, sustained.

6 Q. Thank you, Your Honor. Okay. You heard the tape played
7 in here. It was kind of difficult to hear, but were you here
8 when the tape got played of the meeting where Dr. Dyce was
9 terminated without cause?

10 A. I was.

11 Q. Tell the Judge how you felt about that at the time?

12 A. It was a very difficult day, Your Honor. We've had
13 to -- it didn't -- it wasn't something that we came to
14 lightly, it wasn't something we came to easily as a practice.
15 There were -- obviously, a lot of anxiety and consternation.
16 This is a friend, so from the personal side that was
17 obviously something that was at play and I think, you know,
18 it was obvious in my voice and how we delivered that. I
19 think that there was also some just plain old-fashioned
20 feeling as though the practice had been betrayed and some
21 disbelief that -- that it would come to this, that Dr. Dyce
22 would bring it to this.

23 Q. Did you continue to offer to Dr. Dyce, as the weeks went
24 by, opportunities to mediate the dispute or try to work out
25 some agreement that would resolve the problems?

1 A. Yes.

2 Q. Let's look at Defendant's Exhibit 62. It's Tab N, and
3 we're not going to go through the whole letter, the Judge can
4 read it, but did your lawyer extend to Dr. Dyce's lawyer in
5 this letter opportunity to mediate to resolve the issues, did
6 they discuss reviewing data and financial things in this
7 letter?

8 A. Yes, they do.

9 Q. And then let's look at Defendant's Exhibit 73 which is
10 at Tab O. This is important. Tell the Judge what this is.
11 This is Defendant's Exhibit 73.

12 A. This is an offer for Dr. Dyce to come back to work for
13 SCENT as an at-will employee for \$1 million, I believe,
14 annually -- or, no, I'm sorry, it would be commensurate with
15 what your -- what it was prior to -- previous to termination.

16 Q. So what would that be?

17 MR. CLEVELAND: Excuse me, is it Tab O, is that what you
18 said?

19 MR. SHEHEEN: Yes, that's what I have it as. It looks
20 like this (indicating).

21 MR. CLEVELAND: I apologize.

22 THE COURT: That's okay.

23 Q. Just to recap what you said, this was an offer to Dr.
24 Dyce; is that right?

25 A. Yes.

1 Q. To come back and be employed on what type of basis?

2 A. As an at-will employee.

3 Q. And how much would he -- do you have an estimate how
4 much he would be making on this?

5 A. Dr. Dyce was making approximately \$1.5 million in
6 compensation annually prior to his termination, so this was
7 offering the same amount.

8 Q. Okay. And do you know when this got sent,
9 approximately?

10 A. There were two similar offers. One was in --

11 Q. You can turn the page.

12 A. This one looks like it was the 11th day of August.
13 There was also an offer similar to this before that.

14 Q. Okay. Did you ever get any response from Dr. Dyce about
15 whether he wanted to come back and work or not?

16 A. We finally received a response from Dr. Dyce in August
17 that he was not -- no longer entertaining coming back to
18 work.

19 Q. There were a lot of tape-recorded conversations that I
20 went through with Dr. Dyce, do you recall that from the
21 transcripts?

22 A. I do.

23 Q. Were some of those where he tape recorded you talking to
24 him about trying to work out the problems after he'd been
25 terminated?

1 A. Yes.

2 Q. Did you know he was tape recording?

3 A. No.

4 Q. Were you surprised?

5 A. Very surprised. I had no idea that he was doing that.
6 In retrospect it made sense because his behavior during the
7 times when he was taping was one where he was clearly trying
8 to extract data or -- but not necessarily engage in any
9 meaningful conversation.

10 Q. Let's look at the shareholder agreement which is
11 Plaintiff's Exhibit 7.

12 And, Your Honor you were looking at it in the book, the
13 book that Will gave you, in the book over there.

14 Plaintiff's Exhibit 7. Are there confidentiality
15 provisions in this agreement?

16 A. Bear with me for just a moment. I've got 7.

17 Q. At 3.7 is there a confidentiality provision?

18 A. Yes, there is.

19 Q. I'm just going to read it to save a little time.
20 There's some parts above and then it says, each shareholder
21 shall use information related to the business of the
22 corporation to advance the corporation's best interests and
23 not to benefit their personal interests. Do you see that?

24 A. Yes.

25 Q. Is it your belief that Dr. Dyce violated that provision?

1 A. Yes, it is.

2 Q. And is it in the ways that you've already listed earlier
3 when you talked about the exchange of information?

4 A. Yes.

5 Q. Okay. Does it also say that all forms, templates,
6 systems including billing systems are the property of the
7 corporation and shall not be used apart from the corporation?

8 A. Yes, it does.

9 Q. Do you believe that the taking of the insurance
10 contracts for his own purposes violated that provision?

11 MR. CLEVELAND: Your Honor, I've been lenient, but I
12 must object to the leading.

13 THE COURT: Sustained.

14 Q. Do you believe Dr. Dyce violated that provision?

15 MR. CLEVELAND: Objection, leading.

16 MR. SHEHEEN: It's just a yes or no question.

17 MR. CLEVELAND: That's what a leading question is.

18 MR. SHEHEEN: No, a leading question is, do you agree
19 that they violated the contract.

20 THE COURT: Is the question simply. Do you think he
21 violated the confidentiality agreement?

22 MR. SHEHEEN: Yes, ma'am.

23 THE COURT: Okay, it doesn't suggest the answer, but I
24 bet I know the answer because I've been sitting here now for
25 like a week.

1 Q. Do you believe it violated it?

2 A. Yes, I do.

3 Q. Thank you. Is there also a confidentiality provision in
4 the employment agreement at 5.1? That's Plaintiff's 10. You
5 don't need to turn to it unless you just want to.

6 A. I'm sorry. Yes, there is.

7 Q. 5.10 -- 5.1?

8 A. Sounds right, yes, sir.

9 Q. And you believe he violated that?

10 A. Yes.

11 Q. Dr. Dyce -- and I think we do need to establish this
12 into the record, at Tab C there's a covenant not to compete.
13 Do you see that?

14 A. First C?

15 Q. Yes, sir, first C.

16 A. I have it.

17 Q. You have it?

18 A. Yes.

19 Q. Okay. Was that covenant not -- is that the covenant not
20 to compete referenced in the employment agreement?

21 A. Yes.

22 Q. Was it signed contemporaneously with the employment
23 agreement?

24 A. It was signed at the same time as the employment
25 agreement and the shareholders agreement.

1 MR. CLEVELAND: I'll object to that not being
2 responsive. You asked him if it was done simultaneously and
3 he's, I believe, started to equivocate on that, so because of
4 the importance of this I object to that.

5 MR. SHEHEEN: He answered what he answered. I'm not
6 sure what the objection is. My question was did he -- was
7 this what was referred to in the employment agreement, yes,
8 was it signed contemporaneously with the employment agreement
9 was my next question.

10 THE COURT: So his testimony is that the covenant not to
11 compete that is at Tab C was signed on July the 16th, 2008?

12 MR. SHEHEEN: You've skipped ahead of me about a step,
13 Your Honor. I was really trying to establish that the -- in
14 the employment agreement it refers to a covenant, and since
15 they weren't introduced at the same time, I wanted to make
16 sure in the record that it was clear that this was the
17 covenant signed with the employment agreement.

18 THE COURT: Okay. And no more than that.

19 MR. SHEHEEN: That's all I asked him.

20 THE COURT: Okay.

21 MR. SHEHEEN: I don't think he gave any date. I think
22 we've already been through that line of questioning. It's
23 already there. I don't see any need to go back to it.

24 THE COURT: Okay.

25 Q. Was there a liquidated damages provision in this

1 covenant -- excuse me, in the employment agreement?

2 A. There was a liquidated damages clause in the employment
3 agreement.

4 Q. And that's at 3.11; is that right?

5 A. Yes, sir.

6 Q. Okay. And what does it provide?

7 A. It provides for \$750,000 in the event of a breach.

8 Q. Of what?

9 A. Of the covenant.

10 Q. Did the parties think that was reasonable?

11 A. Yes. That was the intent of the parties, that's what
12 the parties contemplated.

13 Q. Does the covenant itself in Section 2 state what you can
14 recover as well?

15 A. Yes, it does.

16 Q. Does that include attorney fees?

17 A. Yes, it does.

18 Q. Does it include damages?

19 A. Yes, it does.

20 Q. Do you believe it's been violated?

21 A. Yes, it's clearly been violated.

22 Q. In the employment agreement which is Plaintiff's Exhibit
23 10 is there also -- well, let's just go to page 9 of the
24 employment agreement.

25 A. I'm there.

1 Q. At the bottom of that page is talks about variable
2 compensation, do you see that, bottom of page 9?

3 A. Yes.

4 Q. And then it goes to page 10 and it talks about if a
5 physician fails to do some things. Do you see that?

6 A. I do.

7 Q. Can you explain to the Judge what those provisions mean?

8 A. Your Honor, what that provision states is that if you do
9 not follow the provisions of 3.1A, then you -- we agreed that
10 you would have your compensation, your base compensation
11 reduced by 30 percent and that you would also forfeit any
12 claim to call pay during the period of that breach.

13 Q. And what does 3.1A mean?

14 A. Actually, I misspoke. It's 3.1B.

15 Q. It says both 3.1A or 3.1B.

16 A. Yes, sir.

17 Q. What is 3.1B?

18 A. Makes it clear that the physician shall use the
19 physician's best efforts to further the practice of the group
20 and enhance the group's standing among members of the medical
21 profession and present or prospective patients. Physicians
22 will refrain from any conduct or actions which would be
23 libelous or slanderous to the group or the physician
24 employees of the group or would otherwise negatively impact
25 the group members of the medical profession and present or

1 prospective patients.

2 Q. Is it your contention that Dr. Dyce violated that
3 section?

4 A. Yes, clearly he did.

5 Q. And are you seeking the reimbursements and the moneys
6 provided for on page 10?

7 A. Yes, we are.

8 Q. All right. Let's talk a little more about the covenant
9 not to compete. Were there mutual promises between the
10 practice and Dr. Dyce when he signed the covenant?

11 A. Yes.

12 Q. Did he receive increased pay as a result of signing the
13 employment agreement and the covenant?

14 A. Yes.

15 Q. Were there?

16 MR. CLEVELAND: Objection to the leading nature of this.

17 THE COURT: Sustained.

18 Q. Did Dr. Dyce receive increased pay?

19 I don't know how else to ask the question, Your Honor.

20 Did Dr. Dyce receive increased pay?

21 A. Yes.

22 Q. Was that provided for in his employment agreement?

23 A. Yes.

24 Q. Did Dr. Dyce receive protections in Hartsville?

25 MR. CLEVELAND: Again, I object to this as leading. If

1 he wants to ask a question that's not suggestive of the
2 answer, but I believe he's leading him through all this and
3 getting yes or no and I think it's leading.

4 MR. SHEHEEN: He can answer yes or no, Your Honor.
5 Leading is isn't it true Dr. Dyce received something in
6 Hartsville. I'm not asking him that. I'm asking and he can
7 say yes, he can say no. I'm asking specific questions and I
8 think there's nothing wrong with that.

9 THE COURT: What I'm more interested in, I guess, is
10 what in this agreement changed and improved Dr. Dyce's
11 employment, and let me tell you why, because then I've got to
12 go back on that basis and see whether or not he had prior --
13 he had any protections, quote, unquote, in Hartsville because
14 then there's no consideration. What you're saying is
15 consideration for the noncompete is something more.

16 MR. SHEHEEN: I mean, I think, Your Honor, that the
17 caselaw's pretty clear if there are mutual promises between
18 parties, that's consideration, but I wanted to establish some
19 other things that are in there.

20 THE COURT: Okay.

21 Q. Did Dr. Dyce get anything out of the employment
22 agreement in 2008 that was favorable to him?

23 A. Yes.

24 Q. Okay. Tell the Judge what.

25 A. So he got increased pay, he also received increased

1 benefits, he also got the benefit of me signing a restrictive
2 covenant. He also got Hartsville protection provisions
3 within the agreement, and there may be others. I could read
4 through.

5 Q. Look on the covenant itself.

6 A. Yes.

7 Q. It's Defendant's Exhibit 233, at the bottom paragraph
8 there?

9 A. Whereas during the course of employment?

10 Q. No, the one after that. It says now, therefore.

11 A. Now, therefore in consideration of good and valuable
12 consideration including the salary, bonuses and benefits to
13 be paid to the physician during the term of the employment
14 agreement and the mutual promises and covenants as set forth
15 in the employment agreement and the shareholders agreement
16 and the mutual promises and covenants contained herein the
17 parties agree as follows.

18 Q. Okay. Let's move away from documents for a minute
19 because I need a break from that. Tell the Judge how you
20 hire doctors.

21 A. We generally recruit them. We then will have to pay for
22 their up front costs, so malpractice, we have to hire staff
23 for them, sometimes purchase equipment for them, we'll have
24 to pay for their license for their electronic medical record,
25 their practice manager, we'll have to provide the necessary

1 support that they would need, lab coats, computers, phones,
2 what have you, and then we market them and we promote them.

3 Q. Tell the Judge how you market and promote them.

4 A. So we'll advertise sometimes, billboards, newspaper,
5 we'll pay for lunches for them to go ahead and promote to
6 practices, we'll pay for dinners, we'll pay for talks, we
7 will pay for certifications and other things to make them
8 more knowledgeable, more competent as physicians, and we will
9 also help with any and all support staff that's necessary to
10 make sure the letters get out, pictures get to the referring
11 physicians so that they can build a patient base and get
12 introduced to the referring physicians.

13 Q. Did you introduce -- did you do all those things for Dr.
14 Dyce?

15 A. Of course, yes.

16 Q. Did you do it in Hartsville?

17 A. Yes.

18 Q. And we haven't mentioned this, but did you open a Cheraw
19 office that was related to the Hartsville office?

20 A. Yes, there was a Cheraw office.

21 Q. Did you do the same things there?

22 A. Yes.

23 Q. Did you do the same things in the Kershaw office?

24 A. Yes.

25 Q. Did you introduce him in the Richland offices?

1 A. Yes, indirectly. Not as much as the other markets, but
2 yes.

3 Q. And did you advertise him?

4 A. Yes.

5 Q. Did you advertise him in every office?

6 A. Every single office. You know, our -- everything from
7 our letterhead to our prescription pads to every card, every
8 office had nameplates out there when you walked into an
9 office, you had a video that would actually play with every
10 physician in the practice, and it would cycle through, so
11 regardless of which office you went to, you went ahead and
12 got exposed to that physician, but there was plenty of
13 internal marketing, as we discussed earlier in our
14 conversation, and they had a very important role within our
15 practice, so we did that.

16 Q. Did you introduce him to those referring physicians?

17 A. Absolutely. To hospital administrators as well, to
18 other individuals in the community.

19 Q. Why did SCENT want to have covenants not to compete with
20 its doctors, why was that important?

21 A. Well, because if you have somebody come on board and you
22 go through all that expense and you introduce somebody to a
23 market and you pay for them to ramp up, all that money that I
24 spent to ramp myself up, and if you cover all that expense
25 for somebody and then afterwards they were to leave and use

1 the information they gained from your practice, your
2 referring physicians, your patients, your expertise, the
3 knowledge from the practice against itself, then the practice
4 would have -- would be harmed.

5 Q. You interacted with Dr. Dyce about this covenant while
6 it was being signed?

7 A. We negotiated it.

8 Q. Did he seem to understand it?

9 A. Yes. Dr. Dyce was a very savvy negotiator, number one;
10 and, number two, a very competent individual. He had signed
11 one before and he's signed many since.

12 Q. Did you and he sign one with HMA prior to him going to
13 work with HMA when you were doing the syndication deal?

14 A. Yes. When we bought the syndication of shares, he
15 signed one personally where he purchased approximately
16 \$50,000 worth of shares in the hospital and he signed a
17 covenant at that point.

18 Q. Have you seen the covenant he signed in Virginia with
19 his former practice?

20 A. Yes, the contract that he had with Dr. Boucher was
21 also -- there was also a restrictive covenant.

22 Q. In this restrictive covenant how long were the
23 distances, when I say this, I mean the covenant with SCENT,
24 how long were the distances that he was prohibited from
25 competing against you in?

1 A. I believe it was 20 miles and 18 months.

2 Q. Did you believe that was reasonable?

3 A. Yes, we believed that it was reasonable.

4 Q. And for what period of time was it?

5 A. 18 months.

6 Q. And did SCENT believe that was reasonable?

7 A. We all believed that it was reasonable.

8 Q. In your exposure to other practices and the work you've
9 done nationally are these -- and what you've seen in South
10 Carolina, are these reasonable terms compared to other
11 practices?

12 MR. CLEVELAND: Objection.

13 THE COURT: Sustained.

14 MR. CLEVELAND: On the grounds that he's not an expert
15 in noncompetes Nationwide and calls for a legal conclusion.

16 THE COURT: I said sustained. You already won.

17 MR. CLEVELAND: I apologize. I didn't hear that.
18 Excuse me.

19 THE COURT: It's the acoustics in this room.

20 Q. Tell the Judge why you used 20 miles around each
21 location?

22 A. We generally try to look at areas where we felt our
23 practice was drawing patients from and we wanted the radius
24 to be something that would protect the practice legitimately
25 and something that would still allow for a physician to

1 practice outside of that radius in an area that wouldn't have
2 as much or any impact to the practice.

3 Q. Did you prepare a map that's at S, Tab S, did you and
4 your staff at SCENT prepare a map? It's Defendant's Exhibit
5 143, behind Tab S.

6 A. Yes.

7 Q. And is this just -- well, what does this show?

8 A. Your Honor, if you look, there's a border -- there's
9 basically three borders, four borders, they're circular, and
10 then the center of those circles are the center of the office
11 sites at SCENT in 2010, and so Cheraw would be in the upper
12 right, and then the northeast Columbia office in the lower
13 left, and then what you see is that there's -- 86 percent of
14 the patients that were coming from the practice lived within
15 that radius.

16 Q. Is that the best estimate you could arrive at?

17 A. Yes, given the data that we had, and then you can tell
18 also that there's a number of places that are located outside
19 the circles that are fine to practice in.

20 Q. That's a great point. Where could Dr. Dyce have gone to
21 practice if he didn't want to practice within the covenant
22 area?

23 A. Well, it's interesting because if you look at this, so
24 he could have gone to Florence, he could have gone to Sumter,
25 he could have gone to Orangeburg, he could have gone to

1 Lancaster, which is not pictured here but outside the radius,
2 he could have gone to Chester, he could have gone to Rock
3 Hill, and the most interesting thing is that he currently
4 travels all the way down to the VA in downtown Columbia
5 almost, and that distance that he travels is greater, Your
6 Honor, than the distance that he would have to travel from
7 his home to these sites.

8 Q. Okay. I need to ask you a few other questions about the
9 covenant. Did Dr. Dyce treat patients from the Cheraw and
10 the Hartsville sites?

11 A. Yes, he did.

12 Q. When he was with SCENT, I'm sorry, when he was with
13 SCENT.

14 A. He does now too, from the same buildings.

15 Q. Did he treat patients when he was with SCENT from the
16 Richland and the Kershaw sites?

17 A. Yes, he treated patients from the Richland and Kershaw
18 markets when he was with SCENT.

19 Q. Did he perform weekend rounds at some of these hospitals
20 in these areas?

21 A. Yes, but he had a clinic in Kershaw, and so -- this is
22 Kershaw County is what I'm referring to, in our Lugoff office
23 building, he had a weekly clinic that he had there, and then
24 by way of his call coverage and his exposure to open houses
25 and other things he would practice and be exposed to the

1 Columbia office as well.

2 Q. Would he meet with administrators at the hospitals in
3 these various sites?

4 A. Yes, in all of them.

5 Q. Did he sign call pay contracts with any of these
6 hospitals in these sites?

7 A. Yes, he had call pay agreements at the time with
8 Providence Northeast Hospital, which is very close to the
9 Columbia office location here, and then we had an office site
10 that was -- our Camden office site was close to the Kershaw
11 County Hospital, and then in Hartsville, there's a hospital
12 there that's very close to our site as well.

13 Q. Did he receive in meetings confidential financial
14 briefings about the performances of the various sites?

15 A. Absolutely. As we discussed earlier, we would try to
16 maximize revenue using a variety of methodologies, and so he
17 was privy to those methodologies, and he was privy to
18 referring doctors' payer mix, which referring doctors might
19 send over different payer mixes, which referring doctors
20 might send over the Medicare patients we talked about earlier
21 for hearing aids. He was privy to all the information.

22 Q. What was he licensed in when he was at SCENT?

23 A. Otolaryngology and related disciplines.

24 Q. What were you licensed in?

25 A. Otolaryngology and related disciplines.

1 Q. And what did the covenant keep him from competing
2 against you in?

3 A. Otolaryngology and related disciplines.

4 Q. Would he be able to get medical malpractice -- let me
5 strike that.

6 Is a physician licensed in such a way as you and Dr.
7 Dyce are able to even get medical malpractice insurance in
8 other fields?

9 A. No. So, you know, I kind of listened in curiously. I
10 can't go and become a neurosurgeon or an internal medicine
11 doctor or -- and I don't know their job any more than they
12 know mine, and I went to a residency for otolaryngology. It
13 was the same residency program as Dr. Dyce. I know what he
14 was trained to do because I was trained to do the same thing
15 right beside him, and we are licensed in otolaryngology. We
16 are only board certified in otolaryngology and all the
17 related fields under our ABO board, and that's all we have.
18 We don't have any board certifications outside of that. When
19 you go for malpractice insurance, I can't go and get
20 malpractice insurance to become a pediatrician or an internal
21 medicine doctor or a family practice physician or anything
22 along those lines, so it's very clear that what we do is we
23 practice otolaryngology and related disciplines. That's what
24 we do. That's what we're board certified to do. I mean, I
25 can't even get hospital privileges, if I went over and

1 said -- and knocked on the door at Richland and said, hey, I
2 want to get privileges here in internal medicine or emergency
3 medicine or urgent care or something else, I couldn't do that
4 and nobody else could either who has my credentials.

5 Q. Is practicing otolaryngology and related services, is
6 that the practice of medicine?

7 A. Yes.

8 Q. How long would Dr. Dyce have had to wait to compete
9 against you even in the Hartsville market to comply with the
10 covenant?

11 A. He would -- well, he would have had to not send what he
12 sent as far as letters and everything else but so 18 months
13 from his departure would be somewhere in November of 2011,
14 about a year after he actually saw his first patient, I
15 believe, there.

16 Q. All right. Did any of SCENT's -- let's just talk about
17 it a little bit in English first. What happened with him
18 establishing this practice? Were you all continuing to
19 operate Hartsville, do business in Hartsville prior to his --

20 A. Yes, we tried. We made a valiant effort to compete, and
21 we failed, we failed miserably, as would be expected, him
22 living in the community and also being a member of the same
23 group as the referring physicians, the medical group, so they
24 were all part of the same group, and so he was getting
25 referrals, our referring physicians, from his own group.

1 Q. Did any of the patients --

2 A. But we tried. We tried hard.

3 Q. Did any of the patients of SCENT follow Dr. Dyce to the
4 new -- his new practice?

5 A. Yes.

6 MR. SHEHEEN: Your Honor I want to introduce, but I want
7 to discuss it with the Court first, this is a listing of the
8 records of specific -- it's a compilation of specific
9 patients that left SCENT and went with Dr. Dyce. We
10 discussed at the beginning of the trial there were some
11 records that I wanted to have sealed because they mentioned
12 the patient's name. I don't suppose there would be an
13 objection. So this will be Defendant's Exhibit 144. It's at
14 T.

15 THE COURT: Counsel, let me hear from you. Any
16 objection?

17 MR. CLEVELAND: No, Your Honor.

18 THE COURT: Very well. We're just going to have to on
19 the record just put this portion of the record will be
20 sealed, and it's going to be Exhibit 144.

21 MR. SHEHEEN: Thank you, Your Honor.

22 Q. Dr. Dyce, what I'd like to do as we discuss this, to
23 make it easier for the court reporter, is don't refer to any
24 names on here. I think that would maybe facilitate things as
25 well.

1 THE COURT: Be very helpful.

2 Q. So look at that Exhibit, Exhibit 144. Are you there?

3 It's in that black book?

4 THE COURT: T.

5 MR. SHEHEEN: Yes. Thank you, Judge.

6 Q. Do you see it?

7 A. Yes.

8 Q. Without saying the patient name I want you to tell me
9 what this is.

10 A. This is a list of medical record requests that SCENT
11 received from Dr. Dyce's practice in Hartsville requesting
12 medical records on patients.

13 Q. And did SCENT transfer the records that Dr. Dyce's
14 office requested or the patients requested?

15 A. Those requests were signed by the patient on Dr. Dyce's
16 medical records request form.

17 Q. Okay. So let's just make sure the Judge understands how
18 that would work. There would be a medical records request
19 form from Dr. Dyce that would have been sent to SCENT?

20 A. That's right.

21 Q. And then the patient would have signed it to authorize
22 SCENT to send the records to Dr. Dyce's practice.

23 A. That's correct.

24 Q. Okay. And this is a compilation of those.

25 A. It is.

1 Q. And how many was SCENT able to track were sent to Dr.
2 Dyce's office?

3 A. I believe it was 486 patients.

4 Q. And I don't want you to tell me the amount, but has
5 SCENT been able to utilize these records to evaluate its
6 losses?

7 A. Yes.

8 Q. All right. I want you to also -- is this a substantial
9 portion of the patient base of SCENT in Hartsville?

10 A. Yes, insofar as it isn't the total amount, obviously.
11 What you find when you look at this, Your Honor, is that
12 these are folks that required records because they had some
13 sort of a chronic condition that required continued
14 management. Most commonly they were immunotherapy patients
15 who are currently on immuno -- on shots on a weekly basis
16 typically, and Dr. Dyce and the patient were requesting these
17 records in order to have that care continued at Dr. Dyce's
18 office.

19 Q. You said immunotherapy. I say allergy shots. Are those
20 the same thing?

21 A. Those are the exact same thing.

22 Q. Is the allergy shot practice a lucrative practice for
23 otolaryngologists?

24 A. Very much so.

25 Q. Did you notice anything else about these patients?

1 A. What we did was we looked at what our revenue was with
2 these patients for the year prior to their departure with us
3 and we extrapolated that. We added those together to arrive
4 at a figure.

5 Q. Okay. And based on just the loss of these patients how
6 much do you believe SCENT suffered damages to Dr. Dyce for
7 the breach of the covenant?

8 A. It's well over a million dollars.

9 Q. Do you have that specific figure?

10 A. I believe it's \$1.3 something million is what it is.

11 Q. I believe we have the chart. We can look at it later.
12 And are there other patients in the -- in medical practices
13 are there other patients that you might not have sent charts
14 to Dr. Dyce for?

15 A. Yes. So if Dr. Dyce didn't feel that he needed the
16 chart, we -- for instance, if somebody had previously just
17 had a tube placed or had their tonsils removed in the past,
18 then you wouldn't necessarily request those old medical
19 records, you would just be able to continue to care for the
20 patient without requesting the records because there's no
21 continuum of care that needs to be adopted and taken over, so
22 those patients we do not have, so in many cases we don't have
23 times when a patient will request the records outside of Dr.
24 Dyce's office because we have no way of knowing if those were
25 necessarily going to Dr. Dyce or going somewhere else, so

1 these were strictly the patients that were just coming with
2 the medical request form from Dr. Dyce or had somehow
3 indicated that they were transferring to Dr. Dyce.

4 Q. And did you see an even greater decline in the number of
5 patients coming to SCENT as far as the volume --

6 A. Oh, yes.

7 Q. -- than what's documented in these?

8 A. Oh, absolutely. There's no question about that. We
9 have other data that supports very clearly that the patients
10 that we lost he gained and that the revenues that we lost he
11 gained.

12 Q. All right. And what was the effect of Dr. Dyce opening
13 up with HMA?

14 A. It was disastrous on our eastern market. Both the
15 Hartsville and the Cheraw office were -- well, decimated
16 wouldn't be fair because that's 10 percent. It was reduced
17 significantly because of Dr. Dyce opening, and then obviously
18 once we could no longer compete, then we had a total loss.

19 Q. And what types of patients were you losing that you
20 documented, what types of patients were these, generally?

21 A. In this chart here? Generally, these were chronic
22 patients, and so patients -- by far and away immunotherapy
23 patients appear to comprise the majority of this, and these
24 are the most lucrative patients because they require weekly
25 re-visits or vial preps every three months and routine

1 visits, so you would want to get the information so that you
2 could continue their care as opposed to something else.

3 Q. And could you tell the Judge briefly, very briefly,
4 about the payer mix in your practice and how that relates to
5 the loss of patients?

6 A. Sure so -- I'm not sure what you're asking, actually.

7 Q. Do immunotherapy patients, are they usually charity
8 cases?

9 A. No, no, they're not. So immunotherapy is generally
10 covered more so under private insurance than it is under more
11 the public programs and certainly something that's usually
12 outside the realm of a self-paying patient because in its
13 very nature its a long-term longitudinal therapy.

14 Q. Okay.

15 A. Several years, generally, on immunotherapy, on allergy
16 shots.

17 Q. Were there ancillaries that you also lost? We discussed
18 ancillaries already. Were there ancillaries lost?

19 A. Oh, sure, I mean, so the good thing about ancillaries is
20 that if you have patient volume and you have something that
21 will make your revenue go much higher so it's something
22 that -- but the bad news is if your patient volume slows
23 down, then all the things we talked about earlier, you can't
24 become efficient if you don't have a steady flow of patients.
25 You can't go ahead and enterprise, you can't go to other

1 service lines if you're not getting enough patient flow
2 coming through, and you're certainly not going to get any CT
3 scans or anything else from the ancillary perspective if you
4 don't have patients coming through. You're not going to sell
5 hearing aids if you don't have patients coming through the
6 door. They have to actually come through the door for you to
7 have any chance of offering them a hearing aid from your
8 enterprise.

9 Q. Did you have, did you say MRI, is that what you said?

10 THE COURT: CT.

11 Q. CT. Did you have a CT scanner there in Hartsville?

12 A. Yes.

13 Q. How old was it?

14 A. It was the youngest one, it was probably about -- it was
15 probably purchased somewhere in mid to late 2009.

16 Q. Okay. Were you able to use it as you had anticipated
17 once the patient flow dropped?

18 A. No. We had a scanner that we were still paying for and
19 were paying for the maintenance on it, we were paying for the
20 licensing for it, and we didn't have the scans to support it.

21 Q. Do you still have that scanner?

22 A. Yes, right now.

23 Q. Where's it at?

24 A. It's in storage.

25 Q. And how much did it cost, do you recall?

1 A. \$250,000.

2 Q. And how much do you have to pay to store it, do you
3 know?

4 A. We have to pay, on the CT scanner it's separate from the
5 other equipment we have in storage, but that we have -- it's
6 about an annual payment of about \$2000 a year to store the CT
7 scanner.

8 Q. Was there other equipment that you had bought that you
9 were no longer able to utilize to full efficiency?

10 A. A huge storage room full.

11 Q. So what was the effect on SCENT in Hartsville, Dr. Dyce
12 competing?

13 A. It was catastrophic. It was a financial nightmare
14 because we still had all the expenses we had before. Nothing
15 had changed. You still have to pay for electricity, you
16 still have to pay for utilities, you still have to pay for
17 employees, you still have to pay for all of your overhead
18 items. Nothing diminishes whatsoever. You still even have
19 to pay for the AllMeds license for, you know, for everybody
20 that was there because it was a built-in cost. There's
21 nothing that we could do to write down the cost. It just
22 introduced a huge amount of, first, inefficiency into the
23 practice, and then of course it affected these ancillaries
24 and affected these other service lines, and then ultimately
25 when we could no longer compete and our employees were taken,

1 we had to fold, that's it, and that was of course a total
2 loss.

3 Q. Let's look again back at this Exhibit 144. There's also
4 a list of doctors names here, do you see that?

5 A. I do see that.

6 Q. In the looks like the third column?

7 A. Yes.

8 Q. Tell the Judge what that represents.

9 A. That represents the primary care physicians that were
10 listed in our records as the patient's primary care
11 physician.

12 Q. Okay. And were these, you see the names there. Were
13 they doctors who were referring to SCENT previously?

14 A. Yes.

15 Q. Were any of them doctors that you had introduced to Dr.
16 Dyce?

17 A. A number of them.

18 Q. Do you know, can you tell how many referrals these
19 doctors have been sending beyond what you found here?

20 A. These actually don't represent any referrals at all.

21 Q. So have you been able to determine what doctors are
22 referring to Dr. Dyce that were referring to SCENT?

23 A. Yes.

24 Q. Have you been able to determine how many referrals they
25 have been making?

1 A. We were not able to determine how many because we asked
2 over and over and over for Dr. Dyce to share with us what his
3 referral report was, and this is a standard report that we
4 get in the industry. It's very easy to do that. If you
5 don't know where your patients are coming from, you're in
6 deep trouble. And Dr. Dyce has not produced that, so we
7 can't match that up.

8 Q. Okay.

9 A. He produced us a list of every referring physician but
10 not something that breaks it down per referral because we
11 couldn't match that up to what we had, but he just sent us
12 the whole list, which is essentially this list and matches to
13 ours perfectly because it's simply a list of all the eligible
14 referring physicians in the area.

15 Q. Okay. Is it your contention that if Dr. Dyce had not
16 begun practicing within the covenant period that you would
17 have been able to hold on to more of the patients long-term?

18 A. Yes, we would have had a fighting shot. The reason that
19 we contemplated 18 months was that you need some sort of a
20 level playing field. You need to be able to go ahead and get
21 somebody else to compete, and it's difficult to do that. You
22 know, Dr. Dyce is the homegrown individual, he's a person
23 from Hartsville, he's with, you know, he was in that group.
24 More time would have given SCENT the ability of placing
25 somebody there with attributes that could compete with Dr.

1 Dyce and hopefully be able to maintain a share of the market.

2 Q. Was that your plan, was that SCENT's plan, would that
3 have -- strike that.

4 Is it SCENT's plan during the covenant period to have
5 someone come into the territory and begin to be SCENT's
6 doctor in that area?

7 A. That's right. It takes a while to recruit a physician.
8 18 months gives you enough to time to recruit a physician,
9 get them in place to be able to compete. You know, hey we
10 didn't want to give up this practice. I had set it up. I
11 was there before anybody else was there. We wanted this to
12 do well. There were a lot of patients there that I had cared
13 for, that I had great relationships with. We did everything
14 that we could to try to go ahead and reasonably compete and
15 maintain that area.

16 Q. Did SCENT reduce employee pay as you sustained these
17 losses?

18 A. Unfortunately we had to.

19 Q. And employee hours?

20 A. We limited the hours to 36 and we cut pay by 10 percent.

21 Q. Let's look at Tab U. It's Defendant's Exhibit 211.

22 A. I have it.

23 Q. What does that show?

24 MR. CLEVELAND: I'm going to object for the lack of
25 foundation. It's in evidence, but I want to be able to talk

1 about it. I think someone needs to describe who prepared it,
2 where the information came from. That that would be
3 appropriate, given this exhibit, rather than just having Dr.
4 Puchalski say what it shows without saying what it is and who
5 prepared it, so I would object.

6 THE COURT: Are you prepared to go into that?

7 MR. SHEHEEN: Sure.

8 THE COURT: Because it is in evidence. Normally before
9 it went into evidence all of that would be required.

10 MR. SHEHEEN: Right.

11 THE COURT: But obviously it isn't going to make a lot
12 of sense to me if I don't have a foundation.

13 MR. SHEHEEN: Yes, ma'am. I was going to ask him what
14 it showed and how it was prepared, but I can do it in reverse
15 order. We've been working together on these exhibits, so I
16 certainly have no problem with that.

17 Q. All right. So look at 211 and tell the Judge where the
18 data came from for 211.

19 A. This is a chart that was prepared by me and the staff at
20 SCENT, and it used the data that Dr. Dyce provided fairly
21 recently to us on patient volumes that he was seeing within
22 his current practice. That is represented by the blue line.

23 Q. Let's make sure everybody understands where it came from
24 first. Did you prepare this with your staff?

25 A. Yes.

1 Q. What data did you use to prepare it?

2 A. We used data from -- that Dr. Dyce provided us regarding
3 patient volumes, and we used the data in our practice
4 regarding patient volumes that we were seeing.

5 Q. Tell the Judge what it shows.

6 A. What it shows, Your Honor, if you look here, is that you
7 can see patient volumes in SCENT going up and down in kind of
8 a zigzag (sic) fashion, and if you look down on the date
9 there, you can see this is January 2006, which is not that
10 far after, I'll just point out, when Dr. Dyce arrived, he
11 arrived in 2005. And you can see that patient volumes there
12 are climbing, they're climbing, they're climbing to their
13 peak in March of 2010, that tends to be our busiest month,
14 March and April, and then what you'll start seeing is a drop.
15 The arrow is when Dyce actually sees his first patient, Dr.
16 Dyce does, and there's a gap there because -- there's a
17 couple of gaps. One is between the arrow and the start of
18 the blue line, and that's because Dr. Dyce didn't provide us
19 with those initial five months of practice. You'll also
20 see --

21 Q. If you will stop for a minute, I want you to explain
22 because the Judge doesn't know what's been provided and
23 what's not so explain to her what you mean by that.

24 A. There was an Exhibit that was provided by Dr. Dyce
25 saying the number of patients that he saw per month, and it

1 started five months after he started practice so I believe he
2 started March 1st, so March the 1st of 2011 was the first
3 logged month, and then there are also two months that are
4 missing in 2013 and so -- but what you see is that there is a
5 very precipitous drop in the patient volumes at SCENT in that
6 market and a compensatory very in tune line that shows the
7 gain that Dr. Dyce had in the same market, and I'll point out
8 a few things that I find very intriguing about this. The
9 first is that if you were to look at the chart before 400,
10 and unfortunately we don't have that data, but when the
11 practice started in the eastern market, it was slow going. I
12 had to go out and talk to every referring physician. I had
13 to establish myself in the community. I had to get a good
14 reputation. I had to do right by numerous patients in order
15 to develop that reputation. I had to do everything I could
16 to market myself in that community, but it was a slow ramp up
17 just like it was in every location. What you'll notice here
18 is that within five months, by March, he is already at a
19 volume that approximates where we were in that market. I
20 find that very impressive. That is like magic practice in a
21 box, just add water, it's there.

22 Q. And why was he able to did that?

23 A. Because he just simply transferred the patients over.
24 He had already been marketed in the area. He already had
25 that reputation. All that was provided to him by SCENT

1 already, and all he had to do was convert it from one roof
2 line to another roof line and so -- I'm sorry.

3 Q. No, I interrupted you.

4 A. And then you'll see it went down all the way until
5 January 2012. At that time we were no longer able to
6 compete, so you can see that our best shot there the month
7 before was about 100 patients we had dropped there, so we had
8 dropped to a number below anything in the beginning of the
9 practice so we were getting clobbered, clobbered, we did what
10 we could to limit our expenses, but we were getting
11 clobbered.

12 Q. Is the reason you had the covenant not to compete in the
13 SCENT contracts to avoid this situation where somebody could
14 leave and just basically get all the volume?

15 A. And just shift the patients right over. Look, I would
16 have loved to go ahead and come into a market and not had to
17 do all the things that I had to do to start a practice and
18 not risk what I had to risk, not do those things that I had
19 to do. It would have been much easier to be able to just go
20 ahead and put it under a roof line, and everyone recognizes
21 that. You wouldn't have people bringing new people on board
22 if there wasn't some protection from the practice. You don't
23 want to have somebody come on board, give them all your
24 patients, give them all your referring doctors, give them all
25 your methodologies and then have them go down the street and

1 compete with you.

2 Q. I want you to go to the next exhibit which is the next
3 tab, it's Exhibit 212, Defendant's Exhibit 212. Have you got
4 that?

5 A. I do.

6 Q. We have a little chart here so you can look at it.
7 Again, was this formulated from similar documents provided by
8 Dr. Dyce and internal documents of SCENT?

9 A. Yes, they were.

10 Q. And did you and your staff participate in formulating
11 this chart?

12 A. Yes, we did.

13 Q. Tell the Judge what it shows.

14 A. So in this chart what you'll see is what Dr. Dyce's
15 revenue was as he provided for us in an exhibit and what
16 SCENT's loss of monthly revenue was, and what you see is that
17 these two curves are interlaced in much the same way. You'll
18 notice that Dr. Dyce's curve which is now red so that we
19 don't confuse anyone has the same gap that it had in the
20 other chart in 2013 and the initial five months, and then
21 what you'll see is it took a little while for us to start
22 losing, but when we started losing, we were losing what he
23 was earning, and they were interlaced. If you were to draw a
24 curve or try to perform linear regression there, you would
25 have two lines that were very close to one another if you

1 tried to average that.

2 Q. Okay. What does that show to the Court?

3 A. It shows very clearly that Dr. Dyce's gains were the
4 same as our losses in physician derived revenue.

5 MR. SHEHEEN: Thank you. Okay. And, Your Honor I think
6 that we said these were already in evidence, but I want to
7 make sure, since I've laid the foundation, that 211 and 212
8 are in evidence.

9 THE COURT: That's what Mr. Cleveland said, although
10 they were in evidence, he objected to there being no
11 foundation is my understanding.

12 MR. SHEHEEN: Okay. Thank you, Your Honor.

13 MR. CLEVELAND: I'm sorry, I was trying to figure out
14 where we were. We had objected because we wanted to lay the
15 foundation, and we don't have an objection now.

16 THE COURT: Got it, so they're in evidence.

17 MR. SHEHEEN: Thank you, Your Honor.

18 THE COURT: Okay.

19 Q. Is it your contention that Dr. Dyce has breached the
20 covenant in other ways?

21 A. Can you please be more specific?

22 MR. CLEVELAND: I object to that. That was a very nice
23 question because it calls upon the witness to have to answer
24 it without leading him.

25 MR. SHEHEEN: It's not a guessing game, Your Honor. He

1 can't object because he hasn't done or said anything.

2 Q. Did SCENT formerly have a contract with the VA?

3 A. SCENT formerly and currently has a contract with the VA.

4 Q. What does SCENT do with the VA?

5 A. Insofar as VA patients cannot get services from the VA
6 Medical Center, those patients are seen at South Carolina ENT
7 for any services that they might require.

8 Q. Does Dr. Dyce do work at the VA?

9 A. Yes, he does.

10 Q. Is that work similar to the work that SCENT also does?

11 A. In some cases, yes, it's resulted in us no longer seeing
12 many if any VA Medical Center patients who are not getting
13 care at the VA Medical Center.

14 Q. Does SCENT do sleep studies in Kershaw County?

15 A. I was the individual who started the sleep lab, both the
16 one that we own as a practice and the one that is owned by
17 the hospital, and I have been doing sleep studies there,
18 interpreting those, since my arrival or close to it in 2002.

19 Q. Does Dr. Dyce interpret sleep studies from Kershaw
20 County?

21 A. Yes, he does.

22 Q. Are there any -- we've discussed the covenant breaches
23 in Hartsville. Are there any other contentions that SCENT
24 makes that Dr. Dyce has breached his covenant?

25 A. Let me just mention that Dr. Dyce could not interpret

1 sleep studies until he passed his boards which were somewhere
2 in early 2010, and that was something that was paid for
3 entirely by South Carolina ENT, encouraged by myself, I was
4 the first one who had -- first otolaryngologist in the state
5 who had board certification in sleep. I encouraged that for
6 him and covered all of that expense and helped him prepare
7 for the exam, and so he wasn't able to actually interpret
8 studies until 2010, shortly before his departure, and the
9 same with allergy prior to that.

10 Q. Okay.

11 A. Sorry for that.

12 Q. Do you know if he performed the sleep work from Kershaw
13 during the covenant period or not?

14 A. Yes, he did. He interpreted sleep studies at the lab in
15 Kershaw County and the Kershaw County Hospital lab, Kershaw
16 Health, during the entire period of his -- well, during the
17 period of his covenant after starting his practice.

18 Q. How about the work in the VA, was that during the period
19 of covenant?

20 A. Yes.

21 Q. You're aware that Dr. Dyce went to work with HMA,
22 obviously. Briefly let's look at Plaintiff's Exhibit 80
23 which is behind Tab W.

24 A. I have it.

25 Q. Okay. Is there a covenant not to compete contained

1 within this document?

2 A. There is. I'll have to look to find it for you.

3 Q. The Judge can look at it later. I don't think we need
4 to spend a lot of time on that. And is there a
5 confidentiality provision within it?

6 A. Yes.

7 Q. Do you recall, it's another document we've seen, that
8 there was a signing bonus for Dr. Dyce?

9 A. I would just point out that, if I may, that other
10 covenants that I've seen Dr. Dyce execute seem to be more
11 strict in regard to certain comments, and I don't want to
12 speak based upon my knowledge with other practices around the
13 country or anything else, but just with the covenants that we
14 clearly see in this case as exhibits, there are parameters
15 that are much more strict than the covenant that we had in
16 2008.

17 Q. And you're familiar there was a signing bonus that Dr.
18 Dyce got?

19 A. Yes. I was very surprised by that signing bonus,
20 actually.

21 Q. Why? Tell the Judge why.

22 A. It was a fairly high signing bonus, and he also -- he
23 did a very good job at negotiating this contract. I was
24 familiar with other contracts in a variety of other different
25 forms including my role at HMA, but he did a very good job at

1 negotiating a compensation package for himself and then he
2 also included \$75,000 worth of bonus compensation right up in
3 front there.

4 Q. What's bonus compensation usually pay for when you're
5 negotiating these types of contracts?

6 A. You know, we'll give a \$10,000 signing bonus perhaps or
7 maybe a moving bonus. Obviously these would not apply in
8 this scenario. But nothing to the tune of \$75,000. They
9 obviously knew the value that they had in Dr. Dyce because he
10 had in my opinion, I mean, he did, he provided information to
11 them in order to create a pro forma for how much money he
12 would be earning for them.

13 Q. Okay. Let's talk about that briefly. I think the Court
14 will remember it, I don't think we need to go to the exhibit,
15 but on the HMA pro forma there's a little substar that says
16 some comments about SCENT's practice. Do you recall that?

17 A. I do.

18 Q. It's in evidence.

19 A. Mm-hmm.

20 Q. Do you recall what that information was that it stated?

21 A. Yes. It said that SCENT had a --

22 MR. CLEVELAND: I object, is he repeating what an
23 exhibit says.

24 THE COURT: Yes.

25 MR. CLEVELAND: I object to that.

1 MR. SHEHEEN: There's nothing wrong with that, Your
2 Honor.

3 THE COURT: It just speaks for itself.

4 MR. SHEHEEN: And I just asked him what he recalls
5 because I want him to testify about it.

6 THE COURT: Okay. Well, you've got to get the exhibit.

7 MR. SHEHEEN: Okay. Beg the Court's indulgence.

8 THE COURT: Sure.

9 MR. SHEHEEN: Just trying to move things along.

10 THE COURT: I know. I appreciate that.

11 MR. SHEHEEN: I'm going to hand you Defendant's Exhibit
12 99, Dr. Puchalski.

13 May I approach the witness, Your Honor?

14 THE COURT: Of course.

15 MR. SHEHEEN: Thank you.

16 Q. Could you just publish to the Court what it says about
17 SCENT on that pro forma?

18 A. Sure, at the bottom it says, South Carolina ENT
19 currently sees a very low percentage of self-pay business.

20 Q. Who generated that document?

21 A. This was Carolina Pines Regional Medical Center, Dr.
22 Dyce's employer.

23 Q. And what is it?

24 A. It's a pro forma.

25 Q. What's pro forma?

1 A. A pro forma is something that tries to prospectively
2 evaluate the earnings and expenses of a business venture.

3 Q. The information on there, is that confidential
4 information about SCENT?

5 A. The data used to create this is certainly confidential
6 information.

7 Q. And what -- explain, does this have to do with the payer
8 mix?

9 A. It does have to do with the payer mix, but it also has
10 to do with general reimbursement, but this, in order to
11 create this you have to have some knowledge over what a
12 physician is able to do in terms of volume or what that payer
13 mix might be. Procedure-wise, a hospital would have that
14 from the OR perspective, but they wouldn't have anything in
15 the office setting, and so you'd have to provide them with
16 the office part, and they break that up, so you can see
17 inpatient revenue and outpatient revenue.

