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PLAINTIFF'S WITNESS

JAMES MITCHELL - 776

Cross-Examination by Mr. Quadra

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PLAINTIFF'S EXHIBITS

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1823

DIANA T.Y. CHEN, CSR NO. 11312

1 MR. QUADRA: At this time we'd call James Mitchell under
2 Evidence Code Section 776 as an adverse witness.

3 THE COURT: Good morning, sir. If you'd come up to the
4 witness stand here, remain standing and be sworn.

5 JAMES MITCHELL,
6 called as a witness for the Plaintiffs, having been duly sworn,
7 testified as follows:

8 THE CLERK: And be seated, please.

9 THE WITNESS: Thank you.

10 THE CLERK: State and spell your name for the record.

11 THE WITNESS: James Mitchell. M-i-t-c-h-e-l-l.

12 THE COURT: Thank you. Mr. Quadra?

13 CROSS-EXAMINATION

14 Q. Good morning, Mr. Mitchell.

15 A. Good morning.

16 Q. Cinema 7 owns the Mitchell Brothers O'Farrell Theatre,
17 correct?

18 A. Cinema 7 leases a building that we call the O'Farrell
19 Theatre.

20 Q. The operations of the Mitchell Brothers Theatre are managed
21 and overseen by Cinema 7, correct?

22 A. Yes.

23 Q. You co-founded the Mitchell Brothers O'Farrell Theatre with
24 your brother Artie Mitchell, right?

25 A. That is correct.

26 Q. And you are now the sole shareholder of Cinema 7?

27 A. Yes.

28 Q. Your title at Cinema 7 is President of Cinema 7, correct?

1 A. Yes.

2 Q. And Mr. Jeff Armstrong is the Vice President of Cinema 7?

3 A. He's the General Manager.

4 Q. At Cinema 7, is his title Vice President?

5 A. General manager.

6 Q. Could you take -- There's a deposition transcripts that sit
7 before you. Hopefully you will be able to see them on the
8 counter in front of you. If you could take a look at Volume 1,
9 Page 50, Line 9.

10 A. Okay.

11 THE COURT: Go ahead.

12 MR. QUADRA: Q. Start at Line 7, Your Honor. Running
13 through Line 10:

14 "Q. And you are President of the company?

15 "A. Yes.

16 "Q. What is Mr. Armstrong's title?

17 "A. I think Vice President."

18 You signed the tax returns for Cinema 7, correct?

19 A. Yes, I did.

20 Q. Ultimately all employees of Cinema 7 respond to you,
21 correct?

22 A. Yes.

23 Q. And that includes Mr. Armstrong?

24 A. That is correct.

25 Q. You set the policies for the Mitchell Brothers Theatre,
26 correct?

27 MS. RUTTER: Objection. Overbroad. Vague and ambiguous.

28 THE COURT: Overruled. You may answer.

1 THE WITNESS: I answered. Yes.

2 MR. QUADRA Q. And that was true during what we will refer
3 to as the "piece rate" period between July 1998 and April of
4 2003. Correct?

5 A. Yes.

6 Q. During that piece rate period, Mr. Armstrong, however, had
7 the authority to fire and hire without consulting you. Correct?

8 A. I'd say yes.

9 Q. But he did not have the authority to change any of the
10 guidebook policies, right? That was solely your responsibility.

11 A. I don't believe I said that.

12 Q. It's a question, sir.

13 A. No, I would say no.

14 Q. So is it your testimony that Mr. Armstrong, in fact, had the
15 authority to change the policies are the club between
16 July '98 and April 2003?

17 MS. RUTTER: That's a different question. The first
18 question was change policies regarding the guidebook.

19 THE COURT: Did you intend to change the question?

20 MR. QUADRA: I will rephrase, Your Honor.

21 Q. Is it correct that Mr. Armstrong did not have the authority
22 to modify the policies that are reflected in the employee
23 guidebook?

24 A. The question has never come up. I'd say that the ultimate
25 authority is mine. Whether he could modify the book, sure he
26 could.

27 Q. I am not sure I understood your answer, so let me try to
28 rephrase the question.

1 Did Mr. Armstrong have the authority to modify the policies
2 in the guidebook during the piece rate period without consulting
3 you?

4 A. What were the dates?

5 Q. July 1998 to April 2003.

6 A. Without consulting me?

7 Q. Correct.

8 A. It never came up.

9 Q. And you don't know what his authority was at the time?

10 A. It never -- it was never tested. Let's put it like that.

11 Q. To make sure, you had not defined his authority. So you
12 can't tell me what he could or could not do at the time?

13 MS. RUTTER: Objection. Misstates his testimony.

14 THE COURT: Overruled. You may answer.

15 THE WITNESS: It's, I guess -- never -- as I said it never
16 happened, that I know of.

17 MR. QUADRA Q. So his authority was not defined, sir. Is
18 that correct?

19 MS. RUTTER: Objection. Asked and answered.

20 THE COURT: Overruled. You may answer.

21 THE WITNESS: Not -- I have given you my answer basically.

22 But if you are looking for like the memo or something, corporate
23 minutes to that effect, not that I know of.

24 MR. QUADRA Q. You have been convicted of a crime of moral
25 turpitude. Correct, sir?

26 A. What would that be?

27 Q. Your Honor, could we go off the record a second?

28 THE COURT: No, we'll stay on the record.

1 MR. QUADRA: I believe this was subject to a Motion in
2 Limine. And Counsel brought this motion. So we are complying
3 with the motion. If I now respond to the witness's question, I
4 may be going astray of that. I would assume he was prepared to
5 respond to it.

6 THE COURT: Are you able to answer the question as phrased?

7 THE WITNESS: I don't know what he's talking about.

8 THE COURT: All right. Rephrase. You are permitted to go
9 further then.

10 MR. QUADRA Q. Mr. Armstrong, you were convicted of --
11 sorry, Mr. Mitchell. I have had Mr. Armstrong on too long.

12 Mr. Mitchell, you were convicted of manslaughter as a result
13 of the death of your brother, Artie Mitchell. Correct?

14 A. That is true.

15 Q. There is a laser pointer on the counter in front of you. If
16 you could find it. It looks like a pen. Do you see it?

17 A. Yes.

18 Q. And it has a button you press that will create a laser beam.
19 Could you, using that laser pointer, point out in the diagram
20 that is in front of you, which is Exhibit 1007, where your
21 office is located in the Mitchell Brothers O'Farrell Theatre?
22 If you can from that diagram.

23 A. The one that says "Office."

24 Q. And that's the one on the left hand corner, right?

25 A. Bottom left hand corner.

26 Q. That is also an office that's located next to an area that
27 is labeled on the diagram the "Pay Out Area," correct?

28 A. Well, labeled on your chart. Not anywhere in the building.

1 Q. On that chart it's labeled the "Pay Out Area?"

2 A. You labeled it the "Pay Out Area."

3 Q. Is that area on that diagram that's labeled the "Pay Out
4 Area," the area in the theater where dancers check out at the
5 end of a shift?

6 A. I believe so.

7 Q. Do you recall instituting the piece rate system of
8 compensation at the Mitchell Brothers in July of 1998?

9 A. I don't -- no.

10 Q. Do you recall at some point in 1998 the theater reclassified
11 dancers as employees?

12 A. Subject to a Settlement Agreement.

13 Q. And that was a Settlement Agreement in the action entitled
14 Vickery, correct?

15 A. Correct.

16 Q. And as a part of that settlement, you chose to make dancers
17 employees, correct?

18 A. No. It wasn't my choice. It was pursuant to a settlement
19 in Superior Court of San Francisco.

20 Q. You decided to settle the Vickery action, correct?

21 MS. RUTTER: Objection. Relevance.

22 THE COURT: Overruled. You may answer.

23 THE WITNESS: I was basically threatened by the judge who
24 told me he's going to hold it against me if we didn't come to
25 some settlement. So it was either go out of business or come up
26 with something. That's the way I recall it.

27 Q. And by judge, you mean Judge Alfred Chiantelli?

28 A. That's the correct name, yes.

1 Q. As part of that settlement, when you classified dancers as
2 employees, do you recall instituting a piece rate system of
3 compensation?

4 A. I think we did create a piece rate system of compensation.
5 Actually, we created a system of compensation that was minimum
6 wage and part of it was piece rate.

7 Q. You cannot tell me, sir -- is that correct -- who came up
8 with the idea of the piece rate system?

9 A. I told you earlier who came up with it.

10 Q. Sir, you do not know who came up with the system?

11 A. I gave you the answer during my deposition. Do you want me
12 to show you the page?

13 THE COURT: Mr. Mitchell, today if you would -- Counsel has
14 an opportunity to ask you questions. I haven't read the
15 deposition. So he's asking you questions to establish facts in
16 the trial.

17 THE WITNESS: Okay, Your Honor.

18 THE COURT: Do you have the question in mind?

19 THE WITNESS: Yes. And my answer was "Founding Fathers."

20 MR. QUADRA Q. The specific piece rate system at the
21 Mitchell Brothers Theatre. Do you know who was the first person
22 that came up with that idea?

23 A. No.

24 Q. And at the time you instituted the piece rate system in
25 1998, you were not aware of any other exotic dance club that had
26 attempted to do so, correct?

27 A. I believe there were other clubs that had done that, yes.

28 Q. Do you recall the names of a single --

1 A. The one that I was thinking was the Market Street Cinema.

2 Q. Do you -- strike that.

3 At the time you instituted the piece rate system, you did
4 not consider paying, just going to a straight minimum wage
5 system, correct? Where you paid just hourly?

6 A. I don't recall what we discussed in total.

7 Q. So you have no recollection one way or the other?

8 MS. RUTTER: Objection. Asked and answered.

9 THE COURT: Overruled. You may answer.

10 THE WITNESS: Just that might have -- You want to refer to
11 it, what we called it was we had to make people lawful
12 employees. We never discussed it or referred to it as the
13 "Piece Rate Era" or the "Piece Rate System" at that point. So
14 it was never discussed in those terms in 1998.

15 MR. QUADRA Q. Did you consider a system in which there
16 would not be a defined unit of production that would be a lap
17 dance, and instead a system in which you would just pay for
18 every hour worked as a hourly employee and not with a quota for
19 dancers?

20 A. Did we consider that?

21 Q. Correct.

22 A. I believe we did.

23 Q. Do you recall if any analysis was done to compare the
24 revenues to Cinema 7 as a result of the piece rate system versus
25 an hourly wage system?

26 MS. RUTTER: Objection. Relevance.

27 THE COURT: Overruled. You may answer.

28 THE WITNESS: No, I think we discussed more what the cost

1 would be to operate by adding 130 or 140 employees more than the
2 revenue stream, potential revenue stream.

3 MR. QUADRA Q. Sir, my question is, did you compare systems
4 to see which one maximized your revenues?

5 MS. RUTTER: Objection. Asked and answered.

6 THE COURT: Overruled. You may answer.

7 THE WITNESS: Not that I recall.

8 MR. QUADRA Q. Did you consider implementing a system of
9 compensation for the dancers when they became employees that did
10 not require them to be in charge of collection of dance fees?

11 MS. RUTTER: Objection to the extent it misstates testimony,
12 lacks foundation. That the dancers were in charge of
13 collection.

14 THE COURT: Overruled. You may answer.

15 THE WITNESS: I don't have any specific recall of that.

16 MR. QUADRA Q. Before you instituted the piece rate system
17 of compensation, did you personally monitor the enforcement
18 activity of the DLSE in the exotic dancer industry?

19 A. No.

20 Q. Was there somebody assigned at Cinema 7 to monitor
21 enforcement activity by the DLSE?

22 A. In the period of time you are speaking, 1998?

23 Q. Prior to 1998 -- Prior to the conversion to piece rate.

24 A. No.

25 Q. And you referred earlier to Market Street Cinema. Do you
26 recall -- strike that.

27 Were you monitoring the enforcement action by the DLSE
28 against Market Street Cinema?

1 A. I am having trouble with your choice of words, sir. It's
2 not that I am trying to give you a hard time. But monitoring?
3 What would that be?

4 MR. QUADRA Q. Were you following what was going on in the
5 enforcement action so you would know what activity was being --
6 what the DLSE was doing in terms of enforcement against Market
7 Street Cinema?

8 A. I don't know I would follow it, but we heard about it on the
9 drum, but not -- There's nothing in the newspaper. I didn't
10 call anyone at the DLSE. So there was a few rumors around.

11 Q. When you say you heard it on the drum, can you give me the
12 mechanism by which the information came to you as best you
13 recall?

14 A. I think maybe it was Mr. Armstrong that told me they were
15 having a suit or a trial at the Market Street Cinema.

16 Q. Do you remember getting any more detail about that case?

17 A. That would be about it.

18 Q. Did you contact anybody as a result of Mr. Armstrong's
19 statement to you to try to find out any additional information
20 about that case?

21 A. I have no recall.

22 Q. Prior to instituting the piece rate system, did you review
23 any DLSE opinions regarding the exotic dance industry?

24 A. Did I personally?

25 Q. Yes.

26 A. Not that I recall.

27 Q. Did anybody explain the content of any DLSE opinions
28 regarding the exotic dance industry prior to instituting the

1 piece rate system?

2 MS. RUTTER: Just object to the extent that it calls for
3 attorney-client privileged communication.

4 MR. QUADRA: I believe, Your Honor, this was proffered as an
5 area that was relevant to motivation and to the actions leading
6 to the piece rate system.

7 THE COURT: Well, to the extent it involves discussions with
8 Clarence & Snell and Mr. Aubry, I think that privilege has been
9 waived. So objection is overruled.

10 MR. QUADRA: I will rephrase, Your Honor.

11 Q. Do you recall that either Mr. Aubry or any member of
12 Clarence & Snell explained to you the content of any DLSE
13 opinion regarding the exotic dance industry prior to instituting
14 the piece rate system?

15 A. I couldn't definitively say. We had so many meetings and
16 discussions about the general issues. I just don't have any
17 recall now.

18 Q. Do you recall receiving anything in writing from either
19 Mr. Aubry or any member of Clarence & Snell regarding any DLSE
20 opinions prior to instituting the piece rate system?

21 A. No.

22 Q. Do you recall asking for any such writing from either
23 Mr. Aubry or any member of Clarence & Snell?

24 A. Yes.

25 Q. When was that?

26 A. I don't know.

27 Q. Do you know if it was before or after you instituted the
28 piece rate system?

1 A. No. I believe it was in the process of designing the
2 system.

3 Q. Do you recall what the request was in particular?

4 A. The request was could we get Mr. Aubry's opinion on our
5 system as it finally came out in writing. Could he vet our
6 system in writing.

7 Q. How about after the piece rate system was in place? Do you
8 recall receiving any DLSE opinion letters regarding the exotic
9 dance industry after that, that you reviewed?

10 A. Well, as far as I know, we are not like on a mailing list
11 from the DLSE. If the attorneys had one or brought one over or
12 said something, I have no recollection.

13 Q. There's a large binder to your right at the edge of the
14 counter. Could you take a look in that binder at the tab that
15 indicates Exhibit 5088?

16 A. In the large one here?

17 Q. Yes, further over.

18 A. All the way?

19 Q. Yes.

20 THE COURT: 5888?

21 MR. QUADRA: I think it's 5088, Your Honor.

22 THE WITNESS: I don't think it's in this. This one goes to
23 42.

24 MR. SWEET: May I approach the witness, Your Honor, to see
25 if I can help him?

26 THE COURT: You may.

27 MR. QUADRA Q. Do you have the exhibit in front of you,
28 sir?

1 A. Yes.

2 Q. And for the record, 5088 is an August 20th, 1998 letter from
3 the DLSE. If you could take a look at that and let me know if
4 you've ever seen that letter before.

5 A. I don't recall seeing it.

6 Q. Do you recall --

7 A. Not in 1988, or '98.

8 Q. Or at any time --

9 A. I might have seen it after that. But not in those --

10 Q. Do you remember seeing it within six months of implementing
11 the piece rate system?

12 A. I don't recall.

13 Q. Do you recall that anything that was -- Strike that. Do you
14 recall being influenced by any DLSE opinion that you can recall
15 today in the creation of the piece rate system that you
16 implemented at Cinema 7's O'Farrell Theatre?

17 A. Not that I recall.

18 Q. Do you recall being influenced by any DLSE opinion letter
19 after you implemented the piece rate system at the Mitchell
20 Brothers O'Farrell Theatre in any way?

21 A. Up to the present?

22 Q. Yes.

23 A. I have seen them now. I mean during the course of this
24 action.

25 Q. Right. But my question is, have any of those letters
26 influenced the way in which you run the Mitchell Brothers
27 Theatre?

28 MS. RUTTER: Objection to the extent it is overbroad. Vague

1 as to time.

2 THE COURT: Sustained.

3 THE WITNESS: I have no recollection on that.

4 THE COURT: Strike the answer and we will have a new
5 question, please.

6 MR. QUADRA: Your Honor, if I could address that, the
7 costume policies through the present. So I can break those out.

8 THE COURT: Why don't you break it down.

9 MR. QUADRA: Q. As to the piece rate compensation system,
10 do you recall seeing any DLSE opinion after July of 1998 that
11 has affected the way in which you handled the piece rate
12 compensation system?