18 Q. Is this the kind of information that SCENT wants to keep
19 confidential, the information that was used to determine it?

20 A. The information that was used to determine this,
21 absolutely, so insurance contracts would play into this,
22 again payer mix would play into this, so this pro forma in
23 and of itself is something that, it goes year one, year two
24 and year three, and they break it out. If you look in the
25 first column it's hospital, in the second column it's clinic,

1 and so you'll see what he was expecting to make in the
2 clinic, and you'll see for instance outpatient revenue, you
3 know inpatient revenue of course would be zero in the clinic,
4 but outpatient revenue in the clinic is \$1.5 million in year
5 one.

6 Q. Is that a lot?

7 A. Yes, it's a lot, plus it doesn't change from year one to
8 year two. So you know what they're expecting?

9 Q. What?

10 A. A windfall. They're expecting a transfer of patients,
11 which is exactly and precisely what Dr. Dyce was expecting,
12 and it's for that that I'd give you a \$75,000 bonus.

13 Q. Okay. Did you provide HMA with the information they
14 would have needed to come up with this pro forma?

15 A. Absolutely not.

16 Q. Is that why SCENT has confidentiality provisions in its
17 agreements?

18 A. One of many reasons.

19 Q. Is that why SCENT has covenants not to compete?

20 A. Yes.

21 Q. All right. Dr. Puchalski, you have heard a lot about
22 the breakup of Dr. Puchalski, excuse me, Dr. Dyce from SCENT.
23 I want you to -- I want to go through it briefly with you. I
24 want you to tell the Judge, we'll skip to 2009, tell the
25 Judge what was going on in 2009.

1 A. I will. Is there any chance that I could request just a
2 very short comfort break?

3 THE COURT: In fact, this is a good place for us to
4 break for the day, how about that, because we were going to
5 stop in about eight minutes anyway, so we're going to break
6 until the morning.

7 THE WITNESS: Okay.

8 (Discussion held off the record.)

9 THE COURT: We will reconvene in the morning. I do need
10 to instruct you that you cannot talk about your testimony
11 over the evening. Doesn't mean you can't talk about anything
12 else, but you certainly cannot talk about your testimony.

13 THE WITNESS: Thank you, Your Honor.

14 (Court adjourned on 11/25/13 at 4:57 p.m.)

15 (Court resumed on 11/26/13 at 9:00 a.m.)

16 THE COURT: All right, Mr. Sheheen.

17 MR. SHEHEEN: Thank you very much, Your Honor.

18 THE COURT: Yes, sir, you may continue, please.

19 MR. SHEHEEN: Thank you.

20 Q. Dr. Puchalski, I want to briefly go through some of the
21 events that occurred in 2009 and 2010. The Judge has already
22 heard some of it, but just tell the Judge, in the summer of
23 2009, we've talked about -- just to bring us back up to
24 speed, we've talked about how things were going pretty good
25 in 2008 as far as the relationships between the doctors.

1 Tell the Judge what began to happen in the summer of 2009.

2 A. Well, Judge, you've heard before that people didn't know
3 what was going on in 2009 or why it happened, but it was very
4 clear that we started having a disagreement based on the
5 fundamental way to transition the practice from a small
6 practice to a larger practice and --

7 Q. What was that tension?

8 A. What else is tension about, we were tense about money,
9 so let me put things in context a little bit for us. We had
10 a very difficult time in the economy in the US at the time,
11 and then we also had healthcare reform coming down, which
12 caused a great deal of anxiety and consternation among all
13 physicians around the country because of the uncertainty that
14 was coming around the corner, and so Dr. Dyce and I had a
15 number of disagreements in the past, whether it be
16 non-metropolitan bonus or the Hartsville building, but the
17 first major disagreement we had was somewhere in the middle
18 of 2009, and it was a disagreement over money. So at the
19 time it became clear that we couldn't keep up on the pace
20 that we had set for distributions and that we weren't earning
21 enough in the practice to make that pace into the future.

22 Q. How were you affording to pay out these huge
23 distributions to you and Dr. Dyce?

24 A. Through earnings in the practice, but what had happened
25 was, when you looked, you could tell that we wouldn't make

1 it. We couldn't earn enough in the practice to be able to go
2 ahead and cover the distributions that we had planned, and we
3 had some expenses that we had to deal with, and so our first
4 argument that caused me to go and look at a contract or
5 really, really try to hold the ground was over whether or not
6 it was appropriate for us to start taking debt out in the
7 practice in order to cover expenses and distributing that
8 money, and that was a fundamental disagreement between Dr.
9 Dyce and I. I had worked so hard to get rid of the debt in
10 the practice, at one point it was as high as 800, and now we
11 were faced with a proposition of taking on more debt in lieu
12 of paying off expenses and for the purpose of getting
13 distributions and maintaining distributions.

14 Q. Okay. Were you -- well, let's go into the fall of 2009.
15 Talk to the Judge about what the disagreements were about in
16 the fall of 2009.

17 A. By the fall we had recognized that there were two big
18 issues in the practice at that time. One was this whole debt
19 and money issue, and the other one was just fundamentally, as
20 we were growing the practice, how we would have
21 accountability in governance, and so the challenge was how do
22 you build a practice with governance that has some
23 accountability so that individuals can't say, well, I won't
24 do this unless I get my way somewhere else, how can we go
25 ahead and create a practice that has accountability toward

1 the corporation as opposed to having the individual members
2 just look out for their own interests.

3 Q. Were you guys discussing a new shareholder agreement
4 during this time?

5 A. Yes. We had -- there was an attempt to try to alleviate
6 some of our financial pressures by having Dr. Gunnlaugsson
7 buy in with the remaining amount that he had in the summer of
8 2009. That had failed because of a threat to leave, and so
9 then we had to contend with what we were going to do with
10 those two issues moving down the road, so we started talking
11 about those, and we started really discussing them in great
12 detail, and we came to the conclusion that we were
13 fundamentally in completely different camps on these issues.

14 Q. What were the two positions on the two issues?

15 A. So from the debt perspective I felt as though we should
16 be paying expenses, and I felt it was my obligation as the
17 managing shareholder for SCENT to pay expenses and to pay
18 equipment much in the same way that it had been being paid
19 since we paid off our initial debt in the practice, and that
20 is capital financing instead of debt financing, and Dr. Dyce
21 did not. Dr. Dyce felt that we should maintain the
22 distributions, and then on the governance side Dr. Dyce felt
23 that you should be able to have -- every physician in the
24 future should be able to just look at things from their best
25 perspective and the doctors would all get together in a room

1 and fight it out every time, all looking out for their own
2 interests, and whatever came out came out based on leverage,
3 and I looked at it as, having been on other boards, that we
4 needed a board, that we needed some accountability in the
5 practice and that we needed accountability toward the
6 organization, that we needed to be able to justify why
7 actions that we were taking or were in the best interests of
8 the organization as opposed to the best interests of the
9 individual.

10 Q. Prior to this time had you, SCENT, been operating this
11 business in a formal governance manner where decisions would
12 all be made at formal board meetings, or had you been
13 operating it in a less formal manner?

14 A. A less formal manner, no question about that. I felt
15 the need that -- to make it more formal, and I felt that need
16 because if a physician can just say, I want it this way,
17 otherwise I'm leaving, or I want it this way otherwise I
18 won't support X, Y or Z, then that creates a very challenging
19 governance environment, to say the least, and so by
20 formalizing our governance, perhaps we could achieve what we
21 were achieving in other boards that I had been associated
22 with where there has to be a conflict of interest disclosure,
23 there has to be some accountability to your actions.

24 Q. During this time were you building the Hartsville
25 building yet for SCENT?

1 A. We began building the Hartsville building in '08, and it
2 was completed in '09, so the Hartsville building was
3 complete.

4 Q. Why did SCENT build the Hartsville building before the
5 Lugoff building?

6 A. Because Dr. Dyce wanted the Hartsville building built
7 before the Lugoff building. But more importantly, I had
8 wanted to have our practice to expand to another site in
9 Columbia, at that time we had a piece of land there, and Dr.
10 Dyce felt it important to be able to have a presence in
11 Hartsville, the practice needed to invest in that eastern
12 market.

13 Q. Did he express that desire to you?

14 A. Yes, he did.

15 Q. In that fall of 2009 did you and Dr. Dyce discuss any
16 other options to resolve the differences of opinions that you
17 had about the progress of the practice?

18 A. Yes. It got to the point, Your Honor, where we got
19 together and we decided that we needed to entertain possible
20 separation scenarios, and so it was clear that if we were to
21 continue on the same path where a physician could say, I'm
22 out of here if I don't get my way, that we were destined for
23 a very dark place, so we talked about these and we
24 entertained a buyout of either party, so we entertained Dr.
25 Dyce buying Dr. Puchalski out, we entertained Dr. Puchalski

1 buying Dr. Dyce out, and then we entertained a split.

2 Q. You viewed some recorded transcripts of conversations
3 that Dr. Dyce secretly recorded, right?

4 A. I did.

5 Q. And Dr. Dyce and I discussed one of them on the stand.
6 Do you recall that?

7 A. I do.

8 Q. Do you recall there being some allusion to a division or
9 a buyout in some of those conversations?

10 A. Yes. I believe that that was one of the conversations
11 that we held in September of 2009 when we contemplated a
12 division as a reconciliation for our differences in
13 philosophy.

14 Q. Did you have more conversations than that conversation
15 or less?

16 A. I believe that we had two conversations along those
17 lines and then a third where he answered and didn't wish to
18 pursue those.

19 Q. What did he say about these potential options?

20 A. So when it came to a buyout of me, he didn't feel
21 comfortable managing the practice or taking on whatever debt
22 we required to have that happen. When it came to a buyout of
23 him, he didn't want to have the notice period, and he had
24 also had reservations about setting up his own practice by
25 himself. And then when it came to a split, he also felt like

1 he did not want to take on the debt of the practice or take
2 on the managerial responsibilities of owning half the
3 practice.

4 Q. At that time was there -- at that time was the
5 Hartsville building completed?

6 A. Yes, it was. It was our only completed building.

7 Q. And was there debt on that Hartsville building?

8 A. There was debt on that Hartsville building, but more
9 importantly, there was debt in SCENT as well.

10 Q. Okay.

11 A. Plenty.

12 Q. All right. Tell the Judge how your discussions
13 continued with him during the fall of 2009.

14 A. So at one point he returns to me and says, I've talked
15 to Jamie, and I don't want to pursue any of these options. I
16 want to keep it together, and we're going to work something
17 out, and we agreed in principle that there would be some new
18 contract drawn up that would address the financial aspects.
19 Prior to that I had talked about reducing the biweekly
20 distributions, and that was a source of contention between
21 Dr. Dyce and I because I was trying to do those to decrease
22 our distributions -- look, I thought it was crazy that you're
23 getting paid \$1.5 million while you're racking up debt, and
24 it made much more sense to pay for a CT scanner or AllMeds or
25 other equipment or expenses that you had and still enjoy a

1 very, very handsome compensation and not have to accumulate
2 debt, and so we talked about the fact that we would do
3 something to limit the ability of the managing shareholder,
4 or chairman as it were, to decrease the biweekly
5 distributions, and in return for that we would have a
6 provision in the buyout formula in Section 4.5 to include
7 debt because -- and this is very important -- when we signed
8 the agreement in 2008, that agreement was at a time when
9 SCENT had no debt.

10 Q. You said when you signed what agreement?

11 A. When we signed the shareholder agreement in 2008, the
12 practice had zero debt, so there was no need to put a debt
13 provision in the buyout formula. But as we were having this
14 fundamental disagreement in 2009, obviously one of the
15 concerns I had was if we were incurring debt and it wasn't
16 accounted for in that contract, then we needed to account for
17 it because it's now a new being that wasn't in existence
18 before.

19 Q. Did you and Dr. Dyce talk about that situation?

20 A. We did.

21 Q. What did he say?

22 A. He agreed that there would be debt that was put into the
23 buyout formula, and indeed that exists in, you know, the
24 future version, and in exchange there has to be some security
25 so that the biweekly distributions, which in the current

1 shareholders agreement, 2008, the managing shareholder has
2 complete discretion as to biweekly distributions, which were
3 \$546,000 along with the sweep distributions, and so when we
4 were having these discussions in 2009, trying to decide
5 whether or not to take on debt or not, you know, he was
6 concerned, obviously he wanted to maximize the distributions,
7 so in exchange for having some protection and security there
8 the debt was put into the buyout formula in 4.5.

9 Q. Okay. Did you continue to authorize the distributions?

10 A. I did, but I did so under the assurance from Dr. Dyce
11 that there would be something in the agreement that we were
12 working on that would have debt in the 4.5 section of the
13 buyout.

14 Q. And did he ever sign a contract that included debt?

15 A. No. As this progressed, there was also this governance
16 issue, so I wanted to create a board with accountability as
17 we were negotiating the contract in 2009, and I'd just point
18 out to the Court, if I may, that the tapes disappear in the
19 two or three months in the end of 2009, at least to my
20 analysis of the tapes, and there's no -- these negotiations
21 are absent. So but numerous times Dr. Dyce and I are going
22 to my computer, as he stated, and were going through red line
23 versions, red and blue versions of a shareholders agreement
24 that is updated based on the assurances that we made. One of
25 the things that we were concerned about was a future board,

1 yielding the governance to a future board, how would that
2 change things that we were currently doing and the let's say
3 the provisions that we currently benefited from, and so we
4 were talking about those points as well.

5 Q. Okay. As you negotiated the shareholder agreement in
6 the fall of 2009, were there some provisions that you
7 proposed that benefited you?

8 A. Yes.

9 Q. Do you want to mention any of those to the Judge?

10 A. Yes. So there were certain things that we were doing.
11 For instance, Dr. Dyce had agreed to a car stipend, there is
12 an e-mail that is in the exhibits where we talk about it, for
13 me as the managing shareholder, and I wanted to have that in
14 the contract so that any future board would not be able to
15 remove it because it was something that we had agreed on
16 already, so we wanted to memorialize that. And there were
17 other items or expenses similar to that that we wanted to --
18 that I wanted to have memorialized in the contract. In a
19 similar vein there were items that Dr. Dyce also wanted to --

20 Q. Tell the Court some of the ones that he wanted in?

21 A. Well, early on he wanted to make sure that I had a
22 notice period that was longer than the notice period of
23 others.

24 Q. I think you need to explain the notice period.

25 A. So the notice period would be the period that you would

1 have to give to the practice to depart the practice, and I
2 believe ours was a year at that point, or nine months at that
3 point, and Dr. Dyce proposed that mine be twice as long, so
4 two years. We also talked about insurance coverage, and Dr.
5 Dyce wanted to have more life insurance coverage on me. And
6 just to put this in context, there was -- this was a very
7 concerning time in healthcare. Our practice is doing well,
8 but it's clear that healthcare reform's coming, it's clear
9 that the economy isn't doing well, and there's no doubt
10 consternation among all the parties.

11 Q. Did Dr. Dyce have any other provisions that he wanted in
12 the contract related to your termination?

13 A. Yes. So at some point during the fall of 2009, and it
14 wasn't in my recollection somewhere in January, it was in the
15 fall of 2009, Bruce Armon's name comes up again. And this is
16 an individual whose name's come up numerous times since Dr.
17 Dyce has been with the practice, but it comes up somewhere in
18 that time. And then my whole assessment of this negotiation
19 of the shareholders agreement, Your Honor, is that as we go
20 through it we start losing trust in one another is what
21 happens because -- and you can kind of gather that by the
22 requests that are made. In the beginning the requests are
23 for more notice period, and then later in the negotiation the
24 request that he makes is that -- well, one request that he
25 made was that there be no termination not for cause. That

1 was very big with Dr. Dyce. So that was taken out of the
2 employment agreement. So later in the negotiations it comes
3 out that Dr. Dyce would like me to have a termination not for
4 cause as opposed to the others, and so then the counter to
5 that was, well, if I am the only one that's subject to a not
6 for cause termination, then there needs to be something in
7 there that protects me, as the founding physician of this
8 practice, so that I don't get thrown out on the street on a
9 whim by the board when nobody else can.

10 Q. And what was your counter to that?

11 A. A severance package.

12 Q. And how did that severance package work and under what
13 circumstances would it have applied?

14 A. Well, you have to once again just point out that at this
15 point we have a two-year notice that I have to give, so
16 Puchalski has to give a two-year notice in order to depart,
17 then after 2015 the board can go ahead and terminate you not
18 for cause and the buyout -- remember, the buyout is the new
19 provision there with debt, and we've racked up a lot of debt
20 at this point, so the buyout of the practice becomes very
21 minimal because the debt that's been racked up. So the
22 position that Puchalski could have been in at a point if the
23 board decided to go ahead and execute a vote of nonconfidence
24 was planning to be with SCENT for two years by requirement of
25 the notice, all of a sudden finding himself without a job and

1 without a buyout if the debt continued to increase as it was,
2 and so that's what the severance package was for.

3 Q. Okay. Was there any more -- you talked about in the
4 2008 contracts there was a non-metropolitan bonus. Was that
5 going to be continued in -- was that continued into the new
6 discussions?

7 A. There was provisions in both for Dr. Puchalski and for
8 Dr. Dyce that they could not reside in their geographic
9 locations provided they did call coverage, but that was for
10 both Puchalski and Dyce.

11 Q. So were you and Dr. Dyce receiving extra money because
12 you lived in small towns, is that what the non-metropolitan
13 bonus is?

14 A. The non-metropolitan bonus came into being somewhere in
15 2008, and it came into being because Dr. Dyce was looking for
16 homes in Columbia and shared with me that he felt as though
17 he was getting a raw deal in Hartsville from the school
18 system perspective and from a variety of other perspectives.
19 That caused us then to really start a discussion about
20 differences -- remember, this is a shared practice, Your
21 Honor. This is where that comes in. Again, we have a shared
22 practice, but the argument that was being made by Dr. Dyce
23 was we might be shared in terms of finances, but you're
24 living in a better fashion than I am in Hartsville.

25 Q. And so --

1 A. Dr. Dyce pushed for a -- an equalizer, and ultimately
2 that was something that we adopted and that I championed for
3 the practice because of Dr. Dyce.

4 Q. All right. We're in the fall of 2009, late fall. Let's
5 go into the winter of 2009 and of 2010. What's going on
6 there?

7 A. I think at this point it's obvious by Dr. Dyce's most
8 recent request for me to come out and from a number of other
9 things in our discussions that Dr. Dyce is adopting a
10 different path. The first time he starts getting
11 passive-aggressive is in December of 2009, and at that time
12 we had already started construction on the Lugoff building.
13 The bank was trying to put together loan documents for us.
14 They were under increased amount of regulation but they
15 unloaded on us and asked for a number of things. One of
16 those was a personal guarantee for the syndication in
17 December. Dr. Dyce said that he didn't feel comfortable
18 signing that. He also felt as though he didn't feel
19 comfortable signing a conflict of interest form that we were
20 hoping to do for our first board meeting which we were
21 planning in January. He also said that he didn't feel
22 comfortable with a doctor that we wanted to go ahead and
23 interview, and he felt that until things got worked out with
24 the agreement that he didn't feel comfortable doing that.
25 And of course you can't recruit a physician unless

1 everybody's on board. That's just the way it is. And then
2 we were talking -- we had a new physician arriving in
3 January. We were talking about maybe doing that site in
4 Columbia again, and he felt as though that wasn't appropriate
5 either. So you could sense that he was being
6 passive-aggressive at this point, and Bruce Armon's name
7 started coming up more and more in our conversations. And I
8 think, retrospectively, looking back I think he and I both
9 recognized that we started no longer trusting each other.

10 Q. Would he approve equipment purchases or leases?

11 A. Those started coming in a little bit later, but this is
12 in 2010, and no, he would not, so everything was a complete
13 struggle, just pulling teeth. You had to go ahead and try to
14 find absolutely every flicker of data that he requested, and
15 then upon providing it for him he would then say, well, I'll
16 have to talk to Bruce. And I don't even know who this Bruce
17 guy is. I've never even met him. As far as I know he's not
18 even licensed in the State of South Carolina as an attorney.
19 But for all intents and purposes, Your Honor, I got the
20 feeling as though he was a shareholder in SCENT because it
21 seemed as though we required his input on everything.

22 Q. Would he agree to change the malpractice insurance?

23 A. No, he would not. We had a new physician coming on
24 board. There were some -- there were some benefits in
25 switching insurance carriers at that point because we could

1 get a group discount and malpractice insurance -- I heard it
2 discussed earlier. Just to be clear, malpractice insurance
3 isn't something you get through the group. Your Honor, it's
4 something maybe similar to law firms or other professionals
5 where the individuals have to get the policy, you can't get
6 the policy as a group, and so everybody's got to sign on in
7 order for you to get the volume discount and get the rate,
8 and so Dr. Dyce was the holdout.

9 Q. Did he ever tell you that he had called and disagreed
10 with that it would save money?

11 A. Of course not. Dr. Dyce never said any of those things.
12 Dr. Dyce was -- this was a passive-aggressive approach to
13 everything. Nothing was overt.

14 Q. Tell the Judge how it continued in the winter of 2010,
15 the interactions with Dr. Dyce.

16 A. Well, most notably is Dr. Dyce became less reachable and
17 so in -- as we started getting a little bit of a bad taste
18 with one another is probably the best way to describe it from
19 the contract negotiations, we get this contract out, you
20 know, as finalized, and we had agreed upon the terms as we
21 had met so many times, and then it's like Dr. Dyce and Dr. G.
22 are singing the exact same tune, sharing colloquialisms, but
23 I can't get ahold of my other shareholder to engage in any
24 meaningful discussion. And so the way that I try to navigate
25 that is that I call a board meeting, as is anticipated in our

1 new contract, and in that board meeting I bring all these
2 agenda items that are business of the practice that need to
3 be addressed, and in that board meeting what you'd get was, I
4 want this more information or I want this information, I'll
5 get back to you by Wednesday, he puts that -- he says those
6 things, and then you never hear from him, and you send the
7 information, but he never says, oh, that wasn't adequate
8 information or anything else, and so that was the challenge
9 that we had at that time, and it really went out to other
10 things. Frankly, it got to the point where nothing that I
11 could do could make Dr. Dyce happy, so we started arguing
12 about whether or not the lab coats should be blue or white,
13 whether or not our provider handbook should have in it that
14 you, you know, need to wear a tie or not wear a tie. We
15 started arguing about minor things like that and then other
16 major things as well and it was -- even clinical things. You
17 know, even a management of a patient, when there's a
18 complication that is no doing of mine, there's no -- there's
19 nothing that I would do in following a patient that would
20 lead to a fistula in a total laryngectomy patient who
21 underwent radiation therapy, and you go around and you round
22 and you do what you do, and all of a sudden it's your fault
23 that something happened to the patient. It's -- nothing --
24 all of a sudden he just didn't like the cooking. No matter
25 what I cooked, it didn't matter.

1 Q. Have you heard testimony in the trial about a patient
2 and some problems with the patient at some point. Is that
3 what you're referring to?

4 A. Yes. Yes, I am. You know, it's interesting, my
5 recollection of that's a little bit different, and I'm happy
6 to share it.

7 Q. If you can do it briefly, that would be okay?

8 A. I will do it very briefly. So I rounded on a patient,
9 and a patient had a complication, and then afterwards Dr.

10 G. --

11 Q. Dr. G. is who?

12 A. Dr. Gunnlaugsson.

13 Q. Okay.

14 A. Dr. Gunnlaugsson comes in and sees a patient and decides
15 that heroic actions need to be made to take care of this
16 patient, and he goes over and does all these things, and then
17 it's like, well, look, you know, Dr. Puchalski wasn't doing
18 what he was supposed to be doing or somehow caused this
19 complication in the patient. Number one, I had no role in
20 the complication of the patient. Number two, I don't even
21 know that you needed to do what he did to treat that patient.
22 There's plenty of other ways to treat a fistula than doing
23 what they did.

24 Q. How did the behavior that we've discussed earlier, how
25 was that affecting the practice?

1 A. Well, it caused -- it was obvious for the staff that
2 something was going on. It was obvious for everybody outside
3 the practice something was going on. We started having
4 closings, and we would have the folks in the legal office
5 prepare paperwork. We would have the folks at the bank
6 prepare paperwork. Amy would be notified, Jamie would be
7 notified. We'd all go. And then it wouldn't happen, and so
8 people outside in the community were wondering what was going
9 on. They were clear that something wasn't working properly
10 at South Carolina ENT. But, more importantly, what was
11 happening was we started getting into this financial cash
12 flow crunch that was devastating the practice. So what had
13 happened was Dr. Dyce and I had agreed to go ahead and start
14 taking some money from SCENT in a loan to SCENT Land Holdings
15 to make up for a shortfall in anticipation of a closing, and
16 that closing wouldn't occur.

17 Q. Let me stop you there. There's been some discussion of
18 the sweeps stopping in the I think fall of 2009, maybe winter
19 2009.

20 A. Yes.

21 Q. Why did those stop?

22 A. Well, first a comment about the sweeps. They're
23 portrayed as something that was there every single month.
24 The ledger will show that they aren't. The sweeps are
25 actually something that would come when we had the money to

1 distribute, and I have already spoken about the challenges
2 and disagreements that Dr. Dyce and I had about that.

3 Q. Are they profits of the company?

4 A. They're profits, yes, profits of the company above and
5 beyond the biweekly distributions, okay, and so he -- and so
6 what we ended up doing was we sent \$100,000 in December, I
7 believe it was, or end of November to SCENT Land Holdings as
8 a loan, and this was to satisfy an expense that had been
9 incurred from SCENT Land Holdings in the construction of the
10 building. But we kept putting off the closing, and at first
11 it was, oh, we just can't make it, you know. Then
12 progressively it would get something more. It was everything
13 from --

14 Q. Who was saying this?

15 A. Dr. Dyce or Jamie or both.

16 Q. Okay.

17 A. And everything from I can't get baby-sitting coverage
18 for a closing, I mean, at one point. We'd give all our
19 resources -- at one time I remember, you know, in sheer
20 despair Theresa and I looking at each other saying -- I don't
21 know, I remember saying to her, I said, whatever we need to
22 do to make sure that we have coverage for her kids, let's do.
23 I don't care if we have to send over a messenger, I don't
24 care if we have to get a baby-sitter, whatever we need to do,
25 let's make this happen. But it was just panic. It was clear

1 that this passive-aggressive plan was -- it was designed to
2 cause maximal destruction to the practice, and it ground us
3 to a total halt.

4 Q. So what happens with -- the closing you discussed, is
5 that with the Lugoff building?

6 A. Yes.

7 Q. Explain to the Judge why moneys were paid or loaned from
8 SCENT to SCENT Land related to that.

9 A. Well, because there were -- SCENT needed a building by
10 June of 2010 because its lease expired then, and the landlord
11 made it very clear to us that we were not going to be able to
12 go beyond that point. That was what was represented to us.
13 And there's an e-mail that speaks to that effect. And we, as
14 SCENT the corporation, had a vested interest in making sure
15 that that building was complete because if that building
16 wasn't complete, we couldn't practice in Lugoff, our flagship
17 site, so SCENT lent money in anticipation of a closing that
18 kept being rescheduled and missed. At one point we stopped
19 construction on the building because it was clear that
20 something nefarious was going on and the expenses couldn't
21 continue.

22 Q. So was the building construction halted?

23 A. It was.

24 Q. I want to briefly look through a few e-mails that have
25 been discussed, and if you would look behind Tab X,

1 Plaintiff's Exhibit 34, which you and Your Honor should have.
2 This e-mail was discussed in Dr. Dyce's testimony briefly,
3 Plaintiff's Exhibit 34. Do you see it? It's an e-mail.

4 A. I do.

5 Q. And this is a discussion between you and Dr. Dyce; is
6 that right?

7 A. Yes.

8 Q. And you see Dr. Dyce responds to Theresa, Theresa, am I
9 to understand Jamie's coming to the closing in ten minutes to
10 review the following while there and then sign the loan?

11 A. I see that.

12 Q. What information were you providing to Jamie at this
13 point?

14 A. So Orville and Jamie both had access to all the
15 documents that they needed for the closing that we had
16 available prior to the closing. There was a HUD statement
17 that was always the hardest to get because, quite frankly,
18 the bank would produce that like on the day of the closing.
19 It wasn't something that we get a week, a day ahead of time.
20 But, nonetheless, we got something that approximated it and
21 got that to her. What's being requested here is a whole
22 bunch of information not from SCENT Land Holdings but from
23 SCENT, and it's going back to 2004, I believe.

24 Q. Had you received requests from Dr. Dyce for this
25 information previously?

1 A. No. This is -- what happened was that there was an
2 ever-expanding request for information that not only went
3 beyond SCENT Land Holdings, but it also went beyond Dr.
4 Dyce's tenure at SCENT. For instance, Dr. Dyce hadn't even
5 arrived at SCENT in 2004. He's requesting information for a
6 different company at a time when he wasn't even there in
7 order to satisfy a loan on a building, even after I had
8 offered other steps.

9 Q. What other steps did you offer?

10 A. So when Dr. Dyce would say, look, I don't feel
11 comfortable doing this because Bruce says that I need to have
12 X, Y and Z in SCENT before signing any kind of a personal
13 guarantee, so what I did was I went to the bank, and I said
14 would you guys allow me to just sign the personal guarantee
15 on the building, and not Dr. Dyce, in exchange for something
16 as a security. And the bank said, yes, we would do that for,
17 I believe it was \$300,000. If you were to get \$300,000 cash
18 and collateralize that, then we would allow that to happen.
19 So I carried that back to Dyce and said, look, you don't even
20 have to worry about that. If your issue here is that you
21 want to go through these numbers and you want to get through
22 the shareholders agreement, that's fine, but at least let's
23 get this building back online because if we don't get this
24 building back online, we don't have a place to practice as
25 SCENT, and the building's worth nothing partially complete.

1 So he was aware of the fact that that was an opportunity.

2 Now, he still had to be there and she still had to be there,
3 but the risk was taken off the table there --

4 Q. Did he agree?

5 A. -- as a motivator for information.

6 Q. Did he agree to show up under those circumstances?

7 A. He did not show up under those circumstances.

8 Q. Did Jamie show up under those circumstances?

9 A. She did not show up.

10 Q. Okay. Did you provide any other alternatives for access
11 to information?

12 A. Absolutely.

13 Q. Tell the Judge what alternatives that you discussed with
14 Dr. Dyce.

15 A. Your Honor, we offered everything that could be offered
16 prior to this, and so we offered a complete independent
17 accounting from an outside firm. At first we offered that
18 split. Then we offered completely taking the expense. We
19 offered him to come to Austin's office and review any and all
20 files. We offered him to come with a representative and come
21 in and look through the office ledger and anything that he
22 wanted to look through, we offered -- we even offered him to
23 take information out of the practice, provided he signed a
24 confidentiality clause that outlined what that information
25 could be used for and what it couldn't be.

1 Q. What was his response when you offered to allow him and
2 his representative to go to Austin Sheheen's office or
3 SCENT's office to look through documents, how did he respond?

4 A. Initially he said, no, that's not what I want it for. I
5 want the stuff out of the practice and, you know, it's
6 curious that Dr. Dyce started requesting information from the
7 practice about a week after Dr. Gunnlaugsson sends his letter
8 in January requesting information.

9 Q. Was it Dr. Gunnlaugsson or Dr. Gunnlaugsson's lawyer
10 that sent that letter?

11 A. Dr. Gunnlaugsson's lawyer, excuse me.

12 Q. Okay.

13 A. And so he requests similar information at about the same
14 time, and it's perplexed us. We had no idea why somebody
15 wouldn't sign a confidentiality agreement that just simply
16 outlined where things could go, one that I signed myself, to
17 get information out.

18 Q. Okay.

19 A. But he never took us up on any of those offers for an
20 independent audit, for somebody coming in, for him coming in,
21 for him looking at it, for him talking to Austin. Any and
22 all offers that were made along those lines, those were all
23 offers to try to assuage him, to try to make him have access,
24 make him feel comfortable with information. None of those
25 were taken.

1 Q. As the managing shareholder of SCENT were you concerned
2 about how this information might be used if it left the
3 premises?

4 A. Absolutely, I mean, some of this information was
5 obviously proprietary. We're in competition with other
6 individuals, and so some of this is business information that
7 can be used against us. Certainly, after Dr. Gunnlaugsson
8 had proven that he was adverse to the company, we certainly
9 wouldn't want any information going to him, and so it was
10 important to be able to protect that information so that it
11 wouldn't go in the wrong hands.

12 Q. Let's briefly look at the next exhibit which is under
13 Tab Y, it's Plaintiff's Exhibit 27. It's the one that was
14 shown earlier where Dr. Dyce sends you some thoughts and then
15 you respond, wow. Do you see that?

16 A. I do.

17 Q. Why did you respond that way?

18 A. So I actually have another response to this e-mail, but
19 my initial response was, wow, and the reason was this is when
20 Dr. Dyce starts taking a turn from just being
21 passive-aggressive to, frankly, just being driven by his
22 attorney, so this -- I've known Dr. Dyce for a long time, and
23 I can tell you that this is something that was written by his
24 attorney, and it's something that just flies in the face of
25 what our discussions had been up to that point, and it was

1 a -- just a complete change in the tone of our conversations,
2 and it kind of shifted out of passive-aggressive to really
3 more overt confrontation at this point.

4 Q. Let's turn to the next one, which I believe is behind
5 Tab Z, and it's Defendant's Exhibit 54. Could you give the
6 Judge the context of this and what you were trying to convey
7 to Dr. Dyce?

8 A. In this e-mail I say, let's make all of these available
9 to him, him being Dr. Dyce, tonight and answer any and all
10 his questions. I would not feel comfortable sending anything
11 out of the practice without adequate confidentiality
12 provisions.

13 Q. Did you CC Dr. Dyce with that?

14 A. Yes.

15 Q. And down below it lists out things that have been
16 requested, bank statements, check register, balance
17 statement, P&L.

18 A. That's right.

19 Q. Do you know if those things were made available to him?

20 A. They were always made available to him. Just so we're
21 clear, we had monthly meetings where our corporate accountant
22 would be present to answer any and all questions and to
23 discuss the ledger, and Dr. Dyce had access to answer any
24 question he wanted or to look at anything he wanted. He
25 never once requested it, never once had a question of me or

1 of corporate accounting, and when asked why, you know, what
2 do you need, can you share with us what your concern is so
3 that we can address it, he'd say, I don't know what my
4 concern is. I have to wait until Bruce reviews it.

5 Q. Okay. So as this moves on into the late winter and into
6 the spring, you've mentioned the building, were you
7 continuing to communicate with Dr. Dyce or Jamie Curley about
8 the need to close the building?

9 A. Yes.

10 Q. Would they have -- did they have input into how this
11 building was being developed over the year?

12 A. Yes. So the decision to move forward with the building
13 was made sometime in September, and then we would go through
14 the plans. Dr. Dyce was acting as a proxy for Jamie, and I
15 was acting as a proxy for my wife Amy. So insofar as the
16 project was started and planned, that was something that Amy
17 and Jamie were aware of and involved. In insofar as there
18 may have been an e-mail here or request there about color
19 choices or something else they were also involved. Otherwise
20 Dr. Dyce and I as proxies for Amy and Jamie would work on the
21 building, and so he'd see plans for the building. A lot of
22 the actual leg work was done by Theresa Williams and myself.

23 Q. Let me ask you this question, did First Palmetto Bank,
24 over the course of loans that you guys would get, require
25 unlimited guarantees from you and Dr. Dyce?

1 A. Love those. Yes, they would.

2 Q. And would that be true whether it was SCENT Land or
3 SCENT?

4 A. Yes.

5 Q. And had that been the practice when you were financing
6 the buildings?

7 A. Yes.

8 Q. How about the building in Hartsville? To the best of
9 your recollection did you and Dr. Dyce have to sign to get
10 that authorized?

11 A. Yes.

12 Q. I want you to look at Exhibit 22 which is behind the
13 second Tab A, I think. Are there First Palmetto documents
14 there behind the second Tab A?

15 A. Yes, there are.

16 Q. The first one is a letter from First Palmetto; is that
17 right?

18 A. Yes.

19 Q. And it's talking about -- it says what it says, and then
20 the next ones, if you would turn, are these copies of the
21 unlimited guarantees that were signed over the course of
22 looks like a couple years?

23 A. Yes.

24 Q. And is that what First Palmetto wanted to finish this
25 loan, construction loan, for the Lugoff building?

1 A. Yes.

2 Q. And were there other documents that you were -- were
3 there any other documents that you think needed to be signed
4 by you and Dr. Dyce and Jamie Curley and Amy Puchalski?

5 A. Well, yes, Amy and Jamie, as owners of SCENT Land
6 Holdings, needed to be at a closing, and then Dr. Dyce and I
7 also needed to be there for -- for me for the personal
8 guarantee, he if he would sign the personal guarantee because
9 obviously -- look, the banks want the people that are
10 generating the revenue, the higher revenue, to go ahead and
11 guarantee, so if he had agreed to one, he would have to be
12 there for that as well.

13 Q. Was the bank going to loan the money necessary for this
14 building to Jamie and Amy in SCENT Land without you and Dr.
15 Dyce guarantying it?

16 A. No, no. The only exception they made there was that if,
17 you know, provided Dr. Dyce was on board, I could go ahead
18 and guarantee it personally and solely without Dr. Dyce if I
19 put up \$300,000 in collateral.

20 Q. I want to go through just quickly a few exhibits. Under
21 the Tab B, Exhibit 148, you referenced earlier that you would
22 sometimes reach out about some details of the buildings.
23 This is an example of that.

24 THE COURT: I just wanted to just pause for just a
25 moment because as I understand the questioning, the question

1 was are these unlimited guarantees for SCENT Land Holdings,
2 LLC. There's also unlimited guarantees for SCENT Equipment
3 Services, LP. There's been no discussion -- I don't know
4 about SCENT Equipment Services, LP, but I just wanted to
5 point out that there are two unlimited guarantees for an
6 entity called SCENT Equipment Services, Limited Partnership,
7 LP, so I just -- for whatever reason, as I'm reading it,
8 because I don't remember discussions about that, about
9 SCENT -- another entity called SCENT Equipment Services, LP.
10 I remember lots of discussion about the purchase of
11 equipment, but it was my understanding that that was done
12 pursuant to or under the corporate entity of SCENT rather
13 than another entity called SCENT Equipment Services, LP.

14 Q. Dr. Puchalski, are you aware if there's an entity
15 existing called SCENT Equipment Services, LP?

16 A. I'm aware of SCENT Equipment Services. We had
17 contemplated trying to have a limited partnership outside the
18 practice that would have the equipment, and we never formed
19 that company is my recollection, and it was just a d/b/a,
20 basically, under -- doing business as, under SCENT, and the
21 equipment, we decided not to pursue that, the equipment, and
22 the loans and the guarantees were just kept under SCENT, so
23 it was basically considered a subsidiary of SCENT.

24 Q. So did SCENT end up purchasing that equipment?

25 A. Yes, everything was under SCENT.

1 Q. Okay. Let's briefly look at Defendant's Exhibit 148,
2 which is behind Tab B. Is this an example of an e-mail where
3 you would discuss with Jamie or Amy some of the details of
4 the building?

5 A. Yes, it is.

6 Q. Were most of the details handled by you and Dr. Dyce?

7 A. Yes.

8 MR. CLEVELAND: Which tab was that?

9 MR. SHEHEEN: It was B, Defense Exhibit 148.

10 Q. Okay. And, briefly, let's look at the exhibit that's
11 behind C, Tab C, which is Defendant's Exhibit 43. You
12 mentioned some discussions about not being able to attend the
13 closing because of a baby-sitter problem. Is this the e-mail
14 you referenced?

15 A. Yes.

16 Q. And then let's look at the exhibit behind Tab D, which
17 is Defendant's Exhibit 35. Is this where you're cancelling
18 one of the closings?

19 A. Yes. This would be the fourth closing, I believe.

20 Q. Why was it canceled?

21 A. It was canceled because Jamie and Orville decided --
22 said that they would not be attending the closing, and they
23 sent an e-mail to, I believe it was Theresa, saying this, and
24 so we sent out an e-mail or Theresa sent out an e-mail to
25 attorneys and the bank, and I was apologizing that they had

1 gone through all the extra effort to try to put together a
2 closing and that they did not appear.

3 Q. Dr. Puchalski, you've testified -- let me ask you this,
4 the secret tape recordings that Dr. Dyce made, did you review
5 all of them, did you read through them all?

6 A. I did as best I could.

7 Q. Was there anywhere in those reflected that you were
8 making threats to Dr. Dyce?

9 A. No.

10 Q. Did you ever reach a point in this process in the spring
11 of 2010 where you thought that -- strike that.

12 Let me ask you this way: Did you reach a crisis point
13 in 2010?

14 A. Yes.

15 Q. I want you to look at --

16 A. No question.

17 Q. I want you to look at the letter behind E, which is
18 Defendant's Exhibit 127, and I want you to look at the fourth
19 page of that. They're not numbered, but it's just the fourth
20 page. It says at the top, Pyramid Contracting, conditional
21 lien release upon payment. Do you see that?

22 A. I see it.

23 Q. Did you at some point receive this from the builder?

24 A. Yes, we did.

25 Q. Tell the Judge what this meant to you.

1 A. Your Honor, I had always prided myself on running a
2 solid business and enjoyed reputation in the community for
3 paying my bills on time and for following through on our
4 commitments, and this was the conditional lien release upon
5 payment that we discussed earlier that we received on the 1st
6 of March, and this was a bomb that landed in the office
7 because it became clear that we were a hair's breadth away
8 for everything collapsing. What happened at this point is
9 that SCENT had loaned SCENT Land all the money that it could
10 muster and ran up its line of credit to the max to cover as
11 much expense in SCENT Land as it could.

12 THE COURT: I didn't know it had a line of credit. I
13 didn't know it had a line of credit.

14 THE WITNESS: It does, yes.

15 THE COURT: Tell me about that.

16 THE WITNESS: SCENT had a line of credit.

17 THE COURT: First Palmetto?

18 THE WITNESS: With First Palmetto.

19 Q. Was it guaranteed?

20 A. It was guaranteed by Dr. Dyce and myself, unlimited.

21 THE COURT: When? What was the beginning of it?

22 THE WITNESS: I'm sorry, Your Honor. I don't know the
23 beginning. It was redone every year, so you had to -- you
24 were forced to pay it at the end of a year or you could redo
25 it, so every year we have to redo it.

1 THE COURT: When was it last done?

2 THE WITNESS: So it's not redone totally. It's just
3 the -- it's I guess renewed, that's what's done, so it's
4 renewed, but I would say that it started sometime in -- we
5 started taking on debt in 2009, so it would have started
6 somewhere in 2009.

7 THE COURT: In other words, you pay the interest on it
8 and renew it for a year, whatever the line was, the principal
9 would be renewed, and then you would pay the interest that
10 had accumulated on the principal?

11 THE WITNESS: Yes, or you could pay it down.

12 THE COURT: I'm sure, but that's why you were renewing
13 it every year, I gather.

14 THE WITNESS: Yes. That was the source of some of our
15 debates.

16 THE COURT: What was the maximum line?

17 THE WITNESS: It was 300, I believe, was what the
18 maximum line was.

19 THE COURT: Counsel, I did that because I've got to have
20 that number, so I apologize to both sides for --

21 MR. SHEHEEN: I'd rather you ask.

22 THE WITNESS: 200 or 3, I think it's \$300,000, and so
23 our line of credit had been -- it was approaching its max.
24 We had already taken as much money as we could from SCENT to
25 pay SCENT Land Holdings. We still owed \$365,000 to the

1 contractor on SCENT Land. We were facing this lien, and now
2 the bank, they start breathing down our necks, what's going
3 on? They don't necessarily think that things are kosher over
4 at South Carolina ENT and SCENT Land Holdings.

5 MR. CLEVELAND: Objection.

6 THE COURT: What, to kosher?

7 MR. CLEVELAND: No, to hearsay.

8 THE COURT: Sustained.

9 Q. Don't talk about what the bank said, okay? Did you have
10 worries?

11 A. We were getting pressure from the bank and they -- we no
12 longer enjoyed their confidence with respect to our financial
13 situation or our ability to close on a partially constructed
14 building.

15 Q. How about the rate that you had agreed for the
16 construction loan, were you worried about it?

17 A. It was clear that our rate was going to change from the
18 better rate that we were enjoying based on our past business
19 relationship. But if I may continue, we're a hair's breadth
20 from the whole thing coming down, so unless we were to go and
21 curtail, significantly, physician compensation, salaries and
22 other expenses of SCENT, we were not going to be able -- if
23 we couldn't get a loan and we couldn't get the money from
24 SCENT and we were to collapse here, SCENT Land Holdings would
25 take down SCENT in two ways. One is financially, and number

1 two, we wouldn't have a place to practice.

2 Q. Did you think a mechanic's lien had been filed at this
3 point?

4 A. At this point, yes. You know, it says conditional lien
5 release upon payment, so what that tells me when I read this
6 is, my goodness, we have a conditional lien, and unless we
7 pay \$365,000, we're not going to get a release. We need to
8 pay that to release whatever this conditional lien is.

9 Q. Okay.

10 A. And we don't got it. We don't have \$365,000 to cover
11 that.

12 Q. Okay. And what did you decide to do next? What date
13 was this again?

14 A. This came March 1st is what I recall. It came on a
15 Monday.

16 Q. If you'll turn the page, what did you decide that SCENT
17 had to do to survive?

18 A. We had to save SCENT, so that was the bottom line.
19 Nothing was going to happen -- there is simply no way that
20 this logjam could be broken. We had to find \$365,000 fast,
21 and you weren't going to get it from SCENT.

22 MR. CLEVELAND: Objection, Your Honor. You know, I've
23 sat here while he says that he didn't understand what this
24 document means, but now to assert as a fact that the
25 conditional lien release means that they have to come up with

1 the \$365,000 when what this is is a document to the bank
2 indicating that there's a lien release in favor of the loan
3 that was about to be made, and so to have him assert these
4 things that aren't true based on a document that he concedes
5 he misunderstood and didn't understand what it was I think is
6 objectionable.

7 THE COURT: I understand. I understand.

8 MR. SHEHEEN: I think he can cross-examine him about all
9 those things.

10 MR. CLEVELAND: If there was a demand for \$365,000, let
11 him offer whatever evidence there is of that, but there's
12 been no testimony to that effect.

13 Q. Did you owe \$365,000? Did you owe \$365,000 to Charlie
14 Lucas?

15 A. Yes.

16 Q. Had he been sending you e-mails asking for --

17 A. Your Honor, the exhibits are replete with examples --

18 THE COURT: Mr. Cleveland, I think it's probably
19 appropriate for cross-examination, but to great extent I get
20 your point.

21 MR. CLEVELAND: Thank you.

22 THE COURT: But I think that it's probably, to be in
23 strict compliance with the rules, I think it's probably more
24 appropriate to allow him to testify to what he's testifying
25 to and then to have it cross-examined. Having said that, I

1 found it a little remarkable, given -- I get your point. I
2 think it's appropriate for cross-examination.

3 MR. CLEVELAND: I understand. Thank you.

4 THE COURT: I'll let it go at that.

5 Q. Had you received e-mails from Charlie Lucas saying he
6 needed to get paid?

7 A. Yes, numerous ones.

8 Q. Had you been keeping up with payment prior to this as he
9 sent in invoices?

10 A. No. We were clearly behind and there were numerous
11 e-mails. The exhibits are replete with e-mails from Charlie
12 Lucas or between Charlie Lucas and Theresa or myself talking
13 about the challenges that were arising and the fact that we
14 owed him money.

15 Q. Okay. Did you attempt to have another closing?

16 A. We did.

17 Q. Do you recall the date of the last closing that failed?

18 A. March 3rd and then March 10th.

19 THE COURT: Do you have the closing documents? You've
20 talked now for days about this closing, and I can't -- I'm
21 getting a little frustrated because it seems to me that this
22 would be a construction loan. Are we talking about a
23 construction loan and draws on a construction loan, or are we
24 talking about permanent financing? I mean, it's time to give
25 me a little bit of relief, to be honest with you, because you

1 all -- I know all of you know about -- maybe your client
2 doesn't, but I know you all do. So what are we talking
3 about? Where are the loan documents? Is this a construction
4 loan and we're talking about draws, or are we talking about
5 putting in place a permanent construction loan? What are we
6 doing?