13 A. I have no recollection of it.

14 Q. Do you recall receiving, after July of -- or strike that.

15 Do you recall whether any DLSE opinion that you may have
16 seen after July of 1998 has affected the Mitchell Brothers
17 O'Farrell Theatre policies regarding reimbursement to dancers
18 for costumes, hair, makeup, or nail care?

19 A. No.

20 Q. You've never seen a letter from the DLSE that allows Cinema
21 7 to force dancers under threat of termination to overreport
22 dances to meet quota, correct?

23 MS. RUTTER: Objection. Lacks foundation.

24 THE COURT: Sustained.

25 THE WITNESS: Are you answering your own question?

26 THE COURT: Please wait for the next question.

27 THE WITNESS: Was that a question?

28 THE COURT: It was, but I sustained an objection to it.

1 THE WITNESS: Okay.

2 MR. QUADRA Q. Between 1998 and April of 2003, did anybody
3 give Cinema 7 advice, to your knowledge, to discontinue the
4 piece rate system of compensation?

5 A. Did anyone?

6 Q. Give you advice?

7 A. I'm sorry. I didn't get that.

8 Q. Sure. Between July of 1998 and April of 2003, did anybody
9 give Cinema 7 advice, to your knowledge, that the piece rate
10 system of compensation should be discontinued?

11 MS. RUTTER: Objection to the extent it calls for any
12 attorney-client privileged communication.

13 MR. QUADRA: Again, Your Honor, the motivation, if that's
14 going to be an element of a defense, goes to both the design,
15 the implementation, and then the maintenance of the system.

16 THE COURT: The objection is overruled. You may answer.

17 THE WITNESS: I really don't know the answer or haven't an
18 answer for the way your dates and what you asked about. There
19 have been two changes that I know of, if you are speaking of one
20 of those. But I am not sure exactly your question.

21 MR. QUADRA Q. You are aware, the piece right system of
22 compensation was discontinued in April of 2003. Correct?

23 A. Correct.

24 Q. I am now asking you prior to the date that you discontinued
25 the piece rate compensation system, wasn't Cinema 7 given any
26 advice that that should be done?

27 A. I don't believe so.

28 Q. Prior to April of 2003, was Cinema 7 given any advice that

1 the piece rate system of compensation should be modified in any
2 way?

3 A. I don't know if I can answer you about did anyone give us
4 advice. We were, as just citizens, aware of AB 2509.

5 Q. And that would be a change to Labor Code Section 350(e)? Is
6 that what you are referring to?

7 A. Yes, sir.

8 Q. Other than that modification relating to the use of chips,
9 was there any other advice given to Cinema 7 regarding changes
10 that should be implemented regarding piece rate?

11 A. Not that I recall.

12 Q. Did any member of Clarence & Snell ever tell you you should
13 stop the system, the piece rate system of compensation?

14 A. Not that I recall.

15 Q. Did Ms. Dyer ever tell you to stop that system of
16 compensation?

17 MS. RUTTER: Objection. Asked and answered. Ms. Dyer is a
18 member of Clarence & Snell.

19 THE COURT: Overruled. You may answer.

20 THE WITNESS: Not that I recall.

21 MR. QUADRA Q. Do you recall receiving any advice from any
22 member of Clarence & Snell prior to July of 1998 regarding the
23 implementation of the piece rate system?

24 A. No.

25 Q. Do you recall receiving -- strike that.

26 In 1998, you consulted with an attorney named Lloyd Aubry
27 regarding his legal advice about piece rate, the piece rate
28 system, right?

1 A. I think his advised had something to do with piece rate
2 system.

3 Q. My question is, did you consult with him?

4 A. Clarence -- Attorney Clarence brought him to our offices.

5 Q. That's a "yes," sir? You consulted with him?

6 A. Yes.

7 Q. And how did you first become aware of Mr. Aubry?

8 A. Through Attorney Clarence.

9 Q. And when you say that Ms. Clarence brought Mr. Aubry to your
10 office, you mean at Cinema 7's Mitchell Brothers Theatre?

11 A. The one you had me point out.

12 Q. On how many occasions did Mr. Aubry visit the theater?

13 A. I can recall two or three.

14 Q. Were those the only occasions you met with him?

15 A. I believe we met with him in Attorney Clarence's office as
16 well.

17 Q. And on how many occasions did you meet him there?

18 A. One or two.

19 Q. He was paid by Cinema 7 for his advice?

20 MS. RUTTER: Objection. Relevance.

21 THE COURT: Overruled. You may answer.

22 THE WITNESS: Instead of pro bono. He sent us a bill. He
23 did not -- I am not sure if he sent us a bill or he sent
24 Attorney Clarence and bill and she resubmitted it to us. I
25 don't recall.

26 Q. But you recall his services were paid for?

27 A. As far as I know, they were.

28 Q. Did you take notes at any of the meetings with Mr. Aubry?

1 A. No.

2 Q. Do you know of anybody who was present at those meetings
3 that took notes?

4 A. I don't know.

5 Q. Who else was present at the meetings that took place at the
6 theater?

7 A. Attorney Clarence. I don't recall if Ms. Dyer was there or
8 not. I know Mr. Armstrong was there. Mr. Aubry. Myself.
9 That's all I can remember.

10 Q. How about the meetings at Ms. Clarence's office? Who was
11 present?

12 A. I believe Ms. Dyer was present at those meetings and
13 Ms. Clarence and Mr. Aubry and myself. Mr. Armstrong.

14 Q. Do you recall whether Ms. Clarence or Ms. Dyer left the room
15 when you were meeting at their offices, to allow you to speak
16 with Mr. Aubry alone?

17 A. I have no recollection of that.

18 Q. So as far as you can recall, Ms. Clarence and Ms. Dyer were
19 present throughout the entire meeting?

20 A. I said I have no recollection of it.

21 Q. One way or the other?

22 A. I don't know one way or the other. They could have all been
23 there or they couldn't have.

24 Q. Did you ever receive any advice from Mr. Aubry that was
25 communicated, not directly by him at meetings, but through
26 Ms. Clarence or Ms. Dyer?

27 MS. RUTTER: Objection to the extent it calls for him to
28 speculate.

1 THE COURT: Overruled. You may answer.

2 THE WITNESS: I remember the meetings as more kind of a just
3 round table discussion between everyone. And I don't recall him
4 addressing me with any advice. Just lawyers talking.

5 MR. QUADRA: Q. Do you recall Ms. Clarence or Ms. Dyer
6 calling you or meeting with you to relay an opinion that
7 Mr. Aubry was giving to them, and they in turn were giving to
8 you?

9 A. I don't have a recollection of that.

10 Q. Now, your testimony is that Mr. Aubry vetted the
11 compensation system that you had designed, correct?

12 A. Well, I don't know about that.

13 Q. Can you answer "yes" or "no", sir?

14 A. Well, I think that the system was designed with Mr. Aubry
15 and Ms. Clarence and everybody putting their two cents in. "How
16 would you come up with a way to make the payroll here?"

17 Q. Your testimony today is that Mr. Aubry was part of the
18 initial design of the system. Is that what you are saying?

19 MS. RUTTER: Objection to the extent it misstates his
20 testimony.

21 THE COURT: Overruled. You may answer.

22 THE WITNESS: I don't think I -- I didn't think -- you said
23 if I designed the system. I didn't. And that was the system
24 came forth out of the work product of all those parties
25 together.

26 MR. QUADRA Q. So it would be true then that your testimony
27 was that Mr. Aubry was part of the initial design of the system?

28 A. I think Mr. Aubry's probably relating more to some questions

1 we had in answering, you know, "What if? Or could you? Do you
2 have to?"

3 There was -- you are kind of -- never mind. Where do I
4 stop? That was kind of how we put it together. It wasn't
5 designed like your map of the theater. It was more verbal, give
6 and take. And you know. That's all I can say.

7 Q. Do you recall any specific questions you put forward to
8 Mr. Aubry regarding the piece rate system?

9 A. I don't recall them.

10 Q. Do you recall any specific opinions that he expressed at any
11 of these meetings about the piece rate system?

12 A. Yes.

13 Q. And what are those?

14 A. Specifically the one that stands out to me is how you
15 calculate overtime in a piece rate system. I know that someone
16 in the office had called everybody in the State of California
17 and no one had that answer. And Mr. Aubry did explain to the
18 room how piece rate overtime was calculated. That was what
19 stands out in my mind.

20 Q. What did he say to you?

21 A. Give us an outline of how it was calculated.

22 Q. Do you recall what the outline said?

23 A. Well, the way you calculate a piece rate overtime is to base
24 the amount on the piece reported for the time period, whether it
25 was a weekly or a daily. So then that becomes the multiple, not
26 the minimum wage number.

27 Q. Do you recall whether Ms. Clarence or Ms. Dyer responded to
28 that opinion?

1 A. I have no recollection of that.

2 Q. Do you recall whether Ms. Clarence or Ms. Dyer had any
3 contrary opinions to anything Mr. Aubry said?

4 A. I think they really looked up to Mr. Aubry. I didn't hear
5 any commentary from them.

6 Q. Do you remember any suggestions from Clarence and Dyer that
7 you should seek a second opinion other than Mr. Aubry's on how
8 the piece rate system should work?

9 A. He was introduced as the top authority in California. Years
10 of experience in Federal and State Law, labor law. As an ex
11 commissioner. I don't think that she had somebody else in mind.
12 She never brought it up. He was brought in as he was a guru.

13 Q. Do you recall any discussion about a "moving ladder" concept
14 within piece rate?

15 A. No.

16 Q. Do you recall receiving any report, anything in writing
17 regarding the piece rate compensation system from Mr. Aubry?

18 A. I never saw it. I understand that he did write a letter,
19 but it was never presented to me.

20 Q. So you've never seen such a letter?

21 A. Not that I recall.

22 Q. Do you recall Mr. Aubry in any way criticizing the system of
23 compensation that you were outlining for him?

24 A. Once again, I said we had a round table discussion about a
25 system that -- we didn't have any designed system. So I didn't
26 outline a system for Mr. Aubry. And no, I don't have any recall
27 of that.

28 Q. Other than the overtime piece rate advice you remember he

1 gave you, is there any other specific opinion you recall

2 Mr. Aubry giving you about piece rate?

3 A. Oh, yeah. He had a lot of things to say about piece rate,
4 that -- You know, I mean our first question was would piece rate
5 be a legitimate way to put together our approach with our
6 independent contractors who suddenly were able to become
7 employees. And he had a lot to say about that.

8 Q. Do you remember what he said?

9 A. No.

10 Q. When Mr. Aubry visited the theater to have these meetings
11 with you, did you run through the procedures with him and show
12 him how the procedures would work within the theater for piece
13 rate?

14 A. Someone might have. Attorney Clarence or Mr. -- I did not
15 personally.

16 Q. Do you recall making any changes to an anticipated or a
17 planned system that you were thinking of putting in place as a
18 result of anything Mr. Aubry said?

19 A. Nothing comes to mind, Counsel.

20 Q. Do you recall if Mr. Aubry told you it was important for the
21 theater's records to accurately reflect how piece rate worked
22 within the theater?

23 A. He might have, but I have no recollection.

24 Q. Do you recall if he ever told you that it was important to
25 make clear to patrons and dancers the distinction between a
26 dance fee and a gratuity?

27 MS. RUTTER: Objection to the extent it lacks foundation.
28 It's also -- this witness has testified he doesn't recall any

1 other specifics. So it's been asked and answered.

2 THE COURT: Sustained. Rephrase.

3 MR. QUADRA Q. Do you recall from your discussions of the
4 many things Mr. Aubry told you about piece rate, whether he
5 talked about the importance of defining what a dance fee would
6 be within piece rate?

7 A. When Mr. Aubry came to the theater for our meetings, I had
8 already written the work book. I had already defined that.
9 That was in the work book. And he wasn't there to go over the
10 work book per se.

11 More that Clarence brought him, he was there to talk to us
12 about possibilities. But no, as far as your question, no.

13 Q. So you just testified that you had already written the
14 employee guidebook?

15 A. Yes. Yes.

16 Q. And that would have been the 1998 one?

17 A. That would have been the first version.

18 Q. So that first version outlined a piece rate compensation
19 system for the dancers, correct?

20 A. Well, the final version or final product that you have read
21 might not have been what I wrote.

22 Q. But that first draft you wrote, did it convey to the
23 dancers, or was it intended to have language in it that conveyed
24 to the dancers the piece rate system?

25 A. It's been so long since I have seen it, I don't know if
26 that's in there.

27 Q. But somewhere --

28 A. I'm sorry. Go ahead.

1 Q. And somewhere in there your recollection is that you defined
2 the importance of dance fees?

3 A. No. I recall defining the importance, as you like to say,
4 the design of what a dance is. But it was the length of a song.
5 Or what -- and we defined several different rooms, what you
6 would do. And it states what the nature of the work is. And I
7 know it starts with lap dance. And it tries to kind of explain
8 what they are in the different rooms. That is what I did.

9 Q. Did the guidebook draft that you showed Mr. Aubry have
10 language in it stressing the importance of dance fees versus
11 gratuities to the dancers?

12 A. I don't recall.

13 Q. Did Mr. Aubry tell you that you would be taking a risk if
14 you did not implement the piece rate compensation system as he
15 believed it should be in his advice to you?

16 A. I just don't recall what you are asking me. I have no
17 recollection of those words.

18 Q. Did Mr. Aubry tell you that the piece rate system had to be
19 based on the completion of a particular defined task? And not
20 collection of a fee?

21 MS. RUTTER: Objection. Lacks foundation to the extent it's
22 been asked and answered.

23 THE COURT: Overruled. You may answer.

24 THE WITNESS: Could I have the question back, please?

25 MR. QUADRA Q. Did Mr. Aubry tell you that the piece rate
26 system had to be based on the completion of a particular defined
27 task rather than on collections?

28 A. I have no recollection of it.

1 Q. Did Mr. Aubry tell you that if a dancer performed a dance
2 but was not paid for that dance, that the dancer should still
3 receive credit under the piece rate system for having completed
4 that task?

5 MS. RUTTER: Objection. Lacks foundation.

6 THE COURT: Overruled. You may answer.

7 THE WITNESS: The lawyers are confusing me, Judge. I just
8 can't quite understand what he's asking.

9 THE COURT: Then you can ask him to ask it in another way.

10 THE WITNESS: We have never used your terms. And you are
11 creating terms. And I don't want to lead you. So I am going to
12 have to ask you, so I can make sense of it, please.

13 MR. QUADRA Q. Did Mr. Aubry tell you that -- strike that.

14 Under the piece rate system, you implemented a quota where
15 dancers had to, or "suggested quota" I think you referred to it
16 as, where dancers would try to perform a certain number of
17 dances per shift. Right?

18 A. That was a decision I made.

19 Q. Did Mr. Aubry tell you that a dancer at the Mitchell
20 Brothers O'Farrell Theatre should get credit towards that
21 suggested quota if they dance a dance, but they did not get paid
22 for it by a patron?

23 A. I don't recall that. I don't recall him saying that.

24 Q. Did Mr. Aubry tell you that it was improper to charge a
25 dancer a fee for the privilege of performing at the theater?

26 A. I think that was common knowledge in the adult industry at
27 that point.

28 Q. Do you remember Mr. Aubry telling you that, though?

1 A. It would be asking like -- No, I don't recall him saying
2 that. We had already gone through a huge trial where that was
3 part of the issue for a huge amount of money and years. I don't
4 think we were asking Mr. Aubry that. He might have.

5 Q. You just don't remember?

6 A. I don't have a recall.

7 Q. Did he tell you that it would be improper for dancers to be
8 pressured into signing check out forms that overstated the
9 number of dances completed?

10 MS. RUTTER: Objection to the extent it lacks foundation.
11 Misstates the evidence.

12 THE COURT: Overruled. You may answer.

13 THE WITNESS: Your question was, is it all right to pressure
14 dancers?

15 MR. QUADRA Q. No, did Mr. Aubry tell you that it was not
16 proper to pressure the dancers to sign check out forms that
17 overstated the number of dances performed?

18 A. I don't know how he could. We have never done that.

19 Q. The answer is, you don't recall whether he said it or not?

20 A. I have no recollection of him saying that.

21 Q. Did he tell you that you needed to reimburse dancers for
22 expenses they incurred in buying theme related costumes?

23 A. There was some discussion of the costume, the rules, labor
24 rules with -- uniforms, you know, and the distinction between
25 the kind of costumes that were in use at the O'Farrell and I
26 don't recall what exactly it is. A UPS uniform.

27 Q. Do you recall whether he told you that you needed to
28 reimburse dancers for any of the costumes they used at the

1 O'Farrell Mitchell Brothers Theatre?

2 A. I had already written the guidebook that if there was a
3 special costume that the theater requested, that they would be
4 reimbursed. So I don't know if he would come in and tell me
5 what he read in the book. Not that I recall.

6 Q. So you don't recall if he gave you any advice on costume
7 reimbursement?

8 A. No. We had general discussion on uniforms. And our general
9 opinion has been and is today that the dancers do not wear
10 uniforms. And you know, I don't know if you want to know what I
11 think about costumes, but we discussed uniforms and generally
12 agreed that we did not fall into the "uniform" category.

13 Q. Is it your testimony that -- let me clarify, so strike that.

14 Did Mr. Aubry give you any advice about reimbursements for
15 any particular types of costumes that you can recall?

16 A. Not that I recall.

17 Q. Now, after the piece rate system of compensation was in
18 place, you don't recall any analysis being done comparing the
19 profits of the theater under piece rate to the profits of the
20 theater when you had dancers classified as independent
21 contractors, correct?