7 MR. SHEHEEN: Your Honor, my understanding, and I don't
8 know that we put the documents into evidence, which is a good
9 point.

10 THE COURT: But I don't have it memorized.

11 MR. SHEHEEN: I don't know that we actually put it in.

12 THE COURT: I gotcha. So do you know what kind of loan
13 it is? Is it a construction loan or is it a permanent loan?

14 Q. Was this going to be a permanent loan or were they
15 draws? Was it going to be a permanent loan that was going to
16 be used to completely pay for the building?

17 A. That's where I think there might be some
18 misunderstanding. There is no loan on this building at this
19 point.

20 Q. That's not the question.

21 A. Hold on. It's a construction loan that we're trying to
22 get.

23 Q. Okay.

24 A. It's a construction loan that we're trying to get from
25 the beginning of construction.

1 MR. SHEHEEN: Your Honor, there is no loan at all and
2 they're paying in cash.

3 THE COURT: Okay.

4 MR. SHEHEEN: And they're trying to get a construction
5 loan to finish the project.

6 Q. Is that essentially what it was?

7 A. Yes.

8 THE COURT: Okay.

9 MR. ELLISON: That's not true.

10 MR. SHEHEEN: I don't want to misrepresent anything to
11 the Court. The documents will speak for themselves. There's
12 no loan up until this point. I know that.

13 MR. ELLISON: That's not true.

14 THE COURT: We've been going for about an hour and a
15 half. I tell you what, let's just take a little break.
16 Counsel, let me see you just a minute. We'll take 15.

17 Do not discuss this matter, please, sir, during our
18 break.

19 (Recess held.)

20 THE COURT: I just want to thank all of you for just
21 that conference in chambers. I just feel like I had some
22 loose ends because of all the testimony, and you all -- it
23 was almost like a mini closing to just sort of pull me back
24 together in terms of the information. It was a tremendous --
25 obviously a tremendous amount of information, a lot of

1 documentary information, and I was getting a little bit
2 probably lost in the weeds with regards to the guarantees and
3 then the new -- the new entity that popped up, and now I feel
4 much more complete, and I want to thank you all for that.
5 You all sort of brought me back, centered that information
6 for me, and I want to thank you, and I am very much ready to
7 proceed.

8 MR. SHEHEEN: Thank you, Your Honor.

9 THE COURT: Absolutely.

10 Q. We're going to change subjects. Dr. Puchalski, I want
11 you to look at Defendant's Exhibit 133 which is behind Tab F.
12 It's been introduced previously and discussed briefly with
13 Dr. Dyce. Just to save some time, I'm going to lead you
14 through a little bit of it. Is this a copy of the phone logs
15 that SCENT had that were calls on Dr. Dyce's and Dr.
16 Gunnlaugsson's telephones?

17 A. Yes, it is.

18 Q. These were SCENT telephones?

19 A. SCENT telephones, calls and texts.

20 Q. Okay. And just I want to make sure the Court
21 understands, did you review -- and then there was a chart
22 that we looked at as well of the frequency of the calls; is
23 that right?

24 A. Yes. There is a frequency of calls from one to the
25 other, number of minutes of calls between one and the other

1 and texts between one and the other, six total charts.

2 Q. I don't want to spend a whole lot of time on this, Dr.
3 Puchalski, but did you go through and review those call logs?

4 A. Yes.

5 Q. And did you make some notes to yourself?

6 A. Yes.

7 Q. And do you have those up there with you?

8 A. I do.

9 Q. And I have made a copy of his -- there's not much, but
10 does it help refresh your recollection as to what calls were
11 what to refer to those notes?

12 A. Yes.

13 Q. Just briefly tell the Judge what you found, and if you
14 want to refer to any particular pages, it might be difficult
15 to do because they're not numbered, but do the best you can
16 by date.

17 MR. CLEVELAND: Your Honor, I object to the relevance of
18 this. We've heard lots of testimony that there were calls
19 that Dr. Dyce made. There's been no evidence as to what was
20 on those calls other than what Dr. Dyce and Dr. Gunnlaugsson
21 testified to. It's my understanding that Dr. Puchalski has
22 none of that information as to what the content of the calls
23 were. Therefore the volume of calls, seems to me this is
24 duplicative, it's redundant, and it's not relevant, and I
25 would object to it.

1 MR. SHEHEEN: Your Honor, obviously we're able to prove
2 our case through circumstantial evidence as well as direct
3 evidence. We have a conspiracy claim in this lawsuit, we
4 have a breach of fiduciary duty claim in this lawsuit, and
5 Dr. Puchalski is going to testify about why the timing of
6 some of these calls relates to those, and he's going to also
7 testify, I believe, as to how the particular occasions of the
8 calls, like if they were -- for example, there's an e-mail
9 sent with the affidavit from Dyce to Gunnlaugsson, there's a
10 call that's timed up with that as well, so it's
11 circumstantial evidence that there was conspiracy.

12 THE COURT: There is a civil conspiracy cause of action.
13 This would be certainly arguably circumstantial evidence.
14 It's already before the Court, and so I think it's relevant
15 with regards to the civil conspiracy cause of action as
16 circumstantial evidence and no more than that, and it's
17 already been before the Court. The only thing that I would
18 ask is that we not re-plow -- because you did quite a good
19 job on cross-examination with the, you know, with the spikes.

20 MR. SHEHEEN: The frequency.

21 THE COURT: And have been through the frequency, so I've
22 got that, so we don't need to do that again. But I do
23 understand that you're going to want to highlight certain
24 portions.

25 MR. SHEHEEN: Thank you.

1 Q. Dr. Puchalski, are there some calls in here that you
2 think are particularly relevant to the claims in your case?

3 A. Yes. So if I might share, Your Honor, at a time when
4 I'm not able to communicate with the other shareholder, Dr.
5 Dyce, the calls from Dr. Dyce to Dr. Gunnlaugsson spike not
6 only in their numbers but also in their time per call and
7 total minutes.

8 Q. Okay.

9 A. And then the texts also spike in their frequency and in
10 the data per text as well, so it's not a small text, it's a
11 big text, it's not a small phone call, it's a big phone call,
12 and both are more plentiful December, January, February,
13 March. After Dr. Gunnlaugsson's lawsuit we started
14 investigating this and looked back for key dates and tried to
15 see if there was any correlation between when these phone
16 calls were being made or when these texts were being made and
17 whether or not they coincided with meetings that we had or
18 important dates at SCENT and we found some interesting
19 things.

20 Q. Could you briefly just touch on those?

21 A. Yes, I will. So, for instance, if you were to look at a
22 key date, if you were to look at the yellow tab, this is just
23 one example, but if you look at the yellow tab from the top,
24 Your Honor.

25 Q. Did you tab some of these you wanted her to review?

1 A. Yes, I did.

2 Q. And provided those to opposing counsel?

3 A. Provided those.

4 THE COURT: In my notebook there's some notes and it's
5 highlighted.

6 MR. SHEHEEN: I think he actually went through and just
7 tabbed so it would make it easier for you to look at, but
8 they're the same thing that's in the book. So they're the
9 same thing in the notebook if it's easier for you to refer to
10 them. Or you can refer to the date and she can look at them
11 if you'd rather do that.

12 THE COURT: Yes, that might be easier.

13 THE WITNESS: If you go 17 pages from the back, and the
14 middle column date is February 1st, 2010 -- maybe 18 pages,
15 actually.

16 THE COURT: All right. Got it, okay.

17 THE WITNESS: Your Honor, if you were to look at the
18 bottom of the page, you'll see the date corresponds to
19 2/1/2010 and there's a block of yellow. This is the date
20 that Dr. Gunnlaugsson sent the affidavit e-mail to Dr. Dyce,
21 and if you see his call activity throughout that night and
22 just note the time, which is 20:38 for the 15-minute call,
23 the longer call.

24 Q. Okay. All right. Instead of, I'm sorry, instead of
25 trying to have the Judge look at each one could you just

1 summarize what you found?

2 A. Yes. There are times where Dr. Dyce is texting and/or
3 calling Dr. Gunnlaugsson during all key meetings and data
4 points, or many of them, throughout this four-month period,
5 and I believe that that is evidence that they were not
6 discussing a patient or discussing sleep boards that had
7 already occurred. I believe that they were discussing
8 matters concerning the practice and what was going on with
9 the shareholder agreement and everything subsequent to that.

10 Q. Okay.

11 A. I also -- I'm sorry. I'd also like to point out that
12 there are times when the phone calls are embedded with phone
13 calls to other individuals, and there's numerous examples of
14 that throughout the phone logs. But if I could direct Your
15 Honor's attention to -- sorry, I'm going to count it out for
16 us.

17 THE COURT: Sure. I'm 17 in right now.

18 THE WITNESS: Okay. I'm going to count out from the
19 back, Your Honor, one, two, three, four, five, six, seven,
20 eight pages from the back.

21 THE COURT: Okay. And what's the date that I should be
22 looking for?

23 THE WITNESS: In the middle column, Your Honor, it
24 should say 2/25/10.

25 THE COURT: Got it.

1 THE WITNESS: And so you'll notice the yellow lines.
2 Those are the ones between Dr. Gunnlaugsson and Dr. Dyce. Do
3 you notice the call between 549-6859 and 803-622-2069 for 31
4 minutes.

5 Q. What is that?

6 THE COURT: Hold on one second because this type is kind
7 of little, so hold on a minute.

8 THE WITNESS: I'm sorry, Your Honor. I apologize.

9 THE COURT: No problem. All right. Now, I'm seeing
10 513-3826, right, on the left-hand side, and then I'm looking
11 at 803-549-0359, that's what you're talking about?

12 THE WITNESS: I believe you might be on the wrong page,
13 Your Honor. Does your page have three yellow bars on the top
14 like this (indicating).

15 THE COURT: That ones got two because the date here is
16 2/25/10, it's at 17:11.

17 THE WITNESS: 17:05, then 17:11.

18 THE COURT: Wait a minute now.

19 THE WITNESS: 17:05 and then 17:11.

20 THE COURT: All right. And tell me the numbers now
21 again.

22 THE WITNESS: The phone numbers to the left are the
23 originating call, that's 549-6859.

24 THE COURT: I'm not seeing that. Hold on.

25 THE WITNESS: Your Honor may I show you on this one

1 perhaps?

2 THE COURT: All right. Now I've got it. Now I've got
3 it with the three together. Okay. I've got it with the
4 three together.

5 Q. Whose numbers are those?

6 A. That is Dr. Gunnlaugsson calling Dr. Dyce. Interspersed
7 between those two, one call for 28 minutes and one call for
8 15 minutes, is a 31-minute call to Chuck Thompson, who is Dr.
9 Gunnlaugsson's attorney, and if you just notice the timing on
10 this, and there's numerous examples of this, you see 17:11,
11 he calls for 28 minutes, if you see that, then he calls
12 almost immediately afterward Chuck Thompson for 31 minutes,
13 then almost immediately after that he calls Dr. Dyce again
14 for 15 minutes. Every one -- these tabs over to the right of
15 this one show all the ones where there's interspersed calls
16 between Chuck Thompson and Dr. Dyce in similar fashion, and
17 I'd like to provide this as evidence because my testimony is
18 that I believe that these phone calls actually represent
19 discussions about a topic that was equally of interest to
20 Chuck Thompson as it was to Dr. Gunnlaugsson and Dr. Dyce.

21 Q. Okay. And you have other examples in there we're not
22 going to go through, but there are multiple?

23 A. There are numerous examples on key dates, there's
24 numerous examples when they're interspersed with Chuck.

25 Q. When you say key dates, what do you mean? What was

1 happening?

2 A. Sometimes Dr. Dyce and I would have a board meeting, for
3 instance.

4 Q. Okay.

5 A. Drs. Dyce and Gunnlaugsson are texting one another
6 during the meeting that we're having. There are other times
7 when Dr. Dyce and Dr. Gunnlaugsson are present at a providers
8 meeting. Dr. Gunnlaugsson and Dr. Dyce are texting as the
9 meeting is going on.

10 Q. Okay. All right. Thank you.

11 THE COURT: Got it.

12 MR. SHEHEEN: Thank you, Your Honor.

13 Dr. Puchalski, I want to turn to SCENT Land and how it's
14 structured. Let's look at Defendant's Exhibit 115, which is
15 also I believe Plaintiff's Exhibit -- the SCENT Land holding
16 agreement -- Plaintiff's Exhibit 16, Your Honor, which is in
17 the book if you want to keep working off that. It was in the
18 book that Will provided you originally. It's Plaintiff's
19 Exhibit 16, Defendant's Exhibit 115.

20 THE COURT: Got it.

21 Q. Dr. Puchalski, it should be behind the next tab in the
22 book.

23 A. I see it.

24 Q. Let's just try to walk through this, and let me ask you,
25 first of all, who contributed assets to SCENT Land when it

1 was -- at any -- strike that.

2 Who contributed assets to SCENT Land?

3 A. Amy Lauren Puchalski.

4 Q. Is that on page 40 of Exhibit A of the land holding
5 agreement?

6 A. Yes, it is.

7 Q. Okay. And did Jamie Curley contribute anything?

8 A. No.

9 Q. All right. Why was there a lapse in time between the
10 time that the company was registered with the Secretary of
11 State and the land holding agreement in our hands was signed,
12 why was there a lapse of time?

13 A. There were two reasons. The first was that Dr. Dyce did
14 not feel comfortable taking on the debt -- or taking on SCENT
15 Land Holdings until the building was complete.

16 Q. When you say the building --

17 A. The Hartsville building.

18 Q. All right.

19 A. And the other was that there was a natural process that
20 was going on in terms of creating a contract, so some of the
21 time was taken actually putting together a contract, and the
22 other was that he didn't want to jump in with both feet
23 because he was hesitant.

24 Q. Okay. Let's look at the SCENT Land operating agreement.
25 I want to you look at -- well, I think we need to do it this

1 way: At some point was there a capital call made for SCENT
2 Land?

3 A. Yes, there was.

4 Q. Do you recall what provision that was made under?

5 A. It was made under Provision 6.9, I believe. I'm going
6 to check for that to make certain.

7 Q. Look at 6.9C.

8 A. Yes, 6.9C.

9 Q. And why was it made under that provision?

10 A. Because that provision allows for a mandatory expulsion
11 if a mandatory capital call is not made after -- is not
12 fulfilled after six weeks on a project approved by the
13 membership.

14 Q. Was the SCENT Land --

15 MR. CLEVELAND: Objection, Your Honor. The witness is
16 referring to a section that does not provide for a capital
17 call.

18 MR. SHEHEEN: Yes, it does, Your Honor, and that's why
19 he's testifying about it.

20 MR. CLEVELAND: That's why I'm raising it for Your Honor
21 because just to allow him to continue as if it did, I object
22 to it as misconstruing the document.

23 THE COURT: All right. Let me take a look.

24 MR. SHEHEEN: Your Honor, there's a dispute about this
25 provision about whether it does or doesn't. I think he has

1 to be allowed to testify about his understanding of it, and
2 I'm happy to -- maybe I could phrase the question a different
3 way without referring to the particular provision if that
4 would assist the Court in proceeding.

5 THE COURT: I think that the objection, as I understand
6 the objection, the objection is that parole evidence with
7 regards to whether there is a capital call provision
8 contained within this document would be a matter for the
9 Court to make a determination prior to parole evidence being
10 received. Yes?

11 MR. CLEVELAND: Yes.

12 THE COURT: It's your position that there is no term
13 that is ambiguous on that particular issue and therefore
14 parole evidence is inadmissible. Yes?

15 MR. CLEVELAND: Yes.

16 THE COURT: Okay. So it's the position of the defendant
17 counter-claimant that there is such a provision, so that's
18 something I have to make a determination with regards, right?

19 MR. SHEHEEN: You ultimately have to make a
20 determination in regards to what it means, yes.

21 THE COURT: I understand. But you're trying to get
22 other information, so what you're thinking is let me ask it a
23 different way.

24 MR. SHEHEEN: Yes. I mean, I think the Court has to
25 understand why a capital call was made, and the only way I

1 can do that is by saying what he made it under, so let me go
2 about it a different way. I'll withdraw that question, and
3 he can object again if he wants to.

4 THE COURT: Okay.

5 Q. Let's look at 6.9C just as reference, okay? Was there a
6 project approved by the membership in this case?

7 A. Yes, absolutely, the Lugoff building.

8 Q. And what was that?

9 A. The Lugoff building.

10 Q. Okay. And was there a mandatory capital call made by
11 SCENT Land?

12 A. There was a mandatory capital call made to cover the
13 debt that we discussed prior to the break.

14 Q. Okay. And was that capital call made for the project
15 that had been approved by the membership?

16 A. It was indeed.

17 Q. And did Jamie Curley meet the capital call?

18 A. She abstained from the vote and then did not meet the
19 capital call at six weeks, and Amy did make the capital call.

20 Q. Are you aware of any other -- are you aware of any
21 provision in this contract that allows a capital call for
22 something besides a project that is approved by the
23 membership?

24 A. No.

25 Q. Let's look at -- let's deal with this issue and then

1 we'll look a little bit more at the agreement. Look at 154
2 which is behind the next tab.

3 A. This is in the hardbound book?

4 THE COURT: Yes.

5 Q. And I'll just ask you, was this the minutes of the
6 meeting for SCENT Land Holdings and the notice for the
7 meeting that we're discussing?

8 THE COURT: It's behind I, H, I, in the big book.

9 THE WITNESS: Yes, it is.

10 Q. Look at the next exhibit, which is Exhibit 156. Are you
11 there?

12 A. I am at Exhibit 154 now.

13 Q. You're at 154?

14 A. The next exhibit, yes.

15 Q. Is that the special meeting notice for the capital call
16 meeting?

17 A. Yes, it is.

18 Q. Okay.

19 A. With an agenda.

20 Q. Then look at the next exhibit, which is 156. Is that
21 the e-mail going out to Jamie Curley?

22 A. Yes, it is.

23 Q. And that was to notice that the capital call had been
24 approved?

25 A. Yes. It also includes wiring instructions and

1 methodologies to provide the funds for the amount owed by
2 SCENT Land Holdings to the contractors.

3 Q. Okay. All right. Let's go back to the land holding
4 agreement just to point out some provisions. Look at
5 Provision 1.22 and 1.23.

6 A. I'm there.

7 Q. Why were those two provisions included?

8 A. The intent of the parties was to identify the founding
9 member and the manager and then to describe voting in the
10 LLC.

11 Q. Okay. Is there a reason that the founding member was
12 given a tie-breaking vote if there was a tie?

13 A. Yes, because she had taken the risk prior to the other
14 party taking the risk and she had made a contribution where
15 the other party did not make the contribution.

16 Q. Let's look at 3.3.

17 A. I'm there.

18 Q. Does that again discuss the founding member breaking a
19 tie?

20 A. Yes, it does.

21 Q. Let's look at 3.71. Does that discuss situations in
22 which a member can bring a suit?

23 A. Yes, it does.

24 Q. Let's look at 6 --

25 A. 6?

1 Q. 6.4, I'm sorry.

2 A. I've got it.

3 Q. Would you read 6.4?

4 A. It's titled, no distributions, etc., to dissociated
5 members. A member's dissociation shall not entitle the
6 member to receive any distribution of company profits or
7 other assets or to receive any payment for the member's
8 company interest unless said profits, assets or payment for
9 the member's interests are owed to the member from a date
10 which precedes the member's date of dissociation.

11 Q. Are you aware of any profits, assets or payment for the
12 member's interest, the member being Jamie Curley, that were
13 owed to her from a date which preceded the member's
14 disassociation?

15 A. No. Quite the opposite.

16 Q. Did she owe money to the company?

17 A. She owed a capital call for \$170,000.

18 Q. All right. I want to you look at 16.9. Obviously that
19 deals with distributions upon company liquidation; is that
20 right?

21 A. Yes, it does.

22 Q. Okay. And does that set out a formula within it?

23 A. It does not set out a formula.

24 Q. Do you see where it says first, second, third, fourth?

25 A. Yes, it does.

1 Q. All right.

2 A. And if you look at this, Item 3 is noteworthy. This is
3 under 16.9. It kind of spells out not a formula but a
4 protocol by which to follow and it says, first the company
5 shall pay or shall make adequate provision to pay its
6 creditors; second, the company shall distribute its assets to
7 members in satisfaction of its liabilities for distributions
8 to them under Section 4; and then, importantly, No. 3, third,
9 the company shall distribute its assets to members for the
10 return of their contributions; and, lastly, the company shall
11 distribute its assets to members in accordance with their
12 right to share in distributions.

13 Q. Dr. Puchalski, if the Court applies Section 6.4, would
14 SCENT Land owe Jamie Curley anything?

15 A. Nothing at all.

16 Q. Have you calculated and done some charts on other
17 provisions of the contract, if the Court should choose that
18 other provisions apply?

19 A. Yes, we have.

20 Q. Let's look at Defendant's Exhibit 218 which is behind,
21 Your Honor, Tab M, which means we're getting to the end, and
22 it's also up on the board if the Court would like to look at
23 it. We have now moved up into the world of electronics.

24 All right. First, tell the Judge what provision you
25 calculated the buyout or what could potentially be owed or

1 not owed to Jamie Curley, what provision did you apply in
2 this slide?

3 A. Rather than 6.4, 5.5 is applied in this circumstance.

4 Q. And does 5.5 talk about buying a member out?

5 A. It does. It talks about doing it under two scenarios,
6 one when a member has been a member of -- or his or her
7 spouse was a member of SCENT for a certain period of time.

8 Q. Is that under 5.5B?

9 A. It applies to A and B, but you either make one or you
10 make the other, so bottom line is, if you're there for long
11 enough, it calls for one formula to be enacted. If you're
12 not there long enough it calls for another. Clearly Dr. Dyce
13 and Jamie Curley were in the category when they were not
14 there a long enough time.

15 Q. So it's under B; is that right?

16 A. Yes.

17 Q. And the Court can read that, but so you proceeded in
18 this example of what the Court could do under B of 5.5?

19 A. That's right, and that's as of the date of expulsion.

20 Q. Why don't you walk the Court through what you figured
21 here and why you used these numbers.

22 A. Certainly. You don't have a pointer by chance, do you?

23 THE COURT: Interestingly enough, I thought I had a
24 pointer with me, but I do not.

25 MR. SHEHEEN: She's got it in front of her. I think she

1 can walk through it. You stay there and talk about it.

2 THE COURT: Yes, absolutely.

3 THE WITNESS: Your Honor, I'll just kind of turn with
4 you so we can both look at it. So what 5.5B calls for is
5 that the amount B, the difference between the cost of the
6 building and the amount of debt left in it. So it was 100
7 percent financed, SCENT Land Holdings always, as I think
8 you've uncovered, and what it shows is basically intended
9 that you'd only get what the principal paydown was from when
10 you came in. And so if you look at the cost in the
11 Hartsville building, to the left is a million 58 and that the
12 debt, and the closest we could get was May 1st because of the
13 statement because April 21st was the expulsion, but that's 1
14 million 44. And then for the Lugoff land, I think some of
15 the confusion as we talked about before was that there was a
16 note on the land but there was no note on a building or
17 construction loan, and those were two lots, one for 200 and
18 one for 125, and so you have the cost of that land, which is
19 still 325, that was an interest-only loan being paid for, and
20 then you have the debt, which is still 325 because it's an
21 interest only loan, so that's unchanged. Then you have to go
22 ahead and try to assess what the building costs and what the
23 building debt was, and so construction was halted sometime in
24 February, and the last invoice we have is the invoice that
25 you saw with the conditional release of lien language, and in

1 that one what was done was added the debt that SCENT Land
2 Holdings owed SCENT plus the debt that SCENT Land Holdings
3 owed the contractors, and that was put in as both the cost
4 and as the debt from the SCENT Land Holdings perspective. In
5 other words, there was no attempt to try to decrease the
6 value. Although one could argue that a half-finished
7 building is not worth the parts that put it together just
8 yet, this is strictly just looking at it from the cost
9 perspective. And then the next line is the Park Central lot,
10 the lot in Columbia, and that was \$416,000 as a cost, and the
11 debt remaining on that was 387. And so when you go ahead and
12 subtract those two columns from one another, you end up with
13 \$43,000 under 5.5 B.

14 Q. So, Dr. Puchalski, the cost of the what had been paid to
15 acquire or build these buildings minus the outstanding debt,
16 as you calculated, equaled \$43,000 and some change?

17 A. That's right.

18 Q. Okay.

19 A. And then we took -- there's a 50 percent -- I'm sorry,
20 this slide is not current. I think there's been an error
21 made.

22 Q. Okay. And why is that?

23 A. There's one extra line that's in there that we made. As
24 I read earlier, we were talking about the third component.

25 Q. Wait a minute. We're under 5.5 right now, not under the

1 one you referred to in 16.9?

2 A. This is a different slide. My confusion. Okay. So 50
3 percent membership interest would be 21,648. At the time of
4 expulsion Amy owed nothing to SCENT Land Holdings. Jamie
5 owed \$170,000, so the amount that's owed to Jamie at the time
6 of expulsion on April 21st is a negative number in red,
7 \$148,000.

8 Q. Okay.

9 A. So that's the calculation per 5.5B.

10 Q. Let's now look at the liquidation provision of the
11 contract, 16.9. If that were to be applied -- and that is
12 the next chart, which is Exhibit 218. Let's do the same
13 thing. First of all, how did you -- all right, in the
14 previous slide you used the actual cost that had been
15 expended because that was what was in 5.5.

16 A. That's right.

17 Q. In this one did you use values?

18 A. In this case we're looking at a liquidation event so
19 what would happen if there was a liquidation event at the
20 time of expulsion --

21 Q. All right.

22 A. -- April 21st, as opposed to anything in the contract.

23 Q. All right, liquidation event at April 21st, 2010.

24 A. And it's done for purposes so that Your Honor gets some
25 sort of a sense for what the equity is because we don't want

1 to give you the false impression that there's some sort of
2 great equity in this company. So if you look, we have to use
3 something for the appraisals, and we didn't have appraisals
4 as of April 21st. Dr. Dyce, after some time, was gracious
5 enough to provide for us the appraisals.

6 Q. Actually, we subpoenaed those.

7 A. I'm sorry.

8 Q. Did you use appraisals that we subpoenaed from Dr.
9 Dyce's appraiser?

10 A. He graciously did after he was subpoenaed.

11 Q. Did you use the appraisals that Dr. Dyce's appraiser
12 came up with?

13 A. Yes, we did, except for the Lugoff property, and the
14 reason for that is the appraiser made the determination that
15 the building was finished, and he basically used the finished
16 value of the building. This building was obviously not
17 finished. And so what we did there is we used the same
18 number, and then we subtracted on the debt side the 170 that
19 Amy had already put in as a capital call because that money
20 was in that account at that point from Amy but not from
21 Jamie, and then you have the Park Central appraisal, and
22 you'll see that the Park Central appraisal is actually lower
23 than the amount of debt that was on that property as of May
24 1st.

25 Q. Let me interrupt you one minute. Are you a manager of

1 SCENT Land Holdings?

2 A. Yes, I am.

3 Q. Do you agree with the appraisals of Dr. Dyce's appraiser
4 as of that day?

5 A. Quite frankly, I think that Dr. Dyce's appraisals are
6 high, but for the purposes of depicting this we used them.

7 Q. Okay.

8 A. Because we figured he couldn't argue them.

9 Q. Okay. So then what do you have next?

10 A. Gross proceeds -- so then if you were to liquidate these
11 buildings, a typical brokerage fee, let's say that you could
12 sell them for what the appraised value was, which is an if
13 because in this market at that time I don't think you could,
14 but if you could, you would have a 6 percent brokerage fee,
15 which is standard in the commercial market, some people try
16 to get 7, but we used 6 conservatively, and that puts you at
17 \$2.6 million, 2.686. Then if you go ahead and take out the
18 net proceeds from the creditors at that time, April 21st,
19 you're left with \$297,000. Then if you go ahead and take out
20 the \$110,000 contribution as called for in the contract,
21 you're down to \$187,000.

22 Q. Refresh the Judge about what the \$110,000 contribution
23 was.

24 A. That was in that Step No. 3 under section --

25 Q. 16.9?

1 A. -- 16.9.

2 Q. So that's Amy's contribution, supposed to pay back the
3 members anything they contributed.

4 A. That's exactly right.

5 Q. So you put that in there.

6 A. And that makes that 187. Then the net proceeds per
7 shareholder according to that protocol is 93,000, and then at
8 that time Jamie still had an outstanding capital call for
9 170. Remember that was calculated and accounted for up there
10 with Amy's, and so the amount owed to Amy in a liquidation
11 scenario at April 21st is negative \$76,000, if you applied
12 the most conservative and optimal factors to Dr. Dyce and
13 Jamie Curley. In other words, the buildings would sell for
14 the appraised value with 6 percent coming off the top and
15 that the building would actually sell for the cost that went
16 into it partially completed.

17 Q. Okay. Have you, in fact, had the Hartsville building,
18 you being SCENT, had the Hartsville building on the market
19 for some period of time?

20 A. Over a year at this point, I believe.

21 Q. Anybody bought it?

22 A. No, sir.

23 MR. SHEHEEN: Your Honor, I would move these two charts
24 into evidence.

25 THE COURT: Objection?

1 MR. CLEVELAND: Well --

2 THE COURT: They've sort of been published.

3 MR. CLEVELAND: Right. Let me reserve my objection as
4 to the qualifications of the witness to be testifying to
5 this. With that in mind, we agree to the authenticity of it.

6 THE COURT: I understand. In other words, that's a
7 matter for cross-examination for sure.

8 MR. CLEVELAND: Thank you.

9 THE COURT: Yes, absolutely. Okay.

10 MR. SHEHEEN: Beg the Court's indulgence one minute.

11 THE COURT: Sure, absolutely.

12 (Brief pause.)

13 Q. Has SCENT asserted counterclaims against Ms. Curley?

14 A. SCENT Land Holdings has asserted --

15 Q. Excuse me, SCENT Land.

16 A. -- counterclaims against Jamie Curley, yes, sir.

17 Q. What are the damages from those counterclaims?

18 A. Well, Your Honor, there's about a three-month delay in
19 when we could get into the building from all of this, and so
20 that is approximately \$5,000 a month in rent, and so that's
21 \$15,000, and then there is a difference in interest rate that
22 we had, both because of what the interest rate market was
23 doing at that time and the fact that we were not felt to be
24 as creditworthy as we were in the beginning of this project,
25 and that resulted in an impact of approximately \$22,000.

1 Q. All right. We're going to go back to SCENT and talk
2 about some of the contractual issues. Did Dr. Dyce become a
3 shareholder in SCENT at some point?

4 A. Yes, he did.

5 Q. When was that?

6 A. July 16th, 2008.

7 Q. When did he sign onto the debt of SCENT?

8 A. Approximately July 16th, 2008 or thereabouts.

9 Q. Do all of the shareholders of SCENT sign onto the debt
10 of SCENT?

11 A. Absolutely. Currently Dr. Vidrine, who is a shareholder
12 of South Carolina ENT, signed onto the debt when he came on
13 board in August of 2010. Dr. Simmons, when he came on in
14 July of 2013. I'm sorry, Your Honor, Dr. Simmons is a doctor
15 who has -- he's the one that's working while we're here, so
16 he's got to cover things, but he came on in July, and he also
17 signed onto the debt at that time as well.

18 THE COURT: July '13.

19 THE WITNESS: July '13, yes, ma'am.

20 Q. Who did?

21 A. Dr. Simmons.

22 Q. What year?

23 A. '13.

24 Q. 2013?

25 A. Yes, I'm sorry.

1 Q. It sounded like you said July 13th. I'm sorry.

2 We've covered this. I don't want to spend a lot of time
3 on it, but could Dr. Dyce have bought in previously by
4 getting a loan and paying for shares?

5 A. I would have liked nothing more.

6 Q. Okay. Let's look at Plaintiff's Exhibit 125, which is
7 behind Tab N.

8 A. I have it.

9 Q. What is this document? It's already been published by
10 the opposing side. What was it?

11 A. This is a letter from Austin Sheheen to myself and Dr.
12 Dyce.

13 Q. Why did Mr. Sheheen send this letter?

14 A. Because at or around February of 2007 Dr. Dyce was
15 unwilling to take out loans for a traditional purchase into
16 South Carolina ENT with a loan, and in exploring ways with
17 Bruce Armon, his attorney from Philadelphia, they came up
18 with a suggestion that they wanted to do something that put
19 off the time when he comes in as a shareholder until such
20 time as I, Dr. Puchalski, as the former shareholder, original
21 shareholder, received a net revenue equal to what we would
22 have received in a traditional buy-in, and then we took that
23 and we tried to find and explore ways of having that done.
24 As I mentioned earlier in my testimony, Dr. Dyce and his
25 attorneys were also concerned about the fact that -- the

1 depreciation of the assets, if you'll recall, Your Honor, and
2 so Austin here is coming up with a suggestion of ways that we
3 could benchmark the depreciated value of the assets at that
4 time to revenues such that that same benchmark, 25 percent,
5 could then be carried out in future and be used as a
6 substitution for depreciated assets, and that's what this
7 letter speaks to.

8 Q. Let's just look at them real quickly, the suggestions.
9 What's suggestion 1 speaking to?

10 A. At the time of buy-in all cash in the practice will
11 belong to current owners and not transferred to the new
12 group.

13 Q. Who was a current owner?

14 A. Myself, Dr. Puchalski.

15 Q. Did you have a AAA account at SCENT?

16 A. Yes, I did. It was a number, and just to be clear, Your
17 Honor, you probably know this better than I do, but a AAA
18 account is, this is moneys that I have been taxed on because
19 when you're taxed you're taxed on earnings, not on
20 distributions, as we all know so -- and if I'm paying off
21 this equipment and I'm not taking that money, then I'm being
22 taxed on it, but I'm not actually getting it, so basically
23 it's money that I've been taxed on but that I haven't
24 actually taken out of the corporation.

25 Q. Okay. And how about No. 2?

1 A. All receivables for services provided prior to admission
2 of new owners will belong to the previous owners and kept in
3 a separate account. Proceeds may be loaned to new group to
4 prevent a disruption of operation from lack of cash.

5 Q. And how about No. 3?

6 A. All collections from services provided from date of new
7 group will flow directly into the corporate account belonging
8 to new group and percentage of ownership.

9 Q. What's the difference between receivables and
10 collections there in 2 and 3?

11 A. So collections are speaking to the amount of money that
12 you're collecting based on date of services prior to an entry
13 date which is hypothesized here, and the other one is account
14 receivables based on date of service after this hypothesized
15 date.

16 Q. Did Dr. Dyce ever tell you that he was a shareholder
17 prior to July of 2008?

18 A. No. No, no, he wasn't.

19 Q. Were you ever --

20 A. Absolutely not.

21 Q. How did he file his taxes prior --

22 A. Nor did he tell anybody else that, by the way, at SCENT
23 at all. That was never a discussion point.

24 Q. How did he file his taxes prior to July of 2008?

25 A. He filed them as an employee, which is proper and

1 appropriate.

2 Q. And how was he -- strike that question.

3 Did he sign on any lines of credit with the company
4 prior to 2008, July of 2008, excuse me?

5 A. No.

6 Q. When was he listed as an owner for Workers' Compensation
7 purposes?

8 A. He began being listed as an owner after July 16th, 2008,
9 and he also would also be listed as a 50 percent shareholder
10 in various credit applications that the practice would fill
11 out.

12 Q. Why did Dr. Dyce get increased pay beginning in February
13 of 2008?

14 A. Because he reached a milestone in the process to
15 becoming an owner of South Carolina ENT, and those wages were
16 W-2 wages. They were not anything but that.

17 Q. Did he ever receive a K-1 from SCENT for wages, for
18 earnings, before July --

19 A. He never received a K-1 in a tax sense before July 16th,
20 2008 from SCENT.

21 Q. Explain to the Judge the three types of -- explain to
22 the Judge what types of income he was receiving in February
23 and March of 2008.

24 A. All of his income was W-2 income in February and March
25 of 2008. He was receiving a bimonthly distribution on top of

1 his salary and then also pay for call amount, but all of
2 those were W-2 wages.

3 Q. Why was he being paid those?

4 A. Because he had reached a milestone on the path to become
5 an owner of South Carolina ENT.

6 Q. Were those referred by -- were those payments, those
7 bimonthlies -- was it biweekly or bimonthly?

8 A. Bimonthly. Did I say biweekly? I apologize if I did.

9 Q. Were those bimonthlies ever referred to anyone in SCENT
10 as K-1?

11 A. Yes, and this deserves just a special note, if I may,
12 Your Honor. There were times when -- these bimonthly
13 distributions existed for quite some time, even before Dr.
14 Dyce came on board, and they were called K-1 distributions.

15 Q. Why?

16 A. Because I was an owner of the practice and they were
17 coming to me at that amount.

18 Q. Okay.

19 A. And when Dr. Dyce reached his milestone one year after
20 February 2007, the folks in our practice would document that,
21 since it was the same amount of money, as a K-1 distribution
22 in our ledger, but under no circumstances did he ever receive
23 a K-1 at all from the practice as a tax document.

24 Q. Okay.

25 A. Which is what that is.

1 Q. Have you reviewed the charts and the calculations of the
2 defendants -- excuse me, the plaintiff's accountant that were
3 presented here?

4 A. I did.

5 Q. Your Honor, those are Plaintiff's Exhibit 296, and you
6 should have a copy. I don't have another clean copy that I
7 can give you.

8 THE COURT: That's okay.

9 MR. SHEHEEN: I don't think it's in that book. Their
10 expert testified to them. They were sheets that look like
11 this (indicating).

12 THE COURT: Okay.

13 MR. SHEHEEN: May I approach, Your Honor, and hand the
14 witness these?

15 THE COURT: You may.

16 (Discussion off the record.)

17 MR. SHEHEEN: Thank you, Your Honor.

18 Q. Let's turn to page 2, the second page of that.

19 A. I'm there.

20 Q. Okay. This is the -- their calculation for the buy-in,
21 is that correct, is that your understanding?

22 A. Yes.

23 Q. Okay. Tell the Judge just briefly --

24 And I'm not trying to pit the witnesses, Your Honor.

25 There's no other way to do this than to go through it and say

1 where do you disagree.

2 THE COURT: This is helpful, actually.

3 Q. Where do you disagree with the approach that's used
4 here?

5 THE COURT: If he does.

6 Q. If you do.

7 I'm guessing he does.

8 A. Well, under Item A the corporation's numbers and Dr.
9 Dyce's numbers are actually identical.

10 Q. Okay.

11 A. Under B --

12 MR. CLEVELAND: Vincent, I'm sorry, is there something
13 with Dr. Dyce's numbers on them?

14 MR. SHEHEEN: I don't know what you're referring to.

15 MR. CLEVELAND: I mean not Dr. Dyce but Dr. Puchalski's
16 numbers. Is there an exhibit, or are we looking at this?

17 MR. SHEHEEN: No, we're not, I just thought it would be
18 easiest to work off of this exhibit frankly, and he can tell
19 you where the numbers disagree.

20 MR. CLEVELAND: That's our Exhibit 296.

21 MR. SHEHEEN: Exactly.

22 MR. CLEVELAND: I apologize.

23 THE WITNESS: Under B our numbers differ because Dr.
24 Dyce and Mr. Livingston are using a 1.868 figure for accounts
25 receivable, and I would tell you that that that is a little

1 crazy, so there's -- if I were to go to Dr. Dyce in February
2 of 2007 and say, oh, I want you to buy into \$1.8 million
3 worth of accounts receivable, I think that would be a little
4 disingenuous.

5 Q. Why?

6 A. Because --

7 MR. CLEVELAND: Objection, Your Honor. I think the
8 standard that should be applied here is what is booked on the
9 company's records, and I haven't heard any testimony, so I
10 object to this as being irrelevant and believe that the --
11 what is relevant is whether there's evidence that the
12 company's books have some number other than what has been
13 reported. Just because it's his opinion it's crazy is not
14 relevant.

15 THE COURT: I understand. I understand. Insofar as the
16 comment about the amount I will certainly sustain the
17 objection. Just the characterization that this is crazy.

18 MR. SHEHEEN: I'm fine with that. Right, don't call
19 anything crazy.

20 THE COURT: And that wasn't the term but whatever the
21 term was.

22 MR. SHEHEEN: And, Your Honor, I'm not sure why there's
23 an objection about it being the booked value because -- let's
24 lay this foundation.

25 Q. Was your agreement with Dr. Dyce reduced to writing

1 anywhere as he came into the practice?

2 A. Our agreement with Dr. Dyce was -- yes, under a
3 shareholders agreement.

4 Q. What was the date?

5 A. July 16th, 2008.

6 Q. Prior to that was it reduced to writing anywhere?

7 A. No.

8 Q. His process to come in as a shareholder, was it written
9 down on a piece of paper?

10 A. No. Process of coming into a shareholder?

11 Q. Yes, becoming a shareholder.

12 A. Yes, in 2005, his original agreement had language on how
13 he could come in as a shareholder through a traditional path.

14 Q. Did he exercise that?

15 A. He did not.

16 Q. Okay. And after that the things that happened, were
17 they reduced to writing between you two?

18 A. Yes.

19 Q. When?

20 A. The July 16th shareholders agreement that we're
21 currently under.

22 Q. Does that agreement set forth a process to become a
23 shareholder?

24 A. It does not set forth a process to -- well, not a
25 formula, but yes.

1 Q. There's no formula set out in that agreement, is there?

2 A. No.

3 Q. It just says he's a shareholder.

4 A. Yes.

5 Q. Okay. All right. Tell me why you disagree with their
6 number for accounts receivable.

7 A. Because in our contract under Section 4.5B it talks
8 about what -- that the accounts receivable are the accounts
9 receivable that are booked in accordance with the company's
10 usual practices.

11 Q. Is that for the buyout or for him becoming a
12 shareholder?

13 A. That's for the purchase price, which is the buyout.

14 Q. What are we talking about here?

15 A. And here he's listed 1.8 as an accounts receivable. Our
16 90-day accounts receivable -- I'll tell you that a lot of
17 practices will use a 60-day accounts receivable. Some will
18 say, you know, 100 percent of 30, 50 percent of 60 and
19 nothing beyond that. What we did in our calculation, which
20 I'd be happy to show, is a 90-day AR, which is extremely
21 generous to the other party.

22 Q. 90-day, is that what you said?

23 A. 90-day, and that number is much smaller than this
24 number, and that is an accounts receivable that includes
25 collections and things that are so far out that they're just

1 not -- they're not collectible. They're way too far out.
2 It's not realistic or reasonable to include those accounts
3 into an accounts receivable.

4 Q. Okay.

5 A. The cash --

6 MR. CLEVELAND: Your Honor, I'm going to object to --
7 this witness does not have any qualifications to be making
8 those kinds of opinions about accounts receivable
9 collections. I also object that his testimony is not the
10 best evidence and it would be the books and records of the
11 company, which is what's called for under Section 4.5,
12 providing the information that's used in the formula.

13 MR. SHEHEEN: Your Honor, if I could address that.

14 THE COURT: Yes.

15 MR. SHEHEEN: Maybe I can -- maybe I can ask some
16 proffering questions -- well, let me address it with you
17 first. He's the managing shareholder. He is familiar with
18 the books and records, and I'll ask that question if you want
19 me to lay the foundation. He's also familiar with the normal
20 accounting methods of the corporation because he's involved
21 with them.

22 THE COURT: I understand. I think that as I understand
23 Mr. Cleveland's concern, his concern is that there's a number
24 and that the best evidence, given everything you've just
25 said, he's the managing shareholder, he's familiar with the

1 books and records of the close corporation and there's --

2 MR. SHEHEEN: There's lots of numbers.

3 THE COURT: He even maintains there's a document that
4 controls, so the question is why not a number instead of --

5 MR. SHEHEEN: You want what his number is?

6 THE COURT: Best evidence. So all that points to what
7 is the best evidence, and so I'll sustain the objection as to
8 what is the best evidence. In other words, okay, what is it
9 then?

10 Q. Okay. What is it?

11 A. The accounts receivable, \$854,685.77.

12 Q. Is what you believe is the appropriate number to use
13 there?

14 A. Absolutely.

15 THE COURT: 854.

16 Q. Say it again.

17 A. \$854,685.77.

18 Q. Okay. Are there any other things you disagree with on
19 the sheet?

20 A. Well, our cash, the next item, we're right on the mark.

21 Q. Okay.

22 A. CVS life insurance -- cash equivalents are generally
23 things that you can get access to in 90 days. If there is a
24 life insurance policy that you can't liquidate for the
25 initial term and then you have a penalty for it that's

1 staggering and then it goes down, I don't believe that that's
2 considered a cash equivalent, nor should it be.

3 Q. Okay.

4 A. So I think it's inappropriate for Dr. Dyce and Mr.
5 Livingston to use the \$33,900. That was not available to us.
6 When we were struggling to try to get money to cover this
7 \$400,000, you know, you couldn't get it, so that's -- I would
8 not call that a cash equivalent. Same thing for the
9 receivable from SCENT Land. When we were struggling for
10 money trying to save the practice, you're not going to go
11 ahead and come up with that because SCENT Land couldn't
12 close, and so we had no reasonable expectation that we would
13 be able to close on the land and the building, get it
14 complete and get that money back in within that period of
15 time.

16 Q. So based on your management of the business, you would
17 not consider that to be a receivable?

18 A. I would not consider that receivable being counted in
19 cash equivalents.

20 Q. Okay.

21 A. No more than I would the line of credit. And, Your
22 Honor, I mean, just sharing with you, if there's a line of
23 credit for \$270,000 at this time and there's cash in the bank
24 at 472, you could easily take 272,000 and apply it toward the
25 line of credit, which was not done because you'd be stifling

1 your liquidity. But my point is that accounts receivable,
2 one could argue under the same terms, would go against the
3 payable.

4 Q. Okay. All right. What else?

5 A. So then the formulation we don't disagree with, divided
6 by three and divided by two.

7 Q. This is pursuant to that formula?

8 A. Section 4.5 in that formula.

9 Q. Okay.

10 A. Mr. Livingston and Dr. Dyce on C, minus the amount owed
11 by departing shareholder, have placed nothing there at all.

12 Q. That would of course be the setoffs; is that right?

13 A. That's right, and that's very clear in the formula. And
14 so they also do not adjust the amount for 50 percent pursuant
15 to the for cause termination.

16 Q. I want you to point out to the Judge where that is in
17 4.5.

18 A. Yes, sir.

19 Q. Is it in 4.5 is the best way to put it, is there a
20 reduction for at cause termination?

21 A. Yes, that's actually in the 4.5.

22 Q. And what is that reduction?

23 A. That 50-percent reduction is for for cause termination.

24 Q. Okay. And so if you plug all those numbers in, do you
25 know what the resulting number is?

1 A. We have that. If I may ask for your help in displaying
2 a slide, I think would make it a little easier.

3 Q. Which one is that?

4 A. I'd like to request SCENT Defense Exhibit 218.
5 Actually, it would be the one that says on the top -- that is
6 it -- no -- that looks like it, yes.

7 Q. Okay.

8 A. And so, Your Honor, if you were to look at this, this is
9 the corporation's methodology per the contract, per Section
10 4.5, in coming up with a buyout per the contract as of May
11 9th, 2010, which is Dr. Dyce's departure, and it's ruled by
12 4.5 of the shareholders agreement. A, if you notice, is very
13 consistent with what you've noticed in Mr. Livingston's
14 report. It's 1.292508, and he rounded up 40 cents, but those
15 are identical numbers in my mind or close to it. And then
16 the next is using the AR that's booked in the standard
17 methodology used by our corporation and actually giving some
18 benefit to the other party by using a 90-day instead of a
19 60-day AR and using 100 percent of the 90-day AR. And just
20 so we're clear about that, in the medical practice which has
21 an average AR, days in AR of 30, 90 days is generous. So
22 your average claims coming back in 30 days, and we're using
23 the 90-day. That's \$854,000. You divide that by three, then
24 you divide it by two and you come to 142. The cash, we
25 simply use the cash, we don't try to remove the line of

1 credit, we don't try to do the payables, and we certainly
2 don't use the life insurance product that we can't get the
3 money out, and that divided by three and then two comes out
4 to 78. So when you add B total, that's the AR plus the cash
5 equivalents, you get 221152. You have to add that to A and
6 your amount comes out to 1.5. That's reduced by 50 percent
7 under Section 4.5 of the agreement and you have \$756,000.