22 MS. RUTTER: Objection. Relevance. This is also pursuant
23 to a Motion in Limine by Defendants.

24 THE COURT: Just a moment. Overruled. You may answer.

25 THE WITNESS: You are assuming there were profits.

26 MR. QUADRA Q. My question to you, sir, was there an
27 analysis done comparing the two systems to see which one was
28 more profitable?

1 A. And the two systems are?

2 Q. The piece rate compensation system versus your independent
3 contractor system?

4 MS. RUTTER: I am going to object to relevance on that.

5 THE COURT: Overruled. You may answer.

6 THE WITNESS: Not that I know of.

7 MR. QUADRA Q. Now, you don't recall whether the profits
8 actually went up, correct? Between one system and the other?

9 MS. RUTTER: Objection. Relevance.

10 THE COURT: Overruled. You may answer.

11 THE WITNESS: I do not recall.

12 MR. QUADRA: Q. But you are the best person to ask that
13 question, because you sign the tax returns, right?

14 A. Yes.

15 Q. I'd like you to take a look -- strike that.

16 You referred earlier to the guidebook. There was a draft
17 you created that was discussed around this round table with
18 Clarence & Snell and Mr. Aubry, correct?

19 A. Well, I think it was Mr. Armstrong in the beginning. I
20 don't know how much addition. And then it was sent over to the
21 Clarence office and I believe from there she made contact with
22 Mr. Aubry.

23 Q. Mr. Mitchell, you may want to make the microphone come a
24 little closer. So --

25 A. Thank you for that.

26 Q. Do you recall if there were any edits back from either
27 Clarence & Snell or Mr. Aubry of your draft of the guidebook?

28 MS. RUTTER: Objection. Overbroad.

1 THE COURT: Overruled. You may answer.

2 THE WITNESS: I don't have any recall. There might have
3 been.

4 MR. QUADRA Q. Can you take a look at -- there's a volume
5 that you will see of binders in there that would be No. 1. Can
6 you take a look at No. 1 and look at Tab 10, which for the
7 record is Exhibit 1010. And it's the Performers Guidebook.

8 A. Volume 1.

9 Q. Volume 1, dated 1998.

10 A. Tab 8, you say?

11 Q. Tab 10.

12 A. Okay.

13 Q. Is this the 1998 guidebook that was distributed to dancers?

14 A. I think it was, yes.

15 Q. And you are the author of this guidebook, correct?

16 A. Co-author. I started it and did a draft and then turned it
17 over to experts.

18 Q. Do you remember -- if you could take a look through it, look
19 at the Table of Contents and any particular page you want to
20 reference, and tell me which portions of this you believe were
21 not written by you?

22 MS. RUTTER: Objection. It's overbroad. Relevance in terms
23 of many of these areas are not relevant to this case.

24 THE COURT: Overruled.

25 THE WITNESS: One that really jumps out is I had -- insert
26 the Penal Code. I didn't write 647(a), (b), as you know. But
27 the one about -- No. 9, I didn't have anything to do with that.
28 Someone did that for me.

1 Number 10, format, I pretty much -- Number 18, I'm not sure
2 to look at it on the check and withholding information if that
3 went in Mr. Armstrong's area. And there was other input here
4 from Mr. Stanich who, as we well know, is no longer with us.
5 But I think Locker, he had his input. Meals and breaks, that
6 was my wife. I got into trouble.

7 Q. Any other area that you recall input from, any other people?

8 A. Look at this. The number one, sexual harassment. I think
9 there was some input from Attorney Clarence. She did the sexual
10 harassment for this.

11 Q. Mr. Mitchell, the section on compensation, you were the
12 author of that?

13 A. Is that No. 1?

14 Q. Right.

15 A. The at will employment was -- that would be No. 3. That was
16 Attorney Clarence. No. 5, Compensation?

17 Q. I believe in the actual, it's, if you look at the actual
18 text, it's 2?

19 A. Page 2, No. 5.

20 MS. RUTTER: Your Honor, can I just --

21 MR. QUADRA: Q. I'm sorry. I think you might be on the
22 wrong tab. Look at Tab 10.

23 A. I am at Tab -- you know what? I flipped back maybe. Is
24 that a later one?

25 Q. Yes.

26 A. Let me go back. Compensation. The foundation for that was
27 mine.

28 Q. Was there anybody that you recall provided you any input

1 that led to the modification of that section to the version that
2 is reflected in the 1998 guidebook?

3 MS. RUTTER: Objection to the extent it's been asked and
4 answered. He testified that there were -- Clarence & Dyer,
5 Mr. Armstrong --

6 THE COURT: Overruled.

7 THE WITNESS: I really don't know, because I know I didn't
8 write all piece rate information. I don't think we were there
9 at this point. We were at minimum wage. And so I had some help
10 there. But I don't recall.

11 MR. QUADRA Q. Now, shortly after the piece rate system was
12 implemented, Mr. Armstrong tried to count dances for the
13 dancers. Do you recall that?

14 A. Yes, I have a recollection of that.

15 Q. You were opposed to counting dances, weren't you, sir?
16 Because of the invasion of privacy of your patrons?

17 A. Well, the end result would be an invasion. I know that was
18 going on in some of the other clubs around town where they were
19 using little hand-held blackberries or remote controlled, and
20 flashlights. And they were in booths. They would open the door
21 and walk in and see and punch it up. And yes, I did object
22 strenuously to that approach.

23 Q. So it would be fair to say that shortly after the
24 implementation of the piece rate system, you reached the
25 decision that you weren't going to hire checkers because of the
26 reasons you just outlined, the invasion of privacy?

27 A. Well, we have a lot of people that are hired that maybe they
28 don't have the title. Like I said before, we do multi task

1 there. And so anyone could be a checker. There were a lot of
2 employees. But to go out and advertise for checkers, no. Per
3 se, no.

4 Q. Well, aside from whether with you were going to hire new
5 employees that you would call "checkers" or use existing
6 employees that would provide the same function, isn't it a fact
7 that early in the piece rate system, early in 1998, between July
8 and December, you determined that you were not going to assign
9 that task to anybody because it was against your philosophy on
10 privacy?

11 A. No, not necessarily. It was, I think, also from the advice
12 of Mr. Aubry that we asked him, was that required that you would
13 have to be rude or be whatever you want to call it. It did not
14 fit in with our program at all. And he said no. And my
15 question was, "Can I order the employee to give me the report?"
16 And he said yes.

17 Q. When did Mr. Aubry give you that advice as best you can
18 recall?

19 A. In this whole build up period. It was over a month, several
20 months of creating -- this wasn't one weekend.

21 Q. So that would have been prior to July of 1998 when you
22 started this system?

23 A. Yeah, we were vetted before we started.

24 Q. And the -- strike that.

25 At some point you made the decision, you weren't going to
26 assign the task of counting dances to any employee, correct?

27 A. Yes.

28 Q. When was that decision made?

1 A. I just told you that. I will tell it to you again. That
2 would have been after discussing it with Mr. Aubry at some
3 point, about were we required by law to have what is called a
4 "checker." It's just a term that -- there is no such thing,
5 period, that I know of. But in our business, to go around and
6 observe the employee and the customer and then make up a report
7 of what they did to cross tally with their own count. And his
8 opinion was no, that the employee or the worker can keep track
9 of their work units.

10 Q. So is it your testimony that the decision not to assign the
11 task of checker to any employee occurred at the time Mr. Aubry
12 gave you that opinion?

13 A. The dates are a long way back. There's been a lot of things
14 under the river since then. But that was generally -- at the
15 time there was, I mean in our business, small as it is, there
16 was talk of without a checker, you just don't know.

17 Well, it was his opinion that you could ask your employee,
18 or direct your employee to make accurate count of their work
19 unit.

20 Q. And my question is simply, did you make a decision not to
21 assign the task of a checker to anybody when Mr. Aubry told you
22 you weren't legally required to have one? Is that when you made
23 the decision?

24 A. I don't think so.

25 Q. When did you make the decision?

26 A. I have never made a final decision. I could have checkers
27 tonight or tomorrow if I want them. I could put people in there
28 right now.

1 But I gave you a reason why I didn't want to run my show or
2 my theater that way. Whether this was an infringement, it's not
3 show business. That was my reason. His opinion helped me be
4 able to stand on these principles. If he would have said you
5 must have a checker, then we would have probably had some guy
6 with a flashlight under your nose.

7 Q. Did you ever convey that system, your philosophical position
8 against checkers, to your employees at the theater?

9 MS. RUTTER: Objection. Relevance.

10 THE COURT: Overruled. You may answer.

11 THE WITNESS: Probably.

12 MR. QUADRA Q. Can you --

13 A. Probably every day.

14 Q. Can you take a look at Exhibit 1011 which is the guidebook
15 you were looking at, the 1999, the later one?

16 A. The next one over, 1011?

17 Q. Right.

18 A. Section 11 or Section 10?

19 Q. It's Tab 11.

20 A. Tab 11. Okay.

21 Q. If you could take a look at Page 3 of the 1999 guidebook,
22 Section 6.

23 A. Yes.

24 Q. Which is entitled, "Verification of Piece Work?"

25 A. Right.

26 Q. About midway through that first paragraph?

27 A. Uh-huh.

28 Q. A little bit past that?

1 A. Uh-huh.

2 Q. There's a sentence that begins, "To help." Do you see that?

3 A. Um-hum.

4 Q. To help?

5 A. Yeah.

6 Q. (Reading:)

7 "Piece work reporting and to assist the performer
8 in maintaining the accuracy of her piece rate count,
9 the O'Farrell Theatre will employ people as
10 "checkers." Their task will be to observe the
11 performers and maintain an ongoing count of the piece
12 work performance by individuals during their shift."

13 A. Right.

14 Q. (Reading:)

15 "At the beginning of the shift, but prior to
16 checking out, the performer will have an opportunity
17 to compare her records to those of the piece work
18 checker."

19 Do you see that?

20 A. Yes.

21 Q. That statement was not something you actually intended to
22 do, correct?

23 MS. RUTTER: Objection. Lacks foundation that this witness
24 had anything to do with this book.

25 THE COURT: Overruled. You may answer.

26 THE WITNESS: It's like I said, Tab 10, me. Tab 11,
27 somebody else. I have never seen it.

28 MR. QUADRA Q. Is it your testimony that before the 1999

1 guidebook was distributed to dancers, you had no role in
2 reviewing it?

3 A. There is -- I think there's a few more version of this. But
4 no. Why would I?

5 Q. You testified earlier that you ultimately set the policies
6 at the Mitchell Brothers Theatre, correct?

7 A. Yes.

8 Q. And you testified that almost on a daily basis, you send the
9 message about privacy and not wanting checkers, correct?

10 A. Yes.

11 Q. So this statement that was distributed to the dancers was
12 inconsistent with your policy?

13 A. Yes. The statement's inconsistent. But our action's not.
14 So this piece of paper is, yes.

15 Q. This piece of paper is inconsistent with your policy?

16 A. But what's happened at the O'Farrell is not consistent with
17 this piece of paper.

18 And if they had done that, I am sure they would have read
19 this piece of paper and taken some action. But I can give you a
20 little more on that. Not that I am trying to do your job for
21 you.

22 There was a period with the DLSE in these years and, "You
23 have to have checkers." And there was like the DLSE was, if you
24 had a checker, basically, for what we consider, you know, for
25 the help establish accurate gross receipts.

26 Q. To your knowledge, was this statement put in this guidebook
27 so that it would appear to the DLSE that you were doing the
28 correct way of counting the dances, even though you weren't?

1 A. Could have been, but I have no recall of that, because I
2 have never seen it before.

3 Q. To your knowledge, was this statement put in about checkers
4 to mislead dancers as to how the counting would take place?

5 MS. RUTTER: Objection. Argumentative.

6 THE WITNESS: You know, I don't know who put it in or --

7 THE COURT: Overruled.

8 THE WITNESS: How. That was my testimony.

9 MR. QUADRA: Q. Do you recall -- strike that. Earlier you
10 testified that in 2001, there was -- strike that. I'm sorry.

11 You testified earlier that some time during the piece rate
12 period there was a time that Labor Code Section 350(e) was
13 modified. Do you recall that?

14 A. Changed, you mean?

15 Q. Right.

16 A. Because that's a legal term, "modified," that your trying to
17 use on me. And you know better. Changed from what it was to
18 something else?

19 Q. Correct.

20 A. I am aware of that.

21 Q. Do you recall when that occurred?

22 A. No.

23 Q. Do you remember when the change went into effect?

24 A. 2001, January 1st.

25 Q. Did you have any discussions regarding the change to 350(e)
26 with Clarence, any member of Clarence & Snell?

27 A. I believe so.

28 Q. When?

1 A. In that time area around it.

2 Q. Would it have been before January 1, 2001 or after?

3 A. I believe it would be before.

4 Q. And do you recall where you met?

5 MS. RUTTER: Objection. Relevance.

6 THE COURT: Overruled. You may answer.

7 THE WITNESS: Some gay bar somewhere down in the Mission.

8 Q. Who did you meet with?

9 A. Who else was there?

10 Q. Yes.

11 A. Nanci Clarence, Jack Davis, Warren Hinkle, Quentin Kopp.

12 That's all I recall.

13 Q. And you had a discussion about the change to 350(e) with
14 this group of people?

15 A. Yes, I did. How I -- there were unions that jammed us and a
16 specific law for a specific act for an individual. Where is the
17 19th Amendment of the Constitution? We did discuss that at
18 length.

19 MR. QUADRA: Your Honor, it's noon. Would this be a
20 convenient time to break, or would you like us to go longer?

21 THE COURT: Let's take our noontime recess. But let's
22 resume at 1:00 today. Excuse me. Just one moment off the
23 record.

24 (Off-the-record discussion.)

25 THE COURT: Back on the record. We will resume 1:00 p.m.,
26 please. Thank you.

27 (Noon recess taken.)

28

1 MONDAY, MARCH 5, 2007

2 AFTERNOON SESSION

3 --- o0o ---

4 THE COURT: We are back on the record. Counsel are present.
5 Mr. Mitchell is present

6 Please remember, sir, you're still under oath

7 This is the continued 776 examination

8 Mr. Quadra.

9 MR. QUADRA: Thank you, Your Honor.

10 Q. Mr. Mitchell, before the break, we were talking about a
11 meeting that you recall attending at a bar at Mission where Nanci
12 Clarence and others were present and you discussed the change to
13 350(e). Do you recall that?

14 A. Yes.

15 Q. Did Ms. Clarence give you any advice at this meeting at
16 Mission about how to address the changes to 350(e)?

17 A. I don't have any recall.

18 Q. Did anyone else at the meeting give you advice?

19 A. About 350(e)?

20 Q. Correct.

21 A. It would mostly discuss the role the union placed in and get
22 into the labor bill that Governor Davis refused to sign,
23 something like it. Like two years running, it was more around
24 the labor issues than just -- I don't know. At that time, we
25 already made our decision about using chips. So, it's my
26 recollection talking about labor unions.

27 Q. Is it your -- I want to make sure I understood your
28 testimony. You're saying by the time you had this meeting in the

1 Mission, you had already made the decision on chips?

2 A. I don't recall of the exact.

3 Q. Do you recall whether Nanci Clarence or any member of her
4 office reported to you that they had attended a meeting with
5 members of the DLSE to discuss changes to 350(e)?

6 A. Yes.

7 Q. And when did you -- strike that. When did Nanci Clarence or
8 any member of her office inform you that they had had such a
9 meeting?

10 A. I don't have a recall of the exact time. I do remember I
11 think Kate Dyre attended a meeting at the DLSE.

12 Q. Do you recall if that meeting took place before or after you
13 implemented the chip system on January 1, 2001?

14 A. I do not have a recall.

15 Q. Do you recall what the purpose of Ms. Dyre attending that
16 meeting was?

17 A. The way I remember the story was the other clubs in towns
18 attorneys had set up the meeting, and Ms. Dyre just got in on
19 their coattails. That's how I recall it.

20 Q. You don't recall it being a specific meeting to address your
21 system or your plans?

22 A. I don't have a recall of that.

23 Q. Prior to instituting the piece-rate system on July -- in
24 July of 1998, did you request a written opinion from the DLSE
25 about the piece-rate system you were contemplating implementing?

26 A. Not that I know of.

27 Q. Do you know if the DLSE ever issued such an opinion letter?

28 A. I'm not sure exactly.

1 Q. Before you implemented the chip system on January 1st, 2001,
2 did Cinema 7 request from the DLSE an opinion letter as to the
3 chip system you were contemplating implementing at the theater?

4 A. Not that I'm aware of.

5 Q. What do you recall Ms. Dyre, if any, did Ms. Dyre
6 communicate to you about this meeting she attended with DLSE
7 about 350(e)?

8 A. What do I recall from Ms. Dyre?

9 Q. Correct.

10 A. I really can't remember exactly. You know, I just -- I can
11 tell you that Ms. Dyre was very fearful of the DLSE, very -- I
12 mean, that was her general impression DLSE was a monster. As far
13 as the specifics of what they were doing that day, if I was
14 reminded, I'd say oh, yeah, that was it. But it doesn't come to
15 me.

16 Q. Do you remember Ms. Dyre expressing any fear or concern
17 about DLSE in response to that specific meeting she attended
18 regarding 350(e)?

19 MS. RUTTER: Objection. Vague and ambiguous. Overruled.
20 You may answer.

21 THE WITNESS: Did Ms. Dyre say --

22 BY MR. QUADRA: Q. Expressed any concerns or fear regarding
23 the DLSE in connection with the meeting that she attended about
24 350(e).

25 A. Nothing specific about that meeting. I mean, it was more
26 about the hearings that they had.

27 Q. When you say "hearings," what are you referring to?

28 A. I think there's hearings that DLSE had about if an employee

1 makes a complaint there can be a hearing.

2 Q. The meeting she attended regarding 350(e), is it your
3 recollection that Ms. Dyre was the only person from her office
4 that attended such a meeting?

5 A. I would have that impression, but I can't be sure.

6 Q. Did Ms. Dyre provide you anything in writing regarding what
7 she heard at these meeting at the DLSE?

8 A. I -- one of my complaints about this is I don't believe I
9 got anything in writing from Ms. Dyre for years about anything.
10 In fact, a lot of the concessions she made with you earlier,
11 there was nothing to me about it.

12 MR. QUADRA: Your Honor, move to strike as nonresponsive.

13 THE COURT: Just a moment. Denied --

14 BY MR. QUADRA: Q. Mr. Mitchell --

15 THE COURT: -- as to the first sentence and granted as to
16 the second sentence.

17 MR. QUADRA: Thank you, Your Honor.

18 Q. Do you recall receiving anything from the Clarence and Snell
19 office in writing regarding that meeting with the DLSE about
20 350(e)?

21 A. I have no recollection of it.

22 Q. Do you recall what, if anything -- strike that. Did any
23 other member of the Clarence and Snell firm communicate to you
24 about what occurred at that meeting with the DLSE about 350(e)?

25 A. I have no recollection.

26 Q. Do you remember if Ms. Dyre communicated anything about that
27 350(e) meeting to Mr. Armstrong that you became aware of?

28 A. It's possible they did have conversations without me being

1 there.

2 Q. Do you remember Mr. Armstrong communicating any of those
3 conversations to you?

4 A. I don't have the recall of it. If I did, I'd tell you.

5 Q. Mr. Mitchell, do you recall being influenced at all by what
6 Ms. Dyre told you about this 350(e) meeting with the DLSE? Do
7 you recall being influenced at all in your decision to implement
8 the chip system that you put into place on January 1, 2001?

9 A. I don't believe so.

10 Q. The chip system you implemented in 2001, you designed that;
11 is that correct?

12 A. No, I don't think -- I think I answered earlier when you
13 asked that same question about design. It's something we've
14 heard about and looking for a way to bring these people in and
15 how would we be able to do it. So, I wasn't the designer per se
16 of the chip system, you know.

17 Q. Do you know who the first person at Cinema 7 was that had
18 the idea of putting a chip system in place?

19 A. I don't know who brought it up. I don't recall who was the
20 first to bring it up. I think at that point the other clubs
21 around town, which we didn't really have any inside track to, we
22 -- just observation, people checking them out from time to time,
23 just on the public side. They might have already gone to
24 something like that. When they did, we would hear about it or
25 look at it.

26 Q. Did you ever check with the DLSE to confirm whether a chip
27 system would be appropriate where dance chips did not guarantee a
28 dance?

1 MS. RUTTER: Objection. Relevance. And to the extent it
2 lacks foundation.

3 THE COURT: Overruled.

4 You may answer.

5 THE WITNESS: I think in those days at least, what I'm
6 saying about our attorneys, they were in livid fear of the DLSE.
7 They were -- DLSE, somebody ran for governor against the DLSE.

8 BY MR. QUADRA: Q. My question, Mr. Mitchell, is, do you
9 recall whether anybody from Cinema 7, or on behalf of Cinema 7,
10 contacted the DLSE to check whether a chip system that did not
11 guarantee a dance by the purchaser of a dance chip was
12 appropriate under 350(e)?

13 A. I don't know, don't know about that.

14 Q. Do you recall if Cinema 7, or anybody on behalf of Cinema 7,
15 contacted the DLSE to check whether a chip system that had dance
16 chips that had monetary value to the dancers constituted an
17 amount as defined under 350(e)?

18 MS. RUTTER: Objection to the extent it lacks foundation,
19 and also to the extent it calls for a legal conclusion.

20 THE COURT: Sustained on other grounds.

21 BY MR. QUADRA: Q. Mr. Mitchell, do you recall whether your
22 attorneys, Clarence and Snell, or Mr. Aubry contacted the DLSE to
23 inquire what constituted an amount under the changes to 350(e)?

24 A. Not that I'm aware of.

25 Q. As far as you know, Mr. Aubry was not present at that
26 meeting with the DLSE about 350(e), correct?

27 A. Did we establish the meeting was about 350(e)?

28 Q. Well, the meeting that Ms. Dyre attended that you said other

1 clubs had set up, attorneys from other clubs, what is your
2 understanding of the subject matter that was discussed at that
3 meeting, if you have one?

4 A. I have a faint recollection about, not totally precise or
5 clear, that the subject matter had something, maybe it was closer
6 aligned to checkers.

7 Q. You don't recall a meeting that Ms. Dyre or somebody from
8 her office attended regarding the changes to 350(e)?

9 A. I don't have that recollection.

10 Q. Do you recall if Mr. Aubry ever attended such a meeting to
11 your knowledge?

12 MS. RUTTER: Objection. Vague to which meeting. Checker
13 meet or 350(e) meeting? Vague.

14 THE COURT: Rephrase.

15 BY MR. QUADRA: Q. Did you ever became aware that Mr. Aubry
16 attended a meeting at the DLSE about changes to the 350(e)?

17 A. I have no recollection of that.

18 Q. Mr. Aubry, prior to being retained to help you with the
19 piece-rate system, had he worked for Cinema 7 prior to that?

20 MS. RUTTER: Objection. Vague and ambiguous. Relevance.

21 THE COURT: Overruled.

22 You may answer.

23 THE WITNESS: I don't believe he had.

24 BY MR. QUADRA: Q. Do you recall whether he was an expert
25 retained by Clarence and Snell in connection with the Vickery
26 action?

27 MS. RUTTER: Objection. Relevance.

28 THE COURT: Overruled.

1 You may answer.

2 THE WITNESS: I don't believe he was.

3 BY MR. QUADRA: Q. Do you recall Mr. Aubry giving you
4 advice on implementing the chip system in January of 2001?

5 A. He did give us advice, yes.

6 Q. Do you recall receiving that advice directly from Mr. Aubry
7 or did you receive it through Clarence and Snell?

8 A. I don't believe it was directed from Mr. Aubry. I would be
9 guessing. I would think it was through Clarence and Snell,
10 perhaps even from Mr. Armstrong. I'm not sure.

11 Q. Do you recall what, if anything, you were informed was
12 Mr. Aubry's opinion on the chip system that you were attempting
13 to --

14 A. Not attempting. I guess we just hadn't don't it yet. It
15 did not fall under the direct reading of the bill which was
16 moneys and --

17 Q. Do you recall who told that you?

18 A. I could guess. I could just tell you about it would
19 probably be that one or that one, but it would be a guess.

20 Q. You don't have a specific recollection of who told you,
21 correct?

22 MS. RUTTER: Asked and answered.

23 THE COURT: Overruled.

24 You may answer.

25 THE WITNESS: I've answered. Mr. Armstrong.

26 BY MR. QUADRA: Q. And do you remember how -- strike that.
27 Do you remember Mr. Armstrong telling you how he had become aware
28 of Mr. Aubry?

1 A. I have no recollection of it, is what I'm said. I'm
2 assuming it was Mr. Armstrong, but I do not have a recollection
3 of Ms. Clarence or Mr. Armstrong. I said, as far as I can
4 remember it was not Mr. Aubry talking to me directly.

5 Q. Do you remember when you became aware of this information
6 supposedly that came from Mr. Aubry?

7 A. It's ten years ago. I have no recollection of when and
8 where those things came in.

9 Q. And do you remember whether it was before or after
10 January 1, 2001?

11 A. It would be before January 1. January 1 that law became
12 law, that bill did. So, we had made our preparation some months
13 prior to.

14 Q. Did you take notes or write down, in any way, the
15 information provided to you that supposedly came from Mr. Aubry
16 about the chip system?

17 A. I'm not a note taker.

18 Q. That would be no, sir?

19 A. I'm not a note taker. You can take that for what you think.

20 THE COURT: Mr. Mitchell, can you answer the question of
21 whether you took notes?

22 THE WITNESS: I'm not a note taker. I couldn't take notes.

23 BY MR. QUADRA: Q. So, you did not take notes, correct?

24 A. No, I did not.

25 Q. Do you know if Mr. Armstrong took any notes regarding any
26 information that was supposedly provided to him about Mr. Aubry's
27 opinion?

28 A. I have no knowledge.

1 Q. Did Mr. Armstrong ever write a memo to you outlining what
2 Mr. Aubry's opinions were?

3 MS. RUTTER: Objection. Relevance.

4 THE COURT: Overruled.

5 You may answer.

6 THE WITNESS: Not that I recall.

7 BY MR. QUADRA: Q. At any point, did you ask Mr. Aubry to
8 give you a written opinion on the chip system?

9 MS. RUTTER: Objection. Asked and answered. It's
10 cumulative from this morning.

11 THE COURT: I believe it was. Go ahead.

12 THE WITNESS: Yes. I said yes. I've asked him for a
13 written opinion.

14 MR. QUADRA: And I may have been confused between that and
15 the chips so I apologize.

16 THE WITNESS: Easy to get confuse in such a complex area.

17 BY MR. QUADRA: Q. Do you recall ever reading a written
18 opinion from Mr. Aubry on the chip system?

19 A. No, sir.

20 Q. I'd like you to take a look at, in the same large binder,
21 trial exhibit 5086?

22 A. (Witness examining document.)

23 Q. Do you have the exhibit before you, sir?

24 A. Yes, sir.

25 Q. Have you ever seen this letter before?

26 MR. QUADRA: For the record, Exhibit 5086 is a letter dated
27 April 19th, 2001, from Lloyd Aubry to Nanci Clarence?

28 THE WITNESS: Might have, but I don't recall it.

1 BY MR. QUADRA: Q. Would it be fair to say that this letter
2 had no effect on your decision to implement and maintain the chip
3 system?

4 MS. RUTTER: Objection. Lacks foundation what's indicated.
5 He doesn't recall seeing this letter.

6 THE COURT: Sustained.

7 BY MR. QUADRA: Q. After the chip system was implemented in
8 January 1, 2001, do you recall receiving any information from
9 Mr. Aubry that influenced your decision to maintain the system in
10 place?

11 A. Mr. Aubry, before January 2001, informed us of his opinions.
12 This letter is in April. But I had heard it already verbally, I
13 think, from Mr. Armstrong that he was -- as he says here,
14 satisfied both the letter and the spirit of Labor Code Section
15 350(e).

16 Q. My question, sir, was there anything you recall receiving
17 after January 1, 2001, from Mr. Aubry that influenced your
18 decision to maintain the chip system in place?

19 MS. RUTTER: I'm going to object. Vague and ambiguous as to
20 receiving from Mr. Aubry in terms of directly.

21 THE COURT: Overruled.

22 You may answer.

23 THE WITNESS: Well, do you mean a letter saying what you're
24 doing is okay, keep doing it? Is that what you mean, that his
25 letter what he would state? Because I don't recall anything.

26 BY MR. QUADRA: Q. Can you take a look at the second page
27 of the letter? The last line of the letter, which I will read to
28 you:

1 "If in fact the legislature intended to ban
2 compensating dancers on a piece-rate basis, I
3 believe it would have to do so more
4 implicitly than as set forth in Labor Code
5 Section 350(e)."

6 Do you see that?

7 A. Yes.

8 Q. Do you remember having any discussions with Clarence and
9 Dyre or Nanci Clarence or Kate Dyre, prior to implementing the
10 chip system in January 1, 2001, that the changes to 350(e) could
11 constitute a banning of a piece-rate system?

12 MS. RUTTER: Objection. Lacks foundation to the extent it
13 calls for a legal conclusion.

14 THE COURT: Overruled.

15 You may answer.

16 THE WITNESS: Yeah. The way I've always taken the 350(e)
17 was the legislature's attempt to address a lot of complaints that
18 were coming from certain groups, some interest groups and labor
19 groups, which -- about the unfair taking of chips or moneys by
20 these adult clubs, you know, of which we fall in the same general
21 umbrella.

22 I've always assumed it was all the compensation which I
23 referred to -- I don't want to say mob, but they pretend to be --
24 the so-called -- what do they call them -- the independent
25 contractor clubs. That was the catch all for -- and there's a
26 lot of them, I don't know, seventy, a hundred in the state.

27 We were the one little club maybe that I know -- maybe
28 there's one more -- with employees and with the clear, and a

1 clear law in history of 37 years of never, ever taking a tip from
2 a dancer and proud of it. Never, ever.

3 MR. QUADRA: Move to strike as nonresponsive.

4 THE COURT: Granted.

5 BY MR. QUADRA: Q. Mr. Mitchell, was there any discussion
6 with Clarence or -- and/or Dyre about the fact that the change to
7 350(e) could constitute a banning of a piece-rate system, to your
8 recollection?

9 A. No.

10 THE COURT: Excuse me just a moment, please.

11 (Pause in the proceedings.)

12 THE COURT: Excuse me, Counsel. Can we take a ten-minute
13 recess, please.

14 (Brief recess was taken.)

15 --- o0o ---

16 THE COURT: Back on the record

17 Thank you for your patience, Counsel

18 Mr. Quadra.

19 BY MR. QUADRA: Q. Mr. Mitchell, do you have any knowledge
20 as to who provided Mr. Aubry information regarding the chip
21 system you were contemplating for the theater so that he could
22 opine on it?

23 A. I would think it would be a combination of Mr. Armstrong and
24 Ms. Clarence and Ms. Dyre.

25 Q. Did you participate in any way in that process?

26 A. I was there. I mean, I was there, but I wasn't like leading
27 the discussion.

28 Q. Maybe we can back up a little bit because I don't remember

1 you testifying that you actually had a meeting with Mr. Aubry, so
2 I may have missed that.

3 In connection with the chip system, do you recall having a
4 direct discussion with Mr. Aubry about the system that you were
5 contemplating putting in place?

6 A. Are you talking about the general piece rate or the
7 post-2509.

8 Q. The 350(e) change.

9 A. Right.

10 Q. That particular issue.

11 A. The old one, the 2001?

12 Q. Right.

13 A. That's where I think I testified that in that general time
14 frame, I believe some of the other clubs were beginning to use
15 chips. And I think we did some kind of ask-around, and then it
16 was brought up, and Mr. Aubry would that -- and then he gave us
17 his opinion. He thought that that would, you know, take care of
18 this 2509 as far as the intent.

19 Q. My question to you is, who -- strike that.

20 Do you recall actually having a face to face meeting at
21 which Mr. Aubry was present to talk to you about 2509 or 350(e)?

22 A. I don't recall that one. I know -- and I take it back. I
23 do believe, yes, and it was the Law Offices of Clarence and
24 Snell.

25 Q. Who else was present?

26 A. Mr. Armstrong, myself, Attorney Clarence and Attorney Dyre,
27 and Attorney Snell might have come in and out.

28 Q. And during that meeting, do you recall what Mr. Aubry told

1 you?

2 A. I think it was more of a fact-finding mission for him to
3 make an edict. He might have said something at the questions,
4 this, that. But I don't recall if we were to wait for a come
5 exact on the opinion or if he was going -- I don't recall that.

6 Q. So, the best of your recollection is that this particular
7 meeting was where the information regarding the chip system you
8 were thinking about was conveyed to do Mr. Aubry?

9 MS. RUTTER: Objection to the extent that misstates his
10 testimony.

11 THE COURT: Overruled.

12 You may answer.

13 THE WITNESS: I don't have a recollection of that timing.

14 BY MR. QUADRA: Q. Do you recall a subsequent meeting at
15 which Mr. Aubry gave you an opinion face to face?

16 A. Well, one of our meetings at the theater, you know, there
17 were certain questions being asked and there was the question
18 about the issue of quotas and were those permissible.

19 Q. Mr. Mitchell, I want to make sure we understand where we are
20 in time. I'm talking subsequent to your meeting about the change
21 to 350(e) with Mr. Aubry?

22 A. Right.

23 Q. Did you then have another meeting with him at which he gave
24 you an opinion about chips, or was that something that was
25 conveyed to you through other people?

26 A. I don't recall.

27 Q. At this meeting you recall that took place at Nanci
28 Clarence's office, do you recall receiving any advice from any

1 member of Clarence and Snell about the chip system, or was it
2 just Mr. Aubry getting information?

3 A. I think we all looked to Mr. Aubry as the person with the
4 most experience in that area, you know, that -- the Snell office
5 is not -- their specialty is not what this is about.

6 Q. This being employment?

7 A. Correct.

8 Q. What about -- do you recall whether anybody took notes at
9 this meeting that you recall where Mr. Aubry was present at the
10 Snell office, Clarence and Snell office?

11 A. I don't.

12 Q. Did you ever put something in writing about the chip system
13 you were contemplating to be provided to Mr. Aubry for his
14 opinion?