8 Q. Then I want you to stop there because we'll talk about
9 setoffs later. So absent any setoff what does SCENT believe
10 that it would have paid Dr. Dyce?

11 A. Absent any breach in setoff \$756,829.84.

12 Q. Let's look at the next page of their expert's report,
13 the accountant's report, entitled Summary of 2008 Excess
14 Distributions. Do you see that?

15 A. Yes.

16 Q. I don't think we need to talk about the top part of
17 that, so let's just -- can you identify for the Judge what
18 these ones where they say you've got excess distributions
19 are?

20 A. Well, what Mr. Livingston does here is identifies excess
21 distributions as distributions that he feels are either
22 unknown or labeled to the internal revenue service or what he
23 feels are personal credit card expenditures, and it's not
24 clear to me how he defines what's personal and what's not
25 personal in this at all, but what I would like to do if you

1 would allow me is to go through these and just to speak to
2 them.

3 Q. That's what I'm asking you to do, starting with the
4 personal credit card expenditures.

5 A. So I don't know of any personal credit card expenditures
6 that I put on there. I have a business card and I have a
7 personal card. If I'm using a business card, I'm using it
8 because I think it's a personal -- a business expense. I
9 don't have access to my accountant 24 hours a day. I make my
10 best judgment on what is a business expense. I try to be as
11 aggressive as I can, and I rely on our corporate accountant
12 to let us know whether something's a business expense or not,
13 but I believe those are business expenses.

14 Q. If he tells you they're personal expenses, does he
15 charge them to your distribution?

16 A. He charges them to my distribution, yes, of course.

17 Q. And let's look at 637, the Internal Revenue Service.

18 A. The Internal Revenue Service are checks that are going
19 to the Internal Revenue Service but they are income that is
20 under my income, it's just going to the revenue service, so
21 the payee is the Internal Revenue Service as opposed to going
22 straight to me, so we're skipping one step.

23 Q. Let me just interrupt you a moment, please. In 2008, is
24 it your position that prior to July, July 16th, 2008, that
25 your distributions would have been different because he

1 wasn't receiving distributions?

2 A. Of course. Prior to July 16th, 2008 they would have
3 been because we were still in this process of trying to make
4 B look like A, the net revenue.

5 Q. All right. Do you know if the Internal Revenue Service
6 payment came from your AAA account or where that came from
7 during that time, do you know?

8 A. Please repeat that question.

9 Q. Do you know what that was allocated towards, was it from
10 your AAA account, was it prior to July 16th, 2008?

11 A. That was prior to July 16th, 2008, I believe.

12 Q. How about the sleep lab money?

13 A. Sleep lab money is nominee income. So, Your Honor, if I
14 am -- if I have a separate contract that's allowed by the
15 shareholders contract in the employment agreement to provide
16 services with a third party and they send a check to South
17 Carolina ENT for my services instead of directly to me,
18 particularly if they bundle it with some other payment under
19 a different contract, then the practice will owe me that
20 amount and so they'll flip that out.

21 Q. Did Dr. Dyce also receive some income that wasn't from
22 SCENT based on services he provided to other parties?

23 A. Absolutely. He also had a management services agreement
24 with Kershaw Health, for instance, to provide services for a
25 speech and swallowing center and we could bill a number of

1 hours, and I had the same thing, so sometimes they would
2 bundle the checks together. They would send us the call pay
3 money and they would, as another item they would go ahead and
4 put sleep lab directorship or over-read fee. And they would
5 put them together in their billing office, and I would -- we
6 would receive it in the office, and of course some of that
7 belonged to Robert Puchalski and some of it belonged to
8 SCENT, so SCENT would cut the check over.

9 Q. How about the KCMC notation there?

10 A. I believe that's over-read fees.

11 Q. Any idea why he attributed the CME trips to both of you
12 guys? Was that personal income or was that business income?

13 A. That was a business trip where we went out there, and
14 the only reason that I can think that he mentioned it is
15 there is a difference between Puchalski and Dyce of about
16 \$1,000. There's also -- we provided one credit card
17 statement as an exhibit, and I'm not sure if he's using that
18 as well, but I'm not sure why he's choosing that one CME trip
19 of all the CME trips that we go on.

20 Q. How about the \$1500 speaker fee?

21 A. That is nominee income as well. So I did a speaker fee
22 for somebody else. They paid the practice. You know, and
23 the practice reimbursed me.

24 Q. How about the Springdale Hall Club, \$347?

25 A. That was a business expense. So if we were going to go

1 and recruit somebody or take somebody coming in from out of
2 town, Your Honor, we're going to buy dinner or lunch for
3 them, that's a business expense, even though it's a private
4 club. Quite frankly, I use that private club more for
5 business endeavors than I did for personal endeavors.

6 Q. How about \$17,500, 310 Ocean Oaks Court?

7 A. My understanding is those are two checks.

8 Q. Have you looked at them?

9 A. I've looked at the expense, yes.

10 Q. Okay.

11 A. And so one is for \$10,000 and one is for 7,500 and I
12 believe one is a complete mislabel and so if it was --

13 Q. Who were they written to?

14 A. One was written to Nelson Mullins, I believe that was
15 \$10,000, and the other one was written to another law firm
16 and that was 7,500.

17 Q. Were those personal or business expenses?

18 A. The Nelson Mullins was clearly a business expense. It
19 would never -- there is no personal work whatsoever that that
20 law firm has ever done for myself or my family.

21 Q. What about the other one?

22 A. I'm not sure about the other law firm, to be honest with
23 you, but if it was a personal expense, it would have been
24 counted to me as income.

25 Q. Okay. How about the \$850 for estate planning?

1 A. So there was these life insurance plans that we were
2 creating that Mr. Livingston has mentioned in the cash
3 equivalents, and those life insurance plans were going to be
4 created in a way that was going to afford us an opportunity
5 to build wealth under a separate legal entity of some sort
6 with our spouses, and so insofar as he was doing work for the
7 practice, that was billed to the practice.

8 Q. How about the \$5,000 that's labeled as financial
9 planning?

10 A. That's the same thing, there were many checks that go to
11 the financial planner as personal. Insofar as the financial
12 planner was doing work for us to set up the syndication, to
13 set up something else for the practice, then that was a
14 practice expense.

15 MR. CLEVELAND: Excuse me. I'm sorry.

16 (Discussion off the record.)

17 Q. Was the financial planning done for the business or for
18 you, this \$5,000?

19 A. The business.

20 Q. And was it related to the syndication that we've
21 discussed previously?

22 A. Mostly the syndication where we were trying to come up
23 with some sort of way to finance the syndication in the
24 absence of the ability to get anything from the bank.

25 Q. How about the thing that says Scott Bird and lake lot?

1 A. Scott Bird and lake lot, the next two were both times
2 prior to Dr. Dyce coming on as a shareholder, and I don't
3 know why they're listed as something that would be aberrant,
4 but the Scott Bird was a personal expense for a lot. I
5 remember that I wasn't able to get a personal check to a
6 contractor that I needed to do something for and so we cut a
7 check to satisfy that and paid him.

8 Q. How about the unknown to Robert Puchalski for \$100,000?

9 A. So it's 7/8/2008. This is prior to Dr. Dyce coming on
10 as a shareholder, and that's a distribution from SCENT to the
11 sole shareholder of South Carolina ENT, Robert Puchalski.

12 Q. Okay.

13 A. I'm not sure why he's labeling it anything different.

14 Q. Do you know if that was out of your AAA account or do
15 you know if that was current earnings at the time?

16 A. Well, it depends. It's a fluid process, but so there's
17 always a AAA account that was far in excess of any of these
18 figures, Your Honor, so that even if there was a time when it
19 was afterwards, there's a bank that you develop based on
20 stuff that you pay taxes on but that you haven't received the
21 money for.

22 Q. Okay. And the last thing is Amy Puchalski, 10/27/2008,
23 \$24,000.

24 A. The same.

25 Q. Okay. That one was 10/27/08.

1 A. That was after the fact, and we were looking into that
2 one. My understanding is that there is something there
3 that's related to my compensation.

4 Q. And that would be best left to the accountant, is that
5 what you're saying?

6 A. Yes.

7 Q. Okay. Let's turn the page. This is 2009 excess
8 distributions. I don't think we need to spend a lot of time
9 on this, but can you tell the Judge where you disagree with
10 this one?

11 A. Your Honor, I think the stuff on the top looks pretty
12 reasonable. The lower half of it, though, I think that this
13 \$50,000 check issue is by far and away the biggest issue with
14 this, so if Dr. Dyce were to get a check from the practice
15 for \$50,000 --

16 Q. Let's talk about what actually happened. Did Dr. Dyce
17 receive a check for \$50,000?

18 A. Yes, he did, from practice.

19 Q. And then what happened?

20 A. He in turn signed it over to me.

21 Q. And why did he do that?

22 A. He did that in satisfaction of more of a tax
23 differential, so as shares, because we recognized that after
24 the -- our 2008 tax return was done in April, there was still
25 even bigger taxes than the 42 percent that we had theorized

1 would be in, and that was because equipment that we had
2 purchased was being taxed because it couldn't be fully
3 written off at the time.

4 Q. And so he paid you that \$50,000, and do you remember
5 when he paid you that \$50,000?

6 A. It was somewhere in June of 2009.

7 Q. Would that have been --

8 Okay. And does that -- is that the \$50,000 that the
9 accountant discussed?

10 A. I would just point out that that item in and of itself
11 would make the balance even or near even, and then Mr.
12 Livingston and Dr. Dyce put in a number of other items here
13 in order to try to pad. All our numbers show that Dr. Dyce
14 received more distributions than Dr. Puchalski in 2009. But
15 if you notice, he throws in personal expenditures again of
16 11,000. I'm not sure why he considered those personal
17 expenditures, but once again, if there's something that's
18 billed to the business, they're business expenses. He puts
19 in a political contribution. He puts in --

20 Q. Why did he do that?

21 A. I don't know why he put that in there. I guess he -- I
22 guess he felt that that was something that --

23 MR. CLEVELAND: Objection.

24 THE COURT: Sustained.

25 Q. Who was the political contribution to?

1 A. I believe the political contribution was to a Vincent
2 Sheheen.

3 Q. Okay. Was there any -- as the managing shareholder of
4 SCENT was there anything wrong with SCENT giving a political
5 contribution?

6 A. No, nothing at all.

7 Q. Do you know why he allocated that to you as a
8 distribution?

9 A. Other than he wanted to try to cover the gap between
10 what the amount that Dr. Dyce got more than me and the amount
11 that I got less than him.

12 Q. Okay. If there were any personal -- is it your
13 understanding after reviewing the records that if there were
14 any expenses that the accountant thought should have been
15 personal that you had originally charged as corporate that
16 they would be allocated to your share of the earnings from
17 the company?

18 A. Yes, of course.

19 Q. And in 2008 did you withdraw more in distributions from
20 currently earned -- from current earnings or less than Dr.
21 Dyce?

22 A. In 2008?

23 Q. Strike that. I meant 2009, 2009.

24 A. In 2009 --

25 Q. Yes.

1 A. -- I withdrew less in distributions during that period
2 of time.

3 Q. Okay. Let's look at -- and we already talked about 2008
4 and the dates there. Let's look at --

5 A. And I would point out that the same is true for 2010
6 until Dr. Dyce's departure.

7 Q. Okay.

8 A. We're even after July 16th, 2008.

9 MR. SHEHEEN: Your Honor, I'm not going to go through
10 the next one with him because that hinges on if Dr. Dyce was
11 still a shareholder and drawing moneys. I don't think
12 there's any point in going through that.

13 Q. Then Somnus, there's a slide about Somnus. What is
14 your -- is it your position that anything is owed to Dr. Dyce
15 under Somnus?

16 A. No.

17 Q. Why?

18 A. Because you go to the contract, and there's -- we put
19 this stuff on paper for a reason, and there is \$100 that's
20 supposed to go into the contract and \$100 that's supposed to
21 come out on the formation -- coming in coming out. Dr. Dyce
22 never paid the 100 in, and he's not getting 100 out.

23 Q. Did you get a management fee from Somnus?

24 A. Yes.

25 Q. Do you believe that management fee was reasonable?

1 A. Of course it was. I was receiving management fees for
2 managing the sleep lab at Carolina Pines and managing the
3 sleep lab at Kershaw Health. I was the only board certified
4 sleep physician. Our sleep lab, in order to actually have
5 accreditation with the American Academy of Sleep Medicine
6 which, Your Honor, is required in order to get reimbursement
7 for the sleep lab, you have to have ten hours of a board
8 certified sleep doctor in that lab, and so SCENT had the
9 option of either paying Dr. Puchalski to do that as a board
10 certified sleep physician, or they could have to go find
11 somebody else, and if they found somebody else, they were
12 going to have to pay them that standard fee anyway for a
13 sleep lab.

14 Q. All right. Let's look at a couple pages more. This
15 says summary of Dr. Puchalski's tax rate, and there's 2008,
16 2009, 2010.

17 A. I see it.

18 Q. Why is this relevant, first of all, to frame it for the
19 Court.

20 A. Because the parties contemplated, after Dr. Dyce did not
21 want to pursue a traditional buy-in in February of 2007, that
22 we were going to try to find a way to bring him in and delay
23 his entry into ownership until such time as the amount of net
24 revenues that I would receive, Puchalski would receive,
25 equaled the net revenues that Puchalski would have received

1 had Dr. Dyce been a -- come in through a traditional route,
2 got a loan and paid for his shares.

3 Q. Was that ever written down anywhere, that agreement?

4 A. No, so there's no agreement here. This is at the
5 discretion of the company, the corporation, South Carolina
6 ENT, because obviously -- look, you can't predict the
7 performance of a company, nor can you predict a tax rate, I
8 might add, because the tax rates have changed. Now capital
9 gains is 20 percent instead of 15 percent.

10 Q. So this relates to him coming in as a shareholder; is
11 that right?

12 A. Yes.

13 Q. And the accountant for Dr. Dyce used a certain tax rate
14 to try to plug into the description of what happened; is that
15 right?

16 A. Yes. He actually -- the way Mr. Livingston approached
17 this, I believe, is that he chose a date that made sense from
18 them because of something that was on the ledger as a memo,
19 and then he made the data fit that date.

20 MR. CLEVELAND: Objection, Your Honor.

21 THE COURT: Sustained.

22 MR. CLEVELAND: Thank you.

23 Q. Let's look at -- does this relate back to page 1 of this
24 document, of this whole packet?

25 A. Yes, it does.

- 1 Q. Okay.
- 2 A. Well --
- 3 Q. I'm sorry?
- 4 A. Yes.
- 5 Q. If it doesn't, you can say it doesn't.
- 6 A. It does.
- 7 Q. What do you believe the appropriate tax rate is to use
- 8 in evaluating Dr. Dyce's coming into the practice as a
- 9 shareholder?
- 10 A. It turns out that -- it needs to be at least 42, but it
- 11 turns out to be higher.
- 12 Q. Why do you say 42?
- 13 A. Well, Dr. Dyce and Mr. Livingston failed to use state
- 14 tax as well, and obviously if Puchalski could get proceeds
- 15 net 15 percent capital gains tax in February of 2007 and we
- 16 want to compare that to another methodology, then you can't
- 17 just include federal. You'd have to include state, and if
- 18 there was city tax, or any other kind of income tax for that
- 19 matter, that would also have to be levied against it.
- 20 Q. You had state income tax, right?
- 21 A. Yes.
- 22 Q. Do you use that in your calculations?
- 23 A. Yes.
- 24 Q. What else was left out of here, if anything?
- 25 A. So you also have to take out personal exemptions, so

1 let's say that -- I mean, just the most obvious scenario,
2 let's say that somebody were to go ahead and give away half
3 of what they earned to a charity. Your Honor, that would
4 lower your aggregate tax rate considerably because the amount
5 of money you'd pay in tax compared to what you earned would
6 be much lower. So it's not fair to include something like
7 that in trying to calculate a tax rate.

8 Q. Did he include that when he was calculating his tax
9 rate?

10 A. It's our belief that he did.

11 Q. And I asked him that on the stand. Do you recall that
12 testimony?

13 A. I do.

14 Q. And so if you don't use those deductions and if you use
15 state income taxes, what number do you arrive at?

16 A. 42 percent plus.

17 Q. All right. And just to cut to the chase, if you use the
18 42 percent plus and the agreement as you've described it
19 between you and Dr. Dyce, when would he have been eligible to
20 become a shareholder?

21 A. He became eligible to become a shareholder when we did
22 our sweep -- there was a sweep that was done on July 15th,
23 2008 for \$241,000, it came out twice, and that is what got
24 him to meet it, and he therefore was able to sign a
25 shareholders agreement on July 16th, 2008.

1 Q. Okay. When you swept that money out, was that money
2 that you had paid taxes on as the sole shareholder of SCENT?

3 A. Absolutely.

4 Q. Let's look at the next page, which is a list of checks
5 written to Amy Puchalski.

6 A. I see them.

7 Q. And then is it your belief Amy Puchalski received any
8 money -- first of all, why did Amy Puchalski receive moneys
9 from SCENT?

10 A. Any money that she received she received as a
11 beneficiary from me, so it was my distribution or my
12 compensation and she would receive it, so frankly I'm
13 surprised that anyone's making any kind of a hay off me
14 giving money to my wife.

15 Q. Why did you all do that, by the way, why did she get the
16 money?

17 A. Because it was more convenient for Amy, my wife, and so
18 if she were to get the check directly as opposed to me
19 getting the check and then going and trying to sign it over
20 or trying to cash it, she could get it directly. It wouldn't
21 be very much different, quite frankly, than a check going to
22 a joint account or going to another account.

23 Q. Does Amy pay the bills at home?

24 A. Yes, she does.

25 Q. Does she handle the home financial affairs?

1 A. She does.

2 Q. And then turn to the next page.

3 A. I'm there.

4 Q. These are some more distributions or some more checks
5 that Amy Puchalski received. The first two, were they before
6 July 16th, 2008?

7 A. Yes. And just for the Court's benefit, these are not
8 separate from what we discussed before to Scott Bird, this is
9 the exact same one, but now having seen the dates I can
10 confirm to you that they are both prior to the July 16th
11 date.

12 Q. So these are the same -- are these the same things that
13 were being allocated against you previously?

14 A. They are the exact same things. You can see the 10,000
15 to Nelson Mullins there.

16 Q. So before they were distributions to you, but now
17 they're distributions to Amy Puchalski in these charts?

18 A. Well, he's claiming they're benefiting Amy Puchalski or
19 some sort of personal -- once again I'll make the same
20 comment, Nelson Mullins, when it says 310 Ocean Oaks, that is
21 a miss -- clearly something wrong in the memo there because
22 they never did any work for Ocean Oaks or anything in Kiawah,
23 and they never did any personal work at all, so that one
24 right there is just -- if that was charged to my personal,
25 then that's a penalty to me. And then the only new ones that

1 he includes here are three AT&T cell phone expenses on 1/6,
2 2/5 and 2/26.

3 Q. Okay.

4 A. May I comment on those?

5 Q. Please, very briefly.

6 A. So those are expenses, when I had an issue with my cell
7 phone and we were trying to find out at the practice which
8 company or service provider would provide a better service
9 across our entire practice, and so we had a separate one and
10 we used -- I used both phones when I was traveling to
11 Hartsville or traveling to Camden or different areas, the
12 lake, to try to see which one would work better.

13 Q. Okay. So those were -- you're saying you used those for
14 business purposes?

15 A. Absolutely.

16 Q. Did you benefit financially from terminating Dr. Dyce?

17 A. Absolutely not. Dr. Dyce makes more now than I or any
18 other shareholder at SCENT.

19 MR. SHEHEEN: We're just about done, Your Honor.

20 THE COURT: Okay.

21 Q. We went through the buyout provision in the contract,
22 okay. I want you to look at the second part of slide 218
23 which would be if SCENT were liquidated, all right, SCENT
24 Land Holdings. Okay. If it were liquidated at the time, and
25 I think the Judge gets the gist of what we're talking about

1 at this point, if you could just briefly go through it.

2 A. This is SCENT Land Holdings.

3 Q. I'm sorry, not SCENT Land Holdings. Here we go. Okay.

4 A. This is a SCENT balance sheet. Your Honor, once again,
5 just trying to give you some sort of a sense for what the
6 balance sheet -- what would happen in a liquidation at May
7 9th, so if the previous discussions that we had in September
8 about liquidating the practice or splitting it up or buying
9 each other out were actually contemplated as of May 9th and
10 the decision was made to liquidate SCENT as of May 9th, the
11 total assets on the books are 2.332, and there's a question
12 of course on whether or not you would be able to get to that
13 for some of the assets, but those are the assets on the
14 books. The liabilities are 1.5 million. I'll just point out
15 that that is the highest debt that SCENT has had around this
16 time at any point since I began it in 2002. The initial debt
17 for the practice was 800,000. Total balance between those
18 two was 785, per shareholder that's 392. But I'd point out
19 that, and here is the part that's -- is crushing us as a
20 practice now. Not only do we have to service the debt under
21 that total liabilities over the last three years, which has
22 significantly made us less competitive compared to others,
23 but we've also -- you'd have to contend with these two
24 liabilities. One of them is the employment contract
25 liabilities, and we have a chart for this, but at the time

1 SCENT had a number of long-term contracts with various
2 professionals to provide services.

3 Q. Would that be for like employed physicians, employed
4 PA's, where you are locked into a contract with them?

5 A. That's exactly right. So had we liquidated, they would
6 have clearly come to us and asked for their rights under that
7 contract.

8 Q. How about the last one?

9 A. We had office lease liabilities for various periods of
10 time at different places for \$1.3 million. So we couldn't go
11 bankrupt unless we applied that to that, and so there's no --
12 there's no way out, it's a negative proposal on liquidation
13 no matter what.

14 Q. So if everybody just walked away on May 9, 2010, that's
15 what your calculations are?

16 A. We would not be able to cover the liabilities that we
17 had, okay, and then -- and in all fairness, we don't take
18 accounts receivable or accounts payable, which are matched to
19 some degree here, and so you'd end up with a bankruptcy
20 situation.

21 Q. All right.

22 A. With no money.

23 Q. Are you claiming that Dr. Dyce breached his fiduciary
24 duties to SCENT?

25 A. Absolutely.

1 Q. Are you claiming that he violated his contract with
2 SCENT?

3 A. Yes.

4 Q. Are you claiming that he conspired with Dr. Gunnlaugsson
5 to damage SCENT?

6 A. Absolutely.

7 Q. Are you claiming that he breached his contract with a
8 fraudulent intent to leave you with debt?

9 A. No question in my mind.

10 Q. And are you claiming that he breached his covenant not
11 to compete, resulting in damages?

12 A. Yes.

13 Q. All right. We're going to put on the board what you're
14 claiming your damages are, and then we'll be done, okay?
15 Explain to the Judge how you arrived at these figures if you
16 could just briefly.

17 A. Your Honor, the first bullet point is breach of Exhibit
18 A, and so this is the covenant, and what we did is we looked
19 at the loss revenue that SCENT had in the eastern market, the
20 eastern market is defined as Hartsville and Cheraw, two of
21 our four sites, up until November 2011, and November 2011 is
22 significant because it's the end of the 18-month period of
23 the covenant, so that was during the covenant, and we found
24 that year over year comparing to the previous year that we
25 had \$1.5 million in losses, 1.477.

1 Q. Okay.

2 A. And this, Your Honor, if you can just recall perhaps the
3 numbers that we were receiving from Dr. Dyce in discovery
4 where it came out to approximately \$1.2 million, that
5 supports this number, as does the amount that we extrapolated
6 from the medical records, which is approximately 1.33
7 million, which also supports this number.

8 Q. The medical records that were transferred to Dr. Dyce?

9 A. Yes.

10 Q. Okay. What's the \$7 million?

11 A. That is --

12 MR. CLEVELAND: Your Honor, let me just object to the \$7
13 million as being, one, speculative, two, not called for under
14 the agreement. It's, as I understand it, an estimate of
15 damages beyond the time that the noncompete would not be in
16 effect, so I think it's irrelevant. For all those reasons I
17 object to it.

18 MR. SHEHEEN: If I could just ask briefly, of course
19 subject to cross-examination.

20 THE COURT: Sure.

21 Q. Does the \$7 million number there, is that from his
22 breach of fiduciary duty and his conspiracy or the covenant
23 not to compete?

24 MR. CLEVELAND: I have to object to Mr. Sheheen's
25 leading at this point.

1 THE COURT: Yes.

2 MR. SHEHEEN: I'll withdraw that question.

3 Q. What claim is the \$7 million stemming from?

4 A. Well, first and foremost you have to hypothesize what
5 would happen had Dr. Dyce not only waited for a period of
6 time so that we could establish ourselves in the market and
7 continue to compete, how much of our revenue we would be able
8 to continue to bring in had that happened, and that would
9 continue presumably until now and beyond now. So that number
10 is the amount of revenue that we have lost over the period of
11 time after the covenant. It's also our contention that Dr.
12 Dyce breached his fiduciary duty to the practice in many ways
13 and breached the contract in many ways, and had he not done
14 that, we would have continued to be able to generate greater
15 revenue over this period of time. We were a \$10 million
16 practice prior to the shenanigans. Now we are a \$6 million
17 practice every year. That is a significant difference in
18 overall revenue, and I'll just point out that we've had to
19 deal with the same amount of debt service and a similar
20 amount of expense.

21 The next bullet point is fraud, and this number here,
22 773, it amounts to -- well, let me, if I may, this amounts to
23 50 percent of the debt at Dr. Dyce's departure on May 9.

24 Q. Tell the Judge why you think he should owe you for that?

25 A. Well, Your Honor, if you have --

1 MR. CLEVELAND: Objection, Your Honor. There's been no
2 evidence that I'm aware of that there was any fraud and
3 certainly any fraud that related to the incursion of debt.

4 MR. SHEHEEN: I'll ask him.

5 MR. CLEVELAND: I would object to this testimony as to
6 potential fraud damage.

7 THE COURT: Okay. Yes.

8 Q. Do you believe that Dr. Dyce committed fraud?

9 A. I do.

10 Q. How?

11 A. In many ways, but one that I'd like to mention now is
12 that Dr. Dyce had an obligation under his contracts with
13 SCENT to disclose that he knew that Dr. Gunnlaugsson was
14 entering into a lawsuit by way of the affidavit on February
15 1st, 2010. He did not disclose that in a meeting the
16 following day, despite having a phone conversation with Dr.
17 Dyce and e-mail communications at that time. Instead he
18 continued on a path of obstructing the practice, he continued
19 on a path of passive-aggressive behavior.

20 MR. CLEVELAND: Objection, Your Honor. None of those
21 things are elements of fraud, the passive-aggressive
22 behavior, obstructive behavior, none of that's fraud, and the
23 evidence he's given about the affidavit doesn't satisfy the
24 nine elements of fraud either.

25 THE WITNESS: I'm sorry, let me --

1 THE COURT: Whoa, whoa, whoa, whoa, whoa.

2 MR. SHEHEEN: Your Honor, you're ultimately going to
3 rule on whether he meets the elements of fraud, whether he
4 meets the breach of fiduciary duty, and if there's not
5 evidence before you, you'll rule one way, but he certainly
6 can testify as to what he believes, what he saw, what he's
7 learned. It's not a summary judgment motion.

8 THE COURT: Let me say this, and I'm aware that this is
9 nonjury, but to -- I am a little bit concerned about the way
10 that this witness will reach into an agreement and pull
11 something out and then characterize conduct as being fraud
12 like being passive-aggressive and then decide that that has
13 some relationship with debt. I know it's nonjury, but there
14 is no -- but we're not following any theory when we do that.
15 Fraud has nine elements. You know what they are, I know what
16 they are, and being a breach of contract -- you can breach a
17 contract with every bit of fraud in your heart, and if it's
18 just a breach, it's just a breach if it's not accompanied by
19 a fraudulent act. Fraudulent act has to be characterized by
20 the nine elements, and so the testimony that I'm hearing,
21 really the witness is using the word fraud, but it's more
22 like I think that's bad conduct, so we really are getting
23 away from the theory of fraud.

24 MR. SHEHEEN: Yes, Your Honor.

25 THE COURT: So if you --

1 MR. SHEHEEN: Tie it in.

2 THE COURT: Yes, sir, and to go back to the \$7 million,
3 likewise I have concerns about reaching into the contract on
4 covenant not to compete, liquidated damages, which is why you
5 have liquidated damages, because they tend to the
6 speculative, and then saying, yes, I want those, and then oh,
7 by the way, there's a breach on top of that and give me \$7
8 million because of that as well, and the reason that you
9 had -- the reason that there was the covenant not to compete
10 with the liquidated damages is precisely because those types
11 of damages under the law tend to be considered, and obviously
12 assuming that there wasn't a breach, a prior breach, assuming
13 that the covenant not to compete is effective, there are
14 damages and they are liquidated damages of \$750,000, as I
15 understand them, so I have concerns about the \$7 million as
16 well as the 773,598.85.

17 Q. Let's look at the breach at Section 3.1B and 4.2D.

18 A. Thank you. And, I'm sorry, I think I was the reason for
19 that. I was speaking about a different point than what I
20 believe you were asking about. I apologize.

21 Q. What's the violation of 3.1B?

22 A. 3.1B and 4.2D are the two provisions of the contract
23 that I mentioned earlier, and they call for a duty to act in
24 the best interests of the practice, and a failure to do that
25 results in 30 percent reduction in your base pay and a loss

1 of call pay revenue over that period of time, and that
2 amounts to \$80,000.

3 Q. Okay. And those -- you have detailed what you think the
4 violations of his duties and acts in the best interests are.
5 We don't need to go back through that. Do you understand?

6 A. Okay. Yes, I do. The point that I mentioned earlier
7 was actually toward fiduciary duty and Dr. Gunnlaugsson, and
8 I apologize, I was speaking to that point and I didn't --

9 Q. Let me ask you, do you believe Dr. Dyce breached his
10 fiduciary duty to SCENT in relation to Dr. Gunnlaugsson?

11 A. I do.

12 Q. How so?

13 A. In a number of ways, but for the purposes of this
14 calculation, by not disclosing an adverse action and a
15 potential adverse action that Dr. Gunnlaugsson displayed
16 toward SCENT on February 1st with the affidavit and --

17 Q. As managing shareholder of SCENT, if he disclosed that
18 to you, what would have happened?

19 A. We would have not paid him what we were paying him and
20 we would have acted appropriately. He was obviously running
21 a subterfuge at this time.

22 Q. Would you have terminated his employment?

23 A. We would have terminated his employment.

24 Q. And so what does the \$340,000 represent?

25 A. That represents his compensation over the four months

1 after Dr. Dyce failed to alert SCENT of Dr. Gunnlaugsson's
2 actions. And then if I may go back --

3 MR. CLEVELAND: Let me just register my objection that
4 he's not tied up these portions of the contract with any
5 evidence of loss associated with it, and his theories are not
6 legally sound, and I want to register my objection.

7 THE COURT: What I would ask you to do is to, since we
8 are nonjury, you can reserve those for involuntary nonsuit
9 stage.

10 MR. CLEVELAND: Reserve --

11 THE COURT: For involuntary nonsuit. With regards to
12 the counterclaims it would be an involuntary nonsuit --

13 MR. CLEVELAND: Thank you.

14 THE COURT: -- with prejudice, to use the words of
15 Walter Bristow. Yes.

16 MR. SHEHEEN: Thank you, Your Honor.

17 THE WITNESS: If I may go back to the debt.

18 Q. Hold on a minute. Are you referring to the fraud?

19 A. Yes.

20 Q. I'm going to ask you these questions very specifically,
21 okay? I want you to listen, don't want you to give me a long
22 answer, do you believe that Dr. Dyce misled you to any
23 material matters?

24 MR. CLEVELAND: I object to the leading.

25 MR. SHEHEEN: Otherwise we're going to roam around.

1 It's a yes or no question.

2 THE COURT: I'll allow it.

3 Q. Do you believe he misled you as to any material matters?

4 A. Yes.

5 Q. Is there any specific one that you want to mention?

6 A. Yes.

7 Q. What?

8 A. We as a practice, South Carolina ENT, incurred debt
9 based on the promise from Dr. Dyce that there would be, in
10 addition to the buyout formula in Section 4.5 on a contract
11 revision, to include debt as a buyout.

12 Q. How did you rely on that?

13 A. Well, because we increased -- we accumulated debt in
14 favor of giving distributions under that misleading promise.

15 MR. CLEVELAND: Your Honor --

16 THE COURT: Sustained.

17 MR. CLEVELAND: Thank you.

18 THE COURT: That's not what the contract says.

19 Q. Are you claiming any other damages?

20 A. I'm sorry?

21 Q. Are you claiming any other damages at this time?

22 A. Outside of those four would be legal fees as well.

23 Q. Have you accumulated legal fees as a result of this?

24 A. Absolutely.

25 Q. And the dispute related to the covenant not to compete?

1 A. Yes.

2 Q. And the other contractual documents in this case?

3 A. Yes.

4 MR. SHEHEEN: I have no further questions, Your Honor.
5 Thank you.

6 THE COURT: All right. We're going to take lunch.

7 MR. CLEVELAND: Your Honor, I know we were going to be
8 brief for lunch.

9 THE COURT: Yes. And?

10 MR. CLEVELAND: And one of the things that's come up has
11 caused me to have to go across down to our document storage
12 facility because there were some surprises that I didn't
13 anticipate, and so on the lunch I was wondering if we could
14 extend the lunch hour a little further than we normally might
15 because of that.

16 THE COURT: Tell me what you think you need. 2:30 do
17 you think would work?

18 MR. CLEVELAND: Yes, Your Honor, that would be great.

19 (Lunch recess held.)

20 THE COURT: Cross-examination.

21 MR. CLEVELAND: May it please the Court.

22 THE COURT: Yes, sir.

23 MR. CLEVELAND: Your Honor, I'm going to hand to the
24 court reporter Exhibit 301, and I would ask I be allowed to
25 hand this up.

1 THE COURT: All right.

2 (Plaintiff's Exhibit 301 marked for identification.)

3 CROSS-EXAMINATION BY MR. CLEVELAND:

4 Q. Good afternoon, Dr. Puchalski.

5 A. Good afternoon.

6 Q. How are you, sir.

7 A. Good. How are you?

8 Q. Dr. Puchalski --

9 Let's, would you put, Jana, Exhibit 19 on the screen.

10 Your Honor, this is in our book?

11 THE COURT: Okay.

12 Q. Would you highlight the sixth whereas clause?

13 Dr. Puchalski, Exhibit 19 is the resolution that you
14 created to terminate Dr. Dyce without cause, is it not?

15 A. This is the corporate document that terminated Dr. Dyce
16 without cause on March 3rd.

17 Q. Excuse me?

18 A. Yes, sir, this is the corporate document.

19 Q. And in the sixth whereas clause, you reported in that
20 resolution, represented in that resolution that the course of
21 events with the construction of the Lugoff building had
22 resulted in the filing of a mechanic's lien; is that right?

23 A. Yes, that's what it states in the sixth whereas clause
24 and that was based on my information and belief at the time.

25 Q. The fact is that no mechanic's lien was ever filed

1 against any SCENT Land facility ever, was it?

2 A. My understanding is that the lease -- the lien was not
3 actually filed, yes, sir.

4 Q. So you agree with me?

5 A. That is my understanding, yes, sir.

6 MR. CLEVELAND: Your Honor, I'd like to hand up Exhibit
7 278, which is in evidence, as the records of the Kershaw
8 County RMC office or register of deeds office affirming that
9 there were no mechanics liens filed.

10 Q. So that was false, that statement was false, right?

11 A. That statement was based on my information and belief at
12 the time.

13 Q. That's not my question. Is it false?

14 A. In retrospect, yes, that is not an accurate statement.

15 Q. Now, would you go to the previous whereas clause? Now,
16 you represented in Exhibit 19 that Dr. Dyce was preventing
17 the closing of the loan regarding the partially constructed
18 building for the company by SCENT Land Holdings, right?

19 A. Yes, sir.

20 Q. Now, the closing was scheduled for March the 3rd, was it
21 not?

22 A. There were five scheduled closings, sir. One of them
23 was indeed for March 3rd.

24 Q. And would you put Defendant's Exhibit 43 up, please?

25 And would you highlight the top third from Robert Puchalski

1 down to Bob, not highlight but expand.

2 All right. This is March 2nd, the day before the
3 scheduled March 3rd closing, right --

4 A. Yes, sir.

5 Q. -- that you sent this, and you sent this to Jamie Curley
6 in anticipation of the closing the next day.

7 A. That's correct.

8 Q. And you represented to her that you had a mechanic's
9 lien on the property, and that was false, wasn't it?

10 A. That is false now. At the time that was based on my
11 belief and understanding at the time.

12 Q. It was false then, wasn't it?

13 A. No, sir, it's false because -- but at the time, based on
14 my --

15 Q. Was there a mechanic's lien on the --

16 MR. SHEHEEN: Your Honor, I ask that he be allowed to
17 finish answering.

18 Q. I apologize. You may finish.

19 A. Thank you, sir. I agree with you that that statement
20 was false retrospectively. At the time that that was written
21 it was our belief and understanding that there was a mechanic
22 lien on the property.

23 Q. My question is simply the statement at the time it was
24 made was untrue, correct?

25 A. There was not a mechanic's lien, as I've answered

1 before, that was ever filed in the county courthouse.

2 Q. Let's go on. It says, the closing on the property is
3 now imperative. Why was it imperative?

4 A. Because we had no way to finance what was a balance of
5 \$350,000 that was owed to contractors based on work that has
6 already been put into the building.

7 Q. So you needed the loan to close so you could pay the
8 construction company.

9 A. The subcontractors and the construction company, that's
10 correct.

11 Q. Okay. And then you said -- looking at this line, for
12 the closing to occur it is critical that both of you sign the
13 documentation that was previously sent to you by e-mail. You
14 represented that to Jamie Curley and to Orville Dyce, did you
15 not?

16 A. That's correct.

17 Q. That it was critical that they sign the documents that
18 you had forwarded to them previously.

19 A. It was critical to save the building, and the only path
20 towards saving the building was to get a loan.

21 Q. Say that again?

22 A. It was critical to pay what we owed and save the
23 building and continue the project for SCENT, otherwise it
24 would not have a place to practice. The only path toward
25 doing that and toward reaching a \$400,000 -- \$350,000 deficit

1 was through a closing, and so what we were saying in that
2 statement was it's critical that we get this done so that we
3 can achieve those things.

4 Q. All right, sir. Would you take a look at Exhibit 301?

5 MR. SHEHEEN: Your Honor, I'm going to lodge an
6 objection for lack of foundation to establish the
7 authenticity and because it hasn't been provided prior to
8 today.

9 THE COURT: Very well. I don't know if he can recognize
10 it or not. I don't know if he can authenticate it or not.

11 MR. CLEVELAND: Right.

12 Q. Would you take a look at Exhibit 301? Do you know who
13 Keiley Taylor is?

14 A. I do.

15 Q. Who is Keiley Taylor?

16 A. Keiley Taylor was an employee of SCENT, and she
17 functioned in the practice as an administrative assistant and
18 as a -- as an administrative assistant.

19 Q. Did Keiley Taylor have the responsibility, perhaps with
20 others, to assemble loan documents and send them to Dr. Dyce?

21 A. I wouldn't say that was her responsibility but Keiley
22 Taylor would help do administrative things within the
23 practice.

24 Q. And this shows you being copied on this e-mail, does it
25 not?

1 A. If you could give me a moment just to reread -- to read
2 this.

3 Q. Sure.

4 A. Yes, that would be great.

5 Q. Of course.

6 A. I've got it.

7 Q. Were you copied on this e-mail?

8 A. Yes, I was.

9 Q. And does this appear to be an e-mail generated from your
10 office to Jamie Curley on or about March the 1st, 2010?

11 A. Yes, it appears to actually be going to Dr. Dyce.

12 Q. Does this appear in the format that would have been,
13 that you're used to seeing from your office sending e-mails
14 to Dr. Dyce?

15 A. I don't know if it tells me anything, the format, but it
16 says Dr. Dyce in the salutation and it ends with Keiley.

17 Q. Does this appear to be a true and accurate copy of the
18 e-mail that was sent to Dr. Dyce?

19 A. I have no reason to think that it's not.

20 Q. Do you have any reason to think it's not?

21 A. I don't have any reason to think it's authentic or not
22 authentic.

23 MR. CLEVELAND: Your Honor, I would offer this as
24 Exhibit 301.

25 THE COURT: All right. Yes, sir.

1 MR. SHEHEEN: Your Honor, I would just renew my
2 objections.

3 THE COURT: Very well. I think he's authenticated it.
4 I think it's relevant. I think it's admissible.

5 MR. CLEVELAND: Thank you, Your Honor.

6 MR. SHEHEEN: Thank you, Your Honor.

7 Q. Now, these are the documents, are they not, that you are
8 referring to in Defendant's Exhibit 43 that's on the screen,
9 correct?

10 A. I can't say that for certain, but it's possible.

11 Q. Okay. And these documents were sent on March 1st,
12 right, these documents being Exhibit 301?

13 A. Yes.

14 Q. And you follow up with an e-mail on March 2nd, the next
15 day, saying it's critical that you and Dr. Dyce sign the
16 documentation that was previously sent to you by e-mail,
17 right?

18 A. Yes.

19 Q. And do you have any reason to think that there were any
20 other documents being referred to other than those that
21 comprise Exhibit 301?

22 A. I don't know that there would be. I think it's
23 reasonable.

24 Q. It's reasonable to assume these are those documents, is
25 it not?

1 A. Yes, if you pulled them off the e-mail, I think that's
2 reasonable to assume, yes. I will say that I don't
3 necessarily perceive that your intention to say that you sign
4 these e-mails -- that you sign this, sign it now as opposed
5 to sign it at the closing the next day.

6 Q. Right. Isn't it saying you've got to sign the documents
7 I sent you at the closing?

8 A. Yes, I don't think it's --

9 Q. Or before the closing in order to make the closing
10 occur.

11 A. Well, at the closing was the intention.

12 Q. Okay. At the closing.

13 A. Something like that, yes.

14 Q. Right?

15 A. I would think so, yes.

16 Q. And if you would look, are there blue signature things
17 on your copy?

18 A. Yes, there are.

19 Q. Good. Would you look at the first blue signature tab?

20 A. I've got it.

21 Q. Is it a guarantee?

22 A. It looks like a guarantee, yes.

23 Q. And whose name does it have at the bottom that has to
24 sign the guarantee?

25 A. Orville Dyce and Robert Puchalski.

1 Q. All right. So the records reflect, Exhibit 301 and
2 Exhibit 43, that on March the 2nd you told Orville Dyce and
3 Jamie Curley that it was critical that both of them sign the
4 documents that were sent to them and that Orville sign the
5 guarantee of the loan, right?

6 A. Yes. There would have been more documents than this to
7 sign though. There would have been the closing documents of
8 course.

9 Q. But one of the documents that you told Dr. Dyce that he
10 had to sign in order for the closing to occur was the
11 guarantee?

12 A. Yes. I would agree that it was part of this, yes.

13 Q. And in fact his guarantee wasn't needed to close this
14 loan, was it?

15 A. His guarantee -- we had an opportunity to go ahead as
16 long as Dr. Dyce consented for me to be able to guarantee the
17 property independent of Dr. Dyce for \$300,000, security
18 retainer.

19 Q. Right. You'd gone to the bank back in February and said
20 Dr. Dyce won't sign the guarantee, can I still borrow the
21 money without him, or words to that effect.

22 A. Yes.

23 Q. And the bank said, let us go take a look at the project,
24 and then Walter long wrote to you.

25 And, Your Honor I'm handing up now Defendant's Exhibit

1 37 which is in evidence, and let me just publish it and then
2 I'll give it to you, Dr. Puchalski.

3 A. Sure.

4 Q. It says, and this is an e-mail from Walter Long to --
5 MR. SHEHEEN: I'm sorry, did you give a copy to him as
6 well, Will?

7 MR. CLEVELAND: No, I haven't. I'm going to.

8 Q. There you go.

9 A. Thank you, sir.

10 Q. This is an e-mail from Walter Long. Who's Walter Long?

11 A. Walter Long works for First Palmetto Savings Bank.

12 Q. Is he the head guy that deals with your loans?

13 A. I wouldn't say he's the head guy, but he deals with our
14 loans.

15 Q. Senior guy, how about that?

16 A. I think that's reasonable, yes.

17 Q. On February 17th he wrote to you, the bank is agreeable
18 to releasing Dr. Dyce as a guarantor, provided that you
19 pledge \$300,000 as additional collateral. That's the
20 business you told us about earlier on direct, right?

21 A. That's correct, yes.

22 Q. My question is, if that was the case -- and Orville Dyce
23 had told you that he wasn't going to sign a guarantee, hadn't
24 he?

25 A. Dr. Dyce said that he wasn't going to -- that he didn't

1 feel comfortable in moving forward with the loan because he
2 needed documentation and because he needed to have that
3 documentation reviewed by Bruce Armon, and when asked why he
4 didn't feel comfortable, is there something -- is it the debt
5 that we're going to be taking on it, is it the guarantee,
6 what are you uncomfortable on, because I've searched this
7 other way, I showed him that there's -- I tried to look for
8 another way of doing it so --

9 Q. Dr. Puchalski, do you have anything in writing that
10 suggests in any way that you told Dr. Dyce that SCENT could
11 proceed with the loan without his endorsing the loan, do you
12 have anything in writing that does that?

13 A. I don't know if there's anything in writing but
14 there's -- obviously I wouldn't have done it if there wasn't
15 an intention to try to achieve the ultimate goal which was to
16 close on the property.

17 Q. You could have closed the loan on March 3rd, could you
18 not?

19 A. I could not.

20 Q. Why not?

21 A. Well, that's the -- that's the big misunderstanding I
22 think at one point, so the bank was -- the more we put off
23 these closings the more suspicious the bank became with -- I
24 made the kosher comment earlier, but with the company in
25 general, and so they wanted to know what was going on.

1 They -- at this point this would have been closing No. 3, so
2 they have had two closings where they've prepared paperwork
3 and there has been no closing, and now I'm asking for some
4 way of doing something around Dr. Dyce, so they start looking
5 into things a whole lot more than they were before. They
6 start looking at our loans on the land at this time, and they
7 also start looking through corporate documents. They asked
8 that everything be sent to them, and so we gave them
9 corporate documents, and they had an issue with the articles
10 of incorporation of SCENT Land. If I may, can I refer to an
11 exhibit?

12 Q. Well, I asked you why you needed Orville Dyce to sign
13 anything at the closing.

14 A. Well, I'm trying to explain that to you now.

15 Q. Tell me what it is you think he needed to sign.

16 A. So they found a document that had Dr. Dyce as the
17 manager of SCENT Land Holdings, and this was signed in
18 September of 2008 and it had not been -- it was the article,
19 and so they, after this, came over and said, no, you need to
20 have Dr. Dyce present at this -- in other words, he's a party
21 to this. It can't just be Jamie, it can't just be Amy and it
22 can't just be Bob Puchalski. Orville Dyce needs to be
23 present there, and they started exerting some pressure.

24 Q. Did you have anything in writing at all from the bank to
25 support that assertion?

1 A. I had phone calls from them.

2 Q. I didn't ask you that. Did you have anything in
3 writing?

4 A. I don't know that we have anything in writing, no, sir.

5 Q. Did you ever ask the bank for a set of loan documents
6 that would not have Orville as a guarantor?

7 A. That was my hope here was to go ahead and find a way
8 around this obstruction and to achieve a closing.

9 Q. You were told on February 17th that the bank did not
10 need Dr. Dyce as a guarantor on the loan, correct?

11 A. Provided I could come up with \$300,000 in initial -- in
12 additional collateral.

13 Q. Well, you did that, didn't you?

14 A. By -- in two and a half hours.

15 Q. Excuse me.

16 A. In two and a half hours.

17 Q. Do you have the bank memo which is Exhibit 283?

18 A. Is that in the book by chance?

19 Q. No, it's not in there.

20 Let me hand this up. It's in evidence, Your Honor, the
21 next Exhibit, 283.

22 THE COURT: Okay.

23 MR. CLEVELAND: Thank you, Your Honor.

24 Q. Dr. Puchalski, this is the bank's February 10th, 2010
25 loan approval, loan summary memorandum, that's in evidence,

1 and if you look at the first page -- can you put up 283?