15 A. I just don't know about that. I did not, but I don't know
16 if others did.

17 Q. Under the piece-rate system, dancers were supposed to turn
18 in a quota amount at the end of the shift, correct?

19 A. They had a quota at the end of the shift. They checked out
20 and reported what they did. It could be zero to overquota.

21 Q. Concentrating on the period of July '98 to January 1st,
22 2001, under the piece-rate system where you were collecting cash
23 rather than chips from patrons?

24 A. Yes.

25 Q. Under the system, dancers were supposed to turn in, if they
26 could, the quota amount every shift, correct?

27 A. No.

28 Q. Is it your testimony that the dancers were only required to

1 turn in, if they could meet the quota, half the quota amount plus
2 any withholding on their share?

3 A. The way I -- the way I understand it, and it's in the book,
4 is that dancers operated on a 50-50 basis. And there was a
5 suggested quota that the house wanted to have an idea about.

6 Q. What was actually collected from the dancers at the end of
7 the shift, though, was not the full quota amount. It was the --
8 half of the quota amount plus any withholding, correct, if they
9 met the quota?

10 A. It wouldn't matter what they met. Withholding would apply
11 to what they reported, you know. So -- I see what you're saying.
12 Yes, they -- at the end of the shift, prior to the old one, they
13 would come in and they would give the house half of their half
14 and they would make their contribution for their share with their
15 withholding.

16 Q. What you have termed as "their half," would -- that would
17 actually not be turned in, right? It would be just credited on
18 paper.

19 A. Yes.

20 MS. RUTTER: Objection. Vague and ambiguous.

21 THE COURT: Overruled. The answer stands.

22 BY MR. QUADRA: Q. When the piece-rate system started, you
23 Mr. Armstrong and Mr. Stanich set what you called a suggested
24 quota, right?

25 A. You could say that.

26 Q. Is that a yes?

27 A. Well, then I'm going to say no. I did it. I'm just trying
28 to help here.

1 Q. In setting the quota under the piece-rate system, you looked
2 at some historical data about tips that the dancers had reported
3 to the booking agency DGI when your dancers were classified as
4 independent contractor, correct?

5 A. We discussed that, yes.

6 Q. Vince Stanich ran DGI which is Dancers Guild International,
7 right?

8 A. Yes.

9 Q. And then Mr. Stanich, after you settled the Vickery action,
10 came over and became a Cinema 7 employee, right?

11 A. Dancers Guild International was a booking agency, and that's
12 how we ran it. After the Vickery, because he was a prior
13 employee, after the Vickery case when we went to employees, we
14 asked him to come back in-house.

15 Q. And you received this tip information from Mr. Stanich once
16 he became your employee in 1998, correct?

17 A. It goes back a lot earlier than that. It's -- you have to
18 understand the context, I think, a little bit. And I don't want
19 to talk too much to you about it.

20 But we have always encouraged the dancers, encouraged them
21 to report tips, and from the standpoint of trying to bring
22 themselves up on the -- in the world as we know it. So, he took
23 a step further than we did. He actually had the performers come
24 in and give and show copies of their tax return.

25 Q. To DGI?

26 A. Yes.

27 Q. And my question to you is, Mr. Stanich shared this tip
28 information with you that he had obtained through DGI when?

1 A. I think off and on for some time, you know.

2 Q. But in terms of that information being used to set the
3 quota, it would have been prior to July 1, 1998, correct?

4 A. Yes.

5 Q. To your knowledge, Mr. Stanich did not obtain the
6 authorization of the dancers that he obtained the tip information
7 from so that he could provide it to you, correct?

8 A. You'd have to ask Mr. Stanich then.

9 Q. You're not aware of any such authorization being distributed
10 and being signed by dancers, correct?

11 MS. RUTTER: Objection. Relevance. It calls for
12 speculation.

13 THE COURT: Overruled.

14 You may answer.

15 THE WITNESS: I'm not unaware or aware.

16 BY MR. QUADRA: Q. Did you ask Mr. Stanich if he obtained
17 that authorization before he used the tip information to set the
18 quota?

19 MS. RUTTER: Objection to the extent it misstates that he
20 used it to set the quota. He indicated it was a factor that he
21 had looked at. But there's been no testimony that he used it to
22 set the quota.

23 THE COURT: Sustained.

24 BY MR. QUADRA: Q. Mr. Mitchell, did you ask him,
25 Mr. Stanich, whether he had obtained authorization to share tip
26 information with you when you were using it as a factor to set
27 the quota?

28 A. I might have, but I don't recall.

1 Q. And you don't have any copies of anything from Mr. Stanich,
2 any document, where he indicates that he had obtained the
3 authorization?

4 A. I don't believe that I ever received any documents or any --
5 it was more of a -- maybe an annual calculation of how many tips
6 or what was the total amount of tips reported at the theater for,
7 like, a given year. That might have been going on from the 90s,
8 early 90.s I don't know how long that was.

9 Q. Do you recall the amount of tips reported that you used,
10 what figure you had in mind, when you used it as a factor to set
11 the quota?

12 A. You know, I did give you an amount in our deposition, but
13 after I thought about that, I'm not sure. I did say a million,
14 around a million. It went up, it went down a little bit. It
15 moved a little.

16 I'm not positive whether it was a million or a third of a
17 million. It was just about more than anyone else in town that
18 ever did it. We were kind of proud of it.

19 Q. It's a fact, sir -- strike that. It's the fact that you
20 work backwards from that tip information, whether it was a
21 million or some other number, you worked backwards using that
22 number to come up with how many job shifts should be worked to
23 generate the piece-rate income you wanted, right?

24 A. You know, I think Mr. Armstrong would employ more of how
25 many shifts, how many people. I don't think I used the tip money
26 that -- that wasn't the point. Looking more of a flow here,
27 trying to bend over backwards and not run all of our dancers off.
28 That's what we were most concerned with that here we go, we're

1 the ones once this way.

2 The dancers, erotic dancers were employees. It's a lot of
3 paperwork. They sit down and read volumes just to come in and
4 get a job. It goes four or five hours. And I mean, it was very
5 questionable that they would all get up and walk out.

6 Q. Mr. Mitchell, if you could look at your deposition and look
7 at Volume 3 and look at Page 107 starting at Line 4 through 108
8 at Line 1?

9 A. (Witness examining document.) 10 -- direct me again to the
10 page, please?

11 Q. 107.

12 A. 107.

13 Q. Line 4 through 108 Line 1.

14 A. I can use some help. Maybe I'm in the wrong book.

15 MR. SWEET: May I approach, Your Honor?

16 THE COURT: You may.

17 THE WITNESS: I think this is better. I think I have the
18 wrong one. Sorry to get you up.

19 MR. SWEET: No problem.

20 MR. QUADRA: May I read, Your Honor.

21 THE COURT: You may.

22 THE WITNESS: I found it.

23 MR. QUADRA: "QUESTION: As you were designing
24 the piece-rate system and what the
25 appropriate quota would be, did you have
26 discussion with Mr. Stanich, now as your
27 employee, about what information he could
28 provide about tip income as independent

1 contractors?

2 "ANSWER: It's very vague. We did have
3 discussions about how -- what was the kind of
4 money reported, tip income from the
5 independent contractors. In those days, I
6 don't know of any of the other clubs that was
7 keeping kind of track or trying to -- or as I
8 think he said it tried to encourage the
9 dancers to report their tip income.

10 "QUESTION: When you said earlier you
11 testified about doing some math based on some
12 numbers you had gathered and trying to come
13 up with a quota, was that something that you
14 did by yourself or with the assistance of
15 other people?

16 "ANSWER: That's a good question. I would
17 say it was -- once again, it is probably -- I
18 don't have a recall about having a meeting or
19 sitting down and discussing it. My recall is
20 that the reported tips somewhere in that
21 period of years was around a million dollars
22 a year. So, I think we kind of work backward
23 with that number to how many job shifts would
24 be worked and how it would work out. It was
25 like a little -- it was new territory for
26 us."

27 THE WITNESS: Uh-huh.

28 BY MR. QUADRA: Q. Sir, you don't recall how many of that

1 million dollars in tip income if you used as a factor in setting
2 a quota you actually generated as piece-rate income, do you?

3 MS. RUTTER: Objection. Vague and ambiguous as to
4 piece-rate income. It's overbroad.

5 THE COURT: Just a moment. Overruled.

6 You may answer.

7 THE WITNESS: Well, the answer is I didn't use any of those.
8 The --

9 BY MR. QUADRA: Q. Mr. Mitchell, my question is, how much
10 did you generate compared to the million dollars estimated the
11 tip income have been for independent contractors when you set the
12 piece-rate quota --

13 A. Uh-huh.

14 Q. -- do you recall, after that first year, how close you came
15 to the piece rate revenues, the dance fees as you called them,
16 how close did you come to that million dollars?

17 A. The -- I'm not sure it was a million dollars. I know in the
18 deposition I said that. I'm not sure. It was either in my
19 recollection a million dollars or a third of a million dollars.
20 I'm not sure. But I think some years have changed off and on.

21 The piece-rate revenues that came in, which area are you
22 speaking of? The gross figure or the individuals or --

23 Q. The gross.

24 A. That would be reflected in all these documents that we have
25 given you.

26 Q. Do you recall whether it exceeded the amount of money or
27 equal the amount of money that you had used as tip income as a
28 factor for setting the quota?

1 MS. RUTTER: Objection to the extent it misstates the
2 sustain.

3 THE COURT: Sustained. Rephrase.

4 BY MR. QUADRA: Q. Do you recall whether, at any point, you
5 did an analysis looking at with the gross revenues from
6 piece-rate income from the dance fees and comparing it to the
7 historical data you had that you had with independent contractor
8 tip reporting?

9 A. Independent contractor tip reporting would have to be a lot
10 smaller. When they're employees, they're still getting tips and
11 reporting tips. So, what we added on top of it was a work order,
12 a job description, a clearly defined product work product, and
13 price, and a price.

14 There was no price before. Now there's a price for the work
15 product. So, that was the huge number that we first started with
16 that would become overwhelming compared to anything else in the
17 business, which was why it was changed years later.

18 We were creating a lot of money for insurance companies,
19 like workers comp, a lot of money for San Francisco in payroll
20 taxes, and a burdensome amount of money on dancers withholding,
21 trying to make a system that met minimum wage.

22 So, it was pretty high, \$20 dances, whatever the number was.
23 So, it's a lot of money compared to just independent contractors
24 talking about their tips when the rule of the game was what tips
25 in America and in San Francisco.

26 Q. Mr. Mitchell, just to make sure I understand your testimony,
27 it is your testimony that the amount of money that was generated
28 through piece-rate dance fees far exceeded the amount of tip

1 income that had been reported by independent contractors to DGI,
2 correct?

3 A. Yeah. If you start actually paying for the dinner and the
4 tip, then the number is going to be a little larger than what you
5 leave your tip at the table, I would think.

6 Q. Now, do you recall what the initial quota was that you set
7 in 1998?

8 A. I have no recall what it was, but it could be anything I
9 wanted it to be. That's what I -- you know, anything I wanted it
10 to be is what it could have been. It could change tonight or
11 tomorrow and I decide.

12 Q. And in setting the quota, you did not look at any data with
13 regard to how many patrons frequented the theater, right?

14 MS. RUTTER: Objection. Irrelevant.

15 THE WITNESS: When you say --

16 THE COURT: Overruled.

17 You may answer.

18 THE WITNESS: Setting the quota?

19 MR. QUADRA: In, correct.

20 THE WITNESS: In 1998?

21 MR. QUADRA: Correct.

22 THE WITNESS: I think in the end the quota was set too high.
23 I was afraid these dancers were going to leave. If they're not
24 going to make any money, they're going to leave. So, the whole
25 thing came up to -- they made quite a bit money.

26 In fact, on their payroll, then it became we determined
27 after while why, why are we making the dancers on this situation,
28 being at \$20 to \$30 an hour. Why? We are crazy. We are hurting

1 them and we are hurting our ability to get dancers to work at the
2 club.

3 MR. QUADRA: Move to strike as nonresponsive, Your Honor.

4 THE COURT: Sustained. Granted.

5 BY MR. QUADRA: Q. Mr. Mitchell, when you set the quota
6 that went into effect on July 1, 1998, that initial quota, did
7 you take into consideration any data regarding how many patrons
8 came to the theater?

9 A. I just don't have any recall.

10 Q. Can you take a look at your deposition at Page 115 starting
11 at Line 7 through Line 18.

12 A. Uh-huh. (Witness examining document.) Okay.

13 MR. QUADRA: May I read, Your Honor?

14 THE COURT: You may.

15 MR. QUADRA: "QUESTION: Did you have available
16 to you at this time of this conversion data
17 on the amount of patrons that frequented the
18 theater on a daily, weekly, monthly, yearly
19 basis?

20 "ANSWER: I don't -- can you ask the question
21 again? I'm not sure what you said.

22 "QUESTION: Sure. Did you have available to
23 you at this time data regarding how many
24 patrons frequented the theater?

25 "ANSWER: Not that I recall looking at to
26 come up with any changes.

27 "QUESTION: It is not something you analyzed
28 at the time.

1 "ANSWER: No."

2 Q. And Mr. Mitchell, after the quota was in place, the
3 piece-rate quota, you did not put any mechanisms in place that
4 tracked the number of patrons that entered the theater on a shift
5 basis, correct?

6 A. I think there's -- I mean, there's box office reports.
7 There's all kinds of reports people that entered the theater.

8 Q. But did you put any particular tracking mechanism in place
9 so that you would have on every shift a reported number of how
10 many patrons actually entered?

11 MS. RUTTER: Objection, Your Honor. Relevance. There's
12 been no foundation laid that there's any requirement to do such
13 tracking.

14 THE COURT: Overruled.

15 You may answer.

16 THE WITNESS: The question is special tracking other than
17 your box office reports?

18 BY MR. QUADRA: Q. Sure. That would give you the actual
19 number of patrons.

20 A. No.

21 Q. And in setting the quota that went into effect in July of
22 '98, you did not consider the number of dancers who were going to
23 dance on any particular shift, correct?

24 A. Incorrect.

25 Q. Is it your testimony that you calculated the quota based on
26 the number of dancers on a shift?

27 A. To certain extent, yes.

28 Q. When you set the quota in July of 1998, there was a matinee

1 shift and a night shift; correct?

2 A. Yes.

3 Q. And the matinee shift have less dancers on the shift than
4 the night shift, correct?

5 A. That's what the document indicates that I gave you, yes.

6 Q. And the quota was the same, right?

7 MS. RUTTER: Objection to the extent it lacks foundation.
8 Misstates evidence.

9 THE WITNESS: Quotas moved around --

10 THE COURT: Wait just a moment.

11 Why does it misstate evidence?

12 MS. RUTTER: Because I think the evidence is that the quota
13 varied between the matinee shift and night shift.

14 MR. QUADRA: I believe we were provided a chart of what the
15 quota was in 1998. Maybe I can refresh my recollection. But I
16 believe it was the same for the matinee and night shift.

17 THE COURT: That's what the chart says.

18 MS. RUTTER: First of all, the chart is not in evidence. To
19 the extent this witness was being asked whether or not it was
20 same or different.

21 THE COURT: The objection is overruled.

22 You may answer.

23 THE WITNESS: I need the question again, Your Honor.

24 MR. QUADRA: Yes.

25 Q. The matinee shift and the night shift had different numbers
26 of dancers on the shift, correct?

27 A. Right.

28 Q. And you set the quota to be the same on both shifts

1 initially?

2 A. Initially, I did. Okay.

3 Q. Other than the tip, historical tip data from DGI, what other
4 factors went into setting the quota?

5 A. I think I know Mr. Armstrong had -- he had a some
6 calculations that he had made that -- just basically my, you
7 know, I don't know what to say. It was a new system. The quota
8 was suggested.

9 I don't know if any coming or more, and it was an attempt to
10 check our productivity and to let the people know this was more
11 of how we were going versus checkers following people around.
12 Here is an idea of productivity that would be in the realm of
13 realistic.

14 There's so many variables about people. People book a shift
15 and don't show up. So, you don't know, you know. You don't know
16 exactly if anyone will come to the theater tomorrow or not. But
17 you set your schedules and you would set your quota, and they
18 were changed. Generally, they went up. I think they did go down
19 here and there, maybe a time or two but --

20 Q. Mr. --

21 A. -- based on all the factors all the different factors like
22 that.

23 Q. Sorry.

24 Other than the tip income from independent contractors, is
25 it your testimony that you had some analysis done about how often
26 people did not or did show up to shifts in setting the quota? Is
27 that what you're saying?

28 A. No, I don't think so. I'm just saying the quota is --

1 besides the suggested -- the word "suggested quota," the quota is
2 what it is. Some days -- you know, I'd say a lot of the days the
3 dancers met their quotas, some days they didn't.

4 There was -- it was something for us to try to strife for.
5 That's what we're in business for, selling dances, selling lap
6 dances, and stage dances. That was something for people to go
7 for.

8 Q. And the number you set as the quota, the only factor you can
9 tell us about right now is the tip income that was given to you
10 by --

11 A. No.

12 Q. -- Vince Stanich?

13 A. No. No. Not at all. You've taken what I've told you in
14 our deposition, right, that we, as a live sex employer, we're
15 proud of the fact that we encourage up and coming dancers to
16 report some money and not steel every dime, like the general
17 feeling of the world is, to upgrade, to up lift yourself, have a
18 credit card, pay your rent.

19 You're trying to make that like some other thing that is not
20 happening because the dancers are our favorite people. We stand
21 beside them, behind them all their lives, in all of our working
22 lives, from our pornography background, for our erotic dancing,
23 we like those people. We take care of those people.

24 We're not adversarial to those people until the outside
25 adversarial types, like yourself, come knocking on the door.
26 We've had quite a bit of it in our experience.

27 So, no. I could care less what their tips are. I've never
28 taken any of it. I don't need to know. I'm not required to know

1 by law, unless you have a new law that I'm supposed to got look
2 in their purses. I don't and I never have.

3 We are not the mob. We are not running a bunch of hookers.
4 We work with women in an erotic situation. I didn't use the tips
5 to decide what the thing could be. And like I said, I could
6 change it tonight if I want to.

7 MR. QUADRA: Move to strike as nonresponsive, Your Honor.

8 THE COURT: The answer will be stricken, except for the last
9 sentence.

10 BY MR. QUADRA: Q. Mr. Mitchell, if you could look at your
11 deposition at Page 109, starting at Line 22 going through 110
12 Line 1.

13 A. I'm sorry, Counsel. 109?

14 Q. 109 Line 22.

15 A. (Witness examining document.)

16 MR. QUADRA: May I read, Your Honor?

17 THE COURT: You may.

18 MR. QUADRA: "QUESTION: When you used that
19 information as a factor in setting the quota,
20 and I think you also talked about trying to
21 figure out a number of shifts, any other
22 factors that you can recall that went into
23 the quota?

24 "ANSWER: Not that I recall."

25 Q. You did do some analysis, sir, to figure out whether the
26 quota amount you set would be an amount -- would generate an
27 amount sufficient to cover all your overhead cost, right?

28 A. We talked about that.

1 Q. Is that a yes?

2 A. Not per se, no.

3 Q. Do you recall that the quota was set such that you could
4 cover the cost of the Vickery settlement payments?

5 MS. RUTTER: Objection. Relevance.

6 THE COURT: Overruled.

7 You may answer.

8 THE WITNESS: The -- it was something that I probably
9 thought about. It was a huge amount of money, like you said
10 before, that we were paying out. If we don't pay the money, the
11 whole theater is going to collapse.

12 So, there's -- our object was to pay the Vickery settlement
13 off, and that's what we tried to do. So, I would think I had
14 that in mind and the overall overhead, and made up a quota based
15 on that.

16 BY MR. QUADRA: Q. Made up a quota that would cover your
17 overhead including the Vickery settlement, right?

18 MS. RUTTER: Objection. Asked and answered.

19 THE COURT: Overruled.

20 You may answer.

21 THE WITNESS: I just answered. I'm not upset about the
22 question. It's just like, can you have an overhead, can a
23 settlement and a court case be part of any business's overhead,
24 or would that be something else? What could that possibly be?

25 BY MR. QUADRA: Q. Is that yes?

26 A. You're asking these stupid questions. The answer I've given
27 you, I give it here, I'd give it to you again. Yes. What's
28 wrong with that?

1 Q. Now, I'd like you to take a look at Binder 1, Exhibit 1005,
2 if you could. The binder that's on the counter there. No. 1.

3 A. All right.

4 Q. And that would be Tab 5.

5 A. Tab 5. Got it.

6 Q. Do you recognize Exhibit 1005?

7 And for the record, it's a notice indicating a change in the
8 quota on September 1, 1999.

9 A. Yes, sir.

10 Q. Do you recall why the quota was changed on this date?
11 September of 1999?

12 A. Well, if I had a reason, it would be proprietary.

13 Q. Do you have a reason?

14 A. Am I supposed to tell you my secrets of how I run my
15 business? What is the question?

16 Q. My question is, sitting here today, can you tell us what the
17 reasons were for increasing the quota to \$360 for Monday through
18 Saturday night shifts?

19 A. \$180 performer's share and \$180 theater share.

20 Q. So am I to gather from that that your reason was to increase
21 the revenues to Cinema 7?

22 A. Increase the revenues to the performers as well.

23 Q. Had anything changed in the overhead costs that had led you
24 to increase the quota by that amount?

25 MS. RUTTER: Objection. Relevance.

26 THE COURT: Overruled. You may answer.

27 THE WITNESS: I don't -- September 1st, 1999? I don't
28 recall. I hadn't recalled an abnormal event.

1 MR. QUADRA Q. Is there anything that had happened at the
2 theater that made you believe overnight that dancers would be
3 able to generate the additional dance fees that you were
4 demanding?

5 A. Did I have any belief that they could?

6 Q. Is there anything that had happened at the theater that led
7 you to believe that you could do that?

8 A. Just everything. It was the best show in town. Why not?
9 The question could be, "Do you have any reason they couldn't?"
10 I had every indication that they could.

11 Q. What indications did you have that they could?

12 A. Just a wonderful place to go. The best there is. And
13 people are just pouring in the door, loving it. And that would
14 be the reason.

15 Q. Was there any tracking of revenue that indicated to you the
16 dancers were, for example, exceeding the quota before it was
17 raised?

18 A. Not that I recall.

19 Q. Under the piece rate system, the unit of production was a
20 lap dance or a private dance, right?

21 A. Private dance and a lap dance, yes.

22 Q. And when you reclassified employees in July of 1998, you
23 didn't put into place any program to inform the dancers what
24 Cinema 7 meant by the terms "lap dance" and "private dance,"
25 correct?

26 A. We were doing lap dances for years and years there at that
27 point. So as far as did I write something up and run it by the
28 City Attorney's Office to explain what a lap dance is at the

1 O'Farrell Theatre? Is that your question?

2 Q. No, sir. My question is, did you implement a program to
3 communicate to dancers starting in July of '98, what Cinema 7's
4 definition of a "lap dance" and a "private dance" was?

5 A. Yes.

6 Q. What was that?

7 A. Series of meetings.

8 Q. And is it your testimony that at these meetings, Cinema 7
9 personnel explained what their definition of a lap dance was?

10 A. Are we talking about the transition from employee to
11 subcontractor? Where are we?

12 Q. We are at the meetings that you just described that occurred
13 where there was some attempt --

14 A. In the transition?

15 Q. I'm not sure, sir. You are the one testifying about the
16 meetings. So maybe you can tell me.

17 A. Okay.

18 Q. Was there a time that you recall where there were meetings
19 where Cinema 7 personnel defined what they, what Cinema 7 meant
20 by a "lap dance" in the piece rate system?

21 A. That's -- I'm not sure, you know. I'm not positive. I
22 think it's in the -- a lap dance is defined in my work book
23 here. What a lap dance is.

24 Like we had the discussion earlier, you need a lap for a lap
25 dance. And the private dances were in booths for two songs.
26 You are getting down to like, you know, lap dance, erotic
27 theater, America. And your question is like just a waste of the
28 public's slender resources.

1 THE COURT: Mr. Mitchell --

2 THE WITNESS: I'm sorry, Your Honor.

3 THE COURT: I understand you might have an opinion about
4 this. But my job here is to try the case on the facts and have
5 counsel ask their questions and have your answers. And I don't
6 know what was said in deposition. So some of the things may be
7 repetitive to you, but they are not necessarily to me.

8 THE WITNESS: I appreciate that. And I also appreciate
9 being in the City for 37 years, paying a lot of taxes. And I
10 don't appreciate having to step over the winos when I come here
11 for this to be drug on and on and on, I suppose to perhaps,
12 whatever.

13 But it doesn't sit well with people that live and work in
14 this town for many, many years to let it go on like this. Like
15 drop a basketball in the Ghetto and asking, "Did you define what
16 that is for them?"

17 No. I don't know if I did or not.

18 THE COURT: Excuse me, Mr. Mitchell. I think this would be
19 a good time for our mid-afternoon break. We will take a ten
20 minute recess. Please.

21 THE WITNESS: I apologize, Your Honor.

22 THE COURT: Thank you.

23 (Recess taken.)

24 THE COURT: We are back on the record. Mr. Quadra, your
25 continued 776?

26 MR. QUADRA: Thank you, Your Honor.

27 Q. Mr. Mitchell, when you converted the dancers to employees in
28 1998, it is correct you didn't have any meetings where you

1 informed the dancers what the definition of a "lap dance" was
2 under the piece rate system, correct?

3 MS. RUTTER: Objection, Your Honor. To the extent it's been
4 asked and answered. Also relevance. We've had witnesses,
5 Plaintiffs and dancers both testify that they knew what a lap
6 dance was. I don't understand the relevance.

7 THE COURT: Well, let's not have speaking objections. The
8 objection is overruled. You may answer.

9 THE WITNESS: I don't recall.

10 MR. QUADRA Q. And you did not inquire from dancers what
11 their individual definition of a "lap dance" was, or "private
12 dance," correct?

13 MS. RUTTER: Objection, relevance.

14 THE COURT: Overruled. You may answer.

15 THE WITNESS: The -- I don't recall inquiring what the
16 dancers, what their opinion might be of the lap dance.

17 MR. QUADRA Q. Your personal definition of a lap dance is
18 that a dancer must sit on a patron's lap and face away from the
19 patron to perform the lap dance. Correct?

20 A. That would generally be correct.

21 Q. That definition is not contained in the employee guidebook,
22 correct?

23 MS. RUTTER: Objection. Relevance.

24 THE COURT: Overruled. You may answer.

25 THE WITNESS: The facing away thing that had been added
26 later when there was some -- too much hanky-panky on facing the
27 patron. But I don't recall explaining what a lap dance was per
28 se, as part of any indoctrination.

1 Q. Mr. Mitchell, the guide books do not contain the definition
2 that you have, which is sitting on a lap, facing away from a
3 patron. Correct?

4 A. On the lap, without the lap I don't know if you can call it
5 the lap dance. But it was a generic term, "lap dance."

6 Q. Concentrating on what's in the guidebooks, do you know
7 whether your definition is contained in the guidebooks?

8 A. I can refer to the guidebook.

9 Q. Do you know? Sitting here today, do you know?

10 A. My definition?

11 Q. Yes.

12 A. Of what a "lap dance" is. Is it contained in the guidebook?

13 Q. Yes.

14 A. I think it's just referred to as a "lap dance."

15 Q. And that's it, right?

16 A. Yes.

17 Q. Now, your definition of a "lap dance" does not include
18 simply sitting next to a patron at the theater and talking.
19 Correct?

20 A. Correct.

21 Q. And do you know whether Mr. Armstrong shares your definition
22 of a "lap dance?"

23 MS. RUTTER: Objection. Relevance.

24 THE COURT: Overruled. You may answer.

25 THE WITNESS: I don't know.

26 MR. QUADRA: Q. During the piece rate period, dancers were
27 not required to dance with any particular patron, right?

28 A. That is correct.

1 Q. The dancers chose who they dance with?

2 A. Yes.

3 Q. So a patron could go to the Mitchell Brothers with all the
4 money or chips in the world and not get a lap dance, right?

5 A. That could happen.

6 Q. And during the piece rate period between 1998 and 2003,
7 there was no uniform time set for a lap or private dance,
8 correct?

9 A. That's incorrect.

10 Q. Was the only time that was set for dances based on songs?

11 A. A song was used in the book as a general idea of how long
12 that time would be.

13 Q. Was there any other indication of how long generally a dance
14 should be?

15 A. We used the term a "song."

16 Q. And that's it?

17 A. Well, two songs for the private dances.

18 Q. But the song or two songs was the only time factor, right?
19 In defining a lap dance?

20 A. As I have stated, I used a song when I came up with that
21 concept. I could have said 10 seconds. Or I could have said 10
22 minutes. Or any amount of time. But we used a song because the
23 timing sequence of erotic dancing is built around songs. Music.
24 Not a clock or a bell.

25 Q. And the songs could vary in length, right?

26 A. Most songs do.

27 Q. And dancers were allowed to start a lap dance in the middle
28 of a song and go into another song, right?

1 A. I don't think we ever referred to it anywhere. But
2 "allowed"? Yes.

3 Q. And the songs could vary in length, so they could start with
4 a four minute song and move into a seven minute song, right?

5 MS. RUTTER: Objection. Vague and ambiguous.

6 THE COURT: Overruled. You may answer.

7 THE WITNESS: It would kind of depend on where they were in
8 the building. The songs were kept generally in a time frame of
9 around five minutes.

10 Q. But they could start in a short song and move themselves
11 into a longer song, correct?

12 A. What I mean by the five minute time is that's where the D.J.
13 would come in.

14 Q. It is correct that the Mitchell Brothers did not try to play
15 songs of a certain length, right?

16 A. Incorrect.

17 Q. Can you take a look at your deposition and look at Page 149
18 starting at Line 18?

19 A. Yes.

20 Q. And go through 150 at Line 21.

21 A. Then there is one thing I'd like to add to that, that didn't
22 come to me during the deposition.

23 MR. QUADRA: May I read, Your Honor?

24 THE COURT: 149, 15?

25 MR. QUADRA: 149 Line 18.

26 THE COURT: Go ahead.

27 MR. QUADRA: (Reading:)

28 "Q. Before the break we were talking about

1 length of songs, and you indicated it could vary, and
2 I just wanted to give you a chance, or for me to
3 follow up on that. Was there a certain length of
4 song that you were shooting for, even though there
5 was some variation?

6 "A. Not really. The music today is longer than
7 it used to be for popular music. A song is a song.
8 And I would say there is overlap time on a song. It
9 wasn't like a bell went off on negotiations for a
10 dancer for a private or lap dance. You are not there
11 all day, and you can do your dance and then you can
12 get up and move on. So some uniformity because it
13 was posted for the customers on the wall, one song.
14 So it never seemed to be an issue. People I think
15 generally, that's sort of a national standard in the
16 business.

17 "Q. To the best of your understanding, during
18 the piece rate period between '98 and 2003, was the
19 range of time for these songs, can you give me a
20 range in minutes as to what you would consider an
21 appropriate song at the theater?

22 "A. I can't really.

23 "Q. Was it typical to have a song last five to
24 six minutes or was it longer than that?

25 "A. I would say that would be typical.

26 "Q. But there could be songs that were 10
27 minutes?

28 "A. There could be. The music is a large part

1 of our presentation. So that the latest music, the
2 latest artists, et cetera, they are just different
3 mixes. And it's the quality of the music is probably
4 more important to the performance than the exact time
5 within a minute or two."

6 Q. Now, the performers pick the music they dance to on stage,
7 right?

8 A. They can.

9 Q. And the performers who are doing the private dances or lap
10 dances dance to whatever music is on stage at the time?

11 A. If they are within earshot.

12 Q. And the Mitchell Brothers never told dancers to bring a
13 certain length of song for their stage performance?

14 A. We control it another way.

15 Q. But you never told dancers --

16 A. No. No, never told a dancers the length for the song.

17 Q. And there was never any effort on management's part to limit
18 the length of a song D.J.s played so you could maximize the
19 number of lap dances?

20 A. No, that's incorrect.

21 Q. Well, if you could take a look at your deposition at
22 Page 152, Line 25, going through 153, Line 11.

23 A. Yes, sir.

24 Q. May I read, Your Honor?

25 THE COURT: Go ahead.

26 MR. QUADRA: (Reading:)

27 "Q. There was no effort on your part or
28 management's part to reduce the length of a song so

1 you could maximize the amount of lap dances?

2 "A. You know, we are in show business. We are
3 trying to create an ambience in a show. We are not
4 cranking out widgets or parking meters downtown. So
5 we are looking for a little different thing. To be
6 successful, you know, I think it would be going the
7 wrong way to do that. That would be my opinion."

8 Q. When the dancers were reclassified as independent
9 contractors in 1998, and you instituted the piece rate system,
10 you have already alluded that you participated in some meetings
11 to inform the dancers about the change, correct?

12 A. Yes.

13 Q. And at these meetings, you never told dancers that there
14 would be a set charge for a lap dance or a private dance, right?

15 A. I believe we told the dancers that the prices for each thing
16 are posted. And lap dances were \$20, as I recall and \$40 for a
17 private show.

18 Q. Could you take a look at Page 148 of your deposition,
19 Line 13 through 16?

20 THE COURT: Go ahead.

21 MR. QUADRA: (Reading:)

22 "Q. Did you describe in any meeting generally to
23 dancers whether there should be a set charge for a
24 lap dance or a private dance?

25 "A. No."

26 MS. RUTTER: There was an addition. There was a change in
27 his deposition, Your Honor. Added: "It was a standard fee."

28 MR. QUADRA: I don't have it.

1 THE COURT: Let me just look and see. Was there a letter to
2 the court reporter?

3 MS. RUTTER: There was, Your Honor.

4 THE COURT: I'm not sure it got included. Let me just -- Do
5 you have a copy of that?

6 MS. RUTTER: I'm looking for that right now, Your Honor.

7 THE COURT: Okay. Why don't you go ahead, Mr. Quadra. We
8 can address this later.

9 MR. QUADRA: Q. At these meetings you did tell dancers that
10 they would have flexibility to lower a price of a dance,
11 correct?

12 A. Not that I recall.

13 Q. You could have said it, you just don't remember, or you
14 didn't say it?

15 A. There was a standard posted amount.

16 Q. So did you tell dancers they were free to lower price or
17 they were not able to lower the price?

18 A. No, they are not allowed to lower the price.

19 Q. And you never told them that?

20 A. No.

21 Q. During the chip period, starting on January 1st, 2001
22 through April of 2003, you were aware, sir, that dancers were
23 receiving tips in chips, correct?