2 Yes, at the first page the bank determines that the only
3 guarantor that's going to be needed on the loan is you,
4 right?

5 A. It is -- on the bottom it says, the hard copy of
6 guarantor Puchalski --

7 Q. Excuse me?

8 A. I'm sorry. If I may just read this for just a second.

9 It says, Dr. Puchalski will be the sole guarantor for
10 this loan.

11 Q. Say that again?

12 A. It says Dr. Puchalski will be the sole guarantor for
13 this loan.

14 Q. Right. Did you ever schedule a closing with the bank to
15 follow through on this approved request that Dr. Dyce did not
16 have to participate?

17 A. No. We were not able to do that, sir.

18 Q. And you were told back in February that you would have
19 to pledge \$300,000 in additional collateral, correct?

20 A. Actually, what I recall was they said that we'd have to
21 come up with \$300,000 to put into a CD into First Palmetto.

22 Q. Dr. Puchalski -- would you put up 283.

23 Dr. Puchalski, I'm handing you Exhibit 283. That's in
24 evidence.

25 A. I have it.

1 Q. Turn to page -- is it 186, Your Honor, the bottom
2 right-hand corner?

3 THE COURT: Yes.

4 Q. 186, please. All right. This is the note that you
5 ultimately signed, right? That's your signature down there?

6 A. Yes.

7 Q. And it's hard to read, but if you look on yours, do you
8 see where the security for the loan includes a control
9 agreement dated February 17th, 2010?

10 A. I do.

11 Q. So the bank said, if you sign this control agreement
12 that we prepare dated February 17th, we'll make you the loan
13 where you're the only guarantor on the loan.

14 A. No, sir. I'm trying to explain to you that there was an
15 issue where the bank, number one, required \$300,000 into a CD
16 at First Palmetto; number two, they found articles of
17 incorporation for SCENT Land Holdings that had Dr. Dyce's
18 name on there as manager and they felt as though he needed to
19 be there as well.

20 Q. Dr. Puchalski, are you denying that you executed and
21 gave the bank a control agreement dated February 17th, 2010?

22 269, please. Thank you.

23 Dr. Puchalski, I'm going to hand you Exhibit 283, page
24 269. Now, what's the date of this document?

25 A. 2/17/2010.

1 Q. All right. And then what's the title of it?

2 A. Control agreement.

3 Q. Control agreement. And it was signed when?

4 A. It was signed by Amy on the 23rd of March, 2010.

5 Q. Amy Puchalski?

6 A. Yes.

7 Q. And what that is is a securities account that the bank
8 is requiring a pledge of security to secure your loan of a
9 million 7, is it not?

10 A. I'm sure if I read this, that's what it would say, and
11 it makes sense that that would be the case, yes, sir.

12 Q. Going back, did you ever send any loan documents to
13 Orville that reflected the agreement the bank had
14 communicated to you that it would close the loan without
15 Orville being an endorser on the loan?

16 A. So there was no communication about that because we
17 could not do that and so the answer to you is no and if I may
18 add that there was not a path allowed for us to do this.

19 MR. CLEVELAND: Your Honor, Exhibit 283 is in evidence.

20 Q. I've only got one of these but is it your -- if I were
21 to represent to you that there is no indication whatsoever in
22 the bank's file on the closing of this loan that it changed
23 its mind about accepting you as the sole guarantor, how would
24 you explain that?

25 A. Well, I would explain that by saying that at one point

1 we got a call from the bank --

2 MR. SHEHEEN: Your Honor, I'm going to object to that
3 question because there is a lot of documents in the file
4 including the documents that were e-mailed to Dr. Dyce where
5 the bank produces documents saying they want Dr. Dyce to sign
6 as guarantor, so there is things in the file to that effect,
7 so I object to the loaded question.

8 THE COURT: I understand. Very well. I don't know
9 what's in the loan file, and so if he wants to look at the
10 loan file, we'll let him look at the loan file. I'm not
11 going to tell you to change your question because I don't
12 know what's in the loan file. In other words, if he wants to
13 look at the loan file, we'll let him look at the loan file.

14 MR. CLEVELAND: Well, Your Honor, the loan file is 455
15 pages. I think what I would submit is that I think you
16 understand the point we're making and I think the parties can
17 brief to you what's in the loan file to the extent that this
18 testimony is relevant to --

19 THE COURT: I understand.

20 MR. CLEVELAND: If that would be all right.

21 THE COURT: Sure.

22 Q. Who was it at the bank specifically that had this
23 conversation with you that said they had -- are you
24 testifying that the bank reneged on its commitment to close
25 the loan without Orville Dyce as a guarantor of the loan?

1 A. I'm telling you and my testimony is absolutely that the
2 bank had increasing amounts of suspicious -- became
3 increasingly suspect that I was closing or missing loan
4 closings. At one point, and it may have been after the third
5 closing, we realized that, number one, they wanted to know
6 why -- this account that we're referring to is the same
7 account that was leveraged as a -- what's it called? It was
8 leveraged as an account to pay for the syndication, so they
9 wanted a guarantee on -- from Orville as an owner of SCENT on
10 the syndication note, if that makes sense.

11 Q. You're saying this occurred because you asked the bank
12 or advised the bank that Orville didn't want to be a
13 guarantor; is that right?

14 A. Yes. I advised the bank that there was an issue with
15 this and we were trying to find ways to come around that. We
16 missed --

17 Q. When you advised the bank of that, the bank wrote you
18 and said, that's fine, you can close the loan without Orville
19 Dyce as a guarantor, did it not?

20 A. No, the bank said, we want paperwork, and then they,
21 when they saw this paperwork for the articles of
22 incorporation for SCENT Land, they began to question that
23 paperwork, and then they began to question the note from the
24 margin account that's referenced here in this control
25 agreement and whether or not it was guaranteed personally by

1 the parties at SCENT. So the bank wanted this account loan
2 to syndication personally guaranteed by Dr. Dyce.

3 Q. Dr. Puchalski, let's go back to Defendant's Exhibit 37.
4 Thank you. Would you blow up the bottom. Mr. Long said to
5 you, I have instructed William Cox to proceed with the
6 closing today at noon. Let me know if this time does not
7 work for you. Now, are you telling me that in between the
8 time -- this is 9:31 in the morning. You're telling me that
9 after having approved this request in its internal file,
10 having made arrangements with you to get a control agreement
11 dated February 17th, 2010 and having told you in writing that
12 they were ready to proceed with the closing today at noon,
13 you're telling me the bank reneged on all that and said no,
14 we've got problems between then and noon?

15 A. No, sir, I'm not telling you that.

16 Q. Why didn't you close the loan at noon?

17 A. Because Dr. Dyce and Jamie didn't show up for the
18 closing.

19 Q. What did they need to be at the closing for?

20 A. That's what I'm trying to tell you.

21 Q. Tell me this, what documents did --

22 MR. SHEHEEN: Your Honor, Dr. Puchalski was answering.

23 MR. CLEVELAND: I'll withdraw that question.

24 Q. Let me ask you this question, what documents --

25 A. I'm just telling you what they told me.

1 Q. What documents was it necessary for Orville Dyce to sign
2 at the closing of a loan that is not going to have him as a
3 guarantor or endorser of the loan?

4 A. They sent over the documents that he would need to sign
5 but because --

6 Q. Where are those documents? Where are the February 17th
7 loan closing documents that have Orville not being on the
8 loan consistent with what the bank was telling you in this
9 letter?

10 A. You must have them in your report or they're -- I don't
11 know where they are, but if this is what happened at that
12 time, I will tell you that I was prepared to go to this
13 closing. There were five separate closings that I was
14 prepared to go to and five separate times that Orville and
15 Jamie didn't appear. It's not that they didn't look at the
16 records. They didn't even appear to look at the records.
17 They weren't even there. So I can't tell you what the bank
18 was willing to allow at this particular closing, but I can
19 tell you, as things went on further and further and I kept
20 asking for strange requests like this or we kept missing
21 closings, they became more and more suspicious about what was
22 going on.

23 Q. Let's go back to Exhibit 19, please, Plaintiff's Exhibit
24 19. You wrote in this resolution terminating Dr. Dyce that
25 the other shareholder is also preventing the closing of the

1 loan -- can you magnify that? Thank you -- preventing the
2 closing of the loan regarding partially constructed building.
3 If we believe what Mr. Long at the bank says, then this is
4 false, isn't it?

5 A. No, sir, it's not, and I once again reiterate that I
6 think your contention is incorrect. Dr. Dyce and Jamie did
7 not show up for that loan closing. Had they showed up for
8 that loan closing at noon on that date, perhaps we would have
9 been able to close. I know I was trying to do everything we
10 could, but he would have had to execute the documents that
11 they had for him.

12 Q. What documents did Dr. Dyce need to sign?

13 A. I don't know what those documents were during that
14 closing, but the contention of the bank was that Dr. Dyce was
15 a -- had some role in the closing because of the articles of
16 incorporation that were signed on -- somewhere in September
17 of 2008.

18 Q. And do you have anything in writing from the bank to
19 support that statement?

20 A. I don't have anything from the bank that refutes it or
21 supports it, and I do have plenty of evidence that Dr. Dyce
22 wasn't at that closing and neither was Jamie.

23 Q. Now, the closing went ahead on May 10th, some 60 days
24 after this.

25 A. I don't believe that's the case. I believe the closing

1 was prior to May 9th. The document you just showed me was
2 May 5th.

3 Q. I apologize, May 5th, so it's 55 days after the
4 termination of Dr. Dyce, right?

5 A. Yes, 55 days, yes, approximately.

6 Q. You terminated Dr. Dyce so you could proceed with the
7 loan closings, right?

8 A. No, sir. Dr. Dyce was terminated because he was
9 stalling SCENT. We were in a place where we could not move
10 and function. We were able to close on this note on May 5th,
11 prior to Dr. Dyce's departure, because Jamie was expelled
12 from SCENT Land Holdings for failure to meet a capital call.

13 Q. Was the termination of Dr. Dyce related at all to
14 getting the loan closed?

15 A. So insofar as SCENT as a company was the expected tenant
16 in the new building and would not have a place to practice
17 medicine in Kershaw County had that building not been
18 complete, then yes, Dr. Dyce was a party to that process.

19 Q. I didn't ask you that. I asked you if you terminated
20 him -- was one of the reasons that you terminated him because
21 you were having trouble closing the loan?

22 A. That was one of many reasons, yes.

23 MR. SHEHEEN: Your Honor, I'm going to object to the
24 next -- have you gone to 169, Will?

25 MR. CLEVELAND: Yes.

1 MR. SHEHEEN: Your Honor, this is a document that has
2 not been admitted into evidence because it's attorney-client
3 privileged that was inadvertently obtained during discovery
4 and it's a communications between me and SCENT's managing
5 partner and the accountant for SCENT, and I have asserted
6 attorney-client privilege anytime it's been, you know, tried
7 to be entered, introduced, and so I would object.

8 THE COURT: Okay.

9 MR. CLEVELAND: Your Honor, the part that I'm offering
10 is the part at the bottom --

11 MR. SHEHEEN: Your Honor, I'm objecting to publication,
12 production, anything. It's attorney-client privilege.

13 MR. CLEVELAND: I think the record -- one, the privilege
14 was waived because they sent it to the accountant. There's
15 no client-accountant privilege.

16 MR. SHEHEEN: Your Honor, this is a communication
17 between me and the managing shareholder of SCENT. It
18 involves the accountant, who is the accountant for SCENT, in
19 a matter that's relevant to things that he's involved in with
20 SCENT, and Your Honor understands that, one, he's an agent of
21 SCENT, the accountant is an agent of SCENT, No. 2 he's a
22 necessary party to the discussion that's going on here so I
23 can understand as the attorney, and there's a long line of
24 case law that says an attorney is allowed to use necessary
25 parties to interpret and interact with a client, you don't

1 waive the privilege.

2 THE COURT: Let me read it and then I can tell you
3 because there are three rules, number one, it's got to be a
4 communication from a client to an attorney for the purpose of
5 giving -- purpose of receiving advice from counsel and
6 communication from the attorney to the client giving the --
7 giving the advice, and that's what the attorney-client
8 privilege is. It's more limited than lawyers think it is.

9 MR. CLEVELAND: All we care about admitting is the part
10 after the warning in the last full paragraph.

11 MR. SHEHEEN: Which is clearly to me. It's
12 communications from the client to me, clearly.

13 MR. CLEVELAND: That's what we -- that's the relevant
14 part.

15 THE COURT: Okay. This is the order of the Court, and
16 let me go through the elements again so you'll understand my
17 ruling. Number one -- well, perhaps I should ask this
18 question first: The header on the document indicates that it
19 came from Austin Sheheen, and I gather that's because you
20 received it electronically from Austin Sheheen.

21 MR. CLEVELAND: I don't think so. I believe he would
22 have printed it out from his e-mail system and then produced
23 it, but Vince would know that better than I.

24 THE COURT: Okay. I'm just taking it's the way that it
25 electronically was produced, and here's -- the

1 attorney-client privilege exists when there is information
2 that is given to an attorney for the purpose of receiving
3 advice and then the advice that is then given to the client.
4 Other than that, the attorney-client privilege doesn't apply.
5 It would apply, though, if information, say from someone's
6 expert or someone's accountant, is given to counsel for the
7 purpose of receiving advice and it's part of that
8 communication. The mere fact that a lawyer is in the room in
9 and of itself doesn't -- or on the transmission in and of
10 itself doesn't protect the communications. It protects some
11 of it but not all of it. With that in mind, this is the
12 Court's ruling: It's easy to tell you what is not protected
13 by the attorney-client privilege. What is not protected by
14 the attorney-client privilege is the paragraph that begins,
15 last comment, because that is a specific directive by Dr.
16 Puchalski to Mr. Sheheen to do certain work. There is no
17 connection that that's being done for the purpose of
18 receiving legal advice. That's just a directive, do this,
19 perform this task as an accountant. Now, the last line.

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

21 THE COURT: The last line, I will call Austin in the
22 a.m., is not attorney-client privilege. The rest of the line
23 is because the rest of the line is expressing to his lawyer
24 what he is concerned about, and that is attorney-client
25 privileged, okay?

1 MR. SHEHEEN: Your Honor, just for a point of
2 clarification, I just want to make sure I understand, you
3 said the last paragraph?

4 THE COURT: Last comment.

5 MR. SHEHEEN: The one that starts, last comment.

6 THE COURT: Yes.

7 MR. SHEHEEN: Where it's addressing me?

8 THE COURT: You're exactly right. Thank you for
9 pointing that out. For whatever reason I had Austin in my
10 head. No, I'm sorry, that is protected.

11 MR. SHEHEEN: Thank you, Your Honor.

12 THE COURT: I'm sorry, that is protected. For whatever
13 reason in my ahead I read Austin.

14 MR. SHEHEEN: We get confused, we look so much alike.

15 THE COURT: Would you all please change your names for
16 me? Yes. Now, the last comment, no, that's Vincent, that's
17 you are to confirm that. No, that's absolutely
18 attorney-client privilege because that is a directive to you,
19 so I apologize for that. I will call Austin in the morning
20 is not protected. The rest of it is.

21 MR. SHEHEEN: Thank you.

22 THE COURT: Yes.

23 MR. CLEVELAND: Just for clarification, starting with
24 the word -- I just want the record to be clear -- starting
25 with the word warning to the end of the paragraph, what is

1 your ruling on that?

2 THE COURT: Yes, it's attorney-client privileged.

3 MR. CLEVELAND: Thank you, Your Honor. Your Honor, let
4 me state for the record this is Exhibit 169.1.

5 THE COURT: Yes.

6 MR. CLEVELAND: And it's in the group of exhibits that
7 are in evidence, and so I suppose the appropriate thing is to
8 alert our court reporter to that fact and have it be put in
9 an envelope or something so it's preserved.

10 MR. SHEHEEN: It was not admitted into evidence per our
11 previous agreement.

12 THE COURT: Yes. I'm going to put it in an envelope and
13 pop it in and that will be great, and I'm going to give it
14 back to you because I don't want it.

15 MR. SHEHEEN: Thank you, Your Honor.

16 MR. CLEVELAND: Thank you.

17 Q. Dr. Puchalski, at the loan closing on May 5th SCENT
18 borrowed \$1.7 million, right?

19 A. At the loan closing we borrowed up to \$1.7 million. It
20 was a construction loan.

21 Q. And that was part of a construction loan to finish
22 construction of the Lugoff office building.

23 A. Yes, sir.

24 Q. And in shortly or before the loan closing during the
25 fall and winter of 2009-2010 you had taken over \$700,000 of

1 SCENT's money and loaned it to SCENT Land so that it could
2 get under way with the construction before the loan closed,
3 had you not?

4 A. I wouldn't characterize it as I, so SCENT made a loan to
5 SCENT Land Holdings with Dr. Dyce and Dr. Puchalski fully
6 aware of this loan in order to try to cover the expenses that
7 SCENT Land Holdings was incurring until such time as a loan
8 could be closed with representations at least initially from
9 Dr. Dyce and Jamie that there was just some issues with
10 timing and that we were going to get right in there and get
11 it closed.

12 Q. And when it was closed, shortly after that SCENT Land
13 paid back SCENT over \$725,000.

14 A. It paid back the loan that it had, yes, sir.

15 Q. And that was in the amount of over \$725,000.

16 A. I think that's approximately correct, yes, sir.

17 Q. And once that was done, by the time Dr. Dyce's
18 termination was effective, you cut yourself a check for a
19 quarter of a million dollars.

20 A. There was a distribution sometime in May, absolutely. I
21 would point out, if I may --

22 Q. I just want a yes or no and then you can explain.

23 MR. SHEHEEN: Your Honor, he said there was, and he can
24 explain his answer.

25 THE COURT: Yes, you can.

1 THE WITNESS: Thank you.

2 THE COURT: And I took that as a yes.

3 THE WITNESS: Yes, Your Honor.

4 Q. Here's the check we're talking about, right?

5 A. Yes, sir.

6 Q. Now, would you like to --

7 MR. SHEHEEN: Your Honor, I'd ask that he be allowed to
8 explain his answer. He should be able to explain whatever it
9 was he was going to say.

10 MR. CLEVELAND: I agree with that. I was offering him
11 an opportunity to do that.

12 Q. Would you like to explain your answer?

13 A. Yes. Some of that money was a \$170,000 capital call
14 that Amy made to SCENT Land Holdings that was applied.

15 Q. Now, explain that.

16 A. There was a capital call on SCENT Land Holdings, and so
17 Amy made the capital call, Jamie did not. That money was
18 then taken and applied toward the debt that SCENT Land
19 Holdings had with its contractors.

20 Q. Okay. So your wife responded to the capital call and
21 contributed \$170,000?

22 A. Yes, sir.

23 Q. And then as soon as the loan closed she got that paid
24 back.

25 A. She did indeed.

1 Q. And if Jamie Curley had contributed the money, she would
2 have gotten paid back too.

3 A. Had she still been with SCENT Land Holdings and
4 fulfilled her obligations, yes.

5 Q. All right. I saw up on your damages chart that you were
6 deducting money that Jamie Curley didn't pay because of the
7 capital call, right?

8 A. No, sir.

9 Q. Excuse me?

10 A. So on the bottom, yes, because --

11 Q. That's what I thought.

12 A. But, Mr. Cleveland, if I may answer, that was because
13 Amy's capital call contribution of 170 was applied to the
14 number at the top. In other words, the difference, if you'd
15 like to go back to the slide, I'll be happy to explain it a
16 little more fully, but if you count the 170 on one side,
17 you've got to count the 170 on the other. What's good for
18 the goose is good for the gander.

19 Q. Do you contend now that Jamie Curley owes SCENT Land any
20 money because of not responding to the capital call, yes or
21 no?

22 A. Yes.

23 Q. Yes. Do you contend that your wife owes any money?

24 A. No.

25 Q. Well, they both contributed the same amount as of now,

1 which is zero, right?

2 A. No, that's not true, Amy contributed it and then it was
3 refunded. Jamie failed to contribute it and as departing
4 owner of SCENT Land Holdings still owes it.

5 Q. So it's your contention that Jamie Curley still owes
6 \$170,000, is that your contention?

7 A. Our contention is that her owing 170 is applied against
8 anything that were to be used in a buyout formula if you were
9 to use Section 5.5B to calculate interest and if you ignored
10 Section 6.4 which clearly states that the interest doesn't
11 need to be paid out.

12 Q. Okay. Let's move on. I'd like to talk about when Dr.
13 Dyce became a shareholder, and I heard your testimony that
14 you contend that it was on July 16th, 2008, right?

15 A. That's correct, sir.

16 Q. Do you concede that Dr. Dyce was a shareholder pursuant
17 to an agreement that he had with you in August 2007?

18 A. No, I do not.

19 Q. All right. Well, let's look at the exhibit, Exhibit 6,
20 which is the bill of sale. Would you blow that up?

21 Now, let me ask you again, didn't you agree in August of
22 2007 that Dr. Dyce was a shareholder as of that time at that
23 time?

24 A. No. I contend and my testimony is that this
25 transaction, this business transaction wasn't consummated.

1 In other words, if I were to go to Starbucks and I were to
2 buy a coffee and I were to go ahead and -- and they were to
3 write up a receipt as I was paying them and I had the receipt
4 but I never paid them or the check that I gave them was no
5 good, then I don't know that that transaction necessarily
6 goes through. I don't know anything about the law and what
7 that transaction might mean, but that is the way I think
8 about it. So the transaction wasn't consummated. In other
9 words there was no \$50,000 that was ever paid. There won't
10 be any evidence of any \$50,000 that was paid at this time
11 because he never paid it, Dr. Dyce never paid one cent to
12 South Carolina ENT, SCENT Land Holdings or any precursor at
13 any point with the exception of a check that he signed over,
14 that's it.

15 Q. Next page. All right. I get your distinction that he
16 didn't pull money out of his pocket and pay it to you, but
17 what he did do was Dr. Dyce had a contract that said he would
18 work for you as an employee for two years, and then if you
19 liked him you could make him a partner as of March 1st, 2007,
20 right?

21 A. No. It says that he could become an owner as of March
22 1st, 2007 subject to the provisions in the contract for a
23 buy-in, a traditional buy-in, and I can read those to you.
24 They're on page 4 of that contract.

25 MR. CLEVELAND: Your Honor, the contract is -- I think

1 it's 2, Exhibit 2?

2 THE COURT: Yes.

3 Q. Go over to page 3.

4 A. If I may --

5 Q. No, just a minute. All right. Starting on the bottom
6 of page 3 of Exhibit 2, excuse me, on page .005 of Exhibit 2
7 it says, contract term, as previously mentioned, the
8 agreement shall be for a period of two years. At least three
9 months before the completion of the term of this agreement
10 Kershaw ENT shall notify physician in writing whether
11 physician shall become an equal shareholder of Kershaw ENT
12 effective the day after the completion of the term of this
13 agreement or sooner if agreed to by the parties. That's what
14 it says, right?

15 A. Yes, sir, but that's not completely what it says. If I
16 may, the next sentence says, Kershaw ENT's notice to
17 physician shall include the cost and terms of physician's
18 purchase of shares of Kershaw ENT. The physician shall be
19 able to purchase the shares of stock of the corporation,
20 meaning a tax-advantaged transaction toward myself, at the
21 fair market value of the underlying assets, accounts
22 receivable and reimburse an equal portion of the expenses
23 incurred for advertising by Kershaw ENT from March 5, 2005
24 until the physician becomes a shareholder, and that was some
25 of that prepaid that we were discussing earlier.

1 Q. Right. It provided he had to buy in to be a
2 shareholder.

3 A. That's exactly right. That's not what you said in your
4 question.

5 Q. Now, and you've described how he couldn't afford to buy
6 in, didn't want to borrow the money, couldn't afford it,
7 right?

8 A. Dr. Dyce was plenty capable of getting a loan, but he
9 did not wish to get that debt or pay that interest, and so he
10 spoke to his attorney in Philadelphia to come up with an
11 alternate path.

12 Q. Let's go to Exhibit 5 now, page 2. The alternate path
13 was a financial arrangement that you arranged whereby money
14 that would have been paid to him were he a partner is not
15 paid to him but rather is paid to you to fund the buy-in,
16 right?

17 A. I agree with most of your comment. It's to time the
18 buy-in, not to fund it.

19 Q. What's the word you used?

20 A. To time it.

21 Q. Time it, what does that mean?

22 A. So in order for this process B to work, you have no idea
23 what the productivity of the practice is going to be in the
24 next year or two, you have no idea what the tax rates are
25 going to be, and so it's somewhat of a fluid scenario.

1 That's why there is nothing outlining it. And so what this
2 represents is, as you said, the amount that would have gone
3 to him had he done a traditional buy-in, but it's not the
4 purposes of funding his buy-in, it's actually to time it. So
5 we have to know how much money is actually coming to
6 Puchalski that would have gone to Dyce so that we can apply
7 it to the initial 800 and to the accounts receivable prior to
8 March 1st, 2007 and also the cash equivalents in the bank and
9 this --

10 Q. I don't want to get into all that. I just -- isn't this
11 document --

12 Let me ask it this way: Didn't your staff prepare this
13 document under your supervision?

14 A. Yes, we prepared that document.

15 Q. And doesn't this reflect that on March the 7th \$21,000
16 that would have gone to Dr. Dyce, were he a partner, is paid
17 to you or distributed to you or advanced to you or whatever
18 word you want to use?

19 A. The answer to your question is yes, this does
20 demonstrate on March 7th that 21,000 would have gone to him
21 had he become a shareholder through the traditional path A in
22 2007 March.

23 Q. What word have I been using? Have I been saying
24 partner? I don't mean to say partner if I did.

25 A. I've learned over the years that I've got to be very

1 careful about that word.

2 Q. Right, I agree with you. All right. And is it
3 correct -- who kept this, was it Theresa Williams?

4 A. Yes. Theresa or I would keep this at the time, and it
5 was something that we would be updating, but yes.

6 Q. When it was updated, was it updated to the document that
7 was on the computer and saved so there's only one version of
8 this document on your computer?

9 A. It was one document. It was updated.

10 Q. Right, but if you were Nelson Mullins, you would create
11 a million versions of that document. Other people don't do
12 that. So my question is -- my question is isn't the
13 testimony in the case that --

14 Dr. Puchalski, there was some tension, was there not, in
15 the Gunnlaugsson lawsuit because there was a charge that or a
16 claim or whatever that these buy-in sheets were not produced
17 until late in the process, right?

18 MR. SHEHEEN: Your Honor, I'm going to object to what
19 discovery speaks for in the Gunnlaugsson case because it's
20 just not relevant. I don't think that's really where he's
21 going, but I just want to object to make sure you are --

22 MR. CLEVELAND: I'm not suggesting anything wrong
23 happened. I'm just --

24 Q. Isn't the reason you located --

25 THE COURT: I'll give him a little bit of leeway. It's

1 cross. I'll give him a little leeway. Go ahead.

2 Q. You located these buy-in sheets somewhat later in the
3 process in the litigation than you did earlier documents;
4 isn't that fair?

5 A. I would tell you that there was -- it was very little
6 that wasn't contentious or --

7 Q. I didn't ask that.

8 A. -- in the Gunnlaugsson case.

9 Q. I just asked you isn't it true that this set of
10 documents was found a little bit later because there were no
11 hard copies around?

12 A. I'll agree with your statement. I don't --

13 Q. Okay. Thank you. And when you located it on the
14 computer, isn't the buy-in sheet for Dr. Dyce the document
15 that we're looking at now? In other words, this was the last
16 version that was ever prepared of the buy-in sheet.

17 A. My answer to that would be no, it's not the last one,
18 but it is part of the process.

19 Q. Have you produced a buy-in sheet for Dr. Dyce that is
20 dated later than January 23rd in terms of showing the
21 transfer of funds?

22 A. So I don't know what we've produced or what we had, but
23 I know that the process was not complete at this point and
24 this only represented stage one of the process. So if you
25 got through this process -- Your Honor, we mentioned that

1 there was a milestone. Getting through this process -- I can
2 tell from your face that it's very -- it's a challenging
3 document, but if you can get through that, it's the same
4 thing. I mean, it's a complicated document, but this is the
5 stage one.

6 THE COURT: You're not reading anything on my face.

7 THE WITNESS: I'm sorry. I apologize.

8 THE COURT: Pretty simple.

9 THE WITNESS: Okay.

10 THE COURT: The question was is there a document that is
11 a later document than the one that is on the screen. It was
12 pretty simple. And that's a yes or no and you can explain
13 your answer. The question of Mr. Cleveland that I am
14 interested in -- Mr. Cleveland, excuse me, it's important --
15 is there a buy-in sheet that shows a date after -- what is
16 that, January the 23rd -- January the 23rd; and that's a yes
17 or no.

18 THE WITNESS: The answer is yes, there would have been
19 one. I do not know whether or not we have one or whether or
20 not it's in the exhibits, but the answer would be yes, that
21 there would have been one.

22 THE COURT: Okay.

23 Q. The question is does one exist now.

24 A. There's -- I don't know whether or not there's something
25 in the exhibits that has something more recent than this. I

1 know that this was not the final one and I know that the
2 process -- that this would only represent the first
3 milestone.

4 Q. I want you to assume that the evidence in this case and
5 the testimony is that Theresa Williams went and looked on her
6 computer and found the one buy-in file for Dr. Dyce, printed
7 it out, and that's this, and I want you to further assume
8 that the evidence in the case --

9 MR. SHEHEEN: Your Honor, I object --

10 MR. CLEVELAND: Let me finish my question, please, then
11 I'll stop.

12 MR. SHEHEEN: Okay.

13 MR. CLEVELAND: I want you to further assume that her
14 practice was to update this particular document so that there
15 would only be one, and each time she updated it the newer
16 version would be saved, and thereby she kept track in that
17 method of these payments over time.

18 THE COURT: Okay. Now stop. Yes, the objection.

19 MR. SHEHEEN: Your Honor, I'm going to object because it
20 assumes facts not in evidence and poses a hypothetical to a
21 lay witness. Also, Theresa Williams wasn't deposed in this
22 case, so they could have deposed her, they could have deposed
23 Dr. Puchalski and asked this.

24 MR. CLEVELAND: Let me come at it a different way.

25 THE COURT: Okay.

1 Q. Dr. Puchalski, are you aware of anything in writing that
2 exists today that shows that the process of allocating money
3 that would have been due to Dr. Dyce had he been a partner
4 was being paid to you?

5 A. The ledger for South Carolina ENT would certainly be a
6 written document, and I would offer that as far as finances
7 go. As far as other documents, I would reference the
8 shareholders agreement of July 16th, 2008 as another
9 document. I don't know what other documents exist. I will
10 tell that you there were numerous computations that needed to
11 occur to get this from where you are now on this sheet to
12 July 16th, 2008, and I will be happy to discuss those with
13 you so that you have a more accurate representation for the
14 process by which Dr. Dyce became a shareholder of SCENT.

15 Q. I thought you told Mr. Sheheen that there's nothing in
16 writing that describes how this process is supposed to work;
17 is that correct?

18 A. There's nothing that can describe how much money there
19 will be because you don't know what the performance of the
20 practice will be, nor do you know what the tax rate will be
21 at the end, and I stated those two contentions. If there was
22 some sort of a challenge within the practice and we weren't
23 able to go ahead and issue distributions on October 16th of
24 21,000, then obviously that would interrupt any schedule, and
25 I'll just point out that this is precisely the issue that we

1 ran into in 2009 when we were getting to the point where we
2 were trying to issue distributions that we weren't actually
3 earning.

4 Q. Isn't it true that once enough money had been
5 transferred to you under this process and whatever extension
6 of the process you claim to have existed that sooner or later
7 that was the method by which Dr. Dyce was going to have
8 satisfied his financial commitments to you to become a
9 shareholder?

10 A. I just disagree with something in your question. It's
11 not just whatever I thought it was. It was what we
12 contemplated and it was what was in the contract. Even in
13 the 2007, August 2007 agreements which were not consummated
14 it was clear that cash and AR still needed to be addressed
15 so -- but the answer to your question, I will say this, that
16 after this threshold or this milestone was reached and after
17 you addressed the other issue with tax differential, cash and
18 AR that, yes, at that point, once the net proceeds that came
19 to Dr. Puchalski equaled the net proceeds that would have
20 come to Dr. Puchalski under traditional buy-in for those
21 terms, then that's when Dr. Dyce was admitted as a
22 shareholder.

23 Q. Dr. Puchalski, the reason I put this up and asked you
24 about that is that this shows that between March 7th and
25 January the 23rd at least 504,000 had been -- of money that

1 would have been paid to Dr. Dyce were he a shareholder was
2 paid to you.

3 A. I would agree to that.

4 Q. Now let's go back to Exhibit 6. And can you blow that
5 up, the first whereas in paragraph No. 1?

6 Now, I thought you said earlier that as of August 2007,
7 when you executed the bill of sale, that Dr. Dyce had not
8 paid one dime for his shares?

9 A. That is absolutely the case.

10 Q. Okay. But you concede that you had received 504,000 --
11 not 504,000 because it went past August but many hundreds of
12 thousands of dollars of money that would have been paid to
13 Dr. Dyce but that had been paid to you in furtherance of his
14 commitment to buy in for his shares, right?

15 A. No, Mr. Cleveland, and actually I think this is
16 deserving of some more attention. This is the challenge that
17 I think your side doesn't -- may not fully understand this.

18 Q. Explain it to me.

19 A. So there is no transfer of money in the other document
20 whatsoever, all that document is is a timing sheet, a sheet
21 that seeks to answer the question of how much money does Dr.
22 Puchalski receive that would have, and that's what you had
23 asked, the question, that would have gone to Dr. Dyce, and at
24 what point will that sum, net taxes, equal the sum, net
25 taxes, of a traditional buy-in in February of 2007 that

1 included \$800,000, plus AR, plus cash and prepaid expenses,
2 and so there is no transfer of money. Dr. Dyce has not paid
3 anything. Dr. Dyce is not a shareholder at this point. All
4 we're seeking to do is provide a path so that you can see
5 what is coming in to Dr. Puchalski so that you can answer
6 that important question for comparison. Does that make
7 sense?

8 Q. No, but let's move on. In March of 2007 -- I'm sorry,
9 August of 2007 you had been at this process that Exhibit 5
10 reflects since March, right?

11 A. Actually, that's not the case.

12 Q. What is the case?

13 A. Once we realized in August of 2007 that we could not
14 consummate this contract and when Dr. Dyce was offered the
15 opportunity to go out and get a loan for the portion that
16 remained and would not do that, then we started going through
17 and trying to reconstruct what would have happened, so there
18 was -- that's when the sheets were created, and then they
19 were moved forward, so the sheets were created in such a way
20 to try to identify what would have happened, had Dr. Dyce
21 been an owner, how much of that then came to Dr. Puchalski
22 and at what point does the net of that amount equal the net
23 of the amount in traditional buy-in in February of 2007.

24 Q. Are you saying then that in April of 2007 Dr. Dyce did
25 not know that \$21,000 every two weeks was being paid to you

1 that would have come to him were he a shareholder? Are you
2 saying that nobody knew that back in April of 2007?

3 A. No, I'm not even saying that. Dr. Dyce was given access
4 to the finances of the practice upon being offered the
5 opportunity to purchase shares in February of 2007, so he had
6 plenty of access to our financial records and would have
7 easily known about the distributions. Plus things at this
8 point were extremely transparent and the relationship was
9 very, very good between the parties, and so I would have been
10 happy to provide any information to Dr. Dyce.

11 Q. Dr. Puchalski, I thought you told me earlier that
12 Exhibit 5 that shows those \$21,000 in that column reflected a
13 process whereby money that would have been paid to Dr. Dyce
14 were he a shareholder got paid to you; is that correct?

15 A. Yes, it represents a timing mechanism. A process is
16 fine, but it does. What I'm telling you is that it doesn't
17 need to be created on March 1st. You could go back and
18 easily predict this. You can reconstruct this at a point
19 further down the timeline. Does that make sense?

20 Q. No, sir, it doesn't because your buy-in sheet -- and
21 this is what this is called, is it not, a buy-in sheet?

22 A. So this is -- I would call this a timing schedule.

23 Q. But the title that was put on it by your staff was
24 buy-in sheet, was it not?

25 A. I don't believe that was put on it until much later in a

1 different scenario. I think in this case it was a blank
2 document or something along these lines.

3 Q. At any rate, let's go to Exhibit 6, and did you sign
4 Exhibit 6?

5 A. Yes.

6 Q. It purports to be dated in August of 2007. Did you sign
7 it on or about August 2007?

8 A. I think that that is consistent with -- I don't know
9 when it was signed, to be honest with you.

10 Q. Do you need to check your passport?

11 A. I'm sorry.

12 MR. SHEHEEN: Your Honor, I object.

13 THE WITNESS: No, sir, I don't need to check my
14 passport.

15 Q. So my question is did you sign this.

16 A. Yes, sir, I signed it.

17 Q. Are you contending that it has an effective date other
18 than August 2007?

19 A. I don't know when I signed it, which is your first
20 question. I believe the effective date is on the contract as
21 August something 2007.

22 Q. And there was a stock purchase agreement signed at the
23 same time?

24 A. I suspect that they were signed at the same time, yes.

25 Q. And that's Exhibit 4, Plaintiff's Exhibit 4, and there

1 was a shareholders agreement signed at the same time, was
2 there not?

3 A. I have no reason to doubt that they were signed at the
4 same time, sir.

5 Q. Now, isn't it true that as of the date that you signed
6 these three documents, the bill of sale, the stock purchase
7 agreement and the shareholders agreement, it was your intent
8 in signing these to recognize that Dr. Dyce was a shareholder
9 at that time?

10 A. The answer is yes, provided he met the requirements in
11 these documents which were \$50,000, which was never received
12 and never given, and that we were able to do something that
13 we found out we were unable to do. Our intention was that
14 there would be money that was still present within SCENT the
15 corporation that would be drawn out of SCENT pursuant to
16 paragraph 2, and that could not be achieved and so therefore
17 the contracts that -- the business transactions were not
18 consummated.

19 Q. Magnify the preamble to one, please.

20 When you signed this document, it says for valuable
21 consideration, the receipt of which is here by acknowledged.
22 You signed that, didn't you?

23 A. Yes.

24 Q. Was that false?

25 A. It was done with the expectation that Dr. Dyce, as

1 listed there, would provide \$50,000. It is my testimony and
2 I contend now and have always contended that that \$50,000 was
3 never offered, never received and that both parties very
4 clearly and knowingly decided that this could not be
5 consummated and cannot move forward and then actively marched
6 toward a different process.

7 Q. Let's move forward. At some point, as I understood your
8 direct testimony, somebody figured out or decided that the
9 way SCENT was handling Dr. Dyce's forgoing of money that he
10 would have been entitled to in order to credit it to you so
11 he could buy in, somebody figured out that that was
12 perhaps -- that perhaps your Subchapter S election was in
13 jeopardy because you'd have shareholders, one getting a whole
14 lot of distributions and one getting a lot less, which we
15 know the articles of incorporation in Subchapter S doesn't
16 allow. And so, as I understood your testimony, you all got
17 together sometime in 2008 and decided to re-paper the deal
18 and create a new shareholders agreement.

19 Now, forget all the preamble, isn't it true that in 2008
20 you came up with a new shareholders agreement?

21 A. In 2008 Dr. Dyce finally met the requirements to become
22 a shareholder in South Carolina ENT per the process that his
23 attorney initially came up with, and at that time we did
24 execute and consummate a set of contracts on July 16th, 2008.

25 MR. CLEVELAND: Your Honor, Exhibit 300 is in evidence.

1 THE COURT: This is a 2008 agreement. I'm just going to
2 put this one here because I've got it.

3 MR. CLEVELAND: I don't think so.

4 THE COURT: This is the 2008.

5 MR. CLEVELAND: It's the June 1st, 2008.

6 MR. SHEHEEN: It's unsigned.

7 THE COURT: Okay. Oh, okay. You're right. I don't
8 have this one. The one I have is in July. This one's not
9 signed.

10 MR. CLEVELAND: No.

11 THE COURT: Okay.

12 Q. Dr. Puchalski --

13 A. Yes, sir.

14 Q. -- SCENT had prepared for it, sometime in advance of
15 June 1st, 2008, a new shareholders agreement which is Exhibit
16 300, correct?

17 A. Exhibit 300 represents one of the drafts on the road to
18 creating the shareholders agreement that was executed on July
19 16th, 2008.

20 Q. Now, Dr. Puchalski, wasn't it the intent or your intent
21 to have this document signed, this June 1st, 2008
22 shareholders agreement?

23 A. No, sir. We do not have actually a -- we weren't even
24 close to completing the documents at June 1st, 2008.

25 Q. Weren't even close. Well, you've testified that you

1 were provided with a June 1st, 2008 employment agreement
2 which you did sign.

3 MR. SHEHEEN: Your Honor, I object. That's not what his
4 testimony was. I object, it's not what's in evidence. It's
5 not what he testified to.

6 THE COURT: I'm going to let you ask the question
7 because there is a document that says June the 8th --

8 MR. CLEVELAND: June the 1st.

9 THE COURT: I mean June the 1st, and I'm going to let
10 you ask the question.

11 MR. CLEVELAND: Thank you.

12 Q. Dr. Puchalski, Exhibit 10 is an employment agreement
13 that you signed on behalf of SCENT, correct?

14 A. If you don't mind just I want to confirm that. Which
15 Exhibit was that, please?

16 Q. It's in the book, 10, Exhibit 10.

17 A. I've got it.

18 Q. And it has on the first page that the date of this
19 document is typed in June 1st, 2008.

20 MR. SHEHEEN: Your Honor, it says it's effective June
21 1st, 2008 on the front of the page.

22 THE COURT: It does.

23 THE WITNESS: I agree that it says effective as of the
24 1st day of June 2008.

25 Q. And you signed this document and you were asked to put

1 the date on it and you signed it and dated it June 1st, 2008.

2 A. I've already testified to this.

3 Q. Just answer the question, please.

4 A. This document was not signed June 1st, 2008.

5 Q. Did you sign it?

6 A. Yes, Mr. Cleveland, I signed it, and I --

7 Q. Just a minute. Do you need to explain that you signed
8 it?

9 A. I apologize, sir. No, I'm fine.

10 Q. Did you put the date of June 1st, '08 under your
11 signature on Exhibit 10?

12 A. I did put the date June 1st, 2008 on the line marked
13 date.

14 Q. All right. Now --

15 A. But not on June 1st, 2008.

16 Q. You said earlier that you were nowhere near completing
17 the documents on June 1st, 2008, yet we have a shareholders
18 agreement dated June 1st, 2008 and we have an employment
19 agreement dated June 1st, 2008. Looks like they were pretty
20 final. Do you know of any differences between the
21 shareholders agreement that was dated June 1st and the one
22 dated July 16th?

23 A. I don't believe there's much of a difference outside of
24 the date and maybe a few other grammatical errors.

25 Q. You've checked, haven't you?

1 A. I have.

2 Q. You've compared them, right?

3 A. Yes.

4 Q. And you know there's no difference other than the date
5 and maybe some capitalization or correction of that sort.

6 A. I think there's a few sentences, but there's not much
7 difference between these documents. This document, as I
8 reviewed my schedule, this document was not available, even
9 though it says June 1st, on June 1st or near June 1st. I
10 just, I offer that to you as my testimony, and even though it
11 says effective June 1st, this document was being revised and
12 it had that number and that was the goal, but I can tell you
13 that the goal was not achieved. These documents were not
14 completed by June 1st.

15 Q. All right. Let me go back to Exhibit 6 and make sure I
16 understand. Is it your testimony that had Dr. Dyce paid you
17 \$50,000 at or about the time that the bill of sale was
18 executed, that he would have then been a shareholder?

19 A. Had he paid that and also honored the other stipulations
20 that are located -- that will a little further down, yes.

21 Q. What other stipulations are you referring to?

22 A. If you read under Item No. 2, the seller warrants that
23 he owns such stock in the corporation subject to the
24 shareholders agreement and stock purchase agreement and that
25 such stock is free and clear of all liens and encumbrances.

1 Q. Let me ask you about that sentence. That's not
2 something Dr. Dyce is being asked to warrant, is it? You're
3 the seller.

4 A. Yes, I agree but --

5 Q. So that's not a condition for Dr. Dyce to live up to, is
6 it?

7 A. No. I think you've got to take the whole paragraph at
8 its whole though. The next sentence says, the parties
9 specifically exclude the accounts receivable prior to March
10 2007 and all cash in the corporation's bank accounts or
11 certificates of deposit as of March 1st.

12 Q. Okay.

13 A. And by March 1st we're referring to March 1st, 2007.

14 Q. So is it your testimony that had Dr. Dyce paid you
15 \$50,000 as of August 2007, he would have been a shareholder?

16 A. Provided the other terms of the agreement were met, yes.

17 Q. What other term -- I read them but I don't understand
18 what terms they are.

19 A. So he was to go get a loan for the accounts receivable
20 prior to March 2007 and all the cash in the corporation's
21 bank accounts as of March 1st.

22 Q. It doesn't say that.

23 A. That's what was supposed to happen, I'm telling you
24 during this. He was supposed to cover the \$50,000 and he was
25 supposed to cover that.

1 Q. It doesn't say that, does it?

2 A. Well, it does to me.

3 Q. Just yes or no, does it say that?

4 A. Yes, it says the parties specifically exclude.

5 Q. Okay. I've got that.

6 A. And then in the other document.

7 Q. Wait a minute -- where does it say that Dr. Dyce has got
8 to go borrow money to do anything with regard to receivables?

9 A. Well, if you go look to the --

10 Q. I'm just asking about this document.

11 MR. SHEHEEN: Your Honor, he needs to be able to answer
12 the question. He's tried to answer it three times and been
13 interrupted.

14 THE WITNESS: I think you established earlier there were
15 some other documents that were signed with this, and so I'm
16 just trying to go over to that other document and perhaps
17 read that and it might be a little more clear to the
18 courtroom.

19 Q. Before you read it, what document are you referring to?

20 A. The stock purchase agreement.

21 Q. Okay. And what paragraph?

22 A. I don't know your book very well, if you would just
23 please give me a reference again. I know we've referenced it
24 several times --

25 Q. Sure, it's Exhibit 4.

1 A. I've got it. The parties specifically agree, if you
2 look under Item 2, the parties specifically agree that such
3 purchase of stock does not include the accounts receivable
4 based on the date of service prior to March 2007.

5 Q. Which paragraph are you on?

6 THE COURT: 2.

7 THE WITNESS: 2.

8 Q. 2. I'm sorry. Okay.

9 A. The parties specifically agree that such purchase of
10 stock does not include the accounts receivable based on the
11 date of service prior to March 2007 and any cash in the
12 corporation's bank accounts or certificates of deposit prior
13 to March 2007. Such assets will remain the property of the
14 seller.

15 Q. Where does it say in here that Dr. Dyce has got to go
16 out and borrow some money to do anything about this?

17 A. Well, those assets weren't in the practice and so it
18 says here the parties specifically agree that the -- that
19 such purchase of stock does not include, in other words, in
20 addition those will have to be purchased or dealt with in
21 some fashion.

22 Q. Where does it say that?

23 A. That is my interpretation of those -- of that portion.

24 Q. Does it say that?

25 A. Yes, that's what I believe it says. That's the

1 intentions that we had when we were signing this, and that's
2 what was going on at the time.

3 Q. Is the language that you're relying on the part in
4 paragraph 2 that you just read?

5 A. Yes.

6 Q. Let's go to Exhibit 162, please.

7 A. I've got it.

8 Q. All right. Just to put this in context, you created a
9 resolution on March 3rd terminating Dr. Dyce without cause
10 which you delivered to him on March 10th, correct?

11 A. That's correct.

12 Q. And then attached to that was a management directive
13 advising him what the confidentiality provisions of the
14 shareholders agreement says, right?

15 A. It was either attached to that or given to him that
16 night and then re-sent to him later, yes, but the first
17 management directive was given.

18 Q. And then later on March 30th, which is Exhibit 22, you
19 issue, which is in the book, you issue another management
20 directive advising him he'd better comply with the
21 shareholders agreement, right?

22 A. The second management directive says some things that
23 are similar to the first, but it outlines a timeline, there
24 is a timeline that was attached to this, and I don't see it
25 here, but there is a maybe a two or a three page transition

1 timeline or transition plan.

2 Q. All right. What I'm interested in is your termination
3 for cause, that's what this Exhibit 162 is, isn't it?

4 A. Yes, sir, it is.

5 Q. And the part that's handwritten is your explanation of
6 why you've terminated him for cause, right?

7 A. It's not the only reasons, but it lists a reason for
8 termination for cause, yes, sir.

9 Q. The only ones you put in the resolution are the ones
10 that are written here, right?

11 A. There's just not a whole lot of space there, but there
12 was one that was listed, yes.

13 Q. Who created this document? Did you have your attorneys
14 draw this up?

15 A. These were preprinted resolutions that were given to the
16 corporation by corporate counsel at the time of execution of
17 the July 16th shareholders agreement to be used in the event
18 that they needed to be used for board meetings or anything
19 else.

20 Q. And it says, Dr. Dyce was issued a corporate directive
21 in writing requiring him to comply with confidentiality
22 provisions of his two contracts and whereas Dr. Dyce shared
23 numerous pieces of information regarding a proposed contract
24 to other nonshareholder physicians of SCENT to further his
25 own personal position, that Dr. Dyce is hereby terminated for

1 cause effective immediately. Now, let's look at Exhibit 10,
2 which is Dr. Dyce's employment agreement, and let's look at
3 paragraph 2.3A.

4 A. I'm there.

5 Q. Okay. It's on page 10.003 and can you magnify 2.3 and
6 A?

7 All right. This is the provision in Dr. Dyce's
8 employment agreement that authorizes the termination with
9 cause, correct?

10 A. That is a clause in Dr. Dyce's employment agreement that
11 discusses termination with cause, but it is not the provision
12 of the agreement that was invoked in the for-cause
13 termination.

14 Q. Which provision did you -- I didn't see a provision in
15 your resolution. Was there one?

16 A. In the resolution it mentions the management directives,
17 and in the management directives it clearly references that
18 termination would be immediate for cause and under section
19 2.2C.

20 Q. Right. Let's go to 2.2C. Now, don't blow it up yet.
21 This says other termination. I'm sorry. We want the page 2.

22 All right. 2.2, this is the paragraph that you say you
23 terminated Dr. Dyce for cause under, right?

24 A. Yes, sir, 2.2C.

25 Q. Okay. And would you blow up C there at the bottom?

1 It says physician's failure to comply with a clear
2 management directive of the group's managing shareholder --
3 this refers to the failure to abide by a management
4 directive, right?

5 A. Yes, as long as that management directive --

6 Q. And let's get rid of the magnification. Paragraph 2.2
7 provides a number of items that would warrant termination,
8 right?

9 A. It provides a number of scenarios where a physician
10 would be terminated immediately, for instance, the death of a
11 physician, the disability of a physician, the physician's
12 licensure goes away, the physician's DEA or prescriptive
13 authority goes away, hospital privileges go away, gross or
14 flagrant professional negligence, and then of course the
15 federal or state laws. So all of these would result in
16 immediate termination, including 2.2C. It's grouped with the
17 ones that will -- that in effect are either immediate
18 termination by definition such as death, disability, loss of
19 licensure, yadda, yadda.

20 Q. All of the things that you mentioned after C are various
21 items of cause, are they not?

22 A. They are listed just as C is listed. I'm not sure I
23 understand your questions.

24 Q. Come on, Dr. Puchalski, your resolution says that you
25 terminated him for cause, correct?

1 A. That's right.

2 Q. And that's because you interpret these items,
3 particularly Item C, as being an item that would allow you to
4 terminate him for cause --

5 A. Yes.

6 Q. -- right?

7 A. Yes.

8 Q. Where in any of this employment agreement does it say
9 you can terminate him immediately?

10 A. So in the management directive it says that his
11 termination would be immediate.

12 Q. I know what you said, but where does the employment
13 agreement give you the authority to terminate him for cause
14 effective immediately?

15 A. The employment agreement gives the managing shareholder
16 the authority to make a management directive. It does not
17 proscribe what that management directive needs to be and what
18 it needs to have or not have in it. I executed my right
19 under -- SCENT executed its right under this provision of the
20 contract to place a management directive.

21 Q. Let's go back to 2.3A which addresses the issue of
22 termination for cause very explicitly, and you agree with me,
23 do you not, that it says, this agreement may be terminated
24 for cause by a party upon 30 days' written notice to the
25 other party?

1 A. Mr. Cleveland, I agree that it says that in 2.3A, but I
2 will also just submit that 2.3A is nothing to do with Dr.
3 Dyce's termination for cause.

4 Q. Do you agree with me that you did not give 30 days
5 written notice to Dr. Dyce?

6 A. I will tell you that we did not need to give Dr. Dyce 30
7 days.

8 Q. Can you answer my question? Did you give it to him?

9 A. We did not give it to him nor were we required to do so.

10 Q. And, Dr. Puchalski, if the Court concludes that one of
11 Dr. Dyce's rights under this employment agreement was to
12 receive 30 days' written notice before he could be terminated
13 for cause, then you will have breached his rights under this
14 employment agreement by not having done that, will you not?

15 MR. SHEHEEN: Your Honor, I object, this calls for a
16 hypothetical, assumes facts not in evidence, which is how you
17 ruled.

18 THE COURT: Overruled.

19 THE WITNESS: I would defer that to the wisdom of the
20 Court and I do not -- I can't speak to that. I can tell you
21 what our intentions were, what the management directive
22 stated and the fact that it was breached, or not complied
23 with I should say.

24 Q. Now, you have told us that one of the things you wanted
25 to do was to get Dr. Dyce out of governance of the company

1 because he wasn't accountable and all the things you
2 described earlier today and yesterday, right?

3 A. I would -- I would not say that we were trying to get
4 Dr. Dyce out of the governance of the company. I would tell
5 you that our March 3rd resolution was designed to save the
6 company from certain peril, and it was also designed in such
7 a way that it would do so in such a fashion that was as
8 unabrasive as something as this could possibly be and provide
9 us with a 60-day window by which we could either come up with
10 some sort of a transition plan through mediation or a
11 separation.

12 Q. Dr. Puchalski, you took steps to ensure that Dr. Dyce,
13 in your opinion, no longer had the right to vote as a
14 shareholder of SCENT, did you not?

15 A. We took some steps at a time when we needed to do some
16 things with the bank to assert that Dr. Puchalski had the
17 authority by way of a tie-breaking vote to run the practice.

18 Q. And the reason that you created this termination for
19 cause is because you realized that your termination without
20 cause was not effective to snuff out his right to vote,
21 correct?

22 A. No, sir, that's not the case. The tie-breaking vote in
23 the shareholders agreement went to the managing shareholder,
24 and so most issues, if they were decided by a majority, would
25 be ones which went to the managing shareholder, so there were

1 some that were --

2 Q. I didn't ask you about any of that.

3 MR. SHEHEEN: Your Honor, he answered the question, then
4 he was explaining. He said no, sir.

5 MR. CLEVELAND: Totally unresponsive.

6 MR. SHEHEEN: Your Honor, he said no, sir, and then he
7 was explaining it.

8 MR. CLEVELAND: Let me ask the question again.

9 THE COURT: Yes, let's start again.

10 Q. Dr. Puchalski --

11 A. Yes, sir.

12 Q. -- do you agree with me that your termination of Dr.
13 Dyce without cause did not cause him to lose his voting
14 rights or his distribution rights in SCENT?

15 A. Not for the 60 days that he was still with the practice.

16 Q. Well, he's still a shareholder today, isn't he?

17 A. Mr. Cleveland, I know that you contend that, but that is
18 not my belief nor the belief of anyone at SCENT.

19 Q. Let me ask you to look at Exhibit 111?

20 A. Dr. Vidrine's contract?

21 Q. Yes, sir, Dr. Vidrine's 2010 shareholders agreement,
22 Your Honor.

23 If you will turn to page, Exhibit 111.029, and this is
24 the shareholders agreement that you entered into with Dr.
25 Vidrine later in 2010, August of 2010, correct?

1 A. Yes, it is.

2 Q. And page 29 reflects in Exhibit A who the shareholders
3 of SCENT are, doesn't it?

4 A. It does with the appropriate asterisk, yes.

5 Q. Right, you've got Dr. Dyce with his shares and you've
6 got you and Dr. Vidrine with your shares, correct?

7 A. Yes, sir.

8 Q. All right.

9 A. Subject to the asterisk.

10 Q. And this reflects that as of the date of this agreement,
11 which was long after the effective date of Dr. Dyce's
12 termination, long after the commencement date for you to
13 redeem his shares, SCENT reports that he owns 50,000 shares
14 of stock.

15 A. Sir, I don't believe that this contends that, so I
16 think --

17 Q. What did you say?

18 A. I believe that you have to read the asterisk on the
19 bottom, and I'm happy to read that if you would allow me.

20 Q. Sure.

21 A. In accordance with the Dyce shareholder agreement the
22 50,000 shares issued to Dr. Dyce are not entitled to any
23 distributions or to be voted and represents solely the right
24 to be repurchased in accordance with the Dyce shareholder
25 agreement.

1 Q. Right. Now, it's true, is it not, that terminating Dr.
2 Dyce without cause does nothing to affect his distribution
3 rights or his voting rights; do you agree with that?

4 A. During the 60-day period only.

5 Q. Do you think there's something in the shareholders
6 agreement that says that after the effective date of his
7 termination that he no longer has the right to vote or have
8 his distributions?

9 A. Yes.

10 Q. What is that?

11 A. You'll have to show me the shareholders agreement and
12 give me a little time, but I will find --

13 Q. That's Exhibit 7?

14 A. -- what I'm referencing.

15 THE COURT: And you have exactly two minutes.

16 MR. CLEVELAND: Thank you, Your Honor.

17 THE WITNESS: 7?

18 Q. Yes, sir. Dr. Puchalski, do you recall the question?

19 A. I do recall the question, counselor. I'm just looking
20 through the contract here, and I apologize, it's taking me a
21 little while.

22 Q. Okay.

23 A. The bottom of 4.5.

24 Q. Yes.

25 A. Notwithstanding anything in this agreement to the

1 contrary, a departing shareholder shall not be entitled to
2 any distribution from the corporation nor be entitled to vote
3 the shares subsequent to the event of departure.

4 Q. Let's put the bottom three lines of paragraph 4.5 --
5 magnify it, please.

6 All right. Now, do you contend that these last three
7 sentences are applicable to your termination of Dr. Dyce
8 without cause?

9 A. I contend that they are applicable to any departing
10 shareholder.

11 Q. Okay. Well, let's look up the definition of the term
12 that's used in there which is event of departure which is the
13 trigger date, okay? That would be on --

14 MR. SHEHEEN: Could counsel just direct me to where
15 you're referring to?

16 MR. CLEVELAND: Yes, I will.

17 THE COURT: It's Exhibit 7. We're now going probably to
18 the definitions of event of departure which is located --

19 THE WITNESS: On page 2.

20 THE COURT: Page 2?

21 THE WITNESS: Of the contract, yes, Your Honor.

22 MR. CLEVELAND: Yes, middle of page 2.

23 THE COURT: Okay.

24 Q. Would you read out the definition of departure event?

25 A. As any event described in Section 4.2, departure event

1 is any event described in Section 4.2, 4.3 and 4.4.

2 Q. Thank you, Dr. Puchalski. Does termination without
3 cause appear in any of those paragraphs?

4 A. I don't know that it does. I haven't looked.

5 Q. If it does not, if termination without cause does not
6 appear in any of those numbered paragraphs, then it's not a
7 departure event, is it?

8 A. I don't know that that's necessarily the case. When a
9 shareholder's departed, a shareholder's departed.

10 Q. That's not what your agreement defines departure event
11 as, does it?

12 A. If I may --

13 Q. Answer the question, please.

14 A. I agree that departure event is described as any event
15 described in Section 4.2, 4.3 and 4.4.

16 Q. Right and so --

17 A. And I would also like to, if I may, I'd like to point
18 out that departing shareholder is also defined right above
19 that.

20 Q. Right. We're talking about a departure event which is
21 the time after which a shareholder would lose his rights to
22 vote and distributions, and if there is no departure event
23 related to the termination without cause, then the last three
24 sentences of paragraph 4.5 don't apply and you're left with
25 having to apply the for-cause language, which is why you did

1 it, isn't it? You know how these agreements work and you
2 knew that a termination without cause does not trigger the
3 relinquishment of a shareholder's rights to vote or
4 distributions, isn't that true?

5 A. No, Mr. Cleveland. In fact, Dr. Dyce had plenty of
6 reasons for being terminated for cause on March 3rd, 2010.
7 Dr. Dyce was terminated not for cause in a resolution that
8 was given to him March 10th, 2010. Dr. Dyce was further
9 terminated for cause and immediately per management directive
10 that was per this agreement and it was done because even
11 during that 60-day period, even during the period where we
12 were hoping to try to get some sort of amicable settlement,
13 amicable way of continuing the important deeds of the
14 practice, that Dr. Dyce continued to do what he could to
15 obstruct the practice in a very passive-aggressive manner.

16 THE COURT: And that's going to conclude the work that
17 we're going to be doing today.

18 MR. CLEVELAND: Thank you, Your Honor.

19 THE COURT: Dr. Puchalski, of course you cannot discuss
20 your testimony because you are still on the stand. Mr.
21 Sheheen, let me tell you what I think under these
22 circumstances. He cannot talk about his testimony.

23 MR. SHEHEEN: We need some guidance because it's going
24 to be such a long period of time.

25 THE COURT: I know that. In other words, you cannot

1 discuss it with anybody. You can't discuss it with Ms.
2 Puchalski, you cannot talk about it with your lawyer, you
3 cannot talk about your testimony with anyone, okay? Having
4 said that, it's my belief that in the event that you need him
5 for preparation of something else, he has to be able to do
6 that. That's the difficulty in these breaks. Certainly do
7 that.

8 MR. SHEHEEN: Thank you.

9 THE COURT: In the event that you need to prepare other
10 witnesses or the like, and obviously, Mr. Sheheen, a lot of
11 that's going to fall to you to be sure that there's
12 compliance just because it's difficult for folks to
13 understand that and be able to follow that.

14 MR. SHEHEEN: That's why I asked you for guidance, Your
15 Honor. The other scenario that I think I'm -- that I want to
16 approach with the Court is I need to be able to speak with my
17 client about information that I need for the case, so I have
18 to obviously be able to talk to him about things related to
19 the case for my preparations, preparations of other witnesses
20 and information that I need related to the case.

21 THE COURT: If you have questions of him about
22 information that you don't already know, absolutely.

23 MR. SHEHEEN: Thank you.

24 THE COURT: But obviously if it's information that's
25 already been testified to, you know, you've got that.

1 MR. SHEHEEN: Right.

2 THE COURT: You know that.

3 MR. SHEHEEN: Thank you.

4 THE COURT: And that certainly can happen. There can be
5 a witness that could arise that would be new, but with
6 regards to his testimony, can't talk to him about it and nor
7 can anyone else.

8 MR. SHEHEEN: Thank you, Your Honor.

9 THE COURT: Yes, absolutely.

10 (Court adjourned on 11/26/13 at 5:07 p.m.)

11 --- END OF TRANSCRIPT OF RECORD ---

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1 sent to us during the negotiations, and so I frankly
2 neglected to ask you about this during the break, so maybe
3 we'll re-visit this once Mr. Sheheen has had a chance to
4 think about it and further focus.

5 THE COURT: No problem. Now, the ones that need to be
6 sealed.

7 MR. SHEHEEN: Yes, ma'am, there are going to be a
8 number, and you're going to want the exhibit numbers. I
9 think we have them, but let me just confirm that they're
10 going to be all bank records.

11 THE COURT: No problem at all. I'm going to seal them,
12 and if there's any question about whether they ought not be
13 sealed, you all let me know and I'll decide.

14 MR. CLEVELAND: Thank you, Your Honor.

15 THE COURT: Wonderful. Okay.

16 MR. CLEVELAND: May it please the Court.

17 THE COURT: Yes, sir, Mr. Cleveland. You may proceed.

18 MR. CLEVELAND: Thank you, Your Honor.

19 BOB PUCHALSKI, M.D.,
20 having been previously duly sworn, testified as follows:

21 CROSS-EXAMINATION BY MR. CLEVELAND:

22 Q. Good afternoon, Dr. Puchalski. How are you doing?

23 A. Good afternoon, Mr. Cleveland. I'm doing well. How are
24 you?

25 Q. I'm well. Thank you. Just to get us back into where we

1 were when we took our break at Thanksgiving, if you will take
2 a look at the screen there, I put up there some sort of big
3 date events. The first is that SCENT articles of
4 incorporation were signed by you in October 2004, and then in
5 February of 2005 you hired Dr. Dyce to come and work for
6 SCENT, did you not?

7 A. Yes.

8 Q. And Dr. Dyce began his buy-in as a shareholder in March
9 2007, that's true, isn't it?

10 A. That is not.

11 Q. Excuse me?

12 A. That is not. I object to just the term using buy-in,
13 but he started on his shareholder tract toward becoming a
14 shareholder in March of 2007 so --

15 Q. What he was doing was buying into the practice, was he
16 not?

17 A. No, he wasn't, and that's just a cause of contention,
18 but I would agree that he began his process of becoming a
19 shareholder in March of 2007.

20 Q. 52 please. Your Honor, what I've done, and Dr.
21 Puchalski, I'll tell you as well, on all of these slides I've
22 put the exhibit at the bottom so that if I use a page or two,
23 it tells you what the exhibit number and the page number is
24 so that -- for ease of reference?

25 THE COURT: That's wonderful.

1 Q. Exhibit 251 which is on the screen is an email from you
2 to Theresa Williams and Theresa Williams is who?

3 A. Theresa is practice manager for South Carolina ENT
4 Allergy & Sleep Medicine.

5 Q. And did Theresa Williams have a role in preparing the
6 buy-in sheets that were kept on her computer to record the
7 money that was coming to you that otherwise would have gone
8 to Dr. Dyce had he been a shareholder?

9 A. Theresa Williams was one of many who was responsible for
10 taking care of monitoring finances in the practice, yes.

11 Q. Now, I asked you if Dr. Dyce began his buy-in in March
12 of 2007, and you didn't like the word buy-in, correct?

13 A. That's correct.

14 Q. And if we look at -- this is an email you wrote, is it
15 not?

16 A. Yes, it appears to be an email I wrote to Theresa
17 Williams.

18 Q. All right. And if we look at the subject up there at
19 the top, would you read what you call the subject that you
20 were writing about?

21 A. Dyce buy-in.

22 Q. Dyce buy-in.

23 A. Yes, sir.

24 Q. Doesn't say timing mechanism, does it?

25 A. No, it does not.

1 Q. All right. And then let's read the first sentence:
2 Theresa, please email Dr. Dyce an update on his buy-in --
3 that word appears again, doesn't it?

4 A. Yes, it does in this email.

5 Q. -- update on his buy-in to take the recent 42K K-1 -- is
6 that \$42,000, is that what that's referring to?

7 A. Yes.

8 Q. -- into account. He should have 226,000 toward his 750K
9 buy-in. Is that what you wrote?

10 A. Yes.

11 Q. You used that word buy-in again, did you not?

12 A. Yes.

13 Q. And the attachment to this exhibit, page 2 of the
14 exhibit, this is actually pages 2 and 3, I've taken the
15 substance of pages 2 and 3 and put them together, and those
16 exhibits are in your book if you would like to have any
17 reason to want to look at them, Dr. Puchalski.

18 A. Thank you, Mr. Cleveland.

19 Q. Sure. Isn't it true that Ms. Williams or somebody at
20 SCENT created a spreadsheet to record the money that Dr. Dyce
21 was getting credit for as part of his buy-in?

22 A. I disagree with your term, the use of buy-in; but, yes,
23 I do agree the sheet was created by South Carolina ENT in
24 order to time Dr. Dyce's buy-in at that time.

25 Q. Okay. And --

1 A. Dr. Dyce's shareholder status.

2 Q. The file that was created, the spreadsheet file, is
3 stated up there to be Dyce buy-in dot XLS, isn't it?

4 A. It is.

5 Q. And the spreadsheet itself describes it as a buy-in as
6 of May the 25th, correct?

7 A. That's correct.

8 Q. All right. So if I slip up and use the word buy-in,
9 you'll forgive me, won't you?

10 MR. SHEHEEN: I object, Your Honor.

11 THE WITNESS: Mr. Cleveland --

12 MR. SHEHEEN: It's not a question. His slipping up or
13 not is not relevant.

14 MR. CLEVELAND: I'll withdraw the question.

15 Q. Let's go back --

16 A. If I may finish.

17 Q. -- let's go back to 4, please. Now, what we have here,
18 Dr. Puchalski, is what's in your -- a portion of which is in
19 your book at Exhibit 249, and it's a portion of the general
20 ledger. Do you recognize this?

21 A. I don't recognize this particular portion of the ledger,
22 but I recognize this format.

23 Q. This is -- does this remind you of the general ledgers
24 that you would review at SCENT?

25 A. Yes.

1 Q. And it is in evidence as Exhibit 249. It's got lots of
2 information on there. Let's strip out and just get the date
3 and the recipient and the amount to help us maybe pull those
4 together so we can have a little more ease of use of this
5 thing. And you see it ends at 2007 there at the bottom. Can
6 you read that, December 24th, 2007?

7 A. Looks like 2007. I can't actually read that.

8 Q. Well, take my word for it it's 2007.

9 A. I will.

10 Q. Okay. That comes from the general ledger that's Exhibit
11 249. If we add 248 to this exhibit, you'll see that we have
12 a couple of payments that are in January and February of
13 2008. See that at the bottom?

14 A. I see two entries, I believe, the last two entries are
15 2008.

16 Q. All right. Go to 252, please. I'm sorry, 52. Let's go
17 back to 4. All right. We've got 2008. Now what I'd like to
18 do is take out all the things other than the bimonthly
19 sweeps. A bimonthly sweep was a payment that was made when
20 you all would accumulate money and be able to distribute it
21 as part of the profits of the company, wasn't it?

22 A. When it's referenced in regard to me at this time in
23 2007 then that, yes, that would be profits coming out of the
24 company. If they were going to somebody outside of myself in
25 2007, they would be wages.

1 Q. Okay. But everybody that's listed on this exhibit, this
2 slide, is either you or Amy Puchalski. In fact, most of them
3 are Amy Puchalski, are they not?

4 A. I believe every one of them says Puchalski, yes.

5 Q. Excuse me?

6 A. I believe they all say Puchalski, yes.

7 Q. That wasn't my question. My question was most of the
8 distributions in 2007 and going into 2008 as shown on this
9 slide are going to Amy Puchalski, are they not?

10 A. According to this slide, yes.

11 Q. Well, that's your general ledger. This information
12 comes from Exhibit 249 and 248. That's your general ledger,
13 right?

14 A. I don't doubt you, Mr. Cleveland. I'm telling you what
15 I --

16 Q. Excuse me?

17 A. I don't doubt you, Mr. Cleveland.

18 Q. Your general ledger shows that most of the distributions
19 of profits in 2007 and early 2008 went to Amy Puchalski,
20 right?

21 A. I wouldn't doubt that at all.

22 Q. This is your document. This is your financial
23 statement.

24 MR. SHEHEEN: Your Honor, he said it says that on there.

25 THE WITNESS: I don't doubt you at all, and I see that

1 on this document.

2 Q. Thank you. Let's collapse this so it's in a format like
3 the buy-in sheet which is Exhibit 5 and put the two of them
4 up there so we can look at them together. All right. We've
5 got the buy-in sheet on the right and the excerpts from the
6 general ledger on the left. Doesn't this show that the
7 \$21,000 that's being credited to Dr. Dyce on the right-hand
8 graphic comes from the \$42,000 that's being paid to you
9 that's shown on the general ledger on the left?

10 A. Mr. Cleveland, I agree that this data is extracted from
11 the same source. I disagree with your characterization of
12 the money on the right being credited toward Dr. Dyce or
13 being his money if that's the characterization that you're
14 making, but I do agree that the money that you have on the
15 right column represents the same money that you have on the
16 ledger on the left column, provided those dates are the same.

17 Q. And what's happening here, is it not, is that when you
18 would get \$42,000 or Mrs. Puchalski would get \$42,000, that
19 included \$21,000 that Dr. Dyce would have received had he
20 been a shareholder?

21 A. Had he followed the contract in 2005 and bought in, yes,
22 that is correct.

23 Q. Okay. And so what this shows is the mechanism by which
24 money was credited towards, according to the exhibit, Dr.
25 Dyce's buy-in.

1 A. It's the timing mechanism by which we determined when
2 Dr. Dyce would be eligible for becoming a shareholder, and as
3 I said in earlier testimony, it's the timing mechanism by
4 which we determined whether or not the revenue that Dr.
5 Puchalski received during the period of time was equal to the
6 amount of money that Dr. Puchalski would receive had Dr. Dyce
7 fulfilled his obligations under the 2005 contract and bought
8 into the company with accounts receivable, the amount in the
9 bank and the depreciated assets along with some accounts
10 payable, so had that occurred those are the differences.

11 Q. And if we look at this buy-in sheet, using the term
12 that's on it, it shows that in addition to the --

13 A. I don't see buy-in sheet on this just to be clear.

14 Q. Excuse me?

15 A. I don't see buy-in sheet on that.

16 Q. I've got a nice pointer. See right there where it says
17 buy-in as of January 23rd?

18 A. I do. I just objected to calling it a buy-in sheet, but
19 that's fine.

20 Q. All right. Excuse me, the sheet that reflects Dr.
21 Dyce's buy-in as of January 23rd, how about that?

22 A. What I would argue is that this sheet reflects the
23 income that Dr. Puchalski is receiving, and it's used for
24 timing as a general way to try to figure out how much money
25 Dr. Puchalski is receiving and how that would contrast if Dr.

1 Puchalski were to receive the buy-in from Dr. Dyce as his
2 2005 contract outlined.

3 Q. Well, in addition to the payments of \$42,000 that were
4 distributed to you and to Amy as profits during the course of
5 the year there is larger sweeps that occur periodically that
6 result in distributions, isn't that true?

7 A. Yes.

8 Q. All right. And let's blow that up where we can see it.
9 In the 2007 we have a number of larger sweeps, and if we look
10 at Exhibit 248, which is the general ledger and look under
11 Dr. Puch, that's you right, Puch?

12 A. That would probably be reference to me, yes.

13 Q. And in the federal tax portion of the general ledger, if
14 we want to find the \$86,000 referenced in July, if we look
15 there, we see that on August the 2nd, 2007 there was a sweep
16 of \$86,000 that was paid to the government on your behalf,
17 correct?

18 A. I would agree with that, yes.

19 Q. And then we go to the August \$150,000 we see again that
20 on your general ledger in September you reflect a payment to
21 the Internal Revenue Service on your behalf of \$150,000,
22 right?

23 A. I see that.

24 Q. Okay. And let's look at the September \$150,000 payment,
25 that didn't go to you, that went to Mrs. Puchalski, right?

1 A. According to that ledger, yes.

2 Q. The payment to her is under the portion of the general
3 ledger that says K-1 distribution Dr. Puch, right, Puch being
4 P-U-C-H?

5 A. Yes, I think we discussed that.

6 Q. Excuse me?

7 A. I think we've discussed that there were checks that were
8 written to Amy that were credited toward me.

9 Q. Yes, but this is a big one, 150,000. All the rest were
10 42.

11 A. Distributions came in different sizes, different times.

12 Q. Let's look at the 100,000. That went to Amy Puchalski,
13 right the \$100,000 check?

14 A. Yes.

15 Q. And another \$100,000 in December, that goes to Amy as
16 part of the December sweep, right?

17 A. I would think that that would be the December sweep,
18 yes.

19 Q. Okay. And then look at \$178,210, January, parenthesis,
20 final, parenthesis. This is all part of Exhibit 5, on page 2
21 of Exhibit 5, and we see there that in the general ledger it
22 reflects that on February 1st, 2008 Amy Puchalski received a
23 final sweep of \$178,210, right?

24 A. That's what it shows there, yes.

25 Q. And the fact is that ended the payments by Dr. Dyce as

1 part of his buy-in. That was the final payment that he ever
2 made, right?

3 A. That is absolutely incorrect.

4 Q. Well, let's see what your Exhibit 5 says. January,
5 final. What does final mean then if it doesn't mean that
6 he's ended the process?

7 A. I believe I've already given testimony on this, Mr.
8 Cleveland, and what I tried to explain is that if you look at
9 this document, it's difficult because you're pulling out
10 pieces in order to create this, but sometimes that takes it
11 out of context, and if you'll allow me, I'll try to put it
12 back into context for you.

13 Q. The question is what does final mean on this Exhibit 5?

14 A. The completion of, the final check to complete this
15 milestone, the first milestone, as I've described in my
16 previous testimony. You have not addressed in this sheet
17 other important factors including --

18 Q. I just want to know what final means.

19 A. I just explained it to you, Mr. Cleveland, but I'll say
20 it again.

21 Q. No, if you've explained it, I'm ready to move on.

22 MR. SHEHEEN: Your Honor, he gets to explain his answer.

23 THE COURT: He does, but it has to be responsive. The
24 question was what does final mean, and what I took his answer
25 to mean is that final means this is the final check at this

1 milestone or for this milestone if you will.

2 THE WITNESS: That's absolutely correct.

3 MR. SHEHEEN: Yes, ma'am.

4 THE COURT: That's what I understand, and I think that's
5 responsive. Anything else I think is not elicited at this
6 point. All right. You may ask him your next question.

7 MR. CLEVELAND: Thank you.

8 Q. And if we look on the general ledger, this is on Exhibit
9 248, page 258, in the middle and blow that up, your general
10 ledger also reflects that the \$178,210 paid to Amy Puchalski
11 was a final sweep, right?

12 A. It does reflect that, yes, I would also just point out,
13 while you have it, what the balance is in the account at that
14 time.

15 Q. You done? Okay.

16 THE COURT: The balance in the account, what is that, I
17 don't know what that means.

18 THE WITNESS: The balance in the account at that time
19 is -- I'm sorry, I have trouble viewing it but --

20 THE COURT: The next number. Okay. I've got it.

21 THE WITNESS: I know it's not enough to cover the next
22 stage or even close to it.

23 THE COURT: Okay.

24 MR. CLEVELAND: Would you go to 14, please.

25 Q. Now, let's just review what's happened going up from

1 March of 2007 through February 1st, 2008, and the left-hand
2 part of this slide, which comes from Exhibit 248 and 249,
3 pages 258 and page 47, show the sweeps that you and Amy
4 Puchalski were receiving, does it not?

5 A. That appears to be what it is, yes, sir.

6 Q. Okay. And if we look at what Dr. Dyce got, we see that
7 he didn't get any sweeps during that period of time.

8 A. That would be appropriate, yes.

9 Q. And all he got was call pay.

10 A. He wouldn't have received any more money until after he
11 finished the first milestone so the first tier or the first
12 stage.

13 Q. And you also got salaries every two weeks, did you not,
14 both of you?

15 A. At first they were every two weeks, and then I believe
16 they transitioned to twice a month at some point.

17 Q. When it started out 10,000 and then went up to 13,000?

18 A. I believe that reflects the difference between going
19 twice a week to twice a month.

20 Q. All right. Now, let's look what happens on February 1st
21 with regard to the distributions. On February 5th Amy
22 Puchalski received \$21,000, so she's getting now half of what
23 she was getting before, right? They were all 42's before.

24 A. That's correct.

25 Q. Now she's getting half.

1 A. That's my recollection.

2 Q. And lo and behold, Dr. Dyce starts receiving
3 distributions in the same amount on the same date that Amy is
4 getting them, right?

5 A. That was by design, yes.

6 Q. Okay. And they're listed as K-1 distributions, are they
7 not?

8 A. Erroneously so, but yes.

9 Q. So if we looked at February 19th --

10 A. And I --

11 Q. Excuse me. Dr. Dyce, did you want to say something?

12 A. I was just saying I don't know if those are listed as
13 K-1's, but there were numerous distributions listed
14 erroneously as K-1's.

15 Q. Well, you'll see that I've indicated where in the
16 exhibit this information comes from, and it's the K-1
17 distribution, I've got Dr. Puch up there, that's wrong, it
18 should say be Dr. Dyce, apologize for that, that's a mistake,
19 but if you look at Exhibit 248, page 253, let's look at that
20 just so we're clear.

21 Your Honor and Dr. Puchalski, the page numbers are on
22 the left (indicating). If we look on page 253, yes, look on
23 the left-hand column, you'll see that's Dr. Dyce's K-1
24 distribution column. I apologize for that mistake. Do you
25 see that? My question is, if you'll look at Exhibit 248 at

1 page 253, do you agree with me that it shows K-1
2 distribution, Dr. Dyce, dash, other?

3 THE COURT: Here's where he's pointing to, right here,
4 see where I've got the green highlight (indicating).

5 THE WITNESS: I got you. I see it. Thank you.

6 Q. And if you go down to February 5th, 2008, which is
7 about, I don't know, three inches down from where the Dr.
8 Dyce distributions start, do you see February 5th and a
9 distribution of \$21,000?

10 A. I do. I don't see an actual K-1 entry in that
11 independent entry, but it clearly came up on whatever report
12 was run, so I see that, but I see this entry if that's what
13 you're trying to get me to do.

14 Q. Yes, that's what I'm trying to do.

15 A. I gotcha.

16 Q. And on February 29th Amy gets 50 and Dr. Dyce gets 50,
17 right?

18 A. I can follow along with you, but I have no reason to
19 doubt it, so I'm going to say yes.

20 Q. And then I picked up another one in February,
21 distributions in March, April and May, and if you'll look at
22 Dr. Dyce's distributions, you see he's getting exactly the
23 same that you and Amy Puchalski are getting, whether they're
24 big sweeps or \$21,000 sweeps, he gets them, right?

25 A. No. Between February 2008, when he passed the first

1 milestone, and August 16th, 2008 he wouldn't be privy to any
2 monthly sweeps unless they were something that was assigned
3 for something, so there will be sweeps in the record between
4 February 5th and August 16th that would be to just Robert or
5 Amy Puchalski and not to Orville Dyce, and they will occur at
6 whichever point Dr. Dyce decided not to go ahead and make the
7 payments that we were discussing for tier 2 directly but to
8 actually try to use the same process of timing.

9 Q. I didn't ask you about any of that. I just asked you
10 between February 5th and May 5th doesn't Dr. Dyce get exactly
11 the same thing that you and Amy are getting by way of profits
12 and distributions?

13 A. I have no reason to doubt that on your chart.

14 Q. Okay. Now let's go to 47, please. Now, isn't it true
15 that at the first trial of this -- first session of the trial
16 of this case in response to Mr. Sheheen's question, why did
17 Dr. Dyce get increased pay beginning in February of 2008, you
18 answered, because he reached a milestone in the process to
19 becoming an owner of South Carolina ENT and those wages were
20 W-2 wages, they were not anything but that, that was your
21 sworn testimony, was it not?

22 A. That is my testimony now.

23 Q. Oh, it is. Okay. And you were asked to explain what
24 types of income Dr. Dyce was receiving in February and March,
25 and you testified under oath all of his income was W-2 income

1 in February and March of 2008, he was receiving a bimonthly
2 distribution on top of his salary and then also pay for call
3 amount, but all of those were W-2 wages.

4 A. That's correct.

5 Q. That's what you testified to.

6 A. That's the truth.

7 Q. You're still sticking to that today?

8 A. That's the truth, Mr. Cleveland.

9 Q. Okay. Would you go to 17, please. Let's look at the
10 W-2 that SCENT gave to Dr. Dyce for 2008. It has Dr. Dyce's
11 name there blown up, and it shows the Medicare, excuse me,
12 Medicare wages and tips to be \$300,500 right?

13 A. It does.

14 Q. That's Exhibit 302 at page 1. Now, what we need -- your
15 testimony is that the W-2 reflects those distributions he was
16 getting. I'd like you to look now at the payroll records of
17 SCENT, and they refer to what you described a minute ago that
18 in the first six months of 2008 both you and Dr. Dyce
19 received \$10,000 every two weeks during the first six months
20 of the year, right?

21 A. Okay.

22 Q. That comes from Exhibit 304, page 60. Now let's move on
23 to Exhibit 304 at page 65, and it shows that, if you'll look
24 down at the bottom, the period now is July 5th, so on the
25 second half of the year you folks were paying yourselves

1 salaries of \$13,000 every two weeks, right?

2 A. That seems accurate, yes, Mr. Cleveland.

3 Q. And then you also paid yourself a little bonus of \$1500
4 as reflected on Exhibit 304 at page 52. Now, if we take
5 those three things that we've just looked at from the payroll
6 records, \$10,000 every two weeks for 13 weeks is \$130,000,
7 right?

8 A. Yes.

9 Q. And \$13,000 every two weeks for 13 weeks is 169,000,
10 right?

11 A. That's correct.

12 Q. And then we have your bonus, if we add that up, it's
13 \$300,500 which was the amount that was reported as W-2 wages
14 according to the tax returns that your company filed. Let's
15 take the payroll which we've just looked at and the
16 distributions that Dr. Dyce was getting in February and
17 March. Now, you've testified that the distributions that he
18 got in February and March were W-2 wages, but when we look at
19 the W-2 report, it doesn't pick up any of those
20 distributions. The only thing it picks up is the \$300,500 of
21 payroll wages that you and he received, correct?

22 A. On that W-2 form, yes.

23 Q. Okay. Now, go to Exhibit 49, please. When you were
24 asked at the trial about the fact that SCENT's internal
25 records described the post February 2008 payments to Dr. Dyce

1 as K-1 distributions, you testified, when Dr. Dyce reached
2 his milestone one year after February 2007, the folks in our
3 practice would document that since it was the same amount of
4 money as a K-1 distribution in our ledger, but under no
5 circumstances did he ever receive a K-1 at all from the
6 practice as a tax document. Under no circumstances did he
7 ever receive a K-1 at all from the practice as a tax
8 document. Let's go to 29, please. If you look at Exhibit
9 253 which is in your book, it's a portion of the 2008 tax
10 return filed by SCENT.

11 A. Which Exhibit is this, Mr. Cleveland?

12 Q. Exhibit 253 if you would. They're numbered on the
13 right-hand side. Do you have that Dr. Puchalski?

14 A. I do. Thank you, Mr. Cleveland.

15 Q. You're welcome. If you'll go to page 3 -- it's really
16 page 15, but I've only put four or five pages in our little
17 book -- you'll see a red circle around amount to the right of
18 the word distributions, do you see that?

19 A. Yes.

20 Q. Now, so we know that your tax return in 2008 reported
21 that there are distributions of \$3,678,213. Let's look and
22 see what makes up that money. If you will look at Exhibit
23 312, which is at the end of that book, it's the trial balance
24 for SCENT, and do you see where now I've also -- you'll
25 notice that the bottom line that has \$25,759, that actually

1 comes from the next page, but I put it at the bottom so that
2 it all appears on one page, so I've kept all the K-1
3 distributions together. Now, you work closely with your
4 accountants on a monthly basis to make sure the books and
5 records of the company are correct.

6 A. The practice does.

7 Q. The practice does, yes. So that list of distributions
8 that go to you and to Dr. Dyce, if we total those up, they
9 equal \$3,678,213.81. Do you see that?

10 A. I see that on your slide. I don't purport to see that
11 in the tax return, but I see that on your slide.

12 Q. The top part is from the tax return where it says
13 distributions and it has that same number, 3,678,213, doesn't
14 have the 81 cents, but do you see that?

15 A. I see that, I see the slide.

16 Q. Okay. Now, let's see what the \$1,284,192.53 which is
17 reported as distributions --

18 MR. SHEHEEN: Your Honor, I'm sorry, I want to make sure
19 I'm on the right track. This is two put together?

20 MR. CLEVELAND: Yes.

21 MR. SHEHEEN: The bottom one is 312.001.

22 MR. CLEVELAND: Yes, and it's the last document in the
23 book.

24 MR. SHEHEEN: Great. Thank you. I'm sorry, I
25 apologize.

1 MR. CLEVELAND: That's okay.

2 Q. We want to find out what this 1,284,000, what makes that
3 up. If we go back to your general ledger which is Exhibit
4 248 at page 253, you'll see that over on the right-hand side
5 it balances out to zero and you start over at the beginning
6 of the year. On January 1st, 2008, this is a blowup of what
7 we were just looking at where I've just taken the date and
8 the amount and the amount of the running balance, and it
9 shows that on January 1st the account had a zero balance for
10 the beginning of the year. Do you see that, sir?

11 A. I see that on your slide, yes.

12 Q. Now, this takes you to the bottom of page 253 on Exhibit
13 248. Let's go to page 254 of Exhibit 248, and we see that we
14 get down to December 31st and the amount that's shown as
15 having been distributed is \$1,284,192.50, do you see that? I
16 put a circle around it.

17 A. I see the circle on your slide.

18 Q. All right. So your trial balance reported that Dr. Dyce
19 got \$1,284,192.53. From looking at this we see that what
20 he's getting, let's go back, are those February and March and
21 April sweeps that you said weren't distributions, right?
22 That's what makes up the 1,284,000.

23 A. I believe what I said was that they were not K-1's, that
24 the practice to my knowledge has never issued a K-1 to Dr.
25 Dyce until after August 16th, 2008.

1 Q. The point is not when they did it, it's what
2 distributions are collected in it, that's the point.

3 A. Sure.

4 Q. And for the year 2008 doesn't your general ledger show
5 distributions to Dr. Dyce of \$1,284,192.50 as shown on
6 Plaintiff's Exhibit 248 at page 254?

7 A. So in order to -- there's no easy answer to this.

8 Q. I just want to know if that's what it says. Isn't that
9 what it says?

10 A. All distributions didn't go through wages, so if you
11 looked at my W-2, it wouldn't have any of my distributions
12 going through my W-2 either, or it shouldn't. I would defer
13 to Austin Sheheen, our corporate accountant, who would be
14 able to share this with you, but I don't believe that
15 distributions would go through my paycheck, the paychecks
16 wage service.

17 Q. I'm not saying they did go through the wages. They were
18 distributed according to your general ledger.

19 A. I think that was one of the assumptions you made in
20 trying to go down this trail. I'd also say that if it's
21 listed as a distribution here or here, that's not the same as
22 having a K-1. If somebody erroneously put something in a
23 ledger as a K-1, then that's I think different than a K-1
24 being issued. But I would defer the answer to Austin
25 Sheheen, the corporate accountant, who I think would be more

1 apt to be able to answer questions with respect to our tax
2 return.

3 MR. CLEVELAND: Bear with me. I didn't think we would
4 need this. Your Honor, I would ask that the 2008 K-1 for
5 Dr. --

6 THE COURT: It's already in, if I may, it's already in
7 and it's part of, if I may, it's part of Exhibit 253. Take a
8 look and see, if you will, at the last page of that Exhibit
9 at 253. If you'll look at the last page of that exhibit, it
10 says Schedule K-1.

11 MR. CLEVELAND: Thank you, Your Honor.

12 THE COURT: Isn't that correct?

13 MR. CLEVELAND: That's it.

14 THE COURT: Isn't it already in?

15 MR. CLEVELAND: I didn't realize it was. Thank you very
16 much.

17 THE COURT: Yes.

18 Q. Would you look, Dr. Puchalski, at page 18 of Exhibit
19 253?

20 A. I see it.

21 Q. And that's a K-1 for Dr. Dyce, is it not?

22 A. Yes, it is.

23 Q. And it shows him having received distributions of in
24 excess of \$1.4 million, does it not?

25 A. I believe it does. It says that on the top line, yes.

1 Q. All right. So --

2 A. I would point out that it also says shareholder
3 percentage of stock ownership for the tax year is 40 percent.

4 Q. I know, but Dr. Dyce never owned 40 percent, did he?

5 A. No. I think Austin Sheheen, our corporate accountant,
6 would be the person to talk to about why this distribution
7 was chosen, how this was done, because I'm not familiar with
8 the tax rules, why it was done, but my understanding is that
9 that represents Dr. Dyce's distributions that were K-1 after
10 August 16th, 2008 because at that time he was an owner, and
11 then that percent of the distributions over the total
12 distributions for the year is about 40 percent, and that's
13 how that tax year was filed but I would -- I would encourage
14 you to speak to Austin Sheheen.

15 Q. I'll be happy to.

16 A. All right.

17 Q. But let's finish with this. The 1,284,000 which your
18 records show to be the total distributions that Dr. Dyce
19 received in 2008, they include the February, March, April and
20 May distributions according to your general ledger, do they
21 not?

22 A. Once again, I can't comment on that, I would have to ask
23 you to talk to Austin Sheheen to tell you which distributions
24 make which totals.

25 Q. So we know that your tax returns showed a total of 3.6

1 million in distributions. The trial balance shows that
2 1,284,000 of that was distributions to Dr. Dyce, and your
3 general ledger shows us the line items that make up that
4 1,284,000. Now, let's go to 47, please. If your general
5 ledger's correct and if your tax returns are correct and if
6 the K-1 is correct, all of which we've looked at, that means
7 that your testimony about the payments made after February
8 was false.

9 A. Mr. Cleveland, I do not believe my testimony is false.
10 I stand by this testimony, and I ask you to refer to
11 corporate accounting on how the accounting for the tax return
12 coincided with the general ledger.

13 Q. The reason I asked you about it is because you swore
14 under oath that those wages were W-2 wages, they were not
15 anything but that, that's what you testified to, and that's
16 why I asked you since your records prove it to be false.

17 A. That's what I would testify to now, and I don't believe
18 our records necessarily prove that to be false, but I ask you
19 to defer that question to Mr. Austin Sheheen, our corporate
20 accountant.

21 Q. I'll do it. 26, please. Now, the purchase price that
22 you agreed to pay Dr. Dyce for his shares includes an amount
23 for the accounts receivable of the corporation, correct? And
24 I'm showing up on the screen Plaintiff's Exhibit 7, which is
25 the July 10 shareholders agreement, July 10th, 2008

1 shareholders agreement, page 16, and it provides that the
2 accounts receivable are those of the corporation that are
3 booked in accordance with the corporation's normal accounting
4 methods, right?

5 A. That's what it reads there, booked in accordance with
6 the corporation's normal accounting methods.

7 Q. Now, if we look at the data summary sheets produced by
8 SCENT and which are in evidence as Exhibit 250, I'm showing
9 you now page 7, and that shows that the closing accounts
10 receivable in the April data summary is \$1,868,707.37,
11 correct?

12 A. That's what it says on this sheet, yes.

13 Q. Right, and these sheets were prepared by your office,
14 were they not?

15 A. That's correct, not by corporate accounting, very
16 important to point that out.

17 Q. Let's go to 57. This is May 2009, a whole year before.
18 The one we just looked at was April of 2010. And it shows
19 that your charges in that month were a million six, correct?

20 A. Yes.

21 Q. And it shows that your collections were slightly over
22 \$600,000.

23 A. That's correct.

24 Q. And it has adjustments and write-offs of \$852,865,
25 right?

1 A. That's correct.

2 Q. And what this reflects is that your office, the
3 appropriate people would get together every month and would
4 look at the bills they sent out and determine what
5 adjustments and write-offs they had to make, how much money
6 they got in and how much was still on the books that may come
7 in in the next month, right?

8 A. No, I disagree with that. What this sheet shows is
9 these are monthly reports that are generated to try to
10 identify the practice's ability to capture the collections
11 from the charges, and so what this is showing is the amount
12 of money that we're actually collecting on the charges. That
13 AR that's listed up there of 1.7 is not reflective of an AR
14 that is any at all realistic. It's put together there for
15 the purposes of trying to maximize collections for
16 outstanding accounts receivable. That would include items
17 that may or may not be in collections at the time and may
18 include items that are so old that they're not collectible.