24 MS. RUTTER: Objection. Lacks foundation.

25 THE COURT: Overruled. You may answer.

26 THE WITNESS: No, sir. I was not.

27 MR. QUADRA Q. Can you take a look at what has been
28 premarked for identification as Exhibit -- Plaintiff's

1 Exhibit 1045.

2 And for the record, that is an excerpt from dancer Gidget's
3 personnel file. It can be found in Binder 11 that's in front of
4 you at Tab 45.

5 THE CLERK: Plaintiffs' 1045 premarked for identification.
6 (Plaintiffs' Exhibit 1045 marked for
7 identification)

8 MR. QUADRA: For the record, the exhibit is a three-page
9 exhibit. It's Binder 11, sir. It's a thinner binder.

10 May we approach, Your Honor?

11 THE COURT: You may.

12 MR. QUADRA: Are you there, sir?

13 THE WITNESS: Yes, sir.

14 MR. QUADRA: Q. On the first page of the exhibit, there's
15 handwriting. Do you recognize -- and a signature at the bottom
16 that says "Kelly." Do you recognize this handwriting?

17 A. I wouldn't, without the "Kelly."

18 Q. Is there a "Kelly" that works at the theater?

19 A. Yes, sir.

20 Q. And who is that?

21 A. Mr. Kelly Hudson.

22 Q. And what is Mr. Hudson's position?

23 MS. RUTTER: Objection. Vague as to time.

24 THE COURT: Rephrase.

25 MR. QUADRA Q. As of -- do you know what his position was
26 as of March 26th, 2002?

27 A. I'm not positive. I think he was an assistant manager,
28 perhaps.

1 Q. Is there another "Jim" that works in management at the
2 Mitchell Brothers other than yourself?

3 A. In this time frame of '98? I would say no. Not that I know
4 of.

5 Q. If you could look at the second page of the exhibit --
6 strike that.

7 The first page, it indicates that there is a note addressed
8 to "Vince." Other than Mr. Stanich, was there any other "Vince"
9 that was working in management at Cinema 7's Mitchell Brothers
10 O'Farrell Theatre in March of 2002?

11 A. Not that -- No, it would be Mr. Stanich.

12 Q. Looking at the second page of the exhibit, the first line
13 reads:

14 "Gidget went with a customer into a sky box to do
15 a private show. She gave him a nude dance when he
16 gave her 15 chips."

17 Sky boxes are private areas located in the Cinestage. Is
18 that correct? At this time in 2002?

19 A. Yes.

20 Q. And if you go towards the middle of the page, there's a
21 sentence that begins, "I brought him inside." Do you see that?

22 "I brought him inside when he admitted to me he
23 had taken the chips. We called the police. Officer
24 Fisher, Badge Number 4130 arrived and spoke with
25 Gidget, asking her if she wanted to press charges.
26 She said no, she just wanted her chips back. The
27 customer gave them to Kelly who gave them to Gidget."
28 Does this refresh your recollection that at the theater

1 there were occasions where patrons gave more than the one or two
2 chips that had been set as the dance fee for one dance?

3 MS. RUTTER: I'm going to object on the grounds that it
4 lacks foundation that, first of all, this witness has ever seen
5 the document. And also it lacks foundation or assumes facts not
6 in evidence that these 15 chips that were given as tips. There
7 is no evidence as to what these 15 chips meant, Your Honor. It
8 could be 75 minutes worth of dance.

9 THE COURT: The objection is overruled. You may answer.

10 THE WITNESS: Could I have the question back, please?

11 MR. QUADRA Q. Sure. Does this document refresh your
12 recollection that at the theater, patrons would on occasion turn
13 over more chips for a single dance than was called by the
14 theater for dance fees?

15 MS. RUTTER: Objection. Lacks foundation. Assumes facts
16 not in evidence. Misstates this document.

17 THE COURT: Overruled. You may answer.

18 THE WITNESS: The answer is no.

19 MR. QUADRA: Your Honor, at this time we'd move Exhibit 1045
20 into evidence.

21 MS. RUTTER: Objection. There is no foundation laid with
22 this witness.

23 THE COURT: Sustained.

24 MR. QUADRA: Your Honor, if I may, this was produced in
25 discovery. And pursuant to the stipulation regarding business
26 records, it's been stipulated to be admissible as a business
27 record. So --

28 MS. RUTTER: I'm sorry, Counsel --

1 MR. QUADRA: So on that basis I would move it into evidence.
2 We provided, I think, a copy of the stipulation to the Court.

3 THE COURT: You did. We are back to this stipulation. I
4 think we should argue this. We should try to finish with the
5 witness or move along with the witness and we'll reserve
6 argument on this issue. I'll make a note of that.

7 MR. QUADRA: Thank you, Your Honor.

8 Q. Now, if a patron gave a dancer multiple chips beyond the
9 dance fee that you had set and the schedule for a single dance,
10 Cinema 7's position is that that dancer would owe the theater
11 half the value of all those chips when she checked out, right?

12 MS. RUTTER: Objection. Incomplete hypothetical. Lacks
13 foundation.

14 THE COURT: Overruled. You may answer.

15 THE WITNESS: The theater's position is as stated, I think.
16 You owe us for the chips you take for the dances.

17 MR. QUADRA Q. So all chips regardless of whether they were
18 given to the dancer for the performance of one dance?

19 A. Or she found it on the floor. It could be -- I don't know.
20 But our agreement with the dancers are we are encouraging our
21 dancers to dance with our patrons. And our agreement with them
22 is half of what they did.

23 Q. So I just want to make sure I understand your testimony. So
24 if a dancer got 15 chips for one dance --

25 A. Uh-huh.

26 Q. -- you would want, you think you are entitled to half the
27 value of all 15 chips?

28 A. No, I said just the opposite. The dance is a chip. If the

1 dancer had taken 15 chips from a customer, it would basically be
2 in violation of the other posted rules. "Don't use our chips as
3 tips."

4 So if it was a fact that a patron did give a dancer more
5 chips, and she was using chips as tips, she would be probably
6 fired. That is what I would --

7 Q. But would you take half the value of the chips?

8 A. No.

9 MS. RUTTER: Objection to the extent it's been asked and
10 answered. He's given his answer.

11 THE COURT: Overruled. You may answer.

12 THE WITNESS: I said, "No."

13 MR. QUADRA Q. Could you take a look at your deposition at
14 Page 186, Line 21, to 187, Line 6?

15 A. Deposition. Could I have the page again, please?

16 Q. Yes, 186, Line 21, through 187, Line 6.

17 A. Yes.

18 MS. RUTTER: Objection to the extent this is improper
19 impeachment. It's a different question.

20 MR. QUADRA: Can be read for any purpose, Your Honor. It's
21 an adverse --

22 THE COURT: Overruled. You may read it.

23 MR. QUADRA: (Reading:)

24 "Q. You never heard of anybody getting more
25 chips than what a dance was worth? You are not aware
26 of that?

27 "A. I have heard of customers buying more chips
28 than they need, but passing them out to say clients

1 or something with them. Somebody would come by and I
2 don't know how many by an amount, larger amount of
3 chips, and pass them out with his group. But as far
4 as piling chips on the dancers, the dancer is
5 required to give the house half of what they get. So
6 if the guy did that, the dancer would owe the house
7 when she checked out."

8 Q. Mr. Mitchell, there are no rules at Cinema 7 about what a
9 D.J. can or cannot say over the PA system, right?

10 A. You have my answer on this previous one, I'm sorry, so we
11 are good there?

12 Q. We have moved on. So to repeat my question, Mr. Mitchell,
13 there are no rules at Cinema 7 about what a D.J. can or cannot
14 say over the PA system, right?

15 A. Well, they can't say "fire" and other --

16 Q. Other than cause chaos?

17 A. Well, when you say -- the way you pose the question, there's
18 -- it's like there are maybe unwritten or unspoken or there's
19 rules of common decency. There's rules we live by.

20 But as far as a list of statements or suggestions to D.J.s
21 of what they are allowed to say or not allowed to say, I don't
22 think we have that.

23 Q. Nothing you've ever heard of, correct?

24 A. Yes.

25 Q. And you did hear, during the piece rate period, D.J.s
26 encouraging patrons to tip dancers, correct?

27 A. D.J.s encouraged patrons to tip dancers, yes, quite a bit.

28 Q. And you did not prohibit D.J.s from encouraging patrons to

1 tip dancers?

2 A. There was a few points where I would object to incessant
3 hustling by D.J.s hustling the patrons. I would bring it up to
4 them.

5 Q. And you recall this to be during the piece rate period?

6 A. Yes.

7 Q. Can you take a look at your deposition at 174, Lines 2
8 through 13? I'm sorry, to 16.

9 THE COURT: Go ahead.

10 MR. QUADRA: (Reading:)

11 "Q. Did you have any rules as to what D.J.s
12 could or could not say over the PA system?

13 "A. Not that I ever heard of.

14 "Q. To your knowledge did any of the D.J.s
15 encourage patrons to tip dancers?

16 "A. It seems to me they did a lot.

17 "Q. Was that something you ever prohibited the
18 D.J.s from doing?

19 "A. Not that I recall. I do recall, I think I
20 made a point one time of just incessant hustle by the
21 D.J.s. And I think I did say at one point, I did say
22 something. Just be walking around and hear it. And
23 it's like a little much.

24 "Q. Was that during the piece rate period or
25 more recently? Or you don't remember?

26 "A. I don't remember."

27 Q. Now, Mr. Mitchell, you testified that the quota under the
28 piece rate system was a suggested quota. By that did you mean

1 that if dancers, it was a goal to be hit? Is that what you were
2 saying by "suggested quota?"

3 A. I don't think necessarily. The "suggested" did not mean
4 that. The quota meant that.

5 Q. What did "suggested" mean under "suggested quota?"

6 A. I think what I meant when I put that in -- and I was the one
7 who added that to the sign -- was try not to scare the dancers
8 off or having to explain, "I didn't make the quota. What is
9 going to happen?" And that had happened a lot.

10 It was, I think, or it was really trying to make a soft
11 landing for the dancers on their transition from independent
12 contractor to employee.

13 Q. The term "suggested," did that mean to you that it was not
14 mandatory?

15 A. Are you talking about the sign?

16 Q. The "suggested quota." That term. Did it mean that the
17 quota was not mandatory?

18 A. Technically the quota wasn't -- There's nothing that I could
19 do to make a quota mandatory. But if they are not, it might not
20 be for you.

21 Q. So you would inform them that not meeting the quota may
22 point out that this job maybe was not for that particular
23 dancer?

24 A. No. I did inform them when they signed the agreements, they
25 were at will employees, they are free to leave at any time and I
26 am free to ask them to leave at any time for any reason.

27 Whether they hit a quota or didn't hit a quota, suggested quota,
28 imaginary quota, changing quota. That was up to them. That's

1 what they wanted to do and that was the line of work they were
2 in.

3 The "suggested" language was a soft landing for independent
4 contractors who might be wonderful dancers, that aren't too good
5 about the concept of being an employee.

6 As I understand, some have testified in this case. Not a
7 clue. And you could talk for maybe five years to them and not a
8 clue about this, "Whatever I want to do."

9 So that is soft landing. "Don't run off. Don't get upset.
10 Take it easy." That was why I put that in. I don't know if
11 that helps you or not.

12 Q. I am trying to understand what you are saying. So is what
13 you mean by a "soft landing" mean that the suggested language
14 was intended to convey to dancers that not hitting the quota was
15 okay?

16 A. It wasn't the end of the world. I didn't need the quota to
17 say, "Please excuse dancer number seven." That's what I tried
18 to say.

19 Q. Can you take a look at Page 191 of your deposition, Line 1
20 to Line 6? May I read, Your Honor?

21 THE COURT: Yes.

22 MR. QUADRA: (Reading:)

23 "Q. When you said, for example, earlier that
24 there was a suggested quota, the words, "suggested
25 quota" in terms of the piece rate quota, that means
26 that it is not an actual number that had to be hit,
27 right?

28 "A. Yeah."

1 Now, Mr. Mitchell, there was a sign posted that indicated at
2 one point that there was a suggested minimum amount for a dance.
3 Do you recall that?

4 A. Yes, sir.

5 Q. Now, was the term "suggested" used in the suggested minimum
6 pricing for a dance? Was the word "suggested" used in a
7 different way than when you said "suggested quota?" Or was it
8 also a number that need not be hit?

9 A. No, it wasn't that. It was a different concept.

10 Q. Was there anything in writing to explain to dancers that
11 they use "suggested" between "suggested quota" and "suggested
12 minimum" was a different use of the word?

13 A. Are you making faces for emphasis at me?

14 Q. I am asking you a question.

15 A. It looks that way. You are doing clown faces. I will try
16 to answer your question.

17 THE COURT: I would say the Court has not observed that, but
18 I will watch.

19 THE WITNESS: I would appreciate it, Your Honor.

20 The suggested -- in our deposition, I said it was in
21 reference to me more about the sign on the front door of the
22 building, set the tone for the suggested.

23 MR. QUADRA: Q. My question to you, sir, is was there
24 something provided to dancers to explain that you had used the
25 term "suggested" in different ways when you referred to
26 "suggested quota" versus "suggested minimum?"

27 A. And I said yes.

28 Q. And what was that?

1 A. And so I referenced you to the sign on the front door.

2 Q. What is it?

3 A. The difference for -- I will try to answer for you -- was
4 for the price, the table dance price or the lap dance price or
5 the private dance price was -- the suggested part, in my mind, I
6 was trying to get it so we are encouraging customers to tip the
7 dancers.

8 And as far as the quota, suggested quota, that was softened
9 to try to encourage the dancers not to panic or have a real big
10 problem if they were off one way or the other a little bit.

11 Q. Was there something that was communicated to the dancers in
12 writing explaining that the term "suggested" was used in
13 different ways for both of these concepts?

14 A. No.

15 Q. And you referred to the fact that the suggested minimum sign
16 was to encourage tipping, correct?

17 A. That was in my mind, yes.

18 Q. So that sign suggested the minimum amount of tipping you
19 expected from patrons?

20 MS. RUTTER: Objection. Misstates his testimony.

21 THE COURT: Overruled. You may answer.

22 THE WITNESS: I am not sure exactly. I'm sorry. Could you
23 ask it again?

24 MR. QUADRA Q. Sure. The use "suggested minimum" in that
25 sign was to inform patrons what you believe was the suggested
26 minimum tipping that should be given to the dancers for a dance?

27 A. I don't think so. I think it was just a general like, you
28 know, we are an erotic dancing club, and tipping -- and I do

1 remember we got into this in our deposition. And the difference
2 was we had signs that said "No Tipping" for many years. "No
3 Tipping." "No Tipping" in Japanese. It was like -- so tipping
4 had not always been part of the erotic dance scenario there.

5 So I don't think I had in mind that it was a \$20 lap dance
6 that the appropriate tip would be \$20. Not really, no.

7 Q. Now, during the piece rate period, Mr. Stanich was in charge
8 of personnel issues with the dancers, right?

9 MS. RUTTER: Objection. Overbroad. Vague and ambiguous as
10 to "personnel."

11 THE COURT: Overruled. You may answer.

12 THE WITNESS: Mr. Stanich was a booking agent, and had a lot
13 of personal contact with the dancers. A lot more than I did.
14 Anybody had a big problem or they could not get along with one
15 thing or another, it could be brought to my attention.

16 MR. QUADRA Q. Did you ever inform dancers in these
17 transitional meetings in '98 that under California law, you were
18 allowed to fire them if they failed to meet the quota?

19 A. I don't believe that's true. I could fire them without any
20 reason. And I never -- if I said anything to them, I said, "You
21 are an at will employee" and that was the term I used. "And I
22 don't need any reason to ask you to leave. And you don't need
23 any reason to leave." Both sides.

24 Q. And you informed them of this, of your view about at will
25 employment in meetings where you discussed the quota, right?

26 A. Perhaps. I don't -- I mean it could have come up roughly in
27 the same meetings. Generally meetings were not about quotas or
28 at will employment, but about how to perform and make a better

1 show overall for our customers.

2 We are like more into -- I say it's show biz. You might not
3 like it, but it is. And to make a show creates a lot of work.
4 A lot of work for a lot of people. So it wasn't -- in talking
5 in a meeting, at will employment and -- it wasn't about that.
6 It was about what we do for a living and what they did for a
7 living, and how you make it better. And that's what our
8 meetings are generally about. Sometimes it came up on
9 transitions with these other things that had to be announced and
10 brought up.

11 Your characterizations of our meetings are so far from the
12 way the business is, that's it.

13 Q. Going to the transitional meetings that occurred in '98 when
14 the dancers were reclassified as employees, during those
15 meetings, did you discuss the at will employment in conjunction
16 with the setting of a quota?

17 MS. RUTTER: Objection. Asked and answered.

18 THE COURT: Overruled. You may answer.

19 THE WITNESS: I think the "at will" came up with the new
20 workbooks. That was then -- that was the lawyer-supplied term,
21 not mine. And once that was a new legal term, then it required
22 some explanation. And that's where it would come in.

23 Q. And that was in conjunction or around the same time that you
24 were discussing the quota under piece rate, correct?

25 A. I have no recall of that.

26 Q. Now, if a dancer, if the theater felt that a dancer wasn't
27 being productive, was on the low quota report, Mr. Stanich would
28 speak to them about that, right?