19 Q. Sir --

20 A. This is not a monthly roll, okay, and I apologize for
21 trying to expound on this, but SCENT charges, that 1.621,
22 that is a number that is for that month. The other numbers
23 you see there aren't specific for the month, nor are they
24 used to try to get more charges. They're used to try -- this
25 chart's used to evaluate the performance of the billing

1 department.

2 Q. Aren't the collections the collections for that month?

3 A. Yes, they are.

4 Q. Okay. I misunderstood you then. I thought you said
5 only the charges were related to the month. The adjustments
6 and write-offs, aren't they the ones that you decided to make
7 that month?

8 A. Yes, that section is for the month. The top part is
9 not. It's not the monthly AR, and I believe that may be
10 where you're confused but --

11 Q. Well, hold on a second. You told me that the 639,355
12 was for the month. If we go up to the top, don't we see the
13 same number for collections reflecting what happened in that
14 month?

15 A. Yes, we do.

16 Q. Okay. And this wasn't just done on an annual basis.
17 You do this every month. There's June, same process going
18 on, correct?

19 A. Yes.

20 Q. Okay.

21 A. But I have to just explain again that that closing AR on
22 the top line is not the AR for that month.

23 Q. I understand that you hate that number. I got that.

24 A. No, I don't hate it.

25 Q. But the fact is that this is what your books show,

1 according to your normal accounting records, that this is
2 what you all are carrying as AR month in and month out, and
3 it varies based on the charges and the collections, as
4 anyone's accounts receivable will do, correct, Doctor?

5 A. That is a representation of what the AR was. What I --

6 Q. Let's bring it forward. In August --

7 A. If I may just add something to that.

8 Q. If you could be responsive.

9 A. I believe I said, yes, that is the company's accounts
10 receivable, but that is not the accounts receivable that is
11 collectible. That is used so we can gauge from month to
12 month whether or not there's some sort of an explosion in the
13 AR which would signify that for some reason your collection
14 efficiency is going down, but it's not an absolute value,
15 it's a relative one, if that makes sense, Mr. Cleveland.

16 Q. Dr. Puchalski, every month your staff goes and makes
17 significant adjustments and write-offs, every month, correct?

18 A. Yes.

19 Q. Okay. And at the end of that process they report the
20 accounts receivable that are booked according to the
21 corporation's normal accounting methods.

22 A. That is incorrect. First of all, these would not
23 represent the company's normal accounting methods. Number
24 two, it wouldn't be reset, which is what I'm trying to tell
25 you. In other words, it's -- it's just cumulative, so this

1 represents the AR from the last time that it was reduced
2 down. So this is September. It might represent what was
3 there from the beginning of the year. Some of those
4 charges -- some of those charges in the AR will be for
5 charges --

6 Q. Doctor, would you defer to Mr. Sheheen on this as well
7 to be able to explain the details?

8 A. I would defer to Mr. Sheheen on what our normal
9 accounting practices of the business were with respect to
10 what a reasonable AR would be --

11 Q. But you'd agree with me --

12 A. -- with respect to Section 4.5 and the purchase price,
13 so I would definitely agree that we should defer to Austin
14 Sheheen about that.

15 Q. But you would agree with me this is a month-in,
16 month-out process that your staff does and which is reflected
17 in the excerpts of Exhibit 250 that are in the book, right;
18 you agree with me that this process is done every month?

19 A. Mr. Cleveland, I would agree this is something our
20 practice puts together. I think you're trying to put an
21 orange where an apple needs to be. This is not what you
22 would use to try to figure out what a reasonable AR was.
23 Nobody, if I tried to sell that AR to a bank or if I tried to
24 sell that AR to another person, nobody would look at that AR
25 and say that that is reasonable or customary. What that AR

1 number is being used, as I said earlier, is to be able to
2 track how the collection efficiency is going in the practice.

3 Q. Thank you. 26, please. One third of the sum of the
4 accounts receivable of the corporation. It doesn't say the
5 accounts receivable that Dr. Puchalski thinks he can sell.

6 It says, in describing the purchase price contained in
7 Exhibit 7 on page 16, it says that what Dr. Dyce would be
8 paid is one third of the sum of the accounts receivable of
9 the corporation booked in accordance with the corporation's
10 normal accounting methods, correct?

11 A. It does say that sentence, yes, sir, and if --

12 Q. Would you go to 33, please. All right. What this is is
13 the consent that you issued when you decided to terminate Dr.
14 Dyce for cause, correct?

15 A. If I may, can I make a comment on the last thing as well
16 still or not?

17 Q. No. There will be a chance for redirect. Let's look at
18 the unanimous consent. I should know the exhibit number, but
19 this is the May 8, 2010 unanimous written consent in lieu of
20 the meeting of the shareholders of South Carolina ENT. This
21 is what you issued when you decided to terminate Dr. Dyce for
22 cause, correct?

23 A. Yes, sir.

24 Q. Now, you had already terminated him without cause.

25 A. That's correct.

1 Q. Let's look at the second whereas clause. It says, Dr.
2 Dyce shared numerous pieces of information regarding a
3 proposed contract to other nonshareholder physicians of SCENT
4 to further his own personal position. Now, that means that
5 you are accusing Dr. Dyce of having talked with Dr.
6 Gunnlaugsson about the new contract, the new shareholders
7 agreement, correct?

8 A. That is one of the major portions that that's referring
9 to, yes.

10 Q. All right. Let's look at your confidentiality provision
11 in the shareholders agreement dated July 16, 2008. This is
12 page 11 of Exhibit 7, particularly Section 3.7. It states,
13 does it not, the shareholder shall not disclose any
14 information relating to the corporation regarding the
15 corporation's operations, records, patients or procedures to
16 any persons other than employees of the corporation, federal
17 and state regulatory agencies, third-party reimbursement
18 agencies, the corporation's accountants, lawyers, consultants
19 and other professional advisers without the prior written
20 consent of the corporation or, as the case may be, an
21 enforceable subpoena or the final order of a court of
22 competent jurisdiction. That's the statement of the
23 confidentiality policy that governed SCENT, is it not?

24 A. What you've read is a portion of it, yes, sir.

25 Q. All right. And it says that the shareholder shall not

1 disclose to any persons other than the employees of the
2 corporation, correct?

3 A. It does say that.

4 Q. And Dr. Gunnlaugsson was an employee on a shareholder
5 purchase track when you accuse Dr. Dyce of sharing
6 information with him about the new shareholders agreement,
7 right?

8 A. He was an employee of the practice at the time.

9 Q. Wasn't he on a shareholder track?

10 A. He was on a shareholder track.

11 Q. Okay. That's what I thought. And so the company policy
12 specifically allows Dr. Dyce to talk with Dr. Gunnlaugsson
13 about anything he wants to.

14 A. That is not the case.

15 Q. Well isn't that what your agreement says?

16 A. What the agreement says, once again, I think you might
17 be taking something out of context --

18 Q. My question is where in the agreement does it say that
19 Dr. Dyce can't talk with Dr. Gunnlaugsson about the
20 shareholder agreement that you want to have them sign?

21 A. In two places in this paragraph, and there's also
22 another confidentiality clause in the employment agreement,
23 but for the purposes of this discussion let me just point out
24 the two areas in this paragraph Section 3.7 of the
25 shareholders agreement. Number one, it says each shareholder

1 shall use the information related to the business of the
2 corporation to advance the corporation's best interests,
3 comma, and not to benefit their personal interests. And in
4 the next line, all forms, templates, systems, including
5 billing systems are the property of the corporation and shall
6 not be used apart from the corporation by the shareholder or
7 departing shareholder without the written consent of the
8 corporation.

9 Q. Do you contend that if Dr. Dyce told Dr. Gunnlaugsson
10 what was in the new shareholder agreement, that that violates
11 Section 3.7, yes or no?

12 A. If Dr. Dyce told a nonshareholder a confidential piece
13 of information, then it would violate the confidentiality
14 clause of the employment agreement. It would also violate
15 this if it was done for his own personal interests and not
16 the best interests of the corporation.

17 Q. Well, you and Dr. Dyce disagreed on what was in the best
18 interests of the corporation, didn't you?

19 A. Dr. Dyce and I had some philosophical differences on the
20 corporation. I think it would be very difficult for anybody
21 to argue that taking confidential information and disclosing
22 it to a non -- to an employee not for the benefit of the
23 practice, I certainly would not have thought to do that, to
24 share that information with Dr. Gunnlaugsson or Dr. Vidrine
25 or Dr. Paul or anybody else frankly.

1 Q. Well, Dr. Puchalski, when those buy-in sheets that you
2 don't like the name of were created, Theresa Williams created
3 them, did she not?

4 A. Theresa Williams along with others in the practice.

5 Q. Okay. Employees, they were employees of the practice.

6 A. Yes.

7 Q. And you shared the information concerning Dr. Dyce's
8 buy-in with Theresa Williams, did you not?

9 A. Yes.

10 Q. That didn't violate Section 3.7, did it?

11 A. No, because we were doing it in the best interests of
12 the corporation, and what I'm saying is that giving a --
13 taking a dispute or a contract negotiation that's in dispute
14 and giving it to somebody else is not in the best interests
15 of the corporation and it resulted in something,
16 retrospectively. You can see that.

17 Q. Let me give you a hypothetical see what your thoughts
18 are about this.

19 MR. SHEHEEN: Your Honor, I would object to speculation
20 of a hypothetical.

21 THE COURT: Let me hear it first.

22 Q. I want you to assume that there are two doctors that are
23 equal shareholders in a medical practice, and I want you to
24 assume that one of the shareholders decides that he needs to
25 have a lot more control about how things happen than he

1 currently does, and I want you to assume that that
2 shareholder has the company's lawyers draw up, after many
3 versions, a new shareholders agreement that gives him a lot
4 more power than he previously had, and I want you to assume
5 that the other shareholder, when he saw it, didn't like it.
6 Now, do you think that the first shareholder has the right to
7 decide what's in the best interests of the corporation --

8 MR. SHEHEEN: Your Honor.

9 Q. -- to the exclusion of what the other shareholder thinks
10 is right?

11 THE COURT: Yes.

12 MR. SHEHEEN: I'm going to object, first of all, because
13 there's like ten questions in there, and secondly because
14 it's a hypothetical question. He's here as a fact witness to
15 testify.

16 THE COURT: I think there's evidence in this record on
17 each of the elements of the hypothetical, so I'll allow the
18 question, noting the exception. You may proceed.

19 THE WITNESS: So first let me say that your hypothetical
20 situation I don't believe accurately characterizes anything
21 that was going on between Dr. Dyce and Dr. Puchalski at South
22 Carolina ENT. I would also say that you started off -- I
23 think one of your questions, you said there were two
24 shareholders that were even. I do agree that there were two
25 shareholders that were even in South Carolina ENT at the time

1 of Dr. Dyce's departure. There was a contract that dictated
2 the responsibilities for the management of the practice, and
3 that contract was very, very detailed, and that contract was
4 something that Dr. Dyce and Dr. Puchalski signed, and it
5 outlined responsibilities that corporate accounting would
6 have, that corporate counsel might have, that the managing
7 shareholder might have, and it was in lieu of any kind of a
8 board of directors. I'd also point out that -- and I'm sure
9 we'll go through it at some point, but the characterization
10 that there's more power that was given from one shareholder
11 than another is inaccurate. I would just focus on saying
12 that what's in the best interests of the practice is
13 something that is determined by the management of the
14 practice on a whole.

15 Q. Are you done?

16 A. Yes, sir. Unless there was a specific question in there
17 that I've missed for you. I would also add that --

18 Q. Thought you were done.

19 A. -- if there was something that was confidential and that
20 was clearly a source of contention between two shareholders,
21 you would question why one shareholder would feel that it
22 would be in the best interests of the practice to disclose
23 the nature of that debate to one of the other two shareholder
24 track physicians, meaning Dr. Gunnlaugsson and Dr. Vidrine.

25 Q. Are you done?

1 A. Yes, sir.

2 Q. 40, please. Let's look at Exhibit 10, which is Dr.
3 Dyce's June 1st, 2008 employment agreement, and particularly
4 page 15 of that which is Exhibit A, the covenant not to
5 compete. The covenant says on page 16 of Exhibit 10, for a
6 period of 18 whole calendar months from the date of
7 termination of the employment agreement physician shall not
8 directly or indirectly practice medicine or provide medical
9 services within a 20-mile radius of any practice site
10 maintained by the group. Now, this provision prohibits Dr.
11 Dyce, by its wording, from providing any kind of medical
12 services within 20 miles, does it not?

13 MR. SHEHEEN: Your Honor, I'm going to -- I think that
14 the whole covenant is in front of him, but I'm going to
15 object to taking it piece by piece without the witness being
16 able to look at the entire document.

17 THE COURT: You can absolutely ask your witness to see
18 the entire document.

19 MR. CLEVELAND: Absolutely.

20 MR. SHEHEEN: Is it in the book?

21 MR. CLEVELAND: It's in the first book.

22 Q. Dr. Puchalski, I'm handing you now the full version of
23 Exhibit A to Exhibit 10 which is the covenant not to compete.

24 Are you looking at Exhibit A?

25 A. I have Exhibit A.

1 Q. Now, look over on page 16, here we go, paragraph 1, and
2 my question to you is, looking at this paragraph or looking
3 at anything else in the exhibit, do you agree with me that
4 your covenant not to compete that Dr. Dyce signed by its
5 wording would prevent him from practicing any kind of
6 medicine within the areas prescribed there for the time
7 period prescribed?

8 THE COURT: That's a different one. You were dealing
9 with the June 1st. It's actually Exhibit 233.

10 MR. CLEVELAND: I'm sorry.

11 THE COURT: That's okay, but this is the August 1. It's
12 Defendant's Exhibit 233 if that's helpful.

13 MR. CLEVELAND: We can do this. All right. I'm sorry,
14 Your Honor.

15 THE COURT: No problem.

16 Q. Dr. Puchalski, looking at paragraph 1, the portion I
17 have on the screen from Exhibit 10, page 16, or anything else
18 in Exhibit A, would you agree that under the wording of the
19 noncompete that Dr. Dyce signed he's not able to practice any
20 type of medicine within the 20-mile radius of the practice
21 site for a period of 18 months?

22 A. I believe that Dr. Dyce, as I or anyone else are limited
23 by what field of medicine we can practice by a number of
24 things, and so I can't practice any kind of a medicine
25 because I can't do cardiothoracic surgery. I can't get

1 liability insurance for it. I can't get licensed for it. I
2 can't get hospital privileges for it. What I believe is that
3 Dr. Dyce is prevented from doing what is outlined in the
4 contract, and that I think is clear that when you look at the
5 physician's job description, it's pretty clear that a
6 physician shall render full range of professional services
7 typically provided by licensed physicians practicing in the
8 area of otolaryngology, and I believe that's consistent also
9 with the articles of incorporation for South Carolina ENT
10 Allergy & Sleep Medicine.

11 Q. Is there any kind of medicine that this provision allows
12 Dr. Dyce to practice within the 20-mile radius for a period
13 of 18 months?

14 A. So Dr. Dyce could do many other things if you're asking
15 about the scope but --

16 Q. You mean medical things?

17 A. Medical things potentially.

18 Q. Like what?

19 A. So if Dr. Dyce would wanted to work for an insurance
20 company, he wouldn't be practicing and providing medical
21 services, but he'd still be using his experience as a
22 physician. If he wanted to become a hospital executive, he
23 could certainly do that as well. He was practicing in the
24 full breadth of what he was trained to do. I know that
25 because I was trained with him. We went to the same training

1 program. I know what he was doing. I know what he can do.
2 He was doing everything that he could do, and that's what we
3 were covering in this covenant. So you could do something
4 else. I mean, you could go and do a residency in something
5 else or train in something else that was outside of that, or
6 you could do something that was outside the realm but still
7 used your experience and your degree.

8 Q. But you agree that he could go work as a hospital
9 executive.

10 A. If he's not providing medical services, I believe the
11 way this is read.

12 Q. My question is do you agree that under this provision he
13 could go be a hospital executive?

14 A. I don't believe that you're practicing medicine as a
15 hospital executive or providing medical services, so my
16 testimony would be that you could under this.

17 Q. And that's because the practice doesn't need to restrict
18 one of its doctors from going and being a hospital
19 administrator in order to protect its good will, to protect
20 its place in the marketplace, right?

21 A. Well, I wouldn't go that far. Right now numerous
22 physicians are going into hospital administrative roles, and
23 if you were to go into a hospital administrative role where
24 you managed a competing otolaryngology group, you know, I
25 think that there's -- you'd have confidential information

1 that could be spread, but I believe you could go out and do
2 that. It wouldn't be practicing medicine, so it would be
3 outside that.

4 Q. Is there any kind of medicine that Dr. Dyce could
5 practice under this paragraph in the covenant not to compete?

6 A. I don't believe that there's any other medicine that Dr.
7 Dyce could practice outside of what he was practicing at
8 SCENT.

9 Q. Well, Dr. Dyce could go work in an emergency room, could
10 he not?

11 A. He's not an emergency room physician.

12 Q. But he could go and apply for or be accepted as an
13 emergency room physician, could he not?

14 A. I don't know that he'd get privileges as an emergency
15 room physician.

16 Q. I know you don't know that, but the point is that Dr.
17 Dyce has the ability to go work in an emergency room.

18 A. I'm telling you, Mr. Cleveland, as somebody who was the
19 chairman of the credentialing committee at one hospital for
20 three years, you could not become an emergency room at
21 Richland, you couldn't be in the emergency room at Baptist,
22 you couldn't be in the emergency room at Providence, you
23 couldn't be in the emergency room at Providence Northeast,
24 you couldn't be in the emergency room at Kershaw without
25 being board certified in emergency medicine.

1 Q. The law doesn't require board certification, does it?

2 A. The hospital privileges do. If you're working in an
3 emergency room, the hospital has to allow you to do that. So
4 I think you're asking hypothetical questions that just
5 don't -- don't apply.

6 Q. You don't compete with primary care practices, do you?

7 A. We have overlap. There's certainly primary care
8 physicians who may also specialize in something else, so
9 there's some overlap, yes.

10 Q. Did you yourself moonlight in an emergency room when you
11 were a resident?

12 A. I never moonlighted as a resident in an emergency room.

13 Q. Did you ever work in an emergency room?

14 A. I have never -- well, I'm sorry, I worked in an
15 emergency room in my capacity as a resident for
16 otolaryngology seeing consults, but I've never worked in an
17 emergency room. My wife is a pediatric emergency room
18 physician.

19 Q. Dr. Dyce under this provision would not be allowed to go
20 work for a primary care practice, would he?

21 A. Dr. Dyce wouldn't be able to work for a primary care
22 practice because he doesn't have any training in primary
23 care, hadn't done it, couldn't get licensed in it, couldn't
24 get any privileges at a hospital in it, so he can't do it for
25 those reasons.

1 Q. He's not required to have a license in primary care
2 medicine, is he?

3 A. No, you're required to have malpractice insurance, and
4 you're required to have hospital privileges, both of which
5 would require training and board certification.

6 Q. But if a practice wanted to have Dr. Dyce come work for
7 it rendering primary care services, he would not be able to
8 do it under this provision, would he?

9 A. What I'm trying to tell you is that a practice couldn't
10 do that because he couldn't get malpractice insurance.

11 Q. You've repeated that many times, but now answer my
12 question which you've refused to answer.

13 MR. SHEHEEN: Your Honor, I'd object. He's asked the
14 question three times.

15 Q. The question is under this agreement Dr. Dyce would not
16 be able to go work for a primary care practice, would he?

17 A. I am saying that Dr. Dyce wouldn't be able to work for a
18 primary care practice regardless of whether or not he had
19 this agreement or not.

20 THE COURT: That's not the question. I'm going to ask
21 you to be responsive to the question, and I've got where your
22 mind is going. It's sort of skipping over to let me talk to
23 you about what reality is as I see it. I want you to stay
24 with the agreement.

25 THE WITNESS: Yes, ma'am.

1 THE COURT: And respond to the question vis-a-vis just
2 the agreement. In other words, tell your brain, don't jump
3 to the next -- don't jump to that next piece, stay with just
4 the agreement for me. Do you see what I'm saying? Your mind
5 wants to go to, let me tell you what the reality is, let me
6 tell you about the reality. Stay with the agreement, okay,
7 just the language as you understand the language in the
8 agreement, okay?

9 THE WITNESS: So if Dr. Dyce for instance had another
10 fellowship or another training in internal medicine and he
11 wanted to go do that, he would not be allowed to under this
12 contract.

13 Q. Now, this is the covenant not to compete that Dr.
14 Vidrine signed in August of 2010, and it's Exhibit 112.

15 If you need me to get it, I'll go find the full thing.

16 MR. SHEHEEN: That's fine.

17 Q. Dr. Puchalski, SCENT got from Dr. Vidrine a covenant not
18 to compete that it felt appropriate to protect itself in case
19 Dr. Vidrine left the practice, right?

20 A. Yes.

21 Q. Okay. Now, let's compare the two covenants not to
22 compete. Dr. Dyce's covenant keeps him from practicing any
23 kind of medicine or providing any kind of medical services
24 within a 20-mile radius, right?

25 MR. SHEHEEN: Your Honor, I'm going to object.

1 THE COURT: Okay.

2 MR. SHEHEEN: Dr. Vidrine's contract is not in dispute
3 in this case. It is not -- I don't believe it's in dispute
4 in this case. It's not a part of this case, and what the
5 attorney is doing is comparing one to another. He could pull
6 another out of any case or anyplace in South Carolina and
7 compare it to it and ask him questions about it.

8 THE COURT: Let me ask you this question first, is Dr.
9 Vidrine's, is his contract an exhibit?

10 MR. CLEVELAND: Yes.

11 MR. SHEHEEN: Yes.

12 THE COURT: It is an exhibit?

13 MR. SHEHEEN: Yes.

14 THE COURT: Very well, then I would overrule the
15 objection. It's just a comparison between the two. Could be
16 any number of reasons why there might be a difference, but
17 it's simply a comparison at this point because they're both
18 in evidence. I can do it. He can do it.

19 Q. So, Dr. Puchalski, Dr. Dyce's covenant not to compete
20 keeps him from practicing any kind of medicine or providing
21 any medical services within a 20-mile radius. Let's look at
22 what Dr. Vidrine's provides, which you said is reasonable and
23 provides reasonable protection for the practice. He can't
24 provide services that the physician performed while employed
25 by the group in a manner that is competitive with the group.

1 That's different, that's very different, isn't it?

2 A. Mr. Cleveland, can I see the source document, please,
3 before I comment on this?

4 Q. Sure.

5 A. Thank you.

6 MR. CLEVELAND: Yes. I am going to hand Dr. Puchalski
7 Exhibit 112.

8 THE COURT: Okay.

9 THE WITNESS: Mr. Cleveland, I'm going to point out to
10 you that this is not the agreement that Dr. Vidrine had at
11 the time that Dr. Dyce departed.

12 Q. Thank you. Now would you answer my question? Dr.
13 Vidrine's covenant not to compete is very different in scope
14 than Dr. Dyce's, is it not?

15 A. It is. It's not limited to Dr. Vidrine's. All the
16 covenants with Dr. Puchalski, Dr. Simmons, Dr. Emani, all
17 four of our physicians currently in the practice all have
18 covenants that are very similar to your second exhibit on the
19 slide here, so it's not Dr. Vidrine specific.

20 Q. But Dr. Vidrine is only prevented from providing
21 services that were like the ones he performed at SCENT and
22 ones that would be competitive with the group, right?

23 A. The language in our contract was changed from one to --

24 Q. Just answer my question and then you can explain.

25 A. Sorry, yes, Dr. Vidrine signed this confidentiality

1 agreement which is different than the first one.

2 Q. No, sir, the question is Dr. Vidrine is only limited
3 from performing the kinds of services that he did while at
4 SCENT and is only prevented from doing things that are
5 competitive with the group, right?

6 A. Yes, as are all the physicians at SCENT currently.

7 Q. And Dr. Dyce is prevented from, according to Exhibit 10,
8 page 16, he's prevented from engaging or providing medical
9 services even though they're not competitive with the group,
10 right?

11 A. No, sir.

12 Q. Explain that to me. Why do you say no, sir, to that?

13 A. Well, first, all the physicians at SCENT had the first
14 quote that you have there, the first language, so that's Dr.
15 Dyce --

16 Q. You've said that three times.

17 MR. SHEHEEN: Your Honor, he needs to be able to answer
18 the question.

19 THE COURT: He does, but the problem is that he's not
20 being responsive. I need him to be responsive. If he
21 doesn't know the answer, it is perfectly fine to say, I don't
22 know the answer. If it's a yes or no answer, then I need you
23 to answer it yes or no, and then if you need to explain, you
24 can explain, but what's happening is that there's a question,
25 and your mind is going over here, and I need you to stay with

1 where Mr. Cleveland is with the question. Now, I'm not going
2 to keep you from explaining something if it's a yes or no but
3 yes or no doesn't really give me the full answer. That's
4 absolutely fine. But for us to stay organized I need you to
5 answer yes or no if it's a yes or no response because, let me
6 give you an example, the question was this one is different,
7 the top is different than the bottom, and your response was
8 yes, but at the time, everybody had that one, and now
9 everybody has this one. That goes over here, and the
10 question is, sure, yes, they're different, yes, he had that
11 one and, yes, they have these, and you've said all that, but
12 we're sort of chicken-walking around it instead of just here,
13 it is, and if you need to explain it, I don't want to keep
14 you from explaining it. For your purposes here's what I've
15 gotten from the testimony, for everybody's purposes, there
16 are two different ones. This is earlier, this is later. All
17 the doctors now have this one, Dr. Dyce had that one, and
18 they're real different.

19 MR. SHEHEEN: Your Honor, the only reason I object is
20 because he asked him what the limitation -- did he agree that
21 he was limited differently. He said no. Then Mr. Cleveland
22 said explain that to me, and that's when he cut him off.

23 THE COURT: He already explained that. I mean, he
24 already has. I mean, he really has. He really has, so I
25 have it, so I want to move on. I mean, he's told you that.

1 He's told you that you can be an insurance -- you can work
2 for an insurance company under number one, but you can't be a
3 doctor, you can't practice as a doctor under number one, and
4 number two is real different.

5 MR. CLEVELAND: Let me just ask this and I'll move on.

6 THE COURT: Go right ahead.

7 MR. CLEVELAND: Thank you.

8 Q. Dr. Puchalski, do you agree with me that under Dr.
9 Dyce's covenant not to compete the wording would preclude
10 him, keep him from providing medical services even though
11 they were not competitive with SCENT?

12 A. Only if he had the ability to go out and get malpractice
13 insurance and hospital privileges in a specialty that was not
14 his own and --

15 THE COURT: Hold on. That's over here. Come back to
16 here. You just jumped. In other words, that's the reality
17 as you see the reality, and I got that. In other words, you
18 don't think he could go out and do anything other than the
19 ENT stuff and the reality is he couldn't go out and do
20 anything other than ENT, right, and what you all were doing?

21 THE WITNESS: Yes.

22 THE COURT: Yes. That's not the question. The question
23 is does the language, based on your understanding of the
24 language and the agreement, would it limit him.

25 Is it okay that I do that?

1 MR. CLEVELAND: Yes.

2 THE COURT: I kind of need to get there because my
3 head's about to explode.

4 MR. CLEVELAND: Thank you.

5 THE COURT: Because I think it's been asked and
6 answered, but go ahead.

7 THE WITNESS: I believe it has, yes.

8 MR. CLEVELAND: Thank you.

9 Q. Dr. Dyce's covenant would keep him from working in North
10 Carolina if it was within the 20-mile radius, would it not?

11 A. Dr. Dyce didn't have a license in North Carolina.

12 THE COURT: You just did it again. See, you jumped to
13 number two. Go back to number one.

14 THE WITNESS: Yes, it would, if he had a license in
15 North Carolina.

16 Q. Okay. And Dr. Vidrine's doesn't preclude him from going
17 to North Carolina, does it?

18 A. It says that it's limited to only the State of South
19 Carolina, so it has no mention -- it limits it to South
20 Carolina.

21 Q. And that's because --

22 A. If he had a North Carolina license, he'd be able to go
23 to North Carolina if it was across the border.

24 Q. That's because SCENT doesn't need to be protected from
25 people practicing in North Carolina, does it?

1 A. No, sir, so that was changed after there was a challenge
2 to our covenant in March of 2010. The issue of competition
3 has to do with the radius from the site and on our site in
4 Cheraw it's not very far from the border, so our practice is
5 changing. We no longer have the Cheraw site. We no longer
6 have the Hartsville site. We're much further from the
7 border, but it's competition -- within your question, I think
8 some of the problem is within your question you make
9 statements, and I'm trying to address those, and I apologize
10 if I'm doing that in some way that's inefficient.

11 Q. 45, please. Now, this is Exhibit 85, page 1. This is a
12 letter you wrote sometime in August of 2010, or sometime
13 prior to August 31st, 2010, to Dr. Dyce asking him to come
14 back to the practice, right?

15 And I don't think it's in the book, Your Honor.

16 THE COURT: You caught me looking. 84 is though. It's
17 close.

18 MR. CLEVELAND: I can certainly --

19 THE COURT: Don't you worry about that. Just keep
20 going. I'm following you. I can read that.

21 THE WITNESS: Yes, this is an offer to come back to
22 work.

23 Q. And you offered Dr. Dyce to come back as an at will
24 employee, correct?

25 A. Yes.

1 Q. That's so you could fire him whenever you wanted to,
2 that's what at will means, doesn't it?

3 A. It's not so we would be able to fire him at any time,
4 but it's to have him -- he would be coming on not in his
5 previous role, he would be coming on as a physician employee.

6 Q. Right, but the at will part of it means you could fire
7 him whenever you wanted to.

8 A. Just like any other employee. He'd have the same laws
9 as any other employee we have that are at will employees.

10 Q. But you'll agree with me that's what that means.

11 A. I don't --

12 THE COURT: Yes.

13 THE WITNESS: Yes.

14 THE COURT: I mean, I hate to answer for him, but that's
15 the law. I mean, that's what the law says. If he didn't do
16 it on discriminatory -- yes, that's what at will means. Yes.

17 MR. CLEVELAND: Thank you.

18 Q. And look at paragraph 5 of your letter to Dr. Dyce. The
19 parties mutually agree that your being re-employed as an at
20 will employee will have no impact and will not be used by
21 either party to try and impact the consequences of your
22 previous termination of employment or your status as a
23 shareholder. These are issues that we can address after you
24 return to work. And you go on to say, Orville, SCENT would
25 very much like for you to return to work and believe that

1 your talent and skills are far too valuable for you to be
2 collecting unemployment benefits. SCENT and I are very
3 hopeful that you will accept this offer of employment. Was
4 this letter written before or after you lost your contest of
5 his getting unemployment benefits?

6 A. So once again you put something in there. I will tell
7 you that this was probably -- there was two offers for him to
8 return to work as an employee. One sometime in maybe, oh,
9 sometime in May maybe and then one in August.

10 Q. Could you answer my question?

11 A. Your question was was this at about the same time that
12 you lost an unemployment -- something along those lines, is
13 that right?

14 Q. If you'll listen to the question.

15 A. Yes, sir.

16 Q. Dr. Dyce was being paid unemployment compensation
17 benefits, right?

18 A. I don't know if he was or not.

19 Q. You contested his right to get unemployment benefits and
20 accused him of having been terminated for cause, correct?

21 A. We contested his unemployment benefits and offered
22 his -- we offered him -- showed the fact that we had offered
23 him at will employment in that process, yes.

24 Q. You went to the Commission and tried to prove that he
25 had been terminated for cause and you lost. That's what I

1 meant by the term lost.

2 A. What we did when we went to the Commission, we went to
3 the Commission to speak with Dr. Dyce, and this is our way --
4 we were trying to communicate with Dr. Dyce, we tried to get
5 him an offer to come back to work. We did go through the
6 hearing. We were not going there with the intention of
7 trying to prove whether or not he had for cause or not for
8 cause. That's the job of this process here. It's not the
9 goal --

10 Q. Are you denying that you contested his right to receive
11 unemployment benefits?

12 A. No, we did not, we contested it and we appealed it.

13 Q. And you lost before the Commission.

14 A. And we lost, yes.

15 Q. Okay. Now, my question to you is was this letter
16 written before or after you lost before the Commission?

17 A. I believe it was before. If you tell me the date of the
18 Commission, I can try to tell you.

19 Q. I don't know the date of the Commission. Let me ask you
20 about this, did you anywhere in this offer of at will
21 employment say to Dr. Dyce that you felt like you didn't owe
22 him any money for the buyout of his shares?

23 A. I don't think we have anything discussed there about
24 shares.

25 Q. Well, there is something about shares. There's

1 paragraph 5.

2 A. Not buying him out for shares, other than if he came on
3 back we wouldn't have that affect the process.

4 Q. My question is did you tell Dr. Dyce in this letter
5 anything about your intent to not pay him the price of his
6 shares like you had promised him when you terminated him
7 without cause?

8 A. I don't see anything in this letter about that if that's
9 what you're asking, no.

10 Q. Did you ever communicate to Dr. Dyce before lawsuits
11 were filed that you contended that he owed you money and tell
12 him what you thought he owed?

13 A. Dr. Dyce sued us two days after the termination not for
14 cause, so that was -- in those two days, I don't think there
15 was any documentation in those two days.

16 Q. Prior to his accepting work in October did you ever tell
17 him your position on your contention that he owed the
18 practice money?

19 A. We didn't tell him one way or the other.

20 Q. Okay.

21 A. Because we didn't know what he was doing.

22 Q. And as of today have you ever paid him anything for his
23 shares?

24 A. He's not paid us and we've not paid him.

25 MR. CLEVELAND: Thank you, Dr. Puchalski.

1 THE COURT: All right. Do you want to take a little
2 comfort break before redirect?

3 THE WITNESS: Sure.

4 THE COURT: We're going to take about ten minutes, and
5 then we'll have redirect.

6 (Recess held.)

7 THE COURT: Redirect. Your witness.

8 MR. SHEHEEN: Thank you, Your Honor.

9 REDIRECT EXAMINATION BY MR. SHEHEEN:

10 Q. Dr. Puchalski, before we broke for Thanksgiving you were
11 asked some questions about the closing and being able to
12 close on the loan for SCENT Land. Do you recall those
13 questions?

14 A. Yes.

15 Q. Just to jog the Judge's memory and ours as well at that
16 time this would have been the spring of 2010, is that right?

17 A. Yes.

18 Q. All right. Was Kershaw Health's lease on the West
19 Wateree building running out?

20 A. Yes, it was.

21 Q. And did -- was the West Wateree office the central
22 office where billing and other paperwork and things were done
23 for the satellite offices as well?

24 A. Yes, it was the central place for billing offices. All
25 administration came out of there as well.

1 Q. And was SCENT, SCENT, funding the construction through
2 its operation budget by sending money to SCENT Land, loaning
3 money to SCENT Land?

4 A. Yes.

5 Q. Was SCENT in the position to continue doing that?

6 A. No.

7 Q. I'm going to show you Defendant's Exhibit 49 which I
8 believe is already in evidence, but I brought copies just so
9 we can be able to work off of them a little bit. Your Honor,
10 would you like a copy?

11 THE COURT: I've got my notebook. Is it in my notebook?

12 MR. SHEHEEN: It's in your notebook.

13 Q. Are you familiar with this email?

14 A. I recall it, yes.

15 Q. Is it an email from -- who's it an email from?

16 A. It looks like an email chain between Theresa Williams
17 and Charlie Lucas, and it has me copied.

18 Q. Remind the Judge who Charlie Lucas is.

19 A. Charlie Lucas is the general contractor for the
20 building, and it actually also copies Jamie and Amy and Dr.
21 Dyce.

22 Q. Did anything concern you in this email when you saw it?

23 A. If you don't mind, I'd just like to read it.

24 Q. Please.

25 A. Yes.

1 Q. What?

2 A. We were concerned that the relationships between the
3 subcontractors and the general contractor were being stressed
4 and that our relationship with the contractor was being
5 stressed.

6 Q. Could you speak up a little bit?

7 A. Yes. I'm sorry, that the relationship with the
8 subcontractors and the contractor was being stressed and that
9 the relationship between us and the general contractor was
10 being stressed.

11 Q. Was there any specific language in this email that
12 caused you to feel that way?

13 A. He says, our subcontractors and our company are losing
14 our relationship with our suppliers at one point. He says
15 earlier that the last two invoices -- the failure to pay the
16 last two invoices caused burdens on our vendors and
17 subcontractors.

18 Q. Are you on page 2 or page 1?

19 A. I was on page 2 for that last comment.

20 Q. Okay.

21 A. And then our company and some of the subcontractors'
22 suppliers cash flow is negative. We are approaching time
23 limitations, first section on page 1, we are approaching time
24 limitations on vendors, subcontractors that may place a lien
25 on the property due to nonpayment.

1 Q. What did that mean to you?

2 A. That was the scariest part of this email, so it was --
3 it says if liens are put in place, this will probably affect
4 the closing, so we had already been in a position where a
5 line of credit -- we ran into a wall on that, and here we
6 were again apparently running into a wall, but the thought
7 was that a lien was imminent after receiving this email.

8 Q. Okay. There was questions about who had to sign what.
9 I'm not going to re-plow that territory, but I just want to
10 ask you this: Are you aware if in the shareholders agreement
11 that both you and Dyce signed there was anything in there
12 about shareholders guaranteeing debt?

13 A. Yes. There's a section in the shareholders agreement
14 that says that.

15 Q. I'll reference you to 3.5. You have the shareholders
16 agreement up there.

17 A. I'm sure I do somewhere. If someone just gives me an
18 exhibit number, I'll be there very shortly.

19 Q. It's right there in front of you, should be in that
20 book, and I think I actually turned it to the page.

21 A. I've got it.

22 Q. Turn to 3.5, shareholders agreement.

23 MR. CLEVELAND: This is Exhibit 7?

24 MR. SHEHEEN: Yes. It's also Defendant's Exhibit --
25 Plaintiff's Exhibit 7, Defendant's Exhibit 110.

1 THE WITNESS: I'm there, shareholder guarantee, the
2 shareholders agree to execute any guarantee necessary to
3 secure the obligations of the corporation as approved by the
4 majority -- by a majority of the shareholders.

5 Q. Okay. All right. You in your direct and on cross
6 talked about attempts to get Dr. Dyce to sign the closing
7 document. Did you offer any changes to the operating
8 agreement to try to make this occur?

9 A. Yes. So we were trying numerous things to try to get
10 this closing done because we were worried about this email
11 and concerns that we had about our cash flow, and so at first
12 we tried to secure the closing by trying to unilaterally
13 personally guarantee it. Ran into a roadblock with that
14 language that was in the articles of incorporation for SCENT
15 Land Holdings. We also then offered the -- the other side
16 actually said, well, our concerns are that we signed this
17 contract back in 2009, but now we don't like it because it's
18 a brand new building, we're both here, and you're going to
19 have a different deal with Dr. Dyce, and so we actually
20 offered to amend the SCENT Land Holdings agreement in
21 February and then --

22 Q. Did that happen?

23 A. No. We offered it to them, we sent it to them, and
24 during the time when we were talking to them about
25 unilaterally also providing a unilateral guarantee and

1 they --

2 Q. Okay. All right. Did you ultimately -- well, let me
3 show you this document which has been marked as Defendant's
4 Exhibit 239.

5 MR. SHEHEEN: And this one's not in evidence yet, Your
6 Honor. We provided it to opposing counsel earlier today. I
7 don't know if there's an objection. I don't think it's in
8 yet at least. Is it already in? Okay. It is already in.

9 Q. Do you recognize this document?

10 A. Yes, this is an addendum to the articles of
11 incorporation.

12 Q. Okay. And why did you -- why did SCENT do this? Tell
13 the Judge briefly why SCENT did this.

14 A. Well, we -- when we offered Dr. Dyce the opportunity to
15 change the contract and -- well, we realized there was a
16 stopping point at the articles of incorporation and the bank
17 would not let us close without Dr. Dyce's signature. When
18 Dr. Dyce would not be a party to that and fulfill that
19 obligation, then we went to trying to see if we could address
20 any concerns we had. That was with, you know, this amendment
21 that we had to the SCENT Land Holdings agreement. At that
22 point they said no, and they became very adverse at that
23 point. That was that whole "wow" email. That came very
24 shortly after we had proposed the amendment. Then the only
25 way that we could close was to -- was once we finally changed

1 the articles of incorporation, which happened after Jamie
2 departed SCENT Land Holdings for failure to make the capital
3 call, and this represents the change in the articles of
4 incorporation which removed the portion concerning this
5 Article 9 that was deleted and Dyce as a manager was removed.

6 Q. What did that document then allow you to do?

7 A. To close on the property.

8 Q. Okay. On the property or the loan?

9 A. To close on the Lugoff building.

10 Q. I'm going to show you Defendant's Exhibit 240 which is
11 the unsecured -- well, let me ask you if you've seen it.

12 A. Yes, this looks like the line of credit that we had with
13 First Palmetto.

14 Q. All right.

15 A. Signed by myself and Dr. Dyce.

16 MR. SHEHEEN: All right. I'm going to move to enter
17 that in as Defendant's Exhibit 240.

18 THE COURT: Any objection?

19 MR. CLEVELAND: No, Your Honor.

20 THE COURT: Okay.

21 (Defendant's Exhibit 240 received into evidence.)

22 Q. What were you using this line of credit for at that
23 time?

24 A. The line of credit was being used as a backup and
25 then -- and to kind of overcome any shortfalls in cash flow,

1 but then it became used primarily at this time to fund the
2 loan between SCENT and SCENT Land Holdings.

3 Q. Was it coming due, this line of credit?

4 A. This line of credit came due on March 3rd, 2010, the
5 date of Dr. Dyce's termination.

6 Q. Do you recall if there was any relationship between
7 those?

8 A. Yes, there was relationship. This was -- this was a
9 line of credit that was unsecured that was with the practice
10 for \$300,000. We had run it to nearly its maximum. It was
11 coming due, and Dr. Dyce was withholding any signatory or any
12 approval to go ahead and have it redone for an extra year, so
13 this was something that we were contending with in the weeks
14 prior to March 3rd.

15 Q. And I'll refer you to -- I'm going to hand you a copy of
16 Plaintiff's Exhibit 20.001 which is already in evidence,
17 Plaintiff's 20. You may have been asked about this before, I
18 can't recall, but what did this document allow SCENT to do?

19 A. This document allowed us to get another line of credit
20 in the name of South Carolina ENT Allergy & Sleep Medicine.

21 Q. So that other line of credit we were just talking about,
22 it never got called or you didn't get sued on at SCENT, is
23 that right, or did you?

24 A. We didn't get sued. There was a concern over it but
25 through -- through this process we were able to convince the

1 bank that we could get another line of credit.

2 Q. Okay.

3 A. Which was then used to fund the old line of credit.

4 Q. Now I'm coming back to today's questions, just to help
5 the Judge know where we're at, versus pre-Thanksgiving.

6 THE COURT: Wonderful.

7 Q. You were asked about the terminology about a buy-in or
8 timing or whatever else. Just tell the Court why it said
9 buy-in on there, why you don't consider it to be a buy-in,
10 but try to keep it brief.

11 A. Sure. So it's easy to look at back through the
12 retrospect-oscope, but initially it was meant that Dr. Dyce
13 would buy in and it's called a buy-in.

14 Q. When you say initially, when, when do you mean?

15 A. When he arrived in the practice, so 2005 you'd be going
16 through your buy-in.

17 Q. Did he actually buy-in?

18 A. No, Dr. Dyce never bought in.

19 Q. Did he get a loan to pay you money?

20 A. No. At any point in the process, and there were
21 numerous points, in the beginning after the first tier or the
22 first milestone was another opportunity. No.

23 Q. Why did you all leave buy-in on the sheet then?

24 A. So I think that that was as part of -- we had to address
25 the buy-in, so here we come, we're coming up to the two-year

1 anniversary of Dr. Dyce's employment and we have to discuss
2 the buy-in, and so insofar as that was the general category,
3 yes, you know, it was how to address the buy-in. It was
4 instead of a buy-in. My biggest issue with it is that I
5 don't want there to be any misunderstanding that Dr. Dyce
6 actually paid any of those moneys or that those were any
7 moneys that he was taxed on because they were not.

8 Q. Who paid the taxes on those dollars?

9 A. I did.

10 Q. You mentioned that that part was a milestone, and you
11 can refer to -- well, you mentioned that that part was a
12 milestone. What came next?

13 A. After that we had to address the bank account, so what
14 was in the bank of SCENT and its related accounts hadn't been
15 addressed.

16 Q. Were those things earned prior to Dyce beginning this?

17 A. Yes. They were in the account prior to Dr. Dyce
18 starting the process of becoming a shareholder.

19 Q. Who paid taxes on it?

20 A. I did.

21 Q. Okay. What else?

22 A. And then there was the accounts receivable prior to
23 March 1st, 2007.

24 Q. When the process -- is that when the process started?

25 A. That's when the process would have started so --

1 Q. Okay. And who was the owner when -- who owned the
2 practice at that time?

3 A. I owned the practice and I owned the accounts receivable
4 prior to March 1st, 2007.

5 Q. I want to you look -- there was some reference made
6 to -- look up in your exhibits, the most recent book.

7 A. And there was also tax differential, I was going to add
8 that as well.

9 Q. Briefly explain, we've been through it with the Judge,
10 but very briefly what do you mean by the tax differential?

11 A. If you take out money, you've got to pay taxes on it,
12 and so we had to address this difference, so we wanted to
13 make sure that pathway B, this path process, would have made
14 Dr. Puchalski whole as if Dr. Dyce had paid all this money on
15 March 1st, 2007.

16 Q. If Dr. Dyce had paid you money on March 2007, went and
17 got a loan and paid you 750, who would have paid the taxes on
18 that money?

19 A. I would have paid capital gains tax on that money as
20 opposed to normal income.

21 Q. Okay. And instead what did you pay on the moneys that
22 you earned out of the buy-in system, timing system?

23 A. Normal income. I paid normal -- it was treated like
24 ordinary income, I believe is the term.

25 Q. Okay. You were discussing with opposing counsel some

1 documents. I want you to look at 248.58. Do you have it up
2 there in the book? Are you there? It's a foldout piece.

3 A. Yes, I'm getting there, 248.258 you said?

4 Q. Yes, sir, 248.258.

5 A. I've got it.

6 Q. The one where it said final sweep and then it had 178.
7 Are you there?

8 A. Yes.

9 Q. And then you said in your direct something like that you
10 noted what the balance in the account was, 388,341.09, is
11 that right?

12 A. Yes.

13 Q. What's the relevance of that?

14 A. Well, it shows that there wasn't enough money in the
15 account to accommodate for the portions of the process that
16 remained, so there was not enough money in there to cover
17 what we had in the bank account at the start of the process,
18 what we had in the accounts receivable that were due Dr.
19 Puchalski or for the difference in the tax differential and
20 there was -- yes, so those components.

21 Q. Okay. You were asked about the way some income --

22 A. So he had to go get a loan at that point and take care
23 of that difference or -- which he did not want to do -- or we
24 had to go along the same process.

25 Q. Okay. Would you sit down and talk to him about this

1 stuff?

2 A. Yes.

3 Q. Okay. You were asked --

4 A. He was aware of this and, quite frankly, so was
5 everybody else in the practice.

6 Q. You were asked some questions about how certain income
7 for Dr. Dyce was described in different documents. Do you
8 know why -- well, first let me ask you this, was there a base
9 salary that you were paid and Dr. Dyce was paid?

10 A. Yes.

11 Q. And then was there an amount above that that come 2008,
12 the first part of 2008, that you were paid and Dr. Dyce was
13 paid?

14 A. Yes.

15 Q. And you were asked about why it was called K-1's in your
16 cross. You recall that?

17 A. Yes.

18 Q. Do you know why it was called K-1's? This was
19 internally, is that right?

20 A. Yes, this is internally, and it was done in error, but
21 it was called a K-1 because that's what it was to me as
22 the --

23 MR. CLEVELAND: Your Honor, I object. On
24 cross-examination Dr. Puchalski professed he wasn't qualified
25 to answer these questions and deferred to Mr. Sheheen. I

1 think now going back over it on redirect is improper where
2 he's already said that he doesn't have the skills or the
3 ability to be able to answer why the general ledger was
4 prepared the way it was.

5 MR. SHEHEEN: Your Honor, I think what he said was for
6 tax purposes you can talk to Mr. Sheheen. Internally he
7 answered a lot of questions about how they talked about
8 things, and that's what I'm asking, internally.

9 THE COURT: Here's what I'm going to do, I will sort it
10 out because I'll have to go back and pull the transcript and
11 take a look at that, and the reason is that there were a
12 number of things that were going on because the K-1 -- part
13 of the reason as I understand it for the K-1 examination was
14 credibility, that was part of it, the other part was the
15 understanding, and then there was some -- there was some
16 exchange about what those internal documents meant, whether
17 or not they were the general accepted accounting procedures
18 within the practice, and so it's in there for a number of
19 different reasons, and so at this point I'm going to go ahead
20 and allow it because I don't want to stop to have to do that
21 analysis at this point because that part of the examination
22 was, I think, elicited for a couple of reasons, one of which
23 was credibility clearly, and then the other one going to some
24 of these other issues. I'm going to allow it, and then I'll
25 have to do an analysis about how to use it, given the record,

1 yes.

2 MR. CLEVELAND: Thank you.

3 THE COURT: Thank you.

4 Q. Do you know why for internal purposes of SCENT some of
5 these amounts paid to Dr. Dyce were called or listed or
6 talked about as K-1 distributions?

7 A. Because every two weeks for years, as the only
8 shareholder, Dr. Puchalski was receiving K-1's in that
9 amount, and so the term K-1 to our bookkeepers became
10 synonymous with that distribution at that period and on that
11 schedule.

12 Q. And then you went through a bunch of numbers I'm not
13 going to go through about how they were recorded for tax
14 purposes, okay? I'm just going to ask you if you know this
15 or not. Do you know if Dr. Dyce received 1099's for some of
16 the payments that he received above his base salary?

17 A. I believe he did, yes.

18 THE COURT: Can I ask you to just help me, since I'm the
19 fact finder, at what period because there are so many
20 different relationships that this doesn't help me unless you
21 can put it commensurate with a period of time if you don't
22 mind, if you can.

23 Q. In 2008 prior to the shareholder agreement between you
24 and Dr. Dyce are you aware if any of the income earned by Dr.
25 Dyce was recorded as 1099 income at tax time?

1 A. It was, in fact, anything above his wages, his W-2 for
2 that period of time was recorded as 1099 income.

3 Q. Do you know why the CPA did it like that?

4 A. I think he'd be better to go ahead and explain it than I
5 would, but I believe that that was -- it was some reason for
6 doing it the way he did it.

7 Q. You were asked about AR and that. Let's look at
8 250.138. This is just one example. I'm not going to go
9 through all of them. It's in that book that Mr. Cleveland
10 had handed you with the foldout parts. Tell me when you're
11 there, please.

12 A. It's 250 point what now?

13 Q. 250.138.

14 A. They're not in order.

15 Q. If you look at the bottoms and just kind of flip
16 through, you'll get there.

17 A. I've got it.

18 Q. All right. You also discussed with Mr. Cleveland the
19 language in 4.5, I'm just going to read it to you to save a
20 little time, tell me if you recall this discussion with him,
21 where it talked about one third of the sum of the accounts
22 receivable of the corporation booked in accordance with the
23 corporation's normal accounting methods. Do you remember
24 that discussion?

25 A. Yes.

1 Q. Is this sheet which you're looking at here, 250.13, an
2 accounting document?

3 A. It is not.

4 Q. What is it?

5 A. It's a sheet that we use in our billing department to
6 try to identify what our collections efficiency is. It's not
7 used for the intent that the other party's trying to use it.

8 Q. The number -- let's just look at the top of this one.
9 The number up there at the top, \$1,714,231.01, is that what
10 the number is? I want to make sure we're on the same page.

11 A. Yes.

12 Q. How far back could some of those charges have gone?

13 A. Theoretically, months and months, maybe even longer than
14 a year, frankly, so it's just a running total.

15 MR. CLEVELAND: Your Honor, I object on the grounds of
16 the best evidence rule. There's been no foundation that Dr.
17 Puchalski would have any idea what specific charges were
18 included in this, and I think there looks like there's a
19 report that I've never seen that is referenced as the source
20 of this information, but I think it violates the best
21 evidence rule for him to be speculating about. First I'm
22 going to object that there's improper foundation, no
23 foundation laid he has this knowledge; and, two, I think it
24 violates the best evidence rule because the best evidence
25 would be the records that show where this number came from.

1 MR. SHEHEEN: Your Honor, I mean, he asked him what this
2 was, what these numbers were. He asked him all about the
3 numbers. I'm just asking him the same questions. He asked
4 him was it monthly, was it yearly, wasn't it true they were
5 all the AR. I'm just getting a little bit more description
6 of it from him.

7 THE COURT: Well, there are really two issues, number
8 one, that are being addressed, the first issue is, number
9 one, whether or not this is an accounting document which is a
10 normal accounting document for this entity. That's one
11 issue. The other issue is what do these terms mean, and
12 you've asked him what could be in there, and I don't mind
13 sharing with you what's going through my head is that I've
14 got to make determinations, and that's not particularly
15 helpful, and attached to that is the comment of Mr. Cleveland
16 that this may refer to another document that he hasn't had
17 that somehow is related to this information, and of course
18 that's in my head, and that's just concerning me as well. So
19 here's where I am with it, here's what I think I'm
20 comfortable with, given what I must do with this information,
21 I am concerned about the foundation, and I'm going to sustain
22 the objection with regards to the foundation for this reason:
23 It is an exhibit, it's been offered to the Court and I don't
24 think that -- there's an awful lot of information that
25 appears to be --

1 MR. SHEHEEN: He put it in, not me.

2 THE COURT: But he got it from you, though. And so my
3 concern is it does appear on its face to be somewhat
4 self-explanatory, and yet I'm being told, don't believe what
5 you're reading to some extent, and I really want to know what
6 all this means, so I'm going to sustain it as to foundation
7 only because I need to know, rather than just say, oh, gee
8 whiz, golly, by the way, this has got stuff in it that could
9 be years old. That does not help me. And I've got the
10 document, I've got to deal with it, so I'm going sustain it
11 as to foundation.

12 Q. Okay. What is this document?

13 THE COURT: See, this is the kind of foundation I want.

14 THE WITNESS: This document is a document that's created
15 by our billing administrative staff in order to monitor the
16 efficiency with which we collect charges. When you look at
17 this I just want to -- I'd like to point something out if I
18 may.

19 Q. Let me ask you another question.

20 A. Sure.

21 Q. Is this a document used for accounting purposes?

22 A. No.

23 Q. Okay. What is contained within the document itself?

24 A. It lists SCENT's charges for a particular month, the
25 collections for a particular month, the write-offs, the

1 amount that's open, the amount that's sent to appeal. It
2 basically breaks down where the charges are per month.

3 Q. Let's talk about the write-offs for a minute, okay?
4 Tell the Judge what types of things were written off.

5 A. The largest write-off, Your Honor, is typically a
6 contractual write-off, and so if your charge is for \$2 but
7 the contract with the insurance company is for \$1, then you
8 have to write off that other dollar, so a large amount of the
9 write-offs are contractual write-offs.

10 Q. So it's not necessarily the age or someone coming in and
11 saying, hey, I don't want to pay that bill, that kind of
12 stuff?

13 A. No, and that's broken out in other reports. What I'd
14 point out to you, if I may, is that let's just look at this
15 month for a second, and in this month you've got \$198,000
16 that's open.

17 Q. What does that mean?

18 A. After six weeks you have \$198,000 of charges that
19 haven't been addressed, so they haven't been paid, so, Your
20 Honor, if you had \$1.5 million worth of charges and then you
21 had \$627,000 worth of collections, after your write-offs all
22 you have left is about \$200,000.

23 Q. Okay.

24 A. If I were to say -- now, eight weeks from now that will
25 be less for this month, right? Two, three months from now

1 you might get a little more. Every time you get something,
2 there's going to be an associated contractual write-off that
3 will run this number down. Even if you didn't run this
4 number down for this month, \$198,000 divided into \$1.7
5 million is a lot of months. That's how I can tell you that
6 that is multiple, multiple months. I mean, it's going to be
7 over a year because if -- you're going to keep drawing down
8 that 198 number and so after -- this stuff's going to be way
9 older than a year. It's going to be stuff that's been there
10 and run through the mill several times, if that makes sense.

11 Q. So explain, I just want to make sure, explain to the
12 Judge what the open amount is, the 198, what does that
13 represent?

14 A. At six weeks that's the amount that's still open. It's
15 not the amount that we're going to get. It's the amount in
16 charges that are left open, haven't been addressed because at
17 six weeks -- our average days in AR is 30 days, and at six
18 weeks that's the amount that insurance companies still
19 haven't paid us on, so we haven't gotten the money in order
20 to put it in collections and to address the write-off.

21 Q. All right. And, Judge, if this isn't helpful, just
22 interrupt me. But the 1.7 at the top, what is that
23 representative of?

24 A. That represents basically a running total of what the AR
25 is since who knows when, and it's used to just judge

1 differences, so if someone were to look at this sheet, if I
2 look at this sheet, I would be able to tell you how our
3 billing department is performing based on the charges that we
4 received, how much we're recovering and whether or not we're
5 slowing in our efforts because what would happen, we'd have
6 much more of an open amount, that might mean that your bills
7 aren't going out in time, maybe you're not charging quickly
8 enough.

9 Q. Can you look at that sheet and tell what the booked
10 value of the AR is for the company?

11 A. Absolutely not. That's what I'm trying to say. Those
12 two are completely different things. Using a benchmark that
13 you're trying to use in order to track the efficiency of your
14 practice's billing department and trying to get a value of an
15 AR are two completely different things.

16 MR. SHEHEEN: Okay. Beg the Court's indulgence just one
17 minute.

18 THE COURT: Okay.

19 Q. All right. If we could move on, you were asked about
20 the written consent terminating for cause Dr. Dyce, do you
21 recall that, the questions?

22 A. Yes.

23 THE COURT: Hold on. Can you hold on one second for me?
24 I'm so sorry to do that to you.

25 MR. SHEHEEN: Yes, ma'am.

1 THE COURT: Thank you. You may proceed.

2 MR. SHEHEEN: Thank you, Judge.

3 Q. I was asking you if you recall the questioning about the
4 unanimous consent terminating Dyce for cause. Do you recall
5 that questioning?

6 A. Yes.

7 Q. And you were asked about information you believed to
8 have been given to Gunnlaugsson by Dyce. Do you recall that
9 questioning?

10 A. Yes.

11 Q. At that time were you also aware that Dyce had obtained
12 negotiated insurance rates and contracts from SCENT?

13 A. I was, in violation of that same confidentiality
14 agreement.

15 Q. And what were those documents, very briefly?

16 A. Those were insurance contracts between South Carolina
17 ENT, our corporation, and a variety of insurance companies,
18 some 30 or 40 insurance companies.

19 Q. And who negotiates those?

20 A. SCENT, South Carolina ENT, myself and the other members
21 of South Carolina ENT.

22 Q. Are those important to the practice?

23 A. Very. As I mentioned earlier, if the practice is
24 burning, those are the documents you want out.

25 Q. Was there also a confidentiality provision contained in

1 Dr. Dyce's employment agreement?

2 A. Yes, there was.

3 Q. Earlier you discussed one in the shareholder agreement
4 with opposing counsel. Will you turn to 5.1 of the
5 employment agreement, and it should be up there in front of
6 you as a single document. Your Honor, I believe that's
7 plaintiff's 10 if I recall correctly.

8 A. Which section am I looking at?

9 Q. 5.1, on page 11 of the document, also Defendant's
10 Exhibit 111.

11 A. I have page 15; is that correct?

12 Q. I'm on page 11 of the employment agreement, 5.1.

13 MR. SHEHEEN: May I approach the witness, Your Honor?

14 THE COURT: Yes.

15 Q. That's Macy's. I'm sorry, I handed you the wrong one.
16 I'll just let you look at it. 5.1.

17 A. I have it.

18 Q. Okay. And what does that provision say?

19 A. That the physician shall hold in confidence and not
20 disclose and shall protect and safeguard from disclosure any
21 and all business and other information that has not otherwise
22 been publicly disclosed relating to the business.

23 Q. Slow down.

24 A. I'm very sorry. The physician shall hold in confidence
25 and not disclose and shall protect and safeguard from

1 disclosure any and all business and other information that
2 has not otherwise been publicly disclosed relating to the
3 business and operation of the group the terms of this
4 agreement, the operation of the practice, patient records,
5 patient lists and other information designated by the group
6 as confidential.

7 Q. At this time that we've been discussing were you also
8 aware at that time that Gunnlaugsson had given Dyce a
9 proposed affidavit to sign that had confidential information
10 in it?

11 A. Yes. We became aware of that after April 23rd.

12 Q. I want to refer you to the employment agreement again.
13 Do you recall the questions you were asked about the covenant
14 not to compete with Dr. Dyce?

15 A. I do.

16 Q. And you were asked about what the covenant meant. Do
17 you recall that?

18 A. Yes.

19 Q. I want you to read in the employment agreement what the
20 job description was. Read the first three paragraphs slowly,
21 or three sentences, please.

22 A. Physician shall render a full range of professional
23 services typically provided by a licensed physician
24 practicing in the area of otolaryngology at such of the
25 group's practice sites as requested by the managing

1 shareholder.

2 Q. All right. You can skip the next sentence. Read the
3 next one after that starts with physician.

4 A. Physician shall devote his best efforts and loyalty to
5 the treatment of patients and the provision of related
6 healthcare and other services.

7 Q. Okay. Was there any medical care that in reality, in
8 actual fact, Dr. Dyce or you were able to perform in South
9 Carolina that's not described in that?

10 A. No, nothing meaningful.

11 Q. Okay. What was the parties' intent in that covenant not
12 to compete with Dr. Dyce to prohibit him from doing?

13 A. From competing with us in the practice, so doing
14 services that we all do as otolaryngologists that are
15 difficult to define, but they include everything from ENT to
16 allergy to sleep medicine. We have certifications through
17 our ENT board now for sleep medicine and allergy through a
18 related organization.

19 Q. What would related healthcare mean in that job
20 description, what were some examples of that?

21 A. That's what I'm sharing with you now, so once again
22 we're very complex practice, so everything from hearing aids,
23 allergy, sleep medicine, in some cases we're doing transnasal
24 esophagoscopy in the practice, looking down the esophagus, we
25 are looking at the vocal cords with strobos, we're doing

1 cosmetic procedures, and so facial plastic surgery is an arm
2 of ENT under the board, and so we're referring to this
3 compendium of services that we offer within our specialty and
4 that we were trained to do through residency training or
5 through our organization.

6 Q. Are there any other services that Dr. Dyce in reality
7 would be able to perform without having to go get retrained
8 and re-licensed and all that kind of stuff?

9 A. No, he wouldn't. These are what he does. He hasn't
10 done anything since I've done it, and I know that personally,
11 once again, because I was trained with him, so I wouldn't
12 feel comfortable doing anything.

13 Q. Okay. Could he have practiced as an ENT physician in
14 Orangeburg?

15 A. Yes.

16 Q. Could he have practiced as an ENT physician in
17 Charleston?

18 A. Yes, Sumter, he could also practice in Chester and
19 Lancaster and Orangeburg, Florence. As I pointed out
20 earlier, many of these locations are a shorter commute than
21 he currently has now to the VA in Columbia.

22 Q. All right. You were asked about Dr. Vidrine's contract.

23 A. Yes, sir.

24 Q. Are there other differences in Dr. Vidrine's contract
25 than the contract that Dr. Dyce had?

1 A. There are many differences in our contracts that exist
2 now than there were in the contracts that existed in early
3 2010.

4 Q. Did Dr. Vidrine negotiate that contract?

5 A. He did.

6 Q. Was the buyout provision different?

7 A. Yes, the shareholders agreement.

8 Q. Can you think of any other differences?

9 A. There are --

10 Q. Is the pay different, are you all being paid differently
11 than you were then?

12 A. It's not anything significantly different, maybe a
13 little bit different, but the pay is about the same. There's
14 huge differences in the contract concerning governance and
15 accountability. Those are the initial impetuses for the --

16 Q. Was the buy-in different or the mechanism by which you
17 became a shareholder?

18 A. No, Dr. Vidrine had the same mechanism that Dr. Dyce
19 had.

20 Q. Did he complete that or did you guys agree to something
21 different?

22 A. We -- we completed that, but there was some
23 consideration given to Dr. Vidrine.

24 Q. Is that different consideration or the same
25 consideration that was given to Dr. Dyce?

1 A. Same considerations that Dr. Dyce -- Dr. Dyce was given
2 considerations as well, but it's the same basic process.

3 Q. Was his accelerated, was Dr. Vidrine's accelerated at
4 all?

5 A. Dr. Dyce (sic) was an owner approximately three years
6 after starting with the practice, maybe just a little bit
7 longer than that and Dr. Dyce (sic) was about three and a
8 half years so about the same, maybe a little shorter for Dr.
9 Vidrine.

10 MR. SHEHEEN: Beg the Court's indulgence one minute.

11 THE COURT: Sure.

12 MR. SHEHEEN: Nothing further, thank you, Your Honor.

13 THE COURT: Recross.

14 MR. CLEVELAND: Briefly, Your Honor.

15 THE COURT: Sure.

16 RE CROSS-EXAMINATION BY MR. CLEVELAND:

17 Q. Dr. Puchalski --

18 A. Yes, Mr. Cleveland.

19 Q. -- in SCENT Land under the original articles you were
20 the managing partner, sole managing partner, were you not?

21 A. Under the original articles Dr. Dyce and I were both
22 managers, and under Item 9 of those articles Dr. Dyce needed
23 to sign for any and all documents. If you can provide me
24 with a copy of that document, I can reference it.

25 Q. Yes, it's in the first volume book.

1 A. I gotcha.

2 Q. It's No. 16, it's Exhibit 16.

3 MR. SHEHEEN: Are you referring to the operating
4 agreement or to the articles?

5 MR. CLEVELAND: I'm sorry, to the operating agreement.

6 MR. SHEHEEN: Your Honor, maybe he can rephrase the
7 question because he said articles previously.

8 MR. CLEVELAND: I did say articles.

9 THE COURT: It's the operating agreement, but they are
10 referred to as articles, so what to do with that.

11 MR. SHEHEEN: Well, there are articles, Your Honor,
12 floating around somewhere.

13 MR. CLEVELAND: Yes.

14 THE COURT: What section do you want him to go to in the
15 operating agreement?

16 MR. CLEVELAND: Let me look at the articles first.

17 THE COURT: Oh, the articles first.

18 MR. CLEVELAND: 17, Your Honor.

19 THE COURT: Yes, it is 17. You might have been at 16.
20 We're supposed to be on 17. Now where do you want us to go?

21 Q. Is there anything in the articles, which is Exhibit 17,
22 that says that Dr. Dyce is a signatory or authorized to sign
23 documents for SCENT Land?

24 A. So in -- I'm sorry, you started off this question asking
25 about the articles, and we were talking about the articles.

1 In the articles there are.

2 Q. Where?

3 A. If you go to the articles, Exhibit 17, and go to Section
4 9.

5 Q. Yes.

6 A. Under A: These are the articles dated September 10,
7 2008. I will read slowly. It says, pursuant to South
8 Carolina code in order to bind the limited liability company
9 all documents related to real property, including without
10 limitation all leases, deeds, mortgages, assignments,
11 security agreements, and other documents of security,
12 conveyance, transfer or liens, must be signed on behalf of
13 the limited liability company by Robert Puchalski and Orville
14 Dyce, to bind the company to any agreement set forth herein.

15 Q. Thank you. Would you turn to Exhibit 7, which is the
16 shareholders agreement?

17 A. I have it.

18 Q. Would you turn to page 11 which has Section 3.5,
19 shareholder guarantee, that you were asked questions about.

20 A. I'm there.

21 Q. Did you and Dr. Dyce, as comprising the majority of the
22 shareholders, ever issue a resolution or otherwise vote to
23 guarantee SCENT debt, yes or no?

24 A. No, but if I may expound, I would like to say that we
25 weren't issuing resolutions at all about things like that.

1 We did make an obligation to SCENT Land Holdings to make sure
2 that we had a place to practice in Lugoff and a place to run
3 our administrative and billing services from. We also had an
4 obligation to make sure that we paid the debts to First
5 Palmetto vis-a-vis the loan for the line of credit.

6 Q. Would you turn to Exhibit 10, which is the employment
7 agreement of Dr. Dyce, page 11, which contains the
8 confidentiality paragraph that you were asked questions
9 about.

10 A. I'm there.

11 Q. And would you read Paragraph 6.1, and would you do it
12 with the same emphasis that you read the paragraph 9?

13 A. Except as otherwise provided in the shareholders
14 agreement, this agreement contains the complete, full and
15 exclusive understanding of the parties with respect to
16 physician's engagement by the group and supersedes any and
17 all other agreements between the parties with respect to the
18 subject matter. The parties acknowledge and agree that
19 certain provisions in the shareholders agreement may modify
20 this agreement, and in the event of a conflict between the
21 terms of this agreement and the shareholders agreement the
22 terms of the shareholders agreement shall control.

23 Q. So this document defers to Exhibit 7, which is the
24 document I asked you about concerning confidentiality, does
25 it not?

1 A. Only in the event of a conflict and there's not.

2 Q. Right, and Exhibit 7 specifically allows shareholders to
3 discuss matters about the practice with employees. It
4 specifically allows that, does it not?

5 A. Only if they're in the best interests of the
6 corporation. I don't believe that this confidentiality
7 agreement is in conflict with the shareholders agreement
8 confidentiality agreement, and both were mentioned.

9 Q. You're not offering this Exhibit 10 to suggest that a
10 shareholder couldn't talk with a physician employee about the
11 practice, are you?

12 A. No, sir, as long as it was done in the best interests of
13 the practice.

14 Q. So this paragraph doesn't add anything to your position,
15 does it?

16 A. This paragraph does, yes.

17 Q. Okay.

18 A. Because it was confidential.

19 Q. Do you have any evidence that Dr. Dyce, and I don't know
20 that he did talk with Dr. Gunnlaugsson, but other than Dr.
21 Gunnlaugsson, do you have any evidence that Dr. Dyce
22 discussed the practice confidential provisions with anybody
23 other than -- anybody else?

24 A. I have circumstantial evidence, and I believe there will
25 be other evidence that's coming through the trial, yes, sir.

1 Q. I was actually looking for a name.

2 MR. SHEHEEN: I couldn't hear you.

3 THE COURT: He said I was looking for a name.

4 Q. Do you have evidence that Dr. Dyce talked about
5 confidential matters with anyone other than Dr. Gunnlaugsson?

6 A. Dr. Dyce made a phone call to Dr. Gunnlaugsson the
7 evening of his termination. He went ahead and also called
8 his attorney, Dr. Gunnlaugsson, then he came back and called
9 Dr. Dyce. There are numerous examples throughout the record
10 of circumstantial evidence where during key points Dr. Dyce
11 and Dr. Gunnlaugsson are speaking for longer periods of time,
12 texting for longer periods of time.

13 Q. Did you not understand my question?

14 THE COURT: No, he didn't.

15 MR. CLEVELAND: May I ask it again?

16 THE COURT: Yes, please.

17 Q. Do you have any evidence that Dr. Dyce discussed
18 confidential matters concerning SCENT or SCENT Land with
19 anybody other than Dr. Gunnlaugsson and maybe his lawyer?

20 THE COURT: Did you understand that?

21 THE WITNESS: Yes.

22 THE COURT: Other than, take out his lawyer, take out
23 Dr. Gunnlaugsson, take those two people out, anyone else, see
24 what I'm saying? Do you understand what he's asking?

25 THE WITNESS: Okay.

1 THE COURT: Because I understand you're saying there may
2 be other evidence of perhaps the two of those, but anyone,
3 like Mickey Mouse, Donald Duck, anybody else.

4 THE WITNESS: Yes.

5 Q. What evidence do you have?

6 A. So, Mr. Cleveland, if you'll recall that there were some
7 forms from Hartsville during Dr. Dyce's pro forma evaluation
8 where in those pro formas they reference South Carolina ENT's
9 payer mix, and that is confidential information that was
10 clearly shared with Carolina Pines Regional Medical Center
11 not in the best interests of South Carolina ENT. There is --
12 anything else that he shared with his current employer with
13 respect to --

14 Q. Do you have any evidence that he shared or talked about
15 SCENT with his present employer? That's a yes or no
16 question.

17 A. Yes.

18 Q. What evidence do you have?

19 A. We have a form that was produced on discovery from the
20 hospital that they created that references SCENT's payer mix.

21 Q. And what evidence do you have that they got that from
22 Dr. Dyce?

23 A. Well, they couldn't have got it from anybody else and
24 the other -- the only person they could have got it from is
25 Dr. Dyce.

1 Q. Do you have any other evidence?

2 A. There is --

3 Q. Yes or no?

4 THE COURT: With regards to this issue?

5 Q. Yes. Do you have any other evidence that Dr. Dyce
6 discussed confidential SCENT matters with anyone other than
7 the ones you've already told us about?

8 A. That would include Lance Jones, therefore, so we're
9 excluding, just so I'm clear, we're excluding Dr.

10 Gunnlaugsson, I'm going to exclude Dr. Gunnlaugsson's
11 attorney, I'm going to exclude Dr. Dyce's attorneys, Dr.
12 Dyce's experts and financial folks at this point, right?

13 Q. That sounds good. Have we got it?

14 A. Not that I can think of off top of my head.

15 Q. Thank you. Are you familiar with the free medical
16 clinic?

17 A. I am. Which -- the concept or one in particular?

18 Q. The ones that are located near your practice sites.

19 A. Yes.

20 Q. Do you know if Dr. Dyce has ever volunteered to go work
21 in those free medical clinics?

22 A. The only thing I know about Dr. Dyce and the free
23 medical clinic is that for the year or so that we were
24 competing with him in Hartsville Dr. Dyce did not accept
25 anybody from the free medical clinic, or his employer did

1 not, and that we saw and continued to see all those patients
2 in our Hartsville office.

3 Q. My question was do you know if Dr. Dyce ever volunteered
4 to work in a free medical clinic at any time.

5 A. I don't know.

6 Q. You don't know. The noncompetite that Dr. Dyce signed
7 would prohibit him from working for a free medical clinic
8 within the radius of your practice sites, would it not?

9 A. It would.

10 MR. CLEVELAND: I don't have any further questions.
11 Thank you.

12 THE COURT: All right. You may come down.

13 THE WITNESS: Thank you.

14 THE COURT: Now, I'll tell you what, if we could, let's
15 just sort of bring the exhibits that are here, let's just
16 bring them down so you all will have them if you need them
17 and call your next witness.

18 (Judge and attorneys confer.)

19 MR. SHEHEEN: Your Honor, I'm going to call Walter Long
20 from First Palmetto.

21 WALTER LONG,
22 being first duly sworn, testified as follows:

23 THE COURT: Mr. Sheheen, your witness.

24 MR. SHEHEEN: Thank you, Your Honor.

25 THE COURT: Yes, sir.

1 DIRECT EXAMINATION BY MR. SHEHEEN:

2 Q. Mr. Long, where do you work?

3 A. First Palmetto Bank.

4 Q. And what's your occupation there?

5 A. I am a senior vice president.

6 Q. How long have you worked there?

7 A. I have been with First Palmetto for 18 years,
8 approximately.

9 Q. And just, I think you described your title, but tell the
10 Judge what you actually do, what's your day-to-day
11 activities.

12 A. Sure. With our size of bank you wear a lot of hats. My
13 current primary responsibility is special assets but also do
14 commercial lending and formerly used to do much more
15 commercial lending.

16 Q. Are you familiar with the accounts, with the South
17 Carolina ENT and South Carolina Land Holdings accounts at
18 First Palmetto?

19 A. Yes.

20 Q. Are you aware if they have several different accounts or
21 loans?

22 A. Yes.

23 Q. And I'm just going to take you back to 2008, 2009, to
24 the best of your recollection, if you don't remember, you can
25 tell us that, tell us up to present. Do you recall if they

1 had a line of credit in 2008, 2009, 2010?

2 A. Yes, that timeframe sounds correct. I know we had a
3 line of credit.

4 Q. Do you recall if they ever had loans, specific loans for
5 personal property like CT scanners, computer software,
6 equipment loans?

7 A. Yes, we do have equipment loans or have had equipment
8 loans outstanding.

9 Q. And do you know if SCENT Land Holdings had loans for
10 various properties?

11 A. Yes.

12 Q. Do you remember what those properties were by any
13 chance?

14 A. I believe so. I know we had a loan on the Lugoff
15 property when they first acquired that property, also for the
16 acquisition of the Hartsville property, and I believe there
17 was property in Columbia, I'm not sure of the address
18 exactly, but I believe it was Park Road, perhaps.

19 Q. Okay. I'm going to show you what's already in evidence
20 as Plaintiff's Exhibit 281.059. And, Your Honor, it should
21 be in the plaintiff's book or however you're loading them up.
22 I don't know. I have a copy if you want it, just let me
23 know.

24 THE COURT: Okay.

25 Q. Mr. Long, what is this?

1 A. This is a corporate authorization for Dr. Puchalski and
2 Dr. Dyce to sign on behalf of SCENT Land Holdings.

3 Q. Is this a bank form?

4 A. Yes.

5 Q. Why does the bank require this form?

6 A. The bank has to have documentation in its file to show
7 who's authorized to sign on behalf of the company.

8 Q. And in this form who does it say is authorized to sign?

9 A. Robert Puchalski and Orville Dyce.

10 Q. I'm going to show you what has already been marked as
11 Plaintiff's Exhibit 17. Your Honor, this is the articles of
12 incorporation for SCENT Land Holdings. We were discussing a
13 little earlier, articles of organization.

14 THE COURT: Yes. Got it.

15 Q. Are you familiar with these types of documents,
16 generally?

17 A. Generally, yes, this would be a document that we would
18 normally have in our file.

19 Q. Okay. Does this appear to be the articles of
20 organization for SCENT Land Holdings, Inc.?

21 A. Yes.

22 Q. Look at 6. Who does it say the managers are?

23 A. The management of the LLC is vested in a manager or
24 managers and the names and addresses of the managers are
25 Robert Puchalski and Orville Dyce, and then it gives the

1 address.

2 Q. And I want you to look at the next page, No. 9 there,
3 want you to read where it says A, do you see that?

4 A. Yes.

5 Q. Just take a minute and read it to yourself.

6 A. Okay.

7 Q. What does that say?

8 A. It says that Robert Puchalski and Orville Dyce must sign
9 all leases, deeds, mortgages, assignments, security
10 agreements and other documents of security, conveyance,
11 transfer or liens.

12 THE COURT: You've got to slow down for my court
13 reporter, please, sir. Start over, please.

14 THE WITNESS: It states that Robert Puchalski and
15 Orville Dyce -- if you want me to read the whole document, I
16 can but --

17 THE COURT: I don't want you to read the whole document,
18 but if you're going to quote something pursuant to a request
19 by counsel, you need to read it slowly enough so that my
20 court reporter may take down what you are saying. Do you
21 understand?

22 THE WITNESS: Yes, ma'am.

23 THE COURT: Thank you. You may proceed. Do you want to
24 ask him again? I'm not sure he's clear about what you want
25 him to read.

1 Q. Just that A part there.

2 A. Yes.

3 Q. You don't have to read it. How about just tell the
4 Court what your understanding of that provision is.

5 A. My understanding is that Robert Puchalski and Orville
6 Dyce must sign documents on behalf of SCENT Land Holdings.

7 Q. Okay. Are you aware that SCENT was trying to close a
8 loan on property related to the Lugoff building in 2010?

9 A. I don't recall the exact timeframe, but yes, that sounds
10 about right.

11 Q. Do you recall what First Palmetto's position was as to
12 who needed to sign the mortgage and other closing documents?

13 A. Yes. It was our understanding --

14 Q. Speak into the mic if you could, please.

15 A. Yes. It was our understanding at that time that Robert
16 Puchalski and Orville Dyce were the signers for SCENT Land
17 Holdings.

18 Q. Did you base that on the documents you've just reviewed?

19 A. Yes.

20 Q. Do you recall if you conveyed that to Dr. Puchalski or
21 anyone else at SCENT?

22 A. Yes.

23 Q. I'm going to show you what's been previously introduced
24 as Defendant's Exhibit 239. And, Your Honor, this is one
25 that I handed up during the last witness, so you should have

1 it. It was the resolution that was done May 3rd, 2010.

2 What's the date on this, Mr. Long?

3 A. May 3rd, 2010.

4 Q. Okay. And I want you to look at 3A, the little
5 subprovision there. Do you see that?

6 A. Yes.

7 Q. Read it to yourself, please.

8 A. Okay.

9 Q. What's your understanding of that provision?

10 A. That Robert Puchalski is authorized to sign on behalf of
11 SCENT Land Holdings.

12 Q. Do you recall if the bank received this prior to the
13 bank going through with the closing on the Lugoff property?

14 A. I don't specifically recall, but this would be a
15 document that we would customarily obtain in order to have
16 Robert Puchalski sign on behalf of SCENT Land Holdings.

17 Q. I'm going to show you what's been introduced previously
18 as Plaintiff's Exhibit 283.97. And, Your Honor, if I may
19 approach, I'm going to give you a copy because it's in a big
20 book somewhere. Thank you.

21 Take a minute and look at that document, please.

22 A. Okay.

23 Q. Is this another one of those form documents like the one
24 we looked at previously?

25 A. Yes, it is.

1 Q. Who does this give authorization to sign in relation to
2 First Palmetto's legal documents?

3 A. Robert Puchalski.

4 Q. Do you recall if the bank, well, this is the bank's
5 document?

6 A. That's correct.

7 Q. And what would this document allow to occur?

8 A. This would authorize Dr. Puchalski to sign on behalf of
9 SCENT Land Holdings.

10 Q. Was that done prior to the closing on the Lugoff
11 property to the best of your knowledge?

12 A. To the best of my knowledge that would be what we would
13 require in order to close.

14 Q. Are you aware that there was a line of credit that SCENT
15 had during this same period of time?

16 A. Yes, I'm aware, I just -- I don't remember if it was
17 SCENT or which entity that it was in the name of.

18 Q. I'm going to show you what's already been introduced as
19 Defendant's Exhibit 240 and, Your Honor, you have it, I
20 believe.

21 THE COURT: I do, yes.

22 Q. Thank you. Tell the Judge what that is, please.

23 A. This is a note to South Carolina ENT Allergy & Sleep
24 Medicine in the amount of 300,000, and it's dated March 3rd,
25 2009.

1 Q. When's it due?

2 A. The maturity date is March 3rd, 2010.

3 Q. Do you recall anything about whether or not that line of
4 credit was -- strike that question.

5 First of all, who is this with, SCENT or SCENT Land?

6 A. This is with South Carolina ENT Allergy & Sleep
7 Medicine.

8 Q. Who are the signatories at the bottom?

9 A. Robert Puchalski and Orville Dyce.

10 Q. Is that consistent with your -- the bank's limited
11 liability -- strike that, Your Honor. Excuse me.

12 Do you know why both of them were on there?

13 A. I can't speak -- well, I can only tell you what the bank
14 would customarily require. If they're both signing this
15 document we -- there should have been another document
16 accompanying this that said South Carolina ENT Allergy &
17 Sleep Medicine had Robert Puchalski and Orville Dyce as the
18 signers.

19 Q. As signers?

20 A. Yes.

21 Q. Would you have in your file, do you know, would you
22 normally have, for example, the articles of incorporation of
23 that company?

24 A. Yes.

25 Q. And would you utilize that to determine what you had to

1 do or not do?

2 A. We would use articles of incorporation, the borrowers'
3 resolution, which is this previous document but a similar
4 document to this that you just showed me for SCENT Land
5 Holdings, but it would say SCENT Allergy & Sleep Medicine.

6 Q. So we don't have that, I don't think, to show you but
7 normally you would have one of these in the file saying who
8 had to sign it?

9 A. That's correct.

10 Q. Okay. And by looking at this loan who does it appear
11 had to sign it?

12 A. By looking at the note, the fact that Robert Puchalski
13 and Orville Dyce signed, I would say that we also had a
14 document saying that they both needed to sign as signers for
15 SCENT, for SCENT Allergy.

16 Q. And what happens when a line of credit expires, what
17 does the bank do?

18 A. At that point in time the bank either requires that the
19 loan be paid off, it will consider a renewal, pretty much
20 that's it.

21 Q. I'm going to show you Plaintiff's Exhibit 20 which
22 should be, I guess, Judge, in your book. It's been
23 previously introduced. Take your time and read that, okay?

24 A. Okay.

25 Q. Does this document refresh your recollection about how

1 SCENT was able to renew its unsecured line of credit?

2 A. Well, this document indicates that Robert Puchalski has
3 the authority to sign on behalf of SCENT as of March 23rd,
4 2010.

5 Q. Do you recall this document?

6 A. I don't specifically recall this document.

7 Q. Are you familiar with the construction of the -- the
8 financing of the construction of the Hartsville building,
9 were you involved in that at all?

10 A. Yes.

11 Q. Do you recall if it was done similarly to how SCENT and
12 SCENT Land did it for the Lugoff building?

13 A. Yes, generally.

14 Q. Can you remember any of the details about how they did
15 it? Did they start construction prior to getting the loan?

16 MR. ELLISON: Your Honor, I'm giving him a lot of
17 latitude, but at some point the leading's got to stop. If he
18 says he doesn't remember, he doesn't remember, and I don't
19 think Mr. Sheheen should be providing him with the
20 information as he goes to get him to a conclusion he's trying
21 to get to.

22 Q. Tell us what you remember.

23 A. Well, generally, I remembered that the construction was
24 started prior to the actual construction loan being in place.
25 I do recall that Mr. Lucas was the contractor and he would

1 submit his AIA documents to First Palmetto for payment, and
2 then ultimately we did get the construction loan in place and
3 withdrawals were handled accordingly.

4 Q. Are you talking about the Hartsville building or Lugoff
5 building or both?

6 A. Talking about Hartsville, but that's similar to how the
7 Lugoff construction loan occurred. That's how I remember it.

8 Q. Did you have any problems with Dr. Dyce signing on the
9 Hartsville building that you're aware of?

10 A. Not that I recall.

11 Q. Do you recall some discussions back and forth with the
12 bank and SCENT about allowing Dr. Puchalski to be a sole
13 guarantor that the bank was requiring if he did certain
14 things for the SCENT Land loan?

15 A. For the land loan or the construction loan request?
16 Because my recollection was that we had at that time Dr.
17 Puchalski and Dr. Dyce signed on behalf of SCENT to purchase
18 the property but then some issue arose, which apparently is I
19 think part of the reason why we're here today, but that Dr.
20 Dyce was not willing to sign the construction loan for the
21 Lugoff office.

22 Q. Would the bank allow the construction loan, mortgage
23 note and other documents to be signed by just Dr. Puchalski
24 prior to getting the documents that showed only Dr. Puchalski
25 had to sign?

1 MR. ELLISON: Your Honor, I mean, he's really leading
2 now.

3 MR. SHEHEEN: I'm asking him yes or no questions. Well,
4 he's already answered it. I think he's already answered it
5 several times.

6 THE COURT: Very well. You'll withdraw the question.
7 Question's withdrawn. All right. Do you have any additional
8 questions?

9 Q. Prior to the articles being changed by SCENT Land was
10 the bank -- who did the bank require to sign any closing
11 documents?

12 A. When the bank did the original purchase for the Lugoff
13 property, Dr. Dyce and Dr. Puchalski were the signers
14 according to the documentation that I've seen here and then
15 from what I recall, and that would have been the requirement
16 for the construction loan as well, unless we had
17 documentation indicating otherwise, that was the legal
18 requirement in order for the bank to have a perfected lien
19 and to have the documents executed properly.

20 MR. SHEHEEN: Thank you. Nothing further, Judge.

21 THE COURT: Cross-examination, please.

22 MR. ELLISON: One moment, Your Honor.

23 Your Honor, just a matter of housekeeping, after the
24 hearings in November we had previously served a subpoena on
25 the bank and frankly found the documents not responsive, and

1 so additional documents were produced by the bank. Those are
2 included as additional exhibits. We provided those to Mr.
3 Sheheen's office last week, and we haven't heard back from
4 them as to whether they agree they all come in or not. We
5 put them all in, and you'll see why in a few minutes.

6 MR. SHEHEEN: Can I inquire as to when they were
7 received by opposing counsel?

8 MR. ELLISON: January? I mean, we received bits and
9 pieces -- we received a new batch two or three weeks ago.

10 MR. SHEHEEN: Judge, it's hard for me to say because I
11 haven't been able to read 1,000-some pages, or two, we
12 received last Wednesday.

13 THE COURT: Wow, it was 1,000 pages.

14 MR. ELLISON: More than that, Judge. It was a lot.

15 MR. SHEHEEN: 2,200.

16 THE COURT: 2,200 pages. When did you first serve the
17 subpoena?

18 MR. ELLISON: Year and a half ago maybe. Long time ago.

19 THE COURT: It was a long time ago. And then you did it
20 again and then you asked --

21 MR. ELLISON: We got some and then --

22 THE COURT: You got some more.

23 MR. ELLISON: -- I knew it wasn't complete and so I
24 asked again.

25 THE COURT: Sure.

1 MR. ELLISON: And asked again.

2 THE COURT: Wow. Got it.

3 MR. ELLISON: April 26, 2012 was when the subpoena was
4 served.

5 THE COURT: Wow. Wow. Okay.

6 MR. SHEHEEN: I don't recall receiving any further
7 subpoenas after that.

8 MR. ELLISON: These are all documents that are
9 responsive to that. In fact, we had a battle in front of
10 Judge James as to whether we were going to actually be able
11 to get them, and that was comprised in the order that we
12 talked about earlier.

13 THE COURT: In other words, so you just kept raising the
14 issue and things kept appearing. Well, let me ask you this,
15 and you're putting in, you want to put in all the --

16 MR. ELLISON: Everything we got in the last
17 production -- the last two productions. The one I believe in
18 January I think and then one about two or three weeks ago.

19 THE COURT: I understand. I'm so excited to see you do
20 that. Got it. Interestingly enough -- let me ask you this
21 question, and you would provide them, when you would get
22 them, you'd send them --

23 MR. CLEVELAND: No. We don't feel it's incumbent upon
24 us to provide them because we're required to serve the
25 subpoena. If they want copies, they can ask us for copies.

1 It cost us a lot of money to get the copies.

2 THE COURT: And I gather you -- those documents may or
3 may not have been responsive to discovery that you had
4 received.

5 MR. ELLISON: For instance, Your Honor, one of the
6 things that we asked for that was very incomplete were copies
7 of the loan files.

8 THE COURT: Yes.

9 MR. ELLISON: We didn't get them, and so we asked again,
10 and we finally got what purports to be the loan files. We
11 had asked for a lot of things such as that and it was a
12 struggle to get them. The loan files didn't actually come in
13 until January.

14 THE COURT: All right. Well, here's what I think is
15 appropriate, they want to put them in, and I guess this would
16 be the position that I would have is that -- and I suppose
17 it's probably appropriate to ask it this way, Mr. Ellison, as
18 you went through the documents, understanding that you got
19 them for the purposes of your presentation, did you think
20 that the documents that you received were specifically
21 responsive to specific discovery requests or did you just
22 provide the ones -- provide some that you thought were
23 responsive, I guess, because obviously I gather you've not
24 provided all 2,200.

25 MR. ELLISON: We told them last week what they were

1 and --

2 THE COURT: And if you want to see them, we've got them.

3 MR. ELLISON: Yes, and we never heard from them. It
4 cost us somewhere between 3 and \$5,000 to get our copies.

5 MR. SHEHEEN: He sent them to us electronically on
6 Wednesday. We got 2,200 documents on Wednesday.

7 THE COURT: I understand. This is, I think, the way I
8 think it ought to be handled because if there's concern here,
9 my concern isn't going to be with the plaintiff because if
10 you asked back in '12, you should have received them timely
11 in '12, particularly if you went before Judge James on a
12 hearing. However, I don't want the defense disadvantaged
13 because of the late production by the bank. I have a
14 sneaking suspicion that, while I would love to say I am
15 brilliant, I'm going to be able to snap, snap instantly, here
16 it is, it's probably going to take me a little bit of time.
17 So when we think we have finished, if there's something that
18 you see that -- either side for that matter, to be fair, sees
19 that it's just scintillating and we've got to have some more
20 something, either testimony or information about, what I will
21 do is we'll reconvene for that purpose. I don't know any
22 other way to deal with it because I don't think it's your
23 fault, and if we have to reconvene for that purpose, then I
24 may take that up with the entity that was to provide the
25 subpoena, but we'll deal with that when we get there. But

1 what I will do to be absolutely fair, and I know Angel will
2 make a note of this, before I render a decision, I absolutely
3 am going to give you some time to know that so that you can
4 particularly re-address this issue to see if there's anything
5 that you feel as though is burning and, oh, doggone it, I
6 meant to do that, but you were busy with something else and
7 there really was something that you needed to raise that
8 arose out of these documents that was new to you. Now, if we
9 talk about it and play with it and toss it around, that's
10 different; but if it's new in all these documents, we'll
11 reconvene for that purpose. But I'll give you some notice
12 before I render a decision so you'll know. Is that fair?

13 MR. ELLISON: Your Honor, I don't have a problem with
14 it. The one thing I want to be clear about, I don't want to
15 have to authenticate every one of these documents. These
16 came from the bank. Mr. Long, I don't know whether he was
17 involved.

18 THE COURT: Give them all 2,200 and let him do it.

19 MR. ELLISON: I'm sorry?

20 THE COURT: If he's got to do all 2,200, he's got to do
21 all 2,200. There's nothing you can do about that.

22 MR. SHEHEEN: I'm just in a bad position. I didn't get
23 them until Wednesday. I'm objecting because they weren't
24 produced in a timely -- I understand they didn't get them
25 until January but between January and March is a long period

1 of time. I don't want him to go through and authenticate
2 them either. What I think I'm hearing you say is that you
3 are conditionally admitting them. Maybe that's not what you
4 said.

5 THE COURT: I think so. I think I'm going to
6 conditionally admit them. I think what I want you to do is
7 do you have the stack here, all 2,200? If you are going to
8 put them into evidence you've got to have them, right?

9 MR. ELLISON: I've got them, yes.

10 THE COURT: You're going to hand them to --

11 MR. ELLISON: I'm not going to hand him 2,200 documents.

12 THE COURT: Oh, hand them to him, let him look at them,
13 absolutely, see if he can tell if they're from the bank.

14 MR. ELLISON: That I can do.

15 THE COURT: And what we may do is we may have to give
16 them to him this evening and say, come back tomorrow and go
17 through them, authenticate them or not. This is not of your
18 creation. This is not of your making, this is not of your
19 making, and I understand your concern.

20 MR. SHEHEEN: It might be, Your Honor, once we go
21 through these that Mr. Ellison focuses on three documents
22 that are clearly authentic and --

23 THE COURT: That's exactly right, but I'm not going to
24 limit you. That's not your problem. That's their problem.
25 He's going to have to go over them this evening and

1 authenticate them, so we'll do that, we'll have that happen.
2 You don't have to worry about that now. He'll take them with
3 him, and he can authenticate them, and I'll put him under
4 court order that every single solitary document better be
5 there in the morning just like you give it to him, and if not
6 then I'll deal with that as well. Now, having said that, you
7 just got them when you got them, but, again, this is -- this
8 is not of the plaintiff's making and so -- but they've got
9 all my lawyers at a disadvantage and these parties at a
10 disadvantage so, again, I think that the fairest way to deal
11 with this is that in the event that you all need to address
12 something that's raised or if you need to address something
13 else, we'll do that at a later time.

14 MR. SHEHEEN: I'm just going to preserve my objection,
15 and it might be when we get through with this cross that I
16 don't care because it might be four documents that are
17 irrelevant.

18 THE COURT: That's exactly right. Or, again, before I
19 issue a decision I'm going to give you folks an opportunity
20 to raise any concerns if needed when we reconvene, and if we
21 do reconvene, then I'll address any expense or cost that will
22 be assessed.

23 MR. ELLISON: Then for housekeeping purposes, Ms. Baker,
24 what are the document numbers for the bank's documents.

25 THE COURT: I've got to ask a question. Have you been