1 MS. RUTTER: Objection, Your Honor. This is cumulative to
2 Mr. Armstrong's extensive testimony in this area.

3 THE COURT: Overruled. But let me ask counsel, since we are
4 approaching 4:00, where you stand, Mr. Quadra, completing your
5 examination? If I can have an estimate?

6 MR. QUADRA: I think I can complete it, Your Honor, in about
7 a half-hour. However, it may depend on the responses, which
8 have been somewhat lengthy sometimes.

9 THE COURT: All right. And Ms. Rutter, are you going to
10 take Mr. Mitchell back immediately on Direct?

11 MS. RUTTER: I'm not sure, Your Honor.

12 THE COURT: Okay. Why don't we do this? Let's try and
13 complete Mr. Quadra's examination. And maybe we will strive for
14 crisp questions and crisp answers.

15 THE WITNESS: Thank you.

16 THE COURT: Thank you.

17 MR. QUADRA Q. I will rephrase the question, Your Honor.

18 Was it Mr. Stanich's job to talk to dancers once they fell below
19 the quota and ended up on a Low Quota Report?

20 A. That would be one of his responsibilities, front line guy to
21 do that.

22 Q. And on occasion, Mr. Stanich would ask dancers in
23 conjunction with those meetings whether they really thought that
24 dancing at the Mitchell Brothers was the right line of work for
25 them. Correct?

26 MS. RUTTER: Objection. Calls for speculation.

27 THE COURT: Overruled. You may answer.

28 THE WITNESS: I don't think Mr. Stanich said that too much.

1 MR. QUADRA: Q. Did he ever say it?

2 A. If anyone did it, it might be me, not Mr. Stanich.

3 Q. Did you say that to dancers?

4 A. I think, yes, I have.

5 Q. Do you know -- strike that. Are you aware if any dancers
6 were terminated during the piece rate period as a result of not
7 making quota?

8 A. I don't have an exact recall of it. If the purpose or the
9 reason was they were not making quota at all, they were working,
10 and we were paying a minimum wage, they had no chips, or not
11 just the chips to report, and that went on after a certain
12 period after some counseling, there might have be some. But I
13 have no recall of anyone that was terminated for that reason.

14 Q. And as you testified earlier, you could terminate them for
15 any reason, right?

16 A. I understand that's the law.

17 Q. And you didn't have to give them a reason for termination?

18 A. I understand that's the law.

19 Q. So if you terminated somebody for being below quota, you
20 wouldn't necessarily have to tell them, right?

21 A. That's true.

22 Q. Do you recall whether during the piece rate period, the
23 Mitchell Brothers Theatre had a form where they stated the basis
24 for termination of any one employee?

25 MS. RUTTER: Objection. Relevance. Overbroad.

26 THE COURT: Overruled. You may answer the question.

27 THE WITNESS: I have no -- I don't know of any one form.

28 MR. QUADRA Q. I'd like you to take look at Exhibit 1018,

1 from Binder 10, Tab 18. And for the record, the bulk of those
2 are Sub Quota Reports.

3 THE WITNESS: I think I have the wrong book.

4 MR. SWEET: Your Honor, may I approach to assist the
5 witness?

6 THE COURT: You may.

7 THE WITNESS: Volume 10.

8 MR. QUADRA Q. And it's Tab 18.

9 A. Thank you.

10 Q. Are you there, sir?

11 A. Yes.

12 Q. If you look at the first page of the exhibit, at the top of
13 the page, there is what appears to be part of a document
14 entitled "Record of Termination." Do you see that?

15 A. Yes.

16 Q. Do you recall seeing this document? Does it refresh your
17 recollection that, in fact, the Mitchell Brothers Theatre did
18 have a form wherein they stated the reasons for termination?

19 MS. RUTTER: Objection. It's cumulative to Mr. Armstrong.
20 Also goes beyond the piece rate time period.

21 THE COURT: This particular one does.

22 MR. QUADRA: Your Honor, I believe Mr. Armstrong's testimony
23 was that this refreshed his recollection that this form was in
24 use during the piece rate period. And I'm now directing
25 Mr. Mitchell to the same period of time to see if this refreshes
26 his recollection.

27 THE COURT: All right.

28 MS. RUTTER: Objection to the extent it misstates

1 Mr. Armstrong's testimony and is still cumulative.

2 THE COURT: Overruled. You may answer.

3 THE WITNESS: And the question is, have I seen this before?

4 MR. QUADRA Q. Have you seen this type of form? And does
5 it refresh your recollection that this form existed at the
6 theater?

7 A. It does not.

8 Q. You didn't participate in the process of responding to
9 discovery in this case, correct?

10 A. I don't believe I did.

11 Q. And you are not aware of any documents that were responsive
12 to requests that were destroyed, right?

13 A. Am I aware of documents destroyed?

14 Q. Right.

15 A. No.

16 Q. During the checkout process during the piece rate period,
17 before chips were in use, if the theater overwithheld taxes on a
18 particular shift, a check would be issued every couple of weeks
19 to return some of that money, correct?

20 MS. RUTTER: Objection. Lacks foundation. Cumulative.

21 THE WITNESS: Well --

22 THE COURT: Just a moment, please.

23 THE WITNESS: I'm sorry.

24 THE COURT: I'm not sure I understand the question.

25 MR. QUADRA Q. Let me rephrase. There was, in addition to
26 the money that the dancers kept on a daily basis, there was
27 checks that were issued to them every couple of weeks, correct?

28 A. Yes.

1 Q. And those checks were either going to make up for a
2 calculation for minimum wage, or return withholdings, right?

3 A. Yes.

4 Q. But the bulk of the -- what you would call the piece rate
5 earnings for the dancers, their share, was money they kept from
6 fees they collected on a nightly basis, right?

7 A. Yes.

8 Q. After the chip system started, there were occasions in which
9 dancers reported that the chips they had collected from dances
10 were stolen, right?

11 A. Yes.

12 Q. And on those occasions, the dancers received no credit at
13 check out for having performed the dances because they didn't
14 have chips to turn in, right?

15 A. I believe that's correct.

16 Q. And that meant that you would not pay them as if they had
17 performed those dances and therefore you wouldn't give them \$10
18 per dance, right?

19 MS. RUTTER: Objection. Compound as phrased.

20 THE COURT: Overruled. You may answer.

21 THE WITNESS: No, they weren't paid for a number that they
22 just thought up, or whatever, said "I did so many dances. I
23 lost them" or something. As far as I know. I don't recall it's
24 come up too many times. There's been instances lost or stolen,
25 but such a minute amount as far as how many times stuff like
26 that happens.

27 MR. QUADRA Q. The dancers received credit only for the
28 chips that they turned in, collected and turned in, right?

1 A. Yes.

2 Q. And during the piece rate system, the burden was on the
3 dancers to collect the chips and the cash, right?

4 A. Yes.

5 Q. And you wanted the collection of either cash or chips to
6 occur before the dance was performed, right?

7 A. Generally that was the rule, yes.

8 Q. And that was because the theater did not want to involve
9 itself in any collection dispute between dancers and patrons,
10 right?

11 A. Who said that?

12 Q. Is that correct, sir?

13 A. I'm not sure what you are saying.

14 Q. Well --

15 A. You are saying "the theater." Who is "the theater?" Me?
16 Or -- I don't know. It's a little vague there.

17 Q. Let me read to you from Mr. Armstrong's deposition.

18 MS. RUTTER: I'm going to object, Your Honor, in terms of
19 improper question posed to this witness, reading from another
20 witness's deposition testimony.

21 MR. QUADRA: It's a party opponent, Your Honor, and a PMK.

22 THE COURT: It is, but where are we going here?

23 MR. QUADRA: There's a statement by Mr. Armstrong. I want
24 to know if he agrees with it or not, since it was supposedly
25 made on behalf of the theater.

26 THE COURT: Well, that would be argumentative. You can ask
27 him a different question.

28 MR. QUADRA Q. Well, would you agree that by having the

1 chip or cash collected up front, Cinema 7 avoided having to get
2 involved between -- in a dispute between dancers and patrons
3 over how much was owed for a dance?

4 A. There were disputes between dancers and patrons that came
5 up, I wouldn't say "frequently," but it would come up, that
6 would usually be tried to be settled by the manager, the floor
7 staff.

8 And it was usually about, "She promised she would do this
9 and she didn't and she took my money."

10 As far as a dance chip, doesn't mean that you walk up and
11 say, "Give me a dance chip." Which I refer to you again is the
12 nature of our business is not as cut and dried as you would like
13 to make it out.

14 That I had a saying that I tell the ladies that was, "Hey,
15 your butt can go down before your hand comes up." But that
16 doesn't mean you are going to get a lap dance. It's just our
17 customers a lot of times are quite shy and --

18 Q. Mr. Mitchell, was the purpose of asking dancers to collect
19 the chips or cash up front to avoid a dispute between patrons
20 and dancers?

21 A. I'd say no.

22 Q. What was the purpose of asking for the money up front? Or
23 the chip?

24 A. The chip is for the house.

25 Q. But why ask for it up front?

26 A. To let the customer know there's a charge for a lap dance.

27 Q. Was there any sign?

28 A. When you say "up front," I was trying to explain to you the

1 up front. It's not like, "Give me money first." It's like in a
2 question of whatever kind of socialization that we are doing,
3 that the chip was for the house and that any tip would be for
4 them.

5 Q. Was there any communication that you are aware of that
6 informed patrons that there was some -- during the cash period,
7 that there was some difference between money collected before
8 the dance, or money collected after the dance as to who that
9 money belonged to?

10 MS. RUTTER: Objection. Relevance. And also to the extent
11 it's been asked and answered this morning.

12 THE COURT: Overruled. You may answer.

13 THE WITNESS: Well, I'm not sure -- the questions are a
14 little obtuse here. We have the general, prior to the 350(e),
15 the legal California definition of "tip" is for a service above
16 and beyond the cost of the item or service provided, i.e, the
17 restaurant tip. Okay?

18 And after the 350, any monies given to an exotic dancer,
19 automatically a tip. And there we have the situation of the
20 chip.

21 MR. QUADRA Q. Mr. Mitchell, my question is simply whether
22 you ever informed patrons that there was a difference between
23 monies paid before a dance was performed, and monies paid after,
24 as to who would get that money and who it belonged to?

25 THE WITNESS: No, we did not pull a patron aside and state
26 that to him.

27 Q. Did you believe it was fair to put the burden of collections
28 on the dancers for these dance fees?

1 MS. RUTTER: Objection to the extent it's argumentative and
2 also irrelevant.

3 THE COURT: Sustained. Please wait for the next question.

4 MR. QUADRA Q. Did you believe that the dancers found you
5 intimidating during the piece rate period?

6 MS. RUTTER: Objection. Argumentative.

7 THE COURT: Calls for speculation. Sustained.

8 MR. QUADRA Q. Do you know of any reason why dancers would
9 find you intimidating?

10 MS. RUTTER: Objection. Argumentative. Calls for
11 speculation. Assumes facts not in evidence.

12 THE COURT: Overruled. You may answer.

13 THE WITNESS: Just the part about the bald head.

14 MR. QUADRA Q. Do you know of any reason why dancers would
15 be afraid of you?

16 MS. RUTTER: Same objection, Your Honor. Now it's been
17 asked and answered.

18 THE COURT: Overruled. You may answer.

19 THE WITNESS: Why dancers would be afraid of me?

20 MR. QUADRA Q. Correct, sir.

21 A. I can't think of any. I think your own, your Plaintiffs in
22 this action did write nice notes after they left. I think I
23 have a very good rapport with the performers for the last 37
24 years. So it's news to me if they are afraid of me.

25 Q. Do you know of any reason why dancers would be afraid of
26 Mr. Armstrong?

27 MS. RUTTER: Same objection, Your Honor.

28 THE COURT: Overruled. You may answer.

1 THE WITNESS: I don't believe they are afraid of him. I
2 can't think of any reason why they would be. But I don't
3 believe they are.

4 MR. QUADRA Q. Have you ever heard Mr. Armstrong use
5 derogatory terms to refer to dancers at the theater?

6 MS. RUTTER: Objection, Your Honor. Relevance.
7 Argumentative.

8 THE COURT: Where are we going with this?

9 MR. QUADRA: Just want to know if there's intimidation going
10 on. I will rephrase, Your Honor.

11 Q. Do you believe the dancers were, during the piece rate
12 period, afraid not to report making quota because they were
13 afraid of losing their jobs?

14 MS. RUTTER: Objection. Calls for complete speculation.

15 THE COURT: Sustained.

16 MR. QUADRA Q. Did any dancer ever tell you that they
17 reported the quota routinely even if they didn't hit the quota
18 because they were afraid to lose their jobs?

19 A. No.

20 MR. QUADRA: I have no further questions, Your Honor.

21 THE COURT: All right. Thank you.

22 MS. RUTTER: Your Honor, I have a few brief questions.

23 THE COURT: All right.

24 DIRECT EXAMINATION

25 THE COURT: This is Counsel's Direct Examination of
26 Mr. Mitchell.

27 MS. RUTTER Q. Mr. Mitchell. You testified this morning
28 and throughout the day about setting up the compensation system

1 and the input that you received from Mr. Aubry.

2 My question is, did you implement the system as you had
3 discussed it, "you" meaning Cinema 7 with Mr. Aubry?

4 A. I believe we did.

5 Q. To your understanding, did the system continue to be
6 implemented as it had been discussed with Mr. Aubry?

7 MR. QUADRA: Objection. Lacks foundation this witness knew
8 exactly what was discussed with Mr. Aubry based on his
9 testimony.

10 THE COURT: Overruled. You may answer.

11 THE WITNESS: The question is, did we set up the system as
12 we discussed with Mr. Aubry?

13 MS. RUTTER Q. That was my prior question. The next
14 question was, did you continue to implement the system
15 throughout the piece rate system as you had discussed it
16 originally with Mr. Aubry?

17 A. I believe we did.

18 Q. And did that also include the time when the chip system was
19 implemented, did you continue to implement the system at Cinema
20 7 as you had discussed with Mr. Aubry?

21 A. Yes.

22 Q. Did you rely on the advice that was given to you by
23 Mr. Aubry?

24 A. Yes.

25 Q. What was it about the piece rate compensation system that
26 made you believe that the dancers would want to stay and
27 actually work under that system and not flee as you had
28 expressed?

1 MR. QUADRA: Objection, Your Honor. Lacks foundation and
2 Counsel's testifying -- Well, it lacks foundation as to the
3 preface of her question.

4 THE COURT: Sustained. Rephrase.

5 MS. RUTTER: Q. You indicated when you were questioned by
6 Mr. Quadra that you were concerned when the conversion was made
7 from independent contractors to employee, that the dancers may
8 leave.

9 My question is what was it about the piece rate system that
10 you believe that the dancers would possibly stay and work at the
11 O'Farrell?

12 MR. QUADRA: Same objection. Misstates the testimony.

13 THE COURT: Overruled. You may answer.

14 THE WITNESS: Why do I believe that dancers might stay when
15 we made the transition?

16 MS. RUTTER Q. Why do you believe they would stay under a
17 piece rate system?

18 MR. QUADRA: Lacks foundation. Calls for speculation.

19 THE COURT: Overruled. You may answer.

20 THE WITNESS: Well, we didn't know if they would. I mean we
21 were hoping they would.

22 MS. RUTTER Q. In your mind, the fact that you did or
23 didn't hire a checker, did that change your expectation that the
24 dancer, that you were relying on the dancers to report
25 accurately?

26 A. My understanding was that as our big transition was as an
27 employee, you asked the employee, you direct the employee,
28 instruct the employee to do the job as you define it. And

1 that's their job. And they are required to maintain a -- do
2 what's laid out for them.

3 Q. And as part of that instruction, did you have an expectation
4 that the dancers would accurately report the number of dances
5 that they had done?

6 A. Yes.

7 Q. And did you rely on the information that was provided to you
8 by the dancers in terms of the number of dances they had done?

9 A. Yes.

10 MS. RUTTER: I have nothing further. Thank you.

11 THE COURT: Mr. Quadra, Recross?

12 MR. QUADRA: No, Your Honor. Nothing further.

13 THE COURT: Is this witness excused?

14 MR. QUADRA: Yes, Your Honor.

15 THE COURT: All right, Mr. Mitchell. Thank you, very much.
16 You may step down.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: All right. Off the record, please.

19 (Recess taken.)

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1 State of California)
)
2 County of San Francisco)

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4 We, Diana Chen and Joseph Vickstein, Court Reporters for
5 the Superior Court of California, County of San Francisco, do
6 hereby certify:

7 That we were present at the time of the above proceedings;

8 That we took down in machine shorthand notes all
9 proceedings had and testimony given;

10 That we thereafter transcribed said shorthand notes with
11 the aid of a computer;

12 That the above and foregoing is a full, true, and correct
13 transcription of said shorthand notes, and a full, true and
14 correct transcript of all proceedings had and testimony taken;

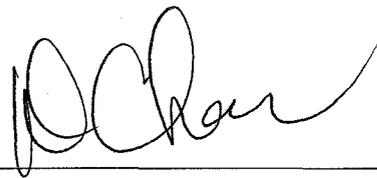
15 That we are not a party to the action or related to a party
16 or counsel;

17 That we have no financial or other interest in the outcome
18 of the action.

19 Dated: March 5, 2007

20

21



Diana Chen

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Joseph Vickstein

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